SUPREME COURT DECISION—CAIN VS. YOUNG AND OTHERS.

In the Supreme Court of Utah Territory, June Term, 1876.

In the matter of the several applications of Joseph M. Cain, Brigham Young, William Jennnigs, *et al*, for deeds to parts of lots 6, block 69, plat "A," Salt Lake City survey.

Appeal from Third District Court. Boreman, Justice, delivered the opinion.

The contest in this proceeding is for the Government title to certain lands under the "townsite" law of Congress. The Mayor of Salt Lake City holds the title in trust for the persons entitled thereto under the provisions of the law. The various parties to the proceeding filed their claims with the Probate Court, asking title. The heirs of Joseph Cain, deceased, prayed for title to the whole of the East half of lot 6, block 69, plat "A," Salt Lake City survey. The other parties claimed fractional parts of said half lot. Those claims being conflicting, the Probate Court considered all the claims together, and sub-divided the half lot amongst the parties filing on it. This sub-division not being satisfactory, an appeal was taken to the District Court. In the District Court a finding of facts was had, and judgment and decree accordingly. The Cain heirs, not being satisfied with the action of the District Court, have brought the subject, by appeal, to this court, a motion for a new trial having been overruled.

The main question involved is as to who of these claimants are "occupants" as contemplated by the "town site" law. This statute was made for the relief of the "inhabitants" of towns and cities upon the public domain. It was made to secure to these "inhabitants" who were "occupants," the legal title according to their "respective interests." To give one the right to a conveyance of the government title, it must appear that he is an "inhabitant" of the town, an "occupant" of the ground to which he seeks title, and have an "interest" in the property. The occupancy must be actual, individual occupancy, not an occupancy begun and held by agent merely. If a person resided upon a parcel of ground, or carried on his business upon the ground, and claimed the whole of the parcel or lot, he might have title to the whole, unless some part be occupied by another person claiming right to the title. Then the question would arise as to which exercised acts of ownership over the disputed ground first, and to what extent, and if that be settled, then was the claim ever abandoned or given up, and if so whose possession in good faith attached after the abandonment.

We do not think that the law of Congress ever contemplated that a party could claim title to more lots or parcels than he actually individually occupied, otherwise a person could gain title to an unlimited amount by not occupying it himself, but by arranging with various agents that they move on to lots and hold for him, and these agents to lay no claim to title, but let the employer claim all. The employer might thus gain title to the various parcels or lots without ever being an occupant or an inhabitant, and could prove his right by simply showing, not his possession, but possession by other men for him—he never having been individually in possession. Such a proceeding would be at war with the very object of the law, which was made for actual settlers and not for speculators. A man having made a *bona fide* actual, individual occupancy, either for his residence or his business, or in some way for his own use, he may no doubt afterwards sell his right of possession—his preference or right to government title, but he must first have been an occupant in good faith, himself, and the purchaser must take actual possession also and become an occupant. There is nothing in the rule we lay down which prohibits contracts, leases, or sales of such interests, but they can only be made to or with "inhabitants" who can become occupants, if the right of preference in obtaining title is to be effected. Such sales, leases, and other contracts are not prohibited or discouraged by the law nor by the policy of the law. The government only says—that if the contract be with one not an "inhabitant," and who does not become an ocupant, such contract or sale will not be recognized in ascertaining to whom the title should be granted. A party in possession of any such city or town lot will be presumed to be so in possession in his own right and for his own use and benefit, until the contrary appears. And the possession of the ancestor when dying is the possession of the heir, unless the contrary appears.

These are some of the principles which will control us in the examination of the merits and rights involved in the proceeding at bar.

