

Property and Marriage

The Law and the Practice in Early Nineteenth-Century Montreal

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Between the 1820s and 1840s, the use of marriage contracts in Montreal changed. Firstly, over this period, marriage contracts were increasingly the tool of a propertied minority of the population. Secondly, a rapidly growing proportion of those signing a contract chose to keep the property of each spouse separate rather than creating a community of property. This choice was not limited to anglophones and was most pronounced when the husband was a merchant or "bourgeois". Thirdly, more and more of the wives of wealthier Montrealers appear to have had the power to administer their own personal goods. How this worked out in practice, however, has to be determined.

Entre les années 1820 et 1840, trois transformations ont marqué l'utilisation des contrats de mariage à Montréal. D'abord, la signature d'un contrat devint progressivement le lot d'une minorité de possédants. Ensuite, une proportion toujours plus large choisit la séparation plutôt que la communauté de biens, surtout chez les couples dont le mari était un marchand ou un bourgeois, et cela, non seulement parmi les anglophones. Enfin, il semble que dans les familles très aisées, un nombre grandissant de femmes aient assumé la gestion de leurs biens quoiqu'on ne sache pas grand-chose sur l'exercice de ce droit.

Some time before 4:00 a.m., on 21 October 1844, the Montreal notary J. Augustin Labadie pulled himself out of bed and made his way to the home of Clément Ferland, a master shoemaker in the city. This was not Labadie's first visit. Just the day before, he had been to this house to write up a marriage

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contract for Clément's daughter Lydie, a minor who was about to marry the Montreal merchant, Hubert Langlois. The initial contract had specified that any property the two brought to the marriage would fall into a community of goods. Someone, however, changed his or her mind, and called urgently for M. Labadie so that the arrangements could be changed before the marriage. By 4:30 a.m., the parties had cancelled the earlier agreement, and at 5:00 a.m., they signed a new one specifying that there would be no community of goods, and that the future spouses each would keep their goods separate during the marriage.¹

Hubert and Lydie's decision to change the way property would be divided up and administered once they were married was sudden. Exactly what or who made them change their minds is not specified in their marriage contract. Nor can we determine their personal interpretations of the advantages that marrying separate as to property would offer over marrying in community of goods. It is impossible to know who had the most say in this matter, the future husband or his or her parents, although it seems likely that in the complex bargaining that went on, Lydie as a woman and a minor had the least power. What is clear, however, is two-fold. Firstly, their twenty-four hour about-face reflected changing ideas about how property should be dealt with in marriage — ideas that were shared by a growing proportion of the minority of Montrealers who made marriage contracts and, in particular, by members of the propertied classes, professionals and those involved in commerce. Secondly, the choice that they and others made to keep husbands' and wives' property separate within marriage significantly modified married women's rights. That choice offered this minority of relatively elite women a circumscribed degree of autonomy within marriage that was not available to those choosing other regimes, or to women in the common law colonies prior to the passage of married women's property acts.²

In the years between the 1820s and the 1840s, the growth in the proportion of couples with little or no property, shifting sources of immigration and the resulting intermingling of people with different legal heritages combined to precipitate a decline in the number of people marrying in Montreal who believed it to be important to sign a marriage contract. At the same time, the economic uncertainties that accompanied the transformations of the economy and world-wide economic fluctuations influenced a growing number of couples from the city's commercial and landed elite and professional families to choose to keep each partner's property separate rather than let it fall into the

1. Archives nationales du Québec à Montréal [hereafter ANQM], Notary J. Augustin Labadie, 20 and 21 October 1844.

2. On these, see Constance B. Backhouse, "Married Women's Property Law in Nineteenth Century Canada," *Law and History Review*, 6, 2 (1988), p. 216, republished in Bettina Bradbury, ed., *Canadian Family History. Selected Readings* (Toronto: Copp Clark Pitman, 1992).

traditional regime of community within the Custom of Paris.³ In this, they were part of a trend that was to be found among the wealthier classes in England, the United States and English Canada at roughly the same time.⁴ In Lower Canada, a relatively brief and inexpensive visit to a notary to make a marriage contract allowed these couples to specify property arrangements that under the laws that prevailed in common law jurisdictions required the expensive and time-consuming process of setting up a separate estate in a trust.

In this paper, we seek to explain why Lydie and Clément, and others in a similar class position, chose to keep their property separate within marriage and why a growing proportion of the total marrying population did not make a contract. To do this, it is necessary to describe briefly how the economic and social context of Montreal between the 1820s and 1840s led to a decline in the practice of signing a marriage contract. We then examine the different choices couples faced and the advice and services they received from Montreal's notaries. Finally, we assess the extent to which changing decisions may have been a result of cultural background, class or gender, by considering the influence of people's legal heritage, their respective class position and concerns for married women's rights to property.

Three major types of sources form the basis of this study. Legal texts consulted include case reports, customary law, statutory law, various treatises on the civil law, digests of jurisprudence and notary's manuals. Marriage contracts constitute the second major source, parish registers the third. For the Catholic population of Montreal, we have been able to identify which of the couples marrying between 1823-1826 and 1842-1845 and appearing in the parish registers had marriage contracts, so that we can report on, for instance, the proportion having a contract relative to occupation or background. In the case of Protestants, we have analyzed all of their marriage contracts, but have not linked them systematically to the marriage acts, as the process is much

3. The original French edition of the *Coutume*, adopted in 1580, remained the only official version in Lower Canada prior to the codification of 1866. In his treatise on the *Fundamental Principles of the Laws of Canada*, the notary Nicolas Benjamin Doucet offered his English readers an unauthorized translation of those portions of the *Coutume* which had not been set aside or eroded by 1840 (Montreal: John Lovell, 1841), II, pp. 228-298.

4. Mary Lynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986); Suzanne Lebsock, *The Free Women of Petersburg. Status and Culture in a Southern Town, 1784-1860* (New York: W.W. Norton and Company, 1984), pp. 57-72; Norma Basch, *In the Eyes of the Law. Women, Marriage, and Property in Nineteenth Century New York* (Ithaca: Cornell University Press, 1982), pp. 27, 127; Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge and London: Harvard University Press, 1990); Lee Holcombe, *Wives and Property. Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983). Some details on such settlements in English Canada are given in C.B. Backhouse, "Married Women's Property Law," and in Peter Ward, *Courtship, Love and Marriage in Nineteenth-Century English Canada* (Kingston and Montreal: McGill-Queen's University Press, 1990), pp. 46-47.

more complicated.⁵ Together, these sources allow us to understand both the law and the use people made of it, to describe the potential choice of marriage regimes and the actual choices made, and to relate decisions to spouses' places of origin, their reported occupations, the language they used and the notary they chose when they devised their marriage contract. What we do not see are how individual men and women deliberated about such choices or what they thought about their decisions afterwards.

Economic and social changes, class positions, and the decision to make a marriage contract

Men and women who married in Montreal during the 1820s and 1840s undertook this initial phase of family formation in a city that was undergoing fairly rapid economic and social transformation as well as some change in the laws surrounding property and marriage. The population virtually doubled from over 22,000 when D.B. Viger took his careful census in 1825 to over 44,000 in the early 1840s. Waves of Irish immigrants stopped in the city, sometimes staying only long enough to marry someone they had met on the boat and move on, some seeking work to accumulate money for a move elsewhere, and others remaining for the rest of their lives. Merchants and producers arrived from England and the United States, adding to the nucleus of anglophone fur traders, timber merchants and manufacturers who had established themselves and their businesses in the years since the Conquest. Both English- and French-speaking Lower Canadians moved into the city from elsewhere in the colony as well. Over these years, the city became predominantly anglophone and remained so until the 1860s.⁶

Rapid population growth boosted the local market. The city's artisans responded by hiring more apprentices, producing more stock, and in some trades, dividing up tasks and taking on unskilled workers. At the same time, Montreal became the economic centre of the Canadas as its merchants profited from the expansion of Upper Canada, and vigorously promoted the creation

5. In the Catholic Parish of Notre Dame, 759 couples were married between 1823 and 1826, and 1,739 between 1842 and 1845. Of these, 178 couples signed marriage contracts with a Montreal notary in the 1820s, while 205 of those in the 1840s marriage cohort did so. Five hundred and eighty-one Protestant couples were married in the various Montreal Protestant churches between 1823 and 1826 and 1,170 between 1842 and 1845. Of these, 66 and 87, respectively, made marriage contracts. All marriage contracts mentioned in the repertories and inventories of all Montreal notaries were listed for each of these years. The contracts of those who married either in Notre Dame or in one of the Protestant churches of Montreal were then transcribed onto forms and analyzed.

