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Mixed Accommodations under Rent Control Laws

John W. Willis

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Legislators all over the world have been vexed, in drafting rent-control laws, by the problem of "mixed accommodations"—premises used both for business and dwelling use, such as the shop with living quarters behind it, the doctor's apartment-and-consultation-room, the flat where the dressmaker lives and plies her needle. If, as is often the case, dwelling premises are controlled and commercial premises are not, the question is an important one, since its determination means the difference between control and no control; but even if commercial rents are subject to regulation, the problem must be faced if there are differences in the regulations applicable to the two classes of premises. Three approaches have been employed: the premises may be regarded as residential in any case (the English rule); or they may be regarded as not residential, with whatever consequences that entails (the minority rule); or some kind of a test of "predominant use" may be applied.

THE ENGLISH RULE

The first alternative was adopted in England at an early date. In the leading case of Epsom Grand Stand Association v. Clarke, decided in 1919, the Court of Appeals held that a public house was covered by the 1915-1919 Acts if the tenant in fact lived on the premises, and the terms of the rental agreement did not forbid it. Bankes, L. J., said that "The object of the legislature was to include all houses which are occupied as dwelling-houses, provided they are of the class ascertained by their value as prescribed by the Act, notwithstanding that they are also used by the tenant for other purposes as well as those of a dwelling-house." The rule of this case was written into the 1920 Act, which provides that "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes." At the time the 1920 Act was passed, business premises were also regulated, but the provision just quoted has been retained in effect although control of business premises lapsed in 1921. The Inter-

*Member of the California Bar and of the Bars of the United States Supreme Court and the United States Court of Appeals for the District of Columbia.
2. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. V, c. 17, § 12(2)(ii). See also Rent and Mortgage Interest Restrictions Act, 1939, 2 & 3 Geo. VI, c. 71, § 3(3).
Departmental Committee which recently studied the whole subject of rent control in Great Britain was asked to recommend decontrol of all mixed accommodations, or at least of all but small premises where the tenant of the dwelling portions carried on a business, trade or profession on the premises, but it did not do so.

Under the 1920 Act, if the letting is for the purpose of residence even in a minor degree, the premises are controlled even though the dominant purpose of the letting is for use as business premises. Thus, for example, a public house has been held to come within the Acts; or a shop with living accommodations attached; or a garage with rooms over it; or a building used partly for a hotel and partly for living purposes; or a house let to an "urban district council" for a residence for their surveyor and a meeting place for the council; or a house used as a nursing home. The lessee must actually live on the premises; where living quarters attached to a shop were unoccupied, the Acts were held not to apply.

4. Memorandum by the Auctioneers' and Estate Agents' Institute, pp. 11-12 (1944).
5. Report of the Inter-Departmental Committee on Rent Control, Cmd. 6621 (1945).
5a. Rent and Mortgage Interest Restrictions (Law Notes, 19th ed.) 95-97.
In Waller & Son v. Thomas, [1921] 1 K.B. 541 (1920), McCardie, J., said that the "dominant purpose and principal user" should be determinative, but held himself bound by the Epsom case. See also Greig v. Francis & Campion; 38 T.L.R. 519 (K.B. 1922) ("real, main and substantial purpose of the premises"); Callaghan v. Bristowe, [1920] W.N. 308, 89 L.J.K.B. 817, 123 L.T. 622, 36 T.L.R. 841 (The Epsom case "is one case, but there are others in which no one could say that the premises were let as a dwelling-house, e.g., that of a large warehouse containing a couple of rooms only, with a small room for a caretaker. Plainly, such premises would not be let as a dwelling-house.")

The editors of Law Notes comment that "...there is much to be said on juristic grounds for the 'dominant purpose' of the letting, and it is perhaps open to the Court of Appeal to reconsider the point." Op. cit. supra, p. 96.

6. Epsom Grand Stand Assn. v. Clarke, supra n. 1; Waller & Son v. Thomas, supra n. 5a; Brakspear & Sons, Ltd. v. Barton, [1924] 2 K.B. 88. Most public houses were subsequently excepted from the Acts by the Rent and Mortgage Interest Restrictions (Amendment) Act 1933, 23 & 24 GEo. V, c. 32, § 1(3); see also the 1939 Act, supra, n. 2, § 3(2)(a).
The Scottish Court of Session has held that a shop was not controlled, even though it was let in the same lease with dwelling quarters and at a single rent, and there was intercommunication between the two premises, where the shop was not "part" of the house. This divisibility test is perhaps more logical, but not as practical as the English rule, since it would not be of much help to the tenant in most cases to have security of tenure as to the living quarters and not be protected as to the shop.

