[1980–87 Gib LR 215]

BENZIMRA v. KING

SUPREME COURT (Davis, C.J.): July 20th, 1984

Land Law—licences—termination—when licence terminated by licensor, licensee to be given reasonable time to vacate premises and find alternative accommodation

Landlord and Tenant—lease or licence—criteria—intention of parties crucial to decision whether agreement to occupy premises creates lease or licence—exclusivity of possession not essential to creation of lease

Landlord and Tenant—lease or licence—criteria—payment of weekly rent in name of licensee may create licence in favour of payor but no weekly tenancy created by acceptance of rent by landlord's agent

Landlord and Tenant—creation of tenancy—acceptance of rent—no tenancy by acceptance of rent in name of licensee if no intention to create tenancy—may only create licence in favour of payor

The plaintiff landlord sought possession of his premises and damages for the period in which the defendant and his family had been in unlawful occupation.

The defendant's family moved into the plaintiff's premises which were occupied by Mr. C as a licensee under the Labour from Abroad (Accommodation) Ordinance 1971. Shortly after the family moved in, Mr. C went to Spain to try to find work and told the defendant that, if he did not return within one month, he would not be returning at all. During the time that he was away, the defendant paid three weeks' rent to the plaintiff's estate agent in the name of Mr. C. On these occasions, the possibility of the licence being transferred into the name of the defendant was discussed with the estate agent, and the defendant said several times that he would like his family to continue living in the property on a more permanent basis under a lease. Not long after, however, the plaintiff's estate agent wrote to Mr. C giving him notice to quit (which was also received by the defendant) but the defendant and his family failed to vacate the premises. At a meeting between the defendant and the plaintiff's estate agent, the defendant then signed a letter consenting to a court order for his eviction six weeks later; nevertheless, he and his family were granted permission by the estate agent to remain in the premises over Christmas until the New Year. In fact, they stayed for well over a year.

The plaintiff sought possession of the premises and damages on the grounds that (a) the defendant had been allowed to stay in the premises not as a tenant but as a licensee at most; his licence to occupy, however, had long since expired; (b) he had already had more than a reasonable amount of time to vacate the premises, the defendant himself having consented to the landlord's obtaining a court order for eviction many months before the commencement of proceedings; (c) the defendant had paid no rent for over 20 months; and (d) no promise had ever been made to the defendant or his wife by the estate agent that, if he continued to pay rent, he would be granted a lease of the property.

The defendant submitted in reply that (a) the estate agent, by accepting rent from him, even if in the name of Mr. C, had granted him a weekly tenancy entitling him to the protection of the Landlord and Tenant (Temporary Requirements as to Notice) Ordinance 1981; (b) he had an equitable right to remain which could not be revoked at will as he had paid rent in reliance on the promise that if he did so, the licence to live in the property would be transferred into his name; (c) his consent to the order for eviction was void as it had been obtained as a result of the estate agent's threat that the police would evict his family if he did not sign the relevant letter; (d) in light of the difficulty in finding alternative accommodation in Gibraltar, he had not been given reasonable time, or notice, to vacate the premises; and (e) he was not precluded from obtaining a lease simply because the premises were registered under the Labour from Abroad (Accommodation) Ordinance 1971.

Held, granting possession and damages to the plaintiff:

(1) The defendant and his family were in unlawful occupation of the premises and the defendant was liable to pay damages. He had not occupied the premises under a lease and had never been more than a licensee. His licence to occupy, however, had long since been determined, it had been revoked on New Year's Day in accordance with the agreement he had reached with the estate agent. If the plaintiff had taken action before the reasonable time to vacate had expired, he would not have succeeded—in the present case, even bearing in mind the difficulty in finding alternative accommodation in Gibraltar, the defendant had been given ample time to vacate the premises (paras. 60–68).

(2) In determining whether the defendant occupied under a lease or a licence, exclusive possession was no longer the crucial distinguishing feature between licensees and tenants. Instead, it was necessary for the court to ascertain whether the parties had intended that the arrangement should give rise to a lease, taking into account any factors which might contradict that intention. Here, only three payments of rent had been made and they had been made in the name of Mr. C, not the defendant. Further, the payments had not been received on the basis that a tenancy existed, but on the understanding that the family occupied the premises as licensees at most. The mere acceptance of rent by the plaintiff's estate

agent, therefore, would not give rise to the inference of a weekly tenancy (paras. 41–42; para. 47; paras. 50–53).

(3) It was also irrelevant that an employee of the estate agents might have claimed that, on the payment of rent, the premises would be put into the defendant's name. Such a comment could, at most, only have envisaged transferring the licence of the pre-existing licensee to the defendant. Accordingly, in the absence of a clear promise upon which the defendant had acted, he was also unable to claim an equitable right to remain in occupation as a contractual licensee (paras. 35–37; para. 56).

Cases cited:
(1) *Binions* v. *Evans*, [1972] Ch. 359; [1972] 2 W.L.R. 729; [1972] 2 All E.R. 70, considered.
(2) *Booker* v. *Palmer*, [1942] 2 All E.R. 674; (1942), 87 Sol. Jo. 30, considered.
(3) *Cobb* v. *Lane*, [1952] 1 All E.R. 1199; [1952] 1 T.L.R. 1037, considered.
(4) *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334, considered.
(5) *Errington* v. *Errington*, [1952] 1 K.B. 290; [1952] 1 All E.R. 149; [1952] 1 T.L.R. 231, considered.
(6) *Heslop* v. *Burns*, [1974] 1 W.L.R. 1241; [1974] 3 All E.R. 406; (1974), 118 Sol. Jo. 581, considered.
(7) *Marcroft Wagons Ltd.* v. *Smith*, [1951] 2 K.B. 496; [1951] 2 All E.R. 271; (1951), 95 Sol. Jo. 501; considered.
(8) *Minister of Health* v. *Bellotti*, [1944] K.B. 298; [1944] 1 All E.R. 238, followed.
(9) *Moss (E.) Ltd.* v. *Brown*, [1946] 2 All E. R. 557, considered.

P. Montegriffo for the plaintiff;
F. Vasquez for the defendant.

1 **DAVIS C.J.:** This is a claim for possession of premises at 17/12 College Lane comprising two rooms, a kitchen and a bathroom ("the premises"), and damages from September 20th, 1982 until possession is delivered at a rate of £20 per week.

