Commonwealth of Virginia)
City ~~of the City~~ of Harrisonburg) **To-wit:**

In the Circuit Court of the County of Rockingham.

BE IT REMEMBERED That D.W.Earman, Attorney for the Commonwealth for the said County of Rockingham, and who for the said Commonwealth prosecutes in this behalf, in his proper person comes into the said Court on this the 19th day of June, in the year 1933, and upon the complaint in writing, verified by the oath of Jas. H. Boice, a competent witness, gives the said Court here to understand and be informed that E. L. Klingstein, on the 17th day of June within the said County of Rockingham, did unlawfully have in his possession 277 12-ounce bottles of beer (ardent spirits), said beer containing 3.2 alcohol by weight, against the peace and dignity of the Commonwealth of Virginia.

~~First Count~~

And the Attorney for the Commonwealth aforesaid, who prosecutes as aforesaid, in the name and by the authority aforesaid, and upon the complaint in writing aforesaid, further gives the said Court to understand and be informed that said _____ on the _____ day of _____, in the year 192__, in the said _____ of _____, **did unlawfully** _____ against the peace and dignity of the Commonwealth of Virginia.

~~Second Count~~

And the Attorney for the Commonwealth aforesaid, who prosecutes as aforesaid, in the name and by the authority aforesaid, and upon the complaint in writing aforesaid, further gives the said Court to understand and be informed that said _____ on the _____ day of _____, in the year 192__, in the said _____ of _____, did unlawfully _____ against the peace ~~and dignity of the Commonwealth of Virginia~~.

~~Third Count~~

D.W. Earman
Attorney for the Commonwealth.

VIRGINIA:— City of Harrisonburg, To-wit:

This day Jas. H. Boice personally appeared before me Pauline M. Andrus Notary Public for the City of Harrisonburg, Virginia, and made complaint and information on oath that E. L. Klingstein within twelve months prior to this date, to-wit on the 17th day of June, 1933, in the county of Rockingham:

~~1.~~—Manufactured undistilled ardent spirits;

~~2.~~—Sold ardent spirits;

~~3.~~—Transported ardent spirits;

~~4.~~—Owned and had in ~~his~~ possession a still, still cap, worm, tub, fermenter, and other appliances connected with a still, and mash and other substances capable of being used in the manufacture of ardent spirits;

~~5.~~—~~Un~~did unlawfully possess ardent spirits.

Sworn to this 19th day of June, 1933.

Pauline M. Andrus
N. P.

Jas. H. Boice

Commonwealth of Virginia)
City ~~or County~~ of Harrisonburg) **To-wit:**

In the Circuit Court of the County of Rockingham.

BE IT REMEMBERED That D.W.Earman, Attorney for the Commonwealth for the said County of Rockingham, and who for the said Commonwealth prosecutes in this behalf, in his proper person comes into the said Court on this the 19th day of June, in the year 1933, and upon the complaint in writing, verified by the oath of Jas. H. Boice, a competent witness, gives the said Court here to understand and be informed that L. L. Klingstein, on the 17th day of June in the year 192.., in the said City of Harrisonburg did unlawfully have in his possession 27½ ounce bottles of beer (ardent spirits), said beer containing 3.2 alcohol by weight.

First Cons.

Commonwealth of Virginia

MISDEMEANOR

L. L. Klingstein

Information for Violation Prohibition Law.

Witnesses:

Jas. H. Boice

Filed 192..

Clerk.

By D. C.

SUPREME COURT OF APPEALS
OF VIRGINIA

STAUNTON

November 1, 1933.

This is to certify that upon the petition of E. L. Klingstein, one of the Justices of the Supreme Court of Appeals of Virginia, has allowed a writ of error and supersedeas to a judgment of the Circuit Court of Rockingham County pronounced on the 17th., day of July, 1933, in the cause then therein pending of Commonwealth of Virginia v. E. L. Klingstein, provided the petitioner, or some one for him, shall enter into bond in the said Clerk's Office, with good security in the penalty of Six Hundred Dollars ($600.00), conditioned as the law directs.

Teste,

H. H. Wayt
Clerk.

To the Clerk of the Circuit Court of Rockingham County.

11/2/33

5/
429

SUPREME COURT OF APPEALS

OF VIRGINIA

STAUNTON

November 1, 1933.

This is to certify that upon the petition of E. L. Klingstein, one of the Justices of the Supreme Court of Appeals of Virginia, has allowed a writ of error and supersedeas to a judgment of the Circuit Court of Rockingham County pronounced on the 17th. day of July, 1933, in the cause then therein pending of Commonwealth of Virginia v. E. L. Klingstein, provided the petitioner, or some one for him, shall enter into bond in the said Clerk's Office, with good security in the penalty of Six Hundred Dollars ($600.00), conditioned as the law directs.

Teste,

H. H. Wayt
Clerk.

To the Clerk of the Circuit Court of Rockingham County.

16/
43

VIRGINIA:

In the Supreme Court of Appeals held at the Library Building in the City of Richmond on Wednesday, *the* 14th *day of* March, 1934.

E. L. Klingstein, Plaintiff in error

against

Commonwealth of Virginia, Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Rockingham county on the 17th day of July, 1933.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and the motion of the plaintiff in error to dismiss the prosecution against him, and being of opinion that there should be no conviction in this case, it is therefore adjudged and ordered that the said judgment be reversed and annulled, the verdict of the jury set aside, and the case is remanded to the said circuit court with direction to dismiss the prosecution.

Which is ordered to be forthwith certified to the said circuit court.

A copy, Teste: Clerk

5/472 3/20/34

To Honorable D. W. Earman,

Commonwealth's Attorney for Rockingham County, State of Virginia.

