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101 Md. 621, 61 A. 203, 4 Am.Ann.Cas. 1005

Court of Appeals of Maryland.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**
v.
LATROBE et al.
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v.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**.
June 22, 1905.

Appeals from Baltimore City Court; Henry Stockbridge, Judge.

Proceeding by the mayor and city council of Baltimore against Ferdinand V. Latrobe and others, as trustees for the condemnation of certain property for park purposes. From a judgment awarding compensation, both parties appeal. Reversed.

West Headnotes

Eminent Domain 148 ⚿155
148k155 Most Cited Cases
Where a portion of a city lot subject to an irredeemable ground rent under a lease for 99 years, renewable forever, was taken for public use, the fact that the portion not taken was sufficient security for the rent charge did not establish that the owners of the ground rent were not entitled to compensation.

Eminent Domain 148 ⚿155
148k155 Most Cited Cases
Where a city lot having a frontage of 28 feet and a depth of 123 feet was taken for public use, except the rear 33 feet thereof, which lot was subject to an irredeemable ground rent of $300, under a lease for 99 years, renewable forever, and it appeared that the value of the ground rent on the entire lot, ascertained by capitalizing the $300 at 3 per cent., was $10,000, and that the value of the ground rent on the land not taken, ascertained by capitalizing it at 4 per cent., was $7,500, and that the value of the remaining lot after the construction of the improvement for which the land was taken would be $15,000, the ground rent should be apportioned, and the owners of the rent charge awarded such part of damages for the land taken as represented the capitalized rental value of the land taken.

Argued before McSHERRY, C.J., and FOWLER, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Edgar Allan Poe, for Mayor, etc., of Baltimore.
John N. Steele, for Latrobe and others.

BOYD, J.
There are two appeals in this record, the one being by the mayor and city council of Baltimore against Ferdinand C. Latrobe and others, trustees, and the other a cross-appeal by those trustees from the rulings of the Baltimore City court. Under and by virtue of an ordinance of the mayor and city council of Baltimore, passed in pursuance of an act of the General Assembly of Maryland, being chapter 87 of the Laws of 1904, what is known as “The Burnt District Commission” was authorized to acquire for the mayor and city council of Baltimore, by various methods named in the act, including that by condemnation, the necessary property for the purposes mentioned-one being to open public squares. Provision is made for notice to those assessed for benefits or to whom damages are awarded in the condemnation proceedings, and the right of appeal to the Baltimore City court is given where the right of a jury trial is secured, and “the damages and benefits assessed by the commission to the appellant shall be open for review and correction by the said city court.” The statute further provides for an appeal to this court. Amongst other improvements proposed is a plaza along St. Paul street from Lexington to Fayette street. Included in that territory is a lot fronting 28 feet on St. Paul street, and having a depth of 123 feet,

in which the trustees have an irredeemable ground rent of $300 per annum, which we understand from the statements of counsel to be 99 years, renewable forever, on the terms usual in such leases in the city of Baltimore and elsewhere in this state, although we do not find it so stated in the record. The burnt district commission condemned 28x90 feet of that lot, leaving in the rear of it 28x33 feet. It awarded to the trustees the sum of $8,000, and provided that the ground rent be reduced to the extent of $240, leaving a rent of $60 per annum on the portion of the lot not taken. The city took an appeal, and the case was submitted to the court, without the intervention of a jury, and it found that the trustees, as owners of the ground rent, were damaged to the amount of $2,500 by being restricted to the collection of the rent to the lot of 28x33 feet-that amount being the damage to the market value of their ground rent. The city offered three prayers, and the trustees one. The first of the city asked the court to declare that, as the undisputed evidence shows that the lot of 28x33 feet is ample security for the $300 ground rent, the trustees are not entitled to recover any compensation; the second asked it to declare that the $300 rent continues upon the lot 28x33 feet, and the owners were not entitled to compensation; and the third that if the court, sitting as a jury, should find that the rent of $300 is fully secured by the lot of 28x33 feet, the trustees are not entitled to any compensation. That of the trustees asked the court to say that, in estimating the damages to them, the court, sitting as a jury, was to bear in mind that the ground rent would be reduced from $300 to $60, and that the rent of $60 would be confined to the portion of the lot not taken by the city. The court rejected all of the prayers, and each party entered an appeal to this court.

