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WORKING FAMILIES. AGE, GENDER AND DAILY SURVIVAL IN INDUSTRIALIZING MONTREAL. (Canadian Social History Series, McClelland and Stewart, 1993). Recipient of the 1993 John A. McDonald award and the 1993-1994 Harold A.Innis award..

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"MEN DEBATE DOWER: PATRIARCHY, CAPITALISM AND WIDOWS' RIGHTS IN LOWER CANADA," forthcoming in the proceedings of the Montreal History Group Conference on Power, Place and Identity. Historical Studies of Social and Legal Regulation in Québec.

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LES
GRANDES CONFÉRENCES DESJARDINS

Class, Culture, Family and the Law

Wife to Widow in Nineteenth-Century Quebec

Bettina Bradbury
YORK UNIVERSITY

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Director, Québec Studies Programme

Class, Culture, Family and the Law

Wife to Widow in Nineteenth-Century Quebec

Bettina Bradbury
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This paper presents three scenes of a much larger drama. Each treats a different set of actors, takes place in a different location, and at a different moment in the transition that some women made from wife to widow. All take place in Lower Canada between the 1820's and the end of the century. Most take place in Montreal in the years leading up to and following the rebellions. Politics were dominated by the shifting conflicts and allegiances that would erupt with the rebellions and shape post-rebellion politics and society. Montreal's elites diversified their interests, moving from the fur trade and imperial trade into new areas of accumulation in banking, land purchase, land transfer, mortgaging and eventually railways and industrial production. These were years of major economic fluctuations, when the risks of business failure were high and when providing for old age and death were a challenge. And, they were years of high death rates for men, women and children, of marriages where men were most frequently older than their wives so that widowhood was almost as common a state as being divorced is today. Growing

numbers of immigrants from Ireland combined with the move of rural Canadiens to swell the proportion of propertyless in the city's population. Class, language and culture divided and united the city's changing population, shaping their social relations at work, on the streets and at home, in public and in private.

Each of these three scenes deals with the negotiation of what a woman might expect to receive should her husband die before she did. Each involves men of authority who set out, debated or determined what women's rights after marriage should be. Thus though the subject of my talk is widows and their rights, the key actors are more often men than women. The key characters include husbands, merchants, notaries, politicians and lawyers. Women and widows are more shadowy figures in most of these three parts of this story, and propertied widows receive more voice than the growing numbers of propertyless.

I start in the relatively private space of the notary's office or family home, looking at choices made about widowhood by those couples who made a marriage contract.[2] I then move to the more public discussions that took place in the political sphere of legislative assemblies and councils, select committees, and published pamphlets and newspapers of Lower Canada.[3] The third location is the courts.[4] Here I discuss those court cases about widows' rights that were deemed interesting enough because of the lesson they taught, or sometimes because of the particular parties involved, to be reported in the law reports of Quebec.

My talk focuses on one of the potential bases of economic support that Lower Canadian law had always offered widows - their claim to a dower. Dower was the right of women who outlived their husbands to use a proportion of their husbands' real property to live on until their own death. Under the Custom of Paris, all widows had a dower that gave them the usufruct of half the real property their husband's owned when they were married or inherited thereafter. This

douaire coutumière existed without a marriage contract and continued to be a widow's right even if the land in question was sold. Widows had the use of this property. It protected them during their widowhood and they conserved it for their children.[5] Canadiens wanting to arrange something different for their widows had long promised a different kind of dower, a douaire préfix in marriage contracts. This set the dower at a specific amount, and could be taken from all of a man's property.[6] Both kinds of dower were radically transformed across the nineteenth century and it is the history of the customary, legal and political aspects of those changes as they occurred in Lower Canada and especially Montreal that I wish to tell here. Similar debates about dower and property in marriage were occurring in common-law jurisdictions across the nineteenth century, but feminist historians have paid little attention to areas of written law, and little attention to changes in Quebec, beyond presenting changes to dower as part of the defeat of women's ancient rights.[7]

I want to show how this essentially domestic question of a woman's claim on her husband's property was intimately linked to the major political, economic, cultural and national issues of the period.[8] It was negotiated, debated and discussed in private and in public. Private decisions and public negotiations reshaped property relations in marriage, the workings of the land market and the wider economy. Marriage, widowhood and dower, like language and the law, were inseparable from the conflicts of the pre-rebellion years and the growing dominance of capitalist relations.[9] Negotiations of these issues sometimes pitted family members against each other, fathers against daughters, francophones against anglophones, bourgeois against craftsmen and farmers, men against women and widows against their children.

Some of the outcomes of past negotiations have left their traces in the archives, many have not. It is easier to find the public voices of

men than of women, easier to follow the traces of literate, powerful men determined to change the law than of busy artisans or boarding house keepers who liked things just the way they were. In the three sections of this paper I draw on three main sets of documents that let us see some of the elements and outcomes of contemporary debates. I start with marriage contracts made by Montreal couples in the 1820's and 1840's. I then draw on newspapers, pamphlets and government documents to examine the public, political debates about the desirability of creating registry offices, for it was here that widow's right to a dower was most in question. I conclude with court cases in which widows' rights were an issue. In each section I will try and consider who the actors were, who was excluded by choice or policy, who participated in the decision making, what the cultural baggage was they brought into the negotiations, where the power lay and who determined the rules.

SCENE I:
NOTARIES, PARENTS AND THE MARRYING COUPLE

Scene One: Several days before their planned marriage, some couples, their parents if they were alive, and friends met with a notary to set out just how property should be organized in the upcoming marriage. They usually met in the notary's office, sometimes in the home of the bride or groom. This might occur at any time of day or night. We can imagine a variety of different scenes, with very different power dynamics at work depending on the relative wealth of each family and partner, the age of the bride and groom, whether it was a first or second marriage and the number of additional friends and family present. In the marriage contracts they signed we see only the result of negotiations that may have a lengthy history. Discussions of previous weeks, arguments and disappointments disappear in the documents reformulated into legal language, and increasingly inserted in the appropriate spaces of pre-printed forms.

Those who made a marriage contract have left a record. Most men and women did not. My colleagues at the Montreal History Group and I have estimated that in the 1820's around three quarters of the couples marrying in the huge parish of Montreal did not. By the 1840's nearly nine out of ten couples did not.[10] A conscious choice? Ignorance? The reasons for not doing so were multiple. Recently arrived Irish and English immigrants may well have had no idea that such a possibility existed. Canadiens for whom the provisions of the Coutume were part of custom were more likely to have decided that they did not need to make any provisions other than those that the law laid out. Perhaps this involved lengthy negotiations and discussions. Perhaps simply the decision that seeing a notary was just too expensive or would take valuable time away from daily matters.

The visit with the notary is best viewed as the conscious choice of someone - parent or future husand or wife - to organize marital property and provisions for widowhood in some way other than that set out in the law. The reason growing numbers of propertied anglophones of American, Scottish and British origin did make marriage contracts in the early decades of the nineteenth century was precisely because they had learned that it was the only way to avoid what some saw as the ridiculously generous provisions the Custom of Paris made for wives and widows alike.[11]

Thus by not visiting a notary to make a marriage contract, the vast majority of Montrealers agreed, consciously or by default to organize property as set out in the Custom of Paris. Any land that the groom or bride already owned or might inherit during the marriage would remain legally theirs. The revenues from it, however, went into the community of property which was managed by the husband. Any wealth or debts they accumulated during their marriage became part of the community of property, managed by the husband, but belonging equally to each partner. When either died, the other could claim their own half.[12] If it was the man who died, the wife also received her dower - the right to the use of one half of the land that fell outside the community of goods. Those who knew the law knew that no document was necessary to create this dower right or to claim it.[13] To be

eligible for dower a women simply had to marry and outlive a husband who had owned such property. They knew too that it was inalienable. It attached to the land he had owned when they married or inherited thereafter even if he sold it. Marriage itself created a general hypothec on all the husband's property and the dower took precedence over the claims of any other creditors of a man's estate.[14] Widows could only use their dower, for the land on which it was based was to go the children. But it did offer some compensation for the wife's inability to control property during the marriage and some potential economic support should she outlive her husband.

