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The Ballad of Harry James Tompkins

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The Ballad of Harry James Tompkins

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THE BALLAD OF HARRY JAMES TOMPKINS

*Brian L. Frye**

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SYMPORIUM, *ERIE AT EIGHTY: CHOICE OF LAW ACROSS THE DISCIPLINES*

IX. The Aftermath of *Erie v. Tompkins* 590

*Freight Train, Freight Train,
Run so fast.
Please don't tell what train I'm on.
They won't know what route I'm going.*¹

I.PROLOGUE

At about 2:30 a.m. on Friday, July 27, 1934, William Colwell of Hughestown, Pennsylvania was awakened by two young men banging on his front door. When he went downstairs, they told him that someone had been run over by a train. Colwell looked out his side window. In the moonlight, he saw someone lying on the ground near the railroad tracks.² He went back upstairs and told his wife that there had been an accident. She told him "not to go out, that them fellows was crazy," but he dressed and went out to help anyway.

Colwell's house was at the stub-end of Hughes Street, where it ran into the railroad tracks. When he reached the tracks, he discovered his neighbor Harry James Tompkins, about 6 or 10 feet south of Hughes Street. Tompkins had a deep gash on his right temple, and his severed right arm was in between the tracks. Colwell told the young men to go to Mrs. Rentford's house down the street and call an ambulance. After calling the ambulance, they disappeared. Colwell also yelled to his neighbor, Aloysius Thomas McHale, who dressed and came out to help.³

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1. Elizabeth Cotten, *Freight Train* (c. 1906-12).
2. On July 27, 1934 at 2:30 a.m., the moon was 99.5% full.
3. Transcript of Record at 115, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1937). (No.367) [hereinafter R.]

Colwell and McHale stayed with Tompkins until the ambulance arrived at about 2:45 a.m. and took him to Pittston Hospital.⁴

After the accident, Tompkins regained consciousness in the hospital receiving room. The doctors sedated him, stitched up the wound on his face, and amputated the remainder of his right arm. He spent about three weeks in the hospital, during which time he developed an infection in his shoulder, which became an abscess. The doctors drained the abscess, and the wound eventually healed, but Tompkins experienced persistent phantom limb pain in his missing fingers.⁵ His surgery cost about \$350, and his hospital stay cost about \$89.⁶

The train that injured Tompkins was the Ashley Special No. 2499, a freight train operated by the Erie Railroad Company. Tompkins filed a diversity action against Erie in federal court, because the relevant federal common law rule on people injured by trains was more favorable to him than the Pennsylvania rule. While Tompkins won at trial and on appeal, the Supreme Court reversed in *Erie Railroad Company v. Tompkins*, holding that federal courts sitting in diversity must apply state substantive law.⁷

The Supreme Court's decision in *Erie Railroad Company v. Tompkins* "was completely unheralded and unexpected."⁸ For almost a century, the Court had followed its opinion in *Swift v. Tyson*, holding that federal courts sitting in diversity should apply "general" common law, which gradually became "federal" common law.⁹ But after *Erie*, "federal general common law" was no more.¹⁰

Initially, lawyers were unsure what to make of *Erie*. But legal scholars immediately recognized its significance, which has only become more pronounced over time. Today, it is widely considered both one of the most important Supreme Court decisions, and one of the most enigmatic, in part because it touches on so many different issues. Among other things, it implicates philosophical questions about the nature of law, constitutional questions about federalism and the separation of powers,

4. R., *supra* note 3, at 86-87. See also *Tompkins Loses Arm*, WILKES-BARRE TIMES LEADER, July 27, 1934, at 25.

5. R., *supra* note 3, at 31-32. Tompkins testified that the doctors amputated the socket. "A. They took my arm right out of the socket. Q. You have no stub or anything? A. Or no socket; they took the socket too." *Id.* However, the doctors actually performed a "shoulder disarticulation," removing the entire humerus at the socket.

6. R., *supra* note 3, at 16.

7. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

8. Robert L. Stearns, *Erie Railroad Versus Tompkins: One Year After*, 12 ROCKY MTN. L. REV. 1 (1939).

9. See *Swift v. Tyson*, 41 U.S. 1 (1842).

10. *Erie*, 304 U.S. 64, 78. ("There is no federal general common law.").

normative questions about access to justice, and practical questions about litigation strategy. For law professors, the Erie doctrine is the gift that keeps on giving. But for law students it is a curse, often dubbed the “Erie doctrine,” presumably because it always appears when least expected.

And yet, in the judicial and scholarly retelling, the facts of the case become almost irrelevant. *Erie* was a case about what law to apply, not what happened in Hughestown on July 27, 1934. But for both Tompkins and the Erie Railroad, it was a case about what actually happened, who was at fault, and why.

Over the years, a smattering of journalists, lawyers, and legal scholars have told the story of *Erie*, relying on the record and an assortment of primary and secondary sources.¹¹ But all have accepted Tompkins’s account at face value: An unsecured refrigerator car door hit him while he was walking on the path next to the railroad track. Apparently, the jury believed Tompkins, or at least voted in his favor. But was he actually telling the truth?

Ultimately, it is impossible to know for sure. Everyone involved is now long dead. But there are reasons to be suspicious. The defense strategy was primarily to question the credibility of Tompkins and his witnesses. Apparently, it failed to convince the jury. But it exposed many curious cracks in Tompkins’s story.

According to Tompkins, he was walking home from his mother-in-law’s house at about 2 a.m., when friends driving home from a lake resort 20 miles away happened to pass by and give him a ride to a railroad crossing a block away from his house. While he walked the rest of the way home on a path next to the railroad track, an oncoming train passed at about 30 miles per hour. Something projecting from the train, probably an unsecured refrigerator car door, struck him in the head and knocked him unconscious. When he fell to the ground, his right arm fell under the wheels of the train, and was severed just below his shoulder. Luckily, only

11. See, e.g., Bob Rizzi, *Erie Memoirs Reveal Drama, Tragedy*, 63 HARV. L. REV. 2 (1976) (while this article is wildly inaccurate in almost every respect, it includes excerpts from Aaron L. Danzig’s unpublished memoirs); Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011 (1978) (relying on communications with Bernard Nemeroff and others, as well as a wide range of primary and secondary sources); *Celebrating The Erie Railroad Company v. Tompkins Project*, 97 Luzerne Reg. Rep., Jan. 2007, <https://docplayer.net/4106463-Published-weekly-by-the-wilkes-barre-law-library-association.html> [<https://perma.cc/LKB8-JP36>] (relying on secondary sources and local legend); EDWARD A. PURCELL, JR., THE STORY OF ERIE: HOW LITIGANTS, LAWYERS, JUDGES, POLITICS, AND SOCIAL CHANGE RESHAPE THE LAW, IN CIVIL PROCEDURE STORIES (Kevin M. Clermont, ed., 2nd ed. 2008) (collecting information from a wide range of primary and secondary sources).

minutes after he was injured, two unidentified young men just happened to stumble upon him, alert Colwell, and then disappear without a trace.

I find Tompkins's story implausible. And so did Erie's lawyer, who repeatedly asked Tompkins and his witnesses if they were serious. Of course, it is impossible to know for sure what really happened. But I think Tompkins and his witnesses were lying. I suspect that Tompkins was actually trying to board the Ashley Special and ride it to Wilkes-Barre, presumably to look for work, when he slipped and fell. The two young men who found him were probably also trying to catch the train, or perhaps were already riding it, and jumped off when they saw Tompkins fall. And Tompkins's friends simply concocted a cover story about dropping him off at the railroad crossing, in order to substantiate his claim.

Does it matter? After all, *Erie* was ultimately a case about the authority of the federal courts, not what actually happened to Tompkins.

I think it does. For one thing, knowing the truth is valuable for its own sake.¹² But for another, knowing the truth about *Erie* may help us better understand the social context in which the case was litigated and decided.

For example, scholars have assumed that Tompkins filed his action in the Southern District of New York in order to choose the more favorable general common law rule. And it is certainly the case that the general common law rule was better for him than the Pennsylvania common law rule. But what if that was not the only reason? What if he also chose the Southern District of New York in the hopes of getting a more favorable jury?

Moreover, conventional wisdom casts the story of *Erie v. Tompkins* as the Supreme Court sacrificing Tompkins in order to achieve the progressive goal of overruling *Swift v. Tyson*. But maybe the progressive Supreme Court justices were willing to use *Erie v. Tompkins* as a vehicle in part because they knew Tompkins was lying? In any case, I offer the following critical account of *Erie v. Tompkins* for your consideration.

12. As a great philosopher once said, "Now you know, and knowing is half the battle." G.I. JOE: A REAL AMERICAN HERO (Marvel Productions 1983).



Harry James Tompkins (c. 1930)

2018]

THE BALLAD OF HARRY JAMES TOMPKINS

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Harry James Tompkins and Edith (Newhart) Tompkins (c. 1930).



Harry James Tompkins & Naomi Tompkins (c. 1960).

II. HARRY JAMES TOMPKINS

Hughestown is a borough in the Greater Pittston area of Luzerne County in northeastern Pennsylvania, about halfway between Scranton and Wilkes-Barre, where the Lackawanna River joins the Susquehanna River. In 1934, it had about 2,300 residents, many of them coal miners.¹³

Harry James Tompkins was born in Hughestown on July 31, 1907, to Emanuel Tompkins and Sarah Bowkley Tompkins. Tompkins started

13. In the 1930 Census the population of Hughestown was 2,252 and in the 1940 Census its population was 2,340. Edward M. Harrington's estimate of a population of about 2,800 is improbably high. Record 107. In the 2010 Census, the population of Hughestown was 1,392, and it appears to be declining.

working as soon as possible, first in a knitting mill, and then at a coal breaker, and dropped out of school at 15.¹⁴ In 1920, he got a job at the Pittston Stove Works, where he eventually learned the trade of iron moulding, and joined the Iron Moulders' Union of North America, Local



No. 133.¹⁵

Pittston Stove Works (c. 1907)

On May 10, 1930, Tompkins married Edith Newhart of Exeter, at the Methodist Episcopal Church in West Pittston.¹⁶ They moved to 7 Hughes Street in Hughestown, an “unpretentious white framehouse.”¹⁷ And their daughter Naomi Tompkins was born on May 14, 1931.¹⁸ One of Tompkins’s lawyers described him as follows: “Mild mannered, slight of

14. R., *supra* note 3, at 18. A “knitting mill” was a factory that produced knitted goods. A “coal breaker” was a factory that processed anthracite coal by breaking it into pieces of various useful sizes, sorting the pieces by size, and removing impurities. Apparently, Tompkins began working at the knitting mill at the age of 12 or 13, possibly even younger.

15. R., *supra* note 3, at 18. See generally Margaret Loomis Stecker, *The Founders, the Molders, and the Molding Machine*, 32 Q.J. OF ECON 278 (1918) (describing the iron moulding trade). The Iron Moulders’ Union of North America was founded on July 5, 1859. RICHARD T. ELY, THE LABOR MOVEMENT IN AMERICA (1886). Local No. 133 represented the moulders at the Pittston Stove Works. It later became the International Molders and Foundry Workers Union of North America. In 1988, it merged with the Glass, Pottery, Plastics and Allied Workers International Union to form the Glass, Molders, Pottery, Plastics and Allied Workers International Union, which is now part of United Steelworkers.

16. Tompkins-Newhart, *The Evening News*, WILKES-BARRE, May 13, 1930, at 6.

17. Aaron L. Danzig, *Erie v. Tompkins at 50: Due a Respectful Burial?*, N.Y.L.J., Feb. 26, 1988, at 6 (1988).

18. *Pittston Briefs*, WILKES-BARRE RECORD, May 20, 1931, at 18.

build, soft spoken, you would say of him that his whole life would be spent in the backwaters of the commonplace.”¹⁹

When the Depression hit in 1929, work at the Pittston Stove Works gradually began to dry up. By 1934, Tompkins was working only three or four days a week for about six months of the year, earning \$7 to \$7.50 per day.²⁰ In late June 1934, the Pittston Stove Works finally closed, and Tompkins was unemployed. He looked for odd jobs repairing stoves, with limited success.²¹ And then he had his fateful encounter with the Ashley Special.²²



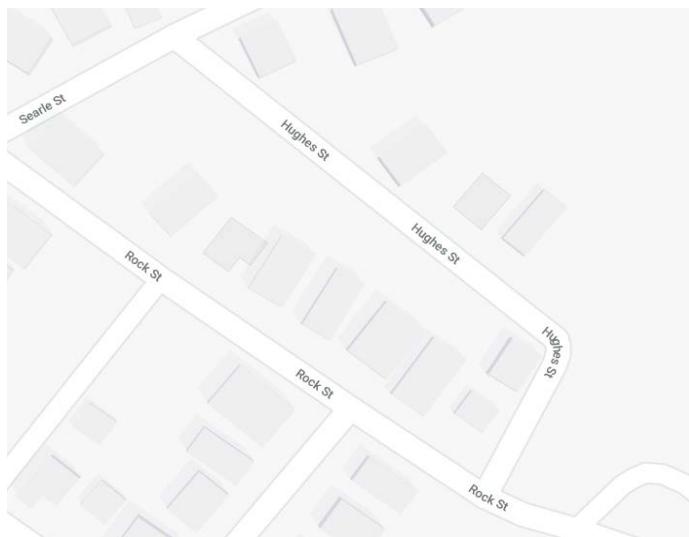
Plaintiff's Exhibit 1, Situation Plan at Rock Street

19. Danzig, *supra* note 18, at 6.

20. R., *supra* note 3, at 175-77.

21. *Id.* at 19.

22. *Hughestown Man Sues Erie for Damages*, THE EVENING NEWS, Oct. 9, 1936, at 3.



Street Plan at Rock Street (Map View) (2018)



Plaintiff's Exhibit 3

Photograph taken with camera 100 feet east from point of accident, looking west.²³

23. The camera was located at Hughes Street and depicts the railroad tracks leading to Rock Street. The solid line to the right of the railroad track indicates the path on which Tompkins was



Street Plan at Rock Street (Satellite View) (2018)



Photograph of Hughes Street from Rock Street (2015)

walking. The dotted lines indicate the paths from Colwell's gate to Rock Street and to the path next to the railroad track. "P" indicates where Colwell found Tompkins. "V1" indicates the window through which Colwell saw Tompkins. "V2" indicates Colwell's gate. "V3" indicates the ditch in front of Colwell's picket fence.



Photograph of Hughes Street showing remaining rail (2015)

III. THE SCENE OF THE ACCIDENT

Tompkins's accident occurred about 5 or 10 feet south of the stub-end of Hughes Street. Rock Street ran roughly east-west through Hughestown. It crossed Searle Street to the west and the railroad track to the east. Hughes Street ran parallel to Rock Street, one block to the north. It dead-ended into Searle Street in the west, and the railroad right of way in the east. The railroad track ran roughly north-south, curving east to the north of Hughes Street. There was a spur just south of the Rock Street crossing.

Colwell's house was on the southwest corner of the intersection of Hughes Street and the railroad track. McHale's house was next to Colwell's, at the northwest corner of Rock Street and the railroad track. Tompkins's house was on the northern side of Hughes Street, two houses to the west of the railroad track.

