

## FAMILY HOME PROTECTION BILL.

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### MEMORANDUM.

THIS reform originated about a century ago in the more advanced States of the American Union. It is now in force over the whole of the United States, and in three provinces of the Dominion of Canada—Manitoba, Alberta, and Saskatchewan.

The homestead may be defined generally as real property owned by the head of the family and occupied by the family as a home. It includes the house in which the family resides and the adjoining land, together with the usual and customary appurtenances.

At common law land cannot be seized by the creditor. Statutes have long altered this. After the enactment of such statutes it came to be considered, at least in the United States, that public policy required the home of the debtor and his family to be exempted from seizure and sale for his debts. (See New York Code, 1850: "Whether the exemptions should be carried still further so as to save the homestead of a family is a high question of public policy which it is for the Legislature alone to entertain.") These provisions are not in derogation of the common law, for the debtor's land could not be seized and sold at all at common law.

The homestead estate or right is purely a creature of the constitution or statute, and there is no precisely similar interest or estate known to the common law. The principal if not the sole object of the homestead-exemption laws is to secure a homestead—a home for the family—and no infringement of rights of property and titles is intended except such as may be necessary for this object.

A claim of homestead does not give any new title, nor does it strengthen or enlarge the one existing. It does not create any interest in the property when the parties claiming homestead have no title or estate therein.

In most States the object of the homestead-exemption laws is not to protect debtors merely as such by exempting their property from liability to seizure and sale for payment of their debts, but it is rather to protect the family by exempting the family home.

**Head of the Family:** There must be a head, who is under either under a legal or a natural obligation to support the other members, and they are dependent upon him for their support. (Californian Code, definition 1261.) The Louisiana Constitution defines it as "Head of a family, or a person having a mother or father or a person or persons dependent on him for support." A mere moral or natural obligation to support and a condition of actual dependence are sufficient.

The Courts have sustained claims of homestead exemption by a widow who had no children of her own, but who had the care and maintenance of orphan children of a sister of her deceased husband; by a widow supporting the minor children of her deceased husband by a former wife; by a woman having a grandchild living with her, and supported by her; by an unmarried man, or widower, maintaining an indigent or dependent father, mother, brother, or sister, and the same is true of an unmarried woman.

This Bill does not extend the protection to a person having ascendants residing with him. The broad policy of the Bill is to protect and encourage families by securing the family home to widow and children until the youngest child attains twenty-one years of age.

In some parts of the United States the protection has been extended to what is known as a "business homestead."

*Mr. Massey.*

## FAMILY HOME PROTECTION.

### ANALYSIS.

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### A BILL INTITULED

AN ACT to give Wives an estate in the Family Home and to protect it from Attachment and Sale for Debt. Title.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Family Home Protection Act 1911. Short Title.

2. In this Act, unless the context otherwise requires,— Interpretation.

10 “Assignee” means the Official Assignee in Bankruptcy:

“Head of family” means and includes—(i) A husband or widower having children residing with or in any way dependent on him, or (ii) a widow having children residing with or in any way dependent on her:

15 “Court” means the Supreme Court:

“Estate of homestead” means the right of a head of a family to have defined and set apart and to hold, use, and occupy an area of land with the buildings thereon as a homestead protected by this Act:

20 “Town land” means—

(i.) Land upon selection classified in the *New Zealand Gazette* by the Land Board for the district in which such land is situate as town land or suburban land:

(ii.) Land situated within the boundaries of any city or borough constituted under the Municipal Corporations Act, 1908 :

(iii.) Land situated within the boundaries of any town district constituted under the Town Boards Act, 1908 : 5

All other land shall be deemed rural land for the purposes of this Act, and shall be deemed classified into first-class, second-class, and third-class lands according to the classification in the *New Zealand Gazette* made by the Land Board for the district upon selection : 10

“Net annual value” means the amount clear of all rates, taxes, and other outgoings which the property to be set apart would be capable of producing yearly in the opinion of the valuers if put to the best use as a homestead in perpetuity. 15

Acts incorporated.

