We see no error in the conclusion reached by the circuit court, and the decree is affirmed.

MORRIS, District Judge. I dissent on the question of the allowance of interest on the claim in this case.

PARKER v. MARCO et al.

(Circuit Court, D. South Carolina. October 30, 1896.)

1. CONTRACTS—INSANE PERSONS—CONTRACTUAL CAPACITY.
   In examining into contracts made by one whose mind is diseased, to determine his ability to do any particular act, the inquiry should be, what degree of mental capacity is essential to the proper execution of the act in question?
2. SAME—EXECUTION OF FORMER AGREEMENT.
   A person whose mind is diseased by drink, but whose business dealings are shown to be conducted with skill, ability, shrewdness, and memory, is not incapacitated to execute a mortgage of his property, in conformity with an agreement entered into when his sanity was unquestioned; and when he, at the time of signing the mortgage, declared his comprehension of the transaction, and impressed others with the fact that he understood what he was doing.
3. SAME—SEPARATE CONTRACT.
   If, however, at the execution of such mortgage, one attorney representing and advising both parties, the mortgagor is persuaded to allow, and does allow, such attorney to retain, for the benefit of the mortgagee, a part of other securities, which he is entitled to have restored to him, the transaction should be set aside.
4. SAME—GOOD FAITH—STATUS QUO.
   But such transaction should not be set aside, when the attorney's good faith is unimpeachable, unless the securities which were surrendered are returned, or their value replaced, thus putting both parties in statu quo.

This was a special inquiry directed by the court to determine the validity of a mortgage executed by Manuel Marco to Pelzer, Rodgers & Co., and resisted upon the ground that Marco was insane at the time of its execution.

Mordecai & Gadsden, P. A. Wilcox, and A. D. Cohen, for complainant.

Lord & Burke, Boyd & Brown, and W. F. Dargan, for defendants.

SIMONTON, Circuit Judge. This case comes up on a special inquiry directed by the court. Manuel Marco, a defendant in this case, was a merchant of Darlington county, S. C. He was a man of remarkable ability as a merchant, and from a humble beginning, by force of character and business talent, he had acquired a fortune. He had been doing his business with Charleston through James H. Parker the present complainant. For some reason he became dissatisfied with Parker, and desired to change his factor. To this end he sought the good offices of R. W. Boyd, Esq., a member of the bar in Darlington. Mr. Boyd introduced him to the firm of Pelzer, Rodgers & Co., of which firm the defendant F. J. Pelzer was the senior member. After some negotiation this firm

agreed to act as factors for Marco, and advanced to him an amount of money sufficient to relieve his entire obligations to Parker. This was towards the close of the year 1883. Thenceforth Marco became a customer of Pelzer, Rodgers & Co. Their mode of doing business was this: The firm made its advances to Marco as needed. To secure them he entered into bond in the penal sum of $100,000, and, as security to the bond, conveyed to them parcels of real estate in the county of Darlington; these conveyances, though absolute on their face, being only in fact mortgages. He also placed in their hands, as further collateral security, sundry bonds and mortgages of third parties to him. The business continued for some time. One of the conditions of business was that Marco should ship to them all the cotton he controlled, some 1,400 or 1,500 bales per annum, and in default he was to pay $1.50 per bale for each bale not shipped. After a time the course of business changed. Buyers of cotton, instead of confining their purchases to the cities and towns, went to the residences of the growers and holders of the cotton, and purchased directly from them, thus dispensing with the middlemen altogether. In this changed course of business, it became greatly to the disadvantage of Marco to continue to ship cotton to Pelzer, or else to pay the penalty of $1.50 a bale, not shipped. After negotiations the business was closed, and the amount due by Marco was ascertained. The accounts were first submitted to an expert accountant resident in Darlington, selected by him, and the result as reported by this accountant was accepted. It was agreed that the principal debt be reduced to $40,000, and this sum was to be secured by the realty already held by the firm, and by other security. Marco himself then proposed to Pelzer that the final settlement be made on this basis: Pelzer to release all claim for cotton not shipped (some $4,000), and to surrender the bonds and mortgages of realty held by him as collateral, and Marco to pay in cash enough to reduce the debt to $40,000, and to give as additional security a mortgage on his home place,—a valuable plantation, known as "Lydia." This was finally agreed upon. The date of the proposition and its acceptance was the spring of 1891. The relations between Mr. Pelzer and Mr. Marco were cordial. The confidence between them was mutual. Mr. Boyd, during the whole transaction, acted for both parties, and he was intrusted with the duty of carrying the final agreement into effect. When he was about to prepare the necessary mortgage, Marco, who evidently did not wish to incumber his home place, except as a matter of absolute necessity, informed Mr. Boyd that he had hopes of selling off some lands held by Pelzer as security, at a price which would largely reduce the debt, and asked indulgence to try this. This was granted, but the hopes of Marco were disappointed. Not discouraged by this failure, Marco made another effort, and sought, through a man named Carpenter, to borrow $50,000 on his lands from some building and loan association. This plan also failed. The efforts thus made by Marco consumed the years of 1891 and 1892. Mr. Boyd then pressed the conclusion of the original settlement. Finally a mortgage was executed

of the plantation Lydia in May, 1893. The validity of this mortgage is the matter now in question. It is charged that Marco was demented at the time the mortgage was executed; that it was the act and deed of an insane person, and so null and void.