6. Jean-Claude Robert, "Urbanisation et population. Le cas de Montréal en 1861," *RHAF*, 35, 4 (March 1982); and "Montréal, 1821-1871. Aspects de l'urbanisation" (Ph.D. thesis, history, École des Hautes Études en Sciences Sociales, Paris, 1977); Fernand Ouellet, *Lower Canada, 1791-1840. Social Change and Nationalism* (Toronto: McClelland and Stewart, 1980).

of canals that would channel exports through the city. Changing patterns of imports and exports linked Montreal in new and different ways both to its hinterlands and to the colonial metropoli, increasing the likelihood that world fluctuations in prices, or world-wide financial booms and depressions would have local repercussions. This is precisely what happened in 1837 when financial crisis in England spread first to the United States and then into the British colonies, leading to credit restrictions, currency shortages and general financial panic in Montreal.⁷

The dynamic economic climate, the growing accumulation of capital that was possible both in production and exchange, and the changing origins of the people combined to promote a shift in ideas about property and marriage and in people's practices as men sought ways to protect some of their assets from the risks of the market. At the same time, politicians' views about women's role in politics and their economic and property rights were hardening. In Lower Canada as elsewhere, "the rise of the common man and the political exclusion of women proceeded in tandem".⁸ In 1834, only weeks after the reformers had pushed for greater democratic rights in their 92 resolutions, a law was introduced to prevent women voting. It was found *ultra vires* for other reasons, but their vote was definitively eliminated in 1849. In Lower Canada, this was a real loss. While women seldom constituted a large proportion of electors, remaining pollbooks show that over 900 presented themselves at elections between 1791 and 1849.⁹

In 1841, between the two attempts to take away women's right to vote, the *Registry Act* was passed. It eliminated the customary claim widows had

7. On different crafts during this period, see Joanne Burgess, "Work, Family and Community: Montreal Leather Craftsmen, 1790-1831" (Ph.D. thesis, history, Université du Québec à Montréal, 1986); J.-P. Hardy and D.-T. Ruddel, *Les apprentis artisans à Québec, 1660-1815* (Montreal: Les Presses de l'Université du Québec, 1977); Robert Tremblay, "La formation matérielle de la classe ouvrière à Montréal entre 1790 et 1830," *RHAF*, 33, 1 (June, 1979); Mary Anne Poutanen, "For the Benefit of the Master: The Montreal Needle Trades during the Transition, 1820-1842" (M.A. thesis, McGill University, 1985). On merchants, industrialists and the nature of the Montreal economy, see Donald Creighton, *The Empire of the Saint Lawrence* (Toronto: Macmillan of Canada, 1956); Gerald Tulchinsky, *The River Barons: Montreal Businessmen and the Growth of Industry and Transportation* (Toronto: University of Toronto Press, 1977); Robert Sweeney, "Internal Dynamics and the International Cycle: Questions of the Transition in Montreal, 1821-1828" (Ph.D. dissertation, McGill University, 1985).

8. Mary Ryan, *Women in Public. Between Banners and Ballots, 1825-1880* (Baltimore: The Johns Hopkins University Press, 1990), p. 135. The best discussion of this in Quebec is in Alan Greer, "La république des hommes: les Patriotes de 1837 face aux femmes," *RHAF*, Vol. 44, no. 4 (Spring 1991). On France, see Joan B. Landes, *Women and the Public Sphere in the Age of the French Revolution* (Ithica and London: Cornell University Press, 1988), pp. 66-89; Georges Duby and Michelle Perrot, eds., *Histoire des femmes. Le XIX^e siècle*, Tome 4 (Paris: Plon, 1991), pp. 102, 133.

9. Nathalie Picard, "Les femmes et le droit de vote au Bas-Canada de 1791 à 1849" (M.A. thesis, history, Université de Montréal, 1992).

had to a dower from their husband's property.¹⁰ The only valid dower rights after 1841 were those stipulated in a marriage contract (*douaire préfix*) and correctly registered at the Registry Office. Like the other provisions of the *Registry Act*, this elimination of customary dower rights aimed to make the transfer of land much easier. Previously, some land purchasers had bought land only to discover, sometimes years later, that it was actually part of a widow's dower rights.¹¹ After 1841, this loss of the automatic right to a dower could be compensated to some extent by women whose husbands promised dower rights or some alternative in their marriage contracts. For widows among the growing proportion of the population which had no landed property, however, the customary dower had already lost its value, as it was based on real property. The *Registry Act* offered some protection to wealthier women, should they become widows, but none to the propertyless, confirming the growing divisions that proletarianization was making in the urban population.

Such legislation constitutes the most obvious and formal expression of the way in which changing economic structures, the new needs of capitalists and producers in diverse sectors, and a hardening gender ideology reshaped aspects of marriage and property during this period. Most importantly, the increasing polarization of the population created a situation in which a growing proportion of marrying couples had little or no real property to organize at the time of their marriage. Those with investments in real estate, trade and production, or even a professional business, by contrast, had more and more reason to try and protect some of their property from the vagaries of market forces, or the dangers of failed speculations and entrepreneurship. This could be done within a marriage contract and especially by avoiding the creation of a community of goods.

After the selection of a spouse, one of the next major decisions facing a couple marrying in Lower Canada was whether or not to make a marriage contract. In contrast to the common law prevailing in the other North American colonies, Lower Canada's civil law gave marrying couples the option of making a marriage contract before the wedding and offered considerable latitude in determining how property would be regulated within the marriage. In a potentially conflictual situation, the parties involved — husband, wife, and their living parents — had to sit down and decide what the woman would bring to the marriage, what would remain hers, how the man would provide for his wife should he die, and who would own and administer what property. No sources that we have found allow us to see the decision-making process as it unfolded. This decision, like that of the selection of a spouse, no doubt was influenced by parents and family tradition, but also by

10. *Coutume*, article 247; Henry Desrivières Beaubien, *Traité sur les lois civiles du Bas-Canada* (Montreal: Ludger Duvernay, 1832), III, 7; *Lower Canada Reports* (1851), 25, Toussaint *et al.* vs. Leblanc.

11. *Statutes of Lower Canada*, Ordinance of the Special Council, 4, Victoria (1841), Chap. XXX, sections 21, 29, 35.

the ideas prevalent at the time, by the economic and social backgrounds of the families, and by the notaries they consulted.

The vast majority of couples increasingly either consciously chose not to make a marriage contract, or neglected to do so because they did not realize the advantages that one might offer. In direct contrast with studies of New France and Lower Canada prior to 1820 suggesting that anywhere between 60 and 90 percent of the population made a formal marriage contract, only 23 percent of Catholic couples marrying in Montreal between 1823 and 1826 and only about 9 percent of Protestants did so. By the 1840s, the percentages had dropped further to only 12 and 7 percent respectively.¹²

The relationship between class position and having a contract was direct and dramatic. Over three out of five Catholic grooms who considered themselves "bourgeois" at the time of their marriage in the 1820s made a contract. Two decades later, nearly four out of five did so (Table 1). Merchants and traders were only a little less likely to make a marriage contract than these "bourgeois", but were much more likely to do so than men involved in shopkeeping, innkeeping and the myriad of smaller kinds of commerce that proliferated in Montreal. Around one-half of the notaries, lawyers and law students made a contract in the 1820s. More did so two decades later, perhaps because they were most likely to be aware of the advantages a contract offered. Farmers who had property to protect were more likely to make contracts than men involved in production. Thus, in the 1820s, about one-half of the husbands involved in agriculture had a contract; two decades later, only one-third did. The situation among artisans was more varied, reflecting no doubt both the changing relations of production and the transformations already underway within some crafts, as well as the different ethnic backgrounds of the workers.¹³ Around two-fifths of those involved in the food and leather trades signed a contract in the 1820s compared to less than one-fifth of men in the woodworking trades or clothing production. Only a fifth of men

12. Louise Dechêne found 96% of Montreal couples signed contracts at the end of the 17th century, *Habitants et marchands de Montréal au XVII^e siècle* (Paris: Plon, 1974) pp. 419-420; Marcel Trudel suggests a lower proportion (65% for the years between 1632 and 1662), *Histoire de la Nouvelle-France. La seigneurie des Cent-Associées (1627-1663)*, Tome III (Montreal: Fides, 1983), pp. 517-534; Yves Landry found that 82% of the "filles du roi" signed a contract prior to their first marriage: "Gender Imbalance: Les Filles du Roi, and Choice of a Spouse in New France," in Bettina Bradbury, ed., *Canadian Family History. Selected Readings* (Toronto: Copp Clark Pitman, 1992), p. 18; and *Orphelines en France, pionnières au Canada. Les Filles du Roi au XVII^e siècle* (Montreal: Leméac, 1992), p. 147; Yves-Jean Tremblay, "La société montréalaise au début du régime anglais" (M.A. thesis, Université d'Ottawa, 1970). The problem with the latter study is that there is no attempt to determine which of the couples marrying had a contract. The total number of marriage contracts signed with Montreal notaries is simply calculated as a proportion of all marriages celebrated in Montreal. However, couples who married elsewhere may well have gone to Montreal notaries to sign contracts, or vice-versa.

13. At the moment, further research is required to determine which men in the various crafts were master artisans, journeymen or simple employees.

overall in the construction trades made a contract in the 1820s. Two decades later, the proportions had dropped among men in most sectors of production. Unpropertied couples were the least likely to make a marriage contract. Only one out of ten labourers or metal workers signed a marriage contract in the 1820s.

The pattern is similar whether one considers the occupation of the groom, the groom's father or the bride's father or the three together. Sons and daughters of men calling themselves "bourgeois" or "écuyer" were the most likely to have a marriage contract, those of labourers the least. Whether one married someone above, below or within a similar social position does not seem to have been as important as the fact of one of the contracting parties needing to specify property arrangements or the marriage regime.¹⁴ Mothers and fathers in the landed and mercantile classes, who had good reason to be careful about how property was organized during their marriages and following their deaths, followed the pattern of similar classes elsewhere and carefully specified the arrangements they thought best for their sons and daughters.

