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Note and Comment

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NOTE AND COMMENT

TERMINATION OF THE LIABILITY AS COMMON CARRIER.—When does the liability of a common carrier as such terminate, and that of a warehouseman begin? Probably upon no proposition in the law of carriers is there a greater difference of opinion so ably supported on all sides. The facts surrounding the burning of a railroad freight house in Boston, in 1850, gave rise to decisions in two states, which proceed upon directly contrary theories. Judge SHAW, of Massachusetts, laid down the rule that when the actual transit has ended and the goods have been placed in a proper warehouse to await delivery to the consignee, the liability as a carrier has ended and thereafter the liability is only that of a warehouseman. *Norway Plains Co.* v. *B. & M. R. R.*, 1 Gray 263, 61 Am. Dec. 423. Two years later the New Hampshire court, speaking through Judge SAWYER, in disapproving of the doctrine of the Massachusetts court, held that the consignee is entitled to a reasonable opportunity, after arrival of the goods, in which to remove them. *Moses* v. *Boston, etc., R. Co.*, 32 N. H. 523, 64 Am. Dec. 381. In 1867 the Michigan court was confronted by the same question, in *McMillan* v. *M. S. & N. I. R.*, 16 Mich. 79. The court was evenly divided. Justice COOLEY (Justice CHRISTIANCY concurring) voiced the decision of the court as fol-

lows: "A common carrier's liability for goods transported by him continues as a carrier until the goods have been placed in a warehouse and the consignee notified of their arrival and he has a reasonable time in which to remove them. After that the carrier is liable as a warehouseman." This differs from both the Massachusetts and the New Hampshire doctrines. Chief Justice MARTIN and Justice CAMPBELL voted for the adoption of the Massachusetts view. The rule as laid down has, however, been approved by a unanimous court in *Walters* v. *Detroit United Railway*, 139 Mich. 303. Since these cases there have been innumerable decisions adopting one or the other of these views. One of the most recent is that of *Poythress* v. *Durham, etc., Ry. Co.* (1908), — N. C. —, 62 S. E. 515. This court, contrary to prior decisions in North Carolina holding to the Massachusetts doctrine, followed the rule of *McMillan* v. *M. S. & N. I. R.*, supra.

Referring to the extraordinary liability of the common carrier, Lord HOLT said: "It is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, etc., and yet doing it in such a clandestine way as would not be possible to be discovered." *Coggs* v. *Bernard*, 2 Ld. Raym. 909. So long as these reasons remain operative, the extraordinary liability should continue.

Those courts adhering to the Massachusetts doctrine hold that the duty of the carrier is to convey the goods safely to the destination and there to deliver to the consignee if he is at hand ready to receive them. If not, then it becomes the duty of the carrier to deliver to itself as warehouseman, whereupon its liability as a carrier ceases and becomes that of a warehouseman. This rule, in the words of the Massachusetts court, "affords a plain, precise and practical rule of duty, of easy application, well adapted to the security of all persons interested." Whatever may be said about the application of the rule, it seems that the reasons for the extraordinary liability of the carrier exist whether the goods are on the cars or in a warehouse, inasmuch as the consignee has no knowledge of their arrival or opportunity to remove them. There is the same opportunity for fraud and collusion of which Lord HOLT speaks so tersely. The Connecticut court has said, "that rule puts an end to the carrier's responsibility as such just when that responsibility is of the highest value to the shipper. Between the deposit of goods on the platform and their delivery to the consignee they are exposed to theft, depredation and injury by strangers and the carrier's employees." *Graves* v. *Hartford, etc., Co.*, 38 Conn. 143, 9 Am. Rep. 369. The fallacy of the rule appears to be in holding that the contract of carriage is ended by mere transportation. Delivery is a necessary part of every contract of carriage; no contract of carriage is complete until delivery is made. It seems to be a mere technical refinement to say that the removal of goods into the carrier's warehouse, over which the consignee has no more control than over its cars, operates *ipso facto* as a delivery. The warehouse is built