The record does not show whether the interest of the owner of the leasehold was included in the same proceeding as this, as would seem to be proper in order that their respective rights should be properly determined and adjusted; but since the argument a petition was filed in this court by James A. Whitcomb, which alleges he is the owner of the leasehold interest, and asks the privilege of filing a brief. From what is stated in that petition we infer that the proceeding was against the trustees and the owner of the leasehold interest. The latter took an appeal from the award of the commission to the Baltimore City court, and then removed it to the Circuit Court of the United States for the District of Maryland. According to the allegations of the petition, an appeal has been taken by the mayor and city council of Baltimore from the action of that court to the United States Circuit Court of Appeals, which is still pending.

It is stated in the bills of exception that the evidence introduced in the lower court tended to prove, amongst other things, that the value of the ground rent on the entire lot was ascertained by capitalizing the $300 at 3 per cent. ($10,000), and that the value of the ground rent ($300) on the 28x33 feet could be ascertained by capitalizing it at 4 per cent. ($7,500), thus lessening the market value to the amount of $2,500, and that the value of the remaining lot after the plaza is constructed will be $15,000. As indicated by our reference to the prayers, the contention of the city is that the owners of the ground rent are not entitled to any damages, because the remaining lot fully secures their rent, and that on the part of the trustees ***205** is that the award of the burnt district commission followed the correct way of compensating them. The contention of the city that no damages can be allowed because the rent is amply secured by the portion of the lot not taken cannot be sustained. Passing for the present the question whether, when part of a lot is taken under the power of eminent domain, on which there is a ground rent, there can be an apportionment or abatement of the rent, we cannot understand how it can be said that the owner of the ground rent is not injured by taking nearly three-fourths of the lot included in

the lease. It cannot be denied that it is private property which cannot be taken for public use "without just compensation, as agreed upon between the parties, or awarded by a jury being first paid or tendered," to use the language of section 40 of article 3 of our Constitution. The city so recognized it by the condemnation proceedings. It may be true, and the evidence tends to so show, that the portion of the lot not taken is sufficient to secure the $300 per annum, but that is not the question. It is possible that conditions may at some time exist that will materially lessen the value of the remaining lot and make it worth less than $15,000, but, if there be no danger of that, the evidence tends to prove that it is now what is called a 3 per cent. ground rent-that is to say, by reason of the security which the lot in its entirety affords, it is worth in the market $10,000-while it will only be a 4 per cent. ground rent after the portion condemned is taken, which is only worth $7,500. The record, which is very meager, does not show when the lease was made, but, prior to the enactment of the statute prohibiting them, irredeemable ground rents were permitted in this state, and, as this is said to be one, the lease must have been executed before the statute referred to. The parties then had the right to agree upon the amount of rent to be reserved, and the quantity of land to be included, and upon what principle can the city of Baltimore, or any other corporation authorized to exercise the right of eminent domain, say that nearly three-fourths of the land included in such a lease by the contract of the parties can be taken without any compensation to one of the contracting parties? It might under some circumstances be very small, or the benefits authorized to be assessed might be equal to the damages awarded, but surely it cannot be said that an owner of an interest in land who can obtain $10,000 for it is not entitled to any compensation when it is shown that his interest will only be worth $7,500 after the public takes what it wants. In Mayor, etc., of Baltimore v. Rice, 73 Md. 307, 21 Atl. 181, this court had under consideration the question of compensation to a lessee, whose lease was only for a year at a time, in a proceeding relative to the opening of a street. It was there said: "In this state no man's property can be taken for public use before he is paid the value of it. The evidence tended to show that Rice's brickyard, though held by a precarious tenure, had a large market value. A thing is worth what it can be sold for. *** It is not a question of the permanency of his title to real estate, but of the salable value of such interest as he had." We cannot close our eyes to the fact, which is frequently before us, that ground rents, especially in Baltimore City, are constantly being sold, and have market values (resembling somewhat those of bonds and stocks) depending upon the manner in which they are secured and the length of time they are to continue. As under our system the taxes are paid by the owner of the leasehold interest, when well secured they are in demand, and frequently realize prices far beyond what they could have been capitalized at when the leases were originally made. We do not doubt the correctness of the rulings of the court in rejecting the prayers offered by the city.

