certain circumstances and within certain limits. For example, self-help is a permissible remedy in the expulsion of trespassers, chiefly because it may well be the only feasible remedy available. If someone breaks into your home and is walking out with your silverware or has left a car in your lot, time does not allow filing a law suit. In the expulsion of trespassers, however, the property owner may use only such force as is absolutely necessary, under the circumstances, to attain that end. The force applied must be appropriate to the defense of the property, and there is no privilege to use any force calculated to cause death or serious bodily injury, unless there is also such a threat to the owner's personal safety as to justify self-defense. Further, what cannot be done directly cannot be done indirectly. There is no privilege to use a deadly mechanical device, such as a spring-gun, unless the owner would have been privileged to use it himself had he been there. Katko v. Briney, 183 N.W.2d 657 (Iowa 1971); W. PROSSER & W.P. KEETON, *supra*, § 21.

Self-help may also be a permissible remedy for the abatement of nuisance. Generally, resort to self-help must be warranted by immediate necessity, and it must be exercised with caution to avoid a breach of the peace. De Funiak, *supra*, at 229–30. Under certain circumstances, however, self-help may be the only remedy available. For example, it has been held to be the only remedy for abating the nuisance of overhanging tree limbs or roots encroaching on the plaintiff's property. See Sterling v. Weinstein, 75 A.2d 144 (D.C. Mun. App. 1950); Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931).

EDWARDS V. SIMS

Court of Appeals of Kentucky.
232 Ky. 791, 24 S.W.2d 619 (1929).

STANLEY, Commissioner. This case presents a novel question. . . . [The statement of facts from *Edwards v. Lee's Admr*, *infra*, p. S134, follows:

[About [thirteen] years ago L.P. Edwards discovered a cave under land belonging to him and his wife, Sally Edwards. The entrance to the cave is on the Edwards land. Edwards named it the "Great Onyx Cave," no doubt because of the rock crystal formations within it which are known as onyx. This cave is located in the cavernous area of Kentucky, and is only about three miles distant from the world-famous Mammoth Cave. Its proximity to Mammoth Cave, which for many years has had an international reputation as an underground wonder, as well as its beautiful formations, led Edwards to embark upon a program of advertising and exploitation for the purpose of bringing visitors to his cave. Circulars were printed and distributed, signs were erected along the roads, persons were employed and stationed along the highways to solicit the patronage of passing travelers, and thus the fame of the Great Onyx Cave spread from year to year, until eventually, and before the beginning of the present litigation, it was a well-known and well-patronized cave. Edwards built a hotel near the mouth of the cave to care for travelers. He improved and widened the footpaths and avenues in the cave, and ultimately secured a stream of tourists who paid entrance fees sufficient not only to cover the cost of operation, but also to yield a substantial revenue in addition thereto. The authorities in charge of the development of the Mammoth Cave area as a national park undertook to secure the Great Onyx Cave through condemnation proceedings, and in that suit the value of the cave was fixed by a jury at $396,000. In April, 1928, F.P. Lee, an adjoining landowner, filed this suit against Edwards and the heirs of Sally Edwards, claiming that a portion of the cave was under his land, and praying for damages, for an accounting of the profits which resulted from the operation of the cave, and for an injunction prohibiting Edwards and his associates from further trespassing upon or exhibiting any part of the cave under Lee's land. At the inception of this litigation, Lee undertook to procure a survey of the cave in order that it might be determined what portion of it was on his land. The chancellor ordered that a survey be made, and Edwards prosecuted an appeal from that order to this court. The appeal was dismissed because it was not from a final judgment. Edwards v. Lee,

230 Ky. 375, 19 S.W.2d 992. . . .

[Commissioner Stanley's opinion continues:]

Following that decision, this original proceeding was filed in this court by appellants in that case (who were defendants below) against Hon. N.P. Sims, judge of the Edmonson circuit court, seeking a writ of prohibition to prevent him enforcing the order and punishing the petitioners for contempt for any disobedience of it. It is alleged by the petitioners that the lower court was without jurisdiction or authority to make the order, and that their cave property and their right of possession and privacy will be wrongfully and illegally invaded, and that they will be greatly and irreparably injured and damaged without having an adequate remedy, since the damage will have been suffered before there can be an adjudication of their right on a final appeal. It will thus be seen that there are submitted the two grounds [p*229] upon which this court will prohibit inferior courts from proceeding, under the provisions of section 110 of the Constitution, namely: (1) Where it is a matter in which it has no jurisdiction and there is no remedy through appeal, and (2) where the court possesses jurisdiction but is exercising or about to exercise its power erroneously, and which would result in great injustice and irreparable injury to the applicant, and there is no adequate remedy by appeal or otherwise. [Citations omitted.]

There is no question as to the jurisdiction of the parties and the subject matter. It is only whether the court is proceeding erroneously within its jurisdiction in entering and enforcing the order directing the survey of the subterranean premises of the petitioners. There is but little authority of particular and special application to caves and cave rights. In few places, if any, can be found similar works of nature of such grandeur and of such unique and marvelous character as to give to caves a commercial value sufficient to cause litigation as those peculiar to Edmonson and other counties in Kentucky. The reader will find of interest the address on "The Legal Story of Mammoth Case" by Hon. John B. Rodes, of Bowling Green, before the 1929 Session of the Kentucky State Bar Association, published in its proceedings. In Cox v. Colossal Cavern Co., 210 Ky. 612, 276 S.W. 540, the subject of cave rights was considered, and this court held there may be a severance of the estate in the property, that is, that one may own the surface and another the cave rights, the conditions being quite similar to but not exactly like those of mineral lands. But there is no such severance involved in this case, as it appears that the defendants are the owners of the land and have in it an absolute right.