TAKE NOTICE:

That on the 27 day of July, 1933, the undersigned will apply to the Clerk of the Circuit Court of Rockingham County for a transcript of the record in the case of Commonwealth vs. E. L. Klingstein for the purpose of submitting said transcript to the Supreme Court of Appeals of Virginia, along with a petition for a writ of error to the judgment of said Court rendered in said case on the 17th day of July, 1933.

Dated this 26th day of July, 1933.

E. L. Klingstein

By ~~E. L. Klingstein~~

~~D. D. Timberlake~~

D. D. Timberlake

Legal and timely service accepted July 26, 1933.

D. W. Earman, attorney for the Commonwealth, Rockingham County, Virginia.

To Honorable D. W. Palmer:

Commonwealth's Attorney for Rockingham County, State of Virginia.

TAKE NOTICE:

That on the 5th day of July, 1882, the undersigned will apply to the Clerk of the Circuit Court of Rockingham County for a transcript of the record in the case of Commonwealth vs. E. L. Mintzberger for the embezzlement of Virginia. Alone with a petition for a writ of error and supersedeas to said Court rendered in said case on the 12th day of July, 1882.

E. L. Mintzberger

By his counsel

Geo. W. Sandy

Geo. W. Sandy, Jr.

This is to certify that the Attorney for the Commonwealth has had reasonable notice of the time and place of the presentation and signing of the 5 Certificates of Exception in this case as required by law.

Given under my hand and seal this 26th day of July, 1933.

H W Bertram (Seal)
Judge of the Circuit Court of
Rockingham County, Virginia.

This is to certify that the Attorney for the Commonwealth has had reasonable notice of the time and place of the presentation and signing of the 3 —
Certificates of Exception in this case as required by law.

Given under my hand and seal this 14th day of July, 1938.

Judge of the Circuit Court of Rockingham County, Virginia.

To the Honorable H. W. Bertram,

Judge of the Circuit Court of Rockingham County, Virginia

This is to certify that I have had reasonable notice in writing of the time and place that the Certificates of Exception in the case of Commonwealth vs. E. L. Klingstein shall be tendered and presented to you for your signature.

Given under my hand this 26 day of July, 1933.

D. W. Lawman

Attorney for the Commonwealth

In the Name of the Commonwealth of Virginia:

To the Sheriff of Rockingham County, Greeting:

You are hereby commanded to summon

Marton Bushaum

to appear before the Judge of the Circuit Court of Rockingham County, at the Court House thereof, at 9:30 o'clock, a. m., on the 17th *day of* July 19 33, *to testify and the truth to say in behalf of the Commonwealth against*

E. L. Klingstein

who stands charged with and indicted for a ~~felony~~ *misdemeanor.*

And this he *shall not omit under penalty of* £100. *And have then and there this Writ.*

Witness, J. ROBERT SWITZER, *Clerk of our said Court, at the Court House, the* 15th *day of* July 19 33 *and in the* 158th *year of the Commonwealth.*

J. Robert Switzer, Clerk

THE SERVICE PRESS, HARRISONBURG, VA. No. 457

Com.

v.

E. L. Klingstein

1933

July 17

July 14 - 1933

Executed by delivering a true Copy of the

within Summons to Mrs. Mrs. Klingstein

in person

C. B. Fuller, M.P.C.

In the Name of the Commonwealth of Virginia:

To the Sheriff of Rockingham County, Greeting:

You are hereby commanded to summon J. H. Bird, C. R. Hawley, C. L. Leake, N. C. Early, H. G. Pickett & Geo. A. Lawson

to appear before the Judge of the Circuit Court of Rockingham County, at the Court House thereof, at 9:30 o'clock, a. m., on the 17th *day of* July 19 33 *to testify and the truth to say in behalf of the Commonwealth against* E. L. Klingstein

who stands charged with and indicted for a ~~felony~~ *misdemeanor.*

And this they *shall not omit under penalty of £100. And have then and there this Writ.*

Witness, J. ROBERT SWITZER, Clerk of our said Court, at the Court House, the 13th *day of* July 19 33 *and in the* 158th *year of the Commonwealth.*

J. Robert Switzer, *Clerk*

THE SERVICE PRESS, HARRISONBURG, VA. No. 457

executed July 14 1933 by delivering a true Copy of the

within Summons to J. H. Boyce, C. R. Pawley, C. S. Leake, M. C. Lasley, H. L. Pickett & E. R. Lawson

each in person.

A. F. Newman Receiver for C. R. Pawley & R. R.

Corr.

E. L. Wingfield

July 17 1933

SUPREME COURT OF APPEALS
RICHMOND, VIRGINIA

3/20/34

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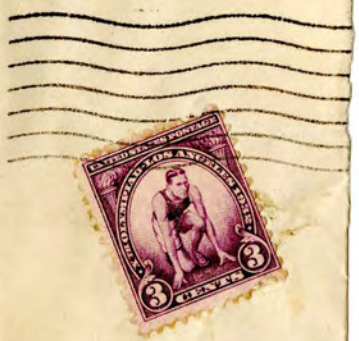

Clerk, Circuit Court of Rockingham County

Harrisonburg, Virginia

CERTIFICATE NO. 1.

The following evidence on behalf of the Commonwealth and on behalf of the defendant, respectively, as hereinafter denoted, is all of the evidence introduced on the trial of this case:-

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY, VIRGINIA:

COMMONWEALTH OF VIRGINIA

v.

E. L. KLINGSTEIN

Before Honorable H. W. Bertram and a jury.

July 17th, 1933.

Appearances:-

For the Commonwealth: D. Wampler Earman, Esq.,

For the Defendant: E. D. Ott, Esq.,
S. D. Timberlake, Jr., Esq.

CERTIFICATE NO. 1.

The following evidence on behalf of the Commonwealth and on behalf of the defendant, respectively, as hereinafter denoted, is all of the evidence introduced on the trial of this case:-

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY, VIRGINIA:

COMMONWEALTH OF VIRGINIA

v.

E. L. KLINGSTEIN

Before Honorable H. W. Bertram and a jury.