for the convenience of the carrier and not of the shipper. It is often said to be but an extension of the cars. However, besides Massachusetts, this rule is sanctioned in Georgia, Illinois, Indiana, Iowa, Missouri, Pennsylvania and South Carolina. *W. & A. R. R.* v. *Camp,* 53 Ga. 596; *Almand* v. *Ga., etc., Co.,* 95 Ga. 775; *G. & A. Ry.* v. *Pound,* 111 Ga. 6; *C. & A. R.* v. *Scott,* 42 Ill. 132; *Schumacher* v. *Chgo. & N. W. Ry.,* 207 Ill. 199; *C. & C. Air Line R.* v. *McCool,* 26 Ind. 140; *Chgo., etc., Ry.* v. *Reyman,* 166 Ind. 278; *Francis* v. *Dubuque, etc., Ry.,* 25 Ia. 60; *Hicks* v. *Wabash R. R.,* 131 Ia. 295; *Holtzclaw* v. *Duff,* 27 Mo. 392; *Gashweiler* v. *Wabash, etc., Ry.,* 83 Mo. 112; *Shenk* v. *Phila. S. P. Co.,* 60 Pa. 109; *Hipp* v. *So. Ry. Co.,* 50 S. C. 129.

Recognizing the fallacy of the Massachusetts rule, the New Hampshire court and those approving its holding require that a reasonable opportunity be afforded to the consignee to remove the goods before the carrier is released of its liability as such. Under this doctrine the consignee is bound to take notice of the time of arrival of trains and has only a reasonable time after arrival of the goods in which to remove them. The carrier is not required to give notice of their arrival, it being conclusively presumed that the consignee will have notice, either through advice from the consignor or otherwise, and unless taken away within a reasonable time thereafter he is held to have assented to the carrier's holding them as warehouseman. This rule seems to afford the full measure of protection designed by the common law rule, except in so far as it conclusively presumes knowledge of the arrival of the goods. In the light of modern railroad methods this is requiring more than one could ordinarily know by the use of reasonable diligence. "Everyone knows, who has transacted business with railroads as carriers of goods, no calculation can be made when they will deliver what they have received." *C. & A. R.* v. *Scott,* supra. Goods are often carried over several roads, and require several weeks in transit. There can be no regularity of delivery in such cases. This rule nevertheless requires constant vigilance on the part of the consignee. The New Hampshire doctrine is supported by the states of Connecticut, Kansas, Kentucky, Louisiana, Vermont, Wisconsin and West Virginia. *Graves* v. *Hartford, etc., Co.,* supra; *Mo. Pacific* v. *Wichita, etc., Co.,* 55 Kan. 525; *Union Pac. Ry.* v. *Moyer,* 40 Kan. 184; *Mo. Pac. Ry.* v. *Newberger,* 67 Kan. 846; *Jeffersonville R. R.* v. *Cleveland,* 2 Bush (Ky.) 468; *Maignan* v. *N. O., etc., R. R.,* 24 La. Ann. 333; *Blumenthal* v. *Brainerd,* 38 Vt. 402; *Backhaus* v. *Chgo. & N. W. R.,* 92 Wis. 393; *Wood* v. *Crocker,* 18 Wis. 363; *Berry* v. *W. Va. & P. R. Co.,* 44 W. Va. 538.

The true rule seems to be that of the Michigan court requiring notice to the consignee and the expiration of a reasonable time thereafter for removal. The contract of carriage requires not only actual transportation, but delivery as well, or that which is equivalent, as giving him notice and then allowing him a reasonable time in which to remove them. *Faulkner* v. *Hart,* 82 N. Y. 413. While not being as easy of application as the Massachusetts rule, it can be said of it that it affords justice to both the shipper and the carrier. The fact of arrival is often exclusively within the knowl-

