The New Orleans Crescent.

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J. O. NIXON, Editor and Proprietor.

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THE DAILY CRESCENT

is published EVERY MORNING—Mondays excepted. Yearly Subscription, in advance, $16; Half yearly, $8; Quarterly, $4; Single copies, 10 cents.

Rates of Advertising:

Squares.	1 month	2 months.	3 months.	6 months.	12 months
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Three	30 "	65 "	70 "	110 "	175 "
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Five	46 "	80 "	105 "	170 "	275 "
Six	54 "	93 "	120 "	200 "	325 "
Seven	60 "	105 "	135 "	230 "	375 "
Eight	65 "	115 "	150 "	260 "	420 "
Nine	70 "	125 "	165 "	290 "	460 "
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Thirteen	90 "	165 "	220 "	410 "	620 "
Fourteen	95 "	175 "	230 "	430 "	660 "
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is published every Saturday morning. Subscription, $5 per annum, in advance; half-yearly and quarterly, same rates. Single copies 10 cents.

Rates of Advertising:

Squares.	1 month	2 months.	3 months.	6 months.	12 months
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Five	18 "	33 "	42 "	58 "	110 "
Ten	30 "	55 "	75 "	130 "	200 "
Fifteen	40 "	75 "	100 "	180 "	280 "
Thirty	70 "	130 "	180 "	300 "	430 "

FRIDAY MORNING, DECEMBER 4, 1868.

EDITORIAL PARAGRAPHS, ETC.

Gold closed yesterday in New York at 135.

Disraeli has resigned the premiership.

J. Gibson has sold the Meridian (Miss.) Gazette to Messrs. J. J. Shannon and W. G. Grace.

A Bremen bark arrived at Charleston, on the 27th ult., with 300 immigrants.

Thanks to the officers of the steamship Josephine for late Galveston papers.

"Peacock feathers" in "bandit hats" are the latest female display in New York.

The Legislature of Kentucky meets on the 5th January next. The State has little or no debt.

Forty-three thousand seven hundred and forty-one is the sum total of the United States army.

The Austrian expedition to explore Oriental Asia, has sailed from Trieste.

Geo. Ellis has laid on our table a copy of Christmas Fun. Have your buttons well fastened—then buy a copy and read it.

The Greensboro (N. C.) Times has received a pumpkin weighing seventy-two pounds, and intends to have it made into a pie for Christmas.

Mrs. Pattie B. Johnson demands $25,000 of a railroad company in Indiana for killing her late husband.

Newell A. Foster, who died suddenly at Boston, where he was attending the woman's suffrage convention, was husband of Abby Kelly Foster.

All the cotton mills of Newburyport pass the October dividends. The balances are on the wrong side of the ledger.

Schuyler Colfax, vice president elect, spent thanksgiving day in Brooklyn, the guest of Benj. W. Delamater.

The St. Louis Democrat thinks that that city will do more in the pork-packing line this season than either Cincinnati or Chicago.

Superintendent Defrees disbursed for the public printing, binding and paper, during the last fiscal year, $1,272,630.

A Troy, New York, conductor found a deserted baby in his train, the other day, after the passengers had left.

A fellow in Portland paid seventy-five cents the other day for the privilege of eating all the oysters he could. He ended with a stew after fifteen dozen raw.

The dentists of the United States have been holding a convention for the purpose, as the chairman said, of devising some means whereby they can pull together.

There is now a considerable movement towards resuscitating the North Carolina copper and gold mining interests. Parties have recently gone down to the mintes from New York, Baltimore, and elsewhere.

Abraham Burrel, the veteran printer of Ohio, died at Elyria, on the 23d ult., in the seventieth year of his age. He has been daily employed at his case fifty-six years, and for the last eleven years has been foreman of the Elyria Democrat.

Gov. Hayes, of Ohio, has written an annual message (saying to the Legislature all that needs to be said and saying it well), which only occupies a single column in the newspapers. Long live Governor Hayes, and may his tribe increase.

William Long, the champion long distance runner of England, and W. E. Harding, the champion three-mile runner of America, have signed articles of agreement to run one half mile for the championship of the world, December 20, at the Fashion Course, New York, for $1000 a side.

From the publishers, Van Evrie, Horton & Co., New York, we have the December number of the Old Guard. Contents: What Next? Democratic Battle Song; The Princess Orsini; The Effects of the Abolition Policy, so far as Developed; Ulysses S. Grant; Dead Under the Roses; In Memoriam—Cleburne; Financial and Commercial; Our Book Table; Editor's Table.