July 27th, 1933.

Appearances:-

For the Commonwealth: D. Wampler Earman, Esq.;

For the Defendant: E. D. Ott, Esq.;
S. D. Timberlake, Jr., Esq.

CERTIFICATE NO. 2.

After the evidence of the Commonwealth was concluded, the defendant moved the Court to strike out said evidence upon the following grounds:

(1) Because it appears that the beverage which the defendant is charged with having in his possession does not contain more than 3.2 per cent. alcohol by weight, and a beverage which contains not more than such percentage of alcohol has been declared by Congress in the exercise of its paramount authority to be non-intoxicating, and it is not competent, therefore, for the State of Virginia to declare such beverage to be intoxicating;

(2) Because the inclusion of a beverage such as was found in the possession of the defendant in this case, within the definition of "ardent spirits" contained in the prohibition law of this State, commonly known as "The Layman Act" and under which the information in this case is filed, was improper and illegal since the Congress has defined a beverage of such character and alcoholic content as non-intoxicating and no non-intoxicating liquor can be properly classified and defined as ardent spirits;

(3) Because the defendant, as a citizen of the United States, was lawfully in possession of the liquor described in the information in this case, and shown by the evidence to have been found in his possession and, therefore, cannot be punished for having such beverage in his possession.

CERTIFICATE NO. 2.

After the evidence of the Commonwealth was concluded, the defendant moved the Court to strike out said evidence upon the following grounds:

(1) Because it appears that the beverage which the defendant is charged with having in his possession does not contain more than 3.2 per cent. alcohol by weight, and a beverage which contains not more than such percentage of alcohol has been declared by Congress in the exercise of its paramount authority to be non-intoxicating, and it is not competent, therefore, for the State of Virginia to declare such beverage to be intoxicating;

(2) Because the incluation of a beverage such as was found in the possession of the defendant in this case, within the definition of "ardent spirits" contained in the prohibition law of this State, commonly known as "The Layman Act" and under which the information in this case is filed, was improper and illegal since the Congress has defined a beverage of such character and alcoholic content as non-intoxicating and no non-intoxicating liquor can be properly classified and defined as ardent spirits;

(3) Because the defendant, as a citizen of the United States, was lawfully in possession of the liquor described in the information in this case, and shown by the evidence to have been found in his possession and, therefore, cannot be punished for having such beverage in his possession.

(4) Because the prohibition law, commonly known as "The Layman Act," under which the information in this case was filed is unconstitutional in that it contravenes the provisions of the Constitution of the United States and particularly Article 6, the Fourteenth Amendment and the Eighteenth Amendment;

(5) Because the prohibision law of the State of Virginia, commonly called "The Layman Act" under which the information in this case was filed, is unconstitutional and void, because it contravenes the provisions of the Constitution of the State of Virginia in that the Act is broader than its title, and in that the fines prescribed by said Act are diverted from the purpose to which the Constititon of the State of Virginia requires them to be applied.

(6) Because the evidence in this case fails to show that the beverage found in the possession of the defendant was not legally acquired by him".

The Court denied this motion and the Defendant, thereupon, excepted.

TESTE: This the 26 day of July 1933

H. W. Bertram JUDGE.

(4) Because the prohibition law, commonly known as "The Layman Act," under which the information in this case was filed is unconstitutional in that it contravenes the provisions of the Constitution of the United States and particularly Article 6, the Fourteenth Amendment and the Eighteenth Amendment;

(5) Because the prohibition law of the State of Virginia, commonly called "The Layman Act" under which the information in this case was filed, is unconstitutional and void, because it contravenes the provisions of the Constitution of the State of Virginia in that the Act is broader than its title, and in that the fines prescribed by said Act are diverted from the purpose to which the Constitution of the State of Virginia requires them to be applied.

(6) Because the evidence in this case fails to show that the beverage found in the possession of the defendant was not legally acquired by him".

The Court denied this motion and the Defendant, thereupon, excepted.

TESTE: This the 21 day of July 1933

Chas. Fontaine JUDGE.

CERTIFICATE NO. 3.

At the conclusion of all of the evidence in the case, the defendant again moved the Court to strike out the evidence of the Commonwealth upon the identical grounds stated in connection with the motion to strike out the Commonwealth's Evidence made when the Commonwealth rested its case, but the Court overruled said motion and the defendant thereupon excepted.

TESTE: This the 26 day of July 1933.

H W Bertram JUDGE

CERTIFICATE NO. 3.

At the conclusion of all of the evidence in the case, the defendant again moved the Court to strike out the evidence of the Commonwealth upon the identical grounds stated in connection with the motion to strike out the Commonwealth's Evidence made when the Commonwealth rested its case, but the Court overruled said motion and the defendant thereupon excepted.

TESTE: This the 26 day of July 1923.

JUDGE

CERTIFICATE NO. 4

During the direct examination of the defendant, the following question was asked him:

Q. Following the conversation which you had with the attorney to whom you have referred, did you discuss the question ofyour desire to have the beer with any other officials of the town?

The Commonwealth's Attorney thereupon objected to any answer to said question and the Court sustained the objection and refused to permit the witness to answer, to which action of the Court the defendant excepted upon the grounds that the evidence is competent as showing or tending to show the defendant's good faith and as to whether or not his violation of the law, if any was made, was intentional or inadvertent.

If the witness had been permitted to answer, he would have testified as follows:

"A. Yes, sir, with four members of the council. Yes, sir, I talked to four members of the council and told them as the United States had legalized 3.2 beer that I did not see why the council did not get together and get some revenue out of it for the City. We were discussing finances and automobile licenses and I told them I thought it would be perfectly legal; that they could obtain this revenue by licensing beer in Harrisonburg because the United States had passed the bill.

