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# Intestate Succession in a Polygamous Society

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# INTESTATE SUCCESSION IN A POLYGAMOUS SOCIETY

*Barry Cushman\**

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## I. INTRODUCTION

THE pursuit of polygamous unions by Mormons in nineteenth-century Utah posed challenges for the law of the family unique in the annals of American legal history. The exotic familial relationships generated by plural marriages created novel and peculiar problems for the traditional law of intestacy. Mormon leaders, in an effort to avoid these

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problems, urged their polygamous brethren to make wills.<sup>1</sup> Many polygamists, however, either neglected to plan their estates or were actively opposed to doing so.<sup>2</sup> Mormon legislators accordingly sought to craft statutory schemes that would accommodate the peculiar inheritance needs of polygamous families. These statutes ultimately became a point of contention between the Utah assembly and Congress; between the Utah assembly and the Utah courts; and, not surprisingly, among the Mormons themselves.

This dispute between Congress and the Utah legislative assembly was ancillary to the larger dispute between those two bodies over polygamy in general. The federal government had never looked favorably on plural marriage. In 1862, Congress made polygamy a felony in the territories,<sup>3</sup> while the Justice Department initiated vigorous prosecution of offenders.<sup>4</sup> In 1882, Congress disfranchised and disqualified from public office all polygamists and their wives.<sup>5</sup> A congressional act of 1887 revoked the Mormon Church's corporate charter, confiscated much of the Church's property, and disfranchised all Utah women.<sup>6</sup> Additionally, Utah was repeatedly denied statehood status due to the Church's refusal to repudiate the doctrine of plural marriage.<sup>7</sup>

During Utah's territorial period, the great majority of its judges were federally appointed. Given the federal government's devotion to the eradication of polygamy, it is not surprising that many of the judges appointed to the Utah bench were hostile to plural marriage. This hostility was occasionally manifested in cases involving the estates of intestate polygamists.<sup>8</sup> Ironically, when Utah finally achieved statehood, the plural families of polygamist decedents fared no better under an elective state judiciary than they had under its territorial

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1. K. YOUNG, *ISN'T ONE WIFE ENOUGH?* 261, 266 (1954).

2. *Id.* at 261.

3. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501, 501.

4. E. FIRMAGE & R. MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, at 137-56, 167-97 (1988).

5. Act of March 22, 1882, ch. 47, § 8, 22 Stat. 30, 31-32.

6. Act of March 3, 1887, ch. 397, §§ 17, 20, 24 Stat. 635, 638-39.

7. See Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 328 (1964).

8. See, e.g., *In re Estate of Thomas Cope*, 7 Utah 63, 24 P. 677 (1890), *rev'd sub nom.* *Cope v. Cope*, 137 U.S. 682 (1891), discussed *infra* notes 183-222 and accompanying text; *Chapman v. Handley*, 7 Utah 49, 24 P. 829 (1890), *appeal dismissed*, 151 U.S. 443 (1894), discussed *infra* notes 159-82 and accompanying text. *Cf.* *Estate of Orson Pratt*, 7 Utah 278, 26 P. 576 (1891) (territorial court allowed polygamous children to inherit if acknowledged by decedent), discussed *infra* notes 223-26 and accompanying text.

predecessor.<sup>9</sup>

But the Utah courts would never have had occasion to hear these cases had they not been litigated among the Mormons themselves. By 1890, Mormon society had undergone transformations that had diminished the viability of the theocratic commonwealth and of polygamy as an institution. The history of the law of intestacy in Utah during this period serves as a small illustration of the demise of a way of life.

## II. THE DOCTRINE OF PLURAL MARRIAGE

The Church of Jesus Christ of Latter-day Saints records the beginning of the doctrine of plural marriage as July 12, 1843.<sup>10</sup> On that date, Joseph Smith is said to have disclosed the revelation of the doctrine of plural marriage to William Clayton in dictation.<sup>11</sup>

And again, as pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second . . . he is justified; he cannot commit adultery for they are given unto him . . . and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and are given unto him; therefore he is justified.<sup>12</sup>

In August of 1843, the revelation was read by Hyrum Smith to the Stake Presidency and the High Council at Nauvoo, Illinois.<sup>13</sup>

Joseph Smith, the founder and prophet of the Mormon Church, had actually become convinced of the righteousness of plural marriage as early as 1831;<sup>14</sup> the Church had been charged with polygamy as early as 1835.<sup>15</sup> According to at least one Mormon historian, Joseph Smith taught the doctrine to the Twelve Apostles in the summer of 1841, and urged its practice. Not all were anxious to comply, however, and Mormon leaders continued to deny the existence of plural marriage

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9. *E.g.*, *In re Handley's Estate*, 15 Utah 212, 49 P. 829 (1897), discussed *infra* notes 252-57 and accompanying text.

10. 1 O. WHITNEY, *HISTORY OF UTAH* 216 (1892); Linford, *supra* note 7, at 308.

11. 1 O. WHITNEY, *supra* note 10, at 216.

12. *DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 132:61-62 (1876).

13. 1 O. WHITNEY, *supra* note 10, at 216.

14. 2 B. ROBERTS, *A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 95-96 (1930); Linford, *supra* note 7, at 309.

15. 2 J. SMITH, *HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS PERIOD I*, at 247 (1904).

until well after they had settled around the Great Salt Lake.<sup>16</sup>

In January of 1850, the residents of Utah set up the Provisional Government of the State of Deseret. Among the ordinances of the Deseret General Assembly was Chapter XVII, section 3, which vested in the Church the power "to solemnize marriage compatible with the revelations of Jesus Christ."<sup>17</sup> On September 9, 1850, Congress passed the Organic Act of Utah, which established a territorial government for Utah.<sup>18</sup> On October 4, 1851, the territorial assembly passed a series of resolutions, the first of which made all Deseret laws not in conflict with the Organic Act legal.<sup>19</sup> Because section 6 of the Organic Act delegated legislative power over domestic relations to the territorial assembly,<sup>20</sup> the Church presumably retained power "to solemnize marriage compatible with the revelations of Jesus Christ."

In late August of 1852, the Church convened for a special conference at Salt Lake City.<sup>21</sup> On August 29, Orson Pratt delivered a sermon in which the revelation of plural marriage was disclosed to the Church membership at large.<sup>22</sup>

All of the pieces were now in place. Utah had its territorial status, and its legislature had the power to regulate marriage. The legislature had vested in the Church the power to solemnize marriage compatible with the revelations of Christ, and Christ had revealed to Smith the doctrine of plural marriage. For the time being, if not for the foreseeable future, polygamy was a legal form of matrimony in Utah.

### III. THE ECCLESIASTICAL COURTS

The practice of plural marriage gave rise to families of mammoth size and byzantine structure. Given the number of potentially competing interests in a polygamist decedent's estate, one might expect to find an abundance of estate litigation pitting family members against one another. It is therefore quite surprising to discover a distinct dearth of appellate cases involving the intestate estates of polygamists in the Utah reports. In fact, no such cases reached the territorial supreme court until 1890,<sup>23</sup> forty years after Utah was granted territorial status.

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16. 2 B. ROBERTS, *supra* note 14, at 101-03 & n.2; Linford, *supra* note 7, at 309 n.4.

17. Act of Feb. 8, 1850, ch. 17, § 3, 1855 Utah Laws 103-04.

18. Act of Sept. 9, 1850, § 1, 1855 Utah Laws 111.

19. Act of Oct. 4, 1851, 1855 Utah Laws 388.

20. *Id.* § 6, at 114.

21. Linford, *supra* note 7, at 309.

22. 1 O. WHITNEY, *supra* note 10, at 216.

23. *Chapman v. Handley*, 7 Utah 49, 24 P. 673 (1890), *appeal dismissed*, 151 U.S. 443

It is tempting to attribute this rather odd phenomenon to a pervasive use of wills. Though the drafting of an effective will would of course have tended to diminish the quantity of intestate litigation, this explanation encounters at least two difficulties. First, sixty percent of all contemporary Americans die intestate;<sup>24</sup> it seems unlikely that the nineteenth-century Mormons in the remote Territory of Utah were any more meticulous in their estate planning. Second, there is a corresponding lack of will-contest litigation among polygamous families for the same period. A more compelling explanation of this phenomenon may be found, however, in an examination of the peculiar manner in which members of the Mormon Church resolved internal disputes.

In keeping with the scriptural injunction, "Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?"<sup>25</sup> leaders of the Mormon Church actively discouraged its members from resolving disputes in civil courts. Members were instead required to settle differences through dispute resolution mechanisms created by the Church. The first duty of two Mormons embroiled in a dispute was to seek an amicable solution between themselves. If this effort bore no fruit, the disputants were next directed to request that local Church officers, called teachers, mediate. If this mediation failed to resolve the dispute, the disputants were then authorized to seek redress in the Church system of ecclesiastical courts.<sup>26</sup>

Joseph Smith formally organized the Mormon system of ecclesiastical courts in 1834 at Kirtland, Ohio.<sup>27</sup> The ecclesiastical system offered three levels of review. At the trial level was the bishop's court, which consisted of a panel composed of a bishop (the head of the local congregation) and his two assistants, called "counsellors." The first level of appellate review was the "stake high council." A "stake," referring to the image of a tent stake anchoring the home of Zion in Isaiah 33:20, was a collection of congregations, much like a Presbyterian synod. The stake high council had jurisdiction to review the decisions of all bishop's courts within its stake. The ultimate arbiter in the ecclesiastical system was the First Presidency, which consisted of the President of the Church and his assistants (usually two or more) sitting with

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(1894).

24. J. DUKEMINIER & S. JOHNSON, *WILLS, TRUSTS AND ESTATES* 76 (1984).

25. 1 *Corinthians* 6:1.

26. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 21-22; Note, *Resolution of Civil Disputes by Mormon Ecclesiastical Courts*, 1978 UTAH L. REV. 573.

27. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 28; Note, *supra* note 26, at 575-76.

the Council of the Twelve Apostles. At all stages in the litigation, the parties were encouraged to submit the dispute to a board of arbitration selected by the parties in conjunction with the court.<sup>28</sup>

The ecclesiastical system remained intact as the Mormons migrated from Ohio to Missouri; to Nauvoo, Illinois; to Iowa and Nebraska; and finally to the Salt Lake Valley.<sup>29</sup> In 1850, when Utah was granted territorial status, federal courts and territorial civil courts were established in the Territory. On September 21, 1854, Church President Brigham Young issued a letter making the use of ecclesiastical rather than civil courts official Mormon policy.<sup>30</sup> Young's letter berated the complexity of the common law, claiming it wasted time and money and supported corrupt judges and unscrupulous lawyers. Young touted the Church courts as more fair, less bound by outmoded precedents, and geared toward the promotion of reconciliation rather than factionalism.<sup>31</sup>

The Church's policy of resort to the ecclesiastical rather than the civil courts was not merely advisory—it was mandatory. The Church courts were to have "exclusive jurisdiction" over controversies between and among Church members.<sup>32</sup> Indeed, the penalties for suing a fellow Mormon in civil court were severe. Typically, the defendant in the civil action would bring charges in the Church courts against the civil action plaintiff for "unchristian-like conduct . . . in going before . . . the ungodly."<sup>33</sup> At this point, the Church court would order the plaintiff in the civil action to withdraw his suit and pay the court costs. If he refused, he would be excommunicated.<sup>34</sup>

The spiritual costs of excommunication were high;<sup>35</sup> the worldly toll could be great as well. "Loss of membership could lead to loss of

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28. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 29-36; Note, *supra* note 26, at 573-74.

29. See Note, *supra* note 26, at 576.

30. *Id.* at 575.

31. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 13-20, 271-74; Note, *supra* note 26, at 575.

32. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 21-22, 263-67.

Solidarity was so important to Young that he called in question the membership of any Mormon who sued a fellow member in civil court. In an official announcement, John Taylor, Young's successor, sanctioned Mormons' resort to civil courts only to bring actions against non-Mormons, or against those Mormons who had refused to obey the judgments of Church tribunals and had as a consequence been excommunicated from the Church.

Note, *supra* note 26, at 575.

33. Note, *supra* note 26, at 591 (quoting Minutes of the Salt Lake Stake High Council, May 8, 1877).

34. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 21-22, 287; Note, *supra* note 26, at 591.

35. See E. FIRMAGE & R. MANGRUM, *supra* note 4, at 288.

business, friendship, and even family ties, for the wayward soul. The threat of social ostracism must have loomed ominously for anyone who considered challenging priesthood authority or pervasive religious norms."<sup>36</sup> In the isolation of the desert of nineteenth-century Utah, excommunication was not a specter to be flirted with lightly.

Though Utah's local probate courts were dominated by Mormons until 1887,<sup>37</sup> the prohibition against resort to civil courts applied even to those courts presided over by Mormon judges.<sup>38</sup> One commentator suggests three reasons for this policy: First, Mormon judges in civil courts were bound by the same procedural and substantive law of the civil courts that Young had criticized in his 1854 letter. Second, all cases brought in civil court were appealable to the often hostile federal courts. Third, civil cases, unlike ecclesiastical cases, were matters of public record, and the consequent exposure of internal dissent injured the cause of Mormon solidarity.<sup>39</sup> Mormon civil judges consequently encouraged resolution of disputes outside the civil courts, but were nevertheless bound to hear the case should the parties insist.<sup>40</sup>

The ecclesiastical system was designed to preempt the civil law. Assuming that only Mormons contracted plural marriages, and that all intestate estates of polygamous decedents were settled in the ecclesiastical courts, one would expect to find nothing especially peculiar in the Utah probate code. However, it was foreseeable that a first wife and her children might seek to disinherit plural wives and their children by bringing an estate into civil court. In order to protect the faithful from those for whom excommunication was not sufficient persuasion to refrain from resort to the civil courts, the Mormon-dominated territorial legislature enacted its first probate code in 1852.<sup>41</sup>

#### IV. THE LEGAL FRAMEWORK

Given the potentially complex structure of polygamous families, one would expect any probate code designed to govern polygamist decedents' estates to be rather exotic. Indeed, one might expect to find two distinct probate codes in the Utah statutes: one for monogamous families, the other for polygamous families. Surprisingly, Utah's probate

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36. *Id.* at 23.

