

THE
AMERICAN LAW REGISTER.

JUNE, 1865.

EXPEDIENCY OF A BANKRUPT LAW.

- I. *Bankruptcy and Insolvency.*
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The Bankrupt Bill before us, which was drawn substantially by Hon. T. A. Jenckes, of Rhode Island, and which with slight modifications passed the House of Representatives, on the 12th December last, by vote of twenty, and which was, after some alteration and improvement, reported to the Senate by Hon. Mr. Foote, but, owing to pressure of business at the close of the session, was not acted upon—will, if it become a law, open a broad field for discussion upon the questions of practicability, its advantage or disadvantage to commerce, and to the individual debtor and creditor generally.

Although we are advised that the Senate will make modifications in the bill, we feel warranted in saying there will be no variation or disagreement of sentiment to prevent its ultimate passage.

It seems fitting at this time to review the bill, and unfold its expediency, touching upon the origin of the system, its constitutionality, and advantages.

We proceed then to note the distinguishing features and primary meaning of terms.

I. *Bankruptcy and Insolvency.*

The leading distinction between a *bankrupt* law and an *insolvent* law, in the proper technical sense of the words, consists in the character of the persons upon whom it is designed to operate; the former contemplating as its object bankrupts only, that is, traders of a certain description; the latter, insolvents in general, or persons unable to pay their debts.

Insolvency, in English law, means strictly the state of a person "not engaged in trade," who is unable to pay his debts: insolvency, as understood in American law, denotes any one who is unable to pay his debts—or whose indebtedness cannot be collected out of his property by legal process.

In England, the distinction between the two systems, in principle and practice, has been adhered to strictly.

Under the Bankrupt Law of the United States, passed April 4th 1800, the term *bankrupt* seems to have been used and understood in quite the technical sense it bore in English law.

The word *bankrupt* literally means one whose *bench* or counter (place of business) is broken or broken up; as Mr. Burrell renders it,—O. Eng. and Fr., *bankerout*, from L. Fr. *banke*, Lat. *bancus*, a bench, and *roupt* or *rout*, Lat. *ruptus*, broken. 2 Bl. Com. 285, 471.

Mr. Webster defines the word bankruptcy thus: "The state of being a *bankrupt* or *insolvent*; inability to pay debts."

The more reliable definitions of commercial lexicography are the same. Mr. McCulloch (tit. *Bankrupt and Bankruptcy*), says: "In the general sense of the term, *bankrupt* is equivalent to *insolvent*." Mr. Ash, who wrote his dictionary several years before our revolution, carries the definitions through the various parts of speech; his verb being, "To break, to disable one from satisfying his creditors." Shakspeare somewhere observes, "The King's grown bankrupt, like a *broken man*."

Bankruptcy being the *status*, of course follows the nature of its primitive.

"A law on the subject of bankruptcies," remarks Mr. Justice STORY, in his excellent work on the Constitution, "is a law making provisions for cases of persons failing to pay their debts." 3 Story on Conf. 13. A safe rule of construction is that laid

down by Blackstone; he says, words are generally to be understood in their usual *and most known signification*.

The word bankrupt occurs for the first time in the title of the statute 34 and 35 Henry 8, c. 4, "against such persons as do make *bank rupt*," (a literal translation of the French idiom *qui font banque route*), which is the first of English bankrupt laws.

By statute 13 Eliz., thirty years later, the law was extended so as to include not only merchants, but all persons seeking a livelihood by "buying and selling."

Neither of these statutes provided for the bankrupt's discharge. By statute 1 and 21 James 1, persons who might be proceeded against were more carefully specified; and now, by long and settled usage, the term bankrupt in English law is applied exclusively to merchants and traders.

A man may be insolvent, said Lord MANSFIELD, without being a bankrupt, and a man may become a bankrupt and yet be able to pay 25s. in the pound: 1 Doug. R. 91, note; 2 W. Blackstone 997, note. The act of becoming a bankrupt is the *status* or condition fixed by legislative provision.

In France, the estate of a bankrupt is summarily sequestered and applied to the payment of his debts.

There has existed in Amsterdam, since 1643, and in other commercial cities of Holland, a court (*Kamer Vandesolade*) consisting of an equal number of lawyers and merchants, who assemble twice a week, to take cognisance of bankruptcies, and appoint commissioners to take charge of the effects.

Denmark has also a court of distribution (*Skifteret*) which appoints trustees, who divide the bankrupt's estate. From the time of notice of insolvency in Sweden, the debtor is obliged to keep his house.

The German system is subject to much delay, expense, fraud, and abuse.

The acts of bankruptcy, under the law passed in Congress, August 19th 1841, and repealed March 3d 1843, were substantially the same as those under the two statutes in England, 6 George 4, and 1 Wm. 4, in effect, where a debtor fraudulently sequestered his property or secreted himself.