The coverage, while it applies, extends to the whole premises: the court cannot give the landlord possession of the business portion or apportion the rent. However, the Acts cease to apply to the business portion if it is later rented separately or if the tenants sublets the residential part.

The English statute has been copied in Ireland, the Antipodes, and in a handful of the British colonies. The New Zealand Court of Appeal followed the Epsom case in a 1934 decision, and its principle was written into the 1942 statute. The first Australian regulations included mixed accommodations in the definition of "dwelling house," although shops were also controlled. The English rule was followed in a Bombay decision; but the statute was later amended to adopt a different test. Siam and Peru have followed the English practice. An early Italian statute provided that when the same building was used for commercial, office or studio purposes and for a dwelling, the latter use should be considered prevailing; but the later statutes employed a different standard.

13. Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, No. 19 of 1923, § 3(2) (ii); Rent Restrictions Act, 1946, No. 4 of 1946, § 4.
14. See nn. 20-22, infra; but see nn. 30, 31.
15. British Guiana, No. 23 of 1941, § 3(3); Gibraltar, No. 4 of 1938, § 6(2) (ii); Newfoundland, No. 45 of 1943, § 2(b)(ii); Northern Rhodesia, No. 3 of 1943, § 2.
17. National Security (Fair Rents) Regulations, S.R. 1939, No. 104, Reg. 2. These regulations were superseded by the National Security (Landlord and Tenant) Regulations, S.R. 1941, No. 275, which contained no comparable provision.
19. Act No. 3 of 1925.
20. Emergency Rent Control Act, B.E. 2489, § 5 (1946) ("House" means a construction used as an abode, regardless of whether or not it is also used for the purpose of carrying our business, trade or industry).
21. Law No. 10,222, Art. 4 (1945) (Dwelling does not lose character as such for purpose of rent law because industrial, commercial or professional activities are carried on within it).
23. See n. 48, infra.
of house rents also covers commercial accommodations which are connected to a dwelling accommodation in such a measure that they cannot be used separately without "notable prejudice."\(^{29}\)

**The Minority Rule**

The second alternative referred to above—treating mixed accommodations as *not* dwelling accommodations—has been adopted in only a few jurisdictions. New South Wales decontrolled mixed accommodations at the same time that shops were decontrolled, in 1928, and did not reestablish control until 1939.\(^ {30} \) The Victoria Act of 1938 also treated mixed accommodations as not subject to control.\(^ {31} \) Palestine in 1934 excluded from the residential rent control ordinance "any part of a building let together with any part of a building used for professional or commercial purposes."\(^ {32} \) Canada put mixed accommodations (a structure or part of a structure used for combined business and dwelling purposes, where the rent is not apportioned) under the commercial rather than the residential regulations.\(^ {33} \) The 1946 law in Rumania provides that a building of which part is used as a dwelling and the rest for trade or industry, shall be regarded as entirely commercial.\(^ {34} \)

**The 'Predominant Use' Rule**

The "predominant use" test is probably more scientific and sensible than the other two tests which have been discussed, although it is less easy to administer. Under this standard, whether premises are to be treated as residential or commercial depends upon the "main" or "predominant" or "principal" use of the premises. Sometimes a separability test may also be employed, although this is not always true.

The predominant use standard was employed by the Office of Price Administration from the start. In an interpretation issued in July 1942,\(^ {35} \) the Office stated that

"In determinations as to the extent of control of property used for both dwelling and business purposes, two tests are to be

\(^{29}\) Arreté du Conseil Fédéral, Oct. 15, 1941, Art. 12, as amended by Arrêté of Feb. 8, 1946.
\(^{30}\) No. 37 of 1939, § 3(1)(c); (d).
\(^{32}\) No. 11 of 1934, § 2. See n. 44, infra.
\(^{33}\) Wartime Prices & Trade Board, Order 294, § 1(c)(iv); Order 315, § 1(b)(iv). Order 315, on commercial rents, was revoked as of March 8, 1948 by Order 772 (Oct. 24, 1947).
\(^{34}\) Law No..330, Art. 7 (1946).
\(^{35}\) Interpretation 1(a)—I (originally issued as a Regional Rent Memorandum on July 24, 1942).

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used: First, are the business and dwelling portions separable, and, second, if they are not, what is the predominant use? If the business and dwelling portions are separable, only the dwelling portion is subject to the Regulations. If they are not separable, then either both portions are subject to the Regulations or neither is controlled. The result under such circumstances depends upon predominant use."

