ERRATUM

In *Taylor* v. *Del. etc. Canal Co.,* 113 Pa. 162, 8 A. 43, cited herein at page 20, the facts are correctly stated. The holding is likewise correctly represented but through inadvertence a quotation from argument of counsel, rather than from the opinion, is set forth. A portion of the opinion which in substance is the same as the erroneous quotation is as follows (p. 175):

> "* * * and where it is shown, as was done in this case, that the footpath across the company's land had been habitually used by the public for many years without objection, it is for the jury to say whether the company had not acquiesced in such use.
>
> "While such use does not convert the company's right of way into a public highway, it certainly does relieve persons passing on the same from being treated as trespassers on the company's premises; and there is a manifest distinction between the degree of care which a railroad company is bound to exercise toward mere trespassers and those who may be using the right of way by tacit or implied permission of the company.
>
> "In the case of such long continued use by the public, the company and its employees are charged with notice of the fact, and therefore cannot with impunity neglect precautions to prevent dangers to persons thus using the same."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

ERIE RAILROAD COMPANY (a New York corporation), Petitioner, against HARRY J. TOMPKINS, Respondent.	No. 367.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENT, HARRY J. TOMPKINS.

Statement of Facts.

On July 27, 1934, respondent, twenty-seven years of age, suffered the loss of his entire right arm (p. 86). The accident which forms the basis of respondent's cause of action occurred just as he was at the junction of two footpaths (pp. 30, 71, 72, 78; Opinion, Circuit Court of Appeals, p. 497) which had been used for decades by his townspeople and himself (pp. 21-27, 83, 107, 114). One of these paths crossed defendant's railroad tracks diagonally and the other ran near the side of defendant's tracks and parallel therewith (pp. 21-27). One night, when returning from his

mother-in-law's, he took the parallel path to the junction, thence intending to proceed along the diagonal path away from the tracks (pp. 29-30). This was the shortest and most direct route to his home (pp. 60, 353, Blue Print, Plaintiff's Exhibit 1), which was the second house from the tracks (p. 19). On the night in question, as he was walking along the parallel path, a train approached from the opposite direction (p. 30). Hundreds of his townsfolk, as well as the plaintiff, were in the custom of walking along this path at all hours of the day and night while trains were passing (pp. 40, 125-127). Many of them had even wheeled barrows of coal along the path while trains were passing (p. 127). He, therefore, had no reason to anticipate danger (pp. 40, 41).

He was but a few steps from the junction of the two paths (p. 30) when he saw the side of the engine as it passed him (p. 42). He continued to walk and took about four steps while parallel to the train (p. 71). This brought him to the junction of the two paths (p. 71). At that moment as the engine and a few cars of the train had passed him (p. 50) and at that time and place just as he had reached the junction (p. 30) there suddenly loomed up in front of him a large black object protruding from the side of the train out over the footpath (pp. 30, 78). In the brief moment before plaintiff was thrown violently backward and under the cars, he was able to judge that he was hit by "a black object that looked like a door" (p. 30). It was later developed at trial that the fourth car on the seal-check list produced at the trial by defendant (Defendant's Exhibit E, p. 374) was a refrigerator car of the type of which the doors swing outward (pp. 290, 239).

As to the alleged negligence of the plaintiff:

One fact must be regarded as vitally significant. Respondent was struck by a door protruding from the train (p. 30). He was not struck by the side of the train (p. 78). The Trial Judge charged the jury, at defendant's request, that

if they believed "plaintiff was not struck by the door of a freight car * * *" (p. 350), then its verdict must be for the defendant. By virtue of the verdict for the plaintiff (p. 352) it is to be assumed that the plaintiff was struck by the door of a car, a danger he had no reason to "anticipate" (p. 397, Opinion, Circuit Court of Appeals). Therefore, the mass of mathematical data compiled in appellant's brief (Appellant's Brief, p. 5) designed to demonstrate plaintiff's proximity to the side of the train becomes irrelevant.

Concerning the defendant's mathematical data:

It is to be noted that appellant has entirely ignored the testimony in stating the facts. Plaintiff testified that he was struck at the junction of the two paths (p. 30); that at this point the two paths widen out to about 4 feet and the pathway space was 2 to 2½ feet from the ties (pp. 26, 157). Under elementary appellate procedure, not only are these facts to be considered as true, but the most favorable inferences that can be drawn in favor of plaintiff must be assumed. Instead, however, appellant has given the measurements of the path at points other than where plaintiff was struck and based invalid arguments thereon (Appellant's Brief, p. 5). It has entirely omitted to mention the measurements at the point where plaintiff was struck.

