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COMMENTS

GROUND RENTS — A TERM ENMESHED IN AMBIGUITY

INTRODUCTION

Though it may be thought that a survey of ground rents and their evolution is more properly an antiquarian interest, it should be recognized that today in many states ground rents are the subject matter of conveyances and leases and are provided for in the clauses of wills, trust agreements and title insurance policies. The legal consequences of transactions involving ground rents are generally well settled within a particular state jurisdiction but their treatment from state to state is quite diverse. Perhaps, this prompted the following dictum of Mr. Justice Pitney, "we cannot say that this term (ground rents) is the recognized equivalent of any legal estate in lands. . ."¹

Depending upon what state jurisdiction is involved ground rents are held to be: *rent service*, *rent charge*, a periodic rent due on a determinable fee, and a periodic rent due on a lease. It is felt that a jurisdictional survey according to these classifications will best clarify the meaning of the term ground rents and will furnish us with a medium by which we can anticipate how a document providing for a ground rent will be interpreted in a jurisdiction faced with the problem for the first time.

I. GROUND RENTS AS RENT SERVICE

A. *Pennsylvania*

Beginning with the Norman Conquest of England in 1066 there was established an estate in land called *rent service*. This was created when a lord conveyed land to one of his vassals, reserving to himself the right to call upon the tenant for services, originally military, as long as the tenant remained the owner of the land. Gradually, rather than reserve the right of demanding actual services of the vassals, the lords granting land began to reserve to themselves the right to receive annually a certain sum of money.² However, upon the failure of the tenant to tender to the lord the agreed sum, the latter had the "seignior right," which gave him the power of distress—the right to go upon the vassal's land and seize the products thereof equivalent to the value of the agreed sum.³

1. *Camp v. Boyd*, 229 U.S. 530, 554 (1913). Others have written in a similar vein. "The meaning of ground rent is generally more misunderstood than any other term in the science of conveyancing." 1 LADNER, *CONVEYANCING IN PENNSYLVANIA* 291 (2d ed. 1941). "Ground rents are mysterious beings." Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 Md. L. Rev. 1, 2 (1940).

2. 1 LADNER, *CONVEYANCING IN PENNSYLVANIA* 291 (2d ed. 1941).

3. 2 BL. COMM. *42; BURBY, *REAL PROPERTY* 207 (1943); CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND"* 188-196 (2d ed. 1947); CO. LITT. *141b-143a; 1 LADNER, *CONVEYANCING IN PENNSYLVANIA* 291 (2d ed. 1941); 1 THOMPSON, *COMMENTARIES ON THE LAW OF REAL PROPERTY* 438 (1939); 3 TIFFANY, *THE LAW*

In 1290 subinfeudation was abolished by the statute of *Quia Emptores*⁴ so that on conveyances in fee a grantee could no longer hold of his grantor. As a result *rent service* could no longer be created in England as an incident to a fee simple conveyance. However in 1836 the Supreme Court of Pennsylvania, by construing the Charter granted to William Penn by King Charles II, held that *Quia Emptores* was not a part of Pennsylvania law, and therefore, all Pennsylvania ground rents⁵ (including those burdening fee simple estates) were *rent service*.⁶

In Pennsylvania a ground rent is created when the owner of the land (called the grantor, the ground rent landlord or the covenantee) conveys land in fee simple to a grantee, (sometimes also referred to as the terre-tenant or covenantor,) reserving for himself the ground rent. This is done by means of a "ground rent deed" which is executed in duplicate. One copy is recorded and retained by the grantor and the other marked "counterpart" is kept by the grantee.⁷ The estate of the grantor is incorporeal, being separate and distinct from the land itself, which is a corporeal estate.⁸ Therefore, either estate can be subject to mortgages, the lien of a judgment⁹ and the spouse's right of curtesy or dower.¹⁰ By custom it is expressly provided in the standard ground rent deed that the grantee shall pay all the taxes,¹¹ sewer and water rents, and other special assessments or charges.

Irredeemable ground rents are those payable periodically to the grantor (his heirs or assigns) forever. Since the owners of irredeemable ground rents demanded too great a price to extinguish them, the General Assembly legislated to abolish them.¹² This act was passed under the guise of making land more alienable by permitting the grantees to purchase them at a price to be determined in a judicial proceeding. Because of its retroactive effect this statute was held to be a subterfuge to aid private interests in the name of

OF REAL PROPERTY 526-528 (3d ed., Jones, 1939). See *Herr v. Johnson*, 11 Colo. 393, 395, 18 Pac. 342, 343 (1888); *Penny v. Little*, 4 Ill. (3 Scam.) 301, 303 (1841); *Van Rensselaer v. Jewett*, 2 N.Y. 141, 151 (1849); *Ingersoll v. Sergeant*, 1 Whart. 337, 347 (Pa. 1836).

