

SESS. II.—1897.
NEW ZEALAND.

“THE AWARUA SEAT INQUIRY ACT, 1897,”

REPORT OF PROCEEDINGS AND DECISION OF THE COURT OF APPEAL,
IN THE MATTER OF.

Laid on the table by leave of the House.

MONDAY, 25TH OCTOBER, 1897.

[Before His Honour the Chief Justice, and Mr. Justice Williams, Mr. Justice Conolly, Mr. Justice Dennisto and Mr. Justice Edwards.]

Mr. Theo. Cooper, and Mr. C. P. Skerrett appeared on behalf of the member for Awarua: Mr. Gully appeared as counsel nominated under subsection (2) of section 4 of the statute.

Chief Justice: Have you arranged who shall begin?

Mr. Gully: It is understood that my friend Mr. Cooper shall begin, and, with reference to the position, it must be obvious that Parliament stands impartial in the matter. I conceive it to be my duty under subsection (2) to allow my friends to put their contentions before the Court, and for me to put forward such arguments as I think necessary to set against their contentions. That, I think, is obvious by the statute. As far as the Speaker of the House and the House itself are concerned, it must be obvious that, having delegated their functions to the Court, they are not in any sense contesting parties; but subsection (2) contemplates argument being placed before the Court on both sides of the question. It is understood that my friends begin, and I assume that that will be a convenient course.

Mr. Cooper: If your Honours please, this is a special case stated by statute under “The Awarua Seat Inquiry Act, 1897,” upon which the Court has to determine certain questions also stated by the statute. Perhaps your Honours will pardon me if I shortly go through the Act of 1897. Section 2 states that “The Court of Appeal of New Zealand (hereinafter called ‘the Court’) is hereby empowered and directed to determine whether under the existing law, and upon the facts hereinafter specified, the seat of the member for the Awarua Electoral District in the present Parliament has become vacant; and, if so, on what date the vacancy occurred.” The facts are here recorded—“(1) That on the 8th day of July, 1897, the person now claiming to be the member was adjudicated a bankrupt under ‘The Bankruptcy Act, 1892’; (2) that on the 5th day of August, 1897, an election for the Awarua Electoral District took place, and he was a candidate for the seat, and was duly declared to be elected; (3) that on the 9th day of August, 1897, the writ was duly returned with his name indorsed thereon as the member for that district; (4) that on the 28th day of September, 1897, he took the oath and his seat in the House of Representatives as the member for that district, the bankruptcy remaining unannulled, and no order of discharge under the said Act having been obtained; (5) except in so far as his position may have been affected by his bankruptcy, he possessed all necessary qualifications as a candidate and a member.” These are the facts, and the questions are as stated in the preceding part of the clause—Is the seat vacant; and, if so, when did it become vacant? Now the question turns upon the construction of “The Electoral Act, 1893.” The particular sections I shall refer to, and which I think are all the sections which bear on that question, are these—sections 6, 8, 9, 75, 120, 123, 130, and 131. I refer first of all to section 130. Under that section the seat of any member of the House of Representatives shall become vacant if, under subsection (1) “for one whole session of the General Assembly he fails, without permission of the House, to give his attendance in the House; (2) if he takes any oath, or makes any declaration or acknowledgment of allegiance, obedience, or adherence to any foreign prince or power; (3) if he does, or concurs in, or adopts any act whereby he may become a subject or citizen of any foreign State or Power, or is entitled to the rights, privileges, or immunities of a subject of any foreign State or Power; (4)”—and this is the subject on which this question depends—“if he is a bankrupt within the meaning of the laws relating to bankruptcy; (5) if he is a public defaulter, or is attainted of treason, or is convicted of felony, or is convicted of a corrupt practice in reference to any election; (6) if he resigns his seat by writing under his hand addressed to the Speaker of the House, or, if there be no Speaker, or if he be absent from the colony, or if the resigning member be the Speaker, to the Governor; (7) if on an election petition the Election Court declares his election void; (8) if he dies.” These are the grounds upon which the seat of a member becomes vacant. Before I go to the preceding sections, and refer your

Honours to the qualifications which a candidate must possess in order to entitle him to be elected a member of the House of Representatives, I should like to make a few observations upon section 130. First, the commencement of the section is in the future tense. It refers to the seat of the member, to something which the member holds, and something which in all these subsections we shall submit to the Court must happen after the seat in the first instance is legally filled. For instance, there cannot be a vacancy until there has first been a seat. The member must be a duly qualified sitting member before the vacancy referred to in all these subsections applies. Secondly, if we examine each one of these subsections, and I shall submit also the subsection (4) upon which this question turns, it is clear that the Legislature speaks of the future, of something happening after the member has obtained his seat. For instance, take subsection (1), that is the future occurrence—"if he fails to give his attendance." That is something which attaches as a disqualification to the member after he has taken his seat—after he has been duly qualified as a sitting member. So also in subsection (2)—"If he takes any oath or makes any declaration or acknowledgment of allegiance." That refers to something done by a member, not to something done by a person who becomes a member, and prior to his obtaining the seat, but it plainly refers to an act done by a person in the capacity of a member. "If he (the member) takes," that is in the future. So if he makes any declaration or acknowledgment of allegiance or oath. Subsection (3) is another disqualification with the same future meaning. If he is a member his seat becomes vacant. "If he does or concurs in or adopts any act whereby he may become a subject or citizen of any foreign State or Power." We shall submit to the Court that "If he is a bankrupt," in subsection (4), is to be read in the same tense. Our contention, which will be supported by the subsections of the statute and other provisions of the Legislature on the matter, and also by some authorities which I will bring before the Court, is that no other construction can be put upon subsection (4). Of necessity it must import something happening—the bankruptcy of the person who was, prior to the bankruptcy, a member of the House, and consequently the words, although of the present tense, have a future application. In subsection (5) we have the same word "is" as in subsection (4)—"If he is a public defaulter." I submit it is abundantly clear that the words, "If he is a public defaulter" means after he becomes a member of the House, and that the words, "or is attainted of treason, or is convicted of felony, or is convicted of a corrupt practice in reference to any election," must also refer to something which has happened after he has become a member of the House, and must of necessity be read in the future tense although literally in the present. All these subsections, with the exception of subsections (5), (7), and (8), are practically taken from the Constitution Act, with the difference that the word used in the Constitution Act is "shall." If he "shall" take any oath, if he "shall" become a bankrupt, if he "shall" become a public defaulter, or "shall" be convicted of a corrupt practice. That is in section 49 of the Act. The first point, therefore, I make in discussing section 130 is that all the subsections are, apparently, in the first instance, in the present tense; but it is apparent that subsections (1), (2), (3), (5), (6), and (8) must be read in the future as something happening after the person has become a member—if he has to resign his seat he has nothing to resign if not a member. This also applies to subsection (7). In subsection (8) we have again the words in the present tense, "If he dies." I do not know whether the legislature in putting all these sub-clauses apparently in the present tense had in mind that in the original construction of the English language there never was a future tense at all, but that it has been added by grammarians in later years; but at all events it was thought fit to use the present tense in all these matters. We shall ask your Honours to read subsection (4) in the same way, and I submit the words "If he is a bankrupt within the meaning of the laws relating to bankruptcy" really mean this: "If he becomes a bankrupt" or "if he is adjudged a bankrupt within the meaning of the laws relating to bankruptcy." Therefore, if the words had been "becomes bankrupt" that would be the present tense and have a future signification; and I submit that the words "If he is a bankrupt" must of necessity, when we consider the construction of the clause, be interpreted in the future tense, and in reference to an act happening after the member has taken his seat. We shall support that position by reasoning which I shall derive from the statute itself and by, as I have said, the authority of one or two cases. I do not intend to weary your Honours with cases upon the construction of statutes, but will later on quote one or two which will support abundantly the position we take up. The next point I would address to your Honours is "the qualification of a person entitled to present himself to the electors for election as a member." The qualification clause does not exclude an undischarged bankrupt. We find the qualification clauses in sections 6, 8, and 9, of the Electoral Act. Section 9 is very emphatic in its terms: "Every man registered as an elector, and not coming within the meaning of the last-preceding section of this Act, but no other man, is qualified to be elected a member of the House of Representatives for any electoral district." There we have a very complete qualification clause. Then there is a proviso that "any man duly qualified as an elector, and who has been registered on any electoral roll, but whose name has become removed from such roll through no fault of his own, shall not, by reason only of not being registered as an elector, be disqualified from becoming a candidate and being elected for any electoral district." Then the Legislature, which seems to have had an abundance of caution, thinking that a woman might come within the definition of a man, provides that no woman shall be entitled to be a candidate, although she may be duly registered as an elector. We have to refer back to section 6 to find out the qualifications of any person entitled to be an elector. The persons qualified to have their names on the roll are, "Every person of the age of twenty-one years or upwards having, of his own right, and not as a trustee, a freehold estate in possession situated within any electoral district;" "Every person of the age of twenty-one years or upwards who has resided for one year in the colony and in the electoral district for which he claims to vote during the three months immediately preceding the registration of his vote." The persons who are disqualified, and the only persons therefore who are

