EXPECTATION WITHOUT RIGHT: TESTAMENTARY FREEDOM AND THE POSITION OF WOMEN IN 19TH CENTURY NEW SOUTH WALES

ROSALIND F. ATHERTON*

> Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty, and the domestic affections, afford a surer pledge among the virtuous than positive institutions.
>
> J.J. Park, *A treatise on the Law of Dower* (1819) 3.

Under this banner testamentary freedom, the unlimited right to leave property by will, had become the general rule in England well before the beginning of the nineteenth century. The general rule, that is, for men. As powers of testation depended on individual ownership and the position of married women in respect to such ownership was totally circumscribed by the effect of their marriage, testamentary freedom from the perspective of a married woman meant something completely different. This article considers testamentary freedom in nineteenth century New South Wales from her perspective.

A study of testamentary freedom in the nineteenth century reveals two strong and closely intertwined philosophical and legal standpoints: the principle of the liberty of property on the one hand and, on the other, the restricted position of married women. Testamentary freedom was valued as a "principle of liberty" and as a power of "peculiar propriety".[1] It was a goal won by the gradual stripping away of the medieval restraints on a man's

* B.A. (Hons.), LL.B (Syd.), Lecturer in Law University New South Wales; Barrister at Law of the Supreme Court of New South Wales.

1 W. Blackstone, *Commentaries on the Laws of England* (1765-69) Vol. 1, 437-8.

testamentary powers and the freedom of testation thus provided was confirmed as the rule in section 3 of the Wills Act 1837 (U.K.) which was adopted in New South Wales in 1839 by 3 Vic No. 5.

Behind the gradual widening of a man's testamentary powers was a belief that such liberty would achieve a better balance among family members and others than could be achieved through fixed rules of law, such as the law of descent of realty to the heir and by the old scheme of 'reasonable parts', which had preserved fixed proportions of a man's goods and chattels to his widow and children. Testamentary freedom thus crystallised eighteenth century liberal thinking in relation to property. An individual was to have utmost freedom in relation to that property as a means of self-fulfilment. The value of that freedom is seen in one of the classic statements on testamentary capacity, the judgment of Cockburn C.J. in *Banks* v. *Goodfellow* in 1870:[2]

> The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given . . . The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.[3]

Speaking in 1870, the words of the Chief Justice are a natural summary of the liberal intellectual tradition of John Locke and William Blackstone over a hundred years earlier. The freedom accorded an owner of property in respect to testamentary dispositions was equated with 'civilisation' and, by parity of reasoning, the rules which such testamentary freedom displaced were an expression of a society which lacked 'civilisation'.

The articulation of this freedom of property rights was however largely gender-biased. Although single women were considered as having the same capacity as men, a married woman had no real testamentary freedom at all, her legal position totally circumscribed by the submergence of her legal personality during her marriage, a position which continued until the passage of the Married Women Property Acts of the late nineteenth century.[4] In

2 (1870) 5 LR QB 549.
3 *Id.*, 563-564.
4 The key Act for New South Wales was the Married Women's Property Act 1879, 42 Vic No. 11.

respect to real estate she was denied a testamentary power at all;[5] and as any personal property became her husband's, it was he therefore who had the power to dispose of it during his lifetime or by his will. From the general rule of absolute vesting of personal property in her husband was derived the denial to a married woman of testamentary capacity in respect to it. Her claim was only as a legatee under his will and to her 'paraphernalia', that is her personal clothes and ornaments. It was said that a married woman was permitted to make a will with her husband's consent. As her personal property vested in him absolutely his consent was essential but it only operated in regard to the particular will and could be revoked by him until probate had been granted and therefore even after the death of the testatrix.[6] Further, if the husband predeceased his wife the will was thereby avoided.[7] The 'will' of a married woman was a very different will to that of her husband. Blackstone commented that it was not really a will at all.[8] It acted rather as a waiver of the husband's interest in his wife's property.

The only power of testation the married woman had was in respect of her 'separate estate' in equity.[9] This depended on a settlement or trust in her favour and usually only provided her 'pinmoney' and her 'jointure' during her lifetime. The Court of Chancery protected the wife's interest under a settlement by treating her as if she were not married, which included recognising both a power of disposition and testation in respect to her separate estate.[10] As the essential provision for a wife under such settlements was an income during her lifetime, a power of testation did not amount to much. Moreover, as the recognition of any separate estate was the province of equity and enforceable only through the costly and complex litigation of Chancery Courts,[11] separate estate was accordingly only the province of the

5 Act for the Explanation of the Statute of Wills 1542, 34 H.VIII c.5. During marriage the husband had complete control of all his wife's freehold interests, which extended to an interest for his life, called 'curtesy', if there had been a child born of the marriage who was capable of inheriting. The husband however could not affect the inheritance of the land. A women's realty remained the property of herself and her heirs after her husband's death, although during the marriage she could not make a will in respect of it, having been expressly denied that right in the 1542 Act. The inheritance of it was thus not defined by her, but by the rules of intestate succession to land and subject to the widower's right of curtesy.

6 H. Swinburne, *A Brief Treatise of Testaments and Last Wills* (1590) 48.

7 J.E. Bright, *A Treatise on the Law of Husband and Wife, as Respects Property* (1849), Vol. II, 66.

8 Note 1 *supra*, Vol. 2, 498.

9 *Id.*, 498. The wife's interest under a settlement providing her with 'separate estate' comprised two elements: her 'pinmoney' and her 'jointure'. The former was an annual income for her personal expenses during her husband's life, while the latter was her provision after his death.

10 *Ibid.* For example: *Oxenden* v. *Oxenden* (1705) 2 Vern. 493; *Dubois* v. *Hole* (1705) 2 Vern. 613; *Peacock* v. *Monk* (1750) 2 Ves. Sen. 190; *Slanning* v. *Style* (1734) 3 P. Wms. 334.

11 John Mackinolty cites an example from *Daniells Practice Book* in which it took 35 pages just to describe the special rules applicable to the starting of such actions by married women: *In Pursuit of Justice: Australian Women and the Law 1788-1979*, J. Mackinolty & H. Radi (eds) (1979), 71, footnote 14.

affluent. For the less affluent, whose wealth consisted mostly in personalty, the framework of the separate estate was irrelevant.

Testamentary freedom therefore, was a concept of little application to a wife. The testamentary freedom of her husband, however, affected her greatly. Hence this article focuses on her position in respect to the testamentary freedom of her husband through a study of two particular areas: the rules in relation to testamentary capacity and the moves to abolish dower.

I. TESTAMENTARY CAPACITY

Where testamentary freedom is unlimited by a scheme of fixed shares for family members and not qualified by legislation like the Testator's Family Maintenance Acts of the twentieth century, the real measure of it is seen in cases on testamentary capacity, in defining the threshold of responsibility required for its exercise.

Testamentary capacity required a 'sound disposing mind', which was defined by case law and involved essentially two elements, a comprehension of the extent of the property which the person had at their disposal and an appreciation of the claims upon their "regard and bounty":[12]

> in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving . . . his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; . . . whether he was . . . capable of recollecting who [his] relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.[13]

Testamentary capacity, in the sense of a mental threshold, was defined therefore not merely by reference to the property which would be subject to an exercise of that power, but also as having some moral component. A person was required to be aware of 'claims upon his regard and bounty'. Once that particular standard was regarded as having been satisfied, the particular exercise of the testamentary power was otherwise unfettered. A person of 'sound disposing mind' could thus exclude a person with a moral claim upon them. The question was simply whether the mind was capable of "deliberately forming an intelligent purpose of excluding them".[14]

Within the concept of a 'sound disposing mind' however there was a considerable measure of flexibility. The moral component in the concept, embodied in its insistence on an awareness of the claims on a person's bounty, was a very malleable standard. It could reflect a varying balance between the value placed on testamentary freedom and the value placed on the fulfilment

12 *Harwood* v. *Baker* (1840) 3 Moo.P.C. 282, 290-291.
13 *Ibid.*
14 *Ibid.*

of a perceived duty. While the balance in an individual case certainly depended on the particular facts, it could also reflect prevailing attitudes to family relationships and proprietary responsibilities. Hence, the greater the value placed on the fulfilment of the duty, the greater the insistence on the awareness of the claims that duty involved before a 'sound disposing mind' might be regarded as evident in a given case. Testamentary capacity therefore reflected a balancing of elements — proprietary power *per se* as against moral duty. The balance was expressed as a decision for or against probate of a will, reflecting the seriousness with which a failure of moral duty was characterised in a given case.

