NEW ZEALAND'S TESTATOR'S FAMILY MAINTENANCE ACT OF 1900 – THE STOUTS, THE WOMEN'S MOVEMENT AND POLITICAL COMPROMISE

ROSALIND ATHERTON*

Introduction

In September 1893 the women of New Zealand won the suffrage.[1] Also in 1893 the question of limiting testamentary freedom, the power to leave property by will, became an electoral issue in New Zealand for the first time. This was not a coincidence. Through a woman's eyes testamentary freedom came to be seen as a power that could be used *against* women; as a power not to bestow, but to take away; and a power which largely was one possessed by a husband and exercisable by him over his wife and children. Female suffrage made testamentary freedom a relevant electoral issue because, cast in such terms, it was an issue which seriously affected women. In the passage of the Testator's Family Maintenance Act 1900 the concern as to abuses of testamentary freedom was translated into a means for redressing injustice. By this statute the court was given power to override a will to make provision for the spouse and/or children of a testator where the testator had left them without adequate provision in the will. Testamentary freedom was thus subjected to judicial control. This was a landmark piece of legislation, and the first of its kind in Anglo-Australasian law. This article traces its history.[2]

From the point of view of nineteenth century wives, a 'Testator's Family Maintenance Act' was a significant mechanism of protection and a recognition of women's rights in their position as widows, redressing the imbalance, at least in part, caused by the demise of the common law right of dower. This had been a valuable right of the widow. It had provided her, in general terms, a life interest in one-third of her husband's real estate.[3] Dower had thus qualified the husband's power of disposition in regard to real estate during his wife's lifetime and hence his testamentary freedom in regard to such property was restricted. Dower had also hampered efficient conveyancing as the right attached to the land itself and affected even subsequent purchasers of the land from the husband. Because of this, dower was almost universally avoided in England by the beginning of the

* Senior Lecturer in Law, University of Sydney.
[Accepted for publication February 1990]

1 For details on how the suffrage was obtained see for example Grimshaw, *Women's Suffrage in New Zealand* (Auckland 1972); Grimshaw, "Politicians and Suffragettes: Women's Suffrage in New Zealand, 1891-1893" (1970) 4 NZJH 160-177; and Bunkle, "The Origins of the Women's Movement in New Zealand: the WCTU, 1885-1895" in Bunkle (ed) *Women in New Zealand Society* (Auckland 1980) 52-76.

2 The Act in its most recent form in New Zealand is the Family Protection Act 1955.

3 The detail of dower is described for example in Megarry & Wade, *The Law of Real Property* (5th ed 1984) 544-546.

nineteenth century[4] and its formal death knell was sounded in the Dower Act 1833. In this Act the husband was given virtually complete control over his wife's dower right.[5] In New Zealand, therefore, the law as to dower had little application.[6] While its passing may have been applauded by conveyancers,[7] in the demise of dower the married woman lost her provision in widowhood guaranteed by the law. In its place she was left merely an expectation that her husband would make provision for her in his will; but an expectation without right.[8] The testamentary freedom of her husband meanwhile had become, to all intents and purposes,[9] complete.

From the point of view of nineteenth century husbands, the introduction of a Testator's Family Maintenance Act represented a major step backwards in regard to their testamentary freedom — the first reversal of the trend of increasing testamentary freedom which had begun with the English Statute of Wills of 1540 and culminated in the abolition of dower.[10] The husband's viewpoint moreover was that which typified the characterisation of testamentary freedom until the end of the nineteenth century. The fact that a man could leave his property away from his family had not been seen as a reason for denying or qualifying his testamentary freedom. Indeed, the freedom itself was seen as the means for making provision — and especially "appropriate" provision in individual circumstances.[11] It was seen as a power to reward "dutiful and meritorious conduct"[12] and, in that, as

4 Park, *A Treatise on the Law of Dower* (London 1819) at 4, comments that instances were "very rare" in which property became subject to the title of dower. Such instances were attributed to "inadvertency or unskilfulness, or from short-sighted economy": British Real Property Commissioners, "First Report" (1829) British Parliamentary Papers, sess 1829, Vol 10, at 17.

5 See for example the history of the abolition of dower in New South Wales and its implications for women in Atherton, "Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales" (1988) 11 UNSWLJ 133.

6 See, for example, Adams (ed) *Garrow's Law of Real Property in New Zealand* (Wellington 1954) 125-6. The English Dower Act 1833 applied as part of the laws of England as existing on the 14 January 1840.

7 See for example the views expressed by the British Real Property Commissioners, "First Report" op cit; and discussion in Atherton, op cit at 148-54.

8 Atherton, op cit. See also Buck, "Women, Property and English Law in Colonial New South Wales", in Kirkby (ed) "Law and History in Australia" Vol IV (La Trobe University 1987) 2-14.

9 Subject, for example, to compliance with formal requirements as to the making of wills and any supervening rules of law, such as the rule against perpetuities.

10 General outlines of the process of extending testamentary freedom can be found in Keeton & Gower, "Freedom of Testation in English Law" (1933-34) 20 Iowa LRev 326; Dainow, "limitations on Testamentary Freedom in England" (1940) 25 Cornell LQ 337; Guest, "Family Provision and the Legitima Portio" (1957) 73 LQR 74; and McMurray, "Liberty of Testation and Some Modern Limitations Thereon" (1919-20) 14 Illinois LRev 536. In regard to women, 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 marriage, a position which continued until the passage of the Married Women's Property Acts of the late nineteenth century (in New Zealand, Married Women's Property Acts were passed in 1860, 1870 and 1884).

11 Blackstone, *Commentaries on the Laws of England* (1765-69) Wol I 437-38; and *Banks* v *Goodfellow* (1870) 5 LR QB 549 at 563-64 per Cockburn CJ.

12 *Banks* v *Goodfellow,* ibid.

a "useful auxiliary" to "paternal authority".[13] Even the great English law reformer, Jeremy Bentham, saw the power of making a will as beneficial, as an instrument of social control: "an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of their families".[14] The few occasions where a man might actually leave his property away from his family were not considered a reason for denying the freedom itself. It was considered "advantageous", "for the good of him who commands".[15]

The last years of the nineteenth century saw a dramatic shift in relation to the characterisation of testamentary freedom: from a power to provide, to a power to disinherit; and, in this shift, to a greater recognition of how testamentary freedom affected women rather than how it benefited men. What was it about the end of the nineteenth century that was so important in leading to this change? These years were significant in two major respects: it was a period of change in liberal ideas towards a more strongly humanist, and, with it, interventionist State; and it was a period of growing agitation for women's rights. The Testator's Family Maintenance Act is essentially an expression of these two things. It reflects on the one hand an acceptance of legislative intervention over the exercise of individual power where that power is considered as having been abused; and, on the other, it reflects a desire to protect wives and children where their husbands and fathers have not fulfilled the expectations of the law. It was the women's movement which essentially changed this focus on the question of testamentary freedom and gave it this new characterisation. It was female suffrage which gradually brought the issue into political prominence and which led eventually to the passage of the Testator's Family Maintenance Act.