not qualified from becoming members of the House of Representatives are aliens and lunatics. According to section 8, "No alien, lunatic, or person of unsound mind, nor any person attainted or convicted of any treason, felony, or of any offence punishable by imprisonment for one year or upwards within any part of Her Majesty's dominions, or convicted within the colony as a public defaulter, or under 'The Police Offences Act, 1894,' as an idle or disorderly person, or as a rogue and vagabond, unless such person shall have received a free pardon, or shall have undergone the sentence or punishment to which he shall have been adjudged for such offence, shall be entitled to be registered." Therefore, we find that every other person registered who does not come under any of these particular disqualifications, and does not come within the particular disqualification of the Disqualification Act of 1878, of "The Corrupt Practices Act, 1881," every man on the roll, except those persons, is entitled to be elected a member. Consequently, there is no disqualification on the ground that a man is an undischarged bankrupt. I submit it is abundantly clear that an undischarged bankrupt is capable of being nominated, elected, and becoming a member of the House of Representatives, and that he is entitled to all the privileges of a member; and, inasmuch as the act of bankruptcy is one which has happened before he takes his seat, and inasmuch as the disqualification clause of 130—the vacancy clause I shall call it—speaks only with reference to acts after he has taken his seat, the only answer that the Court can give is that the seat is not vacant, that the member for Awarua is duly qualified, and that he has the full powers of a member of the House of Representatives. Now, the importance of construing the statute otherwise is obvious, I submit, because the qualification of a member of the House depends upon section 9 as interpreted by section 8; and I shall submit at once that if the Court were to hold that the words in subsection (4), "If he is bankrupt," render the seat of a person qualified to stand vacant, then the Legislature has practically placed the electors and the House in this absurd position, that a man can be duly returned time after time by the electors as a member of the House and yet can never take his seat. This absurd, and, I submit, inconsistent, position would arise if that is the reading of the statute, and I submit it cannot be. For, if that is the reading of the statute, there is still nothing to disqualify an undischarged bankrupt being elected. The suggestion which is made by those who entertain an opposite opinion must be that a man is qualified to be elected as a member, and yet, because he is an undischarged bankrupt, he is unable and unqualified to take his seat. Supposing this seat for Awarua were declared vacant by the Court, the person now member for Awarua would have the right to be returned a second time, and I submit that the effect would be the disfranchisement of the constituency. Now, the Legislature could never have intended that. I do not know whether it will be contended that there is power to read in section 8 a disqualification which does not exist. We shall quote authorities to show that the Court has no such power. Now, the statute never contemplated that because a man happened to be an undischarged bankrupt it should disfranchise the electorate. We must look at the consequences where the language may be open to two constructions, and must ascertain whether these consequences lead to absurdity. The inference is that the Legislature never contemplated it. I repeat that inasmuch as an undischarged bankrupt is qualified to stand and become a member, it would be reducing the statute to an absurdity if the seat became vacant because he did not get his discharge. Now, that is the first ground we submit to your Honours for determination, that the construction of these prior sections show that the word "is" must be interpreted in the Act to apply *after* a person becomes a member. If we turn to the subsequent sections we find an equal absurdity if your Honours interpret this language as language which deprives the member for Awarua of his seat. We find in section 131 the machinery provided under which the House or the Speaker of the House becomes cognisant of the bankruptcy, and we find there is no machinery provided in the case of a person who is an undischarged bankrupt at the time of his election. We must read section 131 as showing the meaning of subsection (4) of section 130. Section 131 speaks of bankruptcy as in the future—of a person who is in the legal possession of a seat—a change in the status of a member, and the notification of the change in the status of the member by the person having official knowledge of the bankruptcy. Section 131 says—"The Registrar or Clerk of any Court in which any member has been adjudged a bankrupt." Now, the adjudication referred to must be the adjudication of a member, not of a person simply a citizen or voter, but the adjudication of the member. "The Registrar or Clerk of any Court in which any member has been adjudged a bankrupt, or has been declared to be a public defaulter, or been attainted of treason, or convicted of felony, or of a corrupt practice, shall, within forty-eight hours after such adjudication, declaration, attainder, or conviction, notify the Speaker, or, if there be no Speaker in the colony, then the Governor thereof; and any Registrar or Clerk failing to send such notification shall be guilty of an offence." Now, under what possible machinery can evidence of the fact of bankruptcy having happened before the person becomes a member be conveyed to that House? By no machinery at all. Therefore, it is not contemplated that a man is disqualified because he is an undischarged bankrupt. But what is contemplated is, that if he becomes bankrupt after being elected by the voters, then there is a change in his position. It is not fair to the electors of that district that a man who, until he has submitted himself again to them, until they have had an opportunity of expressing their views, should continue to occupy his seat, and therefore the seat is rendered vacant. I submit that is the meaning of the disqualification. So, if we go back to subsection (1): A man who is so careless of his Legislative duties as to neglect to go up and attend to public matters loses his seat. He must go back to his constituents, and if he goes back can be re-elected. It might just as well be suggested that he is disfranchised for ever because he fails to give his attendance for one whole session, as it is suggested that because he becomes bankrupt he is prevented from obtaining re-election. The words are in the present tense. The act is an act committed by the member, and it is an act which renders his seat vacant; but there is no provision which prevents a man, who has shown in the first instance a laxity in the performance

of his public duties seeking re-election ; there is no provision which renders him disqualified for the purpose of seeking his seat again. So also in reference to taking an oath of allegiance to a foreign prince or Power. In the disqualification clause there is nothing which disqualifies a man who has taken an oath of allegiance to a foreign Power. There is, it is true, the alien clause, and subsection (3) might in all probability bring that person within the definition of a statutory alien ; but otherwise there is nothing in the disqualification clause which prevents a person from taking an oath of allegiance to a foreign prince or Power from standing for election. The words are in the future. It might be suggested—and I propose to meet this objection—that it would be entirely contrary to the traditions of Parliament that a man who has taken an oath of allegiance to a foreign prince or Power should be allowed to take his seat in the House. The answer is, first, that he is not disqualified ; secondly, the House has complete jurisdiction over the conduct of members, and can expel a man who has shown that he had allied himself with a foreign prince or Power. But the point I make here is that subsections (2) and (3) are manifestly in the future tense, and that there is nothing in the Electoral Act to prevent a man who has taken an oath of allegiance to a foreign Power taking his seat unless he comes within the definition of "alien." There is nothing to prevent that man being elected to the House. In fact, an examination of precedents shows that aliens were at one time allowed to sit in the House of Commons, and the line was drawn only at Scotchmen. If a German was empowered to sit it shows the prejudice which existed at one time between the English and the Scotch. Now, aliens did sit in the House of Commons until they were excluded by statute, which practically placed an alien in the position of a person who was disqualified from having a vote. There is a remarkable instance in the Journals of the House of Commons in the time of James I., where the King chose to issue a writ for the return of a person "not being an outlaw or bankrupt," and a person was returned who was both an outlaw and a bankrupt. Notwithstanding that writ, and the return of the person, the House of Commons refused to declare his seat vacant. Possibly (there is only the resolution of the House recorded) on the ground that the King had no right to restrict the qualifications of a member of the House of Commons by his writ in the absence of statutory power. Later on, there is no doubt that persons in the position of a bankrupt had a complete right to sit in the House of Commons, and it is only because of statute that they were afterwards excluded. So also with public defaulters and persons convicted of felony. They might be excluded from the House on the ground that they were improper persons to sit there, and the House, by its inherent jurisdiction might expel them. The disqualifications in this colony rests upon the statute, and when I come to examine the prior legislation your Honours will find the significance of that. A person who was a "public defaulter" was not disqualified, and that continued for some years, until the Legislature discovered it and passed an Act to prevent a man who was a "public defaulter" from taking his seat in the House. The Legislature came to the conclusion that it was necessary to prevent a "public defaulter" from acting as a member of the House, and if a constituency chose to return him to disqualify him from being elected. It did not simply vacate his seat, but disqualified him from being elected while the consequences of his crime existed, until he had served his sentence or received the pardon of Her Majesty.

The Chief Justice : You say, if he is a "public defaulter" is equivalent to "if he has been convicted as a public defaulter." Section 8 says "if he is convicted as a public defaulter."

Mr. Cooper : I submit that we can read it with subsection (5), which is explained by the preceding section providing for the disqualification of a person, and it must mean "a man who is convicted of an offence" who is prevented from taking his seat.

The Chief Justice : Convicted after election ?

Mr. Cooper : Yes, the words mean necessarily conviction after election, because we find the Registrar has to send to the Speaker notification of the conviction of a person declared to be a public defaulter. I submit the words mean "if he is declared to be a public defaulter." Who is going to say a man is a public defaulter unless he has had a trial ? A "public defaulter" means a person convicted. That is in the interpretation clause, and the words mean not the embezzlement, but the conviction, so the expression used being "convicted of wrongfully expending, using, or taking any moneys the property of Her Majesty." In page 37, in the interpretation clause, we find "public defaulter" defined to be the "person convicted. There is no definition of the word "bankrupt" to be found. It is the conviction of the person who has embezzled the money which renders him incapable of keeping his seat—the conviction after he has become a member. It is the conviction prior to his application to be placed on the roll which disqualifies him from becoming a voter, and consequently of becoming a candidate. So that the provision in subsection (5), "if he is a public defaulter," cannot be read in any other sense than, "if he shall become a public defaulter" ; because no person who is a public defaulter within the meaning of the interpretation clause can possibly become a member. Consequently, it must apply only to a person whose conviction takes place after he becomes a member. And, therefore, this gives a strong reason for contending that "if he is a bankrupt" must be read in the same way. By the way, I did not refer to section 75, which is the nomination section, and provides that "Any man qualified as provided in section 9 of this Act, with his consent, may be nominated as a candidate." Therefore, when we come to consider section 130 with reference to the subsections which follow, we find of necessity that every one of these subsections must be read in the future, although in each one it is significant that the Legislature has used the present, tense. Take subsection (8), "If he dies." That is bad grammar. It should be, "If he shall die"—if this thing shall happen to him. It is a colloquialism to use the present tense for the future. We find that things happening in the future are constantly referred to in the present. "Next Christmas is on Friday," "I am of such and such an age next year," are common expressions, and "If he dies" is another illustration of the present tense of the verb being wrongly used. But it is abundantly clear that it must be a future tense, because a dead man cannot possibly be elected a member. Now I propose to refer your Honours to prior legislation.

The Chief Justice : You cannot call subsection (7) future.

Mr. Cooper : Oh, yes, because he becomes a member on the declaration of the poll.

The Chief Justice : Yes, and before he takes his seat, and it is not future before he takes his seat.

Mr. Cooper : Yes, it is. It is an act which happens after he is elected, and after he is a member, and it might happen after he has taken his seat. What is to prevent an election petition going on concurrently while he holds his seat. It is something which has happened after the man has become the member for the district. It is not the ground upon which the election is declared void which disqualifies him. It is the judgment of the Election Court, which is a future act, something which happens after he has taken the status of a member.

The Chief Justice : After the election?

Mr. Cooper : After the election. He becomes a member by virtue of the declaration. The writ issues for the return of a "member," and the Returning Officer declares the man to be elected as a member. Section 120 says, "The Returning Officer shall make up, from the list made out by him as last aforesaid, and from the list so transmitted by the Deputy Returning Officers as aforesaid (corrected by disallowing votes if need be), the general state of the poll, and shall, as soon as conveniently may be on or after the day of the poll, give public notice of the number of votes received by each candidate, and declare the candidate or candidates, not exceeding the number to be elected, who have received in the aggregate at all the polling-places the greatest number of votes, to be duly elected as *member or members* for the district." So that the membership arises upon the declaration of the poll, and therefore I submit subsection (7) is future, and refers to a future act. Now, why should any of the other subsections be read as present, as continuing a status? I submit that the only reasonable interpretation that can be put on section 130 is to construe the words of subsection (4) as "If he is adjudged a bankrupt," or "If he becomes bankrupt," or "If he shall become a bankrupt," and these are the words which are in the Constitution Act. Perhaps upon this branch of the case your Honours may pardon me if I refer in detail to prior legislation, beginning with the Constitution Act. Now, the Constitution Act provides under sections 49 and 50 for the vacating of seats. Section 49 says, "It shall be lawful for any member of the House of Representatives by writing addressed to the Speaker of the said House to resign his seat in the said House, and upon such resignation the seat of such member shall become vacant." Section 50 is as follows, "If any member . . . shall for one whole session of the General Assembly . . . fail to give his attendance in the said House, or shall take any oath or make any declaration or acknowledgement of allegiance to any foreign prince or Power, or do or concur in or adopt any act whereby he may become a subject or citizen of any foreign State or Power, or become entitled to the rights, privileges, or immunities of a subject of any foreign State or Power, or shall become bankrupt, or shall become an insolvent debtor within the meaning of the laws relating to insolvent debtors, or shall become a public defaulter or be attainted of treason, or be convicted of felony or any infamous crime, his seat in such house shall become vacant." Contrast the first subsection of clause 130 of the Electoral Act of 1893—"If for one whole session of the General Assembly he fails, without permission of the House, to give his attendance in the House." I submit that there can be no argument drawn from the fact that the Legislature has, in the Act of 1893, altered the language, because we find no reason for the alteration of the language in that first subsection from the future to the present. In the Constitution Act it says, "If he *shall* fail to give his attendance." In the present Act it is, "If he fails." It is merely a grammatical alteration by the draftsman. Then, "If he shall take the oath," &c. Now, it is "If he takes" in the Act of 1893. What possible reason can there be for the alteration of the language, unless it is the one I take it to be, unless it is because the draftsman thought he was a better grammarian than the draftsman of the Constitution Act; and that I submit is the key to the alteration from the future to the present. The draftsman has, in following out the same principle, put subsection (4) in the present tense too. In the Constitution Act it is, "If he shall become a public defaulter," and the draftsman, following out the same principle in the Act of 1893 has put in, "If he is a public defaulter," "If he is convicted of felony, or is convicted of a corrupt practice in reference to any election," the seat of any member of the House of Representatives shall become vacant. Contrasting the Constitution Act with our Act of 1893, and dealing with these subsections in the way I have dealt with them, it is quite clear there was no object in the Legislature changing the language. It is a mere change of terms, but not of the law. We find in the Constitution Act the qualifications of a member. Under section 42 the members were to be chosen by the votes of those qualified to vote in the election of members of the Provincial Council, "and every person legally qualified as such elector shall be qualified to be elected a member of the House." Now we find, in going back to section 7 of the Constitution Act, what is the qualification of electors for election in the Provincial Council, and that was a freehold qualification. Then, in section 8 we find the disqualifications were as follow: "Aliens, persons attainted or convicted of any treason felony or infamous offence within any part of Her Majesty's dominion unless pardoned, or unless sentence or punishment served." There was therefore no disqualification in the Constitution Act of persons who enter upon the status of bankruptcy, and the importance of this will be manifest when I quote authorities to your Honours which are conclusive on the point: that, at any rate under the Constitution Act, an undischarged bankrupt was entitled to be elected a member of a representative body. There was no disqualification on the ground of bankruptcy or that the person was a "public defaulter," and, however disgraceful it might be, a "public defaulter" might be elected a member for any constituency. There seems to be no doubt that he could be elected, the Act leaving it to the House to expel him in the exercise of its inherent jurisdiction. Now, these are the qualifications and disqualifications in the Constitution Act; and I emphasise this position, that the words in the Constitution Act are future in reference to each one of the Acts referred

