

# The Transformation of Colonial Property: A Study of the Law of Dower in New South Wales, 1836 to 1863

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## Introduction

The adoption of imperial legislation in nineteenth-century New South Wales suggests a parallel between metropolitan and colonial societies. Both colonial jurists and legislators, however, discounted such a suggestion following the adoption in 1836 of imperial legislation concerning dower.<sup>1</sup> Dower was a common law property right that provided a widow with the use rights to one third of all the freehold lands that her husband had owned during their marriage.<sup>2</sup> During the 1830s, judges in the Supreme Court of New South Wales argued that questions

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<sup>1</sup> 3 & 4 Wm. IV, c. 105 (1833) was adopted in New South Wales by An Act for adopting certain Acts of Parliament passed in the Third and Fourth Years of the reign of his Majesty King William the Fourth in the Administration of Justice in New South Wales in like manner as other Laws of England are applied herein, 7 Wm. IV, No. 8 (1836).

<sup>2</sup> Although alternative provisions, such as a 'separate estate' that secured 'pin money' and 'jointure' for a married woman, were commonplace for the wealthy, dower remained important for others living in the colony. A marriage settlement could establish for a wife a 'separate estate' that comprised two elements: 'pin money', which was an annual income for her personal expenses during her husband's lifetime, and 'jointure', which was a provision for her after his death. During and after the seventeenth century in England, marriage settlements making provisions for jointure became a commonplace alternative to dower for wealthy married women. Only after the Supreme Court of New South Wales gained an equity jurisdiction in 1814 was it possible for a married woman to enforce a separate estate in equity. The 'framework of the separate estate', however, as Rosalind Atherton has established, was irrelevant 'for the less affluent'. Rosalind F Atherton, 'Expectation without Right: Testamentary Freedom and the Position of Women in 19<sup>th</sup> Century New South Wales', *University of New South Wales Law Journal* 11.1 (1988), 134-35. Cf. Hilary Golder and Diane Kirkby, 'Land, conveyancing reform and the problem of the married woman in colonial Australia' in Diane Kirkby and Catharine Coleborne (eds) *Law, History, Colonialism: The Reach of Empire* (2001) 209. On provisions for married women other than dower see Susan Staves, *Married Women's Separate Property in England, 1660-1833* (1990); Barbara J Harris, *English Aristocratic Women, 1450-1550: Marriage and Family, Property and Careers* (2002).

to be decided in relation to dower were 'peculiar to the Colony' and for that reason they were unable to find relevant legal 'precedents out of this Colony'.<sup>3</sup> Prior to 1838 judges in the colony accommodated dower to colonial circumstances in order to acknowledge the property rights of widows. In subsequent decades, legislators of all political positions who debated married women's right to dower in New South Wales also remarked upon the difference between England and its colony. W C Wentworth, leader of elected conservatives in the New South Wales Legislative Council, insisted that 'the position and circumstances of England were totally different'.<sup>4</sup> G K Holden, who represented liberal political views, also insisted contrary to the situation in England 'the law of Dower here is a mere accident'.<sup>5</sup>

Unlike judges in the 1830s who accommodated dower to local circumstances in order to reach equitable decisions, legislators at the mid-nineteenth century annulled dower rights in order to facilitate land transfers and secure capitalistic property relationships. From the 1840s onwards, debates about land law in the two Houses of Parliament, the Legislative Assembly and the Legislative Council, dismissed arguments supporting a widow's right to dower made in the colony's Supreme Court in the 1830s. The rhetoric used by legislators advocating change, as we explain, demonstrates a shift away from an understanding of dower as a customary property relationship and a moral entitlement to market-oriented concepts of property. Our analysis suggests that market forces were a powerful factor in legal change in nineteenth-century New South Wales, an argument previously mounted in relation to nineteenth-century American law by Morton J Horwitz.<sup>6</sup> Although American legal historians have critiqued Horwitz's instrumentalist interpretation of legal development,<sup>7</sup> the following study focusing on the law of dower in colonial New South demonstrates the shaping power of the market in

<sup>3</sup> Forbes CJ in *Davis and Wife v Crispe and another* (1834) and Kinchela J in *Wild v Driver* (1837). All citations from the colony's Supreme Court are taken from Bruce Kercher (ed), *Decisions of the Superior Courts of New South Wales, 1788-1899*. This website is the only definitive source for decisions made in the superior courts prior to 1840. Before 1900 there was no official reporting of decisions in the colony. The web site, published on-line by Butterworths and Austlii, can be accessed at: <http://www.law.mq.edu.au/scnsw>.

<sup>4</sup> *Sydney Morning Herald* (Sydney), 21 September 1850.

<sup>5</sup> New South Wales, 'Select Committee on the Real Property Law Bill', *Votes and Proceedings of the New South Wales Legislative Council* (1849) Vol 2: GK Holden in evidence 24 July 1849.

<sup>6</sup> Morton J Horwitz, *The Transformation of American Law 1780-1869* (1977).

<sup>7</sup> See 'Legal Scholarship Symposium: The Scholarship of Morton J. Horwitz' (2002) 37.4 *Tulsa Law Review* 849.

land. The economic importance of landed property during the years of pastoral expansion in the 1830s, the agrarian depression of the 1840s and the rapid influx of migrants during the gold rushes of the 1850s were factors that accelerated legislative developments that shaped individuals' property rights. Social changes that increased demands for access to land affected not only property law but also ideas customarily associated with married women's status-based entitlements, such as dower.<sup>8</sup>

### **Dower in Law and Society**

Dower, which originated in the context of medieval feudal society, was fixed in English law in the fifteenth century. It is a legal right derived from a concept of property that is the antithesis of a marketable, capitalistic commodity. In feudal society, property was held 'as of the Crown' by tenants-in-chief and those to whom they subinfeudated land, in exchange for personal services due to the king, such as military service.<sup>9</sup> Property was not primarily a commodity that could be sold in such a society but instead an expression of social relationships or bonds, and a mechanism to maintain a degree of stability in the social order based on feudal class hierarchy, ties of kinship and patriarchal gender order.<sup>10</sup> By the early modern period, the inheritance system of primogeniture, practised by the military tenants-in-chief, conceptualised property as a trust, held by one generation of a family for the next. Although dower postponed an heir's possession of one third of his family's lands, they devolved to him upon a widow's death. As W S Holdsworth has explained, dower related to inheritance practices or 'family rights' that 'fettered alienation'; that is, dower like primogeniture maintained a land-family bond among the aristocracy by inhibiting opportunities to sell land rather than hold it in trust for a subsequent generation. In Holdsworth's words, dower gave a wife a right to 'a third of the land for her life of which her husband has ever been solely seised during the marriage . . . and of this right she cannot be deprived by any

<sup>8</sup> See A R Buck, 'Property Law and the Origins of Australian Egalitarianism' (1995) 1.2 *Australian Journal of Legal History* 159; Edward Shann, *An Economic History of Australia* (1930) 167-211; Sumner J La Croix, 'Property Rights and Institutional Change during Australia's Gold Rush' (1992) 29 *Explorations in Economic History* 204; Michael Roe, *Quest for Authority in Eastern Australia 1835-1851* (1965) 13.

<sup>9</sup> See W S Holdsworth, *An Historical Introduction to the Land Law* (1927) 10-139; A W B Simpson, *A History of the Land Law* (2nd ed, 1986), 47-80; Scott L Waugh, 'Tenure to Contract: Lordship and Clientage in Thirteenth-Century England' (1986) 401 *English Historical Review*, 811-39.

<sup>10</sup> Mary Murray, *The Law of the Father? Patriarchy and the transition from feudalism to capitalism* (1995).

alienation made by her husband'.<sup>11</sup> Dower did not make a woman an owner of land or the buildings upon it that she could sell in exchange for commodities. Instead, dower was a property right that provided a widow with the use of one third of her husband's freehold lands from which she could accrue a livelihood, for example by leasing it to others.

Dower was understood as a legal and moral right that acknowledged the consequences of coverture upon a married woman. An unmarried woman or a widow was a *feme sole* who had property rights that she forfeited upon marriage when, according to the legal doctrine of coverture, she became a *feme covert*.<sup>12</sup> Coverture meant a married woman's legal personality was merged with her husband's. Consequently, she could not independently of him make contracts, sue or be sued. She could not make a will without his permission. Her husband held the right to alienate her personal property during his lifetime and to dispose of it by will after his death. The profits of all her lands were his as was her income whether made by her own labour or by receipt of a gift. Dower can be understood as an acknowledgement that marriage had the potential to cause the maldistribution of wealth within a family when an heir came into family property. Dower ensured that a widow, who during her lifetime had no independent property rights to produce and secure wealth on her own behalf, was provided with a means of livelihood from her husband's estate. Dower, as Lori Chambers has explained:

extended the husband's responsibility for his wife's maintenance beyond the grave. Common law dower was intended to provide the wife with security against the interests of her husband's heirs and creditors and to prevent poorer widows from becoming a public liability.<sup>13</sup>

Dower, in the words of the British jurist Sir Joseph Jekyll was 'reasonable' because:

during the cove[r]ture, the wife can acquire no property of her own. If before her marriage she had a real estate, this by the cove[r]ture ceases to be hers; and the right hitherto, while she is married, vests in her husband. Her personal estate became his absolutely, or at least subject to his control; so that unless she has a real estate of her own (which is the case of but few),

<sup>11</sup> See W S Holdsworth, *A History of English Law*, 17 vols. (2nd ed, 1937) 3:197 and 189. Cf. George L Haskins, 'The Development of Common Law Dower' (1948) 62 *Harvard Law Review* 53 on the protection of the wife's dower against her husband's alienation by collusive suits.