The New Liberalism

A 'Testator's Family Maintenance Act' involved a legislative overriding of individual action and, to that extent, it represented a curtailment of free will. It was, therefore, fundamentally at odds with the ideology of laissez-faire as expressed in the notion of 'freedom of property', of which testamentary freedom is an aspect, and as expressed in the liberal intellectual tradition of John Locke[16] and William Blackstone.[17] Hence, before a Testator's Family Maintenance Act could be introduced, the old liberalism of laissez-faire would have to shift to a political philosophy which accepted,

13 Idem.

14 Bentham, "Principles of the Civil Code" in *The Works of Jeremy Bentham – Published under the supervision of his executor John Bowring* Vol I (Edinburgh 1843) 296-364, pt II, ch 5, "Of Wills" at 337.

15 Idem. Although Bentham expressed some concern that "in making the father a magistrate we must take care not to make him a tyrant", he considered that fathers needed such a power not only for their own good but for the good of the community in preserving social order.

16 Locke, *Two Treatises of Government* (1690), Laslett (ed) (Cambridge 1960).

17 Blackstone, *Commentaries,* op cit at 437-38. See also *Banks* v *Goodfellow* op cit; and Atiyah, *The Rise and Fall of Freedom of Contract* (1979), who gives a concise outline of the notion of freedom of property, especially in ch 5.

first, the broad idea that the State could legitimately interfere with the exercise of individual will and, secondly, the particular exercise of that individual will in relation to property represented by the doctrine of testamentary freedom.

The shift to a new Liberalism, which accepted as a basic tenet that the State could legitimately intervene to curtail individual action, occurred in the wake of the Industrial Revolution and it was occasioned by the potent need of weaker members of society to protection. The basis of such intervention was a moral or ethical principle: "the new liberal aim was to establish an ethical framework to prescribe and evaluate human behaviour and, where necessary, to re-create social institutions."[18] The shift in ideas was articulated in England by writers such as John Stuart Mill[19] and T H Green,[20] and its eventual legislative progeny were, for example, the Acts regulating the conditions of the factory, Old Age Pensions Acts and the legislation dealing with the regulation of industrial disputes. New Zealand and the Australian colonies followed this changing pattern of ideas and put them into practice in legislation of their own. New Zealand in many respects leapt to the forefront. It became known as the 'social laboratory of the world' both for its initiative in legislation and the breadth of the legislative programme introduced under the Liberal government during the 1890s.

The translation of such legislative initiative into a specific plan to limit testamentary freedom by way of legislation, however, is due to the move towards greater recognition of women's legal disabilities and a wish to reform them. It was this movement which led to the characterisation of testamentary freedom as an aspect of women's legal disabilities. Only then did it become an issue for reform along with other targets.

A New Awareness of Women's Rights

The second half of the nineteenth century was a period in which there was growing agitation for change regarding women's legal status in England, America, New Zealand and Australia. John Stuart Mill's *The Subjection of Women,* first published in London in 1869, was a landmark work, demonstrating how the legal position of married women was on a level with slavery. For many, this work became a personal catalyst to sympathy with and agitation for female suffrage. Feminist writers and speakers such as Elizabeth Cady Stanton and Susan Anthony in the United States, and Mill and many others in England,[21] increasingly drew attention to women's legal disabilities and the need for female suffrage as the first step in a cam-

18 Freeden, *The New Liberalism: An Ideology of Social Reform* (Oxford 1978) at 40.

19 For example Mill, *On Liberty* (London 1859) (many reprints).

20 Green, *Lectures on the Principles of Political Obligation,* in *Complete Works,* Vol II (London 1889-90).

21 Mill's wife Harriet Taylor, Millicent Garrett Fawcett and Barbara Leigh Smith Bodichon to name but a few. See eg Banks, *The Biographical Dictionary of British Feminists,* Vol I (1800-1930) (Brighton, Sussex 1985).

paign of undoing "the old Blackstone code".[22] Major areas of concern were the property rights, or lack thereof, of married women, the laws regarding guardianship of children, and the lack of equality in divorce, all of which were seen as keeping a stranglehold of dependence around married women.

Testamentary freedom, both in regard to property and in relation to the appointment of testamentary guardians of children,[23] 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 hostage. While women lacked the franchise and had few 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[24] along with reform of divorce laws and the attainment of female suffrage were the issues which for the moment drew the most attention. This pattern was echoed in the Australian colonies and in New Zealand. 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 determined. By comparison with such issues, testamentary freedom was perhaps a minor hurdle, but it was nonetheless a significant question regarding women's status once the major hurdles had been jumped. Interest in a question like testamentary freedom on a theoretical level naturally followed questions regarding the legal relationship of husband and wife, which relationship was thoroughly analysed and reviewed through specific issues like the property rights of married women and the equality of husband and wife in divorce. Once the principle of limiting testamentary freedom was raised it drew a sympathetic audience, especially from proponents of women's rights.

It was the 'women's movement' which gave testamentary freedom the new characterisation which paved the way for the change in the law which began in New Zealand with the passage of the Testator's Family Maintenance Act of 1900. Once New Zealand had passed its Act it was easier for the Australian State legislatures to introduce similar legislation; the way had been forged and the issues well argued. It provided both leverage for those already thinking along such lines and also an example to others who had not begun to think of it yet. The passage of the Act in New Zealand made it ultimately much easier for others to follow suit. And, by its example, New Zealand led the Australian colonies, and eventually England, to imitate it.

22 Stanton, Anthony & Gage (eds) *History of Woman Suffrage* (New York 1881) Vol I at 64, described the first women's convention in 1848 at Seneca Falls, New York, as the "death blow to the old Blackstone code" and "the inauguration of a rebellion such as the world had never before seen" (at 68).

23 The story of the changes in the laws regarding guardianship of children in England is told elsewhere. See for example, Holcombe, *Wives and Property* (Oxford 1983) 50-58 and references cited there; Maidment, *Child Custody and Divorce* (London 1984) at 98. The English reform of the late nineteenth century in this area was adopted in New Zealand in 1887.

