RECENT DECISIONS

ARBITRATION—PENALTY—PROVISION IN ARBITRATION CLAUSE AUTHORIZING ARBITRATORS TO IMPOSE PENALTY FOR VIOLATION OF CONTRACT.—A collective bargaining agreement provided for an award of damages, money or other penalties if the agreement were violated. The arbitrators, upon finding that the defendant union violated a no-strike provision, awarded $2,000 actual damages and provided that, if the union again violated the agreement, a penalty or punitive damages in the amount of $5,000 would be payable at the option of the party aggrieved. Special Term granted a motion by the petitioner for an order confirming the arbitrators' award and denied a cross motion by the defendant to vacate certain paragraphs of the award and gave judgment to petitioner. Upon appeal, two justices dissenting, *held,* order modified by reversing so much thereof as confirms the award of $5,000 punitive damages. *Publishers' Ass'n of New York City* et al. *v. Newspaper & Mail Deliverers' Union,* 280 App. Div. 500, 114 N. Y. S. 2d 401 (1st Dep't 1952).

The two issues in the instant case requiring consideration are whether the contract provisions for and the award of punitive damages should be refused enforcement by the courts, and secondly, whether the award is sufficiently mutual, final and definite to justify enforcement by judgment.[1]

The duty of the court in respect to confirming and enforcing arbitrators' awards is prescribed by statute[2] and the legislature of the state has determined the validity of a contract to arbitrate except as to certain instances not relevant here.[3] It is directed that the courts must grant and enforce an award[4] unless it is vacated upon certain grounds of illegality specifically enumerated in the statute.[5] No ground of excessive or improper damage is specified as a basis for vacating an award.[6] Admittedly a confiscatory or penal award so oppressive as to be violative of basic public policy could not be conscionably enforced by the courts.[7] It appears, however, that in fact the award in the instant case is not confiscatory.[8]

In the past, New York decisions[9] have appeared uniformly to hold that an award

1. "In either of the following cases, the court must make an order vacating the award upon the application of any party to the controversy which was arbitrated:—4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made." N. Y. CIV. PRAC. ACT § 1462(4).

2. N. Y. CIV. PRAC. ACT §§ 1448-69.

3. N. Y. CIV. PRAC. ACT § 1448.

4. N. Y. CIV. PRAC. ACT § 1461.

5. Fraud, corruption, partiality, or where the arbitrators have been guilty of prejudicial misconduct or if the submission was not valid. N. Y. CIV. PRAC. ACT § 1462.

6. *Ibid.*

7. Western Union Telegraph Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N. E. 2d 162 (1949). See Kingswood Management Corp. v. Salzman, 272 App. Div. 328, 70 N.Y.S. 2d 692 (1st Dep't 1947).

8. In East India Trading Co. v. Halari, 280 App. Div. 420, 114 N. Y. S. 2d 93 (1st Dep't 1952), the court enforced an award determined by an arbitrator in accordance with a trade association's rules which included a bonus of $436.80 not covered by actual damages. The court in the instant case asserts that its opinion is not at variance with the holding of that case (decided the same day) since it was found as a fact that no "penalty" was imposed. The suggestion of the dissent that the problem of oppressive awards be dealt with when squarely before the court and not be determined in the instant case appears meritorious.

of arbitrators can not be set aside for mere errors of judgment either as to the law or as to the facts. In the leading New York case of *Fudickar v. The Guardian Mutual Life Ins. Co.*,[10] the plaintiff was employed by defendant as superintendent of defendant's agencies. Plaintiff agreed to render services as an insurance salesman and by his contract was to receive a percentage on premiums collected, which was to continue after the contract should cease to be in force. Plaintiff was also to receive renewal premiums on policies obtained through his agency, including renewal commissions to which he was entitled under a former contract, which was, in other respects revoked. Defendant dismissed the plaintiff for misconduct and their arbitrators upheld the dismissal and cancelled future commissions or any sum in lieu of renewal commissions due to the plaintiff. The Court of Appeals of New York upheld the arbitrators' decision, citing the general principle that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties.[11] In *Matter of Mencher*,[12] the court, citing the *Fudickar* case, held that all reasonable intendments and presumptions are indulged in support of awards. In *Matter of Wilkins*,[13] the questions of law involved related to a submission and award determining the rights of the parties under certain leases of property, which included the interpretation or construction of the leases and a determination of the legal rights of the parties under them. The appellant excepted to the award and to each conclusion thereof but no motion was made to vacate, modify or correct the award upon any of the grounds mentioned in the statute. Relying upon the *Fudickar* case the court held that if the arbitrator acts within his jurisdiction and is not guilty of fraud, corruption or other misconduct his award is unassailable.

In vacating part of the award the decision of the court herein is based upon the rule that punitive damages are not allowed for breach of contract.[14] It is argued that the court may not enforce the penalty provision, because it would not allow or enforce such provision in an action at law for breach of the contract maintained before the court directly.

9. Jacobowitz *et al.* v. Herson *et al.*, 268 N. Y. 130, 197 N. E. 169 (1935); Wheat Export Co., Inc. v. The New Century Co., 185 App. Div. 723, 173 N.Y. Supp. 679 (1st Dep't), *aff'd*, 227 N.Y. 595, 125 N.E. 926 (1919); Matter of Burke *et al.*, 191 N.Y. 437, 84 N.E. 405 (1908); Friedheim v. International Paper Co., 265 App. Div. 601, 40 N.Y.S.2d 144 (1st Dep't 1943); D. Goff and Sons, Inc. v. Rheinauer, 199 App. Div. 617, 192 N.Y. Supp. 92 (1st Dep't 1922); Silver Refrigerator Mfg. Corp. v. Clementi, 99 N.Y.S.2d 767 (Sup. Ct. 1950); Government of Kingdom of Netherlands v. American Armament Corp., 58 N.Y.S.2d 300 (Sup. Ct. 1945).

10. 62 N.Y. 392 (1875).

11. *Id.* at 399. As the basis for its decision the court cited Perkins v. Giles *et al.*, 50 N.Y. 228 (1872), which held that where no charge of corruption or bad faith of the arbitrators is made, mere errors of judgment are no grounds for setting aside an award, and neither party will be allowed to prove for that purpose that the arbitrators erred as to the law or the facts.

12. 276 App. Div. 556, 96 N.Y.S.2d 13 (1st Dep't 1950).

13. 169 N.Y. 494, 62 N.E. 575 (1902).

14. RESTATEMENT, CONTRACTS § 342 (1932). Even this rule has had an exception in damages for certain non-pecuniary suffering such as loss of social position, humiliation and nervous illness caused by breach of promise to marry when such action was maintainable. Chellis v. Chapman, 125 N.Y. 214, 26 N.E. 308 (1891); Johnson v. Jenkins, 24 N.Y. 252 (1862). See also Pullman Co. v. Lutz, 154 Ala. 517, 45 So. 675 (1908), where in actions against public service companies, for breach of duty which, though imposed by law, is enforced in an action of contract, exemplary damages are often allowed.

