

AN HEIRSHIP DECISION.

At five o'clock January 20th, Judge Anderson filed the following opinion in the Third District Court:

In the matter of the estate of Thomas Cope, deceased:

George H. Cope, a son of the above named decedent, applied to the Probate Court of Salt Lake County for a distributive share of the estate of said decedent. His right to share in such distribution was objected to by Janet Cope and Thomas H. Cope, lawful wife and son respectively, of said decedent. A trial was had and the Probate Court adjudged that the said George H. Cope was not an heir of said decedent, and not entitled to share in the distribution of his estate, and decreed the distribution of the whole estate remaining in the hands of the administrator to the said Janet Cope and Thomas H. Cope. From this decree the said George H. Cope has appealed to this court. C. O. Whittemore and Wm. Armstrong, attorneys for George H. Cope, and Le Grand Young and John M. Zane, attorneys for Janet Cope and Thos. Cope, counsel for the respective parties, have stipulated in writing thus: "The facts as stated and found in the decree of distribution made and delivered by said Probate court on the 1st day of March, 1889, are and shall be taken to be facts in the case and that the sole question to be determined in this case is whether the said George M. Cope, mentioned in the decree as the polygamous child of Thomas Cope, deceased, is an heir of said deceased.

The facts found and stated in said decree, so far as they are material to the determination of this case are as follows:

DECREE OF DISTRIBUTION.

"George H. Cope, son of Thomas Cope, deceased, having heretofore, to wit, on the 4th day of February, 1888, filed in the court his petition stating there, among other things, that the final account of Thomas Cope, deceased had, been stated and that said estate was in condition to be closed; that a portion of said estate remained to be distributed among those entitled thereto and he was a son of said Thomas Cope, deceased, and an heir to said estate, and praying that a distribution of said estate be made, and Janet Cope, widow, and Thomas H. Cope, the son of said Thomas Cope, deceased, having filed in this court their written objection to any of the said estate being distributed to said Geo. H. Cope, because the said George H. Cope was not an heir to the estate of Thomas Cope, deceased, and praying that distribution of said estate be made to them. Said matters coming on regularly to be heard on this first day of March, 1889, at 10 o'clock a. m. the said George H. Cope appearing by his counsel, C. O. Whittemore, and the said James Cope and said Thomas H. Cope appearing by their counsel, I. M. Waddell. This Court proceeded to the hearing of this matter, and proof having been made to the satisfaction of the Court that due notice had

been given of the hearing of said petition as required by law and the order of the Court, and it appearing to the Court from the proof made in open Court that the said Janet Cope was the legal widow and the said Thomas H. Cope was the legitimate son of said Thomas Cope, deceased, and one Margaret Cope the plural or polygamous wife of said deceased; that the marriage of said Thomas Cope with said Margaret Cope was contracted when the said Janet Cope was the living and undivorced wife of the said Thomas Cope, deceased; that the said Thomas Cope, deceased, died in Salt Lake City on or about the — day of August, 1864, leaving an estate consisting of the real and personal property hereinbefore described, the title to which is held by Thomas Jack, administrator of the estate of Thomas Cope, deceased, in trust for the heirs of said estate; that the same is now in a condition to be closed; that the whole of said estate was the separate property of said deceased. The court finds that said George H. Cope is a son of the issue of said polygamous marriage of Thomas Cope; that he is not an heir of said deceased, Thomas Cope, and is not entitled to any share in the distribution of the estate. The court further finds that the said Janet Cope is the lawful widow and the said Thomas H. Cope is the legitimate son of the said deceased, and are the sole heirs of said deceased, and were entitled to have said estate distributed to them. It is hereby ordered, adjudged and decreed that all and singular the real estate hereinbefore described be and the same is hereby distributed in full to Janet Cope and Thomas Cope in equal and undivided shares."

At the time of the death of said decedent the statute of the Territory of Utah in relation to the estate of decedents provided as follows, to wit:

"Section 24. The homestead occupied by the wife or any portion of the family of the deceased at the time of his death shall in all cases be held free to the use of the wife and family of the deceased, and shall not be liable to any claim or claims against the said estate, and if there be any property remaining after the liabilities of the estate are liquidated, then it shall, in the absence of other arrangements by will, descend in equal shares to his children or their heirs: one share to such heirs through the mother of such children, if she shall survive him, during her natural life or during her widowhood; or if he has had more than one wife, who either died or survived in lawful wedlock, it shall be equally divided between the living and the heirs of those who are dead, such heirs taken by right of representation."

"Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."

This statute was enacted March 23, 1852, and it is by virtue of the provisions of the last of the above

sections that counsel for claimant contend that he is entitled to no distribution or share of said decedent's estate. It will be observed that this statute makes no distinction as to their right to inherit from the father between the legitimate children and illegitimate children who are the offspring of a polygamous wife and the children of a prostitute; although such illegitimate children may never have been recognized by the father during his lifetime, yet after his death, if it shall be made to appear to the satisfaction of the court that he was their father, "they and their mothers were placed on substantial equality with the lawful widow and legitimate children, and inherit in like manner from the father." Whether the statute was void *ab initio* because contrary to good morals and against public policy, it is not necessary to determine in this case, in view of the act of Congress of July 1st, 1862 (in compiled laws of Utah, 1888, Vol. 1. p. 107-9). The first section of this act prescribes the punishment for the crime of bigamy in any Territory or other place over which the United States has exclusive jurisdiction. The second section is as follows, to wit:

Section 2.—That the following ordinance of the provisional government of the State of Deseret, so called, namely, "An ordinance incorporating the Church of Jesus Christ of Latter-day Saints, passed February 8th, in the year 1851, and adopted, re-enacted and made valid by the Governor and Legislative Assembly of the Territory of Utah, by an act passed January 19th, in the year 1855, entitled 'An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution,' and another act, and parts of acts, heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be and the same are hereby disapproved and annulled; provided that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired, under the ordinance heretofore mentioned, nor the right 'to worship God according to the dictates of conscience,' but only to annul all acts and laws which establish, maintain, protect or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecration or other contrivances."

Counsel for the widow and legitimate son insists that this act of Congress disapproved and annulled the Territorial statute giving to illegitimate children and their mothers the right to inherit from the father, upon the ground that the Territorial statute maintained, protected and countenanced the practice of polygamy. At the time of the passage of this act the inhabitants of the Territory were almost all members of the Church of Jesus Christ of Latter-day Saints, commonly called Mormons. They