

ELECTORAL LAW ACT (NORTHERN IRELAND) 1962
NORTHERN IRELAND ASSEMBLY ELECTIONS ORDER 1982

COURT FOR THE TRIAL OF AN ELECTION
PETITION FOR THE CONSTITUENCY OF ARMAGH

Between:

JAMES HAROLD McCUSKER
and
JAMES ALEXANDER SPEERS

Petitioners.

and

SEAMUS MALLON

Respondent.

HEARING BEFORE THE RIGHT
HON. LORD JUSTICE O'DONNELL and
THE HON. MR. JUSTICE HUTTON

on

16th DECEMBER 1982

W.J. BOYD,
Official Shorthand Writer.

Q 1 O'DONNELL LJ: Yes, Mr. Campbell?

Q 2. MR. A. CAMPBELL, Q.C.: If it please your lordships I appear with my learned friend Mr. Smith for the petitioners.

Q 3. MR. MALLON: Your lordships, I wish to enter an appearance on my own behalf and as this is a unique type of court with indeed very heavy political overtones I would welcome this opportunity to give my reasons --

Q 4. O'DONNELL, LJ: Mr. Mallon, if you would just allow me to take a note of the appearances. You are appearing in person without counsel?

Q 5. MR. MALLON: Yes, your lordship, and I would appreciate if your lordships would give me this opportunity to put my attitude to this court and anything that I may say or do in it in the type of context which I think is essential in this case.

Q 6. O'DONNELL, LJ: You will appreciate that we are simply concerned with legal matters and not with political matters.

Q 7. MR. MALLON: I appreciate that, your lordships. However, you will appreciate that my position is that this is a rather crucial position and I think that rather than that my remarks may be at a later stage misunderstood I would like if you would give me the permission to put them into context where indeed that may be avoided.

Q 8. O'DONNELL LJ: I am sorry, the position is that the petitioners have to prove the case. They have set out to establish that you are disqualified from membership of the Assembly. Until they do that really there is no necessity to involve yourself at all in the matter but my problem is trying to understand precisely what you are saying, your attitude to the court. I do not know what that means precisely..

Q 9. MR. MALLON: Well I would welcome any opportunity, your lordships, of stating my attitude not to the court because I would stress at this stage I have nothing but respect for this court. However, we have a situation here which I would regard as an attempt to frustrate the democratic wishes of County

Armagh; that the petitioners have taken this step and their step is in effect a step to thwart the decision of the only court that is possible in affairs of electoral choice, that is the Court of Appeal. It is for that reason that I am not making my remarks towards this court at all but towards a piece of legislation which I regard as iniquitous, which I regard as unfair and which I regard is insulting not just to myself but to my electorate and to my party.

Q 10. O'DONNELL LJ: Well I think, Mr. Mallon, that you have made that point. As I say, we are not here concerned with that. The points you have made may have and indeed probably do have very considerable political validity but they really have no legal validity and it is really the legal matters that we are concerned with.

Q 11. MR. MALLON: I appreciate that, your lordships, and I would hope that somewhere during the course of this hearing that I would be given the opportunity of presenting a case against what I can only describe as an opportunity to guide democracy.

Q 12. O'DONNELL: L.J.: Well is it convenient for you to sit where you are or do you wish to come down to the front of the court to counsels' benches as would be customary if you wish?

Q 13. MR. MALLON: No, your lordships I would prefer to sit here at this stage.

Q 14. O'DONNELL LJ: Very good, Mr. Mallon.. Yes, Mr. Marrinan?

Q 15. MR. D. MARRINAN: If it please your lordships, my lords, I appear on behalf of the Director of Public Prosecutions.

Q 16. O'DONNELL LJ: Yes, you are here to assist the court?

Q 17. MR. MARRINAN: Yes, my lbrds.

Q 18. O'DONNELL: Very good. Mr. Marrinan appears in that capacity. Yes, Mr. Campbell?

Q 19. MR. CAMPBELL: If it please your lordships, as appears from the petition the petitioners say that they are persons who voted as electors at the election held on the 20th October 1982, the

(Mr. Campbell)

Assembly election for Armagh. At that election Alastair Black, David Norman Calvert, Tom French, Douglas Hutchinson, William Jeffrey, Seamus Mallon, James McAllister, James Harold McCusker, Hugh News, James Nicholson, Joseph Beningus O'Hagan, Patrick O'Hanlon, Mary Simpson, William Wolseley Smith and James Alexander Speers were candidates and on the 25th October 1982 the returning officer returned James Harold McCusker, Seamus Mallon, James Nicholson, James McAllister, Mary Simpson, David Calvert and Hugh News to the Clerk of the Assembly as being duly elected. They further say that Seamus Mallon, of 5 Castlevue, Markethill, County Armagh, is and was at all material times a member of a legislature outside the Commonwealth, namely, a member of the Senate of the Republic of Ireland and was thus incapacitated from being elected a member of the Assembly and disqualified from membership by the Northern Ireland Assembly Disqualification Act 1975, section (1) (1) (e) and they therefore seek for an order that it may be determined that Seamus Mallon was not duly elected and that his election was void. Now, my lords, the statutory provision, as your lordships will know, is in the Northern Ireland Assembly Disqualification Act of 1975 which provides in section 1:

"Subject to the provisions of this Act a person is disqualified from membership of the Northern Ireland Assembly who for the time being..."

and then it sets out various matters in the subsections until subsection (e) where it says:

"is the member of the legislature of any country or territory outside the Commonwealth"

I would now call, my lords, Mr. Patrick A. Bradley.

MR. PATRICK ALPHONSUS BRADLEY duly sworn

EXAMINATION BY MR. CAMPBELL

Q 20. MR. CAMPBELL: Mr. Bradley, was an Assembly election for the Armagh constituency held on the 20th October?

Q 21. O'DONNELL LJ: Who is Mr. Bradley?

Q 22. MR. CAMPBELL: Well I was going to ask him that, my lord, as the next question.

Mr. Bradley

EXAMINATION BY MR. CAMPBELL

Q 23. O'DONNELL, LJ: Well I would like to start off with that.

Q 24. MR. CAMPBELL: Well were you the returning officer at an election? A. Yes, my lord.

Q 25. And was that election held on the 20th October of 1982? A. Yes.

Q 26. And was there an election for the constituency of Armagh? A. Yes.

Q 27. And was it for that election that you were the returning officer? A. Yes, along with all of the other constituencies in Northern Ireland.

Q 28. Now can you say if Seamus Mallon, of 5 Castleview, Markethill, Armagh, was a candidate at that election? A. Yes.

Q 29. And can you say if he was a person declared by you to have been elected? A. Yes.

Q 30. Now on what date did you declare him to be elected? A. He was declared elected by the deputy electoral officer and I made a return to the Clerk of the Assembly on Monday, the 25th October.

Q 31. Of 1982? A. Of 1982.

Q 32. And under the Electoral Law Act, section 34 of the Act, 1962, a candidate is obliged to notify the returning officer of the name of his electoral agent, is that right? A. Yes.

Q 33. Can you say who Mr. Mallon returned to you or notified you as being his electoral agent at this election? A. Can I have a moment please?

Q 34. Yes. A. Francis P. McIlvanna, of Aughnalig, Dungannon.

Q 35. Thank you.

Q 36. O'DONNELL, L.J.: Mr. Mallon?

CROSS EXAMINATION BY MR. MALLON

Q 37. MR. MALLON: Your lordships, could I ask Mr. Bradley if indeed the deputy returning officer for the constituency of Armagh accepted my nomination on the day of nomination? A. He did, yes.

Mr. Bradley

CROSS EXAMINATION BY MR. MALLON

Q 38. Could I further ask if indeed that that was deemed to be a valid nomination by himself??
A. It was.

Q 39. O'DONNELL, LJ: Mr. Marrinan?

Q 40. MR. MARRINAN: I have no questions, my lord.

Q 41. O'DONNELL, LJ: Yes, thank you very much.

Q 42. MR. CAMPBELL: Now Mr. James Harold McCusker please?

MR. JAMES HAROLD McCUSKER duly sworn

EXAMINATION BY MR. CAMPBELL'

Q 43. MR. CAMPBELL: Mr. McCusker, do you live in the constituency of Armagh? A. Yes.

