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ABSTRACTS

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APPEARANCE — WAIVER OF STATUTORY SERVICE OF PROCESS IN A DIVORCE ACTION BY PERSONAL APPEARANCE—Plaintiff filed suit in the Court of Common Pleas of Summit County, Ohio, for divorce and alimony against her husband who was in the armed forces of the United States stationed in California. Defendant was not served in the manner provided by statute, but several months after the petition was filed, he executed in California and personally filed an answer in which he purported to waive the issuance and service of summons. The trial court dismissed the petition. *Held*, affirmed. The court said that "in actions for divorce, the Ohio Statutes governing service of process are exclusive and mandatory. In this state, a defendant in a divorce action cannot waive jurisdiction of his person by a pleading, by personal appearance, or in any other manner, and thus confer jurisdiction upon the court to hear and determine the cause. Jurisdiction over the person of a defendant to dissolve a marriage relation can be acquired only by strict compliance with the Statutes of the State." [1] *Tucker v. Tucker*, (Ohio Ct. App. 1944) 56 N. E. (2d) 200.[2]

[1] Principal case at 202.

[2] Judgment reversed in Tucker v. Tucker, (Ohio 1944) 56 N. E. (2d) 202, the court saying that jurisdiction was acquired by the filing of an answer, the waiver

APPEARANCE — WHERE DEFENDANT HAS OBJECTED TO JURISDICTION OVER HIS PERSON BY PLEA IN ABATEMENT, MOTION FOR CHANGE OF VENUE FOR TRIAL OF ABATEMENT ISSUE AS GENERAL APPEARANCE — In an action against it on an insurance policy, in which service was made, in pursuance of an Indiana Statute,[1] on the Commissioner of Insurance of Indiana appellant here, a Missouri corporation doing business in Indiana, appeared specially and filed a motion to set aside the service and dismiss the cause for want of jurisdiction of the person. On denial of the motion appellant filed a verified plea in abatement covering substantially the same subject matter, requested a jury trial on its plea, and immediately thereafter filed a verified motion for a change in venue. The motion was granted and the cause venued to Jasper County from whence it was moved, on motion of the plaintiff, appellee here, to Starke County. There, appellant's plea in abatement was stricken out on the ground that his motion for a change of venue constituted a general appearance and a waiver of the jurisdictional question. Appellant assigns this ruling as error. *Held*, judgment reversed. The statute [2] provides that the issue on an answer in abatement must be tried first and separately from an answer in bar. At common law issues of fact were triable by jury and under modern practice a change of venue may be taken in order to provide unbiased triers. The court said, "No reason has been pointed out, nor do we see any reason why it does not apply to issues of fact raised by an answer in abatement as well as an answer in bar." [3] In seeking a jury trial and change of venue appellant was merely pursuing his remedy by abatement. *General American Life Ins. Co. v. Carter*, (Ind. 1944) 54 N. E. (2d) 944.

CONTRACTS — EFFECT OF FAILURE OF CONTEMPLATED MEANS OF PERFORMANCE ON DUTY TO PERFORM A PROMISE — Defendant, a public service corporation, engaged in the business of supplying electricity and gas to customers in the Bristol area, contracted with plaintiff, an agency organized for the purpose of constructing and renting low-rent dwellings in the City of Bristol, to furnish natural gas to the tenants of plaintiff's projects for all their heating, cooking, and refrigeration for the five years following September 5, 1940. The contract provided that neither plaintiff nor defendant should be liable for failure to receive or deliver the gas as the results of "fire, strike, riot, explosion, flood, accident, breakdown, acts of God, or public enemy or other acts beyond the control of the party affected." Sometime previous to the making of this contract defendant had been a manufacturer and distributor of artificial gas but when a natural gas supply had been discovered near Bristol defendant had, after a thorough investigation of its extent and a determination that it was sufficient to supply all possible customers in the area for at least ten years, contracted to buy enough gas to supply its customers then or thereafter to be served in Bristol,

of summons, and entry of appearance. The question of collusion is an entirely different matter.

See "Voluntary Appearance as Collusion between Parties to Divorce Suit," 109 A. L. R. 893 (1937).

[1] Ind. Stat. (Burns, 1940 Replacement) § 9509-4.

