



1950

Some Aspects of the Historical Origin of Continental Community Property Law

Frederick H. Mayer

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Frederick H. Mayer, *Some Aspects of the Historical Origin of Continental Community Property Law*, 4 Sw L.J. 1 (1950)
<https://scholar.smu.edu/smulr/vol4/iss1/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SOUTHWESTERN LAW JOURNAL

VOLUME IV

WINTER, 1950

NUMBER 1

Community Property Symposium

SOME ASPECTS OF THE HISTORICAL ORIGIN OF CONTINENTAL COMMUNITY PROPERTY LAW

FREDERICK H. MAYER*

ANY attempt which seeks to explore the origin of Continental community property encounters the difficulties of historical research; loss or destruction of primary sources which compel the use of secondary evidence. Much reliance must be placed upon the interpretation and conclusions reached by the great scholars on the subject in order to reconstruct missing links in the historical chain of events. The following pages endeavor to present certain aspects of the development of Continental community property as it took place 14 centuries ago, the period during which, according to all available sources, husband and wife commenced to hold property in community.

I

In view of the decisive influence of Roman Law upon the development of Continental Law, a review of the historical origin of the principles governing community property should consider whether this type of conjugal ownership was known in the Roman Law.

The development in the Roman Law of the ownership relation between married persons and property was inextricably bound up with the slow process of the legal emancipation of the forms of marriage and the rights granted by them to the spouses.

During the republican period the *matrimonium* with *manus* was the form of marriage then in use. Under it all property owned by the wife at the time of marriage became property of the husband. The same was true of all property acquired by the wife

*Member of New York Bar, J.U.D. Heidelberg, LL.B., New York University.

during marriage by inheritance, gift, labor or otherwise. The wife enjoyed in her husband's household merely the position of a *filiae familias* and was not regarded as her spouse's equal partner.¹

After the third century A.D. this form of marriage was replaced by the so-called "free" *matrimonium*, i.e., the marriage without *manus*.² The free marriage had no effect upon the wife's property owned prior to or acquired during marriage by inheritance, gift, labor or otherwise. Thus, the husband did not obtain by reason of the marriage any rights to his wife's property. He could not administer or dispose of it. The wife determined the management and disposition of her property. The death of one of the spouses did not create any right to inheritance of the deceased's property in favor of the surviving spouse. Thus, during the empire period the marital property relation was governed by the principle of separate property.³

However, the Roman principle of separate property was decisively modified by the institution of the *dos*. Because of its important influence upon the development of community property among the Germanic tribes during and after the collapse of the West Roman empire, a brief description of the *dos* and its functions is deemed essential.

Since the husband had to bear the expense of running the household, the wife's father or a third party⁴ contributed on behalf and in favor of the wife *ad matrimonii onera ferenda*. Such contribution when made by the father was known as *dos adventicia* and when made by third parties as *dos profecticia*. While during the marriage the husband had the right to use, administer and dispose of the *dos* and enjoy its fruits as her contribution to the marital household, upon the dissolution of the marriage the *dos* had to be returned to the wife. Thus, it seems that during marriage

¹ SOHM-MITTEIS-WENGER, INSTITUTIONEN DES ROMISCHEN RECHTS, p. 512 (1934).

² For a description of the legal distinction between marriage with and without *manus* see SOHM-MITTEIS-WENGER, *id.* p. 504-510.

³ SOHM-MITTEIS-WENGER, *id.* p. 513.

⁴ This may have been her mother or the wife may have made the contribution or a third party.

the husband was the owner of the *dos* and not merely a usufructuary. Like any other owner of property he could sue in his own name. His obligation to return the property or its equivalent constituting the *dos* did not diminish his ownership rights. However, in 18 B.C. the *Lex Julia de adulteriis* also known as *Lex Julia de fundo dotali* withdrew from the husband the right to dispose of or pledge *fundus Italicus* where such real property constituted a part of the wife's *dos*. The Justinian Code extended the prohibition to sell *fundus Italicus* to any *fundus dotalis*. Even the wife's consent would not validate such sale, the purpose being that real property as part of the *dos* should be preserved for the wife.

