INDEX.

Table of Cases Cited.

PAGE

Table of Statutes Cited.

Table of Other Authorities Cited.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1937.

No. .....

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

v.

HARRY J. TOMPKINS.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Erie Railroad Company petitions for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit rendered June 14, 1937 in Harry J. Tompkins, plaintiff-appellee, against Erie Railroad Company (a New York corporation), defendant-appellant (pp. 501-2).

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 while walking on defendant's right of way at Hughestown, Pennsylvania, on July 27, 1934 (fols. 7-24). The jury brought in a verdict for $30,000 damages (fols. 1252-3), upon which the District Court rendered a judgment for the plaintiff, dated November 16, 1936 in the sum of $30,260 (fols. 1429-1433).

Upon appeal by this petitioner (fols. 1438-1477), the Circuit Court of Appeals, by the decision above mentioned, affirmed the judgment of the District Court. The opinion of affirmance may be found at pages 496-501 of the record, and is reported in 90 Fed. (2nd) at page 603.

Statement of the Case.

According to the plaintiff's testimony he was struck by a projection from the defendant's train while he was walking at night on a wholly unilluminated pathway alongside defendant's track in Hughestown, Pennsylvania, and was thrown under the wheels, sustaining injuries resulting in the amputation of his right arm.

It is believed that the courts below committed two errors of such a nature as to merit a review by this Court. First, the courts below refused to follow the Pennsylvania law which repudiates the doctrine of permissive pathways along a railroad's right of way (as distinguished from permissive crossings) and accordingly imposes no obligation upon the railroad in such cases except the obligation to refrain from wilful or wanton injury. Second, the courts below refused to hold the plaintiff guilty of contributory negligence as a matter of law and, in that connection, applied a prejudicially erroneous test to determine whether the question was for the jury.

The accident occurred on the defendant's right of way at a point some distance northeast of the Rock Street crossing, a public grade crossing in Hughestown, Pennsylvania. Looking northeasterly from the Rock Street crossing, the longitudinal pathway on which the plaintiff was walking extends along the left side of the track, just outside the ties, to an intersection with a diagonal pathway which leads westerly into Hughes Street (a stub end street running westerly from the left or westerly boundary line of defendant's right of way). The diagonal pathway also extends to the right or easterly across the track. The distance from the Rock Street

grade crossing to the diagonal cross-path is about 115 feet.[1]

On the night of the accident, after visiting his sick mother-in-law until about 12:30 A. M., the plaintiff, according to his testimony, arrived at the Rock Street grade crossing in an automobile with two other men at about 2:30 A. M. At this point he left the automobile, intending to walk along the longitudinal pathway to its intersection with the diagonal pathway and then turn left (away from the track) on the diagonal pathway in order to reach Hughes Street, on which he lived (fols. 100-1, 132-5, 138-140, 178, 230-5).

After starting out 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 (fols. 194-201, 249, 140-1, 190-1), thus contradicting his complaint which alleged there was no signal and that he was unaware of the approach of the train (fols. 14-15).

Except for the momentary light from the headlight, which vanished after the engine passed him, the plaintiff conceded that the pathway was totally unilluminated and that it was a very dark night (fols. 178-9, 543-4; and see plaintiff's bill of discovery, fols. 40, 42, 48).

This longitudinal pathway on which the plaintiff was walking was about two feet wide (fols. 108, 180, 597-9). While plaintiff's witnesses differed somewhat in describing the proximity of the walk to the end of the ties,[2] the variation in esti-

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[1] See fols. 100-131, 348-9, 154, 238-9. The area is photographed looking northeasterly (Pl. Ex. 2, p. 423; Pl. Ex. 6, p. 431; Def. Exs. A, B, and D taken from a little distance, pp. 435, 437, 450-461; Def. Ex. C taken closer, pp. 439, 441) and looking southwesterly (Pl. Ex. 3, p. 425; Pl. Ex. 5, p. 429). The pathway is on the same side of the track as the striped crossing sign at the Rock Street grade crossing. While deemed immaterial, the longitudinal pathway extends along the track on either side of Rock Street as shown by the above exhibits. The area is shown by a blueprint (Pl. Ex. 1, p. 421).

[2] Plaintiff stated the distance as about two feet (fols. 109-112, 180) while others placed the pathway right up against the ties (fols. 320-2, 334-8, 403, 417-8, 443-9, 473-4, 508, 589-598).

mates is 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 (fols. 775-791, 512-3, 546-7). Plaintiff conceded he knew that the train extended beyond the ties (fols. 181-4), and conceded further that his right side was possibly within a foot of the side of the train (fols. 185-8). To avoid being hit, plaintiff knew that he had to walk on the far side of the two-foot path (fols. 178, 340-4, 373, 379, 547-551). 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" (fol. 82). The plaintiff's long familiarity with the pathway and its surroundings was conceded (fols. 103, 156-7, 165, 176). The train was moving at a rate of 8 to 10 miles an hour according to defendant's witnesses (fols. 1027, 1117-9, 1155-9, 1184, 1188, 1199), about 30 to 35 miles an hour according to plaintiff (fols. 187-191).

