PRATT VS. YOUNG.

Decision of Chief Justice White, delivered in the Third District Court, Salt Lake City, Nov. 26th, 1875.

Sarah M. Pratt, appellant, vs. Brigham Young, appellee, } In District Court, Third Judicial District, Octob'r term, 1875.

The appellant and appellee both claim, under the act of Congress of March 2d, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," and the act of the territory of Utah, of February 17th, 1869, prescribing rules and regulations for the execution of the trust arising under said act of Congress.

The relief which was designed to be granted by said act of Congress was to enable the inhabitants of cities and towns settled upon the public lands of the United States to secure a title to such lands from the government by paying to the government the minimum price for such lands. As a means of doing this most conveniently it was provided that when a city or town was incorporated the corporate authorities thereof, and when not incorporated the judge of the county court of the county in which such city or town "may be situated," should enter at the proper land office and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupant thereof, according to their respective interests. These provisions created the corporate authorities of an incorporated city or town, and the judge of the county court in case the city or town was not incorporated when the land was entered under the provisions of the act of Congress, trustees, depositories of the legal title for the inhabitants of the city or town who had settled and occupied the land for the several use and benefit of the occupants thereof according to their respective interest. The execution of which trust, as to the disposal of lots in such town and the proceeds of the sales thereof, was to be conducted under such rules and regulations as might be prescribed by the legislative authority of the state or territory in which the same was situated. Whatever may have been the purpose of congress with reference to cities and towns, as communities, it is evident that the leading object was to secure individual rights to the inhabitants of cities and towns who were occupants of the lands embraced within the limits of the entry contemplated by said acts. These individual rights flow from and are based upon the grant in the act of Congress. It confers the right, defines its character, limits its scope and points out the manner of its consummation.

The power conferred upon the territorial legislature is to execute the trust. It has no power to interfere with the individual rights which vested or became vested under the act of Congress.

If this proposition be true, then we are to look to the act of Congress alone to determine who are entitled under it. The primal fact which gives the right to the inhabitants of the city or town as a community is that they have settled and occupied the public lands as a city or town, and the primal fact that gives to any individual a right to any lot or subdivision of such public lands, is that he or she was the occupant of such lot or subdivision. Occupancy is the central and leading idea of the grant, and upon this, in a positive or qualified sense, must depend any right which can be asserted under it. It is in trust for the several use and benefit of the occupants thereof according to their respective interests. The execution of this trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, is to be conducted under rules and regulations prescribed by the legislative authority of the state or territory. What these rules and regulations shall be is left to legislative discretion, limited only by the condition that they must be in furtherance of the execution of the trust and must not violate its letter or its spirit. As to rights which may accrue to individuals under the grant the legislature can only make rules and regulations to eliminate and define, and establish them. As to the rights which accrue to the community, it has the right to dispose of the proceeds of the sales. In determining what are the rights of individuals under the act of Congress the rules and regulations adopted by the legislature could be looked to at most as only a legislative exposition or construction or the act of congress, and could not be regarded as authoritative or binding upon the court as a legislative enactment. There being no controversy as to compliance with the rules and regulations enacted by the territorial legislature in bringing the claims of the parties before the judge of probate in the court below, and none as to the regularity of the appeal to this court, the court will not look to the act of the legislature of Feb. 1869, in the determination of the question at issue in this case, but will address itself to the construction of the act of Congress as the source from which whatever rights may be asserted, by either of the parties, must flow, and as the standard by which their respective claims must be tested and determined.

