a plaintiff is deprived of his action because of his own wrong, should be mentioned in order to be distinguished. There the negligence of the plaintiff and the defendant contribute to a single injury; here the torts of the plaintiff and the defendant each caused a separate injury. The most persuasive argument in favor of the position of the court is the suggestion that punitive damages should be mutual.[10] This view has been refuted by Sutherland,[11] particularly on the convincing ground that "aside from the ultra refinement it involves, ... the plaintiff is punished without cause—he may not have violated the law." Furthermore, if the plaintiff has committed a legal wrong, the defendant may prosecute a separate action. In refutation of the contention that it is desirable to settle all problems in one suit, it is submitted that the issue is confused by presentation of two different inquiries in a single lawsuit; the attention of the jury is directed to the plaintiff's fault, to the neglect of his injury.

Mitigation predicated on the fact that the defendant is not blameworthy would seem equally undesirable and perhaps anomalous. To allow the blamelessness of the defendant to triumph completely, mitigation must be permitted, whether or not the plaintiff is actually innocent of wrong, in every case in which a suit is contemplated the bona fides of which the defendant justifiably doubts. This is obviously unjust to innocent litigants. If, on the other hand, the fact that the defendant is not blameworthy is permitted to mitigate damages only when the plaintiff is actually guilty of wrong, then the test of the defendant's merit is placed on an external factor over which he has no control. To the suggestion that the defendant should be permitted to shoulder this risk, the refutation is again that such a decision places a premium on risking commission of an admitted wrong.

In justice to the Georgia position it must be granted that the result is to some extent persuasive. The Coca-Cola Company, and many other purveyors of food and drink, have been harassed by a multitude of fictitious claims; a weapon is here placed in their hands to enable effective defense. An extremely flexible scale of damages permits the jury to allow more accurately a recovery commensurate with justice under all the facts. While it is likely that few would attempt to argue that the plaintiff's conduct should be permitted to be pleaded in a burglary action or even in a civil suit for battery, desire to maintain the right of privacy may not be as powerful as the desire to protect against fictitious claims.

Perhaps the circumstance that creation of the tort was comparatively recent is indicative of absence of strong motivating policy. Certainly qualification of early expressions of its strength would not conflict with a powerful momentum. The jury is given an opportunity to balance the social values of the conflicting interests here involved as reflected in the mores of the people. Under this view, the case is an example of the ritualistic function of the law.[12] In denying justification the court celebrated the sanctity of the right of privacy, and conventional consistency; in permitting mitigation it allowed the mores of the people to be effective.

Labor Law—Anti-injunction Act—Enjoining All Picketing after Violence Occurs— [New York].—Members of the defendant union committed several acts of violence while picketing the plaintiff's premises during a labor dispute. *Held*, notwithstanding the

[10] 16 Harv. L. Rev. 591 (1903).

[11] 4 Sutherland, Damages § 1255 (4th ed. 1916).

[12] Arnold, Symbols of Government c. ii (1935).

New York anti-injunction statute,[1] all picketing may be enjoined when sufficient violence has occurred to indicate that the toleration even of peaceful picketing will result in violence. The denial of a motion to modify an injunction prohibiting all picketing was affirmed. *Busch Jewelry Co. v. United Retail Employees' Union, Local 830.*[2]

Early anti-injunction statutes[3] were crippled[4] by limiting the term "labor dispute" to disputes growing out of the employer-employee relationship[5] and by pronouncing the statutes declaratory of the common law.[6] Later statutes,[7] such as the one involved in the instant case, sought to circumvent these difficulties by defining "labor dispute" in broader terms[8] and by specifically declaring that a court of equity was to be without jurisdiction in certain enumerated types of cases.[9] Such statutes commonly contain provisions prohibiting injunctions against activity commonly considered peaceful picketing.

The problem presented by the principal case is whether even under such statutory provisions, peaceful picketing may be enjoined because previous illegal activity may be expected to continue if any picketing is permitted. The problem is further complicated by the constitutional question presented if the statute be interpreted to deny equitable relief against violence. The more general question as to the scope of equitable relief against illegal acts is also presented. The solutions which have been applied by the courts may be discussed in terms of these problems.

