concessions. There can be no hardship in applying the doctrine of *Bissell* v. *Penrose* to the facts of this case. After the lapse of more than sixty years Labeaume's title is disputed in behalf of persons who never appeared before the commissioners with any claim of their own. In that early day there must have been great ignorance among the people of the forms of legal papers. And this fact was, doubtless, considered by the commissioners in reaching the conclusion which they did. They treated the papers of Labeaume as a transfer to him of all the interest that the heirs of Dodier had in the premises, and having the power to adjudicate the title to the claimant on such papers as he presented, their decision, having been confirmed by Congress, whether right or wrong, is final.

An attempt was made in this case to show that the persons from whom the plaintiffs seek to deduce their title were claimants before the board of commissioners, but this attempt wholly failed.* It is unnecessary to discuss the piece of evidence introduced for this purpose, for the Supreme Court of Missouri in their opinion have said all that can be said on the subject.†

JUDGMENT AFFIRMED.

HAMPTON *v.* ROUSE.

1. Under a statute which enacts that the "owner," may within a time named, redeem land sold for taxes, a redemption may properly be made by a person who has been decreed a bankrupt, the lands having been his. In the case here before the court there had as yet been no appointment of an assignee, nor assignment and conveyance to such person, as provided for in the fourteenth section of the Bankrupt Act of 1867; and the redemption was made between the date of the decree and of such appointment.
2. A charge that a person who had been decreed a bankrupt on his own ap-

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* See Statement, *supra*, p. 264.

† Connoyer *v.* Schaeffer, 48 Missouri, 166.

plication had by *such decree* ceased to be owner and had lost the right to redeem, *held* to be erroneous; there having been evidence tending to show a redemption by such a person.

ERROR to the Circuit Court for the Southern District of Mississippi; the case being thus:

A valuable plantation in Mississippi belonging to Wade Hampton, and at the time in his possession, though mortgaged by him, was sold on the 11th of April, 1867, to John Rouse, under a statute of the State just named, entitled "An act to incorporate the Board of Levee Commissioners, &c."* This act gives to this board power to assess taxes on lands such as the plantation of Hampton was, and if the taxes are not paid to have the sheriff sell the lands.

It contains, however, this provision on the subject of redemption:

"The sheriff's deed, however, for all lands sold for taxes, shall be and remain with the probate clerk; and should the *owner or owners* of said land, their agents or attorneys, apply, they, or either of them, *shall be entitled to the redemption* of said land *at any time within two years of the day of sale*, upon the payment of the purchase-money, &c., &c. This redemption may be made from the levee treasurer or from the probate clerk where the sheriff's deed is kept."

In this state of things Hampton, on the 29th of December, 1868, applied for the benefit of the Bankrupt Act, and on the 17th of April, 1869, was decreed a bankrupt under it. On the 19th, an assignee in bankruptcy was appointed.

The Bankrupt Act of March 2d, 1867, the now existing act and the one under which Hampton was decreed bankrupt, enacts:†

"SECTION 11. If any person owing debts provable under this act exceeding the amount of $300, shall apply by petition to the judge of the judicial district in which such debtor has resided, . . setting forth his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit

* Laws of Missouri for 1865, p. 60.

† 15 Stat. at Large, 522.

of his creditors, and shall annex to his petition a schedule containing a full and true statement of all his debts, . . . also an accurate inventory, . . . of all his estate, such petitioner shall be adjudged a bankrupt."

The same section of the act, at its close, further directs that the district judge in that state of the case, shall issue a warrant directed to the marshal of the district, authorizing him to publish notices in such newspapers as the warrant specifies; to serve written or printed notices on all creditors named in the schedule filed with the petition of the applicant, and to give such notice to all concerned as the warrant directs, which notice shall state as follows:

(1.) That such a warrant has been issued.

(2.) That the payment of debts or the delivery or transfer of property to the debtor is forbidden by law.

(3.) That the creditors will meet, on a day therein named, to prove their debts and choose an assignee.

The twelfth section enacts that at the meeting of the creditors, such as the preceding section contemplates, one of the registers of the District Court shall preside, and that the creditors in his presence shall choose one or more assignees of the estate of the debtor.

The act then goes on in its fourteenth section thus:

"As soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, . . . shall by an instrument under his hand assign and convey to the assignee all the estate real and personal of the bankrupt, with all his deeds, books, and papers relating thereto; *and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee.*"

The Bankrupt Act of 1841* differed, as to the mode and time of appointing the assignee in bankruptcy, from the now existing and above-quoted act of 1867. *It* ran thus:

"SECTION 3. That all the property and rights of property, . . .