Q 44. And at the Assembly election for Armagh which was held on the 20th October 1982 were you an elector and did you vote? A. Yes.

Q 45. Thank you.

Q 46. O'DONNELL, LJ: Yes, Mr. Mallon?

CROSS EXAMINATION BY MR. MALLON.

Q 47. MR. MALLON: Your lordships, might I ask first of all Mr. McCusker if indeed he could tell us what is the underlying reason as to why this petition has been sought? A. The law of the land states that persons are disqualified in particular circumstances from membership of the Assembly and I believe that Mr. Mallon is so disqualified.

Q 48. May I further ask, your lordships, if indeed Mr. McCusker believes in the essence of democracy?
A. I believe in abiding by the law of the land.

Q 49. Further to that, your lordships, could I ask if Mr. McCusker would confirm to me that he would believe that in terms of electoral choice the only arbiters are those who exercise the franchise? A. I believe that the law of the land states how elections should be conducted and I will abide by that law and I expect other people to abide by that law.

Mr. McCusker

CROSS EXAMINATION BY MR. MALLON

Q 50. Could I ask Mr. McCusker if indeed he believes that every section of the community has a right to elect representatives and that their right to give a mandate should be respected? A. Every section or every individual is entitled to vote for whatever candidate they chose; if that person is subsequently found to be in breach of the law he cannot represent those people.

Q 51. May I further ask Mr. McCusker if he is aware indeed that another section of political opinion within this island has displayed not only an interest in this case and in this petition but indeed have publicly threatened criminal charges as a result of my election in the constituency of County Armagh? A. Well I am only concerned about ---

Q 52. O'DONNELL, LJ: Well I think that it is only fair to say that I think Mr. McCusker cannot be answerable about what other people may or may not do in certain circumstances. He is responsible for his own acts but not for those of others.

Q 53. MR. MALLON: I apologise to your lordships.

Q 54. O'DONNELL, LJ: That is all right.

Q 55. MR. MALLON: I thought that as it was the leader of his party who made that public threat that he might have had some answer.

Q 56. O'DONNELL: Well I do not think that Mr. McCusker is prepared to be answerable for anyone but Mr. McCusker.

Q 57. MR. MALLON: Thank you, your lordships. There is one final question. Could I ask Mr. McCusker if indeed as I have heard him on many occasions speaking about the value of democracy in any civilised society that if in reality he honestly believes that a piece of law which is decided in essence by a majority of public representatives at Westminster supersedes the expressed will of the electorate in a properly held election and that indeed as a result of that a number of people, my lords, may be disfranchised? A. I am

Mr. McCusker

CROSS EXAMINATION BY MR. MALLON.

only concerned with the Northern Ireland Assembly elections and that election was governed by a law. I believe that law has been breached and I am trying to remedy that.

Q 58. There is just one final question, your lordships. I wonder what Mr. McCusker's observations would be to someone who says that indeed this petition is a rather shabby way to steal what otherwise could not be won? A. If this seat had been won in all of the circumstances properly and in accordance with the law I would not have been making my objection..

Q 59. O'DONNELL, LJ: Mr. Marrinan?

Q 60. MR. MARRINAN: I have no questions, my lord.

Q 61. O'DONNELL LJ: Thank you, Mr. McCusker.

Q 62. MR. CAMPBELL: Mr. James Alexander Speers please?

MR. JAMES ALEXANDER SPEERS duly sworn

EXAMINATION BY MR. CAMPBELL

Q 63. MR. CAMPBELL: Mr. Speers, do you live in Hamiltonsbawn, County Armagh? A. I do, my lord.

Q 64. And is that in the constituency of Armagh? A. It is, yes.

Q 65. And at the Assembly election for Armagh held on the 20th October 1982 were you an elector? A. I was, yes.

Q 66. And did you vote? A. I did.

Q 67. O'DONNELL, LJ: Mr. Mallon?

CROSS EXAMINATION BY MR. MALLON

Q 68. MR. MALLON: Your lordships, could I ask Mr. Speers if he was indeed a candidate and to confirm again if he was a candidate in the Assembly election.

Q 69. O'DONNELL, LJ: Were you a candidate? A. I was a candidate and I was also an elector.

Q 70. MR. MALLON: Could I ask Mr. Speers if he was

MR. SPEERS

CROSS EXAMINATION BY MR. MALLON

a successful candidate? A. I was an unsuccessful candidate.

Q 71. Could I further ask the number of votes that Mr. Speers received in that election? A. I am not in a position to say what votes.

Q 72. O'DONNELL, LJ: Do you not know what you got within 1000 or within say 200 or 300? A. Within a thousand votes I was round 2000 votes.

Q 73. MR. MALLON: Could I ask Mr. Speers if indeed he would view it as being correct that someone who got 2000 votes in that election may well as the result of a decision of an electoral petition assume the representative capacity of someone who exceeded the quota on the first count? A. I do not see it as really necessary to answer a question such as that.

Q 74. O'DONNELL, LJ: Well I will decide, Mr. Speers, whether it is necessary or not. If I feel that it is not necessary I will stop the question but you answer the question until I tell you not to. A. It is really a question of whether one is within the law or not and we felt and I felt that on the basis of the law as it has been presented that the election should be fought within the law and it is on that basis that the petition is brought.

Q 75. MR. MALLON: Could I further ask your lordships if Mr. Speers would agree that laws do change and that the essence of electoral choice does not.

Q 76. O'DONNELL, LJ: I think that is more a matter of comment really, Mr. Mallon, than a question.

Q 77. MR. MALLON: Yes, I would then finally ask if Mr. Speers would confirm if it was a similar type of law which was superseded by the Peerage Act which allowed someone who was in my position in a Westminster situation, and I refer to Mr. Tony Benn, to be elected, and subsequently properly elected to Westminster? A. I am not in a position to answer anything like that.

Mr. Speers

CROSS EXAMINATION BY MR. MALLON.

Q 78. O'DONNELL LJ: I think that is probably a legal matter rather than a matter which the ordinary lay person could with competence deal, Mr. Mallon.

Q 79. Mr. Marrinan?

Q 80. MR. MARRINAN: I have no questions, my lord.

Q 81. O'DONNELL LJ: Thank you, Mr. Speers.

Q 82. MR. CAMPBELL: Mr. James O'Reilly please.

MR. JAMES O'REILLY duly sworn

EXAMINATION BY MR. CAMPBELL

Q 83. MR. CAMPBELL: Mr. O'Reilly, are you a practising member of the Bar of Ireland? A. I am.

Q 84. If it please your lordships, Mr. O'Reilly has brought with him a certificate from the Chief Justice. He has this with him.

Q 85. O'DONNELL LJ: Well I know that Mr. O'Reilly is a constitutional expert and writer on such matters.

Q 86. MR. CAMPBELL: Well he is well known as I think your lordship has pointed out.

Q 87. O'DONNELL LJ: Yes.

Q 88. MR. CAMPBELL: As his lordship has indeed pointed out you have written I believe on constitutional law? A. Yes. That is correct.

Q 89. And you have a particular interest in constitutional law? A. Yes, I have appeared in a number of constitutional cases both for the State and against the State so I think I have seen it from both sides.

Q 90. O'DONNELL LJ: And I think you also lecture in constitutional law in U.C.D.? A. That is correct, my lord.

Q 91. MR. CAMPBELL: Now, Mr. O'Reilly, could you tell the court in your expert view the position of the Senate or the Upper House in the Parliament of Ireland? A. Under the Constitution of Ireland the Senate is an intrical part of the national Parliament.

MR. O'Reilly.

EXAMINATION BY MR. CAMPBELL

The national Parliament is referred to as the Oireachtas and Article 15 is the article which provides for the National Parliament and it establishes three elements in it. There is the President in fact replacing the Crown. There is the House of Representatives which is Dail Eireann and there is the Senate which is the Seanad Eireann. It is also under Article 15 the sole law making organ for the State. All of the legislative authority is vested in the Oireachtas and it has the sole authority to make laws for the state.

Q 92. My lords, there are copies of the Constitution. Perhaps it might be convenient to hand them up now.

Q 93. O'DONNELL LJ: Is this the Irish version now or is it the English version?

