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1. Introduction

Great Onyx Cave lies in the heart of the celebrated cave region of Kentucky. The caves are natural treasures and their remarkable beauty is plain for all to see. However, what does not readily meet the eye are the human stories to which the caves bear witness. There is a rich social and political history here, and a deep and engaging seam of folklore, replete with tales of discovery, of conquest, and of loss of life. There are also stories of bitter conflict. This article recounts one such episode: the fight over ownership of Great Onyx Cave.

The Great Onyx Cave dispute was a contest between two antagonistic neighbors. However, it is far more than just that. The controversy gave rise to two legendary legal decisions with enduring importance. The first of these, Edwards v. Sims (1929), is a leading authority on the extent of ownership rights below the surface of land. The second, Edwards v. Lee's Administrator (1936), concerns the appropriate measure of monetary damages for trespass to land. Stripped to essentials, the facts that led to these two important rulings are quite straightforward: E discovered a cave beneath the surface of his land, which he developed into a thriving tourist attraction. However, it turned out that approximately one-third of the cave passed below (albeit at a considerable depth) the surface of land owned by L, who had no ready means of access to the cave.

To a lawyer, these facts suggest raise two questions: should title to a whole cave belong to the party who owns the mouth and who has taken possession? And if not, how might one assess damages for trespass where E has benefited financially from the acts of trespass, but L has no practical use for his portion of the cave? Basic as these issues are, the resolution of them has proven to be no simple matter, and over the last seven decades, lawyers and judges have turned to these two Kentucky cases for guidance.

The law tends to reduce disputes such as the fight over the Great Onyx Cave to the kind of barebones account used above. Of course, life is rarely as simple as suggested by these sparse facts, and if one delves into the background of this conflict, a story that has been largely neglected over the years, additional insights emerge. The goal of this article is to explore the underlying drama, drawing on the complex experiences of the litigants, their attorneys, and others.

At first glance, the case seems to reflect merely a feud between two neighbors over the spoils of a successful tourism business. It looks like an entirely personal spat. On closer inspection it is apparent that this was one episode in a tempestuous time – the 'cave wars' period – in which confrontations and lawsuits over cave rights and tourism in the region were commonplace. Moreover, the fight over Great Onyx Cave arose amid a campaign to acquire the caves in the region for a national park; a project that held out hope for local landowners just as the clouds of the Great Depression had begun to form.

One member of the Kentucky Court of Appeals, Judge Marvel Mills Logan, played a significant and somewhat unconventional role in the Great Onyx Cave litigation and the surrounding events. Logan was born and raised in Edmonson County, Kentucky, the epicenter of the cave region. He served as a member of the Court of Appeals in the first Great Onyx Cave hearing, and his passionate, colorful, and evocative dissenting opinion in that case is remarkable. Seven years later,
Logan, no longer on the bench, acted as counsel for one of the parties in the second Great Onyx Cave appeal. All the while he was a leading light in the movement to create the national park of which Great Onyx Cave eventually became a part. Logan's stake in the outcome, and the manner in which it might have affected his judicial approach in the case remains uncertain. Yet, that the Great Onyx Cave dispute was of special importance to him seems undeniable. His part in the history of Edmonson County in general, and the Great Onyx Cave dispute in particular, is central to an understanding of both.

The presentation unfolds as follows. In Part 2 the history of cave exploration and development in south-central Kentucky will be outlined. Great Mammoth Cave, the largest known cave structure in the world is located there, and not far from it lies Great Onyx Cave. In Part 3 the events leading up to the spate of litigation concerning the cave, and the ruling in Edwards v. Sims in 1929 will be the focal points. The aftermath of that decision is reviewed in Part 4. Edwards v. Sims confirmed an important legal principle governing cave ownerships and other aspects of subsurface title. However, it did not resolve a core issue – the monetary damages, if any, to be paid by the defendant. The resolution of that question gave rise to another precedent-setting ruling, Edwards v. Lee's Administrator in 1936. That decision will be the subject of Part 5.

Both of these cases still matter, and both are still debated. With the development of carbon capture sequestration and other below-ground technologies, the question of the extent of subsurface title has gained a new significance. Likewise, the principles employed by the judges in ruling on damages have served as valuable tools for refining the law of restitution for wrongs, and continue to be cited in works published in the United States, Britain, and elsewhere. In Part 6, these developments will be explained. Part 7 contains some concluding thoughts.

2. THE HISTORY OF SHOW CAVES IN KENTUCKY AND THE DEVELOPMENT OF GREAT ONYX CAVE

Some background: the central place of Mammoth Cave

South-central Kentucky is renowned for its caves, and for decades they have attracted tourists from across North America and beyond. Hundreds of miles of passages (called avenues) and chambers honeycomb the subterranean spaces. Some caves are narrow and shallow, while others, such as those suitable for public exhibition, are extensive and complex structures. Caves are often multiple-level: in effect, they contain a series of river beds cut over time, with each new bed lower than its predecessor. Along a horizontal plane, there can be a tangle of avenues with forks, spurs, and intersections of various kinds.

Most of the better-known caves of Kentucky are located in Edmonson, Barren, and Hart counties, with the lion's share being in Edmonson. The soil there is not particularly fertile, and the land is undulating and rocky. Still, it was at one time sufficient to support some farming, with corn and tobacco being common crops. Timber was also harvested, though this accelerated soil erosion. In the early part of the 20th century, farms were modest in size, as were the incomes that they were capable of generating. Several small churches, all Baptist, dotted the landscape. All in all, these were ordinary folks, living ordinary lives, in an extraordinary place.

The most magnificent cave in the region is Mammoth Cave. Taking all of its known avenues together, it is now estimated to be over 400 miles in length, making it the largest cave structure in the world, by far. Archeological evidence indicates that it was used thousands of years ago by the indigenous inhabitants of the area, who mined it for gypsum and other materials. Prehistoric mummies have been discovered within Mammoth, pointing to its use as a burial site.

By the beginning of the 18th century, European settlers had learned of Mammoth Cave, and over time it was used for a host of functions. It held large deposits of saltpeter, a key ingredient in the gun powder manufactured during the War of 1812. The cave was acquired by Dr. John Croghan in 1838, and during his life it was used as a tuberculosis sanatorium, a church, and a hotel. Importantly, it was during Croghan’s ownership that...
tourism grew substantially, and this would turn out to be the most lucrative use of Mammoth Cave.

Although Croghan owned the cave for only 10 years, he controlled its destiny for decades afterwards. When Croghan died in 1849 (of tuberculosis), his will called for his Mammoth Cave Estate to be held in trust for nine nieces and nephews. The trustees were directed to continue to operate the cave as a tourist attraction. The will further stipulated that once the last of these beneficiaries had died, the Estate was to be offered at a public sale and the proceeds divided among the heirs of the nine original beneficiaries. It was not until 1926 that the trust would be wound up and sale provisions put into effect.

By the 1850s, train service brought sightseers to nearby Glasgow Junction (now Park City), and from there one could take a stage coach to Mammoth Cave. Visitors could stay at the 25-room Mammoth Cave Hotel, located a short walk from the cave’s entrance. Full rail service was introduced in 1886, when the Louisville and Nashville Railway (L & N) built a spur to the hotel. By the early part of the 20th century, one could also travel along the Green River by steamboat. In the 1920s, travel by automobile started to overtake these other forms of transportation, and the L & N spur line was discontinued in 1931.

Mammoth served as the ‘anchor cave’, drawing tourists to the area, which in turn enabled the owners of a handful of smaller caves to attract some of these sightseers. Show caves with names such as Colossal Cavern, Crystal, Salts, and Diamond offered guided tours. The success of these operations led other landowners to search for caves on their properties that might serve as show caves. This was a risky undertaking: cave ceilings could collapse, floors might give way, one’s footing could be lost on the flowstone, all with fatal consequences. In one sad but celebrated incident, Floyd Collins, the area’s most famous explorer, became trapped in Sand Cave. The efforts to rescue him, in the end unsuccessful, became a national drama. He remains a folk hero, remembered in story and song.5

At least as early as the 1880s, cut-throat business practices were emerging among the tour operators. The time is not-so-fondly remembered as the Cave Wars period. Cave operators were well aware that vacationers would likely visit only a few choice attractions. As tourism became increasingly important in the 1920s, these competitive tensions swelled. Cave owners would typically hire agents to solicit tourists along the road side, sometimes building wooden booths to provide information and sell tickets. Hand bills and road signs would frequently misrepresent the features of the competitor caves. Fake advertisements were also used. Ticket huts were vandalized. Employees from one cave would heckle tour guides from another. On occasion, cave agents would impersonate police officers, diverting traffic to their caves. Typically it was Mammoth Cave, everyone’s prime competition, which was targeted. One common ploy was for agents (called cappers) to jump onto a car’s running-board to advise that Mammoth Cave was closed to the public owing to an order of quarantine, a cave-in, or for some other reason.

Many of the contretemps among the cave owners were settled informally, using rough measures, though a surprising number wound up in court. Wyatt v. Mammoth Cave Development Co.,6 which has been described as the "most notorious event of the Cave Wars period",7 illustrates both the lengths to which proprietors would go in seeking an edge in promoting their caving businesses, and the willingness of operators to pursue their grievances through litigation.

In or around 1916, one George Morrison surreptitiously entered Mammoth on the Estate lands to conduct a survey, his aim being to see if the cave extended to his own nearby parcel. It was all very clandestine. Morrison evidently found what he wanted, and nine years later he opened an entrance which connected with an avenue of Mammoth Cave. Morrison began offering tours and in 1927 he opened his own 25-room hotel located next to what was termed the "Mammoth Cave New Entrance". The enterprise was owned and operated by the Mammoth Cave Development Company (MCDC). Morrison was the company’s alter ego.

Not long afterwards a lawsuit was filed by the trustees of the Estate challenging the legality of

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6 26 F.2d 322 (6th Cir.App. 1928).

7 NATIONAL PARK SERVICE STUDY, supra note 4, at III C-5.
Morrison's operation. At the heart of the claim were two complaints. One was that by using the name Mammoth Cave, Morrison's MCDC was free-riding on the decades-long efforts of the Estate to build a profitable tourist business. Second, it was alleged that patently false claims were being made by Morrison and his agents that popular features of the cave found under the Estate's surface could be viewed by sightseers entering through the New Entrance. That was not so.

It was a bitter and lengthy contest, with accusations of threats of violence and more being hurled in both directions. In the end, each side walked away wounded. The Court held that the Estate did not have the sole right to use the name Mammoth Cave, because that geographical name described a cave network that extended far beyond the boundaries of the Estate. The Estate would have been able to receive legal protection had the name acquired a secondary meaning, that is, if it was understood, in the region, that the name referred only to the Estate's portion of the cave. However, the trial judge concluded that no such secondary meaning had been established. The second allegation against Morrison, that of false advertizing, was sustained. The Court found that MCDC's marketing ploys were misleading. As a result, it issued an injunction mandating that MCDC's promotional materials state that the New Entrance did not provide access to that part of the cave known prior to 1907 as the Mammoth Cave, and that access to that portion could be obtained only through the Estate lands.

While the cave wars were being waged, a movement was afoot to establish a national park, with the centerpiece being Mammoth Cave. The idea was first raised in 1905, and in 1911 a bill was drafted calling for a small park of less than 2,000 acres to be dedicated. Congressional hearings were conducted the following year but nothing came of the bill. There was no concerted forward momentum on the park initiative until the 1920s. In 1924, the L & N Railroad, which operated the spur line and owned Colossal Cavern, offered to donate its lands for a park provided that local support was shown for the idea. That move led later that year to the creation of the Mammoth Cave National Park Association (MCNPA), a private organization whose goals were the promotion of a national park and the acquisition of lands for that purpose.

The stated rationales for the park focused on the geological significance of Mammoth Cave and the smaller caves scattered around its perimeter. Places of such grandeur and geological importance were seen as belonging to the nation as a whole, with the government being best suited to assume the role of steward. Never mentioned explicitly was the regrettable way in which the private tourism trade had degenerated, though this was probably in the back of everyone's mind. The disadvantages of the private-enterprise approach would be largely eliminated once a public park was in place.

In 1926, President Coolidge signed a bill to set the legal foundation for the national park. The legislation authorized the Secretary of the Interior to acquire just over 70,000 acres. Certain benchmarks were also set out: once 20,000 acres were assembled the area would fall under the aegis of the National Park Service, and formal park status would be achieved once 45,310 acres were acquired. In addition, the statute provided that "no general development of ... area shall be undertaken until a major portion of the remainder in such area, including all the caves thereof" had been obtained. As will be seen in Part 4, that phrase proved to be of great significance once the process of land acquisition was underway.

Cost was a major concern. The earliest national parks were in the western states, and the areas designated for those sites were, for the most part, unpatented public lands. Here, however, virtually all of the needed parcels were in private hands, and therefore had to be acquired by donation, sale, or through expropriation. The latter two options obviously required a proper revenue stream, but no federal money was set aside in the 1926 statute for that purpose. The Mammoth Cave National Park Association was responsible for raising money, seeking land donations, and purchasing property. A fund-raising campaign in 1927 and 1928 yielded nearly $800,000, and a buy-an-acre campaign was also launched. The first property was acquired in late 1928, when the MCNPA purchased a two-thirds interest in the Mammoth Cave Estate, comprising over 2,000 acres. In time, full ownership of Mammoth would be achieved, at a cost of approximately $700,000.

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8 16 United States Code, s. 404.
9 Report Shows $792,479.46 Total In Mammoth Cave Park Campaign, EDMONSON COUNTY NEWS, October 11, 1928.
The creation of the park might have seemed a godsend to the local population. Instead, it was met with suspicion, and few properties were acquired in the early years. In response, in 1928 the state legislature created the Kentucky National Park Commission, a body endowed with the power to acquire properties by the exercise of power of eminent domain. Where necessary, therefore, the state could initiate condemnation proceedings, and, if the valuation of the land in issue was disputed, hearings could be held in the local courts to fix the measure of compensation. In 1930, the state earmarked $1.5 million for land acquisition.11

**Great Onyx Cave**

Three miles from Mammoth Cave lies Great Onyx Cave. Estimated to be some 240 million years in the making, Great Onyx contains many of the attributes common to the myriad caverns found in the state. It contains spectacular natural formations — stalactites, stalagmites, and hel네ctites. The stone resembles onyx in appearance, though in fact it is composed of a material known as travertine.12 On proceeding though the main avenue of the cave one encounters a series of large vaulted avenues and domes. Along the way there are various formations with names such as the Nativity Scene, Hanging Gardens, Chimes of Normandy, and Stern of the Titanic. In the course of the litigation over the cave, one prominent party to the dispute described some of the most spectacular formations, found near the entrance:

> they hang from the ceiling anywhere from the size of your little finger, and then they vary anywhere from 10 feet in height, in fluted columns and a drapery formations, and the lady's veil, clear white and translucent, and we have our lights hidden in the back of the drapery to bring out the colors, and we have the lady's shawl that is scalloped just like you would scallop with the scissors, and fluted columns.

[The Hanging Garden] is formed of Onyx in every angle imaginable growing from the ceiling down, and growing each way and then going together and maybe back to the wall and maybe come out and hit something else and go together.13

In addition, there are more subtle, yet exquisitely beautiful, features. The walls and ceilings sparkle with gypsum, sometimes appearing as small, delicate flowers, and at other times as feathers. About halfway through the main route (known as the Flower Route), a second avenue (the River Route) forks off to the right. It leads to a deep, rather treacherous vertical opening, which permits access to what is known as the Lucikovah River,14 home to sightless fish and crayfish. The river is in reality a slender and shallow pond or pool, created by damming. A subterranean body of water was generally regarded as a necessary ingredient to a successful show cave, something that could serve as a counterpart to the Echo River found in Mammoth Cave.

