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## LIMITATIONS ON TESTAMENTARY FREEDOM IN ENGLAND

JOSEPH DAINOW\*

The Englishman's unlimited freedom to cut off his children without a penny is gone. In July, 1939, there came to an end an epoch of over five centuries' duration, in which the English testator's right to disinherit his children or other dependents for any reason that pleased his fancy was unchallenged. Accepted as an inherent part of the common law, this testamentary freedom had been as carefully protected as the right of private property. It may very well be asked how such a harsh rule could have received acceptance in countries like England and in practically all parts of the United States.<sup>1</sup> In the civil law, a person who leaves surviving children never had complete freedom of testation, and unless the children merit a just disinherison they always obtain some part of the parent's succession despite contrary disposition by the will.

The "Inheritance (Family Provision) Act" of 1938 (effective since July 13, 1939)<sup>1a</sup> makes the first breach in the doctrine that a testator may, through mere caprice, turn loose his dependents upon the public for support. This statute reflects a growing consciousness in the minds of English legislators that the patrimony is something of a family affair and that freedom of testation—however desirable it may be as a general principle—should not ob-

\*The main ideas and some of the materials contained in this article were included in a report submitted by the writer to the International Congress of Comparative Law held at The Hague in 1937. At that time the ultimate success of the movement in England to restrict testamentary freedom could be anticipated with some assurance.

<sup>1</sup>28 HALSBURY, LAWS OF ENGLAND (1st ed. 1914) 518, §§ 1028, 1029; PAGE, THE LAW OF WILLS (2d ed. 1928) §§ 21, 26, 27. Cf. 2 KENT, COMMENTARIES ON AMERICAN LAW \*203, citing Lord Alvanley: "I am surprised that this should be the law of any country, but I am afraid it is the law of England." [5 Ves. 444 (1800).] 2 POLLOCK AND MATTLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1899) 355: "To the modern Englishman our modern law which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents." McMurray, *Verbo Succession*, 14 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 440: "Courts continue to say that a person has the right to make an unjust will, an unreasonable will or even a cruel will." See also Keeton and Gower, *Freedom of Testation in English Law* (1935) 20 IOWA L. REV. 326, 339.

<sup>1a</sup>For full text of the statute see Appendix to this article.

struct the interests of society which require that a testator should make adequate provision for his surviving family.

The purpose of the present article is twofold. In the first part, an examination is made of the well-nigh universal conviction that complete freedom to disinherit is ingrained in the English, and hence in the American, national character as a result of uninterrupted observance from "time immemorial." Although known and enjoyed for over five centuries, this testamentary freedom may come to be regarded as an "historical accident." The second part, in the interests of American concern with the new doctrine of testamentary limitations, presents a complete account of the legislative history of the new English statute—an exposition which reveals all the arguments which were so thoroughly aired in the progress of the measure from its incipiency in 1908 to its adoption in 1938.

The advantages of such a factual study of an important piece of legislation are very great. The arguments presented in the hearings on the bill are not theoretical or *a priori*; they are shorn of any unreal quality of academic debate. They grew out of actual controversy between parties who represented interests which were certain to be affected by the law. During recent years, a movement to restrict testation for the benefit of surviving dependents has been very successful in a rapidly increasing number of common law countries.<sup>2</sup> There are definite indications that a similar development is taking place in the United States.<sup>3</sup> The detailed legislative history of the new English reform will serve to orient the unmistakably growing tendency in this country to limit a testator's power of disinheriting the surviving members of his immediate family. And it is doubtful that any argument of a substantial nature, likely to be advanced before one of our state legislatures considering a similar bill, has not been anticipated in the British debates and hearings which preceded the adoption of the new English statute.

It is beyond the scope of this article to consider the extent of the far-reaching effects of this fundamental change in the law of England. It is apparently in the English manner "to proceed by way of homeopathic doses of reform"<sup>4</sup> and since the rules to guide the court's discretion go into excessive detail, the law will probably have to be readjusted in later years. Meanwhile the great accomplishment was to obtain the introduction of the new

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<sup>2</sup>Dainow, *Restricted Testation in New Zealand, Australia and Canada* (1938) 36 MICH. L. REV. 1107. See note 45, *infra*.

<sup>3</sup>See Laube, *The Right of a Testator to Pauperize his Helpless Dependents* (1928) 13 CORNELL L. Q. 559; Cahn, *Restraints on Disinheritance* (1936) 85 U. OF PA. L. REV. 139; Nussbaum, *Liberty of Testation* (1937) 23 A.B.A.J. 183; Dainow, *Inheritance by Pretermitted Children* (1937) 32 ILL. L. REV. 1.

<sup>4</sup>Miss Rathbone, in final debates on English bill; 335 H. C. Deb. 5s. 483 (April 29, 1938).

principle that testamentary freedom should be restricted in the interests of children and other dependents.

## I

## THE EMERGENCE OF TESTAMENTARY FREEDOM

It is not necessary to venture beyond the authoritative assertions of well recognized legal historians in order to demonstrate that the so-called traditional freedom of testation is not an immemorial practice. For this purpose it will suffice to make a brief reference to the Anglo-Saxon period and to give a more extended treatment of the mediaeval common law.

*Anglo-Saxon Period*

It may be well at this point to recall that the devolution of property after death is necessarily based upon two essential prerequisites: (1) a more or less permanent group association to provide some bond of relationship between the survivors and the decedent, and (2) a well developed concept of private property.

One can say nothing with assurance about any definite or organized Anglo-Saxon concepts of succession to property after death. The nature of their group organization has not been ascertained with anything approaching certainty, and even their association into groups for the purposes of blood-feud or *wergild* is not acknowledged as proof of collective ownership.<sup>5</sup> Consequently, it was part of the accepted order for a man's property to devolve after his death upon the nearest kin, usually the children. The development of so-called "birthrights" in favor of children at the time of their birth (or adolescence) was merely a more articulate expression of the long-standing rule of general inheritance.<sup>6</sup>

Testamentary disposition was known and exercised by means of the *cwite*. This Anglo-Saxon form of will prevailed in the ninth, tenth and eleventh centuries; it contained the characteristics of the *post obit* gift (effective at the death of the donor) and of the death-bed confession with its accompanying distribution of property.<sup>7</sup> However, it is doubtful whether the "birthright" could have operated as a testamentary limitation in the form of a compulsory portion for children, and there is no satisfactory proof that

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<sup>5</sup>2 POLLOCK AND MAITLAND, HISTORY 240; 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1927) 91.

<sup>6</sup>HOLDSWORTH, HISTORY 91. However, in 2 Pollock and Maitland, History 255, it is stated that there can be no real proof of these birthrights.

<sup>7</sup>2 POLLOCK AND MAITLAND, HISTORY 314 *et seq.*; 2 HOLDSWORTH, HISTORY 95 *et seq.* Death-bed confession was part of the final religious service and was protected by the Church because a considerable part of the accompanying distribution went to religious purposes.

the *cuide* was restricted in any definite manner by primogeniture (for land)<sup>8</sup> or by any other practice.<sup>9</sup>

### *Mediaeval Law*

In the early mediaeval law the will received more careful attention and underwent greater development as a distinct institution, and definite limitations on testamentary freedom became general throughout England.<sup>10</sup>

*The King's Court and the Mediaeval Will.*—After the Conquest, no immediate change was introduced by the Norman law, but during the twelfth and thirteenth centuries the King's Court prohibited the *post obit* gift of land and likewise every dealing with land in a testamentary manner; this eliminated real property from the field of dispositions *mortis causa*.<sup>11</sup> However, the common law paid little attention to chattels, and made no serious objection to the establishment of the ecclesiastical jurisdiction over wills (necessarily limited to chattels).<sup>12</sup> It was under this ecclesiastical jurisdiction, and probably somewhat influenced by its Roman law origins, that the mediaeval will became a more definitely established institution. There was an increasing horror of intestacy (to die without confession) which would have tended to make wills more general,<sup>13</sup> but very few of these early specimens have been found and this is probably due to their being buried in ecclesiastical records which have not yet been brought to light.<sup>14</sup>

*Land.*—Restraints upon any alienation of land became very stringent during the twelfth and thirteenth centuries.<sup>15</sup> The rule of primogeniture<sup>16</sup> for land

<sup>8</sup>Primogeniture may have been for the general welfare of agriculture (2 HOLDSWORTH, HISTORY 93), or for the more special interest of a lord or king (2 POLLOCK AND MAITLAND, HISTORY 262), but it was an unnatural change from equal division and indicates the existence of some interest more powerful than those of the immediate parties.