During the republican period the husband's duty to return the *dos* upon dissolution of the marriage was merely a moral but not a legal obligation. Therefore the donor of the *dos* obtained from the husband a contractual promise (*cautio rei uxoriae*) to return the *dos*. Such promise was regarded by the *praetor* as *pactum* and enjoyed his protection. The *cautio rei uxoriae* was known as early as 200 B.C.⁵ As a means of enforcing the *pactum*, where necessary, the *praetor* created the *actio rei uxoriae* for *quod melius aequius erit*. Like all *praetorian* law⁶ this action became part of the Roman civil law. It was not a property action but a personal action and therefore the right to sue did not devolve upon the wife's heirs unless at the time of the wife's death the husband was in default with the return of the *dos*. Such occurred only in cases where the marriage was dissolved by divorce. Where the marriage was terminated by the wife's death different results obtained depending upon whether the *dos* was a *dos adventicia* or a *dos profecticia*. The *dos adventicia* was retained by the husband as a profit: *adventicia dos lucro mariti credit*, while the donor of the *dos profecticia* could enforce its return with the *actio rei uxoriae* which compelled the husband to return the *dos* with the exception of one fifth thereof which devolved upon the issue of the marriage.

⁵ SOHM-MITTEIS-WENGER, p. 518, footnote 4.

⁶ SOHM-MITTEIS-WENGER, *id.* p. 80.

Since the husband retained the *dos adventicia* where the marriage was dissolved by the wife's death and since the *actio rei uxoriae* did not devolve upon the wife's heirs, the husband's obligation to return the *dos* was rather limited under the prejustinian law.

Under justinian law however the husband had to return the *dos* irrespective of whether it involved a *dos adventicia* or a *dos profecticia* and the *actio rei uxoriae* could be brought by the wife or her heirs. In the case of the *dos profecticia* the heir was prevented from bringing the action where the donor of the *dos* survived. If the wife sued she could immediately claim ownership of all dotal property and her claim was secured by a preferred lien on her husband's property. Thus, under justinian law, the husband was, it is true, formally the owner of the *dos* but in substance the *dos* remained the wife's property. The husband's privileges as they existed under prejustinian law were reduced to a right to administer the *dos* and enjoy its fruits. He was, in substance, a mere usufructuary.

Mitteis⁷ has shown that this development in the justinian law can be traced to the influence of Greek law. According to Greek law the wife remained the owner of the *dos* while the husband had only usufructuary rights with respect thereto. If the wife died the *dos* devolved upon her children. If she died without children the *dos* was returned to the wife's family.

During the later empire period a further far-reaching change of the character of the *dos* took place. Gifts by the bridegroom to the bride were always valid. Such gifts were usually made prior to the celebration of marriage: *donatio ante nuptias*. The *donatio ante nuptias* was made by the bridegroom in order to provide financial security during marriage and to assure the wife's well being after termination of the marriage.⁸ It occurred very often and became later on customary that the property received by the

⁷ MITTEIS, REICHSRECHT UND VOLKSRECHT IN DEN OSTLICHEN PROVINZEN DES RÖMISCHEN KAISERREICHS, p. 230 *et seq.*

⁸ SOHM-MITTEIS-WENGER, p. 522-523.

wife from her husband as *donatio ante nuptias* was returned by the wife as her *dos*, known as *donatio ante nuptias in dotem redacta* so that in the later empire period the husband in effect provided for the wife's *dos*. Moreover, justinian law permitted a *donatio ante nuptias* even after the celebration of marriage and the name was accordingly changed from *donatio ante nuptias* to *donatio propter nuptias*. This final development of the *dos* as a *donatio* by the husband to his wife also originated in Greek law.⁹

The foregoing description of the historical development of the *dos*, it is submitted, convincingly shows the inaccuracy of the general statement that in Rome the marital property relation was governed by the principle of separate property. The *dos* in its final phase, as stated above, represents the Roman concept of a contribution to the economic success of the marriage. While formally fruits and gains derived from the property constituting the *dos* accrued to the benefit of the husband, in fact the conjugal partnership was finally the real benefactor. Of course, the *dos* had also the purpose of assuring the wife's financial security after the termination of the marriage.

Although both features of the *dos*, contribution to the marital household and a means of providing for the wife economic security upon its dissolution, cannot properly be described as attributes of common ownership, nevertheless the following discussion shows that they constituted the nucleus of the concept of community property as it has found its first expression in the *Lex Salica* and subsequently in the *Lex Ribuaria*. The collapse of the Roman empire prevented the future development of Roman law as living law but its conqueror, the Germanic tribes, adopted a number of the institutions of the conquered, one of which was the justinian *dos* as a *donatio propter nuptias in dotem redacta*.

