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Michael Von Moschzisker

James P. Garland

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THE RIGHT OF THE COMMONWEALTH TO
APPEAL IN CRIMINAL CASES.

MICHAEL VON MOSCHZISKER †

AND

JAMES P. GARLAND ‡

THE SUPREME COURT of the United States has held that no constitutional right is abridged if a state appeals from a judgment of not guilty following a criminal prosecution.¹ The appeal may even follow a verdict of guilty of a lesser crime where the state sought a conviction of a more heinous crime calling for a more severe penalty. The breadth of this doctrine is somewhat astounding when compared with the limits imposed upon such appeals within the Commonwealth of Pennsylvania. Numerous Pennsylvania cases reiterate the principle which was stated most effectively in *Commonwealth v. Obenreder*,² that no appeal in favor of the commonwealth will lie and no new trial will be granted after a verdict by a jury and a judgment in a criminal trial. In the above mentioned case, the court stated:

"It is well settled in this state that the Commonwealth cannot appeal from a judgment of acquittal in criminal prosecutions, except in cases of nuisance, forcible entry and detainer, and forcible detainer (Act of May 19, 1874 P. L. 219). And this is so whether the prosecution be by indictment (citations omitted) or by summary proceeding (citations omitted). And, if the former, it does not matter whether the verdict be rendered by the jury of its own accord or by direction of the court (citations omitted). Such a verdict or judgment of acquittal is not to be confused with the quashing of an indictment, or an arrest of judgment following a verdict of guilty, or a judgment sustaining a demurrer to the evidence, which raise only questions of law, and do not result in a verdict of not guilty, or judgment of acquittal, and, accordingly in those cases the Commonwealth may appeal."³

This doctrine is followed in some degree by the great majority of the states, with Connecticut standing as a notable exception.

† Lecturer in Law, Villanova University. A.B., 1940, Yale University; LL.B., 1947, University of Pennsylvania. Formerly, First Assistant District Attorney of Philadelphia; now engaged in private practice in Philadelphia.

‡ *Third-year student, Villanova University School of Law.* A.B., 1953, Loyola College (Baltimore).

1. *Palko v. Connecticut*, 302 U.S. 319 (1937).

2. 144 Pa. Super. 253, 19 A.2d 197 (1941).

3. 144 Pa. Super. 253, 255, 19 A.2d 197, 198 (1941).

It can be seen that there are numerous instances in the conduct of a criminal trial where the decision rests not on the verdict of a jury but purely on questions of law. In some of these instances the commonwealth has a clear right to appeal; in others that right may be doubtful, but has not been clearly prohibited. Except for the specific instances in which an appeal is allowed by the Act of May 19, 1874,⁴⁻⁵ as outlined in the above quoted opinion, the courts of Pennsylvania have limited the right of the commonwealth to appeal to cases involving "error in quashing an indictment, arresting judgment after verdict of guilty, and the like" (emphasis added).⁶ Examination reveals that in each of these instances the right to appeal has been subject to some limitation, and there is no complete agreement as to what is included in the term "and the like." This article will present, in a somewhat tabular form, the general rules and the limitations applicable to each of the instances in which the commonwealth has sought review in criminal trials.

A.

APPEAL FROM AN ORDER QUASHING AN INDICTMENT.

Where, in a criminal case, an order is entered, quashing an indictment, and that order involves purely a question of law, the commonwealth may appeal.⁷ Of course, no appeal may be taken from an order which is not final; but the order is considered final even if it is coupled with a direction that the defendant give bail for his appearance at the next term.⁸ It should be remembered that a motion to quash an indictment for matters dehors the record is addressed to the discretion of the court, and in such cases, although the commonwealth may appeal, the trial court's decision will not be disturbed except for clear error or obvious abuse of discretion.⁹

4-5. This statute states, in pertinent part, 19 P.S. 1188:

" . . . in cases charging the offense of nuisance, or forcible entry and detainer, or forcible detainer, exceptions to any decision or ruling of the court may also be taken by the Commonwealth, and writs of error or certiorari, as hereinbefore provided, may be issued from the Supreme Court to all criminal courts."

6. *Commonwealth v. Wallace*, 114 Pa. 405, 411, 6 Atl. 685, 689 (1886).

7. *Commonwealth v. Cohen*, 142 Pa. Super. 199, 15 A.2d 730 (1940); *The Commonwealth v. Church*, 1 Pa. 105 (1845); *The Commonwealth v. McKisson*, 8 S.&R. 420 (Pa. 1822). Cf., *Commonwealth v. Simpson*, 310 Pa. 380, 165 A.2d 498 (1933); *Commonwealth v. Kolsky*, 11 Pa. Super. 596 (1930). The commonwealth may also appeal from an order quashing an information. *Commonwealth v. Hallberg*, 168 Pa. Super. 596, 81 A.2d 270 (1951), *reversed on other grounds*, 374 Pa. 554, 97 A.2d 849 (1953).