Q. Who were the members of the council?

A. Mr. Slater, Mr. Conrad, Mr. Thomas and Mr. Masters.

Q. Do you know whether any of these members, following this conversation, did take the matter up with the city attorney?

A. Yes, sir, Mr. Thomas wrote the city attorney a letter and asked his opinion in regard to the licensing of beer in Harrisonburg and Mr. Thomas told me the city attorney said that they would have to take the matter up in council meeting and the Mayor was not in favor of taking the matter up.

During the direct examination of the defendant, the following question was asked him:

Q. Following the conversation which you had with the attorney to whom you have referred, did you discuss the question of your desire to have the beer with any other officials of the town?

The Commonwealth's attorney thereupon objected to any answer to said question and the Court sustained the objection and refused to permit the witness to answer, to which action of the Court the defendant excepted upon the grounds that the evidence is competent as showing or tending to show the defendant's good faith and as to whether or not his violation of the law, if any was made, was intentional or inadvertent.

If the witness had been permitted to answer, he would have testified as follows:

"A. Yes, sir, with four members of the council. Yes, sir, I talked to four members of the council and told them as the United States had legalized 3.2 beer that I did not see why the council did not get together and get some revenue out of it for the City. We were discussing licenses and reasonable licenses and I told them I thought it would be perfectly legal; that they could create this revenue by licensing beer in Harrisonburg because the United States had passed the bill.

Q. Who were the members of the council?

A. Mr. Slater, Mr. Conrad, Mr. Thomas and Mr. Masters.

Q. Do you know whether any of these members, following this conversation, did take the matter up with the city attorney?

A. Yes, sir, Mr. Thomas wrote the city attorney a letter and asked his opinion in regard to the licensing of beer in Harrisonburg and Mr. Thomas told me the city attorney said that they would have to take the matter up in council meeting and the Mayor was not in favor of taking the matter up.

Q/ Did all of this take place before you got the beer from Mr. Soper?

A. Yes, sir, You mean my conversation with the council

Q. Yes, sir, before or after?

A. After.

Q. You got the beer following your advice from the attorney to whom you have referred?

A. Yes, sir.

TESTE: This the 26 day of July 1933.

A.W. Bertram JUDGE.

Q. Did all of this take place before you got the beer from Mr. Soper?

A. Yes, sir, You mean my conversation with the counsel?

Q. Yes, sir, before or after?

A. After.

Q. You got the beer following your advice from the attorney to whom you have referred?

A. Yes, sir.

TESTE: This the 24 day of July 1933.

Hugh Sanford JUDGE.

CERTIFICATE NO. 5.

The following instructions, given at the request of the Commonwealth and the defendant, respectively, as hereinafter denoted, are all of the instructions granted on the trial of the case:-

INSTRUCTION NO. 1.

The jury are instructed that if they believe from the evidence in this case that the liquid commonly known as beer, consisting of 34 bottles found in the kitchen in the restaurant of E. L. Klingstein, and 240 bottles found in the basement under the Bargain Place occupied by him, or in either place, contained more than one-half of one per centum of alcohol by volume, and that said beer was in the possession of said E. L. Klingstein, then you will find him guilty.

The above instruction given on behalf of the Commonwealth was objected to by the defendant for the reasons and upon the grounds given and assigned in connection with the motion to strike out the evidence of the Commonwealth and its giving was excepted to by the defendant.

The following instruction was given on behalf of the defendant.

INSTRUCTION NO. "A".

The Court instructs the jury that even though they may believe from the evidence that the defendant had in his possession the beer mentioned in the information filed in this case and that said beer contained more than one-half of one per cent of alcohol, yet if they further believe from the evidence that the defendant did not intend to violate any of the provisions of the prohibition law, but that there was an

CERTIFICATE NO. 6.

The following instructions, given at the request of the Commonwealth and the defendant, respectively, as hereinafter denoted, are all of the instructions granted on the trial of the case:-

INSTRUCTION NO. 1.

The jury are instructed that if they believe from the evidence in this case that the liquid now only known as beer, consisting of the nothing found in the pitcher in the restaurant of E. L. Kilingstein, and NO article found in the assessment under the Burglin Tiace occupied by him, or in either place, contained more than one-half of one per centum of alcohol by volume, and that said beer was in the possession of said E. L. Kilingstein, then you will find him guilty.

The above instruction given on behalf of the Commonwealth was objected to by the defendant for the reasons and upon the grounds given and assigned in connection with the motion to strike out the evidence of the Commonwealth and the giving was excepted to by the defendant.

The following instruction was given on behalf of the defendant.

INSTRUCTION NO. "A".

The Court instructs the jury that even though they may believe from the evidence that the defendant had in his possession the beer mentioned in the information filed in this case and that said beer contained more than one-half of one per cent of alcohol, yet if they further believe from the evidence that the defendant did not intend to violate any of the provisions of the prohibition law, but that there was an

unintentional or inadvertent violation thereof, then the jury is instructed that they may, in their discretion, omit the jail sentence, and punish the defendant simply by assessing a fine against him within the limits fixed by statute.

TESTE: This the 26 day of July 1933.

H. W. Bertram Judge.

unintentional or inadvertent violation thereof, then the jury is instructed that they may, in their discretion, omit the jail sentence, and punish the defendant simply by assessing a fine against him within the limits fixed by statute.

TESTS: This the 26 day of July 1923.

Stephen Pierce
Judge.

HILLIARD BOICE, a witness for the Commonwealth, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Earman:-

Q. You are J. H. Boice, Chief of Police of the City of Harrisonburg?

A. Yes, sir.

Q. State whether or not you searched on June 17th, 1933 - ~~did you, in company - did you~~ under cover of a search warrant, ~~search~~ the restaurant of E. L. Klingstein situated on the east side of South Main Street in this City?

A. Yes, sir.

Q. ~~State to the jury what, if anything, you searched for, ardent spirits?~~

~~A. Yes, sir.~~

Q. State what, if anything, you found when you made that search in the way of ardent spirits?

A. We found ten bottles of beer in the ice box and there were twenty-four bottles sitting right beside it and we found ten cases in an adjoining room under the "Bargain Place".