24 Reform of the married women's property laws is detailed by Holcombe, ibid.

The Stouts

Although the intellectual climate of 1893 can be said generally to be receptive of the idea of protecting the property interests of widows, the immediate initiative for the introduction of actual legislation putting such an idea into practice by qualifying testamentary freedom in New Zealand came from the Stouts, Lady Anna Paterson Stout, a leader of the women's movement, and her husband, Sir Robert Stout, first Premier and later Chief Justice of New Zealand.[25]

In his campaign for the seat of the City of Wellington, during the general elections called for November 1893, Sir Robert Stout included as a political issue for the first time the question of limiting a husband's testamentary freedom. On 25 October 1893, little more than a month after women's suffrage passed the New Zealand legislature,[26] he gave a political address specifically to women at the Wellington Opera House and one of the matters that he raised with his audience of 700-800 women[27] was the need "for some such law . . . as that in force in France and Scotland, which would prevent a husband from willing the whole of his property to persons other than his wife, as was often done."[28] For Stout, it was a question of women's rights, and he, as a known campaigner for women's rights, "one of their liberators,"[29] adopted it as a specific matter for reform within this wider concern. He characterised testamentary freedom as a power to will property away from a wife and as a matter that should be changed to protect women's interests. Characterised in this way, it was also a natural companion to other issues raised by Stout in the same speech, such as guardianship of children, equality in divorce and in the distribution of property on intestacy.[30] As a result of the election, Stout topped the poll and was returned as the member for the City of Wellington.

Stout did not bring the question of limiting testamentary freedom into the Parliamentary arena straight away. His energies after the 1893 election was largely devoted to the major reforms of the Liberal government

25 Biographical details on the Stouts are drawn largely from the following sources: (i) Sir Robert Stout: *Dictionary of New Zealand Biography* (DNZB), Scholefield(ed) (Wellington 1940) 339-43; *Cyclopedia of New Zealand* (Wellington 1897-1908) 259-260; Bray, "The Place of Sir Robert Stout in New Zealand Social History", MA thesis, Victoria University of Wellington, 1958; Cox, "Early Life of Sir Robert Stout 1844-1879", MA thesis, Dunedin, 1931; Hamer, "The Law and the Prophet: A Political Biography of Sir Robert Stout (1844-1930)", MA thesis, University of Auckland, 1960; Dunn & Richardson, *Sir Robert Stout: A Biography* (Wellington 1961); and Stout's Papers which are held in the Alexander Turnbull Library, Wellington. (ii) Lady Stout: DNZB (entry for Sir Robert); Dunn & Richardson, op cit in passing; Greig, "Wives of the Prime Ministers of New Zealand", unpublished MSS, Alexander Turnbull Library, Wellington (mainly extracts of Dunn & Richardson); and Lady Stout's Papers, Hocken Library, University of Otago, Dunedin.

26 Electoral Act 1893, which came into effect in September, 1893 (the date on the Act itself is 19 September 1893).

27 *Anglewood Record and Waitara News,* 1 November 1893, in "The Election of 1893 – Newspaper Clippings" Vol 1, Stout Papers, Alexander Turnbull Library, Wellington.

28 "Sir Robert Stout before the Women", newscutting with no source, ibid.

29 *Daily Telegraph,* 26 October 1893, ibid.

30 *New Zealand Herald,* 8 November 1893, ibid, Vol 2.

including land policy, the prohibition question and licensing laws. It was not until 1896 that he introduced his first Bill regarding the law of bequest.[31] However Sir Robert's wife, Anna, gave the issue prominence before him in April 1896, when the feminist leaders of New Zealand joined forces in Christchurch to form the National Council of Women of New Zealand, affiliated with the International Council of Women. Lady Stout, representing the Southern Cross Society of Wellington, which she had formed, was appointed a Vice-President and moved her own motion:[32]

> That, in the opinion of this Council, the law relating to the devolution of property should be altered so that every man owning property, and having a wife, or wife and children, should be compelled to make provision for them out of his property, to the extent of not less than one-third of such property for his wife, and one-third part for his children or child, and in the case of a man not having a father or mother, brother or sister, one half of his property should be left to his wife, and the other half to his children, provided that in the latter case it should be lawful for the owner, before making such provision, to leave not exceeding 5 percent of his property to charitable purposes.

This motion was directed specifically to qualifying testamentary freedom along the lines of the civil law principle of fixed shares which applied for example in Scotland. Under this scheme, if a person were survived by both spouse and children, the latter would each get one-third respectively of the property of the deceased, the will only valid in respect of the remaining one-third. Lady Stout's motion followed this pattern, as did her husband's comments in his campaign of 1893. The motion was duly carried and from then the political expediency of introducing an Act in such terms became more obviously compelling. It was now openly a matter in the women's 'catalogue' of reforms for New Zealand and it is not surprising that shortly thereafter Sir Robert Stout introduced into the House of Assembly his "Limitation of the Power of Disposition by Will Bill" in June 1896.[33] In debate on the Bill some members of Parliament were acutely aware of its significance in the women's movement.[34]

The introduction of a Bill into Parliament on the subject was a vital step. The issue now had a reference point and a political impetus, any further Bill being compared to, or contrasted with the earlier one. It was now also forced to the level of debate in the forum of Parliament. It was, therefore, a landmark in the history of testamentary freedom.

Before considering the course of the 1896 Bill in the Parliament, and that of the Bills which followed it, it is interesting to consider whether such

31 Although he did press for a Family Homes Protection Bill in 1894 and 1895 which was aimed at protecting a "family home" from seizure for debt by forbidding mortgages on them. The objective was sympathetic to the position of the family in relation to the home, a sympathy which is consistent with his desire similarly to limit the right of bequest.

32 "Constitution of the National Council of Women of New Zealand and Minutes of the First Meeting held in the Provincial Council Chambers, Christchurch, April 1896" (Christchurch 1896) at 11.

33 First reading 26 June 1896, 1896 NZ Parliamentary Debates (NZPD) vol 92, 386.

34 See eg T Mackenzie's speech in the Second Reading of the Bill where he makes specific reference to the women's conference in Christchurch: ibid at 586.

a Bill would have been introduced without Sir Robert – and would Sir Robert have introduced it without the interest of his wife in the matter? It is difficult to give a precise answer to such questions. Certainly the idea of limiting testamentary freedom, once it had been brought forward, became caught up in the flow of new liberal thought in New Zealand, reflecting the ideology behind such legislation as factory Acts and old age pensions.[35] The Stouts, however, must be credited to a large extent with the initiative for its introduction. They were the pioneers who brought the matter into the public and political arena. As to the role that each of the Stouts played in this, any conclusion must be based on what we know of their personal interests and public activities.