3. This Act shall be read with the Land Transfer Act, 1908, and the Deeds Registration Act, 1908, and any amendments thereof.

Who entitled to create an estate of homestead.

4. Every head of a family shall be entitled to create an estate of homestead, not exceeding the limit hereinafter provided, in the land and buildings thereon (whether erected before or after the acquisition of the estate of homestead) owned in fee-simple or rightly possessed by lease or otherwise and occupied by him as a family residence ; and such estate shall be exempt from attachment, levy on execution, sale for the payment of his debts or other purposes, and from the laws of conveyance and devise, except as hereinafter provided. 20  
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How created.

5. To create such estate of homestead it shall be set forth in the deed of conveyance or transfer or lease, or other deed or document by which the property is acquired, that it is designed to be held as a homestead for wife or infant children, and, in case of land under the provisions of the Land Transfer Act, 1908, the District Land Registrar shall make an entry thereof in the register, and of such further particulars as are necessary ; or, after the title has been so acquired, such design may be declared as to land subject to the provisions of the Deeds Registration Act, 1908, by registering a declaration in the form in the Schedule to this Act in like manner as deeds affecting land are registrable ; and as to land subject to the provisions of the Land Transfer Act, 1908, by lodging a declaration with the District Land Registrar for the district, who shall record on the register and on the duplicate of title the following memorandum : “Homestead declared under the Family Home Protection Act, 1911, for wife, C. D. [and children].” The Registrar shall cause notice of such registration to be forthwith published in the *New Zealand Gazette*. 30  
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Homestead estate limited. Powers and provisions in relation to the continuance thereof.

6. On registration of such deed or other document or declaration, the estate of homestead shall be deemed duly created and acquired, and thereupon the following provisions shall have effect :—

(a.) No estate of homestead shall affect a mortgage, lien, or other encumbrance previously existing. 50

(b.) Property which is subject to a mortgage executed before an estate of homestead was acquired therein, or executed

afterwards and containing a release thereof as herein-  
after provided, shall be subject to such estate of home-  
stead, except as against the mortgagee and those claiming  
under him in the same manner as if there were no such  
mortgage.

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(c.) No deed, agreement, will, or other document affecting pro-  
perty in which an estate of homestead exists, and no  
release or waiver of such estate, shall operate (i) to con-  
vey such property or the part thereof held and exempted  
as a homestead-area defined under this Act, or (ii) to  
defeat the right of the owner or of his wife or children  
to have set apart the whole or part thereof as a home-  
stead-area defined under this Act, unless such deed,  
agreement, or other document, or probate or administra-  
tion of such will is duly registered and the wife of the  
owner (if he has any) joins therein for the purpose of  
releasing such estate of homestead or consents in writing  
to such deed, agreement, will, or other document so far  
as it affects such estate of homestead ; but a deed, agree-  
ment, will, or other document duly executed without such  
release, or not consented to as aforesaid, shall be valid to  
pass, according to its terms, any title or interest in the  
property beyond the estate of homestead.

(d.) The estate of homestead existing at the death of the head  
of a family shall continue for the benefit of the widow (if  
any) and infant children, and shall be held and enjoyed  
by them if some one of them occupies the premises until  
the youngest child attains twenty-one years of age and  
until the remarriage or death of the widow, and upon the  
death of such head of a family shall be limited to that  
period; but all the right, title, and interest of the deceased  
in the premises in which such estate exists, except the  
estate of homestead thus continued, shall be subject to  
the laws relating to devise and sale for the payment of  
debts or other purposes.

(e.) The widow may obtain an order from the Court as in the  
case of sales of real estate of infants and may join in a  
sale of an estate of homestead ; and if there is no widow  
entitled to rights therein, the guardian of such infants  
may, upon obtaining an order, make sale of such estate ;  
and the widow may make such sale without an order of  
the Court if there are no infant children. The purchaser  
shall have the right to enjoy and possess the premises for  
the full period that the widow and children might have  
continued to hold and enjoy them if no sale had been  
made. The Court may apportion the proceeds of the sale  
among the parties entitled thereto.

