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"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law".—Mr. Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON MISSOURI CASES

CRIMINAL LAW—SUFFICIENCY OF INDICTMENTS. *Ex parte Keet*[1]

The petitioner, who was convicted of murder in the second degree and whose punishment was assessed at imprisonment in the state penitentiary for ten years, made application to the Supreme Court for a writ of habeas corpus, and assigned as her grounds *the insufficiency of the indictment.*[2] She contended that the indictment alleged nothing more than manslaughter, and that, therefore, she was convicted of, and is imprisoned for, a crime with which she was never charged.

The Court was of the opinion that the indictment "embraces within its allegations every element of murder in the second degree" and that "it describes the offense with such certainty that the accused was bound to know what she was called upon to answer, and the court and the jury the issue they were to try, and that a conviction or acquital could be pleaded in bar of a subsequent prosecution."

1. 315 Mo. 695, 287 S. W. 463.

2. The information upon which the petitioner was tried, omitting formal parts, was as follows:— "O. J. Page, prosecuting attorney within and for the County of Greene, in the state of Missouri, under his oath of office informs the court that Artie Keet, late of the county and state aforesaid, on the 8th day of June, A. D. 1919, at the county of Greene and state of Missouri, in and upon one Minor Keet, then and there being, feloniously, willfully, premeditatedly, and of her malice aforethought, did make an assault, and with a dangerous and deadly weapon, to wit, a revolving pistol and then and there *loaded with gunpowder and leaden balls, which, she the said* Artie Keet, in both her hands then and there had and held at and against him, the said Minor Keet, then and there feloniously, on purpose and of her malice aforethought, willfully and premeditatedly, did shoot off and discharge, and with the revolving pistol aforesaid, and leaden balls aforesaid, then and there feloniously, on purpose and of her malice aforethought willfully, premeditatedly, did shoot and strike him the said Artie Keet giving to him, the said Minor Keet, then and there with a dangerous weapon aforesaid, the revolving pistol aforesaid and leaden balls aforesaid, in and upon the abdomen and bowels of the said Minor Keet, one mortal wound of the breadth of one inch and of the depth of twelve inches, of which mortal wounds the said Minor Keet then and there instantly died; contrary to the form of the statute in such cases made and provided against the peace and dignity of the state."

The defect which the petitioner alleged was that the indictment failed to conclude with the orthodox formula embraced in common law indictments for murder.[3] The petitioner did not assert that as a result of the omission of this formal conclusion found in ancient precedents her case had been prejudiced in any manner; but, rather, insisted that such a conclusion is a matter of substance unaffected by the statute of jeofails.[4]

This case appears to merit careful consideration. Its effect cannot be confined to the mere matter of formal conclusions to indictments; the tone of the decision seems to permeate the whole field of criminal procedure. It is significant to note that in the face of a long line of decisions committing Missouri as a strict constructionist of legal phraseology, the Court has now ascribed those former decisions to the "influence of thoughts and traditions of another generation", and has held that methods more direct are now needed by the courts.

In the case of *State v. Pemberton*[5] the Supreme Court of Missouri held that the first count of an indictment for murder was bad because it did not conclude with the words "against the peace and dignity of the state."[6]

A few years later in the case of *State v. Meyers*[7] an indictment concluding "and, so said Charles Meyers and John Bogard, in manner and form aforesaid, and by the means aforesaid . . . . " was held to be insufficient because there was not inserted the words "grand jurors aforesaid, upon their oath aforesaid, do say." The Court in the Meyers case seems to reason that an indictment in Missouri means what an indictment means at common law and the omission of a word in the prescribed formula is an alteration in the substance of the indictment.[8] This case of *State v. Meyers* was the principal authority relied upon by the petitioner in *Ex parte Keet.* It seems clear that the changing of the substance of the indictment from that followed

3. The petitioner maintained that the indictment should conclude as specified in STATE V Rector, 126 Mo. 328, 23 S. W. 1074; which would be:—"And so the prosecuting attorney aforesaid, upon his official oath aforesaid, does say, that the said Artie Keet, him, the said Minor Keet, in manner and form aforesaid, and by the means aforesaid, did feloniously, willfully, premeditatedly and of her malice aforethought, kill and murder, etc."

