OUR EARLIEST "HOMESTEAD" OR "DOWER" ACT

WILBUR F. BOWKER*

I. INTRODUCTION

This title refers to the American-type of homestead law that usually has three features — it exempts the home from writs of execution, it requires the wife's consent to a disposition of the home and it gives the wife, and sometimes minor children, an interest in the home after the owner's death. The western provinces all have legislation of this general type, though invariably the exemption from writs of execution is in a separate statute.[1]

The writer had long assumed that the dower or homestead legislation of the prairie provinces going back to World War I was the first in Canada. However, he recently noticed a footnote in a book on the political history of the Northwest Territories. That footnote refers to an Act of the Parliament of Canada called the Homestead Exemption Act, which was enacted for the Northwest Territories.[2] It was passed in 1878, eleven years after Confederation and eight years after the Territories became part of Canada. The title of the Act is misleading because it is more than an Exemption Act. It has all the three main features of an American homestead law.

Why did Parliament pass such an act? Because at that time it exercised in the Territories the powers which the legislatures exercised in the provinces, except those it had delegated to the Territorial Council. It had reserved to itself control over public lands and by the Dominion Lands Act of 1879 established a system of survey for the Territories and provided for free grants of farm land called homesteads. This word unfortunately has more than one meaning and it does not mean the same in the Dominion Lands Act[3] as it does in the Homestead Exemption Act. The Dominion Lands Act provided the framework for settlement of the empty prairies. Then in 1886 the Territories Real Property Act[4] established a system of registration of titles to land — a Torrens system.

The Northwest Territories Act of 1875[5] gave to the Territorial Council and its successor the Assembly specific powers which were narrower than those of a province, and Territorial ordinances could not be inconsistent with federal legislation. It gave the Council six specific powers — taxation for local purposes, property and civil rights, administration of justice, public health, matters of a local or private nature and punishment for

---

* Professor Emeritus and former Dean of the Faculty of Law, University of Alberta.

1. W.F. Bowker, "Homestead Law in the Four Western Provinces" in Bissett-Johnson and Holland, *Matrimonial Property Law in Canada*, Release No. 3, Aug. 1982 at I-43.
2. L.H. Thomas, *Struggle for Responsible Government* (2nd ed. 1978) 75, n. 12. The Act is 41 Vict., c. 15.
3. 42 Vict., c. 31. It was a consolidation of previous Acts. A homestead under this Act was a quarter-section of public land to which a settler became entitled on performing certain services while in the Homestead Exemption Act a rural homestead was 80 acres with a dwelling owned and occupied by any person.
4. 49 Vict., c. 26; R.S.C. 1886, c. 50.
5. 38 Vict., c. 49.

breach of ordinances.[6] Two years later Parliament replaced this provision by one enabling the Governor General in Council to confer on the Territorial Council any power not exceeding those of a province under s. 92 of the British North America Act.[7] An Order in Council of May 11, 1877 granted certain powers. They were slightly wider than those of 1875.[8] A new allotment of powers made on June 26, 1883 was almost identical with that of 1877.[9] Then on July 7, 1886 power over direct taxation and incorporation of companies was added.[10]

Parliament's wide legislative power over the Territories is illustrated not only by the statutes described above but by subjects included in the various Northwest Territories Acts. The 1875 Act covered descent and grants of real estate, wills and property rights of married women[11] and by 1886 the Act still dealt with the last two.[12] In short, Parliament had much wider legislative power than it had in relation to a province, and could claim to be the proper body to enact the Homestead Exemption Act.

II. ENACTMENT OF THE HOMESTEAD EXEMPTION ACT

On March 7, 1878 the Honourable David Mills, Minister of the Interior in the Liberal government of Alexander Mackenzie, moved first reading of the Homestead Exemption Bill and outlined its main provisions.[13] The second reading was on March 29.[14] The Minister said that legislation of this type was prevalent in the United States and had been a boon in the recent depression. Its extension to the Territories would be of benefit to its people. It recognized the family as the unit of society and sought to protect that unit. A certain amount of the family property should to some extent be protected against adverse fortune. The exemption proposed was $4,000.00. The Bill gave to the wife a life estate in the home and on the death of husband and wife gave to minor children an interest in the home during minority.