A New Firm.—Our readers are directed to the card of Messrs. John T. Handy & Co., commission merchants and wholesale dealers in wines, liquors and cigars, 99 Gravier street. Many of our readers will no doubt remember the time when Mr. Handy officiated in the office of Mr. Sewell T. Taylor, and was for many years his confidential friend and business companion. In commencing business for himself he intends, as of old, to merit the confidence of those who intrusts their interests to his care. He will buy or sell on commission any and every class of merchandise, and any one desiring his services in this line may confidently rely upon his prompt and faithful attention. Capt. Brown, of the firm, of whom so many of our citizens have been the recipient of his faithful services, will be happy to serve his friends in his usual and prompt style. All orders from cotton factors will meet with especial care and dispatch. See their card in another column and trust to them for the filling of them, as they have facilities which will result to the material advantage of those purchasing.

Elegant and varied assortment of rosewood parlor, dining and bedroom sets at auction this day, at 11 o'clock A. M., by Chas. T. Nash, corner St. Charles and Perdido. The attention of country gentlemen and the trade is particularly called to this sale.

THE COURTS.

United States District Court.

Argument in the case of James T. Tucker vs. the New Orleans, Opelousas and Great Western Railroad was continued.

ARGUMENT OF E. C. BILLINGS, FOR PLAINTIFF.

May it please the court, the able and protracted discussion, both on the part of my associates and on the part of my opponents in this case, has aided me in the duty which I must now perform, in that it has helped fix, by clear lines of demarcation, the questions that are here involved. Before entering upon the discussion of the legal questions presented, I desire to call the attention of your honor to what seems to have been a fundamental and continual error on the part of those who represent this railroad—as well those who represent it directly as those who represent it by virtue of the interest which others take in it as stockholders or bondholders.

It seems to have been insisted upon to the court, and there has been a sort of melo-dramatic effort made to continually press that consideration upon the court, that here was a something before the court which your honor was asked to put into bankruptcy, and that being was so situated that a great deal of sympathy should be extended to it. How idle is such a pretense! If the prayer of these petitioners be granted, and if this railroad corporation be adjudicated a bankrupt, there is no funeral, there is no crape, there are no tears. The administration of a great public trust—for that is the whole of it, when we take an enlarged view of the matter—passes by the operation of law from certain individuals to others, and that, as I think will be made evident to your honor, under such circumstances as will certainly advance the purpose of that trust.

In the order in which I shall consider the various propositions I shall follow that of my esteemed friend Mr. Cohen, whose order of discussion seemed to me admirable for its clearness and logical method.

The first proposition which I shall endeavor to establish to the satisfaction of your honor is that this road *is* amenable to the bankrupt act—that the provisions of the bankrupt law *do* include the New Orleans, Opelousas and Great Western Railroad. There have been two objections urged against this proposition. The first is that since, in the year 1789, when the Constitution of the United States was adopted, the term "bankruptcy" was borrowed from the English legislation, and that they had until that time included only certain classes of debtors; that, therefore, no bankrupt act which Congress could pass could add to the number of debtors, or classes of debtors, who could be included. But the grant of power on the part of the States to Congress is all-inclusive; Congress is authorized to pass a uniform law of bankruptcy throughout the United States. That bankruptcy was to enlarge or diminish, as the progress of commerce should render it requisite. As well might the gentleman say that the succeeding grant, that "Congress shall have the power to coin money," should be restricted to the kinds of coin then struck, as that a bankrupt law could only include such classes of debtors as had before been included! But when the Constitution says that Congress may pass uniform laws on the subject of bankruptcy, and that it may coin money, it puts the whole subjects of bankruptcy and of coining money into the power of Congress. At the very instant, in the very year when this provision of the Constitution was adopted, the term "bankruptcy" was itself being subjected to changes. It was passing from including two or three classes to including four or five. It was like a tree that was growing, and with its growth the whole subject matter was placed within the power of Congress.

Then we come to the second objection urged, that the terms of the bankrupt law do not include this corporation. The terms of this law have been read to your honor more than once; I will read only that part of the section which is definitive: "That the provisions of this act shall apply to all monied, business, or commercial corporations and joint stock companies." Then all monied, business and commercial corporations, all monied, business and commercial joint stock companies are included within the provisions of this act. The Opelousas Railroad is both a business corporation and it is a commercial corporation. What *is* a business corporation? Every dictionary tells us: a business corporation is one created for the purpose of transacting business; that is, for the purpose of transacting one or more branches of the ordinary affairs of mankind. That is a business corporation, nothing more, nothing less; and when we see that this railroad is chartered for the purpose of conveying freight and passengers, when we come to define the substantive instead of the adjective, we see that is a common carrier. Will gentlemen say that that about which a common carrier is employed is not *business?* If there is anything that is a "business corporation" it is that which is engaged, not only in business, but in business which is so extensive. But it is not only a *business* corporation, it is a *commercial* corporation. I should like to have heard from the gentlemen on the other side what their definition of a commercial corporation is. It is, and must be, a corporation engaged in and about the purposes of commerce, whose grand distinctive purpose is that of conducting commerce. And what is the business of this company but *entirely* that of commerce? As consistently might it be urged before your honor—if instead of this being a corporation to transport freight and passengers on land, it had been one for the transportation of freight and passengers from New York to Liverpool—that it was not a commercial corporation. Therefore I say that not only is it included in the operation of this act, but it is included *twice*, and unanswerably.

