

PARDEE, J. The libel in this case is to recover from the vessel, under section 3088, Rev. St., the penalty imposed on the master and mate for violation of section 2807, Rev. St.; both sections being embraced in title 34, "Collection of Duties," Rev. St. The libel seems to be brought on the instance side of the court, following the case of *The Missouri*, 3 Ben. 508; no averment being made as to previous seizure by the customs officers within the district.

The claimant urges as fatal to the libel (1) that a previous seizure was necessary as a jurisdictional fact; (2) that the vessel cannot be held until the master has been convicted and the penalty adjudged against him; (3) that the libel does not aver that the owner or master, at the time of the alleged illegal act, was a consenting party or privy thereto.

With regard to the first two objections, I am disposed to adopt the reasoning and conclusions of Judge BENEDICT in *The Missouri*, *supra*, as I find that since its rendition it has been generally followed in practice in this circuit, and because I find no authoritative decisions to the contrary rendered since the adoption of the Revised Statutes.

It will be noticed that the leading case as to the necessity of seizure to give jurisdiction (*The Ann*, 9 Cranch, 289) was based upon the wording of section 9 of the judiciary act of 1789, (1 St. at Large, 76;) and also that the words of that act, to-wit, "including all seizures under laws of import navigation or trade," etc., are not reproduced in the Revised Statutes in connection with the grant of jurisdiction to the district courts. However, if we consider the adjudged cases, and the proper construction of admiralty rule 22, the question presented is one of great difficulty; and I should hesitate to give a decision upon it without a more exhaustive examination, and a fuller argument, than has been had in this case.

The question presented under the third objection is one of little difficulty, and is decisive of the case. By statute approved February 8, 1881, (21 St. at Large, 322,) it is declared as follows:

"That no vessel used by any person or corporation as common carriers, in the transaction of their business as such common carriers, shall be subject to seizure or forfeiture by force of the provisions of title thirty-four of the Revised Statutes of the United States, unless it shall appear that the owner or master of such vessel, at the time of the alleged illegal act, was a consenting party or privy thereto."

In order, therefore, to charge the vessel with responsibility for the alleged illegal act charged in the libel in this case, the consent or privity of the owner or master must appear affirmatively; in other words, must be alleged and proved. This necessary averment is entirely omitted from the libel; and, under the evidence in the case, it cannot be said to appear, except inferentially, and in a negative way, that the owner or master was a consenting party or privy to the alleged illegal act. The objection appears to have been taken in the district court, and it was strongly urged in this court; so it is clear that the government proctor has not been surprised, and that the difficulty lays in the facts of the case as well as in the pleading.

The decree will be entered dismissing the libel.

WHITMAN v. HUBBELL, Treasurer, etc.

(Circuit Court, S. D. New York. February 22, 1887.)

1. REMOVAL OF CAUSES—AMOUNT IN DISPUTE.

In a suit to restrain the maintenance by defendant of an awning over a part of a street adjoining the plaintiff's premises, the matter in dispute is the value of the right to maintain the awning, and not the amount of damage done by it to plaintiff. The value of such right held to be more than \$500, within the meaning of Act of March 3, 1875, (18 St. U. S. 470, § 2,) relating to removal of causes from state courts to United States courts.

2. SAME—CITIZENSHIP—DEFENDANT SUED IN REPRESENTATIVE CAPACITY.

The representative character of a party does not affect his right of removal of the cause from a state court to the United States circuit court. It depends upon his citizenship alone, without regard to that of those whom he represents, or of those who are interested in the controversy, but are not parties to the record.

3. PARTIES—PRESIDENT OR TREASURER OF JOINT-STOCK ASSOCIATION—SUED ALONE—CODE CIVIL PROC. N. Y. §§ 1919, 1923.

Under sections 1919, 1923, Code Civil Proc. N. Y., suit may be brought by or against the president or treasurer of a joint-stock association, instead of joining all the individual members.

In Equity.

Ira D. Warren, for plaintiff.

Clarence A. Seward, for defendant.

WHEELER, J. The plaintiff is a citizen of New York, and the defendant of Connecticut. The Adams Express Company is a joint-stock association of New York. This suit was brought in the state court to restrain the maintenance of an awning over a part of Great Jones street adjoining the plaintiff's premises. The defendant removed the cause into this court. The plaintiff moved to have it remanded because as he says the matter in dispute does not exceed the sum or value of \$500, and there is not a controversy in it between citizens of different states. Act of March 3, 1875, (18 St. 470, § 2.) The matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff. *Railroad Co. v. Ward*, 2 Black, 485. This appears to be more than \$500. The Adams Express Company is a partnership, and not a corporation. It has no existence apart from the members, and does not appear to be of itself a citizen of any place. The law of the state permits suit to be brought by or against the president or treasurer of such an association, instead of joining all the individual members. Code Civil Proc. §§ 1919, 1923. When an action is so brought, no action can be brought against the members except on failure to obtain satisfaction of the judgment. Section 1921. The officer is the only defendant on the record, although he represents the association, and the execution against him, if obtained, is to be satisfied out of the assets of the association. Section 1921. The controversy is therefore between citizens of different states in this case, although others who may or may not be citizens of the same state with the plaintiff are