The interpretation went on to state that accommodations are separable if they are in separate structures, or if they are in the same structure but there are separate means of access, the dwelling portion can be used as such without need for access to the business portion, the use of the business portion does not require access to the dwelling portion, and the dwelling portion is, or can readily be, completely shut off from the business portion. Even if all these tests were not met the premises might be found separable if it was very clear that, "by the standards and practices of the community," it was feasible for the tenant to occupy the dwelling portion while the business portion was being used by another. When the premises were not separable, the predominant use test came into play.

"The initial test of predominant use is to be made on a space basis. If a predominant part of the space is used for business purposes, the property is not subject to the Regulation. Where less than a predominant part of the space is used for business purposes (and also where the space test cannot be used because there is no physical segregation of the space used for business purposes and that used for dwelling purposes), a second test of predominant use, in terms of rental value, is to be used. If the rental value of the business portion (or of the business use, where the two uses are not physically segregated) is clearly in excess of the rental value of the dwelling portion, the property is not subject to the Regulation; otherwise it is subject."


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These tests were applied by the OPA in a number of cases and were generally followed by the courts. Before the tests can even come into play, however, it must be shown that there is a commercial use; where premises were used solely for dwelling purposes, with the knowledge and consent of the landlord, it was immaterial that part could have been used commercially or that the premises may have been rented for combined commercial and residential use.

The "predominant use" test has been applied, in various forms, in a considerable number of jurisdictions. In the British West Indies and Malta the standard is whether the accommodations are used "mainly" as a dwelling. The South Australia Act of 1942 applies to "any premises a substantial part of which is leased for residence and the rest for a shop, storeroom, workshop, stable, etc." The Bombay Act was amended in 1925 to apply to premises used "wholly or principally" as a dwelling-house. The Nigeria and Gambia ordinances of the 1920's applied to a dwelling also used by the tenant for trade if no substantial part of the rent was payable in respect of the portion so used, and this was copied in the Palestine ordinance of 1940. In the Straits Settlements, the court (later the board) decided whether any particular house was let chiefly for business, trade or professional purposes, and hence not controlled, considering the nature and importance of the business, trade or profession. The Portuguese Supreme Court held in 1922 that the question was determined by the nature and use of the most important or most lucrative part of the building; a 1946 decision held that a house let for use as a dwelling and a "casa de passe" was

40. Trinidad, No. 34 of 1933, as amended by No. 36 of 1939, § 3(5); No. 13 of 1941, § 2; Antigua, No. 5 of 1942; § 2; Dominica, No. 19 of 1942, § 2; Jamaica, No. 17 of 1944, § 2; St. Christopher & Nevis, No. 1 of 1945 § 2; St. Lucia, No. 3 of 1943, § 2; St. Vincent, No. 3 of 1945, § 2; Malta, No. 16 of 1944, § 2.
41. Act No. 33 of 1942, § 5 (IV).
42. Act No. 3 of 1925.
43. Nigeria, No. 8 of 1920, § 5(4); Gambia, No. 22 of 1922, § 3(3).
44. No. 44 of 1940, § 3(2).
45. No. 3 of 1921, § 2(1)(ii).
to be regarded as residential where the two parts could not be distinguished.\textsuperscript{47} The prevailing use test was employed in Italy,\textsuperscript{48} although in at least one decree it was provided that if part of a building was used for a dwelling and part for other use or if a dwelling and other premises were let at a single rent, the judge or commissar could apportion the rent.\textsuperscript{49} In Fiume, the "essentially most important object of the lease" was to be considered in determining the character of the accommodation.\textsuperscript{50} A Rumanian statute provided that in the case of premises occupied by artisans, the arbitral commission decided whether the principal object of the lease was use as an atelier or as a dwelling; if the character of a dwelling predominated, the law applied, and in any case it applied to a single room serving both purposes, and a dwelling of a worker who worked at home was not considered an atelier.\textsuperscript{51} The new Spanish rent control law, which covers both dwellings and "locales de negocio" with some variations in the provisions applicable to each, provides that a lease of a dwelling does not lose its character as such because the tenant, the tenant's spouse or a relative of one or the other within the third degree residing with one of them carries on a profession, public function or "pequeña industria domestica" in the dwelling; and similarly that a lease of a "local de negocio" does not lose its character because the lessee, his family or employees reside on the premises.\textsuperscript{52} The Belgian Court of Cassation held in 1922 that the rent laws applied although the tenant exercised a commerce or industry in the rented unit, unless it was used, if not exclusively, at least principally for commercial or industrial purposes.\textsuperscript{53} The 1923 law specifically provided that mixed accommodations should be covered only if the 1914 rent was less than a stated amount.\textsuperscript{54} The courts held that whether an accommodation was "mixed" within the meaning of the law depended on whether the tenant actually lived there
and not on whether he could,55 and that occupation by a subtenant56 or the manager of the tenant's business57 was insufficient to bring it under the law.