It has for a long time been the settled policy of the government of the United States to encourage the actual settlement of the public lands, and it has also regarded with disfavor the entry of public lands for purposes of speculation. The settlement required by law includes actual occupation of the land, and the subjection of the soil by labor, to the beneficial use of the person proposing to enter or buy the land from the government. The price at which the land could be bought was fixed by law, as were also the precedent conditions to a purchase. The first act of the set tler was the occupancy of the land; the last was the payment of the purchase money, (by the entry of the land at the proper land offce.) The issuance of the patent followed as a sequence to the regular entry of the land. The title to the land and the right to the title remained in the government until the entry of the land at the proper land office. The settler had possession and the right to possession, and on compliance with the prerequisites of the law he had the exclusive right to buy of the government at the price fixed by law—the entrance money or the minimum price for the land. He was called a pre-emptor, one who buys before, or one who has by law a first and exclusive right to buy the land of the government. The right of the pre-emptor depends upon the occupation of the land and its continued possession, to the time of application to enter it at the proper land office. An abandonment or surrender of possession, is a forfeiture of all right to enter the land. The right of the settler upon public lands is then a possession with a right to possession, coupled with a right (the precedent conditions being complied with) to enter the land at the minimum government price. The title to the land remains in the government and no right to the title inures to the pre-emptor until he has entered the land. Even after he has occupied the land, made his improvements and filed his declaration of an intention to enter the land, the government can by special grant convey the land to another. The pre-emptor has no estate, legal or equitable, in the land which can be recognized or enforced in law except such as grows out of the possession of the land.

The policy of the federal government with regard to public lands settled and occupied as sites of cities or towns was, in the beginning, the reverse of that governing as to public lands open to pre-emption. Such lands were withdrawn from entry, and the government held them with a view to public sales to the highest bidder. This latter policy was abandoned in 1844, and since then the policy of the government has been to allow the entry of such lands at the minimum price for the use and benefit of the occupants of the land within such city or town sites according to their respective interests. In other words the policy which had guided the government with regard to the settlement and entry of agricultural lands, was adopted by it *mutatis mutundis*, as to the inhabitants of cities and towns, the occupancy of lands in both cases being the substantial basis upon which the individual right depends. The nature and quality of the interest which each class has in the lands is the same. The government holds the title—the interest of the occupants is only a possession, and the right to the possession, with the right, to the one as a pre-empter and the other as a member of a community to enter or have entered the land—in other words, to buy it of the government at the minimum price. This limited interest in the land is the creature of the acts of Congress; it is novel and anomalous, and only subject to the ordinary rules of law governing real estate (if at all) in a narrow and subordinate sense. The fee simple, which is usually the largest possible estate which a man can have in and which draws to it all of the incidents of such an estate such as possession and the right of possession, and is the predicate of the relations of the landlord and tenant, does not enter into or constitute any part of this statutory interest in land which is created by the acts of Congress. On the contrary the fee is recognized as being in another, and this estate or interest in the land exists in its narrow and meagre entirety, without and independent of it.

To apply to it the rules and analogies which ordinarily govern and guide in determining interest and relations in regard to real estate, would be in contravention of the very nature of the right itself. The title to real estate is now in abeyance. This statutory interest vanishes upon the mere abandonment of the possession of the land. The title of real estate can only be transferred from one person to another by writing in proper form and duly attested. This interest can pass from one to another by the surrender of possession of the land. The conclusion educed from analogies and above announced is further strengthened and confirmed by the language of the acts of Congress in conferring this right upon the inhabitants of cities and towns. The entry under authority of the acts of Congress is "in trust for the several use and benefit of the occupants, thereof according to their respective interests." This phraseology points out the class who are the beneficiares in trust—"occupants, and also fixes the time of occupancy, the date of the entry of the land by the corporate authorities or the judge of the county court which determines the individual *cestice que trusts.*

Those in possession of the land when the entry is made by the probate judge, are the persons for whom the land is held, in trust, and to whom he is to make the deeds. * * This is the construction and meaning of the act of Congress—Copeld *vs.* McClelland, 16th Wallace, 3 34. The act of Congress of May 23d, 1844, referred to in the citation just made, uses the same phraseology in reference to this subject matter as the act of Congress of March 2d, 1867, under which the parties in this case claim.

