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Respondent offers its apologies for the frequent use of quotations herein. However, the use of deceiving summaries of cases and misleading quotations in petitioner's brief necessitated rebuttal by express and full quotations.

IN THE

Supreme Court of the United States

OCTOBER TERM—1937.

No. 367.

ERIE RAILROAD COMPANY (a New York Corporation),
Petitioner,

against

HARRY J. TOMPKINS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of Facts.

On July 27, 1934, plaintiff, while walking toward his home (about 80 feet away) (Blue Print, Plaintiff's Exhibit I, fol. 1408), was struck by an unusual projection which "looked like a door" (fol. 141) and which was negligently permitted to project from the side of defendant's railroad train (fol. 556). The projection struck him on the right side of the head (fol. 142), as a result of which he was thrown to the

ground and suffered an amputation of his right arm by the train wheels (fol. 328). When plaintiff was struck he was at the junction of two paths (fol. 141; Opinion of the Circuit Court of Appeals, fol. 496), one of which ran parallel with defendant's track and the other crossed it diagonally (fol. 113). The two paths were four and a half feet in width at this point (fols. 569, 593). The edge of the meeting point of these paths, nearest the ties, was from two to two and a half feet from the end of the ties (fol. 130). These paths were well beaten and had been openly and notoriously used by the public for periods variously estimated from twelve to twenty years (fols. 107, 128, 323, 405, 427, 402, 429, 109, 170).

The plaintiff had walked on the parallel path many times when trains went by (fols. 173, 176). Plaintiff's witnesses had walked on the path and had observed the public walking on the path hundreds of times in the day and night while trains were passing, and had even observed persons wheeling barrows while trains were moving by the path (fols. 464, 470, 598). This parallel path was variously estimated to be at points as much as three feet from the ties (fol. 446), the plaintiff testifying it was two feet from the ties (fol. 109). However, the plaintiff and all the witnesses agreed that while walking on the parallel path a person's body would be at a distance of one to two feet from the side of a passing train[1] (fols. 185, 471, 538, 374), and it was not disputed that at the junction of the two paths, where the accident occurred, the edge of the meeting point of these two paths nearest the ties was from two to two and a half feet from the ties (fol. 130).

The aforementioned diagonal path led from Hughes Street, a stub end street, up to the parallel path, and thence across the tracks (fol. 129). The parallel path extends parallel with defendant's tracks from Rock Street to Hughes Street (a distance of 115 feet) when it meets the diagonal path (fol. 129).

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[1] The dimensions and use of the paths were testified to only by the plaintiff and his witnesses. Although petitioner produced a civil engineer who took exact measurements of the topography (fols. 959, 999), it afforded no testimony on this point.

On the night of the accident, plaintiff had alighted from an automobile at the Rock Street crossing (fol. 138) to go home.[1] His home was on Hughes Street, being the second house from the defendant's tracks (fol. 101). As he was proceeding along the parallel path in the direction of his home, he saw the defendant's train approaching (fols. 140, 141), and when he was but a few steps from the juncture of the two paths, the engine passed him[2] (fol. 141). Just as he got on the juncture[3] of the two paths and was about to step down into Hughes Street (fol. 279) he was struck by the projection (fol. 141).

There were substantial and important gaps in defendant's records produced at trial (fols. 905, 906), most of its witnesses were either impeached (fols. 760, 924-938, 1054-1058, 1126) or tended to show negligent inspection (fols. 1009, 737, 1099) of the cars in question and accordingly a jury sitting in the District Court, Southern District of New York, on the 13th day of October, 1936, awarded the plaintiff a verdict in the sum of $30,000. Upon appeal to the Circuit Court of Appeals, the judgment was unanimously affirmed with opinion (fols. 496-501).

In their petition, petitioner has attempted to attack the credibility of the plaintiff. Such questions are, of course, improperly raised at this time. Suffice it to say, however, that although defendant, at trial, tried to browbeat plaintiff into saying that he had contradicted himself in legal papers which he did not draw or understand, the plaintiff's veracity remained unscathed and the jury accepted plaintiff's testimony as truth, rejecting the testimony of defendant's employees.

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1 Which was much the shorter way home (fol. 239; Pl's. Ex. 1, Blueprint, fol. 1408).

2 It was pretty dark but he could see the side of the engine as it passed him (fols. 179, 180).

3 Although one of plaintiff's witnesses testified that on the morning after the accident he told a detective of defendant who was in court, all about the accident (i.e., where plaintiff was found—fols. 382, 394), defendant produced no one in court to contradict the fact that plaintiff was on the juncture.

Introduction.

In substance, the petitioner contends:

First: That a Federal Court, in dealing with an injury to a person on a railroad's right of way, should follow a single peculiar decision of a Pennsylvania Court[1] which states that no duty of due care is owed to persons on longitudinal, as distinguished from crossing, paths on said right of way—rather than follow the rule adopted by almost every State in the Union and the Federal Courts,[2] namely, that a duty of due care is owed to persons under such circumstances.