The remaining, and, we must confess, somewhat difficult, question is, what rule shall prevail in this state, where the system of ground rents is peculiar, when a portion of a lot subject to an irredeemable ground rent, renewable forever, is taken under the power of eminent domain? When the entire lot included in the lease is taken, the question is one of comparatively easy solution; but when, as in this case, only a portion is condemned, many difficulties are suggested, and it is not easy to adopt a general rule that will always do full justice to the condemning party, the owner of the fee, and the leaseholder. The condemning party, as a rule, ought not to be required to pay for the two interests more than the portion taken would be worth if owned by one person. It is said in Lewis on Eminent Domain (2d Ed.) § 483: "When there are different interests or

estates in the property, the proper course is to ascertain the entire compensation, as though the property belonged to one person, and then apportion this sum among the different parties according to their respective rights." In Gluck v. Baltimore, 81 Md. 320, 32 Atl. 515, 48 Am.St.Rep. 515, this court, through Judge McSherry, said: "The owner of the leasehold and the owner of the reversion together hold the fee-simple estate. Each has a distinct estate or property. 'The interest of a termor, in the eye of the law, is just as potential as that of the owner of the fee, although, in fact, it may not practically be so valuable. B. & O.R.R. v. Thompson, 10 Md. 87.' " And, after stating that such interests are protected by article 3, § 40, of the state Constitution, Judge McSherry added: "Whatever be the method of ascertaining the values of these distinct interests, it is evident that the sum of those values must be the full value of the property taken." The method of determining the amount which the condemning party ought, as a general***206** rule, to be required to pay, is therefore quite well settled, although there may be exceptions to that rule, as indicated below; but whether the general rule applies or not, the question still remains, how are the damages to be apportioned between the reversionary and leasehold interests? In considering that, it may not be out of place, before citing authorities on the subject, to endeavor to ascertain the practical results from the several methods adopted.

If the whole lot is worth $60,000, and the part left is worth $15,000, prima facie that taken should be valued at $45,000 as the damage to the two interests; but still the inquiry is, how much to each? If the method adopted by the court below is followed, the reversioner would be entitled to $2,500, plus the whole rent on the remaining lot, and the leaseholder to $42,500 of that fund; and if the remaining lot is worth $15,000, and there is a 4 per cent. ground rent on it for the whole rent ($300), then each of them would have a value of $7,500 in that, thus making the leaseholder's interest in the whole, including the damages paid him, $50,000, and the reversioner's interest $10,000. If, on the other hand, the reversioner is paid $8,000 out of the $45,000, there would be left for the leaseholder $37,000, and as his rent would be reduced from $300 to $60, if the latter be capitalized at 3 per cent. ($2,000), the leaseholder would have an interest in the remaining lot worth $13,000, which, added to the damages received by him, would be $50,000-the same that he would have by the other method, the only difference being that by the first method he would receive more cash, and by the latter have a larger interest in the remaining lot.

We do not overlook the fact that, although the reversioner's interest may be worth $10,000, the capitalization at 3 per cent. in the market, still the leaseholder might say that he could sell his interest on a basis that would allow a capitalization of the rent at the rate of 4 per cent., for example, and hence the leasehold in the whole lot would be worth $52,500, instead of only $50,000. But it is impossible to provide by a general rule for all contingencies in such cases, and, after all, it is for the jury to determine what their respective interests are worth; and we are therefore of the opinion that owing to the peculiar character of this class of property, if it be proven that the reversioner's interest was worth $10,000 and the leaseholder's $52,500, the latter sum could be allowed, although the whole property, if no ground rent had been on it, would only have been worth $60,000. We say that because each is entitled under the Constitution to be compensated in damages for the amount of his interest taken, and, if it be true that the values of the two interests are more than what the lots would be worth if owned by one person, the necessities of the case require an apparent exception to the general rule announced above as to what the condemning party must pay. It was said in Gluck's Case that "the owner of each separate interest has

