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THE EFFECT OF QUIA EMPTORES ON PENNSYLVANIA AND MARYLAND GROUND RENTS

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Ground rents in Pennsylvania and Maryland, particularly in the metropolitan areas of Philadelphia and Baltimore, have been a well-known form of property holding for nearly two hundred years. They have been and still are a popular and comparatively stable form of investment. They also serve a useful economic purpose in the promotion of the improvement of relatively small lots or parcels of ground for individual dwellings. The financial aspect of the rents in both States is substantially the same; their principal characteristic being similarity to the payment of semi-annual interest on a mortgage for a specified sum, the principal of which, however, never matures so long as the interest is paid. But the technical legal nature of the property holdings of the owner of the property subject to the rent are very different in the two States. In Pennsylvania both the owner of the rent and the owner of the property subject to it have separate estates in fee in the land, each classed as real property; but in Maryland, while the owner of the rent is an owner in fee, the owner of the property subject to the rent has only a leasehold estate, which is classed as personal property, and which is capable of being devised as such, and is not subject to the dower interests of the wife of the holder. The Pennsylvania rent is created by deed of grant of the land in fee simple, reserving the stipulated amount of rent; but the Maryland rent arises from a lease for ninety-nine years renewable forever.

The reason for this difference in the legal nature of the ground rent systems of Pennsylvania and Maryland respectively presents an interesting inquiry as to the quantity and quality of feudal tenures in the Colonial period, and particularly to what extent they were affected by the British statute of 18 Edw. I, c. 1 (1290) known as Quia Emptores Terrarum.¹ This statute was a prominent landmark in the field of the feudal system, and its main purpose and effect was to abolish subinfeudation.

Whether the statute was ever in force in either of the two States in the Colonial period, and if so, to what extent, was a matter of uncertainty of legal opinion both before and until long after the Amer-

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¹ The writer's attention was necessarily directed to the subject matter in the study of a recent federal stamp tax case in the district court of Maryland. Jones, et al. v. Magruder, Collector, 42 F. Supp. 193 (1941).
ican Revolution. It was not settled in Pennsylvania until 1836 when the Supreme Court of the State held, upon elaborate reasoning, that it never had been in force in the province or the state. It appears that the question has never been judicially determined in Maryland; but it is the particular purpose of this paper to support the view that the statute did have operative effect here during the Colonial period until the Revolution, and that the origin of the unique legal form of the Maryland ground rent system is attributable to that fact. On the other hand, the Pennsylvania legal system of ground rents follows the conventional pattern of legal conveyances long known and used in England both before and after the statute of *quia emptores*. Therefore, in Pennsylvania, the question whether the statute was in force before or after the Revolution was of importance not as to the form of the creation of ground rents, but whether there was a feudal tenure thereby created between the parties, and whether the rent should be classed as a rent *charge* or rent *service*.

The vital importance of the statute in the history of the English feudal system is well known to all students of the common law. Before the Norman Conquest much of the lands in England had been held by alodial title; but after the battle of Hastings (1066), William the Conqueror succeeded in establishing the feudal system throughout nearly all of England, and by the end of the thirteenth century it had blossomed into full flower, with its incidents of services, fines on alienation, escheats, aids, rents and other money payments due from tenants to their respective overlords. By this time the process of subdivision or subinfeudation of the large tracts of land originally granted by the King to his favorites, or others for reasons of policy, had gone to such an extent that these chief overlords of large estates were being prejudiced thereby in the receipt of their feudal perquisites. It was therefore to their interest to restrict alienation by their tenants, and one such restriction was given them in 1217 by the enactment that—"No free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee the service due to him which pertains to that fee." But restrictions on alienation were contrary to the interests of the tenants, who agitated for their removal, with the result of the compromise of the opposing interests by the statute of *quia emptores*.

As customary, the statute first recited the mischief which was said to exist:

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"For as much as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheates, marriages and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men."

And then the remedy as follows:

"That from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

The effect of this was, of course, to bring the purchaser of land into direct relationship of responsibility to the chief overlord and thus to preserve to him unimpaired the benefit of the feudal incidents which had resulted from his original grant of the land. Section 2 of the statute provided for an apportionment of the feudal services where a part only of the land was granted; and section 3 expressly provided that the statute should be prospective only in operation and should apply "only to lands holden in fee simple". The statute did not in terms apply to original grants made by the king, and therefore did not permit free alienation by his immediate grantees without his assent.

