THE HIGH COURT 1982 No. 414 SS.

(STATE SIDE)

THE STATE (COMMISSIONER OF VALUATION)

v.

HIS HONOUR JUDGE O'MALLEY.

Judgment delivered by Mr. Justice McWilliam on 27th day of January, 1984.

This matter comes before the High Court on the application of the Commissioner of Valuation for an Order of Certiorari directed to the Respondent, the Circuit Court Judge for the Midland Circuit, for the purpose of having quashed an Order of the Circuit Court Judge dated 16th February, 1982, whereby the Circuit Court Judge extended the time for lodging the recognisance required, by section 22 of the Valuation (Ireland) Act, 1852, to be lodged within three days after being entered into, on the institution of an appeal by the Westmeath Co-Operative Argicultural and Dairy Society against a revised valuation of its property.

I have not been furnished with any figures, but I cannot believe that this particular re-valuation can be a

matter of great financial significance to either the Co-Operative Society or the Commissioner. However this may be, it has caused me considerable difficulty both to ascertain the principles applicable and the correct application of them.

Section 22 of the Act of 1852 provides that, within the time specified in the section, a person aggrieved by any valuation may give notice of appeal to the quarter sessions, now the Circuit Court, and shall, within five days of giving notice of appeal, enter into a recognisance in the sum of £5 before a justice of the peace conditioned as therein provided. The section then proceeds as follows:-

"and within three days after such recognisance shall have been entered into, the magistrate before whom such recognisance shall have been entered, or clerk of the petty sessions, shall send the same by post, or shall forward the same to the office of the clerk of the peace for the respective county or place ....."

The effect of section 6 of the Adaptation of Enactments Act, 1922, section 2 of the District Justices (Temporary Provisions) Act, 1923, and section 78 of the Courts of Justice Act, 1924, is to provide that every power or duty imposed on a Justice of the Peace may be exercised or performed by a District Justice.

Section 88 of the Courts of Justice Act, 1924, provide that a Peace Commissioner shall have all the powers and authorities formerly vested in a Justice of the Peace in respect of taking recognisances.

By section 48 of the Courts Officers Act, 1926, the duties of the clerks of petty sessions were vested in the district court clerks for the relevant districts. By section 38 of the same Act, the powers and duties of the clerk of the peace were conferred upon and are exercised by the County Registrar.

An appeal was lodged on behalf of the Co-Operative Society on 29th July, 1981. On the same day a recognisance was entered into before a Commissioner for Oaths but this

was not forwarded to the office of the County Registrar until 9th October, 1981.

This proceedure failed to comply with the provisions of the Act of 1852 in two respects. It was not entered into before a District Justice or a Peace Commissioner and it was not forwarded to the office of the County Registrar within three days after it had been entered into.

On 16th February, 1982, application was made to the Circuit Court Judge for an extension of time for entering the recognisance. It would appear from the form of the affidavit supporting this application that, at the date of the affidavit, it was not realised that the recognisance might not have been entered into before a proper officer under the provisions of section 22. It is not clear to me whether this point was made in the Circuit Court on behalf of the Commissioner of Valuation or not, but the operative part of the Order of the Circuit reads - "And it appearing to the Court that the Recognisance lodged by the Appellants

"is not in accordance with section 22 of the above Act, it is ordered that the time for lodging the required recognisance be and the same is hereby extended for twenty-one days from this date." Objection is taken by the Commissioner that the recognisance was not entered into before a required officer and that, even if it was, it was not lodged in time and that there was no jurisdiction in the Court to extend the time either for entering into the recognisance or for lodging it.

On behalf of the Respondent it is submitted that secti 50 of the Civil Bill Courts Procedure Amendment Act (Irelan 1864, enables the Circuit Court to give liberty to an appellant to enter into a new and sufficient recognisance and to extend the time for so doing. It is also submitted that Rule 2 of Order 46 of the Circuit Court Rules providin that a recognisance shall be executed in the presence of the Judge or a County Registrar or a Commissioner to administer oaths is such an adaptation or modification of section 22 of the 1852 Act as to be authorised by the provisions of

section 66 of the Courts of Justice Act, 1924. Finally, it was submitted that, in so far as section 22 of the 1852 Act imposed a financial condition prior to the institution of an appeal, it offended against the provisions of the Constitution as hindering the right of access to the courts.

