Dower Abolition in Western Canada: How Law Reform Failed

ROBERT E. HAWKINS*

I. INTRODUCTION

IN ITS ORIGINAL FORM, dower gave a widow a lifetime interest in one-third of all lands owned by her husband at any time during their marriage. Dower existed as a measure of redress for the common law doctrine of *couverture*. By that doctrine, a married woman was considered to have no separate legal existence apart from that of her husband and, as a result, to be incapable of owning land. In these circumstances, dower was meant to provide some measure of security for a widow and her family upon her husband's death.

The Manitoba Legislature abolished dower in 1885. Manitoba was admitted to Confederation in 1870 and its borders were extended in 1881 to cover the southern portion of its current boundary. Like the other provinces, it had an elected assembly that was sovereign in its areas of competence, one of which was property and civil rights. Dower laws fell within this jurisdiction.

The Canadian Parliament abolished dower in the Northwest Territories, including the areas that in 1886 became Alberta and Saskatchewan. The vast, empty Northwest, still governed from Ottawa, would not gain provincial status for another two decades. In 1875, Parliament did provide a rudimentary form of local government for the Territory. A Lieutenant-Governor, working with a nominated council, was given delegated power from Parliament to make Ordinances in areas roughly corresponding to those in which the Provinces could pass laws. Any

* Associate Professor of Law, Faculty of Law, University of Western Ontario. I would like to thank the library staff at the Faculty of Law, University of Toronto, the Legislative Library of the Province of Manitoba, the Provincial Archives of Manitoba, and the National Archives of Canada, for providing research assistance. I would particularly like to thank my colleague Margaret-Ann Wilkinson for suggesting this topic to me following her studies with Professor Sylvia Van Kirk, Department of History, University of Toronto. I am indebted to Professor Wilkinson for her many useful comments on this paper. I am also grateful to Dean Peter Neary, Faculty of Social Science, University of Western Ontario for his encouragement with this article and to Michael McConnell for assistance with its preparation.

Ordinance that contradicted an Act of Parliament was invalid and the power of the territorial government was subject to modification by Parliament.

The abolition of dower was a small part of a larger movement to reform land registration in the West; land registration reform was a small part of a larger immigration and western settlement policy; and the immigration and settlement policy was one of three pillars in Sir John A. Macdonald's "National Policy" aimed at tying the country together and repulsing American expansionism. The other two pillars were the construction of an all-Canadian transcontinental railway and industrialization supported by a protective tariff.

During the decade and a half between the time that Manitoba joined confederation and the abolition of dower, the Northwest was transformed from a nomadic, hunting society into a settled agrarian society ready to receive the waves of European immigration that lay in its immediate future. In 1972, Parliament passed the *Dominion Lands Act*. Every settlor was to receive 160 acres of land upon payment of a small fee. Provided certain settlement duties were fulfilled, the settlor's homestead title became absolute within three years and additional "pre-emption" rights to a neighbouring quarter section were made available. Women, single or married, were not eligible to apply unless they were widowed, divorced, separated or deserted and had dependents under the age of 18 to support. The only entitlement to a property interest that a married woman could have, given that she was shut out of property ownership in her own name and excluded from the homestead title despite her pioneering effort alongside those of her husband, was her dower interest.

In 1874, the Northwest Mounted Police arrived on the prairie; the railway was pushed forward in the early 1880s to its eventual completion in late 1885; and the Northwest Rebellion, lead by Louis Riel, was put down in that same year marking the definitive end to an older way of life that was already lost. Like many frontier societies, the West was vulnerable to boom and bust business cycles imposed by external economic conditions. There was more bust than boom. The 1870s were years of recession; from 1878 to 1882 tremendous, if ephemeral, prosperity boosted especially Manitoba; after that a debilitating depression set in marked by drought and insects, falling land values and sharply declining immigration.

Dower was abolished, therefore, just as the West was opening up and at a time when attention focused on settlement and expansion. This article considers the circumstances that led to its abolition. Part II will examine the operation of dower in the frontier context: did it have any real meaning for prairie women prior to its 1885–86 elimination? Part III will examine the arguments in the dower abolition debate: what perceptions about dower did politicians bring to their deliberations? The article's conclusion will note the divergence between the reality of dower as

it existed and the misperceptions associated with its demise. That divergence raises questions about how well the early law reform process served pioneer women.[1]

II. THE UNREALITY OF DOWER

A. The Social Context

At the time of its abolition in the West, dower had only limited practical value. For it to have been valuable in any meaningful sense, a minimum level of settlement and a necessary institutional infrastructure would have had to have been present. Some public awareness of dower, and the issues surrounding its abolition, would also have had to have existed. None of that was in place at the time of abolition.

For most of the nineteenth century, two forms of society were found in the Canadian west. The earlier, nomadic fur-trade society was being gradually displaced by a settled, agrarian society. The fur-trade society had no need of, and indeed could make no use of, rights essentially tied to a settled, private property regime such as dower. In early fur-trade society, native women (who were the women of the fur-trade society) were protected by their place in their tribal group. Their security was in their ability to return to their tribal communities.[2] Later, as fur-trade society became more sophisticated and mixed-blood women became so acculturated that return to native communities was no longer possible, security for the women in the fur-trade society began to take on new forms. The custom of "turning-off"—whereby a woman went from the protection and support of one man to that of another if the protection and support of the first was lost—became prevalent.[3] The fur-trade companies themselves began to assume some responsibility for the welfare of women in the fur-trade communities.[4] Individual fur traders also began to supply security for their families through their wills.[5]

---

1 Dower of a different and more meaningful sort was progressively restored in the West in the decade between 1910 and 1920. Two fine works describe this process for Alberta: W.R. Bowker, "Reform of the law of Dower in Alberta" (1961) 6 Alta. L. Rev. 501, and C. Cavanaugh, "The Women's Movement in Alberta as Seen through the Campaign for Dower Rights, 1909–1928" (M.A. Thesis, University of Alberta, 1986), a version of which is published as "The Limitations of the Pioneering Partnership: The Alberta Campaign for Homestead Dower, 1909–25" (1993) 74 C.H.R. 198.

The process that brought the return of a form of dower to Manitoba will be analyzed in a forthcoming companion article to this one.

2 S. Van Kirk, *"Many Tender Ties": Women in Fur-Trade Society in Western Canada, 1670–1870* (Winnipeg: Watson & Dryer Publishing Ltd. [no date]) at 45. Professor Margaret-Ann Wilkinson provided the information contained in this paragraph.

3 *Ibid.* at 51.

4 *Ibid.* at 93.

5 *Ibid.* at 45.

In 1870, when Manitoba joined Confederation, the total *settled* population of the Province was 11,963. 1,565 people were white, 558 people were Indian and 9,840 were people of mixed ancestry. There were about 10 percent more men than women. Other than Indians, for whom no marriage statistics are available, there were 3,790 married people and 232 widows.[6] Society was still nomadic and still centred on the fur-trade. The little agriculture which did exist was carried on along the banks of the Red and Assiniboine Rivers and existed for the purpose of feeding the Red River colony. The farmers, usually squatters, were retired hunters and traders or casual farmers of mixed Indian and white ancestry.

The land registration system in Manitoba at the time that it joined Confederation was primitive and confused. The Hudson Bay Company was the proprietor of all land. On 5 March 1885, during the debate on the introduction of the Torrens System and the abolition of dower in the Northwest Territories, Senator Gerard (Man., Cons.) reminded the Senate that it had been possible to register title in pre-confederation Manitoba, and that, as a practical matter, the registration system did not make any allowance for dower rights, regardless of what the law on dower might have been. He described the system as follows:

> To Manitoba belongs the honour of having taken the first action towards doing away with dower and tenure by curtesy. For many years there was but a single book to record all titles in the Red River settlement. There were no writings whatever, but when anyone wished to transfer his property he went to the officer in charge of the Hudson Bay Company's book and had the transaction entered. That was the only way of acquiring a title to property in the Red River settlement up to 1870.[7]

The Council of the District of Assiniboia had no legislation that dealt with land sales and land titles, mute testimony to the dominance of the fur-trade economy.[8] Even the rudimentary system described by Senator Gerard was suspect given the

---

6 The figures are from a November 1870 census taken for the purpose of dividing the new province of Manitoba into four electoral districts. The results are reported at: Sessional Papers (No. 20) (Can.), 1871, vol. 4, at 92. This same source indicates that there were 6,767 Indians in addition to the settled population total given here.

Another census of Manitoba was done on 2 April 1871, in conjunction with the national decanal census. It was this census which gave an estimate of the total Indian population of the province. This census put the total population of the province at 18,995 of whom 12,228 people were of white or mixed ancestry, while 6,767 people were Indian. There was about 10 percent more men than women. Apart from Indians, there were 1932 married women and 255 widows. See: *Censuses of Canada 1665 to 1871*, vol. 4 (Ottawa: 1876) at 380, and Department of Agriculture, *The Statistical Yearbook of Canada for 1892* (Ottawa: 1893) at 91, para. 115.

7 Senate Debates, 5 March 1885, at 192 (Gerard (Man., Cons.)).

8 H.L. Thomas, *The Struggle for Responsible Government in the Northwest Territories 1870–97*, 2d ed. (Toronto: University of Toronto Press, 1978) at 26.

failure to extinguish Indian title by treaty.[9] Indeed, the system of registration described by Senator Gerard was often overlooked. Throughout this period, and increasingly so as Canadian settlers started to come in just prior to Confederation, people did not bother with title. Title to land was usually acquired by possession. The historian, W.L. Morton, has described what happened:

> As settler after settler staked his claim, the question of land titles became more urgent. The Nor'Wester' bluntly informed newcomers that every man had as good a title as the Hudson Bay Company, namely, a squatter's title. "The tenure of the land is precisely the same with the newcomer as it is with the Hudson Bay Company—you hold as much as you occupy and no more." It was, it rightly wrote, the custom of the country for each man to take what he could use; that in transfers payment was made only for improvements, not for the land itself. Year after year more and more people had been acting on those premises.[10]

There was no real role for dower to play in the pre-Confederation society where the population base was limited and where land was available for the taking. Dower rights were largely irrelevant in the life of the early settlement. Prior to a husband's death, there was little concern about the wife's dower rights because conveyancing was so limited. After his death, there was little to stop a wife from continuing her possession of the land undisturbed if she were able to manage.

