

Dir P D . McQUAID

1983 No 268 S.S. 80

THE DIRECTOR OF PUBLIC PROSECUTIONS

.v.

FRANK McQUAID

Judgment of Mr. Justice Murphy delivered the 26<sup>th</sup> day of October 1984

The Consultative Case Stated herein by District Justice O'Sullivan raises the question whether a summons in respect of an offence alleged to have been committed within a particular District Court area issued by a District Court Clerk who "was never formally appointed as Clerk" for that area but had acted in that capacity was a valid summons.

The question arises in this way. Michael Feeley was appointed a District Court Clerk on the 15th May, 1962. In the Case Stated the learned District Justice records that it was admitted by both parties that the title of Mr. Feeley on such appointment was "Dublin Metropolitan District Court Clerk". It seems to me that this admission implies and it is intended to imply that Mr. Feeley was duly assigned by the Minister of Justice under Section 48 of the Court Officers Act 1926 as one of the District Court Clerks of the Dublin Metropolitan District. It may be noted that the Minister is in fact bound to assign a District Court Clerk when appointed to one or more District Court areas and that there is no provision for merely

"attaching" a District Court Clerk to a District Court area. The duty of the Minister to assign to an area is mandatory under Section 48 aforesaid as the learned President of the High Court decided in the judgment delivered by him on the 25th day of July, 1983 in the Director of Public Prosecutions and Kevin O'Rourke.

In the circumstances while it was not stated in express terms that Mr. Feeley was assigned by the Minister to the Dublin Metropolitan District I am satisfied that this was in fact the case. In addition it is equally clear from what is not said (rather than what is said) in the Case Stated that Mr. Feeley was not assigned by the Minister to any District Court area or areas other than the Dublin Metropolitan District.

In accordance with the District Court (Areas) Order 1961 (S.I. No. 5 of 1961) certain electoral divisions and wards in the county and county borough of Dublin designated at reference number 76, in the first schedule to that Order, are grouped together to constitute the "District Court area of Kilmainham". The District Court (Districts) Order 1961 (S.I. No. 6 of 1961) in turn combines the District Court area of Kilmainham with those of Dundrum and Rathfarnham to constitute the District Court District No. 11. It was not suggested in the Case State or in the argument before me that the District No. 11 or the Kilmainham area of the District Court fell within or formed

part of the Dublin Metropolitan District. It does appear, however, that the County Office of Dublin is a sub-office of the Office of the Chief Clerk of the Dublin Metropolitan District and that the County Office includes District Court District No. 11 and all of the areas comprising the same. In addition, it appears that the Chief Clerk of the Dublin Metropolitan District has acted (and I assume has been assigned to so act) as Clerk for the District comprised in District Court District Nos. 10 and 11.

On the 10th July, 1978, Mr. Feeley was appointed a Senior Clerk. On or about that date the Chief Clerk of the Dublin Metropolitan District purported to assign Mr. Feeley to the County Office, meaning thereby, apparently, District Nos. 10 and 11 of the District Court.

The District Court Rules (Rule 91, paragraph 2) authorise the division of duties among Clerks assigned to a Court area in the following terms:-

"Where more than one Clerk is assigned to a Court area, then the principal Clerk in such Court area, or in the Metropolitan District, the Chief Clerk, may make such division of duties among the Clerks assigned to such Court area or to the said District respectively as he thinks proper."

It does not seem to me that it would be correct to describe this power to divide duties as a delegation, still less an assignment to a District Court

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area but whatever the description it is clear that the power vested in the principal Clerk or the Chief Clerk as the case may be is limited to the control of functions carried out by Clerks in the area or areas to which they have already been assigned, that is to say, assigned by the Minister pursuant to the provisions of Section 48 of the Court Officers Act 1926. It is understandable that the arrangements - which presumably serve a useful administrative purpose - under which the Chief Clerk of the Dublin Metropolitan District is also a District Court Clerk in District Nos. 10 and 11 which are again apparently for administrative purposes described as the "County Office" should give rise to some confusion but on any analysis it seems to me to be clear that under no circumstances has the Chief Clerk of the Dublin Metropolitan District the power to assign a person who has been validly appointed District Court Clerk of the Dublin Metropolitan District to any other District Court area outside the Dublin Metropolitan District. That being so I am forced to the conclusion that the Minister did not assign and the Chief Clerk of the Dublin Metropolitan District could not assign Mr. Feeley to the District Court area of Kilmainham. That being so, Mr. Feeley had no power to act in that capacity.

The Case Stated records that Mr. Feeley has since July 1972 issued summonses for the District Court area of Kilmainham. On the basis of that

admission the appellant contends that Mr. Feeley had indeed power by virtue of the District Court Rules, Rule 30 (1) (c) to issue the summons in question.

That rule provides as follows:-

"in cases where a defendant is charged with an offence, if the offence is stated to have been committed or the defendant resides within the limits of the Court area or areas for which he acts as Clerk."

