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IN THE

Supreme Court of the United States

OCTOBER TERM—1937.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER ERIE RAILROAD COMPANY.

Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of New York, before which court the case was tried (p. 383).

The opinion of the Circuit Court of Appeals for the Second Circuit appears in the record at pages 393-398. It is reported in 90 Fed. (2d) at page 603.

Jurisdiction.

Certiorari to review the judgment of the Circuit Court of Appeals entered herein on June 14, 1937 (pp. 398-9) was granted by this Court on October 11, 1937, upon a petition therefor filed on August 30, 1937 and based upon Section

240(a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, sec. 1; 43 Stat. 938; 28 U. S. C. A., sec. 347(a).

The Questions Presented.

The action is based on alleged injuries suffered by the plaintiff-respondent on the defendant-petitioner's right of way in Pennsylvania while on a pathway extending alongside defendant's track. As heretofore stated in the petition for writ of certiorari, two questions are presented to this Court.

The first question is whether the defendant's duty toward the plaintiff should have been determined in accordance with Pennsylvania law. Under Pennsylvania law as declared by the highest court of the state, the doctrine of permissive pathways, although applicable to crossings (with the consequence that persons using them are deemed to be licensees to whom the railroad owes a duty of reasonable care), does not apply to pathways along the right of way and hence persons using such pathways are deemed to be trespassers to whom the railroad is under no obligation except to refrain from wilful or wanton negligence. The courts below refused to apply the Pennsylvania law, despite the fact that this was a longitudinal pathway accident as distinguished from a crossing accident, or, at all events, despite the fact that the jury could have so found. The petitioning railroad contends that the courts below should have applied the Pennsylvania rule either on principles of comity or by virtue of the Rules of Decision Act (Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92, as revised; Rev. Stat., sec. 721; 28 U. S. C. A., sec. 725), which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The second question presented is whether the courts below were correct in refusing to hold the plaintiff guilty of contributory negligence as matter of law; and, in particular, whether the Circuit Court of Appeals was correct in holding that, despite its own expressed view that the plaintiff was imprudent, the issue was for the jury because "the fact that recoveries have been allowed under closely similar circumstances * * * indicates that fair-minded men may hold a different view" (pp. 396-7).

The substantial nature of these questions was considered in the petition for certiorari, to which we respectfully refer. We assume that the conflict of opinion among the Circuit Courts of Appeals and like reasons for the granting of certiorari do not require restatement in this brief.

Statement of the Case.

The suit was instituted in the United States District Court for the Southern District of New York to recover $100,000 damages for personal injuries sustained by the plaintiff-respondent while walking on the defendant-petitioner's right of way at Hughestown, Pennsylvania, on July 27, 1934 (pp. 2-5). Plaintiff's testimony was that he was struck by a projection from the defendant's train and thrown under the train, sustaining injuries resulting in the amputation of his right arm. The jury brought in a verdict for $30,000 damages (pp. 351-2), upon which the District Court rendered a judgment for the plaintiff dated November 16, 1936, in the sum of $30,260 (pp. 382-3). Upon appeal by this petitioner (pp. 384-391), the Circuit Court of Appeals affirmed the judgment of the District Court (pp. 398-9).

On the night of the accident, according to the plaintiff's testimony, he started for his home after visiting his sick mother-in-law until about 12:30 a. m. At about 2:30 a. m. he arrived at the Rock Street grade crossing in Hughestown in an automobile, in the company of two other men. At this point he left the automobile, intending to reach his home in

Hughes Street by walking northeasterly on defendant's right of way for some 130 feet, then turning off the right of way into the blind end of Hughes Street, which extends northwesterly from the boundary line of the right of way (pp. 19, 27-30, 41-2, 57-9).

Looking northeasterly along the right of way from the Rock Street grade crossing, a longitudinal pathway extends along the left side of the track, just outside the ties, for a distance of about 115 feet, where it meets a diagonal pathway leading to the left, away from the track at an obtuse angle, off the right of way and into the blind end of Hughes Street. As will be noted more particularly hereafter, an extension of this diagonal pathway to the right, although having nothing to do with the plaintiff's actual or intended route into Hughes Street, crosses the track and the remainder of the right of way into an adjoining field at the right.[1]

After leaving the Rock Street grade crossing and entering on the longitudinal pathway, plaintiff testified, he heard a train whistle ahead of him, heard the noise of the train and saw the headlight on the engine as it approached him, but deliberately continued walking on the pathway until he was struck (pp. 45-9, 63, 30). This testimony, it may be noted, contradicted plaintiff's complaint which alleged there was no signal and that he was unaware of the approach of the train (p. 3).

Except for the momentary light from the headlight, which vanished after the engine passed him, the plaintiff conceded that the pathway was wholly unilluminated and that it was a very dark night (pp. 41-2, 149; and see plaintiff's bill of discovery, pp. 7-9).

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[1] See pp. 19-27, 92, 34, 60. The area is photographed looking northeasterly (Pltf.'s Ex. 2, p. 354; Pltf.'s Ex. 6, p. 358; Deft.'s Exs. A, B and D taken from a little distance, pp. 360, 361, 368-373; Deft.'s Ex. C taken closer, pp. 362-3) and looking southwesterly (Pltf.'s Ex. 3, p. 355; Pltf.'s Ex. 5, p. 357); and is also shown by a blueprint (Pltf.'s Ex. 1, p. 353). The Rock Street grade crossing may be identified by the striped crossing sign which appears in all of the photographs except Plaintiff's Exhibit 6. The longitudinal pathway is on the same side of the track as the crossing sign.

This longitudinal pathway on which the plaintiff was walking was about two feet wide (pp. 21, 42, 166). Plaintiff's witnesses differed somewhat in describing the proximity of the pathway to the end of the ties, the plaintiff stating the distance as about two feet (pp. 21-2, 42) while others placed the pathway right up against the ties (pp. 84, 88-9, 108, 112, 120-1, 128-9, 138, 163-6). These differences, however, are unimportant in the light of the undisputed fact that fixed structural parts of the train extended as much as one foot and five inches beyond the ties (pp. 216-221, 139, 150). Furthermore, plaintiff conceded that he knew that the train extended beyond the ties and conceded further that his right side was possibly within a foot of the side of the train (pp. 42-4). To avoid being hit, plaintiff knew that he had to walk on the outer edge of the two-foot pathway (pp. 41, 90-1, 99, 100-1, 150-1). In his bill of particulars, plaintiff charged defendant with negligence in permitting the pathway "to be located so close to its tracks as to be dangerous to life and limb" (p. 15). The plaintiff's long familiarity with the pathway and its surroundings was conceded (pp. 20, 35, 38, 41). The train was moving at a rate of eight to ten miles an hour according to defendant's witnesses (pp. 288, 315, 326-7, 334, 335, 339), about 30 to 35 miles an hour according to plaintiff (pp. 44-6).

As bearing further on the question of plaintiff's negligence, it should be noted that he could readily have avoided all danger. In the first place, he could have reached his home, without inconvenience, by the regular public thoroughfares (pp. 27, 59-61). In the second place, having chosen to use the pathway along the track, he could readily have stepped aside to a position of safety (pp. 38-41, 20-1, 34, 101, 137-9; Pltf.'s Exs. 2, 3, 5, 6, at pp. 354, 355, 357, 358; Deft.'s Exs. A to D at pp. 360-373), any contrary contention being "patently absurd", as stated by the Circuit Court of Appeals (p. 396).

The plaintiff testified that, after the engine had passed him and while he was continuing on the pathway with no

light at all (pp. 41-2), he was hit by "a black object that looked like a door to me" and had the dimensions of a door (pp. 30, 51, 65-6). This trial version, it may be noted, contradicted the plaintiff's prior sworn statement in his bill of discovery (instituted to obtain information for a bill of particulars herein) that the projection could not be seen in the darkness and that he was "unable to state" and "does not know what object the defendant permitted to project from the said train, much less the dimensions, its nature and its location on the train" (pp. 8, 9-10). This bill of discovery version, if reaffirmed on the trial, would have barred a recovery (*McCarthy* v. *New York, New Haven & Hartford Rd. Co.,* 240 Fed. 602, C. C. A. 2-1917); but on the trial plaintiff disposed of it by the simple expedient of testifying that, in this as in other respects, his bill of discovery, which he had read and verified, was false (pp. 52-4 and see pp. 45, 47-9, 56, 61, 63-4).

Since the Pennsylvania law refuses to recognize permissive rights on longitudinal pathways as distinguished from crossings and imposes upon the railroad no duty to persons thereon except the duty to refrain from wilful or wanton negligence, it becomes important to note that there was no evidence of wilful or wanton negligence on defendant's part. The only evidence of negligence on defendant's part consisted in plaintiff's vague testimony of being struck by a projection which looked like a door to him (pp. 30, 65-6). The lengthy examination and cross-examination of employees of defendant (pp. 179-215, 225-268, 280-339) produced no evidence of negligence in inspection, no evidence that the defendant knew of any loose door if there was one; and it affirmatively appeared without dispute that the plaintiff was not seen and that no employee or representative of the defendant knew of the accident until some time after its occurrence (pp. 329-330, 334-5, 336, 339). Indeed, it is doubtful, to say the least, whether any question of negligence on defendant's part should have gone to the jury, irrespective of the Pennsyl-

vania law;[1] but, in any case, there was no evidence of the wilful or wanton negligence essential under the Pennsylvania law in order to render the railroad liable.