Those visiting a notary to make a marriage contract had other plans. Some wanted to slightly re-arrange what would fall into the community of property, or to specify that the wife should receive a dower worth a specified amount should she become a widow. There was nothing very special about this. French Canadians had been making similar choices for as long as there had been marriages on the banks of the Saint Lawrence. But, by the 1820's Montreal's marrying population was changing. A growing proportion of grooms and brides came from families steeped in the traditions of the English common law. Some were second, even third generation Lower Canadians, but understandings of marriage rooted in the common law still held their power. Under the common law all of a woman's property except her own land passed to her husband. Anything accumulated during marriage became his. And, a wife could only expect the usufruct of a third of his property as her dower right. Furthermore, by the 1820's conveyancing laws in most jurisdictions had made it relatively easy to sell land subject to a wife's dower as long as she agreed formally to the sale.[15]

Men and women brought these different legal and cultural understandings of marriage into their private individual decisions, their public writing and political discussions, and into the courts. Describing the way the Custom of Paris worked, Patriot John Neilson reminded the Select Committee of the British Parlisament, investigating the Civil Government of Canada in 1828 that "people in spite of all laws will follow their old customs and usages; it requires ages for people to alter their

customs."[16] The marriage contracts I have studied which were made by couples marrying during the 1820's demonstrate the continuance of old customs and usages as well as new customs. One hundred and seventy-nine Montreal couples made a marriage contract in French between 1823 and 1826. Almost all of these chose some variation of community of property for the duration of the marriage and the men stipulated a dower for their new bride. In only ten of these was dower renounced by the wife (SEE TABLE 1).

In the 64 contracts written in English, in contrast, only one husband promised any kind of dower for his bride. Instead they offered annuities, a lump sum, sometimes nothing at all. And, the widespread choice of separate property for wives gave them no claim on other wealth the husband might accumulate during the marriage (SEE TABLE 2). Notaries helped phrase these choices, but fathers, grooms and possibly mothers and fiancées made these decisions. It is hard not to hear the insistence of a determined father or groom behind the pen of the notary in those marriage contracts that stated with vehemence "that no community of property . . . shall now or at any time hereafter subsist between them, notwithstanding the *Coutume de Paris*, and all or any Law, usage and custom in relation thereto to all which the said parties . . . do hereby expressly derogate and renounce." In this case the bride's father was William Molson, the groom's his brother John.[17] As Alfred Dubuc has shown, this family had learned the hard way how important it was to opt out of the Custom of Paris when William's brother Thomas had failed to make a marriage contract and they feared that family property would fall into the hands of his wife Martha and her relatives.[18] Montreal's notaries seem to be struggling in these years to correctly phrase some of the choices that were much closer to the common law than the Custom in their conception. Some of their mistakes would cause couples, wives and widows untold problems in the courts in years to come.

If customary traditions and cultural identities explain the choices couples were making in the 1820's, this is no longer so clearly the case by the 1840's. Not only were growing numbers of francophone couples opting to

keep husbands' and wives' property separate, as research I published some time ago with Evelyn Kolish, Alan Stewart and Peter Gossage has shown.[19] They were also renouncing dower in growing numbers. Over one-third of the couples who married between 1842 and 1845 and wrote their marriage contract in french renounced a dower for the wife. This tendency was most pronounced among the francophone elite, and particularly among the leading merchants. Where only three francophone merchants out of nearly thirty had rejected dower in the 1820's[20], fifteen out of twenty did so in the 1840's.[21] Instead of stipulating a dower and preciput they chose to promise an annuity, sometimes with a lump sum of cash as well. English merchants also renounced dower, but were much more likely to promise lump sums to their widows, use of the interest on a specified sum of money or nothing at all (SEE TABLE 3). Arguably, for these privileged widows, a lump sum, or even an annuity may have been much more useful than the customary dower or douaire préfix. However, none of these alternative provisions for widows carried the same claim on a man's property as dower had. They did not take precedence over the claims of other creditors. Nor is it likely that they were worth the equivalent of the income from half these men's real property.

Such decisions made good business sense for men in commerce. If a wife's property was separate and not part of the community it could not be seized by creditors in times of bankruptcy. This same concern would lead men in common-law jurisdictions to accept early versions of married women's property acts from the 1830's on that separated a wife's property from her husbands, without necessarily giving her any control of it. At the same time, keeping the wife's property separate may have pleased wealthy parents, concerned to ensure that their daughters' contribution to a marriage was not whittled away by the bad habits, bad management or bad luck of the groom. In times of economic fluctuation, and especially in the years following the economic crisis of the 1830's, such caution made sense. Rejecting dower ensured that the husband could buy land and sell land more readily and assure the purchaser that his wife had no claim on it. This combination of provisions for wives and widows - separate property in marriage, clear annuities or lump sums for widows makes sense as the possibilities of making money

shifted from the fur trade, commerce and agriculture to finance, banking, real estate speculation and manufacturing. What women had to say about it I am still seeking to find out!

Class interests and concerns that were most likely generated by men's business lives, then, seem to partially explain the growing renunciation of dower by francophones marrying in the 1840's. Those still promising dower were less and less likely to be merchants, professionals or members of the elite, and even among men in construction and production there was a shift away from dower. Community of property and dower remained the marital regime in artisanal families, where such property arrangements recognized a wife's contribution to a family economy that required the productive and reproductive labour of both husband and wife if apprentices were to be fed and clothed and work completed on time.

SCENE II
POLITICS AND DOWER

To fully explore these changing choices about wives, widows and property it is crucial to move from the relatively private family negotiations that occurred when couples married to the broader political debates of the period before, during and after the rebellions. English merchants and others rejecting the Custom of Paris with such flourish in their own marriage contracts were making private contractual agreements. Since the Custom of Paris had been retained as the civil law of Quebec, British merchants and others had learned how to use the flexibility of the Custom to arrange their own family matters as they wished. Many also tried persistently to change those elements of the law they saw as feudal and a hindrance to business. Married women's rights to family property and widow's dower rights were very much part of the much broader public conflict about the relative merits of the Custom of Paris and the common law that permeated the politics of the nineteenth century.[22]

This political debate has left records in colonial papers, newspapers, pamphlets, journals of legislative assemblies and councils and in some private papers. The key players here were merchants, bankers, judges, justices of the peace, lawyers, politicians and other notables with the power to be heard. Although propertied women, most frequently widows did voice their political opinions by voting in early nineteenth century Lower Canada, their voices have left few traces in the available evidence of public discourse around marriage and widows' dower rights.[23]

In this prolonged debate changing ideas about family, property, freedom of contract, gender and citizenship pitted anglophones against francophones, Canadiens and patriots against constitutionalists and reformers in shifting constellations. Widow's dower rights were only one of many kinds of "secret encumbrances" allowed in the Custom of Paris that British merchants had tiraded against and sought to eliminate since the Conquest. In their public posturing dower took on the shape of a feudal devil casting widows' mourning weeds over the land and freezing up the possibilities of honest and open exchange and sale of land. In this British representation of the law, dower was one element of an outmoded legal system controlled by notaries who kept their documents under lock and key.[24]

Scars of this debate have left their marks on the historical record for the years between the 1820's and 1860's. One occasion when opposing views were clearly expressed was when the British House of Commons held a Select Committee hearing on the Civil Government of Canada in 1828. Samuel Gale, justice of the peace, lawyer and virulent opponent of the Custom of Paris expressed his outrage clearly, when he explained that the Custom "interfered with the right of the husband in the disposal of his property." He explicitly represented dower combined with community of property provisions as affronts to a husband's right to accumulate capital and dispose of it as he wished. The law, he carefully explained, entitled a wife to "one half ... of the entire personal property of the husband, and one half of the real property which *he has acquired during his marriage*." To make clear the injustice of this for hardworking men he explained that the law stated that should a

man's wife die "her relations can claim from the husband one half of the fruits of *his labour, although the wife may never have brought him anything*".[25]

This presumption of the male family head's relatively unfettered right to accumulate and decide freely how to dispose of his property was a central element of the discourse of english critiques of the Custom. The public and private pronouncements of members of the parti canadien and patriots prior to the 1830's present a totally different conception of the family. Speaking to the same committee lawyer, and patriot politician Denis Benjamin Viger explained that "by the laws of our country husbands and wives are partners and joint proprietors of every species of personal property."[26] Theirs was an enlightened and protective marriage law that looked after "widows and minors" the powerless members of families most in need of protection.[27] Widows dower rights were part of this. Moderate, anglophone patriot, John Nielson explained that he had not supported a bill to create Registry offices because "wives would lose their privileges; children would lose their privileges".[28]