Community of property for those without a contract

For the majority of the marrying population — all those couples without a contract — property relations within marriage were determined by the provisions of the Custom of Paris, the civil law that continued to regulate marriage in the years after the Conquest. Marriage automatically created a community of property, legally shared equally by both spouses, but administered by the husband. This community included all moveable property such as wages, animals, kitchen utensils, clothing, and debts; any real property such as land, house, crops in the field that they acquired by their own labour during their marriage; and the income from any properties that either spouse inherited. Each spouse retained ownership of inherited properties, although the husband administered those of his wife. Neither could sell, mortgage or exchange them without the other's permission.¹⁵

This community of property shocked some observers from common law jurisdictions where marriage meant that all but a woman's real property was given to her husband forever. "A man who has made a fortune here," explained Hugh Gray, "conceives that he ought, as in England, to have the disposal of it as he thinks proper. No, says the Canadian law, you have a right to one-half only; and if your wife dies, her children, her nearest relations, may oblige you

14. The situation in a complex, changing city like Montreal, where dowries were not an important aspect of marriage tradition, appears to have been very different from that described by Pierre Bourdieu in peasant villages in the South of France. "Les stratégies matrimoniales dans le système de reproduction," *Annales, E.S.C.*, 27 (July 1972), pp. 1105-1125.

15. The correct terms in French are "meubles" for moveable property, "immeubles" for immoveable. "Immeubles" are divided into "conquêts": those acquired during the existence of the marriage and "propres", those estates or real properties that were inherited, given or devised in direct or collateral lines.

to make a partage, and give them half your property...Nothing can prevent this but an ante-nuptial contract of marriage, barring the 'communauté de biens'."¹⁶

Yet the administrative power of a wife was not very different under community of goods from the common law. While the common law eliminated wives as legal and financial beings by insisting that husband and wife were one, civil law maintained that the husband was "the lord of the personal and real property acquired during the marriage." Women who had not made a marriage contract specifying otherwise had no right to sell even their own inherited property or to make a legal contract of any kind without their husbands' express permission. Furthermore, the husband could sell, will away or otherwise dispose of anything that was part of the community as well as administer his wife's "propres". He could only sell or mortgage the latter with her consent. Thus, while both spouses were alive, the husband had complete authority over the community's possessions: "The husband is chief and master of the community and as such can dispose of it as he wishes."¹⁷ As Henry Desrivières Beaubien also explained in his *Traité sur les lois civiles du Bas-Canada* of 1832, "the husband's power over his wife consists in his right to demand of her all the duties of submission that are due to a superior."¹⁸

Notaries and the choices that could be made in a marriage contract

Lower Canadian women could not avoid this patriarchal division of power within the family which was prescribed by the Custom. They, their families, or their future husbands, could modify, however, some of the ways in which property was divided and administered by specifying alternative arrangements within notarized contracts passed prior to the celebration of their marriages. Provided their choices did not violate morality, public order, or the established law of the land, they could introduce whatever clauses they required for their particular circumstances.¹⁹ Once the contract was passed and the couple legally wed, they could change little in it, even if they were in

16. H. Gray, *Letters from Canada Written During a Residence There in the Years 1806, 1807 and 1808* (London: 1809), cited in Collectif Cléo, *L'histoire des femmes au Québec depuis quatre siècles* (Montreal: Le Jour, 1992), p. 97.

17. Claude de Ferrière, *La science parfaite des notaires* (Paris, 1771), I, p. 265.

18. Doucet, *Fundamental Principles of the Laws of Canada*, p. 264 (Article 225); Beaubien, *Traité sur les lois civiles du Bas-Canada*, I, p. 47; in the same sense, see the explanation by A.-J. Massé, *Le parfait notaire, ou la science des notaires* (Paris: Garnery, 1809), II, p. 585.

19. On the special nature of the contractual dispositions which could be inserted in a marriage contract, see Blondela, *Traité des connaissances nécessaires à un notaire* (Paris: Nyon, 1781), II, pp. 226-245. All commentators shared the opinion that "le contrat de mariage est sans doute le plus important de tous ceux qui se font entre les hommes, puisqu'il sert de fondement à la vie civile, au repos des familles & au bien de l'État; aussi est-il celui à qui on a donné de plus grands privilèges, & une autorité toute particulière," C. de Ferrière, *Nouveau commentaire sur la Coutume de la Prévôté et Vicomté de Paris*, rev. by Sauvan D'Aramon (Paris, 1770), I, p. 253.

perfect agreement as to the desired changes: hence the haste of Lydie and Hubert, once they decided that separation of goods was a preferable marriage regime.²⁰

But how did they arrive at this decision? What discussions went on among the future brides and grooms and their families? How much say did any woman have? How well did Montreal notaries inform their clients with respect to the different possibilities that the Custom offered? We have uncovered no descriptions of advice given by notaries to marrying couples and their families. The notary ideally should have informed them of their three major options: community of property, separation of property and exclusion of community. Certainly, each of these was represented in the marriage contracts rendered in Montreal in the 1820s and 1840s. The wording of the contracts, however, suggests that in some cases, neither the marrying couple nor the notary always knew exactly what they were doing.

A well-informed notary would have explained the options offered within the Custom to the marrying couple and their families. He no doubt would start with the most common regime — community of property — and explain how the parties could mould this to their particular needs. He might then describe the advantages that separation of property or exclusion of property might offer. To understand the changing choices of Montreal couples over this period, we must briefly examine each regime.

Community of goods (“Communauté de biens”)

Notaries with francophone clients may not have had to explain much about the choice of community of property; this regime had prevailed in the colony since the earliest times and was the choice of over seven out of ten of the couples making a contract in the 1820s (although of under one-half twenty years later).²¹ Yet couples did need to understand the ways in which they could

20. Processes initiating either “séparation de biens” or “séparation de corps et de biens”, the closest thing to a divorce in Quebec, changed the regime from community to separation, but did not allow a couple to enter into the other kinds of arrangements possible in a marriage contract.

21. This is a dramatically different situation from the 18th century, from earlier in the 19th century, or from what appears to have prevailed in rural areas at the same time. Not only do most couples appear to have signed marriage contracts in the earlier period, but throughout the 18th century and into the early 19th, the regime of “communauté de biens” was the overwhelming choice of couples marrying with contracts. Of the 1,032 marriage contracts passed on the Island of Montreal between 1750 and 1770, all but 4 created community of property. Y.-J. Tremblay, “La société montréalaise au début du Régime anglais”, p. 59. In a sample of 70 contracts made in Montreal between 1801 and 1812, only 8 were not in community, and 7 of these were made by anglophones; Martine Cardin and Guy Desmarais, “Les contrats de mariage au Bas-Canada: étude préliminaire,” *Cahiers d'histoire*, III, 2 (Spring 1983), p. 50. In Quebec City, at the turn of the century, community was still the dominant choice. Less than 4% of couples stipulated another regime. Hélène Dionne, *Les contrats de mariage à Québec, 1790-1812* (Ottawa: National Museum of Man, Mercury Series, 1980), p. 41.

modify the basic premises of this regime to fit their particular needs. There were three major advantages to signing a contract in community of goods over the "communauté légale" or "coutumier" automatically created by marriage without one. Firstly, the couple could designate much more explicitly what property coming into the marriage would be treated as part of the community and what would remain outside of it. Secondly, they could protect the community against the creditors of either spouse for debts incurred before marriage. Finally, they could make provisions for the surviving spouse by designating a specific dower or some alternative arrangement that would come into effect on the death of the first spouse.

In contrast to the rules for those who married without a contract, the law permitted marrying couples choosing community in a contract significant liberality in determining precisely which property would become part of the community. Most importantly, either spouse could designate some or all moveables brought into the community at the time of the marriage, or which, subsequently, would fall to the community as "propres fictifs".²² By such a clause of "réalisation" or "stipulation de propre", these were excluded from the community to the extent that they established an obligation against the marriage community for the value of the property "réalisée".²³ When André Thomas, a master grocer, signed a marriage contract with Julie Hermine Dubord-Latourelle in 1842, for example, they chose community of goods, except that he kept 200 pounds that he was expecting as part of his inheritance

Although the author notes that the choice of a regime was one of the major reasons behind the notarized contract, she makes no attempt to quantify the choice of regime other than to casually state that "ceux rédigés en anglais (nous en avons un peu moins de 4%) différaient dans les accords financiers et ils n'étaient pas régis par la Coutume de Paris." The pattern appears similar in Paris. Of 3,706 marriage contracts signed in Paris over the period from 1769 to 1804, Jacques Lilièvre found that only 178, or 5%, established a regime that was not community: *La pratique des contrats de mariage chez les notaires du Châtelet de Paris de 1769 à 1804* (Paris: Éditions Cujas, 1959), p. 15.

22. The precise wording of the clause of "réalisation" determined how the property in question would be treated in a succession: 1) "lui sortiront nature de propre": if the spouse reserving the property died first, the property would fall to the children or to collateral heirs. The surviving spouse would succeed to the property, to the exclusion of all other heirs, if any child died prematurely; 2) "lui sortiront nature de propre, et aux siens": children succeeded to the property so designated before the surviving spouse, whose claim only became effective, to the exclusion of other heirs, after the death of the last child; 3) "lui sortiront nature de propre, et aux siens de son côté et ligne": collateral heirs succeeded to the property after the death of the last child, to the exclusion of the surviving spouse. C. de Ferrière, *La science parfaite des notaires*, I, pp. 273-277; H.D. Beaubien, *Traité sur les lois civiles du Bas-Canada*, II, pp. 303-307.