It has been said that colonists take with them the laws but not the courts of the mother country. This was true generally as to the English colonies in America. The statute of *quia emptores* was one of the most important laws of England affecting tenures of land, and it had been in force there for more than three hundred years before Maryland and Pennsylvania were settled. There would be little reason to doubt that the colonists took this statute with them as a part of their general law of the land, just as they undoubtedly took the important

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5. The effect of this statute is succinctly stated by J Pollock & Maitland, History of English Law (1895) 318: "The famous statute of 1290, the *Quia Emptores Terrarum*, lies outside of our limits, but a word must be said of it. It declared that every free man might sell his tenement or any part of it, but so that the feoffee should hold of the same lord and by the same services, of whom and by which the feoffor held. In case a part only was sold, the services were to be apportioned between the part sold and the part retained according to their quantities; this apportionment was binding on the lord. The statute is a compromise; the great lords had to concede to their tenants a full liberty of alienation by way of substitution—substitution even of many tenants for one tenant—and thus incur a danger of losing their services by the process of apportionment; on the other hand subinfeudation with its consequent depreciation of the escheats, wardships and marriages was stopped. Nothing was said about the king's rights and no one seems to have imagined for one moment that the tenants in chief of the crown were set free to alienate without royal license; . . ."
statute de donis, authorizing grants of land in fee simple in tail, unless there was some provision to the contrary in the charters to Calvert and Penn. But, as we shall see, there was in both charters a so-called non obstante clause with respect to quia emptores, and therefore it is important to examine them to see just what effect this provision had upon the operative force of the statute.

We come therefore to these Colonial Charters. By the Maryland Charter of 1632 Charles I granted the Province of Maryland to Caecilius Calvert, Baron of Baltimore, as absolute lord and proprietary, and his heirs and assigns, to hold "in free and common Soccage, by Fealty only for all Services, and not in Capite, nor by Knight's Service, Yielding therefore unto Us, our Heirs and Successors, two Indian Arrows of these Parts, to be delivered at the said Castle of Windsor every Year, on Tuesday in Easter Week: And also the fifth Part of all Gold and Silver Ore which shall happen from Time to Time to be found within the aforesaid Limits." The 7th paragraph authorized the proprietary to enact laws for the government of the Province, with the assent of the freemen thereof or their delegates provided "nevertheless, that the Laws aforesaid be consonant to Reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs and Rights of this, Our Kingdom of England." It is the 18th paragraph of the Charter which is the most important for our present purposes. In it there was granted to Calvert the power to "assign, alien, grant, demise or enfeoff" any part of the lands in Maryland to any person willing to purchase the same, they and their heirs and assigns to have and to hold "in fee Simple, or Fee-Tail or for Term of Life or Lives or Years; to hold of the aforesaid now Baron of Baltimore, his Heirs and Assigns, by so many, such and so great Services, Customs and Rents, of this Kind, as to the same now Baron of Baltimore, his Heirs and Assigns, shall seem fit and agreeable, and not immediately of Us, our Heirs and Successors."

There then followed the famous non obstante clause in the following long sentence:

"And We do give, and by these Presents, for Us, our Heirs and Successors, do grant to the same Person and Persons, and to each and every of them, License, Authority and Power, that such Person and Persons may take the Premises, or any Parcel thereof, of the aforesaid now Baron of Baltimore, his Heirs and Assigns, and hold the same to them and their Assigns, or Heirs, of the aforesaid Baron of Baltimore, his Heirs and Assigns, of what

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7. 3 Thorpe's American Charters (1909) 1677-1686.
Estate of Inheritance soever, in Fee Simple or Fee-tail, or otherwise, as to them and the now Baron of Baltimore, his Heirs and Assigns, shall seem expedient; the Statute made in the Parliament of Lord Edward, Son of King Henry, late King of England, our Progenitor, commonly called the 'Statute Quia Emptores Terrarum', heretofore published in our Kingdom of England, or any other Statute, Act, Ordinance, Usage, Law, or Custom, or any other Thing, Cause, or Matter, to the contrary thereof, heretofore had, done, published, ordained or provided to the contrary thereof notwithstanding.”

