



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2020:000111

**Clarke C.J.
O'Donnell J.
Charleton J.
O'Malley J.
Baker J.**

Between/

The Director of Public Prosecutions

Applicant/Appellant

–AND–

District Judge Elizabeth McGrath

Respondent

–AND–

John Matthews

First Notice Party/Respondent to the Appeal

–AND–

Gerard Gearty

Second Notice Party

Judgment of Mr. Justice O'Donnell delivered on the 21st day of September, 2021.

1. More than 160 years ago in *R. v. Beadle* (1857) 7 El. & Bl. 492, 119 E.R. 1329, Lord Campbell C.J.Q.B. observed that the law in relation to the award of costs against an official prosecutor (in that case, the Crown) was not in a satisfactory state and was in need of review. If the law had been clarified in the meantime, the news had certainly

not reached the District Court in County Leitrim by 2009, and the need for review has led to the appeal to this Court, and some elaborate argument now 12 years later.

Background

2. The first named notice party (“Mr. Matthews”) is a wildlife ranger for the National Parks and Wildlife Service. On the 28th of April, 2009, he was involved in an altercation with the second named notice party (“Mr. Gearty”) at Cloonart near Roosky, County Roscommon. As a result of complaints made, both Mr. Matthews and Mr. Gearty were prosecuted in the District Court for assault. The summonses came on for hearing on the 31st of July, 2009, before the respondent District Judge with Superintendent Shields prosecuting the cases on behalf of the D.P.P. The case was heard for a number of hours, which included a cross-examination of Mr. Matthews by the solicitor on behalf of Mr. Gearty. However, the court did not finish the hearing on that day and it was adjourned to the 16th of September, 2009.
3. Prior to the hearing recommencing on that day, however, the parties were informed that the D.P.P. had directed that both prosecutions be withdrawn. On the adjourned date, the solicitor for Mr. Matthews invited the court either to proceed with the cases or to adjourn them to permit or, perhaps more accurately, require the D.P.P. to provide reasons. After hearing argument, the District Judge struck out the prosecutions and ordered the costs of the prosecution to be paid to both parties by the D.P.P. After some correspondence, the solicitor on behalf of Mr. Matthews delivered a bill of costs to Superintendent Kerrins of Carrick-on-Shannon, copied to Superintendent Shields. This prompted the D.P.P. to apply for judicial review of the order of the District Judge of the 16th of September, 2009, on the grounds that O. 36, r. 1 of the District Court Rules of 1997 precluded the making of an order for costs against the D.P.P. or any member of An Garda Síochána prosecuting on his or her behalf.

4. In the High Court, Hanna J. made an order of *certiorari* quashing the order for costs of the 16th of September, 2009. The Court of Appeal (Edwards J.; Birmingham P. and McCarthy J. concurring) allowed Mr. Matthews’s appeal. By a determination of the 9th of February, 2021 ([2021] IESCDET 17), a panel of this court granted leave to the D.P.P. to appeal to this court against the decision of the Court of Appeal.
5. There is little or no dispute between the parties about the relevant provisions of primary legislation, Rules of Court, and even relevant case law that fall for consideration in this case. The dispute between the parties relates to the proper interpretation of these provisions. Accordingly, it may be helpful to set out the relevant provisions before briefly identifying the arguments each party makes and the rival interpretations they advance.

The Legislative Provisions and the Rules

6. Section 59 of the Dublin Police Act 1842 (“the 1842 Act”) provided that:-

“It shall be lawful for any divisional justice who shall hear and determine any charge or complaint ... to award such costs as to him shall seem meet to be paid to or by either of the parties to the said charge or complaint.”

It is accepted that the jurisdiction conferred by this Act on a Divisional Justice of the Dublin Metropolis was transferred to the newly created District Court by s. 78 of the Courts of Justice Act 1924 (“the 1924 Act”), which provided:-

“There shall be transferred to the District Court all jurisdiction which at the commencement of this Act was vested in or capable of being exercised by the Divisional Justices ... of the Police District of Dublin Metropolis ...”
7. It is also accepted that the jurisdiction so transferred was, in turn, transferred to the District Court created by the Courts (Establishment and Constitution) Act 1961 by the provisions of s. 33 of the Courts (Supplemental Provisions) Act 1961 (“the 1961 Act”).

8. Both the 1924 Act and the 1961 Act contain provisions permitting the making of rules by the District Court. Thus, s. 90 of the 1924 Act provided for a District Court Rules Committee. Section 91 provided that rules may be made:-

“... for all or any of the following matters, viz., for regulating the sittings and the vacations and the districts of the Justices and the places where proceedings are to be brought and the forms of process, summons, case stated, appeal or otherwise, and the conditions which a party who requires a case stated or an appellant must comply with in civil cases or in criminal cases or in licensing cases as the case may be and the practice and procedure of the District Court generally including questions of costs and the times for taking any step in the District Court, the entering-up of judgment and granting of summary judgment in appropriate cases and the use of the national language of Saorstát Éireann 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.” (*Emphasis added.*)

Section 101 of the 1924 Act, as originally enacted, provided that Rules of Court could not come into operation unless and until laid before both Houses of the Oireachtas and approved by resolution of each such House. The rule-making authority (which at that time, pursuant to s. 90 of the 1924 Act, was the Minister for Home Affairs acting with the concurrence of the Minister for Finance and with the assistance of a Committee drawn from the District Court bench and both branches of the legal profession) duly promulgated rules in July, 1926, which were laid before the Houses of the Oireachtas and approved. Rule 37(a) of the 1926 Rules contains the forebear of the provisions in issue in these proceedings and provided that no order of costs could be made against the Attorney General or a prosecuting Garda. The Rule provided that the court had power to award costs against:-

“... any party to the said charge or complaint other than the Attorney-General or a member of the Garda Síochána in his official capacity.” (*Emphasis added.*)

Subrule (b) of r. 37 provided, however, that subrule (a) did not extend to proceedings in relation to the taxes and duties under the care and management of the Revenue Commissioners, a provision which was to figure in the decided cases.

9. New District Court Rules were promulgated in 1948 (S.I. 431 of 1947). Rule 67 of the 1948 Rules was in similar terms to r. 37 of the 1926 Rules and provided:-

“A Justice who makes an order in any case of summary jurisdiction shall have power to order any party to the proceedings other than the Attorney General, or a member of the Garda Síochána acting in discharge of his duties as a police officer, to pay to the other party such costs and witnesses’ expenses as he shall think fit to award ...” (*Emphasis added.*)

Once again, a subrule excluded the operation of the Rule in Revenue and Customs matters. Section 34 of the 1961 Act provided for the exercise of the jurisdiction transferred from the District Court established under the 1924 Act to the new District Court established under the Courts (Establishment and Constitution) Act 1961:-

“The jurisdiction which is by virtue of this Act vested in or exercisable by the District Court shall be exercised as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court made under section 91 of the Act of 1924, as applied by section 48 of this Act.”

10. Section 48 of the 1961 Act adapted the Rules of Court then in force (that is, the 1948 Rules) to the newly established District Court and had the effect of continuing the power of the District Court Rules Committee (which had replaced the Minister of Home Affairs as the rule-making authority in 1936) to make rules for the District Court. The District Court Rules in force at the time that these proceedings commenced were

promulgated in 1997 (S.I. 93 of 1997) in this way, that is, under s. 91 of the 1924 Act as applied by s. 48 of the 1961 Act. Order 36, rule 1 of those Rules provided:-

“Where the Court makes an order in any case of summary jurisdiction (including an order to “strike out” for want of jurisdiction) it shall have power to order any party to the proceedings other than the Director of Public Prosecutions, or a member of the Garda Síochána acting in discharge of his or her duties as a police officer, to pay to the other party such costs and witnesses’ expenses as it shall think fit to award.” (*Emphasis added.*)

On this occasion, however, the exclusion of the operation of the Rule in Revenue matters was omitted from the Rules.

Mr. Matthews also points to the provisions of O. 38, r. 1(4) which provides that:-

“Where the court is of opinion that the complaint before it discloses no offence at law, or if neither the prosecutor nor accused appears, it may if it thinks fit strike out the complaint with or without awarding costs.”

It is argued that this appears inconsistent with the provisions of O. 36. Since, however, there is no question of the costs in this case being awarded or capable of being awarded either on the basis that the complaint did not disclose an offence or non appearance, it is not necessary to consider if the provisions of O. 38 r.1(4) operate to limit the exception contained in O. 36 in respect of an award of costs against the D.P.P., or whether O. 36, for its part, would operate to prevent the power contained in O. 38 being exercised against the D.P.P. or a Garda prosecuting on her behalf, but the difficulty of reconciling the two rules is an illustration of the uncertainty surrounding the powers of the Court in respect of costs.