Sixteen members took part in the debate. From both sides of the House there was general approval in principle though the exemption of $4,000.00 was thought to be too high. The lending of money and extending of credit would be discouraged if too much protection was given to debtors. Donald Smith, later Lord Strathcona, and member for the riding of Selkirk in Manitoba, thought there should be an exemption like Manitoba's, that went back to 1871.[15] In Manitoba, however, there was no maximum amount and Smith thought there should be, but $4,000.00 was far too high. He did not want settlers to escape from debts incurred before coming into the Territories. That would simply be a premium on dishonesty, and the Territories would be filled up with the idle and indolent.

6. 38 Vict., c. 49, s. 7.
7. 40 Vict., c. 7, s. 3.
8. 1 Terr. L.R. at xiii.
9. *Id.* at xv.
10. *Id.* at xix.
11. 38 Vict., c. 49, ss. 14-53.
12. R.S.C. 1886, c. 50, ss. 26-40.
13. *House of Commons Debates*, 1878 at 802-03.
14. *Id.* at 1512.
15. Administration of Justice Act, C.S.M. 1880-81, c. 37, s. 85.

Another member, The Honourable J.B. Robinson of Toronto West, thought there should be an exemption for homes in every province. Then he gave the precise amount of the exemption in each of thirty-three states and Washington Territory.

The Bill was amended in committee and passed.[16] Section 1 permitted the owner of land in the Territories with a dwelling house occupied by him to register as a homestead eighty acres in a rural locality or a lot in a city, town or village, in the office for the Registry of Titles to Lands. Section 2 made the registered homestead exempt from seizure or sale under execution if the value was under $2,000.00 (one half of the amount originally proposed). Section 3 provided for an affidavit by the owner that he was married, whereupon the Registrar was required to enter the wife's name on the certificate of title and she thereupon became the owner of a life estate, though this life estate was cancelled in the event of her adultery and separation from her husband. Section 4 forbade alienation of the homestead by the owner "except the transfer be executed by his wife, joining with him". Section 5 gave to the wife a life interest in the homestead on the husband's death, and on her death an interest to minor children until they reached majority. The next section was an elaborate provision to cover the case where the homestead was or might be worth more than $2,000.00. Then ss. 7 and 8 provided the machinery for registering a homestead.

Although s. 5 gave to the widow a life estate in the homestead, s. 9 said that where the husband died without a will the widow had to elect between her life estate in the homestead and the share of her husband's property which descended to her by the law of the Territories. What was the property that descended to her? The Northwest Territories Act of 1875 gave detailed provision for the descent of real property. It never descended to the widow but her right to common law dower was preserved. That Act did not deal with succession to personal property, and the writer's guess is that the Statute of Distributions applied.[17] Section 10 said that where the husband died with a will the widow had three choices — her share on an intestacy or the property devised to her in the will or her life estate in the homestead. Section 11 is notable because it makes the Act "work both ways". The Act applied where the woman was the owner. In other words Parliament was more equality-minded than some modern legislatures.

III. CONFUSION OVER REGISTRIES OF DEEDS AND OF TITLES

Certain phrases in the Act might puzzle one. Section 1 speaks of "the office for the Registry of Titles to Lands", s. 3 of the "certificate of title" and s. 8 refers to "all the lands embraced in any certificate of title granted under the Registration Act". There was in fact no Registry of Titles, no certificate of title and no Registration Act. These terms crept into the Homestead Exemption Act because the Minister of the Interior had introduced at the same session a Land Titles Act (or Registration Act). The two acts were companions. However the Minister withdrew the Registration Act because of opposition and the draftsman of the Homestead Exemption Act overlooked this fact. Mr. Justice McGuire in *Re Claxton* [18]

16. *Supra* n. 13 at 2006. See n. 2 for citation.

17. *Re Steidel* (1902) 5 Terr. L.R. 303 seems to infer this though the judgment is not clear.

18. (1890) 1 Terr. L.R. 282 at 294.

said "Parliament had . . . in 1878, passed an Act dealing with the subject of homestead exemption, but because the provisions of that Act were framed with reference to a Real Property Bill, which was at the same time before Parliament, but did not become law, the Homestead Exemption Act became practically inoperative. . . ." Incidentally, when the statutes were revised in 1886 the reference to the Registration Act was dropped from the Homestead Exemption Act, and when the Real Property Act came into effect on January 1, 1887, the phrase "registry of titles to lands" and "certificate of title" made sense.

