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## Sales--Bulk Sales Act--Lessor Not Creditor As To Future Rent

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If the mining clause by the use of the words "said coal" does not refer to and mean all the coal, why then was a mining clause inserted in the deed? Indeed, the effect of the construction placed on the mining clause in the principal case renders it useless and redundant, mere surplusage. A grant merely of "the coal" in a severance deed containing no mining clause whatsoever would give the grantee, as an incident to the ownership of the coal, "the right to use the surface in such manner and with such means as would be fairly necessary to the enjoyment of the mineral estate", *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924), in other words, all the rights and privileges to mine and remove the coal that the grantees were said to have received in the principal case. Thus, the court now holds that the same legal effect is to be given to, the same expression of intention manifests itself from, each of the following grants: (1) *A* grants to *B* the coal under Blackacre, and (2) *A* grants to *B* all the coal under Blackacre together with the right to enter upon and under the land to mine and remove said coal. But, if *A* grants to *B* all the coal under Blackacre together with the right to enter upon and under the land to mine and remove *all* the coal, there is evidenced an intention to waive the right of subjacent support.

The principal case, therefore, even if it is not a departure from the rule laid down in the *Griffin* case, indicates convincingly that the court intends to limit this rule to the particular facts of that case. Rightly or wrongly, the court, in this instance, leaves no room for the application of accepted rules regarding the construction and meaning of written instruments. In its place, in this instance, it will now apply a rigid and artificial rule of thumb, to wit: Only the word "all" or its exact equivalent when used in the mining clause of a severance deed evinces the intention necessary to indicate a waiver of the right of subjacent support.

W. E. C.

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SALES—BULK SALES ACT—LESSOR NOT CREDITOR AS TO FUTURE RENT.—*P* leased premises to *F*, who operated a hardware store thereon, for two years. The lease provided for a fixed gross rental payable in monthly installments. Five months after the lease was executed *F* sold his entire stock to *D*. *F*, having paid his current monthly rent, and neither *F* nor *D* considering *P* as a creditor, they failed to include *P* in the list of *F*'s creditors given notice in the

manner required by the bulk sales act, ILL. REV. STAT. c. 121 1/2, § 78 (1949). *P* contended that the sale was in violation of the act and that he could resort to the proceeds in the hands of the garnishee-defendant for all rents to become due under the lease after the date of the sale. The Municipal Court of Chicago gave judgment for *D*. *Held*, on appeal, that the lessor under a lease providing for fixed gross rental payable in monthly installments is not a "creditor" within the meaning of the bulk sales act as to installments of rent not yet due at the time of the sale. Judgment affirmed. *Trust Co. of Chicago v. Fargeson*, 92 N.E.2d 211 (Ill. 1950).

West Virginia, Illinois and a majority of the other states have similar bulk sales acts following the New York form. There are no cases in point in West Virginia.

According to the principal case, the original impetus for the enactment of the bulk sales acts came from merchandise creditors. In *Lewis-Hubbard & Co. v. Laughran*, 85 W. Va. 235, 240, 101 S.E. 465, 467 (1919), the court said that the purpose of the legislature in passing the act was to preserve the merchandise itself as security for those engaged in the wholesale merchandise business unless it was sold in the ordinary course of business. However, the general tendency of the courts has been to liberalize the meaning of the word "creditor" and extend protection to creditors of the seller at the time of the sale other than merchandise creditors. *Huckins v. Smith*, 29 F.2d 907 (8th Cir. 1928); *Winthrop Restaurant Co. v. Kournetas*, 265 Ill. App. 535 (1932). One of the most liberal interpretations of the word "creditor" as used in these acts is found in *United States v. Goldblatt Bros*, 128 F.2d 576 (7th Cir. 1942), which was an action against the vendee for the vendor's federal income taxes covering the year in which the sale was made. The United States government was held to be a creditor, the court saying, "It is significant that the statute contains only the word 'owing'. That word was not used in the limited sense of a liability that has become due and payable; it was to cover a liability in contra-distinction to a contingent claim which depended upon the occurrence of another event before liability was established." *Id.* at 580. Even a case going this far does not seem inconsistent with the decision in the principal case, for the federal court recognized that a contingent claim for damages for breach of a contract is not covered by the bulk sales act, but that the tax items involved were debts and were within the act notwithstanding they were not payable until after the date of the sale.