2 It is not disputed that the premises are registered as accommodation for workers under the Labour from Abroad (Accommodation) Ordinance, 1971. Nor is it disputed that for a period of about 11 years up to mid-1982, the premises were occupied by Mr. Calvente, as a licensee under the Labour from Abroad (Accommodation) Ordinance 1971.

3 The plaintiff claims that the defendant and his family were allowed by their estate agent, M. Mattana Ltd., to remain in the premises during the absence of Mr. Calvente, the licensee of the premises. Mr. Calvente had said that he expected to be away for about four weeks seeking employment and that if he did not return and resume occupation of the premises

at the end of that period, he would not be returning at all. The plaintiff claims that on learning that Mr. Calvente would not be returning to the premises, his estate agent, M. Mattana Ltd., allowed the defendant and his family to remain in the premises on licence for a short period because of the difficulty they were having in finding accommodation, but that such licence has now expired and that since November 26th, 1982, the defendant has been in unlawful occupation of the premises as a trespasser.

4 The defendant claims that the plaintiff's estate agent, M. Mattana Ltd., having become aware on or about August 23rd, 1982 that Mr. Calvente would not be returning to occupy the premises and having accepted rent from him between then and September 20th, 1982, he thereby became a weekly tenant and was therefore entitled to the protection of the Landlord and Tenant (Temporary Requirements as to Notice) Ordinance, 1981. Alternatively, the defendant claims that on an unspecified date in August 1982, the plaintiff, through his agent, M. Mattana Ltd., entered into an agreement to grant a lease to the defendant, and that he is therefore entitled, as a tenant of the premises, by virtue of such agreement, to the protection of the Landlord and Tenant (Temporary Requirements as to Notice) Ordinance, 1981. This Ordinance provides that a notice determining a tenancy, served on a tenant after the coming into operation of the Ordinance on October 30th, 1981, shall not determine the tenancy until the day following the appointed day, namely, the date appointed under s.1(2) of the Landlord and Tenant Ordinance 1983, for the commencement of that Ordinance. No date of commencement of that Ordinance has as yet been appointed.

5 The question at issue is: did the transactions that took place between M. Mattana Ltd., as agents for the plaintiff, and the defendant and his wife, result in the defendant becoming a tenant of the plaintiffs or a mere licensee? As these transactions occurred nearly two years before the hearing of this action, and as there are very few written records relating to them, it is perhaps not surprising that there is considerable dispute as to what transactions in fact occurred, on what dates these transactions took place, and between whom.

6 The facts, insofar as they can be ascertained, are as follows: the defendant, with his wife and two sons, came to Gibraltar in March 1982 from England where he had been working for some years. He had lived and worked in Gibraltar before and is the holder of a British passport. On arrival in Gibraltar, the Kings stayed with friends (Mr. and Mrs. Rowe). The defendant was taken on as a casual labourer by a transport firm, Monteverde & Sons Ltd., working on the construction of the new electricity-generating station and Mrs. King started to look for accommodation for her family. After staying for about two weeks with the Rowes, the Kings moved to a flat in Ocean Heights for about 2½ months, at a rent of £80 per week. This was far more than they could afford and they spent

all their savings living at Ocean Heights. In July 1982, Mrs. King, with her two sons, went to La Linea to live with her mother who is Spanish. The defendant moved to the Cannon Hotel, where he shared a room with a friend. Mrs. King's search for accommodation during the period from March to July 1982 was unsuccessful. She was unable to find any suitable accommodation in Gibraltar at a price they could afford to pay on the defendant's wages. It appears that they wished to live in Gibraltar rather than Spain because Mr. and Mrs. King were keen that their two boys should be educated there. In anticipation of finding accommodation in Gibraltar, the Kings had bought a refrigerator and two bunk beds for their children soon after their arrival in Gibraltar. These were stored with Mrs. Rowe's mother.

7 Mrs. King is a close friend of Mrs. Calvente. It seems that at about the time that Mrs. King went to La Linea to live with her mother, Mr. Calvente was thinking of leaving Gibraltar and taking up employment which had been offered to him in Spain. Mr. Calvente, who worked with the defendant and knew of the difficulties the Kings were experiencing in finding accommodation, told the defendant that he might be leaving, and it seems clear, though this was never specifically stated in evidence, that Mr. Calvente and the defendant must have discussed the possibility of the Kings taking over the premises occupied by the Calventes. Be that as it may, the defendant asked Mr. Calvente if he could move the suitcases, the bunk beds and the refrigerator from the house of Mrs. Rowe where the conditions for their storage were not very satisfactory, to the premises occupied by Mr. and Mrs. Calvente. Mr. Calvente agreed to this, providing permission was granted by the landlords' agent, M. Mattana Ltd., with whom he had always carried on all business relating to the premises.

8 Mr. Calvente was called as a witness for the defence. According to Mr. Calvente and the defendant, they both went to the office of M. Mattana Ltd., on some unspecified date before July 21st, 1982, where they saw the secretary, Miss Bossino, who gave permission for the Kings' possessions to be moved into the premises. In her evidence Miss Bossino said she had no recollection of this meeting.

9 Some days later, Mr. Calvente made up his mind to go to Spain. According to the defendant, Mr. Calvente said to him that he could move into the Calventes' premises provided the estate agents, M. Mattana Ltd., agreed to this. Accordingly the defendant and Mr. Calvente went again to the office of M. Mattana Ltd., to seek permission for the defendant and his family to move into the premises. According to Mr. Calvente, this was three or four days before he left for Spain on July 26th, 1982. The defendant and Mr. Calvente say that again they saw only the secretary, Miss Bossino, at M. Mattana Ltd.