<sup>12</sup> See William Blackstone, *Commentaries on the Laws of England (Four Vols)* (1799) 1:431-32; W S Holdsworth, *A History of English Law*, 3:189-97. See Atherton, 'Expectation without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales', 134-35.

<sup>13</sup> Lori Chambers, *Married Women and Property Law in Victorian Ontario* (1997) 19.

she may by his death be destitute of the necessities of life; unless provided for out of his estate, either by a jointure, or dower. As to the husband's personal estate, unless restrained by special custom, which very rarely takes place, he may give it all away from her. So that his real estate if he has any, is the only plank she can lay hold of, to prevent her sinking under her distress. Thus the wife is said to have a moral right to dower.<sup>14</sup>

The language used by Sir Joseph Jekyll implies a range of ideas associated with dower not only in English common law but also in English society until the early 1830s. Because a wife's rights to property had been vested in another during her marriage, she was understood to have a 'moral right' to a provision for her well being out of her husband's estate.<sup>15</sup> Judges in New South Wales, we explain subsequently, described dower, its purposes and consequences, in similar terms as a legal right. Colonial courts continued until 1838 to secure not only a wife's status-based entitlements, such as dower, but also her legal agency to secure provision from her husband's estate.

Dower was limited by imperial legislation adopted by New South Wales in 1836. It provided that, in the case of a woman who married after 1 January 1837, dower would no longer apply, as it had previously, to *all* the freehold lands owned by her husband during their marriage; specifically, dower would not apply to any lands that her husband had disposed of by sale during his lifetime or by will. It also provided that a husband could wholly deprive his wife of her right to dower by means of a deed or a declaration to that effect in his will. Whereas a statute passed by the colonial legislature in 1825<sup>16</sup> had provided that when a woman executed a deed to bar her dower or jointure, a judge must examine the wife separately from her husband and then certify under seal that he had ascertained she was acting of her own free will, the *Dower Act* of 1836

<sup>14</sup> Sir Joseph Jekyll, quoted in William Cruise, *Digest of the Laws of England Respecting Real Property* (3rd ed, 1824) 1: 162-63.

<sup>15</sup> Alternative provisions for a married woman, such as jointure specified in a marriage contract, Barbara J Harris asserts, were usually one-tenth of the economic value of the bride's marriage portion, which may have included both real property, or land, and personal property. In contrast, dower was often referred to as a widow's 'thirds' but this did not refer to a specified monetary value related to her marriage portion. See Barbara Harris, *English Aristocratic Women, 1450-1550* (2002) 45. Cf. Staves, *Married Women's Separate Property in England, 1660-1833* (1990) 95, 173, 202, 204.

<sup>16</sup> 6 Geo. IV, No. 22. The formalities set forth as provisions in this act had not been specified in earlier legislation, specifically, the proclamation of 1819 and the Act of Council of 1825 that first empowered a married woman in New South Wales to alienate her jointure, dower, or other estates of freehold or inheritance by deed, that had the effect of a fine (or mortgage) upon her property. This was re-enacted by the *Registration of Deeds Act* (1843) (7 Vic. No. 16, s. 16).

removed that provision, which protected a woman from coercion. Subsequently, in 1850, the *Dower Amendment Act*<sup>17</sup> abolished the right to dower in New South Wales unless the widow had resided in the colony as the wife of her husband while he still owned the land, and unless a purchaser of any of her husband's lands had notice of that fact at the time of its sale. In order to remedy other inconveniences to the purchaser, dower was reduced from an estate in the land itself to the right of merely recovering one third of the estimated rents of the improved land. In 1863, when the *Real Property Act* of 1862 came into effect, a husband could simply invalidate his wife's dower by making a statutory declaration.<sup>18</sup> To equate the moral right of dower simply with a monetary value, as legislators did in New South Wales from the 1840s to 1863, objectified the right to dower and subordinated the rights of widows as a social group to the rights and interests of landowners. These legislative innovations were implemented three decades before the *Married Women's Property Act 1893*, which significantly ameliorated married women's property rights in New South Wales.<sup>19</sup>

### **Dower explicated in judicial decisions in the 1830s**

During the 1830s – the decade when statutory reform of dower was first implemented by imperial and colonial statutes – the colony's Supreme Court not only applied equity doctrine but also exercised judicial creativity in order to apply 'local policies' about property rights that effected justice for widows living in conditions peculiar to the colony.<sup>20</sup>

<sup>17</sup> 14 Vic. No. 27.

<sup>18</sup> 26 Vic. No. 9.

<sup>19</sup> 56 Vic. No. 11.

<sup>20</sup> The Supreme Court of New South Wales had an equity jurisdiction from 1814. When Van Diemen's Land and New South Wales became separate colonies, the *Administration of Justice in New South Wales Act* of 1823 (4 Geo. IV c. 96, s. 9) made provision that in both colonies 'the Supreme Courts respectively shall be courts of Equity' and common law (4 Geo. IV c. 96, s. 2). See M L Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72 *Australian Law Journal* 799. Equity as 'a body of substantive law supplementary to the common law . . . provides guidance in areas where the common law remained undeveloped or underdeveloped'. It was administered in England from the 1430s onward by the Court of Chancery. By the end of the eighteenth century, equity was a separate body of law administered by a distinct court considered to offer special protection to women of wealthy families. Parents could transfer property to trustees to hold for a woman during marriage and thereby secure for her property held separately from her husband. This kind of trust, as Susan Staves explains, was a provision characteristic of women from families that held significant or substantial property. In nineteenth-century New South Wales, dower, in contrast, was a common law property right that applied to women of all economic statuses, who did not have jointure or a marriage settlement and whose husbands held freehold property. As we will explain, the number of small-

In this decade as the pastoral economy of New South Wales expanded rapidly because of the increased profits of colonial wool in the world market, the laws regulating land tenure changed repeatedly. The 1831 Ripon Regulations abolished the previous system of free Crown grants of land, which had become associated with nepotism and corruption, and in their place provided for auction sales.<sup>21</sup> After 1831 land within the boundaries of areas of the colony selected by the government for settlement could also be leased annually from the Crown.<sup>22</sup> Revenue from land sales was used to bring free immigrants to the colony, particularly women. These innovations, however, did not result in the concentration of population within areas set aside for settlement by the government. Instead 'squatting' expanded on areas beyond the boundaries established for settlement, a problem that resulted in a series of statutes intended to prevent those trespassing from claiming that they held 'tenure' to the land.<sup>23</sup> By instituting an annual licence fee of £10 per year irrespective of the number of acres occupied, an 1836 Act of the Legislative Council provided a tenuous means to assert the Crown's title to the land but failed to restrict squatting. The squatters responded to the need for extensive pastures to profit from the wool market and the increased sales price of land within designated areas of settlement by seizing the opportunity to occupy vast acreages beyond the areas for settlement without the expense of buying land. At this point in time, land in the colony was an important

scale property owners was far greater in colonial New South Wales than in England. Consequently, dower in the colony was a right that provided benefits to women who would not customarily have separate property secured as a trust. On equity as a jurisdiction and body of law see Philip Girard, 'History and Development of Equity' in Mark R. Gillen and Faye Woodman (eds) *The Law of Trusts: A Contextual Approach* (2000) 13; Maria Lynn Cioni, *Women and Law in Elizabethan England with Particular Reference to the Court of Chancery* (1985); Staves, *Married Women's Separate Property in England, 1660-1833* (1990), 236; and B A Helmore, *The Law of Real Property in New South Wales* (1966) 274.

<sup>21</sup> 2 Wm. IV., 1831. By 1831, 3,906,327 acres of land had been disposed of by grant and sales by private tender. According to the 1831 regulations, auction sales of land had a minimum upset price of five shillings per acre, with a peppercorn quit rent and all rights to the mining of coal and precious metals reserved to the Crown. The minimum upset price for town land ranged from £2 per acre for small outlying towns to £1000 for Sydney. From 1832 to 1838, a further 171,071 acres were granted in recognition of promises made by Governors prior to 1831, and 1,450,508 acres were sold at auction, at 5s., 7s.6d. and 10s. per acre. See C J King, *An Outline of Closer Settlement in New South Wales* (1957) 75.

<sup>22</sup> Land within the boundaries selected for settlement could be leased for a minimum rent of £1 per annum, each section being 640 acres. In 1840 the minimum upset price was raised to £5 per section, and in 1841 a system of annual licences was substituted for leases. The latter was a procedural change to reduce the expense of drawing up leases. By 1843, however, only 237 leases had been issued for a total area of 184,000 acres. *Ibid.*, 41.

<sup>23</sup> *Ibid.*, 46-50.

and abundant resource that provided to squatters a means of production without the need to purchase or 'own' property. This to a great extent explains why until 1836 dower as a property right of married women was not contested in a concerted manner by others with interests in land.