However, the instant case is concerned with an award in arbitration to which the legal rules of damage have no application. Arbitrators are not bound to recognize the distinction made by the courts as to the damages properly awarded in actions in contract as distinguished from those in tort. The rules limiting damages in civil actions grow out of judicial interpretation and arbitrators are bound by no rule of stare decisis. In arbitration the interpretation of the law as well as the facts is for the arbitrators and they are limited solely by the extent of their jurisdiction under the submission or agreement to arbitrate.[15]

As to the second question concerning the finality, definiteness and mutuality of the award, the court held that to make operative the $5,000 punitive part of the award, three additional events, each uncertain and unpredictable, must conjoin at some definite future time and therefore the award is judicially unenforceable.[16] The minority opinion argues, and it it submitted validly, that the award is enforceable, since it specifically states the conditions under which the $5,000 becomes payable. There is nothing more for the arbitrators to do[17] except to say that there has been a recurrence of a strike in violation of the contract. Thus the strike that has already occurred defines the event, the recurrence of which makes the penalty payable and further litigation would be unnecessary in order to adjust the matter submitted.

It would appear that neither the contractual provision nor the awarded penalty of $5,000 imposed tentatively as a deterrent against future violations of the collective bargaining agreement conflict with the laws of this state. The dubiousness with which, at one time, courts regarded the withdrawal of controversies from their jurisdiction by the agreement of parties, has yielded to a more sensible view, and arbitrators are now encouraged as an easy, expeditious and inexpensive method of settling disputes, and as tending to prevent litigation.[18] The arbitrator is in effect a judge appointed by the parties; he is with their consent invested with judicial functions in the particular case; he is to determine the rights as between the parties in respect to the matter submitted; and all questions of fact or law upon which the rights depend may be referred to him for decision under a general submission or agreement.[19] If courts

15. In Everett v. Brown *et al.*, 120 Misc. 349, 198 N.Y. Supp. 462 (Sup. Ct. 1923), the court took the view that while an arbitration partakes of the nature of a quasi-judicial proceeding it is not such in a technical sense, and to require an arbitrator to follow the fixed rules of law in arriving at an award would operate to defeat the object of an arbitration.

16. The court referred to these contingencies: (a) there must be a, new violation of the contract by the union; (b) there must be a finding of a new violation by the adjustment board; and (c) the aggrieved party must exercise an option to make the punitive damages effective.

17. An award must be such a disposition of the matters submitted that nothing further remains to fix the rights and obligations of the parties, that the party against whom it is made can perform or pay it without further ascertainment of rights or duties. See Hicks *et al.* v. Magoun *et al.*, 38 App. Div. 573, 578, 56 N.Y. Supp. 484, 488 (2d Dep't 1899), *aff'd mem.*, 167 N.Y. 540, 60 N.E. 1112 (1901).

18. This rationale was set forth where a decision in which a third arbitrator participated was held binding, although one of the parties did not specifically authorize him to be called. It was the trade custom that the arbitrators selected had power to select a third arbitrator when the two original arbitrators could not reach an agreement. See Welsh *et al.* v. Probst *et al.*, 151 App. Div. 147, 135 N.Y. Supp. 642 (4th Dep't 1912).

19. *Cf.* Sweet *et al.* v. Morrision *et al.*, 116 N.Y. 19, 22 N.E. 276 (1889) (where a chief engineer was made an umpire to decide all matters arising or growing out of

should now assume to rejudge the decisions of arbitrators upon the merits, the value of this method of settling controversies would be destroyed, and an award instead of being a final determination of a controversy would now become but one of the steps in its progress.[20]

EQUITY—INTERPLEADER—CONSTRUCTION OF SECTION 51-A OF CIVIL PRACTICE ACT.—Plaintiff, as assignee of the British Treasury, brought an action against the defendant bank for an amount deposited with the defendant by a British National. The depositor had not complied with the provisions of the British Exchange Control Act which required her to exchange her dollars for pounds sterling or suffer a forfeiture to the British government. The depositor was not made a party to the action. Defendant bank obtained leave of the Supreme Court to notify the depositor of the pendency of the action by complying with section 51-A of the New York Civil Practice Act, permitting the depositor to intervene within one year. No appearance by the depositor was made. The defendant then served its answer setting up various defenses and alleging that the failure of the depositor to join in the action precluded the plaintiff's recovery. The plaintiff moved to strike out the defendant's answer on the ground that the running of the statute had barred the depositor's claim and she was no longer an adverse party. The court at Special Term denied the plaintiff's motion. The Appellate Division, one justice dissenting, affirmed. On appeal, one judge dissenting, *held,* affirmed. Defendant was entitled to put plaintiff to his proof. The depositor, though barred in this jurisdiction, remained an adverse party since she could pursue her remedy in another jurisdiction. *His Majesty's Treasury v. Bankers Trust Co.*, 304 N. Y. 282, 107 N. E. 2d 448 (1952).

The instant case is one of first impression in the New York courts. The problem of jurisdiction involved arises under section 51-A of the New York Civil Practice Act,[1] which is applicable to interpleader actions. Under the leading case of

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the contract. Said chief engineer gave his certificate and final estimate as stipulated and the court, citing Perkins v. Giles *et al.*, 50 N. Y. 228 (1872) and Fudickar v. The Guardian Mutual Life Ins. Co., 62 N.Y. 392 (1875), upheld his estimate even though the chief engineer did not personally measure or superintend the measurements, but relied on the reports of his subordinates). The conclusiveness of awards is based upon the principle that the parties having chosen judges of their own and agreed to abide by their decision are bound by their agreement and compelled to perform the award.

20. *Cf.* Itoh & Co., Ltd. v. Boyer Oil Co., 198 App. Div. 881, 191 N.Y. Supp. 290 (1st Dep't 1921), where a contract of sale stipulated that "any dispute arising out of this contract" should be arbitrated. The court held that the arbitrators appointed thereunder had the power to determine any dispute as to the construction of the contract and they did not exceed their powers by adopting a construction differing from that claimed by the buyer. Arbitration, the court stated, is intended to be a short cut to substantial justice between the parties and an award should not be impeached except upon substantial grounds and for the reasons specified in the law.

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1. "Action to be commenced within one year after notice. 1: No action for the recovery of any sum of money due and payable under or on account of a contract, or for any part thereof, shall be commenced by any person who has made claim to said sum, after the expiration of one year from the giving of notice, as hereinafter provided, to the said claimant that an action commenced by another person is pending to recover said sum or any part thereof exceeding fifty dollars in amount. . . ." N.Y. CIV. PRAC. ACT § 51-A.