But, says one of the gentlemen who presented the case on the part of the railroad—avoiding the definition which the court certainly must give to these words, and indeed any definition—it cannot be true that a railroad is included within this act, for the reason that a railroad is created for public convenience. True it is, that if the Legislature granted this railroad a charter for the high purposes for which a Legislature is presumed to grant charters, they did so for the purpose of promoting the public convenience; but it can only be a public convenience by virtue of its transacting business, and therefore it is not only a *business* corporation, by reason of the clear definitions of the term, but by reason of its being unable to attain the purposes of its creation, except by transacting business, and that day and night.

The Code of Louisiana—not with a view of distinguishing, as Congress has, but for the purpose of defining generally what corporations are—has given a classification of them. Articles 420 and 421 of the Civil Code, while they classify on a different principle, give us the same result.

"Corporations are of two kinds; political and private; political corporations are those which have principally for their object the administration of a portion of the State, and make a part of the powers the government has delegated to that effect; all others are private corporations. Private corporations are divided into civil and religious; and this distinction results as well from the quality of the persons who generally compose these kinds of corporations as from the difference of the object of their establishment. Civil corporations are those which relate to the advancement of commerce, agriculture," etc.

Thus if we follow the line of classification which the Code gives us, we see that this is a private, civil corporation. Now, taking the terms which Congress used—"monied, business and commercial corporations," it is clear that they designed to include all corporations except municipal, eleemosynary, and those corporations relating to literary and scientific purposes. All others, transacting the ordinary affairs of mankind, are by their very definition brought within the purview of this act.

But let us see what the Legislature which created this corporation said upon the subject. It was organized under the general act which authorizes that by filing a certain certificate there should spring into being these corporations. In the general act of March 12, 1852, section 6, we find that "any corporation established under this act shall forfeit its charter for insolvency evidenced by a return of no property found on execution against such corporation; and in such case it shall be the duty of the district court of the district wherein such corporation exists, at the instance of any creditor, to decree such forfeiture, and to appoint a commissioner for the purpose of liquidation, whose duty it shall be to convert all the assets," etc.

Then the power that spoke this corporation into being said to it: "Instead of being a public corporation, or in the nature of a public corporation, you are forever—so far as your creditors are concerned—a purely *private* corporation; and when you do not pay your debts you go out of existence." Then I say that by the terms used, laying alongside of these terms the character and purposes of this corporation, it is clearly within the purview of the act.

I come now to the second proposition of my friend, and I say that the road *was*, at the time of the filing of the petition of Mr. Tucker, and has been since, and had been for five years before that time, *insolvent*. There is a legal definition of insolvency upon which we might rest entirely—that given, not alone by the courts of England, by the courts of Massachusetts, but as declared by the United States Supreme Court in the case of Buckingham vs. McLane, in 13 Howard; which is that the meaning of the word "insolvency" is fixed to be that state in which a man is unable to pay his debts in the ordinary course of business, without reference to the question whether, upon the final winding up of his affairs, he has assets enough to pay them or not.

My friend Mr. Taylor said yesterday, when he addressed the court on this point, that this being a question which originated in Louisiana, a debt created here, a corporation existing here, we are to determine the meaning of the term "insolvency" by a reference to the Louisiana decisions and the Louisiana Code. Now, the Louisiana decisions do nothing more than reiterate and apply the strict definition which the Louisiana statute has made for its own State, and with reference to its own State proceedings; and that definition undoubtedly is that if a debtor's assets are equal to his liabilities, he is not insolvent. But what has that to do with *this* question? The question is: What did Congress mean by the term "insolvency?" and the fact that the Legislature of Louisiana has by an arbitrary definition fixed the meaning of the word in contradistinction and contrary to the opinion of the jurisprudents of the world can avail but little. If we were talking about fixed, vested rights, the law of Louisiana would, of course, be conclusive; but when we are talking about the definition of terms, the statutes of this State or the decisions of this State are only one element, among numerous and controlling elements, from which Congress derived their definition and settled the meaning of the word.

