

H. C. OF A. that Edwin Thomas John Kerby was not duly elected for Ballarat
1920.
and that the election for that Division on 13th December 1919 was
absolutely void. No costs. Deposit ought to be returned.

KEAN
v.
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*Declare that respondent was not duly elected
and that the election was void. Deposit to
be returned.*

Solicitor for the petitioner, *M. Blackburn.*

Solicitors for the respondent, *Arthur Robinson & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MULCAHY PETITIONER ;

AND

PAYNE AND OTHERS RESPONDENTS.

H. C. OF A. *Parliamentary Election—Election for Senate—Petition—Time for filing—Return of*
1920. *writ—" Periodical " and " casual " vacancies—" Greatest number of votes "—*
Preferential voting—Senate Elections Act 1903 (No. 2 of 1903), sec. 9—Common-
HOBART, *wealth Electoral Act 1918-1919 (No. 27 of 1918—No. 31 of 1919), secs. 135, 141,*
May 4. *185.*

MELBOURNE,
May 13.

Knox C.J.,
Gavan Duffy,
and Rich J.J.

Sec. 141 (1) of the *Commonwealth Electoral Act 1918-1919* provides that
" In elections for the Senate, the Commonwealth Electoral Officer for the State
for which the election is held shall . . . (b) by indorsement under his hand
certify on the writ the names of the candidates elected, and return the writ to
the Governor of the State in respect of which it was issued." Sec. 185 provides
that every petition disputing an election shall (*inter alia*) (e) " be filed . . .
within forty days after the return of the writ."

Held, that the return of the writ is not complete until the writ indorsed as
required by sec. 141 (1) (b) has come into the possession of the Governor of the
State so that he may act upon it.

At an election for the Senate pursuant to the *Senate Elections Act* 1903 and the *Commonwealth Electoral Act* 1918-1919, there being three periodical vacancies and one casual vacancy to be filled, on a count being taken pursuant to sec. 135 of the latter Act, A obtained the third highest number of first preference votes and was third in the order of the election of the elected candidates, and B obtained the fourth highest number of first preference votes and was fourth in the order of the election of the elected candidates.

Held, that A was one of the three elected candidates who received the greatest number of votes within the meaning of sec. 9 (1) of the *Senate Elections Act* 1903, and was therefore elected to fill one of the three periodical vacancies, and that B was elected to fill the casual vacancy, although on the count of the votes when B was elected he had a greater number of votes than A had when he was elected.

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CASE STATED.

On the hearing of an election petition in which Edward Mulcahy was petitioner and John Dunlop Millen, George Matthew Foster and Herbert James Mockford Payne were respondents, *Knox C.J.* stated for the opinion of the Full Court a case which, as amended at the hearing, was substantially as follows :—

1. The following is a copy of the petition, omitting formal commencement :—

(1) That your petitioner was a candidate for the Senate of the Commonwealth of Australia to represent Tasmania at the general election held on 13th December 1919, and he was declared by the Chief Electoral Officer for Tasmania to have been duly elected as a Senator at such election.

(2) That at such election there were four vacancies in the Senate to be filled from the State of Tasmania, three being “periodical” vacancies and one being a “casual” vacancy.

(3) That three other candidates, John Dunlop Millen, George Matthew Foster and Herbert James Mockford Payne, were also declared by the said Chief Electoral Officer to have been elected; and that the number of votes received by the elected candidates respectively was as follows: Millen 33,247, Foster 33,173, Payne 30,277 and your petitioner 33,102.

(4) That the said Chief Electoral Officer in declaring the poll declared the said John Dunlop Millen, George Matthew Foster and Herbert James Mockford Payne to have been elected as Senators

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(5) That the election was conducted under the *Commonwealth Electoral Act* 1918-1919, and that the said Act is incorporated with the *Senate Elections Act* 1903, which last mentioned Act prescribes the mode in which both periodical and casual vacancies are to be filled whenever there is a casual vacancy.