Case law reveals how decisions made by the colony's Supreme Court accommodated the common law to circumstances peculiar to the colony, particularly the fact that from 1788 to 1840, the year when transportation of felons to New South Wales was abolished, convicts constituted a substantial proportion of the population.<sup>24</sup> As Bruce Kercher has established, judges in the colony developed and applied 'local policies' that enabled convicts to hold property although according to the rules of the law of attaint convicted felons could not hold property, sue in courts or give evidence.<sup>25</sup> The judges, Kercher explains, avoided implementing the rigours of the law of attaint by nullifying it through technicalities, for example, by holding that attaint would not apply unless a record of criminal conviction could be shown. 'The only proof accepted by the judges was the record of conviction in the United Kingdom, and the court had a discretion whether to send for it.'<sup>26</sup> Through the exercise of judicial discretion, judges supported local policy that enabled convicts to hold property. *Wild v Driver* (1837) is an important example of how judges applied this policy in relation to the property rights of married women who were convicts. The defendant, who had purchased property from Mrs Wild's husband, in answer to her bill in equity to recover dower, pleaded that because she was a convict under sentence when she married, she was not entitled to dower after her husband's death. Mrs Wild admitted that at the time of her husband's death she was a convict under sentence but since that time had become free. The defendant placed at issue the peculiarities of the plaintiff's legal status as a convict in order to bar her from dower. The judges noted, in the words of Kinchela J, that it was unlikely to 'find any precedents out of this Colony' on the point of the dower rights of a convict. Dowling ACJ and Burton and Kinchela JJ

<sup>24</sup> King records that in 1836 the population of the colony was 77,000 including 27,000 convicts. King, *An Outline of Closer Settlement in New South Wales* (1957) 42. Roe records that in 1841, 19,397 emancipists (i.e. ex-convicts) and 26,977 convicts lived in the colony with a total population of 130,856 people. These numbers include 3,637 female emancipists and 3,133 female convicts. See Roe, *Quest for Authority in Eastern Australia 1835-1851* (1965) 207.

<sup>25</sup> Prior to 1820, governors, judges and magistrates developed policies that, in Kercher's words, amounted to 'local law' and 'local rules', in order to mitigate the law of attaint. Kercher explains, decisions of the colony's superior courts, after 1820 indicate 'the practice, if not the formal law, was that convicts could hold property.' See Bruce Kercher, *An Unruly Child: A history of law in Australia* (1995) 32, 33, 36.

<sup>26</sup> *Ibid*, 37.



decided that ‘nothing had been stated that would bar the plaintiff from her right to dower’.<sup>27</sup> They specified that the answer to the bill for recovery of Mrs Wild’s dower did not state, as was required by Act of Parliament, ‘that the plaintiff, when her dower became due, was a transported felon’.<sup>28</sup> They strictly followed the requirements of statutory law – deciding the case on a technicality – and implemented an equitable decision on behalf of the widow in order to acknowledge her common law property right. Judicial discretion, in *Wild v Driver*, nullified the rules of the law of attain in order to allow the plaintiff to claim dower.

Two other cases presented in 1837 in the Supreme Court of New South Wales, *Middleton v Taylor* and *Middleton v Therry*, clearly indicate how equity rules and doctrine were rigorously exercised in order to accord to a married woman her right to dower. This was so regardless that it conflicted with the economic interest of landowners who had invested capital in the improvement of their property. In these cases, defendants who described property as a commodity found themselves opposed by plaintiffs who used a distinctive rhetoric of legal rights to describe their interests in land – a rhetoric that the judges confirmed in their decision in favour of the plaintiffs. In both of these cases, the plaintiff Mrs Eliza J Middleton, in 1837, presented bills in equity for recovery of her dower in freehold lands that her husband held in fee simple during their marriage but sold nine years prior to his death in 1829. The stories told by the defendants, Mr Taylor and Mr Therry, in their answers, it needs to be appreciated, were not only similar but also typical of land transactions in colonial New South Wales. In 1835 Mr Taylor purchased the property in which Mrs Middleton claimed dower from ‘one Ashley, who purchased it from Mr. J.T. Campbell, who purchased it in 1820 from the deceased, Middleton; and . . . when the defendant purchased the land he had not notice of any right of dower’.<sup>29</sup> A series of sales and purchases over a period of seventeen years had been effected without a record explicitly stating that Mrs Middleton had a right of dower in this property. This was also a consequence of the repeated transfer of the freehold owned by Mr R Therry whose answer stated:

in 1820 the late Mr Middleton sold the land to Mr J T Campbell, for a valuable consideration, and that in 1831 it was purchased by Mr Therry for

<sup>27</sup> *Wild v Driver* (1837). James Dowling was Puisne Judge from March 1828 to July 1837, and Chief Justice from August 1837 to September 1844; W W Burton was Puisne Judge from December 1832 to August 1844; John Kinchela was acting Puisne Judge from April 1836 to November 1837.

<sup>28</sup> *Wild v Driver* (1837).

<sup>29</sup> *Middleton v Taylor* (1837).

£1200; that since he purchased it he expended upward of £800 on it, that had he known that any person had a claim on it he would not have expended this money in improvement, and that he never knew there was such a person in existence as the plaintiff, until January last'.<sup>30</sup>

The value of the property, as both owners impressed upon the court, was substantially greater in 1837 than when Mr Middleton had owned it because they had invested capital in its improvement. They gave loud voice to their sense of the injustice of Mrs Middleton's claim not only to the use of one third of their freehold property but also to one third of the rents and profits of the property since her husband's death in 1829. Both defendants asked the court to limit her claim to 'a right of dower in the value of the land at the time it was disposed of by the late Mr Middleton' in 1820 'especially as she allowed so long a period to transpire [after her husband's death in 1829] before she put in her claim for dower'.<sup>31</sup> The fact that Mrs Middleton in 1837 attempted to recover one third of the rents and profits that had accrued from the property since the death of her husband in 1829 was an illustration of why the British Real Property Commission of 1828 considered dower a potential 'injury to proprietors and purchasers'.<sup>32</sup>

The defendants in these two cases failed to persuade Dowling, the Acting Chief Justice, or Burton and Kinchela JJ, who sat with him, to deny Mrs Middleton's dower on the basis of their answers to her bills. In their answers, the defendants, Taylor and Therry, used an economic rhetoric to define their property relationships. They argued that when they purchased their land, in 1835 and 1831 respectively, they had not been notified of her right of dower, and consequently had invested their capital in 'improvements'.<sup>33</sup> Both landowners asked the judges to deny the plaintiff's right to dower because she had offered 'no proof' that she 'was actually the wife of Middleton; nor that Middleton had been seized of the

<sup>30</sup> *Middleton v Therry* (1837).

<sup>31</sup> *Middleton v Taylor* (1837).

<sup>32</sup> British Real Property Commissioners, 'First Report (1829)', *British Parliamentary Papers*, Sess. 1829, 17. See A R Buck, 'Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England' (1995) 15 *Journal of Legal History* 63.

<sup>33</sup> *Middleton v Taylor* (1837) and *Middleton v Therry* (1837). On improvement as a discourse about property see Laura Brace, *The idea of property in seventeenth-century England* (1998), Nancy E Wright and A R Buck, 'Property Rights and the Discourse of Improvement in Nineteenth-Century New South Wales' in A R Buck, John McLaren and Nancy E Wright (eds) *Land and Freedom: Law, property rights and the British diaspora* (2001), 103-16, and John Gascoigne, *The Enlightenment and the Origins of European Australia* (2002) 69-85.

land during the time he was married to the plaintiff'.<sup>34</sup> Dowling ACJ and Burton and Kinchela JJ used a rhetoric of legal rights when they ruled that the plaintiff was entitled to her dower, on the basis of the defendants' failure in their pleadings to deny her marriage and her husband's interest in the land to which the dower right could attach. The judges asserted, on the basis of this technicality, that Mrs Middleton 'has a right to come into equity to have her dower assigned out of the estate of the defendant'.<sup>35</sup> Rules of equity, as the judges explained, meant that the legal right of the widow was both assumed and respected. A married woman's 'abstract' legal or moral right to dower, in both *Middleton v Taylor* and *Middleton v Therry*, was given full due according to the rules and doctrines of equity by the colony's Supreme Court.

The second question evaluated by the judges, however, required them to determine to what the right of dower applied: did it apply to the profits and rents of the property from the date of her husband's death in 1829 or from January 1837 when Taylor and Therry were first notified of, and refused her dower? The answers to the bills by both Taylor and Therry indicate their belief as landowners that dower was an imposition upon those who improved the land. Taylor, for example, verified his statement that the property had appreciated in value since Mr Middleton sold it in 1820, by referring not only to his own but also to previous owners' improvements. Taylor admitted to the court 'that the land in question is worth £100 per annum' in rents and profit. Prior to his purchase of the property in 1835 for £960, its previous owner, Mr Ashley, who had purchased the property from Mr Campbell, had 'laid out £400 and upwards, in improvements and building, which increased it to more than double the amount of the prior value thereof.' The current value, rents and profit of the property, Taylor emphasised, were the result of capital and improvements invested in it by men other than Mrs Middleton's spouse. Taylor also stated that if Mrs Middleton had claimed her dower immediately after her husband's death in 1829, he would not have expended a further £100 'in improvements, such sums would not have been laid out thereon'. He argued that Mrs Middleton's delay in attempting to recover her dower until eight years after her husband's death, ought to 'deprive her of every benefit or advantage thereof' because it was tantamount to 'a fraud upon the defendant'.<sup>36</sup> Therry, like Taylor, emphasised that by postponing her demand to recover her dower

<sup>34</sup> *Middleton v Taylor* (16 June 1837).