23. While a husband could not alienate or mortgage his wife's true "propres" without her consent, he was free to dispose of her "propres fictifs" which became indistinguishable from other moveables in the community. H.D. Beaubien, *Traité sur les lois civiles du Bas-Canada*, II, p. 305.

from his father, out of the community.²⁴ Catherine Fullum, similarly, reserved “différents meubles, linges et hardes de corps estimés à l’amiable entre les parties à la somme de 600 livres, laquelle dite somme lui sortira de propres à elle et aux siens de son estoc, côté et ligne.”²⁵ Between the 1820s and 1840s, growing numbers of husbands resorted to this convention, highlighting how even those marrying within community sought to keep separate control over capital not embodied in land: deeds of debt, bank stock, stocks of merchandise, as well as various successorial rights.²⁶ Where “réalisation” transformed a moveable into a “propre”, “ameublissement” worked in the opposite direction by relaxing the controls over real property in the family line.²⁷ Over the first half of the 19th century, couples were less likely to use this convention.²⁸ Those who did place their real property at the disposal of the community — mostly artisans and various small proprietors such as farmers, shopkeepers and carters as well as the wives of such men — apparently intended to provide a secure economic basis for the marriage by pooling limited resources.²⁹

The second advantage of a contract in community was that neither spouse inherited the other’s pre-marital debts. Spouses marrying with a contract always agreed to pay their earlier debts separately, using the revenues from personal property that was specifically itemized or evaluated. Agreeing

24. ANQM, Marriage contract of André Thomas Ouellet and Julie Hermine Dubord-Latourelle, n.m. Joseph Belle, 30 April 1842, no. 4818.

25. ANQM, Marriage contract of Adolphe Riendeau with Catherine Fullum, n.m. Pierre Beaudry, 4 April 1842, no. 708.

26. Since the husband administered the community and became the owner of all of the moveables entering the community including those from which his “propres fictifs” might be taken, the clause of “réalisation” had little meaning when applied to his property because he became liable to himself for the moveables “réalisés”. While “réalisation” improved the position of a wife who renounced the community in favour of claiming her matrimonial rights, including her “propres fictifs”, a similar clause to the husband’s benefit only had effect when his wife or her heirs accepted the community: C. de Ferrière, *La science parfaite des notaires*, I, p. 277.

27. 1) If the parties agreed to a ceiling on the value of the real property covered by the clause, the real property did not itself enter the community. The wife retained full and entire ownership over the estate, but unlike true “propres”, her husband could encumber or mortgage the property up to the ceiling stipulated. 2) If the parties agreed that the estate should be sold or that it become a “conquêt” of the community, in either case, until such time as it was sold, the wife retained ownership. In renouncing the community, the wife could repossess the unsold property provided that the marriage contract gave her the “droit de reprise”. C. de Ferrière, *La science parfaite des notaires*, I, pp. 265-266.

28. The proportion of contracts stipulating partial or general “ameublissement” of estates fell from 24% in the 1820s to 14% by the 1840s.

29. See, for example, the “ameublissement” of a house and lot by the master joiner Louis Brousseau, on the condition that the community assume responsibility for the balance of the purchase price: ANQM, n.m. J.-H. Jobin, 5 January 1844, no. 4177. Charles Gauthier, a shoemaker, and Marie-Louise Deromme agreed that all of their property, present and future, acquired by any means, would enter the community: ANQM, n.m. Thomas Barron, 2 June 1825, no. 4261.

to separate their debts also meant that a widow's liability for her husband's debts was limited to those contracted during the marriage.³⁰

Finally, a contract in community allowed greater flexibility in making provisions for the surviving spouse. Husbands could make more generous provisions for their widows than the customary dower, which gave a widow the first claim on the revenue of half the husband's property, and these provisions were binding.³¹ After 1841, the only way to provide a dower was by specifying the details of it in a marriage contract and registering it at the Registry Office. Furthermore, women could agree to sell the land on which it was based and to renounce their dower rights. While the dower continued to exist, it was no longer protected by an automatic lien on the real property of the husband. Wives increasingly were encouraged to renounce their dower rights in favour of receiving a specific annual sum or gift should they be widowed. Olivier Sénécharles, a joiner, for example, promised his wife 6 pounds as a dower should he die and the contract was dutifully registered. Carpenter Martial Beautron promised 300 pounds.³² Renunciations became so common that during the 1840s, several notaries had printed forms stating there would be no dower.³³ Women were left potentially much more vulnerable should they become widows, dependent both on the whims of the parties to the marriage contract, and on the vagaries of a husband's fortune.

Other provisions could be made only within a contract. By providing a "préciput", the couple ensured that the surviving spouse could deduct money or moveables up to a certain value from the whole mass of the community property before the estate was divided among the heirs. Thus, Olivier Sénécharles and Joséphine Allaire also specified that the surviving spouse should receive as a "préciput" 3 pounds as well as a bed and furniture of the bedroom, bedding and clothing. In addition, as was usual, the wife was to receive her jewels should she survive, the husband his fire-arms.³⁴ Couples also could specify a "don mutuel" in the marriage contract. This gift transferred the usufruct for all of the community property and all of the deceased spouse's personal property — "meubles" and "immeubles", "acquêts" and

30. H.D. Beaubien, *Traité sur les lois civiles du Bas-Canada*, II, pp. 307-310; C. de Ferrière, *La science parfaite des notaires*, I, pp. 265-266; A.-J. Massé, *Le parfait notaire*, II, pp. 592-595.

31. The customary dower represented one-half of the estates that the husband held at the time of marriage and one-half of those he acquired during the marriage. (Articles 247-248).

32. ANQM, Marriage contract of Olivier Sénécharles and Joséphine Allaire, n.m. Pierre Beaudry, 7 November 1842, no. 449; Marriage contract of Marital Major Beautron and Lucie Mûter, n.m. Pierre Beaudry, 27 November 1843, no. 17.

33. See, for example, ANQM, Marriage contract of Édouard Monarque and Élizabéth Poitras, n.m. Pierre Beaudry, 29 January 1843, no. 760. This move towards renunciation of dower follows the trend elsewhere. See especially S. Staves, *Married Women's Separate Property*, pp. 27-55.

34. ANQM, Marriage contract of Olivier Sénécharles and Joséphine Allaire, n.m. Pierre Beaudry, 7 November 1842, no. 449.

“propres” — to the survivor in cases where there were no surviving children at the time of their widowhood.

A marriage contract in community of goods did not allow a wife to undertake any legally binding action without her husband's express authorization. Against the potentially ruinous administration of her husband, the law offered a married woman only two, rather drastic means of protection: to claim her matrimonial rights either by suing for a judicial separation from her husband, or by renouncing her part of the community upon his death.³⁵ If, however, she was recognized as a “marchande publique” (articles 234 to 236), she was entitled to act on her own in matters concerning her trade, although this did not include the right to sue without her husband.³⁶

Separation of goods (“Séparation de biens”)

Many factors might have influenced couples, their families or the notaries to consider the possibility of avoiding community of property by keeping all of the property of each spouse separate throughout the marriage. The economic crisis of 1837 no doubt showed some families the dangers of combining all assets in one pool. If a wife's land and income were separate, it could not be seized by creditors. At the time of marriage, men could make gifts to their wives which would form part of their separate property, protected from creditors.³⁷ In other families, the father of the bride may have wanted to keep money aside for his daughter because he did not trust his future son-in-law to manage it well. The regime of separate goods clearly offered advantages to those interested in accumulating and keeping property within their family line, of protecting each spouse's goods against the other's creditors or in giving some measure of administrative freedom to the wife. Why particular couples chose it depended upon their individual circumstances.³⁸

These benefits were pursued by a growing proportion of those making a contract. In the 1820s, only one-quarter of the Montreal couples making a contract clearly had chosen “séparation de biens”. By the 1840s, about one-half had done so (Table 2). In these marriages, there was no community of

35. As a matter of law, the *Coutume* permitted a wife to renounce the community, but in a “communauté légale”, she could only claim the “douaire coutumier” and her “propres”. Under the “communauté conventionnelle”, however, these matrimonial rights included the “douaire préfix” and the “préciput”, as well as all of the property which she brought to the marriage and which fell to her during the community, provided that the contract expressly gave her the “droit de reprise” for all property owned by her by whatever means.

36. Brian Young, “Getting around Legal Incapacity: The Legal Status of Married Women in Trade in Mid-Nineteenth Century Lower Canada,” in Peter Baskerville, ed., *Canadian Papers in Business History*, 1 (1989).

37. Cases cited in various case reports highlight the extent of this practice. See, for example, *Joseph et al. vs. Fortin et al.*, and Nugent, opposante, and Thompson *et al.*, contestant, *Quebec Law Reports*, 7 (1881), p. 87.