If Mr. Taylor's argument is true, there would be one definition of insolvency for Louisiana and another for Massachusetts, under the administration of this law; and instead of having a *uniform* system of bankruptcy—which the constitution renders imperative—we should have one as multiform and dissimilar as the different shades of judicial and legislative opinion in the various States. When Congress used this term "insolvency," they meant insolvency as the jurisprudence of the world, the day they passed it, had defined that word, and that definition, with the single exception of the statute of Louisiana, is such as I have given it. That disposes of the question; for it will not be contended that this corporation has ever been able to meet its liabilities in the ordinary course of business.

But I go further; I say not only is this corporation insolvent in the legal sense of the word, but it is *hopelessly*, remedilessly insolvent, according to any practical definition which can be given, and with reference to any action that men of sense must take, and that upon their own testimony.

Now, the liabilities of this corporation are between twenty-six hundred and twenty-seven hundred thousand dollars—twenty-seven hundred thousand dollars we will say, in round numbers. That is admitted; it is not a matter of estimate, but it is a conceded fact—a matter of bond and coupon. Now, then, what are their properties? By the evidence in this case, the company has not in its possession twenty-seven hundred thousand dollars worth of property. The only evidence which has been introduced as to the value of the property, is that of estimates. They have introduced evidence of estimates; we have introduced the same, and they are before you.

What are these evidences in the way of estimates? They produced Mr. Segar, they produced Judge Robertson, they produced Mr. Bailey. Both of the former witnesses based their opinion as to the value of this property upon the estimate of Mr. Bailey. But suppose all three had said, or, in the view that I take of it, if thirty men, instead of one, had come forward and said that the value of that property was thirty-eight hundred thousand dollars, their testimony would be outweighed by a vast preponderance, and I will grant, if you please, that those thirty men shall be competent men—as competent as I believe Mr. Bailey to be—and I have the profoundest admiration for him; I believe he has been a true and a faithful and devoted servant of that road, and that he gave his testimony with an honesty that no man ought to question; but it unfortunately happens, as my friend Mr. Cohen remarked, that this road is the child of Mr. Bailey, and when we remember the feeling that parents have toward their children, when we remember the long years that Mr. Bailey has devoted to the service of this road, hoping against hope and working for it incessantly, we can well understand why it is he clings to the fond delusion that the road is solvent, and believes—biased, prejudiced by that strong impulse which he would not be human if he did not have—believes that the road is of the value at which he estimates it. But what are the estimates against Mr. Bailey's testimony? We have it from Mr. Segar and we have it from one other witness of the defense—Mr. Squires, the secretary—and we have it as an admitted fact that the first mortgage bonds of that road have been selling for the last year for from forty to fifty cents, and that they are to-day sold for 46½.

Now here are bonds covering everything that this company has or ever can have, except its right to extend the franchise beyond Berwick's Bay. These bonds bear eight per cent. interest; they have twenty-one years to run; and it is a great object with the capitalist when he is investing his money at eight per cent., to have the investment long; and if that road were solvent even according to the definition which they have sought to enforce, if that property were worth thirty-eight hundred thousand dollars, can it be that those bonds would sell for 46½? Is the capital of this country asleep? Is the capital of New York, of London—for these coupons and bonds are payable in London as well as New York and New Orleans—and is the capital of New Orleans asleep? Not at all; and by virtue of every sale of those bonds at 46½ per cent., the sagacity, the business intelligence of those who have thus parted with them testify that the road is worth but 46½ per cent. of its first mortgage debt. There is no answer to it. Say that that road is solvent and you impeach the business sagacity of the whole country.

But what else do we find? There is the evidence of a record in the Sixth District Court before your honor. That record shows that proceedings were taken for executory process, for seizure and sale of all the property of this road for the sum of about two hundred thousand dollars, and that no answer was put in, and but for the injunction, the mandate issued by your honor, this road would now be in the hands of that mortgage creditor. Nine witnesses have said that the action of that mortgage creditor was "precipitated" by the efforts of these petitioners to bring these parties into bankruptcy. Suppose it was, here is a railroad powerless, utterly powerless, and the very mortgage creditor who is said to be the moving spirit, who is to relieve them, takes them into court; takes possession—unless interrupted by the mandate of your honor—of all the property they have. Can that be true, and this company have thirty-eight hundred thousand dollars worth of property? I say it is impossible, if that road was not insolvent in every conceivable sense of the term, that the effort of Mr. Morgan to foreclose that mortgage should not have been resisted.