<sup>35</sup> Report of decision made on 22 July 1837 in *Middleton v Therry* (1837).

<sup>36</sup> *Ibid.*

Mrs Middleton stood to benefit from his and other landholders' capital investment to improve the value of their property.

The court, while acknowledging Mrs Middleton's dower, decided that she was 'not entitled to an account of the rents and profits, except from the time of demand, as her husband did not die seized; and secondly, that she is only entitled to dower of the land according to its value at the date of the conveyance by her husband'.<sup>37</sup> The decision on these two questions could easily be assumed to have been swayed by the market-oriented arguments of the landowners, Taylor and Therry, to the detriment of the rights of the widow, Mrs Middleton. A careful reading of the opinions on *Middleton v Taylor* and *Middleton v Therry*, however, reveals that the judges' decisions do not privilege the legal rights of those who buy property over the property rights of a married woman. Instead, the decision on the first question agrees strictly with legal precedent documented in the court's opinion.<sup>38</sup> In applying precedent and statute law to Mrs Middleton's bills, the judges determine that any claim for damages (rather than a claim for use rights to one third of the freehold lands) applies only to dower property of which the 'husband actually dies seized' whereas Mrs Middleton's husband had alienated the property in 1820 and 'died dis-seized' in 1829. Consequently, in the court's opinion Mr Taylor and Mr Therry were

in possession of the land as a *boná fide* purchaser for valuable consideration without notice of the plaintiff's claim of dower until January last. By the statute, therefore, she is entitled to no damage for the detention of the possession of her dower, and her claim must be confined to the land itself.<sup>39</sup>

Consequently, the judges decide:

She comes into Equity to enforce a legal right, but as a Court of Equity, we cannot exclude from our consideration the hardship and injustice which would ensue to the defendant if we allowed her to work an injury which . . . would be irreparable. . . . In thus holding we do no injustice to the widow, who is only entitled to be endowed, in consideration of marriage, to the one

<sup>37</sup> *Middleton v Therry* (1837).

<sup>38</sup> *Middleton v Taylor* (1837). When explaining why they determined that Mrs Middleton was not entitled to damages for the detention of her dower, the judges cited not only law reports but also the Statute of Merton 20 Henry 3 c. 1 and commentary upon it in *Coke on Littleton*.

<sup>39</sup> *Ibid.* Legal doctrine and precedent decided the question of whether Mrs Middleton was entitled to dower according to the improved value of the lands or only according to the value of the land in the life-time of her husband. The opinion cited *Coke on Littleton*, 1 Hen. 5, 11 and other authorities.

third of the value of her husband's estate. She has no right to her thirds of another man's,<sup>40</sup>

The decisions reached in both *Middleton v Taylor* and *Middleton v Therry* accord strictly with rules and doctrines of equity and statute law in order to strike a balance between the property right of a married woman to dower and the material interests of buyers and sellers of property.

In other cases that addressed dower in the early 1830s the colony's judges asserted the necessity, in the absence of explicit precedents, of adapting common law to colonial circumstances. Their decisions clearly indicate respect for married women's moral right to dower. An important illustration of this is Forbes's decision in *Davis and Wife v Crispe and another* (1834).<sup>41</sup> That case addressed the subject of dower in the context of debate concerning the intention of a testator who in his will demised all his estate, including real and personal property, to trustees whom he instructed:

to sell and dispose of the same by public auction, and after deducting the expen[s]es attending the sale thereof, payment of his debts and funeral expen[s]es, and paying his wife, Mary Carter, who he married in New South Wales, her lawful dower, to deposit the remainder in one of the Banks of New South Wales, for the purpose of being paid over to his wife and children, who were resident in England.—It was also admitted that Carter was married in England, that his wife was now alive, but that subsequent to his first marriage he had been transported to this Colony for a felony.<sup>42</sup>

Counsel for the plaintiff (Davis and his wife) argued: 'this was a case in which the intention of the testator must guide the Court in its decision. The terms lawful dower mentioned in the will could only be construed to mean a third portion of the testator's estate'. The plaintiffs did not simply base their argument on the testator's intention stated in his will. Instead they insisted upon the importance of recognising the widow's right or entitlement to dower.

Forbes CJ stated that 'it was fruitless to look for precedents' in English law because, in his words, the case was 'peculiar to this Colony'. He took note of the fact that bigamy was not uncommon in New South Wales because many people believed when:

a man is transported for life for a felony to this Colony, he comes here a new man. Therefore many people have contracted matrimony, and have treated

<sup>40</sup> Ibid.

<sup>41</sup> Francis Forbes was Chief Justice from October 1823 to July 1837.

<sup>42</sup> *Davis and Wife v Crispe and another* (1834).

their issue by such marriages as legal heirs to the property, as if they had never been married before.

Although he stated in his decision ‘that the law of England recognised nothing of the kind’, Forbes gave his opinion in this case:

that it was the intention of the testator to make some provision for ‘the wife he married in New South Wales,’ to use his own terms, and that the words lawful dower should be taken as a measure by which he intended to apportion the widow’s share of his property, and therefore she was enabled to receive one third after payment of the testator’s just debts and funeral expenses.<sup>43</sup>

Forbes CJ and Dowling J clearly seek to implement the testator’s intention but do not use terminology that might be expected in such circumstances; namely, they do not refer to the ‘testator’s gift’ to his widow, but instead they refer to a ‘widow’s share’ of her husband’s property. This rhetoric acknowledges, even in the circumstances of a bigamous marriage, a woman’s ‘moral right’ to provision such as dower from her spouse’s estate.

There are two other issues in the decision of Forbes CJ and Dowling J that we would like to emphasise. Their interpretation of the law involves judicial creativity that secures justice for Mrs Davis. In this case, the judges adapt the kind of property to which dower customarily applied. In this case the wife’s dower did not simply apply to her deceased husband’s freehold property, as was customary, but also to his chattels. This kind of legal reasoning that accommodates a married woman’s moral right to dower is evident in other cases heard in the colony throughout the 1830s.<sup>44</sup> The second issue that merits emphasis is Forbes’ recognition of the consequences, for a wife, of legal disability in a convicted husband. As Forbes notes:

certain disabilities were certainly attached to a conviction for felony, and consequent upon *attaint*, was the disability to sue in a Court of Justice, or to make a contract. This disability in the husband rendered the wife a *feme sole* to a certain extent, for the purposes of trade for instance, but a marriage contract legally solemnised could not be put an end to, by transportation or exile.<sup>45</sup>

<sup>43</sup> *Ibid.*

<sup>44</sup> Compare *Davis and Wife v Crispe and another* (1837) with other relevant decisions, see *Doe dem Wentworth Ainslie v Collins* (1831), *Perkins v McDonald* (1833), *Williams v Terry* (1836) in Bruce Kercher (ed), *Decisions of the Superior Courts of New South Wales, 1788-1899*.

<sup>45</sup> *Davis and Wife v Crispe and another* (1837).

Legal disability in a husband could become the basis of a married woman regaining the legal rights of a *feme sole* to make contracts, to sue and be sued independently of her husband, and to own real and personal property. Thus the transportation of husband could be said to make a 'new woman' of his wife. The potential for a convicted felon's wife, who lived in the colony, to exercise the legal rights of a *feme sole* was a subject also addressed by Dowling CJ in his notebooks. He recognised that the legal status of such a wife would change during and after her husband's sentence for felony:

during the continuance of his sentence . . . his marital rights were suspended, & . . . he was incapable of acquiring property at that time . . . [U]pon the expiration of his sentence or pardon . . . [he] w[oul]d become then entitled to such property of his wife . . . unless settled upon her before marriage.<sup>46</sup>

A wife of a felon was a *feme sole* only for the duration of her husband's sentence, after its conclusion she again lived under coverture as a married woman without property rights. Dower was viewed as a just provision for such a married woman whose legal status as *feme sole* or *feme covert* was more likely to vary than that of most women living in England.

The changing legal status of a married woman in the colony was clearly exemplified in the case of *Wild v Driver* discussed earlier in this article. It was brought into focus again when an argument on a demurrer to Mrs Wild's original bill to recover her dower brought her before the Supreme Court again in *Wild v Driver* when Willis J was sitting.<sup>47</sup> On this occasion the specific question for decision was 'whether a woman who shall marry while a Convict, and whose husband dies while she is under sentence, can claim dower when she becomes free'. Willis' opinion was 'that as she was not in a position to claim dower when her husband died, the right could not ly [sic] in abeyance, and she could not subsequently claim it'.<sup>48</sup> This decision implemented the law of attain that denied property rights to a convicted felon rather than local policy customarily applied by judges in the colony, as in fact had been done in *Wild v Driver*, only one year earlier.<sup>49</sup> The difference in the decisions in the cases in 1837 and 1838

<sup>46</sup> 'Notes to *Cooper v Clarkson* (1831)' in Bruce Kercher (ed), *Decisions of the Superior Courts of New South Wales, 1788-1899*.

<sup>47</sup> J W Willis was Puisne Judge from November 1837 to January 1841. As Michael Roe explains, subsequently Willis was resident Judge at Port Phillip from January 1841 to June 1843 but then returned to England when he was moved by Governor Gipps. His appointment was not terminated until October 1846. See Roe, *Quest for Authority in Eastern Australia 1835-1851* (1965) 211.