These distances were only the estimates of plaintiff's witnesses and were not offered as exact measurements. They should be blended with the information that this well-defined path (p. 21) was safely used at all hours while trains were passing.

The defendant produced exact measurements by experts as to the width of the railroad ties (p. 218), the engine (p. 220) and the cars of the train in question (p. 216). The defendant also produced a surveyor, who gave accurate measurements as to the slope and character of the terrain immediately adjacent to the footpath and tracks (pp. 269-276; Defendant's Exhibit I, p. 379). He admitted the existence of paths (p. 279). However, the defendant offered

no testimony, accurate or estimated, as to the path, its distance from the tracks or the distance between a pedestrian on the path and a passing train. The fair conclusion is that the estimated distances of plaintiff's witnesses were more favorable to the defendant than revealed by the accurate investigation of defendant.

The appellant in its brief (Appellant's Brief, p. 6) attempts to attack plaintiff's credibility, which is not at all one of the issues here involved. The plaintiff testified he was struck by "a black object that looked like a door" (p. 30) which he knew projected from the side of defendant's train (p. 51). He was not willing to swear positively that the projection was a door, although he believed it to be one (p. 73); and he told this to Drs. Murphy and Fleming when he was in the hospital (pp. 77, 78), immediately after the accident, before he had seen a lawyer and before he had signed the bill of discovery (p. 79). This bill of discovery was prepared by plaintiff's attorney in order to obtain information for a bill of particulars sought by defendant and in the main coincided with plaintiff's testimony at the trial.

Defendant's witnesses, on the other hand, clearly attempted to conceal the true order of the cars on the train. The seal-check list (Defendant's Exhibit E, p. 374) read differently from the train list (Defendant's Exhibit F, p. 375); the wheel-book (Plaintiff's Exhibit 7, p. 359) read differently from the former two. Two cars, which were not even mentioned in these three lists, were shown to have blood stains on their wheels after arrival at their destination (p. 255). An alleged inspection of the train in question, before it departed, was attempted to be proved in the case of one witness by a report which he conceded he made up after he knew of the accident (p. 259) and in the case of another witness by independent recollection of the inspection which occurred back in 1934, although he had kept no record (p. 268). It appears that on defendant's railroad the car inspectors never tested the seals on doors to see that the doors were securely locked (pp. 305, 304, 258, 267). Two other witnesses were produced by defendant who were under no

duty to make any inspection (pp. 281-297, 311). Their only duty was to prepare the order and description of the train (pp. 281, 311). These witnesses only inspected one side of the train, conveniently the side from which the projection protruded (pp. 283, 296, 297). Their testimony regarding the alleged safety of the train in every respect on the night in question in 1934 can hardly, therefore, be called credible.

An inspection of the train was made after the accident and records were kept by defendant (pp. 253, 254). In spite of this fact, defendant offered as its sole witness to this latter inspection a person who had inspected only part of the train (pp. 252-254). Defendant concealed the number of cars inspected by him as well as the condition of the balance of the train (pp. 252-254). It is a fair inference that said concealed information was detrimental to appellant's cause.

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. Decisions of this Court, as well as logic and reason, have established that questions of the type here presented, involving railroad accidents, are questions of general law, upon which independent judgment may be exercised by Federal Courts.

Decisions of this Court involving railroad accidents or closely analogous questions in which it has been held that

Federal Courts may exercise their independent judgment are as follows:

Baltimore & Ohio R. R. v. *Baugh,* 149 U. S. 368.

That case 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. This 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 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."

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 a passerby for injuries sustained due to unguarded excavation on property.)

This 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."

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

Said this 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.)
>
> *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.)

This Court held (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.)

This Court stated (p. 368):

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

Liverpool Steam Co. 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 there argued that the law of New York, where contract made, controlled and was settled by recent decisions. This 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 and 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 jurisdiction and upon a contract made and to be performed within the State."

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.)

This Court said (p. 87):

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

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 infant on turntables, on theory of attractive nuisance applied in both above cases without consideration of State law on subject.)

Chesapeake & Ohio R. v. *Kuhn,* 284 U. S. 44. (Holding in negligence cases arising under Federal Employees' Liability Act "federal common law" must be followed in preference to contrary state decisions.)

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, recognize 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 above citations have been confined to railroad accidents or closely analogous situations. In addition it should be noted that this Court on numerous occasions has clearly enunciated the sort of questions which it deems to be questions of local and those which it deems to be questions of general law. A reading of the following quotations will reveal that the legal issue here involved is not of a local nature.

Said this Court in *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518, in holding that the issue there involved was not one of a local nature (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 discovery of common law principles applicable to 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 contains a clear statement of the rule (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 * * *."