Within such a broad standard there was also considerable room for the expression of diverging views. The particular judge's own viewpoint could therefore play an important role in measuring the degree of failure to meet the standard. The seriousness of the failure could then be translated in terms of delusions or undue influence, depending on the particular facts, whilst remaining within the framework of principle. This was significant in a climate of pressure on traditional views, especially in regard to women. The second half of the nineteenth century saw much debate on issues which reflected attitudes to women and wives, such as the debate on the introduction of divorce in a secular court and later the changes in the law regarding married women's property.[15] As cases on testamentary capacity very often involved a challenge to a man's will by his widow and/or children, they provide a good source for the expression of views regarding a man's duty to his wife on his death and the freedom of his power in regard to his property. Most remarkably, where a particular judge had strong views regarding certain types of conduct, it could colour his judgment considerably in terms of the rhetoric used and the manner of its expression.

The individual cases in which testamentary capacity was raised as an issue in New South Wales in the course of the nineteenth century show that here, as in England, testamentary freedom was valued as a special right in relation to property and the broad standard of testamentary capacity was consistently defined from that viewpoint:

> if, notwithstanding the terms of the will, we can clearly see that the testator, at the time he executed it, possessed the faculties and capacity which the law requires for the performance of so important an act, it is our duty to give effect to the will, however we may disapprove of the testator's conduct. Otherwise we would deprive a man of the right to dispose of his property, which the law allows him.[16]

15 See especially H. Golder, *Divorce in 19th Century New South Wales* (1985); L. Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England* (1983) and Mackinolty note 11 *supra*.

16 *McDonald* v. *Watson* (1872) 11 SCR 4; *The Sydney Morning Herald* 1 July 1872, 39 *per* Faucett J. In this case the testator had left his property unequally between his two daughters and the issue of his testamentary capacity was raised by the daughter who had been left the smaller share. Hargrave J. at first instance directed the jury that the father had: "a perfect right to leave one daughter a mere pittance out of his property if he so pleased; and also to bequeath the bulk of his property, if he so pleased, to the other daughter alone", (19-20). Hargrave J. was even critical of the contest itself, in view of this "perfect right", condemning the "quarrelling" on the basis of "squandering" the estate in costs.

Such statements echoed the underlying premise that testamentary freedom was a right of property which necessarily involved a right to be capricious, so long as the act of limiting or excluding natural beneficiaries was deliberate.[17] Disapproval of the testator's conduct, which capriciousness presumably would entail, was not considered a sufficient ground for attacking the right itself,[18] although it was relevant in regard to the burden of proof in each case:[19]

> [w]here the will is officious, that is, where the testator disposes of his property fairly among those for whom he is morally bound to provide, a very small amount of capacity is needed. In that case wills have been upheld which were made almost *in articulo mortis*; but where the will is inofficious, where no provision, or an apparently inadequate or unfair provision, is made for those who ought to be the objects of the testator's bounty, then fuller and clearer evidence of capacity is required, and the capacity must extend to a memory and understanding of the extent of the property to be disposed of, and of the claims of those for whom he ought to provide.[20]

The fact that the will is considered 'unjust', 'cruel' or 'unfair' may affect the burden in considering capacity as suggested but the injustice or cruelty *per se* "is no ground for setting aside the will of a capable testator".[21] The rationale for this was the value placed on the freedom of property itself as a 'landmark of a man's property':

> the instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.[22]

In the balance that testamentary capacity represented between the standpoints of freedom of property and of moral obligations, the testator's choice won the day over the "stereotyped and inflexible rules of a general law",[23] even though those very rules had given some guarantee of right to the testator's spouse and children. The 'fairness' and 'justice' of the provisions of the will itself were not the grounds for deciding capacity.

What then was the position when these broad general rules were applied to individual facts? The cases in New South Wales on testamentary capacity

---

17 See *Public Trustee* v. *Clarke* (1895) 16 NSWR B & P 20, 32-33.

18 See *Watson* v. *Kerridge* (1887) 8 NSWR Eq. 25, 26 *per* Manning J. and *Browne* v. *McElhone* (1883) 15 NSWR B & P 154, 168 *per* Innes J.

19 See for example *In the Will of Richard Trudgeon* (1882) 3 NSWR Eq.22, 25; *Wheaton* v. *Childs* (1889) *The Sydney Morning Herald* 6 November 1889 and *Brown* v. *McEnroe* (1890) 11 NSWR Eq 134.

20 *Brown* v. *McEnroe Id.*, 138, *per* Owen C.J. in Eq. There are similar comments by Owen C.J. in Eq. in *Public Trustee* v. *Clarke* (1895) 16 NSWR B & P 20, 27.

21 *Ibid.*

22 *Greenwood* v. *Greenwood* (1790) 3 Curt. (App.) 1 *per* Lord Kenyon, cited by Owen C.J. in Eq. *Id.*, 139, 140.

23 e.g. the scheme of 'reasonable parts'.

in the latter part of the nineteenth century are remarkable both for the strong views expressed, in language often extreme and impassioned, and the width of divergence of opinion between particular judges, especially Stephen C.J. and Hargrave J. They provide a fascinating insight not only into contemporary judicial attitudes on the question of capacity but also the tension within that very issue itself. They also reveal how vulnerable a woman was in the application of those principles and how much she was at the mercy of her husband's testamentary powers. Three cases merit close consideration: *Gordon* v. *Townsend*;[24] *Brown* v. *McEnroe*[25] and *Buckley* v. *Millar*.[26]

In *Gordon* v. *Townsend* the testator was suffering delusions as to his wife's fidelity[27] and consequently omitted her and their son from his will. Hargrave J. as primary judge found in favour of the will. On appeal, Stephen C.J. and Faucett J., with Hargrave J. dissenting, reversed that decision. The divergence of views in this case is significant, not simply because of the attitudes which perhaps are revealed about the individual judges, but because those diverging viewpoints reflect the stress in the concept of testamentary freedom itself and the very imperfect way that the judicial standard of testamentary capacity acted as a possible check on alleged abuses of that freedom.

The facts of the case are brief. Mr and Mrs Townsend were married in April 1853. Mrs Townsend was then about twenty-one years of age and Mr Townsend some twelve years her senior. By March 1854, Mr Townsend had apparently become convinced that his wife was unfaithful to him and he left her. In April 1854 their son was born and in July Mr Townsend executed a deed of separation and a will. The deed made provision for Mrs Townsend and the son. The will excluded both in favour of Mr Townsend's sister and her children.

Hargrave J. as primary judge and then as the dissenting member of the appellate tribunal considered that the provision made in the deed indicated the testator's "abundantly kind and affectionate behaviour" (particularly in view of the shortness of time the couple had lived together); and against the apparent 'rationality' of the deed and the will considered together, he was extremely skeptical of Mrs Townsend's "peculiar" testimony as to her husband's delusions and placed little weight on the "incoherent rhapsodies" of the testator to the same effect.[28] He was critical and disbelieving of Mrs

24 (1872) 11 SCR 215; *The Sydney Morning Herald* 24 December 1872.
25 *Brown* v. *McEnroe*, note 19 *supra*.
26 (1869) 8 SCR Eq. 4 & 74.
27 In cases of a challenge to testamentary capacity of husbands, this ground is surprisingly common.
28 *Gordon* v. *Townsend*, note 24 *supra*, 247. The testator had given certain papers to several persons which were not to be opened until his death which stated his beliefs and allegations fully, referred to by Stephen C.J. at 221, 229.