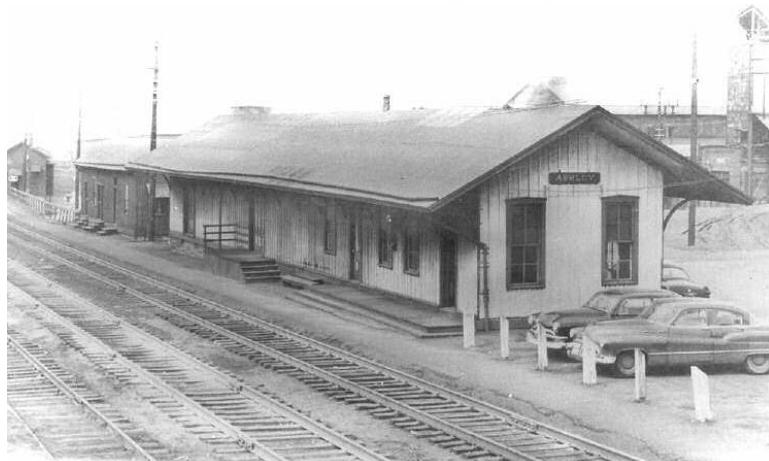
The railroad right of way on the west side of the track between Rock Street and Hughes Street was about 29 feet wide, and ended at Colwell's picket fence. The right of way sloped up to the track, and the ground was rough and rutted. A footpath on the west side of the railroad track ran from Rock Street to Hughes Street, about 115 feet. The path was about 2 feet from the ends of the railroad ties and about 2 feet wide. Another footpath ran east from the end of Hughes Street, crossed the railroad track, and led to Center Street.

The Ashley Special was an Erie Railroad freight train traveling from Avoca Station to Ashley Station. On the morning of July 27, 1934, it was pulling thirty-eight cars, a coal tender, and a caboose. When it reached

Ashley Station, the cars were transferred to the Central Railroad Company of New Jersey.²⁴



Avoca Station (c. 1930)



Ashley Station (c. 1940)

24. R., *supra* note 3, at 181-85.



Bernard Nemeroff (1956)

IV. BERNIE NEMEROFF & AARON DANZIG FOR THE PLAINTIFF

Nathan Nemeroff owned several shirt factories, including one in Berwick, Pennsylvania, about 40 miles southwest of Hughestown.²⁵ Somehow, Nemeroff heard about Tompkins's accident and referred him to his son Bernie, a New York lawyer.²⁶

Bernard G. "Bernie" Nemeroff was a recent graduate of the New York University School of Law, who ran a struggling practice with his classmate, Bernard Kaufman, out of a rented office at 11 Broadway in

25. Nathan Nemeroff was born in Kiev and emigrated to the United States in 1898. He began working in the textile industry as soon as he was able, and opened his own business in 1915. Most of his factories were in New York City. *Radio Singer, Bride of Reading Resident*, READING TIMES, Jan. 17, 1936, at 10. *Obituaries: Nathan Nemeroff*, THE JOURNAL NEWS, Mar. 12, 1965, at 2.

26. Danzig, *supra* note 18, at 6 ("Bernie got the case through his father who was in the shirt business and dealt with Pennsylvania contractors in the area.").

Manhattan.²⁷ Desperate for clients, and willing to gamble on a big payout, Nemeroff took Tompkins's case on contingency.



11 Broadway (1919)

When Nemeroff took Tompkins's case, his first question was where to file the action. In theory, he could have filed in a Pennsylvania or New York state court. Tompkins alleged a common law tort claim for negligence, over which both states had personal jurisdiction.²⁸ But filing

27. Nemeroff graduated from the NYU Law part-time division in 1929. In 1934, Nemeroff and Kaufman were both 27. Younger, *supra* note 11. See also Danzig, *supra* note 18, at 6.

28. While Erie did not question personal jurisdiction, it operated a railroad in both New York and Pennsylvania, so presumably it was subject to jurisdiction *in personam* in both states. In any case, Erie was incorporated and headquartered in New York, and owned a great deal of property in Pennsylvania, so at the very least it was subject to jurisdiction *in personam* in New York and jurisdiction *quasi in rem* in Pennsylvania. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1878).

in state court was pointless, because Erie could and most certainly would remove the action to federal court based on diversity jurisdiction.²⁹

So, Nemeroff knew he might as well file Tompkins's action in federal court. But which one? While Tompkins lived in Pennsylvania, Nemeroff was a member of the New York bar and was not licensed to practice in Pennsylvania, so New York was obviously the most convenient option for him.

Accordingly, on August 29, 1934, Nemeroff served the Erie Railroad Company with a summons and complaint, initiating Tompkins's action in the United States District Court for the Southern District of New York, a few blocks up the street from his office.³⁰ The complaint alleged that Tompkins was on an established footpath when Erie negligently injured him by running its train at a dangerous speed, failing to ring the bell or blow the whistle, and allowing an object to project from the train, which struck Tompkins, and demanded \$100,000 in damages.³¹

Shortly after filing the action, Nemeroff hired Aaron L. Danzig, Columbia law student, to help with research.³² According to Danzig's recollection:

Renting an office in the same suite where I went to work was a lawyer by the name of Bernard Nemeroff. Bernie was all of 28 but seemed 40 years older than I. A sharp dresser, keenly intelligent, with piercing blue eyes that frequently darted about as he spoke to you. Bernie had a practice of sorts, but was definitely not a legal scholar. One day he approached and asked me if I would help him with a piece of litigation. It was a case involving Harry Tompkins.

...

Bernie had brought the case in the U.S. District Court in the Southern District of New York on grounds of diversity, after discovering that the railroad was a New York corporation.³³

29. Tompkins was a citizen of Pennsylvania, where he lived, and Erie was a citizen of New York, where it was incorporated and headquartered, so the parties were diverse, and the amount in controversy far exceeded the \$3,000 statutory requirement for diversity jurisdiction.

30. The United States District Court for the Southern District of New York had just moved to the City Hall Post Office and Courthouse.

31. R., *supra* note 3, at 2-4. By that time, Tompkins and his family had moved into his mother-in-law's house at 1125 Wyoming Avenue in Exeter.

32. Aaron Leon Danzig was 21, and was clerking for another lawyer at 11 Broadway when Nemeroff hired him. Danzig, *supra* note 18, at 6. See also Younger, *supra* note 11. Danzig graduated from law school in 1935, and later earned an LLM from the New York University School of Law. Notably, Danzig had contracted polio as a child, and lost the use of one of his arms. Stuart Lavietes, *Aaron Danzig*, 89, *Who Argued Landmark Case on Court Power*, N.Y. TIMES, Sept. 17, 2002.

33. Danzig, *supra* note 18, at 6.

Danzig soon discovered that Nemeroff was lucky to have filed Tompkins's action in a New York federal court, because he had unwittingly chosen the substantive law most favorable to Tompkins.³⁴ At the time, most courts held that a person using a path parallel to a railroad track was a licensee of the railroad, so the railroad was liable in tort for injuries caused by its negligence. But the Pennsylvania Supreme Court had recently held that a person using a path parallel to a railroad track was a trespasser, so the railroad was liable in tort only for injuries caused by "wanton negligence," which essentially meant recklessness.³⁵

Tompkins only alleged negligence, so if Nemeroff had filed the action in a Pennsylvania court, it probably would have been dismissed for failure to state a claim. And if Nemeroff had filed the action in a New York court, it probably would have applied Pennsylvania substantive law and dismissed as well.

But federal courts didn't have to apply state common law rules. In *Swift v. Tyson*, the Supreme Court held that federal courts sitting in diversity should apply state statutory law and "general" common law.³⁶ Accordingly, under *Swift*, federal courts were supposed to apply the general common law negligence rule, rather than the Pennsylvania common law willfulness rule. In other words, while a state court probably would have dismissed Tompkins's action, a federal court probably would not.

Even better, New York federal courts were more likely to apply the favorable general common law than Pennsylvania federal courts. The Third Circuit had recently held that Pennsylvania federal courts should apply Pennsylvania common law to tort claims against railroads, but the Second Circuit consistently held that federal courts should apply general common law.³⁷

34. Many scholars have assumed that Nemeroff filed Tompkins's action in the Southern District of New York for the purpose of forum shopping, and after the fact, Nemeroff appears to have encouraged that assumption. See Younger, *supra* note 11 (describing Nemeroff's litigation strategy, based on a conversation with Nemeroff). But Danzig's account suggests that Nemeroff's decision to file in the Southern District of New York was merely fortuitous. Danzig, *supra* note 18, at 6.

35. *Falchetti v. Penna. R.R. Co.*, 160 A. 859 (Pa. 1932).

36. *Swift v. Tyson*, 41 U.S. 1 (1842).

37. Compare *Perucca v. Baltimore & Ohio R.R. Co.*, 35 F. 2d 113 (3rd Cir. 1929) ("The duty of one about to cross the tracks of a railroad in the state of Pennsylvania has been frequently declared by the courts of that state. That law governs here.") with *Tompkins v. Erie R. Co.*, 90 F.2d 603, 604 (2d Cir. 1937)

The defendant contends that the only duty owed to the plaintiff was to refrain from willful or wanton injury because the courts of Pennsylvania have so ruled with respect to persons using a customary longitudinal path, as distinguished from a path crossing the track. The plaintiff denies that such is the local law, but we need not go into this matter since the

In other words, Nemeroff inadvertently filed Tompkins's action in one of the only available venues in which it had a chance of success. In state court or in Pennsylvania federal court, it probably would have been dismissed for failure to state a claim or decided on summary judgment. But in the Southern District of New York, it could survive and get to a jury. And not just any jury, but a remarkably sympathetic one.



Theodore Kiendl (1944)

V. DAVIS POLK FOR THE DEFENDANT

The Erie Railroad Company was formed in 1832 to provide rail service between New York City and Lake Erie, and gradually expanded across New York, Pennsylvania, and Ohio, with several hiccups along the

defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law.

way.³⁸ Erie had long retained the venerable white-shoe law firm Davis, Polk, Wardwell, Gardiner & Reed as its legal counsel.³⁹ Accordingly, when Erie received service of process from Tompkins, it naturally sent the summons and complaint to Davis Polk.⁴⁰ Soon afterward, Davis Polk answered the complaint, denying any liability, alleging contributory negligence, and asking the court to dismiss the action.⁴¹



The Equitable Trust Building, 15 Broad Street (~1930)

The court ignored Erie's motion to dismiss, and the parties traded discovery requests. Erie served Tompkins with a demand for a bill of particulars describing the accident, its causes, and its effects.⁴² Tompkins responded by serving Erie with a notice of discovery, stating that on July

38. The New York and Erie Rail Road was formed in New York on April 24, 1832. It went bankrupt in 1859, and was reorganized as the Erie Railway in 1861. The Erie Railway went bankrupt in 1878, and was reorganized as the New York, Lake Erie and Western Railroad. In 1893, the New York, Lake Erie and Western Railroad went bankrupt, and was reorganized as the Erie Railroad Company in 1895.

39. The firm was founded in 1849 as Gunthrie, Bangs & Van Sinderen, but changed its name many times to recognize new partners. In 1934, its primary office was at 15 Broad Street in Manhattan. Today, it is known as Davis Polk & Wardwell LLP, and its primary office is at 450 Lexington Avenue. Kiendl was a graduate of Columbia College and Columbia Law School. He became a partner in 1923, and remained with the firm until he retired in 1965.

40. R., *supra* note 3, at 2-5.

41. *Id.* at 5-6.

42. *Id.* at 13-14.

27, 1934, at about 2:30 am, he was walking home on the path next to the railroad track when an Erie train approached him at a “terrific” rate of speed.⁴³ As the train passed, “some projection” from the third or fourth car hit Tompkins in the head and knocked him to the ground, causing the wheels of the train to sever his right arm.⁴⁴ Tompkins observed that under the circumstances, he could not specifically identify Erie’s negligent acts, noting that “there were no other pedestrians or persons at the scene of the accident at the time of its occurrence” so he “has no witnesses nor witness who saw the accident.”⁴⁵ Tompkins’s statement was followed by a series of interrogatories, seeking information about the train and Erie’s investigation of the accident.⁴⁶

Davis Polk assigned the action to Theodore Kiendl, its primary trial lawyer.⁴⁷ Among other things, Kiendl asked S. Hazard Gillespie, a summer law clerk from Yale Law School, to determine whether the application of Pennsylvania law would benefit Erie, and Gillespie responded that it would.⁴⁸

On February 14, 1935, the lawyers for both sides deposed seventeen witnesses in Pittstown.⁴⁹ On April 29, 1936, Nemeroff filed a bill of particulars.⁵⁰ And then the action proceeded to trial.

VI. THE SOCIAL CONTEXT

In the 1930s, the New York bar was still sharply divided by both geography and ethnicity. The elite WASP firms were “downtown,” clustered around Wall Street, and the Jewish and Irish firms were “uptown,” which meant anything north of Cedar Street. The elite firms hired few Jews, and gave them even fewer opportunities for promotion.

43. *Id.* at 7-16.

44. *Id.*

45. *Id.*

46. *Id.*

47. Kiendl was a graduate of Columbia College and Columbia Law School. He became a partner in 1923, and remained with the firm until he retired in 1965.

48. Younger, *supra* note 11, at 1017 (citing Letter from S. Hazard Gillespie to Irving Younger, Jan. 23, 1978). Younger placed the letter on file with the Texas Law Review, but it was discarded. Gillespie later became the United States Attorney for the Southern District of New York, the President of the New York State Bar Association, and a senior partner in Davis Polk.

49. R., *supra* note 3, at 91. The witnesses deposed in Pennsylvania were Henry Brodbeck, Jr.; Walter Perschau; Samuel Carr; Joseph Guerin; Thomas Hefferon; Albert Dotter; John J. Reilly; George Trewein; Frank T. Keller; Benjamin Renfer; Ernest Cook; Charles Fritz; Elmer Smith; Louis Weitz; William Colwell; and Fred Jennings. *To Take Depositions in Big Damage Suit*, PITTSTON GAZETTE, Jan. 24, 1935, at 5. Some of these witnesses testified at trial, but most did not.

50. R., *supra* note 3, at 15-16.

And the elite bar was openly and unapologetically anti-Semitic. Jewish lawyers started their own firms, because they had no other choice.⁵¹

Davis Polk was among the most exclusive of the elite firms. It represented Wall Street and the titans of industry, and hired no Jews. Nemeroff, Kaufman, and Danzig were the epitome of striving Jewish lawyers, with a rented office on the periphery of prestige, struggling to find clients.



Judge Samuel Mandelbaum (1934)

A. *Judge Mandelbaum*

When Tompkins's action was ready for trial, it was assigned to the newly-appointed Judge Samuel Mandelbaum. Mandelbaum was born in Poland in about 1884.⁵² His family emigrated to the United States in 1890, and he grew up in a tenement on the Lower East Side. As a child, he contracted polio, which crippled his legs.⁵³ Nevertheless, he got involved

51. MILTON S. GOULD, THE WITNESS WHO SPOKE WITH GOD, AND OTHER TALES FROM THE COURTHOUSE ix-xx (1975).

52. Mandelbaum's naturalization papers stated that he was born on September 23, 1883. But his New York State Bar membership stated that he was born on September 20, 1884. And the Martindale-Hubble legal directory stated that he was born in 1885. FBI Rep. (February 13, 1939).

53. According to the FBI,

Judge Mandelbaum's health is generally satisfactory except for a slight impairment, the result of an accident some years ago when he was struck by lightning, and while not physically incapacitated, as a result of the accident he finds it more conducive to his comfort to ride to court each morning in his privately owned automobile rather than make the trip by ordinary city transit facilities.