38. Unlike a judicial separation of property, that created by a marriage contract was irrevocable.

property; the property of each spouse remained separate. Each partner was responsible for his or her own debts and, unlike in community, the wife was expected to contribute to the household according to her means and position. The wife, furthermore, might be given the free use of her income including wages and the right to administer her own property. In theory, she could administer her moveable property, but not her immoveables, without her husband's permission. In practice, the courts appear to have had a great deal of trouble determining exactly what such women were free to do and to have demanded a husband's authorization for all but the purchase of household necessities.³⁹

Limited as it was, this choice gave married women rights unavailable to most wives in the common law colonies without releasing them from their general legal incapacity. They still could not make contracts other than those related to the administration of their own property.⁴⁰ Wives married in separation could not guarantee their husbands' debts or alienate their own goods to pay for them. Nor could the husband use his wife's name and property to extend his credit.⁴¹ Most of these women, however, did have some control over the day-to-day administration of their property, protecting it from potential misuse by their husbands.

Exclusion of community ("Exclusion de communauté")

There was a second alternative to community of goods that was less well known, less favourable to the wife than either separation or community, and in several ways was closer to the common law. When couples excluded community but did not provide for separating their property, the regime was known as exclusion of community. French legal commentators of the 18th and 19th centuries were agreed that this regime was the least favourable to the wife, for she was barred from any claim on the properties and revenues acquired by her husband during the course of the marriage (a disadvantage shared with separation of property).⁴² She was not entitled to administer her own real property except by special authorization and it was assumed that all moveable property belonged to the husband unless she could prove clear title with receipts or a written inventory. Unlike those married in community or

39. See Brown *et al.* vs. Guy *et al.*, and Proulx, *The Legal News*, 4 (1881), p. 264; Bateau vs. Brault *et uxor*, *Lower Canada Journal*, 1 (1857), p. 171.

40. Pothier, *Traité de la communauté*, p.75; *Revue de Législation et de Jurisprudence* (1846), p. 406, appeal of Hertel de Rouville vs. The Commercial Bank of the Midland District.

41. *Registry Act, Statutes of Lower Canada*, 4, Victoria (1841), Chap. XXX, section 36. Exactly how to interpret this statute was debated by jurists. Different opinions were clear in the case of Dame Rachel Boudria vs. Mathew Mclean, reported in the *Lower Canada Jurist*, 6 (1862), pp. 65-74.

42. "Tout ce qui provient de la collaboration commune étant destiné à soutenir les charges du mariage, et le mari étant tenu de pourvoir à toutes ces charges, tous les produits et gains provenant de cette collaboration appartiennent au mari; ainsi, les gains faits pendant le mariage par la femme non commune appartiennent, comme les fruits de ses biens personnels, au mari seul," A.-J. Massé, *Le parfait notaire*, II, p. 613.

common law jurisdictions, she did keep ownership of the immoveables brought to the marriage and they were to be returned to her should her husband die first.

Because wives had so little power and benefits when married under exclusion of property, it has been suggested that, in France, recourse to this regime was rare. In Montreal, some forty couples in the 1820s and around sixteen in the 1840s appear to have had marriage contracts that were worded in such a way that the regime created was exclusion of community (Table 2). What is not clear is how many, or indeed, whether any of these couples actually intended to establish a regime of exclusion, or whether they did so unwittingly because of the mis-phrasing of their contracts by the notary. Some notaries, and perhaps the couples themselves, appear to have believed that by simply specifying that they did not want community, they were opting for separation. They were not. While separation of property automatically meant there was no community — the reverse was not true.⁴³ When a notary specified that there should be no community of property, but had not made clear the property of each spouse should remain separate, he was creating the regime exclusion of community.

The problems that such mis-wording of a contract could cause are clear in a suit that Charles Wilson initiated against Moïse Pariseau in the 1850s. Pariseau had failed to pay his rent, so Wilson took him to court and received a judgment against him. To recover the rent and costs, Wilson had various goods of the Pariseaus seized. Madame Pariseau opposed his right to seize some of these goods, claiming that they were part of her own separate property, established in their marriage contract.⁴⁴ As a wife married under separation of property, M^{me} Pariseau believed she had the legal capacity to file an action to recover her goods. However, the judge decided that the marriage contract had not created a separation of their property. Rather, it had excluded community, and granted to her husband the administration, management and enjoyment of her property, even though he could not alienate or engage it. The plaintiff, Wilson, argued that since there was no separation, M^{me} Pariseau had no right to act in court, so she could not be heard in the case. The court found in favour of the plaintiff and the judge's comments on exclusion bear citing in full:

It can happen that a marriage contract is written up contrary to the intention of the contracting parties, but it is certain that if the parties had intended to stipulate separation of goods, the principles of the law on the matter have been confused by the Notary, for the contract only contains an exclusion of community between the partners.⁴⁵

43. A.-J. Massé, *ibid.*, p. 613.

44. ANQM, Archives judiciaires, Cour supérieure de Montréal, 5 January 1857, no. 1707, Honourable Charles Wilson vs. Moïse Pariseau and Dame M. Simard (M^{me} Pariseau).

45. Lower Canada Jurist (1857), pp. 164-166. Our translation.

Clearly, the wording of a contract and the order of its provisions were extremely important. Analysis of the contracts signed in the 1820s and 1840s suggests that many couples who believed they had married separate as to goods could have discovered, like M^{me} Pariseau, that, in fact, their regime was one of exclusion, had their status been contested in court. What is not clear in the preceding judgment, and what also does not appear to have been clear to all notaries, is precisely what wording or formulation was necessary to establish separation if the term “séparation de biens” was not used by the notary.⁴⁶ This was especially true in the 1820s when opting out of community was relatively new and when few court cases had clarified the potential problems. Over one-half the contracts that opted out of community between 1823 and 1826 appear to have created a regime of exclusion — in most cases apparently against the wishes of the parties involved.⁴⁷

By the 1840s, the wording was clearer in many contracts and only 11 percent of those not in community seem to have created exclusion. The majority of these were drawn up by one notary, Ross, who made no contracts in separation.⁴⁸ Couples were more likely to get the regime that they wanted, as notaries developed standardized phrasing to designate a choice of separation. An unmistakable separation of property existed when the contract explicitly referred to “séparation de biens”, or stipulated that each spouse was to “separately and individually hold and possess” their property or that “ils

46. The ruling in *Wilson vs. Pariseau* was abstracted in two digests of court decisions, published within a year of one another, each with significantly different emphases: “That to establish a ‘séparation de biens’, the wife must stipulate, in the marriage contract, for the ‘gestion’ and administration of her property,” in Andrew Robertson, *A Digest of All the Reports Published in Lower Canada to 1863* (Montreal: John Lovell, 1864), p. 195; and “‘Séparation contractuelle’ is not effected, by providing in a contract of marriage merely for exclusion of community...”, in T.K. Ramsay, *A Digested Index to the Reported Cases in Lower Canada* (Quebec: George E. Desbarats, 1865), p. 291. However, the summary given by Robertson provides an important clue for understanding what formulation jurists believed was necessary and sufficient for creating “séparation” in the absence of a clear statement. This need for precision is in direct contrast to the philosophy of courts of equity in England, for example, where the intention of the parties was held to be more important than the wording. L. Holcombe reports that “no special form was required...and the obvious intention of the donor would suffice to create separate property”, p. 40. M. Salmon, in writing about 18th- and early 19th-century America, in contrast, argues that “precise wording in a settlement became the key to its effectiveness”, not in establishing the separate estate, but in delimiting a wife’s powers, *Women and the Law of Property*, p. 101.

47. ANQM, Marriage contract of Horatio Munro, merchant, and Henriette Berthelot, n.m. Bedouin, 25 January 1825, no. 2287.

48. Among his clients were Hugh Allan and Matilda Smith, whose contract was typical of those he made. First, it stated that “there shall be no community of property.” Hugh Allan was then designated to “receive the rents issues and profits of the property real and personal, moveable and immoveable which shall belong to the wife,” however, careful provisions were made to prevent confusion of their respective properties. Thus, although they appear to have aimed to create separate property, giving administrative rights to Allan, in effect, they created exclusion of property. ANQM, Marriage contract of Hugh Allan and Matilda Smith, n.m. Ross, 11 September 1844, no. 964.

jouiront séparément". Thus, notaries Bagg and Guy invariably stated that the partners would "severally and respectively, use, have, possess, and enjoy, their several and respective properties and estates, real and personal, moveable and immoveable...as their own separate properties...as if they had remained single."⁴⁹ Notary Belle simply specified in French that the respective spouses "jouiront séparément" their goods, while in English, he stipulated that there would be "no community of property...in either of the real or personal, which now belongs to them...or which may be acquired by them", and clarified that the wife would administer hers. Notary Bedouin, who had created many ambiguous contracts in the 1820s, was taking extreme care, specifying, for example, that the merchant Robert Esdale and his wife Nancy Fisher Mackenzie, a minor, would be separate as to property and that "each of them respectively shall hold, possess and enjoy his and her estate personal and real, moveable or immoveable" in the present and the future. In this case, he went on to clarify that "notwithstanding the exclusion of 'communauté de biens' and the separation of property", the husband should manage the wife's affairs.⁵⁰

This confusion among the notaries as to how to word the contracts reflects a general confusion about marriage law in the colony. It is not surprising. During this period, there were no standard manuals and no digests of legal cases. Prior to the codification of the civil law in 1866, it was difficult to know what parts of the Custom or the edicts and ordinances of the kings of France had been altered or abrogated by subsequent legislation or jurisprudence. The 1841 publication by Nicolas Benjamin Doucet of the *Fundamental Principles of the Laws of Canada* in English and French may have helped English-speaking notaries, for previously, the major texts on the civil law were only available in French. Notaries were trained through five-year clerkships, so the knowledge acquired depended on the notaries with whom they had worked. The Chamber of Notaries was only created in 1847, just after the period covered here. At that point, it received the right to give the notarial examinations previously administered by judges.

