The *Plotzki* case illustrates a weakness in the traditional statement of the attractive nuisance doctrine. The propensity of courts to attempt abstractly to rule that particular conditions may and others may not be "attractive nuisances,"[38] coupled with a fear that to once allow recovery for an infant drowning is to impose liability in every such instance, perhaps even where a natural pond is involved, has led to a questionable crystalization in the tort law of Indiana.[39] But the fear of strict liability—advanced by some as a reason for repudiating the attractive nuisance doctrine[40]—is justified only so long as the mistaken idea of "nuisance" (which implies strict liability) pervades the opinions.[41] The attractive nuisance cases, regardless of labels, are properly in the area of "negligence," where liability flows only from unreasonable conduct depending on the circumstances of each case.[42]

TAXATION OF ROYALTIES RECEIVED BY THE EMPLOYED INVENTOR

When the owner of patents or inventions transfers them in exchange for royalties, the return in excess of basis is considered for tax purposes a capital gain rather than ordinary income.[1] However, certain qualifications to this rule stand ready to frustrate the quest for favorable capital rates. There must

(1942). Insulation of electric wiring at certain places is required by statute in Indiana although it involves some expense. IND. STAT. ANN. § 20-304, (Burns 1950 Repl.).

38. See 9 ORE. L. REV. 190, 191-192 (1930).

39. The *Plotzki* case should be compared with the following recent cases in other jurisdictions in which a landowner was held liable for an infant drowning: Saxton v. Plum Orchards, 215 La. 378, 40 So.2d 791 (1949); Gimmestead v. Rose Bros. Co., 194 Minn. 531, 261 N.W. 194 (1935); Williams v. Morristown, 222 S.W.2d 607 (Tenn. App. 1946) (on demurrer), *modified* 189 Tenn. 124, 222 S.W.2d 615 (1946); Angelier v. Red Star Y. & P. Co., 215 Wis. 47, 254 N.W. 351 (1934) (on demurrer); Altenback v. Leheigh V. R.R., 339 Pa. 272, 37 A.2d 429 (1944).

40. See Smith, *Liability of Landowners to Children Entering Without Permission,* 11 HARV. L. REV. 434, 435-439 (1898).

41. *See* Coffey v. Oscar Mayer & Co., 252 Wis. 473, 479, 32 N.W.2d 235, 238 (1948), [1949] WIS. L. REV. 598.

42. See Gimmestead v. Rose Bros. Co., 194 Minn. 531, 536, 261 N.W. 194, 196 (1935); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948) *passim.* See also Hudson, *The Turntable Cases in the Federal Courts,* 36 HARV. L. REV. 826, 844-853 (1923); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort,* 21 MICH. L. REV. 495, 522 (1923).

A court may be reluctant to leave the fate of the landowner—always favored in the law—to the jury which may not fully appreciate his position. Yet, this does not excuse casting a decision in a particular case as a rule of law which, by stare decisis, will prevent a practical judgment of the rights of parties in subsequent litigation. See Bohlen, *Mixed Questions of Law and Fact,* 72 U. OF PA. L. REV. 111, 119-122 (1924).

1. Burnett v. Logan, 283 U.S. 404 (1931); Hofferbert v. Briggs, 178 F.2d 743 (4th Cir. 1949); Commissioner v. Carter, 170 F.2d 911 (2d Cir. 1948); United States v. Adamson, 161 F.2d 942 (9th Cir. 1947); Commissioner v. Hopkinson, 126 F.2d 406 (2d Cir. 1942); *See* Commissioner v. Celanese Corp., 140 F.2d 339, 341 (D.C. Cir. 1944). See also Greenlee and Kramer, *Capital Gains on Sales of Patents,* 26 TAXES 779 (1948).

be ownership of a property interest which can be sold,[2] retention of the same for six months,[3] and escape found from the exclusions from capital assets defined in § 117(a)[4] of the Internal Revenue Code (unless § 117(j) applies).[5] A recent case may portend a desirable trend toward denial of capital rates to the employed inventor in order to align taxation of royalties with the actualities of business relationships.

