

I'm glad to see that a couple of people are trying their hand at the sample exam question. Don't try to figure out who's got title to the property. We'll get to that in the next third of the course. Simply assume that Clarissa, but not Ebenezer, has title to the property, which means, of course, that David's letter did not transfer title to Clarissa – she got it some other way. David's letter, however, was written to Clarissa and Ebenezer, and they may well have thought that they both had title. Happy to answer questions about this in a Q&A session.

1. Some more “facts” about *Geragosian*:
  - a. The justices of the Supreme Judicial Court at the time were named Rugg, Crosby, Pierce, Field, Lummus (who wrote the opinion), Qua, and Donahue.
  - b. The master's name was Arnold Leonard. The principals of the Union Realty Co. were named Stoneman and Rosenberg.
  - c. The Charlestown Five Cents Savings Bank was widely thought at the time to be behaving badly in the face of the Depression.
  - d. The Union Realty Company had behaved badly.
  - e. Aaronian, Geragosian, and Vartigian were Armenian immigrants, at the time the most recent of immigrant groups.
  - f. An imaginary conversation in the chambers of the SJC.
2. We approached the *Geragosian* case last time from three points of view, doctrinal, economic, and humanistic:
  - a. From a doctrinal point of view, we saw that the opinion rested on propositions that either beg the question (this is the fee and therefore we must grant an injunction), or are at best questionable, such as land, unlike other resources, is unique, or rest on feared consequences that are avoidable, such as that failing to grant the injunction would lead to title by adverse possession or prescription in the wrongdoer. Perhaps more fundamental is that *Geragosian* is an equity case. Equity always has an element of discretion, and the court offers a number of ways in which the case could have come out the other way. We suggested that doctrine of relative hardship certainly might have been applied in a case where the injunction would lead to \$4300 worth of expenditures to benefit land the entire value of which was \$2800.
  - b. From an economic point of view we saw that the granting of the injunction in the case is likely to lead to one-on-one bargaining with indeterminate results. We said quite a bit about that yesterday, but let's summarize, because the problem is endemic in property cases. It is sometimes called the problem of 'bilateral monopoly', which is simply a fancy way of saying there's no market and the price reached will be reached, if at all, with one-on-one bargaining. We set it up this way. Gaeragosian has an injunction which the Union Realty Company wants to buy from it. How much should Union pay G.?

Geragosian is better off if Union pays him \$1, because he gets no benefit from having the injunction enforced.

Union is better off if they pay G. anything less than \$4,300 because that's better than having to pay \$4,300.

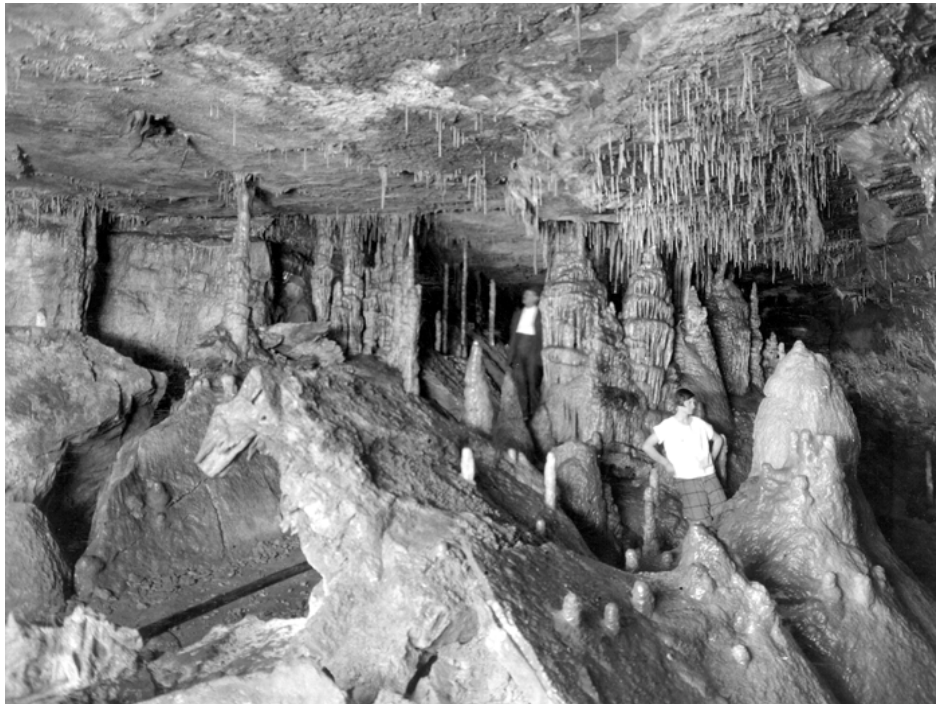
It is frequently said that economically rational actors will arrive at some price between \$1 and \$4,299, but that's not right for at least three reasons:

    - i. The theatre may not have the surplus to pay \$4,300.

- ii. The parties may misestimate their own or the other's numbers. Economists call this information asymmetry.
- iii. "I'll take my ball and my bat and go home."

Even if we don't care how the parties divide the surplus, we certainly should care from an economic point of view that they do reach an agreement.

- c. From what we might call a humanistic point of view, we suggested in the last few minutes of the class that the court may have had some sympathy for Armenian immigrants who got caught in the Great Depression just when the American Dream seemed to be within their grasp. Let us pursue that fact for just a couple of more minutes.
3. All of this is a bit shocking.
- a. How do I know what is going on? Much of it is in the opinion itself. You have to pick up on ethnicity. You need to know some American history.
  - b. Justice is blind. But justice has an effect. Someone has to win. Either the Armenians will win or they won't. Either the people who behaved badly will win or they won't.
  - c. Should the court have been more upfront about the fact that the case could have come out either way?
  - d. The competence or lack of it of the Union Realty Co.'s lawyers.
4. Final question on *Geragosian*: What's going to happen next? What's happening now? *Geragosian* as a microcosm of American property law.



Near the entrance to the Great Onyx Cave in 1925 (United States Geological Survey Photographic Library)



The first entrance to the Great Onyx Cave from the website of the Geology Department, Case Western Reserve University. Notice the classic bulkhead-style entrance.

1. The Edwards litigation (a readable, and perhaps accurate, account of the story may be found at [http://www.appalachianhistory.net/2011/05/kentucky-cave-wars\\_15.html](http://www.appalachianhistory.net/2011/05/kentucky-cave-wars_15.html) ; a longer and much more sophisticated account by a Canadian law professor, Bruce Ziff, The Great Onyx Cave Cases — A Micro-History was posted in 2012 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1998381](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998381)):
  - April, 1928 — Lee filed suit
  - Edwards v. Lee, 230 Ky. 370 (1929) — interlocutory appeal
  - Edwards v. Sims, 232 Ky. 791 (1929) — prohibition action
  - Edwards v. Lee, 250 Ky. 166 (1932) — fixing the boundaries
  - Edwards v. Lee's Adm'r, 265 Ky. 418 (1936) — damages awarded
  - Richardson v. Lee's Admin, 278 Ky. 656 (1939) — Lee's lawyer sues his estate for his fee

Effect of procedure:

  - a. Eight years (not counting the lawyer's suit).
  - b. Lee is probably dead.
  - c. Probably before the litigation began, certainly by the time that it reached the Ky. Ct. App. for the fourth time, the cave had been condemned for a public park and the jury valued it at \$396,000. (Not mentioned in the opinions and probably unknown to the court at the time, the Federal Government did not come up with the money, and the Great Onyx Cave remained in the hands of the Edwards family until 1961, when they finally sold it to the Federal Government.)
  - d. Was bringing the prohibition action a smart piece of lawyering?
2. Theories of cave ownership
  - a. Accession
    - i. Segmented
    - ii. Joint
  - b. *Res nullius*