(6) That the writ for the said election was returned in due course to the Governor of the State of Tasmania on 13th January last, with a certificate that the said John Dunlop Millen, George Matthew Foster and Herbert James Mockford Payne had been elected to fill the periodical vacancies and that your petitioner had been elected to fill the casual vacancy, whereas your petitioner received a greater number of votes than the said Herbert James Mockford Payne and under sec. 9 of the *Senate Elections Act* 1903 ought to have been declared elected to fill one of the periodical vacancies.

(7) That the votes recorded in favour of David John O'Keefe, who was also a candidate at the said election and who was the last candidate to be excluded when the election was completed, were at the first count 11,204 and at the final count when he was excluded had reached 26,250.

(8) That none of the votes recorded in favour of the said David John O'Keefe were counted in favour of the four candidates declared to be elected, and your petitioner contends that such votes should have been counted in order to ascertain the true result of the voting.

Your petitioner therefore prays :—(1). That your petitioner be declared to have been duly elected at the said election to fill one of the three periodical vacancies. (2). That as the votes of all other excluded candidates were counted and contributed towards the result of the polling at the said election, so for the determination of the question as to which of the four elected candidates shall be declared to have received the greatest number of votes a count may be directed (if this Honourable Court deems it necessary and proper) of the votes recorded in favour of the said David John O'Keefe.

2. The said petition was duly signed and witnessed in accordance

with the *Commonwealth Electoral Act* 1918-1919, and was filed on the said 20th February last.

3. The said petition was duly served in accordance with the said Act on the Commonwealth Electoral Officer for the State of Tasmania and on Senators John Dunlop Millen, George Matthew Foster and Herbert James Mockford Payne, as respondents thereto, and was published in the *Commonwealth and Tasmanian Government Gazettes* in accordance with the said Act.

4. Appearances have been duly entered on the part of the said Commonwealth Electoral Officer and the said Herbert James Mockford Payne, but no appearance has been entered on behalf of the other respondents.

5. The writ for the said election was issued under the hand of the Governor of the State of Tasmania in the form prescribed by the *Senate Elections Act* 1903 on 3rd November last.

6. The said election was conducted under the *Commonwealth Electoral Act* 1918-1919, and the petitioner claims (but the respondent Herbert James Mockford Payne does not admit) that with the said Act ought to be read the *Senate Elections Act* 1903; and that the said last mentioned Act prescribes the mode in which both periodical and casual vacancies are to be filled whenever there is a casual vacancy.

7. The writ for the said election was returned to the Governor of the State of Tasmania as the petitioner contends on 13th January last, or as the respondent Herbert James Mockford Payne contends either on 7th or 8th January last. The following are copies of the relevant documents with regard to the return of the writ:—

“Commonwealth of Australia.—Electoral.—Commonwealth Electoral Office, Customs House, Hobart, 7th January 1920.—Dear Sir,—I have the honour to return, herewith, for the favour of transmission to His Excellency the Governor, the writ dated 3rd November 1919, on which I have duly indorsed the names of the Senators elected to serve in the Parliament of the Commonwealth of Australia. I have the honour to be, Sir, your obedient servant, F. P. Bowden, Commonwealth Electoral Officer for the State of Tasmania.—To D. W. Addison, Esq., Under Secretary, Hobart.”

“Chief Secretary’s Department, Hobart, 8th January 1920.—

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H. C. OF A. Memorandum.—The Private Secretary, Government House, Hobart.
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 v. Payne as the three Senators from and after 1st July 1920, and
 PAYNE. Edward Mulcahy as a Senator from and after the date of his election,
 — in pursuance with the above writ for the information of His Excellency the Governor. W. H. Lee, Chief Secretary.”

“Senate writ returned to the Private Secretary with a request that His Excellency the Governor will kindly forward the same to His Excellency the Governor-General, in accordance with the Act. W. H. Lee, Chief Secretary, 13/1/20.”