4. The first statute of jeofails ('jeofails—I have failed or I am in error) was passed shortly after the Norman Conquest and has been followed by numerous others. But as late as Blackstone's time none of them applied to criminal proceedings. By 1821 the Legislature of Missouri had provided that "—indictments and proceedings in criminal cases may be amended in point of form at any time before the jury are sworn for the trial of the case." This statute was amended in 1855, 1879, and 1889. Section 3908 R. S Mo. 1919 provides that "No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be staid, arrested or in any manner affected....(by) any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits: Provided, that nothing herein shall be so construed as to render valid any indictment which does not fully inform the defendant of the offense of which he stands charged."

5. 30 Mo. 376 (1860).

6. STATE V PEMBERTON interpreted Article VI. Sec. 38 of the Constitution of Missouri reading "and all indictments shall conclude 'against the peace and dignity of the state' " as mandatory in its nature; and in deciding whether a plain statement of the facts and accusations without specifically mentioning the term "murder" is enough, held that it is insufficient and argued that to hold otherwise would be to put civil and criminal proceedings on the same footing and allow the prosecution to make, as in civil proceedings, "a plain and concise statement of the facts" constituting the offense, But it would seem that it might well be argued that the only purpose of the pleadings in either criminal or civil actions is to inform the defendant with what he is charged and the court of the issue to be tried, and that, therefore, "a plain and concise statement of the facts" would be enough. Dean Pound, in his report to the American Institute of Criminal Law and Criminology said, "A chief object of reform of procedure, both crim- inal and civil, must be to insure trial and reviews of the *case* rather than the record. The present practice amounts to record-worship."

7. 99 Mo. 107, 12 S. W. 516 (1889).

8. At common law great strictness and technica accuracy were exacted as to the conclusion of an indictment for murder, and in some states it is still held that the conclusion of an indictment for murder distinguishes it from an indictment for manslaughter, the previous words without the conclusion being insufficient to charge murder. 30 C. J. 117

in common law indictments would be contrary to the Constitution.[9] However, the wide divergence of opinion comes in determining what is substance; and the recent decisions seem to be getting away from the literal interpretation given in *State v. Meyers*.[10]

Perhaps the most outstanding of the older cases which attempts to limit substance to literalism is *State v. Campbell*,[11] the celebrated "The" case, in which an indictment concluding "against the peace and dignity of state" was held insufficient because of the omission of the word "the" before "state". The opinion said, "While it may be conceded that the word "the" preceding the word "state" is a small one and in many instances of little importance.....we see no escape from the conclusion that the definite article "the" preceding the word "state" is absolutely necessary in order to designate the particular state against which the offense is charged to have been committed." And again, " 'the state' in the conclusion prescribed by the Constitution of this State means the State of Missouri....." It would seem to require a rather vivid imagination to conceive of a situation in which the defendant, who had committed rape in the State of Missouri, could have any misgivings as to the particular state against whose laws he had offended; or, again, a situation in which the defendant's lawyer had any doubt as to the state referred to in the indictment. It seems that the Court in this instance defined substance in terms of sentence structure.

Numerous cases have been decided in Missouri in which a strict observance of technical accuracy was insisted upon. For example, an indictment charging that the defendant fired a pistol "thereby and thus striking" the deceased, was held bad because the words "thereby and thus striking" indicated that the indictment had previously alleged a "shooting and wounding", when, in fact, it had not.[12] Again, an indictment for murder was declared fatally defective because the word "weapon" was misspelled so as to read "neapon".[13] Likewise, an indictment which alleged that "some heavy weapon or instrument... did forcibly strike and beat" was held insufficient because of the omission of the word "with".[14]

More recently, however, the Court has shown a decided tendency to get away from formalism and technicalities, and to disregard such minor errors or imperfections in indictments and informations as do not prejudice the rights of the accused or prevent a fair determination of the issues involved. In the case of *State v. Evans*[15] the Court grew noticeably liberal, as compared with its previous attitude, and held an indictment concluding "and so the jurors aforesaid upon their oath aforesaid" etc. was not defective because of the omission of "Grand" before "jurors".

9. In view of our statute of jeofails it would seem that an indictment in Missouri means what an indictment meant at common law only so far as *substance* is concerned. The statute evidently abolished the necessity of consistency in mere form. See R. S. Mo. 1919 Section 3853.

