PRESCOTT Ltd. v CRUZ and anothe.

Supreme Court (Summary Jurisdiction)
Bacon, C.J.
14 October 1953.

Landlord and tenant — statutory tenancy — when leaving premises amounts to abandoning them as a home.
Landlord and tenant — statutory tenancy — need for possession (actual or constructive) to be continuous.
Practice — statutory tenant abandoning premises leaving licensee in possession — need to make statutory tenant a party in proceedings for possession.

The contractual tenant of the second and third floors of a house (the second defendant) agreed to surrender his tenancy, on a new tenancy of the third floor being granted to his son-in-law (the first defendant), who was already living there with his wife and child. The second defendant sold some of his furniture and left the remainder on the third floor mingled with that of the first defendant. He then went to England, intending to settle there. From England, he sent some money to the first defendant to help with the rent. After a short time, the second defendant returned to Gibraltar with his wife and went to live with the first defendant on the third floor. This continued for over a year, when the first defendant with his wife and child moved to other accommodation, leaving the second defendant in physical possession of the third floor.

The landlord, the plaintiff, served notice to quit on the first defendant and subsequently took action for possession. The first defendant argued that he was merely the licensee of the second defendant during the latter's absence in England.

The main issue was whether the second defendant was entitled to the protection afforded by s. 12 of the Rent Restriction Ordinance.

Held: (i) The first defendant became a statutory tenant on the expiration of the notice to quit, but had abandoned the premises as his home and thereby forfeited his right to statutory protection.

(ii) The second defendant was no more than a licensee and lost his right to remain when the first defendant left the premises.

(iii) An order for possession would cause no hardship to the first defendant and would be reasonable in all the circumstances.

Per curiam. Where a statutory tenant abandons the premises leaving a licensee in possession, both must be made parties to an action for possession.

Note. The Rent Restriction Ordinance was repealed and replaced by the Landlord and Tenant (Miscellaneous Provisions) Ordinance (No. 3 of 1959, Cap. 83, 1965-69 Ed.). Section 22 of the later Ordinance corresponds with s. 12 of the earlier.

Cases referred to in the judgment.

Haskins v Lewis, [1931] 2 K.B. 1.
Skinner v Geary, [1931] 2 K.B. 546.
Thompson v Ward, [1953] 1 All E.R. 1169.
Hallwood Estates Ltd. v Flack, (1950) 66 T.L.R. 368.
John M. Brown Ltd. v Bestwick, [1950] 2 All E.R. 338.
Barrell v Fordree, [1932] A.C. 676.
Brown v Draper, [1944] 1 All E.R. 246.
Kings College Cambridge v Kershman, (1948) 64 T.L.R. 547.
Barton v Fincham, [1921] 2 K.B. 291.
Old Gate Estates Ltd. v Alexander, [1949] 2 All E.R. 822.
Middleton v Baldock, [1950] 1 All E.R. 708.
Wabe v Taylor, [1952] 2 All E.R. 420.
Foster v Robinson, [1950] 2 All E.R. 342.
Murray, Bull & Co. Ltd. v Murray, [1952] 2 All E.R. 1079.
Standingford v Probert, [1949] 2 All E.R. 861.
Nevile v Hardy, [1921] 1 Ch. 404.
Crowhurst v Maidment, [1952] 2 All E.R. 808.
Murgatroyd v Tresarden, [1946] 2 All E.R. 723.
Regional Properties Ltd. v Frankenschwerth, [1951] 1 All E.R. 178.
Hyde v Pimley, [1952] 2 All E.R. 102.
Oak Property Co. Ltd. v Chapman, [1947] 2 All E.R. 1.

Action

This was a claim for possession of a dwelling house.

W. Isola for the plaintiff company.
A.J. Vasquez for the defendants.

3 November 1953: The following judgment was read—

In this case the plaintiff company, for present purposes the landlord of No. 5A John Mackintosh Square, claims against each of the defendants possession of the third floor of those premises and against the defendant Cruz rent and mesne profits in respect of that floor as from 1 April 1953.

