would be to tax their proceeds as ordinary income in all cases under a "spreading" method similar to that now existing in § 107(b) of the Code.[29] But instead of requiring 80% to be received in one year, a lesser percentage should be the measure, based on the time consumed in developing the invention.[30] This solution would tend to reduce the unnecessary tax benefit accorded inventors over other taxpayers engaged in selling personal services.[31]

RIGHT OF EMPLOYEE TO SUE EMPLOYER FOR AN INTENTIONAL TORT

Workmen's compensation laws propose to make some of the consequences of industrial accidents and conditions a part of the cost of production to be borne by industry and eventually by society. Thus, the acts vitiate the common law defenses to an action for negligence, which had forced the burden of industrial mishaps on the individual employees, and assure workers of definite and speedy payments if incapacitated during the course of their employment. In return, the employer's liability is limited to a portion of the wage loss and medical expenses, against which he may insure. To further the policy involved, the machinery of the acts is uniformly made the exclusive remedy.[1] A recent case, *Bevis v. Armco Steel Corporation*,[2] presented the issue of

---

income derived from filing and final fees and from the annual taxes would be approximately the same as the income realized under the present system. But this, it has been contended, would result in the successful and more profitable patents paying more of the country's overall tax burden. Frederico, *Taxation and Survival of Patents*, 19 J. PAT. OFF. SOC'Y 671 (1937); Brodahl, *Taxation of the Patent Right*, 17 GEO. WASH. L. REV. 482, 483 (1949).

29. INT. REV. CODE § 107(b).

30. Since it is seldom that eighty per cent will be received in one year, the percentage should be based on the length of time necessitated to develop the patent. The following are rough estimates of more equitable required percentages:

Length of Development	Per Cent Received in One Year
Three years	43⅓%
Four years	35 %
Five years	30 %
Six Years	26⅔%

To change § 107(b) without a corresponding change in § 107(a) might partially appease those who contend that the tax law should favor inventors.

31. Taxation of royalties at capital rates evidences one more instance of the absurd manner in which a perhaps once valid tax favor has been bestowed. See Miller, *The Capital Asset Concept: A Critique of Capital Gains Taxation*, 59 YALE L.J. 837, 1057 (1950). The classical theory of capital rates was to tax income accruing over a long period but received in an aggregate at rates roughly correlated to those which would have applied had the income been taxed in the year it was realized. But receipts of royalties are usually spread over years.

---

1. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 2-10 (1944); 1 SCHNEIDER, WORKMEN'S COMPENSATION LAW § 1 (2d ed. 1932); Honnold, *Theory of Workmen's Compensation*, 3 CORNELL L. Q. 264 (1918).

2. 86 Ohio App. 525, 93 N.E.2d 33 (1949), *aff'd mem.*, 153 Ohio St. 366, 91 N.E.2d 479, *cert. denied*, 70 Sup. Ct. 74 (1950). The appeal to the Ohio Supreme Court and the petition for certiorari to the U. S. Supreme Court were based on constitutional grounds.

whether an exclusive remedy clause prevents a common law action where the employer has committed an intentional tort.

In the *Bevis* case the employer's physicians had induced the employee to continue working by purposely concealing the fact that he had contracted silicosis and by representing that their examinations disclosed no evidence of this disease. Becoming permanently and totally disabled, the employee accepted compensation and later brought an action for deceit. A demurrer to the complaint was sustained, and affirmed on appeal, on the ground that the sole remedy was under the Ohio Workmen's Compensation Act.[3]

Although exclusive remedy clauses are usually worded broadly,[4] most jurisdictions in which the question has arisen have held that a suit for an intentional tort is not barred.[5] The common law action of assault, for example, has been sustained on the ground that the injury was not "accidental" and therefore not covered by the acts.[6] Concomitantly, where employees have

3. OHIO GEN. CODE ANN. § 1465-37 *et seq.* (1946).

4. These clauses differ but are similar in purpose. The Indiana statute is illustrative, providing that: "The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death." IND. STAT. ANN. §40-1206 (Burns, 1933). The Ohio statute seems to go farther than most as it bars a common law action against an employer whether the injury, disease, or condition is compensible or not. OHIO GEN. CODE ANN. § 1465-70 (1946). See Note, 5 OHIO ST. L.J. 436 (1939). Despite the generality of these clauses, they have frequently been construed not to preclude a common law action when to do so would prevent any recovery, or would be contrary to the purposes of the acts. For example, employees have been allowed to recover from their employers for injuries and diseases not compensible under the acts, HOROVITZ, *op. cit. supra* note 1, at 321, and third persons from whom an employee has recovered may obtain indemnity from the employer when the latter was primarily at fault in causing the injury. American District Telegraph Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950).

