without regard to the outcome of the federal claim. *Vogue Co. v. Vogue Hat Co.*, 12 F. (2d) 991 (C.C.A. 6th 1926); *Chanel, Inc. v. Riviere Perfumes*, 8 Fed. Supp. 473 (N.Y. 1934); *L. E. Waterman Co. v. Gordon*, 8 F. Supp. 351 (N.Y. 1934). A third group of cases permits consideration of the local claim only in computing damages for the federal claim. *Wilson Mfg. Co. v. Myers*, 25 F. (2d) 659 (C.C.A. 6th 1928); *Swanfeldt v. Waldman*, 50 F. (2d) 445 (D.C. Cal. 1931).

The Supreme Court has held that the unfair competition claim may be adjudicated on the merits irrespective of the decision on the federal claim and of the absence of diversity of citizenship. *Hurn v. Oursler*, 289 U.S. 238 (1933); 46 Harv. L. Rev. 1339 (1933); 32 Mich. L. Rev. 412 (1934); see also, 1 Univ. Chi. L. Rev. 480 (1934). The only distinction between the *Hurn* and the principal case is that in the former the Court decided that the copyright although valid had not been infringed, whereas in the latter the patent was held invalid; a distinction which the Supreme Court itself considered immaterial. *Hurn v. Oursler*, 289 U.S. 238, 244–45 (1933). The holding in the *Hurn* case provides a desirable solution since much evidence and argument relevant to the federal issue will also be relevant to the unfair competition claim; thus making expedient a decision of the local question, precluding the defendant from raising jurisdictional questions for dilatory purposes, and saving the plaintiff from a burdensome duplication of suits. Probably, however, the Court will require the federal claim to have been prosecuted in good faith.

The same result could be reached by a broad construction of "cause of action." Since substantially the same evidence and argument are used to support the infringement and unfair competition claims, the plaintiff may well be considered to have set out one cause of action which can be disposed of on either or both of two grounds. See *Hurn v. Oursler*, 289 U.S. 238, 246, 247 (1933); *Vogue Co. v. Vogue Hat Co.*, 12 F. (2d) 991, 994, 995 (C.C.A. 6th 1926); *Waterman v. Gordon*, 8 F. Supp. 351, 353 (N.Y. 1934). Such a definition of "cause of action" would emphasize evidential convenience rather than traditional analyses of theories of recovery. Clark, Code Pleading 83, 84 (1928). In view of the general controversy over the scope of "cause of action," however, the solution previously suggested provides a less dangerous method of reaching a desirable result.

Real Property—Ownership of Caves—Subterranean Limits of Land Ownership—[Indiana].—The mouth of Marengo cave was discovered in 1883 on the property of the defendant's predecessor in title. Shortly thereafter the cave was explored and since that time, it has been exhibited for profit by the owners of its mouth. The plaintiff purchased a neighboring tract of land in 1908, and in 1929 brought suit to secure a survey of the cave and to quiet title to that portion which should be found to extend under his land. The defendant filed a cross-complaint to quiet title to the whole cave in his favor. The survey was ordered by the lower court and the plaintiff's claim to the portion of the cave under his land was sustained. *Held*, reversed. The defendant has acquired title by adverse possession. *Marengo Cave Co. v. Ross*, 7 N.E. (2d) 59 (Ind. App. 1937).

Apparently assuming that the rights of ownership in a cave are necessarily in the owner of the land above it, the court disposed of the adverse possession point according to accepted authority when it found fulfillment of the orthodox requirements that adverse possession be actual, open, notorious, exclusive, hostile, continuous, and under a claim of right. See 2 Tiffany, Real Property §§ 500–504 (2d ed. 1920). The ignorance

during the limitation period that any of the cave lay under the land of the plaintiff cannot, on principle, be distinguished from mistake in the location of a surface boundary. Such mistake is dealt with in two ways: (1) it is allowed no independent significance (*Rennert v. Shirk*, 163 Ind. 542, 72 N.E. 546 (1904)), or (2) reference is made to the intention of the adverse claimant and if his intention has been to claim to the full extent of his possession his claim will be sustained (*Davis v. Owen*, 107 Va. 283, 58 S.E. 581 (1907)). Since an intention to claim only to the rightful boundary deprives the claim of its hostility, the practical effect of both views is the same.

