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THE MARYLAND GROUND RENT—MYSTERIOUS BUT BENEFICIAL*

By FRANK A. KAUFMAN**

Some questions are often asked and seldom answered. Baltimore has its share of these: What is the ground rent system?¹ Where did it come from? Of what importance is it? Has it any connection with the many rows of red-brick houses and white steps by which Baltimore is so often remembered by passing motorists?

These problems until recently were mainly of interest to lawyers, real estate men, and investors of Baltimore and the immediate vicinity; but with the advent of such Federal agencies as the Home Owner's Loan Corporation and the Federal Housing Administration, they have also become important to the men charged with the local administration of those agencies. Some of these men who are not Baltimoreans are rather bewildered by the intricacies of the ground rent system. Thus, it seems particularly appropriate at this time to investigate some of the habits of the ground rent animal.

* The author, while taking full responsibility for the views expressed, wishes to express his deep appreciation to the following men for their assistance: Professor A. James Casner, of the Harvard Law School, under whose direction the paper was originally prepared in a research course in that School; Hon. Oscar Leser, of the Baltimore City Bar, who not only read the manuscript and offered most helpful and constructive criticisms, but also made available his personal collection of ground rent data; and Messrs. Joseph S. Goldsmith, Louis J. Jira, R. Dorsey Watkins, J. Charles Gutberlet, and George Gump of the Baltimore City Bar, all of whom read all or parts of the paper and offered valuable criticisms.

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¹ The Maryland ground rent system is centered mainly in Baltimore City and the adjacent counties. Lewis, *The Taxation of Maryland Ground Rents* (1939) 3 Md. L. Rev. 314, 316, n. 8. However, there are a few ground rents in other parts of the state. See *Anderson v. Power Co.*, 162 Md. 501, 160 A. 286 (1932) involving several Port Deposit (Md.) ground rents.

What ground rents were up to and including the year 1883 has been set forth by Lewis Mayer in his book, *Ground Rents in Maryland*.² This 1883 treatise is the only entire text devoted to the subject, despite the fact that the 1940 ground rent is a very different animal from its 1883 ancestor. Why Baltimore has innumerable rows of similar houses has often been attributed to the ground rent system³ despite the fact that row houses are just as prevalent in other large eastern cities.⁴ It is true that the Baltimore rows and ground rent system developed hand in hand, but Baltimore would seemingly have had its red brick houses without its ground rents.

Ground rents are mysterious beings. A recent writer has remarked that he "long labored under the impression that they popped out of the ground in the spring, only to dash back again in terror of their own shadow."⁵ Actually, a modern day ground rent is a first cousin to a purchase money mortgage. That the ground rent system in its present day form is an exceedingly beneficial and useful institution is the thesis of this article.

I. ANCIENT HISTORY

At common law, rents were classified and distinguished according to the method of their creation. There were three types of rent—rent service, rent charge, and rent seck. If tenure existed between the owner of the rent and the tenant, and the rent was incident to that tenure, the rent was a rent service. Before the statute of *Quia Emp-tores* was passed in 1290,⁶ it was possible and customary to

² MAYER, *GROUND RENTS IN MARYLAND* (1883), referred to hereinafter as MAYER, *op. cit. supra*. For a definition of the term ground rent and a general discussion of ground rents in the United States, see 28 C. J. 834-879. Usually, the term ground rent as used in Maryland refers to the rent payable to the lessor, but sometimes the reference is to the reversionary interest. See *Ogle v. Reynolds*, 75 Md. 145, 23 A. 137 (1891).

³ Hearn, *Those Row Houses and Ground Rents*, Baltimore Sunday Sun, December 19, 1937, Mag. Sec. pp. 5, 7.

⁴ Baltimore's red rows and white steps have perhaps gained more fame than have the row houses of Boston, New York, and Philadelphia by reason of the fact that they line the streets along which pass most of the New York and Philadelphia to Washington (and vice versa) traffic and also because they are almost all of the same color and pattern.

⁵ Lewis, *The Taxation of Maryland Ground Rents* (1939) 3 Md. L. Rev. 314.

⁶ 18 Edward I, c. I (1290).

create tenure by a conveyance of land in fee as well as by the conveyance of a lesser estate. And so before 1290, whenever land was granted to a tenant with rent reserved, the tenant owed his rent along with the performance of the other feudal duties that encumbered his tenure.

One way for the lord to enforce the obligations of this tenure was to exercise the right of distress and distraint upon the chattels found upon the tenant's land. This method was open to every landlord, since before *Quia Emptores*, the right of distress was either incident to the right of seignory retained by a lord when he granted in fee, or incident to the reversion retained by a lord when he granted estates of terms of less than fee. However, when the lord granted away his seignory or reversion and kept his rent, or vice versa, tenure ceased to exist between the owner of the rent and the tenant; and the owner of the rent, having neither a right of seignory nor a reversion in the land, found himself possessed of only a dry rent called a rent seck which he could not enforce by way of distress, unless the right of distress had been expressly reserved.

A rent seck could also be created by a landowner who retained his ownership but granted away a rent on his land. Since no tenure was created between the owner and the grantee of the rent, the latter did not obtain the right of distress. The right of distress could, however, be expressly granted by the owner, and if it were so granted the rent created was termed a rent charge.

After *Quia Emptores* was passed, the reservation of a rent on a fee conveyance was no longer incident to any tenure, for no tenure was created by the conveyance. Therefore, such a rent was only a rent seck unless, by reason of the express inclusion of a right of distress in its terms, it was made a rent charge.⁷

⁷ Rent charges are today quite common in England where they are sometimes granted by the purchaser of land in part payment and where they are also used in family settlements to provide for younger sons. They are seldom seen in the United States. In effect they are merely annuities. For an example of a rent charge created in Maryland in 1861 and redeemed within five years under the terms of the grant, see Land Records in Balti-

However, all rents reserved in conveyances of estates of less than fee continued to be rent services, and it would therefore seem that present day rents reserved on terms for years would be rent services.⁸ Thus, Maryland ground rents, which are reserved on terms of ninety-nine years renewable forever, are rent services.⁹ In contrast, Pennsylvania ground rents which are reserved in fee conveyances would at first glance appear to be rents seck or rent charges. Actually, however, since *Quia Emptores* has never been in force in Pennsylvania, Pennsylvania ground rents, like their Maryland relatives, are rent services.¹⁰

more City, Liber G. E. S. 211, folio 228, (discussed in Mullen, *Some Aspects of Ground Rent Law* (1940) Baltimore Daily Record, September 28, 1940).

For a discussion of the three types of rent, see 3 TIFFANY, *REAL PROPERTY* (3rd ed. 1939) Sec. 878; 1 THOMPSON, *REAL PROPERTY* (2d ed. 1939) Sec. 276-8; 28 C. J. 835-837.

⁸ TIFFANY, *loc. cit. supra*, n. 7 and cases there cited show that the weight of authority so holds. But the Illinois court in *Penny v. Little*, 4 Ill. 301 (1841) and the Colorado court in *Herr v. Johnson*, 11 Col. 393, 18 Pac. 342 (1888) have taken a contrary position basing their view on a statement by Coke that rent service gained its appellation "because it hath some corporeal service incident to it, which at least is fealty" (Co. Littleton 142a). Remarking that fealty is non-existent today, these two courts have held rent service to be non-existent. This seems clearly wrong since in the time of Coke, rent service was one of the possible incidents of feudal tenure and so naturally was accompanied by fealty, which was an indispensable and ever-present incident of feudal tenure. But rent service was itself a feudal service and was not a service merely because it always existed side by side with fealty.

⁹ *Ehrman v. Mayer*, 57 Md. 612 (1881). *MAYER, op. cit. supra* n. 2, 15, 63, 75 ff. Whether or not a rent is a rent service is involved in determining whether a rent has been apportioned or extinguished and also in regard to the existence of the right of distress. It has been said that since Maryland ground rents are rent services, *Quia Emptores* is not in force in Maryland. Mullen, *Some Aspects of Ground Rent Law*, Baltimore Daily Record, September 28, 1940. It is submitted that this statement is based on the opinion that *Quia Emptores* abolished feudal tenures. It would seem, however, that it only abolished tenure between the transferor and transferee of a fee simple estate; it did not abolish the tenurial relationship between the grantee and grantor of a lesser estate than the grantor possessed. Powell, *Determinable Fees* (1923) 23 Col. L. Rev. 207.

¹⁰ Charles II granted to William Penn the power to grant land to be held of himself immediately and mediately of the Crown, *Quia Emptores* notwithstanding. The Charter for the Province of Pennsylvania (1681); see 5 THORPE, *AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS* (1909) 3042.

Quia Emptores has been held not in force in the State of Pennsylvania. *Ingersoll v. Sergeant*, 1 Whart. 337 (Pa. 1836) where rent reserved on a fee conveyance was said to be rent service and so apportionable. But see *Wallace v. Harmstad*, 44 Pa. 492 (1863) where it was stated that tenure was non-existent in Pennsylvania, but that a ground rent was a rent service. This case has been severely criticized on the ground that rent service can not exist independently of tenure. GRAY, *RULE AGAINST PERPETUITIES* (3rd ed. 1914) sec. 26, CADWALADER, *GROUND RENTS IN PENNSYLVANIA* (1879) Ch. 1, Sec. 183. See also 14 Am. and Eng. Encyc. of Law (2d ed. 1900) 1121-1122.

II. MARYLAND HISTORY

On June 20, 1632, Charles I granted to Cecilius Calvert, Lord Baltimore, the charter of Maryland.¹¹ By this charter, Calvert and his heirs and assigns were given as much authority as the Bishop of Durham had ever enjoyed within the County Palatine of Durham.¹²

Among the powers specifically granted by the charter to Baltimore was the authority to grant lands in fee, in tail, or in any term he desired and to have the grantees hold immediately of himself as lord and mediately of the King. That is, Quia Emptores was not to apply to the proprietary and his immediate grantees, but it was not superseded altogether. However, it has been contended that the grant to Calvert in the charter totally exempted the colony from the operation of Quia Emptores and that that statute never became part of the law of Maryland.¹³ At any rate, it is certainly clear that it did not apply to the proprietary's grants to his immediate grantees and that is the important point here.

Baltimore and his heirs and assigns became tenants in fee, under the charter, holding in common socage (or agricultural tenure), subject only to the payment of two Indian arrows every year and one-fifth of all the gold and silver found in the colony.¹⁴

Baltimore encouraged immigration to his new colony. He established a Land Office, which became the principal department of the proprietary government and through which all grants from the proprietary or later from the

¹¹ The Charter of Maryland (1632); see 3 THORPE, AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS (1909) 1677; MARYLAND MANUAL (1929) 336.

¹² A county palatine was so-called because its sovereign lord enjoyed within his palatinate the royal rights of a king within his palace. See 1 BOUVIER'S LAW DICTIONARY (8th ed. 1914) 694.

¹³ Hartogensis, *Maryland Statutory Modifications of the Common Law of Real Property* (1937) 1 Md. L. Rev. 238. But see MAYER, *op. cit. supra*, 47, 48. The section of the charter in which the Quia Emptores exemption appears is Art. 18. The Charter of Maryland: see 3 THORPE, AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS (1909) 1684.

¹⁴ The Charter of Maryland (1632) Art. 5; see 3 THORPE, AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS (1909) 1679.

State were issued.¹⁵ The proprietary at first granted only in fee, reserving to himself, his heirs, and assigns quit rents to be *perpetually* paid by the tenant and his heirs and assigns, annually or semi-annually, in acknowledgment of his tenancy and possibly also in lieu of taxation. A quit rent, according to the original English usage, was a term meaning a fixed sum of money reserved as a substitute for all indefinite services due by the tenant to the lord, since after he had paid it, the tenant was quit from all feudal services except fealty.¹⁶

The very early quit-rents were payable in wheat or tobacco, although later on they were also payable in money. The Calverts continued to grant lands up to the Revolutionary War. The grants, as in the beginning, were usually in fee but were sometimes for 99 years minus the now familiar covenant for perpetual renewal. Land Office records of such 99 year leases show that they existed at least as early as 1742 and 1744.¹⁷

These were not, however, true ground rent leases as they created only ninety-nine year terms and did not set up perpetual leaseholds. At the outbreak of the Revolutionary War, a convention of the people of Maryland took over the Government, ousted the proprietary, and abolished quit rents and all feudal rights of the proprietary leaving the immediate proprietary lessees the owners of fee simple property unencumbered by any rent.¹⁸ This action was confirmed by the Declaration of Rights of 1776,¹⁹ and by an act of the General Assembly in 1780.²⁰ It has been estimated that the annual value of quit rents to the proprietary at the time of the Revolution was 30,000 pounds. However, as the quit rents were part of the proprietary's own personal estate and he was not required to

¹⁵ MAYER, *op. cit. supra*, n. 2, 14, 15.

¹⁶ See 2 BOUVIER'S LAW DICTIONARY (8th ed. 1914) 2786.

¹⁷ Jira, *Baltimore Real Estate News*, September 1932, Vol. 1, No. 14, p. 2; *Republished February 1933*, Vol. 3, No. 2; MAYER, *op. cit. supra* n. 2, 28.

¹⁸ MAYER, *op. cit. supra* n. 2, 36-38.

¹⁹ Constitution of Maryland (1776), Declaration of Rights, Art. 3; see 3 THORPE, *AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS* (1909) 1686, 1687.

²⁰ Md. Laws 1780, ch. 18; MAYER, *op. cit. supra* n. 2, 37.

keep any public records of them, this figure may be very inaccurate.²¹

So after the Revolution, quit rents had disappeared in Maryland. But for some years previous to the Revolution, many large landowners had leased various sized strips of their holdings for long periods, just as the proprietary himself had occasionally, during the later colonial days, granted land for ninety-nine year periods. Gradually there grew up a system of annual rents and sub-rents reserved on leases for ninety-nine years renewable forever.²² These rents, known as ground rents were retained after quit rents were extinguished and were used more and more as time went on in Baltimore and to a lesser extent in the adjacent counties and in the other towns of Maryland.²³

The earliest ground rent leases on record are the Harrison leases executed about 1750 and the Fell leases executed shortly thereafter.²⁴ The form of these two sets of leases differs materially in only one respect—the covenant for renewal in the Fell leases is better phrased. A glance at a modern day ground rent lease will indicate that the present-day ground rent leases are substantially the same as the Fell leases.

Now from where did this system of ninety-nine year leases renewable forever come? It is probably impossible to give an entirely accurate answer to that question though a thorough investigation of the discussion of the

²¹ *Ground Rents in Baltimore*, 6th Annual Report of the Bureau of Industrial Statistics for Maryland (for 1897). 83. But see 1 McMAHON, HISTORICAL VIEW OF THE GOVERNMENT OF MARYLAND (1831) 192, putting the income at a smaller figure. See also, MAYER, *op. cit. supra* n. 2, 36.

²² There are also records of leases for 9,999 years, or longer, renewable forever. These are treated just like 99 year leases renewable forever. MAYER, *op. cit. supra* n. 2, 134. See *Ward v. Newbold*, 115 Md. 689, 81 A. 793, A. C. 1913A 919 (1911) where the court held that a "ground rent" does not necessarily always mean a rent reserved under a lease for 99 years renewable forever. It therefore refused to grant specific performance of a leasing arrangement using the term "ground rent" but silent on the length of the term, stating that it was lacking in definiteness.

²³ For an explanation of the objectives in the minds of the early creators of ground rent leases, see pp. 13-14, *infra*.

²⁴ MAYER, *op. cit. supra* n. 2, 49, 50. Apparently, a 1769 Fell lease was involved in *Myers v. Siljacks*, 58 Md. 319 (1882) and a 1772 Fell lease in *Banks v. Haskie*, 45 Md. 207 (1876).

Court of Appeals in *Banks v. Haskie*,²⁵ and an examination of the English and Irish cases cited therein will throw some light on the subject.

Ninety-nine year leases without covenants for renewal were customary in England. Mayer points out that the lease for a long term of years first grew into prominence in England after the passage of *Quia Emptores*.²⁶ As noted before,²⁷ the ninety-nine year lease minus a covenant for renewal was also used by the Maryland proprietary in leasing a few of his manors and reserved lands.

Sometimes the English leases for ninety-nine years included covenants for renewal. This was rarely the case, but even if they were included, the English courts were extremely reluctant to enforce them unless they were clearly expressed.²⁸ One of the best examples of an English court's dodging and squirming to avoid construing a ninety-eight year Irish lease to include a covenant for renewal is the opinion of the House of Lords in *Brown v. Tighe*.²⁹ In that case, the Lord Chancellor interpreted a rather clear covenant for renewal as a covenant for further assurance. In so doing, he traced the historical dislike of the English courts for covenants of renewal and took pains to show how rare such covenants were in England. He admitted the existence of many perpetual leases in Manchester but remarked that "there is hardly any renewal in it; it is at once by its original construction a perpetual lease, an interest resembling the Scotch feu for a fixed rent."³⁰ The Maryland Court in *Banks v. Haskie* further explained that the Manchester leases though perpetual, are perpetual by reason of the term of the original lease and not because of any covenant of renewal in favor of the grantee.³¹

²⁵ 45 Md. 207 (1876).

²⁶ MAYER, *op. cit. supra* n. 2, 48.

²⁷ *Supra circa* n. 16.

²⁸ MAYER, *op. cit. supra* n. 2, 43.

²⁹ *Brown v. Tighe*, 8 Bligh N. S. 272 (1834), cited and discussed in *Banks v. Haskie*, 45 Md. 207, 219, 220 (1876).

³⁰ 8 Bligh N. S. 272, 299 (1834). The Scotch feu is a type of tenure whereby the tenant pays in grain or money. 1 BOUVIER'S LAW DICTIONARY (8th ed. 1914), 1211.

³¹ 45 Md. 207, 219 (1876).

In *Banks v. Haskie*, the question before the court was whether a court of equity could properly grant relief to a lessee who had failed to exercise his option to renew a ninety-nine year lease renewable forever within the ninety-nine year period, but who had applied for equitable relief within a reasonable time after the expiration of the original term. The Court, holding there had been no gross laches, decreed a renewal on payment of the renewal fine, together with back rent due under the lease.³² The Court also perpetually enjoined the prosecution of the ejectment proceedings which the lessor had instituted before the beginning of the equity suit. Miller, J., in rendering the opinion, said:³³

“ . . . It seems to us quite clear that the intention was on the part of the lessor to secure the prompt payment in perpetuity of the interest on a sum of money, equivalent to the value of the property in fee, at the time the lease was made, and on the part of the lessee to acquire a perpetual interest in the leased premises, which would justify his making permanent improvements therein, and enable him to avail himself of the value of the property thus enhanced, as well as of its increase in value arising from other causes. . . . The owner of a vacant ground in a town located and about to be built up, from which he can derive in its then condition no adequate income, being himself unable or unwilling to erect the necessary buildings, instead of selling the property in fee for its then value and investing the proceeds in securities, or raising by mortgage the money to make the improvement himself, resorts to this method of deriving an income from it and making a secure and permanent investment of its value in the land itself. He makes a lease of it by which he secures the erection of improvements, which enhance the value of his property, and consequently make a permanent and safe investment of its actual

³² See relief being denied in *Myers v. Siljacks*, 58 Md. 319 (1882) because of delay and other factors. See laches as a bar in *A. S. Abell Co. v. Fireman's Insurance Co.*, 93 Md. 596, 49 A. 334 (1901). See also, Note, *Lessee's Failure to Give Notice to Renew* (1923) 27 A. L. R. 981, 991, stating that the Maryland Court has distinguished between mere neglect and wilful neglect or refusal to renew.