This question is of no wide significance, since, excluding the State of Pennsylvania, Courts throughout the country have almost unanimously decided that a duty of due care is owed to persons on all types of railroad paths. It therefore appears that it is only in Pennsylvania that there is any question of the State Court rule being disregarded for a different, majority rule. Even in Pennsylvania the very decision relied on by petitioner is confined solely to longitudinal paths—as to cross-paths, Pennsylvania decisions are the same as in the other jurisdictions.[3]

Second: That the Circuit Court of Appeals applied the wrong test concerning the alleged contributory negligence of the plaintiff, although the said Court enunciated and followed the well-established rule that where reasonable men

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[1] *Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 160 A. 859, which is directly contrary to other Pennsylvania decisions, as shown in Point I, subdivision C.

[2] The lower Court adopted the rule endorsed by practically every jurisdiction where the question has been presented, namely, that "when the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to such persons on such permissive pathway a duty of care in the operation of its trains" (fol. 497, opinion of Circuit Court of Appeals). Cases were collected in the brief below from close to thirty jurisdictions, from several Federal Circuits and from the American Law Institute Restatement of Torts. Petitioner conceded in the Court below that the overwhelming authority was in accord with the rule stated by the Circuit Court of Appeals.

[3] See *infra*, Point I, subdivision C (2).

may differ the question of contributory negligence is for the jury.[1]

This question is of no wide significance since it concerns itself with the application of a firmly established rule to the particular facts of this case.

It thus appears that the questions presented by petitioner are not of substantial or pressing significance.

It will further appear from the following that no error was committed below:

ARGUMENT.

I. The lower Court was correct in applying the rule of the great weight of authority since

A. In cases involving questions of general law, Federal Courts will exercise their independent judgment.

This doctrine, which is now elementary, found its inception in *Swift* v. *Tyson,* 16 Peters 1; has constantly been reaffirmed by the Supreme Court and was most recently applied in the case of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518.

B. The case at bar involves a question of general law, since

1. Supreme Court decisions have established that questions of the type here presented involving railroad accidents are questions of general law.

The case of *Baltimore & Ohio R. R.* v. *Baugh,* 149 U. S. 368, involved a railroad accident which occurred in Ohio. Under a well-established line of decisions in Ohio the fellow-servant rule was inapplicable to the case. Under the decisions of Federal and other State Courts the fellow-servant rule applied. The Court held the fellow-servant rule applicable, saying (p. 370):

> "* * * unvarying has been the course of decision that the question of responsibility of a railroad

[1] The relevant portions of the opinion and the correctness of the ruling on the facts of this case are set forth in Point II.

corporation for injuries caused to or *by* its servant is one of general law.

"This is not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but rather one of general law *to be determined by a reference to all the authorities,* and a consideration of the principles underlying the relation of master and servant." (Writer's emphasis.)

The principle of the *Baugh* case has been consistently followed by the Supreme Court. In each of the following cases, involving either railroad accidents or negligence law, the local rule was disregarded and the weight of authority followed:

Chicago v. *Robbins,* 67 U. S. (2 Black) 418. (General law rule applied in preference to contrary local law rule on question of liability of land owner to passer-by for injuries sustained due to unguarded excavation on property.)

The Court held (p. 428):

"It was urged at the bar that this court, in such cases, follows the decisions of the local courts.

Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the State courts. But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

Gardner v. *Michigan Central Railroad,* 150 U. S. 349. (General law rule applied in preference to contrary local law rule on question of due care owed to plaintiff, injured due to hole in planking of defendant railway.)

Hough v. *Railway Co.,* 100 U. S. 213. (General law rule applied in preference to contrary local law rule

on question of contributory negligence of plaintiff in continuing to work after notice of defect in defendant's railroad equipment.)

The Court stated (p. 226):

> "The question before us, in the absence of statutory regulations by the State in which the cause of action arose, depends upon principles of general law, and in their determination we are not required to follow the decisions of the State Courts."

Lake Shore etc. Ry. v. *Prentice,* 147 U. S. 101. (General law rule applied in preference to contrary local law rule on question of liability of railroad for punitive damages for acts of agent toward passenger.)

New York Central Railroad Co. v. *Lockwood,* 17 Wall. 357. (General law rule applied in preference to contrary local law rule on question of the ability of a carrier to limit its liability for injury to a passenger.)

Said the Court (p. 368):

> "We should not feel satisfied without being able to place our decisions upon grounds satisfactory to ourselves and resting upon what we consider sound principles of law."

Liverpool Steam Company v. *Phenix Ins. Co.,* 129 U. S. 397. (General law rule applied in preference to contrary local law rule on question of ability of carrier to limit its liability for injury to goods.)

Defendant argued that law of New York, where contract made, controlled and was settled by recent decisions. The Court stated (p. 423, per Gray, J.):

> "But on this subject as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the Courts of the State but will exercise their own judgment, EVEN WHEN THEIR JURISDICTION ATTACHES ONLY BY REASON OF THE CITIZENSHIP OF THE PARTIES IN AN ACTION AT

LAW OF WHICH THE COURTS OF THE STATE HAVE CONCURRENT JUISDICTION AND UPON A CONTRACT MADE AND TO BE PERFORMED WITHIN THE STATE." (Writer's emphasis.)

Beutler v. *Grand Trunk Railway,* 224 U. S. 85. (General law rule applied in preference to contrary local law rule on question of applicability of fellow-servant rule.)

Per Homes, J. (p. 87):

"* * * So it has been decided that in cases tried in the United States Courts we must follow our own understanding of the common law when no settled rule of property intervenes."

Central Vermont Ry. v. *White,* 238 U. S. 507. (Question of burden of proof of contributory negligence.)