It was around this issue of registry offices that widows' dower rights entered the public debate of the 1820's and 1830's. Recall that under the Custom of Paris unless a couple made a marriage contract renouncing dower marriage meant the man's own immoveable property was encumbered with a general hypothec or mortgage to ensure his wife's dower should she outlive him. This claim on the one major type of property that did not fall into the community of goods existed automatically. No legal document was necessary to create it. The wife's claim to this dower took precedence over the claims of any other creditors of an estate. And, it was not extinguished if the land was sold. In rural areas where the lineage of land transfers was well understood this probably caused few problems. In growing cities, with changing populations, however, purchasers could buy land, then discover years later that a widow had a claim on its revenues.[29] And, unlike in common-law jurisdictions, there was no way to extinguish this right by conveyancing procedures. A sheriff's sale, in which land to be sold was described in newspapers, then sold so that anyone with a claim to it could stake their

claim, could extinguish all other kinds of mortgages on land, but not dower.[30] Because of the tenacity of dower, all debates about land registration were also debates about the marriage contract and widows' rights. Those seeking to change dower were blunt. If the law respecting "the legal consequences of marriage on the property of the parties remain unaltered, the English will be deterred from settling the country," J. Stephen told the same committee in 1828.[31]

In debate about the law before the 1830's dower seemed to constitute a danger zone, a word that it was difficult to utter without conjuring up different visions of family and gender that divided anglophones from francophones, supporters of civil law from those seeking to make it closer to english legal traditions. Every attempt between 1785 and the 1830's to introduce some kind of registry system or to make land ownership public in some other way, or to eliminate other kinds of secret encumbrances foundered unless dower was excluded.[32] The creation of some kind of land registry system was suggested repeatedly by various Governors. At least nine bills were introduced in both Houses from 1817 through to 1836. The only legislation that passed set up registry offices in the Eastern Townships where the land tenure system was different.[33]

Yet, in the 1830's as Lower Canada lurched toward open rebellion, as all co-operation between the elected assembly and appointed Legislative council broke down and political divisions between patriots and constitutionalists hardened on most issues, some consensus seemed to emerge about the need to do something about dower. More and more French Canadians of all political persuasions began to argue that dower, and particularly the customary dower that existed without a marriage contract, should be abolished. Louis Hyppolite Lafontaine had proposed early in the 1835-1836 session of the Legislative Assembly that a committee look into "whether it would be expedient to amend the law of Dower, either customary or conventional." And, he had drafted a more comprehensive bill that proposed eliminating customary dower.[34] It failed to pass both Councils like

so much legislation at the time. During the rebellions at least one patriot meeting discussed abolishing dower rights along with the seigneurial system, linking both to the problems of attracting industry and capital to the colony.[35] And, when radical patriots issued their declaration of independence in 1838, the abolition of customary dower and creation of registry offices was clearly linked to their new citizenship claims that proposed universal male suffrage for those over 21, voting by ballot and equal rights for Indians but not women.[36]

By the time of the rebellions, dower seemed to have been liberated from its older association with private family matters and from its key place at the center of opposition between french and english law. It became linked by patriots and constitutionalists alike to the difficulties of attracting capital and industry to the Province, although their proposals about how it should be changed continued to diverge. Key constitutionalists had been seeking to abolish dower and establish registry offices in the years leading up to the rebellions. The leading promoters of registration, George Moffatt and William Badgeley had initiated and published petitions, polled the opinions of the Province's political elites, chaired special legislative committees[37] and published articles in the Montreal newspapers, pushing public opinion to accept the idea of creating registry offices and transforming dower. William Badgeley published a series of articles in the Montreal Herald in 1836 promoting registry offices and the abolition of customary dower. They were also circulated as a pamphlet. More conciliatory than Moffatt in his public writing and posturing, Badgeley suggested that change could be made in a way that respected the principles of the Custom of Paris. Arguing that "innovation and change" had characterised the jurisprudence in Lower Canada, he suggested that changes could be made without interfering with "old prejudices" or disturbing "existing rights".[38] Furthermore, he pointed out that a system of registration for land ownership and mortgages had been established in France in 1795 and that the customary dower had been abolished there. Such changes, he had concluded, would help "retain Capital in the province and advance and improve the country".[39]

These two men campaigned relentlessly against the patriots, for land registration and for the elimination of dower rights taking advantage of every political possibility to push their views. As delegates of the Constitutional Association they visited Lord Durham in England after the Constitution had been suspended and before the second rebellion broke out raising these and other issues and attempting to convince the Imperial Government to pass laws for the colony.[40] On his return, George Moffatt joined the Molsons, McGills and other largely anglophone elites chosen for their loyalty and appointed to the Special Council that was to rule the colony in the wake of the rebellions.[41] This select group of men were predominantly aged between 50 and 70, anglophone and heavily involved in commerce, banking, production and land speculation, or, as in the case of Chief Justice James Stuart trained in the law. As councillors they had the power to frame and pass ordinances without the inconvenience of any opposition.

One of the last of the hundreds of controversial ordinances passed by the Special Council was the Registry Ordinance which would reshape widows' dower rights. Members had expected to deal with it earlier. Indeed friends and relatives lobbied Councillors hoping for access to the many new patronage appointments they expected to become available. But, it was a complex subject that was suspected to exceed the Council's powers and that required careful drafting.[42]

The Registry Ordinance that became law the day before the Union with Upper Canada went into effect was drafted by Chief Justice James Stuart, who along with Dominique Mondelet, one of the few francophone Special Councillors had once been closely affiliated with the Parti Canadien, but had broken with the patriots.[43] Described as brilliant, outspoken and extremely knowledgeable about the Custom of Paris as well as the common law, Stuart's new affiliation with the authorities landed him the position of Chair of Council proceedings. According to fellow councillor Edward Hale, he did so wretchedly. Hale complained to his wife that he kept no order "and gets on with nothing at the same time that he is perpetually lecturing us."[44]

The ordinance was lengthy, obscure and complicated in its content as in its title.[45] Its major goal was the creation of registry offices where titles to land, dower rights and other acts concerning claims on land would be registered. In drafting the sections concerning registration Stuart borrowed from the new civil code of post revolutionary France and inserted provisions drawn from English Acts setting up Registries in York and Middlesex.[46] The ordinance set out the details of the massive infrastructure and bureaucracy that would be required. Key sections addressed widow's dower and married women's rights.

Stuart's Ordinance made three major changes to the law that appear crucial for relations between husbands and wives and the rights of widows. I say appear, because the import of these changes and the meaning of the law were debated for decades to come in newspapers, pamphlets and in the Quebec courts. First dowers promised in a marriage contract would no longer have precedence over other claims to a man's estate unless they were registered.[47] Secondly, the Ordinance gave married women new rights to agree to alienate property subject to their customary dower.[48] And, thirdly the Ordinance limited the legal or customary dower rights of women to the land the husband or father owned at the time of his death.[49]

These were radical changes to dower, but different from either those proposed by Lafontaine and other patriots or Badgeley and Moffatt. Let us examine these changes one by one. The provisions requiring that dower be registered were curious. Nothing in the Ordinance abolished customary dower, the dower that existed without a marriage contract and that patriots and constitutionalists alike had been pushing to eliminate, or particularize, each in their own way.[50] Instead, the Ordinance made it mandatory for husbands or guardians to register any dower right set out in a marriage contract, **le douaire préfix,** or stipulated dower, and to specify what property would secure it. In the same way, any other claims that wives might have on their husbands' property because of property the women brought into the marriage as their dowry also had to be registered. Failure to register

meant women's claims would not rank in preference to any other claims as they had traditionally done.

