Rather than require the defendants to replead their new matter, eliminating paragraph 47, and to further delay the ultimate resolution of this litigation, paragraph 47 will be ignored by the plaintiffs and no contention under it will be made by the defendants.

Under the motion to strike the plaintiffs contend that paragraphs 45 and 46 constitute a mere traverse not properly pleadable under new matter. Paragraph 45 alleges:

> "45. Plaintiffs have themselves substantially caused any problems that presently exist by connecting the kitchen plumbing facilities, including garbage disposal to the septic system at the rear of plaintiffs' dwelling, thus adding an additional burden to that system, which at the time of conveyance, served only the downstairs bathroom, consisting of a bathtub, toilet and sink."

Pa. R.C.P. 1030 provides inter alia:

> ". . . a party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading."

It is our opinion that paragraph 45 undoubtedly alleges additional facts that could be highly relevant to the issues in the case at bar and are, therefore, properly pleaded.

As previously indicated paragraph 46 may be an effort on the part of the defendants to plead the failure of the plaintiffs to mitigate damages which would be relevant at the trial of the matter, but would not properly constitute new matter. Therefore, the motion to strike paragraph 46 is granted.

In the interest of avoiding further delay, the plaintiffs shall consider paragraph 46 as harmless surplusage and will not be required to answer the same.

ORDER

NOW, this 3rd day of June, 1976, the plaintiffs' demurrer to the defense of laches is sustained, and their motion to strike paragraph 46 is granted. The motion to strike paragraph 45 is denied.

The plaintiffs are granted twenty (20) days from date hereof to file a reply.

Exceptions are granted the parties.



COMMONWEALTH v. FOGAL, C.P. Cr. D. Franklin County Branch, No. 117 of 1976

*Appeal from decision of Justice of the Peace in summary case - municipal tax ordinance - civil rules applicable.*

1. An action brought for the violation of a municipal tax ordinance is a suit for the recovery of a penalty due the municipality and is civil in nature.

2. Rules of civil procedure are applicable to an action brought for the violation of a municipal tax ordinance.

*Rudolf M. Wertime, Esq.*, Attorney for the Commonwealth

*John R. Walker, Esq., District Attorney*, also for the Commonwealth, nominally

*Roy S. F. Angle, Esq.*, Attorney for the Defendants

OPINION

LEHMAN, J., Specially Presiding, January 12, 1977:

A two count criminal complaint was lodged before Justice of the Peace Robert E. Eberly on October 30, 1975, by I. Eugene Martin, Income Tax Officer of Greencastle-Antrim School District, against the defendants, Ronald R. Fogal and Margaret Fogal, setting forth in count 1. the failure of the defendants on or before April 16, 1974 to make and file with said Income Tax Officer a final return of earned income tax due said School District for the calendar year 1973 on the form prescribed or approved for said purpose and failing to pay the balance of earned income tax due for the calendar year 1973 and in count 2. the failure of the defendants on or before April 15, 1975 to perform similar acts for the calendar year 1974, all of which were against the peace and dignity of the Commonwealth of Pennsylvania and contrary to the Act of Assembly, or in violation of Section 4 of the Earned Income Tax Resolution of Greencastle-Antrim School District, Franklin County, Pennsylvania enacted May 14, 1969, and requesting that a warrant of arrest or a summons be issued and that the accused be required to answer the charges made by said Income Tax Officer.

A summons was sent to the defendants by certified mail by said Justice of the Peace commanding them to appear for arraignment upon the charges on November 11, 1975.

At the arraignment defendants pleaded not guilty to the above mentioned charges and requested a summary trial which was held on December 30, 1975, before said Justice of the Peace.

At said trial, defendants were represented by Roy S. F. Angle, Esquire. Evidence was presented and thereafter the Justice of the Peace found the defendants not guilty and placed the costs of the proceeding upon the County of Franklin.

On January 16, 1976, the Commonwealth through its attorney, Rudolf M. Wertime, Esquire, filed an appeal, with three copies thereof, from the aforesaid decision to the Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch.

Notice of said Appeal was duly served on said Justice of the Peace and the District Attorney but not upon defendants or their counsel.

The Court of Common Pleas scheduled the within case to be heard de novo on April 30, 1976, and the first notice to defendants or their counsel that an appeal had been filed was a letter from the District Attorney's Office, dated April 14, 1976, listing said case for hearing on April 30, 1976.