II

Tacitus (Germania, chapt. 18) reported as a custom among the Germanic tribes that at the time of the celebration of marriage

⁹ MITTEIS, p. 256 *et seq.*

the husband gave his wife property which he described as *dos*. Based on Tacitus' statement some authors have distinguished between the Germanic and the Roman *dos*. In the former case it was regarded as a gift by the husband to his wife and in the latter as a contribution by the wife made to her husband.¹⁰ However, Tacitus' report is couched in such uncertain terms which make it impossible in the absence of other sources to determine the true character of the Germanic *dos* as referred to by him.

On the other hand it is certain that in the early Germanic law the wife had no property rights whatsoever.¹¹ She was a member of her husband's household. Her legal status was almost identical with that of her Roman counterpart during the republican period. Only the male members of the household, *i.e.* the husband and his sons, not the wife and daughters, could be owners of property. It is disputed however whether the same status obtained under the tribal laws, also known as *leges barborum*.¹²

¹⁰ BRUNNER, DIE FRANKISCH-ROMANISCHE DOS, SITZUNGSBERICHTE DER AKADEMIE DER WISSENSCHAFTEN ZU BERLIN, p. 545 *et seq.* (1894).

¹¹ HEUSSLER, INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS, Bd. II, p. 295 *et seq.*

¹² The *leges barborum* include the following tribal laws:

- (a) *Lex Salica*, the oldest of the laws evidencing the existence of community property. It originated in the time of Chlodwig I. between 508-511 A.D. Its original text has not been preserved although a number of revised copies which differ from each other are in existence. The *Lex Salica* was the law of the Salic Franks who inhabited the area of the lower Rhine, that is part of what is known today as Belgium and the Netherlands.
- (b) *Lex Ribuaria*, certain parts of which originated in the beginning of the 6th century. It is mainly a revision of the second part of the *Lex Salica*. It was the law of the Ribuarian Franks who settled in the area roughly described as located between Cologne and the Ardennes.
- (c) *Lex Burgundionum* also known as *Lex Gundobada* since its compilation was prepared about 506 A.D. pursuant to instructions issued by King Gundobad. It was the law of the *Burgundiones* who settled in the lower Rhone valley and the Maritime Alps.
- (d) *Lex Visigothorum* probably codified at the end of the 7th century was based upon the *Code Eurici* which dates back to the year 469 A.D. It was the law of the Visigoths who settled in Spain. Regarding the development of the community of acquets and gains in Spain and in this country, see DE FUNIAK'S excellent treatise PRINCIPLES OF COMMUNITY PROPERTY, 2 vols. (1943).
- (e) *Lex Langobardorum* which was substantially based upon the edict of King Rothari of 643 and upon the statutes of later kings, particularly upon the laws of King Liutprand enacted between 712-744 A.D.
- (f) *Lex Alamanorum* also known as *Pactus Alamanorum*. It dates back to the 8th century and was prepared under Duke Lantfried between 710-720. The com-

Brunner¹³ contends that the husband had only possession and administration of the wife's property. He bases his argument upon the *Lex Burgundionum* title 100 which provides: *ut maritus ipse facultatem ipsius mulieris, sicut in ea habeat postestatem, ita et de omnes res suas habeat*. Apparently Brunner interprets "*in ea habeat potestatem*" as a right to possession and administration only.¹⁴ Brunner's contention is of course predicated on the assumption that the wife was the owner of property. From whom did the wife acquire the property?

Upon leaving the parental household and entering the marital household the wife received a gift from her relatives who were members of the parental household. This gift apparently consisted of her personal clothes and jewelry (hereinafter sometimes briefly called dowry) which on her death devolved upon her daughters. The parental household made no other contribution to the wife's marital household. Thus, it seems that the wife owned nothing beyond her personal clothes and jewelry. The *Lex Thuringorum* c. 32, 28 supports the foregoing view since it provided that the mother (the widow) should leave to the sons all real property and livestock, while the daughters should receive her jewelry. The mother who died was not the owner of the real property and livestock but she had usufructuary rights (life portion) on all prop-

pilation was based upon some older text which originated in the beginning of the 7th century. It was the law of the *Alamanorum* who inhabited the area known today as Black Forest, the original Swiss cantons and parts of Württemberg.