Q. Did the defendant state to you whose beer it was?

A. He was not there at the time.

Q. Did he, later?

A. Yes, sir, he called up about nine-thirty that evening.

Q. What did he say?

A. Said the beer was his and for us not to destroy it.

HILLIARD BOICE, a witness for the Commonwealth, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Herman:-

Q. You are J. H. Boice, Chief of Police of the City of Harrisonburg?

A. Yes, sir.

Q. State whether or not you searched on June 17th, 1933 - ~~did you, incidently - that is, under cover~~ of a search warrant, ~~search~~ the restaurant of E. L. Klingstein situated on the east side of South Main Street in this City?

A. Yes, sir.

Q. ~~State to the jury what, if anything, you searched for, incident with it?~~

~~A. Yes, sir.~~

Q. State what, if anything, you found when you made that search in the way of ardent spirits?

A. We found ten bottles of beer in the ice box and there were twenty-four bottles sitting right beside it and we found ten cases in an adjoining room under the "Bargain Place".

Q. Did the defendant state to you whose beer it was?

A. He was not there at the time.

Q. Did he, later?

A. Yes, sir, he called up about nine-thirty that evening.

Q. What did he say?

A. Said the beer was his and for us not to destroy it.

Q. How did you gain entrance to the basement under the "Bargain Store" building?

A. We had a search warrant for it and we went in the back way and the ware room was locked and we took off the hinges and opened the door that way.

Q. After this beer had been found -- was any one with you?

A. Mr. Fawley and Mr. Lawson were with me.

Q. What did you do with the beer?

A. Loaded it in a police car and took it to the jail

Q. Where was it put in the jail?

A. In a cell on the lower floor.

Q. Who was with you when it wasput in there?

A. Mr. Early, Mr. Leake; the Sheriff was there and Mr. Morrison.

Q. Has any of that beer been removed, do you know?

A. Two bottles were taken out to the State Chemist at the State Teachers' College?

Q. Were you present when it was removed?

A. No, sir, I sent Mr. Early to get it.

MR. TIMBERLAKE: No cross examination.

WITNESS LEAVES THE STAND.

-o-

C. R. FAWLEY, another witness for the Commonwealth, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Earman:

Q. You and Mr. Boice made this search of E. L.

Q. How did you gain entrance to the basement under the "Bargain Store" building?

A. We had a search warrant for it and we went in the back way and the ware room was locked and we took off the hinges and opened the door that way.

Q. After this beer had been found -- was any one with you?

A. Mr. Pawley and Mr. Lawson were with me.

Q. What did you do with the beer?

A. Loaded it in a police car and took it to the jail.

Q. Where was it put in the jail?

A. In a cell on the lower floor.

Q. Who was with you when it wasput in there?

A. Mr. Early, Mr. Leake; the Sheriff was there and Mr. Morrison.

Q. Has any of that beer been removed, do you know?

A. Two bottles were taken out to the State Chemist at the State Teachers' College?

Q. Were you present when it was removed?

A. No, sir, I sent Mr. Early to get it.

MR. TIMBERLAKE: No cross examination.

WITNESS LEAVES THE STAND.

-o-

C. R. PAWLEY, another witness for the Commonwealth, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Barman:

Q. You and Mr. Bolce made this search of K. L.

Klingstein's Restaurant on June 17th?

A. Yes, sir.

Q. What disposition was made of the beer - - is it true that the beer was found as Mr. Boice stated?

A. Yes, sir.

Q. What disposition was made of the beer?

A. Moved it to the jail and locked it up in one of the old death cells.

Q. Who kept the key?

A. I did.

Q. Did you deliver to W. C. Early a few days ago two bottles of that beer?

A. Yes, sir.

Q. I hand you two empty bottles labeled "Yuengling's Winner Beer" and will ask you - - - -

MR. TIMBERLAKE: In order to save time and prevent the unnecessary taking of evidence, it is stipulated that the two bottles of beer which were analyzed were two bottles taken from the beer found in the possession of the defendant, one of said bottles having been taken from under the adjoining building and the other taken from the beer found in the restaurant.

By Mr. Earman:-

Q. You delivered the bottles to Mr. Early?

A. Yes, sir.

MR. TIMBERLAKE: No cross examination.

WITNESS LEAVES THE STAND.

Klingsteln's Restaurant on June 17th?

A. Yes, sir.

Q. What disposition was made of the beer - - is it true that the beer was found as Mr. Boice stated?

A. Yes, sir.

Q. What disposition was made of the beer?

A. Moved it to the jail and locked it up in one of the old death cells.

Q. Who kept the key?

A. I did.

Q. Did you deliver to W. C. Early a few days ago two bottles of that beer?

A. Yes, sir.

Q. I hand you two empty bottles labeled "Yuengling's Winner Beer" and will ask you - - - -

MR. TIMBERLAKE: In order to save time and prevent the unnecessary taking of evidence, it is stipulated that the two bottles of beer which were analyzed were two bottles taken from the beer found in the possession of the defendant, one of said bottles having been taken from under the adjoining building and the other taken from the beer found in the restaurant.

By Mr. Earman:-

Q. You delivered the bottles to Mr. Early?

A. Yes, sir.

MR. TIMBERLAKE: No cross examination.

WITNESS LEAVES THE STAND.

DR. H. G. PICKETT, another witness for the Commonwealth, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Earman:-

Q. This is Dr. H. G. Pickett?

A. Yes, sir.

Q. What is your business?

A. Chemist at the State Teachers' College.

Q. What training and experience have you had in chemistry?

A. Two degrees.

Q. Did you analyze two specimens of beer delivered to you by W. C. Early a few days ago? When were they delivered to you?

