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Subterranean Limits of Land Ownership

Ira G. Stephenson
University of Kentucky

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STUDENT NOTES

SUBTERRANEAN LIMITS OF LAND OWNERSHIP

This subject requires a definition of the term "land". Any attempt to define so broad a term is difficult. The word "land", both in England and America, is a word of general application. It is *nomen generalissimum* and appears in many phases. In its more limited sense the term denotes the quantity and character of the interest the tenant may own in the land. Ordinarily, the term is descriptive of the ownership, and not of the thing owned. Thus, in its broadest sense, "land" legally embraces much more than the word literally imports, and includes all things that have become a part of, or attached to, the soil. Lord Coke, in defining land, said, in part: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cuius est solum, eius est usque ad coelum et ad inferos* is the maxim of the law; upwards, therefore, no man may erect any building, or the like to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the center of the earth belongs to the owner of the surface; as is every day's experience in the mining countries."¹ Coke thus stated an old maxim the origin of which fades back into antiquity and which has been adopted into the common law of both England and America.

An exploration into the application of the maxim by modern courts reveals an interesting divergence as to the application of *eius est usque ad coelum et ad inferos*. In recent developments in air law, the "ad coelum" part has not been applied to the air space,² and that part of the maxim has become practically meaningless under modern interpretation. Now, the rights of the owner of land to the air space above depend on such considerations as his own safety and that of his property.³ Most, if not all of the states have made this departure by statute. How have the courts applied the *ad inferos* part of the maxim? In recent American cases involving caves, the courts have shown greater disposition to follow the maxim almost absolutely.⁴

¹ 2 BL. COMM. 18.

² *Hinman v. Pacific Air Transport*, 84 F (2d) 755 (C.C.A. 9th 1936), noted in (1937) 4 Univ. Chi. L. Rev. 480; *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930), *Sweetland v. Curtis Airports Corp.*, 41 F (2d) 927 (D.C. Ohio 1930), *Mod.* 55 F (2d) 201 (C.C.A. 6th 1932)

³ *Hackley, Trespassers in the Sky* (1937) 21 Minn. L. Rev. 773; *Note* (1938) 72 U.S.L. Rev. 185.

⁴ *Wyatt v. Mammoth Cave Development Co.*, 26 F (2d) 332 (1928), *Marengo Cave Co. v. Ross*, 212 Ind. 624, 10 N.E. (2d) 917, 7 N.E. (2d) 56 (1937), *Edwards v. Lee's Adm'r.*, 265 Ky 418, 96

Reliance upon the common law view respecting the ownership of land, and the assumption that the ownership of a cave is necessarily in the owner of the surface above compelled the Appellate Court of Indiana to resort to adverse possession of the cave⁵ by the defendants in order to transfer the title. The Supreme Court of Indiana, however, reversed the Appellate Court because the adverse possession of the defendant did not fulfill the orthodox requirements that adverse possession be actual, open, notorious, exclusive, continuous, hostile, and under a claim of right.⁶ Reliance upon the same view compelled the Kentucky Court of Appeals in *Edwards v. Sims*,⁷ to affirm a judgment granting an injunction prohibiting defendant Edwards from trespassing on Sims's land. On final hearing in the Circuit Court, findings were made as to the damages to which Lee was entitled. These were to the effect that about one third of the cave was on or under Lee's land and that he was therefore entitled to one third of the net proceeds which had been derived from exhibition during the years, as to which proof had been offered. A judgment was, with corrections in computation, affirmed.⁸

If, however, it could be assumed that the plaintiffs in the above mentioned cave cases did not own *ad infernos*, it would have been possible for the defendants to have obtained ownership in the respective caves. In many cases such a holding would be desirable and could, indeed, be achieved in spite of the ancient maxim. It is submitted that the early protagonists of the maxim never intended it to be taken literally and that they never intended to establish any rights other than those closely associated with the surface, because such rights were the only ones contemplated. "The old sophistry," said Mr. Justice Logan, "that the owner of the surface of land is the owner of every thing from zenith to nadir must be reformed, the theory was never true in the past, but no occasion arose that required the testing of it. He owns nothing which he cannot subject to his dominion."⁹ The maxim is authoritative only in those situations in which it has been accepted and applied by the courts. In *Beardsley v. Hartford*¹⁰ the court said: "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, *cessante*

S.W. (2d) 1028 (1936), *Edwards v. Sims*, 232 Ky. 791, 24 S.W. (2d) 619 (1929). cf. *Cox v. Colossal Cavern Co.*, 210 Ky. 612, 275 S.W. 540 (1925).

⁵ *Marengo Cave Co. v. Ross*, 212 Ind. 624, 10 N.E. (2d) 917, 7 N.E. (2d) 56 (1937), cited *supra* note 4.

⁶ 2 *TIFFANY, REAL PROPERTY* (2d ed. 1920) secs. 500-504.

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

⁸ *Edwards v. Lee's Adm'r.*, 265 Ky. 418, 96 S.W. (2d) 1028 (1936); Note (1938) 72 U.S.L. Rev. 195.