Notaries did make errors in law and inserted redundant clauses. In addition, some notaries and their clients may have been influenced in what they sought in a marriage contract by a different conception of property within marriage derived either from English common law or equity. A further factor to consider, therefore, both in understanding the declining use of contracts and the growing importance of "séparation de biens", is the influence of English legal traditions.

49. See, for example, ANQM, Marriage contract of George Mantz and Anne Isaacson, n.m. Bagg, 10 October 1843, no. 67.

50. ANQM, n.m. Bedouin, 5 October 1842, no. 6005.

Legal heritage and the choice of marriage regime

Most couples who had migrated from England or other regions where the common law ruled relations between husband and wife were not used to the options possible within the Custom, nor to the idea of making a marriage contract. In these jurisdictions, marriage obliterated the wife's legal identity and drastically curtailed her property rights. Expressed in its most extreme form by Blackstone, the common law held that marriage transformed the two spouses into one person, the husband. All of a wife's personal property passed to her husband on marriage as did the control of her real property. This meant that any wages a woman earned, revenues generated by selling butter or sewing, along with shares and any other forms of liquid property, legally belonged to the husband. Furthermore, the husband could do anything with her real property short of selling it. Revenues generated by real property were also his. As a non-person in the eyes of the law, a married woman could not make contracts or sue. She had no legal responsibilities and, therefore, no liabilities.⁵¹

Immigrants arriving in Montreal from the British Isles or the United States, then, brought with them a legal heritage in which most couples made no arrangement about property prior to marriage. Samuel Gale was blunt about this in testimony he gave in 1828 to the Select Committee of the British House of Commons on the State of the Civil Government of Canada. In order to make a marriage contract, he argued, "it is necessary to have some idea of the law, and most Englishmen who come to that country know very little about that."⁵²

In common law countries, the main way of avoiding these disabilities for married women, as well as the problems surrounding property and its disposition and control, was to turn to a separate body of English law-equity. After the 16th-century, families wishing to settle property on daughters, so that it would remain out of their husbands' hands, or husbands wanting to protect some property from creditors, had turned to the Courts of Chancery. The developing body of equity law there enabled the parties to make different provisions through trusts. Parents, the future husband, or other interested people could settle any amount of property, with basically whatever conditions they wished, on the future wife by creating complicated trusts that set aside property as a separate estate. A third person usually controlled these trusts and often the amount of liberty a woman had to dispose of the property involved was quite limited. They were usually guaranteed, however, a given annual

51. The best descriptions of married women's legal and property rights under the common law and of the different kinds of property within the common law are to be found in L. Holcombe, *Wives and Property*, pp.29-33; N. Basch, *In the Eyes of the Law*, pp. 20-25; M. Salmon, *Women and the Law of Property*, pp. 14-18.

52. "Report from the Select Committee on the Civil Government of Canada," *British Parliamentary Papers*, 8 May 1828, p. 23.

income which was theirs to use as they wished.⁵³ When these settlements were made prior to a marriage — they also could be made during one — they performed a function roughly similar to a marriage contract, and the effect on property was akin to choosing separation. Such marriage settlements were expensive to make. In England, they were used largely by an elite minority of landed and wealthy families. Across the border, in the State of New York, during the early 19th century, some middle-class couples also took advantages of the options they offered, but, according to Norma Basch, they “best served landed and mercantile elites, the same classes for whom the first exceptions to common law marital rules had been carved out in English equity.”⁵⁴ Furthermore, such pre-nuptial settlements were difficult to make in jurisdictions where there were no courts dealing in equity.⁵⁵ While research is revealing that some women in British North America did have settlements during the 19th century, this was at first a complicated and legally risky procedure, before colonies like Upper Canada had courts with the personnel and jurisdictions to deal with equity cases.⁵⁶

For some Montreal couples steeped in common law traditions, the possibility of making a contract in exclusion of community may have appeared to be a way to duplicate a husband’s power under the common law. A contract in separation of goods may have seemed a cheap and viable alternative to a marriage settlement in equity. A contract in separation of property, for example, cost about 12 shillings at this period, while one in community cost less, suggesting another reason why less wealthy couples tended to choose community.⁵⁷ As a result, until married women’s property

53. The most useful works on the use of separate estates in England and the United States are: Susan Staves, *Married Women’s Separate Property in England, 1660-1833*; Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (New Jersey: Princeton University Press, 1989); Holcombe, *Wives and Property*; Basch, *In the Eyes of the Law*; Salmon, *Women and the Law of Property*.

54. N. Basch, *In the Eyes of the Law*, p. 110.

55. M. Salmon found that the presence of a separate court of chancery in New York, Maryland, Virginia and South Carolina allowed *femes covert*s to own separate property and to deal with it relatively easily by the early 19th century. This contrasted with Connecticut and Massachusetts where there was neither a chancery court nor a legislative assignment of jurisdiction for trusts and Pennsylvania where common law courts had equitable jurisdiction, which was uneasily exercised. *Women and the Law of Property*, p. 185.

56. C.B. Backhouse, “Married Women’s Property Law”; P. Ward, *Courtship, Love and Marriage*, pp. 46-47. Courts of Chancery were only set up in Upper Canada in 1839 after long delays and debates. Access was somewhat easier in the Maritimes, but there, as in the United States, marrying separate as to property remained costly and the practice of a minority of wealthy couples. Philip Girard, “Married Women’s Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867,” in Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law, III, Nova Scotia* (Toronto: University of Toronto Press, 1990), pp. 80-127. On the establishment of a court of chancery in Ontario, see Paul Romney, *Mr. Attorney: The Attorney General of Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: University of Toronto Press for Osgoode Society, 1986), pp. 76-78, 129-130, 141, 143, 173, 192.

57. Marriage contracts, 1823-1826, 1842-1845.

acts eliminated the husband's ownership of their wives' property and wages, and made separate property the legal marriage regime in common law jurisdictions, the possibility of making this choice offered Quebec women of all origins a liberty to control their own property and wages. This choice could be achieved only through recourse to equity in the various American States, England and the other Provinces of Canada.⁵⁸

Our data unfortunately do not allow us to determine with any precision how recently the couples marrying in Montreal during this period had come to Montreal, and the marriage data is limited to Catholic couples, so we do not have details on the background of many of the wealthier Protestants for whom we have contracts. Contracts certainly were rare among Catholic couples where the husband's father was still living in the British Isles, Ontario or the United States. Nearly 550 of the grooms marrying between 1842 and 1845 still had a father living in Ireland, and only 6 of them made a marriage contract. Those from Scotland, England or Ontario were more likely to do so, but the numbers were very small. The arrival of growing numbers of largely transient Irish immigrants clearly flooded the marriage cohorts and the city with people who had no tradition of signing marriage contracts and little economic reason to do so. Second-generation Catholic immigrants were no more likely to make contracts than those born elsewhere. Not one of the Catholic couples, where both spouses were anglophone and the father of the groom was a Montreal resident, made a contract.

By the 1820s and 1840s, the longer-established and predominantly Protestant, propertied anglophone citizens clearly were aware, in contrast, of the importance of making a marriage contract.⁵⁹ Many of the couples from this group who married during these decades had not arrived recently from common-law jurisdictions, but were from families long established in Quebec for whom English legal tradition may have held little significance. They had

58. The earliest married women's property acts in common law jurisdictions were passed during the 1830s in some American States. It was not until the 1860s, however, that fairly comprehensive acts giving wives the right to control both wages and real property were passed in growing numbers of states. In British North America, the earliest acts were passed in the Maritimes and the gold rush colonies of the West. Ontario passed a fairly comprehensive act in 1872. In England, feminists started a lengthy battle to transform the law during the 1850s. A largely unsatisfactory bill was passed in 1870 that did have the advantage of giving women the right to their wages, and a more comprehensive one in 1882. N. Basch, *In the Eyes of the Law*, pp. 137-161; M.L. Shanley, *Feminism, Marriage, and the Law*, pp. 44-69; L. Holcombe, *Wives and Property*; C.B. Backhouse, "Married Women's Property Law"; Amy Dru Stanley, "Conjugal Bonds and Wage Labour: Rights of Contract in the Age of Emancipation," *The Journal of American History*, 75, 2 (September 1988), pp. 471-500; P. Girard, "Married Women's Property".