11. Before turning to the case law, it is appropriate to observe that the line of statutory provisions set out above commences with the provisions of the 1842 Act which, at that time, and up until 1924, only governed the proceedings within the Police District of the

Dublin Metropolis. The Petty Sessions (Ireland) Act 1851 governed summary proceedings in the country outside the Dublin Police District and, in s. 22(9), contained a somewhat different provision:-

“In all cases the justices may order that the defendant shall pay to the complainant, or, in case of a dismissal, that the complainant shall pay to the defendant, such sum, not exceeding twenty shillings, for costs, as to such justices shall seem fit; ...”

12. One of the distinctive features of the Courts of Justice Act 1924 was the creation of a single District Court with an expanded jurisdiction which included both the powers and jurisdiction vested in a Justice of the Peace sitting at Petty Sessions (s. 77) and all jurisdiction vested in or capable of being exercised by the Divisional Justices of the Police District of Dublin Metropolis (s. 78). It by this route, it is said, that Mr. Matthews is able to invoke the provisions of the 1842 Act, itself limited to the Dublin Metropolitan Area, in respect of a decision of the District Court in County Leitrim. There does not appear to be any statutory provision, or court decision, as to the manner in which the inconsistency between s. 22(9) of the 1851 Act and s. 59 of the 1842 Act was to be resolved in the newly created District Court, if indeed it was understood that both provisions continued to apply and were not superseded by the provisions of the Rules made under the 1924 Act, as it appears from time to time to have been suggested. Section 22(9) of the 1851 Act was, however, repealed by s. 9 of the Courts (No. 2) Act 1986 with effect from the 22nd of July, 1988, but s. 59 of the 1842 Act was not addressed, and appears to have simply faded from view until invoked in this case.
13. Pausing here, it can be said that one point of consistency in this tangled history is that District Court Rules made since the foundation of the State — in 1926, 1948, and 1997, respectively — have all made provision for the award of costs, and each iteration of the rule in respect of costs has expressly excluded the power to award costs against the

official prosecutor, originally the Attorney General or a member of An Garda Síochána, and, by 1997, the D.P.P. and any Garda prosecuting on his or her behalf. The order for costs made in this case by the Respondent in favour of Mr Matthews and against the D.P.P. was not in compliance with the terms of Order 36 and was accordingly unlawful and must be quashed unless it can be established that the limitation in the rule is itself invalid. The issue which arises in this case is, the *vires* of the rule, particularly by reference to the provisions of s. 59 of the 1842 Act.

The Case Law

14. In order to put the contentions of the parties in their appropriate context, it is useful to set out, even in very limited terms, some of the decided cases which have considered the provisions of the District Court Rules and the power to award costs of an unsuccessful prosecution.
15. The provisions of s. 59 of the 1842 Act, s. 78 of the 1924 Act, and r. 37(a) of the 1926 District Court Rules were all considered in *The State (Hempenstall) v. Shannon and Reddin* [1936] I.R. 326 (“*Hempenstall*”). The claim was for maintenance under the Married Women (Maintenance in case of Desertion) Act 1886. The Act, itself, made no provision for costs and the husband who had contested the issue and failed contended there was no power to award costs against him. Sullivan P. (as he then was) held that the power to award costs under the 1842 Act was unlimited and had been transferred to the District Court by s. 78 of the 1924 Act and, furthermore, that the 1924 Act permitted rules to be made in regard to pleadings, and practice and procedure generally, including liability for costs, and r. 37(a) was validly made and conferred power to award costs in the case. It is not clear why it was considered necessary to invoke two sources for a general power to award costs. *Hempenstall* is significant for present purposes, however, both in treating the 1842 Act as a continuing source of the power to award costs in all

cases in the courts established under the 1924 Act and also in treating the general power to make rules in relation to costs as sufficient statutory authority to permit the making of rules in respect of costs in respect of the exercise of jurisdictions created by statute where the statute, itself, was silent on the question.

16. *The State (Minister for Lands and Fisheries) v. Sealy* [1939] I.R. 21 (“*Sealy*”) arose when a Circuit Court judge awarded the costs of an unsuccessful prosecution under the Sea Fisheries Protection Act 1933 (“the 1933 Act”) against the prosecutor, the then-relevant Minister. Section 9 of that Act provided for costs to be awarded to the prosecutor on a conviction, but made no corresponding provision for the award of costs to the defendant if a prosecution was unsuccessful. It was argued, on the application of the principle *expressio unius est exclusio alterius*, that the provision therefore precluded the award of costs in this case. It was also argued that, if the 1933 Act did not preclude the award of costs, such costs were limited by the provisions of s. 24(6) of the 1851 Act which (apparently corresponding to s. 22(9) dealing with summary hearings) limited costs on appeal from summary proceedings to Quarter Sessions to 40 shillings. A Divisional Court expressed the view that, since there had always been a right to obtain costs in such a case (the exclusion in the Rules not being applicable since the Attorney General was not the prosecutor), the provisions of the 1933 Act were to be interpreted as introduced *ex abundanti cautela* and to ensure that the Minister was entitled to recover costs in an appropriate case. The Court concluded that r. 37(a) of the 1926 District Court Rules gave a District Justice full discretion to award costs and, with some doubt, that the general provisions of the Circuit Court Rules had the same effect, and finally that the monetary limit contained in s. 24(6) of the 1851 Act did not apply since this was not an appeal under the 1851 Act to Quarter Sessions. Perhaps the most significant conclusion in the case was the view expressed by Henry Hanna J. that the effect of the decision was that the Circuit Court could exercise its discretion to award

costs in any criminal proceedings, a conclusion that anticipated the landmark decision in *People (Attorney General) v. Bell* [1969] I.R. 24 (“*Bell*”). *Sealy* is an early example of a degree of confusion about the interaction of the costs provisions of the twin Victorian statutes, the 1924 Act, and the Rules made under the latter. Counsel for the Minister described the 1926 Rules as “amending” or superseding the 1851 Act (p. 25 of the report) and no reference was made to the 1842 Act. The decision is also an early example of a strict approach to the interpretation of provisions which are contended to constrain a court’s discretion in relation to costs.

17. *Attorney General v. Crawford* [1940] I.R. 335 (“*Crawford*”) concerned the provisions of r. 37 of the 1926 Rules. This was a Customs case brought by the Attorney General, which was dismissed, and the District Justice considered it was a case in which to award costs and stated a case to the High Court as to his power to do so having regard to the District Court Rules. It was argued that the provisions of subrules (a) and (b) of r. 37 (set out at para. 10 above) cancelled each other out, leaving the position in Revenue matters governed by the pre-existing law. It was argued that under that law, costs could be awarded under the Crown Suits Act of 1855. It was argued on behalf of the Attorney General that the District Court Rules formed a complete code regulating costs in that court and superseded all rules previously in existence and inconsistent with them. Hanna J. held that, *prima facie*, the procedure laid down in the Rules were to be regarded as comprehensive, save where there was express or implied incorporation of extraneous provisions. The Attorney General could not rely on the exclusion contained in r. 37(a) because of the terms of subrule (b). However, subrule (b) also had the effect that no costs could be awarded to either party in a Revenue matter, since it disppplied the entirety of subrule (a) and not merely the provisions precluding costs against the Attorney General. The 1855 Act was inapplicable since the Attorney General was not a successor to the Crown for the purposes of that Act and, in any event, that provision

only meant that the same rule applied as between Crown and subject as between subject and subject which, in this case, was to be found in subrule (b). Hanna J. expressed the view that subrule (b) was quite unusual and unfair to both parties and should be set right by the Legislature. Maguire J. (as he then was) held that the District Court Rules “provide a complete and comprehensive code governing procedure and the incidence of costs in that Court, save where otherwise expressly provided by statute” and that r. 37 precluded the award of costs.

18. *Crawford* is an authority against the respondent, Mr. Matthews, in that it applies the provisions of r. 37 with the result that the successful defendant was not able to recover costs. However, counsel on behalf of Mr. Matthews argues that no reference was made to the 1842 Act as a possible source of a power to award costs and also argues that the fact that the Court at least considered the provisions of the Crown Suits Act 1855 showed an acceptance of the principle that the provisions in the Rules did not preclude the possibility of an award of costs if there was statutory authority to do so which, it is argued, s. 59 of the 1842 Act provides.
19. The case of *State (O’Flaherty) v. O’Floinn* [1954] I.R. 295 (“*O’Floinn*”) did not concern the Rules relating to costs, but is an important case on the extent of the power contained under s. 91 of the 1924 Act permitting the making of rules and “the adaptation or modification of any statute that may be necessary” for the purposes of such rules. Section 21 of the Indictable Offences (Ireland) Act 1849 provided for a remand in custody not exceeding eight days. Rule 55(4) of the 1948 Rules of the District Court provided for a remand in custody for a period not exceeding 15 days. Rule 1(3) of the 1948 Rules also provided, where the Rules conflicted with any statute in force at the date of making of the Rules, that “such statute may be modified or adapted to the extent of such conflict”.