In Blum v. Commissioner,[6] decided in 1950, the taxpayer was hired to further develop preconceived ideas about the construction of a chain saw. Under the interrelated agreement (as found to have resulted from an original employment contract and two negotiated modifications of it) with the Disston Company he was bound to assign any ensuing patents to the company for a certain rate of royalties (which the negotiations resulting in the later two contracts had increased).[7] While seven of the taxpayer's patents were pending he left Disston but later assigned these plus two subsequently applied for. He continued to receive a percentage of the sales. The Commissioner's refusal to consider the royalty payments as capital gains was upheld by the Tax Court and the Third Circuit Court of Appeals. Since the taxpayer had been hired to invent and was bound to assign, the patents had at all times been the exclusive property of the Disston Company. The employe's only interest in the patents was to receive the emolument provided in the employment agreement, which, therefore, was ordinary income.[8]

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2. INT. REV. CODE § 117(a) provides: "The term 'capital asset' means *property held* by the *taxpayer*. . . ." (Italics added.)

3. INT. REV. CODE § 117(a) and (b).

4. These are: stock in trade which would be included in inventory if on hand at the close of the taxable year; property held primarily for sale to customers in the ordinary course of trade or business; property, used in trade or business, of a character which is subject to allowance for depreciation provided in section 23 (1); real property used in the trade or business; a copyright; a literary, musical, or artistic composition; or similar property held by a taxpayer who by his efforts created such property or held by a taxpayer whose basis is at least partly determined by reference to the basis of the creator; certain obligations of the United States.

5. Under § 117(j) when there are gains upon involuntary conversion of property used in the trade or business or capital assets, or from the sale or exchange of certain property used in the trade or business, the gain is capital; but when from these occurrences loss results which is greater than the gain from like occurrences, that loss is deductible as ordinary.

6. 183 F.2d 281 (3d Cir. 1950), *affirming* 11 T.C. 101 (1948).

7. Under all three "contracts" the taxpayer was to receive a regular monthly income as well as a certain percentage of net sales on saws the Disston Company might manufacture and sell. The later two agreements merely changed parts of those previously made. The assignment clause of the third stated, "If you obtain a patent (or patents) and assign it (or them) to this company, the said 10% commission will be payable during the life of the patent (or patents)." This clause read separately would seem to indicate that it was left to the taxpayer's discretion whether he would assign to Disston. A rejected argument, based on this language, was that taxpayer owned the inventions which he later sold to his employer for royalties. Arthur N. Blum, 11 T.C. 101, 106 (1948).

8. INT. REV. CODE § 22(a) and §§ 11 & 12.

Thus, § 117 rates are not applied to royalties when the inventor is bound to assign[9] since he could not sell a capital asset because equitable title to the invention vested in the employer from its inception.[10] A mere employer-employee relationship will not bind the employee to assign;[11] but when an inventor is retained, the usual contract contains the obligatory assignment clause.[12] Even without this provision, employment to invent or to pursue a

9. Where an inventor is not bound to assign future inventions and develops them on his own time and expense, courts have held that he has property which he may later sell as capital assets. Edward C. Meyers, 6 T.C. 258 (1946); John W. Hogg, 13 P-H T.C. MEM. DEC. ¶44,066 (1944).

10. When the employee contracts to assign all future inventions for a stipulated royalty or other compensation, he is in effect contracting to sell future goods. The employer by virtue of the fact that he is supplying the money and materials to develop the inventions acquires an equitable security interest in the invention at the moment of its development. Holroyd v. Marshall, 10 H.L. Cas. 191 (1861); VOLD, SALES §§42-44 (1st ed. 1931). By this interest the employer can compel specific performance and delivery of the inventions. Littlefield v. Perry, 88 U.S. 205, 206 (1874); Conway v. White, 9 F.2d 863, 866 (1925). Although this equitable interest may be cut off by a transfer of the inventions to a purchaser for value without notice, the employer has the substantial and important equitable title which for tax purposes gives him the property in the goods from the first. Lucas v. American Code Co., 280 U.S. 445, 449 (1930) (tax law requires a practical not a legal test).

