

TWENTY-FIFTH CONGRESS. FIRST SESSION

IN SENATE.

Speech of Mr. Benton. (Continued.)

These are the objections which the Senator from Massachusetts takes to the Executive recommendation. They are of a two-fold character: first, to the constitutional power of Congress to pass a bankrupt law, confined to merited corporations and bankers, and with a view to operate upon the paper currency; secondly, to the consistency of the President in having made such a recommendation.

I take up the second of these objections first, because it creates a prejudice against the whole recommendation of the President. The imputation of inconsistency creates a prejudice; and it is necessary to remove that prejudice before the recommendation could be fairly considered.

The inconsistency imputed, lies in the supposed disclaimer of the President of all federal authority over the currency, and then, an assumption of power to regulate that currency, and to regulate it by an unauthorized exercise of the power to pass bankrupt laws. This is the point of the imputed inconsistency. It all turns up on this word currency; and now, what currency does the Senator from Massachusetts mean? Certainly not the currency of the Constitution; for the President recites the power to coin that currency, and to regulate its value. It must be the paper currency—the local bank notes and the shin-plasters—which are intended; and, if so, I have to remark that the President very explicitly disclaims both the authority and the expediency of having recourse to a national bank, to regulate that species of currency.

He disclaims that instrument of regulation; and in doing so, he stands upon the Constitution, which disowns its existence; upon the fact, which shows its impotence; and upon the ground which the authors of the first national bank occupied, and to whom the regulation of currency and of exchanges was wholly unknown as among the reasons for its creation. These reasons are of modern conception and recent date. They are an after-thought of the subsequent supporters of a second national bank. The President disclaims also a power to suppress the local banking institutions by federal legislation; but he nowhere disclaims the authority to prevent their paper issues from superseding and expelling the hard money currency of the Constitution.

On the contrary, he claims that power, and points to the sources of its rightful exercise in the incidental effects of federal legislation in favor of hard money as necessarily improving the condition of paper currency; and then he points to the bankrupt power as furnishing the direct means of checking the issues of non specie paying banks, and giving a remedy to the holders of their unpaid notes. This is what the President does; and nothing can be further from his word than a disclaimer of all authority over the regulation of the currency. And here I must remark upon a systematic error into which some Senators incessantly fall; they always speak of the federal authority, and the federal duties over "the currency," meaning all the while, not gold and silver, but bank notes and shin plasters. Now, Sir, I repeat, for about the thousandth time, that the word currency is not in the Constitution, nor any word which can mean what these speakers intend by it. The nearest approach to the term which the Constitution contains, is the word current; and that is coupled with the word coin; so that the thing which gentlemen have constantly in their minds, and which they use an equivocal term to express, exists no where in the Constitution, and is not in any way known to that instrument, either by expression or intendment. I think it right, on this occasion, thus to allude to the equivocal use of this phrase; for upon this equivocation, there is built up, in these United States, an immensity of erroneous speaking, erroneous writing, and erroneous legislation. Vast is the number of persons who are mystified by the use of an equivocal term; and in nothing does the rhetorical show the perfection of his art in a higher degree, than in making a debate turn upon one of them.

The Senator from Massachusetts, in taking his objections, declared that he would not do intentional injustice to the Message or its author; but it is the same thing to the Message and to the author, if injustice had been done without intention; and this I apprehend to have been the case. The Message says, nothing about confining the bankrupt law to corporations and bankers alone; it says, nothing about excluding merchants and traders from the operation of the law; and it proposes something else to result from the

law, besides an operation upon currency; and that something else is a remedy to the disappointed creditors of the delinquent banks. This is his recommendation:

"In the mean time it is our duty to provide all the remedies against a depreciated paper currency which the Constitution enables us to afford. The Treasury Department, on several former occasions has suggested the propriety and importance of a uniform law concerning bankruptcies of corporations and other bankers. Through the instrumentality of such a law, a salutary check may doubtless be imposed on the issues of paper money, and an effectual remedy given to the citizen, in a way at once equal in all parts of the Union, and fully authorized by the Constitution."