Both Stouts were keen supporters of the temperance movement from their early years and both were staunch advocates of womanhood suffrage. Sir Robert was influenced by John Stuart Mill's account of the position of women in *The Subjection of Women,*[36] and he became a leader of legislative change in the interests of women. Convinced by Mill's work as to the injustice of women's legal status and the need therefore for female suffrage, he introduced in 1878 a Bill which would have made women ratepayers eligible both to vote and stand for Parliament.[37] It was Stout, too, who introduced the Married Women's Property Act 1884, the aim of which was to protect women in the absence of a settlement on marriage against the automatic transfer of their property to their husband on their marriage. Sir Robert's concern for women and the need to protect them was also responsible in large measure for a transformation in his own political views. By 1893, his formerly conservative, laissez-faire liberalism, gave way to a greater concern for State intervention on behalf of women's working conditions. His overwhelming concern to protect women as a whole from exploitation by men in a stronger position (whether employer or husband) was to act as a catalyst in the transformation of his own liberalism to one which advocated State action on certain matters and particularly in regard to women.[38]

Anna Stout, as Anna Paterson Logan, married Robert Stout in 1876 when she was 18 and he, 33. Her father, John Logan, was keenly interested

35 For details on New Zealand's Liberals see especially: Hamer, *The New Zealand Liberals: The Years of Power, 1891-1912* (Auckland 1988); and Lyon, "The Principles of New Zealand Liberal Political Thinking in the Late Nineteenth Century", PhD thesis, Auckland University, 1982. A Factories Act and an Employer's Liability Act were passed in New Zealand in 1891; an Industrial Conciliation and Arbitration Act in 1894; and an Old Age Pensions Act in 1898.

36 A copy of this book was leant to Stout by Henry Chapman after Stout came to Dunedin in 1864. Chapman was a puisne judge in Otago at this time. Chapman, a friend of Mill's, had helped Mill to bring out the *London Review.* Chapman came to New Zealand in the 1840's and to Dunedin in 1864 – the same year that Stout himself arrived from the Shetlands. DNZB, entry for Chapman; and Sawer & Sims, *A Woman's Place: Women and Politics in Australia* (Sydney 1984) at 20 footnote 2. See also Spiller, "The Career of Henry Chapman in Dunedin" in this issue of the Otago LR.

37 Electoral Bill 1878, 1878 NZPD vol 28, 2nd reading at 152.

38 See especially Hamer, "The Law and the Prophet", op cit, ch 16; and Hamer, "Sir Robert Stout and the Labour Question 1870-1893" in Chapman & Sinclair (eds). *Studies of a Small Democracy* (Auckland 1963) 78-101.

in prohibition and other social reforms[39] and Anna's sympathies, thus nurtured, were to develop in her into a passionate concern for attaining equality for women, especially in voting, wages and the application of the law generally. Hailed as "a born crusader" and as one who would "never be without a cause",[40] not only was she a leader of the women's cause in New Zealand[41] but she also actively participated in the suffrage campaign in England in the period 1909-12, during which time some of her children were attending schools there.

Some estimation of the work of Lady Stout has been given by Dunn and Richardson, who, in their biography of Sir Robert, made a plea for recognition of Lady Stout's work in her own right: "Possessed of strong determination and fearless in her support of the causes she championed she has in her own right a prominent place in the social history of New Zealand."[42] They also offered their assessment of Lady Stout's influence on her husband as to his social views, commenting that although it was "a little difficult to assess, she certainly encouraged him and reinforced his beliefs in such matters as prohibition and franchise for women, but it seems that they both had the same basic philosophy and thought along the same lines rather than that one directed the thinking of the other."[43]

Is this then the role that Lady Stout played in regard to the Testator's Family Maintenance Act? Was it merely that she "encouraged [Sir Robert] and reinforced his beliefs"; or can it be placed higher than this? Did the Stouts simply think "along the same lines" with the "same basic philosophy", or did they interact more intensely on this particular issue, campaigning together for its implementation? It is, as Dunn and Richardson commented, a little difficult to assess, but it is submitted that some more positive conclusion can be drawn. At a public level, the Stouts' specific interest in limiting a husband's testamentary freedom seemed to gain momentum at around the same time, both advocating in their public spheres the need for such a change. That they both adopted the issue as a specific matter for reform at the same time is hardly coincidental, however. It can be argued that it reflects clearly the degree of their interaction and intellectual sympathies: both were crusaders for women and both sought to improve the lot of women under the law. The situation, it would seem, was not so much that Anna reinforced and encouraged Sir Robert's beliefs, but rather that they reinforced and encouraged each other's beliefs. The impression to be drawn from the surviving record[44] is that they were a powerful combination for promoting legislation of vital interest to the

39 Dunn & Richardson, op cit, at 54.

40 Special article 26 December 1925, on Sir Robert Stout's retirement making particular reference to the work of Lady Stout: "Newspaper Clippings 1878-1920", Stout Papers, Alexander Turnbull Library, Wellington.

41 Particularly through the National Council of Women of New Zealand and the Southern Cross Society. See for example Woods, "A House Divided Against Itself Cannot Stand", MA thesis, University of Auckland, 1983, a study of New Zealand's women's organisations particularly in the 1890s.

42 Dunn & Richardson, op cit, at 209.

43 Idem.

44 See sources cited in footnote 25 supra.

women's movement and together they initiated a change in the law regarding testamentary freedom which was to lead the world.

Stout's Bills — 1896, 1897

Sir Robert Stout's first Bill in 1896 sought to reintroduce the civil law principle of fixed shares, which applied, as he had mentioned in 1893, in France and Scotland. The Bill was not exactly the same as the one proposed by Lady Stout, but the main 'fixed shares' principle was the same. Stout regarded the matter as one of principle — that a Bill such as this was necessary "as an affirmation of the principle that a man or a woman should not have the power to will all their property away from their family".[45] At the second reading of the first Bill on 2 July 1896, the Bill attracted praise for its central principle even from those who criticised its mechanics. There was concern as to how the Bill would work: for example, whether "ill-behaved" members of the family should be entitled to a share[46] and the proportion of the property over which testamentary freedom should operate. The latter concern led Stout to modify the proportion in favour of testamentary freedom upwards in his second Bill in 1897, "so as to meet objections" raised in regard to the earlier Bill.[47] Where the 1896 Bill had limited testamentary freedom to one-third of a person's property, the 1897 Bill increased this to one-half. This was the first political compromise in the story of the Testator's Family Maintenance Act.