Impressive though it certainly is, Great Onyx Cave must be understood in perspective: it is a tiny fraction of the size of Mammoth Cave. Great Onyx Cave was a side-show, as were the other nearby show caves. It is no surprise, therefore, that the Onyx’s owners, as with other small operators, participated in questionable business practices during the cave wars.

There is a serious difference of opinion as to who discovered Great Onyx. The published accounts agree on the time of discovery — June 12, 1915 is often recited as the date. There is also a general consensus that Great Onyx was a sealed cave, that is, there is no natural entrance capable of providing access to humans. At least no natural opening has been found to date; some are still looking. The entrance created in 1915 was the product of dynamite, shovels, and arduous labour.

Beyond that, the stories diverge. One version credits L.P. (Levi Porter) Edwards, the most central figure in the story of the Great Onyx Cave controversy, with the discovery. Edwards was a farmer and a Baptist minister. Together with his wife Sallie Edwards (née Slemmons), he owned a

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11 *Mammoth Cave National Park a Reality*, KENTUCKY PROGRESS MAGAZINE, March 1930.


13 This is part of the oral testimony of Lucy Cox, Edwards v. Lee’s Administrator, #57251, location D08/G2-A box 3630, KDLA, vol. 9, at 1276.

14 This name was chosen by the cave’s owner, L.P. Edwards, in honor of his two daughters, Lucy and Kovah.
220 acre parcel atop Flint Ridge. It has been suggested that Edwards discovered the cave quite serendipitously while blasting rocks on the farm. Another account has it that the discovery was prompted by the chance finding of limestone blocks that looked as if the roof of a cavern had fallen in. Alternatively, Edwards is thought to have stumbled upon evidence of a cave while seeking water for his plough-horse at what is termed a woodland surfing. Edwards found both sawdust and peach pits at the site. There was a sawmill and a peach brandy distillery some two miles away, prompting him to surmise that the debris had been carried to his farm through a subterranean river. It was well understood that the presence of an underground watercourse signaled the likelihood that a cave lay below.

A detailed account, found in a book published by L.P. Edwards, sets the discovery of the sawdust and peach pits in the 1880s, when the land was owned by Sallie Edwards’s father, John Slemmons. Sallie acquired a share of the farm on her father’s death around 1905, and she and her husband bought out the other heirs. Some ten years later, Edwards began to search in earnest for either a natural opening or an avenue close enough to the surface that it could be reached by excavation. A likely location was selected, presumably near the spot where the sawdust and pits had once accumulated. After about six weeks of digging, an underground crawlway was unearthed 45 feet below the surface: "Thus was fairyland found." 

A competing narrative credits the discovery to L.P. Edwards’s one-time business partner, Edmund Turner. Turner was a geologist and civil engineer who moved to the Mammoth Cave region from Buffalo, New York. He worked for Edwards from time to time and lived on the Edwards property. Turner, the story goes, entered into a partnership agreement with Edwards under which Turner was to use his expertise to find a cave, and if he succeeded they were to own and operate it as a show cave on a fifty-fifty basis. Among current researchers the accepted view is that it was Turner who found the cave, and that it was Turner who then did most of the heavy lifting to render the cave suitable for tourism.

A variation on this story suggests that Turner was merely hired by Edwards to help with excavation. In this account, the two men dug for weeks without success. On one exasperating day, Edwards sat down to rest only to discover an exposed onyx rock, which they surmised might be the side wall of a cave. Penetrating the rock to locate a chamber proved difficult, but in "one last try" at sledging, blasting, and digging, Edwards and Turner were able to create an opening that led to the Great Onyx chamber.

Other accounts have been offered. Under one, it is thought that Turner approached Edwards and formed the partnership on the understanding that Turner would show Edwards the location of the cave, having already discovered it. It has also been suggested that Turner and the legendary Floyd Collins might well have found the cave in 1914, or perhaps even earlier. It is known that these two had met while exploring a cavern known as Dossey Domes around 1912. Turner acquired rights to the subsurface of land (referred to later as the Davis tract) near the Slemmons/Edwards farm, and from there may have located Great Onyx Cave. With that knowledge in hand, Turner then approached Edwards, proposing to search for the cave, though in fact he had already found. This theory would account for the presence a signature that reads "Floyd Collins, 1914" scratched on a wall along the Flower Route of Great Onyx Cave. It might also explain what happened next.

In November 1916, Turner sued Edwards in the Edmonson County Court for breach of contract. Turner alleged that the two had reached an agreement...
agreement in February 1915. In the statement of claim, Turner recited that it was agreed that he was to use his technical acumen to locate and develop caverns under Edwards's surface. If a cave was found and later opened to the public, then, as suggested above, the partners would each be entitled to a 50% share of the profits. Turner was also to be given a one-half interest in the title to the cave, and (of course) access to the cave entrance on Edwards' surface.

In the court documents prepared by Turner's attorneys, it was alleged that he found Great Onyx Cave at a place "that gave no outward evidence to the unskilled and inexperienced person of any cave or hollow formation beneath the surface so completely hidden and concealed as it was". What followed this discovery, it was claimed, were months of back-breaking work to prepare the site for exhibition. The avenues were cleared and in certain places footpaths were dug so as to increase the headroom. In the early months of operation as a tourist site, the profits were divided between the two. However, Turner alleged that by May, 1916 Edwards had denied him both access to the property and a share of the income. No deed transferring an interest in the cave was ever signed. Edwards may have come to believe that he had been deceived, and that Turner had in fact already discovered Great Onyx before striking the deal with Edwards. That would account for Edwards' decision to renege on the partnership agreement.

The exact nature of what Turner wished to obtain from the lawsuit is not clear from the court materials; they seem to have been poorly drafted. It is alleged that Turner's contributions to the enterprise increased the value of the cave by at least $50,000, and that he was therefore entitled to an interest the land (called a lien) for that amount. It was also alleged that the failure to share the proceeds and the refusal to sign the conveyance gave rise to a claim of monetary damages of $25,000 and a lien to secure that amount. However, the concluding portion of the statement of claim seeks $25,000, an accounting for the proceeds, and enforcement of his lien.

In the end, the case never proceeded to trial. In March 1917, Edwards filed a challenge to the lawsuit, claiming in essence that it had no foundation in law. Two months later, before that challenge could be heard, Turner died at the age of 60. He was a pauper at the time of his death, and left no will. George McCombs, an attorney, was appointed as the administrator of the Turner estate. In that capacity, he continued to pursue the lawsuit. Edwards's challenge was heard – and upheld. McCombs initially indicated an intention to appeal that ruling, but there is no record that the matter was pursued further. Indeed, even if the trial had taken place, it would have been a difficult case to win. Without Turner's testimony in court attesting to the arrangement he had made with L.P. Edwards it is likely that the lawsuit would have failed.

In the result, as of mid-1917, L.P. Edwards and his wife Sallie were regarded in the region as the owners of the length and breadth of Great Onyx Cave. As it turns out, that status would be short-lived.

3. Edwards v. Sims (1929)

From modest beginnings, Great Onyx Cave developed into a successful attraction. L.P. Edwards built a two-story hotel near the entrance to accommodate its visitors, as had been done at Mammoth Cave. Several small cabins and a dance hall were also built on the site. There was a retail gasoline service there as well, and a restaurant, the American Cafe in Cave City, which was principally used as a ticket office for tours. Edwards was assisted in promoting and operating the cave by his wife Sallie until her death in 1926. Their daughter and son-in-law, Lucy Edwards Cox and Perry Cox, also worked at Great Onyx. In time, they assumed the chief managerial roles, though L.P. Edwards remained a patriarchal figure until his death in 1938, at the age of 80 years.

About one-quarter of a mile from the entrance to Great Onyx Cave was a property owned by the other main protagonist in the story, Fielding Payton Lee, known to everyone as Pate. He owned an 86-acre parcel, on which he lived with his wife Ida and their children. Lee grew corn and tobacco on the land, and, like so many others in the area,

22 Turner v. Edwards, File 2747, Edmonson County Courthouse, Brownsville, KY.

23 L.P. Edwards Dies After Long Illness, EDMONSON COUNTY NEWS, 5 January 1939. L.P. Edwards, together with Lucy and Perry Cox, can be understood as the Great Onyx Cave triumvirate. For the sake of brevity, I will refer mainly to L.P. Edwards as the defendant in the lawsuit. The suit also names Harry Bush, who was L.P. Edwards' grandson and ward. He was also on title and worked at Great Onyx in various capacities.
eked out a modest living. From time to time, Pate Lee had worked for Sallie and L.P. Edwards, distributing circulars along roadsides and extolling the wonders of Great Onyx Cave to potential visitors.

Somewhere along the line, Pate Lee became convinced that the main avenue of Great Onyx Cave meandered until his land. He was well-acquainted with Edmund Turner, and in fact Turner lived on the Lee property after Turner’s falling out with Edwards, so it is highly likely that that Turner was the source of this information. Still, Lee did not act until 1928. In that year he filed a lawsuit in the Edmondson Circuit Court claiming that part of the Great Onyx Cave was located below his farm. His motivation may have been the creation of the Kentucky Parks Commission, which had been established that year to acquire park land. Cave and non-cave properties were to be obtained, but a premium would be paid for lands that contained show caves.

Prior to the Lee’s suit against Edwards, the title to Lee farm was itself called into question. As with the Turner-Edwards dispute, this title question was part of the undercard to the main event of Lee versus Edwards. In 1926, Pate’s half-brother Lonnie claimed a one-third interest in the farm. According to the suit, in 1891 or 1892 their father, John J. Lee, executed a deed in which one-third joint interests were given to Lonnie Lee (then 18 or 19 years old), his father, and his step-mother (Mattie Lee). The deed was never recorded, and had been lost in the interim, but the father’s oral evidence supported Lonnie’s claim. It was accepted that Pate had acquired the remaining two-thirds from his parents, and that he had lived on the land for many years.

The litigation twice required the intervention of the Kentucky Court of Appeals, then the final appellate court in the state. At the initial trial, the father’s testimony was improperly presented, which triggered procedural wrangling. The Court of Appeals, noting that “[i]t is perfectly manifest that this case has been meagerly prepared for trial”, held that the parties could present additional evidence; in effect, they were permitted to start again from scratch. At the second trial it was concluded that no property interest in land had been transferred to Lonnie Lee, and that in any event his claim had been brought too late: it was barred by virtue of the operation of the state’s statute of limitations. A second appeal was launched. The statute of limitations, a logical defence to Lonnie Lee’s lawsuit, had not been argued in the case, and so the Court of Appeals rejected that part of the trial judge’s reasons. But the record of the trial once again demonstrated an unnecessarily confused proceeding, so much so that the appellate court was unable to conclude that an error had been made by the trial judge. Lonnie Lee’s claim was therefore dismissed.25

**The survey order**

Even before the Lee brothers’ dispute had been put to rest, Pate Lee launched his suit against L.P. Edwards. One suspects that by that time the enmity between the two was deep-seated, fueled initially perhaps by Edmund Turner. Edwards and Lee had also crossed swords over their shared surface boundary line. At one point, Edwards built a fence some ten feet in from the property line to annoy Lee, who did the same, and for the same reason. In testimony Lee explained this petulant boundary skirmish:

Q. 152: Does your land join any lands owned by L.P. Edwards?
A. Yes sir.

Q. 153: On which side of your farm is the land situated which joins your land?
A. He joins me solid on the west. ...

Q. 160: Has the fence had the same location during the time you had known the farm on the west side?
A. Near about. He put his fence 10 feet from the line on himself and I did the same and when we got even with one another we pulled it up and put the fence together.26

Lee sought three things from the court: (i) a declaration as to ownership of a portion of the cave; (ii) an order for a proportionate share of the profits of the tourist business (premised on an implied contract between Edwards and Lee), and (iii) a permanent injunction to prevent Edwards from trespassing on the Lee side in the future. As originally submitted, Lee claimed $60,000 for the


period 1923 to 1928, plus interest and a share of income accruing after the filing of the suit. The claim was amended at Pate Lee's insistence to embrace the revenue from 1916 to 1922, thereby covering the entire time span of the tourist operation. The principal claim for the full twelve-year period was just over $70,000. No doubt the more limited initial timeframe was based on the belief that a claim for the earlier years has been bought too late (as with Lonnie Lee's suit), that is, no action could now be brought for those earlier years. Once the petition was amended, a reply based on the statute of limitations was, predictably and successfully, raised by the defendants. Consequently the relevant period was as originally set out: from 1923 onwards.27

The revenue calculations in the Lee petition were largely conjectural. However, there was an even more central, yet uncertain, fact: to what extent – if at all – did Great Onyx Cave extend under Pate Lee's farm, located some 1,500 feet from the entrance? Lee tendered a survey made by the Edmund Turner that described the cave's path. The defendants asserted that the document was "bogus".28 The Turner blueprint was hearsay and could not be proven without Turner's sworn testimony. That was now impossible. In response, Lee sought an order that the cave be surveyed. It is here that the attorneys for Edwards dug in, vigorously opposing that application. However, Circuit Judge Porter Sims granted the Lee request. The order called for a survey to be conducted by

27 When the action was launched in 1928, Edwards was, arguably, edging towards acquisition of title to the Lee portion of the cave by virtue of the operation of the law of adverse possession. The limitation period for adverse possession in Kentucky is 15 years: see, e.g., Wallace v. Neal, 11 S.W.2d 1002 (Ky.App. 1928). Taking the starting date as 1915, Lee's title could have been extinguished as early as 1930. To succeed in such a claim, the possession must, inter alia, be open and notorious throughout the period, and a claim for subterranean space raises factual issues in that regard. For example, in Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind.S.C. 1937), a squatter's claim to a cave failed to satisfy these criteria. However, if one can assume that Edmund Turner was the source of Lee's knowledge of the location of the cave, one can fix the time that Lee learned of Edwards' occupation in 1916 or 1917. One would then count 15 years from that point in time.


officials from nearby Warren and Barren counties. The parties and their attorneys were permitted to be present during the surveying process, and the results were not to be disclosed except to the court.

The Court of Appeals ruling in Edwards v. Sims

Edwards launched an appeal. However, counsel for Lee maintained that an appeal was premature: the survey order was a preliminary step only, not a final disposition of the case, and so it was argued that it was not amenable to an appeal. The argument seems pedantic, almost trivial. But Edwards was bound and determined to prevent a survey from being undertaken. It is likely that he was aware that it would establish the validity of the Lee claim, and his appeal would at least stall the process. Lee's attorneys felt it was necessary to object.

Lee prevailed on this point, the Court of Appeals finding that an appeal could not be brought at this stage in the litigation.29 However, in an effort to circumvent that holding, Edwards's attorneys sought an order of "prohibition" against Judge Sims. If successful, it would mean that Sims had no authority to order the survey. Importantly, an order for prohibition is not, strictly speaking, an appeal. Hence it could be heard on the merits.

The legal question, given this procedural turn, was whether a Circuit Court Judge had jurisdiction to require a survey that of necessity would permit entry on Edwards' land without consent. Although Judge Sims was the nominal respondent in this application, he was not represented at the hearings and took no part in it personally. Pate Lee, as the party in whose favor the survey had been granted, opposed Edwards' petition.

A continuous refrain throughout the prohibition hearing was that Lee had launched the suit out of malice. Returning fire, Lee accused Edwards' attorneys of a litany of sins including "bold and flagrant misrepresentation" of the evidence.30 The arguments of Edwards' attorneys were characterized as "petty and childish",31 and

29 Edwards v. Lee, 19 S.W.2d 992 (Ky.App., 1929).
30 Edwards v. Sims, REPLY BRIEF FOR RESPONDENTS, #57251, location D08/G2-A box 3630, KDLA, at 1.
31 Edwards v. Sims, SUPPLEMENTAL BRIEF FOR APPELLEE, #57251, location D08/G2-A box 3630, KDLA at 28.
"laughable". In written argument it was asserted that without a survey the trial "[would] BE A SILLY FARCE". This was a tooth and nail fight.