This is the recommendation—the whole of it; and here is no proposition to exclude merchants and traders; and here is an actual proposition to give a remedy to the injured citizens against the delinquent banks; which remedy would naturally be a pro rata distribution of the effects of the bankrupt institutions. Here, then, is injustice to the Message, in not stating it as it is, but as it is not; and here, also, is injustice to the author, in representing him as opposed to the execution of the bankrupt law to merchants and traders, when the records of this Senate bear the evidence of the fact that he has been one of the most able and zealous supporters of such a law applicable to the trading part of the community. I speak of the bill of 1827, brought in by General Hayne of South Carolina, and earnestly supported by the present Chief Magistrate, then a member of this body. It is unjust to suppose that the present Chief Magistrate would object to a bill which should include now those for whom he so strenuously contended when a member of this body; there is nothing in the recommendation to deter the friends of a general bankrupt law from coming forward to include the trading class with the banking class; on the contrary, there may be something to encourage them. A general bill to include banks, as well as traders, might combine more support than the bills for the latter class alone have heretofore received. Besides, if the President had expressly recommended the exclusion of other classes from the bill, it would have been no impediment to the action of Congress. His recommendation would have been no prohibition upon their powers.

They might have included what classes they pleased; and if they included those for which he contended in 1827, the bill might have become the more acceptable to him on that account. The Senator from Massachusetts objects to our Constitutional power to pass such a bankrupt law as the President recommends, qualifying that recommendation, as he does, with a limitation of the law to bankers and banking corporations, and with a primary view to the regulation of a paper money currency. I have shown that this qualification is an error and a mistake; and in doing that, I have sufficiently answered the Senator's objection; but I choose to go further, and to show not only the constitutional right, but the clear expediency of passing such an act as the President recommends, whether merchants and traders shall be included in it or not.

The power of Congress to pass bankrupt laws is expressly given in our Constitution, and given without limitation or qualification. It is the fourth in the number of enumerated powers, and runs thus: "Congress shall have power—to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." This is a full and clear grant of power. Upon its face it admits of no question, and leaves Congress at full liberty to pass any kind of bankrupt laws they please, limited only by the condition, that whatever laws are passed, they are to be uniform in their operation throughout the United States. Upon the face of our Constitution there is no question of our right to pass a bankrupt law, limited to bank and bankers; but the Senator from Massachusetts, (Mr. Webster,) and others who have spoken on the same side with him, must carry us to England, and conduct us through the labyrinth of English statute law, and through the chaos of English judicial decisions, to learn what this word, bankruptcies, in our Constitution, is intended to signify. In this he, and they, are true to the habits of legal profession—those habits which, both in Great Britain and our America, have become a proverbial disqualification for the proper exercise of legislative duties. I know, Mr. President, that it is the fate of our lawyers and judges to have to run to British law books to find out the meaning of the phrases contained in our Constitution; but it is the business of the legislator, and the statesman, to take a larger view—to consider the difference between the political institutions of the two countries—to ascend to first principles—to know the causes of events—and to judge how far what was suitable and beneficial to one, might be prejudicial and inapplicable to the other. We stand here as legislators and statesmen, not as lawyers

and judges; we have a grant of power to execute, not a statute to interpret; and our first duty is to look to that grant, and see what it is; and our next duty is to look over our country, and see whether there is any thing in it which requires the exercise of that grant of power. This is what our President has done, and what we ought to do. He has looked into the Constitution, and seen there an unlimited grant of power to pass uniform laws on the subject of bankruptcies; and he has looked over the United States, and seen what he believes to be fit subjects for the exercise of that power, namely, about a thousand banks in a state of bankruptcy, and no State possessed of authority to act beyond its own limits in remedying the evils of a mischief so vast and so frightful. Seeing these two things—a power to act, and a subject matter requiring action—the President has recommended the action which the Constitution permits, & which the subject requires; but the Senator from Massachusetts has risen in his place, and called upon us to shift our view; to transfer our contemplation—from the Constitution of the United States to the British statute book—from actual bankruptcy among ourselves to historical bankruptcy in England; and to confine our legislation to the characteristics of the English model.