Cujus est solum, ejus est usque ad coelum [et] ad infernos (to whomsoever the soil belongs, he owns also to the sky and to the depths), is an old maxim and rule. It is that the owner of realty, unless there has been a division of the estate, is entitled to the free and unfettered control of his own land above, upon and beneath the surface. So whatever is in a direct line between the surface of the land and the center of the earth belongs to the owner of the surface. Ordinarily that ownership cannot be interfered with or infringed by third persons. There are, however, certain limitations on the right of enjoyment of possession of all property, such as its use to the detriment or interference with a neighbor and burdens which it must bear in common with property of a like kind. 22 R.C.L. 77.

With this doctrine of ownership in mind, we approach the question as to whether a court of equity has a transcendent power to invade that right through its agents for the purpose of ascertaining the truth of a matter before it, which fact thus disclosed will determine certainly whether or not the owner is trespassing upon his neighbor's property. Our attention has not been called to any domestic case, nor have we found one, in which the question was determined either directly or by analogy. It seems to the court, however, that there can be little differentiation, so far as the matter now before us is concerned, between caves and mines. And as declared in 40 C.J. 947:

"A court of equity, however, has the inherent power, independent of statute, to compel a mine

owner to permit an inspection of his works at the suit of a party who can show reasonable ground for suspicion that his lands are being trespassed upon through them, and may issue an injunction to permit such inspection."

There is some limitation upon this inherent power, such as that the person applying for such an inspection must show a bona fide claim and allege facts showing a necessity for the inspection and examination of the [p*230] adverse party's property; and, of course, the party whose property is to be inspected must have had an opportunity to be heard in relation thereto. In the instant case it appears that these conditions were met. The respondent cites several cases from other jurisdictions in which this power has been recognized and exercised. . . .

We can see no difference in principle between the invasion of a mine on adjoining property to ascertain whether or not the minerals are being extracted from under the applicant's property and an inspection of this respondent's property through his cave to ascertain whether or not he is trespassing under this applicant's property.

It appears that before making this order the court had before him surveys of the surface of both properties and the conflicting opinions of witnesses as to whether or not the Great Onyx Cave extended under the surface of the plaintiff's land. This opinion evidence was of comparatively little value, and as the chancellor (now respondent) suggested, the controversy can be quickly and accurately settled by surveying the cave; and "if defendants are correct in their contention this survey will establish it beyond all doubt and their title to this cave will be forever quieted. If the survey shows the Great Onyx Cave extends under the lands of plaintiffs, defendants should be glad to know this fact and should be just as glad to cease trespassing upon plaintiff's lands, if they are in fact doing so." The peculiar nature of these conditions, it seems to us, makes it imperative and necessary in the administration of justice that the survey should have been ordered and should be made.

It appearing that the circuit court is not exceeding its jurisdiction or proceeding erroneously, the claim of irreparable injury need not be given consideration. It is only when the inferior court is acting erroneously, and great or irreparable damage will result, and there is no adequate remedy by appeal, that a writ of prohibition will issue restraining the other tribunal, as held by authorities cited above.

The writ of prohibition is therefore denied.

Whole court sitting.

LOGAN, J. (dissenting). The majority opinion allows that to be done which will prove of incalculable injury to Edwards without benefiting Lee, who is asking that this injury be done. I must dissent from the majority opinion, confessing that I may not be able to show, by any legal precedent, that the opinion is wrong, yet having an abiding faith in my own judgment that it is wrong.

It deprives Edwards of rights which are valuable, and perhaps destroys the value of his property, upon the motion of one who may have no interest in that which it takes away, and who could not subject it to his dominion or make any use of it, if he should establish that which he seeks to establish in the suit wherein the survey is sought.

It sounds well in the majority opinion to tritely say that he who owns the surface of real estate, without reservation, owns from the center of the earth to the outmost sentinel of the solar system. The age-old statement, adhered to in the majority opinion as the law, in truth and fact, is not true now and never has been. I can subscribe to no doctrine which makes the owner of the surface also the owner of the atmosphere filling illimitable space. Neither can I subscribe to the doctrine that he who owns the surface is also the owner of the vacant spaces in the bowels of the earth. [p*231]

The rule should be that he who owns the surface is the owner of everything that may be taken

from the earth and used for his profit or happiness. Any thing which he may take is thereby subjected to his dominion, and it may be well said that it belongs to him. I concede the soundness of that rule, which is supported by the cases cited in the majority opinion; but they have no application to the question before the court in this case. They relate mainly to mining rights; that is, to substances under the surface which the owner may subject to his dominion. But no man can bring up from the depths of the earth the Stygian darkness and make it serve his purposes; neither can he subject to his dominion the bottom of the ways in the caves on which visitors tread, and for these reasons the owner of the surface has no right in such a cave which the law should, or can, protect because he has nothing of value therein, unless, perchance, he owns an entrance into it and has subjected the subterranean passages to his dominion.

A cave or cavern should belong absolutely to him who owns its entrance, and this ownership should extend even to its utmost reaches if he has explored and connected these reaches with the entrance. When the surface owner has discovered a cave and prepared it for purposes of exhibition, no one ought to be allowed to disturb him in his dominion over that which he has conquered and subjected to his uses.

It is well enough to hang to our theories and ideas, but when there is an effort to apply old principles to present-day conditions, and they will not fit, then it becomes necessary for a readjustment, and principles and facts as they exist in this age must be made conformable. For these reasons the old sophistry that the owner of the surface of land is the owner of everything from zenith to nadir must be reformed, and the reason why a reformation is necessary is because the theory was never true in the past, but no occasion arose that required the testing of it. Man had no dominion over the air until recently, and, prior to his conquering the air, no one had any occasion to question the claim of the surface owner that the air above him was subject to his dominion. Naturally the air above him should be subject to his dominion in so far as the use of the space is necessary for his proper enjoyment of the surface, but further than that he has no right in it separate from that of the public at large. The true principle should be announced to the effect that a man who owns the surface, without reservation, owns not only the land itself, but everything upon, above, or under it which he may use for his profit or pleasure, and which he may subject to his dominion and control. But further than this his ownership cannot extend. It should not be held that he owns that which he cannot use and which is of no benefit to him, and which may be of benefit to others.