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 (fols. 131, 234-242). In the second place, having chosen to use the pathway along the track, he could readily have stepped aside to a position of safety (fols. 168-178, 105-6, 109, 153-4, 380-1, 507-8, 511; Pltf.'s Exs. 2, 3, 5, 6, at pp. 423, 425, 429, 431; Deft.'s Exs. A to D at pp. 434-461; and see Circuit Court's statement that any contrary contention was "patently absurd", p. 499).

The plaintiff testified that, after the engine had passed him and he was continuing on the pathway with no light at all (fols. 178-9) he was hit by "a black object that looked like a door to me" and had the dimensions of a door (fols. 141, 207, 254-260). 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" (fols. 42, 48-50). This bill of discovery version, if reaffirmed on the trial, would have barred a recovery (*McCarthy* v. *New York New Haven & Hartford R. R. 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 verified bill of discovery was false (fols. 210-8; and see fols. 189, 194-201, 210-4, 225, 243, 248-253).

Two other factual matters remain to be noted in connection with the applicability of the Pennsylvania law which, as above stated, repudiates the doctrine of permissive longitudinal pathways, as distinguished from permissive crossings, and renders the railroad liable only for wilful or wanton injury.

First, 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 (fols. 141, 256-260). There was 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 it occurred (fols. 1166-8, 1185, 1189, 1200). 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 Pennsylvania 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.

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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.)

Second, in his briefs below, the plaintiff made a belated effort to escape the Pennsylvania law by picturing the accident as a crossing accident rather than a longitudinal pathway accident. The contention is that the plaintiff, in walking along the longitudinal pathway, had arrived precisely at the intersection of the longitudinal pathway with the diagonal crossway and hence that defendant, even under Pennsylvania law, was under the duty of due care applicable to persons on permissive crossings. Apart from this asserted arival at the point of intersection, there is no pretense that the plaintiff used the pathway crossing the tracks or even that he intended to use it except after turning away from the longitudinal pathway and from the tracks in order to reach Hughes Street. But, in any case, the asserted arrival at the diagonal pathway was disputed, the jury could have found that plaintiff did not arrive there, and the charge to the jury made no discrimination in this regard (fols. 1219-1250) nor did the opinion of the Circuit Court of Appeals make any such discrimination. Further considerations which are believed to dispose of any contention that this was a crossing accident are set forth in the footnote.[1]

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[1] Plaintiff testified that he continued on the longitudinal pathway after he heard the whistle and saw the headlight, 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 (fols. 140-1, 274-6). 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 (fol. 279), but that he "had not started turning into" the diagonal path (fol. 302). Plaintiff's witnesses Colwell and McHale testified that they found the plaintiff lying six to ten feet short of the diagonal path (fols. 331-2, 429-430), 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 (fols. 432-4).

Further, it may be noted that the complaint described the accident as occurring exclusively on the longitudinal pathway (fols. 12-14); that plaintiff's verified bill of discovery described the accident as occurring on the "parallel" pathway (fol. 41); that plaintiff's bill of particulars

First Question Presented.

With respect to the standard of care owed by the defendant railroad to the plaintiff, the trial court refused to apply the established Pennsylvania law (as laid down in *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, and other cases cited in the brief *infra* pp. 16-17) to the effect that the doctrine of permissive pathways along a railroad's right of way (as distinguished from permissive crossings) is not recognized in Pennsylvania and that, in consequence, the only obligation of the railroad is to refrain from wilful or wanton negligence.[1]

On the contrary, the trial court, in direct contravention of the Pennsylvania law, charged that a permissive longitudinal pathway could be found by the jury and that the defendant, in that event, owed a duty of reasonable care to the plaintiff as a licensee (citation to the charge, *supra*).

