REPORT OF THE COMMITTEE ON BANKRUPTCY AND INSOLVENCY.

FRIDAY, 17th April, 1868.

(*Concluded.*)

WITH regard to the oath of the Insolvent whether its efficacy for the desired object be great or otherwise, it is already fully provided for by the Act, in every form. The Insolvent may be examined on oath at any moment before the Judge, at which examination his creditors may be present if they think proper; and he may be examined before the Assignee at the first general meeting of his creditors; and again, when he applies either for his discharge, or for its confirmation. The adoption of a form of declaration under oath, which some propose, is an inefficient substitute for an open interrogation, and moreover, too frequently degenerates into a formality which is gone through with as a matter of course.

The policy of treating any act of concealment of property, or any collusion with excessive ranking, as a crime has found favour in many systems of bankruptcy. In France a fraudulent bankrupt is treated as a criminal, and though the punishment of *banqueronte fraudulense* has been gradually relaxed from the penalty of death, which was once inflicted for being guilty of it, through the perpetual mark of infamy involved in the compulsory wearing of the *bonnet vert* down to the comparative humanity of the present commercial law of France, yet in it the policy of treating and punishing dishonest conduct as a crime, has been retained and preserved.

In England the Act of 1861 defines eleven specified acts, each of which is made a misdemeanour, punishable by imprisonment for not more than three years. The acts of the bankrupt thus made criminal are such as tend to prevent his own examination; and permit of excessive ranking on his estate; to deprive the creditors of any part of his estate, or of the use of his books of account, and to create unjust preferences.

Even this strictness, however, and the careful definition of crime contained in the statute, have failed, in some classes of cases, to reach the evil sought to be checked; and in the bill recently introduced by Lord Cairns, attempt is made to improve upon the old statute in one important particular, in which the Act of 1864 is also found insufficient. One of the most prolific sources of complaint against insolvents, both in England and in this country, has been the contracting of debts within a short period of the failure, —the debtors in such cases, being, in fact, floating his business forward at the risk and expense of his most recent creditors. Both in England and Canada a remedy was sought against this practice, but in both countries the burden of the proof of fraudulent intent being left upon the creditors, it has been found practically impossible to obtain a conviction, even in the most glaring cases. In the bill introduced by Lord Cairns, it is proposed that the debtor's discharge shall be suspended if he has contracted a debt without a reasonable expectation of being able to pay it; and proof of such reasonable expectation is made to rest on him. It is considered that if a man is in a position indicating a presumption that he had not a reasonable expectation of being able to pay a debt contracted by him, and he contends that such presumption is unfounded, the facts on which he rests are within his own knowledge, and he can have no difficulty in establishing them. If this theory be approved of, it would appear to offer the means of checking, and of punishing one of the most numerous of the classes of fraudulent acts charged again insolvent debtors.

In Scotland the fraudulent bankrupt is reported to the Lord Advocate for prosecution. The Bankrupt Act in force there does not contain definitions of the offences regarded as exposing the debtor to punishment under criminal process, but the principle that the fraudulent debtor should be subjected to such punishment is fully recognised.

In the recent United States Bankrupt Act no provision whatever is made for the punishment of fraud or concealment, otherwise than by the refusal of his discharge. It is possible that a difficulty in exacting such provisions may have occurred in respect of the jurisdiction of the Federal Government to legislate upon offences of that description.

The majority, therefore, of the leading commercial countries regard and punish fraudulent acts by a bankrupt as a crime. And in the answers received by your Committee, there is evidence to show that the absence of more stringent provisions for the punishment of such acts, is regarded as a defect in the Insolvent Act of 1864.

The fourth branch of enquiry, as to the inefficiency of the provisions of the Act in respect of the insolvent and of his discharge, has elicited a considerable mass of evidence as to their operation and numerous suggestions for their improvement.

The discharge of the insolvent may be obtained in three ways:—

First, by the consent thereto of a certain proposition of the creditors.

Second, under a deed of composition and discharge assented to by a similar proposition of creditors.

Third, by an order of the Judge, which may be made at any time after the expiration of a year from the date of the insolvency.

The first and second of these modes of obtaining a discharge are not generally objected to, though some changes are suggested in matters of detail. For instance, it is suggested that it should be made clear to be considered and computed as a creditor, a claimant should have proved his claim; that no doubt should have been allowed to remain as to the validity of a composition, the payments or some of the payments of which are to be made at a future date, or which is conditional upon such payments being regularly made; that the assignee should be capable of contesting the confirmation of a discharge when authorized to do so by the creditors and the like. And it is probable that many of these suggestions, being the result of the experience of the writers, may be found useful in remodelling the law.