<sup>48</sup> *Wild v Driver* (1837).

<sup>49</sup> The decision in *Wild v Driver* stated that the plaintiff 'might be a prisoner of the Crown for debt or a prisoner of war, or she might have been convicted in the Colony,

merits attention because it marks a turning point in the history of the common law property right of dower in the colony. *The Dower Act* (1836) limited the property to which the common law property right of dower had previously applied, except in the case of women who had married prior to 1 January 1837. This legislative restriction of dower coincided with the effect of the decision in *Wild v Driver*; by eschewing local policy that enabled married women who were convicts to have property rights, that decision restricted the number of married women able to benefit from dower. It needs to be emphasised that the consequences of decisions denying property rights to women were not simply economic; in addition, the denial of dower as a customary or 'moral' right in effect nullified attributes of the legal status of married women, particularly their legal agency to have their interest in their husbands' estates recognised at law.

### **Dower explicated in legislative debates from the 1840s to the 1860s**

Given the decisions in favour of dower in the colony's Supreme Court prior to 1838, it may seem surprising that the conceptualisation of dower as a legal and moral right was subsequently defeated in the face of economic demands. But that is exactly what happened in New South Wales. That defeat is all the more remarkable as local policy and rules that enabled convicts to own property were reconciled with imperial law in 1843. In that year, as Kercher explains, the imperial parliament passed a new act that secured legal rights of convicts, who under the 'ticket of leave system' were entitled to hold personal property and leases of land, and to sue in the courts to protect these and other rights. Although the new act did not extend to convicts full title to land, it mitigated the full rigour of the law of attainder by restoring local policy in regard to property rights.<sup>50</sup> Giving official recognition to the property rights of convicts under the 'ticket of leave system' did not interfere with the rapidly expanding market in land developing in the 1830s with the arrival of free

neither of which would be any bar to dower.' In the 1837 case the decision specified that only the affirmation that Mrs Wild was a transported felon could bar her right to dower.

<sup>50</sup> 6 Vic. C. 7 NSW Act (1843). Kercher, *An Unruly Child: A history of law in Australia* (1995) 36. 'Ticket of leave' was analogous to parole. Tickets of leave were first issued in 1801 but governors did not, in law, have authority to issue them until 1828 when they were recognised by statute. *Ibid.*, 29. Emancipists, that is, ex-convicts whose sentence had expired, and convicts who had been granted pardons were able to hold land and sue to defend their property rights in court.



settlers and in the 1850s during the gold rush.<sup>51</sup> It was the consequences that legislators feared dower posed to an efficient market in land that countered and ultimately undermined that property right of married women.

During the 1840s economic and political change focused attention on social conflict over land settlement patterns. In the early 1840s, economic depression occurred because of several factors, including a fall in wool prices in the world market, the cessation of convict transportation that until 1840 had been the mainstay of labour in the colony, and financing immigration that drained government revenues from land sales. The depression of the pastoral economy, which depended heavily upon wool, encouraged squatters as an interest group to consolidate their power in relation to both the land and politics when a limited form of colonial representative government came into being.<sup>52</sup> Statute law in 1842 provided for the creation of a Legislative Council consisting of thirty-six members of whom twelve were nominated by the Crown and twenty-four were elected.<sup>53</sup> The electoral franchise, however, was restricted to those who owned substantial freehold property worth £200 or who occupied dwelling houses worth £20 per annum. It was a property-owning electorate, including a faction of squatters, who chose the elected members of the Legislative Council. The elected majority in the 1840s used their political power to obtain for squatters the pre-emptive right to purchase the land that they leased from the Crown. This was secured by the *Waste Lands Occupation Act* (1846)<sup>54</sup> that, in effect, prevented small-scale agriculturalists from settling on the land. This Act protected the land runs of established squatters from competition by granting them eight or fourteen-year leases upon paying a rent of £10 per annum for land that could carry 4,000 sheep with additional payments in proportion to stock

<sup>51</sup> The population of free settlers (including emancipists) in 1841 was 103,879 and in 1851 rose to 184,550. The gold rush brought a sudden and dramatic increase in population after 1851. In 1857 after discovery of gold in New South Wales, the population was 305,487. See Shann, *An Economic History of Australia* (1930) 175.

<sup>52</sup> See D S MacMillan, *The Debtor's War. Scottish Capitalists and the Economic Crisis in Australia, 1841-1846* (1960); Philip McMichael, *Settlers and the Agrarian Question: Foundations of Capitalism in Colonial Australia* (1984) 191-214.

<sup>53</sup> A C V Melbourne, *Early Constitutional Development in Australia* (1963) 269-76.

<sup>54</sup> 9 and 10 Vic. C. 104. The act remained largely unchanged until 1861 when the *Crown Lands Alienation Act* and the *Crown Land Occupation Act*, commonly known as the Robertson Land Acts (which are discussed subsequently) came into effect in 1861. See D W A Baker, 'The Origins of the Robertson Land Acts' in F B Smith and J Eastwood (eds) *Historical Studies: Selected Articles, First Series* (1964).

in excess of that number. This secured land tenure for squatters in exchange for a nominal annual fee.<sup>55</sup>

It was a Legislative Council dominated by a small group of elite land holders that first debated the conceptualisation of dower as a property right.<sup>56</sup> When a bill proposing amendments was debated during 1850 in the Legislative Council, W C Wentworth argued

where the wife by her own laches [*i.e.*, delay] had failed to make her position known to any person who might purchase property from her husband in this colony, she had no right to complain of being prevented from acquiring a subsequent benefit from this property.<sup>57</sup>

His opinion should be evaluated in relation to his land holdings; Wentworth was not only a substantial land owner but also a squatter, who under the provisions of the the *Waste Lands Occupation Act* retained for a nominal annual fee fifteen squatting runs that each supported at least 4,000 sheep.<sup>58</sup> His assertion about dower, not surprisingly, expresses the interests of a landholder for whom dower was an economic disadvantage. His opinion opposes that of judges in the cases of *Middleton v Taylor* and *Middleton v Therry* (1837) in which a widow's delay in attempting to recover her dower was found insufficient to bar it. Evidence presented to the Select Committee established in 1850 to report on the proposed bill on dower included arguments similar to Wentworth's. The principles of the Bill were described as 'perfectly just', in contrast to the 'extreme injustice . . . [that] resulted from the existing state of the law' to those

<sup>55</sup> King, *An Outline of Closer Settlement in New South Wales* (1957) 50-58.

<sup>56</sup> When the *Dower Act* of 1836 was implemented, the Governor's concern was to make the laws of the colony consistent with those of England. By the Act of 1828 (9 Geo. IV, c. 83), the Governor and Legislative Council, which consisted of not less than five and no more than seven members nominated by the Crown, were given power to make laws and ordinances for the colony consistent with the laws of England. The Act of 1828 did not make provision for a representative element in the legislature. The *Dower Act* of 1836 was implemented during the period when the colony was governed according to the Act of 1828. Subsequently, the Act of 1842 (5 & 6 Vic. C. 76) provided for a representative element. It was a government composed according to the Act of 1842 that first debated dower in the colony. See Melbourne, above n 53, 112, 154-55, 376-80.

<sup>57</sup> *Sydney Morning Herald* (Sydney) 21 September 1850. W C Wentworth was leader of elected conservatives in the Legislative Council from 1843 to 1851 and continued in the Legislative Council, elected under the provisions of the Act of 1850, until 1854. He was also a pastoralist who owned substantial property. See C N Connolly, *Biographical Register of the New South Wales Parliament 1856-1901* (1983) 355.

<sup>58</sup> King, above n 55, 59.

who purchased property to which dower applied.<sup>59</sup> G K Holden concurred with the argument that dower was best understood as an injustice to purchasers. He insisted that the proposed legislation would not be an injustice to an English wife who:

when she married in England . . . never could have considered it part of her matrimonial contract that she should be entitled to Dower out of land that her husband might purchase in New South Wales, any more than out of land which might be purchased by him in South America, where she would not be entitled to Dower.<sup>60</sup>

But in fact that is exactly the eventuality for which the existing law provided. Holden's argument, however, supported legal change to facilitate a market environment in which titles to land would be unencumbered by the property rights of widows. Holden argued that the matter should be considered not in terms of legal rights but instead as a matter of market efficiency. Holden asserted that: 'The law of Dower here is a mere accident, and ...clean titles with regard to third parties, much more important.'<sup>61</sup> He advocated legal change to facilitate the transfer of landed property as a commodity. In the rhetoric used by Holden, married women's common law property right of dower becomes objectified as something separate from conceptualisations of them as persons. This rhetoric facilitates conceptualisations of property simply as a 'res' or thing rather than a relationship, as dower and other property rights had customarily been understood. This kind of objectification of rights as 'things' separate from the self or personhood of women facilitated understandings of dower as 'a mere accident' impeding transactions in land rather than an attribute endowing married women with legal agency.

One effect of the subsequent 1850 'Act to amend the Law of Dower in certain respects'<sup>62</sup> was to eliminate 'the remaining old cases'<sup>63</sup> of dower that involved only women married prior to 1 January 1837. According to

<sup>59</sup> New South Wales, 'Select Committee on the Real Estate and Dower Bills', *Votes and Proceedings of the New South Wales Legislative Council* (1850) Vol 2: James Norton in evidence 5 September 1850.