Pennoyer v. Neff,[2] in order to make a binding adjudication the court must either have jurisdiction over some property in the action, *i.e.*, in rem, or jurisdiction of the person, *i.e.*, in personam. In the instant case there is no claim made that the court has jurisdiction over the person of the depositor. It is necessary therefore that there be in rem jurisdiction. Usually a deposit of property with the court or an attachment of property before the action is commenced[3] will give the court in rem jurisdiction. The equitable remedy of interpleader is, as are most equitable forms of action, in personam in nature. However, by statute a certain amount of in rem jurisdiction exists in the courts of New York. The subject matter in issue, however, must be specific personal property.[4] If the debt being claimed in an action is evidenced by a negotiable instrument there is a "specific res" and it may be the basis of an in rem action.[5] Whenever there is a specific res there is a full and adequate remedy supplied to the stakeholder under the Civil Practice Act. The court will adjudicate the rights of the claimants to the property and will discharge the stakeholder from further liability.

The problem here is, whether a debt or claim for a sum of money only, is a sufficient res to give the court in rem jurisdiction. Some courts have held it to be so. In *Feuchtenwanger v. Central Bank and Trust Co.*,[6] a bank account was held to be a specific res sufficient to support a service by publication[7] on a non-resident party and to give in rem jurisdiction. Also the court in *Morgan v. Mutual Life Ins. Co.*[8] held a debt in the form of an insurance policy to be specific personal property. However, neither of these cases involved interpleader. Contra to these holdings are several cases directly involving interpleader in which a debt or bank deposit was squarely held to be incapable of supporting an in rem action. The earliest such decision was *Cross v. Armstrong*,[9] where a money claim based on an insurance policy was involved and it was held to be an intangible res. In accord with that case, and the leading case on the question, is *Hanna v. Stedman*.[10] That case involved an action of interpleader brought by an insurance company to which conflicting claims had been made for monies due and payable under a life insurance policy. One of the claimants was a non-resident and was served with summons and complaint by publication. Relying upon a decision of the United States Supreme Court in *New York Life Insurance Co. v. Dunlevy*[11] the Court of Appeals held that interpleader is essentially an in personam action and that a debt is not a res which serves as a constitutional basis to empower a court to adjudicate a creditor's rights in an action in rem.

In 1939 to alleviate the existing situation[12] the legislature added section 51-A to

2. 95 U.S. 714 (1877).
3. N.Y. Civ. Prac. Act § 232.
4. N.Y. Civ. Prac. Act § 287-a.
5. N.Y. Civ. Prac. Act § 287-d.
6. 288 N.Y. 342, 43 N.E.2d 434 (1942).
7. Under N.Y. Civ. Prac. Act § 232(2).
8. 189 N.Y. 447, 82 N.E. 438 (1907).
9. 44 Ohio St. 613, 10 N.E. 160 (1887).
10. 230 N.Y. 326, 130 N.E. 566 (1921).
11. 241 U.S. 518 (1916).
12. In 1939 numerous interpleader cases arose due to the many confiscations of property by foreign nations of their citizen's bank accounts deposited in New York banks. Both the foreign government and the depositor claimed these accounts. The stakeholder banks were constantly under the threat of a hazard of double recovery.

the Civil Practice Act. This section was enacted in the hope that it would give relief in the one situation where all other remedies had failed, *i.e.*, where there was a claim for a sum of money only and non-resident claimants.

The procedure as set forth in section 51-A was followed in the instant case. However, the court held, that although the non-resident claimant was barred from bringing an action to recover the funds in New York, she was not barred from so doing in any other state where jurisdiction could be had over the stakeholder-creditor bank.[13] Hence, the procedure under section 51-A was of no practical value to the stakeholder herein since it is still under a hazard of a double recovery. It seems apparent, therefore, that the statute has failed to accomplish its stated purpose, namely, protection for a stakeholder of a money debt against non-resident claimants.

The court in the instant decision has held that section 51-A is a short statute of limitations[14] applicable to interpleader actions and it is not pretended to be anything more. Thus as a statute of limitations it has no extraterritorial effect.[15] The stakeholder has no remedy by proceeding under sections 232 and 232-A of the Civil Practice Act which allow service by publication on a non-resident since these sections are not applicable unless there is a specific res with a New York situs. It has been held by the United States Supreme Court that a debt in interpleader does not have its situs where the debtor resides nor does the depositing of it in court give the court any jurisdiction in rem.[16] Attachment statutes such as sections 232 and 902 of the Civil Practice Act offer no remedy since in order to be subject to attachment the subject matter must belong to a non-resident debtor.

A more complete remedy may be had under the Federal Interpleader Statutes where an adjudication would be binding throughout the country. However, these are not applicable here in view of the foreign claimant.[17]

Thus under the facts of the instant case there is no possible remedy afforded by the existing laws from the ever impending threat of double recovery, if the stakeholder should be sued by the non-resident claimant in another jurisdiction. The decision points out an urgent need for revision of New York interpleader remedies.

TAXATION—INCOME TAXES—LEGAL FEES INCURRED IN DEFICIENCY REDETERMINATION NON-DEDUCTIBLE.—Petitioner in 1940 made a gift of a number of shares of stock in a family corporation and filed the required gift tax return that year. In 1944 the Commissioner revalued the stock and notified petitioner of a deficiency. Through his attorney petitioner sought a redetermination of the deficiency, forestalled an assessment, and effected a settlement at a figure substantially less than that demanded by

13. Relief under Section 51-A will be sufficient in those states which will recognize our Statute of Limitations under their borrowing statutes.

14. See also Koninklijke Lederfabriek v. Chase Nat. Bank, 177 Misc. 186, 30 N.Y.S. 2d 518 (Sup. Ct. 1941).

15. Goodrich v. Rochester Trust & Safe Deposit Co., 173 App. Div. 577, 160 N.Y. Supp. 454 (4th Dep't 1916) (concededly a statute of limitations is usually a procedural statute and thus in resolving the conflict of laws the law of the forum will control). See Townsend v. Jemison, 9 How. 406 (U.S. 1850).

16. N.Y. Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916).

17. (1) The claim must be over $500; (2) there may not be foreign claimants; (3) there must be diversity of citizenship. 49 STAT. 1096, 28 U.S.C.A. § 1335 (1936).

the Commissioner. In his 1946 return the petitioner claimed a refund on his 1944 taxes on the ground that the attorney's fees incurred in the 1944 suit should have been deducted from his gross income for that year. The Commissioner refused to allow the refund whereupon petitioner instituted this suit. The district court held as a matter of law that the fees were deductible and the court of appeals reversed. Upon appeal to the United States Supreme Court, three justices dissenting, *held,* judgment of the court of appeals affirmed. The expense of counsel was not proximately related to the production or collection of income or to the management, conservation or maintenance of property held for the production of income as required by Section 23 (a) (2). *Lykes v. United States,* 343 U.S. 118 (1952).