That this is the reasonable and just construction of the act of Congress and that the presumption is in favor of the actual occupant at the time of entry of a lot or parcel of ground within the limits of a city or town site, settled and occupied as such upon public lands and entered under authority of the act of Congress March 2, 1867, above referred to, is, in the opinion of the court, sustained by reason and authority; but out of this springs another question of general interest and necessary to the abjudication of this case, and that is whether the occupancy at the time of entry is conclusive in favor of the right of the individual occupying, to the title to the land, or whether it is only presumptive, and if so, whether the circumstances in this case repel the presumption in favor of the actual occupant at the time of the entry of the land by the trustee, and show the right to the land in controversy to be in another. The act of congress of March 2, 1867, confers upon the state or territorial legislature the execution of the trust "as to the disposal of the lots in such town," etc., "under such rules and regulations as may be prescribed," etc. This must be done according to the respective interests of the occupants. Does this language "respective interests" apply to the topographical area and measurement of the lots occupied or is it to be considered in a larger sense as embracing the nature of the occupancy and the quality of interest in the land which the occupant claims as well. The legislature has construed this language in the larger and more comprehensive sense: by section 3 of the act of the legislature of Utah, entitled "An act prescribing rules and regulations for the execution of the trust arising under the act of Congress of March 2, 1867," it is enacted "that each and every person, or association, or company of persons, or corporation claiming to be the rightful owner of possession, occupant or occupants, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall, within six months," &c., &c., sign a statement in writing, &c.

These are the persons and these the interests which the legislature regarded as entitled to claim and assert titles to lots or parcels of land in any city or town in the territory under this act of Congress. It is manifest that it was the design of the legislature to extend the benefits of the act of Congress to two classes of persons, actual occupants and the rightful claimants or owners of possession—without the occupancy or possession.

This legislation in the opinion of the court was in harmony with the act of Congress, and within the authority conferred by the act of Congress upon the territorial legislature, and the construction given by the the legislature to the act of Congress in this particular is adopted by the court.

The findings of the law by the court in the case under consideration are as follows:

First—That under the several acts of Congress upon the subject and especially the act of the 23d of May 1844, entitled "An act for the relief of citizens of towns upon the public lands of the United States under certain circumstances," and the act of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," that the right which the individual inhabitant of the city or town took was a possession of the land and a right to possession and the use with the right as a member of the community to have land entered by the trustee indicated in said acts of Congress, at the minimum price in the proper land office of the United States, and the right under such rules and regulations as might be prescribed by the proper legislative authority to have title made to himself for such lot or subdivision as he occupied, or had the rightful claim of possession to at the time of the entry of the land by the trustee, &c.

Second—That this right was a statutory right created and existing by authority of the acts of Congress, declaring, defining and limiting it.

Third—That the basis of the right, and an indispensable constituent of it is the actual occupancy of the land at the time of the entry by the trustee, or the possession, actual or constructive, or the right to the possession at that time.

Fourth—That occupancy at the time of the entry of the land by the trustee, presumptively gives the right to the occupant of the land, but that this presumption may be impeached and overthrown by proof.

Fifth—That possession being of the substance of the right, that the right may be lost by an abandonment or surrender of the possession, and that it may be transferred to another by a transfer of the possession.

Whether at all, and if so, or how far improvements on lots may enter into the question of rights of occupants under the acts of Congress referred to, is not necessary to the determination of this case, and therefore has not been discussed or decided in this opinion. An application of the conclusions of law to the facts as found by the court will readily determine the rights of the parties in this case.