<sup>60</sup> *Ibid.* G K Holden in evidence 18 August 1850. G K Holden was a liberal in the early 1850s and a conservative in the late 1850s and early 1860s. See Connolly, *Biographical Register of the New South Wales Parliament 1856-1901* (1983) 150.

<sup>61</sup> *Ibid.*

<sup>62</sup> 14 Vic. No. 27.

<sup>63</sup> 'Select Committee on the Real Property and Dower Bills', *Votes and Proceedings of the New South Wales Legislative Council* (1850) Vol. 2: James Norton in evidence 5 Nov. 1850. As we explain later in this article, cases in the Supreme Court indicate that as late as the 1870s women who had married before 1837 lived in the colony and sought to enforce their dower in equity.

the provisions of the statute, no widow was entitled to dower unless it should be proved: 1) that she resided in the colony as the wife of the deceased while he still owned the land; and 2) that the purchaser had notice before, or at the time of the sale, of the fact of the deceased owner having been married to her. In cases where the defendant derived title through a purchaser other than the widow's deceased husband, in order for her to claim dower, it was necessary for her to show that before the defendant made the purchase that: 1) he must have been informed of the marriage, and 2) the widow must have resided in the colony. The 1850 statute also enacted that when land had been alienated the claim to dower was to be limited to one third of the estimated rent of the land, based on its state of improvement at the date of its alienation by her husband. As a result of these provisions, dower was reduced from an estate in one third of a husband's lands to only one third of the estimated rents of the unimproved land.

In legislative debates prior to the passing of the 1850 *Dower Amendment Act*, Attorney-General J H Plunkett clearly established that the statute's provisions constituted 'a direct interference with vested rights. The right of the widow to dower was as complete as the right of any honourable member to his freehold estate'.<sup>64</sup> Similarly, Robert Johnson, in his evidence to the Select Committee on the Real Property and Dower Bills had commended to others' attention the facts 'that Dower is a legal right' and provisions 'to deprive a widow of her legal right because she might be absent or unknown' were 'unjust'.<sup>65</sup> The fact that dower in common law was a legal right established by English custom and precedent was discounted by W C Wentworth who contended that: 'The position and circumstances of England were totally different'.<sup>66</sup> By this, Wentworth explained, he meant that in England '[t]here could be no difficulty . . . in ascertaining whether a man had been married or not, but here it was

<sup>64</sup> *Sydney Morning Herald* (Sydney) 21 September 1850. J H Plunkett was Attorney-General of New South Wales from 1836 to 1856. He was a nominated member of the Legislative Council from 1836 to 1841 and 1843 to 1856. Thereafter he was an elected member of the Legislative Assembly or the Legislative Council at various times until 1866. He was again Attorney-General from August 1865 to January 1866. See Connolly, *Biographical Register of the New South Wales Parliament 1856-1901*, 271. See also John Molony, *An architect of freedom: John Herbet Plunkett in New South Wales, 1832-1869* (Canberra, 1973).

<sup>65</sup> 'Select Committee on the Real Property Law Bill, *Votes and Proceedings of the New South Wales Legislative Council* (1849) Vol. 2: Robert Johnson, in evidence 24 July 1849. Robert Johnson was a solicitor who would become the leader of extreme conservatives in the Legislative Council in the later 1850s and early 1860s. See Connolly, above n 57, 170.

<sup>66</sup> *Sydney Morning Herald* (Sydney) 21 September 1850.

impossible to do so. The expenses and the difficulties of conveyancing had therefore been multiplied to an enormous extent'.<sup>67</sup> Wentworth directed attention to the fact that there was no consolidated register of births, deaths and marriages in the colony that would enable a purchaser or solicitor to determine easily and with confidence whether dower did encumber land. This was an illustration of what James Martin called 'the circumstances of this colony' that needed to be taken into account when revising the land law. During debate on the Dower Bill on 21 September 1850, Martin advised others that circumstances in New South Wales 'were so very different from those of England that the sound reasoning which would apply to one country would be wholly inapplicable to the other'.<sup>68</sup>

If we examine the debate over dower in light of adjacent legal reforms we discover similar concerns about the role of property in the colonial economy. In 1849 there was an attempt to pass a bill shortening the period of limitations, then twenty years, covering a mortgagor's right of redemption. Under the existing law of real property, the mere possession of land did not prove ownership conclusively. On the contrary, the ownership of landed property differed from the ownership of other property in English law because title to land could be modified by deeds into a number of degrees of ownership. In order to transfer title to land, it was necessary to draw together the ownerships in order to confer the complete title. Under the existing law, however, there was no record of the derivation of title, except through the title deeds. Moreover, existing law made it quite possible to suppress any of those deeds. To ensure against fraud, all transactions required a complete and expensive, retrospective investigation of the title. The expense of conveyancing and the potential for fraud in land transactions were exacerbated in New South Wales as a result of the large proportion of the population with interests in land. 'Property changes owners here more frequently than at home', noted Robert Johnson in evidence to the Select Committee on the Real Property Law Bill on 24 July 1849: 'Such changes would not occur in England in a hundred years as occur here in twenty'.<sup>69</sup> It was for this reason that Johnson argued for a shortened period of limitations. Such a move was necessary, he asserted, because of 'the rapidity with which property changes hands here'. However, to shorten the period of

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> 'Select Committee on the Real Property Law Bill', *Votes and Proceedings of the New South Wales Legislative Council*, 1849, Vol. 2: Robert Johnson, in evidence 24 July 1849.

limitations could unfairly bar the claim of a genuine owner. But for some, such as G K Holden, who gave evidence to the same committee: ‘the general advantage gained in security, simplicity and economy in all transactions in land, far outweighs the occasional hardship of a claim prematurely barred’.<sup>70</sup> Their market rhetoric explained the financial benefits that would accrue from legal change that subordinated the legal rights of owners with genuine titles to land and of married women with genuine entitlement to dower to the interests of third parties, who had the legal and economic agency to buy land. This rhetoric deprecated the importance of married women’s legal rights to dower without which they lacked legal agency to secure an interest in their husband’s estates.

To take another adjacent statutory development, during debate on the Titles to Land Bill in September 1857, Sir Alfred Stephen, urged other members of the Legislative Council to view law reform purely in light of expediency. ‘As to changing the laws of England’, Stephen asked:

was the law in question like the law of inheritance, like the Habeas Corpus Act, or like any other of those most important laws? What was there in the question, that the law of England should be considered rather than the principle of expediency?<sup>71</sup>

For Stephen, laws securing the legal rights of widows were subordinate in importance to secure titles to property that would increase the marketability of land. There were important social changes in New South Wales during the 1850s that made it expedient to change common law property rights secured by the laws of England within a colonial setting.

By the late 1850s the gold rushes had attracted large numbers of settlers, many of whom, having failed on the goldfields, turned to the land as a livelihood.<sup>72</sup> Although nominally held by the Crown, the vast bulk of the land in New South Wales in the late 1850s was believed by many to be ‘locked up’ in vast leasehold squatting runs held by private pastoral and banking interests. For this reason, the principal issue of popular political argument in mid nineteenth-century New South Wales was the question

<sup>70</sup> Ibid: G K Holden, in evidence 24 July 1849.

<sup>71</sup> *Sydney Morning Herald* (Sydney) 3 September 1857. Sir Alfred Stephen was Chief Justice from 1844 to 1873. He was active in the Legislative Council of May 1856 to Nov. 1858 and subsequent periods (i.e. 1875-March 1879, Aug. 1879-Nov. 1885, Dec. 1885-Oct. 1890). He was President of the Legislative Council from May 1856 to Jan. 1857. See Connolly, above n 57, 315-16.

<sup>72</sup> Between 1851 and 1857, the population of New South Wales had grown from 184,550 to 305,487. See Robin Gollan, *Radical and Working Class Politics: A Study of Eastern Australia, 1850-1910* (1960).

of access to the land.<sup>73</sup> The desire to unlock the lands and to encourage small-scale settlement was the driving social factor behind political change, including manhood suffrage and equal electoral districts in 1858.<sup>74</sup> With the passage of the Robertson Land Acts of 1861, land became more available for settlement by small-scale agriculturalists, who were able to select plots on the extensive pastoral lands previously held by squatters.<sup>75</sup> Although subsequent land settlement patterns, in fact, favoured the large landowner, the Robertson Land Acts of 1861 were, for radical and conservative alike, a vehicle of democracy.<sup>76</sup>

The juxtaposition of political democracy and a vigorous market in land undermined the widow's right to dower in the second half of the nineteenth century. In the years following the introduction of responsible government in 1856 and manhood suffrage in 1858 in the colony, 'the great mass of the people', in the words of Robert Richard Torrens, aimed 'to become landed proprietors. Consequently he argued that in Australia 'thorough law reform' is essentially 'the people's question'.<sup>77</sup> This

<sup>73</sup> Popular political debate about access to land was animated by the introduction of universal manhood suffrage in 1858. Prior to this the electoral franchise was limited to those who owned substantial property.

<sup>74</sup> Gollan, above n 72, 33.

<sup>75</sup> A R Buck and Nancy E Wright, *The Poor Man: Law & Satire in 19<sup>th</sup> Century New South Wales* (2005) 5, 13, 21-24.