The question of law to which the facts of this case must be applied is a very simple one. Whatever may have been the ancient law on this subject, and however conflicting the decisions of the state courts may be upon the question whether the deed of an insane person be void or voidable, the law of this court is fixed and settled by the decision of the supreme court of the United States. The contract of a person, whether by deed or parol, who at the time of making it is bereft of reason, is absolutely void. The very essence of a contract is that there must be a concurrence of minds. There can be no concurrence, and therefore no contract, if one of the parties be without mind. This is the ratio decidendi in Dexter v. Hall, 15 Wall. 9:

"The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person non compos mentis, has nothing which the law recognizes as a mind; and it would seem, therefore, on principle, that he cannot make a contract which may have efficiency as such." Id. 20.

The question before the court was whether the deed of an insane person was void or voidable. To that question the court directed its attention, and solved the doubts created by conflicting decisions in other jurisdictions, fixing the law in the federal courts. Mr. Justice Clifford, in the subsequent case of Johnson v. Harmon, 94 U. S. 371, amplifies this:

"Confirmed insanity, which deprives a person of mental capacity to distinguish between right and wrong in respect to the act in question, renders the person irresponsible for such an act, though criminal, and disqualifies him to enter into a contract, or to execute a valid instrument to convey real or personal estate. Both minds must meet in such a transaction, and if one is so weak, unsound, and diseased that a party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance."

But in avoiding contracts made by one, lunatic or insane, it must be inquired whether at the time the contract was made he was without contractual capacity. As is said in Lee v. Lee, 4 McCord, 194:

"It is not every man of a frantic appearance and behavior who is to be considered a lunatic, either as it regards obligations or crimes; but he must appear to the jury non compos mentis, not at an anterior period, but at the moment when the act was done."

The law is well stated by Field, J., in Hall v. Unger, Fed. Cas. No. 5,949, known in the supreme court as Dexter v. Hall, 15 Wall. 9:

"But, examining into contracts made by one whose mind is diseased, it does not follow from the fact that mania or dementia be shown that there may not be reason or capacity for business on some subjects. In determining the ability of the alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question? and then whether such capacity was possessed

at the time by the party. It is evident that a very different degree of capacity is required for the execution of a complicated contract, and a single transaction of a simple character, like the purchase or sale of a lot."

The same general principle is found in Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; The Parish Will Case, 25 N. Y. 9; Ball v. Mannin, 3 Bligh (N. R.) 1; M'Creight v. Aiken, Rice, 58.

The question of fact, therefore, in the case is: Was Marco, when he executed this mortgage to Pelzer,—at the time,—competent to make the contract? Did he understand what he was doing,—that he was executing a mortgage? Did he know what property the mortgage covered,—that it was his Lydia plantation? Did he know to whom it was mortgaged,—F. J. Pelzer? Did he know for what it was mortgaged,—his indebtedness to Pelzer's firm? A vast amount of testimony has been taken before the special master, and has been reported to the court. In its consideration the court has been assisted by arguments characterized by unusual ability, research, and learning. As has been said, Marco had remarkable ability as a merchant and business man. His habits, so far as the record discloses, were good until 1892. Up to that year he had his place of business at his plantation, Lydia; and from that place, for several years, he conducted a large business as a merchant, and very extensive planting operations. He removed to Darlington in the year 1892, and opened a large business house in that city. During 1892 and during 1893 he drank very heavily, and his debauchery in this respect had grave effect on his mental capacity. His powers became seriously impaired. His eccentricities of speech and manner became greatly exaggerated. His memory weakened. His business faculties dulled and sometimes suspended. On this subject there is a volume of testimony. Very many witnesses testify as to acts and conduct of Marco which are the acts and conduct of an insane man. Others—men of business capacity and of character—testify as to other acts, business transactions, which clearly show that at times, at least, his business capacity existed. He has never been adjudged a lunatic. Three physicians—one of them his family physician—declare that in their opinion he had become and was subject to dementia, a dement, from protracted and habitual intemperance. But, as has been seen, this does not conclude the matter. The question is, was Marco, at the date of the execution of this mortgage, without contractual capacity? Did he on that day have the ability to execute this particular act? Did he, could he, understand what he was doing,—that he was executing a mortgage. Did he, could he, understand that this mortgage covered his home plantation, Lydia. Did he, could he, know what the mortgage was to Mr. Pelzer, and for his debt to Pelzer's firm? In reaching a conclusion on this point, it is well to consider what degree of mental capacity was essential to the proper execution of the act in question, and then whether Marco possessed it at that time.

The act performed was the execution of a mortgage of the Lydia plantation. The causes inducing that act—the motive and purpose of it—had been proposed, discussed, determined upon, two years

