RENT CONTROL: THE MAXIMUM RENT DATE METHOD

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Three main methods of fixing maximum rents have been employed in various parts of the world: the "fair rents" system, under which some attempt is made to fix rents for individual buildings or dwelling units on a basis of fairness to the landlord and the tenant;¹ the "percentage" method, whereby rents are fixed on an over-all basis at a percentage of the value of the property;² and the "maximum rent date" or "freeze" method. It is the purpose of this article to examine some of the problems arising in the application of the latter system of rent control.

The basic theory of the "maximum rent date" or "freeze" method of controlling rents is that maximum rents are fixed with relation to the rents actually charged for the particular property, or comparable property, on a given date or during a given period. Many variations have been rung on this theme; many exceptions are made or adjustments allowed, but the basic idea has been employed more widely than any other method of regulating rents. Examples of its use may be found as far back as 1680 in Spain³ and 1755 in Portugal;⁴ and long before that the Popes had frozen rents in Rome.⁵ In one form or another the method has been used in Great Britain, France, Italy and many other countries of Europe, as well as in Canada, Latin America, Africa, Asia and Australia. It was adopted by Congress in the District of Columbia Emergency Rent Act of 1941 and consistently championed and employed by the Office of Price Administration and its successor agencies⁶ with the at first tacit and eventually express approval of the Congress.

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1. See Willis, *"Fair Rents" Systems*, 16 GEO. WASH. L. REV. 104 (1947).

2. See Willis, *Maximum Rents—The "Percentage" Method*, 23 TEMP. L. Q. 122 (1949).

3. A Real pragmática of 1680 reduced the price of pasture lands to the level of 1633, and later the Consejo by an auto acordado of 1702 ruled that pasture lands could not be rented for more than in 1692. INFORME DE LA REAL ACADEMIA DE CIENCIA MORALES Y POLITICAS SOBRE LA REFORMA DE LAS LEYES DE INQUILINATO Y LOS MEDIOS DE CONTENER EL AUMENTO DESPROPORCIONADO DE LOS ALQUILERES DE EDIFICIOS 12 (Madrid, 1863).

4. Decree of December 3, 1755 (year of the Lisbon earthquake).

5. The writer purposes to write an article on the history of rent control, to appear in another law review.

6. Use of the method was advocated even before enactment of the Emergency Price Control Act, 56 STAT. 23 (1942), 50 U.S.C. APP. § 901 et seq. (Supp. 1948), by the NATIONAL DEFENSE ADVISORY COMMISSION BULLETIN No. 7, pp. 10-11 (1941), and by the non-statutory Office of Price Administration in INSTRUCTIONS FOR ORGANIZATION AND OPERATION OF FAIR RENT COMMITTEES, p. 7 (1941). It was generally used by the local fair rent committees prior to enactment of the Emergency Price Control Act. OPA, FIRST QUARTERLY REPORT 49 (1942).

The merits and demerits of the freeze method can be better considered after the workings of the system have been examined in detail. In brief, however, the case for the freeze system can be stated as follows:

Under this procedure, landlords and tenants know with as much certainty as possible the legal rent on any particular dwelling unit. Occasions for dispute are minimized. Long-drawn-out proceedings to determine individual rents are avoided, and the program takes immediate hold. Delay and frustration through numerous and lengthy proceedings, such as have characterized previous rent-control programs, have been eliminated by the adoption of rents determined by the normal market.⁷

. . . The rental existing on a basic date not too far in the past [has] the administrative merit of being a definite fact easily ascertained and providing a simple criterion for enforcement, and it [has] in addition the advantage of being an amount upon which landlord and tenant had agreed at a date before wartime congestion had become a serious factor.⁸

A more disinterested observer—Lord Justice Scott of the English Court of Appeal—has commented that

. . . the primary principle which, from the outset of the legislation in 1915, must really have underlain the decision of Parliament to use the rental figure arrived at by the parties themselves when at arm's length [was] that the letting of the house in a free market, that is to say, one unrestricted by statutory limitation, can be used as the basic and permanent criterion of what can in fairness to the parties be treated as the "standard rent" of the house.⁹

He further stated that the standard rent was based on "probable fairness." Substantially the same concept was expressed earlier by an Irish commission, which pointed out that the standard rent was fixed on the basis of the rent on August 3, 1914 on the theory that prior to the war rents generally were fair competitive rents representing a fair return on the landlord's investment, and that any increased rents obtainable under war and post-war conditions would be monopolistic in character.¹⁰ One member, however, in his separate report remarked rather acidly that

7. OPA, SECOND QUARTERLY REPORT 59 (1942). For more elaborate expositions of OPA's viewpoint see *In the Matter of Theresa E. Reimel*, 1 OPA Op. & Dec. 1385 (1942); *900 Michigan Avenue North Corp.*, 1 OPA Op. & Dec. 1402 (1942), *aff'd* in *Wilson v. Brown*, 137 F.2d 348 (E.C.A. 1943).

8. Canada, WARTIME PRICES & TRADE BOARD, REPORT, Sept. 3, 1939-March 31, 1943, p. 10.

9. *Winchester Court Ltd. v. Miller*, 60 T.L.R. 498 (Ct. Ap. 1944).

10. REPORT, TOWN TENANTS TRIBUNAL 18 (1941). See also page 14 (theory of the acts was that the landlord was not to make more, or at least not much more, out of the house than he did before the war).

. . . the rent levels of the Rent Restriction Acts were not fixed to conform with any abstract idea of "fairness"—they were fixed upon a rough and ready makeshift basis . . .¹¹

THE MAXIMUM RENT DATE

The first step in applying the maximum rent date system is of course the selection of a maximum rent date. The purpose is to choose a date on which rents on the whole were reasonable and had not yet been affected by the abnormal conditions which made control necessary. The date should not be too far in the past since the more remote the date, the more difficult it becomes to ascertain what any particular rent was at that time.

The selection of any particular date is of course to a large degree arbitrary; it cannot be otherwise. As an Irish commission has said, in commenting on the choice of August 3, 1914 as the freeze date in the original English and Irish legislation, doubtless the conditions which prevented competition from accomplishing its normal effect of keeping profiteering in check "did not come into being in the twinkling of an eye on 4th August, 1914; but some date had to be fixed, and 3rd August appeared to be, on the whole, the best selection."¹²

Whether the legislature is to set the date itself or empower the administrative agency to fix it is a matter of choice and depends largely on local conditions. When Congress passed the District of Columbia Emergency Rent Act it selected January 1, 1941 as the crucial date; but the Emergency Price Control Act, enacted two months later,¹³ provided only that

So far as practicable, in establishing any maximum rent . . . , the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which, in the judgment of the Administrator, does not reflect such increases). . . .¹⁴

Originally, April 1, 1940 was to be the base date, probably because there was a good deal of census data on rents as of that date. But it was

11. Separate report of Mr. Herlihy, *id.* at 207.

12. REPORT, TOWN TENANTS TRIBUNAL 19 (1941).

13. When Congress eventually assumed a greater degree of control over rents in the Housing and Rent Act of 1947, 61 STAT. 193, 50 U.S.C. § 1001 (1947), it froze rents at those chargeable under the Emergency Price Control Act, *supra* note 6, on June 30, 1947.

14. Emergency Price Control Act, *supra* note 6, § 2(b).

thought that the date would serve only as a starting point.¹⁵ A Senate amendment, however, changed the provision, making April 1, 1940, the ultimate date beyond which the Administrator could not go. As it turned out, the provision did not mean much in practice; the Administrator always recited that he had "considered" rents on or about April 1, 1941, but usually set the maximum rent date at some later point.¹⁶

Except for the April 1, 1940 limitation, the language of the Act left the selection of the particular date almost entirely in the discretion of the Administrator. In the earlier actions, the Administrator attempted to key the date selected to the type of defense activity in the area and to the vacancy ratio.¹⁷ This was a complicated process, calling for a good deal of expertise.¹⁸ Eventually, of course, the references to April 1, 1941 and to "defense activities" became anachronistic, and in the last areas brought under control maximum rent dates as late as January 1, 1946 were specified.¹⁹

The Administrator's choice of a maximum rent date, particularly with respect to those areas brought under control in 1942 and 1943, was subject to considerable criticism from real estate interests, who contended that because of the tendency of rents to lag behind the general price level, rents were frozen at or near depression levels in many areas; the average rent in 1943 was said to be 22% below 1929.²⁰ The

15. Remarks of Congressman Steagall, 87 CONG. REC. 9072 (1942).

16. Of the first 323 areas designated as areas subject to potential rent regulation, including a population of some 86,000,000, four-fifths had a maximum rent date of March 1, 1942. OPA, FIRST QUARTERLY REPORT 53 (1942). On October 5, 1942, all areas not previously designated were named for possible future control with a maximum rent date of March 1, 1942. In some cases a later date specified when control was actually instituted.

17. OPA, FIRST QUARTERLY REPORT 53-4 (1942).

18. *Equitable Trust Co. v. Bowles*, 143 F.2d 735 (E.C.A. 1944). In determining the most recent date on which defense activities had not caused rent increases, the court said, the Administrator "must consider the general characteristics of the area, the type of industry, if any, which existed prior to the advent of defense activities, the available supply of suitable labor, the kind and amount of defense activity introduced, the extent and rate of population growth, the trend of unemployment, the trend of wages, the supply of and demand for housing prior to the introduction of defense activities, the construction of new housing, the types of housing, the size (including percentage and amount) and frequency of rent increases, and recommendations of state and local officials. . . . All the factors which we have named for the Administrator's consideration, and probably others, are inextricably interwoven in this question of selecting a proper rent ceiling. A charge of discrimination in applying the standards of the Act to the circumstances of various areas cannot be sustained unless a comparison is made of all these essential factors affecting rent control in the complaining area with the same factors in the areas claimed to have been favored." In this case the court rejected the contention that the administrator had erred in applying the April 1, 1941, date to the Detroit area, and held that no discrimination in favor of other areas had been shown.

As to different maximum rent dates for different areas see also E. M. Wesner, 1 OPA Op. & Dec. 1437 (1943).

19. Amdt. 105 to Rent Regulation for Housing, 11 FED. REG. 13028 (Nov. 1, 1946).

20. New York Journal of Commerce, April 10, 1946.

Price Administrator consistently rejected all such arguments,²¹ and he was never reversed by the Emergency Court of Appeals,²² nor did Congress take any action to overrule him.²³ In 1948 the Housing Expediter, in partially approving a local board recommendation for a rent increase for Oklahoma City, conceded that the rent level on the freeze date, March 1, 1942, was 9% below the level of March 1, 1939 in the area.²⁴

The idea of fixing rents by reference to a single date of course involves a fiction. Rents do not change from day to day, and in most areas there is no one "moving day," such as October 1st once was in New York, on which most yearly leases start, so that freezing rents as of a given date in many individual cases means freezing them as of the date, six months or nine months or a year earlier, when the lease in effect on the maximum rent date was made. As long as rents were generally fair and equitable for the area as a whole on the maximum rent date, however, the Price Administrator held that it was immaterial that for some landlords the rent on that date might actually have been fixed at an earlier time.²⁵

Another objection to the maximum rent date system is that it favors "bullish real-estate manipulators" who raised rents before the maximum rent date at the expense of those landlords who did not.²⁶ If the maximum rent date really reflected a purely competitive situation, this would not be true since the law of supply and demand would not have permitted any unconscionable increases. At least under modern conditions,²⁷ the maximum rent date is something of a compromise and there probably is some validity to the objection, particularly where prior to the date landlords had been urged to hold rents down by government officials or voluntary fair rent committees without actual power to prevent increases on the part of uncooperative owners.²⁸ The Price Administrator rejected all suggestions that he distinguish between landlords who had made "unwarranted" rent increases prior to the crucial date and those who had not, on the grounds

21. Elbert H. Ash, 1 OPA Op. & Dec. 1408 (1943); Spotswood Gardens, Inc., 1 OPA Op. & Dec. 1432 (1943); E. M. Wesner, 1 OPA Op. & Dec. 1437 (1943).