Prior to 1942 the deduction available to the individual under Section 23 of the Internal Revenue Code were limited to "ordinary or necessary expenses incurred during the taxable year in carrying on a trade or business."[1] As a result of *Higgins v. Commissioner,*[2] where expenses incurred by an individual in the management of income producing securities were held not to be deductible because they were not trade or business expenses, Congress added the provision under which the present deduction is sought. The purpose of the amendment was not to make all family or personal expenses deductible but to allow a deduction for ordinary and necessary expenses incurred during the taxable year for (a) the production or collection of income, or (b) the management, conservation or maintenance of property held for the production of income.[3]

The applicability of the foregoing section to legal fees incurred and paid by the taxpayer has been the subject of extended litigation. In the case of *Bingham's Trust v. Commissioner,*[4] legal fees, expended partly in contesting an income tax deficiency and partly in terminating a trust under the trust agreement, were held to be deductible. The Court in allowing these deductions reasoned that the fees were an integral part of the management of the trust property held for the production of income. Citing and following *Bingham's Trust,* the Court of Appeals for the Second Circuit in *Williams v. McGowan*[5] held that legal fees paid to secure a refund on taxes previously paid on an erroneous determination concerning losses on certain lease holdings were deductible under the instant section. The court noted that although the *Bingham* case involved a trust it "was not a controlling consideration"[6] and "nothing turned upon the circumstance."[7] *Cammack v. Commissioner,*[8] a case decided soon after the *Bingham* case, held that fees incurred in obtaining a refund on a claim of loss resulting from investment in securities of a corporation which failed were deductible as non-business expenses incurred in the management of property held for the production of income.[9] This holding is now generally accepted.[10] From an analysis of the cases it would seem that to be deductible the expenses must bear a reasonable and proximate

1. 53 STAT. 12, 26 U.S.C. 23 (a) (1) A (1939).
2. 312 U.S. 212 (1941).
3. 56 STAT. 819, 26 U.S.C. 23 (a) (1) (C) (2) (1942).
4. 325 U.S. 365 (1945).
5. 152 F. 2d 570 (2d Cir. 1945).
6. *Id.* at 571.
7. *Ibid.*
8. 5 T.C. 467 (1945).
9. This was so notwithstanding the fact that the taxpayers had ceased to regard the property as productive of income and had claimed it as a loss.
10. Heyman *et al.* v. Commissioner, 6 T.C. 799 (1946); Connelly v. Commissioner, 6 T.C. 744 (1946).

relation to the production and collection of income and/or to the maintenance of income producing property.[11]

In *Cobb v. Commissioner*,[12] the first adjudication of the instant problem by an appellate court, the taxpayer made a gift to his children of certain real property interests for the purpose of lowering his income. Upon review of the petitioner's gift tax return, the Commissioner determined a deficiency which the taxpayer contested thereby expending legal fees. The court denied the right of the taxpayer to deduct such fees and held: "The true criterion would seem to be that, to become deductible under the statute, the expense must be in proximate relation to the production or collection of income or to the care and conservation of property held to produce it. The paring of the deficiency in the taxpayer's gift tax through the efforts of his attorneys was beneficial to him, in that he was not forced to sell other income-producing property, but the expense to that end is not appropriately classifiable as an expense in conserving such property."[13] Neither gifts in their ordinary sense nor the expenses incurred in making them are regarded as productive of income.[14]

The ordinary and necessary character of the legal expenses incurred in the principal case was not questioned but the Court indicated that they must depend for their deductibility on the nature of the activities to which they relate. The Court refused to treat the transfer of stock or the attorney's fee as incidents of management within the scope of the statute and took the position that the attorney's fee expended in making the gift was not proximately related to the production of income.

The decision in the instant case appears sound. The argument of the dissent that the substantial saving effected through the efforts of the attorney constituted maintenance of property held for the production of income is not convincing. That the petitioner has saved money and property can not be doubted but it is submitted that such savings flow not proximately but incidentally from the expense claimed. To hold otherwise would be to allow legal fees in almost every type of defended action. As to the further contention of the dissent that the casual argument, if carried to its extremes, would lead to absurdities one needs but point to the multifarious problems of causation in the field of torts which have yielded to the judicial process tempered by a little common sense.[15]

11. The treasury regulation interpreting Section 23 (a) (2) reads as follows: "Expenses paid or incurred by an individual in determining or contesting any liability asserted against him does not become deductible, however, by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying the liability. Thus, expenses paid or incurred by an individual in the determination of gift tax liability, except to the extent such expenses are allocable to interest of a refund of gift taxes, are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability or even though, in the event of a claim for refund, the amount recovered will be held for the production of income." U.S. Treas. Reg. 111, § 29.23 (a)-15 (b).

12. 173 F. 2d 711 (6th Cir. 1949).

13. *Id.* at 714.

14. In the principal case petitioner sought to distinguish the *Cobb* case alleging that the gift herein was part of a general plan to produce income for himself by fostering family management through ownership by the donee of an interest in the corporation.

15. GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

TAXATION—INCOME TAXES—STOCKHOLDER-TRANSFEREE'S LIABILITY FOLLOWING CORPORATE LIQUIDATION—CAPITAL LOSS OR ORDINARY LOSS.—Petitioners were shareholders of a corporation which began a series of distributions in complete liquidation in 1937 with the final distribution occurring in 1940. Petitioners reported the profits obtained from this transaction, classifying them as capital gains. Prior to final distribution in complete liquidation in 1940 a suit was commenced against the corporation. The suit resulted in final judgment against the corporation in 1944, which the stockholders, as transferees of the corporation's assets, were required to and did pay. Classifying the loss as an ordinary business one, each took a tax deduction for 100% of the amount paid. The Commissioner determined a deficiency by asserting that the 1944 payment represented a capital loss. The Tax Court held that it represented an ordinary loss. On appeal, the Court of Appeals for the Second Circuit reversed, treating the loss as "capital." On certiorari, to the United States Supreme Court, *held,* three justices dissenting, judgment affirmed. Since the petitioners' liability as transferees was not based on any ordinary business transactions apart from the liquidation proceedings, the payments should be capital losses. *Arrowsmith* et al. *v. Commissioner,* 73 Sup. Ct. 71 (1952).

Losses from sales or exchanges of capital assets are capital losses[1] and amounts distributed in partial or complete liquidation of a corporation are treated as payments in exchange for the stock.[2] When judgments or other claims become enforceable against an already dissolved corporation, the stockholder-transferees may then be held liable for these debts of the corporation to the extent of the liquidating dividends paid to them.[3] Where, as in the instant case, the stockholder pays as a transferee a subsequently determined liability of the dissolved corporation, a problem, not specifically provided for by the Code, is presented as to the tax treatment of this payment.