Now then that is the evidence on the question of insolvency, coupled with which there is another series of facts to which I wish to call your honor's attention. Here is a road chartered in 1853, building somewhere prior to 1859 eighty-one and half miles of its road, the part beyond that being all that gentlemen have painted before your honor, fertile beyond expression, flowing with milk and honey and everything that a railroad would like to carry; and they have sat down quietly, and since the year 1859 have not struck a blow, have not had a spade at work there—have done nothing to extend that road, are doing nothing to-day—I mean directly; I will speak about the negotiations presently—but they themselves are not to-day and were not in February, when the petition was filed, on the line which the Legislature gave them a right to extend, they were not even preparing the way for its extension; and when I asked Mr. Bailey what was the reason, he said, "The want of money." He could not and did not desire to say anything else. Now I say that by virtue of every eulogism they have passed upon the fertility of Texas—and I do not think they over-did it—by virtue of every advantage which this road would derive from an extension—and they did not over-state that either—but by virtue of everything they have said on that subject, taken in connection with their five years of inactivity, they have confessed not alone legal insolvency, not alone insolvency according to their own definition, but utter, hopeless, remediless insolvency.

Now, if the court please, on this question of insolvency as on all others that I discuss, I wish to treat this company with entire fairness. The directors are gentlemen, every one of them, whom I respect, and towards every one of them I have nothing but the kindest feelings; but I wish to see what method they themselves can resort to—for not only have I said that they are insolvent, but now I say they are insolvent to such a degree that nothing but bankruptcy can relieve them, or ever enable a blow to be struck beyond this 81½ miles of railroad. I purpose to consider the several methods which have been hinted at in their testimony for self-extrication. They have been the artists who painted their own picture. I looked narrowly from the beginning to the end of this testimony for such a method. I think no one will question the truth of a remark uttered by Mr. Webster, in one of his arguments, that "if a thing was to be done, a reasonable man could tell *how*," and now I ask what one of the methods alluded to by the witnesses on that stand, has in it the least of promise, or foreshadows anything but sheer failure. Mr. Morgan's foreclosure was alluded to. If Mr. Morgan had been allowed to sell this property, then there would have been put in operation this excellent scheme of relief for this road. There is this unfortunate circumstance connected with Mr. Morgan's mortgage: He holds a mortgage, the principal of which is not due for twenty-one years, concurrent with the coupons; and who is going to buy property sold under such a foreclosure? Who but Mr. Morgan himself would buy it? Who, except somebody that was interested in keeping the road just where it is, and was therefore willing—not for his desire to purchase the road, but for his desire to arrest its extension—would be willing to run that risk? But they themselves condemn the foreclosure—though some say they liked that—Mr. Taylor, I believe, liked it—but Judge Robertson, representing the State, says that he himself would have enjoined its execution.

It was it seems to me simply an effort on the part of Mr. Morgan to get possession of that road for the very purpose of stopping its progress—for I am sure my friend was not in collusion with him; I am sure that he has been honest in his professions of antagonism to Mr. Morgan's scheme. A farther objection to this plan is found in the fact that the mortgage included and the sale under the State process could have covered only the eighty-one miles and not the right to extend. Both should pass together. So drops scheme number one. What is the second? Leasing. Well, the terms of the lease which they propose are, that somebody shall take this road, and shall at the outset covenant to pay these overdue coupons—$600,000—and shall covenant further, that they will pay the coupons that are to mature—$80,000 for every six months! Is it not idle to suppose that anybody is going to do that? They made that proposition—published it to the world by advertisement some time last June, and it don't appear that any capitalist in the wide world will touch it. Mr. Price made offers very unsatisfactory—he didn't propose to pay that $600,000 debt! Somebody else made an offer—I have forgotten who. At last a proposition came from General Fremont. He says—what? That he will accept that offer with certain modifications. What are those modifications? They don't tell, but I can tell them. He said, I feel sure, "he would be very happy to lease that road, but he would not lease it with that $600,000 debt in cash, and the payments so enormous to be made every six months." What sane man would? The second plan then must prove a failure.

