

THE PALIMPSEST

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Pioneers and Preemption

Congress in 1841 established preemption as the general rule of public land disposal. While the lawmakers had argued this issue, pioneers had moved the frontier westward. In many instances the settlers outran the surveyor and the surveyor usually outdistanced the Congressman. It was at the time Iowa was being peopled that the debate upon public land disposal culminated in the preemption law.

When the first frontiersmen found their way into the territory that was to be Iowa, the Congressional enactment of March 3, 1807, relative to occupation of the public lands was still in force. This statute was entitled an act "to prevent settlements being made on lands ceded to the United States, until authorized by law." It was aimed at the pioneers who had settled upon the public domain in advance of the surveyor and the land office auctioneer. The President was authorized to direct the United States marshal and "to em-

ploy such military force as he may judge necessary and proper" in removing any trespassers.

Persons who had located upon the public lands but who had not obtained legal title could request the register of the land office for permission to continue their residence temporarily. These requests were to be based upon actual settlement, to be limited to 320 acres, and to be abandoned if that part of the public domain should be either ceded or sold by the United States. Before being granted such permission for continued residence the applicant had to sign a declaration stating that he did not lay claim to the tract of land. If the area contained a lead mine or salt spring, special permission to work these resources had to be obtained from the United States government.

It is obvious that this statute was diametrically opposed to the doctrine of preemption and particularly unsatisfactory to the ambitions and wanderlust of the pioneers. To protect their improvements and to retain the soil they had tilled, the settlers formed "claim clubs" or "claim associations" which were designed to frustrate the speculator and the competitive bidder who came to secure title at the time of the land sales.

Meanwhile there were many violations of the statute. Being contrary to popular sentiment in the region to which the act of 1807 applied, it was

not respected. The irrepressible sweep of settlement continued to push the frontier westward ahead of land titles.

To use John C. Calhoun's characterization that these pioneers were "lawless bands of armed men" is very misleading. They were more like the Iowa settlers who in 1838 were described by William R. Smith in his *Observations on the Wisconsin Territory*. "Of course", he wrote, "the people are all 'squatters;' but he who supposes that these settlers on the public lands, whose enterprise has led them to seek a home in the 'Far West,' and who are now building upon, fencing, and cultivating the lands of the government, are lawless depredators, devoid of the sense of moral honesty; or that they are not in every sense as estimable citizens, with as much intelligence, regard for law and social order, for public justice and private right, and as much patriotism as the farmers and yeomen of the states of New York and Pennsylvania, is very much mistaken".

Continual agitation for the repeal of the 1807 statute brought little change in the attitude of Congress. One of the reasons for the insistence upon retaining this measure has been well interpreted by Jesse Macy in his *Institutional Beginnings in a Western State*. "The law", wrote Macy in 1884, "seems to have been kept on the

statute-book by Congress out of deference to a sentiment in the older states that people ought to stay at home and not go gadding about through the wilderness in search of new homes. Generally, when a particular case was brought before Congress where trespassers upon the territory had made for themselves homes, Congress could be persuaded to exempt them from the operation of the law. Congress favored the law but was against its execution."

An obvious reason for the reluctance on the part of Congress to grant preemption rights was a financial one. The national treasury needed money. And one political faction continually insisted upon competitive bidding as a lucrative source of income.

Conflicting sectional interests also restrained Congress from altering the basic law of 1807. The slavery faction of the South was competing for the West with the industrial Northeast, and so western interests held a balance of power in Congress. Alliances between the South and West made possible the passage of temporary acts legalizing preemption.

In 1830, 1832, 1834, 1838, and 1840 special preemption measures were approved. These enactments did not grant preemption privileges to future squatters. Instead, they were of a legal-

izing nature. That is, they offered the right of preemption to settlers who had already located upon the public domain previous to the passage of each particular act and who could give proof of actual occupation of the land claimed. Usually the statutes applied to pioneers who were bona fide residents upon the land in the year previous to the legalizing act. The general preemption law applying to squatters without regard to the time of their settlement was not passed until 1841.

