EARLY HISTORICAL INFLUENCES ON SEPARATION OF PROPERTY IN ENGLISH LAW

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I. INTRODUCTION

To a modern civilian lawyer the absence of community of property\(^2\) between spouses in English law appears curious, and at variance with the tenet in most European countries that the act of marriage, \textit{per se}, affects the ownership of property during the marriage, and its devolution on the termination of the marriage. From the outset we must make it clear that this article is not concerned with discussing whether separation of property\(^1\) is better than community or vice versa, and a number of articles have already covered this point. Marriage in civil law countries ‘creates’ a patrimony that is jointly owned by the husband and wife, and separate from the patrimonies they own as individuals, and the devolution of property upon divorce and death is predetermined by the regime to which the parties are subject. The idea of separation of property between spouses has been a central feature in English law since the Dower Act 1833 and the Married Women’s Property Act 1882. The former allowed a man to dispose of his real property as he wished, save for the restriction on devises for charitable purposes which was removed by the Mortmain and Charitable Uses Act 1891 section 5, and thus any curtailment upon his testamentary freedom in respect of realty by means of a widow’s right of dower was abolished;\(^3\) moreover the Wills Act 1837 section 3 had made it clear that a person had complete freedom of testation in respect of personality. Combined with this, the Married Women’s Property Act 1882 changed the law so that neither spouse acquired any rights in the other’s property merely by means of the marriage, with the result that married women were fully ‘emancipated’ in relation to their property interests. England had been wedded to dower as the central method by which a widow was provided with a home on the death of her husband. It is of ‘ancient origin’\(^4\) and the common law right of dower, which existed until 1833, had crystallised at the end of the

\(^1\) Meryl Thomas, Birmingham City University 
\(^2\) The term ‘community property’ is used in the US. 
\(^3\) The widow’s right could be avoided by making provision for her before the marriage by means of jointure or by employing a variety of conveyancing devises. 
\(^4\) \textit{Eileen Spring, Law, Land and Family: Aristocratic Inheritance in England 1300 to 1800} 40 \(\text{Chapel Hill, 1994}\).
thirteenth century, so that by the time of Edward I it had become an irreducible third. It provided the means by which the interests of the widow were accommodated within the wider framework of property ownership in a family, and within wider property principles.

The first problem we encounter is to determine what we mean by the term ‘community of property’. There is no comprehensive definition. Cooke, Barlow and Callus, when discussing community of property in a modern setting, state that the term means the ‘automatic sharing of property… during [a] relationship [of marriage]’ and ‘a rule-based sharing of property when the community is dissolved on death.’ A slightly different meaning was ascribed to it by Lemaire who, when examining the origins of community of property in France, said that it meant an association of pecuniary interests between the spouses, with the wife participating only in acquêts. Watkin, whose description is close to that of Lemaire’s, says it means ‘… a patrimony containing property owned jointly by a husband and wife which is separate from the patrimonies they own severally as individual persons.’ While there are common threads to these definitions, all of them, for example, emphasize the importance of the matrimonial unit, there are also differences, and this may lead to problems when assessing how, when and why community of property originated. The adoption of one definition may produce a conclusion that community of property existed, whereas another may not. The definition we have formulated for the purpose of this paper is as follows: (a) there must be special rules or a system of law which comes into operation in relation to property because the state of marriage

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5 Elizabeth Cooke, Anne Barlow, and Theres Callus, Community of Property a Regime for England and Wales, 5 (The Nuffield Foundation, 2006).
6 Id.
7 André Lemaire, Les Origines de la Communauté de Biens Entre Époux, 47 Revue Historique de Droit Français et Etranger 584, 585-586 (1928).
8 Property can be divided into that which is inherited, i.e., family property, which is termed propres, and property that is acquired by means of, for example, gift or purchase. Acquired property, in turn, can be subdivided into property which is acquired during a marriage – conquêts - and that which is acquired before the marriage - acquêts. A further point needs to be made in that the strict division into conquêts and acquêts is not always adhered to, and the term acquêts is frequently used in both this paper and more generally to encompass property acquired both before and after marriage.
exists; (b) such a system must permit the wife’s heirs to take the share she would have taken if she not predeceased the husband; (c) during the joint life of the spouses, they are regarded as joint owners or partners of all property acquired and debts accruing during the marriage; and (d) the husband is not allowed to dispose of the community property by his will thereby defeating the interest of the widow.

