RECENT CASES.

CARRIERS—INJURIES TO PASSENGERS—DEPOT PLATFORMS.—PITTSBURG, C., C. & ST. L. RY. CO. v. HARRIS, 77 N. E. 1051 (IND.).—In an action for injuries to a passenger by falling on an icy depot platform, instructions requiring the carrier to exercise the highest degree of care consistent with the operation of its railroad in providing reasonably safe means for passengers to enter and depart from its cars and depot, and declaring that a carrier of passengers is held to the highest degree of care in taking aboard and discharging passengers, and is liable for the slightest neglect, etc., *held*, were erroneous, as imposing too high a degree of care.

Common carriers of passengers are required to do all that human sagacity and foresight can do under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers and are responsible for any—even the slightest—negligence, *Diabola v. Manhattan Ry. Co.*, 8 N. Y. Supp. 334; *Baltimore & O. R. Co. v. Wightman*, 26 Am. Rep. 384. The above cases would seem to impose a higher degree of care than the one digested. However *Chicago & N. W. Ry. Co. v. Scates*, 90 Ill. 586 holds that a railroad company is bound to do no more than to provide a suitable platform, approaches, etc., at its depots and stations, and use ordinary care. There are always arising a multitude of cases on the subject but the prevailing view seems to be in harmony with this case. It is more logical and consistent with sound reasoning. To require a railroad company to exercise this highest degree of care in keeping their station platforms and approaches for the use of passengers in boarding and alighting from trains would be manifest injustice, *Louisville & N. R. Co. v. Cockerel*, 33 S. W. 407.

CARRIERS—STREET RAILROADS—MISTAKE IN TRANSFER.—GEORGIA RY. & ELECTRIC CO. v. BAKER, 54 S. 639 (GA.).—*Held*, that the conductor of the second car must at his peril determine the right of the passengers to ride upon the transfer, notwithstanding it does not upon its face show such right.

The franchise of the street railway company may, or may not, require the company to issue transfers to its passengers, but in both cases their effect is the same. *Indiana R. Co. v. Hoffman*, 161 Ind. 573. The object of the transfer being to secure an additional passage, upon its face it must clearly indicate what that passage shall be. *Tawshe v. Tacoma R., etc., Co.*, 70 Pac. 118 (Wash.).

Against this view and, it seems, with the better reason, it is maintained that the transfer is conclusive as to the right of the passenger to ride upon the second car. *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; *Norton v. Consolidated Ry. Co.*, 79 Conn. 109; *Baldwin's Am. R. R. Law*, p. 292. Clearly there is a conflict of rights. *Townsend v. New York, etc., R. Co.*, 56 N. Y. 295. The passenger has a sufficient remedy upon breach of contract *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390. To confine him to this relief would only enforce the rights of the company; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; and respect the element of public interest involved. *Pennsylvania R. Co. v. Connell*, 112 Ill. 295. See Comment *ante*

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—STATE v. LILLISTON, 54 So. E. 427 (N. C.).—*Held*, that in a criminal case, a motion for a new trial would not be granted by the Supreme Court, to enable the defendant to produce evidence which he had in possession at the time of the trial but withheld from the jury. Connor and Walker, JJ., *dissenting*.

In the great majority of our states the doctrine is well established that in the absence of any constitutional or statutory provision to the contrary it is the exclusive province of the court to determine all questions of law that arise in criminal prosecutions. *Sparf v. U. S.*, 156 U. S. 51; *State v. Elwood*, 73 N. C. 189. As a general rule a new trial will be granted, if since the former trial new evidence has been found which would in all probability have changed the result of the trial. *Simmons v. Mann*, 72 N. Car. 12; *Husted v. Mead*, 58 Ct. 55. But facts which are within the knowledge of the defendant at the trial and are not put in evidence as in this case, do not constitute new evidence and are not grounds for a new trial. *Heard Civil Pleading*, p. 82; *Tilley v. State*, 55 Ga. 557; *People v. Cesena*, 90 Cal. 381. In criminal actions the Supreme Court of any state, in the absence of any constitutional or statutory provision to the contrary, is limited to a review and correction of errors of law committed in the trial below. *Carson v. Dellinger*, 90 N. C. 226; *Sumrion v. Mann*, 92 N. C. 12.

EVIDENCE—OFFER OF COMPROMISE.—FINN v. NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY, 64 ATLANTIC 490 (MAINE).—*Held*, that the admissability or non-admissability of evidence offered to prove an alleged compromise depends upon the intention of the party seeking it. If he intends his offer to be a compromise settlement it is inadmissable. If he intends it to be an admission of liability, coupled with an endeavor to settle such liability, then it is admissible to prove such liability.

