the Baptist Association *v.* Hart's Executors has given occasion.[1] . . . In eight States, therefore, the law of charitable uses is held, as it is held in Pennsylvania, and I cannot but regard it as a public misfortune to those States where it is held otherwise."[2]

SUPREME COURT OF ILLINOIS.

LAKE SHORE & M. S. RY. CO. *v.* BODEMER.[3]

SYLLABUS.

The engineer of a railroad company, while driving his locomotive through a crowded portion of a large city at a rate of speed greatly in excess of that allowed by ordinance of the city, struck and killed a young boy, who was a trespasser. The tracks of the company at the place where the accident occurred, were laid on ground belonging to the company, but they were not fenced in, and on each side of them was a public way. The engineer could have seen the boy when one hundred and twenty-five feet away from him, but no bell was rung, and, according to the weight of the testimony, no whistle was blown until the locomotive was but a few feet from the boy. Held: That it was for the jury to say whether under the circumstances the engineer was guilty of such wanton and wilful negligence as would allow plaintiff, the administrator of the boy, to recover damages in spite of the contributory negligence of the boy.

STATEMENT OF THE CASE.

Appeal from the Appellate Court of the First District. This was an action on the case brought by Philip

[1] Mr. Binney here says: "In Massachusetts there are, beside the prior cases of Bartlett *v.* King's Executors, 15 Mass., 537, and Trustees of Phillips' Academy *v.* King's Executors, 15 Mass., 537, the case of Goring *v.* Emery, 16 Pick., 107; Burbank *v.* Whitney, 24 Pick., 146, and Bartlett *v.* Nye, 4 Metcalfe, 378. In Maine, Shapley *v.* Nissbury, 1 Greenl., 271. In Vermont, Burr's Executors *v.* Smith, 7 Verm. Rep., 241. In New York, Coggeshall *v.* Nelton, 7 John Ch. Rep., 292; McCartie *v.* Orphans' Asylum, 9 Cowen, 437; Baptist Church of Hartford *v.* Witherill, 3 Paige, 300; King *v.* Woodhull, 3 Edw., 79; Potter *v.* Chapin, 6 Paige, 640; Reformed Dutch Church *v.* Mott, 1 Paige, 77; Pearsall *v.* Poast, 20 Wendell, 119, and Wright *v.* Trustees Methodist Episcopal Church, 1 Hoff, 302. In New Jersey, Ackerman's Executors *v.* Legatees cited in the report of Shopwell *v.* Hendrickson, Vol. III, 9, which is itself a full authority for the same doctrine. In North Carolina, Griffin *v.* Graham, 1 Hawks, 96. In Ohio, McIntyre Poor School *v.* Zanesville Canal Co., 9 Ohio, 203."

[2] Argument of H. Binney, Girard's Will Case, p. 185.

[3] 29 Northeastern Reporter, 692, decided Jan. 18, 1892.

Bodemer, as administrator of the estate of his son, Philip Bodemer, Jr., to recover damages for the death of the latter. The facts of the case were as follows: At the place where the accident happened the tracks of the appellant ran north and south at right angles to Twenty-fifth and Twenty-sixth Streets, along Clark Street, in the city of Chicago, on ground owned by the defendant. On each side of the tracks was a public way ten feet wide, and the tracks were not fenced in. The tracks were crossed by Twenty-fifth and Twenty-sixth Streets, on which there was much travel at the locality in question. The deceased, a boy about nine years old, and his brother, about twelve years old, came to Twenty-fifth Street from the east at the time of the accident, which cost decedent his life, to cross the tracks there. A long and noisy freight train was going southward on one of the eastern tracks, and the boys walked southward along the alley east of the track till the last car of the freight train had passed. The elder brother then crossed the tracks in safety, going to the west, but his younger brother, while attempting to follow, was struck and killed by the engine of a passenger train going at a high rate of speed to the north on one of the tracks west of the one on which the freight train had just passed.