It seems that Congress preferred to keep the basic 1807 statute but grant exemptions to persons who actually settled upon the public domain. Obviously, the decade between 1830 and 1840 was one of innumerable petitions to Congress for preemption rights. Those who located each year desired to be pardoned for transgressing the 1807 law.

The pioneers on the frontier of Iowa were not exceptional in this attitude. When, in 1837, the inhabitants of the Territory of Wisconsin west of the Mississippi petitioned Congress for a separate government, the issue of preemption was an important factor. In addition to sending a memorial to Congress for the division of the Territory, the 1837 convention petitioned Congress for a squatters' rights law because the special exemption of 1834 had lapsed. They requested "a preemption

law by which the settlers on the public lands shall have secured to them at the minimum price, the lands upon which they live". The petitioners pointed out that none of the land in the "Iowa District" had been offered for sale and yet that area had an estimated population of 25,000. "An attempt", they argued, "to force these lands thus occupied and improved into the market to be sold to the highest bidder, and to put the money thus extorted from the hard earnings of an honest and laborious people into the coffers of the public treasury, would be an act of injustice to the settlers which would scarcely receive the sanction of your honorable bodies." The memorialists concluded by asking for the passage of a preemption law permitting a bona fide settler to purchase, previous to public sale, as much as one half section of land upon which he had located.

When the petitions of the Territorial Convention were presented to Congress the debate over the issue of preemption was as lively as the discussion on dividing the Territory of Wisconsin. The Iowa settlers were described as persons who, without "the authority of law, and in defiance of the Government, . . . have taken possession of what belongs to the whole nation, and appropriated to a private use that which was intended for the public welfare." Little wonder that the Iowa

pioneers thereupon continued to depend upon themselves for protection. The formation of the land clubs or claim associations was their only alternative. Then, when the land they claimed was offered for sale, the minimum price was obtained by pioneer law if not by Congressional statute.

On June 22, 1838, Congress again suspended the act of 1807. Claimants were authorized to enter title with the register of the land office of the district for not more than 160 acres at the minimum government price of \$1.25 an acre. In order to claim preemption rights the settlers had to give proof of ownership "to the satisfaction of the register and receiver". Every "actual settler of the public lands, being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper, by personal residence thereon, at the time of the passage of this act, and for four months next preceding" was eligible to enter a claim. The enactment was not to interfere with the Congressional authority to dispose of the public domain and was to be effective for only two years. It revived the exemptions of the first legalizing act of 1830, thus giving the men who had squatted in Iowa before February 22, 1838, the right to buy their claims within two years without competition.

The First Legislative Assembly of the Territory of Iowa also undertook to define the legal rights of the settlers. On January 25, 1839, an act was approved "to prevent trespass and other injuries being done to the possession of settlers on the public domain, and to define the extent of the right of possession on the said lands." The statute provided that if the question of trespass or ejection relative to an area of land should be raised in court the individual should have his "claim" considered "without being compelled to prove an actual enclosure". The size of the claim (though not exceeding a half section) and boundaries were to be established "according to the custom of the neighborhood." To maintain a claim, actual improvements had to be undertaken and the land could not be neglected for a period of more than six months.

Ten days earlier, on January 15, 1839, the Governor had approved an act "to provide for the collection of demands growing out of contracts for sales of improvements on public lands." This measure, copied from the statute of the Territory of Wisconsin, provided that all contracts or promises made in good faith "for sale, purchase, or payment, of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or equity, and may be

sued for and recovered as in other contracts." Quit claim deeds and other conveyances for all improvements upon the public lands were to be "as binding and effectual, in law and equity . . . as in cases where the grantor has the fee simple to the premises conveyed." It is obvious that if Congress did not believe in preemption the First Legislative Assembly of the Territory did.