59. In analysing the contracts, we have used the language of the contract as the means of identifying the ethnic and linguistic affiliation of couples. Clearly, this is an imprecise method, although the hypothesis that such a document, so closely linked to the intimate life of a couple, would be made out in their usual language of communication does not seem implausible.

learned the importance of making a marriage contract to conserve property within the family line and to keep some family belongings out of the hands of creditors. As early as the debate preceding the passage of the *Quebec Act*, when the civil law was reinstated, some leaders of the English community had identified marriage contracts in combination with the right to will as ways around Lower Canadian civil law.⁶⁰ Some English residents were convinced that the community of goods was unfair to the husband, limiting his capacity to accumulate and dispose of property freely. Jonathan Sewell, the Attorney-General of the colony, and later its Chief Justice, explicitly stated in 1801 that the new law on willing would encourage greater concentration of property in the hands of men by allowing wives to leave their share of the marital community to their husbands.⁶¹ Judge P.L. Panet, in contrast, stressed the fact that since a Canadian woman was the owner of her half of the community, the law should make clear that she also could dispose of that property by will.⁶²

It is interesting that apart from this exchange between Sewell and Panet, there is little public evidence of concern about marital regimes in the debate between anglophones and francophones on the civil law. This contrasts dramatically with the sustained and heated debate that continued until 1839 on the negative effect of the hidden "hypothèque" (mortgage) that guaranteed a widow's dower rights.⁶³ Yet public debate may have been unnecessary since signing a marriage contract was so easy. Experience with Lower Canada's civil law and the desire to regulate the ownership of property clearly, rather than a transposition of equity ideas into the civil law of Quebec, probably explains why the majority of these couples made a contract.

In the 1820s, 27 percent of all contracts made by couples who married in Montreal were in English; in the 1840s, 33 percent were. This largely privileged minority did use marriage contracts to opt out of community of property. Only 4 of the 65 anglophone couples signing contracts chose community in the 1820s, while only 2 out of 96 did so two decades later (Table 2). Separation was the clear choice of approximately 9 out of 10 by the 1840s. By opting for separation, such anglophones were making a choice similar to that made by men and women in similar class positions in the States to the South, in much of the British Isles and in other English colonies where the common law prevailed. Yet they also were opting for an existing choice

60. See André Morel, *Les limites de la liberté testamentaire dans le droit civil de la province de Québec* (Paris: Librairie générale de Droit et Jurisprudence, 1960), p. 27.

61. Sewell to Milnes, 2 April 1801, PAC, MG 11, Q.86, pp. 249-255.

62. P.L. Panet, Observations on a protest of the Honourable William Osgoode, Speaker of the Legislative Council, on a bill entitled "An Act to explain and amend the Law respecting last Wills and Testaments", 2 April 1801, PAC, MG 11, Q.86, pp. 259-267.

63. Note that while English observers referred to such dower rights as mortgages, an "hypothèque" constituted a different kind of legal instrument that had no exact parallel in the common law. See Evelyn Kolish, "Le Conseil législatif et les bureaux d'enregistrement (1836)," *RHAF*, 35 (September 1981) 2, pp. 217-230.

within the Custom, one that paralleled, but did not duplicate English law. Typical of such couples were Anne and John Molson, offspring of William and John, respectively, who married each other in the 1840s. Their uncle, Thomas, had not made a marriage contract and the family had gone to great lengths to keep any family property from falling into the "communauté de biens" created automatically upon his marriage.⁶⁴

Among francophone Québécois, the tradition of seeing a notary to make a marriage contract prior to marriage was well established. French Canadian Catholics continued to be more likely to sign marriage contracts than their anglophone counterparts, but the practice had, as we have already seen, diminished since the previous century. The growing number of francophone couples who had minimal property to organize simply did not make a contract. Only one-quarter would do so by the 1840s. Furthermore, while separation was initially a choice made predominantly by English couples who married, more and more French Canadians began to opt for this regime and the advantages it offered.

It was changes in the practice of francophones that, in fact, would explain much of the overall growth of separate regimes. The trend is clear. In the earlier period, over nine out of ten of the contracts written in French were in community. Two decades later, only seven out of ten were (Table 2).⁶⁵ In Montreal, growing numbers of marrying francophones were deciding to opt for the advantages that "séparation de biens" offered as a way of organizing property within marriage. They may have been influenced in their choice by anglophone Montrealers with a different legal heritage. Much more important, however, were the economic planning and pragmatism necessary to protect property and avoid the worst effects of bankruptcy in the increasingly complex and unstable economy that characterized Montreal and the colonies of British North America during this period.

Class, property and the choice of regime

In the first half of the 19th century, in Montreal, making a marriage contract became more important among the upper "bourgeoisie" as anglophone and francophone families learned how to use the flexibility of the Custom to their advantages, and became less common among the wider population. A growing majority of those making contracts chose some regime other than community, while those choosing community were more and more

64. ANQM, n.m. Gibb, 7 June 1845, no. 8059; Alfred Dubuc, "William Molson", DCB, Vol. 10, p. 520.

65. Religious affiliation bore no relationship to the regime chosen apart from that already linked to language. In the 1840s, there were only 11 contracts written in English for Catholic couples marrying in Notre Dame. Coming from Ireland (6), England (2), Scotland (1) and Upper Canada (2), these anglophone Catholics followed the pattern of other anglophones, not that of French Catholics.

likely to use clauses like “réalisation” to modify some aspects of that regime towards forms of separation.

Men who called themselves “bourgeois”, gentleman or esquire were not only the most likely to make a contract. They also were most likely to marry in separation (Table 3). Their behaviour changed little over this short period of time. Over 80 percent of couples where the groom reported his profession as “bourgeois” or gentlemen chose not to marry in community in both decades. It was among the city’s most important merchants that the shift towards separation was most pronounced. Half of the merchants and traders who married in the earlier period did so in separation, whereas over nine out of ten did so in the 1840s. French Canadian merchants were largely responsible for this shift. Whereas four out of ten francophone “marchands” and “négociants” had signed contracts in community between 1823 and 1826, twenty years later, the proportions were exactly reversed.⁶⁶ Like Hubert Langlois and his fiancée, Lydie Ferland, who had woken the notary so early in the morning in 1844 to change their marriage regime before marrying, other French-speaking men of commerce opted for separation (Table 4).

The movement towards separation was most pronounced among those most likely to be wealthy. Yet a similar though less dramatic shift occurred among smaller property holders, farmers and some artisans. Only one in ten men working in the leather trades had chosen not to marry in community in the 1820s; nearly one in five did so two decades later. Workers in construction were slightly less likely to have a contract in the 1840s than during the 1820s. Those that did, however, were much more likely to keep the spouses’ property separate. This made sense in trades where bankruptcies were frequent and a wife’s separate goods might be all that could be kept out of the hands of creditors.

Even couples deriving their livings from agriculture were more and more likely to chose separation. By the 1840s, one-third of “cultivateurs” marrying in Montreal chose to keep their property separate from that of their wives, and although the few anglophone farmers invariably chose separation, francophones were more likely to do so than two decades earlier. Tradespeople and those in small commerce also began to act differently over this period. About one-half had chosen separation in the 1820s; in the 1840s, over three-quarters did. The change among men in the liberal professions was similar (Table 3).

Marrying separate as to goods offered these newly formed, largely propertied families advantages very similar to those offered by the more complicated and costly process of settlements made in equity in the common

66. Among English merchants, only one contract was made in community of goods out of the total of 48 in the two periods.

law jurisdictions. Couples who had spare assets at marriage could protect a portion of those assets from some of the risks of the marketplace. They could keep each spouse's properties separate both within marriage and following the death of either spouse. Because a contract was relatively easy and inexpensive to make, this choice also offered the advantages that early feminists and other supporters saw in married women's property acts proposed and passed elsewhere. In the case of a husband's bankruptcy, wastefulness or poor administration, the wife's personal property was secure. Furthermore, a husband in business would not see the profits of his accumulated wealth pass automatically to his widow and her family should he die. For the wives, there also was the possibility of enjoying the full administration and disposition of their personal property, and some, albeit more limited control over their real property.

Married women's rights

It was not only in the movement towards separate property as the regime of the wealthy that Montreal practice parallels that found in common law jurisdictions over this period; this also was evident in the expansion of power given to wives. The earliest legislation in other jurisdictions initially gave married women property rights for economic reasons that were unrelated to any interest in women's rights. Most often, these were accorded during times of depression to protect family property from creditors. But in countries like the United States and England, where there were organized feminist movements by the 1840s and 1850s, more comprehensive rights eventually were won as a result of pressure based, at least partially, on the argument that it was only just if wives should control their own property. It is interesting that in many of these common-law jurisdictions, French civil law was cited by legislators as being more favourable to married women than the common law. This was, in part, due to a romantic vision of the idea of community of property, but also to the recognition that separation of property was so much more easily achieved.⁶⁷

Contracts made in Montreal that specified separation of goods increasingly were likely to give wives more explicit control over their own property. The trend parallels that found by Suzanne Lebsock among the couples of Petersburg, Virginia, in precisely the same period.⁶⁸ During the 1820s, over one-third of the merchant and "bourgeois" husbands or their families took

67. See, for example, N. Basch, *In the Eyes of the Law*, pp. 62-63, 116, 147, where she describes the attraction that the idea of community of property held for major jurists like Kent and legislators like Hertell. As far away as New Zealand, Members of Parliament cited French civil law as treating married women more favourably than the common law when they argued for married women's property acts. *Debates*, New Zealand, 1870, pp. 142-143.