the constitutional right to be fully compensated before his estate can be lawfully taken for a public use," and as the two interests are not only distinct, but may be somewhat conflicting in a case of this character, we must, in order to do justice to both and to comply with the requirements of the Constitution, recognize an exception to the general rule. Indeed when a piece of property which is subject to an ordinary lease for a short term is taken, it may happen that, although the owner of the fee is allowed full value for the property, the tenant must also be paid a large and substantial amount in addition by reason of the value of his lease. But the jury or other tribunal authorized to make the award should always keep the value of the entire property in mind, and should limit the whole amount to be paid to that value, unless it is clearly shown that the lessee is entitled to more than the difference between what they allow the reversioner and what the whole property would be worth in the market if there had been no ground rent.

The reversioner is undoubtedly entitled to what his interest is worth in the market, and prima facie the leasehold is charged with that value. Of course, we are aware that the market values may vary according to the conditions of the money market and other circumstances; but so will the leasehold interest vary, and the jury must be governed by the values of each at the time. We have seen that the leaseholder practically gets the same compensation whether the one or the other of the two methods above mentioned be adopted, but it is manifest that this may not be so with the reversioner, or possibly with others. If all but a few feet or a few inches of a lot be taken (not being enough to secure the whole rent), while the compensation in cash allowed might be correspondingly increased over what he is allowed when the remainder of the lot is sufficient to secure the ground rent, still placing the whole of the rent on the part not taken might work great injustice. In the first place, the original lessee would still be liable for the rent under his covenant in the lease, notwithstanding he has assigned it, for the owner of the fee can proceed against the original lessee by virtue of his covenant, or against the present holder of the lease by reason of his privity of estate, Hintze v. Thomas, 7 Md. 346, and many other cases, so deciding. As irredeemable ground rents were not prohibited in this state until 1884, it is readily seen that there may still be a great many persons living who entered into covenants to pay the rent in such leases made prior to that time, and, indeed, there may be many lessees who entered into covenants in leases made since that date, who have assigned them, but could only relieve ***207** themselves of the covenant to pay by redeeming the rent under the act of 1884, 1888, or 1900 (according to the dates of leases), now codified in Code Pub.Gen.Laws 1904, art. 53, § 24.

If the original lessee be dead or financially irresponsible, and the lease be assigned to some one from whom the rent cannot be made, the reversioner cannot recover, and, if the remainder of the property be insufficient, he would in many cases be without any effective remedy, and yet it might in some cases affect the amount he would receive out of the damages allowed, if such a rent is still to be retained by him. If it does not so affect it, then the leaseholder might suffer, for the amount paid to the reversioner might be considered in allowing compensation to the leaseholder, and he would still be liable for the whole rent as long as there was privity of estate, if he was an assignee, or as long as he was financially responsible, if he was the original lessee. It would seem, therefore, that the more equitable method would be to apportion or abate the rent, if that can be done, and hence we will now determine that precise question.

It was said at the argument that the case of Gluck v. Baltimore, supra, was thought by the lower court to settle it, and it is so contended by the city