The patent law by its application procedure has as its purpose the preservation of property rights in the invention to the individual inventor. See Mertz, *To Whom Does the Grant of Industrial Property Belong in the Case of an Invention by an Employee,* 28 J. PAT. OFF. SOC'Y 783 (1946). But for tax purposes to accord with business realities, courts try to take property out of the hands of the inventor and place it in the possession of his employer. Quaere whether these policies are at odds. For a discussion of patent policy, see Stedman, *Invention and Public Policy,* 12 LAW & CONTEMP. PROB. 649 (1947).

11. Even though the employer is not entitled to an assignment of the patent, where an employee in the course of his employment perfects an invention using his employer's time, labor, and materials, the employer has a free and irrevocable license or "shop right," under the process or product expressed in the employe's patent. Beyond this the inventor-employee retains his rights as owner. United States v. Dublier Condenser Corp., 289 U.S. 178 (1933), 28 TEX. L. REV. 728 (1950).

12. Information solicited and received from a number of large and small manufacturers throughout the country reveals that companies and inventor-employes consider inventions devised as belonging to the employer. Out of fourteen companies replying, twelve have specific contracts which require the employee to assign any inventions and patents conceived when so employed. Below is a typical contract:

"WITNESSETH:

"WHEREAS, the employer is engaged in the manufacture and sale of chemicals, . . . and in research activities for itself and others; and in all such activities utilizes patented and secret methods, . . . which constitute a valuable part of its assets; and

"WHEREAS, the employe, whether or not directly engaged in manufacturing or research activities, by reason of the nature of his duties may become informed of such technical information and may be enabled to contribute improvements of new inventions; and

"WHEREAS, the employer now maintains a bonus plan, under which bonuses may, in the discretion of its executive committee, be awarded to employes who have contributed in an unusual degree to the success of the employer by their inventions;

"NOW THEREFORE, in consideration of and as part of the terms of the employment or continuation of employment . . . of the employe by the employer at a wage or salary such length of time as shall be mutually agreeable, it is agreed as follows;

"1. Any and all improvements and inventions conceived or made by the employe during the period of his said employment, relating in any way to the activities of business of the employer shall be disclosed promptly to the employer and shall be the SOLE AND

specific inquiry, such as to perfect a particular instrument, poses the same objection—lack of salable property—to the favorable rates.[13]

Aside from the lack-of-property argument, the Bureau has additional weapons in its arsenal. The Commissioner may attempt to show that the invention was not held for the requisite six months.[14] This may sometimes be phrased in terms of an assumption that even if the inventor held property, he was bound to assign from its first instance and could not have held it for six months. The sale would, therefore, have been made immediately after the creation of the invention.[15] The conclusion sought is the same, in effect, as a lack-of-property argument would reach. Also, it is possible to argue that the gain is ordinary income because inventions were held primarily for sale to customers in the ordinary course of trade or business.[16] Due to a narrow interpretation of "customers" the argument stands little chance of success unless sales have been made to others besides the employer;[17] and sales of several inventions is a sine qua non to a finding of a separate business carried on by the inventor—the business of inventing and selling inventions.

There would seem to be slight chance for employed inventors to maintain successfully that royalties received should be taxed under § 117. But occasionally, where the inventor has greater bargaining power or merely where the contract is drafted in a more adept manner, the employer will be given less than the three rights—to manufacture, use, and sell—in the ensuing

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EXCLUSIVE PROPERTY OF THE EMPLOYER OR OF ITS NOMINEE: and whenever requested to do so by the employer, the employe shall execute any and all applications, assignments, and other instruments which the employer shall deem necessary in order to assign and convey to the employer or its nominee the sole and exclusive right, title and interest therein. These obligations shall continue beyond the termination of the period of employment with respect to improvements or inventions conceived or made by the employe during the period of said employment, and shall be binding upon his assigns, executors, administrators or other legal representatives. . . ." (Emphasis added.)