37. *Id.* at 24, 219.

38. Note, *supra* note 26, at 591.

39. *Id.*

40. *Id.*

41. Act of Mar. 3, 1852, ch. 12, 1855 Utah Laws 149-54.



codes during its territorial period read, for the most part, like any other probate code. Consider, for example, the 1852 probate code.<sup>42</sup> Section 9 appointed the wife as administrator should the will fail to appoint an executor;<sup>43</sup> section 14 spoke of the deceased leaving a "wife or family";<sup>44</sup> section 21 spoke of the maintenance of "a widow or minor children."<sup>45</sup> In short, the vast majority of the 1852 code seems to have been designed to govern the estates of monogamous decedents.

There were, however, two distinct legal problems posed by the polygamous family structure. First, at common law, the children of polygamous marriages were considered illegitimate, and the wives of polygamists were deemed mere concubines. Consequently, polygamous families were confronted with the failure of the common law and conventional statutory law to provide intestate rights for many of their family members. The second problem posed by the polygamous family structure was that of dower. At common law, dower was a wife's right to a life estate in one third of all real property of which her husband had been seised in fee simple or fee tail at any time during the marriage. The Mormon solution to each of these problems has its own history; accordingly, this Article will deal with them separately here.

#### A. *The Intestacy Statutes*

The Utah Territorial Legislature made its first attempts to provide polygamous wives and children with intestate inheritance rights in sections 24 and 25 of the 1852 probate code. Section 24 appears at first glance to be an ordinary homestead exemption statute:

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 said estate . . . .<sup>46</sup>

The rather muddled language at the end of the section, however, appears to be designed to govern the distribution of any remaining real or personal property among the heirs of either monogamist or polygamist decedents:

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42. *Id.*

43. *Id.* § 9, at 150.

44. *Id.* § 14, at 151.

45. *Id.* § 21, at 152.

46. *Id.* § 24, at 153.

[I]f there be other 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.<sup>47</sup>

The confusing language of the statute obscures its intended effect. In *Cain Heirs v. Young*,<sup>48</sup> a case involving the estate of a monogamist, the Utah Supreme Court interpreted the statute to require that the residuary estate of the intestate descend in equal shares to the children of the decedent, the widow taking the same share as would a child, with her share being evenly divided among the children upon her death or remarriage.<sup>49</sup> Section 24 was thus certainly understood to be the statute governing the distribution of monogamist decedents' estates; moreover, the language of the statute appears to contemplate the possibility that the decedent might be survived by more than one wife.

The scheme of distribution prescribed by section 24 was unusual for its time. Indeed, Georgia appears to have been the only other state with a comparable scheme.<sup>50</sup> In most other states, the widow received an enumerated fraction of the estate (usually one third), with the remainder being divided among the decedent's children.<sup>51</sup> One can easily see how the scheme erected by the Utah legislature would have been more attractive to a group of men concerned with the fate of a polygamist decedent's heirs. If each wife were to be given one third of the estate, two wives would dramatically curtail and three wives would extinguish the interests of the decedent's children in his estate. Moreover,

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47. *Id.* § 24, at 153 (emphasis added).

48. 1 Utah 361 (1876).

49. *Id.* at 370. This interpretation of the statute finds some support in the fact that the legislature in 1876 erected a similar scheme of distribution for property set aside for the support of a decedent's family pending the administration of the estate: "When property shall have been set apart for the use of the family in accordance with the provisions of this act, the same shall pass to such surviving family in equal shares: *Provided*, the portion inherited by the widow shall, upon her death, pass to the heirs of the deceased husband." Act approved Feb. 18, 1876, ch. III, § 117, 1876 Utah Comp. Laws 304.

50. A. BINGHAM, A TREATISE ON THE LAWS OF DESCENT 318 (1870); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 568-70 (O.W. Holmes Jr. 12th ed. 1873).

51. 2 J. KENT, *supra* note 50, at 568-70.

were a decedent to leave four or more wives, such a conventional scheme of intestate distribution would, by its own terms, no longer be susceptible of administration. By simply apportioning the estate equally among the surviving wives and children, the Utah legislature sought to avoid such an arithmetic embarrassment.

Because the Utah Supreme Court never had occasion to interpret section 24 in the context of a case involving the estate of a polygamist, we are left with little clarification of the legislature's actual intent and no indication of how the court might have construed the statute. Standing alone, however, section 24 provided little security for the intestate rights of plural wives and their children. First, there was the substantial probability that a court, due to the opacity of the statutory language, might simply not construe section 24 as a legislative accommodation to the estates of polygamists. Second, there lurked the possibility that a hostile gentile judge would declare polygamous marriages void as against public policy and therefore deny plural wives and their children any recovery under section 24. The legislature, however, had a solution to this problem, found in section 25: "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 children."<sup>52</sup>

Obviously, one need not have been a child of polygamy to be considered an illegitimate child, nor were all mothers of illegitimate children necessarily plural wives. Nevertheless, section 25 did manage to integrate plural wives and their children into the distributional scheme of section 24, irrespective of whether section 24 was understood by itself to apply to the estates of polygamists. Reading sections 24 and 25 synoptically, one simply divided the residuary estate into as many shares as there were wives and children, and distributed the shares accordingly.

Section 25, presumably a safety net for those polygamous wives and children denied relief under section 24, provided only for wives who bore children. This premium on childbearing reflected the purpose of plural marriage. According to Mormon doctrine, man has a preworldly existence as a spirit. Life on earth is a transitional stage during which man takes possession of a human body. Thus, it is incumbent upon the Mormon man to father as many children as he can in order to provide earthly bodies in which preworldly spirits may begin

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52. Act of Mar. 3, 1852, ch. 12, § 25, 1855 Utah Laws 149, 153.

their sojourn to the afterlife.<sup>53</sup>

Not surprisingly, a statute that allowed illegitimates to inherit from their intestate fathers whether acknowledged or not was something of a novelty in 1852. At common law, the bastard was *filius nullius* and could inherit from neither his mother nor his father.<sup>54</sup> By 1839, Vermont had enacted a statute that permitted illegitimates to inherit from their mothers.<sup>55</sup> Nine other states had similar laws at the time: Connecticut, Virginia, Ohio, Indiana, Missouri, Illinois, Tennessee, North Carolina, and Georgia.<sup>56</sup> By 1858, Wisconsin law provided that:

[e]very illegitimate child shall be considered an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock.<sup>57</sup>

In all other states, illegitimates were subject to the disqualifications of the common law.<sup>58</sup> In no state could the mothers of illegitimates inherit from the child's intestate father, nor did any state permit illegitimates to inherit without acknowledgement. Given this background, the 1852 Utah statute cannot reasonably be read merely as progressive legislation on the status of illegitimacy. Its design is clear: to protect polygamous wives and their children.

In 1862, Congress passed the Morrill Act.<sup>59</sup> Section 1 of the Act made bigamy a crime in Utah. Section 2 annulled the Deseret law that had made polygamy legal, as well as the territorial resolution by which it had been reenacted. Polygamous marriages thereby became illegal and void. Section 2 went on to disapprove and annul "all other acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield, or counte-

53. McGrath, *Chief Justice Waite and the "Twin Relic": Reynolds v. United States*, 18 VAND. L. REV. 507, 515 (1965).

54. T. REEVE, *THE LAW OF BARON AND FEMME* 403 (3d ed. 1862).

55. 1839 Vt. Rev. Stat., ch. 52, § 4, 291-92.

56. T. REEVE, *supra* note 54, at 404 n.1.

57. 1858 Wis. Rev. Stat., ch. 92, § 2, 554-55.

58. T. REEVE, *THE LAW OF BARON AND FEMME* 275 n.1 (2d ed. 1846).

59. Act of July 1, 1862, ch. 126, 12 Stat. 501.

nance polygamy.”<sup>60</sup> Nothing in the Act or its legislative history, however, suggests that Congress intended to annul either of the 1852 statutes. There are no reported cases challenging section 24 under the Morrill Act; section 25 was not to be challenged under the Morrill Act until twenty-eight years later.<sup>61</sup>

The 1876 Compiled Laws of Utah reprinted the 1852 probate code in full.<sup>62</sup> The 1876 legislature also sought to supplement, and to some extent supersede, the 1852 code. Like its predecessor, the 1876 code contained some curious provisions. Compare the following two consecutive sections dealing with the disposition of intestate estates:

Sec. 702. If the decedent at the time of the death, be a resident of this Territory, and the head of a family, the property, real and personal, then exempt from execution, shall pass to the surviving family in equal shares. . . .<sup>63</sup>

Sec. 703. If the decedent leave a husband or wife, and only one child, or the issue of only one child, the estate, except as provided above, passes one-third to the surviving husband or wife for life, the remainder and the other two-thirds to such child or the issue of such child by right of representation. If there be more than one child living, or one child and the issue of one or more deceased children living, the estate goes one-fourth to the surviving husband or wife for life, and the remainder, with the other three-fourths, to the surviving children and the issue of any deceased child by right of representation. If there be no child of the decedent living at the time of the death, and there be issue of any deceased child, the remainder goes to all the lineal descendants of the decedent . . . .<sup>64</sup>

Section 702 adopted the share-and-share-alike scheme of section 24 of the 1852 code, while section 703 adopted the enumerated-fraction scheme embraced by most other jurisdictions, in which heirs' shares of the decedent's property depended on their relationship to the decedent. The two schemes were patently inconsistent. Section 703 applied to estates only "except as provided above," i.e., except as provided in section

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60. *Id.* § 2, at 501.

61. *See Chapman v. Handley*, 7 Utah 49, 24 P. 673 (1890), *appeal dismissed*, 151 U.S. 443 (1894); *see also infra* notes 159-82 and accompanying text.

62. Act approved Mar. 3, 1852, tit. XIV, ch. I, §§ 653-84, 1876 Utah Comp. Laws 264-69.

63. Act approved Feb. 18, 1876, tit. XIV, ch. II, § 702, 1876 Utah Comp. Laws 273.

64. *Id.* § 703, at 273-74.

702, which governed the estates of all decedents who were residents of the Territory and "the head of a family." The term "the head of a family" was nowhere defined, but it is clear that the legislature envisioned two schemes of intestate distribution: one for ordinary husbands and wives, and one for "heads of families." Given the state of affairs in Utah at the time, it is not difficult to figure out who was meant by the term "the head of a family." The share-and-share-alike scheme of section 702, particularly suited to the numerical uncertainties of polygamy, was to apply to the estates of polygamist decedents; the more conventional enumerated-fraction scheme of section 703 was to apply to the estates of monogamists.

The 1876 legislature also revised the provision of the 1852 code governing the intestate rights of illegitimate children.<sup>65</sup> Section 714 of Chapter II provided: "Every illegitimate child is, in all cases, an heir to its mother. It is also an heir to its father when acknowledged by him."<sup>66</sup> Unlike its 1852 predecessor, the 1876 statute made no explicit provision for the mothers of illegitimate children. Section 732 of the 1876 supplement repealed as much of the 1852 probate code as was inconsistent with the provisions of the 1876 supplement.<sup>67</sup> Insofar as the intestate rights of illegitimate children were concerned, the 1876 statute was generally understood to have repealed section 25 of the 1852 probate code.<sup>68</sup> However, the portion of the 1852 statute granting intestate rights to the mothers of illegitimate children was consistent with the 1876 code, and it is possible that the legislature intended such women to continue to inherit under that provision of the 1852 code.

In enacting the 1876 statute, which, unlike its predecessor, required that an illegitimate child be acknowledged by his father before he could inherit, the territorial assembly apparently sought to make its illegitimacy statute look less like a sham established to protect polygamous families and more like the Wisconsin statute. How are we to explain this retreat from radical fringe to progressive vanguard? Justice Brown of the United States Supreme Court suggested that the statute was enacted due to the territorial assembly's concern that the Morrill Act had annulled the 1852 statute.<sup>69</sup> His explanation is less than com-

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65. *Id.* § 714, at 275.

66. *Id.*

67. *Id.* § 732, at 278.

68. *See, e.g., Cope v. Cope*, 137 U.S. 682, 687 (1891); Brief for Appellant at 2-3, *Cope v. Cope*, 137 U.S. 682 (1891).

69. *Cope*, 137 U.S. at 687.

elling. The Morrill Act had been passed fourteen years earlier, in 1862; the territorial assembly had taken no action in the interim. Moreover, the 1852 statute was not to be challenged under the Morrill Act until 1890.<sup>70</sup>

A more plausible explanation may be gleaned from a perusal of the Council and House Journals for the year 1876. In his message to the Territorial Assembly of January 11, 1876, Governor George W. Emery requested extensive revision of the 1852 probate code. Among the provisions that Governor Emery viewed as in need of reform was section 25. Regarding that section, the Governor argued: "Such a provision is simply a premium offered to fraud and perjury, and a great injustice to legitimate and recognized children of a deceased. Some writing or acknowledgement of equal certainty, by the putative father, should, in all cases, be required."<sup>71</sup> Even a casual examination of the differences between section 25 and section 30 suggests that the legislature, by enacting the 1876 statute, intended to address Governor Emery's concerns. Perhaps the legislature believed that such an acknowledgement requirement posed no substantial threat to the inheritance rights of polygamous children.

In 1882, Congress passed the Edmunds Act.<sup>72</sup> Though generally hard on polygamy, Congress was sympathetic to the plight of polygamous children. Section 7 provided:

That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases where such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, anno Domini eighteen hundred and eighty-three, are hereby legitimated.<sup>73</sup>

Passed March 22, 1882, the Edmunds Act generously provided a full nine-month grace period,<sup>74</sup> the average length of human gestation.