10. However, STATE V. MEYERS has been followed in many cases, including STATE V. FERGUSON, (1899), 152 Mo. 98, 53 S. W. 427; STATE V. SANDERS,(1900), 158 Mo. 610, 59 S. W. 993; STATE V. COOK, (1902), 170 Mo. 210, 70 S W. 483; STATE V. DAWSON, (1905), 187 Mo. 60, 85 S. W. 526; STATE V. MINOR, (1906), 193 Mo. 599, 92 S. W. 466.

11. (1908) 210 Mo. 202, 109 S. W. 706.

12. STATE V GREEN, (1892), 111 Mo. 585, 20 S. W. 304.

13. STATE V. FAIRLAMB, (1894), 121 Mo. 137, 25 S. W. 895. This case was partially overruled in STATE V. HASCALL, 284 Mo. 607, 226 S. W. 18.

14. STATE V. RECTOR, (1894), 126 Mo. 328, 23 S. W. 1074. The case was overruled by STATE V. BAIRD, (1923), 297 Mo. 219, 248 S. W. 597, which held that the omission of "with" does not invalidate the indictment. STATE V. JONES, (1896) 134 Mo. 259, 35 S. W. 607, held that an indictment otherwise sufficient is not defective because the conclusion commences "And the grand jury aforesaid upon their oath aforesaid, do say....." instead of "And *so* the grandjury aforesaid etc." STATE V. GLEASON, (1903), 172 Mo. 279, 72 S. W. 676, held that the adding of the words "of Missouri" was only surplusage and did not make the indictment bad, and STATE V REAKEY, (1876), 1 Mo. A. 3, held that an alteration might be surplusage and not affect the validity of the indictment.

15. (1895), 128 Mo. 406, 31 S. W. 34.

An information was held good in *State v. Borders*[16] even though it did not state the place where the deceased died. In *State v. Webb*[17] the Court held that the fact that the deceased received a wound in the head instead of the body as alleged, was not sufficient to defeat the indictment. And in *State v. Flannery*[18] the Court held that misspelling the name of the deceased did not render the indictment defective. In this latter case, the Court said, "Courts should not lend themselves to subterfuges as defenses to criminal prosecution where not even an intimation of prejudice is made. The time has passed, not only in this state but elsewhere, when pure technicalities, in the absence of evidence of well defined injury to the accused, will be permitted to obstruct the enforcement of the criminal law."

Perhaps one of the best statements of the modern attitude of the Missouri Court is found in *State v. Hascall*[19] in which the Court said, "While it is true in a criminal charge that nothing must be left to intendment or implication, this rule must be construed as having reference to such allegations as are necessary to inform the defendant of the nature and cause of the accusation against him, and not extrinsic matter, the averment of which is unnecessary, and if averred, need not be proved."

When the petitioner appealed to the Supreme Court in the principal case, she did not argue that she had not committed the act of killing; but in so many words argued that the conviction should be set aside because the grand jury forgot to say "hocus pocus". Mr. Justice Ragland in his able opinion intimates that such antiquated procedural objections are the outgrowth of English legislative enactments which could not possibly have any justification in this country. He says, "It is a mere form, without life or substance, which we have been idolatroulsy following."[20] It seems that the necessity of distinguishing in the formal conclusion to the indictment as here contended for between murder and manslaughter arose in the English statute affecting "benefit of clergy". According to this statute, one who was convicted of "wilful murder" was deprived of the benefit of clergy, and in order to bring a case within the statute it was deemed necessary to use in the indictment the language of the statute itself. It would seem that it is indeed a timely opinion which observes that the Meyers case and those concurring decisions adhering to this English tradition "should no longer be followed" and that "*Methods more direct and involving less of circumlocution than were then employed are now demanded in all the activities of life.*"[21]

Dean Pound of Harvard tells us, "Our criminal procedure still suffers from the astuteness of judges in the past to avoid convictions at a time when all felonies were punishable with death."[22] This seems to furnish an answer to the question whether procedural technicalities are necessary to protect the innocent. It seems that these technicalities were never initiated to protect the innocent, but rather to save the obviously guilty from a punishment made too severe by legislative enactment. The English courts of that period recognized that justice could not then be done by declaring the guilty guilty; and the court, lawyers, and the accused seemed

16. 199 S. W. 180.
17. (1914), 254 Mo. 414, 162 S. W. 622.
18. (1915), 263 Mo. 1. c. 579, 173 S. W. 1053:
19. (1920), 284 Mo. 607, 226, S. W. 18.
20 STATE V. SCHLOSS, 93 Mo. 361,6 S. W. 244. held that when the indictment embraces the words in the Constitution but also adds "contrary to the form of the statute" the conclusion embraces the language designated by the Constitution and the additional words are only surplusage. And the Court in STATE V WATERS, 1 Mo. A. 7, concludes that "the general doctrine is that if the intent of the Constitution be substantially responded to in this part (conclusion) of the indictment, a literal transcript of the formula is not essential."