The only count in the declaration that was left to the jury alleged that the defendant was driving its locomotive toward a certain point on its railroad near the crossing of Twenty-fifth Street; and while the deceased, who was a minor under the age of ten years, was

"then and there, at said aforementioned point upon said railroad, attempting to cross said railroad," the engineer, although he knew that persons were in the habit of passing across and along the track at and near said place, between Twenty-fifth and Twenty-sixth Streets, "and although, while at a great distance from said certain point aforesaid, upon the railroad of the defendant, he saw divers persons near to that track of defendant's railroad upon which he was at that time driving his engine, and although he saw said Philip Bodemer, Jr., upon and between said tracks, upon which he was at that time driving said engine, said Philip Bodemer, Jr., being at that time at a great distance from said engine, yet the said servant of the defendant wantonly, recklessly, and with gross negligence drove said engine and train at a very great rate of speed along and upon aid railroad of the defendant, and toward said Philip Bodemer, Jr., and

toward and across said certain place, and did not make reasonable or efficient effort to avoid causing his said engine to strike the said Philip Bodemer, Jr., nor did he give adequate, sufficient, or timely warning to the said Philip Bodemer, Jr., in order that he might avoid being injured by the approach of said engine, and by and through the gross and wanton negligence and improper conduct of the defendant, the locomotive struck the deceased and killed him."

The evidence showed that the engine of the defendant was being driven much faster than was allowed by an ordinance of the city of Chicago, and that the engineer could have seen the boy when one hundred and twenty-five feet away from him. No bell was rung, and according to the weight of the testimony no whistle was blown till the engine was within a few feet of the boy. It was admitted that decedent was a trespasser on the tracks of the defendant when he was killed. The other facts in the case are set forth sufficiently in the opinion of the Court.

The Court below left it to the jury to say whether injury was inflicted wantonly or wilfully, or with such gross negligence as showed wilfulness. The jury found for the plaintiff, and the defendant then took the present appeal, assigning as error the refusal of the Court to instruct the jury to find for the defendant.

OPINION OF THE COURT.

MAGRUDER, C. J. : It is assigned as error that the trial court refused, at the conclusion of the testimony on both sides, to instruct the jury, as then requested by the defendant, to find for the defendant. The position of the appellant is that the deceased was a trespasser upon its right of way, attempting to cross the tracks where there was no public crossing. It has been held that, where a trespasser upon the tracks of a railroad company is injured, the company is not liable unless the injury was wantonly or wilfully inflicted, or was the result of such gross negligence as evidences wilfulness. By withdrawing the first, second, third and fourth counts from the consideration of the jury, and submitting the case upon the fifth count, the Court assumed that the deceased was a trespasser at the time of his

death, required the jury to find that the injury was inflicted wantonly and wilfully, or with such gross negligence as showed wilfulness.

The evidence of the plaintiff tended to show that there were public street-crossings over appellant's tracks at Twenty-sixth, Twenty-fifth and Twenty-fourth Streets; that the passenger train, which struck the deceased, was travelling at the rate of from thirty to thirty-five or forty miles an hour; that there were no gates where Twenty-sixth Street crosses the tracks; that the tracks were laid upon what was called "Clark Street," running directly south from Twenty-second Street; that there were two roadways along the east and west sides of the tracks; that there were no fences between these roadways and the tracks; that the public drove along these roadways, running north and south, with wagons, and people passed up and down upon them; that wagons drive up to the tracks upon these roadways, between Twenty-sixth and Twenty-fifth Streets, and unload the cars standing there on the tracks; that "the wagons do not drive in there between the tracks except when they are unloaded;" that there are houses on the east side of the tracks; that upon the west side of the tracks, fronting upon the strip of ground called "Clark Street," and consisting of the two roadways and the tracks between them, are a saloon, a rag-shop, carpet-shop, stone-yard, packing-house and ice-house, all located between Twenty-sixth and Twenty-fifth Streets; that many people pass there, going across the tracks to the rag-shop and packing-house every day, and no bell was rung on the engine of the passenger train which killed the deceased; that a whistle was blown twice, giving two short, sharp sounds, when the engine of the passenger train was about five or ten feet from the deceased, or, as some of the witnesses express it, that the deceased was struck at the same time when the whistle was blown; that the deceased when struck was thrown into the air several feet; that the engine which struck him did not stop until it reached Twenty-fourth Street, about two blocks north of the place of the accident; that three boys who were on an empty

freight car standing on a track about a car length south of Twenty-fifth Street witnessed the killing of the deceased, and one of them saw him on the tracks before he was struck.