When Salt Lake City was first settled, the place was laid out, or the laying out dictated by Brigham Young, Willard Richards and others, yet Brigham Young claimed to have "exclusive control" in making the settlement. Shortly after the first settlers came and the town was laid out, certain parties, among whom was Willard Richards, were allowed to select portions of the city, each portion composed of a number of lots or blocks, all in a body, in order to distribute the lots to those whom they desired to have near them. It appears that lot 6, block 69, was among the lots selected by Willard Richards under this arrangement. He turned the east half of the lot over to Joseph Cain, and marked the boundary between the east and west half; he gave Cain possession of a house situated on the north half of this east half, and he had the public records made to show that this east half was the property of Cain; and there is evidence going to show that Cain bought and paid for the half lot. Cain moved upon the lot and lived there until his death. He exercised acts of ownership over the half lot, and it was assessed in his name and he paid taxes on the same until his death, and being so in possession, the current of the evidence is that he claimed the whole of the same to the boundaries of the half lot on every side; and that his possession and ownership of possession were recognized by Williard Richards and the public generally, and the heirs of Willard Richards claim nothing now in this proceeding, not having appealed, but they have made two deeds for portions of the disputed parts, one to Brigham Young and one to William Jennings, the effect of which will be considered hereafter. At the death of Joseph Cain he was in the undisputed possession of all of said half lot, although Mrs. Ogden was living on the lot, but she claimed no ownership of the possession, and moved off shortly after Cain's death.

The appellants claim that in the findings of fact by the District Court there has been a failure to find that Brigham Young, Wm. Jennings, Samuel Stringfellow, George Stringfellow and Nicholas Grosbeck, or either of them, ever have been "inhabitants" of Salt Lake City or of Utah Territory. The law, as we have stated, requires that the persons claiming, must, to entitle them to deeds, be "inhabitants." Inhabiting was an essential fact and should have been found.

The appellants further claim that there was a failure to find that Young, Jennings, Stringfellows, or Groesbeck were in possession at the date of the entry. The law requires that the parties or perhaps those under whom they claim, should have been in possession at the date of the entry by the Mayor. It was therefore an essential fact and the failure to find thereon was an error.

The appellants, the heirs of Joseph Cain, take exceptions to the findings of fact made by the District Court, and allege that the material findings to which they object as erroneous are as follows:—

I. It is found "that if said Joseph Cain ever occupied or claimed the right of possession of any portion of the north half of the east half of said lot after he moved into the new house, his heirs and representatives soon after his decease surrendered and gave up such possession."

II. It is found that portions of the south half of the east half of said lot, formerly in the possession of the heirs of Joseph Cain, "have been sold," and the possession delivered to the persons named in the judgment and decree of the Court, with the particular description which each was now in possession of and entitled to.

III. It is found "that the north half of the east half of said lot has been subdivided, and the occupancy, possession, and right of possession have been in various persons, and that the persons named in the judgment and decree of the Court are in possession and entitled to the possession of the several particular descriptions of land given in connection with their names."

The first of these points, the alleged surrender of possession of the north half of the east half of said lot, by the heirs of Joseph Cain, after Joseph Cain's death, we consider is well taken, for we are unable to discover facts which would warrant the finding, certainly none so far as the children of Cain are concerned. They have never done anything that would indicate that they gave up or surrendered any rights which they have to such north half. The widow did not control this portion of the ground, although Joseph Cain had possession of it when he died. She said that Brigham Young claimed it and she did not question his right—for in those days no one questioned what their leaders did, but, as she says, she would have taken the word of the leaders in those days as readily as she would "an angel." Such implicit confidence and faith in him was simply abused by Brigham Young, and he used it to take away from this widow and her infant children property to which he did not have a shadow of a right.

The finding therefore of a surrender of said north half, we deem as erroneous.

The second of these material findings to which exception is taken, has reference to a sale which it alleges took place of portions of the south half, which had prior thereto been in possession of the heirs of Cain. One would naturally conclude from the reading of this finding that the heirs had sold such portions as are referred to, or at least were parties to some sale. Nothing of the kind appears, however, from the evidence. The parties referred to as having been the purchasers of parcels of said south half were Nicholas Groesbeck and the Stringfellow Brothers. Groesbeck's portion is very small, being only sixteen (16) inches fronting on East Temple Street, and running back (west) nine rods. Not a solitary witness was introduced to support Groesbeck's claim, nor any written or oral testimony—and there is an absolute want of any evidence on the point, except an incidental reference thereto in Mrs. Cain's testimony, she saying that she sold a strip of, as she thought, that width to Mr. Groesbeck. Even then there is nothing in the evidence to show where this sixteen inches was, or how long the strip was, or that she ever delivered the possession of it to Mr. Groesbeck, or whether Groesbeck ever was in possession, nor is there anything to show that any interest of the children was intended to be conveyed, nor indeed is there anything to show whether she sold as an individual or administratrix or as guardian, although, as it is mentioned in connection with the sale to the Stringfellow Brothers, it might be inferred to have been a sale as administratrix, but upon this inference we could not depend. There is therefore no proof to support Mr. Groesbeck's claim, and it must fall.