to in the subsections of section 180 of the Electoral Act of 1893; and, inasmuch as the events referred to in these subsections must of necessity be future, and inasmuch as the Legislature has chosen the present tense for each one of these matters, it shows not a conscious alteration of language for the purpose of altering the law, but a grammatical alteration of words by the draftsman, because it might be better, in his opinion, to put the words in the present tense instead of the future. I suggest this position to your Honours, that the Parliament of England, in its desire to give a Constitution to the Colony of New Zealand, did not think it was expedient to prevent an undischarged bankrupt being elected to the House of Representatives, that Act being passed after a decision of the Court of Queen's Bench, which settled the law upon the subject that an undischarged bankrupt was entitled to be elected to representative assemblies, even though there was a section which vacated the seat of a man who became a bankrupt. The case I refer to is *Rex against Chitty*, 5 Adolphus and Ellis, at page 609. In that case an undischarged bankrupt was elected a Councillor for the Borough of Shaftesbury. He was declared a Councillor, made and subscribed the declaration, and took his seat. A rule *nisi* for a writ of *quo warranto* was obtained on an affidavit stating that at the time of the election, and still, he was an uncertificated bankrupt. The affidavits in answer stated that he was a ratepayer duly qualified, and that he had paid all rates for the year and was duly entered on the roll. Mr. (afterwards Chief Justice) Erle showed cause, and the Attorney-General (Sir John Campbell) supported the rule. After argument the rule was discharged. Now, in order that the full significance of the case may be appreciated, I would refer your Honours to a section of the Statute 5 and 6 William IV., chapter 76, and the disqualification clause was section 52, providing "that if any person holding the office of Mayor, Alderman, or Councillor for any Borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of debtors, or shall compound by deed with his creditors," his seat should be declared void. Then comes a very significant clause, showing that it could be suggested that the Legislature did not intend a person in the position of an undischarged bankrupt to become a member of these representative bodies, because it provides that such a person, ceasing to hold office because he was bankrupt, shall not be capable of being re-elected. This is the clause: "Every person so disqualified shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office"; so that he could not become eligible until he had obtained his discharge or paid his debts in full, but the Court decided that there was nothing to prevent a man who was in the position of an undischarged bankrupt being elected a member of the Council. Your Honours will see the applicability of this case in the argument of Mr. Erle, which I appropriate, "that what the Legislature really intended was that a person who had become bankrupt should go before his constituents, who should have the right to say, 'Are you or are you not a fit person to sit in the Assembly?' and, if they did elect him, that was an expression of their opinion of their confidence in him notwithstanding his bankruptcy." Section 28 of this Act disqualified clergymen, dissenting ministers, persons employed by the local body, and contractors from being elected as Councillors, but not bankrupts. These were the disqualifications, and bankruptcy was not one of them, and the argument, which is short, is that the defendant was duly qualified, because at the time of the election he was duly entered on the roll. "The defendant is and was duly qualified," said Mr. Erle, "unless he be disqualified by having been an uncertificated bankrupt at the time of his election. Section 28 enumerates all the disqualifications and does not specify this." Then he argues that the provisions of section 52 do not apply to persons who are bankrupts at the time of their election. "The intention of the Legislature," he says, "in making this distinction was probably to give the electors an opportunity of determining whether the fact of the party becoming bankrupt made him in their opinion unfit for the office of Councillor. . . . It is simply an exercise of discretion given to the electors upon the occurrence of a new fact." Sir John Campbell, on the other side, used practically one of the arguments which Mr. Gully must use to-day. "The intention of the Legislature," he says, "was to prevent uncertificated bankrupts from being Councillors at all," and then he argued that the disqualification of bankruptcy must be read into section 28. Under this Act, if a man was elected a Councillor and would not take the seat, he was liable to be fined for not doing so, and there was no exemption by reason of his existing bankruptcy. Lord Denman, in giving judgment, said that "the Court would clearly not be justified in raising any inference of an intention to disqualify where such an intention is not expressed. We are bound by what is said. The Act has said what shall be a disqualification and what shall be a qualification. . . . It is enough for us to abide by the words of the Act," and he adds, "that if an undischarged bankrupt was disqualified, it should have been so declared in the 28th section, and it was not so declared." Patteson, J., says that the disqualification is confined to the cases mentioned in section 28, and did not comprehend this case. Mr. Justice Williams concurred, and Mr. Justice Coleridge said, "We are not at liberty to intend a disqualification where the clauses of the Act specify what is to be a disqualification." That is direct authority that an undischarged bankrupt could be elected a member under our Constitution Act. Seeing that the Act provided—and we must so construe it according to this judgment—that an undischarged bankrupt was not an unfit person to hold his seat as a member of the House, and seeing that the Legislature in the Act of 1881—the Act on which "The Electoral Act, 1893," is founded—only made a grammatical alteration in the various subsections, and did not think fit to introduce into the disqualification clause a disqualification on the ground of bankruptcy, I submit we may infer that the Legislature considered that an undischarged bankrupt, if he is sent by the votes of his constituents, who are the best persons to judge, is not a person disentitled to take his seat. That case has been followed in New South Wales, in *Ex parte Mossman*, 6 Supreme Court Reports, 1867, page 245. In that case Mossman was elected, and was an undischarged bankrupt. He was elected while in that position. He took his seat, and the Mayor and other Councillors practically threw him out. They simply said, "You are disqualified because you are an undischarged bankrupt and cannot hold a seat in the Council." He would not go out, and they put him out. Then Mr. Butler

moved by *mandamus* to compel them to admit him, on the ground that he was not disqualified by bankruptcy, and supported his argument with *Rex v. Chitty*. The disqualification clause did not contain any disqualification on the ground of bankruptcy, but ratepayers were the persons entitled to vote and to be elected. There were certain disqualifications, such as the taking of contract under the Council, but no disqualification as to bankruptcy in the qualification of candidates. The Attorney-General, in his argument, relied on section 48 of the New South Wales Act, which enacted that any Councillor, &c., having his estate placed under sequestration or becoming bankrupt should vacate his seat, and should not be capable of being re-elected until he had obtained his discharge or paid his debts in full, and he contended that the words "having his estate placed under sequestration" prohibited the election of an undischarged bankrupt and distinguished the case from *Rex v. Chitty*. Stephens said: "It has been argued that it appears from the 48th section that the Legislature intended that an uncertificated insolvent should not be elected at all. But it is a clear rule of construction that a disqualification or forfeiture never arises except by express words, and it seems to me also that this case is not distinguishable from the one cited. The 48th section applies to any one holding any office. How can a retrospective meaning be given to the words 'having his estate placed under sequestration,' and not to the other alternative words? The same rule must be applied to all." Now, the member for Awarua did not hold office at the time he became bankrupt. How can your Honours give a different meaning to the word "is" in subsection (4) to the other words in the other sections? You must apply the same rule to all. That is what the Chief Justice says in the case I have quoted. Mr. Justice Hargrave said "It was not, intended that the insolvency should be made use of to deprive the electors of their franchise. If the electors chose to elect an insolvent they can do so," and Mr. Justice Clarke concurred. I submit that the same reasoning applies here, because, if so, it would be in the section, and if it is not, we have no right to read into the section words not contained in it. These two cases are authorities directly in point, not only on the Constitution Act, but upon our statute, because the expressions of the Chief Justice mean this, which I submit is sound law, that when you have a statute with a number of cases stated, and you find that in reference to all these cases except one you can apply a certain rule, you must apply that rule to that one unless there is some distinct language preventing this. Now, clearly, this man Mossman was a man having an estate under sequestration, but as he did not hold office at the time of the sequestration, the Court held that he was qualified to be elected. So here I submit the bankruptcy referred to as a disqualification is an act of bankruptcy after the person becomes a member, and has no reference whatever to the state of bankruptcy before he became a member. Passing on through the examination of subsequent statutes—I quote those two cases as bearing on the Constitution Act—we find there was a Disqualification Act of 1858, disqualifying persons who held Government offices. Practically the same provisions were in that Act as in the Act now in force of 1878. Then we come to a significant statute—the Public Offenders Disqualification Act of 1867. If your Honours will recollect, in the Constitution Act there was no disqualification of a "public defaulter." His seat was rendered vacant if he became a "public defaulter," but there was no provision preventing a "public defaulter" from submitting himself for election, and, therefore, taking his seat again, and that continued until 1867, when the Legislature seemed to recognise that and passed "The Public Offenders Disqualification Act, 1867," with a view of adding to the disqualifications in the Constitution Act that of "public defaulters," and they were very careful in that statute to disqualify the person, not only from sitting and acting as a member, but from being elected. Section 2 says, "Every person coming within the meaning of either of the following subsections, that is to say—(1.) Every person attainted of treason or convicted of felony or of any infamous offence; (2.) Every person convicted under the provisions of this Act or of 'The Provincial Audit Act, 1866,' or of any other Act, or of wrongfully extending, using, or taking any public money; and (3.) Every person indebted upon any judgment recovered against him at the suit of Her Majesty under the provisions of this Act, or at the suit of any Provincial Auditor under the provisions of 'The Provincial Audit Act, 1866,' if such judgment shall have remained unsatisfied for a period of thirty days and during such time thereafter as it shall remain unsatisfied, shall be incapable of being elected or of being or continuing to be a Superintendent of any province, a member of the House of Representatives, a member of any Provincial Council, a Mayor of any municipality, and of being nominated to or of holding or continuing to hold a seat in the Legislative Council, and generally of being appointed or elected to or of holding any office or employment in the public service, whether of the service or of any province therein, and every such election, nomination, and appointment shall be null and void, and every public office or seat held by any such person be and be deemed to be vacant."

Mr. Justice Denniston: That is not retrospective.

Mr. Cooper: No; the seat of a sitting member was rendered vacant under the Constitution Act.

Mr. Justice Denniston: But supposing he had been re-elected in the interim?

Mr. Cooper: It was not retrospective, and this supports my contention.

Mr. Justice Denniston: That particular Act would not apply to any person who had been a "public defaulter" before.