We are unable to say that there was not evidence enough to justify the Court in leaving it to the jury to say whether or not the boy was killed by the wanton and wilful negligence of the company. The company introduced no evidence whatever to contradict the testimony of the plaintiff, except for the purpose of showing that the strip of land occupied by the tracks between Twenty-fifth and Twenty-sixth Streets was its private right of way, and not a public street. In answer to written questions calling for special findings, submitted at defendant's request, the jury found that the tracks were straight for a considerable distance toward the south from the place of the accident; that a locomotive approaching that place from the south could be seen a distance of 1,000 feet; that the deceased did not step from behind the freight train immediately in front of the engine of the passenger train, but that he was about 125 feet from the engine when he stepped upon the track. The jury answered, "We cannot say," to the question, "Did the engineer have time to stop the train, after seeing deceased, and before striking him?" It was the duty of the engineer to exercise ordinary care to avoid striking the deceased, even if he was a trespasser. If it was impossible to stop the train in time, it may yet have been possible to have warned the plaintiff of his danger in time to enable him to get out of the way. The engineer "must use all the usual signals to warn the trespasser of danger."[1] If the boy was 125 feet from the engine when he stepped upon the track, did the engineer see him? It was for the jury to answer this question. The company did not produce the engineer to say that he did not see the deceased, nor did it introduce any evidence upon that subject. It is not necessary to show by affirmative testimony that the engineer's look was directed toward the boy. It is sufficient, if it appear from all the circumstances that he might

[1] 2 Shear. & R. Neg., 4th ed., 483.

have seen him by the exercise of reasonable diligence and ordinary prudence. Why did he not see him? The track was straight and clear and unobstructed for a long distance. Others saw him. The boys on the freight car were distant more than 125 feet, and one of them saw the deceased standing . . . on the track, right between the rails, not quite in the middle." If the engineer saw the boy when he was at a distance of 125 feet, did he give him the signal of danger as soon as he ought to have given it? One witness standing on Twenty-sixth Street, and waiting for the freight train to pass, swears that he heard the whistle blow at the crossing. His testimony tends to show, however, that the engine had passed Twenty-sixth Street before the whistle blew, and how far it had passed does not appear. But three witnesses swear that when the whistle sounded the engine was near enough to strike the boy, or only five or ten feet from him. It was for the jury to weigh this evidence, and consider its bearing. If they believed from the evidence that the engineer saw the boy, and thereafter waited until the sound of the whistle could do no good, when, by whistling as soon as the deceased came upon the tracks, he could have warned him in time to enable him to escape, they were justified in finding for the plaintiff.

The jury were authorized to look at the conduct of the engineer in the light of all the facts in the case. It has been said: "What degree of negligence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement."[1] In Railroad Co. *v.* Godfrey,[2] we said that when a trespasser is injured, the railroad company is liable for "such gross negligence as evidences wilfulness." We said the same thing in Blanchard *v.* Railroad Co.[3] What is meant by "such gross negligence as evidences wilfulness?" It is "such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness."[4] It is

[1] 2 Thomp. Neg., p. 1264, par. 53. [2] 71 Ill., 500.
[3] 126 Ill., 416. [4] 2 Thomp. Neg., p. 1264, par. 52.

such gross negligence as to imply a disregard of consequences, or a willingness to inflict injury.[1] In Harlan *v.* Railroad Co.,[2] it was said: "When it is said in cases where plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company fail to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity." Contributory negligence, such as that of a trespasser upon a railroad track, cannot be relied on "in any case where the action of the defendant is wanton, wilful or reckless in the premises, and injury ensues as the result."[3] "Under the rule conceding the right of a free track to a railway company, in the event of an injury to a trespasser upon its line, it can be held liable only for an act which is wanton, or for gross negligence in the management of its line, which is equivalent to intentional mischief."[4] Although the plaintiff is guilty of negligence, he can recover if the defendant could have avoided committing the injury by the exercise of ordinary care."[5]

Let these principles be applied to the facts of the case at bar. The train which committed the injury was travelling at the usual speed of thirty-five to forty miles an hour in the crowded city of Chicago; over street-crossings; upon unguarded tracks, so connected with a public street and so apparently the continuation of a public street as to be regarded by ordinary citizens as located in a public street; along a portion of such tracks where persons were known to be passing and crossing every day; in conceded violation of a city ordinance as to speed, and without warning of the approach of the train by the ringing of a bell. This con-

[1] Deer. Neg., par. 29. [2] 65 Mo., 22.