The Stringfellow Brothers have allotted to them, on the north of and adjoining the parcel allotted to Groesbeck, a parcel of ground fronting East Temple (Main) Street, sixteen feet and three inches, running back, west, eight rods, with the road privilege on the west. The road privilege was merely a written consent given by S. W. Richards and Elizabeth Cain as individuals, and without consideration, and of course was subject to revocation at any time, even if S. W. Richards and Elizabeth Cain had the right to make it. The Stringfellow brothers claim their parcel of ground (not including the road-way), under a sale and deed from S. W. Richards and Elizabeth Cain, administrators of Joseph Cain, deceased, made in pursuance of an order of the Probate Court Administration of the estate of Joseph Cain, deceased, which was taken out more than ten years after his death. Such is the verbal proof, and there is no other kind of proof, that any administration was ever taken out. S. W. Richards and Elizabeth Cain, claiming to be administrators, filed their petition in the Probate Court on Nov. 4th, 1869, praying "for an order to sell real estate," upon the ground that the estate was at that date "involved, in consequence of loaning money to erect buildings thereon, upon which interest is being paid, and also in consequence of taxes accumulating, while rents have been rapidly declining, by which the obligations and expenses of the estate have to be maintained." There is no evidence that when administration was taken out, any debts or other obligations of the deceased remained unpaid, but, on the contrary, the administrator Richards testifies that no such claims were ever presented to him, and that he believed they were all paid out of the personal effects of the deceased long before application was made to sell the real-estate, and that the sale was made to raise money for support of the family, to pay for improvements, taxes, &c., and that of all this indebtedness accrued from three to ten years after Cain's death; and Mrs. Cain says that the sale was not made to pay debts idcurred by Joseph Cain, deceased. What interest then passed by such sale, and the conveyance thereunder? The Probate Court is an inferior court, one of limited jurisdiction. It has no power not given to it by statute.

Our Territorial Statute) Utah Laws, 1852 p. 44, s. 16) says that personal and real property may both be sold upon the order of Court, but it does not authorize the real-estate to be sold except to pay debts, and then only when the personal property is insufficient to pay the charges against the estate. These facts must appear affirmatively. The parties to this proceeding, and also the administrators, treated these possessory rights as real estate, and we must conclude the statute likewise treated them as real estate, as the statute speaks of real estate, and none existed if these rights be not such, for they were the highest interest that an individual could have in land when the statute was passed, and it is not to be presumed that the statute was not meant to apply to them, but only to something that did not then exist.

Whether they are strictly real estate or not as understood at common-law, we are inclined to hold that the laws of those early dates intended them to be treated as real estate. But whether we deem such possessory rights as real estate or as personal property, we are unable to see how such property could be sold under the law referred to concerning decedents' estates. If it was personal property it was not claimed to be of a "perishable nature," or likely to "depreciate in value." But it may be said that although this property was not "perishable" or liable to "depreciate," and although no debts, existing against the estate at the death of Joseph Cain, deceased, remained unpaid, yet that years after his death a large indebtedness was incurred against his estate. Who was authorized to incur such indebtedness? There was no administration. The property had descended to the heirs and could not be taken away from them by any administration, unless debts incurred by Joseph Cain in his life time remained unpaid. The guardian might incur debts for the support and education of the children but this is not a case of that kind. Some unauthorized person, years after Cain's death, puts up improvements on the land of the heirs of Joseph Cain, and it is sought to pay therefor by taking out letters of administration and selling the property under the administration. That cannot be right. And further, the administrators had no authority whatever to pay debts and charges against the estate, even if in existence, until they were proven in manner prescribed by law and allowed by the Court, and the administrator cannot pay for the support of the widow and children, except under an order of Court. No debts were proved up and no allowance for support made. But really all these charges, including the taxes, were against the heirs, if against any one at all, and the administration had nothing to do with them.

The sale, therefore, under which the Stringfellow Brothers claim, being unauthorized by law—the Court having no power to make it—the sale and conveyance are null and void, and the parties take nothing by them. They are therefore upon the ground, if at all, wrongfully, and can only be treated as trespassers, and trespassers can have no rights as against the true and rightful claimants.