20. Maguire C.J., dissenting, was prepared to hold that the Rule was an adaptation or modification permitted by s. 91 of the 1924 Act. The majority of the Supreme Court disagreed, however, and held that the provision was *ultra vires* the powers of the Rules Committee under s. 91. However, there was a difference of approach. Kingsmill Moore J. considered that the alteration of the period of remand could not be considered a matter of practice and procedure at all. He defined practice and procedure as “the manner in which, or the machinery whereby, effect is given to a substantive power which is either conferred on a Court by statute or inherent in its jurisdiction”. In other words, a matter of practice and procedure was essentially mechanical so that even if, in this case, there was a general power to remand, the Rules could only provide for *how* such applications were to be made and could not, for example, limit the maximum period of remand. Furthermore, the substantive jurisdiction could not be found in the power to make rules itself, but had to be found elsewhere: either conferred by statute or in the court’s inherent jurisdiction. There could be borderline cases where enlargement of a substantive power was so trifling or incidental as to be still considered a matter of practice and procedure, but the particular matter involved the liberty of the citizen and could not be so considered. He considered that the power of modification or adaptation did not indicate an intention that a wider definition should be given to the term “practice and procedure” since it would still be necessary to adapt some procedural rules and forms provided by statute “to make them applicable to the new institutions.”
21. Ó Dálaigh J. (with whom Lavery J. agreed) considered that provisions relating to the power to remand were part of the machinery to ensure that the court process was carried to completion and that was properly considered to be “procedure” and within s. 91. It appears, therefore, that three of the four members of the court took a broader view of the term “practice and procedure” than Kingsmill Moore J. However, in the instant case, Ó Dálaigh J. considered the change was too radical to be considered a

“modification”, a term which he considered meant, adopting a definition in the *Smaller Oxford Dictionary*, “[making] partial changes; to alter without radical transformation”. He cited, with approval, a passage from the judgment of Gavan Duffy P. in an earlier case, *State (Attorney General) v. Judge Roe* [1951] I.R. 172 (“*Roe*”), to the effect that the range of contemplated interferences with statute law were shown by the use of two of the mildest nouns in the language “modification” and “adaptation” denoting change, and the use of the word “necessary” which implied reasonably necessary. It was also noteworthy that the Legislature had eschewed the use of the word “amendment”.

22. *Bell* concerned an application for costs in an unsuccessful prosecution in the Central Criminal Court. The High Court (Kenny J.) and the Supreme Court, by a majority, held that although prior to 1961 the High Court had no jurisdiction to award costs to an accused person who had been acquitted, the combined effect of the 1924 and the 1961 Acts gave the rule-making authority *power* to make rules in respect of practice and procedure, including liability to costs, which permitted the making of rules which could alter that position and allow the Central Criminal Court to award costs to the Attorney General or to an accused person who had been acquitted. It was further held that the general language of the Rules of the Superior Courts adopted in 1962 which provided that “the costs of and incidental to every proceeding in the Superior courts shall be in the discretion of those courts” was sufficient to have that effect. Again, it is of some interest that Kenny J. in the High Court acknowledged that there was a general rule of construction that a radical change in the existing law should require clear words, but he considered (at p. 36 of the report) that, while this was a good guide in cases concerning changes affecting private rights:-

“... it should not ... be held to apply to a construction of the Rules which will remove what has been a persistent public complaint about our law. To most of our citizens it seems wrong that the High Court should not have power to award

costs to a person who is accused of a criminal offence and is acquitted. I think that the words of Order 99 are sufficiently clear to make the change.”

23. The decision of the High Court upheld by the majority of the Supreme Court in *Bell* was undoubtedly a bold one, but the provisions of the 1962 Rules as so interpreted were not altered by any legislative provision and were repeated in 1986 without amendment in this regard. Moreover, the courts, commencing with the judgment in *People (D.P.P.) v. Kelly* [2008] IECCA 103, [2008] 3 I.R. 202 have given guidance as to the exercise of the discretion identified in *Bell* and, therefore, the jurisdiction first identified in that case must now be taken to be firmly established. This leads, however, to an inconsistency between the position in the Central Criminal Court and Circuit Courts where a court has a discretion to award costs and the blanket provisions of the Rules of the District Court which preclude the award of costs against the D.P.P. in any circumstances.
24. *Thompson v. Curry* [1970] I.R. 61 (“*Thompson*”) illustrates the difficulty of application of the term “modification or adaptation” which is used in the 1924 Act in relation to the rule-making power in relation to the Superior Courts (s. 36(ix)), the Circuit Court (s. 66) and, as we have seen, the District Court (s. 91). The Summary Jurisdiction Act of 1857 provided (and still provides) for appeal by way of case stated from the District Court and provided, by s. 2:-

“After the hearing and determination by a justice or justices of the peace of any information or complaint, which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the Superior Courts of Law to be named by the party applying; and such

party, herein-after called the appellant, shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, herein-after called the respondent.” (*Emphasis added.*)

25. The provisions of the applicable District Court Rules also provided for prior notice to a respondent, but allowed a 14-day period for transmission to the High Court. The Rules of the Superior Courts 1962, for their part, required transmission to the High Court within three days of receipt — consistent with the 1857 Act — but allowed for notice to the respondent either before transmission to the High Court or within three days after transmission. The case, itself, was stated by District Justice Reddin (who had been the District Justice in *Hempenstall* 30 years earlier), and notice to the respondent was given after transmission of the case stated, within the three-day period stipulated by the Rules of the Superior Courts, but not in compliance with s. 2 of the 1857 Act which provided for prior notice to the respondent. Faced with this difficulty, it was argued that the provisions of the 1962 Rules were a permissible adaptation or modification of the 1857 Act. Walsh J. in the Supreme Court preferred the reasoning of the majority in *O’Flóinn* that the rule-making authority could not amend a statute. The abolition of what he considered a statutory condition precedent to the jurisdiction of the High Court could not be considered necessary for the purpose of carrying the 1924 Act into effect. While he acknowledged that in *A.G. v. Healy* [1928] I.R. 460 (“*Healy*”), rules had been held to have permissibly dispensed with a condition precedent to the issue of a summons under the Customs and Inland Revenue Act 1879, he considered that case to be a borderline one which he was content to leave as such but not follow and, accordingly, the case stated in *Thompson* had not been lawfully transmitted.

26. The fineness of the distinctions made in this line of case law is illustrated not merely by those cases which were referred to in the report (*A.G. v. Bruen and Kelly* [1935] I.R. 615 and *A.G. v. Callaghan* [1937] I.R. 386) where departures from procedure prescribed by statute in rules made under the 1924 Act were upheld as permissible modifications or adaptations, but perhaps most vividly by the companion case of *A.G. v. Shivnan* reported with *Thompson* at [1970] I.R. 61. In that case, the solicitor for the appellant had unsuccessfully attempted to transmit the case stated within three days of receipt and the High Court found there had been non-compliance with the statute, relying in this regard on *Thompson*. However, the same Supreme Court which decided *Thompson* held that the transmission of the case stated was valid because it considered that the same three-day time period was provided for both in the statute and in the Rules and there was power under r. 108 to enlarge time for anything to be done under the Rules. The court considered that the critical flaw in *Thompson* was the alteration of the statutory sequence of notification to the respondent prior to transmission. Here, the three-day period was adopted in the Rules and could be extended. However that may be, the outcome of the case is that the provisions in the Rules were held to have changed the provisions of the statute and, indeed, to include a power to extend the time period provided by it. It appears that the Court considered this change was to be seen as a modification, rather than an amendment, of the 1857 Act.

27. A similar fine distinction is to be observed in a comparison of the decisions in *Rainey v. Delap* [1988] I.R. 470 (“*Rainey*”) and *Kerry County Council v. McCarthy* [1997] 2 I.L.R.M. 481 (“*McCarthy*”). In *Rainey*, the provisions of r. 29 of the District Court Rules permitted a complaint for the issuance of a summons to be made to “a Justice, a Peace Commissioner or a Clerk” and r. 30(1)(c)(i) permitted a District Court clerk to issue a summons. Under s. 10 of the Petty Sessions (Ireland) Act 1851, however, the complaint could only be made to a justice. The Supreme Court decided that r. 29 and r.

30 went far beyond the mere modification or adaptation of a statute and, rather, purported to amend it; rules 29 and 30 were, therefore, *ultra vires* the powers of the Rules Committee. *McCarthy*, on the other hand, concerned the summary recovery of local authority dwellings under the Housing Act 1966 — which incorporated the provisions of s. 86 of Deasy’s Act 1860. That section provided that a summons to seek recovery of possession was to be issued by a justice. Rule 30(1)(c)(ii) of the District Court Rules (which is the civil element of the Rule which was challenged successfully in *Rainey* in the context of criminal proceedings) permitted a District Court clerk to issue the summons. Nevertheless, the Supreme Court dismissed a challenge to the Rule, relying on cases such as *Healy* and distinguishing this case from *Rainey* on the basis that it concerned civil and not criminal matters and, presumably, that the alteration of the statutory provision was less significant and, therefore, within the powers of the rule-making authority as no more than a permissible modification or adaptation.