22. See *Spaeth v. Brown*, 137 F.2d 669 (E.C.A. 1943).

23. H.R. 993, § 4(a) (Jan. 11, 1943) would have prevented the establishment of rent ceilings lower than the rentals prevailing for "such property" on Sept. 15, 1942, but no action was taken on the bill.

24. See Recommendation of Local Advisory Board for Oklahoma County, 170 F.2d 556 (E.C.A. 1948).

25. Spotswood Gardens, Inc., 1 OPA Op. & Dec. 1432 (1943); Norman A. Avant, 1 OPA Op. & Dec. 1463, *aff'd* Avant v. Bowles, 139 F.2d 702 (E.C.A. 1943).

26. Remarks of Rep. Monkiewicz, 90 Cong. Rec. 5564 (1944). See also Remarks of Rep. Outland, *id.* 5678.

27. The situation may be different where a date like August 3, 1914 is specified, as in the British Acts.

28. Winnet, *Rent Control—The Philadelphia Experiment*, 14 PA. B.A.Q. 71, 75 (1942).

that it would be administratively impossible to determine which increases were unwarranted, and that there was no necessity to erase the differences in rents which normally exist in a free competitive market.²⁹ A general policy of adjusting all rents on a comparability basis was thought to be undesirable.

It has been suggested that rents should be frozen at the average rent charged over a period of time, rather than on the basis of rents charged on a particular date.³⁰ This idea is superficially attractive, but in practice it would not work well. One great advantage of the maximum rent date is that it makes it easy to determine the maximum rent; but this advantage is lost if rents over a period of months or years must be averaged.³¹ Difficulties are presented also if the property was vacant during part of the period; and if the rent was low because of special circumstances at any time during the period, the same problem arises as where it was low on the maximum rent date.³² The averaging idea has been used almost nowhere except in the case of resort or seasonal accommodations.³³

Ordinarily the same maximum rent date applies to all accommodations covered. Theoretically, at least, this may result in an injustice, since inflationary pressures may affect some classes of housing at a later date than others. The Price Administrator, however, dismissed

29. William F. Chatlos, 1 OPA Op. & Dec. 1390 (1942), *aff'd* Chatlos v. Brown, 136 F.2d 490 (E.C.A. 1943); Modern Homes, Inc., 1 OPA Op. & Dec. 1406 (1943); Spotswood Gardens, 1 OPA Op. & Dec. 1432; American Hotel Co., 1 OPA Op. & Dec. 1491 (1943).

Adjustment on the ground of "peculiar circumstances" was refused landlords who claimed that they had not raised their rents because of the activities of a "fair rent" committee. Rent Memorandum 5(a) (11)-II, OPA SERV. 200:1748-I (1944).

The fact that the Administrator originally indicated that March 1, 1942 would be the maximum rent date when control was imposed in the New York City area, but eventually set the date at March 1, 1943, did not entitle landlords who had lowered rents after March 1, 1942 to an upward adjustment. 315 West 95th Street Realty Co., Inc., 2 OPA Op. & Dec. 3045 (1944). See also Robert Trimble, 2 OPA Op. & Dec. 3192 (1944); 1165 Park Avenue Corp. v. Bowles, 150 F.2d 117 (E.C.A. 1945).

30. Note, 50 YALE L.J. 176, 181 (1940). Under a bill drafted by the Citizens' Housing Council of New York, and introduced in the New York legislature as S.I. 2111 (1940), rents would have been frozen at the average monthly rent charged during the year prior to control, but not more than 25% above the lowest rent charged during that year except for capital improvements.

31. Maloney Land & Improvement Co., 1 OPA Op. & Dec. 1381 (1942).

32. NATIONAL DEFENSE ADVISORY COMMISSION, Bulletin No. 7, p. 11 (1941).

33. Under the Miami Rent Regulation, § 4(a), the maximum rent for accommodations rented on September 1, 1943 was the rent on that date, or one-twelfth of the total rent for the year ending August 31, 1943, whichever was higher. See Jack Oberson, Docket No. RPA-IV-31-P (OPA, 1944); France, Law of July 22, 1943, Art. 1, par. 3 (in bathing, climatic or thermal resorts, rent fixed according to rent of annual letting); Indo-China, Decree No. 1406, Art. 2 (1942) (as to seacoast or mountain resorts, follow rents for 1938 season rather than Jan. 1, 1938 rent). A possible exception is Palestine, Ordinance No. 6, § 6 (1941), by which rents of commercial accommodations were limited to the rent paid for the year prior to the critical date plus 25%; as to premises completed during the year, the rent on the last day of the year controlled, subject to adjustment up or down, or if it was not let on the last day the Rent Commissioner fixed the rent. See also Assam, Act No. 3, §§ 3, 4 (1946) (average monthly rent paid during January-September 1943).

objections to the applicability of March 1, 1943 as the maximum rent date for residential apartment hotels and residential clubs in New York City—made on the ground that these accommodations had not undergone undue rent rises as of that date—saying that no class of accommodations was free from inflationary pressures and that OPA “policy” was to have a single maximum rent date for all accommodations in the area.³⁴

For historical reasons, the British Acts provide two different maximum rent dates—August 3, 1914 and September 1, 1939. Newly-constructed housing was not subject to control from 1920 to 1939, and in addition a large number of units were decontrolled piecemeal under a provision of the 1923 Act decontrolling any accommodation within a specified rent range if the landlord obtained vacant possession.³⁵ On the outbreak of World War II, however, rents of these hitherto free units were frozen at September 1, 1939 levels. As might be expected, there is considerable disparity between the maximum rents of 1920-Act houses and 1939-Act houses. As yet, however, nothing has been done to remedy the situation.³⁶ The remoteness of the 1914 date which still determines the rent of many houses is also a defect in the British system.³⁷

THE MAXIMUM RENT

In theory, the maximum rent under the freeze system is the rent charged on the maximum rent date. This seemingly simple formula gives rise to many questions, as will be seen.

Ordinarily the maximum rent is *in rem* and does not vary according to the tenant, but exceptions to this principle may be found. The OPA, for instance, retained the rent schedules used by the Army and Navy in their housing projects, whereby the rent varied according to the tenant's rank or salary grade.³⁸ Under the Rumanian law of

34. Hutton Hall Operating Co., Inc., 2 OPA Op. & Dec. 3221 (1944). Cf. 31 West 72d Street Corp., 2 OPA Op. & Dec. 3239 (1945); New York Towers, Inc., 2 OPA Op. & Dec. 3249 (1945).

35. Rent and Mortgage Interest (Restrictions) Act, 1923, 13 & 14 Geo. V, c. 32, § 2. When the 1939 Act went into effect there were about 4,000,000 pre-1919 houses subject to rent control and about 4,500,000 decontrolled, the average rent of the latter group being about 30% above that of the former group (50% in London). REPORT, INTER-DEPARTMENTAL COMMITTEE ON RENT CONTROL, CMD. No. 6621, p. 8 (1945).

36. The Inter-Departmental Committee, *supra* note 35, recommended various changes but the Government has found itself too occupied to enact any new legislation except for limited amendments in the Landlord and Tenant (Rent Control) Act, 1949, 12 & 13 Geo. VI, c. 40.

37. REPORT, *supra* note 35, at 13. The Committee recommended a registration system to remove this defect. The Irish Act of 1946 follows a somewhat different plan but also makes it unnecessary now to refer back to 1914. REPORT, TOWN TENANTS TRIBUNAL 20 (Dublin, 1941). Cf. France, Law of May 30, 1943, freezing rents at the June 30, 1943 level rather than on the basis of the 1914 rental value as under the Law of April 30, 1926.

38. OPA, FOURTH Q. REP. 59 (1943).

1946,³⁹ rents were fixed at double, triple or five times the 1945-46 rent. Which coefficient applied depended upon what category the tenant fell into (e.g., public official, journalist, student, professional, business man). These coefficients could be increased 50% or 100% if the total income of the tenant and his family exceeded specified sums. A similar provision was found in a Greek law of 1946.⁴⁰ Thus, we see that in many countries the rent on the maximum rent date is merely a starting point with the actual maximum rent being determined by multiplying that figure by a percentage or, under extreme inflationary conditions, by several hundred or thousand.⁴¹

The courts have not been in agreement on the question whether the rent which is frozen is the rent reserved and payable in the lease in effect on the maximum rent date, or the rent which the landlord was actually receiving on that date. The question has arisen particularly under the New York commercial and business rent laws. In *Auswin Realty Corp. v. Kirschbaum*,⁴² the owner without consideration had agreed, prior to the maximum rent date, to accept a lower rent than that reserved in the lease "for the duration." The court held that the maximum rent was nevertheless determined by the amount reserved in the lease, asking what would have been the situation, under the contrary argument, if the tenant had occupied rent free on the maximum rent date. Similar holdings were made in other cases.⁴³ Where the tenant on the maximum rent date was given an allowance in lieu of decorating, amounting to a 20% reduction in rent, the court refused to consider the allowance as changing the amount of rent reserved and payable.⁴⁴ And where the lease in effect on the freeze date provided for a payment of a percentage of the tenant's gross income over a given amount, the fact that the gross income in that year did not reach the minimum amount did not mean that the landlord was not entitled to a

39. Law No. 330, Arts. 6, 7 (1943). The Decree of April 6, 1943 had imposed an additional 15% rent on Jews, stateless persons and companies with at least 40% Jewish capital.

40. Legislative Decree of May 11, 1946.

41. E.g., Nanking, Temporary Standards for House Rents, Art. 2 (1946) (500 times October 1937 rent for houses, 1000 times for stores); Shanghai, Ordinance of April 1, 1946 (140 times 1937 rent for residences, 180 times for business premises); Tangier, Law of July, 1946, Arts. 8, 9 (January 1, 1940 rent multiplied three to six times); Belgium, Decree Law of March 12, 1945, Art. 6 (Aug. 1, 1939 rent increased 40%); Luxembourg, Law of March 21, 1947, Art. 1 (Jan. 1, 1939 rent increased 50%).

For data as to increases allowed in the post-World War I European laws see EUROPEAN HOUSING PROBLEMS, *passim* (I.L.O., 1923).

Discussion of increases in maximum rents, whether over-all or by individual adjustments, is beyond the scope of this article.

42. 270 App. Div. 334, 59 N.Y.S.2d 824 (2d Dep't 1946).

43. *Segal v. Renweis Holding Corp.*, 72 N.Y.S.2d (App. Term 1st Dep't 1947); *140 West 69th Street Corp. v. Simis*, 115 N.Y.L.J. 725 (Muni. Ct. 1945); cf. *Manufacturers Trust Co. v. Arvin Chemists, Inc.*, 60 N.Y.S.2d 504 (City Ct. 1946).

44. *18 Realty Corp. v. Paley*, 56 N.Y.S.2d 466 (N.Y. Muni. Ct. 1945).

percentage in later years.⁴⁵ A contrary result was reached in two cases where the lease had been expressly modified by a written agreement reducing the rent, even though in one case the reduction was "for the duration"⁴⁶ and in the other case for the period of gasoline and tire rationing.⁴⁷ The OPA took the view that the amount which the landlord actually received on the maximum rent date was the ceiling, and not what he could have obtained under the lease.⁴⁸

Realistically, it would seem that the maximum rent should be the rent actually paid on the freeze date and not what the landlord might have had the legal right to demand. The contrary view would permit a foresighted landlord to evade rent ceilings by making a lease for an inflated rent, prior to the freeze date, with the understanding that a lesser rent would be accepted.⁴⁹ Either view is likely to cause hardship in particular fact situations, and liberal provisions for adjustment should be made.