21. Mr. Justice Ragland, in his opinion in Ex. parte KEET quotes at length from ANDERSON V STATE, 5 Ark. 444, an opinion handed down by the Supreme Court of Arkansas over a hundred years ago, which, in exploding the literalists' theories, gives an excellent historical review of the conditions leading the courts to favor the use of technicalities.

22. See page 582 of Pound's Criminal Justice in Cleveland.

to have entered into a "humane conspiracy" to evoke every conceivable technicality to prevent conviction, when a minor offense meant death. However, England soon found it unnecessary to continue this practice, and we find Lord Hale warning the English courts, "And it were very fit that by some law this overgrown curiosity and nicety were reformed, which has now become the disease of the law, and will, I fear in time grow mortal without some timely remedy."[23] England long ago abolished trial by technicality; but many of the United States courts have jealously guarded the old practice as a protection to the innocent.[24] But as Mr. Justice Holmes has said, "There is much more danger today that criminals will escape justice than that they will be subjected to tyranny."[25]

Conditions have changed, but many courts continue to allow the obviously guilty to take advantage of technical and unimportant mistakes in the indictment. And with what result? *A practice which had a praiseworthy origin in the English judiciary's effort to promote justice, is being so perverted and misapplied that it is now defeating the very purpose for which it was established.* A rule which has outlived its usefulness should no longer be followed.

The late Governor Herbert S. Hadley said, "The effect of a technical administration of law is to develop what is known as the sporting theory of justice."[26] Too often our criminal trials are not honest efforts to discover whether the accused committed the crime; but rather a fencing of skillful lawyers, not concerned with the innocence or guilt of the defendant, but interested in discovering some technical defect which will be held to be reversible error.[27] A century ago it was the custom in England to allow a defendant to prove his innocence by challenging his accuser to open battle[28]. Our generation has retained its sporting instincts; but a less virile age seems too often to have reduced a criminal trial to an indoor sport in which dueling weapons have been replaced by the procedural astuteness of the attorneys. [29] Again quoting Governor Hadley: ".....the principal influence which makes for an ineffective administration of justice, in my opinion, is a cumbersome, archaic and ineffective system of criminal procedure with the glorification of technicality and formalism which it fosters and maintains."[30]

The public has objected to the repeated miscarriages of justice; and the public

23. 2 Hale 193, page 131 of Kelley's Criminal Law and Practice (3rd Ed.).

24. "_____in England to a greater extent than in the United States the trial of a criminal case is regarded by all connected with the case solely as an investigation to ascertain the guilt or innocence of the accused_____" Defects in Criminal Justice 11 Am. Bar Assn. J. 297, 301.
"There is no filibustering in trials over there_____ They try the defendant and not the complaining witness or some other witness or the prosecuting attorney." Ibid. 30.
"The most noticeable feature of the English courts and procedure is their freedom to accomplish justice." Reid's, English Criminal Trials of Today, 10 Marquette L. Rev. 27, 29.

25. 26 Col. Law Rev. 253, 262, Frank H. Hiscock's Criminal Law and Procedure in New York.

26. 11 Am. Bar Assn. J. 674, 678, Present Conditions Historically Considered. See also: 1 J. of Crim. Law and Criminology 63, Lawson's Technicalities in Procedure.

27. Our system "leads to exertion to get error into the record rather than to dispose of the controversy finally and upon its merits." Pound's, The Causes of Popular Dissatisfaction With The Administration of Justice, 29 Reports of Am. Bar Assn. 395.

28. See ASHFORD V THORNTON, (1818), 1B, & Ald. 405, in which the prosecution was stopped because the prosecuting witness declined to accept a challenge to do battle.

29. "The idea that prodecure must of necessity be wholly contentious disfigures our judicial administration at every point_____ It leads counsel_____ to deal with rules of law and procedure exactly as the professional football coach with the rules of the sport_____"—
11 Am Bar Assn. J. 674.