Part of the strategy on the Lee side was to undermine the perception that the success of Great Onyx Cave was due to the efforts of L.P. Edwards, from discovery onwards. At every opportunity attempts were made by Lee's attorneys to raise the question as to whether Edmund Turner should be recognized as the man who found Great Onyx. Each time, Edwards' attorneys pre-empted the inquiry. Consider this protracted and testy exchange, part of the cross-examination of L.P. Edwards on his pre-trial deposition:

Q. 159: Who discovered the Cave?
Mr. Rodes: I object and advise witness not to answer, entirely irrelevant.

Q. 160: Do you [o]bject to answering that question?
A.: I do.

Q. 161: Do you refuse to answer it?
A.: Yes, on account of my attorney advising me not to.

Q. 162: Do you object to telling who discovered Great Onyx Cave?
Mr. Rodes: I advise the witness not to answer for the same reason as given above.

Q. 163: Do you object to telling me whether or not you object to telling who discovered the Great Onyx Cave?
A.: Yes, Sir. Been advised not to by my attorney.

Q. 164: Isn't it a fact that Edmund Turner discovered Great Onyx Cave?
Mr. Rodes: Same advice given.

Q. 165: Did you know Edmund Turner?
A.: Yes, Sir.

Q. 166: Did he ever live with you?
A.: Yes, Sir.

Q. 167: How long did he live with you?
Mr. Rodes: We object and except.

Q. 168: Is Edmund Turner living or dead?
A.: I reckon everybody in the country knows he is dead.

Q. 169: Do you refuse to tell me how long Edmund Turner lived with you?
Mr. Rodes: Advise him not to answer as entirely irrelevant.

Q. 170: Do you refuse to answer the quest[i]on?
A.: Yes, Sir.

Q. 11: Why?
A.: My attorney forbids it to be answered.

Q. 172: What was Edmund Turner's occupation?
Mr. Rodes: Advise him not to answer, incompetent, and not involved in the issue in this case.

Q. 173: How much did it cost you to open up Great Onyx Cave?
Mr. Rodes: Advise him not to answer that, irrelevant and incompetent.

Q. 174: Do you refuse to answer what it cost you to open up Great Onyx Cave?
A.: Yes, Sir.

Q. 175: Who named Great Onyx Cave?
Objections and exceptions by Mr. Rodes.
A.: Me and Edmund Turner together named it.

Q. 176: Edmund Turner discovered it, didn't he?
Mr. Rodes: Advise the witness not to answer.

Q. 177: Do you refuse to answer the question?
A.: Yes.

Q. 178: Didn't you and Edmund Turner operate the Cave for a while?
Mr. Rodes: I object and advise, as counsel, that the witness not answer for the same reasons.

Q. 179: Do you refuse to answer the question?
A.: Yes.

32 Id. at 38.
33 Id. at 10. The phrase "silly farce" was drawn from Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160, 167 (1894) (per Brewer J.). The capitalization was added by Lee's attorneys.
Mr. Richardson: I would like for the stenographer to make a notation there that when the witness is asked questions, before he answers he looks to his attorney.

Mr. Rodes: I object to the stenographer being directed as to what to write down by counsel on the other side.

Q. 180: Mr. Edwards, before you are answering, don't you look at Mr. Rodes, before you answer?
A.: Looking at you most of the time.

Q. 181: Don't you look at him most of the time?
A.: I look at Mr. Rodes and look at John and look at everybody in the room, that's what my eyes are for.

Q. 182: When I ask you a question, you are looking at me and before you answer it, you look at Mr. Rodes?
A.: Not every time.

Q. 183: Most of the time?
A.: Answer most of them.

Q. 184: The ones he has made objections to, you have looked at him?
A.: Not every time.

Q. 185: I believe you testified the other day that you built a wooden wall and left a door in it?
A.: Yes, Sir, and I am not looking at Mr. Rodes.

Lee's lawyer strongly insinuated that Edwards had conducted a survey of his own, and knew full well that the cave extended into Lee's property. In 1921, a concern over the location of the avenues of Great Onyx prompted Edwards to purchase cave rights under land then owned by one Frank Davis. The Lee lands were sandwiched between Edwards and Davis parcels. Moreover, it was alleged that not long after the cave was discovered Edwards constructed a wooden wall with a door inside the cave near the spot at which the court-ordered survey eventually marked as the boundary line. The wall had remained in place until the Davis lands were acquired.

Edwards' attorneys attacked the request for a survey from all possible legal angles. There were concerns raised about the specter that the surveying might result in irreparable physical damage to the many extremely delicate cave formations. Counsel for Edwards requested that Lee post a bond as a protection against damage. It was presumed, with good reason, that imposing a substantial bond obligation would delay the survey, perhaps indefinitely, since Lee would likely find it difficult to raise the necessary funds. It was also argued that the survey would compromise the long-term security of Great Onyx Cave. A survey, once a matter of record, might aid would-be trespassers in creating an alternative means of access from the surface. Such action could result in vandalism to the formations and to the removal of valuable materials. Edwards claimed that, for such reasons, there was a custom in the Mammoth Cave region not to survey cave holdings.

Edwards' attorneys also characterized Lee as being on a voyage of discovery, there being no proper evidence that avenues of Great Onyx Cave extended to his land. They further complained that the desire for a survey was a contrivance by Lee to avoid the costs of exploration. Lee could, without the aid of the court or entry under Edwards' land, determine whether there were caves (of any kind) by digging shafts or searching for sinkholes. During cross-examination, Lee had acknowledged that he had looked for caves on his farm, and had been able to locate a small avenue. Lee's explanation for his actions in this regard seems rather unconvincing:

Q. 179: In other places where you dug, you found nothing?
A. Yes sir.

Q. 180: What did you find?
A. I found a 20 foot avenue

Q. 181. Did you go to the end of it?
A. No, sir.

Q. 182: Why?
A. It was broke down and low ceiling.

35 "Have you noticed that nowhere in the record has [Edwards] stated whether or not he has had the cave surveyed, or has a survey of the cave, or even stated that he knows positively where the cave runs?": Id. at 25.

36 Edwards v. Sims, SUPPLEMENTAL BRIEF OF APPELLEE, #57251, location D08/G2-A box 3630, KDLA, at 32.

Q. 183: You didn't do any blasting?
A. No, sir.

Q. 184: You mean that you couldn't go any further?
A. No, sir, I couldn't without doing work, and I didn't do any work.

Q. 185: Why?
A. Well, I just didn't do it.

Q. 186: Well, if you did the work to go that far, why didn't you go a[head?]
A. Oh, I might not have had the money.

Q. 187: Is that all you lacked about it, just a little more money?
A. Oh, I don't know, just stopped and didn't work anymore. ...

Finally, there was the more general plea that to order a survey in such circumstances would violate Edwards' private property rights. A man's home is his castle, in Kentucky as in England, it was said. To order a survey was tantamount to a search and seizure, as well as a state confiscation of Edwards' property, albeit a temporary one. Couched in this way, it was argued that Edwards' constitutional rights were being infringed.

The entire Kentucky Court of Appeals heard the case. The request for a writ of prohibition to prevent the trial judge's order was rejected. Four months later, a motion to have that decision reconsidered, a last ditch effort, was likewise dismissed. The survey was to proceed under the terms of the Sims order.

Commissioner Osso W. Stanley wrote the majority opinion of the Court. He acknowledged at the outset that the case presented a novel question, presumably meaning the proper determination of cave title rights. Most of the reasoning in the majority opinion concerned whether Judge Sims' action in ordering the survey was precluded under constitutional law. Resort to the constitution is appropriate in two circumstances, he observed: first, where a lower court has acted without jurisdiction, but there is otherwise no available appeal mechanism; and second, a superior court may intervene where three elements are present: (i) the inferior court (here the Edmondson Circuit Court) possesses jurisdiction but exercises it erroneously; (ii) enforcing the order would result in great injustice and irreparable injury; and (iii) there is no adequate remedy by appeal or otherwise.

The majority held that the case fell, if at all, under the second situation. In other words, the trial court had authority to order the survey. Moreover, it was found that it had not done so erroneously. Hence, a claim under the second basis of constitutional protection failed at the first of the three hurdles. That finding engages the key legal question for which this case is a leading authority: if Lee held title to the portion of the cave below his surface, it was perfectly sensible to order a survey to determine if a trespass had occurred. However if title does not extend to that depth, the survey would involve an invasion of Edwards' property rights for no valid purpose.

One might be tempted to assume that an elemental question such as the extent of rights to land below the surface would have been settled long ago, especially in a cave-rich state like Kentucky. However, the law, even there, was far from clear. There was certainly no statutory provision fixing the extent of subsurface title rights in the state. That being so, it became necessary to turn to the common law, that body of legal principles constructed over time by court decisions. The common law system is a remnant of English law, and so when there are no modern decisions, looking back to the English case law is sometimes helpful. That is precisely what the Court did.

A conventional point of departure for legal analysis of both airspace and subsurface rights is an ancient Latin brocard, most commonly recited as follows: *cujus est solum, ejus est usque ad coelum et ad inferos*. This means that the owner of the surface of land is taken to own all of the airspace above, as well as the subsurface to the very centre of the earth. The maxim is thought to have been coined in the 13th century by Accursius, an Italian jurist, and was affirmed at least as to airspace in a 16th century English decision. In William Blackstone's *Commentaries on the Laws of England* (circa 1765-9), it


40 WILLI BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. 2, 18 (1765-69). But see the critique of Blackstone's account in Sprankling, infra note 122, at 985ff.
was stated to represent the law of England. Blackstone's *Commentaries* was a highly regarded legal treatise in its day, and still serves as a respected source of early common law principles. Blackstone's conclusions on points of law carry great weight.

However, even if the *cujus est solum* maxim was part of English law, it did not necessarily follow that it would be applied without question to land rights in Kentucky in the 1920s. At the time of the Court of Appeals decision in *Edwards v. Sims*, the validity of the maxim as it relates to airspace was being challenged. To apply the maxim literally to the entire column of air above privately owned land would mean that airplanes would perpetrate multiple acts of trespass during any given flight. For that reason, by the 1930s American courts began adopting the position that one's title to airspace was limited to that which could reasonably be used and enjoyed by the owner of the surface. This created an indeterminate upward boundary line, but one that would not normally extend into commercial flight paths. In 1946, the Supreme Court of the United States limited the scope of the *cujus est solum* maxim in that way.41

The extent of the maxim's operation below the surface is not subject to precisely the same kinds of issues, and as of 1929 there were few precedents in American jurisprudence or elsewhere to provide guidance. Moreover, just two years after *Edwards v. Sims*, a New York court accepted the analogue with airspace rights, holding that a sewer line that ran some 150 feet below a residential property did not invoke the surface owner's property; title did not extend that deep.42

The majority ruled that *cujus est solum* maxim was fully applicable to subsurface ownership, with the result that Lee held title held to the entire subsurface beneath his land. Accordingly, it was decided that it was appropriate – actually necessary and imperative – that a survey be conducted to ensure that justice would be done. As in mining disputes, which the majority treated as highly analogous, it is sometimes necessary to collect evidence of title in that way.

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### The dissenting opinion

Were matters to rest there the case of *Edwards v. Sims* would be useful, but not particularly remarkable. It would appear listed in the footnotes of property law textbooks, standing as authority for the ruling described above. What makes this case unique is the second opinion in the case, written by Judge Marvel Mills Logan. His was the sole dissenting voice. His now-famous minority opinion is passionate, compelling, and unorthodox.

Judge Logan was harshly critical of the majority ruling, declaring at the outset that it would "allow[] that to be done that will prove of incalculable injury to Edwards without benefiting Lee".43 No survey would be warranted if Lee had no claim to the cave, and Logan J. believed that Edwards was the owner of Great Onyx Cave for its entire length and breadth. Hence a survey would serve no purpose, though it might produce the kinds of harms feared by Edwards. In a handwritten addendum to the typed copy of his opinion he wrote, "Any ruling by a court which brings great and irreparable injury to a party is erroneous."44

The dissent rejected the view that *cujus est solum* maxim had ever represented the law, either for rights above or below the surface. As with the reassessment of the correct approach to airspace rights prompted by the advent of air travel, so should subsurface entitlements be responsive to present-day circumstances. Logan J.'s preferred rule was based on a mixture of surface rights, reward for labor, and rights based on first occupancy. He endorsed the notion, consonant with the majority opinion, that title to the surface gives to that owner of everything that may be taken from the earth and used for profit or happiness. He was, it seems, principally thinking of mineral rights. However, the surface owner acquires nothing that cannot be subjected to his or her dominion. The "Stygian darkness"45 of a cave, as he called it, cannot belong to the surface owner unless there is an entrance on that land. Logan maintained that a cave should belong to the owner of the entrance and that ownership should extend to those parts of the cave that have been explored and connected to the surface. As a result, Logan J. would have awarded ownership of the cave to Edwards by virtue of his

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43 *Supra* note 2, at 621.

44 *Edwards v. Sims*, Opinion of Judge M.M. Logan, location D08/G2-A box 3630, KDLA.

45 *Supra* note 2, at 622.
discovery, exploration, development, advertising, exhibition, and conquest. No survey would be warranted. Quite the contrary: Edwards' title to the cave should be affirmed.

The above summary conveys the distilled essence of Logan J.'s conclusions and the supporting reasons he advanced. What it does not capture is the florid language he chose to invoke. Mills Logan's dissenting opinion contains unique stylistic flourishes. Not only is it unusual as a form of judicial writing generally speaking, but it is not at all comparable to any of his other reported opinions (which were numerous). In it, he narrated the story of cave exploration in Kentucky, relating this to the claim before him. The majesty of Great Onyx Cave is reverently celebrated; Pate Lee is cast as an opportunistic Johnny-come-lately; L.P. Edwards is depicted as an intrepid explorer; tireless; a visionary. Floyd Collins makes a cameo appearance, though there is no trace of Edmund Turner in this florid exposition. Nor would one appreciate from this depiction that the success of Great Onyx as a show cave owes much to the spillover effect of the popularity of Mammoth Cave. No prior case law is cited to bolster his ruling.

Here is the heart and soul of Logan J.'s dissenting opinion:

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 multitudes. 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 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.\textsuperscript{47}

In the 1920s, as Mills Logan was penning these words, a number of American legal scholars were developing a school of thought that came to be known as legal realism. They were sceptical of claims that judges could be truly impartial. Instead, they advanced the view that personal biases, not the dictates of the law and adherence to legal precedent, might well explain some, perhaps many, legal outcomes.\textsuperscript{48} With the cynical posture of the legal realists in mind, it is virtually impossible to read the above passage without wondering about Judge Logan's underlying motivations. Who was this man? What could have sparked this unorthodox and moving judicial pronouncement? Does his opinion support the theory that judges do not necessarily serve as neutral arbiters of justice? A closer look at the life and career of Marvel Mills Logan might shine some light on these questions.

Who was Marvel Mills Logan?

Marvel Mills Logan (7 January 1875 to 3 October 1939) was the third of ten children born to Gillis and Georgiana Logan. The family lived on a 100-acre farm in Edmonson County, not far from Great Onyx Cave. He was a studious young man and on completing high school took a position as a teacher, working one year at a school near Mammoth Cave.