With further reference to the Pennsylvania law, it is necessary to note the facts bearing on plaintiff's belated effort to escape the effect of that law as applying to longitudinal pathways. This effort consisted in an attempt to picture the accident as a crossing accident rather than a longitudinal pathway accident. Although conceding that he was still walking on the longitudinal pathway when the engine and several cars passed him and when he was struck, he testified that he arrived at the precise point of intersection of the longitudinal and diagonal pathways at the precise instant of impact.

Aside from the fact that the plaintiff's arrival at the diagonal pathway is disputed (as will presently be noted), the facts clearly indicate that, even if plaintiff's testimony be given the fullest effect, the accident is still to be characterized as a longitudinal pathway accident rather than a crossing accident. As shown by the testimony and exhibits already cited, a person using the pathways in going from the Rock Street grade crossing to the blind end of Hughes Street would walk along the longitudinal pathway at the left of the track until he reached the diagonal pathway and would then veer to the left, away from the track, on the diagonal pathway, and pass off the right of way into the blind end of Hughes Street. The part of the diagonal pathway to the right of the longitudinal pathway, after crossing the track and the rest of the right of way, continued diagonally across a field and over a hill, running into Rock Street at a point some distance southeast of the Rock Street grade crossing (pp. 20, 22-3, 24-7, 34-5, 69-70, 85, 92-4, 107-8, 117, 154, 157;

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[1] Not only was plaintiff's testimony as to a projecting door too vague to be credited, but, even if credited, the mere fact of a loose door would be insufficient to put the rule of *res ipsa loquitur* into operation (*Musto* v. *Lehigh Valley R. R.*, 192 A. 888, Penn. Supreme Court, June 25, 1937; *Texas & N. O. R. Co.* v. *Smith*, 285 S. W. 913, Tex. Civ. App.).

Pltf.'s Ex. 1, p. 353). Obviously, a person walking from the Rock Street grade crossing on the longitudinal pathway would not turn to the right on the diagonal pathway, since the latter would merely carry him back to Rock Street. The portion of the diagonal pathway which crossed the track would be used only by persons coming from the blind end of Hughes Street and desiring to strike Rock Street some distance to the southeast of the Rock Street grade crossing. Assuming that the defendant had given a permissive right to use this winding diagonal pathway as a crossing and hence should have exercised due care in watching for anyone approaching the track from either side of the right of way, the plaintiff's own testimony is that, as the train approached and as the engine passed him, he was still walking exclusively on the longitudinal pathway some distance short of the diagonal pathway.

In any case, as above intimated, the plaintiff's asserted arrival on the diagonal pathway, if at all credible and if relevant, was disputed. It may be noted that the complaint described the accident as occurring exclusively on the longitudinal pathway (p. 3); that the plaintiff's verified bill of discovery described the accident as occurring on the "parallel" pathway (p. 8); that plaintiff's bill of particulars claimed that the accident occurred on the longitudinal pathway "about 60 feet" from the Rock Street crossing (p. 15) which would be some 55 feet short of the diagonal pathway (see p. 4, including footnote 1, *supra*), and that the defendant's negligence was in respect of the longitudinal pathway (p. 15).

It was not until the plaintiff took the stand that he moved the accident out along the longitudinal pathway to the precise point where it ran into the diagonal pathway. He testified that, after leaving the Rock Street grade crossing by way of the longitudinal pathway, he was "about half ways over the block" from Rock Street to Hughes Street when he heard the whistle and saw the headlight of defendant's approaching train "about a hundred or a hundred and fifty

feet" ahead of him (pp. 30, 48-9), that he "kept right on walking" on the longitudinal path, that he "got to almost where the paths joined, all but a few steps" when the engine passed him, and that he had "got right on the [diagonal] path" when he was hit (pp. 30, 71). But on further examination, his testimony was that he was "on the verge" of turning onto the diagonal path, that his "next step was to be" down the diagonal path (p. 72), but that he "had not started turning into the diagonal path" (p. 79). Plaintiff's witnesses Colwell and McHale testified that they found the plaintiff lying six to ten feet short of the diagonal path (pp. 87, 115); but on cross examination McHale could not deny that the plaintiff's body might have been 75 feet nearer to Rock Street or that he had so indicated to a representative of the defendant named Dineen (pp. 116-7).

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals erred in refusing to apply the established law of Pennsylvania which denies permissive rights on longitudinal pathways along the right of way as distinguished from crossings over the right of way, and holds the railroad liable only for wilful or wanton negligence toward persons using such longitudinal pathways (see C. C. A. opinion, pp. 394-5).

This question was presented below (Deft.'s objection, p. 25; Deft.'s motions, pp. 178, 339-340, 352, 381-2; Deft.'s request to charge No. 1, pp. 342, 349; court's charge re license and trespass, pp. 345, 346-7; Deft.'s exception thereto, p. 351; assignment of errors Nos. 1-5, 10, 15, pp. 385-6, 388, 390).

It is urged that error was committed in this regard even if there was a disputed question of fact whether plaintiff had arrived at the junction of the longitudinal path and the crosspath inasmuch as the charge did not submit the question to the jury and imposed upon the railroad the duty of due care whatever the jury might find on this disputed question.

2. The Circuit Court of Appeals erred in refusing to hold the plaintiff guilty of contributory negligence as matter of law; and, in particular, erred in applying an unsound and prejudicial rule to determine whether the question of contributory negligence was one of fact or of law, the rule being stated in the following words (pp. 396-7):

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

The question was presented below (Deft.'s motions, pp. 178, 339-340, 352, 381-2; Deft.'s requests to charge Nos. 6, 9, 10, pp. 343, 350; court's charge, pp. 346, 347; assignment of errors Nos. 1-4, 9, 16-18, pp. 385-6, 388, 390-1).

Summary of Argument.

Point I. Assuming that Pennsylvania law denies permissive rights on longitudinal pathways as distinguished from crossings and assuming that this Pennsylvania law controls, the courts below have committed reversible error (p. 12).

A. Error was committed since the evidence conclusively characterizes the accident as a longitudinal pathway accident as distinguished from a crossing accident (p. 12).

B. Error was committed in any event since the jury should at least have been permitted to find that the plaintiff was exclusively on the longitudinal pathway when struck (p. 13).

Point II. The law of Pennsylvania, as established by the highest court of the state prior to this accident, repudiates permissive rights on pathways along a railroad's right of way as distinguished from crossings (p. 15).

ARGUMENT.

POINT I.

Assuming that Pennsylvania law denies permissive rights on longitudinal pathways as distinguished from crossings and assuming that this Pennsylvania law controls, the Courts below have committed reversible error.

For the purposes of the present Point we assume that Pennsylvania law denies permissive rights on longitudinal pathways as distinguished from crossings, with the consequence that persons using such longitudinal pathways are trespassers to whom the railroad owes no obligation except to refrain from wanton or wilful injury while persons using crossings are licensees to whom the railroad owes an obligation of due care (argued in Point II); and we further assume that the Pennsylvania law in this respect should have been applied in this case (argued in Point III). It is not disputed that the accident occurred in Pennsylvania.

A. Error Was Committed Since the Evidence Conclusively Characterizes the Accident as a Longitudinal Pathway Accident as Distinguished from a Crossing Accident.

In an insubstantial attempt to characterize the accident as a crossing accident, the plaintiff testified as heretofore noted that in walking along the longitudinal pathway he had arrived at the precise point where the longitudinal pathway meets the diagonal crosspath when he was struck.

Even if this testimony were undisputed it would not characterize the accident as a crossing accident and thus impose upon the railroad an obligation of due care. Assuming that the diagonal pathway was a permissive crossing, the per-

mission was to use the pathway as a crossing, and the correlative duty of the railroad was to exercise due care toward persons so using the pathway. In the exercise of due care it would be incumbent upon the railroad to anticipate that licensees might be approaching the track, by way of the crosspath, from either side of the right of way; but it would be wholly without relation to the granted permission and highly unreasonable to require the railroad to anticipate that a trespasser, springing from a forbidden spot, might suddenly appear in the middle of the crosspath—not to mention the fact that the present plaintiff's sudden appearance did not occur until the engine had passed the crosspath. Under no reasonable construction of the permissive crossing doctrine can such a person be regarded as availing himself of the permitted usage.

In its charge, the trial court treated the accident as a longitudinal pathway accident, manifestly ignoring the plaintiff's asserted arrival at the diagonal pathway as without any significance (p. 345); and in this treatment of the facts we think the trial court was fully justified. But, under the assumptions of law made for the purposes of the present Point, the trial court erred in permitting the jury to find that the longitudinal pathway was a permissive way and in imposing an obligation of due care upon the railroad in the event of such a finding (pp. 345-6, 347). The Circuit Court of Appeals likewise erred in sustaining this charge (pp. 394-5).

B. Error Was Committed in Any Event Since the Jury Should at Least Have Been Permitted to Find that the Plaintiff Was Exclusively on the Longitudinal Pathway When Struck.