With the presentation of the second Bill in 1897, more objections arose: what would happen if the widow remarried;[48] what would happen if the couple had long been separated;[49] what if the children had been given their 'portions' already?[50] Again, there was still general support for the principle of the Bill and many who spoke strongly in favour of it had specific examples of hardship in their own minds, from their personal and/or professional experiences, which they considered such a Bill could alleviate.[51] Both Bills were read a second time but did not go any further. It was not until 1900 that a modified version of the concept in Stout's Bills was enacted in the form of the Testator's Family Maintenance Act 1900.

The thrust of Sir Robert's Bills was clear and it was encapsulated in the title of them: to limit the power of disposition by will. The objective was to curtail testamentary freedom and, in doing so, to guarantee provision to the surviving spouse and children. Sir Robert described the proposal as follows when he introduced the first Bill:[52]

> If there were a wife and children a man could only will away one-third from his wife and children; and if he left a widow alone he would only be able to dispose of one-

45 1896 NZPD vol 92, 586.
46 T Mackenzie, ibid.
47 Second Reading of the 1897 Bill 13 October 1897: 1897 NZPD vol 98, 546.
48 Captain Russell, ibid at 547.
49 Seddon, ibid at 546.
50 Montgomery, ibid at 547.
51 For example, Stout, ibid at 546; J Hutcheson, ibid at 548; and Meredith, ibid at 549.
52 1896 NZPD vol 92, 585-6.

> half; and the same law applied to a wife in regard to the disposition of property which she might possess . . .

Although the wording of the Bill was not limited to a man, the focus was unashamedly to limit a man's powers of disposition by will in order to protect his wife and children: nearly every example cited was of a wife needing protection from the testamentary powers of her husband.

The mandatory form of Stout's Bills, however, was too great an incursion on individual liberty and rights of property for the Parliamentarians of the day, a view expressed succinctly in the comment of the Honourable Mr Bowen, that:[53]

> if you attempt to interfere with wills, except so far as it is necessary to prevent the testator from perpetuating an injustice and a wrong, you will go too far.

Stout's Bills were objectionable because they made a will for a testator, thereby removing his power of discretion in regard to the disposition of his property.[54]

The rejection of Stout's Bills reveals much about the political ideas of the Liberals at the time.[55] The Liberal party, the first 'party' as such in New Zealand politics, took office in late January 1891 and remained in power until July 1912. Its basic ideas accorded with the new Liberalism in England, which accepted the notion of State intervention on moral grounds. Stout's Bills, however, were couched in mandatory terms. This was at odds with the framing of interventionist legislation on some moral or ethical base: there was no discrimination between individual cases or circumstances, just a mandatory limitation on testamentary freedom. There was, therefore, no link to the Liberal rationale of intervention. It was only once some moral framework had been included in the legislation in the later Bills of Robert McNab that it became acceptable.

It is interesting to speculate why it was that Stout proposed Bills cast in that mandatory form. Stout was regarded as one of the more conservative of the Liberals, "a survivor of the politics of an earlier period",[56] and was often in opposition to reforms proposed by the Liberal party.[57] In a sense, then, the model of his Bills was out of place with his wider ideology. They were not, however, simply his invention. They did follow the Scottish precedent with which he was familiar. Moreover, the Bills were also consistent with his special concern for women and children. If his

53 1900 NZPD vol 113, 618.

54 Fisher, 1900 NZPD vol 111, 508, reflecting on Stout's earlier Bills during debate on the 1900 Bill.

55 The comments on the political ideas of the Liberals are drawn principally from Lyon, "The Principles of New Zealand Liberal Political Thinking" op cit and Hamer, *The New Zealand Liberals,* op cit.

56 Clarke, "The New Zealand Liberal Party and Government, 1895-1906", MA thesis, University of Auckland, 1962, at 3.

57 Hamer, "The Law and the Prophet" op cit, at 513-14; DNZB, entry for Stout, at 341; and Clarke, ibid at 9-10.

Bills are considered as cast in a mould most protective of women as widows, the mandatory form of them does not appear so startling.

However Sir Robert himself was unable to see his Bills through to enactment as legislation. He resigned from Parliament in 1898[58] and, in the same year, the issue of limiting testamentary freedom was taken up by Robert McNab.

McNab's Bills — 1898, 1899, 1900

Robert McNab introduced three Bills aimed at curtailing unlimited testamentary freedom, in 1898, 1899 and 1900, the last of which was finally passed to become the Testator's Family Maintenance Act 1900. One particular question poses itself in relation to McNab's taking up the issue, namely, was there any link between McNab and Sir Robert Stout on the matter? There is no direct evidence surving of a 'causal' link between the two men which led to McNab's taking over as champion of the issue, but there are facts from which inferences of a possible link, or at least influence, can be drawn.[59]

McNab and Stout both had their legal backgrounds in Dunedin, where the Scottish influence was strong; both were liberals and strongly interested in legislation affecting women; and both had reason to set themselves apart from the Premier, Richard (Dick) Seddon.[60] With a certain similarity of background and common political interests it seems likely that Stout at least supported McNab's Bills and probable that McNab looked to Stout, who was twenty years his senior and very much the elder statesman, for guidance.

The object of McNab's Bills was the same as Stout's earlier ones: namely to guarantee some provision for a testator's family. The form of the Act, however, was new. The civil law principle was completely abandoned in favour of a discretionary model embodied in section 2 of the "Testator's Family Provision out of Estate Bill" 1898:

> Should any person die leaving a will, and without making therein due provision for the maintenance and support of his or her wife, husband, or children, the Supreme Court may, on application made to it by or on behalf of the said wife, husband, or children, order that such provision as to the said Court shall seem fit shall be made out of the estate of the deceased person for the maintenance and support of his or her said wife, husband, or children.

58 He took up the post of Chief Justice on 22 June 1899.

59 Patterson, *Family Protection and Testamentary Promises in New Zealand* (Wellington, 1985) at 3, asserts simplistically that "there is no evidence that [Stout] had any hand in its drafting". Biographical information for McNab is drawn from DNZB.

60 See eg Clarke, "The New Zealand Liberal Party and Government" op cit, ch 2. Stout himself had lost out to Seddon in a leadership struggle in 1893 on Stout's re-entry into Parliament in that year and thereafter he often attacked the Government, in the object, according to Clarke, of finding support "to make himself once again a political power" (at 10). McNab also found himself in opposition to Seddon. In 1896 he was deliberately deprecated by Seddon during the election of that year (ibid at 65) and later remained apart, like Stout, from the Government's "slavish followers" (ibid at 73).

This was an innovation in inheritance law[61] and a brilliant political compromise. It avoided Stout's mandatory shares and confirmed the testamentary freedom which Stout's proposal appeared to curtail – but with the same ultimate objective, of protecting the family. It did so by providing a safety valve to check abuses of the power of leaving property by will, rather than curtailing the power itself. For those who had baulked at the incursion to "rights of property" represented by the reintroduction of the principle of fixed shares, such a concept was indeed more palatable and in 1900 McNab's third Bill became law.

