

sion, and ineffective for any purpose. It is, however, held by the supreme court of Illinois that a certified copy of an ordinance, under the seal of the corporation, with nothing further, is evidence of its passage and legal publication. In *Lindsay v. City of Chicago*, 115 Ill. 120, 123, 3 N. E. 443, the court say:

"It is too plain to admit of argument that where the ordinances of a town or city have been printed in book or pamphlet form, purporting to be published by authority of the board of trustees or city council, the book shall be received as evidence of the passage of the ordinance, because this is the plain language of the statute. But a book of ordinances was not put in evidence. The petitioner, in lieu of the book, put in evidence a certified copy, attested by the clerk, under the seal of the corporation. This, in our opinion, proved the passage of the ordinance as effectually as the fact would have been proved had a printed book of ordinances been admitted. The language found in the first part of section 4 [section 66, supra], 'All ordinances and the date of publication may be proven by the certificate of the clerk, under the seal of the corporation,' will admit of no other construction. It is said this means that you may thus prove the contents of an ordinance. But such is not the language of the act. The language is, the ordinance may be proven. The legislature no doubt intended, by the use of this language, that a certified copy of an ordinance, under the seal of the corporation, made by the clerk of the council, should have the same force and effect, as evidence, as a printed book of ordinances, which, in express terms, is made evidence of the passage and publication of an ordinance."

To the same effect is the case of *Railroad Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20. In this case the court say:

"Under these decisions, as well as upon principle, it must be held that the copies of the ordinances in this case, certified by the city clerk and authenticated by the corporate seal, were competent evidence tending to show that said ordinances had been duly passed by the city council, and that they had gone into effect in one of the modes prescribed by the charter."

The construction placed upon the statute by the supreme court is binding on us, and it follows that no error was committed in permitting the copy of the ordinance in question to be read in evidence to the jury. This view renders it unnecessary to express any opinion on the question whether or not the printed pamphlet copy of ordinances was improperly admitted in evidence. If it were conceded to be incompetent, it was merely cumulative evidence of a fact already proven by competent evidence, and hence it was harmless. The judgment is reversed, at the cost of the appellee, and remanded to the court below with instructions to grant a new trial, and to permit the declaration to be amended if the appellee so desires.

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

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

No. 128.

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS—INFANT.

Where a bright, intelligent boy, eight years and seven months old, is killed by a train while walking along the track, it is reversible error to refuse to instruct the jury, in an action for his death, that if he entered the right of way for his own convenience, and walked along the track in a dangerous position, and did not use his faculties as a person of like age could,

and failed to use ordinary prudence to learn if a train was approaching, when by so doing he might have avoided injury, he was not exercising ordinary care, and the plaintiff could not recover unless the injury was willfully inflicted.

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, Jr., against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for causing the death of said Phillips. Plaintiff obtained judgment. Defendant brings error.

John T. Dye and George F. McNulty, for plaintiff in error.

A. R. Taylor, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. The plaintiff's intestate was a boy eight years, seven months, and six days old at the time he was killed. He was a strong and healthy boy, and bright and intelligent for his age. The facts in this case, and the circumstances connected with the fatal collision, are sufficiently disclosed in the case of Railway Co. v. Tartt (just decided) 64 Fed. 823. A number of questions are presented by the assignment of errors which have been argued by counsel. The decedent was old enough to be prima facie responsible for his trespasses, as well as chargeable with contributory negligence for a failure to exercise ordinary care, having regard to his age and intelligence, and the circumstances in which he was placed when killed. The court declined to instruct the jury that if they believed that the deceased, for his own convenience, entered on the right of way of the railroad company, and walked along the track, either on it or close to it, in a dangerous position, and did not use his faculties as a person of like age could, and failed to use ordinary prudence to learn if a train was approaching, when the use of such faculties as he possessed would have notified him that a train was approaching in time to avoid the injury, he was not exercising ordinary care, and the plaintiff could not recover unless the injury was willfully and wantonly inflicted. This instruction, and others of like character, stated a proposition of law with substantial accuracy, which was applicable to the facts of the case, and it was error to refuse so to instruct the jury. The charge given by the court did not clearly and distinctly embody the substance of the above instruction. In view of what is said in the case of Railway Co. v. Tartt, nothing further need be added in this case. The case is reversed, at the costs of the appellee, and remanded to the court below with instructions to grant a new trial, and to permit the appellee to amend his declaration if he so desires.

FISHER v. HANOVER NAT. BANK.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 10.

SET-OFF—MATURITY OF DEMANDS—FRACTIONS OF A DAY.

May 8, 1891, the H. Bank of New York was indebted to the S. Bank of Philadelphia for a balance of deposit of \$9,688.17, and held the S. Bank's demand note for \$25,000. On that day, about 11 a. m., the H. Bank telegraphed the S. Bank, demanding payment of the note. On the same day, between 11 and 12 o'clock, the bank examiner took possession of the S. Bank, and closed its doors. *Held*, that the court should not be astute to divide the day into fractions, to deprive the solvent debtor of a just defense, and that the note might be set off against the deposit balance in an action to recover the latter.

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

This was an action by Benjamin F. Fisher, as receiver of the Spring Garden National Bank, against the Hanover National Bank, to recover a balance of deposit. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error.

Silas W. Pettit, for plaintiff in error.

Thos. S. Moore, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Spring Garden National Bank of Philadelphia was taken possession of by the bank examiner, by direction of the comptroller of the currency, on May 8, 1891, it being then insolvent. The plaintiff in error was duly appointed its receiver. On May 8, 1891, the Hanover National Bank of New York was indebted to the Spring Garden Bank in the sum of \$9,688.17, balance of deposit account. At the same time the Hanover Bank held a note of the Spring Garden Bank originally for \$30,000, on which \$5,000 had been paid, and secured by a pledge of several promissory notes as collateral security. This action was brought to recover the deposit balance and the collaterals, or their proceeds. When the proofs were completed, however, all question as to the collaterals was eliminated from the case, and the only point left to be determined is whether the Hanover Bank was entitled to set off its claim upon the \$30,000 note against the receiver's claim for the deposit balance.

The note of the Spring Garden Bank was a demand note, and the evidence shows that "about 11 o'clock of May 8, 1891, or shortly after," the Hanover Bank telegraphed the Spring Garden Bank, calling the loan for immediate payment. The bank examiner took possession of the latter bank "some time between 11 and 12 o'clock on the 8th of May, 1891." On the day of the failure, therefore, the defendant bank owed the Spring Garden Bank the balance of deposits, and the Spring Garden Bank owed defendant bank the amount of the loan. There is no reason in justice or in equity why a court should be astute to divide the day into fractions, in order to deprive the solvent