In *Lawndale S. & D. Co. v. West Side T. & S. Bank*, 207 Ill. App. 3 (1917), it was held that the lessor of premises to a corporation is not a "creditor" of the corporation at the time of the sale of its business to another when there is no rent due under the lease. It seems that any debt for which the lessee may become obligated in a liquidated amount to the lessor would arise from the use of the premises by the lessee, and until such use no liquidated debt exists. Such liquidated debt is contingent on the lessee's occupation of the premises in the future. The only other alternative remedy accrues upon a lessee's failure to use the premises and repudiation of the lease, in which event the lessor may bring an action for damages. Although there is a split of authority on the subject, the better view seems to be that the lessor should make a reasonable effort to re-let so as to mitigate damages, allowing him to recover any deficiency between that for which he re-lets and the amount of the rent under the lease. *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945); *Zabriskie v. Sullivan*, 82 N.J.L. 545, 81 Atl. 1135 (1911). Such amount certainly is contingent and unliquidated. A leading case in point is *Apex Leasing Co. v. Litke*, 159 N.Y. Supp. 21, 121 N.E. 853 (1916), in which the facts were substantially the same as those in the principal case. The rent for the month in which the sale was made was satisfied by the lessee's deposit, and the court held that as the rental payments became due the lessor would have a cause of action but that at the time of the sale it was only a contingent liability under the lease and was not protected by the bulk sales act. Apparently the only case in point contra to the principal case is *Wright v. Haley*, 208 Ind. 46, 194 N.E. 637 (1935), which held that the lessor was a creditor within the meaning of the act, the lessee being obligated to pay the rent for the full term since no surrender of the lease was shown. The court said that obligations to make payments for merchandise delivered and accepted or to pay a promissory note given for money were no different than the obligation of the lessee to pay rent for the full term. The court's argument here is convincingly met by the principal case which points out that the vital difference lies in the fact that a merchandise creditor parts with his goods and a money creditor with his money, but that a lessor in no comparable sense parts with his property, he being given preferential and speedy remedies to repossess and obtain payment of rent.

In *Talty v. Schoenholz*, 224 Ill. App. 158 (1922), the court held that the purpose of the bulk sales act was to prevent sales of

stocks of goods in bulk without first giving the creditors of the vendor an opportunity to protect themselves. What opportunity or advantage could the lessor have by receiving notice of the sale in advance? The lessee had not broken his lease; his rent was paid in full. On what grounds could the lessor base his complaint in taking any action prior to the sale? There is nothing to show that the rights of the lessor have been prejudiced.

W. W. A.

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HUSBAND AND WIFE—RIGHT OF WIFE TO RECOVER FOR LOSS OF CONSORTIUM DUE TO INJURY CAUSED BY NEGLIGENCE.—An employee of defendant company was injured as a result of its negligence while in its employ. The employee's loss was covered by a compensation act, but his wife sued the company to recover for the loss of consortium as a result of the negligent injuries. *Held*, on appeal, that a wife has a cause of action for the loss of consortium due to a negligent injury of her husband, that consortium includes not only material services but also love, affection, companionship and sexual relations, and that her recovery is not barred by his receiving benefits under the compensation act. Judgment reversed. *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950).

This decision is particularly worthy of note because it is only the second case holding that the wife was able to recover for loss of consortium due to a negligent injury of her spouse. The first case to so hold, *Hipp v. Dupont de Nemours & Co.*, 182 N.C. 9, 108 S.E. 318 (1921), was later overruled. *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925). Although at least one commentator points out that the path is clear for such a recovery by the wife, so far as has been found, the principal case is the only standing decision to permit such action. HARPER, TORTS 566 (1933).

The weight of authority is overwhelmingly against allowing the wife to recover anything for the loss of consortium as a result of the negligent injury of her husband. *Emerson v. Taylor*, 133 Md. 192, 104 Atl. 538 (1918); *Cravens v. Louisville & N.R.R.*, 195 Ky. 257, 242 S.W. 628 (1922); *Howard v. Verdigris Val. Elec. Co-op.*, 207 P.2d 784 (Okla. 1949). There is a generally recognized exception to this denial to the wife. When the injury is intentional, such as criminal conversation, adultery or seduction, she has a right of recovery against the offending party. *Eschenbach v. Benjamine*,