In *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, the Court specifically addressed itself to what is meant by local law (p. 582):

> (After stating that Federal Courts will follow State Courts in questions which concern the Constitution and laws of the State, the Court continued):
> "It is also well settled that where a course of decisions, whether founded upon statute or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer or sale of property and the rules which affect the title or possession thereto, they are to be treated as the laws of that State by the Federal Courts."

See also, quotations, *infra,* pp. 25, 26.

There is not involved here any "title to land," "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 to see the national scope of the problem involved.

In the case at bar, not only were the Courts below supported by the great weight of authority above recited, but every dictate of practicality, logic and reason compelled the application of the general law rule.

The same practical reason which influenced 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 one State.* 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."

* He worked in and out of the town of Bellaire, Ohio.

With equal appropriateness it may be stated here, must the rights, obligations and duties subsisting between the raidroad and pedestrian change at every State line?

The contention of appellant (Appellant's Brief, p. 43) that the instant case is closely analogous to *Detroit* v. *Osborne,* 135 U. S. 492, is clearly belied by the following quotation. That case dealt with a problem of municipal government. 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."

The Courts below, in rejecting the single, illogical decision of the Pennsylvania Court, chose to follow the rule not only supported by authority, but also by logic and justice. In the briefs below, decisions were compiled by respondent, illustrating that in practically every jurisdiction where the question has arisen the Courts have decided that persons upon *all* types of beaten pathways on railroad property are owed a duty of care by said railroads. (Decisions were collected from close to thirty jurisdictions and the great weight of authority was conceded by appellant to support the rule.)

This overwhelming authority bases its position upon the cogent reason that since persons are likely to be upon such beaten paths at the time of passage of railroad trains, injuries to such persons are likely to result unless the railroad is operated with due regard for the safety of the individuals so situated, and this is true whether the path crosses the railroad tracks or runs parallel thereto (*Adams* v. *Southern R.,* 84 Fed. 596, 600). It is to be further noted that this rule is not oppressive on railroads since it is confined to well beaten and well defined pathways (*Adams* v. *Southern R.,* 84 Fed. 596, 600),* and it certainly is within the province of railroads to protest such user and discontinue the same if it so desires. Surely it should be in the power of a Federal Court, if it so chooses, to adopt the more logical and humane rule of the majority opinions. That the Federal and State Courts operate under separate and distinct sovereignty is a fundamental concept in our government. The ultimate aim of both is justice, and where a State Court has gone astray, to compel Federal adhesion to such injustice is not only to destroy the judicial function but to make a fetich of legalistic conflicts principles.

Let the Federal Courts exercise their own judgment on all principles of general law, except where local rules of property, involving such things as transfer of title upon which people have relied for generations, or except where peculiar local customs, such as, e. g., prohibition of riding on Sunday, have grown up. How much clearer does the "local law" exception to the rule become when analyzed in this light, an exception designed only to prevent the upsetting of vested local rights and undue interference with provincial customs and ways, by Federal Courts.

Authority, logic and reason, therefore, impelled Federal Courts in this case to exercise their independent judgment.

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* See also *Tiers* v. *Pa. R. Co.,* 292 Pa. 522, 141 Atl. 487; *Conn.* v. *Pa. R. Co.,* 288 Pa. 494, 136 Atl. 779; quotations contained *infra* (p. 22).

C. There is no such doctrine as contended by appellant, that where a rule is well established in a State, the question is one of local law and Federal Courts must follow the rule even though the rule might otherwise be regarded as one of general law.

Appellant contends (Point III, subd. "B," Appellant's Brief) 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, even though the rule might be regarded as one of general law.

It must be noted at the 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.*

But even if Pennsylvania decisions were well established on the issues, petitioner's contention is based upon a superstructure of authority so tenuous that it cannot even be called *"obiter dicta."* It is at most *inference* from *"obiter dicta."* This Court has clearly defined those situations under which it will follow State law and those under which it will use its independent judgment in following the weight of authority. Quotations from this Court on the subject have been previously set forth in full, *supra,* at pages 9 to 11; and see also pages 25, 26. From none of these quotations does it appear that this Court will follow a State rule, even if the rule is well established, where the case involves an issue of general law.

Appellant's brief entirely disregards the aforesaid clear enunciations by this Court and delving into hidden crevices of its judicial opinions draws inference upon inference concluding with what "we think" this Court means.

Such conduct on appellant's part would indeed be justifiable, if it could by some means show that this Court in spite of its clear words as above enunciated *has acted* in a way inconsistent with its clear statements above set forth.