solicitor, as well as by the counsel for the leaseholder in the brief filed by him. It must be conceded that that case does give considerable ground for that contention; but when it is limited, as all decisions must be, to the facts and conditions shown to there exist, it is by no means conclusive of what is now before us. Gluck was the owner of a leasehold interest, under a lease executed on April 14, 1885, for 20 years, which was not renewable. When it was heard in this court, 10 years of the term had expired, and the intention of the parties is very clearly indicated by the terms of the lease that the lessee's interest should cease at the end of the term, and it was provided that a building to be erected by the tenant should become the property of the lessor at that time. The tenant was even prohibited from assigning or subletting the premises without the consent in writing of the lessor. The rent reserved was $1,000 per annum, payable monthly. When, therefore, the city of Baltimore took the front part of the premises, including a portion of the building and an elevator, it was an easy matter to determine the loss to the tenant for the 10 or 11 years he still had the right to the property, and the damages sustained by him to the buildings, and the injury to the fee could be determined without difficulty. The latter belonged to the lessor, and at the expiration of the lease he was to get the property back, diminished by what the city took. He was the substantial owner, and the lessee only had an interest until the end of his term (1905). But in the case of an irredeemable ground rent, such as this, where the owner of the fee only has an interest of $300 per annum in rent, and such covenants as are contained in the lease, which are usually to pay the rent, taxes, etc., the owner of the leasehold interest is the substantial owner of the property. In Holland v. Baltimore, 11 Md. 186, 69 Am.Dec. 226, it was held that the reversioner of a 99-year lease, renewable forever, was not even such owner or proprietor as was authorized to sign a petition to have a street paved, but the leaseholder of such a lease was the party who must sign for the lot so leased. Any enhancement in value inures to the benefit of the latter. He, his personal representatives and assigns, have a perpetual interest in the property, which can only be affected by a failure to pay the rent or comply with some covenant, and are entitled to a renewal at the expiration of every 99 years on payment of a small renewal fine. Much of the most valuable property in the city of Baltimore is subject to such leases, and in some instances they have proved to be a serious injury to property, and a consequent detriment to the city, so much so that the Legislature, beginning in 1884, has passed statutes providing that leases for more than 15 years can be redeemed on the terms mentioned in the statutes. In no other state in this country has the system been adopted to such an extent as it is here, unless possibly in Pennsylvania. Although we and our predecessors have from time to time applied many of the same principles to such leases as are applicable to short leases, no such question as that now before us has been passed on by this court when such a lease was involved.

The expressions used in the Gluck Case, on page 322, 81 Md., page 516, 32 N.E., so much relied on in this, were quoted from Dyer v. Wightman, 66 Pa. 427, where the court was considering an ordinary lease for five years, and hence one of the character before us in Gluck's Case. It was there said that “nothing but a surrender, a release, or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant to pay rent (Fisher v. Milliken, 8 Pa. 111 [49 Am.Dec. 497])”; that it still remained if the premises were wrongfully entered by a disseisor and the tenant dispossessed for his entire term, even by a military force of a public enemy, or if the premises were destroyed or rendered untenantable by fire, floods, etc.; and that it was also settled that a taking under the right of eminent domain was not an eviction. Dyer v. Wightman was an action of debt for two years' rent. A Mrs. Smith