As a general proposition, I lay it down that Congress is not confined, like jurists and judges, to the English statutory definitions, or the Nisi Prius, or King's Bench, construction of the phrases known to English legislation, and used in our Constitution. Such limitation would not only narrow us down to a mere lawyer's view of a subject, but would limit us, in point of time, to English precedents, as they stood at the adoption of our Constitution, in the year 1789. I protest against the absurdity and contend that we are to use our granted powers according to the circumstances of our own country, and according to the genius of our republican institutions, and according to the progress of events, and the expansion of light and knowledge among ourselves. If not, & if we are to be confined to the usual objects, and the usual subjects, and the usual purposes of British legislation at the time of the adoption of our Constitution, how could Congress ever make a law in relation to Steamboats, or to railroad cars? both of which were unknown to British legislation in 1789, and, therefore, according to the idea that would send us to England to find out the meaning of our Constitution, would not fall within the limits of our legislative authority. Upon their face, the words of the Constitution are sufficient to justify the President's recommendation, even as understood by those who impugn that recommendation. The bankrupt clause is very peculiar in its phrasing, and the more strikingly so from its contrast with the phrasing of the naturalization clause which is coupled with it. Mark this difference: there is to be a uniform rule of naturalization; there are to be uniform laws on the subject of bankruptcies. One is in the singular, the other in the plural; one is to be a rule, the other are to be laws; and it is bankruptcies that are, and bankrupts that is, to be the objects of these uniform laws.

As a proposition, now limited to this particular case, I lay it down that we are not confined to the modern English acceptance of this term bankrupt; for it is a term, not of English, but of Roman origin. It is a term of the civil law, and borrowed by the English from that code. They borrowed from Italy both the name and the purpose of the law; and also the first objects to which the law was applicable. The English were borrowers of every thing connected with this code; and it is absurd in us to borrow from a borrower—to copy from a copyist—when we have the original lender, and the original text before us. Bancus and ruptus signifies a broken bank; and the word broken is not metaphorical but literal, & is descriptive of the ancient method of cashiering an insolvent, or fraudulent banker, by turning him out of the exchange, or market place, and breaking the table to pieces on which he kept his money and transacted his business. The term bankrupt, then, in the civil law, from which the English borrowed it, not only applied to bankers, but was confined to them; and it is preposterous in us to limit ourselves to an English definition of a civil law term.

Upon this exposition of our own Constitution, and of the civil derivation of this term bankrupt, I submit that the Congress of the United States is not limited to the English judicial or statutory acceptance of the term; and so I finish the first point which I look in the argument. The next point is more comprehensive, and makes a direct issue with the proposition of the Senator from Massachusetts, (Mr. Webster.) His proposition is, that we must confine our bankrupt legislation to the usual objects, the usual subjects, and the usual purposes of bankrupt laws in England; and that currency (meaning paper money, and shin-plasters, of course,) and banks, and bank-

ruptcy, are not within the scope of that legislation. I take issue, sir, upon all these points, and am ready to go with the Senator to England, and to contest them, one by one, on the evidences of English history, of English statute law, and of English judicial decision. I say English, for although the Senator did not mention England, yet he could mean nothing else. He must mean the English examples, and the English practice, or nothing; and he is not a person to speak, and mean nothing.

Protesting against this voyage across the high seas, I, nevertheless, will make it, and will ask the Senator on what act, out of the scores which Parliament has passed upon this subject, or on what period, out of the five hundred years that she has been legislating upon it, will he fix for his example? or, whether he will choose to view the whole together? and out of the vast chaotic and heterogeneous mass, extract a general power which Parliament possesses, and which he proposes for our example? For myself, I am agreed to consider the question under the whole, or under either of these aspects, and, relying on the goodness of the cause, expect a safe deliverance from the contest, take it in any way.