In the twentieth century there was a conscious decision in England to reject a community régime. 10 Aside from the main question as to why community had not emerged prior to this, a number of related sub-questions are required to be addressed, namely, could community have developed within the legal structure that pertained in English law: were conditions present in English law, which were present in systems where community developed; and what were the factors that led to the emergence of community in other systems? These questions, and the analysis and exposition of the answers, form the basis of this paper. The approach taken to addressing them is a comparative one, examining a system where community developed with that of England. The region of northern France 11 has been chosen for comparison for several reasons, which include the political connection of parts of northern France with England during the High Middle Ages, the fact that customary law operated in both systems and also both legal systems had been subject to Germanic influence in the early medieval period. The time frame within which the examination takes place is the fifth century to the beginning of the fourteenth century, since, as we shall see, it is not until the fourteenth century that the term community of property was used in the coutumiers of northern France, and England was firmly wedded to dower by that date. We begin our discussion in the fifth century in order to determine whether community had its roots in the law of the Germanic races, since, as we shall see, writers from an earlier period had suggested this to be so.

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10 See Inheritance (Family Provision) Act, 1938; see also Report by the Royal Commission on Marriage and Divorce, 1956, Cmd. 9678 (U.K.) [the Commission examined and rejected the idea of a community of property regime in England and Wales].

11 This is the area north of the central massif. It is the region of customary law or the pays de droit coutumier.
II. MARRIED WOMEN’S PROPERTY – THE EVIDENCE IN THE EARLY GERMANIC CODES

The Germanic peoples who migrated into areas formerly governed by the Empire brought with them their own laws including, *inter alia*, those in relation to marriage, inheritance and property. These peoples were by no means a homogenous group, either in language or culture, although their laws were textualised under the influence of the church, and this led to a degree of cohesion amongst these laws.

In the early societies of the Indo-Germanic peoples the kin-goup was the most important institution in private law and comprised the whole body of kindred. In very early Germanic and Anglo-Saxon society it is likely that the kin-group owned and administered the property in common, but as the kin-group crumbled a new family structure evolved. The household became important and was comprised of a much smaller group which included, amongst others, the husband, wife and children. The household was distinct from the kin-group, but also part of it, and the relationship of the household to the kin-group, and the dynamics between the two can be illustrated by the laws pertaining to the wife. She never completely passed out of her own kin-group: she was never regarded as kin of her husband’s kin. On her marriage her father and brother still retained a type of guardianship over her and would watch over her, although the husband received ‘true’ guardianship of her. Marriage, in these early

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17 By the time of Ine and Wihtraed in Anglo-Saxon England, this was no longer the case. See Ernest Young, The Anglo-Saxon Family Law, in Essays in Anglo-Saxon Law 121, 123 et seq (Boston, Little Brown and Co. 1905).
18 Brundage, supra note 12, at 126.
19 Young, supra note 17, at 123.
20 Id.
21 Id., at 124.
Germanic societies, reflected the tribal tradition of being an alliance between two kin-groups,\(^{22}\) and it was a useful tool in forging alliances and ending feuds.

Early Germanic laws contain no evidence of a community of property regime: earlier writers, such as Huebner and Schroeder, who argued that there are traces of community in the early Germanic laws are in error, since an examination of the Germanic laws of the time give no indication of such a system.\(^{23}\) What is clear from the early Anglo-Saxon laws is that there was an exchange value to a marriage,\(^{24}\) with the woman being regarded, certainly at a societal (and possibly at an individual) level as a transactional commodity, although whether marriage was an actual sale by the father (as guardian of the woman) to the bridegroom is less clear.\(^{25}\) The *weotuma* or bride-price which was originally the purchase price paid to the father for relinquishing control of the maiden’s *mundium* or his guardianship over her,\(^{26}\) changed in nature and in most of the laws became a gift received by the woman in her own right.\(^{27}\) This change may well have coincided with the disintegration of tribal society; the evolution of the family as “a coresidential primary descent group”:\(^{28}\) the increasing role of the ‘state’ in family matters; and the diminution of the exchange value of the marriage. Its importance in the

\(^22\) See *Frederic Seebõhm, Tribal Custom in Anglo-Saxon Law* 32 (1902) (for a similar function of marriage in Cymric tribal society).


\(^25\) Compare Jacob Grimm, *Deutsche Rechtsalterthümer* 321 (Nabu Press, 2010) and Schroeder, *supra note 33*, at 325 (both arguing the sale was an actual sale of the woman by her father), with Young, *supra note 14*, at 172 (arguing that it was not the ‘person of the woman, but the right of guardianship’ that was subject to the sale). It is likely from the evidence available that Young is correct certainly in relation to the later Anglo-Saxon period.

\(^26\) See Noël Senn, *Le contrat de vente de la femme en Droit Matrimonial germanique* (1946). This corresponds to the marriage by purchase (*Kaufeleh*) described by Brundage, *supra note 12*, at 128.