By 1885, when dower was abolished, Manitoba had become a settled and agrarian society in which a private property regime was firmly in place. The "property question"—that is, the question of guaranteeing the land holdings of Indians and early settlers through a system of title registration—had been resolved. The 1870 *Manitoba Act*[11] guaranteed the land titles of settlers and set aside 1.4 million acres in reserves to be allotted to the unmarried children of mixed Indian and White families. In 1871, by Treaty No. 1., negotiated with the Ojibwas and the Crees, all the lands of Manitoba and a band of land to the north and west were ceded by the Indians to the Queen in the right of Canada in return for reserves, annual presents, and money payments.[12] By 1873, all of then Manitoba had been surveyed into six-mile square townships and one mile square sections separated by ninety-nine foot road allowances. Also in that year, the Provincial Government passed a *Registry Act*[13] and the Dominion Government issued regulations concern-

---

9 W.L. Morton, *Manitoba: A History*, 2d ed. (Toronto: University of Toronto Press, 1967) at 115–16.

10 *Ibid.* at 115–16.

11 *Manitoba Act, 1870*, R.S.C. 1970, Appendix II, No. 8.

12 Morton, *supra* note 9 at 55.

13 *The Registry Act*, (1873) 36 Vict. (Man.), c. 18.

ing the distribution of public lands in Manitoba.[14] After this, it was possible to locate reserves and the claims of settlers. In all, 2,448,160 acres of Manitoba land was granted to these settlers.[15] The great remainder of the province was available for grants as homestead under the *Dominion Lands Act* of 1872.[16] In Winnipeg, the first Dominion Lands Office in the West was established to handle the business of adjusting the title of old inhabitants and registering the claims of new settlers.[17] By the mid-1870s, the land registration infrastructure existed to at least make operative a dower claim.

The value of dower rights depended, at least in some measure, on the value of land.[18] This, in turn, reflected the forces of supply and demand. Demand was in part a function of population. By 31 July 1886, the population of Manitoba had risen to 108,640, of whom 95,080 people were white, 5,575 people were Indian and 7,985 people were of white and Indian ancestry. There was still about ten percent more men than women. Other than Indians, 16,971 women were married and 1,357 women were widows.[19] If people were still few, land supply was abundant. Between 1873 and 1886, the dominion government set aside 70,034,462 acres of land for homesteading in Manitoba and the Northwest Territories. This would have made for 427,467 homesteads of 160 acres each, land which at five souls to a homestead would have supported a prairie population of 2,137,335.[20] In fact, in 1885–86, Manitoba had 16,351 landowners, almost all occupying over 80 acres. The total occupied land in Manitoba was only 4,171,225 acres.[21] At the same time in the Territory, 6,885 people owned land, again almost all over 80 acres. Only 3,861,818

---

14 Sessional Papers (Can.), 1873, vol. 6, no. 45, at 2–6.

15 Morton, *supra* note 9 at 155.

16 *Dominion Lands Act*, (1872) 35 Vict. (Can.), c. 23. See also C. Martin, *"Dominion Lands" Policy* (Toronto: 1938: Toronto) at 395.

17 Morton, *supra* note 9 at 166.

18 Although not entirely. The wife's right to some say in the disposition of her husband's land, and her right on his death to an interest in that land, would have been more significant the higher the value of the land. However, even if the land was not worth much in market terms, it might still have been valuable to a widow, and her family, as a home and as security for which there was no easy replacement.

19 Census of Manitoba, Sessional Papers (No. 12) (Can.), 1887, 50 Vict., Tables I and II.

20 Department of Agriculture, *Statistical Yearbook of Canada (1886)* (Ottawa: 1957) at 365. Note that married women were excluded by law from claiming a homestead. See Martin, *supra* note 16 at 225ff.

21 *Supra* note 19 at Table XIII.

acres were occupied.[22] Not all of this land was equally desirable; proximity to wood, water and the railroad made a big difference. Still, these numbers indicate just how empty the country was. They also explain why the dominion Government was prepared to offer homestead farms of 160 acres for the nominal fee of $10.00 per homestead.

Land values corresponded with this reality. Prior to 1870, land in the District of Assiniboia had been worth only the improvements made to it. Between 1871 and 1881, land prices in Manitoba rose largely as a result of speculation on railway development and most markedly in urban areas. Although the rise was great in relative terms, in absolute terms it was small.[23] In 1881, the coming of the Canadian Pacific Railway touched off the most pronounced round of land speculation in Manitoba's history. W.R. Morton tells how in Winnipeg, "lots on Main Street were exchanged for higher prices than those commanded on Michigan Avenue in Chicago ... Canada had never seen anything like it before, nor was it ever to see quite such a delirium again."[24] Although the boom spilled over into the smaller towns, it was essentially limited to urban real estate and it was over by 1883 when land prices plunged. The years from 1883–87 were difficult ones owing to frost, draught, grasshoppers, problems in moving grain, falling wheat prices, rising duty on farm machinery and a world depression which had set in 1873 and which, save for the upturn of 1878–82 marked in Canada by the Manitoba boom, was not to end until 1896. Immigration from Ontario to Manitoba and the Northwest Territories fell from an estimated 60,000 people in 1882 to 21,000 people in 1887.[25] Land prices settled to the "comparatively low levels" at which they were to remain for the remainder of the century.[26] Indeed, "cheap land" was to become Manitoba's calling card in the renewed influx of immigration in 1896.

The situation in the Northwest Territory was no different from that in Manitoba except that it lagged behind by at least fifteen years. By a census taken on 24 August 1885, the total population of the Northwest Territories was 48,362. Of these people, 23,344 were white, 20,170 were Indian and 4,848 were of mixed ancestry. There was a little over 10 percent more males than females. There were

---

22 *Census of the Three Provisional Districts of the Northwest Territories, 1884–85* (Ottawa: 1886) at Table XIV.

23 Morton, *supra* note 9 at 200.

24 *Ibid.*

25 *Ibid.* at 222.

26 *Ibid.* at 202.

5,715 married women (other than Indian women) and 1,008 widows.[27] As discussed above, land was abundant. Like in Manitoba, land values reflected these facts.

The land registration infrastructure necessary to make dower rights practical was only just in place in the Territories by the time those rights were abolished. After several unsuccessful attempts to set up a system of land registration, the Territorial Council passed an "Ordinance respecting the Registration of Deeds and other Instruments relating to Lands" in 1879.[28] A system modelled on the Ontario land registry system was adopted. A Registry of Deeds was established and a local registrar was appointed. By 31 July 1884, only 300 titles had been registered.[29] As in Manitoba, there were difficulties in establishing the claims of pioneer settlers and Métis. In 1884, the Council advised the Minister of the Interior to recognize the claims of the early settlers in the vicinity of Regina and Moose Jaw.[30] In 1881, 1884 and 1885, Council made the same request urging the Dominion Government to settle claims of people of mixed ancestry in the Territories.[31] A commission was appointed to settle these claims. When it reported in September of 1885, without having dealt with all of the claims, it issued 1,710 certificates for "Money Scrip" and 232 certificates for "Land Scrip" totalling 55,260 acres.[32] In this early stage of settlement, dower rights could have had little practical application.

There was a political aspect to this social reality. Conditions in Manitoba and the Territories at the time when dower was abolished were such that it would have been very difficult to create the kind of political movement in favour of dower as was done some 25 years later. The population of the affected constituency was still thin. From the figures cited earlier, at the time of dower abolition there were about 17,000 married women in Manitoba with fewer than 1,400 widows. In the Territories, there were fewer than 6,000 married women with only about 1,000 widows.[33] The constituency was scattered. The government only permitted homesteading on alternate sections of land often leaving two or three miles between farms.[34] When the 1881–82 land boom in Manitoba pushed up land prices in settled districts,

---

27 *Supra* note 22 at Tables I and III.

28 D.C. Williams, "Law and Institutions in the Northwest Territories (1869–1905), (Continued)" (1966) 31 Sask. Bar Rev. 137 at 140, and (1964) 29 Sask. Bar Rev. 51 at 52.

29 Senate Debates, 23 February 1885 at 73 (Campbell (Ont. Cons.)).

30 Williams (1966), *supra* note 28 at 144–45.

31 *Ibid.* at 146.

32 *Ibid.*

33 *Supra* notes 19 and 22.

34 L. Rasmussen *et al.*, *A Harvest Yet to Reap—a History of Prairie Women* (Toronto: Women's Press, 1976) at 42.

newcomers were driven to cheaper lands, thus further scattering settlement.[35] Communication was poor. Transportation was by horse, and contact could only be made in person or by letter. The car and the telephone were a generation away. Prairie newspapers, whose women's pages were to become the central vehicle for mounting the campaign to reinstate dower after the turn of the century, were just getting started at the time of abolition.[36] The immediate fragility of existence was the principal preoccupation of the settlers and settlement the principle concern of government. Almost one-half of homesteads would fail within three years because their owners would be unable to meet the conditions set by the government for receiving absolute title to the land.[37]

Finally, the existing political structure was not one through which women could easily have made their voice heard. Women were still a long way from having any political role, organization or vote. There was no real possibility or evidence of any grassroots movement to defend dower; it was not yet a cause that had a chance to ripen. Indeed, as the reality of thin demographics, weak land prices and an embryonic land registry system suggests, dower scarcely existed at this time as a meaningful social cause at all.