³³ 45 Md. 207, 217 (1876).

market value, and this is all he had in view or intended to accomplish.³⁴ The lessee is encouraged to spend his money in improvements by the permanency of the interest he acquires and expectation of further increase in value, which will enable him also to realize a profit from the expenditure of his means. Thus a mutual advantage was contemplated by both parties at the time, and the result has usually been beneficial to both. . . ."

Judge Miller went on to point out that the value of leaseholds fluctuated and often increased greatly due to the growth of the city and/or to the extensive and costly improvements usually made by the leasehold owners; and that therefore under the particular circumstances of the case, it would be only just for equity to grant relief to a party who having spent money for improvements or who having purchased the leasehold at its present value, neglected through forgetfulness to secure a renewal of the lease before the end of the ninety-nine year term.

The Maryland Court in its long and detailed analysis gave a great deal of weight to the Irish court's treatment of the ninety-nine year Irish agricultural leases, determinable on three lives³⁵ in being at the time the lease was executed, and renewable forever on the fall of every life, such renewal being contingent on the payment of a specified renewal fine, which was one year's rent, just as it was in the Harrison and Fell leases.

Judge Miller reviewed the English and Irish authorities showing that the English House of Lords had reversed the Irish courts in several cases³⁶ where the latter had decreed renewals after the periods specified for renewal had

³⁴ The lease in *Banks v. Haskie* included a covenant by the lessee to build a house of specified description within two years of the commencement of the demise and also a covenant to keep the house in a state of repair. Such covenants are sometimes seen in Maryland ground rent leases, but are not essential to the ground rent leasing arrangement.

³⁵ Three lives in being was the rough equivalent of the life-expectancies of three men in the sixteenth and seventeenth centuries. See *MAYER, op. cit. supra* n. 2, 45.

³⁶ *Kane v. Hamilton*, 1 *Ridgway P. C.* 180 (1784); *Bateman v. Murray*, 1 *Ridgway P. C.* 187 (1785). For a discussion of these and other English and Irish cases, see Note, *Lessee's Failure to Give Notice to Renew* (1923) 27 *A. L. R.* 981, 997-1000.

elapsed. The reversals created such a stir in Ireland that the Irish Parliament passed the Irish Tenantry Act³⁷ which provided for relief for the tenant in the absence of fraud. Then, in *Boyle v. Lisacht*,³⁸ the Irish House of Lords, having been given back its appellate jurisdiction, granted relief to a tenant whose position was almost the same as that of the leaseholder in *Banks v. Haskie*.

The Court of Appeals relied heavily on *Boyle v. Lisacht*, and quoted the Irish court as stating that the Irish system of long term agricultural leases "has prevailed since the time of the Great Earl of Ormond³⁹ who, in order to people his vast estates . . . , and to invite a respectable and improving tenantry, produced this tenure: it had the effect he desired; and in the nature of things these leases have a tendency to create a respectable and improving tenantry. It obtained, till it had acquired these tenants, great respect, and very valuable properties, inasmuch as they were considered to have a *perpetual* interest."⁴⁰

It might well be noted that the Earl of Ormond's reasons for creating the long term leases were the same as the original Lord Baltimore had in mind when he established his quit rent plan in Maryland. Mayer thought that the strong point of resemblance between the Maryland ground rents and the Irish leases was that they both included covenants for renewal and that otherwise "they

³⁷ 19 and 20 Geo. III, c. 30. The Maryland Court in *Banks v. Haskie*, 45 Md. 207, 221 (1876) said that "soon after the decision in *Bateman v. Murray*, it was seen its effects would be so disastrous upon the interests of Irish tenants that Parliament [Irish] interfered and passed the Irish Tenancy [Tenantry] Act." But note that that Act was passed in 1779 while the final decision in *Bateman v. Murray*, in which Lord Thurlow reversed the Irish court was in 1785.

³⁸ 1 Ridgway Ir. P. C. 384; 1 Vern and Scriv. 135 (1787). The Court of Appeals stated in *Banks v. Haskie*, 45 Md. 207, 221 (1876) that the Irish Lords were given back their appellate jurisdiction in 1787, but it would seem that this jurisdiction was returned to them in 1783 by the Irish Appeals Act, 23 Geo. III, c. 28.

³⁹ This Ormond was probably James Butler, Twelfth Earl and First Duke of Ormond (1610-1688). See BURGHOLEE, *LIFE OF THE DUKE OF ORMOND* (1912).

⁴⁰ Italics by the Maryland court quoting *Boyle v. Lisacht*, 1 Ir. P. C. 384, 1 Vern and Scriv. 135, 143 (1787) in *Banks v. Haskie*, 45 Md. 207, 222 (1876).

are dissimilar in form and terms."⁴¹ He goes on to speculate:⁴²

"These Irish leases were possibly not unknown to the Maryland lawyers of the last century, some of whom were natives of Ireland and others . . . had been students of law . . . at the Inns of Court, London. They were necessarily familiar with the English and Irish long leases and the leases for three lives in use in the province. Consequently, out of these old-world customs, by a process of legal selection, was evolved the lease for the certain term (carved out of a round century) of 99 years (equivalent to the average length of three lives in succession), renewable forever, shorn of its collateral determinations, and retaining only the renewal fine—one year's rent—the same in amount as the alienation fine due the proprietary by virtue of his grants, the fine reserved to him for license to assign in his long leases, the fine paid to the Irish landlord on the fall of each life, and the heriot exacted by the lord of a manor on the death of a freeholder."

Mayer also points out that it was the object of the landowners in Maryland around the time of the Revolution to create permanent rents with the advantage of being rent services and that this scheme was probably suggested by the proprietary's quit rents.⁴³

It is submitted that it is mere speculation to state that the Maryland ground rent system either grew out of the quit rent system or was patterned after the Irish agricultural leases. It probably evolved out of both.⁴⁴ To the extent that the Maryland Court gives effect to Irish precedents the connecting links between the Irish and Maryland systems are important. Otherwise, the problem of determining the origin of the ground rent system is of little legal relevance.

⁴¹ MAYER, *op. cit. supra*, n. 2, 45.

⁴² *Ibid.*

⁴³ *Ibid.*, 46.

⁴⁴ But see *Hollander v. Central Metal Co.*, 109 Md. 131, 140, 71 A. 442, 23 L. R. A. (N. S.) 1135 (1908) where counsel argued: "In Ireland, from which our ground rent system was taken, . . ." This seems like a very doubtful proposition.

But because the problem is fascinating, it might not be entirely fruitless to speculate that the clause in the Maryland charter⁴⁵ exempting the proprietary and his immediate grantees from the operation of *Quia Emptores* prompted the proprietary to grant land in fee subject to perpetual quit rents, and that in later years large Maryland landowners, knowing of the profits the quit rent system yielded for the proprietary, searched around for a way to retain the benefits of tenure by avoiding *Quia Emptores*, and at the same time reserve for themselves perpetual rents. They did not have to look very far, for the proprietary himself in later colonial days had employed the ninety-nine year lease, though without a covenant for renewal.⁴⁶ It would seem to have been natural for the large landowners to have used this ninety-nine year device of the proprietary in order to avoid *Quia Emptores*, and not unnatural for them to have used the covenant for renewal in order to obtain the perpetual element present in the quit-rent system, for such covenants, known to the Irish land-law, were one of the few common law precedents for perpetual leases.⁴⁷

Exactly where the ground rent system came from and exactly why it happened to perch itself in Baltimore and the adjoining counties will probably never be completely known, though there is hardly enough evidence to conclude that so basically attractive a system as now exists in and around Baltimore "just sort of began" in Maryland and evolved into its present form.⁴⁸

⁴⁵ The Charter of Maryland (1632), Art. 18; see 3 THORPE, *AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS* (1909) 1684.

⁴⁶ *Supra* circa n. 16.

⁴⁷ For reference to the "ground annual" of the Scotch law, perpetual land charges in Continental Europe, and the perpetual rent charge or the emphyteusis of the Roman Law, see Chief Judge Bond, concurring in *Silberstein v. Epstein*, 146 Md. 254, 259, 260, 126 A. 74, 75, 76 (1924) and citations there included. See also MAYER, *op. cit. supra* n. 2, 17, 18.

⁴⁸ A very interesting and somewhat unorthodox explanation of the origin of the 99 year lease is given by E. H. Brenner of Omaha, Nebraska, once a member of the Executive Committee of the National Association of Building Owners and Managers. Brenner's observations were set forth in the *Building Owner's and Manager's Bulletin* and were commented on in the November, 1928 San Francisco Real Estate Circular in an editorial entitled *Long Term Leases*. Brenner was apparently prompted to set forth his views after reading a St. Louis Bulletin Newspaper excerpt on an article from the *Pathfinder Magazine* which stated that "the cus-

III. THE FORM OF A GROUND RENT LEASE

The form of the modern ground rent lease is only slightly different from that used in the eighteenth century. What were the original objects of the creators of those leases? The Court of Appeals in *Banks v. Haskie* has said the object on the part of the lessees was to secure a perpetual tenancy and the object on the part of the lessors was to obtain a valuable, long term, safe investment.⁴⁹

Present day creators of ground rents have very much the same ideas in mind. Grantors of ground rent leases either plan to retain the ground rents as investments or sell them to other investors, while lessees, who today buy subject to ground rents, are still greatly interested in acquiring perpetual interests in property which will justify their making improvements. However, it is definitely necessary to note that the underlying philosophy of both lessors and lessees has been greatly affected by the Redemption Acts, the first of which was passed in 1884.⁵⁰ As a result of these acts which make it possible for a lessee

tom of making leases for 99 years is a relic of the old English feudal system." Brenner, in an answer to this statement, claimed that the custom dated back to Biblical times and quoted the 25th chapter of Leviticus to substantiate his claim: "And ye shall hallow the 50th year and proclaim liberty throughout the land and unto all the inhabitants thereof; it shall be a jubilee unto you and ye shall return every man unto his possessions and ye shall return every man unto his family, a jubilee shall that 50th year be unto you." Another portion of the Mosaic law pertaining to resumption of ownership of land states: "In this year of jubilee ye shall return every man unto his own possessions . . . and the land shall not be sold in perpetuity for the land is mine; for ye are strangers and sojourners with me . . . That which he hath sold shall remain in the hand of him that hath bought it until the year of jubilee; and in the year of jubilee it shall grant, and he shall return unto his possessions."

Brenner, commenting on the Biblical land law, observed: ". . . : This law of Moses, therefore, allowed 49 year leases of property to be made and it was a common practice when leases were made to have them made for the full term of 49 years or for the remaining years until the jubilee. In this way there was built up a land tenure of 49 years because the 50th year was a free year. This was later extended to 99 years and more recently to 999 years. This, I think, was the real beginning of the custom of leasing property for a period of years and was the origin of 99 year leases."

⁴⁹ *Banks v. Haskie*, 45 Md. 207, 217 (1876) quoted *supra circa* n. 33. See also *Myers v. Siljacks*, 58 Md. 319, 329, 330 (1882); *Collins v. McTavish*, 63 Md. 166 (1884).

⁵⁰ Md. Laws 1884, Ch. 485. The Redemption Laws are codified in Md. Code (1939) Art. 21, Secs. 110, 111; Art. 53, Sec. 25 of Md. Code (1924) was repealed by Md. Laws 1929, Ch. 361.

to pay off his ground rent after five years, the lessor can no longer be certain that he will have a long term or perpetual investment. On the other hand, the lessee can buy subject to a ground rent knowing that if he ever has the money to purchase his lessor's reversionary interest, he will have the opportunity to do so.

Still, despite the fact that the ground rent system is somewhat different in 1940 than it was in 1750, the covenants in the modern ground rent lease are substantially the same as they were in 1750, and have been given, for the most part, uniform interpretation ever since that time. With that in mind, an examination of the various covenants in a typical ground rent lease now in use in Baltimore will help to exhibit the details of the relationship between the lessor and the lessee of a ground rent conveyance.

Under such a lease, the lessor grants to the lessee, his executors, administrators, and assigns a specifically described lot along with the improvements on that lot and all rights and appurtenances connected with it for a term of ninety-nine years.

The lessee covenants in return for himself, his executors, administrators, and assigns to pay a specified yearly rental during the running of the lease in equal semi-annual installments and also agrees to pay all the taxes and assessments on the leased property.

The lessor is given the right to distrain all chattels found upon the premises at any time the rents shall be wholly or partially in arrear.⁵¹ If any rent is unpaid either in whole or in part for sixty days, the lessor can, if he wishes, take over the premises by re-entry and hold them until all back rent is paid up. And if any part of the rent is in arrear for six months, the lessor may re-enter the leased premises and possess them again as he did before the lease; that is, he can take over the property and consider the lease null and void. Indeed, he can hold the

⁵¹ The right of distraint in Maryland is much the same today, with a few exceptions, as it was at the common law. Hartogensis, *Maryland Statutory Modifications of the Common Law of Real Property* (1937) 1 Md. L. Rev. 243. See also MAYER, *op. cit. supra* n. 2, 99-101.

property as if the lease had never been made. However, by complying with the provisions of an act of the legislature of 1872, as amended in 1929, the lessee may obtain relief in equity, by filing a bill within six months after execution.⁵²

The lessor, for himself, his heirs, executors, administrators, and assigns also covenants that in return for performance by the lessee he will warrant the leased premises against all persons claiming by or through the lessor, his heirs, executors, administrators, or assigns.⁵³ He likewise covenants on his and their behalf to renew the lease any time during its ninety-nine year term at the request of the lessee, his representatives, or his assigns on payment by him or by them of from One to Ten Dollars as a renewal fine. It is specified in the lease, however, that the lessee shall have no right to demand renewal of any lease forfeited for non-payment of the rent. But otherwise, the lessee can at any time during the ninety-nine year period secure another lease for an additional ninety-nine years, to begin on the expiration of the first lease, with the same rent and with the same covenants, "so that the demise hereby created may be renewable and renewed as to such lot or lots respectively from time to time forever."⁵⁴

⁵² Md. Laws 1872, Ch. 346, codified as Md. Code (1939) Art. 75, Sec. 78, which re-enacted the substance of 4 Geo. II, c. 28, sec. 2 and added certain improvements. See ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND (2d ed. 1912) 950. See also 2 POE, PLEADING AND PRACTICE (5th Ed. 1925) Sec. 493. That statute was passed in England after English courts of both law and equity had instituted and carried out a discretionary practice of staying ejectment proceedings by lessors for periods which they considered just periods of postponement of forfeiture. MAYER, *op. cit. supra* n. 2, 101-105; Watts, *Maryland Ground Rents and Their Collection*, Baltimore Real Estate News, August, 1931, Vol. 1, No. 2, p. 3.

Note that under the statute of 1872 if the lessee defaults, a leasehold mortgagee can come in within six months, and become the lessee by doing what the lessee covenanted to do.

That statute applied to all leases. *Campbell v. Sidley*, 41 Md. 81, 93 (1874). It was repealed and re-enacted by Md. Laws 1929, Ch. 406 and codified as Md. Code (1939) Art. 75, Sec. 78.

⁵³ The ground rent covenant for title is a covenant of special warranty as contrasted with a covenant of general warranty by which the covenantee is guaranteed against the claims of all persons whomsoever. See 4 TIFFANY, REAL PROPERTY (3rd ed. 1939) Sec. 999.

⁵⁴ For a more detailed discussion of the form of the ground rent lease, see MAYER, *op. cit. supra* n. 2, 51 ff. For further treatment of the lessor's opportunities for relief and for a showing of the many difficulties in a lessor's path, see Cameron, *Procedure for the Collection of Ground Rents in Maryland*, Baltimore Daily Record, August 15, 1934.

IV. PERPETUAL ASPECTS AND THE RULE AGAINST PERPETUITIES

The basic, fundamental covenant of the ground rent lease—the one that really distinguishes it from the ordinary long term lease—is the covenant by the lessor to renew the lease on the same, identical terms at any time during the original term on request of the lessee. It would appear from a reading of the lease that unless the lessee exercised his option to renew and paid the specified renewal fine at some time before the expiration of the first ninety-nine year term, he would stand to forfeit his leasehold interest and thereby lose its market value, which would of course include the value of the improvements he had added to the premises. And indeed such was the situation before 1886, subject to the possibility that a court of equity would give the relief afforded in *Banks v. Haskie*.⁵⁵

But in 1886, the legislature passed the following act:

“Whenever the lessee or lessees named in any lease or sub-lease containing a covenant for perpetual renewal, or any person or persons claiming under such lessee or lessees shall have retained or shall retain uninterrupted possession of the demised premises, or any part thereof, for twelve months after the expiration of such lease or sub-lease, it shall be conclusively presumed in reference to the whole or any part or parts of said demised premises, whereof possession shall have been retained as aforesaid, and in favor of said lessee, lessees, or of the person or persons claiming under such lessee or lessees, that a new lease or sub-lease of the whole of said demised premises was executed prior to the expiration of said lease or sub-lease by the lessor or lessors therein named, or persons rightfully claiming under such lessor or lessors to the said lessee or lessees, for such additional term; under such rent and upon such covenants, conditions and stipulations as were provided in said lease or sub-lease.”⁵⁶

⁵⁵ 45 Md. 207 (1876) and discussion, *supra circa* notes 25-33.

⁵⁶ Md. Laws 1886, Ch. 154, codified as Md. Code (1939) Art. 21, Sec. 113.

Thus, except for the lessee's statutory right of redemption, all leasehold estates whether created before or after the passage of this act have, since 1886, been practically perpetual interests. Indeed, most investors and real estate men think of a leasehold as a perpetual estate and a ground rent as a perpetual investment which can be "called in" by redemption.⁵⁷ In fact, renewal fines are rarely paid though it would seem at least somewhat doubtful whether the act of 1886 was either intended to or could constitutionally do away with the provisions requiring these payments in the event of renewal, at least in regard to leases executed before 1886. However, since the sums involved would be so small there will hardly be any litigation concerning renewal fines.

As a result of this statute, lessees who pay their rent during the hundredth year are protected. Likewise, lessees challenged by their landlords at the end of the original ninety-nine year period would seem to be able to secure automatic renewal under the statute by paying the hundredth year's rent. However, it is well to note that this 1886 act has never been litigated in the Court of Appeals and that the written language of the law itself is the only authority in connection with it.

A possible problem that may arise in connection with the statute concerns the unfortunate lessee who, unable

⁵⁷ "The covenant of the reversioner is that the tenant and his representatives may hold, occupy, and enjoy the land through *all future time*, provided they pay the stipulated rent. If they continue to pay the rent and elect to hold the premises by renewals of the lease, the reversioner can *never*, under any circumstances obtain possession of the demised premises." *Crowe v. Wilson*, 65 Md. 479, 482, 5 A. 427, 428, 57 A. R. 343; 344, 345 (1886) (Italics supplied).

A lease for 99 years renewable forever creates an interest "coextensive with the fee itself in duration . . ." (*Culbreth v. Smith*, 69 Md. 450, 459, 16 A. 112, 116, 1 L. R. A. 538, 541 (1888).

"He (the leaseholder), 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 ninety-nine years, on payment of a small renewal fine. *Mayor of Baltimore v. Latrobe*, 101 Md. 621, 634, 61 A. 203, 207 (1905).