We come now to the third plan—that of Mr. Bailey. I said to Mr. Bailey: "If you were made supreme in your control of that road, what would you do?" He said, "In the first place I would get the consent of the coupon-holders." Well, your honor well knows that these coupon-holders live in almost every clime. I asked him how long that would take. He said about a year. He said he would then collect the subscription of the State, the subscription of parishes and the debt which is alleged to exist on the part of the government of the United States. That, if done entirely, would take Mr. Bailey's lifetime. I might as well say that I would take any one of those plans and go and arrest the flow of the magnificent river that passes by us, as to say that I would take any one of those plans and relieve this road; and this brings me to what is the great fact—not with reference to their *legal* insolvency, not with reference to their *practical* insolvency, but with reference to their *hopeless* insolvency; and that fact is, that these $600,000 of overdue coupons forever stand between this road and any relief. They never can extricate themselves; and if they were left to their own management, so long as the sun should rise and set they could not accomplish anything, because they can only manage it on the theory and the effort to make nobody lose. But somebody must lose; because the road not only will stand still, but will retrograde, unless somebody loses. It is idle to talk about anything else. This $600,000 is the old man of the sea upon the back of that road, and he won't get off, and they can't get him off by any conceivable method except by walking straight into the court of bankruptcy. And I say to your honor, candidly, that were I to represent the State on this occasion and in this suit, I should say to the officer that employed me, "Sir, if you send me to that court to act consistently with my views of what is for the interest of this community and this State, instead of opposing, I will invoke—I will urge this bankruptcy; I will do more, I will advise the railroad corporation themselves to come in voluntarily. For looking at the subject in an enlarged view, laying aside this love which everybody has for having things to be as they have been, taking up the subject as men who understand the laws of political economy and the administration of affairs, we can come to but one conclusion; that is, that if your honor shall find that this corporation can not go into bankruptcy, you have found for this whole community that there is no relief—that there is no extension of that road; and when people think on this subject, the tables will turn, and it will be seen that he who uttered one word, and did one thing towards pushing this road into bankruptcy, did it in the interests of this whole community, and I do not think those interests have been or can be overstated. I concur fully in the opinion that this road is the great artery of this city and this State. It is its all—except the commerce which comes to it from the Mississippi river; and its future depends largely, not only upon having that road extended, but upon having it extended immediately, and upon having it extended in the hands of those who will command a capital which can defy competition. Therefore, if your honor should decide that this road can not be forced into bankruptcy, and if they won't come in themselves, it is to my mind the most calamitous result that ever befel this city. No event of the war has been as calamitous as that would be. This consideration I urge, not all with reference to its influencing your honor's decision, but only as showing that by virtue of these great advantages, by virtue of the public spirit which I concede resides in the breast of every one of that directory, and by virtue of their having for five years exhausted every effort to extend this road—by virtue of these facts, we of New Orleans, we of Louisiana, are powerless to extend this road, except through the instrumentality of this court of bankruptcy.

I urge it simply as showing how thorough, how complete is the bankruptcy of that road—if the bondholders have felt that they were being sacrificed by this attempt to force this company into bankruptcy, why have they not stepped forward and raised that $600,000? If they believe in the solvency of this road, why have they not done this? By virtue of their not having done *anything*, I say they confess they *know* that the road is insolvent. So much, then, for the question of insolvency, and I submit that not only upon the technical definition which the jurists give—not only upon the practical definition which men of business give—but by every conceivable test, they are insolvent, and hopelessly so.

I come now to the third proposition of my friend, and I say that this road *has* committed the acts of bankruptcy charged in the petition and in the amended petition. I say, first—they fraudulently suspended and failed to resume payment for more than a period of fourteen days, to-wit: from the first day of February last down to the time when this petition was filed. One of my friends said he did not see how this was commercial paper. Now, the allegation is, that they have failed to pay these coupons. Your honor, I presume, is perfectly conversant with them, but as it is short I will read it.

"The New Orleans, Opelousas and Great Western Railroad Company will pay to bearer, on the first day of April, ——, eight pounds, five shillings sterling, if payable in London, or forty dollars, if payable in New Orleans or New York, being the interest of that debt on their bond No. —."

Now, that is simply a note of hand, payable to bearer; and I ask the gentlemen if they are serious in saying that that species of written promise to pay which was first called commercial paper, which is last called commercial paper, and which is everywhere called commercial paper, is *not* commercial paper?

Then, they say that they are not merchants, traders or bankers. In what way does this act apply the provisions of it to corporations? I will read:

"The provisions of this act shall apply to all monied business or commercial corporations and joint stock companies, * * * and all the provisions of this act which apply to the debtor * * shall in like manner, and with like force, effect and penalties, apply to each and every officer of such corporation or company * * * and the money and property thereof." *All* the provisions, when they are so worded that they could make money, and business and commercial corporations subject to the provisions of that act, is it reasonable—is it not almost impossible to suppose that they went on further; and said: "We will apply certain provisions of that act to monied corporations, certain provisions to business corporations, certain others to commercial?" No; they said, and in very clear language, "we apply *all* the provisions of that act to *every one* of the corporations which we have above mentioned." So much for that. Then, these coupons being commercial paper, and the provisions of the act of bankruptcy being applicable to all of these corporations, without reference to what their business is, they are, I am sure, included within the act.

Now let us see if they fraudulently suspended, and did not resume within fourteen days, payment of this paper. And here, with the permission of the court, and the presumed consent of my friend, I wish to read from the opinion of Judge Blatchford—not in a case were fraudulent suspension was alleged—but where the question was whether there had been a "suffering" of the property to be levied upon, with intent to give a preference.

