strong as to shift the burden of persuasion[26] there ought to be some social policy to justify this effect of the presumption.[27] But the only ascertainable policy, if such it may be called, seems to be the implicit dissatisfaction with the disproportionate contractual bargaining positions of the insured and the insurer. The usual policy is drawn by the insurer's attorneys. It seems questionable whether, by the use of limited conditions, they should succeed in placing the burden of pleading and proof on the beneficiaries.[28] The question of "best common law" however, was foreclosed by *Travellers' Ins. Co. v. McConkey*.[29] In that case the Supreme Court expressly approved an instruction which was in substance that of the instant case.[30] Surprisingly enough, the majority here said that in the *McConkey* case no instruction was approved.

Labor Law—Anti-injunction Act—Right To Picket in Non-labor Dispute—[Federal].—The plaintiff operates a large number of retail grocery stores in the District of Columbia, some of which are largely dependent on negro patronage. The defendant, a corporation composed solely of colored persons not associated with any labor organization, is "organized for the mutual improvement of its members." The plaintiff refused a request of the defendant to adopt a policy of employing colored help in certain of its stores. The defendant thereafter began an organized peaceful patrol of the premises of one of the plaintiff's stores and threatened a similar patrol of two others. The pickets

[26] Travellers Ins. Co. v. McConkey, 127 U.S. 661 (1888); New York Life Ins. Co. v. Brown, 39 F. (2d) 376 (C.C.A. 5th 1930); Bachmeyer v. Mutual Reserve Fund Life Assoc., 87 Wis. 325, 58 N.W. 399 (1894); United Commercial Travellers v. Watkins, 38 Ohio App. 420, 176 N.E. 469 (1931); O'Brien v. New England Mut. Life Ins. Co., 109 Kan. 138 197 Pac. 1100 (1921); American Home Circle v. Schneider, 134 Ill. App. 600 (1907); Withers v. Pacific Mutual Life Ins. Co., 58 Mont. 485, 193 Pac. 566 (1920); the "weight of authority," however, appears to be *contra:* 103 A.L.R. 185.

[27] See Morgan, *op. cit. supra* note 2, at 909; but see Morgan, Instructing the Jury upon the Presumption and Burden of Proof, 47 Harv. L. Rev. 59, 81 (1933).

[28] Normally the burden of persuasion follows the burden of pleading. First National Bank v. Ford, 30 Wyo. 110, 216 Pac. 691 (1923); Wigmore, *op. cit. supra* note 3, §2486. Other tests often used place the burden of persuasion on the party having special knowledge (Wilson v. Hodges, 2 East 312 (1802); 5 Wigmore, *op. cit. supra* note 3, §2486), the "legal affirmative" (Dickinson v. Evans, 6 T.R. 57 (1794)), or the "literal affirmative" of the issue (Berty v. Dormer, 12 Mod. 526 (1701)), but seem inapplicable here. The general contract rule that the party desiring to come within a limited condition has the burden of pleading and proof on that issue, 5 Wigmore *op. cit. supra* note 3, §§2510, 2537, is not illuminating. It may be argued that the condition was the double indemnity clause and the burden should be on the insured to show the accident to come within the limited condition, or it is equally plausible to say that a more limited condition was suicide and the burden is on the insurance company on that issue. Though it is questionable whether the language of the insurance company's lawyers should determine the placement of the burden of persuasion, it may be that because the beneficiary in a double indemnity policy is trying to recover something extra that the burden of persuasion should be on him. If the policy is in standard form prescribed by statute there seems even less reason to favor the beneficiary.

[29] 127 U.S. 661 (1889).

[30] "The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant. The presumption is that death is not voluntary . . . . ."

carried placards stating: "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" The plaintiff sought an injunction restraining the picketing. The district court granted the injunction. The court of appeals,[1] in affirming the decree, held that the case did not involve or grow out of a labor dispute within the meaning of the Norris-LaGuardia Act. The Supreme Court *held* (two justices dissenting), reversed. Even though the dispute is "racial," there exists a labor dispute within section thirteen of the Norris-LaGuardia Act, thus prohibiting injunctive relief. *New Negro Alliance v. Sanitary Grocery Co.*[2]

The Court in the instant case by its broad interpretation of the Norris-LaGuardia Act again illustrates the technique with which the judiciary interprets legislative enactments in order to reach the favored result.[3] The Court felt that the strong social justification for a limitation of injunctive relief against trade unions applies equally to non-labor organizations, and that therefore under the act[4] like treatment should be accorded both groups. The definition of a labor dispute in section thirteen relied upon by the court should be construed in conformity with section two. That section clearly indicates that the statute was intended to aid labor in organizing and to obtain collectively increased wages, shorter hours, and a betterment of working conditions. It is indeed questionable, therefore, whether the act should permit its application to this dispute, in which the defendants do not seek a betterment of conditions of employment, but simply seek the employment on whatever terms it comes.[5]