Mr. Cooper: I do not think so. I quote that Act to show that the Legislature recognised the necessity for disqualifying such persons by statute, because the disqualification had been omitted from the Constitution Act. The Disqualification Act of 1858, disqualifying Government servants and contractors, was practically re-enacted by the Disqualification Act of 1870; and although it has been repealed there is a section in it which is significant. That section disqualifies persons who had any office under the Government from being elected. The words are, "Shall not be capable of being elected, or of sitting, or of voting," and, in order that there might be no mistake, the Legislature in section 10 says, "If any person hereby disqualified or declared incapable of being elected a member of the House of Repre-

sentatives is nevertheless elected and returned as a member of the said House, his election and return shall be null and void." There the Legislature evidently thought the disqualification clause in the Act was not sufficient. The next statute was the Disqualification Act of 1876. That took the place of the Act of 1870, and in section 3 we find the disqualification clause states, not only that seats shall become vacant if the persons take office, but that they shall not be capable of being elected. Then came the Disqualification Act of 1878, which is still in force, and which is read with the Electoral Act of 1893, and which contains certain grounds of disqualification which are not in previous sections of the Act. That not only disqualifies a man from taking his seat if he becomes a public servant or contractor, but also prohibits the election of the man. Under section 4 he is disqualified from being elected, acting, or sitting as a member if he takes Government service or becomes a Government contractor, and if already a member, his seat is rendered vacant. The Legislature has not, however, thought that the position of an undischarged bankrupt is incompatible with the exercise of the duties of a member. It vacates the seat, but refers the conduct of the person as to whether he is a fit and proper person to be elected to the judgment of his constituents. Then we come to "The Regulation of Elections Act, 1881," which for the first time really repealed the provisions of the Constitution Act. In that statute appeared for the first time the vacancy clause—that is, a general vacancy clause containing the grounds of vacancy as declared by the Constitution Act,—yet there is no disqualification clause under the Act of 1881. The qualification continued under the Act of 1879. The Act of 1879 provided for the qualification of electors. Subsection (4) of section 2 contained the disqualification of electors; but among these disqualifications the bankruptcy does not appear. Section 4 is almost in the same words as section 9 of the Act of 1893—"Every man registered as an elector, and not coming within the meaning of section 2 of 'The Public Offenders Disqualification Act, 1867,' but no other man, is qualified to be elected a member of the House of Representatives for any electoral district." If he was registered as an elector, and was not a public offender he was eligible for election to the House of Representatives. That is under the Act of 1879. In the statute of 1881 appeared, as I have said, the vacancy clause (section 58) for the first time, and there we find this language in the present tense used. I submit, following up the line of statutes and the current of legislation, it is impossible to derive from that current of legislation any ground for a suggestion that the Legislature thought an undischarged bankrupt ought not to be elected to the House of Representatives or that he was incapable of sitting. They thought a member who had become bankrupt should go back if he chose to his constituency, but I submit it is impossible to derive from them any authority which affects the plain right of a person to submit himself to his constituency for election.

Mr. Justice Williams : Is there a provision preventing an undischarged bankrupt from becoming a Legislative Councillor?

Mr. Cooper : Yes, there is a distinct provision. It is "The Legislative Council Act, 1891," and it strongly helps my argument, because the Council is a nominated body, and the House is an elected body. The Legislature thought that no man who was an undischarged bankrupt ought to be nominated to the office of a Legislative Councillor. The Act is that of 1891. In the Constitution Act, section 36 states that if any Legislative Councillor of New Zealand shall become bankrupt his seat shall become vacant. That remained the law until 1891. By "The Legislative Council Act, 1891," section 10, that section in the Constitution Act was repealed, and it was provided by section 4 that the seat of any member of the Council, whether appointed thereto before the time of the passing of this Act or subsequently thereto, shall *ipso facto* be vacated if, among other things, "he is a bankrupt, or compounds with his creditors under any Act for the time being in force," and by section 2 of the same Act "the Governor may from time to time summon to the Legislative Council such person as he shall think fit, provided that no person shall be so summoned "who at any time theretofore has been bankrupt and has not received his discharge." Now, there is a distinct statutory provision. Before that such a person might have been nominated again, and the Legislature thought that an anomalous state of affairs, and therefore amended it. I now refer your Honours to Statute 52, George III., clause 144, because we have the statement in May that in Ireland an undischarged bankrupt can be returned to the House of Commons, the provisions of "The Bankruptcy Act, 1883," under which a member of the House of Commons is disqualified, not having been extended to Ireland. The law in Ireland depends upon the statute of George III., which is substantially similar to our Constitution Act and also to the Municipalities Act of New South Wales, 1858. It is an Act to suspend and finally vacate the seat of members of the House of Commons who shall become bankrupt and shall not pay their debts within a certain time. It has never been repealed. May, on page 32, referring to that provision and to the English Bankruptcy Act of 1883, says that, "although a bankrupt cannot be elected for any constituency in England, there is nothing to prevent an undischarged bankrupt from being elected for an Irish constituency, although it is doubtful if a member whose seat was rendered vacant by reason of bankruptcy could, while a bankrupt, be re-elected for the same seat though he could for another, the English Bankruptcy Act, 1883, not applying to Ireland." So that a man elected for Dublin, and whose seat was vacated by reason of his bankruptcy, could not stand again for Dublin, but could stand for Cork, according to the opinion of May. That is, I submit, very strongly in my favour, and I derive, therefore, an argument from that. I propose to bring before your Honours one or two authorities upon the principles of construction, although I submit it will not be necessary to apply them in this case, because it appears to me that it is easy enough to construe the statute in the manner I suggest, and the difficulty is to construe it in any other way, for no force could be given to many of the principal provisions if any other construction is placed on subsection (4) than that I suggest. First of all is *Rein v. Lane*, Law Reports, 2, Q.B., 144, and *Mr. Justice Blackburn*, on page 151, lays down a principle. He says: "It is, I apprehend, in accordance with the general rule of construction in every case that you are not only to

look at the words, but you are to look at the context, the collocation, and the object of such words relating to such a matter, and interpret the meaning according to what appears to be the meaning intended to be conveyed by the use of the words under such circumstances." Now, I submit, the object, collocation, and context of the words of the statute all point to only one meaning of the language, and that is that a member of the House who becomes bankrupt vacates his seat, but that a person who is already bankrupt can submit himself to the judgment of his constituency; he is entitled to be elected, and he is entitled to hold his seat. Now, in the case of *Brooks v. Colquhoun*, 59 Law Journal, 53, Q.B., a House of Lords case, on page 59, Lord Herschel lays down a principle which I submit is abundantly clear: "It is beyond dispute that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature, and may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act." Then, Lord Justice Bowen, *In re Cuno*, 43 Chancery Division, page 17, says: "In the construction of the statute you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature." Now, I submit, the electors for Awarua, before the Act of 1881, had a plain right to return a man who was an undischarged bankrupt if they chose to do so, and if they returned an undischarged bankrupt he had a plain right to take his seat in the House and was not liable to any disqualification; and then, I submit, the principle of the case stated by Lord Justice Bowen distinctly applies, and that you must not so construe a statute as to take away rights existing at the time of the passing of the statute, "unless you have plain words which indicate that such was the intention of the Legislature." Now, where do you find these words in the Act of 1893, or in the earlier Act of 1881? Nowhere at all. But we do find plain words that an undischarged bankrupt has a right to be a member. I submit, if the statute is construed in any other way, the right given by the Constitution Act is taken away by inference by "The Regulation of Elections Act, 1881." I submit that no Court can find that that was the intention of the Legislature; the civic rights of any man are quite as high as the rights of property—in fact, some people think they are higher. The right to be a member if a man chooses to submit himself for election to such a position is a very important right indeed, and it is not to be inferred without plain and direct evidence that it was the intention of the Legislature to take that right away. I submit, we have not got that plain intention. I submit, on the contrary, that the intention of the Legislature shows clearly that it has not interfered with the right given by the Constitution Act. It was doubtful at one time if we could look at repealed statutes as an aid to the construction of later statutes; but it has been laid down by the Privy Council as late as 1890 that, in determining the meaning of a statute, the Court is entitled to examine and construe previous legislation. Allison and Burns, Law Reports, 15, Appeal Cases, page 51; in *Lawless v. Sullivan*, Law Reports, 6, Appeal Cases, 373, the Court held that "the employment of different language in the same may in some cases help to show that the Legislature had in view different objects; but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such change must depend on a view of the entire enactments in which they occur and the degree of ambiguity existing in the language to be construed." That is the judgment of the Privy Council. Hardcastle, on page 158, uses this expression: "There are many instances to be found of the Legislature departing from language previously used for the purpose of conveying a certain meaning without intending to depart from that meaning." Mr. Justice Blackburn, in *Hadly v. Perks*, Law Reports, 1, Q.B., on page 457, says: "In drawing Acts of Parliament the Legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change them without intending to change the meaning." That is what I submit, that the Legislature, not believing that the framers of the Constitution Act had a sufficient knowledge of English grammar, thought they would alter the graces of the style from the future to the present, but did not intend to alter the meaning; and Lord Justice Mellish, *In re Wright*, 3 Chancery Division, 78, says: "Every one who is familiar with the present Act ('The Bankruptcy Act, 1869') knows that the language of the former Acts has been very much altered in many cases where it could not have been intended to make any change in the law." Now, if it were necessary to modify (I do not know what position my friend takes up. He may say I am submitting a modification of the language of subsection (4)—that I am asking the Court to alter or modify the language), the Court has ample power to do so if it thinks it necessary, and there are many cases where the Court has used that power. In *Hollingworth v. Palmer*, 4 Exchequer Reports (old), page 281, Baron Parke states a rule and says: "The rule we have always followed of late years is to construe statutes, like all other written instruments, according to the ordinary grammatical sense of the words used, and if they appear contrary to or irreconcilable with the expressed intention of the Legislature, or involve any absurdity or any inconsistency in their provisions, they must be modified to obviate that inconvenience, but no further." Now, I say, applying that principle, we have an absurdity created if the word "is" a bankrupt is to be used as disqualifying a man elected after his bankruptcy. We have this absurdity, which could never have been intended by the Legislature: that such a person is qualified to be elected, but immediately his election is declared as a member his seat is vacated, and there must be a fresh election, for which he is qualified to stand. Then we have an inconsistency, because can it be suggested that the Legislature thought a man was fit to be elected a member and not fit to take his seat? That is an inconsistency which is obviated by modifying these words. Then, we have a repugnancy between clause 131 and section 130, because how can a man notify the bankruptcy to the Speaker within forty-eight hours of its occurrence if the bankruptcy has taken place six months, twelve months, or five years before? If it is necessary to modify the language, then I submit it is the duty of the Court to modify it in order to give effect to what I submit was the intention of the Legislature. In *Waugh against Middleton*, 8 Exchequer