[2] Ind. Stat. (Burns 1933) § 2-1034).

[3] Principal case at 945.

Virginia and Bristol, Tennessee. In 1942 it appeared that the supply of natural gas, contrary to expectations, was nearly exhausted and defendant pleaded with its customers to change to some other type of fuel heating. Plaintiff agreed to make the change in its buildings but did not waive its right under the contract. Plaintiff brought an action for the cost of the change over. Defendant contended that first, the express provisions of the contract excused its performance in that non-performance was occasioned by an act beyond his control and second, the subject matter essential to performance which both parties used as the basis of the contract had ceased to exist. The trial court restricted the defense to the second conclusion and under instructions from the court, the jury refused a verdict for defendant. Plaintiff appealed contending that both defenses should have been rejected and defendant assigns cross error because the first was not permitted. *Held*, affirmed. Impossibility due to the failure or non-existence of a certain state of affairs or means of performance, the continued existence of which was contemplated by both parties as the basis of their contract but not contracted for will excuse performance on the part of the promisor, unless it appears that the promisor has assumed the risk of its continued existence. *Housing Authority of City of Bristol v. East Tennessee Light & Power Co.*, (Va. 1944) 31 S. E. (2d) 273.[1]

CORPORATIONS — CONSIDERATIONS INDICATING DEBTOR-CREDITOR RATHER THAN PROPRIETARY RELATIONSHIP — The Commissioner of Internal Revenue petitioned for review of a decision of the Tax Court of the United States, deciding that the amounts of accrued interest payable on non-voting 7% Income Debentures of defendant taxpayer constituted interest on indebtedness deductible under the Revenue Act,[1] and not non-deductible dividends on preferred stock. The debentures provided for payment of a sum certain at due date and of interest at seven per cent payable quarterly "only out of and to the extent of the net earnings of the company," or, irrespective of earnings, cumulative and payable absolutely at the due date. With the written consent of the holders of sixty-six and two-thirds per cent in principal amount of the outstanding debentures, the terms could be changed, but not in such a way as to affect the absolute obligation of the company in respect to the principal or interest. The taxpayer reserved the right to issue other "notes, debentures, bonds or other obligations of the company." *Held*, affirmed. The essential feature of the debtor-creditor relationship is the presence of a fixed maturity date at which time the holder may demand payment. The fact that annual payment of interest was contingent upon annual earnings does not take the debenture out of this class. This court did not decide whether a power in the hands of the holders to change the date of maturity would take the instruments out of the debtor-creditor class, but found that the holders had no such power. *Commissioner of Internal Revenue v. H. P. Hood & Sons*, (C. C. A. 1st, 1944) 141 F. (2d) 467.

[1] For related topics see, for rights of parties the performance of whose contract has been interfered with by the war conditions or act of government, 137 A. L. R. 1119 (1942), 147 A. L. R. 1447 (1943), 150 A. L. R. 1413 (1944), 151 A. L. R. 1447 (1944); where subject matter no longer available, 127 A. L. R. 1015 (1940).