Townsend in face of the "most rational"[29] character of the documents. In short, the omission of the wife and child from the will was not weighty enough in the judgment of Hargrave J. to refuse probate of the will and the judge condemned Mrs Townsend in the costs of the application.

In deciding against the will, the Full Court of the Supreme Court held by majority that the testator lacked testamentary capacity because he suffered from an insane delusion which had a material influence on the will. There was thus more than mere disapproval of the testator's conduct — that conduct was held to be the result of a delusion. The mind of the testator could therefore not be trusted to fulfil the obligation which testamentary freedom involved. The judgment would not be freely exercised, it was 'perverted' by delusion. The decision of the appellate court therefore was one in favour of the wife.

The majority view was in direct contrast to that of Hargrave J. The judgment of Stephen C.J., in particular, is expressed in often emotive terms, the Chief Justice quite obviously sympathising with the "wronged and innocent" woman and child and entirely dissenting from Hargrave J. "on every one of the points taken by him".[30] Both Stephen C.J. and Faucett J. had no doubt that the testator believed, and believed wrongly, that his wife was unfaithful to him. They also held that these false beliefs were the product of an insane delusion which led to the exclusion of the wife and son from the will. In such circumstances Stephen C.J. considered Mrs Townsend's conduct as "irreproachable",[31] that she was "cruelly aspersed"[32] by the "monstrous" allegations[33] of her husband and that she had a duty to protect not only her own interests but those of her son, "whom the disputed document in effect disinherits".[34]

Contrary to Hargrave J., both Stephen C.J. and Faucett J. considered the provision made for the wife and child ungenerous, Mr Townsend reserving to himself the bulk of his considerable property during his life and leaving it away from the wife and child on death. In the circumstances they concluded that the omission of the wife and child was only because of the delusions and therefore, that within the relevant authorities,[35] the testator did not possess the requisite capacity and hence the will should be refused probate.

Such judgments reflect important attitudes in regard to the exercise of testamentary freedom. First, they clearly express the idea that a man has a moral duty to provide for his wife and child(ren). Hence a will which omits

29 *Ibid.*
30 *Id.*, 236.
31 *Id.*, 228.
32 *Id.*, 226.
33 *Id.*, 228.
34 *Id.*, 226.
35 The following were cited: *Banks* v. *Goodfellow* note 3 *supra*; *Smith* v. *Tebbitt* (1867) LR 1 P & D 398; *Dyce Sombre* (1856) 10 Moo.P.C. 232; *Waring* v. *Waring* (1848) 6 Moo.P.C. 341; *Dew* v. *Clarke* (1826) 3 Add. 79.

them is described as 'leaving property away' from them and is therefore regarded as *prima facie* capricious. Secondly, if the mind of the testator were not affected by delusions, for example the testator were just being perverse, such a will would have to stand. Here it was held that there was evidence of a delusion and a delusion which was calculated to have, and in fact had, a material influence on the testamentary disposition. Thirdly, the fact that members of the court could take such diverging views reveals that, if the broad principles expressed in the judicial standard of testamentary capacity could be so flexible a measure in their application, the position of family members, like the wife and child here, was very precarious.

That Stephen C.J. and Hargrave J. took diverging views in the case is not an isolated instance of such disagreement and it raises comment in two respects, namely the fact of the continuing disagreement *per se* and its impact on their judgments and the respective attitudes to women revealed by the judges. The dissenting views of Hargrave J. to Stephen C.J. were apparently legendary. Verses circulating at the time expressed the attitude of Hargrave J. in the line, "[n]o matter what the case may be I differ from the Chief";[36] and Stephen C.J. himself stated that, "[Hargrave J.] rarely, if ever, failed to express a different opinion judicially from my own, whatever the question";[37] and he partly attributed his own retirement from the Bench in 1873 to the fact he was "harassed by repeated anxieties" over Hargrave J.[38]

Part of the disagreement between the judges reflected their own diverging attitudes to women which is also evident in their judgments. Stephen C.J. was known for his sympathy to women as victims in his exercise of jurisdiction in relation to deserted wives[39] and the language of his judgment in *Gordon* v. *Townsend* is consistent with such a view. He goes beyond a simple decision on the issues and uses the opportunity to extol the deserts of

---

36 Cited by Stephen C.J. in an unpublished manuscript, "A Trio of Judges", 1 March 1894, ML MSS Set 211, Volume 16, 83, 85. This impression is confirmed elsewhere. Amongst Stephen's newspaper cuttings is an item under the anonymous authorship of "The Lounger", entitled "Colonial Celebrities. No. 11 — Sir Alfred Stephen" and dated (by internal reference to Stephen's then age of 78) somewhere in 1880, which similarly confirms the legendary disagreement between the two judges. It states: "While the late Mr Justice Cheeke invariably summed up an opinion on a case submitted to the Full Court with the remark, 'I agree with the Chief Justice', Mr Justice Hargreaves (sic) almost as certainly did not agree with the Chief Justice": ML MSS Set 211, Volume 17, p. 237. Another striking example of their disagreement is *Ex parte Richardson*, (1874) 12 SCR Eq. 99; *The Sydney Morning Herald* 18 December 1874; *Newspaper Reports of Judgments*, AO 7/352, p.31.

37 *Ibid*, Stephen. Stephen does not mention Hargrave J. by name, but it is quite clearly that judge to whom he refers by the internal references made — *e.g.* to his role in *Gordon* v. *Townsend* itself and the details of his appointment to the bench.

38 *Id.*, 103.

39 Golder, note 15 *supra*, 38-40 (Stephen's role in the introduction of the legislation), 72. His own writings are full of such sympathies — particularly in his pamphlets and newspaper contributions in support of the Divorce Extension Bill in 1891: ML MSS Set 211, Volume 13 contains many of them and see "Wives and their Friends", reprinted from *The Sydney Morning Herald* 13, 18 August 1891, contained in Pamphlets Vol. 57(042053) in the Mitchell Library.

virtuous women, casting Mrs Townsend as the virtuous woman wronged by her husband in the exercise of his testamentary freedom. Hargrave J. in contrast showed little sympathy for Mrs Townsend's plight. He also had a clear reputation where women were concerned — but to the opposite effect. Stephen C.J. was particularly critical of the clearly negative attitude of Hargrave J. to women and considered that his appointment as a judge in New South Wales was "so disastrous for women suitors".[40] That the attitudes of individual judges to women could be so apparent in their judgments is remarkable. It illustrates how flexible a standard the definition of testamentary capacity could be and, therefore, how unreliable it was as protection to wives and children in particular, as they were at the mercy of the attitude of the particular judge. Should the judge at first instance take such a strong view against an applicant widow and she not have the means to appeal, the injustice she had suffered would not avail her any remedy.

After Hargrave J. had died, Sir Alfred Stephen returned to consider this case in an unpublished manuscript in 1894.[41] More than twenty years after the case was decided, the judge was still fuming over the "wild injustice" of the "iniquitous" judgments of Hargrave J. in that case,[42] which he considered revealed the judge's own mental derangement. Sir Alfred narrated the fact that Mr Justice Hargrave's wife had had him committed to an asylum in England earlier in his life, which, according to Sir Alfred, led both to Hargrave's extreme suspicion of all medical certificates imputing lunacy to anyone and also to a hatred of all women for the sake of his wife. Both issues, of course, came together in a case such as *Gordon* v. *Townsend* concerning the testamentary capacity of a deceased husband brought by the widow on the basis of the alleged unsoundness of mind of the testator and the severity of the judgments of Hargrave J. in that case lend great weight to the suggestions made by Sir Alfred.[43]

As a startling comparison to *Gordon* v. *Townsend* stands the case *Brown* v. *McEnroe*[44] which involved a suit for probate of the will of John Brown, who died in August 1888 at the age of eighty. The case was particularly long,[45] probably reflecting the fact that the estate involved "a fortune estimated at about 200,000l."[46] The testator in this case had been married

---

40 Stephen, note 36 *supra*, 87. Golder, note 15 *supra*, 111, considers that this memoir is not unbiased in view of the open hostility between them, but comments that it is probably "an accurate reflection of Sydney gossip". Hargrave J.'s appointment was indeed very unpopular — his swearing-in was boycotted by the Bar: *ADB*, vol. 4, 346.

