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Real Property--Transfer of Surface Reserving Mineral Interests--Right to Subjacent Support

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REAL PROPERTY — TRANSFER OF SURFACE RESERVING MINERAL INTERESTS — RIGHT TO SUBJACENT SUPPORT. — Plaintiff brings suit for injuries to her property caused by the removal of all the coal from under the land, there having been a severance of title of substrata and surface estates. Plaintiff, grantee, had secured the title to the surface by a deed originating from the defendant coal company in which it had reserved the "right to mine and ship by the most practicable method all of the coal and other minerals lying in and upon said land". Plaintiff recovered a judgment in the lower court which was reversed on appeal, the court holding that on application of the rule of the *Griffin* case[1] the right of subjacent support had been waived by the grantee by the express terms of the deed. *Simmers v. Star Coal and Coke Co.*[2]

This decision is a departure from legal principles and an encroachment on the established law of property. The decision is placed squarely on the theory that the Griffin case lays down a rule of property that is applicable to the situation of the principal case. However, the two cases are distinguishable and the *Simmers* case serves to overrule dictum as enunciated by Judge Cox in his concurring opinion in the *Griffin* case.[3] The present case involves a question of "implied grant" as contrasted to the *Griffin* case where there was a problem of "implied reservation". Every American jurisdiction other than West Virginia which has passed upon the question has held that where the owner in fee granted the surface, but reserving all the minerals together with mining rights, the court will imply a grant of the right of subjacent support.[4] The logic of this rule is apparent on its face since to hold

[1] Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24 (1905).

[2] 167 S. E. 737 (W. Va., 1933).

[3] Judge Cox in his concurring opinion in the *Griffin* case (p. 498) said: "The principle contained in the first proposition, when applied to a case where the fee owner has granted the surface and reserved the underlying strata or estate, would necessitate an implied additional grant of so much of the subjacent strata or estate as was necessary to the support of the surface; but we are not dealing with that case here." Judge Cox again on p. 516 of this same opinion says "If, however, there were any doubt (which I do not concede) then the rule that the deed must be construed most strongly against the grantor is applicable."

[4] Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812 (1886); Carlin v. Chappell, 101 Pa. 348 (1882); Williams v. Hay, 120 Pa. 485, 14 Atl. 379 (1888); Marvin v. Brewster Iron Mfg. Co., 55 N. Y. 538 (1874); Catron v. South Butte Mining Co., 181 Fed. 941 (C. C. A. 9th, 1910); Piedmont George Creek Coal Co. v. Kearney, 114 Md. 496, 79 Atl. 1013 (1911); Collins v. Gleason Coal Co., 140 Iowa 114, 115 N. W. 497 (1908); Evans Fuel Co. v. Leyda, 77 Colo. 356, 236 Pac. 1023 (1925); Audo v. Western Coal Co., 99 Kan. 454, 162 Pac. 344 (1917); Stonegap Colliery Co. v. Hamilton, 114 Va. 271, 89 S. E. 305 (1916); North-East Coal Co. v. Hayes, 260 Ky. 639, 51 S. W. (2d) 960 (1932).

otherwise would permit the subsurface owner under his reservation so to mine as to destroy the value of the thing he has granted which would be a clear derogation of his grant.[5] It is difficult to conceive that the grantee would pay full and valuable consideration for a grant of the surface if he believed that the courts would allow the grantor to take a valuable property right without compensating him in any manner.[6]

It is interesting to note that both the article and the court decision cited in the opinion by the court as approving the rule of property as laid down in the *Griffin* case reach an absolutely contrary result when confronted with the problem which is presented here.[7] The court could have substantiated well their decision on the factors of social and economic desirability,[8] but it seems difficult to square this case on mere legal principles alone. Controversies such as are involved in this type of case, could be avoided by the adoption of a statute similar to the English Mines Act.[9]

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CAVEAT

Whether or not the *Griffin* case was correctly decided is not the subject of discussion in the foregoing comment. Nor, is it pertinent to inquire whether it had been emasculated by subsequent decisions of the same court.[1] The sole question is whether or not the *Simmers* case is a correct application of the doctrine of

[5] Bosworth, *What Duty to Support the Surface Does a Subsurface Owner Owe?* (1928) TECHNICAL PUBLICATION, N. 116 (American Institute of Mining and Metallurgical Engineers).

[6] Collins v. Gleason Coal Co., *supra* n. 4.

[7] Bosworth, *op. cit. supra* n. 5; Collins v. Gleason Coal Co., *supra* n. 6.

[8] Since the mineral estate is normally a great deal more valuable than the surface estate and since the interests of the coal industry outweigh those of good husbandry in West Virginia, these factors are to be weighed and considered in a situation like that in the principal case. Judge Hatcher in the court opinion said that at least two-fifths of all the coal would need to be left untouched if the surface was to be protected, and the value of it greatly exceeded the worth of the land injured.

[9] MINES (WORKING FACILITIES AND SUPPORT) Act, 13 and 14 Geo. 5, c. 20 (1923).

[1] *Cf.* Kuhn v. Fairmont Coal Co., 152 Fed. 1013 (N. D. W. Va., 1917); 179 Fed. 191 (C. C. A. 4th, 1910); 215 U. S. 349, 30 S. Ct. 140 (1910); Godfrey v. Weyanoke Coal and Coke Co., 82 W. Va. 665, 92 S. E. 186 (1918); Hall v. Harvey Coal and Coke Co., 89 W. Va. 55, 108 S. E. 491 (1921); Cole v. Signal Knob Coal Co., 95 W. Va. 702, 122 S. E. 268 (1924); Goodykoontz v. White Star Mining Co., 94 W. Va. 654, 119 S. E. 862 (1923).