B. The Legal Context

Up until 1833, English common law gave a widow a right of dower. If a wife survived her husband, she was entitled to a one-third interest in all of her husband's lands for the rest of her life.[38] This was true of any land that her husband had owned during their marriage even if he had sold the land prior to his death or had given it as a gift in his will. Two consequences flowed from the existence of dower. First, it provided some security for a widow after her husband's death. This was important for the common law recognized neither a woman's separate legal existence during marriage nor, consequently, her right to own property. Second, dower gave a wife a *dé facto* veto during her marriage over any transaction involving her husband's land. A husband could only sell his land "free" of his wife's dower interest

---

35 Morton, *supra* note 9 at 202.

36 The first prairie newspaper was *The Nor'Wester*, founded in 1859 in the Red River Settlement. The *Manitoba Free Press* was founded in 1872. The first newspaper in Saskatchewan was the *Saskatchewan Herald* founded in Battleford in 1878. The *Edmonton Bulletin* was founded in 1880, the *Regina Leader* and *Calgary Herald* in 1883, the *Calgary Tribune* and *Medicine Hat Times* in 1885, and the *Regina Journal* in 1886.

37 Rasmussen *et al.*, *supra* note 34 at 42.

38 If the husband attempted to leave his wife an interest in property through his will that was inconsistent with her dower right, the law permitted the widow to choose whether she wished to claim her dower right or the property left through her husband's will. See: *Abbott* v. *Grant* (1966), 52 D.L.R. (2d) 313 (S.C.C.) at 315, *per* Judson J.

if she agreed to "bar" her dower. She did this by signing a waiver of any future interest in the land. Most purchasers insisted on a vendor's wife barring her dower prior to the completion of the land sale. The wife's ability to grant or withhold her dower bar meant that she could, for practical purposes, prevent a land sale from taking place.

In 1833, England replaced this more generous common law dower right with a severely restricted statutory dower right. Section IV of the 1833 *Dower Act*[39] abolished dower in any land that "shall have been disposed of by the husband in his lifetime or by his [w]ill." Section VI re-enforced this provision by permitting a husband to declare, in a deed of conveyance, that his wife was not entitled to dower in the lands being conveyed. These two sections meant that dower only existed in a husband's lands that passed on an intestacy. However, even this was limited. Section VIII permitted a husband to provide in his will that his wife was to receive no dower in any lands that passed on an intestacy. Thus, the only dower right left to a widow in England after 1833 was a one-third life interest in lands that the husband owned at the time of his death provided that the lands were not dealt with by the husband in his will and provided that the husband did not deny his wife's dower right in his will.

The "date of reception" of English law into the Canadian West determined whether common law dower or statutory dower was operative in the region when dower was abolished.[40] If the date of reception was prior to 1833, the English *Dower Act* of 1833 would never have been received as part of Western Canadian law. The

---

[39] *Dower Act*, 3 & 4 Will 4 1833 c. 105.

[40] The term "date of reception" referred not to a start-up date, that is a point for starting to receive English law from that time forward into the future. Rather, it referred to a cut-off date. English law was imported as it existed up to that date. Subsequent changes made in England to that law were not operative in the importing colony.

There were two qualifications to this rule. First, the cut-off date of reception only applied to English statute law. The common law was considered an uniform law declared by the House of Lords and Privy Council and applicable throughout the British Empire. Its reception was a continuous process as lower colonial courts followed the precedents established by the Privy Council and Lords.

Second, not all statute law was subject to the cut-off date. The Parliament of the United Kingdom could pass two sorts of statutes. The first were local laws meant to govern conditions in the United Kingdom. These laws were received into a colony up until the cut-off date to the extent that the local law was suitable to the territory concerned. The second were Imperial Statutes, statutes which the U.K. parliament intended would govern the whole of the Empire. These statutes were in force in the colony not by virtue of their being received, but rather by their own force (*propio vigore*). They were subject to no cut-off date.

Whether any particular enactment of the U.K. Parliament was a local law or an Imperial Statute depended on statutory construction. In considering the question, courts took into account the intention of the lawmakers as revealed by the object of the statute and its substantive provisions. (See P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1985) ch. 2 and especially at 27–29 and 42–43.)

more generous common law form of dower would have continued undisturbed as it did in Ontario.[41] If the date of reception was after 1833, the very limited statutory form of dower would have been received and would have been operative at the time of dower abolition.

In order to determine the date of reception of English law into Manitoba and the Northwest Territories, it was necessary to go back to 2 May 1670. On that date, a Royal Charter granted to the Hudson Bay Company authorized the company:

> [T]o make ... reasonable laws ... as to them shall seem necessary and convenient for the good government of the said company ... . All and singular which laws [to] be reasonable and not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs of the realm.[42]

Arguably, by establishing a local authority to make local laws, this Charter implicitly cut off the adoption of English Law at 1670. A case for 1670 as the date of reception could be made on alternate grounds. The common law rule for establishing a date of reception for settled colonies provided that the first settlers were deemed to have imported English law with them at the time of settlement.[43] Rupert's Land, as this whole area was known, would probably have been considered settled territory from 1670 when the Hudson Bay Company first proceeded to establish trading posts in the region.[44]

The District of Assiniboia, a small part of Rupert's Land within an approximately 50 mile radius of the Red and Assiniboine Rivers, was governed by an extremely rudimentary legislative council appointed by the Hudson Bay Company after 1834. In 1862, the Council of Assiniboia passed an Ordinance altering the date of reception of English law to 1837, the year that Queen Victoria ascended to the throne. In 1864, the Council passed a second Ordinance receiving English

---

41 In Ontario the date of reception of English law was 1792: see Hogg, *ibid.* at 34–35.

42 "Royal Charter for Incorporating the Hudson's Bay Company," as extracted in W.A. Taylor, "A Synopsis of the More Important Imperial Acts, etc., Relating to Manitoba and the Northwest Territories" (1885) 2 Man L.J. 17 at 18–19. The Company's power to legislate, which was delegated to it in such broad terms, was very sparingly used. The Company was mainly interested in the commercial regulation of the fur trade and never developed the legislative functions which had been delegated to it to any appreciable degree. See D.C. Williams, "The Dawn of Law on the Prairies" (1962) 27 Sask. L. Rev. 126 at 126; Thomas, *supra* note 8 at 24ff; and D. Owram, *Promise of Eden: The Canadian Expansionist Movement and the Idea of the West, 1856–1900* (Toronto: University of Toronto Press, 1980) at 10.

43 Hogg, *supra* note 40 at 28.

44 *Walker* v. *Walker*, [1919] 2 W.W.R. 935 (P.C.) at 936; J.E. Cote, "The Introduction of English Law Into Alberta" (1964) 3 Alta. L. Rev. 262 at 263–65; and J.E. Cote, "The Reception of English Law" (1977) 15 Alta L. Rev. 29 at 89–90.

law as of that date and "all such laws of England of subsequent date as may be applicable."[45] Had these Ordinances been valid, the restrictive 1833 English *Dower Act* would have become the law in the District of Assiniboia part of Rupert's Land. The validity of the two Ordinances is doubtful, however, and, given subsequent events, academic.[46]

On 15 June 1870, Rupert's Land and the Northwest Territory were admitted to Canada.[47] At the time of admission, the province of Manitoba was carved out of Rupert's Land by the *Manitoba Act*.[48] In 1871, the Manitoba Legislature provided that so much of the laws of the Governor-and-Council of Assiniboia as were not inconsistent with provincial legislation were to be extended to the whole of the province of Manitoba.[49] By continuing the legal *status quo*, this *Act* continued the uncertainty over whether the date of reception of English law into Assiniboia was 1670 or the date established by the Company's Ordinances of 1862 and 1864. In order to resolve this difficulty, Manitoba passed further legislation in 1874 to provide that the laws of England, as they stood at 15 July 1870, were to be the law of Manitoba in all matters of provincial jurisdiction so far as they could be made applicable.[50] Therefore, the 1833 English *Dower Act*, with its very restrictive statutory form of dower, was in force in Manitoba possibly from 1862, certainly from 1874, and, in any event, well before dower was finally abolished.

The establishment of the date of reception of English law in the Northwest Territories was slightly different than for Manitoba. The 1862 and 1864 Ordinances of the Governor-in-Council of Assiniboia were probably never meant to apply

---

45 These Ordinances were discussed in *Walker*, *ibid.* at 937. There, the date of the first Ordinance was given by Viscount Haldane as 1851, but this was an error. The correct date was 1862. See also Cote, *ibid.*

46 *Sinclair* v. *Mulligan* (1888) 5 Man. R. 18 (C.A.) suggested that the Ordinances were limited to regulating the proceedings of the Court, and did not introduce the general laws of England. But see *Walker* v. *Walker*, *supra* note 44 at 937, where Viscount Haldane, suggested in *obiter* that the Ordinances were valid. Neither case dealt with dower and in both cases the ultimate date of reception of English law was determined by enactments passed subsequent to the Ordinances.

47 *Order of Her Majesty in council admitting Rupert's Land and Northwestern Territory into the Union, June 23, 1870*, R.S.C. 1970, Appendix II, No. 9.

48 *Supra* note 11. The *Manitoba Act* was passed prior to, and in anticipation of, the admission of the territories.

49 *An Act to Establish a Supreme Court in the Province of Manitoba, and for other purposes*, S.M. 1871, c. 2, s. 52.

50 *An Act Respecting the Court of Queen's Bench in Manitoba*, S.M. 1874, c. 12, s.1. This provincial *Act* could only establish a date of reception of English law into Manitoba in matters of *provincial* jurisdiction. A date of reception of English law into Manitoba in matters of *federal* jurisdiction was established by an *Act* of the Canadian Parliament: *An Act respecting the application of certain laws therein mentioned to the Province of Manitoba*, S.C. 1888, c. 33.

outside the district of Assiniboia itself. That would have left the date of reception at 1670 in the rest of Rupert's Land when that territory was admitted into Canada.[51] Common law dower would have been operative. Legislation passed by the Canadian Parliament in 1869, in anticipation of the 1870 admission of the territories into Canada, provided that existing laws were to remain in force in the territory so far as applicable.[52]

In 1884, the Legislative Assembly of the Territories passed an Ordinance providing that in all matters of controversy relative to property and civil rights in the Territories, the laws of England as they stood on 15 July 1870, were declared in force from that date. There is some doubt about the validity of this Ordinance given that it conflicted with the 1670 date of reception contained in the 1869 parliamentary statute admitting the Territories to Canada.[53] In any event, in 1886,

---

[51] The common law rule for establishing a date of reception for settled colonies was that the first settlers were deemed to have imported English law with them at the time of settlement (Hogg, *supra* note 40 at 28). Rupert's Land, as this area was known, would probably have been considered settled territory from 1670 when the Hudson Bay Company first proceeded to establish trading posts in the region (*Walker*, *supra* note 40 at 936).

