argued that the same reasoning should enable the life beneficiary of a trust acquired by gift to take advantage of his donor's profit motive. But if Congress, by requiring a donee to use the basis of his donor, intended the donee to have the benefit of the donor's profit motive, then it can as well be urged that a beneficiary under a will, who acquires a new basis for computing gain and loss, cannot relate any tax consequences back to the testator's acquisition of the property, since Congress by requiring a new basis also required a new profit motive.

It appears that the taxpayer in the *McCallister* case would have difficulty in demonstrating that the surrender of her life income interest was part of a transaction entered into for profit. The court did not consider this aspect of the problem. Had it done so, there is at least good reason to doubt whether the taxpayer would have been entitled to a loss deduction as a result of the surrender of her interest.

Labor Law—Injunctions—Picketing That Prevents Performance of Statutory Duty Owed Stranger to Dispute Non-Enjoinable—[New York].—A non-union builder was in the process of constructing homes on a tract of land to which there was only one entrance from the public highway. The defendant, a building and construction union, called a strike of the union men employed on the project when the builder refused to recognize or bargain with the union. One month after picketing had begun at the only public entrance, the plaintiff purchased one of the homes which had been completed except for the installation of gas and electricity. The co-defendant, a lighting company, in compliance with a statutory duty,[1] sent some men to install these services in the plaintiff's home among others. However, these employees, members of a sister union, refused to cross the defendant union's picket line. The plaintiff sought an order to compel the lighting company to perform its statutory duty and to enjoin the union from picketing in such a way as to prevent the performance of the statutory duty. The New York lower court granted a temporary injunction which was reversed by the Appellate Division. On appeal to the New York Court of Appeals, *held*, the New York little Norris La-Guardia Act[2] prohibits the issuance of any injunction "in any case involving or growing out of a labor dispute" in the absence of findings of fact which are not present in this case. Judgment affirmed, three justices dissenting. *Schivera v. Long Island Lighting Co.*[3]

May a third party who has suffered an injury arising out of a labor dispute to which he was not a disputant obtain an injunction when the injury stems from the violation of an express statutory duty?

The plaintiff contended that he was not a party to a labor dispute within the

[1] N.Y. Transportation Corporation Law (McKinney, 1943) c. 63, § 12.

[2] N.Y. Civ. Prac. Ann. (Cahill, 1946), § 876-a.

[3] 296 N.Y. 26, 69 N.E. 2d 233 (1946).

meaning of the New York little Norris-La Guardia Act,[4] and therefore was entitled to an injunction because he had suffered an injury. However, an examination of this anti-injunction statute indicates that it expressly includes those cases "involving persons participating or interested in a labor dispute,"[5] and such persons are further defined as those persons against whom relief is sought.[6] The majority opinion infers from this language that "It makes no difference who is the plaintiff"[7] where the defendant is involved in a labor dispute. Although the dissenting opinion readily confirms the existence of a labor dispute, it denies that the present case "grows out of a labor dispute" since the plaintiff is a stranger to that dispute.

In an analogous case, *Norman v. Sullivan*,[8] a tenant on the eighteenth floor of an office building sought to enjoin the union from interfering with the building owner's duty to furnish elevator service. Although the court admitted that the tenant was a stranger to the labor dispute, it denied the injunction on the ground that to do otherwise "would breach fatally the armor with which the Legislature has endeavored to shield the rights of labor."[9] The broad definition of a labor dispute in the anti-injunction statutes was undoubtedly intended to embrace controversies other than those between employers and employees and those between labor unions and employees.[10]

It is evident from the cases and legislative history[11] that this section in the anti-injunction statutes staking out the "allowable area of economic conflict" constitutes the real progress over the substantive law existing under Section 20 of the Clayton Act.[12] Even if it should appear that the situation in the present case is unique and not expressly provided for by the language in the act, any ambiguity must be resolved by giving effect, in the process of the construction of the statute, to the history and circumstances surrounding the origin of the statute. The anti-injunction statutes, federal and state, were intended to remedy the abuses of the judicial power in granting injunctions in the field of labor disputes and thus to obviate the results of the rigorous judicial construction of the Clayton Act and its state prototypes. Consequently, the judiciary is bound to give effect to this clearly expressed legislative mandate unless the facts are clearly outside the scope of the statute.

