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);

1 Mechem, Agency § 1502 (2d ed. 1914). This policy does not apply to railroads, however, because the carrying of mail is obligatory by statute. 39 Stat. 428 (1916); 39 U.S.C.A. § 539 (1928).

The doctrine finds its traditional application in cases of regular government officials (*Lane v. Cotton*, 1 Ld. Raym. 646 (1701); *Dunlop v. Monroe*, 7 Cranch. (U.S.) 242 (1812); *Robertson v. Sichel*, 127 U.S. 507 (1888)), but the same result is dictated by broader considerations in the law of agency. See *Denton v. Y. & M. Ry. Co.*, 284 U.S. 305 (1932); *Norfolk & W. Ry. Co. v. Hall*, 57 F.(2d) 1004 (C.C.A. 4th 1932). In a typical agency situation, an intermediate corporate official has not been held liable for the negligence of his subordinates because the benefits of the subordinates' activity run primarily to the corporation. *Ellis v. So. Ry. Co.*, 72 S.C. 465, 52 S.E. 228 (1905); *Brown Lumber Co. v. Sessler*, 128 Tenn. 665, 163 S.W. 812 (1914). Similarly in the case of the regular public officer, the benefit runs to the government. See *Dunlop v. Monroe*, 7 Cranch. (U.S.) 242 (1812) (postmaster). And where a carrier transporting mail has so been exempted as a public official, the result is again explainable on general agency doctrine; here, the employees of the carrier having been sworn into government service, the carrier lacked control and could not prevent negligence. *Conwell v. Voorhees*, 13 Ohio 523 (1884); *Foster v. Metts & Co.*, 55 Miss. 77 (1877); *Boston Ins. Co. v. C.R.I. & P. Ry. Co.*, 118 Iowa 423, 92 N.W. 88 (1902); *Banker's Mutuality Casualty Co. v. M.St.P. & S.S.M. Ry. Co.*, 117 Fed. 434 (C.C.A. 8th 1902).

But the instant case is unable to derive support from these conventional agency notions. Since the employees of the railroad had not taken the government oath, the railroad had complete control of their activity. Further, the railroad and not the government was the direct recipient of the benefits of the subordinates' acts. Thus in such cases, vicarious liability has previously been imposed upon the railroad. *Sawyer v. Corse*, 17 Gratt. (Va.) 230 (1867); *Central R. & B. Co. v. Lampley*, 76 Ala. 357 (1885); *Skaggs v. M.K.T.R. Co.*, 228 Mo. App. 808, 73 S.W. (2d) 302 (1934). In reaching its result, moreover, the court ignored its earlier decision in *Barker v. C.P. & St.L. Ry. Co.* (243 Ill. 482, 90 N.E. 1057 (1909)), relied upon by the appellate court and the dissenting justices, which held that a railroad carrying mail is an independent contractor with the government and liable on *respondeat superior*.

The court further argued that entirely apart from considerations of agency it would be unfair to impose liability on the railroad since it did not know the value of the mail it was transporting and hence had no opportunity to take precautions commensurate with the risk assumed. If strict common carrier liability were here sought to be imposed, this argument might have validity (3 Univ. Chi. L. Rev. 144 (1935)), but this action is based on negligence. Since the conduct of the railroad was negligent, even if the contents of the package were of so little value that a duty to use only slight care was raised, and the injury were of a foreseeable type, the value of the package is irrelevant on the issue of liability. The traditional policy argument against imposition of liability on agencies serving the public—that the cost to the public will be greatly increased—seems very weak in this instance, since it is only the exceptional case in which mail is not under the direct control of a government mail clerk. Cases will be further limited by the refusal of courts to impose liability for the loss of non-mailable matter. *United States v. Atl. Coast Line R. Co.*, 215 Fed. 56 (C.C.A. 4th 1914) (diamonds).

Nor finally does the court find much comfort in resurrecting the ghost of the doctrine of *Winterbottom v. Wright* (10 M&W. 109 (1842)), that a tort action based on a

duty created by contract is limited to parties privy to that contract. In these terms, the sender would not be able to rely on the contract between the railroad and the government, to which he is not a party, to raise a duty of care from the railroad to him. To adhere to the privity doctrine and thus obscure the patent duty arising from the possession in the railroad is one more example of the classic failure to recognize a distinct duty arising apart from the contract. See Labatt, Negligence in Relation to Privity in Contract, 16 L. Q. Rev. 168 (1900); *McPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916).

Trade Regulation—Anti-Trust Laws—Use of Patents and Copyrights in Restraint of Trade—[Federal].—In a suit for copyright infringement the defendant answered that the plaintiff had a virtual monopoly of popular music copyrights in violation of the Sherman Act. The license fee demanded of the defendant had been twice that paid by the defendant's competitor. The plaintiff moved to strike. *Held*, motion granted. *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (R. I. 1937).

Through cross-licensing agreements with other large manufacturers, the defendant controlled indispensable patents on communication equipment. The plaintiff brought a suit to enforce the issuance of a license to him alleging that the defendant's control was a violation of the Sherman Act. *Held*, suit dismissed. *Andrea v. Radio Corporation of America*, 14 F. Supp. 226 (1936), aff'd, 88 F. (2d) 474 (C.C.A. 3d 1937).

Courts have been slow to apply the principles of the anti-trust laws to combinations involving patents or copyrights. The patent law gives patentees and copyright owners the "exclusive right to make, use and vend . . . ." (16 Stat. 201 (1870); 35 U.S.C.A. § 40 (1929)) and it is clear that the anti-trust laws do not affect the right of the owner of a single patent or copyright to license whomever he chooses at whatever rate he pleases. *Rubber Tire Wheel Co. v. Milwaukee Rubber W. Co.*, 154 Fed. 358 (C.C.A. 7th 1907). In some of the early cases under the Sherman Act courts were so impressed by the "exclusive right" thus granted that they extended the individual patent monopoly privilege to patent pools. *Bement v. National Harrow Co.*, 186 U.S. 70 (1902); *United States Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364 (C.C.A. 9th 1903); see *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1912) (overruled in *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917)); *contra*, *National Harrow Co. v. Hench*, 83 Fed. 36 (C.C.A. 3d 1897). While nothing in the patent law expressly limits the manipulation of patents, succeeding cases have considerably lessened the powers originally thought to have been granted to patentees and copyright holders. The right to control resale prices has been denied. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Straus v. American Publishers Ass'n*, 231 U.S. 222 (1913); *Victor Talking Machine Co. v. Straus*, 243 U.S. 490 (1917); *Boston Store v. American Graphophone Co.*, 246 U.S. 8 (1918). The Court has invalidated so-called "tying contracts," whereby use of the patented product is granted only to those purchasing other products from the patentee. *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917); *Carbice Corp. v. Am. Patents Development Corp.*, 283 U.S. 27 (1931); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936). The trade control in the principal cases, however, is less clearly affected by the Sherman Act since it was exercised by the patentee directly upon the marketing of the patented and copyrighted articles themselves. But there is some indication that application of the Sherman Act will not be affected in any case by the fact that the combination at-