Further support for the 1670 date comes from the fact that 1+2 Geo. 4, c.66, an Imperial Statute, provided that cases from the Northwest Territories were to be heard in the courts of Upper Canada according to the laws of Upper Canada. 1670 was the date of reception in that province.

[52] *An Act for the temporary Government of Rupert's Land and the Northwestern Territory when united with Canada*, S.C. 1869, c. 3, s. 5. This was the first legislation that used the term Northwest Territories. The Northwest Territories were made up of those parts of Rupert's Land, the old Hudson Bay Company domain, which had not gone into making up the new province of Manitoba, together with parts of what had been called the Northwestern Territory (that is, British lands in North-America between Rupert's Land and the Vancouver colony). In 1905, Saskatchewan and Alberta were carved out of the Northwest Territories from lands which had originally been, for the most part, Rupert's Land. See: *Attorney-General for Alberta* v. *Huggard Assets Ltd.*, [1953] A.C. 420 (P.C.), at 444, where the Privy Council referred to "that part of Rupert's Land which later became Alberta."

Existing laws were again continued in force by further legislation in 1871, 1875 and 1880, meaning that the 1670 date of reception would have continued unchanged. See *An Act to make further provision for the government of the Northwest Territories*, S.C. 1871, c. 16, s. 4; *The Northwest Territories Act, 1875*, S.C. 1875, c. 49, s. 6 and s. 32; and *The Northwest Territories Act, 1880*, S.C. 1880, c. 25, ss. 8 and 41.

[53] "An Ordinance respecting property and civil rights" (1884), cited in Williams (1966), *supra* note 28 at 140. Section 3 of *An Act to amend the "Northwest Territories Act, 1875,"* S.C. 1877, c. 7, gave the Northwest Territories' Council, "such powers to make ordinances for the government of the Northwest Territories as the Governor in Council may, from time to time, confer ... ." In May, 1877, by federal Order-in-Council, the Territories' Council was given power to legislate with respect to "Property and civil rights in the Territories, subject to any Legislation by the Parliament of Canada upon these subjects" (cited in Williams (1964), *supra* note 28 at 52).

Several weeks after Parliament passed legislation abolishing dower in the Territories but prior to the proclamation of the law, the Minister of the Interior requested information about a widow's dower rights. In a reply dated 28 June 1886, a Department of Justice civil servant responded. He noted the uncertain invalidity of the 1884 Territorial Ordinance that purported to change the date

Parliament confirmed the Territorial Ordinance. It enacted that the laws of England relating to civil and criminal matters, as they existed on 15 July 1870, "shall be in force in the Territories so far as the same were applicable."[54] It is significant that the *Act* of Parliament confirming 1870 as the date of reception of English law and thus confirming the introduction of the limited statutory form of dower into the Territories, and the *Act* of Parliament abolishing dower in the Territories altogether, received Royal Assent on the same day—2 June 1886.

Just as was the case in Manitoba, it was the very restricted statutory form of dower, rather than the more generous common law form, that was done away with in the Territories. In any event, in social terms, the impact of dower in a sparsely settled frontier society was limited. These realities, however, did not always coincide with the perception of the lawmakers who abolished dower. The dower debate in the Canadian Senate, undertaken mostly by Eastern gentlemen thousands of miles away, was characterized by a kind of abstractness, by an unreal quality that failed to appreciate the limited social and legal importance of dower at the time of its demise. What social choices did the legislators intend when they abolished dower? What legal change did they make and what opportunities did they miss?

---

of reception of English law into the Territory. He reasoned that on one of several possible readings of sections 9 and 41 of the *Northwest Territories Act, 1880, ibid.*, the power granted to the Lieutenant-Governor of the Territories to make ordinances respecting property and civil rights did not include the power to make ordinances affecting, "the estate of the widow as tenant in dower." See National Archives of Canada, document RG13, volume 2249, file 78/1886 (June 1886).

54 *An Act to further amend the law respecting the Northwest Territories*, S.C. 1886, c. 25 s. 3.

III. THE UNREALITY OF THE DOWER DEBATE[55]

A. The Social Misperceptions

The dower abolition debate in Manitoba and the Northwest Territories was a very small part of a much larger debate in which the Torrens System of land registration was adopted in place of the older registry system originally copied from Ontario.[56] The relevant round of this debate began in 1885 when Sir Alex Campbell, Minister of Justice, introduced a Bill in the Senate that would have adopted Torrens land registration and abolished dower.[57] The Bill received extensive debate on Second

---

[55] It is worth clearing away one myth at the outset. In the first volume of her autobiography, Nellie McClung, the leading figure in the movement that culminated in the 1916 enfranchisement of Manitoba women, described how a Mrs. Brown first interested McClung in politics. Mrs. Brown made the following case to McClung: "[w]e have got to get the vote on account of the laws. In Ontario a woman has some claim on her husband's property, but none here. The poor Indian women were cut off from any claim on a man's property. ..."

McClung recorded these words in 1935. At the same time, Emily Murphy, a leader in securing a measure of dower reform in Alberta in 1910, wrote a short story entitled, "The Romance of Henry Harmon." In the original draft, Murphy made the following reference to the abolition of dower in the Territories: "[a]s an exemplification of ... disrespect of the Indian women, we find that the white man of the western plains who had married native women had an enactment put through the Territorial Legislature providing that she should not inherit his property."

These quotations seem to imply that it was the intention of the legislators in abolishing dower to limit Indian women's property claims. However, there is no evidence in the Parliamentary debates that the abolition of dower had anything to do with a negative animus towards Indian women. Indian women were not even mentioned. See N.L McClung, *Clearing in the West: My Own Story* (Toronto: Thomas Allen, 1935) at 305; City of Edmonton Archives, "Murphy Papers," Box 2 (1932).

[56] The land registration systems first adopted in Manitoba and the Northwest Territories were patterned after the Registry System then in use in Ontario. See *An Act to Amend the Act Concerning the Registration of Deeds and to introduce a better system of* Registration, S.M. 1873, c. 18, *The Northwest Territories Act, 1875*, *supra* note 52, and the various Ordinances passed pursuant to that act as described in Williams (1966), *supra* note 28 at 11.

[57] *Debates of the Senate of Canada* (30 January 1885) at 22 (Campbell (Ont., Cons.)). Private members bills seeking to introduce the Torrens System and abolish dower had been introduced previously into the House of Commons in 1878, 1883 and 1884. The sponsors of these Bills argued that settlers would be induced to come to the West by the knowledge that the government would provide homestead lands for almost nothing and, after homesteading requirements had been met, would grant indefeasible title which could be transferred simply and cheaply.

See *House of Commons Debates* (11 March 1878) at 951 (Mills (Ont., Lib.)); *House of Commons Debates* (12 April 1883) at 572 (McCarthy (Ont., Cons.)); *House of Commons Debates* (12 April 1883) at 573 (Blake (Ont., Lib.)); and *House of Commons Debates* (24 January 1884) at 43 (McCarthy (Ont., Cons.)).

The debate on this issue dragged over so many Bills and so many years that at one point Senator Dickey (Cons., N.S.) could not restrain himself from offering the following bad pun: "I do not wish to go into the argument again, because I am sorry to say, in the words of a friend of mine, that we

Reading and in Committee of the Whole. During the debate, Senator Campbell acknowledged that the Bill had been modelled after legislation in the Australian Colonies.[58] Only two Senators spoke against introducing the Torrens System into the Northwest Territories;[59] the others were prepared to try it, at least on an experimental basis. The provision abolishing dower sparked a more contentious debate which cut across party lines. At the end of second reading, Senator Scott (Ont. Lib.) moved that the dower abolition clause be struck out. The motion was defeated on a recorded vote: 36 Senators favoured retaining dower abolition clause, while 18 would have struck it. The Bill, with the dower abolition clause, received third reading. It was sent to the House of Commons where it subsequently died on the order paper without debate.

In 1886, the Bill establishing the Torrens System and abolishing dower in the Northwest Territories was finally passed by the Parliament of Canada.[60] Unlike the case in 1885 when the Bill originated in the Senate, this time it originated in the Commons under the sponsorship of Sir John Thompson, who had replaced Sir Alexander Campbell as Minister of Justice.[61] There were brief introductory remarks on First Reading and only a slightly more extensive discussion on Second. Dower was not mentioned. The Bill, considered too technical for Committee of the Whole, was referred to a Special Committee of the House consisting of Messrs. White (Cardwell), McCarthy, McMaster, Mills, Hall, Davies, Weldon, Royal, Shakespeare, Desjardins and Thompson. After the Bill passed Third Reading in the Commons it was introduced into the Senate by Josiah Plumb.[62] Although debate

---

have had too much discussion—Torrens of Eloquence—on this Bill." See *Debates of the Senate of Canada* (20 March 1885) at 381.

A general description of the campaign to secure the Torrens System of Land Registration in Ontario, Manitoba and the Northwest Territories can be found in D.J. Thom, *The Canadian Torrens System* (Calgary: Burroughs and Company, 1912) at 9.

58 *Debate of the Senate of Canada* (6 March 1885) at 209 (Campbell (Ont. Cons.)).

59 Senators Trudel (Que., Cons.) and Plumb (Ont. Cons.).

60 *The Territories Real Property Act*, S.C. 1886, c. 26.

61 *House of Commons Debates* (3 March 1886) at 40 (Thompson (N.S., Cons.)).

62 The Bill was introduced in the Senate on 28 May 1886, immediately following the conclusion of the Debate on the execution of Louis Reil.