COURTS — POWER OF FEDERAL CIRCUIT COURT OF APPEALS TO PASS ON MERITS ON PETITION FOR LEAVE TO FILE BILL OF REVIEW — Hazel-Atlas Glass Company petitioned the Circuit Court of Appeals for leave to file a bill of review in the District Court to set aside a judgment entered in that court in a patent infringement suit pursuant to an order of the Circuit Court of Appeals, on the ground that the Circuit Court's judgment had been obtained by fraud practiced upon it by appellant in that case. After a hearing the Circuit Court determined that since the fraud had been practiced upon it rather than upon the District Court, it would itself pass on the issue of fraud. It thereupon denied the petition but granted to petitioner leave to amend the prayer to ask that the Circuit Court hear and determine the issue of fraud. Upon consideration of the facts, the court denied the prayer of the amended petition, one ground of denial being that the court lacked power to set aside a decree of the District Court after the expiration of the term. The Supreme Court granted certiorari and reversed. In answer to respondent's contention that although the District Court has the power, upon proper proof, to set aside its 1932 decree in a bill of review proceeding, the Circuit Court does not possess a similar power for the reason that the term during which the 1932 judgment was entered had expired, it *held* that the Circuit Court, on the record presented had both the duty and the power to vacate its own judgment and give the district court appropriate directions. Equitable relief against fraudulent judgments is a judicially devised remedy fashioned to relieve from hardships which arise from application of the court-made rule that judgments should not be disturbed after the term of their entry has expired. When the judgment sought to be relieved from has been acted upon by the appellate court, permission to file a bill of review must be sought in the appellate court. The petition must contain the necessary averments supported by acceptable evidence, and the appellate court may, in the exercise of reasonable discretion, reject the petition in which case a bill of review cannot be filed in the lower court. If the court has the power to pass upon, and hence grant or deny, it would be a cumbersome and dilatory procedure if, after the Circuit Court had determined that relief must be granted, the case had to be sent to the District Court for decision, especially where the alleged fraud was on the Circuit Court. Justice Black in his dissent pointed out that the decision of the majority repudiated the unbroken rule of decision with respect "to finality of a judgment at the expiration of the term; . . . to jurisdiction of an appellate court to try issues of fact upon evidence and . . . to the necessity for resorting to a bill of review to modify or set aside a judgment once it has become final." [1] He said that if relief on equitable grounds was to be obtained, it should be sought in a formal suit in a court of first instance. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, (U. S. 1944) 64 S. Ct. 997.[2]

FRAUDULENT CONVEYANCES — APPLICATION OF ORDINARY FRAUD LAW IN CASE OF VAN SWERINGEN CREDITORS AGAINST BALL — Ohio Superin-

[1] Principal case at 1005.

[2] On problem of power of lower court to set aside on ground of fraud, judgment entered to mandate of, or affirmed by, a reviewing court. 146 A. L. R. 1230 (1943).

tendent of Banks in charge of liquidation of The Union Trust Company of Cleveland and as trustee for certain other creditors of the partnership of O. P. & M. J. Van Sweringen, late railway and real estate magnates, brought an action in the Federal District Court at Indianapolis against George A. Ball (of the Muncie Fruit Jar Balls) and the George and Frances Ball Foundation to recover the value of 8250 shares of the common stock in Midamerica Corporation allegedly converted by the defendants. The vast holdings accumulated by the Van Sweringens were controlled through two principal holding companies, Vaness and Cleveland Terminals Building. In 1930 Vaness and C.T.B. borrowed a total of $39,500,000 from two syndicates of banks headed by Morgan, pledging as security for their notes, stocks which had been held as collateral by Cleveland banks, the original Cleveland loans being repaid with money borrowed in Cleveland by the partnership using Vaness stock as collateral. Among the stocks pledged to Morgan were 2,000,000 common shares of Allegheny Corporation, the holding company for the railroads of the Van Sweringen System. Being unable to repay the Morgan loan May 1, 1935 when the notes came due and unable to get further extension of time or credit there, the pledged collateral was sold at public auction. The only concession to the Van Sweringens was the grouping of securities so that they could bid separately on those groups essential to control of their railways. With G. A. Tomlinson, a director of the Midland Bank which was a Cleveland creditor as well as a member of the Morgan syndicate, the Van Sweringens interested Ball. Midamerica was incorporated under the laws of Ohio September 28, 1935. Ball and Tomlinson subscribed $2,000,000 for 20,000 shares of common stock. A few days later the Midland Bank took over part of Tomlinson's interest. Ball later bought out the Midland and most of the Tomlinson interest. No money was subscribed by the Van Sweringens but they voted 8250 shares (55%) of the common stock under an agreement by which the stock was to be put in escrow with an unassignable option to the Van Sweringens to purchase when they had satisfied five of the six directors that all claims enforceable against them had been "paid or adjusted." Midamerica, on September 30, 1935 bought from Morgan that part of the collateral necessary for control of the railroads for $3,121,000, the money subscribed by Ball plus additional funds borrowed from a trust company. The management of the railroad interests remained with the Van Sweringens until the death of the survivor of them in November, 1936. In December, 1936 a receiver was appointed for the partnership and on April 1, 1937 he notified Ball of his rights in the partnership's option to buy the 8250 shares of Midamerica. On that day, however, Ball had transferred this stock, with the rest that he held, without consideration and with knowledge of the receiver's claims, to the George and Frances Ball Foundation. Ball contended that the Van Sweringens had no interest in the stock beyond their option to buy which expired with the death of O. P.; that plaintiff's claim was unenforceable because based upon the Van Sweringens' right to compensation for services which were found to be in violation of their fiduciary duty to Vaness and C. T. B.[1];