Congressional generosity, however, was short-lived. On December 13, 1882, Senator George Franklin Edmunds, a Republican from Ver-

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70. See *Chapman v. Handley*, 7 Utah 49, 24 P. 673 (1890), *appeal dismissed*, 151 U.S. 443 (1894).

71. Message to the Legislature from Governor George W. Emery, January 11, 1876, in *LEGISLATIVE JOURNALS OF UTAH* 32-33 (1876).

72. Act of March 22, 1882, ch. 47, 22 Stat. 30.

73. *Id.* § 7, 22 Stat. at 31.

74. See *id.*

mont, Chairman of the Judiciary Committee, and sponsor of the Edmunds Act, introduced a bill to amend his original Act.<sup>75</sup> As introduced, the bill made no mention of illegitimate children. The bill died in the Senate that winter,<sup>76</sup> but was reintroduced by Edmunds on December 4, 1883,<sup>77</sup> and was promptly referred to the Judiciary Committee. The Committee reported back in late January of 1884,<sup>78</sup> adding a new provision: "That hereafter no illegitimate child be entitled to inherit from his or her father, or to receive any distributive share in the paternal estate."<sup>79</sup>

Undoubtedly aware of these developments in the Congress, the Utah legislature was, by the spring of 1884, playing defense. On March 13, 1884, the Utah assembly revised its illegitimacy statute to read:

Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate.<sup>80</sup>

Though more prolix, the first part of the 1884 statute accomplished the same effect as the 1876 illegitimacy statute. However, by legitimating the issue of all void marriages, the assembly sought to exempt polygamous children from the disinheriting provision of the Edmunds bill. Oddly enough, the assembly added this provision as a safety net to a statute that they probably knew would be annulled. The assembly must have assumed that only so much of the statute as was inconsistent with the Edmunds bill would be annulled, and that the legitimating provision would stand. No court ever clearly ruled on the effect of the Edmunds-Tucker Act<sup>81</sup> (the version of the Edmunds bill ultimately enacted in 1887) on the 1884 statute; the only subsequent case dealing with the 1884 statute held that it did not effectively legitimate polyga-

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75. 14 CONG. REC. 240 (1882).

76. The bill was last heard from on February 24, 1883. See 14 CONG. REC. 3221 (1883).

77. 3 O. WHITNEY, *supra* note 10, at 551-52.

78. *Id.*

79. *Id.* at 552.

80. Act of March 13, 1884, ch. XLIV, tit. II, § 4, 1884 Utah Laws 75; Act of Mar. 13, 1884, pt. Sixth, ch. II, tit. II, § 2742, 1888 Utah Comp. Laws 124.

81. See *infra* notes 125, 135-44 and accompanying text.



mous children.<sup>82</sup>

The 1884 legislature also made some significant changes in Utah's general law of intestacy. Most importantly, the 1884 code contained no provision comparable to section 702 of the 1876 code. Indeed, the principle of share-and-share-alike had been completely excised from the scheme of intestacy; the code now adopted the enumerated-fraction scheme characteristic of monogamous jurisdictions.<sup>83</sup> The 1884 code contained no provision repealing the 1876 probate code, and it is possible that the legislature intended section 702 of the 1876 code to continue to govern the estates of polygamists, without occupying so prominent a place in the Territory's statutory law. However, it is equally plausible that the Utah assembly, in its effort to model its probate code after those of other jurisdictions, was now relying on wills, lifetime transfers, and informal estate settlements to secure the financial futures of plural widows.

The Edmunds bill was debated in the Senate in June 1884.<sup>84</sup> Though most of the debate focused on other provisions of the bill, Senator George Graham Vest, a Democrat from Missouri, called into question the provision disinheriting illegitimates.<sup>85</sup> Senator Vest argued that the disinheritance of innocent offspring was not only unchristian and inhumane, but economically unsound: "From what great source are our poor-houses, our jails, our penitentiaries recruited at will?" he queried. "What is the character of the population which fills the streets of our great cities at night? . . . These are the vagabond offspring of illicit love."<sup>86</sup>

Senator Vest noted that California, Maine, Minnesota, Dakota, Idaho, Nebraska, and Nevada all had statutes permitting illegitimates to inherit from the father when acknowledged by him.<sup>87</sup> Senator George Frisbie Hoar, a Republican from Massachusetts, retorted that

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82. *Rohwer v. District Court*, 41 Utah 279, 286-87, 125 P. 671, 674 (1912); see *infra* notes 267-71 and accompanying text.

83. Act of Mar. 13, 1884, ch. XLIV, tit. II, § 3, 1884 Utah Laws 73-75; Act of Mar. 12, 1884, tit. X, ch. LVI, ch. V, § 5, 1884 Utah Laws 407-08. Indeed, the share-and-share-alike principle embodied in the 1876 statute pertaining to property set aside for the support of the family pending the administration of the estate (Act approved Feb. 18, 1876, tit. XIV, ch. 3, § 849, 1876 Utah Comp. Laws 304) had likewise been replaced by a statute distributing such property according to an enumerated fraction scheme. Act approved Feb. 12, 1884, ch. LVI, tit. V, § 5, 1884 Utah Laws 407-08.

84. 15 CONG. REC. 5286-93 (1884).

85. *Id.* at 5291-93.

86. *Id.* at 5291-92.

87. *Id.* at 5292.

the father of an illegitimate child was not disabled from making a will.<sup>88</sup> Senator Vest moved to strike the provision and lost.<sup>89</sup> Senator John Rhoderick McPherson, a Republican from New Jersey, succeeded in having the provision amended so as not to apply to any child born before the passage of the Act.<sup>90</sup>

The bill was passed by the Senate on June 18, 1884,<sup>91</sup> but again died in the House. Senator Edmunds reintroduced his bill on December 8, 1885,<sup>92</sup> and the bill was debated again in January of 1886.<sup>93</sup> On January 8, 1886, Senator Joseph E. Brown, Democrat of Georgia, proposed that the provision disinheriting illegitimates be amended so as to provide a grace period for those children conceived but not yet born, citing the grace period allowed in the Edmunds Act as precedent.<sup>94</sup> At this point, Senator Edmunds uttered a series of English words, the collective meaning of which is, to say the least, elusive. When the baffled Brown pressed Edmunds to explain, the wily Senator again replied in oratory reminiscent of Edward Lear. Bemused, bothered, and bewildered, the mortally nonplussed Brown quickly took his seat.<sup>95</sup>

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88. 15 CONG. REC. 5292 (1884). Senator Hoar's remarks suggest that the bill's Republican sponsors did not intend to deprive polygamists of the capacity to provide for their children through testamentary means. For the contrary interpretation of the Edmunds-Tucker Act, see *Chapman v. Handley*, 7 Utah 49, 55-56, 24 P. 673, 675 (1890), *appeal dismissed*, 151 U.S. 443 (1894); K. YOUNG, *supra* note 1, at 262-63.

89. 15 CONG. REC. 5293-94 (1884).

90. *Id.* at 5294-95.

91. *Id.* at 5298.

92. 17 CONG. REC. 122 (1885).

93. *Id.* at 549-67.

94. *Id.* at 563.

95. *Id.* at 564. The colloquy reads as follows:

Mr. EDMUNDS: The act of 1882 finished up the whole of that subject; and this act so far as it is necessary at all after that act (as I doubt if it is, because we merely annul that Territorial act which I think the legal effect of the act of 1882 accomplished) is merely to put illegitimate children in that Territory on the same footing that illegitimate children are everywhere else, I believe, in every country. I do not think the provision in this act was necessary as affecting the status of any illegitimate child born since 1882, or born after the passage of this act and within nine months, but the point of this provision is to annul and get off the statute-book of that Territory that act which stands in opposition to the law of 1882 that we passed, so that my friend's observation really does not apply.

Mr. BROWN: If it was proper to allow the period of gestation in that statute is it not equally proper in this case?

Mr. EDMUNDS: No, because we wound up that business by an affirmative act then and there, and it is doing no injustice to the illegitimate children in Utah anymore than elsewhere, because in 1882 we made an end of the question, and this merely annuls their old act and makes an end of it.

Mr. BROWN: I will not press my amendment, because of course it will share the

The bill was passed by the Senate on January 8, 1886.<sup>96</sup> Sponsored by Representative William Randolph Tucker of Virginia, Chairman of the House Judiciary Committee, a considerably altered version of the bill was passed by the House on January 12, 1887.<sup>97</sup> A conference committee drafted a compromise that was passed by the House on February 17, 1887.<sup>98</sup>

On February 18, 1887, the bill was debated for the last time in the Senate.<sup>99</sup> The third and last congressman to speak out against the provision disinheriting illegitimates was Senator Wilkinson Call, a Democrat of Florida. Citing the scriptural directive, "Let little children come unto me,"<sup>100</sup> the Senator argued:

Sir, in my judgment it is a disgrace to civilization as it is a reproach to the religion of Christ, a barbarism condemned by every principle of humanity and justice, a cruelty without excuse or palliation. . . . [T]his law seeks to visit on their innocent heads disgrace and beggary, want and starvation, because their parents innocently, as they thought, and with the sanction of divine providence brought them into the world.<sup>101</sup>

Senator Call's upbraiding fell on deaf ears. The bill was passed by the Senate that same day.<sup>102</sup> The Act became law on March 3, 1887,<sup>103</sup> without the signature of President Cleveland, who had doubts as to the constitutionality of certain of its provisions.<sup>104</sup>

In its final form, section 11 of the Edmunds-Tucker Act provided:

That the laws enacted by the legislative assembly of the Territory of Utah which provide for or recognize the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of the father of any such illegitimate child are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father or to receive any distributive share in the estate of his or

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fate of all the others, but it seems to me there is necessity for it.

96. *Id.* at 565.

97. 18 CONG. REC. 596 (1887).

98. *Id.* at 1877-82.

99. *Id.* at 1896-1904.

100. *Matthew* 19:14.

101. 18 CONG. REC. 1901 (1887).

102. *Id.* at 1904.

103. *Id.* at 2667.

104. 3 O. WHITNEY, *supra* note 10, at 574.

her father: *Provided*, [t]hat this section shall not apply to any illegitimate child born within twelve months after the passage of this act, nor to any child made legitimate by [the Edmunds Act].<sup>105</sup>

In its exasperation with Mormon recalcitrance generally, Congress had finally clamped down on the inheritance rights of polygamous children. They were no longer the special objects of federal solicitude.

### B. *The Right of Dower*

The right of dower, though technically not a right of intestate succession, was nevertheless an integral component of the problem of succession upon death in nineteenth-century Utah. Accordingly, its history deserves at least brief mention here.

By virtue of the Organic Act of Utah of 1850, the common law was in effect in the Territory of Utah from its inception.<sup>106</sup> Dower, the common law right of a widow to a life estate in one third of all real property in which her husband had held a fee simple or fee tail at any time during their marriage, was accordingly secured to all Utah wives by the Organic Act. The women of Utah could be deprived of this right only by explicit legislative action.<sup>107</sup>

It is not clear when the Utah Territorial Assembly first recognized that the common-law right of dower was incompatible with the polygamous family structure. Nevertheless, dower did pose serious problems in the administration of polygamous decedents' estates. First, recall that a synoptic reading of the ordinances of the Deseret General Assembly and the Organic Act of 1850 leads one to conclude that polygamy was a legal form of marriage in Utah before 1862.<sup>108</sup> Accordingly, each wife of a polygamous decedent would have been vested with a right of dower. Were a decedent to have left two wives, the present interest of the decedent's children in the decedent's real property, whether acquired by will, intestate succession, or lifetime transfer, would have been sharply curtailed; if the decedent had left three wives,

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105. Act of March 3, 1887, ch. 397, § 11, 24 Stat. 635.

106. *People v. Green*, 1 Utah 11, 13 (1855 term).

107. *Hilton v. Thatcher*, 31 Utah 360, 365, 88 P. 20, 21 (1906) (citing 1888 Utah Comp. Laws, pt. First, § 18); *Hilton v. Stewart*, 31 Utah 255, 260-61, 87 P. 900, 903 (1906); *Norton v. Tufts*, 19 Utah 470, 475, 57 P. 409, 409-10 (1899) (citing Edmunds-Tucker Act of 1887 as providing only two methods by which dower could be waived or forfeited: waiver by the wife and divorce).

108. See *supra* notes 10-22 and accompanying text.

any such present interest would have been extinguished. Were the decedent to have left more than three wives, dower would, by its own terms, no longer have been administrable.

It is of course possible that a territorial judge would have adhered to the common-law view that polygamous marriages were void and, thus, that polygamous wives had no right of dower. In such a case, the scenario set forth above would have been avoided. However, precisely the same result might have been rendered had a less-than-fastidious frontier judge held polygamous marriages to be void, yet held at the same time that dower was a right of intestate succession. Recall that section 25 of the 1852 probate code accorded to the mothers of illegitimate children the intestate rights of the mothers of legitimate children, i.e., the intestate rights of lawful wives. If a judge were to have construed dower as an intestate right, then section 25 would have vested plural wives with that right. Such a construction would thus have rendered nearly the same results and the same problems as a construction recognizing plural marriages as valid.

Finally, because dower was a right that could be exercised to set aside the terms of a will or a lifetime transfer, it gave first wives substantial power over the financial futures of plural widows. Suppose, for example, that John had five wives. His first wife, Mary, was recognized by the common law as his legal wife. All of his other wives were polygamous, and, at common law, merely concubines. At the time John made his will, Mary owned outright the property on which she lived. Accordingly, John devised all of his real property in equal shares to his other four wives. Mary could, by exercising her right of dower, obtain a life estate in one third of the real property devised to the other four wives. Thus, a first wife hostile to the decedent's other wives could frustrate the husband's testamentary plan to provide for them by exercising her right of dower. Against this right the plural wives had no defense.