The Charter to Penn granted by Charles II in 1681 followed the pattern of the prior charter to Calvert and it has been said was practically a copy thereof except as to the description of the lands granted. Penn was also made Lord Proprietary of the Province of Pennsylvania to hold the same in free and common soccage, by fealty only, for all services and not in capite or knight's service, yielding and paying two Beaver Skins every year; and also the fifth part of all gold and silver ore. The power to make local laws for the government of the Province was also granted in substantially the same language as in the Maryland Charter. And particularly the charter to Penn contained in practically the same wording, as in the Maryland Charter, the power to grant lands on terms and conditions determined by Penn, the grantee to hold of him and not immediately of the Crown, the statute of quia emptores terrarum notwithstanding. Penn was also granted authority to erect manors and hold therein courts-baron and courts-leet; but it may be important to note that in this respect there is a provision in the Pennsylvania grant which differs from the Maryland charter. In the latter the authority to erect manors was expressly given only to Calvert and to his heirs; while in the Pennsylvania grant the authority to erect manors was given not only to Penn, and his heirs, but likewise to all and every such person or persons "to whom the said William Penn or his heirs shall at any time hereafter grant any estate or inheritance as aforesaid." And there was the following further provision in the charter to Penn:

“And Wee doe further grant license and authoritie, that every such person and persons who shall erect any such Mannor or Mannors, as aforesaid, shall or may grant all or any parte of his said Lands to any person or persons, in fee-simple, or any other estate of inheritance to be held of the said Mannors respectively, soe as noe further tenures shall be created, but that upon all further and other alienations thereafter to be made, the said lands

8. Italics supplied.
9. 5 Thorpe's American Charters (1909) 3035-3044.
soe aliened shall be held of the same Lord and his heirs, of whom
the alienor did then before hold, and by the like rents and Services
which were before due and accustomed."

The point of construction of these charters in which we are inter-
ested is whether, or to what extent, the much debated non obstante
clause carried the exemption from quia emptores beyond the immediate
grantees of the proprietary; and our particular inquiry is whether per-
sons holding lands directly from Calvert and Penn could alien them
by grant in fee simple reserving rents which would be properly classed
as rent service and not rent charge, the distinction between which will
be later noted. Let us first consider the construction without the
influence of subsequent history or judicial decision. In doing so we
must keep in mind the English law as it then stood with regard to quia
emptores. The statute had been in force for more than three hundred
years and was a landmark in the feudal system. It was evidently
thought that it would apply to grants made by the proprietaries unless
otherwise provided in the charters, and for this reason express author-
ity was given to Calvert and Penn to grant lands at their pleasure so
that the grantees would hold of them and not immediately of the King.
And then another sentence was added giving authority to the grantees,
their heirs and assigns, to hold of Calvert and Penn notwithstanding
quia emptores. It is important to note that not only the immediate
grantees of the proprietaries but also their heirs and assigns were like-
wise to hold of the proprietary. From this it would seem fairly clear
that the only purpose of the non obstante clause was to accomplish the
result that grantees from the proprietary as well as their heirs and
assigns, should hold of the proprietary and not of the King. And
this seems to mean that quia emptores was not to apply to the im-
mediate grants by the proprietary but was to apply to subsequent
grants made by the immediate grantees, unless possibly it was other-
wise expressly provided in the grants made by the proprietaries which
could be on such terms as they deemed "fit and agreeable". However,
in this connection, we must not overlook the further provision in the
charter to Penn with regard to manors.10 By this either Penn or his
immediate grantees could erect manors, and make grants of subdivi-
sions thereof, the grantees to hold of the manors; but no further sub-
feudation was to be permitted. The apparent effect of this was to
further extend the exemption from quia emptores to the first grants
by the holders of the manors but no further. And this express pro-
vision seems rather to fortify the view that the non obstante clause of

10. To what extent Penn or his immediate grantees created manors is not very
evident, although there were many erected in Maryland. See Mayer, Ground Rents
in Maryland (1883) 39, 137.
itself did not carry the exemption from *quia emptores* beyond the proprietary's first grant.

