RECENT CASES

ACTION—CAUSES OF ACTION—PAYMENT BY INSTALLMENTS.—PUCKETT v. NATIONAL ANNUITY ASS'N, 114 S. W. 1039 (Mo.).—*Held,* that a single default in the payment of an installment due under a contract calling for periodic payments does not constitute a repudiation of the contract so as to empower the creditor to sue for payments falling due in the future.

It is well settled that an action is maintainable to recover an installment due on a note payable by installments, some of which are not due. *Basler v. Nichols,* 8 Ind. 260; *Tucker v. Randall,* 2 Mass. 283. And such failure to pay an installment, although a breech of the contract, is ground for recovery only on those unpaid installments due or past due at the time suit is brought. *Thomas v. Richards,* 124 Ga. 942. It has been held, however, that if a person is bound by a bond with a penalty conditioned to be discharged by the payment of several sums at different times, a suit will lie immediately after the time fixed for the payment of any one installment has elapsed, although the other sums may not be due. *Cocke v. Stewart,* 2 Overt. (Tenn.) 231.

CONTRACTS—FAILURE TO PERFORM—EFFECT.—MCCORMICK v. TAPPENDORF, 99 PAC. 2 (Wash.)—*Held,* that where a party to a contract indicates that he cannot or will not perfom, the other party will not be bound by the contract. Mount, J., *dissenting.*

The general rule is that where one of the parties to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. *Wolf v. Marsh,* 54 Cal. 228; *Miller v. Ward,* 2 Conn. 494. It has also been held that one who has violated his obligations under a contract is in no position either to compel the other party to fulfill his duties, or to complain because the latter is unwilling to do so. *Shaeffer v. Blair,* 149 U. S. 248; *Pittsburgh Bessemere Steel Rail Co. v. Hinckley,* 17 Fed. 584. But a mere declaration made by one bound to perform a future act, before the time for doing it, that he will not do it, is of itself no breach of contract. *McPherson v. Walker,* 40 Ill. 371. However, if this declaration is not withdrawn when the time arrives for the act to be done, it is a sufficient excuse for the default of the other party. *Carstens v. McDonald,* 38 Neb. 858.

CONTRACT—PARTIAL PERFORMANCE—RIGHT OF RECOVERY.—MOORE ET AL. v. BOARD OF REGENTS, 115 S. W. 6 (Mo.).—*Held,* that a contractor who only partially performs his contract is entitled to recover a reasonable value of work done, and materials furnished not exceeding the contract price, and deducting any damages suffered by the owner.

It is generally held that the contractor may recover for partial performance where complete performance is prevented by the act of God

or the public enemy. *Butterfield v. Byron*, 153 Mass. 517; *Hollis v. Chapman*, 36 Tex. 1; *Parker v. Macomber*, 17 R. I. 674. In cases where the contractor willfully abandons his contract the general rule is that he cannot recover for partial performance. *Serber v. McLaughlin*, 97 Ill. App. 105; *Hartman v. Meighan*, 171 Pa. St. 46. But there is conflict on this point, other courts deciding that the contractor may recover for work done and materials furnished, less any damage resulting to the owner. *Wolf v. Gerr*, 43 Ia. 339; *Barnwell v. Kempton*, 22 Kan. 314. If the owner prevents the contractor from completing the contract, recovery may be had upon a *quantum meruit*. *Adams v. Burbank*, 103 Cal. 646; *Guerdon v. Corbett*, 87 Ill. 272; *Jones v. Call*, 93 N. C. 170. But in all the above cases the following two rules govern, namely, that the contractor must have a legal excuse for non-performance of the contract; *Phelps v. Hubbard*, 59 Ill. 79; *Fairfax Co. v. Chambers*, 75 Md. 604; and that the partial performance must be of some benefit to the adverse party. *Boughton v. Smith*, 142 N. Y. 674; *Genni v. Hahn*, 82 Wis. 90.

DESCENT AND DISTRIBUTION—ADVANCEMENTS—HELPLESS ADULT CHILDREN.—CRAIN v. MALONE, 113 S. W. 67 (KY.).—The Ky. St. 1903, Sect. 1407, requires property given a descendant to be charged against him on the distribution of the undivised estate. In an action brought under this statute, *held*, that the statute does not authorize a charge against an insane adult child for the value of his support since majority by his parents.