30. 11 Am. Bar Assn J. 674, 675.

has a right to object.[31] What need has an innocent man of an absurd technicality to emphasize his innocence? Criminal procedure "with a few notable exceptions in one or two localities...remains what it was fifty years ago."[32] Many members of the legal profession have consoled themselves by saying that the public cannot appreciate the necessity of adhering strictly to the prescribed form in the indictment, but without doubt the Missouri Supreme Court has greatly improved procedure in this state by announcing that it, too, can no longer appreciate the necessity of adhering to the prescribed form.

The purpose of a criminal trial is to determine the guilt or innocence of the accused. As long as the *substance* of the indictment is not altered, no unfair advantage can be taken of the defendant by allowing the substitution of one word for another; nor can any legitimate advantage be preserved to him by worshiping form. It is interesting to note that at one time it was the style in England to allege that the defendant committed the act "not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil."[33] Lord Mansfield disregarded such phrases as "saying nothing". This seems, in *Ex parte KEET, to be the position of the Missouri Supreme Court:* The magic formula which the petitioner insisted upon was only a *rhetorical flourish saying nothing.* The court carefully states that the decision in *Ex parte KEET* does not affect the *substance* of the indictment.[34] The petitioner's constitutional right to have the indictment conform in *substance* to a common law indictment is carefully preserved; but the petitioner's desire to have the indictment conform in *grammatical syntax* to a common law indictment is denied. The logic of this position is very aptly alluded to in *State v. Glass*,[35] a case decided since *Ex parte KEET.* The Court concluded that "this formal sonorous conclusion was a part of the habiliments of the charge, and performed the same office for the indictment that judicial robes perform for the judges, investing them with apparent authority, but adding nothing to the weight and soundness of their judgment".[36]

Some recent attempts to secure legislative reform in criminal procedure in Missouri proved unavailing. No far reaching changes may be looked for, probably, in the near future. Until such time as the legislature sees fit to make the needed reforms, the courts can serve the cause of criminal justice by refusing to set aside convictions for mere technical errors, not going to substance. *Ex parte Keet* is a step forward.

J. P. B.

31. Chief Justice Taft has frequently stated in his public addresses that our system of procedure in criminal cases has practically broken down of its own burden of technicalities and that administration of the criminal law in practically all the states "is a disgrace to our civilization". Charles R. Holdeh's Public Interest in Crime presents an able discussion of this point.

32. See Pound's "Problems of Law."

33. Bishop's New Crim. Proc. Vol 1. Pg. 314, taken from Wonders of the Invisible World, Lond ed. of 1862; p. 54

34. "We would not be understood as departing in the least from our former rulings that in this state an indictment means just what it did at common law_____in so far as substance is concerned." Ex-parte Keet, 315 Mo. L. C. 701.

35. 300 S. W. 691 (Mo.)

36. In STATE V FOX, (1927),300 S.W. 820, the court answers the argument of counsel with respect to formal conclusions to indictments by saying, "But that view was exploded in Ex parte KEET."

CONTRIBUTORY NEGLIGENCE. FAILURE OF MOTORIST TO STOP, LOOK AND LISTEN BEFORE CROSSING RAILROAD.

In *Flanagan v. St. Louis-San Francisco Ry. Co.*,[1] a decision of the Springfield Court of Appeals, plaintiff sued for damages to his automobile caused by a collision with defendant's train at a public crossing. Defendant pleaded contributory negligence, bottomed upon plaintiff's failure to stop, look and listen before driving upon the tracks. Although it appeared that plaintiff's view of the tracks, until within a few feet of them, was completely obstructed, the court denied defendant's instruction in the nature of a demurrer to the evidence, and left to the jury the question whether the plaintiff was guilty of contributory negligence under the circumstances. Plaintiff had a verdict and judgment, and defendant appealed, alleging that plaintiff's failure to stop, look and listen convicted him of contributory negligence as a matter of law. The Springfield Court of Appeals affirmed the judgment. The court said: "Distances, speed, physical facts, and the conduct of the injured party, together with all the other facts and circumstances, must be taken into consideration in passing upon the question of contributory negligence. Each case is more or less different on the facts, and no hard and fast rules may be laid down applicable alike to all cases".