[3] Baumeister *v.* Railroad Co. (Mich.), 30 N. W. Rep., 337; Banking Co. *v.* Denison, 84 Ga., 774.

[4] 1 Thomp. Neg., 449. [5] Deer. Neg., par. 30.

duct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness. It also tended to show that if there was failure to discover the danger of the deceased, such failure was owing to the recklessness of the company's servants in the management of its train. We are of the opinion that the Court committed no error in refusing to instruct the jury to find for the defendant.[1]

Appellant assigns as error the admission of testimony that persons were in the habit of passing across the tracks at the place where the accident occurred. In cases where persons have travelled along a railroad right of way as a mere footpath, using it for their own convenience, and where there was no evidence of any assent of the railroad company thereto except its non-interference with the practice, it has been held that such persons are to be regarded as wrongdoers and trespassers, and that a mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.[2] But in each of such cases it was conceded that the place where the injury occurred was upon the right of way of the railroad company, and that the party making use of such right of way knew it to be the exclusive property of the railroad company for the purpose of running its trains. But in the case at bar the testimony of the plaintiff tended to show that the tracks at the point where the deceased was killed were laid in Clark Street, a public street of the city of Chicago. There were travelled roadways constantly in use on both sides of the tracks, and several witnesses testified that the strip of land which embraced the tracks in the middle and the roadways on the sides was called Clark Street, and regarded as a public street.

When the evidence on the part of the plaintiff had closed, the defendant introduced proofs tending to show

[1] Railroad Co. *v.* Gregory, 58 Ill., 226; Railroad Co. *v.* Galbreath, 63 Ill., 436.

[2] Railroad Co. *v.* Godfrey, 71 Ill., 500; Railroad Co. *v.* Blanchard, 126 Ill., 416; Railroad Co. *v.* Hetherington, 83 Ill., 510.

that the strip in question was 120 feet wide; that 100 feet in the middle of the strip where the tracks were laid, was railroad right of way, but that ten feet on each side of said 100 feet belonged to the public, and were used by the public. The strip in question was used partly by the public and partly by the railroad company. The proofs also tended to show that for years the railroad tracks had been laid in Clark Street as far south as Twenty-second Street, though they had subsequently been moved somewhat to the westward. The course of the tracks southward was such as to appear to be a mere extension of Clark Street. There was no fence or other mark of separation to designate what portion of the strip 120 feet wide belonged to the public, and what portion belonged to the railroad. There was proof tending to show that before any tracks were laid at all there had been a footpath in use from Twenty-second Street as far south as Twenty-fifth Street. As has already been stated, it also appeared that persons were allowed to come up to the cars standing upon these tracks for the purpose of loading and unloading their wagons; and one witness stated that wagons drove upon or between the tracks for such purpose. The books draw a distinction between cases where there is a mere naked license or permission to enter upon or pass over an estate, and cases where the owner or occupant holds out any enticement, allurement, or inducement to persons to enter upon or pass over his property.[1] "A mere passive acquiescence by an owner or occupier in a certain use of his lands by others involves no liability; but if he, directly or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use; and for a breach of this obligation he is liable to damages to a person injured thereby." Though it is unnecessary to go so far as to hold in this case that the facts hereinbefore recited amounted to an implied inducement on the part of the railroad company to the public to pass over its tracks, it is nevertheless quite manifest that the surroundings were such as to give to the tracks the appearance of being lo-

[1] Sweeny *v.* Railroad Co., 10 Allen, 368.

cated in a public street, and all the circumstances of the situation were such as to lead those who had occasion to frequent that neighborhood to believe that the tracks were in a public street; hence, we are inclined to the opinion that the Court did not err in admitting proof of the passing of persons across the tracks, for the reason that such proof was admitted before the defendant proved that the tracks were on its right of way, and while as yet the evidence of the plaintiff tended to show, in the absence of contradictory proof, that the tracks were in a public street, or what was called or regarded as a public street. If the tracks were in a public street, the company was unquestionably under obligations to "provide against the danger of accident" to those rightfully thereon. After the defendant introduced its proof, it did not move to exclude the particular testimony of the plaintiff as to the passing of persons over the tracks. Whether, therefore, after the ownership of the company had been shown, persons who had been proved to be in the habit of crossing the tracks under the belief that they were crossing a public street, were or were not such wrongdoers as to relieve the company from liability for injury to them, is a question which need not be further considered.

