

was there the receipt of April 23, 1872, but May 5, 1872, in reply to Wood's letter of May 3d, defendant wrote him a detailed description of the declaration of trust under which the pool lands were held, which, it is apparent from the correspondence, Wood then understood had been completed. This letter Wood acknowledged May 13, 1872; so that at that date Wood knew that the defendant's obligation to deliver the stock under the agreement with the plaintiffs, set up in the bill, had matured, and that the plaintiffs had then a legal right to enforce that obligation, unless Wood had discharged it, in whole or in part, by the transactions and receipt of April 23d. Moreover, the defendant's letter to plaintiff Carlisle, of April 13, 1874, put into the case by plaintiffs, leads to the belief that Carlisle also understood the situation. This letter, after referring to Mr. Stevens, and the shares he had agreed to take, says:

"My understanding was that the shares which were taken were to be accounted to the parties he represented as so much cash, but I judge from the inquiries made by those parties of me that his idea was not precisely the same."

This confirms the defendant's testimony that he made up the balance of \$15,000 in receipts running to Stevens, and also that he understood that it was to be determined between the parties directly in interest whether Stevens would settle for the receipts with the persons to whom they belonged, whoever they might be, in cash or in stock. It also explains why in some of his letters, especially that of March 9, 1889, he might be led to assume that some at least of the plaintiffs were shareholders, or rather holders of receipts entitling them to stock, of the form we have described. However, the state of facts is clear as to Wood. As we have already said, the other plaintiffs had a joint interest with him; they have seen fit to make him a party plaintiff in the bill, and their rights under it can rise no higher than his. Nothing in our conclusions is intended to prejudice any right, if any there is, which the plaintiffs may have in the lands themselves, either separately or with others, or to an accounting as legal or equitable shareholders, if such they are. Bill dismissed, without cost to either party.

PIDCOCK v. HARRINGTON et al.

(Circuit Court, S. D. New York. December 20, 1894.)

MONOPOLIES—SUIT BY PRIVATE INDIVIDUAL.

The act "to protect trade and commerce against unlawful restraints and monopolies" (Act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States.

This was a suit by John F. Pidcock against Dennis Harrington and others for an injunction and accounting. Defendants demurred to the bill.

This is a suit in equity against the above-named defendant, and a number of others, praying for an injunction and an accounting on the ground that the defendants have conspired to ruin complainant's business as a commission merchant and dealer in live stock. The bill alleges that the defendants have ceased dealing with the complainant and have threatened to cease dealing with people who deal with him. The action is founded upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209).

William F. Randel, for complainant.

Edward C. Boardman, for defendants.

COXE, District Judge. At the argument the counsel for the complainant was asked whether he sought to maintain this action under the general equity principles of the common law or under the provisions of the act of July 2, 1890. He answered that it was founded solely upon the statute. It is unnecessary, therefore, to discuss the proposition whether or not the action can be maintained independently of the statute. The demurrer challenges the jurisdiction of this court to maintain, under the act in question, a bill in equity filed by a private individual and his solicitor. It is clear that the right to maintain such a suit is not expressly conferred by the act. Indeed, such right is, by implication, denied—First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the law-makers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms? The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6 there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

But for this section no private person would have any standing in court, and as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan*, 54 Fed. 40, affirmed 56 Fed. 696, 6 C. C. A. 86. The demurrer is allowed.

CLEVELAND, C., C. & ST. L. RY. CO. v. TARTT.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 129.

1. DEATH BY WRONGFUL ACT—PLEADING—NEGLIGENCE.

In an action for death by wrongful act, an allegation that the deceased was killed by reason of defendant's "gross and reckless and wanton negligence" does not amount to a charge that the killing was willfully done.

2. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—LICENSE.

One who is killed by a train while walking along the track for his own convenience without any invitation from the railroad company, although it has permitted others to walk along it, is at most a mere licensee, for whose death no recovery can be had unless it was caused willfully, or by negligence so gross as to imply willfulness.

3. EVIDENCE—ORDINANCE—PROOF OF PUBLICATION.

Under Starr & C. Ann. St. Ill. c. 24, § 66, which declares that "all ordinances and the date of publication thereof may be proven by the certificate of the clerk under the corporation seal," a copy of an ordinance so certified to is admissible in evidence without proof of its publication. *Lindsay v. City of Chicago*, 3 N. E. 443, 115 Ill. 120, followed.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Action on the case by James T. Tartt, administrator of the estate of Jesse H. Phillips, Sr., against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for causing the death of said Phillips. Plaintiff obtained judgment. Defendant brings error.

On July 7, 1891, the deceased, Jesse H. Phillips, Sr., the plaintiff's intestate, was killed by a collision with a train of the appellant (the defendant below) in the village of Venice, in the state of Illinois. The declaration, consisting of a single count, charges, in substance, that the defendant, on July 7, 1891, at a point within the incorporated village of Venice, killed the plaintiff's intestate, and avers that at the time of the collision, and immediately before his death, the deceased was on defendant's track, exercising all due care and diligence in seeking to rescue his minor son, aged eight years, who was in imminent peril from said train and engine, and that while exercising due care and diligence in that behalf he was killed; that there was in force in the village of Venice an ordinance by which it was provided that railroads should not run engines or trains within its limits at a greater rate of speed than 10 miles an hour; that, at the time of the killing of the deceased, the defendant's servants were running the engine and train at a rate of speed in excess of 10 miles an hour, to wit, at the speed of 60 miles an hour or thereabouts, in violation of said ordinance; that defendant's servants in charge of said engine and train saw the child upon the tracks in time to have enabled them, by the exercise of slight care, to have reduced the speed and averted the danger, "yet with gross and reckless and wanton negligence" they failed and neglected to reduce the speed until the collision occurred, and "with said gross and wanton negligence" they failed to give any signal or warning of the approach of said train, and that by reason of "said gross and wanton negligence" the deceased was killed; that the deceased left surviving him a widow and two minor children, who have suffered damage in the sum of \$5,000. The pleas were the general issue, and that the deceased came to his death by his own negligence, to which latter plea there was a replication in denial.

The deceased had lived for about two months in a house located close to the railroad tracks. Every morning many trains passed his house, to and through the village of Venice, at a rapid rate of speed. The train which came into collision with him passed on the same track every morning at