⁹ *Edwards v. Sims*, 232 Ky. 791, 799, 24 S.W. (2d) 619 (1929); cited *supra* note 4, noted in (1938) 72 U.S.L. Rev. 185, 190.

¹⁰ 50 Conn. 542, 47 Am. Rep. 677 (1883).

ratione, cessat ipsa lex. This means that no law can survive the reasons on which it is founded. It needs no statute to change it. It abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force the old law, must cease to apply as a controlling principle to the new circumstances." In *Katz v Walkinshaw*¹¹ the court said: "whenever it is found that, the application of a given common law rule by our courts tends constantly to cause injustice and wrong rather than the administration of justice and right, then the fundamental principles of right and justice require that a different rule be adopted."

Aside from any analogy to air law, which limits the title above the surface to the extent to which the owner may reasonably make use thereof, damages should not have been granted in the cave cases, because no injury can be shown. If the surface owner has suffered no injury to himself or property, he should be allowed no recovery.¹² Even in cases of negligence on the part of the defendant, where no actual injury occurs to the plaintiff or his property, the courts refuse to allow a recovery even of nominal damages.¹³

A sound public policy dictates that the person who owns land should have no claim to the ownership of a cave which lies so far beneath the surface that he cannot reasonably expect to reach and use it. By analogy to the law regulating ownership of space above the ground, his only right should be that the law be not used so as to interfere unreasonably with his enjoyment of the surface.

There is no sound policy in the law which would deny the right to use property to a person who has the sole access to it and give that right to one to whom the property is utterly useless. If the cave is to be of value to anyone, and if the public is to enjoy the privilege of viewing the natural phenomena therein, it must be through the efforts of the owner of the apex. His industry, labor, and expense in utilizing it are sufficient for giving him present ownership.

If, however, the surface owner has reasonable access, or afterwards by excavation acquires an opening into the chambers below he would be entitled to all of the rights to the cave suggested for the owner of the apex. He would then have all of the benefits

¹¹ 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L.R.A. 236, 99 Am. St. Rep. 35 (1903).

¹² *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500 (1873) *Sheldon v. Sherman*, 42 N.Y. 484, 1 Am. Rep. 569 (1870), *Polebitzke v. John Week Lumber Co.*, 173 Wis. 509, 181 N.W. 730 (1921)

¹³ *Farrell v. Waterbury Horse R. R.*, 60 Conn. 239, 21 Atl. 675, 22 Atl. 544 (1891), *Sullivan v. Old Colony Street Railway*, 200 Mass. 303, 86 N.E. 511 (1908)

of the common law rule. He would not be deprived of the right to excavate and enjoy the subsoil profits, which is a well recognized right in the law of real property.¹⁴ Mining law has achieved this desirable result in allowing a miner to follow a vein of ore under the land of his neighbor where the apex is on the miner's own land.¹⁵

In a recent New York Case,¹⁶ the existence of a sewer 150 ft. beneath the surface was held not to be such an incumbrance as would permit a claim for breach of covenant against incumbrances. The court said: "It, therefore, appears that the old theory that the title of an owner of real property extends indefinitely upward and downward is no longer an accepted principle in its entirety. Title above the surface is now limited to the extent to which the owner of the soil may reasonably make use thereof. By analogy, the title of an owner of the soil will not be extended to a depth below ground beyond which the owner may not make use thereof."

It would certainly be regrettable to deprive human beings the right to view the intricate and beautiful handiwork of nature confined within American caves, in order to satisfy a rule anciently developed without foresight as to its possible consequences.

IRA G. STEPHENSON

COMPROMISE OF CONTRACT CLAIMS— A CRITICISM OF TANNER V MERRILL

That the law loves a compromise is a familiar maxim. The Kentucky Court has said that it is "the peculiar duty of the Courts of Justice to cherish and support" compromises, for the reason that they contribute to the peace and quiet of the community.

Ballentine's *Law Dictionary* defines a compromise as an agreement based on mutual concessions.³ The reasoning of the court is expressed in terms of consideration since each party has given up something, frequently the right to have his claim decided in court.³ Three types of fact situations are generally classified as compromises, although not all of them fit into this definition.

The first is the part payment of an undisputed debt then due. The creditor may collect the balance by legal action, for there was no consideration. The debtor did no more than he was bound to do and the fact that the creditor gave a receipt in full is immaterial.⁴

¹⁴ 1 TIFFANY, REAL PROPERTY (2d ed. 1920) sec. 253.

¹⁵ COSTIGAN, MINING LAW (1908) secs. 113, 114.

¹⁶ Boehringer v Montalton, 142 Misc. 560, 254 N.Y.S. 276 (1931)

¹ Fisher v May's Heirs, 5 Ky ((2 Bibb) 448, at 450 (1811).

(1930) p. 250.

³ Taylor v. Patrick, 4 Ky (1 Bibb) 168 (1808).

⁴ N. Y. Insurance Co. v. Van Meter's Adm'r., 137 Ky. 4, 121 S.W. 438 (1909), Warren v. Hodge, 121 Mass. 106 (1876), Nixon v. Kiddy, 66 W. Va. 355, 66 S.E. 500 (1909)