41 Stephen, note 36 *supra*.

42 *Id.*, 99 and "Postscript" 30 April 1894, 119.

43 Although Stephen C.J.'s account might be criticised as exaggerated in other respects. See E. Grainger, *Hargrave and Son. A Biography of John Fletcher Hargrave and his son Lawrence Hargrave* (1978) 27.

44 *Brown* v. *McEnroe*, note 19 *supra*.

45 It appears to have occupied 20 days of the Court's time, as indicated by the marginal note in the report, 15 of which were involved in the presentation of evidence — *Id.*, 140.

46 *Id.*, 135.

three times, leaving nine children surviving him. He had married his third wife in 1876 and she had borne him five children (two of whom predeacesed the testator). She was, however, more than forty years his junior. In his will the testator had left fairly meagre provision for her considering the size of the estate and contrary to promises he had made during his life.[47] She was left a house to live in until remarriage or until she permitted any but her children or servants to reside with her and she was left an annuity of 2l per week. The residue of the testator's estate was divided roughly equally among his children. The widow filed a caveat objecting to probate on the ground of unsoundness of the testator's mind.[48]

The alleged grounds of unsoundness were that the testator suffered from chronic alcoholism and, as in *Gordon* v. *Townsend*, he held certain delusions regarding his wife's fidelity. The presence of such beliefs was acknowledged by the testator's own solicitor, who when himself raising with the testator the smallness of the provision for his widow, was advised in detail as to the nature of the beliefs and the fact that they were the reason for the provision which was proposed. Mr Brown told his solicitor that he had "strong reason" for limiting the provision for his wife, namely, that for "some time" he had doubts as to the fidelity of his wife and even as to the paternity of one of his children.[49]

On the facts of the particular case, Owen C.J. in Eq. held that the testator was generally capable[50] and was not suffering from insane delusions, although there was no doubt that the testator held the beliefs regarding his wife and that this was also the reason for the will being drawn as it was. Owen C.J. in Eq. however held that there was no insane delusion and accordingly upheld the will which was admitted to probate.

Such beliefs were similarly held by the testator in *Gordon* v. *Townsend* and in both cases the beliefs affected the relevant wills, in *Brown's* case by way of limited provision to the widow and in *Gordon's* case by way of no provision at all for the widow. In one case the beliefs were considered irrational by the majority of the appeal court and therefore 'delusions', and in the other case, not. In *Gordon's* case, the "lady's conduct" was considered to be "irreproachable" and her husband's accusations as "monstrous" and

47 *Id.*, 146-7.

48 She died before the suit could come to court and the proceedings were carried on by her administrator.

49 *Brown* v. *McEnroe*, note 19 *supra*, 142-3.

50 His understanding of his property was demonstrated by the testimony of the more than forty witnesses who spoke of the testator's good memory and understanding in business and his ability in managing his affairs, *id.*, 140-141. The testator also satisfied the test of capacity in regard to his understanding of the claims on his bounty, here the claims of his wife and children, as he had included them all and made a full disposition of all his properties to them, *id.*, 142.

"absurd", only to be explained 'on the supposition of disease'.[51] Yet in *Brown's* case, the beliefs were not 'explained' in such a way.

For the beliefs to be an 'insane delusion', such as could lead to a refusal of probate of the will, they had to be irrational — to amount to:

> a belief in facts which could not possibly have occurred, or in facts so utterly improbable under the circumstances that the common sense of mankind would invariably reject them.[52]

It was not assumed at the outset that the allegations of infidelity were false (whereas in *Gordon* v. *Townsend* it apparently was) and as the testator's wife had already died by the time of the hearing, the argument on insane delusion rested on a decision as to whether the testator's belief in infidelity was a belief in "utterly improbable" facts, facts that "the common sense of mankind" would reject and therefore that the only explanation was that they were the result of insane delusion. The "common sense of mankind" would not consider the allegations here "utterly improbable" because Owen C.J. considered that it was a perfectly rational thing for an old man married to a young wife to doubt her fidelity,[53] even if the suspicion were unfounded. Owen C.J. in Eq. referred to the fact that such jealousy had been "from time immemorial the theme of dramatists, poets and novelists".[54] There was thus no insane delusion. The testator's conduct in leaving his wife "a miserable pittance"[55] was affected by his jealousy and suspicion, but not insane delusion. The jealousy and suspicion, however unfounded, did not qualify as an insane delusion because the belief was not irrational, not "utterly improbable", apparently because other men in the position of the testator could hold such beliefs. The will was accordingly admitted to probate.

The judge clearly disapproved of the testator's conduct regarding the provision made for the widow as "expressed in language most cruel and insulting to her",[56] but that disapproval *per se* was not a sufficient basis for refusing probate of the will. Hence, even though the judge clearly considered that there was a failure by the testator to meet his duty to his widow, her position remained as an 'insulted' widow because the testator was not considered lacking in testamentary capacity and hence the court could do nothing to remedy the insult. In *Gordon* v. *Townsend* however, the appeal court by majority was satisfied that the testator's conduct demonstrated delusion and on that basis probate could be refused, yet in both cases the beliefs were similar. What then is the basis for distinguishing the cases?

There are factual distinctions between *Brown's* case and *Gordon's* case which help to explain the different results. In *Gordon's* case, the beliefs of

---

51 Note 24 *supra*, 228, *per* Stephen C.J.

52 *Brown* v. *McEnroe* note 19 *supra*, 144.

53 *Ibid.*

54 *Ibid.*, citing Shakespeare, *Othello*: "trifles light as air are to the jealous confirmation strong as proofs of holy writ".

55 *Ibid.*

56 *Ibid.*

the testator were more extreme in their expression in that the widow and her son were both excluded altogether from the will (although some provision had been made for them in the deed of separation executed the same day) and the testator would not see either of them after the birth of the boy. In *Brown's* case however, not only did the testator not exclude his children, even if he doubted their paternity, but he continued to live with his wife and made some provision for her in the will (albeit a "miserable pittance") and his widow had died by the time of the hearing. A further factual distinction is the age gap between the respective husbands and their wives. In *Gordon's* case the twelve-year-age gap raised no comment but in *Brown's* case the forty-year-age gap did. In the former case the beliefs were considered irrational but in the latter not, and unless the beliefs crossed the threshold of what was considered 'irrational', the court could do nothing about the will. In the decision as to 'rationality' of the beliefs held by the testator, Owen C.J. in Eq. seems very influenced by the fact that the case involved a young wife and an old husband and in such a case it was apparently perfectly 'rational' to be swayed by jealousy and believe a wife unfaithful.

If this is indeed a critical difference, both cases confirm the fundamentally paternalistic and male-centred basis of the rule itself, reasonableness of provision not deciding the issue but 'rationality' of belief in the circumstances judged from an essentially male standpoint. The application of the standard of testamentary capacity was also, therefore, unpredictable and involved litigation trying the issue of soundness of mind rather than merely asserting the unfairness of provision *per se*. This was hardly a protection for the wife who had been unfairly treated in her husband's will and yet it was the only way of enforcing the expectation of the law upon which his testamentary freedom was based. He was accorded testamentary freedom because the law trusted him to fulfil his moral duty. If he failed to do so, the court could do nothing unless they considered him unsound of mind except remark that he had failed in his duty.