What lay behind the discretionary model of the Bill – was it merely its political expediency? Certainly this reason by itself counselled a modification of Stout's Bills if the principal objective was to succeed: namely ensuring legislation of some kind protecting the surviving spouse and children of capricious testators. But there is another element in the background to the discretionary model of the Testator's Family Maintenance Act: there was already a legislative precedent.

Under the Native Land Court Act 1894, the Native Land Court[62] was given certain powers to override the wills of Maori testators. Section 46 of that Act provided that:

> On every application for the appointment of a successor where the deceased has left a will, and on every application for probate or letters of administration with will annexed, the Court shall inquire if the testator has devised land to a person other than his successor; and if the testator has so devised land, the Court, if it shall further appear on inquiry that such successor has not, without the land so devised, sufficient land for his support, shall award to such successor a part, or, if necessary for his support, but not otherwise, the whole of the land so devised; and the probate or letters of administration shall be expressly limited to the estate and effects of the deceased other than the land so awarded to the successor.

The Court was thus able to override a devise of land to provide sufficient land for the support of the testator's "successor" which was defined in section 2 of the Act to mean:

> the person who, on the death of any Native, is, according to Native custom, if there be no Native custom applicable to any particular case, then according to the law of New Zealand, entitled to the interest of such Native in any land or personal property.

Where the successor had been left without sufficient support by the testator, the court had power to rectify the situation by overriding the will. This principle was also the basis of the discretionary model of the Testator's Family Maintenance Act.

To what extent then did this provision affect the form of McNab's Bills? At least one commentator attributes the "germ of the particular approach"

61 Subject to the comments below in relation to the provisions of the Native Land Court 1894.

62 The court was established under the Native Land Act 1865, "for the investigation of the titles of persons to Native Land . . ." (section v).

in the Act of 1900 to this provision.[63] It is certainly clear that a number of members of Parliament were aware of it and specifically referred to it in the course of debate on the Bills.[64] Sir Robert Stout for one was fully aware of the Act and was closely associated with its development,[65] which would have been important if he was behind McNab's Bills at all. Even without any influence from Stout, however, the provision of the Native Land Court Act would have provided an easily accessible and familiar model for a new version of Stout's earlier Bills, although exactly how strong a connection can be drawn is difficult to gauge.

The background for the introduction of section 46 in the Native Land Court Act however is somewhat different, and if indeed the section provided the model for the Testator's Family Maintenance Bills it is a rather curious borrowing in the light of this history. Apparently a number of Maori wills of doubtful authenticity had been produced to the Native Land Court as evidence of the title of certain persons. It was said that there was "quite a trade" in the making of wills and that it had become "a fine art".[66] In the interests of protecting native lands and controlling exploitation of it through uncontrolled private dealings, the Native Land Court was given much greater powers in the 1894 Act than it had had previously, following upon a thorough review of the problems by the Native Affairs Committee in 1891.[67] One such power was the power in section 46 to override a devise of land to overcome "the fabrication of spurious wills".[68]

The discretionary form of the provision was particularly apt given the objective of protection in relation to native land, as it meant that no allegation of fabrication need be brought. The question was simply whether the "successor" had been insufficiently provided for. This was an ingenious solution given the difficulty of proving that a will was indeed spurious, as it avoided such an issue entirely. The focus under section 46 was rather on the propriety of what was done in the will; hence the issue of forgery was irrelevant.

The distinct logic of the form of section 46 was thus to circumvent the problem of questionable wills in order to protect native land, given the great problems which had arisen in proving matters of title to Maori land. The logic of the discretionary form of the Testator's Family Maintenance

63 Robson, *New Zealand: The Development of its Laws and Constitution* (2nd ed 1967) 472.

64 ALD Fraser, 1900 NZPD vol 111, at 506; The Hon Col Pitt, ibid vol 113, at 614: "it is perfectly clear that the main principle involved in this Bill has already been applied to the Native race."

65 Stout was aware of the problems in relation to native land which led up to the Native Land Court Act of 1894. For example he had been Minister for Lands in 1878-79 and as Attorney-General he had been concerned in 'a great number of native cases' as he reported to the Native Affairs Committee in 1891, whose deliberations and report lay behind the 1894 Act: Appendices to the Journals of the House of Representatives (AJHR), 1891, Session II, II, G-I, at 165 par 2189.

66 Seddon, Second Reading of "Native Land Court Bill 1894", 28 September 1894, 1894 NZPD vol 86, 3744.

67 Some of the problems in relation to Maori lands are considered in Martin, "Aspects of Maori Affairs in the Liberal Period", MA thesis, Victoria University, Wellington, 1956.

68 AJHR 1891, Sess. II, II, G-I, xi.

Bills on the other hand was to provide a way around wills which had treated a spouse and children unjustly, while still endorsing the basic tenet of testamentary freedom. If section 46 indeed provided the model for McNab's Bill, it was an interesting historical borrowing given its peculiar background. A broad objective of both provisions however was the same, namely the protection of 'weaker' groups, whether they be seen as women, children or natives, and this itself perhaps provides a sufficient basis to justify the borrowing in any event.

The discretionary model of the Testator's Family Maintenance Bill was specifically designed by McNab to answer objections made to the more intrusive model of Stout's earlier Bills[69] and it had the advantage of the very juxtaposition with those Bills. It is not surprising then that McNab's Bills appealed as an improvement[70] and "a fairer measure than the Bill introduced by Sir Robert Stout".[71] It was deliberately less of an invasion to existing rights of property than Stout's Bills and McNab stressed the contrast between his Bill and Stout's in moving the second reading of his 1900 Bill. He did not propose, he said, "to take away from any person any right of disposal of any part of his property",[72] rather he "only sought to provide for the maintenance of the wife and family".[73] The title of McNab's Bills reinforced this point: his "Testator's Family Maintenance" Bills were contrasted with Stout's "Limitation to the Power of Disposition by Will" Bills. The central objective of both, however, remained in essence the same, namely ensuring some provision to the spouse and children of a testator. McNab's Bills, however, were cast in a more winning light.[74]

In the debate on McNab's Bills a new dimension emerged in the arguments. It was not simply the principle whether a man should be permitted to leave his family unprovided for by will, but rather whether a man should be allowed to throw his family on the State for support. It was, in essence, a 'hip-pocket' argument: should the testator pay, or should the State? Where debate on Stout's Bills had focused on the extent of limiting a man's power to deprive his wife and children of provision, the