Id.

in politics at an early age, graduated from the New York University School of Law, practiced law for about a decade, and then ran for public office.⁵⁴ He served as a member of the New York State Assembly from 1923 to 1932, where he became an advisor to Governor Franklin D. Roosevelt, and as a member of the New York State Senate from 1933 to 1936.⁵⁵

On June 15, 1936, President Roosevelt nominated Mandelbaum to a new seat on the United States District Court for the Southern District of New York.⁵⁶ The American Bar Association, the New York County Lawyers' Association, and the Association of the Bar of the City of New York all opposed the nomination, arguing that Mandelbaum was unqualified, because he had never even tried a case in federal court.⁵⁷ The Southern District was the most prestigious court in the country, and they were appalled to see a ghetto Jew nominated for a seat.

In fairness, Mandelbaum's qualifications for the job were questionable. But he had overwhelming political and popular support, and was confirmed on June 20, 1936.⁵⁸ As Roosevelt observed: "There was one other man I considered for the job. He was equally qualified, but unlike Mandelbaum, he had never lived in a tenement. All other things being equal, I think the man who had lived in a tenement is better suited

54. Mandelbaum earned an LL.B. in 1912 and an LL.M. in 1913. "His marks, however, were barely passing." *Id.*

55. Mandelbaum was a member of Roosevelt's "Turkey Cabinet," a group of political advisors that convened most Mondays at the Executive Mansion for a turkey lunch. He became close friends with Eleanor Roosevelt, who ensured that he received kosher turkey on kosher dishes, and accompanied him on tours of the Lower East Side slums. When Roosevelt was elected President, Mandelbaum frequently visited him at the White House. Gould, *supra* note 52.

56. Congress had recently created three new seats on the court. 49 Stat. 1491.

57. The New York City Bar objected to both Mandelbaum and Clancy, one of Roosevelt's other nominees, observing that they were not,

[A]ctive practitioners in the Federal Court and we know of no reason for their nominations other than political consideration. . . . They do not possess the essential qualifications for this high office and are not equipped with the specialized knowledge and experience that present day administration of justice requires.

Bar Opposes Two Nominees, MIDDLETOWN TIMES HERALD, June 19, 1936, at 18.

According to the FBI,

The canvass of members of the District Court Bench, both for the Southern and Eastern District made prior to Judge Mandelbaum's appointment as Judge, failed to develop any knowledge on the part of any of those interviewed with Judge Mandelbaum's earlier active participation in Federal practice, and the investigation further indicated that Judge Mandelbaum's prior activities have been more along legislative lines than the regular practice of law.

FBI Rep., *supra* note 55.

58. Milton S. Gould, *The Alien Corn in the Southern District: A Memory of Judge Sam Mandelbaum, Legend of Foley Square (Parts 1 and 2)*, N.Y.L.J., Aug. 1, 1977, at 1, and Aug. 2, 1977, at 1. See also Gould, *supra* note 52.

for a judgeship for he will have a better understanding of human problems.”⁵⁹

Mandelbaum was sworn in on July 10, and presided over criminal cases for ten weeks before moving to the civil docket. *Tompkins v. Erie Railroad Company* was his first civil case.

B. The Trial

The trial in *Tompkins v. Erie* began on October 5, 1936. Tompkins was represented by G. Everett “Stub” or “Stubby” Hunt, who Nemeroff hired as trial counsel.⁶⁰ Erie was represented by Kiendl.⁶¹ Danzig described the beginning of the trial as follows:

The fallen leaves that lay upon the steps of the U.S. Court House were tokens of the season. It was October of 1936 and the trial was on. I sat next to Harry in the courtroom, impressed by the grandeur, the heavy green drapes, the dignity, and the suffocating silence, but, like him, nervously awaiting the arrival of the judge, who we had been informed was Samuel Mandelbaum. I had prepared an exhaustive trial memorandum which had been handed up to the judge’s clerk.

Like Franklin D. Roosevelt who had appointed him, Judge Mandelbaum had suffered from polio and walked with a pronounced limp. His diction reflected his beginnings on the Lower East Side of New York City. Unprepossessing, baldish, he did not present the image of a federal judge. The truth is that this was the first civil case he had ever tried, since he had been recently appointed and prior to that having served in the state legislature.⁶²

C. Tompkins’s Story

According to Tompkins, on Thursday, July 26, 1934, he ate supper at home in Hughestown with his wife and three-year-old daughter at about 5:00 p.m. At about 6:00 p.m., he walked to visit his sick mother-in-law Alice Newhart at her home in Exeter, about 5 or 6 miles away, across the Susquehanna River.⁶³ At about 8:00 p.m., he walked down to the river to

59. THE MONTGOMERY ADVERTISER, Nov. 29, 1946, at 4.

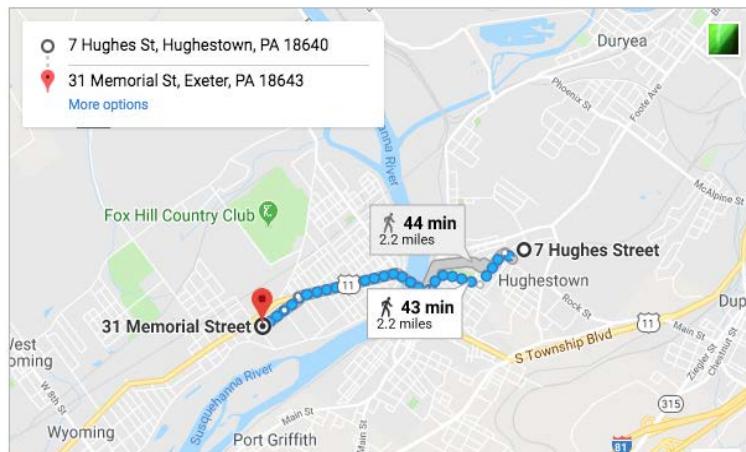
60. Hunt was assisted by his associate, William G. Walsh.

61. Kiendl was assisted by Harold W. Bissell, L. Ray Glass, and S. Hazard Gillespie.

62. Danzig, *supra* note 18, at 6.

63. R., *supra* note 3, at 57. Tompkins lived at 7 Hughes Street in Hughestown and Alice Newhart lived at 31 Memorial Street in Exeter. The walking distance between the two is actually about 2.2 miles.

watch people fish, then returned to Newhart's home. And at about 12:30 or 1:00 a.m. he began walking home to Hughestown.⁶⁴



Tompkins took the "main road" through Exeter, and used the Fort Jenkins Bridge to cross the river.⁶⁵ At about 1:30 a.m., while Tompkins was crossing the bridge, a car passed him, then stopped, and his friend Wilbert Schultz called out, "Come on, Harry, we will give you a ride up."⁶⁶ The driver of the car was Edward M. Harrington, Jr., the former Chief of Police of Hughestown.⁶⁷ Schultz was a member of the Iron Moulders' Union who had worked with Tompkins at the Pittston Stove Works.⁶⁸ Harrington and Schultz were driving home from Harvey's Lake,

64. *Id.* at 27-29, 57-59. Alice Newhart lived at 31 Memorial Street in Exeter, which is actually about 2.5 miles from 7 Hughes Street. *Mrs. Alice Newhart Dies in Exeter*, PITTSSTON GAZETTE, Dec. 1, 1938, at 7.

65. Presumably Wyoming Avenue, which leads directly to the Fort Jenkins Bridge.

66. R., *supra* note 3, at 29.

67. Harrington was appointed Chief of Police on January 4, 1932. *Hughestown Council Makes Clean Sweep*, THE WILKES-BARRE RECORD, January 5, 1932, at 17. He lost the position on March 28, 1933. *Changes Made in Personnel in Hughestown*, THE EVENING NEWS, March 29, 1933, at 7. He was reappointed on April 15, 1933. *Eight Borough Employees Lose Their Positions*, WILKES-BARRE TIMES LEADER, April 17, 1933, at 18. But he lost the job to Steve Moss sometime in early 1934. "Round-Up" Nets Fifty, WILKES-BARRE RECORD, Feb. 17, 1934, at 12.

68. WILKES-BARRE TIMES LEADER, Aug. 12, 1946, at 13.

which is about 20 miles east of Hughestown.⁶⁹ They both lived near Tompkins and offered to give him a ride home.⁷⁰



Harvey's Lake, Pennsylvania (c. 1930-45)

At about 2:00 a.m., Harrington and Schultz dropped Tompkins on the east side of the Rock Street crossing. Tompkins crossed back over the railroad track and began walking north on the footpath toward Hughes Street. When he got about halfway to Hughes Street, he heard the whistle of a southbound train, and then saw the train's headlight approaching, but he continued walking north on the path.⁷¹ Tompkins was "about four or five steps" away from Hughes Street when the engine passed him on his right at about 30 or 35 miles per hour.⁷²

The accident occurred a moment later. "When I got right on the path there was something came up in front of me, a black object that looked like a door to me, and I went to put my hands up and I guess before I got them up I was hit."⁷³ The object projecting from the side of the train was about 2 or 2½ feet wide, and it hit Tompkins on his right temple, knocking

69. R., *supra* note 3, at 71. Harvey's Lake is one of the largest lakes in Pennsylvania. In the 1930s, it was a popular summer resort, featuring hotels, cottages, boathouses, a casino, and an amusement park.

70. Harrington lived at 1 Kenley Street and Schultz lived at 235 Rock Street. *Miss Ann Mattison and Wilbert Schultz Were Wedded Today*, PITTSSTON GAZETTE, Aug. 29, 1936, at 1. *Local Gleanings*, PITTSSTON GAZETTE, June 6, 1938, at 3. R., *supra* note 3, at 152.

71. R., *supra* note 3, at 47-48.

72. *Id.* at 71.

73. *Id.* at 65.

him unconscious.⁷⁴ He fell to the ground, and the wheels of the train severed his right arm.

D. Erie's Response

Unsurprisingly, Kiendl's strategy was to discredit Tompkins's story. He focused on three issues: 1) the use of the footpath; 2) the speed of the train; and 3) the inspection of the doors. Kiendl's goal was to show that people did leave the footpath, especially when a train was passing, that the Ashley Special was moving relatively slowly, and that there was no evidence of an unsecured refrigerator car door.

E. The Footpath

Tompkins claimed that he continued walking on the footpath next to the railroad track while the train was passing. Kiendl questioned the credibility of that claim:

Q. Well then, if I get your testimony correctly, Mr. Tompkins, you were walking along within two feet of the side of this moving train that was going past you at the rate of 30 miles per hour, and you kept right on walking alongside of it?

A. Yes, sir.

Q. Without any fear that anything was going to hit you?

A. Yes, sir.

Q. Without any fear that any coal or something else might have fallen from that train and hit you; that is right?

A. I do not think there was any coal on that train.

Q. Well, you did not know when you saw the train coming what it had on, did you?

A. No, sir.

Q. And did it occur to you that there might have been coal on that train?

A. No, sir.

Q. That might fall off and hit you?

A. No, sir.

Q. Did it occur to you that there might be anything else on the train that might fall off and hit you?

A. No, sir.

Q. You felt perfectly safe in your own mind as you walked along there within a foot or two of a 30 mile moving train, to continue along, and it never occurred to you at any time to get further away to a place of safety?

A. No, sir.⁷⁵

74. *Id.* at 65.

75. *Id.* at 45-46.

Tompkins's witnesses made the same claim, eliciting the same reaction from Kiendl. For example, witness McHale insisted that people walked on the footpath while trains were passing a foot or two away, day and night, and that it was perfectly safe to do so.

Q. Have you ever seen anybody walking along that path at night in the pitch dark when a train was going by?

A. Yes, sir.

Q. How many times have you seen people doing that, Mr. McHale?

A. I have seen them hundreds of times.

Q. Hundreds of times at night?

A. Yes, sir.

Q. In the pitch dark?

A. Yes, sir.

Q. Walking along that path?

A. Yes, sir.

Q. And you have walked along it yourself at night?

A. Yes, sir.

Q. And when you were walking along it, when you got to the point that we are interested in -

A. Yes, sir.

Q. (Continuing.) - where these two paths converge -

A. Yes, sir.

Q. - alongside of the ties; you have done that often, haven't you?

A. I have walked it; yes, sir.

Q. How close was your body to the moving side of the train when you did that?

A. Oh, I would say a foot or two feet away.

Q. A foot or two feet away?

A. Yes, sir.

Q. And you tell this Court and Jury that you have walked alongside of a moving train?

A. Yes, sir.

Q. At night?

A. Yes, sir.

Q. With the side of that moving train within a foot of your body?

A. Yes, sir.

Q. And you have seen other people do that?

A. Yes, sir.

Q. And the trains go by there pretty fast, wouldn't they?

A. Yes, sir.

Q. Sometimes, twenty miles an hour, thirty miles an hour, forty miles an hour?

A. Yes, sir.

Q. And you have done that frequently?

A. Yes, sir.

Q. Did you think that was dangerous?

A. No, sir.⁷⁶

...

Q. Do you tell this Court and jury that you feel perfectly safe walking at night on this path with a train moving up to forty miles an hour?

A. Yes, sir.

Q. Passing you within one foot of the side of your body?

A. Yes, sir.⁷⁷

Schultz made the same claim, albeit somewhat more reluctantly, as if he recognized the absurdity of what he was saying:

Q. Now, when you used the path on the twenty times when you used it, if it were twenty times, did you walk along that path along the edge of these railroad ties when trains were coming?

A. Yes.

Q. You have?

A. Yes.

Q. When trains were coming from either direction?

A. Yes, sir.

Q. And you had been in this stove company business all of your life; you had never been in the railroad business, had you?

A. No, sir.

Q. And the trains come awfully close to you when you were walking along that path?

A. Oh, maybe a foot and a half away.

Q. Maybe a foot and a half?

A. Yes, sir.

Q. And the trains would move at a fairly rapid rate of speed?

A. Fairly good rate of speed.

Q. And they would come from behind you and in front of you?

A. Yes, sir.

Q. You did not consider that dangerous at all, did you?

A. Not if the train was in good condition and nothing sticking out from it, no.

Q. Well did you expect things might be sticking out from trains sometimes?

A. No.

Q. It never occurred to you that things might be sticking out from trains, such as machinery or something of that kind?

76. *Id.* at 127-28.

77. R., *supra* note 3, at 142.

A. Sir?

Q. It never occurred to you, did it?

A. Never could, did you say?

Q. You never thought about anything projecting from the side of the train?

A. No.

Q. You never thought about any wide cars containing automobiles or furniture?

A. No, sir.

Q. Or anything of that kind?

A. No, sir.

Q. You considered it perfectly safe in the daytime to walk along that path with trains moving at a rapid rate of speed within a foot and a half of you?

A. Yes, sir.

Q. Did you consider it safe for you to do that at nighttime?

A. I didn't do it at nighttime.

Q. In complete darkness?

A. I did not do it at nighttime.

Q. Would you consider it safe to do it at nighttime in complete darkness?

Mr. Hunt: Objected to.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Would you?

A. No, sir.

Q. In your experience in using that path, as one of the citizens of that borough for thirty-nine years, I understand you to tell this Court and Jury that, having seen the path and having seen people walking on it, you would consider it dangerous to walk on that path in pitch darkness?