10 Their evidence is that Mr. Calvente told the secretary that he had been offered a job in Spain and that he intended going away for four weeks to see if he liked it. If, at the end of that period he did not come back, it would mean that he was happy in the job and that he would not be returning to the premises at all. The secretary was told that the defendant and his family would be moving into the premises while the Calventes were away and that if the Calventes did not return after five weeks the Kings would then take over the premises. According to the defendant, he then paid £80 to the secretary in cash in payment in advance of four weeks' rent. The defendant produced a receipt in the name of J. Moya Calvente for £80 dated July 21st, 1982 for rent for four weeks up to August 16th, 1982. It is not disputed that this is signed by Miss Bossino. According to both the defendant and Mr. Calvente, the secretary told them that there would be no problem and that if Mr. Calvente did not return by August 16th, the flat would be put into the defendant's name the following week. The defendant says that he told Miss Bossino that his wife would then be coming to pay the rent. The defendant says that he thinks that Mr. Mattana, the head of the firm, was present and that he said he would ask the landlords if the defendant could take over the premises in his name if Mr. Calvente did not return.

11 The evidence of the defendant and Mr. Calvente as to these transactions, however, is not accepted by Miss Bossino. She remembered Mr. Calvente coming to the office to tell her that he was going to Spain for employment and that if he did not like it there after a month he would come back. She said that Mr. Calvente (not the defendant) paid her four weeks' rent in advance; that he came to see her alone and that he said nothing about the defendant and his family moving into the premises during his absence. She denied that on July 21st, 1982, she knew anything about the defendant and his family moving into the premises when Mr. Calvente left. Mr. Mattana denied that any such meeting took place at which he was present on July 21st, 1982.

12 Mrs. King, the defendant's wife, said that as from August 16th, 1982, she went to M. Mattana Ltd. every Monday to pay the rent. She said that on each occasion she paid Miss Bossino, who gave her a receipt. These receipts were admitted in evidence. Each receipt is in the name of Mr. Calvente and is signed by Miss Bossino. Each receipt is for the payment of £20 rent paid in advance. There are five receipts dating from August 18th to September 20th. From the evidence of the receipts, it appears that the first payment on August 18th, was made on a Wednesday and that the third payment was made on a Tuesday, and not, as stated by Mrs. King, on Monday in each case.

13 Mrs. King, who was extremely uncertain about dates in giving her evidence, said that she thought that on the second time of going to pay the rent (August 23rd) but possibly after, she asked the secretary (Miss

Bossino) whether, if the Calventes did not return to Gibraltar, the premises would be put into the name of the defendant. She said that Miss Bossino replied: "Yes. Don't you worry. Carry on paying, and everything will be fixed and put into your husband's name." Mrs. King said that Miss Bossino said words to this effect to her on more than one occasion when she went to pay the rent.

14 Mrs. King's evidence was supported by her friend Mrs. Rowe, who said that she had gone four or five times with Mrs. King to pay the rent. Mrs. Rowe said that on each occasion that they went to pay the rent Mrs. King asked the secretary when the premises would be put in the name of King, on each occasion she was told not to worry and that it would not take long. Miss Bossino however, denied that she had ever said any such thing to Mrs. King.

15 Mrs. King said that on the second last time she paid the rent (which would have been on September 6th, 1982), Mr. Mattana himself came out of an office. Mrs. King said she introduced herself and it appears that they confirmed that the Calventes were not returning to the premises. Mrs. King says that she asked Mr. Mattana when the flat was going to be put into the name of the defendant and that Mr. Mattana told her to go on paying the rent for a few more weeks, that he would consult the owners of the flat and indicated that, as the flat was "for renting," it would then be put into the name of King.

16 Mrs. Rowe, who was present at this meeting, which she says she thinks was on the second occasion she went with Mrs. King to pay the rent, but could not say on what date this was, said that when Mr. Mattana appeared, Mrs. King told him that the Calventes would not be coming back and asked him when the flat would be put into the name of King. To this, Mrs. Rowe said that Mr. Mattana had replied that Mrs. King should continue as at present and that soon the flat would be put into their name. Mr. Mattana denied that he had ever told Mrs. King that the flat would be put into the Kings' name once it was clear that the Calventes were not coming back.

17 In cross-examination, Mr. Mattana's recollection was that the defendant was with Mr. Calvente on August 30th, 1982, and that this was the first time he had met the defendant. He denied that this meeting had occurred on July 21st, 1982, and that it was the defendant who had paid him £80 as four weeks' rent in advance. Mr. Mattana stated that on September 2nd, 1982, M. Mattana Ltd., on behalf of the plaintiff, wrote to Mr. Calvente giving him notice to quit on September 23rd, 1982. He said that this was done to protect the plaintiff's interest in the event of Mr. Calvente not returning to occupy the premises and in case the defendant and his family did not then vacate the premises. Mrs. King said she had received this letter but she could not say how or when, except that she thought it was

after September 13th, 1982, and possibly after she had forwarded it to Mr. Calvente in Spain as it was addressed to him.

18 Mr. Calvente said that having left Gibraltar on July 26th, 1982, he did not return until January 22nd, 1983, and this was borne out by his passport. On this evidence, it appears that Mr. Mattana must be mistaken when he says that it was on August 30th, 1982, that he had his conversation with Mr. Calvente. Mr. Calvente was quite definite that Mr. Mattana was not present on July 21st, when four weeks' rent was paid in advance. Miss Bossino said that this rent was paid by Mr. Calvente and that he then told her he was going to Spain for four weeks. However, she denies that he said anything about the Kings staying in the premises or that the defendant was present on this occasion. The defendant says that he was present, that he paid the rent in advance and he has a vague recollection that Mr. Mattana was present.

19 While there is a complete conflict of evidence as to when and by whom it was agreed that the defendant and his family should occupy the premises while Mr. Calvente was away for a month in Spain, it is clear from Mr. Mattana's evidence that, as far as he was concerned, as agent for the plaintiff, he had no objection to it. It is equally clear, in my view, that during the period of a month when Mr. Calvente had said he expected to be away and the defendant and his family occupied the premises, they did so as licensees in place of Mr. Calvente.

20 Mr. Mattana said that it was on September 20th that Mrs. King told him that she had heard from the Calventes to the effect that they were not returning to Gibraltar. Mrs. King said this occurred, she believed, on September 6th. Mr. Mattana said that Mrs. King (who, on her own evidence, would, by September 20th, have received the notice to quit addressed to Mr. Calvente) asked if they could stay in the premises for a bit longer until they had found alternative accommodation. Mr. Mattana said that when it seemed that the Kings were going to have considerable difficulty finding other accommodation, he contacted the plaintiff, Mr. Benzimra, and subsequently the plaintiff's solicitors, who advised that the defendant should sign a letter consenting to a voluntary court order for the eviction of himself and his family on November 26th, 1982. It is not disputed that it was signed by the defendant on October 4th, 1982. The defendant says that according to the best of his recollection this was the first time he had met Mr. Mattana.