13. Property in the invention may be the employer's if it is shown conclusively that the employee was hired to develop the invention for the employer. United States v. Dublier Condenser Corp., 289 U.S. 178 (1933). If the employee had voluntarily assigned previous inventions, an intention is shown that the property in a later invention belongs to the employer. Magnetic Mfg. Co. v. Dings Magnetic Separator Co., 16 F.2d 739 (7th Cir. 1926). But property may be in the inventor-employee where he was under a contract to assign all future inventions but in fact did not do so. After an inventor developed five patents a new contract was made assigning them for designated royalties which the court held were capital gains. Hofferbert v. Briggs, 178 F.2d 743 (4th Cir. 1949).

14. INT. REV. CODE § 117(a) (2)—(11) and § 117 (b). The six months holding period begins with the moment that the idea, process, or invention is reduced to practicability and extends until the rights are actually assigned. Samual E. Diescher, 36 B.T.A. 732, 743 (1937).

15. Paul L. Kuzmick, 11 T.C. 288, 297 (1948).

16. Higgins v. Commissioner, 312 U.S. 212 (1941); Carl G. Dreymann, 11 T.C. 153 (1948); Edward C. Meyers, 6 T.C. 258 (1946).

17. Where an employee sold two patents to his employer and one to another person, it was held that the patents were property held primarily for sale to customers in the ordinary course of taxpayer's trade or business. Harold T. Avery, 47 B.T.A. 558 (1942).

patents.[18] The resulting legal relation is a license, return from which is ordinary income to the inventor.[19] The reserved rights may, therefore, constitute property which later may be sold as a capital asset. Thus the agreement can allocate the really valuable rights to the employer and reserve the usually insignificant right to use[20] the patented invention to the employee with consequent taxation of the inventor at capital rates on royalties received after the disposal of the reserved right. This technical and highly fictional artifice was successfully invoked by the taxpayer in *Carl G. Dreymann,* a recent Tax Court case.[21]

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18. However, relying to an extent upon certain indicia that the property in the inventions reposed in them, certain taxpayers have achieved capital rates. One indication that the taxpayer inventor owns the invention is the fact that he had ideas conceived prior to employment. Carl G. Dreymann, 11 T.C. 153 (1948); William M. Kelly, 16 P-H 1947 T.C. MEM. DEC. ¶ 47,252 (1947) (taxpayer was not originally employed as an inventor but had other duties. During this time his basic invention coalesced. Later, when taxpayer was employed as inventor, he assigned the invention and it was held a sale of a capital asset); Raymond M. Hessert, 16 P-H 1947 T.C. MEM. DEC. ¶ 47,301 (1947) (taxpayer assigned patents he developed before his employment for royalties extending over the period of his employment. They were held to be proceeds from the sale of a capital asset). In Blum v. Commissioner, 183 F.2d 281 (3d Cir. 1950), *affirming* 11 T.C. 101 (1948), the taxpayer had preconceived ideas about the chain saw, but the employment contracts which required him to assign to the Disston Company the resulting patents persuaded the court that the company was not paying royalties for property the employee owned, but merely for his aid in its development.

That the company is entering the royalty payments on its books as the purchase of a capital asset is also an indication of the employee-inventor's ownership. In the *Blum* case the Commissioner introduced evidence of a contrary nature—that the royalties were carried as ordinary expense on the company's books. The reaction of the court was, "We attach no controlling significance to such evidence. It does indicate, however, that both parties construed their respective pertinent rights and obligations as we do." Arthur N. Blum, 11 T.C. 101, 110 (1948).

In addition, statements and conduct of the employer or inventor which indicate an intention that the inventor own the invention until assignment are of some value in proving that the inventor possesses the property in the invention. See note 13 *supra.*

19. The patentee may, by instrument in writing, assign, grant, and convey either (1) the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States, or (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent within and throughout a specified part of the United States. Any assignment or transfer, short of one of these, is a mere license giving the licensee no title in the patent. Waterman v. Mackenzie, 138 U.S. 252 (1891).