"The originators of the [ground rent] device had contrived a permanent ownership of the land in the one in the position of lessee, coupled with a permanent charge or annuity in the one standing as fee simple owner or reversioner. On both sides were to be permanent owners, one of the land and the other of the charge." *Bond, C. J., concurring in Silberstein v. Epstein*, 146 Md. 254, 258, 280, 126 Atl. 74, 75, 76 (1924).

to assign his leasehold, is forced to continue on as the owner of property which has depreciated so badly that he no longer possesses sufficient equity in it to justify his paying rent. And yet so long as he remains solvent, as the owner of the leasehold he is personally liable on his covenant to pay the rent. But what if the ninety-nine year term runs out? Our lessee of course, will be perfectly delighted to let the leasehold go by default. Why couldn't he say: "I didn't demand a renewal lease during the running of the original term. I didn't pay rent during the ensuing twelve months and so there was no automatic statutory renewal. Since there has been no renewal, the lease is up and I'm free?" There seems to be no good reason why a lessee couldn't do just this, although a decision to that effect will fly squarely in the face of the popular belief that a leasehold estate is a perpetual interest unless the lessee chooses to redeem.

However, despite this probable exception, the 1886 statute has in effect made most leasehold interests automatically renewable and therefore perpetual since most lessees have sufficient equity in their leaseholds to warrant their continuing rental payments after the first ninety-nine years are up. As a result, there are many perpetual interests in land in Maryland. How does this square with the Rule against Perpetuities?⁵⁸

Since 1886, there could hardly be any objection in regard to the covenant for renewal, for the legislature has authorized automatic renewal. But what was the story before 1886? It would seem that during the hundred or more years of ground rent history prior to 1886, some lessor would have refused to renew on the ground that the covenant for renewal was void under the Rule against Perpetuities. But as a matter of fact only a limited amount of ground rent litigation occurred until the 1870's because it was not until then that any number of the early ninety-nine year terms ended, and so the perpetuity prob-

⁵⁸ For a discussion and definition of a perpetuity and the Rule against Perpetuities, see *Graham v. Whitridge*, 99 Md. 248, 57 A. 609, 58 A. 36, 66 L. R. A. 408 (1904).

lem was never discussed by the Court before *Banks v. Haskie* in 1876. In that case, the Maryland Court referred only to the covenant for perpetual renewal and concluded in a sentence that it did not take the property "ex commercium" and so did not violate the Rule against Perpetuities.⁵⁹

Another and more serious perpetuity problem that cannot be so easily brushed aside is the validity of the lessee's option to redeem the fee. Before 1884, though most of the ground rents in being in Maryland were irredeemable, a goodly number contained covenants of redemption. That is, the lessor agreed to convey the fee to the lessee on request by the lessee at a specified time or within a specified period on condition that the lessee would pay the amount of the yearly rent capitalized at a certain percentage, which was usually six per cent, the legal rate of interest.⁶⁰

Since 1884, each and every leaseholder holding under a lease post-dating that year has a right to redeem by statute and this is true even though the ordinary ground rent lease makes no mention of the statutory option of redemption.⁶¹ Of course, since the modern right of redemption owes its existence to the Maryland legislature, there can be no problem concerning its validity under the Rule, for though the legislature did not specifically refer to the Rule, it certainly impliedly treated the Rule as inapplicable when it required ground rents to be redeemable.

As to options to redeem in pre-1884 leases, apparently no case involving their validity arose until 1908. Then,

⁵⁹ 45 Md. 207, 218 (1876), repeated and accepted in *Brown v. Reeder*, 108 Md. 653, 660, 71 A. 417, 420 (1908) and in accord with the great weight of authority. See Abbott, *Leases and the Rule Against Perpetuities*, (1918) 27 Yale L. J. 878, 883-885; Note, *Land Trusts as Methods of Finance* (1939) 52 Harv. L. Rev. 1149, 1151-1152. Prof. John Chipman Gray at one time contended that a covenant for perpetual renewal was part of the lessee's present interest and not a separate future contingent interest with the possibility of vesting too remotely. GRAY, *THE RULE AGAINST PERPETUITIES* (1886) Sec. 230. But Gray later retreated considerably. GRAY, *THE RULE AGAINST PERPETUITIES* (2d ed. 1906 and 3rd ed. 1915) Sec. 230a. It would seem that until the lessee exercises his option to renew, no additional term can be said to have vested and that the validity of the option for renewal is a definite and justifiable exception to the Rule. Abbott, *Leases and the Rule Against Perpetuities*, *supra*.

⁶⁰ Md. Code (1939) Art. 49, Sec. 1.

⁶¹ Md. Code (1939) Art. 21, Secs. 110, 111.

in *Hollander v. Central Metal Co.*,⁶² which concerned a covenant for redemption in an 1835 ground rent lease, the Court of Appeals held the covenant valid. Since the redemption legislation did not affect ground rents already in existence in 1884 the Maryland Court had before it in that case a common law problem. Its decision coming as it did in 1908, was of practical importance in Maryland only in regard to the limited number of redeemable ground rents created before 1884. However, outside of Maryland, the holding in the case would still be extremely vital if redeemable ground rents of the Maryland type were created without the aid of statute.⁶³

V. MISCELLANEOUS PROBLEMS OF THE GROUND RENT RELATIONSHIP

In order for a covenant in a lease to run with the land, it must meet certain technical requirements. Since these requirements are satisfied by the covenants which are usual in the ordinary ground rent lease, the burdens and

⁶² 109 Md. 131, 71 A. 442, 23 L. R. A. (N. S.) 1135 (1908).

⁶³ The Court of Appeals, in sustaining the validity of the covenant for redemption in the *Hollander* case, emphasized the commercial importance of the ground rent system and the liberal judicial attitude adopted in connection with the system in order to retain its benefits. The Court discussed and relied on *Banks v. Haskie*, 45 Md. 207 (1876), *Myers v. Siljacks*, 58 Md. 319 (1882), and *Worthington v. Lee*, 61 Md. 530 (1884).

In his discussion of options in leases for terms for years by which lessees have the right to buy out their lessor's reversionary interest, Gray stated that such options when exercised at a remote time were invalid. GRAY, *THE RULE AGAINST PERPETUITIES* (3rd ed. 1914) Sec. 230b, distinguishing the *Hollander* case in n. 2 to Sec. 230b as based on local law. All the cases Gray cited in favor of his proposition were English cases. The English rule is still as Gray indicated it was in 1914. Abbott, *Leases and the Rule against Perpetuities* (1918) 27 Yale L. J. 878, 888; Note: *Land Trusts as Methods of Finance* (1939) 52 Harv. L. Rev. 1149, 1150, n. 22. But the American law is in accord with *Hollander v. Central Metal Co.* Abbott, *Leases and the Rule Against Perpetuities*, *supra*; Note, *Land Trusts as Methods of Finance*, *supra*. The American rule would seem to be the better one. The English courts have failed to distinguish between options in gross which are threats to continued possession and clogs on alienability; and options in leases to purchase the fee which encourage the tenant to develop and improve his interest in the land. But see Note, *Options to purchase and the rule against undue suspension of the power of alienation*, L. R. A. 1917D, 904, 907; Note, *Options to Purchase Realty as Violating the Rule Against Perpetuities*, Ann. Cas. 1916D, 577, 578, citing the *Hollander* case as a local rule which illustrated the tendency of the Maryland Court to keep land tenure certain.

benefits of these leases run with the land.⁶⁴ And so all successors in title of the lessee become liable to the lessor and his successors for performance of the covenants of the lessee while they have the right to possession of the leasehold. Likewise, the successors of the lessor become liable for performance of the covenants of the lessor while they own the ground rent. However, note that the liability of these successors exists only during the time they are connected with the ground rent or the leasehold. For example, the assignee of the original lessee is liable to the person or persons then owning the ground rent for the performance of the covenants of the lessee only in so far as their performance is connected with his tenure. So, although he must pay all the rent and taxes on the property for the time he is tenant, he is not responsible for any defaults that have occurred before, or will occur after, his period of tenancy.⁶⁵

In contrast, the original lessee is not only liable for performance of his covenants to pay rent and taxes during his tenancy, but also throughout the entire term of the lease. For his liability growing out of privity of contract rests on his continuing contractual liability,⁶⁶ while the liability of his assigns arises solely from the basis of their privity of estate and continues only so long as that privity exists.

⁶⁴ *Thurston v. Monke*, 32 Md. 487 (1870); *Hollander v. Central Metal Co.*, 109 Md. 131, 155-157, 71 A. 442, 446, 447, 23 L. R. A. (N. S.) 1135, 1143, 1144-1146 (1908). See, Note: *Covenants Running with the Land* (1937) 1 Md. L. Rev. 320, discussing the three requirements for a covenant to run with the land which were laid down in *Spencer's Case*, 5 Coke 16a (1853), and the Maryland Court's treatment of these requirements. These requirements are: (1) privity of estate must exist between the covenantor and covenantee; (2) both benefit and burden of the covenant must touch and concern the land; (3) if the covenant relates to something not in esse, then the covenant can run only if the "assigns" are expressly designated. In relation to the third requirement, see *Maryland and Pennsylvania R. Co. v. Silver*, 110 Md. 510, 73 A. 297 (1909) discussed in the Note, *supra*, 1 Md. L. Rev., at 326.

⁶⁵ *Reid v. Wiesner Brewing Co.*, 88 Md. 234, 40 A. 877 (1898); *Williams v. Safe Deposit and Trust Co.*, 167 Md. 499, 506, 175 A. 331, 334 (1934).

⁶⁶ *Hintze v. Thomas*, 7 Md. 346 (1855); *Lester v. Hardesty*, 29 Md. 50 (1868); *Danielson v. Polk*, 64 Md. 501, 2 A. 824 (1886); *Consumer's Ice Co. v. Bixler*, 84 Md. 437, 446, 447, 35 A. 1086, 1087 (1896); *Building Assn. v. Robinson*, 90 Md. 615, 634, 45 A. 449, 455-456 (1900); *Williams v. Safe Deposit and Trust Co.*, 167 Md. 499, 506, 175 A. 331, 334 (1934); *MAYER, op. cit. supra*, n. 2, 113-117; 28 C. J. 860, Sec. 48.

But suppose there is a default after his death? Is his estate just as responsible as he would have been had he been alive? This precise question has never come up before the Court of Appeals though the general rule is that debts of the deceased bind his estate. The problem has however arisen in Pennsylvania where the highest court in effect has decided that the estate of an original lessee is only liable for defaults which have occurred during the life-time of that lessee or during the tenancy of his executors or administrators. The Pennsylvania Court stated that if estates of original lessees were subject to contingent contractual liability in the event that resort to the land proved ineffectual, final distribution of estates of original lessees could never be made as long as the ground rent was outstanding. The Court held that such a result was contrary to settled policy and was not intended by the original grantee and probably not intended by the original grantor who usually looks to the land as his real security and not to the continuing liability of his grantee.⁶⁷

Of course alert lessees and their estates are not bothered by any problems of contractual liability for they customarily employ straw men to act as original lessees. Straw men are persons of little or no means who take the conveyance of leasehold estates and immediately assign them to the real lessees who are legally considered assignees of the original lessee and so are exempt from contractual liability. When this method is used, the lessor and his successors can as a practical matter look only to liability by way of privity of estate. However, if a straw

⁶⁷ Quain's Appeal, 22 Pa. 510 (1854).

Pennsylvania ground rents are created by way of a fee conveyance while Maryland ground rents are created by leases for years, but the problem of the continuing liability of the grantee would seem to be the same under both systems. In accord with Quain's Appeal, *supra*: Williams' Appeal, 47 Pa. 283 (1864); Hunt's Appeals, 105 Pa. 128 (1884); Gardiner v. Painter, 3 Phila. (Pa.) 365, 16 Leg. Int. (Pa.) 141 (1859); 3 ELLIOT, CONTRACTS (1913) sec. 1907; 28 C. J. 873; 14 Am. and Eng. Encyc. of Law (2d ed. 1900) 1121, 1125.

It is submitted that the Maryland Court will follow the lead of the Pennsylvania Court if the problem is ever litigated in Maryland. See a possible dictum in Baltimore City v. Latrobe, 101 Md. 621, 632, 633, 61 A. 203, 206 (1905).

Another interesting question is whether an original lessee, who has assigned his leasehold interest, is discharged from this continuing contractual burden by going through bankruptcy.

man should become affluent, it would seem that he would be held liable on the basis of his contractual obligation.⁶⁸

A more serious and pressing question than the problem of the liability of the estates of original lessees concerns leasehold mortgagees. One of the standard covenants in a leasehold mortgage is that the mortgagor shall pay rent and taxes. If he fails to do so, he is in default, and since the mortgagee upon default acquires the right to take possession of the property, he is automatically deemed by the Maryland court to be in privity of estate with the ground rent owner, and to have therefore become liable for future rents and taxes.⁶⁹ This rule has caught many unwary mortgagees including the HOLC, who, in attempting to help property owners with mortgages around their necks, certainly did not intend to play "Lord Bountiful" to numerous ground rent owners.⁷⁰ This rule has naturally met with considerable criticism and, it is submitted, should be changed by statute.⁷¹

While future legislation can remove this last-mentioned difficulty, it will take more than legislation to cure all the

⁶⁸ Apparently it was once the practice for the original lessee to require his assignee to agree to pay the rent for the duration of the lease, thus protecting himself against his assignee's assigning to an irresponsible person.

A similar method might be employed by lessors to prevent the use of straw men. That is, a lessor could require his lessee to require any of his assigns, and any assignee of his immediate assignee, etc. to agree to pay the rent for the duration of the term. However, of course, such a method might not be acceptable in a community where the use of straw men is so well established.

⁶⁹ *Hintze v. Thomas*, 7 Md. 346 (1855); *Mayhew v. Hardesty*, 8 Md. 479 (1855); *Lester v. Hardesty*, 29 Md. 50, 54 (1868); *Judik v. Crane*, 81 Md. 610, 617, 32 A. 276, 277 (1895); *Building Assn. v. Robinson*, 90 Md. 615, 618, 633, 45 A. 449, 450, 455 (1900); *Gibbs v. Didier*, 125 Md. 486, 492, 94 A. 100, 101 (1915); *Williams v. Safe Deposit and Trust Co.*, 167 Md. 499, 506, 175 A. 331, 334 (1934); *Hart v. HOLC*, 169 Md. 446, 182 A. 322 (1936); *Jones v. Burgess*, 4 A. (2d) 483 (Md. 1939); *Lewis, The Taxation of Maryland Ground Rents* (1939) 3 Md. L. Rev. 314, 321, 322.

⁷⁰ See *Lewis, op. cit. supra* n. 69, 314, 323.

⁷¹ See *Ibid.*, 314, 322, 323, and note his reference to House Bill 61, unsuccessfully introduced into the House of Delegates in the 1937 session. This bill was designed to change the Maryland rule. The Pennsylvania rule is contra, that Court holding a mortgage conveyance is for security purposes and conveys no real interest in the property. See *Wetherell v. Hamilton*, 15 Pa. 195 (1851); where the Pennsylvania Court cited and considered two old English cases, *Eaton v. Jacques*, 2 Doug. 455 (1780), and *Williams v. Bosanquet*, 1 Brod. and Bing 238 (1819), (which overruled the *Eaton* case) and then proceeded to accept the rule of the *Eaton* case. The Maryland rule dates from *Hintze v. Thomas, supra* n. 69 and *Mayhew v. Hardesty, supra* n. 69 where the Court of Appeals followed the *Bosanquet* case. See 28 C. J. 861.

possible headaches that can arise from the use of sub-ground rents and sub-sub-rents which encumber many of the older down-town properties.⁷²

Sub-ground rent leases are modeled closely after the form of original leases, though in order to keep the conveyance of a sub-leasehold from being an assignment of the entire leasehold interest, the leaseholder must reserve a reversion of at least one day to himself and usually he will reserve one year. Thus most sub-leases are for ninety-eight years renewable forever. In addition, some of them contain covenants by the sub-lessor whereby he agrees that if at any time during the duration of the sub-lease he should acquire the fee, he will on request, execute a new *original* lease, as contrasted with a *sub-lease*.⁷³

Sub-rents are often used to carve out leasehold interests under one-cent original ground rents which are quite common in Baltimore City.⁷⁴ Perhaps the primary reason for setting up these one-cent rents is to prevent the creation of dower rights. For instance, a single man, who is either contemplating marriage or wants to guard against the possibility of its future occurrence, will convey the fee to property which he owns to a friend and take in return a leasehold estate for ninety-nine years renewable forever subject to a one-cent ground rent in favor of his friend. Or, take the case of a purchaser, who being married, desires to acquire an interest in land to which no dower right in his wife will attach. He can do this easily by taking a leasehold subject to a one-cent ground rent. In both these cases, dower rights will not attach to the leasehold inter-

⁷² *MAYER, op. cit. supra* n. 2, 58-62, 93-94. Usually the total amount of sub-rents on a piece of property equals the original rent reserved on it, but sometimes that total is greater.

⁷³ A sub-lessee is not in privity of estate with the original lessor and so is not liable on the covenants of the original ground rent lease. *Mayhew v. Hardesty*, 8 Md. 479 (1855).

For an example of a sub-lease with a covenant to convey upon request the fee if acquired, see *Swift and Co. v. Trustees of Shepard-Pratt Hospital*, 13 A (2d) 174 (Md. 1940).

⁷⁴ One-cent ground rents are treated exactly like other original ground rents. *Crowe v. Wilson*, 65 Md. 479, 481, 5 Atl. 427, 428, 57 A. R. 343, 344 (1886).

Rents of one peppercorn were once common but these have long since given away to one-cent ground rents.

ests, which are characterized as chattels real and classified as personalty and not realty.⁷⁵

However, despite the fact that he legally is the mere owner of a chattel real, practically speaking, the leaseholder under a ground rent demise owns realty which he can hold on to as long as he lives up to the obligations of the lease. And though as a rule, his property interest is treated by the law as personalty, still the law sometimes takes cognizance of the physical status of his property interest. For instance, he must convey it by an instrument which conforms to the legal requirements for the transfer of realty or the conveyance will not be valid.⁷⁶

On the other hand, original ground rent holders, being reversioners in fee, own realty just as do all other persons owning future interests in land in fee. In contrast, however, sub-rent holders do not possess realty; for sub-rents are created out of leasehold estates, which being themselves personalty, can hardly give birth to offspring of greater stature.⁷⁷

⁷⁵ At one time in the past, one-cent grounds rents were used to get around the law forbidding aliens to own realty. This law has long since been changed. Md. Laws 1874, Ch. 354, codified as Md. Code (1939) Art. 3, Sec. 1.

⁷⁶ Maryland leasehold interests are personalty. *Allender v. Sussan*, 33 Md. 11, 3 A. R. 171 (1870); *Dumfries v. Abercrombie*, 46 Md. 172 (1877); *Taylor v. Taylor*, 47 Md. 295 (1877); *Merryman v. Long*, 49 Md. 540 (1878); *Arthur v. Cole*, 56 Md. 100, 40 A. R. 409 (1881); *Culbreth v. Smith*, 69 Md. 450, 16 A. 112, 1 L. R. A. 538 (1888); *O'Brien v. Clark*, 104 Md. 30, 64 A. 53 (1906); *Craig v. Craig*, 140 Md. 322, 117 A. 756 (1922). The fee interest encumbered by a Pennsylvania ground rent is realty, and the man in the position of a Maryland leaseholder has a fee interest. *Ingersoll v. Sergeant*, 1 Whart. 336, 350 (Pa. 1836). Cf. *Craver's Estate*, 319 Pa. 282, 179 A. 606 (1935), where the Pennsylvania Court was dealing with a Maryland ground rent.