The courts have stressed the fact that mere "incidental injury" will not justi-

[4] N.Y. Civ. Prac. Ann. (Cahill, 1946) § 876-a.

[5] Ibid., at § 876-b.

[6] Ibid., at § 876-c.

[7] Schivera v. Long Island Lighting Co., 296 N.Y. 26, 69 N.E. 2d 233, 234 (1946).

[8] 185 N.Y. Misc. 957, 57 N.Y. S. 2d 855 (1945).

[9] Ibid., at 959 and 857.

[10] New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[11] See Gregory, Labor and the Law 184–99 (1946).

[12] 38 Stat. 738 (1914), 29 U.S.C.A. § 52 (1942).

fy the issuance of an injunction where a labor dispute exists.[13] The freedom of movement and interests of third parties are necessarily affected to some extent as a result of the exercise by employees and labor unions of their privilege of appealing to the public for support.

Injunctions have issued, however, 1) where the coercive techniques employed were directed at the plaintiff as a secondary pressure;[14] 2) where the union activity in question was not deemed to be legal;[15] 3) where the picketing was violent;[16] and 4) where the public interest involved was deemed so forceful as to be overriding.[17] The legality of the union's objective, the nature of the picketing, and the intervention of a paramount public interest were not placed in issue here.

The plaintiff, however, argued that the picketing was aimed, not only at the employer, but also at him. The use of such secondary pressures has been enjoined by the New York courts unless the courts have found a "unity of interest" existing between the employer and the third party. The leading case enunciating this doctrine, *Goldfinger v. Feintuch*,[18] held that the product of a non-union manufacturer could be picketed at an independent retail outlet because a common benefit or interest existed between these parties as a result of the non-union conditions prevailing. The majority and concurring opinions in the present case disposed of the plaintiff's contention that he was being secondarily boycotted rather summarily by noting that the plaintiff had purchased the home a month after the picketing had begun. They apparently concluded from this fact that the picketing could not have been directed at the plaintiff. Realistically, however, picketing involves a complex of coercive techniques intended to harass the employer in every conceivable situation by which he may benefit. Consequently, it may well be contended that such picketing was also aimed at all purchasers, prospective or other, of the homes. A better argument to explain why the plaintiff apparently does not fall within the "unity of interest" exception is the fact that this approach has never been extended to a consumer or purchaser who has completely severed his relationship with the manufacturer or seller after the

[13] Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Perfect Laundry Co. v. Marsh, 120 N.J. Eq. 508, 186 Atl. 470 (1936); Norman v. Sullivan, 185 N.Y. Misc. 957, 57 N.Y.S. 2d 855 (1945).

[14] People v. Bellows, 281 N.Y. 67, 22 N.E. 2d 238 (1939); Canepa v. Doe, 277 N.Y. 52, 12 N.E. 2d 790 (1938); Weil & Co. v. Doe, 168 N.Y. Misc. 211, 5 N.Y. S. 2d 559 (1938).

[15] Opera on Tour v. Weber, 285 N.Y. 348, 34 N.E. 2d 349 (1941), noted in 9 Univ. Chi. L. Rev. 170 (1941).

[16] May's Furs and Ready to Wear v. Bauer, 282 N.Y. 331, 26 N.E. 2d 279 (1940); Busch Jewelry Co. v. United Retail Employees Union, 281 N.Y. 150, 22 N.E. 2d 320 (1939).

[17] Society of the New York Hospital v. Hanson, 185 Misc. 937, 59 N.Y.S. 2d 91 (1945), where a hospital was being picketed and the immediate welfare of the patients was involved, the court held that the public interest was superior to the union's right to picket and issued a limited injunction.

[18] 276 N.Y. 281, 11 N.E. 2d 910 (1937).

initial transaction.[19] Consequently, a finding that a secondary pressure existed outside the protection of the anti-injunction act may well have justified enjoining the picketing here, had it not appeared in the record that the plaintiff's attorney was being paid by the non-union employer. This factor, indeed, is somewhat reminiscent of the *Goldfinger* case itself.[20]

