scene afoot when his view was obstructed by freight cars standing on a siding. It is a matter for the jury. *Pokora v. Wabash Ry. Co.* (1934) 54 S. Ct. 580.

The case is in accord with the prevailing American view, although there is much controversy on the subject. Of course, all the Courts recognize the duty to stop, look and listen at a crossing as an important part of the traveller's duty of care. The conflict concerns the degree of rigidity with which the rule is to be applied as a determination of the proper standard of care, and, consequently, the effect of a failure to stop, look and listen. On this question there are three main classes of holdings. The Courts of Pennsylvania in an early case, *Pennsylvania R. Co. v. Beale* (1873) 73 Pa. 504, 13 Am. Rep. 753 laid down the rule that there is an absolute duty to stop, look and listen, and that a failure to perform this duty is contributory negligence in all cases. This rule has been followed unbendingly by the Courts of that state but has received little encouragement elsewhere. *Ihrig v. Erie R. Co.* (1904) 210 Pa. 98, 59 Atl. 686; *Nolder v. Pennsylvania R. Co.* (1924) 278 Pa. 495, 123 Atl. 507. The second view is that the duty is conditioned upon the circumstances. Under this class some Courts hold that the duty may be declared as a matter of law if there are exceptional circumstances, such as a blind and dangerous crossing or obstructions near the tracks. *Central Coal and Coke Co. v. Kansas City Southern R. Co.* (Mo. App. 1919) 215 S. W. 914; *Crandall v. Hines* (1921) 121 Me. 11, 115 Atl. 464. Other Courts while subscribing to the same general view apply the rule more firmly and hold that failure will be held contributory negligence unless there are special circumstances, as where the traveller's failure is caused by some misleading act of the railroad company, or where the last clear chance doctrine is applicable, or where the failure is not a proximate cause. *Lefebvre v. Central Vermont R. Co.* (1924) 97 Vt. 342, 123 Atl. 211; *Cunningham Hardware Company v. Louisville and N. R. Co.* (1923) 209 Ala. 327, 96 So. 358. The third view is that the question of negligence in failing to stop, look and listen is a question of fact for the jury in practically every case. Most of the state Courts, and the Federal Courts since the instant case, are in accord with this view. *Cook v. Missouri P. R. Co.* (1923) 160 Ark. 523, 254 S. W. 680; *Norton v. Davis* (Mo. App. 1924) 265 S. W. 107; *Murray v. Southern P. R. Co.* (1917) 177 Cal. 1, 169 Pac. 675.

The instant case overrules the dictum of Justice Holmes in *Baltimore and Ohio R. R. Co. v. Goodman* (1927) 275 U. S. 66, 48 S. Ct. 24. There it was said that the traveller is under an absolute duty to stop, look and listen, and that if his view is obstructed he must get out of his car and survey the scene afoot, failure to do so being held contributory negligence as a matter of law.

J. D. Y. '36.

EMBEZZLEMENT, LARCENY, FALSE PRETENSES—TIME OF INTENT.—The defendant, owner of a realty and loan business, held $1,100 belonging to an investor and procured an additional $400 from her to invest in a loan secured by a valuable lot, pointed out to the investor. It was latere found that the deed of trust conveyed an adjoining lot of a value insufficient to secure the loan and also that the defendant had failed to have the deed of trust recorded. The trial resulted in a conviction of embezzlement by an agent, and the defendant appeals principally upon the theory that the evi-

dence showed he had formed the intent to deprive the investor of her money at the time he took possession and that, consequently, embezzlement was not the offense. The Supreme Court held, however, that there was evidence to prove a subsequent intent and, furthermore, that where the evidence would support a conviction for embezzlement or false pretenses the Court need not ascertain the exact moment when the criminal intent was formed. *Gould v. State* (1932) 329 Mo. 828, 46 S. W. (2d) 886. Compare with *People v. Wildeman* (1927) 325 Ill. 99, 156 N. E. 257.

The traditional distinction as to time of intent in embezzlement, on one hand, and false pretenses and larceny, on the other, has been that intent to deprive the owner of his property must be formed after a lawful possession to constitute embezzlement, whereas intent must exist at the time of the taking to constitute larceny or false pretenses. *Eggleston v. State* (1901) 129 Ala. 80, 30 So. 582.

Missouri cases have supported this distinction. As Judge Westhues in his opinion points out, there is authority for relaxing this particular distinction between false pretenses and embezzlement by an agent, *note* (1908) 17 L. R. A. (N. S.) 531, but Missouri cases impliedly favor the traditional view, although no cases prior to *State v. Gould* are in point. In *State v. Norton* (1882) 76 Mo. 180, the Court declared the obtaining of property with intent to cheat or defraud to be the gist of the offense of obtaining money by false pretenses. Similar dicta are in *State v. Fraker* (1899) 184 Mo. 143, 49 S. W. 1017; and *State v. Mastin* (1919) 277 Mo. 495, 211 S. W. 15.