A. Abou t three o'clock on Thursday, July 13th.

Q. What analysis of them did you make?

A. Quantitative determination of the ethyl alcohol content.

Q. What did they show?

A. Both bottles analyzed the same, 2.72% by weight corresponding to 3.4% by volume.

Q. Both bottles ran the same?

A. Exactly.

Q. Did you make a very careful analysis of the beer?

A. With the - according to the official methods of agribultural chemistry.

MR. TIMBERLAKE: No cross examination

WITNESS LEAVES THE STAND.

DR. H. G. PICKETT, another witness for the Commonwealth, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Earman:-

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A. Yes, sir.

Q. What is your business?

A. Chemist at the State Teachers' College.

Q. What training and experience have you had in chemistry?

A. Two degrees.

Q. Did you analyze two specimens of beer delivered to you by W. C. Early a few days ago? When were they delivered to you?

A. About three o'clock on Thursday, July 15th.

Q. What analysis of them did you make?

A. Quantitative determination of the ethyl alcohol content.

Q. What did they show?

A. Both bottles analyzed the same, 2.72% by weight corresponding to 3.4% by volume.

Q. Both bottles ~~ran~~ the same?

A. Exactly.

Q. Did you make a very careful analysis of the beer?

A. With the - according to the official methods of agricultural chemistry.

MR. TIMBERLAKE: No cross examination

WITNESS LEAVES THE STAND.

C. R. FAWLEY, recalled:

By Mr. Earman:-

Q. Mr. Fawley, the defendant's place of business is in the City of Harrisonburg, Rockingham County, Virginia?

A. Yes, sir.

WITNESS LEAVES THE STAND.

AT THIS POINT THE COMMONWEALTH RESTED IN CHIEF.

~~The defendant, to maintain the issue on his part, introduced the following evidence:-~~

MR. TIMBERLAKE: We desire to submit a motion to the Court:-

NOTE: The following motions was heard out of the presence of the jury:

MR. TIMBERLAKE: We move the Court to strike out the evidence on behalf of the Commonwealth in this case upon the following grounds:

(1) Because it appears that the beverage which the defendant is charged with having in his possession does not contain more than 3.2 per cent alcohol by weight, and a beverage which contains not more than such percentage of alcohol has been declared by Congress, in the exercise of its paramount authority, to be non-intoxicating, and it is not competent, therefore, for the State of Virginia to declare such beverage to be intoxicating;

(2) Because the inclusion of a beverage such as was found in the possession of the defendant in this case, within the definition of "ardent spirits" contained in the p rohibition law of this State, commonly known as "The Layman Act" and under which the information in this case was filed, is improper and illegal since the Congress

C. R. PAWLEY, recalled:

By Mr. Barman:-

Q. Mr. Pawley, the defendant's place of business is in the City of Harrisonburg, Rockingham County, Virginia?

A. Yes, sir.

WITNESS LEAVES THE STAND.

AT THIS POINT THE COMMONWEALTH RESTED IN CHIEF.

~~[illegible]~~

~~[illegible]~~

MR. TIMBERLAKE: We desire to submit a motion to the Court:-

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(2) Because the inclusion of a beverage such as was found in the possession of the defendant in this case, within the definition of "ardent spirits" contained in the p rohibition law of this State, commonly known as "The Layman Act" and under which the information in this case was filed, is improper and illegal since the Congress

has defined a beverage of such character and alcoholic content as non-intoxicating, and no non-intoxicating liquor can be properly classified and defined as ardent spirits;

(3) Because the defendant, as a citizen of the United States, was lawfully in possession of the liquor described in the information in this case, and shown by the evidence to have been found in his possession and, therefore, cannot be punished for having such beverage in his possession.

(4) Because the prohibition law, commonly known as "The Layman Act", under which the information in this case was filed is unconstitutional in that it contravenes the provisions of the Constitution of the United States and particularly Article 6, the Fourteenth Amendment and the Eighteenth Amendment;

(5) Because the prohibition law of the State of Virginia, commonly known as "The Layman Act", under which the information in this case was filed, is unconstitutional and void, because it contravenes the provisions of the Constitution of the State of Virginia in that the Act is broader than its title, and in that the fines prescribed by said Act are diverted from the purpose to which the Constitution of the State of Virginia requires them to be applied.

(6) Because the evidence in this case fails to show that the beverage found in the possession of the defendant was not legally acquired by him.

I don't care to go into any extended argument. It is fundamental and elementary that when Congress has the right to do a thing, it is binding upon all states and the states must act only within the congressional legislation that has been applied

has defined a beverage of such character and alcoholic content as non-intoxicating, and no non-intoxicating liquor can be properly classified and defined as ardent spirits;

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(4) Because the prohibition law, commonly known as "The Layman Act", under which the information in this case was filed is unconstitutional in that it contravenes the provisions of the Constitution of the United States and particularly Article 6, the Fourteenth Amendment and the Eighteenth Amendment;

(5) Because the prohibition law of the State of Virginia, commonly known as "The Layman Act", under which the information in this case was filed, is unconstitutional and void, because it contravenes the provisions of the Constitution of the State of Virginia in that the Act is broader than its title, and in that the fines prescribed by said Act are diverted from the purpose to which the Constitution of the State of Virginia requires them to be applied.

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and we submit, therefore, that the State of Virginia has no right to prescribe a penalty for the possession of a liquid - beer - which the Congress of the United States in the exercise of the authority conferred upon it by the Eighteenth Amendment has now said is non-intoxicating and also which a citizen of the United States can legally have in his possession. It is no more competent for the State of Virginia to say that a liquid containing one-half of one per cent. is intoxicating than it would be that one containing four per cent. is not intoxicating. Does the State of Virginia undertake to say that a liquid - - if it should say that a liquid containing four per cent. is not intoxicating, it would be met at once by the fact that the limit is 3.2 per cent and so, for the same reason, if the State of Virginia undertakes to class as ardent spirits that which the Congress, in the exercise of its paramount authority has said is non-intoxicating, then the State must give way to it immediately. A matter that is now under consideration is that the Layman Act makes certain provisions for the application of fines which were directed to be turned over to the Literary Fund which has not been done and the state cannot legally levy a fine dedicated to a certain purpose in this case against this defendant charged with the violation of it inasmuch as a dedication of that fine is, unquestionably, unconstitutional ;in that Act it must do certain things which have not been done and this dedication is likewise unconstitutional, null and void.