The marked distinction of a bankrupt from an ordinary law is: 1. The summary and immediate seizure of all the debtor's property; 2. The distribution of it among the creditors in general;

and, 3. The discharge of the debtor from future liability for debts then existing.

II. *The Bankrupt Bill.*

The bill before us provides more equitably for the interest of both debtor and creditor than any former law; that of April 4th 1800, which was repealed December 19th 1803, was clearly for the benefit of the creditor; while the law of 1841, in the opposite extreme, favored the debtor. "The debtor was the principal thing aimed at," said Mr. Trumbull upon that bill, "and the surrender of the debtor's property merely an incidental."

The points aimed to be secured in this bill are in substance as follows:—

Sections 1 to 10 specify what courts shall have jurisdiction, and their administration. District Courts of the United States are to be courts of bankruptcy; Circuit Courts to have general superintendence over cases, and to appoint registers and other officers to assist in the District Courts.

Sections 10 to 22 provide for appeals and practice; for voluntary bankruptcy, and of assignments and assignee. Appeals may be taken to the Circuit Courts in all cases in equity; but no appeal or writ of error can be made by the Supreme Court, unless the matter in dispute exceed the sum of "two thousand dollars." The Supreme Court to make rules of procedure. Any person residing within the jurisdiction of the United States, owing debts provable under this act, exceeding the sum of "two hundred and fifty dollars," may apply by petition to the judge of the judicial district "in which such debtor has resided or carried on business for the six months next preceding the time," annexing to his petition a verified schedule containing a full statement of all his debts and property: if there be no opposing party, the judge to issue a warrant directing the marshal to take possession of the debtor's property, except such as is exempt from attachment. The assignee may prosecute suits, and no suit pending at the time of the attachment shall abate by his death or removal, and the estate not disposed of vests in the surviving assignee.

Sections 22 to 29 relate to debts, proof of claims, and perishable property. If the bankrupt be bound as drawer, indorser, or on any special contract, and his liability shall not have become absolute until after adjudication, the creditor may prove the

same; and, "in all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend," and in cases of mutual credits between parties, the accounts may be stated, and one debt set off against the other; "and no creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

Creditors may act at all meetings by an attorney, same as though personally present.

Perishable property in the hands of assignees liable to deteriorate may be sold under order of court.

Sections 29 to 38 provide for the examination of the bankrupt, distribution of estate, and his discharge. The court may require the bankrupt to attend and submit to an examination, upon all matters relating to the condition of his property. The debtor may amend his schedule of creditors and property from time to time, so that the same shall conform to facts; he shall not be liable to arrest during the pendency of the bankruptcy suit, unless the proceedings instituted are founded upon some debt or claim from which a discharge in bankruptcy would not release him. Dividends already declared shall not be disturbed by reason of debts being subsequently proved; but such debts shall be entitled to a dividend before any further payment is made. The following claims to be entitled to preference in the distribution:—

"1st. All debts due to the United States, and all taxes and assessments under the laws thereof; 2d. All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state; 3d. Wages due to any operative, clerk, or house servant, to an amount not exceeding \$50, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy; 4th. All debts due to physicians for medical attendance on the debtor or his family, rendered within six months prior to the institution of proceedings in bankruptcy, or pending said proceedings; 5th. All debts due to any persons who, by the laws of the United States, are or may be entitled to

a priority or preference, in like manner as if this act had not been passed."

At any time after the expiration of six months from the adjudication of bankruptcy, if no debts be proved against the bankrupt, and no assets come to the hands of the assignee within one year from the adjudication, the bankrupt may apply to the court for a discharge.

No discharge to be valid if the bankrupt shall have sworn falsely in his petition, or otherwise guilty of fraud; or if he "shall have borne arms against the United States, or given aid or comfort to the enemies of the United States."

No person who has been discharged in bankruptcy and afterwards become bankrupt, shall again be discharged, unless his estate is sufficient to pay "seventy per centum of the debts proved against him," without three-fourths of his creditors consent *in writing* to the same.

And no discharge shall be granted a third time, unless it be shown that the debtor has paid all debts owing by him at the previous bankruptcy, or shall have been voluntarily released therefrom. Creditors may oppose a discharge by filing specifications of objection, and demanding that the same be "tried by a jury;" if the jury disagree, the court shall decide.

No debt created by fraud shall be discharged; and the validity of a discharge may be contested on this ground at any time "within two years."

