

1. Having established the proposition that the court would make use of the accession theory of ownership of resources in its segmented version, the court in *Edward's v. Lee's Adm'r* turned to the problem of remedy. Basically what the court does is to allow the plaintiff to waive the tort of trespass and sue in assumpsit for restitution of the benefits which Edwards had gained from his wrong. This is odd. At the time, and perhaps even today, waiver of tort and suit in assumpsit was 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. S136: "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, that is to say in the case of 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.
- b. What would Lee have gotten if E. had done it right? (Logically the following considerations should come first, but it may be easier to understand if you start with no. 2.)
 - i. Take a look at p. S 135. Are these the numbers they will arguing about? Accounting profits do not equal economic rent.
 - α It does not take into account the cost of equity capital;
 - β It probably does not take into account the opportunity cost of Edward’s time;
 - γ *Ex post* is not the same thing as *ex ante*. Edwards was able to make money. *Ex post* we know that. *Ex ante* we do not know that he is going to do that.
 - ii. Variables
 - α Where the 1/3 lay (see diagram below)



- β Knowledge
- γ Bargaining skill

2. Some specifics on the numbers:

- a. What will Lee and Edwards be bargaining about? $> \$0$ and $< \$132,000$. The derivation of the first figure is easy. Letting Edwards in will cost Lee nothing. Any amount $> \$0$ will make him better off. The derivation of the second figure is harder. It's $1/3$ of the condemnation award. But that's not what they will be bargaining about. They will be bargaining about how much more Edwards can make if he can use Lee's $1/3$, which may or may not = $1/3$ of the value of the entire cave. Assuming that this is the right number, if Edwards gives \$131,000 in turn for having the extra one-third, he's still better off than he would be if he did not have Lee's one-third. Similarly, Lee is better off if he gets anything from Edwards for the use of his one-third because he can't earn anything from his one-third if Edwards doesn't use it.
 - b. In both cases the numbers are capitalized. That is to say, it is the discounted present value of a stream of earnings from the $1/3$ of the cave. The present value calculation is a forward-looking calculation. It asks how we should figure out what the cave is worth today (or how the jury will arrive at "just compensation" for the taking of the cave). It is not the method that the court used to calculate Lee's damages. Now who in the room is uncomfortable when I say discounted present value?
3. The Value of the Cave If I offer you \$10 now or \$10 a year from now, which do you take?
- a. Distinguish risk from the time value of money
 - b. The PV of \$10 a year from now with a 2% interest rate is \$9.80 ($9.80 \times .02 = .196$) $.196 + 9.80 = \$10$ with rounding. (You can hit it almost on the button if you use a PV of \$9.803922.)
 - c. The concept of the discount rate: the PV of \$10 a year from now at an 8% discount rate = $9.26 + (.08 \times 9.26) [= .74]) = \10 .
 - d. How did I get from 2% to 8%?
 - e. Now suppose that we are talking not about one year from now but two years from now. Would the simple addition that I just did still apply? No, because of the principle of compounding. That stream of income is going to get paid out at least annually, and when I get it I can earn interest on it, and then interest on the interest. Now it turns out that compound interest has pretty dramatic effects over a relatively short period of time. Both in the materials and on the screen what I have done is give the present value of \$1000 at an 8% discount rate.

Discount	Amount	Time	Equals	Sum
8%	\$1000	1 yr.	\$926	\$ 926
8%	\$1000	10 yrs.	\$463	\$ 6710
8%	\$1000	50 yrs.	\$ 21	\$12223
8%	\$1000	100 yrs.	\$ 0.45	\$12494

The figure in the last column is the sum of the present values, assuming a payment of \$1000 each year, i.e., \$6710 is the sum of the present values of \$1000 at the end of year 1, \$1000 at the end of year 2, etc. up to and including year 10. By the time we reach year 10 almost half of the sum of the present values is made up of interest on the interest.

Sum from 0 to 100 of the PV \$1000 p/a @ 8% = \$12,494

Sum from 0 to infinity PV \$1000 p/a @ 8% = \$12,500

4. \$396 K is the discounted present value of \$31,700 p/a at 8%. This suggests that
 - a. the estimate of Edward's economic profits in *Lee's Admr* was too low (estimated at \$23,340 in 1930)

b. or that they were using a lower discount rate

c. or that the government took the hotel (or part of it) as well as the cave.

(b) seems most likely because the present value of \$23,340 at a 6% discount rate is \$387,854, which is close enough for government work. (According to Ziff that's not how they did it. They had a different annual revenue figure [\$39,600, which may be the gross revenue or, more likely, net revenue for a different year] and multiplied it by 10.)

5. Now apply this to Edwards and Lee bargaining at the beginning of the deal. I.e. go back to 1b.
6. If this leads you to want to revisit the wisdom of Judge Thomas's concurring opinion in *Lee's Adm'r*, you are in good company.

Legal Fiction

Law makes long spokes of the short stakes of men.

Your well fenced out real estate of mind

No high flat of the nomad citizen

Looks over, or train leaves behind.

Your rights extend under and above your claim

Without bound; you own land in Heaven and Hell;

Your part of earth's surface and mass the same,

Of all cosmos' volume, and all stars as well.

Your rights reach down where all owners meet, in Hell's

Pointed exclusive conclave, at earth's centre

(Your spun farm's root still on that axis dwells);

And up, through galaxies, a growing sector.

You are nomad yet; the lighthouse beam you own

Flashes like Lucifer, through the firmament.

Earth's axis varies; your dark central cone

Wavers, a candle's shadow, at the end.

William Empson, Poems, 1935.