4. *Quia Emptores Terrarum*, 1290, 18 Edw. I, c. 1.

5. In Pennsylvania a ground rent is a sum of money reserved by a grantor of land payable periodically (usually semi-annually) to the grantor (his heirs or assigns) for a stated number of years or in perpetuity.

6. *Ingersoll v. Sergeant*, 1 Whart. 337 (Pa. 1836). Before 1836 Pennsylvania cases characterized ground rents as *rent charges*. *Bantleon v. Smith*, 2 Binney 146 (Pa. 1809); *Kunckle v. Wynick*, 1 Dall. 326 (Pa. 1788). For other cases see CADWALADER, *THE LAW OF GROUND RENTS IN PENNSYLVANIA* 71-75 (1879).

7. I LADNER, *CONVEYANCING IN PENNSYLVANIA* 291-292, 297 (2d ed. 1941).

8. *Irwin v. The Bank of The United States*, 1 Pa. 349 (1845).

9. *Hart v. Anderson*, 198 Pa. 558, 48 Atl. 636 (1901).

10. This lien does not attach if the other spouse expressly relinquishes the right to curtesy or dower at the time the property is conveyed. PA. STAT. ANN. tit. 20, § 1.5 (1952).

11. At present this deed expressly exempts the grantee from paying income taxes due on the ground rents received by the grantor. Without such a provision the tax covenant has been held to obligate the grantee to pay the income tax. *Ehrlich v. Brogan*, 262 Pa. 362, 105 Atl. 511 (1918).

12. Act of Assembly, Apr. 15, 1869. P.L. 1869.

the public and therefore a taking of property without due process of law.¹³ To overcome this objection new legislation was adopted which provided that all ground rents created subsequently would be *redeemable*.¹⁴ The redeemable ground rent differs from the irredeemable variety in that the *grantee* can have it extinguished by payment of the principal at *any* time after its due date which cannot be for more than twenty-one years (or a life or lives in being). The ground rent itself cannot exceed the legal rate of interest prevailing at the time of the creation of the ground rent.¹⁵ The grantor can never demand the principal, except after its due date or on default of the periodic ground rent payment; however, these exceptions must be expressly provided for (as has been customary in recent years) in the ground rent deed.¹⁶

The right of distress as an incident of the ground rent¹⁷ was modified in *Wallace v. Harmstad*¹⁸ to be permitted only if there is an express reservation providing for it in the ground rent deed.¹⁹ If the land, out of which a ground rent landlord collects the rent, is divided the landlord need not recognize the apportionment, but can hold the original terre-tenant liable,²⁰ however, the original tenant has a right of action against his assignees who are

13. Palairet's Appeal, 67 Pa. 479 (1871).

14. This act was made effective as of June 24, 1885, the date it became law. PA. STAT. ANN. tit. 68, § 162 (1952).

15. PA. STAT. ANN. tit. 68, § 162 (1952).

16. Crean's Estate, 321 Pa. 216, 183 Atl. 915 (1936).

17. This was recognized because the Pennsylvania ground rent is *rent service* to which distress attached as a matter of right. See *Kenege v. Elliott*, 9 Watts 258, 262 (Pa. 1840); *Ingrsoil v. Sergeant*, 1 Whart. 337, 347, 352 (Pa. 1836).

18. 44 Pa. 492 (1863).

19. The theory of this case was that distress was not an incident of *rent service* in Pennsylvania because *tenure* did not exist there. This holding has been vehemently criticized on the grounds that *rent service* can only exist when there is *tenure*. CADWALADER, *THE LAW OF GROUND RENTS IN PENNSYLVANIA* 50 (1879); GRAY, *THE RULE AGAINST PERPETUITIES* 24 (4th ed., Gray, 1942); Vance, *The Quest for Tenure in the United States*, 33 YALE L.J., 248, 262 (1924); Note, 5 TEMP. L.Q. 279, 283 (1931). As a practical matter the objections to *Wallace v. Harmstad* have been overcome by the standard provisions in ground rent deeds which provide that: the grantor shall be authorized to distraint should the grantee default in his ground rent payments; the grantee shall pay a constable's fee of ten per cent based on the distrained goods and a five per cent attorney's fee based on the principal and interest of the ground rent; the grantee shall pay a two hundred fifty dollar attorney's fee for any action at law that stems from his breach of any provision of the ground rent deed; and that the grantee waives the provisions of The Exemption Act of 1849 and "any other Act of Assembly now or hereafter passed". The Exemption Act of 1849 exempted property up to three hundred dollars from levy and sale on execution and distress for rent. PA. STAT. ANN. tit. 12, §§ 2161-2162; 2164-2165 (1952). However, the provisions of this act with regard to exemption from execution and distress for *rent* were repealed on April 6, 1951 by The Landlord and Tenant Act of 1951. PA. STAT. ANN. tit. 68, § 250.401 (1952). Since the grantee's covenant waiving The Exemption Act of 1849 and "any other Act of Assembly now or hereafter passed" is extensive it would probably be construed to include the provisions of the 1951 Act relating to exemption from execution and distress for *rent*. However, in view of the maxim that "a deed is construed strictly *against* the grantor" the cautious grantor will insist that the grantee specifically waive, in an additional covenant, the exemption provisions of The Landlord and Tenant Act of 1951.