Mills Logan (as he was known) was a person of strong intellect, coupled with great drive and ambition. When he was 21, Logan began the study of law, working for a small firm in Brownsville, the Edmonson County seat. Within a year he had passed the Kentucky bar exam, received his call and opened an office in Brownsville.\textsuperscript{49} He held many public positions over the course of his life. A devout Baptist, he taught Sunday school for many years.\textsuperscript{50} A contemporary in these years recalled Logan's many passions during these years, all of which pursued with seemingly indefatigable energy:

During the fifteen years he resided here at Brownsville (1896–1912) [Mills Logan] promoted a canning factory and the construction of sidewalks, built a bowling alley, served as Chairman of the Town Board, organized the local Old Fellows Lodge and planned their new building, managed the baseball team, sang in the church choir, taught a Sunday School class, speculated in timber, organized two or three mineral companies, bought and sold tens of thousands of acres of land, served as County Attorney, engaged in the general practice of law, married and reared a family, and dabbled in politics, serving as Democrat County Chairman throughout the entire period.\textsuperscript{51}

In 1911, Logan was appointed Assistant Attorney General for Kentucky, and in 1915 he was elected to the office of Attorney General. After about two years in that position, and a comparable period as chair of the Kentucky Tax Commission, he returned to private practice, first in Louisville, and later in Bowling Green. While there he became heavily involved in several business ventures, including Kentucky Rock Asphalt Co., a profitable firm.\textsuperscript{52} From humble beginnings he had become a wealthy, successful, and respected figure.\textsuperscript{53}

In 1926, Mills Logan was elected to the Kentucky Court of Appeals. He sat for five years, serving as the Chief Justice for a brief period in 1931. In late 1930 he was elected to the U.S. Senate, and assumed that high office in March, 1931. A lifelong Democrat, he became an ardent supporter of Roosevelt's New Deal. Logan did not initially have a taste for Washington politics. While in the Senate he lobbied for an appointment to the Court

Bowling Green and Washington; and at the time of his death he is said to have attended Sunday School every Sunday for more than 30 years\textsuperscript{54}: CHARLES E. WHITTLE, BRIEF SKETCHES ON MEMBERS OF THE EDMONSON COUNTY BAR AT BROWNSVILLE, KENTUCKY, 1909 TO 1971, 13 (1971).

\textsuperscript{47} Supra note 2, at 622-3.

\textsuperscript{48} For a modern overview of the emergence and ideas of the realists, see Brian Z. Tamanaha, Understanding Legal Realism, 87 Tex. L. Rev. 731 (2009).

\textsuperscript{49} In 1901, the 26-year-old Logan lost a close election for the position of County Attorney. A legal challenge of the result failed: see Edwards v. Logan, 70 S.W. 852 (Ky.App. 1902); petition for rehearing overruled: 75 S.W. 257 (Ky.App.1903).

\textsuperscript{50} “This habit of teaching a Sunday School Class followed him wherever he went: Frankfort, Louisville,

\textsuperscript{51} CHARLES E. WHITTLE, NO LAUGHTER IN THE COURT ROOM 40 (1968).

\textsuperscript{52} See further John B. McFerrin, The Kentucky Rock Asphalt Company, 4 SOUTHERN ECON. J. 455 (1938).

\textsuperscript{53} See further HISTORY OF KENTUCKY, THE BLUE GRASS STATE 583-5 (1928).
of Appeals for the 6th Circuit, and expressed interest in having his name go forward for a seat on the United States Supreme Court. Despite his misgivings about being in Washington, he had achieved a measure of stature among his Senate colleagues, and in 1936 he decided to seek, and was elected to, a second term. Senator Logan died in office in October, 1939. He was buried in the family plot in Edmonson County after lying in state in Brownsville. At the time of his passing he was remembered as a kind, able, honest, hard-working, and unselfish man.

That Logan was from Edmonson was not inconsequential. The counties in Kentucky are small (there are 120), and at the time the population of Edmonson was approximately 11,500. County events are inherently local, and those living within the vicinity share a common knowledge. However, although Logan favored Edwards' position, and, as we will see, acted for Edwards later in this very case, there is nothing to suggest that he held personal views about the litigants, much less that he would let these sway his attitude about the merits of the law suit. Apart from all else, the Reverend Edwards was not a sympathetic figure. His dispute with Turner, which Lee's attorneys tried to inject into the case at every opportunity, cast a shadow over Edwards' development of Great Onyx Cave. This was no secret in and around the county.

If Logan can be said to have had a stake in the outcome of Edwards v. Sims it is likely to relate to the national park project. In 1929 there was nothing of greater importance in Edmonson County. Mills Logan played a leading role in the creation of Mammoth Cave National Park; indeed, he is credited with having first advanced the idea. In 1905, Logan wrote to his local congressman, who in turn took the proposal to the Secretary of the Interior. Although the concept was viewed with favour, the political winds shifted and no immediate steps were taken. When the Mammoth Cave National Park Association was created (in 1924), Mills Logan was its founding president. He served in that capacity for about a year, during which time he led a delegation to Washington to meet with President Coolidge and the Secretary of the Interior.

Mills Logan would have been aware that the outcome of the Lee-Edwards lawsuit would establish the rules of the game for other caves in the region. Dozens of properties, perhaps hundreds, might be affected. There was real potential that the title problems raised by the case could recur elsewhere in the area. Virtually all of the lands had to be acquired from private owners on a parcel-by-parcel basis. It was known that Mammoth Cave itself extended beyond the lands of the Estate, so there were well-founded fears that any number of landowners around the perimeter of that cave might launch law suits, seeking surveys as Lee had done in the hope of raising the possibility that they, too, were entitled to be paid for their cave rights. Strategic bargaining would almost certainly raise the land acquisition costs for the MCNPA. As a result, a rule based on first discovery might work to settle title rights in a way that a simple application of the cujus est solum maxim might not. In other words, it would be simpler to identify and compensate those landowners who had openings on their lands and had developed a cave (such as L.P. Edwards), than to locate every surface owner who might be able to assert title to a share of the cave as Lee had done.

Logan had other, personal reasons to believe that land assembly could be rife with problems. In January 1929 (less than a year before the Court of Appeals ruling in Edwards v. Sims) he had sold some 8,000 acres of land to the MCNPA at the urging of a high-ranking member of the association's executive. The selling price was well below market value; it was essentially at cost. That sale was, in theory, of value to the MCNPA, though the some of the lands were located outside of the

54 Clifford E. Smith to M.M. Logan, 11 July 1938, M.M. Logan Collection, 96M5, UK Archives. See also Logan is Supported for High Court Post, PORTSMOUTH TIMES, 10 January 1938. The appointment was given to another Kentuckian, Stanley F. Reed.


56 See the eulogies in MEMORIAL SERVICES HELD IN THE HOUSE OF REPRESENTATIVES AND SENATE OF THE UNITED STATES, TOGETHER WITH REMARKS PRESENTED IN EULOGY OF MARVEL MILLS LOGAN, LATE A SENATOR FROM KENTUCKY (1941).


58 In a written submission to the secretary he described Great Onyx as "one of the most beautiful caves in all the world": M.M. Logan & J.B. Rodes, Submission to Hon. Hubert Work, U.S. Secretary of the Interior, 5 February 1925.

59 8000 Acres Sold to Park Association, EDMONSON COUNTY NEWS, 18 January 1929.
The proposed boundaries for the park. However, considerable problems were encountered in proving clear title to a number of the parcels, so much so that years later only about 1,000 acres of the land that Logan donated had been incorporated into the park holdings. In 1937, the state Attorney General asked Logan for an outline of the circumstances under which he had acquired the properties. Logan, operating seemingly from memory, provided a detailed description, starting with a patent issued in 1780. The legal situation he recounted was extremely muddled.

L.P. Edwards' attorney, John B. Rodes, likewise understood what was at stake. He was as involved in the park initiative as Logan, and had worked shoulder-to-shoulder with Logan on the national park campaign. Both were charter members of the MCNPA, and they had gone to Washington together to lobby for the park. In arguing the case of Edwards v. Sims in the Court of Appeals hearings, Rodes highlighted the park project element in a way that Judge Logan could readily appreciate. Rodes claimed that Lee's actions were undertaken with an eye to obtaining a tidy profit from sale of any caves on his property to the MCNPA. If Great Onyx did extend under Lee's land, it was cautioned, he would be perched "to demand or require an exorbitant price therefor if ever purchased by the Mammoth Cave National Park Association." Likewise, one legal brief concluded with what was captioned "a word of warning". It recited that "on the strength of a simple affidavit, any landowner in the area would be entitled to a survey, something that was "likely to set the whole cave region in turmoil". It was added that "[e]very native of the cave region knows this to be true, including Judge Logan."

Understanding, the broader political issues in play in Edmonson County and environs takes one only so far in trying to discern Judge Logan's approach to the case. He chose to advance his position, one he evidently held ardently, with a stylistic flourish not found elsewhere in his judicial writings. But why? For whom was he writing? If he was attempting to sway the other members of the Court, one wonders why he believed that this kind of prose would be effective to that end. It is not the stuff of lawyerly logic. There is no obvious explanation, and few clues.

George Logan, a professor emeritus of English and a living relative of Mills Logan, has offered some valuable insights into these questions. It is doubtful, he suggests that Judge Logan was trying to persuade his brethren on the court; their minds were made up. Nor was it likely that he was speaking to the people of Edmonson County. The choice of style would be ill-advised, and in any event, judicial opinions do not have a wide popular readership. The local newspaper reports of the case barely mention the dissent, if at all. To some degree, Mills Logan may have been writing for himself. He was a self-taught authority on the classics and much else. His longstanding interest in the caves in and around Edmonson County has already been described. Here was case, perhaps unique in his time on the bench, in which these two passions converged, namely "classical learning and rhetoric [and] the romance of the exploration and development of the wonderful caves of Kentucky."

Professor Logan suggests that Judge Logan's primary motivation may lie elsewhere. Mindful of the classical rhetorical tradition manifested in the language of the dissent, it can be argued that he was writing for posterity: "I think he was writing for exactly the audience that he has in fact had: lawyers and judges, current and future, who would be engaged in property rights in caves." In short, he was writing in the hope of reaching us. If so, he has succeeded.

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60 Hubert Meredith (A.G. Kentucky) to Senator M.M. Logan, 29 June 1937, M.M. Logan Collection, 96N5, UK Archives.
61 Senator M.M. Logan to Hubert Meredith (A.G. Kentucky), July 2, 1937, M.M. Logan Collection, 96N5, UK Archives.
62 Rodes was a prominent figure in his own right. He was, among other things, the mayor of Blowing Green from 1929 to 1933, and served on the bench in Warren County.
63 Edwards v. Sims, RESPONSE TO ACTION OF PLAINTIFF FOR ORDER OF SURVEY, #57251, location D08/G2-A box 3630, KDLA, at 53.
64 Edwards v. Sims, PETITION FOR REHEARING, MODIFICATION AND EXTENSION OF OPINION.
65 George Logan to Bruce Ziff, Personal Correspondence, 25 April 2012.
66 Id.
4. The Immediate Aftermath of Edwards v. Sims – 1929 to 1935

*Edwards v. Sims* affirmed the validity of the order of a survey, and established that the *cujus est solum* maxim governed ownership rights below the surface in Kentucky. Until the survey was carried out, there could be no finding as to the precise location of the boundary, let alone the measure of damages should a trespass to have occurred. Lee was broke, and he found it very difficult to arrange financing for the survey. Lenders were wary, but by 1930 he had arranged a loan of $1,000 with the Bank of Glasgow Junction. His attorney, John Richardson, had assisted in that regard by agreeing to sign as a guarantor for the loan in return for a supplemental fee arrangement. (In time, there would be a disagreement about the terms of that added retainer, which, as with so much else in this dispute, eventually required resolution by the Court of Appeals.67)

A team led by the two court-appointed surveyors carried out the work in early 1930 and by mid-May the survey map had been completed. No damage to the cave seems to have occurred while the work was being carried out, and over all the time that has since passed vandals never exploited the information to enter the cave from Lee's property. The surveyors reported that about one-third of the Great Onyx Cave was below the Lee farm. A line was marked in blue on a cave wall, and a row of small rocks was placed across the footpath. From June 1930 onwards the Great Onyx Cave tours did not extend past those rocks.

The map on the following page is the survey blueprint done in 1930:68

67 Richardson v. Lee's Administrator, 129 S.W.2d 147 (Ky.App. 1939).

68 Edwards v. Lee's Administrator, #63359, location D10/A8-C box 4316, KDLA, vol 7.
Scan of the blueprint map from the 1930 survey of Great Onyx Cave. The colors were inverted to make the map more legible, but it is still very hard to read. See below for a more detailed view of the area inside the box, which is the most contested area of the cave. (Scanned blueprint courtesy of the Kentucky Department for Libraries and Archives, Frankfort, Kentucky)

Enlargement of the most contested area in the cave. The boundary between Edwards and Lee are the vertical and horizontal lines marked Fence” and “wire fence”. L. P. Edwards’ land is to the left of and below the fence lines. F. P. Lee’s land is to the right of and above the fence lines.
Despite the completion of the survey there were still outstanding issues relating to the surface boundary, and this brought the parties back to court. The legal description of the Lee farm referred to two trees, a post oak and a hickory, as the monuments to describe one corner of his parcel. However, by the late 1920s these trees were no longer standing, and there were questions as to where they had been. Only a few hundred square feet were at issue, but the point was not trivial, motivated by spite, or by an ill-conceived matter of principle: what drove this aspect of the case were the implications that the placement of the surface markers held for title to the Lucikovah River inside the cave. It happened to be located directly below the contested boundary.

Given that the trees were long gone, evidence was introduced to determine where they had once stood. Testimony was given as to fence lines, a road, a monument cornerstone, and so on. It was believed by those testifying that the corner had been marked by a stone, since moved. A large number of witnesses were called, including both Lee and Edwards, but as the trial judge noted, "it is not amazing that the numerous witnesses differ as to this corner". In the end it was decided that Lee "[came] nearer than any other person as to the exact location of this cornerstone". In the result, the a boundary was declared that placed most of the Lucikovah River, as well as the steps leading down to it, on Lee's side. An appeal from that ruling was dismissed.

While these proceedings were underway, attempts were being made to acquire properties for the park, including Great Onyx Cave. Efforts to reach a negotiated price with Edwards having fallen through, the Kentucky National Park Commission brought condemnation proceedings in the Edmonson Circuit Court. They were going to expropriate the land. That application pertained to the Edwards farm and to the caving rights held by Edwards on the other side of Pate Lee's property (the Davis lands). For reasons that are not clear, no application was made for Lee's farm. Three so-called "impartial housekeepers" were appointed for the purpose of establishing the fair market value of condemned properties, and they collected the relevant information. John Rodes, L.P. Edwards' attorney in Edwards v. Sims, acted for the Commission.

In August, 1930 the valuers reported. The holdings were assessed as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Edwards surface</td>
<td>$3,150.00</td>
</tr>
<tr>
<td>Timber</td>
<td>750.00</td>
</tr>
<tr>
<td>Buildings and improvements</td>
<td>13,000.00</td>
</tr>
<tr>
<td>Cave and other underground rights</td>
<td>272,408.70</td>
</tr>
<tr>
<td>Davis subsurface</td>
<td>4,697.00</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$294,004.70</strong></td>
</tr>
</tbody>
</table>

The key figure here is the deemed value of the cave rights for the Edwards property – $272,408.70. What is noteworthy about that valuation is the basis upon which it was determined. Pages and pages of financial information covering the preceding five years form part of the record. Precise numbers of ticket sale per month are recited. The costs of bumper strips (i.e., bumpers stickers) and other minor expenses were itemized in excruciating detail. However, that information was not ultimately relevant, except as it related to one year, 1929. The report found that the net income for the cave and hotel in that year was $27,240.87. That sum was, inexplicably, multiplied by ten to produce the figure $272,408.70.