8. *Commonwealth v. Gouger*, 21 Pa. Super. 217 (1902); *Commonwealth v. Bartilson*, 85 Pa. 482 (1872); see also, 45 A.L.R. 470(n).

9. *Commonwealth v. Ross*, 58 Pa. Super. 412 (1914); *Commonwealth v. Carlucci*, 48 Pa. Super. 72 (1911); *Commonwealth v. Sheppard*, 20 Pa. Super. 417 (1902).

B.

APPEAL FROM AN ORDER ARRESTING JUDGMENT.

An order arresting judgment after a verdict of guilty is subject to appeal by the commonwealth.¹⁰ However, the evidence in the lower court is not part of the record on appeal,¹¹ even if the defendant submitted a point for binding instructions.¹² It is within the discretion of the trial court after arresting judgment to release the defendant on bail, or to hold him to his own recognizance, or to discharge him *sine die* pending an appeal when the District Attorney announces his intention to appeal; this action by the trial court is not reviewable except for gross abuse of discretion.¹³

The commonwealth does not waive its right to appeal from an order arresting judgment by an unsuccessful attempt to convict the defendant under a new indictment for the same offense. In *Commonwealth v. Heikes*¹⁴ the defendant had been indicted and tried in Cumberland County for fornication and bastardy. The jury returned a special verdict that the fornication had been committed in York County and the child had been born in Cumberland County. Judgment was arrested on the ground that the indictment charged fornication in Cumberland County and the jury found it to have been committed in York County. The Cumberland County grand jury then returned a true bill charging fornication in York County with the birth of the child in Cumberland County. The defendant pleaded the former indictment, the special verdict, and the arrest of judgment as a former acquittal. The commonwealth demurred to this plea. Judgment was given for the commonwealth and the defendant was sentenced. On defendant's appeal, the judgment was reversed, and a new judgment

10. *Commonwealth v. Kammerdiner*, 165 Pa. 222, 30 Atl. 929 (1895); *Commonwealth v. Wallace*, 114 Pa. 405, 6 Atl. 685 (1886); *Commonwealth v. Moore*, 99 Pa. 570 (1882); *The Commonwealth v. Taylor*, 5 Binney 277 (Pa. 1812); *Commonwealth v. Heller*, 147 Pa. Super. 68, 24 A.2d 460 (1942); *Commonwealth v. Duchnicz*, 59 Pa. Super. 527 (1941); *Commonwealth v. Teman*, 134 Pa. Super. 36, 3 A.2d 960 (1938); *Commonwealth v. Short*, 38 Pa. Super. 562 (1909), *aff'd*, 228 Pa. 279 (1910).

11. *Commonwealth v. Heller*, 147 Pa. Super. 68, 24 A.2d 460 (1942).

12. *Commonwealth v. Pa. R.R.*, 72 Pa. Super. 353 (1919). This may have been changed as a result of the Act of June 15, 1951, 19 P.S. § 871. Under that statute, where judgment is arrested on the ground that the evidence is insufficient, it appears that the commonwealth may appeal. In such case the evidence would logically have to be part of the record. See *Commonwealth v. Souder*, 172 Pa. Super. 463, 94 A.2d 136 (1953), *reversed in part, on other grounds*, 376 Pa. 78, 101 A.2d 693 (1954).

13. *Commonwealth v. Stetska*, 69 Pa. Super. 15 (1918); see *Commonwealth v. Bartilson*, 85 Pa. 482, 490 (1872). In a case in which arrest of judgment was granted and a new trial motion was not disposed of, the appellate court, when successfully resorted to by the commonwealth, will remand the record for disposition of the new trial motion. See *Commonwealth v. Souder*, 376 Pa. 78, 101 A.2d 693 (1954); *Cf.*, *Commonwealth v. Pflaum*, 48 Pa. Super. 370 (1911).

14. 26 Pa. 513 (1856).

was given discharging defendant *sine die* on that indictment; the court holding that the defendant could have been sentenced for fornication and bastardy on the facts as found in the special verdict at the first trial, and, therefore, he could not again be indicted and tried for the same offense.¹⁵ Meanwhile, the commonwealth, in addition to bringing defendant to trial on the second indictment, had appealed by writ of error the order arresting judgment in the first proceeding. The Superior Court reversed with directions that defendant be sentenced on the special verdict under the first indictment. The court held that the second prosecution did not constitute a waiver of the right to appeal.

C.

APPEAL FROM AN ORDER SUSTAINING A DEMURRER
TO THE EVIDENCE.

