

ing that issue. It avers that the defendant, prior to the late prohibitory legislation, erected the building, and established the plant in question, for the express purpose of being used for the sale of beverages such as the law at that time authorized and permitted; that said premises were erected and fitted up, at great expense, and adapted to said particular use; and, further, that before the enactment of said law the defendant, with a view to the use hereinbefore described, purchased said property at a cost of \$13,000, to be used by him in a business at that time authorized by the law of said state. It is apparent that the pleader studiously avoids stating the particular use for which the building was erected, and the kind of plant established before the prohibitory legislation. If it was for the manufacture and sale of such intoxicants as wine and beer, the use was lawful, and the property used just as rightful, in a legal sense, as any other kind of property; but if it was for the manufacture and sale of whisky, brandy, and the like, then the use was unlawful, and the plant not within the protection of the law as it existed at that time. It will not do for the pleader to make himself the judge as to whether the use to which the property was applied before the prohibitory legislation was lawful or unlawful, prohibited or not prohibited, by the evasive allegation that it was "erected and fitted up for the purpose of selling beverages at that time authorized and permitted by law." That is an allegation of matter of law, not matter of fact.

The facts of jurisdiction must be stated in order that the court may judge whether or not the property was erected and fitted up for a then lawful purpose. If the pleader had stated the fact to be that prior to the prohibitory legislation the property had been bought or erected, and fitted with proper machinery, for the manufacture of wine or beer, the court might say that the plant was established for a lawful purpose, and that the attempt to deprive the owner of the use of it for that purpose by retrospective law raised a federal question, within the guiding rule laid down in the case of *State v. Walruff*. But, on the contrary, if the averment was that the erection and plant were for the purpose of making and vending of such intoxicants as brandy and whisky, the court would be compelled to pronounce a wholly different judgment.

Upon the case as it stands, the averments in the record are insufficient to give this court jurisdiction, and the motion to remand must be sustained.

KESINGER v. VANNATTA.

DEIMER v. FRANZ.

(Circuit Court, S. D. Iowa. June Term, 1886.)

COURTS—STATE AND FEDERAL COURTS—JURISDICTION—INTOXICATING LIQUORS.

Whether the law of Iowa prohibiting the sale of intoxicating liquor is in violation of the constitution of the United States, and therefore involving a question of which the federal courts have jurisdiction, is involved in so much doubt that the federal courts will not assume jurisdiction, but will remand the cause to the state courts, since no material rights will thereby be affected.

In Equity.

D. C. Cloud, for plaintiff.

H. J. Lauder, for defendant.

LOVE, J. These cases are here by transfer from the circuit court of Iowa for Muscatine county. The plaintiffs move to remand. They are petitions in equity under the Iowa prohibition law. The purpose of the bill in each of them is to enjoin the defendant from continuing the business of vending intoxicating liquors, and to declare the saloon in which the business is carried on, with its fixtures, furniture, etc., a nuisance, and to deal with it as such under the law. These cases have been removed to this court upon the ground that they involve a federal question which gives this court jurisdiction. The contention of the defendants is that if these proceedings shall prevail against them they will be deprived of their property, and certain other rights, without due process of law, in violation of the constitution of the United States.

I have considered these cases with great attention, and the conclusion which I have reached is that the motions to remand involve questions of difficulty and doubt as to the jurisdiction of this court. It is the constant practice of this court to remand causes brought here from the state courts in cases of doubtful jurisdiction. The reason of this practice is obvious and conclusive. In the first place, the jurisdiction of the state court is unquestionable. It is, at least, concurrent with this court. But the jurisdiction of this court depends upon special facts, and it is in the present case, to say the least, doubtful. It is the safer and wiser course to send a cause for trial to a court of unquestionable jurisdiction, rather than retain it here, and go through all the forms of trial, when the jurisdiction is doubtful.

Again, if we sustain the motion to remand, exceptions can be taken at once to the order, and, because that order is a final adjudication here, a writ of error to the judgment of this court can be taken to the supreme court of the United States, and disposed of in that court