The Circuit Court of Appeals upheld the District Court in this respect, expressly stating that it was not necessary even to "go into" the question of Pennsylvania law since the mat-

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claimed that the accident occurred on the longitudinal pathway "about 60 feet" from the Rock Street crossing (fols. 81-82) which would be some 55 feet short of the diagonal pathway (see p. 3, footnote 1, *supra*) and that the defendant's negligence was in respect of the longitudinal pathway (fol. 82). Despite plaintiff's testimony that he was "on the verge" of turning into the diagonal pathway, the accident is properly to be characterized as a longitudinal pathway accident rather than a crossing accident inasmuch as the plaintiff was concededly walking on the longitudinal pathway, some distance short of the diagonal crossway, as the train approached and as the engine passed him. Furthermore, even if the diagonal pathway were a material factor in the case, it is to be noted that it was a winding path, crossing the track at a considerable angle, continuing diagonally across a field and over a hill (fols. 103, 113, 121-130, 154-6, 270, 323-5, 349-354, 403-4, 406, 435-6, 558-9, 568; Pl. Ex. 1, p. 421); and thus even this path was of the general type as to which the Pennsylvania law denies a permissive way (see Pennsylvania cases in brief, *infra*, pp. 16-17).

[1] Defendant's objection, folios 123-4; defendant's motions, folios 638-640, 1201, 1253-4, 1426; defendant's request No. 1, fols. 1213, 1243-4; court's charge re license and trespass, fols. 1227, 1232-5; defendant's exception thereto, fols. 1249-1250; assignment of errors Nos. 1, 2, 3, 4, 5, 10, 15, folios 1451-1469.

ter was one of "general law" and therefore subject to the independent judgment of the federal courts (pp. 497-8).

The first question, therefore, is whether the courts below are not in error in refusing to apply the Pennsylvania law as unequivocally declared, prior to the accident in suit, by the highest court of that state.

Second Question Presented.

The trial court refused to hold that the plaintiff was guilty of contributory negligence as matter of law, despite plaintiff's own testimony that he was deliberately and unnecessarily walking, on a very dark night, on a wholly unilluminated path alongside defendant's track with his right side within possibly one foot of a moving train.[1]

The Circuit Court of Appeals upheld the trial court in this respect in spite of the fact that the plaintiff's conduct seemed "imprudent" to them—and in such a degree that it would have seemed imprudent to them "even to stand" so close to the moving train (p. 499).

While petitioner does not expect this Court to determine just how many inches contributory negligence extends, as matter of law, beyond the side of a moving train, it is believed that the courts below have gone to such an extreme as virtually to exclude contributory negligence as matter of law from cases of this nature. But, more than this, it is believed that the Circuit Court of Appeals applied an unsound and highly prejudicial test in arriving at the conclusion that the question of contributory negligence was for the jury.

The court said that, while the plaintiff's conduct seemed imprudent to them, the fact that recoveries had been allowed under circumstances deemed by them to be "closely similar" indicated that fairminded men might hold a different view

[1] Citations, *supra;* defendant's motions, fols. 638-640, 1201, 1253-4, 1426; defendant's requests Nos. 6, 9, 10, fols. 1215-8, 1245-7; court's charge, fols. 1230, 1234-5; assignment of errors Nos. 1-4, 9, 16-18, fols. 1451-3, 1461, 1470-2.

than their own, and that this was "enough to preclude taking the issue from the jury" under the rule of *Richmond & Danville R.R.* v. *Powers,* 149 U. S. 43, 45, and *Texas & Pac. Ry. Co.* v. *Harvey,* 228 U. S. 319 (pp. 499-500).

The test of contributory negligence implicit in this reasoning (as more fully developed in the brief, *infra,* pp. 33-35) is a distortion of the rule stated by this Court in the cited cases; it involves a definite fallacy in logic; and this fallacy, in the light of the Circuit Court's express view that the plaintiff was negligent, would seem to be the only basis on which the Circuit Court could have reached its conclusion adverse to defendant.

The Supreme Court rule is that the question is for the jury if fairminded men might reach different conclusions as to the existence of contributory negligence; but the rule here applied by the Circuit Court of Appeals is that the question is for the jury if *other courts have thought that* fairminded men might reach different conclusions. The effect of the rule applied by the Circuit Court of Appeals is that the judgment of the courts which have been the most extreme in their doubts as to what fairminded men might conclude becomes the criterion for all other courts.

Reasons for the Granting of a Writ of Certiorari.

1. The Circuit Court of Appeals has decided an important question of local law in direct contravention of applicable local decisions.

The case involves the question of the standard of care owed by a railroad to persons on longitudinal pathways (as distinguished from crossways) on the railroad's right of way within the State of Pennsylvania.

The highest court in Pennsylvania, prior to the accident here in suit, had unequivocally declared that, whatever the rule might be in other states, Pennsylvania refused to recognize permissive longitudinal pathways and hence held rail-

roads liable only for wilful or wanton negligence. *Falchetti* v. *Pennsylvania R. Co.,* 307 Pa. 202, 160 A. 859 (1932), *supra;* and other cases cited in the brief, *infra,* pages 16-17. There was no evidence of wilful or wanton negligence in the present case and, in any event, the jury was permitted to find the defendant liable for ordinary negligence.