* 5 Stat. at Large, 443.

of every bankrupt . . . shall, by mere operation of law, *ipso facto, from the time of such decree* be deemed to be divested out of such bankrupt without any other act or conveyance whatsoever; and the same shall be vested by force of the same decree in such assignee, as, from time to time, shall *be appointed by the proper court* for the purpose."

Hampton being still in possession of his land, Rouse now brought ejectment against him for it; and on the trial Hampton offered to prove that on the 10th day of April, 1869—that is to say, "within two years of the day of sale," the same having been made as above stated on the 11th of April, 1867—his son, as his agent, offered to redeem the land, under circumstances which made the offer equivalent to a redemption.

The son testified in substance thus:

"On the 10th of April, 1869, I went as agent of Wade Hampton to the office of Mr. Haycroft, the levee treasurer, and offered to redeem the lands in controversy. I had the means to redeem the lands. There were so many applicants waiting to redeem lands before me that I could not then be attended to. The press of business in the treasurer's office prevented my redeeming the lands when I went on the 10th of April, and that pressure continued until the time of redemption had passed.

"The means which I had were levee bonds. They were my means and not my father's. They were in the hands of Mr. Haycroft, in his office. Some of them had been converted into currency. I do not know how much. The proceeds of some of these bonds had been applied to the redemption of another estate, which was redeemed entirely out of them.

"When I applied to redeem these lands, in controversy, Mr. Haycroft exhibited a map of the county to me, and it was perfectly understood between him and myself what lands I wished to redeem, and also the taxes of what year. He knew at the time what means were to be used in redeeming said lands, and he made no objection, and the only reason why the lands were not then redeemed was because of the press of business in his office."

Mr. Haycroft, the levee treasurer, referred to above, testified that he occasionally sold the levee bonds, such as just

above spoken of, as an accommodation to taxpayers, and with the proceeds paid the redemption-money; that he had done so in the case of other lands for Hampton; but that it was no part of his official duty so to sell bonds and apply the proceeds; that in this case he had told Hampton's son that he would have to pay in currency. He added, however, that the applications for redemption on the 10th of April, 1869, were so numerous that he could not on that day have attended to the redemption of these lands under any circumstances; and that on the 11th the time expired.

The court charged the jury,

"That Wade Hampton, having been adjudged a bankrupt on his own application, after the land was sold for the taxes, had thereby ceased to be the owner of the land, and had lost the right to redeem."

And this charge was assigned for error.

Messrs. James Lowndes and W. W. Boyce, for the plaintiff in error:

It is clear that under the eleventh and twelfth sections of the Bankrupt Act, the decree in bankruptcy does not, under the present Bankrupt Act, divest the debtor of his estate, though under the act of 1841 it did do so in terms. Under the present act the decree only settles the fact that the debtor is a bankrupt; that is to say that he cannot now pay his debts as they come due.

It is by what is prescribed in the fourteenth section as to be done—that is to say, by the appointment of the assignee and the assignment and conveyance to be executed, "as soon as said assignee is appointed," that the debtor's property is divested. Now, as no assignee was appointed in this case, nor any assignment or conveyance made until several days after the offer to redeem was made, it can only be through the words at the close of the paragraph which declares that "such assignment shall relate back, &c.," that it can be pretended that the redemption was of no effect. But while the assignment and conveyance vest the assignee with

"the title to all such property and estate" as the bankrupt had when the proceedings were begun, it does not follow that they vest him with that title wholly unaffected by what has been *lawfully* done as to the estate in the meantime; what has been done by way of benefit to the estate. If, for example, a debtor at the time when the proceedings in bankruptcy were begun, had land heavily charged by mortgage, and by the voluntary act of the mortgagee the mortgage were satisfied, would the assignee take the land still subject to the mortgage or discharged from it? or if the debtor or any one else put on the land valuable improvements, would the assignee get those improvements or not get them? We suppose that the assignee in one case would take the land clear of the mortgage, and in the other would take it improved by the new erections. In the case now before the court, a defeasible estate is made by the act of the debtor, between the time of the decree and that of the assignment and conveyance, an indefeasible one. In this case as in the former ones, we suppose that the assignee—in other words the creditors or the assets—get the benefit of what is done. They still get "all the title to all such property and estate."

But even if the estate were vested in the assignee the old owner could redeem.

I. In *Dubois* v. *Hepburn*,* this court said:

"Any right which in law or *equity* amounts to an ownership in the land; *any* right of entry upon it, to its possession or *enjoyment*, or *any part of it* which can be deemed an *estate*, makes the person the *owner*, *so far as it is necessary to give him the right to redeem*."