Reliance upon the common law view toward the ownership of land, expressed by the ancient maxim, *Cujus est solum, ejus est usque ad coelum et ad infernos*, compelled the Indiana court to consider the problem of adverse possession. If, however, it could be assumed that the plaintiff does not own the land "to the depths," it would have been possible for the defendant to obtain ownership to the entire cave without being forced to rely upon adverse possession. In many cases this result would be desirable, and it could, indeed, be achieved in spite of the ancient maxim, although the maxim has been applied or implied in the few American cases involving caves. See *Cox v. Colossal Cavern Co.*, 210 Ky. 612, 275 S.W. 540 (1925); *Wyatt v. Mammoth Cave Development Co.*, 26 F.(2d) 322 (C.C.A. 6th 1928); *Edwards v. Sims*, 232 Ky. 791, 24 S.W. (2d) 619 (1929); *Edwards v. Lee's Adm'r*, 265 Ky. 418, 96 S.W.(2d) 1028 (1936). Limitation of the scope of the common law rule in this connection is justified by several factors: (1) The maxim, traceable to the *Accursian Gloss* of approximately the year 1250, was not intended to establish any rights other than those very closely associated with enjoyment of the surface of the land, because those were the only rights contemplated by its early protagonists. Application of the maxim has been extended, but it is authoritative only in those situations in which it has been accepted and applied by the courts. See Bouve, Private Ownership of Airspace, 1 Air L. Rev. 232, 243–57 (1930); Vinding Kruse, Das Eigentumsrecht 340 (1931). (2) The more recent foreign codes show a tendency to abandon the ancient maxim. German Code § 905 (1897) (although the landowner's title extends to the airspace above and the depths under the surface, he cannot object to activities carried on in such depths "that he has no interest in their prevention"); Swiss Code § 667 (1907) (ownership extends to the space above and below the surface to such a height and depth only as there is an interest of the owner of the surface in its exercise); Chinese Code art. 773 (1929) (ownership of land extends to such height and depth above and below the surface as is advantageous for the exercise of ownership of the surface; interference by others cannot be excluded if it does not obstruct the exercise of that ownership). (3) In recent developments in air law the maxim has not been applied to the airspace. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Swetland v. Curtis Airports Corp.*, 41 F. (2d) 929 (D.C. Ohio 1930), mod. 55 F.(2d) 201 (C.C.A. 6th 1932); *Hinman v. Pacific Air Transport*, 84 F.(2d) 755 (C.C.A. 9th 1936), noted in 4 Univ. Chi. L. Rev. 480 (1937). Even by those who would preserve the maxim in this situation, so broad a privilege is created against it that the maxim is practically meaningless. Rest., Torts § 193 (1934). (4) Mining law has completely divorced the ownership of the surface and the mineral beneath it in allowing a miner to follow a vein of ore under the land of his neighbor. Costigan, Mining Law §§ 113, 114 (1908). (5) The application of the doctrine of adverse possession to substrata of land, in the principal case itself, shows a realization that the ownership of land is divisible vertically as well as horizontally, and such a notion of dividing ownership along vertical lines is obviously incompatible with the maxim.

Considerations of policy dictate that the person who owns land should have no claim of ownership to a cave which lies so far beneath his land that he cannot reasonably expect to reach and use it. By analogy to air law, his only right should be that the laws be not so used as to interfere unreasonably with his enjoyment of the surface. Swetland v. Curtis Airports Corp., 41 F.(2d) 929 (D.C. Ohio 1930), mod. 55 F.(2d) 201 (C.C.A. 6th 1932); Rest., Torts § 194 (1934). He has that much right in respect to the land of his neighbor. Walsh, Equity § 36 (1930). There is no sound policy in the law which would deny the right to use property to the person who has the sole access to it and give that right to one to whom the property is utterly useless. In contrast to the large number of people who have access to a given airspace, as a practical matter only one person has access to the cave. If the cave is to be of value to anyone, it must be used through him. His industry and expense in utilizing the cave are sufficient grounds for giving him ownership of it.

When, however, a cave is reasonably accessible to the surface owner the arguments just advanced in favor of the owner of the mouth no longer apply to him. In such a case, if the surface owner were to be deprived of the subterranean ownership he would lose a distinct and physically accomplishable right—to excavate and enjoy the subsoil profits—which is a well recognized right in the law of real property. 1 Tiffany, Real Property §§ 253 ff. (2d ed. 1920). An exercise of that right would put him in the same position in relation to the cave as the owner of the mouth, thereby entitling him to all the arguments advanced in that person's favor, together with the benefit of the traditional common law rule. Mere failure to exercise the right should not divest it in the absence of adverse possession. The recent tendency to allow airplane flights to invade the lower strata of the air may be prompted by policies in favor of air transportation that will not aid the owner of the mouth of a cave, which runs close to the surface in establishing rights in it. See *Hinman v. Pacific Air Transport*, 84 F.(2d) 755 (C.C.A. 9th 1936), noted in 4 Univ. Chi. L. Rev. 480 (1937).

Torts—Agency—Liability of Railroad to Sender for Loss of Registered Mail—[Illinois].—A bank, the plaintiff's insured, sent a package containing $21,000 in currency by registered mail. After being carried part way in a mail car on the defendant's railway under the direction of a government mail clerk, the package, together with other mail, was put in a locked pouch and transferred to a baggage car on one of the defendant's branch-line trains where it was handled by trainmen, none of whom had taken the government oath prescribed by the postal laws. During some switching operations, the baggage car was negligently left unguarded and the money stolen. The plaintiff, having paid the bank, brought this action as assignee of the bank's claim. From a judgment for the plaintiff for the full amount of the loss, the defendant appealed. *Held*, three justices dissenting, reversed. The defendant is an agent of the government in the exercise of a public function and is therefore not liable for torts of its own agents. *Aetna Ins. Co. v. I.C. Ry. Co.*, 365 Ill. 303, 6 N.E. (2d) 189 (1937).

Invoking the doctrine that public officials are not liable for the negligent acts of their official subordinates seems ill-advised in the instant case. Although the doctrine may have a historical basis in some tenuous notion of the identity of official and government which would entitle him to governmental immunity (see *Lane v. Cotton*, 1 Ld. Raym. 646, 648 (1701)), it has been most commonly supported by the policy of making public office attractive to responsible men. *Robertson v. Sichel*, 127 U.S. 507, 515 (1888);