The appellant further objects that the Court should have excluded the ordinances as to speed and the ringing of a bell, as these ordinances were not described in the fifth count of the declaration.[1] The ordinance as to speed was described in the third count, and the ordinance as to the ringing of the bell was described in the fourth count, and they were properly admitted under these counts at the time when they were admitted. After defendant introduced its proof, it made no formal motion to exclude the ordinances, though it objected to the reading of them to the jury in the argument of plaintiff's counsel, and asked the Court to instruct the jury to disregard them as evidence. We do not think that the action of the Court in this particular, even if it be regarded as technically erroneous, could have done the defendant any harm, for the reason that counsel

[1] Railroad Co. *v.* Godfrey, *supra.*

for the defendant admitted in his opening statement to the jury that the city ordinance prohibited the running of trains in the city at greater rate of speed than ten miles an hour, and also admitted that the train that killed the deceased was travelling at a greater rate of speed than ten miles an hour, and for the reason that the ordinance as to the ringing of the bell was not read at all in the hearing of the jury, and counsel for defendant allowed the testimony that no bell was rung to be admitted without objection. Furthermore, the action of the Court in withdrawing from the consideration of the jury all the counts except the fifth was exceedingly favorable to the defendant. We do not think that the jury ought to have been told that there could be no recovery under the third count which described the ordinance as to speed. Even if it be admitted that the deceased was a trespasser, the third count was sufficient to authorize the proof under it of such gross negligence as evidences wilfulness. The word "reckless" implies heedlessness and indifference. If an engineer, knowing that persons are accustomed to cross a track between the streets of a large and crowded city, drives his engine forward "recklessly," that is to say, with indifference as to whether such persons are injured or not, and at the rate of speed "greatly" in excess of that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he be a trespasser, will be regarded as the result of "such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness."

The views already expressed dispose of appellant's objections to the refusal of instructions numbered 3, 4, 5 and 8, asked by the defendant. Refused instruction number 7 was not based upon the evidence. It submitted to the jury the question whether or not the deceased was using the tracks as a playground. We find no evidence in the record tending in the slightest degree to show that the tracks were used for any such purpose. Refused instructions numbered 9, 10, 11, 12, 15 and 17 merely related to the degree of care which the deceased was re-

quired to exercise; but as the case was submitted to the jury upon a declaration which charged wanton and wilful negligence, it made no difference to what extent the deceased was guilty of a want of care. Contributory negligence on the part of the plaintiff is no excuse for wanton and wilful negligence on the part of the defendant. Refused instructions numbered 24 and 25 assumed the existence of facts about which there was a controversy, and each singled out and gave undue prominence to a single circumstance, as characterizing the defendant's conduct, instead of leaving it to the jury to pass upon such conduct, upon a view of all the facts and circumstances in the case. The judgment of the appellate court is affirmed.

CRAIG and BAILEY, J. J., dissent.

CONTRIBUTORY NEGLIGENCE.

"Where the conduct of the defendant is wanton or wilful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of injury:" Cooley, Law of Torts, 674.

This wanton or wilful negligence or recklessness is not easy to define, nor is it easy in many cases to say whether or not the negligence of the particular case is such. The injury must be deliberate or wilful, or the action which caused it must be so reckless that the law regards the injury resulting from it as wilful or deliberate. If the plaintiff is placed in a dangerous position owing to his own negligence and the negligence of the defendant, and the defendant then becomes aware of the dangerous position of the plaintiff and fails to make every effort to avoid the injury, the defendant's negligence is here wilful. No amount of negligence on the part of the plaintiff will justify the subsequent wilful negligence on the part of the defendant in such a case.

At one extreme it is very simple. If a man persists in walking along a street that is closed to the public on account of a building operation, say, and a workman engaged at the top of the building sees the man on the street below, and, in spite of that fact, drops a hodful of broken bricks into the street, taking the chance that the man will not be hit, and the man is hit by a piece, here the injured party will have his action. True, he was guilty of contributory negligence in going on the closed part of the street, but that is no excuse for the action of the workman in deliberately throwing the bricks down on top of him, and trusting that no one of them will

strike him. In a case such as this there is no difficulty, for the injury is wilful, or the result of an action so reckless that the injury is treated as if it were wilful.