While the cases are not altogether clear in defining the line between local law and general law, it is believed that the above question comes well within the scope of local law. It relates to a standard of care exclusively in respect of Pennsylvania property. The Pennsylvania rule is based on a local public policy adverse to burdening railroads with obligations which would render "most difficult, if not impracticable" "a proper operation of trains for the convenience of the public". The Pennsylvania rule is presumably the outgrowth of local conditions, such as the congestion of population and railroad traffic in a highly industrialized state. The Pennsylvania cases have established the rule with such definiteness that it must be regarded as a "rule of conduct" in Pennsylvania.

2. The Circuit Court of Appeals has decided a federal question in a way believed to be in conflict with applicable decisions of this Court.

The first reason above assigned for the granting of a writ involves the federal question as to whether the federal courts, under the Rules of Decision Act (28 U. S. C. A., section 725) or under principles of comity, are under obligation to follow the applicable state law as established by decisions of the highest court of the state. Decisions of this court deemed to be contrary to the holding of the Circuit Court of Appeals are cited in the brief (*infra,* pp. 21-30).

3. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on essentially the same matter.

Leaving other instances of conflict for the brief, it is deemed sufficient to cite here the case of *Boston & Maine Rd.* v. *Breslin,* 80 Fed. (2d) 749, cert. den. 297 U. S. 715 (decided in 1935 by the Circuit Court of Appeals for the First Circuit.) The question was there raised as to the standard of care owed by a railroad to a child injured on the railroad's turntable in Massachusetts. As the Pennsylvania courts refuse to recognize the doctrine of permissive longitudinal pathways on a railroad's right of way, so the Massachusetts courts refuse to recognize the doctrine of attractive nuisances on a railroad's property. But in the *Breslin* case, the Circuit Court of Appeals for the First Circuit deemed itself bound by the Massachusetts rule despite the contrary rule more generally prevailing in other states.

4. The Circuit Court of Appeals has decided an important question of general law in a way deemed untenable and in conflict with the weight of authority.

It is an important rule of general law that the question of contributory negligence is one of law and not of fact when, in the judgment of the court, fairminded men might reach different conclusions as to the existence of such negligence. *Richmond & Danville Rd. Co.* v. *Powers,* 149 U. S. 43, 45, *supra; Texas & Pac. Ry. Co.* v. *Harvey,* 228 U. S. 319, *supra.*

Although purporting to follow this rule, the Circuit Court of Appeals has actually applied the very different rule—different in logic and result—that the question is one of fact, not if fairminded men might differ, but if other courts have thought that fairminded men might differ. Under the untenable rule applied by the Circuit Court of Appeals, the courts which are most extreme in their doubts as to the conclusions which fairminded men might reach establish the criterion for all other courts to follow.

For the reasons above outlined, your petitioner prays that a writ of certiorari issue to the United States Circuit Court

of Appeals for the Second Circuit commanding said court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals be reversed, and that the petitioner may be granted such other and further relief as may seem proper.

Dated, August 31, 1937.

ERIE RAILROAD COMPANY,
By WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Preliminary Matters.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit may be found in the record at pages 496-501. It is reported in 90 Fed. (2nd) at page 603.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on June 14, 1937 (pp. 501-502).

The statutory provision which is believed to sustain the jurisdiction of this court is 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).

Statement of Case.

The principal facts have been summarized in the petition, *supra,* at pages 2 to 6.

A summary of the argument is given in the Index.

Statutes Involved.

The question of the obligation of the federal courts to follow the Pennsylvania law as declared by the Pennsylvania courts is affected not only by principles of comity but by 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 other-

wise 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."

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in refusing to apply the established law of Pennsylvania with respect to the standard of care owed by a railroad to persons on a longitudinal pathway (as distinguished from a crossway) on the railroad's right of way. This question was presented below (defendant's objection fols. 123-4; defendant's motions, fols. 638-640, 1201, 1253-4, 1426; defendant's request No. 1, fols. 1213, 1243-4; Court's charge re license and trespass, fols. 1227, 1232-5; defendant's exception thereto, fols. 1249-1250; assignment of errors Nos. 1, 2, 3, 4, 5, 10, 15, fols. 1451-1469).

2. The Circuit Court of Appeals erred in refusing to hold the plaintiff guilty of contributory negligence as a matter of law, and in applying an unsound and prejudicial rule to determine whether the question of contributory negligence was one of fact or of law. This question was presented below (defendant's motions, fols. 638-640, 1201, 1253-4, 1426; defendant's requests Nos. 6, 9, 10, fols. 1215-8, 1245-7; Court's charge, fols. 1230, 1234-5; assignment of errors Nos. 1-4, 9, 16-18, fols. 1451-3, 1461, 1470-2).