I propose to deal with this last submission first. I was referred to some cases, including Macauley -v- Minister for Posts and Telegraphs (1966) I.R. 345 and the judgment of Carroll, J., in L'Henrygenat -v- Ireland & Others, but they were not opened to me and the argument was not supported by any authority dealing with a recognisance. A recognisance is a form of bond and does not require the payment of any money other than whatever fee may be payable on entering into it. It is conditioned on the prosecution of the appeal, abiding by the order of the Court and the payment of any costs awarded on the hearing of the appeal. It has not been suggested that the payment of court fees on the institution of proceedings or the liability to a possible award of costs at the conclusion of them are such a hindrance to access to

the courts as to offend against any provision of the Constitution. Even if such a proposition were put forward and accepted, it does not appear to me that it would invalidate the requirement of a recognisance. Having forme the opinion that the requirement of a recognisance does not contravene any of the provisions of the Constitution, it is unnecessary for me to consider the point made on behalf of the Commissioner that a company cannot have personal rights of such a nature as are protected in the case of individuals

Section 50 of the 1864 Act provides as follows:-

"And whereas the Act now in force giving a right of appeal to the Courts of General Quarter Sessions in Ireland, ... frequently require a recognisance or recognisances to be entered into as a condition of such appeal, and appellants are liable to be prevented from trying their appeals upon the merits in consequence of imperfections in the taking of such recognisances: Be it enacted, That where any recognisan or recognisances which shall have been entered into within the time by law required, before any justice or justices,

for the purpose of complying with any such condition of appeal, shall appear to the court before which such appeal is brought to have been insufficiently entered into, or to be otherwise defective or invalid, it shall be lawful for the court, if it shall so think fit, to permit the substitution of a new and sufficient recognisance or new and sufficient recognisances, and for that purpose to allow such time, and make such examination, and impose such terms as to payment of costs to the respondent or respondents, as to such court shall appear just and reasonable, and such substituted recognisance or recognisances shall be valid to all intents and purposes as if the same had been duly entered into at any earlier time or times as required by an Act or Acts now in force."

On behalf of the Commissioner it is submitted that the expression "the Act now in force" at the commencement of the section refers to the Petty Sessions (Ireland) Act, 1851, which, by section 24, gave a right of appeal in cases of summary jurisdiction on entering into the recognisances

therein provided. I do not accept this submission. Sectic 50 reads "whereas the Act now in force ..... frequently require a recognisance ....." It is clear that there is a misprint as the section should read either "Acts require" or "Act requires". As the concluding words of the section refer to recognisances duly entered into as required by any Act or Acts now in force, I am of opinion that the word "Ac" at the beginning of the section should be read "Acts". Both the Petty Sessions Act and the Valuation Act were in force at the time of the enactment of this section and I am of opinion that it applies to both Acts. But this does not conclude this aspect of the case because section 50 is expressed to apply only to recognisances entered into withi the time required by law before any justice or justices. Under the enactments I cited at the beginning, I am of opinion "justice or justices" must now be interpreted as "a District Justice or a Peace Commissioner". This recognisance was not entered into before either and was not entered into within the time required by law so section 50

has not got any application to the present case.

With regard to the submission that Rule 2 of Order 46 of the Circuit Court Rules enabled the recognisance to be entered into before a Commissioner for Oaths, it was argued on behalf of the Commissioner of Valuation that there was no power in the rule-making authority to make a Rule varying an express provision of a statute. I was referred to a number of authorities.

Section 66 of the Courts of Justice Act, 1924, provided that rules for the Circuit Court could be made for all or any of the following purposes:- "For regulating the sessions, vacations and circuits of the Circuit Judges and the practice, pleading and procedure generally (including liability of parties as to costs and also entering up of judgment and granting of summary judgment in appropriate cases) of the Circuit Court and the use of the national language of Saorstat Eireann therein and the fixing and collection of fees and the adaptation or modification of any

"statute that may be necessary for any of the purposes aforesaid and all subsidiary matters." Similar provisions with regard to District Court rules were contained in section 91.