Some decrees have prohibited all picketing, excepting only such acts as are particularly defined and regulated therein.[10] In so far as such decrees merely define peaceful picketing in the particular situation, there is no conflict with the statute. A decree which goes further, however, to enjoin specifically or by implication activity usually considered peaceful, is more difficult to reconcile with the statute. In any event, no constitutional problem arises under this construction. The court exercises its power to determine precisely the amount of pressure which a union may exercise. As a practical matter partial prohibition refuses to the union the privilege of determining for itself which, among peaceful picketing techniques, will be most desirable in rapidly chang-

[1] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1939) § 876-a.

[2] 22 N.E. (2d) 320 (N.Y. 1939).

[3] E.g., 38 Stat. 730 (1914), 29 U.S.C.A. § 52 (1927); Ill. Rev. Stat. (1939) c. 48, § 2a; Minn. Stat. (Mason, 1927) § 4256–7; Kan. Gen. Stat. (Corrick, 1935) § 60–1104.

[4] Frankfurter and Green, The Labor Injunction 150–98 (1930).

[5] Duplex Printing Co. v. Deering, 254 U.S. 443 (1921); Bull v. Int'l Alliance of Theatrical State Employees, 119 Kan. 713, 241 Pac. 459 (1925).

[6] See American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 203 (1921).

[7] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1939) § 876-a; 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101–15 (1935).

[8] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1939) § 876–a10; 47 Stat. 73 § 13(a), (b), (c) (1932), 29 U.S.C.A. § 113 (a), (b), (c) (Supp. 1938).

[9] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1939) § 876–a1; 47 Stat. 70 § 4 (1932), 29 U.S.C.A. § 104 (1935).

[10] De Agostina v. Holmden, 157 N.Y. Misc. 819, 285 N.Y. Supp. 909 (1937); Remington Rand v. Crofoot, 248 App. Div. 356, 289 N.Y. Supp. 1025 (1936); Lake Charles Stevedores v. Mayo, 20 F. Supp. 698 (La. 1935). Under the Clayton Act: American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 (1921).

ing situations and such partial prohibition generally entails a more complicated court decree, the niceties of which cannot readily be appreciated by the layman affected.[11]

A second solution to the problem of enjoining peaceful picketing is the one accepted in the principal case—complete prohibition of picketing, peaceful and otherwise, once violence has occurred.[12] It is difficult to see how this can properly be done after a statute has deprived the court of jurisdiction to enjoin such activity. A possible justification is that even peaceful picketing under such circumstances[13] is a "method involving violence,"[14] hence beyond the protection of the statute. But aside from the logical difficulty of asserting that peaceful picketing can be a "method involving violence," it does not appear that the court in the principal case relied on this point.

The court did rely on the proposition that if the statute were construed to deny jurisdiction to enjoin dangerous and illegal acts, it would be unconstitutional.[15] The applicability of this principle may be questioned without doubting its soundness. The dissenting justice pointed out that the problem was not whether illegal acts were enjoinable but whether legal[16] acts could also be enjoined.[17] So stated, the constitutional question is hardly formidable.[18] The argument that once violence has occurred, any

[11] Statement of William Green, S. Hearing on S. 1482, 70th Cong. 1st Sess., at 70 (1928). Where conduct is to be closely regulated, a lengthy decree may be advantageous from the point of view of the union in so far as unionists may then know exactly what action they may take. Compare the discussion in Great Northern R. v. Brosseau, 286 Fed. 414, 415 (D.C. N.D. 1923) with the decree in that case, at 424.

[12] May's Furs and Ready to Wear v. Bauer, 255 App. Div. 643, 8 N.Y.S. (2d) 819 (1939); cf. Swing v. AFL, 298 Ill. App. 63, 18 N.E. (2d) 258 (1938); Wiest v. Dirks, 20 N.E. (2d) 969 (Ind. 1939). In the case last cited it does not appear that the court was urged to limit the injunction to violent acts alone.

[13] See American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 205 (1921).

[14] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1939) § 876-a1(f): "That no item of relief granted prohibits directly or indirectly . . . . giving publicity . . . . whether by advertising, speaking, picketing, patrolling any public street . . . . by any method not *involving* fraud, violence, or breach of the peace . . . ." (Italics added).

[15] Busch Jewelry Co. v. United Retail Employees' Union, Local 830, 22 N.E. (2d) 320, 322 (N.Y. 1939); cf. Truax v. Corrigan, 257 U.S. 312 (1921).