<sup>76</sup> *Crown Land Acts 25 Vic. No. 1 & 2*. The conditions imposed by the Land Acts effectively prevented small purchasers from competing for access with the wealthier leaseholders, who selectively converted their runs to freehold. For a detailed description of this process, see W K Hancock, *Discovering Monaro: A Study of Man's Impact on his Environment* (1972). Whether the impact of the conditions imposed by the Acts was calculated or unforeseen by the legislators remains a point of some debate. Compare the arguments of Baker, above n 54 and C N Connolly, *Politics, Ideology and the New South Wales Legislative Council, 1856-72* (PhD, Australian National University, 1974) 162-83.

<sup>77</sup> Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) 6-7. The system of registration of title (or system of registered conveyancing) developed by Sir Robert Richard Torrens (1814-1884) was enacted in the six states of Australia and other British colonies. As James Edward Hogg remarks, 'Adaptations and modifications of the Australian system are also known as "Torrens" systems. Thus, there is now an English Torrens system, a Canadian Torrens system, and an American system'. See Hogg, *The Australian Torrens System* (1905) 1. See also Douglas J Whalan, *The Torrens System in Australia* (1982); J E Moore, 'Converting New South Wales to the Torrens System' (1966) 15.4 *Public Administration* 333; A R Buck, 'The Logic of Egalitarianism: Law, Property and Society in mid nineteenth-century New South Wales' (1987) 5 *Law in Context* 18. Torrens held a seat in the Legislative Council of South Australia in 1851 and in the following year became Colonial Treasurer and Registrar-General. Robert Stein argues that the principal reason for Torrens' success in the 1857 election in South Australia, when he topped the poll in Adelaide, was his call for reform of conveyancing. While unpopular with the legal profession that made lucrative fees from investigation of land

opinion of Torrens, who developed the system of registration of title, or as it is commonly known, Torrens Title, was widely shared. For example, an editorial in the *Sydney Morning Herald* on 23 June 1859, concurred that law reform was necessary because in the colony land was not, as it was in England:

in possession of a limited number of families from generation to generation. It is greatly subdivided; it is held to a great extent by small capitalists; it is the working man's savings bank; and it is constantly being mortgaged and transferred.

Law reform advocated by Torrens was justified with market rhetoric that emphasised how Torrens Title would enhance the opportunities of 'small capitalists' to own and sell land.<sup>78</sup> It was agreed that '[a] simplification of conveyancing is one of the greatest helps that can be offered towards multiplying the number of freehold settlers'.<sup>79</sup> Torrens was one of many colonial reformers fond of repeating John Stuart Mill's assertion: 'To make land as easily transferable as stock would be one of the greatest economical improvements which could be bestowed on a country'.<sup>80</sup> The argument of an English law reformer such as Mill that 'the best system of landed property is that in which land is most completely an object of commerce; passing readily from hand to hand'<sup>81</sup> criticised the nature of aristocratic property relationships that prevented alienation. In New South Wales, however, the problem confronting law reformers was speculation in land, particularly by wealthy pastoralists and banking interests for whom conveyancing costs, while a nuisance, did not have the effect of preventing the purchase of land, as they did for small-scale agriculturalists. The *Empire* newspaper commented forcefully on the problem resulting from speculation by squatters and banks:

titles, Torrens proposed system was popular with both large and small-scale landowners. Torrens became Chief Secretary and colonial Premier of South Australia in 1857 but his Ministry lasted only one month. With the passage of the *Real Property Act* of 1858 in Australia, Torrens resigned from parliament and thereafter travelled to promote the Torrens system in other colonies. See Robert Stein, 'Sir Robert Richard Torrens and the Introduction of the Torrens System' (1981) 67.2 *Journal of the Royal Australian Historical Society* 119. Cf. A Norman Jeffares, 'Robert Richard Torrens' (1956-59) 8 *Proceedings of the Leeds Philosophical and Literary Society* 275.

<sup>78</sup> See John Stuart Mill, *Principles of Political Economy* (first published 1848, 1970), 367; and J N Gray, 'John Stuart Mill on the Theory of Property' in Anthony Parel and Thomas Flanagan (eds) *Theories of Property: Aristotle to the Present* (1979) 257-80.

<sup>79</sup> *Sydney Morning Herald* (Sydney) 30 March 1860.

<sup>80</sup> Torrens, above n 77, 44. See quotations of John Stuart Mill in an article concerning the consequences of introducing legislation implementing the Torrens system in New South Wales in the *Empire* (Sydney) 22 August, 1862.

<sup>81</sup> Mill, above n 78, 255-56.



in a colony where the population is rapidly increasing by immigration, there is a mode of getting rich at the expense of other people, which could not be carried on to the same extent in a long settled country, namely by purchasing land and leaving it unoccupied, unimproved, until the labours of others in the neighbourhood have enhanced the value of the property.<sup>82</sup>

When Torrens and others quoted Mill they implied that a simplified and accurate system of registering title in the colony would address conditions peculiar to its economic environment and thereby increase the marketability of land for small purchasers.<sup>83</sup> The social and political objectives of facilitating dealings in land by reducing expense on behalf of the middle and working classes was central to the market justification used by those who were intent on reforming the law of property in the second half of the nineteenth century.

When the subject of married women's property rights was addressed during parliamentary debates in 1862, it was to identify how they multiplied the possibility of fraudulent land transactions. Thomas Holt addressed married women's property rights from the perspective of his own personal experience on 20 August 1862. He discovered that land he had bought in Victoria had previously been conferred on the vendor's wife in a marriage settlement. The vendor had not been entitled to sell the property. Holt brought an action and received £1000 costs.<sup>84</sup> In the meantime however, Holt had unwittingly sold the property to a third party who in turn sued him successfully for £3000. Such examples provided persuasive arguments that the priority to be considered when

<sup>82</sup> *Empire* (Sydney) 11 January 1860. Cf. Opinions expressed in the *Goulburn Herald* (Goulburn) 1 March 1856:

to see the number of these land sharks, with their countenances fully developing their master passion – avarice – entering the land sales rooms, and unfolding their papers of sales, ready to outbid the *bona fide* intending purchaser, and then, being bloated with wealth, they can afford to let the land remain idle until the day of judgement, unless they can make money by the re-sale of it.

<sup>83</sup> This was stated explicitly by Mill:

the expense of making transfers, operates to prevent land coming into the hands of those who would use it to most advantage; often amounting, in the case of small purchasers, to more than the price of the land, and tantamount, therefore, to a prohibition on the purchase and sale of land in small portions, unless in exceptional circumstances.

Mill, above n 78, 246.

<sup>84</sup> *Sydney Morning Herald* (Sydney) 20 August 1862. Thomas Holt was a member of the Legislative Assembly from April 1856 to December 1857 and July 1861 to November 1864, and a member of the Legislative Council from September 1868 to December 1883. After his arrival in Sydney in 1842, Holt became a wool buyer who invested in property and acquired significant pastoral interests totalling approximately three million acres in New South Wales and Queensland from 1851 to 1880. See Connolly, above n 57, 152-53.

implementing legislation, such as the *Real Property Act* (1862),<sup>85</sup> was to make land more attractive commercially and more saleable. When this Act introduced Torrens Title to New South Wales in 1863, an application for the purchase of land required the owner to state if he was married. If the owner had married before or on 1 January 1837, he was required not only to state whether his wife was entitled to dower but also to negate dower by statutory declaration. As these provisions indicate, since 1863 a married woman's right to dower, without her consent, could easily be invalidated by a statutory declaration to that effect by her husband. Dower clearly was not described as a property right that was an attribute of a married woman by legislators but instead as an impediment to the economic flourishing of others engaged in land transactions. This conceptualisation of property rights led to the subordination of the legal agency of a married woman, whose dower could be nullified by her husband.

The provisions of the *Real Estate of Intestates Distribution Act* (1862)<sup>86</sup> seem to suggest that dower as a provision for married women remained in positive law in the colony as a template or guideline. The *Real Estate of Intestates Distribution Act* entitled a widow whose husband died intestate to no more of her husband's property than she would be entitled to under the provisions of the *Dower Amendment Act* (1850). It also provided that, should the husband's real property have been sold, a payment only equivalent to a widow's dower was to be made to her. This legislation seems mindful of the necessity of providing for a widow from her husband's estate. Yet the 'care' suggested by such provision needs to be evaluated in terms of what it denies as well as what it provides to her. Case law provides insight into the consequences of this statute. In *Ex parte Murphy* (1867), presented in equity in the Supreme Court of New South Wales, it was decided that the widow was entitled to dower only out of the proceeds of sale estimated as if it had been invested in government debentures at six per cent, which was the lump sum that she was authorised to retain out of the proceeds of the sale.<sup>87</sup> As J M Bennett has noted, particular hardship occurred as a result of the application of the statute in *Merriman v The Perpetual Trustee Co. Ltd.* (1896). In this case the court held that because of the partial failure of a trust for the

<sup>85</sup> *The Real Property Act 1862* (26 Vic. No. 9) came into operation on 1 January 1863.

<sup>86</sup> 26 Vic. No. 20 was also known as 'Lang's Act' because of the role of John Dunmore Lang in its passage through parliament. He was a noted 'radical' from the 1840s to 1860s, and member of the Legislative Assembly from June 1859 to November 1869. See Connolly, above n 57. See also D W A Baker, *Days of Wrath: A life of John Dunmore Lang* (1985).