5. Heskett v. Fisher Laundry & Cleaners Co., 230 S.W. 2d 28 (Ark. 1950); Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Lavin v. Goldberg Bldg. Materials Corp., 274 App. Div. 690, 87 N.Y.S.2d 90 (Third Dep't 1949); Richardson v. The Fair, Inc., 124 S.W.2d 885 (Tex. Ct. Civ. App. 1939); Stewart v. McLellan's Store Co., 194 S.C. 50, 9 S.E.2d 35 (1940); HOROVITZ, *op. cit. supra* note 1, at 336; Note, 2 ARK. L. REV. 130 (1948). *Contra*: McLaughlin v. Thompson, Boland, & Lee, 72 Ga. App. 564, 34 S.E.2d 562 (1945).

6. Le Pochat v. Pendleton, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd mem.*, 271 App. Div. 124, 68 N.Y.S.2d 594 (First Dep't 1947); DeCoigne v. Ludlum Steel Corp., 251 App.. Div. 662, 297 N.Y. Supp. 636 (Third Dep't 1937); Boek v. Wong Hing, *supra* note 5. Since the compensation acts replaced the action for negligence as a remedy against employers, the courts might be more reluctant to allow a common law action for physical injuries resulting from reliance on misrepresentations, the usual remedy in such cases being an action for negligence. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty,* 41 HARV. L. REV. 733, 734 (1929). However, damages for personal injuries are recoverable in an action for deceit. Flaherty v. Till, 119 Minn. 191, 137 N.W. 815 (1912); Hoar v. Rasmussen, 229 Wis. 509, 282 N.W. 652 (1938); PROSSER, TORTS 703 (1941). Moreover, whether an action for deceit will lie or not, there is no doubt that an intentional tort was committed in the Bevis case for which an action should lie whatever its name. PROSSER, TORTS 5 (1941); Smith, *Torts Without Particular Names,* 69 U. OF PA. L. REV. 91 (1921). Certainly, an intentional misrepresentation which results in

chosen to seek compensation rather than pursue a common law action, recovery has been allowed by rationalizing that from the employee's point of view the assault was "accidental," since unexpected.[7] This is a nice verbalistic distinction between what is or is not accidental but is of little utility other than as a means to justify a desired result.[8]

The underlying basis for permitting the common law action is that it is *not* the purpose of the compensation acts to allow employers to insure against their intentional wrongs, thereby escaping civil liability, while relegating their unfortunate victims to the partial and meager relief of workmen's compensation.[9] The common law forbids intentional tort liability insurance[10] and there is nothing to indicate a reversal of this policy. None of the statutes expressly providing for instances of willful misconduct by employers limits the employee to the compensation given for other industrial injuries.[11] Intentional wrongs are generally regarded as more reprehensible than those resulting from carelessness.[12] And exemplary as well as compensatory damages may be recovered, as a punishment and deterrent, for an intentional tort, but not for negligence.[13] Further, one of the secondary purposes of the compensation acts is to make it advantageous for employers to improve safety conditions and

---

permanent disability is at least as reprehensible as an assault and battery, especially where the employer profited from his wrong by securing the continued services of a valued employee.

7. Pawnee Ice Cream Co. v. Yates, 164 Okla. 48, 22 P.2d 347 (1933). *Contra:* Rumbulo v. Erb, 19 N.J. Misc. 311, 20 A.2d 54 (Ct. of C.P. 1941). The holding of the Pawnee case has been accepted by most jurisdictions in other types of workmen's compensation cases, especially in the last few years. Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E.2d 364 (1945) (employee injured by defective machinery); Duncan v. Perry Packing Co., 162 Kan. 79, 174 P.2d 78 (1946) (worker electrocuted due to gross negligence of employer); Comm. of Taxation & Finance v. Bronx Hospital, 276 App. Div. 708, 97 N.Y.S.2d 120 (Third Dep't 1950); Horovitz, *Modern Trends in Workmen's Compensation,* 21 IND. L.J. 473, 491 (1946). Employees have obtained compensation for injuries caused in the course of their employment by the assaults of employers, supervisory employees, fellow workers, and even by outsiders on the grounds that such assaults were "accidental." See, generally, Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws,* 41 ILL. L. REV. 311 (1946).