Shall a man be allowed to stop airplanes flying above his land because he owns the surface? He cannot subject the atmosphere through which they fly to his profit or pleasure; therefore, so long as airplanes do not injure him or interfere with the use of his property, he should be helpless to prevent their flying above his dominion. Should the waves that transmit intelligible sound through the atmosphere be allowed to pass over him the lands of surfaceowners? If they take nothing from him and in no way interfere with his profit or pleasure, he should be powerless to prevent their passage?

If it be a trespass to enter on the premises of the landowner, ownership meaning what the majority opinion holds that it means, the aviator who flies over the land of one who owns the surface, without his consent, is guilty of trespass as defined by the common law and is subject to fine or imprisonment, or both, in the discretion of a jury. [p*232]

If he who owns the surface does not own and control the atmosphere above him, he does not own and control vacuity beneath the surface. He owns everything beneath the surface that he can subject to his profit or pleasure, but he owns nothing more. Therefore, let it be written that a man who owns land does, in truth and in fact, own everything from zenith to nadir, but only for the use that he can make of it for his profit or pleasure. He owns nothing which he cannot subject to his dominion.

In the light of these unannounced principles which ought to be the law in this modern age, let us give thought to the petitioner Edwards, his rights and his predicament, if that is done to him which the circuit judge has directed to be done. Edwards owns this cave through right of discovery, exploration, development, advertising, exhibition, and conquest. Men fought their way through the eternal darkness, into the mysterious and abysmal depths of the bowels of a groaning world to discover the theretofore unseen splendors of unknown natural scenic wonders. They were conquerors of fear, although now and then one of them, as did Floyd Collins, paid with his life, for his hardihood in adventuring into the regions where Charon with his boat had never before seen any but the spirits of the departed. They let themselves down by flimsy ropes into pits that seemed bottomless; they clung to scanty handholds as they skirted the brinks of precipices while the flickering flare of their flaming flambeaux disclosed no bottom to the yawning gulf beneath them; they waded through rushing torrents, not knowing what awaited them on the farther side; they climbed slippery steeps to find other levels; they wounded their bodies on stalagmites and stalactites and other curious and weird formations; they found chambers, star-studded and filled with scintillating light reflected by a phantasmagoria revealing fancied phantoms, and tapestry woven by the toiling gods in the dominion of Erebus; hunger and thirst, danger and deprivation could not stop them. Through days, weeks, months, and years-ever linking chamber with chamber, disclosing an underground land of enchantment, they continued their explorations; through the years they toiled connecting these wonders with the outside world through the entrance on the land of Edwards which he had discovered; through the years they toiled finding safe ways for those who might come to view what they had found and placed their seal upon. They knew nothing, and cared less, of who owned the surface above; they were in another world where no law forbade their footsteps. They created an underground kingdom where Gulliver's people may have lived or where Ayesha may have found the revolving column of fire in which to bathe meant eternal youth.

When the wonders were unfolded and the ways were made safe, then Edwards patiently, and again through the years, commenced the advertisement of his cave. First came one to see, then another, then two together, then small groups, then small crowds, then large crowds, and then the multitude. Edwards had seen his faith justified. The cave was his because he had made it what it was, and without what he had done it was nothing of value. The value is not in the black vacuum that the uninitiated call a cave. That which Edwards owns is something intangible and indefinable. It is his vision translated into a reality.

Then came the horse leach's daughters crying: "Give me," "give me." Then came the "surface men" crying, "I think this cave may run under my lands." They do not know they only "guess," but they seek to discover the secrets of Edwards so that they may harass him and take from him that which he has made his own. They have come to a court of equity and have asked that Edwards be forced to open his doors and his ways to them so that [p*233] they may go in and despoil him; that they may lay his secrets bare so that others may follow their example and dig into the wonders which Edwards has made his own. What may be the result if they stop his ways? They destroy the cave, because those who visit it are they who give it value, and none will visit it when the ways are barred so that it may not be exhibited as a whole.

It may be that the law is as stated in the majority opinion of the court, but equity, according to my judgment, should not destroy that which belongs to one man when he at whose behest the destruction is visited, although with some legal right, is not benefited thereby. Any ruling by a court which brings great and irreparable injury to a party is erroneous.

For these reasons I dissent from the majority opinion.

Notes and Questions

1. The procedural context of this case differs somewhat from that of any case we have

considered previously. What, if any, effect do you think it had on the result?

2. Most students (and many instructors) find Judge (later Senator) Logan's opinion more appealing than the majority's. What is to be said for the majority's views on subsurface ownership? Judge Logan's statement of air rights law is substantially correct. Can you distinguish subsurface trespass from trespass by overflight? For an application of the air rights principles to a case involving a sewer 150 feet below the surface of the land, see Boehringer v. Montalto, 142 Misc. 560, 254 N.Y.S. 276 (1931), *noted in* 30 MICH. L. REV. 1126 (1932); 18 Iowa L. Rev. 67 (1932) (holding defendant could not defeat the foreclosure of a purchase money mortgage on the ground that the sewer constituted a breach of plaintiff's covenant against encumbrances). (Note: the only relevant in-state precedent for the Boehringer case was a Court of Appeals decision applying the ad coelum principle without reference to the air rights cases. The case was Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716 (1906). In that case, discussed *supra*, p. S125 n. 2, a telephone company had strung wires high over a corner of plaintiff's land and lost an action of ejectment as a result. Can you see how the court in *Boehringer* might have distinguished *Butler*?)