A. I would not.

Q. When trains were coming toward you?

A. I would not consider it dangerous.

Q. You would consider it perfectly safe?

A. Yes.⁷⁸

Additionally, Tompkins and his witnesses claimed that people walked on the footpath and only on the footpath. Indeed, they insisted that no one ever walked anywhere in the right of way, except on the footpath. Tompkins stated that he had never seen anyone set foot in the right of way, outside of a footpath:

Q. 12 or 14 years you lived in that neighborhood?

A. Yes, sir.

78. *Id.* at 147-49.

Q. And during all that time you were within two blocks of the Rock Street Crossing of the railroad company, weren't you?

A. Yes, sir.

Q. And during those 12 or 14 years that you have seen anybody walking in that territory they were walking on the path that goes up to Hughes Street or they were walking on the Hughes Street path that came up to the track, is that right?

A. Yes, sir.

Q. Now I will ask you again, Mr. Tompkins, do you mean that seriously?

A. Yes, sir.

Q. What?

A. Yes, sir.⁷⁹

Likewise, Colwell stated that he had never seen anyone set foot in the right of way, outside of a footpath:

Q. Now, take that piece of land, Mr. Colwell, it is about 115 feet long and about 35 feet wide between Hughes Street, Rock Street, the railroad ties and the fence. In the two years that you have lived at the house that you have indicated on the map had you ever seen anybody at any time walk in any part of that territory except on the two paths that you have told us about?

A. No, sir.

Q. Never once?

A. No, sir. That is too rough walking.

Q. Let us see Mr. Colwell; see that I get this straight. You have never seen a soul -

A. No, sir.

Q. (Continuing.) - walking over any other part of that whole territory?

A. No, sir.

Q. Except the path along the ties and the path to Hughes Street?

A. Yes, sir.

Q. Do you mean that?

A. I sure do.

Q. You understand that you have told Mr. Hunt here - I thought you did - that you walked out of your gate across part of that territory?

A. Well, that path I do.⁸⁰

Indeed, Colwell even claimed that it would have been impossible for anyone to walk in the right of way, except on the path:

Q. Did you ever see anybody walk alongside of your fence?

79. *Id.* at 36.

80. *Id.* at 92-93.

A. No, sir.

Q. Is there any reason why you could not walk alongside of your fence if you wanted to?

A. Well, you could walk alongside of it, but you would roll down and under.

Q. You would roll in under the fence?

A. Exactly.

Q. You don't mean that, do you?

A. I sure do. Here is the ditch right here (indicating), see, and down here there is a bank goes right under the fence.

Q. Now, you asked me if I saw the ditch?

A. Yes.

Q. There are some rocks right up against the fence, aren't there?

A. Yes.

Q. And a drain that runs in there?

A. Yes, sir.

Q. But come out two feet from the fence. There is no reason why you couldn't walk in there, is there?

A. It is pretty rough there.

Q. It is like it is shown in this picture?

A. No, sir; it is rougher than that.

Q. Do you mean that the territory we are talking about is not correctly shown in this picture, Mr. Colwell?

A. It is not, no, sir.⁸¹

In all of these exchanges, Kiendl's incredulity is palpable. And for good reason, because the claims are ridiculous. It is simply not credible that people walked on the path while trains were passing a foot or two away. Surely, people stepped off the path when trains were passing. Indeed, it is more likely that people simply did not use the path at all when trains were passing. The railroad track in question was only rarely used, primarily late at night by the Ashley Special. Most of the time, the path was perfectly safe, simply because no trains were present.

Unsurprisingly, William H. Henning, the engineer who was operating the Ashley Special when it hit Tompkins, testified that he had seen people walking on the footpath next to the railroad track between Rock Street and Hughes Street, and that when a train passed them, they always stepped out of the way.⁸² Notably, Henning also testified that he did not see anyone on the path on July 27, 1934, when Tompkins was injured.⁸³

81. Kiendl and Colwell are referring to Plaintiff's Exhibit 3. *Id.* at 425.

82. *Id.* at 325-26.

83. R., *supra* note 3, at 325-26.

F. The Speed of the Train

Tompkins claimed that the Ashley Special was going about 30 or 35 miles per hour when it hit him.⁸⁴ And Tompkins's witnesses claimed that it regularly went 30 to 40 miles per hour at the Rock Street crossing. Specifically, Colwell insisted that the Ashley Special often went through the Rock Street crossing at 30 or 40 miles per hour, and that he had complained about it to Gannon.⁸⁵

Q. You have told us that you have told Mr. Gannon that the trains were going too fast because of the rails?

A. Yes, sir.

Q. Is that right?

A. Yes, sir. And that is right on a curve and our house is right there at that curve, and I would hate to have them come through that at night.

Q. You would hate to have them go through your house at night?

A. Yes, sir.

Q. Are you being serious, sir?

A. Well, no -

Q. Are you being serious?

A. Well, certainly I would hate to have that engine jump the road and go through our house.

Q. Has the engine ever jumped the road down there?

A. No, but there is always a first time.⁸⁶

Kiendl effectively discredited those claims, by showing that the Ashley Special was actually going about 8 to 10 miles per hour, and that it would have been impossible for it to go any faster. When the Ashley Special left Avoca and approached the Rock Street crossing, it was going uphill and around a curve. As the Ashley Special's flagman James A. Dooner observed, "The pull was too great for the size engine we had. That engine couldn't make over eight to ten miles an hour with the train."⁸⁷ Likewise, Henning testified that the Ashley Special was going about 8 or 10 miles per hour when it approached the Rock Street crossing on July 27, 1934.⁸⁸ This is consistent with the fact that it took about an hour and a half for the Ashley Special to go about 16 miles from Avoca to Ashley.⁸⁹

84. *Id.* at 45.

85. *Id.* at 102-03

86. *Id.* at 104.

87. *Id.* at 315.

88. *Id.* at 288, 325-26.

89. R., *supra* note 3, at 288.



Swift Refrigerator Car, East Orange, New Jersey (1937).

G. *Inspection of the Refrigerator Car Door*

According to Tompkins, the object that hit him was probably an unsecured refrigerator car door. Trains pulled many different kinds of cars, including boxcars and refrigerator cars. The doors on a boxcar slide on a rail, but the doors of a refrigerator car swing open and closed. Tompkins claimed that Erie had failed to secure the doors of a refrigerator car, and that an unsecured door hit him in the head as the Ashley Special passed him.

Hunt focused on showing that it was possible a refrigerator car door had been open. Of course, it is always hard to prove a negative, but the evidence suggests otherwise.

On July 27, 1934, the Ashley Special was pulling three refrigerator cars. Specifically, the 14th, 21st, and 30th cars after the engine and coal tender were refrigerator cars.⁹⁰ Albert Howell inspected the Ashley Special before it left Avoca and found no defects.⁹¹ Michael Bernard McGrath inspected the Ashley Special when it arrived at Ashley at 4:50 a.m. and marked all of its refrigerator car doors closed and sealed. But he acknowledged that his testimony was based entirely on his seal record book, and that he had no direct recollection of checking the train that

90. *Id.* at 187-88.

91. *Id.* at 257.

night.⁹² Alfred Alworth and Steve Prabola, car inspectors for the Central Railroad Company of New Jersey, inspected the Ashley Special shortly after its arrival in the Ashley yard on the morning of the accident, and found nothing significant out of the ordinary.⁹³ And at about 11 a.m., Victor H. Deppi, the car inspector foreman for the Central Railroad Company of New Jersey in Penobscot, Pennsylvania, was informed that there had been an injury and inspected the cars arriving from Ashley. He found bloodstains on the flanges of the wheels of seven cars, but did not find any open doors.⁹⁴

H. The Verdict

When Hunt finished presenting Tompkins's case, Kiendl made a motion to dismiss the action, on the ground that Tompkins had failed to prove negligence, and had in fact shown contributory negligence. Mandelbaum denied the motion.⁹⁵ And when Kiendl finished presenting Erie's case, he made another motion to dismiss, which Mandelbaum also denied.⁹⁶

On October 13, 1936, Kiendl and Hunt gave closing arguments, and the court charged the jury. Essentially, the court told the jury that its job was to determine whether Erie had failed to secure a refrigerator car door.⁹⁷

The jury retired at 12:40 p.m., and returned at 4:45 p.m. with a verdict for Tompkins, awarding him \$30,000, plus interest and costs.⁹⁸ Tompkins and his lawyers were thrilled, both by the win and by the enormous recovery.⁹⁹ As Danzig recalled, "Mr. Tompkins had been put up at a cheap hotel, and at the celebration that evening in his room, I remember thinking, the practice of law is really simple as long as you're well prepared."¹⁰⁰

Kiendl moved to set aside the verdict, but on November 9, 1936, Mandelbaum denied the motion. Accordingly, on November 16, 1936, the

92. *Id.* at 179-90.

93. *Id.* at 241.

94. *Id.* at 249-55.

95. R., *supra* note 3, at 178.

96. *Id.* at 339-40.

97. *Id.* at 343-49.

98. *Id.* at 351.

99. The inflation adjusted value of \$30,000 in 1936 is about \$500,000 in 2018. See *Measuring Worth is a Complicated Question*, <https://www.measuringworth.com/index.php> [<https://perma.cc/G9TM-JX2R>]

100. Danzig, *supra* note 18, at 6.

clerk entered judgment for Tompkins in the amount of \$30,260.¹⁰¹ Erie immediately petitioned the district court for an order allowing an appeal, which Judge John C. Knox granted on December 15, 1936. Knox also ordered the clerk of the district court to prepare a transcript of the record, proceedings, and judgment for the circuit court. As required by statute, Erie paid for the printing of twenty-five copies of the record, and filed one for certification with the clerk of the circuit court on January 14, 1937.¹⁰²

I. The Second Circuit

Erie appealed, primarily on the ground that the district court should have granted its motion for summary judgment.¹⁰³ Essentially, Erie argued that the district court should have applied the Pennsylvania common law rule and ruled in its favor as a matter of law. Erie was represented on appeal by Theodore Kiendl, Harold W. Bissell, and L. Ray Glass.¹⁰⁴ And Tompkins was represented by Bernard G. Nemeroff, G. Everett Hunt, and William G. Walsh.¹⁰⁵



Judge Manton

Judge Swan

Judge Hand

The Second Circuit panel consisted of Manton, Swan, and Hand, three of the most distinguished judges in the United States.¹⁰⁶ On June 7,

101. The judgment included \$165 in interest and \$95 in costs.

102. 36 Stat. at L. 901, chap. 47, U. S. Comp. Stat. Supp. (1911).

103. *Erie*, 90 F.2d.

104. *Id.* Presumably, Kiendl made the oral argument.

105. *Id.* Presumably, Hunt made the oral argument.

106. Thomas Walter Swan (December 20, 1877 to July 13, 1975) was Dean of Yale Law School from 1916 to 1927 and served on the United States Court of Appeals for the Second Circuit from 1926 until his death in 1975, taking senior status in 1953. Martin Thomas Manton (August 2, 1880 to November 17, 1946) was appointed to the United States District Court for the Southern District of New York in 1916, becoming the youngest federal judge in the United States, and was appointed to

1937, the Second Circuit issued a unanimous opinion affirming the district court, albeit not without throwing some shade. According to the panel, the only question was whether Tompkins was contributorily negligent for failing to step aside while the train passed:

Plaintiff's testimony that the black object which struck him looked like a swinging door was sufficient to take to the jury the question whether he was injured in the manner alleged and whether the defendant was negligent in allowing a door to swing, despite the defendant's testimony that an inspection at Ashley showed all car doors to be closed and sealed.

The main contention of the appellant is that the plaintiff's conduct in walking so close to a moving train in the dark constituted contributory negligence as a matter of law. Much testimony was directed to the character of the ground lying between the longitudinal path and the fence, the plaintiff endeavoring to prove that he could not safely have walked outside the beaten path, and the defendant that he could. Witnesses testified that no one ever walked outside the path because the ground slanted away toward the fence and there were ruts in it; but the fact that trucks and automobiles of all sorts were accustomed to pass along the right of way from Rock street to Hughes street proves conclusively that the ground was traversable outside the beaten path, and the photographs show that at the worst it is only a little rough at the spot where Tompkins was struck. The contention that he could not have stepped aside while the train was passing is patently absurd. So the question is reduced to whether he was guilty of contributory negligence as a matter of law in not avoiding all danger by the simple expedient of stepping to one side. On this issue we must take the evidence in the light most favorable to the plaintiff and must assume that the train was moving at a speed of only 8 or 10 miles an hour, as the train crew testified.

While the panel affirmed the jury's verdict, it strongly signaled its skepticism of the impartiality of that verdict, as well as jury verdicts in similar cases:

To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 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

the United States Circuit Court for the Second Circuit in 1918. He resigned in 1939, in order to avoid impeachment, and was convicted of bribery. Billings Learned Hand (January 27, 1872 to August 18, 1961) was appointed to the United States District Court for the Southern District of New York in 1909, and was appointed to the United States Circuit Court for the Second Circuit in 1924, where he served until his death in 1961.

may hold a different view. This is enough to preclude taking the issue from the jury.¹⁰⁷

Apparently, Hand and Swan found Tompkins's reliance on *Swift v. Tyson* a bit of a stretch, but applied it anyway:

During and after the argument of the appeal, the two judges discussed at length the advisability of extending the *Swift* doctrine in yet another opinion. They were sensitive to the sort of criticism raised against the federal judiciary following the decision in the taxicab case, which continued to cast a shadow eight years after [sic] its decision. Hand and Swan appreciated the flexibility that the *Swift* doctrine gave federal judges, especially where state law was obscure or (to their minds) unfair; but they were also concerned about potential abuse arising from an unwise use of discretionary authority. Finally, the judges agreed to apply the well-established doctrine of *Swift v. Tyson*, and decided the case accordingly.¹⁰⁸

When the Second Circuit denied Erie's appeal, Tompkins's lawyers assumed that was it. Erie had to pay the judgment, unless the Supreme Court issued a stay, and there was no reason for the Court to take the case. So when they received a copy of Erie's petition for a writ of certiorari, they weren't worried. As Danzig observed:

Now we really celebrated, this time in Bernie's office - champagne, smoked salmon, corned beef sandwiches, the works. The case was over. There wasn't a chance in the world that the Supreme Court would grant *certiorari* in a case involving an accident in a small hamlet in Pennsylvania.

So we laughed when we got the petition for *certiorari*. Even if they won, they would lose. Mr. Tompkins could take his money, go to Tahiti, and how would the railroad ever get it back? They realized that, too, and made an application for a stay.¹⁰⁹

J. Supreme Court Stay

The Court was already in summer recess, so a stay had to be issued personally by one of the justices. Kiendl arranged for an appointment to meet with Justice Cardozo in July at his summer home in Mamaroneck,

107. *Erie*, 90 F.2d at 605.

108. TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 128-29 (1981) (summarizing July 11, 1978 interview with W. Graham Clayton, Jr., law clerk to Judge Learned Hand in 1937 and Justice Brandeis in 1938).

109. Danzig, *supra* note 18.

New York. At the meeting, Kiendl represented Erie, and Tompkins was represented by Nemeroff, Danzig, and Hunt's partner Fred Rees.¹¹⁰

According to Nemeroff:

The Justice walked down the steps to greet them wearing beige trousers, a black velvet coat, and black bedroom slippers. His left hand was in the pocket of his jacket; in his right hand he carried a white handkerchief.