Prior to the decision in *North American Oil v. Burnet,*[4] the Board of Tax Appeals held that the proper treatment of such stockholder-transferee payments would be to consider them as reductions of the liquidating dividends received.[5] The reopening of the transferee's tax return in which the liquidating dividend was received was allowed in order to reduce the amount of the tax. The *North American* case overruled the earlier decisions and held that income received "under a claim of right and without restriction as to its disposition"[6] is taxable in the year of receipt and that if the taxpayer later repays part of that income he is entitled to a deduction in the year of repayment rather than in the year of original receipt.[7] The courts have subsequently upheld the "claim of right" doctrine as consistent with the concept of the single year as the unit of taxation.[8] Thus it seems quite

1. INT. REV. CODE §§ 23(g) and 117.
2. INT. REV. CODE § 115(c).
3. Phillips-Jones Corp. *et al.* v. Parmley *et al.,* 302 U.S. 233 (1937). See Comment, 19 FORD. L. REV. 311 (1950). INT. REV. CODE § 311(a) provides the method by which taxes imposed on a corporation may be collected from the transferee after dissolution.
4. 286 U.S. 417 (1932).
5. Benjamin Paschal O'Neal, 18 B.T.A. 1036 (1930); E. M. F. Leflang, 6 B.T.A. 4 (1927); D. B. Barker, 3 B.T.A. 1180 (1926).
6. 286 U.S. 417, 424 (1932).
7. "If in 1922 the Government had prevailed, and the Company had been obliged to refund the profits received in 1917, it would have been entitled to a deduction from the profits of 1922, not from those of any earlier year." *Id.* at 424.
8. John T. Furlong, 45 B.T.A. 362 (1941); Roberta Pittman, 14 T.C. 449 (1950); Commissioner v. Hartfield, 194 F. 2d 662 (2d Cir. 1952).

clear that whatever the tax status of the subsequent loss, it should be accounted for in the later taxable year when the obligation accrues or is paid.[9]

The question of the tax status of the subsequent loss is not as simple to determine as is the taxable year of reporting. Under the accepted concept of the single year as the unit of taxation, is the subsequent gain or loss a single transaction and, as such, taxable as ordinary income or expense,[10] or is it so tainted with capital qualities as to have the same tax status as the original transaction from which it resulted? In the recent case of *Commissioner v. Switlik*[11] stockholders of a corporation received distributions in complete liquidation in 1941 and each reported his pro rata share in his income tax return for that year as a long-term capital gain. In 1944, the stockholders paid their liability as transferees for deficiencies in tax which the Commissioner, in 1942, determined the corporation owed for the years of 1940 and 1941. The Court of Appeals for the Third Circuit, affirming the Tax Court, held that the losses sustained by the stockholders as a result of the payments made in 1944 were deductible in that year as ordinary losses and not as capital losses. Basing its decision on the "single year" rule the court considered the transferee's payment in 1944 as a separate and distinct transaction from the liquidating distributions in 1941. Further, it held that the payment of transferee liability in 1944, taken by itself, is neither a sale nor an exchange of capital assets.[12] Thus under the *Switlik* reasoning of strict interpretation of Sections 23(g) and 117 of the Code, if the payment by the transferee does not fall specifically within the statutory language of a "loss from the sale or exchange of a capital asset," it is deductible as an ordinary loss. The Tax Court has since adhered to this reasoning in a nearly unbroken line of decisions.[13]

The Court of Appeals for the Second Circuit in the principal case[14] related the loss in 1944 resulting from the payment of the judgment by the transferees to the liquidating dividend of 1940 and extended Sections 23(g) and 117 of the Code to include losses "arising out of a 'sale or exchange.'"[15] The Supreme Court, in affirming, held the losses to fall within the definition of "capital losses," without, however, interpreting the mentioned sections of the Code. It was also asserted that the principle of each taxable year being a separate unit for tax accounting purposes is not breached by examining the liquidation transaction events in order "properly to classify" the subsequent loss.[16]

9. "Income taxes must be paid on income received (or accrued) during an annual accounting period. . . . The 'claim of right' interpretation of the tax laws has long been used to give finality to that period, and is now deeply rooted in the Federal tax system." United States v. Lewis, 340 U.S. 590, 592 (1951).

10. *E.g.*, INT. REV. CODE § 23(e)(2).

11. 184 F. 2d 299 (3d Cir. 1950).

12. *Id.* at 302.

13. Frederick R. Bauer, 15 T.C. 876 (1950) (Instant case in Tax Court); Seth M. Milliken, 15 T.C. 243 (1950); Frederick M. Paist, 10 T.C. Mem. 967 (1951); *Contra:* Duveen Brothers, Inc., 17 T.C. 124 (1951).

14. Commissioner v. Bauer, 193 F. 2d 734 (2d Cir.), *aff'd sub nom,* Arrowsmith *et al.* v. Commissioner, 73 Sup. Ct. 71 (1952).

15. *Id.* at 735.

16. *Accord,* Milliken v. Commissioner, 196 F. 2d 135 (2d Cir. 1952); Duveen Bros. Inc. v. Commissioner, 197 F. 2d 118 (2d Cir. 1952). Where the value of the assets acquired by a transferee was not immediately ascertainable at the time of liquidation, income from such assets, received in a subsequent year was held to be capital gain.

Mr. Justice Douglas in his dissent regarded the loss as an ordinary loss in accordance with the principle that each tax year must "stand on its own footing." In the other dissenting opinion, Mr. Justice Jackson, with whom Mr. Justice Frankfurter concurred, expressed the view that where a statute is so indecisive, as in the instant case, greater reliance and deference should be given to the Tax Court decisions.[17]

It appears that the decision in the instant case presents a more logical and realistic result than the *Switlik* decision. The subsequent loss is not such a separate and distinct transaction from the liquidating dividend as to be rewarded with the benefits of an ordinary loss. It does not thwart the single year rule merely to examine, without reopening, the prior transaction in order to determine the nature of the subsequent payment. Moreover, the *Switlik* decision offers a potential tax-minimization device whereby officer-stockholders may underestimate liabilities (especially Federal income taxes) prior to liquidation in order to gain the benefits, as transferees, of an ordinary loss.[18]

Though the principle of looking to the nature of the original transaction to determine the tax status of the subsequent transaction is more equitable than treating it as an independent transaction, it does present a hardship to the taxpayer who has no capital gains in the years available.[19] Thus in the instant case, the payment of the judgment, which probably would have been fully deductible by the corporation, becomes a capital loss of limited deductibility to the stockholder-transferees. The solution would appear to be that liquidators should leave sufficient assets in the corporation at the time of liquidation in order to meet such foreseeable contingent liabilities.

TORTS—NEGLIGENCE—MEANING OF "GUEST" AS USED IN GUEST STATUTES.—Plaintiff, a minor and member of a boy scout troop of which the defendant was the assistant scout master, was injured while engaged in a scrap paper collection for the benefit of the troop, which was under the direct control and supervision of the defendant. Plaintiff alleged that he was climbing aboard a utility trailer attached to the defendant's automobile when the defendant increased the speed of the auto and the plaintiff was thereby thrown underneath the wheels and suffered severe injuries. Defendant moved for judgment on the pleadings and the plaintiff's opening statement. The trial court granted the motion. The Court of Appeals

Westover *et al.* v. Smith, 173 F. 2d 90 (9th Cir. 1949); Commissioner v. Carter, 170 F. 2d 911 (2d Cir. 1948).