The second change gave women new, but circumscribed powers within marriage, recognizing them as owners of their dower rights in unprecedented ways that, at the broadest level, brought the law in Lower Canada closer to conveyancing methods in common law jurisdictions. In his desire to make the alienation of land as easy as possible, Stuart jettisoned the inviolability of the dower under French law, allowing women to release their dower rights on any property their husband wished to sell during the marriage. This was a fundamental shift in the logic of the law which had viewed the dower as a right of the widow and children. Widows had previously only had the usufruct. They could live on the property, enjoy its profits and revenues, but had no right of ownership, for this would fall to their children. By allowing women to release their dower rights on any immoveables a husband intended to sell, Stuart was proposing to eliminate the bonds of protection characterizing the old law. Wives gained a limited freedom to contract - the right to agree to alienate their dower.[51] In setting out how women could do this he drew on conveyancing rules sorted out in the American colonies that were much simpler than the English law. Women could release their dower rights by signing to that effect on the conveyance.[52]

There appears to have been no discussion at all between this group of Montreal's male élite about the third major provision concerning widows - that limiting the land subject to dower to that held by a man at the time of his death. Yet this narrowed some widows' claims significantly, for dower had previously attached to all the immoveables a man owned at marriage or inherited thereafter, whether had still owned them when he died or not. This was a logical extension of the provision that women could relinquish their dower rights. It also promised to prevent many of the dower claims that had so bothered those interested in purchasing land for years. In drafting this section Stuart was duplicating legislation in other jurisdictions. The 1831 dower Act in England stated that women marrying after the first of January 1834 who became widows were only entitled to dower out of land the

husband held at his death. The English law went further disallowing dower on any land a husband disposed of in his will as well.[53] Similarly, over the century legislators in most American states either abolished dower or limited it to the lands a man held at death.[54] In Upper Canada, however, dower was still a claim to a third of the property the husband held over his life time unless the wife had renounced dower at the time of sale. When Upper Canadian legislators proposed that dower law there be similar to England's this was opposed in part because it was already possible for wives to bar dower when their husband sold land. Subsequent debates about reshaping dower during the 1840's solicited hot and somewhat raucous debates in which familiar figures of dependent, fragile widows were cast against shrewd, scheming calculating widows.[55]

The special councillors who voted to accept Stuart's Registry Ordinance after making several minor suggestions were all, as far as I can tell, married men with wives of their own to provide for. Men of their class had learned, like the couples studied in the first part of this paper, to make provision for their own wives by making a marriage contract before they married so that they could arrange property as they wished. These men were not against providing for widows. Each had made their own marriage contract, most had also, no doubt made a will. They did, however, want to make sure that claims on land were as clear as possible. And, behind their desire to know who had a claim on what land was a belief in freedom of contract as the best way to set out agreements. They believed in individual contracts, like a marriage contract or a will, as the best way to determine a widow's subsistence.[56] Laws that set out a more generalized marriage bargain, however, and tied up the property of those without the common sense to make such contracts themselves or promised too much to widows or offspring, were best changed. The freedom of contract in which they believed was, as Carole Pateman has argued so eloquently, based on views of citizenship and contract that were resolutely male and hid married women's exclusion. Here, Lower Canadian special councillors were involved in shaping a "modern form of patriarchy"[57], in which individual contract and responsibility replaced older socially

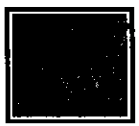
guaranteed rights like the dower, which had not required any written document to produce them.

Within weeks of the passage of the Registry Ordinance elected government was restored to Lower Canada. There was a flurry of criticism of the Registry Ordinance over the next few years but it was enhanced rather than reversed in subsequent legislation. In 1842 Lafontaine published a lengthy, rather tedious criticism of the Registry Ordinance that attacked the scissors and paste amalgam of legal traditions brought together in the ordinance and the way it was written. Four years later Jacques Crémazie explained the problems of its operation. Opponents of the Registry Ordinance had "hoped that with a real legislature one of the first acts would be to repeal all the odious laws imposed by the Special Council, especially the Ordinance" that had only just been enacted.[58] The return to an elected Assembly within the new United Parliament brought no reversal, however. In 1842 Viger attempted to postpone its operation for twelve months, but was quashed by the ever belligerent George Moffatt. He argued that such a long delay would be dangerous because it would give too many wives and children the right to half the estate the father had when he married.[59] Here, as in other policies, the new generation of reform politicians, men like Lafontaine and George-Étienne Cartier "assumed the mantle . . . of the Special Council."[60]

Subsequent legislation cleaned up Stuart's work rather than reshaping it. Over subsequent decades politicians of diverse stripes whittled away at what remained of widow's dower rights and set out to make it as easy as possible for married women to agree to the sale of their own and their husband's land, without making any other property of theirs easy prey for their husband's creditors. In 1845 married women were given the right to renounce dowers promised in a marriage contract if their husband wished to sell the land, in addition to the customary dower already covered.[61] The amount of time allowed to register existing dower rights was extended several times. Customary dower was effectively abolished for those marrying after 1 August 1866 when the men codifying the Civil Code deemed that only registered dowers would be valid from then on. Subsequent legislation

gradually eliminated unregistered dowers for women married before the Registry Ordinance, although it was not until the mid 1880's that customary dower had been effectively abolished by a series of bills.[62]

SCENE III
THE COURTS AND CASE REPORTS



omen were present before notaries when they signed their marriage contract, but their role in the negotiations is hard to discern. The public, published investigations, debates, legislation and ordinances concerning widows' dower rights and land registration were dominated by men. Women must surely have discussed these issues in private, but their concerns have left few traces in documents available to historians today. Of the three places I am examining here, it is only in the records of court cases that women appear in person as key actors. Here we see widows fighting for their rights. Here are women acting in ways modern feminists might approve - as valiant women, agents of their own lives, determined to claim their rights against a motley crew that includes members of their family, creditors and other opponents. They did so, however, in a highly ritualized context, often dependent on the support of male family members and subject to the skill of male lawyers. They might win or they might lose, but the game was played out in an arena where the rules of the law and of evidence, and the manoeuverings of lawyers, justices and judges framed limits to the autonomy of most participants.

To hear these women's voices and to understand what happened to widows' rights in the legal system, I have turned to the cases concerning dower rights that were reported in the law reports of Lower Canada/Quebec during the nineteenth century. It is important to be clear about the meaning of this particular stratum of the documentation that remains of the court system. I am not using documents that record the day-to-day cases and decisions of the courts. The case reports upon which I am drawing are the published records of cases deemed important enough to be publicized within

the legal profession. They give us no idea of the frequency or representivity of cases that dealt with particular issues. They were reported for other reasons. Sometimes it was because a case represented a shift in the jurisprudence. Other times because it seemed important to re-assert a particular interpretation of the law. And, sometimes, they were reported only because they involved members of a particularly important or litigious family. Written largely for the legal profession, they are frequently dry, technical reportings of dry and difficult cases. Yet, they also demonstrate the ways justices and judges used their social power to articulate their visions of the ways marriage and patriarchy should work. They can give us an idea of competing interpretations and of dominant ones. They both reflected and shaped contemporary jurisprudence. Case reports offer the historian a sense of the prevalent discourse of the law. It is for these reasons I think they are important. They give us an idea of what lawyers and judges were reading in order to decide how to apply the law. At the same time, we see how dower and other aspects of married women's and widows' rights were being reported.

Widows ended up in court seeking to claim their dower over creditors, their children, and subsequent purchasers of their husbands' land. They sought recompense for the cost of their mourning clothes, defended their right to register a marriage contract late and defended themselves against charges of adultery that would have wiped away their claim on dower. Sometimes they did so while still married, more often after their husbands' death. Some widows initiated their own case. Frequently they were on the defensive - claiming their entitlement against their husband's creditors, executors, or family, against land owners and against their own sons and daughters and sometimes grandchildren. Dower did not disappear either from the courts or from widows' potential bases of support with the passage of the Registry Ordinance. Women were defending their dower rights early in the nineteenth century, and they continued to do so for the rest of the century.[63] The reported cases make it clear that women continued to view dower as one of their rights. Within an increasingly restrictive body of legislation and jurisprudence the law upheld them in this view. But pruned from its firm attachment to men's land, and more firmly grafted to the

wording and registration of a marriage contract, dower was definitely a new and more limited species, only one of many possibilities of support for Montreal's widows.