But there are many cases in which the workman threw down the bricks without first looking, though, perhaps, he knew the street was used by a great many people although it was closed. Here there would not be such a total disregard of the rights of others, and the injury is not so close to being wilful as in the former case. The difficulty in these cases lies in determining just what negligence is such that the injury resulting from it will be regarded as wilful, and in determining what cases should be left to the jury to decide this fact. The case reported above seems to be very close to the border line. A review of the cases shows that the courts of the different States do not agree in the matter, and that the Central and Western States are, perhaps, more favorable to the plaintiff than the Eastern ones. The question comes up more often, probably, in the case of trespassers injured on a railroad track than in any other form. In such cases the first principle to be remembered is that "a railroad engineer is not bound, usually, to foresee the wrongful presence of any person upon the track, even where it is open to an adjoining highway; . . . but if his experience has shown that persons are thus constantly entering upon the track, . . . such persons, if injured by reason of the engineer's failure to use ordinary care to keep watch for them, may recover damages if the engineer could have seen them without difficulty, had he kept a reasonable watch, even though, in point of fact, he did not see them:" Shearman & Redfield on Negligence, 4th ed., § 484. The second principle is that "the law presumes that a person walking upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge or should have by the ordinary use of the senses of hearing and seeing, and the managers of the train may act upon this presumption:" Per STAYTON, C. J., in I. & G. N. Ry. Co. *v.* Garcia, 75 Tex., 591. The third principle is that "although a man may be unlawfully on the track, may be a trespasser, the employees of the company would have no right to carelessly and negligently run over him after his presence and danger became known to them." Per MAXEY, J., in Saldana *v.* Galveston, H. & S. A. Ry. Co., 43 Fed. Rep., 862. STONE, C. J., lays down the law in such cases very clearly in S. & N. R. R. Co. *v.* Black, 89 Ala, 313. A person on a track must employ his eyes and ears to discover an approaching train, and if he fail to do so he is guilty of contributory negligence. When the engineer discovers a person on the track who from appearances is a person of discreet years, he is justified in supposing that such person will see or hear the locomotive and get off the track, and hence in such a case he is not bound to stop or check the train in the absence of other attendant circumstances. The engineer can act on this supposition until circumstances make it apparent that the trespasser is not aware of the approach of the train, or is unable to extricate himself from the peril. But when the engineer discovers that the trespasser is unaware of the approach of the train, or cannot leave the track,

he must use every endeavor to avert the catastrophe by stopping the train. In this case the decedent, who was deaf, was a trespasser on the tracks at a place where they were straight for nearly a mile, and the engineer saw him half a mile away. When the train was two hundred yards from him the bell was rung, and when within one hundred the whistle blown; and then the engineer, noticing that decedent did not look around or get off the track, reversed the engine, but the decedent was killed. The Court held that the question of the defendant's wilful negligence was for the jury, under instructions embodying the principles laid down above.

In the case of Central R. R. & Banking Co. *v.* Denson, 84 Ga., 774, plaintiff's decedent was walking along defendant's track, and a train of defendant came up from behind him at a place where defendant's servants could have seen decedent 400 yards away. No warning was given decedent by bell or whistle, nor was an effort made to check the speed of the train till it was but a few feet from decedent, when the whistle was blown twice, and about the same instant decedent was struck and killed. Held: Defendant was "guilty of gross, wilful and culpable negligence," and plaintiff could recover in spite of decedent's contributory negligence. See also Central R. R. & Banking Co. of Georgia *v.* Vaughan, 9 So. Rep., 468.

In Hyde *v.* Union Pac. Ry. Co., 26 Pac. Rep., 979 (Utah), a child, who was a trespasser, fell asleep on the defendant's track. The engineer saw the child when he was between two and three hundred yards away, but could not make out what it was till within thirty feet, when he endeavored to stop the train. Here it was held that the child's father could recover. See, also, Keyser *v.* Railway Co., 56 Mich., 559; Gunn *v.* Ohio River R. R. Co., 14 South East Rep., 465 (West Va.). A higher degree of care is demanded of the railroad company when the trespasser is a child than when he is a grown person: Kansas Pacific Ry. Co. *v.* Whipple, 39 Kan., 531. In this case the plaintiff recovered.