28. A final case which should be noted in this particular sequence is *State (Lynch) v. Ballagh* [1986] I.R. 203 where a majority of the Supreme Court (over a strong dissent from Henchy J.) held that the District Court Rules Committee’s powers did not extend to making any provision for the grant of station bail on the basis that it was no function of the District Court Rules to regulate the conduct of An Garda Síochána, even though the purpose of such bail was to require the attendance of the individual in court at which time a complaint might be made and proceedings commenced.
29. The particular provisions of the District Court Rules in respect of costs of an unsuccessful prosecution were the subject of further consideration in *The State (Attorney General) v. Shaw* [1979] I.R. 136, where Finlay P. (as he then was) followed *Crawford* and held that the provisions of the District Court Rules precluded the award of costs against the Attorney General in a Customs matter. Again, the respondent seeks to distinguish this case on the basis that s. 59 of the 1842 Act was not considered.

30. In *Dillane v. Ireland* [1980] I.L.R.M. 167 (“*Dillane*”), the plaintiff challenged the constitutional validity of the provisions of r. 67 of the 1948 District Court Rules on the grounds that the prohibition on the order of an award of costs against the Attorney General and/or a Garda prosecuting in the course of his or her duties was an infringement of the Article 40.1 guarantee of equality and, also, an unjust attack on property rights. In an important decision on the approach to interpretation of the Constitution and Article 40.1, the Supreme Court (Henchy J.) dismissed the claim and upheld the validity of the exclusion from the Rule of the prosecutor, observing that there was a difference in social function between official prosecutors and a common informer which justified a differentiation in the Rule. The Court further held that the Rule could not be considered an unjust attack on the property rights of the individual (assuming, for this purpose, that such rights were engaged by the provision) since what was positively permitted by one provision (a permissible differentiation on the grounds of social function under Article 40.1) could not constitute a breach of another provision of the Constitution. Counsel for Mr. Matthews acknowledges that this decision upheld the provisions of the then-applicable Rule from challenge on constitutional grounds and that there is no relevant distinction between the Rule considered in *Dillane* and the version in issue in these proceedings, but argues that no question of the *vires* of the Rule was argued either by reference to the 1842 Act or more generally and accordingly that such argument is not precluded in this case.

31. One final case which is relied on heavily by the respondent is the decision of this Court in *Sweetman v. Shell E. & P. Ireland Ltd.* [2016] IESC 58, [2016] 1 I.R. 742 (“*Sweetman*”). The issue which arose in that case was whether the then-new rules on costs in environmental proceedings — contained in s. 3 of the Environment (Miscellaneous Provisions) Act 2011 and providing for a general rule, subject to exceptions, that in proceedings covered by the Act each party would bear its own costs

— applied to proceedings commenced before the coming into force of the Act. There is a general rule of construction that changes to the law do not affect pending proceedings which is, in turn, qualified by a rule of interpretation that changes of procedure normally take effect as of the date of enactment. These principles are, it should be noted, principles of interpretation rather than rules of law and can therefore be negated by the use of clear statutory language showing a contrary intent. The Supreme Court considered that the significant alteration on the costs regime effected by the 2011 Act could not be considered merely a procedural change from which both parties could benefit, but was, rather, a radical change of an element that could be part of the decision to initiate proceedings at all. Therefore, it was held that the change should be interpreted as not applying to cases commenced before the legislation came into effect, even if the costs decision occurred after that date.

32. Counsel for Mr. Matthews acknowledges that the provisions of the District Court Rules in 1926, 1948, and 1997 all contained a prohibition on the award of costs against a prosecutor such as was made in this case and, moreover, that such Rules have been considered and applied in a number of cases, and, in *Dillane*, upheld against challenge. However, it is argued that the provisions of s. 59 of the 1842 Act confer a general power to award costs and that the provisions of the Rules are an impermissible amendment of that section and cannot be treated as a permissible adaptation or modification of the primary legislation. Furthermore, it is submitted that a decision to exempt a party from a possible award of costs is a matter for primary legislation and cannot be treated as a matter of practice and procedure, relying, in this regard, on *Sweetman*. As the argument developed in this appeal, counsel for Mr. Matthews has responded to arguments advanced on behalf of the D.P.P. by arguing that if the provisions of the Rules are held to be permissible by the combined effects of the 1924 and 1961 Acts then they are nevertheless invalid as there are no sufficient principles and policies to guide the

making of delegated legislation, having regard to the test first set out in *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381 (“*Cityview Press*”), and recently reviewed by this court in *O’Sullivan & Anor. v. Sea Fisheries Protection Authority & Ors.* [2017] IESC 75, [2017] 3 I.R. 751 (“*Sea Fisheries Protection Authority*”).

33. The D.P.P. argues, and the High Court agreed, that s. 34 of the 1961 Act provided full jurisdiction to make rules in respect of costs, in the same way as s. 27(1) of the same Act permitted the making of rules of practice and procedure including costs in respect of the Circuit Court. It is also argued that, insomuch as the provisions of the Rules have an impact on the terms of the 1842 Act, they merely adapt and modify it and do not extend or expand the provision in any way or confer power on any person which was not given by statute. It is also argued that if costs cannot properly be provided for as a matter of practice and procedure, but rather require primary legislation, that would call into question the validity of the costs provisions of the Circuit Court Rules, for example. Mr. Dwyer S.C., on behalf of the D.P.P., offered a comprehensive and helpful analysis of the legislation and case law. However, since, on the face of it, the order of the District Judge was not permitted by the clear terms of the O. 36, r. 1 and her order must be quashed unless Mr. Matthews can succeed in establishing that the Rule is invalid, the case is best approached by considering the arguments advanced by Mr. Matthews for such invalidity.

Discussion

34. It should be observed that these arguments, while focussed on the narrow question of the validity of O. 36, r. 1, would, if taken at their broadest, have very far-reaching consequences for the decided case law, the provisions of the legislation, and, indeed, future regulation through Rules of Court, which explains, perhaps, why a modest local dispute could give rise to issues of law of general public importance. Thus, even at its

lowest, Mr. Matthews's contention must mean that those decisions appearing to apply the predecessor of O. 36, r. 1 (such as *Crawford* and *Shaw*) and an important decision upholding the validity of the differentiation in the Rule (*Dillane*) were all incorrect, not on their own reasoning, but rather because the argument now advanced, particularly in relation to the 1842 Act, was not considered. If the broader arguments as to the limitation of the rule-making power are correct it would raise serious questions, at a minimum, as to the correctness of the decisions in *Sealy* and *Bell* (since both of those cases found a new jurisdiction to award costs in criminal cases had been created by the terms of the applicable Rules) and, if the argument as to principles and policies is correct, then it would seem to question the validity of the provisions in the 1924 and 1961 Acts which used general language in permitting Rules of Court to be made.

35. It is possible to clear away some of the undergrowth which obscures the difficult issue at the heart of this case. It was argued variously that the early jurisprudence could be distinguished on the basis that there was a difference between the provisions of the Free State Constitution and Bunreacht na hÉireann, and that after *Sweetman* costs must be considered not to be matters of procedure and therefore outside the powers of the Rules making committees, and therefore, or in any event, the statutory authority to make rules could not justify rules as to costs. These arguments are not persuasive. First, it is now accepted that the pre-1937 authorities cannot be distinguished on the basis that they were decided under a different constitutional provision, and that it was only Article 15.2.1° of Bunreacht na hÉireann that established the Oireachtas as the “sole and exclusive” law-making authority for the State. In fact, Article 12 of the Irish Free State Constitution also provided that the “sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas”. The historical context for this provision which is important in its interpretation is referred to in the judgment of Keane J. (as he then was) in *Laurentiu v.*

Minister for Justice [1999] 4 I.R. 26, at p. 83 of the reported version, and in my judgment in *McGowan v. The Labour Court* [2013] IESC 21, [2013] 3 I.R. 718 and set out in helpful detail in G. Hogan, *The Origins of the Irish Constitution: 1928 – 1941* (Dublin: Royal Irish Academy, 2012), pp. 335 to 339. The assertion of sole and exclusive legislative power on the part of the Oireachtas established by the 1922 Constitution was a core element of the State established under that Constitution and accordingly the differences between the constitutional regimes created in 1922 and 1937 cannot, themselves, provide any satisfactory basis for distinguishing the pre-1937 case law dealing with legislative provisions and subordinate rules.