The key issues in the reported cases underline the changes that the Registry Ordinance made to this area of the law. After 1841 they hinged largely around the issues of registration, retro-activity, women's renunciation of their dower and the strength of dower against the claims of other creditors. Cases reported in the 1840's and 1850's wrestled with the question of registration as creditors tried to get their hands on women's dowers promised in unregistered contracts and widows tried to negotiate options within and around the new law. When Widow Panet went to court in 1851 to claim the £1200 dower promised in her marriage contract, the case was rapidly settled and became a basis for subsequent decisions. The contract had not been registered. Her claim for the dower lost all primacy in the line up of claims on her husband's estate.[64]

The lessons of the new requirement to register were learned quickly by some widows and landowners, though not always quickly enough. Some widows rushed to the registry office to officially record their marriage contracts following their husbands' deaths. Some attempted to claim their dower on lands long sold as they had been able to in the past. Mme Mure had married in 1817. Her husband died in 1852. She registered their marriage contract a year after his death. That same year she attempted to claim £500 douaire préfix and £250 préciput from the man who had bought the land in 1829 from another man who had purchased it in 1819 from her husband. The current owner had registered his deed in 1844. Justices Day, Smith and Mondelet dismissed the action with costs basing their decision on the Registry Ordinance, the case of Widow Panet and other similar cases. Essentially they argued that the marriage contract should have been registered earlier, supporting the defendant's claim because he had registered his title before her.[65]

The reported court cases confirm the sanctity of contracts well made. What went on in myriad court decisions may have been different. When a

couple and their notary had clearly specified a dower in a marriage contract and the contract had been properly registered the law reports convey the impression that widows could successfully claim dower even against opponents with excellent lawyers as long as the contract had been clear. After Madame Dessain's husband died her brother in law who had been named tutor of her husband's estate refused to give her the $2,000 douaire préfix she had been promised in her marriage contract. This stingy executor had also refused her the $75.00 she argued she should receive to cover the cost of her mourning clothes. So, she took him to court in 1891. Her dower, which had been properly registered was upheld, as was her claim for mourning clothes, which according to all the french jurisprudence cited was the right of any wife, whatever the marriage regime they had chosen. Her right to the cost of her widows' weeds, like the dower, could be taken from the man's estate before the claims of other creditors or heirs.[66]

Some widows defending their dower faced plaintiffs determined to attack their honour by using one of the few weapons strong enough to destabilize dower in a well written contract. Women's right to dower had always been subject to their proper performance of their wifely roles. In the Custom of Paris, the only grounds for denying a woman her dower were if she had committed adultery or abandoned her husband during the marriage and he had refused to take her back.[67] A widow proven to have committed what was referred to as adultery in the year following her husband's death could also lose her claim to dower.[68] In 1857 an anonymous woman's claim to dower was contested by the heirs of her dead husband. They claimed she had no right to the use of her dower because she had committed adultery in the year following her husband's death. They were therefore seeking the revenues and profits from the land that was subject to her dower. Judge Meredith dismissed the case largely because of issues of timing, but including because she had married the man with whom she was accused of committing adultery before any charge had been made against her. However, he seemed determined to ensure that his decision would not constitute a legal justification for widows bent on fornication. The legal claim of the plaintiff's, he explained, was on solid ground. The widow's conduct did seem to have been sufficient

to lose dower. It was the timing of the claim that caused problems. "In order to guard myself from being misunderstood, I wish to add that although in the course of the foregoing observations I have constantly spoken of the misconduct of a doweress during the first year of her widowhood, it is not therefore to be inferred that a widow even after that period can misconduct herself without being liable to lose her dower."[69]

Widow Lamirande had been managing as a widow for seven years when she sought to claim her dower rights on land owned by her husband during their marriage. He had sold the land in 1874 and registered their marriage act in 1876 hoping to conserve her right to customary dower. The land in question had been sold one more time before being purchased by M. Lalonde, the current owner. She was claiming her right to half the income from the property for the time since her husband's death in 1881 until the time of the trial, as she had never renounced her rights to dower. His lawyers tried both technical and moral arguments to counter her claim. Her dower should be denied they argued, because she had committed adultery during the marriage, while her husband was dying and during the first year of her widowhood. Worse, she was living by prostitution. Whatever the truth of the accusations about this widow who must have been at least 56 at the time of the trial, the judge argued the defense had not succeeded in proving these assertions and should pay all the costs involved in investigating them. Yet the final judgement did not help Dame Lamirande at all and one can't help but wonder whether Judge Taschereau was influenced by the morality issues raised. She had a fair claim to dower, he argued, but not retroactively. He thus dismissed her claim to the $475.00 earned on the property between her husband's death and the trial. And, because she had only claimed back revenues, rather than future ones she was left with no gains at all and the obligation to pay expenses. Dower was thus upheld, while Dame Lamirande, tainted by accusations of immorality, left court poorer than when she began, and probably with faint hope of receiving any money in the future either.[70] Such reported cases suggest the ways in which judges manoeuvred to uphold properly made contracts while still using the courtroom as a platform to

preach about the importance of women's proper sexual behaviour during marriage and as widows.

Prior to 1866 those widows who succeeded in claiming their dower rights when they had not been registered were those who had a customary dower - the dower normally obtained without a marriage contract and for which registration was not specifically mandated until the reformulation of the Civil Code in 1866. In 1860 Madame Selina Woods was able to claim dower because the marriage contract she had signed in 1844 had stated that she was to receive a dower "such as is established by the laws of Lower Canada." Her lawyers successfully argued that hers was a customary dower and therefore did not require registering. She was therefore to receive £230. 3s 1d to use for herself and her child.[71] After 1866 couples had to register their marriage act if they wanted a customary dower, and dower no longer existed on land a man inherited during his marriage unless he registered it and described the land.[72]

The Registry Ordinance had not only required that dowers be registered. It had also limited a widow's claim to the property her husband held at the time of his death and gave her the right to renounce dower at any time the husband wished to sell his land. Widows and wives appeared in court with inventive and heart-rending stories about renunciations they claimed to have made unwittingly or under co-ercion, apparently to no avail. Women's new and very limited contractual power to renounce dower was consistently upheld. Mme Dufresnay appeared in the Montreal Court two days after Christmas in 1867. She was attempting to reverse a renunciation of her claim to dower made in a notarized act four years earlier. Her story should have moved the judges. Her husband was insane and notoriously insolvent. Because of the suspension of her husband's civil rights a Judge had authorized her to act without her husband's permission. She argued that she had been misled "by error or fraud" when she signed the notarial act relinquishing her dower rights. In 1867, she attempted to undo her actions, to no avail. She appealed the decision, but in 1869 the Court of Queen's bench re-affirmed her full legal power to renounce dower.[73]

CONCLUSIONS

Questions about marriage and the property rights of wives and widows were debated across the western world during the nineteenth century just as they were in Lower Canada/ Quebec. In most provinces, states and nations dower lost much of its hold over men's property and married women were given some rights to ownership of their own separate property, if they had any. The impact of such changes cannot be charted as representing steady declines or improvements in women's rights. Some women benefitted, others lost out, but in all the politicaly economy of marriage and the workings of patriarchy were reshaped in diverse ways. In most jurisdictions this was an area of heated debate that exposed divergent views rooted in changing relations and understandings of class and gender and changing political economies. In Lower Canada/Quebec the debate was different in part because questions of marriage and property were governed by the Custom of Paris rather than the common law, in part because it occurred across this period of fundamental political and social conflict. Here, issues of class and gender interacted with questions of cultural identity as anglophone and francophone visions of the law and of proper relations of power and property within families collided, coalesced and diverged at different moments and in different contexts.

The three threads in the negotiations of dower that I have attempted to trace here were intimately linked. The move away from dower and community of property in the marriage contracts of the 1840's was a result of the same shifting ideas and economic realities that had led up to the Registry Ordinance of 1841 and its successors. Such decisions were propelled by and were propelling transformations in the economy. The passage of the Ordinance with its new provisions about dower reflected a change already underway in marriage contracts. The content of the Ordinance may well have influenced growing numbers of couples to renounce dower and seek other ways to provide for their wives should they be widowed. Men making such

decisions in their private marriage contracts were of the same class background as the Special Councillors. Indeed, some of them were on the Special Council. The shift away from choosing dower among bourgeois francophones in the marriage contracts parallels the shift that patriots and others made in the years of the rebellions and thereafter. The reported cases, like subsequent legislation in Canada East and Quebec, upheld the logic of the Registry Ordinance, as they were obliged to do. Yet lawyers and judges would continue to express divergent understandings of marriage and family for the rest of the century, based sometimes in the difference between tory and reform visions, sometimes more clearly in class interest and frequently on different senses of how the law should work.

The three threads in the negotiations of dower that I have attempted to trace here do not make a neat and tidy braid. The three scenes do not complete the play. To better understand how real women whose husbands died managed the transition from wife to widow I am currently seeking the documents produced at their husband's death - wills, inventaires de biens and other notarial acts. I want to find traces of the myriad decisions a woman had to make at that difficult time of death. Accept or reject the community of property? Claim dower or the promise of her husband's will? Aggressively pursue clients who owed him money? Carefully hide property so creditors could not find it? And, what of women for whom a husband's death left nothing? No trace, no property, no other legacy but their own resourcefulness perhaps already long practiced in a life of poverty? Some can be found in the listings of the charitable institutions of charity, others in the censuses, the court records and other documents of the times.