Reports (old) page 352, on 357, Chief Baron Pollock states a similar rule, but in rather different terms. He says: "Learned counsel for the defendants relied upon the grammatical construction of the Act, and contended that the Court was bound to give effect to it according to that construction. That rule of construction has been frequently adverted to in this Court. But I doubt, if it were laid down as a general rule that the grammatical construction of a clause shall prevail over its legal meaning, whether a more certain rule would be arrived at than if it were laid down that its legal meaning shall prevail over its grammatical construction. . . . It must, however, be conceded that where the grammatical construction is quite clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition: that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear that the apparent construction cannot be the true one, then that which is upon the whole the true meaning shall prevail in spite of the grammatical construction of a particular part of it." Now, that is an important case for applying these principles. The Court ruled that it was not the intention of the Legislature that the word "now" should have a retrospective effect and affect rights existing before the Act. The Act was one to set aside certain documents which should be executed by a bankrupt, and it contained the words that "every deed or memorandum of agreement now or hereafter," &c. It was argued that the word "now" meant every deed *now* entered or hereafter entered into, and the Court said that could not be the intention of the Legislature, and they practically read the word "now" as "hereafter." Then, there is the Caledonian Railway Company *v.* the North British Railway Company, Law Reports, 6, Appeal Cases, on page 122. Lord Selbourne says that "the mere literal construction of a statute ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." Now, I submit that if the literal construction is against the intention of the statute, then it should not prevail. The statute in the Caledonian Railway Company case provided that a sum of money should, from and after a vesting period fixed at the 1st February, 1880, be paid half-yearly on the 1st days of March and September in every year. The company entitled to the payments demanded the first one on the 1st March, 1880, but the House of Lords determined that the first payment was not due till the 1st September, 1880, and ignored the words of the statute, or, rather, modified them. Then, there is the case of *Ex parte Walter, in re Levy*, 17 Chancery Division, 746, where the Master of the Rolls, Jessel, refuses to construe a statute according to its literal meaning because of an absurdity. I would also quote the River Wear case, two Appeal cases, 756, where Lord O'Hagan says: "Your Lordships act as a Court of construction; you do not legislate, but ascertain the purpose of the Legislature; and if you can discover what that purpose was you are bound to enforce it, although you may not approve the motives from which it springs, or the objects which it aims to accomplish." Now, many minds might think that it is a very improper thing that a bankrupt should sit in the House of Representatives, but the Legislature has not thought so, and the purpose of the Legislature, I submit, can only be ascertained from the statute itself. I would quote one or two other cases where there has been a change of language, and which apply. In the case of *Hargreaves v. Hooper*, 1 Common Pleas Division, page 195, the Court read the word "is" as "was." That was a case in which the claim to vote was based upon the age of the person making the claim. The words were "if he is of twenty-one years of age." The argument turned on these words: "If he is of twenty-one years of age at the time when he recorded his vote, or when he made the application." Lord Justice Coleridge said, in construing the statute, "It is manifest that the word 'is' must be read 'was,' because the Registration Court must necessarily be after that date, and therefore the word 'is' must not be construed as referring to the time of revision." There Lord Coleridge, in order to give a reasonable meaning to the statute, read the word "is" as "was." And in the case of *Powell v. Boadley*, 18 Common Bench, New Series, 65, the Court in a similar case read the words "shall occupy" as "shall have occupied." The appeal was from the Revising Barrister. Both cases were under the same statute, and your Honours will notice that the Judge says the words of the Act could only have been intended in the past tense, although used in the present tense. Then, there is the case of *Macandrew and McLean*, 2 Court of Appeal Reports, page 189, in which the Court read the words "shall be" as "are." The section is, "When any gold-mine or goldfield shall be discovered and proclaimed upon any Crown lands which at the date of the passing of this Act *shall have been* under license or lease for depasturing purposes, it shall be lawful for the Governor in his discretion to cancel the license or lease under which such land *shall have been* held in occupation." The Court read the words "shall have been," &c., as "are under license or lease." The unsuccessful party was not satisfied with the decision of the Court in that case, and went to the Privy Council, which read the words "shall have been" as "shall be," and sustained the decision of the Court of Appeal. That is a case of correcting and modifying language in order to carry out the intention of the Legislature. The cases I have quoted support the principle, and are in fact unanswerable. Still, I submit, there is no necessity whatever to modify this language. The language can be used as supporting the position that I take without doing any violence to it at all, by reading the word "is" as "becomes." I, however, submit that if it is necessary to modify the language, or to introduce other words into the section, then it is the plain duty of the Court to do so, to prevent the statute being inconsistent, repugnant, and absurd; for the absurdity of reading the word "is" as applying to a person who is standing for election was never contemplated by the Legislature. Then, I submit that the Court cannot hold the member for Awarua to be disqualified without reading into section 9 of the statutes a disqualification which does not exist, and that Lord Justice Coleridge's decision in *Rex v. Chitty* is against it. His remarks are entirely applicable to this case, that we are not at liberty to do so. Finally, I submit to your Honours that upon the principles of the cases I have quoted the Court cannot even read these words as "shall become a bankrupt." No more violence will be done to the language than was done in the case of *Macandrew and McLean*, or in

the other cases I have quoted; and I submit I have shown ample authority in support of this contention. I contend, therefore, that the seat of the member for Awarua is not vacant, and that the Court cannot declare it vacant; that he is fully qualified, possessing as the case states all the other qualifications entitling him to take his seat; and that to hold otherwise will be to do violence to the intention of the Legislature. I submit, therefore, the answers to these questions should be in favour of the person claiming the seat.

Mr. Skerrett: May it please your Honours,—It must be admitted that there never was, either at common law or by the usages of the House of Commons, any disqualification of an undischarged bankrupt from being elected or sitting in the House of Commons. The disqualification is created purely by statute. The first statute which imposed the disqualification was the Imperial Bankrupt Act of 1869. The disqualification therefore, is purely statutory, and depends exclusively upon the statute. I propose to supplement Mr. Cooper's observations by a few remarks of a general character on the construction of section 130 of "The Electoral Act, 1893." First, I submit that the appropriate office of section 130 is to define a class of well-known disqualifications—namely, those that occur after the election of a member and create a disqualification from sitting. And, I submit, if this be the scope and purpose of section 130, an operation ought not to be given to it beyond that scope and purpose, unless the language of the statute clearly and unequivocally required it. There are two classes of disqualification which have always been regarded as separate and distinct, and which have always been considered by the Legislature as separate and distinct. First, the disqualifications which preclude a person from being eligible and from being a candidate. These disqualifications are set out in sections 8 and 9. The second class are disqualifications which arise after a person is clothed with the status of a member, and they are the disqualifications which are intended to be defined by section 130. They are in their very nature separate and distinct, and in all legislation on the subject they have been kept separate and distinct. An event happening before a person is elected might not disqualify him from being a member, while the same event happening after he was elected would cause disqualification and render the seat vacant. An illustration of that is a conviction of felony. Before election a conviction of felony is no disqualification after pardon or sentence served, whereas after election it is a disqualification. The difference between the two classes of disqualification is shown by the circumstance that the House of Commons itself never had any control over the eligibility of candidates except in the course of administering the laws upon which that eligibility depended. ("May," page 53.) Dealing with the matter, Sir Thomas May says: "But, notwithstanding their extensive jurisdiction in regard to elections, the Commons have no control over the eligibility of candidates except in the administration of the laws which define their qualifications." The result therefore is, where the Commons have exercised their power of expulsion and have said a member by reason of gross misconduct should not occupy a seat in the House, that has not been held to be a disqualification to him being re-elected.

Mr. Justice Denniston: That is in Wilkes's case.

Mr. Skerrett: Yes, your Honour.

Mr. Justice Edwards: It is a disqualification to stand if the man has been convicted of any offence punishable by imprisonment of one year or upwards.

Mr. Skerrett: Apparently it is a disqualification for eligibility as a candidate if a man has been convicted under the Police Offences Act; whereas such a conviction after election would not be a disqualification. Section 8 provides that no person convicted under "The Police Offences Act, 1884," shall be qualified as an elector unless he has received a free pardon or undergone the sentence or punishment to which he shall have been adjudged for such offence. That shows, of course, that the two classes of disqualification are separate and distinct. The statutes my learned friend cited also showed that the two classes are separate and distinct.

The Chief Justice: Do you say as part of your argument that a member cannot lose his seat except for some cause mentioned in this vacating clause?

Mr. Skerrett: Yes; your Honour, or under some statute expressly creating the disqualification. In England the Lunacy Act contains a disqualification.

Mr. Justice Denniston: Until recently a member could remain a member of Parliament although he was a lunatic.

Mr. Skerrett: Yes; but a provision was afterwards made providing for the expulsion of a lunatic after he has been ascertained to be such, and declaring his seat vacant. Before the passing of the statute, a case occurred of a lunatic having been brought from a lunatic asylum for the purpose of recording his vote. First of all dealing with the question as to whether the Legislature has not kept the two classes of disqualification separate and distinct, in our Constitution Act, and indeed in all the statutes, such as the Act of George III., dealing with the disqualification of bankrupts in the three kingdoms, in all these the Legislature has kept separate and distinct clauses affecting the non-eligibility of candidates and those disqualifying a member from sitting. Allow me to refer to the language of the very first statute disqualifying bankrupts from sitting; that is, 32 and 33 Victoria, cap. 71, which is the English Bankruptcy Act of 1869. Section 121 reads: "If a person, being a member of the Commons House of Parliament, is adjudged bankrupt, he shall be and remain during one year from the date of the order of adjudication incapable of sitting and voting in that House, unless within that time either the order is annulled or the creditors who prove debts under the bankruptcy are fully paid or satisfied." Then, there is a provision relating to a disputed debt, and then follows section 122, which reads: "If within the time aforesaid the order of adjudication is not annulled and the debts of the bankrupt are not fully paid or satisfied as aforesaid, then the Court shall, immediately after the expiration of that time, certify the same to the Speaker of the House of Commons, and thereupon the seat of such member shall be vacant." Your Honours will see that the effect of the Act of 1869 was only to disqualify a member from sitting and voting in the House of Commons, and it is stated in the early edition of Rogers that it only went to that extent. (Twelfth edition, Rogers, page 259.) Dealing with the Act of 1869, he says: "It will be observed that the above Act is confined to such persons as become bankrupts

after their election, and that there is nothing in it to incapacitate any person by reason of previous bankruptcy from being elected." You will perceive that in the Irish case, where it was precisely similar, "May" seemed to think that the candidate was incapacitated from standing for the same constituency "in the room of the member whose seat has become vacant." But that does not detract from the merit of the argument. I submit, therefore, that section 8 was intended by the Legislature to define all these classes of disqualification which relate to the eligibility of candidates, and likewise that section 130 specifies all those classes which arise after the member is elected. And I submit these two sections are mutually exclusive. What is defined in section 8 relates to the incapacity of a candidate to be elected, and what is defined in section 9 relates to events which occur after section 8 has worked its effect and a new status has been acquired by the member. My observation, therefore, only goes to this: You must commence the construction of section 130 with the idea that *prima facie* it was intended to apply only to events occurring after a member was elected, unless the statute by express language requires otherwise. The governing sentence of the section confirms this observation. The heading is "Vacancies." Its position in the Act is after all the procedure has been completed and the candidate declared elected, and the governing sentence is "The seat of a member shall become vacant." The word "seat" is used in the abstract sense. It means the office of the member. It means the right to sit shall be vacated in consequence of these events. Another observation I desire to make on section 130 is that all these subsections from (1) to (8) may be thus classified. They all relate (1) either to some act done, or omitted, or suffered by a member after he is elected; or (2) to some status acquired by a member after he is elected. Your Honours will perceive that this is an exhaustive classification. Acts omitted or suffered to be done are contained in subsections (1), (2), (3), (5), (6), (7), and (8). The status acquired is defined by subsection (3), practically if he becomes an alien; and by subsection (4), relating to bankruptcy. My learned friend has addressed to your Honours observations on all these subsections, and I do not therefore propose to follow him.

The Chief Justice: Would you not read subsections (2) and (3) "If he shall have"?