The prevailing doctrine is that relations are liable for the support of helpless adult children. *Watt v. Smith*, 89 Cal. 602; *Pa. State Lunatic Hospital v. Franklin*, 30 Pa. St. 522. However, in Iowa the word "relations" in the code, making relations of an insane person liable for his support in a hospital, means those only bound by law to support a patient, and the father is not liable for the support of an adult child. *Monroe Co. v. Teller*, 51 Ia. 670. In many of the older cases, it was held that a father is not liable for the support of a helpless adult child, in the absence of a statute to the contrary. *Bennet v. Canterbury*, 23 Conn. 356. The father of an indigent adult insane child is not liable for his support while in an asylum. *Sussex Co. v. Jacobs*, 6 Houst. 330.

DIVORCE—DEFENCES—RECRIMINATION—MATTISON v. MATTISON, 113 N. Y. SUPP. 1024.—*Held*, that abandonment by a husband of his wife will not prevent him from obtaining a divorce for her subsequent adultery.

The general rule of law is that divorce is a remedy for the innocent as against the guilty, and will not be granted where both parties are at a fault. *Rose v. Rose*, 51 Hun. (N. Y.) 154. The equitable maxim, "He who comes into equity must come with clean hands," has been applied in dealing with this doctrine. *Hoff v. Hoff*, 48 Mich. 281. By the weight of authority any misconduct on the part of the complainant which constitutes ground for divorce, bars his suit, without reference to the offence of which he complains. *Watts v. Watts*, 160 Mass. 464; *Deisler v. Deis-*

ler, 59 N. Y. App. Div. 207. However, in other states a contrary rule applies, and the two offences must be of the same character. *Bast v. Bast*, 82 Ill. 584; *Benerfening v. Benerfening*, 23 Minn. 563. In England and in some of the states, desertion will bar a suit based on an act of adultery subsequently committed by the defendant. *Yeatman v. Yeatman*, L. R. 2 P. 187; *Walker v. Walker*, 172 Mass. 82; *Wilson v. Wilson*, 40 Ia. 230; *Conant v. Conant*, 10 Cal. 249.

EVIDENCE—HOMICIDE—UNCOMMUNICATED THREATS.—STATE V. BARKSDALE, 48 So. 264 (LA.).—*Held*, that in a prosecution for manslaughter, uncommunicated threats made by the deceased against the accused shortly before the homicide are admissible in evidence as tending to show who was the aggressor in the fatal encounter, and as supporting the plea of self-defense. Nicholls, J., *dissenting*.

There is little doubt but that evidence of threats is admissible to show *animus*. *Greene v. State*, 69 Ala. 6; *Keener v. State*, 18 Ga. 194; *State v. Evans*, 33 W. Va. 417. Or to show who was the aggressor. *State v. Faile*, 43 S. C. 52; *Burns v. State*, 49 Ala. 370; *State v. Cushing*, 14 Wash. 527. But these decisions must be taken with certain limitations, some courts holding such evidence not admissible, unless some phase of the other evidence tends to show a case of self-defense. *Rutledge v. State*, 88 Ala. 85; *State v. Elliott*, 45 Ia. 486; *Bell v. State*, 69 Ark. 148. And a number of cases hold that threats made previous to the homicide are not admissible in evidence when uncommunicated to the defendant. *Rogers v. State*, 62 Ala. 170; *State v. Gregor*, 21 La. Ann. 473; *Vann v. State*, 83 Ga. 44; *State v. Maloy*, 44 Ia. 104.

HUSBAND AND WIFE—NOTES EXECUTED BEFORE MARRIAGE—VALIDITY.—MACKEOWN V. LACEY, 86 N. E. 799 (MASS.).—*Held*, that a note given by a man for money loaned to him by a woman prior to their marriage was not extinguished by their marriage, though husband and wife are incompetent to contract with each other.

At common law the debts of a woman are extinguished by her marriage with the debtor; *Smiley v. Smiley's Admr.*, 18 Ohio St. 543; and a note made and given by a husband to his wife before their marriage becomes a nullity on the marriage. *Abbot v. Winchester*, 105 Mass. 115. But under modern marriage reform acts, a debt previously due the wife by the husband remains her separate property, and she may enforce payment by execution after marriage. *Flenner v. Flenner*, 29 Ind. 564.