Q 93. MR. CAMPBELL: I think they are in both to avoid doubt..

Q 95. O'DONNELL LJ: And you are dealing with the English version or the Irish version?

Q 96. MR. CAMPBELL: I think we are dealing with the English version.

Q 97. O'DONNELL LJ: It is not the authentic one, as it were?

Q 98. MR. O'REILLY: This text incorporates all of the amendments. It is a recently published edition by the Stationary Office and it has all of the amendments that were filed in the office of the Registrar in the Supreme Court down to the 24th December 1980 so that all of the recent amendments are incorporated.

Q 99. O'DONNELL: I am sorry, did you say that it was Article 5?

Q 100. MR. CAMPBELL: No, Article 15. A. Yes, Article 15.

Q 101. It is page 32. So that the Senate is an intrical part of the national Parliament and the National Parliament is the legislature for the Republic of Ireland? A. That is correct.

Q 102. O'DONNELL LJ: "The sole and exclusive power

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

of making laws for the State is hereby vested in the Oireachtas".

Q 103. MR. CAMPBELL: Now I would like to ask you now about a different matter. Membership of the Senate is nomination, one of the methods by which a person can become a member of the Senate? A. Yes, Article 18 of the Constitution of Ireland provides for the Senate in detail and your lordships will see that in section 1 of Article 18 the Senate shall be composed of 60 members, of whom 11 shall be nominated members and 49 shall be elected members. The provisions with regard to nominated members are dealt with in the body of the Constitution itself unlike elected members which are provided for by law. Your lordships will see that Article 18, fourth section, sub section 2, says:

"Provision may be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions, namely...."

That deals with elected members. The nomination of members to the Senate, one of the 11 members, is provided for in Article 18, sections 2 and 3. Section 2 is the first one. It provides

"A person to be eligible for membership of Seanad Eireann must be eligible to become a member of Dail Eireann"

Section 3 reads:

"The nominated members of Seanad Eireann shall be nominated, with their prior consent by the Taoiseach who is appointed next after the re-assembly of Dail Eireann following the dissolution thereof which occasions the nomination of the said members".

So unlike elected members the Taoiseach of the day has an absolute and unfettered right to nominate with the prior consent of those individuals 11 members of the Upper House. It will be seen from the Constitution that the prior consent of that person is required and that also he would have to comply with section 2. That is that he must be eligible for

Mr. O'Reilly

membership of Dail Eireann. This is restricted to citizenship.

Q 104. Now could you explain how long a person remains a member of the Senate? A. It is provided for in Article 18. Article 18, section 9, deals with the length of membership of Seanad Eireann. It provides:

"Every member of Seanad Eireann shall, unless he previously dies, resigns or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Eireann next held after his election or nomination."

And at present, my lords, although the Senate has been dissolved the polling day has been fixed by the Minister for the Environment for the 31st January 1983. That is the close of polling day.

Q 105. O'DONNELL LJ: In fact then according to subsection 9 anyone nominated or elected and has not resigned remains a member of Seanad Eireann until the 31st? A. No, the day before, until the 30th January 1983, that is correct.

Q 106. MR. CAMPBELL: Until the 30th January 1983? A. Yes, that is correct.

Q 107. Now the proceedings of the Senate how are they recorded? A. Well under Article 15, section 10, of the Constitution provision is made for standing orders in both Houses. The Dail has its standing orders and the Senate has its standing orders. There are standing orders relative to public business provided for under that constitutional authority. If your lordships turn to standing order No. 70 you will see it under the heading of "Office of Clerk and Records of the Seanad". Order No. 70 provides for a journal of proceedings of Seanad Eireann. This is a formal record or a formal minute kept by the Clerk which is initialled by the Cathaoirleach which forms an official record and which is subsequently published by authority and may be produced as proof of those formal matters in a court of law. There is a provision in Ireland in Irish law, in the Republic of Ireland, the Documentary Evidence Act 1925. This is No. 24 of 1925 and section 2 of the Documentary

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

Evidence Act 1925 provides for the formal proof of the journal of the proceedings of the Senate by producing a copy printed by the Stationary Office.

Q 108. Can you identify the document which I am handing to you. A. This is the journal of the proceedings of Seanad Eireann for the 13th May which was the day the present Senate was first assembled, my lords.

Q 109. O'DONNELL LJ: I am sorry, Mr. Campbell, you are not proposing to introduce this on the basis that the Documentary Evidence Act of Dail Eireann has no application here?

Q 110. MR. CAMPBELL: No, my lord. I am not. I am merely producing it for the expert witness to prove that that would be so in the country about which he is giving evidence but I am not saying that it is proof in this case in this Court. There are two copies of the document. I think there is another official journal? A. Yes, there is the journal of Dail Eireann which is the equivalent of the English Houses of Parliament.

Q 111. O'DONNELL: Hansard really? A. No, not Hansard. It deals with all of the divisions, what bills have been moved and the committee stages that have been completed are formally set out.

Q 112. MR. CAMPBELL: And what is the name of that? A. That is the Journal of the Proceedings of Dail Eireann.

Q. Now there is also the official gazette? A. Yes, that is another formal proof provided by the Irish Government for the law of the Republic under the Documentary Evidence Act. It is the way that you would formally prove proclamations in court would be by way of producing the official gazette.

Q 114. O'DONNELL LJ: It would be the same as our Gazette? A. It is, yes.

Q 115. MR. CAMPBELL: Is that the official gazette for the 14th May? A. Yes.

EXAMINATION BY MR. CAMPBELL

Q 116. The 14th May 1982? A. It is. This gazette contains a list of the nominated members of Seanad Eireann.

Q 117. Now moving on then to another aspect.

Q 118. O'DONNELL LJ: The date of this is the 14th May?

Q 119. MR. CAMPBELL: Yes, my lord. Moving then to another aspect, in the course of these proceedings I think that we have referred to it as Ireland and the Republic of Ireland. Could you say what the correct description is in fact? A. Well the correct constitutional description is either Ireland or Eire. Article 5 is quite clear. It says that Ireland is a sovereign independent democratic state. There was a statutory description added in 1948 by the Republic of Ireland Act in which in fact the 26 Counties are also referred to. It may also be referred to as the Republic of Ireland but the correct constitutional description is Ireland or Eire.

Q 120. O'DONNELL LJ: Where do we find that?

A. Article 5, my lord, is the article which describes the State.

Q 121. I see Article 4 states: "The name of the State is Eire, or in the English language, Ireland"?

A. Yes, my lord. Yes, the name is Eire or in the English language Ireland. Article 5 "Ireland is a sovereign democratic state That deals with the constitutional description of the state. Its official name would be Eire or Ireland. The statutory description of the Republic of Ireland was only added in 1948 by the Republic of Ireland Act.

Q 122. That is when the Republic of Ireland became a Republic? A. Yes, my lord. Although the Act was passed in 1948 it did not take effect until 18th April 1949. The Republic of Ireland Act 1948 provided that it would come into effect when the Government by order so provided and Statutory Instrument No. 27 of 1949 brought it into effect on the 18th April 1949. There is

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

another article describing the status of the State. Perhaps your lordships would turn to Article 29, section 4. This is under the general heading of international relations and at the time that the constitution was enacted by the people in 1937 there was in force a Statute known as the External Relations Act, the Executive Authority (External Relations) Act of 1936. This was a Statute which was passed on the abdication of Edward VIII and it provided that in certain formal matters, the accreditation of diplomatic envoys, the King was used and although the Commonwealth is not referred to in name in the constitution of Ireland it is accepted by constitutional authority that Article 29, section 4 (2) in effect provided for the external relations. Perhaps I should read section 4 (2) and then state my sources and that might be of assistance.

Q 123. O'DONNELL LJ: Yes. A. Section 4, sub section 2, provides:

"For the purpose of the exercise of any executive function of the State or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern."

That in effect provided for the continued use of the King under the External Relations Act for the formal accreditation of diplomatic envoys. The standard authority on the Irish Constitution accepted in the courts of the Republic is the recent text book bearing that name by John Kelly. It was published in 1980 and at page 151 he deals with this given article and also at page 553. I think that those are the two most helpful passages

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

in the text. There is also a passing reference although I do not think that it would carry the same authority in his foreword or in his preface.