The case involves a most unfortunate series of factual disputes, mainly as to an alleged oral agreement of 28 April 1951. There is a marked conflict of evidence as to what was then agreed and as to various ancillary matters—not necessarily a conflict of veracity, perhaps only one of recollection, but nevertheless a definite conflict which has to be resolved. Moreover, this dispute as to the facts of the case, with the inevitable uncertainty as to how they would ultimately be found by the court, led to a further complication; various aspects of the law, some or others or all of which would apply according to the view taken of the facts, had to be examined with considerable care, a task in which Mr. William Isola for the plaintiff and Mr. A.J. Vasquez for the defendants greatly assisted the court.

The whole of this controversy might well have been avoided if the agreement or arrangement made in April 1951 relating to the third floor premises had been recorded by an exchange of two short letters as was then done in relation to the second floor. The case is a sorry example of failure to take a little trouble at the time producing far greater trouble later on.

The law concerned is by no means easily ascertainable: the Rent Restriction Ordinance suffers from the same notorious defects and difficulties of construction as its English prototypes upon which it was modelled. In the year 1930, fifteen years after the first Rent Restriction Act was passed, Scrutton L.J. opened one of his illuminating judgments in the Court of Appeal [1] with these words: "This case, like all cases in my experience under the Rent Restriction Acts, is of a most bewildering character. The reason for that bewilderment comes, I think, from this, that . . . . . those who drafted them and those who passed them had not made up their minds what was the nature of the privilege they were conferring on the tenant". Since then further legislation and a vast number of judicial decisions have been added to this branch of the law, but the bewilderment of twenty-three years ago has not yet entirely vanished.

The most convenient approach to this particular case is perhaps first of all to state briefly what I understand to be the propositions of law round which the argument in this case has turned, and then to review the facts to which the relevant law must be applied.

Generally speaking, one of the principal objects and effects of the Rent Restriction Ordinance (the object with which we are now concerned) is to prevent landlords from obtaining a judgment for possession of residential

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[1] *Haskins v Lewis*, [1931] 2 K.B. 1, at p. 9.

premises such as they would otherwise be entitled to at common law. There is a complicated code of rules defining the various circumstances in which landlords may succeed or must fail in that respect.

The answers to the specific questions raised directly or indirectly at the trial of the present case are in my view as follows.

(1) The Rent Restriction Ordinance (like the English Acts) was never intended to protect a non-occupying tenant; the test as to non-occupation is whether he has effectively given up his occupation of the dwellinghouse — whether he has abandoned it as his home. That doctrine was established in *Skinner v Geary* [1].

(2) But the mere fact that the tenant has left the dwellinghouse does not necessarily mean that he has given it up as his residence. People frequently leave their homes for a period, either voluntarily or through force of circumstances. If, however, the tenant leaves the dwellinghouse, his absence may be sufficiently long or continuous to compel the inference, prima facie, that he has ceased to occupy it. The onus is then on him to prove, first, his intention to return and reside there, and secondly that, on leaving the dwellinghouse, he installed or left some caretaker or representative as his licensee and with the function of preserving the premises for his own home-coming, or (though it has not been laid down that in law this alone is enough) that he left furniture on the premises as a deliberate symbol of his continued occupation: *Thompson v Ward* [2], in which the judgment of the Court of Appeal in *Brown v Brash and Ambrose* was cited at length and re-affirmed as an accurate exposition of the law.

(3) But in every case where a tenant relies on the protection of the Ordinance it must be shewn that he was in continuous possession (actual or constructive); if a contractual tenancy comes to an end and is followed by a period during which the tenant is neither in actual nor in constructive possession, he cannot revive a right to protection under s. 19 (1) of the Ordinance by resuming possession even if he does so before the landlord commences proceedings to recover possession against him; in those circumstances he is not a protected statutory tenant at all for the purposes of such proceedings: *John M. Brown Ltd. v Bestwick* [3].

And, whenever a contractual tenant has been served with a duly effective notice to quit and, the notice having expired, he claims the rights of a statutory tenant by virtue of the Ordinance, the burden is on him to show that, at the date when the contractual tenancy terminated, the premises

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1 [1931] 2 K.B. 546, per Scrutton and Slesser L.JJ., especially at pp. 560 - 561 and 569.

2 [1953] 1 All E.R. 1169, C.A. See also *Hallwood Estates Ltd. v Flack*, (1950) 66 T.L.R. 368, especially at pp. 372, 374 and 376, where the keeping of a *furnished* bedroom in the premises for occasional use seems to have been the decisive factor in the tenant's favour, though Evershed M.R. at p. 374 expressly declined to decide as a matter of law that this alone (coupled with the animus revertendi) was enough.