Maryland leaseholds, though personalty, must be conveyed as realty. *Bratt v. Bratt*, 21 Md. 578 (1864); Md. Code (1939) Art. 21, Sec. 1. See also Md. Code (1939) Art. 26, Sec. 20 stipulating that all judgments and decrees of Maryland courts shall constitute liens on all leaseholds and terms for years owned by the defendants in land, except year to year leases and terms of less than five years which are not renewable. The statute states that these liens are to have the same extent and effect as judgment liens created upon real estate.

Under a statute providing for the assent of "the owner" of property to the paving of a street the leaseholder, not the ground rent man, was held to be "the owner". *Holland v. Baltimore*, 11 Md. 186 (1857).

"But in the case of an irredeemable ground rent . . . the owner of the leasehold interest is the substantial owner of the property." *Baltimore City v. Latrobe*, 101 Md. 621, 634, 61 A. 203, 207 (1905).

⁷⁷ Maryland ground rents are realty. *Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236 (Md. 1828). Pennsylvania ground rents are also realty. *Ingersoll v. Sergeant*, 1 Whart. 336, 350 (Pa. 1836).

VI. REDEMPTION AND OTHER REMEDIAL LEGISLATION

Though the Court of Appeals in 1876 in *Banks v. Haskie* had praised the irredeemable ground rent system to the skies,⁷⁸ a great deal of dissatisfaction gradually arose with the system, until, in 1884, the Maryland legislature passed several ground rent statutes, one of which materially changed the entire ground rent system. This act was the Redemption law of 1884 entitled "An Act to prohibit the creation in the future of irredeemable ground rents and to regulate the leasing of land."⁷⁹ It provided that all leases created in the future for more than fifteen years would be redeemable by the lessee at his option any time after the expiration of fifteen years, at the rate of six per cent, unless some other rate not exceeding four per cent was specified in the lease.

Thus, by one act, the legislature forbade the future creation of irredeemable ground rents.⁸⁰ No longer was it possible to create a ground rent and sit back securely, conscious that, as a ground rent owner, one could probably count on a definite amount of income for the rest of his life, if the value of the leasehold held up at all decently. On the other hand, no longer was it possible for a leaseholder to obligate himself to pay a sum twice every year for the rest of his life or at least so long as he owned the leasehold.

⁷⁸ See also *Bosley v. Bosley's Exrx.*, 14 How. 390, 396, 14 L. Ed. 468, 470 (1852) where Mr. Chief Justice Taney praised the system. See n. 141, *infra*, for a discussion of the dissatisfaction which grew up, and see also *supra circa* notes 84, ff., and 114, ff.

⁷⁹ Md. Laws 1884, Ch. 485; Md. Code (1939) Art. 21, Sec. 110.

⁸⁰ It may still be possible to create irredeemable rents by the use of a rent charge mechanism. Cf. *supra circa* n. 7. An irredeemable rent charge might be created by the conveyance by a fee simple owner of his fee interest, reserving to himself a perpetual annual rent. Such a method would be similar to the ground rent indenture in use in Pennsylvania, except that such irredeemable ground rents are prohibited in Pennsylvania by statute, Pa. Code, Title 68, Secs. 161, 162. The Maryland legislature, in abolishing irredeemable ground rents in Maryland, phrased the language of the statute it formulated in terms of the leasehold form of ground rent known in Maryland. Md. Code (1939) Art. 21, Secs. 110, 111. For the view that irredeemable rents created other than by the leasehold mechanism can exist under the laws now in force in Maryland, see Mullen, *Some Aspects of Ground Rent Law*, Baltimore Daily Record, September 28, 1940.

In 1888, the legislature further revised the system by providing that all leases and subleases of more than fifteen years were redeemable after ten years at the option of the tenant on six months' notice at a rate not to exceed six per cent.⁸¹

Another change was made in 1900 when leases of more than fifteen years were declared redeemable after five years at no more than six per cent.⁸²

The result of these three redemption laws is that today the following situation exists in Maryland regarding ninety-nine year leases renewable forever:

1. All ground rents created before 1884 are irredeemable unless by their own terms they state otherwise, since the redemption laws cannot constitutionally apply retroactively.⁸³

2. All ground rents created between 1884 and 1888 are redeemable after fifteen years at the option of the lessee at six per cent, unless by their terms, another rate not exceeding four per cent is specified.

3. All ground rents created between 1888 and 1900 are redeemable after ten years at the option of the lessee at six-per cent.

4. All ground rents created after 1900 are redeemable after five years at the option of the lessee at six per cent.⁸⁴

Why were these statutes passed? The legislative records of the debates which preceded their passage are not available today and so the only official explanation of them appears in the decisions of the courts.

⁸¹ Md. Laws 1888, Ch. 395; Md. Code (1939) Art. 21, Sec. 110.

⁸² Md. Laws 1900, Ch. 207; Md. Code (1939) Art. 21, Sec. 111.

⁸³ See *Marburg v. Mercantile Building Co.*, 154 Md. 438, 443, 444, 140 A. 836, 839 (1928) where it was said that if the Act of 1922 (Md. Laws 1922, Ch. 384) were to apply to leases made before it went into effect, it would interfere with existing contractual rights and be a violation of the Fourteenth Amendment of the Federal Constitution.

A lease executed after 1884 on request of a lessee under a ground rent created before 1884 would be irredeemable as executed in pursuance of an agreement in the original lease. See *Flook v. Hunting*, 76 Md. 178, 24 A. 670 (1892); *Jones v. Linden Building Assn.*, 79 Md. 73, 29 A. 76 (1894); *Maulsby v. Page*, 105 Md. 24, 65 A. 818 (1907); *Poultney v. Emerson*, 117 Md. 655, 84 A. 53 (1912); *Swift and Co. v. Trustees of Shepard-Pratt Hospital*, 13 A. (2d) 174, 178, 179 (Md. 1940).

⁸⁴ For the present status of the Redemption Statutes of 1884, 1888, and 1900, see Md. Code (1939) Art. 21, Secs. 110, 111.

Stewart v. Gorter,⁸⁵ which was decided in 1889 is the first landmark case in this field. It involved a lease for fourteen years with a covenant for perpetual renewal by the lessor, an agreement by the lessor to allow redemption at five per cent, and a promise by the lessee not to avail himself of his statutory option to redeem at six per cent under the act of 1888. The precise question before the Court concerned performance of a leasing contract made in 1888, after the passage of the second redemption law. The result turned on whether the lease would be subject to the provisions of the 1888 statute.

The Court of Appeals held that the act of 1888 applied to the lease and that the lessee was not estopped by his promise. The Court emphasized that the redemption legislation of 1884 and 1888 was promulgated, not for the exclusive benefit of future leaseholders, but because of the general feeling that perpetual, irredeemable leases were injurious to the prosperity of the City of Baltimore and that public policy demanded the future prohibition of irredeemable rents. This explanation of the redemption legislation has been reiterated many times by the Court, and was amplified in *Safe Deposit & Trust Co. v. Marburg* where, speaking of the irredeemable ground rent system, the Court stated:⁸⁶

"It is well known . . . that the complex system of ground rents in this State often rendered titles unmarketable, although in some instances the rents had not been collected for many years, and some of them were for such a nominal sum and were owned by so many persons, that it was difficult to obtain the reversions for anything like a reasonable amount as compared with the rent reserved."

In rendering its decision in *Stewart v. Gorter*, the Court did not even indicate that the lease for fourteen years re-

⁸⁵ 70 Md. 242, 16 A. 644, 2 L. R. A. 711 (1889).

⁸⁶ 110 Md. 410, 413, 414, 72 A. 839, 840 (1909). For similar statements, see *Swan v. Kemp*, 97 Md. 686, 690, 691, 55 A. 441, 442, 443 (1903); *Spear v. Baker*, 117 Md. 570, 573, 574, 84 A. 62, 64 (1912); *Brager v. Bigham*, 3 Balto. City Rep. 348, 351 (1915) overruled in 127 Md. 148, 96 A. 277 (1915); Chief Judge Bond concurring in *Silberstein v. Epstein*, 146 Md. 254, 258, 259, 126 A. 74, 75, 76 (1924).

newable forever might not be classified as a lease for more than fifteen years within the meaning of the 1888 statute. But in *Swan v. Kemp*,⁸⁷ the second important case involving the redemption laws, the Court stated that though strictly speaking the lease in *Stewart v. Gorter* had not been within the language of the act of 1888, actually the provision in the *Stewart v. Gorter* lease for successive, continuous renewal leases was so plain an attempt to evade the redemption law that the Court had had no difficulty with the case.⁸⁸ Speaking of *Stewart v. Gorter* and the redemption laws, Judge Jones in his decision in *Swan v. Kemp* stated that the redemption legislation was, in effect, pronounced remedial in nature in that case and "that it is therefore by the settled rule of construction in such cases to be liberally construed so as to advance the remedy and suppress or prevent the mischief against which it is directed."⁸⁹

Swan v. Kemp made two other important contributions to the interpretation of the redemption legislation in addition to its explanation of *Stewart v. Gorter*. The first concerned the holding that the 1888 act had not invalidated the 1884 act as to leases made during the four year interim between the acts. The Court stated that "where a repealing law contains a substantial reenactment of the previous law the operation of the latter continues uninterrupted,"⁹⁰ and also noted the principle that "where rights are acquired under a statute, in the nature of a contract, or where there is a grant of power, a repeal of the statute will not divest the right of the interest acquired under it, or annul acts done under it."⁹¹ Thus it established a definite precedent for handling leases executed before

⁸⁷ 97 Md. 686, 690, 55 A. 441, 442, 443 (1903).

⁸⁸ But see *King v. Kaiser*, 126 Md. 213, 94 A. 780 (1915); *Sweeney v. Hagerstown Trust Co.*, 144 Md. 612, 125 A. 522 (1924); *Silberstein v. Epstein*, 146 Md. 254, 126 A. 74 (1924); *Maryland Theatrical Corp. v. Manayunk Trust Co.*, 157 Md. 602, 146 A. 805 (1929) where this aspect of *Stewart v. Gorter* has been discussed, approved, distinguished, and limited.

⁸⁹ 97 Md. 686, 690, 55 A. 411, 443 (1903).

⁹⁰ 97 Md. 686, 691, 55 A. 441, 443 (1903).

⁹¹ 97 Md. 686, 692, 55 A. 441, 443 (1903).

amending ground rent legislation and litigated after its passage.

The other contribution made by *Swan v. Kemp* was that it applied a redemption law to a lease of improved land. Since *Stewart v. Gorter* had concerned a lease of an unimproved lot, this was a definite extension of the coverage of the redemption legislation. However, it was an easy extension for the Court to make because in 1903 it was a well-known fact that nearly all recently-created ground rents had attached to improved land and not to empty lots. And so in order to give the redemption legislation any effect at all, the Court necessarily had to apply it to leases of improved land. An additional factor was that the redemption laws clearly referred to *all* leases of more than fifteen years which would seem to include leases of improved as well as unimproved land.

The broad language of the Acts of 1884, 1888, and 1900 has been however the cause of much trouble, for if construed literally these acts apply not only to ground rent leases but to all business and residential leases of terms in excess of fifteen years. The unfortunate aspect of such a construction becomes particularly apparent in regard to commercial building leases made since 1884 for these leases, which often reserve and call for other types of consideration besides monetary rent, are hardly suited to out-and-out redemption on a basis of the rent capitalized at six per cent. With this in mind, the legislature in 1914 passed an act which was apparently supposed to state that the legislature had always intended that business leases of less than twenty-five years would be exempt from the provisions of the acts of 1884, 1888, and 1900.⁹² Realizing however that this act of 1914 was poorly drawn, the legislature in 1922 replaced its 1914 creation with a new law which provided that the redemption laws were not intended to apply to business leases of ninety-nine years or less.⁹³

Thus, the legislature lifted all non-ground rent business

⁹² Md. Laws 1914, Ch. 371.

⁹³ Md. Laws 1922, Ch. 384 codified as Md. Code (1939) Art. 21, Sec. 115.

leases created after 1922 from the coverage of the redemption legislation.⁹⁴ But unfortunately it was not able to protect business leases executed between 1884 and 1914 or indeed between 1884 and 1922.

In 1929, the case of *Maryland Theatrical Corp. v. Manayunk Trust Co.* arose, involving a lease executed in 1914 after the act of that year had gone into effect.⁹⁵ The lease was for business purposes and did not exceed twenty-five years and on that basis the lessor contended that his lessee did not possess a statutory option of redemption under the act of 1900 since the lease was governed by the act of 1914. That act provided that the acts of 1884, 1888, and 1900

“were not intended to apply and do not apply to leases or sub-leases of property leased for business purposes when such leases or sub-leases contain a clause prohibiting assigning or sub-leasing all or any part or parts of the property leased, without the written consent of the landlord, and where the term of such leases or sub-leases, including all renewals provided for, shall not exceed twenty-five years.”⁹⁶

The Court, in construing this statute, held that the lease in the case before it was not exempt from the operation of the act of 1900 since, although it was for business purposes and was not in excess of twenty-five years, it did not prohibit assignment and sub-leasing of the property without the written consent of the landlord. The Court stated that it was quite reluctant to reach this conclusion, which though in accord with the language of the statute, quite obviously ran counter to the intent of the legislature.

As the result of this decision, the ordinary business lease executed between 1914 and 1922 in excess of fifteen years would seem to be subject to the redemption law of 1900. *A fortiori*, all such leases executed between 1884 and 1914 would seem to come within the purview of the redemption statutes. Probably, this matter is a closed

⁹⁴ The 1922 act exempted leases 99 years or less from the operation of the redemption laws. Ground rent leases, as the term has been used in this paper, are leases for 99 years renewable forever. But see *Ogle v. Reynolds*, 75 Md. 145, 23 A. 137 (1891) discussed *supra* n. 2.

⁹⁵ 157 Md. 602, 146 A. 805 (1929).

⁹⁶ Md. Laws 1914, Ch. 371.

book as far as the Court of Appeals is concerned but it is submitted that the redemption acts were never intended to apply to any but ground rent leases and that they should have been construed in such a light.

The first case involving a business lease for a term of fifteen years or more which had been executed prior to the passage of the 1914 act was *Brager v. Bigham*.⁹⁷ This case, decided in 1915, involved a sub-lease by leaseholders of a three story building in down-town Baltimore on North Eutaw Street, which then was Brager's Department Store, and today is the Brager-Eisenberg Store. The lease, executed in 1906, was to run for a term of twenty years which was to begin in 1915 on the expiration of a lease already existing between the parties. The rental was to be \$2,100 per year and the sub-lessee, in addition to covenanting to pay this rent, agreed to erect a building at a cost of not less than \$20,000 by December, 1915, or in the alternative to pay his lessors \$10,000.

In February 1915, the sub-lessee requested redemption on a six per cent basis under the act of 1900, but the defendant sub-lessor refused to convey his interest. At the time of the demand and at the time the case came up before the Circuit Court of Baltimore City, the plaintiff had neither erected a new \$20,000 building, nor paid the alternative sum of \$10,000.

Judge Bond, now Chief Judge of the Court of Appeals, but then a member of the Supreme Bench of Baltimore City, heard the case. His opinion stated that two main questions were raised by it. One was whether the right of redemption, if it existed, would come into being five years after the execution of the leasing agreement, or five years after the term began. The other—the main question of the case—was whether the right of redemption existed, that is, whether the lease involved came within the purview of the redemption statutes.⁹⁸ In reaching

⁹⁷ 127 Md. 148, 96 A. 277 (1915), reversing 3 Balto. City Rep. 348 (1915).

⁹⁸ Judge Bond rested his decision on the proposition that the lease before him was not covered by the redemption statutes, but stated that he believed the right of redemption would accrue five years after the execution of the instrument. The Court of Appeals, though reversing Judge

his answer to this latter question, Judge Bond started out by distinguishing between leaseholds under ninety-nine year renewable forever (or ground rent) leases and terms under ordinary house and building leases, comparing the former to the fee estates under Pennsylvania ground rents.⁹⁹ He then went on to make the following comment upon the reasons behind the passage of the redemption laws:

"From such of the published discussions as I could find on objections made to these irredeemable ground rents at or about the time of the passage of the statutes, and from information I have obtained from judges and attorneys who have recollections of the discussion, it appears that there were four or five specific objections. For one, ground rents were so much sought as investments that buildings were being erected far in excess of any demand, merely in order to create the ground rents under them. And this was done upon loose, unsound financial arrangements which brought confusion and injury. There was a belief that this particular form of security withdrew capital from activities which might advance the prosperity of the city, and into a position of usefulness. Again, it was thought to produce a highly artificial, unfair charge in a long course of time, in that as the return upon capital naturally decreased this fixed unchangeable charge became disproportionately great on many lots. The inevitable splitting-up of old lots subject to ground rents had produced accumulations of sub-leases and sub-rents, and so brought complaints of confusions in land titles and unequal charges upon portions of these old lots. And the existence of these old rents, especially with the uncertainty and confusions in the titles to them, made real property in some instances unmarketable."¹⁰⁰

Bond's decision on the main point in the case, held that the lessee could redeem even before the start of the term. It said that the language of the 1900 statute provided for redemption at five years from the date of the lease or sub-lease, not from the commencement of the term. It added that the latter construction would allow parties to frustrate the exemption laws by executing a series of leases and agreements to take effect at future times.

⁹⁹ Leasehold estates as compared with mere terms for years are also distinguished in *Culbreth v. Smith*, 69 Md. 450, 459, 16 A. 112, 116, 1 L. R. A. 538, 541 (1888) and in *Baltimore City v. Latrobe*, 101 Md. 621, 61 A. 203 (1905). See also *Crowe v. Wilson*, 65 Md. 479, 5 A. 427 (1886).

¹⁰⁰ 3 Balto. City Rep. 348, 351 (1915).

Continuing, Judge Bond stated that the mischiefs sought to be cured by the redemption laws were therefore incident to the ground rent system, and had no relation to rents in building leases. However, he added that though these reasons alone were probably not sufficient to exclude the lease before him from the operation of the 1900 statute, his reasoning was also supported by the title of the act of 1884 which declared that it proposed "to prohibit the creation in the future of irredeemable ground rents, and to regulate the leasing of land."¹⁰¹ The judge then noted that a fair construction of the last seven words of the title of the 1884 act seemed to indicate that the legislature did not contemplate the regulation of all leases of "land", using that word in its broadest sense.¹⁰²

The opinion then included a discussion of the difficulties in the way of applying the redemption laws to building leases and stressed that the active interests of both parties to a building lease brought forth "a variety of considerations not all expressed in rent."¹⁰³ It observed that the provision in the lease in the case at bar calling for the erection of a \$20,000 building or a payment of \$10,000 was almost surely entered into in conjunction with the rental covenants and that possibly "the alternative payment of \$10,000 was a commutation of rent" to be waived in consideration of the plaintiff's construction of a new building.¹⁰⁴

Judge Bond also referred to leases where there were provisions for reduced rents if store fixtures were installed and to a twenty-year no-rent lease in *Feldmeyer v. Werntz*,¹⁰⁵ where the only bargain was that the lessee should keep and maintain a certain space in the leased building for the lessor. He concluded by discussing the effect of the 1914 law, stating that it was not applicable here since the lease was executed in 1906.

¹⁰¹ Md. Laws 1884, Ch. 485.

¹⁰² Judge Bond cited *Buckler v. Safe Deposit and Trust Co.*, 115 Md. 222, 80 A. 899 (1911), where a lease of railroad properties which included land, was held not to be within the purview of the redemption laws.

¹⁰³ 3 Balto. City Rep. 348, 352 (1915).