69 1898 NZPD vol 102, 419.
70 Seddon, ibid.
71 McLean, 1900 NZPD vol 111, 422.
72 Ibid at 504. McNab, 1900 NZPD at 504.
73 Idem.
74 It could also be argued that the compromise position posed by McNab's discretionary Bills, whereby the property owner's power to choose the objects of bounty could be modified by the Court, was acceptable because it provided a substitute form of patriarchy, and therefore far less of a change than cutting the power of testamentary disposition altogether. The concept of judges as new kinds of patriarchs is argued in relation to 19th century America eg by Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* (Chapel Hill 1985) ch 8; and Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, New York 1982) ch 8.

arguments on McNab's Bills added to this a welfare aspect.[75] McNab expressed the principle thus: "The question to be decided in regard to this Bill was, was the State to be liable for the support of the wife and children, or was the estate to be liable?"[76] To this he responded: the estate.[77] Many interpreted the Bill in this light, agreeing with the broad proposition that the State should not be liable.[78]

In the course of argument, however, it became clear that the question to be decided was not as clear-cut as McNab suggested. For many, the simple question, "was the State to be liable or was the estate," did not afford of a simple answer where "undeserving" family members were being considered: should not a testator be permitted to disinherit an undeserving wife or children, they asked?[79] For them, a 'morality principle' conflicted with a strict application of the 'State v estate' principle. Such a principle was an underlying rationale of testamentary freedom, in that the freedom provided the way of discriminating between family members, not simply on the basis of need, but of conduct. The virtuous person was contrasted to the unfaithful, the dissolute, or the reprobate, to use some of the terminology used in debate. Hence if testamentary freedom were exercised in a way which could be justified by the morality principle, it was argued, such an exercise should not be interfered with under the proposed Act; otherwise, it was thought, the Act would represent a reward for bad conduct and an encouragement to the undeserving. Neither McNab's Bills nor Stout's earlier fixed shares Bills had made such a distinction. But without introducing some such qualification in the legislation it was considered that the Act would, in short, contradict the fundamental liberal notion of self-reliance.[80] McNab, however, argued in reply that the claim of the welfare principle was higher: "if a father had a dissolute son — bad and

75 Oughton, *Tyler's Family Provision* (2nd ed Oxford 1984) at 7, comments however that "Although primarily promoted as a measure to alleviate a burden on the public purse, the jurisdiction was invoked substantially to alter private rights." This comment should be qualified in that although this became a main argument in the course of debate on McNab's Bills and later in the exercise of jurisdiction under the Act, it was not raised initially during discussion on Stout's Bills.

76 1900 NZPD vol 111, 504.

77 Idem.

78 Hutcheson for example considered that the measure "proposed to do nothing else than to save the State from having the maintenance of disinherited persons"; and he connected this principle with the old-age pension scheme and other beneficent schemes to reduce the charge on charitable aid. Hence, for him, the matter was simply "a question whether the State or the estate should provide the food and clothing required": 1898 NZPD vol 102, 424. Also see Symes, ibid at 421; McKenzie, ibid at 422; Hogg, ibid at 422; and Meredith, ibid at 427. Hamer, *The New Zealand Liberals,* op cit, ch 2, especially at 58, points to the extreme dislike for the workhouse institution of poor relief in England which mitigated against State aid for the poor, which in this context could include disinherited family members. A solution was therefore to place the burden of relief on individuals (or their estates), not the State.

79 This had also been touched on in the context of the debate on Stout's 1896 Bill, footnote 46 supra.

80 A viewpoint expressed for example by ALD Fraser, 1900 NZPD vol 111, 506; Captain Russell, ibid at 506-507.

all as he was – he had no right to cast the duty on the State of supporting him."[81] He was not entirely alone in this view.[82]

The morality principle finally won out over a purely welfare-oriented principle. A proviso was included by way of a specific amendment in Committee on the 1898 Bill,[83] under which the Court could refuse to make an order in favour of any person "whose character or conduct is such as, in the opinion of the Court, to disentitle him or her to the benefit of an order". The proviso was then included specifically in the 1899 Bill and the 1900 Bill which became the Act of 1900. The question of who should maintain a man's wife and children was to be qualified by a notion of conduct: if the wife or children "deserved" to be excluded by the testator then the Court would not override his exercise of testamentary freedom, even if this meant that the spouse and/or children became a burden of the State. The testator was still to be protected in his right to discriminate between the objects of his bounty; as the head of the family he could still exercise his testamentary powers a a means of social control within his family. Unless there was some proviso regarding conduct, it was thought that this mechanism of control would break down, that undeserving children would be able to claim against their deceased father, that there would be no encouragement to individual thrift and self-reliance.[84]

The proviso in regard to disentitling conduct was therefore a compromise of the welfare principle in favour of the morality principle. It was, moreover, a compromise which kept the Testator's Family Maintenance Act 1900 still firmly within the rationale of testamentary freedom. Behind it lay two poles of nineteenth century liberalism: a reverence for the freedom of property and the doctrine of self-reliance. From McNab's point of view the compromise was not something he favoured.[85] It was a concession and it was deliberate. He stated in 1900 that he had "to safeguard this measure against every conceivable objection otherwise there would be a great difficulty in getting the measure through Committee".[86] It was, in short, a sop to those who still insisted upon the sanctity of the freedom of property:[87]

81 1898 NZPD vol 102, 429.

82 Hall, 1900 NZPD vol 111, 504 and Meredith, ibid at 507.

83 1898 NZPD vol 103, 427.

84 The morality principle is also evident in reverse through the inclusion of a means of ensuring proper provision for the spouse and children under the exercise of the Court's jurisdiction under the Act, not simply adequate maintenance based purely on a concept of needs: 1900 NZPD vol 113, 614, where the Hon Colonel Pitt referred to the views of the Statutes Revision Committee that "the wife ought not to be limited merely to a sufficient sum being granted for her sutenance, or the children either, but that an adequate sum should be provided to enable them to be maintained in a proper manner". Where the morality principle led to the desire to protect the testator in his right to exclude an unworthy wife or child, it also led to a desire to recognise 'worthiness' in the assessment of what was proper in the circumstances.

85 1900 NZPD vol 111, 508. Hall and Meredith agreed with him in this: ibid, at 504, 507.

86 Ibid at 508.

87 Ibid, speech in reply.

> Although it might appear to a number of them that nothing could be said against the principle of a measure preventing a man from leaving his wife and family absolutely destitute, and leaving a large fortune to people who had absolutely nothing to do with it, still there was a great number of people who held that it was the right of every British subject to do that, and that no one had any right to interfere with a man in the execution of that right, and that it was absolutely within a man's power to leave his own people destitute and make wealthy the friends and relatives of other people.