21 According to Mr. Mattana, the defendant or his wife had told him at their meeting of September 20th, that they expected the defendant's job at the generating station to finish before the end of the year (the defendant denies this) and that if they could not find anywhere to live in Gibraltar they would probably go to Spain. At their meeting on October 4th, Mr. Mattana said he explained to the defendant that the letter confirmed that

the defendant and his family could stay in the premises until November 26th, 1982, and that if they did not vacate the premises then, it enabled the landlords to obtain a court order for their eviction.

22 It was suggested that the defendant was forced to sign the letter on October 4th, and Mr. Mattana admitted that he had told the defendant that if he did not vacate the premises he would be evicted by the police. Mr. Mattana said that he had said this to the defendant in conversation around the end of September. He denied that on October 4th, 1982 he had threatened the defendant with eviction by the police if the defendant did not sign the letter. It is in my view clear, from the defendant's evidence, that it was not the threat of eviction by the police that led him to sign the letter, but that by signing as requested, he would be able to remain in the premises until November 26th, at a time when there was no other accommodation available for him and his family in Gibraltar. The defendant said that his meeting with Mr. Mattana on October 4th, in which he had signed the letter, was conducted calmly and in a friendly way. He gave no support to the allegation raised in the cross-examination of Mr. Mattana that he had wept at the meeting because of the pressure that was being put on him by Mr. Mattana. In examination-in-chief, the defendant mentioned that after signing the letter he consulted a police sergeant who told him that the police could not be called in to evict him. The defendant said he would never have signed the letter had he known this before. It would appear from what the defendant said in cross-examination, however, that he consulted the sergeant simply to ascertain whether the police could really be called in view of the fact that, according to his evidence, when he signed the letter on October 4th, he had made up his mind to stay in the premises.

23 On obtaining the defendant's signature to the letter of October 4th, the plaintiff's solicitors, apparently to safeguard the plaintiff's position, filed a writ claiming that the defendant was in unlawful occupation of the premises as a trespasser and claiming possession. This was forwarded to the defendant with a letter explaining the purpose of the writ and suggesting that the defendant indicate on the acknowledgement of service that he would not be contesting the proceedings.

24 According to Mr. Mattana, in November 1982, the defendant came to see him again and told him that his job was not going to end until the new year when he expected a bonus. He asked if he could stay in the premises until the new year and the receipt of his bonus and that, after that, he would then be going to Spain.

25 Mr. Mattana said that he was reluctant to turn the defendant and his family out just before Christmas and that consequently he allowed them to stay on and agreed not to take proceedings for possession of the premises. The defendant did not deny that this meeting took place, but it appears

from his evidence that he had no recollection of it. He said he could not remember whether after the meeting of October 4th, 1982 he had gone to see Mr. Mattana again towards the end of the year. Mrs. King said she thought her husband had gone to see Mr. Mattana about Christmas-time. In cross-examination, however, the defendant agreed that he had discussed his job with Mr. Mattana, but he denied ever having told him he was leaving his employment or that he would be getting a bonus in the new year. From the fact that the acknowledgement of service sent to the defendant on October 14th, was filed in the Supreme Court Registry on November 17th, indicating that the defendant intended to contest the proceedings, and that on November 18th, 1982, the defendant's solicitors wrote to the plaintiff's solicitors enclosing a defence to the plaintiff's claim, it appears that the defendant must have decided to seek legal advice in mid-November 1982 with a view to disputing the plaintiff's claim to possession of the premises and retracting from the letter of October 4th, 1982, in which he had consented to his eviction from the premises on November 26th, 1982.

26 The defendant and his family have been in occupation of the premises to date. No rent, however, has been received from them since September 20th, 1982. Mr. Mattana said that in his conversations with the defendant and his wife, he had gained the impression throughout that their stay in Gibraltar was a temporary one and that they intended to go to Spain where he had understood that Mrs. King had relations. He had never understood, he said, that the Kings intended to stay in Gibraltar permanently.

27 I revert now to the evidence of Mrs. King. Mrs. King said that, at her meeting with Mr. Mattana on September 6th, 1982, she asked Mr. Mattana when the premises were going to be put into the name of the defendant and she said that he told her to go on paying the rent, that he would consult the owners and that it was likely that the flat would then be put into the defendant's name. Mr. Mattana, however, denied that he had ever told Mrs. King that the premises would be put into the defendant's name. Mrs. King said that on September 13th, 1982, when she went to pay the rent up to September 20th, she was told by Miss Bossino that Mr. Mattana wanted to see her. She went to see Mr. Mattana in the afternoon, accompanied by her friend Mrs. Hernandez; she said she expected to be told that the premises were to be put into the defendant's name. On meeting Mr. Mattana, however, he told her that she could not have the premises because the owners wanted it. Mrs. King said (and this was confirmed by Mrs. Hernandez but denied by Mr. Mattana) that Mr. Mattana then told her that if she would sign a letter, he could let her stay a little longer in the premises. On being asked what the letter said, Mrs. King and Mrs. Hernandez, in almost identical words, said that Mr. Mattana said that it was not important and that it was only to say that the

Kings had gone into the premises without his permission. Mrs. Hernandez advised Mrs. King not to sign the letter and that she should consult a lawyer, at which, according to Mrs. King and Mrs. Hernandez, Mr. Mattana became very angry and threatening and the two ladies then left.

28 As a result of this meeting, Mrs. King, accompanied by Mrs. Hernandez, went to see the local organization called Action for Housing to see if it could help. Mrs. King could not be precise as to when she went to Action for Housing, but she thought it was the day after her meeting with Mr. Mattana on September 13th. She said that she explained her family's situation and that they had been told to leave the premises in 17/12 College Lane. She said that she may have shown the man to whom she spoke the receipts for rent in her possession, but she said that she showed him no other papers. She said that she had not shown him the notice to quit which she did not think she had received by that point. Mrs. King said that the man to whom she spoke asked her if she would like Action for Housing to write to the landlords of the premises to which she had said that she would.