Q 124. O'DONNELL LJ: 353 or 553 is it? A.

A. 553. It is at page 151.

Q 125. Perhaps if you would just read that.

Q 126. MR. CAMPBELL: We have a copy here which might help your lordships to follow it. He says:

A. He says:

"As the specific reference to Article 28 suggests

Article 28 deals with the powers of Government.

".....sub section 1 of this section might seem redundant if it stood alone; its presence is intended to assert emphatically the status of the Government as controlling external affairs despite the contemporary situation -in 1937, created by the Executive Authority (External Relations) Act, 1936, which featured the British Crown still discharging a vestigial function in this area.."

There is a reference then to when it was recently relied upon.

"Sub section 2 was designed to accommodate in the Constitution, but without saying so in so many words, the sole remaining function of the British Crown just mentioned. The group or league of nations was the British Commonwealth of Nations. The Executive Authority (External Relations) Act, 1936, for which this subsection provided cover, was repealed by the Republic of Ireland Act, 1948, of which section 3 provides that:

Well you will see in section 3 of the 1948 Act the President now carries out those functions rather than the King. The last sentence on that page is:

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

"The sole such function in fact exercised by the President (and the only one previously discharged by the British monarch) is the accreditation of diplomatic envoys."

In page 553 there is a reference to Article 49 which is a reference to the statutory prerogative of power. There is a passage on it and Article 49 deals with the succession to the prerogative. Indeed your lordships will note that in Article 49, subsection 1, there is a reference to the 11th December 1936, which is the date following the abdication of Edward VIII and I think that it is best set out in the first full paragraph of page 553 against the marginal note "Fading out of the Crown" and this states as follows:

"In 1936 the government of the day, which had already announced its intention to promote a new constitution from which all trace of the Crown would have disappeared, anticipated this event by making the abdication of King Edward VIII (on 10th December) the occasion for a radical amendment of the old Constitution. The day after the abdication the Dail (the only House of the Oireachtas) passed the Constitution (Amendment No. 27) Act, which removed the Governor-General from the Constitution, and with him virtually all trace of the King, the opening sentence of Article 51, cited above, being repealed in its entirety. "

Now this is Professor Kelly's comment:

"The King survived only in a hidden form - like a face camouflaged by foliage in a children's puzzle - namely in a new sentence interpolated into the same Article".

Here, my lords, he has given his own words rather than the words of the Constitution:

"Provided that it shall be lawful for the Executive Council, to the extent and subject to any conditions which may be determined by law to avail, for the purposes of the

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

appointment of diplomatic and consular agents and the conclusion of international agreements, of any organ used as a constitutional organ for the like purposes by any of the nations referred to in Article 1 of this Constitution, namely, "the Community of Nations forming the British Commonwealth of Nations"

Q 127. O'DONNELL LJ: That is Professor Kelly's wording there? A. Yes, his writing. He has a rather laconic and witty style of delivery.

Q 128. Yes, indeed. A. And that would be in tenor with that.

"This organ used as a constitutional organ turned out to be under section 3 subsection (1) of the Executive Authority (External Relations) Act, passed the next day, the King, recognised by --

and there he interpolates:

"Australia, Canada, Great Britain, New Zealand and South Africa) as the symbol of their co-operation. The arrangement thus made for external relations continued in force until the Executive Authority (External Relations) Act was repealed by the Republic of Ireland Act, 1948, which transferred external executive functions to the President (to be exercised on the authority of the Government) and therewith cut the last institutional link between the State and the United Kingdom"

So the nett effect in Irish law of the coming into force or the coming into effect of the Republic of Ireland Act, 1948, was to cut a last thread which still existed between the Irish policy established by the Constitution in 1937 and the Crown.

Q 129. MR. CAMPBELL: And indeed I think that you did refer and made the point that it would be of less important authority than in the preface to his work. He does state that Ireland did cease to be a part of the Commonwealth? A. He does.

Q 130. I think that it is at page 19? A. Page 29.

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

Q 131. It is page 29 A. It is the last full paragraph there.

Q 132. O'DONNELL: The last full paragraph where?

Q 133. MR. CAMPBELL: On page 29. The last full paragraph on page 29, your lordships will see it there.

A. Again he expresses himself in the same terms. I think I had better read the paragraph and in the preface he very well condenses his experience as a teacher. This is the full paragraph in page 29:

"In 1932 the first Government was succeeded by an administration led by Mr. de Valera, whose whole programme was rooted in opposition to the Treaty and whose adherents had pushed their resistance to it to the length of civil war in 1922-23. Once in power, they proceeded to dismantle the Crown's positions, disregarding the judicial view that the Treaty was beyond the amending power of the Oireachtas. In 1933 the reservation 'within the terms of the Scheduled Treaty' was removed from Article 50 and the oath of allegiance provided for in Article 17 was scrapped by the same Act. Further Acts in the same year abolished the the appeal to the Privy Council from decisions of the Supreme Court, and reduced the functions of the representatives of the Crown. In 1936 the representative of the Crown himself was eliminated and with him every other reference to the British sovereign which the Constitution contained. However, by a separate Act passed the next day, the Executive Authority (External Relations) Act, the Crown survived with the sole practical function of accrediting Irish diplomatic representatives. In 1948, the first Inter-Party Government, led by John A. Costello (who had been Attorney General under the first Government from 1926-32) repealed this Act; the repealing measure provided that executive authority in external relations might henceforth be exercised by the President on the advice of the Government, and formally declared the State a Republic (a designation which the 1937 Constitution

Mr. O'Reilly

EXAMINATION BY MR. CAMPBELL

had mysteriously avoided). Thus the royal and British theme descended between 1922 and 1948 in a chromatic scale until it ran off the constitutional keyboard; and a full Republican chord, which might have been struck together in 1916 if the Easter Rising had succeeded, sounded (for 26 Counties) in an arpeggio gradually formed over a quarter of a century."

It would not carry the same status, my lords,

Q 134. O'DONNELL LJ: It is very nicely written..

Q 135. MR. CAMPBELL: Well then, Mr. O'Reilly, if I could ask you about the status of Ireland. First of all I think that it was the Ireland Act of 1949 section 1 (1) which declared that Eire ceased to be a part of His Majesty's Dominions from the 18th April 1949, is that right? A. That is correct, my lords, but that was an Act of the Westminster Parliament.

Q 136. Of course, yes. A. And my function is purely Irish domestic law.

Q 137. Quite. Well then if I could ask you from the view of Irish domestic law if you consider Ireland to be part of the Commonwealth? What is your view? A. I cannot find a statutory authority for my view but I would rely on those passages in John Kelly's text that the nett effect of the coming into effect of the Republic of Ireland Act 1948 was to sever the last link between Ireland, the Republic of Ireland and the Crown.

Q 138. I think I did ask you earlier but perhaps I should get it quite clear because of the words used in the petition, the Republic of Ireland Act 1948, section 2, it is declared that the description of the State be the Republic of Ireland? A. That is correct and it is only a statutory description. The Irish Supreme Court have stressed this time and time again, that the correct description of the State would be either Eire or Ireland. A statutory description was added which is the Republic of Ireland just in the same way as our courts take judicial note of Northern Ireland as the Six Counties, my lords.

Q 139. Thank you.

Mr. O'Reilly

CROSS EXAMINATION BY MR. MALLON

Q 140. O'DONNELL LJ: Yes, Mr. Mallon?

Q 141. MR. MALLON: Your lordships, could I ask, Mr. O'Reilly, is it?

Q 142. O'DONNELL LJ: Yes, O'Reilly.

Q 143. MR. MALLON: Ask Mr. O'Reilly if he is aware of any document known as the Constitution of the Republic of Ireland? A. I am aware of the document known as the Constitution of Ireland, not as the Constitution of the Republic of Ireland. The official title is the Bunreacht na hEireann which is translated into the Constitution of Ireland. There is no reference to a document such as the Constitution of the Republic of Ireland.

Q 144. Arising from that question, my lords, is Mr. O'Reilly aware or does anybody know of a body referred to in that Constitution as the Senate of the Parliament of the Republic of Ireland?