Another startling feature of the decisions of the New South Wales court on capacity during the latter part of the nineteenth century is the double standard evident in relation to women.[57] A woman considered a 'virtuous' wife could attract the greatest flexibility in the exercise of the standard of capacity, whereas a woman considered 'immoral' could attract its full condemnation. *Gordon* v. *Townsend* itself illustrates these tendencies. Mrs Townsend apparently fitted the ideal of the 'virtuous' wife who was the victim of her husband's "monstrous" conduct. In contrast to the image of the virtuous wife is the rhetoric used in relation to the picture of the 'fallen' woman and her position as applicant to the court, seen for instance in

57 Discussed in other contexts by Golder, note 15 *supra*, chapter 2, "The Politics of Divorce", especially 70-72.

another capacity case, *Buckley* v. *Millar*.[58] In this case, probate of the will of the Reverend William Baird Millar was refused by Hargrave J. at first instance and by the Full Court of the Supreme Court by majority on appeal on the basis of the undue influence of the sole beneficiary and executrix, Mrs Buckley, the de facto wife of the Rev. Millar at the time of his death.[59] In many passages in the case Mrs Buckley is characterised as a 'fallen' woman and the result of the case, in the refusal of probate of the will in her favour, is essentially a judgment against her. For example, throughout the judgments of Hargrave J., both at first instance and on appeal, Mrs Buckley is condemned, her meeting with the Rev. Millar described as a "misfortune" and their cohabitation as the testator's "unfortunate connection with the plaintiff". The relationship was described as "infatuated immorality"[60] and Mrs Buckley as having "some fatal obliquity of moral sense" and she as "the guilty partner of his miserable home".[61] Hargrave J. continued the severity of his attack on Mrs Buckley when sitting on the appeal referring to the "repugnance" of the law "to all gifts from men to women of abandoned character".[62] Cheeke J., on appeal, also stressed the "connection with Millar" as condemning Mrs Buckley, and that she had "put herself out of Court entirely by her own conduct".[63]

Compared with this was the relationship with Mrs Millar and her apparent virtue. They had lived together since their marriage in 1841 until Mrs Millar separated from her husband in 1858 "on account of his intemperate habits and violent conduct towards her".[64] Despite the separation they corresponded "affectionately" until March 1866 and in all their correspondence Rev. Millar "never intimat[ed] any intention of disposing of his property so as to exclude them from participating in it after his death".[65] This correspondence confirmed in the mind of Hargrave J. "the natural feelings of the husband and father".[66]

---

58 Note 26 *supra*.

59 It was held that the Rev. Millar was generally capable, but that he had been overborne by Mrs Buckley. The majority of the Court erroneously applied the equitable principle of a presumption of undue influence arising from certain relationships of influence (see especially Hargrave J. at first instance, 11-15). This involved applying a rule of equity to a probate matter. The same error of approach was made in *Callaghan* v. *Myers* (1880) 1 NSWR 351. The matter was subsequently corrected by Stephen J. (Matthew Henry Stephen, son of Sir Alfred Stephen) in *Buckley* v. *Maddocks* (1891) 12 NSWR Eq 277, 278. Stephen J. stated that it was not the law that the principles of equity in relation to the presumptions of undue influence apply in the case of wills, citing in support *Fulton* v. *Andrew* (1875) LR 7 HL 448, which settled the law on this point. Stephen J.'s position was subsequently confirmed: Nye v. *Sewell (1894) 15 NSWR B & P 18, 21 per* Manning J.; and *Hendy* v. *Jenkins* (1900) 21 NSWR B & P 43, 63 *per* Walker J.

60 Note 26 *supra*, 16.

61 *Id.*, 19.

62 *Id.*, 96.

63 *Id.*, 95.

64 *Ibid.*, 5 (headnote).

65 *Ibid.*

66 *Id.*, 18.

What is remarkable about the case is the vociferousness of the language of Hargrave J. in particular[67] and the plainly moral terms in which it is cast.[68] At the heart of his reasoning, apart from the validity *per se* of its result, is quite obviously a moral judgment. By recognising the validity of this will in favour of a de facto spouse, Hargrave J. considered that he would "break down the barriers of social life".[69] The will stood condemned with the condemnation of the "infatuated morality" of the plaintiff. The relationship itself therefore is apparently the rationale of his refusal of probate.[70]

As a case on testamentary capacity and the principles of undue influence, the case is perhaps not particularly remarkable, but as a case indicating the sanctity of marriage and its force in the context of inheritance the case is in many ways a hallmark of nineteenth century attitudes — the morally virtuous and innocent wife vindicated over the erring and immoral one, when the husband's exercise of his testamentary freedom was under challenge. A case like *Buckley* v. *Millar* thus goes beyond being simply a case regarding testamentary capacity and can be seen as an emphatic endorsement both of marriage and the moral duty which testamentary freedom was seen to embody. Hence, a will which preferred a de facto wife over a lawful wife and child(ren) who were thereby excluded from the will, betrayed the law in two respects, namely the sanctity of the marriage relationship and the exercise of testamentary freedom.[71]

The cases considered on testamentary capacity illustrate that testamentary freedom was prized as an adjunct to property ownership and a valuable form of self-expression. The cases reflected a clear continuity of tradition which reinforced the dependence of the wife on the husband. Provision for her on his death was trusted to the exercise of capacity in accordance with the perceived moral duty to provide for her. If she was not provided for,[72] or

67 Described by J.M. Bennett as "a typically vigorous judgment" in "Equity Law in Colonial New South Wales 1788-1902" (1962) University of Sydney Research Project 59/20(1), 313.

68 It is also another instance of marked disagreement with Stephen C.J.

69 Note 26 *supra*, 18.

70 From the facts given it is not evident what the result of the refusal of probate would have been in relation to the distribution of the estate. Either Rev. Millar had made an earlier will in favour of his family, or he would have died intestate. In either case his wife and children would have benefitted rather than Mrs Buckley. For a somewhat different consideration of the case see Bennett, note 67 *supra*.

71 Stephen C.J. was in this case the dissenting judge — and hence once more putting himself in disagreement with Hargrave J. His decision was in favour of the will on the balance of the evidence. His descriptions of Mrs Buckley as compared with Mrs Millar however reflect much the same categorisation as other members of the court (see especially 79-80). Stephen C.J. shows a considerable degree of balance in his judgment. In particular he does not condemn Mrs Buckley merely on the basis of her cohabitation with the testator. Indeed he appears somewhat sympathetic to her in putting up with the testator, a chronic drunk, whose "acquaintance was in all probability more a misfortune to her than to him" (85). Rev. Millar had also made two previous wills in her favour and it had been many years since his lawful wife had left him.

72 As in *Buckley* v. *Millar* and *Gordon* v. *Townsend*.

inadequately provided for,[73] her only recourse was to challenge the testator's soundness of mind or to allege undue influence. Where such a challenge was made the principle applied was very broad, the elements loose and the case often very difficult to establish. The hearings were often consequently lengthy and a great number of witnesses and counsel involved. For example, *Wolfskehl* v. *Mitchell*[74] occupied eleven days and involved fifty-eight witnesses,[75] *Browne* v. *McElhone*[76] involved sixteen days and sixty-four witnesses at first instance and eight counsel on the appeal, and *McDonald* v. *Watson*[77] involved eight days, seven counsel and sixty-nine witnesses. The uncertainty involved in such wide principles and the daunting prospect of possibly long and undoubtedly expensive litigation could well have prevented much litigation from ever being initiated. Indeed, in 1905 one member of Parliament even remarked of contested wills cases that "they are of all cases probably the most expensive cases that come before the courts" and therefore sure to erode the estate in costs.[78] The position of the wife and child(ren) was therefore confirmed as dependent, and in that dependence extremely vulnerable.