Now, though a man may be a bankrupt—that is to say, though he may be unable to pay all his debts as they fall due, and though his estate may be passed accordingly to his assignee in bankruptcy—it does not follow that the debtor may not himself afterwards, from other property, coming to him by descent or gift or other good fortune, pay all his debts; nor follow that without this good fortune of any kind the as-

* 10 Peters, 1.

signee may not, with the proceeds of the assigned estate, pay all the debts and return a surplus to the former debtor. The debtor has, therefore, "a right which in equity amounts to an ownership." He has a right to pay the debts, and if he do pay them, all the estate is his; or if the assignee pay them from a *part* of the estate assigned, all the residue of the estate is equally his. *Such* an interest, says the above-cited case, "makes the person owner so far as it is necessary to give him the right to redeem;" for that case makes "any (possible) right of enjoyment of *any* part of it enough," if that part can be called an estate. Indeed it is only by a liberal construction of the word "owner" that an assignee in bankruptcy can redeem. Strictly speaking he is but a trustee to pay debts, and return any balance to the debtor.

It may be here observed that long since the case of *Dubois* v. *Hepburn*, this court has twice construed statutes authorizing redemption from taxes, with the utmost benignity. The cases of *Bennet* v. *Hunter*, in 9th Wallace,* and *Tracy* v. *Irwin*, in the 18th of the same reports,† show this; the former case deciding that any person may act as the owner's agent to redeem, and that the action of such person if ratified by the proper party operates as a redemption. If it were necessary to enlarge the scope of *Dubois* v. *Hepburn* these cases minister the means. But it is not necessary.

We assert, therefore, that notwithstanding the retroactive words of the fourteenth section of the Bankrupt Act of 1867, Hampton had still the right to redeem. No doubt the assignee also had. So indeed had any creditor; or, if the proper person ratified the act of redemption, any person whatever. It would certainly be monstrous if an estate worth $100,000, which had been sold for $500 tax, should be wholly lost to creditors because the bankrupt owner had *no right* to redeem and the assignee as yet *no money* to do so; or because the time for redemption expired *between* the time of filing the petition and the appointment of the assignee.

II. If our views are at all correct, then the charge was

* Page 338. † Page 550; and see Patterson *v.* Brindle, 9 Watts, 29.

wrong. We assert that under the two last cases above cited from Wallace, that which was in law a tender was made. But whether or not, evidence was certainly given *tending* to show that a tender was made; and if such evidence was given, the charge was equivalent to having rejected the evidence on the trial. To have done this would have been error.

Mr. P. Phillips, contra:

The fourteenth section of the Bankrupt Act enacts that "the assignment shall '*relate back*' to the commencement of the proceedings in bankruptcy;" and thereupon, "*by operation of law*," *the title to all the property of the bankrupt shall vest in the assignee.* The present act herein goes further than did the act of 1841. Under the third section of that act the bankrupt's estate was divested out of him *ipso facto* by the decree. But so, too, under that act, the assignee in bankruptcy was appointed by the court, at the moment of the decree made. In fact, in some courts, the assignee was always the same person in all cases; so that he was really a permanent officer of the court existing previously to the decree. There was thus a person in whom the estate could, on the divestiture from the bankrupt, immediately vest. The present act, we say, goes further, and means to vest the bankrupt's property in his assignee from the time that proceedings are begun—from the time, namely, that the debtor himself has proclaimed that he was bankrupt, or is shown by his creditors to have been so. And, why should it not so vest it? The bankrupt's estate *ought* to pass from him from *that* time if bankrupt acts are to prevail at all. But this difficulty occurred here. Under the present act the assignee is not an officer of the court, but is appointed in each case by the creditors, *pro re natâ*. He cannot be appointed, therefore, until after the petition is filed, in other words, until after "the commencement of the proceedings." The creditors must have notice of them, and meet before they can appoint the assignee. If, therefore, the act had said that the estate of the debtor "shall be divested from him on

the commencement of proceedings in bankruptcy," there would be no one in whom it could vest. It would be *in nubibus*. It accordingly leaves it to the assignment to divest the estate, but declares that "such assignment shall relate back to the commencement of the proceedings."

But whatever may have been the reason for the special character of the enactments, the language of the fourteenth section is positive; and under the enactment made by it all the property of Hampton, as he owned it, on the day when he filed his petition, vested in the assignee. Thus vesting, Hampton was not "owner" of it when the alleged offer to redeem was made. The assignee was owner, and *he* alone had power to redeem.