It is clear that appeals from orders sustaining demurrers to the evidence fall within that nebulous area referred to as "the like." In *Commonwealth v. Kocher*¹⁶ for example, an appeal from an order sustaining defendant's demurrer to the evidence on an indictment charging malicious mischief was allowed, and the order was reversed. However, the appeal in such cases may not be used to test the propriety of the lower court's exclusion of evidence offered by the commonwealth. The order can only be judged on the evidence which was received.¹⁷

It is important to note that the proper procedure for the trial judge on sustaining a demurrer to the evidence is to discharge the defendant.¹⁸ If, however, the judge does not discharge the defendant but incorrectly directs the jury to return a verdict of not guilty, that verdict is binding, and since the defendant will then have been acquitted by the jury, the commonwealth cannot appeal.¹⁹ In *Commonwealth v. Kerr* the court stated:

15. Although double jeopardy, the grounds on which the court here rested, is only applicable in capital cases today, the question arises as to whether, on the authority of *Commonwealth v. Heikes*, one may again be tried for first degree murder after judgment arrested. See *Commonwealth v. Simpson*, 310 Pa. 380, 165 Atl. 498 (1933).

It should also be noted here that, generally, an order vacating sentence on the ground that the indictment does not charge an indictable offense is similar to one arresting judgment, and is appealable. *Commonwealth v. Bienkowski*, 137 Pa. Super. 474, 9 A.2d 169 (1939); see, generally, *Commonwealth v. Moore*, 99 Pa. 570 (1882).

16. 162 Pa. Super. 605, 60 A.2d 385 (1948).

17. *Commonwealth v. Frank*, 159 Pa. Super. 604, 49 A.2d 521 (1946).

18. See *Commonwealth v. Marino*, 142 Pa. Super. 327, 330, 16 A.2d 314 (1940); *Commonwealth v. Heller*, 147 Pa. Super. 68, 83, 24 A.2d 460 (1942).

19. *Commonwealth v. Kerr*, 150 Pa. Super. 598, 29 A.2d 340 (1942).

“. . . Since the Act of June 5, 1937, P. L. 1703, 19 P. S. § 481,²⁰ the court on a demurrer to the evidence must act upon it and either sustain it or overrule it . . . If the facts and inferences therefrom thus admitted do not support a finding of guilty and judgment thereon, it is the duty of the court to sustain the demurrer and discharge the defendant (citations omitted). The jury then has no further function to perform (citations omitted). If the demurrer is sustained and the defendant discharged, the Commonwealth may then appeal (citations omitted). The court below, however, after sustaining the demurrer did not discharge the defendant, but directed the jury to return a verdict of not guilty. While this procedure was incorrect, the result of a verdict of not guilty is that the Commonwealth is precluded from appealing from the judgment of not guilty.”²¹

The reasoning which underlies the allowance of an appeal in cases involving demurrers to the evidence is that in such cases no question of fact could be before the appellate court. On a demurrer to the evidence, every fact which the jury could infer in favor of the party offering it, is to be considered as admitted and is part of the record.²² Nevertheless, every order sustaining a demurrer to the evidence involves a finding that facts sufficient to show guilt have not been proved. This necessarily means there will be a consideration of the evidence on appeal.²³ The decision in *Commonwealth v. Feigenbaum*²⁴ complicates this. Philadelphia's old vice-squad, departing from its ordinary chore of chastening homosexuals and gamblers, raided a number of reputable local book stores in an attempt to censor Philadelphia's reading matter. At a trial without a jury on the charge of exhibiting obscene books, a demurrer to the evidence filed by the defendant booksellers was sustained. In his opinion the trial judge said the books were not pornographic and were within the constitutional provisions protecting a free press. On the commonwealth's appeal the judgment was affirmed. The Superior Court said:

20. This Act provides:

“Hereafter, in all criminal prosecutions, the action of the defendant at the close of the Commonwealth's case in demurring to the evidence submitted by the Commonwealth, shall not be deemed to be an admission of the facts which the evidence tends to prove or the inferences reasonably deductible therefrom, except for the purpose of deciding upon such demurrer, and if the court shall decide against defendant on such demurrer, such decision shall be deemed interlocutory only, and the case shall proceed as if no demurrer had been made.”

21. 150 Pa. Super. 598, 29 A.2d 340 (1942).

22. *Commonwealth v. Kolsky*, 100 Pa. Super. 596 (1930).

23. *Commonwealth v. Shiroff*, 131 Pa. Super. 565, 200 A.2d 204 (1938).

24. 166 Pa. Super. 120, 70 A.2d 389 (1950).

“Being bound by the factual inferences made by the trial judge, all of which were drawn in favor of the defendants, we are compelled to affirm. . . .”²⁵

It is difficult to see why the Superior Court was any more bound by the factual inferences drawn by the trial judge than it would be in any other case in which a demurrer to the evidence is sustained. The Superior Court has stated that a defendant who has judgment in his favor on his demurrer to the evidence is in a situation similar to that of a defendant who has a determination in his favor after the filing of a special verdict by which the facts are put on record and the law is submitted to the court.²⁶ The court has described the situation in this manner:

“In criminal cases demurrer to the evidence of the Commonwealth admits all the facts which the evidence tends to prove, and all inferences reasonably deducible therefrom. . . . The court in such cases is not the trier of the facts.”²⁷

This does not lead to the conclusion that the appellate court should be bound by the inferences of the trial court, but rather would seem to indicate that the opposite is true.