Said the Court (p. 512):

"But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced the principle even in trials in States which hold that the burden is on the plaintiff." (Citing cases.)

See also:

Baltimore & Ohio R. v. *Goodman,* 275 U. S. 266. (Federal "Stop, Look & Listen" rule applied to railroad crossing accident cases although no such rule in State where accident occurred.)

Prokora v. *New York Central R.* 292 U. S. 98. (Modifying Federal "Stop, Look & Listen" rule.)

Union Pac. R. v. *McDonald,* 152 U. S. 262.

Sioux City & P. R. Co. v. *Stout,* 17 Wall. 657. (Federal doctrine on liability of railroad for injuries to infants on turntables, on theory of attractive nuisance applied in both above cases *without* consideration of State law on subject.)

The foregoing array of authorities prompted Judge Learned Hand, in *Cole* v. *Pennsylvania R. R.,* 43 Fed. (2d) 953 (involving the New York rule on the spreading of fires by railroads), to hold:

> "It is evident from the foregoing that the most recent decisions of the Supreme Court, as well as a long line of authorities in back of it, recognizes a wide field of general jurisprudence in which the Federal Courts decide cases according to their independent judgment. In this field actions involving the liability of railroads have undoubtedly been conspicuous."

The Circuit Court of Appeals and District Courts alike have universally interpreted the foregoing decisions to indicate that questions of negligence law are questions of general rather than local law upon which Federal Courts will exercise their independent judgment.

The following are representative holdings, in negligence and tort cases, to that effect, and in which a general rule of law was applied in preference to a local rule:

C. C. A.—1st:

N. Y., N. H. & H. R. v. *O'Leary,* 93 Fed. 737.
(Question of liability of employer to employee for negligence.)

C. C. A.—2nd:

New York, N. H. & H. R. Co. v. *Fruchter,* 271 Fed. 419 (rev'd 260 U. S. 141 on other grounds).
(Question of applicability of attractive nuisance doctrine to railroad turntable.)

Snare & Trieste Co. v. *Friedman,* 169 Fed. 1, cert. den. 214 U. S. 518.
(Question of applicability of attractive nuisance doctrine to railroad turntable.)

Exnir v. *Sherman,* 54 Fed. (2d) 510.
(Question of liability without fault for personal injuries due to setting off of high explosives.)

Fowler v. *Pa. R.,* 229 Fed. 373.
(Question of validity of release of defendant from liability for negligence.)

National Metal Edge Box v. *Agostini,* 258 Fed. 109.
(Question of applicability of attractive nuisance doctrine.)

C. C. A.—3rd:

Pa. R. v. *Hummel,* 167 Fed. 89.
(Question of liability of third party and employer, for negligently supplying defective equipment to plaintiff.)

C. C. A.—4th:

Hewlett v. *Schadel,* 68 Fed. (2d) 502.
(Question of liability of owner of car to guest for negligence.)

Virginia Motor Express v. *Jiminez,* 76 Fed. (2d) 694.
(Question of applicability of last clear chance doctrine in crossing accident.)

Commercial Electric v. *Greschner,* 59 Fed. (2d) 512.
(Question of applicability of doctrine of imputed negligence.)

B. & O. R. v. *Thornton,* 188 Fed. 868.
(Question of wrongful ejection of passenger by railroad.)

Snipes v. *Sou. R. R.,* 166 Fed. 1.
(Question of applicability of fellow-servant rule.)

Norfolk v. *A. P. Traction,* 174 Fed. 607.
(Question of liability of carrier for exemplary damage for acts of servant.)

C. C. A.—5th:

Jones v. *Southern Pac. R.,* 144 Fed. 973.
(Question of applicability of fellow-servant rule.)

C. C. A. 6th:

Grand Trunk Western R. Co. v. *Collins,* 65 Fed. (2d) 875.

(Question of imputing negligence of driver to guest in railroad accident case.)

Texas Co. v. *Brice,* 26 Fed. (2d) 164, cert. den. 49 Sup. Ct. 34.

(Question of agency of truck driver of defendant in personal injury action.)

Elliott v. *Fenton,* 119 Fed. 270.

(Question of negligence of servant superior to plaintiff.)

Western Union v. *Sklar,* 126 Fed. 295.

(Question of damage for delay in delivery of telegram.)

Illinois Central v. *Hart,* 176 Fed. 245.

(Question of liability of employer for negligence toward servant.)

Western Union v. *Wood,* 57 Fed. 471.

(Question of liability of telegraph company for delay in delivering messages.)

C. C. A.—7th:

Hunt v. *Hurd,* 98 Fed. 683.

(Question of applicability of fellow-servant rule.)

C. C. A.—8th:

Redfield v. *New York Central,* 83 Fed. (2d) 62.

(Question of contributory negligence of plaintiff in boarding defendant's train.)

Parramore v. *Denver etc. R.,* 5 Fed. (2d) 912, cert. den. 269 U. S. 560.

(Question of contributory negligence in death action arising out of collision of defendants with decedent's auto.)

Busch v. *Brunner,* 36 Fed. (2d) 189.

(Question of validity of provision absolving carrier from liability for injury to passenger on purely intrastate free pass.)

Western Union v. *Burris,* 179 Fed. 92.

(Question of extent of damage recoverable against telegraph company for failure or delay in delivery of message.)