Point I. The Courts below erred in refusing to apply the Pennsylvania Law repudiating the Doctrine of Permissive Pathways other than crossings on a railroad's right of way.

As shown in the petition, the plaintiff, when the accident in suit occurred, was on the defendant's right of way in Pennsylvania, and was walking on a longitudinal pathway alongside the track as distinguished from a crossing over the track.

The decisions below have gone against the defendant on the theory 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 standards of care owed by a railroad are questions of general law, and that the federal courts affirm the doctrine of permissive pathways, whether crossings or not, regardless of the Pennsylvania decisions.

We think this reasoning rests on an over-simplified rule of thumb, that it is unsound in principle, that it is at variance with the far more flexible doctrine expressed in the considered opinions of this Court, and that it has led to an erroneous and flagrantly unjust conclusion in the present case. It is believed that the problem is of such outstanding importance and marked by such diversity of opinion among the various Circuit Courts of Appeals as to merit the consideration of this Court.

A. The Federal Courts are Bound to Apply the Law of Pennsylvania as 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 cite Restatement, Conflict of Laws, §380, page 462, for a statement of the rule.

Whatever difficulties there may be in ascertaining the pertinent Pennsylvania law, or more particularly, 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.

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.

B. THE LAW OF PENNSYLVANIA, AS ESTABLISHED BY THE HIGHEST COURT OF THE STATE PRIOR TO THIS ACCIDENT, REJECTS THE DOCTRINE OF PERMISSIVE PATHWAYS WITH RESPECT TO 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, it will be observed that the Pennsylvania decisions relate to the Pennsylvania law as established prior to the accident.

In *Falchetti* v. *Penn. R. Co.,* 307 Pa. 203, 160 A. 859 (1932), a case of injury to a child walking on an alleged permissive pathway on a railroad's right of way, alongside the tracks, 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 contra, 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 Pennsylvania rule thus declared, as shown by the group of Pennsylvania cases cited below, is apparently 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 doctrine of permissive use of 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" (*Tiers* case at p. 490). *Tiers* v. *Penn. R. Co.,* 292 Pa. 522, 141 A. 487 (1928); *Gray* v. *Penn. Rd. Co.,* 293 Pa. 28, 141 A. 621 (1928); *Conn* v. *Penn. R. Co.,* 288 Pa. 494, 136 A. 779 (1927); *Kolich* v. *Monongahela Ry. Co.,* 303 Pa. 463, 154 A. 705, (1931); *Koontz* v. *B. & O. R. Co.,* 309 Pa. 122, 163 A. 212 (1932); *Lindsay* v. *Glen Alden Coal Co.,* 318 Pa. 133, 177 A. 751 (1935), citing the *Falchetti* case with approval.

It is apparent that the factor of public interest is affected by local conditions such as the congestion of population and railroad traffic in a highly industrialized state.

This 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. 44, 67 A. 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 willful 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.

In their brief below, plaintiff's counsel attempted to discredit the *Falchetti* decision by citing a number of prior

Pennsylvania decisions deemed to sustain a different rule. If these cases were contra, they were manifestly overruled by the *Falchetti* case. But the brief comments on the cited cases given in the footnote, will sufficiently indicate their inapplicability.[1]

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.

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[1] *Kay* v. *Penn. Rd. Co.*, 65 Pa. 269, 3 Am. Rep. 628 (1870). The site of the injury 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 A. 43 (1886). This case involved a permissive crossing, not a longitudinal pathway.

Lodge v. *Pittsburgh, etc. R. Co.*, 243 Pa. 10, 89 A. 790 (1914). This case also involved a well-defined permissive crossing.

Francis v. *B. & O. R. Co.*, 247 Pa. 425, 93 A. 490 (1915). A careful reading of the case discloses that it involved what was essentially a permissive crossing. The decision rested on the *Kay* case, *supra*, as "exactly in point".

O'Leary v. *Pittsburgh, etc. R. Co.*, 248 Pa. 4, 93 A. 771 (1915). 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 *Steele* v. *Lake Shore, etc. R. Co.*, 238 Pa. 295, 86 A. 201 (1913), which was a permissive crossing case.

Counizzarri v. *Philadelphia, etc. Ry. Co.*, 248 Pa. 474, 94 A. 134 (1915). The accident 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. *Penn. R. Co.*, 266 Pa. 63, 109 A. 544 (1920). 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 A. 766 (1920). 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.

C. THE FEDERAL COURTS ARE BOUND TO FOLLOW THE PENNSYLVANIA DECISIONS, DEFINING THE APPLICABLE LAW PRIOR TO THE ACCIDENT IN SUIT, BECAUSE THE DECISIONS ESTABLISH A RULE OF ACTION AND CONDUCT IN PENNSYLVANIA AND RELATE TO A MATTER LOCAL IN NATURE.