On April 29, 1976, Roy S. F. Angle, Esquire, for defendants, presented his Petition to Strike said appeal and the Court entered an Order directing that the petition shall be heard at the time scheduled for hearing.

On April 30, 1976, argument was heard on said petition and becuase of the need for research on the matters raised therein, we held our ruling on same in abeyance and directed that the hearing proceed. The only evidence presented consisted of three exhibits on behalf of the Commonwealth, to wit: the School District Earned Income Tax Resolution and the Earned Income Tax Returns of defendants covering the years 1973 and 1974, each of which was filed November 10, 1975, after prosecution was instituted, and a stipulation of counsel that the School District is satisfied that said tax returns correctly set forth a net loss that was sustained by defendants for the years in question, to wit: 1973 and 1974.

Arguments were heard by the court on the issues involved and subsequently briefs were filed by counsel.

Inasmuch as the issues of the case are for the most part included in said petition to strike the appeal, we will discuss them together.



Counsel for defendants contends that the criminal proceeding is invalid because redress for a violation of a municipal resolution or ordinance can be had only in a civil court, that the Pennsylvania Rules of Court - Justice's of the Peace as to civil proceedings require appellant, if the claimant, to file a complaint within twenty days after filing its notice of appeal and, inter alia, by personal service or certified or registered mail to serve a copy of said notice of appeal upon the appellee and that the appellant failed to comply with each of said mandates and that if the proceeding is criminal, only the defendant may appeal.

Counsel for appellant counters by claiming that the Constitution of Pennsylvania provides for the right of appeal in all cases to a court of record from a court not of record, that The Local Tax Enabling Act which authorizes municipalities to adopt an earned income tax speaks of fines, penalties and sentences, thereby making this procedure criminal in nature and that the appeal complied with Rule 67 of the Pennsylvania Rules of Criminal Procedure.

Ever since the decision of Judge Woodside in *York v. Baynes*, 188 Pa. Superior Ct. 581, 149 A. 2d 681 (1959), it has consistently been held that "an action brought against a defendant for the violation of a municipal ordinance is a suit for the recovery of a penalty due the municipality and is a civil proceeding. It is not a summary proceeding, which is a criminal proceeding, even though it may be started by a warrant. A judgment entered against a defendant for the violation of a municipal ordinance is for a penalty, even though it may be referred to by the legislature and the magistrate as a 'fine'." The action is civil despite the captioning of the case in the name of the commonwealth. See *Commonwealth v. Ashenfelder*, 413 Pa. 517, 198 A. 2d 514 (1964). Baynes took her appeal to the Court of Quarter Sessions after the alderman found her guilty of violating a city ordinance. The lower court on motion of the City, ordered her appeal quashed and the Superior Court affirmed the order. This rule of law applies as well to municipal tax ordinances adopted pursuant to an act of the legislature permitting same: *Pleasant Hills Borough v. Carroll*, 182 Pa. Superior Ct. 102, 125 A. 2d 466 (1956).

Since this action was civil in nature, it was incumbent upon appellant to comply with the Rules of Court — Justices of the Peace as to civil proceedings. Rules 1001 et seq., deal with appellate proceedings with respect to judgments and other decisions of Justices of the Peace in civil matters.

These rules provide, inter alia, as follows:

## LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS OF THE 39th JUDICIAL DISTRICT, PENNSYLVANIA, FRANKLIN COUNTY BRANCH

| | | |
|---|---|---|
| Stanley J. Bumbaugh, Plaintiff, | ) | |
| vs. | ) | Action to Quiet Title |
| Paul D. Tarner and M. Blanche Tarner, his wife, and their heirs and assigns, Defendants. | ) | A.D. 1978-376 |

To: Paul D. Torner and M. Blanche Tarner, his wife, their heirs and assigns.

You are notified that the Plaintiff has commenced an action to quiet title against you which you are required to defend.

You are required to plead to the complaint within twenty (20) days after the service has been completed by publication.

This action concerns the land here described:

On the South by Commerce Street; on the East by Lot #108 of the plat of lots laid out by Paul D. Tarner and N. P. Ninneman and recorded in Franklin County Deed Book Volume 267, Page 438; on the North by a fifteen foot public alley; and on the West by Lot #110 of said plot. Having a frontage on the North side of Commerce Street of 50 feet and a depth of 120 feet, and having an even width throughout. Being #109 of the above mentioned plat, known as Fairmount Heights.

