

Virginia

Pleas before the County Court of Rockingham County
at the Court House thereof on the day of

1878

Commonwealth.

⁽²⁰⁾ Upon an Indictment, For selling Wine
Ardent Spirits and a mixture thereof and
James Kavanaugh. Spirituous and fermented liquors to a
minor knowing him to be a minor without the
consent of his parent or guardian.

Be it remembered that that the Grand Jurors
impaneled and sworn in the County Court of Rock-
ingham at the Term thereof, commencing on the 18th day
of March 1878 in and for the body of said County and
attending said Court found an Indictment against
the Defendant James Kavanaugh for selling intoxicating
drink on Sunday which with the endorsement thereon
by the Foreman is as follows Viz:-

State of Virginia, Rockingham County, to-wit:

In the Court of the said County:-

The Jurors of the Commonwealth of Virginia, in and
for the body of the County of Rockingham, and now
attending the said Court Upon their Oath Present, that
James Kavanaugh on the 12th day of February in the
year 1878 at his bar-room in Harrisonburg in the
County aforesaid did unlawfully sell to a minor
knowing him to be a minor without the consent of
his parent or guardian Wine, Ardent Spirits and
a mixture thereof, and Spirituous and fermented
liquors and against the peace and dignity of the

Commonwealth of Virginia. And the jurors aforesaid upon their oath aforesaid. do farther present, that on the 12th day of February 1878 Luther Morrison was a Minor and that James Kavanaugh being a tradesman and knowing him the said Luther Morrison to be a Minor, with the Consent of his parent or guardian on the day aforesaid and in the County aforesaid at his barroom in Hanisouburg did unlawfully give furnish and dispose of to him the said Luther Morrison Wine ardent Spirits and a mixture thereof and Spirituous and fermented liquors and against the peace and dignity of the Commonwealth of Virginia. And the jurors aforesaid, upon their oath aforesaid. do farther present that on the day of February in the year 1878 Luther Morrison was a Minor said James Kavanaugh being a tradesman knowing said Luther Morrison to be a Minor without the Consent of his parent or guardian on the day aforesaid in the County aforesaid at his Bar-room in Hanisouburg did permit to be sold and furnished by his agent to him the said Luther Morrison Wine ardent Spirits and a mixture thereof and Spirituous and fermented liquors and against the peace and dignity of the Commonwealth of Virginia. This Indictment is found upon the testimony of Luther Morrison witness sworn in Court and sent before the Grand Jury to give evidence

Endorsement.

Commonwealth.

Indictment.

James Kavanaugh.

For selling Wine &c.
to a Minor without

A true bill

Chas Bradley.

Foreman.

Summons

The Commonwealth of Virginia.

To the Sheriff of Rockingham County, Greeting:
You are hereby commanded to Summon James
Kavanaugh to appear before the Judge of the County
Court of Rockingham, at the Court-House, on the 6th
of April Court 1878 to answer an indictment of
the Grand Jury, found at the March Term last, of
said Court for Selling Wine, ardent Spirits and a
mixture thereof and Spirituous and fermented
liquors to a minor, knowing him to be a minor
without the consent of his parent or guardian, And
have then there this writ. Witness J. P. Logan, clerk
of said Court, at the Court-House, the 10th day of
April 1878 and in the 102^d year of the Commonwealth
J. P. Logan, clerk

Return

Executed April 10th 78 upon James Kavanaugh by
delivering to him in person a copy of the within
Summons on Indictment.

D. H. Bear D. C. for
D. H. Rotston S. R. C.

And at another day to-wit:-

At a County Court continued and held in and for
the County of Rockingham at the Court-House thereof
on Saturday April 20th 1878

Commonwealth.

James Kavanaugh } upon an Indictment. For Selling Wine
Ardent Spirits and a mixture
mixture thereof and Spirituous and
fermented liquors to a minor knowing
him to be a minor without the consent of
his parent or guardian.