II. DOWER

The law of dower, like the law regarding testamentary capacity, is a pivotal area in a study of testamentary freedom. Dower operated to qualify the will of a woman's husband through the operation of law by providing to the widow a life interest in one-third of the realty of her deceased husband which their issue might inherit.[79] Dower thus qualified the husband's power of disposition in regard to real estate, at least during his wife's lifetime, and hence his testamentary freedom in regard to such realty was also restricted. As dower therefore qualified in a significant respect the efficacy of wills, moves to abolish or limit the operation of it were moves which simultaneously facilitated testamentary freedom. Debate on dower was therefore also debate on the underlying issue of the freedom of the individual in regard to the disposition of property on their death.

Dower was a problem. It hampered efficient conveyancing because it attached to the land itself and hence could affect successors-in-title to the

73 As in *Brown* v. *McEnroe*.
74 (1869) 8 SCR 221.
75 Noted by Hargrave J., note 16 *supra* 14.
76 (1894) 15 NSWR B & P 154.
77 Note 16 *supra*.
78 Carruthers, Colonial Treasurer, *NSWPD* (1905), 2896, Second Reading debate on the Testator's Family Maintenance Bill.
79 The detail of dower is described in Sir R. Megarry and H.W.R. Wade, *The Law of Real Property* (1984) (5th ed) 544-546.

relevant husband, notwithstanding alienation or disposition of the property by him. From the point of view of clear titles and security of interest to a purchaser, the possibility of dower was a distinct nuisance even though by the beginning of the nineteenth century it was almost universally avoided.[80] It could not be predicted with certainty and a purchaser could never be sure that the land was free from it. While land was not treated as a commodity to be bought and sold, but rather retained by the same person or within the same family, this nuisance factor was not unduly objectionable. Once land became increasingly treated as a commodity, however, then the nuisance problem arose. In such a climate mechanisms were needed whereby the land could be freed from the possibility of dower and the purchaser assured of security of title. Such mechanisms were developed by conveyancers in England[81] and with the utilisation of these almost universally, it was only the lax practitioner who did not render dower virtually a dead letter.[82]

The means for avoiding dower were also quickly developed in New South Wales. By proclamation of 6 March 1819, Governor Macquarie provided that a conveyance "under the hand and seal" of the wife acknowledged before the Judge Advocate or Deputy Judge Advocate would bar dower.[83] This was followed by the Registration of Deeds Act 1825,[84] which gave a married woman power to bar her dower and to alienate her lands by means of a deed duly executed and acknowledged.[85] As with the English devices, provision was made both in Macquarie's proclamation and the Act in Council which followed it, for the woman to be separately examined in order to determine that she was acting of her own free will. From this time on, the means for avoiding dower or narrowing its application were increased, until in 1890 in New South Wales dower was finally abolished.[86]

The first step was the Dower Act 1836[87] which adopted the British Act of 1833[88] and facilitated the removal of dower to such an extent that it became

---

80 J.J. Park, *A treatise on the Law of Dower* (1819), 4, comments that instances were "very rare" in which property became subject to the title of dower.

81 In the form of "fines" and "recoveries" and "conveyances to uses to bar dower", with a money provision in the way of "jointure" in lieu of it.

82 Note 80 *supra*, 4 — those instances were attributed to "inadvertency or unskilfulness, or from short-sighted economy", British Real Property Commissioners, First Report (1829), *British Parliamentary Papers*, Sess. 1829, 10, 17.

83 The text of the Proclamation is printed in *The Sydney Gazette* 6 March 1819, 1, and is included as a footnote to the text of the 1825 Act in T.Gallaghan, *Acts and Ordinances of the Governor and Council of New South Wales and Acts of Parliament Enacted for, and Applied to, the Colony*, Vol.2, 999.

84 6 Geo. IV No. 22.

85 C.H. Currey, "Chapters on the Legal History of New South Wales 1788-1863", LL.D. University of Sydney, 1929, 341, considers Macquarie's proclamation to be ultra vires, but that any invalidity was cured by section 8 of the 1825 Act.

86 Probate Act 1890, 54 Vic. No. 25.

87 7 Will. IV No. 8.

88 3 & 4 Wm. IV c. 105. The legislation formed part of the proposals of the British Real Property Commissioners in their First Report of 1829, note 82 *supra*.

virtually non-existent[89] for women married after 1 January 1837.[90] The Act provided that dower did not apply to any lands that had been absolutely disposed of by the husband by sale or by his will.[91] Dower still had to be removed positively through either the disposition of the land or by will, although the means for doing so were much simpler and entirely at the husband's discretion, no consent of the wife being necessary. If dower were not expressly barred, the wife's right continued as before the Act, except that now it was only to attach to the freehold lands that her husband owned at the time of his death and not to all such lands that he had owned during the whole of the marriage.

The law in New South Wales went further than its English progenitor in two major respects: (1) the abolition of dower in regard to absentee wives in 1850 to deal with a peculiarly colonial problem and (2) the abolition of dower altogether in 1890, a step which was not taken in England until 1925.[92]

The problem of the 'absentee wife' concerned a widow making claim to dower out of property in New South Wales when she had remained in England and had never come to the colony herself. In 1850 a Bill was proposed to prevent dower from attaching to lands in the colony if the wife had not also resided here when the lands were acquired. The Real Property (Dower) Act 1850[93] was subsequently passed providing that a woman could not claim dower out of lands in New South Wales unless she had lived in New South Wales with the owner as his wife before the sale, or unless the purchaser had notice before, or at the time of sale, of the fact of the marriage.[94]

---

89 Several men who gave evidence to the Royal Commission appointed to inquire into the working of the Real Property Act in New South Wales in 1879 commented to this effect, (1879-80) *V & P*, LA NSW, vol.5, 1021: e.g., J.B. Jones, Examiner-of-Titles, 1082 par. 1162; H.D. Maddock, Examiner-of-Titles, 1097 par. 1573, 1577; A. Oliver, Solicitor, 1110 par. 2267. In *Marshall* v. *Smith* (1907) 4 CLR 1617, Barton J. at 1626 commented that after this Act, dower out of alienated or devised lands was "swept away". Actual instances of dower were apparently more common, if applicable at all, in the case of intestacy, J.B. Jones, 1082, par. 1161.

90 The date on which the Dower Act 1836 came into force. In *Marshall* v. *Smith*, *ibid*, Barton J. summarised the only remaining cases in which dower applied: (1) lands in which the husband at his intestate death had at law or in equity the beneficial estate in fee simple, including lands in which he had a right of entry or action; (2) lands in which the husband at his death had a beneficial legal or equitable estate in tail, including lands in which, not being in possession, he had a right of entry or action.

91 Sections iv and vi.

92 Administration of Estates Act 1925. The procedure adopted by Governor Macquarie in New South Wales in 1819 and followed in the 1825 Act was also ahead of England in that it preceded a similar proposal of the Real Property Commissioners 10 years later in their First Report (1829), note 82 *supra*, 21.

93 14 Vic. No. 27.

94 The Act also provided that dower out of alienated land should be calculated by reference to the unimproved value of the original purchase. This second aspect of the Act was to remedy 'other inconveniences' of dower consequent upon an English decision contrary to a New South Wales one that the widow could claim one-third of the value of the improvements made after the property had passed out of the husband's ownership, cited by Mr Nichols in his Second Reading speech on the Bill, *The Sydney Morning Herald*, 21 September 1850.

The perspective of such an Act was unashamedly that of the purchaser. Such a perspective was evident in virtually all the comments made in evidence to the Select Committee on the Laws of Real Property and of Dower Bills and in debate on the Real Property (Dower) Bill which became the 1850 Act, 14 Vic. No. 27. The focus was upon the purchaser and what was 'known' to him and the "injustice"[95] (to the purchaser) where a claim to dower was made, in this instance by a widow resident in England. The security of the purchaser's title was jeopardised by the possible claims of a wife unknown in the colony, hence the "unknown wife"[96] was to be treated as if she had no rights. It was even stated in the preamble to the 1850 Act that such claims "unfairly prejudiced" titles to land.