before, when there was no doubt of the possession by Marco of unimpaired business capacity. From 1891 to 1893 nothing remained to be done but the affixing of his signature to that deed. It is not suggested that the deed was anything more than a simple mortgage. Now, this was no complicated transaction, no comparison of figures, no negotiation as to liability, no proposition on one side to be heard, discussed, considered, decided. It was a single act,—affixing his name to an instrument determined upon two years before, in the presence of witnesses. Using the language of Mr. Justice Field, supra, "It is evident that a very different degree of capacity is required for the execution of a complicated contract, and a single transaction, like the purchase or sale of a lot." Now, did Marco have at that time the mental capacity to do this act? To ascertain this, we must go to the facts testified to in the case. On 15th March, 1893, when Marco was in the mental condition testified to by experts and laymen, he executed a mortgage to S. Jerkowski, for $16,000, of lots in Darlington. The deed was executed in the presence of, and was witnessed by, Appelt, his close personal friend, adviser, and an earnest witness in this case. This mortgage has never, to this time, been questioned, or its validity disputed. Appelt saw and certified to its signing, sealing, and delivery. During this period, also, Marco changed his attorney; consulted Mr. Nettles about certain of his cases; instructed him in them. Among other things, he conferred with him about this proposed mortgage. Mr. Silverstein, a cousin of Marco, was consulted by Mrs. Marco upon the question of her renunciation of dower on this mortgage. He went to Darlington, saw Marco and Mrs. Marco, considered the whole situation, and advised her to renounce her dower. This is conclusive proof that this gentleman then had no doubt of the validity of the mortgage, else he would have been false to the trust Mrs. Marco imposed on him when she sought his counsel and protection. The fact that Marco had executed this mortgage was known to his family and friends. The record shows not one word of protest against it after its execution until the present complainant raised in the progress of this case the issue of his insanity. Many merchants and business men, including public officers, testify to the acts of Marco, their dealings in business with him, his management in these dealings, all during this same period, and all showing skill, ability, shrewdness, and even memory. Dr. Griffin, a physician of experience, and who was his family physician, saw no reason why he could not perform a simple act, not complicated in its nature. The extensive farming operations which Marco had been carrying on, by tenants and otherwise, were not interrupted. Appelt and Brice, his clerks, purchased a very large stock of goods in his name and on his credit. Can it be believed that these business men would have ventured to do this if Marco was habitually and continually void of intellect? But we are not left to probabilities deduced from attending occurrences. Nor are we without direct testimony on this subject. When Mrs. Marco, accompanied by Mr. Silverstein and her husband, visited Mr. Boyd, to state her conclusion, and to

express her consent to renounce her dower, he called Mr. Edwards into the room. There, in Mr. Edwards' presence, he stated to Marco what had been done, and Marco assented to it. This is his language, as reported by the master: He had stated that he was in Mr. Boyd's office on a day in 1893. (Other witnesses testified that he had been invited there specially by Mr. Boyd and his partner, Mr. Brown.) He was asked by Mr. Boyd who were present. Answer:

"Mr. Marco, his wife, Mr. Silverstein, and one or two others. I forget who they were. You stated that there had been some transaction between Mr. Marco and Mr. Pelzer, I think it was, and that it hadn't been completed, or there was some trouble about it, because it had been stated that Mr. Marco was unsound in mind, on account of drinking, and did not understand the transaction, and that you wanted him to say for himself whether he did understand it or not, and then you stated what the transaction was, and asked Mr. Marco whether he understood it, and whether he was willing to do it. He stated that he was, and that he did understand it."

Above all, we have the testimony of Mr. Boyd himself, who prepared the mortgage, in whose presence it was executed, to whom it was delivered. He had known Marco for years; had been his intimate friend and legal adviser for years. Knew him, his habits, his mental capacity, if any one knew them. He had himself noted the mental failure of Marco, and was on his guard. Above all, he knew that the act he was then engaged in was void,—worse than void,—if Marco had not then capacity to execute it. Mr. Boyd, in detail, states the whole transaction, and swears that Marco, at the time he made this mortgage, knew what he was doing. His testimony has been attacked with great earnestness and ability. If his testimony be disregarded, if the court adopts the view of it taken by counsel, then it must believe that a man of pure life and conversation, prominent in the profession of the law, honored and esteemed throughout the state, for the purpose of aiding one client, basely took advantage of an old friend and client, when he was non compos mentis, with full knowledge of his mental condition, and committed a foul wrong, crowning his infamy by wholesale perjury as a witness. Take a lower view of this matter. No one can question Mr. Boyd's ability in his profession. Yet it is contended that this able and acute lawyer took into his office an insane man, known to him to be insane, known to all the inhabitants of the town of Darlington to be insane, and induced him to sign a paper, the contents, purpose, and effect of which he had not mind enough to grasp; that is to say, induced this insane man to do an act any tyro in the profession would know was either void, or easily avoided. Not only so, but having done all this,—having obtained this deed of questionable value,—upon the strength of it he gave up valuable securities, the property of Mr. Pelzer,—and this not on the impulse of the moment, but after full time of calm and deliberate reflection. This conclusion cannot receive the sanction of the court. Mr. Boyd, in his sworn testimony, after detailing the facts leading up to the execution of the papers, and which have been stated, says:

"That brings us to the execution of the papers. After I had prepared them and got them ready, I recollected what Dr. Griffin had said about his appre-

hensions concerning Marco's mind if he continued drinking, and, as I knew of his excessive drinking, it occurred to me that it was due Mr. Pelzer and Mr. Marco, from me, representing both, that it would be the proper thing not to proceed with the execution of important papers without hearing what Dr. Griffin would then say as to his condition; not that I felt any apprehension myself, because I was then certain as I am now that Mr. Marco was capable of attending to the matter. I thought it was proper to see him before going on, though, and saw him. I gave him a general statement of what I proposed to have done, and asked him to go to Mr. Marco's store, have a talk with him, not letting him know what he came for, and then to come up and let me know if he was in condition to attend to papers of such importance. Dr. Griffin stated that Marco seemed to be quite bright and clear that morning; that he could not see any objection to his attending to the matter,—and thereupon I at once sent for Marco to come. I read over the papers, and we then sat and had a long talk over the terms of the papers, and also as to the business generally. I cannot recollect the line of that talk, or the particulars of it, except two matters I recollect very distinctly in regard to these papers: Mr. Marco said that in his embarrassed condition he would not be able to pay so large a debt in five years, and begged me to change that and make it ten years, so as to give him that time. I told him that he must recollect he had already obtained by the delay since '91, two years; that five years was his own proposition, and that I could not make the discharge without communicating with Mr. Pelzer, and that would be further delay; and that he knew Mr. Pelzer well enough to know that he would not be exacting if he failed to pay the debt in the time. He seemed satisfied with that. Speaking of the land Mr. Pelzer had as security, he said he thought Mr. Pelzer was so amply secured he ought to let me turn over to him all the bonds and mortgages I held, and not hold the seven fresh bonds and mortgages which I had to secure the interest that had accumulated from 1891. I didn't have the same estimate that he had of the value of the land property. I recollect that I calculated the interest from '91 so as to show him how large an amount had accumulated, called his attention to the terms of the agreement, to the effect that he should pay up all interest by the 1st of December, 1893; that, in his condition, I did not see how he could get the money to do so, except out of these bonds; and that they would be more likely to be collected in my hands than in his hands. That seemed to satisfy him, and nothing more was said about it. I recollect distinctly those two matters."

Dr. Griffin, who had in his earlier testimony expressed the opinion that Marco could at times sensibly attend to an ordinary transaction, but not conclude any complicated matter, indicates in his later testimony an inclination to doubt whether he gave the opinion to which Mr. Boyd refers, at the time which Mr. Boyd fixed. Both of them speak of an event which occurred two years before they went on the stand. Dr. Griffin is uncertain, and cannot enter into details. Naturally so. He had no interest whatever in the act to be done. Mr. Boyd did have such an interest, and he fixes the date thoroughly; acting, as he says, at once upon the opinion. There is no contradiction here.

From the testimony, it is clearly shown that, at the date of the execution of this mortgage, Marco had sufficient mind and memory to execute it. But there was another part of this transaction which must be inquired into. Upon the execution of this mortgage, Marco was entitled to receive the bonds and mortgages in the possession of Mr. Pelzer. When the mortgage was in fact executed, a portion of these bonds and mortgages were retained by Mr. Boyd for Mr. Pelzer, to secure certain unpaid interest. This was a new arrangement, a separate transaction, proposed to Marco for the first time at the execution of the mortgage. Now, Marco's mind and memory were greatly impaired by his habits,—his nerve

and will power, especially. Mr. Boyd represented both Mr. Pelzer and him. This Mr. Boyd, perhaps, could safely do, in completing an agreement carefully considered and agreed to by both parties in 1891, and wanting completion by the doing of a single act. But, when it came to the retention of the bonds and mortgages, this was solely for the benefit of Mr. Pelzer, securing him a preference in the estate of an embarrassed debtor, and in no sense for Marco's benefit. Under the circumstances, it should not stand. But Marco received and used the bonds and mortgages in extinguishing some debts, and in securing stay on pressing executions. If, therefore, the transaction be set aside, it cannot be done without putting the parties in statu quo. No doubt is entertained of the good faith existing, nor is it supposed that a fraud was perpetrated. But in the situation of these parties, the dual capacity of the counsel, the mental infirmity of one client, the one present, his inability to go into a transaction of a complicated character, the natural subserviency of his will to his long known and trusted adviser, these reasons induce the setting aside of the arrangement, however unconscious Mr. Boyd may have been of the bias under which he was laboring, or of the unfairness of the result to Marco. But, before the arrangement can be set aside, both parties must be put in statu quo. The plantation, Lydia, has been offered for sale in this case. At that time there was no doubt as to Mr. Pelzer's right to his mortgage of it, and his bid at the sale had a vastly superior advantage over that of any one else. He purchased it on his own terms. Under these circumstances, the sale will not be confirmed. Time will be given, and steps will be taken to ascertain the value of the securities received by Marco from Pelzer, and used by him. Reasonable time will be given to him to replace them or return their value. Failing in this, the plantation will be sold, and the proceeds used first in reimbursing Mr. Pelzer, for the value of the bonds and mortgages surrendered by Mr. Boyd to Marco when the execution of the mortgage of Lydia was completed, and the remainder to go to Marco, or to be applied as the law may direct.

ILLINOIS CENT. R. CO. v. DAVIDSON.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1896.)

No. 300.

1. COMMON CARRIERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
   Where plaintiff, leaving defendant's railroad train, and going onto a platform of insufficient width, provided by the company, was caught between two trains passing on the nearest tracks on either side of such platform at a high rate of speed, and injured thereby, *held*, that evidence to show that theretofore passengers had been accustomed to leave the trains on that side was admissible as bearing on the question of contributory negligence.

2. SAME—EVIDENCE—OPINION OF WITNESSES.
   Where personal injury to a passenger on a railroad is alleged to be due to the insufficient width of a platform, a witness may give his opinion as to the safe method of constructing platforms with reference to the track, or an esti-

mate, founded on actual measurements of several other locomotives in use on the road, of how far the parts of the locomotives and cars extend over the tracks.