36. Furthermore, while *Sweetman* figured very heavily in Mr. Matthews’s submissions, and in the Court of Appeal judgment, which appeared to accept those submissions, I do not think it is of more than tangential relevance in this case. It is, in my view, an error to map the language used in statutory interpretation — and, in particular, the reference to concepts of substantive and procedural change — directly onto statutory provisions referring to practice and procedure, including liability for costs, to argue that “procedure” cannot include costs, even when the statutory language appears to so provide.
37. The decision in *Sweetman* does not decide that issues as to the award of costs in particular cases cannot be correctly included in a provision permitting rules to be made in respect of practice and procedure, including costs. *Sweetman* was concerned with primary legislation providing for rules in respect of costs in environmental matters. The issue in *Sweetman* concerned a general question of statutory interpretation. The common law has always leaned against retroactivity, by which I mean the alteration of the legal consequences of past events: something which is reflected in the provisions of Article 15.4.5° of the Constitution. However, a more difficult question still arises in what I will call the retrospective aspect of legislation: that is, that it is permissible for

legislation to be backward-looking and to permit the taking into account of past events in the application of the legislation to matters occurring after the coming into force of the legislation. There was no question of the costs provisions in the 2011 Act being applied to decisions in respect of costs which predated the coming into force of the Act. The difficult question which arose in that case was whether the Act applied when an award of costs fell to be made after the coming into force of the Act in relation to proceedings which had been commenced and prosecuted prior to that point. The issue was further complicated by a general principle that legislative change is not to be understood as affecting the merits of litigation already commenced, and, at least in a general sense, a case tends to carry the law with it as of the date of the commencement of the litigation. That generalisation has, in turn, been qualified by the principle, and by a recognition of the reality that some changes which are procedural must have been intended to apply to litigation in being and that there may be no unfairness in this, even if the operation of the new rule gives one party an advantage which they would not have had at the time the proceedings were commenced.

38. *Sweetman* decided that the changes effected by the 2011 Act in respect of the costs regime were of such moment and had the potential to significantly alter calculations made in relation to the commencement of the proceedings that they could not be considered to have been intended by the Oireachtas to apply to litigation then in being. As such, it is a decision on the interpretation of the 2011 Act which seeks to discern the intended meaning of that provision by using the guidance of the principles of statutory interpretation developed in the case law. The decision cannot be understood as making some general determination that the jurisdiction in respect of costs is substantive and not procedural, and in particular to suggest that costs issues cannot be properly considered as being included within matters of practice and procedure, even when the statutory language says so explicitly, as it does here.

39. The further argument that the 1924 and 1961 Acts, in their references to “practice and procedure including costs” or, indeed, more explicitly, “practice and procedure including liability to costs”, must be read as merely permitting rules to be made in respect of the procedure for decisions to be made about costs, with the substantive jurisdiction to award such being left to be found elsewhere, would not only depart from the plain meaning and intent of both statutory provisions, but would be impossible to reconcile with the case law and, indeed, principle.

40. The award of costs requires statutory authorisation: *Garnett v. Bradley* (1879) 43 J.P. 20. In some cases the only relevant statute which permits the grant of costs in proceedings such as this are the 1924 and 1961 Acts, themselves. This conclusion also emerges clearly from the decisions. In *Sealy*, there was a statutory provision in relation to costs which only permitted the award of costs to the Minister. The conclusion in that case that the costs could be awarded to a successful defendant followed from the terms of the Circuit Court Rules adopted under the power conferred by the 1924 Act. In *Bell*, Kenny J. said, at p. 33:-

“This somewhat lengthy review ... shows that in 1961 the Central Criminal Court (which is the High Court exercising its criminal jurisdiction) had no power to award costs to an accused person who had been acquitted but that ss. 53 and 65 of the [Judicature] Act of 1877, s. 36 of the Act of 1924 (as amended) and s. 14, sub-s. 2, of the Act of 1961 gave the rule-making authority for the High Court power to alter this and to confer jurisdiction to award costs to an accused person who had been acquitted, or to the Attorney General.” (*Emphasis added.*)

In other words, the statutory authorisation for the jurisdiction to award costs came from the provisions of the 1924 and 1961 Acts permitting rules to be made in respect of costs.

41. This conclusion also emerges from the series of cases which held that the general language of the Acts of 1924 and 1961 allowed rules to be made in respect of costs

which, in turn, permitted costs to be awarded in proceedings under statutes which, themselves, contained no provision in relation to costs such as *Hempenstall; Inspector of Taxes v. Arida Ltd.* [1995] 2 I.R. 230; *H.S.E. v. O.A.* [2013] IEHC 172, [2013] 3 I.R. 287, and *D.P.P. v. Douglas* [2015] IEHC 461, [2015] 1 I.R. 315. In addition, it may be observed that two of the basic rules on costs which were contained in O. 99 of the Rules of the Superior Courts 1986 (and which governed the award of costs in the Superior Courts until the coming into force of Part 11 of the Legal Services Regulation Act 2015) — namely, that costs are in the discretion of the court (O. 99, r. 1(1)) and that the costs of every action, question, or issue shall follow the event (O. 99, r. 1(3)) — cannot be considered to be merely matters of procedure regulating a jurisdiction to award costs contained in some separate provision.

42. Accordingly, I cannot accept the broad argument advanced by the appellant purported to be derived from *Sweetman* and respectfully disagree with the analysis in this regard contained in the judgment of the Court of Appeal at paras. 64 to 69.
43. *Sweetman* has, however, some relevance to this case. It shows that questions of costs can cover a very wide spectrum and may include matters which have profound consequences for the parties. A decision on costs is part of the administration of justice. The issue which arises therefore is the limit of the range of the decisions in respect of costs which could be made by the rule-making authority under the 1924 and 1961 Acts and, if so, whether O. 36 of the District Court Rules (and its predecessors) is within the scope of rule-making permitted by those statutes or is outside that scope and, moreover, an impermissible amendment of s. 59 of the Act of 1842.
44. The High Court found that the provisions of O. 36 constituted a permissible modification or adaptation of the provisions of s. 59 of the 1842 Act pursuant to s. 91 of the 1924 Act. The Court of Appeal found the opposite. This raises important issues as to the interpretation to be given to the power undoubtedly included in the 1924 Act in

relation to the rule-making function in respect of the District Court, Circuit Court, and Superior Courts, respectively, to adapt or modify any statute that may be necessary for the purposes of making rules governing those matters specified in the sections, ranging from the fixing of court terms and the use of the national language to the preparation of a case stated and the procedure of the court generally, including questions of costs. Although counsel for Mr. Matthews mentioned doubts as to the constitutionality of this provision, describing it as a concealed Henry VIII clause, no direct challenge was made to the validity of the provisions of s. 91 by arguing that it was impermissible to permit the adaptation or modification of any statute. Instead, it was argued that what was effected here went beyond any permissible modification or adaptation.

45. Gavan Duffy P.'s *dictum* in *Roe*, at p. 180 of the report, that the scope of the permissible interference with statute law is best understood by use of two of the mildest nouns for change ("adaptation" or "modification") as compared with "amendment" which is, perhaps, the natural term for any change in legislation, is certainly a useful guide to the meaning to be given to the phrase in the respective statutory provisions. However, while it is possible to make a clear verbal distinction which, moreover, implies that only modest change is permissible, the decided cases and the range of opinions within those cases shows that it is more difficult in practice to identify a clear dividing line between permissible adaptation or modification and impermissible amendment.
46. Some further guidance can, in my view, be obtained from the terms of the 1924 Act and its context. The limited power conferred by statute on a subordinate authority to adapt or modify prior statute law, which appears to be the first use of this rare terminology in the State's legislation, is found in the 1924 Act and employed there in the context of a rule-making authority for the courts being established under the Act. The Courts of Justice Act 1924 was, itself, a substantial achievement running to more than 100 sections and establishing, almost from scratch, a new court system for the new State.

The Statute Book for 1924 contains other absolutely fundamental provisions such as the Ministers and Secretaries Act, the Central Fund Act, the Civil Service Regulation Act, the Garda Síochána Act, and the Criminal Justice (Evidence) Act, along with other provisions reflecting the troubled circumstances in which the legislation was being passed, such as the Public Safety (Powers of Arrest and Detention) Temporary Act, the Public Safety (Punishment of Offences) Temporary Act, the Indemnity Act and the Dáil Éireann Courts (Winding-Up) Act (Amendment) Act. When, therefore, the 1926 District Court Rules spoke of the Attorney General or a member of An Garda Síochána acting in official capacity in the prosecution of offences, they were referring to entirely new bodies created in 1924, albeit succeeding to the roles and, in some cases, the powers, of similar entities under the old dispensation.