8. "So far as such injury relates to the injured employee it is, as to his right to accept compensation, accidental. So far as the assaulting employee or employer is concerned, the act is deliberate and intentional and not accidental. This is a rational basis on which an employee may make an election either to claim compensation or to sue at common law." Mazzaredo v. Levine, 274 App. Div. 122, 80 N.Y.S.2d 237, 243 (First Dep't 1948) (concurring opinion).

9. See Heskett v. Fisher Laundry & Cleaners Co., 230 S.W.2d 23 (Ark. 1950); Lavin v. Goldberg Bldg. Materials Corp., 274 App. Div. 690, 87 N.Y.S.2d 90 (Third Dep't 1949); Richardson v. The Fair, Inc., 124 S.W.2d 885 (Tex. Ct. Civ. App. 1939); HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 336 (1944).

10. VANCE, INSURANCE 64 (2d ed. 1930); Woodford, *Insurance Against the Consequences of Wilful Acts,* (1948) INS. L. J. 867, 874.

11. See notes 18, 19 and 23 *infra.*

12. PROSSER, TORTS 39 (1941).

13. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 477, 487 (1906); McClelland, *Exemplary Damages in Indiana,* 10 IND. L.J. 275 (1935).

reduce injuries in their businesses.[14] To remove the deterrent effect of punitive damages and to substantially circumscribe the actual damages recoverable for willful injuries can hardly be considered an inducement to this end, especially as the employer may, under the acts, insure against such limited liability. And finally, to so restrict the employee to workmen's compensation would be of no substantial benefit to one for whose benefit the statutes were enacted, since the common law defenses which made recovery from employers so difficult in an action for negligence were never applicable in the case of an intentional tort.[15] For these reasons the interpretation placed upon the exclusive remedy clause in the *Bevis* case appears to he unsound.

Yet, in the *Bevis* case compensation was accepted under the act.[16] And it has been held that, although the exclusive remedy clause be considered inapplicable to intentional wrongs, the employee nevertheless must elect between accepting compensation and pursuing his common law action.[17] But there is no compelling reason why the employee should be required to make an election,[18] and a mandatory choice between the two remedies can impose hardship. Many workers do not have sufficient resources to carry them through a period of disablement and to bear the costs of a legal proceeding. The very ones who need a full redress most would have no practical alternative to the acceptance of workmen's compensation. A few acts meet this objection

14. Bohlen, *The Drafting of Workmen's Compensation Acts,* 25 HARV. L. REV. 328, 333 (1912).

15. Contributory negligence is not a defense to intentional torts. PROSSER, TORTS 402 (1941). The fellow servant rule would not apply to a tort committed by an employer himself, nor, in those states which adopted the vice-principal rule, where it was committed by a superior employee. Gibbons, *Who Is a Vice-Principal with Respect to the Law of Master and Servant,* 13 VA. L.J. 725 (1889). Of course, a servant would not assume the risk of an intentional tort. See Thompson, *Under What Circumstances a Servant Accepts the Risk of His Employment,* 31 AM. L. REV. 82 (1897).

16. See State ex rel. Bevis v. Coffinberry, 151 Ohio St. 293, 85 N.E.2d 519 (1949). Bevis was awarded $260 as compensation for his silicotic condition, and brought this earlier action to have the award increased.