Even though in the instant case the Court had found the controversy not a labor dispute within the meaning of the act, the question whether an injunction should issue would not have been foreclosed.[6] In those jurisdictions where peaceful picketing is illegal if no strike is in progress,[7] it would be difficult to justify picketing by a non-labor group. Where, however, peaceful picketing in the absence of a strike has received judicial sanction,[8] it would seem that picketing by a group unassociated with or-

[1] 92 F. (2d) 510 (App. D.C. 1937). [2] 58 S. Ct. 703 (1938).

[3] *Cf.* 5 Univ. Chi. L. Rev. 515, note 6 (1938).

[4] 47 Stat. 70 (1932), 29 U.S.C.A. §§101–115 (1937).

[5] Beck Shoe Co. v. Johnson, 153 Misc. 363, 274 N.Y. Supp. 946 (1934); Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935). In neither of these analagous cases was it urged by the defendants that a labor dispute was involved.

[6] An association of food stores picketed competitors for keeping their shops open at a time when the association members remained closed; an injunction against peaceful picketing was denied, although the court found no labor dispute within the Pennsylvania Anti-Injunction Act. Individual Retail Store Owners Ass'n v. Penn Treaty Food Stores Ass'n (Phila. C. P. Ct. No. 6, Jan. 20, 1938), noted 86 U. of Pa. L. Rev. 556 (1938).

[7] Harvey v. Chapman, 226 Mass. 191, 115 N.E. 304 (1917); Gevas v. Greek Restaurant Workers' Club, 99 N.J. Eq. 770, 134 Atl. 309 (1926); Keith Theatre v. Vachon, 134 Me. 392, 187 Atl. 692 (1936); Smith Metropolitan Market Co., Ltd. v. Lyons, C.C.H. Labor Law Service §18026 (Sup. Ct. Los Angeles Co., Calif. 1937).

[8] American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); two of the plaintiff's employees were on strike, but in the absence of this factor it is hard to believe that the court would have relied upon such a technical distinction to reach a different result. It is also noteworthy that many of the men in the picket line were employees who had been laid off and had not been recalled to work. Conceivably the court felt the men had a legal interest in their jobs, which may be a possible differentiation from the ordinary cases of picketing

ganized labor is not unlawful where there exist considerations in favor of extending such privileges that are equally as compelling as those existent in a labor dispute.[9] The results have varied in the non-labor cases,[10] but where tenants picketed in an effort to procure lower rents,[11] it was felt that the social gain outweighed the commensurate loss inflicted on the landlord. Likewise an injunction was denied where an association of retail cleaners picketed a rival dealer to protest against the violation of an N.I.R.A. code.[12] The same method was stamped with approval when employed by a theater owner against a scalper,[13] and by consumers protesting against excessive prices.[14] Just where the line must be drawn in denying injunctive relief in disputes of this type is of necessity rather tenuous,[15] but it is apparent that each case must be decided on its own facts in light of the advantage to be derived by the community balanced against the injury befalling the complainant.

Although the courts have protected interests similar to that in the instant case, there are considerations which may distinguish the racial dispute. There is a substantial likelihood that race riots and reprisals might result from the prejudice incited.[16]

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in the absence of a strike. Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 Pac. 107 (1917); Exchange Bakery v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Stillwell Theatre v. Kaplan, 259 N.Y. 405, 182 N.E. 63 (1932), *cert. denied*, 288 U.S. 606 (1932); Blumauer v. Portland Union, 141 Ore. 399, 17 P. (2d) 1115 (1933).

[9] See Barnes-Arno Bldg. Corp. v. Hoffman, N.Y.L.J., Mar. 6, 1933, p. 1324 (Sup. Ct. 1933) (picketing by tenants in rent dispute upheld); Bernstein v. Retail Cleaners' and Dyers' Ass'n 31 Ohio N.P. (N.S.) 433 (1934) (picketing of competitors to protest a reduction in prices below those fixed by N.I.R.A. code).

[10] Allowing peaceful picketing: Barnes-Arno Bldg. Corp. v. Hoffman, N.Y.L.J., Mar. 6, 1933, p. 1324 (Sup. Ct. 1933); Cohen v. Martin Beck, N.Y.L.J. Oct. 23, 1934 p. 1407 (Sup., Ct. 1934); Bernstein v. Retail Cleaners' and Dyers' Ass'n, 31 Ohio N.P. (N.S.) 433 (1934); Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y. Supp. 250 (1934); Roseman v. United Strictly Kosher Butchers, 163 Misc. 331, 298 N.Y. Supp. 343 (1937). See also Dutch Industries Fair at Utrecht v. Dutch Committee against Terror and Persecution in Germany, N.Y. Times, Sept. 13, 1933, p. 8 (Amsterdam Ct.). Not allowing peaceful picketing: Birnbaum v. Margosian, N.Y.L.J., March 6, 1933, at 1323 (Sup. Ct. 1933); People v. Kopezak, 153 Misc. 187, 284 N.Y. Supp. 629 (1934), aff'd., 266 N.Y. 565, 195 N.E. 202 (1935); Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y. Supp. 946 (1934); Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935).