Sections 38 to 48 relate to allowances to the bankrupt, fraudulent conveyances, bankruptcies of partnerships and corporations, and involuntary bankruptcies. A bankrupt is to receive witness fees, and also an allowance to each member of his family of \$3 per week, during a term not exceeding two months. "And every bankrupt who is discharged shall be allowed five per centum of the net proceeds of all his estate received by the assignee, if such net proceeds, after such allowance, are sufficient to pay the creditors entitled to a dividend the amount of fifty per centum, and ten per centum if such proceeds amount to seventy-five per centum of their debts; but the allowance shall in no case exceed the sum of two thousand five hundred dollars."

"If any person being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, procures any part of his property to be attached, sequestered, or seized on execution, either directly or indirectly,

the person receiving such property, having reasonable cause to believe such person insolvent, and that such pledge, assignment, or conveyance is made in fraud of the provisions of this Act, the same shall be void, and the assignee may recover the property."

Partners in trade may be adjudged bankrupts on the petition of a partner, or of a creditor; by a petition of any officer of a corporation duly authorized, or upon the petition of a creditor, like proceedings may be had. The assignee in such cases to be chosen by such creditors.

Proceedings in bankruptcy to be matter of record, and certified copies of such record to be *primâ facie* evidence of such facts.

Acts constituting bankruptcy are, substantially: if one shall depart from the state, conceal himself to avoid service of legal process, remove any of his property to prevent attachment, or shall commit any act in relation to same to defraud or injure his creditors. A bankrupt about to leave the district, or fraudulently dispose of his property, may be arrested. A proceeding may be dismissed if creditors fail to appear on the return day.

Sections 48 to 58 provide that proceedings in bankruptcy may be superseded by arrangement, if three-fourths in value of the creditors whose claims have been proved shall determine it to be for their interest that the bankrupt's estate be wound up by act of "trustees," upon reporting such resolution to the court.

If any bankrupt act in bad faith,—destroy or falsify deeds, books, or the like, or impede the assignee's action, within three months next preceding the bankruptcy,—he shall be deemed "guilty of a misdemeanor," and may be punished by imprisonment not exceeding "three years."

An officer committing a breach of faith shall forfeit a sum not exceeding "five hundred dollars," and likewise be rendered incapable of holding any office under the United States; shall be dismissed from office if he commit any fraud in relation to stamps; and for forging the signature of a judge shall be "guilty of felony."

After specifying the amount of stamps to be used on a creditor's petition, warrant, and the like, and giving the meaning of certain terms—that the word "person" shall include "corporations," &c.—the act closes as follows:—"That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general

orders, from and after the date of its approval; provided, that no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini eighteen hundred and sixty-five."

III. *Constitutionality of a Bankrupt Law.*

The Federal Constitution declares, that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States." Art. 1, sec. 8.

This power has lain dormant, except for a short time, ever since the Constitution was adopted. It is evidently a system which this country has long needed.

Mr. Justice STORY observed, several years ago, that one of the most pressing grievances bearing upon commercial, manufacturing, and agricultural interests, is the total want of a general system of bankruptcy. Story on Conf., § 541.

Although the above constitutional provision passed the convention with little opposition—Connecticut having voted against it—wiseacre politicians have sought from time to time to fetter the action of Congress, by interpolating a rule of construction equally repugnant to good sense and sound policy.

MARSHALL, C. J., in the case of *Gibbons vs. Ogden*, 9 Wheaton 188, observed, that he could not perceive the propriety of a strict construction, nor adopt such as the rule by which the Constitution should be expounded. "The enlightened patriots," he remarks, "who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

Justice CATRON, in *Klein's Case*, 1 How. Rep. 277, sustained the Bankrupt Law of 1841, as constitutional.

"The power to establish uniform laws of bankruptcy," says Mr. Madison in the *Federalist*, No. XLII., "is so intimately connected with the regulation of commerce, and will prevent so many frauds, when the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn into question." Laws made in pursuance of the Constitution constitute the supreme law of the land, anything in the constitution or laws of a state to the contrary notwithstanding.

Before the adoption of our Federal Constitution, the states severally possessed the exclusive power, as belonging to their

general sovereignty, to pass such laws; as prior to that time no such thing as a bankrupt law, *eo nomine*, had ever been enacted in this country.

A defect seriously felt under the Confederation was the want of an uniformity—as laws of “naturalization” and “bankruptcy”—a coercive authority operating upon individuals, as a guaranty of internal tranquillity.

Charles Pinckney thus carefully prepared and submitted the proposition which is embodied in our organic law.

Mr. Rawle observes, in his work on the Constitution, p. 101, that until this right of Congress of passing a bankrupt law is exercised, states are not prohibited from passing such law, but such right is suspended from that time.

While the Act of Congress is in force, the power of a state continues over such cases as the law does not embrace, but no state bankrupt or insolvent law can be permitted to impair the “obligation of contracts;” and no state law can act upon the rights of citizens of other states. Thus, the Supreme Court determined years ago, by a series of decisions, 4 Wheaton’s R. 122, 12 Id. 273, the following points:—

1st. That state insolvent laws cannot discharge the obligation of antecedent contracts:

2d. That the power of Congress to pass bankrupt laws is not an *exclusive* grant: it may therefore be exercised within constitutional limits by the states.