INNKEEPERS—INSULTS TO GUESTS—INNKEEPERS' LIABILITY.—DE WOLF V. FORD, 86 N. E. 527 (N. Y.).—*Held*, that a hotel keeper is liable to a female guest for a servant's unjustified acts, in the course of his employment, in forcing his way into her room, subjecting her to mortification of an exposure of her person, accusing her of immoral conduct, and ordering her to leave the hotel.

At common law if a guest be beaten in an inn, the innkeeper is not liable, 8 *Coke*, Sect. 33; and no other rule seems to have existed in this

country, *Rahmel v. Lehndorff*, 142 Cal. 681; *Weeks v. McNulty*, 101 Tenn. 495, holds that a hotel keeper is not an insurer of the person of his guests, but he is only bound to exercise reasonable care in their behalf; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221; and the duty cannot be delegated so as to relieve the hotel keeper from liability for non-performance. *Statt v. Churchill*, 36 N. Y. Supp. 476. This seems to be the general rule. *Goddard on Bailments & Carriers*, Sect. 179; *McHugh v. Schlosser*, 159 Pa. St. 480. For unwarranted assaults by his servants he is liable; *Overstreet v. Moser*, 88 Mo. App. 72; but only when done in the discharge of the particular duties for which they are employed, *Little Miami R. Co. v. Wetmore*, 190 Ohio St. 110; *Keith v. Lynch*, 19 Ill. App. 574. *Contra*: *Schouler on Bailments*, Sect. 323. The decision in this case is in line with the tendency of modern legislation, which is to enlarge the responsibility of the master in favor of the servant. *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

LICENSE—REVOCATION—MILLER AND LUX v. KERN COUNTY LAND CO., 99 PACIFIC, 179 (CAL.).—Where license was granted and the grantee entered and expended a large sum of money in consequence thereof, it was *held*, that the license was irrevocable. Beatty, C. J., *dissenting*.

It is generally held that a license is revocable at the will of the grantor. *Lambe v. Manning*, 171 Ill. 612. *Fleeker v. Rye & Banking Co.*, 81 Ga. 461; *Brown v. New York*, 78 N. Y. App. 361. Some courts modify this rule by holding that where expense is incurred by the grantee the license is turned into an agreement that equity will enforce. *Dark v. Johnson*, 55 Pa. St. 164. In many of these cases slight expense has been considered sufficient to make the license irrevocable. *Simons v. Moorehouse*, 88 Ind. 391. Other courts, however, have held that slight expense is not enough. *Wiseman v. Lucksinger*, 84 N. Y. 31. Many courts hold that the license may be revoked, even though the grantee has expended time and money in reliance upon it. *Turner v. Mobile*, 135 Ala. 73; *Lumber Co. v. Wilson*, 119 Mich. 406. Some courts allow the license to be revoked upon compensation being made to grantee for expenditures made by him. *Snowden v. Willas*, 19 Ind. 10; *Hall v. Chaffe*, 13 Vt. 150. In all cases where the grantor is not allowed to revoke the license after the grantee has incurred expense, the decisions are based upon the doctrine of estoppel. *Clark v. Glidder*, 60 Vt. 702; *Tufts v. Capen*, 37 W. Va. 623.

MASTER AND SERVANT—CHOICE OF DANGEROUS METHOD—NEGLIGENCE.—BRADY v. FLORENCE & C. C. R. CO., 98 PAC. 321 (COLO.).—*Held*, that the choice of the more dangerous of two methods of work by a servant does not constitute negligence, if in doing so he does not disobey instructions or rules, acts in good faith, and the method chosen might have been adopted under like circumstances by a prudent man. Goddard and Bailey, JJ., *dissenting*.

The facts in numerous cases have lead the courts to say that when a man chooses a dangerous method of performing a duty, he is guilty of

contributory negligence as a matter of law. *Atchinson, T. & S. F. R. Co. v. Tindall,* 57 Kan. 719; *Quirouct v. Alabama Great Southern R. Co.,* 111 Ga. 315. The above is well illustrated in *Lothrop v. Fitchburg R. Co.,* 150 Mass. 423, where the court held as a matter of law that a brakeman, who, in attempting to couple from the north side of the track two flat cars of timbers, which on that side dangerously projected toward each other, was killed by having his head caught between the timbers, did not exercise due care, as the danger would have been avoided if he had stooped or coupled from the south side of track. In other jurisdictions, different facts have caused the courts to hold that the adoption of a dangerous way of accomplishing a task when a safe way is open to him is not necessarily negligence, but is a question of fact for the jury. *Gibson v. Burlington, C. R. & N. Ry. Co.,* 107 Ia. 596; *Norton Bros. v. Sczpurak,* 70 Ill. App. 686; *Flutter v. N. Y., Chicago & St. L. R. Co.,* 27 Ind. App. 511.

MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE.—DAVIDSON v. FLOUR CITY ORNAMENTAL IRON WORKS, 119 N. W. 483 (MINN.).—The duties of an operator required him to change the emery wheels from time to time to meet the exigencies of the work, and in making these changes it was necessary to remove a guard. This he negligently failed to replace, and the revolving wheel injured respondent. *Held,* that the operator and respondent were not fellow servants, that the defenses of contributory negligence and assumption of risk were not applicable, and that appellant was responsible for failure to maintain the guard. Elliott, J., *dissenting.*

It has been held that all serving a common master and working under the same control, deriving their authority and compensation from the same source, and engaged in the same business, although in different departments, are fellow servants and take the risk of each other's negligence. *N. & W. R. R. Co. v. Donnelly,* 80 Va. 853. And that the master's liability depends on his exercise of reasonable care to ascertain the competency of his servant, whose negligence caused the injury to the other servant. *Nordyke & Marmon Co. v. Van Sant,* 99 Ind. 188; *Norfolk & W. R. Co. v. Nuckols,* 91 Va. 193. But by the weight of authority the true test to determine whether the negligent act causing the injury is chargeable to the master, is, was the negligent employee in the performance of the master's duty, or charged therewith? If so his negligence is that of the master and the latter is liable, otherwise it is theact of a co-servant. *Colley on Torts,* Stud.'s Ed. 553; *Lewis v. Serfert,* 116 Pa. 628. Another test is, did the injury result from the negligence in performing personal duties, which the master cannot delegate. *Koosorowska v. Glasser,* 8 N. Y. Supp. 197; *Enright v. Olliver & Burr,* 69 N. J. L. 357.

MASTER AND SERVANT—PERSONAL INJURIES—"RES IPSA LOQUITUR"—KEENAN v MCADAMS & CARTWRIGHT E. Co., 113 N. Y. Supp. 343.—*Held,* that the rule of *res ipsa loquitur* cannot be applied, where no negligence

on defendants part is shown by direct evidence, and it is apparent that other causes may have led to the accident. Laughlin, J., *dissenting.*

The weight of authority holds that the origin of the accident being fixed upon the defendant, negligence is presumed in the absence of explanation. *Shearman & R. on Negligence,* Sect. 60; *Spaulding v. C. & N. W. R. Co.,* 30 Wis. 110. In the following cases negligence was presumed: explosion of a steamboat boiler; *Posey v. Scoville,* 10 Fed. Rep. 140; running down cattle on the railroad track; *Louisville R. Co. v. Conrey,* 63 Miss. 562; and where a bolt fell from an elevated railway into the street; *Volkmar v. Manhattan Co.,* 134 N. Y. 418. But some courts hold that negligence is not presumed in the absence of explanation. *Huff v. Austin,* 46 Ohio St. 386; *Consulich v. Standard Oil Co.,* 12 N. Y., 118; except where the relation of carrier and passenger exists; *Curtis v. Rochester, etc., Ry. Co.,* 18 N. Y. 534; and where the condition or event permits no inference save negligence on the part of the defendant. *Mullen v. St. John,* 57 N. Y. 567.

RAILROADS—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—SCHAUB v. KANSAS CITY SOUTHERN, 113 S. W. 1163 (MO. APP.).—*Held,* that it is the duty of one on approaching a railroad crossing, on a public street, to look and listen and use reasonable care to discover appraching trains.