This day came as well the Attorney for the Commonwealth as the Defendant in person and by Counsel and the Defendant filed his plea of not guilty and thereupon came the following jury, to-wit John Lineweaver, Jacob B. Runo, Lewis Powell, Valentine Botton, John L. Ellis, J. J. Nicholas, Lemrad Rodeffer, John H. Frank, John W. Stetzer, Harvey Rifer, Joel B. Miller & A. B. Myers, who being elected tried and sworn well and truly to try the issue joined and a true verdict render according to the evidence and having fully heard the evidence but not having time fully to hear the argument of Counsel were adjourned until Monday morning at 9 o'clock.

And at another day to-wit:-

At a County Court continued and held in and for the County of Rockingham at the Court-House thereof on Monday April 27th 1878

Commonwealth.

Upon an Indictment, For selling Wine, Ardent Spirits and a mixture thereof and Spirituous and fermented liquors to a minor knowing him to be a minor
James Kavanagh. Without the Consent of his parent or Guardian.

This day came again as well the Attorney for the Commonwealth as the Defendant by Counsel and thereupon came the jury sworn and impaneled on Saturday last the 6th day of this term of the Court for the trial of this cause and not having agreed upon a verdict retired to their room to consider the same and after sometime returned into Court and upon their oaths do say we the jury find

the Defendant James Kavanaugh guilty in manner
and form as charged in the Indictment and
afes his fine at Ten Dollars V. Rotten Foreman
And at another day to-wit:-

At a County Court Continued and held in and for the
County of Rockingham at the Court-House thereof on
Thursday April 25th 1878.

Commonwealth. } Upon an Indictment. For selling Wine and Spirit
and a mixture thereof and Spirituous and fermented
liquors to a minor knowing him to be a minor
James Kavanaugh. } without the consent of his parent or guardian.

The jury sworn and impaneled in this cause
having on the 7th day of this term of the Court April
22^d 1878 brought in a verdict of guilty and afessed
a fine of Ten Dollars against the Defendant,
and thereupon the Defendant by Counsel moved the
Court, first to set aside the verdict and grant
him a new trial and second in arrest of judgment
which motions on consideration the Court doth
overrule. It is now considered by the Court that
the Commonwealth of Virginia do recover of the
Defendant James Kavanaugh the sum of Ten
Dollars the amount of fine by the jurors in their
verdict ascertained, and her costs by her in
this behalf expended.

And now at this day to-wit:-

At a County Court Continued and held in and
for the County of Rockingham at the Court-House
thereof on Monday April 29. 1878

Commonwealth. } Upon an Indictment For selling Wine, Ardent Spirits and
a mixture thereof and Spirituous and fermented liquors
to a minor. Knowing him to be a minor without the
James Kavanaugh } Consent of his parent or guardian.

Memor: Be it remembered that upon the trial of
this Cause the Defendant by Counsel excepted to the
Opinion of the Court, and filed his two Bills of
exceptions, which he prays may be signed, Sealed
and enrolled which is accordingly done, and are
in the words & figures following to-wit
Commonwealth.

On Indictment for selling liquor to
James Kavanaugh } a minor knowing him to be such.

Be it remembered that after the jury were sworn
to try the issue joined in this Cause the Commonwealth
to maintain the issue on her part introduced a
Witness Luther Morrison who proved the following
facts that he was a Minor in his 19th year five feet
eight inches in height, and had lived in Harrisburg
all his life, that he had been working for his father
in the Carriage business for several years and had
also for a time been a billiard marker for J. J. Walls
during the night time. that within the period of twelve
months next preceeding the indictment on a Sabbath
day the said Morrison had gotten of Joseph Kavanaugh
the brother of Defendant for a third person on the written
order of said person one half pottle sent of whiskey
that said Jos. Kavanaugh went into the Bar-room of
Defendant & brought the liquor out to him & that said