The statute of Mississippi doubtless uses the word "owner" in the sense in which people ordinarily use it. Now, people do not ordinarily call a man owner of an estate after a bankrupt act has, even by relation back, divested him of the estate which he once had. A person may be interested in an estate—a lien-creditor is directly interested, and every creditor is interested indirectly—but he is not owner in either a legal or a popular sense.

The case, therefore, does not come within any expressions in *Dubois* v. *Hepburn*, nor is it helped by *Bennet* v. *Hunter*. The first case decided that "the *owner*, either acting in person or through some friend or agent, compensated or uncompensated," might redeem—in other words, that anybody might redeem, if professing to act in behalf of the "owner" —and that a ratification by the owner would be presumed in furtherance of justice. But the case does not decide that a "*no* owner," acting either in person or through some friend or agent, may redeem. In the present case, had an assignee been appointed, and had Hampton's son, without being authorized so to act, professed to act for *him*, the case would be in point. But the son did not so profess to act; but professed to act, and was authorized to act, for quite another person, to wit, his father, who was *not* owner.

Nor does *Tracy* v. *Irwin* help the difficulty of *this* part of the case; though it may help the difficulty of another part;

the part, namely, involving the question whether Hampton's son made any tender for anybody. *Tracy* v. *Irwin* decides that if tax collectors, being bound, as they are in law, to receive redemption-money from the *agents* of owners, announce by general announcements that they will receive it from nobody but *owners* themselves, an agent who goes to the proper office to pay, need not show an *actual* offer of the money. And this we admit to be good law. If he had the money *ready* to tender, it was enough; for an actual tender would have been nugatory. But, as we have said, this case does not show at all who *is* owner, or that the agent of a person *not* owner need or need not do anything.

Everything here, it is to be observed, is statutory. Considerations of common law do not come in; still less any equitable ones. It is a case where the oft-quoted sentence of the great English Chief Justice, Sir Henry Hobart, is applicable:* "The *statute* makes sure work. The *statute* is like a tyrant. Where *he* comes, he makes all void; but the common law is like a nursing father."

But there was no tender by anybody, or at any time. Hampton's son offered to redeem the premises, not by the payment of any *money* in his hands, but out of the proceeds of certain bonds which had been deposited in the hands of Haycroft, the treasurer, and which were then unsold and which the levee treasurer was under no official obligation to sell. The evidence shows that the levee treasurer told Hampton's son that he must pay the redemption-money in currency. But if he had not so told him, and if the treasurer had specially undertaken to redeem the lands, yet—as it was no part of his official duty thus to undertake or to redeem—his failure to redeem, from whatever cause the failure arose, and even if it arose from fraud, could not avoid the deed made to Rouse by the treasurer in the discharge of his official duty. Under the case of *Tracy* v. *Irwin* it cannot be doubted that the party going to see about the redemption must be *able* to redeem; that is to say, must have, somewhere at command, *money* to redeem with.

* 1 Modern, 36; 21-22 Car. 11.

Of course, if there was no tender in law, the court properly charged as it did. Indeed, it would have acted properly enough had it excluded the evidence in the first place; the old doctrine about submitting a case, if there is a *scintilla* of evidence, having been long an exploded one.

Mr. Justice CLIFFORD delivered the opinion of the court.

It appears by the record that the offer to redeem was made by the agent of the owner on the 10th of April, 1869, less than two years from the sale. This was within proper time, as allowed by law.

It is clear that a decree in bankruptcy, without more, will not, under the Bankrupt Act, which in the first part of its eleventh section provides for the decree, have the effect to discharge the debts of the petitioner nor to divest him of the title to either his real or personal estate. And argument is hardly necessary to show that none of the proceedings contemplated in any part of the eleventh section, or those directed in the twelfth, have that effect, as neither of the sections contains any language whatever to import or indicate that anything of the kind was intended by the framers of the act.

Conclusive support to this view, if any be needed, is derived from the fourteenth section of the act. Prior to the assignment and conveyance authorized and directed by that section, the title, whatever it be, of the estate belonging to the debtor, both real and personal, remains unchanged, except that the court, in certain cases, may in the meantime restrain the debtor or any other person, by injunction, from making any transfer or disposition of any part of the same, not excepted from the operation of the act.

Sufficient appears in the sections of the act referred to, when considered in connection with the admissions and other evidence exhibited in the record, to show beyond doubt that the instruction of the court under discussion is erroneous, and that the error was of a character to supersede every question of fact submitted to the jury.

