

sengers, they fulfilled their duty as common carriers. *Bennett v. Dutton*, 10 N. H. 481. The car starter certainly had no authority to enlarge their business. Any attempt of his in that direction would be his act and not that of the defendants.

The plaintiff does not allege that his injury was due to a failure of the defendants to make and promulgate reasonable rules for the government of their employees in their business. He could not reasonably take this position, for, as before remarked, the evidence indubitably shows that the defect was seasonably discovered and reasonable precautions were taken to prevent the employees from injury by it.

Nor did the negligence alleged consist of a careless exercise of the defendants' discretion in fixing times for the movement of cars over the road. It was not the sending of a car over the road in the rear of the car on which the plaintiff was employed that caused his injury, but the use of a defective car. The recent case of *Wallace v. Railroad*, 72 N. H. 504, furnishes no support for a judgment in the plaintiff's favor.

The facts reported do not tend to prove want of care on the part of the defendants in the performance of any non-delegable duty which they owed to the plaintiff, but only want of care on the part of a fellow-servant. The plaintiff assumed the risk of injury from such negligence when he entered the defendants' employ, and he has no ground of action against them therefor.

*Exception sustained: verdict set aside: judgment for the defendants.*

All concurred.

Coos, }  
Oct. 4, 1904. }

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GOULD v. HUTCHINS.

Upon the question whether the plaintiff's horse was frightened by an obstruction in a highway, evidence that other horses while passing the same object were not frightened may be competent.

CASE, for negligently leaving in the highway six cakes of ice, which frightened the plaintiff's horse and caused him to run away and to be injured. Trial by the court and verdict for the plaintiff. Transferred from the November term, 1903, of the superior court by *Stone, J.*

The defendant claimed that the cakes of ice, as left in the highway, were not calculated to frighten horses of ordinary gentleness,

and offered testimony to show that other horses passed the same place during the same time and in the same manner, and were not frightened by the ice. The evidence was excluded, not on the ground of an exercise of judicial discretion, but because immaterial, and the defendant excepted.

*Batchellor & Mitchell*, for the plaintiff.

*Drew, Jordan, Buckley & Shurtleff*, for the defendant.

WALKER, J. As the case is understood, the trial judge ruled that the experimental evidence offered by the defendant, of the liability of the ice to frighten horses, was as a matter of law incompetent. In view of the settled law of this state (*Darling v. Westmoreland*, 52 N. H. 401; *Gordon v. Railroad*, 58 N. H. 396; *Dow v. Weare*, 68 N. H. 345; *Folsom v. Railroad*, 68 N. H. 454, 461), the evidence was clearly competent, unless it was too remote as a matter of fact. But as the evidence was not excluded upon the ground of remoteness, but because legally incompetent (*Challis v. Lake*, 71 N. H. 90, 95; *Watson v. Twombly*, 60 N. H. 491, 493), the order must be,

*Exception sustained.*

All concurred.

Rockingham, }  
Nov. 1, 1904. }

NADEAU v. SAWYER.

In an action for injuries sustained while driving upon a public highway, evidence that the plaintiff disregarded the law of the road is competent upon the question of his care; and if such evidence has been adduced, a recital by the presiding justice of the statute prescribing the conduct of highway travelers is not exceptionable.

A verdict will not be set aside because instructions otherwise correct were not sufficiently specific, in the absence of a request by the excepting party for a more definite statement.

An exception to instructions is waived unless taken and reduced to writing before the jury retire.

CASE, for personal injuries. Trial by jury and verdict for the defendant. Transferred from the April term, 1904, of the superior court by *Stone, J.*

On the day of the accident the plaintiff was traveling on a highway with a horse and wagon. The defendant was following