

Case No. 5,207.

[9 Blatchf. 470.]¹

GALVIN v. BOUTWELL.

Circuit Court, S. D. New York.

March 8, 1872.

REMOVAL OF CAUSES—CITIZENSHIP—ALIEN AS PARTY.

A case was removed into this court, under the 12th section of the act of September 24, 1789 (1 Stat. 79), on the allegation that the plaintiff was a citizen of New York, and the

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defendant a citizen of Massachusetts. The plaintiff moved to remand the cause, on the ground that he was an alien. That fact was not denied: *Held*, that the motion must be granted.

[Cited in *Heath v. Austin*. Case No. 6,305; *Mackaye v. Mallory*, 6 Fed. 751.]

[This was a suit by Bartholomew C. Galvin against George S. Boutwell. Heard on motion to remand the cause to the state court.]

Joseph J. Marrin, for plaintiff.

Noah Davis, for defendant.

BLATCHFORD, District Judge. As it is not denied, on this motion, that the plaintiff is an alien, I think the case ought to be remanded to the state court. It was removed here under the 12th section of the act of September 24, 1789 (1 Stat. 79), on the allegation that the plaintiff was a citizen of New York, and the defendant a citizen of Massachusetts. I do not think it falls within the principle of *Dennistoun v. Draper* [Case No. 3,804], and *Wood v. Matthews* [Id. 17,955]. If the question of the alienage, of the plaintiff were seriously contested, it would be proper to retain the case for a trial of that question, on the merits, on formal issues in the cause. There can be no doubt of the power of this court to remand the cause, if it sees that there is no jurisdiction. *Witetiqui v. D'Arbel*, 9 Pet [34 U. S.] 092,701. The exercise of that power at this stage of the cause is a question of discretion; and, in this case, I think a proper exercise of such discretion requires that the case be remanded. The motion is granted, on condition that the plaintiff stipulates that the defendant have thirty days time to answer the complaint, after a certified copy of the order herein shall have been filed in the state court.

¹ [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]