17. Dobson v. Commissioner, 320 U.S. 489 (1943). Speaking of the Tax Court, the Court said at 498, 499: "It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. . . . Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts." *But see* INT. REV. CODE § 1141(a).

18. However, the court intimated in the *Switlik* case that the result might have been different if there had been any "untoward motivation" for the distributions in liquidation. Commissioner v. Switlik, 184 F. 2d 299, 302 (3d Cir. 1950).

19. Capital losses are only deductible to the extent of capital gains plus net income up to $1000.00 and may be carried forward for five years. INT. REV. CODE §§ 117(d)(2) and 117(e)(1).

reversed and remanded the cause. Upon appeal to the Supreme Court of Ohio, three judges dissenting, *held,* affirmed. The plaintiff was not the guest of the defendant under the Ohio guest statute and the defendant was therefore liable if negligent. *Vest v. Kramer,* 158 Ohio St. 78, 107 N.E. 2d 105 (1952).

Under common law principles, the majority of jurisdictions requires a motorist who carries another gratuitously to exercise ordinary care in the maintenance and operation of his automobile.[1] A minority of states, by analogy to the bailee's liability in gratuitous bailment cases, holds a host liable only for gross negligence.[2] Other jurisdictions are those which have enacted so-called guest statutes which predicate liability upon a finding of wilful, wanton or gross negligence.[3] The various guest statutes which have been passed are twofold in their purpose. Primarily legislators have sought to eliminate the apparent injustice occasioned by holding a motorist liable for injuries to his guest where there has not been commensurate compensation for the transportation.[4] The minimizing of the advantages of the opportunity for collusion between host and guest practiced on insurance companies has been the secondary motivating factor.[5]

The instant case was decided under the Ohio guest statute and has presented to the court the problem of determining what factors render a rider a guest within the meaning of the statute. While each case must rest upon its own peculiar facts,[6] certain tests have been applied in attempts to solve the problem. Courts have made extensive use of the so-called benefit theory in which they seek to ascertain the benefit of the trip and the recipient of such benefit.[7] The application of this test has necessarily resulted in two main classifications of trips: those where tangible benefit is conferred on the driver and those where insufficient or no tangible benefit is conferred. Riders in the former class are generally said to be passengers while those under the second classification are usually treated as guests.

A guest has been defined as anyone being transported without compensation.[8]

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1. This is the law in the heavily populated states of New York and Pennsylvania. 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2321 (Perm. ed. 1946) and cases cited therein; Comment, 35 MICH. L. REV. 804 (1937).

2. 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2322 (Perm. ed. 1946) and cases therein cited.

3. Gammon, *The Automobile Guest,* 17 TENN. L. REV. 452 (1943). Twenty-six states have passed "guest statutes" which are substantially similar but can be grouped into the following categories: a) Those states which have a provision similar to the Ohio section under discussion wherein a guest is defined as one transported "without payment." This group includes—Alabama, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Carolina, Texas, Utah, Vermont, Virginia, Washington, Wyoming. b) A second group, whose legislative enactments use the words "without compensation" rather than "without payment" include—California, Iowa and South Dakota.

4. Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E. 2d 140 (1942).

5. Kitchens v. Duffield, 149 Ohio St. 500, 79 N.E. 2d 906 (1948); PROSSER, TORTS 634 (1941).

6. George v. Stanfield *et al.,* 33 F. Supp. 486 (D. Idaho 1940).

7. Forsling v. Mickelson, 66 S.D. 366, 283 N.W. 169 (1938); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2292 (Perm. ed. 1946).

8. Crawford *et al.* v. Foster *et al.,* 100 Cal. App. 81, 293 Pac. 841 (1930); 2 RESTATEMENT, TORTS § 490 (1934).

In Ohio the statute specifies guests as persons who are transported without payment.[9] The ordinary rules of negligence apply when there is a "bargained for" transportation.[10] Hence, when the driver is for "hire or reward," the rider is correctly termed a "passenger." The compensation given need not be money in order to exclude a rider from the guest classification nor must it necessarily pass between the passenger and the driver.[11] Also, where one becomes a rider for the purpose of being of service to the driver he is not deemed to be a guest.[12]

When the rider is the sole beneficiary of the trip, merely contributing companionship[13] or is riding for his own pleasure upon the invitation of the driver,[14] he falls squarely within the language and intent of the statutes. Mere incidental benefit accruing to the owner would not seem to destroy the status of guest.[15] Actual payment of expenses or a sharing thereof by the one accepting the ride has caused the courts to differ in resolving his status. In such a situation the trip could be for the common benefit of both the rider and the driver and, hence, is not within the previously mentioned main categories. A determination as to whether the trip has a business or a social aspect has immeasurably helped in reconciling cases which involve this particular point.[16] Where there is a mutual business venture of which the trip is an essential part, it has been held that the driver has received sufficient material benefit as to render the status of the rider that of a passenger.[17] A contrary result is reached when the trip is of a social nature.[18]

The principal case involves a charitable enterprise.[19] The crucial question before the court, in view of the foregoing discussion, was whether the actual or prospective

9. "The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wilful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle." 4A PAGE'S OHIO GENERAL CODE 6308-6 (Replacement 1945).

10. Ward v. George, 195 Ark. 216, 112 S.W. 2d 30 (1937); Crawford *et al.* v. Foster *et al.*, 100 Cal. App. 81, 293 Pac. 841 (1930).

11. See note 6 *supra;* McCann *et al.* v. Hoffman *et al.*, 9 Cal. 2d 279, 70 P.2d 909 (1937); McGuire v. Armstrong, 268 Mich. 152, 255 N.W. 745 (1934). In Jenkins v. National Paint & Varnish Co., 17 Cal. App. 2d 161, 165, 61 P.2d 780, 782 (1936), the court defined compensation as "any return which may make it worth the operator's while to furnish the ride."

12. An expectation of compensation has been held insufficient to prevent one from being considered a guest within the statute. See note 6 *supra* and Voelkl v. Latin, 58 Ohio App. 245, 16 N.E.2d 519 (1938).

13. Holtsinger v. Scarbrough, 69 Ga. App. 117, 24 S.E.2d 869 (1943).

14. Shiels v. Audette, 119 Conn. 75, 174 Atl. 323 (1934).

15. Drea v. Drea, 292 Mass. 477, 198 N.E. 743 (1935); Audia v. De Angelis *et al.*, 121 Conn. 336, 185 Atl. 78 (1936).

16. See note 4 *supra.* Even in this situation the benefit test obtains. The benefit, of which the driver must be the recipient in order to preclude him from the protection of the statute must be a material and tangible one flowing from and depending on the transportation provided. McCann *et al.* v. Hoffman *et al.*, 9 Cal. 2d 279, 70 P.2d 909 (1937).

17. Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47 (1942); Note 26 CALIF. L. REV. 251 (1938).

18. Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938).

benefit accruing to the driver was sufficiently tangible and material to be considered compensatory and thereby to take the plaintiff out of the guest status.

In sweeping triple hypotheses, the court sought to determine the relationship of the plaintiff and defendant. Their relationship, reasoned the majority, was either one in which: (a) the plaintiff was rendering services to the defendant; (b) the plaintiff and defendant were mutually interested in the venture; (c) the plaintiff and defendant were fellow workers. The majority of the court did not clearly indicate what they considered was the true relationship but were satisfied in concluding that under each hypothesis, the plaintiff was not a guest.

Approaching the problem on a different, and, it is submitted, more positive tack the dissenting opinion tests the case by the plain words of the Ohio statute. Rather than speculating as to who is *not* a guest the dissent argues that one transported "without payment therefor" *is* a guest and the burden of proving that he was not so transported is upon him who asserts it.[20] The dissenting opinion concludes that the failure of the plaintiff to sustain this burden precludes his recovery.

The majority opinion is not without precedent. In *Forsling v. Mickelson*[21] a business man transported a musician who volunteered his services in connection with a community enterprise. The court rejected the defendant's plea that the plaintiff was a guest. Similarly in *Thuente v. Hart Motors*[22] where the plaintiff was transported and injured while participating in a scrap drive, the court concluded that no host-guest relationship existed. Between those cases and the instant case no substantial distinctions appear. Nevertheless in each, it would appear, there is an absence of anything resembling a tangible benefit accruing to the driver.[23] These holdings when tested by the benefit theory appear to be at least doubtful and their sanction by this court seems to compound the uncertainty as to what constitutes payment[24] under the statutes. Other decisions relied on by the court are inapposite since they involve either situations where services are being rendered to the driver[25] or transportation given in the course of the driver's employment.[26]

19. This charitable enterprise is to be distinguished from a joint enterprise which necessarily involves an equal right of control. Bloom v. Leech, 120 Ohio St. 239, 166 N.E. 137 (1929); Note, 10 CINN. L. REV. 297 (1936).

20. Ames v. Siebert, 156 Ohio St. 45, 99 N.E.2d 905 (1951); Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949). It is a general rule that the party benefiting from a statute has the burden of pleading and proving it but many states have held just the contrary in the application of guest statutes. Green v. Grimes-Stassforth Stationary Co., 39 Cal. App. 2d 52, 102 P.2d 452 (1940); Indianapolis & G.R.T. Co. v. Foreman, 162 Ind. 85, 69 N.E. 669 (1904); Pilcher v. Erny, 155 Kan. 257, 124 P.2d 461 (1942); Goldberg v. Friedrich, 279 Pa. 572, 124 Atl. 186 (1924).

21. 66 S.D. 366, 283 N.W. 169 (1938).

22. 234 Iowa 1294, 15 N.W.2d 622 (1944).

23. It is not sufficient that it is contemplated that some indirect benefit, *e.g.*, a reduction of expenses resulting from the sharing thereof will accrue to the driver. Voelkl v. Latin, 58 Ohio App. 245, 16 N.E.2d 519 (1938).

24. A recent federal case suggests the test of payment to be whether or not the driver could maintain an action at law for the reasonable or agreed value of the given transportation. Pheiffer v. Pennsylvania R.R. Co. *et al.*, 186 F. 2d 558 (6th Cir. 1951).

25. Dorn v. North Olmstead, 133 Ohio St. 375, 14 N.E.2d 11 (1938).

26. Dobbs v. Sugioka, 117 Colo. 218, 185 P.2d 784 (1947); Hansen v. Nelson *et al.*,

On the other hand the result reached by the dissenting opinion seems in harmony with well considered authority.[27] It had formerly been held in Ohio that where there is no business connection and no transfer of benefit, mutual or otherwise, but rather a mere common interest the rider is a guest as a matter of law.[28] In *Iles v. Lamphere*[29] an officer of a ladies' aid society was injured due to the negligent driving of a fellow member while both were engaged in the furtherance of a food sale by the society. The court held that the rider was a guest since no tangible benefit accrued to the driver. Similarly in *Henry* et ux. *v. Henson* et ux.[30] co-workers in a missionary society travelling to a convention were held to be host and guest. The court concluded that the advancement of the Christian religion was not a benefit of such a nature as to remove the passengers from that relation. The instant decision, though presenting a situation seemingly identical with those cases, appears to present a conflict.

The present decision appears to constitute a correct implementation by the judiciary of the intent of the legislature in enacting the statute. The benefit, if any, accruing to the defendant in a situation such as presented by the principal case is of a most intangible nature. If such a benefit be "payment" then the statute would seem to have failed to achieve its purpose.

TORTS—NEGLIGENCE—STATUTE OF LIMITATIONS—TIME OF SALE OF DEFECTIVE GOODS DETERMINES RIGHT OF ACTION.—Plaintiff, a resident of Pennsylvania, brought suit in the United States District Court for the District of Connecticut by reason of diversity of citizenship charging defendant company, a Connecticut corporation, with negligence in the manufacture of a rifle. Defendant manufacturer had shipped the article on May 26, 1946, to a retailer. A cousin of the plaintiff purchased the rifle on July 8, 1949. The rifle was loaned to the plaintiff on July 3, 1950, and on the same day, while firing at a mark, the plaintiff lost his left eye when the rifle backfired due to alleged faulty construction. The defendant pleaded the Connecticut one year statute of limitations and moved for summary judgment. The motion was granted. Upon appeal, one judge dissenting, *held,* affirmed. The plaintiff's action was barred notwithstanding the commencement of the action within one year of the date of the injury to the plaintiff since the act or omission of the defendant complained of occurred more than one year prior to the action. *Dincher v. The Marlin Firearms Co.,* 198 F.2d 821 (2d Cir. 1952).

It is fundamental to the law of negligence that no actionable wrong exists until there has been an actual loss or damage to the plaintiff.[1] The pertinent Connecticut statute of limitations provides in part: ". . . No action to recover damages for injury to the person or to real or personal property, caused by negligence, . . . shall be brought but within one year from the date of the act or omission com-

240 Iowa 1298, 39 N.W.2d 292 (1949); Howes v. Kelman, 326 Mass. 696, 96 N.E.2d 394 (1951).

27. Ames v. Siebert, 156 Ohio St. 45, 99 N.E.2d 905 (1951); Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949).

28. Snyder v. Milligan, 52 Ohio App. 185, 3 N.E.2d 633 (1936).

29. 60 Ohio App. 4, 18 N.E.2d 989 (1938).

30. 174 S.W.2d 270 (Tex. 1943).