A. I know of an institution known as Seanad Eireann which is the body provided for in Article 18, a body known as the Senate of the Republic of Ireland. The official description of the Senate and the only constitutional description that I am aware of is Seanad Eireann and there is no reference, good, bad or indifferent to the Republic of Ireland in that title.

Q 145. May I ask Mr. O'Reilly if indeed there is reference to this and in view of his very enlightening views earlier if he can tell us in the Bunreacht na hEireann what is defined as Ireland?

A. Yes, this is Articles 2 and 3 and here one has to distinguish between the nation and the State. The reference there is --

Q 146. O'DONNELL LJ: Has he got a copy of this?

Q 147. MR. CAMPBELL: Yes, he has. Articles 1 to 3 deal with the nation and Article 4 deals with the State.

A. Yes. Article 1 states:

"The Irish nation hereby affirms its inalienable, indefensible and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions."

The extent of the national territory is dealt with

Mr. O'Reilly

CROSS EXAMINATION BY MR. MALLON.

in Article 2. Article 2 provides:

"The national territory consists of the whole island of Ireland, its islands and the territorial seas"

Article 3 provides:

"Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstat Eireann and the like extra territorial effect."

Q 148. O'DONNELL LJ: But the laws of Saorstat Eireann are the laws made under the old Constitution?

A. That is correct, my lord.. It is usual and the distinction has been drawn by the Irish Supreme Court recently, and it is even there on page four of the Constitution, the distinction between the nation and the State and when there is a reference the national territory consisting of the whole island of Ireland, its islands and the territorial seas that seems to exist and the Supreme Court have so stated that in the political domain it is the theory of the Irish nation consists of all people North and South of the Border but that the State which is in effect the full extent the enforceability of Irish laws is restricted as is stated in Article 3 to

"the like area and extent of application as the laws of Saorstat Eireann"

That area is now statutorily described as the Republic of Ireland.

Q 149. O'DONNELL: Yes, Mr. Mallon?

Q 150. MR. MALLON: Could I ask Mr. O'Reilly indeed if he knows of any individual mentioned within Bunreacht na hEireann as the Prime Minister of the Republic of Ireland? A. Well I am here to give evidence on the domestic law of the State. I know of my own personal knowledge, I am not sure if that is as a practising lawyer, I know that at present ---

Mr. O'Reilly

CROSS EXAMINATION BY MR. MALLON

Q 151. I was asking does it refer to it in the document, in the Constitution? A. There is.

Q 152. O'DONNELL LJ: To the Prime Minister in the Constitution. A. Yes, the Taoiseach is the Irish Prime Minister.

Q 153. Is there a reference? I think that Mr. Mallon's point is, is there a reference to the Prime Minister?

Q 154. MR. MALLON: Yes, your lordships.

Q 155. O'DONNELL: A reference rather than to the Taoiseach.

Q 156. MR. MALLON: Yes, is there a reference in the Bunreacht na hEireann to the Prime Minister of the Republic of Ireland?

Q 157. MR. CAMPBELL: I think Article 28 is dealing with the powers of Government.

Q 158. O'DONNELL LJ: This is in the English text? A. Yes, Article 28 (5)

"The head of the Government or Prime Minister shall be called, and is in this Constitution referred to as the Taoiseach."

Q 159. The Prime Minister shall be called the Taoiseach? A. Yes, the Taoiseach.

Q 160. MR. MALLON: My lords, could I ask what name is given to Ireland in its international affairs at the United Nations? A. I think the only correct description of the State constitutionally is either Ireland or Eire. It may be statutorily described as the Republic of Ireland. I know from my own experience that when the State, for example, would appear in the Court of Justice of the European Community even if it intervenes in a case or appears in a case it is sued as Ireland, not as the Republic of Ireland. If a citizen in the Republic of Ireland feels aggrieved he has to take an action against the State to vindicate his rights under the Constitution. The suit is brought against Ireland and the Attorney General because that is the appropriate description and because our rules of the Supreme Court require the Attorney General to be joined in such provisions.

Mr. O'Reilly

CROSS EXAMINATION BY MR. MALLON

Q 161. MR. MALLON: Could I ask finally, my lords, what are the embassies of Ireland known as abroad?

A. I am not sure what you mean by that question.

Q 162. Could I ask, if I could rephrase the question, are they referred to as embassies of the Republic of Ireland or as the embassies of Ireland? A. That I do not know. I am a practising lawyer.

Q 163. O'DONNELL LJ: That is not within your expertise as such? A. No, my lord.

Q 164. Mr. Marrinan?

Q 165. MR. MARRINAN: I have no questions, my lord.

Q 166. O'DONNELL: Thank you very much, Mr. O'Reilly. A. It has been a pleasure, my lord.

Q 167. It has been a very interesting lecture.

Q 168. MR. CAMPBELL: Mr. Robert Turner please.

MR. ROBERT WOLSELEY TURNER duly sworn

EXAMINATION BY MR. CAMPBELL

Q 169. MR. CAMPBELL: Mr. Turner, where do you live? A. 25 Corernagh Road, Tandragee.

Q 170. Were you an elector at the election held in the constituency of Armagh on the 20th October? A. I was.

Q 171. Of this year? A. Yes.

Q 172. Did you receive an election address from Mr. Mallon? A. I did.

Q 173. Or on his behalf? A. Yes.

Q 174. And would you look at the document that I am now handing to you. Is that the election address that you received addressed to you? A. That is the address which I received.

Q 175. And do you now hand that into court? A. Yes, I do.

Q 176. O'DONNELL: Yes, Mr. Mallon?

Q 177. MR. MALLON: No questions.

Q 178. O'DONNELL LJ: The point I assume of this is because of Seamus Mallon's membership of the Irish Senate?

Q 179. MR. CAMPBELL: Yes, my lord. It is really a declaration against interest.

Q 180. Thank you, Mr. Turner.

Q 181. MR. CAMPBELL: Mr. Mallon?

MR. SEAMUS MALLON duly sworn

Q 182. O'DONNELL LJ: Mr. Campbell, there was some suggestion -I think in one of the questions that Mr. Mallon asked of the possibility of criminal proceedings being brought against him?

Q 183. MR. CAMPBELL: Yes, my lord.

Q 184. O'DONNELL LJ: I do not know whether in fact it is possible for Mr. Mallon to be prosecuted for any breach of the law. The reason that I am asking it is that it would be my duty to warn Mr. Mallon that he need not answer any question -which tended to incriminate him.

Q 185. MR. CAMPBELL: Well I would rely, my lord, on the Eighth Schedule of the Electoral Law Act of page 62. This is the 'eight Schedule of the Electoral Law Act (Northern Ireland) 1962.

Q 186. MR. SMITH: Page 365.

Q 187. MR. CAMPBELL: In the Statutes Revised it is at page 602.

Q 188. O'DONNELL: Mr. Smith, did you say 361?

Q 189. MR. SMITH: Page 365.

Q 190. MR. CAMPBELL: Now it deals with witnesses and in paragraph 12 (7):

"Subject to subparagraph (9) a person called as a witness respecting an election before any election court shall not be excused from answering any questions relating to any offence at or connected with any election on the ground that the answer thereto may tend to incriminate a person or the husband or wife of that person or on the ground of privilege"

Then there are provisos which would mean that your lordships could give a certificate of indemnity.

Mr. Mallon

DISCUSSION

Q 191 O'DONNELL LJ: "Provided that the witness answers truly all the questions...shall be entitled to receive a certificate stating that the witness has so answered....answer shall not except in the case of any criminal proceedings for perjury in respect of the evidence be in any proceedings, civil or criminal, admissible in evidence....."

I think that it is quite clear that it means that no harm can come to Mr. Mallon by answering any question, any criminal harm by answering any question.

Q 192. MR. MALLON: Could I ask at this stage, your lordships, I did request at the very beginning of this hearing that at some stage in the proceedings I should be allowed to put my attitude to this piece of legislation into context.

Q 193. O'DONNELL: If you would like to sit down, Mr. Mallon.

Q 194. MR. MALLON: I was wondering if this would be a good time to do it.

Q 195. O'DONNELL: What I would prefer if it is convenient is that Mr. Campbell, who has called you as a witness, would put whatever questions he wishes to put to you. It may be that an opportunity will present itself out of questions to answer. Subsequently I would give you an opportunity after the case for the petitioners has been closed to make your own case.