It has been suggested by at least one commentator that the Utah legislature intended, by enacting section 24 of the 1852 probate code, to abolish the right of dower in Utah.<sup>109</sup> Recall that section 24 provided in part: "[O]r 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 . . . ."<sup>110</sup> Nothing in the history of section 24 lends any insight into the intention of its framers. It

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109. Linford, *supra* note 7, at 324 n.79.

110. Act of March 3, 1852, ch. XII, § 24, 1855 Utah Laws 153.

is true that the statute admits of a construction that permits all wives of a polygamous decedent to share equally in the decedent's estate: were a decedent to leave more than three wives, it would be impossible for any of them to take a life estate in one third of the decedent's holdings in real property. Under such a construction, therefore, section 24 would by implication have abolished the right of dower under such circumstances. The statute is far from a model of perspicuity, however, and statutes in derogation of the common law (as section 24, under such a construction, most certainly would have been) were strictly construed by common law judges. While there were no reported cases that settled this issue, it is fair to assume that no judge of the period trained in the common law would have construed section 24 as having abolished the right of dower. The ambiguities of section 24 notwithstanding, it appears that the common-law right of dower was in effect in Utah in 1852.

It was not until 1872 that the territorial assembly offered any further clarification of the status of dower in Utah. Section 3 of "An Act Concerning the Property Rights of Married Persons" provided: "No right of dower shall exist or be allowed in this Territory."<sup>111</sup> Ironically, this legislation was enacted within six weeks of the territorial governor's call for enactment of a comprehensive marriage law. In his annual message to the territorial assembly of January 9, 1872, Governor George L. Woods had urged:

There are many rights incident to, and growing out of, the marriage relation, which make it absolutely necessary that there should be a plain, positive statute upon that subject. Such as the right of the wife to support, and to the protection of her person, including the protection of her children, her right to a separate estate, and to her individual earnings; *her right of dower in the estate of her deceased husband*—claims which are in harmony with the spirit of the age, and founded in equity and good judgment. I cannot urge you too strongly to speedily enact such a law upon marriage as will meet this great public want. By so doing you will render to the people of the Territory an invaluable service, in preventing interminable and vexatious litigation, which otherwise must inevitably come.<sup>112</sup>

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111. Act approved Feb. 16, 1872, ch. XVII, § 3, 1872 Utah Laws 27.

112. Message of Governor George L. Woods to the Utah Territorial Assembly, January 9,

Rather than securing the wife's right of dower by enacting a comprehensive marriage law, the territorial assembly responded to Governor Woods's exhortation by abolishing that right. Curiously, Governor Woods approved the 1872 statute without amendment the very day it was presented to him for review.

The popular interpretation of this legislative maneuver was expressed in an "Address" sent to "Mrs. Rutherford B. Hayes and the Women of the United States" by the Anti-Polygamy Society of Salt Lake City on November 7, 1878. The "Address" read in part: "Our legislature is composed almost entirely of polygamists and members of the Mormon priesthood. They have thrown around polygamy every possible legislative safeguard in their power, and the right of dower has been abolished to break down the distinction between the lawful wife and the concubine."<sup>113</sup>

The Anti-Polygamy Society's interpretation of the 1872 legislation is eminently plausible. Unfortunately, the legislative history provides little insight. There is no record of any dower dispute between polygamous wives in the Utah reports prior to 1872, nor is there any record in the Utah reports of the 1872 statute having been challenged. If the Anti-Polygamy Society was correct, it appears on the scant evidence available that the measure was precautionary rather than reactionary.

A rather intriguing analysis of the 1872 legislation was offered by the petition to Congress of Mrs. Angie F. Newman.<sup>114</sup> On June 8, 1886, Mrs. Newman petitioned Congress to repeal the act of the Utah legislature of February 12, 1870, which granted the elective franchise to the women of the Territory. In her petition, Mrs. Newman raged:

The same body of men who passed the act of 1870 legislated away the right of dower—an infamous scheme to give the husband the leverage of power over the first wife. If she refuses to give the husband a second, he in retaliation may will the property to the second, or the tenth, and the first wife be left penniless.

Oh! Boasted magnanimity of the Mormon hierarchy touching the civil status of women! "Oh! Liberty, what deeds are done in thy name!"<sup>115</sup>

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1872, *Journal of the Legislature of Utah*, 20th Session, 1872, 33-34 (emphasis supplied).

113. H.R. EXEC. DOC. NO. 58, 45th Cong., 3d Sess. 2 (1879).

114. WOMEN SUFFRAGE IN UTAH, S. MISC. DOC. NO. 122, 49th Cong., 1st Sess. (1886).

115. *Id.* at 5.

Though Mrs. Newman's argument contains an internal inconsistency, it would be unfair to dismiss her point. Certainly, were a wife to refuse her husband a second wife, the husband would have no second wife to whom to devise his property. However, with dower abolished, the wife was placed at the mercy of her husband's testamentary largesse. Were he to decide to devise all of his property to someone other than his wife, his wife would have no claim against his estate. While it appears plausible that the 1872 legislature may have been motivated in part by a desire to give the husband power to coerce his wife into consenting to a plural marriage, it would be foolish to accord that motivation disproportionate weight. It would be difficult to explain, under such an analysis, why the general goal of keeping wives in line had not set off a national movement to abolish dower. It must be assumed that the recognition of the inconsistency of the right of dower with the polygamous family structure played the pivotal role in the legislature's decision to enact the 1872 statute.

The 1880s witnessed a campaign to restore the right of dower to the women of Utah. The leaders of this campaign were Eli H. Murray, the new governor of the Territory, and the federally appointed Utah Commission.<sup>116</sup> In his first annual message to the territorial legislature in January of 1882, Governor Murray urged the legislature to see the error of its ways:

Sheer justice then demands the right of dower for wifhood. Unjust discrimination, unrest and untold suffering follow its denial. Every enlightened argument favors it. To grant the elective franchise and deny the right of dower is entirely inconsistent. It is denied in no state or Territory except where something better is given. The passage of an act that restores the right of dower to the wives of Utah will receive my cordial approval.<sup>117</sup>

Governor Murray reiterated this request in 1884,<sup>118</sup> and again in 1885.<sup>119</sup> Each time his request was met with legislative silence.

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116. The Edmunds Act, which disfranchised all polygamists and their wives, *see supra* notes 72-74 and accompanying text, created the Utah Commission to supervise elections in the Utah territory. *See* E. FIRMAGE & R. MANGRUM, *supra* note 4, at 231-37.

117. Message of Governor Eli H. Murray to the Utah Territorial Assembly, 1882 Utah Council Journal 32.

118. Message to the Legislature from Governor Eli H. Murray, January 14, 1884, 1884 Utah Council Journal 28-29.

119. Message to the Legislature from Governor Eli H. Murray, January 11, 1886, 1886 Utah



On September 16, 1883, Governor Murray issued his annual report to Congress. Distraught by political and social conditions in the Territory, Murray saw the need for sweeping reform. Accordingly, Murray urged that, if within the next legislative session the Utah legislature did not, among other things, "bestow the right of dower or its equivalent" upon the wives of Utah, "that Congress shall repeal that section of the organic act establishing such a body and assume control in the Government here."<sup>120</sup> Congressional action, however, was not as yet forthcoming.

In 1884, Governor Murray's voice was joined by that of the Utah Commission. In its report to Congress dated April 29, 1884, the Commission included the following: "In addition, we would also recommend the enactment of a law by Congress giving to the first (or legal) wife the right of dower as at common law, or other interest in the real estate of her husband as provided in the statutes of many of the states."<sup>121</sup> It is apparent from the wording of the Commission's recommendation that it viewed restoration of dower not as an act for the benefit of Utah women, but as an attack on polygamy. Apparently the Commission believed that, were the right of dower restored to the first wife, fewer Mormon women would be willing to enter plural marriages. While the restoration of dower might indeed have created some disincentive for women considering plural marriage, its effect would most likely have been marginal. The preponderance of current opinion indicates that Mormon women entered plural marriages more for reasons of the spirit than for those of the flesh.<sup>122</sup>

On June 10, 1886, the House Judiciary Committee reported back on the Edmunds-Tucker bill.<sup>123</sup> Section 22 of the proposed legislation restored the right of dower in the Territory of Utah. Stated the Committee's report:

This re-establishes the dower right of the widow secured to

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Council Journal 36.

120. ANNUAL REPORT OF THE GOVERNOR OF UTAH, H.R. EXEC. DOC. NO. 1, 48th Cong., 1st Sess. 636 (1883).

121. REPORT OF THE UTAH COMMISSION, APRIL 29, 1884, H.R. EXEC. DOC. NO. 153, 48th Cong., 1st Sess. 6 (1884). This recommendation was to be reiterated by the Commission the following year. REPORT OF THE UTAH COMMISSION, OCTOBER 28, 1885, H.R. EXEC. DOC. NO. 1, 49th Cong., 1st Sess. 889 (1885).

122. For a comprehensive study of the economics and psychology of polygamous marriages, see K. YOUNG, *supra* note 1.

123. For a discussion of the Edmunds-Tucker Bill, see *supra* notes 75-106 and accompanying text.

her in England by Magna Charta. Dower, which is inconsistent with plural marriages, was abolished by the Territorial legislature of Utah, and is now to be restored, as continuing the claim of the lawful wife upon her living husband, against his estate, when he dies.<sup>124</sup>

With the passage of the Edmunds-Tucker Act in 1887, the concerns of Governor Murray and the Utah Commission were finally addressed by congressional action. Section 18(a) of the Act provided: "A widow shall be endowed of third part of all the lands whereof her husband was seized [sic] of an estate of inheritance at any time during the marriage unless she shall have lawfully released her right thereto."<sup>125</sup> Curiously, this provision of the Act appears never to have been debated. The right of dower remained intact for the remainder of Utah's territorial period.

## V. THE DECLINE OF THE ECCLESIASTICAL COURTS

In 1890, cases dealing with polygamist decedents' estates began to appear in the Utah reports. Not coincidentally, the late 1880s and the 1890s saw the gradual demise of the Mormon system of ecclesiastical courts. At least two major factors contributed to the death of the ecclesiastical system: the draconian antipolygamy campaign of the federal government and the development of the American West.

Historian Leonard J. Arrington has characterized the Mormon economy of the mid-nineteenth century as "one which was relatively self-sufficient, relatively equalitarian, and relatively homogenous," a "tightly-reined independent theocratic commonwealth."<sup>126</sup> As another commentator has pointed out, however, "with the transcontinental railroad came an infusion of capitalism into Utah's cooperative economy, and a concomitant philosophy of individualism began to erode the ethics of mass cooperation and self-denial which underlay the vast work of Mormon colonization in the Great Basin."<sup>127</sup> Firmage and Mangrum have noted that "[a]s the impetus to establish a separate socioeconomic community waned toward the end of the nineteenth century, the necessity of maintaining a separate court system eroded."<sup>128</sup>

Mormon esprit de corps also suffered greatly at the hands of the

124. H.R. REP. No. 2735, 49th Cong., 1st Sess., pt. 1, at 9 (1886).

125. Edmunds-Tucker Act, ch. 397, 24 Stat. 635, 638 (1887).

126. L. ARRINGTON, GREAT BASIN KINGDOM 237, 244 (1958).

127. Note, *supra* note 26, at 534.

128. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 262.

federal government. Through the better part of the nineteenth century, the Mormons had responded to persecution by closing ranks. Convictions under the Morrill Act had been difficult to obtain: "key witnesses disappeared, plural wives refused to testify against their husbands, and sympathetic juries would not convict."<sup>129</sup> After the Morrill Act had been upheld by the United States Supreme Court in *Reynolds v. United States*,<sup>130</sup> Church President Wilford Woodruff had responded, "I will not desert my wives and my children and disobey the commandments of God for the sake of accommodating the public clamor of a nation steeped in sin and ripened for the damnation of hell. I would rather go to prison and to death."<sup>131</sup>

By the late 1880s, however, Mormon resistance had finally been worn down. The vigor of the federal government's efforts to prosecute polygamists had sent many of the Church's leaders fleeing to Canada or Mexico, or to prison. Without leadership, many of the Saints' experiments in social organization began to crumble.<sup>132</sup> The Edmunds Act had disqualified Mormons to sit as jurors at bigamy trials,<sup>133</sup> and had disfranchised and disqualified from public office all polygamists and their wives.<sup>134</sup> The Edmunds-Tucker Act had made adultery a crime,<sup>135</sup> greatly curtailed the jurisdiction of local probate courts;<sup>136</sup> caused all property held by the Church not for worship or burial purposes to escheat to the United States;<sup>137</sup> revoked the Church's corporate charter;<sup>138</sup> made probate judges Presidential appointees;<sup>139</sup> disfranchised all Utah women;<sup>140</sup> required anti-polygamy oaths to be taken by voters, grand jurors and petit jurors;<sup>141</sup> reestablished dower;<sup>142</sup> and disinherited all polygamous children.<sup>143</sup> By 1888, Utah's application for statehood

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129. McGrath, *supra* note 53, at 534.

130. 98 U.S. 145, 168 (1878).

131. McGrath, *supra* note 53, at 534 (quoting K. YOUNG, *ISN'T ONE WIFE ENOUGH?* 367 (1954)).

132. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 205.

133. Edmunds Act, ch. 47, § 5, 22 Stat. 31 (1882).

134. *Id.* § 8, 22 Stat. at 31-32.

135. Edmunds-Tucker Act, ch. 397, § 3, 24 Stat. 635, 635-36 (1887).

136. *Id.* § 12, 24 Stat. at 637.

137. *Id.* § 13, 24 Stat. at 637.

138. *Id.* § 17, 24 Stat. at 638.