Next—adjoining the "Stringfellow" ground, lies that which was allotted to the Cain heirs, about which there is no contest (except perhaps to a small piece on the back part of the lot).

Adjoining on the north the parcel allotted to the Cain heirs, lies the "Ransohoff" property, as it is called. It is part of the south half of this east half lot, and was allotted by the District Court to William Jennings, it being No. 51, with extention back. Jennings claims the ground under a claim of quit-claim deeds from Elizabeth Cain through Charles King, Ransohoff and Brigham Young to himself. The quit-claim deed of Mrs. Cain purported to convey only "her right of claim, interest and possession." Of course such a deed conveyed not interest of the minor heirs, if they had any. Did they have any?

The Territorial Statute says that if there be "other property" remaining, it shall "descend in equal shares to his children," the widow taking a child's part during her life or widowhood. The interest which her deed therefore purported to convey was only equal to a child's part during her life or widow-hood and at her death or marriage it became the property of the two children. Under that statute therefore the children of Cain had a valid and perfect right to a title for two-thirds of said parcel, with the further right to the residue at the death or marriage of their mother. And we can see no reason why such a statute of descents is not valid. (Utah Laws, p. 43., s. 24). It in no way affected the "primary disposal of the soil," it does not seem to be inconsistent with any law of Congress, and it is a proper subject of Territorial legislation.

If therefore Jennings was in possession, it was only as co-occupant with the heirs. His interest could only be that of the widow—one-third interest for the life or widowhood of Mrs. Cain. He cannot by having possession of such an interest thereby obtain a right to oust the two heirs. He only becomes a co-occupant with the heirs—a possession in the nature of a tenancy in common. The Courts are generally inclined to guard the interests of minors, and will not allow them to be deprived of any rights except under proceedings by proper suit to which they are parties. The conveyances set up as the foundation of Jennings' claim, recognize and support the rights of the children. They are a recognition of Joseph Cain's rights, and that is a recognition of theirs. But there is no evidence that Jennings ever went into possession of this property. Then in saying to whom the government title should go, his claim could not be recognized. If he had gone into possession, under Mrs. Cain's title, he would have complied with the requirements of the United States Statute, which is that to be recognized as being entitled to the Government title the party must be an "occupant," and this he was not at any time. He can therefore have no right to any share in the property. If he has any remedy it is against Mrs. Cain. He shows no right to a preference in the purchase of the Government title.

Let us look then at the Third Point—the exception to findings respecting the north half of this east half lot, together with the strips or parcels claimed by Jennings across the whole west end of the east half lot.

The first allotment to William Jennings was No. 45 (according to the plat), including its extension somewhat further west than is indicated by the plat.

In 1861 Brigham Young deeded "all of his right of claim, interest and possession" in and to said parcel of ground to William Jennings. It nowhere appears that Young had any "right of claim," "interest," or possession" to convey. He therefore could convey none. He himself says that whatever possession he might have had was as Trustee in Trust for the church of which he is the head, and not as an individual. The Church has made no conveyance and lays no claim to the lot and files no declaratory statement therefor. The deed, therefore, from Young to Jennings is valueless, although there is testimony to show that Jennings intended to have Young make his title good.

There is evidence that Jennings was at one time "in possession of and exercised ownership" over the Eagle Emporium building, situated on No. 45. But he was not in possession at Cain's death, and there is no evidence that he was in possession at the entry of the "town-site" by the Mayor. The character of his possession is not shown, it not being shown that he lived there or did business in such building. Nor does it appear that he held possession by consent of the heirs. If his possession was not by their consent, legally obtained, by proper action to which they were parties, they being under age, their rights are in no way bound or affected by his possession. It is not claimed that any such suit was ever had.

If therefore Jennings went into possession under authority given by Brigham Young in his deed, and depended upon Young's supposed power to compel a good title to the possession from Cain's heirs, and Young has failed to be able to compel such title, Jennings cannot make the heirs the conveyancers, but he must look to Young for his remedy. The heirs are not bound by any arrangement he and Young may have made.

Jennings, therefore, being in possession at one time, was there wrongfully, and as a trespasser, and gained no rights which could be recognized in ascertaining to whom the legal title should be made. This finding and the allotment following to Jennings were therefore erroneous.