And first, as to the acts passed upon this subject; great is their number, and most dissimilar their provisions. For the first two hundred years these acts applied to none but aliens, and a single class of aliens, and only for a single act, that of flying the realm to avoid their creditors. Then they were made to apply to all debtors, whether natives or foreigners, engaged in trade or not, and took effect for three acts: 1st. Flying the realm; 2d. Keeping the house to avoid creditors; 3d. Taking sanctuary in the church to avoid arrest. For upwards of two hundred years—to be precise, for two hundred and twenty years—bankruptcy was only treated criminally, and directed against those who would not face their creditors, or abide the laws of the land; and the remedies against them were not civil, but criminal; it was not a distribution of the effects, but corporal punishment, to wit: imprisonment and outlawry. The statute of Elizabeth was the first that confined the law to merchants and traders, took in the unfortunate as well as the criminal, extended the acts of bankruptcy to inability, as well as to disinclination to pay, discriminated between innocent and fraudulent bankruptcy, and gave to creditors the remedial right to a distribution of effects. This statute opened the door to judicial construction, and the judges went to work to define by decisions, who were traders and what acts constituted the fact, or showed an intent, to delay or defraud creditors. In making these decisions, the judges reached high enough to get hold of royal companies, and low enough to get hold of shoemakers, the latter upon the ground that they bought the leather out of which they made the shoes, and they even had a most learned consultation to decide whether a man who was a landlord for dogs, and bought dead horses for his four-legged boarders, and then sold the skins and bones of the horse carcasses he had bought, was not a trader within the meaning of the act, and so subject to the statute of bankrupts.

These decisions of the judges set the Parliament to work again to preclude judicial constructions by the precise, negative, and affirmatively of legislative enactment. But, worse and worse! Out of the frying pan into the fire. The more legislation the more construction; the more statutes Parliament made, the more numerous and the more various the judicial decisions; until, besides merchants and traders, near forty other descriptions of persons were included, and the catalogue of bankruptcy acts, innocent or fraudulent, is swelled to a length which requires whole pages to contain it. Among those who are now included by statutory enactment in England, leaving out the great classes comprehended under the names of merchants and traders, are bankers, brokers, factors, and scriveners; insurers against perils by sea and land; warehousemen, wharfingers, packers, builders, carpenters, shipwrights and victuallers; keepers of inns, hotels, taverns and coffee-houses; dyers, printers, bleachers, fullers, calenderers, sellers of cattle or sheep; commission merchants and consignees; and the agents of all these classes. These are the affirmative definitions of the classes liable to bankruptcy in England; then come the negative; and among these are farmers, graziers, and common laborers for hire, the receivers general of the king's taxes, and members

of subscribers to any incorporated companies established by charter of act of Parliament. And among these negative and affirmative exclusions and inclusions, there are many classes which have repeatedly changed positions, and found themselves successively in and out of the bankrupt code. Now, in all this mass of variant and contradictory legislation, what part of it will the Senator from Massachusetts select for his model? The improved and approved parts, to be sure! But here a barrier presents itself—an impassable wall interposes—a veto power interposes. For it so happens that the improvements in the British bankrupt code, those parts of it which are considered best, and most worthy of our imitation are of modern origin—the creations of the last fifty years—actually made since the date of our Constitution; and, therefore, not within the pale of its purview and meaning. Yes, sir, made since the establishment of our Constitution, and, therefore, not to be included within its contemplation, unless this doctrine of searching into British statutes for the meaning of our Constitution, is to make us search forwards to the end of the British empire, as well as search backwards to its beginning. Fact is, that the actual bankrupt code of Great Britain—the one that preserves all that is valuable, that consolidates all that is preserved, and improves all that is improvable, is an act of most recent date—of the reign of George the Fourth, and not yet a dozen years old. Here, then, in going back to England for a model, we are cut off from her improvements in the bankrupt code, and confined to take it as it stood under the reign of the Plantagenets, the Stuarts, and the earlier reigns of the Brunswick sovereigns. This should be a consideration, and sufficiently weighty in favor of looking to our own Constitution alone for the extent and circumscription of our powers.