If the story remains only partially told, there are, nevertheless, recurring and inter-related themes that emerge from the three scenes examined here. Choices made by individual marrying couples, changes in legislation and court decisions converge to confirm how the power of dower was whittled away and transformed across the nineteenth century. Until the 1840's a widow's claim to dower was an inalienable right that required no formal documentation or claim and that took precedence over all other claims on her

husband's own land. And, it was a right that Canadiens sought to protect as part of their civil law and that they spoke of as intimately linked to their own distinctive legal and family traditions. Changes debated earlier, and introduced by the Special Council in 1841 reduced dower to a private contractual agreement that men might chose to bestow or not and that the courts would uphold only when correctly described in a marriage contract and officially registered. Patriots assimilated the growing discourse against dower into their rebellion rhetoric, and into post-rebellion reform strategy. In so doing they asserted the possibility that a new, bourgeois sense of property rights and obligations within marriage could be accommodated within the Custom of Paris, the Civil Code and Quebec society. In this ultimately bourgeois view of property, family and gender, the right of individual men to choose how to dispose of their own property overrode the law's older prescription of the proper proportion of a man's wealth that should be made available to his widow.

Public debates, private and court decisions reveal the particular ways in which individuals of divergent legal and cultural heritages in the very mixed and divided society of early nineteenth century Lower Canada negotiated a new kind of patriarchy within the formal law and within their own families over this period. At the heart of this was freedom and sanctity of contract. Political scientist Carole Pateman has argued that "contract was the means by which a modern patriarchy was constituted." This is particularly clear in the Quebec case.

This reformulated patriarchy in which freedom and clarity of contract replaced earlier socially guaranteed rights did offer wives new, very limited contractual rights. These opened up a small fissure in married women's legal incapacity by allowing them to renounce their dower rights. Limited, constrained, leading more to possibilities of co-ercion than to liberation, this was, nevertheless a reformulation of married women's rights in marriage. Wives had to take part actively when husbands decided to sell property. How to sell their own property was also clarified. Clearly such changes helped free up the exchange of land in an economy in which this was a key to stability for some, accumulation to others. It also offered some women the possibility to participate in a more active way in family real estate transactions.

In Quebec feminist writing, the changes of these times have been presented as part of the defeat of women's traditional rights and as the goal and desires of a capitalist anglophone bourgeoisie. Widows dower rights were fundamentally reshaped, but not eliminated. The anglophone capitalist bourgeoisie was involved. But, the sets of negotiations I have examined here suggest a more complex picture in which some women were involved in private family decisions about marital property and in which widows publically continued to claim dower rights in the courts throughout the century. Anglophones and francophones did have different understandings of family and law, but the class interests of an emerging bourgeoisie produced convergences on issues like dower. The debate about dower and marital property parallelled those in other jurisdictions but was different because it could never be detached from issues surrounding broader questions about civil law, ethnic and cultural identity.

This reformulation of the rules surrounding property in marriage and widows' rights was not peripheral to the central dramas of Lower Canadian/Quebec history in the nineteenth century. It was in no way an issue of importance only in some private sphere shut off from politics and the economy. Rather, it was at the heart of the transformations of class and power that were changing the basis of wealth and of the economy and that propelled legal reform. It was at the heart of ongoing negotiations in families, society and politics that had their roots in the Conquest and colonial rule.

TABLES

TABLE 1:
Renunciations of dower in Montreal marriage contracts, according to the language of the contract.

	1823-1826			1842-1845		
LANGUAGE	NUMBER RENOUNCING DOWER	%	TOTAL	NUMBER RENOUNCING DOWER	%	TOTAL
French	10	6	179	72	37	196
English	64	98	65	83	86	96
Total	**74**	**30**	**244**	**155**	**53**	**292**

TABLE 2:
Renunciations of dower according to choice of marital regime

	1823-1826			1842-1845		
CHOSEN REGIME	NO.	%	TOTAL	NO.	%	TOTAL
Community of goods	5	3	171	72	18	138
Separation of property	32	94	34	83	86	138
Exclusion of property	37	95	39	14	88	16

TABLE 3

Provisions for widows in the contracts of merchants according to the language of the contract

	1823-1826				1842-1845			
PROVISIONS FOR WIDOW	FR. NO.	FR. %	ENG. NO.	ENG. %	FR. NO.	FR. %	ENG. NO.	ENG. %
Stipulated Dower								
- with preciput	21	77	-	-	2	10	1	3
- without preciput	3	11	-	-	3	15	-	
Renounce Dower	3	11	19	100	15	75	29	97
Other Provisions								
- preciput but no dower	-	-	-	-	1	5	-	-
- annuity only	3	11	10	53	12	60	1	3
annuity and lump sum	-		-	-	2	10	-	-
- lump sum only	-	-	5	26	-	-	13	43
- interest and a lump sum	-	-	-	-	-	-	1	3
- interest on a sum	-	-	-	-	-	-	9	30
- interest and furniture	-	-	-	-	-	-	2	6
- nil	-	-	4	21	-	-	3	10
Total contracts	**27**	**-**	**19**	**-**	**20**	**-**	**30**	**-**

APPENDIX 1:
LEGAL TERMS

Conventional, or Customary Dower (*douaire coutumier*): right to the use of half the **real property** a husband owned at the moment of marriage or inherited in a direct line thereafter. Set out in the law, usually not in a contract

Stipulated Dower, or prefix dower (*douaire préfix*): A dower that was promised in a marriage contract. It was stipuated as having a specific value, and could be taken off all property that belonged to the husband, not just real property that he owned prior to marriage or inherited.

Community of Goods (*communauté de biens*): The organization of property within the Custom of Paris that meant that unless a marriage contract specified otherwise all property a couple acquired or earned during marriage fell into a community. This belonged equally to the husband and wife, though he had full power to control and even sell it during marriage. Should he die first, the wife received her half.

Preciput (*préciput*): Goods, cash or property up to a value specified in a marriage contract that could be taken out of the community of property before it was divided.

Separation of Goods (*séparation de biens*): The choice made in a marriage contract to keep husband and wife's property separate throughout the marriage. This usually went along with giving the wife the right to administer that property.

ENDNOTES

[1] This research would not have been possible without financial support from FCAR and SSHRC and the intellectual inspiration and research assistance of members of the Montreal History Group. I would like to thank the Québec Studies Programme at McGill for inviting me and the Mouvement Desjardins for their support.

[2] This section is based on analysis of all the marriage contracts in the files of Montreal notaries that were made by the 244 couples marrying between 1823 and 1826 and the 292 couples marrying between 1842 and 1845.

[3] This section is based on analysis of the Journals and Reports of the Legislative Assembly, the Legislative Council, the Special Council (1837-1841), and of contemporary newspapers, pamphlets and personal papers.

[4] Here I draw on all the cases reported in the law journals of Lower Canada/Canada East/Quebec that dealt with marital property and dower between the 1830's and 1891.

[5] James Armstrong, *A Treatise on the Law Relating to Marriages in Lower Canada*, (Montréal, John Lovell, 1857),36; Henry des Rivières Beaubien, *Traité sur les lois civiles du Bas-Canada* (3 tomes, Montréal, Ludger Duvernay, 1832), 6-7; Nicholas Benjamin Doucet, *Fundamental Principles of the Laws of Canada* (2 vols, Montréal, John Lovell, 1841), 268-72.

[6] Doucet, *Fundamental Principles*, 273.

[7] On common law jurisdictions see especially: Constance B. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review* (Fall 1988); Norma Basch, *In the Eyes of the Law. Women, Marriage and Property in Nineteenth Century New York*,(Ithaca, Cornell University Press, 1982); Bettina Bradbury, "From Civil Death to Separate Property: Changes in the Legal Rights of Married Women in Nineteenth-Century New Zealand", *New Zealand Journal of History*, Vol. 29, no.1 (April, 1995) 40-66; Lee Holcombe, *Wives and Property. Reform of the Married Women's Property Law in Nineteenth-Century England*, ((Toronto, University of Toronto Press, 1983); Mary Lyndon Shanley, *Feminism, Marriage, and the Law in*

Victorian England, 1850-1895, New Jersey, University of North Carolina Press, 1989; Susan Staves, *Married Women's Separate Property in England, 1660-1833*; Lori Chambers, (Osgoode Law Society and University of Toronto Press, 1997). Le collectif Clio, *L'histoire des femmes au Québec depuis quatre siècles* (Montréal, Le Jour, éditeur, 1992), 164-5 is the main discussion of dower in Quebec. These historians acknowledge the importance of dower, but paint a very simple picture of widows' dower rights being lost as a result of the capitalist needs of British immigrants and mistakenly argue that it was the new government of the United Canada's that passed the law changing dower.