<sup>9</sup>2 POLLOCK AND MAITLAND, HISTORY 349. From Beda's story of the Northumbrian (2 *id.* at 314) who came back to life and divided his estate into three parts, there may be inferred the existence of a local principle of intestacy, but this does not indicate any testamentary restriction.

<sup>10</sup>2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Cooley's ed. 1872) \*491-492; 2 POLLOCK AND MAITLAND, HISTORY 349; 3 HOLDSWORTH, HISTORY 550; 20 HALSBURY, STATUTES 432; REPPY AND TOMPKINS, THE HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION (1928) 8.

<sup>11</sup>2 POLLOCK AND MAITLAND, HISTORY 325, 327-329; 3 HOLDSWORTH, HISTORY 535.

<sup>12</sup>2 POLLOCK AND MAITLAND, HISTORY 325-326; 3 HOLDSWORTH, HISTORY 536.

<sup>13</sup>2 POLLOCK AND MAITLAND, HISTORY 326; 3 HOLDSWORTH, HISTORY 535.

<sup>14</sup>2 POLLOCK AND MAITLAND, HISTORY 352.

<sup>15</sup>3 HOLDSWORTH, HISTORY 73-86. Nevertheless, in 2 Pollock and Maitland, History 308, it is stated that alienation *inter vivos* in the thirteenth century was quite possible, to the disappointment of the expectant heir.

<sup>16</sup>2 BLACKSTONE, COMMENTARIES \*214; 3 HOLDSWORTH, HISTORY 172-173; 10 HALSBURY, THE LAWS OF ENGLAND (2d ed. 1933) 612. This rule was repealed by the Administration of Estates Act, 1925, sec. 45; 8 HALSBURY, THE STATUTES OF ENGLAND (1929-1931) 263, 306, 345.

was very strictly enforced,<sup>17</sup> and the heir's right in expectancy was respected by requiring his consent in many alienations *inter vivos*.<sup>18</sup> However, while these limitations on the power of disposition of land were beneficial to the eldest son or other next of kin, they are outside the scope of the present inquiry which is limited to restrictions which insured a more general benefit to survivors of the family.

*Chattels: The Tripartite Principle.*—There is left for brief examination the early mediaeval will which dealt only with chattels, and which concerned benefits inuring to members of the immediate family generally. In regard to such wills the so-called tripartite principle of limited disposition applied. The development of this principle must have been imperceptibly gradual during the twelfth and thirteenth centuries, and it must have been adopted by one local custom after another until the law was general throughout England. Whether this was so or not, there are references in the works of Glanvil and Bracton and in Magna Charta<sup>19</sup> to a restriction on testamentary disposition of chattels in the compulsory rights of the surviving widow and children. If such survivors existed, the provisions of the decedent's last will and testament were applicable only to a certain fraction of his goods, determined in the following manner. If there were both widow and issue, the personal estate was divided into three equal parts: the "wife's part," the "bairn's part" and the "dead's part." It was only to this last part that the decedent's power of disposition extended. If only the widow or children survived, the disposable portion consisted of one-half, the other half being reserved for the widow or the children as the case might be.<sup>20</sup>

The bairn's part was divided equally among all the children, but the heir could not claim a share unless he collated whatever inheritance he had received. Any other children who had been advanced during the lifetime of the testator likewise had to bring such benefit into hotchpot if they wished to claim a share in the bairn's part.<sup>21</sup>

In view of the close relationship between the ecclesiastical jurisdiction over wills and the religious belief in the expiation of sin, the dead's part was usually given to the Church *pro salute animae*.<sup>22</sup> Thus in practice, testamentary freedom was reduced to almost nothing, which is the complete antithesis of absolute liberty of testation.

<sup>17</sup>2 POLLOCK AND MAITLAND, HISTORY 325, 331.

<sup>18</sup>3 HOLDSWORTH, HISTORY 74.

<sup>19</sup>Glanvil, VII. 5; Bracton, ff. 60b, 61; Magna Charta, § 26; cited in 3 HOLDSWORTH, HISTORY 550. See also 2 POLLOCK AND MAITLAND, HISTORY 350-351.

<sup>20</sup>2 POLLOCK AND MAITLAND, HISTORY 348 *et seq.*; 3 HOLDSWORTH, HISTORY 535 *et seq.*

<sup>21</sup>2 POLLOCK AND MAITLAND, HISTORY 348-349.

<sup>22</sup>2 POLLOCK AND MAITLAND, HISTORY 314, 348, 339-340; Brissaud, *History of French Private Law* (1912) 3 CONTINENTAL LEGAL HISTORY SERIES 625, 691; Dainow, *The Dead's Part* (1935) 29 ILL. L. REV. 1098.

The existence of this tripartite rule of division was evidenced not only by the aforementioned texts, but also by the special writ *de rationabili parte bonorum*<sup>23</sup> which was available to the widow and children for the purpose of claiming their due portions. The provisions in some early wills<sup>24</sup> further confirm the existence of the institution. And finally, the continuance of the tripartite division in intestate succession (the dead's part going to the Church and to charity) for a long time after its disuse in testate succession, has been considered as a satisfactory basis for the inference that it was once a universal scheme.<sup>25</sup>

Although the tripartite principle with its compulsory bairn's part for children fell into disuse generally throughout England in the fourteenth century,<sup>26</sup> its observance was expressly continued by some of the local customs until abolished by statute at a much later date (York, 1692; Wales, 1696; London, 1724).<sup>27</sup> As a principle of intestate succession, the tripartite rule continued until 1856.<sup>28</sup>

The evidence regarding the disappearance of the tripartite principle of restricted testation is very insufficient. This is partly due to an inadequate knowledge of ecclesiastical law,<sup>29</sup> and partly to the fact that not enough cases of actual wills have been found yet because they are not in the Year Books.<sup>30</sup> Nevertheless, the investigation of certain environmental conditions leads to the following inferences:

(a) Since this branch of law was in the no man's land of the rivalry between the lay and the ecclesiastical jurisdictions, the way was open for the development of divergent rules and local customs without any supervisory or standardizing power.<sup>31</sup> It may thus be inferred that by gradual changes<sup>32</sup>

<sup>22</sup> BLACKSTONE, COMMENTARIES \*493; 2 POLLOCK AND MATTLAND, HISTORY 351; 3 HOLDSWORTH, HISTORY 550; 2 STRAHAN, TRANSLATION OF DOMAT'S CIVIL LAW (1722) 109 n.

<sup>24</sup>"I will that my Wyfe have hir thirde parte of all my goodes, my debts to be paid of the hole, my goodes equally to be devyded in thre, oon parte for my Wyfe such as p'teyneth to hir by the laye, oon parte to be devyded amongst my childer not promoted, the thirde parte thereof belonging to myselfe to goo for the performance of this my last Will and Testament, and the residue thereof to be equally devyded amongst my said children, and the expence of myne Executors to be paid of my partie." Cited in 3 HOLDSWORTH, HISTORY 552. Although this particular specimen is of a somewhat later period (1522), it is from a part of the country in which the custom continued for a longer time. See also 2 POLLOCK AND MATTLAND, HISTORY 354.

<sup>25</sup> 3 HOLDSWORTH, HISTORY 553-554.

<sup>26</sup> 3 HOLDSWORTH, HISTORY 552. However, in 2 Blackstone, Commentaries \*492, Sir Henry Finch is cited as authority for the existence of the tripartite rule as a general law in the reign of Charles I (1625-1649).

<sup>27</sup> York: 4 & 5 William and Mary, c. 2; Wales: 7 & 8 William III, c. 38; London: 11 Geo. I, c. 18; 2 BLACKSTONE, COMMENTARIES \*493; 3 HOLDSWORTH, HISTORY 552.

<sup>28</sup> 3 HOLDSWORTH, HISTORY 552.

<sup>29</sup> *Id.* at 554.

<sup>30</sup> 2 POLLOCK AND MATTLAND, HISTORY 352.

<sup>31</sup> 3 HOLDSWORTH, HISTORY 554.