- (g) *Lex Baiuvariorum* was compiled under Duke Odilo between 741 and 743 and was also based upon some older text dating back to the 7th century. It was the law of the *Baiuvariorum* who settled in that region of Germany which is known today as Bavaria.
- (h) *Lex Saxonum*, which was the law of the Saxons and originated in the 9th century.
- (i) *Lex Thuringorum* was compiled in the beginning of the 9th century and was the law of tribes which settled in Thuringia.

See also: SCHWERIN, GRUNDZÜGE DER DEUTSCHEN RECHTSGESCHICHTE, p. 47 *et seq* (1934).

¹³ BRUNNER, GRUNDZÜGE DER DEUTSCHEN RECHTSGESCHICHTE, p. 225 (7th ed. 1923).

¹⁴ To the same effect: WOLFF in ENNECERUS, KIPP UND WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, DAS FAMILIENRECHT II, 2, § 40, footnote 1; see also HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW, p. 623, who apparently adopted Brunner's views.

erty which was part of the marital household. Heussler¹⁵ maintains that these rights were the *quid pro quo* for the wife's contribution of her dowry to the marital household. Brunner, however, contends that no evidence is available supporting Heussler's view.¹⁶ While it is probably correct that the wife's right to enjoy for life the security of the marital household was not a direct *quid pro quo* for her contribution, nevertheless such contribution has had some influence upon the extent of such rights granted by the husband.

The theory that the wife owned nothing beyond her dowry finds further support in the *Lex Burgundionum*. According to title 14, § 4, all property was the husband's property except the wife's personal clothes and jewelry. However after the husband's death the widow received upon remarriage the right to use the *donatio nuptialis*, that is the right to enjoy the husband's property together with her children from the first marriage: title 24, § 1, of the *Lex Burgundionum*.

It was mentioned above that the widow had the right upon remarriage to use the *donatio nuptialis*. The statute, it is submitted, referred to no other *donatio nuptialis* but the justinian *donatio propter nuptialis in dotem redacta*. Brunner¹⁷ has shown that the *Lex Salica* adopted the justinian *donatio propter nuptialis*. He was able to prove that the Germanic *dos* as it was provided for in the *Lex Salica* was actually a gift by the husband to the wife which the wife in turn contributed to the marital household. Although he limited his findings to the *Lex Salica*, the law of the Salic Franks, because, in his opinion, the other Germanic tribes were not exposed to the influence of Roman law, it is difficult to believe that those Germanic tribes which were in contact with, and lived among, Romans for at least two centuries were able to resist the influence of Roman law. Indeed, neither the *Lex Burgundionum* nor the *Lex Ribuaria* nor the other *leges barborum* contain any evidence that their concept of the *dos* differed from that of the *Lex Salica*. I,

¹⁵ HEUSSLER, p. 295 *et seq.*

¹⁶ BRUNNER, DIE FRANKISCH-ROMANISCHE DOS, p. 548.

¹⁷ BRUNNER, DIE FRANKISCH-ROMANISCHE DOS, *id.*, 545 *et seq.*

therefore, conclude that the *donatio propter nuptias in dotem redacta* was the Germanic *dos* of the *leges barbarum*.

Thus, on the basis of the foregoing it seems that Heussler's theory of the *donatio* as a *quid pro quo* for the wife's contribution of her dowry cannot be sustained. However, during the husband's lifetime the wife had no title to the property constituting the *dos*. With respect to this point Heussler seems to be correct. Also, after the husband's death, the property remained part of the marital household and devolved upon the children of the marriage. The widow, of course, remained a member of the household. Only upon her remarriage, the *dos* was carved out and held by her for life together with her children from the first marriage.

Up to this point it may be said that the Germanic marital property law does not show any community property features other than the elements which are found in the justinian *dos*.

As the legal position of the daughter improved particularly with respect to the law of inheritance in that the daughter finally could inherit real property, her dowry increased in value and included not only her personal clothes and jewelry but also real property and personalty to which she was entitled as her father's heir. The question, of course, arose whether, for example, property as valuable as real property should pass by reason of the daughter's marriage to the husband's sole ownership. Under the old law the daughter lost by reason of her marriage any right to share in any way in her father's property. The property of her husband devolved upon his family. Where, even in the face of the wife's improved legal status real property owned by her passed upon her death to her family the development of community property principles was greatly impeded. Where, however, property was acquired by the spouses' own activities and labor, the commingling of the wife's property with the husband's property was considerably encouraged and according to Heussler¹⁸ this development was facilitated by the 'mixing' of the urban population.