29 Mr. Pinna's letter is as follows:

> "We would like to refer to the case of Mr. and Mrs. King of 17/12 College Lane. We have been informed by this family that although they are not the rightful tenants, they have been occupying these premises for the past 10 weeks. The rightful tenant was Mr. Calvente, a relative of Mrs. King who has taken up residence in Spain. We are fully aware that the King family is illegally occupying this flat. They were compelled to do this in desperation as they were not able to find any other accommodation.
>
> You have now given them notice to quit in about one week's time. We appreciate the fact that you are legally entitled to take this action. However, the housing situation in Gibraltar is so desperately acute, as you probably know, that if this family is evicted from their present dwelling they will no doubt find themselves in the street and unable to find any other accommodation.
>
> We would therefore be grateful to you if you could allow them to remain in the dwelling they are occupying at the moment, or offer them alternative accommodation.
>
> Should you wish to discuss this further with our association we shall be pleased to meet you at your request."

30 In cross-examination Mrs. King said she told the man at Action for Housing that she and her family had not had the premises put into their name but that they had been allowed into the premises and it had been agreed that the premises would be put into their name. She said she had not told the man that they had a right to be in the premises, but that they

were there with the consent of Mr. Mattana or his secretary. Mrs. Hernandez said she was sure that Mrs. King had told the man that a promise had been made to her by Mr. Mattana that if Mr. Calvente did not return from Spain, she was not to worry and that they would come to some written agreement. She said Mrs. King had said that she had nothing in writing to prove that such a promise had been made but that she wanted Mr. Mattana to keep that promise.

31 Mrs. Hernandez said that it was possible that the man at Action for Housing had not recorded correctly what Mrs. King had said or that Mr. Pinna, in writing to Mr. Benzimra on September 15th, had misunderstood what he had been told. Certainly, the letter itself hardly reflects the account of what Mrs. King and Mrs. Hernandez say they said to the man at Action for Housing.

32 To speculate over what is meant in the first sentence of para. 2 of the letter that "the King family is illegally occupying this flat" would be otiose. It is to be observed, however, that in para. 1, the writer says that Action for Housing had been informed by the family that they had been occupying the premises for the past 10 weeks. This would go back to about July 7th, 1982, the date on which the Kings moved into the premises. It lends support to the statement in para. 2 of the amended defence that the defendant was residing at the premises at the same time as Mr. Calvente for a period of time prior to the latter's departure for Spain, and casts doubt on the veracity of the evidence of Mr. Calvente and Mr. and Mrs. King that they moved into the premises on July 26th, on the departure of the Calventes, and not before.

33 A curious feature of this part of the evidence is that while Mrs. King says that she told her husband when he got back from work that evening all about the distressing meeting she had had with Mr. Mattana that afternoon, the defendant has no recollection of going to see Mr. Mattana until September 21st, the day after his wife told him that Mr. Mattana had refused to accept payment of the weekly rent. He had no recollection of his wife telling him of any other problem other than the refusal of the rent and he had no recollection of having discussed with his wife her visit to Action for Housing.

34 The defendant says that on September 21st, when he went to M. Mattana Ltd., he cannot remember who he saw but he was told that he would have to move from the premises and that he would have to sign a letter. His first real meeting with Mr. Mattana, according to his recollection, was on October 4th, when he signed the letter of that date.

35 In this welter of conflicting and confusing evidence, there is absolutely nothing, in my view, that points to an agreement or promise by the plaintiff or his agent, M. Mattana Ltd., to give the defendant a lease of the premises. Mr. Mattana says that he only met the defendant for the first

time on August 30th, 1982. The defendant can only clearly remember meeting Mr. Mattana on October 4th, 1982. If, as stated by the defendant and Mr. Calvente, Miss Bossino, the secretary of M. Mattana Ltd., told the defendant and Mr. Calvente on July 21st, 1982, that if Mr. Calvente did not return in four weeks' time, the following week the premises would be put into the defendant's name (which is denied by Miss Bossino). Not only did Miss Bossino have no authority to make such a statement but, even if she had, this remark can in no way be construed as a promise to lease the premises to the defendant. As Mr. Calvente was a mere licensee of the premises, the most that this statement can amount to is that Mr. Calvente's licence to occupy the premises would be transferred to the defendant.

36 On Mr. Mattana's own admission, he, as agent for the plaintiff, gave his consent to the defendant and his family occupying the premises until Mr. Calvente returned from Spain or until the expiry of about a month, by which time it could be assumed that he would not be coming back at all. As I have already said, it is clear in my view that, during this period the defendant and his family were mere licensees of the premises. According to Mr. Calvente, supported by the evidence of his passport, he left Gibraltar and entered Spain on July 26th, 1982. He said that he told Miss Bossino that if he did not return in five weeks' time, he would not return at all.

37 In my view, the defendant can therefore be said to have been a licensee of the premises up to August 30th, 1982. According to Mrs. Rowe, on one occasion when she went with Mrs. King to pay the rent to M. Mattana Ltd., Mrs. King spoke to Mr. Mattana and told him that Mr. Calvente was not returning to Gibraltar. Mrs. King said that it was on this occasion that Mr. Mattana said that he would consult the landlords to see if the flat, vacated by Mr. Calvente, could be transferred to the defendant. Mr. Mattana denied that he had ever told Mrs. King that the flat would be put into the defendant's name. Even if Mrs. King's evidence is accepted, however, I cannot see how it can be said that Mr. Mattana thereby promised Mrs. King a lease of the premises. These premises were registered as accommodation for workmen under s.3 of the Labour from Abroad (Accommodation) Ordinance 1971, and M. Mattana Ltd. is licensed under s.4 of the Ordinance to manage the premises. In my view, the most Mr. Mattana can be understood to have been saying to Mrs. King was that he would consult the landlords to see if the defendant and his family could take the place of Mr. Calvente as licensees of the premises.

38 If it is accepted, as I think it must be, that Mr. Calvente went to Spain on July 26th, 1982, that Mr. Mattana is mistaken when he says that he met Mr. Calvente on August 30th, 1982 and that Mr. Calvente told him then that he was going away to Spain for about a month, then it seems to me that the payments of rent are payments accepted by M. Mattana Ltd. in the

knowledge that Mr. Calvente was not returning to the premises. The receipts issued for each of these payments, however, were issued in the name of Mr. Calvente, indicating that Miss Bossino, the secretary of M. Mattana Ltd., had received no instructions that the receipts for rent should be issued in the name of the defendant.