3 [1950] 2 All E.R. 338.

were within the Ordinance: *Hoskins v Lewis*. Thus, in order that premises (or part of the original premises) may come within the Ordinance, it is for him to shew (inter alia) that on that date he was in residential occupation (actual or constructive) thereof: *Barrell v Fordree* [1].

(4) There are, however, only two ways in which a protected statutory tenant may lose the protection of the Ordinance in relation to his tenancy: either he can leave of his own free will, surrendering his tenancy (which is probably the principal matter described as "any other reason" determining the tenancy in s. 19(4) of the Ordinance), or, if he remains in possession, he can be ordered by the court to give it up but such an order can only be made on grounds specified in s. 12(1): *Brown v Draper* [2].

The landlord also has certain rights in this connexion, for he is protected by s. 19(1) against undue loss of rent, since a statutory tenant cannot, unless the landlord agrees to waive his rights, put an end to his liability by summary unilateral action. The tenant must give the landlord due notice as provided by that sub-section: *King's College Cambridge v Kershman* [3].

(5) The grounds for a possession order by the court being expressly limited by the Ordinance, a mere agreement — made either in a contract of tenancy or after a contractual tenancy has come to an end — to give up possession on a certain date, or a mere notice to quit given by the tenant, is not by itself a sufficient ground for an order under the Rent Restriction Ordinance. If the tenant changes his mind, or for any other reason remains in actual or constructive possession, he cannot be ordered out under the Ordinance on the footing of his former promise or intention alone: *Barton v Fincham* [4]; *Old Gate Estates Ltd. v Alexander* [5]; *Middleton v Baldock* [6]; and *Wabe v Taylor* [7].

(6) The protection afforded by the Ordinance to a statutory tenant (unless and until either he surrenders his tenancy and gives up possession or an order is made against him for the recovery of possession) extends also to the tenant's licensee who is in actual possession, not because the licensee can claim in his own right but because actual possession by the licensee is constructive possession by the tenant. Therefore the court cannot make an order against the licensee unless the tenant is a party and the order is made against him as well: *Brown v Draper*.

(7) On the other hand, a contractual tenant who remains in possession — even in sole occupation — of the premises after his contractual tenancy has come to an end does not necessarily become a statutory tenant (and thereby entitled to the protection of the Ordinance).

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1 [1932] A.C. 676.
2 [1944] 1 All E.R. 246.
3 (1948) 64 T.L.R. 547.
4 [1921] 2 K.B. 291, at pp. 297 - 298.
5 [1949] 2 All E.R. 822.
6 [1950] 1 All E.R. 708.
7 [1952] 2 All E.R. 420.

For instance, there is an effectual surrender by operation of law whenever there is an act of purported surrender, invalid per se because of non-compliance with formalities, and some change of circumstances supervening on or arising from it which, by reason of the doctrine of estoppel or part performance, makes it inequitable and fraudulent for any of the parties to rely on the invalidity of the purported surrender. Each case turns on a question of fact. An example was *Foster v Robinson* [1] where such a surrender by operation of law occurred because the contractual tenant and his landlord agreed that the tenancy was to be determined but that the one-time tenant should be allowed to live rent-free in the premises during the remainder of his life, and that agreement was acted on by both parties. It was held that in such a case the tenant ceases to be a tenant at all.

Or again, a contractual tenant holding over after the expiration of a lease by effluxion of time may, on the facts of a given case, be holding not as a statutory tenant but as a contractual tenant on the previously existing terms; and, on certain events occurring at a later date, he may become not a statutory tenant but the landlord's licensee in occupation: *Murray, Bull & Co. Ltd. v Murray* [2].

Thus it depends on the facts in each case whether a contractual tenant ceases to be such, and, if he ceases, what he becomes. And the cesser of his tenancy does not necessarily involve the removal of the occupants and furniture from the premises and the delivery of the key to the landlord, though that is no doubt a normal procedure.

(8) The provision as to the availability of "suitable alternative accommodation" in s. 12(1)(b) of the Ordinance has no reference to accommodation as a guest or licensee or lodger in the house of a relative or friend or stranger. One of the essential characteristics of "alternative accommodation" within the meaning of that section is security of tenure substantially equivalent to that enjoyed by the tenant in relation to the premises from which it is sought to eject him. That (inter alia) is the effect of s. 12(3). That sub-section also provides that the alternative accommodation is in the opinion of the court to be reasonably suitable to the means of the tenant and to the needs of the tenant and of his family as regards extent and character.

