

Marriage Contract in New France
according to
La Coutume de Paris / The Custom of Paris
by

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The France from which the original colonists of New France emigrated allowed many different legal “customs” for the use and inheritance of property after a marriage. By 1664, *La Coutume de Paris / the Custom of Paris* was chosen as the one “custom” to be followed in *Nouvelle France* and *Acadie*, Canada. This did not change after the British took over the government of Canada (the Quebec Act of 1774 protected *La Coutume de Paris*); and it also applied to all the French settlements across the Detroit River in what became Ontario, and in what is now the United States: along the Mississippi, in *Louisiane*, at Michilimackinac, at Fort St. Joseph (Niles, Michigan), *etc.*, and definitely in the Detroit / Monroe areas. Modifications or changes were made under Spanish and American rule in *Louisiane* and elsewhere under United States law, and, after 1837, in Canada; but the basic provisions of the Custom of Paris continued to be chosen by many couples in Canada to the extent that the law provided.

The marriage contract was a legal document, usually - but not exclusively - drawn up before the marriage. It appears also to have been an occasion for celebration by the family and friends who were present to witness and sign the act. Since lawyers were banned from New France, this legal document (as well as many others) was drawn up by an official called a NOTARY. In distant settlements, the marriage contract could be written by a priest or a *commandant* of a post, to be delivered to a notary at a later date. Thousands of these marriage documents survive and they preserve a fascinating window into the society of New France.

TERMS and DEFINITIONS

INTITULÉ / Title: *Contrat de mariage entre X et Y*. Contract of marriage between X and Y.

The first section of the text identifies the parties appearing before the notary to contract marriage, their ages, parents’ names, parishes of origin, current domiciles, professions or occupations. This is usually followed by the names of those in attendance to counsel the couple and witness the document and often an indication of their relationship to the future bride and groom.

The future spouses promise to solemnize their marriage *in facie ecclesiae* (Latin) / *en face de l’église* (French): before witnesses and a representative of Holy Mother Church, Catholic, Roman and Apostolic, as soon as possible, which was French law at the time.

The next section usually identifies the extent to which the couple will observe the Custom of Paris. Since the Custom allowed important variations, this is where any such choices would be indicated. Even if a marriage contract was not written, all marriages were established under the basic provisions of the Custom, but most couples, of all social classes, filed a contract, some spelling out the variations to be in effect. Unless otherwise stated, all couples owned property after marriage under a *communauté de biens*.

COMMUNAUTÉ DE BIENS / Community of commonly held marital property, both movables, *biens meubles* (household goods, tools, animals, clothing, *etc.*), and *conquets immeubles*, those immovables (usually real estate) acquired during the marriage. The *communauté de biens* did not include the immovables, called *acquets* (usually real estate), inherited by a wife before or during the marriage.

As for variations, Hans W. Baade describes one: “[T]he most extreme [of the variations allowed within the Custom of Paris] is the stipulation of separation of property [*séparation de biens*] to the exclusion of community property. That clause was fairly frequent in contracts of second marriages, especially where one of the spouses had children from what was colloquially called the ‘*premier lit*’ (literally, “first bed’).” (Baade, p. 16)

A *séparation de biens* could also be legalized after a marriage if conditions warranted (e.g., because of misuse of funds by either spouse or for other reasons, such as the absence of a spouse). Couples could even petition for a *séparation de corps*, bodily separation, although divorce was, of course, not sanctioned by the Church and remarriage would not have been canonically allowed.

Some marriage contracts expressly state the Custom would be followed even if the couple changed their domicile:

The future spouses shall be in common as to their movable goods and immovable acquisitions according to the **Custom of Paris**, by which their community shall be regulated and apportioned, even though afterwards they come to establish their domicile or make acquisitions in countries with contrary customs, laws and usages, which they hereby expressly alter and renounce. (Baade, p. 16.)

The next clauses usually include provisions for:

PAYMENT OF PRIOR DEBTS:

“Ne seront tenus des debtes l’un de l’autre faits et créés avant le futur mariage ainsy aucunes y a seront payées et acquittées par celui qui les a faits et créés et sur son bien.”

The future spouses were not liable for debts incurred prior to the marriage. These would be paid by the one who contracted the debt and from his or her property. This clause would sometimes be followed by a declaration of the assets brought to the marriage by both the future wife and the future husband, and whether some or all of these were to be considered *propres*, the legal possessions of the owner, therefore not entering into the marital community.

DOT (pronounced /duht/): the equivalent of the English Law bride’s dowry, but not subject to the rules of English law. Under the Custom of Paris, a future bride could stipulate that some or all of her **dot** would remain her *propres*, hers legally to hand on to her heirs or to be returned to her family in the case of her death without children. The **dot** was usually a gift of the bride’s parents, sometimes real property or goods to help the couple become established, or in the case of the *Filles du Roi*, from the king, Louis XIV. (The *Filles du Roi* were marriageable women sent from France between 1663 and 1673.) Sometimes the *dot* was an advancement of inheritance.