8. SAME—LOSS OF EARNINGS—MEASURE OF DAMAGES.
Where plaintiff has been unable to work for a long time by reason of his injuries, evidence of his earnings for several years past is admissible as going to show the amount of damages.

4. SAME—PLEADING AND EVIDENCE—EARNINGS WITH FORMER EMPLOYER.
Where the averment of special damages only shows loss of commissions from plaintiff's employer at the time of the injury, but such employer is the successor of a company whom plaintiff had previously served in the same capacity, and under the same contract, evidence of plaintiff's earnings while employed by such company is admissible.

5. RAILROAD COMPANIES—DEFECTIVE PLATFORMS, ETC.—INSTRUCTIONS.
A charge that "the law imposes the duty on railroad companies to keep in safe condition all portions of their platforms, approaches thereto, and exits therefrom, to which the public are invited or would naturally resort, and all portions of their station grounds reasonably near to the platforms where passengers take passage on or are discharged from their cars," while too broad a statement of the proposition, is not reversible error where, under the evidence, it is impossible that the jury could have been misled thereby to the injury of the party complaining.

6. TRIAL—INSTRUCTIONS.
It is not error for a federal court to say to the jury in a personal injury case that "it cannot be doubted, under the evidence, that the place where the plaintiff received his injury was a most dangerous one," where the jury are also told that they are the exclusive judges of the weight of the testimony.

7. SAME—CURING ERROR—REDUCTION OF VERDICT.
Instructions to a jury that they may consider physical pain and suffering which the person injured "may" have endured in the past and "is likely" to endure in the future, or time that "may" be lost in the future, under the evidence, would not lead the jury to think that they can go outside the evidence, and infer consequences which are conjectural and unwarranted; and the inaccuracy of such expressions, if error, is cured where the court gives judgment for only three-fifths of the amount of the verdict.

8. SAME—REQUESTS TO CHARGE—MATTERS OF LAW AND FACT.
A request to charge, which assumes as matter of law a question of fact which belongs to the jury, is faulty, and properly refused.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This was an action on the case by Wilbur F. Davidson against the Illinois Central Railroad Company for damages for personal injuries.

This case has been tried three times, and is here the second time. See 12 C. C. A. 118, 64 Fed. 301. The action is on the case for personal injury suffered by the defendant in error, Wilbur F. Davidson, as a passenger, while leaving a suburban train of the plaintiff in error at Hyde Park station, Chicago, February 27, 1893. On the first trial the jury disagreed; on the second there was a verdict for $43,000, of which the court required that $18,000 be remitted; and on the last trial the verdict was for $50,000, of which the court required a remittitur of $20,000, and gave judgment for the remainder, with interest.

The amended declaration contains five counts. The first, after alleging the duty of the railroad company to provide reasonably safe means at the station whereby the plaintiff could leave the train and premises without unnecessary or unreasonable hazard of injury to his person, proceeds to charge that: "The defendant, disregarding its duty in that behalf, carelessly, negligently, and willfully, then and there, at to wit, its said Hyde Park station, provided means for leaving its said train and premises that, as the said defendant well knew, were grossly unsafe and inadequate in this, to wit: it then and there provided a narrow platform of the width, to wit, of four feet, between two of the tracks of its said railway, and close to, to wit, within one foot of, the

rails thereof on either side of said platform, for its passengers and the said plaintiff to go and walk upon in leaving the train aforesaid, at, to wit, its said Hyde Park station, which platform was of insufficient width to permit passengers to be or walk thereon with reasonable safety from injury from passing trains, and was so constructed that the defendant's engines and trains running upon its two tracks last mentioned, in passing by the said platform on either side thereof, extended to wit, six inches over the said platform, leaving an unreasonably insufficient and narrow space for the defendant's passengers upon said platform between such trains when so passing each other, of but, to wit, three feet in width; and also permitted and caused its servants in charge of its said trains to manage and drive the same in approaching and passing the said platform at frequent intervals and at a rapid and dangerous rate of speed; and by reason of the said grossly inadequate and unsafe means so afforded its passengers and the plaintiff as aforesaid the said defendant then and there exposed its passengers and the said plaintiff upon the said platform to great and imminent danger of being struck and injured, and while the plaintiff, being a passenger as aforesaid, of the said defendant, was then and there on the said platform for the purpose of leaving the said defendant's train hereinabove first mentioned and its premises at, to wit, its said Hyde Park station, and being in the exercise of ordinary care on his part, and while at the same time a certain cattle train of the defendant, going south, and running at, to wit, the rate of twenty miles an hour, was passing by the said platform, upon the defendant's track next east of said platform, the said defendant then and there caused a certain other passenger train going north upon its track west of said platform, under the care and management of certain of its employés and agents in that behalf, to pass the said platform at a rapid and dangerous rate of speed, to wit, at the speed of twenty miles an hour, whereby the plaintiff was then and there exposed to great and imminent peril of his life, and he, the said plaintiff, being unaware of the danger to which he was so subjected, by reason of the gross and willful negligence aforesaid of the said defendant in providing the unsafe and inadequate means aforesaid for leaving its said first-mentioned train and premises, was, without want of due care on his part, then and there caught in the narrow space aforesaid upon said platform between said passenger train and said cattle train, and was struck and run down by the said passenger train of the said defendant as it passed the said platform, and the said plaintiff was then and there thereby thrown and hurled by the said passenger train against the side of said defendant's cattle train, by means whereof," etc.