C. C. A.—9th:

Western Union Tel. v. *Cook,* 61 Fed. 624.

(Liability of telegraph company for mistakes, validity of contract exempting same.)

Exception C. C. A.—1st:

Boston & Maine R. R. v. *Breslin,* 80 Fed. (2d) 749.

(Question of applicability of attractive nuisance doctrine to railroad turntable.)

(a) *There is no such doctrine, as contended by petitioner, that where a rule is well established in a State, the question is one of local law and Federal Courts must follow the rule.*

Petitioner contends that where a rule is well established in a State whose law would ordinarily be applicable under conflicts principles, Federal Courts are bound to follow the same.

It must be noted at the very outset that so far as the instant case is concerned there is no well established State rule. There is but a solitary Pennsylvania decision in point, decided in 1932, and clearly contrary to other Pennsylvania decisions.[1]

But even if the Pennsylvania decisions were well established on the issues of this case, THERE IS NO HOLDING OF THE SUPREME COURT STANDING FOR SUCH A DOCTRINE AS PROPOUNDED BY PETITIONER. Petitioner itself concedes that it

[1] *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 A. 859, analyzed in subdivision C of this Point.

arrives at the rule through implication. This is necessarily so, for all of the cases cited by petitioner on this point were cases where the Federal Court *refused* to follow State Court rulings,[1] with the exception of the *Bucher* case and the *Hartford Insurance* case, both of which involved construction of State Statutes.[2] The cases cited could not, therefore, stand for the proposition that State decisions will be followed, where a rule is well established.

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[1] Cases cited by petitioner are as follows:

Swift v. *Tyson,* 16 Peters 1 (p. 21 of petitioner's brief). General law applied in preference to contrary local rulings on question of negotiable instruments.

Black & White Taxicab Co. v. *Brown & Yellow Taxi Co.,* 276 U. S. 518 (p. 23 of petitioner's brief). General law applied in preference to contrary local rulings on question of right to give exclusive soliciting privileges on railroad property.

Carpenter v. *Providence Washington Ins. Co.,* 16 Peters 495 (p. 23 of petitioner's brief). Construction of insurance policy deemed to be a question of general law.

Lane v. *Vick,* 3 How. 464 (p. 23 of petitioner's brief). Construction of will held to be question of general law and local decision disregarded.

Chicago v. *Robbins,* 67 U. S. 418 (p. 23 of petitioner's brief). Negligence of landowner in Chicago held to be a question of general law and local decisions disregarded.

Yates v. *Milwaukee,* 10 Wall. 497 (p. 23 of petitioner's brief). Holding that question of what constitutes a dedication of land to public use is a question of general law; local decision ignored and contrary general rule applied.

New York Central R. R. v. *Lockwood,* 17 Wall. 357 (p. 23 of petitioner's brief). Ability of carrier to limit its liability for injury to passenger held a question of general law.

Burgess v. *Seligman,* 107 U. S. 20 (p. 24 of petitioner's brief). Two local decisions squarely in point on question of liability of pledgee of corporate stock for debts of corporation, disregarded and general law applied.

Kuhn v. *Fairmont Coal Co.,* 215 U. S. 349 (p. 24 of petitioner's brief). Local decision disregarded and general law applied on question of implied obligation to support surface in lease of subsurface mining rights.

Snare & Triest Co. v. *Friedman,* 169 Fed. 1, cert. den. 214 U. S. 518 (p. 25 of petitioner's brief). Federal rule in turntable case applied in preference to State decisions where accident occurred.

[2] *Bucher* v. *Cheshire Rd. Co.,* 125 U. S. 555 (p. 26 of petitioner's brief). Involved local interpretation of purely local statute prohibiting traveling on Sunday and clearly, therefore, not within the *Swift* v. *Tyson* doctrine.

Hartford Ins. Co. v. *Chicago etc. Ry. Co.,* 175 U. S. 91. Local statute here stated that a railroad could not exempt itself from liability for negligence. Local decision interpreting the statute held that the statute was not to be interpreted to mean that railroad could not do so on leases of its own property, such as involved in this case. Held: "Under such circumstances, that decision [State decision] being upon a question of statutory and local law was rightly followed by the Circuit Court" (p. 108).

(b) *The doctrine is that the subject-matter, not the degree to which State decisions are settled, determines whether a question is general or local in nature.*

Petitioner's theory crumples under the weight of square Supreme Court holdings directly contrary to the theory.

In *Baltimore & Ohio R. R.* v. *Baugh,* 149 U. S. 368, the Ohio rule was so well established that even the highest Court of Ohio felt that the rule would "doubtless be accepted as authoritative," although they disagreed with its wisdom. Yet the Federal Court disregarded the Ohio rulings and followed the majority holdings, stating that the *subject-matter* was one on which the general or common law would be applied.[1]

The latest pronouncement of the Supreme Court on this subject, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518, belies the theory advanced by petitioner. There, although it had been settled for thirty-five years in Kentucky that a railroad had no authority to grant exclusive soliciting privileges at its stations to Taxi Companies, the Kentucky rule was disregarded and the weight of authority to the effect that such licenses were valid, was followed. (The license and place of performance were in Kentucky.) The Court stated that the *subject-matter* involved was one on which Federal Courts were not bound by State decision.[2]

In the case of *Central Vermont Ry.* v. *White,* 238 U. S. 507, the Supreme Court again refused to follow a long established State ruling that the burden of contributory negligence was upon the plaintiff even though it considered the question one of substance.[3] In the following cases clear and unequivocal rulings by State Courts which would have governed under principles of conflicts were ignored in favor of majority rulings. In none of them does the degree to which State law is settled concern the Court. The essential determinative factor is the SUBJECT-MATTER involved:

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1 Relevant quotation may be found at page 5.
2 Relevant quotation may be found at page 15.
3 Relevant quotation may be found at page 8.