had leased a lot to Dyer, who rented a part to Wightman. A railroad company condemned the whole of the lot, and the viewers awarded Mrs. Smith $10,000. The report of the case does not distinctly show what, if anything, was awarded to Dyer, the lessee of Mrs. ***208** Smith and lessor of Wightman, but the reasoning of the court would seem to indicate that something was. The court (Sharswood, J.) said that, conceding that at law the tenant would still be liable for the rent, in equity he would not be, and, as all courts in Pennsylvania proceed upon principles of equity, the plaintiff could not recover. It was said that a tenant would be entitled to be indemnified against the rents payable during his term; that if they are deducted from the damages allowed the lessor, and paid to the lessee, in equity that money belonged to the lessor, and it would be decreed to be paid to him; that, "the damages awarded thus taking the place of the land, the relation of landlord and tenant is extinguished, and all covenants growing out of that relation are necessarily at an end." Judge Sharswood, after announcing the above doctrine, added: "We believe the rule for the measure of damages, when lessor and lessee have claimed compensation for land taken for public use, has always been in this state that which we have herein propounded." It will therefore be seen that although that court fully recognized the common-law rules governing the relation of landlord and tenant, yet, even in a case of a lease for five years, when all of the lot that was useful to the tenant was taken by condemnation, and the landlord was deprived of recourse to the land and thrown upon the personal responsibility of the tenant, the money awarded to the tenant to meet the payments of rent in futuro in equity belonged to the lessor. The court further said: "If a chancellor would regard the damages awarded to the tenant to indemnify him against his covenant to pay rent as in equity the money of the landlord, and decree it to be paid to him, a jury of view to assess damages ought at once to award it to him." The court cited with approval the two cases which we will next refer to. In Voegtly v. P. & F.W.R.R. Co., 2 Grant, Cas. 243, there was a perpetual lease, and a railroad company condemned a part of the land, but the owner of the ground rent was not a party to the proceeding. The viewers fixed the value of the land appropriated and made it subject to a ground rent of $180 per annum, being part of that reserved on the whole property, which was to be assumed by the corporation condemning, it being capitalized at $3,000. The damages were paid to the lessee. The reversioner filed a bill to restrain the railroad company from using the road until said sum of $3,000 was paid, and asked the court to decree an apportionment of the principal of the ground rent. The court refused the relief because the proceedings were not against him and he was not affected by anything that was done, but in the opinion it was said: "A ground rent, being a rent service, and not a rent charge, is undoubtedly apportionable, and may be partially released without extinguishing the whole; and, if part of the ground be taken for public use of a highway, equity will apportion the rent in relief of the tenant, compensating the ground landlord out of the damages awarded." Cuthbert v. Kuhn, 3 Whart. 357, 31 Am.Dec. 513, the other case mentioned by Judge Sharswood, also involved a ground rent. There a street was condemned over part of a lot in the city of Philadelphia, and damages were awarded to the landlord and tenant respectively. The tenant filed a bill in equity for an apportionment of the ground rent. It was conceded that the residue of the lot would be sufficient for the entire rent, but it was held that the ground rent was apportioned by the opening of the street, and that the rent was reduced in proportion to the amount of the lot taken for the public use. Chief Justice Gibson said: "In proportion as the enjoyment is curtailed without the tenant's default, so is the rent to be; and as by the contract, which could be remodeled only by common consent, every part of the rent is to issue out of every part of the ground, the landlord could

not concentrate the whole of it on a particular part, and how can we treat the subject as if he might? *** By the contract, however, the consideration of the rent is not to be money, but land, for which the tenant is not bound to accept an equivalent." A decree was passed that the complainant was entitled to an apportionment of the ground rent, and so much should be extinguished as would be in just proportion to the part of the lot taken. It directed a trial at law upon the issue, how much of the ground rent had become discharged by the opening of the street, and what part should remain on the rest of the lot? In Workman v. Mifflin, 30 Pa. 362, it was said that a ground rent was not apportioned by taking part of the lot for a public highway. This was an action of covenant for the rent. The tenant of the land had received its full value in damages, and therefore neither in law nor equity was discharged from his personal covenant to pay the rent. Justice Sharswood said in Dyer v. Wightman that that case did not in any way overrule Cuthbert v. Kuhn, which he fully adopted and relied on. It may be said that in Dyer v. Wightman the whole lot was taken, but in a later case (Uhler v. Cowen, 192 Pa. 443, 44 Atl. 42) that court said there was no distinction by reason of the fact that only part was taken. In Barclay v. Picker, 38 Mo. 143, the court held that a lease became void by a condemnation, and rent could not be recovered. See, also, Board v. Johnson, 66 Miss. 248; David v. Beelman, 5 La.Ann. 545; Gillespie v. Thomas, 15 Wend. 464; Corrigan v. Chicago, 144 Ill. 537, 33 N.E. 746, 21 L.R.A. 212; Mills on Eminent Domain, § 69. In Lewis on Eminent Domain (2d Ed.) § 483, that author cites a number of cases on each side of the question (including Gluck's Case, as against the doctrine), and states that: "Undoubtedly***209** the conclusion which is practically the most satisfactory, and which can be applied with the least injury to the parties, is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may be. Under the opposite rule there is handed over to the tenant a portion of the damages which is the equivalent of the rent to be paid, and the landlord may lose his rent by the insolvency of the tenant or otherwise, or be put to a suit in equity to have the fund impounded for his benefit." Again, he says: "While the taking of the premises for public use is not a destruction of land in the literal sense, it is a destruction of the right and title of the parties in and to the land. While it is not an eviction by paramount title, it is an eviction by paramount right. A very slight modification or extension of the rules referred to will be sufficient to make them embrace the case of a taking for public use."