The second count, alleging the same construction and situation of platform and tracks, charges that it was the duty of the defendant, in order to apprise passengers upon the platform of the approach of trains on the adjacent tracks, to cause the bell or whistle upon the engines thereof to be sounded, and that the passenger train by which the plaintiff was struck was negligently run upon him without the bell or whistle being sounded.

In the third count it is charged that the passenger train was run carelessly at an unreasonably rapid and dangerous rate of speed.

The fourth count is not perceived to be essentially different from the first, the negligence causing the injury being alleged to have been in the construction of the platform.

The fifth count, which was added after the reversal by this court of the first judgment, alleges that at its Hyde Park station "the defendant had divers main tracks of its said railway running north and south, and lying, to wit, seven feet distant from each other, and divers platforms between and alongside of the said main tracks; and the passengers of the said defendant and the said plaintiff, as the said defendant well knew, unless they were prevented by it from so doing, were likely to, and naturally would, select the east side of the said train in which the said plaintiff was so being carried in alighting therefrom at its said Hyde Park station, which east side of the said train, by reason of the number of the said defendant's main tracks on that side, and the frequency with which trains passed by thereon, as from time to time they were wont to do, and at a high rate of speed, was a place on its premises at its said Hyde Park station where its passengers and the said plaintiff in leaving its said train, if permitted so to do, would be and

were, as the said defendant well knew, exposed to the unreasonable, great, and unnecessary danger of being struck by its trains and injured; and it then and there became and was requisite and necessary for the said defendant, as a measure of ordinary care and prudence, to prevent its passengers and the said plaintiff by gates or fenders on its car platforms, or by an agent or guard, to direct them from leaving its said train on the east side; but the said defendant, disregarding its duty in that behalf, as the said plaintiff, being then and there a passenger of the said defendant as aforesaid, and being in the exercise of ordinary care on his part for his own safety, was about to leave its said train, to wit, at its said Hyde Park station, then and there carelessly, wrongfully, and negligently failed by any of the means aforesaid, or by any means, to prevent the said plaintiff from leaving the said train by the east side thereof, and by its agent in that behalf directed him, the said plaintiff, to leave by that side. And the said plaintiff, being unaware of the dangers aforesaid, to which he was then and there thereby exposed as aforesaid, and being in the exercise of ordinary care on his part to avoid injury, then and there alighted from the said train on the east side thereof, and, while walking on one of the said defendant's said platforms between its said main tracks and its said Hyde Park station, in leaving its said train and premises, by reason of the gross negligence and carelessness aforesaid of the said defendant in permitting him to so leave the said train on the east side thereof, was, without want of due care on his part, then and there caught in the narrow space upon said platform between a certain passenger train and a certain cattle train of the said defendant passing by said platform on either side thereof, and was struck and run down by the said passenger train," etc.

The errors assigned have relation to the admission of evidence and to instructions given or refused.

Sidney Andrews, for plaintiff in error.
Edward R. Woodle, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Before entering upon the particular questions presented, it is important to observe that the duty of a common carrier of passengers requires the exercise of the highest practicable care for their safety, and that in some measure or degree the duty continues until the passenger has left the premises of the carrier. If, therefore, it be true, as contended, that the plaintiff in error had provided a suitable and safe platform on the west side of its tracks at Hyde Park, by which it was intended that passengers by its suburban trains should make their exit, and that the platform in question, conceded to have been a perilous place, was not intended for such use, it was the plain duty of the company to its passengers, and especially to a stranger, or to any one not known not to be a stranger, to guard him by all reasonable means against going into the dangerous situation. In this view, it was the duty of the company to prevent, or at least to warn, the defendant in error against alighting from its train on the east side, from which he was likely to go upon the platform where he was hurt. While it was perhaps unnecessary to show that theretofore passengers had been accustomed to leave the trains on that side, the evidence on that point was not incompetent. It tended to show actual notice to the company of the probable presence of passengers upon the platform, and of the necessity that trains on the adjacent tracks be run

consistently with their safety. The evidence was also competent, and perhaps important, on the question of contributory negligence. Railway Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281.

The question to a witness, "What is the safe method of constructing platforms with reference to the track, so that trains passing will not extend over the platform?" was objected to as "incompetent, irrelevant, and immaterial." Another witness was permitted, over objection, to testify that the bunting beams on the engines in use by the plaintiff in error after the accident, as he had observed them, were all of the same length, and that by two or three measurements he had found that they extended over the rails "about twenty to twenty-one inches." It is the common and indispensable practice in the conduct of trials to accept the estimates of witnesses, though not experts, in respect to matters of distance, dimension, time, and the like, and it is no objection to the testimony of either of these witnesses that he gave only an opinion. Besides, it is evident that the testimony was not important. The defendant in error, it is certain and undisputed, was struck by a beam or other part of a locomotive or car extending over the platform upon which he was walking; how far, is not material. The court might well have instructed the jury that, if the company saw fit to construct a platform in a manner and place to make such accidents possible, it was bound to move its locomotives and cars with such care as to prevent avoidable injuries. If, therefore, the passenger in this case was properly upon the platform, and was run down without fault of his own, the company is responsible, and it is not material whether the negligence be found in the situation and construction of the platform, or in the running and management of trains, or in both. It is to be observed, too, that the testimony in question was concerning matters peculiarly within the knowledge of the plaintiff in error. If the beam of the particular engine which did the harm was different from the beams on other engines of the company, and projected beyond the tracks less than the witness estimated, the plaintiff in error could easily have made the proof; and, not having deemed it worth while to do so, is in no position to ask a reversal of the judgment because of the supposed incompetency of this evidence.