Chicago v. *Robbins,* 67 U. S. (2 Black) 418. (Rule on liability in negligence of owner of land for acts of independent contractor.)

N. Y. C. R. R. v. *Lockwood,* 17 Wall. 357. (Rule on ability of railroad to contract itself free of liability for negligence.)

Myrick v. *Michigan Central R. R. Co.,* 107 U. S. 102. (Rule on liability of a railroad for safe delivery beyond its own line.)

Olcott v. *The Supervisors,* 16 Wall 678. (Rule on power of a county to tax in aid of construction of a railroad.)

Beutler v. *Grand Trunk Ry.,* 224 U. S. 85. (Fellow-servant rule.)

The statement in petitioner's brief (p. 27) that "Even a single decision, if 'clear and unequivocal' and constituting a 'definitive holding' should be recognized as controlling," citing *Hawks* v. *Hamill,* 288 U. S. 52, is very misleading. *Hawks* v. *Hamill* involved a State decision interpreting the STATE CONSTITUTION and this Court merely stated (p. 58):

> "If the single decision interpreting *a constitution* or a *statute* is clear and unequivocal submission to its holding has developed in these days to a practice * * *." (Writer's emphasis).

2. Questions of the type here presented, involving railroad accidents, are general rather than local in nature.

Petitioner contends that the instant case is distinguishable from the numerous Supreme Court cases cited in this brief, on the ground that there is here involved a question "local in its nature."

The holding of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518, furnishes a ready answer (p. 529):

> "There is no question concerning *title to land.* No provision of *State statute* or *constitution* and *no ancient* or *fixed local usage is involved.* For the dis-

> covery of common law principles applicable in any case investigation is not limited to the decisions of the Courts of the State in which the certiorari arose." (Writer's emphasis.)

The holding of *Olcott* v. *The Supervisors,* 16 Wall 678, is equally appropriate (p. 689):

> "It is undoubtedly true in general that this Court does follow the decisions of the highest court of the states respecting local questions *peculiar to themselves,* or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions on local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments." (Writer's emphasis.)

Swift v. *Tyson,* 16 Peters 1, the progenitor of the rule, likewise advances a conclusive reply (p. 18):

> "In all the various cases, which have hitherto come before us for decision, this Court has uniformly supposed, that the true interpretation of the 34th Section limited its application to State laws strictly local, that is to say to the positive statutes of the State, and the construction thereof, adopted by the local Tribunals, and to rights and titles to things, having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the Section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law * * *."

There is not involved here any "title to land," and "ancient or fixed local usage," "State statutes" or "Constitution."

Nor is there involved here a question, "peculiar to" the State of Pennsylvania. This Court will judicially notice that railroads extend into every State of the Union, and the same

problems of railroad accidents and injuries to persons on beaten paths exist throughout the land. One has but to consult the numberless cases dealing with such accidents which are reported in every jurisdiction, in order to see the national scope of the problems involved.

The same practical reason whch had some influence in the decision of *Baltimore & Ohio R. R.* v. *Baugh,* 149 U. S. 368, is present here. Here, as in the *Baugh* case, we have a railroad extending over many State lines. The employee there involved, like the pedestrian here involved, was located exclusively in Ohio.[1] The Court said:

> "As it (the railroad) passes from State to State must the rights, obligations and duties subsisting between it and its employees change at every State line."

With equal appropriateness it may be stated here, must the rights, obligations and duties subsisting between the railroad and pedestrians change at every State line? If the facts of *Chicago* v. *Robbins,* 67 U. S. (2 Black) 418, which involved the liability of a landowner for negligence toward a passerby on a street in Chicago were held by the Supreme Court to present a question of general law, certainly the instant case may be said to be an *a fortiori* case.[2]

The petitioner concedes (p. 11, petitioner's brief) that the issue of contributory negligence presents a question of "gen-

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[1] He worked in and out of the Town of Bellaire, Ohio.

[2] The contention of petitioner (p. 29 of petitioner's brief) that the instant case is closely analogous to *Detroit* v. *Osborne,* 135 U. S. 492, is clearly belied by the following quotation. After showing that Michigan statutes, as interpreted by State Court decisions, exempted the defendant municipality from liability to plaintiff for defective sidewalk, the Court said (p. 498):

"The question is not new in this court. In the case of Clairbourne County v. Brooks, 111 U. S. 400, 410, it was held that, 'When the settled decisions of the highest court of a state have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States'; and in the opinion it was observed: 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body public of the State.'

"What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation."

eral law." To be consistent, certainly, the negligence of the defendant at the same time and place must also be considered a question of general law.