D.

APPEAL FROM AN ORDER GRANTING A NEW TRIAL.

One of the most doubtful areas concerning the question of the commonwealth's right to appeal is that involving an order granting a new trial. In *Commonwealth v. Pflaum*²⁸ it was assumed without further discussion that such an order is not subject to appeal, since it does not result in a final judgment. But in *Commonwealth v. Supansic*, which involved an appeal from an order granting a new trial after a verdict of guilty of extortion, the court, while upholding the order, stated:

“It cannot properly be said that an order granting a new trial is, as a general proposition, kindred to one quashing an indictment or arresting judgment. . . . When we consider the variety of grounds upon which new trials have been and may be ordered, we are not prepared to hold that the Commonwealth can never appeal from such an order, but we are of opinion that there is no warrant in any statute or controlling decision for this appeal, and that it should therefore be dismissed.”²⁹

25. 166 Pa. Super. 120, 121, 70 A.2d 389 (1950).

26. *Commonwealth v. Kolsky*, 100 Pa. Super. 596 (1930).

27. *Commonwealth v. Parr*, 5 W. & S. 345 (Pa. 1843).

28. 48 Pa. Super. 370 (1911).

29. 93 Pa. Super. 111 (1927).

In *Commonwealth v. Antonini*,³⁰ an appeal was allowed from an order granting a new trial, but this was done in a situation where the trial judge had certified that the new trial was granted solely on a question of law, and both defendant and prosecutor had concurred in seeking the appeal. The court deliberately avoided discussion of the commonwealth's general right to appeal, stating:

"Because of the importance of this case and those related to it, and the fact that the Department of Justice of the Commonwealth conducted the prior investigation, participated in the trial, argued this appeal, and since defense counsel concurred, we will not discuss the right of the Commonwealth to appeal, and follow literally *Commonwealth v. Simpson*, 310 Pa. 380, 383, 165 A. 498."³¹

In the *Simpson* case the court had permitted the commonwealth to appeal where the question ruled against the commonwealth had been one purely of law. The importance of the judge's certification in the *Antonini* case stems from the fact that the most frequent objection to appeals from orders granting new trials is that such appeals are concerned primarily with questions of the exercise of a sound judicial discretion.³² Even in a civil case, an appeal will not be successful where a new trial has been granted in the exercise of a general discretion.³³ However, rulings which have based a refusal to grant an appeal from such an order on the fact that an exercise of discretion is involved, lead to the inference that an appeal would lie for an abuse of that discretion.³⁴ Yet, no case has been found allowing an appeal from such an order, except in the unusual situation present in the *Antonini* case, *supra*.

E.

APPEAL FROM ORDERS INVOLVING PLEAS OF FORMER JEOPARDY OR AUTREFOIS ACQUIT.

Where the defendant pleads former jeopardy, and the commonwealth's demurrer thereto is overruled, it is generally conceded that the commonwealth may appeal. This point is concretely stated in *Commonwealth v. Simpson*.³⁵ The defendant had been indicted for

30. 165 Pa. Super. 498, 69 A.2d 177 (1949).

31. 165 Pa. Super. 498, 503, 69 A.2d 177, 179 (1949).

32. *Commonwealth v. Dolan*, 155 Pa. Super. 453, 38 A.2d 508 (1944).

33. *Weinfeld v. Funk*, 342 Pa. 160, 20 A.2d 206 (1941); *Commonwealth v. Dolan*, 155 Pa. Super. 453, 38 A.2d 508 (1944).

34. *Commonwealth v. Dellcese*, 155 Pa. Super. 120, 38 A.2d 494 (1944); see, also, *Commonwealth v. Dolan*, *supra* n.32.

35. 310 Pa. 380, 165 A.2d 498 (1933).

murder. He was brought to trial, and a jury was sworn, but it was discharged before verdict without the acquiescence of the defendant. In a subsequent trial for murder on the same facts, the commonwealth's demurrer to defendant's plea of former jeopardy was overruled, and the commonwealth appealed. In sustaining the right of appeal in the face of numerous authorities to the contrary, the court stated:

"The criminal law must move forward to meet the new conditions which confront organized society if its law-abiding members are to be protected in their personal and property rights. Whatever the rule may have been in past decades, we think now when there is such wide latitude allowed those convicted of crime to appeal and have their convictions reviewed, there should be a liberalizing of the attitude towards the Commonwealth, where the defendant has been convicted, and the question ruled against the Commonwealth, as here, is purely one of law. . . . Our determination, therefore, is that the Commonwealth has the right to appeal."³⁶