47. It has been said, that the most striking achievement of the Courts of Justice Act 1924 was the creation of a single District Court staffed by professional judges. Prior to 1924, there were two types of summary jurisdiction courts in Ireland: the Petty Sessions presided over by magistrates or Justices of the Peace in areas outside Dublin; and the Dublin Metropolitan Courts presided over by Justices. Each court had its own guiding statute; principally, the Petty Sessions Ireland Act 1851, and the Dublin Police Acts, including the Act of 1842, which both created offences and contained procedural matters including, as we have seen, provisions in relation to costs.
48. The task of the 1924 Act in relation to the creation of the courts system, and in the District Court in particular, was, therefore, considerable. It was not only necessary to establish a new and independent court as a decisive break with the old system, but it was necessary to locate that court within a new constitutional order which proclaimed a new source for the law, set up new institutions, and which generally sought to establish as significant a rupture as possible with the old order. However, the ideological desire to establish a new system had to operate in tandem with the practical requirement to

have a body of law capable of being enforced within that court system. This involved the continuation under Article 73 of the Irish Free State Constitution of the law in force prior to the creation of Saorstát Éireann and the coming into force of the Constitution with the significant qualification that such continuation was “[s]ubject to this Constitution and to the extent that they are not inconsistent therewith”. And, in addition to the task of making the old law fit within the new institutions, it was also necessary, in the case of the District Court, to funnel two separate summary jurisdictions into one.

49. This provides a helpful background from which to consider the scope of permissible modification and adaptation. The word “adaptation”, itself, echoes the second Act adopted by the new Oireachtas (after the Constitution, itself, which was adopted by the Oireachtas as a constituent assembly): the Adaptation of Enactments Act of 1922. That was an important provision which attempted to adapt pre-existing legislation to ensure that it would continue to have the full force and effect in the new entity of Saorstát Éireann. It seems plausible, therefore, that the power given by the 1924 Act to rule-making authorities to modify and adapt prior statutes was particularly apt to ensure that the effective reception of the existing body of law into the law of Saorstát Éireann was not hampered or possibly prevented by the fact that it contained references or provisions to bodies, institutions, and procedures which no longer existed or, perhaps, no longer operated in the same way under the new system. This suggests why anything which amounted to an amendment of the pre-existing law was not permitted and, furthermore, that the level of interference permitted by the statute was limited. Not only was the area of such adaptation or modification identified and limited (the making of rules for specified purposes), but any modification or adaptation had to be “reasonably necessary” for that purpose and amount to something adapting or modifying the statutory provision to make it fit more easily and work more smoothly within the new system. While the power of adaptation and modification was not limited to pre-1922 or

pre-1937 provisions, this context, which was obvious in 1924, provides a useful guide to the type of modification or adaptation permissible under the section.

50. By 1926, there were, at least, three provisions capable of governing the area of costs in the newly established District Court and which, moreover, were different in material respects. Section 59 of the 1842 Act was, at least ostensibly, unlimited, s. 22(9) of the 1851 Act was limited in terms which, even by 1926, must have been significant, while r. 37 of the 1926 Rules made no financial limitation but precluded costs against the Attorney General and the prosecuting Garda and, as interpreted, precluded the award of any costs to either side in Revenue matters. Section 91 of the 1924 Act provided ample statutory authority for the making of rules in respect of costs and, accordingly, neither s. 59 of the 1842 Act nor s. 22(9) of the 1851 Act were necessary to provide a statutory basis for the Rule and could, accordingly, have been repealed if the matter had been addressed. It is unlikely, however, that this was considered an important issue at that time. It seems probable that it was considered that the 1926 Rules simply superseded the provisions of the preceding legislation and, indeed, R.L. Sandes, *Criminal Law and Procedure in the Republic of Ireland* (3rd edn., 1951, Sweet & Maxwell) at p. 74 recites the provisions of Rule 37 of the 1926 Rules and states that “it superseded” s. 22 of the Petty Sessions Ireland Act. It may have been assumed that the Rules created a self-contained code of procedure for what was, after all, a new court, and that are certainly traces of that approach in the arguments made in some of the earlier cases and some of the judgments. It was only later, as the implications of the constitutional entrenchment of the position of the Oireachtas came to be appreciated, that difficulties began to emerge and the subsequent cases do seem to show both a concern about the possible inconsistencies between the Rules and the pre-existing statutes, and a narrowing of the scope of what was considered as adaptation or modification.

51. This case had proceeded on the basis that the 1842 Act provided a general power to award costs against any party in the courts of the Dublin Metropolis: a power which was, moreover, transferred to the entire District Court by s. 78 of the 1924 Act. If so, the provision of the Rules would appear to restrict that discretion in significant respects. However, in the course of the case management of this appeal, the parties were invited to address the question of the precise position prior to 1922 both in the Dublin Metropolis and in the Petty Sessions courts since the extent and nature of any change is central to the question of whether the Rules amount to a modification or adaptation, on the one hand, or an impermissible amendment of the prior statute on the other. The picture that has emerged is more nuanced and less clear-cut than may have first appeared.

52. In *Bell* (at p. 29), Kenny J. explained that the fact that costs had not, prior to 1962, been awarded against the prosecutor in the High Court sitting as the Central Criminal Court was not merely a result of the absence of a provision permitting such an award, but could be traced to a principle of general application that the Crown neither paid nor received costs. This principle can be traced back to the late 18th century and Book III of Blackstone's *Commentaries on the Laws of England* (Philadelphia: Birch & Young, 1803) ("*Commentaries*") at p. 400:-

“The king (and any person suing to his use) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.”

53. Of course, in this case it is said that the Act of 1842 could provide a statutory basis for the award of such costs but, as the extract from Blackstone just quoted illustrates, there was also a principle that the King was not captured by general words of statutes. In

Book I of the *Commentaries* (at p. 261), describing the prerogatives of the Sovereign, Blackstone states:-

“... the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (“any person or persons, bodies politic or corporate &c.”) affect him not in the least, if they may tend to restrain or diminish any of his rights or interests.”

54. Both these principles have been adopted in the United States. Thus, in *U.S. v. Barker* 15 U.S. (2 Wheat.) 395 (1817), John Marshall C.J. stated bluntly:-

“The United States never pay costs.”

55. In *Dollar Savings Bank v. U.S.* 86 U.S. (19 Wall.) 227 (1874), Strong J. delivered the opinion of the court and, at p. 239, stated:-

“It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect him not in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts.”

56. It should be observed immediately that, in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, a majority of this Court held that the same principle could not be held to apply in the Irish law under the Constitution. However, the question here is directed to the legal position immediately prior to the coming into force of the Constitution of 1922, and whether r. 37 of the 1926 Rules effected a modification or adaptation of that provision, it is, accordingly, not necessary to consider the question of the interpretation of the Act of 1842 if it were sought to be applied today, rather it is necessary to attempt

to understand how the section was understood and applied in 1922 and 1926 when the Rules were adopted.

57. The application of the general principles set out by Blackstone can be seen in *R. v. Beadle* (1857) 7 El. & Bl. 492, 119 E.R. 1329. There, an excise officer sued for a penalty under the Excise Acts and the accused was convicted before magistrates. The excise officer appealed to the Quarter Sessions, but the appeal was dismissed with costs. The order of the Quarter Sessions was quashed. The successful accused had sought to rely on the provisions of Victorian legislation permitting costs to be awarded in certain circumstances. Lord Campbell C.J.Q.B. intervened to say that the officer prosecuting the proceedings represented the Sovereign and “it is well established law that the Crown is not bound by an Act of Parliament without express words”.
58. All of this might suggest a conclusion that the general words of Act of 1842 did not permit an order for costs to be made in what might be described as an official prosecution. However, on further examination, the position is more complex. The law relating to costs including the position of the Crown is traced in a helpful article by Dr. Miriam Keane, “From Gloucester to Judicature: Tracing the Roots of the Indemnity Rule on Costs” (2014) 51(1) *Ir Jur* 149. This article shows that part of the difficulty was that the law did not address the question of prosecution in criminal proceedings separately. Instead, a more general principle that the Crown neither paid nor received costs seems to have applied across a range of litigation including applications for the prerogative writs. As the range of State involvement in litigation grew, there was increasing unhappiness with a general approach, particularly when it was sought to be invoked by unsuccessful defendants to seek to escape an order for costs. Thus, for example, in *R. (Byrne) v. Belfast Corporation* [1919] 2 I.R. 143, the Inspector-General of the Royal Irish Constabulary sought to require Belfast Corporation to pay a sum determined to be due in respect of the provision of additional police officers in the city

area. *Mandamus* was ordered, but the Corporation sought to resist an order for costs on the principle that the Crown could neither receive nor pay costs. Gibson J., in a judgment described by Kenny J. in *Bell*, at p. 29 of the report, as “remarkable”, considered that there was no rule of law preventing an order of costs, but, rather, a practice which could not require to be followed in every case. This approach anticipated, by some time, that taken by H. Street in a learned article: “The Effect of Statutes upon the Rights and Liabilities of the Crown” (1948) 7(2) *University of Toronto Law Journal* 357, albeit that this article was principally concerned with civil proceedings.