[8] I hope in this way to contribute to the body of scholarship by feminist scholars that seeks to examine how "politics construct gender and gender constructs politics" in this particular context and to expose the connectedness of what appear as public policy and private decisions. Joan Scott, "Women's History," in her *Gender and the Politics of History* (1988), 27; Joy Parr, "Nature and Hierarchy: Reflections on Writing the History of Women and Children," *Atlantis*, 11, 1, (Fall/automne, 1985)", 41.

[9] Allan Greer, *The Patriots and the People. The Rebellion of 1837 in Rural Lower Canada* (Toronto, University of Toronto Press, 1993); F. Murray, Greenwood, *Legacies of Fear. Law and Politics in Quebec in the Era of the French Revolution* (Toronto; University of Toronto Press, 1993); Evelyn Kolish, *Nationalismes et conflits de droits: le débat du droit privé au Québec: 1760-1840* (LaSalle, Québec, Hurtubise, 1994); Evelyn Kolish, "Le conseil législatif et les bureaux d'enregistrement (1836)," *Revue d'histoire de l'Amérique française*, 35 (September 1981), 217-30; Brian Young, *The Politics of Codification. The Lower Canadian Civil Code of 1866* (Montreal, McGill-Queen's University Press, 1994.

[10] Bettina Bradbury, Alan Stewart, Evelyn Kolish and Peter Gossage, "Property and Marriage: The Law and Practice in Early Nineteenth Century Montreal," *Histoire sociale/ Social History*, XXVI, (May, 1993).

[11] Alfred Dubuc, "William Molson," *Dictionary of Canadian Biography*, vol. X, Toronto, University of Toronto Press, 1972.

[12] The most useful descriptions of the community of goods are in

manuals of the period. See especially, James Armstrong, *A Treatise on the Law Relating to Marriages in Lower Canada*; Beaubien, *Traité sur les lois civiles du Bas Canada*; Benjamin Doucet, *Fundamental Principles of the Laws of Canada.*

[13] Doucet, *Fundamental Principles*, Article 256.

[14] Evelyn Kolish explains that whereas mortgages gave a creditor a claim on a specific immoveable as security for a debt, an hypothec existed as a general claim on all immoveables, present and future of a debtor. "Le Conseil législatif et les bureaux d'enregistrement (1836)," *Revue d'histoire de l'Amérique française*, 35, 2 (septembre 1981), 218-9. William Badgeley, *Remarks on Register Offices* (Montréal, Herald Office, 1836) explained - there are engagements formed without convention (i.e. contract).. by the sole authority of the law.. "engagements, which from their object and from principles of humanity or justice, claimed a preference before all other contracts....Such is the mortgage of the wife upon her husband's property, that of minors on the property of their tutors etc.", 21: Samuel Gale explains this to to the subcommittee of the House of Commons in his evidence in "Report on the Civil Government of Canada,"1828, 22.

[15] See footnote 6. The laws in force in Upper Canada in the 1830's are summarized in Doucet, *Fundamental Principles*, 8. These included "An act for the more easy barring of dower,"37. George III, 1797 and 3 William IV, 1833 and "An Act to Amend the law enabling married women to convey their real estate," 2 Victoria, 1839.

[16] "Report on the Civil Government of Canada," presented to the House of Commons. *British Parliamentary Papers*, 1828, I, 82.

[17] Archives Nationales du Québec à Montréal, Notary Gibb, Marriage Contract of Ann Molson and John Molson, 7/06/1845, no. 8059.

[18] Alfred Dubuc, "William Molson," *Dictionary of Canadian Biography*, vol. X, 518-21.

[19] Bradbury, Gossage et. al. "Property and Marriage".

[20] Horatio Munro, Toussaint Leboeuf-Laflamme and J-M, Bonacina.

[21] They included Hubert Langlois, Georges Hudon, Antoine Marion,

Jean-Oliver Lanthier, Francois Lemay, F-X Desève and others.

[22] Young, *The Politics*; Greenwood, *Legacies of Fear*; Kolish, *Nationalismes*; Greer, *The Patriots.*

[23] Nathalie Picard, "Les femmes et le vote au Bas-Canada," dans Évelyne Tardy et. al., *Les Bâtisseuses de la Cité* (Actes du Colloque, ACFAS, Montréal, 1993), 57-64.

[24] Greenwood, *Legacies of Fear*, 186.

[25] Gale, "Report on the Civil Government of Canada," 1828, 23, 266.

[26] Denis-Benjamin Viger, "Report on the Civil Government of Canada," 1828, 145. See also the reasons given for retaining dower by the eight men sent a questionnaire about registration and dower in 1836, responses of: Heney, Neilson J., Hon. Mr Primrose, Jos F. Perrault, Boutillier, Boisseau, Vezina and Leprohon. See Journal of the Legislative Council of the Province of Lower Canada1835-36, Appendix F.

[27] J. Duchesnay to Perrault the elder, 1 October 1788, cited in Kolish, *Nationalismes et conflits de droits*, 49 Hilda Neatby, *Quebec. The Revolutionary Age, 1760-1791*, 255.

[28] "Report on the Civil Government of Canada," 1828, 86.

[29] William Badgeley, *Remarks on Register Officers* explained - there are engagements formed without convention (i.e. contract).. by the sole authority of the law. "engagements, which from their object and from principles of humanity or justice, claimed a preference before all other contracts....Such is the mortgage of the wife upon her husband's property, that of minors on the property of their tutors etc. Samuel Gale explains this to the subcommittee of the House of Commons in his evidence in "Report on the Civil Government of Canada,"1828, 22.

[30] Report on the Civil Government of Canada," 1828, 54, 101, 118, 145-7, 264.

[31] "Report on the Civil Government of Canada," 1828, 240 263.

[32] Thus, in 1829 a bill was passed that simplified the procedure for discharging other kinds of hypothecs. When the bill reached the House of Assembly from the Legislative Council

amendments were added so that dower was explicitly excluded. "Nothing. . .shall extend or be construed to extend to take away, diminish, alter or any way affect the rights of hypothecs of women during marriage, upon the immoveables of their husbands, or of children upon the immoveables of their fathers in relation to dower not yet open." *Journals of the House of Assembly of Lower Canada*, 7 March 1829.

[33] Bills were introduced in the legislative Council in 1817, 1819, 1821, 1822, 1823, 1824 and 1825, 1827 and 1828 then again frequently during the early 1830's. On the context and this issue see Young, *The Politics*, especially 30-34; Evelyn Kolish, "Le Conseil législatif," *La Gazette de Québec*, 24 décembre 1822; *Montreal Herald*, 8 March 1826; J.-D. Roy, *Histoire du Notariat au Canada: depuis la fondation de la colonie jusqu'à nos jours* (4 vols., Lévis, Imprimé à la Revue de Notariat, 1900-1902), II, chap. 36.

[34] Lower Canada, *Journal of the House of Assembly of Lower Canada*, 1835-6, Vol. 46, 25; J.-E. Roy, *Histoire du Notariat au Canada: depuis la fondation de la colonie jusqu'à nos jours* (Lévis: 1900), 552 -54.

[35] Alan Greer, *The Patriots and the People*, 285; *La Minerve*, 14 August 1837, *Le Populaire*, 21 August 1837.

[36] *Montreal Gazette*, 6 March 1838.

[37] Appendix F. "Report of the Special Committee to whom was referred the Petition of certain Inhabitants of the city and District of Montreal, respecting the state of the Law regarding the creation of incumbrances upon Real Estate in this Province, and praying for the establishment of Register Offices therein," Lower Canada, Journals of the Legislative Council of the Province of Lower Canada (...) 1835-36. (Quebec, T. Cary & G. Desbarats, 1836).

[38] William Badgeley, *Remarks on Register Offices*.

[39] Ibid., 45-6, 25-29.

[40] Badgeley Papers, McCord Museum of Canadian History Archives (MMA), Folder 10. Moffatt and Badgeley to Lord Glenelg, 15 April 1838. Here they request support regarding Bills dealing with "the general commutation of feudal tenure throughout

the Seigneuries of Lower Canada, the communation in the Seigneury of Montreal, and the removal of doubts of the existence of the 9 & 10 Geo. IV, Cap. 77." The latter law dealt with the Law concerning Lands held in Free and Common Soccage in Lower Canada.