20. *The Ministers, Trustees, etc., of German Lutheran Congregation v. Limehouse*, 19 D.R.; 199 (C.P. no. 5, Phila. County, Pa., 1910).

the other tenants of the apportioned land.²¹ If the landlord extinguishes the ground rent obligation of one parcel of divided land subject to a ground rent, the owners of the other parcels are not relieved of their obligation to pay the remaining share of the ground rent assessment.²² Should the tenant default in his ground rent payments the grantor can bring an action of assumpsit²³ against him or his assignee.²⁴ However, on ground rents reserved since June 12, 1878, assignees are not liable to the ground rent landlord unless they personally assume such liability in writing;²⁵ but if the original ground rent was created before June 12, 1878, they are personally liable even though they became assignees after that date.²⁶

The land subject to a ground rent may be used to satisfy a judgment for back rents due the grantor, but neither the estate of the grantee nor his personal representative is liable for any deficiency even though the deceased may have assumed *personal* liability for the ground rents during his lifetime.²⁷ Another remedy usually provided for in the ground rent deed in case of default by the grantee is the obsolete and cumbersome right of re-entry (rarely used today). The more common method to achieve this end is the action of ejectment.²⁸ In Pennsylvania it is a common practice for those who purchase land subject to a ground rent to take title of the property as an assignee of a straw man²⁹ and thereby avoid the personal liability that would otherwise attach if title were taken directly from the ground rent landlord.³⁰ In the event that a ground rent is owned by several persons the terre-tenant is individually liable to each for the payment of the portion of the ground rent due them.³¹

A ground rent may be extinguished through merger by a conveyance of it to the grantee owning the land that is encumbered by the ground rent.³² A conclusive presumption as to its extinguishment or release arises when no payment, claim, demand or declaration on a ground rent shall have been made for twenty-one years.³³

21. *Lennox v. Brower*, 160 Pa. 191, 28 Atl. 839 (1894). Cf. *May's Estate*, 218 Pa. 64, 67 Atl. 120 (1907).

22. *Ingersoll v. Sergeant*, 1 Whart. 337 (Pa. 1836).

23. Originally covenant was brought; but the statute consolidating the forms of action merged covenant into assumpsit. PA. STAT. ANN. tit. 12, § 1 (1952).

24. PA. STAT. ANN. tit. 68, § 211 (1952); *Louer v. Hummel*, 21 Pa. 450 (1853).

25. PA. STAT. ANN. tit. 21, §§ 655-656 (1952); *Easby v. Easby, Ex'rs*, 180 Pa. 429, 36 Atl. 923 (1897).

26. *Sachse v. Myers*, 15 Pa. Super. 425 (1900).

27. *Williams's Appeal*, 47 Pa. 283 (1864); *Quain's Appeal*, 22 Pa. 510 (1854).

28. I LADNER, *CONVEYANCING IN PENNSYLVANIA* 301-302 (2d ed. 1941).

29. A straw man is one who is hopelessly insolvent, and therefore, is quite willing to assume a contingent liability for an extremely small consideration. Only in the miraculous event that the straw man becomes the recipient of a "windfall" is it theoretically possible that his judgment creditors could be satisfied.

30. *Real Estate-Land Title & Trust Co. v. Philadelphia Record Co.*, 302 Pa. 370, 153 Atl. 684 (1931).

31. *Reed v. Ward*, 22 Pa. 144 (1853).

32. *Frank v. Guarantee Trust & Safe Deposit Co.*, 216 Pa. 40, 64 Atl. 894 (1906).

33. *Clay, Adm'r v. Iseminger*, 187 Pa. 108, 41 Atl. 38 (1898). PA. STAT. ANN. tit. 12, § 80 (1952). *Wilson v. Iseminger*, 185 U.S. 55 (1902) (this statute is not an act

B. Delaware

It appears that *Quia Emptores*³⁴ is not recognized in Delaware as that state was a part of Pennsylvania till 1702; and therefore, *rent service* can be created on a conveyance in fee simple.³⁵ On the other hand it has been asserted that Delaware was outside the patent from the Duke of York to William Penn and consequently, *Quia Emptores* is a part of Delaware law.³⁶ However, neither the Delaware statutes nor the Delaware cases³⁷ involving ground rent appear to suggest that *Quia Emptores* is a part of Delaware law nor seem to prevent the reservation of irredeemable ground rents on fee simple conveyances. Redeemable ground rents are recognized and the legislature has authorized the Superior Court of Delaware to issue a writ of *scire facias* against any grantor who fails to extinguish or release a ground rent on payment of the principal.³⁸