59. Dr. Keane’s article also referred to the important case of *In re John Sullivan* (1888) 22 L.R. Ir. 98, which concerned a prosecution for conspiracy for alleged boycotting in Furies, County Kerry, involving the refusal by the defendant blacksmith to shoe the horse owned by a particular woman. County Kerry had been proclaimed under the provisions of the Criminal Law and Procedure (Ireland) Act 1887 (informally known as “the Crimes Act”), which meant that offences which were otherwise triable at the Quarter Sessions before a jury could be tried before a magistrate. Sullivan was convicted and sentenced to one month’s imprisonment, but sought *habeas corpus*. Tim Healy appeared for Sullivan, and Edward Carson appeared for the Crown. The Exchequer Division granted an order of *habeas corpus*. When, however, the successful applicant sought costs, Palles C.B. inquired if the prosecution at the Petty Sessions had been carried out on behalf of the Crown, and held that “[a]s to the District-Inspector, the prosecution was one at the suit of the Crown, and costs could only be awarded against the Crown in cases falling within 18 & 19 Vict. C. 90” (the Crown Suits Act 1855) which did not apply.

60. One further intriguing reference is to be found in E. Burnes, *Guide to the New Rules and Practice of the District Court (Saorstát Éireann)* (Dublin: Falconer, 1926) which, at

pages 86 to 87, recited the provisions of r. 37 and states that “[t]his merely enacts by rule what was always the custom, as while power was given to award costs in such cases the writer knows of only one case of summary jurisdiction within 25 years when costs were given against the police” (*emphasis added*).

61. This statement provides support for both sides of the argument. It certainly suggests that the changes being brought in 1926 would have not have been considered significant. However, it also suggests that it was nevertheless a formal change in the law and that the pre-existing law, although not specified, permitted the possibility of an award of costs even against an official prosecuting party. In addition, there is also the fact that, until 2005, a member of An Garda Síochána could prosecute in the District Court as a common informer. The 1842 Act recognises this and makes a distinction between common informers in general and policemen suing as common informers in respect, at least, of the treatment of any fine recovered, but makes no such distinction in relation to the costs provision under s. 59 which might imply that the section permitted the recovery of costs by, or an award of costs against, a policeman suing as a common informer.
62. In addition to the foregoing, counsel for the D.P.P. makes two further points. Section 101 of the 1924 Act provided that the Rules of Court make under the Act should not come into force unless and until they were laid before the Houses of the Oireachtas and the subject of a positive resolution approving them. That, indeed, occurred in respect of the 1926 Rules and, we were told, there was some debate and discussion of the provisions of r. 37. The requirement of a positive resolution for delegated legislation is the strongest form of retention of control by the Oireachtas which is possible. As both MacMenamin and Charleton JJ. observe in *NECI v. The Labour Court & Ors.* [2021] IESC 36 (Unreported, Supreme Court, MacMenamin J. and Charleton J.; Clarke C.J., O’Donnell and Dunne JJ. concurring, 18th of June, 2021) (“*NECP*”), the Court must take

this into account when considering whether the statutory instrument has exceeded the scope of delegation permissible under the Constitution.

63. Section 101 was repealed by s. 3 of the Courts of Justice Act 1936, so this form of legislative oversight is no longer available. However, it was also pointed out that the 1961 Act does not, itself, contain a power to make rules. Instead, it provides by s. 34 that the jurisdiction which by virtue of the Act is vested in or exercisable by the District Court “shall be exercised as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by Rules of Court made under section 91 of the Act of 1924”. Thus, it was argued that this gives some statutory recognition and, it was said, approval to the terms of the Rules then in existence in 1961, including the provisions of r. 67 of the 1948 Rules which was in essentially the same terms as r. 37 of the 1926 Rules. All this suggested, it was said, that there was some approval either in primary legislation or by positive resolution of the provisions of the Rules.

Decision

64. If it was the case that, prior to 1922, the law did not permit an award of costs against a prosecutor in the case of a summary prosecution, then I would consider that the terms of r. 37 in 1926 and its successors could fall comfortably within the category of modification and adaptation of the pre-existing law permitted by s. 91 since it would simply be translating that law and practice into the law and procedure of the new State and making it explicit. Conversely, if it could be said that it was clear that, immediately prior to 1922, the courts exercising jurisdiction under the 1842 Act had, and exercised, a power to award costs against the police or anyone prosecuting on behalf the Crown when a person was acquitted, then I would consider that the provisions of r. 37 would go beyond any permissible modification and adaptation and amount to a quite

significant amendment of the pre-existing law, making an important policy decision and significantly restricting the discretion of the new District Court. It is apparent that the picture is more nuanced than the simple proposition that the rule-making authority had impermissibly amended the provisions of statute, and the relative absence of a reference to s. 59 of the 1842 Act after 1926 only compounds the difficulty. However, it does not seem possible at this stage to reach a definitive conclusion on this issue, obscured as it is by the effects of time and the distortion created by viewing it through secondary and imperfect sources. In the light of the uncertainty as to the precise legal position under the 1842 Act and which existed prior to 1922, I do not think it is possible to determine with any confidence what the state of the law was in an equivalent case to this in 1921 and accordingly to determine with any confidence on which side of the borderline identified by Walsh J. in *Thompson* the present case lies.

65. It is, perhaps, preferable to approach this case, therefore, as the appellant has also sought to argue in this case (which the respondent agrees that they are entitled to), that is that the respective Rules exceed any permissible area of rule-making authority permitted by Article 15.2.1° of the Constitution.

66. This is well-trodden ground, albeit that the result is neither neat nor clear. In *Cityview Press*, at p. 399 of the report, it was said that:-

“[T]he test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power.”

67. This provides a vivid image of the scope of permissible delegation; the Oireachtas is like a master craftsman or painter who may, however, leave the filling in of the details to a subordinate. The resulting work would be clearly attributed to the artist and not merely his or her studio or school. However, as has been pointed out, even in relation to the facts of *Cityview Press* itself, the application of these principles was by no means clear-cut. In the most recent edition of *Kelly: The Irish Constitution* (5th edn., G.W Hogan, G.F. Whyte, D. Kenny, & R. Walsh eds., Dublin: Bloomsbury Professional, 2018) (“*Kelly*”), at para. 4.2.25, it was said that there “was nothing in the 1967 [*Industrial Training*] Act which provided guidance as to the amount of the levy and it is not at all obvious it did contain the appropriate principles and policies”.
68. While there may be cases in which the application of the principles and policies/filling in the details test is a useful approach, it has been increasingly doubted that it is a comprehensive and satisfactory way to approach the question of the permissible scope of delegation. Taken to its logical extreme, it would defeat the purpose of delegation altogether. If the outcome must be found in, or be deducible from, the Act itself, then delegation serves no useful purpose, and the provision ought to be included in the primary legislation itself. On the other hand, in response, perhaps, to judicial pronouncements, it has become fashionable for legislation to recite extensive principles and policies in purported compliance with the test. This makes it almost impossible to assert that the subordinate provisions have not been implemented in compliance with some principles or policies identified in the Act but, in fact, the subordinate rule-maker may be entirely at large as to the choice of principle or policy and, indeed, its manner of implementation. The *Cityview Press* approach is helpful therefore but cannot be considered an infallible guide.
69. More recently, it has been suggested that it may also be possible to address the question by reference to the consideration of whether the Oireachtas has abdicated its function

under Article 15.2.1° and that a relevant consideration may be the scope of the area of delegation: see *Sea Fisheries Protection Authority; Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1; and *NECI*.

70. In approaching this issue, it is important to recognise that both the practice of subordinate rule-making pursuant to statutory power and, indeed, the making of common law by judicial decisions were well-known features of the law and legal system and there is nothing in either the 1922 or 1937 Constitution to suggest that there was any intention to restrict the scope of either activity. The emphatic words of Article 15.2.1° of Bunreacht na hÉireann repeating, with some additional emphasis, the words of Article 12 of the Irish Free State Constitution of 1922 were directed towards another, and more politically pressing, issue in those years. However, the Constitution does reserve to the Oireachtas the power of legislating for the State. In any particular case it may be useful, therefore, to ask whether what is permitted by primary legislation is an abdication of the power or the duty of the Oireachtas, or whether what is done under the power is an impermissible encroachment on an area consigned by the Constitution to the Oireachtas. The scope of the area of delegation may, therefore, be a relevant and important consideration. If the area is narrowly defined and confined, it may be concluded that the Oireachtas was content to permit decisions to be made within that confined area without seeking to control the specific decision. As the authors of *Kelly* point out, at para. 4.2.45, “focusing on the breadth or narrowness of the delegation may be a useful heuristic; the idea that, with a narrow delegated area, the legislature has considered the possible choices and found them all acceptable is appealing, and might help explain the result in cases such as *Cityview*”.