PROBLEMS OF APPLICATION

Freezing rents by legislative fiat is not a cure-all; more problems are created than are solved by that action. Maximum rents must be fixed for accommodations not rented on the freeze date, perhaps not even in existence on that date. Accommodations which were rented on the critical date may change; the premises may be reconstructed, premises previously let as a whole may be let in parts or vice versa, furniture may be added or taken away, the premises may be sublet. The rent on the maximum rent date may have been affected by some extraordinary circumstance, or—as often happens when the maximum rent date is many years in the past—it may simply be impossible to ascertain what the rent was on that date. Statistics show that even in the first year of OPA rent control, in 9% of the cases the rent regis-

45. *Seven Eleven Fifth Avenue, Inc. v. Dave Herstein Co., Inc.*, 68 N.Y.S.2d 607 (App. Term 1st Dep't 1947).

46. *86 Near Second Ave. Corp. v. Fennekohl*, 61 N.Y.S.2d 67 (N.Y. Muni. Ct. 1946). The court distinguished the *Auswin* case, 270 App. Div. 334, 59 N.Y.S.2d 824 (2d Dep't 1946), on the ground that there was no written modification of the lease in that case. But cf. *Pilkington v. Connolly*, 68 Ir. L.T.R. 144 (1934), where a rent reduction by endorsement on the lease was apparently disregarded.

47. *McDougall v. Service Garage, Inc.*, 187 N.Y. Misc. 950, 69 N.Y.S.2d 176 (N.Y. Muni. Ct. 1946).

48. *Fasons Realty Corp.*, 2 OPA Op. & Dec. 3036 (1944); OPA Interpretation 4(a)-VII. See also *877 Fifth Avenue Corp.*, 2 OPA Op. & Dec. 3292 (1945) (amount received by landlord on freeze date is maximum rent even though part was from a sub-tenant and the balance from the original tenant under a new arrangement). But cf. *Woods v. Callahan*, 172 F.2d 179 (1st Cir. 1949) (where tenant in occupation on maximum rent date was obligated by lease to pay certain taxes, such taxes were to be included in determining the maximum rent even though the tenant did not in fact pay them during the freeze period).

49. Cf. *Mrs. Martha B. King*, 1 OPA Op. & Dec. 1379 (1942) (lease made on Nov. 23, 1940, to commence Sept. 1, 1941, at increased rent, nullified by later establishment of January 1, 1941 maximum rent date).

tered was not the rent in effect on the maximum rent date;⁵⁰ and the percentage grew steadily with the passage of time.⁵¹

This inadequacy of the rent freeze to take care of every case makes it necessary that it be supplemented by other methods of fixing maximum rents or of adjusting the frozen rent.⁵² Some of these supplementary techniques are discussed in the following sections.

"Last Rent."—As noted above, one difficulty with the maximum rent date method is that the particular premises may not have been rented on that date. One way to solve this is to provide that in such a situation the last rent prior to the critical date shall be the maximum rent. Thus the British Acts provide that where the dwellinghouse was not let on August 3, 1914 or September 1, 1939, as the case may be, "the rent at which it was last let before that date" shall be the standard rent.⁵³ The difficulty with this provision is that there is no limitation on the reference back; theoretically, at least, it is possible to refer back to "some almost prehistoric letting"⁵⁴ to find the "last rent." This can be remedied by providing for an adjustment of a rent fixed in this manner, or by fixing a limit on the time within which a "last rent" may be found. This latter expedient was employed in the District of Columbia Emergency Rent Act, which provides that where accommodations were not rented on January 1, 1941, but had been rented within the year ending on that date, the last rent within such year should control.⁵⁵ The OPA regulations provided a two-month period.⁵⁶

Property First Rented After Maximum Rent Date.—A number of methods have been used in an attempt to apply the maximum-rent-date system to property not rented on the freeze date, nor within the prescribed period before that date, but first let thereafter. The problem is a substantial one, and becomes more prevalent the longer rent control remains in effect.⁵⁷

50. OPA, FOURTH Q. REP. 56 (1943). The percentage was as high as 55% in Brownwood, Texas, but only 3% in Chicago.

51. OPA, FIFTH Q. REP. 42 (1943) (10%); SIXTH Q. REP. 46 (1943) (12%); EIGHTH Q. REP. 58 (1944) (13%); NINTH Q. REP. 66 (1944) (14%); ELEVENTH Q. REP. 54 (1944) (16%).

52. See *Rex v. Trusts & Guarantee Co., Ltd.*, [1943] 3 W.W.R. 346 (Alberta Dist. Ct.) (no discrimination involved because different methods used to fix maximum rents).

53. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. V., c.17, § 12(1) (a); Rent and Mortgage Interest Restrictions Act, 1939, 2 & 3 Geo. VI, c. 71, First Schedule.

54. *Davies v. Warwick*, [1943] 1 K.B. 329, 332 (C.A.), per Scott, L.J. In this case the "last rent" under the 1939 Act was a 1916 rent.

55. District of Columbia Emergency Rent Act, § 2(1) (b), D.C. CODE, tit. 45, § 1602(1) (b) (Supp. 1949).

56. Rent Regulation for Housing, § 4(b).

57. See notes 50, 51, *supra*.

A rather draconian solution is not to control such rents at all. While this might assist in getting additional accommodations on the rental market, on the whole it seems to be a matter of throwing out the baby with the bath-water. This plan has not been widely employed, but instances of its use may be found. In some cases this seems to have been a pure oversight;⁵⁸ elsewhere, control has been deliberately confined to existing leases, thus not only leaving new lettings uncontrolled but even decontrolling existing accommodations if the tenant vacated.⁵⁹ This latter scheme of course cannot work over any extended period and it has usually been abandoned after a short time,⁶⁰ except where it has been deliberately employed as a decontrol or tapering-off device.⁶¹

A second approach is to provide that new rents shall be fixed in accordance with some method other than the maximum-rent-date system. For instance, it is sometimes provided that rents for newly-let accommodations shall be determined by the "percentage" method,⁶² although existing rents are frozen.⁶³ This hybrid procedure is not to be commended; there is too much likelihood of disparity between rents fixed under the two methods.

A third answer to the problem is to provide that the "first rent" shall become the maximum rent, usually, but not always, with a provision for reduction to comparable levels. The British Acts, for instance, provide that in the case of a dwelling-house first let after August 3, 1914, or September 1, 1939, as the case may be, "the rent at which it was first let" shall be the standard rent.⁶⁴ The use of the past tense

58. *E.g.*, Uruguay, Law of June 20, 1921; Peru, Law No. 8766 (1938). The defect in the Peruvian law was remedied by Law No. 9186 (1940), applicable to Arequipa Province.

59. Saulsbury Resolution, 40 STAT. 593 (1918) (District of Columbia) (only existing leases controlled); NEW YORK, LAWS OF 1920, c. 942-953 (same).

The New York laws were upheld as against the contention that they deprived one class of tenants of equal protection of the laws. *People ex rel. Durham Realty Corp. v. LaFetra*, 230 N.Y. 429 (1921). But the Saulsbury Resolution was held unconstitutional on the ground, *inter alia*, that it discriminated against those landlords whose property was already let. *Willson v. McDonnell*, 49 App. D.C. 280, 265 Fed. 432 (1919), *app. dis.* 257 U.S. 665 (1921).

60. 41 STAT. 298 (1919) (District of Columbia), (*Ball Rent Law*).

61. *E.g.*, New Zealand, Fair Rents Act of 1936, § 3(1)(a), (b) (houses not let before Nov. 27, 1935 not controlled); Fair Rents Amendment Act, 1939, § 4 (houses first let after Jan. 1, 1939 above a certain rent exempted). See also the Federal Housing and Rent Act of 1947, discussed in Willis, *The Federal Housing and Rent Act of 1947*, 47 COL. L. REV. 1118 (1947).

It is sometimes provided that the rent of accommodations not rented on the maximum rent date may be fixed by agreement. NEW YORK, LAWS OF 1945, c. 3 and 314, § 2(c) (to be fixed by agreement, arbitration or court proceedings on basis of reasonable rent on maximum rent date plus 15%).

62. See note 2, *supra*.

63. MISSOURI, REV. STAT. ANN. § 3015.3(2) (Sept. 1947 Supp.); Louisiana, Acts of 1946, No. 333; Brazil, Decree Law No. 4598, Art. 3 (1942); Kenya, No. 12 of 1940, § 2.

64. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. V, c. 17, § 12(1)(a); Rent and Mortgage Interest (Restrictions) Act, 1939, 2 & 3 Geo. VI, c. 71, First Schedule.

in this clause does not mean that it refers only to first rents after the maximum rent date but before the effective date of the Acts;⁶⁵ indeed, as far as the 1939 Act is concerned such a construction would be meaningless, inasmuch as the Act was passed on September 1, 1939. The absence of any provision for adjustment downward in the British Acts, however, meant that for accommodations first rented after the Acts went into effect the landlord had a comparatively free hand, although once he had set a rent he was held to it. Thus in one case a house was let for £150 a year but the lease provided that "for the duration" the tenant would pay £112. The court held that the standard rent was £112 "rising to £150," commenting that whether or not a "first rent" fixed by a landlord with his eye on the Acts should be the standard rent was a matter of policy and not construction.⁶⁶ Where the lease of a house first let after 1939 provided for an annual rent of £200 and on the same day that the lease was executed the landlord executed a deed providing that since the tenant took the flat undecorated, the rent would be reduced to £150, the court held the standard rent to be £200.⁶⁷ However, an attempt to establish a first rent by a fictitious lease to an affiliated company at an inflated rent failed.⁶⁸ The possibility, if not probability of profiteering where the "first rent" was agreed on during a period of housing shortage points up a defect in the English system.⁶⁹

The fourth approach, and the one that has been most widely used, is for the maximum rent simply to be fixed by a court, commission or other agency. The "first rent" idea may be combined with this, the first rent being a provisional maximum rent until the court or agency has acted. More commonly, however, the first rent is given no consideration. Sometimes, letting of the property is forbidden until a rent is fixed.

65. See *Dunlop v. McGeehan*, [1921] N.Z.L.R. 1026.

A distinction may be made between premises first let between the maximum rent date and the effective date, and premises let thereafter. See Ceylon, Ordinance No. 60 of 1942, §§ 5(2) (c), (d).

66. *Tedman v. Whicker*, 170 L.T. 51, 60 T.L.R. 107 (C.A. 1943).

67. *White v. Richmond Court, Ltd.*, 60 T.L.R. 391 (C.A. 1944).

68. *Conqueror Property Trust Ltd. v. Barnes Corp.*, 60 T.L.R. 75 (K.B. 1943). Compare Colombia, Resolution No. 50 of 1943 of the Interventorio de Precios (first rent will be accepted as the maximum only if the tenant has occupied for six months).

69. Under the Landlord and Tenant (Rent Control) Act, 1949, 12 & 13 Geo. VI, c. 40, § 1 (1949), the Rent Tribunals set up under the Furnished Houses (Rent Control) Act, 1946, 9 & 10 Geo. VI, c. 34, are empowered to fix the "reasonable rent" for accommodations first let after September 1, 1939.

In *Chair v. J. N. Moeseri et Cie.*, 12 Gaz. des Tribs. Mixtes d'Egypte 107 (Trib. Civ. Cairo, 1922), the court indulged in some judicial legislation and held that the provision in Art. 27 of Law No. 4 of 1921 that, when a house was first let after August 1, 1914, the judge should fix the maximum rent on the basis of the first rent in preference to the evaluation by the tax authorities, should not be applied when the first rent was at the height of the inflation, since this would result in depriving the tenant of the benefit of the law.