Robert Johnson, a solicitor, was one who conceded that the "vested rights" of women "ought not to be interfered with" and that "it would be unjust to deprive a widow of her legal right because she might be absent and unknown".[97] In this he recognised that the proposed Act would interfere with "vested rights", but he also recognised that dower was an "evil" which had "nearly died away".[98] Since the adoption of the English Dower Act in 1836, dower could easily be removed for women married after 1 January 1837, hence the old rules only really affected women married prior to that date. His recommendation for these women was "to let the legal right die out", and so long as the Bill did not interfere with their vested rights, it was not objectionable.[99] In regard to women resident in the Colony however, the issue was different. There was apparently no injustice to purchasers because the fact of the marriage was more obvious. Accordingly, there was to be no similar interference with the dower of widows resident here. W.C. Wentworth explained the position thus:

> The position and circumstances of England were totally different. There could be no difficulty there in ascertaining whether a man had been married or not, but here it was impossible to do so. The expenses and the difficulties of conveyancing had therefore been multiplied to an enormous extent.[100]

The non-interference with dower in such cases however, reveals a consistent logic. The perspective was that of the purchaser and the possibility of injustice to him.

Even with the enormously narrowed scope for the operation of dower after the Dower Act 1836 and the Real Property (Dower) Act 1850, dower was still

---

95 James Norton, evidence given 5 September 1850, to the Select Committee on the Laws of Real Property and of Dower Bills, *V & P* LC NSW, 1850, vol. II, Report, 4; Allen, Second Reading speech, *The Sydney Morning Herald* 21 September 1850.

96 G.K. Holden, evidence given 13 August 1850 to the Select Committee on the Laws of Real Property and of Dower Bills, *id.*, report, 2.

97 Robert Johnson, evidence given 13 July 1850 to the Select Committee on the Laws of Real Property and of Dower Bills, *id.*, report, 1.

98 *Ibid.*

99 Attorney-General J.W. Plunkett, Second Reading speech, *The Sydney Morning Herald* 21 September 1850.

100 *Ibid.*

considered problematic and the only real solution seen as a formal abolition of the law altogether. The mere possibility that a claim to dower might arise upset the symmetry of the new Real Property Acts,[101] the object of which was to make titles to land 'independent', cutting off any need for retrospective investigation of title.[102] Dower, arising from the historical fact of marriage of an owner at some time, was squarely opposed to this objective.

The problems arose specifically in the changeover from the older common law or old system title to the new Torrens title.[103] In each case dower had to be negated or noted as a possibility on the certificate of title even though it was commonly recognised that the possibility rarely arose. 'Old dowers', in relation to women married before 1837, were "comparatively few",[104] and although dower could still arise, where for instance husbands died intestate, the occasions where a claim to dower was either worth pursuing or actually made were apparently very rare.[105] Hence the notation of dower amounted in practice to "an illusory cloud on the certificate"[106] with attendant conveyancing problems generating among purchasers a "great horror of dower".[107] In some cases, the noting of dower on the certificate "absolutely prevent[ed] the sale of property in the market".[108]

The Royal Commission appointed to inquire into the working of the Real Property Acts consequently reported in 1879 that the question of dower had "caused much trouble in every Colony where the new system of titles [had] been introduced".[109] Edmund Burton, an Examiner of Titles, stated that it caused a "great deal of difficulty" and created a "great deal of expense" in the working of the Acts and that "titles to dower are very great plagues",[110] even though the practical scope for dower was by now very narrow.

In 1881 the Dower Abolition Bill was brought forward in response to recommendations of the Royal Commission to deal with the problem of noting dower on certificates of title. The Bill proposed simply to abolish all 'old dowers' except those registered under the Act within two years, the objective being to facilitate conveyancing. The Bill lapsed with the prorogation of Parliament and it was not until 1890 that the Probate Act

---

101 Real Property Act 1857 (SA), 21 Vic. No. 15; Real Property Act 1862 (NSW), 26 Vic. No. 9.
102 R.R. Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859), 8-9, 43.
103 Named after the initiator of the legislation in South Australia, Sir Robert Richard Torrens.
104 J.B. Jones, evidence to the Royal Commission on the working of the Real Property Acts 1879, note 89 *supra*, 1082, par. 1162.
105 Note 89 *supra*. There is general agreement on this point among those who gave evidence to the Royal Commission to inquire into the working of the Real Property Act.
106 A. Oliver, Solicitor, *id.*, 1110, par. 2267.
107 T. Salter, Solicitor, *id.*, 1132, par. 2448.
108 Terry, Second Reading speech on the Dower Abolition Bill, 7th October 1881, *NSWPD* 1881, vol. 6, 1492.
109 *V & P*, LA NSW (1879-80), Vol. 5, p. 1037, No. 32.
110 *Id.*, 1074, No. 973.

included the abolition of dower in its consolidation of the law of inheritance.[111]

Each step was directed towards the same end, namely, the avoidance and finally abolition of the burden of dower, so that "will or no will, widows shall have no dower of that which the husband owns".[112] The approach was the same in England as here, although the course of achieving the objective took a slightly different path and was more quickly achieved in New South Wales.[113] The logic behind the objective was the same and was consistent throughout the century — that dower was an "evil"[114] and an objectionable burden that should be eradicated as it interfered with efficient conveyancing and 'clean titles'.[115]

The moves to abolish dower were part of a broader push to improve the efficiency of land dealings and to ensure security of title to a purchaser over preceding unknown interests. This was evident not only in the introduction of Torrens title legislation but also for example in the reworking of limitation statutes in regard to possessory titles to land.[116]

The only significant objections to the abolition of dower at each stage were regarding the extent to which vested rights would be interfered with, as in the 1850 Act, or real contingent interests undermined, as in the proposed 1881 Bill in regard to women married before 1837.[117] Such objections were not at odds with the proposal to abolish dower ultimately. They were directed towards preserving existing rights and letting the question of dower 'die out'.

While the security of the purchaser's interest has been a vital lynch-pin in modern conveyancing, it is an achievement which may be queried in a significant respect.[118] Although the abolition of dower was a necessary part

---

111 In 1901 the Conveyancing and Law of Property (Supplemental) Act repealed the Dower Act 1836. A question was raised whether this revived the old common law rules in relation to dower. In *Marshall* v. *Smith* note 89 *supra* it was held that this did not happen and that the 1901 Act was "a mere rounding off of the process of development which had gradually rendered the Dower Act in operative and a mere piece of useless legislative furniture", per Barton J., 1635. Less than two weeks after the decision at first instance legislation was passed to prevent the argument arising again — the Dower Abolition Act 1906.

112 *Marshall* v. *Smith*, per Barton J. 1630, commenting on the object of the Legislature in the 1890 Act.

113 One important reason may have been that property changed hands more frequently in New South Wales. The "rapidity" with which property changed hands was cited as a reason for having a shorter limitation period in regard to actions for the recovery of land, Robert Johnson, evidence to the Select Committee on the Real Property Law Bill. *V & P*, LC NSW, (1849) Vol. II, 726, No. 18.

114 Note 97, *supra*.

115 Note 96, *supra*.

116 The rationalisation of the rules in relation to the limitation of actions was also one of the recommendations of the British Real Property Commissioners which led to the Real Estate (Limitation of Actions) Act 1833, 3 & 4 Wm IV c.27, adopted in New South Wales in 1837 by 8 Wm. IV No. 3.

117 Wisdom and Smith in the Legislative Assembly 7th October 1881, *NSWPD* 1881, Vol. 6, 1493; Norton and Stephen in the Legislative Council, *NSWPD* 1881, Vol. 6, 2156-7, 2158.