Rees had told Nemeroff and Danzig that the application would be denied because the Supreme Court had not taken a negligence case for years and the standard for determining a motion for a stay was whether the deciding Justice thought the full Court was likely to grant certiorari.

Kiendl spoke. He made the arguments he had made in the lower courts and remarked also that if the stay were denied, Erie would not pursue its petition for certiorari. No stay, no case in the Supreme Court.¹¹¹

As Danzig recalled:

The Court was in summer vacation, so it was to be heard by Justice Cardozo in his home in Mamaroneck, N.Y. Since I had written both briefs, Bernie asked me to argue it.

Justice Cardozo lived in a lovely old Victorian house. A summer wind gently swayed the curtains as we waited downstairs. He entered the room in a black velvet jacket, white handkerchief in hand, wispy grey hair, the satiny skin on his long face bespeaking his age and ill health.

Mr. Kiendl began. His argument was the same he had used in the two courts below. Acknowledging that *Swift v. Tyson* was good law, he argued that it didn't apply here because a local custom (a recognized exception to *Swift*), applied, and then he said, "Your Honor, I must be honest and say that if a stay is not granted, we will carry the case no further." Now I knew we had won. I had lined up cases in 24 states in our favor, and I sent out this imposing legal infantry in my short statement. The judge paused for a moment. Then he turned to me and said, "Mr. Danzig, the law may well be what you say it is, and I don't doubt it, but if I don't grant the stay it will end the case, and I think the Court as a whole ought to have the opportunity to rule on the petition.

110. Hunt died of pneumonia on April 1, 1937. *Law Graduate Dies of Pneumonia*, THE ITHACA JOURNAL, April 3, 1937, at 4.

111. Younger, *supra* note 11, at 1023 (paraphrasing a February 21, 1978 letter from Bernard G. Nemeroff to Irving Younger).

Despair. Compounded with astonishment, when a few months later the High Court granted *certiorari*.¹¹²

Cardozo probably knew that he was preserving a case that would enable the Court to overrule *Swift v. Tyson*. While he had a heart attack in late 1937, and did not return for the January 1938 sitting, “Cardozo was deeply interested in the Tompkins decision, and happy that he had had something to do with the case earlier.”¹¹³ Sadly, Cardozo had a stroke in early 1938, and died on July 9, 1938, about three months after *Erie* was decided.

K. The Grant of Certiorari

Erie filed its petition for certiorari on August 30, 1937. Neither party thought the Supreme Court would grant the petition. As Rees observed, the Court had not taken a negligence case for a long time, and there was nothing special about *Erie v. Tompkins*.¹¹⁴ Even the Supreme Court clerks who reviewed the petition dismissed it as unremarkable. Brandeis clerk William Claytor characterized *Erie v. Tompkins* as “just another” diversity case, and a Hughes clerk expressed a similar opinion.¹¹⁵

Nevertheless, the Supreme Court granted certiorari in *Erie v. Tompkins* on October 11, 1937.

L. The Rise and Demise of *Swift v. Tyson*

Presumably, Cardozo granted *Erie*’s request for a stay primarily because he and other members of the Court wanted to overrule *Swift v. Tyson*, and *Erie v. Tompkins* looked like a promising vehicle. And presumably the Court granted certiorari in *Erie v. Tompkins* primarily because the justices who wanted to overrule *Swift v. Tyson* thought they had a majority.

The Court decided *Swift v. Tyson* in 1842, essentially holding that federal courts sitting in diversity should apply state statutory law and “general” common law.¹¹⁶ Specifically, the Court interpreted the Rules of Decision Act, which provided that federal courts sitting in diversity should apply “the laws of the several states” unless preempted by federal

112. Danzig, *supra* note 18. In an unpublished draft memoir, Danzig recalled making a “beautiful statement of our argument and the few points that defendant’s counsel made were easily overcome. It was a cinch.” Rizzi, *supra* note 11.

113. MELVIN I. UROFSKY & DAVID W. LEVY, HALF BROTHER, HALF SON: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 617 (1991) (quoting Judge Irving Lehman).

114. FREYER, *supra* note 111.

115. *Id.* (summarizing July 11, 1978 interview with William Graham Claytor, Jr.).

116. *Swift*, 41 U.S..

law. It concluded that the Act required federal courts to apply “strictly local” state laws, including state constitutions, state statutes, and “long-established local customs having the force of law,” but allowed them to apply “general” commercial law, irrespective of state practice.¹¹⁷

The application of “general” commercial law authorized by *Swift v. Tyson* eventually led to the application of “general” common law.¹¹⁸ In other words, a decision intended to promote a uniform commercial law developed into a principle intended to promote a uniform common law.¹¹⁹

But it did not work. States stuck to their own common law rules. Even worse, the “general” common law of the federal courts became associated with corporate self-interest, especially as the Supreme Court became seen as a conservative bulwark against progressive legislation. The political legitimacy of the Court was at stake, and *Swift v. Tyson* was not helping.

While the long pedigree of *Swift v. Tyson* was hard to challenge, justices gradually began to defect. The crack in the dyke was Justice Field, who rejected *Swift v. Tyson* in his lone dissent to *Baltimore & Ohio Railroad Co. v. Baugh*.¹²⁰ But the architect of its demise was Justice Holmes.

Holmes’s first volley was his dissent in *Kuhn v. Fairmont Coal Co.*, which rejected the concept of general common law.¹²¹ “The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else.”¹²² The second was his dissent in *Southern Pacific Co. v. Jensen*, which doubled-down on the same claim.¹²³ “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified, although some decisions with which I have disagreed seem to me to have forgotten the fact.”¹²⁴ And the third was his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, which referred to general common law as a “subtle fallacy.”¹²⁵ “In

117. *Id.* at 18.

118. See, e.g., *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368 (1893) (extending general common law to tort) and *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910) (extending general common law to property).

119. Purcell, Jr., *supra* note 11, at 23-24.

120. *Baugh*, 149 U.S. at 391.

121. *Kuhn*, 215 U.S. at 371.

122. *Id.* at 372.

123. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting).

124. *Id.* at 222.

125. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928) (Holmes, J., dissenting).

my opinion the authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word.”¹²⁶

While Holmes could not quite convince the Court to overrule *Swift v. Tyson*, he provided the ammunition for a generation of criticism that made it almost inevitable. Gradually, *Swift v. Tyson* became a symbol of corporate power and the overreach of the federal courts. And as President Roosevelt filled the court with progressive justices, a majority to overrule *Swift v. Tyson* gradually formed. And when *Erie v. Tompkins* came along, they made their move.

M. Erie’s Thwarted Settlement Attempts

According to several accounts, at some point after Tompkins won at trial, Erie tried to settle. But it is unclear when Erie tried to settle, how many times it tried to settle, how much it offered, and whether Tompkins’s lawyers kept him fully informed. In 1976, a law student paraphrased Danzig’s written recollections:

As the date for argument before the Supreme Court grew near, the railroad apparently made on [sic] last effort to end the case through the back door. While Tompkins’ lawyers were sitting at their offices at 32 Broadway, the railroad had apparently sent an emissary to the plaintiff. A man in Tompkins’ hometown who owned a local gas station went to Tompkins’ house with the message that the railroad would drop its petition for certiorari if he would accept a settlement of \$22,000. Danzig and Nemeroff reacted with a fitting countermove. They sent for Tompkins, and secreted him in a hotel near Masapequa [sic], Long Island, where he could be protected from the enticements of the railroad. There he stayed for several weeks, until the “danger” of early settlement passed. Both Nemeroff and Danzig were sure that the judgment of \$30,000 was as good as won, with interests and costs.¹²⁷

In 1978, a law professor paraphrased Nemeroff’s oral recollections:

Not long after [the trial], Nemeroff received a phone call from Tompkins. The owner of the Hightstown gas station had come to him, said Tompkins, and reported that a friend who worked for the railroad wanted Tompkins to know that the railroad was ready to pay \$7500 to settle the case. The sum was enormous to Tompkins, but Nemeroff advised him that it was paltry: only a quarter of the jury’s verdict and small compensation for a lost right arm. Tompkins seemed unpersuaded. Fearful that he might yield to temptation, Nemeroff invited Tompkins to

126. *Id.* at 535.

127. Rizzi, *supra* note 11 (paraphrasing Danzig’s unpublished memoir).

visit Baldwin, New York, where Nemeroff then lived. Tompkins accepted. He arrived the next afternoon. Nemeroff put him up at a local rooming house for a few days and then installed him in the Nemeroff guest room, where he stayed for two weeks. By then the appeal was fairly under way. The danger of a precipitate settlement had passed. Tompkins returned to Pennsylvania.¹²⁸

And in 1988, Danzig himself recalled the despair and astonishment he felt when the Supreme Court granted certiorari. “But we were still optimistic. A gas station attendant had approached Harry Tompkins and told him he could get him several thousand dollars to settle. Bernie hid Harry for weeks in an old hotel in Freeport, L.I., to prevent them from getting to him.”¹²⁹

Obviously, these three accounts differ in several material respects. While Nemeroff claimed Erie tried to settle soon after the trial for about a quarter of the verdict, Danzig claimed it tried to settle after the Supreme Court granted certiorari, either for a pittance or for more than two-thirds of the verdict. Of course, it is possible that Erie made multiple attempts to settle. But all three accounts involve a gas station owner or attendant approaching Tompkins with a settlement offer, which suggests that there was only one settlement attempt.

Also, one wonders why Erie used a Hughestown gas station owner or attendant to convey its settlement offer to Tompkins. Danzig and Nemeroff implied that Erie was trying to trick Tompkins into settling by avoiding his lawyers, but maybe Erie was trying to send Tompkins a message his lawyers refused to deliver. While it is misconduct for a lawyer to initiate *ex parte* contacts with a represented party, it is also misconduct for a lawyer not to communicate a settlement offer. Danzig and Nemeroff both describe sequestering Tompkins in Long Island, in order to prevent him from agreeing to a settlement. At the very least, it suggests that they may not have given him complete and unbiased information about Erie’s settlement offers.

N. The Supreme Court Briefs

A new printed record was prepared for the Supreme Court, and both parties filed briefs. Erie’s brief argued that the district court should have applied the Pennsylvania law making Tompkins a trespasser, rather than

128. Younger, *supra* note 11, at 1021-22 (summarizing an April 2, 1978 conversation with Nemeroff).

129. Danzig, *supra* note 18.

the general common law rule making him a licensee.¹³⁰ Erie explicitly recognized the objections to *Swift v. Tyson*:

It is no doubt possible to collect isolated statements of this Court seeming to authorize a virtually complete disregard of state court decisions in the field of general law. It may be conceded that many of the criticisms of the supposed doctrine of *Swift v. Tyson* (16 Pet. 1) and succeeding cases proceed upon the assumption that these cases sanction this sweeping disregard of state court decisions. It would be idle to deny that some of the cases go to considerable lengths in overriding state court decisions.¹³¹

But Erie chose to distinguish *Swift v. Tyson*, rather than question its legitimacy. “We do not question the finality of the holding of this Court in *Swift v. Tyson*, 41 U.S. (16 Pet. 1) 1, that the ‘laws of the several States’ referred to in the Rules of Decision Act do not include state court decisions as such.”¹³²

Specifically, Erie focused on Justice Story’s claim in *Swift v. Tyson* that no “firmly established” state common law rule had governed the issue before the court.¹³³ Accordingly, Erie argued that federal courts sitting in diversity should resort to general common law “only when the pertinent principle or rule of law has not been definitely settled, foreclosed or established so as to have become a rule of property, action or conduct in the state.”¹³⁴ A long line of Pennsylvania cases “firmly established” that a person using a path parallel to a railroad track was a trespasser. And if the Pennsylvania common law rule was “firmly established,” then under *Swift v. Tyson*, the lower courts should have applied it.¹³⁵

Tompkins’s brief made a much simpler argument.¹³⁶ Under *Swift v. Tyson*, the lower courts correctly applied the general common law rule that a person using a path next to a railroad track is a licensee.¹³⁷

130. Erie’s counsel before the Supreme Court were William C. Cannon, Theodore Kiendl, and Harold W. Bissell. Petitioner’s Brief.

131. Petitioner’s Brief at 24.

132. Petitioner’s Brief at 27.

133. *Swift*, 41 U.S. 1, 17-18 (1842).

134. Brief for Petitioner at 35, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1937) (No. 367).

135. *Id.* at 15-22.

136. Tompkins’s counsel before the Supreme Court were Alexander L. Strouse, Fred H. Rees, and Bernard G. Nemeroff. Tompkins’s brief was written by Bernard Kaufman, William Walsh, and Aaron L. Danzig. Brief for Respondent, *Erie Railroad Company v. Harry J. Tompkins*, 304 U.S. 64 (1937) (No. 367).

137. *Id.* at 5-17.

Accordingly, the district court properly held that negligence was a question for the jury, and its verdict should stand.¹³⁸

O. The Oral Argument

On the morning of January 31, 1938, the Supreme Court inducted Justice Stanley Reed to replace Justice George Sutherland. And then it heard oral argument in *Erie v. Tompkins*.

Kiendl appeared for Erie, and Rees appeared for Tompkins. Unfortunately, no transcript of the oral argument is known to exist.¹³⁹ But luckily, some anecdotal accounts of the oral argument were preserved.

Apparently, Tompkins's lawyers had no idea why the Supreme Court granted *certiorari*, and were blindsided by the Court's focus on *Swift v. Tyson*. And they believed the same was true of Kiendl. As Danzig observed:

The simple fact was that neither we nor anyone in the gigantic law firm of Davis, Polk knew why the petition had been granted. When Mr. Kiendl argued the case before the Supreme Court, he was questioned at length by the Court about *Swift*. He had no idea what they were driving at, acknowledging that it was good law, but arguing it didn't apply here.¹⁴⁰

In a letter to Frederick C. Hicks of Yale Law School, Kiendl explained:

After the granting of the petition for certiorari we were faced with the dilemma of attacking the doctrine of *Swift v. Tyson* directly or endeavoring to suggest that this doctrine was inapplicable to the instant case. Convinced that a head-on attack might be fatal, we decided to present the case based on the argument we had available, which you have found in our main brief.

At the time of the oral argument, I had not proceeded very far before Mr. Justice Brandeis pointedly inquired about our views with regard to the *Swift v. Tyson* case. In the ensuing discussion I could not refrain

138. *Id.* at 28-33.

139. The Supreme Court began creating audio recordings of oral arguments in the October Term of 1955. Before 1955, the Supreme Court allowed parties to create stenographic transcripts at their own expense. Some of the parties who chose to create a transcript also provided a courtesy copy to the Supreme Court. See Zvi S. Rosen, *Transcripts of Supreme Court Oral Arguments from Before OT1955 – They Exist!*, MOSTLY IP HISTORY, April 20, 2017, <http://www.zvirosen.com/2017/04/20/transcripts-of-supreme-court-oral-arguments-from-before-ot1955-they-exist/> [https://perma.cc/2H8Y-LXJK]. There is no evidence that Tompkins or Erie chose to create a transcript and no transcript is known to exist. However, Kiendl apparently destroyed his files when the case, as was his customary practice. FREYER, *supra* note 111.