The dissenting judges were also impressed by the plaintiff's contention that the picketing has interfered with the lighting company's statutory duty to install gas and electric services. The issuance of an injunction based on such considerations would provide an umbrella under which recalcitrant employers would be quick to take cover. A parallel situation in the history of labor law is the use made of the *Lumley v. Gye*[21] doctrine to defeat the unionization of non-union employers. Agreements were exacted from employees as a condition of their being employed by which they agreed not to join the union. When organization of the employees was actually attempted by the union, an injunction was obtained on the ground that the unions were deliberately inducing a breach of contract. Thus this English tort doctrine, initially applied in a completely unrelated situation, provided the means by which employers could circumvent the slowly accumulated progress made by unions in acquiring legal sanctions for their coercive techniques. The efficacy of this doctrine was recognized by Judge Beach, dissenting in *R an W Hat Shop, Inc. v. Scully*,[22] where he stated: ". . . . employers of labor could extinguish the possibility of lawful strikes by posting notices of their outstanding contract obligations."[23] Subsequently these judicial excesses in the issuance of injunctions were remedied by the passage of the Norris-La Guardia Act.[24]

Similarly, the use of injunctions in all instances where the performance of statutory duties have been prevented by otherwise legally recognized union activities would provide a protective screen for non-union employers to avoid the effects of the anti-injunction statutes. Thus the Iowa Supreme Court in *Burlington Transportation Co. v. Hathaway*[25] enjoined the union from picketing because a common carrier was thus prevented from performing its statutory duty to haul the goods of all shippers indiscriminately. The huge number and wide range

[19] See People v. Bellows, 281 N.Y. 67, 22 N.E. 2d 238 (1939). But cf. People v. Muller, 286 N.Y. 281, 36 N.E. 2d 206 (1941), where a secondary boycott was justified because of the finding that a "unity of interest" existed where the non-union manufacturer agreed to service a burglar alarm for a definite period of time. See also Gregory, Labor and the Law 147–53 (1946); Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L.J. 341 (1938).

[20] See Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. 2d 910 (1937); and Blumenthal v. Weikman, 279 N.Y. Supp. 966 (1935), aff'g 154 Misc. 684, 277 N.Y. Supp. 895 (1935).

[21] 2 E. & B. 216 (1853).

[22] 98 Conn. 1, 118 Atl. 55 (1922).

[23] Ibid., at 20. But cf. Bricklayers' Masons' & Plasterers' International Union of America v. Seymour Ruff & Sons, Inc., 160 Md. 483, 154 Atl. 52 (1931).

[24] 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1942).

[25] 234 Ia. 135, 12 N.W. 2d 67 (1943).

of statutory duties, state and municipal, would provide a fertile field for non-union employers seeking immunization against the effects of anti-injunction statutes.

Finally it is important to note that the majority and concurring opinions carefully skirted the question of peaceful picketing as constituting an expression of constitutionally guaranteed free speech. If the doctrine enunciated by the United States Supreme Court in *Thornhill v. Alabama*[26] had been applied, the court could have reached its ultimate decision with a minimum of effort. The failure of the New York court to apply the *Thornhill* rationale is indicative of the doubt cast upon that case by the Supreme Court's subsequent decisions[27] which have attempted to mark out an area of economic conflict within which states can determine their internal labor policy.[28]

Procedure—Discovery of Witnesses' Statements to Adversary Attorney Not Allowed as Matter of Right under Federal Rules—[United States].—Four days after the sinking of a tugboat the owners of the tug and their insurer retained an attorney to represent them in anticipated litigation arising out of the accident. The United States Steamboat Inspectors held a public examination of surviving crew members and immediately thereafter the attorney for the tugboat owners obtained written statements from the men who had testified. The plaintiff, widow of a crew member who had been drowned in the accident, sought to discover the contents of these statements by an interrogatory directed to the defendants under the deposition-discovery provisions of the Federal Rules of Civil Procedure.[1] The interrogatory read as follows: "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."[2] While admitting that the statements had been taken, the defendants and their attorney refused to set forth the con-

[26] 310 U.S. 88 (1940).

[27] Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); American Federation of Labor v. Swing, 312 U.S. 321 (1941); Carpenters and Joiners Union of America, Local No. 213 v. Ritters Cafe, 315 U.S. 722 (1942).

[28] "But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing." Carpenters and Joiners Union of America, Local No. 213 v. Ritters Cafe, 315 U.S. 722, 727–28 (1942). See also Gregory, Labor and the Law 350–69 (1946).

[1] Rules 26–37, 28 U.S.C.A. following § 723c (1940).

[2] Hickman v. Taylor, 4 F.R.D. 479, 480 (Pa., 1945).