118 A. Buck, "Women, Property and English Law in Colonial New South Wales", in D. Kirby (ed) *Law and History in Australia* Vol. IV (1987) 2 in a paper highly critical of the process whereby dower was abolished, describes the implications of it for women's legal status as a regression.

of that security of interest, it is arguable that it involved an enormous devaluing of the interests of the married woman in the law. Dower was originally an interest in the land itself — a provision in widowhood for the married woman guaranteed by law and a significant qualification on her husband's testamentary freedom. Whereas the first mechanisms for removing dower involved the concurrence of that woman and an assurance of her voluntary participation in its release, the Dower Act 1836 left it entirely at the discretion of the husband. The wishes of the wife, even in form, were no longer considered relevant, on the assumption that the widow would be provided better by the exercise of her husband's testamentary freedom, or in default of this, by the new scheme on his intestacy defined in Lang's Act.[119] The widow's vested right had been transformed into a mere expectation, namely that her husband would make provision for her in his will. Again, as in testamentary capacity, the married woman's position was now based solely on expectation with no guarantee that that expectation would be fulfilled.

There was no public outcry at this loss — perhaps because the 'right' had long been lost in any practical sense and because its formal abolition was achieved through a process of slow erosion of the legal right. That it had to go was plain. The application of dower was completely unsuited to a market where realty had become a commodity and it was fundamentally at odds with the verisimilitude of Torrens title.

A desire to abolish dower however did not amount to a deliberate attack on the position of married women. There is a tacit acknowledgment of a duty to provide for her, as in the definition of testamentary capacity, and some clearly expressed a consciousness of this obligation. Edmund Burton, Examiner of Titles, for example considered that "a man's wife is his first creditor"[120] and that "women are entitled to all the protection that men can give them".[121] Dower, however, was no longer considered the means for providing it.

The problem is that in the abolition of dower married women did suffer a loss because their guaranteed right was not replaced by anything as certain as dower had originally been and nowhere is there articulated clearly what was to take its place. What replaced the right was an expectation — the expectation that the husband would fulfil his duty and "give her preference over all others".[122] But it was an expectation without right.

119 Real Estate of Intestates Distribution Act (1862) 26 Vic. No. 20. This Act provided the widow a statutory right to the equivalent of dower but took away "dower" properly so called.

120 Note 89 *supra*, 1074, No. 973 evidence to the Royal Commission.

121 *Ibid.*

122 *Ibid.*

III. AFTER DOWER — THE ROAD TO TESTATOR'S FAMILY MAINTENANCE

This position did not remain unchallenged for long. The second half of the nineteenth century was a period in which there was growing agitation for change regarding women's legal status. John Stuart Mill's *The Subjection of Women*, first published in 1869, was a landmark work demonstrating how the legal position of married women was on a level with slavery. In the United States, led by the heroic figure of Elizabeth Cady Stanton, and in England led by people like Mill and his wife, Harriet Taylor Mill, Millicent Garrett Fawcett and Barbara Leigh Smith Bodichon to name but a few, there was increasing attention being drawn to women's legal disabilities. The winning of the franchise for women was seen as a means to the end of changing those appalling disabilities and finally undoing the Blackstone code.

Our major area of concern was the law in relation to the property rights, or lack thereof, of married women and how that law and the laws regarding guardianship of children and the lack of equality in divorce, kept a stranglehold of dependence on married women. Testamentary freedom, both in regard to property and in relation to the appointment of testamentary guardians of children, in turn came under scrutiny and was condemned as another aspect of male power over women, another weapon in the armoury of patriarchal control to which wives were subject. While women lacked the franchise and had little property rights as married women, testamentary freedom was not an issue which received much attention. Other questions were fundamental preliminaries. In England, for example, questions like married women's property legislation along with suffrage for women were the issues which drew the most attention. But testamentary freedom was a question which was waiting in the wings for its turn on the platform of issues regarding women's rights and it took its turn once questions like married women's property rights and female suffrage had been considered. By comparison with such issues, testamentary freedom is perhaps a more minor hurdle, but was nonetheless a significant question regarding women's status once the more major hurdles had been jumped.

Toward the latter years of the nineteenth century in England, America, New Zealand and Australia, a movement gained strength which sought to reform the law regarding women. This movement gave testamentary freedom a new characterisation, namely as a power to disinherit wives. It was this new characterisation, generated by the women's movement, which lay behind the introduction of the Testator's Family Maintenance Act (N.S.W.) 1916,[123] an

123 Following the New Zealand example in their Testator's Family Maintenance Act 1900. Once New Zealand had passed this Act in 1900 the way had been paved, for it was easier for the Australian State legislatures to follow suit, the way had been forged and the issues fully argued.

Act which gave the court a power to override a will to provide for the surviving spouse and children. While it was an Act available to both widows and widowers, its objective was plainly to provide for women, and those women who had been unfairly treated by their husbands in their wills.

It was only with the introduction of such an Act that the widows of New South Wales regained some of the 'right' they had lost in the abolition of dower. Their position was still defined by the wills of their husbands, but they were no longer left 'without right'. Their 'right' was something less than the right of dower, in that it only gave a right to apply to the court rather than a right to provision, but it nonetheless marked the first real departure from the faith in the 'independence of mind' guided by the 'domestic affections' which lay behind the nineteenth century celebration of testamentary freedom evident in the quote with which this article began.

IV. CONCLUSION

The law regarding testamentary freedom represented ideal expectations in regard to the duties of property ownership and the distribution of it on death. It was fundamentally an expression of eighteenth century liberalism and was justified both as the fulfilment of individual freedom and the restriction of a State-defined 'compulsory appropriation of property' in the belief that it would provide a better balance among family members than 'arbitrary' fixed rules. A fixed scheme of dower therefore was just as objectionable as a fixed scheme of 'reasonable parts' because it hindered the power of the husband to choose in his wisdom the objects deserving of his bounty. In other words, it restricted his 'liberty', his power to discriminate.

The principle of liberty, which Blackstone and others cited as the rationale of the doctrine, was largely the sole province of men, and provision for wives accordingly characterised as an exercise of the wise and benevolent disposition of their husbands, rather than as rights of the women themselves. The position of married women was circumscribed by an interlocking mesh of doctrine which accorded them little free action. A woman's husband incorporated her legal personality and her status was defined by reference to her marriage to him. Such rules were admittedly expressed to be in the married woman's interest, for her "protection and benefit",[124] but the rules and their rationale belied the notion of liberty articulated by Blackstone and the liberal tradition to which he succeeded. While testamentary freedom was a vindication of the liberty of property, the law regarding married women's property denied her liberty in the interests of the property itself.

Although the freeing up of testamentary powers for men was considered not as a means for depriving widows but rather as the best means for

124 Note 1 *supra*, 433.

providing for everyone,[125] the only check on the exercise of testamentary freedom was the threshold requirements of responsibility built into the definition of testamentary capacity. This placed the wife at the mercy of her husband's whim and hostage to the vague principles in which testamentary capacity was couched. The widow had the expectation of provision, the expectation that her husband would fulfil the moral obligation at the heart of the definition of testamentary capacity, but it was an expectation with no legal right to provision. If that expectation were unfulfilled, her only 'right' was defined by the difficult, costly and totally unpredictable prospect of a challenge to her husband's testamentary capacity. In the context of the New South Wales Supreme Court in the late nineteenth century, such a prospect would have offered little comfort.

125 Refer *Banks* v. *Goodfellow*, note 2, *supra*. The power of devise established under the Statute of Wills 1540, 32 H. VIII c.1, was described in the Statute itself not as a power of disinheriting but as a power for making provision: "to and for the advancement of his wife, preferment of his children, and paiment of his debtes, or otherwise at his will and pleasure".