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The Law of Subjacent Support and the West Virginia Rule

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wrongful? Presumably because it is unconstitutional, since legislatures may, except as bound by constitutional limitations, define both "rights" and "wrongs." But its "wrongfulness" is suggested as a reason for its unconstitutionality. Are the two made synonymous by the Fourteenth Amendment?

To those who have thought that, in recent years, the Supreme Court of the United States has, by a too-liberal definition of the term "police power," allowed to the states such freedom of action that the general constitutional guarantees had become illusory, the decision in the Truax Case will indicate a marked reversal of policy on the part of that court. The further application of that policy to the cases will be watched with interest by the profession.

—J. W. M.

STUDENT NOTES AND RECENT CASES

THE LAW OF SUBJACENT SUPPORT AND THE WEST VIRGINIA RULE. —By a grant of the minerals and reservation of the land or by a sale of the land and a reservation of the minerals, two estates are created, each having certain rights and duties in reference to the other. The most important duty and the one which gives rise to legal complications is that which the subservient estate owes the upper. There is imposed upon the mineral estate the servitude of supporting the surface in its natural form. The general rule established by the common law and by American and English decisions is that it is incumbent upon the grantee of coal to leave a sufficient amount thereof to prevent the subsidence of the surface, unless waived by express words or clear implication.[1] In other words it resolves itself into the maxim of so using your own as not to interfere with others. At common law the right of subjacent support is fundamental, existing as an easement or servitude from which the servient estate could not be relieved except by apt words or necessary implication.[2] As the right was absolute, the courts

[1] Lennox Coal Co. *v.* Duncan Spangler Coal Company, 265 Pa. 572, 109 Atl. 282 (1920); Godfrey *v.* Weyanoke Coal Co., 82 W. Va. 665, 97 S. E. 186 (1918); Stonegap Colliery Co. *v.* Hamilton, 119 Va. 271, 89 S. E. 305 (1916); Rowbotham *v.* Wilson, 30 L. J. Q. B. 54, 17 Eng. Rul. Cas. 647 (1860); Love *v.* Bell, 9 App. Cas. 296, 17 Eng. Rul. Cas. 657 (1884); Western Indiana Coal Co. *v.* Brown, 36 Ind. App. 44, 74 N. E. 1027 (1905); Collins *v.* Gleason Coal Co., 140 Iowa 114, 115 N. W. 497, 118 N. W. 36 (1908); Hooper *v.* Dora Coal Mining Co., 95 Ala. 235, 10 So. 652 (1892); Williams *v.* Hay, 120 Pa. 485, 6 Am. St. Rep. 379 (1888); Silver Springs *etc.* Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884 (1903); Hall *v.* Harvey Coal *etc.* Co., 108 S. E. 491 (W. Va. 1921).

[2] Paull *v.* Island Coal Co., 44 Ind. App. 218, 88 N. E. 959 (1909); Lennox *v.* Duncan Coal Co., *supra;* Burgner *v.* Humphrey, 41 Ohio St. 340 (1884); Berkley *v.* Berwind White Coal Mining Co., 229 Pa. 417, 78 Atl. 1004 (1911).

as a general rule have held that the deed of conveyance would not exclude the right of support unless there was an express waiver or a clear intent on the part of the surface owner to absolve the grantee of the minerals from any damages arising because of the removal of the entire body of coal.[3] All jurisdictions recognize the right of waiver, but the courts are jealous of the duty of keeping the surface in an uninjured condition and will not recognize the claim of the grantee of the coal to remove the whole of it, unless there is a grant of all coal and a renunciation in express words or by clear implication of any claim for surface damage.[4]

The West Virginia court does not follow the salutary rule adopted in most jurisdictions but lays down the rule that a deed conveying "all" the coal with the right to mine and remove the same defeats the claim of the surface owner to have the land left uninjured by subsidence. This doctrine, enunciated by the court in the case of *Griffin* v. *Fairmont Coal Co.*,[5] is an anomaly in the law of subjacent support. The decision has received adverse criticism in other jurisdictions.[6] The case of *Kuhn* v. *Fairmont Coal Co.*[7] came up in the Circuit Court of Appeals upon a similar state of facts. The court held that the Griffin Case established a rule of property and was therefore binding on the federal court. The question as to whether it was a rule of property was certified to the Supreme Court, where the question was answered in the negative.[8] The Circuit Court followed the ruling of the Griffin Case, deeming it inexpedient to establish two rules for the same state upon