Our question is, what practical effect these charter provisions respectively had upon the creation of Maryland and Pennsylvania ground rents. In Maryland the now classic text on ground rents is that of Mayer published in 1883. It is his view that by the proper construction of the Maryland Charter the exemption from *quia emptores* extended only to Calvert's immediate grantees and not to subsequent grants by the latter, and therefore a grantee from Calvert could not validly make a further grant of lands in fee reserving to himself a rent service issuing thereout, because the force of the statute would make the reserved rent a rent charge. The device of a lease, renewable forever, rather than a grant in fee subject to a reserved rent, was adopted to avoid the statute; because the statute applied only to grants in fee, and long term leases had long been customary in England after the passage of the statute with the substantial effect of avoiding its prohibition.11

The unique feature of the Maryland ground rents so adopted was not that they were made for a long term of years, but that they were made renewable forever. Grants of land in fee reserving quit rents and grants of long term leasehold estates reserving rent (but not renewable) were both well-known forms of conveyances familiar in England, and in Maryland many such grants were made by the proprietary, but grants in fee subject to rents had seldom if ever been made by the proprietary's immediate grantees. Apparently what they and other prospective grantors desired was a form of conveyance which, though substantially equivalent to a grant in fee with a reserved rent, would nevertheless not be within the prohibition of the statute, on the assumption that it applied to their grants. Maryland lawyers in the Colonial period, and particularly in the eighteenth century, were familiar with the system of Irish leases for a period of three lives renewable as the respective lives fell in. Ordinarily three lives would be roughly equivalent to ninety-nine years. What was adopted in Maryland was a simplified form of the Irish leases substituting for the three lives a period of ninety-nine years but providing that the leases should be renewable forever.12

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12. Banks v. Haskie, 45 Md. 207 (1876), is the leading Maryland case upon the subject. The present form of the Maryland rents originated about 1750. In *Banks v. Haskie* the court was dealing with such a rent created in 1772 in or near Baltimore City. The terms of the lease are fully stated by the court and their similarity to the Irish leases is pointed out. The economic purposes of the parties in creating the lease is also discussed. The court, by Judge Miller, adds: "This character of tenure is, so far as we know, among the States, peculiar to Maryland. It has not been generally adopted so far as we are informed in any other State. It was introduced here in Colonial times, and has been a favorite system of tenure from a very early period."
Mayer puts it thus; "The object was to create permanent rents for the benefit of the land owners, with the advantage of being rent-services, which idea was probably suggested by the proprietary's quit rents, to which the inhabitants of the province had long been accustomed; and at the same time to secure to the tenant such use and enjoyment of the land that he would be justified, from the assurance of his long lease, in making valuable improvements on the premises. The common law lease in which the reversion remained in the landowner and his tenure of the proprietary was not interfered with, was evidently considered by the lawyers of the period as the form best adapted to accomplish their purpose. In fact, it is a question whether the landed proprietors could have secured their object in any other way. They might have created rent-charges, but they were not desirable. It may be inferred from section XVIII of the Charter that subinfeudation was permitted only for the purpose of allowing his tenants to hold immediately of the proprietary, as the proprietary held of the King, and that it did not extend beyond his immediate grantees. Kilty, 28. At least it does not appear that the lords of manors ever exercised the power (if it existed by construction of the charter) of making grants and feoffments, to be holden of them by such rents as they held of the proprietary. The reservations of rents to them were, in point of fact, under leases for lives—(in some cases renewed to the heirs of the life tenants, as in copyhold estates)—or for terms of years."

Mayer also submits the view that the Pennsylvania system of grants in fee subject to reserved rents was satisfactory there, while it was not in Maryland, by reason of the further provision above noted in the charter to Penn with respect to manors. On this point he says: "Section XIX of the Charter authorized the proprietary to erect tracts of land into manors, and provided for courts-baron and courts-leet, to be held by lords of manors or their stewards. The charter to William Penn, however, went further, and expressly empowered the lords of

A large city has been built, and improved, and the vast majority of the real estate in Baltimore is now held under it. It is not open to any of the objections against perpetuities. Property is not thereby placed extra commercium. On the contrary, these leasehold interests devolve upon the personal representatives of the owner, are in terms made assignable, and they, as well as the ownerships in fee under the denomination of 'ground rents', are subjects of daily transfer, and are constantly sought for as safe investments of capital. It is a peculiar description of tenure which has been sustained by our courts, and approved and fostered by our people. While the ground rents from their nature are usually of a fixed value, the leasehold interests are more or less fluctuating. In many, and indeed in most cases, they have largely increased in value with the growth of the City. And most extensive and costly improvements have been and are daily being made by owners of such interests on grounds thus leased." In the particular case the court held the renewable provision sustainable and enforceable in equity, even where application therefor was not made until after the expiration of the term, where the applicant was not guilty of laches. But otherwise where the laches were gross and inexcusable. Myers v. Silljacks, 58 Md. 319 (1881).