<sup>32</sup> *Cf.* 2 BLACKSTONE, COMMENTARIES \*492.

and diffusion, the children's legitime of the twelfth and thirteenth centuries fell into disuse. This inference is further supported by the fact that a few local customs did retain the bairn's part as late as the eighteenth century.<sup>33</sup>

(b) It has been suggested that if the temporal lawyers had cared more than they did about the law of chattels, the Church would not have acquired this jurisdiction, and the old scheme might have persisted.<sup>34</sup> Under the ecclesiastical jurisdiction, the disposition of property *mortis causa*, the very concept of a will, and the horror of intestacy, were all interwoven with the religious beliefs in the need for confession before death, in the expiation of sin, and in the immortality of the soul.<sup>35</sup> The testator always left something to the Church.<sup>36</sup> With the increase of bequests to religious institutions,<sup>37</sup> it may be inferred that the exact limits of disposition might have been relaxed (*pro salute animæ*) and that the augmentation of the dead's part gradually became complete and general.

(c) The fact that the will which developed in England was one with executors<sup>38</sup> may have had something to do with the disappearance of the widow's and children's rights, because until the establishment of rules to govern the conduct and of security to guarantee the honesty of these trusted friends, there was considerable leeway for fraud against the claims of the widow and children.<sup>39</sup> This possibility would be even greater as the rights of the latter became less strictly defined.

(d) Finally, it has also been suggested<sup>40</sup> that the disappearance of the old scheme of tripartite division might have been facilitated by the common law concepts of a man's property rights in relation to his wife and children. The wife's goods were given by the common law in full ownership to the husband, and the argument could have been made that his absolute power *inter vivos* should not be limited *mortis causa*. And when the children's rights of expectancy in realty were weakened by the relaxation of the restraints on alienation, their rights in personalty likewise gave way to the stronger property right of the father.

<sup>33</sup>*Supra* note 27.

<sup>32</sup> POLLOCK AND MATTLAND, HISTORY 354, 355. In the matter of successions, the common law lawyers and the King's Court were so preoccupied with the establishment of primogeniture for land that chattels were permitted to fall into the ecclesiastical jurisdiction. *Id.* at 325, 331-332.

<sup>32</sup> POLLOCK AND MATTLAND, HISTORY 325, 326, 340, 356. It was, therefore, with some color of right that the Church (usually represented at the death-bed) made claim to the protection and to the execution of the decedent's will. *Id.* at 332.

<sup>32</sup> POLLOCK AND MATTLAND, HISTORY 338. *See supra* note 22.

<sup>37</sup>*Cf.* Huebner, *History of Germanic Private Law* (1918) 4 CONTINENTAL LEGAL HISTORY SERIES 306, 745.

<sup>32</sup> POLLOCK AND MATTLAND, HISTORY 334; Caillemer, *The Executor in England and on the Continent* (1909) 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 746, 752.

<sup>33</sup> HOLDSWORTH, HISTORY 557.

<sup>40</sup>*Id.* at 555.

It cannot be stated with certainty that any of these inferences respecting the disappearance of the tripartite principle of restricted testation is true. It is undeniable that some of them are the result of conjecture. And it is impossible to associate positively any definite cause with the disappearance of the tripartite principle of restricted testation. With the passage of time, the acquired freedom became so deeply rooted in English tradition<sup>41</sup> that the testamentary limitations of the early English law had been forgotten by all except a few historians.<sup>42</sup> Liberty of testation was universally acclaimed, and the suspicion that it produced evil effects<sup>43</sup> was rare indeed. Nonetheless, the past few years have witnessed a very active interest in the whole question of testamentary freedom.

## II

### THE LEGISLATIVE HISTORY OF THE INHERITANCE (FAMILY PROVISION) ACT

In the light of the historical background and in view of the Scottish law<sup>44</sup>

<sup>41</sup>Cf. *supra* note 1; see CECIL, PRIMOGENITURE (1895) 105.

<sup>42</sup>As a matter of fact, complete freedom of will was only established in the Wills Act of 1837 (7 William IV and I Vict. c. 26, sec. 3; 28 HALSBURY, LAWS [1st ed. 1914] 517; 20 HALSBURY, STATUTES 433) by removing the limitations on testamentary disposition of certain kinds of land tenures which had been excluded from the operation of the Statute of Wills of 1540 (32 Hen. VIII, c. 1; 20 HALSBURY, STATUTES 432; 4 HOLDSWORTH, HISTORY 465, 466).

<sup>43</sup>See 2 POLLOCK AND MAITLAND, HISTORY 363.

<sup>44</sup>In Scottish law the legal rights of the surviving spouse and children still conform to the tripartite principle which operated under the mediaeval law of England (see text supported by notes 19-21, *supra*). According to this principle, one third of a man's free movable estate goes to the surviving children (*legitim*) and one third to the widow (*jus relictae*); if only one or the other survives, the fraction is fixed at one half. In 1881 the woman's estate was likewise subjected to these claims in favor of the surviving children and widower (*jus relictii*). In addition, the widow enjoys the right of *terce*, which is a life-rent on one-third of the husband's heritable estate, and is based on the obligation of a landed proprietor to provide for his widow in keeping with his circumstances and condition in life. The husband's counterpart of this right is called *courtesy*, and extends over the whole of the wife's heritable estate.

All the surviving children have equal rights in this *legitim* (also called bairn's part), but if the heir of the heritable property (to which the intestate rule of primogeniture applies) wishes to share in the *legitim* he must collate, or bring into the mass, that which he received independently. The same rule of collation applies to advances received by any of the children.

However, it must also be observed that by disposing of movable property or by converting it into heritable estates during lifetime, the testator can defeat the children's *legitim*. This may also be excluded by a discharge in the parents' ante-nuptial contract, by the child's renunciation, and by satisfaction through the acceptance of some other substituted benefit.

This system of fixed legal rights is quite rigid but the Scots evidently find it very satisfactory. Its application is usually a simple matter of calculation and adjustment, and there is very little litigation. In practically all the cases where these legal rights are excluded by a proper method some other benefit is provided in its place, so that the evasion is only apparent and not real. Encyclopedia of the Laws of Scotland (Green, 1930) vo. *Legitim*, vol. 9, pp. 133 *et seq.*; vo. *Terce*, vol. 14, pp. 386 *et seq.*; vo. *Courtesy*, vol. 5, p. 44; vo. *Collation*, vol. 3, pp. 476 *et seq.* GLOAG AND HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND (2d ed. 1933) ch. 39, pp. 480 *et seq.*; 1

and the parallel developments in other parts of the Empire,<sup>45</sup> it is not surprising that the question of protecting a testator's family against an undutiful will recently forced itself upon the reluctant attention of the English parliament.

#### 1908: Report

The first consideration given to the subject by parliament was in 1908, when an investigation was made into foreign practices and a report was submitted under the title of "Reports respecting the Limitations imposed by Law upon Testamentary Bequests in France, Germany, Italy, Russia, and the United States."<sup>46</sup> It is significant that this occurred in the same year that the principle of the New Zealand legislation was definitely established with an improved revision of the first act. However, no further action was then taken in England, and the matter remained dormant for twenty years.

#### 1928: Astor Motion

A proposal to investigate the question of actual reform in England and Wales was made in May 1928, when Viscount Astor presented a motion in the House of Lords "that a Select Committee be appointed to see whether a change is necessary in the laws governing testamentary provision for wives, husbands and children based on the experience of Scotland, Australia and other portions of the Empire."<sup>47</sup> The incentive to raise the issue had come from an appreciable number of hard cases which had aroused attention. And the legislative suggestion inferred from the motion was to attempt a combination of the most desirable and adaptable elements of the other systems, in-

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MCLAREN, *THE LAW OF SCOTLAND IN RELATION TO WILLS AND SUCCESSIONS* (1868) 117 *et seq.* BELL, *PRINCIPLES OF THE LAW OF SCOTLAND* (10th ed. 1899) 615 *et seq.*; Report by the Joint Select Committee of the House of Lords and the House of Commons on the Wills and Intestacies (Family Maintenance) Bill (H. L. Papers, 1930-31, no. 97; see note 79, *infra*), Evidence of Mr. Scott, ques. 770 *et seq.*, 1180 *et seq.*

<sup>45</sup>New Zealand was the first common law country (in 1900) to break away from the traditional principle of absolute liberty of testation. Without the influence of historical precedents, a totally new institution and technique were evolved whereby the surviving spouse and children of a testator are provided for out of the estate and against the provisions of the will. The result depends upon all the circumstances involved and lies within the discretion of the court. Thus, there is neither a fixed limitation on the testator's bounty nor a minimum disposable portion. There exists the complete range of possibilities: the provisions of a person's will may all stand, or they may all fall.