In *Commonwealth v. Danis*³⁷ the trial court, in response to a plea of former acquittal, had removed a juror and directed the District Attorney to enter a nolle prosequi. The Superior Court, relying on *Commonwealth v. Sobel*³⁸ held that, there being no question as to the identity of the defendant, the commonwealth had the right of appeal. In the *Sobel* case, like the *Danis* case, the indictment and trial were for arson. On the grounds that all the material facts were undisputed and that only questions of law were before the court on appeal, the Superior Court was of the opinion that the appeal was from one of those situations "like" an order quashing an indictment or arresting judgment, and hence the appeal was allowed. Such an appeal will also be allowed where the trial court has first overruled the commonwealth's demurrer to the plea of *autrefois acquit*, then sustained the plea and discharged the defendant.³⁹

In view of the foregoing cases, and especially in view of the broad language in *Commonwealth v. Simpson*,⁴⁰ the commonwealth has the

36. *Commonwealth v. Simpson*, 310 Pa. 380, 383, 165 A.2d 498 (1933). For a contrary view of this point, see *Hilands v. Commonwealth*, 111 Pa. 1, 2 Atl. 70 (1885), which was in part overruled by the opinion in *Commonwealth v. Simpson*. In the *Hilands* case the court determined that an arraignment and conviction of first degree murder after a jury had been sworn and then discharged by the trial judge, involved double jeopardy. See, also, *Commonwealth v. Balles*, 163 Pa. Super. 467, 62 A.2d 91 (1948).

37. 130 Pa. Super. 597, 198 Atl. 183 (1938).

38. 94 Pa. Super. 525 (1928).

39. *Commonwealth v. Trimmer*, 84 Pa. 65 (1877); *Cf.*, *Commonwealth v. Bergen*, 134 Pa. Super. 62, 4 A.2d 64 (1938); *Commonwealth v. Biederman*, 109 Pa. Super. 70, 165 A.2d 765 (1933); *Commonwealth v. Sobel*, 94 Pa. Super. 525 (1928).

40. 310 Pa. 380, 165 A.2d 498 (1933).

right to appeal from any order sustaining a plea of *autrefois convict* or *autrefois acquit*, and from any order overruling the commonwealth's demurrer to a plea of former jeopardy, as long as no question of fact is presented.

F.

APPEAL BY THE COMMONWEALTH FROM THE SUPERIOR
COURT TO THE SUPREME COURT.

In numerous situations the commonwealth has been allowed to appeal from an adverse decision of the Superior Court to the Supreme Court, as long as only questions of law are involved.⁴¹ In several of these situations the Supreme Court has been even more careful than usual to point out the special circumstances under which the appeal was granted. For example, in *Commonwealth v. Vallone*,⁴² the court stated that the appeal was allowed because the case involved the proper interpretation and application of a rule of evidence which the court considered to be of extreme importance in its effects upon methods of criminal investigation by law enforcement officers. Likewise, in *Commonwealth v. Zasloff*,⁴³ a case involving an alleged violation of the then Fair Sales Act, the Supreme Court allowed the commonwealth's appeal for the express purpose of determining the constitutionality of the statute.

Where an appeal is allowed, the Supreme Court may directly reinstate the verdict and judgment of the court of quarter sessions,⁴⁴ and this is the more normal procedure. Even where the Superior Court has discharged defendant *sine die*, the Supreme Court is not precluded from ruling and reinstating the trial court's verdict. This situation was fully discussed in *Commonwealth v. Greevy*, where the court stated:

“ . . . Section 9 of the Act of June 24, 1895, P. L. 217, which provides that on appeals from the Superior Court ‘the whole proceeding shall be brought thereby within the jurisdiction and power of the Supreme Court, who may enter therein such judgment, order or decree as may be just, except that it may not in-

41. *Commonwealth v. Disanto*, 285 Pa. 1, 131 Atl. 489 (1925), *reversed on other grounds*, 273 U.S. 34 (1926); *Commonwealth v. Greevy*, 271 Pa. 95, 114 Atl. 511 (1921); *Commonwealth v. Hilton*, 265 Pa. 353, 108 Atl. 828 (1919). Logically, appeals from Superior Court orders granting new trials ought to be governed by the same rules as appeals from trial court orders granting new trials.

42. 347 Pa. 419, 32 A.2d 889 (1943).

43. 338 Pa. 457, 13 A.2d 67 (1940); see, also, *Commonwealth v. Hallberg*, 374 Pa. 554, 97 A.2d 849 (1953).

44. *Commonwealth v. Disanto*, 285 Pa. 1, 131 Atl. 489 (1925), *rev'd on other grounds*, 273 U.S. 34 (1926).

crease (although it may reverse) a sentence upon an indictment.' This decides adversely to defendant the question last referred to. . . .