Morrison at the Bar-room of said James Kavanaugh
had bought of James Kavanaugh the defendant on
one occasion intoxicating drink that he went to the
said Kavanaugh at his place of business & asked him
to let him (witness) have liquor and that the said
defendant let him have the liquor for which he
paid him. and the Commonwealth here concluded
its evidence, whereupon the Defendant to maintain
the issue on his part ~~proved~~ introduced a witness John
Kavanaugh who testified that Joseph Kavanaugh was
the brother of defendant that he said Joseph Kavanaugh
lived and conducted the business of distilling about 2 1/2
miles from Harrisburg at the period of alleged offenses,
that he was not in the employ of said James Kavanaugh
as a Bar Keeper but that when at J. Kavanaugh's, he
occasionally assisted him in his business he (witness)
was his (defendants) Bar Keeper and liquor Salesman
to whom he (defendant) had given him (witness) instruc-
tions not to sell to a minor or on Sunday or otherwise
violate the liquor law in sales. And these being all
the facts proved and evidence introduced the counsel
for defendant moved the court to instruct the jury
as follows in the following letters and figures to wit:-

no. 1

The jury are instructed that unless the Commonwealth
has proven that James Kavanaugh knew that the witness
Morrison was a minor and so knowingly sold or furnished
to the said Morrison or caused to be sold or furnished
him or given or disposed of to him or that the clerk

Saleman or agent of said Kavanaugh with said Kavanaugh's permission sold or bartered Wine, Ardent Spirits or a mixture thereof or any kind of Spirituous or fermented liquors and this was done without consent of Morrison's Guardian or parent they must find defendant not guilty.

no 2. The jury are instructed that the defendant James Kavanaugh is not in any way responsible for the act of Joseph Kavanaugh in selling liquor to the minor Morrison unless they believe from the evidence that Joseph Kavanaugh was the agent of James Kavanaugh or was in charge of his Bar by his directing & made the sales to said Morrison by permission of the defendant James Kavanaugh and that the said Kavanaugh knew that Morrison was a minor. (as to whether the said liquor was sold with permission of James Kavanaugh by Joseph Kavanaugh it is not necessary that there should have been direct permission given, if the jury believe from the evidence that the defendant by his mode of doing business was such as to give tacit permission to such sale.)

no 3. Court instructs the jury that the delivery of Wine ardent Spirits &c. to a minor to be sent to a third party on the order of that third party is not a sale to a minor within the meaning.

But the Court only gave No 1 of said instructions See # (above) No 2 asked for the Court gave with the following

modifications and addition after the words "Agent of James Kavanaugh" ^{or} "The words or was in charge of his bar by his direction" inserted by the Court at the end of the instructions the words "as to whether the said liquor was sold by the permission of James Kavanaugh by Joseph Kavanaugh it is not necessary that there should have been direct permission if the jury believe from the evidence that the Defendant by his mode of doing business was such as to give tacit permission to such sale No 3 the Court refused and the Court gave the following.

No 4

The Court further instructs the jury, that is not necessary in prosecutions for selling intoxicating liquors to minors without the consent of their parents or guardians, for the Commonwealth to prove that the defendant had actual knowledge that the party to whom he sold was a minor: it is sufficient, if the appearance of the party or other circumstances surrounding the selling were sufficient that any reasonable man of ordinary observation would have known or believed that the party was a minor.

If the appearance of a party or the circumstances surrounding the selling of intoxicating liquors to such party, be such as to induce belief upon the part of a reasonable man of ordinary observation that the party was a minor. The law implies knowledge upon the part of the seller in prosecutions for selling liquor to minors without the consent of their parents

or guardians.

to ~~which~~ action of the Court in refusing the instruction No 3 asked for and making the modification and addition aforesaid to No 2 and giving the instructions ^{nos 4 & 5} the defendants Counsel excepted and prayed that this his first bill of exceptions be signed sealed and made part of the record in this Cause which is accordingly done.