Neither side was satisfied with the bottom line. Objections were filed, and in consequence a jury of twelve was empanelled to set the compensation. Prior to these proceedings it had been feared that Edwards would seek $250,000, 73

69 It appears that the oak had been felled by Pate Lee's half-brother, Lonnie, who was indicted for "fraudulently and willfully remov[ing] and cut[ting] down and destroy[ing] a corner tree, the boundary of a tract of land belonging to one John Slemmons": Grand Jury, Brownsville KY, December, 1903.

70 Edwards v. Lee, 61 S.W.2d 1049 (Ky.App. 1933) quoting the trial judge.

71 Id.

72 Id.

73 The acquisition of Lee's land was discussed around the early part of 1931: Minutes of the Meeting of the Kentucky National Park Commission, 19 March 1931, MSS 329, B3 F13, WKU Archives.

74 Kentucky National Park Commission v. Edwards, REPORT OF COMMISSIONERS, File 2165, Edmonson County Courthouse, Brownsville, KY.

75 Edwards v. Lee's Administrator, #63359, location D10/A8-C box 4316, KDLA, vol. 8, at 1035.

76 Various additional parties came forward claiming an entitlement to the lands owned by Edwards. None of these challenged were successful.
which the MCNPA regarded as an unreasonable and unaffordable sale price.\(^77\) As it turns out, they underestimated their opponent. Edwards claimed that his holdings were worth $575,000.\(^78\) One can only imagine what the asking price would have been had Edwards prevailed against Pate Lee in court. The state argued that the correct valuation was $52,250, less than one-tenth of the amount submitted by Edwards.

The jury accepted the initial valuation to the penny, and the court\(^79\) initially affirmed the validity of the deliberations and finding. However, the matter did not end there. Applications were brought by both sides seeking to set aside the jury verdict. In the end, the trial judge increased the award, setting the value of all of the relevant properties at $398,000.\(^80\) Accounting for inflation, that is equivalent to almost $6 million in current dollars. If that amount had been paid, Edwards would have become a multi-millionaire just as the Depression was descending.

The Commission and the MCNPA took the decision hard. Six years earlier, Mills Logan had advised the federal government that the Mammoth Cave Estate could likely be acquired for less than $1 million, and that the surrounding caves and surface lands, all in, could be obtained for a similar amount. Although he feared that costs might escalate if prompt action was not taken, the Great Onyx award was completely out of kilter with his expectations and calculations.\(^81\)

An appeal was contemplated, but it was appreciated that a more fundamental response was needed if the park project was to come to fruition. There was an unexpected hostility to the park in Edmondson, an attitude both fueled and channeled by the editor of the Edmonson County News. In testimony in the Lee-Edwards case, he put the matter starkly: "I have criticized the Association on account of the way they have tried to gyp [sic] the people of Edmonson County".\(^82\) One must appreciate that in the end more than 500 families were displaced, by one means or another, to make way for the park. For many, the true worth of these hardscrabble tracts, some of which had been family holdings for generations, could not be reduced to a dollar amount. In addition, some residents felt that the park concept was somehow a ploy by the L & N Railway to gain control of the caves for a private project.\(^83\) Similarly, the secretary of the MCNPA, as well as others, were accused of land speculating.\(^84\)

At a meeting of the executive of the MCNPA, Senator Logan weighed in:

> With reference to the recent verdict in the Great Onyx Cave condemnation suit amounting to $398,000, Senator M.M. Logan of Bowling Green, a native of Edmonson County, stated that the verdict was altogether too high but that he felt that some kind of arrangement could be made to complete the purchase of the required land and caves during the next three or four months. He stated that while the verdict was unfortunate, it was not disastrous and that while

\(^77\) M.B. Harlin to B. Helm, 25 January 1929, MSS 296, B4, F1, 61-1, WKU Archives.

\(^78\) See also Edwards v. Lee's Administrator, Brief for Appellees, #57251, location D08/G2-A box 4316, KDLA, at 2, where it is stated that during the condemnation proceedings that an appraisal of $800,000 had been submitted by Edwards.

\(^79\) Judge Porter Sims recused himself from the case, presumably because he was still seized of the Lee lawsuit. Judge J.F. Bailey, a member of a different judicial district served as a special judge in the hearing by order of the Chief Justice of the Court of Appeals, M.M. Logan.

\(^80\) In Edwards v. Lee's Administrator, supra note 3, at 1029, it is stated that the award was $396,000. That is an error, which may have resulted from a mistake in the materials submitted by Lee's counsel.

\(^81\) M.M. Logan & J.B. Rodes, Submission to Hon. Hubert Work, U.S. Secretary of the Interior, 5 February 1925, at 10, WKU Archives.

\(^82\) Testimony of Perry Meloan, Edwards v. Lee's Administrator, #63359, location D10/A8-C box 4316, KDLA, vol. 10, at 1213. See also W.W. Thompson to M.B. Nahm, 29 January 1931, MSS 196, B7, F3, WKU Archives.

\(^83\) W.W. Thompson to M.B. Nahm, 30 April 1931, MSS 296, B7, F3, WKU Archives: "I believe that at least fifteen ... citizens made the statement within my hearing that the whole of the idea was a scheme of the L. & N. RR Company to obtain control of the caves and that the Association and Commission were tools in the hands of that company."

\(^84\) Id. The person in question was George Zubrod, a real estate agent.
a bad situation existed in Edmonson County in so far as the feeling of the people was concerned he thought we could go ahead with the project. He stated that the ordinary rules of business would not apply to the establishment of a national park and that the Edmonson County people felt that no citizen of that County had been placed on the Kentucky National Park Commission.85

It was apparent to all that the verdict had greatly strengthened Edwards' bargaining position, for he now held three powerful cards in his hand: (i) the verdict; (ii) the view among MCNPA members that time was of the essence and that the project might now falter; and (iii) the legal requirement that Great Onyx Cave be obtained before national park status would be conferred. As mentioned in Part 2, the 1926 legislation provided that before the lands could be designated as a national park, all of the caves within the proposed boundary had to be included.

Senator Logan suggested a response that would realign the balance of power. He was prepared to move an amendment to the governing legislation that would allow the park designation to be achieved without the incorporation of Great Onyx Cave. The MCNPA approved of that strategy,86 and Logan introduced a bill in the United States Senate that gave the federal government authority to designate the park officially even though Great Onyx Cave (and Crystal Cave) had not been acquired. That bill did not proceed but comparable legislation became law in 1937.87

It took six years, but the crisis was averted. Great Onyx Cave was an important site in the region, but it was no longer indispensable. Edwards was left with a condemnation verdict that suddenly had little monetary value. (In fact, as will be seen in the next part, those proceedings proved in the end to be financially damaging to him.) In addition, in 1934 the task of acquiring lands was transferred to the National Parks Service. That allowed for future condemnation proceedings to be heard in the federal court, a move designed, no doubt, to reduce the likelihood that there would be a repeat of the Great Onyx Cave verdict.

Throughout this period, cave-war friction continued, with Great Onyx Cave often being caught in a swirl of controversy. During the time of the litigation over the survey, Mammoth Cave obtained an injunction against Edwards for inappropriate solicitation practices designed to divert visitors away from Mammoth Cave. Yet compliance with the court order remained an ongoing struggle. John Rodes, as attorney for Mammoth Cave in this instance, reported to his principals in 1930 that he had personally witnessed the injunction being flouted by agents for Great Onyx Cave along the roadside and in a local store, and had served those involved with written notice demanding compliance.88

A dispute also erupted over the use of the term "Frozen Niagara" to describe cave formations. That term had been used by Mammoth Cave for years to denote one of its chief tourist features – a limestone formation near the entrance that resembled a cascading waterfall. The owners of Great Onyx Cave erected several billboards claiming that the Frozen Niagara was in (and only in) its cave. L.P. Edwards claimed that he had copyrighted the term in 1922, and it can be seen in the surviving promotional material.89

In 1933, Pate Lee died of pneumonia; he was not yet 50 years old. A local attorney, Bev M. Vincent, was appointed the administrator of the

85 Minutes of the Executive Committee of the Mammoth Cave National Park Association, 5 May 1931, MSS 296, B7 F3, WKU Archives.
86 M.B. Nahm to W.C. Montgomery, 27 April 1931, MSS 296, B7, F2, 227, WKU Archives.
87 H.R. 5594, 75th Congress, 1st Session. Logan's Bill was Senate Bill 1996.
88 J.B. Rodes to G.E. Zubrod, 4 August 1930, MSS 296, B6, F2, 5, WKU Archives.
89 W.W. Thompson to Hon. B.F. Wotton (A.G. Kentucky), May 24, 1933, MSS 329, B3, F13. Disputes arose after the period under discussion (1929-1935). In 1939, Perry Cox launched a lawsuit against Mammoth Cave claiming that three tourist routes of the cave passed beneath land that he owned. Over $200,000 in damages was sought: Caves in Squabble, KINGSPORT TIMES, 23 March 1939, 3. In 1940, Mammoth Cave and Great Onyx Cave accused each other of inappropriate practises. With the intervention of a Barren County Circuit Court Judge, such skirmishes were curbed and a code of ethics was agreed to by these parties: Judge Ponders Battle of Caves, Tells Operators to be Good, LOUISVILLE COURIER-JOURNAL, 28 August 1940; Code of Ethics for Operating Caves is Given by Barren Judge, PARK CITY DAILY NEWS, 5 September 1940; CAVE: A windy controversy ends on a note of harmony, LOUISVILLE COURIER-JOURNAL, 27 December 1940.
estate. Vincent continued the action for damages, as one might expect. However, he acceded to the request of the heirs to sell Lee's portion of the cave to the Kentucky National Park Commission. The price was $8,000. That is almost $140,000 in current dollars, an impressive sounding figure. However, it looks quite paltry when placed beside the condemnation verdict for Edwards' rights ($398,000). There were liens on the Lee property, and land values had fallen with the onset of the Depression, both of which help to account for the fire-sale price. Still, as a strategic matter it does not seem wise to have agreed to that price while at the same time trying to obtain the highest measure of damages possible in the suit against Edwards. Both sides readied for the trial of that issue.

5. **Edwards v. Lee's Administrator (1936)**

At long last the stage was set for the resolution of the final aspect of the Lee claim: what compensation, if any, was Lee (now his estate) entitled to receive? The case returned to Judge Porter Sims in the Edmonson Circuit Court in Brownsville for the trial of that issue.

The measure of damages proved difficult for one main reason: Edwards' use of Lee's portion of the cave did not interfere with Lee's use whatsoever, for Lee had no capacity to occupy his part. Owing to the 1929 ruling, Lee could now prevent Edwards from trespassing in the future, but it did not inevitably follow that Lee should be entitled to compensation for Edwards' prior trespasses. In essence, the issue reduces to this: when should the law focus on the losses suffered by the plaintiff (which were minimal), and when should the principal concern be the gains reaped by the defendant (which were considerable)?

A parade of witnesses testified on the location of the key attractions in the cave and whether or not Edwards had knowingly trespassed. However, some highly pertinent evidence, that having to do with the income received by the operation of Great Onyx Cave, was in short supply. Edwards resisted the plaintiff's attempts to acquire a proper accounting of the financial information of the tourist business. These "obstructive tactics",\(^9\) as Lee's counsel aptly described them, severely hampered the plaintiff's case. Although the financial for the years 1923 and 1924 was obviously relevant, counsel for Edwards was able to stifle disclosure successfully. The financial information for those years could not be reliably proven.

Without adequate business records for two years before the court, no award was made for that period. Given that it had earlier been determined that the claim for 1917 to 1922 was brought too late under Kentucky's statute of limitations, Lee could receive damages for only about half the period of trespass. Edwards might have fared even better had there not been an alternative source of financial information for the period from 1925 to 1930. That source was the 1931 condemnation proceedings in which the Edwards property had been valued at nearly $400,000. In those hearings it was obviously in Edwards' interest to accentuate the earning power of the caves. We saw in Part 4 that the handsome valuation proved to be a hollow victory, and as concerns the Lee dispute it was now also manifestly detrimental.

The method by which Judge Sims calculated the damages was quite advantageous to Lee's estate. The exhibited portion of the cave during the years in question was found to be 6,499.88 feet, of which 2,048.60 feet were on Lee's side of the line. Hence, for the purpose of allocating entitlements, approximately two-thirds of the cave belonged to Edwards and one-third to Lee. To be more precise, Lee's portion was 31.7% of the whole. But the figures pegged by the trial judge were not merely premised on the strict measurements of each section of the cave, but also on the view that the points of interest were roughly evenly distributed throughout the cave. In the result, Judge Sims concluded that Edwards knew that he was trespassing on Lee's land, and in consequence, Lee's estate was entitled to receive a one-third share of the net profits of the tourist business, plus 6% interest. The principal sum of damages was approximately $25,000.

Both parties were displeased with the ruling, and both appealed.

**The Court of Appeals decision**

In preparation for this final showdown, the two sides maneuvered to bolster their legal teams. Two former judges were retained on the Edwards side. One was Charles Dawson, a former state Attorney-General and a judge of the federal district

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\(^9\) Edwards v. Lee's Administrator, BRIEF FOR APPELLLEES, #63359, location D10/A8-C box 4316, KDLA, at 2.
court from 1925 to 1935.91 The other was, of all people, Senator Marvel Mills Logan, the man who had penned the spirited dissent in Edwards v. Sims. Well-acquainted with the nuances of the case, he now acted for the party that he believed should have prevailed in the first place. As a direct response, Lee's attorneys approached Richard Priest Dietzman of Louisville, a very seasoned and respected attorney. He had also served as a member of the Kentucky Court of Appeals, including two years as Chief Justice. He, too, had sat on the 1929 hearing of this case, siding with the majority.

Detailed legal briefs were prepared by both sides. As in 1929, Edwards' legal team was extremely resourceful, raising almost92 every argument imaginable. These were presented in a somewhat scattered fashion, and appeared in a main brief, a supplement, as well as in an application for rehearing. Taken together, the Edwards position can be understood as a series of tiered arguments as explained below.

Edwards disputed both the basis for establishing the proper measure of damages and the way in which it was applied to the facts. The first line of defense was that as there was (i) no appreciable physical damage to the Lee property, (ii) no use that had been denied to Lee, and (iii) no evidence that anything had been extracted from Lee's property, damages were not warranted. Second, if the plaintiff was nevertheless entitled to an award, at most this should be based on a reasonable rental value, and because Lee's part of the cave could only be reached via Edwards lands, it was asserted that the rent should be a purely nominal amount.93 Even if that were not the correct approach, the estimated rent had to be set at a level that was lower than the profits received by Edwards. It was reasoned that no rational tenant in Edwards' position would lease space for a rent equivalent to the entire profit that could be recouped by using that very space.94

The holding that Lee should receive a share of net profits was vigorously opposed. The finding of intentional trespass, which had served as the basis for the net profits standard, was questioned. Moreover, it was argued that an order based on a share of net profit would, in effect, produce the counter-intuitive result of transforming Lee into a business partner. If that odd position were to be adopted, then presumably Lee would be bound to pay a rental fee for both the use of the entrance and Edwards' section of the cave. As Edwards' attorneys explained, to award net profits here would be equivalent to requiring a telephone company to disgorge a portion of its profits merely because it had wrongly placed a pole on someone else's land. It was also argued that the award was in large measure a computation of gross profits, because no reduction had been made by the trial judge for the work of the defendants in the management and operation of the Great Onyx Cave business. Such costs would normally be taken into account in determining the net profit of an enterprise.

Even if the trial judge had been correct in assessing damages based on net profits, it was asserted that the use of the proportionate ownership of the avenues to determine the ratio for fixing damages was flawed. It was maintained that during the most of the period at issue, only a small part on the Lee side had been exhibited, the proof of which was said to be the absence of electric lights in that part. Along the Flower Route, the lights extended only about 175 feet into Lee's property. As to the River Route, there was evidence that the lights were a mere 12 feet over the line. Based on such considerations, counsel argued that the Lee should receive no more 1/18 of the net profits, not 1/3 as ordered at trial.