The principle of this departure was followed in all the six states of Australia, with minor individual adjustments. In Canada, the provinces of British Columbia and Ontario have similar enactments; Alberta, Saskatchewan and Manitoba have arrived at some measure of protection for the widow. For full discussion see Dainow, *Restricted Testation in New Zealand, Australia and Canada* (1938) 36 MICH. L. REV. 1107.

<sup>46</sup>187 H. C. Deb. 4s. 295 (March 31, 1908); 194 *id.* at 10, 22 (October 12, 1908). Papers by Command [4251] Miscellaneous no. 7 (1908). This report consisted of a circular addressed to the English embassies in the countries named, and their replies stating the local codal or statutory provisions on the subject.

<sup>47</sup>71 H.L. Deb. 5s. 37-38 (May 16, 1928).

cluding at least some measure of the discretion vested in the courts under the New Zealand law.

The opposition which greeted this motion was so rigid that it hardly received a fair hearing. The disdain of the Law Lords for such an unorthodox departure from the tradition of testamentary freedom was pointedly expressed in the opinion<sup>48</sup> that judges were not sufficiently capable and wise to understand all the circumstances and family complications in every case. The further argument that public opinion was the only practical force to curb undutiful testaments, was merely another part of the dogmatic dismissal of an objectionable suggestion. The Lord Chancellor was more kindly in his comments about hard cases making bad law, and about the undesirability of washing family linen in public, but he was none the less insistent upon his request that Viscount Astor withdraw the motion.<sup>49</sup>

### *1928: First Astor Bill*

In August of the same year, Viscount Astor took the more concrete step of presenting the "Wills and Intestacies (Family Maintenance) Bill"<sup>50</sup> whose object was "to secure that the family and dependants of a testator or testatrix shall, unless this is otherwise affected, be properly provided for out of the available assets by the will, but without taking away powers of disposition." It was anticipated that this object would be accomplished through a fixed statutory share (following the Scottish precedent) carried out by means of powers conferred upon the personal representative, and checked by the power of the court to interfere (resembling the New Zealand principle). The Bill did not cover chattels, and gave permission to contract out of its provisions. The ultimate purpose seems to have been preventive rather than remedial, so that on proper advice a testator would make a dutiful will and not call forth the operation of the law.

Needless to say, the fate of this first formal Bill was a predestined failure, but it did obtain a wide newspaper publicity,<sup>51</sup> and the general reaction was quite favorable.<sup>52</sup>

<sup>48</sup>*Id.* at 46 *et seq.* (Haldane).

<sup>49</sup>*Id.* at 53 *et seq.*

<sup>50</sup>H.L. Bills, 1928, no. 146; 71 H.L. Deb. 5s. 1540 (Aug. 1, 1928).

<sup>51</sup>80 H.L. Deb. 5s. 209 (Astor).

<sup>52</sup>*Cf.* "The debate proved how important the study of comparative law might be, for in framing legislation the experience of other countries is frequently of more value than a priori theories. It is to be hoped that further investigation will be made into the practice of the New Zealand statute, for the English law of inheritance does give rise to hardship and injustice. It may be true, as the Lord Chancellor epigrammatically said, that 'hard cases make bad law,' but it is equally true that hard cases are often the evidence that the law is bad." Note (1928) 44 L. Q. REV. 281-283.

*1928-1929: Second Astor Bill*

Encouraged by this response, Viscount Astor presented a second Bill by the same name during the next session.<sup>53</sup> Despite a slight improvement, its complexity of calculation and instruction would have stirred doubts in the mind of a proponent of the principle. Furthermore, the legislators were not convinced that a need existed; and in any case, there was no indication that they would cede an iota of the cherished property right of free testamentary disposition. Traditional principles of English law are not readily changed, and the Bill expired with its first reading.<sup>54</sup>

*1930-1931: First Rathbone Bill*

With further support from public opinion and with an improved mechanism, a new but similar Bill was introduced in the House of Commons by Miss Rathbone.<sup>55</sup> Despite a certain amount of opposition, the proposal did receive a sympathetic hearing and a most exhaustive debate took place on the occasion of its second reading.<sup>56</sup>

(a) *Explanation.*<sup>57</sup>—Historically, testation has been restricted rather than unfettered, and the freedom of disposition must be subordinated to the more elementary obligations of marriage and parenthood which should not be terminated by death. A compromise of this sort would still leave a fair proportion of the estate to the free disposition of the testator. The Bill did not follow exclusively either of the two usual principles—(1) a fixed share or (2) an application to the court's discretion—but took a middle course combining elements of both. Based on the first, the Bill provided a priority payment and an income for the surviving spouse, and an income for the children.<sup>58</sup> Based on the second, the court was empowered to annul the rights under the Bill (wholly or in part, and either permanently or temporarily) in certain cases where equivalent provision had already been made and in certain cases where there had been a separation.<sup>59</sup>

The idea of the priority payment to the spouse was admittedly taken from Scottish law, but the detail followed section 46 of the Administration of

<sup>53</sup>"Wills and Intestacies (Family Maintenance) Bill"; H.L. Bills, 1928-1929, no. 50.

<sup>54</sup>73 H.L. Deb. 5s. 85 (March 6, 1929).

<sup>55</sup>"Wills and Intestacies (Family Maintenance) Bill"; H.C. Bills, 1930-1931, no. 15; 244 H.C. Deb. 5s. 343 (Oct. 31, 1930).

<sup>56</sup>"The object of this Bill is to secure that, in the distribution of the estate of a testator or testatrix, a surviving husband or wife and any surviving children who are of an age necessitating parental support shall have a statutory right to certain provision out of the estate in order to secure the funds necessary for their maintenance." Wills and Intestacies (Family Maintenance) Bill, Memorandum, p.i.

<sup>57</sup>248 H.C. Deb. 5s. 1641-1703 (Feb. 20, 1931).

<sup>58</sup>Particularly by the sponsor, Miss Rathbone, *id.* at 1641 *et seq.*

<sup>59</sup>Wills and Intestacies (Family Maintenance) Bill, clause 1.

<sup>60</sup>*Id.* clauses 7, 8.

Estates Act, 1925. The declared purpose was to cover immediate needs, and the calculation of this payment included the total of three sums: (1) one-half of the value of the personal chattels, (2) either £1000 or one-half of the value of the net estate (whichever is less), and (3) interest on these two sums at the rate of five per cent from the date of the death until payment.<sup>60</sup>

The right of the spouse to the income of one-third of the net estate (or of one-half if no children) was explained as based upon the Scottish rule of terce; but instead of being restricted to real estate only, the Bill again followed the Administration of Estates Act, 1925, and treated real and personal property as one.<sup>61</sup> The fractions for the children's income (of one-third of the net estate, or of one-half if no surviving spouse) were also derived from the law of Scotland.<sup>62</sup> However, differing from the Scottish legal rights, the Bill set £2000 a year as the maximum total income for the spouse (including independent sources), and £300 for a child.<sup>63</sup> Furthermore, since the underlying principle of this Bill was one of alimentary obligation rather than any idea of family ownership, the right of a child should cease at the age of twenty-three, or two years after its full-time education, unless physically incapable of self-support.<sup>64</sup>

The Bill permitted the parties to contract out of its provisions for valuable consideration, and provided an ancillary procedure by way of recourse to a Referee for the preliminary decision of certain questions.<sup>65</sup>

(b) *Criticism.*—The provisions of this Bill were very complicated, and it was not surprising that it should have brought forth violent opposition. Its principle was criticized on the grounds that it was a hybrid between the concepts of individual and family ownership,<sup>66</sup> and that it took a dangerous middle course between the Scottish rigidity and the colonial elasticity.<sup>67</sup> It would cause family misunderstanding and litigation,<sup>68</sup> and would unnecessarily interfere with too many people who did not need it;<sup>69</sup> it would create more hardships than it would relieve.<sup>70</sup> Objection was made to the mechan-

<sup>60</sup>*Id.* Memorandum ii.

<sup>61</sup>*Ibid.* i, ii; 248 H.C. Deb. 5s. 1646 (Rathbone).