3. Assume that in Kentucky as in Massachusetts (*Peters*) a landowner can exclude any encroaching activity by another on or near the surface (fire escapes, cables, sewer pipes, as well as buildings). Assume further that Kentucky law grants the owner a similar right to exclude all solid mineral mining below the surface unless mineral rights have been separated in a past transaction. With those positions established, along with the airplane overflight cases, but with no prior cave rights cases, which of the following options would you have chosen had you been on the Kentucky court faced with Edwards?

(1) Caves (and portions of caves) belong to the surface owner.

(2) Caves belong to the surface owner(s) with access.

(3) Caves belong to those who discover them and put them to use.

(4) Caves belong jointly to all owners of the land beneath which they lie.

What are the consequences of your preferred rule in the dispute between Lee and Edwards? For other cases you might imagine arising? [p*234]

EDWARDS v. LEE'S ADMINISTRATOR

Court of Appeals of Kentucky.
265 Ky. 418, 96 S.W.2d 1028 (1936).

SITES, J. This is an appeal from a judgment of the Edmonson circuit court sitting in equity. Appellants argue but two points in this court: (1) That the court below applied an improper measure of damages; and (2) even if the measure of damages was correct, the amount was erroneously computed. Due to the unique nature of the case, a somewhat detailed statement of the facts is necessary.

[The Court's statement of the early litigation history of the case may be found *supra*, p. S129.]

. . . A tremendous amount of proof was taken on each side concerning the title of Lee to the land claimed by him; how much, if any, of the cave is under the land of Lee; the length of the exhibited portion of the cave and the amount thereof under the land of Lee; the net earnings of the cave for the years involved; the location of the principal points of interest in the cave and whether they were under the lands of Edwards or of Lee; and whether or not Edwards and his associates had knowledge of the fact that they were trespassing on Lee's property. An appeal was taken to this court from a judgment fixing the boundaries between the lands of Edwards and Lee, and that judgment was affirmed. Edwards v. Lee, 250 Ky. 166, 61 S.W.2d 1049. An injunction was granted prohibiting Edwards and his associates from further trespassing on the lands of Lee. On

final hearing the chancellor stated separately his findings of law and of fact in the following language:

"The Court finds as a matter of law the plaintiff is entitled to recover of defendants the proportionate part of the net proceeds defendants received from exhibiting Great Onyx Cave from the years 1923 to 1930, inclusive, as the footage of said cave under Lee's land bears to the entire footage of the cave exhibited to the public for fees during the years 1923 to 1930, inclusive, with 6%, interest on plaintiff's proportionate part of said fund for each year from the first day of the following year as set out in the memorandum opinion.

"1. The Court finds as a matter of fact the true boundary line between the Lee and Edwards land is as set out in a former judgment of this Court in this case which was affirmed in Edwards v. Lee, 250 Ky. 166, 61 S.W.(2d) 1049.

"2. The Court finds as a matter of fact there was 6,449.88 feet of said cave exhibited to the public during 1923 to 1930, inclusive, and that 2,048.60 feet of said footage was under Lee's lands making plaintiff entitled to 2048.60–6449.88, or 1/3 of the proceeds.

"3. The Court finds as a matter of fact the proof failed to show the proceeds received for the years 1923 and 1924 and there can be no recovery for those years. That the net proceeds for 1925 amounted to $3,090.31 and plaintiff's one-third thereof is $1,030.10, with 6% interest from January 1st, 1926, and that the net proceeds for the other years were:

1926	$ 4,039.56
1927	7,288.57
1928	14,632.99
1929	24,551.96
1930	23,340.51 [p*235]

"and the plaintiffs are entitled to one-third of the net proceeds for each of said years, with 6% interest thereon from January 1st of each succeeding year."

Appellants, in their attack here on the measure of damages and its application to the facts adduced, urge: (1) That the appellees had simply a hole in the ground, about 360 feet below the surface, which they could not use and which they could not even enter except by going through the mouth of the cave on Edwards' property; (2) the cave was of no practical use to appellees without an entrance, and there was no one except the appellants on whom they might confer a right of beneficial use; (3) Lee's portion of the cave had no rental value; (4) appellees were not ousted of the physical occupation or use of the property because they did not and could not occupy it; (5) the property has not in any way been injured by the use to which it has been put by appellants, and since this is fundamentally an action for damages arising from trespass, the recovery must be limited to the damages suffered by appellees (in other words, nominal damages) and cannot properly be measured by the benefits accruing to the trespasser from his wrongful use of the property; (6) as a result of the injunction, appellees have their cave in exactly the condition it has always been, handicapped by no greater degree of uselessness than it was before appellants trespassed upon it.

Appellees, on the other hand, argue that this was admittedly a case of willful trespass; that it is not analogous to a situation where a trespasser simply walks across the land of another, for here the trespasser actually used the property of Lee to make a profit for himself; that even if nothing tangible was taken or disturbed in the various trips through Lee's portion of the cave, nevertheless there was a taking of esthetic enjoyment which, under ordinary circumstances, would justify a recovery of the reasonable rental value for the use of the cave; that there being no basis for arriving at reasonable rental values, the chancellor took the only course open to him under the

circumstances and properly assessed the damages on the basis of the profits realized from the use of Lee's portion of the cave. Appellees have taken a cross-appeal, however, on the theory that, since the trespass was willful, their damages should be measured by the gross profits realized from the operation of the cave rather than from its net profits.

As the foregoing statement of the facts and the contentions of the parties will demonstrate, the case is sui generis, and counsel have been unable to give us much assistance in the way of previous decisions of this or other courts. We are left to fundamental principles and analogies.

We may begin our consideration of the proper measure of damages to be applied with the postulate that appellees held legal title to a definite segment of the cave and that they were possessed, therefore, of a right which it is the policy of the law to protect. We may assume that the appellants were guilty of repeated trespasses upon the property of appellees. So much was in effect determined when the case was here before on the appellants' application for a writ of prohibition. Edwards v. Sims, 232 Ky. 791, 24 S.W.2d 619. The proof likewise clearly indicates that the trespasses were willful, and not innocent.