In the case of The State (O'Flaherty) -v- O'Floinn (1954) I.R. 295 it was held that a District Court rule purporting to extend the time during which an accused could be remanded from the period of eight days provided by the Indictable Offences Act, 1894, to a period of fifteen days was ultra vires. Consideration was given to the question whether this extension of time for remand was merely a matter of practice or procedure and an adaptation or modification of the statute for the purposes of the section within the meaning of the 1924 Act. Davitt, P., in the High Court held that the power to remand in custody is a matter of jurisdiction and that the extension of the period of remand was not a matter merely of procedure or practice. Kingsmill-Moore, J., said, at page 305, with regard to the

expression "the adaptation or modification of any statute" that these words "do not warrant the rule-making authority in framing a rule which in the guise of an alteration in practice or procedure nevertheless operates to extend enormously a substantive power which the legislature was careful to confer in a restricted form." O'Dalaigh J., contrasted the use of the expression "adaptation or modification" with the omission to use the word "amendment" and held that the increase in the maximum period of custody was radical in character and more than the mere modification permitted by section 91 of the Act and was, therefore ultra vires.

In the case of Thompson -v- Curry (1970) I.R. 61, Walsh, J., accepted the proposition that a rule-making authority cannot amend a statute but can only adapt or modify it as may be necessary. The view of the Court was that it would constitute an amendment of a statute, as apart from an adaptation or modification of it, to dispense with a statutory condition precedent and that a rule containing such a

provision would be ultra vires.

I am of opinion that a rule enabling a recognisance to be taken before a Commissioner for Oaths would be a rule regulating a procedural matter within the meaning of the statute and would effect an adaptation rather than an amendment. But the use of the word "shall" in the rule presents difficulties. Read in the ordinary sense of that word, the rule provides that a recognisance may not be taken in any other manner. In so far as it is argued that the rule applies to the recognisance required by section 22 of the 1852 Act, I am of opinion that such a rule would be ultra vires the rule-making authority and that the submissior on behalf of the Commissioner that the rule does not apply to any statutory recognisance is correct. It is significant that a similar provision is contained in Rule 205 of Order 27 of the County Courts (Ireland) Orders, 1877, and Rule 3 of Order 34 of the County Courts (Ireland) Orders, 1890. Although section 79 of the County Officers and Courts (Ireland) Act, 1877, providing for the rules to be made for

the County Court, did not give any power to adapt or modify any statute, it seems to me that, in carrying over this rule into the present Circuit Court Rules, it was intended that the rule should apply only to recognisances required by the Circuit Court for which no statutory provision had been made. Certainly it would be an unusual exercise by a rule-making authority of its powers that a function given by statute to a District Justice should be transferred by a rule of court to the Circuit Judge.

If I am correct in my opinion, that disposes of the matter, but, if I am not, and the recognisance was properly entered into, it remains to consider the statutory requirement that the recognisance be filed within three days In the Circuit Court case of Cox, Dugdale and McGovern -v- Commissioner of Valuation (1970) 104 I.L.T.R. 41, recognisances were entered into before a District Justice in accordance with the statute but they were not forwarded to the County Registrar within three days after being entered into. Under the provisions of the section it was the duty

of the District Justice or the District Court Clerk to forward them to the County Registrar. The Circuit Court Judge gave liberty to enter into a new or sufficient recognisance under the provisions of section 50 of the 1864 Act on the grounds that the appellants should not be prejudiced by the default of a public servant in the discharg of his duty, but he expressed a doubt about his power to extend the time for forwarding the recognisances to the County Registrar.

The case of Attorney General -v- Shivnan (1970) I.R. 66 indicated that a rule permitting the Court to extend a time laid down by statute, where the time laid down by the statute is adopted by the rules in the first instance, is merely an adaptation or modification on a procedural matter and is therefore within the competence of the rule-making authority. But I have not been referred to any rule in the Circuit Court Rules dealing with appeals under section 22 of the Act of 1852. Rule 6 of Order 59 only gives power

to extend times fixed by the Rules. In the case of Ganly & Others -v- Minister for Agriculture (1950) I.R. 191, Kingsmill Moore, J., held that the Court had no power to extend a time limit fixed by the Fisheries Act, 1925, although the length of time fixed by the Act appeared to be unreasonable. It does not appear from the report on what ground the application for an extension of time was made but, presumably, a general jurisdiction in the Court was alleged. There is no suggestion that any argument was presented that any rule specifically attempted to enlarge the time fixed by the statute, as was the case in Attorney General -v- Shivnan. I am of opinion on the authorities that the Co-Operative Society was bound by the time limit of three days for forwarding the recognisance to the County Registrar and that the Court had no power to extend this time.

In accordance with these opinions, I will make absolute the conditional order of certiorari made on 30th July, 1982.