Even if a bare contact with the diagonal pathway, no matter how achieved, could be deemed sufficient to inaugurate a duty of due care on the part of the railroad, the plaintiff's asserted arrival at the pathway was disputed (Statement

of the Case, *supra,* pp. 8-9). Under the applicable Pennsylvania law as assumed in the present Point, this dispute presented at least a question of fact which should have been submitted to the jury, and the jury should have been instructed to bring in a verdict for the defendant in case they found that the plaintiff was struck before he reached the diagonal pathway. The trial court left no such question to the jury. Indeed, as just noted, the trial court treated the accident exclusively as a longitudinal pathway accident and nevertheless permitted the jury to find, contrary to Pennsylvania law, that the railroad had given permissive rights thereon (charge, pp. 345-6). This charge was necessarily sustained by the Circuit Court of Appeals in affirming the judgment (see pp. 394-5). In opposing certiorari, plaintiff's counsel, citing the statement of the Circuit Court of Appeals that the plaintiff was struck "just as he got to the intersection" of the two paths (p. 394), asserted that the Circuit Court of Appeals "affirmed the fact" that the plaintiff was at the junction of the two paths, that at best this was a disputed question of fact, and that this Court will not concern itself with disputed questions of fact (Brief opposing certiorari, pp. 22-3). The context of the opinion, however, renders it quite clear that the Circuit Court of Appeals was not purporting to rule, as a matter of fact or of law, that the plaintiff had reached the diagonal pathway. On the contrary, the determinative part of the opinion followed the trial court in treating the accident as a longitudinal pathway accident (pp. 394-5). It is perhaps needless to add that we are not asking this Court to determine a disputed question of fact. The point of course is that, if there was a disputed question of fact on a material issue, the question should have been submitted to the jury.

Thus, the decisions below have gone against the defendant on the assumption, correct in point of fact, that the accident occurred while the plaintiff was walking on a longitudinal pathway as distinguished from a crossing. Under the applicable Pennsylvania law, the fact so assumed necessarily renders the decisions erroneous.

POINT II.

The law of Pennsylvania, as established by the highest court of the state prior to this accident, repudiates permissive rights on pathways along a railroad's right of way as distinguished from crossings.

Before considering the extent to which the Pennsylvania decisions should influence the federal courts, we here set forth an analysis of those decisions. Since the accident in suit occurred in July 1934 (pp. 15, 33, 38, 57, 344), it will be observed that the Pennsylvania decisions related to the Pennsylvania law as established prior to the accident.

In *Falchetti* v. *Pennsylvania R. Co.,* 307 Pa. 203, 160 Atl. 859 (1932), a case of injury to a child walking on an alleged permissive pathway on a railroad's right of way, alongside the track, the court said that "an alleged permissive way parallel with plaintiff's tracks and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this State." Referring to the cases cited to it as contrary, the court said further: "So far, if at all, as they tend to sustain the right to continue such a use, they must be considered as overruled by the *Conn* and *Kolich* cases."

The plaintiff has heretofore attacked this unequivocal declaration of the Pennsylvania law as to longitudinal pathways by citing prior cases asserted to be inconsistent with the *Falchetti* case, by endeavoring to distinguish prior cases cited by appellant and by the Pennsylvania Supreme Court in support of the *Falchetti* doctrine, and by endeavoring to distinguish subsequent cases approving the *Falchetti* case. We shall briefly discuss these cases in their chronological order.

Kay v. *Pennsylvania Rd. Co.,* 65 Pa. 269, 3 Am. Rep. 628 (1870). Plaintiff has cited this case as sustaining permissive rights on a longitudinal pathway, quoting the state-

ment that "along the tracks where the accident happened a well-worn footpath was plainly visible." That this case is an authority for defendant rather than for plaintiff is shown by the fact that the site of the accident was a large open lot, traversed by sidings, used for the storage of lumber and open to the public in connection therewith. In holding that there was proper evidence of permissive use, the court said, "it is not like those portions of the road used solely for the passage of trains, where the company would have not only the right to demand, but reason to expect a clear track."

Taylor v. *Del. & H. Canal Co.*, 113 Pa. 162, 8 Atl. 43 (1886). In his brief opposing certiorari, the plaintiff cited this case as upholding permissive rights on longitudinal pathways as distinguished from crossings, and purported to give two quotations from the opinion (Br., p. 18). The first quotation is from the opinion of the lower court (Court of Common Pleas) the determination of which court was reversed. The second quotation is from a summary of the argument of one of the parties to the appeal. While this would seem to be sufficient to dispose of the purported quotations, it is interesting as well as pertinent to note that the opinion of the Court of Common Pleas sustained the trial court's nonsuit of the plaintiff on the ground that the evidence showed the pathway in question was used to go along the right of way rather than across it. In its opinion of reversal, the Supreme Court treated the accident as exclusively a crossing accident, and held that the evidence was sufficient to warrant the submission of the plaintiff's case to the jury on the question "of permissive crossing at the point where she was injured" (p. 175). So far as appears, the Supreme Court would have affirmed and upheld the nonsuit had it agreed with the lower court in viewing the accident as a longitudinal pathway accident rather than a crossing accident.

Steele v. *Lake Shore & M. S. Ry. Co.*, 238 Pa. 295, 86 Atl. 201 (1913). The evidence showed that, when a direct cross-path was obstructed by cars, pedestrians customarily used a

substitute crossing which involved the use of a path extending a short way alongside the track. The plaintiff was injured on the substitute crossing. The plaintiff's recovery was permitted to stand on the evidence that there was a well-defined crossing.

Lodge v. *Pittsburgh, etc. R. Co.,* 243 Pa. 10, 89 Atl. 790 (1914). Although heretofore cited by plaintiff, this case involved a permissive crossing, not a longitudinal pathway; and the opinion considered the case on no other basis.

Francis v. *B. & O. R. Co.,* 247 Pa. 425, 93 Atl. 490 (1915). Although cited by plaintiff as recognizing permissive rights on a longitudinal pathway, the case involved what was essentially a permissive crossing. The railroad had lengthened, by about 700 feet, the approach to a public crossing by building a Y on the south side of the tracks. Thereafter, as a short-cut in crossing the tracks from the south, pedestrians followed one branch of the Y to the main track, and then walked a short distance along the ties to reach the regular crossing. The decision rested on the *Kay* case, *supra,* as "exactly in point." The accident was essentially a crossing accident similar to that in the *Steele* case, *supra.*

O'Leary v. *Pittsburgh etc R. Co.,* 248 Pa. 4, 93 Atl. 771 (1915). Although heretofore cited by plaintiff as contrary to the *Falchetti* case, the facts indicate otherwise. The injury occurred on a plot used as a playground, partly public and partly railroad property, with no visible separation line. In admitting evidence of permissive use, the court cited the *Steele* case, *supra,* which as already noted was exclusively a permissive crossing case.

Counizzarri v. *Philadelphia etc. Ry. Co.,* 248 Pa. 474, 94 Atl. 134 (1915). Although cited by plaintiff as contrary to the *Falchetti* case, the accident in this case occurred on a permissive strip of the right of way, used as a street, walk and playground, and fronted by private houses having no other access. The decision rested on the *O'Leary* case, *supra.*

Slamovitz v. *Pennsylvania R. Co.,* 266 Pa. 63, 109 Atl. 544 (1920). This is incorrectly cited by plaintiff as a permissive

longitudinal pathway case. The accident occurred on "26th Street," a public street on which the railroad had a siding.

Kremposky v. *Mt. Jessup Coal Co.,* 266 Pa. 568, 109 Atl. 766 (1920). Plaintiff cites this case as contrary to the *Falchetti* holding, but fails to observe that it was not a railroad case. The accident occurred on a trestle for coal cars, on the coal company's private property. The court held that a permissive way over the trestle could be shown.

The foregoing cases comprise all the cases heretofore cited by plaintiff as contrary to the *Falchetti* case. These cases all antedate the *Falchetti* case by twelve years or more. If contrary to the *Falchetti* decision, they were manifestly overruled by that case. But the foregoing comments sufficiently indicate that they were not contrary to the *Falchetti* decision.

Conn v. *Pennsylvania R. Co.,* 288 Pa. 494, 136 Atl. 779 (1927). This case was referred to in the *Falchetti* opinion in the statement that "as the *Conn* and *Kolich* cases show, an alleged permissive way parallel with plaintiff's tracks, and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this State." The present plaintiff quotes the above as showing that the justice who wrote the *Falchetti* opinion was under a misapprehension as to the Pennsylvania law since the *Conn* and *Kolich* cases "stand for no such proposition" (Br. opposing certiorari, pp. 21-2). It may be remarked that Chief Justice Frazer, who wrote the *Falchetti* opinion, also wrote the *Conn* opinion and, together with one or more of the other justices in the *Falchetti* case, participated in the *Conn, Tiers* (*infra*) and *Kolich* opinions. Since a large portion of the *Conn* opinion is devoted to a discussion of the special facts, any attempted synopsis would be open to the charge of inadequacy; but we call attention to certain significant expressions. The court stated that the plaintiff was following the tracks "longitudinally" when he was struck by a train (p. 781). The court found "a state of affairs entirely inconsistent with the claim of a public crossing" (p. 782). The

court commented on the fact that the "combined police personnel" of a railroad company "cannot foresee or prevent the innumerable and dangerous trespasses upon and over its tracks daily in a thousand different places along its lines" (p. 784). In distinguishing the case from public crossings, the court approved of the following doctrine (p. 784):

> "But upon its general track, where the public have no equal easement or right of way, a railroad company may operate its trains without regard to the possibility that unauthorized persons may be trespassers thereon. It need not anticipate the presence of such intruders either upon its general track or in its strictly private yards."