Whether these Territorial enactments were contrary to United States statutes was not at once clear. In 1840 the Supreme Court of the Territory interpreted the law in the case of *Enoch S. Hill v. John Smith and others*. Hill on January 23, 1837, had signed a note promising to pay \$1000 in one year to John Smith and Brothers of St. Louis. The "value received" for the note was a claim "or the possessory right to a certain tract or parcel of land, belonging to the United States".

Hill argued that the contract was void and the note was illegal because it was given "for a contract for the purchase of a claim, to a tract of the United States lands with the improvements thereon, in violation of the provisions of the several acts of Congress". The court, however, held the contract to be valid, the \$1000 recoverable, and in addition, Smith was granted \$63.83 damages.

When the case came before the Supreme Court, Chief Justice Mason stated the opinion of the

court on the question of preemption. The law of Wisconsin, of which the 1839 Iowa law was a copy, provided that contracts relative to claims upon United States lands were as valid as if the parties had title in fee simple. This enactment was in force at the time Hill and Smith executed their contract. "If this statute", said Mason, "is of any validity, it closes the door to all further controversy, in relation to this matter."

Thereupon the Chief Justice considered the propriety of the original Wisconsin statute. The general rule, said Mason, was that "illegality in the consideration will prevent the enforcement of any contract". But it is within the power of the legislature "to modify or abridge the rule, or even to abolish it altogether". Consequently, if, prior to the 1836 Wisconsin statute, such contracts were illegal that law made them legal. Such a procedure was of course dictated by public policy and public welfare. "At the time this law was passed," pointed out the Chief Justice, "there were more than ten thousand inhabitants within the present limits of this territory (then a part of Wisconsin) residing on the lands of the United States and daily dealing in what were denominated 'claims,' or the settlers rights to those lands. Public policy dictated that there should be some better sanction to enforce the observance of their contracts, than

the bludgeon or the rifle. The legislature therefore declared, that such contracts should be under the peaceful sway of the civil magistrate, rather than that the whole country should be overwhelmed with the miseries of violence and anarchy. We believe that in so doing they were not only promoting the public welfare, but that they were acting entirely within their legitimate province, and that the law therefore, for this purpose, is valid and binding."

The act of 1807, argued Mason, was not intended to prohibit settlement upon the public domain but to prevent title from being acquired without competitive bidding. "It is notorious", he explained, "that when this territory was organized, not one foot of its soil had ever been sold by the United States, and but a small portion of it [the Half-Breed Tract] was individual property. Were we a community of trespassers, or were we to be regarded rather as occupying and improving the lands of the government by the invitation and for the benefit of the owner?" The Chief Justice thought the latter.

"It is true", concluded Mason as if to ease his legal conscience, "that public opinion would frequently be a very unsafe guide for a judicial decision. The fluctuating feelings of the multitude frequently operated upon by the momentary ex-

citement, by prejudice or by caprice would very improperly be adopted as the standard of truth or sound reason. But where the same opinions are concurred in for centuries, and after passion and prejudice have wholly subsided, such opinions are always found in truth and justice, and can more safely be followed than those of the most learned and able judges."

It is unlikely that this resolute decision had much effect upon Congress. The drift of political events in 1841, however, stimulated the passage of a general preemption statute. The election of the Whigs and the continued alignment of the South with the West caused the defeat of the conservative East on the question of the land policy. The retroactive, legalizing preemption policy was abandoned in favor of permanent preemption rights.

On September 4, 1841, President John Tyler approved a statute granting preemption rights to any person "who since the first day of June, A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon". Indi-

viduals qualified for such preemption privileges were "every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of intention to become a citizen." Claims limited to 160 acres were to be filed with the register of the land office and title could be obtained upon payment of the minimum government price.

Other limitations upon preemption were: no person could claim more than one preemptive right; no person was eligible who was the proprietor of 320 acres in any State or Territory; and no person who had abandoned his home property to reside on the public land could enter a claim. Reservations made for internal improvements or school purposes or containing natural resources were of course exempt from preemption. The statute also prescribed that proof of settlement was to be made to the satisfaction of the register and the receiver of the district land office.