The argument of the appellant is, therefore, that where a person is a District Court Clerk then, provided that he acts as District Court Clerk for a particular area that, the rule aforesaid gives him power so to do. Whilst this may be a literal interpretation of the rule I cannot accept that it is the correct one. If that interpretation was accepted it would mean that any person (or more correctly any District Court Clerk) who usurped an authority would necessarily obtain that authority. Moreover it would necessarily involve concluding that the actual authority vested in the usurper on the first occasion on which he purported to exercise the particular function because it is the very exercising of the function that confers upon him the power if that construction is correct. Of course it is not suggested in the present case that there was any conscious attempt by the Chief Clerk of the Dublin Metropolitan District to grant or by Mr. Feeley to assume the unwarranted exercise of any power; quite the reverse. It is clear that

Mr. Feeley must have acted in fact as District Court Clerk of the Kilmainham District Court area for upwards of five years with the knowledge and tacit approval of the Minister for Justice and his officials. However, the argument made on behalf of the appellant must stand or fall on the proposition that the very fact of acting on even one occasion as District Court Clerk of an area confers the power to issue summonses within that area. The repetition of facts over a period of years in no way strengthens the argument based on the interpretation of Rule 30 aforesaid.

It seems to me that the rule in question must be interpreted as being limited to a District Court Clerk who acts validly as Clerk of the area in which the offence is alleged to have been committed or the defendant resides. Unless the rule is so construed it would lead to the absurd result to which I have already referred, i.e. that the usurpation of a power validates its exercise.

Counsel on behalf of the appellant contended that the presence of the respondent in the District Court to answer the charge alleged in the summons cured any defect which may have existed in the summons or the issue thereof. In support of that contention she referred to the State (Attorney General) and Fawsitt 1955 I.R. 30; D.P.P. and Clein 1983 I.R.M. 76 and the decision of the President of the High Court in the State (O'Leary) and District Justice

Neilan unreported but delivered on the 21st March, 1983. What these cases make clear is that no want of form or lack of procedural correctness in the summons itself can be of any avail to an accused if and when he attends in answer to the summons. In the Clein case Mr. Justice Henchy in delivering the judgment of the Supreme Court (at page 77) stated the position as follows:-

"A summons, after all, is only a written command issued to a defendant for the purpose of getting him to attend Court on a specified date to answer a specified complaint. If he responds to that command by appearing in Court on the specified date and by answering the summons when it is called in Court, he cannot be heard to say that he was not properly summoned if the complaint set out in the summons is a valid one."

It seems to me that that quotation deals fully and authoratively with the position insofar as it relates to the summons but it also adds the important qualification that the estoppel (if I may so describe it) only operates "if the complaint set out in the summons is a valid one".

In the present case Counsel on behalf of the respondent argued that the power to issue the summons was co-extensive with the power to hear the complaint and that accordingly as the District Court Clerk did not have power

to issue the summons within the District Court area in question neither did he have power to hear a complaint which arose in that area either by reason of the fact that the offence was alleged to have been committed within the area or that the defendant resided there. Whilst this does not appear to be expressly stated in the statutory provisions dealing with the District Court or the functions of the District Court Clerk nor in the District Court Rules it does seem to me that the receipt of a complaint and the issue of a summons by the recipient of the complaint are, as Counsel has said, "co-extensive". The purpose of receiving the complaint is to enable the recipient, be he District Justice, Peace Commissioner or District Court Clerk, to decide whether it is an appropriate case in which to issue a summons. As a District Court Clerk cannot, as I have already found, issue a summons in respect of an offence arising outside the area or areas to which he has been assigned it seems to me that he cannot in any meaningful sense receive a complaint in respect of any such offence. Indeed it may be observed that the Ordinary Summons Form four of the District Court Rules contains a recital in the following terms:-

"Whereas a complaint has been made to me that - - "

and then goes on

"This is to command you to appear as defendant on the hearing of the



"said complaint at the District Court at etc."

Certainly the form indicates that the summons is issued by the person to whom the complaint has been made and it seems to me not only is it understandable that the form should so prescribe but that any other procedure would be meaningless. The only justification for a person who has power to issue a District Court Summons for issuing one is that he has in the particular case processed a complaint and has reached the conclusion that it is an appropriate case in which to exercise the power vested in him.

In these circumstances it seems to me that the defect of which the respondent complains relates to the substantive condition precedent to the issue of the summons, namely, that it should have been received and processed by a person who had the appropriate authority to issue a summons in respect of the complaint and that the failure to fulfil this condition is not merely a want of form or lack of procedural correctness in the summons but a defect going to the root of the matter. Accordingly, the attendance of the respondent in answer to the summons did not in my view cure the defect.

In these circumstances I am of opinion that the questions raised by the learned District Justice should be answered as follows:-

1. No.
2. No.

*Richard J. ...*