3d. That a state may pass valid laws discharging the *person* of the debtor and his after-acquired property from debts contracted *after* the passing of such law.

4th. That such a discharge is valid only *between the citizens of the state* by which the law was passed.

5th. That the insolvent law of one state does not discharge the debtor from debts which he has incurred in another state.

The doctrine seems to obtain that Congress has exclusive power to pass bankrupt laws, but that a state may exercise the right under restrictions.

Mr. Justice WASHINGTON, of the Supreme Court of the United States, maintained that this power was “exclusively in Congress;” one other judge then on the bench is known to have held the same opinion.

Since the Law of 1841, it has been held that a state insolvent law may exist in full vigor, so far as it does not impede the ope-

ration of a bankrupt law of Congress. Massachusetts courts have decided differently.

The Act of 6 Geo. 4, c. 16, introduced the right of a trader to voluntarily declare himself a bankrupt. The bill before us gives the same right, the constitutionality of which has been often denied.

In the case of *Kunzler vs. Kohans*, 5 Hill 317, and also in *Sackett vs. Andross*, 5 Id. 327, wherein the Law of 1841 is elaborately discussed, it is held that voluntary as well as involuntary bankruptcy is constitutional, applying as well to debts created before as after the passage of the law. BRONSON, J., and WELLS, J., of the Supreme Court, held otherwise; but insolvency and bankruptcy being practically and theoretically the same—as an historical review of the colonial and state legislation will abundantly show—there seems to be no just and legal ground for such opinion.

After carefully reviewing the several works on the Constitution, the various cases arising under the bankrupt laws of 1800 and 1841, there appears no prudent or valid reason for not acquiescing in the entire constitutionality of such a law.

IV. *A Bankrupt Law a Desideratum.*

Some writer truly observes, that hopeless insolvency is commercial death. Should the bankrupt act under consideration become a law, it will open to the honest bankrupt freedom from his debts and a new lease of mercantile life.

The points aimed to be secured by the present bill, are, the discharge of the honest debtor upon the surrender of his property, protection of the creditor against the fraudulent practices and reckless conduct of his debtor. Without such a law, creditors may be defrauded of their just debts, and debtors become cast-aways upon the broad ocean of commercial life. To vouchsafe such relief in the community is assuredly the paramount duty of legislation. Under this act the debtor and creditor meet upon the common ground of obligation and duty.

There being ocean thieves and "land thieves," it seems necessary to establish a system of protection against the commercial Shylocks that systematically refuse a discharge to insolvent debtors, and thus prevent their exaction of the "bond," or the "pound of flesh."

Under the system of insolvency in most of the states, the

debtor is bound hand and foot in a commercial gyve, realizing in his sore misfortune the motto that the poet found inscribed over the gates of hell—"Who enters here abandons hope!"

The acts of bankruptcy, as set forth in this bill, are facts, and such facts alone become the ground of involuntary proceedings; it is neither retroactive nor even retrospective, nor in the nature of an *ex post facto* law; and proceedings under it in nowise impair the obligation of contracts, as no contract has been made since 1789 which might not have been discharged by operation of such a law as Congress had the power to pass.

Thousands of enterprising men of extensive business knowledge are now anxiously waiting to be released from the shackles that bind them, and from which "durance vile" Congress alone has the power to vouchsafe. Bearing upon their limbs no visible chains, they are still in the power of those who may sweep away their substance at any moment, and in some states may be incarcerated in prison. And of what possible advantage can it be to creditors that they be held in thralldom?

The present is a most auspicious time to enact a bankrupt law, as thousands who were wrecked in the crash of 1857 and calamities of 1860, which shook as well the faith and structure of the nation, never since have been able to secure a foothold in the business community. Both old and young men shared the same fate, and sank in the quicksands of irretrievable insolvency. Hundreds, ay, thousands of deserving men throughout the country are thus circumstanced.

A young man of fair business qualifications informed us a short time since, that in 1858 he embarked in what was supposed to be a profitable business; but by a succession of losses on sea and land, his firm failed in debt over one hundred thousand dollars, with comparatively nothing to pay; the senior partner died soon after the failure, leaving no available effects; and now this young man is burdened with this entire indebtedness, while anxious, hungry creditors stand ready to seize whatever he may earn or possess. Such deplorable cases of misfortune seem especially to demand relief, not only in justice to the honest insolvent, but thereby give an impetus to trade.

On the other hand, such a law would give creditors an opportunity to attach the property of insolvents *instantly*, and thus prevent his abjuring the realm, or sequestering his goods and effects, as he may at present do.