
Volume 38
Issue 2 *Dickinson Law Review - Volume 38,*
1933-1934

1-1-1934

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Recommended Citation

Joseph L. Kramer, *Appeals by the Commonwealth in Criminal Cases*, 38 DICK. L. REV. 129 (1934).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol38/iss2/5>

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the measure of damages to which the customer is entitled is the highest value which the stock may attain between the date of the conversion and a reasonable time after notice¹⁶ thereof.¹⁷ Third, a reasonable time is that period in which the customer could after notice of the conversion go into the market and purchase like shares of stock as those converted by the broker.¹⁸ Fourth, this period is a question of law and hence determined by the court,¹⁹ it normally being a period of fifteen to sixty days depending upon the circumstances.²⁰

E. M. Blumenthal.

APPEALS BY THE COMMONWEALTH IN CRIMINAL CASES

Lawyers as well as legal teachers and students undoubtedly will recognize the importance of the Court's holding in the recent case of *Commonwealth v. Simpson*¹ as to the right of the Commonwealth to appeal in criminal cases. It marks a step forward in the protection of both personal and property rights. Quoting from the decision—

"This is what we intended when we said in *Commonwealth v. Wallace*, 114 Pa. 405, 411, 6 Atl. 685, 687, 'For error in quashing an indictment, arresting judgment after verdict of guilty, and the like, the Commonwealth may remove the record for review without special allowance of the proper writ'. By the words 'and the like' we meant cases in which the ruling is against the Commonwealth on pure questions of law. Our determination is therefore that the Commonwealth has the right to appeal."

¹⁶Notice of conversion may be actual or constructive. In other words, the customer may acquire notice of the conversion by written or oral information from the broker or, the circumstances may be such that although the customer has received no actual notice he could not have possibly been ignorant of it.

Dinock v. U. S. National Bank, 55 N. J. L. 296 (1893); *Galigher v. Jones*, 129 U. S. 193 (1888); *Mayer v. Monzo*, supra note 14.

¹⁷Supra note 7; Act of 1929, P. L. 476.

¹⁸Supra notes 7 and 12.

¹⁹Supra note 7; Act of 1929, P. L. 476.

²⁰Supra note 14.

¹310 Pa. 380, 165 Atl. 498 (1933) where the Commonwealth appealed from an order of the lower court in overruling its demurrer to plea of former jeopardy entered by defendant to an indictment of murder on which he was about to be tried, giving judgment for him on the plea and discharging him from the indictment.

It should not be believed that the Court arrived at this holding in easy, logical steps. Indeed their path was anything but straight and narrow for the few but varied decisions in other states tend to confuse rather than to enlighten and lead.

Unknown to the early common Law,² appeals by the state in criminal cases are now recognized in practically every state in the union. But presumably because there was no precedent given us by England on which to lean, thereby forcing each state to shift for itself, the answers to the question as to when the state can appeal in criminal cases have been varied and dissimilar as well as limited. It is the purpose of this note to review briefly the situation in the United States with greater emphasis placed upon the Pennsylvania cases on the subject.

I

In England appeals by either the defendant or the crown were not regarded as a vested right until the statute of the 3rd of Queen Anne.³ It was not until the English Criminal Appeals Act of 1907 that the defendant was given the right to appeal from a verdict of guilty,⁴ and since no act has given the Crown the right to appeal, it is unknown.⁵

In the vanguard of the American States is Connecticut. There it has been held, both under a decision of the Supreme Court of Errors⁶ and an act of the Legislature,⁷ that the State has the right to appeal on all questions of law and after a reversal can even bring the defendant to trial again. Directly opposite is the holding in Minnesota where the State cannot appeal under any conditions or circumstances;⁸ Massachusetts,⁹ Texas,¹⁰ and Illinois¹¹ where the same is held; and Georgia where the State cannot appeal from the judgment of an intermediate Appellate Court overruling an original verdict of guilty.¹²

²Rex v. Wilkes, 98 Eng. Rep. 327 (K. B. 1770).

³Lord Mansfield in the case of Rex. v. Wilkes, 98 Eng. Rep. 327, 340, (K. B. 1770) says, "Writs of error in criminal cases are (were) not grantable ex debito justitiae but ex gratia regis" previous to this time.

