

agreed to deliver, the defendants were not bound to accept them. If they were as good as the Boston valves for the purposes for which they were designed, it would not follow as a matter of law that the defendants agreed to purchase them. Many other considerations might have an important bearing in the determination of the fact of the parties' intention in this respect. An agreement to sell a black horse would not ordinarily be fulfilled by the tender of a white one of equal or greater value. *Newmarket Iron Foundry v. Harvey*, 23 N. H. 395, 409. And the plaintiffs' offer to deliver Pittsburg water valves in the place of Boston valves, though of the same value, might not be a performance of their contract.

Verdict set aside.

SMITH, J., did not sit: the others concurred.

CONNOR *v.* CONCORD & MONTREAL RAILROAD.

A railroad corporation is not liable to a person injured accidentally by stumbling over the foot of a baggage-master engaged in taking freight from a baggage car at the usual place on the depot platform in the ordinary way.

CASE, for personal injuries.

Felker & Pearl, for the plaintiff.

Frank S. Streeter, Joseph W. Fellows, and George E. Cochrane, for the defendants.

CLARK, J. The plaintiff was a passenger from Concord to Laconia on the defendants' train arriving between twelve and half past twelve o'clock, went to a millinery store and transacted some business, then returned to the depot to meet a friend expected on the train from Alton Bay. The train arrived at twenty-five minutes past one, and the friend did not come. The plaintiff, after speaking to the conductor who was standing by the steps of the passenger car next to the baggage car, turned to go down town again, seeing the baggage-master standing by his truck by the baggage car a few feet from her, waiting to receive the baggage as it was passed out to him. The width of the platform was thirteen feet and four inches, and the truck did not exceed three feet in width. The plaintiff walked rapidly along looking straight ahead; and as she came opposite the baggage-master as he was receiving a piece of beef from the car, he stepped back, and she tripped over his foot and fell forward on the platform, receiving severe injuries.

The baggage-master was attending to his work, and did not notice the plaintiff until the accident happened. The plaintiff claims to recover damages of the railroad on the ground that her injuries were caused by the negligence of the baggage-master, and produces evidence of the foregoing facts to sustain her action. The evidence is insufficient. It shows that the baggage-master was attending to his duties in the ordinary place and manner, with no knowledge of the presence of the plaintiff until the accident happened. Eight or ten feet of the platform between him and the depot was unobstructed, leaving ample room for the plaintiff to pass without hindrance; and no negligence on his part is shown. The raising of the foot against which she tripped and fell was the natural movement to sustain the poise of the body as he reached forward to take the beef from the car, and is no evidence of negligence. He was in no fault for the accident, and the railroad is not chargeable. A nonsuit was properly ordered.

Exceptions overruled.

SMITH and CHASE, JJ., did not sit: the others concurred.

67	312
67	435
67	312
69	289
67	312
70	213
70	358
70	450
70	614
67	312
71	32
67	312
72	370
67	312
74	189

EDGERLY, *Adm'x*, v. UNION STREET RAILROAD COMPANY.

It is both the right and the duty of a common carrier to remove from his vehicle a passenger whose conduct or condition is such as to endanger the safety of or cause discomfort or annoyance to, other passengers; and if the removal is made in a proper manner and at a suitable time and place, it cannot be regarded as the proximate cause of a subsequent injury to him.

An electric railroad company is liable for the death of a drunken man who is run over and killed by its car while he is lying on its track, if by reason of his condition he was incapable of extricating himself from his danger, and if the employes of the company could have prevented the injury by the use of ordinary care.

A general exception to instructions given to the jury is unavailing.

CASE, for injuries to Charles J. Edgerly, the plaintiff's intestate and late husband, resulting in his instant death November 22, 1890, from the negligent management of one of the defendants' cars propelled by electricity. The action is brought under Laws of 1887, c. 71. The first count in the declaration alleges that the deceased was run over and killed in consequence of the negligent management of one of the defendants' cars by their servants. The second count is similar to the first, except that it alleges that the deceased was lawfully in a public highway. The third count is