20. While the patentee can withhold from his licensee the right to use the patented article after its manufacture, one purchasing the manufactured article from the licensee takes free of the restriction. United States v. Univis Lens Co., 316 U.S. 241 (1942). It must be remembered that the right to use may under some patents be of considerable value. Such may be the case for patented processes and production machinery. Here, however, the right to sell might be the insignificant right which the patentee could reserve so as to retain the property in the patent.

21. In Carl G. Dreymann, 11 T.C. 153 (1948), the taxpayer was employed to develop a process to waterproof boxes under a contract which required him to give the employer the exclusive rights to manufacture and sell. After the process was developed, taxpayer assigned all rights in the resulting patent to the employer in exchange for a percentage of income derived from sales of the waterproofed boxes. The court held that this was a sale of a capital asset and the royalties were taxed at capital rates. The possibility that the taxpayer may have been employed to invent was not considered; it was assumed that from its creation the property was in the inventor since he reserved the right to use.

The Commissioner's non-acquiescence in the *Dreymann* case, 1950 INT. REV. BULL.

When the *Blum* case is compared with *Carl G. Dreymann,* it is evident that the present system of taxing inventors' royalties has become entangled with the fine distinctions of patent and contract law. In each case the taxpayers were employed under a contract to develop patentable inventions and both developed the inventions while so employed; but Blum's royalties were taxed as ordinary income, while Dreymann's were not. The only apparent basis for distinction lies in the contracts for employment: Blum was required to assign all rights in subsequent inventions, while Dreymann gave the employer the right to manufacture and sell, but not to use, any resulting inventions. The formal difference between assigning all the patent rights and retaining only the right to use an invention is almost imperceptible in practical effect and should be disregarded for

No. 16 at 1 (1950), refers for support to Wodehouse v. Commissioner, 337 U.S. 369 (1948). There royalties from the assignment by a non-resident alien of the exclusive serial rights on a story written outside the United States were held taxable on the theory that they were income from the use of a United States copyright. By the 1936 Revenue Act, §§ 143, 211, 49 Stat. 1700, 1701, 1714 (1936), only gains, profits, and income from sources in the United States were taxable to non-resident aliens, and income derived from the sale of property in the United States by such persons was not taxable. The question arose as to whether the payment was return for the sale of property or taxable income under the statute. The dissent, 337 U.S. 369, 401-425 (1948) (Justices Frankfurter, Murphy, and Jackson dissenting), pointed out that less than all the rights under a copyright may be sold as property. Apparently the dissenters felt that the majority opinion approved taxation of the sale of certain property rights as ordinary income. Drawing an analogy from copyrights to patents, the conclusion would be that a patent merely privileges the holder to use the patent and that the income from this use is ordinary income in all cases, even though the use made is to grant all the rights—to manufacture, use and sell. The validity of this argument can be questioned, especially in the light of the peculiarities inherent in *Wodehouse.*

The strongest case to which the Commissioner could apply the above argument is where the inventor is employed, and invention evolves, and payments are received periodically and not as a lump sum. The proceeds will be tinged with the color of employment compensation rather than that of a sale. Right to income is not a capital asset. Hort v. Commissioner, 313 U.S. 28 (1941).