Appellees brought this suit in equity, and seek an accounting of the profits realized from the operation of the cave, as well as an injunction against future trespass. In substance, therefore, their action is ex contractu and not, as appellants contend, simply an action for damages arising from a tort. Ordinarily, the measure of recovery in assumpsit for the taking and [p*236] 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. 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. Each trespass was a distinct usurpation of the appellees' title and interruption of their right to undisturbed possession. But, even 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 (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.

That profits rather than rent form the basis of recovery is illustrated by the cases involving the question of when an action of this character survives against the personal representative of a wrongdoer. If rent alone were the basis of recovery, we would expect to find that the action would survive against the estate of the trespasser. It would certainly be reasonable to assume that a simple action for debt would lie and that this would survive. The rule, however, has been established to the contrary. In considering what actions survive against an estate, Lord Mansfield, in Hambly v. Trott, 1 Cowp. 371, said:

"If it is a sort of injury by which the offender acquires no gain to himself, at the expense of the sufferer, as beating or imprisoning a man, &c., there, the person injured, has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

"So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged."

In the leading case of Phillips v. Homfray, 24 Ch. Div. 439, the plaintiffs were the owners of a farm, and the defendants had for some time past been working the minerals underlying lands adjoining plaintiffs' farm. Plaintiffs discovered that the defendants were not only getting minerals from under their farm, but were using roads and passages made by them through the plaintiffs' minerals for the conveyance of minerals gotten by the defendants from their own mines. An action was brought to recover for the minerals taken from under the plaintiffs' property, and also for damages to be paid as wayleave for the use of the roads and passages [p*237] in transporting the minerals of the defendants across the property. One of the defendants having died, the question was presented as to whether either of these causes of action survived against his estate. The court held that this defendant's estate was liable in the action for the minerals taken because it had, to that extent, been enriched by the defendant's wrong. As to the recovery for wayleave, the court held that the action did not survive because nothing had been added to the defendant's estate through the use of the roads and passages under plaintiffs' land. The defendant had been saved expense in thus using the passages, but it was pointed out that this did not constitute an enrichment and that the action did not, therefore, survive. Other English cases in harmony with Hambly v. Trott and Phillips v. Homfray might be cited, but we deem these two to be sufficient to illustrate the principle. Clearly, the unjust enrichment of the wrongdoer is the gist of the right to bring an action ex contractu. Rental value is merely the most convenient and logical means for ascertaining what proportion of the benefits received may be attributed to the use of the real estate. In the final analysis, therefore, the distinction made between assumpsit concerning real and personal property thus disappears. In other words, in both situations the real criterion is the value received for the property, or for the use of the property, by the tortfeasor.

Similarly, in illumination of this conclusion, there is a line of cases holding that the plaintiff may at common law bring an action against a trespasser for the recovery of "mesne profits" following the successful termination of an action of ejectment. . . . Here again, the real basis of recovery is the profits received, rather than rent. In Worthington v. Hiss, 70 Md. 172, 16 A. 534, 536, 17 A. 1026 . . . the court said:

"It is well settled that an action to recover mesne profits the plaintiff must show in the best way he can what those profits are, and there are two modes of doing so, to either of which he may resort,-he may either prove the profits actually received, or the annual rental value of the land. . . . The latter is the mode usually adopted. Where there is occupation of a farm or land used only for agricultural purposes, and the income and profits are of necessity the produce of the soil, the owner may have an account of the proceeds of the crops and other products sold or raised thereon, deducting the expense of cultivation. These are necessarily rents and profits in such cases, but even there it is more usual to arrive at the same result by charging the occupier, as tenant, with a fair annual money rent. . . . But the proprietor of city lots, with improvements upon them, can only derive therefrom, as owner, a fair occupation rent for the purposes for which the premises are adapted. This constitutes the rents and profits, in the legal sense of the terms, of such property, and is all the owner can justly claim in this shape from the occupier."

Finally, in the current proposed final draft of the Restatement of Restitution and Unjust Enrichment (March 4, 1936), Part 1, § 136, it is stated:

"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."

The analogy between the right to protection which the law gives a tradename or trade secret and the right of the appellees here to protection of their legal rights in the cave seems to us to be very close. In all of the mineral and timber cases, there is an actual physical loss suffered by the plaintiff, as well as a benefit received by the defendant. In other words, there is both a plus and a minus quantity. In the trade-name and similar cases, as in the case at bar, there may be no tangible loss other than the violation of a right. The law, in seeking an adequate remedy for the

wrong, has been forced to adopt profits received, rather than damages sustained, as a basis of recovery. In commenting on the section of the Restatement quoted above, the reporter says:

"Persons who tortiously use trade names, trade secrets, water rights, and other similar interests of others, are ordinarily liable in an action of tort for the harm which they have done. In some cases, however, no harm is done and in these cases if the sole remedy were by an action of tort the [p*238] wrongdoer would be allowed to profit at little or no expense. In cases where the damage is more extensive, proof as to its extent may be so difficult that justice can be accomplished only by requiring payment of the amount of profits. Where definite damage is caused and is susceptible of proof, the injured person, as in other tort cases, can elect between an action for damages and an action for the value of that which was improperly received. The usual method of seeking restitution is by bill in equity, with a request for an accounting for any profits which have been received, but the existence of a right to bring such a bill does not necessarily prevent an action at law for the value of the use. In the case of tortious interference with patents, under existing statutes there is a right to restitution only in connection with an injunction."

Whether we consider the similarity of the case at bar to (1) the ordinary actions in assumpsit to recover for the use and occupation of real estate, or (2) the common-law action for mesne profits, or (3) the action to recover for the tortious use of a trade-name or other similar right, we are led inevitably to the conclusion that the measure of recovery in this case must be the benefits, or net profits, received by the appellants from the use of the property of the appellees. The philosophy of all these decisions is that a wrongdoer shall not be permitted to make a profit from his own wrong. Our conclusion that a proper measure of recovery is net profits, of course, disposes of the cross-appeal. Appellees are not entitled to recover gross profits. They are limited to the benefits accruing to the appellants.