The Bill of 1900 was successful in reaching the Legislative Council and although there were still objections to the principle of interfering with testamentary freedom in the manner proposed,[88] the Bill survived all stages to become the Testator's Family Maintenance Act 1900. The keys to its final passage into legislation were essentially the discretionary model of the Act and the addition of the proviso in regard to disentitling conduct, both of which diluted Stout's original proposal considerably, but were necessary political expedients.

Female Suffrage and the Testator's Family Maintenance Act

What role did the women of New Zealand play in the passage of the Testator's Family Maintenance Act? In 1903 the Women's Christian Temperance Union of New Zealand, which had been strongly involved in pressing for votes for women,[89] claimed that the Testator's Family Maintenance Act was among the things achieved through female suffrage.[90] Rose Scott, a leader of the women's movement in New South Wales, also viewed the Testator's Family Maintenance Act as an achievement of New Zealand's women.[91] It is quite clear that the addition of women to the electorate in 1893 had an effect on political priorities. Sir Robert Stout, for instance, considered that female suffrage "changed the whole attitude of Parliament. The House knew that now that women had votes they would deal with social questions, whether the men did or not".[92] And Lady Stout reflected in an interview in Scotland in 1909 that "the amount of good done by women in New Zealand through the polling booth has been enormous".[93]

88 For example the Hon Sir GS Whitmore considered that it would interfere with "the duties of the head of the family towards his children and his wife" and with "the rights of property", and would force people "to wash their dirty linen outside": 1900 NZPD vol 113, 615.

89 Bunkle, "The Origins of the Women's Movement in New Zealand: the WCTU", op cit; and Grimshaw, *Women's Suffrage in New Zealand,* op cit.

90 *The White Ribbon* (the magazine of the Women's Christian Temperance Union) February 1903, cited in Condliffe, *New Zealand in the Making* (London 1930) at 202, footnote 36. W Sidney Smith in 1905 made the same claim, directly attributing the passage of the Act to the female vote: *Outlines of the Women's Franchise Movement in New Zealand* (Christchurch 1905) at 100.

91 *The Armidale Chronicle,* 31 October 1903, Scott Family Papers MSS 38, folio 43, Mitchell Library, Sydney, "Women's Political Educational League, Newspaper Cuttings 1902-1907", 121.

92 *The Alliance and Temperance Reformer,* 24 June 1909, in "News Clippings", Stout Papers, Alexander Turnbull Library, Wellington.

93 *The Shetland News,* 28 August 1909, cited in Dunn & Richardson, op cit, at 198.

The amount of humanitarian reform and particularly changes in the laws affecting women that occurred after the introduction of the female vote is noteworthy and it is arguable that it can be attributed to some extent to the level of involvement of women in the process of political change. Women were involved to a large extent in the process of implementing political changes. There was not simply an expanded electorate after the extension of the franchise to women, but groups of women agitated for change in the law. Women's organisations in Wellington for example were plentiful. By 1895 it was described as being "rich in women's societies"[94] and the main objectives of these societies were political ones.[95] Their influence was channelled through organisations such as the National Council of Women which kept close watch on the passage of legislation affecting women and children,[96] and although there was a certain amount of tension between some of these organisations and their political agitation faded somewhat into the early years of the twentieth century,[97] the significance of women voters and their concerns as articulated through these organisations could not simply be ignored.

Conclusion

What then was the nature of the achievement in the final passage of the Testator's Family Maintenance Act in 1900? In its final form the Act was not so much a restriction on testamentary freedom but a confirmation of it. Sir Robert Stout's Bills would have restricted testamentary freedom to protect a testator's wife and children – an objective which would have corresponded more directly with his wife's motion to the National Council of Women of New Zealand in 1896 – but even the new Liberalism of the 1890s, with the power of the women's vote behind it, did not support such an incursion on individual freedom. The Testator's Family Maintenance Act was an improvement on the position which had preceded it, and as an improvement it was pressed by women's groups and hailed as "a loud cry for justice from wives and children of deceased persons who had been very wrongly treated",[98] but it was still firmly rooted in

94 *Woman's Voice,* 7 September 1895, Mitchell Library, Sydney.

95 The Minutes of the first meeting of the National Council of Women in Christchurch in 1896 (footnote 32 supra) for example considered issues such as: minimum wages, working conditions, marriage law, divorce, problems of unemployment, charitable aid, reform of the Legislative Council, education, women as jurors, abolition of the Contagious Diseases Act and the law of bequest. Siegfried, *Democracy in New Zealand* (1904) (English translation 1914) at 292 also observed that the women's societies were mainly concerned with political matters.

96 The question of limiting testamentary freedom was discussed at the second convention of the National Council of Women in Christchurch on 28 March 1897. Although Lady Stout was not in attendance it was included in a paper given by Mrs Sievwright concerning the economic independence of women, marriage and divorce: Lady Stout Papers, "Newspaper Clippings 1896-1913", Vol B, Hocken Library, Dunedin. The Council also expressed their preference for Sir Robert Stout's Bills to those proposed by McNab, the former being more protective of women: ibid.

97 Woods, "A House Divided Against Itself Cannot Stand," op cit.

98 Fraser, 1900 NZPD vol 111, 506.

nineteenth century notions regarding property and was therefore clearly not the "drastic innovation" that has been claimed of it.[99]

It has also been claimed that "flexible restraints on testamentary freedom in their modern form seem an independent creation of New Zealand's legislative genius."[1] This estimation must also be qualified. It sees the Testator's Family Maintenance Act as if it were a single brilliant idea. When the background to the Act is subjected to closer analysis, the Act is evidently rather the end result of a process of dilution and compromise of ideals over five years and five Bills. Moreover, to assert that such a restraint on testamentary freedom is "an independent creation of New Zealand's legislative genius" masks the reasons why it became of interest to the legislature at all and it especially hides the significance of female suffrage, the pressure of the women's organisations and, in particular, the role of Sir Robert and Lady Anna Stout.

In its final form, and in the climate of New Zealand in the second half of the 1890s, it is not surprising that the Testator's Family Maintenance Act became law. But this is the end of the story and an expression of hindsight. The idea for the story emerged in the context of changing attitudes in relation to the legal position of women and the role of the State vis-a-vis individual rights, but the credit for the idea itself must in large measure be given to the Stouts.

99 Robson, *New Zealand,* op cit, at 473.

1 Laufer, "Flexible Restraints on Testamentary Freedom – A Report on Decedents' Family Maintenance Legislation" (1955) 69 Harvard LRev 277 at 282.