The statute did not propose to delay the sale of public lands. Nor did it apply to persons who failed to make proof and payment of their claim before the day of the sale. New settlers upon the public domain had thirty days in which to declare their intention to preempt a quarter section, and if within twelve months they failed to make proof

and payment to the land office their tract of land was open to the entry of other pioneers or subject to be offered for sale at the next public auction.

This statute is usually called the "Land Distribution Act" because the principal features pertained to the distribution of the income from the sale of the public land. After a ten per cent grant to certain States and the expenses of the General Land Office were deducted, the net proceeds of the land sales were to be divided among the States and Territories "according to their respective federal representative population as ascertained by the last census". These funds could then be applied to such purposes as the local legislatures might direct. Henry Clay, as chief advocate, was primarily interested in distributing the proceeds of public land sales to the States, and so, to accomplish this purpose, he was willing to adopt preemption as a permanent policy. This also explains why the procedure for acquiring a land title according to this act of 1841 is sometimes referred to as "the preemption clause".

In contrast to the views of Clay were the opinions of John C. Calhoun and Thomas H. Benton. Calhoun, leading advocate of state rights, favored giving the public land to the States for disposal. The Missouri Senator favored preemption. Therefore, when Clay sponsored the land distribution

bill with the "preemption clause" he was accused of compromising with Benton's views.

The passage of this measure immediately provoked debate between the Whig and Democratic factions in the Territory of Iowa. So heated were the arguments that they often evoked personal bitterness. One of the most pronounced exchanges of philippics was between Editor "Silly Billy" William Crum of the *Iowa City Standard* and Editor Verplank Van Antwerp, "the West Point jackass" of the *Iowa Capitol Reporter*. Beneath such exchanges of personal epithets, the two editors revealed the pioneer attitude toward the 1841 preemption law.

On September 17, 1841, the *Standard* quoted with approval a statement in the *St. Louis New Era* that the preemption statute had settled "forever all questions connected with the Public Lands". And by October 15th there must have been considerable discussion of the land law because Editor Crum pointed out that Iowa statehood, with the attendant cost of financing the government out of local taxes, would counterbalance the benefits of the Federal donation under the distribution clause.

The *Iowa Capitol Reporter*, a Democratic paper, made its first appearance at Iowa City on Saturday, December 4, 1841. By January 22,

1842, the editor felt confident that he could "convince those who do not know the fact already, that the Whig preemption act is a most odious law, and merits the reprobation of the western people." In the next issue he analyzed the measure and asked the question "Who does such a law benefit?" Whereas the *Miners' Express* of Dubuque had estimated that three-fourths of the Iowa pioneers were ineligible under the limitations of the bill, Van Antwerp had no doubt that "AT LEAST NINE-TENTHS!" could not claim any benefits from the law. Meanwhile, the *Burlington Gazette* referred to the preemption statute as "a law to prohibit settlements upon the public lands!"

The press complained that the provision of the law making eligible only those who had settled upon surveyed land excluded most of the Iowa pioneers. Only eleven persons in the Dubuque Land District, it was alleged, had come within the provisions of the measure, though it was rumored by the *Burlington Gazette* that "those who have been enabled to avail themselves of it in the Burlington district will much exceed that number." Settlers on surveyed land had already gained title by private entry, public sale, or in accordance with earlier preemption laws. Thus, only the squatters who had outrun the surveyor were interested in the preemption statute. To refuse preemption

rights until the lands were surveyed was tantamount to preventing settlement. Indeed, pointed out Editor Van Antwerp, such a provision if rigidly enforced would have been a bar to any pioneer moving westward.