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LEGAL SERVICE OF
FRANKLIN-FULTON COUNTIES
COURT HOUSE
CHAMBERSBURG, PENNSYLVANIA 17201
TELEPHONE NO.: CHAMBERSBURG
264-4125, EXT. 13

Thomas D. Singer, Esquire
134 West Main Street
Waynesboro, PA 17268
Attorney for Plaintiff

Of Counsel:
Keller & Reichard
134 W. Main Street
Waynesboro, PA 17268

(8-4, 8-11, 8-18)

Pursuant to Writ of Execution issued on Judgment Nos. DSB 1977-256 and 1977-257 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, August 25, 1978 the following real estate improved as indicated:

## LEGAL NOTICES, cont.

All that lot of ground lying and being situate in Guilford Township, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at the eastern side of Briar Lane at corner of other land of the grantors; thence along Briar Lane, North 12 degrees 34 minutes 45 seconds East, 100.00 feet to Lot No. 59, now owned by John W. McNew; thence by the same, South 77 degrees 25 minutes 15 seconds East, 145.00 feet to an iron pin at Lot No. 133, now owned by the grantors; thence by the same and Lot No. 132, now owned by the grantors, South 12 degrees 34 minutes 45 seconds West, 110.01 feet to an iron pin at other land of the grantors; thence by the same, North 77 degrees 25 minutes West, 145.00 feet to an iron pin at said Briar Lane, the place of beginning. Containing 0.366 acre. Being Lot No. 60 on a plan of lots made for Earl H. Stull, Jr., by Nassaux-Hemsley, Inc., dated April 9, 1976, and recorded in the Deed Records of Franklin County, Pennsylvania, in Deed Book Vol. 288B, Page 82, reviewed by Franklin County Planning Commission and approved by Guilford Township Board of Supervisors.

A strip of ground twenty-five (25) feet from the center of Briar Lane is reserved for future widening of the right of way.

BEING part of the same real estate which H. W. Tolbert and Nellie Tolbert, his wife, by deed dated November 5, 1956, and recorded in Franklin County, Pennsylvania, Deed Book Vol. 486, Page 5, conveyed to Earl H. Stull, Jr. and Pauline M. Stull, his wife, the grantors herein.

The above lot of ground herein conveyed is subject to the following conditions and restrictions upon its use as set forth in the above mentioned Deed.

Having erected thereon a single family dwelling, concrete block foundation, full basement area with cement floor. Frame construction and brick veneer. Has a asphalt shingle roof. Interior walls are of plaster and is heated by Electric.

Seized and taken in Execution as the real estate of John Stevenson and Nancy Stevenson, under Judgement Nos. D.S.B. 1977-256 and D.S.B. 1977-257.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay $20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on September 6, 1978, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before September 20, 1978, distribution will be made in accord therewith.

FRANK H. BENDER, Sheriff of Franklin County, Pennsylvania

July 26, 1978

(8-4, 8-11, 8-18)

### Rule 1004. Filing Complaint or Praecipe on Appeal.

A. If the appellant was the claimant in the action before the Justice of the Peace, he shall file a complaint within twenty (20) days after filing his notice of appeal.

### Rule 1005. Service of Notice of Appeal and Other Papers.

A. The appellant shall by personal service or by certified or registered mail serve a copy of his notice of appeal upon the appellee and upon the Justice of the Peace in whose office the judgment was rendered. If required by Rule 1004B to request a rule upon the appellee to file a complaint, he shall also serve the rule by personal service or by certified or registered mail upon the appellee. The address of the appellee for the purpose of service shall be his address as listed on the complaint form filed in the office of the justice of the peace or as otherwise appearing in the records of that office.

B. The appellant shall file with the prothonotary proof of service of copies of his notice of appeal, and proof of service of a rule upon the appellee to file a complaint if required to request such a rule by Rule 1004B, within five (5) days after filing the notice of appeal.

C. The party filing a complaint under Rule 1004 shall forthwith serve it upon the opposite party in the appeal by leaving a copy for or mailing a copy to him at his address as shown in the justice of the peace records mentioned in subdivision A of this rule.

D. Service and proof of service may be made by attorney or other agent.

Rule 1006 provides that upon failure of the appellant to comply with Rule 1004A or Rule 1005B, the prothonotary shall, upon praecipe of the appellee, mark the appeal stricken from the record and that upon good cause shown the court of Common Pleas may reinstate the appeal.