<sup>62</sup>*Ibid.*

<sup>63</sup>These are the maxima usually adopted in divorce proceedings. 248 H.C. Deb. 5s. 1647 (Rathbone).

<sup>64</sup>Wills and Intestacies (Family Maintenance) Bill, clause 11. This would leave a more substantial benefit for the younger children whose need would be greater in the case of small estates. 248 H.C. Deb. 5s. 1646-1647 (Rathbone).

<sup>65</sup>Wills and Intestacies (Family Maintenance) Bill, clauses 6, 10A.

<sup>66</sup>248 H.C. Deb. 5s. 1658 (Roberts).

<sup>67</sup>*Id.* at 1663 (Solicitor-General).

<sup>68</sup>*Id.* at 1663 (Llewellyn-Jones).

<sup>69</sup>*Id.* at 1660 (Roberts).

<sup>70</sup>*Id.* at 1674 (Llewellyn).

ism of the Bill in that it involved long and complicated administrations,<sup>71</sup> and would cause the break-up of small estates<sup>72</sup> while merely increasing the business of lawyers and law costs.<sup>73</sup> Further impracticalities were discovered in the fact that the provisions of the Bill could readily be avoided by means of trust funds created during lifetime,<sup>74</sup> and in the probability that people would take the easier course of contracting out.<sup>75</sup>

Despite all this criticism and objection, many members expressed their approval of some principle which would assure family maintenance,<sup>76</sup> and the greatest preference was for the New Zealand System.<sup>77</sup> When the sponsors of this Bill succeeded in obtaining a favorable vote on the second reading and at the same time in having the measure committed to a Joint Select Committee of both Houses for a thorough investigation,<sup>78</sup> it was indeed a great accomplishment towards the desired reform.

(c) *Joint Committee: Evidence, Report.*—The Committee examined eight witnesses, in support of and in opposition to the Bill, including English, Scottish and New Zealand solicitors, a representative of certain women's organizations, and the Public Trustee; it also heard from the Law Society and from the Judges of the Chancery Division.<sup>79</sup>

The first point of conflict in the Evidence was on the factual question of whether there actually existed a need for such legislation. In this regard, the positive evidence on one side<sup>80</sup> was stronger than the absence of evidence to the contrary;<sup>81</sup> but no rule of proof could be applied to the question of whether the new evils might not exceed those eliminated.<sup>82</sup> The attempts to localize the alleged injustice to undivorced women in cases of family unhappiness,<sup>83</sup> or to small<sup>84</sup> or large estates,<sup>85</sup> had no important bearing on the issue because such distinctions were totally unnecessary. After hearing the

<sup>71</sup>*Id.* at 1657 (Bourne).

<sup>72</sup>*Id.* at 1675 (Llewellyn).

<sup>73</sup>*Id.* at 1655 (Bourne), 1689 (Solicitor-General).

<sup>74</sup>*Id.* at 1664-1665 (Llewellyn-Jones).

<sup>75</sup>*Id.* at 1657 (Bourne), 1698 (Herbert).

<sup>76</sup>*Id.* at 1661 (Roberts).

<sup>77</sup>*Id.* at 1665 (Llewellyn-Jones), 1674 (Llewellyn), 1690 (Solicitor-General), 1694 (Herbert), 1698 (Falle).

<sup>78</sup>*Id.* at 1703. See also 80 H.L. Deb. 5s. 204-214.

<sup>79</sup>Report by the Joint Select Committee of the House of Lords and the House of Commons on the Wills and Intestacies (Family Maintenance) Bill, together with the Proceedings of the Committee, Minutes of Evidence and Appendices" (Hereafter cited as "Report" and "Evidence"). H.L. Papers, 1930-1931, nos. 97, 127.

<sup>80</sup>Evidence, ques. 5 (Hubback), 114 (Withers), 1336 (Burgin).

<sup>81</sup>For example, the belief that solicitors usually saw to it that the testator made a dutiful will. Evidence, ques. 586 (May), 663, 721 (Holmes), 824 (Simpkin).

<sup>82</sup>For the Bill: Evidence, ques. 338-341 (Withers); against the Bill: *id.* ques. 450 (May), 661 (Holmes).

<sup>83</sup>*Id.* ques. 5-7 (Hubback).

<sup>84</sup>*Id.* ques. 17 (Hubback).

<sup>85</sup>*Id.* ques. 116 (Withers).

witnesses, the Committee were "satisfied that there is a substantial number of cases in which widows or widowers and children, who are unable to support themselves, have been unjustifiably left unprovided for," and although constituting only a small portion of all testaments the number was not negligible.<sup>89</sup>

On matters of principle the evidence was preponderantly favorable to the measure. While the state's interest to avoid a public charge was given very little attention, the contest between the property interest of the testator and the alimentary interest of his family was very keen but consisted largely of attempts to rationalize a predetermined decision.<sup>87</sup>

In favor of the testator's property interest it was stated that it would be inexpedient to graft this kind of a restriction on the English system of testamentary freedom; such an issue should be considered as a whole, including gifts to outsiders, to charity and so forth. Furthermore, it was reasoned that the proposed change in the law would obstruct certain deserved disherisons, encourage divorce (to avoid the statutory right), and would be a dangerous interference with family relations.<sup>88</sup>

For the alimentary interest of the family it was urged that marriage was a partnership in which the legal rights of the parties should not be affected by the length or success of the union.<sup>89</sup> It was also contended that the testator's obligation to provide for the support of his family should come before his bounty to outsiders.<sup>90</sup> However, the most emphasized idea in favor of the restriction was the one of providing subsistence rather than the right to a fair share of common property.

Opinions also differed on the incidental questions of whether such a law would encourage marriage adventurers,<sup>91</sup> and of how much present and periodical revision of wills would be necessary.<sup>92</sup> But the preventive value in restraining undutiful wills was admitted.<sup>93</sup>

The Judges of the Chancery Division approved the general principle of restricting testation where necessary to assure subsistence,<sup>94</sup> and the Committee came to a similar conclusion in their Report.<sup>95</sup>

The greatest and the fatal criticism of the Bill was directed at the mechan-

<sup>87</sup>Report, par. 3.

<sup>88</sup>For example, while the interest of the family was supported by the historical reference to the former existence of the tripartite principle (248 H.C. Deb. 5s. 1642 [Rathbone]), the interest of the testator was supported by its disappearance (Evidence, ques. 825 [Simpkin]). Both arguments are irrelevant to the question of present day needs.

<sup>89</sup>Evidence, ques. 824 *et seq.* (Simpkin).

<sup>90</sup>*Id.* ques. 5 (Hubback), 1283 (Scott).

<sup>91</sup>*Id.* ques. 269 (Withers), 744 (Holmes), 975 (Wray).

<sup>92</sup>For the affirmative: Evidence, ques. 450 (May), 826 (Simpkin); for the negative: *id.* ques. 1291 (Scott).

<sup>93</sup>*Id.* ques. 450, 571 (May).

<sup>94</sup>*Id.* ques. 58 (Hubback), 404 (Withers), 1183 (Scott), 988, 1051 (Wray).

<sup>95</sup>Letter from Mr. Justice Bennett. Report, Appendix A.

<sup>96</sup>Report, par. 7.

ism which it offered for the accomplishment of its purpose. There were objections to the large priority payment because it would break up small estates,<sup>96</sup> to the compulsory incomes which would cause indefinite delay and expense in administration, and to the unfair burden placed upon solicitors and the Public Trustee whose procedure would be safe only on the orders of the court.<sup>97</sup> Furthermore, the inevitable amount of litigation, supplemented by unnecessary duplication through jurisdiction to the Referee,<sup>98</sup> would seriously reduce the net value of an estate and merely be a gold mine for the lawyers.<sup>99</sup> Some witnesses considered twenty-three too arbitrary an age limit to exclude children,<sup>100</sup> others were dissatisfied that children received no capital sum.<sup>101</sup> The final objection was that the permission to contract out together with the effect of the ante-nuptial renunciations would completely defeat the purpose of the Bill.<sup>102</sup>

Many of the objections to the Bill might be disputed, but even those who favored its principle had to admit that it lacked the essentials of simplicity, flexibility, and rapid inexpensive procedure.<sup>103</sup> As compared with the Scottish and New Zealand laws, only the solicitor from Scotland<sup>104</sup> favored the rigidity of the former. Some supporters of the measure felt that the Bill was more flexible than the law of Scotland but not as free and loose as that of New Zealand, and was therefore preferable to both.<sup>105</sup> However, while the evidence showed that each system worked very satisfactorily in its respective country, the preference of the witnesses was decidedly in favor of the New Zealand approach,<sup>106</sup> as being the most practical and the best suited to be grafted on to the existing laws of England.<sup>107</sup>

Thus, when the Committee reported approval of the principle of the Bill, it was to be expected that they would find its mechanism altogether too complicated and impracticable, and would indicate a preference for something along the lines of the New Zealand system.<sup>108</sup> By the time the Committee report was received, it was late in the session and the Bill made no further headway.