¹⁰⁴ 3 Balto. City Rep. 348, 352 (1915).

¹⁰⁵ 119 Md. 285, 86 A. 986 (1913).

In reversing Judge Bond's decision that the lessee did not possess the right to redeem, the Court of Appeals, held that so-called building leases were not distinguishable under the language of the redemption laws, or under the policy behind their passage, from other leases. It stated that the lease of a building carried the land along with it and therefore was a lease of land within the terms of the redemption legislation. The Court admitted that there was some injustice in allowing the sub-lessee in the case before it to redeem before performing his agreement to erect a \$20,000 building or pay \$10,000 but remarked that first of all, the lessee's option to redeem was a statutory right and that the parties had to be taken as having contracted in reference to it; and that secondly, as stated in *Stewart v. Gorter*, the right of redemption was given mainly for the benefit of the public. The first reason might well be joined with the further remark that since the Court had decided that the lessee could redeem and buy out the lessor, the erection of a new building would be rather immaterial to the lessor. But the plain answer is that the parties did not contemplate redemption and entered into a perfectly normal business arrangement which only became abnormal when redemption was allowed. If there were any reason for wanting to limit the terms of business leases to fifteen years, then the result of *Brager v. Bigham* might be a necessary one; but only the bare statement of the Court of Appeals that the policy behind the redemption laws required the result was given in rendering the decision.¹⁰⁶

¹⁰⁶ *Brager v. Bigham* lay entirely by the wayside until 1923 when it was cited for the first time in *Williams v. State*, 144 Md. 18, 24, 123 A. 457, 459 (1923), in support of the following quotation from *Smith v. State*, 66 Md. 215, 217, 7 A. 49, 50 (1886): "Whatever latitude may, at one time, have been assumed by courts in the construction of statutes, the more recent cases have established the rule that when the language of a legislative enactment is clear and unambiguous, a meaning, different from that which the words plainly imply, cannot be judicially sanctioned. Even when a court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."

But note the following proposition stated in *Chesapeake and Ohio Canal Co. v. Baltimore and Ohio R. R. Co.*, 4 G. and J. 1, 152 (Md. 1832) which was cited and quoted by Judge Bond concurring in *Silberstein v. Epstein*, 146 Md. 254, 258, 264, 126 A. 74, 75, 78 (1924) and was quoted

The second case involving the redemption laws and building leases arose in 1924. This was the case of *Silberstein v. Epstein*¹⁰⁷ and the specific problem before the court was whether or not there could be specific performance of a contract for sale of the New Howard Hotel, situated in down-town Baltimore. The solution of this problem turned on whether or not the lessee could successfully claim the right to redeem under the statute of 1900.

The hotel had been leased in 1906 for ten years with a privilege of renewal for another ten. In 1916 a second lease was executed for ten years. The Court posed the issue as follows: Was the 1916 lease a renewal of the 1906 lease? If not, it was but a ten year lease and so not within the terms of the redemption law. The Court held that the 1916 lease constituted a new contractual arrangement, noting that there had been an interval of several weeks between the expiration of the 1906 lease and the signing of the 1916 lease, that there was a new provision in the second lease regarding payment of a mortgage on the leased property, and that the parties apparently had thought they were making a new bargain.

In a concurring opinion, Judge Bond, who had shortly before been elevated to the Court of Appeals, reiterated and restated the position he had taken in *Brager v. Bigham*. He commented on the perpetual character of ground rent leases and opined that the redemption legislation was designed for ground rent leases and ground rent leases only. He noted that long term business leases were known before 1884, but had become more popular with the growth

and approved as lately as *Jones v. Gordy*, 169 Md. 173, 180 A. 272 (1935): "Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them, as best to answer that intention which may be collected from the cause or necessity of making the act, or from foreign circumstances; and when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute. . . . That, therefore, which is within the letter of the statute, is not within the statute, not being the intention of the makers."

In this connection, it might be well to compare the following statement by Mr. Justice Stone in *Haggard Co. v. Helvering*, 308 U. S. 389, 394, 84 L. Ed. 287, 289, 60 S. C. 337, 339 (1940): "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."

¹⁰⁷ 146 Md. 254, 126 A. 74 (1924).

of business and the resultant need for the settled business status which long term leases secured. In conclusion, he proposed that the Court expressly overrule *Brager v. Bigham* and hold that the lease before it was not a ground rent lease and so not subject to the redemption law of 1900.

But then, in 1928, in *Marburg v. Mercantile Building Co.*,¹⁰⁸ the Court, in dealing with the application of the redemption act of 1900 to a twenty-one year lease which had no covenant for renewal, expressly approved *Brager v. Bigham* and declined to overrule it. The lot and building involved in this case was located at Fayette Street and Park Avenue in the heart of down-town Baltimore. In holding that the lessee could redeem, the Court concluded that the redemption laws were entirely constitutional and did not violate the freedom of contract clause of the Fourteenth Amendment. It compared the Maryland statutes to legislation in New York, Michigan, Iowa, Minnesota and Wisconsin, limiting the length of leases of agricultural land, and to legislation in Massachusetts, Alabama, California, North and South Carolina, and Nevada limiting the periods of land and building leases. The Court referred to the irredeemable ground rent system which the legislature had intended to break up and proceeded to apply the statute of 1900 to the commercial lease in the case before it. Counsel for the ground rent owner had argued that the acts of 1914 and 1922 indicated that the legislature had never intended the redemption laws to affect building leases but the Court's answer was that the interpretation of statutes is for the courts and that courts are not bound by the legislature's own interpretation of its prior acts.

The Court perhaps was influenced in making its decision in this case by its knowledge of earlier litigation of the same lease; for in handing down his opinion, Judge Sloan stated that the defendant ground rent owner was not an innocent victim of the law. The judge after noting that in *American Piano Co. v. Knabe*,¹⁰⁹ counsel for this same

¹⁰⁸ 154 Md. 438, 140 A. 836 (1928). Judge Bond concurred in this case, the opinion being written by Judge Sloan.

¹⁰⁹ 131 Md. 111, 101 A. 680 (1917).

defendant had admitted that the leasehold was redeemable at six per cent, stated that the present plaintiff lessee had taken an assignment of the lease for \$20,000 and had invested an additional \$30,000 in improvements, "all in contemplation of the redemption of the property, and in reliance upon the act of 1900, and the decisions of this court. . . ." ¹¹⁰

Undoubtedly, it would have been hard on the plaintiff to have overruled *Brager v. Bigham* and denied him his right of redemption. But hardships often result when a court overrules itself. ¹¹¹ At any rate, the Court set its star in *Marburg v. Mercantile Building Co.*, and in *Maryland Theatrical Corp. v. Manayunk Trust Co.*, ¹¹² it showed that it intended to follow the path it had marked out in *Brager v. Bigham*. Here the property leased was the entrance lobby of Keith's Theatre, situated on Lexington Street in the middle of the shopping district of Baltimore. The lease (actually a sub-lease) was executed in 1914 for six years, with a right to renew in 1920 for eight more years, and with an additional right to renew in 1928 for another ten years. The lessor also granted to the lessee an option to purchase the leasehold in 1938 for \$125,000 subject to an annual ground rent at \$240. Thus, the parties had seemingly worked out a business-like arrangement which

¹¹⁰ 154 Md. 438, 445, 140 A. 836, 839 (1928).

¹¹¹ Indeed, if the Court of Appeals had wished to overrule the *Brager* case in *Marburg v. Mercantile Building Co.*, 154 Md. 438, 140 A. 836 (1928) and still not subject the current plaintiff to undue hardship, it might well have adopted the technique espoused by the State of Montana and upheld by Mr. Justice Cardozo of adhering to the established rule in the case at bar and giving only future effect to its overruling decision. *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. C. 145 (1932).

¹¹² 157 Md. 602, 146 A. 805 (1929). The effect of the 1914 Act upon the lease in this case is discussed *supra circa* n. 94ff. The lessor also contended that the arrangement in question was really a series of short leases and did not constitute a twenty-four year lease. See n. 88, *supra*. The lessor in addition claimed that the rent was too uncertain. The rent was \$7,500 plus one-half of any increases in taxes over the 1914 assessment arising not from any increase in rate but solely from an increase in the assessment, plus water rent in excess of \$13 a year, plus fire insurance premiums in excess of \$50 a year. The Court held these items were easily ascertainable. Cf. *Walker v. Washington Grove Ass'n*, 127 Md. 564, 96 A. 682 (1916) where the redemption laws were held inapplicable to leases under a special Camp Meeting Association plan. This case was distinguished by the Court in the *Manayunk Trust Co.* case, *supra*.

would hardly seem to contravene the welfare of the people of Baltimore. And yet the provisions of the lease were in effect set aside by the Court's construction of the 1900 statute.

To date, the Court has not been faced by a long-term lease of residential or non-commercial property—a lease which does not create the type of perpetual interest arising under a ground rent indenture. Probably there are a relatively small number of such leases in existence. In *Bellevue Club v. Punte*,¹¹⁸ a lease, for five years renewable for twenty-one, of a Middle River shore, boats, and out-houses was brought before the Court by the lessee fishing club which had sued to compel redemption; but the Court disposed of the lessee's demand on other grounds without ever mentioning the redemption legislation. However, there is no reason to believe that the Court, when squarely faced by this problem, will not apply the rule of *Brager v. Bigham* and treat long-term residential leases exactly as if they were perpetual ground rent leases.

Whether such an application would be wise or not is a question which cannot be easily answered. If it be assumed that the redemption legislation was directed at ground rent leases and at ground rent leases alone, then it would seem that they should not be construed to cover any other type of lease. And yet it is necessary to note that the redemption laws of 1884, 1888, and 1900 all provided for redemption of leases of more than fifteen years. This flat fifteen year limit without reference to whether the lease was renewable forever, is the strongest single argument in favor of the rule of *Brager v. Bigham* and the cases which followed in its wake. It is submitted that this reason does not justify the decisions in those cases, particularly in view of the legislature's own expression of opinion in 1914 and 1922 in regard to commercial leases. But it also must be admitted that the existence of the fifteen year limit might possibly support an application of the redemption laws to long term residential leases of other than the ground rent variety. The final answer to this

¹¹⁸ 148 Md. 589, 129 A. 900 (1925).

problem might depend on the Court's evaluation of the usefulness of long term leases. But it would seemingly be better for the Court to say: the existing redemption laws were directed toward ground rent leases; if the legislature wishes to restrict other forms of long term leasing, it is up to it to formulate legislation to handle the problem. Undoubtedly in formulating any new laws, the legislature would do well to keep in mind the connection of long term residential leases to ground rent leases and whether under the guise of the former a return to the old irredeemable rent system was being manipulated. Of course, in reality, the problem of long term residential leases does not exist today in Maryland for they are so seldom employed. But if it should arise, it might be well for the legislature to act unless it desires a repetition of *Brager v. Bigham*, and the consequent application of straight redemption to leasing arrangements unsuited for such application.¹¹⁴

And yet despite the backfire of the redemption statutes into the field of commercial and perhaps residential leases, that legislation has been responsible for changing the ground rent system into a workable, beneficial mechanism. Before 1884, the irredeemable system was in full swing and, really to appreciate the significance of the acts of 1884, 1888, and 1900, it is necessary to look back at the workings of the irredeemable system and note in particular how it affected leaseholders.

Take for example the case of a leaseholder who in some year before 1884 has executed an irredeemable ground rent lease. He has a ninety-nine year lease renewable forever and is therefore safe in making improvements on his property. But he must continue to pay a steady sum of rent as long as he owns the leasehold. And even if he assigns it, he remains liable for rent during the entire duration of the term, or at least as long as he lives,¹¹⁵ unless he has been wise enough to have it created through a straw man. If

¹¹⁴ For a general discussion of long term leases, see Note: *The Long Term Ground Lease: A Survey*, (1939) 48 Yale L. J. 1400. For a brief discussion of constitutional and statutory limitations on the length of leases, see FREUND, *POLICE POWER* (1904) Sec. 371.

¹¹⁵ *Supra* circa n. 67.

the value of the property goes down, he must still continue his payments; indeed, the lessor, if he so desires, can forego his right of reentry and sue the lessee for the semi-annual rental payments each time they fall due. So if a lessee remains financially solvent, he must pay his rent unless he is able to assign the lease. If he is unable, he is in reality a perpetual debtor.

Then also, if the value of the property goes up and the lessee wants to clear his title, he will have to redeem it at a very high price—transactions at one per cent have occurred. There are many reasons why a lessee may wish to clear his title. He may, for instance, own a term in a small parcel of land in a down-town business area. Let us suppose he gets an offer from a department store, which is buying up an entire half-block to use as the site of a new building. The store wants unencumbered fee simple titles. Perhaps it plans to mortgage the property and its prospective mortgagee is demanding a clear fee title. Our lessee goes to his landlord and asks him to redeem. (This assumes that there are not several strata of sub-rents with consequent added complications.) The landlord refuses to sell the fee, except at a very high price, a price which the lessee who has invested heavily in his leasehold refuses to pay and naturally so, since he wants to get at least the fair value of what he put into the property plus an adequate percentage of its extra value to the store. The upshot is that the store may not be able to acquire the property it wishes to buy and which, in the interests of the development of the city, it should buy.

It is true, of course, that the owner of any interest in a particular piece of land can always "hold up" acquisition of a free and clear title. But as a result of the irredeemable ground rent system, this "hold-up" power was spread and respread into the hands of so many persons as to become quite objectionable and burdensome.

Another difficulty was that some ground rents had been reserved on large tracts of land in the early days of the city's history. Later these tracts were subdivided, but despite the subdivision, the cloud of the entire ground

rent continued to hang over each separate piece. For the ground rent owner had and has the right to exercise his rights of distraint and reentry in regard to any part of the leased premises when the tenant of another part of the leasehold is in default. Probably he has not the right to enforce personal liability for more than a proper proportion of the original rent from the assignee or sub-lessee of each separate part of the leasehold—probably he cannot thus collect the entire original rent from the owner of one slice of the leasehold and force the latter to subrogate himself to the landlord's claims against the owners of the rest of the leasehold.¹¹⁶ But even if this power is denied to him, the original ground rent man has enough rights in respect to each parcel of the leasehold under an irredeemable ground rent to hamper materially the clearing of title to those premises.

Such complications were hardly within the ken of the original landowners who created these irredeemable leases against the setting of an agricultural and small town society,¹¹⁷ but they have been headaches to many Baltimoreans since the city has become a commercial center, and especially so during the period after the great fire of 1904 when a large part of the city had to be rebuilt.¹¹⁸ As a matter of fact, however, one result of the big fire was

¹¹⁶ See 1 TAYLOR, LANDLORD AND TENANT (9th ed. 1904), Sec. 109; 3 THOMPSON, REAL PROPERTY (4th ed. 1939) Sec. 1421; 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) Sec. 882.

¹¹⁷ MAYER, *op. cit. supra* n. 2, 57.

¹¹⁸ The following appeared in the Baltimore Sun on December 23, 1904 under the title *Ground Rents an Obstacle and the sub-head Make Acquisitions of Lots for City Improvements Difficult*:

"Chairman Swann of the Burnt District Commission, said yesterday that at least 50 pieces of property in the wharf district could be secured at once if an agreement were reached between the owners of properties and the leasehold interest. He explained that ground rents had been a continual source of trouble to the commission in acquiring property in the market and wharf districts."

For condemnation powers given the Burnt District Commission, see Md. Laws 1904, Ch. 87. For difficulties that arose in the condemnation of property encumbered by irredeemable ground rents, see *Baltimore City v. Latrobe*, 101 Md. 621, 61 A. 203 (1905) involving what is now the Court House Plaza on St. Paul Street.

See also the Baltimore Sun, February 1, 1906, where there is reference to a piece of property on Frederick Street in the burnt district lying idle because it was burdened by an irredeemable ground rent which scared off a prospective buyer who had planned to buy the property and erect a building on it.

“to wipe out a great many of the old irredeemable rents, either by purchase, condemnation, or re-entry.”¹¹⁹

Mayer,¹²⁰ writing in 1883, flatly advocated the prohibition of any more irredeemable ground rents. He referred to the extinguishment of quit rents in Maryland in 1780, of perpetual and long term rents in France in 1789, in Germany in 1848, and in New York in 1846 and 1848.

¹¹⁹ Letter of May 25, 1906 from Conway W. Sams, President of the Appeal Tax Court of Baltimore City, to Governor George C. Pardee of California in answer to a letter written by the governor to Mayor Timanus of Baltimore, which stated that the California legislature was considering the advisability of introducing a ground rent system and asked for information regarding the Maryland system. The reply letter traced the history of the redemption legislation, enclosed a typical ground rent lease, and commented that redeemable ground rents are “not much more than five year mortgages, with the distinction that the mortgage can remain indefinitely unless the tenant chooses to redeem, otherwise only by default under the terms of the lease can the landlord reenter.” The writer estimated that about three hundred old irredeemable rents were wiped out by the fire and stated that he thought Maryland would never go back to the irredeemable system.

This letter was reprinted in the *Baltimore American*, May 26, 1906. A copy of it can also be found in the Legislative Reference Library in the City Hall.

For an earlier identical statement that the Baltimore fire wiped out a great many irredeemable rents, see Leser, *What the Great Fire Has Accomplished for Baltimore*, Municipal Engineering, November 1905, vol. 29, no. 5. See *Mayor of Baltimore v. Latrobe*, 101 Md. 621, 61 A. 203 (1905) where the Court had before it a condemnation problem, and severely limited its earlier decision in *Gluck v. Mayor of Baltimore*, 81 Md. 315, 32 A. 515 (1895).

Another letter of interest in this connection was written May 18, 1906 by one John E. Bennett, apparently a member of the San Francisco Bar, from San Francisco to the Editors of the *Baltimore Sun* and the *Baltimore American*. It starts off by stating that the “Legislative Committee on Reconstruction of San Francisco has adopted a recommendation to the legislature to put into operation in California the 99-year lease or the ground rent system.” The writer goes on to say that he was a resident of Baltimore and a member of the bar during the '80's when the irredeemable ground rent system was discarded and notes the reasons why it was discarded and asks that the *Sun* and/or *American* publish some information concerning the history of the ground rent system.

The writer concluded as follows: “Perhaps I am asking too much of you, but our libraries here are all burned, and we have no access to reference works which would give us the information sought at this time upon the general subject, and the specific local information as regards Maryland you probably have at hand. Whatever you may be pleased to publish will be embodied in a communication to the Legislature for its information.

“I enclose 50 cents for two months' subscription to your paper.”

This letter was commented on in a *Baltimore Sun* editorial (May 29, 1906) which stated that the Committee on Reconstruction of San Francisco would recommend to the California Legislature the adoption of the ground rent system in order to facilitate the borrowing of money on lots made vacant by the fire so that houses could be rebuilt. The editorial also reviewed the history of the Maryland ground rent system.

¹²⁰ Mayer, *op. cit. supra* n. 2, 127-130.

He noted the Pennsylvania ground rent redemption legislation of 1850 and 1869¹²¹ and declared that though the form of the Pennsylvania Act could not be followed since the Pennsylvania and Maryland systems were based on different principles, still public opinion in Maryland was favoring a law with the same object. He then included a copy of the preambles and resolutions in favor of a law prohibiting the future creation of irredeemable ground rents in Maryland which had been offered before the Baltimore City Council in February of 1883 by Henry N. Bankard. The first section of the preamble reads:

“Whereas the State of Maryland is the only place that tolerates perpetual debts in the shape of irredeemable ground rents; . . .”

and it goes on to point out many evils of the irredeemable system.¹²²

Of course, the Redemption legislation has largely cured the “irredeemable evil” but the problem still remains and will almost surely continue to remain in regard to the irredeemable ground rents renewable forever which are now in existence. For under the due process clauses of both the State and Federal Constitutions, these interests as a general proposition cannot be abolished.

