HOUSE.....No. 30.

Commonwealth of Massachusetts.

The Committee on the Judiciary, to whom was referred the subject of the repeal or amendment of the Insolvent act of 1838,

REPORT

as follows:

They do not think it necessary, at the present time, to go into the full consideration of the policy or impolicy of bankrupt laws. They are aware that, until a recent period, they have been alien to the habits and feelings of the people of this Commonwealth, while in those governments where they have been long tested, they are considered essential to the interests of trade and commerce. The fundamental principle of every such law is, that from the time the fund of the debtor is insufficient to pay the creditors in full, his property should be distributed among them all in equal proportion. In connexion with this, is commonly found the principle, that a debtor who has conducted himself honestly, shall on certain conditions receive a discharge. The discharge is not intended to interfere with the moral obligation of a contract, and in this respect may be said to resemble statutes of limitation and quieting laws, which though they destroy the legal remedy, and thus virtually annul the contract in law, still leave to the debtor's conscience perfect freedom of action. The creditor enters into

the contract, knowing that under certain contingencies, as, for instance, honest bankruptcy, he may not be able to enforce that contract against the body or estate of the debtor, and that he must come in for a dividend or lose all legal redress. He makes the contract, therefore, being forewarned of the consequences, and is presumed to have intended to run the risk of insolvency, and to have taken that hazard into account in agreeing to its terms. Your Committee have said thus much upon this aspect of the subject, because it is set forth in some of the petitions referred to them.

A strong and conclusive reason against the repeal of the law at the present time, arises from the fact that great efforts are making throughout the States to induce Congress to exercise the power given them by the Constitution in relation to this subject, and that the establishment of a uniform system of bankruptcy for the United States is highly probable. Such a law would to a great extent override and set aside the insolvent laws of the States. To repeal our present insolvent law, therefore, and adopt any other system, no matter what, when, in a short time, and before the business of the people could be adjusted to such change, this new system itself is most likely to be superseded, would be but introducing new elements of litigation, confusion, and uncertainty, in a subject which is already too much embarrassed with all these evils. Constant reference is had to the laws of debtor and creditor in the daily operations of trade; and stability, uniformity, and certainty in their operation is eminently to be desired. Business has somewhat accommodated itself to the present law, and though imperfect in some of its provisions, which to some extent your Committee propose to amend; still they do not recommend any material change in the laws regulating the delicate relation of debtor and creditor, at the present session of the Legislature.

Another reason for deferring decided legislative action is suggested by the consideration, that the present law has not been in force a sufficient length of time to ascertain fully what will be its natural and legitimate operation in a settled state of

pecuniary affairs, and when applied to contracts made since it took effect, by persons at that time solvent, and well aware of its bearings. A longer trial on the part of those opposed to it appears expedient and necessary in order justly to determine whether it is more or less wholesome than former laws. It was not be expected, that a law, complicated in its provisions, as every bankrupt law must be to a greater or less extent, would be at once practically understood. But the lapse of every month diminishes this difficulty. Many have availed themselves of its provisions, whose affairs became involved before its passage, under laws which rather favored than checked an undue extension of credit. These causes, together with the uncertain state of trade, the want of mercantile confidence, and the fluctuation of prices, have probably tended to swell the list of bankrupts much beyond what is to be anticipated in a healthy state of times. At the same time, it is generally admitted that the law has prevented numberless suits and attachments and bills of cost for the mere collection of debts. If a debtor is solvent, as a general rule, legal process is not resorted to, in order to compel payment of an undisputed debt. If he is in doubtful circumstances, the temptation to attach is small, when the probable effect will be to compel a ratable distribution among all the creditors under the bankrupt law. If the creditors wish to compel an unwilling debtor to come in under the law, one attachment is sufficient.

Still another objection to a repeal of the law, which to your Committee seems a weighty one, is found in the fact that such a measure would revive the system of voluntary assignments and preferences by attachment. In 1836, the Legislature passed an act regulating these voluntary assignments, and providing for an equal distribution of the property of the creditor, and for a discharge. But it did not prevent mortgages from being given to prefer creditors, and so general was the dissatisfaction of the people with it, that before judicial construction was given to its provisions, it was repealed, and the present act passed, almost by general consent. This law of 1836 was not

found to prevent suits or attachments, or litigation. Your Committee do not believe that a revival of that law will be deemed expedient or necessary. Recourse then must be had to the old law of attachments, and voluntary preferences by assignment, by which a debtor conveys all his property to pay a few favored friends, family connexions, or endorsers, and the remainder of his creditors may help themselves as they can. This system is fraught with the grossest wrong, and at war with the first principles of justice. Credit is given by each person on the presumption of solvency. One creditor as much as another, relies on the common fund, and laws which permit a more rapacious or vigilant one to appropriate to himself the fund on which all relied for payment, can find no defence except in the established usages, and perverted modes of thought, that have grown up insensibly under their influence and long continued existence.