As one would expect, the award in favor of Edwards in the condemnation suit (nearly $400,000) was compared to the sale price by the Lee estate ($8,000).95 For the sake of argument, it was allowed that the Lee portion might have been worth twice that amount, which was still a fraction of the condemnation assessment. It was argued that the award of $35,000 – more than four times the price received by Lee for his surface and subsurface – was tantamount to awarding punitive damages. An award of punitive damages, as the name implies, is designed not merely to compensate the innocent

91 Charles Dawson had been the trial judge in the cave-wars case of Wyatt v. Mammoth Cave Development Co., supra note 6.
92 See the analysis of the legal arguments in Edwards v. Lee's Administrator in Part 6.
93 Edwards v. Lee's Administrator, REPLY BRIEF FOR APPELLANTS, #63359, location D10/A8-C box 4316, KDLA, at 20.
94 Id. at 21.
95 Edwards v. Lee's Administrator, PETITION FOR REHEARING, #63359, location D10/A8-C box 4316, KDLA, at 14.
party, but also to punish the defendant. In a civil case, the general goal is to provide compensation to the injured party, not to punish a wrongdoer. As a result, punitive damage awards are rare. As Edwards' lawyers stated, punitive damages would be tenable were the trespass not just willful, but also wanton and malicious. Their position was that none of these requirements were present in this dispute. Finally, it was argued that even if all else was to be sustained (and it was), the trial judge should not have awarded any sum for the period from June 1930 to the end of that calendar year because no part of the Lee property was used during that time.

In reply, counsel for Pate Lee stressed the cave features found on Lee's side, especially the Lucikovah River. It was suggested that lanterns were used to show the cave features in areas beyond the areas in which light fixtures had been installed. They also took the offensive, claiming that in cases of willful trespass the measure of damages should be gross, not net profits. There were in fact, precedents cited to the Court of Appeals that would support that result. Indeed, in the trial decision Sims J. strongly intimated that he would have adopted that position, but refrained from doing so because it had not been argued by Lee's attorneys.

The Court of Appeals affirmed the trial judge's conclusions (i) that the monetary award to the estate should be based on net profits, and (ii) that the ratio set at trial should stand. By the same token the Court also found that the award based on profits obtained from June, 1930 onwards was clearly wrong, and the order was revised to delete that amount. As in 1929, Edwards brought a motion for rehearing; again it was denied.

Judge James W. Stites delivered the majority opinion. For him the most vexing issue was whether the appropriate measure of damages should be based on rental value or a share of net profits. His reading of the case law suggested to him that when rental value was used to determine damages, it was done, in effect, as a proxy for awarding net profits. Where, as here, those profits were known, there was no need to use proxy measurements. Reliance was placed on analogous copyright and other intellectual property claims, where actual loss may not be provable. When a tangible harm cannot be precisely defined, the value received by the wrongdoer is taken to supply the correct amount of monetary compensation.

Hovering above all of this reasoning was a policy concern: "a wrongdoer should not be permitted to make a profit from his own wrong". A trespass is considered wrong in law even if committed innocently, that is, even when the defendant is unaware that the property belongs to someone else. The notion that a party should not be allowed to profit from a wrongdoing contemplates that the relevant act be knowing or willful, as was found to the case here. Hence, a good deal turned on the finding of fact that Edwards was aware that part of his tourist operation was being conducted under Lee's surface. That does seem to have been the case. As mentioned earlier, Edwards purchased the cave rights to the Davis lands on the far side of the Lee parcel in 1921. Moreover, there was evidence that prior to that time he had installed a wall with a door at a point near to what turned out to be the Edwards-Lee boundary line.

Judge Gus Thomas wrote a separate concurring judgment. He agreed with the final dollar amount awarded, but his line of reasoning was different from that of the other members of the Court of Appeals. He took the position that the entire cave, from entrance to its terminus, should be regarded as being co-owned by the two surfaces.

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96 Edwards v. Lee's Administrator, BRIEF FOR APPELLEES, #63359, location D10/A8-C box 4316, KDLA, at 12ff. Among the cases cited was the Kentucky decision of J.M. Thompson Coal Co. v. Dentzell, 287 S.W. 548 (Ky.App. 1926).  
97 "[I]t would seem this court would be fully justifiable in holding defendants are liable to Lee's estate for the gross sums defendants have received from exhibiting the part of Great Onyx Cave which lies under the lands of Lee. But in the brief filed by the plaintiffs they have, in effect, asked for only the proportionate part of the net proceeds received by defendants from the exhibition of the cave under Lee's lands, and not for Lee's proportionate part of the gross proceeds; and the court feels inclined to give the plaintiffs no more than is asked": Lee's Administrator v. Edwards, MEMORANDUM OPINION OF JUDGE PORTER SIMS, 30 May 1935, #63359, location D10/A8-C box 4316, KDLA.  
98 Edwards v. Lee's Administrator, supra note 3, at 1032 (per Stites J.).  
99 Edwards v. Lee's Administrator, BRIEF FOR APPELLEES, #63359, location D10/A8-C box 4316, KDLA, at 4-5.  
100 It is curious that Thomas J. did not advance this position in the 1929 appellate hearing, given that he sat on that case too.
owners in proportion to the ratio of their respective surface titles. Under Kentucky law, one co-owner would be entitled to a proportionate share of net profits realized by the other. Therefore, here the shares of entitlement (two-thirds to Edwards, and one-third to Lee) would remain the same. This position calls into question the underlying basis of subterranean title that was resolved in Edwards v. Sims seven years earlier. The 1929 case held that there were two separate titles to the property, not a single, shared interest. Thomas J. characterized that ruling as interlocutory (i.e., preliminary or provisional) and hence not a binding authority on the title issue.

Judge Thomas preferred his approach for two main reasons. First, by treating title as being co-owned, the finding that Lee had suffered no real loss would clearly be wrong. Rather, Lee would have been entitled to access to the entire cave, and also to the profits for activity that he, too, could have undertaken. Second, he reasoned that his approach would optimize the productive value of the cave, since neither owner could have prevented the other from operating the cave as a tourist attraction for the full its full length and breadth. That, in turn, would be beneficial to the public at large.

In the end, the net profits from 1925 to the end of May, 1930 were calculated to be $70,844.36. The damages award was one-third of that amount – $23,614.79 – plus interest (at 6% from the relevant year). Edwards was also required to pay a portion of the plaintiff’s legal fees. In May 1937 the defendants paid $35,397.00 to Pate Lee’s administrator. Attorney fees of $13,184.85 and other expenses were deducted, leaving the Lee beneficiaries with a sum just under $20,000. That is equivalent to just over $300,000 in current dollars.

6. THE ENDURING IMPORTANCE OF THE GREAT ONXY CAVE CASES

Very few interpersonal disputes lead to lawsuits, and most that do are resolved before they are heard in a court of law. A small number of trial decisions are taken to appeal and of those only a minute fraction give rise to legal precedents that matter. Bearing all of this in mind, it is remarkable that the Great Onyx Cave litigation produced two appellate rulings with sustained legal value. Pate Lee and the Reverend Levi Porter Edwards could not have imagined that their grudge match over cave rights would become so notorious and well-studied. It is quite likely that most law students in the United States will encounter one or both of the Great Onyx Cave cases as part of their basic training in the law. The core facts – one cave, two would-be owners – have proven to be very useful study of property law and restitution. Property treatises cite Edwards v. Sims, and its correctness remains a matter of debate. Likewise, Edwards v. Lee’s Administrator has enjoyed its share of scholarly attention, and has probably attracted at least as much attention outside of the United States as within it. Legal commentators at Oxford University and elsewhere continue to debate the best way to understand the ruling, and what it means for the deep structure of the area of law known as "restitution".

102 The late Peter Birks, a highly respected Oxford law don, has been by far the leading light in this endeavour, and his ideas form the main baseline for discussion. Late in his life, Birks significantly revised his initial structural description of the area, so much so that in 2003 he declared that his earlier writings on the topic needed to be recalled and burned. To explain an important feature of his new taxonomy, Birks turned to Edwards v. Lee's Administrator. His initial view had been that this was a simple case of restitution for a wrong (the trespass). Later he sought to demonstrate that the result in Edwards could be justified as a case of unjust enrichment without the need to rely on the fact that Edwards' benefit arose directly from his trespass. Rather, it was enough, claimed Birks, that a profit was derived from Lee's property. Edwards had obtained from Lee not only the land, but also the opportunity to make a profit. That latter element had been intercepted by Edwards before it could be obtained by Lee, and this called for the profits to be disgorged and handed over to Lee. Edwards had been enriched at Lee's expense. See Peter Birks, Unjust Enrichment (2003). See also Peter Birks, "At the Expense of the Claimant": Direct and Indirect Enrichment in English Law, Oxford University Comparative Law Forum <http://ouclf.iuscomp.org>, published in 2000; William Swadling, Ignorance and Unjust Enrichment: The Problem of Title, 28 OXFORD J. OF LEGAL STUD. 627, 651 (2008). Not everyone agreed: see Ross Grantham & Charles Rickett, Disgorgement for Unjust Enrichment? 62 C.L.J. 697 (2003). Accord Steven Hedley, The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment (2004) 28 MELB. U. L. REV. 759, at 779. See further Dennis Klimchuk, The Scope and Structure of Unjust Enrichment, 57 U.T.L.J. 795, 806ff (2007).

101 Richardson v. Lee's Administrator, supra note 67.
The Impact of Edwards v. Sims

Edwards v. Sims was, and remains, a controversial decision. A brief commentary in the Kentucky Law Journal in the immediate aftermath of the case declared a preference for what was termed "the well-considered opinion" of Judge Logan. Likewise, Prosser and Keeton, two respected legal scholars, criticized the outcome because it condoned a dog-in-the-manger attitude for those in Lee's position.

However, not everybody joined that chorus and rightly so. Pate Lee should not be so pejoratively characterized; he did have a use for the cave, even though he had no means of access (at the time). The right to occupation is merely one stick in the bundle of property rights. Another is the right to sell. In this case it was the most valuable stick, just as it would have been had Lee had easy access but had never ventured below because he hated caves, or was allergic to bat guano, or was disabled, etc. The law does not normally deny property rights merely because the owner allows land to lie fallow. What is more, for the purposes of the litigation it made sense to treat Lee's area of the cave as inaccessible to him. It had been so at all of the relevant times and was likely to remain so for the foreseeable future. But perhaps it would not have been so forever: with enough time, money, determination, and dynamite the cave could have been reached by Lee, probably even in 1929, and certainly today.

Whatever its shortcomings, the case of Edwards v. Sims is still the leading authority on cave rights in Kentucky. In addition, it stands among a handful of American cases that have met the issue of subterranean title head on. The case is referred to in both Canadian and Australian textbooks, for in those jurisdictions there is no direct case on point.

Still, it is not certain that a modern-day court would necessarily follow Edwards v. Sims to the letter.

Richard Epstein, a professor of law at the University of Chicago, has identified six plausible rules that might have been applied to the facts of the case. A court might confer ownership on:

(i) the owner of the surface (as the Court held);
(ii) the discoverer of the cave;
(iii) the owner of the entrance;
(iv) co-ownership of the entire cave based on the surface title proportions;
(v) the party most willing to buy out the claim of the other party; or
(vi) the state.

Professor Epstein examined Edwards v. Sims with a view to determining which of six rules of ownership would best promote the economic efficient use of both the cave and the surface above it. In terms of that kind of efficiency, Epstein preferred the rule that sole ownership of the cave should go to the owner of the entrance (item (iii)). His starting premise is that the law should attempt to place title in a single owner. Such a rule would avoid the "horrendous" problem that one party could impede the other from using the cave as a whole, just as occurred in Edwards v. Sims. A rule conferring single ownership does not require co-operation between neighbours.

Epstein acknowledged, however, that his solution was not perfect. The surface owner may wish, say, to extract the minerals under the land, a use that could result in substantial damage to the cave. Given that, there was real potential that there would be conflicting uses between neighboring properties.


Presumably, Epstein would have been thinking of Edwards here. But, if Edmund Turner discovered the cave, then Turner would be the owner under this rule, subject to the agreement to share his ownership (as discoverer) with Edwards on a 50/50 basis.

This is the outcome preferred by Thomas J. in Edwards v. Lee's Administrator, supra note 3.

Epstein, supra note 107, at 567.


104 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 82 (5th ed. 1984). See also JOHN G. FLEMING, THE LAW OF TORTS 45 (8th ed. 1998), which describes Logan J.'s dissent as "the more commendable view", and a "fine piece of literature".


106 BRUCE ZIEFF, PRINCIPLES OF PROPERTY LAW 95-6 (5th ed. 2010) (Canada); PETER BUTT, LAND LAW 17 (3rd ed.1996) (Australia). See also Lynden D. Griggs &
owners. His preference to award title to the owner of the mouth of the cave was predicated on what he called an empirical judgment, a hunch really, that such a problem was far less serious than the kind of obstruction difficulties that could result from conferring title on two potentially uncooperative parties, as occurred in the case.\textsuperscript{111}

The fact is, though, that Professor Epstein's attempt to identify a single owner under his proposed rule can easily fail. A cave might have several surface openings; and that may not be easy to discern at the outset. For instance, we now know that all but one of the smaller show caves on Flint Ridge connect to Mammoth Cave. (Great Onyx Cave is the apparent\textsuperscript{112} exception.) In addition, it is not clear whether Epstein intended that the rule conferring cave rights on the owner of the mouth of the cave would be applied when that surface access was non-natural. As mentioned above, he would confer title on the owner of the entrance regardless of who discovered it, and that suggests that he had in mind only natural entrances under his rule (iii). If so, that rule would, ironically perhaps, not be applicable to Great Onyx Cave. As we saw in Part 2, all of the accounts of its discovery agree that it was a sealed cave. The entrance had to be artificially created.

If the law should confer title on the owner of the mouth \textit{no matter how it was created}, then we in fact are applying a principle of first occupancy: rule (ii) on Epstein's list. Under such an approach title is conferred on the first person to acquire possession of property lawfully. That standard is, famously, applied to the ancient law governing the ownership of wild animals: physical capture is the general requirement.\textsuperscript{113} Closer to the issue at hand, first occupancy has been applied in many places to the staking of mineral claims. That is, in essence, more consistent with the result advanced by Judge Logan, who stressed that Edwards' title ripened by reason of his exploration, occupation and development. Ownership is therefore determined by a race between competing surface owners to occupy and improve the cave.

However, first occupancy rules do not always supply the best method of determining title. A race can produce wasted effort by the losing party, and in the present setting might also lead to damage to cave formations. Moreover, one might easily arrive at the result that different sections of the same cave have been reached first by different claimants. Again, that is real possibility in and around Mammoth Cave. Competing claims as to who arrived first seem inevitable and would be costly and time-consuming. By comparison, a rule based on the general principle of \textit{cujus est solum} – the surface titles includes all land below – requires only that a survey be conducted to establish the correct boundary line.

Even putting all of this aside, the effect of the proposed rule on surface owners may be more serious than Richard Epstein appreciates. For example, a cave owned by $A$ found very near the surface of land belonging to $B$ might seriously interfere with the ordinary use of $B$'s land. Would that owner be entitled to lay a building foundation if part of the cave ceiling is destroyed?