In 1885, the Bill had been introduced in the Senate by Sir Alex Campbell, the Minister of Justice. He was named Postmaster-General later that year. Campbell had voted in favour of dower abolition.

In 1886, the Bill was introduced by Sen. Plumb (Ont., Cons.). Plumb had spoken strongly against dower abolition prior to the 1885 vote arguing that dower had saved many families, "from utter destruction and destitution" (*Debates of the Senate of Canada* (5 March 1885) at 183). By 1886, Plumb had changed his mind. In that year he acknowledged that the abolition of dower, while at first sight a seemingly violent departure from our tradition, was one which would be acceptable to

on the measure in the Senate was not as extensive in 1886 as it had been in 1885, the principles of the Torrens System were again canvassed and vigorous opposition to the abolition of dower was again expressed. Nevertheless, the Bill passed with the dower abolition clause intact and received Royal Assent on 2 June 1886.

In the dower portion of the Torrens debate, two arguments were made in favour of retaining dower. The first was a fairness argument. It was suggested that the wife, having contributed to the creation of an asset, ought to have some say in its disposition. Even Sir Alex Campbell, the proposer of the 1885 Torrens Bill, conceded the cogency of the fairness argument: "[i]t may be said with very great force, that the wife for the most part, assists the husband in earning the land he is about to sell, and therefore it is very hard to say that she shall not have dower out of it."[63]

The abolitionists attempted to meet this fairness argument by maintaining that fairness itself required doing away with dower. Section 13 of the *Act* which introduced the Torrens System and abolished dower also removed all liabilities which attached to married women in respect of their ownership and dealings with land.[64] Section 9 of the same *Act* abolished the husband's curtesy in his wife's land.[65] Section 11 made it possible for a husband or a wife to convey land to each other without the intervention of a trustee. The scheme of the whole *Act* was to treat the husband and wife as separate, equal legal entities with respect to land ownership. This notion was a triumph of liberal individualism. Dower, which would have continued the wife's inchoate interest in her husband's lands, was seen as a violation of this scheme by the *Act*'s supporters. It failed to give the husband the same independence with respect to his lands that the wife was to enjoy with respect to hers. It would have been unfair to maintain dower while abolishing curtesy. Senator Power made this point in the 1885 debate:

> In Ontario, New Brunswick and Nova Scotia laws have been passed within the last few years which make the property which a woman owns before marriage, or which comes to her during her marriage, her own separate property, and which put that property out of the control of her husband. It seems to be that, if we take from the husband the control over his wife's

---

the House considering the desirability of adopting a simple and inexpensive system of land transfer in the circumstances of the new country (*Debates of the Senate of Canada* (29 May 1886) at 865). No one commented on the "flip-flop."

63 *Debates of the Senate of Canada* (6 March 1885) at 207.

64 *Supra* note 60.

65 Curtesy was the right of the husband to a life interest in his wife's property upon her death. It differed from common law dower in that it applied to all of her property, and not just to one-third of it, and was limited only to land of which the wife was seized on her death. Also, it only applied if a child had been born of the marriage.

> property, it is only fair that the wife's control over the husband's property should be taken away also ... .[66]

The symmetry of this argument made it superficially attractive but it contained a logical *non sequitur*. The issue was not whether one spouse controlled the property of the other. Rather, the issue was whether the property that the husband was alienating was his own. The wife's fairness claim was that she had contributed to the value of that property and so should have been entitled, if not to a fair share, then at least to a fair say in what happened to it.

Perhaps sensing their vulnerability on this point, the abolitionists attempted to counter the widow's appeal to fairness values with an appeal to market values, values that they claimed were the basis for the efficient settlement of the West. They argued that a title clouded by an inchoate dower right undermined the worth of land. Senators McInnes and Power explained that the legislation under consideration was right for a country where a large percentage of the population consisted of unmarried men or married men who had gone West without their families. If an opportunity came up for them to dispose of their land at a profit, it would at best have been inconvenient for them to secure their wife's bar of dower. At worst, the potential purchaser would have been discouraged from proceeding with the sale for fear that a wife from Ontario or Quebec would appear a year or two later with a claim against the land.[67] The result would be lower land prices. Sir Alex Campbell stressed the overriding benefit of creating an efficient land market. Although he acknowledged the fairness of the wife's dower claim on the one hand, he continued:

> On the other hand, the husband being able to sell his land freely, may result in increasing his wealth, and in that way it would really rebound more to the advantage of his wife and family than if she could stop the sale altogether by saying she would not sign.[68]

The difficulty with Campbell's argument was that without dower the wife had no guarantee of getting anything at all. She might well have been better off with land worth less over which she had some control than with land worth more over which she had none. In other words, the market efficiency argument did not answer the distributional problem. Although it worked well in the context of the Torrens

---

[66] *Debates of the Senate of Canada* (5 March 1885) at 189 (Power (N.S. Lib.). He made similar remarks in debate on 20 March 1885 at 377, and on 31 May 1886 at 889. Other Senators argued the same point: see *Debates of the Senate of Canada* (5 March 1885) at 200 (O'Donohue (Ont., Lib.-Cons.)); *Debates of the Senate of Canada* (20 March 1885) at 375 (Kaulbach (N.S., Cons.)); and *Debates of the Senate of Canada* (20 March 1885) at 377 (Dickey (N.S. Cons.)).

[67] *Debates of the Senate of Canada* (20 March 1885) at 377 (Power (N.S., Lib.)); Debates of the Senate of Canada (31 May 1886) at 890 (McInnes (B.C., Ind.)).

[68] *Debates of the Senate of Canada* (6 March 1885) at 207.

System debate, where the problem was reducing transaction costs, it provided no answer in the context of the dower debate, where the problem was providing fair treatment.

The second reason for retaining dower was a security argument. Senator Plumb suggested that the need for a wife to join in any conveyance of land by her husband was a protection: "I believe that in cases where men are dissipated, extravagant, or otherwise squander their properties, the resolute conduct of the wife, who is not necessarily controlled by the husband, may save the family from ruin."[69]

Several Senators attempted to rebut this point by arguing that dower provided little security. The instances in which a husband, even a dissipated husband, failed to convince his wife to bar dower were said to be rare.[70] Senator Kaulbach suggested that a woman's bar of dower could generally be had for a silk dress,[71] and was concurred by Sir Alex Campbell who said: "[t]he silk gown suggestion for the Hon. member for Lunenburg [Kaulbach] is the ordinary remedy for any difficulty on the part of the wife."[72]

Senator Plumb recognized that it was no answer to the security argument to say, as these Senators had, that they had rarely, during the course of their legal practices, seen a wife refuse consent. He pointed out that such a response ignored the deterrent effect of the bar of dower: "[the bar] may not be used: it may not be necessary for a wife to refuse to join in a conveyance, because with that safeguard she would not be even asked to do it; but I think that the wife is usually the protector of the family against the improvidence of the husband."[73] Situations in which the need to request a dower bar had discouraged a husband from even contemplating an improvident land sale would never have reached the doors of the abolitionist Senators' law offices.

It might have been, as the silk dress banter suggests, that the security argument for retaining dower was not so much rejected on its merits as it was just never taken seriously at all. Alternatively, the seriousness of the need to provide security for widows might simply have been outweighed in the Senators' minds by the desire to foster proper conditions for expansion in the West. In 1885, the frontier need for settlement based on individual initiative was given priority over the longer term security needs of the family. By 1910, as cities had started to emerge in the West,

---

69 *Debates of the Senate of Canada* (5 March 1885) at 183 (Plumb (Ont., Cons.)); see also *Debates of the Senate of Canada* (20 March 1885) at 376 (Alexander (Ont., Cons.)).

70 *Debates of the Senate of Canada* (5 March 1885) at 181 (Macpherson (Ont., Cons.)); *Debates of the Senate of Canada* (5 March 1885) at 193 (Kaulbach (N.S., Cons.)).

71 *Debates of the Senate of Canada* (5 March 1885) at 193.

72 *Debates of the Senate of Canada* (6 March 1885) at 207.

73 *Debates of the Senate of Canada* (20 March 1885) at 375.

and as a secure foundation of wealth was being established in the grain trade, there was room for more generosity. The fairness and the security arguments for dower were again made and were, this time, successful in winning the reinstatement of an expanded form of dower.

The retentionist arguments in favour of dower were never fully joined by the abolitionists. The argument for fair treatment of women was met with a market efficiency argument that ignored the wife's contribution to the development of her husbands' property. The argument for security for women was met with a denial that dower provided any protection. With the retentionists' social message left largely unanswered, it was no wonder that the dower debate had an unreal quality about it.

B. The Legal Misperceptions

Whereas social misperceptions skewed legislative choice, legal misperceptions resulted in lost opportunity. The social misperceptions had to do with the fair treatment of women and with security for widows. The legal misrepresentation had to do with whether dower was compatible with the Torrens land registry system and with whether the replacement for dower left women better or worse off than they had been prior to its abolition.

In order to appreciate the first issue, whether dower was compatible with the Torrens System, some explanation of the differences between that system, and the Registry system that it replaced is necessary. Under the registry system, any person with a claim against land was required to register that claim in order for it to be valid. This was done by filing a copy of the document establishing the claim in the register for the affected parcel of land. Certain claims, such as those made for dower, were considered exceptions that did not have to be registered in order to be valid. Individuals wishing to find who had an interest in a parcel of land could search the register to determine if there were any outstanding claims or "clouds" on title. The search was time consuming and expensive and had to be repeated by each person who wished to know the state of title. The system itself did not guarantee that any title to land established the interest in land which it purported to create. The only guarantee that a person had as to the state of title depended on the accuracy and thoroughness of the search that he or she made.