140. Danzig, *supra* note 18.

from expressing my view that the doctrine of that case was unfortunate in its consequences but that nevertheless its acceptance by so many courts for so many years precluded me from suggesting that the doctrine be overruled. Practically all the members of the Court then participated in a discussion of *Swift v. Tyson*, and a large part of my argument revolved about it.¹⁴¹

According to Elliott Cheatham of Vanderbilt Law School:

I talked with two Columbia Law School men who were in the case. Mr. Aaron Denzig [*sic*], one of my former students, who wrote the brief for Tompkins and whom I saw some months after the decision, sputtered: ‘The Court took a thirty thousand dollar verdict away from our client without ever letting us brief the issue on which the Court went.’ Mr. Kiendl, counsel for the Erie Railroad, said that both sides had briefed the case on the assumption that *Swift* (as commonly understood) was controlling and the determinant was whether the common law of Pennsylvania in question concerned a subject of ‘general’ law. A couple of minutes after he began the oral argument, Justice Brandeis leaned over and asked, ‘Mr. Kiendl, do you think *Swift v. Tyson* was rightly decided?’ This was the first intimation anyone had that the *Swift* case would be questioned.¹⁴²

Despite Kiendl’s claim to have been blindsided by the Court’s focus on the legitimacy of *Swift v. Tyson*, some commentators have speculated that he was actually trying to avoid a Hobson’s choice. Maybe he knew the Court wanted to overrule *Swift v. Tyson*, and was trying his best to both win the case and preserve a favorable precedent. For example, Edward Purcell has observed that Kiendl apparently refused to question the legitimacy of *Swift v. Tyson* even after Brandeis explicitly asked whether it should be overruled. “Despite Brandeis’s direct invitation - and the promise of automatic victory if Swift were overturned - Kiendl still refused to criticize the case. Indeed, he actually argued that Swift was too well-established even to be questioned.”¹⁴³

According to Purcell:

He knew that his client would rather pay \$30,000 than see the ‘general’ law interred. Like other national corporations, the Erie Railroad put a high value on the *Swift* doctrine and wanted to preserve it at all costs. It

141. FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 376 (Lawyers Cooperative Pub. Co. 3d ed. 1942).

142. Elliott Cheatham, *Comments by Elliott Cheatham on the True National Common Law*, 18 AM. U. L. REV. 372 (1969).

143. Purcell, Jr., *supra* note 11, at 47-48.

was understandable, then, why Kiendl's brief not only failed to attack *Swift*, but defended it explicitly.¹⁴⁴

On Purcell's reading, at oral argument, Kiendl was horrified to realize that he was poised to win a pyrrhic victory:

The explanation for Kiendl's tactic is straightforward: he did not want *Swift* overruled. He shaped his response in the oral argument so blandly for the same reason that he crafted his brief to avoid questioning *Swift*'s continued authority. His paramount goal in litigating *Erie* was, ironically, not to defeat Tompkins but to preserve *Swift v. Tyson*.¹⁴⁵

In other words, Purcell infers that Kiendl was trying to thread the needle. His "clever and sophisticated" strategy" and "brilliant" lawyering were intended to "enable his client to triumph on narrow grounds in Tompkins's suit while safeguarding the *Swift* doctrine for its continued use in future disputes."¹⁴⁶ If it had worked, "Kiendl would have saved the railroad the substantial sum of \$30,000 while at the same time preserving the 'general' law that served its interests in the great majority of cases."¹⁴⁷ And Kiendl's profession of ignorance was merely an effort to save face, "In retrospect, it seems likely that Kiendl offered his after-the-fact explanations for an entirely understandable reason. He sought to mask his true strategy in order to portray himself more favorably. He preferred to be seen as a surprised winner than an overreaching lover."¹⁴⁸

I am not convinced. While Purcell's theory is clever, I find it too clever by half. Hindsight bias makes it "obvious" that the Supreme Court was angling to overturn *Swift v. Tyson*. But was it obvious to the actual litigants? I doubt it. There is certainly no direct evidence that Kiendl expected the Court to overturn *Swift v. Tyson*, even after it granted certiorari. And if he did, surely he would have advised Erie not to pursue an appeal. After all, if Erie valued *Swift v. Tyson* so highly, \$30,000 seems like a small price to preserve it. The idea that Kiendl's strategy was to knowingly chart a course between Scylla and Charybdis seems less "brilliant" than foolhardy.

Kiendl's reluctance to question the legitimacy of *Swift v. Tyson* is no evidence to the contrary, but rather reflects cautious lawyering. I am

144. *Id.* at 48.

145. See, e.g., EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 99-100 (2000).

146. Purcell, Jr., *supra* note 11, at 48.

147. *Id.* at 49.

148. *Id.*

reminded of the oral argument in *Dalmazzi v. United States*, when Justice Kennedy asked petitioner's counsel Stephen Vladeck, "Do you think Marbury versus Madison is right?"¹⁴⁹ Vladeck wisely demurred, and I suspect Kiendl did the same. If the Court intends to overrule long-standing precedent, it will do so irrespective of the parties, who are almost always well-advised to offer the narrow grounds on which they can prevail.

And in any case, was *Swift v. Tyson* and the general common law really so valuable to the railroads? Certainly not in *Erie v. Tompkins*. The Pennsylvania rule that Tompkins wanted to avoid came from somewhere, presumably the advocacy of the railroads. If they could influence state law to their particular advantage, why prefer a general common law over which they may have had less control? After all, from the railroad's perspective, the real problem in *Erie v. Tompkins* was not its duty of care *per se*, but the fact that the action went to the jury.

In theory, the timing and amount of Erie's settlement offer could provide objective information about its assessment of Tompkins's action. A relatively small offer soon after the trial would suggest that Erie was confident of its prospects on appeal. A relatively small offer after the Supreme Court granted certiorari would suggest that Erie expected the Court to reverse. And a relatively large offer after the Supreme Court granted certiorari would suggest that Erie either expected the Supreme Court to affirm, or expected it to reverse on undesirable grounds. Unfortunately, in the face of conflicting accounts of the settlement offer, it is impossible to know what actually happened.

But Erie's apparent decision not to pay for the creation of a transcript of the oral argument at least suggests that Kiendl did not realize that the Court intended to overrule *Swift v. Tyson* prior to the oral argument. While only a limited number of Supreme Court litigants chose to pay for the creation of a transcript, many of the existing transcripts are for major constitutional cases.¹⁵⁰ This suggests that parties were more likely to pay for a transcript if they expected a case to be important. The possibility of the Court overruling *Swift v. Tyson* would surely be sufficient to motivate the creation of a transcript, especially for a party as wealthy as Erie and a firm as prominent as Davis Polk.¹⁵¹

149. See Transcript of Oral Argument at 30, *Dalmazzi v. United States*, 585 S.Ct. ____ (2018) (No. 16-961).

150. See Rosen, *supra* note 143.

151. It is possible that Erie did pay for the creation of a transcript and Kiendl destroyed it with the rest of his files. But it seems unlikely, because it would defeat the purpose of creating a transcript in the first place.

VII. THE SUPREME COURT OPINION

When the Justices of the Supreme Court met to discuss *Erie v. Tompkins* on February 5, 1938, Chief Justice Hughes “laid the case before the conference with the comment, ‘If we wish to overrule *Swift v. Tyson*, here is our opportunity.’”¹⁵² And the Court seized that opportunity. Justices Hughes, Stone, Roberts, and Brandeis were determined to overrule *Swift v. Tyson*, and saw *Erie v. Tompkins* as the perfect vehicle. Justices Reed and Black also wanted to overrule *Swift v. Tyson*, but didn’t want to deny Tompkins his judgment. Only Justices Butler and McReynolds wanted to affirm and preserve *Swift v. Tyson*.¹⁵³ Chief Justice Hughes assigned the opinion to Brandeis, the most determined opponent of *Swift v. Tyson*.

While a majority of the Justices wanted to overrule *Swift v. Tyson*, they didn’t necessarily agree about why it should be overruled. Sometime before February 11, Stone wrote to Black that the “basis of our decision in the Pennsylvania railroad accident case is that we follow local law when it is well enough defined so that we know what it is.”¹⁵⁴ In other words, Stone initially thought the Court had adopted Kiendl’s argument that federal courts sitting in diversity should apply well-established state common law rules. And based on their ultimate dissent, Butler and McReynolds apparently agreed.

Brandeis began drafting his opinion in *Erie v. Tompkins* on about February 28, with a goal of releasing the opinion on about March 28. His initial drafts were narrow. “The only matters requiring consideration are the alleged Pennsylvania law and whether it should govern cases tried in the federal courts.”¹⁵⁵ But the draft opinions gradually became more expansive, and began referring to the “unconstitutionality” of *Swift v. Tyson*.¹⁵⁶ And his fifth draft stated, “The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.”¹⁵⁷ And on March 17, 1938, Brandeis circulated a draft opinion to the Court, overruling *Swift v. Tyson* as unconstitutional.

Justices Reed and Stone agreed that federal courts sitting in diversity should not ignore state common law, but disagreed with Brandeis’s

152. MERLO J. PUSEY, CHARLES EVANS HUGHES 710 (1952) (citing June 4, 1947 interview with Charles Evans Hughes).

153. *Id.* at 710 (citing June 4, 1947 interview with Charles Evans Hughes).

154. ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 478 (1956) (quoting letter from Stone to Black).

155. FREYER, *supra* note 111, at 132 (quoting Brandeis draft).

156. *Id.*

157. *Id.*

conclusion that Congress could not require them to apply rules inconsistent with state law.¹⁵⁸ Reed was adamant in his opposition, ultimately writing an opinion concurring in the outcome, but observing that it was unnecessary to find *Swift v. Tyson* unconstitutional, because the Court could reach the same conclusion by simply changing its interpretation of the Rules of Decision Act.¹⁵⁹

Stone was more ambivalent, admitting that it might be unconstitutional for Congress to create general common law rules for federal courts, but observing that it was unnecessary to reach that conclusion. Notably, Stone also presciently observed that it would be hard for the Court to distinguish between substantive and procedural rules. But Stone eventually came around, when Brandeis accepted his suggested change, acknowledging that Congress had failed to correct the Court's unconstitutional interpretation of the Rules of Decision Act in *Swift v. Tyson*.¹⁶⁰

In addition, Tompkins's fate clearly worried some of the Justices. In particular, Justice Black wrote a letter to Brandeis expressing concern about the impact of the Court's decision on Tompkins's claim:

My dear Justice Brandeis:

Your requiem over *Swift v. Tyson* is one of your best - and that is saying much. While I am not always in agreement with the opinions delivered by my Alabama predecessors, Mr. Justice McKinley and Mr. Justice Campbell, I am personally very happy that their dissents mentioned in your Note 1, will now be in accord with "the law of the land." I hope that sometime hereafter this Court may deliver another opinion in harmony with the spirit and purport of the dissents of Mr. Justice McKinley and Mr. Justice Campbell, respectively, in the cases of *Bank of Augusta v. Earle*, 13 Peters 519, 597 to 606, and *Dodge v. Woolsey*, 18 Howard 331, 362, 380.

I hesitate to make a suggestion in connection with your decision and personally hope that not a word will be changed relating to the last repose of *Swift v. Tyson*. I hope that there may be no misunderstanding as to the application to this particular case which might bring about an unintentional injury to the injured litigant. On page 2 of the opinion in the first paragraph, and on page 8 in the fourth paragraph the issue is stated as limited to the single question as to whether injury sustained on

158. *Id.* (citing letter from Reed to Brandeis, March 21, 1938; letter from Reed to Brandeis, March 23, 1938; letter from Brandeis to Reed, March 24, 1938; letter from Stone to Brandeis, March 23, 1938; and letter from Stone to Brandeis, March 25, 1938).

159. *Erie*, 304 U.S. 64, 90.

160. FREYER, *supra* note 111, at 138.

a “longitudinal pathway” relieves the railroad from liability under Pennsylvania law. The respondent rather forcefully insisted on Pages 26 and 27 of his brief that the Falchetti case was not applicable to the facts involved in this particular case because it was “uncontested in the case at bar that plaintiff was at the intersection of a diagonal and a longitudinal pathway when he was struck.” [Page 27]. I am wondering if you would feel justified in inserting something to show this fact on Page 2, where you say, “Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts.” If it could be shown that this Court realized there was a further controversy as to the applicability of the Falchetti rule, I believe that it would prevent anyone from reaching the conclusion that this Court was attempting to foreclose any further consideration of Pennsylvania law as to the facts in this case.

With kind regards, I am Sincerely,
Hugo L. Black¹⁶¹

Responding to Black’s suggestion, Brandeis asked his clerk William Claytor to research Pennsylvania law and determine whether it would be possible for Tompkins to recover if the case were retried. Claytor wrote a memorandum concluding that it would not. He found no basis for “Justice Black’s theory” that something in the facts would enable Tompkins to recover on retrial, because the Pennsylvania rule was “very strict.” Nevertheless, he conceded, “I suppose that a new trial must be granted.”¹⁶² Apparently, Black accepted Claytor’s conclusion, as he joined Brandeis’s majority opinion.¹⁶³

Butler responded with a dissent disputing every element of Brandeis’s opinion.¹⁶⁴ But his primary focus was Brandeis’s conclusion that the Rules of Decision Act was unconstitutional. According to Butler, the Court should have adopted Kiendl’s argument that *Swift v. Tyson* did not apply because Pennsylvania law was well-established.¹⁶⁵

In response to Butler’s dissent, Brandeis clarified that the Court was not questioning the constitutionality of the Rules of Decision Act, only the Court’s own interpretation of the statute. “In disapproving [*Swift v.*

161. Letter from Justice Black to Justice Brandeis, March 22, 1938.

162. FREYER, *supra* note 111, at 132 (quoting memorandum “Pennsylvania Law” from William Claytor to Louis Brandeis).

163. It seems that Black accepted Tompkins’s loss as a necessary sacrifice to federalism. In a September 25, 1942 speech to the Missouri Bar Association, he observed, “The decision marks the expression of a particular legal philosophy, a philosophy which believes that laws governing isolated legal transactions should spring from the customs, habits, and experiences of a people.” Hugo L. Black, *Address of U.S. Supreme Court Associate Justice Hugo L. Black to the Missouri Bar Annual Banquet*, 64 J. Mo. B. 26 (2008).

164. *Erie*, 304 U.S. 64, 80. McReynolds joined Butler’s dissent.

165. FREYER, *supra* note 111, at 140.

Tyson] we do not hold unconstitutional [the Rules of Decision Act] . . . We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.”¹⁶⁶

On April 25, 1938, the Supreme Court delivered its opinion in *Erie v. Tompkins*, voting 6–2 to reverse *Swift v. Tyson* and hold that federal courts sitting in diversity must apply state substantive law.¹⁶⁷ Brandeis wrote the opinion for the majority, Reed concurred on statutory grounds, and Butler and McReynolds dissented.

In any case, despite some reservations, the progressive Supreme Court justices threw Tompkins under the bus, in order to overrule *Swift v. Tyson*. Why? Maybe it was just opportunistic. For better or worse, the Supreme Court often sacrifices the interests of particular parties on the altar of general principles. But maybe some of the Justices were mollified by the knowledge that Tompkins was lying?

VIII. A CRITICAL ANALYSIS OF TOMPKINS’S STORY

Countless scholars have studied the impact of *Erie v. Tompkins* on United States law.¹⁶⁸ But relatively few have studied the facts of the actual case itself. And they have uniformly accepted Tompkins’s account as true.¹⁶⁹ Was that a mistake?