Without meaning to in any way question the conclusion reached in the Gluck Case, or now to adopt the principles established in some of the authorities above cited which we declined to follow in that case, we cannot extend the doctrine there announced to a case such as this. In the first place, while neither the report of the case nor the record shows the exact amount taken from Gluck, it is apparent it was relatively a small portion of the whole lot, which was about 90 feet deep, while in this case nearly three-fourths of the lot was taken. That will injuriously affect the lot very materially, for it does not require evidence to show that the uses of a lot 28x33 feet must be very much limited as compared with those of one 28x123 feet. Even in states where the courts have held that rent cannot be apportioned when a part of a lot is taken, it is generally decided that the taking under the power of eminent domain of the whole lot extinguishes the rent, and lessor and lessee must be paid for their respective interests. Corrigan v. Chicago, 144 Ill. 537, 33 N.E. 746, 21 L.R.A. 212, cited in Gluck's Case, so holds, although in that state an apportionment for a part taken is not allowed, and Foote v. City of Cincinnati, 11 Ohio, 408, 38 Am.Dec. 737, is there referred to as the only case cited to show that the rent is not extinguished when the whole lot is condemned. In O'Brien v. Ball, 119 Mass.

28, the same doctrine is announced, while, in other cases in that state, apportionment, when part was taken, was denied. So in Taylor's Landlord & Tenant, § 519, the same view is taken, while in Wood's Landlord & Tenant (2d Ed.) 1098, it is said that, to constitute an eviction, "the act complained of must proceed from the landlord himself, or some person acting under his authority, or by or through him, or from the exercise of some legal right by state or municipal authorities, and must be such as deprives the tenant of the beneficial enjoyment of the whole or a part of the premises." It was said in Board v. Johnson, supra: "It is difficult to perceive how the quantity of the estate taken can vary the relations of the parties, since in the one case, as the other, the act is the act of the state." If, however, the part taken be so small in proportion to the whole as not to materially affect the use of the property which could be made of it in its entirety, then all that the lessee and lessor can reasonably ask is compensation for that taken. If a tenant rents a farm of 100 acres for a term of years, and a railroad company condemns a few acres for a right of way, there is no urgent reason for extinguishing the lease or apportioning the rent, and the damages sustained by lessor and lessee can be readily determined and compensation paid. So, as in the Gluck Case, if one rents for a limited term a house and lot in a city, and a small portion is taken, and the remainder can still be used for the purposes originally intended by the tenant, all that he can reasonably demand is to be compensated for his damages, and there is no necessity or occasion for the law to further interfere with the lease. But if a lot is leased that is well adapted to the purposes of an ordinary-sized store, an office building, or some such use, it would work great injustice to the tenant to take three-fourths of it for the public use and require him to pay the same rent that he formerly had paid. If the rent corresponded with the present value of the property, it would in many cases be a prohibition on his selling the remaining lot, as no one would buy it, and subtenants would hesitate to occupy it. It is no answer to say that it is shown that the remaining lot in this case is ample security for the rent, for if it be a legal principle, which cannot be departed from, that an apportionment of rent cannot be allowed when part of leasehold property is condemned, what difference does it make that the residue is still sufficient to secure the rent? If it be admitted that it can be apportioned in some cases, that establishes the fact that the rule is not without exceptions, and we think this is one, because the amount taken from this lot is such as to radically change the uses that can properly be made of it, and nothing short of an apportionment can do full justice to all persons concerned.