edge of the carrier. Freight schedules are too irregular to be relied upon. To make the consignee liable if not at hand on the arrival or within a reasonable time thereafter often makes him liable for the wrong of the carrier. At important points many hundred shipments are received daily for as many consignees. To require them all to be at hand on arrival, or all to be on a constant lookout, so as to remove them within a reasonable time thereafter, is to require a practical impossibility. It is not a hardship to require notice. The common law required personal delivery. With the advent of modern railroads this has become impracticable; it would require delivery carts at every station. But in lieu of personal delivery, to require notice and a subsequent opportunity to remove the goods cannot be said to be an added burden. The decisions of Arkansas, Minnesota, Mississippi, Nebraska, New York and Ohio accord with the Michigan rule. *Railway Co.* v. *Nevill*, 60 Ark. 375; *Derosia* v. *Winona, etc., R.*, 18 Minn. 133; *Pinney* v. *St. Paul, etc., R. R.*, 19 Minn. 251; *Gulf & Chgo. R. R.* v. *Horton*, 84 Miss. 490; *B. & M. R. R.* v. *Arms*, 15 Neb. 69; *Fenner* v. *Buffalo, etc., R. R.*, 44 N. Y. 505; *Sprague* v. *N. Y. C. R. R.*, 52 N. Y. 637; *Faulkner* v. *Hart*, supra; *Lake Erie & W. R.* v. *Hatch*, 52 Ohio St. 408. Practically the same rule obtains in Alabama, California, Tennessee and Texas, by statute. HUTCHINSON, CARRIERS, § 708. A. C.

IS A VENDEE SEEKING SPECIFIC PERFORMANCE ENTITLED TO COMPENSATION FOR THE INCHOATE DOWER RIGHT OF THE VENDOR'S WIFE?—Defendant signed a contract agreeing upon payment of the purchase money to deliver to the plaintiff a warranty-deed conveying to it real property clear of all incumbrances, liens or adverse titles. Defendant testified that at the time of signing he told the plaintiff that his signature was on condition that his wife agreed to the sale at that price. Plaintiff tendered the purchase money, which defendant refused, alleging that his wife would not relinquish her inchoate dower right. The wife's refusal was not due to collusion. Plaintiff asks for specific performance of the contract as to the husband's interest, and an abatement in the purchase price proportionate to the inchoate dower right. *Held*, that the husband convey his interest to plaintiff, without any abatement in the purchase price. *Aiple-Hemmelmann Real Estate Co.* v. *Spelbrink* (1908), — Mo. —, 111 S. W. 480.

LAMM, FOX and GRAVES, JJ., dissent. They differ from the majority in their interpretation of the facts in believing that the plaintiff had no notice that the defendant was married. However, they treat this fact as of no controlling effect. The reason for their dissent is that to require the plaintiff to pay the full purchase price for this estate with an outstanding dower right is to allow the husband to benefit by his own wrong. They say that the value of the dower interest can be computed with reasonable accuracy, and that the plaintiff may be allowed an abatement without coercing the wife. The following authorities accord: *Sanborn* v. *Nockin*, 20 Minn. 178; *Walker* v. *Kelly*, 91 Mich. 212; *Leach* v. *Forney*, 21 Ia. 271; *Martin* v. *Merritt*, 57 Ind. 34; *Hazelrig* v. *Hutson*, 18 Ind. 481; *Wingate* v. *Hamilton*,

7 Ind. 73; *Wright* v. *Young,* 6 Wis. 127; *Wilson* v. *Williams,* 3 Jur. N. S. 810; *Davis* v. *Parker,* 14 Allen (Mass.) 94; *Park* v. *Johnson,* 4 Allen (Mass.) 259; and dicta in *Bostwick* v. *Beach,* 103 N. Y. 414; 26 AM. & ENG. ENCY. OF LAW, Ed. 2, p. 83, and WATERMAN, SPECIFIC PERFORMANCE, p. 720, support this opinion if the plaintiff had no knowledge that the defendant had a wife; but both authorities favor the majority opinion if the plaintiff did have such information.

The theory of the majority opinion is that to allow an abatement in the purchase price would in effect induce the wife to relinquish her dower right and thereby deprive her of freedom of choice, to which she is entitled by statute and by equitable principles. In accord with this view are: *Humphrey* v. *Clement,* 44 Ill. 299; *Reisz's Appeal,* 73 Pa. St. 485; *Clark* v. *Seirer,* 7 Watts (Pa.) 107; *Lucas* v. *Scott,* 41 Oh. St. 636; *Graybill* v. *Brugh,* 89 Va. 895; *Barbour* v. *Hickey,* 2 App. (D. C.) 207. In 6 POM. EQ. JUR., p. 1369, note, it is said: "Of course if the vendee knows the vendor is a married man * * he is not entitled to compensation." 26 AM. & ENG. ENCYC. OF LAW, Ed. 2, p. 84, is to the same effect; 2 WARVELLE, VENDORS, p. 893, is as follows: "The rule * * * receiving the highest sanction * * * provides that the vendee may have conveyance * * * without the retention of any part of the purchase money to indemnify him against the contingent interest of the wife."