Of course, as a legal matter, the jury ruled for Tompkins, implicitly endorsing his story. If a jury verdict is perlocutionary, then Tompkins’s account became “true” when the jury returned a verdict in his favor. And it remains “true” today, as the Second Circuit did not reverse the jury’s findings of fact, only the legal conclusions that followed from those facts.

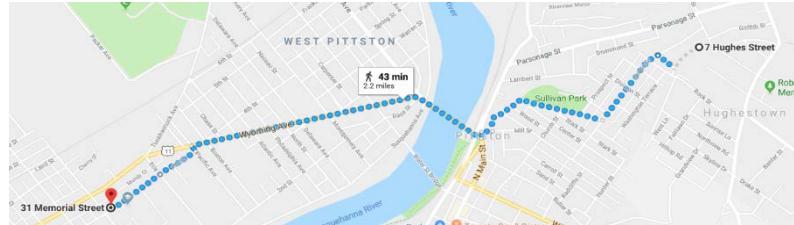
But “judicial facts” and the truth are not necessarily the same thing. What actually happened in Hughestown, Pennsylvania at the corner of Hughes Street and the railroad track at 2:30 a.m. on Friday, July 27, 1934? Did Harry James Tompkins get hit in the head by the door of a refrigerator car? Or did he slip and fall while trying to board the Ashley Special?

166. *Id.* at 141.

167. *Erie*, 304 U.S. 64.

168. As of July 16, 2018, the Westlaw “law reviews” database includes 6,176 citations to *Erie v. Tompkins*.

169. See, e.g., Rizzi, *supra* note 11; Younger, *supra* note 11; Luzerne Legal Register Report, *supra* note 11; Purcell, Jr., *supra* note 11.



A Social Visit

Tompkins testified that he walked from his house at 7 Hughes Street in Hughestown to Alice Newhart's house at 31 Memorial Street in Exeter at about 6 p.m., and then began walking home at about 12:30 or 1:00 a.m. While Tompkins estimated the distance as about 5 or 6 miles, it is actually about 2 miles.

It is plausible that Tompkins would have visited his sick mother-in-law in the early evening, especially given that it was only a 2 mile walk. However, it seems a little unusual for him to stay at her house until 12:30 or 1:00 a.m. before walking home. Perhaps he waited until she retired to bed. In any case, neither Edith Tompkins nor Alice Newhart were deposed or testified to corroborate Tompkins's account of the visit.

B. A Chance Encounter

Tompkins, Harrington, and Schultz testified that Harrington and Schultz were driving home, when they saw Tompkins on the Fort Jenkins bridge and gave him a ride to the Rock Street crossing. According to Harrington and Schultz, they left Harvey's Lake and began driving to Hughestown sometime after midnight on July 27, 1934. At about 1:30 a.m., while crossing the Fort Jenkins Bridge, they saw Tompkins, and stopped to give him a ride home.

It is plausible that Harrington and Schultz were driving home late at night from Harvey's Lake. After all, it was a popular summer resort, with a casino and other attractions. And it is plausible that if Harrington and Schultz saw Tompkins while driving home, they would give him a ride. After all, he was a friend, and his house was on their way home. But it is also a remarkable coincidence.

Harrington and Schultz testified primarily to corroborate Tompkins's claim that he was walking home from Exeter at 2 a.m., and to explain why Tompkins used the path next to the railroad track, rather than Searle

Street. But Harrington refused to talk to Erie's investigators, and refused to be deposed.

Q. Did the railroad come to see you about the case, Mr. Harrington?

A. Why yes, they did, I believe, the two gentlemen in the house there, yes.

Q. You refused to tell them anything?

A. I told them that if my testimony was wanted I would give it.

Q. They asked you to give it and you refused to give it to them, didn't you?

A. I believe I did. I don't believe I even asked them to sit down.

Q. You know you refused to give them any information when they called and asked you what you knew about this accident?

A. I told—

Q. Listen to me. You refused to give them any information when they asked you what if anything you knew about this accident; isn't that so?

A. I am answering it the best way I can. I told you that I told them that if my testimony was wanted I would give it in court when the time came.

Q. They said to you in substance, "So you refuse to tell us anything about it" and you said, "I do"? Isn't that what occurred?

A. Well, am I being tried? I don't understand.

Q. Are you being tried? I am trying to get some information from you as to what you said and did. Did the railroad come to you and ask you for some information and did you point blank refuse to give them any?

A. Just as I told you. I told them I would give it if I were called as a witness.

Q. Didn't they ask you to give it to them?

A. In other words, I refused, if that is what you mean, yes, sir.¹⁷⁰

Harrington's refusal to cooperate with Erie's investigation is interesting. Perhaps he was simply a hostile witness who didn't want to help Erie. But maybe he was trying to help protect Tompkins's story by hampering Erie's investigation.

C. A Short Walk

Harrington and Schultz testified that they dropped Tompkins on the east side of the Rock Street crossing at about 2 a.m. Tompkins testified that he crossed back over to the west side of the railroad track, and began walking north on the footpath from Rock Street to Hughes Street. When he was about halfway to the stub-end of Hughes Street, he heard the

170. R., *supra* note 3, at 110-11. Schultz was not deposed either, but it is unclear whether he cooperated with Erie's investigation. *To Take Depositions in Big Damage Suit*, PITTSTON GAZETTE, Jan. 24, 1935, at 5.

whistle of the southbound Ashley Special and saw its oncoming headlight. Just before he reached Hughes Street, the engine passed him. Tompkins testified that the train was traveling at about 30 miles per hour, about a foot away from him, but he did not step off the footpath, because the ground in the railroad right of way was rough and he was afraid of injuring himself. Colwell testified that the Ashley Special often traveled at about 30 miles per hour at the Rock Street crossing.

This account is false or implausible in several respects. First, it is impossible that the Ashley Special was traveling 30 miles per hour. In fact, it was traveling at about 8 to 10 miles per hour. The distance from Avoca Station to Ashley Station was about 16 miles, and the total running time on July 27, 1934 was about 90 minutes, for an average speed of about 10 miles per hour.¹⁷¹ The approach to the Rock Street crossing from Avoca Station was uphill and around a curve, which forced the train to slow down. The conductor testified that the Ashley Special was traveling at about 8 to 10 miles per hour, and the flagman testified that it was not capable of traveling any faster than 8 to 10 miles per hour as it approached the Rock Street crossing from Avoca Station, because of the uphill grade.¹⁷²

Second, it is implausible that Tompkins would have stayed on the path while a train was passing, especially at night. A person on the path would be only 1 or 2 feet from a passing train, a terrifying and dangerous prospect. When Tompkins and his witnesses insisted that people routinely stayed on the footpath while trains were passing, they were lying. And everyone knew it. Kiendl's incredulity at their testimony was neither masked nor feigned. Erie's witnesses were telling the truth when they stated that pedestrians stepped off the path when trains were passing. As Kiendl observed and the photographs introduced into evidence reflect, the railroad right of way was reasonably smooth and perfectly walkable. There was nothing to prevent people from using it when a train was passing.

Third, Tompkins's testimony implies that he should have reached Hughes Street before the train reached him. The path was about 115 feet long. According to Tompkins, he saw the train and heard its whistle when he was about halfway to Hughes Street. A normal walking pace is about 4 miles per hour, or about 6 feet per second. The Ashley Special was traveling at most about 10 miles per hour, or about 15 feet per second.

171. On July 27, 1934, the Ashley Special left Avoca Station at 2:10 a.m. and arrived at Ashley Station at 4:40 a.m., with about an hour delay, for a total running time of about 90 minutes, which was the typical running time. R., *supra* note 3, at 284-87.

172. *Id.* at 288, 315.

And a person standing on the railroad track at the stub-end of Hughes Street could see about 400 feet down the track toward Avoca.¹⁷³ If Tompkins saw the Ashley Special when he was about halfway down the path, it would have taken him about 10 seconds to walk the 60 feet to Hughes Street, if he maintained a normal pace. But it would have taken the Ashley Special at least 23 seconds to travel the 350 feet to Hughes Street. In other words, based on Tompkins's own testimony, he should have been out of harm's way long before the train arrived.

D. An Accident

Tompkins testified that when he was only about 5 or 10 feet away from Hughes Street, a dark object protruding from the Ashley Special—probably an unsecured refrigerator car door—struck him in the head and knocked him unconscious. When he fell to the ground, his right arm fell under the wheels of the train, and was severed just below the shoulder. Colwell testified that he found Tompkins about 5 to 10 feet from Hughes Street.

Nothing about this story adds up.

First, Tompkins's injuries are impossible to square with his account of what happened. He suffered a deep cut on his right temple and a severed right arm. If the Ashley Special had been traveling at 30 miles per hour when the refrigerator car door hit Tompkins, it would have caused massive head trauma that he almost certainly could not have survived. Of course, the Ashley Special was actually traveling at about 8 or 10 miles per hour. But even at that speed, the refrigerator car door would have caused a very serious head injury, including skull fractures. It would be the equivalent of sprinting headfirst into a brick wall. Tompkins had no such injury. In addition, the impact with a refrigerator car door would have knocked Tompkins away from the train, not under it.

Second, while Tompkins claimed he was injured by an unsecured refrigerator car door, Erie's records showed that all of the doors were secured. Given that the records were created before Erie was aware of Tompkins's injury, there is no reason to believe they were falsified.

Third, on July 27, 1934, the first refrigerator car on the Ashley Special was the fifteenth car. Each car was 40 feet long, so with 14 cars, a coal tender, and the locomotive in front of it, the first refrigerator car was about 640 feet from the front of the train. The only way the door of

173. *Id.* at 271.

that refrigerator car could have hit Tompkins was if he had stood still and waited for it.

E. A Rescue

Almost immediately after the accident, two “boys,” presumably young men, given that they were out alone at 2:30 in the morning—found Tompkins on the railroad track. They alerted Colwell to the accident, asked Mrs. Rentford to call an ambulance, and then disappeared. Who were these young men? Why were they at the stub-end of Hughes Street and the railroad track at 2:30 a.m.? How did they find Tompkins so quickly? If they lived in the neighborhood, why could not Colwell identify them, and why would he have had to tell them who owned a telephone? And what did Colwell’s wife mean when she said they were “crazy”?

F. A Revisionist Account

What really happened in Hughestown, Pennsylvania at the corner of Hughes Street and the railroad track at 2:30 a.m. on Friday, July 27, 1934? I suspect that Tompkins was trying to board the Ashley Special and ride it into Wilkes-Barre to look for work, when he slipped and fell. He hit his head on the ground, and his right arm fell under the wheels of the train.

The Rock Street crossing, and the end of Hughes Street in particular, were a perfect place to hop aboard the Ashley Special. The train was traveling relatively slowly as it labored uphill and around a curve. There were no streetlights, and little traffic. And there was a convenient path running alongside the railroad track, perfect for running next to the train.

Notably, the engineer operating the Ashley Special did not see Tompkins walking on the footpath next to the railroad track. And curiously, Tompkins was injured right at the intersection of Hughes Street and the railroad tracks. If he had been walking home, it would have been particularly easy to step aside for the train. But if he were trying to board the train, better to hide behind the picket fence.

The young men who found Tompkins may have been hoboes, which would explain why Colwell did not know them, and why they disappeared. Presumably, they were either trying to board the train themselves, or hopped off when they saw Tompkins slip and fall.

In the early 20th century, it was common for people to hitchhike on trains, especially freight trains. And the number of people riding the rails spiked in the 1930s, as unemployment spiked during the Depression, and made it increasingly necessary for people to travel to look for work. But it was also extremely dangerous, and produced many casualties:

It is quite astonishing to realize that trespasser fatalities per head of population were ten times higher than current levels in the 1920s and 1930s. In part this is explained by the large numbers of hoboes who rode the trains during the depression years. It is also true that more people were exposed to trespassing risks earlier this century because the railroads served a mass market, and provided extensive freight and passenger service to small communities.¹⁷⁴

In the 1930s, thousands of people were killed or injured every year while riding trains:

H.L. Denton, general superintendent of police of the Baltimore & Ohio, read a paper on ‘The Railroad Trespass Evil.’ He said that during the past two years there has been a very large increase in the number of adult trespassers, due to general business conditions, many good citizens going from one community to another seeking employment. Due to the inadequacy of laws covering trespassing in many communities, railroad are in a position where they can do little other than eject trespassers from the property. He felt that a great deal of good work can be accomplished if employees could be educated to understand that in the interest of safety it is as much their job to warn the trespasser as it is that of the police officer. Very little result has been obtained in reducing accidents to trespassers in the past ten years. In 1921 the number killed was 2,481 and 3,071 were injured, and in 1931 there were 2,401 killed and 3,321 injured. In the last year and a half the police departments of 90 railroads made 213,353 arrests, a large portion of which were for trespassing.¹⁷⁵

While casualty rates fell dramatically in the 1920s, from about 100 per 10 million miles traveled to about 40 per million miles traveled, they spiked to 80 per million miles traveled in the 1930s.¹⁷⁶

The most plausible explanation for Tompkins’s accident is that he was trying to climb aboard the Ashley Special when he slipped and fell. Notably, Hunt alluded to hoboes on a couple of occasions. For example, he referred to refrigerator cars as “reefers,” a hobo term also used by railroad employees, and referred to a boxcar as a “side door palace car,” a term used primarily by hoboes.¹⁷⁷ Furthermore, Kiendl asked Tompkins whether he was attracted to trains, which Tompkins denied:

Q. You have seen railroad trains going through time and time again?
A. Yes, sir.

174. IAN SAVAGE, THE ECONOMICS OF RAILROAD SAFETY 15-16 (1988).

175. *Annual Meeting A.R.A. Safety Section*, 93 Railway Age 505 (1932).

176. Savage, *supra* note 178, at Figure 2 (Trespassing on the Railroad).

177. R., *supra* note 3, at 263.

Q. And I suppose like most young men, they attracted your attention?
A. No, sir, they never attracted my attention. I have seen too many of them.¹⁷⁸

Indeed, Kiendl's questions implied that he believed Tompkins was trying to board the train when he slipped and fell:

Q. Let us see if we get that straight, Mr. Tompkins. The object was about two feet wide and it was about five or six feet high; right?
A: Yes, sir.
Q: And it hit you just in the right eye?
A: Yes, sir.
Q: That is the only place?
A: Right through (indicating).
Q: It didn't hit you any other place in the body?
A: My head was all swollen. I wasn't cut in my eye.
Q: It hit you in the side of the face?
A: Yes, sir.
Q: It didn't hit your body at all?
A: My leg was cut up here and here (indicating).
Q: You don't know whether it was from that dark object?
A: No.
Q: Or whether it was from the fact that you fell down and were dragged along?
A: No, sir.
Q: You don't know whether the swelling on the side of your eye was from this object hitting your face, do you?
A: No, sir.¹⁷⁹

The question in *Erie v. Tompkins* was whether to apply the Pennsylvania rule that a person walking on a path parallel to a railroad track was a trespasser, which was affirmed in *Falchetti v. Pennsylvania Railroad*.¹⁸⁰ But the plaintiff in *Falchetti* was a 6 year old boy who was killed by a train while playing unsupervised in a railroad right of way.¹⁸¹ The claim that John L. Falchetti "was struck by the overhang of the cylinder head on one of defendant's passing engines, while he was walking longitudinally on its right-of-way, immediately adjacent to its tracks" is just as implausible as Tompkins's claim that he was injured by an unsecured railroad car door while walking home. In truth, the Pennsylvania Supreme Court was removing from the jury the right to

178. *Id.* at 44.

