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The Kansas 'Manhattan Cocktail Case' and Some Others Concerning Judicial Notice

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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.