"So, also, with regard to the question of suffering property to be taken on legal process, * * * * * (and it must be equally true—if the violation alleged as here were an active one) "he could have prevented the preference by filing his voluntary petition in bankruptcy. * * Being able to prevent the preference, he must, not having prevented it, be held to have suffered it within the meaning of the act." In re Black and Secor, vol. I, Law Times, Bktcy, R.

What I desire to call your honor's attention to particularly, is that Judge Blatchford says, "the alleged bankrupt *suffers* this to be done with the intent to prefer this creditor—because he could have prevented it by coming and filing his petition in bankruptcy and neglected so to do," and that is the key note to all that I have to say on this subject. They being insolvent stood there, collecting, day by day, the earnings of that road; they stood there day by day suspending the payment of those coupons, and paying to the officers of the company their salaries; they day by day committed the act of bankruptcy of suspending in fraud of the law—they had but one thing to do, and that was to come into this court as bankrupts, and pass over their assets for the benefit of *all* their creditors. Milton says: "They also serve, who only stand and wait;" and it is equally true that they also *violate*, who only stand and wait. A suspension, of itself, is but inactivity; and having it in their power to have put into the hands of their creditors every dollar of these earnings, stop the pay of these officers, to continue it from the first of January down to the time when this petition was filed—I say that in the eye of the law by so doing they have fraudulently suspended payment.

I do not mean by that that there was any actually wrongful purpose in the minds of these directors—not at all—but I mean that the bankrupt law having said to them: "If you are insolvent, and you suspend the payment of your paper, and do not resume it for fourteen days, that is an act of bankruptcy." That if they *were* insolvent, they had the intent not to conform to the law. That is all the fraud the law means. As I read the bankrupt law, a person who is insolvent, and who, upon the petition of his creditors, is proved to be insolvent, any inaction with funds in the debtor's hands, and his notes overdue, any action by way of paying one creditor and not others, is an act of bankruptcy. Mr. James says in his notes that this is a very strange provision about fraudulent suspension. So it is, but be it strange or be it common, there it is, and when taken in connection with the provision prohibiting a preference and payment—because a payment on the part of an insolvent is a preference—there leaves but one thing for him to do, namely, to come into bankruptcy, and that Judge Blatchford says, in effect. Then I say they *fraudulently* suspended.

We come then to the second act of bankruptcy charged in the petition; and that is, the payment of these $3000 of coupons some time in February last. It is said that a suit had been commenced on one or all of these coupons. We do not deny it. It is said that after suit was commenced a note or notes were given, and they were paid; and that that is not a preference, "because you sued us." Then if you sue me and I see you are going to get your judgment, and I pay you, that is not a preference. Well, now, if the court please, it is a preference. I know there are authorities, and there are a great many authorities to that effect—under some bankrupt laws. But it is not the case under our bankrupt law—under the law which we are now considering; because down to the last instant before the execution is levied, before the levying officer has placed a lien upon the property, the debtor has one way of avoiding a preference—to come into court and present his voluntary petition. Now, if the view of the law which they contend for be correct, what is the utility of the bankrupt law? The law declares its object. It is to secure an exactly equal and rateable distribution of the property of the debtor; but if, by virtue of being sued, he may go on and pay one after another of his creditors—and Judge Blatchford says expressly in that decision that the bankrupt law was designed to prevent all race of diligence between creditors—if their view be true then it must follow that he may go on paying, as fast as he is sued, creditor after creditor, until one-fourth, perhaps one-third in number of his creditors being paid, his property is exhausted. What sort of application of the bankrupt law is that, the law declaring that its object is, the moment it goes into execution, to secure to these creditors an equal and rateable distribution of this property, which can be defeated merely by bringing suit against the debtor? No; they had a choice; they could have come in here into bankruptcy, and let this creditor, who was suing, follow them here. But because they did not—because they paid—by virtue of that payment they committed an act of bankruptcy. The more we look at it the clearer and more certainly correct will be that view. Because I wish to impress upon your honor that if the contrary is true—if when I am sued and insolvent, I can go and pay creditor number one when he sues me, creditor number two when he sues, and so on, and if creditor number three exhausts all my property—that that would be the best way of avoiding the force of the bankrupt law in the world. The bankrupt law was too wise in its provisions to admit of such a construction. It says: "If they shall prefer a creditor;"—prefer, or do what?—if he shall prefer instead of coming into the court of bankruptcy; and as long as there was that option left to these respondents, and they *paid* they *preferred*.

Then I say that the third act of bankruptcy was that committed in the presence of your honor, in the presence of us all, and in the face of this community.