68. S. Lebsock found that "before the 1840s, only 14.3% (6/42)...empowered the woman to sell her property; from 1841 to 1860, that figure jumped to 62.3% (33/53)." *The Free Women of Petersburg*, p. 76.

pains to specify that, despite the fact that a wife automatically had the right to control her own property under this regime, theirs would not. About one-half of the contracts that were not in community gave the husband administrative power, and this was true of both English and French couples (Table 2). By the 1840s, in contrast, nearly nine out of ten such contracts gave the wife the power to administer her own property. Some women may have insisted on this right, or men simply may have found the idea easier to accept and seen advantages to it. The question of women's property rights within marriage and the desirability of separate property must have been discussed in some Montreal households. Just across the border, in New York, legislation that would have made separate property for women the norm had been unsuccessfully proposed in 1837. In the same year, Sarah Grimké had begun publishing a series of letters in the *New England Spectator* that harshly criticized marriage under common law as destroying women's independence and crushing their individuality.⁶⁹

The growing importance of separation among those making a contract, coupled with the tendency to follow the normal provisions of this regime by giving administrative power to the wife, meant that within that minority of the population who signed a contract, more and more women were enjoying some rights over their own property. Women's own desires and arguments must have played some part in this. It seems fairly clear that neither parents nor future husbands would have so empowered women whom they believed incapable of the necessary administration. Nor would they likely have given such powers to a woman reluctant to use them. The fact that giving administrative power to a wife became the normal procedure when couples chose separation highlights changes of perception as well as practice — both within the population at large and among notaries.

This potential legal liberation was limited to a minority of elite women. How they used it requires further study. Certainly, it appears to go against the overall trend of the period in which women lost both their customary dower rights and the right to vote. The majority of Montreal wives — all of those who married without a contract and all of those who made a contract specifying either "communauté" or exclusion — remained totally dependent on their husband's administration of property and of the household during their marriage.

69. These were later republished as *Letters on the Equality of the Sexes and the Condition of Women* (Boston, 1838). See N. Basch, *In the Eyes of the Law*, pp. 119, 182.

Conclusion

This study is preliminary in the sense that it examines only the framework and the beginnings of marriage, the use of a contract and the choice of regime. We need to know more about how men and women arrived at decisions about their marriages, and how they used their rights within marriage or coped with the absence of rights.⁷⁰ The research clearly demonstrates, however, that at least three important changes were occurring in early-19th-century Montreal. Firstly, as a diminishing proportion of Montrealers had property to organize, marriage contracts became more and more a tool of the propertied minority of the population. Most marrying couples were either quite willing to live with the community of property created automatically on marriage, or were unaware that it could be circumvented by signing a contract.

Secondly, a rapidly growing proportion of those signing contracts chose to keep the property of each spouse separate rather than create a community of property. This choice was not limited to anglophones. Whereas during the 1820s, those francophones choosing to make a marriage contract opted almost universally to marry "en communauté de biens"; by the 1840s, a growing proportion were choosing separation. This shift was most pronounced when the husband was a merchant or "bourgeois" among whom separate regimes could offer significant protection in times of economic crisis or bankruptcy.

Thirdly, because of the choice of a regime of separation, more and more of the wives of wealthier Montrealers appear to have had the power to administer their own personal goods. How this worked out in practice has to be determined in other ways, but the shift was real. It offered the minority of women a circumscribed legal capacity denied in the two other regimes, denied generally by a legal system that equated married women with minors and idiots, and unavailable under the common law that prevailed in other British colonies, in England and the United States until mid-century. Some of the first feminist struggles in these other jurisdictions were to enact legislation that gave all married women some form of separate property. Fights for married women's property acts gave women experience in the political arena and furnished them with allies who were useful in subsequent crusades. It is interesting to ponder the impact of the fact that Quebec's female élite did not have this cause as an early training ground for the subsequent development of feminism in the province. The possibility of making a private choice at the

70. We hope to present more detailed findings on the provisions for dowries and what happened when a husband died in a future article. On the necessity to add other sources to marriage acts and contracts, see Jacqueline Vincent, "Richesses et lacunes des actes notariés pour la connaissance des anciennes structures sociales : les contrats de mariage à Cannes de 1785 à 1815," *Revue historique*, CCL, 3 (1973), p. 402.

time of marriage may have held back legal changes in this area until well into the 20th century.

Neither francophones nor anglophones blindly followed their legal heritages nor the traditional uses of their civil law. The Custom of Paris has been identified by historians as contributing to the formation of a family-oriented, conservative society in which capitalist development and capital accumulation were thwarted.⁷¹ To be sure, the Custom was the fruit of centuries of judicial activity and reflected the preoccupations of previous eras: family lineage, landed property, the dominance of men. The same was true of the common law. However, the use that Montreal couples made of the property arrangements possible within the Custom of Paris clearly demonstrates that its stipulations were not so all-encompassing or comprehensive that they could not be adapted to changing needs. Its attractiveness to legislators in other jurisdictions, who sought models for a fairer distribution of property within marriage, also suggests that we should not dismiss it too rapidly as archaic. Francophones and anglophones alike shaped the possibilities of the law to their own ends. The Custom appears to have been a much more flexible body of law than most commentators, Zoltvany in particular, hitherto have suggested. At least in terms of marriage regimes, it could be moulded to the needs of those seeking to accumulate capital, so long as the notary was well-versed in the law. It clearly is not sufficient to look only at the letter of the law. How people used it or quietly went against its intents also must be considered.

71. Yves-F. Zoltvany, "Esquisse de la Coutume de Paris," *RHAF*, XXV, 3 (December 1971), pp. 365-384.

Table 1 Percentage of Couples Making a Marriage Contract According to the Type of Employment of the Husband. Catholic Couples Only, Notre Dame Parish, Montreal, 1823-1826 and 1842-1845

Year of Marriage	1823-1826			1842-1845		
	Employment Category	No. of Husbands	Contract No. %	No. of Husbands	Contract No. %	
Bourgeois	6	4	66	9	7	77
Upper Commerce	43	26	60	42	27	64
Other Commerce	19	9	47	50	11	22
Professions	8	4	50	25	17	68
Public Service	9	2	22	1	0	0
Construction	149	33	22	182	31	17
Production						
– Food	31	12	39	56	12	21
– Leather	58	23	40	96	15	16
– Wood	36	7	19	31	10	32
– Clothing	17	3	18	28	6	21
– Metal	25	4	12	35	9	26
– Other	14	3	21	14	3	21
Transport	73	7	10	155	17	11
Agriculture	77	36	47	49	16	33
Day Labour	189	2	1	210	13	6
Other	14	0	0			
Army Related				31	2	6
Nothing Reported	5	2	40	725	9	1
Total	759	178	23	1739	205	12

Sources: Marriage acts, Notre Dame Parish, Montreal, 1823-1826, 1842-1845; matched marriage contracts, all Montreal notaries, 1823-1826, 1842-1845. In cases where the husband's job was not clear in the marriage act, we took the information from the marriage contract.

Table 2 **Marriage Regime Chosen in the Marriage Contracts According to the Language of the Contract.**
Catholics and Protestants Combined, 1823-1826 and 1842-1845

Year of Marriage	1823-1826						1842-1845					
	French		English		Total		French		English		Total	
Language of the Contract	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Community of Goods	167	93	4	6	171	70	136	69	2	2	138	47
No Community	12	7	61	94	73	30	60	31	94	98	154	53
Total	179	100	65	100	244	100	196	100	96	100	292	100
% in each language		73		27				66		33		
Details on regimes other than community												
- Separation, the wife administers	6	50	28	46	34	46	56	93	80	85	136	88
- Separation, the husband administers	0		0		0		0		2	2	2	1
- Exclusion, the husband administers	6	50	33	54	39	54	4	7	12	13	16	11
Total	12		61		73		60		94		154	

Source: All marriage contracts signed by couples married in the Protestant and Catholic Churches of Montreal, 1823-1826 and 1842-1845.

Table 3 Marriage Regimes Chosen in the Contracts According to the Categories of Employment of the Husbands

Year of Marriage	1823-1826			1842-1845		
	Community Yes	No	% Not in Community	Community Yes	No	% Not in Community
Bourgeois	2	10	83	3	16	84
Upper Commerce	23	23	50	4	46	92
Other Commerce	8	9	53	6	21	77
Professions	5	4	44	7	21	75
Public Service	2	1	33	1	1	50
Army	0	3	100	0	6	100
Construction	33	3	8	30	13	30
Production						
– Food	13	0	0	12	3	20
– Leather	23	2	8	14	3	18
– Wood	7	3	30	7	0	0
– Clothing	1	4	20	3	4	57
– Metalworking	5	0	0	9	1	10
– Other	3	3	50	2	4	66
Agriculture	35	4	10	12	5	29
Transport	7	0	0	16	3	16
Day Labourers	2	1	33	4	0	0
Other	–	–	–	1	0	0
Not Reported	2	2	50	7	7	50
Total	171	73	30	138	154	53

Source: All marriage contracts signed by couples married in the Protestant and Catholic Churches of Montreal, 1823-1826 and 1842-1845. Where possible, missing details on occupations were taken from the marriage acts.

Table 4 Comparison of the Regimes Chosen by French and English couples Where the Husband Was a Merchant or Involved in Agriculture

Year of marriage	1823-1826				1842-1845			
	Community		Other		Community		Other	
French Merchants	22	81%	5	19%	4	20%	16	80%
English Merchants	1	5%	18	95%	0	0%	30	100%
Agriculture–French	35	95%	2	5%	12	80%	3	20%
Agriculture–English	0	0%	2	100%	0	0%	2	100%

Source: All marriage contracts signed by couples married in the Protestant and Catholic Churches of Montreal, 1823-1826 and 1842-1845. Where possible, missing detail on occupations were taken from the marriage acts.