The defendant in error, as a witness in his own behalf, testified that for a number of years before his injury he had been an agent in Michigan for the General Electric Company, selling apparatus for electric lighting, electric power for railroads, etc., and that his earnings in 1886 were $14,133.53, in 1887 $12,332.18, in 1888 $18,943.60, in 1889 $10,773, in 1890 $26,000, in 1891 $18,400, in 1892 more than $32,000, and that those earnings consisted mainly in the difference between the net prices which he was required to obtain for the company and the prices at which he was able to sell to purchasers. It is contended that these earnings "are too speculative, contingent, and unreliable" to form a basis for the estimation of damages by the jury. The evidence also shows that by reason of the injury the defendant was unable for more than a year to prosecute his business, and that his earnings therefrom practically ceased. Without entering upon a review of the numerous cases upon the subject, we deem it enough to

say that the testimony was competent. "In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant." Railroad Co. v. Putnam, 118 U. S. 546, 554, 7 Sup. Ct. 1. Or, as it is expressed in District of Columbia v. Woodbury, 136 U. S. 450, 459, 10 Sup. Ct. 990, 993: "All evidence, tending to show the character of his ordinary pursuits, and the extent to which the injury complained of prevented him from following those pursuits, was pertinent to the issue." See, also, Wade v. Leroy, 20 How. 34; Railway Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239; Railroad Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579. The following cases, cited to the contrary, are not inconsistent, and most of them, upon their facts, are inapplicable: Railroad Co. v. O'Reilly, 158 U. S. 334, 15 Sup. Ct. 830; Railroad Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837; Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500; The Lively, 1 Gall. 325, Fed. Cas. No. 8,403; The Amiable Nancy, 3 Wheat. 546; L'Amistad Rues, 5 Wheat. 385; Cahn v. Telegraph Co., 1 C. C. A. 107, 48 Fed. 810; Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577; Bierbach v. Rubber Co., 54 Wis. 208, 11 N. W. 514; Lincoln v. Railroad Co., 23 Wend. 424; Griffin v. Colver, 16 N. Y. 489.

It is further urged that the testimony in respect to the earnings of 1886, 1887, and 1888 was incompetent, and that the motion made to suppress it should have been sustained, because it was not embraced in the averment of special damage found in the declaration, that averment being to the effect that the plaintiff had lost and been deprived of his commissions and earnings as general agent for Michigan of the General Electric Company, while during the years named he was in the employment of the Thomson-Houston Company, which is not mentioned in the declaration. The objection is not available. The proof is that the General Electric Company was successor to the Thomson-Houston Company, and that the contract under which the plaintiff served the first company was, in substance, continued with the successor. As a matter of pleading it was necessary to allege the loss of business under the existing contract and employment, but, to aid the jury in determining the extent of that loss, evidence of the earnings under the previous agency and contract was clearly proper.

It is further contended that the testimony concerning earnings was improperly admitted in rebuttal. That was within the discretion of the court.

The assertion of a variance between the declaration and the proof is not tenable. It is not important whether or not the platform in question was provided by the defendant company for the use of passengers arriving on the south-bound suburban train. It was in a place where it was liable and likely to be used by such passengers, and consequently the responsibility of the company was the

same as if it had been so intended. The evidence in the record is sufficient to justify a recovery under any of the counts of the declaration, and there was, therefore, no error in refusing instructions to the contrary.

The court gave to the jury the following instruction, upon which error is assigned:

"The law imposes the duty on railroad companies to keep in safe condition all portions of their platforms, approaches thereto, and exits therefrom, to which the public are invited, or would naturally or reasonably resort, and all portions of their station grounds reasonably near to the platforms where passengers take passage on or are discharged from their cars."

Though justified by some authorities (McDonald v. Railroad Co., 26 Iowa, 124; Id., 29 Iowa, 170; Railroad Co. v. Riley, 39 Ind. 568, 586), the proposition seems to be too broadly stated: Kelly v. Railway Co., 112 N. Y. 443, 20 N. E. 383; Moreland v. Railroad Co., 141 Mass. 31, 6 N. E. 225. In the first of these cases the passenger fell upon the stairway of a station made slippery by a fall of sleet and snow, and in the other was hurt by stepping on shingles lying on the station grounds, and it was held in each case that the company was bound to exercise simply ordinary care in view of the danger to be apprehended; but at the same time it was conceded that, "where the injury occurs from a defect in the roadbed or machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road," the rule of "utmost care" applies, "for the reason that a neglect of duty in such a case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance." "That rule is applicable to such appliances of a railroad as would be likely to occasion great danger and loss of life to the traveling public if defects exist therein, on account of the velocity with which cars are moved, and the destructive and irresistible force which accompanies such motion." It is not alleged in the declaration or in argument that the platform in question was out of repair, or, considered by itself, defectively constructed. By the averment and by the proof it was dangerous by reason of its location in relation to the adjacent tracks and passing trains. That the company was bound by the rule of supreme diligence to guard its passengers against the dangers of that situation, there can be no doubt, and, this being so under every phase of the evidence in the case, it is impossible that the jury could have been misled by this part of the charge to the injury of the plaintiff in error. It follows, without further consideration, that the court did not err in saying to the jury that "it cannot be doubted under the evidence that the place where the plaintiff received his injury on the platform east of the station between passing trains running in different directions on tracks very near to each other was a most dangerous one." There was, and could be, no dispute about it, and, besides, the jury was told explicitly that they were "the exclusive judges of the weight of the testimony and of the credibility of witnesses."