139. *Id.* § 19, 24 Stat. at 639.

140. *Id.* § 20, 24 Stat. at 639.

141. *Id.* § 24, 24 Stat. at 639-40.

142. *Id.* § 18(a), 24 Stat. at 638.

143. *Id.* § 11, 24 Stat. at 637.

had been rejected six times.<sup>144</sup>

This massive federal assault finally caused the Mormons to begin making concessions. Article XV, section 12 of the 1887 proposed Utah Constitution contained a prohibition of polygamy.<sup>145</sup> Chapter VII of the 1892 Utah laws made polygamy a crime.<sup>146</sup> Article III, section 1 of what ultimately became the Constitution of the State of Utah also prohibited polygamy.<sup>147</sup> Perhaps the most telling of these conciliatory gestures was the renunciation of the doctrine of plural marriage by the Church itself. On September 24, 1890, President Wilford Woodruff issued what has come to be known as the Woodruff Manifesto: "I now publically declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land."<sup>148</sup> The Manifesto was accepted as authoritative and binding by unanimous vote of a General Conference of the Church convened at Salt Lake City on October 6, 1890.<sup>149</sup>

These contributions to the diminution of solidarity among the Mormon community were reflected in the practices of the ecclesiastical courts during the late 1880s and 1890s. Until the mid-1880s, professional advocates had been excluded from practice in the Church courts.<sup>150</sup> By 1886, however, attorneys made regular appearances in the Salt Lake City bishop's courts.<sup>151</sup> The members of the high councils considered these attorneys especially valuable in cases presenting complex issues of fact and law.<sup>152</sup>

[T]he recognition of a legitimate role for attorneys in the Church court system was an admission by the bishops and high councilors that their decisions should be legally accurate as well as roughly equitable. Their judgments began to be viewed as illegitimate if they did not conform to the legally-defined rights and obligations of the parties. As they tried to duplicate the results of civil court trials, both the necessity and legitimacy of the Church courts came into question. As

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144. The rejections occurred in 1851, 1856, 1862, 1872, 1882, and 1887. See Linford, *supra* note 7, at 328.

145. H.R. Misc. Doc. No. 104, 50th Cong., 1st Sess. 11 (1888).

146. Act of Feb. 4, 1892, ch. 7, § 1, 1892 Utah Laws 5-6.

147. UTAH CONST. art. III, § 1.

148. See 3 O. WHITNEY, *supra* note 10, at 745.

149. *Id.* at 744-46.

150. Note, *supra* note 26, at 592.

151. *Id.*

152. *Id.*

greater emphasis was laid on honoring the legal rights of individuals, as those rights were defined by civil government, the reasons for a separate Church court system began to fade. If the Mormons did not trust the Church courts to define their rights in accordance with equity and justice, it became less justifiable to excommunicate a defendant for an honest difference over the interpretation of secular law.<sup>153</sup>

Indeed, as the need to allay gentile concerns caused the Church to renounce polygamy and the political direction of its members in the 1890s, "the justification for church courts hearing secular matters wore thin. Thus by 1900 the exclusive jurisdiction rule was no longer emphasized."<sup>154</sup>

After 1880, Church courts no longer reviewed the acts of government officials.<sup>155</sup> This policy was affirmed by a letter from the First Presidency in 1889.<sup>156</sup> After 1893, the St. George High Council no longer heard civil disputes.<sup>157</sup> By 1903, a Church magazine had declared that "[a]ll disputes involving legal titles must be adjudicated by courts of competent jurisdiction. The point is this, *Church courts must not undertake to interfere with the legal rights of any member.*"<sup>158</sup>

By 1890, Mormon solidarity was breaking down, the ecclesiastical system was being phased out, and the Church had renounced plural marriage as a divinely ordained institution. It was time to play family feud.

## VI. THE CASES

### A. Chapman v. Handley

The first case on the issue of polygamous intestate succession to reach the territorial supreme court was *Chapman v. Handley*.<sup>159</sup> George Handley had died intestate in 1874, leaving two wives and eight children. By his lawful wife, Elizabeth Handley, he had fathered four children: John Handley, William Handley, Charles J. Handley, and Emma N. Handley. By his polygamous wife, Sarah Chapman, whom he had married according to the rites and tenets of the Church,

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153. *Id.* at 592-93.

154. E. FIRMAGE & R. MANGRUM, *supra* note 4, at 271.

155. Note, *supra* note 26, at 593.

156. *Id.*

157. *Id.* at 593-94.

158. See Note, *supra* note 26, at 594 (quoting 38 THE JUVENILE INSTRUCTOR 467 (1903)).

159. 7 Utah 49, 24 P. 673 (1890), *appeal dismissed*, 151 U.S. 443 (1894).

he had also fathered four children: Mary F. Handley, Ruth A. Newson, Benjamin T. Handley, and Harry F. Handley. Mary Handley died unmarried and intestate on September 28, 1879. Accordingly, when the other three children petitioned the probate court to share in George Handley's estate pursuant to section 25 of the 1852 probate code, Sarah Chapman claimed a share of the deceased's estate as Mary's successor in interest.<sup>160</sup> It is interesting to note that Sarah Chapman framed her claim as that of a successor in interest to an illegitimate child rather than as the mother of illegitimate children.<sup>161</sup> Recall that section 25 of the 1852 probate code provided not only for inheritance by illegitimate children, but also by their mothers. For reasons that will soon become apparent, this was a clever strategic move. In the end, however, for rather technical reasons, it failed to yield recovery.

When the probate court denied the petition, the petitioners appealed to the territorial district court. On May 3, 1890, the case was heard by the District Court for the Third Judicial District of Utah Territory, County of Salt Lake, Judge T.J. Anderson presiding. Judge Anderson denied the petition, holding that:

The court is of opinion and doth conclude as a matter of law that said petitioners are not, under the laws of the Territory of Utah and of the United States, entitled to any part of the estate of the said George Handley, deceased, and their petition is hereby dismissed with costs.<sup>162</sup>

Judge Anderson did not elaborate the rationale for his decision; it is not clear whether he believed that the Morrill Act had annulled Section 25. In any event, the petitioners appealed his decision to the Territorial Supreme Court on May 5, 1890.

The issue before the territorial supreme court was whether the Morrill Act of 1862 had annulled section 25 of the 1852 probate code. Section 2 of the Morrill Act had disapproved and annulled all "acts and parts of acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield, or countenance polygamy . . . ."<sup>163</sup> The respondents contended that the 1852 statute was such a law and had therefore been annulled by the

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160. *Id.* at 51, 24 P. at 674.

161. *Id.*

162. Record at 4, *Chapman v. Handley*, 151 U.S. 443 (1894) (No. 206).

163. Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501; see *supra* notes 59-61 and accompanying text for discussion of the Morrill Act.

Morrill Act.<sup>164</sup>

Justice Henry Parry Henderson, writing an opinion for the court in which Justice Charles Shuster Zane concurred, deemed the threshold issue to be the purpose of the 1852 statute. The Justice found that the statute was designed to "support, shield, maintain and countenance" polygamy.<sup>165</sup> He reasoned that the statute had been passed at a time when Utah had been inhabited almost exclusively by believers in plural marriage, and that the offspring of such marriages were illegitimate at common law.<sup>166</sup> Given this state of affairs at the time of the statute's passage, Justice Henderson concluded, the purpose of the statute was undoubtedly to protect plural wives and their children.<sup>167</sup> The Justice further argued that the 1852 illegitimacy statute would neither deter men from entering into plural marriage nor turn legal wives against plural marriage, for the strength of religious conviction would overcome these mundane pecuniary concerns.<sup>168</sup> Oddly enough, Justice Henderson did not consider plural wives to be blessed with the same degree of religious conviction: he saw the statute as being a direct response to their concern for their own and their children's financial security.<sup>169</sup>

The appellants contended that disinheriting the children of polygamous marriages was an unjust infliction of punishment upon an innocent class of persons.<sup>170</sup> Justice Henderson responded that Congress had been legislating against polygamy as an institution when it passed the Morrill Act, and that, while disinheriting illegitimates might be inequitable, it was nevertheless a potent factor in discouraging sexual irregularities.<sup>171</sup> Just as the common law recognized that the status of illegitimacy was instrumental in deterring fornication, so Congress, in enacting the Edmunds-Tucker Act, had recognized disinheritance of polygamous children as a weapon in the war against polygamy.

The final portion of Justice Henderson's opinion is somewhat hard to understand, largely because he confuses the provisions of the Edmunds Act and the Edmunds-Tucker Act. It appears that the appellants had argued that, had Congress intended in the Morrill Act to

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164. *Handley*, 7 Utah at 51, 24 P. at 674.

165. *Id.* at 55, 24 P. at 675.

166. *Id.* at 54, 24 P. at 675.

167. *Id.* at 55, 24 P. at 675.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 55-56, 24 P. at 675.

annul the 1852 statute, the portion of the Edmunds-Tucker Act disinheriting illegitimates would have been unnecessary. By enacting section 11 of the Edmunds-Tucker Act, appellants contended, Congress had implicitly recognized that illegitimates had, up to that point, been inheriting from their fathers.<sup>172</sup> Justice Henderson responded that the Edmunds-Tucker Act was necessary because the Edmunds Act had legitimated all children previously born of polygamous marriages.<sup>173</sup> Moreover, Justice Henderson continued, if illegitimates had been inheriting from their fathers according to the 1852 statute, then the section of the Edmunds Act legitimizing them would have been unnecessary.<sup>174</sup> The court thus concluded that the Morrill Act had annulled the 1852 statute, and affirmed the decision of the district court.<sup>175</sup>

Justice Henderson's opinion is flawed for a number of reasons, some of which are considered in Justice John Widener Blackburn's dissent, which will be discussed presently. However, at least two points not appearing in Justice Blackburn's dissent are worthy of mention.

First, Henderson's argument that the Edmunds-Tucker Act was necessary because the Edmunds Act legitimated previously born polygamous children defies logic. Though the Edmunds Act legitimized all children born before January 1, 1883, it did nothing to resuscitate the 1852 law nor to provide any inheritance rights for those born thereafter. If the Morrill Act had annulled the 1852 statute, then section 11 of the Edmunds-Tucker Act was indeed superfluous.

Second, Justice Henderson's reading of the legislative history of sanctions against polygamous children leaves something to be desired. There is no mention of the inheritance rights of polygamous children in the Morrill Act itself, nor was the subject discussed in the Act's legislative history. Indeed, there is no indication that Congress was even aware of the 1852 statute until January of 1884. Congress's first legislation with respect to polygamous children was, if anything, magnanimous: the Edmunds Act legitimized them. It was not until public clamor against polygamy had reached fever pitch and the draconian provisions of the Edmunds-Tucker Act had been proposed that Congress had manifested any intent to use children's rights as a bargaining chip.

Justice Blackburn's dissent offers more convincing reasoning. First,

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172. *Id.* at 56, 24 P. at 675.

173. *Id.*

174. *Id.*

175. *Id.* at 57, 24 P. at 675.



he argued, there was nothing in the Morrill Act regarding the rights of illegitimate children.<sup>176</sup> The 1852 statute had been before Congress when the Morrill Act was passed, and if Congress had intended to invalidate the statute it would have said so. Courts disfavor repealing laws by implication, the Justice noted, and the 1852 statute, on which title to a great deal of property was based, ought not to be repealed without weighty reasons.<sup>177</sup>

Justice Blackburn argued further that the 1852 statute did not establish, support, maintain, shield, or countenance polygamy, because allowing illegitimate children to inherit was not inconsistent with the severest punishment and overthrow of polygamy.<sup>178</sup> Blackburn also noted the lenience of the Edmunds Act with respect to illegitimate children and the twelve-month grace period provided by the Edmunds-Tucker Act.<sup>179</sup> Thus, he concluded, Congress did not manifest any intent to repeal the 1852 statute in the Morrill Act.<sup>180</sup>

Justice Blackburn conceded that the part of the 1852 statute that permitted the mother of illegitimate children to inherit as a lawful wife might indeed establish, support, maintain, shield, or countenance polygamy, in which case that portion of the statute might have been invalidated by the 1862 Morrill law.<sup>181</sup> He was quick to point out, however, that this issue was not before the court.<sup>182</sup> Thus it can be seen that Sarah Chapman's decision to claim as the heir of her daughter Mary rather than as the mother of illegitimate children was the correct strategic move. If she had claimed as a mother she would have run the risk not only of being denied her own claim, but of bringing a potentially invalid feature of the statute before the court and thereby threatening her children's recovery.

## B. *Cope v. Cope*

Justice Blackburn was to be vindicated by the United States Supreme Court in *Cope v. Cope*.<sup>183</sup> The *Cope* case had been a companion case to *Handley* under the name *In re Estate of Thomas Cope*.<sup>184</sup> In a

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176. *Id.* at 58, 24 P. at 676 (Blackburn, J., dissenting).

177. *Id.*

178. *Id.* at 60, 24 P. at 676.

179. *Id.* at 60-61, 24 P. at 676-77.

180. *Id.* at 61, 24 P. at 677.

181. *Id.* at 62, 24 P. at 677.

182. *Id.*

183. 137 U.S. 682 (1891).

184. 7 Utah 63, 24 P. 677 (1890).

one-paragraph opinion, Justice Henderson had announced for the court that *Cope* was decided in accord with *Handley*.<sup>185</sup> Justice Blackburn had dissented without opinion.