[16] Since the New York statute merely denies jurisdiction to enjoin certain acts, it may be argued that such acts remain illegal if they were illegal before the statute and continue to entail liability in damages, the statute having merely rendered them non-enjoinable. Such a construction presents constitutional difficulties in view of the holding in Truax v. Corrigan, 257 U.S. 312 (1921) that a denial of equitable relief against illegal activity in labor disputes is a denial of equal protection. Difficulty is avoided where the statute in terms declares that the non-enjoinable activity is legal. E.g. Wis. Stat. (1935) § 133.07.

[17] Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931) is the leading case in New York to the effect that all picketing may be enjoined where previous illegal acts indicate danger to property if any picketing be allowed. In that case an injunction had already been violated by the defendants. This demonstration of irresponsibility was considered sufficient to warrant a blanket injunction. The case is founded on a dictum in Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 269, 157 N.E. 130, 135 (1927) where the injunction was denied. Even the dissenting justice in the principal case accepted the doctrine of Nann v. Raimist, arguing only that it did not appear in the case that peaceful picketing was out of the question.

[18] Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

picketing will appear coercive to the public may be met by the suggestion that the injunction against further violence should allay such fears.

It should be further considered that the protection accorded the plaintiff in the principal case is unusual in equity in cases other than labor disputes. Ordinarily, unlawful acts alone are enjoined.[19] Hence, if it be assumed that peaceful picketing is legal, courts which enjoin it because of its previous connection with illegal activity thereby enlarge the area of protected interest in this special case. The policy of providing such added relief where social and economic conflict is severe and where the relative right is difficult to weigh may well be doubted.[20]

These considerations point to the desirability of the third solution, enjoining violent acts only.[21] It is suggested that such a rule is in accord with the provisions of the statute, is not properly assailable on constitutional grounds, and allows as great a measure of relief as has been usual in equity cases other than in labor disputes.

Postal Laws—Right of Third Party to Recover upon a Postmaster's Bond—[Federal].—The plaintiff finance company purchased conditional sales contracts from an automobile dealer and for credit information regarding the makers of the contracts relied upon the answers to mailed inquiries sent to such makers and to their credit references. At the dealer's request, the postmaster delivered these letters to him for the addressees. The dealer fraudulently answered the letters himself and was thereby enabled to sell to the plaintiff $40,000 worth of spurious contracts. Without the express consent of the United States the plaintiff sued the defendant, surety on the postmaster's bond to the United States, the bond being conditioned on the postmaster's "faithful discharge of all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department. . . . ." *Held,* in requiring a postmaster's bond the United States did not impliedly consent to a suit thereon by a user of the mails. The judgment of dismissal was affirmed. *United States for use and benefit of Midland Loan Finance Co. v. National Surety Co.*[1]

The statutes which require bonds of government officers frequently provide expressly that third parties injured by breaches of the conditions of the bonds may sue the sureties in the name of the obligee.[2] Even in the absence of such express provisions courts have sometimes found a "legal intendment" to permit third parties to sue in

[19] In Hunnicutt v. Eaton, 184 Ga. 485, 191 S.E. 919 (1937) the maintenance of a dance pavilion was enjoined because certain acts constituting a nuisance had been committed, notwithstanding that some of the business was lawful. Although the court relied on its general equity powers it is suggested in 16 N.C.L. Rev. 33 (1937) that the decision may have been on analogy with statutes in other Southern jurisdictions enlarging the powers of courts of equity in such cases.

[20] Prior Illegal Acts as a Ground for Blanket Injunctions against Picketing, 44 Harv. L. Rev. 971 (1931).

[21] Houston & North Texas Motor Freight Lines v. Local Union No. 886, 24 F. Supp. 619 (Okla. 1938); Newton v. Laclede Steel Co., 80 F. (2d) 636 (C.C.A. 7th 1935); cf. Rosen v. United Shoe and Leather Workers' Union, 287 Ill. App. 49, 4 N.E. (2d) 507 (1936). At common law: Wise Shoe Co. v. Lowenthal, 266 N.Y. 264, 194 N.E. 749 (1935).

[1] 103 F. (2d) 450 (C.C.A. 8th 1939), cert. granted, 7 U.S. Law Week 355 (1939).

[2] E.g., Rev. Stat. § 1735 (1878), 22 U.S.C.A. § 103 (1927) (consular officers); cf. Rev. Stat. § 784 (1878), 28 U.S.C.A. § 500 (1928) (marshals).