Finally, the court arrived at "the conclusion that plaintiff was a trespasser, and that the evidence falls far short of showing the existence of a defined permissive way or crossing over defendant's property at the place of the accident, so no recovery can be had * * *" (p. 784).

Tiers v. *Pennsylvania R. Co.*, 292 Pa. 522, 141 Atl. 487 (1928). The present plaintiff distinguished this case as involving an injury to a person crossing the railroad track at a place where no path existed. As leading up to the *Falchetti* decision, however, the opinion is significant by reason of the broad ground upon which the determination rested. The court said (p. 490):

> "The mere fact that the public generally may use the tracks of a railroad company to walk upon, other than to cross at fixed points, is not sufficient to impose liability upon it. *Kaseman* v. *Sunbury,* 197 Pa. 162, 46 Atl. 1032. If it were bound to keep constant guard against the possible presence of others, wherever it was customary for trespassers or licensees to enter upon its right of way, a proper operation of trains for the convenience of the public would be rendered most difficult, if not impracticable. It is bound to take due precautions to protect those at grade crossings established by law, or definitely fixed by consent, but cannot be held to the same degree of watchfulness in the use of its tracks

> generally, to the occupation of which it has the exclusive right, and is not bound to guard against the possibility of intruders thereon."

Kolich v. *Monongahela Ry. Co.*, 303 Pa. 463, 154 Atl. 705 (1931). This case was apparently cited in the *Falchetti* case because of a *dictum* (p. 705) to the effect that the plaintiff in the *Kolich* case could not have recovered if he had been travelling "longitudinally on defendant's right of way", between the rails of a track or between two tracks.

These cases were followed by the *Falchetti* case, 307 Pa. 203, 160 Atl. 859 (1932). In the most definite terms, this case crystallized the Pennsylvania doctrine recognizing permissive rights only on well-defined crossings and denying permissive rights along the right of way, whether the longitudinal routes be marked by beaten paths or not. The foregoing cases show that the rule, thus crystallized in the *Falchetti* decision, is based on two conceptions. The first is that it cannot be supposed that a railroad, merely by failing to take effective prohibitory steps, is consenting to the use of its right of way upon other than well-defined crossings. The second is that the recognition of permissive rights on longitudinal pathways, as distinguished from crossings, would conflict with the public interest since the obligation to take due precautions in such cases would render "most difficult, if not impracticable" "a proper operation of trains for the convenience of the public". Manifestly, these conceptions are based upon or affected by local conditions such as the congestion of population and of railroad traffic in the highly industrialized state of Pennsylvania.

The *Falchetti* case still stands as the unquestioned and settled law of Pennsylvania. While no subsequent Pennsylvania case appears to have involved a well-defined longitudinal pathway, the Pennsylvania courts have reaffirmed the general doctrine denying permissive rights except upon well-defined crossings.

In *Koontz* v. *Baltimore & Ohio R. Co.*, 309 Pa. 122, 163 Atl. 212 (1932), the plaintiff was injured while crossing a

train-yard of the defendant railroad. In reversing a judgment for the plaintiff and entering final judgment for the defendant, the court rested the reversal in part upon the fact that the evidence of user of the yard did not show a user for the purpose of crossing the yard. After stating that the "question as to what constitutes a permissive crossing has been before us several times in recent years" (p. 213), the court said (p. 214):

> "If there were a permissive way across the yard, with a well-marked path leading to the tracks, it would seem that there would necessarily be a well-defined path leading away from the tracks on the opposite side. The most favorable construction that can be placed on the testimony is that it shows a definite way or path to the yard, and nothing to indicate the existence of any path across the tracks or to or from them on the other side. It seems to us that plaintiffs completely failed to prove the existence of a permissive way."

In *Lindsay* v. *Glen Alden Coal Co.*, 318 Pa. 133, 177 Atl. 751 (1935), the railroad maintained tracks on an embankment of culm and cinders, the lower part of which was protected by sloping concrete. The *Falchetti* case was approved in the following language (p. 753):

> "The evidence that people ran up the concrete and then walked at one place or another over the culm bank to the top is not of such character as to establish a right of way or to put an increased burden on defendant in the circumstances disclosed by the evidence. See *Leithold* v. *Railway Co.*, 47 Pa. Super. 137; *Conn* v. *Railroad Co.*, 288 Pa. 494, 136 Atl. 779; *Falchetti* v. *Pennsylvania R. R. Co.*, 307 Pa. 203, 160 Atl. 859."

In *Noonan* v. *Pennsylvania R. Co.*, 194 Atl. 212 (Superior Court of Pennsylvania, September 29, 1937), the plaintiff was struck while on the right of way alongside the track. Although the plaintiff was not on a beaten path, the court recognized the *Falchetti* decision in the following words (p. 215):

> "In *Falchetti et ux.* v. *Pennsylvania R. Co.,* 307 Pa. 203, 206, 160 Atl. 859, it was held that even an alleged permissive way parallel with defendant's railway tracks and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this state. See *Conn, et al.,* v. *Pennsylvania Railroad,* 288 Pa. 494, 136 Atl. 779; *Kolich* v. *Monongahela Railway Co.,* 303 Pa. 463, 154 Atl. 705. To approve of appellant's contention that defendant was bound to anticipate the presence of children on its main line tracks would create an unreasonable obligation on defendant and result in a condition whereby the practical operation of its trains would be made impossible. *Tiers* v. *Pennsylvania Railroad Co.,* 292 Pa. 522, 141 Atl. 487; *Koontz et al.* v. *Baltimore & Ohio R. Co.,* 309 Pa. 122, 129, 163 Atl. 212."

Aside from the foregoing cases dealing with permissive paths, it may be noted that the Pennsylvania conception of the standard of care owed by railroads, and of the public interest or public policy involved, was foreshadowed in the case of *Thompson* v. *B. & O. R. Co.,* 218 Pa. 444, 67 Atl. 768 (1907). That was a "turntable case" in which evidence was offered that children were accustomed to go through a fence onto the railroad property. After considering *Railroad Co.* v. *Stout,* 84 U. S. 657, and other cases upholding the "attractive nuisance" doctrine, the court disapproved of the doctrine, declared that the trend was against it, and thereupon repudiated it, holding that the intruders were trespassers rather than licensees and that the only obligation of the railroad was to refrain from wilful or wanton injury. The court observed that a duty of due care in such cases would impose, for the benefit of intruders, an unreasonable restraint upon the beneficial use of land.

Certainly, so far as it lies within the power and vocabulary of the Pennsylvania Supreme Court to establish a Pennsylvania rule of action and conduct for pedestrians and railroads with respect to longitudinal pathways along a right of way in Pennsylvania, that Court has done so in the *Falchetti* case.

POINT III.

The Courts below erred in refusing to recognize the Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings.

The obligation of a railroad toward persons on its right of way in Pennsylvania is not regulated by any federal law or state statute. There is squarely presented, therefore, the question of the extent to which the federal courts are bound to recognize state court decisions.

The Pennsylvania decisions denying permissive rights except upon well-defined crossings, as heretofore noted, were ignored by the District Court (see citations under specification of errors to be urged, *supra,* p. 9). In sustaining the District Court the Circuit Court of Appeals regarded it as unnecessary even to "go into" the question of Pennsylvania law since "the great weight of authority in other states is to the contrary" of the Pennsylvania rule asserted by defendant (pp. 394-5).

The opinion of the Circuit Court of Appeals rests on an assumed doctrine that there is a rigid line of demarcation between questions of local law and questions of general law, that while questions of local law are determinable by the local courts questions of general law are determinable by the federal courts according to their own judgment unaffected by decisions of the local courts, that "the question of the responsibility of a railroad for injuries caused by its servants [including the question of permissive rights on its right of way] is one of general law" (p. 395), and that the federal courts are free to decide the question in accordance with their independent judgment or in accordance with the weight of authority in other states, regardless of the decisions in the particular state involved.

We think this assumed doctrine is unsound in theory, that it is typical of many ill-fated attempts to compress into in-

flexible rules of thumb the broad principles applied by this Court, that it has led to an erroneous and flagrantly unjust conclusion in the present case and that, as urged in the petition for certiorari, the problem is of such outstanding importance and marked by such divergence of opinion among the various Circuit Courts of Appeals as to merit the consideration of this Court.

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.