Chas. J. O'Connell Seal

In the same Cause at the same time

Be it remembered that after the facts and proceedings detailed and set forth as in the first bill of exceptions which is made a part of this the Cause was given to the jury which retired for consultation, and after which returned into Court and gave the following verdict "We the jury find the Defendant James Kavanaugh guilty in manner and form as charged in the Indictment and assess his fine at Ten Dollars W. Bolton Foreman, and thereupon the Counsel for the defendant moved the said Court to set aside the verdict upon the ground that it was contrary to the evidence in the Cause and the instructions asked of the Court on defendants motion and the said Court refused to set aside the verdict but overruled the same to which action of the Court in overruling said motion the defendant by his Counsel excepted and tendered this his second bill of exceptions which

he prays may be signed sealed and enrolled as
part of the record in this cause, which is done
accordingly.

Chas. D. O'Neill Secy

State of Virginia: Rockingham County, to-wit:-
J. D. Logan, clerk of the County Court of the
County aforesaid, do hereby certify that the
foregoing is a true transcript of the record
of said Court, in the cause of the Common-
wealth vs James Kavanaugh, on
Indictment No. 3. Witness, J. D.
Logan, clerk of said Court at the
Court House, this the 8th day of May 1878,
and in the 102^d year of the Common-
wealth,

J. D. Logan, clerk,

Commonwealth.
of Record.
James Kavanaugh.

Copy

July 11 ~ 1878

Process issued to Clerk of.

Clerk's fee \$3.⁰⁰

Ex parte } Upon an appeal from the judge=
John Kavanaugh } ment of County Court of Rockingham
} denying Barroom License and
} license as Retail Liquor Dealer -

This came the appellant by Counsel, as well the Attorney for the Commonwealth; and thereupon the appellant presented a transcript of the judgment complained of - whereupon the Court, having ~~heard~~ the evidence adduced in support of the application, and seen and inspected and maturely considered the transcript of said judgment, is of opinion to dismiss the appeal, and affirm the judgment aforesaid of the County Court of Rockingham - And it further appearing to the Court that the Appellant, as required by the Statute, had deposited with ~~Samuel R. Dyer, Treasurer~~ ^{Samuel R. Dyer, Treasurer} of the Revenue for Central District in the County of Rockingham, the sums of \$36³⁶ and \$65⁹⁹ a total of \$102³⁵; it is ordered that ~~Samuel R. Dyer, Treasurer~~ ^{Samuel R. Dyer, Treasurer} of the Revenue as aforesaid do refund the said sum of \$102³⁵ to the Appellant, John Kavanaugh -

Ex Parte
John Kavanaugh

Order dismissing appeal.

Enter this
W. M. L.

To the Hon Mark Bird Judge of the
Sesant Court for Rockingham County

Your petitioner James
Havenagh represents that he is aggrieved
by a final judgment entered in the County
Court of Rockingham County, ^{in House of Commons 28 June 1840} a transcript
of the Record in said cause is herewith
presented from which it will be perceiv-
ed that on an indictment for selling liquor
to a Minor charged against your petitioner
it was proven that there was a Minor (while
it was not proven the said petitioner knew
him to be such directly or circumstantially)
who presented an order from another per-
son for liquor to be sent to him, that
liquor was furnished to the order of the
person and not the Minor -

An instruction asked for by petitioner's
Counsel to the effect that the furnishing
to order of another was not such
furnishing or selling furnishing or disposi-
ing of to a Minor as the law intended
either in its spirit or verbal require-
ment was refused - This was clearly error
to furnish ^{to} order was not barter, or sale to
a Minor, except the order was from the Minor
- Butting in the heading with and to the Minor
or selling to him, see the reading of the Statute

— ~~It is also~~ If I furnish to another person through an order carried by a boy, I do not hasten, trade, sell to or furnish the boy —

Petitioner submits also that the Grand Jurors on the Commonwealth of proving knowledge of ~~any of~~ Minors, ~~total~~ directly or Circumstantially totally failed —