C. Maryland

The Maryland ground rent which has been held to be *rent service*³⁹ is in some ways akin to its "cousin", the Pennsylvania ground rent, but differs in several vital aspects. In Maryland a ground rent consists of a sum of money periodically⁴⁰ received by the owner of real property in return for his *leasing* it for a given number of years⁴¹ coupled with an option in the lessee (his heirs or assigns) to perpetually renew the lease upon its termination by payment of a nominal "renewal fine."⁴² The distinctive characteristics of the Maryland ground rent reflect its indigenous growth and, though its exact origin is unknown, it has been theorized that the familiarity of many early Maryland settlers with their native Irish long term leases,⁴³ coupled with the then prevalent feeling that the statute of *Quia Emptores*⁴⁴ was part of Maryland law, gave rise to the Maryland ground rent.⁴⁵

or law impairing the obligation of contracts within the meaning of U. S. CONST. ART. I, § 10).

34. *Quia Emptores Terrarum*, 1290, 18 EDW. I, c. 1.

35. CADWALADER, *THE LAW OF GROUND RENTS IN PENNSYLVANIA* 111 (1879).

36. GRAY, *THE RULE AGAINST PERPETUITIES* 25 (4th ed., Gray, 1942).

37. *Brown v. Pierce*, 29 Del. (6 Boyce) 326, 99 Atl. 530 (Sup. Ct. 1916); *Dougherty, Ex'ts v. Flemming*, 23 Del. (7 Penn.) 278, 79 Atl. 104 (Super. Ct. 1908).

38. DEL. REV. CODE c. 5060-5062 § 75-77 (1935).

39. *Ehrman v. Mayer*, 57 Md. 612 (1882).

40. Ground rents are usually payable semi-annually, although occasionally some ground rent leases provide for annual or quarter-annual payment.

41. It is generally provided that a ground rent lease shall be for ninety-nine years, however, leases for 9,999 years have been created. Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 MD. L. REV. 1, 7 21n (1940).

42. "Renewal fines" generally vary from one to ten dollars. They are rarely paid and in effect are merely a fiction. However, it has been asserted that should property subject to a ground rent lease depreciate in value the lessee could with impunity forfeit his lease at its expiration by failing to pay the "renewal fine." Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 MD. L. REV. 1, 17-19 (1940). But if the lessee pays the ground rent for the hundredth year in a ninety-nine year lease, renewable forever, the "renewal fine" is conclusively presumed to be paid. MD. ANN. CODE GEN. LAWS art. 21, § 114 (1951).

43. See *Culbreth, Adm'x v. Smith*, 69 Md. 450, 458-459, 16 Atl. 112, 116 (1888); *Banks v. Haskie*, 45 Md. 207, 214 (1876).

44. *Quia Emptores Terrarum*, 1290, 18 EDW. I, c. 1.

45. The consensus still is that *Quia Emptores* is part of Maryland law. Chestnut,

The owner of real property creates a ground rent by leasing his land, usually for ninety-nine years,⁴⁶ renewable forever. The rent reserved to the landlord constitutes the ground rent which is redeemable. Before 1884 irredeemable ground rents could be created in Maryland. They consisted of those which the lessee had a right to retain forever, and as a result lessors habitually charged exorbitant consideration to extinguish them. Therefore, in 1884 the Maryland legislature provided that henceforth all ground rents would be redeemable at the option of the lessee.⁴⁷ This legislation has been favorably received⁴⁸ and is similar to the action of the Pennsylvania General Assembly in abolishing irredeemable ground rents in that state. However, irredeemable ground rents created before 1884 are unaffected by this act because it would be "in violation of the Fourteenth Amendment of the Federal Constitution."⁴⁹ Under existing law ground rents on a leasehold for ninety-nine years or more, renewable forever, may be redeemed after five years by the lessee paying the amount of the yearly rent capitalized at an amount not exceeding six per cent. The estate of the lessor is realty, but that of the lessee is personality⁵⁰ and not subject to dower.⁵¹

In Maryland the ground rent lease usually provides that the lessor shall have: the right to distrain all the chattels found on the premises at any time that the rents shall be partially or wholly in arrears; the right of re-entry when the ground rent is either partly or wholly unpaid for sixty days or longer; and the right to deem the lease null and void if any part of the rent is in arrears for six months or longer. However, the mortgagee of a lessee may file a bill in equity within six months after execution and gain possession of the leasehold by performing all the covenants of the lessee in addition to paying all costs and damages sustained by the lessor.⁵² Most ground rent leases also provide that the lessee shall pay all the taxes and assessments on the property

The Effect of Quia Emptores on Pennsylvania and Maryland Ground Rents, 91 U. OF PA. L. REV. 137, 142-147 (1942); GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed., Gray, 1942). It appears that this view nurtured the device of the long term lease renewable forever as an alternative to achieve practically the same effect as the perpetual rent service on a fee simple conveyance which was used in Pennsylvania where *Quia Emptores* was declared not part of its law. See *Jones v. Magruder*, 42 F. Supp. 193, 196-197 (D. Md. 1941). But see Note, *Maryland Statutory Modifications of the Law of Real Property*, 1 MD. L. REV. 238 (1937) (*Quia Emptores* is not a part of Maryland law).