[Since the Superior Court] correctly decided that the evidence in the murder trial is not before us, we can, therefore, consider only the record proper, which consists of the indictment, the pleadings, the issue thereby formed, and the verdict."⁴⁵

The defendant had entered a plea of *autrefois acquit* on the trial, and this plea was not sustained. On appeal, the Superior Court sustained the plea and discharged defendant *sine die*. In reversing this decision of the Superior Court, the Supreme Court held that, although the defendant had been acquitted of felonious homicide, this did not preclude the commonwealth from establishing from the same facts the lesser crime of involuntary manslaughter.

G.

APPEALS BY THE COMMONWEALTH FROM SUMMARY JUDGMENTS BY A MAGISTRATE OR A JUSTICE OF THE PEACE.

Appeals of this nature generally fall into three classes:

- (1) Appeal from a judgment of acquittal.
- (2) Appeal from a decision of the court of common pleas discharging defendant on certiorari after a summary conviction by a magistrate or justice of the peace.
- (3) Appeal from an order of the court of quarter sessions finding defendant not guilty on a hearing *de novo* after an appeal by defendant from a conviction by a magistrate or a justice of the peace.

In the first class, the commonwealth has, without objection, appealed to the court of quarter sessions, and when it received an adverse judgment there, has appealed to the Superior Court.⁴⁶ In cases wherein the court of common pleas has discharged the defendant after a summary conviction, the commonwealth is also entitled to appeal.⁴⁷

However, the law is unsettled as to those appeals which fall into the third category. Early decisions established the rule that the commonwealth may appeal where the acquittal resulted from an erroneous

45. 271 Pa. 95, 98, 99, 114 Atl. 511 (1921).

46. *Commonwealth v. Kenney*, 32 Pa. Super. 544 (1907).

47. *Commonwealth v. Borden*, 61 Pa. 272 (1869); *Commonwealth v. Burkhart*, 23 Pa. 521 (1854); *Commonwealth v. Jackson*, 146 Pa. Super. 328, 22 A.2d 299 (1941).

construction of the penal statute involved,⁴⁸ or from a decision of the court of quarter sessions that the statute was unconstitutional.⁴⁹ In such cases it seems to be within the discretion of the appellate court whether a judgment should be entered against defendant where such an appeal is sustained, or whether a *procedendo* should issue.⁵⁰

The scope of appeals in such cases has been considered to be very narrow. In *Commonwealth v. Janower*,⁵¹ the Superior Court held that on an appeal from the judgment of a court of quarter sessions reversing a summary conviction after a hearing de novo, and entering judgment for defendant, the evidence is not part of the record and the appellate court will only consider whether or not the lower court was within the limits of its jurisdiction and proceeded with regularity according to law.⁵²

Another line of cases⁵³ indicates that the commonwealth can not appeal. In *Commonwealth v. Bertollette*⁵⁴ the Superior Court quashed an appeal of the commonwealth from a judgment of the court of quarter sessions which had found defendant not guilty on the ground that the rule, for violation of which he had been convicted by a justice of the peace, was void. The court held that no appeal lies from a judgment of not guilty entered by a quarter sessions court after a hearing de novo on appeal from a summary conviction by a justice of the peace.⁵⁵ In 1935, in *Commonwealth v. Peacock*,⁵⁶ the court further

48. *Commonwealth v. Forrest*, 170 Pa. 40, 32 Atl. 652 (1895).

49. *Commonwealth v. Hazen*, 20 Pa. Super. 487 (1902), *rev'd on merits*, 207 Pa. 52 (1903).

50. In *Commonwealth v. Forrest*, *supra* n.48, and *Commonwealth v. McComb*, 39 Pa. Super. 411 (1907), *aff'd*, per curiam, 227 Pa. 377 (1910), the lower court's decision was reversed and judgment given by the appellate court, while in *Commonwealth v. Hazen*, *supra* n.49, in a fact situation similar to that in *Commonwealth v. McComb*, and in *Commonwealth v. Immel*, 33 Pa. Super. 388 (1907), the Superior Court reversed with a *procedendo*.

51. 48 Pa. Super. 400 (1911).

52. In later cases, however, the evidence has been allowed as part of the record for specific purposes. See *Commonwealth v. Pahlman*, 118 Pa. Super. 175, 179 Atl. 910 (1935), and *Commonwealth v. Peacock*, 118 Pa. Super. 168, 179 Atl. 907 (1935).

53. *Commonwealth v. Bertollette*, 101 Pa. Super. 334 (1931); *Commonwealth v. Ahlgrim*, 98 Pa. Super. 595 (1930); *Commonwealth v. Benson*, 94 Pa. Super. 10 (1928); *Commonwealth v. Preston*, 92 Pa. Super. 159 (1927); see, also, *Commonwealth v. Long*, 276 Pa. 154, 120 Atl. 125 (1923). *Commonwealth v. Benson*, *supra*, is also authority for the proposition that only the Attorney General or the District Attorney can appeal on behalf of the commonwealth. An appeal by the attorney for a private prosecutor in the name of the commonwealth, without special allowance, will be quashed. In the above-mentioned opinion, the court distinguished *Commonwealth v. Immel*, *supra* n.50, on the ground that in that case the effect of the judgment had been equivalent to an order quashing an indictment or arresting judgment.