Under the Pennsylvania law as established by the Supreme Court of that State, the longitudinal pathway on which the plaintiff was walking could not be recognized as permissive (such recognition being restricted to crossings); hence the plaintiff was a trespasser and hence the standard of care imposed upon the railroad would be merely that of refraining from wanton negligence or wilful injury.

Ignoring the Pennsylvania law as so established, the District Court in this case permitted the jury to find that the plaintiff was walking on a permissive longitudinal pathway, and the charge was to the effect that plaintiff was in that event a licensee, and that the railroad was under an obligation to use due care toward him as such licensee (fols. 1213-4, 1226-8, 1231-4).

In sustaining the District Court, the Circuit Court of Appeals regarded it as unnecessary to "go into" the question of Pennsylvania law because the Court, in conformity with what it deemed to be "the great weight of authority in other states", approved the conception that the doctrine of permissive ways embraces longitudinal pathways as well as crossings (pp. 497-8).

The opinion is clearly erroneous in so far as it purports to apply some supposed federal common law of negligence; but the point now urged is that, even if the opinion be interpreted as recognizing that Pennsylvania law governs, it is erroneous in principle and in result in its method of determining the Pennsylvania law.

The opinion of the Circuit Court of Appeals manifestly rests on two propositions. The first is that questions of law divide into two rigid categories with respect to their subject matter, questions of general law and questions of local law; and that on questions of general law the federal courts are

independent of state court decisions, with an independence so absolute that the federal courts may apply an approved rule of law no matter how definitely and firmly the state courts may have established a contrary rule. The second proposition is that "the question of the responsibility of a railroad for injuries caused by its servants [including the question of a railroad's responsibility to persons on a longitudinal pathway along the right of way] is one of general law" (pp. 497-8). It is on the strength of these two propositions that the Circuit Court of Appeals has imposed a rule of law contrary to that established by the Peinnsylvania courts.

We think the opinion of the Circuit Court of Appeals is typical of many ill-fated attempts to compress into inflexible rules of thumb the broad principles declared and applied by this Court.

The precise scope of the Rules of Decision Act may be doubtful in view of the holding that the "laws of the several States" do not include state court decisions as such (*Swift* v. *Tyson,* 16 Pet. 1); but whether by virtue of the Act or of comity, it is well settled that such decisions are controlling under certain circumstances. The extent to which the federal courts are bound to follow state decisions, as shown by innumerable cases, is determined partly by the definiteness and finality with which such decisions have established the contested rule of law and partly by the extent to which the contested rule is general or local in nature and effect. We think that this court, refusing to adopt rigid rules as determinants, has treated the factors of establishment and general or local quality as matters of degree; and that it applies more severe and critical tests of establishment according as the state rule is more general in nature and effect, less severe and critical tests according as the state rule is more local in nature and effect.[1]

[1] We think this is a correct statement of the broad principles applied by this Court, that it is sound in theory, and that it furnishes the fundamental answer to the many criticisms of the doctrine of *Swift* v. *Tyson* and following cases.

(1) *The Pennsylvania rule is sufficiently established to be controlling, even if the question be regarded as mainly one of general law.*

It is obvious that the standard of care with regard to a pathway along a railroad's right of way in Pennsylvania is in some degree a local matter. But, even if the question could be regarded as general or predominantly general in nature, the Pennsylvania rule is established with sufficient definiteness and finality to be controlling.

It may be noted, in the first place, that, even in cases where an asserted rule of the state courts has been rejected, it is frequently stated or implied that the asserted rule would govern if sufficiently established.

In *Swift* v. *Tyson,* 16 Pet. 1, *supra,* Mr. Justice Story justified the exercise by federal courts of an independent judgment on a question of "general law" relating to the law of negotiable instruments on the ground that decisions are not the law but merely evidence of the law and are "often reexamined, reversed and qualified" by the state courts themselves (p. 18). The argument has been frequently repeated. But this reasoning would seem to carry the 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 laws where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the contested rule is established with sufficient definiteness and finality.[1] Obviously, the evidence of the Pennsylvania rule now in question is conclusive.

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[1] In the *Swift* case, while discussing the problem on the assumption that the contested rule had been "fully settled in New York", the Court in fact considered it doubtful if any doctrine on the 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). So, in *Barber* v. *Pittsburgh, etc. Ry. Co.,* 166 U. S. 83, this Court considered that the one state case relied upon was "not conclusive evidence of the law of the state" (p. 100).