¹⁸ HEUSSLER, p. 308, *et seq.*

A. *The Lex Salica*

The *Lex Salica* is the oldest source¹⁹ evidencing at the time of its compilation (between 508 and 511) the existence of community property principles. The property to which these principles applied was the *donatio propter nuptialis in dotem redacta*, and the dowry. The time of remarriage of the widow was the event which gave rise to the operation of the principles because at that time the *dos* and dowry were divided between the family of the husband and the surviving spouse. The community idea found its first expression in the provision of chapter 4 of *Capitula V ad legem Salicam: si vir uxorem suam superstitem mortuus fuerit, tunc illa mulier dimediam dotem accipiat*. Since upon the husband's death the wife's *dos* was reduced by one-half, it must be assumed that she enjoyed certain advantages during the marriage. According to Heussler²⁰ the *dos* (*donatio propter nuptialis in dotem redacta* i.e., originally the gift by the husband to his wife and contributed by the wife to the marital household) constituted the wife's ownership share in her husband's property. Heussler's theory is supported by Rozière Nr. 226²¹ which provided as follows: *haec omnia ambo*

pariter tenere et possidere debeamus. In lieu of a transfer of property by the husband to his wife and the return by the wife of such property as her contribution to the marital household, the *Lex Salica* altered the mode of creating the *dos* by constituting it as a grant by the husband to his wife of a share of his property.

Thus the Roman *dos* in the form adopted and developed by the Salic Franks and, as will be shown *infra*, by other Germanic tribes represented the first known type of property which was held in community by husband and wife. The property thus held in community was everything acquired during marriage. The above-mentioned ownership share of the wife covered property which the spouses obtained by *collaboratio*. It was *acquaeustus conjugal*s.

¹⁹ See footnote 12. *supra*.

²⁰ HEUSSLER, p. 309, *et seq.*

²¹ RECUEIL GÉNÉRAL DES FORMULES USITÉES DANS L'EMPIRE DES FRANCS du 5. au 10.

The widow received one-third of *durante matrimonio acquisitum* as her property.²² Accordingly, there can be no doubt that the community of acquets and gains was the oldest community property system known in Continental law.

The community of acquets and gains was also incorporated in the *Lex Langobardorum*. According to the *Edictum Rothari* (*Leges Langobardorum* 181), the *Edictum Liutprandi* (*leges Langobardorum* 3 and 7), the wife's share in the acquisition could not exceed one-quarter. A similar provision is contained in the statute issued by King Chindaswind in 645 (*Lex Visigothorum* III, 1, 5) which prohibited the husband from granting to his wife more than one-tenth of the acquisitions.²³

The community of acquets and gains of the French coutumes²⁴ is based upon the *Lex Salica*. The first trace of this community system in French law may be found in the assises de Jerusalem which provided: *S'il avient, que un home et sa feme ont ensemble conquis vignes ou terres ou maisons ou jardins, le dreit dit que la feme deit aver la moitié de tout par dreit et par l'assise deu reyaume de Jerusalem*.²⁵ This assise originated in the 13th century and was based upon older laws which were lost.²⁶ The French community of acquets and gains became commingled with the community of movables and acquets. However, the community system of movables and acquets developed in France later on independently. It became known in Germany where it was adopted from French law as *Fahrnisgemeinschaft*. It is very difficult to trace the origin of

²² SCHROEDER, GESCHICHTE DES EHELICHEN GÜTERRECHTES IN DEUTSCHLAND, Bd. I, p. 92.

²³ SCHROEDER, *id.*, p. 71, *id.* 84-89.

²⁴ Coutume de Paris, art. 220, provided as follows:

Homme et femme conjoints ensemble par mariage, sont communs en biens meubles et conquests immeubles faits durant et constant le dit mariage.

²⁵ WARNKONIG UND STEIN, FRANZÖSISCHE STAATS UND RECHTSGESCHICHTE, Bd 2, GESCHICHTE DER RECHTSQUELLEN UND DES PRIVATRECHTES, p. 346.