[1]Before judgment was entered by the district court in this action, it had been determined in an action by Vaness and C. T. B. against Ball and the foundation that

that plaintiff was estopped from maintaining his action because one of the four creditor banks represented by plaintiff had become the owner of 754½ shares of Midamerica common, and had sold them at a profit of $523,000. The other three banks had acquiesced in this action and had profited by it in that they were obligated to make up the deficiency when the insolvency proceedings of the fourth were wound up, and the obligation was reduced pro tanto by this profit. The court found that the 8250 shares of Midamerica were the property of the partnership held in trust for it, that the condition precedent to acquisition of ownership expressed in the agreement was designed to hinder, delay and defraud the partnership creditors, that Ball had been guilty of conversion when he transferred 14,050 shares of Midamerica to the foundation, that Ball, having no interest in the Vaness and C. T. B., could not assert in their defense, the Van Sweringens' breach of fiduciary duty to those companies, but that the effect of the breach was to reduce the value of the 8250 shares by 55% of the amount paid by the foundation in settlement of the costs,[2] and that there was no estoppel present. The court entered judgment for plaintiff for $3,664,616. *Held*, modified and affirmed as modified. The district court should have permitted a deduction from the recovery of 55% of the amount paid for Midland's Midamerica stock. The principle of equitable estoppel which defendant sought to invoke has its proper function in the prevention of fraud, actual or constructive. There was no fraud on the part of the creditors, but Midland, by electing to treat the rights of the receiver terminated in 754½ shares which it held, was barred by real estoppel from claiming now that the receiver had such rights. The judgment is reduced by $343,750. *Cook v. Ball*, (C. C. A. 7th, 1944) 144 F. (2d) 423.

HABEAS CORPUS — MAY A JUDGMENT OF CONVICTION BY A COURT HAVING JURISDICTION BE CHALLENGED ON HABEAS CORPUS ON GROUND THAT DEFENDANT WAS DENIED DUE PROCESS OF LAW? — One Whitman was convicted in a court of general jurisdiction of manslaughter in the first degree and was sentenced to imprisonment in Great Meadow Prison. Thereafter he applied for a writ of habeas corpus charging that he had been deprived of his liberty without due process of law, in contravention of the Fourteenth Amendment to the Federal Constitution. The trial court dismissed the writ without giving relator an opportunity to prove the truth of his allegations. The appellate court affirmed [1] and this court denied permission to appeal,[2] and ruled, on relator's appeal as of right [3] that relator is not entitled to habeas corpus in this case because the New York Legislature has provided that the writ is not

the Van Sweringens had breached their fiduciary duty to plaintiffs and the suits were settled by payment by the foundation of $662,500 to Vaness and C. T. B.

[2] See note 1.

[1] People ex rel. Whitman v. Wilson, 263 App. Div. 908, 32 N. Y. S. (2d) 29 (1942).

[2] Permission was sought under N. Y. Civil Practice Act (Cahill, 1937) § 589.

[3] N. Y. Civil Practice Act (Cahill, 1937) § 588 provided that if the construction of the Constitution of the State or of the United States was directly involved, an appeal would lie as of right.