*Cope* had first been heard in the Probate Court for Salt Lake County by Judge John A. Marshall. The facts as stipulated were as follows: Thomas Cope died intestate August 22, 1864, leaving an estate valued at \$15,000. Cope left one son, Thomas H. Cope, by his lawful wife Janet Cope, and one son, George H. Cope, by his plural wife Margaret Cope. In the distribution of the estate, George H. Cope was excluded from the inheritance, and the whole estate decreed to Janet Cope and Thomas H. Cope. Margaret Cope was not a party to the action.<sup>186</sup>

On March 1, 1889, Judge Marshall rendered the decision of the court, which held "that George H. Cope aforesaid is the son . . . of the polygamous marriage of said Thomas Cope; that he is not an heir of said deceased, Thomas Cope, nor entitled to any share in the distribution of his estate."<sup>187</sup>

Judgment was entered accordingly. On April 25, 1889, George Cope appealed to the District Court for the Third Judicial District of Utah Territory, County of Salt Lake, where the case was heard by Judge T.J. Anderson. On January 22, 1890, Judge Anderson affirmed the holding of the Probate Court, holding:

And as conclusions of law the court finds—

1. That the sole heirs at law of said Thomas Cope, deceased, are Janet Cope and Thomas H. Cope and are alone entitled to share in the distribution of the estate of said Thomas Cope . . . .

2. That the said George H. Cope is not an heir of said Thomas Cope, deceased, and is not entitled to any share of said Thomas Cope's estate.<sup>188</sup>

Appeal was taken to the Utah Supreme Court on February 11, 1890. The affirming opinion of that court was handed down on January 19, 1891.

George Cope was represented in his appeal before the United States Supreme Court by J.G. Sutherland of the Salt Lake City firm of

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185. *Id.* at 63, 24 P. at 677.

186. Record at 1, 7-8, *Cope v. Cope*, 137 U.S. 682 (1891) (No. 1327).

187. *Id.* at 8.

188. *Id.* at 11.

Sutherland & Judd. In writing his brief, Mr. Sutherland took his cues largely from Justice Blackburn's *Handley* dissent. Appellant argued that the annulling clause in the Morrill Act was a repeal by implication, and therefore did not repeal any legislation "except to the extent of unavoidable repugnancy."<sup>189</sup> Because a law permitting illegitimate children to inherit from their intestate fathers could be carried into effect without impugning a law severely punishing polygamists, the Morrill Act did not operate to annul the 1852 statute. Appellant further argued that, because the 1852 law also offered relief to illegitimate children not born of polygamous unions, there was no ground for the assertion that the 1862 antipolygamy law was designed to invalidate the 1852 statute.<sup>190</sup>

Appellant next argued that constructions of statutes that would produce odious results were to be avoided if the plain meaning of the statute so permitted.<sup>191</sup> The respondents' construction of the Morrill Act, appellant argued, shocked the conscience:

In England, while her criminal law was at the acme of its brutality, a statute made one an accessory who gave meat and drink to a felon, but his wife and children were excepted out of it by construction. Now, in this humane and enlightened age, it is sought to involve children in the offense of the father by cutting off their meat and drink.<sup>192</sup>

Eloquent and emotive opprobrium ensued:

If the annulling clause repeals that statute, polygamous children are thereby degraded to the state of *bastards* at common law, to be without father or mother, brothers, sisters or collateral kindred—waifs—unrelated beings, thrust out upon life's great common by resentful fate to expiate sins which they never committed, while those who are bastards have heritable rights. A statute which works such injustice, by relegating those who are in no social sense bastards, to the obsolete *status* which the common law assigned to the children of sin, should express its malign purpose plainly . . . . Such a law would resuscitate a legal condition, purely artificial, that the sad lot of those in it may serve a retributive purpose in regard

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189. Brief for Appellant at 5, *Cope v. Cope*, 137 U.S. 682 (1891) (No. 1327).

190. *Id.* at 8-9.

191. *Id.* at 9-10.

192. *Id.* at 10.

to others. It would reduce innocent persons to a status which the moral sense of mankind has long since abolished, because it involves gross injustice . . . .<sup>193</sup>

Counsel for the appellant further argued that the 1852 statute countenanced polygamy no more than any other statute that recognized polygamous children as entitled to equal protection of the law:

A law allowing them to inherit countenances polygamy no more than the law which authorizes a will devising property to them or a law which holds another bound by his contract with them; or a law which permits them to share the benefits of schools supported by public funds.<sup>194</sup>

Thus, counsel argued, if the Morrill Act had annulled the 1852 statute, it had simultaneously annulled every other law that did not specifically exclude polygamous children from its protection.<sup>195</sup> To suppose that Congress intended by the Morrill Act a wholesale nullification of territorial law, counsel argued, would be "a disrespect to Congress."<sup>196</sup>

Appellant finally argued that, because the Edmunds Act and the Edmunds-Tucker Act expressly amended the Morrill Act, the three laws were *in pari materia* and should therefore be read together as one harmonious piece of legislation.<sup>197</sup> The 1852 statute was before Congress when it passed the Morrill Act, and Congress had neither referred to it nor expressly annulled it. In 1876, the Utah legislature had reenacted the 1852 statute in modified form. If Congress had intended the Morrill Act to annul the 1852 statute, it would have seen the 1876 statute as an act of impudence and annulled that statute "with the emphasis of a righteous indignation."<sup>198</sup> Instead, Congress had not only recognized the capacity of polygamous children to inherit, it had conferred the full status of legitimacy on them. If Congress had intended by the Morrill Act to disinherit all polygamous children, was it not odd that the generally harsher Edmunds Act, passed at a time when public outcry against polygamy was greater, had fully legitimized them? Moreover, counsel noted, the Edmunds-Tucker Act, which had expressly annulled all Utah statutes recognizing the capacity of illegiti-

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193. *Id.* at 10-11.

194. *Id.* at 14.

195. *Id.*

196. *Id.*

197. *Id.* at 15-16.

198. *Id.* at 21.

mates to inherit, had specifically excluded from its coverage all illegitimate children born within twelve months of its passage, as well as all children made legitimate by the Edmunds Act.<sup>199</sup>

The annulling of the laws of the territory here mentioned evinces no dissatisfaction with their operation in the past, nor any denial that they have operated in the past. The language of this section implies that those territorial laws have operated, and will operate, except as that section otherwise provides.<sup>200</sup>

Counsel concluded, therefore, that the Morrill Act had not annulled the 1852 statute, and the decision of the territorial supreme court merited reversal.<sup>201</sup>

Counsel for the respondent, Mr. R.N. Baskin, argued that "no system of civilized jurisprudence ever permitted"<sup>202</sup> an adulterine bastard to enjoy full inheritance rights, because "to permit it would be a heinous wrong, subversive of society and all good morals."<sup>203</sup> Because the 1852 statute was in derogation of the common law, a court should construe it narrowly, granting inheritance rights to illegitimates and their mothers only where there were no legitimate heirs. Because the decedent here had left legitimate heirs, Baskin contended, George Cope could claim no share in his father's estate.<sup>204</sup>

Counsel next examined the intent underlying the 1852 statute. Given the social conditions in Utah at the time of its passage, he argued, the plain purpose of the statute was to raise concubines and bastards to the same level as wives and legitimate children.<sup>205</sup> The statute encouraged and protected "the evil practices of adultery by offering a reward to the woman who sacrifices her virtue to the calls of alleged religion."<sup>206</sup> Counsel rhetorically inquired whether such a law was not void *ab initio* on principles of public policy, "as opposed to all decency and morality."<sup>207</sup>

Baskin next argued that even if the 1852 statute had been valid

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199. *Id.* at 19.

200. *Id.*

201. *Id.* at 21.

202. Brief for Respondents at 3, *Cope v. Cope*, 137 U.S. 682 (1891) (No. 1327).

203. *Id.* at 5.

204. *Id.* at 2-3.

205. *Id.* at 6-7.

206. *Id.* at 7.

207. *Id.* at 6.

when enacted, it had been annulled by the Morrill Act.<sup>208</sup> The Morrill Act had annulled all Utah laws that supported, maintained, shielded, or countenanced polygamy. The 1852 statute had been enacted for exactly that purpose and with precisely that effect. Responding to the appellant's contention that the Morrill Act could not have repealed the 1852 statute by implication, Baskin argued that the difference between a repeal and an annulment made the doctrine of repeal by implication inapposite. A repeal, Baskin contended, is an act by the same body which passed a law; an annulment is an act by a superior body, which cannot be presumed to have had all of the inferior body's legislation before it. The remainder of respondents' brief consisted in large part of a moral denunciation of polygamy, teeming with vintage nineteenth century overstatement.

The *Cope* case was submitted to the United States Supreme Court on December 22, 1890. On December 29, 1890, Justice Samuel F. Miller died. President Harrison quickly appointed Henry Billings Brown, United States District Judge for Eastern Michigan, to fill the vacancy. Confirmed without opposition in the Senate, Brown took his seat on January 5, 1891.<sup>209</sup> On January 19, 1891, the newly appointed Brown read the opinion of the Court determining the fate of George Cope and, potentially, of a generation of polygamous offspring.

In reversing the decision of the territorial supreme court, Justice Brown began by observing that the 1852 statute was in derogation of the common law and a novelty among inheritance statutes.<sup>210</sup> Nevertheless, he ruled, there was no reason to declare it invalid.<sup>211</sup> The Organic Act had delegated authority to promulgate legislation regarding succession to the territorial assembly. Picking up on appellant's somewhat disingenuous argument that the 1852 statute, "in its essential features, follows the lead of legislation which is general in this country, differing only in details,"<sup>212</sup> Justice Brown noted that many jurisdictions had statutes permitting illegitimates to inherit not only from their mothers, but from their fathers as well where the parents had subsequently married, or where there were no lawful children, or where the illegitimate child had been duly adopted or provided for by will: "And

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208. *Id.* at 7.

209. 2 L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 1555 (1969).

210. *Cope v. Cope*, 137 U.S. 682, 684 (1891).

211. *Id.*

212. Brief for Appellant at 10, *Cope* (No. 1327).

if the question of parentage be satisfactorily settled, there would seem to be power in the legislature to endow even the children of an adulterous intercourse with inheritable blood from the father."<sup>213</sup>

While he recognized that it was the duty of the Court to construe statutes to be consistent with good morals, here Justice Brown could find no legal principle that "would authorize us to pronounce a statute of this kind, which is plain and unambiguous on its face, void, by reason of its failure to conform to our own standard of social and moral obligations."<sup>214</sup>

Justice Brown conceded that the state of affairs then obtaining in Utah rendered the 1852 statute "much wider in its operation" than illegitimacy statutes in other states and territories.<sup>215</sup> The children, however, were not responsible for that state of affairs, and to punish them for their parents' sins, he contended, would have been unjust:

To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a *particeps criminis*.<sup>216</sup>

The Court also rejected the claim that the Morrill Act had annulled the 1852 statute.<sup>217</sup> The 1852 statute, the Court held, did not establish, maintain, support, shield, or countenance polygamy.<sup>218</sup> It did not treat polygamous offspring as legitimate; rather, it put all illegitimate children, "whether the fruits of polygamous or of ordinary adulterous or illicit intercourse, upon an equality and vest[ed] them with inheritable blood."<sup>219</sup> Legislation favorable to polygamous children did not necessarily shield or countenance polygamy. There was no inconsistency in protecting polygamous children while punishing polygamists. The Court rejected respondent's contention that courts should be more receptive to claims of annulment by implication than to claims of repeal by implication.<sup>220</sup> In order for the territorial statute to have been annulled by the Morrill Act, the former must have had a clear and

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213. *Cope*, 137 U.S. at 684-85.

214. *Id.* at 685.

215. *Id.*

216. *Id.*

217. *Id.* at 686.

218. *Id.*

219. *Id.*

220. *Id.*

direct tendency to establish and support polygamy. That, the Court held, was not the case here.

Justice Brown rounded out the opinion by reiterating the *in pari materia* analysis offered by the appellant in his brief.<sup>221</sup> Noting specifically the wholesale legitimation of polygamous children by the Edmunds Act and the twelve-month grace period afforded by the Edmunds-Tucker Act, the Court concluded:

The object of these enactments is entirely clear. Not only does Congress refrain from adding to the odium which popular opinion visits upon this innocent but unfortunate class of children, but it makes them the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a *locus penitentiae*, to discontinue their unlawful cohabitation.<sup>222</sup>

Accordingly, the decision of the territorial supreme court was reversed. There was no reported dissent.

#### C. Estate of Orson Pratt and the Subsequent Proceedings of Handley

Meanwhile, back in Utah, the territorial district court had heard *Estate of Orson Pratt*.<sup>223</sup> Orson Pratt had died intestate in 1881, leaving some legitimate children, many polygamous children, and a whopping estate.<sup>224</sup> The polygamous children's petition to share in the estate (no plural wife had joined in the petition) had been denied by the district court. On appeal, the territorial supreme court reversed, citing the United States Supreme Court's opinion in *Cope*.<sup>225</sup> In a per curiam opinion, the Utah court entered a decree "that all of the children acknowledged by [Pratt] as such in his life-time, or proved to be such by satisfactory evidence, shall share in the distribution of the estate."<sup>226</sup> The wording of the decree comports with the liberality of the 1852 statute. Because the Pratt estate's descent was cast in 1881, after the more conservative 1876 statute was enacted, it may be presumed that the territorial court did not read the 1876 statute as repealing the 1852 statute.

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221. Brief for Appellant at 15-19, *Cope* (No. 1327).

222. *Cope*, 137 U.S. at 689.

223. 7 Utah 278, 26 P. 576 (1891).

224. *Id.* at 278-79, 26 P. at 576.

225. *Id.*

226. *Id.* at 279, 26 P. at 577.



In 1894, the Handley clan aired its dirty linen before the United States Supreme Court.<sup>227</sup> On appeal, the respondents presented three main arguments. First, respondents contended that the claims of the appellant distributees were several and not joint. Because each individual share of the \$25,000 estate divided among eight heirs was less than the \$5,000 federal jurisdictional requirement, the Court did not have jurisdiction to hear the case.<sup>228</sup>

Second, respondents argued that the *Handley* case was distinguishable from *Cope*. Whereas the *Cope* marriage had taken place prior to the passage of the Morrill Act, the *Handley* marriage had taken place in 1866, in flagrant violation of the 1862 congressional legislation. In addition, where the *Cope* case had involved only innocent polygamous offspring, here the polygamous wife of the deceased and mother of these illegitimates was a party to the action, seeking to reap the fruits of her own criminality. A ruling for the appellants would therefore, unlike the *Cope* decision, shock the conscience and flout the will of Congress.