The OPA regulations originally required the landlord to file a petition for fixation of the maximum rent of property not rented on the maximum rent date or within two months prior thereto, and to allow 15 days for action thereon before renting the property. If no order was entered within 15 days, the landlord could rent the accommodations and the first rent would become the maximum rent, subject to reduction to comparable levels. After a few months, however, this was changed.⁷⁰ In order to prevent delay in making housing available, the landlord was permitted to rent the accommodations immediately; the first rent became the maximum rent but the Administrator had the power to decrease it to the level of rents prevailing for comparable accommodations on the maximum rent date.⁷¹ The Irish Act of 1923 was similar: the rent was to be fixed by the court, but pending application the first rent was the standard rent.⁷² Canada, however, reversed the process. Under the original regulations, the first rent was the maximum rent, subject to reduction to "comparability," but this was changed in December, 1942, and thereafter the rent was fixed by the rent control authorities *ab initio*, on a comparability basis.⁷³

In order to prevent evasion of the rent laws in the case of newly-rented accommodations, provision must be made for prompt registration of such leases, or the authorities must be empowered to make a retroactive determination of the maximum rent. To require approval of the rent before the premises may be rented at all is too drastic a remedy, since it results in keeping housing off the market. The OPA required filing of a registration statement within thirty days; if the landlord without adequate excuse failed to file within that time, all rents received by him were subject to refund in case of a later reduction.⁷⁴ The Rent Administrator for the District of Columbia, however, did not have as free a hand as the OPA Administrator. The District of Columbia Act provided that the rent for accommodations not let on January 1, 1941, nor within the year prior to that date, should be the rent fixed by the Administrator on the basis of comparable rents,⁷⁵

70. Supplementary Amendment No. 4, 7 FED. REG. 7534, 10081 (1942). See OPA, FOURTH Q. REP. 58-9 (1943).

71. Rent Regulation for Housing, § 4(c), (d), (e).

These provisions for reduction were reasonable and were authorized by the Emergency Price Control Act. Beatrice S. Woolf, 2 OPA Op. & Dec. 3085 (1944).

72. Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, No. 19 of 1923, § 2(1) (b). The rent fixed by the court need not bear any relation to the first letting: *Gaffney v. O'Donnell*, 60 Ir. L.T.R. 38 (1926).

73. WARTIME PRICES & TRADE BOARD, Order No. 108, § 3, as amended by Order No. 211; Order No. 294, § 10.

74. Rent Regulation for Housing, §§ 4(e), 7.

75. District of Columbia Emergency Rent Act, *supra* note 55, § 2(1) (c).

the result being that, until the Administrator determined the maximum rent, the landlord could charge what he pleased.⁷⁶

Where the maximum rent for newly-rented housing is fixed by a court or board, the standard—if any is prescribed—is usually the rent of comparable accommodations.⁷⁷ In some statutes the standard is more vaguely defined as “what the property might reasonably be expected to have rented for” on the maximum rent date;⁷⁸ but the two standards amount to the same thing since the best evidence on the issue would be what similar properties actually did rent for.

Special provision is sometimes made for new construction, in order not to deter building and to make due allowance for increased costs of construction. Under OPA, the maximum rent for priority-constructed housing (practically the only type of housing that could be built during the war) was fixed by FHA.⁷⁹ Rents for this type of housing were substantially above comparable levels for pre-war housing.⁸⁰ The Canadian regulations were amended in 1947 to provide that, for housing completed by original construction or by structural alteration before January 1, 1944, the rent should be fixed at 110% of the comparable rents on the maximum rent date (October 11, 1941); for housing completed after January 1, 1944, the maximum rent was to be fixed at an amount which would “yield a fair return, based on

76. The Administrator in General Order No. 1, 70 Wash. L. Rep. 105 (1942) provided that it would be assumed but not conceded that the first rent was fair and reasonable, but that the landlord would have to file a petition for determination of rent. This was superseded by General Order No. 6, 70 Wash. L. Rep. 873 (1942), which proclaimed that the ceiling would be zero until the petition was filed, and that upon its filing the first rent would be the ceiling, but this was held invalid because such a determination was not based upon the rent charged for comparable accommodations as required by the Act, *Van Mechelen v. Block*, D.C. Munic. Ct. No. 420,644 (Sept. 2, 1943). G.O. No. 6 was then superseded by G.O. No. 11 (1943) which merely required the filing of an application. The court held that the Administrator's determination was not retroactive. *Moore v. Coats*, 40 A.2d 68 (D.C. Munic. App. 1944); *Dekelbaum v. Lloyd*, 41 A.2d 174 (D.C. Munic. App. 1945). See also *Sager v. Stamps*, 38 A.2d 113 (D.C. Munic. App. 1944).

77. New York, Laws of 1945, ch. 314, § 2(c) (comparability or other satisfactory evidence); France, Law of April 30, 1926, Art. 10, Decree of Feb. 28, 1941, Art. 1.

78. Ireland: Act No. 19 of 1923, [1923] PUBLIC STATUTES OF THE OIREACHTAS 522, § 2(1) (b); see COGHLAN, LAW OF RENT RESTRICTION IN EIRE, 8 (1945) (this section set out no standards, but the practice was to introduce evidence as to what would have been a reasonable rent in 1914 for the house as it existed at that time); Act No. 4 of 1946, [1946] PUBLIC STATUTES OF THE OIREACHTAS 70, § 16 (rent to be fixed by court on basis of rent which might reasonably have been expected in the year ending May 7, 1941); Belgium: Decree Law of March 12, 1945, Art. 37, see also Report of the Minister of Justice, *Moniteur Belge*, March 15, 1945, 1477 (court should consider present state of the premises, not their state in 1939).

79. Rent Regulation for Housing, § 4(f). Honolulu Ordinance No. 941, § 3A was similar.

See SEN. REP. No. 86, pt. 2, 80th Cong., 1st Sess. 6 (1947), quoting testimony of the National Housing Administrator. FHA fixed rents on a economic return basis so as to allow 6½% return on the landlord's investment, after allowance of operating and maintenance expenses and taxes, and with an allowance also for vacancy and collection losses.

80. *Parkview, Inc.*, 3 OPA Op. & Dec. 3374 (1945); see Ray E. White, 2 OPA Op. & Dec. 3207 (1945) (purpose of § 4(f) to encourage new construction).

prevailing costs of land, labour and material." ⁸¹ New construction is frequently exempted altogether. ⁸²

When the rent on the freeze date is unknown, which may frequently be the case when that date is in the distant past, ⁸³ the common provision, when there is one, provides for the maximum rent to be fixed on the basis of comparability. ⁸⁴

Effect of Change in Accommodations or in Terms of Tenancy.—Difficulty arises when changes in the accommodation or in the terms of tenancy have been or are made after the maximum rent date. Does the old rent still apply or are the premises to be treated as if they were new accommodations?

Reconstruction may, if the governing law so provides, work a complete decontrol of the accommodations. ⁸⁵ For the purposes of the present discussion, however, it will be assumed that reconstructed premises are still controlled, and that the question is only one of how to determine the rent. The question has arisen frequently in the United

81. WARTIME PRICES AND TRADE BOARD, Order No. 707 (1947), amending Order No. 294, §§ 10(6), (9). See W.P.T.B. Report 50 (1946) (increased construction costs were taken account of even before the amendment). New housing was exempted after June 19, 1947 by Order No. 742 (1947).

82. *E.g.*, N. Y. Unconsol. Laws §§ 8534, 8535 (McKinney, 1949); Great Britain: Increase of Rent and Mortgage Interest (War Restrictions) Act, 1919, 9 & 10 Geo. V, c. 7, § 8; Increase of Rent and Mortgage Interest (War Restrictions) Act, 1920, 10 & 11 Geo. V, c. 17, § 12(9); Ireland: Act No. 4 of 1946, [1946] PUBLIC STATUTES OF THE OIREACHTAS 70, § 3(2)(b); Belgium: Law of August 14, 1920, Art. 11; Luxembourg: Law of March 21, 1947, Art. 1; Brazil: Decree Law No. 6739, Art. 12 (1944); Italy: D.L. No. 370, Art. 14 (1919); Italy: R.D. No. 8, Art. 12; South Africa: Law No. 13 of 1920, § 13; United States: 61 STAT. 197 (1947), 50 App. U.S.C. § 1892(c) (3) (1946 Supp.).

83. In England rents may be fixed by reference to a date as far back as August 3, 1914, or even earlier, where the "last rent" is used, see note 53, *supra*.

84. England: Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. V, c. 32, § 6. The court cannot consider comparable rents if it is possible to ascertain the rent on the critical date, *Chamberlain v. Farr*, [1942] 2 All E.R. 567 (C.A. 1942). The amendment was suggested in the REPORT, INTER-DEPARTMENTAL COMMITTEE ON THE RENT RESTRICTION ACTS, Cmd. 3911, p. 52 (1931).

In Ireland it was held that, in the absence of proof of the rent on August 3, 1914, the standard rent could not be fixed at all. *O'Neill v. Martin*, 69 Ir. L.T.R. 63 (1935). See also *Tyson v. Munns, Jr.* Jur. Rep. 77 (1938); *Leigh v. O'Byrne, Jr.* Jur. Rep. 53 (1935); REPORT, TOWN TENANTS TRIBUNAL 19-20 (Dublin, 1941), criticizing this situation as absurd. The defect was corrected in the Emergency Powers (No. 313) Order, 1944 (Stat. Rules and Orders, 1944, No. 29), § 4(1) and by the 1946 Act, which does not refer back to 1914 and does not rely solely upon the rent on a given date.

Canada: WARTIME PRICES AND TRADE BOARD, Order No. 294 § 10(9); Shanghai: Ordinance of April 1, 1946.

United States: Rent Regulation for Housing, § 5(d).

85. *E.g.*, Great Britain, Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. V, c. 17, § 12(9); Ireland, PUB. GEN. ACTS OF 1923, No. 19, § 3(5) (houses "bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements" exempted from control); Belgium, Law of August 14, 1920, Art. 11, Law of Feb. 20, 1923, Art. 23, Law of Dec. 28, 1926, Art. 2, § 3.

The Housing and Rent Act of 1947 exempted "additional housing accommodations created by conversion on or after February 1, 1947," 61 STAT. 197 (1947), 50 U.S.C. App. § 1892 (1950). See Willis, *The Federal Housing and Rent Act of 1947*, 47 COL. L. REV. 1118, 1120 (1947).

States and in the British Isles, as well as in other countries, but is specifically covered by legislation in only a few jurisdictions.

Under the British Acts, as we have seen, where an accommodation is first let after the maximum rent date, the "first rent" becomes the standard rent. Where there is a maximum-rent-date rent, however, the court in appropriate cases may order an apportionment.⁸⁶ It must do so "where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply."⁸⁷ The English courts have attempted to draw a distinction between the creation of a new "dwelling-house" *in fact* by alteration, and the creation of a new "dwelling-house" *in law* by a mere change in the manner of letting; where there has been substantial alteration, the first rent of the new accommodation will be the standard rent,⁸⁸ but if there has not been, the rent must be determined by apportionment.⁸⁹

In the United States, the problem is best illustrated in the decision of the United States Court of Appeals for the District of Columbia in *Delsnider v. Gould*.⁹⁰ There, the landlord after the maximum rent date had purchased a miserable frame building then rented at \$15.50 a month. The house had no water, no plumbing, no electricity, and was generally in bad condition; it was heated by kerosene stoves. The new owner installed water, plumbing and electricity, put in a bathroom, finished the walls, installed an electric refrigerator and an electrically-controlled kerosene furnace, rebuilt the front entrance, planted flowers in the yard, repainted the house, laid a new floor in the living room, supplied screens and completely furnished the house. She subsequently rented it at \$100 a month, and the Rent Administrator later determined that the rent generally prevailing for comparable accommodations was \$85. This order was revoked upon the discovery that the original house had been rented for \$18.50 on the maximum rent date, and the

86. British Act of 1920, *supra* note 85, § 12(3).

87. Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, 1 & 2 Geo. VI, c. 26, § 5.

