

Case No. 7,678.
[7 Int. Rev. Rec. 86.]

KELSEY v. DALLON.

Circuit Court, E. D. New York.

1868.

REMOVAL OF CAUSES—SUIT AGAINST MARSHAL—COLOR OF OFFICE.

[On a petition by a United States marshal to have a case against himself removed from state to federal court, it must be shown that he is sued on account of some act done by him under color of his office.]

In the case of Charles Kelsey against Francis L. Dallon, the plaintiff sued defendant in the state courts for rent of premises from May, 1867, in which the defendant held the appurtenances of a distillery he had seized therein the previous month of April, the case having expired on the above date, and the marshal holding over in possession of such premises. The defendant, by writ of certiorari, removed the case to the United States court, E. D. N. Y., affirming in his petition for the writ, that pursuant to section 67 of the act of congress, passed July 13, 1866 [14 Stat. 171], he was entitled to have cause so removed, said action having been commenced against him on account of acts done by him under color of his office as marshal of the United States in and for the Eastern district of New York, to which plaintiff demurred that the cause shown was not sufficient in law to maintain the certiorari, the said defendant not being sued in his official capacity.

On argument upon the demurrer, Richard Rowland, Esq., plaintiff's counsel, moved that the action be referred back to the state courts on the ground that the marshal had no authority to seize or hold the property of the plaintiff, and should have removed the effects seized on the expiration of the tenant's lease, and no notice had been given to plaintiff that his property had been seized or attached, nor was the defendant authorized to seize or attach the plaintiff's property and the holding of the premises was not under color of his office as claimed.

John S. Allen, Asst. Dist. Atty., for defendant, in support of the certiorari.

BENEDICT, District Judge, held that the petition and papers in the case did not show that the action was brought on account of any act done by the defendant under color of his office, and granted plaintiff's motion to quash the proceedings, and remanded the cause to the state courts.