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* *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 Atl. 859, analyzed in Point II of this brief.

This, however, appellant is unable to do. Every case cited by appellant on this point was a case where the Court held that State Court rulings were rightfully disregarded.* Those decisions cannot possibly demonstrate that this Court *has acted* in such a way as to provide a basis for appellant's contention that there is a rule that State decisions in questions of general law will be followed, where a State rule is well established.

The single case cited by appellant in which this Court did follow the local law was *Bucher* v. *Cheshire Road Co.*, 125 U. S. 55, which involved the local interpretation of a

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* Cases cited by petitioner are as follows:

Swift v. *Tyson,* 16 Peters 1 (p. 24 of Appellant's Brief). General law applied in preference to contrary local rulings on question of negtoiable instruments.

Black & White Taxicab Co. v. *Brown & Yellow Taxi Co.,* 276 U. S. 518 (p. 34 of Appellant'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. 29 of Appellant's Brief). Construction of insurance policy deemed to be a question of general law.

Lane v. *Vick,* 3 How. 464 (p. 30 of Appellant's Brief). Construction of will held to be question of general law and local decision disregarded.

Chicago v. *Robbins,* 67 U. S. 418 (p. 30 of Appellant'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. 31 of Appellant'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. 31 of Appellant'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. 31 of Appellant'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.

Baltimore & Ohio R. v. *Baugh,* 149 U. S. 368 (p. 32 of Appellant's Brief). General law applied in preference to contrary local holdings on question of fellow-servant rule.

Barber v. *Pittsburgh etc. R.,* 166 U. S. 83 (p. 33 of Appellant's Brief). General law applied in preference to contrary State decision on question of construction of a devise of land within said State.

Kuhn v. *Fairmont Coal Co.,* 215 U. S. 349 (p. 33 of Appellant'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. 36 of Appellant's Brief). Federal rule in turntable case applied in preference to decisions of State where accident occurred.

purely local statute prohibitng traveling on Sunday. The case, therefore, clearly involved a local issue and could be no possible authority to the effect that Federal Courts will follow well established State decisions on questions of general law.

It appears that this Court has acted in just such situations as those wherein appellant contends the State Courts will be followed. But whereas appellant is unable to offer a single decision in its favor, the following *holdings* are set forth to demonstrate that *even* where State decisions are well established the Federal Court may rightfully disregard State rulings, if the subject-matter is general rather than local in nature.

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

The latest pronouncement of the Supreme Court on this subject, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518, also 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.†

The assertion in appellant's brief (p. 35) that "the question at issue had not been foreclosed or settled by previous

* Relevant quotation may be found at page 6.
† Relevant quotation may be found at page 9.

Kentucky adjudications" is clearly untrue, for as Mr. Justice Holmes remarked in his dissenting opinion (p. 535):

> "This is a question concerning the lawful use of land in Kentucky by a corporation chartered by Kentucky. The policy of Kentucky with regard to it has been settled in Kentucky for more than 35 years."

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 proving contributory negligence was upon the plaintiff even though it considered the question one of substance.* 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 that a question of general law was involved:

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.)

Appellant itself points out that in the case of *Swift* v. *Tyson,* 16 Peters 1, this Court would not even have gone into the question of whether Federal Courts may disregard

* Relevant quotation may be found at pages 6, 7.

State decisions if it had not first assumed that the question has "been fully settled in New York" (*Swift* v. *Tyson,* 16 Peters 1, at p. 27, footnote 1).

The statement in petitioner's brief (p. 45) 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.)*

Swift v. *Tyson,* 16 Peters 1, itself stated that a State decision interpreting State statute must be followed by Federal Courts (see quotation *supra,* p. 10).

It thus appears that even though a State rule is well established, Federal Courts are not bound to follow the same where a question of general law is involved.

II. Even if a question of local law were here involved, the same result must be reached since appellant relies upon a solitary Pennsylvania decision, clearly contrary to the weight of Pennsylvania decisions, and of doubtful applicability to the facts of the case at bar.

The case relied on by petitioner (Petitioner's Brief, p. 15), *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 A. 859 (1932) 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 longitudinal paths.

* It will be noted that this doctrine applies only to interpretation of constitutions and State statutes and not to other local matters (see Point II, *infra*).

Many of these cases have been generally characterized in appellant's brief as not so holding. To avoid any misconstruction, the facts and holdings are, therefore, stated in the quoted language of the Pennsylvania courts.

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). "The testimony further showed that, in going into the Kennedy Plant, people generally walked either in the middle of the railroad tracks or on this narrow packed pathway" (p. 66). 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). (This case is characterized in appellant's brief as "essentially a crossing accident"; Appellant's Brief, p. 17.)