Mr. Skerrett: No. I submit the two may very well be read together. As it appeared in the Constitution Act, subsections (2) and (3), it was open to the construction that the oath must have been of such a character as entitled the person taking it to the rights, privileges, or immunities of a subject of any foreign State or Power. Substantially, what was meant by subsections (2) and (3) was the act of a person under the Imperial Naturalisation Act, a declaration of alienage whereby he ceased to be a British citizen and acquired a foreign status.

The Chief Justice: I do not say the language is capable of no other construction at all, but a man entitled to the rights of a foreign subject may be elected.

Mr. Skerrett: It may be so, unless he comes within the definition of "alien" in section 8. The particular instance is a *casus omissus* of the statute, but this Court is not empowered to supply it. If the construction suggested by me of subsections (2) and (3) be the true construction, then it gets over the difficulty. Clearly, the language is future as to subsection (2), "If he takes," not "If he shall have taken"; and the language of this particular subsection is also future in the Constitution Act. It creates no incongruity which did not exist under the Constitution Act. The only other observation I desire to make is in reference to subsection (7). I submit that is clearly future, "If on an election petition the Election Court declares his election void." That can only happen if the person has been clothed with the status of a member; and after he has acquired the right to take or has taken his seat. I venture to suggest to the Court that "seat" means the right to seat. It is used in the abstract sense. I submit that, if the Court is to read grammatically, the Court must read all the subsections as in the future. "If for one whole session of the General Assembly he fails" must be read "shall fail." That, however, does not avoid the real controversy in this matter. It must be admitted that all these sections must be read in the future. "If for one whole session of the General Assembly he shall fail to give his attendance," "If he shall take any oath of allegiance," "If he shall be a public defaulter," "If he shall resign his seat," "If on an election petition the Election Court shall declare his election void," "If he shall die." That is the way the Court must think out these subsections. The two opposing constructions of subsection (4) are these: My friend Mr. Gully will say "If he is a bankrupt within the meaning of the laws relating to bankruptcy" should mean "If he shall be a bankrupt." That involves the idea of retrospective action relatively to the time of the member acquiring his seat. My friend will say the section must be read "If he shall be bankrupt," and therefore if an uncertificated bankrupt is elected he is on election a bankrupt, and therefore he is within the prohibition. On the other hand, my friend Mr. Cooper and myself contend that the words must be construed to be "If he shall become bankrupt or should be adjudged bankrupt." The difficulty is, which is the true construction of the subsection? I submit there is—apart from the general considerations I have submitted to the Court as to the scope of section 130 and as to all these subsections dealing with the events happening after the member has acquired his status—one principle that effectively answers the question, and that is that it requires plain language to express such a disqualification. There is no such language in this statute, whereas there is express language in the statute whereby it is declared that a bankrupt shall be entitled to be elected. It is quite as strong as that, that he shall be qualified to be elected. My answer to my friend's contention is that they are plain words to qualify an undischarged bankrupt to be elected, and no language to say he shall not. To escape, Mr. Gully has to adopt a construction which does either one of two things. It must either import into section 8 a disqualification of bankruptcy which you do not see there, or his construction would create the absurdity pointed out by Mr. Cooper. Now, I submit a construction which does either of these two things ought not to be adopted by this Court. I submit a construction which violates the canon laid down in *Rex and Chitty* and *Mossman's* case ought not to be adopted. You cannot import a disqualification not contained in express language into section 8. As was said in the case of *Rex and Chitty*, if the Legislature intended to disqualify for bankruptcy it would have said so in

express terms. There was much more reason in Rex and Chitty and Mossman's disqualification for importing a disqualification. In those cases there was an express proviso that the member disqualified by bankruptcy could not be elected until certain events happened—a much stronger reason for importing a disqualification than in the present case.

The Chief Justice: Are you arguing that a disqualification for election should be intended in this case?

Mr. Skerrett: What I argue is that the opposing construction must either go to the length of intending a disqualification for election, or it creates the absurdity which Mr. Cooper points out. My friend, Mr. Gully, is on the horns of a dilemma. Either this construction has the effect of intending a disqualification in section 8, or it creates the absurdity of a person qualified by the same Statute for being a candidate and being elected, and instant after the election rendered incapable of sitting. I submit that that is an absurdity.

The Chief Justice: Your contention is very plain. It is that the seat shall become vacant if he is bankrupt. "Become," you say, indicates change; whereas the contention of the other side is that there is no change.

Mr. Skerrett: Just so, your Honour. That is precisely our argument. I wish to make one observation as to whether it is an absurdity for a candidate to be elected and yet be incapable of sitting. There never has been an instance of that type created in one and the same statute. It is quite true that where the House of Commons expels a member he is entitled to go back to his constituency, and they are entitled to return him again and again. It is not a species of disqualification at all; the difficulty arises from the circumstance that Parliament has no control over the eligibility of persons to be elected, although it has the right to say that no person guilty of misconduct shall sit. I submit that great stress is to be laid on section 131 as an aid to construction. Section 131 provides not only the machinery for ascertaining when a vacancy by reason of bankruptcy occurs, but also when a vacancy is caused by conviction or attainder. It will be seen that if a member is attainted of treason, or is a public defaulter, or is convicted of felony, the Registrar or Clerk of the Court must notify the same to the Speaker. The same course is taken if the member has been adjudged a bankrupt. Section 131 is the complement both of subsections (4) and (5). Subsection (5) is clearly future, and applies to a conviction or attainder after election, although the subsection is expressed in the present tense. Surely the same method of construction must be applied to subsection (4); and, to read it plainly, relates to a bankruptcy occurring after election.

Mr. Justice Dennistoun: Was not that the case of Wilkes? As a matter of fact, the sheriff returned Mr. Luttrell's name although Mr. Wilkes had a majority. The electors petitioned against Mr. Luttrell, but the Commons resolved that he ought to have been returned, and never receded from the position maintained then. Mr. Luttrell did sit, and was returned, although Wilkes had a majority, on the strength of Wilkes's expulsion from the House of Commons.

Mr. Skerrett: A resolution was placed on the Journals of the House declaring such a course unconstitutional. May says the resolution declaring Mr. Luttrell elected was ordered to be expunged from the Journals. There is only one observation I wish to make, and that is this: It seems to me the only argument my friend is able to urge in the opposite direction is the suggestion that, there being a change of language from the Constitution Act, it must have been intended to have altered the sense or the meaning. Now, I submit that, in most of the subsections, it was a mere change of expression—a mere alteration in the grammatical form, and not a change in the meaning. If all the subsections but the bankruptcy section had been preserved in the future tense, and that one alone altered into the present tense, then there would be a great deal of weight and force in the argument.

Mr. Gully: The argument which has been put before your Honours amounts to this: that a person who becomes a bankrupt the day before his election is left entirely unfettered by the consequences of his bankruptcy; but if he becomes bankrupt the day after his election, then immediately there is a vacancy in the seat, and he enters upon a period of disability. Now, the fallacy, I submit, of the argument for the claimant in this case is that it almost wholly rests upon the suggestion that we are asking the Court to read in a disqualification into sections 8 and 9 which is not to be found there. I submit, however, that upon a close analysis of section 130 it will be found that section 8 of the Statute is not exclusive, that there are grounds upon which a vacancy may occur quite apart from the disqualifications under that section; and further, that such vacancy may occur immediately upon election. If that be so, it does away with a great deal of the effect of the argument on which my friends rely in reference to the construction of section 130.

The Chief Justice: At the time of election, you say, there may be a cause existing which would vacate the seat though it does not disqualify for election.

Mr. Gully: Yes; although it is not a *personal* disqualification affecting the right of the member to stand, it nullifies the election because "he is bankrupt." I submit that view is supported not only by section 130 but by other sections. The first observation I desire to make is this: that section 8 does not primarily relate either to qualification or status. Primarily, it relates to the elector, not to the candidate. It is true that under section 9 the qualification the elector is bound by is made a *sine qua non* of the right of the member to be elected, but that is all. Now, manifestly, in considering the effect of bankruptcy upon a member or candidate, considerations affecting an elector must be entirely different from those affecting the status of a member. Therefore, apart from the actual legislation, I submit we ought to approach the question of disability in a different spirit to the disqualification of an elector. It is obvious that an elector who has in the performance of his functions to take a few moments only is differently affected by bankruptcy compared with a member who (as I suggest) by the Bankruptcy Act is almost *incapable* of performing the functions of a member of the House, and at the same time of doing his statutory duty under the Bankruptcy Act. Section 9 simply says this, "You shall not put up for election unless you are a registered elector." Before coming to the construction of section 130, I would ask to be allowed very shortly to suggest that the construction of the present

bankruptcy law is a matter of considerable importance in interpreting the position of a bankrupt member under section 130. I do not propose to labour the matter; but it does appear, if one looks at some of the principal sections of the Bankruptcy Act of 1892, that in most cases it would really be impossible for the two duties, that of membership and that of bankruptcy, to be concurrently exercised. The member would have to perform the duties of a member of the House and the duty he owes to his creditors under the statute. I submit the law of electoral disability has shown a process of evolution, and, beginning with the time when bankruptcy was no disqualification at all, it has spread, so to speak, first to disqualify the elector, then to include the disqualification of a member if the bankruptcy occurs after his election. I now submit that the process of evolution has gone further, and made bankruptcy a disqualification whether the act of bankruptcy takes place before or after election. I only want to point to some conclusions which show that if this legislation does not meet the present case, it ought to; and that it is a mischief which requires legislative interference. When I say that it ought to, I mean that the disabilities imposed under the Bankruptcy Act are of such a character that it is unreasonable to suppose that the member can perform the dual functions at the same time.

Mr. Justice Connolly: We are not asked to say what the law ought to be, we are only asked to say what it is. To ask us to say what the law ought to be seems to me to be beyond the question.

Mr. Gully: I am not asking the Court to make new statute law. I say that in order to arrive at the interpretation of the existing statute, it is necessary to ask the Court to consider the kind of mischief aimed at. The consideration of the Bankruptcy Act shows that the whole of the proceedings in bankruptcy would have to be suspended, at least during the time the member is attending the session of the House, and the two things, I submit, could not go on together. For instance, under the Bankruptcy Act of 1892, section 61 makes it incumbent on the bankrupt to make up his books for three years, and give the Official Assignee all the assistance that may be necessary. Under section 81 it assumes that he remains in the one place, and he must give every assistance in realising the estate. Under section 91 the whole of his correspondence is made subject to an investigation by the Official Assignee, or he can be summoned before a Resident Magistrate for examination. Well, if he became a Cabinet Minister it might be very inconvenient to have his correspondence made subject to investigation.

Mr. Justice Denniston: Is there not some provision by which the honorarium of a member is protected from bankruptcy?

Mr. Gully: I do not think it can be attached, but it has not been so decided in case of bankruptcy.

Mr. Justice Denniston: Is there not a specific provision against attachment?

Mr. Gully: Not in the case of bankruptcy. The honorarium becomes due *de die in diem*.

Mr. Justice Edwards: Do you not require an order from a judge before you can inspect correspondence?

Mr. Gully: Under section 91, I think so.

Mr. Justice Edwards: Well, the judge would not give you an order to inspect correspondence under the circumstances you mention.