Finally, the respondents urged somewhat circumspectly that *Cope* be overturned.<sup>229</sup> For this section of the argument the respondents re-submitted the brief used before the Utah Supreme Court. Counsel argued first that the sole motivation of the legislature in enacting section 25 was to support and shield plural marriage.<sup>230</sup> Given the existence of polygamy and Mormon domination of the territorial assembly at the time of the legislation's passage, counsel argued, the purpose of the statute was beyond doubt.<sup>231</sup>

Counsel next argued that section 25 did in fact support, maintain, protect, shield, and countenance polygamy, and thus had been annulled by the Morrill Act.<sup>232</sup> In so arguing, counsel placed particular emphasis on that portion of the statute that permitted the mothers of illegitimates to inherit. As discussed previously, because Sarah Chapman was claiming not as a mother of illegitimate children but as an intestate distributee of the estate of her deceased daughter Mary, that portion of the statute was not technically before the Court.<sup>233</sup> Not surprisingly,

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227. *Chapman v. Handley*, 151 U.S. 443 (1894); see *supra* notes 159-82 and accompanying text for a discussion of the earlier proceedings of this case.

228. Brief for Appellant at 2-4, *Chapman v. Handley*, 151 U.S. 443 (1894).

229. *Id.* at 6-8.

230. *Id.* at 7.

231. *Id.* at 7-8.

232. *Id.* at 8.

233. See *supra* notes 181-82 and accompanying text.

counsel for the respondent sought to obscure this distinction and make the most of Sarah Chapman's joinder in the cause.

The legislation which we are now discussing was one of the most seductive arguments in favor of polygamy. If allowed to stand, the polygamous wife is not punished for her crime, or her part in the crime of her husband, but she is rewarded by being allowed to inherit the estate of her husband. Her children were not made illegitimate, but they were to stand upon the same plane, and viewed in the same favorable light as the legitimate children. Could any reasoning be brought to bear upon the mind of the doubtful female more ingenious, or more inclined to induce her to submit to the polygamous relation . . . . As an act of humanity, other legislatures may have sometimes enabled illegitimate children to inherit; but nowhere before can any statute be found which authorizes the co-partner in a crime, the illicit mistress to be rewarded for her crime, by being permitted to inherit equally with the lawful wife.<sup>234</sup>

Counsel finally argued that section 7 of the Edmunds Act, which had legitimated all polygamous children born before January 1, 1883, was an express congressional declaration that, until that date, polygamous children had had no inheritance rights.<sup>235</sup> Thus, counsel surmised, the 1882 Congress must have thought that the Morrill Act had annulled section 25.<sup>236</sup>

The appellants were again represented by Mr. J.G. Sutherland of Sutherland & Judd. Mr. Sutherland's brief was mercifully concise. As authority for the proposition that the appellants were entitled to share in the decedent's estate, he cited section 25 of the 1852 code.<sup>237</sup> As authority for the proposition that the Morrill Act had not annulled section 25, counsel cited the ruling of the United States Supreme Court in *Cope v. Cope*.<sup>238</sup> Finally, counsel argued that the claims of the appellants were joint rather than several, thereby conferring jurisdiction on the Court.<sup>239</sup>

Chief Justice Melville W. Fuller delivered the unanimous opinion

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234. Brief for Respondents at 11, *Handley* (No. 206).

235. *Id.* at 12.

236. *Id.* at 13.

237. Brief for Appellants at 2, *Chapman v. Handley*, 151 U.S. 443 (1894) (No. 206).

238. *Id.*

239. *Id.* at 2.

of the Court. In a brief, three-page opinion, the Chief Justice ruled that the claims of the appellants were several and not joint.<sup>240</sup> Because no one of the individual appellants' several claims satisfied the jurisdictional prerequisite of \$5,000, the Court dismissed the appeal for want of jurisdiction.<sup>241</sup> Consequently, the Court had occasion neither to reconsider *Cope* nor to distinguish it from *Handley* on other than jurisdictional grounds.

In 1894, Congress passed legislation enabling Utah to enter the Union as a state on the condition that the Utah Constitution contain a provision prohibiting polygamy.<sup>242</sup> This condition was met by Article III of the Utah Constitution, and, in 1896, Utah became a state.<sup>243</sup>

That same year, the Utah state legislature drafted its first probate code.<sup>244</sup> Section 1 of "An Act defining and providing for the right of Dower" reenacted section 18(a) of the Edwards-Tucker Act verbatim.<sup>245</sup> The common-law right of dower was abolished by section 2832 of the 1898 Utah laws.<sup>246</sup> In its place the Utah legislature enacted section 2826, which gave the wife, subject to some qualifications not important here, a fee simple in one third of all legal or equitable estates in real property possessed by the husband at any time during coverture.<sup>247</sup> Section 2826 remained in effect until 1977, when the Utah legislature adopted the Uniform Probate Code.<sup>248</sup>

The 1896 legislature also enacted three new provisions that seemed to secure the heretofore precarious inheritance rights of polygamous children. The 1896 code legitimated all children born of polygamous marriages before January 4, 1896.<sup>249</sup> It gave inheritable blood to

240. *Handley*, 151 U.S. at 446.

241. *Id.* at 446.

242. Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108.

243. Article III of the Utah State Constitution begins:

The following ordinance shall be irrevocable without the consent of the United States and the people of this State: . . . No inhabitants of this state shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

UTAH CONST. art. III. (1895).

244. UTAH REV. STAT. tit. 72 (1897).

245. *Id.*

246. *Id.* § 2832.

247. *Id.* § 2826.

248. UTAH CODE ANN. tit. 75, (1978).

249. Section 1 of "An Act to Legitimate the Issue of Bigamous and Polygamous Marriages, born on or prior to January 4th, 1896, and declaring their Heritable and other rights" (Section 2850) provided:

That the issue of bigamous and polygamous marriages, heretofore contracted between the

all polygamous children whose fathers had died between the enactments of the 1884 illegitimacy law and the Edmunds-Tucker Act, as well as to all polygamous children born during Utah's statehood.<sup>250</sup> Moreover, it granted new trials to all polygamous children who had been denied their inheritance rights in estates wherein the descent had been cast before the enactment of the Edmunds-Tucker Act.<sup>251</sup>

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members of the Church of Jesus Christ of Latter-Day Saints, born on or prior to the 4th day of January, A.D. 1896, are hereby legitimated; and such issue are entitled to inherit from both parents, and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock.

Act effective January 4, 1896, ch. LXXII, § 1, 1896 Utah Laws 527 (codified at 1907 Utah Comp. Laws § 2850).

250. Section 1 of "An Act relative to the Heritable Rights of the Issue of Polygamous Marriages" (Section 2848) provided:

That section 2742 of the Compiled Laws of the Territory of Utah [the 1884 illegitimacy statute] included when first enacted and effectually operated at all times thereafter and now operates to include the issue of bigamous and polygamous marriages, and entitles all such issue to inherit, as in said section provided, except such as are not included in the proviso of section 11 of the act of Congress called the "Edmunds-Tucker Act". . .

Act relative to the Heritable Rights of the Issue of Polygamous Marriages, ch. XLI, § 1, 1896 Utah Laws 317 (codified at 1907 Utah Comp. Laws § 2848).

251. Section 2 of "An Act relative to the Heritable Rights of the Issue of Polygamous Marriages" (Section 2849) provided:

That in all cases involving the rights of such issue to so inherit, heretofore determined adversely to such issue in any of the courts of the Territory of Utah, a motion for a new trial or rehearing shall be entertained, on application of such issue who was or were parties, at any time before the 10th day of March, 1897, and the case or cases in which said motion is so directed to be heard shall be deemed transferred to the court of the state of Utah corresponding to that of the territory of Utah in which such adverse decision was made, and the courts shall thereupon proceed to hear and determine such motion, and if granted, to proceed to hear and determine the case or cases without prejudice from the lapse of time since the former hearing or any prior determination of a like motion; *provided*, that this section shall not be construed to affect the rights of bona fide purchasers from any such parties before the approval of this title.

Act relative to the Heritable Rights of Polygamous Marriages, ch. XLI, § 2, 1896 Utah Laws 318 (codified at 1907 Utah Comp. Laws § 2849).

On approving sections 2848 and 2849 on March 9, 1896, Governor Heber M. Wells sent the following message to the legislature:

I understand that the purpose of this act is to reenact and make clear the laws already in operation, and that it entitles the issue of polygamous marriages born previous to March 3rd, 1888, to inherit or be entitled to any distributive share in the estate of the father of such issue. I believe that this legislation is proper and right and it appears to me, in view of the fact that conditions which called forth Congressional legislation on this subject are settled, and that the past has been condoned, that it would be in the interest of public policy and for the welfare of the state to remove whatever ban may exist against the issue of polygamous marriages, up to one year succeeding the date of the amnesty proclamation of the President; or what would be better in my judgment, up to the date of the admission of the State. I am convinced that such legislation would not only be in the interest of the State, but the children themselves affected thereby, would be better citi-

In 1897, the Handleys performed their swan song before the Utah Supreme Court.<sup>252</sup> The Handleys sought a rehearing and a decree in their favor under the new provisions of the 1896 code.<sup>253</sup> Writing for the court, Chief Justice Charles Shuster Zane denied the petition for rehearing and invalidated sections 2848 and 2849. Justice Zane first noted that the *Handley* case had been decided under the 1852 statute, not the 1884 statute (section 2833 of Compiled Laws of Utah 1907).<sup>254</sup> Even conceding that the rights of the parties should have been decided under the 1884 law, however, it was beyond the power of the legislature to enact section 2848. The decree sought to be set aside, noted Justice Zane, had become final six years before the enactment of section 2848.<sup>255</sup>

After the court has interpreted or construed a statute on the trial of a case, and rendered judgment, the legislature cannot affect it by a declaratory or explanatory law, giving the law under which the decree was rendered a different construction. To hold that the legislature can, would recognize the law-making department as a court of errors . . . Such a concentration of power would give to the class of officers possessing it absolute power and that would amount to despotism.<sup>256</sup>

Under the territorial law in effect when the decree was entered, the Handleys had had ten days after the verdict to move for a new trial, and twenty days after the verdict to move for a rehearing. After that time elapsed, those rights were lost, the decree became final, and the rights had vested in Handley's legitimate children. Sections 2848 and 2849, Justice Zane held, were an attempt to usurp judicial authority, an unconstitutional violation of the principle of separation of powers

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zens in the knowledge that they were entitled to all the legal rights and privileges of their fellows. Legislators will not forget that while the manifesto was final with the great majority of the people, it signaled the immediate surrender of what had for a lifetime, been held as a vital religious sacrament, and some hearts cannot change in a day.

Message to the Utah Senate from Governor Heber M. Wells, March 9, 1896, 1896 Utah Senate Journal 356-57.

252. *In re Handley's Estate*, 15 Utah 212, 49 P. 829 (1897).

253. Specifically, the Handleys sought review under sections 1 and 2 of chapter 41 of the 1896 laws of Utah (sections 2848 and 2849 of the 1907 Compiled Laws of Utah). *Handley*, 15 Utah at 217-18, 49 P. at 829-30.

254. *Id.* at 216-17, 49 P. at 830.

255. *Id.* at 220, 49 P. at 831.

256. *Id.* at 217, 49 P. at 830.

embodied in Article 5 of the Utah Constitution.<sup>257</sup> Thus, the Chief Justice penned the final chapter in the sordid *Handley* saga.

#### D. *Later Cases*

In 1905, the Utah Supreme Court heard *Raleigh v. Wells*.<sup>258</sup> The plaintiff, a plural wife, sought to quiet title to her deceased husband's homestead, where she had lived for forty-six years.<sup>259</sup> The decedent had died testate, and in his will had left the plaintiff an equitable share of his estate. The property in question had been devised to the Mormon Church with a life estate reserved for his daughter by another wife: Mrs. Caroline Wells, the defendant. The plaintiff sought to renounce her rights under the will and to appeal to the chancellor to award her the home.<sup>260</sup>

The opinion of the court was written by Chief Justice George Washington Bartch; Justices William Murdock McCarty and Daniel Newton Straup concurred. The court held, without appeal to statutory authority, that, by becoming a plural wife, the plaintiff had placed herself beyond both the aid of the law of inheritance and the conscience of the chancellor.<sup>261</sup> In the alternative, the plaintiff sought to exercise her right of dower. The court ruled, again without appeal to statutory authority, that, as a plural wife, the plaintiff had no right of dower to exercise.<sup>262</sup>

The Utah Supreme Court decided *In re Garr's Estate*<sup>263</sup> in 1906. John Garr, a bachelor, had died intestate in 1900, leaving as his only lineal descendants the children of his deceased illegitimate son.<sup>264</sup> The district court had ordered the estate distributed to Garr's collateral kindred, excluding his grandchildren. The supreme court opinion was again authored by Chief Justice Bartch, with Justices McCarty and Straup concurring. The court held the evidence sufficient to entitle Garr's illegitimate child to inherit Garr's estate under section 2833, as well as under section 10 of the 1898 Revised Statutes.<sup>265</sup> The latter statute provided:

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257. *Id.* at 218-19, 49 P. at 830-31.

258. 29 Utah 217, 81 P. 908 (1905).

259. *Id.* at 219, 81 P. at 909.

260. *Id.* at 219-20, 81 P. at 909.

261. *Id.* at 221, 81 P. at 910.

262. *Id.*

263. 31 Utah 57, 86 P. 757 (1906).