13. Mayer, Ground Rents in Maryland (1883) 46, 47.
manors to grant lands in fee-simple or fee-tail, reserving quit rents to themselves (now known as ground rents in that State). It would therefore seem that the non obstante clause as to the statute _Quia Emptores_ (the same as that contained in section XVIII of the charter to Lord Baltimore) was supposed not to extend beyond the proprietary's immediate tenants; and when the charter to Penn was granted, the additional section was inserted to extend the power of subinfeudation further than was authorized by the charter to Lord Baltimore. The form of a lease for ninety-nine years was consequently adopted in Maryland, as being in accordance with the tenure of land authorized by the Charter, for the purpose of reserving rent-services, known as ground rents, to the tenants of the proprietary; while in Pennsylvania, by force of the charter to Penn, the form of the proprietary's grant was used for the same purpose."

Legal opinion in Maryland has not been unanimous that _quia emptores_ was in force there in the Colonial period. The statute is not included in _Alexander's British Statutes in Force in Maryland,_ and this fact has led some careful commentators to express the view that the statute has probably not been in force here. But this reason for the view expressed seems inadequate. The list of British statutes in force in Maryland as compiled by Alexander in 1870 was based on Chancellor Kilty's Report of 1810, made pursuant to a resolution of the General Assembly that there should be prepared a report of all such parts of the English statutes as were proper to be introduced and incorporated into the body of the statute law of the State. Kilty's report divided all the English statutes into three classes (1) those not found applicable at all to Maryland; (2) those found applicable, but not proper to be incorporated in the laws of the State, and (3) those found applicable to the Province and proper to be incorporated in the laws. _Quia emptores_ is put by him in class 2, and he makes the following note explaining the reason for not including the statute among those proper to be then (1810) incorporated in the laws of the State.

"See 2 Bl. Com. 289, stating that the former restrictions on subinfeudation were in general removed by this statute—and see page 91—. See also (Kilty's) Land Holder's Assistant, 22, 28, 106, 301. The provision made in the charter as to this statute may not have affected the general operation mentioned in 2 Bl. Com.

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14. _Id._ at 47.
but however that may be, it does not appear necessary as to the right of aliening land at this time, that this statute should be incorporated."

It is fairly evident from this note that Kilty's classification of the statute as applicable to Maryland but not then properly to be incorporated into the laws, was due to the effect of the American Revolution which, in Maryland, had the result of abolishing feudal tenures and converting land so previously held into allodial lands. Evidently therefore the omission of the statute from Kilty and Alexander's compilation does not settle the question whether the statute was in force in Maryland before the Revolution.

On the contrary, I think there is satisfactory historical evidence that the statute was considered operative in Maryland in the Colonial period, to confirm the view advanced as to the proper construction of the wording of the charter itself. In Chancellor Kilty's note on the statute of *quia emptores* just mentioned, he refers to an early Maryland book, *Landlords' Assistant*, published in 1808 by John Kilty who was Register of the Land Office. It is there pointed out that the proprietary's grants were in general a fee simple estate of inheritance with a reserved quit-rent "which constituted the patentees his tenants, and so they were invariably called." The important practical question with respect to the force of the statute lay in the matter of escheats and fines upon alienation. If the statute was in force lands granted by the proprietary and in turn regranted by his immediate grantees escheated to the proprietary on the failure of heirs of the remote grantees. As to this Kilty's *Landlords' Assistant*, after referring to the statute of *quia emptores*, says: "The operation of this statute, the reader will have observed, was dispensed with in the grant to Lord Baltimore, whose tenants it was conceded should hold of him and not of the Crown. How far this exemption from the statute destroyed its force beyond the Proprietary's immediate tenants is not clearly perceived, nor does the point appear to have been well settled in Maryland; for, many questions arose relative to the rights of the Lords or owners of manors in opposition to those of the Proprietary as Chief Lord of the Fee. The practice of subinfeudation does not seem, however, to have been permitted much to Lord Baltimore's prejudice, as all fines for alienation and Escheats for want of heirs

17. *Kilty, Report of English Statutes Existing at the Time of the First Emigration of the People of Maryland, and of Others Since Made in England and Introduced by the Courts of Law or Equity, and Such Parts of the Same as May Be Proper to Be Introduced Into the Statute Laws of the State* (1811) 146.