1. Commercial Bank v. Ten Eyck, 48 N.Y. 305 (1872); PROSSER, TORTS § 30 (1941).

plained of, . . ."[2] In a leading New York case, *Schmidt v. Merchants Despatch Transportation Co.*,[3] the court in applying the New York statute[4] pointed out that not until there was actual injury to the person or property of the plaintiff arising from the defendant's negligent act did the plaintiff have a personal right protected by law. Logic and precedent compelled the court further to hold that until such right accrued the statute could not begin to run against it. The United States Supreme Court has had occasion to pass on the subject in *Urie v. Thompson*.[5] There the Court held that a plaintiff was not barred by a three year statute of limitations[6] because of the fact that he had been exposed to, but not injured by, silica dust more than three years prior to commencement of the action. The Court noted, "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations."[7] Heretofore the Connecticut decisions have regarded the function and purpose of a statute of limitations as a bar to rights of action after accrual. Thus in the early case of *Bank of Hartford County v. Waterman*[8] the defendant pleaded the statute of limitations[9] claiming that the neglect or breach of duty is the gist of the action and the statute begins to run from the time of such neglect or breach. The court rejected this argument and reasoned that where the act is not legally injurious until certain consequences occur, the statute can only be said to run from the date of the consequential injury.

Clearly under the former wording of the instant statute where the limiting period commenced from "the date of the injury or neglect complained of"[10] the plaintiff could have recovered. In *Kitchner v. Williams*[11] plaintiff sued for negligence in the installation of a water heater. The action was brought more than two years after installation, but within two years of an explosion allegedly resulting therefrom. Defendant pleaded a two year statute which ran from the time the cause of action accrued. The court refused to bar the plaintiff's action on the sole ground that had the plaintiff brought the action anytime before the explosion it would have to be dismissed for up to that time he had suffered no damage. In *dicta* the court noted that the result would have been otherwise were the plaintiff arguing that he was unaware of the damage. In *White v. Schnoebelen*[12] the action was for the negligent installation of lightning rod equipment. The court refused to compute the running of the limiting statute from the date of installation. It was stated that it would be incomprehensible to attribute to the legislature the intent to have the

2. CONN. GEN. STAT. § 8324 (Revision 1949). See footnote 16 *infra*.

3. 270 N.Y. 287, 200 N.E. 824 (1936).

4. "The following actions must be commenced within three years after the cause of action has accrued: . . .(6) An action to recover damages for . . . a personal injury, resulting from negligence." N.Y. CIV. PRAC. ACT § 49.

5. 337 U.S. 163 (1949).

6. "No action shall be maintained . . . unless commenced within three years from the day the cause of action accrued." 53 STAT. 1404, 45 U.S.C.A. § 56 (1948).

7. 337 U.S. 163, 170 (1949).

8. 26 Conn. 323 (1857).

9. "No suit or action . . . shall be brought . . . but within two years next after the right of action shall accrue." 26 Conn. 323, 339 (1857).

10. CONN. GEN. STAT. § 6015 (1930).

11. 171 Kan. 540, 236 P.2d 64 (1951).

12. 91 N.H. 273, 18 A.2d 185 (1941).

plaintiff's right of action barred before the cause even accrued. In *Di Gironimo et al. v. American Seed Co.*[13] the defendant sold an air rifle to a minor who permitted a third boy to fire it. The plaintiff was thereby injured and brought suit for negligence in the sale of a rifle to a minor. The defendant argued that the statute began to run from the time of the sale. The court rejected this reasoning and held that the statute could not run until the cause of action accrued. The intervening time, while relevant on the question of proximate cause, could not affect the plaintiff's right to bring the action.[14]

The majority of the court in the instant case, however, reasoned that the change in the language of the statute from "the date of the injury or neglect complained of" to "act or omission complained of" compelled them to uphold the defendant's plea. The legislative intent, argued the court, was to have the statute run from the date of the sale. *Kennedy v. Johns-Manville Corp.*,[15] cited by the majority as precedent for its decision, seems, as the dissenting opinion points out, to be inapposite. There the plaintiff sued for negligent insulation of his home. The statute had apparently run, but the plaintiff insisted that he had not been aware of the damage and that therefore the action was brought in time. The court saw no force in the argument and held quite properly that the statute had run against plaintiff's cause of action despite his lack of knowledge as to its existence.[16] The principal case is readily distinguishable from the instant case in that in the *Kennedy* case the negligence and injury were simultaneous. Even though the plaintiff was unaware of the injury, it was inflicted at once. Here the plaintiff sues not for damage to the gun, but to his eye, which did not occur until a date within the period of limitation.

The majority opinion is based upon the express language of the statute which substituted "act or omission" for "injury or neglect" as the date for the commencement of the period of limitation. Against this argument the dissent maintains, and it is submitted correctly, that the terms "injury or neglect" and "act or omission" are often synonymous and the amendment was merely indicative of an attempt at statutory uniformity.[17]

It is apparent that the result of the instant case is anomalous. A statute of

13. 96 F. Supp. 795 (D. Pa. 1951). The pertinent statute read in part ". . . from the time when the injury was done. . . ." 12 PA. STAT. 34 (Purdon 1895).

14. *Id.* at 797. "If as defendant suggests, the intervening time until the injury had been a matter of many years rather than, as here, a matter of a few months that fact would bear not upon the problem of limitations but upon the problem of proximate cause."

15. 135 Conn. 176, 62 A. 2d 771 (1948).

16. The majority of the court also cites Giambozi v. Peters, 127 Conn. 380, 16 A. 2d 833 (1940) which decidedly is not in point. There a malpractice suit was brought under a special section requiring action to commence within "two years from the date of the accrual." The issue was whether the cause accrued when the defendant negligently transfused syphiletic blood into the plaintiff's testator or when treatment was completed. The court held that the injury occurred with the transfusion and therefore the action was not timely brought.

17. CONN. GEN. STAT. § 8316 read from 1930 - 1935: "No action upon a tort shall be brought but within six years next after the right of action shall accrue." In 1935 the legislature changed the terms of the statute to read "from the date of the act or omission complained of." This, the dissent argues, renders the change in the instant statute insignificant since Section 8316 is the catch-all section in the limitation of tort actions.

limitations, remedial in nature, has operated on the remedy before the maturity of the right. It has ever been the purpose of a procedural[18] statute of limitations to penalize the plaintiff for his laches after his cause accrued. In this, the courts of Connecticut have concurred.[19] There is no reason to ascribe to that legislature a contrary intent unless it is clearly required by the language employed. If the Connecticut courts choose to approve of the construction of the statute given in the instant case, then the legislature should move swiftly to avoid, in the future, such an apparently inequitable result.

18. A procedural statute of limitations, one barring the remedy, must be distinguished from a substantive statute, one extinguishing the right. For a comprehensive discussion of this problem see GOODRICH, CONFLICT OF LAWS 240 (3d ed. 1949).

19. Consolidated Motor Lines Inc. v. M. & M. Transportation Co., 128 Conn. 107, 108, 20 A.2d 621, 622 (1941).