264. *Id.* at 59-60, 86 P. at 757-58.

265. *Id.* at 69-70, 86 P. at 761.

The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth.<sup>266</sup>

Though *Garr's Estate* did not itself involve the intestate rights of a polygamous child, the court's solicitous treatment of Garr's illegitimate progeny augured well for the inheritance rights of polygamous offspring.

In 1912, the Utah Supreme Court heard *Rohwer v. District Court*.<sup>267</sup> The facts of the case were these: Nephi P. Anderson had taken Maggie Rohwer as his plural wife. Joseph T. Anderson, the only child born of the marriage, had been born October 18, 1895. On March 15, 1898, Maggie Rohwer had conveyed certain real estate to Joseph T. Anderson, and, one week later, Maggie Rohwer had died. Joseph T. Anderson subsequently died intestate August 12, 1906.<sup>268</sup>

The central question in *Rohwer* was whether Nephi, Joseph's father by the plural marriage, could inherit the real estate from the intestate Joseph. In an opinion authored by Justice Joseph E. Frick and concurred in by Justices McCarty and Straup, the court held that, because Joseph had been born before January 4, 1896, section 2850 of the 1896 laws had legitimated him for all purposes.<sup>269</sup> The statute had effectively lifted from Joseph all of the common law's disabilities, including the inability to transfer property. In addition, the court noted, Nephi had publicly acknowledged Joseph and had cared for him in his own family as his son.<sup>270</sup> Accordingly, the court held, Nephi was entitled to inherit the real estate from his deceased child.<sup>271</sup>

The next year, in 1913, the Utah Supreme Court heard the last important reported case involving a polygamous decedent's estate.<sup>272</sup>

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266. UTAH REV. STAT. tit. 1, § 10 (1898).

267. 41 Utah 279, 125 P. 671 (1912).

268. *Id.* at 281-82, 125 P. at 672-73.

269. *Id.* at 292, 125 P. at 676.

270. *Id.* at 292, 125 P. at 675-76.

271. *Id.* at 292-93, 125 P. at 676.

272. *Mansfield v. Neff*, 43 Utah 259, 134 P. 1160 (1939). The final polygamist decedent's estate case to appear, *Beck v. Idaho-Utah Sugar Co.*, 59 Utah 314, 203 P. 647 (1921), raised no new issue of law. Bertha Beck, the plural wife of John Beck, sought to exercise her statutory dower right over real property that John had owned and conveyed during his marriage to Bertha. Under *Raleigh*, of course, Bertha had no such right to exercise. Accordingly, Bertha sought to

The facts of *Mansfield v. Neff* are ludicrously complex, and need not be recounted in full here.<sup>273</sup> Suffice it to say that John Haslam had had one daughter, who had entered into a polygamous union with one Matthew Mansfield. That union had begotten one child, John Mansfield. Haslam's daughter had predeceased him, and Haslam had failed to provide for John Mansfield in his will. John Mansfield sought to have the will set aside under section 2761 of the Compiled Laws of Utah of 1907, which provided:

When any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate . . . .<sup>274</sup>

Justice Frick, writing an opinion in which Justices McCarty and Straup concurred, held that the statute applied only to grandchildren born of lawful marriages.<sup>275</sup> Justice Frick reasoned that under the common law, which had been in force in the territory by virtue of the Organic Act at the time that John Mansfield had been born, John Mansfield was illegitimate because he was born of a plural marriage.<sup>276</sup> Illegitimate children, he held, did not "come within either the letter or the spirit of said section."<sup>277</sup> The appellant argued that he had been made legitimate by the Edmunds Act.<sup>278</sup> The court ruled, however, that the Edmunds Act had legitimated illegitimates "only as between themselves and their parents."<sup>279</sup> Only by section 2850 of the 1896 code had polygamous children been legitimated "for all purposes."<sup>280</sup> Because the descent in this case had been cast in 1882, while John Mansfield was still illegitimate, he had no claim under section 2761.

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prove that, after the death of John's lawful wife, he and Bertha had entered into a common-law marriage in Nevada, whereafter they had held themselves out as man and wife. The Utah Supreme Court held the evidence insufficient to sustain Bertha's claim of a common-law marriage, noting acidly that, when late in life John was reduced from great wealth to ill health and abject poverty, Bertha lost interest in John, allowing him to be cared for in the home of another of his wives.

273. See *Mansfield*, 43 Utah at 264-66, 124 P. at 1161-63.

274. 1907 Utah Comp. Laws § 2761.

275. *Mansfield*, 43 Utah at 269-71, 134 P. at 1163-64.

276. *Id.* at 269, 134 P. at 1163.

277. *Id.*

278. *Id.* at 269, 134 P. at 1163-64.

279. *Id.*

280. *Id.*



### E. *The Utah Justices*

The reluctance of the territorial courts to uphold the statutory rights of polygamous children is no great surprise. The territorial justices had been appointed to the bench by federal administrations with antipolygamy agendas, and were presumably selected in light of their views on plural marriage. The hostility of state court judges is considerably harder to explain. Because state court judges were elected, one would expect post-1896 judges to have been Mormons, sympathetic to the plight of polygamous children. Amazingly, quite the opposite was true. Of the six justices who sat for *Handley* (in 1897), *Raleigh* (in 1905), and *Mansfield* (in 1913), none was a Mormon. Indeed, each of these six judges was a member of the Republican Party,<sup>281</sup> devoted since 1856 to the eradication of polygamy, one of the "twin relics of barbarism."<sup>282</sup>

Charles Schuster Zane, who authored *Handley*, was born and raised in New Jersey. The son of Quaker parents, he was himself a lifelong agnostic. Zane did not arrive in Utah until 1884, when, at the age of fifty-three, he was appointed Chief Justice of the Utah Supreme Court by President Arthur. Zane was extraordinarily firm in his dealings with polygamy.

At first, his rigorous rulings and severe sentences as a *nisi prius* judge caused the Mormons to call his regime "a judicial reign of terror." But his enforcement of the laws of a Mormon legislature with equal rigor, courtesy and impartiality gradually compelled their respect, the more quickly, no doubt, because of the fact that his known agnosticism acquitted him of any charge of religious bias.<sup>283</sup>

When, in 1890, the Church renounced plural marriage, Zane

praised the character of the Mormons, attacked proposed legislation to disfranchise them, helped gain amnesty for those convicted and to secure the return of Church property forfeited under the Edmunds-Tucker Law. It was not remarkable that, when Utah was admitted to the Union, Mormon joined

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281. Julien, *The Utah State Supreme Court and Its Justices, 1896-1976*, 44 UTAH HIST. Q. 267, 279-80 (1976).

282. D. JOHNSON & K. PORTER, NATIONAL PARTY PLATFORMS, 1840-1972, at 27 (5th ed. 1973).

283. 20 DICTIONARY OF AMERICAN BIOGRAPHY 643-44 (1936).

Gentile to elect him first chief justice of the state.<sup>284</sup>

James Alvin Miner, who concurred in *Handley*, was born in Marshall, Michigan, and was a lifelong member of the Episcopal Church. Formerly a prosecuting attorney in Michigan, Miner did not arrive in Utah until 1890, at the age of forty-eight. He was appointed to the Utah Supreme Court by Benjamin Harrison in 1891. Like Zane, Miner was elected to the court when Utah became a state in 1896.<sup>285</sup>

George Washington Bartch, who authored *Garr* and *Raleigh*, was likewise not a Mormon. The son of an Evangelical clergyman, Bartch was born and raised in Pennsylvania. He did not arrive in Utah until 1888, at the age of thirty-nine. President Arthur appointed Bartch to the Probate Court for Salt Lake County in 1889. Bartch served as probate judge until 1893, when he was appointed to the Utah Supreme Court. He was elected to the state supreme court in 1896, where he sat until 1906. A Presbyterian by faith, he attended the First Church of Salt Lake City for nearly forty years.<sup>286</sup>

William Murdock McCarty, who concurred in *Garr*, *Raleigh*, *Rohwer* and *Mansfield*, is the only one of these six judges born and raised in Utah. Born to Mormon parents, McCarty apparently rejected his inherited faith, attending instead the local Presbyterian church. McCarty was nevertheless elected to the court in 1902, where he served until his death in 1919.<sup>287</sup>

Daniel Newton Straup, who also concurred in *Garr*, *Raleigh*, *Rohwer* and *Mansfield*, was born in South Bend, Indiana. Straup moved to Salt Lake City in 1890, at the age of twenty-eight. He was elected to the court in 1905. A Unitarian by faith, Straup regularly attended the First Unitarian Church of Salt Lake City.<sup>288</sup>

Joseph E. Frick, author of *Rohwer* and *Mansfield*, was born in Tiffin, Ohio, and raised in Iowa—both areas where the Mormons had met with animosity on the road to Salt Lake. Frick arrived in Salt Lake City in 1897, at the age of forty-nine. He was elected to the court in 1906, where he sat until 1918. Frick does not appear to have been affiliated with any particular religious denomination, though his funeral

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284. *Id.*

285. 13 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 477 (1967) [hereinafter NATIONAL CYCLOPEDIA]; Julien, *supra* note 281, at 284-85.

286. 20 NATIONAL CYCLOPEDIA, *supra* note 285, at 199.

287. 19 NATIONAL CYCLOPEDIA, *supra* note 285, at 301; Julien, *supra* note 281, at 284-85.

288. 33 NATIONAL CYCLOPEDIA, *supra* note 285, at 427-28.

was conducted by a Congregationalist minister.<sup>289</sup>

Thus, none of the judges deciding cases adverse to polygamous family inheritance rights was a member of the Mormon Church. Indeed, only one of these judges was even a native of Utah. Moreover, Zane, Miner and Bartch, all appointed to the territorial bench by anti-polygamy administrations, were subsequently elected to the bench by the people of Utah upon that state's admission to the Union. The political success of these gentile judges is indeed a marvel, and might be the subject of another essay.<sup>290</sup> It may be that once the Church and the legislature had renounced polygamy, the threat posed by a gentile judge was greatly diminished in Mormon eyes.

The scant biographical information available on these state court judges nevertheless goes far in explaining the results reached in these post-1896 decisions. *Handley*, decided entirely by former territorial judges and based on sound constitutional principles, is no great surprise.<sup>291</sup> Nor does *Raleigh* pose substantial explanatory problems.<sup>292</sup> While the 1896 legislature had shown great generosity toward polygamous children, it had granted no statutory relief for plural wives. Indeed, the 1896 legislature had by statute established the common-law right of dower in Utah. Justice Bartch, a former territorial judge, would have had little difficulty distinguishing his decision in *Raleigh* from his opinion in *Garr*. *Garr* involved an illegitimate child born of the union of two unmarried people and acknowledged by his father.<sup>293</sup> The legislature had clearly provided inheritance rights for such a child under section 2833. *Raleigh*, on the other hand, involved the claim of an adult woman who had knowingly entered into a polygamous union in violation of the laws of the United States. For such a woman the legislature had provided no relief. The Republican, Presbyterian son of an Evangelical minister was not to second-guess the wisdom of the legislature on that point.

*Rohwer* and *Mansfield*, both decided by panels of Frick, McCarty and Straup, appear flatly inconsistent in their policies toward polygamous children. The *Rohwer* court was certainly correct in its reading of section 2850.<sup>294</sup> However, there is nothing in the language or legislative

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289. 22 NATIONAL CYCLOPEDIA, *supra* note 285, at 250; Julien, *supra* note 281, at 284-85.

290. For a tentative, not altogether convincing hypothesis, see Julien, *supra* note 281, at 276.

291. See *supra* notes 252-57 and accompanying text.

292. See *supra* notes 258-60 and accompanying text.

293. See *supra* notes 263-65 and accompanying text.

294. See *supra* notes 267-71 and accompanying text.

history of the Edmunds Act to support *Mansfield's* contention that section 7 legitimated polygamous children only as between themselves and their parents.<sup>295</sup> If the *Mansfield* court felt free to play fast and loose with legislative intent, why did not the same panel feel so free in *Rohwer*? The answer, it appears, may lie less in any notion of a hidden political agenda than in the vicissitudes of judicial gastronomy.

## VII. CONCLUSION

The practice of plural marriage in nineteenth-century Utah created exotic family structures with which the traditional law of intestacy was not prepared to deal. In order to protect the interests of plural wives and their children, the Utah legislative assembly enacted a series of statutes designed to accommodate the peculiar inheritance needs of a polygamous society. In the battle against polygamy, the federal government was initially sympathetic to the plight of polygamous children, if not to that of their mothers. In 1887's fit of exasperation, however, Congress took no prisoners.

By 1890, the development of the West and the draconian anti-polygamy campaign of the federal government had wreaked havoc on the previously unbreachable Mormon solidarity. The Church renounced plural marriage, and the ecclesiastical system waned in importance. Polygamist decedents' estates cases began to appear in the Utah Reports. As the Handley saga eloquently testifies, the Utah territorial and state courts were almost uniformly hostile. As late as 1913, the Utah courts were finding creative, if implausible, ways to disinherit polygamous children.

The paucity of reported cases on polygamous decedents' estates suggests that the novel inheritance statutes of nineteenth century Utah played mostly a secondary, contextual role in structuring the transmission of wealth upon death. Many polygamists provided for their families through wills or lifetime transfers,<sup>296</sup> while the families of intestate polygamists often arrived at informal, consensual divisions of the estate.<sup>297</sup> The ecclesiastical courts held powerful sway until the 1890s, and even thereafter the pressure to share the wealth with polygamous wives and their children remained considerable.<sup>298</sup> In characteristic

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295. See *supra* notes 273-80 and accompanying text.

296. K. YOUNG, *supra* note 1, at 264-65.

297. *Id.* at 267-70.

298. *Id.* at 271-72.

fashion, the Mormons had managed to take care of their own without the aid of the ungodly.