The problems associated with split ownership of cave lands were examined in another Mammoth Cave region case, \textit{Cox et ux. v. Colossal Cavern Co.},\textsuperscript{114} a 1925 decision of the Kentucky Court of Appeals. Coincidentally, the case involved L.P. Edwards' daughter and son-in-law, Lucy and Perry Cox. The surface of the property in question had been conveyed to the Cox family in 1883, but cave rights had been retained by the original owner. An issue arose as to how, in a very practical way, one could define where the surface rights ended, and the cave rights began. The Court of Appeals ruled that title to the cave included not merely a right of exclusive possession to the cavity, but also as much of the land around it as was necessary to preserve the cavern. The cave owner has "the right to maintain the ground beneath his feet and the curving vault above his head" wrote the Court.\textsuperscript{115} The precise depth of this buffer layer was not specified and would likely be both cave-specific and difficult to ascertain. Moreover, the Court concluded that the surface owner was not permitted to take any action that detrimentally affected the cave, by mining operations or otherwise. By the same token a cave owner cannot take any action that would cause the surface of the land to subside. And, while the owner of the Colossal Cavern was

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} One legend has it that Edmund Turner did find a connecting avenue but closed it off as an act of revenge against Edwards. It is now known, however, that avenues of Mammoth Cave run \textit{under} Great Onyx Cave.

\textsuperscript{113} Ziff, \textit{supra} note 106, at 136ff.

\textsuperscript{114} 276 S.W. 540 (Ky.App. 1925).

\textsuperscript{115} \textit{Id.} at 543 (\textit{per} Drury C.).
entitled to access over the surface, that access could not unreasonably interfere with surface activities. In sum, entitlements held by both the cave and surface owners were accorded fairly robust and roughly equal protection against disruption and damage.

The law as enunciated in *Cox v. Colossal* is cast in terms that invite disputes. However, even if a better approach could be adopted to mediate the rights of the parties, the use of somewhat broad and flexible language cannot be totally avoided. That being so, it can be seen that Epstein’s approach merely threatens to replace one kind of split title (that which resulted in *Edwards v. Sims*) with very similar problems that could arise between the surface and subsurface owners of a given parcel of land. In contrast, the *cujus est solum* approach establishes a bright-line principle of ownership which does not on its own produce split titles. In other words, the outcome in *Edwards v. Sims* seems correct.

The basis for fixing subterranean property rights remains a live issue, as is demonstrated by the 2010 decision of the United Kingdom Supreme Court in *Star Energy Weald Basin Ltd. v. Bocardo SA*.116 That case involved three petroleum and natural gas wells that were drilled diagonally on A’s land and extended under B’s property. The shafts entered B’s subsurface at distances of 1,300, 800, and 950 feet below ground level, and terminated at about 2,900, 2,800, and 1,400 feet, respectively. B did not have title to the minerals beneath its property, but claimed that the drilling to obtain access to the reservoirs were a trespass of its subsoil.

The English Court of Appeal held that title extended to the depths at issue, though it also cast doubt on the place of the *cujus est solum* maxim in English law. One member of the Court wryly observed that were the maxim to apply in full force, landowners would "all have a lot of neighbours."117 The finding of trespass was affirmed by the Supreme Court. It, too, recognized that the maxim might not be applicable at reaches far below the earth’s crust, but held that the case at hand involved depths that were nowhere near the point at which the strict application of *cujus est solum* would be absurd. After all, this dispute demonstrated that the oil and gas could be reached from the surface. The barristers for the parties cited an extensive array of authorities and scholarly works. Among the cases presented to the Supreme Court were *Edwards v. Sims* and *Edwards v. Lee’s Administrator*.118

As a general matter, plumbing the depths of the earth’s crust is becoming ever more viable, from both economic and technological perspectives. As in the *Bocardo* case, one motivation is mineral exploration and development. Another is the effort to tap the earth’s liquid core as a source of heat and energy. A third is the use of deep reservoirs, more than one-half mile below the surface, as long-term storage tanks for carbon pollution: so-called carbon capture sequestration (CCS). In brief, the CCS process involves injecting carbon dioxide (CO2) into the pore spaces of permeable rock in the earth’s crust. Those gases are stabilized, trapped, by less permeable rock formations. Such phenomena are found in nature, with CO2 deposits being locked in place for millennia. CCS technologies are still in their infancy, although there are a small number of projects already in operation.119

Geological sequestration technologies hold out a special promise as a response to global warming. But they also give rise to issues relating to title. When the sequestration occurs in public lands, there is no substantial ownership question. However, large areas are needed for this purpose, and not all land can serve as a suitable repository. In consequence, some prime sites that are currently in private hands may be needed for sequestration. If that pore space forms part of a surface owner’s title, then an appropriation by the state must be carried out in compliance with the rules governing the

116 Bocardo SA v. Star Energy UK Onshore Ltd., [2010] 3 All E.R. 975, 980 (U.K.S.C.). *Edwards v. Lee’s Administrator* has some bearing on the issue of damages, which was a very key aspect of the *Star Energy* dispute. As in the Great Onyx litigation, the plaintiff’s actual use and enjoyment of the subsurface was not affected whatsoever. But the *Star Energy* case differs in several respects. Most importantly, the plaintiff did not own any of the mineral estate below its lands so in that respect the defendant’s profits were not at the plaintiff’s expense. See further Shyam Kapila, *Compulsory Purchase of Ancillary Rights over Land: Star Energy v. Bocardo*, [2011] L.M.C.L.Q. 11-5; John Murdoch, *Getting to the Core of the Problem*, [2010] E.G. 1039.


exercise of the power of eminent domain. If Edwards v. Sims is good law, an otherwise valid governmental taking of pore space would require just compensation to private owners (though the measure of that compensation may well be affected by the depth below the surface at which the expropriation occurs). Recognizing such questions, several states have declared that title to pore space is vested in the owner of the surface, essentially codifying the law as laid down in Edwards v. Sims.

The Response to Edwards v. Lee’s Administrator

As with the 1929 case, the early reaction to the 1936 decision was divided. And as with the underground boundary controversy, there are several lines of reasoning that one might adopt to fix the quantum of the award. A court could award:

(i) nominal damages on the ground that there was no harm to the property and no use of the cave was denied to Lee;
(ii) an amount equal to the fair market rental value of the property, assuming a willing buyer and seller;
(iii) punitive damages against Edwards;
(iv) a share of the net profits; or
(v) a share of the gross profits.

Most commentators have regarded the case as having been rightly decided, though the reasons given in support vary. Some have viewed the willfulness of the trespass as an essential feature of the outcome, as had the Kentucky Court of Appeals. Had the Edwards believed that he was not under Lee’s land, the reasoning goes, the correct response would have been to award an amount equal to a rental value. In contrast, in a case of intentional wrongdoing it then becomes important as a matter of justice and deterrence to strip the defendant of all ill-gotten gains. An award based on net profits produces that result.

Others have accepted the net-profit approach as providing rough justice because it would have been quite difficult to determine the fair rental value of the property. It has been said, for example, that given the peculiar situation here – bad blood between the only potential parties to a lease – the idea of establishing a market value makes no sense, since there is no actual market. It has also been asserted that the award was fair because the defendant’s profits were knowable, whereas the plaintiff’s losses (in rent) were conjectural.

Both the trial judge and the Court of Appeals discounted the spade work (literally and figuratively) undertaken by Edwards and his family to create and promote the cave over the years. That work was not treated as relevant in determining net profits, an approach that has been questioned.

120 See further Klass & Wilson, id.
121 Id. at 382.
122 But see the alternative proposal advanced by John Sprankling. He argues that a bright line rule should be imposed that limits a surface owner’s title to a depth of 1,000 feet below the surface: John Sprankling, Owning the Center of the Earth, 55 U.C.L.A.L.REV. 979 (2008).
124 Regarding the analogy drawn by Stites J. to the law governing misappropriation of intellectual property, George Roach has offered that "the legal reasoning in the Edwards opinion is clear and even prophetic in its comparison of unjust enrichment for the misappropriation of tangible and intangible assets, especially given the fact that the Restatement [which adopted that approach] was still in draft form at the time that the Edwards opinion was handed down": George P. Roach, How Restitution and Unjust Enrichment Can Improve Your Corporate Claim, 26 REV.LITIG. 265, 281 n47 (2007).
The rationale for not taking those contributions into account seems to have been premised on fault-based grounds. Along the same lines, Edwards' conduct as a willful trespasser impeded the court's ability to determine the measure of damages based on a rental value of the Lee portion of the cave, thereby justifying resort to a measure based on actual profits. That basis for calculation having been lost, the uncertainty is resolved in a way that was appropriately adverse to Edwards.

One can see the logic of resolving an unknown variable – the rental cost – against a defendant, at least where the defendant’s actions have contributed substantially to the uncertainty. In this case, however, that hard-line stance is inconsistent with how the Court responded to the dearth of the financial evidence. Recall that the plaintiff (Lee's estate) failed to prove the profits acquired by Great Onyx Cave in 1923 and 1924. As a direct result of that weakness in the plaintiff’s case, no damages were awarded for those two years. That kind of information was solely within the possession of the Edwards. That being so, one would have thought that the Court might have presumed that the profits in those years matched the highest annual profit for the known years, or the lowest, or perhaps even an average profit, unless the Edwards could show otherwise. Instead, the plaintiff was left with nothing for 1923 and 1924. Even a purely conjectural and conservative rental value would have been preferable.

Other computation issues have been debated. It has been argued that the fact that Edwards held the only means of access to Great Onyx Cave should have affected the calculations in his favor, as should the fact that the tourist features of the cave closest to the entrance were of greater value. On the other side of the ledger, it has been argued that Lee should have been given a share of the profits not just for the cave tours, but also the Great Onyx Cave Hotel. After all, it is very likely that virtually every hotel guest intended to take a tour of the cave. One explanation for the courts' reluctance to go that far is that ignoring the hotel profits served as a crude way to compensate the defendants for their entrepreneurial contributions. Another (more convincing) reason for excluding the hotel revenue is that those profits were too remotely connected to the acts of trespass.

There appears to have been one strategy that the Edwards camp might have adopted in an effort to reduce the award to Lee's estate, an aspect of the case that so far has apparently escaped notice. The measure of damages required an assessment of a range of unknowable facts: what would have happened had Edwards sought Lee's permission, or if Lee had his own means of access, and so on. This is all educated guesswork at best. However, by the time of the trial in 1935 there was tangible information that was, arguably, highly germane. Edwards stopped providing tours to the Lee portion in June, 1930. There were, presumably, financial records for the next five years. If those records were to show, say, a slight drop-off in revenue, the argument would be that the marginal advantage of having the free use of the Lee portion for all those years was negligible.

One can only guess why Edwards' blue-chip team of Kentucky lawyers did not advance that argument. It may be that this information was not available, or that the point was not considered, or that Edwards was not willing to bring the necessary business records into the light of day. The
advertisements for the cave did not change after the 1929 case, so the impact of the ruling on the tourist population was likely nil. It is, of course, also conceivable that these records would have proven the reverse, namely that revenues during the period dropped significantly. This was, remember, the depths of the Depression. Income might have declined sharply for reasons that were independent from, but contemporaneous with, the abbreviation of the Great Onyx Cave tours. We have no idea.

7. Conclusion

In the preceding part, attention was paid to the importance of the precedents set by the Great Onyx cases. However, the main goal of this study has been to dig beneath the legal texts in an effort to locate the back-story that had been neglected all these years. It is an intriguing tale, hinted at in the published law reports (which are reproduced in the appendices), with lessons of its own, especially concerning the relationship between law and society.

One noteworthy feature that emerges from the events is the extent to which the main participants chose to resort to the law to resolve their differences. With regard to the Great Onyx Cave lands alone, there were eight trials in the Edmonson Circuit Court, six appellate hearings, and three motions for re-hearings. Added to that total are various other cave-war lawsuits during the same period. How the parties were able to devote the time, energy, and money needed to pursue and defend their grievances in this way is a mystery.

The timing of the Lee-Edwards lawsuit hints at a key contextual feature – the national park initiative. It is not clear why Pate Lee waited until 1928 to sue Edwards, given that he was probably aware of the trespass for a decade or more. The ability to reap a tangible gain by sale to the MCNPA or, by 1928, via condemnation proceedings, may have been the triggering event. Lonnie Lee’s lawsuit claiming an interest in Pate’s land might well have been motivated by the same considerations.

These cases also serve to highlight an interesting aspect of legal practise in close-knit communities – a small number of lawyers take part, changing roles frequently in what looks like a game of musical clients. It has already been noted that John Rodes acted for L.P. Edwards in the main litigation but was on the opposite side in skirmishes between Great Onyx Cave and Mammoth Cave, and in hearings involving the MCNPA or the Kentucky State Park Commission. Likewise, John Richardson represented Pate Lee, but later acted for Edwards in at least one cave war dispute. Bev Vincent was Lee’s administrator, but was also retained by the Commission, and one wonders whether Vincent was affected by his divided loyalties when the Lee estate sold its portion of the cave to the government.

Nobody played more parts in the drama than Marvel Mills Logan, and the temptation to speculate about his motivations is difficult to resist. He had an intimate familiarity with the litigants, their lawyers, the property at issue, and the local community. Probably no other member of the Court understood the dispute in Edwards v. Sims better that Judge Logan. At the same time his acquaintance with counsel, especially John Rodes, might well have prompted him to withdraw from the case. Whatever else may be said, all of these factors must have tested Mills Logan’s ability to act as a fully disinterested adjudicator. In any event, it should be observed that he had essentially no impact on the outcome of the legal dispute. He was in dissent in the first case, and acted for the unsuccessful party in the second. In the end, he was far more effective in depriving his former client (Edwards) of a windfall gain following the condemnation proceedings in 1931 than he had been in advancing Edwards’ side in the litigation.

What was to be the fate of the national park project and Great Onyx Cave? By 1941, the park's holdings had surpassed 45,000 acres, and on July 1st of that year the Mammoth Cave National Park came into being (though its formal dedication was delayed until the end of World War II). It has since been declared as a World Heritage Site (1981) and an international Biosphere Reserve (1990). There are now just over 52,000 acres within its boundaries, and about half a million people visit the park annually. It has been a resounding success.

Lucy and Perry Cox, who for many years had operated the tourist business, assumed full ownership when L.P. Edwards passed away in 1938. They (and Lucy especially) developed a reputation as strict and demanding employers. Touching the cave formations could lead to summary dismissal. Guides were required to live on the grounds. Great Onyx Cave brochures promised access to the cave day or night, and at any moment a guide might be summoned to the entrance to conduct a tour. When the park became a reality in 1941, Great Onyx Cave remained on the outside looking in. While the park lands were re-forested, and various improvements
were made to those grounds, no comparable work was undertaken for the benefit of Great Onyx Cave. The only point of access to that cave was through the well-appointed park grounds and then along a three-mile bumpy gravel road.

A second concerted effort was made around 1950 to acquire Great Onyx, and federal money appropriated for that purpose, but no agreement resulted. Throughout the next decade the issue occasionally resurfaced, and in late 1960 an agreement was finally reached. The following year, Great Onyx Cave was conveyed to the federal government for $365,000. Accounting for inflation, that figure is less than half of the amount of the condemnation valuation from 1931, and about $2.5 million in today’s dollars.

Great Onyx was closed for a period following the sale, but by 1975 at the latest it had been re-opened to the public. Currently, tourists are permitted to visit for several weeks in the fall. The original wiring has been stripped out; only a small, non-functioning sprig remains. Tours are conducted by lantern, or as Judge Logan once put it, "by the flickering flare of ... flaming flambeaux". In that light, about two-thirds of the way along the main avenue one finds a line of small rocks, and just beyond that, blue survey markings are visible on one of the walls. These artifacts are the only remaining tangible evidence in Great Onyx Cave of a remarkable moment in its history, one of lasting significance.