²⁶ The assise de Jerusalem was apparently based upon a law drafted upon the instruction of Gottfried de Bouillon after the creation of the Kingdom of Jerusalem and it was his custom to have all laws enacted and published at a solemn meeting of his noblemen (*assisia baronum*). The original text of such laws were put into a container which was placed into the holy grave. The content of these laws cannot be determined with certainty, since all documents were lost when Sultan Saladin took Jerusalem in 1190. See WARNKONIG, *id.*, p. 51-52.

the community of movables and acquets. Based upon his research, Warnkönig²⁷ presents the following hypothesis: At the time when the acquisitions became the community property of the spouses, the share of the widow in such acquisition had lost its character as *dos*. The need arose to provide the widow with additional means in cases where the marriage contract failed to do so. The assises de Jerusalem provided that at least the noble widow be permitted to transfer to herself one-half of all property owned by the husband at the time of his death irrespective of whether such property was hers or her husband's and regardless of whether such property consisted of real or personal property. She became owner of the personal property and usufructuary of the real property. It is certain that the French community of movables and acquets did not originate in the *Lex Salica* where this system was unknown, and it is equally certain that the community of movables and acquets was the result of developments which took place several centuries after the compilation of the *leges barborum*.

B. *Lex Ribuaria*

Title 37 of the *Lex Ribuaria* provided that the wife should receive as *dos* 50 shillings, one-third of all acquisitions during marriage and possibly a gift which the husband presented to his wife after the first night of the marriage. The *dos* covered probably in the beginning only movables since the *Lex Ribuaria* in title 56, § 4 followed the old law to the effect that women could not inherit real property. But early documents of Ribuarian Franks show that both spouses joined in the sale of real property. Thus, it seems that the above-mentioned provision excluding women from the ownership of real property was no longer in force.²⁸

However, the community of goods was not complete since upon dissolution of the marriage a distribution of the property pursuant to quotas could not be effected. The distribution of property was determined by the origin of such property. But during marriage the property was used jointly as provided by title 37, §3. The sur-

²⁷ WARNKÖNIG, *id.*, p. 246-247.

²⁸ HEUSSLER, p. 314.

living spouse enjoyed the use of all property which devolved at death upon the children of the marriage. Where no children survived the property passed upon death of the surviving spouse to the respective families of the deceased spouses and its distribution to such families depended upon whether it was the property of the wife or husband, *i.e.*, the wife's property devolved upon the wife's family and the husband's property upon his family which, I assume, was of importance in cases involving real property. The community of property remained intact, as stated, where children survived the deceased parent in which instances the surviving spouse shared the property with the children. Where the surviving spouse was the widow she was granted the right to use the *dos* together with the children of the first marriage as it was the case under Salic law. Heussler²⁹ points out that the community of acquets became of particular importance in uninhabited areas which had to be cultivated for agricultural purposes because the land acquired and developed jointly by husband and wife was regarded as *bona collaborationis*. No difficulties arose where the marriage was blessed with children since the children and the surviving spouse held such property in community. In cases of marriages without children the surviving spouse enjoyed the use of all acquisitions and partition occurred only upon his or her death or remarriage.

During the period following the compilation of the *Lex Ribuarica*, the law of the Ribuarian Franks developed in two directions. Because of financial reasons the noblemen who had settled in the area of the lower part of the Rhine region resorted to the concept of the *dos* as *donatio propter nuptias*, known in German as *witthum*, in order to preserve for their families any real property owned by them. The pre-salian and pre-ribuarian concept of the *dos*, that is to say of the Roman *dos*, was revived. By doing so any real property which the husband acquired during marriage was not subject to any claim by the wife since, as shown above,

²⁹ HEUSSLER, *id.*, p. 316.

under the old concept of the *dos*, as *donatio propter nuptias*, she did not participate in the acquisitions during marriage. The change of the character of the *dos* from a gift by the husband to his wife to an ownership share in all acquisitions during marriage was abrogated for economic reasons.

