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

the circumstances have not changed. At the time of that order, she says, Charles was living with his present wife out of wedlock and their son had been born and was living with them. Charles acknowledges that this was true, but states that before the marriage, his present wife was receiving public assistance in the amount of $120.00 every two weeks. With the marriage, public welfare payments terminated.

Parents have the duty to support their minor children and the duty falls upon each parent in accordance with his or her ability to pay. *Costello v. LeNoir*, 462 Pa. 36, 337 A.2d 866 (1975). No support order is final so orders may be modified upon proof of a change in circumstances of a party, including financial circumstances. *Commonwealth ex rel. Levy v. Levy*, 240 Pa. Super 168, 361 A.2d 781 (1976). 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. *Commonwealth ex rel. Gerstemeir v. Gerstemeier*, 196 Pa. Super 308, 175 A.2d 105 (1961); *Commonwealth ex rel. Piffath v. Piffath*, 63 Del. Co. 218 (1976).

In seeking modification of a support order, the burden is on the asking party to establish the required changed circumstances. *Gerstemeier*, supra. On July 6, 1977, Charles was paying $20.00 per week towards the support of his illegitimate child and his paramour was receiving $60.00 per week from Public Assistance. He was living with them.

At this time he is married to the mother of the child, has formally acknowledged the child as his own, his second wife is no longer receiving assistance, his support of the child is no longer fixed by the $20.00 per week order, and his income has increased to $225.00 per week. All of these are changed circumstances.

A common sense evaluation of these changes reveals a substantial reduction in Charles' ability to pay the existing order of $58.50. His physical living arrangements have not changed since the order was made in July, 1977, but his status has changed. He is now totally responsible for the support of his second wife and the child. Before his marriage he was not required to support his present wife and his total obligation to support the child was measured in terms of the $20.00 order.

The order of July 6, 1977, was not, as we said, a final order. It was temporary. Having found that there are changed circumstances we believe the correct approach is to review the entire matter in light of the present circumstances without

reference to any prior order. Orders for support must be based on existing circumstances. *Commonwealth ex rel. Milne v. Milne*, 150 Pa. Super 606, 26 A.2d 207 (1942); *Commonwealth v. Elliott*, 155 Pa. Super 477, 38 A.2d 531 (1944). So the amended order will not be an adjustment of the old order taking into consideration the changed circumstances, but will be a new temporary order based upon the circumstances as they exist at this time.

We will file, contemporaneously herewith an order in the usual form requiring Charles to pay $33.00 per week for the support of his daughter, Jacquie. After we reached this conclusion we were somewhat surprised to find that mathematically it works out to be a fair distribution of the money available to these families. Sally's income is approximately $95.00 per week; to that we add $33.00 that Charles will pay her under our order giving her a total spendable income of $128.00. From that she must support herself and her daughter. Thus, she has $64.00 a week available for each of them.

Charles' income is $225.00. From that we deduct $33.00 which he must pay to Sally for Jacquie leaving him 192.00. From this he must support three persons, and has $64.00 available for each.

The order of July 6, 1977, contained some provisions with regard to the payment of arrearages. That issue was not raised before us. We will continue the provisions of the former order relating to payment of the arrearage in effect.

CROW v. CROW, C.P., Franklin County Branch, E.D. Vol. 7, Page 147

Equity - Power of Attorney - Constructive Trust - Unjust Enrichment - Illegality of Purpose - Offer to Partition

1. A constructive trust is established when one spouse, pursuant to a power of attorney granted by the other spouse, conveys jointly owned property to herself, with the knowledge that the other spouse did not intend to surrender his beneficial interest in the property; to allow the first spouse to retain full ownership would result in her unjust enrichment.

2. Where no actual fraud is worked on a third party a constructive trust will not be prevented on the grounds of illegality of purpose.

3. An offer to partition real estate does not arise where one party refuses to reconvey formerly held joint property on the mistaken belief that the property is in her name alone.