46. See note 41, *supra*.

47. MD. ANN. CODE GEN. LAWS art. 21, § 111 (1951), *Stewart v. Gorter*, 70 Md. 242, 16 Atl. 644 (1889).

48. Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 MD. L. REV. 1, 42-46 (1940).

49. See *Marburg v. Mercantile Bldg. Co.*, 154 Md. 438, 443-444, 140 Atl. 836, 839 (1928).

50. *Culbreth, Adm'r v. Smith*, 69 Md. 450, 16 Atl. 112 (1888); *Arthur v. Cole*, 56 Md. 100 (1881); *Taylor v. Taylor*, 47 Md. 295 (1877). But cf. *Jones v. Magruder*, 42 F. Supp. 193 (D. Md. 1941) (a leasehold interest subject to a ground rent is real property within the purview of the Documentary Tax Act requiring federal revenue stamps to be affixed on deeds transferring realty). For a cogent presentation of the view that the Documentary Tax Act does not apply to leaseholds subject to the Maryland ground rent see *Lewis, The Taxation of Maryland Ground Rents*, 3 MD. L. REV. 314, 334-335 (1939).

51. *Spangler v. Stanler*, 1 Md. Ch. 36 (1847).

52. MD. ANN. CODE GEN. LAWS art. 75, § 78 (1951).

subject to the ground rent. If the lessor is tax-exempt the lessee can be taxed on an assessment based on the value of the leasehold interest only.⁵³ However, if the lessee is tax-exempt, and the lessor is not, it has been the practice in Maryland not to tax the property; but it has been asserted that the lessee should pay the taxes on the value of the reversionary interest of the lessor on the basis of "performing a contractual obligation with a third party."⁵⁴

The lessee may mortgage his leasehold interest.⁵⁵ The lessee of a ground rent lease may assign his entire leasehold interest, but he still remains personally liable for all his covenants to the lessor if the assignee defaults.⁵⁶ However, the third party assignee is only liable for his covenants during the period he is in possession of the leasehold even though the fourth party to whom he assigns his interest defaults.⁵⁷ As a result it is the general practice in Maryland (as in Pennsylvania) for a prospective lessee of a ground rent leasehold to take mediately of his lessor as an assignee of a straw man.⁵⁸ Ground rents may be extinguished in Maryland by forfeiture for breach of covenant, merger, adverse possession, redemption and estoppel.⁵⁹

D. South Carolina

Although the statute of *Quia Emptores*⁶⁰ has been held to be inoperative in Pennsylvania⁶¹ and would probably not be recognized in Delaware⁶² it has been generally held to be in effect throughout the United States, as part of the common law. Therefore, in the majority of states real property owned in fee simple cannot be subject to *rent service*. A possible exception appears to be South Carolina where *Quia Emptores* is not recognized.⁶³

53. Philadelphia, W. & B. R.R. v. Appeal Tax Court of Baltimore City, 50 Md. 397 (1879).

54. Lewis, *The Taxation of Maryland Ground Rents*, 3 MD. L. REV. 314, 320 (1939).

55. The standard leasehold mortgage covenant provides that the mortgagor shall pay all the rents, assessments and taxes due on the property and that he shall be deemed in default upon his failure to so perform. If the mortgagor defaults the mortgagee automatically acquires the right to possession and thus becomes in privity of estate with the owner of the reversionary interest in the land and is liable to him for the payment of all future ground rents, assessments and taxes provided for in the ground rent lease. Thus, many mortgages including federal agencies such as the Home Owners Loan Corporation (HOLC), organized to provide emergency relief to home owners and assist them with respect to home mortgage indebtedness, were caught unawares, and upon default of the mortgagor found themselves the reluctant obligors of ground rent owners. As a result this rule encountered strong criticism. Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 MD. L. REV. 1, 24-25 (1940); Lewis, *The Taxation of Maryland Ground Rents*, 3 MD. L. REV. 314, 321-323 (1939).

56. *The Consumers' Ice Co. v. William H. H. Bixler & Co.*, 84 Md. 437, 35 Atl. 1086 (1896).