Dictates of logic compel a choice of the beaten path rule followed throughout the country, in preference to the solitary decision of the State Court. Wherever the question has arisen, tribunals of the land prompted by motives of humanity have created a duty on the part of railroads to use due care toward persons who are likely to be upon beaten paths on their right of way. Certainly it is within the province of a railroad company to protest such user and discontinue the practice if it so desires.

C. The solitary Pennsylvania decision upon which petitioner relies is of doubtful applicability to the case at bar.

1. Said decision is clearly contrary to other decisions in Pennsylvania.

The case relied on by petitioner, *Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 160 A. 859, allegedly stands for the proposition that a railroad owes no duty of due care to a person on a well beaten path parallel to "a railroad's tracks and on its right of way, as distinguished from a permissive crossing over them."

Decisions in Pennsylvania have uniformly held that a duty of care *is* owed to persons on both longitudinal and crossing paths. The following are longitudinal path cases:

Taylor v. *Del. etc. Canal Co.*, 113 Pa. 162, 8 A. 43. Plaintiff injured while on a beaten path which "was used, so far as the testimony shows, by persons not for the purpose of crossing directly across the tracks to reach a point, but for the purpose of going along the track itself, within the right of way of the railroad" (p. 164). Held: "Under the allowance of this permissive way, therefore, the defendant company was bound to use reasonable care" (p. 169). Judgment for defendant reversed.

Slamovitz v. *Penn. R. R.*, 266 Pa. 63, 109 A. 544. Plaintiff injured while walking on a "generally used and well beaten path located between the track and the before mentioned concrete wall" (p. 65). Held: Duty of "close lookout" required of defendant. Judgment for plaintiff affirmed.

Kremposky v. *Mt. Jessup Coal Co.*, 266 Pa. 568, 109 A. 766. Plaintiff injured on a trestle for coal cars on defendant's private property. "A double track railroad occupied the center of the bridge, on each side of which was a plank walk four or five feet in width. * * * For many years prior to the accident people, both adults and children, had been accustomed to use the walks daily as a short cut" (p. 571). Held: The walks had become permissive ways. Judgment for plaintiff affirmed. "It is the duty of the owner of premises to exercise reasonable care to avoid inflicting injury upon those using a permissive way thereon" (p. 572).

Francis v. *Balt. & O. R. R. Co.*, 247 Pa. 429, 93 A. 490. Discussing certain testimony, as to the admission of which defendant claimed error, the Court said: "This testimony was direct and positive and, if believed, was entirely sufficient to establish not only the fact of the existence of a path *along* and *upon* the ties of the railroad at the point where the accident occurred, but the further fact of its frequent and continuous use by the public for the period above mentioned" (two months) (p. 429). Held: Judgment for plaintiff affirmed. "When the railroad company knew or should have known that part of the tracks through its yard was being used by the public in the way shown by the testimony, except as it interfered and prevented such use, a duty at once attached to exercise a degree of care in operating its cars thereon corresponding to the increased risk" (p. 429).

Kay v. *Penn. R. R.*, 65 Pa. 269, 3 Am. Rep. 628. "* * * along the tracks where the accident happened a well-worn footpath was plainly visible" (p. 272). Plaintiff was on this path when struck by one of defendant's trains. Held: Nonsuit reversed. A duty existed to use reasonable care toward those on the pathway.

Petitioner concedes that Pennsylvania decisions require a duty of due care toward persons on *cross-paths* (see cases, p. 18, of petitioner's brief).

The cases cited by petitioner on page 17 of its brief are set forth in such a manner as to make it appear that they support the *Falchetti* case. *The cases have absolutely nothing to do with the duty of due care owed to persons on beaten paths:*

Tiers v. *Penn. R. R.,* 292 Pa. 522, 141 A. 487. Plaintiff injured while crossing railroad, at a place where no path existed. The Court stated, in reversing a verdict for the plaintiff (p. 527): "If the evidence established a definite permissive point of crossing and while traversing such path plaintiff was injured a recovery might be had. That was the situation presented to the Court in *Steele* v. *Lake Shore* Ry. Co., 238 Pa. 295, 86 A. 201, relied on by appellee. There the regular walk was obstructed and plaintiff followed a well defined beaten way along * * * and over the tracks at a point beyond * * * but no such facts appear here * * * There is no evidence that there was any defined passageway at or near the place mentioned." A different ruling, said the Court, would render "most difficult, if not impracticable a proper operation of trains for the convenience of the public." It is the last quotation which petitioner set forth in its brief.

Gray v. *Penn. R. R.,* 293 Pa. 28, 141 A. 621. Plaintiff injured while proceeding along defendant's tracks. Held: "They did not establish that there was a well-defined path, but their testimony was that people walked wherever they pleased on the tracks" (p. 31). Judgment for defendant affirmed.

Conn v. *Penn. R. R.,* 288 Pa. 494, 136 A. 779. Plaintiff, infant, was injured while walking under a bridge and parallel to defendant's tracks. Plaintiff relied on the existence of a beaten path under the bridge, saying that it was used frequently by other boys. Held: No beaten path was established. Page 502: "A permissive way is a license to pass over the property of another; it may be either express or implied, but must, however, be restricted to a well-defined location and especially in the case of an implied public permission must be frequently, notoriously and continuously used by the public, to raise the inference of acquiescence on

the part of the landowner in such use." Page 508: "The testimony does not show that there was ever any regularity or continuity in the trips of the boys under the bridge." Judgment for plaintiff reversed.