88. *Marchbank v. Campbell*, [1923] 1 K.B. 245. The question is whether the identity of the original accommodations has been destroyed. See *Phillips v. Barnett*, [1922] 1 K.B. 222 (C.A. 1921); *Harte v. Byrne*, 76 Ir. L.T.R. 4 (Eire High Court 1941) (house let as a dwelling in 1914; later reconstructed and let as a shop, house and premises; held, 1914 rent did not control); *Boyle v. Fitzsimons*, [1926] I.R. 378, 60 Ir. L.T.R. 122; *Doucette v. Pascal*, [1943] 3 D.L.R. 349 (Nova Scotia Sup. Ct. 1943).

89. See *Phillips v. Barnett*, [1922] 1 K.B. 222 (three houses converted into a factory; first rent held standard rent); *Sinclair v. Powell*, [1922] 1 K.B. 393 (C.A. 1921) (house bona fide converted into three apartments in 1916; same holding); *Stockham v. Easton*, [1924] 1 K.B. 52 (1923) (entire house reconstructed; particular floor involved had not been greatly changed although it had been indirectly benefited by the improvements to the house as a whole; same holding); cf. *Woodward v. Samuels*, [1920] W.N. 82, 89 L.J.K.B. 689 (three-story house converted into three separate flats without substantial reconstruction; 1914 rent apportioned to determine new rent).

90. 154 F.2d 844 (D.C. Cir. 1927).

tenant then brought an action to recover the difference between that amount and the rent which he had paid. The Municipal Court held for the tenant. The Municipal Court of Appeals affirmed on the theory that the reconstruction did not make the house a different accommodation from the one rented on the maximum rent date.⁹¹ The United States Court of Appeals reversed the Municipal Court of Appeals. It held that under the Act "the unit for which a rent ceiling was fixed is not the real estate, or the premises, but the combination of real estate, all personal property, all facilities and all services connected with the use or occupancy and for which the rent was payable." Whether particular housing accommodations are new ones not rented on the critical date, or are old ones with substantial capital improvements, the court said, was a question of fact; but in the instant case only one conclusion was possible, that the accommodations were not the "same."

Different tests were employed by the OPA. Under the regulations, the maximum rent for housing accommodations changed after the maximum rent date so as to result in an increase or decrease of *the number of dwelling units* in such accommodations was the first rent after the change, subject to reduction to comparable levels.⁹² Where the accommodations had been substantially changed after the maximum rent date, but before the effective date of regulation, by "a major capital improvement as distinguished from ordinary repair, replacement and maintenance," the same was true;⁹³ but the making of major capital improvements after the effective date was the basis only for an adjustment of rent.⁹⁴ The OPA itself did not agree with the theory of the *Delsnyder* case. In one case, for instance, a landlord of three cold-water flats with shared toilet facilities, no bathrooms, no heat, no refrigeration and no kitchen facilities remodeled the accommodations at a cost of some \$7800. Bathrooms and kitchens were installed in each unit, fireplaces and bookcases built in, hanging dressers and clothes closets installed, steam heat and hot water supplied, additional electric outlets and fixtures put in, and all rooms repainted and

91. *Gould v. Delsnyder*, 42 A.2d 140 (D.C. Muni. App. 1945).

92. Rent Regulation for Housing, §§ 4(d), (e).

Cost of improvements and refurbishing need not be taken into account in reducing the first rent. *Mrs. C. E. Howland*, 2 OPA Op. & Dec. 3269 (1944).

93. *Id.*, § 4(d).

94. *Id.*, § 5(a)(1). Adjustment was also permitted where a major capital improvement had been made on or prior to the maximum rent date and the rent on the maximum rent date was fixed by a lease in effect at the time of the improvement. § 5(a)(2).

Some difference in practical result was possible, depending upon whether a case came under § 4(d) or § 5(a)(1). In § 4(d) cases the rent was subject to reduction to comparable levels, but in cases involving a major capital improvement the measure of adjustment was "the amount the Administrator finds would have been on the maximum rent date, the difference in the rental value of the housing accommodations by reason of such change." § 5, second unnumbered paragraph.

redecorated. The landlord contended that the first rent became the maximum rent, subject to reduction, because the accommodations were "newly constructed."⁹⁵ The Administrator rejected the argument, stating that "the subject units retained their essential identity although greatly improved by a major capital improvement."⁹⁶ The Administrator conceded that in some cases a reconstruction might result in the creation of a new accommodation; "For example, a 'new' unit might be created by a change in the perimeter walls so as to encompass a substantially greater or lesser area within the unit."⁹⁷ The particular question seems not to have been passed upon by the courts.

It is possible for living accommodations to be substantially changed without physical reconstruction, and probably the same tests should be used as in the case of reconstruction. The question has not often arisen. In an English case, the second and third floors of a house were let separately on the maximum rent date, as well as two rooms on the first floor. Subsequent to passage of the rent control laws, four rooms on the first floor were let to a tenant. It was held that the first rent of these four rooms was the standard rent; the rent of the entire house could not be apportioned because there was no such rent.⁹⁸ In a converse case, a house was let in two separate parts on the maximum rent date. Later the entire house was let to a single tenant at a smaller rent than the former total, and it was held that the latter became the standard rent for the house as a unit.⁹⁹ The OPA held that where a house had been rented as a unit, but after the maximum rent date the landlord reserved an apartment for himself and rented the rest of the house, a new dwelling unit was created and the first rent controlled.¹⁰⁰ In a District of Columbia case it was held that adding the use of kitchen facilities did not make an apartment a new accom-

95. Rents for "newly constructed" accommodations were fixed under §4(e); the first rent became the maximum rent, subject to reduction to comparable levels. In the instant case, adjustments had been ordered increasing the pre-reconversion rents approximately 100%, but the landlord argued that the adjustment should have been made by reducing the first rent. The difference was that under §5(a)(1) the landlord would be entitled to charge only the old rent until the effective date of the adjustment order, whereas under §4(e) he would have been required to refund only the excess over the adjusted rent. 4 OPA Op. & Dec. 3296, n.2 (1946).

96. Louise S. Austin, 4 OPA Op. & Dec. 3295 (1946).

97. See W. Adolph Peters, 3 OPA Op. & Dec. 3491 (1946).

98. Lelyveld v. Peppercorn, [1924] 2 K.B. 638. Cf. Quinn v. Redmond, [1939] I.R. 74 (in the same situation the maximum rent was determined, under the Irish Act, by adding to the 1914 rent of the rooms then let, the standard rent for the remainder as determined by the court).

99. Vaughan v. Shaw, [1945] 2 All E.R. 52 (C.A.). Cf. Jennings v. Kennedy & Co., Ltd., [1940] Ir. Jur. Rep. 9 (where house consists of rooms let separately in 1914, standard rent of whole is sum of standard rent of parts). This decision is criticized in COGHLAN, LAW OF RENT RESTRICTION IN EIRE 13 (1945) on the ground that there is a greater demand for small holdings.

100. Mignon A. Weber, 3 OPA Op. & Dec. 3468 (1945).

modation or authorize the landlord to increase the rent without applying to the Rent Administrator.¹⁰¹

Under the original OPA regulations, a change from unfurnished to furnished after the effective date of regulation did not permit the landlord to increase the rent until the Administrator had granted an adjustment.¹⁰² This was changed to provide that where accommodations were changed from unfurnished to fully furnished after July 1, 1943, or after the effective date of regulation, whichever was later, the first rent would become the maximum rent, subject to reduction to comparable levels.¹⁰³ The effect of this was to place accommodations changed from unfurnished to fully furnished on the same footing as accommodations first rented after the maximum rent date.¹⁰⁴ A similar result was reached by the District of Columbia courts under the ruling in the *Delsmider* case.¹⁰⁵ In several jurisdictions laws have specifically provided that the maximum rent should be fixed by a commission or court when the premises were changed from unfurnished to furnished.¹⁰⁶

101. *Lumpkin v. Ryan*, 2 OPA Op. & Dec. 5213 (D.C. Muni. Ct. 1945). See also *Sawyer v. Warner*, 63 A.2d 683 (D.C. Muni. App. 1948) (jury could decide that change from "rooms" to an "apartment" did not give rise to new housing accommodations, nor did addition of a refrigerator and giving of exclusive use of a bathroom in place of a former non-exclusive use).

102. See Statement accompanying Amendment No. 2 to Rent Regulation for Housing, OPA SERV. 200: 280 (1943).

103. Amendment No. 2 to Rent Regulation for Housing, 8 FED. REG. 9020 (1943), adding § 4(j) to Rent Regulation for Housing. This provision applied where apartments were constructed with an FHA priority rating under which maximum unfurnished rents were fixed, and the landlord first rented the apartments furnished. *Womack v. Bowles*, 146 F.2d 497 (E.C.A. 1944), this was already the rule as to such changes made after the maximum rent date but before the effective date of regulation. Rent Regulation of Housing, § 4(d) (3), (e).

A fictitious sale of the furniture by the landlord to the manager of the apartment house did not convert the accommodations from furnished to unfurnished so that the first rent thereafter (after the maximum rent date but before the effective date) became the maximum rent. *Taylor v. United States*, 142 F.2d 808 (9th Cir. 1944).

In decreasing a "first rent" where the accommodations were changed to furnished between the maximum rent date and the effective date of regulation, OPA took the higher of (1) the rent generally prevailing for comparable accommodations on the maximum rent date; (2) the actual maximum-rent-date-rent plus the difference in rental value as of that date by reason of the change. *Mrs. F. A. Chamberlain*, 1 OPA Op. & Dec. 1530 (1943).

104. Adding a refrigerator to an unfurnished apartment is not enough to come within this rule, *Thierry v. Gilbert*, 147 F.2d 603 (1st Cir. 1945), *affirming* *Gilbert v. Thierry*, 58 F. Supp. 235 (D. Mass. 1944).

105. *Supra* note 92, *et seq.* See *Norris v. Rael*, 47 A.2d 766 (D.C. Munic. App. 1946) (at least a question for the jury whether furnishing an unfurnished apartment might make it a new and different accommodation); *Janes v. Noorholm*, 47 A.2d 105 (D.C. Munic. App. 1946) (tenant of a \$37.50-a-month apartment entitled as a matter of law to receive \$190 a month from subtenants to whom she had let it furnished with linen service, janitor service, heat, electricity and other utilities, until the Rent Administrator fixed a maximum rent).

106. *E.g.*, Belgium, Law of Feb. 20, 1923, Art. 8; Jamaica, No. 17 of 1944, §§ 9, 11; see South Australia, Act No. 29 of 1939, § 8 (increase of 8% of value of furniture allowed where furniture added after passage of Act; query as to accommodations

In the case of commercial accommodations, changes in the terms of the tenancy may be so extensive as to make the former rent inapplicable. This is illustrated by a New York case, in which, just prior to the passage of the commercial rent laws, the parties had made a new lease giving the tenant the additional right to conduct a "luncheonette," giving him the exclusive right to run a drug store and luncheonette in the building, providing for alterations and improvements by the landlord and allowing the tenant to make other changes. The court held that the rent on the freeze date did not control, but that the case came under a section of the law dealing with changes in the accommodations, and was similar to the situation where the space was not rented on the freeze date.¹⁰⁷ As might be expected, the common practice when accommodations have been converted from commercial to residential or vice versa is to fix the rent on a comparability basis.¹⁰⁸

Subleases.—Legislators have varied in their approach to the problem of subletting. At one extreme, they have left subtenants unprotected;¹⁰⁹ at the other extreme, they have prohibited subletting entirely.¹¹⁰ Between these two extremes there is considerable variation.