The principal case is one of first impression in Missouri; the decision by four judges, with three dissenting, is fairly representative of the conflict among cases and text writers. If the plaintiff knew that the defendant was married, there is no injustice in requiring him to pay the full price if he has specific performance, for the refusal of the wife to relinquish her right was a possibility that he must have considered in making the contract. Even though he was unaware of this fact it would be better to require him either to pay the full price or to resort to his action for damages, because an abatement of the purchase price would have a tendency to induce the wife to sign, and thereby destroy her freedom of choice. F. O.

AN EXECUTOR'S RIGHT TO AN ALLOWANCE OUT OF THE ESTATE FOR COUNSEL FEES FOR SERVICES RENDERED BEFORE LETTERS TESTAMENTARY ISSUE.—A question of interest to the profession and to the public generally is involved in a recent California case: *In re Riviere's Estate,* 98 Pac. 46. Riviere died possessed of an estate valued in excess of $50,000.00, and left a paper writing purporting to be his last will and testament, in which B. was named as executor. B. offered it for probate as such, whereupon interested parties contested its admission. Counsel was employed by B. to present his case, and, as a result, the alleged will was admitted to probate. It was moved that the court make an allowance out of the estate for services rendered the executor under § 1616, CODE CIV. PROC., which provides: "Any attorney who has rendered services to an executor or administrator may at any time during the administration * * * apply to the court for an allowance to him-

self of compensation therefor." The granting of the motion was objected to on the ground that no attorney's fees can be allowed against an estate for services rendered before the will is admitted to probate, on the authority of *Miller* v. *Kehoe,* 107 Cal. 340, 40 Pac. 485, where it is said, "Counsel fees are not recoverable by a successful party in an action either at law or equity, except in the enumerated instances where they are expressly allowed by statute." Citing *Estate of Olmstead,* 120 Cal. 454, 52 Pac. 804. The court in overruling the objection and allowing the fee said that this code provision "should receive such construction as would include services rendered the executor in the performance of *any* duty devolving upon him by the terms of the will, including the duty of prosecuting necessary and proper proceedings toward the establishment of such will." An executor's right to employ counsel depends upon the right to litigate. To successfully litigate the employment of counsel becomes necessary, and to maintain that the expenses of such counsel are not a proper charge upon the estate would be an anomaly. Undoubtedly the decision reached is one that common sense and justice would alike dictate. In the *Estate of Olmstead,* supra, which the appellants cite, and which the court distinguishes from the principal case, the California court makes just as strict an interpretation of this same code section as is here quoted as its latest interpretation is liberal. In the *Estate of Olmstead,* decided in 1898, the essential facts were similar to those of the principal case, except that the contestants were successful and the alleged will was not admitted to probate. Counsel was not allowed compensation out of the estate for his services on the ground that letters testamentary not being granted there was no executor to whom services were rendered, and the code provision does not warrant payment except for services rendered an executor or an administrator. Manifestly if the decision in the Olmstead case is to stand as the law of California, one named as executor in a purported will must be personally liable to his attorney in case the will is not proved. Such a situation will discourage an executor in an endeavor to establish the will of his testator where there is an interested and energetic contestant. Obviously intestacy will result in a greater number of cases, whereas the policy of the law, as is well known, and as indeed the principal case points out, is in favor of testacy.

The courts of other states have not permitted such an unfortunate situation to arise. In the recent case of *In re Title, Guarantee & Trust Co.* (1907), 100 N. Y. Supp. 243, 114 App. Div. 778, 188 N. Y. 542, 80 N. E. 1121, an executor, seeking in good faith to uphold a will disposing of an estate worth several millions of dollars as against an attack of a beneficiary, was permitted to be reimbursed from the estate the amount legitimately expended in litigation even though the same resulted in a judgment for the beneficiary. Where an executor had reasonable grounds to take an appeal from a decree denying probate of the will, he was entitled to his necessary reasonable counsel fees in the Supreme Court * * * to be paid out of the estate: *Gardner* v. *Moss* (1906), 29 Ky. Law Rep. 759, 96 S. W. 461. In *McNaughton* v. *McGreagor* (1907), 133 Wis. 494, 113 N. W. 956; *In re Bowman's*