The other development led to a strengthening of the community property principles as laid down in title 37 of the *Lex Ribuaria*. It took place in the urban areas of the middle Rhine and Main. All property owned by husband and wife was held jointly. During marriage no distinction was made as to the origin of the property, *i.e.*, whether it was acquired before or during marriage. Husband and wife disposed of real property *communi manu*, sometimes with and sometimes without the consent of the children. Upon the death of one of the spouses all real property passed to the ownership of the children, subject, however, to the usufructuary rights of the surviving spouse, while personalty became the sole property of the surviving spouse. Where the marriage remained without children all real property owned by the spouse prior to marriage was distributed to the families of the spouse who owned the property subject, however, to the rights of the surviving spouse to use and enjoy the fruits of the property. Property acquired during marriage was distributed, upon the decease of both spouses to the respective families of the spouses on the basis of quotas, sometimes two-thirds of the property to the husband's family, while the wife's family received one-third of the acquisitions. In other instances each family received one-half of all acquisitions.

Although the community property principle described in the foregoing have not been the result of urban developments since they governed the marital property relation also in agricultural areas, the urban population contributed most to the strengthening of the community property system of acquets and gains. It should be noted, however, that the community under Ribuarian law was not a complete community of goods because a partition and not distribution pursuant to quotas resulted upon the death or remar-

riage of one of the spouses. A true community of goods was achieved during the post-ribuarian period.

C. *Lex Alamanorum*

Since in its chapter on marital property the *Lex Alamanorum* deals only with the legal consequences resulting from the dissolution of childless marriages and from the remarriage of widows without children of the first marriage, Heussler assumes that the property law governing marriages with children was already at the time of the compilation of the *Lex Alamanorum* (between 710-720, see footnote 12) so strongly entrenched that a statutory sanction was regarded as superfluous. With the aid of “*a fortiori*” conclusions, I believe, Heussler arrived at the correct results.

Since pursuant to title 55, § 1, the widow without children of the first marriage continued to reside in her husband’s house until remarriage, it must be assumed that the widow with children shared upon her husband’s decease the household with the children, a feature common to all *leges barbarum*. Further, in accordance with title 56, the childless widow who remarried had the right to use and enjoy the *donatio propter nuptias* during life. There can be no doubt that the widow with children enjoyed the same rights. At her death the *dos* devolved upon the children.

Regarding the *dos* it seems that the *Lex Alamanorum* preserved in part the concept of the *dos* as gift by the husband to the wife. However, it incorporated in addition thereto the community principles as laid down in the *Lex Salica* and *Lex Ribuarica* and the other *leges barbarum* mentioned above. Thus, during marriage the spouses jointly used, and disposed of not only the property constituting the *dos* but all other property. Rozière No. 239³⁰ which applied equally to the *Lex Alamanorum* provided: *Le omnia (dotis nomine data) cum ceteris rebus mei mecum pariter habeat et possideat et augmentare studeat*. According to the above-mentioned provision the spouses jointly determined the disposition of all contributed and acquired property. Moreover, the documents

³⁰ See footnote 21, *supra*.

contained in the collection of documents of the St. Gallen monastery³¹ bear witness to the view expressed above. Thus, document No. 272 relates to the joint ownership of the property contributed by the wife, document No. 130 deals with the acquisitions, document No. 611 refers to *quidquid paterne hereditatis et nostre acquisitionis habeamus*. Heussler³² presents an exhaustive list of all documents which show convincingly that the *Salic* and *Ribuarian* community system was adopted by the *Lex Alamanorum*.

As in the case of Ribuarian law the community of acquets and gains of the *Lex Alamanorum* was incomplete. The *lex* distinguished between property owned by the husband and property owned by the wife. The wife transferred to the marital union what she inherited from her parents: *in iurem proprietatis dimiserunt* which was subject to her husband's usufructuary rights.³³ The distinction between the husband's and the wife's property is referred to as *paterna* and *materna hereditas*.³⁴ This distinction, however, disappeared as soon as children were born to the couple. Then all property was treated as a unit: *simul uti, pariter habere res nostras*. If no children were born the distinction between the husband's and the wife's property continued. In the case of a marriage with children which terminated due to the death of one of the spouses, the surviving spouse continued to use and enjoy the marital property together with the children upon whom the property devolved at the death of the surviving spouse.

On the basis of the distinction of property, discussed above, the principle of separate property developed in the mountain regions of Switzerland. There the wife was regarded already during marriage as the owner of her contributed and acquired property.³⁵ In the urban areas as well as in the "flat regions" of Switzerland the

³¹ URKUNDENBUCH DER ABTEI ST. GALLEN, HERAUSGEGEBEN VON WORTMAN, ZÜRICH, 1863.