¹²¹ The Pennsylvania Redemption Act of 1869 (Pamph. L. 1869, p. 47, *Purd.* 1570) was declared unconstitutional in *Palairret's Appeal*, 67 Pa. 479 (1871); a later redemption act which is still in effect is Pa. Public Laws 1885, 161, Sec. 1 codified as Pa. Code, Title 68, Sec. 162. The Act of 1850, still in effect, is Pa. Public Laws 1850, 549, Sec. 21 codified as Pa. Code, Title 68, Sec. 161.

¹²² Bankard was a member of the City Council of Baltimore for the 14th ward. Mayer mentions that he was active for many years in his opposition to the irredeemable system. In 1897, Bankard made an address before the Taxpayer's Association of Baltimore City entitled “Taxation—under the New and Old Assessment Laws,” dated September 8, 1897 and published in Baltimore in that year by the Sun Book and Job Printing Office. One portion of the address, pp. 22-24, is entitled “The Irredeemable Ground Rent Evil.” In it, Bankard claimed that every taxpayer in Maryland was paying tribute to the holders of irredeemable ground rents, contending that the system was responsible for the deficiency in the taxable basis. (This claim would not seem to have any basis since the tax assessors can and could assess independently of the existence of any ground rent.) He valued ground rents then in existence at \$60,000,000 and perhaps was talking only of irredeemable ground rents. In this connection see the 6th Annual Report of the Bureau of Industrial Statistics for Maryland (for 1897) which states that no records as to the amount of land held under ground rent have been kept but that the Tax Department estimated that about 75% of the property in the city was then held subject to ground rent.

However, it is well to note that despite all the trouble caused by the irredeemable ground rents, the legislature apparently realized that the ground rent system contained many distinct advantages and that therefore it did not attempt to do away with the system entirely.

One indication of what was in the legislature's mind can be gleaned from the language of the redemption legislation itself. From this language it appears certain that the legislation contemplated the present development of redeemable ground rents.

A second indication that the legislature did not wish to do away with ninety-nine year leases was the passage of other remedial ground rent legislation in the 1884, 1886, and 1888 sessions. One of those other acts¹²³ provides that whenever there has been no demand for, or payment of rent reserved for twenty years, it is to be conclusively presumed that the rent is extinguished¹²⁴ unless the lessor at the expiration of the twenty year period proves he was under a legal disability to assert his claim. This statute, held constitutional in *Safe Deposit and Trust Co. v. Marburg*,¹²⁵ was another step by the legislature in its cam-

¹²³ Md. Laws 1884, Ch. 502 codified as Md. Code (1939) Art. 53, Sec. 36. Other remedial legislation passed in the 1880's included the automatic renewal statute, Md. Code (1939) Art. 21, Sec. 113. Later ground rent redemption legislation includes the trustee-redemption act, Md. Code (1939) Art. 16, Sec. 275, considered in *Kingan Packing Ass'n v. Lloyd*, 110 Md. 619, 73 A. 887 (1909); and in *McCrory Stores v. Bennett*, 159 Md. 568, 152 A. 258 (1930); the infant-redemption act, Md. Code (1939) Art. 93, Sec. 179; the unmarried-women-over-eighteen redemption act, Md. Code (1939) Art. 21, Sec. 2. See also Md. Code (1939) Art. 16, Secs. 116 and 150 enacted in 1884 and connected with the renewal legislation. See also Md. Laws 1884, c. 502 codified as Md. Code (1939) Art. 53, Sec. 35.

¹²⁴ Four methods of extinguishing ground rents are listed in *Liss, The Ground Rent System in Maryland*, Baltimore Daily Record, August 6, 1937: (1) forfeiture for breach of covenant; (2) merger (*Mayer, op. cit. supra* n. 2, 70); (3) adverse possession; (4) redemption. A fifth method is estoppel. See *Jones v. Rose*, 96 Md. 483, 54 A. 69 (1903).

¹²⁵ 110 Md. 410, 72 A. 839 (1909). The Court construed the statute to provide that failure to demand or receive payment of rent for twenty years operated not only to bar any action for rent by the landlord, but also to automatically extinguish the landlord's reversionary interest. The Court also stated that the statute may have been hastened by the decision in *Myers v. Silljacks*, 53 Md. 319 (1882) where it had been held that possession by a tenant and non-payment of rent were not sufficient to bar the landlord's title and right to demand future payments of rents even though the Statute of Limitations barred his claims for back rent. The Court reasoned that the mere non-payment of rent did not show any hostility on the part of the tenant or any denial of the lessor's rights, sufficient to bring about adverse possession. For this same proposition, see *Gwynn v. Jones' Lessee*, 2 G. and J. 173, 184 (Md. 1830) and *Camp-*

paign to remove from leasehold properties the harmful restrictions which were tying up the development and the use of a great deal of land.¹²⁶

Taking the redemption and other remedial legislation together, it can be clearly seen that they materially changed the status of the lessee under a ground rent demise. But it also is necessary to note that leaseholders under such leases were still just as liable on their covenants as they had been before the period of remedial legislation began; and until they exercised their statutory options of redemption, they were still merely owners of personalty subject to tenurial and possibly contractual obligations.¹²⁷ However, for the most part there have been only scattered complaints about the lessee's position since the statutory changes discussed above were put into effect, and most observers have felt that in the last thirty years the redeemable ground rents have been an exceedingly satisfactory and beneficial institution.

VII. A COMPARISON OF REDEEMABLE GROUND RENTS AND MORTGAGES

A redeemable ground rent is in effect a mortgage without a due date—a mortgage whose principal need never be paid—with an option in favor of the “mortgagor” to pay it off at any time after the expiration of five years at a capitalization of six per cent.

Mayer, commenting in 1883, when there were but few redeemable ground rents, noted that they were sometimes

bell v. Shipley, 41 Md. 81, 96 (1874). See also Arnd v. Lerch, 162 Md. 318, 159 A. 587 (1932), involving the adverse possession act of 1884, Md. Code (1939) Art. 53, Sec. 36.

Cf. Wilson v. Isemminger, 185 U. S. 55, 22 Sup. Ct. 573 (1902), where the United States Supreme Court sustained the validity of the Pennsylvania Act of April 27, 1855, which raised a conclusive presumption of extinguishment of a ground rent after non-payment for twenty-one years.

¹²⁶ For instance, the 1884 extinguishment statute must have been the means of extinguishing many one-cent rents and such token rents (e. g. peppercorn, arrowhead, etc.) as still existed that late in the nineteenth century.

¹²⁷ A leaseholder with the statutory right to redeem is the owner of personalty and not realty until he exercises that right, just as he was before the redemption legislation. Leaseholds have always been considered personalty except in so far as these rules have been modified by express legislation. *Holzman v. Wagner*, 114 Md. 322, 79 A. 205 (1911).

used in lieu of mortgages for securing loans or for making up the unpaid residue of purchase money on the sale of property.¹²⁸

In *Mayor of Baltimore v. Canton Co.*, the Court of Appeals said:

"The landlords interest in land is but a form of money investment, analogous to that secured by a mortgage."¹²⁹

In *Posner v. Bayless*, a previous case, the Court had already held as follows:

"A redeemable ground rent is a common and ordinary form of securing a loan of money. In fact a ground rent redeemable at a definite future period has most of the essential features of and is practically nothing more than a mortgage to secure a principal sum, the interest of which is placed in the form of an annual rent. . . ."¹³⁰

However, it is well to remember that though a redeemable ground rent and an ordinary mortgage are very similar, they have different aspects. When a ground rent is

¹²⁸ Mayer, *op. cit. supra* n. 2, 120.

¹²⁹ 63 Md. 218, 237 (1885).

¹³⁰ 59 Md. 56, 60 (1882). See also *Whiting-Middleton Co. v. Preston*, 121 Md. 210, 88 A. 110 (1913).

Ground rents have been treated like mortgages in many instances. They have been included in the statutory classification of "mortgages and instruments in the nature of mortgages." 21 Ops. A. J. 760 (1936) regarding interpretation of the so-called Mortgage Deduction Act, Md. Code Supp. (1935) Art. 81, Secs. 2, 15(b).

Another instance is tied up with the policy of the FHA. That federal agency will guarantee loans up to 80% or 90%, depending on the status of the property. In guaranteeing mortgages on leasehold estates, the FHA deducts the capitalized value of a redeemable ground rent (which is usually the annual rent capitalized at six per cent) from 80% or 90% of the fee value of the property. Thus the FHA does not consider the leasehold as a separate entity, but values the property as a whole, and deducts the capitalized value of the ground rent just as if it were a mortgage. If it treated each leasehold as a separate entity it would deduct the amount of the ground rent from the fee simple value, thus get the value of the leasehold and approve a loan up to 80% or 90% of that amount. Such a procedure would allow leaseholders to borrow more money from the FHA. In protesting the policy of the FHA, the Baltimore Real Estate Board argued that a ground rent is not a first mortgage, but only a fixed charge like a tax charge, and claimed that it is no more justifiable to capitalize a ground rent and treat it as a mortgage than to capitalize the annual tax bill and treat it as a mortgage. This contention seems entirely incorrect for a redeemable ground rent is certainly more like a mortgage than a tax charge. See Editorial, *Realtors Protest FHA Rules—Ask Change*, *Baltimore Real Estate News*, April 1938, vol. 6, no. 4, pp. 1, 2.

created, the lessee buys a leasehold and a privilege to buy in the reversion at the end of five years from the date of the creation of the lease. Where there is a mortgage, the creation of a debtor-creditor relationship is considered the crux of the transaction and the conveyance is treated as being really for the purpose of securing the indebtedness.¹³¹ Mayer,¹³² writing in 1883, queried whether a lessee under a redeemable ground rent should not be allowed the privilege possessed by the ordinary mortgagor of discharging at any time he chose, but the Court of Appeals appears to have summarily rejected this proposition when it was advanced by counsel in 1893 in *Packard v. Corp. for Relief of Widows*.¹³³

However, despite the fact that a leaseholder cannot redeem at will, he can under the present state of the law, redeem any ground rent created after 1900 at any time after five years of the term has elapsed—that is, he can redeem anywhere along the line between five and ninety-nine years and anytime after that if he renews the lease or can claim automatic renewal under the act of 1886.¹³⁴ And so the fact that leaseholders cannot redeem during the first five years is no great detriment.

It is worthwhile noting that relatively few ground rent defaults occurred during the recent depression. In fact, it is probably true that in times of depression and money panic, Baltimore has seen less of the foreclosure evil than have other large cities in which only ordinary mortgages are used.¹³⁵ This may be largely be-

¹³¹ Nevertheless, a usurious mortgage loan cannot be covered up by the use of ground rent trimmings. *Montague v. Sewell*, 57 Md. 407, 412, 413 (1881) where the Court held that what was in form a ground rent lease was in fact a loan because of "well established facts . . . which cannot be satisfactorily accounted for upon any other theory than that the transaction was a loan. . . ." See also *Gaither v. Clark*, 67 Md. 18, 8 A. 740 (1887); *Odd Fellows Association v. Merklin*, 65 Md. 579, 5 A. 544 (1886); *Oxenham v. Mitchell*, 160 Md. 269, 153 A. 71 (1930). But see *Packard v. Corp. for Relief of Widows*, 77 Md. 240, 26 A. 411 (1893) and *Rosenstock v. Keyser*, 104 Md. 380, 65 A. 37 (1906) where the Court felt that there was not clear evidence that the parties intended to make loans and treated the transactions concerned as involving ground rents.

¹³² Mayer, *op. cit. supra* n. 2, 122.

¹³³ 77 Md. 240, 26 A. 411 (1893).

¹³⁴ See *supra circa* n. 56.

¹³⁵ Ferguson, *In Defense of Baltimore's Ground Rent System*, Baltimore Evening Sun, January 14, 1914.

cause Baltimore, though not a boom city, is also not a depression city. But also it is at least partially due to the redeemable ground rent system. For when a money panic comes at the same time as a mortgage falls due (and there are always a certain number of mortgages which come due just at the height of a panic) it is almost impossible to re-finance them. In the last depression, the problem was partially solved in some states by broad mortgage moratorium legislation.¹⁸⁶ But in the past, money panics have often caused foreclosures which have wiped out many working men and discouraged others from attempting to save and finance purchases of their own homes.¹⁸⁷ Baltimore, with a great deal of its property under ground rents rather than mortgages, has not had to bear the full force of any such panic. For as long as the leaseholders were able to scrape together or borrow enough money to meet their rental and tax payments, there were no ground rent ejections. And of course only needing small sums of money in comparison with the large amounts required by mortgagors with principal payments on their hands, lease-

¹⁸⁶ Note the Maryland Mortgage Moratorium legislation Md. Laws 1933, Special Session, Ch. 57; Md. Laws 1935 Ch. 527, codified as Md. Code (1939) Art. 66, Sec. 7; Md. Laws 1937, Ch. 173; Md. Code (1939) Art. 66, Sec. 7. Also Md. Laws, 1933, Special Session, Ch. 56; Md. Laws 1935, Ch. 589 codified as an amendment to Md. Code Pub. Loc. L. (1930) Art. 4, Sec. 720, to be known as Sec. 720A; and Md. Laws 1937, Ch. 174; c. 251 (vetoed). These acts apply only to certain fractional interests in unpaid mortgage debts and do not constitute broad mortgage moratorium legislation.

¹⁸⁷ Such hardship is best illustrated by reference to an editorial of May 9, 1909 in the Baltimore Sunday Sun entitled "Home-Makers and Our Redeemable Ground-Rent System" which retold briefly the story of Barach Sholinky which was published in the May 1909 number of World's Work in an article entitled "How a Home-Maker Became an Anarchist." Briefly the story tells of a man who toiled for 16 years on the East Side of New York existing with an increasing family in a tenement, paying \$5 per month as rent, a large per cent of his income. By dint of much hardship he and his family saved \$1,500 out of joint earnings and bought a \$6,000 home in 1904 in Brooklyn. Of this \$6,000, \$2,500 was to be paid in cash and installments; for the remaining \$3,500 there was a 5% mortgage due September 1, 1907. Came the fall of 1907 with a money panic in New York and Barach found himself unable to get a loan to pay off his mortgage. His life savings went up in smoke; he who was a home-maker became an anarchist. Frank Bailey, Vice-President of Title Guaranty and Trust Co. of New York wrote the article. Bailey apparently advocated a system like that of the Credit Foncier of France which is designed to put at the disposal of persons of small means safe ways of borrowing money at low interest on real estate security, and repaying the money in installments without danger of foreclosure.

holders were often able to borrow, even in a tight money market, the money they needed to forestall ejection.

With these considerations in mind, it is time to ponder over the point of view of a man who owns vacant property. Usually, he will wish to improve it or dispose of it at a profit, for while it is vacant he is deriving neither enjoyment nor profit from it and, moreover, what is worse, he is paying taxes on it.¹³⁸ By improving the land and selling it subject to a ground rent, he can shift the taxes and acquire a valuable, profit-yielding investment. The result has been that these vacant lot owners have either themselves become builders or have sold out to builders who have erected houses and disposed of the improved premises, very often under a ground rent method of finance.¹³⁹

Why have these builders preferred redeemable ground rents to purchase money mortgages? First of all, it must be realized that there are some circumstances under which a purchase money mortgage is preferable. But usually the builder will create a ground rent because experience and the practical workings of psychology have shown that if a builder has a small piece of commercial or residential property, he will find it easier to sell as leasehold property subject to a redeemable ground rent than as fee property subject to a first mortgage. Indeed, he will probably find it possible to sell the property by way of ground rent at a higher price than by way of a straight cash sale or a cash and mortgage sale. There are two main reasons for this. First, although a \$60 ground rent representing \$1,000 of the purchase price is equivalent to paying six per cent on a mortgage, it somehow seems cheaper to many purchasers to be talking in terms of \$60 than in terms of \$1,000.¹⁴⁰ Second, and of course more important, is the fact that if a ground rent is placed on the property, the buyer will *never* be forced to repay the principal, though it is his option to do so at any time after five years have elapsed.

¹³⁸ Of course, some owners of vacant lots are speculators who are holding them in expectation of appreciation in the value of the property.

¹³⁹ see *infra*, Section VIII, entitled "Advance Building".

¹⁴⁰ Hobbs, *The Good and Bad of Ground Rents*, Baltimore Evening Sun, March 24, 1937, p. 27; Hearn, *These Row Houses*, Baltimore Sunday Sun, December 19, 1937, pp. 6, 7.

On the other hand, if he buys subject to a purchase money mortgage, he will either have to amortize the principal of the mortgage loan and pay it off gradually over the life of the mortgage, or he will be faced by one big lump sum payment of the principal at the termination of the mortgage period.¹⁴¹

Good ground rents today can usually be sold at approximately five and one-half per cent while attractive first mortgages can sometimes be financed for as little as four per cent. It is for this and also for several other reasons that it is impossible to state dogmatically that a redeemable ground rent is preferable to a purchase money mortgage in the eyes of either the purchaser or the seller.

Ground rents have historically been good commercial risks.^{141a} This has been no accident, for the percentage of the ordinary ground rent to the value of the premises is very small in contrast to mortgages, which usually are for a great deal more than fifty per cent of the value of the

¹⁴¹ It is true that a mortgagee, satisfied with his investment, may let the mortgage run as long as his mortgagor desires, especially in an easy money market. This is particularly true if the security behind the mortgage is adequate. For a mortgage like a ground rent is frequently an investment in the eyes of a mortgagee and if he calls in the mortgage, he only has to invest it again. But still the mortgagor can never feel quite as safe as a lessee under a redeemable ground rent for he can never tell when Mr. Mortgagee will say: "The jig's up." And that feeling which tends to make a borrower steer away from taking out a mortgage also reacts against the interests of the mortgagee who desires to let the mortgage debt run on. If he had a ground rent, his lessee would be secure in letting it run on. Under a mortgage, the debtor can never feel entirely secure. Of course, the mortgagee may renew the mortgage for a definite term. But then at the end of that term, the same problem will arise. See *Bosley v. Bosley's Executrix*, 14 Howard's Sup. Ct. Rep. 390, 396, 14 L. Ed. 468, 471 (1852) where Mr. Chief Justice Taney, said that "it is far more convenient [to use a redeemable ground rent in sales of ground] than a mortgage or a bond of conveyance, both to the seller and the purchaser. For it enables the vendee to postpone the payment of a large portion of the purchase money until he finds it entirely convenient to pay it; and at the same time it is more advantageous to the vendor, as it gives him a better security for the punctual payment of the interest; and while an extended credit is given to the vendee, it is to the vendor a sale for cash. For if his ground-rent is well secured, he can, at any time, sell it in the market for the balance of the purchase money left in the hands of the vendee."