Will, Id., it was said that since an executor is called upon at the death of the testator to present the will for probate, and that necessarily resulted in contesting a subsequent will offered for probate, he is entitled to costs and disbursements in the Supreme Court on appeal, on the affirmance of a judgment allowing probate of the subsequent will. And in *Wier* v. *Wier* (1906), 28 Ohio Cir. Ct. R. 199, it is said that the question as to whether or not an executor may be allowed credit on his account for expenses incurred in the successful defense of a will contest depends upon the circumstances of each particular case; and, further, while an executor is not bound to assume the defense of a will contest, he may do so, and where this is done in a disinterested effort to maintain it and preserve the trust therein created and to effectuate the intention of the testator, a court of chancery may allow the executor credit in his account for the expenses incurred.

Statutory provision for the payment of the fees of the executor's attorney out of the estate, whether the services were rendered before or after letters testamentary issue, and whether the will is probated or not—provided always that the purported will is offered for probate in good faith—would be a commendable legislative act. Such statutes, being in derogation of the common law, will be strictly construed by the courts, and that they should be carefully drawn by someone learned in the law is the lesson taught by the questions litigated in the foregoing cases. J. E. O., Jr.

The Kansas "Manhattan Cocktail Case" and Some Others Concerning Judicial Notice.—Some anti-prohibitionists may think they have an "eye-opener" in the recent Kansas decision that judicial notice will be taken of the intoxicating properties of a Manhattan cocktail: *State* v. *Pigg*, 97 Pac. 859.

Pigg complains to the supreme court that he was charged with an "unlawful sale of intoxicating liquor" and that on one count the state elceted to rely upon a sale of two Manhattan cocktails; that he was convicted, although there was no evidence that a Manhattan cocktail is intoxicating. On this point the court says: "The Century Dictionary defines a cocktail as 'An American drink, strong, stimulating, and cold, made of spirits, bitters, and a little sugar, with various aromatic and stimulating additions.' The particular kind of cocktail under discussion is popularly understood to have taken its name from the island whose inhabitants first became addicted to its use. While its characteristics are not so widely known as those of whisky, brandy, or gin, it is our understanding that a Manhattan cocktail is generally and popularly known to be intoxicating." The judgment of conviction is affirmed by a full court.

Local circumstances and the customs of the time have much to do with the determination of the question as to what matters courts will judicially notice, and it may be suggested that a judge should not close—say, his eyes—to those sources of information that are open to all about him. However,

it is to be remembered that "there is a real but elusive line between the judge's *personal knowledge* as a private man and his knowledge as a judge. The latter does not necessarily include the former; as a judge, indeed, he may have to ignore what he knows as a man, and contrariwise." (WIGMORE, EVIDENCE, § 2569.) But whether he should or should not ignore as a judge what he knows as a man, it does not necessarily follow from this decision that "prohibition does not prohibit," because, while it is generally admitted that judges are underpaid and so presumably have little money to spend on vacation travels, they have been known to travel, and it is quite possible that a western judge may have visited the eastern island metropolis and there learned to distinguish "sky-scrapers" from corncribs and "oyster cocktails" from "Manhattan cocktails."

As an illustration of the principle that usages of time and place control decisions on this subject, it may be noted that territorial expansion has enlarged the list of judicially noticed intoxicants, and it now embraces liquors until recently unknown to the American bar: "Okolehoa," the Hawaiian beverage, will be noticed judicially as an intoxicating liquor (*The Kawailani,* 128 Fed. 879); and so, undoubtedly, would be the "tuba" of the Philippine islands (see *United States* v. *Dalasay,* 5 Philip. Rep. 41).