⁴Stephen, *General View of Criminal Law*, (2nd ed. 1881) 171.

⁵1 Chitty *Criminal Law* at 660. An only exception to this is where the accused has practiced fraud on the Crown during the trial.

⁶State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894).

⁷Conn. Gen. St. (1930) Sec. 6494.

⁸State v. McGrorty, 2 Minn. 224 (1858); State v. Johnson, 146 Minn. 468, 177 N. W. 657 (1920).

⁹Com. v. Cummings, 3 Cush. (Mass.) 212, (1849).

¹⁰Prescott v. State, 52 Tex. Cr. App. 35, 105 S. W. 192 (1907).

¹¹People v. Barber, 348 Ill. 40, 180 N. E. 633 (1932).

¹²State v. B'Gos.—Ga.—; 165 S. E. 566 (1932) seems to indicate that a writ of error can not be sued out by the state in any criminal case unless under a right conferred by statute.

Between these states are the decisions and statutes in other states providing for appeals by the State in a limited number of cases. The most common of these are from (1) an order setting aside or quashing an indictment or information, (2) an order sustaining a demurrer to an indictment or information, (3) an order arresting judgment after verdict of guilty on any ground, (4) an order granting a new trial. Statutes in twenty-one states allow appeals by the State in one or all of these instances.¹³ When the statute is not express in its declaration that the State can appeal in all these instances, the Courts have so interpreted the statutes as to exclude those not expressly set forth.¹⁴ In only two states, Pennsylvania¹⁵ and South Carolina,¹⁶ can the State appeal without the right being conferred by a statute. A few states allow appeals only in case of major offenses¹⁷ and a few more only in case of minor offenses.¹⁸

*U. S. v. Sanges*¹⁹ laid down the rule that the United States has no right to appeal a criminal case of any grade after judgment for the defendant below. The Court subsequently followed this ruling in the case of *U. S. v. Burroughs*.²⁰ But here they enumerated the three exceptions as provided in the Criminal Appeals Act of 1907. These exceptions are—(1) Decisions quashing an indictment or sustaining a demurrer to an indictment based upon the invalidity or construction of the statute on which the indictment is founded, (2) decisions arresting judgment for insufficiency of the indictment, based upon such invalidity or construction of the statute, (3) decisions sustaining a special plea in bar when the defendant has not been put in jeopardy.

II

One of the earliest cases in Pennsylvania on the subject of the right of the Commonwealth to appeal is *Commonwealth v. Taylor*.²¹ There the defendant was indicted for forcible entry and malicious mischief. The lower

¹³See Feinberg's note in 10 N. Y. L. Q. R. 373, 376.

¹⁴*State v. Weathers*, 13 Okla. Cr. 92, 162 Pac. 239 (1917); *State v. Minnick*, 33 Ore. 158, 54 Pac. 223 (1898); *State v. Key*, 93 Miss. 115, 46 So. 75, (1908).

¹⁵*Com. v. Wallace*, 114 Pa. 405, 6 Atl. 685, (1886). A full discussion of the Pennsylvania cases will be given later.

¹⁶*State v. Bouknight*, 55 S. C. 353, 33 S. E. 451 (1899) allowing an appeal from quashing of an indictment; and *State v. Long*, 66 S. C. 398, 44 S. E. 960, (1903) allowing an appeal from a judgment reversing a conviction on the ground there was no basis for the indictment.

¹⁷*State v. Harrison*, 154 La. 1011, 98 So. 622, (1923); *City of Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892, (1916); *State v. Adams*, 142 Ark. 411, 218 S. W. 845 (1920).

¹⁸*Com. v. Trall*, 146 Ky. 109, 152 S. W. 202, (1912); *Com. v. Gritten*, 180 Ky. 446, 202 S. W. 884 (1918).

¹⁹144 U. S. 310, 36 L. Ed. 445 (1892).

²⁰— U. S. —, 77 L. Ed. 685, (1932).

²¹*Binney* (Pa.) 277, (1812).