71. The example of the rule-making power conferred upon the respective rule-making bodies by the 1924 Act is a useful case in point. Under ss. 36, 66, and 91, respectively, the relevant rule-making authority is given authority to make rules for the Superior

Courts, Circuit Court, and District Court, respectively; in each case, such Rules may provide for “pleading, practice and procedure generally” and “questions of costs”. The detailed provisions of the Rules of the Superior Courts, the Rules of the Circuit Court, and the Rules of the District Court, respectively, which have been made — and amended — in the century since 1924 contain many detailed provisions which may be critical in the determination of particular cases. There is little in the terms of the 1924 Act (or any subsequent legislation) to indicate what the detail of those rules should be. It is, no doubt, possible to deduce some guidance from the specific provisions of the statute identifying those matters to be covered by the Rules, and from the reference back to the practice and procedure adopted under the pre-existing body of rules, but it does not seem helpful to analyse these provisions by seeking to deduce principles and policies in the 1924 Act and describing the Rules so adopted as the mere filling in of details in accordance with those principles or policies. Nor would the position be markedly better if the legislation recited a menu of principles and policies such as efficiency, fairness, cost effectiveness, and promotion of the administration of justice. It is more helpful to consider the Act as a whole as a very substantial undertaking which established an entire new court structure, and either declared what was within the jurisdiction of those courts, or transferred jurisdiction to them, and required that procedure be regulated by a set of rules but left to the defined rule-making body the obligation of setting out those detailed rules to achieve the objective of permitting justice to be administered in respect of the matters within the courts jurisdiction. It is not, therefore, that the Oireachtas had a general view about the content of the Rules which it set out in the legislation, leaving only details to be filled in; it is, rather, that the Oireachtas considered that once it had established that there should be rules and identified what was to be covered by them, the content of those rules was a matter better

decided by a body with expertise — content, as it were, that the decisions to be made were not matters which were within the exclusive jurisdiction of the Oireachtas.

72. The question then becomes whether, in this case, the provisions of O. 36 of the District Court Rules 1997 can be said to come within the terms of what was contemplated by the statutory delegation under s. 91 of the 1924 Act as applied by s. 48 of the 1961 Act: namely, to make rules:-

“... for all or any of the following matters, viz., for regulating the sittings and the vacations and the districts of the Justices and the places where proceedings are to be brought and the forms of process, summons, case stated, appeal or otherwise, and the conditions which a party who requires a case stated or an appellant must comply with in civil cases or in criminal cases or in licensing cases as the case may be and the practice and procedure of the District Court generally including questions of costs ...” (*Emphasis added.*)

73. Rules of Court have always covered a wide range of matters and go beyond the merely mechanical. There is no clear line between issues of simple process and some consideration of policy which is implicit in decisions, for example, to shorten time periods. The purpose of any rule change is to make a process better and that, itself, involves some conception of what is desirable in litigation and therefore involve some consideration of policy. Thus, the Rules of the Superior Courts have introduced novel procedures and concepts which have significant effects on litigation, such as third party discovery or the revision of the procedure for judicial review, including the alteration of time limits. The fact that the terms of the Rule embody some conception of policy in relation to the fair and efficient processing of the myriad claims that come before a court does not, itself, mean that the relevant decision is one for the Oireachtas alone.

74. It should also be said that remaining within the area of delegation permitted by statute is only one of the constraints upon the drafters of rules. Since the function of the Rules

is to regulate court process, it necessarily involves the administration of justice and, accordingly, a Rule which arguably came within the scope of permissible delegation under the statute could nevertheless be impugned as an impermissible interference with the administration of justice: see, for example, the helpful discussion in the judgment of Finlay Geoghegan J. in *O'S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149.

75. The question remains, however, whether the provisions of O. 36 come within the area of delegation authorised by the Oireachtas when it permitted rules to be made covering the area of “practice and procedure including costs”. On the surface, O. 36 is a Rule concerning “costs”, but it does not deal with any procedural issue or, indeed, refer to the manner in which the litigation was conducted or its outcome. Instead, it makes a policy decision that a certain limited class of litigants cannot be subject to an order for costs whatever the circumstances of the case.

76. I am reluctant to adopt a narrow and formalistic approach to what is permissible on the part of a rule-making authority when making rules in relation to practice and procedure and, in this case, costs. In particular, I would reserve the question of whether the formulation of Kingsmill Moore J. in *O'Floinn* as to what constitutes practice and procedure should be applied more generally, notwithstanding its application in subsequent cases. While it proposes a clear verbal test to distinguish between procedure and substance, it is arguable it is too narrow and is difficult to reconcile with the outcome of the cases. As already observed, that was a minority judgment on that issue, and Ó Dálaigh and Lavery JJ. were prepared to take a broader view albeit that did not save the provision at issue in that case. It is, however, not necessary to resolve this question, in order to decide this appeal.

77. However, even taking a broad view both of the meaning of “practice and procedure” and “costs”, I have come to the conclusion that the terms of O. 36 are not within the

area of permitted delegation and, instead, intrude both upon an area of decision which is required to be made, if at all, by the Oireachtas if a general rule is sought to be made, and by the courts in individual decisions in particular cases.

78. Underlying the apparently simple terms of the Rules is a very significant decision to grant an exemption to some litigants from the possibility of a costs order on the basis of their status. The Rule also singles out a single group of litigants — those who successfully defend a prosecution brought by the D.P.P. or a member of An Garda Síochána — as uniquely deprived of the possibility of obtaining a costs order. The question of liability of the State, State bodies, or State officials, to Rules which apply to members of the public more generally is a very significant one. At the level of principle, it is possible to conceive of a range of possible rules in this regard, such as: (1) a rule which exempts all official prosecutors in criminal cases (and there are now very many agencies empowered to bring prosecutions other than the D.P.P. and the Gardai covered by the rule in issue in these proceedings); (2) a rule exempting only the particular official prosecutors contained in O. 36; a rule that provided that all official prosecutors (or some limited class) were exempt from any order of costs but subject to certain identified exceptions; (3) a rule that did not exclude liability for costs but did limit the costs recoverable, as provided for in the Petty Sessions Ireland Act; (4) a rule that sought to embody the principles for the determination of costs applications in trials on indictment; or, (5) a general rule in the terms of any of the options set out above but also applicable to civil litigation. It might be said that the parent Act gives no guidance as to the choice between these possibilities (and others) but, in my view, it is preferable to say that the underlying choice here goes beyond any question properly consigned to the rule-making authority as to practice and procedure including costs, and involves a broad ranging policy decision which lies within the function of the Oireachtas under Article 15.1.2°. It might be said that the reason why law-making for the State is

reserved to the Oireachtas is that there are decisions which must be made by the representatives of the people, and this decision, to exempt one class of prosecutor from the possibility of an award of costs in summary prosecutions is one that requires democratic justification rather than technocratic expertise.

79. It may appear somewhat paradoxical. That on this reasoning either the Oireachtas, in the exercise of its power, might decide to exempt certain parties from costs (subject to the compatibility of such a provision with the Constitution) or a court, in the exercise of its discretion in the administration of justice, might conclude that there are good reasons to distinguish the position of official prosecutors, in a particular case, or even set principles for the exercise of such discretion could be set out in case law. In either case the same result might occur and the successful defendant might fail to recover costs. But this merely reflects the constitutional functions of the Oireachtas and the Courts. The function and power of the rule-making authority is necessarily more limited both by the fact that it must remain within the permissible area of delegation (and the terms of the specific provision) and cannot impermissibly trench upon the administration of justice. The outcome of this case is, therefore, merely a reflection of the constraints upon rule-making authority.

80. It follows that the respondent is correct in distinguishing those cases which applied and upheld the provisions of O. 36 and its predecessors, and that it must be held that the exclusion of the DPP and Gardai prosecuting on her behalf from the possibility of an award of costs is *ultra vires* the power of the rules making committee. It is important to observe, however, that the judgment of Henchy J. in *Dillane* retains much of its essential vitality. There is no doubt that members of the Gardaí prosecuting in an official capacity or the D.P.P. perform a different social function from ordinary litigants which can, and arguably must, be acknowledged in any approach to the awarding of costs, whether by primary legislation or in an individual case. By the same token, the

situation cannot be equated to civil litigation between private parties where, if a claim fails, it can be said that it ought not to have been brought and the losing party should therefore pay the costs of the party required to come to court to defend the claim. In many, if not all, cases, a prosecutor can be said to have properly performed his or her functions even if the case does not result in a conviction. It cannot be said that because the case does not result in conviction that it ought not to have been brought. It is arguable therefore that any legislation adopted or judicial decision made would have to take account of the factors identified in *Dillane*. It has been agreed by the parties, however, that no issue arises in this case as to whether, on the assumption that the District Judge had a discretion, it was properly exercised in this case and, accordingly, it is not possible to address here, in any detail, the criteria that should be applied if the District Court has jurisdiction to award costs against the D.P.P. or a Garda prosecuting in an official capacity such as were discussed in the case of trials on indictment in the judgment of Charleton J. in *D.P.P. v. Kelly* [2007] IEHC 450 (Unreported, High Court, Charleton J., 19th of December, 2007).

- 81.** For the reasons set out above, which, while they differ from those of the Court of Appeal, would nevertheless reach the same conclusion, I would dismiss the appeal.