(f.) When an estate of homestead exists in property in which  
other parties have an interest, the party entitled to the  
estate of homestead or any other party interested may  
have partition thereof like tenants-in-common, and upon

Family Home Protection.

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any such partition the homestead-area shall be defined in accordance with the provisions of this Act. No partition shall be made of a defined homestead-area.

(g.) In case of an insolvent deceased estate the provisions of section eight of this Act shall apply, *mutatis mutandis*, in favour of the widow (if any) and infant children of the deceased insolvent.

Definition of homestead-area.

7. When a homestead-area is required to be defined under this Act or upon application made to the Court by or on behalf of any person entitled to an estate of homestead (whether as owner of freehold or leasehold property or as holding no right, title, or interest in the property beyond the estate of homestead), the Court may make an order defining the area of land with the buildings thereon which it appears the applicant or other person is entitled to hold, use, and occupy as a homestead, but not exceeding in any case the limit provided in section *thirteen* hereof; and every such order shall take effect accordingly. The Court may order a survey to be made, and in the case of land under the provisions of the Land Transfer Act, 1908, if the defined area is less than the whole area, the District Land Registrar for the district shall cancel the certificate of title therefor, and substitute a certificate of title having the defined homestead-area delineated thereon.

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Homestead estate exempt on insolvency.

8. When the property of a debtor is assigned under the laws in relation to insolvent debtors and such debtor claims and it appears to the Court wherein the proceedings in insolvency are pending that he is entitled to hold such property or a part thereof as a homestead, the Court shall cause the homestead-area in such property to be defined as herein provided, and the residue shall vest in and be disposed of by the Assignee in the same manner as property not exempt by law from levy or execution. The expenses of valuation and survey shall be paid from the estate in insolvency. An estate of homestead shall not vest in the Assignee.

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Homestead-area defined on execution.

9. If a judgment creditor requires an execution to be levied on property which is subject to an estate of homestead, the judgment debtor may apply to the Court to have the homestead-area defined as herein provided, and the residue of the property shall be levied upon and disposed of in like manner as real estate not exempt from levy on execution. If the property levied upon is subject to a mortgage, it may be sold subject to the mortgage and the estate of homestead in like manner as land subject to a mortgage only.

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On divorce, Court may make order re homestead estate.

10. Where a homestead estate has been created by a husband and the marriage is afterwards dissolved or a judicial separation ordered, then, and in any such case, the Court by which the marriage is dissolved or the separation ordered shall have jurisdiction to adjudge that the estate of homestead or the interest of either the husband or wife therein be terminated, or that the sole right to hold, use, and occupy a homestead-area defined under this Act be granted to either in exclusion of the other, whether wholly or in part; and such Court may also adjudge that all or any of the provisions of this Act shall cease to have effect in respect of such homestead, and every such adjudication shall take effect according to the tenor thereof.

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11. If land subject to an estate of homestead is held under the provisions of the Land Transfer Act, 1908, upon proof of the occurrence of the event or circumstance upon which, in accordance with the provisions of this Act, an estate of homestead or the right to

Determination of homestead estate to be registered.

5 hold, use, and occupy as a homestead an area of land defined under the provisions of this Act shall be deemed terminated, the District Land Registrar for the district in which such land is situated shall make an entry in the register of such termination, and the duplicate of title shall be produced to him for that purpose.

10 12. When a head of a family has acquired an estate of homestead he shall not be entitled to acquire another estate of homestead until the first has been determined and the land affected thereby discharged from the provisions of this Act.

Homestead estate to be determined before another acquired.

13. The limit of a homestead-area of town land shall be land and the buildings thereon not exceeding together in value seven hundred and fifty pounds, to be ascertained as hereafter provided, and of rural land shall be an area of first-class land not exceeding twenty acres, of second-class land not exceeding fifty acres, and of third-class land not exceeding five hundred acres.

Limit of area upon definition of homestead estate.