Court arrested judgment after a verdict of guilty. The Commonwealth took an appeal and the lower Court was reversed. Nothing was said about the right of the Commonwealth to appeal. The Court seemingly assumed that the Commonwealth had the right to appeal. This implied ruling that the Commonwealth has the right to appeal from an order arresting judgment after a verdict of guilty, has been followed many times.²²

In *Commonwealth v. McKisson*²³ the lower Court quashed the indictment. The Commonwealth took an appeal and succeeded in having the lower Court reversed. This case was followed in *Commonwealth v. Wallace*²⁴ which is a leading and important case on the subject in Pennsylvania. There the defendant was indicted for false pretenses. The lower Court quashed the indictment. In sustaining the Commonwealth's appeal, the Supreme Court said at page 411.

"To erroneous decisions made in the trial which may cause the acquittal of the accused, except in the three misdemeanors already mentioned (nuisance, forcible entry and detainer, and forcible detainer), the Commonwealth cannot except and such decisions cannot be reviewed. But for error in quashing an indictment, arresting judgment after verdict of guilty, and the like, the Commonwealth may review the record for review without special allowance of the proper writ."

These and many other cases²⁵ definitely establish the right of the Commonwealth to appeal from an order quashing an indictment.

The right of the Commonwealth to appeal from a defendant's demurrer to the evidence is recognized in Pennsylvania. The earliest case is *Commonwealth v. Parr*.²⁶ There the defendant's demurrer was sustained. The Commonwealth took an appeal and the lower Court was reversed. This right is now well established.²⁷

²²*Com. v. Jackson*, 1 Gr. Pa. 262 (1855); *Com. v. Moore*, 99 Pa. 570 (1882); *Com. v. Wallace*, 114 Pa. 405 (1886); *Com. v. Fulton*, 263 Pa. 336 (1919); *Com. v. Bateman*, 92 Pa. Super. Ct. 53 (1927); *Com. v. Sexton*, 107 Pa. Super. Ct. 69 (1932); *Com. v. Kline*, 107 Pa. Super. Ct. 594, (1933); *Com. v. Simpson*, 310 Pa. 380, (1933).

²³8 S. & R. (Pa.) 420, (1822).

²⁴114 Pa. 405, (1886).

²⁵*Com. v. Church*, 1 Pa. 105 (1845); *Com. v. Heikes*, 26 Pa. 513 (1856); *Com. v. Haas*, 57 Pa. 443 (1868); *Com. v. Bartilson*, 5 Pa. W. N. C. 177 (1877); *Com. v. McHale*, 97 Pa. 397 (1881); *Com. v. Sober*, 15 Pa. Super. Ct. 520 (1901); *Com. v. Carlucci*, 48 Pa. Super. Ct. 72 (1911); *Com. v. Haines*, 57 Pa. Super. Ct. 616 (1914); *Com. v. Ross*, 58 Pa. Super. Ct. 412 (1914); *Com. v. Scott*, 88 Pa. Super. Ct. 68 (1926); *Com. v. Wooden*, 94 Pa. Super. Ct. 452 (1928); *Com. v. McDermott*, 94 Pa. Super. Ct. 470 (1928); *Com. v. Vancel*, 99 Pa. Super. Ct. 40 (1930); *Com. v. Simpson*, 310 Pa. 380 (1933).

²⁶5 W. & S. (Pa.) 345 (1843).

²⁷*Com. v. Capp*, 48 Pa. 53 (1864); *Com. v. Wallace*, 114 Pa. 405 (1886); *Com. v. Kolsky*, 100 Pa. Super. Ct. 596 (1930); *Com. v. Simpson*, 310 Pa. 380 (1933).

The Act of May 19, 1874, P. L. 219 provides that the Commonwealth may except to any decisions or rulings of the Court in cases charging the offenses of nuisance, forcible entry and detainer and forcible detainer. While this provision of the Act of 1874 was repealed by the Act of May 19, 1896, P. L. 67, the Courts have constantly recognized the right of the Commonwealth to appeal in cases involving a nuisance²⁸ and forcible entry and detainer or forcible detainer.²⁹ *Commonwealth v. McNaugher*³⁰ allowed an appeal in a nuisance case and then reversed the judgment of the lower Court which had been entered on a verdict of not guilty.