As early as 1875 Parliament had made provision for a Registrar of *Deeds* of land in the Territories.[19] This was replaced by more elaborate provisions in 1880.[20] These in turn were amended in 1884.[21] Then the Territories Real Property Act, passed in 1886, repealed these provisions[22] because the Registry of Deeds was replaced by the Registry of Land Titles. In the meantime the Territorial Council pursuant to the federal legislation on registration of deeds had in 1879 provided by ordinance for the mechanics of registration of deeds though the ordinance carried the misleading title, Registration of Titles.[23] It was repealed by the revised Ordinances of 1888 because the Real Property Act of 1886 had replaced the provisions for a Registry of Deeds with one for a Registry of Titles.[24]

The Real Property Act of 1886 did not explicitly repeal the Homestead Exemption Act but s. 140 said that "all . . . Acts . . . relating to . . . interests of land in the Territories, so far as the same are inconsistent with this Act, are hereby repealed." It is at least arguable that the Homestead Exemption Act was inconsistent with the Real Property Act. Yet on April 1, 1893 Parliament amended that Act so must have assumed that it was still in force. The amendment changed the maximum size of a rural homestead from eighty acres to 160.[25]

IV. A DECADE OF DIFFICULTIES OVER HOMESTEAD EXEMPTIONS 1884-1894

We come now to an account of the sparring between Parliament and the Governor General in Council on the one hand and the Territorial Council and its successor, the Assembly, on the other, in relation to exemption of the homestead from writs of execution. It will help first to mention the Manitoba statute and the Territorial ordinances on the subject of exemptions. At its first session in 1871 the Manitoba legislature created an exemption of homesteads up to 160 acres with no reference to a maximum value.[26] In the Territories the original Exemption Ordinance of 1879 was

19. 38 Vict., c. 49, s. 54.
20. 43 Vict., c. 25, ss. 63-70.
21. 47 Vict., c. 23, s. 1.
22. 49 Vict., c. 26, s. 140.
23. Registration of Titles Ordinance No. 9 of 1879, amended No. 3 of 1881; amended No. 16 of 1883; consolidated No. 2 of 1884.
24. The Registrar under the Real Property Act had to take cognizance of instruments filed under the Ordinance: *Re Land Titles Act and CPR* (1899) 4 Terr. L.R. 227.
25. 56 Vict., c. 19, s. 1.
26. *Supra* n. 15.

confined to chattels but in 1884 an exemption for homesteads up to eighty acres was provided.[27] This Ordinance was disallowed on August 15, 1885 — not because of the exemption for homesteads but because of a section which forbade the enforcement of judgments against a settler for six years after his arrival in the Territories.[28]

The Territorial Council re-enacted the ordinance in 1885 omitting the section that provoked the disallowance. At the same time the exemption for a homestead was raised to 160 acres and there was a second exemption, presumably for town lots, of the house and buildings occupied by the defendant to the extent of $1,500.00 and the lot or lots on which they were situated. These two exemptions were known as paragraphs nine and ten of Ordinance No. 8.[29]

When the Minister of Justice the Honourable John Thompson scrutinized the 1885 ordinances, his report of 28 April 1886 to the Governor General in Council made no mention of the 1885 Exemptions Ordinance. However, on November 3, 1886 he sent to Lieutenant-Governor Dewdney this telegram: "On looking again at Ordinance No. 8, of 1885, I think I should advise government to disallow it, unless paragraphs 9 and 10 of section 1 are repealed, as ample provision appears to have been made by 41 Victoria, chapter 15. [Homestead Exemption Act] Please Answer."[30]

In reply, Lieutenant Governor Dewdney on 11 November sent to the Minister a report of a subcommittee of his Council. The stipendiary magistrates formed the subcommittee. He also sent a resolution of the Council.