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). This statement of fact is taken from the opinion of the Court of Common Pleas, which statement the Court on appeal adopted as its own (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.

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. The Court said:

> "If, therefore, an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury, without a proper warning of his intent to recall his permission" (p. 273). "* * * The presumption of a clear track would not reasonably arise if the circumstances were such as have been stated" (p. 274).

It can be seen that the above cases do not rest upon whether paths are longitudinal or crossings but rather on the likelihood of persons being on beaten paths regardless of their route. A reading of the cases dealing with cross-paths, in Pennsylvania, will reveal the same deduction. *Steele* v. *Lake Shore & M. S. Ry. Co.*, 238 Pa. 295, 86 Atl. 201; *Lodge* v. *Pitts etc. R. Co.*, 243 Pa. 10, 89 Atl. 780; see also *Counizzari*

v. *Phil etc. Ry. Co.,* 248 Pa. 474, 94 Atl. 134, and *O'Leary* v. *Pitts etc. R. Co.,* 248 Pa. 4, 93 Atl. 771. Appellant concedes that a duty of due care is owed to persons on cross-paths in Pennsylvania (Appellant's Brief, pp. 15-21). The Pennsylvania Courts in the above cases reached this conclusion without drawing a distinction between cross-paths and parallel paths.

Whereas, in its brief in support of its petition for certiorari and also before the Circuit Court of Appeals, appellant gave the impression that the *Falchetti* case was based upon a long line of authority, this position is now abandoned by appellant, who is unable to cite any holding supporting the *Falchetti* case. This is extremely significant, for the Court in deciding the *Falchetti* case stated that it did so by virtue of precedent. Said the Court (*Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 206):

> "* * * And moreover as the Conn. and Kolich cases show, an alleged permissive way parallel with defendant's tracks, and on its right of way, as distinguished from a permissive crossing over them is not recognized in this State * * *.
>
> "We do not deem it necessary to review the authorities cited by either litigant as showing, or tending to show, that a long continued use of a well defined path on the right of way of the defendant railroad company may or may not be considered as evidencing a permission to continue to use it. So far, if at all, as they tend to sustain, the right to continue such use, they must be considered as overruled by the Conn. and Kolich cases."

But appellant now concedes that the only support that can be found in the *Kolich* case, *supra,* is *dictum* (Appellant's Brief, p. 20), and makes no attempt to show that the holding in the *Conn* case in any way supports the *Falchetti* case, although the *Conn* case is commented on at length in appellant's brief (pp. 18, 19). For the convenience of this Court the *Conn* and *Kolich* cases are briefly set forth:

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. *Monongahela 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.

It thus appears that the *Conn* and *Kolich* cases, the sole authority cited by the Pennsylvania Court in the *Falchetti* case to support its holding, have nothing whatever to do with the proposition of law propounded by the Court in that case. In the *Conn* case no beaten path was proved. In the *Kolich* case the accident happened on a cross-path and the sole issue was plaintiff's contributory negligence.

The same may be said of *Tiers* v. *Penn. R. R.,* 292 Pa. 522, 141 A. 487, the single case cited by appellant as "leading up to the Falchetti decision" (Appellant's Brief, p. 19). That was a crossing case, plaintiff was injured at a crossing, and, of course, in the quotation set forth in appellant's brief, page 19, the Court talks only about crossings. The facts

and holding are as follows: 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."

Nor has any case ever followed the *Falchetti* case. Appellant concedes, page 20, that no subsequent decision in Pennsylvania has involved a longitudinal pathway. It can be seen from a reading of appellant's brief that three later cases cited therein involving use of railroad property did not even involve beaten paths. *Koontz* v. *B. & O. R. Co.,* 309 Pa. 122, 163 A. 212 (Appellant's Brief, p. 20); *Lindsay* v. *Glen Alden Coal Co.,* 318 Pa. 133, 177 A. 751 (Appellant's Brief, p. 21); *Noonan* v. *Penn. R.,* 194 A. 282 (Appellant's Brief, p. 21).

Appellant can, therefore, rely on but a single Pennsylvania decision, clearly contrary to the weight and reasoning of other Pennsylvania decisions.

This Court has repeatedly held that, even where local questions of law are involved and Federal Courts would otherwise be under a duty, pursuant to the general rule, to follow State decisions, no such duty exists where there is but a single State decision expressing the State law or where the State law is unsettled.

The reasoning of these cases is that a single decision, particularly when recently made, is insufficient to establish a rule of property or action in a State. The same is true where State law is unsettled. The danger of disturbing vested rights and long-continued action in reliance thereon does not exist under such circumstances and, therefore, Federal Courts may follow their own independent judgment.