39 According to Mrs. King, she was told by Mr. Mattana on September 13th, 1982, that she and her family would have to leave the premises as the landlords wanted it. If Mrs. King's very shaky evidence as to dates is accepted, it seems that Mr. Mattana must have consulted the landlords between September 6th and September 13th, when she had her next meeting with Mr. Mattana. No further payments of rent were accepted after that date.

40 Mr. Mattana said that it was on September 20th, 1982 that Mrs. King told him that the Calventes were not returning and asked him if they could stay on in the premises for a little while until they could find alternative accommodation. It was as a result of the meeting with Mrs. King that he consulted the plaintiff, Mr. Benzimra, and subsequently the plaintiff's solicitors, and prepared the letter of October 4th, 1982 for signature by the defendant which gave the defendant and his family until November 26th, 1982 to vacate the premises.

41 On whichever date it was that Mrs. King told Mr. Mattana that the Calventes were not returning, it cannot be said, in my view, that the mere acceptance of rent from Mrs. King (but received in the name of Mr. Calvente) up to September 20th, 1982, gave rise to a weekly tenancy of the premises as between the defendant and the plaintiff, as alleged in para. 4 of the amended defence. It appears to me that it is on the three payments of rent of August 31st, September 6th and September 13th, alone, on which the defendant bases his claim to a weekly tenancy. As I have said, I do not consider that these three payments, by themselves, are sufficient to give rise to the presumption of a weekly tenancy, and in my view there is no other evidence to support the contention that a weekly tenancy was created in the defendant's favour.

42 Insofar as para. 5 of the amended defence is concerned—that the plaintiff, through his agents M. Mattana Ltd., on an unspecified date in August 1982, entered into an agreement to grant a lease to the defendant—there is no evidence whatsoever in my view to support this contention. Mr. Montegriffo for the plaintiff has drawn my attention to the following passage in 1 *Woodfall's Law of Landlord & Tenant*, 28th ed., para. 1–0017 (1978), relating to possessory licences. This is as follows:

> "The question whether the grantee has exclusive possession is no longer the crucial test distinguishing between leases and licences. Although a person who is let into possession is prima facie to be considered a tenant, nevertheless he will not be held to be so if the

> circumstances negative any intention to create a tenancy. It has been said that in the cases where a grantee has been held to be a licensee, although in fact he had exclusive possession that there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or suchlike, to negative any intention to create a tenancy. No doubt the list of circumstances which have that effect is not closed. The modern tendency is not to infer the creation of a tenancy from the payment and acceptance of rent for a limited period unless it is clear that that was the intention with which the rent was accepted. The distinction between a lease and a licence depends on the truth of the relationship and not on the label which the parties have chosen to put upon it."

Mr. Montegriffo also referred me to the following (*op. cit.*, at para. 1–006):

> "The law does not impute an intention to enter into the legal relationship of landlord and tenant where the circumstances and conduct of the parties negative any such intention."

He also referred me to the following cases cited in *Woodfall's Law of Landlord & Tenant* in the note to that passage, namely *Booker* v. *Palmer* (2), *Moss (E.) Ltd.* v. *Brown* (9), *Marcroft Wagons Ltd.* v. *Smith* (7) and *Heslop* v. *Burns* (6).

43 In *Marcroft Wagons Ltd.* v. *Smith* (7), the facts were not dissimilar to those in the present case. In that case, the widow and daughter of a statutory tenant of a dwelling-house within the Rent Acts continued to occupy the house until the widow's death in 1950. The daughter asked the agent of the landlord (the plaintiffs) to put her name on the rent book and to transfer the tenancy of the house to her. The agent refused, saying that the house was required by the plaintiffs. He told her, however, that he did not wish to distress her and accepted two weeks' rent. The daughter remained in possession, paying rent, for about six months. It was held that no tenancy had been created between the plaintiffs and the daughter.

44 Evershed, M. R. in his judgment said ([1951] 2 K.B. at 501):

> "There is no doubt that the intricacies of modern life, as reflected in the Rent Restriction legislation, have made, in many respects, the relationship between landlords and tenants assume an artificial, and, indeed unfriendly character, which is somewhat to be deplored. In particular, landlords, who may have ordinary human instincts of kindliness and courtesy, may often be afraid to allow to a tenant the benefit of those natural instincts in case it may afterwards turn out that a tenant has thereby acquired a position from which he cannot subsequently be dislodged. In the general interest, it may be necessary that the relationship should have to assume a much more formal character than would otherwise be necessary; nevertheless, I should

be extremely sorry if anything which fell from this court were to have the effect that a landlord could never grant to a person in the position of the defendant any kind of indulgence, particularly in circumstances such as existed in March, 1950, when the defendant lost her mother. It seems to me that it would be quite shocking if, because a landlord allowed a condition of affairs to remain undisturbed for some short period of time, the law would have to infer therefrom that a relationship had arisen which made it impossible thereafter for the landlord to recover possession of the property, when, admittedly, by taking proper measures from the start he could have got possession."

45 Denning, L.J., after referring to the effect of the Rent Acts, said (*ibid.,* at 506):

"In these circumstances, it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Restriction Acts cases is the same test as that laid down by Lord Mansfield in cases of holding over: 'The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was?'. . ."

46 In Gibraltar, the place of the Rent Acts of England is taken by the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83) and its replacement, the Landlord and Tenant Ordinance 1983 (*cap.* 49). It is not disputed, as I understand it, that the premises with which we are concerned in the present case, as well as falling under the Labour from Abroad (Accommodation) Ordinance 1971, fall under the Landlord and Tenant (Miscellaneous Provisions) Ordinance and its successor, so that the *dicta* of the Court of Appeal in *Marcroft Wagons Ltd.* v. *Smith* (7), apply to Gibraltar as well as England.

47 In *Booker* v. *Palmer* (2), Lord Greene, M.R. said ([1942] 2 All E.R. at 676–677):

"Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention. Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all and in particular, such a special relationship as that of landlord and tenant."