It is urged that the court erred in charging "that there was no

evidence that it was customary for passengers to alight on the west side, and that the company had prepared a platform for their convenience on that side." The court gave no such charge. Instead, it said that there was no evidence that the plaintiff "had any previous knowledge of the situation, or that it was customary," etc. Besides, the matter was incidental, and of little importance. The objections made to those portions of the charge covered by the twenty-third and twenty-sixth specifications of error are not deemed important enough to justify a statement of them here. The jury were told that, if they found that the plaintiff's injuries were permanent, they might in determining the amount of damages consider "the physical pain and suffering which the plaintiff may have endured in the past, and is likely, under the evidence, if you so find, to endure in the future"; and also, "the time lost by him in the past, or that may be lost in the future, if any, and, under all the evidence, determine," etc. The objection to these propositions is that by the use of the words "likely" and "may" the jury were not restricted to the consideration of such pain and loss of time as were reasonably certain to occur, and in support of the objection are cited: Fry v. Railway Co., 45 Iowa, 416; White v. Railroad Co., 61 Wis. 536, 21 N. W. 524; Hardy v. Railroad Co., 89 Wis. 183, 61 N. W. 771; Block v. Railroad Co., 89 Wis. 371, 61 N. W. 1101; Raymond v. Keseberg (Wis.) 64 N. W. 861; Smith v. Milwaukee Exchange, Id. 1041. We are not able to believe that the jury were led to think that they could go outside of the evidence to infer consequences which were conjectural and unwarranted. Things which, under the evidence, are likely to happen, are reasonably certain to happen (Scott Tp. v. Montgomery, 95 Pa. St. 444); and the word "may," used, as it was, in the same connection, was probably understood in the same way. Greater accuracy of expression is, of course, always desirable; but, in this instance, if error was committed, and was possibly harmful, it has been more than cured by the action of the court in giving judgment for but three-fifths of the amount of the verdict. Upon the undisputed evidence in the case, that judgment cannot be regarded as excessive. Objections to other portions of the charge present no essentially different question from those already considered.

An extended argument has been made, and numerous decisions cited to show, that the case should have been taken from the jury on account of variances between the proof and averments of the declaration, and because of contributory negligence. It would serve no valuable purpose to attempt a review of the evidence. The supposed variances are upon immaterial points. In respect to contributory negligence, the burden of proof was upon the plaintiff in error, and, if it can be said that there was evidence upon the point worthy of the jury's attention, it was certainly not such as to warrant a peremptory withdrawal of the question from their consideration.

The following instruction, asked by the plaintiff in error, was refused:

"If you believe from the evidence that the plaintiff knew, or would, by the exercise of ordinary care, have known, that the planking between tracks two and three was not of a reasonably safe width for him to walk or remain upon should another train pass by upon track two, and you further find from the evidence that he voluntarily and unnecessarily remained on such planking, and by reason thereof was injured as complained of, then he is not entitled to recover, and your verdict must be for the defendant."

This instruction is identical with one to which, when the case was first here, we declared that we saw no objection, and that, as nothing in the general charge covered the same ground, we thought its refusal error. The general charge before us now is ample upon the point, ending with the explicit statement that if "by the exercise of proper care and prudence" the plaintiff "could have avoided the place of danger and injury and was thereby guilty of contributory negligence, he cannot recover." It is to be observed, too, that the instruction asked is in fact objectionable. The gist of it is in the proposition "that he voluntarily and unnecessarily remained on such planking." That is not a true test of negligence. He was not held there by force or by threats, and therefore remained voluntarily, but whether he remained there unnecessarily was a matter of knowledge and opinion or judgment. He may have perceived his danger, and yet not have been at fault for failure to perceive that to go was safer than to stay.

The eleventh request for instruction, if in nothing else, was faulty in assuming as matter of law that a speed of not more than four or five miles an hour was not, under the circumstances, too much for the train by which the plaintiff was run down. Whether it was or not should have been left to the jury.

The twelfth request is obnoxious to a like objection. It assumes that a failure of the plaintiff, while he was walking along the platform, to look south for an approaching train, was negligence. Whether it was or not was a question for the jury.

The first part of the thirteenth request is to the effect that, a proper platform having been prepared at the west side, the plaintiff ought to have made his exit from the car on that side. That depended on the circumstances, and therefore belonged to the jury. Besides, it by no means was certain on the evidence that the platform on the west side extended to the car in which the plaintiff arrived. The latter part of the request is sufficiently covered by the charge given.

The judgment of the circuit court is affirmed.

GRAY v. SMITH et al.

(Circuit Court, N. D. California. August 10, 1896.)

No. 11,878.

1. VENDOR AND VENDEE—EXECUTORY CONTRACT.
   It is not necessary to a valid executory contract for the sale of lands that the vendor shall be absolute owner thereof when he makes the con-