The appellant Sarah M. Pratt, was in the possession of the lot in controversy, occupying it as a home at the time of the entry of the land on which the city of Salt Lake is situate, by the trustee, under the act of Congress. This gave to her a *prima facie* right to a title from the trustee. Is this right repelled by the proof, and the right established in the appellee, Brigham Young? Sarah M. Pratt and her husband Orson Pratt occupied the lot for some years previous to 1861, and she put improvements upon it. They then left it, and afterwards, some several years before 1868, the appellee came into possession. In the latter part of 1867, or early in 1868, Mrs. Pratt came back to the city of Salt Lake and, according to the testimony of both the appellant and appellee, the appellee gave her the possession of the lot. There was no qualification of this surrender of possession at the time, no reservation of rent, or any agreement of any kind, showing or tending to show that there was any reservation of the possession, or the right of possession, by the appellee. No rent was ever paid by, or claimed of the appellant, and she has had the continuous possession from the 12th of March, 1868, occupying it as a home for herself and her family. There was an effort made to prove that Orson Pratt paid rent for the premises to the appellee, but in this (even if appellant would have been bound by it) there is a failure. There is no proof that Orson Pratt ever paid rent for the premises, or ever knew that any was paid, or that any authorized agent of his ever paid any rent for him.

Upon this state of case it is the opinion of the court that there is no sufficient proof in this case to repel the presumptive right of Sarah M. Pratt to a title to the lot in controversy as the occupant thereof at the date of the entry of the land by the trustee under the act of Congress.

It is therefore ordered, adjudged and decreed that the decree of the court below of the 28th of November, 1873, declaring that Sarah M. Pratt is not the legal and rightful owner and occupant of the property therein in controversy, but that the said Brigham Young, senior, is the rightful owner and occupant thereof and entitled to a deed in fee simple thereto, and further decreeing that Brigham Young pay the sum of six and fifty hundredths dollars costs, and that Sarah M. Pratt pay the sum of forty-four and eighty-five hundredths dollars costs, be and the same is reversed, set aside and held for naught.

It is further ordered, adjudged and decreed that Sarah M. Pratt was in possession and rightful claimant of the south half of lot number five (5), block seventy-six (76), plat A, in Salt Lake city, being one hundred and sixty-five (165) feet square, enclosed by a board fence, and including the dwelling house of the said Sarah M. Pratt at the time of the entry of the lands embraced within Salt Lake city by the mayor of said city, under the provisions of the act of Congress of March 2nd, 1857, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," and that the said Sarah M. Pratt is entitled to a deed in fee simple thereto from the mayor of Salt Lake city.

It is further ordered that this judgment of the court be certified to the mayor of Salt Lake city, and that the appellee, Brigham Young, senior, pay the costs of this court and of the court below.

By Telegraph.

CONGRESSIONAL.

SENATE.

WASHINGTON, 7.—The Senate was called to order at twelve. After prayer by the chaplain and the reading, of the journal of yesterdays proceedings, Eaton sent to the clerk's desk and had read the credentials of James E. English, appointed U. S. Senator from Connecticut, in place of O. S. Ferry, deceased, and the oath of office was administered to the new Senator.

Adams, clerk of the House of Representatives, appeared at the bar of the Senate with a message announcing the organization of the House and the appointment of a committee to join a committee on the part of the Senate to wait upon the President of the U. S.; the Senate then took a recess till one o'clock.

Upon reassembling Anthony, from the joint committee to wait upon the President and inform him of the organization of the two houses of Congress, reported that the President said he would communicate with Congress immediately in writing. At 1.15 Mr. Luckey, private secretary to the President, appeared at the bar of the Senate with the message, and it was read by Gorham, secretary of the Senate. The reading was concluded at 2.08, and was listened to with marked attention by the senators and a large audience in the galleries. Sir Edward Thornton, British minister, was in the diplomatic gallery, and appeared deeply interested. The portions of the message in regard to the school question, taxation of church property, Cuba, our financial affairs and the condition of the navy especially attracted the closest attention. On motion of Conkling the message was ordered to lay upon the table and be printed, he also offered the usual resolution to print extra copies; referred to the committee on printing.

The president *pro tem* laid before the Senate the reports of the vari-