In *Barber* v. *Pittsburgh* (166 U. S. 83) this Court refused to follow a single State decision relating to the construction of a certain form of devise in a will. Said this Court (p. 99):

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the Courts of the United States in determining the title to land within the State, whether between the same or other parties (citing cases).
>
> "But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State in a case in a court of the United States, involving the construction of the same or like words, between other parties or a case between the same parties or their privies unless presented under such circumstances as to be an adjudication of their rights (citing cases)."

Likewise in accord is *Lane* v. *Vick,* 44 U. S. (3 How.) 464. In that case this Court refused to follow the decision of the highest Court of the State of Mississippi on the construction of a devise in a particular will, stating at page 476:

> "It is insisted that the construction of this will has been conclusively settled by the Supreme Court of Mississippi in the case of Vick, et al. v. The Mayor, etc., of Vicksburg, 1 How. 379,"

and after indicating that that case was not *res adjudicata,* the opinion continues:

> "With the greatest respect, it may be proper to say this Court does not follow the State Courts in their construction of a will or any other instrument as they do in the construction of statutes. Where * * * the construction of a will had been settled by the highest Courts of the State and had long been acquiesced in as a rule of property this Court would follow it, because it had become a rule of property."

See also *Yates* v. *Milwaukee,* 77 U. S. (10 Wall.) 497.

A case very close to the case at bar was *Pease* v. *Peck,* 18 How. 595. In that case a late Michigan decision was contrary to a series of earlier Michigan decisions on the question of a Statute of Limitations. In refusing to follow the later decision this Court stated (p. 599):

> "Where the decisions of a State Court are not consistent we do not feel bound to follow the last if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedents."

In addition to the aforementioned authorities this Court has explicitly stated that where the law of a State is not settled, even though the Federal Court would otherwise be under a duty to follow local law, under such circumstances they may use their independent judgment.

In view of the obvious reliance in the *Falchetti* case on previous precedent in Pennsylvania, and the total failure of said precedent to support the holding in the *Falchetti* case, the law of Pennsylvania can hardly be said to be "settled" against the respondent on the subject here involved.

In *Burgess* v. *Seligman,* 107 U. S. 20, where this Court declared that it was stating its "views with distinction in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions" (p. 34), the following appears (p. 33):

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is. But where the law has not been settled, it is the right and

> duty of the Federal Courts to exercise their own judgment, as they *also always* do in reference to the doctrines of commercial law and general jurisprudence." (Writer's emphasis.)

Again, this Court reaffirmed the rule in *Kuhn* v. *Fairmount Coal Co.,* 215 U. S. 349 (p. 360):

> "We take it then that it is no longer to be questioned that Federal Courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under the laws, the jurisdiction of the Federal Courts is an independent one, not subordinate to but coordinate and concurrent with the jurisdiction of the State Courts. 2. Where, *before the rights of the parties have accrued,* certain rules relating to real estate have been so established by State decisions as to become rules of property and action in the State, these rules are accepted by the Federal Court as authoritative decisions of the Law of the State. 3. *But where the State law has not been then settled,* it is not only the right but the duty of the Federal Court to exercise its independent judgment as it also always does when the case before it depends on the doctrines of commercial law and general jurisprudence * * *." (Writer's emphasis.)

See also:

> *Swift* v. *Tyson,* 16 Peters 1;
> *Hines, Trustee,* v. *Martin,* 268 U. S. 458, 465.

It, therefore, appears that, even if a question of local law were here involved, the Federal Court in the case at bar was perfectly justified in exercising its independent judgment, in view of the unsettled condition of the Pennsylvania law and the fact that appellant relies upon a solitary Pennsylvania decision clearly contrary to the weight of Pennsylvania decisions.

Aside from such consideration, however, even if the Federal Court were to attempt to apply the *Falchetti* case to the case at bar, the latter case is inapplicable to the facts

involved herein. It is uncontested in the case at bar that plaintiff was at the intersection of a diagonal and a longitudinal pathway when he was struck. This was affirmed by the Circuit Court of Appeals and by defendant's own counsel (p. 79; Plaintiff's Exhibit 1, p. 353; Opinion, Circuit Court of Appeals, p. 394). Defendant offered no witness to dispute the fact, although an agent of the railroad (in court) had been shown the exact spot where plaintiff was found (pp. 116, 100). The assertion in appellant's brief (p. 13) that the Trial Court "treated the accident as a longitudinal pathway accident" is incorrect. The Trial Court after its charge to the jury refused as already "covered" plaintiff's request to charge (p. 341) that if the jury believed plaintiff was on the junction of the two paths at the time of the accident, the defendant owed him a duty of reasonable care.