^{141a} *Cf.* Rule 23, Circuit Courts, Supreme Bench of Baltimore City, providing that a trustee, "to be relieved of responsibility for the choice of investments to be made of funds under the jurisdiction of the equity courts," must invest in certain securities, mortgages, or "ground rents on unencumbered real estate situate in Maryland where the amount of the rent capitalized at six per cent is not over fifty per cent of the value of the property from which they issue."

property. The reason why there is more cushion behind a ground rent lies in the natural hesitation of persons to buy investments which can never be called in, unless there is more than a slight differential between the value of the property represented by that investment and the amount of the investment.¹⁴² In contrast, they will require less cushion when they buy mortgages for then they are in reality making a loan which is due in a few years. The time limit being so short, they feel rather certain that they will be repaid before the security behind their loan will have a chance to depreciate to any great extent. On the other hand, in the case of a ground rent they cannot be sure that the property represented by their perpetual investment will not greatly deteriorate in value. Then also this demand for more cushion behind a ground rent than behind a purchase money mortgage goes hand in hand with the fact that people consider themselves investors and not lenders when they purchase ground rents. And indeed it would seem that though redeemable ground rents have many of the incidents of purchase money mortgages, and are sometimes used interchangeably with such mortgages, they are more like capital investments than loans.

What advantages besides the no-payment-of-principal factor are possessed by the leaseholder over the purchase money mortgage? For one thing, it is probably true that if he desires to borrow further on the security of his leasehold, he will probably be able to do so more easily by way of a leasehold mortgage than can the first mortgagor by way of a second fee mortgage.^{142a} Of course, this will depend in a large measure on the size of the first mortgage. If it is small, the mortgagor will find it easier to float a second fee mortgage. But even so, he usually will have more trouble placing a second fee mortgage on his property than a leaseholder will have in taking out a leasehold mortgage. This is because the buyer of a leasehold mortgage always

¹⁴² See this idea put forward in *Packard v. Corp. for Relief of Widows*, 77 Md. 240, 249, 250, 28 A. 411, 414 (1893).

^{142a} Note, however, that a leasehold mortgagee, upon default by the leaseholder, becomes liable under the ground rent covenants. See *supra* *otroa* n. 69.

knows that the ground rent man—the owner of the prior lien—can never demand repayment of the principal. Therefore he realizes that the annual rental payments due to the ground rent holder and performance of the obligations of the ground rent covenants are the only obstacles to the collection of interest on his leasehold mortgage and the repayment of the principal of that mortgage.¹⁴³

This feeling of security pervades the philosophy of all ground rent buyers. They feel that the leaseholder has such a large equity in the property in proportion to the ground rent that he will be very unlikely to forfeit the equity by failing to pay that rent. Closely related to this feeling is the policy of most ground rent owners of not requiring their lessees to carry insurance on the premises. Since mortgages usually require that insurance be carried, this is a slight advantage in favor of the leaseholder. Ground rent owners have adopted the no-insurance policy because they calculate that even if the house and other improvements on the premises should be destroyed, the value of the vacant lot plus the worth of non-destroyable improvements such as the foundation, will equal and probably surpass the ground rent investment.¹⁴⁴

A further advantage that a ground rent holds over a mortgage is in regard to the policy of building and loan associations which, at least in the past, have lent more

¹⁴³ Note the FHA policy discussed in n. 130, *supra*.

¹⁴⁴ Sometimes but rarely ground rent owners do require that lessees carry insurance. More often, however, they carry ground rent insurance themselves. This type of insurance is exceedingly cheap, the premium being approximately one-third of the fire rate. Nevertheless, the policy of at least certain trust companies, who along with other moneyed corporations in Maryland are the largest investors in grounds rents, is to carry this insurance only on frame buildings or badly dilapidated structures. Under a ground rent insurance policy, the insurance company will agree to do one of two things in the event that the improvements are destroyed and not rebuilt within a specified period: (1) the company will reimburse the ground rent owner for the amount of damage he has sustained up to the insured sum, or (2) it will pay to him the agreed value of the ground rent and take over the ground rent. The agreed value, which may or may not be the same as the sum insured and which is often larger, is agreed on at the time the policy is written in order to avoid dispute later on. Under this type of contract, the insurance company is given an option which enables it to take advantage of any rise in the value of the ground rent over the agreed value. It thus behooves ground rent owners who take out this type of insurance to mark up the agreed value as the market value of their ground rents increases.

freely on property burdened by a ground rent than on property burdened by a mortgage because with a ground rent there is no necessity of amortizing the principal.¹⁴⁵

Suppose a purchaser has gone to such an association and requested a loan. He can afford to pay down a certain amount as an initial payment and he can raise so much in the open market by means of a mortgage or a ground rent. He wants to get the rest from an association. The association, before granting the requested loan, will work out the weekly charge which it will assess the purchaser. That charge will include taxes, insurance, water, building and loan association dues, and also a sum sufficient to meet the payments due under the ground rent or the mortgage. The latter sum will be much greater if there is a mortgage because the association will include costs of amortization in its charge, whereas under a ground rent there will be no such inclusion. The fact that this sum will be larger may cause the association to decide that the extra sum might make it impossible for the borrower to keep up his payments, and lead it to refuse to lend unless the borrower agree to finance by way of a ground rent. This has probably been the case in regard to many working men to whom the difference of a dollar or two a week is vital.¹⁴⁶

To the advantages thus far mentioned which are possessed by a leaseholder over a mortgagee, it is necessary to add the possible advantage in regard to avoidance of personal liability after assignment of the leasehold interest. A leaseholder can do this by having the ground rent lease created through a straw man. Such a procedure is custom-

¹⁴⁵ In 1914, a \$2,500 house could be bought with an initial payment of \$100 and a weekly charge of \$7.43 over 14 years. The \$2,400 left over the \$100 initial payment was taken care of by a \$60 ground rent which capitalized at 6% is \$1,000 and a \$1,400 Building and Loan Association mortgage. Ferguson, *In Defense of Baltimore's Ground Rent System*, Baltimore Evening Sun, January 14, 1914.

¹⁴⁶ Such an attitude on the part of building and loan associations was quite important, for most of the people who applied to them were working people. Today these people can secure help from the FHA. But in the past this has not been possible and in the future it may not be. Many working men in the past have bought houses by resort to a ground rent and an association loan. Many others have financed home purchases solely by means of a ground rent.

ary in Maryland.¹⁴⁷ Therefore, if he is alert, the real original lessee can avoid the personal liability which attaches to privity of contract with the landlord: that is, he can avoid the burden of remaining liable after assignment for the rent during the duration of the lease. In contrast it is not customary in Maryland for straw men to be used in creating a mortgage and so mortgagors who are personally liable for the mortgage debt do not necessarily lose their personal liability by sale or other disposition of their equity in the property.

When one considers all the advantages in favor of leaseholders along with the excellent record of ground rents as investments, one tends to lose sight of the fact that redeemable ground rents are not always more desirable instruments of real property financing than purchase money mortgages even though such is often the case. In the first place, it is difficult to place a very large ground rent on a property for the simple reason that investors have found by experience that large rents on high price residential property, even though well-cushioned, are not very safe propositions, since the characters of many residential neighborhoods change so rapidly. In the second place, ground rent investors want plenty of cushion. The usual value ratios between ground rents and the underlying premises encumbered by them range from about three to four to one at time of creation. In the third place, if the property in question is in a run-down section of the city or is in bad condition itself, it may be impossible to secure anything but a short term mortgage since the long-run picture seems so very insecure and uncertain. In the fourth place, there is the matter of money rates which may make it desirable for either the seller or the buyer of real property to employ a purchase money mortgage.

Let us take the case of a builder who has a \$4000 piece of property for sale and suppose that he has the choice of selling it subject to a \$60 ground rent at six per cent or a \$1000 mortgage at five per cent. In either case he

¹⁴⁷ See *supra* circa n. 67.

would have about the same amount represented by the ground rent or the mortgage.¹⁴⁸ Which method will he choose? The answer is that he will almost always prefer to use the ground rent method. Under it, he can obtain a higher rate of interest; also he will be taking little risk since he will almost surely be able to dispose of his rent at six per cent and probably at a premium.¹⁴⁹ What little risk he takes is embodied in the possibility that he will not be able to sell the rent, that the property will depreciate in value, and that he will never be able to demand repayment of the \$1000 from his lessee. Under these circumstances, he would wish that he had sold subject to a mortgage. But such circumstances are unusual.

On the other hand, a purchaser of a new home may not be willing to buy subject to a ground rent. He may say: "I know I'll have the money to pay you back at the end of five years. I'll buy subject to a \$1000 five-year mortgage at five per cent. Why should I pay six per cent in the form of rent when I intend to pay off the lien, whether it be a mortgage or a ground rent, at the end of five years?" And such an attitude would be entirely sensible. The only fly in the ointment will come if the purchaser does not have the \$1000 handy at the expiration of the five year period. And so it is not always true that ground rents are the solution of either a seller's or purchaser's problems, though there are many situations where it is desirable to create ground rents in place of purchase money mortgages. However, it is always necessary to look at the peculiar circumstances of each case in order to determine when the ground rent method is preferable.

It would seem that ground rents would also be resorted to by property owners desiring to raise money on the se-

¹⁴⁸ A \$60 ground rent created at 6% would sell at \$1,000. It figures out as follows:

By hypothesis, \$60 equals 6%. Therefore 1% equals \$10 and 100% equals \$1,000.

¹⁴⁹ The phrase "Selling at a premium" can best be explained by this type of illustration. A builder having taken a \$60 ground rent at 6%, sells it to an investor at 5½%. That is, he sells it for \$1,090.91, making a profit of \$90.91. It figures out as follows:

By hypothesis, \$60 equals 5½%. Therefore, 1% equals \$120 divided by eleven; and 100% equals \$1,090.91 (plus a small fraction).

curity of their property—that a would-be “borrower” owning fee property would convey the fee to his “lender” who would convey back a leasehold for ninety-nine years renewable forever. In effect, the would-be-borrower would be capitalizing a proportion of his property represented by the ground rent. The “lender” who is really not a lender but an investor would thus hand over the sum of money being “borrowed” and retain a ground rent as his interest and security. This process would require the property owner to give up the fee title to his property and accept instead a leasehold estate, but this would not be objectionable since he could always redeem the fee after five years if he saw fit. Such a method seemingly would possess the same advantages over the ordinary fee mortgage that a ground rent possesses over a purchase money mortgage. But it is seldom used,¹⁵⁰ probably because the type of property owner who would find the method attractive is the owner of a moderately priced home or small store and he has almost always purchased subject to a ground rent in the first place. Owners of more expensive commercial and residential property will not wish to create a ground rent, for if they decide to borrow at all on the security of their real estate they will almost always want to raise a sum close to the total value of the premises which will be too large a sum to be raised by way of ground rent. And then again, even if they would be satisfied with a smaller sum, there is no assurance that they would find ready purchasers, for sums which may be small in relation to the value of such property would still represent large rents and trust companies and other investors have a definite preference for small ground rents. This is because a portfolio of small ground rents, as compared with fewer large ones, is conducive to the spread of the risk of non-payment of rentals and taxes, and it also tends to minimize the gamble of redemption.

¹⁵⁰ But see the deed of a fee and the lease back of a leasehold for ninety-nine years renewable forever in *Montague v. Sewell*, 57 Md. 407 (1881); *Odd Fellows Association v. Merklin*, 65 Md. 579, 5 A. 544 (1886); *Oxenham v. Mitchell*, 160 Md. 269, 153 A. 71 (1930) discussed in n. 131, *supra*. See also the remarks of Mr. Chief Justice Taney, n. 141, *supra*.

At certain periods in the past, ground rents have possessed a tax advantage over mortgages. For instance, at one time mortgagees were subjected to a separate tax on the interest covenanted to be paid, in addition to the regular property tax paid by the mortgagor, on the unencumbered value of the property, as the man in possession.¹⁵¹ But under the State Income Tax of 1939,¹⁵² ground rent owners have been treated exactly like mortgagees and other investment owners, and required to pay a state income tax of six per cent on rents collected by them.

The legislature, in the 1939 income tax act, attempted to prevent ground rent lessors from shifting the tax on their ground rent income to their leaseholders, but in *Oursler v. Tawes*,¹⁵³ where the constitutionality of that act was litigated, the Court of Appeals, in one section of its opinion, stated:¹⁵⁴

“Turning now to the provisions of section 223 (C) which provides that no tax imposed on any person with respect to income from ground rents received by him shall be collected from the lessee by the lessor; and is designed to invalidate any agreement between such parties to the contract. We are of the opinion that the effect of section 223 (C) is to impair the obligation of a contract and is therefore in conflict with Article 1, Section 10 of the Constitution of the United States.¹⁵⁵ Accordingly, we declare the same unconstitutional.”

¹⁵¹ Md. Laws 1896, Ch. 120 imposing an 8% tax on interest covenanted to be paid. Repealed by Md. Laws 1904, Ch. 405 for Baltimore City and fourteen counties. In force for some of the other counties from 1904 on to 1933. Md. Code (1924) Art. 81, Sec. 198. In force in Frederick County till 1933. Md. Code Pub. Loc. L. (1930) Art. 11, sec. 75; repealed as to Frederick County, Md. Laws 1933, Ch. 400.

¹⁵² Md. Laws 1939, Ch. 277, Sec. 215 (K) and (N), Sec. 223; Md. Code (1939), Art. 81, Sec. 222, discussed in Lewis, *The Taxation of Maryland Ground Rents* (1939) 3 Md. L. Rev. 314, 323-325; see Kelly, *The Maryland Classified Income Tax of 1939* (1940) 5 Md. L. Rev. 77, *circa* n. 55 therein, where is discussed the classification of ground rent income as “investment income” in the same category as mortgage income, and of ordinary rent in a different category.

¹⁵³ 13 A. (2d) 763 (Md. 1940).

¹⁵⁴ 13 A. (2d) 763, 770 (Md. 1940); see Kelly, *supra* n. 152, *circa* n. 60 therein, where it is stated that the argument concerning the constitutionality of Section 230(c) was not an important issue in the case.

¹⁵⁵ “No State shall . . . pass any . . . law impairing the obligation of contracts. . . .”

Thus, the Court held that the 1939 act did not and could not abrogate the obligation of leaseholders under ground rent indentures, executed before the passage of the act, to pay the state income tax on rental payments received by the lessor, *if such an obligation existed*. The Court has yet to specifically declare, however, whether it will construe the usual covenant to pay taxes, which appears in the standard ground rent leasing agreement, to cover payment of state and/or federal income taxes. The argument supporting the exclusion of payment of federal income taxes is particularly strong, since the federal tax is on net income, and not directly on rental income, as is the state tax. However, the Court may conclude that the parties to ground rent indentures did not covenant with income taxes in mind, and construe the covenant to pay taxes as relating only to property taxes.

If the Court does hold that leaseholders under ground rent leases executed before 1939 must pay an income tax on rentals collected from them, it would seem that a great deal of confusion would result, for the amount of the tax to be paid by the individual leaseholder would depend on the interrelation of other taxable income, and personal credits and exemptions possessed by the lessor. It is therefore probable that many ground rent holders would themselves pay the tax on their rental collections, rather than go through the bother and confusion of shifting the tax. This might be particularly true of those who own more attractive rents, for they would not wish to irritate their leaseholders into redeeming their rents and seeking to execute new ground rent leases under which they would be specifically exempted from liability for the income tax assessed to their landlords. Such an attitude on the part of ground rent owners would seem all the wiser when one remembers that the amount of the tax due on the income from any particular rent would be so relatively small.

But the confusion resulting from the shifting of the state tax would be slight by comparison with the difficulties that would be caused by any attempt by ground rent owners to shift part of their federal income taxes. For

they would face the added obstacle of a graduated tax. Indeed, it is hard to perceive how such a system would work out in practice. And if it were worked out, the lessor would have to pay a federal income tax on the tax payment made for him by his lessee, for the payment of taxes for a person constitutes additional taxable income to him.¹⁵⁶

But whatever the result of the difficulties growing out of the 1939 tax and the Court's treatment of it, they have apparently not affected the ground rent market. Indeed, ground rents are still selling at about the same rate as they did before the tax went into effect and there are no signs yet of an increase or a decrease in the demand for them. Probably the basic reason is that the idea of getting a good return on a relatively safe investment which can be easily liquidated unless the property has badly depreciated, is exceedingly inviting to the investor of today. Indeed, at the present time good newly created ground rents are in so much demand that they are selling at a premium; and some trust companies are willing to pay as high as 5¼% or 5½% for them. These companies figure that their rents will most likely not be redeemed and that even if they are, their five-year net yield will more than equal the yield on government bonds.¹⁵⁷

VIII. ADVANCE BUILDING.

"Advance" or "bonus" building was the term applied to a system which grew up as the direct outcome of competition between vacant lot owners to improve their property and sell it to the public, usually subject to ground rents. On the whole, this competition was beneficial to the community for it led to a constant supply of houses at what were probably rather low prices. But around

¹⁵⁶ *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 73 L. Ed. 918 (1929); *United States v. Boston and Maine Rd. Co.*, 279 U. S. 732, 73 L. Ed. 929 (1929).

¹⁵⁷ Some persons, however, have felt that too much Baltimore capital is invested in ground rents and that particularly before the World War this was responsible for restraining the commercial and industrial growth of the city. Hobbs, *The Good and Bad of Ground Rents*, *Baltimore Evening Sun*, March 24, 1937, p. 27.

the turn of the century, it apparently was not an unmixed blessing.¹⁵⁸ Under this system, the land-owner advanced previously agreed-upon sums of money to the builder upon the completion of each story of the house to be erected. It was claimed that this caused landowners to place greater valuations on their lots than would otherwise have been justified. This claim seems to be merely a segment of the general criticism of the ground rent system, which is still often heard today—that the ground rent system is responsible for inflated land values.

The claim is that people have paid more for land subject to a ground rent than it is worth. This in a sense may be true, for a man might pay more money for leasehold property subject to a ground rent, when the capitalized value of the ground rent is added in, than he would for the fee simple title to the property. But this is because he would rather assume, let us say, a \$60 ground rent than pay an extra \$1,000 or be subject to a mortgage payment of \$1,000. However, it must be admitted that there has been a tendency on the part of builders and real estate agents to make eager home purchasers buy over their heads by causing them to think in terms of a \$60 ground rent rather than in terms of \$1,000 investment.¹⁵⁹

A valid criticism of the "advance" or "bonus" system that was being made around the turn of the century was that all too often the builder who had contracted to build the house found himself unable to complete his contract and that that portion of the house which was unfinished fell into the hands of the landowner. The latter, of course, would immediately sell it for what it would bring. He would do this by creating a ground rent on the partially improved premises and selling the leasehold interest. He would either retain the ground rent himself, or sell it and thus cash in entirely at the beginning.

¹⁵⁸ *Ground Rent System in Baltimore*, 6th Annual Report of the Bureau of Industrial Statistics (for 1897), 85-87.

Houses put up by bonus builders were sometimes so badly built that resulting repair bills caused abandonment. Hyde, News Article, Baltimore Evening Sun, February 2, 1921, pp. 1, 2.

¹⁵⁹ *Supra* n. 141.

What hardship was there in this? From the point of view of the would-be house-purchasers, there was none. Indeed, it was welcomed by them as they were able to buy at bargain prices. But from the point of view of the mechanics and laborers who had worked on the house and who had not secured their wages from the builder, the system was quite unfair. Today, they would be protected by the Mechanics' Lien Law.¹⁶⁰ But until that law was amended by the acts of 1898 and 1910, it was so defective that it prevented the laborers and mechanics from placing effective liens. This naturally led to many protests and some agitation against the "advance" building system, but it would seem that the fault lay not with that system, but only in the then defective Mechanics' Lien Law and that once that law was amended, the trouble was disposed of.¹⁶¹

IX. THE SO-CALLED TAX INJUSTICE.

The law of Maryland treats the holder of a leasehold interest as the party liable to assessment for taxation of the entire property at its fee simple value.¹⁶² This may be defended not only on the ground that the lessee has assumed an express contractual obligation to pay the tax, but also on the ground that the price paid by him for the

¹⁶⁰ Md. Laws 1898, Ch. 502, and Md. Laws 1910, Ch. 52 codified as Md. Code (1939) Art. 63, Secs. 1, 2. The Mechanics' Lien Law as it is in force in the counties protects material men as well as mechanics and laborers. As it is in force in Baltimore City it protects only the latter groups.