Mr. Gully: I am only indicating the general absurdity of a bankrupt being called on to exercise continuous legislative duties. However, I do not want to press the contention too far. These sections and sections 124 and 125 show that during the period of suspense the bankrupt is practically completely (and ought to be) at the beck and call of the Assignee in his estate. He is, moreover, compelled under the statute to apply for his order of discharge within a period of four months, so that during that period at least, the functions of a member of the House could not be performed unless he broke his statutory duty under the Bankruptcy Act. Turning now to what is really the important feature in the case, the construction of section 130 of "The Electoral Act, 1893," and the group of subsections which follow it, I submit that the intention is (and the words in their ordinary sense carry out the contention) that the existence of bankruptcy at the time of election virtually disqualifies the candidate, and that thereupon the election becomes void. The wording of subsection (4) in the ordinary sense is entirely in accord with that contention. "*If he is a bankrupt*" at the time of the election, no matter whether he was bankrupt a week before, or a month. Now, my friends take that subsection, which is quite plain according to the ordinary interpretation of English, and they seek to control that by going back to the first part of section 130, which says, "the seat of any member of the House of Representatives *shall become vacant*" in the event of certain things happening. I submit that means can become vacant upon election. It is not precisely a disqualification, but it is another way of saying so. It is suggested that this leads to an absurdity, but I shall have something to say about that later on. Is there anything in the statute that shows there cannot be a vacancy occurring immediately on election? I contend that in the statute bankruptcy is contemplated as creating a vacancy if only there "*is*" a bankruptcy. The statute informs the electors that if they elect a person who is disqualified their votes will be thrown away. Section 132 contemplates a vacancy immediately on election, and why not section 130?

Mr. Justice Denniston: But of a seat previously declared to be filled. That refers to the election of an unqualified person. A man could not be elected to a vacancy caused by an unqualified person. It is the phrase "election" which is badly used.

Mr. Gully: The words used are "the seats for both shall thereupon become vacant." It doubles the disability, and, so far as the later election is concerned, it does create—what I contend for—a vacancy immediately upon election. The section says that A, a member for one district, shall not be capable of being elected to supply a vacancy in any other district, and in the event of his being returned, with his consent, for one district whilst he is member for any other, the seats for both *shall thereupon become vacant*. In one case the word "vacancy" would be properly used, in the other only in the electoral sense, and that is the sense it is used in under section 130. Coming now to section 133, that also I submit contemplates a vacancy occurring immediately on election, and not after an interval, because it relates back. Under this section (133) the person next on the

list may stand elected. It follows, therefore, that by relation back a nullity in the election is created, and it uses the words "If the seat of any member *becomes vacant*," as in section 130. So that here is another case—subject to the declaration of the Court—where the Act uses the expression, "If the seat of any member becomes vacant," where the vacancy clearly operates as from the date of the election. Therefore, that weakens the force of the argument on the other side in reference to a later part of section 130. Again, in subsection (7) of section 130 the statute contemplates a vacancy which operates as from the date of the election. A corrupt practice when declared by the Election Court, renders the election void as from the date of election, and therefore I say that my friends cannot plead an interval of time as being essential between the election and vacation of the seat under the words of section 130. The real position is this, that the words used in subsection (4) in their ordinary sense mean that the status of bankruptcy *ipso facto* vacates the seat. I submit this puts an end to the question. I submit there is a continuous status indicated as avoiding an election under various subsections. Under subsection 4 there is this continuous status, and then if the election takes place thereupon the seat becomes vacant. There is no reason why the Legislature should not say it will not disqualify the elector or member, but under certain circumstances the seat shall become vacant; and if the electors in the face of the statutory provision choose to give their votes, as they did in Mitchell's case, they are supposed to take the consequences. That is the result of the well-known case of Mitchell quoted in the Irish Reports, Common Law, page 217.

Mr. Justice Edwards : Do you say that if two candidates put up, one a bankrupt and the other not, that one can be elected and the other cannot?

Mr. Gully : I suggest that if the voters voted for a person knowing him to be disqualified, their votes would not have any effect.

Mr. Justice Denniston : How do you mean?

Mr. Gully : I mean virtually—as it was in Mitchell's case.

Mr. Justice Denniston : I do not want to know about virtually. What is your opinion? When they elect him is the effect to disfranchise the district?

Mr. Gully : I do not know the result to the person second on the list. It is not provided for.

Mr. Justice Denniston : If your argument is correct, if the man is not disqualified and is nominated and elected, then the effect must be to disfranchise the district.

Mr. Gully : Whether the effect would be to entitle the man second on the list to hold the seat I do not know. Upon petition by him, I should hold it would.

Mr. Justice Edwards : That will not hold with your argument. You say the seat becomes vacant.

Mr. Gully : My argument is intended to show the fallacy of the argument on the other side, which depends upon the mere use of the word *vacancy*. I say the effect is to make the election a nullity.

Mr. Justice Denniston : You cannot vacate a nullity. You must have something to vacate.

Mr. Gully : Practically that is what it comes to. The same word is used in sections 132 and 133. Under subsection (3) there is some peculiar wording—"If he is a public defaulter, or is attainted of treason, or is convicted of felony, or is convicted of a corrupt practice." It does not say only in his own election, but in any election. Does that mean before or after?

Mr. Justice Edwards : It says conviction afterwards.

Mr. Gully : Conviction afterwards of a corrupt practice, before or after?

Mr. Justice Denniston : If there is a conviction there is an end of it.

Mr. Gully : Then you get to the somewhat absurd position that, although in no other case in these sections can the member create a vacancy by an act done before the election; in this case the act comes before, though the conviction is afterwards.

Mr. Justice Edwards : If you commit a felony before and get convicted afterwards it is just the same.

Mr. Gully : The commission of the felony creates the disability—not the conviction. Next, your Honours, it is suggested that the reason why there is a distinction made between bankruptcy and the other disqualifications after election and not taking effect before election is that the bankrupt if he becomes bankrupt after election should be relegated back to his constituents. If that is a reason affecting the status of an election, it must affect the whole of these sections, and it would lead to this: that a person guilty of a corrupt practice would have to be relegated back to his constituents. However, my friends are driven logically to the contention that in each one of the eight subsections, section 130 has no effect unless the act done or omitted takes place after the election of a member. For instance, first of all you have in section 8 the word "alien." Then subsections (2) and (3) clearly, I submit, are not coincident disqualifications. What would the effect of the claimant's contention be? It must be that if a person took the oath of allegiance to a foreign Power the day before his election he would be qualified to be elected. That, I submit, is the best illustration of the absurdity of the interpretation contended for by the other side, and in every other instance it leads to the same incongruity. This cannot be lessened by the idea that the candidate could be relegated to his constituency. These principles of disability are founded upon public policy, and not for the protection of the electorate. With reference to the change of language in the Act departing from the Constitution Act, I submit we are entitled to use the argument that the change was intentional, so as to do away with the anomaly of a person having a continuous status capable of being elected if he fails the day before and incapable of sitting if he fails the day after election. It is not suggested on the other side that there was any reason for the change except, as Mr. Cooper put it, to make the language look more graceful. But it has not that effect; it has exactly the opposite effect. The words "*shall become vacant*" carry the meaning clearly. There must have been a reason especially applicable to bankrupts having a continuous status. There, I submit, it is appropriate to say

"if he is bankrupt" at the time the election takes place. Beyond that, I do not think threshing out the presumed intention of the Legislature in the past assists the case at all. In the two cases, *Rex v. Chitty* and the New South Wales case, the language was perfectly clear that the seat should become vacant, and the member should cease to sit. The language was distinctly future—with us it is distinctly present. Considerations which the Legislature would probably at this time take into account are not necessarily what would have been taken into account so long ago as the time when *Rex v. Chitty* was decided. I seek to invoke the argument on the policy of the modern legislation, and it is only by looking at the modern legislation that any useful guide can be got as to the policy of the Legislature. Going no further than the recent legislation at Home, I submit that the Legislature has now definitely recognised the difficulty of a member who is an undischarged bankrupt being permitted to perform his functions as a member of the House of Commons. He is suspended for six months, which may be taken as the time during which the bankruptcy ought to be concluded, and if not so concluded, thereupon the vacation takes place. But in the meantime the modern law recognises that there is a period of suspension during which he is unable to perform his duties. Now, I want to refer to local legislation with reference to other bodies in regard to bankruptcy, and I think it will be found that, in every local body where there is a public function to be exercised, in every case the disability is recognised. I am not referring to this as helping in the interpretation to be used, but only in a general sense. In the several statutes different language is used. I would refer to "The Education Act, 1887," section 21, which refers to the duty of a member. Some of the Acts do not make the member ineligible, but in others they do.

Mr. Justice Edwards: Is there not in some of these cases a property qualification? May there not be a difference where the qualifications for an elector must be some property or interest in a property?

Mr. Gully: In some instances he is merely a ratepayer, but not in all. Under the Harbours Act, for instance, the members of the Board get their qualification in various ways—some are appointed by the Government, some by the merchants, and some by ratepayers. Then, under the Act of 1882, a Justice of the Peace, if he becomes bankrupt, *ipso facto* ceases to be a Justice of the Peace. Under the Road Boards Act we get a different phraseology. Section 29 says: A bankrupt or insolvent who has not obtained his final order of discharge "shall be incapable of *being* or of *being elected* a member." In this instance the Legislature not only refers to the qualification, but to the election, and my friends may use this as an argument against me. But my object now is to show the policy and intention of the Legislature as to disability under such circumstances. It is the same in the Counties Act of 1886, section 65, and "The Municipal Corporations Act, 1886," section 88. Those are the principal local bodies. The Legislative Council Act has already been submitted to the Court. Under "The Land Act, 1892," section 44, the seat of a member of the Board is vacated if he shall be adjudicated a bankrupt, and under "The Industrial Conciliation and Arbitration Act, 1894," a bankrupt shall not be appointed or elected or hold office as chairman, or as a member of any board, or as president or member of the Court, and if so elected or appointed shall be incapable of continuing to be such member, president, or chairman. Then there is the well-known case of the suspension of the civil rights of the bankrupt juror. Under the English law, by the Bankruptcy Act of 1883, section 33, "If a member of the House of Commons is adjudged a bankrupt, and the disqualifications arising therefrom under this Act are not removed within six months from the date of the order, the Court shall immediately after the expiration of that time certify the same to the Speaker of the House of Commons, and thereupon the seat of the member shall become vacant." In the other colonies the expression in most cases is future—"shall become." The expression originally used is retained in Victoria, Queensland, and New South Wales. In all these cases, however, I suggest that the analogy of similar statutes elsewhere really does not assist the Court. I think it is sufficient for the purpose of comparison to note the words used in the Constitution Act and the change we find in the Act of 1893. I submit, therefore, on consideration of section 130, by giving the ordinary meaning to the words there used under subsection (4), a person is bankrupt at the time his bankruptcy takes place, and his seat thereby becomes vacant.

The Chief Justice: Would you say you make the contention the same if he be "adjudged" bankrupt?

Mr. Gully: I do not know that I could. That is the expression used in the Canadian Act. It might be used to indicate the status—so long as he is a bankrupt.

The Chief Justice: Yes, the language of the Constitution Act is a little clumsy, "if he become bankrupt."

Mr. Gully: "If a man become bankrupt," that is an act *in futuro*. If it could be suggested that the word "become" was left out by mistake it might be read in, but I say the word "is" is intentionally used here, as indicating a continuing status disentitling the member to sit and vote at all. At any rate, it creates a vacancy upon election. I have already answered what my friends had to say. First of all, I say we do not mean to read anything into section 8, and I say our interpretation of section 130 does not lead to any absurdity any more than if it said he should be disqualified. There is no difference between a statute which says he shall not be elected, and one that says if he shall be elected the election shall be void. Bradlaugh's case shows that if a constituency time after time elect a person whom they have good reason to suppose is disqualified or may be expelled, they take that risk and throw away their votes.