Detaching cars from the engine and letting them run by themselves with so few brakemen that they cannot be stopped promptly, if necessary, is wilful negligence: Georgia Pacific Ry. Co. *v.* O'Shields, 90 Ala., 29; Patton *v.* Railway Co., 89 Tenn., 370; Schumacher *v.* St. Louis & S. F. Ry. Co., 39 Fed Rep., 174 (U. S. C. C., W. D. of Ark.).

In Conley *v.* C. N. O. & T. P. Ry. Co., 12 Southwest. Rep., 754 (Ken.), a detached portion of a train was allowed to go by itself with no bell, lights or other signal of its approach, nor any one to look out for people on its track, and the defendant was held liable for the death of a person killed on the track.

In Highland Ave. & B. R. Co. *v.* Sampson, 8 South. Rep., 778 (Alabama), plaintiff sued for damages for injury to his mule and wagon, caused by an engine of the defendant. The track along which the engine came was hidden by a building, but there was an open space of twelve feet between the track and the building. Plaintiff did not stop to listen, and drove on the track when the engine was distant but thirty feet, and his mule and wagon were injured in the collision that followed. The evidence was conflicting as to how fast the mule was

going, how fast the engine was going—the witnesses varied from six and a half to sixteen miles an hour—as to whether the engine had a head-light, and as to whether it gave the signals. An ordinance limited the speed of trains to eight miles an hour at the place of the accident. Held: That the circumstances were such that the Court properly refused to direct a verdict for the defendant.

In Piper *v.* C. M. & St. P. Ry. Co., 46 N. W. Rep., 165 (Wis.), plaintiff while going over defendant's tracks at a crossing, was struck by a train going thirty-six miles an hour, though the statutory speed was but six miles an hour. When between fifty and sixty feet from the track plaintiff looked for trains and saw none, and if the train which struck him had not been going faster than the statute allowed, he would have crossed in safety. No signal was given, and the brakes were not applied till the train was near the crossing. When the plaintiff was within forty-eight feet of track, the engineer could have seen him when the train was 1235 feet away, and the train could have been stopped in 600 feet. Held: That under all the circumstances it was a question for the jury, and that a verdict for the plaintiff would stand. See, also, C. C. C. & I. Ry. Co. *v.* Harrington, 30 Northeast. Rep., 37 (Indiana).

The deafness of the trespasser does not change the duty of the engineer, unless he is aware of this fact or has reason to presume it from the action of the trespasser: L. & N. R. R. Co. *v.* Black, 89 Ala., 313; AVERY, J., in Meredith *v.* R. & D. R. R. Co., 108 N. C., 616.

In the following cases the negligence of the defendant's employee was held not to be wilful:

In Atkyn *v.* Wabash Ry. Co., 41 Fed. Rep., 193, a statute of Ohio enacted that a railroad company should "adjust, fill or block the frogs, switches and guard-rails on its tracks" . . . for the safety of its employees. Held: That the failure of a railroad company to comply with this law was not such "a reckless disregard of its duty" as to make it liable for an accident caused by this failure to comply with the law, in spite of the contributory negligence of the plaintiff, an employee.

In Givens *v.* Kentucky Central R. R. Co., 15 Southwest. Rep., 1057 (Kentucky), plaintiff's decedent, a boy nine years old, was killed in passing over defendant's railroad track at a place which was neither a public highway nor a usual crossing place, though within the limits of a village. A freight train had just passed, and the decedent, without seeing the engine and tender which immediately followed it, running backward, went upon the track and was killed. The engine was not going faster than a man could walk, and the son of the engineer in charge of the engine could not see the decedent because of the tender. Held: That a binding charge in favor of the defendant was proper. See, also, Tennis *v.* I. C. R. T. Ry. Co., 25 Pac. Rep., 876 (Kan.). See, also, Spicer *v.* Ches. & Ohio R. R. Co., 34 W. Va., 514.

In Woodruff *v.* Northern Pacific R. R. Co., 47 Fed. Rep., 689, it was held that where a train is not going at an unlawful rate of speed it is not wilful negligence for an engineer not to see a trespasser on the railroad company's track, though "by ordinary care and vigilance" he might have discovered the trespasser in time to have avoided the injury.