Nevertheless, it is believed that any attempted formulation of the doctrine actually applied by this Court is bound to be wide of the mark unless it gives due effect to three outstanding factors which this Court has repeatedly taken into account in determining the extent to which the federal courts are bound by state court decisions. This Court has consistently recognized that there is no federal common law applicable to such cases and that the law to be applied is that of the state; it has considered the extent to which the state court decisions have established the asserted rule of state law; and it has considered the extent to which the disputed question of law is general or local in nature and effect. While recognizing the application of state law as absolute, the Court has treated the factors of establishment and of general or local quality as matters of degree. It has refused to recognize any rigid dividing line between established and unestablished law or between general and local law.

In view of the great frequency with which the question has come before this Court, it would seem impracticable to attempt a detailed analysis of the cases; and we have deemed it more appropriate and useful to discuss the expressions

and considerations which appear to us to reveal the broad principles applied by this Court.

If we read the cases aright, the fundamental doctrine is, first, that the federal courts are bound to give due consideration to state decisions in the light of the principle that the law to be applied is that of the state and, second, that the federal courts, while bound to follow state decisions where they have established an asserted rule of state law with sufficient definiteness and finality, may and should apply more severe and critical tests of establishment according as the disputed question of law is more general in nature and effect, less severe and critical tests according as the disputed question of law is more local in nature and effect.

If the foregoing statement is correct, the Circuit Court of Appeals has misconceived the doctrine of this Court and, it may be added, the persistent criticisms of *Swift* v. *Tyson* and succeeding cases have been largely misdirected.

A. THE PENNSYLVANIA DECISIONS DENYING PERMISSIVE RIGHTS ON LONGITUDINAL PATHWAYS AS DISTINGUISHED FROM CROSSINGS SHOULD HAVE RECEIVED DUE CONSIDERATION IN RECOGNITION OF THE ELEMENTARY PRINCIPLE THAT THE LAW TO BE APPLIED IS THE *lex loci delicti.*

It is a thoroughly established principle of conflict of laws that, in tort actions, the *lex loci delicti* governs as to the incidents of negligence such as the standard of care. Since the principle is elementary, we do no more than quote the statement of the rule as given in Restatement, Conflict of Laws, Section 380, page 462:

> "Where by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decision of the law of the place of the actor's conduct, such application of the standard will be made by the forum." (Note the illustration given on p. 463.)

Whatever difficulties there may be in ascertaining the pertinent Pennsylvania law or in fixing the extent to which the federal courts are bound to recognize the pertinent decisions of the Pennsylvania courts, it is settled beyond question that it is the Pennsylvania law which the federal courts, quite as truly as the state courts, are bound to ascertain and apply. There is no such thing as a federal common law applicable in such cases. *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, 583-4; *Smith* v. *Alabama*, 124 U. S. 465, 478-9.[1]

Accordingly, the standard of care owed by the defendant in the present case is that prescribed by the law of Pennsylvania, however that law may be ascertained. In refusing even to "go into" the matter of the Pennsylvania decisions, the Circuit Court of Appeals necessarily rules them out no matter how definite and final they may be in their declaration of the Pennsylvania rule of law. Although each state unquestionably has the power to determine the particular conception of the common law adopted by it and although the common law is acclaimed as being adaptable to changing conditions, the opinion of the Circuit Court of Appeals constitutes an unqualified pronouncement that it is beyond the power of the Pennsylvania courts to determine or evolve the law of Pennsylvania as to permissive rights on railroad rights of way in Pennsylvania. It would seem clear that this is a sweeping repudiation of the principle that the law to be applied is that of the state.

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[1] See also *Carroll County* v. *Smith*, 111 U. S. 556, 563; *McGuire* v. *Sherwin-Williams Co.*, 87 Fed. (2d) 112; *Boston & Maine Rd.* v. *Breslin*, 80 Fed. (2d) 749, cert. den. 297 U. S. 715; *Moore* v. *Backus*, 78 Fed. (2d) 571, cert. den. 296 U. S. 640; *Reed & Barton Corp.* v. *Maas*, 73 Fed. (2d) 359; *Public Service Ry. Co.* v. *Wursthorn*, 278 Fed. 408, cert. den. 259 U. S. 585; *Keystone Wood Co.* v. *Susquehanna Boom Co.*, 240 Fed. 296, cert. den. 243 U. S. 655; *Snare & Triest Co.* v. *Friedman*, 169 Fed. 1, 11, cert. den. 214 U. S. 518.

B. THE PENNSYLVANIA DECISIONS DENYING PERMISSIVE RIGHTS ON LONGITUDINAL PATHWAYS AS DISTINGUISHED FROM CROSSINGS SHOULD HAVE BEEN RECOGNIZED AS CONTROLLING BECAUSE THEY HAD ESTABLISHED THE RULE OF LAW WITH SUFFICIENT DEFINITENESS AND FINALITY TO CONSTITUTE IT A LOCAL RULE OF PROPERTY, ACTION OR CONDUCT, EVEN THOUGH THE QUESTION MIGHT OTHERWISE HAVE BEEN REGARDED AS MAINLY ONE OF GENERAL LAW.

It is obvious that the question of permissive rights on a railroad's right of way in Pennsylvania is in some degree a local matter. Postponing a consideration of the local nature of the question, however, our present contention is that the Pennsylvania decisions establish the pertinent rule with sufficient definiteness and finality to be controlling, even though the question be viewed as general or predominantly general in nature.

We do not question the finality of the holding of this Court in *Swift* v. *Tyson,* 41 U. S. (16 Pet.) 1, that the "laws of the several States" referred to in the Rules of Decision Act do not include state court decisions as such. But whether by virtue of the Act or of comity, it is well settled that such decisions are pertinent and, under certain circumstances, controlling in ascertaining or determining the law of the state.

It would be idle to deny that this Court, in matters of a general nature, has exhibited a marked reluctance to recognige nonconformist state rules as settling the question of state law. But even in cases where an asserted rule of the state courts has been rejected, it has been stated or implied that the asserted rule would govern if sufficiently established. Expressions to this effect occur with such frequency and consistency that they must be recognized, we think, as forming a part of the general doctrine on the subject.

Thus, it is repeatedly stated that decisions are merely evidence of the law. In *Swift* v. *Tyson,* 41 U. S. 1, *supra,* Mr. Justice Story justified the exercise by federal courts of

an independent judgment on a question of "general law" relating to negotiable instruments on the ground that decisions are not the law but merely evidence of the law. This was his basic argument in holding that the "laws of the several States" referred to in the Rules of Decision Act do not include state court decisions as such. In amplifying the statement, Mr. Justice Story noted that state court decisions are "often reexamined, reversed, and qualified" by the state courts themselves (p. 18). This frequently repeated argument would seem to carry the clear implication that, as a matter of comity at least and, we think, by virtue of the Rules of Decision Act as well, the federal courts are bound to recognize an asserted rule of state law where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the asserted rule is established with sufficient definiteness and finality.

In the *Swift* case, the Court considered it doubtful if any doctrine on the disputed question could be "treated as finally established" by the New York courts and "certain" that the highest court had not pronounced "any positive opinion upon it" (pp. 17-18).[1] In the present case, the evidence of the Pennsylvania rule now in question is conclusive.

In further justification of the exercise of an independent judgment by federal courts on a question of general law, this Court observed in the *Swift* case that the federal and state courts have the like function of ascertaining the governing rule by "general reasoning and legal analogies" in accordance with principles and doctrines of general jurisprudence (p. 19); and this statement was preceded by the particular

[1] It is true that this Court, in the *Swift* case, after observing that there was no "finally established" New York rule, proceeded to discuss the problem on the assumption that the contested rule had been "fully settled in New York" (p. 18). If this unnecessary assumption were to be given its full import, the case would be an authority for the proposition that there is a domain of general law in which the state courts may never declare or evolve a state rule binding on the federal courts. It is believed, however, that such a harsh doctrine is belied by other expressions in the opinion and, in any event, has been substantially relaxed in subsequent cases.

observation that the courts of New York, the State there involved, resorted to "the general principles of commercial law" for a solution and did not found their decisions upon any fixed local usage (p. 18). Here again the implication would seem to be that the federal courts would follow the state rule if established with such definiteness and finality that the state courts would no longer resort to the general sources of the common law or to general reasoning and legal analogies, but would regard the question as foreclosed in the state.

The equivalent statement that the federal and state courts, in matters of general law, go to the "same sources" to ascertain the applicable rule has repeatedly been made by this Court in justifying the federal courts in exercising an independent judgment. But we think an analysis of such cases shows the meaning to be that the state courts, upon questions of the sort at issue, *in fact* go to the same sources, not that they are *bound* to go to the same sources. When the question of state law is sufficiently open so that it may fairly be said that the state courts themselves would regard it as one of general law to be solved by resorting to these common sources, then the federal courts are manifestly justified in making an independent investigation and determination. But this Court has repeatedly indicated that when the question of state law has been decided with such definiteness and finality as to have established a rule of property, action or conduct in the state, that is, with such definiteness and finality that it can no longer fairly be said that the state courts would resort to the common sources and principles of jurisprudence, then the question is *ipso facto* removed from the domain of general law and the federal courts will thereupon recognize the established state rule.

This Court has so indicated in many cases where the conclusion was that there was no state rule so firmly established as to exclude resort to general principles.