And (*ibid.*, at 677):

> "There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

48 That was a case in which, during the war, an evacuee from London was allowed by a landowner, out of charity, to occupy a cottage for the duration of the war. It was held that no tenancy had been created. This was followed in *Cobb* v. *Lane* (3) applying the test laid down by Lord Greene, M.R. in *Booker* v. *Palmer* (2).

49 In *Heslop* v. *Burns* (6), Scarman, L.J., after referring to the effect of the Rent Acts, said ([1974] 1 W.L.R. at 1252):

> "What has happened, therefore, is that the facts of society have changed and a more subtle investigation of the facts has to be undertaken in answering the two question: 'What is the intention of the parties?' and 'Are there circumstances negativing the inference of a tenancy at will?' It seems to me, with respect, that Denning, L.J. in *Facchini* v. *Bryson* . . . gives some helpful guidance as to the sort of circumstances that now have to be examined and assessed in determining whether or not a tenancy has been created. In the course of his judgment he used these words:
>
> > 'In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy.'
>
> In the present case I think that one can find something very akin to a family arrangement."

50 Mr. Montegriffo submits, and I agree with him, that the acceptance of rent for three weeks after it was known by M. Mattana Ltd. that Mr. Calvente had vacated the premises, even if coupled with Miss Bossino's alleged assurances to Mrs. King that the premises would be put into the defendant's name (an allegation which was vigorously denied by Miss Bossino) cannot possibly be said to evince an intention to create the relationship of landlord and tenant between the plaintiff and the defendant.

51 I am satisfied that the defendant and his family were allowed by Mr. Mattana to continue to occupy the premises from August 30th to September 13th, 1982, out of motives of kindness on the part of Mr. Mattana while he consulted the plaintiff as to the Kings remaining in the premises and having in mind the difficulty they were likely to encounter in finding other accommodation.

52 During that period, the defendant and his family continued in occupation of the premises on the same terms, in my view, as those governing Mr. Calvente's occupation, namely, as a licensee under the Labour from Abroad (Accommodation) Ordinance 1971. I consider that there is support for this view in the fact that the receipts for rent received during that period continued to be made out in the name of Mr. Calvente.

53 Mr. Vasquez for the defendant submits that the acceptance of rent by M. Mattana Ltd. on August 31st, September 6th and September 13th, after Mr. Mattana's knowledge that the Calventes were not returning to Gibraltar must be taken as evidence of an intention on his part to enter into the relationship, on behalf of the plaintiff, of landlord and tenant with the defendant. He submits that the fact that the premises were registered under the Labour from Abroad (Accommodation) Ordinance 1971 and that Mr. Calvente occupied the premises as a licensee under that Ordinance has no relevance insofar as the continued occupation of the premises by the defendant and his family is concerned. Mr. Vasquez submits that once it was known by M. Mattana Ltd. that Mr. Calvente was not returning, the occupation of the premises by the Kings must be construed as a common law weekly tenancy and not as a mere licence. For the reasons already given, I cannot accept this argument.

54 Mr. Vasquez referred me to the cases of *Errington* v. *Errington* (5) and *Binions* v. *Evans* (1). The facts of those two cases are far removed from the present case. In both cases it was held that the defendants were in occupation of the premises concerned as contractual licensees with an equitable right to remain in occupation.

55 Mr. Vasquez submits that the promise of a tenancy was held out to the defendant and his wife, which was acted upon by them in that they continued to pay rent to M. Mattana Ltd. They paid rent in the same way that the Erringtons in *Errington* v. *Errington* (5), acting on the promise that, if they paid the instalments due on a building society loan, the house would be theirs, paid the instalments. As I understand Mr. Vasquez's submission, it is that by continuing to pay rent that the Kings acquired an equitable right to a tenancy of the premises which could not be revoked at will as in the case of a licence.

56 As I have said, I cannot accept that any promise of a tenancy was held out by M. Mattana Ltd. to the defendant or his wife. Furthermore, the amended defence makes no mention of the defendant's rights in equity arising from any such promise of a tenancy acted upon by the defendant, and in the absence of any application by counsel for the defendant to make a further amendment to the defence, I am not prepared to consider this line of defence. I am satisfied that the defendant was never more than a licensee of the premises.

57 The question that now arises, however, is whether the defendant's licence to occupy the premises has ever been determined. In para. 7 of the amended statement of claims, it is claimed that the defendant has been in unlawful occupation of the premises as a trespasser since November 26th, 1982.

58 The evidence of Mr. Mattana does not support this allegation in that Mr. Mattana said that the defendant came to see him in November 1982 and it was agreed that the defendant and his family should be allowed to remain in the premises until the new year. Clearly therefore, the defendant's licence to occupy the premises was extended by Mr. Mattana on behalf of the plaintiff from November 26th, 1982 to at least January 1st, 1983.

59 Mr. Mattana said that after his meeting with the defendant in November 1982, he had had no further conversation with the defendant and his wife and there is no evidence that there was any further communication with them at all by the plaintiff or M. Mattana Ltd., other than in correspondence between the parties' solicitors.

60 In my view, however, it can be said that the licence to occupy the premises granted by Mr. Mattana to the defendant was revoked on January 1st, 1983 in accordance with the agreement which Mr. Mattana says he reached with the defendants when the defendant came to see him in November 1982. As from the revocation of the licence on January 1st, 1983, the defendant and his family had whatever in the circumstances was a reasonable time in which to remove themselves and their property from the premises. See Lord Greene, M.R. in *Minister of Health* v. *Bellotti* (8) ([1944] K.B. at 305–306):

> "The true view is that where a licence is revoked, the licensee has, in spite of the revocation, whatever in the circumstances is a reasonable time to enable him to remove himself and his possessions from the scene of the licence."