But let us continue this discussion upon principles of British example and British legislation. We must go to England for one of two things; either for a case in point, to be found in some statute, or a general authority to be extracted from a general practice. Take it either way, or both ways, and I am ready and able to vindicate, upon British precedents, our perfect right to enact a bankrupt law, limited in its application to banks and bankers. And first, for a case in point, that is to say, an English statute of bankruptcy, limited to these lords of the purse-strings, we have it at once, in the first act ever passed on the subject—the act of the 30th year of the reign of Edward the Third, against the Lombard Jews. Every body knows that these Jews were bankers, usually formed into companies, who, issuing from Venice, Milan, and other parts of Italy, spread over the south and west of Europe, during the middle ages, and established themselves in every country and city in which the dawn of reviving civilization, and the germ of returning industry, gave employment to money, and laid the foundation of credit. They came to London as early as the thirteenth century, and gave their name to a street which still retains it, as well as it still retains the particular occupation, and the particular reputation, which the London Jews established for it. The first law against bankrupts ever passed in England, was against the banking company composed of these Jews, and confined exclusively to them. It remained in force two hundred years, without any alteration whatever, and was nothing but the application of the law of their own country to these bankers in the country of their sojournment—the Italian law, founded upon the civil law, and called in Italy, *bancus rotto*, broken bank.—It is in direct reference to these Jews, and this application of the exotic bankrupt law to them, that Sir Edward Coke, in his Institutes, takes the occasion to say that both the name and the wickedness of bankruptcy were of foreign origin, and had been brought into England from foreign parts. It was enacted under the reign of one of the most glorious of English princes—a reign as much distinguished for the beneficence of civil administration as for the splendor of its military achievements. This act of itself is a full answer to the whole objection taken by the Senator from Massachusetts. It shows that, even in England, a bankrupt law has been confined to a single class of persons, and that class a banking company. And here I would be willing to close my speech upon a compromise—a compromise founded in reason and reciprocity, and invested with the equitable mantle of a mutual concession. It is this: if we must follow English precedents, let us follow them chronologically and orderly. Let us begin at the beginning, and take them as they rise. Give me a bankrupt law for two hundred years against banks and bankers; and, after that, make another for merchants and traders.

The Senator from Massachusetts (Mr. Webster) demands whether bankrupt laws ordinarily extend to corporations, meaning merited corporations. I am free to answer that, in point of fact, they do not. But why because they ought not to? because these corporations have yet been powerful enough, to keep their necks out of that noose? Certainly the latter. It is the power of those merited corporations in England and their good fortune in our America, which enables them to grasp all advantages on one hand, and to repulse all penalties on the other, has enabled them to obtain express statutory exemption from bankrupt liabilities in England, and to escape, thus far, from similar liabilities in the United States.—This, sir, is history, and not invention; it is fact, and not assertion; and I will speedily refresh the Senator's memory, and bring him to recollect why it is, in point of fact, that bankrupt laws do not extend to these corporations. And, first, let us look to England, that great exemplar, whose evil examples we are so prompt, whose good ones we are so slow to imitate. How stands this question of corporate unliability there? By the judicial construction of the statute of Elizabeth, the partners in all incorporated companies were held subject to the bankrupt law; and under this construction, a commission of bankrupt was issued against Sir John Wolstenholme, a gentleman of large fortune, who had advanced a sum of money on an adventure in the East India Company trade. The issue of this commission was affirmed by the Court of King's Bench; but this happened to take place in the reign of Charles the Second—that reign during which so long a found worthy of imitation in the government of Great Britain—and immediately two acts of Parliament were passed, one to annul the judgment of the Court,

and the other to exempt all the partners in the East India Company from the operation of the bankrupt law. I answer by following the example of that England which he has conducted us, by copying the act of the 30th of Edward the Third, by going back to that reign of heroic patriotism and wisdom; that reign in which the monarch acquired as much glory from his domestic policy as from his foreign conquests; that reign in which the acquisition of dyers and weavers from Flanders, the encouragement given to agriculture and manufactures, conferred more benefit upon the kingdom, and more glory upon the king, than the splendid victories of Poitiers, Agincourt, and Cressy.