The report, signed by Hugh Richardson as chairman of the subcommittee states that the Homestead Exemption Act would be in operation prior to the coming into force of the Real Property Act on January 1, 1887. Until that date there was no "office for the registry of titles to lands" and no provision for certificate of titles or memorials, and even after the new Act came in force "it will be impossible for parties generally throughout the North-west Territories to take advantage of its provisions"; and finally, few copies of the 1878 Act were to be found in the Territories and its provisions were "but little known by the general public".[31]

The resolution of the Council stated that settlers, animated with the hope of good crops, and the desire to improve their lands, were induced to buy large quantities of agricultural implements on credit; that because of bad crops their hopes had been disappointed and large numbers of judgments had been obtained against settlers. If not protected by clauses similar to those objected to, hardship would be entailed and they would be compelled to leave the country or else be unable to take advantage of good seasons.[32]

---

27. 1884 No. 28, s. 1(9), (10).
28. Orders in Council on the subject of Dominion and Provincial legislation 1867-1895 at 1242-43.
29. 1885 No. 8, s. 1(9), (10).
30. *Supra* n. 28 at 1245.
31. *Id.* at 1245-46.
32. *Id.* at 1246.

On March 14, 1887, George W. Burbidge, the Deputy Minister of Justice, wrote to Dewdney to tell him that the Minister of Justice "is of opinion that this Ordinance should be repealed at the next session of the council of the North-west Territories".[33] He added that "the objection taken to this repeal by the Civil Justice Committee, that the Homestead Exemption could not be effectively applied until the 1st January 1887, has now no force." In answer to the objection that the Homestead Exemption Act was not well known, the Council should see that it was made known by publication.

The letter ended:[34]

> I am to add that so much importance is attached to this matter by the Minister that, unless the repeal is made by the Council of the North-west Territories, he will probably be obliged to introduce a bill on the subject into the Dominion parliament. The necessity for action in the matter by Parliament is to be deprecated, as it will give great prominence to the exceptional exemptions, which have been sought for by the people of the North-west Territories.

The Council met in October of 1887 for its last legislative session before it was replaced by the Assembly. The Council did not yield to the threat. Nor did the Assembly when it first met in 1888 under a new Lieutenant-Governor, Joseph Royal. One of the first acts of the new Assembly was to consolidate all of the ordinances, and the offending provisions remained in the Revised Ordinances of 1888.[35] These provisions remained to the end of the Territorial period and beyond. In Alberta today the exemption for a farm homestead is almost identical with that in paragraph 9 of the 1885 Ordinance. The exemption for an urban homestead stems directly from paragraph 10, though in 1984 the amount of the exemption was increased from $8,000.00 to $40,000.00.[36]

After the Council and Assembly had weathered the criticisms from Ottawa, the exemption for homesteads came under the scrutiny of the Territorial Court in 1890. One Claxton had acquired a homestead under the Dominion Lands Act. When he received a patent he was an execution debtor. The Registrar was prepared to issue to him a certificate of title under the Real Property Act, but asked the Court whether the writs of execution should appear against the title.[37] Claxton argued that they should not. In a careful examination of the Dominion Lands Act and of the registration provisions in the Real Property Act, Wetmore J. concluded that the executions must appear against the title. Then he dealt with the argument that the Exemptions Ordinance came into play. He concluded that it was *ultra vires*. An ordinance could not be inconsistent with an Act of Parliament even though it was in relation to property and civil rights. Here, the Homestead Exemption Act gave an exemption of eighty acres with a maximum value of $2,000.00 whereas the Ordinance gave an exemption of 160 acres with no monetary limit. Thus there was an inconsistency. The Homestead Exemption Act itself did not apply because the land was never registered as a homestead.

---

33. *Id.*
34. *Id.*
35. R.O. 1888, c. 45, s. 1(9), (10).
36. Exemptions Act, R.S.A. 1980, c. E-15, s. 1(j), (k) as am.
37. *Re Claxton*, *supra* n. 18.

Mr. Justice McGuire gave a similar judgment. He pointed out that in the Ordinance, "homestead" had a completely different meaning from that which it had in the Dominion Lands Act. Later he turned to the validity of the Ordinance. It was *prima facie* a matter of property and civil rights. The question then arose whether the Ordinance was inconsistent with the Homestead Exemption Act. He thought the question "by no means an easy one", but concluded that the Ordinance was inconsistent with the Act and hence, invalid. The remaining three judges, Richardson, MacLeod and Rouleau JJ. simply concurred.