This brings us to a consideration of appellants' second contention, namely, that even if the measure of recovery was correct, the amount was erroneously computed. . . .

In determining the profits which might fairly be said to arise directly from the use of appellees' segment of the cave, the chancellor considered not only the footage exhibited, but the relative value of the particular points of interest featured in advertising the cave, and their possible appeal in drawing visitors. Of thirty-one scenes or objects in the cave advertised by appellants, twelve were shown to be on appellees' property. Several witnesses say that the underground Lucikovah river, which is under the appellees' land for almost its entire exhibited length, is one of the most attractive features of the cave, if not its leading attraction. Other similar attractions are shown to be located on appellees' property. The chancellor excluded profits received by the appellants from the operation of their hotel, and we think the conclusion that one third of the net profits received alone from the exhibition of the cave is a fair determination of the direct benefits accruing to the appellants from the use of the appellees' property. . . .

THOMAS, J. (concurring). . . .

My theory is this: That the cave in this sui generis case should be treated as a unit of property throughout its entire exhibitable length, including the augmentations of prongs or branches, and that it should be adjudged as owned jointly by all of the surface owners above it, in proportion that the length of their surface ownership bears to the entire length of such exhibitable portion. I realize that herein lies the departure (but which I think is justified from the exigencies of the case) from the ancient rule of, "Cujus est solum, ejus est usque ad coleum et ad infernos (to whomsoever the soil belongs, he owns also to the sky and to the depths.)" That maxim literally followed would segmentize ownership both above and below the surface corresponding to boundaries of the latter; and it is the denying of that effect, as applied to property of the nature of a cave, that constitutes the departure from, or exception to the rule, that I advocate; whilst the majority [p*239] opinion not only discards that theory, but advocates other departures equally if

not more drastic, and which are necessarily followed by much more impractical and destructive consequences. The same departure has already been made by all courts before which the question as arisen, with reference to ownership "to the sky" by the owner of the surface, in determining aerial navigation rights, and which departure was forced by the necessities of the case. I, therefore, can conceive of no objection to extending it in the opposite direction when the same necessities demand it. . . .

The cave in divided segments according to surface ownership, if the division should be made, would render each segment of little profit producing value. But the theory of the opinion indisputably implies that right which if exercised would render all portions of the cave beyond the Edwards boundary (within which is located its entrance from the surface) absolutely valueless, since it is incontrovertibly established by the evidence in this case that no opening into the cave can be made upon any of the lands of the respective owners extending back from its mouth located, as said, within the Edwards boundary. Nevertheless, as pointed out, the other owners of different segments of the cave (back from its entrance) may prevent, under the theory adopted by the majority's opinion, the owners of the Edwards tract from exhibiting any portion of the cave than that which lies under their surface. With the attractiveness of the cave thus curtailed, but a small amount of patronage of inspecting it could be obtained, since the sightseers could penetrate it no farther than the Edwards line. The same consequences would follow as to the other segments, if their owners could make a practical entrance into their separately owned segment, but which as we have seen, they cannot do. Thus the cave as an entirety, as will be easily seen, could be destroyed as a profit producing property, and also as a pleasing and educating exhibition to the members of the public. But such consequences could not and would not follow the theory herein advanced. Following its adoption, remedies are abundant whereby any joint owner might enforce the continued opening and operation of the cave, even by the appointment of a receiver if necessary, or the employment of some other remedy known to the law. The theory of joint ownership which I conclude is the correct one to adopt and apply under the exigencies of this case does not conflict with the maxim *supra* that the surface owner also owns to the "depths below," except that it applies his ownership-not to the particular segment underlying his surface rights-but to the aliquot part of the entire attractive vacuum made by nature, called "a cave," and that the extent of his joint ownership in the entire property is measured by his surface rights. As will be seen, that theory prevents any such obstructive and destroying consequence as is above pointed out, both as applied to each joint owner and to the sightseeing public; as well as to render easy the adjustments of the rights of all the owners in all future operation of the cave as a profit-producing agency.

If it should be said that some of the rulings heretofore advanced by us in former appeals with reference to the rights of the parties in this case prevent the application of the views of joint ownership herein advocated, the answer is that so far as I have been able to discover such orders were interlocutory in their nature and were not final, being employed only to preserve the status until a correct and final determination of the rights of the parties could be adjudged. If, however, I should be mistaken in that, then the majority opinion might be approved as being the only equitable one now available, after barring the joint ownership theory in this particular case [p*240] under the "law of the case" rule, but at the same time declare that as to future cases of like nature the joint ownership theory should prevail.

For the reasons stated, I concur in the result of the majority opinion, but disagree with the theory upon which it is based.

Notes and Questions
(Including Waiver of Tort and Suit in Assumpsit)

1. What a monstrous piece of litigation the Edwards cases turned out to be! You should get some feel for the time span involved in the four separate trips taken to the Kentucky Court of

Appeals. What does this mean so far as the effect on Edwards of the final judgment is concerned? Who is the plaintiff in the principal case? What is the relevance of the court's casual reference to the condemnation proceedings, *supra*, p. S129?

2. When Lee brought his original action in 1928 the statute of limitations on real actions in Kentucky was fifteen years. See CARROLL'S KY. STAT. § 2505 (Baldwin ed. 1922 & 1930) (now KY. REV. STAT. ANN. § 413.010 (Bobbs-Merrill 1972)). He was thus within the limitations period. What would have happened if Lee had not filed his action until 1932? *See* Marengo Cave Co. v. Ross, 22 Ill.212 Ind. 624, 10 N.E.2d 917 (1937).