Also the Commonwealth has the right to appeal where a new trial has been granted on a question of law. In *Commonwealth v. Curry*³¹ the defendant was indicted for violating the Pure Food Law. The lower Court set aside the verdict of guilty on a motion for a new trial. The constitutionality of the law was the issue involved. The Superior Court reversed the lower Court and said that this was an instance where the words "and the like" in *Commonwealth v. Wallace*³² applied. In *Commonwealth v. Sobel*³³ the defendant was convicted on the second count in the indictment. The lower Court granted a new trial and then sustained a plea of autrefois acquit because the defendant had been acquitted on the first count. The Commonwealth's appeal was allowed and the lower Court reversed, the Superior Court feeling it involved a question of law. If the granting of a new trial is based solely on a question of fact, however, the Commonwealth can not appeal.³⁴

The Commonwealth has appealed in another isolated instance in Pennsylvania. In *Commonwealth v. Reed*³⁵ the defendant was indicted for robbery. With the consent of the private prosecutor but against the wishes of the District Attorney a nolle prosequi was entered. The District Attorney took an appeal which was allowed on the ground that he had not consented to it and a nolle prosequi does not act as an acquittal.

While the Commonwealth can appeal in the aforementioned cases, it can never appeal from a verdict of "not guilty" (except in the cases of nuisance, forcible entry and detainer and forcible detainer where the Commonwealth has the complete right of review³⁶) whether the verdict is the result of

²⁸*Com. v. Wallace*, 114 Pa. 405 (1886); *Com. v. Bradney*, 126 Pa. 199 (1889); *Com. v. Cassell*, 1 Pa. Super. Ct. 476 (1896); *Com. v. Simpson*, 310 Pa. 380 (1933).

²⁹*Com. v. Wallace*, *supra*; *Com. v. Simpson*, *supra*; *Com. v. Heiland*, 110 Pa. Super. Ct. 188, 167 Atl. 439 (1933).

³⁰131 Pa. 55 (1890).

³¹14 Pa. Super. Ct. 356 (1897).

³²114 Pa. 405 (1886).

³³94 Pa. Super. Ct. 525 (1928).

³⁴*Com. v. Supansic*, 93 Pa. Super. Ct. 111 (1927).

³⁵65 Pa. Super. Ct. 91 (1916).

³⁶*Com. v. Wallace*, 114 Pa. 405 (1886).

an error on the part of the jury or the Court in stating the law³⁷ or an error on the part of the Court in directing an acquittal.³⁸

III

The desirability of appeals by the state is fast becoming more widely recognized. The American Law Institute's "Code of Criminal Procedure"³⁹ recommends five instances in which the state should be given the right to appeal; namely, from

1. An order quashing an indictment or information or any count thereof.
2. An order granting a new trial.
3. An order arresting judgment.
4. A ruling on a question of law adverse to the State where the defendant was convicted and appeals from the judgment.
5. The sentence, on the ground that it is illegal.

It is submitted that the views of these men are far ahead of the prevailing viewpoint.

One of the reasons most frequently advanced against giving the state the right to appeal in criminal cases is the doctrine of double jeopardy. Inserted in the Federal Constitution and followed in practically all of the State Constitutions, this doctrine decrees that no man shall be twice put in danger of loss of life or limb for the same offense. The U. S. Supreme Court in *Ex Parte Lange*⁴⁰ so interpreted "life or limb" as to extend protection against double jeopardy to all criminal offenses. The Pennsylvania Supreme Court has not followed this interpretation. The Pennsylvania view, as reiterated in *Commonwealth v. Simpson*,⁴¹ has been that "life and limb" only applies to those cases in which life or limb is actually in danger, i.e., first degree murder. Certainly this view of double jeopardy will remove barriers blocking appeals by the state. More freedom in appealing by the state will mark a great step forward in the more successful enforcement of our criminal law.

Having eliminated double jeopardy as an objection to appeals by the

³⁷Com. v. Steimling, 156 Pa. 400 (1893); Com. v. Coble, 9 Pa. Super. Ct. 215 (1899); Com. v. Stillwagon, 13 Pa. Super. Ct. 547 (1900); Com. v. Long, 276 Pa. 154 (1923); Com. v. Preston, 92 Pa. Super. Ct. 159 (1927); Com. v. Ahlgrim, 98 Pa. Super. Ct. 595 (1930).