In *City of Easton v. Marra*, 230 Pa. Superior Ct. 352, 326 A. 2d 637 (1974), the Superior Court affirmed the order of the lower court which refused to reinstate the appeals taken from the judgment of the Justice of the Peace. On praecipe of the City, the prothonotary struck the appeals because of appellant's failure to perfect his appeals in accordance with the rules of procedure governing appeals from orders and judgments of a justice of the peace. Specifically, the appellant defendant did not file a rule upon the City to file a complaint as required by

Justice of the Peace Rule 1004B and serve the same on the City as required by Rule 1005B. Appellant's argument was that justifiably he believed that the proceedings before the Justice of the Peace were criminal in nature. The Superior Court held that since the case was a civil proceeding, appellant was bound to perfect his appeal in accordance with Pennsylvania Justices of the Peace Rules 1004 and 1005 and that by failing to do so was subject to the sanction of Rule 1006, providing for the striking of appeals upon the praecipe of the appellee. Confusion as to the nature of the case was held not to provide "good cause" for reinstatement by the court in view of the well-established law defining the nature of such a case.

The same reasoning applies to the instant case. We find no "good cause" for reinstatement of the appeal.

The Commonwealth cannot be successful in its appeal were the proceeding to be adjudged criminal in nature.

Rule 67 of the Rules of Criminal Procedure relates to appeals from summary judgments by the defendant. There is no Rule of Criminal Procedure that permits the Commonwealth to appeal from a summary judgment. Furthermore, the Minor Judiciary Court Appeals Act of December 2, 1968, P. L. 1137, 42 P. S. Section 3001, et seq., specifically addresses itself to appeals in summary proceedings by defendants convicted by an issuing authority. In summary matters, i. e., nonindictable offenses, the Commonwealth cannot bring the same charge against the same defendant before another issuing authority where that defendant had been previously acquitted of the charge by an issuing authority: *Commonwealth v. Bergen*, 134 Pa. Superior Ct. 62, 4 A. 2d 164 (1939). We are satisfied that the same rule is applicable to an appeal by the Commonwealth from a previous acquittal before an issuing authority.

Counsel for the Commonwealth contends that the Commonwealth now has the absolute right of appeal by virtue of Section 9 of Article V of the new Constitution of Pennsylvania which provides that "(t)here shall be a right of appeal in all cases to a court of record from a court not of record". Judge MacPhail, in a very able opinion and one to which we fully subscribe, held that the recent amendments to the Constitution have not changed the rule that the Commonwealth does not have the right to appeal to the Court of common Pleas from an acquittal of a defendant in a summary criminal action brought before an issuing authority: *Commonwealth v. Lory*, 60 D. & C. 2d 780 (1973).

Accordingly, we enter the following.



ORDER

AND NOW, January 12, 1977, after argument and consideration of briefs, the Prothonotary of Franklin County is ordered and directed to strike from the record the appeal of the Commonwealth pursuant to the praecipe of appellee. Commonwealth's motion to permit it to proceed in accordance with the rules of Court - Justices of the Peace as to civil proceedings is refused.

Franklin County shall pay the costs of this proceeding.

Exception is noted to the Commonwealth.

**Editor's Note: The writer of this opinion is the Honorable Paul S. Lehman, Senior Judge, Mifflin County.**

COMMONWEALTH OF PENNSYLVANIA, EX REL. Vaughn v. Vaughn, C.P. Cr. D. Franklin County Branch, No. 62 of 1975, N.S.

*Nonsupport Action - Petition to Modify - Changed Circumstances - Child by a Second Marriage*

**1. Assumption of new support obligations to a second wife and child by a second marriage constitute changes in circumstances sufficient to warrant a reduction in a support order for a child of a prior marriage.**

*Kenneth F. Lee, Esq.*, Attorney for Petitioner

*Michael B. Finucane, Esq.*, Attorney for Respondent

OPINION

Eppinger, P.J., August 1, 1978:

Charles E. Vaughn (Charles) petitoned for a reduction of a support order dated July 6, 1977. Under this order he was required to pay Sally E. Vaughn (Sally) the sum of $58.50 per week for the support of Jacquie J. Vaughn (Jacquie), their child, and $15.00 on account of arrearages. Nine dollars of the support order was considered to be payment of health insurance coverage which Charles had originally agreed to. This order was a modification of a previous order.

Charles said he is entitled to a reduction because, since the order was made July 6, 1977, he has remarried and is supporting his present wife and their son. Sally counters that