The Torrens land titles system was an alternative system developed in Australia in the 1850s.[74] It aimed at eliminating the uncertainty of title and the need for costly searches by providing a state guarantee that the holder of a certificate of title

---

[74] In 1857, Sir Robert Torrens, in Australia, and the Commission on Land Transfer and Registration, in England, both recommended that land registration systems adopt the land titles format. The recommendation was accepted in 1858 by the State of South Australia and by 1870 all of Australia and New Zealand were successfully using it.

was entitled to the interest in land set out in the certificate. In order to achieve this, a central registry of title was established. The registrar issued a certificate to those with an interest in land and recorded the certificate in the central register. The traditional incidents that had historically clouded title to land, such as claims of dower or of interests based on trusts, were no longer be recognized.[75] Only interests appearing on the register were considered valid. The Registrar thus guaranteed that the holder of the registered certificate possessed the interest in land as set out in the certificate. Title was made certain without the need to go behind, or search outside of, the register.

The Senators who debated this law reform showed a strong grasp of the technical details of the operation of the Torrens System. When introducing the 1885 version of the Bill on Second Reading the Senate, Sir Alex Campbell, Minister of Justice, was able to describe clearly how the system worked:

> If you want to sell land under the Torrens System you make a short memorandum of sale. You go to the Registry office and surrender your certificate of title and memorandum of sale, and the Registrar issues a new certificate to the vendee and he has the title, and the certificate is made good against all the world by statute.[76]

The proponents of the Torrens System in the 1885–86 debates were expansionists. Their vision of the West was a frontier vision rooted in individual initiative and market-driven growth. In the legislative debates, they maintained that the Torrens System was ideally suited to the circumstances of the Northwest Territories[77] from three points of view: implementation, settlement and land marketability.

In terms of implementation, the Territories were like Australia, a vast area just starting to be peopled. Implementation of the Torrens System had worked well in that colony.[78] The Territories were a "*tabula rasa*" with respect to title registration;[79]

---

[75] During the Second Reading of the 1885 bill to establish the Torrens System, Senator Scott (Ont., Lib.) stated the principle as follows: "[b]y converting land from real estate to chattels real, we take from it all the incidents that accrue to lands, and put them [the lands] in the same category as stocks." Debates of the Senate of Canada (4 March 1885) at 175.

[76] *Debates of the Senate of Canada* (23 February 1885) at 73 (Campbell (Ont., Cons.)).

[77] *Debates of the Senate of Canada* (5 March 1885) at 192 (Gerard (Man., Cons.)).

[78] *House of Commons Debates* (12 April 1983) at 572 (McCarthy (Ont., Cons.)); *Debates of the Senate of Canada* (23 February 1885) at 73 (Campbell (Ont., Cons.)); *Debates of the Senate of Canada* (5 March 1885) at 193 (Kaulbach (N.S., Cons.)); and *House of Commons Debates* (3 March 1886) at 41 (Thompson (N.S., Cons.)).

[79] *Debates of the Senate of Canada* (5 March 1885) at 180 (Macpherson (Ont., Cons.)).

there already existed a good system of surveys[80] but there were only 300 titles outstanding in 1885.[81] To those who worried that trusts of land could not be registered in the land titles system,[82] the proponents answered that as yet the Territories were still in a very "primitive condition," that up until now there was "very little entanglement of rights," and that it was as well that land not be tied up for years in trusts which prevented its full use.[83] For the faint of heart, Torrens supporters argued that the Territories were ideally situated to conduct an experiment with the new system. Now it would be easy to implement the system. If, after a fair trial, the population did not like it, they could do away with it once they obtained responsible government. If, however, the system was not implemented and the population wanted it, it would be much more difficult to bring it in later.[84]

In terms of settlement, the Torrens System's supporters argued that pioneers would be induced to buy land knowing that the titles they would receive would be indefeasible and easily transferable.[85] After having bought, they would be able to

---

[80] *Debates of the Senate of Canada* (5 March 1885) at 196 (Gowan (Ont., Lib-Cons.)).

[81] *Debates of the Senate of Canada* (23 February 1885) at 73 (Campbell (Ont., Cons.)); and *Debates of the Senate of Canada* (5 March 1885) at 193 (Kaulbach (N.S., Cons.)).

[82] The issue of trusts was much debated. The problem was that under the land titles system a person holding land as a trustee for another person would appear on the register as the holder of absolute title to the land. This would create the possibility of fraud if the trustee sold the land dishonestly. The rightful owner could not recover the land from the new owner, the new owner being entitled to rely on the register. The rightful owner would continue to have a cause of action against the trustee if the trustee could be found and was solvent.

On the trusts point, Senator Power (N.S., Lib.) argued: [t]ake the case for instance of a person who holds valuable real estate as trustee for a number of children. Under the present law his title would be registered as trustee and subject to the trust; and no one could buy from him without being aware of the fact that he was simply trustee. Under this Act, supposing there was one trustee, it would not appear that he was trustee, and these infant fiduciary rights would be prejudiced, and no one would be to blame except the trustee" (*Debates of the Senate of Canada* (6 March 1885) at 208).

In the 1885 debate on the introduction of the Torrens system in Manitoba, Mr. Prud'Homme, Member of the Legislative Assembly, said that it was quite natural for parents to put trust clauses in their deed in order to safeguard the land from improvident children (*Winnipeg Daily Times* (24 March 1885)).

[83] *Debates of the Senate of Canada* (6 March 1885) (Campbell (Ont., Cons.)); *Debates of the Senate of Canada* (5 March 1885) (Gowan (Ont., Lib.-Cons.)).

[84] *Debates of the Senate of Canada* (5 March 1885) at 197 (Gowan (Ont., Lib.-Cons.))and 178 (Scott (Ont., Lib.)).

Note also the comment of Attorney-General Hamilton in the Manitoba debate where he stated: "we (are) a young province, and if the Act (is) a good one, the sooner we begin the better" (*Winnipeg Daily Times* (17 April 1885)).

[85] *Debates of the Senate of Canada* (23 February 1885) at 73 (Campbell (Ont., Cons.)); *Debates of the Senate of Canada* (5 March 1885) at 196 (Howlan (P.E.I. Lib.)); and *Debates of the Senate of Canada* (5 March 1885) at 203, where O'Donohoe (Ont., Lib.-Cons.) stated his support for the Torrens

develop their holdings because investment money would be more available and interest rates cheapened if there was less risk of bad title.[86] Senator Macpherson argued:

> Most of the people [in the Northwest] are men of very limited means ... . [One large crop and one medium crop] puts them in possession of a moderate amount of money, but not as much as they require, and not as much as most of them desire to enable them to improve their land, to improve their buildings, and to improve their pre-emption lots; and, furthermore, if they have children to enable them to set them up on farms also. It is therefore very desirable that they should be able to borrow money on the most favourable terms. That they cannot do unless they can offer land to which they hold an indefeasible title. If they go with the title having a blot on it, it takes very much from the value of the land and makes it difficult to borrow, or prevents borrowing altogether, and in other cases under the existing system they must employ a lawyer to make the necessary search into the title of the land to enable them to borrow upon it.[87]

In terms of marketability, Torrens supporters stressed the advantage of the ease of land transfer in an area of the country where land changed hands often. Senator Scott suggested that men who went into the new country liked to hold land for a limited time and then sell out and remove to newer land.[88] Senator Macpherson explained this tendency in land development terms. Many homesteaders broke up the land, made the necessary improvements to obtain title from the government and then sold to other settlers who preferred to pay a fair price for the land rather than breaking it themselves.[89]

Those who questioned the merits of the Torrens System held a different vision of the West. Instead of expansion, they stressed stability; instead of efficient land markets, they stressed strong communities; instead of unimpeded entrepreneurs, they stressed close family bonds. They worried that the introduction of the Torrens System, with its guaranteed titles and easier conveyance methods, and the abolition of dower and registered trusts, would make it too easy for a man to pledge his land. The result would be improvident speculation, particularly as there was abundant opportunity to borrow money. This lead Senator Scott to wonder, "whether it is in the interests of the great mass of people that they should have this form of

---

System in terms of "doing everything that can be done to make the Northwest Territories attractive to settlers."

86 *Manitoba Free Press* (17 April 1885).

87 *Debates of the Senate of Canada* (5 March 1885) at 180. Pre-emption lots were quarter section lots adjoining homestead lots which were made available at a nominal fee to homesteaders at the time that they made entry onto their homestead.

88 *Debates of the Senate of Canada* (4 March 1885) at 177 (Scott (Ont., Lib.)).

89 *Debates of the Senate of Canada* (5 March 1885) at 180 (Macpherson (Ont., Cons.)).

transferring their land, that it should be attended with as little ceremony as the parting with a horse or a cow or a bill of goods, or a certain amount of bank stock?"[90] Senator Trudel opposed using borrowed money to facilitate farm development:

> Of course farmers ought to improve their property, but it ought not to be done on borrowed capital, and those who have large experience in farming operations will admit that it is very seldom agriculture will pay even a moderate interest on large capital borrowed for improvements.[91]

Senator Trudel used England as an example of how encumbrances that restrained the alienation of land, encumbrances inherent in what he called the "principle of property," had protected the country's great families by preventing them from squandering their landed patrimonies. Instead, the landed wealth was used by these families to educate and fit their offspring for public life. Senator Trudel argued that the Torrens Bill, by removing impediments to land transfer, would remove the safeguards of the family and would thus "destroy the main foundations of the community."[92] This notion of a landed aristocracy fit to carry out the public affairs of the West was more than Sir Alex Campbell, the sponsor of the Torrens Bill and himself a Conservative, could handle. After dismissing Senator Trudel's speech as, "one of the most decided conservatism I have heard for a long time," Campbell argued a more populist viewpoint:

> Whatever may be the truth as regards England, it seems quite out of the question that we should seek here in any way to build up families or keep together large blocks of real estate with any reference to such circumstances; that we must here consider the land as more commonplace, so to speak, than they do in older countries, and more likely to be transferred from hand to hand; and therefore we should, as far as we can, remove difficulties in the way of such transfers.[93]

The legislative history and debate which led to the introduction of the Torrens System in Manitoba and the Northwest makes it clear that dower abolition was debated as a secondary issue in the context of a much more compelling reform. It is not surprising, therefore, that the ideological views which were articulated in the Torrens's discussion would spill over and colour the legislator's perceptions in the dower debate. For dower abolitionists, abolition was perceived as a small reform measure situated in the context of the larger need to open the West to expansion

---

[90] *Debates of the Senate of Canada* (4 March 1885) at 175 (Scott (Ont. Lib.)).