DOUAIRE, either *douaire coutumier*, customary dower (one half of the community property and the right to use the community property during the lifetime of the widow, *usufruit*), or *douaire préfix*, *une fois payé*, a stated amount. The *douaire* was provided by the future husband, to be granted to his widow at his death before any debts owed to the community were subtracted. The choice of type was the widow’s. Sometimes the contract states that the future husband will *hypothéquer*, establish a type of mortgage, for his current possessions to satisfy this future indebtedness. Although this term *douaire* has sometimes been translated as dowry, it is really “dower” rights, or the rights granted to the widow of a marriage, and it was far more generous under the Custom of Paris than under English law. In case of a separation of property resulting from bankruptcy, the *douaire* could not be seized by the persons who were owed money. (From

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“Le contrat de mariage et le statut des femmes en Nouvelle-France”: “En cas de séparation de biens découlant d’une faillite, le douaire ne peut être saisi par les créanciers.”)

PRÉCIPUT: a right of either surviving spouse to a specific amount of money or possessions at the death of the other spouse, and before any division of the estate. Often this sum was one-half of the *douaire*. Prospective spouses also reserved the right to keep their personal *linge, hardes, et bijoux joyeux* (linens and clothing, tools and other possessions, such as firearms, and jewelry) and the wife was allowed to keep her *lit garni*, her furnished bed.

RENONCIATION of the marital community by the wife (or later by children of the marriage). “This clause specified that the wife or children renouncing the community could recover (*repandre*) that which the wife had brought into the community (*apporté*), in addition to the *douaire* and the *préciput* where stipulated.” (Baade, p. 17) A renunciation of the marital community sometimes occurred if the debts of the community were substantial.

DONATION entre vifs, mutuelle, égale, et réciproque: “The donation clause generally stipulated a reciprocal gift to the survivor of all or part of the predeceasing spouse’s estate, either in full property or in usufruct, and conditioned upon the absence of children of the marriage at its termination by death.” (Baade, p. 18) A widow in New France was thus protected from eviction and destitution. She did not have to petition any court to enjoy the use of the community property. This clause was often followed by the *insinuation* clause: “To have these presents registered where necessary, the parties give all power to the bearer thereof.”

After the formal language concluding the contract and a statement that it was read aloud, the future spouses signed the contract, if they were able to do so, or sometimes affixed their crosses, and witnesses who chose to do so also signed. It is interesting that some contracts include signatures by individuals not mentioned as witnesses in the text of the contract.

Inheritance Laws under the Custom of Paris

Each child of a marriage, male and female, inherited equal shares of one half of the marital community property at the death of a parent. Often an inventory was taken first. If a child of a marriage predeceased the parent and had children of his or her own, those children inherited the share their parent would have received. If children were under legal age, twenty-five in *Nouvelle France*, a *tuteur*, guardian, was appointed to safeguard their interests until they came of age. This guardian was often, but not always, the surviving parent. At the death of the surviving parent, the remaining marital community of that union was dissolved and transmitted to surviving heirs.

Second (and third ...) marriages further complicated the situation, and contracts for remarriages often indicate that the children of the prior marriage would be brought up, fed and clothed, and provided education at the expense of the new marital community, without jeopardizing their inheritance rights from the former community. Other variations were possible, such as that the widow of the second marriage would be treated as if she were a child of the first for inheritance purposes, especially if she was young or had no children of her own.

If a wife died without legal children, her *propres* and any *dot* reverted to heirs in her birth family. Wills and Final Testaments were thus rarely needed in New France, except by *celibate* or unmarried individuals who chose to stipulate who would receive specific gifts from their estate. Illegitimate children were sometimes provided for through a Last Will and Testament.

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It would require an examination of the extant contracts to spell out the other variations. I have learned more from reading the contracts themselves than from any published commentary, and I am still learning.

As can be readily seen, adopting the Custom of Paris as the legal code for New France assured the protection, first, for children born to a marriage, then for widows, and also for the families of wives who died without leaving any issue. This “custom” may have been chosen because of pioneer conditions facing the first settlers, the relative scarcity of women, and a belief that those who cannot easily help themselves must be provided assistance. It is not surprising, then, that begging and destitution were relatively unknown in New France.

Married women were required to have the permission of their husbands to engage in business or legal matters, and single, underage women, permission of their fathers or guardians. A husband could alienate property without his wife’s consent, although he could not alienate any income from property she owned, her *inalienable* right. The provisions of the Custom compensated a married woman for the liberties a husband could take with their common property. Once a woman attained her majority as a single woman or became a widow, though, she was free to engage in legal matters in her own name, and far more than you might imagine did become business women, even engaging in the fur trade.

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There are other sources, but these are the ones I found most helpful for this presentation, and I wanted to limit this handout to two sheets of paper, back-to-back. Geneviève Postolec has written about the transition stage in the nineteenth century when some of the rights of women in Canada were curtailed. See also Bettina Bradbury, “Debating Dower: Patriarchy, Capitalism and Widow’s Rights in Lower Canada” at <<http://www.ghm-mhg.mcgill.ca/publications/ppi/bradbury.html>> Visit the Web site of *Les Archives Nationales du Québec* [now *Bibliothèque et Archives nationales du Québec* (BANQ)] for addresses to obtain photocopies of marriage contracts by mail. Most of the older contracts will be found at the Québec, Montréal, or Trois-Rivières branches. One good source for dates of marriage contracts and the notaries involved up to 1730 is René Jetté, *Dictionnaire généalogique des familles du Québec des origines à 1730*, Les Presses de l’Université de Montréal, 1983. PRDH (Programme de recherche en démographie historique / Program of research in historical demography) also sometimes cites marriage contracts. <www.genealogy.umontreal.ca>