¹⁶¹ Even before that law was changed, there was developed a related system which protected both workers and materialmen. Under this alternate plan, the lot owner contracted with a builder to erect a row of buildings, and with dealers in building material to furnish supplies, agreeing to pay them by turning over to them one or more of the houses to be constructed. This of course, had the same effect upon the price of new houses as the "advance" system since as soon as they were completed, they were quickly thrown upon the market by the builders and materialmen who naturally wished to convert their end of the bargain into ready cash.

¹⁶² There are three types of state ground rent taxes which have been used at different times, Lewis, *op. cit. supra*, n. 152, 314, 315-316. Note that it has been said that in the absence of any tax covenant in the lease, the liability of the entire tax would rest on the leaseholder and that *Hughes v. Young*, 5 G. and J. 67 (Md. 1832) stands for this proposition. For a contention that this is not so, see Lewis, *op. cit. supra* n. 152, 314, 316, n. 8. See also a discussion of Md. Laws 1929, Ch. 226, Sec. 3, codified as Md. Code (1939) Art. 81, Sec. 3 (c) at Lewis, *op. cit. supra*, n. 152, 314, 318, Sec. 3 (c).

leasehold estate allowed for and reflected the tax burden assumed by him at the time of purchase. For if, at that time, the ground rent landlord had remained liable for property taxes, the selling price of the leasehold interest would have been greater.

In fact, it is rather hard to see any good reason why a leaseholder should not pay real estate taxes on property in which he has a leasehold interest. This becomes particularly clear when it is recalled that no one has ever suggested that a mortgagor should be relieved from paying taxes on the entire mortgaged premises on the ground that he was only the owner of an equity in that property. On the contrary, it has always been true that if the value of premises subject to a fee mortgage increases, the mortgagor is subject to a higher assessment on the property. This of course is just since the increase in value primarily inures to his benefit as the real owner and is important to the mortgagee only in so far as it builds up additional security for his loan. In the same way, it is fair that a leaseholder be charged with the increase in value of the premises he is occupying or has a right to occupy; for since he has the rights of perpetual use and enjoyment of that property, he and not the ground rent man is the primary beneficiary of any increase in its value. The ground rent owner, it is true, receives some of the benefit of any increase in value of the premises, but this benefit is in regard to an improvement of his ground rent investment along the same lines as a long term mortgage investment is improved by an increase in the value of the security behind it.¹⁶⁸

And yet, at one time, there was considerable dissatisfaction with and criticism of the taxing authorities for assessing the full value of the premises to the leaseholder and considerable agitation for legislation forbidding the

¹⁶⁸ Note also that if taxes are not paid on property subject to a ground rent, and the land is sold at a tax sale, the leasehold alone is sold if it will bring enough to satisfy the tax claim. Md. Laws 1929, Ch. 226, Sec. 73 codified as Md. Code (1939) Art. 81, Sec. 77. This statutory provision is in line with the contention that leaseholders, as the real owners, should be responsible for real estate taxes on property they have a right to use.

enforcement of covenants to pay taxes on the entire property which are of course present in all ground rent demises.

The city, in an effort to explain to leaseholders why they were taxed on the full value of the premises, published several articles in the *Municipal Journal*. One published in 1915, was entitled "Why is My Assessment Substantially Higher than the Purchase Price Paid for My Home?"¹⁶⁴ In this article, the case of a man who had bought a home for \$1,500, subject to a \$60 ground rent, was discussed. It was shown that he was assessed at \$2,500 and could not understand why. The article explained this seeming mistake by pointing out that this leaseholder had signed a lease which included a covenant to pay all taxes and assessments of every kind and description levied against the property and advised prospective lessees to read their leases carefully, implying that lessees in the past had been misled into signing leases which included tax covenants.¹⁶⁵ No mention was made that the price the lessee paid was reckoned on the basis of his paying the taxes. No mention was made that a leaseholder under a ground rent is a first cousin to a mortgagor and that no mortgagor ever complains about paying the taxes levied against the entire mortgaged property.

The writer of the article fell into the same error that has characterized the basic dissatisfaction with the assessment of the entire property to the leaseholder. He spoke of the leasehold and the house as if they were synonymous. The following inquiry, addressed to the *Baltimore News*, by a correspondent, exhibits this misunderstanding most clearly:

"Will you kindly tell me what law or section of the Maryland Laws provides that the person owning a house on ground is compelled to pay taxes on the ground when the ground is owned by some one else."¹⁶⁶

¹⁶⁴ *Baltimore Municipal Journal*, January 22, 1915; Later reprinted and distributed in pamphlet form.

¹⁶⁵ The same tactics were used in an article in the *Baltimore Municipal Journal*, July 28, 1916.

¹⁶⁶ This inquiry, written out on a form blank, was addressed to E. A. Doetsch, Editor of the *Woman's Inquiry* Column of the *Baltimore News* on June 20, 1913. It was referred to Judge Oscar Leser of the Appeal Tax Court of Baltimore City.

The answer to this question is that the lessee under a ground rent lease does not "own" the house and that the ground rent holder does not "own" the ground. Each has an interest in both. The leaseholder owns the leasehold interest which is a far different thing than the house. At one time, it was probably true that the value of the ground rent was roughly equivalent to the value of the bare ground—the unimproved lot.¹⁶⁷ When that was the case, the ground rent at first glance did apparently equal the value of the lot, and the leasehold the value of the building. But this was only so when the value of the lot equalled the amount of the ground rent. Just as soon as the lot began to decline in value, the ground rent began to eat into the house. This is so, because a ground rent like a mortgage covers the entire premises—and because both house and lot are security for the ground rent. For instance, when a lessee under a ground rent defaults, the ground rent owner can eject him from both house and land. Note also that the ground rent man can prevent the leaseholder from impairing his security by destroying the house and other improvements.¹⁶⁸

In recent years, however, there has been even less excuse for laboring under the delusion that a lessee is the owner of the house.¹⁶⁹ For ground rents almost always exceed the lot value and eat considerably into the improvements. Therefore, it would seem clear that what the leaseholder owns is the equity remaining in both house and lot after subtracting the capitalized rental payment. At least this is so in regard to any lessee under a term which is five years old. Before the five year mark is reached, there may be some additional detriment to the lessee because of

¹⁶⁷ Mayer, *op. cit. supra* n. 2, 56, 57.

¹⁶⁸The law of waste ordinarily applicable to the relation of landlord and tenant does not apply to a ground rent relationship, again exhibiting that a ground rent lease is not the same as an ordinary lease. *Crowe v. Wilson*, 65 Md. 479, 5 Atl. 427, 57 A. R. 343 (1886). See also *supra* circa n. 99. A leaseholder is free to tear down, rebuild, and remodel the buildings and improvements of his leasehold so long as he does not render the ground rent investment insecure. If he does render it insecure, equity will enjoin his actions on request of the ground rent owner. *Crowe v. Wilson, supra*.

¹⁶⁹Cf. Editorial, *Ground Rent Critics*, Baltimore Real Estate News, June 1938, vol. 6, No. 6, pp. 8, 9, defending payment of taxes by lessees.

his inability immediately to exercise his statutory option of redemption.

Nevertheless, it was not so long ago that there was quite some agitation directed toward compelling the ground rent owner to pay the taxes on the land because he was said to own the land outright.¹⁷⁰ A movement in 1912 to impose an income tax on income accruing from ground rents apparently grew out of this feeling.¹⁷¹ Then in 1914, a more serious attempt was made to "get at" the ground rent owners. This time, the agitators went so far as to introduce and to secure the passage of a resolution through both branches of the City Council of Baltimore which demanded that the Maryland legislature prohibit the enforcement of the lessee's covenant to pay the taxes.¹⁷² Such legislation fortunately never came. Of course, if it had been constitutional, such legislation could have been offset by future ground rent owners who would have taken the law into account in setting rental rates. Still, nevertheless, it would have caused them as well as the taxing authorities a great deal of inconvenience.

For even assuming that a law passed as a result of this resolution would have recognized that a ground rent, like a mortgage, covers the entire premises, the problem of the tax assessors would have been fairly complex. Bear in mind that the tax concerned was a tax on the property as a whole. The agitators wanted the ground rent owner to pay the tax on his interest and the leaseholder the tax

¹⁷⁰ Real estate brokers had just as hard a time as did the tax assessors in convincing leaseholders that they were similar to mortgagees, that they owned leaseholds and not houses, that the leasehold covered both house and ground, and that it was necessary for them to pay commission based on the value of the entire premises. *The Broker's Commission*, Baltimore Real Estate Board Bulletin, November 12, 1920 and *Is a Ground Rent a Mortgage?* Baltimore Real Estate Board Bulletin, November 26, 1920.

¹⁷¹ Baltimore American, February 20, 1912.

The movement to impose an income tax died down because of an opinion by Deputy City Solicitor Preston that the proposed tax would be a violation of the Constitution of Maryland. Md. Code (1924), Constitution of Maryland (1867), Declaration of Rights, Art. 15. See Baltimore American, March 1, 1912.

¹⁷² The resolution was introduced by City Councilman John F. O'Meara, long one of the principal agitators against the "unjust" system of taxation of ground rent properties. It was introduced in the council on January 12, 1914 and passed June 19, 1914.

on his interest. This would probably have been done by taking the value of a ground rent in the eyes of the leaseholder and assessing the ground rent owner at that value and the leaseholder at the difference between that value and the value of the premises as a whole.¹⁷³

Perhaps the assessors could have devised a workable system of separate taxation. Perhaps also, would-be ground rent owners would have stomached the added inconvenience. But these problems need not detain us any longer, for happily, the O'Meara Resolution, based on an entirely false premise, is buried in obscurity.

X. TODAY AND TOMORROW.

Baltimore has time and time again been called a city of home-owners and it has been rather generally conceded that this accomplishment is due in a large measure to the growth of the redeemable ground rent system under which there has been a minimum of foreclosures.¹⁷⁴ Working hand in glove with the "advance" or "bonus" system,¹⁷⁵ and the policy of building and loan associations, this system has gained for Baltimore a title of which it has due cause to be proud.

This does not mean that the existing ground rent system as a whole has achieved perfection. Indeed, it is far from perfect. For one thing there are still a certain num-

¹⁷³ But see *Latrobe v. Baltimore City*, 101 Md. 621, 61 A. 203 (1905) where the Court was faced with the problem of valuation of an irredeemable ground rent and the leasehold under it and recognized that their sum value might exceed the value of the property. In the case of a redeemable rent, it might also be true that the investment value of the ground rent would exceed its redemption price and thus exceed its value in the eyes of the leaseholder. The excess would represent an investor's hope that no redemption would take place. This last consideration would probably be too speculative for assessment purposes.

¹⁷⁴ Pitt, *In Explanation of Ground Rents*, National Real Estate Journal, May 24, 1925, vol. 26, no. 9. See the contention that Baltimore had so few labor troubles because workingmen were home-owners. Ferguson, *In Defense of Baltimore's Ground Rent System*, Baltimore Evening Sun, January 14, 1914. And see also, Hyde, News Article, Baltimore Evening Sun, February 2, 1921, pp. 1, 2; Hobbs, *The Good and Bad of Ground Rents*, Baltimore Evening Sun, March 24, 1937, p. 27; Hearn, *Those Row Houses and Ground Rents*, Baltimore Sunday Sun, December 19, 1937, Mag. Sec., pp. 5, 7. This latter article refers to Baltimore as the "City of Home Ownership" and states that without row houses and ground rents Baltimore might not have escaped the tenement problem of other large cities.

¹⁷⁵ *Supra* circa notes 157-161.

ber of irredeemable ground rents in existence.¹⁷⁶ The sooner they die out entirely, the better it will be for the good of the city and the reputation of the system. However, it will probably be many years and perhaps several centuries before all the irredeemables are gone.

Then also, there are many existing problems in connection with the redeemable ground rent system. For instance, in some sections of Baltimore, rents are seemingly too high, in others too low. They usually appear to be too high in the neighborhoods which were once desirable ones but have now fallen greatly in desirability. Probably the persons in possession hold on sub-leases and so are not paying excessive rents. But the original lessee, or his successor in title, is still paying the original rent unless he has suffered forfeiture or has concluded a new arrangement with the ground rent owner.¹⁷⁷

Rents also often seem very low in down-town sections of the city where many concerns pay only a small percentage of the rental worth of their property. However, there is no evil in this and these concerns are in no different position than if they had purchased the fee in the property years ago.

In fact, in a sense, ground rents cannot be too high or too low. If a man buys property in fee and it depreciates in value, the man loses money. If the property appreciates, his investment has become more valuable. Now if he purchases subject to a ground rent and the property depreciates in value, the rent is apparently too high. But when one remembers that the ground rent represents part of the purchase price, then it becomes apparent that the

¹⁷⁶ Hyde, News Article, Baltimore Evening Sun, February 2, 1921, pp. 1, 2, mentioned the existence of a \$200 irredeemable ground rent on a strip of land under the bed of the lake in Druid Hill Park which was being paid every year by the City Water Department and also noted a \$120 ground rent on a \$70,000 building on Saratoga street in down-town Baltimore owned by an old negro living in a cabin in Howard County, Maryland, who had been given the rent by his master many years ago.

¹⁷⁷ Wise ground rent owners adjust rents, but many insist on full rentals and as a result sometimes run right into tax foreclosures. Hobbs, *The Good and Bad of Ground Rents*, Baltimore Evening Sun, March 24, 1931, p. 27. As a rule, leaseholders will continue to pay rent under an existing arrangement only so long as they have sufficient equity in the property to justify their hanging on.

rent is too high, as far as he is concerned, only in the same way as the original purchase price paid for property seems too high after the property has become less valuable. However, it is also well to note that when a man has bought property in fee and has made a down-payment and then sees that property depreciate, he can write off that loss and forget about it. If he buys it subject to a ground rent, unless he can refinance, he must either allow himself to be wiped out or he must continue to "pay through the nose." He never gets through taking his loss and this may be objectionable since it prevents this man from starting over with a new slate.

Also it is well to consider that the amount of a ground rent may be too high or too low from the standpoint of the investor owning a ground rent, for it may be that the capitalized value of the ground rent is so close to the value of the premises that there is little or no cushion left as security.

One rather bad aspect of the system was taken care of in the last session of the legislature when a law was passed requiring advertisements of leasehold properties for sale to specify the amount of the ground rent burdening the property.¹⁷⁸ If this law is enforced, purchasers of real estate will at least be warned when they are buying leasehold property, though of course they can never be sure of the actual number of ground rents encumbering the premises until they have had its title searched.

This law might well be amended so as to require advertisements to include not only the amount of the ground rent, but whether or not it is redeemable; and if it is redeemable, at what capitalized value and after what date it can be redeemed. This would certainly tend to enlighten leasehold purchasers.

But if all leaseholders are to be fully informed, the legislature will have to do more than promulgate rules of advertising. It will need to prescribe several additions to the common form of ground rent lease that is in vogue.

¹⁷⁸ Md. Laws 1939, Ch. 500, codified as Md. Code (1939) Art. 27, Sec. 209.

For this form is substantially the same as it was in the eighteenth century¹⁷⁹ and bears no mention of the lessee's statutory option to redeem or of the legislative provisions for automatic renewal.¹⁸⁰ It would seem very desirable for the legislature to require specific reference to both these changes in each and every ground rent lease.¹⁸¹

In addition, there is some feeling that it will be necessary to curb what is called ground rent racketeering;¹⁸² but this feeling is almost altogether misfounded. The "racketeers" are said to be persons who go around soliciting the refinancing of ground rents which are yielding higher returns than are necessary to attract investment. They will offer to finance the redemption of such ground rents by lending to lessees who do not possess sufficient sums themselves to redeem the rents.

In return, these "racketeers" arrange with the lessees to create new ground rents and sell them at a premium, sharing the resulting profits with the lessees. From their point of view, and indeed also from the point of view of the lessee and the community in general, this refinancing is good business and is in line with the policy of refinancing of mortgages at lower rates adopted by the HOLC. However, it is true that some rents have been refinanced by door to door solicitors who have pocketed most of the profits of refinancing at the expense of uninformed leaseholders. If such occurrences took place frequently, remedial legislation would be necessary. But they are the exception rather than the rule.¹⁸³

In general it would appear necessary to conclude that the redeemable ground rent system is in rather healthy condition today. That it will be retained in Baltimore

¹⁷⁹ *Supra circa* n. 49.

¹⁸⁰ *Supra circa* n. 55, ff.

¹⁸¹ Note also the discussion, *supra circa* notes 69-72, regarding the position of leasehold mortgagees.

¹⁸² Liss, *The Ground Rent System in Maryland*, Baltimore Daily Record, August 6, 1937.

¹⁸³ For a ruling by the Committee on Professional Ethics of the Bar Association of Baltimore City that a lawyer may not solicit redemption of ground rents for the purpose of recreating the rent and selling it at a profit in which the lawyer would share, see the Baltimore Daily Record, May 20, 1937.

seems almost beyond doubt. For it has made Baltimore a city of few tenements and many homes¹⁸⁴ and has provided a type of safe investment which sold at or near par during the entire depression.

Why hasn't it been adopted elsewhere? For one thing similar systems have been developed elsewhere, particularly in Pennsylvania.¹⁸⁵ For another, the exact form of the present Maryland system "just sort of" evolved by accident and has been under more or less steady fire in its birthplace until recently. Also, new cities are no longer springing up in this country and old cities have their own ways of financing real property. And so probably there is little chance for the spread of the Baltimore ground rent mechanism. Even if other communities wished to adopt it, they would undoubtedly desire to adopt with it the redemption, renewal and other remedial legislation which so greatly affects the present status of the system. In addition, they might desire legislation specifically validating covenants for redemption unless they were entirely sure that their courts would adhere to the rule of *Hollander v. Central Metal Co.* and reject the strict English rule.¹⁸⁶ But it would certainly appear that other communities might find it advisable to study Maryland's redeemable ground rents, for on the whole they go to make up a very beneficial system, which, with a slight bit of legislative remodelling, can be made even more beneficial, and much less mysterious.

¹⁸⁴ *Supra* n. 173.

¹⁸⁵ The treatise on Pennsylvania ground rents comparable to Mayer's text on the Maryland system is CADWALADER, *GROUND RENTS IN PENNSYLVANIA* (1879).

For the view that ground rents exist only in Maryland and Pennsylvania, see 14 Am. and Eng. Encyc. of Law (2d ed. 1900) 1121. This view seems mistaken. Ground rents or similar interests seemingly exist in many jurisdictions. See 28 C. J. 839, 840, 841 stating that there are ground rent or similar systems in Maryland, Pennsylvania, New York, and eighteen other states, and the District of Columbia, and Porto Rico.

In Ohio and other parts of the mid-west, the land trust or fee certificate system, which also involves a ninety-nine year lease renewable forever, is in vogue. See Bingham and Andrews, *FINANCING REAL ESTATE* (1924) Ch. 20; Note, *Land Trusts as a Method of Finance* (1939) 52 Harv. L. Rev. 1149.

¹⁸⁶ 109 Md. 131, 71 A. 442, 23 L. R. A. (N. S.) 1135 (1908), discussed *supra* circa notes 60-63.