available where the prisoner "is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction."[4] The Supreme Court of the United States granted certiorari [5] and, upon the determination that under the recently decided case of *Lyons v. Goldstein* [6] there was another remedy available to relator, that court, without deciding whether habeas corpus could be used as an alternative or cumulative remedy, vacated the judgment and remanded the proceeding to the State Supreme Court for "its determination, in the light of that decision [*Lyons v. Goldstein*] and for such further or other proceedings as may be deemed advisable." [7] The motion on behalf of the warden of Great Meadow to dismiss the writ after the cause had been remanded to the state court was denied. He then applied to the Appellate Division for an order prohibiting the Supreme Court of the State of New York "from proceeding to trial or adjudication of issues of fact now arising or hereafter to arise upon the petition in the habeas corpus proceeding." The application was denied, the court expressing the view that *coram nobis* was not an exclusive remedy for imprisonment in violation of constitutional rights. *Held*, order reversed and application for prohibition granted. Where a prisoner has been deprived of his liberty without due process, the state must accord him a remedy in its courts to obtain redress of the prohibited wrong. The writ of habeas corpus is the traditional process devised to safeguard the rights of persons deprived of liberty. At common law, however, the writ was not available in cases where the prisoner was detained under a conviction and sentence by a court having jurisdiction of the cause. This limitation is expressed in the New York statute. Although the "common-law principle does not apply in full force where a court . . . has failed in the course of a trial to observe the requirements of due process," [8] imprisonment is unlawful only if the prisoner cannot find a remedy in an appropriate proceeding in a court of competent jurisdiction. The relator had such a remedy in its right to move to vacate the judgment and to be granted a new trial. *Morhous v. Supreme Court of New York*, (N. Y. 1944) 56 N. E. (2d) 79.

INSURANCE — WHAT IS A FIRE LOSS WITHIN THE MEANING OF COVERAGE CLAUSE IN A FIRE INSURANCE POLICY? — Appellee operated a grain elevator where there was stored undried corn which had to be moved regularly in order to prevent deterioration or possible spontaneous combustion. As the result of an explosion and fire within the elevator, the machinery employed to move the grain was damaged and although appellee used due diligence in the repair or replacement of the machinery, the grain could not be moved for six or seven days and was thereby damaged by deterioration. On the date of the fire appellee held two insurance policies issued by appellant, one insuring the corn against all direct loss or damage by explosion, and the other insuring it against all direct loss or damage by fire. Appellee recovered on these policies

[4] N. Y. Civil Practice Act (Cahill, 1937) § 1231.
[5] New York ex rel. Whitman v. Wilson, 317 U. S. 615, 63 S. Ct. 70 (1942).
[6] 290 N. Y. 19, 47 N. E. (2d) 425, 146 A. L. R. 1422 (1943).
[7] Principal case at 82.
[8] Principal case at 82.

in the court below for the loss sustained. Appellant contends that the judgment is erroneous because (1) the loss resulted from causes which were remote and consequential while the policy covered only direct and immediate damages or losses and (2) appellant was expressly exempt under the terms of the policy from liability for loss from interruption of business or manufacture. *Held*, affirmed. (1) To determine whether the loss was a direct one under the terms of the policy requires the application of the doctrine of proximate cause. From the fact that the fire was responsible for the damage to the machinery, and but for that damage, the corn would not have deteriorated, and from the absence of any denial that the insurer knew, at the time the policies were issued, that damage to the corn would inevitably flow from prolonged failure of the machinery to function, it may be concluded that the damage to the corn proximately resulted from the fire. (2) The losses sustained were not expressly excluded from the policies' coverage by the clause relied upon by appellant, since that clause was meant to exclude damages claimed under a loss of profits theory. *Norwich Union Fire Ins. Soc., Ltd. v. Board of Commissioners of Port of New Orleans*, (C. C. A. 5th, 1944) 141 F. (2d) 600.

JOINDER OF PARTIES AND CAUSES OF ACTION—REPRESENTATIVE SUITS—JOINT ACTION BY BONDHOLDERS FOR AMOUNTS OF SEPARATELY HELD BONDS — The makers of seventy-two bonds secured by a mortgage made an agreement with the trustee (all bondholders approving and consenting) that the mortgage might be foreclosed, and that, if the makers did not make certain payments, the trustees, or any individual bondholder, should "be privileged to thereupon proceed personally" against the makers "as though this agreement had not been made." The makers having defaulted, some thirty of the bondholders brought an action for money judgments suing on behalf of themselves and all other bondholders who should come in as plaintiffs. The defendants demurred to the complaint on the ground that several causes of action were improperly united therein. The demurrer was over-ruled. *Held*, affirmed. Under sections 7406 and 7466 of the code,[1] the named plaintiffs are entitled to bring their action on behalf of themselves and others similarly situated. The action here arose out of the agreement which was the subject in which all plaintiffs had an interest. The joined plaintiffs have the interest in the relief required by section 7403,[2] the relief demanded being "identical" except as to amount. To permit such an action not only reduces costs to the plaintiffs, but prevents a multiplicity of suits. Two judges dissented on the ground that the plaintiffs

[1] N. D. Comp. Laws (1913) § 7406 provide that " . . . when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

Section 7466 provides that the causes may be united where they all arise out of the same transaction or transactions connected with the same subject matter, provided that the causes so united must "affect all the parties."