³² HEUSSLER, p. 327.

³³ URKUNDENBUCH, documents Nos. 633, 655.

³⁴ URKUNDENBUCH, *id.*, documents Nos. 299, 371, 373, 701, for an almost complete list see HEUSSLER, 327.

³⁵ HEUSSLER, *id.*, p. 328, *et seq.*

community property system of the *Lex Alamanorum* was widely used.

D. Westfalian Law

Under Westfalian law the widow was entitled to ownership of one-half of the acquisition where children were born of the marriage. She received this one-half share in lieu of the *dos* which she had the right to claim if no children were born of the marriage. The foregoing statement is based on the *Lex Saxonum*, title 47: *apud Westfalos, postquam mulier filios genuerit, dotem amit-tat*. The widow was compensated for the loss of the *dos* by receiving one-half of all acquisitions in sole ownership. Where, for example, the child or children died during marriage the widow was entitled to the *dos* and one-half of the acquisitions. Thus, in case of childless marriages or in instances where children did not survive the husband, the principle of the community of acquets and gains governed the marital property relation under Westfalian law. Where children were born of the marriage who survived their father the *dos* became part of the community and since the *dos* consisted in numerous cases of personalty as well as real property the community of property was a general community including all property, movables and immovables. Thus, the general community of property originated in Westfalian law.³⁶ This conclusion finds support in numerous documents relating to sales or other dispositions of real property. It appears from these documents that husband, wife and children participated jointly in such real estate transactions.³⁷ The husband on occasions sold real property *conjuncta* or *communi manu* of wife and children.³⁸ It cannot be determined from the documents whether the property sold was

³⁶ BRUNNER, DIE GEBURT EINES LEBENDEN KINDES UND DAS EHELICHE VERMOGENS-RECHT, IN ABHANDLUNGEN ZUR RECHTSGESCHICHTE, Bd. II, p. 156. To the same effect HEUSSLER, *id.*, p. 348. SCHRODER, DEUTSCHE RECHTSGESCHICHTE, p. 312, assumes that the *dos* became part of the community of acquisitions.

³⁷ RECESTA HISTORIAE WESTFALIAE, BEARB. VON ERHARD, 2 Bd., Münster, 1847, documents Nos. 96, 154.

³⁸ RECESTA, *id.*, Nos. 430, 576.

owned by the husband or the wife. Husband and wife jointly used all property they owned. Thus, in *Traditiones Corbeienses* it is stated: *O, tradidit predium, quod ipse et conjux ejus in villa N possederunt.*³⁹

It seems that in the Westfalian law the term *dos* had a double meaning. In the case of a childless marriage the *dos* was a gift by the husband to his wife in the sense of the *donatio propter nuptias in dotem redacta* as well as a grant of ownership of one-half of all acquisitions. Where children were born of the marriage the *dos* constituted the wife's right to the undivided enjoyment of all property. She could not be deprived of this right even in case of remarriage although all of the property held in general community devolved upon the children with the exception of one-half of the acquisitions which was the widow's absolute property.

III

During the centuries following the compilation of the *leges barbarum* innumerable shades of continental community property, particularly Germanic community property developed partly due to the fact that the spouses could arrange the property relation by contract. However, by and large all existing variations may be classified into three main groups: the community of acquets and gains, the community of movables and acquets, and the general community. In the foregoing pages an attempt was made to explore and explain their origin. It was endeavored to show that a visible trail leads from the *dos* of the Roman law to the *donatio propter nuptias* of the *leges barbarum* which under the influence of Roman law have developed the community property system. The findings in the foregoing pages support the conclusion that the community of acquets and gains was the oldest community system known in Continental law which via Spain found its way into the law of the

³⁹ TRADITIONES CORBEIENSES, HERAUSGEGEBEN VON WIEGAND, Leipzig, 1843, see HEUSSLER, 348.

community property states of this country.⁴⁰ The community of movable and acquets was the result of developments in French law while the general community was the product of Westfalian law.

⁴⁰ For an excellent and complete account of the development of the community of acquets and gains in Spain and in the community property states in this country, see DE FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY*, 2 vols., particularly §§ 19-56 of Vol. 1 and appendices in Vol. 2.