But as to the third mode of discharging insolvents, great difference of opinion exists, and many objections are made to it. It is urged that the power of discharging the debtor should rest absolutely with the creditors, or with the majority of them required by the Act. That if a debtor has acted honestly and properly, he can always obtain the consent of a sufficient number to discharge him; and that his being unable to do so should be regarded as conclusive evidence of his misconduct. And in fact that the creditors ought in justice to have the right of deciding in the last resort, whether their debtor should be discharged or not.

On the other hand it is said that men are frequently by misfortune alone, reduced so low, that their estates cannot pay such a dividend as is expected by creditor; that from feelings of disappointment and mortification alone, creditors will frequently refuse to discharge their debtor; and moreover that if they have really valid grounds for doing so, they can place him before the judge who will thereupon act further in refusing them a discharge.

It would appear from the evidence, that the complaint that the power given to the judge to discharge a debtor, has operated injuriously to the creditors, is not altogether without foundation. The expense which is risked by a creditor who credits the application for discharge, the trouble and labour involved, and the variety of successful contestations, have no doubt combined to facilitate the granting of many discharge to which the debtor was little entitled. And in proportion as he could hope for a discharge independent to the will of his creditors, the inducements to consider their rights, and to make a complete surrender of his estate would of necessity diminish. But although no doubt the power of the judge to grant a discharge is open to objection, the propositions to have the debtor entirely in the hands of his creditors is by no means far from difficulty. The theory of every Bankrupt Law involves the discharge of the honest Bankrupt in Exchange for the free disposition of his entire estate; and it would be directly opposed to this idea to place it in the power of his creditors to strip him of everything, and afterwards to leave him entirely dependent upon their caprice for permission to begin the world anew.

The objection which rests upon the risk and the great inconvenience involved in a contestation by a creditor, may in a very great measure be removed by giving all the power to the creditors to contest at the expense of the estate, either through the assignee or by means of one of their number deputed for the purpose.

The chief difficulty, therefore, appears to lie in deciding upon the extent to which the disapprobation of creditors should be permitted to obstruct the discharge of a debtor, when no breach of the law can be charged against him sufficiently to warrant a contest. They might be granted the power of suspending the discharge for a limited time, or of classifying the discharge to be granted as second or third class; such powers to be exercised by means of a writing signed by the same proportion of creditors as is required for the validity of a discharge. As has been suggested, they might have the power in a similar manner of absolutely refusing a discharge.

But while your committee find evidence before them that there should be some modification of the judges' power in respect of discharge, they do not consider that he should be entirely deprived of it, either absolutely or only by the will of the creditors on certain conditions. They consider that nothing less than fraud should deprive the debtor of his right to a discharge, upon the complete surrender of his estate; and that he should not be held to be guilty of fraud, or be made to suffer its penalties, unless the fraudulent act can be described and proved. And in that case it cannot be supposed that the judge would grant a discharge.

There are, however, many cases in which the insolvent has been blamable, but in which his misconduct is not susceptible of exact definition, and therefore could not with any propriety be made the subject of penal enactment. Extravagance, over-trading, undue speculation, are all more or less censurable, but it would be difficult to fix the precise limits, beyond which expenditure, trading, or speculation may properly be described in those terms. Probably it is in such cases as those that the disapprobation of creditors might be allowed weight independent of any formal charge against the insolvent, and that they might be authorized to suspend the insolvent's discharge, or class it as second or third class, or both. Leaving, however, similar powers with the judge in the event of a case being made out before him for their exercise.

A further class of suggestions having reference to the insolvent's discharge, tend to an addition of the number of circumstances under which the judge is bound to refuse it, or to refuse its confirmation when granted by the creditors. At present those consist of fraudulent preferences; fraud in procuring the assent of creditors; fraudulent concealment or retention of assets; misconduct on examination; neglect to keep a cash-book and other suitable books of account; and refusal of delivery of such books:—It is proposed to add to these—the neglect or inability to account for losses and the non-payment of a dividend exceeding 10s in the pound. It is undoubtedly of much importance that the debtor should so keep his books, as to enable him to show from them in what his losses consisted; and that he should be encouraged to place his estate in the hands of his creditors before he has depleted it by exorbitant discounts, forced sales, and all other modes of depreciation to which a failing trader is subjected. But in the present condition of the country, it is, to say the least, doubtful whether there are not numerous country traders who not only do not, but cannot keep systematic books of account, showing accurately their gains and losses during a series of years. And, although the plan of refusing discharges, unless dividends reach a fixed point, has found favour in the United States, and has been embodied in the recent Bankrupt Act there, it has been rejected in England upon the obvious ground that it is not only possible, but probable that persons may in many ways be suddenly rendered insolvent, and unable to pay any named dividend, without any fault, and even without any imprudence of their own, while a debtor may so manage his estate as to pay 10s in the pound, and yet may have largely benefitted himself or his friends at the expense of his creditors.