54. 101 Pa. Super. 334 (1931).

55. The court cited in support of this proposition *Commonwealth v. Benson*, *supra* n.53. See, also, *City of Scranton v. Noll*, 108 Pa. Super. 94, 164 Atl. 850 (1933).

56. 118 Pa. Super. 168, 179 Atl. 907 (1935).

discussed this problem. The defendant, having been convicted and sentenced by a magistrate for driving an overweight truck, appealed to the quarter sessions court which entered an order "sustaining the appeal," without having received any evidence. Upon the commonwealth's appeal, the Superior Court reversed with directions that the quarter sessions court hear the case de novo, and enter such judgment as the law and evidence might require. Defendant's motion to quash the appeal was denied. The court said that the appeal to it was in the nature of a certiorari and was not a writ of error or an appeal proper. In such instances according to the court's opinion the record of the court below is before the appellate court, including, since the Act of April 18, 1919,⁵⁷ the testimony taken in the court below for the purpose of a limited review. What the court meant by this may be questioned, since the act itself states that:

" . . . the appeal so taken shall not have the effect only of a certiorari to review the regularity of the proceedings in the court below."⁵⁸

Nevertheless, the court went on to say that, although there is no appeal from a judgment of not guilty in such cases:

" . . . on a trial by a judge without a jury in the court of quarter sessions, it is his duty 'to try the case de novo, to hear the evidence and arguments of counsel, to find the facts and thereupon to enter such judgments as would be warranted by the law and the evidence': Com. v. Brann, 78 Pa. Superior Ct. 345. And the judgment following such a trial should be 'Guilty' or 'Not Guilty'. A judgment affirming the justice of the peace, dismissing the appeal, or sustaining the appeal is not sufficient, but will be reversed: Com. v. Brann, *supra*; Com. v. Congdon, 74 Pa. Superior Ct. 286; Com. v. Oliver, 77 Pa. Superior Ct. 580; Com. v. Benson, *supra*; Com. v. Sesse, 95 Pa. Superior Ct. 552; Manerville v. Flenner, 84 Pa. Superior Ct. 246. And the Commonwealth may appeal from an order quashing a summary conviction: Com. v. Immel, 33 Pa. Superior Ct. 38; Com. v. Preston, *supra*, p. 161."⁵⁹

But, apparently, where there was a hearing on the evidence in the court of quarter sessions, an appeal by the commonwealth, will be quashed.⁶⁰

57. P.L. 72 § 1 (1919), 12 P.S. § 1165 (1952).

58. *Ibid.*

59. Commonwealth v. Peacock, 118 Pa. Super. 168, 171, 179 Atl. 907 (1935).

60. Commonwealth v. Peacock, *supra* n.59. However, in *Commonwealth v. Pahlman*, 118 Pa. Super. 175, 179 Atl. 910 (1935), the Superior Court reversed on appeal a judgment of the county court which had considered the evidence in an overweight truck case.

There is no uniformity whatever in the subsequent cases.⁶¹ The most that can be said is that the latest case holds merely that the commonwealth may appeal where the order of the court below in such instances is based on a question of law, and not a determination of the guilt or innocence of the parties.⁶²

H.

APPEALS FROM ORDERS QUASHING SEARCH WARRANTS.

The commonwealth may appeal from an order of the court of quarter sessions quashing a search warrant and directing that the seized matter be returned to the defendants, provided the appeal is based on that portion of the order directing that "the papers and other articles seized thereunder be returned to the defendants."⁶³ The rationale of this rule is that an order requiring officers to return seized property terminates the prosecution and is therefore a final judgment from which the commonwealth may appeal.⁶⁴ It has been held, nevertheless, in an almost identical situation, that if the commonwealth bases its appeal only on the portion of the order of the court directing that the seized materials be suppressed as evidence the appeal will not be allowed since that portion of the order does not dispose of the prosecution.⁶⁵

I.

APPEAL FROM A VERDICT AND JUDGMENT OF ACQUITTAL.

The Act of May 19, 1874⁶⁶ provides that:

“. . . in cases charging the offense of nuisance or forcible entry and detainer, or forcible detainer, exceptions to any decision or

61. *Commonwealth v. Hallinger*, 170 Pa. Super. 180, 84 A.2d 794 (1951); *Commonwealth v. Petersheim*, 166 Pa. Super. 90, 70 A.2d 395 (1950), and *Commonwealth v. Teman*, 134 Pa. Super. 36, 2 A.2d 960 (1938), are all consistent with *Commonwealth v. Peacock*, *supra* n.59, whereas in *Commonwealth v. Reitz*, 156 Pa. Super. 122, 39 A.2d 522 (1944), and *Commonwealth v. Wanamaker*, 128 Pa. Super. 528, 194 Atl. 681 (1937), the right of the commonwealth to appeal seems to depend on whether the judgment of not guilty in quarter sessions court was based on the alleged unconstitutionality or invalidity of the statute or ordinance in question.