Plenary evidence was given that the offer to redeem, as

exhibited in the transcript, was made on the 10th of April, 1869, and the assignee of the estate of the bankrupt was not appointed and qualified as such until the 19th of April in the same year, and the testimony reported shows that the bankrupt was in the possession of the premises and that he ever after continued in the possession of the same to the present time.

Whether or not the evidence introduced to prove that an offer to redeem the premises was made at the time was sufficient to avail the defendant as equivalent to a tender, it is not necessary at the present time to decide, but the court is of the opinion that it was of such a character, in view of a recent decision of this court, that it ought to have been submitted to the jury, untrammelled by a prior instruction, which in substance and effect amounted to a direction to the jury that their verdict must be for the plaintiff.

Such an offer to redeem it was held, in the case of *Bennet* v. *Hunter*,* might be made by the owner or by an agent or by any person willing to act for the party interested, upon the ground that an act done by a third person for the benefit of another is valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice. Since that time it has also been decided, in the case of *Tracy* v. *Irwin*,† that if the tax commissioners announce that they will not receive the payment of the taxes in such cases unless tendered by the owner, that a formal offer by another to pay is unnecessary, that it is enough if a relative of the owner went to the office of the commissioners to see after the payment of the tax, even though he made no formal offer to pay, because such an announcement is in effect a waiver of a tender by the commissioners, they having declined to receive payment unless the tender is made by the owner in person.

Apply that rule to the case and it is clear that the evidence introduced by the defendants tending to show an offer to redeem the premises should have been submitted to the

* 9 Wallace, 338. † 18 Wallace, 550.

jury under proper instructions. Instructions of the kind, however, would have been useless after the jury had been told that the defendant ceased to be the owner of the land, and that he lost his right to redeem the same when he was adjudged a bankrupt, it appearing that the decree was entered before the offer to redeem was made, as assumed by both parties.

Enough appears in the language of the fourteenth section of the Bankrupt Act to demonstrate the proposition that the instruction of the Circuit Court in that regard was incorrect, nor is the question affected in the least by the fact that the same section provides that such assignment or conveyance shall relate back to the commencement of the proceedings, as the instrument of assignment cannot operate either retrospectively or prospectively before it is executed. Until an assignee is appointed and qualified and the conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt, which is the plain meaning of the fourteenth section of the Bankrupt Act.* Different regulations in that respect were enacted in the former Bankrupt Act, as the third section of that act provided that "all the property and rights of property, of every name and nature, of the bankrupt, not excepted from the operation of the act, . . . shall, by mere operation of law *ipso facto*, *from the time of such decree*, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever."† Unlike the old act, the existing act makes it the duty of the court, or, where there is no opposing interest, of the register, by an instrument under his hand, to assign and convey to the assignee all the estate, real and personal, of the bankrupt, and the rule is that such a conveyance or assignment divests the bankrupt of the whole of his property, except what is exempted from the operation of the Bankrupt Act, and vests the title to the same in the assignee, but the record in this case shows that

* Sutherland *v.* Davis, 42 Indiana, 28.

† 5 Stat. at Large, 443; Ex parte Newhall, 2 Story, 362; Oakey *v.* Bennett, 11 Howard, 44.

no assignee had been appointed when the alleged offer to redeem was made, which affords a demonstration that the charge of the court that he had ceased to be the owner of the land and thereby lost his right to redeem was improper, being equivalent to a direction to the jury to find a verdict for the plaintiff.*

JUDGMENT REVERSED, and the cause remanded with directions to issue

A NEW VENIRE.

MECHANICS' AND TRADERS' BANK *v.* UNION BANK.

1. The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest.
2. A court established by proclamation of the commanding General in New Orleans, on the 1st of May, 1862, on the occupation of the city by the government forces, will, in the absence of proof to the contrary, be presumed to have been authorized by the President.
3. Though *called*, in the order establishing it, a Provost Court, a larger jurisdiction than one over minor criminal offences might, in fact, have validly been given to it by the power which constituted it.
4. Whether such court acted within its jurisdiction in a case where one bank of the State of Louisiana was claiming from another bank of the same State a large sum of money, is not a question for this court to determine, but a question exclusively for the State tribunals.

ERROR to the Supreme Court of Louisiana; the case being thus:

The State of Louisiana, as is known, during the late rebellion joined the rebel forces. On or about the 29th of April, 1862, however, the government forces under General Butler—then in command of the conquering and occupying army, and commissioned to carry on the war in the Depart-

* Wright *v.* Johnson, 4 National Bankrupt Register, 627; Same Case, 8 Blatchford, 150; Bump on Bankruptcy (7th ed.), 22.