Q 196. MR. MALLON: Well, your lordships, while I have nothing but respect for your wishes in this matter it may well be, and as a matter of fact it will be, that I will not subsequent to this moment of time be taking any further part in the proceedings of this court nor will I be answering any questions put to me by Mr. Campbell because, my lords, I have only two things to protect in this matter. One is the integrity of my own political position and the other is the integrity of the political position of those who have voted for me. In saying that, your lordships, I would emphasise that I mean

DISCUSSION

9. | no disrespect to yourselves or to this court. I have nothing but respect for both. I must say, however, that I have nothing but contempt for the piece of legislation which is guaranteed and aimed to deny the legitimacy of the aspirations which -I hold and which is held by electorates, my electorate, and which indeed is held by the vast majority of the people from this island. I have nothing but contempt for those who have sought to invoke this piece of legislation, indeed utter contempt. Utter contempt because as I have said what this petition is trying to do is to steal something which could not properly be won by them. I must protect the integrity of that political position, your lordships, and indeed that position of my electorate because in the last analysis when it comes to the question of electoral choice the -only people, the only court, which has any proper jurisdiction is that court at while the people, the electorate of County Armagh, did exercise their franchise. Nobody can take that mandate away from me. This court cannot do it nor can any other court or any other petition. Irrespective of any outcome of this court, your lordships, I will continue to serve those people, to serve their interests and indeed to represent their very deeply held aspirations and it is because of what I regard ---

Q 197. O'DONNELL LJ: I am sorry, Mr. Mallon.

Q 198. MR. MALLON: It is because of what I regard as a very, very undemocratic approach to the electoral process I now must take up the position that I am taking up and say that as from this moment of time without any discourtesy whatever to yourselves or the court I shall not be taking any further proceedings in this matter.

Q 199. O'DONNELL: I do not know what will happen. You may sit down if you wish. I do not know what attitude the petitioners will take. Strictly speaking you are a witness in the proceedings and I think strictly speaking must answer questions which are directed at you. The Electoral Law Act provides that on the trial a member of the election court may order that a person who appears to him to attend as a witness and any person refusing to obey an order shall be guilty of contempt of the court. Now that seems simply to provide for attendance. What is the position, Mr. Campbell. Mr. Mallon has indicated, as I understand it, that he is not prepared to answer questions.

Mr. Mallon

DISCUSSION

Q 200. MR. CAMPBELL: Well I think perhaps, my lord, the proper procedure with respect would now be for me to pose the question and then the issue will arise as to whether the witness refuses to answer.

Q 201. O'DONNELL LJ: Very good. Well we will deal with the question.

Q 202. MR. CAMPBELL: Mr. Mallon, on the 20th October 1982 were you a member of the Senate of the Parliament of Ireland? A. Your lordships, I refuse to answer this or any other question.

Q 203. MR. CAMPBELL: I would respectfully submit that the witness is obliged to answer the question

Q 204. O'DONNELL LJ: Yes, well all I can do is to direct Mr. Mallon that he is obliged to answer the question. A. Your lordships, I again repeat that I do not intend to answer this or any other question.

Q 205. The position, I must warn you, Mr. Mallon, is that you will be then in contempt of court if you refuse to answer the question. A. Your lordships, I continue to refuse to answer this or any other question.

Q 206. Yes, well, Mr. Campbell, are you in a position to prove this case without these questions. I think you are. I do not see why we should be in this position at all.

Q 207. MR. CAMPBELL: I would very much wish to reserve the position because it depends very much on what witnesses say when I call them.

Q 208. HUTTON J: Are there other witnesses that you propose to call?

Q 209. MR. CAMPBELL: There are other witnesses to be called.

Q 210. O'DONNELL LJ: At the moment Mr. Mallon you may leave the box but not the court. A. Your lordships, I take it that I am not allowed to leave the court?

Q 211. O'DONNELL: No, in fact because there is this question, the question of contempt which is in

Mr. Mallon

DISCUSSION

reserve at the moment and I must ask you to remain in court until that matter is decided. A. Well, your lordships, the logic of my position is that I must leave this court and indeed having stated very honestly and very fairly and straightforwardly what my position is in this I do not think that I have any option but to continue with the logic of my position.

Q 212. Well now, Mr. Mallon, you are placing the court obviously in a certain position. I do not know whether this is deliberate on your part or not but you are obviously trying to place the court of having to place you under restraint. That obviously is a most embarrassing matter. If this case can be disposed of without you giving evidence I can see no reason why that should be but regrettably the court must ask you to remain until the matter is decided; at least until that issue is decided.

Q 213. HUTTON J: Mr. Mallon, the court is not, as my lord has indicated, giving any ruling at this moment as to the action that it should take in regard to your refusal to answer questions. The court is concerned to hear if there is any further evidence and the court is therefore requiring you to stay in court while the further evidence is called. Now that is all that is involved at the moment. A. I feel, your lordships, I must follow the logic of my position with the utmost respect to this court.

Q 214. O'DONNELL LJ: Well the logic of your position, Mr. Mallon, is that I then would have to ask that you remain here and that if you refuse to remain here then I would have to insist that you be placed under restraint in the court. I do not wish to do that because it may be quite unnecessary in the circumstances but if driven to it I am afraid I would have to prevent your leaving. A. Your lordships, I appreciate your position in this matter and I hope you also appreciate my position in this matter. I would now seek to take my leave of this court.

Mr. Mallon

DISCUSSION

Q 215. O'DONNELL LJ: Well, as I say, I have no desire to embarrass you or indeed to embarrass the court in the matter but I must ask you to remain and if you attempt to leave the court I must ask that you be placed under restraint. I would hope that in the circumstances you would find it possible to wait until the evidence is disposed of. I think that the court has given you a fair amount of latitude to make the points that you are making but as I say having refused to answer the questions there is a prima facie contempt of court. The court in the circumstances is not anxious to pursue that matter if it can be disposed of in another way. I can only warn you if you attempt to leave the court I will direct that you be detained. A. May I thank your lordships for your courtesy.

Q 216. Thank you. I am sorry, if Mr. Mallon attempts to leave the court he should be detained until the rising of the court please.

Q 217. MR. CAMPBELL: Mr. Robb.

MR. JOHN ALEXANDER ROBB duly sworn

EXAMINATION BY MR. CAMPBELL

Q 218. MR. CAMPBELL: Mr. Robb, are you a member of the Senate of the National Parliament of Ireland, of the Oireachtas? A. I am, my lords.

Q 219. O'DONNELL LJ. Sit down, Mr. Robb. A. I would like, your lordships, to make a point before I commence.

Q 220. Yes. A. Last Friday a man arrived at our home and having refused to give this document to my wife he then arrived in the Route Hospital. He or another man arrived in the Route Hospital, Ballymoney. It was left with a theatre sister without checking her name or her identity. It was left on a bench in the theatre. I collected it. I had not seen the seal. I understand that it is customary to have a fiat although I am not sure that it applies in an electoral court to confirm that it is in fact a subpoena. I feel

EXAMINATION BY MR. CAMPBELL

~~that~~ it was extraordinary to have a document for such an important case as this handed over in such a manner.

Q 221. O'DONNELL LJ: This is a subpoena for you to attend. A. That is correct, my lord. I then had to decide whether or not I would come and I was assured by a number of people both in my own profession and in yours that there was no obligation on me to do so.

Q 222. Quite right. A. Therefore I am appearing here this morning because of the political implications of this case and you can -already see what these may be in the country which is torn asunder. I have respect for the court. I have respect for the Bench. But I would just like to comment before I am asked questions. If one goes back into Greece for a definition of ancient democracy democracy is defined in the old Greek philosophy, taking the people into partnership. In my opinion it is not about unseating their representatives.

Q 223. O'DONNELL: Mr. Campbell, how does it come that a subpoena directed to securing the attendance of Senator Robb was not served personally or served by leaving it at his home with his wife?

Q 224. MR. CAMPBELL: I find it extraordinary, my lords. I can only say that the endorsement on the document is obviously not correct.

Q 225. Well I would like to see that endorsement if I might (O'DONNELL LJ).

Q 226. MR. CAMPBELL: Yes.

Q 227. O'DONNELL: Because a writ of subpoena must be served personally.