Under the former laws of priority by attachments and voluntary assignments, numerous suits, expensive trustee processes, frequent litigation, and great delay in closing the affairs of the insolvent, were the common result. Costs, sacrifices of property by forced sales, and the charges of assignees, far exceeded the amount accruing under the present insolvent law. The counsel fees for merely drawing up an assignment, frequently exceeded the amount paid under the present law for messengers fees, receiving petition and issuing warrant, and all the charges of the master in chancery and clerk at all the meetings, and indeed, in many cases, all the expenses whatever of settling an estate. Under the former laws, each creditor conducted a separate suit in litigated cases, with its attendant expenses and long delay. Under the insolvent law, the creditors having a common interest, constitute, in most cases, a single party, represented by assignees, and settle disputes, if they arise, by a single suit. This suggestion deserves the greater consideration, from the fact that the greater proportion of lawsuits and law questions in our courts, arises from insolvent estates and the conflicting claims of creditors. In an estate in

Suffolk county, which came under the operation of the insolvent law, and which gave rise to more embarrassing questions, and involved more conflicting rights than any other in that county, a large amount of property employed in two distinct branches of business, encumbered with various mortgages, liens, and equitable claims, was surrendered to pay creditors whose debts amounted to between twenty and thirty thousand dollars. The mortgages were tried on allegations of fraud, conflicting claims settled, debts proved, and all litigation closed, in three weeks after the first meeting, at an expense of one hundred and twenty-five dollars. In this sum is included the expense of keeping the property, advertising, messengers, clerks and masters' fees, and not fees paid to counsel.

In attachments, the creditor who first sues, has no inducement to save any thing for remaining creditors, if so be his own debt is paid. Under the insolvent law, the assignees in behalf of all the creditors, have the control of the whole property secure from suits, and dispose of it at the least possible sacrifice for the common benefit of all.

Under the old laws, the debtor was enabled to extend his credit beyond proper bounds by private assurances to his endorsers or sureties that they should at all events be secured. The insolvent law, by cutting off unfair preferences and annulling such promises, materially checks over-trading and the improper expansion of credit, fruitful sources of commercial distress and embarassment. The temptation to furnish the means to a debtor in doubtful circumstances to involve himself still further is taken away.

Under the insolvent law, a debtor may be examined under oath, and he is compelled under the penalty of imprisonment to make a full disclosure of the state of his affairs, his payments, his conveyances, and in short, of all his business transactions, if required. This affords a strong security against fraud. A return to former laws would destroy this safeguard, and open the door to the numerous frauds and unjust preferences which were so often perpetrated and almost encouraged by their operation.

For these reasons, your Committee would not recommend a repeal of the law at the present time. They believe that the great source of dissatisfaction with the law is to be found in the provisions of the tenth section. This section has not only given rise to great doubts as to its true construction, but it is not extensive enough in its provisions to prevent unfair preferences in some instances. Under the present construction of the law, a debtor has gone on making mortgages in preference of old debts, and when his property has for the most part passed out of his hands, or perhaps been transferred, and permitted to remain in his hands as agent, he has applied for a commission, and obtained a discharge, because at the time he made the conveyance in preference he did not have it in his mind to become insolvent under the law and to get a discharge. It is proposed to remedy this evil by providing that the discharge shall be void if he makes such conveyances six months before the filing of the petition, being in fact insolvent, whether he contemplated insolvency or not, unless he can make it appear that he had good reason to believe he was solvent. And the person who takes the property so conveyed in preference, is to refund to the estate, if it appear that he had reasonable cause to suppose the debtor was insolvent. But if the creditor had *not* such cause, and the debtor had reason to believe he was insolvent, he is to lose his discharge, though the creditor may retain his security. It is thought that this enactment will check the evil which has been complained of, by forewarning the debtor of its serious consequences.

It is also proposed to reduce the amount of indebtedness for which a debtor may apply for a commission from five hundred to two hundred dollars, making it correspond to the amount necessary in case of a compulsory insolvency, and withholding the temptation to increase his debts. For a less sum it can hardly be an object to apply for a commission. The only other amendment offered, supplies a slight omission in the law. The Committee, therefore, report the following Bill in amendment of the existing law.

By order of the Committee,

C. P. HUNTINGTON.

Commonwealth of Massachusetts.

In the year One Thousand Eight Hundred and Forty-one.

AN ACT

In addition to an Act for the Relief of Insolvent Debtors.

BE *it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows*:

SEC. 1. The first section of an act relating to insolvent debtors, passed April 23d, 1838, is hereby so far amended as to extend its provisions to any applicant whose debts may amount to not less than two hundred dollars.

SEC. 2. The sixth section of said act is so far amended as to require the debtor to present, at the first meeting of the creditors, a schedule of all his real and personal estate, giving a description of the same, and stating where it is situated, said schedule to be delivered to the assignees.

SEC. 3. The provisions of said act are hereby so far extended, that a discharge shall be of no effect, if a debtor, within six months before the filing of the

petition by or against him, shall procure his lands, goods, monies, or chattels to be attached, sequestered, or seized on execution; or being insolvent, or in contemplation of insolvency, shall directly or indirectly make any assignment, sale, transfer or conveyance, either absolute or conditional, of any part of his estate, real or personal, intending to give a preference to a pre-existing creditor, or to any person who is or may be liable as endorser, or surety for such debtor, unless said debtor shall make it appear, that at the time of making such preference, he had reasonable cause to believe himself solvent. And all preferences so made, or intended to be made, shall, as to the other creditors, be void, and the assignees may recover the full value of the property so transferred, or the property itself, from the creditor so preferred, provided the creditor, when accepting such preference, had reasonable cause to believe such debtor was insolvent.