[91] *Debates of the Senate of Canada* (5 March 1885) at 187 (Trudel (Que. Cons.)).

[92] *Ibid.* at 184–85.

[93] *Debates of the Senate of Canada* (6 March 1885) at 205.

and settlement. For dower retentionists, abolition was perceived as just one example of the larger threat to landed patrimony, family and community welfare posed by the Torrens System. In a frontier country, unencumbered by old-world notions of aristocracy, it was not surprising that the Torrens System, and dower abolition as an incident of it, carried so decisively.

It would have been possible to fashion a legal compromise that would have permitted both the Torrens System and to co-exist. That had been done in Ontario. There, dower was maintained within the Torrens System simply by making all land registered in the system subject to the wife's dower interest and, as a further protection, by enabling a wife to register a notice of her dower interest.[94] In the Senate debate over dower abolition in the Territories, the retentionists maintained that such a compromise would not affect the facility with which land might be conveyed.[95] Sir Alex Campbell, the sponsor of the 1885 bill introducing the Torrens System and abolishing dower, recognized the merit of this compromise argument. He conceded that dower abolition was "really not necessary to the [Torrens] System at all" and had simply been copied from the Australian example.[96] He agreed that the dower abolition clause was a fair clause for the House to debate and to eliminate if so desired. For his part, although he supported abolition, he accepted that there were arguments going both ways.[97]

Despite the Ontario example, most of the dower abolitionists were purists who perceived that any legal compromise in the theory of the Torrens System was either impossible or unworkable. Senator Haythorne reflected this attitude by arguing that

---

[94] *Land Titles Act*, S.O. 1885, c. 22, ss. 22(7) and 57. It is interesting that in 1912, when Manitoba women were arguing for the return of dower and their opponents were still arguing that such an interest would defeat the land titles system, the Ontario compromise was cited. In a speech before the Women's Canadian Club, A.J. Andrews, K.C., a prominent local lawyer, stated: "I can see no valid reason why there should not be a dower in Manitoba. The Torrens title system is in operation in Ontario as well as here. The existence of this splendid system of registering land would not be hampered by the dower law" (*Manitoba Free Press* (29 April 1912) at 18).

For his conclusion, Andrews was lauded by the editorialist of the Women's Page (*Manitoba Free Press* (4 May 1912) at 1 women's section) and castigated by a writer of a letter to the editor, styled "Lex," who referred to the "miserable insulting dower law" in existence in Ontario (*Manitoba Free Press* (9 May 1912) at 12).

[95] *Debates of the Senate of Canada* (20 March 1885) at 374 (Scott (Ont., Lib.)).

[96] See note 58.

[97] *Debates of the Senate of Canada* (6 March 1885) at 207 and 209, and *Debates of the Senate of Canada* (20 March 1885) at 374. However, it was clear by the end of the debate on Sen. Scott's motion to strike out the clause abolishing dower that Sen. Campbell had had enough and wished to see the legislation passed. Just prior to the vote he was asked whether, if the clause abolishing dower was struck out, it would impair the general efficacy of the other clauses of the Bill. He replied that, "it would be very inconvenient to strike out this clause" (*Debates of the Senate of Canada* (20 March 1885) at 379).

it was, "quite necessary that a Bill of this sort should come into operation in as perfect a form as possible."[98] The abolitionists justified their purism partly on a theoretical basis. The general principle that the Bill laid down was that real estate should no longer be treated as real estate, but as chattels. It followed from this general principle that dower and tenancy-by-curtesy, both incidents peculiar to real estate, must be abolished.[99] Senator Power held the following view:

> I think that the abolition of dower is really almost an essential part of the Torrens System, and I think so for this reason, that one great difficulty in searching titles under the present system is that the solicitor has to know whether every man from whom the title has passed had a wife or not, and if he had a wife whether she joined in the conveyance. It is one of the most inconvenient things in connection with the searching of titles.[100]

The conviction of the majority that dower was incompatible with the Torrens System ruled out the possibility of an Ontario style compromise. A second legal misperception, relating to whether the position of women would be better or worsened after dower abolition, caused other opportunities to be lost.

The 1885 provision of the Manitoba Legislature abolishing dower in that Province,[101] and the 1886 provision of the Parliament of Canada abolishing dower in the Northwest Territories,[102] were identical and read as follows:

> No widow, whose husband dies on or after the day of the commencement of this Act, shall be entitled to dower in the real property of her deceased husband, but shall have the same right in such real property as if it were personal property.

What did it mean to say that a widow had the same right in her husband's real property as in his personal property (i.e., property other than land)? In Manitoba, in cases where a husband died without a will, personal property, and after 1885–86, real property, was distributed as follows: where there were no surviving children,

---

98 *Debates of the Senate of Canada* (6 March 1885) at 204 (Haythorne (P.E.I., Lib.)).

99 *Debates of the Senate of Canada* (23 February 1885) at 74–75 (Campbell (Ont., Cons.)). See also *Debates of the Senate of Canada* (20 March 1885) at 377, where Senator Dickey (N.S., Cons.) stated that the whole framework of the Bill would be interfered with if the dower abolition clause was struck out.

100 *Debates of the Senate of Canada* (20 March 1885) at 376 (Power (N.S., Lib.)). See also *Debates of the Senate of Canada* (6 March 1885) at 203, where Senator O'Donohue (Ont. Lib-Cons.) argued that if dower rights were outstanding for even fifty years, the conveyancer would be faced with the inconvenience of searching for evidence that the dower had been barred or that the wife had died.

101 *The Real Property Act*, S.M. 1885, c. 28.

102 Section 8 of *The Territories Real Property Act*, S.C. 1886, c. 26, was identical to Section 24 of the Manitoba *Real Property Act*, cited above.

the wife would take the estate outright; where there was one surviving child, the wife and that child would split the estate equally; where there were two or more surviving children, the wife would take one-third of the estate with the rest of the property being divided equally amongst the children.[103] The situation was similar in the Northwest Territories with the difference that the wife whose husband died without a will always took one-third of her husband's personal property regardless of the number of surviving children.[104]

Was a prairie woman better off with the right to treat her husband's real property as personal property, as provided for by the 1885–86 reform that replaced dower, or would she have been better off with the abolished dower right. The 1885–86 reform gave a wife no say in her husband's land transactions during the marriage and no claim, on his death, to any land that he had owned during his lifetime except land that he had not distributed under his will. With respect to those undistributed lands, the widow received a one-third interest (more in Manitoba if there were less than two children) and that interest was an absolute ownership interest.[105] By way of comparison, common law dower gave a wife considerable say in her husband's land transactions during the marriage and a claim, on his death, to one-third of all land which the husband had owned during the marriage, provided she had not barred her dower. This interest was a life interest. Therefore, had common law dower been operative at the time of dower abolition, the 1885–86 reform would have left a widow in a worse position in all cases except the case in which her husband died owning land which he did not distribute under his will. In that intestacy case, common law dower would have only given the widow a one-third *life interest* in the land whereas the 1885–86 reform would have given her a one-third *absolute interest* in the same lands.

However, as the earlier discussion dealing with the date of reception of English law showed, it was not the common law form of dower, but rather the much less generous statutory form of dower that was being abolished. Statutory dower only gave a widow a *life interest* in one-third of her husband's lands for which no provision was made in his will. The 1885–86 reform gave the widow an *absolute interest* in those same lands. Therefore the reform was an improvement for the widow, if only a marginal one, over statutory dower.

---

[103] *The Intestacy Act*, S.M. 1871, c. 5, s. 3 and c. 6, s. 2.

[104] In the Northwest Territories, at the time dower was abolished, the descent of personal property was governed by the English *Statute of Distributions (1670)*, 22 & 23 Car. 2, c. 10, s. 3. If there were no surviving children, and the husband had no will, the wife inherited the whole estate.

[105] As the above discussion of the Manitoba *Intestacy Act* indicates, the one-third fraction would have been greater in that province where there were fewer than two surviving children.

The difficulty was that the Senators wishing to retain dower acted under the assumption that common law dower would be retained.[106] While it was true that women would have been better off with common law dower than the proposed reform, the above analysis shows that that was not the case when the reform was compared with statutory dower. The legal confusion over the existing status of dower was not surprising. On the one hand, most of the Senators were from the East and most simply assumed that dower law in the Territories would continue to be the same as the common law form of dower operative in Ontario.[107] On the other hand, the timing of the 1885 dower debate was bound to create confusion. The questionable Territorial Ordinance that purported to change the date of reception had only passed the previous year in 1884. No Senator mentioned it nor

---

[106] In fact, this was true for both those senators wishing to abolish dower as well as those wishing to retain it. It is evident that Senator Campbell, the abolitionist who proposed the Bill in 1885, assumed that common law dower was in force in the Territories from the following remark which he made during debate: "[w]hether with reference to land[the husband] parts with in his lifetime it is desirable to cut off the wife or not from her dower, I do not feel very strongly about" (*Debates of the Senate of Canada* (6 March 1885) at 207). Senator Campbell was missing the point that the 1833 English *Dower Act*, which had been received as law in the Territories in 1884 or 1886 at the latest, had already eliminated a wife's dower claim on land that the husband parted with in his lifetime.

Senator Scott (Ont. Lib.), the retentionist who moved the motion to strike out the clause that would have abolished dower from the legislation, also assumed common law dower was in force in the Territories. This is evident from the following remark that he made when moving his motion to strike: "I am not aware that in the past it has been regarded that this dower, particularly under the law which prevails in Ontario, has been a real substantial embarrassment ... . I think it is a very serious proceeding, that dower should be taken away from all lands. The furthest it has gone is in Ontario, where a law has been passed permitting the husband to dispose of lands on which no improvements have been made ..." (*Debates of the Senate of Canada* (20 March 1885) at 374).