But there is an additional and still stronger reason which shows that this is not the character of case that the general rule, announced in the Gluck Case, should be applied to. We have already referred to some of the qualities of a lease of this kind. Unlike ordinary leases referred to in the authorities establishing the general doctrine, the leasehold interest is frequently, not to say usually, by far the most valuable of the two interests in such perpetual leases, as are peculiar to this state (with the possible exception of Pennsylvania). The leaseholder, as we have said, is the substantial owner of the property. All that the owner of the ground ***210** rent is concerned about is that his rent is secure, and in the great majority of leases made years ago in Baltimore it is secure whether the property is improved or not, as they were made when the value of the ground was much less than it is now. Some of the most valuable property in Baltimore is held by subleases. A. leased to B. a large lot, B. to C. part of that, and C. to D. a part of that, and so on. Some of the cases that have been before us from time to time show how confusing and injurious it may be to continue the whole of the original rent when a part of the property originally leased is taken. A ground rent is a rent service, and hence

not only can be apportioned, but will be so regarded, if the lessor accepts a surrender of part of an entire lot (Ehrman v. Mayer, 57 Md. 612), or, if he grants part of the reversion (Worthington v. Cooke, 56 Md. 51), acquiescence by the owner of the reversion in the apportionment of the rent will sometimes be presumed although there is no record evidence of it, as shown in Connaughton v. Bernard, 84 Md. 577, 36 Atl. 265, and Barnitz v. Reddington, 80 Md. 622, 24 Atl. 409, and other instances might be cited to show the tendency of this court to sustain apportionments of rents when the circumstances permitted such a conclusion. And when the state, or a municipality or other corporation authorized by the state, takes a part of a lot subject to such a lease as this, under the power of eminent domain, there is no reason why the rent should not be apportioned when the circumstances require that, in order to do full justice to all parties.

Certainly the reason assigned in the brief of the leaseholder cannot be sustained. It is contended that it would impair the obligation of the contract made between lessor and lessee, but how can it have that effect, by paying the reversioner the value of his interest taken and correspondingly reducing the rent of the leaseholder, in addition to compensating him for his loss, any more than, if as much as, by requiring the leaseholder and his assigns to perpetually pay the same rent for one-fourth of the ground contracted for as he was required by the contract to pay for the whole. In order to do justice to both, the original contract made by the lease must be affected in some way. The reversioner can no longer have the security the lessor and lessee contracted he should have; the leaseholder can no longer have all the land the lease called for. They never agreed that the rent should be "concentrated," to use the expression of Chief Justice Gibson, upon the rear fourth of the lot. But some change is the necessary result of the exercise of the power of eminent domain reserved in the state for itself, or those upon whom it is authorized to bestow it. Every owner of property holds it subject to that higher right. The individual must yield to the public good, and all he can ask or demand is that he be duly and fully compensated for his loss. We are of the opinion, therefore, that in this case the rent can and should be apportioned.

Under our system these is no reason why this cannot be done by the commission, jury, or whoever is authorized to award the damages, subject to the review of the court, which can see that it is properly and fairly done. For, although the proceeding is not on the equity side of our courts, when damages are to be awarded for property thus taken, regardless of the wishes of the owner, equitable principles can and should be applied. The effort should always be to place an owner of land in as favorable a position as he occupied before, so far as that can be done by the compensation to be awarded him. Our decisions show that although the jurisdiction conferred on our courts in condemnation proceedings is special and limited, yet great latitude is given them to fully and properly dispose of all questions that are within that jurisdiction. The right to review and correct the award of damages and the assessment of benefits is expressly provided for by the statute now before us, and the courts usually have such powers in this class of cases. There can therefore be no reason why they cannot apply equitable principles when the circumstances require it, in order to do full justice to the parties, as we are of the opinion they do in this case. It is not for us to determine whether the amounts fixed by the burnt district commission are correct, but the method pursued by them was the proper one. We must therefore reverse the rulings of the court below.

Rulings reversed, and cause remanded for further proceedings in accordance with this opinion; the mayor and city council of Baltimore to pay the costs.

Md. 1905.

City of Baltimore v. Latrobe
101 Md. 621, 61 A. 203, 4 Am.Ann.Cas. 1005

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