appear to have gone to him, and not to the proprietors even of the most extensive manors which he granted; but there are some instances to show that Escheat or forfeiture for nonpayment of rent, and on other accounts, was claimed by the Lords or owners of large Manors, which as to the article of rent was perfectly fair in respect to the Proprietary, as he received from the Lord himself his stipulated rent for the whole manor.” 20

In Bozman’s History of Maryland the author says: “Few, if any, other privileges attached to Manors in England appear to have been exercised in Maryland by the grantee of Manors. Fines for alienation, and escheats, for want of heirs, are well known to have usually gone to the Lord Proprietary of the Province, and not to the Lords of the Manors.” 21 It is, I think, therefore fair to conclude that the proprietary himself acted on the assumption that the statute was in force and inured to his benefit. In the absence of a clear and express provision in the charter and of any authoritative judicial decision, it is not surprising that there should have been some difference of opinion and some controversy at times between the proprietary and his immediate or remote grantees over the highly important practical property matter of escheats and fines on alienation.

In Pennsylvania it is the absence, rather than the presence, of the statute, as judicially determined, that has had an important result in relation to ground rents. And it is the character of the rent, rather than the form of its creation, that has been so affected. As to the method of creating the rents (a deed in fee simple reserving rent) we have noted Mayer’s view which attributes the form to the extension of the exemption from quia emptores, in the paragraph of the Charter to Penn relating to the creation of Manors. As a practical matter this was a possible and plausible cause, as subinfeudation was expressly permitted by the immediate grantees of manors, and it may have been that grants by them in the then customary form in English law of deeds in fee reserving rents created the pattern for subsequent similar transactions by other grantors, despite the definite provision that no further tenures should be created. But technically at least the view is open to some objection and has been inferentially criticized. 22

As to the nature of Pennsylvania ground rents, it was determined by the Supreme Court of the State in Ingersoll v. Sargeant, 23 that they were to be classed as rent service and not as rent charge, because quia emptores never was in force in Pennsylvania; and in Wallace v. Harmstad, this holding was confirmed, Judge Woodward saying:

20. Id. at 28. (Italics supplied.)
21. 2 Bozman, History of Maryland (1837) 581.
22. See note in Cadwalader, Ground Rents (1879) 83, 87.
23. 1 Whart. 337 (Pa. 1836).
"That ground-rent is a rent-service was demonstrated in Ingersoll v. Sargeant, 1 WH. 337, a case which has been so often recognized and followed as to have become a rule of property." 24

While these cases definitely settled the law of the State, it is still interesting to inquire, on historical grounds, whether the statute had any operative effect in Pennsylvania during the Colonial period, and if not, whether the form of its creation by deed in fee reserving the rent, which at that time in England created a rent charge, was by virtue of the absence of the force of the statute, properly classed as a rent service.

For the distinction which existed by English law in the seventeenth century between a rent service and a rent charge, we must go back to Littleton on Tenures, and Coke's Commentaries thereon. 25

Section 213 of Littleton, defines the three classes of rents:

"Three manner of rents there be, that is to say, rent-service, rent-charge and rent-secke. Rent-service is where the tenant holdeth his land of his lord by fealtie and certaine rent, or by homage, fealtie and certaine rent, or by other services and certaine rent. And if rent-service at any day, that it ought to be payed, be behinde, the lord may distraine for that of common right."

On this Coke commented:

"It is called a rent-service, because it hath some corporall services incident unto it, which at least is fealty, as here it appeareth."

Littleton then points out in sections 214 and 215 that rent service also resulted where the grant was in fee-tail or for life or for a term of years, provided there was a reversion remaining in the grantor. And then he adds in section 216:

"and this is by force of the statute of quia emptores terrarum. For before that statute, if a man had made feoffment in fee simple, by deed or without deed, yielding to him and to his heires a certain rent, this was a rent-service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramount."

Littleton then in section 217 defines a rent charge and a rent secke as follows:

"But if a man, by deed indented, at this day (that is after quia emptores) maketh such a gift in fee-taile, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heires a certaine rent, and that if the rent be behind it shall be

24. 44 Pa. 492, 495 (1863).
lawfull for him and his heires to distreine", ... "such a rent is a rent-charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and his heires a certaine rent without any such clause put in the deed, that he may distreine, then such rent is rent-secke; for that he cannot come to have the rent, if it be denied by way of distresse; and if in this case he were never seised of the rent, he is without remedie, as shall be said hereafter."