The absence of a watchman, usually stationed at a crossing, the fact that the gates are open, or the silence of an alarm bell known to ring on the approach of a train, do not free one from the duty to stop, look and listen before entering the danger zone. *St. Louis I. M. & S. Ry. Co. v. Amos,* 54 Ark. 159; *Romeo v. Boston & M. R. R.,* 87 Me. 540; *Tobias v. Mich. Cent. R. Co.,* 110 Mich. 440; *Greenwood v. Philadelphia W. & B. R. Co.,* 124 Pa. 572. However, he has a right to take any of these facts into consideration in determining to what extent he will look. *Merrigan v. Boston & A. R. Co.,* 154 Mass. 189. Contrary to this view, many jurisdictions have held the lack of the prescribed signs of warning an assurance of a safe crossing; and that, one injured while crossing without farther investigation regarding movements of trains is free from contributory negligence. *Chicago, R. I. & P. Ry. Co. v. Clough,* 134 Ill. 586; *Kane v. New York, N. H. & H. R. Co.,* 56 Hun. 648; *Berry v. Pennsylvania R. Co.,* 48 N. J. Law (19 Vroom) 141; *Cleveland, C., C. & I. Ry. Co. v. Schneider,* 45 Ohio St. 678. When one waits to allow a train to pass, and only proceeds after the customary signal showing the way to be clear, he need not stop to assure himself of the conditions. *Conaty v. New York, N. H. & H. R. Co.,* 164 Mass. 572; *Oldenburgh v. York Cent. H. R. Co.,* 124 N. Y. 414.

RAILROADS—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.—WILKINSON v. OREGON SHORT LINE R. R. CO., 99 PAC. 466 (UTAH).—Where the plaintiff was driving along the side of a railroad track in a place of safety, and, without looking, attempted to cross the track, and was struck by an engine and injured, *held,* that he was not entitled to recover on the ground that by the exercise of ordinary care defendant's servant

could have seen him going into a dangerous place and prevented the accident. Straup, C. J., *dissenting.*

The general rule is that if the injured person's own negligence contributed to his injury, he cannot recover. *Moulton v. Ry. Co.,* 99 Me. 508; *Jones v. R. R. Co.,* 107 Ala. 400; *Trust Co. v. Fashion Co.,* 106 Ill. App. 135. But the courts differ as to the degree of negligence necessary to bar a recovery. Some courts hold slight negligence on the plaintiff's part sufficient to bar his recovery. *Lindberg v. Ry. Co.,* 83 Ill. App. 433; *Ry. Co. v. Bynum,* 139 Ala. 389. Other courts hold that the plaintiff may recover in spite of slight negligence on his part, when the defendant was grossly negligent. *R. R. Co. v. McElmurry,* 24 Ga. 75. Many courts, by basing their decisions on the doctrine of last clear chance, allow the plaintiff to recover, even where his negligence contributed to the injury, if the defendant, by use of ordinary care, could have prevented the injury. *McLamb v. Ry. Co.,* 122 N. C. 862; *Kolb v. Transit Co.,* 76 S. W. 1050 (Mo.); *Atwood v. Ry. Co.,* 91 Me. 399. The Indiana courts adopt the strict rule that if the plaintiff was guilty of contributory negligence he cannot recover unless the defendant was wantonly and willfully negligent. *Ry. Co. v. Ceder,* 110 Ind. 376; *De Lou v. Ry. Co.,* 22 Ind. App. 377. The principle on which the doctrine allows the plaintiff to recover is that his own negligence was the remote cause of the injury. *Troy v. R. R. Co.,* 99 N. C. 298; *Tanner v. Ry. Co.,* 60 Ala. 621. And when the negligence of the plaintiff and the defendant is concurrent, the plaintiff cannot recover. *Butler v. Ry. Co.,* 99 Me. 149; *Power v. Gordon,* 102 Va. 498.

SALES — WARRANTY — STATEMENTS CONSTITUTING. — WOOLDRIDGE v. BROWN, 62 S. E. 1076 (N. C.).—The buyer of coal told the salesman that he was buying it to burn brick, and the salesman told him that it would burn brick, and was used for that purpose. *Held,* that the salesman's statement does not show a warranty of quality, or that the grade ordered would burn brick.

No particular form of words is necessary to constitute a warranty. *Hawkins v. Pemberton,* 51 N. Y. 198; and a representation by the seller as to the quality of the article sold is a warranty if so intended by the parties. *Murray v. Smith,* 4 Daly 277; *Weimer v. Clement,* 37 Pa. St. 147. However, a mere statement by the seller of his own belief, upon a matter concerning which the purchaser is to exercise his own judgment, does not constitute a warranty. *Coates v. Harvey,* 10 N. Y. St.. 276. But if the buyer relies upon the representation of the seller in making a purchase, he affirmation will be given the effect of a warranty. *Evans v. Schriver Laundry Co.,* 57 Ill. App. 150. A warranty of fitness of an article for a specific purpose cannot be implied from a knowledge on the part of the seller that the article was intended for such purpose. *Bartlett v. Hoppock,* 34 N. Y. 118; *Rose v. Meeks,* 91 Ia. 715.