A complete reading of the Court's charge in the light of this later ruling reveals that the Trial Court did recognize plaintiff's presence on the diagonal path at the time of the accident. The *Falchetti* case only states that no duty of due care is owed to persons upon longitudinal pathways and clearly does not attempt to reverse or modify the previous well-established Pennsylvania ruling that a duty of due care is owed to persons on cross paths.* Appellant contends that the cross-path doctrine is inapplicable to the facts of the case at bar because the plaintiff was not using the aforementioned diagonal path for the purpose of crossing the railroad track. However, a reading of the Pennsylvania decisions herein set forth† indicates that the liability of a railroad for injury to persons upon cross paths is based not upon the manner of use of such paths but rather upon the likelihood of persons being present in the vicinity of the railroad track where such paths may be situated.

Thus, reviewing the picture as a whole, appellant relies upon a single State decision, recently decided, clearly contrary to the weight of other decisions within the same State

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* See quotation *supra*, page 21.
† See quotations at pages 19, 20.

and itself of highly dubious applicability to the facts of the case at bar. Under such circumstances, even if a local issue had been here involved, the Federal Court was justified in exercising its independent judgment.

III. The lower Courts properly held that it was a question for the jury as to whether plaintiff was under a duty to foresee the danger of an unusual and undesigned projection protruding from the side of defendant's train.

The appellant asserts (Appellant's Brief, p. 46) the Courts below erred "in refusing to hold plaintiff contributorily negligent as a matter of law; and in particular the Circuit Court of Appeals erred in applying an unsound test in reaching this conclusion."

An appraisal of the plaintiff's conduct in the light of all the circumstances at the time of the accident will reveal that the Courts below correctly concluded that the issue of plaintiff's negligence was properly submitted to the jury.

The plaintiff, a young man twenty-seven years of age, having resided in the vicinity of the accident all his life, and within 80 feet of it (Blueprint, Plaintiff's Exhibit 1, p. 353) for the three years prior to the accident (p. 19), knowing that he had safely traversed this path at all hours of the day and night while trains were passing (p. 40); knowing that hundreds of his townsfolk had also safely traversed this path at all hours of the day and night while trains were passing (pp. 125-127); knowing that the terrain immediately adjacent to the said path contained many ruts and was uneven and was on an incline (p. 40); and knowing that the foot path on which he was proceeding was solid and well beaten (p. 39), was walking upon this path on the night of the accident.

He took three or four steps while parallel to the train (p. 71). During this time the engine and several cars of the train safely passed him (p. 50). He kept his body a suffi-

cient distance away from the side of the train so that the overhang of the cylinder head of the engine and all other normal and designed projections from the engine and train safely cleared him by a distance which he estimated in his testimony to be from 1 to 2 feet (p. 44).

When he had reached the junction of the parallel path and the diagonal path, a point (p. 30) where the paths widened out to about 4½ feet (p. 26), and were distant about 2 to 2½ feet from the ends of the ties (pp. 26, 157), a "black object, which looked like a door" suddenly loomed up in front of him (p. 30), struck him on the right side of his head, throwing him backward so that his right arm was severed by the wheels of the passing train.

The undisputed testimony that the plaintiff as well as hundreds of his townsfolk had safely used the paths in question innumerable times prior to the accident, at all hours of the day and night, while trains were passing, is ample proof of the plaintiff's exercise of due care.

In the case of *Harris etc.* v. *Uebelhoer,* 75 N. Y. 169, the Court stated at page 174:

> "So far as prior safe and successful experiments go to negative a negligent frame of mind, in making another, in similar circumstances, it must be conceded that here were sufficient. It cannot be said, as matter of law, that it was negligent and careless, lacking of prudent forethought, to attempt that which others often undertook with safety, and which the party herself had often herself achieved, without harm and without imminent peril."

Furthermore, as pointed out in Points I and II, appellant was under a duty to exercise due care toward the respondent, therefore the latter could proceed on the assumption that appellant would conduct itself in such a manner that he had no reason to believe a freight car door would be open.

Appellant goes to great length to show that in the numerous cases cited by the Circuit Court of Appeals there might have been a difference in inches in the closeness of the plain-

tiff in those cases to the train.* But, in doing so, appellant overlooks the point. If plaintiff had been struck by the side of the train, such discussions might be relevant. Plaintiff, however, was struck by an unusual and undesigned projection protruding from the side of the train, as were the plaintiffs in all the cases cited by the Circuit Court of Appeals.