[11] Barnes-Arno Bldg. Corp. v. Hoffman, N.Y.L.J. March 6, 1933, p. 1324 (Sup. Ct. 1933).

[12] Bernstein v. Retail Cleaners' and Dyers' Ass'n 31 Ohio N.P. (N.S.) 433 (1934).

[13] Cohen v. Martin Beck, N.Y.L.J., Oct. 23, 1934, p. 1407 (Sup. Ct. 1934).

[14] Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y. Supp. 250 (1934). Unlike the tenement dwellers, see note 11, *supra*, the consumers could readily have patronized another bakery by way of protest.

[15] A factor meriting consideration is the possibility of subjecting the pickets to liability under the usual theories of the right of privacy. See Brents v .Morgan, 221 Ky. 765, 299 S.W. 967 (1927). It would seem that the pickets should be forced to respond in damages where they are using some personal item that is nobody else's business, for example, a group picketing the plaintiff's store for the publicized reason that he failed to contribute to the community chest.

[16] Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y. Supp. 946 (1934); Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935); New Negro Alliance v. Sanitary Grocery Co., 92 F. (2d) 510 (App. D.C. 1937).

On analogy to criminal libel[17] it would seem ill-advised for a court to sanction a movement of this type, which likewise tends to provoke retaliation,[18] and to disturb the peace.[19] A certain degree of violence, however, seems a necessary accompaniment to any effort on the part of a previously subjected group to improve its conditions, as many labor disputes will illustrate, and it has been suggested that "the alternative of abandoning all attempts at progress is hardly preferable."[20] It is particularly noteworthy that if the negroes organized as a labor union and demanded employment for its members, there would clearly be a labor dispute within the meaning of the Norris-LaGuardia Act.[21] Thus the argument as to the likelihood of violence seemingly loses its vigor.

In the present case, in contrast to the labor dispute, the interests of organized labor will not be advanced and living standards will not be raised by a compliance with the demands of the defendant. Because of this factor, there seems less justification for applying the same liberal attitute now accorded labor.[22] A solution, both providing for the economic progress of the negro race and eliminating the possibility of racial conflict, would be a legislative prohibition against the exclusion of any person from union membership because of race or color.[23]

Torts—Slander Actionable per se—Extension of Scope of Business Slander—[England].—The plaintiff's employer, a diamond merchant, and most of the customers of the business, were Jewish. The alleged words, spoken by the defendant to the plaintiff's employer, were, "Victor [the plaintiff] is a Jew-hater." No special damages were proved. *Held*, that these words were actionable *per se*, as touching the plaintiff in his employment. *De Stemple v. Dunkels*.[1]

The categories of slander actionable *per se* rest on arbitrary distinctions, which have been strictly maintained by the courts.[2] Although recovery for slander generally

[17] "The gist of the offense is its tendency to provoke a breach of the peace." Miller, Handbook of Criminal Law §170 (1934).

[18] Where members of a labor union picketed a restaurant owner because he refused to discharge his colored employees after the union rejected an offer from the negroes seeking admission to the union. Willis v. Restaurant Employees, 26 Ohio N.P. (N.S.) 435 (1927).

[19] It should be noted that while there is a broad social justification in the instant case, there is no justification for criminally libelling another.

[20] 83 U. of Pa. L. Rev. 383 (1935).

[21] Lauf v. E. G. Skinner Co. 58 S. Ct. 578 (1938). But see Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807 (Mo. 1937), noted 5 Univ. Chi. L. Rev. 514 (1938).

[22] Exchange Bakery v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Stillwell Theatre v. Kaplan, 259 N.Y. 405, 182 N.E. 63 (1932), *cert. denied*, 288 U.S. 606 (1932); Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910 (1937).

[23] Many unions expressly exclude negroes from union membership. Spero and Harris, The Black Worker 53 *et seq.* (1931). For a recent case refusing to compel a union to accept an application for membership and stating that the problem is one for the legislature, see Miller v. Ruehl, 2 N.Y. S. (2d) 394 (Sup. Ct. 1938).

[1] 158 L.T. 19 (1938).

[2] Gatley, Libel and Slander 40 (2d ed. 1924).