17. Heskett v. Fisher Laundry & Cleaners Co., 230 S.W.2d 28 (Ark. 1950); Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); DeCoigne v. Ludlum Steel Co., 251 App. Div. 662, 297 N.Y. Supp. 636 (Third Dep't 1937); Note, 2 Ark. L. Rev. 130 (1948). But see Le Pochat v. Pendelton, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd mem.,* 271 App. Div. 124, 68 N.Y.S.2d 594 (First Dep't 1947). The acceptance of compensation does not constitute a binding election if the employee's application for compensation was fraudulently induced by his employer. Johnsen v. American-Hawaiian S.S. Co., 98 F.2d 847 (9th Cir. 1938); Pisanello v. Polinori, 60 Ohio App. 422, 22 N.E.2d 92 (1938). In some jurisdictions, the employee may also rescind his acceptance of compensation if he was ignorant of his right to elect at the time. Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts,* 12 U. OF CHI. L. REV. 231, 250 (1945); Smith v. Price Bros. Co., 131 F.2d 750 (6th Cir. 1942); Johnsen v. American-Hawaiian S.S. Co., *supra. Contra:* Talge Mahogany Co. v. Burrows, 191 Ind. 167, 130 N.E. 865 (1921).

18. A few statutes specifically provide for an election of remedies by an employee disabled by his employer's intentional wrong. ARIZ. CODE ANN. § 56-946 (1939); KY. REV. STAT. § 342.015 (2) (1946); MD. ANN. CODE GEN. LAWS ART. 101, § 44 (Cum. Supp. 1947); UTAH CODE ANN. § 42-1-57 (1943).

by affording compensation increased a fixed percentage over what it would ordinarily be for the injury suffered, when it was due to an employer's willful or wanton misconduct.[19] This has the advantage of reducing litigation and the consequent expenses, awarding a more adequate compensation, and penalizing employers for their intentional wrongs. But the employee's recovery would still be based primarily on the wage loss suffered and would not necessarily bear any close relationship to his actual damages.[20]

A more equitable solution is suggested by those cases involving an employee who has been tortiously injured by a third party. Many state compensation acts have third party clauses[21] which allow the employee both to accept compensation and to sue the third party, with the employer or insurer subrogated to part of the cause of action against the tortfeasor to the extent of compensation paid, plus costs.[22] No reason suggests itself for denying a

19. CAL. LABOR CODE § 4553 (Cum. Supp. 1949) (50% increase with a $3750 maximum); ANN. LAWS OF MASS. c. 152, § 28 (1943) (100% increase). The employee cannot bring a common law action in these states. Buttner v. American Bell Tel. Co., 41 Cal. App.2d 581, 107 P.2d 439 (1940); Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir 1928). In California, the employer cannot insure against this additional liability. CAL. INS. CODE § 11661 (1944). The Ohio Constitution, Art. II, § 35, provides that if the injury or death of the employee results from the employer's violation of a lawful order or requirement, then the award is to be increased between 15 and 50 per cent. See Lacher v. Roxanna Petroleum Corp., 40 Ohio App. 444, 179 N.E. 202 (1931).

20. It was estimated, in 1946, that the injured worker, on the average, received workmen's compensation to cover only 40% of his wage loss. Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311, 313 n. 5 (1946). As most of the acts are relatively inflexible, providing a maximum on the amount of compensation, it is probable that this percentage is even smaller today, considering the increase in the wage level since 1946. Hence, even if the compensation were doubled, as is done by the most liberal of the acts which allow increased payments, it would probably fall short of full satisfaction of even the wage loss suffered by the injured employee.

21. Three states have no third party provisions in their acts. Their courts allow the employee both to receive compensation and to sue the third party, retaining the full amount recovered. George v. Youngstown, 139 Ohio St. 591, 41 N.E.2d 567 (1942); Holland v. Morley Button Co., 83 N.H. 482, 145 Atl. 142 (1929); Mercer v. Ott, 78 W. Va. 629, 89 S.E. 952 (1916). The workmen's compensation is said to be in the nature of occupational insurance, Trumbull Cliffs Furnace Co. v. Schahovsky, 111 Ohio St. 791, 146 N.E. 306 (1924), or a pension, Mercer v. Ott, *supra*, and therefore a full common law recovery is permissible. This is against the public policy of the other states as a double recovery and an undue burden on their industrial insurance funds. See Behrendt, *supra* note 17, at 240; Hardman, *The Common Law Right of Subrogation Under Workmen's Compensation Acts*, 26 W. VA. L.Q. 183 (1920). This policy would be even stronger in the employer's intentional tort cases since the employer would also be subject to a double liability.