57. *Reid v. John F. Weissner & Sons Brewing Co. of Baltimore*, 88 Md. 234, 40 Atl. 877 (1898); *Donelson v. Polk*, 64 Md. 501, 2 Atl. 824 (1886); *Hintze v. Thomas*, 7 Md. 346 (1855).

58. For a definition of a straw man, see note 29, *supra*.

59. Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 MD. L. REV. 1, 46 (1940).

60. *Quia Emptores Terrarum*, 1290, 18 Edw. I, c. 1.

61. *Ingersoll v. Sergeant*, 1 Whart. 337 (Pa. 1836).

62. CADWALADER, *THE LAW OF GROUND RENTS IN PENNSYLVANIA* 111 (1879).

63. GRAY, *THE RULE AGAINST PERPETUITIES* 25 (4th ed., Gray, 1942); Vance, *The Quest for Tenure in The United States*, 33 YALE L.J. 248, 268 (1924).

Thus, it is theoretically possible that irredeemable ground rents in the nature of *rent service* will be upheld there. There are no reported cases regarding *rent service* in South Carolina but it has been stated that "they may once have existed in the early feudal days [circa 1750]."⁶⁴ However, it seems unlikely that ground rents would be permitted today in South Carolina in view of the hesitancy of courts to recognize segments of the ancient common law that have been ignored for centuries in the jurisdiction.

E. Other Jurisdictions

The statute of *Quia Emptores* did not prohibit the creation of *rent service* on estates of less than fee simple if the reversion was held by the grantor.⁶⁵ However the courts of Colorado⁶⁶ and Illinois⁶⁷ have announced that *rent service* cannot be recognized because fealty does not exist in the United States. The theory of these decisions has been criticized⁶⁸ but other courts would probably reach the same result on grounds of "public policy" based on the theory that in a modern society courts should disregard archaic parts of the common law.

II. GROUND RENTS AS RENT CHARGE

A. Virginia

In Virginia a ground rent is a valid, but uncommon, interest in real property. It is created by a conveyance of land to a grantee reserving a ground rent which is the specified sum of money covenanted to be paid periodically in perpetuity to the grantor (his heirs or assigns).⁶⁹ The Virginia ground rent is regarded as a *rent charge*.⁷⁰ The common law *rent charge* is a reservation of a rent on a conveyance of land, usually in fee simple, but unlike *rent service* it cannot be apportioned nor does it carry the right of distress unless specifically provided for in the deed.⁷¹ The reservation of the ground rent constitutes the sole consideration for the conveyance and provision is usually made for an option in the grantee to redeem the land from the ground rent upon payment of a specified sum after a certain number of years.⁷² Most Virginia ground rents are, therefore, similar to the Pennsylvania redeemable ground rent (which is *rent service*). However, un-

64. CALWALADER, *THE LAW OF GROUND RENTS IN PENNSYLVANIA* 111 (1879).

65. *Ehrman v. Mayer*, 57 Md. 612 (1882). See *Cornell v. Lamb*, 2 Cow. 652, 656-657 (N.Y. 1824).

66. *Hert v. Johnson*, 11 Colo. 393, 18 Pac. 342 (1888).

67. *Penny v. Little*, 4 Ill. (3 Scam.) 301 (1841).

68. Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial*, 5 MD. L. REV. 1, 4 8n (1940); 3 TIFFANY, *THE LAW OF REAL PROPERTY* 528-529 (3d ed., Jones, 1939).

69. *Willis's Ex'r v. Virginia*, 97 Va. 667, 34 S.E. 460 (1899).

70. *Ibid.*; *Wartenby v. Moran*, 7 Va. (3 Call) 491 (1803).

71. 2 BL. COMM. *42; CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND"* 188-196 (2d ed. 1947); CO. LITT. *143b-150a; 1 THOMPSON, *COMMENTARIES ON THE LAW OF REAL PROPERTY* 438-439 (1939). In England and Ireland the *rent charge* has also been denominated ground rents. 180 L.T. 231 (1935); 67 IR. L.T. 281 (1933). The common law *rent charge* should be distinguished from the Louisiana *rent charge* which is derived from the civil law. LA. CIV. CODE art. 2779-2792 (1952). It has been referred to as a ground rent. See *New Orleans v. Camp*, 105 La. 288, 290, 29 So. 340, 341 (1901).

72. *Willis's Ex'r v. Virginia*, 97 Va. 667, 34 S.E. 460 (1899).

like the law of Pennsylvania⁷³ it still seems possible for one to create an irredeemable ground rent in Virginia. The grantor is expressly provided with the rights of distress and re-entry should the grantee default in his ground rent payments.⁷⁴ The ground rent itself is an incorporeal hereditament subject to the incidents of real property such as curtesy and dower, and it cannot be taxed as personalty.⁷⁵ Taxes on land subject to a ground rent are assessed against the grantee.⁷⁶ No action may be brought on a ground rent obligation for which payment to the owner thereof has not been made ten years after such ground rent became due and payable.⁷⁷

B. Other Jurisdictions

Other states have recognized *rent charges*⁷⁸ even though they have not been referred to as ground rents. However the recent dictum of Judge James Alger Fee, that "ground rents (apparently meaning *rent charges*) have no place in the law of Oregon because the customs of the people have not called for the creation of such incidents,"⁷⁹ may foreshadow a movement by the courts in the United States to hold such interests in land unrecognizable, especially in those jurisdictions contemplating a case involving *rent charges* for the first time.

