

I consider that, according to the spirit and intention, as well as the terms, of the law, the court must refuse to entertain the motion to relieve the defendant from the burden of an attachment, until she places herself within the jurisdiction of the court by a general appearance in the action. Of course, if the court has no jurisdiction to issue the writ, the defendant cannot be coerced into a waiver of the jurisdictional question, but she can be compelled to come in and defend by process against her property within the jurisdiction as well as by service of a summons.

By referring to the record, I find that I am relieved from the necessity of passing upon the second question. It appears by the affidavit for the attachment and the complaint that the plaintiff is proceeding upon the theory that the action is *ex contractu*, and the defendant is indebted to him in a fixed and definite amount for a breach of covenant. If he can recover at all upon the facts alleged, the amount of his recovery can be ascertained by computation, and fixed by the court, without the aid of a jury. Motion denied.

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JONES v. McCORMICK HARVESTING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 386.

1. JURISDICTION—AMOUNT IN CONTROVERSY.

Jurisdiction of an action for conversion is not lost by reason of the finding that the goods were worth less than the jurisdictional amount, where there is no reason to believe that the value was overstated in the declaration for the purpose of conferring jurisdiction.

2. CONVERSION—ASSIGNMENT FOR CREDITORS.

An action for conversion is maintainable though the defendant came into possession and disposed of the property as an assignee for the benefit of creditors under the Wisconsin statute, as property in the hands of an assignee under that statute is not in the custody of the law or of a court.

3. SAME—APPEAL—SCOPE OF REVIEW.

Questions involving an inquiry into the correctness of the finding of facts cannot be considered on writ of error.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

J. E. Malone, for plaintiff in error.

T. W. Spence, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error was the defendant below. The action was for the conversion of goods alleged to have been of the value of \$2,500. There was a written waiver of trial by jury, and the court, upon a special finding of the facts, gave judgment for the plaintiff for a sum less than \$2,000.

Jurisdiction of the case was not lost by reason of the finding that the goods converted were worth less than the jurisdictional amount, since it does not appear, nor is there shown reason to believe, that the value was overstated in the declaration for the purpose of conferring

jurisdiction. *Pickham v. Manufacturing Co.*, 23 C. C. A. 391, 77 Fed. 663.

The objection that the action was not maintainable because the defendant had come into possession and had disposed of the property as an assignee, by virtue of an assignment for the benefit of creditors under the statute of the state of Wisconsin, is not well taken, and would not have been even if the action had been in replevin. Property in the hands of an assignee for the benefit of creditors under the Wisconsin statute is not in the custody of the law or of a court. *Matthews v. Ott*, 87 Wis. 399, 58 N. W. 774.

Other questions urged upon our attention cannot be considered, because they involve inquiry into the correctness in certain particulars of the finding of facts. The decisions upon the point by this court, commencing with *Jenk's Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641, are numerous.

The judgment below is affirmed.

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WASHBURN & MOEN MANUF'G CO. v. RELIANCE MARINE INS. CO.  
RELIANCE MARINE INS. CO. v. WASHBURN & MOEN MANUF'G CO.<sup>1</sup>

(Circuit Court of Appeals, First Circuit. September 7, 1897.)

Nos. 156, 157.

1. MARINE INSURANCE—LIABILITY FOR CONSTRUCTIVE TOTAL LOSS.

Underwriters are not liable for a constructive total loss, except where they consent to an abandonment, under a policy containing a warranty against partial loss.

2. SAME—ACCEPTANCE OF ABANDONMENT.

Underwriters, under the "sue and labor" clause of a policy, cannot be charged with the acceptance of an abandonment, simply because they caused the property to be preserved, and removed from a place where there was no agent of the assured, no adequate means for its protection, and no market, to the place to which it was originally shipped, where were conveniences for its protection, and a good market, and there offering it to the representative of the assured, to whom it had been, in the first instance, consigned; especially where the assured had no right to abandon.

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

Eugene P. Carver, for Washburn & Moen Manuf'g Co.

Francis C. Lowell, F. J. Stimson, and A. Laurence Lowell, for Reliance Marine Ins. Co.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

WEBB, District Judge. In the course of the disaster a part of the property insured, exceeding in amount 5 per cent. of the whole, was totally lost, and for this a verdict was taken for the plaintiff by consent. As to the rest of the property insured, it is evident that the

<sup>1</sup> Rehearing denied October 30, 1897.