With respect to the standard of conduct which a traveler must observe in a crossing case, there is some divergence of judicial opinion in this country. The rule in Missouri, however, seems to be well settled in accordance with the instant case.[2] The courts of this state have uniformly held, in such situations, that the standard of care which may be exacted from the traveler is that which is characteristic of a reasonably prudent individual under the circumstances. Except in those cases where a directed verdict is possible because the evidence conclusively establishes contributory negligence,[3] it is always, according to the Missouri decisions, a question for submission to the jury. The great weight of authority elsewhere is to the same effect.[4]

But a different rule is followed in a minority of jurisdictions.[5] In Pennsylvania, perhaps, the minority rule has received its greatest impetus and most definite pro-

1. 297 S. W. 463 (1927).

2. Elliott v. Chicago, etc. Ry Co., 105 Mo. App. 523, 80 S. W. 270 (1904); King v. St. Louis, etc. Ry. Co., 143 Mo. App. 279, 127 S. W. 400 (1910); Woodward v. Wabash R. Co., 152 Mo. App. 468, 133 S. W. 677 (1910); Moore v. Wabash R. Co., 157 Mo. App. 53, 137 S. W. 5 (1911); Feldewerth v. Wabash R. Co., 181 Mo. App. 630, 164 S. W. 711 (1914); Underwood v. St. Louis, etc. Ry. Co., 182 Mo. App. 252 (1914); Salisbury v. Quincy, etc. R. Co., 268 S. W. 896 (Mo. App.) (1924); Pierson v. Mo. Pac. Ry. Co., 275 S. W. 561 (Mo. App.) (1925).

3. See Burge v. Wabash R. Co., 244 Mo. 76, 148 S. W. 925 (1912).

4. Central of Ga. Ry. Co. v. Hyatt, 151 Ala. 355, 43 So. 867 (1907); Martin v. So. Pac. Ry. Co., 150 Cal. 124, 88 Pac. 701 (1906); E. J. and E. Ry. Co. v. Lawler, 229 Ill. 621, 82 N. E. 407 (1907); Hartman v. C. G. W. Ry. Co., 132 Ia. 582, 110 N. W. 10 (1906); Harwood v. Mo. Pac. Ry. Co., 118 Kan. 332, 234 Pac. 990 (1925); Jenkins v. R. Co., 124 Minn. 368, 145 N. W. 40 (1914); Hall v. Union Pacific R. Co., 113 Neb. 9, 201 N. W. 678 (1924); Davis v. Concord, etc. Ry. Co., 68 N. H. 247, 44 At. 388 (1895); Alden Speares Sons Co. v. B. and M. R. Co., 80 N. H. 243, 116 At. 343 (1921); Cowell v. Pa. Ry. Co., 101 N. J. L. 507, 129 At. 136 (1925); Kentfield v. N. Y. C. R. Co., 206 App. Div. 540, 199 N. Y. S. 860 (1923); Manning v. Atlantic, etc. R. Co., 129 S. C. 391, 125 S. E. 31 (1924); Galveston, etc. Ry. Co. v. Duty, 267 S. W. 744 (Tex. Civ. App.) (1924); Payne v. Mason, 123 S. E. 519 (Va.) (1924); Petry v. Hines, 117 Wash. 175, 200 Pac. 1077 (1921). For additional cases see Cent. Dig., Railroads, Sec. 1169, 1171, 1174; Dec. and 2nd Dec. Dig., Railroads, Sec. 350 (16), 350 (23).

5. C. R. I. and P. Ry. Co. v. Hamilton, 92 Ark. 400, 123 S. W. 379 (1909); St. Louis, etc. R. Co. v. Stacks, 97 Ark. 405, 134 S. W. 315; St. Louis, etc. R. Co. v. Coleman, 97 Ark. 438, 135 S. W. 338 (1911); North P. R. Co. v. Heilman, 49 Pa. 60 (1865); Irey v. P. R. Co., 132 Pa. 563, 19 At. 341 (1890); Mostaller v. B. and O. R. Co., 233 Pa. 388, 82 At. 462 (1912); Weike v. P., etc. Ry. Co., 237 Pa. 524, 85 At. 872 (1912); Atlantic Refining Co. v. N. Y. etc. R. Co., 67 Pa. Super. Ct. 320 (1917); White v. Minneapolis, etc. R. Co., 147 Wis. 141, 133 N. W. 148 (1911); Bates v. San Pedro, 38 Utah 568, 114 Pac. 527 (1911); Wright v. Clark, 79 Fed. 744, 25 C. C. A. 190 (Utah