14. When a homestead-area is required to be defined under this Act in the case of town lands three valuers shall be appointed—one by the Court, one by the applicant, and one by the two valuers so appointed. The valuers shall be sworn to faithfully, impartially, and honestly, according to the best of their skill and ability, execute the duty of making the valuation and report referred to them. The value shall be determined by capitalizing the net annual value at a rate per centum to be fixed by the valuers, and the rate per centum so fixed shall be based by the valuers upon—(1) Supply and demand; (2) security; and in no case shall the net annual value be capitalized at a less rate than eight pounds per centum per annum. If in the judgment of the valuers the property is of greater value than seven hundred and fifty pounds, they shall set off so much thereof, including the dwellinghouse in whole or in part, as appears to them to be of the value of seven hundred and fifty pounds, and report to the Court. If any valuer having been sworn as aforesaid shall wilfully or corruptly act to the contrary, he shall be guilty of a misdemeanour.

Valuation of homestead-area of town land.

15. If the valuers appointed to value a homestead-area of town land report that a homestead-area cannot be conveniently set aside in accordance with the provisions of this Act, and that the land and buildings are of greater value than the sum of seven hundred and fifty pounds, then the Court may require the valuers to appear and be examined on oath, and if it appears that the property subject to the estate of homestead is of greater value than seven hundred and fifty pounds, and that a homestead-area therein cannot be conveniently defined, the Court may refuse to define a homestead-area therein, and if the head of the family shall become a bankrupt or execution debtor the Assignee or execution creditor may require such property to be offered for sale, and, provided a sum greater than seven hundred and fifty pounds be offered, such property shall be sold and the estate of homestead shall be thereby determined,

Homestead estate may be sold in certain cases.

but the amount to the extent of the exemption shall at once be paid over to the debtor, and such sum, until paid over to the debtor, shall be exempt from seizure under execution, garnishment, attachment for debt, or any other legal process :

Provided that no such sale shall be made unless the amount offered shall, after deducting all costs and expenses, exceed seven hundred and fifty pounds; and provided further that no such sale shall be carried out or possession given to any person thereunder until such time as the amount of exemption shall have been paid over to the debtor entitled to such exemption.

Protection afforded by Act not to affect certain liabilities.

16. Nothing in this Act shall operate to relieve any property from any liability which if this Act had not been passed would from time to time attach thereto, or to exempt such property from sale, in respect of—

- (a.) Debts contracted for the purchase thereof : 15
- (b.) Debts contracted before notice as required by section five hereof is published in the *New Zealand Gazette* :
- (c.) The payment of rates, taxes, and burdens imposed on such property by virtue of any statute, or authorized to be so levied or imposed : 20
- (d.) Burdens and obligations imposed on such property by virtue of any statute relating to drainage or water-supply :
- (e.) The erection and maintenance of boundary-fences under any Act for the time being in force :
- (f.) Liens on such property under the Contractors' and Workmen's Lien Act, 1908 : 25

Nor shall buildings on land not owned by the head of a family be exempt from sale or levy for the ground-rent of the lot of land whereon they stand.

17. Nothing in this Act contained shall be deemed to affect the right of the Crown to resume compulsorily any lands required for public purposes. 30

Schedule.

#### SCHEDULE.

I, A. B., of \_\_\_\_\_, being the head of a family as defined by the Family Home Protection Act, 1911, and being [*Here state interest*] in all that piece of land, [*Description, &c.*], do hereby declare the said piece of land to be subject to an estate of homestead: And I do solemnly and sincerely declare—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, I married one, C. D.
2. That hereunto annexed, marked "A," is a true copy of the entry of such marriage, certified under the hand of the Registrar-General of Marriages.
3. That my said wife is still alive and resides with me [*Or, as the case may be*].
4. That there are \_\_\_\_\_ surviving infant children, issue of the said marriage.
5. That herewith annexed marked "B," &c., are the copies of the entries of birth of the said children, certified under the hand of the Registrar-General of Births.

And I make this solemn declaration, &c.