June 1933

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

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RECENT CASE COMMENTS

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
ccoal 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 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.

This decision is a departure from legal principles and an en-
croachment 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 Sim-
mers case serves to overrule dictum as enunciated by Judge Cox
in his concurring opinion in the Griffin case. 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 sup-
port. The logic of this rule is apparent on its face since to hold

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 sub-
jacent 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. Glen-
son Coal Co., 140 Iowa 114, 115 N. W. 497 (1905); 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, 61 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. 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.

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. The court could have substantiated well their decision on the factors of social and economic desirability, 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.

—Bonn Brown.

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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. The sole question is whether or not the *Simmers* case is a correct application of the doctrine of

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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.
