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# Caveat

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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]

—BONN BROWN.

## *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).

the *Griffin* case. The comment seeks to make a distinction between a *conveyance* of all the coal with the right to mine and remove it, reserving to the grantor the surface, and a *reservation and exception* of all the coal, with the right to mine and remove it, conveying to the grantee the surface. And this distinction is sought to be made upon the principle that a grantor *prima facie* does not intend to derogate from his grant. Let it be noted that no contention is or can be made that a grantor *cannot* derogate from his grant. The sole question is whether or not he has done so by appropriate language.

It is quite true that the cases cited in the comment support the proposition that a grant of the surface impliedly carries with it the right of subjacent support notwithstanding a reservation and exception of all the coal and the right to remove it. But they have no argumentative weight here for the reason that those courts repudiate the *Griffin* case. In only one[2] of the cases cited is there an attempt to distinguish between a grant and an exception, but no authority is cited in support of the proposition. Moreover, the case is of little value, since the reservation and exception was of "the coal . . . . and reasonable facilities for mining and removing the same". The word "all" was not employed in the instrument. On the contrary, three of the cases cited state that there is no distinction between a grant and a reservation and exception.[3] In *Marvin v. Brewster Iron Mining Co.*,[4] the court said that "a reserve of minerals and mining rights is construed as is an actual grant thereof. It differs not whether the right to mine is by an exception from a deed of the surface, or by a grant of the mine by the owner of the whole estate, therein reserving to himself the surface". A similar statement is made in Sheppard's Touchstone,[5] and in English cases.[6]

[2] Collins v. Gleason Coal Co., 140 Iowa 114, 115 N. W. 497 (1908).

[3] Stonegap Colliery Co. v. Hamilton, 114 Va. 271, 89 S. E. 305 (1916) ("A conveyance or reservation of 'all the coal' with the right to mine it is, as was said, in the dissenting opinion in Griffin v. Fairmont Coal Co., *supra*, one and the same thing."); Catron v. South Butte Mining Co., 181 Fed. 941 (C. C. A. 9th, 1910) (" . . . .it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. In either case the obligation to protect is the same."

[4] 55 N. Y. 538 (1874).

[5] P. 100, quoted in n. 6.

[6] Dand v. Kingscote, 6 Mees. & Wels. 174, 151 Eng. Reprint 370, 380 (1840). Baron Parke said: "This reservation is to be construed, according to the rule laid down in Sheppard's Touchstone, 100, in the same way as a grant by the owner of the soil of the like liberties: 'for what will pass by words in a grant, will be excepted by like words in exception' ". In Butterknowle Col-

The principle that the grantor does not intend to derogate from his grant is simply another way of stating that the language used in the instrument will be most strongly construed against the grantor. But this is at most a rule of construction[7] and has no application where the language is unambiguous. It is submitted that the *Griffin* case is bottomed upon the proposition that the words "all the coal" together with the right to mine and remove "all the coal" are unambiguous. The contention made in the comment comes, then, to this: that words which are unambiguous when used in the granting clause of a deed become ambiguous when used in a clause of reservation and exception. In a word, a rule of construction is employed to raise an ambiguity which will then call for the application of that same rule. This is plainly a bit of raising oneself by one's own boot-straps.

It is, therefore, submitted that language which is appropriate to indicate an intention to waive the right of subjacent support when used in a clause granting all the coal and mining rights to remove it, does not, by some magic having no relation to the realities of the situation, become inappropriate when used in a clause reserving and excepting the same property and rights.

Finally, it should be said that the contention made in the comment does not appeal to any considerations of economic or social policy. Nor does it attempt to inquire into the circumstances surrounding the transaction, such as the comparative values of the surface and coal either at the time of severance or at the time of inquiry; nor what the parties presumably intended and would have expressed otherwise if it had occured to them. There is no problem but to take the instrument of conveyance by its four corners and construe it by reference alone to the language therein employed. It is, therefore, submitted that the *Simmers* case is a logical, consistent application of the principle enunciated in the *Griffin* case, which, as Judge Hatcher succinctly said, was only a departure in construction of the legal effect to be given to the word "all" when used in connection with mining rights. The upshot of the two cases is, then, that the word "all", when so used, is invested with a technical significance analogous to the

liery Co. v. Bishop Auckland Industrial Cooperative Co., (1906) A. C. 305, 313, Lord Loreburn, L. C., said: "This presumption (of surface support) . . . . holds good whether the instrument of servance is a lease, or a deed of grant or reservation, or an inclosure Act or award."

[7] See Proud v. Bates, 34 L. J. (Ch.) 406, 5 Am. Law Reg. (N. S.) 171 (1865), in which Vice-Chancellor Wood said: "The case comes to this: whenever a person demises the surface, he *prima facie* intends to uphold the surface, in order that he may not derogate from his own grant'.'

words "and his heirs" necessary at common law for the creation of a fee-simple. Any supposed intention of the parties to the contrary cannot penetrate the stone wall of intentions technically expressed.

—ROBERT T. DONLEY.

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TAXATION — REVOCABLE TRUSTS AND INCOME TAX EVASION. — The plaintiff created trusts in December, 1922, in favor of her daughter and her nephew, for the duration of the life of the settlor or of the beneficiaries or of the minority of the latter, whichever period should first expire, the settlor being one of the two trustees. The income was to be paid to the beneficiaries in the discretion of the trustees or to the settlor for the use of the beneficiaries. The settlor reserved "the right to revoke the trust estate prior to the determination thereof, upon and at the expiration of twelve months and one day after notice of revocation as hereinafter set forth". In 1928 the trusts terminated upon the attainment of majority by the beneficiaries and on the next day new trusts were set up on the same terms for the life of the beneficiary or the settlor, whichever proved shorter. The settlor was taxed on the income for the year 1928 and on appeal the court held that such tax was improper under the statute set out below,[1] Augustus N. Hand dissenting. *Langley v. Commissioner of Internal Revenue.*[2]

The device of a revocable trust is but one of many used by persons who wish to avoid a surtax by dividing the income in such a way that such divisions fall into the lower brackets of the rate scale, thus securing a lower tax rate and in some cases complete evasion of any tax whatever, while at the same time substantial enjoyment of the income is retained in the settlor. Another device is the formation of a partnership by the husband including the wife and minor children. The income is equally divided and each files a separate return thus avoiding the higher tax rate. In some instances stockholders in a corporation set up a partnership, composed of their wives, which is used as a selling agent for the corporation, thereby reducing the profits of the corporation which

[1] "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income to such part of the trust for such taxable year shall be included in computing the net income of the grantor". Revenue Act 1928, § 166, 45 STAT. 840, 26 U. S. C. A. § 2166 (1926).

[2] 61 F. (2d) 796 (C. C. A. 2d, 1932).