nouncement, and the minority rule will therefore, for convenience, be referred to herein as the Pennsylvania rule. In Pennsylvania, and the states which have a similar doctrine, the standard of conduct is not so flexible as in Missouri. In Atlantic *Refining Co. v. N. Y., Chicago and St. L. R. R. Co.*,[6] the court said: "The rule to stop, look and listen is not a rule of evidence, but a rule of law, peremptory, absolute, and unbending, and the jury can never be permitted to ignore it, or to pare it away by distinction and exception". It is, in Pennsylvania, an absolute and unbending rule that a traveler upon the public highway must stop, look and listen before he enters upon the railroad crossing. If he has done this, and thenproceeds, the question wheth er or not he has exercised proper care in crossing the tracks, as he proceeds, and whether it is necessary for him to stop again, is a question for the jury.[7] But if he fails to stop, look and listen before he goes onto the tracks, he is thereby convicted of negligence, and, no matter what the other circumstances, he cannot recover.

Except in Pennsylvania and the jurisdictions which follow it, this obligation to stop, look and listen before crossing a railroad is not absolute. To be sure, the duty to look and listen is so proper a precaution, in most cases, as to be frequently mentioned in terms which, standing alone, might be interpreted to imply an absolute duty; but the general rule is undoubtedly in accord with that promulgated by the Missouri decisions.[8] Even in Missouri, if an automobilist's view at a crossing is obstructed in such a manner that he can neither see nor hear an approaching train, it may become his duty, in the exercise of ordinary care, to stop his car in a place of safety, to ascertain, before driving into the danger zone, whether a train is near at hand.

A possible third and intermediate view seems to have been adopted by the United States Supreme Court in the recent decision of *Baltimore and Ohio R. Co. v. Goodman*[9]. In that case the plaintiff's intestate was driving an automobile truck in an easterly direction and was killed by defendant's train running southwesterly across the road at a rate of not less than sixty miles per hour. The line was straight, but the driver "had no practical view" beyond a section house 243 feet north of the crossing until he was about 20 feet from the tracks. He had been driving at the rate of 10 or 12 miles per hour but in going onto the crossing cut down his rate to 5 or 6 miles per hour. The plaintiff had judgment below, and the same was affirmed by the Circuit Court of Appeals for the Sixth Circuit. The Supreme Court reversed the judgment, the error adjudged being the refusal of the trial court to direct a verdict for the defendant. Justice Holmes, in delivering the opinion of the court, said: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. It is true that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear, it should be laid down once for all by the courts". The necessity of stopping would apparently extend, according to this decision, only to those cases where a view of the tracks is rendered impossible by reason of obstructions flanking the road. The case does not seem to go the full length of the Pennsylvania decisions.

6. 67 Pa. Super. Ct. 320 (1917).
7. Lehigh V. R. Co. v. Braidmaier, 113 Pa. 610 (1886); Kinter v. Pa. Ry. Co., 204 Pa. 497, 54 At. 276 (1903); Bistider v. Lehigh V. R. Co., 224 Pa. 615, 73 At. 940 (1909); Benner v. P., etc. Ry. Co., 262 Pa. 307, 105 At. 283 (1918).
8. See notes 4 and 5.
9. 48 S. Ct. 24, 72 L. Ed. (Adv. 22), (1927).

What are the relative merits of the foregoing rules?

If the rule followed by the Pennsylvania courts be adopted, presumably railroads would seldom be liable for crossing accidents. The duty imposed on the traveler is so extreme that if he performs it he is almost certain to get across safely. Perhaps the rule is supposed to work toward the protection of human lives. However, human beings are, and probably may be expected to remain, human beings. A man is not likely to use more caution than he thinks necessary under the circumstances. It is improbable that a stringent rule of law (and certainly if he has no knowledge of it) will make him act differently from the way he would have responded under a more lenient rule. In *Murphy v. Wabash Railroad Co.*,[10] Judge Lamm remarks: "It may well be doubted if a single person, within the memory of man now alive, ever walked on a railroad track in Missouri, or refrained from walking there, solely because of any decision made by this or any court on any phase of the law of negligence". The Judge's remarks have the flavor of good sense. They apply to a crossing case with equal reason. It may well be doubted, therefore, whether the enforcement of the Pennsylvania rule would result in the prevention of crossing accidents and the consequent saving of life.

The application of the Pennsylvania rule might well tend to laxness on the part of the railroads. Certainly the feeling of security on their behalf which the rule must engender, would not naturally stimulate additional effort toward the abolition of accidents.