Your committee, therefore, do not consider that the operation of the law would be improved by the addition of these two grounds to those which render imperative the refusal of the insolvent's discharge.

There is yet another point connected with the discharge of the insolvent, which has been mentioned in a small number of the answers, and which deserves consideration. It is proposed that the discharge shall not be final, but that the debtor shall always be subject to a further contribution towards his indebtedness to be levied under an order of the judge. This idea has been adopted in framing the Bankrupt Bill now under discussion in England, and appears to be considered an important and advantageous innovation upon the old system. In this view your committee find it difficult to concur. In Canada the Bankrupt or Insolvent Law has always been regarded, both as a matter of public expediency, and as resulting in individual benefit. It has been thought to be inexpedient to offer the honest but unfortunate debtor an inducement to remain in the country and re-commence his career, rather than force him to seek a new field of action elsewhere. And while this was a matter of interest to the country generally, it was an act of humanity to the debtor and to his family. Your committee believe that the energies of the debtor would be cramped, the avenues of credit would be closed to him, and neither the public nor the private benefit expected from an Insolvent Law would be attained, if the power of depriving the debtor by operation of law, of any part of his earning in his new career, were made the condition of his being permitted to enter upon it.

When the last subject of enquiry to which the attention of your committee has been directed, they have to report that a very considerable majority of the answers they have obtained affirm the beneficial character of the Insolvent Act of 1864. And that, in view, the persons and institutions of a commercial character from whom answers have been received unanimously concur. The Boards of Trade of the different cities appear to have given the subject very earnest attention, and while they agree in opinion as to the general effect of the law, they have furnished in their answer many of the most valuable of the suggestions which your committee have had under consideration.

In addition to the more prominent of the suggestions which have been considered by your committee, many minor points have been brought under their notice by the answers. But they have not thought it necessary to report upon them in detail. The evidence will afford all the requisite particulars of them, and will doubtless be found to contain much information of a character in the highest degree valuable in the preparation of any Bill that may be thought requisite. But the attention of your committee has been forcibly called to two points of very great importance in the operation of any Bankrupt Law which may be enacted in the Dominion, which they submit deserve the earnest consideration of your Honourable House. It has been brought to the knowledge of your committee that persons resident in a Province have obtained discharges from liabilities incurred while trading in that Province under the English or Scotch Bankrupt Acts, and thus, as your committee have been led to believe, without having any real domicile in Britain. And it is stated to be doubtful whether a discharge obtained under an Insolvent law here would relieve the debtor from liabilities incurred in England or Scotland. If those be the actual results of the Bankrupt Laws of the two countries, your committee believe that it is of the utmost importance to take such steps as may be necessary to terminate so anomalous a state of things, and define in a more equitable manner the operation of each law within the ordinary limits of the jurisdiction of the other.

In conclusion, your committee submit, as a summary of the result of their enquiries, that no complete system of Bankruptcy or Insolvency is in force in any of the Provinces, except the Insolvent Act of 1864. That the operation of that Act has been found to be defective in the following respects:—

1. In permitting delay in divesting the debtor of his estate in voluntary assignments; and, when a proceeding like this was adopted which was not open to this objection, leaving the choice of the Assignee to the debtor.

2. In imposing any restriction either dependent on residence or official charter (if, in fact, such be its correct interpretation) upon the choice of an assignee by the creditors.

3. In not providing a more convenient means by which the creditors could exercise a constant control of and supervision over the assignee by means of inspectors, of a supervising committee or otherwise.

4. In requiring too long a period to intervene before real estate can be sold, dividends declared, or meetings of creditors validly held.

5. In not permitting the Assignee, with the authority of the creditors, to sell the entire estate of the insolvent in one lot, either upon a fixed price or for a per centage upon the liabilities.

6. In not providing for the punishment of fraudulent acts as crimes.

7. In abridging to too great an extent the power of the creditors over the debtors' discharge.

8. In not granting power to the Judge and the creditors to mark disapprobation of the conduct of the debtor by granting a discharge of an inferior class.