Q 228. MR. CAMPBELL: Yes, my lord.

Q 229. O'DONNELL LJ: "A true copy of the subpoena was served by me on John D. Robb at the Route Hospital" That is obviously totally inaccurate and wrong. "By handing the same to the same John D. A. Robb personally, he having identified himself to me as John D. A. Robb verbally".

Q 230. MR. CAMPBELL: Obviously from what Mr. Robb has said that is quite incorrect. It will have

Mr. Robb

EXAMINATION BY MR. CAMPBELL

to be inquired into.

Q 231. O'DONNELL LJ: Well I think that it should be inquired into. In the circumstances, Mr. Robb, the court thanks you for coming in spite of the invalid method of serving this on you.

Q 232. MR. CAMPBELL: Now I think that I asked you, Mr. Robb, if you were a member of the Senate of the National Parliament of Ireland.

Q 233. O'DONNELL: You have no necessity to stand, Senator Robb. A. I would prefer to stand and I am, yes.

Q 234. MR. CAMPBELL: Now on Thursday 13th May 1982 did you attend the opening session? A. I take it if the opening session was on the 13th May 1982 --

Q 235. O'DONNELL LJ: You attended the opening session? A. I attended the opening session.

Q 236. MR. CAMPBELL: And on that day did you sign the roll of members? The roll of members of the Senate? A. I did.

Q 237. Do you know the witness who left the box immediately before you, Mr. Seamus Mallon? A. I do.

Q 238. Was he at the Senate on that day? A. He was.

Q 239. Was he also introduced as a member on that day? A. Well to my recollection he was although I do not remember him signing any document or making any declaration to that effect.

Q 240. And was he in the chamber of the Senate when you were in it? A. He was.

Q 241. And was he welcomed by the Speaker as you were or I believe that it is by the Chairman of the Senate. A. I dare say you will not manage the pronounciation. It is the Cathaoirleach.

Q 242. It is very difficult, yes. I bow to your knowledge but first of all I was going to ask you if the two Northern members were welcomed, as I understand it, by the chairman? A. I would like to add in response to your questions that we were welcomed very graciously indeed and my independence was respected throughout the whole time that I was in Seanad Eireann.

Q 243. And, Mr. Robb, when I say that you were welcomed as a new member so also was Mr. Mallon welcomed as a new member on that day? A. He was.

Mr. Robb

EXAMINATION BY MR. CAMPBELL

Q 244. Thank you.

Q 245. O'DONNELL LJ: Mr. Marrinan?

Q 246. MR. MARRINAN: I have no questions, my lords.

Q 247. O'DONNELL LJ: Thank you. Thank you very much, Mr. Robb. I know that you are a busy man--

Q 248. MR. CAMPBELL: Yes, I was just going to ask about that.

Q 249. O'DONNELL LJ: And if you wish to go you are welcome to go. I have directed that an inquiry be made into the matter that you raised and the court or at least the court staff will communicate the result of that inquiry to you. A. My lords, you will appreciate that I came here out of respect for this court.

Q 250. O'DONNELL LJ: I appreciate that. A. And I would just like to add before leaving that if we have in fact two mutually exclusive communities in this country surely a dual loyalty situation involves or also demands dual political manners of coping with it. Thank you, my lords.

Q 251. MR. CAMPBELL: Mr. Neilly please.

MR. WILLIAM ROBERT NEILLY duly sworn

EXAMINATION BY MR. CAMPBELL

Q 252. MR. CAMPBELL: Mr. Neilly, are you a journalist?
A. I am.

Q 253. And for what organ do you work? A. The B.B.C.

Q 254. And do you conduct or have you conducted interviews on the radio? A. I have, yes.

Q 255. Have you interviewed Mr. Seamus Mallon or did you interview Mr. Seamus Mallon just after the dissolution of the Dail? A. I did.

Q 256. And in the course of that interview, and I take it that you have no record of it, only your own recollection? A. That is correct.

Q 257. Did you pose him any questions concerning

Mr. Neilly

EXAMINATION BY MR. CAMPBELL

his period as a member of the Senate?. A. I did
That was one of the questions I asked.

Q 258. HUTTON J: What date approximately was
this, Mr. Neilly? A. I cannot remember the date
but it was shortly after the fall of the Government
in the Republic.

Q 259. MR. CAMPBELL: And perhaps rather than me
put what you said what do you say is your recollection
of the question and the answer? A. Well to my
recollection it was the second question that I asked
Mr. Mallon what he felt that he had achieved in
his time in the Senate. I cannot remember the
full reply but I do remember that he said that
he thought that he had brought the opinions of a
great number of people in Northern Ireland, a great
number of people whom he represented, directly into
the Southern legislature which -would not otherwise
have happened if he had not been in the Senate.

Q 260. Thank you.

Q 261. O'DONNELL: Yes, Mr. Marrinan?

Q 262. MR. MARRINAN: I have no questions, my lord.

Q 263. O'DONNELL LJ: Thank you very much, Mr. Neilly.

Q 264. MR. CAMPBELL: Now the only other matter of
evidence, my lords, which I would seek to adduce is
correspondence with the Foreign and Commonwealth
Office as I think it is a matter of evidence rather
than a matter of law at the moment. Now, my lord,
the position is that the original letter which the
Foreign Office say is in the post has been sent by,
and this is the most recent letter, has been sent
by a telegraphic process and so I do not have the
original letter in court this morning. It is
somewhere in the course of post.

Q 265. O'DONNELL LJ: Yes, I see.

Q 266. MR. CAMPBELL: May I say, my lords, that a
copy of this letter has been sent to Mr. Mallon.
I think this is the letter of the 14th December 1982
and the fourth paragraph in which the legal adviser
of the Foreign and Commonwealth Office states:

DISCUSSION

"Subject to the foregoing I am authorised to state that the Republic of Ireland is not regarded by Her Majesty's Government of the United Kingdom to be a member of the Commonwealth

Q 267. O'DONNELL: This is conclusive?

Q 268. MR. CAMPBELL: Well we would respectfully submit so, my lord, yes. The position is that there is no legislative process by which one becomes a Member of the Commonwealth. You become a member of the Commonwealth by applying to the Commonwealth Prime Ministers' Conference and being accepted by them. That seems to be the view of the authorities which I can open to your lordship. Therefore it is a political matter whether or not one is a member of the Commonwealth. Strangely enough I would have thought before looking into the matter that it would have been a question of law to be determined.

Q 269. O'DONNELL: It is a question really of what view one takes.

Q 270. MR. CAMPBELL: Yes. I will open the authorities my lords, but it does seem that the position is that you merely apply to the Commonwealth Prime Ministers. Your lordships will appreciate that the fact that a country is a republic. It does not mean that it cannot be part of the Commonwealth. India is a very obvious example but our argument would be that if it is a matter of applying the courts are in no position to know whether somebody has applied or not and the position with regard to certificates is that it would be extraordinary of the Queen in the form of her Executive expressed one view and the Queen in the form of her courts expressed another view, or a different view.

Q 271. O'DONNELL: It would be a remarkable thing if the Commonwealth Office did not regard it and if Mr. O'Reilly, as a constitutional expert in the Republic did not regard it, that if this court were to differ from these two and declared that it was I think that we might provoke an international incident..

Q 272. MR. CAMPBELL: It seems a very obvious

DISCUSSION

proposition until you as a lawyer try to get clear authority for it but if I may say so I think that the neatest way of dealing with it is by certificate.

Q 273. O'DONNELL LJ: Yes, well I think that we can accept the certificate having regard to the evidence that we have heard that the Republic is not part of the Commonwealth.

Q 273. MR. CAMPBELL: Well now, my lords, on the question which is really the issue, Mr. Mallon's membership of the Senate, my position is now that I have called a witness who has refused to answer certainly in electoral courts a declaration against interest your lordships will note from that document that I proved through the returning officer that under section 34 of the 1962 Act the agent, the electoral agent, was Mr McIlvanna

Q 274. O'DONNELL: Yes, Mr. McIlvanna.