This distinction has been rigidly adhered to as between larceny and embezzlement. In *State v. Scott* (1923) 301 Mo. 409, 256 S. W. 745 the defendant told another he could procure for him a suit of clothes at half-price. The defendant took the money, returned, gave the purchaser a box and disappeared. When the purchaser reached home and opened the box he found it contained only rags. The defendant appealed from a conviction for larceny, contending that the evidence showed that intent was formed after the taking and that the actual crime was embezzlement. The Court affirmed the conviction, approved the distinction between the two crimes, but held that the evidence supported the verdict rendered. Other Missouri cases in line are *State v. Kennedy* (Mo. App. 1922) 239 S. W. 869; and *Williams v. State* (1864) 35 Mo. 229.

The distinction as to time of intent between embezzlement and false pretenses having been abolished in *Gould v. State*, there is no logical basis for retaining it as between embezzlement and larceny. Perhaps this case will provide precedent for abolition of other useless distinctions among these three crimes, distinctions which serve only as loopholes through which criminals may evade, and have evaded, justice. See *State v. Ruznak* (Mo. App. 1929) 15 S. W. (2d) 349, and compare with *State v. Wren* (S. C. Mo. 1933) 62 S. W. (2d) 853. In his opinion, Judge Westhues points out that had the defendant been convicted of false pretenses instead of embezzlement he no doubt would have attempted to evade justice by appealing on the ground that he was really guilty of embezzlement. The Court said further: "When the defendant by his own criminal acts has placed himself in such a position that the evidence will support a conviction on either of two theories, such as embezzlement by agent or obtaining money by false pretenses, it should not be the duty of the Court to draw fine hair-splitting distinctions and ascertain just at what moment the criminal intent was formed."

Some states, including Massachusetts and California, have by statute combined the three crimes into one for purposes of indictment. A similar statute would be welcome in Missouri. See (1920) 20 Colo. L. Rev. 318, and 484, 490a California Penal Code 1931, also *People v. Stevenson* (1930) 103 Cal. App. 82, 284 P. 487. J. C. L. '36.

EVIDENCE—HEARSAY—LEARNED TREATISES.—The defendant company maintained its wires carrying 13,000 volts, at a height nineteen feet and four inches above a rural road. Plaintiff's intestate was electrocuted when a twenty-two foot iron pole he was erecting came in contact with the high power line. The defendant assigned as error the exclusion as evidence of the "National Electric Code" issued in 1926 by the United States Department of Commerce, Bureau of Standards, which showed that, for wires carrying 750 to 15,000 volts, the vertical minimum clearance along roads in rural districts should be eighteen feet. This book was issued to inform the public, but no law required it. Held; that the book deals not with an exact science, nor mathematical or factual certainties, but with a controversial and developing science in which opinions may vary and experience work great changes, and is therefore excluded, just as medical books are, from the evidence. *Mississippi Power and Light Co. v. Whitescraver* (C. C. A. 5, 1934) 68 F. (2d) 928.

This decision is of more than passing interest since it determines a point which, heretofore, seems to have been unsettled in the federal courts, and thus falls in line with the overwhelming weight of authority which holds that scientific books are not exceptions to the hearsay rule and must be excluded. *Ashworth v. Kittridge* (1853) 12 Cush. (Mass.) 193, 59 Am. Dec. 178; *People v. Vanderhoof* (1888) 71 Mich. 179, 39 N. W. 28; *Whiteley v. Stien* (S. C. Mo. 1931) 34 S. W. (2d) 1001; 3 Wigmore (2d ed., 1923) par. 1696; 10 R. C. L., Evidence, sec. 364. The courts offer varied reasons for their position. A Missouri court says that such a learned treatise represents a statement out of court by one not present for cross examination. *Whitely v. Stien, supra.* Others say that scientists disagree among themselves and thus such evidence is not trustworthy. *Ashworth v. Kittridge, supra; Hoffman v. Click* (1877) 77 N. C. 57. Passages from a book may not convey the author's complete view, *Gallager v. Market St. R. Co.* (1885) 67 Cal. 16, 6 Pac. 869, and may confuse the jury without oral simplication, *Ashworth v. Kittridge, supra.* Alabama, despite the elsewhere unanimous opinion to the contrary, has continually admitted scientific works as evidence, *Stoudenmeier v. Wilson* (1857) 29 Ala. 568; *Bales v. State* (1879) 63 Ala. 38; *Birmingham R. L. and P. Co. v. Moore* (1906) 148 Ala. 115, 42 So. 1024, arguing that all expert testimony is based in some part on written authorities, and therefore the admission of books is in fact the admission of primary evidence. *Stoudenmeier v. Williamson, supra,* l. c. 567. Several states, for this reason, have attempted to escape the limitations of the common law with regard to the exclusion of scientific books as evidence, by statutory enactment designing them to be an exception to the hearsay rule. *Cal.* C. C. P. 1931, sec. 1936; *Idaho* Comp. St. 1919, sec. 7961; *Iowa* Rev. Code, sec. 7325; *Nebr.* Rev. St. 1922, sec. 8852; *Mont.* Rev. Code 1921, sec. 10575; *Ore.* Laws 1920, sec. 781; 3 Wigmore (2d ed., 1923) par. 1693. In California, Iowa, and Nebraska, however, the effort of the legislature has been negatived by