A good many laws forbid the tenant to sublet at a rent higher than that which he is paying.¹¹¹ Where the subletting is partial, the rent is to be proportionate to the part sublet.¹¹² Sometimes, this restriction applies only to total subletting, and quite frequently it applies only to a subletting of unfurnished premises. The OPA regulations

changed to furnished between the maximum rent date and the effective date); Colombia, Resolution No. 169 (1945) (approval of price control office required before rent could be increased on account of furniture).

107. *Lang v. Resberg*, N.Y.L.J., March 16, 1946.

108. WARTIME PRICES & TRADE BOARD, Order No. 294, §10; Order No. 315, §10. The comparability provision was deleted by Order No. 707 (1947). See also *Zervudachi c. Israel*, 12 Gaz. des Tribs. Mixtes d'Egypte 54 (Trib. Somm. Cairo, 1921); *Galanou c. Marcopoulo*, *id.* 22 (same); *Suares Freres & Co. c. Popolani*, *id.* 115 (Trib. Civ. Cairo, 1922).

109. See REPORT OF THE RENT COMMISSION, 12 L'Egypte Contemporaine 114, 123 (1921) (partial subletting should be allowed and rents not controlled, in order to encourage subletting).

110. *E.g.*, Spain, Decree Law of Dec. 30, 1944, Art. 1 (total subletting of unfurnished dwellings prohibited); Albania, Law No. 76, Art. 2 (1945) (total subletting prohibited). A good many other laws prohibit subletting except with the written authorization of the landlord; but on the other hand some laws permit subletting even where the lease forbids it, *e.g.*, Italy, R.D.L. No. 1624, Art. 2 (1924). In Poland, a tenant is required to sublet excess space. Decree of Dec. 21, 1945.

111. *E.g.*, District of Columbia (Ball Rent Act), 41 STAT. 298, §118 (1919) (permission of Rent Commission required for sublease at higher rent); H.R. 11563, 74th Cong., §17 (same); Austria, Law of June 22, 1929, see EUROPEAN HOUSING PROBLEMS 381 (I.L.O., 1930) (unfurnished subletting only); Portugal, Decree No. 5411, Art. 109 (1919); Belgium, Law of Aug. 14, 1920, Art. 7 (unfurnished only); Brazil, Decree Law No. 9669, Art. 7 (1946). See also *Umersey v. Damji*, 45 Ind. L.R. (Bombay) 744 (1920) (act fixes only one standard rent for particular premises; there cannot be one standard rent as between landlord and tenant and another as between tenant and subtenant; profiteering at expense of subtenant condemned).

112. See Puerto Rico, Act No. 464, §16 (1946); Brazil, *supra* note 111 (proportional to area occupied and situation in the building).

contained no specific provisions on this subject, but sublettings were treated as no different from other leases, and the rent could not be increased.¹¹³

Other laws permit the tenant to increase the rent by a specified percentage either in all cases of subletting, or in case of a partial and/or furnished subletting.¹¹⁴ The right to charge an increased rent may be restricted to cases of partial subletting. The British Acts, for instance, permit an increase of 10% of the net rent of the sublet part.¹¹⁵

Obviously, if the tenant supplies the furniture he should be allowed to charge something above the rent he has to pay, if he is allowed to sublet at all. Many laws recognize this. In Austria, no increase was allowed on an unfurnished subletting, but if the accommodation were sublet furnished and with services the law required only that the rent be "reasonable." We are told that the legislature wanted to protect the actual tenant and let him derive a financial advantage from the subtenant "who generally belongs to a wealthier class." Subletting was the only resource of many people in the bad times following World War I, and the monthly rent of a subletting often amounted to many times the annual rent of the main letting.¹¹⁶ In Northern Ireland, a partial subtenant could apply to the court to declare his rent excessive or fair and reasonable, but this applied only to unfurnished sublettings.¹¹⁷

113. See Interpretation 4(a)—II (1942).

114. *E.g.*, Italy, R.D.L. No. 1, Art. 4 (1920) (increase of 25% if unfurnished, 50% if furnished); Italy, D.L.L. No. 669, Art. 16 (1945) (rent for subletting unfurnished apartment cannot exceed rent owed landlord by main tenant by more than 20%; rent for subletting part of apartment with right to use all or part of the "ambienti" and common services limited to 50% above proportionate amount of main tenant's rent corresponding to number of rooms sublet; where subletting is with furniture, figures are 100% and 130% respectively); Luxembourg, Law of Feb. 25, 1927, Art. 2 (subtenant could be required to pay up to 125% of main rent); Argentina, Civil Code Art. 1583, as amended by Law No. 11156 (1921) (20% above main rent); see also the complicated provisions in Spain, Law of Dec. 31, 1946, Arts. 16, 17.

115. Rent and Mortgage Interest (Restrictions) Act, 1923, 13 & 14 Geo. V, c. 32, §7(1). The landlord can require up to 5% to be passed on to him. But under the Second Schedule to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, 1 & 2 Geo. VI, c. 26, if the subtenant becomes the tenant he is required to pay only 5% over the original tenant's rent. This section does not apply to houses brought under control by the 1939 Act.

See also Chile, Decree No. 239, Art. 3 (1942); Decree No. 794, Art. 3 (1944) (where tenant sublets one or more rooms and lives in the house and takes care of it in person, he may charge subtenant an extra 20% for costs of light and other services); Paraguay, Decree Law No. 8025 (1948) (tenant may charge increased rent only if he occupies part of house).

116. EUROPEAN HOUSING PROBLEMS 381 (I.L.O. 1923). See also Hungary, Order No. 2222 (1923); EUROPEAN HOUSING PROBLEMS 433 (increase of 100% to 150% allowed); Spain, Decree Law of Dec. 30, 1944, Art. 1 (25% markup), superseded by Law of Dec. 31, 1946.

117. Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1932 22 & 23 Geo. V, c. 14, §8; Rent & Mortgage Interest (Restrictions) Act, 1940 4 & 5 Geo. VI, c. 7, §20.

Some laws require the tenant to pass on to the landlord a part of the benefit of the subletting. This is fair enough, since the presence of more occupants means greater wear and tear on the building.¹¹⁸ The British Acts permit the tenant to make an increase of 10% of the net rent of the part sublet, but also allow the landlord to increase the rent of that part 5%.¹¹⁹ A French law provided that a tenant who had sublet without the landlord's permission had to pay an augmentation in rent proportional to the benefits realized.¹²⁰ In Belgium, if the rent paid by the subtenants exceeded the rent paid by the tenant for the entire property (making an allowance for the part occupied by the tenant) the landlord was entitled to half of the excess.¹²¹ In Spain, it is not considered subletting or boarding if one or two people, not related to the tenant, together with their children, share the tenant's apartment; but if there are more than two, the tenant must pay an additional 10% rent for each one.¹²² The Italian law of 1945 contains extremely complicated provisions for rent increases in case of subletting; the increases may vary from 10% to 150%, depending on whether the subletting is partial or total, furnished or unfurnished, by virtue of contract or in derogation thereof, and whether or not speculation is involved.¹²³

Little if any justification can be found for allowing an increase of rent on a total subletting where the tenant provides no furniture or services; the tenant in such a case is a mere middleman and an increase would be an unjustified burden on the subtenant. The case may be different where a partial subletting is involved; in times of housing shortage it is in the public interest to encourage partial subletting, and in such situations the tenant usually performs some management functions and supplies some services to the subtenants. If the tenant has furnished the apartment himself, of course he should be given a fair amount as rent for the furniture.

Where the premises were sublet on the maximum rent date, what is the maximum rent? Is it the rent paid to the landlord by the tenant, or the rent paid to the tenant by the subtenant? Or are there two maximum rents? The question seems not to have been faced in many jurisdictions. In an early English case, a "public house" had been let to a brewery company in 1911 for £130 a year. On the freeze

118. Increased wear and tear may be ground for an individual rent adjustment.

119. See note 115 *supra*.

120. Law of March 31, 1922, Art. 1.

121. Law of Dec. 28, 1926, Art. 17.

122. Law of Dec. 31, 1946, Art. 27.

123. D.L.L. No. 669, Art. 3 (1945). In case of dispute the arbitral commission fixes the amount of the increase considering the location and construction of the building, the date on which rents were stabilized, and the return which the tenant obtained from the subletting and the number of dwelling units sublet.

date, August 3, 1914, the premises were occupied under a sublease at £24 a year, the disparity being due to the fact that the establishment was a "tied house." Later, the subtenant became the tenant, holding directly under the owner. The court held that the standard rent was £24, on the theory that the standard rent was the rent paid by an occupying tenant.¹²⁴ The Court of Appeals affirmed, questioning whether this principle would hold in every case, but saying that where it was a question between the landlord and a tenant who was in occupation on the maximum rent date, the standard rent was the rent the tenant was paying at that time.¹²⁵ The result seems unjust to the owner; he had no direct relationship with the subtenant on the maximum rent date and there is no reason why he should have been deprived of the benefit of his bargain because the tenant had chosen to sublet at a lower rent than he was paying.

The case just discussed is, of course, an atypical one; ordinarily the rent under the sublease is higher than the rent the main tenant is paying. If the theory of the maximum rent date method is to freeze conditions in effect on that date, it would seem that the rent under the sublease should control, since normally it will be later in date than the original lease; this is no hardship to the tenant, and it gives the landlord the benefit of the rent actually being paid. Of course, while the main lease remains in effect the landlord cannot raise the rent of the original tenant; there is only one maximum rent, but the rent fixed in the original lease may be less. This view was adopted by OPA in the case of total subletting.¹²⁶ The Canadian regulations were the same.¹²⁷ In a New York case, however, where commercial premises had been let at a rent of 10¢ for each ton of coal weighed on scales on the premises, and sublet at \$500 a month, the rent payable under the sublease was held not the basic rent.¹²⁸

Where the premises are let unfurnished and sublet furnished, there may be two maximum rents: one for the unfurnished premises and one for the same premises furnished.¹²⁹

124. *Glossop v. Ashley*, [1921] 2 K.B. 451. Cf. *Cleary v. Stuart*, [1941] Ir. R. 128.

125. *Glossop v. Ashley*, [1922] 1 K.B. 1 (C.A. 1921). Public houses were subsequently excepted from the Acts.

126. OPA Interpretation 4(a)—II.

127. WARTIME PRICES & TRADE BOARD, Order No. 294, § 4(2)(b); Order No. 315, § 4(2)(b) (maximum rent under sublease becomes maximum rent if same accommodations, furniture, services, etc., are provided).

128. *City of New York v. Interboro Fuel Corp.*, 56 N.Y.S.2d 808 (App. Term 1st Dep't 1945). The premises had been sold and a lease to a new tenant made since the maximum rent date.