[2] N. D. Comp. Laws (1913) § 7403 provides that "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except as otherwise provided in this chapter."

did not have an interest in the subject of the action, the action being on the bonds and not on the agreement, and that they did not have an interest in the relief demanded as required by the code. *Bonde v. Stern*, (N. D. 1944) 14 N. W. (2d) 249.[3]

LABOR LAW—INJUNCTIVE RELIEF AGAINST PICKETING WHERE UNDERTAKEN TO COERCE EMPLOYER INTO PAYING UNION INITIATION FEES FOR EMPLOYEES REGARDLESS OF WHETHER OR NOT THEY WISHED TO JOIN — Plaintiff is in the business of selling gasoline and fuel oil to dealers and consumers in Washtenaw County, and has in its employ eight truck drivers. In the course of a campaign to organize truck drivers in the petroleum industry in Ypsilanti in that county, defendant, A. F. of L. local, solicited plaintiff's truck drivers for membership and found them unwilling to join except upon the condition that their employer pay their initiation fee of $27.50 per man. Upon plaintiff's refusal to meet with this demand, defendant established a picket line at plaintiff's Ypsilanti plant and thereby partially deprived the plaintiff of his supply of oil and gasoline. There was no evidence of any dispute between plaintiff and his employees or of any dissatisfaction on their part with wages, hours or working conditions. The union's position was that if all truck drivers were to become members, it would facilitate getting better working conditions and more money for all. The trial court granted plaintiff an injunction to restrain defendants from maintaining a picket line at plaintiff's Ypsilanti plant on the ground that no labor dispute was present. *Held*, affirmed. A labor union has the right to make known the fact of a labor dispute by peaceful picketing, even when there is no dispute between the particular employer and his employees; the right exists if the economic interests of the employees engaged in the same industry are affected. But if the objective to be obtained by such picketing were not a lawful objective, then the picketing itself would be unlawful and could be enjoined. Whether or not the picketing here was unlawful is a question of fact. "The testimony is convincing that defendant's real objective was to compel plaintiffs to put their drivers in defendant union by paying their initiation fees, regardless of whether or not the drivers wished to join. This was not a lawful labor objective."[1] *Silkworth v. Local No. 575, A. F. of L.*, 309 Mich. 746 (1944).[2]

LABOR LAW — NATIONAL LABOR RELATIONS BOARD APPROPRIATION ACT — STABILIZATION OF LABOR CONDITIONS UNDER — The National Labor Relations Board, upon charges made by an affiliate of the C. I. O., issued a complaint against respondent and upon finding that the Alliance, the company union with whom respondent had had an agreement for nearly five years, had

[3] See William Wirt Blume, "The 'Common Question' Principle in the Code Provision for Representative Suits," 30 MICH. L. REV. 878 (1938).

[1] Principal case at 758.

[2] See Lennart Larson, "May Picketing be Enjoined," 22 TEX. L. REV. 392 (1944); Arthur Lathrop, "Labor Law—Objective Test for determining the Legality of Labor Activities," 41 MICH. L. REV. 1143 (1942), and 149 A. L. R. 452 (1944).