“26th January 1920.—Dear Sir,—With reference to the Senate writ, I should be glad of an assurance that action has been taken as set out in the final paragraph of sec. 7 of the Commonwealth Constitution Act, which reads: ‘The Senators shall be chosen for a term of six years, *and the names of the Senators chosen for each State shall be certified by the Governor to the Governor-General.*’ Thanking you in anticipation for the favour of an early assurance in this regard, Yours faithfully, F. P. Bowden, Commonwealth Electoral Officer for the State of Tasmania.—To the Chief Secretary, State Government Buildings, Hobart.”

“Tasmania, Chief Secretary’s Department, Hobart. 31st January 1920.—Dear Sir,—In reply to your letter of 20th instant I beg to advise you that the writ showing the names of the Senators chosen at the recent election in Tasmania was forwarded to His Excellency the Governor, for transmission to His Excellency the Governor-General, on 13th instant. Yours faithfully, D. W. Addison, Chief Electoral Officer.—To the Commonwealth Electoral Officer, Hobart.”

8. The said return was placed before the Governor of the State of Tasmania on 13th January last, and was then transmitted by the Governor of the said State to the Governor-General of the Commonwealth.

9. Figures with regard to the counts of the votes at the said election are set out in a statistical return, dated 1st March last, which has been presented to both Houses of the Parliament of the Commonwealth and of which a certified copy is made an exhibit to, and is to be taken as part of, this case.

10. The following questions, which are in my opinion questions of law, were raised before me on the trial of the said petition, namely :—

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- (1) Whether the said petition was filed within the period prescribed by sec. 185 (e) of the *Commonwealth Electoral Act* 1918-1919.
- (2) Whether at the said election the petitioner should have been declared elected to fill a periodical vacancy and not a casual vacancy within the meaning of sec. 3 of the *Senate Election Act* 1903 or sec. 135 of the *Commonwealth Electoral Act* 1918-1919.
- (3) Whether the respondent Herbert James Mockford Payne should have been declared elected to fill a casual vacancy and not a periodical vacancy within the said sections or one of them.
- (4) Whether a count can or ought to be ordered of the votes cast for David John O'Keefe, a candidate at the said election, for the purpose of determining the second and third questions before stated.

Lodge, for the petitioner. The petition was filed within the period specified in sec. 185 of the *Commonwealth Electoral Act* 1918-1919. The return of the writ is not complete until, under sec. 141 (1) (b), it has reached the hands of the Governor of Tasmania so that he may act upon it (*In re Poole Election Petition*; *Hurdle v. Waring* (1); *Ransford v. Maule* (2)). The *Senate Elections Act* 1903 should, for the purpose of Senate elections, be read as incorporated in the *Commonwealth Electoral Act* 1918-1919. Applying sec. 9 of the former Act to a count taken under sec. 135 of the latter Act, the elected candidates who receive the "greatest number of votes" are those who receive the greatest number of votes ascertained to have been received by the elected candidates when the count is concluded. If that is so, the petitioner, having received more votes when the count was concluded than the respondent Payne, is one of the three who received the greatest number of votes. If this is not so, then a further count should be

(1) L.R. 9 C.P., 435.

(2) L.R. 8 C.P., 672.

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Dobson, for the Electoral Officer. The *Commonwealth Electoral Act* 1918-1919 and the *Senate Elections Act* 1903 must be construed together. Doing that, the "greatest number of votes" in sec. 9 (1) of the latter Act means the greatest number of votes at the last stage when those votes are competing, and the greater number of votes obtained by the petitioner was not obtained while his votes were competing with those of the other three elected candidates. The proper method of ascertaining the greatest number of votes is by comparison of the first preference votes, for the other votes are only contingent votes.