129. OPA Interpretation 4(a)—II, as revised July 1, 1945. Formerly, the interpretation was to the contrary.

Logically the result should not be any different where the subletting is partial. The OPA, however, seems to have taken a different view. The original rent regulations provided that

Where, at the expiration or other termination of an underlying lease or other rental agreement, housing accommodations or a predominant part thereof are occupied by one or more subtenants . . . , the landlord may rent the entire premises for use by similar occupancy for a rent not in excess of the aggregate maximum rents of the separate dwelling units, or may rent the separate dwelling units for rents not in excess of the maximum rents applicable to such units.¹³⁰

On March 1, 1943, however, this clause was revoked; underlying leases of structures containing more than 25 rooms rented or offered for rent by the operating tenant were exempted from control; and provision was made for reduction to comparable levels of rents increased under the revoked provision, since the Administrator believed that in some instances such rent was "higher than is consistent with the general objectives of the regulations."¹³¹ The result of the revocation was apparently to freeze separately the rent under the main lease and the rents under the sub-leases, where the structure contained less than 25 rooms and hence was not exempted. Under the British Acts, where a part was sublet the standard rent apparently must be determined in all cases by apportioning the amount of the standard rent for the entire dwelling-house, without regard to the rent actually paid by the subtenant on the freeze date.¹³²

Furnished Accommodations.—Furnished accommodations are sometimes exempted from rent control.¹³³ This was true, for example, in Great Britain until a special statute was enacted in 1946;¹³⁴ the regular provisions of the Acts did not apply to "a dwelling-house bona fide let at a rent which includes payments in respect of . . . use of

130. Rent Regulations, § 5(e) (1942).

131. OPA Amendment No. 156, 8 FED. REG. 2673; Statement Accompanying Supplementary Amendment No. 15, OPA SERV. 200: 378 (1943); see OPA FIFTH Q. REP. 45 (1943).

132. See RENT AND MORTGAGE INTEREST RESTRICTIONS, Law Notes, 19th ed., p. 101 *et seq.*

Cf. Hong Kong, No. 13 of 1921, §§ 2(f), (g) (standard rent means rent payable by tenant in actual occupation, *i.e.*, occupying by self, family or servants; a tenant who sublets part and lives in part is deemed to be tenant in actual occupation as regards the landlord, and subtenant is deemed to be tenant in actual occupation); *Yuet Yung Yu v. Tseung Fat*, 18 H.K.L.R. 64 (1923) (tenant paying \$37 a month sublet part of accommodations for \$77 a month; court held \$77 to be standard rent for the part; no apportionment provisions in the ordinance).

133. See South Australia, Act No. 29, 1939, § 2 (this provision was not carried over in Act No. 33 of 1942); South Africa, Act No. 13, 1920, § 13, deleted by Act No. 26, 1940; Paraguay, Decree Law No. 2489, Art. 28 (c).

134. *Furnished Houses (Rent Control) Act*, 1946, 9 & 10 GEO. VI, c. 34; see also *Rent of Furnished Houses Control (Scotland) Act*, 1943, 6 & 7 GEO. VI, c. 44.

furniture."¹³⁵ Limited control was exercised in the 1920 Act (as amended in 1939) by provisions that the landlord could not obtain a profit more than 25% in excess of the normal profit, *i.e.*, the profit which might reasonably have been expected from a similar letting on the freeze date (1914).¹³⁶ As to houses brought under control by the 1939 Act, the normal profit was determined by what might have been obtained in the year ending Sept. 1, 1939, and no increase over the normal profit was allowed.¹³⁷ Both civil and criminal penalties were imposed on violators.¹³⁸ This limited control was found to be inadequate,¹³⁹ and a different system was employed in the 1946 Act.¹⁴⁰

Where furnished lettings are not exempted, special provisions are not usually made for them.¹⁴¹ The OPA, for instance, made no distinction between furnished and unfurnished accommodations as to the method of determining the maximum rents. Over a long period of time, however, this is likely to cause trouble because of the fact that furniture depreciates more rapidly than real property, and because changes in the quantity or quality of furniture supplied may easily be made.

Some examples of special treatment of furnished accommodations may be found.¹⁴² And in some places, the legislators have avoided the question simply by delegating to the rent control authorities the determination of the rents of furnished premises. While this permits arbitrary determinations, it is probably less arbitrary than any rigid

135. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 GEO. V, c. 17, § 12(2) (i); see also Rent and Mortgage Interest Restrictions Act, 1939, 2 & 3 GEO. VI, c. 71, § 3(2) (b). The Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 GEO. V, c. 32, § 10 further defined the meaning of § 12(2) (i); and see *Property Holding Co. v. Mischeff*, [1946] 2 All E.R. 294 (C.A.). For the reasons for the exception see REPORT, SALISBURY COMMITTEE ¶ 19 (1920).

136. The proper procedure was for the court to determine the normal profit produced from a furnished letting in 1914, estimate what rent would produce that profit at the date of the determination and add 25%. *Truss v. Olivier*, 40 Times L.R. 588 (1924). The 1914 practice in Scotland of doubling the unfurnished rent to arrive at the furnished rent could be followed. *Langdon v. Elliott*, [1924] 2 Scot. L.T. 9 (Sheriff's Ct.).

137. Rent & Mort. Int. (Restrictions) Act, 1939, *supra* note 135.

138. See *Jones v. Johnson*, 86 Sol. J. 120 (1942).

139. REPORT, INTER-DEPARTMENTAL COMMITTEE ON RENT CONTROL, Cmd. 6621, 42-43 (1945).

140. See Willis, "Fair Rents" Systems, 16 GEO. WASH. L. REV. 104 (1947).

141. Questions of course arise where the accommodations are changed from unfurnished to furnished or vice versa.

142. Kenya, No. 12, 1940, § 14 (maximum rent of furnished house is standard rent plus a maximum of 15% of value of furniture and 25% of value of "soft furnishings", linen, cutlery, kitchen utensils, glassware and crockery); Egypt, Proclamation No. 369 (1943) (furnished rent is unfurnished rent plus a monthly sum corresponding to equivalent of usage of furniture; disputes settled by a commission); Rumania, Law No. 330, Art. 8 (1946) (special coefficient for furnished accommodations by which 1945-46 rent is multiplied); Spain, Law of Dec. 31, 1946, Art. 58 (unfurnished rent may be doubled); Brazil, Decree Law No. 6739, Art. 4 (1944) (increase based either on percentage of unfurnished rent or percentage of value of furniture); Chile, Decree No. 794, Art. 4 (1944) (maximum rent of 7% on value of furniture plus 6% for normal deterioration, security and other contingencies).

statutory formula. As a British Commission has pointed out,¹⁴³ providing for an increase by a percentage of the amount of the unfurnished rent will not work well, because furnished lettings vary so that no flat percentage could apply to all; and it is difficult to decide the appropriate proportion of the value of the furniture, assuming that that value can be determined.

Progressive Rents.—Leases of commercial premises frequently provide for periodic increases in rent during the life of the lease or for an increase in rent on exercise of an option to renew. Similar clauses are sometimes found in leases of residential property. What is the maximum rent in such a situation—is the rent frozen at the particular rate in effect on the maximum rent date, or may the stipulated increases be made despite the freezing of rents generally?

On principle, the landlord should be permitted to collect the increases provided for in the lease; the maximum rent date method does not aim at freezing merely the particular rent which happened to be in force on the critical date, but the whole rental bargain between the landlord and the tenant. Realistically, the monthly rent under a lease of this sort is determined by prorating the total rent under the lease.¹⁴⁴ For this same reason, there is no justification for allowing the landlord to continue, after the expiration of the lease, to collect the highest rate in effect during its currency, since this does not represent the true monthly rent.

The British Acts have recognized the first principle stated above but not the second. Where a house is "let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent,"¹⁴⁵ *i.e.*, the landlord can collect the stipulated increases during the life of the lease and thereafter can continue to receive the highest rent provided for in the lease. "What is meant by a 'progressive rent' is a rent under one single tenancy and a rent which automatically rises during the continuance of that tenancy."¹⁴⁶

143. See note 139 *supra*.

144. See 500 Fifth Avenue, Inc., 274 App. Div. 241, 80 N.Y.S.2d 227 (1st Dep't 1948) (graduated leases disregarded after expiration because rent on freeze date might not bear proper relation to rental value); *Isquith v. Athanas*, 33A.2d 733 (D.C. Munic. App. 1943) (where lease was made for term of years at rental payable in progressively increasing monthly installments, rent is not frozen at amount payable on maximum rent date).

See also *Reverdy c. Andrieu*, Sirey 1921 Bull. Somm. 1:10 (France, Court of Cassation 1920) (provision that 1914 rent shall be taken into account in fixing maximum rent did not abrogate a 12-year lease providing for quadrennial increases of rent).

145. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. V, c. 17, § 12(1) (a).

146. See *Wheeler v. Wirral Estates*, [1935] 1 K.B. 294, 300, per Lord Wright, M.R. More than one increase is not required to make a rent "progressive." *Goldsmith v. Orr*, [1920] W.N. 250, 89 L.J.K.B. 901 (rent which was to be at a higher

The New York Business and Commercial Rent Acts take the more equitable approach. A lease in effect on the maximum rent date, providing for payment of rent in a graduated scale, is given effect, but on its expiration or other termination the maximum rent for future lettings is to be fixed by agreement, arbitration or the court on a comparability basis—the same methods employed where the premises were not rented on the freeze date.¹⁴⁷ The courts have recognized the policy of these provisions by holding that the fact that the last graduation in rent took effect before the maximum rent date is immaterial,¹⁴⁸ and that a rent is “in a graduated scale” even though it decreases rather than increases during the life of the lease.¹⁴⁹

Inconsistently, however, the lower courts have held that these provisions apply only to leases in force on the effective date of the amendment, and not to leases in effect on the maximum rent date but having expired before the amendment.¹⁵⁰

A lease providing for payment of a percentage of the tenant's gross income, with a minimum of \$11,500 for two years and \$12,000 for three years, was held not a graduated lease because of the slight step-up in the minimum.¹⁵¹

Under the OPA regulations, where the lease or other rental agreement in effect on the maximum rent date provided for a higher or lower rent at other periods during the term of the lease or agreement, the rent was frozen at the figure charged on the critical date; but the landlord or tenant could petition for an adjustment.¹⁵² The

figure during final year of tenancy was not a progressive rent) was presumably overruled by *Bryanston Property Co., Ltd. v. Edwards*, [1944] 1 K.B. 32 (C.A. 1943), and *Tedman v. Whicker*, [1944] 1 K.B. 112 (C.A. 1943), holding that where a tenant covenanted to pay a certain rent but the landlord by a special clause in the lease allowed him to deduct a substantial amount each year during the war, the rent was a “progressive” one.

147. N.Y. UNCONSOL. LAWS, §§ 8534, 8563 (McKinney's, 1949).

The courts had held, prior to the amendments, that leases in effect on the freeze date, providing for periodic increases, were not invalidated by the acts. *Ronaho Corp. v. Morse*, 186 Misc. 334, 61 N.Y.S.2d 545 (Sup. Ct. 1945), (*aff'd* on reargument), citing an apparently inconsistent decision in *Adams v. Riker Operating Co., Inc.*, 270 App. Div. 755, 810 (1st Dep't 1946) (mem. opinion); 140 West 69th St. Corp. v. Simis, 186 Misc. 342, 59 N.Y.S.2d 429 (Munic. Ct. 1945).

148. *City Bank Farmers Trust Co. v. Seconset Corp.*, 274 App. Div. 112, 80 N.Y.S.2d 117 (1st Dept. 1948); *Grossman v. Circle Diner Inc.*, 82 N.Y.S.2d 304 (Sup. Ct. 1948).

149. *331 Madison Avenue Corp. v. Hegeman Harris Co.*, 82 N.Y.S.2d 302 (Sup. Ct. 1948).

150. *160 Fifth Avenue Corp. v. Raymond Service, Inc.*, 82 N.Y.S.2d 846 (Sup. Ct. 1948); *Traymore Apts., Inc. v. Queens Blvd. Real Estate, Inc.*, 80 N.Y.S.2d 790, 192 Misc. 596 (Sup. Ct. 1948); *Application of Budget Holding Corp.*, 80 N.Y.S.2d 793, 192 Misc. 594 (Sup. Ct. 1948); *Application of Bryant Park Building, Inc.*, 193 Misc. 734, 85 N.Y.S.2d 234 (Sup. Ct. 1948).