22. ARK. STAT. ANN. tit. 81, § 1304 (1947); CAL. LABOR CODE § 3853 (1943); CONN. REV. GEN. STAT. § 7425 (1949); GA. CODE § 114-403 (1933); ILL. ANN. STAT. c. 143, § 44 (Cum. Supp. 1949); IND. STAT. ANN. § 40-1213 (Burns Cum. Supp. 1949); IOWA CODE ANN. § 85.22 (1950); KY. REV. STAT. § 342.055 (1946); LA. GEN. STAT. ANN. § 4397 (1939); MINN. STAT. § 176.06 (Henderson 1945); MISS. GEN. LAWS c. 354, § 30 (1948); MONT. REV. CODE ANN. § 92-204 (1947); NEB. REV. STAT. § 48-118 (1943); NEV. COMP. LAWS ANN. § 2687 (1929); N.J. REV. STAT. § 34:15-40 (1937); N.Y. WORKMEN'S COMPENSATION LAW § 29; PA. STAT. ANN. tit. 77, §§ 671,1419 (Cum. Supp. 1949); R.I. GEN. LAWS c. 300, § 20 (1938); TENN. CODE ANN. § 6965 (Williams Cum. Supp. 1949); WIS. STAT. § 102.29 (1947). Most of the other statutes provide that the employee must elect

similar recourse to the employee intentionally harmed by his employer. If the employer were self insured, the compensation paid, plus costs, could be applied in mitigation of damages. Against an insured employer, the insurer could be subrogated to part of the employee's cause of action.[23] Those states which have comparable third party clauses[24] could achieve this result by applying them, either by analogy, or directly on the ground that the employer-employee relationship was severed by the action of the employer, who would then be in the position of a third party.[25] However, a statutory enactment would probably be necessary in some instances.[26]

If this recommended procedure were applied to the *Bevis* case the employee could obtain both the speedy relief afforded by the compensation act and full monetary satisfaction for all damages, punitive as well as actual. The employer could not limit or insure against liability for his intentional torts, yet would not suffer a double loss. Such an outcome would be more in harmony with the liberal purposes of the compensation acts.

SUBSTITUTED SERVICE AND WAIVER OF FEDERAL VENUE UNDER "NEIRBO"

Venue relates to the place of trial.[1] Parties to litigation enjoy it as a personal privilege, hence they may waive that privilege and consent to a different situs for trial.[2] *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, held

between compensation and a common law procedure. If he chooses to accept compensation, the employer alone may proceed against the third party with any excess recovery over the compensation paid, plus costs, going to the employee. For a classification and discussion of the third party clauses, see Behrendt, *supra* note 17, at 231; Note, 7 MONTANA L. REV. 89 (1946).

23. The Oregon, Washington, and West Virginia acts expressly permit an employee who has been injured by his employer's willful and wanton misconduct to accept compensation and sue the employer for any excess damages. ORE. COMP. LAWS ANN. § 102-1753 (1940); WASH. REV. STAT. ANN. § 7680 (1932); W. VA. CODE ANN. § 2527 (1943). In Texas, dependents of an employee who has died due to the intentional misconduct or gross negligence of his employer may sue at common law for exemplary damages. TEX. STAT., REV. CIV., ART. 8306, § 3 (1948).

24. See note 22 *supra*.

25. *See* Boek v. Wong Hing, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930).

26. It has been contended that in the third party cases the employer or insurer could be subrogated against the third party by analogy to the indemnity principle that subrogation takes place where one party has been subjected to liability for the fault of another. See Behrendt, *supra* note 17, at 240; Hardman, *supra* note 21, at 183. If this were applied to the employer's intentional tort cases, a double recovery by the employee could be prevented without resorting to statutory provisions, even though he were allowed both compensation and a common law action.

1. General Investment Co. v. Lake Shore Ry., 260 U.S. 264 (1922); Lee v. Chesapeake & O. Ry., 260 U.S. 653 (1922).

2. 28 U.S.C. 1406(b) (1948). Commercial Cas. Ins. Co. v. Stone Co., 278 U.S. 177, 179 (1928); Seaboard Rice Milling Co. v. Chicago, R.I. & P. Ry. Co., 270 U.S. 363 (1925); Grover Tank & Manf. Corp. v. New England Terminal Co., 125 F.2d 71 (1st Cir. 1942). "The privilege accorded may be lost by failure to assert it seasonably, by formal