<sup>96</sup>Evidence, ques. 165, 414 (Withers), 1310 (Scott), 1336, 1442 (Burgin).

<sup>97</sup>*Id.* ques. 303 (Withers), 450 (May), 663 (Holmes), 829, 830 (Simpkin).

<sup>98</sup>*Id.* ques. 450 (May), 836 (Simpkin).

<sup>99</sup>*Id.* ques. 560 (May), 829 (Simpkin).

<sup>100</sup>*Id.* ques. 831 (Simpkin), 1339 (Burgin).

<sup>101</sup>*Id.* ques. 831 (Simpkin).

<sup>102</sup>*Id.* ques. 461 (May), 668 (Holmes), 831 (Simpkin).

<sup>103</sup>*Id.* ques. 450 (May), 1460 (Burgin).

<sup>104</sup>*Id.* Mr. James Scott, M.P. (id. ques. 767-817, 1180-1330).

<sup>105</sup>*Id.* ques. 14, 1159 (Hubback).

<sup>106</sup>*Id.* ques. 472 (May), 721 (Holmes), 838 (Simpkin), 1056 (Wray), 1371 (Burgin).

<sup>107</sup>*Id.* ques. 1371 (Burgin).

<sup>108</sup>Report, par. 7.

*1933-1934: Wardlaw-Milne Bill*

The next official reappearance of the measure came after an inactive lapse of more than two years when Sir John Wardlaw-Milne presented the "Powers of Disinheritance Bill";<sup>109</sup> it was read a second time<sup>110</sup> and committed to a standing committee which duly reported its approval and suggestions and changed the name to the "Inheritance (Family Provision) Bill."<sup>111</sup>

This Bill was drawn along the lines favored by the Report of the Joint Select Committee on the Rathbone Bill.<sup>112</sup> All the complicated mechanism was eliminated, attempts to combine principles and details from so many different sources were dropped, and the new Bill provided for a simple easy procedure very similar to that of New Zealand. As first presented, the Bill authorized any surviving spouse or child to make application for "an adequate provision for proper maintenance, education or advancement in life,"<sup>113</sup> but by the committee amendment this was simplified to a "reasonable provision for maintenance."<sup>114</sup> And if the application was granted the court could make any kind of an order which would best suit all the circumstances.<sup>115</sup> Where property was not disposed of by will, the laws of intestacy had exclusive application,<sup>116</sup> but an order with regard to testamentary property was subject to no restrictions because it was meant to override the will as far as necessary.<sup>117</sup>

When the Bill, as amended in committee,<sup>118</sup> was being discussed, two things of particular interest were emphasized: (1) that the Bill had been carefully framed on the recommendations of the Report of the Joint Select

<sup>109</sup>283 H.C. Deb. 5s. 404 (Nov. 24, 1933); H.C. Bills, 1933-34, no. 16.

<sup>110</sup>284 H.C. Deb. 5s. 1082 (Dec. 18, 1933).

<sup>111</sup>287 H.C. Deb. 5s. 1041 (March 20, 1934). "Report from Standing Committee A on the Powers of Disinheritance Bill changed to the Inheritance (Family Provision) Bill"; H.C. Reports, 1933-1934, no. 57. "Inheritance (Family Provision) Bill" (as amended by Standing Committee A), H. C. Bills, 1933-1934, no. 85.

<sup>112</sup>310 H.C. Deb. 5s. 850 (Rathbone).

<sup>113</sup>Powers of Disinheritance Bill, clause 1 (1).

<sup>114</sup>Inheritance (Family Provision) Bill (as amended by Standing Committee A), clause 1 (1).

<sup>115</sup>Provision may be ordered out of the capital or income of the testamentary property of the testator, or partly in one way and partly in another, and subject to such conditions or restrictions as the court may impose. *Ibid.*

<sup>116</sup>*Id.* clause 6; New clause (Savings) par. b. 288 H.C. Deb. 5s. 2029 *et seq.*

<sup>117</sup>Inheritance (Family Provision) Bill (as amended by Standing Committee A) clause 1 (3). At the same time, this gave rise to the objections that the Bill did not formulate any broad principle, that it placed upon the court the burden of deciding what was a proper case for intervention, and that it would spread uncertainty among testators as well as encourage speculative litigation. Keeton and Gower, *Freedom of Testation in English Law* (1935) 20 IOWA L. REV. 326.

<sup>118</sup>The inclusion in the original Bill of clause 5 prohibiting any mortgage, charge or assignment without permission of the court, was disagreed to in committee and eliminated from the amended Bill (Report from Standing Committee A, *supra* note 111 at 6).

Committee;<sup>119</sup> and (2) that the discretion allowed to the court was practically unlimited so that most of the details, such as the duration of the maintenance,<sup>120</sup> could be eliminated from the Bill. But with the tactics of proposing two new clauses<sup>121</sup> and several amendments<sup>122</sup> of no importance, the opponents of the measure succeeded in preventing a vote on the Bill by "talking it out."<sup>123</sup>

*1935-1936: Gardner Bill; Second Rathbone Bill*

After allowing the matter to rest during another entire session, the issue was raised again early in 1936 when two Bills were introduced by Mr. Gardner and Miss Rathbone respectively.<sup>124</sup> The Gardner Bill was withdrawn when brought up for the second reading,<sup>125</sup> and when the Rathbone Bill came up for its second reading a short filibuster talked it out.<sup>126</sup>

This second Rathbone Bill was practically identical with the preceding Wardlaw-Milne Bill (as amended by committee) of 1934.<sup>127</sup> It is interesting to note that the measure had gone through much change and evolution since its first official inception in 1928. For some time already, there had been no attempt to even look to the laws of Scotland or of the continent for guidance, and this time the Explanatory Memorandum of the Bill came right out with the statement that "based on a principle in operation in the law of New Zealand, Australia, and some of the Canadian provinces, the Bill empowers the Court, upon certain conditions and at its discretion, to order such reasonable provision as it thinks fit to be made out of the net estate of a testator for a surviving spouse or child for whose maintenance the testator has failed to make reasonable provision by will." However, this attempt to curtail the freedom of a testator met with no more success than its predecessors.

<sup>119</sup>288 H.C. Deb. 5s. 2065 (Withers), 2074, 2088 (Wardlaw-Milne).

<sup>120</sup>*Id.* at 2082-2083 (Spens).

<sup>121</sup>New clause (Savings): that the Bill should not affect the rights of the testator's creditors, nor any rights of intestate succession in property not disposed of by the will. New clause (Application of Act): that the new law should not apply in the case of a testator dying before its coming into effect (instead of December 31, 1934, as previously indicated). 288 H.C. Deb. 5s. 2029-2054.

<sup>122</sup>*E.g.*, to insert "or otherwise" after "will," and "legitimate" in front of "child" [clause 1 (1)]; but these were all so obviously unnecessary that they were not accepted. *Id.* at 2055-2098.

<sup>123</sup>*Id.* at 2029-2098 (April 27, 1934).

<sup>124</sup>"Inheritance (Family Provision) (No. 1) Bill," and "Inheritance (Family Provision) (No. 2) Bill"; H.C. Bills, 1933-1936, nos. 43, 47. 308 H.C. Deb. 5s. 504, 504-505 (Feb. 7, 1936).

<sup>125</sup>310 H.C. Deb. 5s. 45 (March 16, 1936).

<sup>126</sup>*Id.* at 849-852 (March 20, 1936).

<sup>127</sup>Inheritance (Family Provision) (No. 2) Bill, Explanatory Memorandum. See also 310 H.C. Deb. 5s. 849 (Rathbone).