Thus, in *Carpenter* v. *Providence Washington Ins. Co.*, 41 U. S. (16 Pet.) 495, involving the construction of a fire in-

surance policy, the Court, by Mr. Justice Story, rejected the asserted state rule partly because the state decisions were doubtful as to their bearing and results (pp. 511-2).

In *Lane* v. *Vick,* 44 U. S. (3 How.) 464, the Court refused to follow a Mississippi case on the construction of a will because the case involved the question only incidentally and did not establish a rule of property, but specifically stated that it would follow state decisions on the question if they had established such a rule (p. 476).

In *Chicago City* v. *Robbins,* 67 U. S. (2 Black) 418, particularly relied upon by respondent in the present case, the question was whether the negligence of an independent contractor in failing to guard or cover an excavation adjoining a city sidewalk could be imputed to the owner for whom the work was being done. This Court considered an Illinois case, "similar in many of its facts," in which the Illinois Supreme Court held that the owner was not responsible since "the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work." This Court disagreed with this criterion and deemed it to be the owner's duty to see that the excavation was safely guarded. To the argument that the federal courts should follow the rule apparently applied by the Illinois court in the single decision cited, this Court said (pp. 428-9):

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

If any inference may be drawn from this language, applicable to the present case, it is that this Court would adopt the Pennsylvania decisions as fully settling the Pennsylvania rule of permissive rights on rights of way in Pennsylvania.

In *Yates* v. *Milwaukee,* 77 U. S. (10 Wall.) 497, where the question of dedication to public use under Wisconsin law turned on common law principles, this Court indicated that state decisions would govern if they established a rule of property, but in refusing to be bound by a particular Wisconsin case, said that even the Wisconsin courts would decide each such case on its special facts, and that the particular case relied on laid down no general governing principle of law. In the present case, the Pennsylvania Supreme Court has unmistakably laid down and established a general governing principle of law.

In *New York Central Rd. Co.* v. *Lockwood,* 84 U. S. (17 Wall.) 357, involving the validity of a general contract exempting the railroad from negligence with respect to drovers on stock trains, this Court rejected the asserted New York rule and, on what it regarded as "sound principles," held the contract void as against public policy, but justified its independent view in part upon the fact that the New York courts had expressed "such diverse views" and had "so recently and with such slight preponderancy of judicial suffrage" reached a contrary conclusion, and then only on special contracts as distinguished from a "contract general in its terms" (pp. 363, 367-8).

In *Burgess* v. *Seligman,* 107 U. S. 20, involving the question whether the defendants were stockholders rather than pledgees, so as to be liable to the creditors of a Missouri corporation, this Court deemed itself to be free to reject an asserted rule of Missouri law inasmuch as the Missouri courts had not established any rule of property or action on the subject when the transactions in suit occurred and when the rights accrued (although subsequent Missouri decisions did rule on the question). At the same time the Court indicated that it would follow established rules of property and action (p. 33):

> "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are estab-

> lished which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence."

While the final clause of this quotation, taken by itself, might seem to declare that the federal courts are absolutely independent of state court decisions in certain fields of the law, it is to be noted that the clause is limited by the further statement, occcuring in the same paragraph, that "it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication" (p. 34). In the present case, unlike the *Burgess* case, the state courts had already foreclosed the pertinent question when the cause of action arose.

In *Baltimore & Ohio Rd. Co.* v. *Baugh,* 149 U. S. 368, in justifying an independent judgment on a negligence question, arising in Ohio, as one of general law, this Court deemed it "significant" that the Ohio Supreme Court itself regarded the question "as one of common or general law," and it was noted that the Ohio court was "not wholly satisfied" with its asserted rule or doctrine (pp. 376-7). While the case contains very comprehensive language as to the independence of the federal courts in matters of general law, the Court repeated the language of the *Burgess* case heretofore quoted including the declaration of a duty to exercise an independent judgment "in cases not foreclosed by previous adjudication" (pp. 372-3). As hereafter pointed out, the question at issue was not local in any such sense or degree as that at issue in the present case. The immediate point, however, is that the language referred to recognizes that a

question may be foreclosed by previous state adjudications, even in a matter of general law.

In *Barber* v. *Pittsburgh etc. Ry. Co.,* 166 U. S. 83, the Court considered the extent to which state decisions evidenced the law of the state. The question certified to this Court was whether a particular Pennsylvania decision concluded the federal courts on the construction of a devise of Pennsylvania land. The Court stated that a single decision on the construction of a particular devise "is not conclusive evidence of the law of the State" (p. 100) and, upon a further examination of the Pennsylvania cases, concluded that they showed no settled rule on the question (pp. 103-4). It was conceded that a settled rule would control (p. 99). Manifestly, the inference is that state decisions, although not *per se* constituting the law of the state, may be such as to conclusively evidence that law.

In *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, a tort action involving the question whether the seller of unmined coal in West Virginia was entitled to have the surface supported, this Court, quoting at length from the *Burgess* decision, deemed itself to be free to reject an asserted rule of West Virginia law inasmuch as the West Virginia courts had not established any rule of property or action on the subject when the transactions in suit occurred and when the rights accrued (although subsequent West Virginia decisions did rule on the question). In thus following the *Burgess* case, the Court reasserted that where the law of the state has not been so settled by state decisions as to constitute "rules of property and action in the State", it is "the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence". As in the *Burgess* case, this final clause is qualified by the reassertion of the duty of the federal courts to "exercise an independent judgment in cases involving principles not settled by previous adjudications" (p. 360). While rejecting the asserted

West Virginia rule, it was specifically recognized that "a wholly different question would have been presented" if, before the rights of the parties were fixed, the asserted rule "had become a settled rule of law in West Virginia, as manifested by decisions of its highest court" (p. 361).

In *Black and White Taxicab Co.* v. *Brown and Yellow Taxicab Co.,* 276 U. S. 518, there was in question the validity of a contract whereby a railroad gave to the plaintiff taxicab company the exclusive privilege of going upon railroad property, at a station in Kentucky, for the purpose of soliciting patronage and parking its cabs. In refusing to follow two Kentucky decisions which held similar contracts void as tending to monopoly and contrary to the public interest, this Court used language which we quote as typical of the strongest expressions which may be cited against the doctrine for which we are contending. In holding that the Rules of Decision Act did not apply, the Court said (pp. 529-30):

> "* * * There is no question concerning title to land. No provision of state statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. * * * The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment."

But among the "many decisions" cited by the Court were substantially all of the cases above considered, including the

Burgess, Baltimore & Ohio and *Kuhn* cases. The inference would seem to be warranted that the above language was not intended to overrule the qualification that the asserted independence applies to "cases involving principles not settled by previous adjudications"; and it may be noted that Mr. Justice Holmes (dissenting opinion, concurred in by Mr. Justice Brandeis and Mr. Justice Stone) did not regard the prevailing opinion as intended to deny the recognized principle "that a settled line of state decisions was conclusive to establish a rule of property or the public policy of the State. *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 100" (p. 536). Of the two Kentucky cases to which this Court was asked to yield, the first considered the problem as one of first impression and concluded that the contract tended to monopoly and was contrary to the public interest; the second, after considering the conflict of views in other jurisdictions, saw "no reason for changing the rule" of the earlier Kentucky case; and each case examined in detail the particular facts tending to create a monopoly and to defeat the public interest. In the *Taxicab* case this Court observed that no inconvenience to the public was shown in the case before it and that it would be unwarranted to "assume" that the contract was "contrary to public interest" (p. 529). Under such circumstances it might reasonably be said that the question at issue had not been foreclosed or settled by the previous Kentucky adjudications.

We think that a case is properly to be regarded as depending "upon the doctrines of commercial law and general jurisprudence" 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. Obviously, a case is not regarded as depending "upon the doctrines of commercial law and general jurisprudence" when the applicable state rule is established by state statute, even though the statute deals with a

matter which but for the statute would unquestionably come within the scope of commercial law and general jurisprudence.[1] It would seem equally obvious that a case is not to be regarded as depending "upon the doctrines of commercial law and general jurisprudence" when there is an applicable state rule of property, action or conduct, *definitely and finally established as such* by decisions of the highest state court, even though the decisions deal with a matter which but for such established rule would unquestionably come within the scope of commercial law and general jurisprudence.

In attempting to frame and apply a comprehensive rule based on the distinction between "general law" and "local law", a number of federal courts including the Circuit Court of Appeals in the present case have failed to note that "local law", if it is to be the criterion in any such rule, must be construed as including not only state rules of law upon matters inherently local in nature or subject matter but also state rules of law which are local only in the sense that they are peculiarly established in the state, whether by statute or by decisions. Thus, state statutes and their construction by state courts are included among "state laws strictly local", regardless of whether the subject matter is general or local (Mr. Justice Story in *Swift* v. *Tyson,* 16 Pet. 1, 18), and state court decisions have been viewed as transforming into local law what otherwise would be called general law. Thus, in the frequently cited case of *Snare & Triest Co.* v. *Friedman,* 169 Fed. 1 (cert. den. 214 U. S. 518), involving a general question of the law of negligence, the Court refused to follow a particular state decision because

[1] And it is settled by the more recent cases in this Court that this is true even though the state courts characterize the statute as declaratory of the common law (as in statutes adopting the uniform negotiable instruments law) while adopting a construction at variance with the federal court's conception of the pertinent doctrines of commercial law and general jurisprudence. *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487; *Marine Bank* v. *Kalt-Zimmers Co.,* 293 U. S. 357.

it was not regarded as establishing a rule of conduct on the subject, but said (p. 12):

> "And as to what the common law of a state may be, the best evidence is generally found in the settled line of decisions of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practiced in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the 'common law' prevails. On these questions, the courts of the United States do not hold themselves bound by the decisions of the courts of the state, unless, perchance, such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that state."