been instigated and dominated by the company in violation of the National Labor Relations Act,[1] the board, on December 31, 1942, ordered respondent to cease and desist from engaging in the unfair labor practices found, to withdraw all recognition from and completely disestablish the Alliance and to post appropriate notices. The board petitioned this court to enforce its orders and respondent prayed that the petition be denied because under the National Labor Relations Board Appropriation Act of 1944 [2] the proceeding is outlawed. The act provides that no part of the funds appropriated should be used in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed, provided that for three months a notice shall have been posted indicating the place at which a copy of the agreement could be inspected by interested persons. *Held*, affirmed. The court said that the purpose to be achieved by the rider to the act was "stabilization of labor conditions, particularly the elimination of jurisdictional disputes between unions," but this purpose was sought to be achieved, not by a substantive change in the act, depriving the National Labor Relations Board of jurisdiction, but by a limitation on appropriations. The case was decided, however, on the consideration that the term "complaint case" applied only to the proceeding ending with the decision of the board, and not extending to enforcement or review petitions in the courts. There is nothing in the act to indicate that funds may not be used in connection with such petitions, certainly when the proceedings were pending in the federal court at the time of the passage of the Appropriation Act. *National Labor Relations Board v. Thompson Products, Inc.*, (C. C. A. 9th, 1944) 141 F. (2d) 794.

TORTS—LIABILITY OF A LANDOWNER TO CHILD TRESPASSER—Plaintiffs sought damages for the death of their son, aged three years, nine months, who drowned in a reservoir on land owned by defendant. The reservoir had been maintained for many years in a well populated residential district where there were many children. It was surrounded by a seven foot six inch fence and on the premises were posted "no trespassing" signs. Nevertheless, it was found by the court below that children played there almost daily, and that boards were frequently missing from the fence, and it was found that defendant company is chargeable with knowledge of these facts since its employees visited and inspected the reservoir twice each day. On appeal from a refusal by the court below to enter judgment for defendant n.o.v. or grant a new trial, *held*, affirmed. The reservoir was a dangerous body of water because of its location, and children were permitted to play in and near it. Under these circumstances, it is the duty of the landowner in the use of his land to use ordinary care not to injure such trespassers. He must not create, or fail to obviate, risks reasonably tending to cause injury. Defendant company indicated its awareness of the danger by erecting a fence, but it failed in its duty of ordinary care when it permitted the fence to fall into a condition of disrepair. *Altenbach v. Lehigh Valley R. Co.*, (Pa. 1944) 37 A. (2d) 429.[1]

[1] 29 U. S. C. (1943) §§ 157, 158 (1), 158 (2).
[2] 57 Stat. L. 515 (1944).

[1] On the subject of liability of a landowner to a child trespasser see 36 A.L.R. 34

TRADE RESTRAINTS — APPLICATION OF FEDERAL ANTI-TRUST LEGISLATION TO THE FORCED ELIMINATION FROM BUSINESS OF INTERSTATE CARRIER — Plaintiffs brought an action against defendant labor union officers and members to recover triple damages for alleged conspiracy in violation of the Sherman Anti-Trust Act. The facts found by the district court were that plaintiffs had been under contract to transport produce and foodstuffs by motor truck for the A. & P., 80 to 85 per cent of the transportation being interstate; that as a result of a strike of the A. & P. truckers and haulers called by the union, A. & P. entered into a closed shop agreement with the union, and notified the employees of all contract haulers that they must become members. Plaintiffs attempted to negotiate an agreement with the union, and its employees attempted to join but both negotiation and admittance were refused. A. & P. and Sterling Supply Co. for whom plaintiff subsequently contracted to do hauling, cancelled their contracts for no other reason than that plaintiffs were non-union. The plaintiff's business was destroyed by reason of defendant's refusal to admit plaintiff's employees into the union. *Held*, the district court's determination that plaintiffs had failed to show a cause of action under the Sherman Anti-Trust Act is affirmed. "Congress did not intend by enacting the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public."[2] The interstate business of the A. & P. and the Sterling Supply Company was not decreased by the fact that plaintiffs were forced to go out of business. *Hunt v. Crumbach*, (C. C. A. 3d, 1944) 143 F. (2d) 902.[3]

at 164 (1925); 39 A.L.R. 486 at 489 (1925); 45 A.L.R. 982 at 990 (1926); 53 A.L.R. 1344 (1928); 60 A.L.R. 1444 (1929); 29 MICH. L. REV. 1092 (1931); 30 MICH. L. REV. 477 (1932); 41 MICH. L. REV. 766 (1943).

[1] 15 U. S. C. (1941) §§ 1-7, 15.
[2] Principal case at 903.
[3] For an interpretation of the Sherman Act see 128 A. L. R. 1044 (1940).