Also that the act of ~~James~~^{Joseph} Ravenagh who was not an agent clerk or Barkeeper, and not proven to have been permitted in any manner to sell, but on the contrary lived miles away from Petitioner was not sufficient to convict. Especially in face of the orders of James Ravenagh to his Barkeeper not to sell to minors, & that the verdict was induced by said instruction given by the Court as contained in transcript or record and refusal to allow them asked — The elements of knowledge, of Agency of sale or clerkship of permission are all wanting in this case, and Petitioner made to bear the burden of ^{alleged} wrong which he never committed authorized another to commit or permit in any manner, in connection with a person (5 ft 8 inches in height) whom he is assumed to have ~~any~~ knowledge of being a minor, and which no species of evidence is adduced to prove that he or ~~James~~ Ravenagh knew of his being such —

For the foregoing reasons and others mentioned
by the record your petitioners pray
a writ of error and supersedeas may
be awarded by this Court to the
Judgment of the Court, Court Comptroller
of -

Paul & Lyette Counsel

James R. Ransom
by Counsel

We attorneys practicing in
the Circuit Court certify that
in our opinion it is proper that
the judgment and decision aforesaid
should be reviewed by the Circuit Court

Wm Lyette
John Paul

And, Green

S. W. Carter

1851 before

Prayer

James Kavanaugh

Commonwealth
Petition for

writ of error,

To the Clerk of the
Circuit Court of Rock-
ingham County Va.

A writ of error to the
judgment complained of
in the within petition
is awarded, which
writ shall operate as
a supersedeas to said
judgment.

June 26. 1878

Mark Bond
Judge of the 1st
Judicial Circuit
of Va.

1. W. H. Carter 1872-4

Kavenagh
Commonwealth² On the question of Agency
The law does not recognize except by order
or permissive fact - It is here shown that
Joseph Kavenagh was not an agent or Bookkeeper
that he lived and did business in the
County, and that Kavenagh's orders to his
bookkeeper was directly to follow and not
antagonize the law

See 2nd Whedon's Criminal Law § 2436. The fact
that a son sold liquor at his father's bar is
not in absence of father *prima facie* evidence
that he sold by his Authority -

Sect 68 & 69 of 4th Edition <sup>master liable in trespass for
act of servant only in consequence
of express command or
in absence of proof, master not liable</sup>
James Kavenagh was not proven present at
the sale ~~the remaining~~ ~~the remaining~~ in
meeting an order carried by Morrison, the
bar was not really running, Joseph
Kavenagh furnished the liquor *primarily*
in no manner an agent -

In the sale of liquor to Morrison by James Kavenagh, ~~shows, the~~ ~~does it~~ it is not shown that
James Kavenagh knew of Morrison being
a minor, It does appear that he had
the size and appearance of an adult
and that he was doing business for
himself. It does not appear that the act
at any rate was done within the necessary
time next preceding the indictment
required by law, the addenda of the
judge in connection with the facts proven

were calculated to mislead a jury
as was the verdict plainly opposed
to the facts and the laws

James Kavanaugh

vs

The Commonwealth

} upon a writ of error and
superior to a judgment
of the County Court of Rockingham
remanded on the 23^d. day of April
1878

This day came again the Plaintiff in error
by his attorney as well the attorney for the Commonwealth
and the Court being seen in respect to the transcripts
of the record ^{of the judgment} and viewing evidence & the arguments
of counsel is of opinion that there was error in the
said judgment in ~~reversing~~ the motion for a new
trial and in not granting a new trial; the said
reversal not being sustained by the evidence in this -
1st. That if ~~they~~ ^{they} find that the plaintiff in error
had said the lawyer is not not found that is not
said within twelve months.

2. That if they find that it was said by another
it was not found that he was the agent of
the plaintiff in error so as to fix responsibility
on him for this act.

It is therefore considered that the said
judgment be reversed and annulled and that
~~a new trial~~ the reversal of the jury be set aside
and a new trial be awarded to be had therein,
and that the case be remanded to the ~~County~~ ^{Circuit}
Court of Rockingham for further proceedings to
be had therein, all of which is ordered to be
certified to said county court.

James Karamay
is } Order
The Commune

Enter
W. M. L.

Entered - Oct 17/84
A N B