- i. Mouth owner
    - ii. Explorer
  - c. Regalian rights (The theory that, in some sense, ultimately prevailed.)
3. What's the majority got going for it?
- a. Expectations?
  - b. The air rights cases distinguished
    - i. Argument that something of value is taken?
    - ii. Argument that something permanent rather than a temporary passage is involved with caves
  - c. ?Psychology
  - d. Difficulties with the Logan theory
    - i. How much economic rent do you need to give Edwards in order to make him explore?
    - ii. Why give him a right to exclude? Wouldn't a privilege of use do just as well?
    - iii. The man can write.
4. The remedy: Basically what the court does is to allow the plaintiff to waive the tort of trespass and sue in assumpsit for the benefits which Edwards had gained from his wrong. This is odd. Normally, waiver of tort and suit in assumpsit is not allowed in cases of trespass to land. This is recognized, for example, by the first *Restatement of Restitution* given in the notes and by many other authorities. Let us postpone the question whether this rule makes sense and ask how the court justified what it did. It did it by trying to suggest that the authorities were in its favor. They were not. Let's look at the arguments step by step.
- a. How the court got there
    - i. Equitable accounting: "Appellees brought this suit in equity, and seek an accounting of the profits realized from the operation of the cave . . . . In substance, therefore, their action is ex contractu and not, as appellants contend, simply an action for damages arising from a tort."
    - ii. "Ordinarily, the measure of recovery in assumpsit for the taking and selling of personal property is the value received by the wrongdoer. On the other hand, where the action is based upon a trespass to land, the recovery has almost invariably been measured by the reasonable rental value of the property."
    - iii. Assumpsit for use and occupation: "Strictly speaking, a count for 'use and occupation' does not fit the facts before us because, while there has been a recurring use, there has been no continuous occupation of the cave such as might arise from the planting of a crop or the tenancy of a house."
    - iv. Trade secrets. "A person who tortiously uses a trade name, trade secret, profit a prendre, or other similar interest of another, is under a duty of restitution for the value of the benefit thereby received."
    - v. Passive transmissibility — *Hambly v. Trott*, *Phillips v. Homfray*. The way the argument is set up contains a basic logical flaw. "[E]ven if we apply the analogy of the crop cases or the wayleave cases it is apparent that rental value has been adopted, either consciously or unconsciously, as a convenient yardstick by which to measure the proportion of profit derived by the trespasser directly from the use of the land itself . . . ."

- α In order to answer the question whether the action for rental value is basically a tort action or whether it is basically a contract action in which a restitutionary remedy would be appropriate, the court asks whether the action would have survived the death of the tort-feasor at common law. The common-law theory on the passive transmissibility of actions is laid out in *Hambly v. Trott*, from which the court quotes at some length. The basic idea is that actions for unjust enrichment survive but simple tort actions do not survive.
- β *Phillips v. Homfray* is one of the leading cases and states the general common law rule: the action for mesne profits does not survive. Therefore what was sought to be demonstrated by the exercise is not demonstrated by the exercise. And we're right back to where we started from.
- γ The key mistake is made in the statement on p. 236: "If rent alone were the basis of recovery, we would expect to find that the action would survive against the estate of the trespasser." Quite the opposite is the case. Tort actions, including trespass actions for rental value, do not survive. so the authorities do not support the proposition that a restitutionary recovery is appropriate here.
- vi. "[I]t is apparent that rental value has been adopted, either consciously or unconsciously, as a convenient yardstick by which to measure the proportion of profit derived by the trespasser directly from the use of the land itself (9 R.C.L. 942). In other words, rental value ordinarily indicates the amount of profit realized directly from the land as land, aside from all collateral contracts." There may be something to this. What there is to it we will pursue tomorrow.
- b. Here's, however, a question about which you might puzzle: What would Lee have gotten if E. had done it right?