Hodgman, for the respondent Payne. The certifying required by sec. 141 (1) (b) of the *Commonwealth Electoral Act* 1918-1919 is a ministerial act, and the return was completed when it was received by the Chief Secretary, or at any rate when transmitted by him to the Governor. [He referred to *Rogers on Elections*, 17th ed. (revised), vol. II., pp. 142, 179.] The *Senate Elections Act* 1903 is not repealed by the *Commonwealth Electoral Act* 1918-1919 (*Bennett v. Minister for Public Works (N.S.W.)* (1)). The comparison of votes for the purpose of sec. 9 (1) of the *Senate Elections Act* cannot go beyond the point at which the last exclusion of a candidate takes place. The respondent Payne, having received a greater number of first preference votes than the petitioner and having been before him in the order of the election of the successful candidates, was properly declared to have been elected to one of the periodical vacancies.

Cur. adv. vult.

May 13.

The judgment of the COURT, which was read by KNOX C.J., was as follows :—

The substantial question raised by this special case is whether the petitioner, Senator Edward Mulcahy, or the respondent, Senator Herbert James Mockford Payne, should have been declared elected

to fill a periodical vacancy within the meaning of the *Senate Elections Act* 1903, as a result of the election of Senators for the State of Tasmania held in the month of December 1919. A preliminary question was raised whether the petition was filed within the time prescribed by the *Commonwealth Electoral Act* 1918-1919, sec. 185 (e.)

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The relevant facts are as follows :—At the election in December 1919 there were four vacancies to be filled, three of these being “periodical” and one “casual.” There were ten candidates duly nominated, including Messrs. Millen, Foster and Payne, and the petitioner. The writ for the election was issued by the Governor of Tasmania in the form prescribed by the *Senate Elections Act* 1903 on 3rd November 1919; the polling took place on 13th December 1919. The result of the polling was that no candidate received an absolute majority of first preference votes, and, the counting of votes having proceeded in the manner prescribed by the *Commonwealth Electoral Act*, Senator Millen was elected to the first vacancy with 33,247 votes against 26,105 votes cast for Mr. O’Keefe, the last candidate to be excluded. To the second vacancy Senator Foster was elected with 33,173 votes against 26,179 votes cast for Mr. O’Keefe, the last candidate to be excluded. Senator Payne was next elected with 30,277 votes against 29,075 votes cast for Mr. O’Keefe, the last candidate to be excluded; and the petitioner was elected to the fourth vacancy with 33,102 votes against 26,250 votes cast for Mr. O’Keefe, the last candidate to be excluded. The first preference votes cast for the elected candidates were Millen 10,766, Foster 10,693, Payne 4,678, Mulcahy 4,457. On 7th January 1920 the Electoral Officer indorsed on the writ his certificate and return that Senators Millen, Foster and Payne had been duly elected as the three Senators from and after 1st July 1920 (*i.e.*, to fill the periodical vacancies), and that the petitioner had been duly elected as a Senator from and after the date of his election (*i.e.*, to fill the casual vacancy); and on the same day he forwarded the writ so indorsed to the Chief Secretary of the State of Tasmania for transmission to the Governor. On 8th January the Chief Secretary wrote to the Private Secretary to the Governor forwarding with his letter the writ indorsed as above mentioned. On 13th January the Governor of Tasmania signed the indorsement as having been

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seen by him, and, apparently on the same day, returned the writ to the Chief Secretary, who on the same day returned it to the Governor for transmission to the Governor-General. There is nothing to show that the writ came to the knowledge of the Governor or into his possession before 13th January. The statistical return of the result of the polling shows that on every count up to and including that on which Senator Payne was elected he received a greater number of votes than the petitioner, the conclusion being that so long as Senator Payne and the petitioner were in competition the electors who desired the election of the former in preference to the latter were in a majority.