If the object of the particular rule be the stimulation of greater care and the consequent decrease in accidents, it would seem that more might be accomplished along this line by putting a greater burden on the railroad, rather than on the traveler; for a railroad corporation informs itself of the rule of law, and seeks to come within it, whereas an injured traveler would in all likelihood learn of the rule for the first time when he consulted his lawyer after the accident.

It is argued that as the automobile is a heavy and powerful machine, a higher degree of care should be observed at grade crossings by the driver than in the case of ordinary horse-drawn vehicles, not only for the safety of the occupants of the car, but for the safety of the train and its passengers as well. But it seems that this circumstance is adequately taken account of under the Missouri rule, by reason of the fact that the character of the vehicle enters into the question whether the driver was in the exercise of due care under the circumstances.

Justice Holmes, in his book on "The Common Law" (1881) (pp. 122-129) stated with much force probably the strongest argument in favor of the stringent rule. He says:

> "But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. There is no reason why any such question should not be settled.....The exceptions would mainly be found where the standard was rapidly changing....The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination."

10. 228 Mo. 56, 128 S. W. 481 (1910).

The position of Justice Holmes is, therefore, that the state of facts embraced within an ordinary crossing accident case has been so frequently repeated as to justify laying down an arbitrary standard of conduct, failure to live up to which shall constitute negligence as a matter of law.

However it is difficult to perceive why the arbitrary standard, if it is to be established, should apply only in cases where the traveler's view is obstructed. The position taken by Holmes in "The Common Law" would seem to lead him to the Pennsylvania rule.

We confess to a preference for the orthodox rule of the Missouri court. There seems to be no sound reason why a different rule should be enforced in crossing accident cases than that which prevails in all other actions grounded upon negligence and in which contributory negligence is available as a defense. The hard and fast rule, as enunciated in Pennsylvania, or as promulgated in its modified form by the Supreme Court of the United States, would seem to work a judicial usurpation of the function of the jury. There are conceivable cases in which the person injured might justifiably go upon the crossing without pausing to stop, look and listen; as, for example, when a flagman invites him to cross,[11] or where there is an implied invitation by reason of the opening of gates,[12] or where there is a flagman who makes no signal though he sees the oncoming traveler.[13]

Furthermore, fairness seems to dictate that railroad and traveler be subjected to reciprocal rights and obligations. The Supreme Court of the United States has not always been of the opinion that the entire burden should be placed upon one party to the exclusion of the other. In *Continental Improvement Co. v. Stead*[14] a case arising from Indiana, a railroad, sued in a crossing accident case, requested the court to charge the jury to the general effect that the plaintiff should have looked out for the train, and was chargeable with negligence in not having done so; that an engineer is not bound to look to right or left, but only ahead on the line of the railway, and has a right to expect that persons and teams will keep out of the way of the locomotive; and that it is the duty of those crossing the railroad to listen, and to look both ways along the railroad before going onto it, and to ascertain whether a train is approaching or not. The trial judge refused so to instruct. Plaintiff had a verdict and judgment. Defendant appealed, alleging the refusal of the requested instruction as error. The Supreme Court affirmed the judgment. The court says that the obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal; that no greater degree of care is required of the one than the other; that though it cannot be expected that the train will stop and let the traveler cross first, yet the railroad is bound to give reasonable and timely warning of the approach of the train, and to slacken speed if necessary, or station watchmen at the crossing, if, by reason of intervening objects obstructing the view of the traveler, or otherwise, the railroad cannot otherwise give timely warning. And the traveler, on the other hand, says the court, is bound to exercise ordinary care and diligence to ascertain whether a train is approaching; but there is no justification, the court holds, for putting all the burden on the traveler.

Continental Improvement Co. v. Stead seems preferable to *Baltimore and Ohio R. Co. v. Goodman.*

R. V.

11. St. Louis, etc. Ry. Co. v. Hitt, 76 Ark. 224, 88 S. W. 908 (1905); Chicago, etc. R. Co. v. Cough, 134 Ill. 586 (1891).

12. Conaty v. N. Y. etc. Ry. Co., 164 Mass. 572. 42 N. E. 103 (1895); Slushing v. Sharp, 96 N.Y. 676 (1884).

13. Robbins v. Fitchburg R. Co., 161 Mass. 145, 36 N. E. 752 (1894).

14. 95 U S. 161 (1877).