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[3] "A reservation of all minerals or of the right of mining must always respect the surface rights of support. The surface is not to be destroyed without some additional authority." 2 DEVLIN, REAL ESTATE, § 979. "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support unless the language of the instrument regulating their rights, or other evidence clearly shows the contrary. In order to exclude the right of support the language used must unequivocally convey that intention either by express words or necessary implication." Butterknowle Colliery Co. *v.* Bishop *etc.* Coal Co., [1906] A. C. 305, 20 Times L. R. 675. In accord: Gumbert *v.* Kilgore, 4 Sadler 84, 6 Atl. 771 (Pa. 1886); Nelson *v.* Hock, 14 Phila. 665; Mickle *v.* Douglass, 75 Ia. 78, 39 N. W. 198 (1888); Burgner *v.* Humphreys, *supra.*

[4] In the following cases there was a grant of "all" coal, yet the court held that the right of support was not extinguished. Piedmont *etc.* Coal Co. *v.* Kearney, 114 Md. 496, 79 Atl. 1013 (1911); Harris *v.* Ryding, 5 M. & W. 60, 8 L. J. Ex. 181 (1839); Nelson *v.* Hock, *supra;* Williams *v.* Gibson, 84 Ala. 228, 4 So. 350 (1888); Erickson *v.* Michigan Land *etc.* Co., 50 Mich. 604, 16 N. W. 161 (1883); Carlin *v.* Chappell, 101 Pa. 348, 47 Am. St. Rep. 722 (1882).

In Scranton *v.* Phillips, 94 Pa. 15 (1880) and Graff Furnace Co. *v.* Scranton Coal Co., 244 Pa. 592, 91 Atl. 508 (1914), all the coal was removed and the right to support was lost but the words of conveyance gave an exclusive right to remove all the coal and gave an unconditional release from any injury that might result to the surface. In accord: Rowbotham *v.* Wilson, *supra.*

[5] 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115 (1905).

[6] Walsh *v.* Kansas Fuel Co., 91 Kan. 310, 137 Pac. 941, 50 L. R. A. (N. S.) 686 (1914); Paull *v.* Island Coal Co., *supra;* Schloss-Sheffield Steel *etc.* Co. *v.* Sampson, 158 Ala. 590, 48 So. 493 (1909). See also 18 GREEN BAG 370.

[7] 102 C. C. A. 457, 179 Fed. 191 (1910).

[8] 215 U. S. 349, 30 Sup. Ct. 140 (1909).

identical facts. In a recent Virginia case,[9] the Griffin Case was cited, but the court said:

> "We could not follow either the reasoning or the ruling in the case for which ruling the court did not cite a well considered case as sustaining it. On the other hand the decided cases to which we have adverted, both English and American and the text books written by eminent law writers concur in holding that the right of subjacent support is not waived by the sale of 'all' the coal with the right to mine and remove it."

The latter part of this statement is supported by abundant authority.[10]

There seems to be a slight relaxation by the West Virginia court on the doctrine of subjacent support. Recent cases affirm the general rule, but make no great departure from the established rule as to what constitutes waiver. In *Hall* v. *Harvey Coal & Coke Co.*[11] the deed stated that "We do bargain, sell, grant and hereby convey the coal and all minerals in and upon the hereinafter described tract." The court held that such words do not evince the waiver of the right of subjacent support. The court distinguished the case from the Griffin Case, saying that in the latter the word "all" modified the word coal, while in the late case "all" modified minerals. By differentiating the cases the court impliedly clings to the doctrine of the Griffin Case. However, the case definitely affirms the general rule, but postpones to a later date the declaration that the grant of "all coal" does not evince the extinguishment of the right of subjacent support.

—C. P. H.

JURIES—PREJUDICIAL CONDUCT—SEPARATION.—Indictment for a felony. A verdict of guilty was rendered. It was urged that the separation of one juror from the others to go home for his nightshirt was prejudicial conduct. *Held,* the affidavit of the juror cleared all doubt as to his conduct. *State* v. *Driver,* 107 S. E. 189 (W. Va. 1921).

The common law rule in regard to the separation of a jury was that separation *per se* annulled the verdict. *McCaul's Case,* 1 Va. Cas. 271; *Overbee's Case,* 1 Rob. (Va.) 756. But the strictness of this rule has been tempered with the progress of time. In civil cases, now, the jury may separate during recesses and adjourn-

[9] Stonegap Colliery Co. *v.* Hamilton, *supra,* note 1.
[10] See *supra,* note 1.
[11] See *supra,* note 1.