In these circumstances we are of opinion, first, that the question raised by question 1 of the special case, namely, whether the petition was filed within the time prescribed by sec. 185 (e) of the *Commonwealth Electoral Act* 1918-1919 ought to be answered in the affirmative. In ascertaining the date of the return of the writ, the material point of time to consider is that at which the writ indorsed by the returning officer comes into the possession of the person authorized by law to act upon it, so that he may act upon it, and the return is not complete until that time (see *In re Poole Election Petition* (1); *Rogers on Elections*, 17th ed. (revised), vol. II., at p. 142). By the *Commonwealth Electoral Act* 1918-1919, sec. 141 (1) (b), the Electoral Officer is required to return the writ, when indorsed, to the Governor of the State in which it was issued, the Governor being required by sec. 7 of the Constitution to certify to the Governor-General the names of the Senators chosen for the State. In our opinion it is clear that the return of the writ is not complete until the indorsed writ has come into the possession of the Governor of the State so that he may act on it, and, as the proper inference to be drawn from the facts is that the writ did not come into the possession of the Governor of Tasmania before 13th January, we must hold on the facts stated that that is the date of the return of the writ. Consequently the petition was filed within forty days after the return of the writ, and the point taken on sec. 185 (e) of the Act fails.

We come then to the substantial matter in dispute, viz., which of the two contestants, Senator Payne and the petitioner, is entitled

(1) L.R. 9 C.P., 435.

to be declared elected to the "periodical" vacancy. The answer to this question depends on the application of sec. 9 of the *Senate Elections Act* 1903 to the result of the polling at the election now under consideration. The section runs thus :—“(1) Those of the elected candidates, to the number of the periodical vacancies, who receive the greatest number of votes shall be elected to fill the periodical vacancies. (2) In the event of an equality of votes between two or more elected candidates, not all of whom can be elected to fill the periodical vacancies, the Commonwealth Electoral Officer for the State shall give a casting vote for the purpose of deciding which of them shall be elected to fill the periodical vacancies. (3) The elected candidates who are not elected to fill the periodical vacancies shall be elected to fill the casual vacancies.” When that Act became law the *Commonwealth Electoral Act* 1902 prescribed a different system of election from that now in force. Under the earlier system each voter was entitled to record one vote for each of a number of candidates corresponding with the number of vacancies to be filled. If, for instance, there were three vacancies to be filled, each elector was entitled to vote for three candidates, giving no more than one vote to each candidate for whom he voted. Every vote given by any elector had the same value, and the result was ascertained by adding up the votes cast for each candidate, the three candidates who obtained the greatest number of votes being elected. It was to an election conducted in this manner that sec. 9 of the *Senate Elections Act* 1903 was originally intended to apply, and so long as that system remained in force no difficulty would arise in applying its provisions literally construed. Subsequently it was thought that the system prescribed by the *Commonwealth Electoral Act* 1902 was not calculated to ensure the election of those candidates favoured by a majority of the electors, and by the *Commonwealth Electoral Act* 1918 (subsequently amended by the *Commonwealth Electoral Act* 1919) the system under which the election of 1919 was held was introduced. Under the new system the cardinal idea is that before any candidate shall be elected he shall have received an absolute majority of the votes cast at the election; the method adopted for giving effect to this idea being, in the case of a Senate election, that each elector shall vote for not

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less than twice the number of candidates to be elected plus one, if there be so many candidates, and, if not, then for all the candidates, in the order of his preference for the candidates for whom he votes, placing the number 1 opposite the name of the candidate for whom he votes as his first preference and the numbers 2, 3, 4, and so on, opposite the names of the other candidates in the order of his preference. Under this system, however many candidates are to be elected, if one of them obtains an absolute majority of first preference votes he is elected, notwithstanding that other candidates might have a greater number of votes if second and third preference votes were included with the first preference votes in the count (see sec. 135 (5) (b) of the *Commonwealth Electoral Act* 1918-1919). But, if no candidate obtains an absolute majority of first preference votes, the scrutiny proceeds in the manner prescribed by sec. 135 (5) (d) and (e), under which the second and subsequent preference votes are taken into account in order to arrive at a result which will give one candidate an absolute majority of votes counted according to the method prescribed by the section. It is apparent that this system differs radically from that prescribed by the Act of 1902, first, in the number of votes to be cast by an elector, and, secondly, in the fact that the value of the votes cast by each elector is not necessarily equal, the second and subsequent preference votes being contingent in their nature, and so of inferior value to the first preference vote.

