

for their services, but on an implied contract, under which they are entitled to recover what their services are reasonably worth less any payments they may have received on account of their labor. *Elliot v. Heath*, 14 N. H. 131; *Horn v. Batchelder*, 41 N. H. 86; *Smith v. Newcastle*, 48 N. H. 70, 74; *Bloodgett v. Berlin Mills Co.*, 52 N. H. 215; *Wood v. Garland*, 58 N. H. 154; *Spiller v. Cass*, 58 N. H. 489. They were not obliged to return money received from the defendants under the special contract, which they are entitled to retain under the implied contract. *Wiswall v. Harriman*, 62 N. H. 671. The rule as to a return of property received under a rescinded contract merely requires a plaintiff to do what equitably he ought to do; and in many cases, in which equity requires a return of property received, the purpose is fully accomplished by returning it at the trial, or depositing it with the clerk subject to the order of court before trial. If the property is money or papers, the latter course may often be most conformable to justice. If the opposite party seasonably objects to a trial until such deposit is made, the question will often be raised under circumstances most favorable to that just and ample remedy which is a party's right. An order can be made imposing conditions and providing for all contingencies. *Shaw v. Abbott*, 61 N. H. 254; *Fletcher v. Chamberlin*, 61 N. H. 438, 495, 496; *Owen v. Weston*, 63 N. H. 599, 602. It necessarily follows that orders may be made before trial that will put the parties on a footing of legal right without impairing the cause of action, or unjustly defeating the action on a point not affecting the merits.

It is not necessary to consider how far the doctrine of returning property has been modified by the view that parties are entitled to the best inventible procedure. In many cases, the return is a matter affecting the remedy only. In the present case, if justice required the plaintiffs to return what they had received before trial, it might be difficult, under the prevailing view of remedial law, to resist a motion that they deposit it with the clerk before trial, subject to the order of the court. But the verdict shows that justice did not require such a deposit. As the exceptions in both cases present the same question, there is no ground for disturbing the verdicts.

*Judgment on the verdicts.*

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

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HERVEY & a. v. DIMOND.

The interest of a bailee for hire of goods, with a right to purchase them upon payment of a certain price, is attachable; and the attaching creditor can hold the goods as against the bailor, if he seasonably tenders him so much of the price as may be due.

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REPLEVIN, of household furniture. Facts agreed. February 5, 1891, the plaintiffs delivered from their place of business in Boston, to one Fred D. Story at Penacook, a lot of household furniture, under a contract in writing in which it was stipulated that he had hired and received the same of the plaintiffs, and would pay them for the rent and use thereof the sum of five dollars per month until the price, \$77.38, should be paid; that the plaintiffs were to remain absolute owners of the property until the full price should be paid, when they were to "release their claim and right in the goods above leased" to Story. The contract further provided, that if Story should fail to pay the rent as stipulated, or should remove the goods from Penacook, or sell or underlet them, or suffer them to be attached, he would thereby forfeit all right to the goods and to the further use of them, and to all moneys paid, and that the plaintiffs might enter the premises of Story and remove the same. August 14, 1891, Story paid and the plaintiffs accepted a monthly instalment, making the whole amount paid by him under the contract \$30.

On that day the defendant as deputy sheriff attached the goods, as the property of Story, in the freight station at Penacook, awaiting shipment to Boston, on a writ in favor of one Whitaker. In answer to a letter from the defendant inquiring the amount due them upon the contract, the plaintiffs replied, August 18, that the balance due was \$47.38; that they had given Story permission to move the goods to East Boston; and concluded, "so we do not presume that you would care to detain the goods knowing they were leased property."

A demand made September 8 for the goods was refused. On that day Whitaker, the attaching creditor, tendered them \$47.38, which was refused. Later, the same day, the defendant demanded in writing of the plaintiffs an account under oath of the sum due them by virtue of any contract with Story. The plaintiffs never made any reply to the demand. September 12, 1891, they replevied the goods and took them to Boston.

*Streeter, Walker & Chase*, for the plaintiffs.

*Albin & Martin*, for the defendant.

SMITH, J. The contract (called a lease) does not, in legal effect, differ materially from a conditional sale. Although by the contract it was stipulated that the plaintiffs should remain absolute owners of the goods until the full price should be paid, it does not follow that Story had no interest in the property. He had the right to pay the balance due and become the owner of the property. While the plaintiffs remained the general owners until the full price should be paid, Story's interest was that of a special owner, which the law recognizes and protects. It was an

assignable and attachable interest, his assignee or attaching creditor acquiring the same rights as he had. If Story failed to make the monthly payments according to the contract and the plaintiffs might for that cause have asserted a forfeiture, they waived the default by accepting an instalment August 14.

Although the attachment was nominally of the property, yet it plainly appears that Whitaker did not intend to attach in disregard of the plaintiffs' rights, and he fully recognized them by tendering the amount due. If necessary, the officer's return can be amended to conform to the fact. By the tender of the amount due the plaintiffs, their title to the goods became vested in Story, subject to Whitaker's attachment. As Whitaker seasonably tendered the amount of their claim, the defendant is entitled to judgment for the value of the property and for his costs. A few of the authorities in support of these views are *Sargent v. Gile*, 8 N. H. 325; *Porter v. Pettengill*, 12 N. H. 299; *Bailey v. Colby*, 34 N. H. 29; *McFarland v. Farmer*, 42 N. H. 386; *Partridge v. Phalbrick*, 60 N. H. 556.

There is a clause in the contract that Story, by suffering the property to be attached, would forfeit all right to and use of the goods. It does not appear that Story procured or advised the attachment to be made. Whether he can be said to have "suffered" the attachment to be made when it was not made by his procurement or with his consent, and when, so far as appears, he could not prevent it, is a question not made. The plaintiffs have not contended or suggested that Story's interest in the goods was terminated by the attachment.

*Case discharged.*

All concurred.

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SMITH, *Ex'r*, v. SHEEHAN & a.

A child who takes under a devise to the testator's "legal heirs," though not otherwise mentioned or referred to in the will, is not entitled to the same portion of the estate as he would be if the deceased were intestate.

BILL IN EQUITY, by the executor, for the construction of the will of William Sheehan.

The will, after legacies to several of the testator's children and others, and making a partial provision for the widow, contains a residuary clause as follows: "Fourth. All the rest and residue of my estate I give to said Leland A. Smith in trust, to expend so much thereof as may be in his opinion necessary for the support of my said wife during her life, and whatever may remain at her decease, I give, bequeath, and devise the same to my legal heirs in