But the Senator may not be willing to yield to this example—this case in point—drawn from his own fountain, and precisely up to the exigency of the occasion. He may want something more, and he shall have it. I will now take the question of general power—the point of general authority—exercised by the General practice of the British Parliament, for five hundred years, over the whole subject of bankruptcy. I will try the question upon this basis; and here I lay down the proposition, that this five hundred years of parliamentary legislation on bankruptcy, establishes the point of full authority in the British Parliament to act as it pleased on the entire subject of bankruptcies. This is my proposition; and when it is proved, I shall claim from those who carry me to England for authority, the same amount of power over the subject which the British Parliament has been in the habit of exercising. Now, what is the extent of that power? Happily for me, I, who have to speak, without any inclination for the task—still more happily for those who have to hear me, peradventure without profit or pleasure—happily for both parties, my proposition is already proved, partly by what I have previously advanced, and fully by what every Senator knows. I have already shown the practice of Parliament upon this subject—that it has altered and changed—contracted and enlarged—put in left out—abolished and created, precisely as it pleased. I have already shown in my rapid view of English legislation on this subject, that the Parliament exercised plenary power, and unlimited authority, over every branch of the bankrupt question; that it confined the action of the bankrupt laws to a single class of persons, or extended it to many classes; that it was sometimes confined to foreigners, then applied to natives, and that now it comprehends natives, aliens, denizens and women; that at one time all debtors were subject to it; then none but merchants and traders, and now besides merchants and traders, a long list of persons who have nothing to do with trade; that at one time bankruptcy was treated criminally, and its object punished corporally, while now it is a remedial measure, for the benefit of creditors; and the relief of unfortunate debtors; and that the acts of a debtor which may constitute him a bankrupt, have been enlarged from three or four glaring misdeeds, to so long a catalogue of actions, divided into the head of innocent and fraudulent—constructive and positive—intentional and unintentional—voluntary and forced—that none but an attorney, with book in hand, can pretend to enumerate them. All this has been shown; and from all this, it is incontestable that Parliament can do just what it pleases on the subject; and therefore, our Congress, if referred to England for its powers, can do just what it pleases also. And thus, whether we go by the words of our own constitution, or by a particular example in England, or deduce a general authority from the general practice of that country, the result is still the same; we have authority to limit, if we please, our bankrupt law to the single class of banks and bankers.

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But the Senator may not be willing to yield to this example—this case in point—drawn from his own fountain, and precisely up to the exigency of the occasion. He may want something more, and he shall have it. I will now take the question of general power—the point of general authority—exercised by the General practice of the British Parliament, for five hundred years, over the whole subject of bankruptcy. I will try the question upon this basis; and here I lay down the proposition, that this five hundred years of parliamentary legislation on bankruptcy, establishes the point of full authority in the British Parliament to act as it pleased on the entire subject of bankruptcies. This is my proposition; and when it is proved, I shall claim from those who carry me to England for authority, the same amount of power over the subject which the British Parliament has been in the habit of exercising. Now, what is the extent of that power? Happily for me, I, who have to speak, without any inclination for the task—still more happily for those who have to hear me, peradventure without profit or pleasure—happily for both parties, my proposition is already proved, partly by what I have previously advanced, and fully by what every Senator knows. I have already shown the practice of Parliament upon this subject—that it has altered and changed—contracted and enlarged—put in left out—abolished and created, precisely as it pleased. I have already shown in my rapid view of English legislation on this subject, that the Parliament exercised plenary power, and unlimited authority, over every branch of the bankrupt question; that it confined the action of the bankrupt laws to a single class of persons, or extended it to many classes; that it was sometimes confined to foreigners, then applied to natives, and that now it comprehends natives, aliens, denizens and women; that at one time all debtors were subject to it; then none but merchants and traders, and now besides merchants and traders, a long list of persons who have nothing to do with trade; that at one time bankruptcy was treated criminally, and its object punished corporally, while now it is a remedial measure, for the benefit of creditors; and the relief of unfortunate debtors; and that the acts of a debtor which may constitute him a bankrupt, have been enlarged from three or four glaring misdeeds, to so long a catalogue of actions, divided into the head of innocent and fraudulent—constructive and positive—intentional and unintentional—voluntary and forced—that none but an attorney, with book in hand, can pretend to enumerate them. All this has been shown; and from all this, it is incontestable that Parliament can do just what it pleases on the subject; and therefore, our Congress, if referred to England for its powers, can do just what it pleases also. And thus, whether we go by the words of our own constitution, or by a particular example in England, or deduce a general authority from the general practice of that country, the result is still the same; we have authority to limit, if we please, our bankrupt law to the single class of banks and bankers.

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