Mr. Justice Denniston: What about the minority? You maintain that the majority can disfranchise the minority.

Mr. Gully: Where there is ground of expulsion and the electors are aware of that, they give their votes on the risk of being disfranchised.

Mr. Justice Edwards: What is the object of enabling the majority in this constituency to put the country to the expense? Why do you suggest that the country should be put to the expense?

Mr. Gully : It is purely a matter of interpretation. I do not see that the result of repeated elections being caused can be taken into account. Supposing the Court had declared a person guilty of a corrupt practice, that nullifies the election, and the country is put to expense.

Mr. Justice Edwards : But here you say it allows a man to become a candidate, but immediately vacates his seat.

Mr. Gully : Although not disqualified by section 8, practically the Legislature has indicated that the election of a bankrupt is a nullity. It might have been done by adding it to section 8 as a disqualification ; but I submit a reason for not doing that, and that is that it would be most unfair and unreasonable to make bankruptcy a disqualification for an elector.

Mr. Justice Edwards : That is section 9. Every man registered as an elector, and not coming within the meaning of the last-preceding section of this Act, but no other man, is qualified to be elected a member of the House of Representatives for any electoral district.

Mr. Gully : One can always see when these cases arise that the object of the Legislature could be better expressed. As to the authorities cited by Mr. Cooper upon the question of construction, I do not see that they assist the matter. My friend asks that the Court, according to my contention, should modify the wording of subsection (4). I suggest that, taking the words in their natural sense, they are quite plain, and that no modification is required or possible ; and that with regard to the early part of section 130, and by looking at sections 132 and 133, the wording shows that a vacancy can take place immediately after election. Then comes the argument under section 131.

Mr. Justice Williams : Does it not imply that the seat must be filled, and if so, for how long?

Mr. Gully : I appreciate that point, but I have shown that section 132 does contemplate the vacancy immediately.

Mr. Justice Denniston : It disqualifies the person from the beginning, and in that case his election was a mere form.

Mr. Gully : Under section 132 he stands for election. It practically declares that on the second election that election shall be void. The words are "*The seats for both shall thereupon become vacant*"—the same expression as in section 130.

The Chief Justice : Properly, the seat he was contesting was vacant, but they wanted to vacate his own seat, and so they said both.

Mr. Gully : Yes ; but still, nevertheless, there is no necessity to imply the words "after an interval." As to section 131, this lays down the duty of the Registrar or Clerk of any Court after election. That, therefore, admittedly contemplates bankruptcy after election.

The Chief Justice : How is the Speaker to know? Supposing the member is returned, there is no statutory and prescribed means of informing the Speaker.

Mr. Gully : That is the object of section 131.

The Chief Justice : How is he to be informed of the vacancy in a case which happened after election?

Mr. Gully : Section 131 is intended to meet that case.

The Chief Justice : I mean the person who was bankrupt before his election. How is the Speaker to be advised of that fact?

Mr. Gully : I do not think the Speaker is intended to be advised, because section 130 provides for that.

The Chief Justice : Is there any prescribed method?

Mr. Gully : Not in the case of bankruptcy happening before election, but practically, although put in section 130, the matter is settled by statute ; and I do not quite see why the Speaker should require notice of disqualification in this any more than in any other case. If the person were an alien and an unqualified person I should think, under section 8, the election would be void. I do not think there is any machinery required to advise the Speaker of anything antecedent to the election.

Mr. Justice Williams : The Registrar would have knowledge. Supposing a man had been adjudged bankrupt two or three years before and had never obtained his discharge, and offered himself as a candidate for a district far away from the place of his bankruptcy, who is to advise the Speaker?

Mr. Gully : There is no provision. But nevertheless there would be the fact that it was an election of an unqualified person.

The Chief Justice : Is there any special provision for it in the other colonies?

Mr. Gully : I do not think so. It looks as if it was supposed to be completely provided for by the Constitution Act. With regard to the special argument on section 131, that, no doubt, does apply to something happening after election. It does not necessarily or inferentially limit the operation of section 130 as referring to something happening before election. All that section 131 and some subsequent sections do is to provide special machinery for bankruptcy and other matters if they occur after election. Section 130 does include things occurring after election, and therefore section 131 is necessary ; but it does not follow that that limits the operation of section 130. I contend, therefore, your Honours, first, that the policy of the law requires that the disability should be a general one, and that there is no sense in the disability occurring after and not before election. It has been suggested that it was intended that the constituency should have the right to consider the matter, and that that should not apply to the other sections ; but that in itself is a weak reason, and this distinction obviously leads to a great absurdity. Further, I contend that the Bankruptcy Act and the Acts relating to the status of a member also show the need of disability or a period of suspense, and that is the way the matter has been dealt with by the Legislature at Home. That being so, I submit, taking the first part of subsection 4, that the words used there are general, and the word "is" refers to status at the time election takes place, although it has been acquired beforehand by adjudication ; and then that fines the argument down to the point as to whether the first part of section 130 is to be taken as controlling the whole position. And I submit it is not doing violence to the language to adopt the expression used in section 132, and say that the seat becomes vacant by reason of bankruptcy immediately the election takes place.

Mr. Cooper : I submit my friend has not answered the position we have taken up. He seeks to answer it, as I understand, on two grounds—or, rather, three grounds. He says the policy of the law requires the disability of bankruptcy to be imposed. Well, I submit we have the statute to deal with, and, in the language of Lord O'Hagen, "If you can discover what the purpose of the Legislature was, you are bound to enforce it, although you may not approve the motives from which it springs or the objects which it aims to accomplish." My friend's argument really does come down to this, as I suggested at the opening of the case, that he asked the Court to read in the disqualification clause the disqualification of bankruptcy.

The Chief Justice : He does not ask us to do that, but you are justified in maintaining that that is the substance of the thing.

Mr. Cooper : That is the substance. In one sense he disavowed any intention of reading the disqualification into the clause, but the whole of his argument goes to that contention, and brings it down to this : that if an undischarged bankrupt is not entitled to sit in the House of Representatives, then the effect of holding that is practically to read the disqualification into the disqualification clause, or to determine that an absurdity has been created by the statute of practically disfranchising a district. In the matter of disfranchisement the case of Bradlaugh, referred to by His Honor Mr. Justice Denniston, is not altogether in point. He was elected to take his seat, and could have taken it, but he objected to take the oath ; and so it was in the case of Salomans. Unless he had taken the oath on the four Gospels he could not sit, and he would not take the oath.

Mr. Justice Denniston : He had to swear on the true faith of a Christian.

Mr. Cooper : A Jew could not swear on the true faith of a Christian if he was an honest Jew, consequently Salomans never took his seat.

Mr. Justice Denniston : The resolution expelling Mr. Bradlaugh was withdrawn in the House of Commons at Bradlaugh's death.

Mr. Cooper : Yes, it was ; but they are quite distinct cases. Then my friend has suggested that if the contention I raise is correct, that a person who had become subject to a foreign Power might sit in the House of Representatives, and he relies on Mitchell's case ; but in Mitchell's case—the Tipperary case—it was shown clearly that Mitchell was in reality an alien and a convict, and had broken his ticket of leave in addition. He was a statutory alien and had become a naturalised citizen of the United States, and it was upon that ground that the matter was upset upon petition.

Mr. Justice Denniston : He was of Irish birth.

Mr. Cooper : Yes. There were two grounds—that he was a convicted felon, and, secondly, that he was an alien, having become a naturalised American citizen. In that case the objection was taken by petition, and upon petition the election Court determined the question and unseated the person claiming to be a member. Now, how could the Election Petition Court unseat the member for Awara? Surely, if a petition were presented on the ground that he was an undischarged bankrupt, that petition must have been dismissed. If the Election Court could not unseat him and declare the next person entitled to the seat, that clearly establishes his position that he is a member of the Legislature. Then, being a member of the Legislature, we come down to the point that, unless our contention be upheld, we have a person who is a member for the space of one moment and then is immediately disqualified for that position. That is the position my friend takes up. He says, "I do not know when this disqualification attaches ; if it attaches at all, it must attach immediately after he is elected." Therefore, immediately he is declared a member his seat becomes vacant. There are many of the statutes which my friend has quoted which assist me in the construction I have contended for. Under the Road Boards Act, by section 29, no undischarged bankrupt is capable of being elected. Under the Harbours Act the member simply vacates his seat, and consequently Rex and Chitty exactly applies. There is nothing to prevent an undischarged bankrupt being elected to Harbour Boards. Under the Justice of the Peace Act, there is the position which the Legislature has avoided by "The Legislative Councillors Act, 1891." I submit the Governor could appoint, if he chose to appoint, an undischarged bankrupt to the office of Justice of the Peace, and under the Constitution Act an undischarged bankrupt to the office of Legislative Councillor. Under the statute, however, of 1891, the Legislature has considered it necessary and essential to impose a restriction on the Governor's powers, and make bankruptcy a ground of disability of appointment as well as a ground of disability for holding the seat. My friend has quoted several foreign Acts, and the Acts of Victoria and New South Wales. I do not know whether he did it to support his argument ; but in New South Wales we have the case of Sir George Dibbs, who never vacated his position of Premier of the colony although he was an undischarged bankrupt the whole of the time, and was re-elected within a week after he filed his petition ; and there are, I believe, other instances of a like character over there. I do not know that the morality of the public men there is any lower than it is in the colony of New Zealand. Then, my friend has submitted an argument on "corrupt practices." He said that I suggested that if a member were guilty of a corrupt practice he could be re-elected. I never suggested anything so absurd. The qualification clause in section 9 of the Act refers not only to the disqualifications specially stated in section 8, but disqualifications arising under any other statute, and that "The Corrupt Practices Act, 1881," disqualifies a person convicted of a corrupt practice for a period of five years. His seat is vacated under the Act of 1893, and he is disqualified by the Act of 1881. I do not propose to take up any further time, as I elaborated my argument this morning. I submit that my friend has not shown that the argument I raise of inconsistency, repugnancy, and absurdity is not a sound one. He has not shown any indication that there is any intention in the statute law of this colony that an undischarged bankrupt ought not to be elected a member of the House of Representatives ; but he has shown that if his argument is sound then the inconsistency, repugnancy, and absurdity we seek to place upon the section does exist. Now, I submit the Court will not say that the Legislature intended that such a state of things should arise, but that it had in view the Constitution Act, and, simply because the graces of language appearing in the Act of 1893 required it, made the verbal alterations. He

has not shown that the case of Rex and Chitty and Mossman's case do not apply expressly to the position we take up in this case.

The Chief Justice : The Court is unanimously of opinion that the seat of the member for the Awarua Electoral District in the present Parliament has not become vacant on the facts stated. We shall, therefore, as soon as the document can be prepared, forward to the Speaker of the House of Representatives the certificate of two Judges to that effect; and the members of the Court desire to intimate that the reasons for the conclusion we have arrived at will be put into writing, and will be announced as soon as possible. The only question now is the question of costs.

Mr. Skerrett : I submit that the costs ought to be allowed as between solicitor and client. It is obvious that subsection (3) of section 4 intends that the costs shall be as between solicitor and client, because it speaks of the scale of fees. There is no scale, and what is contemplated is that the costs shall go as between solicitor and client. I submit that the statute requires the fees to be fixed by the Court, and that your Honours will comply with the statute and forward the accounts to the Registrar to be fixed. I submit that Mr. Ward should have a complete indemnity for costs.

The Chief Justice : We allow the costs on one side — that is Mr. Ward's side — at seventy guineas, and on the Speaker's side we allow costs at forty guineas.

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