3. In order to understand what is going on in the principal case it is necessary to come to grips with an arcane bit of lore known as "waiver of tort and suit in assumpsit." Most, although not all, of the procedural consequences of this waiver have been abolished in most jurisdictions. (Principal among the procedural consequences still surviving is that there is in many jurisdictions a longer statute of limitations for suits in assumpsit.) The remedial consequences, however, are with us to this day.

For a brief summary consider the following note from the RESTATEMENT OF RESTITUTION 522–25 (1937):

> *Introductory Note*: Restitution, as the word is used in the Restatement of this Subject, means restoring to a person property transferred by him to another or property of his acquired by another, or paying to him the value of such property or the value of services rendered by him. It implies both a loss by him and a receipt of something by another, although in some cases the amount of loss and the value of that which was received are not equal (see 1). Restitution does not require a wrong by the person who has received the property, although in the situations dealt with in this Chapter the property has been wrongfully acquired.
>
> Actions of tort are ordinarily not restitutionary in this sense. They are based primarily upon wrongdoing and ordinarily, through the payment of money, compensate the injured person for the harm suffered by him as a result of the wrongful conduct, irrespective of the receipt of anything by the defendant. If the defendant received nothing of value, the person who has suffered has merely a tort remedy.
>
> Certain actions, however, are classified as tort actions, although they are restitutionary in that they restore the plaintiff to his former position by taking from the defendant what he had wrongfully acquired, or its value. This is true of actions of replevin and ejectment, both of which restore to the possession of the owner property of which he was deprived, or under modern statutes in the case of replevin, its value. This is true also of actions of trover and of trespass to chattels where the tortfeasor acquired and retained possession of the chattels and of actions of trespass to land to the extent that the defendant is required to pay the mesne profits. Likewise where, by [p*241] fraud or duress a person has obtained the services of another, a tort action in which he is required to pay for the value of the services is restitutionary in nature.
>
> However, in all of these cases a typical quasi-contractual situation exists and even though the tort actions normally produce results which are similar to those produced by the quasi-contractual actions, the fact that the defendant was a wrongdoer does not limit the injured party to a tort action. There are a number of differences between a tort action which, though restitutionary, is based primarily on wrongdoing, and a quasi-contractual action in which the wrong by the defendant is only incidental to his unjust enrichment. The common law distinctions between tort actions and the action of general assumpsit by which quasi-contractual rights were enforced have been preserved in substance even in states in which there are no forms of action. These differences between the two types of actions sometimes make it advantageous for the injured person to seek a quasi-contractual remedy. The tort

remedy, formerly at least, terminated on the death of either of the two parties, while the action of general assumpsit and its modern successors are unaffected by death. Furthermore, States which do not permit a tort action to be brought against them may permit a person to sue for restitution. Claims based upon the receipt of benefits may be provable in bankruptcy proceedings when claims based merely upon a wrong done may not be. The distinction between the two bases of liability may likewise be of importance where a setoff is claimed, where the period for the statute of limitations differs for the two types of actions, and where an attachment or arrest is allowed for one type of action and not for the other (see also § 5, Comment b).

The granting of relief by way of general assumpsit in such situations originated in the fiction of an implied agreement by the defendant to compensate the plaintiff for the benefit received. The earliest cases were those where the defendant had received the emoluments of a public office to which the plaintiff was entitled and where the defendant had converted and sold the plaintiff's chattels (see the Introductory Note to Part I). With increasing recognition of a restitutional basis for the action, however, relief of this nature has been given in a variety of situations in accordance with the general principle stated in § 3, to the effect that a person who obtains a benefit from a tort committed by him at the expense of another is under a duty of compensating the other for the value of the benefit thus received. To require the wrongdoer to pay the value of what he has improperly received is ordinarily demanded by justice. There are, however, reasons why the principle has not been applied in some situations. Thus the tort remedies for the disseisin of land were usually adequate, and when the defendant claimed title to the land, the customary method of pleading in assumpsit did not give the defendant adequate notice of the basis of the plaintiff's claim (see § 129). The rules stated in this Chapter are those which have become sufficiently crystallized from the principle to be capable of statement.

A person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to "waive the tort." The election to bring an action of assumpsit is not, however, a waiver of a tort but is the choice of one of two alternative remedies. In fact the action of assumpsit is sometimes based primarily upon the fact that a tort was committed. Thus a bona fide purchaser of a chattel from a thief must reimburse the owner (see Comment f to § 128) since his receipt of possession from one who had no title was tortious, while a bona fide purchaser from a fraudulent trustee is under no duty of restitution (see § 13), since his receipt of the property was not tortious. [p*242]

For an earlier comprehensive view of the waiver of tort problem and a suggestion that the whole thing is a mistake, see Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221 (1910).

4. Now that you have been introduced to the waiver of tort and suit in assumpsit, examine the following black letter rules from the *Restatement*, and consider whether the court in the principal case may have misused and-or ignored its authorities:

(1) A person who tortiously has taken possession of another's land without the other's consent is not thereby under a duty of restitution to the other for its value or use. . . .

(2) A person who has trespassed upon the land of another is not thereby under a duty of restitution to the other for the value of its use, except a person who has tortiously grazed his animals upon the other's land to which he makes no claim of right.

(3) A person who has tortiously severed and taken possession of anything in or upon the land of another to which he makes no claim of right is under a duty of restitution to the other.

RESTATEMENT OF RESTITUTION § 129 (1937).