The general rule seems be to that a written offer to compromise, it being on its face an offer to compromise the case, is not admissable. *Tufts v. DeBignon*, 61 Ga. 322. Admissions of a party, when made for the purpose of effecting a compromise of the matter in dispute, should be excluded as evidence, on the ground of public policy. *Rockefeller v. Newcomb*, 57 Ill. 186. But it is held that no part of an offer to compromise is admissable if it is expressly stated to be made without prejudice. *White v. Old Dominion Steamship Co.*, 102 N. Y. 660; *Tennant v. Dudley*, 144 N. Y. 504. Some courts have held that while an offer of compromise, as such, is inadmissable, statements of independent facts are admissable against the party making them. *Chaffe et al v. Mackenzie*, 43 La. Ann. 1062; *Rose v. Rose*, 112 Cal. 341; *Garner et al v. Myrick et al*, 30 Miss. 448. It is held in some jurisdictions that an offer of compromise is not admissable, either as evidence of a fact from which the liability of the party making the offer may be inferred, or as an admission of such liability. *Sherber v. Piser & Yenney*, 26 O St. 476. Statements not admissable for any purpose if made in offer of compromise. *Robertson v. Blair*, 56 S. C. 96; *Johnson v. Wilson*, 1 Pinn. 65, (Wisc.).

EVIDENCE—RES GESTÆ—INJURIES TO SERVANT.—So. IND. R. R. Co. v. OSBORNE, 78 N. E. 248 (IND.).—*Held* that in an action for injuries the defendant was not harmed by the admission of the declaration against interest made by its agent, an engineer, forty-five minutes after the accident. Wiley J., *dissenting*.

It is a well-established rule of law in the United States that when a declaration against interest is made by an agent which is unquestionably subsequent both as to time and casual relation, such declaration is inadmissable. *Williams v. Cambridge R. R. Co.*, 144 Mass., 148; *Packet Co. v. Clough*, 20 Wall. (U. S.) 528. But if the declaration is subsequent in time, while in point of casual relation to the main act substantially contemporaneous, as occurs in this case, it will be admitted in some states and rejected in others. The weight of modern authority, however, favors the relaxation of this rule, when the declaration by the agent is undesigned and spontaneous. *Huffcut on Agency*, Ed. 2, p. 184; *Olive, etc., R. R. Co. v. Stein*, 133 Ind. 243; *Hermes v. Chicago, etc., R. R. Co.*, 80 Wis. 590. Yet this case does not necessarily favor this rule, since its admission is harmless, inasmuch as facts sought to be shown have been, otherwise, fully and properly established. *Webb v. Barling*, 81 U. S. 406; *Gray v. Borrough of Danbury*, 54 Conn. 574. It seems, however, in the southern and eastern states, and in the U. S. Supreme Court, such declarations made by railroad conductors, engineers, etc., as to the accident are generally excluded. *Southerland v. Wilmington, etc., R. R. Co.*, 106 N. C. 100; *Furst v. 2nd Ave. R. R. Co.*, 72 N. Y. 106; *Vicksburg, etc., R. R. Co. v. O'Brien*, 119 U. S. 99.

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.—HILL V. STATE, 41 So. 621 (ALA.).—*Held,* that the plaintiff should have retreated if thereby he could have avoided the necessity of taking the life of the decedent.

Upon this question the authorities are by no means uniform. This case follows the common law doctrine and the English rule as expressed by Blackstone, Volume IV, p. 185; and as declared by several states, that homicide is justifiable only when every means of escape has been exhausted. *State v. Walker*, 9 Honst. 464 (Del.); *Compton v. State*, 110 Ala. 24. Other states, and it sems with the greater weight of authority, hold that the party whose person is unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. *State v. Bartlett*, 178 Mo. 658; *State v. Sherman*, 16 R. I. 631; *Beard v. N. S.*, 158 N. S. 550. The reason for the more lenient construction now placed upon the strict requirement of the common law may be attributed to the introduction of fire arms and the recognition by courts that self-defense should not be distorted into self-destruction by the unreasonable requirements of the duty to retreat. *Duncan v. State*, 49 Ark. 543.

INFANTS—CONTRACTS—FALSE REPRESENTATIONS AS TO AGE—EFFECT.—COMMANDER V. BRAZIL, 41 SOUTHERN 497 (MISS.).—*Held,* an infant who, after reaching the stage of maturity indicating that he is of full age, enters into a contract falsely representing himself to be of age and accepts the benefits thereof, is estopped from denying that he is not of age when the contract is sought to be enforced against him; the party dealing with him believing him of full age.