151. *Application of 500 Fifth Avenue, Inc.*, *supra* note 144.

152. *Rent Regulation for Housing*, §§ 5(a)(6), 5(c)(5); 877 Fifth Avenue Corp., 2 OPA Op. & Dec. 3292 (1945). Originally the rent had to be “substantially”

adjustment could be on the basis either of comparable rents or of the provisions of the lease.¹⁵³

Specific provisions permitting leases at a progressive rent to be carried out are found also in several parts of the British Empire, although they do not always indicate how the rent is to be determined after the expiration of the lease.¹⁵⁴

Option to Renew at Increased Rent.—An option to renew at an increased rent is not the same as a progressive rent. The landlord is bound, but the tenant is not; and the tenant may agree to the terms of the lease, even though the proposed increase is exorbitant, thinking that he will not have to exercise the option.

In a number of jurisdictions nevertheless, such an option contained in a lease in effect on the maximum rent date can be exercised.¹⁵⁵ The New York Court of Appeals has held that a lease with such an option is a lease for a graduated rental within the Business Rent Law.¹⁵⁶ An English court, on the other hand, has ruled that a 21-year lease determinable at the end of seven, fourteen or twenty-one years at rentals of £45, £60 and £65 respectively was not a lease at a progressive rent and that the £45 rent in effect on August 3, 1914 was the standard rent.¹⁵⁷ The District of Columbia court has refused to give any effect to an option to renew at a higher rent.¹⁵⁸

Variable Rents.—Commercial leases sometimes provide for the rent to be determined on the basis of a percentage of the tenant's volume of business. There is no particular reason for not permitting such leases to be carried out according to their terms, except that this may give a windfall to the landlord who has such a lease as distinguished from an ordinary lease. The New York Business and Commercial Rent Acts sanction such leases, but provide that any fixed, basic or minimum rent may not be increased except as provided in

higher or lower, but this word was deleted by Amendment No. 67, 10 FED. REG. 11666 (1945).

This clause was inapplicable to a situation where the tenant's son had agreed to pay a higher rent on his return from service. *Andrews Equities, Inc.*, 5 OPA Op. & Dec. 3254 (1947).

153. *Id.*, § 5, third unnumbered paragraph.

154. *E.g.*, Canada, WARTIME PRICES & TRADE BOARD, Order No. 315, § 4(2)(e) (commercial rents); Burma, Law No. 6 of 1948, § 2(f)(II)(D), § 5(1)(b) (after expiration of lease, rent payable during last period shall be the maximum rent); Ceylon, No. 60 of 1942, § 5(1)(2); Jamaica, No. 17 of 1944, § 9(a)(c) (rent determined by board after expiration of lease).

155. Canada, WARTIME PRICES & TRADE BOARD, Order No. 294, § 4(2)(c); Order No. 315, § 4(2)(c); South Africa, War Measure No. 42 of 1941, § 16; Act No. 33 of 1942, § 16(1); Federated Malay States, No. 14 of 1940, § 5(i).

156. *Harvey Holding Corp. v. Satter*, 297 N.Y. 113, 75 N.E.2d 619 (1947). The exact holding was that the rent was to be determined on a comparability basis after the expiration of the lease.

157. *Pond v. Barber*, *Estates Gazette*, June 9, 1923.

158. *Hicks v. Behrend*, 40 A.2d 78 (D.C. Munic. App. 1944).

the acts.¹⁵⁹ This provision applies even though the rent was not variable on the freeze date because of a temporary modification.¹⁶⁰ The acts do not indicate how the rent is to be determined after the expiration of such a lease.¹⁶¹ In cases not subject to the statutory provision,¹⁶² the New York courts have held that, where the rent was fixed on a percentage basis on the maximum rent date with minimum specified, the maximum rent is 1/12 of the annual amount paid under the lease, *i.e.*, the average monthly rent paid,¹⁶³ plus the statutory increase.

The Canadian regulations permit a percentage lease to be carried out but also fail to indicate clearly how the maximum rent is to be determined on its termination.¹⁶⁴ An Italian law, on the other hand, suspended all clauses in leases whereby the rent varied according to some element, to the extent that as a result the rent exceeded that on a given date.¹⁶⁵

Seasonal Variations; Seasonal Lettings.—Rents frequently are affected by seasonal demand, or they may vary from season to season by local custom, being higher in the winter if the landlord supplies heat, lower if the tenant supplies it.¹⁶⁶ Purely seasonal accommodations are often exempted from control.¹⁶⁷ Where they are not, it should be made clear that, while the rent charged for the particular season including the maximum rent date may continue to be charged for future seasons, the accommodations may not be let for year-round occupancy or off-season occupancy at the high seasonal rent. Conversely, if the maximum rent is fixed by an off-season letting, the landlord should not be held to it around the year. Thus under the OPA, while certain seasonal or resort accommodations were exempt

159. Laws of 1945, c. 3, § 14 as amended by c. 315; c. 314, § 13. See Application of 500 Fifth Avenue, Inc., 274 App. Div. 241, 80 N.Y.S.2d 227 (1948) (lease cannot be both variable and graduated; slight step-up in the minimum does not make it a graduated lease).

160. King Arthur Restaurant v. London Terrace, Inc., 273 App. Div. 233, 76 N.Y.S.2d 452 (1948).

161. See Matter of Cortlandt & Dey Streets Corp., 119 N.Y.L.J. 814 (Sup. Ct. 1948) (landlord can seek determination of "fair and reasonable rent" after expiration of variable lease; tenants had been paying the minimum amount, plus the statutory increase, since expiration).

162. The statutory provision, note 159 *supra*, applies only to leases in effect when the law was enacted and not to leases in effect on the freeze date but having expired later. City of New York v. Interboro Fuel Corp., 185 Misc. 299, 56 N.Y.S.2d 808 (Sup. Ct. 1945).

163. City of New York v. Interboro Fuel Corp., *supra* note 162; New Deal Petroleum Corp. v. Royal Automotive Service, Inc., 118 N.Y.L.J. 838 (App. Term 1947).

164. WARTIME PRICES AND TRADE BOARD, Order No. 315, § 4(2) (e).

165. Italy, R.D.L. No. 1387 (1938), Law No. 486 (1939), Art. 13.

166. OPA FIFTH Q. REP. 45 (1943).

167. *E.g.*, Rent Regulation for Housing, § 1(b) (6); Australia, Landlord and Tenant Regulations, S.R. 1945, No. 97, Reg. 8.

from control during the resort season, where the rent of a particular accommodation was frozen at a rent which was substantially higher or lower than at other times of the year because of seasonal demand, the Administrator could adjust it to the level generally prevailing for comparable accommodations during the year ending on the maximum rent date,¹⁶⁸ or could provide for different maximum rents for different periods of the year.¹⁶⁹ Special provisions were made for Miami, Florida, because of the peculiar conditions existing in that area. Rents were frozen at the rent charged on Sept. 1, 1943, or at one-twelfth of the total rent for the year ending August 31, 1943, whichever was the higher;¹⁷⁰ but the landlord, at his option, could have his maximum rents set on a seasonal pattern where the total rent for the eight off-season months in the year ending August 31 was less than half of the rent received for the four winter months, January through April. The seasonal rents so fixed were determined on the basis of the rents charged in the particular month of the year ending August 31, 1943.¹⁷¹

In Canada, where accommodations were customarily let for a season only, the maximum rent was that payable for the last corresponding season prior to the maximum rent date, but if the premises were let for year-round occupancy the first rent became the maximum rent if not higher than comparable levels.¹⁷²

In the case of rents subject to seasonal variations, as distinguished from seasonal demand, the OPA regulations were the same as those applicable to seasonal demand described above.¹⁷³ In Canada, however, the rent was not frozen at the particular sum charged on the freeze date, but the variations were preserved.¹⁷⁴

168. Rent Regulation for Housing, § 5, fifth unnumbered paragraph. In most other cases comparability was determined as of the maximum rent date.

If no comparable accommodations could be found which had been rented year-round, the rent could be fixed on the basis of seasonal rents for comparables supplemented by off-season rents. Myrtie O. Taylor, 2 OPA Op. & Dec. 3090 (1944).

169. *Id.*, § 5(a) (7), (c) (6).

170. Miami Rent Regulation, § 4(a); see Jack Oberson, Docket No. RPA-IV-31-P (OPA 1944).

171. *Id.*, § 5(h); see Wasserman and Bruckner, 2 OPA Op. & Dec. 3096 (1944). If the unit had not been rented for any particular month in the year, the Sept. 1, 1943 rent or the first rent thereafter was taken as the maximum rent for that month, subject to adjustment upward or downward to comparable levels for that month.

172. WARTIME PRICES & TRADE BOARD, Order No. 294, §§ 4(2) (d), 10(2) (e); Order No. 315, §§ 4(2) (d), 10(2) (c). See also France, Law of July 22, 1943, Art. 1, par. 3 (rent fixed on annual basis in bathing, climatic or thermal resorts); Indo-China, Decree No. 1406, Art. 2 (1942) (rents in seacoast or mountain resorts fixed on seasonal basis).

173. The provisions as to seasonal variations were added by Supplementary Amendment No. 16, 8 FED. REG. 2780 (1943); see OPA FIFTH Q. REP. 45 (1943).

174. WARTIME PRICES & TRADE BOARD, Order No. 294, § 4(2) (a); Order No. 315, § 4(2) (e).

CONCLUSION

The foregoing discussion does not purport to be a complete treatment of the maximum rent date system of rent control. Nothing is said as to the validity of the system.¹⁷⁵ Nor has there been any discussion of the matter of adjustments of maximum rents, whether over-all, by area, by classes of accommodations or tenants, or in individual cases. A thorough analysis of these problems would more than double the length of the present article. All that can be done here is to point out that in many—perhaps the majority of cases, the frozen rent is only a starting point from which to calculate adjustments. General adjustments may be ordered to bring rents more in line with other prices or to make up for increases in maintenance costs; individual adjustments may be authorized to correct some inequity in the original frozen rent or to take account of supervening changes in circumstances.

No definitive comparison of the maximum rent date system with other systems¹⁷⁶ can be made on the basis of the present analysis. One conclusion which can probably be drawn, however, is that the vaunted simplicity of the freeze system is in many situations a myth. The idea of congealing the rent level as of a given day has a superficial attractiveness,¹⁷⁷ but the practical application of the freeze, as has been seen, raises many knotty problems, and these only increase as time goes on and other elements of the economic picture change. History shows that attempts to maintain a rent freeze over a protracted period of time are liable to involve governments and legislatures in almost insoluble difficulties. But that, too, is another story.¹⁷⁸

175. It may be noted in passing that its use in the United States has been held constitutional. *Taylor v. Brown*, 137 F.2d 654 (E.C.A. 1943), *cert. denied*, 320 U.S. 787 (1943); *Wilson v. Brown*, 137 F.2d 348 (E.C.A. 1943); *Spaeth v. Brown*, 137 F.2d 669 (E.C.A. 1943); *Madison Park Corp. v. Bowles*, 140 F.2d 316 (E.C.A. 1943); *Bowles v. Willingham*, 321 U.S. 503 (1944).

176. See Willis, "Fair Rent" Systems, 16 GEO. WASH. L. REV. 104 (1947); *Maximum Rents: The "Percentage" Method*, 23 TEMP. L.Q. 122 (1949).

177. Some legislators or rulers in their naïveté have thought it sufficient simply to provide that no rents should be increased. See, e.g., Guatemala President Ubico's decree No. 2749 of May 5, 1942, the only material part of which provides that "For the duration of the war in which the Republic is involved, the owners of buildings may not receive for their rental rents higher than those which their tenants are actually paying, nor increase, under any pretext, those which have been agreed upon."

178. The writer hopes to treat these matters in a projected article on the history of rent control.