[41] The period of the Special Council has received surprisingly little attention from historians. Fernand Ouellet's *Lower Canada 1791-1840. Social Change and Nationalism* (Toronto, McClelland and Stewart, 1980), for example stops in 1840, while J.S. Careless's *The Union of the Canadas. The Growth of Canadian Institutions, 1841-1857* (Toronto, McClelland and Stewart, 1967) begins in 1841. Brian Young is one of the few historians who has clearly signalled the importance of this period and of the Special Council. "Positive Law, Positive State: Class Realignment and the Transformation of Lower Canada, 1815-1866," in Greer and Radforth, *The Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto, University of Toronto Press, 199-), 50-63. A chronological overview of their work can be found in Antonio Perrault, "Le Conseil Spécial, 1838-1841,"*La revue du Barreau* 3, nos 1-9, 1943.

[42] Lord Durham was interested in setting up Registry Offices, but did not attempt to do so. The reason appears to have been that the Special Council had not been given taxation powers and levying a fee for registration of deeds was seen as a form of taxation. Hale Papers (MMA) Edward Hale to Eliza Hale, 7 June 1840; 9 June 1840.

[43] I have found no evidence to support Blaine Baker's claim that William Badgeley was the author of this bill, "Law Practice and Statecraft in Mid Nineteenth Century Montreal: The Torrance-Morris Firm, 1848-1868," in Carol Wilton, p. 51, 63. Contemporary evidence refers consistently to Stuart as the author, as do several historians. *Le Canadien*, 30 octobre 1840; *Gazette*, 27 september 1847; John Bonner, *An Essay on the Registry Laws of Lower Canada*, (Québec, John Lovell, 1852), 16; Brian Young, *The Politics of Codification*, 45. Some time late in 1840, Governor Sydenham had asked James Stuart to draft an Ordinance to deal with registration. His draft was

introduced on the 5th of November 1840, sent to a subcommittee for amendments, debated again on ten different occasions, then became law when Lord Sydenham sanctioned it on the 9th of February 1841. *Journals of the Special Council*, 1837-1841

[44] Brian Young, *The Politics of Codification*. Mondelet was born in 1799, Day in 1806, which made Day the youngest Special Councillor in attendance over this period. Edward Hale to Eliza Hale, 30 April 1840.

[45] Witness its title! "An Ordinance to prescribe and regulate the Registering of Titles to Lands, Tenements and Hereditaments, Real or Immoveable estates, and of Charges and Incumbrances on the same; and for the alteration and improvement of the law, in certain particulars, in relation to the Alienation and Hypothecation of Real Estates, and the Rights and Interest acquired therein." Ordinance 4 Vic. CAP. 30. Subsequent critic Crémazie would point to the pomposity of the title as part of the problem. Jacques Crémazie, *Rapport de J. Crémazie, écuier, nommé en vertu de l'acte 4 Vict. Chap 30, pour visiter les bureaux d'enregistrement de Québec et de Gaspé* (1846, Montreal) Canadian Institute of Historical Microfilms, no. 514117, 2.

[46] John Bonner, *An Essay on the Registry Laws of Lower Canada*, 16-20, 37.

[47] 4 Vic CAP 30, "Registry Ordinance," Section 21.

[48] Sections 34-35.

[49] Section 37.

[50] Customary dower is only mentioned in sections 35 and 37, those dealing with how wives could relinquish dower rights on land and those stipulating that dower would only be on land held by the husband at this death. On this see Crémazie, 3-5; Bibaud, 45-6.

[51] Similar limited contractual freedom was being offered wives across the western world through conveyancing rules, married women's property acts and dower acts. For a broad discussion of what was going on across the United States, including in those states where community of property rather than common law property provisions prevailed, see especially Carole Shammas,

Marylynn Salmon and Michel Dahlins, *Inheritance in America from Colonial Times to the Present*, (New Brunswick and London: Rugters University Press, 1987) 86-7.

[52] Section 34-5. If married women wished to sell their own lands, they had to appear before a Judge of the court of Queen's Bench who was to examine them and ensure they were not being co-erced into the sale. This section inserted the common law assumption that husbands would co-erce their wives so a third party was necessary to prevent this. Previously wives may have been able to renounce their dowers on a piece of land at the time of its sale and claim it on another piece of land. In this way the children's claim on dower could not be extinguished. With the Registry Ordinance, a woman's renunciation of dower extinguished that right for the children as well, and demanded no compensation. Morley v. Massue, *Lower Canada Jurist* 13, (1869), 85-7.

[53] "An Act for the Amendment of the Law Relating to Dower," England, CAP. CV, August, 1833, section IV. Susan Staves comments that this Act reflected the growing conviction that the husband rather than society was the right judge of the proper provision for his wife, not only during marriage, as had always more or less been the case - but after the marriage, *Married Women's Separate Property*, 112.

[54] Shammas, Carole, Marylynn Salmon and Michel Dahlin, *Inheritance in America from Colonial Times to the Present*, 86-7.

[55] United Canadas, *Debates*, 17 February 1845, pp. 1582-3; 21 June 1847, pp. 361-4. Note, however, that barring dower had been facilitated in Upper Canada, 1833, 3 William Cap. 4, "An act for the more easy barring of dower". Note also the role Papineau and Lafontaine play in these debates.

[56] See, for example, Brian Young's argument about Charles Dewey Day's belief in the integrity of contract and on the importance that it be applied equally, whatever the privileges of a particular group, in *The Politics of Codification*, 91-4

[57] Carole Pateman argues that "accounts of the rise of contract do not tell the whole story - half is missing... the one that tells how a

specifically modern form of patriarchy is established." *The Sexual Contract*, Stanford, Stanford University Press, 1988, p. xi. She does not, however, examine how men and later women reshaped the marriage contract as determined by the law of the land thus establishing the modern forms of patriarchy.

[58] L.H. Lafontaine, *Analyse de l'Ordonnance du Conseil Spécial sur les bureaux d'hyopthèques, suivie du texte anglais et français de l'ordonnance; des lois relatives à la création des ci-devant bureaux de comtés; et de la loi des lettres de ratification* (Montréal, Louis Perrault, 1842); Jacques Crémazie, *Rapport* (1846, Montréal), 10.

[59] *United Canadas Debates*, edited by Elizabeth Nish, 1 October, 1842, 277.

[60] Brian Young, "Positive Law, Positive State," 56.

[61] 8 Vic. CAP 27, "An Act to amend the Act and Ordinance therein mentioned, relative to the Registration of Titles to and Incumbrances upon Real Property in Lower Canada."

[62] Article 2116, Civil Code. In 1880, 44-45 Vict. CAP 16, "An Act to order the registration of customary dowers and servitudes in certain cases not provided for by the law," extended article 2116 to dowers created before 1 August 1866, giving two years to register them. This period was extended to 1 May 1884 in 1883, in 46 Vict. CAP 25, "An Act to amend the Act 44-45 Victoria, chapter 16 to extend the delay for registering the customary dowers and servitudes mentioned therein and to provide for more efficient publication of the Act", and again in 1884, in 47 Vict. CAP 15, "An act to amend the act 44-45 Victoria, chapter 16, to extend the delay for registering the customary dowers and servitudes mentioned therein," which extended the final deadline to 1 January 1885.

[63] There were 61 cases reported in the law journals of Lower Canada/ Quebec that dealt with dower between 1810 and 1891.

[64] Panet v. Larue et Panet et Larue, opposants, *Lower Canada Reports*, 2 (1852), p. 83.

[65] Forbes vs. Legault, *Lower Canada Reports*, 6, (1856), 100-1.

[66] Dessaint v. Ladrière, *Quebec Law Reports*, 16, (1890), 277-80.

[67] Henry des Rivières Beaubien, *Traité sur les lois civiles* (1832), T. 3, 32

[68] M.L. Mercier vs. J.B. Blanchet and E. Bignell vs. Alexander Henderson, *Revue de législation et de jurisprudence*, I, 1845, p. 124.

[69] *Lower Canada Review*, 7, pp. 391-399. Superior Court Quebec, 9 Feb. 1857 quote at p. 398.

[70] Dame Lamirande v. Lalonde, *Montreal Law Reports, Superior Court*, 4 (1888): 55-6.

[71] Sims et. al vs. Evans et divers opposants, *Lower Canada Jurist*, 4 (1860), 311-16.

[72] Civil Code, Article 2116.

[73] Dufresnay v. Armstrong, *Lower Canada Jurist*, 14 (1870): 253.