Where occupation is merely accessory to the business use, the premises are regarded as commercial.58

Separate residential and commercial accommodations in the same building will usually be treated separately for purposes of determining maximum rents.59

**Rooming Houses**

Underlying leases of rooming or boarding houses present a special problem. As between the landlord and the main tenant, is the lease one for business or residential purposes? Courts in the United States and in Great Britain and other parts of the British Empire have generally held that the letting is a residential one.60 Only a few decisions take the contrary view.61

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57. Petitjean c. Delhaise Frères et Cie., Pas. BeIge 1923 III 95 (J. P. Anderme, April 18, 1923).
59. Italy D.L.L. 669, Art. 5 (1945); Venezuela, Decree 184 (1946). See Ridolfi v. Benton, 58 A. 2d 723 (D.C. Mun. App. 1948) (barber shop on first floor and apartment on second floor were not a single unit where they were capable of being used separately and in fact had been).

In some of these cases the main tenant lived on the premises, in other cases he did not.

61 Curtis v. Devlin, [1942] N.Z.L.R. 197 (Sup. Ct.); Kirkland v. Anderson, 36 Mag.Cc.Rep. 41 (N.Z.Mag.Ct. 1941) (house let as a boarding or apartment house not covered even though only tenant and relatives actually lived there); In re Kleckner & Lane, [1944] 3 W.W.R. 43 (Sask.Dist.Ct.) (tenant sublet the entire house to various subtenants; one subtenant bought the house and evicted the tenant on the theory that the accommodations were commercial); Mazloum

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"MIXED ACCOMMODATIONS"

INTERVENTION OF THE PARTIES

Whatever test is followed, the intention of the parties must be given weight. Mixed accommodations can be regarded as residential only if the parties contemplated occupancy by the tenant as a dwelling, and business premises cannot be brought under residential rent control by an unauthorized use for dwelling purposes. As an English judge has said, "If an agreement were to let premises as a barn, the tenant though he lived there could not be heard to say that they were let as a dwelling-house." Thus, where premises are rented as business premises, the tenant cannot by living in them without the landlord's knowledge or consent change their status or bring them under residential rent control. Where the lease is silent as to user or permits either residential or business user, the actual use by the tenant is determinative. If the landlord knows of the residential use and consents to it, or fails to object, the premises will be considered as residential.

v. Froment, 10 Gaz. des Tribs. Mixtes d'Egypte 84 (Trib. des Référes, Cairo, 1920) (law does not apply to a tenant who having rented an apartment for personal habitation has installed a pension).

In Tompkins v. Rogers, [1921] 2 K.B. 94, the court held that premises occupied by the tenant and used for taking in lodgers were being used for business purposes. However, business premises were controlled at that time and the effect of the decision was to protect the tenant. The case was distinguished in Collins v. Parham, supra n. 60.

62. "The important matter is the rights under the lease, not the de facto use." Barrett v. Hardy Bros. [1925] 2 K.B. 220, 227.

63. Epsom Grand Stand Assn. v. Clarke, as reported in (1919) W.N. 170.


65. Gidden v. Mills, [1925] 2 K.B. 713; Shooter v. Gaitley, 80 S.J. 74 (1936); Glasgow Abstainers Union v. Forman, [1930] Scots L.T. (Sh.Ct.) 17; In the Matter of Paul R. Salomon, 4 Pike & Fischer OPA Op. & Dec. 3052 (OPA 1946); cf. Charmet c. Doye, Sirey Rec. Gen. 1921 II 4 (Comm. Sup. Cass. March 17, 1921) (even though lawyer's office and living quarters, while located in same building, are susceptible of being distinguished and of forming separate lettings, commission can grant tenant extension of lease appropriate to professional accommodations when intent of parties was that the accommodations formed a single letting for one rent and for the same term). Pickfords v. Wheeler, Est. Gaz. Feb. 7, 1948, p. 117 (County Court) (premises let under agreement whereby tenant agreed to use them "solely in connection with his business" as a dentist were nevertheless controlled since he could live there).