There are various reasons why the *Wodehouse* argument may fail: (1) Tax decisions have long acquiesced in the difference between an assignment of all rights, which is termed a sale, and the mere licensing of some of the rights. The courts may not now want to place sales and assignments on the same basis as licenses without the spur of a definite legislative mandate. (2) All property in a sense is the right to income. Surely the Commissioner would not attempt to tax the gain from a sale of realty as ordinary income, for this would clearly be outside the capital gain treatment expressly allowed. (3) The majority in the *Wodehouse* case based its decision purely on a statutory basis without deciding whether assignment of serial rights was a property sale. The dissent raised the latter point. This discrepancy may considerably weaken the case as precedent. (4) Since *Wodehouse* was a copyright case it may not be strong precedent in the instance of a patent purchase. Courts seem to treat patents as more necessary to the economy. United States v. Dublier Condenser Co., 289 U.S. 178, 206 (1933). Generally a patented invention requires more thought, time, skill, and effort to develop than a copyrighted article. Also a patent usually requires exploitation after issuance, whereas a copyrighted article is ready for publication immediately. As a result, although the copyright may be treated as a governmental privilege to use the article in the United States, or, in other words, a right to income, a patent will tend to be taxed as a property right and not merely as a privilege to use the patented invention in the United States, or a right to income.

tax purposes.[22] To tax substance here requires that the royalty income, which, regardless of the niceties of contract language, does not flow from the sale of a beneficial interest in property, should be subject to ordinary rates.

Much criticism has been leveled at capital taxation of royalties however received.[23] Contrast the inventor's royalty to the income of the lawyer who may work for many years to develop abilities culminating in receipts of large sums in one year or over a short span of years. This latter income is taxed at ordinary rates. It would seem tenable to argue that a rational distinction cannot be drawn between the lawyer's and the inventor's incomes.[24] Indeed, when the additional compensation to the employed inventor is an award or bonus, ordinary rates do apply.[25] The agitation to directly remove inventions, copyrights, and works of art from the pale of capital gains rates met with only partial success in the recent changes in the Code. Capital assets as defined by § 117(a) and § 117(j) of the 1950 Revenue Act do not include copyrights and works of art.[26] Patents were not specifically listed in the new act because the Senate Committee felt that the desirability of fostering the work of inventors outweighed the small additional revenue which might be collected by their exclusion from the capital assets category.[27] This does not mean that the obstacles discussed will not harass the inventor-taxpayer.

A possible solution may be to abolish taxation of receipts from patented inventions. As a substitute some authorities suggest that a tax should be levied on the patent right itself, as done in England.[28] An alternative

22. See Casey, *Sale of Patents, Copyrights and Royalty Interests*, SEVENTH ANNUAL INSTITUTE ON FEDERAL TAXATION, NEW YORK UNIVERSITY 383 (1949).

The courts seem to have forgotten the admonition of Helvering v. F. & R. Lazarus Co., 308 U.S. 252, 253 (1939): "In the field of taxation, administrators of the laws and courts are concerned with substance and realities, and formal written documents are not rigidly binding."

23. Miller, *The Capital Asset Concept: A Critique of Capital Gains Taxation*, 59 YALE L.J. 837, 1057 (1950); Lowndes, *The Taxation of Capital Gains and Losses Under the Federal Income Tax*, 26 TEX. L. REV. 440 (1948).

24. By giving the inventor favorable tax rates, Congress feels that invention will be encouraged, SEN. REP. No. 2679, 81st Cong., 2d Sess. 99 (1950); actually, however, most invention is done under the auspices of corporate research and will be done without favorable tax encouragement.

25. With regard to the solicitation of information referred to in note 9 *supra*, it was discovered that most companies gave extra compensation in the form of cash bonuses, United States Savings Bonds, or common stock in the company to their employed inventors for contributing to a successful invention. These payments are usually treated by inventors as ordinary income just as any other bonuses received for good work. Courts have little trouble in calling them extra compensation.

26. INT. REV. CODE § 117(a) "The term 'capital assets' means property held by taxpayer . . . but does not include . . . (C) A copyright; a literary, or musical composition; or similar property . . ." See also § 117(j).

27. SEN. REP. No. 2679, 81st Cong., 2d Sess. 99 (1950).

28. The patent laws of the United States have never required the payment of periodic fees during the life of a patent. If such a system were put into effect, the tax could be adjusted by basing the rate (which would be determined independently from the rates on the inventor's other income) on the annual income from the patent so that the total

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

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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.

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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.