However strongly this Court has felt the desirability of uniformity in matters of a general nature and however reluctant it has been to recognize non-conformist state rules as settling the question of state law, it has nevertheless recognized such rules as controlling when established, by state court decisions, with sufficient definiteness and finality to constitute rules of property, action or conduct.

In *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, the asserted Massachusetts rule was that a plaintiff could not recover for a railroad's negligence when the injury occurred while the plaintiff was illegally travelling in Massachusetts on Sunday. Although incidentally involving a state statute against Sunday travel, the question was one of common law, as noted by Judge Taft in *Byrne* v. *Kansas City, Ft. S. & M. Rd. Co.*, 61 Fed. 605. After discussing the general question at length and pointing out that "there is no common law of the United States", this Court said (pp. 583-4):

> "It is in regard to decisions made by the state courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises."

The conclusion was that the Massachusetts decisions had adequately established the asserted rule to render it controlling.

It would seem to us that the many expressions of this Court above referred to can be harmonized as part of a consistent doctrine only by recognizing that matters which otherwise would be regarded as dependent on principles of "general law" or of "commercial law and general jurisprudence" are not so regarded when, in a particular state, the pertinent rule has been so definitely and finally established as to "settle" or "foreclose" the question and constitute a rule of property, action or conduct in the state. If this conclusion is sound, then the Pennsylvania decisions have manifestly established the Pennsylvania rule of permissive rights on a railroad's right of way with sufficient definiteness and finality to constitute it a Pennsylvania rule of conduct, binding on the federal courts.

C. The Pennsylvania Decisions Denying Permissive Rights on Longitudinal Pathways as Distinguished From Crossings Declare a Pennsylvania Rule Sufficiently Local in Nature to be Controlling, Even Though More Definiteness and Finality Might Be Required in a Rule of a More General Nature.

As heretofore contended, we think the cited Pennsylvania decisions have established the Pennsylvania rule as to permissive rights and rights of way with such definiteness and finality that the rule would control even if it could be described as general in nature.

It is manifest, however, that the Pennsylvania rule is, in a large measure, local in its nature. It rests expressly on a local policy relating to the efficient operation of railroads, a policy which presumably was dictated by local conditions.

This Court has repeatedly indicated that the nature of a contested rule, whether general or local, is a question of

degree, and that the requirements as to definiteness and finality of establishment are less exacting accordingly as the rule is more local in nature.

Thus, on the construction of a local statute relating to local matters, the federal courts are disposed to follow even local administrative interpretations when local decisions are lacking (*Fox* v. *Standard Oil Co.,* 294 U. S. 87), or they await a state court decision when practicable (*Thompson* v. *Consolidated Gas Utilities Corp.,* 300 U. S. 55, 74).

As to state rules of property, which constitute a classic example of "local law", it is of course true that there must be some degree of establishment to render them controlling (*Gibson* v. *Lyon,* 115 U. S. 439; *Lane* v. *Vick,* 3 How. 464); but innumerable cases in this Court demonstrate that the requirements as to establishment are much less exacting than in matters of a more general nature or concern. Thus, the federal courts may yield to a pertinent state decision even though doubtful of the establishment of the rule involved (*Hulburd* v. *Commissioner,* 296 U. S. 300); and, if the rule is definitely established, will not concern themselves with the logic of its derivation even when expressly contrary to holdings of the Supreme Court (*United States* v. *Robbins,* 269 U. S. 315).

That the local nature of a contested rule is a question of degree was clearly indicated in the recent case of *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335. On the construction of an insurance policy, determinable by the law of Virginia, this Court yielded to a Virginia case with the comment (pp. 339-340):

> "At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance * * *. With choice so 'balanced with doubt', we accept as our guide the law declared by the state where the contract had its being."

A question otherwise general in nature may be treated as local when affected by a local policy. Mr. Justice Story so intimated in *Carpenter* v. *Providence Washington Ins. Co.*, 41 U. S. (16 Pet.) 495. In treating the construction of a fire insurance policy as a matter of general law, he noted that the contract was "by no means local in its character, or regulated by any local policy or customs" (pp. 511-2). And in *Northwestern Life Ins. Co.* v. *Johnson*, 254 U. S. 96, involving the validity of an incontestability clause where the insured committed suicide, this Court specifically stated that "The public policy with regard to such contracts is a matter for the States to decide" (p. 100).

In *Hartford Insurance Co.* v. *Chicago etc. Ry. Co.*, 175 U. S. 91, there was involved the question of the validity of a contract exempting the defendant railroad from liability for fire with respect to a warehouse on its property in Iowa. The plaintiff insurance companies (subrogated to the rights of the lessee of the warehouse) asserted that the exemption clause was void as against public policy, relying in particular on an Iowa statute providing that no contract should exempt any railway transportation company "from liability of a common carrier" which would exist in the absence of such contract (p. 104). The highest court of Iowa, in a similar case, had held that the public policy expressed in the statute applied only to cases where the railroad entered into the contract as a common carrier, that there was a "paramount public policy" favoring freedom of contract, and that this paramount policy governed since there was no public interest in an exemption clause relating to leased property on the railroad's right of way (pp. 105-7). This Court stated the general rule that questions of public policy, when not controlled by general principles "of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court" (p. 100); the Court then considered Iowa statutes and decisions deemed illuminating upon the

question of the public policy of the state with respect to the liability of a railroad in reference to its right of way and adjoining lands; and the Court concluded that the Iowa decision above referred to, "being upon a question of statutory and local law, was rightly followed by the Circuit Court" (p. 108). In weighing the significance of this concluding statement, it should be noted that the Iowa decision held that the Iowa statute invoked against the railroad did not apply, and hence the question turned on Iowa public policy independent of statute.

In *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, this Court indicated that it would similarly yield to State court decisions on the question of what constituted "public uses" within the state. The railroad sought to condemn land in Virginia belonging to Hairston in order to construct a spur track to the factory of a single large shipper. This Court agreed with Hairston's contention that a condemnation for private uses would contravene the Fourteenth Amendment, but accepted the holding of the highest court of Virginia that the condemnation in question was for a public use. Referring to decisions in various states, the Court said (pp. 606-7):

> "But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. * * * The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. * * * The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justi-

> fied, and acted upon in [cited cases in the United States Supreme Court] * * *. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people."

The Pennsylvania rule as to permissive rights on a railroad's right of way is specifically based on considerations of public policy and is closely related to the question of public uses. The Pennsylvania rule clearly lacks the features of a general nature which were emphasized in the only case in this Court cited by the Circuit Court of Appeals, namely, *Baltimore & Ohio Rd. Co.* v. *Baugh,* 149 U. S. 368, *supra.* On a question of assumption of risk under the fellow servant doctrine, raised by an injury to a fireman caused by the engineer's negligence while the train was in Ohio, this Court noted that the Ohio decisions invoked by the plaintiff decided the question "as one of common or general law" and not "upon anything of a local nature" (pp. 376-7). In reaching a contrary conclusion on the question, this Court said (p. 378):

> "* * * it is a question in which the nation as a whole is interested. It enters into the commerce of the country. * * * The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every state line?"

Such cases as *Myrick* v. *Michigan Central R. R. Co.,* 107 U. S. 102, *Beutler* v. *Grand Trunk Ry.,* 224 U. S. 85, and *Central Vermont Ry.* v. *White,* 238 U. S. 507, heretofore cited by respondent, are similarly distinguishable from the present case.

In this connection may be noted the case of *Boston & Maine Rd.* v. *Breslin,* 80 F. (2d) 749 (C. C. A. 1, 1935), cert. den. 297 U. S. 715, one of the cases cited in our application for certiorari as showing that the decision of the Circuit Court of Appeals in the present case is in conflict with the decisions of other Circuit Courts of Appeals on essentially the same matter. In the *Breslin* case, the court followed the Massachusetts rule rejecting the attractive nuisance doctrine in turntable cases, and held the railroad only to the obligation to refrain from wilful or wanton injury to a child as a trespasser. The court distinguished the *Baltimore & Ohio* case and similar cases as resting on very different considerations.

The present question relating to longitudinal pathways is much more closely analogous to that raised in *Detroit* v. *Osborne,* 135 U. S. 492 (distinguished in the *Baltimore & Ohio* case at pp. 373-4). On the question of the liability of a municipal corporation for negligence in failing to keep a sidewalk in repair, this Court said, in recognizing the Michigan decisions as controlling (p. 498):

> "Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. * * * There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan * * * walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens."

We think it is well within the boundary lines laid down by this Court to conclude that the Pennsylvania rule denying permissive rights except upon well-defined crossings is marked by two outstanding and decisive characteristics.