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 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 *Black and White Taxicab Co.* v. *Brown and Yellow Taxicab Co.,* 276 U. S. 518, involving the validity of a Kentucky contract, it was said that federal and state courts would go to the same sources to ascertain "the existing applicable rule," or "for evidence" of that rule or "for the discovery of common law principles" (pp. 529-530); it was noted that Kentucky had adopted the common law and that her courts recognized its principles; and it may be noted that the Kentucky courts resorted to those principles in the cases cited on the question.

Similar implications are to be found in many other cases, including the following which were cited in the *Taxicab* case: *Carpenter* v. *Providence Washington Ins. Co.,* 16 Pet. 495, 511-2; *Lane* v. *Vick,* 3 How. 464; *Chicago* v. *Robbins,* 67 U. S. 418, 428-9; *Yates* v. *Milwaukee,* 10 Wall. 497; *New York Central Rd. Co.* v. *Lockwood,* 17 Wall. 357, 363, 367-8. In the *Yates* case, in refusing to follow a Wisconsin case, the Court particularly noted that the Wisconsin case established no governing principle of law and that the Wisconsin courts would themselves decide similar cases by resort to general principles.

In *Baltimore & Ohio Rd. Co.* v. *Baugh,* 149 U. S. 368, in justifying an independent judgment on a negligence question as one of general law, it was noted that the Ohio courts deduced their rule from general principles and were not wholly satisfied with the rule (pp. 376-8), and that it was not a case of an established Ohio rule of property and action, which would be regarded as authoritative both by federal and state

courts (pp. 371-2). Quoting from *Burgess* v. *Seligman,* 107 U. S. 20, 33-4, the Court recognized a duty to exercise an independent judgment "in cases not foreclosed by previous adjudication" (pp. 372-3).[1]

In *Burgess* v. *Seligman,* 107 U. S. 20, *supra,* and *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, certain state decisions were deemed not controlling, primarily because they were not rendered until after the transactions in suit occurred and after the rights accrued (a point not here involved). It was stated, however, that "rules of property and action", established by state courts in "the ordinary administration of the law", have "all the effect of law" and "are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is." It was further said that where the state law has not been thus settled, it is the right and 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" (*Kuhn* case, pp. 360, 358; *Burgess* case, p. 33).

We think that isolated expressions such as that last quoted may not properly be seized upon to support the theory, espoused by the Circuit Court of Appeals in the present case, that there are certain unalterably bounded subject matters as to which state decisions may never control. 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

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[1] As hereafter pointed out, the question at issue in the *Baltimore & Ohio* case was not local in any such sense or degree as the question at issue in the present case. The immediate point is that the Pennsylvania courts have foreclosed the question now at issue, as a question of Pennsylvania law.

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

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[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.

> "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. 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 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.[1]

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[1] Although incidentally involving a state statute, the question was one of common law, as noted by Judge Taft in *Byrne* v. *Rd. Co.*, 61 Fed. 605.

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 railroad from liability for fire with respect to a warehouse on its property in Iowa. The lower federal courts deemed the contract void as against public policy, despite state decisions to the contrary. This Court, citing the *Burgess* case, *supra,* among others, held that the matter of public policy was for the state to determine, and that the state decisions had adequately established the asserted Iowa rule.[2]

If the present question is to be regarded as a general question of Pennsylvania common law and public policy, the Pennsylvania decisions have manifestly established the Pennsylvania rule with sufficient definiteness and finality to constitute it a Pennsylvania rule of action and conduct, binding on the federal courts. Indeed, the *Falchetti* case, together with the associated Pennsylvania cases heretofore cited, would seem to us to have established the Pennsylvania rule with a degree of definiteness and finality which might fairly be called absolute. 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).

(2) *The Pennsylvania rule is sufficiently local in nature to be controlling, even if more definiteness and finality of establishment 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 longitudinal pathways with such definiteness and finality that the rule would control even if it could be described as general in nature.

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[2] See *Northwestern Life Ins. Co.* v. *Johnson,* 254 U. S. 96, involving the validity of an incontestibility clause where the insured committed suicide, this Court stating that "The public policy with regard to such contracts is a matter for the States to decide" (p. 100).

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 will 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 har-

> mony 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, as Mr. Justice Story intimated in *Carpenter* v. *Providence Washington Ins Co.,* 16 Pet. 495, and as this Court stated in *Northwestern Life Ins. Co.* v. *Johnson,* 254 U. S. 96, 100.

The Pennsylvania rule as to longitudinal pathways 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, *B. & O. 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?"

The present question relating to longitudinal pathways is much more closely analagous to that raised in *Detroit* v. *Osborne,* 135 U. S. 492 (distinguished in the *Baltimore & Ohio* case at pages 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."