THE COURT: The motion will be overruled.

MR. TIMBERLAKE: Note our exception.

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THE COURT: The motion will be overruled.

MR. TIMBERLAKE: Note our exception.

NOTE: The following evidence was taken in the presence of the jury.

The defendant, to maintain the issue on his part, introduced the following evidence:-

E. L. KLINGSTEIN, the defendant, called in his own behalf, being first duly sworn, testified as follows:-

DIRECT EXAMINATION

By Mr. Timberlake:-

Q. This is Captain E. L. Klingstein?

A. Yes, sir.

Q. You are the defendant in this case?

A. Yes, sir.

Q. Where do you live?

A. Harrisonburg.

Q. How long have you lived here?

A. For the past twelve years. I was born here and lived here for about ten years and then left.

Q. What is your business?

A. Restaurant.

Q. You conduct the restaurant known as "Friddle's"?

A. Yes, sir.

Q. Do you have a license to sell soft drinks under the laws of this state?

A. Yes, sir.

Q. Entitled to keep, store and sell soft drinks?

A. Yes, sir.

Q. I mean non-intoxicating drinks?

A. Yes, sir.

Q. You were in the army?

A. I served in France eighteen months.

NOTE: The following evidence was taken in the presence of the jury.

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Q. You are the defendant in this case?

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A. Yes, sir.

Q. I mean non-intoxicating drinks?

A. Yes, sir.

Q. You were in the army?

A. I served in France eighteen months.

Q. Get promoted overseas?

A. Yes, sir.

Q. What command?

A. Eighty-ninth Division.

Q. Wounded in service?

A. Yes, sir.

Q. Receive any citations for gallantry?

MR. ERRMAN: Object to that.

THE COURT : Objection sustained.

MR. TIMBERLAKE: We except upon the grounds that the jury is entitled to know the defendant and know his occupation and environment and other facts ~~as~~ connected with his life; and upon the further ground that the matter which is sought to be inquired into in connection with his service record is particularly important upon the question of his good faith and intention in having in his possession the beer mentioned in the information.

By Mr. Timberlake:

Q. Do you hold any official position with the World War veterans?

A. I am State Service Officer in this section

Q. Do you hold any position with the American Legion?

A. Department Sergeant-at-Arms, Grand Chef de Guerre Forty-and-Eight; Past Commander of the Veterans of Foreign Wars and Past Commander, American Legion, State of Virginia.

Q. It has been testified here that this beer was found in your possession. Is that correct?

A. Yes, sir.

Q. Got promoted overseas?

A. Yes, sir.

Q. What command?

A. Eighty-ninth Division.

Q. Wounded in service?

A. Yes, sir.

Q. Receive any citations for gallantry?

MR. ERRMAN: Object to that.

THE COURT : Objection sustained.

MR. TIMBERLAKE: We except upon the grounds that the jury is entitled to know the defendant and know his occupation and environment and other facts as connected with his life; and upon the further ground that the matter which is sought to be inquired into in connection with his service record is particularly important upon the question of his good faith and intention in having in his possession the beer mentioned in the information.

By Mr. Timberlake:

Q. Do you hold any official position with the World War veterans?

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Q. Do you hold any position with the American Legion?

A. Department Sergeant-at-Arms, Grand Chef de Guerre Forty-and-Eight; Past Commander of the Veterans of Foreign Wars and Past Commander, American Legion, State of Virginia.

Q. It has been testified here that this beer was found in your possession. Is that correct?

A. Yes, sir.

Q. Please tell the Court and jury how you happened to have that beer?

A. We happened to have it because a man came through here two or three months ago and asked if we wanted any beer and I told him I did not believe I wanted any at that time. I did not think at that time that I could use it and then I talked to a very prominent attorney here and he told me that, in his opinion, it was legalized to have it in your possession at any point in the United States and the law was passed by Congress and having been in the service, I thought that the laws of the United States were supreme, and believing them and knowing that it was going on in different parts of the country and looking at the newspapers and seeing the pictures of unloading beer and having beer. I then immediately looked into the matter and saw that it was being had at different places in the valley and all over the state and then this man asked me if I knew of any one who would handle it and I told him I thought I would take some and he left fifty cases over in the basement next door which was next door to me - to my place of business and which I don't own and don't rent and don't have anything to do with and then various people came and got some of it and I got mine in there and when he came back in a week or ten days - he does quite a business through the state and he would collect for it. The thirty-four or thirty seven bottles in my ice box was English beer and some of it was near beer and the other beer was my own. This man does business in Pennsylvania and runs a truck through here selling beer. I was advised by this attorney that in his opinion it was perfectly legal to sell it or to have it in my possession.

Q. Please tell the Court and jury how you happened to have that beer?

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Q. State to the jury, whether or not you had the talk with this attorney before you got the beer?

A. Yes, sir, before I got the beer I talked to him and he told me that in his opinion it was legal; that he had the dope that he thought it was all right to sell the beer and have it in my possession.

Q. What was the man's name that you speak of?

A. Soper.

Q. As I understand you, the man by the name of Soper from Pennsylvania was trucking beer in here?

A. Yes, sir.

Q. Making deliveries of beer here?

A. Yes, sir.

Q. He stored this beer in thebasement of the building adjoining.

A. Yes, sir.

Q. Upon the understanding that any of his customers could come there and get it and he made settlement when he came back the next time?