*1936-1937: Windsor Bill*

The supporters of the measure were evidently prepared for a long seige, and at the first opportunity another "Inheritance (Family Provision) Bill" was introduced by Mr. Windsor.<sup>128</sup>

This proposal was a verbatim reproduction of the one presented in the preceding session, and a long discussion took place on the occasion of its second reading.<sup>129</sup> The publicity of the proposed reform had caused many constituents to write to their representatives, and among the cases cited was that of a wealthy man who had ignored his family in leaving a large estate for the care of animals.<sup>130</sup> Although the Bill would probably benefit surviving widows more than any others, it was pointed out that in any event the differences between spouses should not be permitted to prejudice their children.<sup>131</sup> It would be better for the undutiful spouse to receive an undeserved benefit occasionally than for many persons to be left destitute unjustly.<sup>132</sup> To some members, the existence of the wrong seemed too obvious to require evidence and they felt that regardless of the extent it should be remedied.<sup>133</sup>

The opponents of the measure still urged that the Bill would do more harm than good<sup>134</sup> and that there were broader social issues involved; but the greater weight of opinion anticipated a beneficial operation of the principle to prevent injustice.<sup>135</sup> The Solicitor-General added that there was a very general agreement to remedy the evil if possible.<sup>136</sup> The fact that such a testamentary limitation was foreign to English legal principles should not obstruct the reform, because "it is now becoming not uncommon to find in the legislation of this country successive adoptions of those branches of the law of other countries which have for centuries been unknown to us."<sup>137</sup>

This Bill was successful enough to reach the committee stage,<sup>138</sup> and after weathering a well-organized filibuster of proposed amendments—which were either destructive of or unnecessary to the principle of the Bill—it was reported

<sup>128</sup>"Inheritance (Family Provision) Bill"; H.C. Bills 1936-1937, no. 16. 317 H.C. Deb. 5s. 391 (Nov. 6, 1936).

<sup>129</sup>319 H.C. Deb. 5s. 512-536 (Jan. 22, 1937).

<sup>130</sup>*Id.* at 514 (Windsor), 515 (Hardie).

<sup>131</sup>*Id.* at 515 (Hardie).

<sup>132</sup>*Id.* at 526 (Petherick).

<sup>133</sup>*Id.* at 515, 516 (Hardie).

<sup>134</sup>*Id.* at 521, 523 (Heneage).

<sup>135</sup>*Id.* at 524 (Withers, Craddock), 529 (Rathbone), 520 (Beaumont, who even considered the Bill unsound in principle).

<sup>136</sup>*Id.* at 534 (Solicitor-General).

<sup>137</sup>*Id.* at 531 (Pritt).

<sup>138</sup>*Id.* at 536 (Jan. 22, 1937). See Standing Committee Debates, Inheritance (Family Provision) Bill, Standing Committee A, First Day (March 23, 1937); *Idem*, Second Day (April 8, 1937); also Minutes of Proceedings from Standing Committee A, H.C. Papers, 1936-1937, no. 96 (Inheritance (Family Provision) Bill).

back to the House with but few technical amendments.<sup>139</sup> However, even in the speeches of the sponsors, it was clear that they did not yet expect the acceptance of the reform.<sup>140</sup>

### 1937-1938: *Holmes Bill*

The work was picked up and continued early in the next session when Mr. Holmes presented a Bill<sup>141</sup> which reproduced verbatim the text of the preceding Windsor Bill as amended by Committee.<sup>142</sup> There still persisted strong opposition to the proposed reform, but the preponderance of expression greatly favored the measure and may have reflected the facts that prior to the summer recess a clear majority of members had signed a memorial in favor of the Bill<sup>143</sup> and that (for this reason?) the Government had shown sufficient interest in it to give its supporters the counsel and advice of the Attorney-General and Solicitor-General and the expert assistance of the legislative draftsmen.<sup>144</sup> The debate on the second reading<sup>145</sup> constituted one of the best discussions of the basic principle and the mechanism of the Bill.

The debates re-emphasized the financial responsibilities of marriage and parenthood which should not terminate with death<sup>146</sup> and which during life-time constituted a serious imposition on a person's absolute property rights.<sup>147</sup> The contention that this reform would restrict individual liberty<sup>148</sup> was more than covered by the reply that private limitation was the consequence of nearly all legislation, which must look toward the general good rather than the individual inconvenience.<sup>149</sup> It was still argued that in many instances disinheritance was reasonable,<sup>150</sup> but of course this is not prevented under the Bill. Running out of arguments against the principle of the Bill, the opponents insisted that—even if the objective was desirable—the measure as proposed would not work; that it gave no guidance to the court;<sup>151</sup> that

<sup>139</sup>"Inheritance (Family Provision) Bill," as amended by Standing Committee A, H.C. Bills, 1936-1937, no. 110. 322 H.C. Deb. 5s. 367 (April 8, 1937).

<sup>140</sup>*Cf.* 319 H.C. Deb. 5s. 529 (Rathbone, Jan. 22, 1937); 324 *id.* at 276-277 (Kelly, May 26, 1937), 560 (Windsor, May 27, 1937).

<sup>141</sup>"Inheritance (Family Provision) Bill"; H.C. Bills 1937-1938, no. 8. 328 H.C. Deb. 5s. 415 (Oct. 29, 1937).

<sup>142</sup>328 H.C. Deb. 5s. 1292 (Holmes). *See supra* note 139.

<sup>143</sup>*See* 328 *id.* at 1309-10 (Rathbone).

<sup>144</sup>*See* 328 *id.* at 1309 (Rathbone); "Inheritance (Family Provision) Bill," Debates of Standing Committee B, Official Report, col. 8 (Solicitor-General); 12, 14 (Southby); 13 (Windsor); 19, 20 (Holmes).

<sup>145</sup>328 H.C. Deb. 5s. 1291-1372 (Nov. 5, 1937).

<sup>146</sup>*Id.* at 1293 (Holmes).

<sup>147</sup>*Id.* at 1292 (Holmes).

<sup>148</sup>*Id.* at 1332 (Southby).

<sup>149</sup>*Id.* at 1356 (Rathbone); 1368 (Adams).

<sup>150</sup>*Id.* at 1301 (Dower).

<sup>151</sup>*Id.* at 1297 (Heneage); 1356 (Attorney-General).

the courts and the conditions of the people in New Zealand and the Dominions which warranted such wide judicial discretion were quite different from those in England;<sup>152</sup> that this Bill would encourage litigation<sup>153</sup> and even be a weapon for blackmail;<sup>154</sup> that endless applications for variations would prevent the winding up of estates.<sup>155</sup> In final desperation, attempts were made to sidetrack this Bill by reiterating preference for a fixed statutory share on the Scottish lines<sup>156</sup> although this idea had been completely ruled out in the Report of the Joint Select Committee in 1931.<sup>157</sup> The weakness of the opposition was apparent from their inconsistency that while they were not convinced of the existence of many hard cases under the present law they bewailed the flood of litigation which would follow the proposed change.<sup>158</sup>

The growing and spreading interest in the proposed reform had reached the point of a determination to carry the measure further, leaving the mechanical perfection to later legislative stages.<sup>159</sup> The members were becoming more impressed with the need<sup>160</sup> for such a change in the law and with the fact that England was one of the very few civilized countries which still permitted the disinheritance of children and others of the immediate family without just cause.<sup>161</sup> It was even disclosed that the parliament of North Ireland was waiting for England to take the initiative so that it could follow the example.<sup>162</sup>

With this, the Bill passed the second reading by a very large majority<sup>163</sup> and was sent to committee for the amendments which would meet some of the valid objections raised in the House.

Of the committee debates<sup>164</sup> the following observations can be made: the principle of the Bill was sufficiently accepted to insure its passage in some form; the drafting of the amendments with Government assistance not only embodied the objectives but also added a strong moral support; opposition attempts to "talk the Bill out" with useless amendments were not serious; most marked was the wide spirit of compromise of the supporters.

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<sup>152</sup>*Id.* at 1297 (Heneage).

<sup>153</sup>*Id.* at 1302 (Dower); 1332 (Southby).

<sup>154</sup>*Id.* at 1332 (Southby).

<sup>155</sup>*Id.* at 1303 (Dower).

<sup>156</sup>*Id.* at 1305-6 (Dower); 1318 (Spens); 1337 (Southby); 1346 (Hill).

<sup>157</sup>*Id.* at 1365 (Hutchison). *See also* notes 79, 108 *supra*.