179. *Id.* at 66-67.

180. *Falchetti v. Penn. R.R.*, 160 A. 859 (Pa. 1932).

181. *Id.*

award tort damages to those injured by railroads while in the right of way, including both unsupervised children and trespassers, like Tompkins.

The true story of *Erie v. Tompkins* is probably that everyone knew Tompkins was injured while trying to board the Ashley Special. After all, riding trains was both incredibly common and incredibly dangerous. But Judge Mandelbaum did not care, and neither did the jury. Tompkins was poor, Erie was rich, and the jury decided accordingly. The Second Circuit almost said as much in its opinion. And it probably gave the progressive justices some comfort when they stole Tompkins's judgment from under his nose.

IX. THE AFTERMATH OF *ERIE V. TOMPKINS*

Initially, *Erie v. Tompkins* was ignored. The popular press was entirely indifferent to it, and the legal press just noted it as another important decision. Indeed, Justice Frankfurter was quite surprised by the lack of fanfare, writing to President Roosevelt:

I certainly didn't expect to live to see the day when the Court would announce, as they did on Monday, that it itself has usurped power for nearly a hundred years. And think of not a single New York paper—at least none that I saw—having a nose for the significance of such a decision.¹⁸²

On April 25, 1938, the Supreme Court remanded *Erie v. Tompkins* to the Second Circuit. And on July 12, 1938, the Second Circuit dismissed the action. Under *Erie*, it had to apply Pennsylvania law, so Tompkins had to prove wanton recklessness.¹⁸³ Given the facts pleaded by Tompkins, that was impossible, so the court had to reverse. Tompkins filed a petition for certiorari, but it was summarily denied, and the case ended on October 24, 1938.¹⁸⁴

Apparently, at some point after the Supreme Court decided *Erie*, Kiendl destroyed his files, as was his custom when a case became final.¹⁸⁵

Despite getting reversed, Judge Mandelbaum was immensely proud of his role in *Erie v. Tompkins*:

The late John Cahill once told this writer that in arguing before Mandelbaum he once questioned whether the judge correctly

182. Letter from Felix Frankfurter to Franklin D. Roosevelt (April 27, 1938), reprinted in MELVIN I. UROFSKY & DAVID W. LEVY, HALF BROTHER, HALF SON: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 455-56 (M. Freedman ed. 1967).

183. *Tompkins v. Erie R. Co.*, 98 F.2d 49 (2d Cir. 1938).

184. *Tompkins v. Erie R. Co.*, 305 U.S. 637 (1938).

185. FREYER, *supra* note 111, at 142 (1981).

understood a principle of law in question. Cahill said Mandelbaum smiled at him indulgently and asked: “Mr. Cahill, did you ever hear of a case, *Erie v. Tompkins*.¹⁸⁶”

“Of course, your honor,” said Cahill.

“Do you know, Mr. Cahill, who was the trial judge in that case?”

“I’m not sure, your Honor,” said Cahill.

“I was,” said Mandelbaum “and Learned Hand and Judge Swan agreed with me, even though the Supreme Court later on got a little confused and reversed us. So don’t tell me I don’t understand the law!”¹⁸⁶

In his copy of Volume 304 of the United States Reports, Mandelbaum wrote in the margin of *Erie v. Tompkins*, “Because the Swift Tyson case although before this case I never knew of its existence to be truthful and for the confusion this decision brought about, it might have been better to leave it alone and stand by good old Swifty.”¹⁸⁷

When the United States entered the Second World War, the Army classified Tompkins 4-F, unfit for service for medical reasons. During the war, Tompkins had a job, but he lost it when the war ended. He eventually learned to compensate for his missing arm, and enjoyed fishing in the Susquehanna River.

It was said that he would tie the line using his teeth and he would ready his bait with his hand, while he carefully tucked the hook in his shoe. Harry is also remembered in Hughestown for his great soul and the passion that he had for music. He loved to sing.¹⁸⁸

Tompkins died on August 27, 1961.¹⁸⁹ While none of his obituaries mentioned his accident or his role in *Erie v. Tompkins*, they followed a standard form that included few personal details.

In 1960, the Erie Railroad Company merged with the Delaware, Lackawanna & Western Railroad and became the Erie-Lackawanna Railroad. In 1972, the Erie-Lackawanna filed for bankruptcy, from which it never recovered. In 1976, the United States purchased most of the Erie-Lackawanna’s remaining assets, which became part of the Consolidated Rail Corporation, also known as Conrail.

186. Gould, *supra* note 59, at 1.

187. *Id.*

188. Luzerne Legal Register Report, *supra* note 11 (recollections of Michael I. Butera).

189. *Harry Tompkins Dies in Hospital*, WILKES-BARRE TIMES LEADER, August 28, 1961, at 1; *Harry Tompkins*, PITTSSTON GAZETTE, August 31, 1961, at 12.

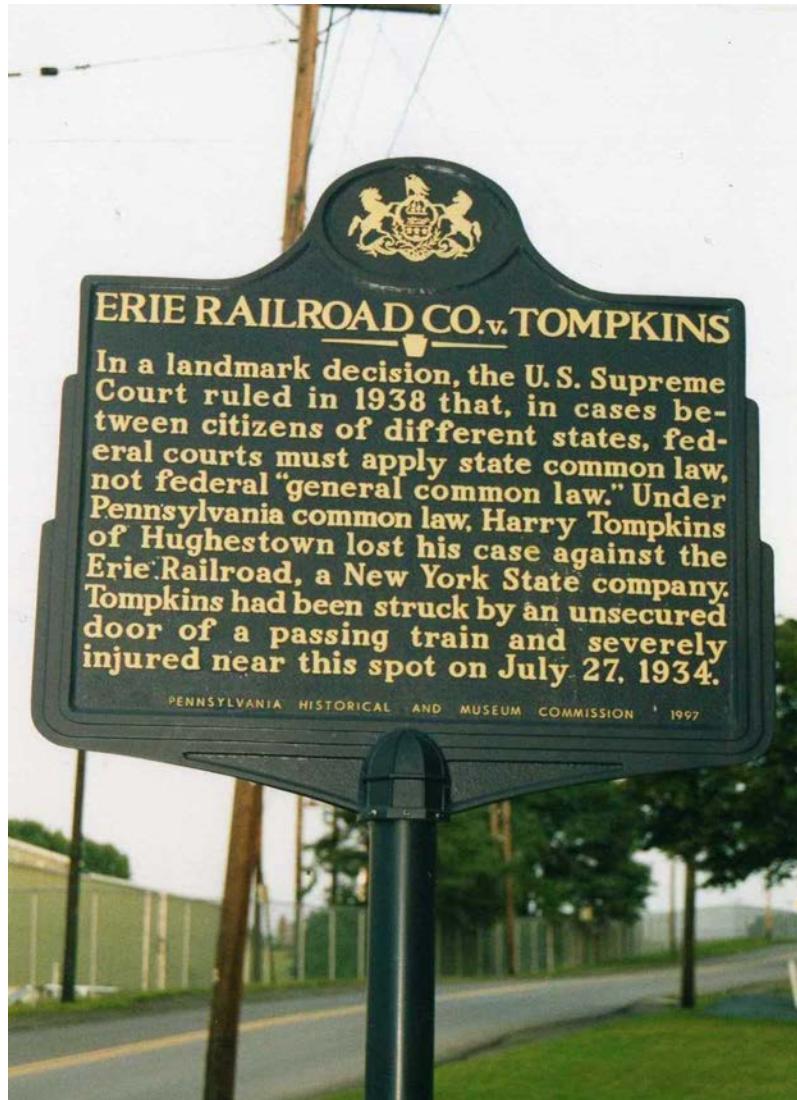


Hughes Street facing north, remaining railroad track on the right.



Hughes Street facing north, from Rock Street.

Eventually, the railroad track running through Hughestown was decommissioned. While much of the track remains in place, the track running from the Rock Street crossing to Hughes Street was removed, and Hughes Street was extended along the former right of way and connected to Rock Street.



On October 13, 1997, the Pennsylvania Historical and Museum Commission installed a historical marker commemorating *Erie Railroad Company v. Tompkins* and Tompkins's accident on Rock Street, near the former Rock Street crossing.¹⁹⁰ It reads as follows:

190. Christopher Romanelli, *Historical marker honors court battle*, THE TIMES LEADER WILKES-BARRE, October 14, 1997, at 6.

In a landmark decision, the U.S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal “general common law.” Under Pennsylvania common law, Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

Is that what really happened to Tompkins? Maybe so. But maybe not.

APPENDIX



Plaintiff's Exhibit 2

Photograph taken with camera 50 feet west of crossing and 150 feet from point of accident, looking east.



Plaintiff's Exhibit 3

Photograph taken with camera 100 feet east from point of accident, looking west.

The camera was located at Hughes Street and depicts the railroad tracks leading to Rock Street. The solid line to the right of the railroad track indicates the path on which Tompkins was walking. The dotted lines indicate the paths from Colwell's gate to Rock Street and to the path next to the railroad track. "P" indicates where Colwell found Tompkins. "V1" indicates the window through which Colwell saw Tompkins. "V2" indicates Colwell's gate. "V3" indicates the ditch in front of Colwell's picket fence.

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THE BALLAD OF HARRY JAMES TOMPKINS

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Plaintiff's Exhibit 4
Photograph of Rock Street Crossing, Hughes Street to the right.

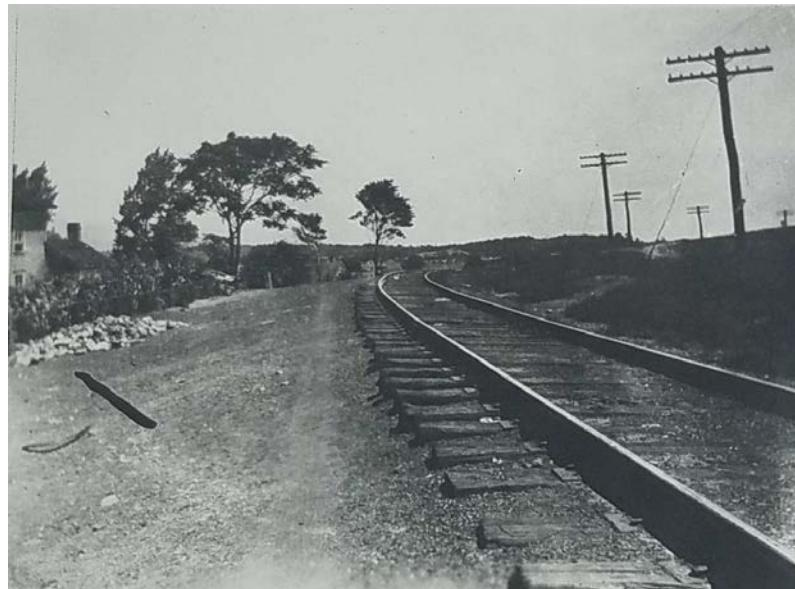


Plaintiff's Exhibit 5

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AKRON LAW REVIEW

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Plaintiff's Exhibit 6



Defendant's Exhibits A & B

2018]

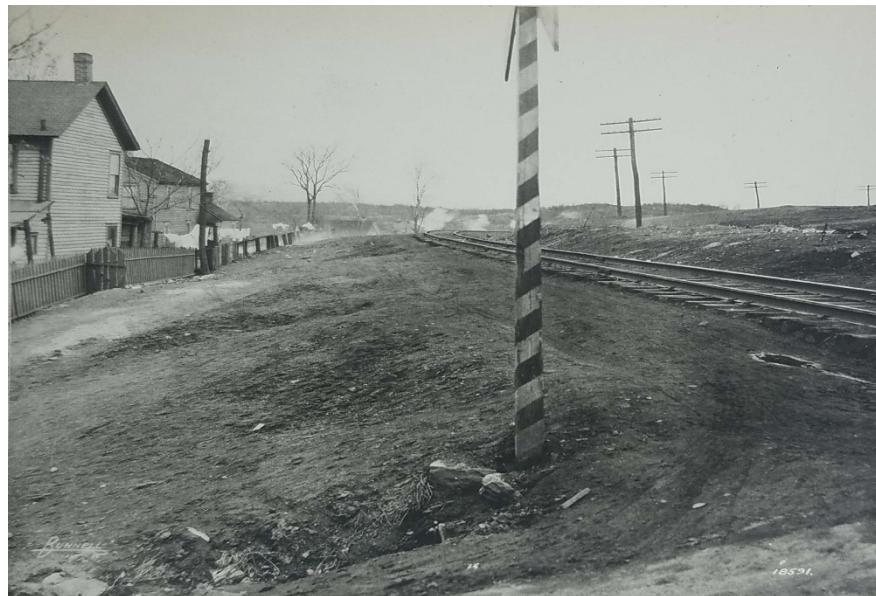
THE BALLAD OF HARRY JAMES TOMPKINS

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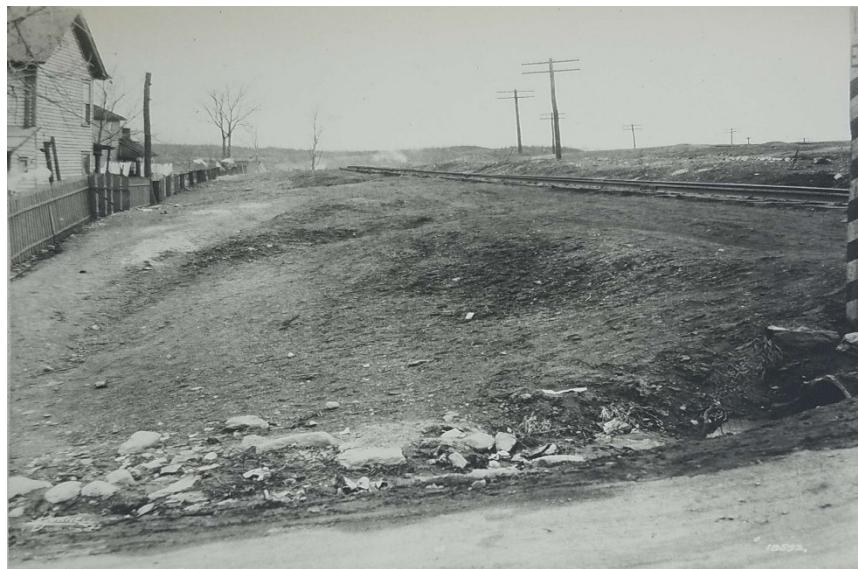
Defendant's Exhibit C[1]

Photograph taken with camera over Rock Street, 5 feet north from
near rail, looking east.



Defendant's Exhibit C[2]

Photograph taken with camera over center of Rock Street, 15 feet north from near rail, looking east.



Defendant's Exhibit C[3]

Photograph taken with camera over center of Rock Street, 25 feet north from near rail, looking east.



Defendant's Exhibit C[4]

Photograph taken with camera over center of Rock Street, 35 feet north from near rail, looking east.



Defendant's Exhibit C[5]

Photograph with camera over center of Rock Street, 50 feet north from near rail, looking east.

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AKRON LAW REVIEW

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Defendant's Exhibit C[6]

Photograph taken with camera 20 feet north from near rail, and about 75 feet east from center of Rock Street, looking west.



Defendant's Exhibit D[1]

Photograph taken looking east.

2018]

THE BALLAD OF HARRY JAMES TOMPKINS

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Plaintiff's Exhibit D[2]



Plaintiff's Exhibit D[3]