In the spring of 1893 Parliament made an extension to the scope of the Homestead Exemption Act by increasing the maximum acreage to 160. This did not satisfy the Territorial Assembly. On September 13, 1893 it prepared a memorial asking the Governor General in Council to submit to Parliament a new Homestead Exemption Act so as to place the farmers of the Territories upon the same footing in regard to exemptions from seizure and sale as those of Manitoba. The memorial makes no mention of the Territories Exemptions Ordinance. Rather it is directed to weaknesses in the Homestead Exemption Act as compared to Manitoba's exemption provisions. The memorial makes four points: (1) In Manitoba the exemption extended to 160 acres the settler used for cultivation or grazing even though he did not live on them, and to lots up to a half-acre; in the Territories on the other hand the settler must have registered his homestead for the exemption to operate. (2) Under the Homestead Exemption Act a homesteader could not register until he had received a patent for his land, yet the creditor might issue execution against the land, defeating the apparent object of the Act. (3) The wife's consent was needed to alienation of the registered homestead. (4) Because of these objections and because the Act was cumbersome only one registration had taken place in the Territories although the Act had been in force for a period of sixteen years.

The memorial concludes: "the present Homestead Exemption Estates Act is ineffectual and should be replaced and . . . an Act should be submitted to parliament similar in effect to the Manitoba Act dealing with the same subject."[38]

Parliament responded. In the 1894 session the Honourable T. Mayne Daly, Minister of the Interior, introduced a Bill. It did not provide for a new Homestead Exemption Act. Rather it proposed the repeal of that Act, so as to leave the matter of exemptions of real property to the Territorial Assembly. The Minister said the Territories Real Property Act was in conflict with the Homestead Exemption Act. Then he mentioned the 1888 Exemption Ordinance and the fact that the court of the Territories had held it to be *ultra vires*. The solution was for Parliament to give to the Territorial Assembly the authority to pass legislation like the 1888 Ordinance. "It is in order to carry into effect the wishes and desires of the people as expressed by their representatives in the Territorial Assembly, that this Bill is introduced." Then in reply to a question, "the whole matter will be entirely in the hands of the Territorial Assembly." When the Minister moved second reading he said that so long as the Homestead

38. Journals of the Legislative Assembly, 1893 at 76-79.

Exemption Act remained on the statute-book the Territorial ordinance would be *ultra vires*. To meet the wishes of the people, the Homestead Exemption Act would be repealed, leaving the law as passed by the assembly of the Northwest Territories in force. The Bill was passed.[39]

The repealing Act went further. It specifically gave validity to the Territorial exemption provisions.[40] As we have seen, those provisions have had not only validity but longevity for in essence they remain after a century as part of Alberta law.

V. CONCLUSION

The repeal of the Homestead Exemption Act meant that there was no provision in the Territories, or later in Alberta, requiring the wife's consent to a disposition of the home or giving her an interest in the home after her husband's death. This situation continued until World War I. The writer has written elsewhere about the Married Women's Home Protection Act of 1915 and its successor the Dower Act of 1917 which we still have.[41]

In the western provinces today the law does exempt the home from writs of execution, require the wife's consent to a disposition of the home, and give the wife an interest in the home after the husband's death. Thus, it has the three features of the American-type of homestead law.

Recent years have seen an intense growth of interest in Matrimonial Property law generally and particularly in improving the wife's position. Many proposals are designed to protect the wife's interest in the home. Indeed provinces that never had a homestead law are moving in that direction, at least in relation to the need for the wife's consent to a disposition.

The Homestead Exemption Act lasted for only sixteen years and in its short existence was of little use except to render invalid a Territorial exemption ordinance. However its existence illustrates the problems in governing a huge empty territory and in providing a legal framework for the settlers. The writer thought it worthwhile to call attention to a little-known chapter in the legal history of Alberta.[42]

---

39. *House of Commons Debates*, 1894 at 2289-90 and 4590-91.

40. 57-58 Vict., c. 29, s. 2.

41. W.F. Bowker, "Reform of the Law of Dower in Alberta" (1955-61) 1 *Alta. L. Rev.* 501.

42. The writer acknowledges with thanks the helpful comments of W.H. Hurlburt, Q.C. on an earlier draft and also the continual assistance of Neil Campbell, Reference Co-ordinator of the Law Library, University of Alberta, in obtaining for the writer various works not readily available.