³⁸Com. v. Weber, 66 Pa. Super. Ct. 180 (1917); Com. v. Heiland, 110 Pa. Super. Ct. 188, 167 Atl. 439 (1933).

³⁹Official Draft, June 15th, 1930, Sec. 428, Pg. 155.

⁴⁰18 Wall. 163, 21 L. Ed. 872 (1873).

⁴¹310 Pa. 380 (1933).

state in all cases save first degree murder in Pennsylvania, we are confronted with the plea of *autrefois acquit*. Briefly the plea of *autrefois acquit* is this—once having been acquitted, the defendant cannot again be brought into Court and tried anew for the same offense. This plea is not protected by the Constitution nor does its existence depend upon statute, being a common law plea in origin and existence. That being so, the plea could be wiped out by a decision of the Supreme Court. But having been enunciated so unequivocally and emphatically as a valid plea by that tribunal, it is a little too much to expect a complete reversal. Therefore the more logical means of extinguishing it is by legislative enactment. While there appears to be nothing to prevent this, yet the Pennsylvania Constitution provides in Article I, Section 6 that "trial by jury shall be as heretofore, and the right thereof remain inviolate." We are immediately met by the objection that abolition of *autrefois acquit* would be a violation of this provision of the constitution. It is at least debateable whether this objection is tenable. It may be argued that the finality of the verdict of the jury was meant to be protected only by the double jeopardy provision of the Constitution and that the right of trial by jury does not include the element of finality.⁴² Limits of space forbid any extended discussion of this interesting topic. It is submitted that abolition of *autrefois acquit* and allowance of appeals by the state, at least when pure questions of law are involved, would be an advanced step in creating more efficiency in our criminal Courts. Especially is this not to be abhorred when we consider that the jury is no longer held in the awe and respect it was a century or two ago.

Nor does the fact that it will occasion too many appeals, too great delay, expense and hardship, as some say, appear to be of great weight when we consider the good that will result to the people as a whole. Should it not be deemed to be the wisest policy to apply the law so as to derive the greatest good to the largest number of people? Whatever hardship may be experienced by the individual will be more than offset by the benefit to the people as a whole and the increased esteem in which the administration of the law will be held by the people, an esteem for which those connected with the law are forever striving. In the words of Justice Schaffer in *Commonwealth v. Simpson*:⁴³

"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 the past decades, we think now, when there is such wide

⁴²*Smith v. Times Publishing Co.*, 178 Pa. 481 (1897); *Com. v. Collins*, 268 Pa. 295 (1920); 17 C. J. 44, Sec. 3318.

⁴³310 Pa. 380 (1933).

latitude allowed those convicted of crime to appeal and have their conviction reviewed, there should be a corresponding 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."

It appears that more good than harm will result from an extension of the right of the state to appeal in criminal cases at least where the question involved is one purely of law, no matter at what time during the trial the question may have arisen.

Joseph L. Kramer.

CORPORATE STOCK AS TRUST PROPERTY IN NEW JERSEY

In the recent case of *Waterhouse's Est.*, 308 Pa. 422, 162 Atl. 295, Justice Kephart again set forth the Pennsylvania rules as to apportionment of stock dividends, stock rights, etc., in cases where a trust is created for life tenant and remaindermen. For the purpose of this article, the following outline of these rules will be followed:—

1. Basic rule : "The value of a trust estate, where its income is to be paid to life tenants with remainder over is determined as of the time the testator dies or when trust is created and is the intact value."
 - a. Prima facie, intact value is book value.
 - b. Intact value is subject to capital increases and losses. Burden of proof is on the person asserting a change.
2. Rules of distribution :
 - a. Ordinary cash dividends belong to life tenants, and are not "in absence of unusual circumstances, apportionable."
 - b. Extraordinary cash dividends; stock dividends.
 - (1) Presumption that same belong to life tenant.
 - (2) When following of such presumption would impair the intact value, there must be apportionment.
 - (3) When extraordinary dividends come from capital increases, such dividends belong to the corpus.
 - c. Sale of stock, producing income, at greater than intact value.
 - (1) Presumption is that proceeds belong to corpus.