I was a little annoyed, perhaps, because I did not understand exactly what the gentleman said; but there seemed to be a view that this third act of bankruptcy was not before this court, but if the court examines the record, you will find that by express agreement, and in order to avoid the weariness and trouble of a second struggle, most wisely the counsel for the defendant said: "We will go to trial on that issue now, and try the whole together." Now, what is that allegation? That, with the intent to defeat and delay the operation of the bankrupt act, and with intent to prefer certain creditors, they transferred certain property, to-wit: $1500 to these creditors. *Did* they transfer that property? No doubt about that. But did they do it with the intent to prefer those creditors? Why, they didn't attempt to pay anybody else. Then they *did* do it with the intent to prefer. They transferred; it went into the custody of the clerk, and we could have taken it in one of those days; and it is now in Mr. Cohen's pocket, merely as the custodian of the court, not as his money. Will the gentleman make a legal tender, and then put the money in his pocket as his own? That money is in the hands of the court, and in the eyes of the law stays with the court. Because the party refuses the tender, that does not revest the money in the party tendering; he merely holds it as the custodian of the court; and they just as truly transferred it, when it was in his pocket, as if it had staid in his pocket, as if it had staid in the bank. And I say they did it with the intent to prefer these two creditors; and I say also they did it with the intent to defeat and delay the operation of the bankrupt act.

What else did they do? Here was a petition filed, the prayer of which was that they should be adjudged bankrupts; and to defeat that petition—which is nothing but defeating the operation of the bankrupt act itself—they come in and make that tender! Then there was an act of bankruptcy, they being insolvent, committed in the presence of your honor, and is a part of the records of this very case.

I pass now to consider, in the fourth place, the objections they have urged to the standing of the petitioners before the court. They say, if it be true, that the bankrupt law includes this corporation—if it be true that they were and have been insolvent—if it be true that they have committed acts of bankruptcy—the acts of bankruptcy alleged in the petition and amended petition—still, the petitioning creditors in this case, Mr. Tucker and Mr. Conand, cannot stand before this court to allege these facts.

Now, the first objection they urge is that this debt is not provable. Their reason is that this coupon carried with it the privilege of a mortgage, but the very filing of this petition and claiming this whole debt, swearing that it is provable is a complete renunciation of this privilege, this *charge*, for it is that rather than a privilege. But in addition to that here is a formal release filed and made a part of the record. The objection which I supposed they would urge to the release, either implied or expressed, is that there is no assignee. But there is a general assignee. If the debtors are bankrupts the release operates to him—if not bankrupts to themselves. But there is another answer to the objection; it was competent for these petitioners by a deed poll, renouncing to whomever it might concern, to have extinguished effectually and forever this privilege or charge. By the affidavit that the debt is "provable" they have renounced. The English authorities on this point are conclusive. Ex parte Spotteswood. Font.; Ex parte Soloman 1, Glyn. and L., page 93.

By the Court—"I have decided heretofore, that in this State a mortgage, so-called, leaves the fee in the mortgagor, the mortgage is not the debt, 'tis but an adjunct. The creditor proves his debt."

Mr. Billings—Passing that point, then, as being too clear in your honor's view and in fact, to require further comment, we come to the last objection, "that the petitioners cannot take the oath." My friend, Mr. Grant, made a complete answer to that yesterday, when he said that it rested purely on the mistake of counsel, resulting from their confounding two of the prescribed forms of affidavit—but there is another answer. The petitioners have alleged that their debt is provable, and have filed the proofs sustaining that allegation; then they have sworn and proved that they can take any oath which is necessary in order to prove their debts. The bankrupt act, page 224, provides that unless the alleged bankrupt *disproves* the allegations of the petition, that he shall be adjudicated a bankrupt. The respondents in this case offered no evidence on this point—they are therefore concluded; the burden of proof is then on them, and they offered none. For anything that appears, the petitioners held these coupons before the bankrupt act was passed.

I am through with the suggestions which I have to make upon the issues involved in this case. I feel confident that I have shown that the respondents are within the operation of the bankrupt law; that they are now and have been for years insolvent; that they have committed the acts of bankruptcy charged, and that the objections to the *status* of these petitioners are unfounded.

I would, in conclusion, ask your honor if these respondents are bankrupts, upon the law and the evidence, that you will be moved by your known interest in the welfare of this community and this State, to swiftly enter up the decree and will follow it with such orders as will at the earliest possible time place this road in the market for sale, under such circumstances that the capital of the country may compete for its purchase, to the end that this road may pass untrammeled into the hands of those who will in the shortest space of time extend it, not alone through the vast and fertile regions of Texas, but through those that lie further on, thereby making that whole territory, as by nature it was designed, and of right it ought to be, a mighty tributary to the growth and prosperity of the city of New Orleans.

The court reserved his decision in the case.

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