Moreover s. 12(3) is not merely indicative but is mandatory. Thus no order can be made on the footing of an offer of alternative accommodation unless those conditions are satisfied: *Standingford v Probert* [3].

And the onus is on the landlord to satisfy the court by positive evidence that such alternative accommodation is available for the tenant or will be when the order takes effect: *Nevile v Hardy* [4].

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1 [1950] 2 All E.R. 342, per Evershed, M.R. at pp. 344 and 346.
2 [1952] 2 All E.R. 1079.
3 [1949] 2 All E.R. 861.
4 [1921] 1 Ch. 404.

(9) Whenever there has been an assignment of the whole, or a sub-letting of the whole or of a part, of the premises, fresh considerations arise. For present purposes I need only refer to the matter of sub-lettings, though the position as regards assignments seems to be analogous.

(10) When a *contractual* tenant sub-lets the whole or a part of the original premises he thereby ceases to be the occupier of the whole or of that part, as the case may be. Thus, under the *Skinner v Geary* doctrine, at the time when he seeks to start a period of protection as a statutory tenant such protection is in law not afforded to him at all in relation to the premises or to that part of them, as the case may be, for he is not the occupier at that time (and he can never revive a right to protection by re-occupying thereafter). Only one person can enjoy the protection of s. 19(1) of the Ordinance at any one time, namely the occupier; the tenant cannot be an occupier of premises occupied by a sub-tenant of his: *Crowhurst v Maidment* [1]; *Barrell v Fordree;* and *Murgatroyd v Tresarden* [2].

It is true that paragraph (d) of the Second Schedule to the Ordinance prescribes a more restricted ground for the making of a possession order, in these words: "if the tenant *without the consent of the landlord* has.....sub-let the *whole* of the dwellinghouse or sub-let part of the dwellinghouse, the *remainder* being already sub-let." It is also true that it has been held very recently that "tenant" in that context at any rate includes a contractual tenant, that the paragraph applies whether or not the tenancy agreement required a consent to a sub-letting, and that the word "consent" as used in the paragraph means the landlord's *active* consent, express or implied: *Regional Properties Ltd. v Frankenschwerth* [3]. Incidentally, the consent need not necessarily have been given at or before the time of the sub-letting; active consent *may* be implied (according to the circumstances) from the landlord's behaviour at any time before the commencement of the action for possession: *Hyde v Pimley* [4].

Nevertheless it would appear from the judgments in *Skinner v Geary,* in *Haskins v Lewis* (on which *Skinner v Geary* was founded) and in *Crowhurst v Maidment* that the courts have so construed the English Acts from which the Rent Restriction Ordinance is copied that they do not *in any event* protect a *tenant* who, before the end of his contractual tenancy, went out of occupation (actual or constructive), in respect of such premises as he thereby ceased to occupy. That view was re-stated categorically per Evershed M.R. in *Crowhurst v Maidment* [5] where, having expressly rejected the tenant's argument that, because he had not brought himself within the English equivalent to paragraph (d) of the Second Schedule, therefore he was entitled to protection, the Master of the Rolls said this: "Whatever the strength of that argument, I think it has been too severely cut into by decisions which proceed on another principle, inherent in the Acts, which is

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1 [1952] 2 All E.R. 808, particularly per Romer L.J. at p. 811.
2 [1946] 2 All E.R. 723.
3 [1951] 1 All E.R. 178.
4 [1952] 2 All E.R. 102, at p. 105.
5 At p. 809.

that their purpose was *to protect occupants in the occupation of their homes and no more.*"

It therefore seems that paragraph (d), so far as it relates to transactions by a *contractual* tenant and *his own* consequent loss of the protection which he would later on have had as a statutory tenant, must be treated (in the words of Romer L.J. in *Haskins v Lewis* [1]) adopted by Talbot J. in *Skinner v Geary* [2]) as having been "introduced by the Act of 1923 really for the purpose of quieting any doubts that may previously have existed on the subject" and as redundant in view of the construction put by the courts on the Rent Restriction legislation as a whole to the effect that a non-occupying tenant is in any event outside its protection as regards any separate part or parts of his premises which he does not occupy (personally or by another) as a home of his own.