The historical reasons for the first two rules (which have no counterpart in the case of the conversion of chattel) are explored in Ames, *Assumpsit for Use and Occupation*, 2 HARV. L. REV. 377 (1889), in J. AMES, LECTURES ON LEGAL HISTORY 167–71 (1913). The only procedural reason for the rule of any possible relevance today is that actions to try title should be brought where the land is located, and to allow a quasi-contractual action for the tort of trespass might mean that the action could be brought far from the situs of the land if the defendant could be found there. This procedural reason hasn't convinced some commentators (can you see why?), and the whole rule has not been without its attackers. *See*, *e.g.*, Comment, 30 MICH. L. REV. 1087 (1932). Thus, the principal case was greeted with approbation by no less than the giants who were Reporters for the *Restatement of Restitution*, Warren Seavey and Austin Scott. *See* RESTATEMENT OF RESTITUTION, Reporters' Notes 129 comment a, at 194–95 (1937). RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (2011), illustration 4, approves the result in *Edward's v. Lee's Adm'r*, and it is said to be the law today. It may be. Whether it is good law is something that we should consider. For a contrary view, see 37 COLUM. L. REV. 503 (1937), and for a recent review of these old questions, see Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989).

In order to make up your own mind about both the craftsmanship and the result in the principal case, consider the following snippets of information and questions:

(a) An accounting is an equitable proceeding between parties who bear a fiduciary relationship to each other. An accounting may also be available in equity to aid actions in law where the facts are unusually complicated. *See* W. BLUME, AMERICAN CIVIL PROCEDURE 23 (1955).

(b) An action for use and occupation is an action for rent due or a reasonable rental value brought against someone who occupies land with the permission of the owner, normally under an oral lease. *See* J. KOFFLER & A. REPPY, COMMON LAW PLEADING § 176, at 354–57 (1969). Cf. Gunn v. Scovil, 4 Day 228 (Conn. 1810).

(c) Phillips v. Homfray, 24 Ch. D. 439 (1883), cited in the principal case, held that an action for the rental value (trespass for mesne profits) of an underground wayleave did not survive the death of the defendant.

(d) *Phillips v. Homfray* also involved the recovery of the value of minerals taken from under plaintiff's land. *See* RESTATEMENT OF RESTITUTION, *supra*, [p*243] § 129(3). If the court in *Phillips* had allowed the mesne profits action to survive, would it have been double counting to allow the plaintiff to recover both the mesne profits and the value of the minerals?

(e) The court's statement in the principal case concerning trade secrets is substantially correct. Can you distinguish the trade secret situation?

(f) Why did the court in the principal case allow net profits rather than gross profits? *Cf.* McKee v. Gratz, 260 U.S. 127, 137 (1922). If the land had some rental value, should the court have allowed that as well? What if Edwards had done some damage to the cave? Could Lee have recovered the cost of repair? Why not all of these?

5. A readable, and seemingly accurate, account of the story of the *Edwards* litigation may be found on a websited called "Appalachian History"; longer and much more sophisticated account by a Canadian law professor Bruce Ziff, called "The Great Onyx Cave Cases — A Micro-History" was posted in February, 2012, on SSRN.

Some Economics and More Questions on the Edwards Cases

The classic economic argument for private property, focusing on the right to exclude, takes the following course. "[L]egal protection of property rights creates incentives to use resources efficiently." With the right to exclude others from the fruits of the owner's labor and investment, there is proper incentive to incur these costs. "If every piece of land is owned by someone-if there

is always someone who can exclude all others from access to any given area-the individuals will endeavour . . . to maximize the value of the land." This may allow an owner to generate a return far in excess of either the costs incurred or what alternative uses of the land would yield. What the land will yield, in effect, determines its value. R. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (3d ed. 1986). So long as exclusively held resources are transferable and the market works, land or other resources that are inefficiently used (either because of the owner's choice of activity or the size, location or other attributes of the parcel) will, in due course, be acquired by another owner who can increase their value. Land that is worth only $10,000 when held by A which B can use to generate income that translates into a present value of $15,000 will be transferred from A to B at a price somewhere between those figures. Id.

A special problem exists in cases of "bilateral monopoly", cases where neither party (A or B) has realistic alternatives to dealing with the other. This situation can lead to frustration of a potential transfer to more valuable use or to very large transaction costs as both parties seek to secure for themselves the lion's share of the gain from the transaction. See Id. § 3.7. One solution in such cases is eminent domain. Indeed, this may be why eminent domain (rather than straightforward market acquisition) is necessary once a public project like a highway or pipeline is planned for a specific location. *Id*. § 3.6.

All of this has implications for the remedies that should be granted when the market is bypassed and the right to exclude is violated by a trespasser. See generally Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

1. Is Edwards a case of bilateral monopoly? Suppose that the court in Edwards had simply granted Lee's Administrator an injunction. Could Lee's Administrator have used it to obtain a share of the net profits from Edwards? Gross profits (gross revenue)?

2. Can you think of surface cases in which one parcel has little or no value to A but when combined with a parcel held by B the whole has substantial value? In the event of a knowing trespass by B what relief should be granted A in such a surface case? Should caves be treated any differently? [p*244]

3. Suppose the court had followed Justice Thomas's theory. How should the profit derived from the cave be divided? How would future decisions about use be made, in the absence of agreement between the parties? How would shares of investment in lights or the cost of widening the footpaths be allocated?

4. If the National Park Service takes over the cave, what admission should it charge? The same as Edwards or Lee? Higher? Lower? What "just compensation" will it have to pay Edwards or Lee for their cave rights?

5. Does economic analysis assist in evaluating the following (probably erroneous) statement in C. MCCORMICK, DAMAGES 481–82 & n. 4 (1935): "The measure of damages [against a wrongful occupant of land] is . . . the reasonable rental value during the period of the defendant's occupancy, with this proviso, that if the defendant has caused the land to yield more than its reasonable rental, he is liable for the value of the yield. [N. 4:] The cases put it somewhat more mildly by saying that the actual yield is evidence of the rental value, but the intent seems to be as expressed in the text."

Note on Present Value Calculations

Note 4, *supra*, asks the question "What 'just compensation' will [the National Park Service] have to pay Edwards or Lee for their cave rights?" And then it doesn't answer the question. Let's take a stab at it.