Though a plaintiff may assume one danger, he is not barred from recovery if injured due to a danger created by defendant which he does not assume or expect.†

The case of *St. Louis Southwestern Ry.* v. *Balthrof,* 167 S. W. 246 (Tex.), is particularly relevant and is set forth here at length. In that case appellee's wife was injured on a longitudinal pathway which ran parallel to defendant's tracks at a distance of 3 feet. There was a nearer and safer way than the path chosen by appellee's wife. When several cars had passed her, and as she was proceeding on her way with a bucket of milk in her hand, she was struck a "blasting lick," as she puts it, on the right side, the one next the train, by some object from the cars. She testified she was making her way carefully without excitement, as she had done many times before, and did not know what struck her before losing consciousness. A piece of scantling, used in packing freight, was found near her. In affirming a verdict for plaintiff, the Court held (p. 249):

> "It may be conceded that one of the inherent risks or dangers of the use of the pathway appellee's wife

* The cases cited were (*Sullivan* v. *Vicksburg, S. & P. R. Co.,* 39 La. Ann. 800, 2 So. 586) where the plaintiff was within fourteen inches of a moving train; (*Texas & Pacific* v. *Green,* 291 S. W. 929, aff'd 299 S. W. 639) where plaintiff was about two or three feet from a moving train; (*Chesapeake & O. R.* v. *Davis,* 22 Ky. L. Rep. 748, 58 S. W. 698) where plaintiff was about two and a half feet to three feet from a moving train; (*Pruitt* v. *Sou. R.,* 167 N. C. 246, 83 S. E. 350) where plaintiff was three or four feet from a moving train; (*Schultz* v. *Erie R.,* 46 Fed. [2d] 485) where plaintiff was within five feet from a moving train. In the second and fourth cases cited in this footnote it was dark when the accident occurred.

† *American Inst. Restatement Law of Torts,* Sec. 468; *Smithwick* v. *Hall & Upson,* 59 Conn. 261, 21 Atl. 924; *Passenger Ry. Co.* v. *Boudrou,* 92 Pa. 475, 37 Am. Rep. 707; *Webster* v. *Rome etc. Ry. Co.,* 115 N. Y. 112, 21 N. E. 725; *N. Y., L. E. etc. Ry. Co.* v. *Ball,* 53 N. J. L. 283, 21 Atl. 725; *Wagner* v. *Mo. & Pac. Ry. Co.,* 97 Mo. 512, 10 S. W. 486; *Berry* v. *Sugar Notch Borough,* 191 Pa. 345, 43 Atl. 240; *Sullivan* v. *Vicksburg S. & P. R. Co.,* 39 La. Ann. 800, 2 So. 586.

> was using was that trains would pass in close proximity to the traveler, and that conceivable dangers and risks were imminent, but it is not at all inconsistent with such probability to say that the rule none the less contemplates the exercise of ordinary care to prevent the occurrence shown under the facts in the present case and as is illustrated in St. Louis S. W. Ry. Co. of Tex. v. Wilcox, where we sustained the finding of the jury that appellant had not exercised ordinary care when it so loaded cross ties on one of its cars that one protruded from the car and struck and injured appellee, a licensee upon the company's right of way. Accordingly we conclude that appellee's wife was not guilty of contributory negligence, since her injuries did not result from the inherent or usual and ordinary dangers of the pathway she was travelling but from the active negligence of appellant, independent of any contributing cause afforded either by the pathway, the tracks it paralleled, or the train which ran over the tracks, or appellee's wife."

The Circuit Court of Appeals was aided in reaching its conclusion that the issue of plaintiff's negligence was properly left to the jury by similar reasoning when it stated (p. 396):

> "* * * 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 we say, in view of the cases, that the possibility of being hit by some unusual object projecting 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."

And further (at p. 397):

> "He (plaintiff) is not, however, obliged to anticipate unusual projections from the side of the cars and from the jury's verdict we must take it that he was injured by a projecting door. We do not think it was error to leave the issue of contributory negligence to the jury."

Appellant criticizes the following statement in the opinion of the Circuit Court of Appeals (p. 396):

> "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 clearly indicate that the Circuit Court of Appeals applied the correct test as recognized by this Court (*Texas & Pacific Ry. Co.* v. *Harvey,* 228 U. S. 319).

Petitioner raises the objection that the Circuit Court of Appeals 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.

It will be noted that the portion of the opinion of the Circuit Court of Appeals which is criticized by the appellant was not the sole basis for that Court's conclusion, that the issue of plaintiff's negligence was properly left for the jury. Appellant's criticism, therefore, is purely verbal.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

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