Q 275. MR. CAMPBELL: And that document as it states on it is published by him. In electoral law the agent enjoys a peculiar position in that he is much more of an agent as it were than in the ordinary law so, for example, one finds authorities where a canvasser who perhaps bribes a voter is the agent of the candidate and even though the candidate has said to the canvasser "Under no circumstances are you to bribe" he is responsible for that. We would say that the electoral agent, who is as it were the official agent, is in a much closer position and it is suggested that he is in a position of master and servant or employer and employee. So we say that where there is a declaration by an agent against interest in an electoral address that that is evidence of membership. My lords, there is one point which I think perhaps is relevant and that is that anybody who makes a mis-statement of fact as to the character of the candidate is guilty of an electoral offence under the 1962 Act. Therefore one must assume that an electoral agent will be particularly cautious about statements of fact contained in an electoral address. I think I should say, my lords, as an advocate presenting this case I would be very anxious where in a situation if your lordships found that we had satisfied the onus

DISCUSSION

of proof that I would not have to proceed by requesting that Mr. Mallon be required to answer the questions.

Q 276. O'DONNELL LJ: Well obviously there are two separate matters at issue here.

Q 277. MR. CAMPBELL: Yes. One can say that.

Q 278. O'DONNELL LJ: One is whether you have established or succeeded in establishing your case without the necessity. It would be necessary for the court to rise for a few moments at least to consider that aspect of the matter.

Q 279. MR. CAMPBELL: If it assists your lordships I should say that the authority about declaration of interest is the Tipperary case which I have temporarily mislaid. It is the case involving John Mitchell, if I could find the reference. It is in Volume 3 of the Reports, which is O'Malley and Hardcastle Volume 3 and it is page 19 and the question on this particular point was that Mr. Mitchell had written a letter. Your lordship will remember that the question in this case or there were two questions and the question was that he was dead by the time of the election. He was supposed to have been convicted of treason and felony. He had written a letter and at page 34 Mr. Justice Keogh said

"Mr. Dillon has argued the point very clearly and well but I have no doubt that that an admission made by Mr. Mitchell either before, during or after the election is admissible as evidence in this inquiry. He was a candidate at the election and therefore he was a party to the cause. It is laid down in Rodgers on Elections 10th Edition, page 480, that though hearsay evidence is not admissible declarations of a party to the suit are an exception to this rule, such being against his interest the presumption is that they are true."

Perhaps I should say there are a great many volumes on this point and I would hand in this copy.

Q 280. O'DONNELL LJ: Yes, well we will rise for a few moments.

On resuming:

Q 281. O'DONNELL LJ: Well, Mr. Campbell, the court is satisfied on the evidence adduced, the evidence of Dr. Robb, the election document issued on behalf of Mr. Mallon by Mr. McIlvanna, the fact that Mr. Mallon did not in fact cross examine either the witnesses as to whether he was a member, we are satisfied that at all material times he was a member of Seanad Eireann which is the legislature of a country which is not a part of the Commonwealth and we are satisfied that the evidence so discloses. In the circumstances do you want to pursue the questions?

Q 282. MR. CAMPBELL: No, my lord.

Q 283. O'DONNELL LJ: Well in those circumstances since you are not asking that any further questions be asked or any further action be taken the court is not prepared at this stage of its own motion to do anything other than to direct that any restraint which has been placed on Mr. Mallon leaving the precincts of the court be lifted so that he may, if he so wishes, leave. What we propose to do is to rise for 10 minutes or 15 minutes to write something very short as a judgment on the matter. As I have said the evidence is all one way and it is clear.

Adjourned and on resuming:

Q 284. O'DONNELL LJ: In this case the petitioners seek to have a declaration that the election of the respondent to the Northern Ireland Assembly is void. The law in the matter is reasonably clear. By section 1 (1) of the Northern Ireland Assembly Disqualification Act 1975 it is provided that :

"Subject to the provisions of this Act a person is disqualified from membership of the Northern Ireland Assembly who for the time being is a member of the legislature of any country or territory outside the Commonwealth"

The Court is satisfied on the evidence presented to it on the hearing of this petition that an election to the Northern Ireland Assembly for the constituency of Armagh was held on the 20th October 1982 and that on the 25th October 1982 the returning officer returned Mr. Seamus Mallon, the respondent, together with six other persons as being duly elected. The Court is further satisfied by the evidence presented to it that during the entire period between 19th

JUDGMENT contg.

October 1982 and the 26th October 1982 Mr. Mallon was a member of Seanad Eireann, the Senate of the Parliament of the Republic of Ireland. The Republic of Ireland is a country outside the Commonwealth and accordingly during that period Mr. Mallon was a member of the legislature of a country outside the Commonwealth and by virtue of section 1 (1) (e) of the Northern Ireland Assembly Disqualification Act 1975 was disqualified for membership of the Northern Ireland Assembly. Article 10 of the Northern Ireland Assembly Elections Order 1982 applies Section 6 of the House of Commons Disqualification Act 1975 to the Northern Ireland Assembly. Section 6 (1), with substitutions and modifications provides

"Subject to any order made by the Northern Ireland Assembly under this section if any person disqualified by the Northern Ireland Assembly Disqualification Act 1975 for membership of the Northern Ireland Assembly is elected as a member of that Assembly his election shall be void."

Article 4 of the Northern Ireland Assembly Elections Order 1982 provides that the Electoral Law Act (Northern Ireland) 1982 should apply to Northern Ireland Assembly elections. Therefore pursuant to section 77 (1) of the 1962 Act the Court determines that the election of Mr. Mallon to the Northern Ireland Assembly was void and the Court will forthwith certify this determination to the Presiding Officer of the Assembly.

Q 285. MR. CAMPBELL: My lords, I would ask for costs under section 91 of the Act. The position is that under that Act the costs are in such proportions as the election court may determine. Section 91.

Q 286. O'DONNELL LJ. In such proportions as the High Court may determine.

Q 287. MR. CAMPBELL: My lord, in Rodgers on Elections at page 250 the statement is that the ordinary rule is that costs are borne by the unsuccessful party. But he does go on to say that the cases disclose numerous exceptions to this rule. I would respectfully

APPLICATION: COSTS

submit that in this case the costs should be borne by the unsuccessful party.

Q 288. O'DONNELL LJ: Well there are a lot of costs incurred I am sure by applications abundante cautella on your part so strictly speaking I do not see why the respondent should have to pay for your excessive costs.

Q 289. MR. CAMPBELL: Well certainly I do not press the matter about the application with regard to the Foreign Secretary's certificate. Insofar as the notice to admit facts and the interrogatories which were never replied to I feel with respect, my lords, that if that step had not been taken and I had applied for costs I then mere than likely would have been met by the argument "Why did you not interrogate the respondent?" and therefore it was for that reason that we took that step which would of course have avoided costs.

Q 290. O'DONNELL LJ: Mr. Mallon is not here. Has he left?

Q 291. MR. CAMPBELL: I think so.

Q 292. O'DONNELL LJ: He is not in a position then to make any submissions. Does any agent of his wish to make any submissions? Well in the circumstances I would conceive no reason why the successful parties should not have their costs and accordingly the court will direct that the costs be taxed.

Q 293. MR. CAMPBELL: There is one other matter and that is that your lordships will know that a security of costs of £1000 had to be lodged with the petition and I assume that it would require an order of the court before that could be released.

Q 294. O'DONNELL LJ: There is no reason why it should not be released. I am sorry, Mr. Marrinan, I did not call on you.

Q 295. MR. MARRINAN: I have no comment to make.

Q 296. O'DONNELL LJ: You do not get costs.

Q 297. MR. MARRINAN: Well I am not asking for them.

Q 298. O'DONNELL LJ: The only other point I want

to clear up is what would appear, and one perhaps should not say anything, that Senator Robb was clearly of the understanding that he was not served personally with this, and it was led in such a way or was left in such a way in quite clear contradiction of the rules of the Supreme Court. I would like to find out why it was done in that way. I would also like to find out why a misleading endorsement was placed on the copy. When that arrives I will discuss it with the Registrar and we will send a copy of our comments as I promised to Mr. Robb.

Q 299. MR. CAMPBELL: I think my instructing solicitors could make the relevant inquiries and possibly report to the Registrar in writing. I have no reason to doubt Mr. Robb's version. My clients have come this morning and express their grave concern that their business was conducted in this way.

Q 300. O'DONNELL: Yes, thank you very much.