

SINGER MANUFACTURING COMPANY v. BULLARD.

Where a sewing-machine is delivered upon an agreement that a specified sum is to be paid monthly for the use of it until a certain amount is paid, and then the machine is to be returned, or one cent paid for it the title to the machine does not pass to the bailee until the full amount is paid.

REPLEVIN of a sewing-machine. Facts found by a referee. In March, 1879, the defendant received from the plaintiffs a sewing-machine, and signed an agreement acknowledging the receipt of the machine of the value of twenty dollars, and agreeing to pay the plaintiffs for the use of it five dollars per month until the amount of twenty dollars was paid, and then to return the machine to the plaintiffs or pay one cent for it. After making payments to the amount of ten dollars, the defendant neglected and refused to make any further payment; and in July, 1881, after a demand upon the defendant, and a refusal to pay or deliver up the machine, the plaintiffs replevied it. Judgment was ordered for the plaintiffs, and the defendant excepted.

Sulloway, Topliff & O'Connor, for the plaintiffs.

J. P. Bartlett, for the defendant.

CLARK, J. The machine was the property of the plaintiffs, whether the agreement is regarded as a lease or as a conditional sale. The title would not pass until the price was paid in full. Upon a demand of payment, and a refusal to comply within a reasonable time, or to deliver up the machine, the plaintiffs had a right to replevy it. *Bailey v. Colby*, 34 N. H. 29; *Singer Mfg Co. v. Graham*, 8 Oreg. 17—S. C., 34 Am. Rep. 572.

Exceptions overruled.

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

ROWELL & a. v. HOLLIS.

The duty imposed upon towns to keep their highways in suitable repair cannot be varied by proof of a custom to make repairs in a particular manner.

The admission of evidence wholly immaterial furnishes no sufficient ground for granting a new trial.

CASE, for damages from defective highway. Facts found by a referee. The plaintiffs claimed to recover for damages sustained by their horses, harnesses, and sleigh, by reason of a defective highway, the alleged defect being obstructions and incumbrances by snow. At the trial before the referee, against the plaintiffs' objection, several witnesses, who had been surveyors of highways in Hollis and accustomed to breaking winter roads, were permitted to testify, in substance, that "it has been customary in drifting places to keep the track above the drifts instead of canalizing down,—and for this reason: If you dig down near to the ground you will have to build up banks on the sides, and when the snow blows it fills the road full; but if you keep the road over the top, the snow blows across, and then when the thaws come, you shovel out. If you canalled down you would have to keep shovelling, so that it would require the force of all the men in town, in such a winter as last winter, to keep the roads clear."

The referee found the defendants not guilty. The court ordered judgment for the defendants on the report, and the plaintiffs excepted, and filed this bill of exceptions which is allowed.

R. D. Barnes, for the plaintiffs. The liability of towns to persons injured by defective highways is fixed by Gen. Laws, c. 75, and cannot be contravened by any custom however well established; and evidence thereof is inadmissible. 2 Gr. Ev., s. 249; *Homer v. Dorr*, 10 Mass. 26, 29; *Lewis v. Thatcher*, 15 Mass. 431; *Randall v. Rotch*, 12 Pick. 107; *Wadley v. Davis*, 63 Barb. 501; *Strong v. Bliss*, 6 Met. 393; *Deweese v. Lockhart*, 1 Tex. 535. Proof of this custom or usage of the town relating to the repair of their winter roads was inadmissible. The only question is, What was the condition of the highway in fact? Was it suitable for the travel passing thereon? If it was, that is all that is required. If it was not, the fact that the town had repaired their winter roads according to this or any other particular custom or usage could not change the actual condition of the road, or relieve the town from their liability. *Winship v. Enfield*, 42 N. H. 210.

The evidence relative to this custom of the town could have no other tendency than to prejudice the judgment of the referee; and the verdict, therefore, should be set aside. *Winkley v. Foye*, 28 N. H. 513.

J. B. Fassett, for the defendants.

BLODGETT, J. The customary action of the defendants in respect to snowdrifts in their highways was not admissible, either upon the question of the sufficiency of the highway whereon the injuries were received, or upon that of the plaintiffs' negligence; nor do we perceive its relevancy upon any issue between the parties which could have arisen at the hearing. Nevertheless its

admission does not afford a sufficient ground for granting a new trial, inasmuch as it was incidental and introductory merely, and was so plainly irrelevant and immaterial that it is altogether improbable that it could have had any influence upon the mind of the referee. See *Winkley v. Foye*, 28 N. H. 518, 519; *Cook v. Brown*, 34 N. H. 460; *Tucker v. Peaslee*, 36 N. H. 168; *Barry v. Bennett*, 7 Met. 354.

Exceptions overruled.

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

ROGERS v. MILLER.

If a party would avoid a sale or exchange of a chattel for breach of contract by the other party, he must not retain any part of the consideration he received upon such sale or exchange.

TROVER, for a horse. Facts found by the court. June 25, 1878, the plaintiff sold to the defendant a bay horse, warranted sound and kind, for \$100. The sale was at the plaintiff's place of business in Boston, Mass., and the defendant took the horse to his home in Manchester. Upon using the horse the defendant ascertained that he was subject to fits; and on July 5 he went to Boston, saw the plaintiff, and requested him to refund the \$100, take back the horse, and pay damages. The plaintiff offered to exchange a black horse for the bay horse, and after some negotiations an exchange was agreed upon. The defendant took the black horse now in controversy to Manchester, upon the agreement and understanding, if he suited him, to return the bay horse and send \$60 to the plaintiff by one Welch, a man doing business in Boston, and residing at Manchester, and who was then present at the trade. The plaintiff was then intending to start for Ohio on the next day, and requested the defendant to keep the bay horse at Manchester until his return. On his return to Boston, the plaintiff notified the defendant, and on July 18, the defendant sent the bay horse to Boston, and wrote the plaintiff as follows:

“Manchester, July 18.

“Mr. Rogers. Dear Sir: I have shipped the bay horse this morning to you. The black horse has been sick so I have not been able to use him much yet. He is better now and hope he will be all right. I will send down by Welch in a few days. Yours truly,
D. F. Miller.”

The defendant did not send the \$60 to the plaintiff, and on August 3 the plaintiff wrote asking him to send a check for that amount, and afterwards came to Manchester, and saw the defendant, and demanded the black horse. The defendant then refused