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136 $803,745 *Price Tag on 2 Caves*, PARK CITY DAILY NEWS, 13 July 1958; *New Negotiations*, PARK CITY DAILY NEWS, 15 August 1958: "The owners have set a value of $403,745.45 on Great Onyx Cave, a property for which the government is offering $350,000"; *Realization Nearer*, PARK CITY DAILY NEWS, 5 October 1958; *Let's Not Give Up*, PARK CITY DAILY NEWS; 26 October 1958; *New Effort Set to Purchase Onyx Cave*, PARK CITY DAILY NEWS, 21 December 1958; *Cave Buying Hitting Snag*, KENTUCKY NEW ERA, 10 April 1959; *Cave Purchase to be Delayed*, KENTUCKY NEW ERA, 24 June 1959; *Cave Buying Talks Slated*, Kentucky New Era, 22 June 1960; *Cave Purchase Talks Begin Here Today*, PARK CITY DAILY NEWS, 18 October 1960. In 1954, a lawsuit was launched by 36 heirs of John Slemmons, claiming an interest in the cave and seeking to prevent its sale: KENTUCKY NEW ERA, 7 April 1954.

137 *Owners Sell Great Onyx Cave to Fed. Gov't*, HART COUNTY HERALD, 1 December 1960. See also Goode, *supra* note 57, at 52. The other long-standing holdout, Crystal Cave, was obtained at the same time for $285,000, though the acreage was slightly larger (261 compared to 243) than Great Onyx: *id*.


Advertising brochure for Great Onyx Cave. The caption below L. P. Edwards’ photo says he’s the discoverer of the cave. (Scanned image courtesy of the Kentucky Department for Libraries and Archives, Frankfort, Kentucky)

Photo credits for this issue

Page 35: Levi Porter Edwards’ photo is enlarged from the brochure on this page.
Edmund Turner’s photo is from Helen Randolph’s Mammoth Cave and the Cave Region of Kentucky.

APPENDIX A

EDWARDS et al. v. SIMS, Judge

Court of Appeals of Kentucky

232 Ky. 791, 24 S.W.2d 619 (1929)

Dec. 3, 1929.

Rehearing Denied March 11, 1930.

Original proceeding by L. P. Edwards and others for a writ of prohibition to N. P. Sims, Judge of the Edmonson Circuit Court. Writ denied.

Rodes & Harlin and Guy H. Herdman, all of Bowling Green, for petitioners.

John E. Richardson and J. Wood Vance, both of Glasgow, for respondent.

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Commissioner Stanley:

This case presents a novel question.

In the recent case of Edwards v. Lee, 230 Ky. 375, 19 S.W.(2d) 992, an appeal was dismissed which sought a review and reversal of an order of the Edmonson circuit court directing surveyors to enter upon and under the lands of Edwards and others and survey the Great Onyx Cave for the purpose of securing evidence on an issue as to whether or not a part of the cave being exploited and shown by the appellants runs under the ground of Lee. The nature of the litigation is stated in the opinion and the order set forth in full. It was held that the order was interlocutory and consequently one from which no appeal would lie.

Following that decision, this original proceeding was filed in this court by the 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 rights on a final appeal. It will thus be seen that there are submitted the two grounds 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 it 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. Duffin v. Field, Judge, 208 Ky. 543, 271 S. W. 596; Potter v. Gardner, 222 Ky. 487, 1 S.W.(2d) 537; Litteral v. Woods, 223 Ky. 582, 4 S.W. (2d) 395.

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 Cave” 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 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. 17 C. J. 391; 22 R. C. L. 56; Langhorne v. Turman, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211. 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 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. A leading case very much in point is that of Montana Co. v. St. Louis Mining & Milling Co., 152 U. S. 160 [20 L. Ed. 557], it was held that, if a party is deprived of the entire use of his property, it is a taking, within the scope of the fifth amendment, although the mere title is not disturbed; but by an inspection neither the title nor the general use is taken, and all that can be said is that there is a temporary and limited interruption of the exclusive use; and it is in that light that the question of the validity of this statute is to be determined."

Further considering the issue, and of pertinence to criticism of the order involved in the case now before us, the opinion continues:

Reasoning the question as to whether the statute deprived the owner of his property without due process of law, it is said by Mr. Justice Brewer in the opinion:

"On the other hand, while not decisive of the question, the frequency with which these orders of inspection have of late years been made, and the fact that the right to make them has never been denied by the courts, is suggestive that there is no inherent vice in them; and if the courts of equity, by virtue of their general powers, may rightfully order such an inspection in a case pending before them, surely it is within the power of a state, by statute, to provide the manner and conditions of such an inspection in advance of the suit. To 'establish justice' is one of the objects of all social organizations, as well as one of the declared purposes of the federal Constitution; and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice; and any measures or proceedings which, having the sanction of law, provide for such temporary invasion with the least injury and inconvenience, should not be obnoxious to the charge of not being due process of law.

Passing from these general suggestions to some of a more special character, it must be remembered that inspection does not deprive the owner of the title to any portion of his property, nor does it deprive him permanently of the use. The property, therefore, is not taken in the sense that he no longer remains the owner, nor in the sense that the permanent use of the property has been appropriated. In Pumpelly v. Canal Co., Green Bay Company, 13 Wall. 166 [20 L. Ed. 557], it was held that, if a party is deprived of the entire use of his property, it is a taking, within the scope of the fifth amendment, although the mere title is not disturbed; but by an inspection neither the title nor the general use is taken, and all that can be said is that there is a temporary and limited interruption of the exclusive use; and it is in that light that the question of the validity of this statute is to be determined."
“In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, as of requiring the production of books and papers; that this power on the part of such courts has never been denied, and, if it exists, a fortiori the state has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, of a hearing and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding, in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law.”

The Supreme Court of Kansas, in Culbertson v. Iola Portland Cement Co., etc., 87 Kan. 529, 125 P. 81, 82, Ann. Cas. 1914A, 610, sustained a similar order even though there was no specific statutory authority to do so; the court saying:

“It is contended that there was no authority for ordering or making such an inspection, and that those acting under it would, in fact, be committing a trespass. There is no specific statutory authority for the order; but such orders have been made by courts of equity from the beginning. It may be done where there is a real necessity for inspection, or where the facts to be determined cannot well be determined by the ordinary methods. ...

Inspection is frequently ordered in mining cases; but the power is exercised to assist in determining the value of buildings, and to ascertain other essential facts.”

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.

Judge Logan (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 new 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.

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. Anything 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 the lands of surface-owners? 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 a trespass as defined by the common law and is subject to fine or imprisonment, or both, in the discretion of a jury.

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 multitudes. 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.

Marvel Mills Logan believed that a cave should be owned by the owner of the entrance.

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 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.
APPENDIX B

EDWARDS et al. v. LEE'S ADMINISTRATOR et al.

Court of Appeals of Kentucky

265 Ky. 418, 96 S.W.2d 1028 (1936)

June 5, 1936.


Appeal from Circuit Court, Edmonson County.

Action by F. P. Lee's administrator and others against L. P. Edwards and others. From the judgment, the defendants appeal and the plaintiffs file cross-appeal.

Affirmed in part and reversed in part on appeal and affirmed on cross-appeal.

Woodward, Dawson & Hobson, of Louisville, M. M. Logan, of Bowling Green, and Logan & Logan, of Brownsville, for appellants.

John E. Richardson, of Glasgow, Richard P. Dietzman, of Louisville, and J. Wood Vance, of Glasgow, for appellees.

* * *

Justice Stites:

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.

About twenty 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. Thereupon Edwards sought a writ of prohibition in this court against the circuit judge to prevent the carrying out of the order of survey. The writ was denied. Edwards v. Sims, 232 Ky. 791, 24 S.W.(2d) 619, 620. In this last case the maxim, “Cujus est solum, ejus est usque ad column et ad infernos” (to whomsoever the soil belongs, he owns also to the sky and to the depths) was considered and applied, and an analogy drawn between trespassing through mining beneath another's land and passing under it through a cave. 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:

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<tr>
<th>Year</th>
<th>Proceeds</th>
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<tr>
<td>1926</td>
<td>$4,039.56</td>
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<td>1927</td>
<td>7,288.57</td>
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<td>1928</td>
<td>14,632.99</td>
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<td>1929</td>
<td>24,551.96</td>
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<tr>
<td>1930</td>
<td>23,340.51</td>
</tr>
</tbody>
</table>

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 selling of personal property is the value received by the 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 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. For example, see Capital Garage Co. v. Powell, 98 Vt. 303, 127 A. 375. 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 (cited with approval in the Vermont case), the court said:

"It is well settled that in 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. West v. Hughes, 1 Har. & J. [Md.] 574, 576 [2 Am.Dec. 539]; Mitchell v. Mitchell, 10 Md. 234. 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 then it is more usual to arrive at the same result by charging the occupier, as tenant, with a fair annual money rent. McLaughlin v. Barnum, 31 Md. [425] 452. 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 I, § 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 trade-name 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 wrongdoer would be allowed to profit at little or no expense. In cases where the damage is more extensive, proof as to 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 a 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. It is argued that the appellants ceased to exhibit the portion of the cave on appellees’ land after electric lights were put into that part of the cave on the appellants’ property. The proof on this question was conflicting. Various witnesses testified concerning the particular points of interest that were exhibited, and many of these were shown to have been on appellees’ land. Likewise, it was established that tourists entering the cave, even after it had been electrified to the limits of appellants’ property, carried lanterns, which, presumably, would only be of use if they were going into its unlighted portions, and advertisements of the cave published after the electrification continued to feature points of interest on the appellees’ land. Under the circumstances, therefore, we cannot say that the chancellor did not correctly conclude that the entire cave was exhibited even after the portion of it on appellants’ land had been equipped with electric lights.

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.

Finally, it is argued that the chancellor erroneously permitted the recovery of one-third of the profits for the entire year of 1930, when in fact the record shows that the appellants did not exhibit the entire cave during the latter part of that year. Appellees, in their brief, do not dispute this contention, and, on the contrary, refer to the figure given by an audit showing the profits during the first six months of 1930. We think it may properly be assumed that a third of the net profits for the six months’ period was derived from the use of appellees’ segment of the cave, although it is argued that this portion of the cave was only exhibited for five months. Certainly it was advertised as an attraction during the entire year. It is evident that the chancellor simply overlooked this fact in going through the mass of figures contained in the ten volumes which make up the record, and that the base figure to be used in ascertaining appellees’ one-third of the profits for the year 1930 should be $17,240.97 in lieu of the figure of $23,340.51 found in the judgment. The judgment is affirmed in part and reversed in part on the original appeal and affirmed on the cross-appeal.

Whole Court sitting, except Judge Richardson, who took no part in the consideration or decision of this case.

Judge Thomas filed a separate concurring opinion.

Justice Thomas (concurring).

I concur in the ultimate conclusion reached by my brethren as expressed in the majority opinion, but I differ widely from the reasoning employed therein as a basis for reaching it. In
expressing my views as to the basis-or platform so to speak-upon which I think the judgment should rest, I will content myself with only mentioning universally known principles of the law without encumbering what I shall say with supporting opinions and text authorities, except where I deem it necessary to adopt a different course. If this were the majority opinion, I would feel it requisite throughout to fortify the legal propositions that I shall state with adjudicated cases and text authorities of recognized and undisputed reliability.

The opinion states the facts, and correctly concludes that “the case is sui generis.” It then adds: “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.” Those excerpts therefrom are undoubtedly true, and some principle must be found by which (1) the involved property (the cave) may be rendered profitable to each of its several owners, and (2) that it may be kept open in its entirety; not only for the purpose of making each owner's portion profitable to him, and all others having proprietary rights therein, but also that the patronizing public might not be deprived of the educational and other benefits to be derived from visiting the nature made wonder throughout its length, without any obstructing walls by separate segment owners, which under the theory of the opinion they would undoubtedly have the right to construct, provided they could gain entrance into the cave for that purpose.

It is because of the recognition of such segment ownership, as recognized and applied by the opinion, with its following consequences, that has led me to adopt the views hereinafter expressed, and which I am confident will be found to be not only the more practical, but also an assured guarantee is thereby furnished against the possible obstructions, already mentioned, and other potential consequences that lurk in the theory approved and adopted by the court's opinion. The case, being *sui generis*, with its peculiar facts having never heretofore been presented to a court for a declaration of rights growing out of similar conditions, must necessarily be determined upon equitable principles, formulated with the view of not only preserving the rights of owners, but also for maintaining those of the public, both of which I think are endangered and liable to become wholly destroyed if the declared basis of the opinion should be adhered to in any future state of facts wherein such obstructing activities should be employed. The opinion, according to my interpretation of it, recognizes the right of courts in such *sui generis* cases to employ a tool from the contents of its inexhaustible chest whereby a particular case may be fitted into the niche that it should occupy so as to preserve the rights of all persons concerned. That recognition is exhibited by the attempted differentiation of this case from an ordinary trespass action and to determine the rights of the parties on *ex contractu* principles. In doing so it regards as analogous the multiplied cases that have been determined wherein a trespasser on real estate takes away from the corpus a part of it, and which part so abstracted was the only source of profit involved-as for example oil, gas, coal, and other tangible minerals. To the same effect are the cases wherein a trespasser takes away a part of the soil of another. In all such cases where the trespassing act is willfully done, the measure of recovery of the one trespassed upon is the net value of the substance taken away from the corpus of his property. On the other hand, where no corpus is abstracted and taken away, but only a mere use of the property, with the corpus left intact upon the cessation of the use, the measure of recovery is the reasonable rental value of the property.

I have yet to meet with a case where A would be made to account to B for all of the agricultural profits grown by A on B's land while the grower was an undoubted trespasser. The measure would be the damages that A did to B's land (all of which he would leave intact after the trespassing act ceased) and which is practically universally determined as being the rental value of the land for the use to which it was put. Other illustrations could be cited in substantiation of the same view and which illustrations are analogous to the one here involved, as is pointed out in the opinion. Manifestly that rule for the measure of damages in this case (and which is the one insisted on by appellants) would be utterly impractical and glaringly inequitable in the exigencies of the case developed by the facts. Therefore, the opinion properly searches for, and finally discovers and applies what is regarded therein as the proper shaping tool from the law's reserved chest, but which I think is the improper one. Authority for the grafting upon a universally established rule an exception to meet the exigencies of the case, or to reshape and remodel it so as to fit the facts in hand, is well stated in the text of 21 C.J. pages 22 to and including page 30, and the devotion of more time and space would thoroughly demonstrate it. Such authority springs from the recognized fact that the reservoir of the law, containing available equitable principles, is not supposed to ever become so depleted as to render courts impotent in the
administration of justice. The theory herein advanced for the correct principle upon which the judgment should be based, recognizes and employs that authority, the same as does the majority opinion; but it is my conclusion that the theory herein advanced is the one best fitted and best calculated to guarantee and perpetually preserve the rights of all parties concerned than is the one adopted and approved by the majority members. The sui generis nature of the case producing the demonstrated exigencies undoubtedly calls for an exercise of that authority in declaring the principles upon which the rights of all parties concerned should be adjusted.

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 cœlum 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 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 has 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.

Joint ownership arises under three classes of acquired titles. Under one, the several owners are known as “cotenants”; under another they are known as “tenants in common”; and still another they are known as “joint tenants” or “holders in coparcenary.” But subsection 28 of section 732 of our Civil Code of Practice dispenses with the common-law distinctions and treats alike all of such joint ownerships. It was so interpreted and applied in the case of Melton v. Sellars, 167 Ky. 704, 181 S.W. 346. The Code provision, therefore, dispenses with the technical distinction of such joint ownerships and upholds all the rights that a cotenant would have at common law in and to the jointly owned property. Among those rights are (1) to employ the jointly owned property so as to produce profit to the one so employing it, as well as to his co-owner or owners, and (2) to call upon his cotenant or tenants, who do profitably employ the property, to account to him for his proportion of the net profits. See the text in 7 R.C.L. 832, § 26, and Freeman on Co-Tenancy, § 270 et seq.

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 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 consequence 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 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 principles or theory upon which it is based.