(11) As regards a *statutory* tenant, he has no right of property capable of transmission by assignment, gift or devise; thus any such purported transaction on his part is not maintainable in law; probably also (though the point may not yet have been finally decided) any such purported transaction by a statutory tenant without his landlord's "active consent" would *also* fall within paragraph (d) of the Schedule and would thus be a ground for a possession order against him: see per Evershed M.R. in *Regional Properties Ltd. v Frankenschwerth* [3]. But, here again, the *Skinner v Geary* doctrine must be accepted as paramount and just as fatal to the claim to the protection of the Ordinance by a non-occupying tenant who had in fact gone out of the occupation (actual or constructive) during his statutory tenancy as it is to a similar claim by one who had gone out before the end of his contractual tenancy.

(12) Thus I think that the position of *any* head tenant who effectively parts with possession of premises at *any* stage is that he has thereby lost the protection of the Ordinance unless he recovers possession before his contractual tenancy comes to an end and does not part with possession again. In other words a sub-letting without consent which comes within paragraph (d) of the Second Schedule is only an extreme instance of steps taken by a tenant which results in his total loss of the protection of the Ordinance, which loss he would suffer in any event by reason of the mere fact that he had ceased, with or without his landlord's consent, to occupy any part of the premises.

(13) The position of a sub-tenant is, however, governed by special provisions of the Ordinance and in many cases differs from that of the head tenant who has sub-let to him: see ss. 4(4), 6(1) (the definition of "tenant"), 12(8) and 19(4). Thus it may well happen that, while the landlord can obtain an order for possession as against the head tenant, the sub-tenant is protected and secure in his tenure so long as he remains in occupation. The question turns in the first place on whether the dwellinghouse or part of it has been "lawfully sub-let" within the meaning of the Ordinance, and for

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[1] At p. 18.
[2] At p. 555.
[3] At pp. 180 to 181.

the purpose of settling that point the relevant facts must be determined at the date when proceedings for possession were commenced: *Oak Property Co. Ltd. v Chapman* [1]. A number of other legal considerations may, and often do, affect cases of sub-lettings by contractual or statutory tenants. But in the present instance it is unnecessary to pursue the matter further, on account of the state of affairs as at the above-mentioned material date, so far as the evidence (to which I shall presently refer) goes.

I now pass to the questions of fact. The evidence disclosed a substantial controversy, as I have mentioned, but, having seen and heard the witnesses and having examined the documentary evidence and given due weight to the way in which the parties dealt with the matter on paper, I am clear as to the result and accordingly find the facts as proved to be the following.

In September 1945 the plaintiff orally let the third floor of 5A John Mackintosh Square to the defendant Carrara as a dental mechanic's workshop at £8 per month plus rates, or perhaps as a combined workshop and home. The defendant Carrara at any rate subsequently also used those premises as his home, with his wife, son and daughter.

In April or May 1947 the plaintiff and the defendant Carrara agreed to determine the letting of the third floor and made a fresh oral agreement whereby the defendant Carrara became the monthly tenant of the second and third floors combined, at a monthly rent of £21 plus rates.

From then until April 1949 the defendant Carrara continued as tenant of, and in occupation of, both floors, partly as a home for himself and his wife and family, partly as his workshop, with the exception of one room which at some unspecified time was sub-let by him to a person unnamed in evidence.

In April 1949 the defendant Carrara's daughter married the defendant Cruz and the latter came to live as a member of the family. The defendant Carrara continued to be the contractual tenant of both floors combined. The defendant Cruz and his wife lived on the third floor, the defendant Carrara and his wife and son living on the second. That state of affairs continued until April 1951.

During his tenancy of the two floors combined the defendant Carrara was, from the plaintiff's point of view, an unsatisfactory tenant. He was careless, arbitrary and irregular in his payments. A letter from the plaintiff to him dated 26 April 1951, the contents of which are admittedly true, shews that he was then in arrears to the tune of over £100, and that he had been constantly in arrears to some extent throughout his tenancy. With that letter was enclosed a notice to quit the premises — both floors — expiring on 31 May 1951. On the other hand the plaintiff's managing director (who had personally dealt with all these affairs) was on good terms with the defendant Cruz whose behaviour had been that of a steady man in regular though modest employment.