Kolich v. *Mononghahela Ry. Co.,* 303 Pa. 463, 154 A. 705. Plaintiff injured while crossing defendant's tracks. The case rests solely on the contributory negligence of plaintiff. The Court held: "The jury's finding that this was a permissive crossing * * * had ample evidence to support it, as had also their finding that defendant was guilty of negligence in giving no warning of the approach of its train thereto. This leaves open only the question of plaintiff's contributory negligence, which we think was clearly established" (p. 467). Judgment for plaintiff reversed.

Koontz v. *B. & O. R. R.,* 309 Pa. 122, 163 A. 212. Plaintiff injured while crawling under one of defendant's freight trains. Held: No duty of care was owed since, "Instead of showing the existence of a permissive crossing, the evidence showed that no such crossing existed" (p. 127). Judgment for plaintiff reversed.

Lindsay v. *Glen Alden Coal Co.,* 318 Pa. 133, 177 A. 751. In this case plaintiff's intestate after ascending a 12-foot wall of concrete was climbing up a railroad embankment when killed by a live wire. After holding the deceased guilty of contributory negligence, the Court stated: "The evidence that people ran up the concrete and then walked at one place or another over the culm bank to the top is not of such a character as to establish a right of way or to put an increased burden on defendant in the circumstances disclosed by the evidence. See Suthold v. Ry. Co., 47 Pa. Sup. 137; Conn v. R. R., 288 Pa. 494; Falchetti v. Pa. R. R., 307 Pa. 203. Decedent's heedlessness resulting in his death" (p. 137). Judgment for defendant affirmed. (This case is cited by petitioner as approving the *Falchetti* case. See page 17, petitioner's brief.)

It is important to note that the Justice who wrote the opinion in the *Falchetti* case was apparently under a misapprehension as to the law of Pennsylvania, for it is stated as follows:

> "* * * as the Conn and Kolich cases show an alleged permissive way parallel to the plaintiff's tracks and on its right of way, as distinguished from a crossing over them, is not recognized in this State."

The *Conn* and *Kolich* cases are above set forth and clearly stand for no such proposition. In the *Conn* case, no beaten path was established.[1] In the *Kolich* case, the accident happened on a cross-path and the sole issue was plaintiff's contributory negligence.[2]

The authority of the *Falchetti* case is further weakened since peculiar facts were there involved. In that case plaintiff was struck by the overhang of an engine. At the time he was struck he was on a path parallel to defendant's railroad track at a sharp curve. The Court pointed out that even in the exercise of due care the engineer could not tell whether his overhang would hit anyone on the path. Said the Court (p. 206):

> "It is difficult, if not impossible, for the engineer of an approaching train on the track nearest the path to know, until it is too late to avoid an accident, whether or not he can operate his engine without striking a pedestrian, if one should be on the path at the place of this regrettable accident. At that point it was but a few inches from the track, so that the cylinder of the engine, on account of the curve, not only projected over the rail further than would have been the case on a straight track, but also by means hereof, tended to hide from the view of the engineer those who were on the path."

2. The facts of the case at bar do not come within the purview of the Pennsylvania decision.

The record discloses and the Circuit Court of Appeals affirmed the fact that at the time plaintiff was struck he was at the junction of two paths (fols. 141, 276; Circuit Court of Appeals Opinion, fol. 496), one crossing the track and one running parallel thereto (fols. 111-114; Circuit Court of Ap-

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[1] See *supra*, page 20.

[2] See *supra*, page 21.

peals, fol. 496). It will be noted that the Pennsylvania decision on which petitioner relies states only that no duty of due care is owed to persons on longitudinal paths but specifically confines the decision to such paths as distinguished from cross-paths.[1] Under the law of Pennsylvania, it is clearly established that a duty of due care *is* owed to persons on cross-paths (*Lodge* v. *Pitts etc. R. Co.,* 243 Pa. 10, 89 A. 790; *Steele* v. *Lake Shore etc. R. Co.,* 238 Pa. 295, 86 A. 201; see footnote, p. 18 of petitioner's brief). It would, therefore, appear that the Pennsylvania decision of *Falchetti* v. *Pa. R. R.* is inapplicable to the facts of the case at bar[2] since at the time plaintiff was struck he was on the cross-path. At trial, defendant claimed no duty of due care whatsoever was owed to plaintiff, asserting that no permissive pathway doctrine could be applied to this case (defendant's objection, fols. 123-124; defendant's motion, fol. 640; defendant's assignment of error, fol. 1453).

On appeal, defendant, in order to sustain its position at trial contended that the cross-path had nothing to do with the case at bar. Now defendant concedes that it was a "disputed" question of fact[3] as to whether plaintiff was on the cross-path. This Court will refuse to entertain certiorari where disputed questions of fact are involved.

D. There is no conflict among the Circuits upon the question here involved.

Petitioner contends there is a conflict in the Circuits on the question involved. Since clear Supreme Court holdings are determinative of the issues involved, any conflict in the Circuits necessarily becomes irrelevant. The cases cited in subdivision B of this point clearly indicate, however, that whenever the point has been squarely raised (except in the First Circuit) the Circuits have unanimously followed Supreme Court rulings.[4] IN NONE OF THE CASES OUTSIDE OF THE FIRST

[1] Relevant quotation from said decision, *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 A. 859, may be found at page 22.