A. Yes, sir.

Q. The beer that was found in your ice box was some that you had gotten from that basement?

A. Yes, sir.

Q. Did you own the other beer in the basement?

A. No, sir.

Q. State to the jury, whether or not you had the talk with this attorney before you got the beer?

A. Yes, sir, before I got the beer I talked to him and he told me that in his opinion it was legal; that he had the dope that he thought it was all right to sell the beer and have it in my possession.

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Q. The beer that was found in your ice box was some that you had gotten from that basement?

A. Yes, sir.

Q. Did you own the other beer in the basement?

A. No, sir.

Q. Following the conversation which you had with the attorney to whom you referred, did you discuss the question of your desire to have the beer with any other officials of the town?

A. Yes, sir, with four members of the counsel.

MR. EARMAN: I object to that, if your Honor please.

THE COURT: Objection sustained.

NOTE: At this point, counsel and the witness retired to the Judge's chamber in order that this evidence may be put in on the above question before the Court.

IN CHAMBERS

A. Yes, sir, I talked to four members of the council and told them that as the United States had legalized 3.2 beer that I did not see why the council did not get together and get some revenue out of it for the City. We were discussing finances and automobile licenses and I told them I thought it would be perfectly legal; that they could obtain this revenue by licensing beer in Harrisonburg because the United States had passed the bill.

Q. Who were the members of the council?

A. Mr. Slater, Mr. Conrad, Mr. Thomas and Mr. Masters.

Q. Do you know whether any of these members, following this conversation, did take the matter up with the city attorney?

A. Yes, sir, Mr. Thomas wrote the city attorney a letter and asked his opinion in regard to the licensing of beer in Harrisonburg and Mr. Thomas told me the city attorney said

Q. Following the conversation which you had with the attorney to whom you referred, did you discuss the question of your desire to have the beer with any other officials of the town?

A. Yes, sir, with four members of the council.

MR. EARMAN: I object to that, if your Honor please.

THE COURT: Objection sustained.

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A. Yes, sir, Mr. Thomas wrote the city attorney a letter and asked his opinion in regard to the licensing of beer in Harrisonburg and Mr. Thomas told me the city attorney said

that they would have to take the matter up in council meeting and the Mayor was not in favor of taking the matter up.

Q. Did all of this take place before you got the beer from Mr. Soper?

A. Yes, sir. You mean my conversation with the council?

Q. Yes, sir, before or after?

A. After.

Q. You got the beer following your advice from the attorney to whom you have referred?

A. Yes, sir.

MR. TIMBERLAKE: We submit that is competent on the question of good faith.

THE COURT: The objection is still sustained.

MR. TIMBERLAKE: We except to the action of the Court in excluding this evidence for the reason that the evidence is competent as showing or tending to show the defendant's good faith and as to whether or not his violation of the law, if any was made, was intentional or inadvertent.

NOTE: The following evidence was taken in the presence of the jury.

Q. As a result of the advice that you had received, did you honestly entertain the belief that you had a right to have in your possession this beer?

A. Yes, sir. I believed that the law of the land was supreme in everything, that the United States laws were the supreme laws of the land.

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CROSS EXAMINATION

By Mr. Earman:-

Q. Who was the attorney?

A. Mr. John T. Harris.

Q. You say that was before you had possession of any of the beer that was found on June 17th

A. I had several conversations with Mr. Harris, a couple before and four or five or ten after that time

RE-DIRECT EXAMINATION

By Mr. Timberlake:

Q. Did you apply to the Attorney for the Commonwealth who is prosecuting this case as to - did you talk to him about the advice you had gotten?

A. I asked him what he thought about the matter and he said he didn't know.

Q. You did tell him about the advice you received?

A. Yes, sir.

WITNESS LEAVES THE STAND.

DEFENDANT RESTED IN CHIEF.

MR. TIMBERLAKE: The defendant at the end of the testimony renews the motion to strike out the evidence in this case upon the same grounds as those stated in connection with the motion made at the conclusion of the Commonwealth's evidence.

THE COURT: Which motion the Court overrules.

MR. TIMBERLAKE Exception.

TESTE: This 26 day of July 1933.

H. W. Bertram JUDGE.

CROSS EXAMINATION

By Mr. Earman:-

Q. Who was the attorney?

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THE COURT: Which motion the Court overrules.

MR. TIMBERLAKE Exception.

TESTE: This 26 day of _____ 1933.

_____ JUDGE.

Com
v
Klingenberg
HWB

INSTRUCTION NO. A.

The Court instructs the jury that even though they may believe from the evidence that the defendant had in his possession the beer mentioned in the information filed in this cause and that said beer contained more than one-half of one per cent of alcohol, yet if they further believe from the evidence that the defendant did not intend to violate any of the provisions of the prohibition law, but that there was an unintentional or inadvertent violation thereof, then the jury is instructed that they may, in their discretion, omit the jail sentence, and punish the defendant simply by assessing a fine against him within the limits fixed by statute.

State
v
Klingenstein
Appeal

INSTRUCTION NO. 1

The jury are instructed that if they believe from the evidence in this case that the liquid commonly known as beer, consisting of 34 bottles found in the kitchen in the restaurant of E. L. Klingstein, and 240 bottles found in the basement under the Bargain Store, occupied by him, or in either place, contained more than one-half of one per centum of alcohol by volume, and that said beer was in the possession of said E. L. Klingstein, then you will find him guilty.

INSTRUCTION NO. 1

The jury are instructed that if they believe from the evidence in this case that the liquid commonly known as beer, consisting of 34 bottles, found in the kitchen in the restaurant of E. I. Klingstein, and 240 bottles found in the basement under the Bargain Store, occupied by him, or in either place, contained more than one-half of one per centum of alcohol by volume, and that said beer was in the possession of said E. I. Klingstein, then you will find him guilty.

We The Jury find the defendant
guilty and impose a fine of $500.00

W. G. Cook

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