61 In that case Gibraltarian evacuees housed in a block of flats in Earls Court, London during the war were given a week's notice to remove themselves, their families and possessions from the flats which they occupied as licensees. The county court judge held that the defendants were entitled to reasonable notice sufficient not only to remove themselves and their families and possessions from the flats but also to find alternative accommodation. He found that a week's notice was not reasonable notice and that the action therefore failed. On appeal by the Minister of Health, Lord Greene, M.R. found, as had the county court judge, that the defendants, in the circumstances of the case, were entitled to a reasonable time to find alternative accommodation and that a week was not a reasonable time. He said (*ibid.*, at 306):

"I have already said that in the circumstances of this case such a reasonable time must extend to whatever is a reasonable time to find alternative accommodation, and, if the day after this notice expired, proceedings had been taken by the minister to eject the defendants, those proceedings would have failed because the defendants were entitled to a reasonable time, and a week was not a reasonable time, to enable them to find alternative accommodation. The circumstance that the threat to remove them before the expiration of what would have been a reasonable time was inserted in the letter does not prevent the letter from being a good notice to determine the licence. That being the position, the county court judge decided that the interval which elapsed between the expiration of the week mentioned in that document and the commencement of these proceedings was a sufficient time to enable alternative accommodation to be found. In view of that finding of fact, the defendants could not complain at the time these proceedings were instituted that they had not been allowed sufficient time in the circumstances to remove themselves and their possessions and find alternative accommodation."

62 After referring to the case of *Cornish* v. *Stubbs* (4) and to the judgment therein of Willes, J. (L.R. 5 C.P. at 339), Lord Greene, M.R. said ([1944] K.B. at 307):

"I do not read those observations as in any way contrary to my statement at the beginning of this judgment, that the right of the licensee in respect of the manner and method of the revocation of his licence and the time to be allowed him to comply with it is, in the absence of express provision, to be ascertained by a consideration of all the circumstances of the case."

63 It seems, in the present case, that the defendant has made no effort to move from the premises despite the passage of well over a year. On January 7th, 1983 the plaintiff's solicitor wrote to the defendant's solicitors. They wrote again on February 11th, 1983. In the final paragraph of each of these letters the writer expressed the hope that the defendant's solicitor would, in the circumstances, advise the defendant to vacate the premises. It would appear that these letters are what is referred to in para. 6 of the amended statement of claim, where it is claimed that "despite repeated reminders the defendant has failed to vacate the premises."

64 Goddard, L.J. in *Minister of Health* v. *Bellotti* (8) said (*ibid.*, at 308–309):

"On the other point, the position is that if a licensor determines a licence to reside on premises, he is bound to give a reasonable time within which the determination is to take effect, so that the licensee can remove himself and his property. The licensor is bound to give a reasonable time, and, if he does not and takes proceedings before the

> reasonable time has elapsed, he loses his action, but if he does not give a reasonable time, it seems to me that that does not put an end to the withdrawal of the licence. The licence has been withdrawn, and the withdrawal become effective when a reasonable time has expired. The fact that [the] licensor may have limited a time which, as in this case, was wholly unreasonable, does not justify the licensee in sitting down and doing nothing. He should have begun to make arrangements to remove himself, and by the time proceedings had started he had had ample time."

In my view the position in this case is much the same.

65 Bearing in mind the difficulty in Gibraltar in finding accommodation, it appears to me, as it did to the court in *Minister of Health* v. *Bellotti*, that the defendant in the present case should in the circumstances of Gibraltar's housing shortage have a reasonable time from the determination of his licence within which it was to take effect, to enable him not only to remove himself, his family and possessions from the premises, but also to find alternative accommodation.

66 In pursuance of the letter of October 4th, 1982, to M. Mattana Ltd. from the defendant, in which the defendant consented to the plaintiff's obtaining a court order for the eviction of himself and his family on November 26th, 1982, the plaintiff issued a writ against the defendant claiming possession of the premises on October 14th, 1982. On November 17th, 1982, service of the writ was acknowledged on behalf of the defendant by his solicitor indicating that the defendant intended to contest the proceedings, and a defence was entered on November 18th, 1982, a copy of which was sent to the plaintiff's solicitors under cover of a letter from the defendant's solicitors. The plaintiff's solicitors took no further action until January 7th, 1983, when they wrote a letter to the defendant's solicitors to be followed by another letter on February 11th, 1983. The defendant's solicitors replied on March 3rd, 1983 claiming that the defendant was a weekly tenant of the premises and protected by the Landlord and Tenant Ordinance. On June 15th, 1983, the plaintiff took out a summons for directions returnable on October 4th, 1983. In accordance with the court's order on that summons made on October 4th, 1983, an amended statement of claim was filed on October 4th, 1983, an amended defence was filed on October 6th, 1983, and this trial started on March 23rd, 1984.

67 If I am right in holding that the defendant's licence to occupy the premises must be deemed to have been revoked on January 1st, 1983, and that the plaintiff's solicitors' letters of January 7th and February 11th, 1983 are clear indications to the defendant's solicitors that the licence had been revoked and that the defendant should vacate the premises, then it appears to me that the defendant has had ample time to remove himself,

his family and possessions from the premises, and to find alternative accommodation. I am satisfied that he is now, as alleged, in unlawful occupation of the premises as a trespasser.

68 Accordingly, I find that the plaintiff succeeds in his claim to possession of the premises known as 17/12 College Lane and to damages at the rate of £20 per week from September 20th, 1982, until possession of the premises is delivered up.

Order accordingly.

[1980–87 Gib LR 236]

CURSON (Chairman of the Ocean Heights Lessees' Association) v. ATTORNEY-GENERAL

SUPREME COURT (Alcantara, A.J.): August 8th, 1984

Administrative Law—judicial review—Governor—court has jurisdiction to review decisions of Governor acting in ministerial capacity—only to intervene if jurisdictional error, e.g. bad faith, breach of natural justice, considering wrong question, etc.—no jurisdiction to review decision made as representative of Queen, Head of State or Executive Authority

Administrative Law—judicial review—natural justice—opportunity to be heard—Governor hearing appeal against refusal to extend permitted licensed hours under Licensing and Fees Ordinance (cap. 90), s.6 to give notice appeal under consideration and opportunity to applicant and objector to be heard

Constitutional Law—Governor—judicial review—decision of Governor acting as representative of Queen, Head of State or Executive Authority, not reviewable—only reviewable if decision made in capacity as minister under local or municipal ordinance

The applicant sought judicial review of the Governor's decision, under the Licensing and Fees Ordinance (*cap*. 90), s.6, to grant a licence extending the opening hours of a nightclub.

A nightclub owner applied to the Magistrates' Court for a licence to extend its opening hours but at the hearing a number of objectors opposed the application, and the magistrate decided not to grant the licence. The owner appealed to the Governor, who, some time later, directed that the