From this we see that the essential characteristics of rent service were that the grantor held the reversion in the land, and the tenant or grantee owed fealty to the grantor. Prior to quia emptores both conditions existed when a grant was made in fee simple reserving the rent, by virtue of the feudal tenure between the parties; but after the statute neither existed between the parties because the grantee held not of his immediate grantor but of the latter's overlord. The rents reserved on the grants by the proprietaries to their immediate grantees, sometimes called quit rents, were rent service, as there was the feudal incident of fealty from the tenant, express or implied, and the reversion to the land was in the grantor, on failure to pay the rent, or by way of escheat. The question in Ingersoll v. Sargeant was whether a Pennsylvania ground rent created in 1811, by virtue of subsequent deeds and conveyances, could be apportioned. It was agreed that if it were a rent charge it was not apportionable, but otherwise if a rent service, as this was the undoubted rule of English law. In considering whether the nature of the rent was a rent service or a rent charge, the court said:

"Hence, it is evident that the ground-rent in question cannot be considered a rent-charge, unless it be so by the force of the statute quia emptores; but if it shall appear, upon examination, that this statute is not and never has been in force in Pennsylvania then it would seem to be equally evident that it must be held to be a rent-service." 27

In holding that the ground rent was a rent service because the statute had never been in force in Pennsylvania, the opinion took the view on the construction of the non obstante clause in the charter to Penn that it was the intention of the charter "to grant the lands of the Province to William Penn, his heirs and assigns, so as to enable them to hold and dispose of the same as if the statute quia emptores had not been in existence. That it has ever been so understood, may be seen

26. Mayer, Ground Rents (1883) 16; Cadwalader, Ground Rents (1879) 183.
and fairly inferred from both our legislative and judicial proceedings." Reference is then made to certain local legislation for the Province of Pennsylvania with regard to the right of escheat. Without here questioning the conclusion to the extent that it is based on local legislation, it is nevertheless permissible to observe that the construction of the *non obstante* clause itself in the charter to Penn would seem to be quite contrary to the understanding of the similar language in the charter to Calvert, according to the view apparently acted on in Maryland. And it will be noted that in the *Ingersoll* case the court did not note or comment on the added proviso in the paragraph as to manors in the grant to Penn which, as we have seen, was stressed by Mayer as a possible differentiating factor.  

In Maryland, ground rents resulting from ninety-nine year leases renewable forever have also been held to create rent service and not rent charge; but on quite different grounds from that stated in *Ingersoll v. Sargeant*. The holding in Maryland was based on the simpler proposition that the statute *quia emptores* itself, as shown in *Littleton's Tenures*, did not apply to leases or other grants less than fee simple, and therefore conveyance by way of a lease reserving rent even though renewable forever created a rent service not converted into a rent charge by the statute. 

Apparently the only practical question whether ground rents in either Maryland or Pennsylvania are to be classed as rent service or rent charge has relation to the *apportionment* of the rents. As the forms of conveyance in both systems included the right to distrain for non-payment of the rent, the question of distress as of common right, becomes unimportant. And the holding in both States that the rents can be apportioned was obviously in accordance with modern legal principles, because the grounds on which a rent charge at common law could not be apportioned manifestly have no present application. But it may still be doubted whether, strictly speaking, these ground rents

28. Id. at 348.

29. The holding in *Ingersoll v. Sargeant* that *quia emptores* was not in force in Pennsylvania, at least in the Colonial period, has met with strong adverse comment both in Pennsylvania and elsewhere. See note 1 in *Cadwalader, Ground Rents* (1879) 83, contributed, as the author states, by "an eminent real estate lawyer of Philadelphia"; Note (1931) 5 Temp. L. Q. 279; Van Rensselaer v. Hays, 19 N. Y. 68, 98 (1859); *Gray, Rule Against Perpetuities* (3d ed. 1915) 21. It should also be noted that in the *Ingersoll Case* the court was dealing with a ground rent created in 1811, long after the effect of the American Revolution had been to abolish feudal tenures and to make titles to land allodial in Pennsylvania as was subsequently held in *Wallace v. Harmstad*, 44 Pa. 492 (1863).