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[1] [1947] 2 All E.R. 1.

That was the background against which the events — vital to this case — of 28 April 1951 took place.

On the morning of that day the position was this. The plaintiff and the defendant Carrara were still in contractual relationship as landlord and tenant respectively of both floors combined, at a rent which took the premises outside Part II of the Rent Restriction Ordinance. It was a tenancy from month to month, and a notice to quit served by the landlord was due to expire on 31 May 1951. The defendant Cruz was, in the eyes of the law, a lodger or guest of the defendant Carrara. The landlord was displeased on account of its tenant's behaviour, it had accordingly served the notice to quit, and there was very little chance for the tenant of being able to retain any right to the possession of any part of the premises.

On 28 April 1951 the defendant Carrara had made up his mind to two things. First, he was going to England within a few days, taking his wife and son and daughter-in-law, to find employment there and thus to make a new home outside Gibraltar. Secondly, he desired to rid himself of his obligation as regards the second floor forthwith, that is to say without any liability for rent for even the month of May. He went to see the plaintiff's managing director, told him of his decision, and put the proposal to him. The proposal was promptly accepted, the plaintiff's then legal adviser was summoned, letters between the parties were drafted, and those letters were signed and exchanged. They are Exhibits 2 and 3, each dated 28 April 1951.

Exhibit 2, signed by the defendant Carrara, is noteworthy as regards its first paragraph, which reads as follows: "I am leaving the 2nd floor flat of your premises which I have been using as a Dental Mechanic Laboratory since December 1947 because I am departing to England within the next few days." According to the defendant Carrara's own evidence, that statement as to the use he had made of the second floor is untrue, for he says that at least for some time prior to April 1951 he was using it as living-quarters for himself, his wife and his son. Secondly there is no suggestion that his journey to England was to be merely exploratory or by way of a visit: it is described as his departure.

Similarly, Exhibit 3, signed by the plaintiff in reply, refers to the defendant Carrara's "departure to England within the next few days" as the reason for his "vacating" the second floor forthwith and expresses the hope that he will pay the arrears "with least possible delay after you have obtained employment in England".

If those letters reflect the substance of the first conversation that day, nothing was said about the defendant Carrara returning to reside again in Gibraltar. Judging from his evidence as to his prospects and connections in England, as well as from those letters, it seems to me to be established that he was confident of settling there and had no intention or fear of returning empty-handed to live in Gibraltar.

Later that day further meetings took place, culminating in a tri-partite conversation between the parties, the plaintiff's mouthpiece being again its managing director. The further suggestion was made — it matters not by which of them — that the defendant Carrara should be relieved of the tenancy of the third floor also. The defendant Cruz was in fact already occupying it as his home, with his wife and child. It was proposed and accepted that he should become the tenant — the head tenant, not a sub-tenant — as from 1 May 1951 at a rent of £8 per month and no liability for rates. This transaction suited everyone at that time. The plaintiff wanted nothing better than to exchange an unsatisfactory tenant for a better one (as they thought); the defendant Carrara was immediately freed from the burden of rent and rates and at the same time preserved a home for his daughter; and the defendant Cruz was thereby assured of a home of his own which incidentally would be protected by Part II of the Ordinance — a welcome event for a married man who had, so far without success, applied to the authorities ever since 1949 for the allocation of a dwellinghouse.

It was as to the exact form of the agreement then orally made between all concerned that the main controversy occurred at this trial. All three protagonists — and they alone, on this particular matter — gave evidence. I accept in substance that of the plaintiff's managing director. Apart from the question of personal credibility I think that the circumstances as proved point strongly towards his recollection being the correct one.

Among other matters proved was the fact that the form and tenor of the receipts given by the plaintiff for rent was radically changed from that day onwards. Between 5 September 1945 (the date of the first receipt) and 6 March 1951 (the date of the last receipt given before 28 April 1951) all the receipts were in the sole name of the defendant Carrara; and, according to the evidence of Celestino Berini, the plaintiff's clerk who was charged with the collection of rent and rates, which evidence was unchallenged on this point, whenever the defendant Carrara was in arrears his next payment was expressly allocated in the corresponding receipt to the oldest of such arrears. But as from 28 April 1951 all the receipts were in the sole name of the defendant Cruz, and the arrears then owed (and today still unpaid) by the defendant Carrara were disregarded as far as the Cruz receipts were concerned and were treated as a separate accrued debt due from the defendant Carrara alone.