<sup>158</sup>*Id.* at 1306 (Rathbone).

<sup>159</sup>*Cf. id.* at 1365 (Lewis).

<sup>160</sup>*Cf.* the favorable and encouraging expression of public opinion in Manchester Guardian Weekly, Nov. 5, 1937, p. 363; Nov. 12, 1937, pp. 381, 386; Nov. 26, 1937, pp. 421, 438.

<sup>161</sup>328 H.C. Deb. 5s. 1291 (Holmes).

<sup>162</sup>*Id.* at 1343 (Pethick-Lawrence).

<sup>163</sup>*Id.* at 1372-3.

<sup>164</sup>"Inheritance (Family Provision) Bill"; Minutes of Proceedings of Standing Committee B, H.C. Reports 1937-38, no. 14; Debates of Standing Committee B, Official Report, Nov. 23, Dec. 7, 9, 14, 16, 1937.

The Bill was duly reported back to the House of Commons<sup>165</sup> and when it came up for third reading its promoter admitted that ". . . as we could not get all we wanted we wanted all that we could get."<sup>166</sup> After a final tribute to Miss Rathbone,<sup>167</sup> the Bill was read the third time and passed.<sup>168</sup>

In the House of Lords, the Bill<sup>169</sup> was given an easy passage with a very light debate on the second reading and only a few minor amendments of detail.<sup>170</sup> The decade which had elapsed since their pitiless dismissal of Viscount Astor's proposals had brought about a great change in their attitude. The Lords Amendments were summarily considered and agreed to by the House of Commons,<sup>171</sup> and on July 13, 1938 the Bill received the Royal Assent and became law.<sup>172</sup>

This history of English law demonstrates that there was a time when the right to deal with private property was severely limited and that, in particular, the right unjustly to disinherit one's children did not exist. The present English statute seems to be ushering into England a return to the former policy. The foregoing report of the debate on the new English law has attempted to present the arguments for and against limitation of testamentary disposition with impartiality. The writer has not tried, however, to conceal his predilection for the civil law principle of responsibility, nor does he disguise the hope that the American states will not be slow to follow the English recognition of the principle to continue after a testator's death his financial responsibilities of marriage and parenthood.

#### APPENDIX

##### Inheritance (Family Provision) Act, 1938 (1 and 2 Geo. VI, Chap. 45)

An Act to amend the law relating to testamentary dispositions; and for other purposes connected therewith.

Be it enacted by the King's most Excellent Majesty, by and with the advice and con-

<sup>165</sup>"Inheritance (Family Provision) Bill," as amended by Standing Committee B, 330 H.C. Deb. 5s. 1348 (December 16, 1937). H.C. Bills 1937-38, no. 70.

<sup>166</sup>335 H.C. Deb. 5s. 478 (Holmes). Cf. Debates of Standing Committee B, col. 133 (Simpson).

<sup>167</sup>*Id.* at 479 (Withers).

<sup>168</sup>*Id.* at 488.

<sup>169</sup>"Inheritance (Family Provision) Bill," H.L. Bills 1937-38, no. 87; and "Inheritance (Family Provision) Bill" as amended in Committee, H.L. Bills 1937-38, no. 143.

<sup>170</sup>108 H.L. Deb. 5s. 707 (first reading, May 2, 1938); 109 *id.* at 799-803 (second reading, May 31, 1938); 110 *id.* at 438 (amendments reported, June 30, 1938); 110 *id.* at 618 (third reading, July 6, 1938).

<sup>171</sup>338 H.C. Deb. 5s. 1291 (July 13, 1938). "Lords Amendments," H.C. Bills 1937-38, no. 206.

<sup>172</sup>338 H.C. Deb. 5s. 1392 (July 13, 1938); the new law is to come into operation at the expiration of one year from the passing thereof, Inheritance (Family Provision) Act, 1938, § 6 (2).

sent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Where, after the commencement of this Act, a person dies domiciled in England leaving—

- (a) a wife or husband;
- (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself;
- (c) an infant son; or
- (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself;

and leaving a will, then, if the court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in this Act referred to as a "dependant" of the testator) is of opinion that the will does not make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the testator's net estate for the maintenance of that dependant:

Provided that no application shall be made to the court by or on behalf of any person in any case where the testator has bequeathed not less than two-thirds of the income of the net estate to a surviving spouse and the only other dependant or dependants, if any, is or are a child or children of the surviving spouse.

(2) The provision for maintenance to be made by an order shall, subject to the provisions of subsection (4) of this section, be by way of periodical payments of income, and the order shall provide for their termination not later than—

- (a) in the case of a wife or husband, her or his remarriage;
- (b) in the case of a daughter who has not been married, or who is under disability, her marriage or the cesser of her disability, whichever is the later;
- (c) in the case of an infant son, his attaining the age of twenty-one years;
- (d) in the case of a son under disability, the cesser of his disability;

or, in any case, his or her earlier death.

(3) The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say:—

- (a) if the testator leaves both a wife or husband and one or more other dependants, two-thirds; or
- (b) if the testator does not leave a wife or husband, or leaves a wife or husband and no other dependant, one-half.

(4) Where the value of a testator's net estate does not exceed two thousand pounds, the court shall have power to make an order providing for maintenance, in whole or in part, by way of a payment of capital, so however that the court, in determining the amount of the provision, shall give effect to the principle of the last preceding subsection.

(5) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order, the court shall have regard to the nature of the property representing the testator's net estate and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the testator's dependants and of the person who, apart from the order, would be entitled to that property.

(6) The court shall, on any application made under this Act, have regard to any past, present or future capital or income from any source of the dependant of the testator to whom the application relates, to the conduct of that dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise.

(7) The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any

statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

2.—(1) Except as provided by section four of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.

(2) For the purposes of subsection (1) of Section one hundred and sixty-two of the Supreme Court of Judicature (Consolidation) Act, 1925, (which relates to the discretion of the court as to the persons to whom administration is to be granted), a dependant of a testator by whom or on whose behalf an application under this Act is proposed to be made shall be deemed to be a person interested in his estate.

3.—(1) Where an order is made under this Act, then for all purposes, including the purposes of the enactments relating to death duties, the will shall have effect, and shall be deemed to have had effect as from the testator's death, as if it had been executed with such variations as may be specified in the order for the purpose of giving effect to the provision for maintenance thereby made.

(2) The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order made under this Act but no larger part of the net estate shall be set aside or appropriated to answer by the income thereof the provision for maintenance thereby made than such a part as, at the date of the order, is sufficient to produce by the income thereof the amount of the said provision.

(3) An office copy of every order made under this Act shall be sent to the principal probate registry for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate of the will of the testator or the letters of administration with the will annexed, as the case may be.

4.—(1) On an application made at a date after the expiration of the period specified in section two of this Act the court may make such an order as is hereinafter mentioned, but only as respects property the income of which is at that date applicable for the maintenance of a dependant of the testator, that is to say—

- (a) an order for varying a previous order on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant or of a person beneficially interested under the will in the property; or
- (b) an order for making provision for the maintenance of another dependant of the testator.

(2) An application to the court for an order under paragraph (a) of the preceding subsection may be made by or on behalf of a dependant of the testator or by the trustees of the property or by or on behalf of a person beneficially interested therein under the will.

5.—(1) In this Act unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say:—

"annual income" means in relation to a testator's net estate, the income that the net estate might be expected at the date of the order, when realised, to yield in a year;

"the court" means the High Court and also the Court of Chancery of the county palatine of Lancaster or the Court of Chancery of the county palatine of Durham where those courts respectively have jurisdiction;

"death duties" means estate duty, succession duty, legacy duty and every other duty leviable or payable on death;

"net estate" means all the property of which a testator had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death;

"will" includes codicil;

"son" and "daughter," respectively, include a male or female child adopted by the testator by virtue of an order made under the provisions of the Adoption of

Children Act, 1926, and also a son or daughter of the testator en ventre sa mere at the date of the death of the testator.

(2) References in this Act to any enactment or any provision of any enactment shall, unless the context otherwise requires, be construed as references to that enactment or provision as amended by any subsequent enactment including this Act.

6.—(1) This Act may be cited as the Inheritance (Family Provision) Act, 1938.

(2) This Act shall come into operation at the expiration of one year from the passing thereof.

(3) This Act shall not extend to Scotland or to Northern Ireland.