In the first place, the rule deals with a matter which is predominantly local in nature. It applies solely to railroad rights of way in Pennsylvania. It is based on a public pol-

icy derived from local conditions affecting the efficient operation of railroads in the public interest. In this respect it differs substantially from the asserted state rule rejected in the *Baltimore & Ohio Railroad* case. The rule there involved, namely, the fellow-servant rule as applied between engineer and fireman on a moving train, had no practical relation to local conditions in the state through which the train happened to be passing. Similarly, in the *Taxicab* case, which we think is the strongest case citable on the plaintiff's behalf, there was no suggestion that the propriety of granting the exclusive privilege of soliciting patronage on the railroad's property was affected by any local conditions in Kentucky. So, the decision in *Chicago* v. *Robbins* (*supra,* p. 30) turned on the general question whether the omission to guard an excavation was an incident to the construction for which the defendant had contracted, a question which manifestly had no relation to local conditions in the state. Unlike the asserted rules in those cases, the Pennsylvania rule here invoked is expressly based on the holding that, consistently with public interest in Pennsylvania whatever may be the case in other states, the railroads cannot be required to anticipate the presence of intruders on the regular right of way devoted to the operation of trains, except at well-defined crossings. Is it conceivable that the federal courts may deny to the Pennsylvania courts the power effectively to establish such a rule of action and conduct within the borders of the state?

In the second place, the Pennsylvania rule here invoked, in view of its substantially local nature, is established with sufficient definiteness and finality to be controlling. It may be the position of this Court that matters of a predominantly general nature are not foreclosed against the independent judgment of the federal courts unless the state decisions relate strictly to titles to real estate or unless they merely recognize fixed customs of a more or less "ancient" nature, although, as heretofore argued, we do not think the Court

has committed itself to any such extreme doctrine. But, however that may be, the cases above cited demonstrate beyond question that this Court requires no such degree of establishment in the case of state rules of law on matters of a largely local nature. The Pennsylvania cases have unmistakably and definitely established the Pennsylvania rule that permissive rights on the main right of way are confined to well-defined crossings. Even if the *Falchetti* case were the only case in point, which it is not, it is so definite and unequivocal in its declaration of the governing principle as to be controlling on a matter of such a local nature. Even a single decision, if "clear and unequivocal", and constituting a "definitive holding", should be recognized as controlling. *Hawks* v. *Hamill,* 288 U. S. 52.

However strongly the argument for "uniformity" may favor the independence of the federal courts in matters of such a general nature as that involved in the *Baltimore & Ohio* case, it operates with at least equal force in favor of adherence to state decisions in matters of such a local nature as those involved in the *Detroit* case and the present case. Since the Pennsylvania courts are under no obligation to yield to the federal courts, and presumably would consider that they could not do so under the doctrine of *stare decisis,* the prospect under the present decision of the Circuit Court of Appeals is that railroads in Pennsylvania will owe—or rather will have owed—one duty to residents who sue in the State courts and another to those who, by establishing a residence without the state or otherwise, are able to capitalize on a diversity of citizenship.[1] The Circuit Court of Appeals is not here exercising the legitimate function of preventing state favoritism as between citizens of different states; it is itself creating a discrimination.

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[1] The present plaintiff, a citizen and resident of Pennsylvania, could have sued the defendant in the Pennsylvania state courts (pp. 2-3, 5; Purdon's Penn. Statutes, Title 67, §§491-2).

POINT IV.

The Courts below erred in refusing to hold plaintiff contributorily negligent as matter of law; and, in particular, the Circuit Court of Appeals erred in applying an unsound test as to whether the question was for the jury.

As shown in the statement of facts in the Petition, *supra,* the plaintiff, according to his own testimony, was deliberately and unnecessarily walking alongside the track in complete darkness with his right side within possibly a foot of the moving train when he was struck by some projection which, on the trial if not in his sworn bill of discovery, he thought looked like a car door.

The Circuit Court of Appeals regarded plaintiff's conduct as "imprudent" but nevertheless regarded the question as one for the jury for the stated reason that the allowance of recoveries in other cases, deemed to be similar, indicated that fairminded men might differ from them; and this conclution purported to be pursuant to the rule of *Richmond & Danville Rd. Co.* v. *Powers,* 149 U. S. 43, 45, and *Texas & Pac. Ry. Co.* v. *Harvey,* 228 U. S. 319.

The familiar rule, as stated in the latter case, is as follows (p. 324):

> "Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law."

It would seem obvious that the Circuit Court of Appeals did not apply this rule. It held the question to be for the jury, not because fairminded men might differ as to the existence of negligence, but because other courts (in cases

deemed to be similar) have thought that fairminded men might differ as to the existence of negligence.

We think a reading of the opinion renders it clear that this criticism is more than a verbal one. The apparent intent and the inevitable effect of the rule applied by the Circuit Court of Appeals is that the cases which are most extreme in holding that fairminded men might differ, *ipso facto* establish the criterion for all other courts. If the court is to yield its own judgment to that of other courts, there is no more reason for yielding to the courts which have been most extreme in holding negligence to be a question of fact than there would be for yielding to the courts which have been most extreme in holding negligence to be a question of law. If there is any blind presumption in the matter, it is in favor of the courts that have taken a position between the two extremes.

The vice of the rule applied by the Circuit Court of Appeals is indicated by the cases cited as involving "closely similar circumstances". In none of them was there any such deliberate flirting with danger as that exhibited by the plaintiff in this case. In *Schultz* v. *Erie R. Co.*, 46 F. (2d) 285, the plaintiff was five feet from the track at a public crossing. In *Pruitt* v. *Southern Ry. Co.*, 167 N. C. 246, 83 S. E. 350, the plaintiff was four to five feet from the track at a public crossing. In *Missouri K. & T. Ry. Co.* v. *Scarborough,* 29 Tex. Civ. App. 194, 68 S. W. 196, a child was on a private loading skidway, about four feet from the edge which, in turn, was six inches to two feet from the cars. In *St. Louis, S. W. Ry. Co.* v. *Wilcox,* 51 Tex. Civ. App. 3, 121 S. W. 588, the plaintiff was on a station platform, five feet from the train. In *Texas & P. Ry. Co.* v. *Greene,* 291 S. W. 929, affirmed by Tex. Com. App. 299 S. W. 639, the plaintiff was at a street grade crossing when the sudden stopping of the train caused a door to swing open and hit him. In *Chesapeake & O. Ry. Co.* v. *Davis,* 22 Ky. Law Rep. 748, 58 S. W. 698, the plaintiff was two and a half to three feet from the train at a public crossing in a populous place. In *Sullivan*

v. *Vicksburg S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586, the plaintiff was in the middle of a walk constructed by the railroad for passengers. In *Munroe* v. *Pennsylvania R. Co.*, 85 N. J. L. 688, 90 A. 254, the plaintiff was three feet from the edge of a station platform. In none of the cases was it dark.

The single case cited by the Circuit Court of Appeals in which the plaintiff was found to be contributorily negligent as matter of law was a case decided by the same Court, namely *Delaware & H. R. Co.* v. *Wilkins*, 153 F. 845. The case was distinguished as inapposite because the plaintiff was there struck by a fixed structural part of a train whereas the jury was permitted to find that the present plaintiff was struck by a negligently permitted projection. Of course, the existence or non-existence of negligence on the railroad's part does not determine the issue as to the plaintiff's contributory negligence.

The rule stated by this Court in the case above cited is too well settled to justify amplification. It has been recently reiterated in *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98. We think it is clear that the Circuit Court of Appeals has distorted the rule in application as well as in statement. If this Court should sanction the reasoning of the Circuit Court of Appeals and accept its substantial modification of the correct rule, it would thereby lend its aid to the crystallization of a new rule to the effect that the question of contributory negligence is for the jury unless the injured person has propelled himself against a structural part of the train.

It is respectfully urged that the cases cited by the Circuit Court of Appeals, in conjunction with the rule applied by the Court in disregard of its own judgment, show beyond question that the defendant has been denied the benefit of a proper judicial determination upon the question of plaintiff's contributory negligence. It would seem to us to be of general importance that the novel test applied by the Circuit Court of Appeals with respect to contributory negligence should not be permitted to stand.

CONCLUSION.

It is urged on behalf of the petitioning defendant: first, that the plaintiff was a trespasser under the applicable Pennsylvania law, and is barred from recovery since there was no showing of wilful or wanton negligence on the defendant's part; second, that even if plaintiff's bare arrival at the diagonal crosspath could be regarded as imposing upon the defendant an obligation of due care toward the plaintiff as a licensee, the asserted arrival involves a disputed question of fact which, under the applicable Pennsylvania law, should have been submitted to the jury with an instruction to bring in a verdict for the defendant in the event of a finding that the plaintiff had not arrived at the diagonal crosspath; and, third, that the plaintiff, upon his own testimony, was guilty of contributory negligence as a matter of law.

Should the Court reach either the first or third of these conclusions, the judgment below should be reversed and final judgment directed in favor of the defendant. Should the Court reach only the second of the above conclusions, the judgment below should be reversed and a new trial ordered.

Respectfully submitted,

WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.