31. Rents charge at common law were not apportionable in some cases because they were opposed to the general policy of the feudal system in that they tended, by burdening the land, to impair the ability to perform feudal services. See *Gilbert, A Treatise on Rents* (1758) 52; *Mayer, Ground Rents* (1883) 16.
have the required essential characteristic of the common law rent service which included the elements of both reversion and fealty. Of course, as of the present time, the reversion clearly exists in the grantor in the case of Maryland rents, and the reversion, in the sense of right of re-entry on failure to pay the rent due, exists in Pennsylvania; but it has been held in both States that fealty no longer existed after the American Revolution. Although it definitely did exist in Maryland before the Revolution, it has been said by the Pennsylvania Court that it never existed there even during the Colonial period.\(^2\)

Whether or not \textit{quia emptores} was in force in Pennsylvania or Maryland during the Colonial period is now of little practical importance because what influence it had on the ground rent systems of the two States disappeared as a result of the American Revolution, whereby feudal tenures to the extent that they then existed were converted into allodial titles. In both States there was legislation which effectually divested all interests and property rights of the Proprietaries to Maryland and Pennsylvania lands respectively then still existing, in Maryland without compensation but in Pennsylvania with some compensation.\(^3\) The quit-rents which had been reserved to the proprietaries on grants immediately made by them were abolished, and the obligation of the grantees or their successors or assignees to pay the rents was extinguished; and the State succeeded to the rights of escheat.\(^4\) In Maryland and Pennsylvania it has been judicially held, without legislative aid, that the effect of the American Revolution was to abolish tenure and to make titles to land allodial.\(^5\)

\(^2\) Matthews v. Ward, 10 Gill & J. 443 (Md. 1839); Wallace v. Harmstad, 44 Pa. 492 (1863). The feudal characteristics of fealty and homage are to be distinguished. The former was an oath of fidelity from the tenant to his lord; while homage was a more elaborate ceremony performed by the tenant. According to Littleton, as we have noted, rent service could exist without the ceremony of homage but apparently not without fealty. In Maryland it is clear that the oath of fealty from tenants to overlords was commonly given in Colonial days. See Mayer, \textit{Ground Rents} (1883) 23, 156. But in Wallace v. Harmstad, 44 Pa. 492 (1863) the court stated that fealty (possibly confused with homage) had never been customarily practiced in Pennsylvania even in the Colonial period. As to this, see comments in Gray, \textit{Rule Against Perpetuities} (3d ed. 1915) 22, and Note (1931) 5 Temp. L. Q. 279, 283. As to the form of the oath of fealty, see 1 Pollock & Maitland, \textit{History of English Law} (1805); 2 Bozman, \textit{History of Maryland} (1837) 671. In Matthews v. Ward, 10 Gill & J. 443 (Md. 1839) the court said: "The Lord Proprietary, by the express terms of the charter, held his lands in free and common soccage, and his grantees, or tenants, anterior to the Revolution, held by the same tenure. Services of a feudal character, or of the nature of feudal services, were attached to his grants, and the incidents of \textit{fealty, rent, escheat} and \textit{fines} for alienation, or some of them, were the necessary incidents thereto."\(^3\)

\(^3\) As to Maryland, see Mayer, \textit{Ground Rents} (1883) 35.


\(^5\) Wallace v. Harmstad, 44 Pa. 492 (1863). In Matthews v. Ward, 10 Gill & J. 443, 451 (Md. 1839), it was said: "After the Revolution, therefore, lands became allodial, subject to no tenure, nor to any of the services incident thereto, and if allodial, the supreme power of the State would succeed to them as the king would succeed to allodial property in \textit{England}, by the common law, upon the death of the owner without next of kin."
It is beyond the scope of this paper to consider to what extent *quia emptores* is still, nominally at least, in force in other States; but in conclusion it may be observed that the question involves consideration of to what extent "tenure" itself can properly be said to be in force in these other States. As to this, it is said in *Gray's Perpetuities*,\(^3\) "In those States where tenure no longer obtains there can be no question whether the statute *quia emptores* is in force; its subject matter has ceased to exist. . . . In the States where there is no reason to question the existence of tenure, there seems as little reason to question the existence of the statute *quia emptores*. There is no cause why this statute should not have prevailed as generally as the statute *De Donis*. . . . There would seem to be, of the States in which tenure exists at the present day, but two in which the statute *quia emptores* is not in force, Pennsylvania and South Carolina."\(^3\)

\(^{36}\) *Gray, Rule Against Perpetuities* (3d ed. 1915) §§ 24, 25.

\(^{37}\) Whether and to what extent tenure exists in the United States is the subject of an interesting and scholarly article by Prof. Wm. R. Vance, *The Quest for Tenure in the United States* (1924) 33 Yale L. J. 248.