62. *Commonwealth v. Hallberg*, 168 Pa. Super. 596, 8 A.2d 270 (1951), *reversed on other grounds*, 374 Pa. 554, 97 A.2d 849 (1953).

63. *Commonwealth v. Bruno*, 176 Pa. Super. 115, 106 A.2d 905 (1954).

64. *Commonwealth v. Rich*, 174 Pa. Super. 174, 100 A.2d 144 (1953).

65. *Commonwealth v. Montanero*, 173 Pa. Super. 133, 96 A.2d 178 (1953).

66. P.L. 219, § 1 (1874), 19 P.S. § 1188 (1952).

ruling of the court may also be taken by the Commonwealth, and writs of error or certiorari, as hereinbefore provided, may be issued from the supreme court to all criminal courts."

Except for the three instances pointed out by this statute, the commonwealth may not appeal from a verdict and judgment of acquittal, whether it be in cases involving felonies,⁶⁷ or merely misdemeanors.⁶⁸ It does not matter whether the prosecution is by indictment or summary proceedings;⁶⁹ and in prosecutions by indictment there may be no appeal by the state whether the verdict was returned by the jury of its own motion or pursuant to binding instructions.⁷⁰ Moreover, a verdict and judgment of acquittal obtained by fraud on the court is nevertheless a bar to an appeal by the commonwealth, unless it be found that the whole proceeding was a mere sham.⁷¹ Perhaps due to the fact that at common law the judge's charge to the jury was not part of the record, no appeal is allowed even where error is assigned in the judge's charge to the jury.⁷² This is not surprising in view of the fact that there can be no appeal from an acquittal even where a jury has been waived. The verdict of a judge trying a case without a jury pursuant to the Act of June 11, 1935 is a determination of fact as well as of law, with the same effect as the verdict of a jury, and if the defendant is acquitted, an appeal by the commonwealth will not lie.⁷³ It is well to note again that even where a judge incorrectly directs a verdict of acquittal and the jury returns that verdict, an appeal by the commonwealth will be quashed.⁷⁴ However, in *Commonwealth v. Dudenhoeffer*,⁷⁵ a case which stands alone, the commonwealth successfully appealed from a directed verdict of not guilty which followed an order sustaining, quite incorrectly, a plea of *autrefois*

67. *Commonwealth v. Steimling*, 156 Pa. 400, 27 Atl. 297 (1893).

68. *Commonwealth v. Obenreder*, 144 Pa. Super. 253, 19 A.2d 497 (1941); *Commonwealth v. Stillwagon*, 13 Pa. Super. 547 (1900); *Commonwealth v. Coble*, 9 Pa. Super. 215 (1899).

69. *Commonwealth v. Obenreder*, 144 Pa. Super. 253, 19 A.2d 497 (1941); *Commonwealth v. Kerr*, 150 Pa. Super. 598, 29 A.2d 340 (1942).

70. *Commonwealth v. Steimling*, *supra* n.67; *Commonwealth v. Heiland*, 110 Pa. Super. 188, 167 Atl. 439 (1933); *Commonwealth v. Tremeloni*, 93 Pa. Super. 432 (1927); *Commonwealth v. Weber*, 66 Pa. Super. 180 (1917).

71. *Commonwealth v. Kroekel*, 121 Pa. Super. 423, 183 A.2d 749 (1936).

72. *Commonwealth v. Stillwagon*, 13 Pa. Super. 547 (1900); *Commonwealth v. Coble*, 9 Pa. Super. 215 (1899).

73. *Commonwealth v. Snaman*, 131 Pa. Super. 383, 200 A.2d 106 (1938).

74. As stated *supra*, P. 39, if the court sustains a demurrer to the evidence, and goes on to direct a verdict of not guilty, the effect is acquittal, and the commonwealth may not appeal. See *Commonwealth v. Miller*, 150 Pa. Super. 604, 29 A.2d 343 (1942); *Commonwealth v. Kerr*, 150 Pa. Super. 598, 29 A.2d 340 (1942).

75. 105 Pa. Super. 254, 161 Atl. 426 (1932).

acquit.⁷⁶ One proffered explanation for this is that the appeal was really from an order overruling the commonwealth's demurrer to the plea of *autrefois acquit*, rather than from the verdict of not guilty. But the docket entries and the record as printed for use in the Superior Court contradict that explanation; *Commonwealth v. Dudenhoeffer*⁷⁷ remains a lonely exception among the numerous cases denying the commonwealth the right to appeal from a verdict and judgment of acquittal.

76. In this case the court held acquittal after directed verdict of not guilty of bastardy, is no bar to a prosecution for neglecting to support the child resulting from such illicit intercourse, since there was no identity of offense.

77. *Supra* n.75.