The question here involved has long been a much mooted question in the various jurisdictions of this country. And although the courts have by no means been harmonious in their conclusions the weight of authority on this point is well defined. At law, the fraud of an infant in falsely representing himself to be of age and so inducing another to contract with him, does not estop him from pleading his infancy if sued upon the con-

tract. *Studwell v. Shapter,* 54 N. Y. 249; *Sims v. Everhardt,* 102 U. S. 300. *Contra* by statute, *Dillon v. Burnham,* 43 Kan. 77. By so doing, however, the infant will in many jurisdictions incur a liability for deceit. *Fitts v. Hall,* 9 N. H. 441; *Wallace v. Marss,* 5 Hill (N. Y.) 391. *Contra Nash v. Jewitt,* 61 Vt. 507; *Slayton v. Barry,* 175 Mass. 513. In equity, however, where the infant has falsely represented his age, or taken active steps to conceal it and has thereby induced the other party to enter into the contract, his fraud will estop him from pleading his infancy to the prejudice of the other. *Ferguson v. Bobo,* 54 Miss. 121; *Charles v. Hastedt,* 51 N. J. E. 171. But mere failure to make known his age is not such a fraud as will justify equitable interference with the common law rule. *Baker v. Stone,* 136 Mass. 405; *Davidson v. Young,* 38 Ill. 145. If goods are obtained by an infant by fraudulent representation as to his age, it is the better opinion that the other party may rescind the contract and recover the goods. *Badger v. Phinney,* 15 Mass. 359; *Neff v. Landis,* 110 Pa. 204.

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.—CENTRAL GRANARIES CO. v. AULT, 106 N. W. 418 (NEB.).—*Held,* that a servant, who from the length or character of previous service or experience, may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment, as if he was ignorant or inexperienced in the particular work.

The facts in this case appear to preclude a negative influence from those losses establishing the master's liability when he has failed to give proper warning and notice when he knew of latent defects, *Nason v. West,* 78 Me. 253; or has furnished not reasonably safe machinery, *Matthew v. Rilston,* 156 W. S. 391; or when the master employs persons too young and inexperienced to appreciate the dangers attending the work, *Hays v. Colchester Mills,* 69 Ver. 1; or when the servant, knowing of the defects and dangers, has continued at work without objection. *Woodley v. Metropolitan R. R. Co.,* L. R. 2 Ex. D. 384. It is generally conceded in all jurisdictions that a servant assumes the ordinary risks incidental to the work. *Cooley on Torts,* Sect. 552; *Hayden v. Smithville Manf. Co.,* 29 Conn. 548. The master can not send the servant into new and dangerous work without instructions, but if the dangers are obvious and familiar, a servant can not demand instruction as to it, *Bergen v. St. Paul Ry. Co.,* 38 N. W. 814 (Minn); or if the dangers incidental are patent to every one or could have been seen by the servant, had he used reasonable care, then the master is not liable. *Welsh v. Bath Iron Works,* 98 Me. 361.

NUISANCE—ACTION FOR DAMAGES—NEGLIGENCE.—STOKES v. PENNSYLVANIA R. CO., 63 ATL. 1028 (PENN.).—*Held,* that in an action for damages occasioned by the maintenance of a nuisance, the question of negligence is not involved.

This case is strictly in line with the rules laid down in most jurisdictions. *Gas Co. v. Murphy,* 39 Pa. St. 257. As long as nuisance is not committed a person may, if he exercises due care, use his property as he sees fit. But when damage is a necessary consequence the question of negligence does not apply but the law of nuisance does. *Bohan v. Port Jervis Gas Light Co.,* 25 N. E. 246 (N. Y.). The exception to this rule is in the case of authorized

public works. In this case negligence must be alleged in order to make out a nuisance. *Transport Co. v. Chicago*, 99 U. S. 635.

RAILROADS—ACCIDENT AT CROSSING—SIGNALS—QUESTION FOR JURY.—GOODWIN ET UX. *v.* CENTRAL R. R. OF NEW JERSEY, 64 ATL. REP. 134.—Where a train ran into the hind wheel of a wagon passing over a railroad crossing, *held*, that in view of the positive testimony of the plaintiff that the statutory signals were not given, corroborated by circumstantial testimony, that question should have been submitted to the jury, notwithstanding the positive testimony of the defendant's witnesses to the contrary. Gummer, C. J., and Reed, Green, Gray and Dill, JJ., *dissenting*.