[2] Defendant's assignment of errors, fol. 1453.

[3] Petitioner's brief, page 6.

[4] See *supra,* pages 9, 10, 11, 12.

CIRCUIT CITED BY PETITIONER WAS THE QUESTION OF GENERAL-LOCAL LAW RAISED EXCEPT in *Roberts* v. *Tennessee Coal etc. Co.*, 255 Fed. 469, and in *McGuire* v. *Sherwin-Williams Co.*, 87 Fed. (2d) 112. In the latter case, although the Court stated that in the case at bar it (p. 114) "was not bound to follow the decisions of the highest court of the state," "no impelling reason" existed for disregarding the state decisions since there was a square split of authority on the point involved.

It is interesting to note that the case upon which petitioner mainly relies as creating such a diversity among the Circuits as to warrant certiorari, *B. & M. R. R.* v. *Breslin,* 80 Fed. (2d) 749 (C. C. A., 1st), was a case where certiorari was denied by the Supreme Court on March 2, 1936 (297 U. S. 715), EVEN THOUGH AT THE TIME OF ITS RENDITION THERE WAS A DECISION IN ANOTHER CIRCUIT DIRECTLY CONTRARY TO IT (*Snare & Triest Co.* v. *Friedman,* 169 Fed. 1, cert. den. 214 U. S. 518—involving the same doctrine, attractive nuisance aspect of railroad turntable, and holding general rather than local law applicable).

II. The lower Court properly applied the rule that where reasonable men may differ contributory negligence is a question for the jury.

In spite of a feeble protest by petitioner, it cannot be denied that the lower Courts followed the simple and well-established rule that where reasonable men may differ the question of contributory negligence is for the jury.

The Circuit Court of Appeals opinion reads as follows (fol. 498):

> "Nor can we say, in view of the cases, that the possibility of being hit by some unusual projection from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it (citing several cases). To us it would seem imprudent to walk or even stand in the dark within a foot of a train moving at 10 miles an hour; but the fact that recoveries have been allowed under

> closely similar circumstances in the cases above cited *indicates that fair minded men may hold a different view. This is enough to preclude taking the issue from the jury"* (citing cases). (Writer's emphasis.)

The italicized portions of the above quotation clearly indicates that the Circuit Court of Appeals applied the correct test as recognized by this Court and conceded by petitioner.[1]

Petitioner raises the objection that the lower Court should not have looked to the decisions of other Courts in order to determine whether this plaintiff was guilty of contributory negligence. Unless we are to assume that other verdicts were not rendered by fair-minded men and passed upon by fair-minded jurists, and unless we are to abolish the entire system of precedent upon which our judicial foundation is constructed, the petitioner's argument is untenable.

The American Law Institute Restatement of the Law of Torts, at Section 285, Topic 3, recognizes that the conduct of a plaintiff may be defined by a decision, or series of decisions, in closely similar cases and that such decisions are controlling.

Nor can any alleged difference in inches (if any there appears from the extended testimony) between the instant case and those cited by the Circuit Court of Appeals[2] be said to be of such moment as to warrant certiorari.

It is to be noted, of course, that the Circuit Court of Appeals did not rely solely on the cases cited therein in reaching its determination of the instant case, although a reading of petitioner's brief would lead one to so believe. The Circuit Court of Appeals opinion reads (fol. 498):

> "In the case at bar, the opportunity to avoid danger was easily available and the danger was very

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[1] Pages 33, 34 of petitioner's brief.

[2] The cases cited were cases in which plaintiff was so close to the edge of a station platform as to be thrown down by the suction of a swiftly passing train (*Munroe* v. *Penn. R. Co.*, 85 N. J. L. 688, 90 A. 254); where plaintiff was about two or three feet from a moving train (*Texas & Pacific* v. *Greene*, 291 S. W. 929, aff'd 299 S. W. 639); where plaintiff was about 2½ to 3 feet from a moving train (*Chesapeake & O. R.* v. *Davis*, 22 Ky. L. Rep. 748, 58 S. W. 698); where plaintiff was three or four feet from a moving train (*Pruitt* v. *Sou. R.*, 167 N. C. 246, 83 S. E. 350); where plaintiff was within five feet from a moving train (*Schultz* v. *Erie R.*, 46 Fed. [2] 485).

> great, if anything should happen to be projecting from the train; but we cannot say that this particular danger was likely, in view of the testimony of the train checkers that seldom, if ever, had they known a door to swing open."

Nor can it be urged in earnest that the time or attention of this Court should be devoted to a detailed analysis of the facts in order to see whether this plaintiff was guilty of contributory negligence in this single case at bar. Voluminous testimony was presented relating to the widening of the paths at the point of the accident (the parallel path widened out to about 4½ feet at this point, fols. 569, 592, 593), the user of the paths by the public at night (the paths were used at all hours of the day and night WHILE TRAINS WERE PASSING, fols. 462-470); the frequent use of the paths by the plaintiff (fols. 173, 176); the distances of the paths from the tracks (the edges of the two paths were about 2 to 2½ feet from the ties at the place where the accident occurred, fol. 130). Two lower Courts and a jury have decided in the light of all these facts, that the plaintiff was not guilty of contributory negligence.

CONCLUSION.

It is respectfully submitted that there are no questions here presented warranting certiorari and that petitioner's application for a writ should, therefore, be denied.

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