Early in the spring of 1842 word reached Iowa that Congress was contemplating a change in the preemption statute. By April President Tyler's message with its reference to the \$14,000,000 Treasury deficit and recommendation that the Distribution Act be repealed appeared in the local newspapers. Thereupon interest in the controversy was kindled anew. On May 7, 1842, Editor Van Antwerp announced to his readers that the Senate had approved certain amendments to the statute. He wanted to emphasize that the yeas and nays showed how "Democracy did the work for the settlers." As for Mr. Clay, he said he adhered "to his former odious project by the same instinct that the washed sow returns to the mire."

Specifically the Senate amendments repealed the prohibition of aliens preempting land, the provision that only surveyed land was eligible for preemption, and the 320-acre limit of land proprietorship as a bar to preemption privileges. These changes were calculated to remove the principal causes of criticism by the settlers.

But to such Democratic proposals Editor Crum

of the *Iowa City Standard* took exception. He thought the repeal of all land holding limitations as a prerequisite to preemption would benefit "the capitalist and speculator" as much as the squatter. Certainly, the restriction of preemption to surveyed lands did not prevent settlement. All that was intended was that the pioneers await the rod and chain before entering their claim. And surely aliens could not complain of being required to declare their intention to become United States citizens before requesting a portion of the country's public domain. However valid the attitudes of the Iowa pioneers may have been, the proposed modifications of preemption procedure were quashed in the House where the majority of Representatives were either indifferent or hostile to the preemption policy.

Late in 1842, another problem associated with the 1841 preemption statute was raised in the Territory. The Iowa settlers sent petitions to the President asking him to postpone the land sales announced for the following February 20th and March 6th. The reason they gave was "that the season of the year is an unfavorable one." Actually, however, "the larger portion of those who are settled upon the lands are extremely desirous to procure a postponement of the sales, from the fact that they are without the means to enter their

claims." Inasmuch as the preemptors were required to pay for the land before the public sale, many settlers were unable to meet this requirement. Therefore, their only alternative was the hope that their acreage, though offered, would not be sold at the sale. Later they might purchase it by private entry.

Besides the criticisms of the pioneers, eastern interests asserted that the preemption law was partial to the new States; that laborers and farmers lured by the cheap land would migrate westward and leave their jobs; that the price of the land in private hands would decrease; and that the pioneer would take all the best land first.

Notwithstanding these criticisms, the preemption law remained in the United States statutes at large until 1891 when the rules regulating the disposal of the public domain were completely revised. To be sure, Congress attempted to correct abuses. For example, pioneers managed to postpone the day of payment for their claims by filing "a chain of entries", and so, in 1843, Congress provided that an individual was entitled to file a preemption claim only once.

The discussion of preemption in Iowa soon merged into a debate on what should be done with Iowa's share of the proceeds of the Distribution Act. The entire amount acquired under the law

in 1842 was \$693,444 of which only \$1,860.23 was allocated to the Territory of Iowa. The purposes for which this fund should be used caused considerable debate. The *Burlington Gazette* suggested that the money be spent on "a thorough geological survey of the Territory", but Editor Van Antwerp of the *Iowa City Reporter* argued that \$1000 would scarcely make a start in such an undertaking. Better yet, thought he, the money might be used to pay "the just debts of the Territory".

The Territorial Legislative Assembly had already passed an act "to provide for receiving the proportion of money to which Iowa will be entitled under the Distribution law." Approved on February 17, 1842, the statute authorized the Territorial Treasurer to receive the Federal money "subject to appropriations hereafter to be made by the legislative assembly." It seems that the lawmakers followed Van Antwerp's suggestion because both the Fifth and Sixth Legislative Assemblies endeavored to liquidate previous deficits.

The entire history of preemption is the story of attempts to encourage pioneers to move westward. But the settlers' criticisms of the statutory provisions continually reflected the hope for a more liberal land policy. Probably what they really desired was a homestead law. Indeed, Thomas H.

Benton in his *Thirty Years View* indicated that homesteading rather than preemption was his preference. Twenty years after the passage of the 1841 preemption law this pioneer dream was achieved.

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