Where several witnesses testify that an engine bell was ringing as the train approached the crossing, and one witness who was in a position to hear, testifies that he did not hear the bell rung, the question whether the bell was rung must be submitted to the jury. *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202. So, where persons near the track did not hear any signals and certain members of the train crew testified that the bell was rung, it was decided that it was a question of fact for the jury. *Reed v. Chicago, St. P. and M. & O. Ry. Co.*, 74 Iowa 188; *McDuffie v. Lake Shore and M. S. Ry. Co.*, 98 Mich. 356. For, the position and situation of the witnesses, the attention they were giving, and their credibility, are questions for the jury, and hence it is proper to submit to them the ultimate fact as to whether or not the bell was ringing. *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236. And, in such a case, where conflicting testimony is given on both sides, the determination of the question is for the jury. *Ernst v. Hudson River R. Co.*, 24 Howard Practice 97; 32 Howard Practice, 262.

RAILROAD—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—LEGANO V. NEW YORK CENT. AND H. R. R. CO.—99 N. Y. SUPP. 1103. Where, in an action for injuries to a girl five years and ten months old, who was struck by a locomotive at a crossing, it did not appear from any of the plaintiff's evidence that she looked in the direction from whence the locomotive approached, or that she exercised any care, *held* that there should have been a non-suit. Spring & Kruse, JJ., *dissenting*.

A child must exercise such care and diligence at a railway crossing as would reasonably be expected from its age and intelligence at the time. *Baltimore & O. Ry. Co. v. Breinig*, 25 Md. 378. Nor could the child recover if it failed in this, even though the jury should find negligence on the part of the defendant. *Baltimore & O. Ry. Co. v. Breinig, supra.* It has been held that a child seven years of age, could not be deemed, as a matter of law, to be *sui juris* so as to be chargeable with negligence, but that it presented a question for the jury. *Stone v. Dry Dock Ry. Co.*, 115 N. Y. 104. A child four or five years is not, as a matter of law, chargeable with contributory negligence, and barred from recovery in action brought by him, because he did not exercise reasonable care to avoid injury. *Westbrook v. Mobile & Ohio Ry. Co.*, 66 Miss. 560. The child's capacity is always the measure of his responsibility and if he has not the ability to foresee and avoid danger, negligence will never be imputed to him. *Philadelphia Ry. Co. v. Layer*, 112 Pa. St. 414.

STREET RAILROADS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—DEFECTIVE HEARING.—ADAMS V. BOSTON & N. ST. RY. CO.—78 N. E. 117

(MASS.).—Where deceased, at the time he was killed while walking on defendant's street car track, was 78 years of age and very deaf, *held*, his want of hearing made it incumbent on him to be more alert in the use of his other senses.

It is not, as a matter of law, negligence for a man 79 years old, blind in one eye and of defective hearing, to drive unattended on a public street. *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30. Nor is it necessarily negligence for a blind person to be unattended on the street. *Smith v. Wildes*, 143 Mass. 556. The test in such cases is: Under the special circumstances what care is reasonably necessary to insure safety? *Neff v. Wellesley*, 2 L. R. A. 500. An infirm person must use such care as one with such infirmity and conscious of it should use. *Cleveland C. & C. R. Co. v. Terry*, 8 O. St. 570. The extent of care is greater for a person suffering from an infirmity to avoid danger. *Mark's Adm'r v. R. R. Co.*, 88 Va. 1.

TELEGRAPHS—DELAY IN DELIVERY OF MESSAGE—DAMAGES FOR MENTAL SUFFERING.—GEROCH V. WESTERN UNION TELEGRAPH CO., 54 S. E. 782 (N. C.). —*Held*, that where, by reason of defendant's delay in delivery of a telegram announcing plaintiff's illness to her husband, the addressee was detained for nearly two days in reaching her bedside and the plaintiff testified that the delay caused her great anxiety, mental suffering, and a nervous chill, whether damages were recoverable for the defendant's negligence in addition to the price of the telegram was for the jury.

This case holds with the minority rule that in some cases damages are recoverable for mental suffering. In most of the states the rule is that damages are not recoverable for mental suffering alone. *Chase v. Western Union Telegraph Co.*, 44 Fed. 554. The first departure in any way from the rule was made by allowing mental agony to increase the damage resulting from physical injury. *Phillips v. Hoyle*, 4 Gray 568 (Mass.).—Texas in 1881 first extended this rule and allowed recovery for mental suffering alone when occasioned by delay in the delivery of a telegram. *So. Relle v. Western Union Telegraph Co.*, 55 Texas 308. A minority of the states has followed this holding. *Green v. Western Union Telegraph Co.*, 136 N. C. 489. It must be apparent on the face of the message that delay in delivery will cause mental suffering. *Western Union Telegraph Co. v Warren*, 36 S. W. 314 (Tex.). A few jurisdictions limit the right of recovery to the sender. *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510. The law of the state to which the message is sent will govern whether a recovery shall be had or not. *Gray v. Tel. Co.*, 91 Am. St. Rep. 706.