<sup>87</sup> 6 S.C.R. Eq. 63.

conversion of real property, the husband was to be considered 'intestate', and the proceeds of the conversion passed to the executors as personal property. Because the proceeds of the sale were money, or personal property, according to the provisions of the *Real Estate of Intestates Distribution Act*, the widow had a right to no more than dower. Unfortunately her dower had been barred previously, so she was awarded nothing from her husband's estate.<sup>88</sup>

The concept of dower, which was relevant to statute law determining the provision of a widow whose husband died intestate, was irrelevant to the property rights of a widow whose husband made a will. The law presumed that it could trust a husband who made a will to perform his 'moral duty' to provide for his widow. That trust, as Rosalind Atherton has shown, was often misplaced. If a husband chose to will his property away from his wife, judges would respect his intention. Courts in the colony respected the 'testamentary freedom' of a deceased husband, unless it could be shown that he did not meet standards set by rules of testamentary capacity; that is, that the deceased was of 'sound disposing mind', meaning that he comprehended the extent of his property and appreciated the claims of his wife and heirs to 'regard and bounty'. Judges concurred that it was insufficient to show that a testator's intention expressed in his will was unjust or cruel. If the deceased's intention to disinherit his wife was 'deliberate' and he was determined by judges to meet standards of testamentary capacity, they would not refuse probate of a will.<sup>89</sup> Decisions of courts supporting a husband's testamentary intention not to fulfil his 'moral duty' to provide for his widow indicate why the conceptualisation of a provision such as dower as a legal and moral right was of consequence. A mere expectation that a husband should fulfil his moral duty to his widow did not secure for her a property right or an interest in his estate that she could confidently assert at law.

The testamentary powers of a husband were established in the colony when the imperial *Wills Act* (1837) was adopted in New South Wales in

<sup>88</sup> 17 NSW Eq. 325. See J M Bennett, 'Equity Law in Colonial New South Wales 1788-1902' (1962) University of Sydney Research Project 59/20 (1) 335. Cf. *Mitchell v Hannell* (1886), 7 NSW Eq. 53.

<sup>89</sup> See the discussion of *Brown v McEnroe* (1890) 11 NSW Eq 134 in Atherton, above n 2, 142-45. On the *Real Estate of Intestates Distribution Act* of 1862, see A R Buck, "'This remnant of feudalism": primogeniture and political culture in colonial New South Wales, with some Canadian comparisons', in John McLaren, A R Buck and Nancy E Wright (eds) *Despotic Dominion: Property Rights in British Settler Societies* (2004).

1839,<sup>90</sup> shortly after the adoption of imperial legislation restricting dower in 1836. Both statutes affected the legal status and agency of married women and men in the colony. The adoption of the *Wills Act* in 1839, like the *Dower Act* of 1836 and subsequent legislation that eroded dower, effected two ends: they stripped from married women legal rights and agency without removing the disabilities of coverture while investing male property owners with the attribute of freedom with regard not only to the testamentary disposition of their property after their death but also to the transfer or sale of their property during their lifetime. The legal status and agency of married men and women were affected by concepts of property articulated in legislative debates about the reform of the law of dower in colonial New South Wales. Real property was viewed increasingly as a commodity that provided a means to express an owner's liberty or freedom by engaging in a market in land. Dower prior to the 1830s had provided married women with a property right and thereby attributed to them a degree of legal and economic agency. With the devolution of this property right from the 1840s to the 1860s, when legislators used market rhetoric to describe it as a mere vestige of English land law unsuited to colonial conditions, male owners and sellers of property gained greater freedom to engage in the ready sale of property. Economic factors that directed legislative reform of dower in New South Wales, although contested in legislative debates, subordinated married women's legal rights to the interest of the colonial market in land.

## Conclusion

The statutory reform that eroded married women's right to dower from 1850 to 1863 took place before legislation removed all the consequences of coverture upon married women. The colonial *Married Women's Property Act* (1893) that removed most but not all of married women's disabilities in regard to property postdates legal reform of dower.<sup>91</sup> This

<sup>90</sup> 2 Vic. No. 5.

<sup>91</sup> As John Mackinolty has explained, the 1893 *Married Women's Property Act* removed not all but merely 'most of the legal disadvantages [or disabilities] of the married woman in respect of property'. John Mackinolty, 'The Married Women's Property Acts' in Judy Mackinolty and Heather Radi (eds) *In Pursuit of Justice: Australian Women and the Law 1788-1979* (1979) 75. According to B A Helmore, only in 1931 were restrictions in New South Wales finally removed in order to place married women in the same position as men in applying for, and acquiring, land holdings. B A Helmore, above n 20, 511. On the specific provisions of the *Married Women's Property Act* (1893) see *Ibid*, 275-77. *The Probate Act* (1890) (54 Vic. No. 25. c. 33), which consolidated the law of inheritance in New South Wales, eliminated dower in the colony forty-five years before it was abolished in England.

was of consequence to women living in the colony because, as the Torrens register for New South Wales shows, only a small number of wives having marriage settlements that conferred separate property on them were involved in land transactions by 1893.<sup>92</sup> The 1850 *Dower Act*, which transformed dower from a married woman's right in the estate of her husband to the cash equivalent of one third of the value of her husband's lands during his lifetime, conceptualised dower not as a moral or legal right but instead as a commodity accommodated to the commercial market in land. This was effected not only in law by colonial statutes but also in colonial society by the use of market rhetoric. Even those who spoke in defence of married women conceptualised dower as a commodity. Evidence to the Select Committee of the Real Property Commission of 1879, for example, suggested that dower must be understood in terms of property relationships that existed between husband and wife: 'dower has sometimes been a very great protection to a woman . . . a man's wife is his first creditor'.<sup>93</sup> It is worthy of note that this argument used the language of the market to defend the legal right of widows to dower.

In legislative debates and the proceedings of select committees, the benefits that accrued to male buyers and sellers of property were assumed to be commensurable, or indeed, more valuable to property owners and colonial society than dower rights to a married woman. At no point in their arguments did legislators argue that a married woman would gain a benefit commensurable in economic terms with her right to dower when it was abolished. As openly admitted by some legislators, the rights and well-being of married women were simply subordinated to the interests of buyers and sellers of property who stood to gain financially from simplified procedures for the transfer of land. The potential for the abolition of dower to exacerbate inequalities in the distribution of property rights and the maldistribution of wealth in the colony, on the rare occasion that it was raised as a subject for consideration, was quickly set aside. The changing legal rights of married and widowed women proceeded without legislators questioning the priority given to the interests of those who conceptualised property as a commodity. In debates from the 1840s to the 1860s legislators subordinated married women's lives and well-being to those of others who, it was believed, would benefit the economy of colonial society by investing capital in the

<sup>92</sup> Golder and Kirkby, above n 2, 217.

<sup>93</sup> New South Wales, 'Royal Commission into the Workings of the Real Property Acts', *Votes and Proceedings of the New South Wales Legislative Assembly* (1879): Edmund Burton in evidence, 17 March 1879.

purchase and improvement of landed property. Legislators' association of capital investment with 'improvement' of property is an important example of their market-oriented conceptualisation of property. 'Improvement' when referred to by defendants in equity cases in the 1830s, such as *Middleton v Taylor* and *Middleton v Therry* (1837), to explain that they had invested capital in the maintenance of their property and the construction of buildings, also defined a commodified understanding of property that in their discourse was opposed to a widow's legal right to dower. In the 1830s judges' decisions, which secured for married women the common law property right of dower, were based on rules and doctrines of equity as well as local rules that mitigated the consequences of attain.

When compared with decisions of colonial judges in the 1830s, legislative debates from the 1840s to the 1860s reveal different responses to colonial circumstances affecting property relationships over the course of the nineteenth century. Legislation in the 1850s and 1860s gave priority to facilitating land transfers and securing capitalistic property relationships. Similarly, cases about dower heard in the Supreme Court after 1870 viewed dower as a vestige of English land law unsuited to the colony. The decision handed down in *Carr v Harrison* (1871) denied a widow's dower although she had been married before 1 January 1837, and consequently according to the *Dower Act* of 1836 was entitled to dower.<sup>94</sup> An *obiter dictum* in that case to the effect that the Supreme Court was prepared to regard dower as being barred in equity after a period of twenty years, by analogy to the Statute of Limitations, had persuasive value in subsequent cases. In contrast, during the decade of the 1830s when imperial and colonial statutes first restricted dower, judges sitting in the colony's Supreme Court responded creatively in order to acknowledge the peculiarity of colonial circumstances rather than strictly following precedent in cases such as *Davis and Wife v Crispe and another* (1834). The judicial creativity exercised by the judges in this and other cases in the 1830s accommodated the 'rights' of a widow of a bigamous marriage to provision by dower and inheritance. In other cases prior to 1838 judges responded equitably to customs peculiar to the colony when making their decisions involving married women's property rights. Their understanding of married women's right to dower was expressed with terms such as 'an abstract legal right', 'a provision for a wife', 'entitlement' and 'endowment' that compose a rights rhetoric informed by equity doctrine and local policy that secured property rights. Their understanding, however, was not shared by legislators who used

<sup>94</sup> 10 S.C.R. Eq. 107.

market rhetoric that from the 1840s onwards objectified women's rights as an 'injury to proprietors and investors', 'an encumbrance', 'an economic interest' and 'a privilege'. These terms expressed a commodified concept of property that resulted in the subordination of married women's property rights to the demands of the market in colonial New South Wales.