Some liquors, such as whisky, gin, rum and brandy, have been noticed universally by the courts as intoxicating, but as to some others—for example, "beer"—there has been a difference of opinion. It is not clear whether or not climatic conditions, as well as local usages, have a bearing on the question as perhaps affecting the quantity of liquor that reasonably may be consumed as a beverage without producing intoxication. In Texas, for example, "beer" is not necessarily intoxicating, and the court is not prepared to hold even that "lager beer" is judicially known to be so (*Potts* v. *State,* 50 Tex. Cr. App. 368, 97 S. W. 477), while in Wisconsin the contrary is held, the court there remarking that "when beer is called for at the bar, in a saloon or hotel, the bartender would know at once from the common use of the word that a strong beer—a spirituous or intoxicating beer—was wanted" (*Briffit* v. *State,* 58 Wis. 39, 46 Am. R. 621), but just how the court obtained this assurance is not stated. To the argument that the word "beer" does not imply an intoxicating liquor because there are many kinds of beer some of which are not intoxicating, the court replies that when one is asked to take a drink of milk it would be unnecessary to prove what is meant, though there are many kinds of milk: "such as 'the white juice of plants,' which is the remote definition; or milk in the cocoanut, or that in the milky-way." This lofty flight of the judicial imagination, taken in 1883, is prophetically suggestive of pleasant journeys to Mars, and of slaking one's thirst from a bucket dipped over the side of his aëroplane as it churns through the milky-way.

While there may be some question as to whether the simple term "beer," unaccompanied by evidence as to its quality, should be taken as necessarily meaning an intoxicating liquor (see *Blatz* v. *Rohrback,* 116 N. Y. 450, 6 L. R. A. 669; *State* v. *Sioux Falls Brewing Co.,* 5 S. D. 39, 26 L. R. A. 138;

Cripe v. *State* (Ga. Crt. Ap. 1908), 62 S. E. 567; *Dallas Brewery* v. *Holmes Bros.*, Tex. Civ. Ap. 1908, 112 S. W. 122), in most of the recent decisions it is, nevertheless, judicially noticed as intoxicating (*Feddern* v. *State* [Neb. 1907], 113 N. W. 127; *State* v. *Seelig*, 16 N. D. 177, 112 N. W. 140; *State* v. *Moran*, 46 Wash. 596, 90 Pac. 1044; *State* v. *Carmody*, Ore. 1907, 91 Pac. 446, 12 L. R. A. [N. S.] 828; *Hall* v. *The People*, 134 Ill. App. 559); and even if "beer" is not so judicially noticed, "lager beer" is (*State* v. *Church*, 6 S. D. 89—a case name, by the way, hardly suggesting such a matter—; *Cripe* v. *State*, — Crt. Ap. Ga. 1908 —, 62 S. E. 567).

Obviously, what is legally intoxicating liquor—if one may so speak—cannot be made otherwise by evasively calling it by some name not indicative of its true character. If the case at the bar is a case of intoxicants it cannot be made a case of non-intoxicants by such labels as: "Frosty," "Ino," "Uno" (*Potts* v. *State*, 97 S. W. 477; *James* v. *State*, 49 Tex. Crim. App. 334, 91 S. W. 227); "Hop Pop" (*People* v. *Rice*, 103 Mich. 350); "Hop Jack" (*Lambie* v. *State*, 151 Ala. 86, 44 So. 51); "Hop Soda" (*Feddern* v. *State*, Neb. 1907, 113 N. W. 127); "Pop" (*Godfreidson* v. *People*, 88 Ill. 284; "Gold Foam" (*State* v. *Ely*, S. D. 1908, 118 N. W. 687); "Grape Juice" (*Askew* v. *State*, Ga. 1908, 61 S. E. 737); "Tanto" (*State* v. *Olson*, 95 Minn. 104).

Where such evasion is attempted the courts very judiciously leave the question to the jurors rather than undertake to decide it themselves; so whether, for instance, "Sherman's Prickly Ash Bitters" or "McLean's Strengthening Cordial and Blood Purifier" are included within a statute defining intoxicating liquors as "all liquors and mixtures by whatever name called, that will produce intoxication," is a question for the jury (*Intoxicating Liquors Cases*, 25 Kan. 751); and in deciding this question the jury may take exhibits with them on retiring to look at, but not to taste (*State* v. *Olson*, 95 Minn. 104).

The title "Intoxicating Liquors" has become an important one in the law. Each step in the regulation of the liquor traffic has been tested in the courts by those specially interested in it. In discussing the liquor question much has been said by those opposed to the trade about the waste and expense caused by it, but has anyone ever attempted to compute the amount of time and money that have been spent in simply defining "intoxicating liquor?"

J. H. B.