It follows from what we have said that the provisions of sec. 9 of the *Senate Elections Act* 1903 have now to be applied to a system of voting which differs radically from that in force when that Act was passed, and it is not surprising, under these circumstances, that difficulties should arise in applying those provisions. We cannot but think that when the new system was introduced by the *Commonwealth Electoral Act* 1918-1919, Parliament overlooked the necessity of amending the provisions of sec. 9 of the *Senate Elections Act* 1903 in order to make those provisions appropriate to the new system of voting. Under these circumstances we refrain from expressing any opinion as to the proper method of applying the provisions of sec. 9 of the *Senate Elections Act* 1903, except so far as is necessary to enable us to decide whether the petitioner ought to be declared

elected to fill a periodical vacancy, this being the only question which it is necessary for us to decide on the case stated. We proceed to consider this question, the solution of which depends on the answer to be given to the further question : Was the petitioner one of the three elected candidates who obtained the greatest number of votes at the election ? or, there being four elected candidates and three periodical vacancies, the question may be stated thus : Did the petitioner obtain at the election a greater number of votes than some other elected candidate ?

In whichever way the question is stated, the answer must, in our opinion, be in the negative on any reasonable construction of sec. 9 of the *Senate Elections Act* 1903 as applied to the system now in force for the election of Senators. Several views were pressed upon us during the argument. First, it was said that the word "votes" in sec. 9 meant votes similar in nature to those recorded under the system in force in 1903, and that first preference votes now answered that description. If this construction be adopted, the petitioner fails; for each of the other elected candidates obtained a greater number of first preference votes than he. Secondly, it was contended that sec. 9 of the Act of 1903 may be applied as referring to the number of votes obtained by each elected candidate at the moment of his election in competition with all candidates not previously elected. If this be so, it was said that in the present case Senator Millen received the greatest number of votes in competition with all candidates, Senator Foster received the greatest number of votes in competition with all candidates except Senator Millen, Senator Payne received the greatest number of votes in competition with all candidates except Senators Millen and Foster, and Senator Mulcahy received the greatest number of votes in competition with the candidates not already elected. These were the elected candidates, and it is said that, as the number of votes counted for Senator Mulcahy when he was elected exceeds the number counted for Senator Payne when he was elected, Senator Mulcahy was one of the elected candidates who received the greatest number of votes within the meaning of the *Senate Elections Act* 1903. But this method of comparison is fallacious, because the votes counted for Senator Mulcahy at the moment of his election are votes given to

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him in competition with Mr. O'Keefe, and not in competition with or in preference to those candidates already elected, and do not necessarily indicate any preference for him as against them.

A third possible way of applying the phrase "elected candidates who receive the greatest number of votes" in sec. 9 is by treating it as equivalent to "the elected candidates in the order of their election." On this construction the petitioner fails, because Senator Payne was elected before him.

It was further contended that the way to ascertain which elected candidates obtained the greatest number of votes is to count the whole of the votes cast for each elected candidate, whether first, second, third, or subsequent preference votes, attributing an equal value to each vote. The first answer to this contention is that the treatment of first, second, and subsequent preference votes as all of equal value is opposed to the scheme of the Act. For example, if A obtains 1,000 first preference votes, B having the second preference votes on those papers, B would, on this construction, be put on the same footing as A with respect to these 1,000 votes, though each of the voters who cast them voted for A in preference to B. A further answer is that the *Commonwealth Electoral Act* does not require or authorize any count of this kind, nor any count of any kind after the point at which the necessary number of candidates has received each in his turn an absolute majority of votes.

For these reasons we are of opinion that the questions should be answered: (1) Yes; (2) No; (3) No; (4) No.

Questions answered accordingly.

Solicitors for the petitioner, *Roberts & Allport*.

Solicitors for the respondent Payne, *Page, Hodgman & Seager*.

Solicitors for the Electoral Officer, *Dobson, Allport & Mitchell*.

B. L.