Senator Scott was arguing that the replacement right for dower in the dower abolition proposal was inadequate because it was limited to land of which a husband died intestate, as opposed to all of his lands. However, the 1833 English *Dower Act*, received as law in the Territories in 1884 or 1886 at the latest, had already removed the wife's claim to dower from any lands disposed of by her husband in his lifetime or under his will.

[107] Owing to the 1792 date of reception of English law in Ontario, the 1833 English *Dower Act*, which limited common law dower, was never operative in that province. Indeed, in Ontario, as well as in the three Maritime colonies, local statutes in the early 1860's actually extended common law dower not just property legally held by the husband at any time during the marriage but also to property beneficially held for him, as in a trust, at the time of his death. These amendments to the common law would have impressed in the Senators' minds a more generous, rather than a more limited, conception of dower. See *An Act respecting Dower*, C.S.U.C. 1859, c. 84; *An Act respecting the Procedure in Actions of Dower*, C.S.U.C. 1859, c. 28; and *An Act for the better Assignment of Dower in Upper Canada*, S.C. 1861, c. 40.

market seems a rather odd strategy, given that leases are an obvious example of the personal property right as commodity.[11] In order to draw attention to what Radin terms the "nonmarket personal significance"[12] of certain property rights, it would make better sense to focus not on something which is traded, but on those things which—although, in principle, could be traded—have traditionally been considered inappropriate for commodification.

Such a change of emphasis occurs in Radin's latest book, *Contested Commodities*.[13] Rather than highlight the non-market character of things which are traded, Radin examines certain goods and activities the commodification of which is generally contested. Although she takes issue with proponents of "universal commodification"—those theorists, that is, who would try to explain all human behaviour in market terms[14]—she does not believe that expansion of the market domain is always unwelcome. She contends, for example, that, subject to certain regulatory safeguards, "we should now decriminalize the sale of sexual services" (at 135). Furthermore, she claims to be wary of "slippery slope" or "domino effect" arguments about market domination which proceed on the assumption that commercial and non-commercial valuations of the same goods and activities cannot exist side by side (at 96–101). What Radin is seeking is some sort of "middle way" between traditional arguments for and against the extension of market activity (at xiii). Developing this middle way demands an appreciation of "incomplete commodification" (*ibid.*) as a market phenomenon, a recognition that "many things can be usefully understood as ... neither fully commodified nor fully removed from the market" (at 20).

Cass Sunstein has recently argued that, when people need to make collective decisions but find themselves in conflict on basic issues of principle, they will often seek to achieve incompletely theorized agreements on particular outcomes.[15] Rather than try to agree on high-level principles, judges in particular do better to develop the law in a cautious, *ad hoc* fashion, searching out principles which, while not

---

[11] See Duxbury, "Do Markets Degrade?," *supra* note 2 at 334.

[12] Radin, *supra* note 3 at 140.

[13] M.J. Radin, *Contested Commodities* (Cambridge, Mass.: Harvard University Press, 1996). All page references in the text are to this book.

[14] Radin states at the outset of the book that, "As an archetype, universal commodification is oversimplified, a caricature" (at 2). Chicago neo-classical economics, particularly as developed by Gary Becker and Richard Posner, "call[s] readily to mind th[is] archetype" (at 3). Later on in the book, her position seems to change in that she writes about the possibility of a person being "fully committed to the archetype of universal commodification" —adding that Becker is "perhaps" one such person (at 103).

[15] See C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1995) at 35–61.

especially ambitious, at least facilitate the emergence of some degree of consensus.[16] The notion of incompleteness operates as a compromise measure in Radin's work also. "[A]n incomplete commodification," she observes, "can sometimes substitute for a complete noncommodification that might accord with our ideals but cause too much harm in our nonideal world" (at 104). When the trade of something seems contentious but unavoidable, incomplete commodification may be the best, if not the ideal, response (at 110).

In presenting the case for incomplete commodification in this way, Radin argues as a self-styled pragmatist (at xi). Pragmatism, she insists, requires sensitivity to context (see 76–78 and 131–32). "[F]or each case of contested commodification," she claims, "I believe we should look and see how powerful the market conceptualization is in context. We should consider whether under some circumstances market understandings and nonmarket understandings can stably coexist" (at 104). Sometimes, the issue of commodification will create a "double bind" (at 52): that is, both the commodification of, and the failure to commodify, particular goods and activities may prove harmful. While there can exist "no handy algorithm" (at 126) for deciding what should be done in such circumstances, "the answer must be pragmatic. We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad)" (at 127).

In this essay, I shall offer two general criticisms of Radin's perspective as presented in her latest book. First, I shall suggest that, despite her claims concerning the importance of context-sensitivity, Radin herself sometimes uses not real social contexts but extreme hypotheticals and caricatures in order to illustrate and support her line of argument. This inclination to rely on exaggerations and stereotypes fits in with one specific claim which emerges frequently throughout the book: that thinking makes it so—that is, that the more we use market theory to explain human activity, the more human activity will actually become commodified. Secondly, I shall argue that the notion of contested commodification turns out itself to be unavoidably contestable owing to the fact that Radin is able only to assert, but cannot demonstrate, the existence of some fundamental shared consensus concerning the proper scope of markets.

---

[16] Judges, of course, are not alone in proceeding in this fashion. For another example of decision-making by resort to incompletely theorized agreement, see S.E. Toulmin, "The National Commission on Human Experimentation: Procedures and Outcomes" in H.T. Engelhardt, Jr. & A.L. Caplan, eds., *Scientific Controversies: Case Studies in the Resolution and Closure of Disputes in Science and Technology* (New York: Cambridge University Press, 1987) 599 at 611.

seemed to be aware of it. The 1886 Parliamentary confirmation of the change in the date of reception did not take place until a year after the main dower debate.[108]

It was unfortunate that the Senators who argued to retain dower did so on the basis of the incorrect legal premise that common law dower would have continued. Had they been less confused about the state of the law, they might have concluded, correctly, that the new legislation was slightly more advantageous than the statutory dower regime. They might then have gone on to argue that the new legislation, while marginally more generous than statutory dower, was itself wholly deficient in providing adequate protection for prairie widows.[109]

In summary, the legal misperceptions that underlay the 1886 dower abolition debate prevented any meaningful reform that would have provided widows with security after their husband's death. The Abolitionists incorrectly assumed that dower and the Torrens System were incompatible. As a result, they missed an opportunity to compromise. The retentionists incorrectly assumed that common law dower would continue in force if abolition did not take place. By defending an illusion they missed an opportunity to consider more viable alternatives. Incorrect legal assumptions meant that the abolitionists refused to consider a dower right when they might otherwise have done so while retentionists defended a dower right that was not worth defending. Reform borne of such misperception did not serve the cause of women well.

---

[108] Although the abolition of dower in the Territories was a contentious part of the Senate Torrens debate, it does not appear to have prompted any significant debate when the Manitoba legislature discussed the same issues in 1885. Perhaps this is because the Manitoba legislators were less confused over the kind of dower which they were abolishing. As mentioned, the Canadian Senators assumed that they were abolishing the more significant common law dower rights. In Manitoba, as the earlier discussion on the "date of reception of laws" demonstrated, common law dower had long since been replaced by the more limited statutory form of dower when the Manitoba abolition debate was held.

A word of caution about sources for the Manitoba debate is necessary. There was no Hansard for Manitoba at this time. The *Manitoba Daily Free Press* (see 10 April 1884, 20 March 1885, 24 March 1885, and 17 April 1885) and the *Winnipeg Daily Times* (see 24 March 1885 and 17 April 1885) provide detailed accounts of the Second Reading Debate on the Bill establishing the Torrens System and abolishing dower. They report no debate on dower. Clause by clause consideration of the Bill was given in Committee of the Whole but the press did not report on these debates.

[109] Senator Trudel (Que., Cons.), a retentionist, did suggest a system for providing security to a widow other than the common law dower system. This system would have prevented the husband from alienating some portion of his property. This property would then have been available to the family if the husband became insolvent. The idea was borrowed from Quebec law: *Debates of the Senate of Canada* (20 March 1885) at 378–79. The idea was not pursued.

III. CONCLUSION: THE FAILURE OF LAW REFORM

IN REALITY, THE 1885–86 abolition of dower in Manitoba and the Territories did not hurt women. A small population, low land values and an embryonic land registration system meant that at the time dower was abolished it had little practical value. The adoption of the limited form of statutory dower through the operation of the reception of laws doctrine meant that dower rights had only a very restricted legal import, one less important for widows than the marginal benefit that they received under the 1885–86 reform.

The divergence between the reality of the 1885–86 reform, marginally beneficial as it was, and the perception that produced that reform, faulty as it was, suggested that the law reform process was deficient. Uncertainty about the existing applicable law, unwillingness to compromise where compromise was available, and lack of input from the constituencies most directly affected, were symptomatic of a reform process unlikely to succeed. Until that process was changed, reform that would provide some security for women was impossible. Mrs. Brown, Nellie McClung's friend who was mentioned earlier, understood this. She predicted that the dower issue "won't be set right until women vote. You'll see."[110] The prediction proved accurate when dower was reintroduced in Manitoba in 1918 following the enfranchisement of women in that province in 1916.

It was not only the case that an improved law reform process would produce a better dower law: the need for a better dower law would spur the fight for an improved law reform process. Catherine Cleverdon pointed out that the political system became more sensitive because of the unjustness of a situation in which widows had no claim on their former husbands' property:

> The first faint traces of might be termed a movement for women's rights (principally the right to vote) appeared at the birth of the province of (Alberta, 1905) and arose in a controversy over the homesteading laws. The law which denied a wife all rights in her husband's estate was manifestly unjust to those pioneer wives who had struggled shoulder to shoulder with their husbands to establish themselves under the hardships of frontier conditions.[111]

If the abolition of dower in 1885–86 is a story of a faulty process that produced a weak reform, then that story has its *denouement*. A quarter of a century later, a much strengthened law reform process would produce a much better dower reform.

---

[110] *Supra* note 55.

[111] C.L. Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1950) at 67.