The last parcel allotted to Jennings is fifty-six feet north front, on First South Street. The west twenty-six feet of this north front, running clear across the lot, are upon the west half of lot 6, and not contested, and therefore not to be disturbed by this court.

The east sixteen feet of the remaining thirty feet, of said allotment is held under no deed, or any other kind of transfer or possession, and if Jennings be in possession, it was, as in the last instance, as a trespasser, as to the Cain heirs, no authority from said heirs having ever been obtained. The allotment of this sixteen feet front (and running south) to Jennings was therefore erroneous.

Now, respecting the fourteen feet lying between the twenty-six and the sixteen feet referred to, there is some doubt.

Price seems to have been in possession in 1856-7 of forty feet north front, running south across the lot. We hear no more of him until in 1869, when he makes a deed to William Jennings of forty feet front and running across the lot, and the fourteen feet in question is embraced therein. In giving his testimony, Price says that he does not know what distance from the east line of the lot his ground was situated, and the great preponderance of testimony is that Price's possession was on the west half of the lot and not the east half. The simple fact that Price's deed fixes 151 feet as the distance from the east line of the lot, does not prove that the deed from Eddins to him gave the same description, or that Eddins put him in possession of the same, and the evidence shows that Eddins' ground was west of centre of the lot, and we cannot say that the statement in Price's deed should override the testimony of numerous witnesses, and the very actions of Dr. Richards himself, especially when Price does not seem to have been in possession for some twelve years before his deed was made.

A deed is also shown in evidence from Willard Richards' heirs to Jennings, covering this fourteen feet. But that deed is subsequent to Jennings' filing, and besides, we think that the evidence clearly shows that the Richards' heirs had no rights or interests in such property or the possession to pass by such conveyance.

The deed, of course, is of no value so far as this fourteen feet are concerned. There is some evidence going to show Jennings' possession, although the evidence is very indefinite as to the precise ground possessed by him. His possession, however, was without authority and wrongful, and in no way can invalidate the rights of the heirs of Joseph Cain, deceased, when they have given no consent thereto, and it was subsequent to the death of Joseph Cain, deceased.

The remaining portion of said findings objected to, as stated, refer to parcels allotted to Brigham Young by the District Court, and numbered 47 and 49 with extensions back to the west.

Brigham Young testifies that he never lived on any portion of Lot 6, now in controversy. Yet he claimed to have had peaceable possession of portions of it, for many years, not in his individual right, but as Trustee in Trust for the Church of which he is the head. The Church makes no claim, his possession as Trustee—if it ever existed—would effect nothing in the present proceeding. But he really never was in possession as contemplated by the statute. The fact that he sent Mrs. Ogden down to Joseph Cain with directions to him to measure her off a piece for a house, gave him no rights, as her occupancy was only temporary, and so intended; and he has never been in possession prior thereto. It was evidently only in exercise of that "exclusive control over the settlement" which he had claimed, but which gave him no right in or to the real estate. It was a permission to Mrs. Ogden to use the ground for a time, and not a transfer of his right thereto.

Jennings claims also under a deed from Willard Richards' heirs, made only a few days before the filing of his declaratory statement. He never had possession under that deed, and all of Willard Richards' right had been transferred to Joseph Cain in his life time. The fact that two women, Mrs. Braddock and Mrs. Franklin, who bore the relation of polygamous wives to Willard Richards, resided a short while on the lot after it was transferred to Cain, Richards, does not show that Richards ever claimed said lot. Such an inference would be very slight when compared with Richards' own positive acts, showing the contrary. The occupancy by these women was not Richards' occupancy. The law does not recognize the polygamous relation, and that is all that gives color to the idea that their possession was his possession. They laid no claim to the possession themselves, and removed at the request of Cain. Joseph Cain had lived in that house himself before these women were there and owned it, and rented it after they removed. There seems nothing in the evidence to warrant the belief that there remained in the heirs of Willard Richards any—even the slightest—claim or right to any part of this half lot.

Brigham Young says in his testimony that he does not own parcel No. 47, but that it belongs to the Co-operative Institution. His deed to Bassett and Robertshaw shows that he conveyed to them all of his interest in that parcel in 1865, and he says himself that it was never deeded back to him; yet he claims it. His claim has no foundation in justice. He was never an occupant of