III. GROUND RENTS AS A PERIODIC RENT DUE ON A DETERMINABLE FEE *Georgia and Ohio*

There exists in Georgia and Ohio a unique type of ground rent that clouds an estate which at first blush appears to be a fee simple determinable.⁸⁰ This ground rent is created when one conveys land reserving to himself (his heirs and assigns) a stipulated amount of money called the ground rent, usually to be paid quarter annually forever; but the grantee may be relieved of the burden of the ground rent by the lump sum payment of a stated sum of money. The deed further provides that if a specified number of days elapse after the quarter annual ground rent becomes due then the premises shall revert to the grantor, who shall possess a right of re-entry to divest the grantee of all his interest in the land.⁸¹ However, if the grantor exercises the right of re-entry and sells the land to a third party, equity will force him to disgorge to the original grantee all the profits gained by the

73. PA. STAT. ANN. tit. 68, § 162 (1952).

74. *Wartenby v. Moran*, 7 Va. (3 Call) 491 (1803).

75. *Willis's Ex'r v. Virginia*, 97 Va. 667, 34 S.E. 460 (1899).

76. *Ibid.*

77. VA. CODE ANN. § 5817 (1950). This statute changed the common law that actions on ground rents are not barred by lapse of time. *Mulliday v. Machir's Adm'r*, 45 Va. (4 Gratt.) 1 (1846).

78. *Herner v. Dellinger*, 18 Fed. 495 (C.C.E.D. Wisc. 1883); *Bartos, Adm'r v. Skleba*, 107 Nebr. 293, 185 N.W. 1002 (1921) (rent charge held apportionable); *Farley v. Craig*, 11 N.J. Eq. 262 (1830). See *Smith v. Campbell*, 10 N.C. 596, 598 (1825).

79. *United States v. Florea*, 68 F. Supp. 367, 373 (D. Ore. 1945).

80. A fee simple determinable estate is one granted in perpetuity, but subject to a specific prohibition which, if violated, terminates the estate and automatically re-vests title in the grantor. The estate of the grantor is called a possibility of reverter. *First Universalist Society of North America v. Boland*, 155 Mass. 171, 29 N.E. 524 (1892).

81. *Laurence v. Savannah*, 71 Ga. 392 (1883); *Swoll v. Oliver*, 61 Ga. 248 (1878); *Stephenson v. Haines*, 16 Ohio St. 478 (1866).

grantor over the amount due on the land.⁸² Both estates are realty; that of the grantor being an incorporeal hereditament, but the estate of the grantee is corporeal and he must pay all the taxes assessed on the property.⁸³

IV. GROUND RENTS AS A PERIODIC RENT ON A LEASE

A number of jurisdictions have recognized the use of the term ground rent in a less technical sense than the states discussed in the foregoing paragraphs. In this sense ground rent usually means a rent payable periodically to the lessor of unimproved land for a specified number of years. The lessee is given the right to improve the property and must pay all the taxes and assessments attaching thereto. Cases so using the expression ground rent are found in the following American jurisdictions: Connecticut,⁸⁴ District of Columbia,⁸⁵ Maine,⁸⁶ New York,⁸⁷ Rhode Island,⁸⁸ Washington⁸⁹ and Wisconsin.⁹⁰ Recently the Supreme Court of Rhode Island acknowledged that the term ground rent could be so used, but frowned upon its use in this sense which it regarded as "misnomers of a kind not uncommon among laymen in speaking of rights and interests in real property and of the devolution thereof."⁹¹ Attorneys and conveyancers should avoid the use of the expression "ground rent" as meaning the rent payable periodically on a lease in jurisdictions where the term is not so used as other courts may show a similar hostility to the use of the expression.