The Pennsylvania rule refusing to recognize permissive rights with respect to pathways along the rights of way of railroads is essentially local because it is based on a state policy derived from local conditions and because it applies solely to pathways in Pennsylvania. Is it conceivable that the federal courts may deny to the Pennsylvania courts the power effectively to establish such a rule of conduct within the borders of the State?

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 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 (fols. 11-12, 29; Purdon's Penn. Statutes, Title 67, §§ 491-2).

D. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals on essentially the same matter.

Aside from *Baltimore & Ohio Rd. Co.* v. *Baugh,* 149 U. S. 368, *supra,* the Circuit Court of Appeals cited, in support of its rejection of the Pennsylvania decisions, only two cases: *Cole* v. *Pennsylvania R. Co.,* 43 Fed. (2d) 953 (CCA-2-1930), and *Redfield* v. *New York Central R. Co.,* 83 Fed. (2d) 62 (CCA-8-1936). The *Cole* case rejected the New York rule that a railroad is not liable for the spread of fire to non-abutting land, and applied a contrary rule on the theory that the question was one of general jurisprudence. The *Redfield* case, in rejecting an asserted Ohio rule as to presumed negligence, adopted a contrary rule on the stated theory that "The common law is, as to federal courts, the same in all states" (p. 65).

That a conflicting view is held by other Circuit Courts of Appeals is attested by many cases.

In *Boston & Maine Rd. Co.* v. *Breslin,* 80 Fed. (2d) 749 (CCA-1-1935), cert. den. 297 U. S. 715, the court followed the Massachusetts rule which rejected 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 (149 U. S. 368, *supra*) and similar cases as resting on very different considerations.

In *Marcus* v. *Forcier,* 38 Fed. (2d) 8 (CCA-1-1930), the Court followed the Maine rule that an automobile driver's negligence can not be imputed to a guest.

In *United Shoe Machinery Corp.* v. *Paine,* 26 Fed. (2d) 594 (CCA-1-1928), the Court followed the New Hampshire rule as to the standard of care required of a landlord with respect to an unleased entrance way.

In *Milford & U. St. Ry. Co.* v. *Cline,* 150 Fed. 325 (CCA-1-1907), the Court followed a Massachusetts rule as to negligence in approaching a street railway, deeming the question, since it concerned the use of highways, to be a local one as

distinguished from the question of a railroad's general responsibility to employees.

In *Delaware and Hudson Co.* v. *Nahas,* 14 Fed. (2d) 56 (CCA-3-1926), the court followed the New York rule as to the standard of care required of a person approaching a railroad crossing.

In *Roberts* v. *Tennessee Coal etc. Co.,* 255 Fed. 469 (CCA-5-1918), the court followed an Alabama "rule of conduct" that an employee's forgetfulness of a dangerous wire was contributory negligence.

In *Gibson Coal & Coke Co.* v. *Allen,* 280 Fed. 28, 37 (CCA-6-1922), the court followed a Kentucky rule as to *bona fide* purchasers on the strength of a Kentucky decision deemed "dispositive" of the question in that State.

In *Ballard* v. *Ocean Accident & Guarantee Co.,* 86 Fed. (2d) 449 (CCA-7-1936), the court followed the Wisconsin rule on the question whether an insurance company was under an obligation of due care or only of good faith in the handling of a suit for injuries in an automobile accident.

In *McGuire* v. *Sherwin-Williams Co.,* 87 Fed. (2d) 112 (CCA-7-1936), the court followed the Illinois rule as to the standard of care required of an employer with reference to occupational diseases.

In *Huffman* v. *Baldwin,* 82 Fed. (2d) 5 (CCA-8-1936), cert. den. 299 U. S. 550, the court followed the Arkansas rule with respect to an engineer's joint liability with that of the railroad in a crossing accident.

In *Kowalski* v. *Chicago G. W. R. Co.,* 84 Fed. 586, aff'd. 92 Fed. 310 (CCA-8-1899), the court followed the Iowa rule as to imputing a parent's negligence to a child in a crossing accident.

The foregoing cases include the First, Third, Fifth, Sixth, Seventh and Eighth Circuits. It may be noted that the Circuit Court of Appeals for the Second Circuit has itself apparently held a different view. In *New York S. & W. R. Co.* v. *Thierer,* 209 Fed. 316 (CCA-2-1913), the court followed the New Jersey rule as to negligence in approaching a rail-

road crossing, as declared by the highest court of that State. To the same effect is *Boston & Maine R. R.* v. *Daniel,* 290 Fed. 916, 922 (CCA-2-1923).

Point II. 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 conclusion 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 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.[1]

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[1] In *Schultz* v. *Erie R. Co.*, 46 Fed. (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*, 57 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. *Green*, 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.

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 respectfully submitted that this case involves matters which should be reviewed by this Court, and that a writ of certiorari should be granted for that purpose.

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