Another matter is this: as from 1 May 1951 the third floor was let on reduced terms, namely at £8 per month rent with no liability for rates. The plaintiff's managing director says that he made this concession because the defendant Cruz was in his view less able to afford money for his home than the outgoing tenant.

The essence of that tri-partite arrangement on 28 April 1951 was, in my view, as follows. The defendant Carrara then and there surrendered his tenancy of the third floor with the plaintiff's approval and consent, with effect as from 1 May 1951 inclusive. He thus ceased to be the tenant of the third floor, having already ceased to be the tenant of the second floor. The

defendant Cruz became the tenant of the third floor as from 1 May 1951 on the reduced terms which I have mentioned.

A few days later the defendant Carrara went off to England by car with his wife, son and daughter-in-law, having borrowed £200 for the purpose. Before going, he sold some of his furniture and left the remainder in the third floor premises mingled with that of the defendant Cruz. His son succeeded in establishing himself in England, but the defendant Carrara did not. But in my view he has clearly failed to prove that when he left he intended to return to live in Gibraltar. He may possibly have intended to return on a flying visit to clear up his affairs here after establishing himself in his new life in England, but that, even if it was the fact, was a very different thing. Indeed, I think it is clear from the evidence of his actions and of the unfortunate circumstances in which he was placed that he had every intention and confidence in his ability to start life afresh in England, armed as he was with sufficient money to carry out his project and with acquaintances and connections there. He did not leave his son-in-law Cruz as a caretaker or custodian to keep the third floor for him as his home. He left him there with the knowledge that it had now become the defendant Cruz's own home until Cruz could obtain a more suitable one. I accept the evidence that he sent money to his son-in-law to help towards the rent, but this no doubt he did as a matter of affection towards him and his own daughter, knowing their difficulties as he must have done. In fact he was merely perpetuating the arrangement between himself and his son-in-law ever since the latter joined the family in 1949, namely that the latter should contribute £3 per month towards the rent payable to the plaintiff.

Accordingly some time during the summer of 1951 — no date has been given — the defendant Carrara returned from England with his wife and went to live in the third floor premises with their son-in-law, daughter and grandchild. He admits that he saw the receipts in their new form but did nothing about it. That state of affairs continued until early in March 1953, when the defendant Cruz told the plaintiff's managing director that he was leaving the premises, which in fact he did a few days later, transferring himself, his family and his furniture to new premises at last allocated to him. The defendant Cruz, however, refused to take any other steps to procure the vacation of the third floor. He thus left the defendant Carrara in physical possession.

The effect of that move on the part of the defendant Cruz was that he voluntarily went out of possession and occupation in the fullest sense. He left neither custodian nor furniture behind him, nor does he suggest — as obviously he cannot — that he had or has any intention of returning. He intends to go on living in his new home.

The plaintiff's managing director having told the defendant Cruz that he insisted on due notice being given, and the latter having declined to give it, on 28 March 1953 the plaintiff's solicitors sent him a notice to quit expiring on 30 April to which he replied that the tenant was his father-in-law, not

himself. So on 25 September these proceedings were commenced.

The defendant Cruz does not, of course, seek to resist the claim for possession; on the contrary, he says in effect that he never had any right to possession except (as he contends) vicariously as the defendant Carrara's licensee during the latter's absence in England. But on the facts as I find them I must hold that, in the view of the law, as from the expiration of the notice to quit on 30 April 1953 he has been the statutory tenant and, although he has removed his own entire household from the premises, he has refused to remove the lodgers who were living there with him. He has definitely and irrevocably abandoned the premises as his home, and has thereby forfeited his right to protection under the Ordinance. But he has left his father-in-law in physical occupation as his licensee and has thus declined to surrender his tenancy. On the principle of *Brown v Draper* it was necessary to have the defendant Cruz before the court as a defendant, and the only way in which the court can dispossess the defendant Carrara is by making an order against both of them.

The defendant Carrara is not in a position to resist the claim for possession because he has no right or title to the premises. He has never been the contractual tenant since 30 April 1951, and never became the statutory tenant at any time.

(The Chief Justice then remarked that no question arose of sub-letting or of alternative accommodation and concluded by considering hardship and reasonableness.)