CONCLUSION

The multitude of cases involving ground rents demonstrate that the term is one of varied meanings from jurisdiction to jurisdiction. Scrupulous

82. *Laurence v. Savannah*, 71 Ga. 392 (1883); *Stephenson v. Haines*, 16 Ohio St. 478 (1866). Except for this rule giving the grantee equitable relief this estate subject to a ground rent is identical to the fee simple estate subject to a condition subsequent which is one giving the grantor power to terminate it by use of the right of entry upon the happening of a specific event. *Van Rensselaer v. Ball*, 19 N.Y. 100 (1859). MOYNIHAN, *PRELIMINARY SURVEY OF THE LAW OF REAL PROPERTY* 19 (1940). *But cf.* *Penick Ex'r v. Atkinson*, 139 Ga. 649, 71 S.E. 1055 (1913) (the estate subject to a ground rent called base or determinable fee). In Florida landowners should avoid conveyancing in fee subject to a ground rent with a right of re-entry in the grantor if payment is not made because after the twenty-first year the right of re-entry would probably be declared void under a recent statute limiting most possibilities of reverter and rights of entry to twenty-one years. FLA. STAT. § 689.18 (1951). *Stephenson*, *Constitutional Inviolability of Possibilities of Reverter and Rights of Entry in Florida*, 6 MIAMI L.Q. 162 (1952).

83. *Penick, Ex'r v. Atkinson*, 139 Ga. 649, 77 S.E. 1055 (1913); *Wells v. Savannah*, 87 Ga. 397, 13 S.E. 442 (1891), *aff'd*, 181 U.S. 531 (1901); *Stephenson v. Haines*, 16 Ohio St. 478 (1866).

84. *Russell, Receiver v. New Haven*, 51 Conn. 259 (1883) (in addition lessee obtains title to all buildings he erects on the land, but the lessor has the right to purchase them).

85. *Prout v. Roby*, 15 Wall, 471 (U.S. 1872); *Willard v. Taylor*, 8 Wall. 557 (U.S. 1869) (lessee also given right to discharge property of ground rent by payment of a specific sum).

86. *Gale v. Edwards*, 52 Me. 363 (1864).

87. *Application of Flushingside Realty & Construction Co.*, 186 Misc. 117, 59 N.Y.S. 2d 131 (Sup. Ct. 1945).

88. *Hadley Falls Trust Co. v. Green*, 74 R.I. 153, 59 A.2d 356 (1948).

89. *Monidah Trust v. Arctic Construction Co.*, 156 Wash. 630, 287 Pac. 898 (1930).

90. *Marshall & Hsley Bank v. Guaranty Inv. Co.*, 213 Wisc. 415, 250 N.W. 862 (1933).

91. *Hadley Falls Trust Co. v. Green*, 74 R.I. 153, 160, 59 A.2d 356, 359-360 (1948).

attorneys should, therefore, avoid this expression unless it is used in conjunction with other descriptive words that give it a definite meaning.⁹² Otherwise, litigation that could have been avoided may ensue to unravel the meaning posed by the use of the term ground rent in a document.⁹³

CHARLES B. SLOANE.

PROPER SUBJECTS FOR COLLECTIVE BARGAINING UNDER FEDERAL LEGISLATION

The subjects of collective bargaining are numerous and varied. Those generally accepted by both labor and management as proper subjects include the following: wage rates, hours of employment, overtime, discharge, suspension, layoff, recalls, seniority, discipline, promotion, transfer, plant safety and sanitation together with protection of health in the place of employment.¹

On the other hand other subjects are usually considered to be the sole prerogative of management and therefore not proper subjects of collective bargaining. Those subjects in this category usually include the corporate or other structure of the business, the location of plants, production schedules, the number and personnel of the official and supervisory force, and processes and means of manufacturing.²

Having already achieved, to a great extent, the direct benefits of proper wages, reasonable hours and healthful working conditions, union efforts recently have been and continue to be directed to matters which yield indirect benefits that could aptly be described as fringe issues. These subjects have caused much litigation before the National Labor Relations Board³ and in federal courts. In the main, management has contended that such matters

92. A provision in a trust agreement providing for the investment in "ground rents" is as indefinite as a provision to invest in "real property." A carefully worded provision might state: "The trustee shall have the power to buy and sell only such irredeemable ground rents as exist incident to land in Pennsylvania and that are recognized by the law of Pennsylvania and which yield not less than four per cent interest at the time of purchase by the trustee. Furthermore the irredeemable ground rent must expressly provide that the owner thereof shall have the rights of distress and re-entry should there be a default in the payment of the ground rent. The trustee shall not have the power to purchase any irredeemable ground rent that is encumbered by a mortgage, judgment or any other lien whatsoever."

It is the practice of some title companies to insure the title of the grantee except for such "encumbrances or ground rents" as exist against the land. As all ground rents are encumbrances of land this statement adequately protects the title company; but the grantee should be cautioned to check against *all* types of ground rents to ascertain to what extent his property is covered by the title insurance policy.

93. *Camp v. Byrd*, 229 U.S. 530 (1913) ("ground rent" held to include the reversionary interest); *Moran v. Hammersla*, 188 Md. 382, 52 A.2d 727 (1947) (ground rent agreement too indefinite to permit specific performance).

1. 1 CCH LAB. LAW REP. § 3020.

2. *Ibid.*

3. Hereinafter the National Labor Relations Board will be referred to simply as the board.