\(^27\) See the Kentish Betrothal of King Edmund, Thorpe, *supra note 24*; Lex Burgundionum, 86, 2, in *Leges Nationum Germanicarum* (LNG) *Leges Burgundionum*, [L.R. de Salis ed.], Hanover, 1892]; Lex Visigothorum III, 1, 6, in *Monumenta Germaniae Historica*, LNG *Leges Visgothorum* [K. Zeumer ed.], Hanover, 1902]; Lex Baiuariorum, 8, 14, in *Mon. Germ. Hist. LNG Lex Baiuariorum* [E. von Schwind ed.], Hanover, 1892-1969]; and Lex Alamannorum, LIV, 1, in *Leges Alamannorum* [E. Heymann ed.], Hanover, 1888. The exception were the laws of the Lex Saxonom of Charlemagne, where the bride-price was not paid to the woman but to the father - *Leges Saxonom*, 47, in *Mon. Germ. Hist, Leges V*, [Karl von Richthofen ed.], 1863]. Interestingly it was the same as the amount paid to the father or guardian for the violation of her person.

\(^28\) Brundage, *supra note 12*, at 134.
evolution and development of community of property (and the financial provision accorded to the wife generally) cannot be overstated, for once the weotuma or bride-price changed from being a gift to the father to one which was a gift to the wife, the economic dynamics between the three parties to the marriage changed, with the father’s position waning and the wife’s waxing, thereby paving the way for the development of a wife possessing property interests in her own right.

As the importance of the father’s mundium faded, the bride-price mutated into the dos ex marito (or Germanic marriage portion), and that, together with the morning-gift, rose to prominence. The morning-gift was the price paid for the woman’s honour, was made to her by her husband on the morning following the consummation of the nuptials, and was linked to a new sexual and domestic union. It was present in most of the continental Germanic and Anglo-Saxon laws, but it varied in amount.

III. DECLINE OF THE MORNING-GIFT AND THE RISE OF DOWER
Towards the end of the eighth century in the Frankish kingdom things began to change, the morning-gift began to fade and disappeared in the course of the tenth and eleventh centuries, although in parts of the Mediterranean south it remained until the end of the Middle Ages, but it was largely symbolic. The fading of the morning-gift was another important step in the evolution of the property interests of a married woman since its decline provided an opportunity for other rights to emerge and take its place. The reasons for the demise of the

29 It also served to distinguish a legal marriage, in which a morning-gift was present, from a ‘concubinage’ in which the morning-gift formed no part.
30 There is evidence in the earliest Anglo-Saxon law codes of the existence of the morning-gift. Law §81 of the dooms of Æthelberht of Kent (from about 600AD) states, “If she [the wife] bear no child, let her paternal kindred have the fioh and the morgen-gyfe” see Thorpe, supra note 24.
31 Didier Lett, Famille et Parenté dans l’Occident Médiéval VIe-XXe Sècles 89 (2000). Although Brissaud says that there however is evidence of a morning-gift in a deed of 1282 – “dote seu dotalicio quod vulgariter dicitur morgangabo”.
Jean Brissaud and Raphael Howell, A HISTORY OF FRENCH PRIVATE LAW V2 755 (Little Brown & Company, 1912 (Reprint 2010)).
32 See Lett, supra note 31, at 88-89 where he says that there is evidence of the morning-gift in Genoa and Milan at the end of the twelfth century and in Tuscany at the end of the Middle Ages. Moreover, we can find evidence in the marriage charters of Visigothic Spain of the tenth and eleventh centuries of husbands making gifts to their wives in acknowledgment of their virginity. See e.g. Pablo Mereá, ESTUDOS DE DIREITO HISPÂNICO MÉDIEVAL, Vol. I, Docs 3-4, 8, 12, 17 (1992).
morning-gift are difficult to pinpoint. Goody links its earlier demise in the north of Europe compared with the south to the postponement of the age of marriage in the north compared with the south. He argues where a woman marries at a younger age there is a briefer courtship and less likelihood of her being deflowered. While this may explain the difference in the treatment of the morning-gift in the north of Europe compared with the south, it provides, at best, a partial and incomplete explanation.

Brissaud, on the other hand, rather enigmatically suggests that the church’s “reaction against the facilitation of divorce” caused the morning-gift to become obsolete. It is difficult to see the causal link between the decline of the morning-gift and the increasing difficulty of obtaining a divorce. The decline in the use of the morning-gift does occur at the same time as the rise in the church’s antagonism to divorce, but the church’s control of family matters was far from settled at this time. In Germanic law divorce had been relatively easy for a man, and the first year of the marriage was viewed as a trial period, at the end of which the marriage could be terminated unless a child was conceived, in which case divorce became more difficult, although not impossible. McNamara and Wemple describe Germanic marriage as a union contracted, sealed and symbolised by sexual relations, which could be dissolved at will (at least if you were a man). It is true that the church, on the other hand, looked upon marriage as a life-long bond between husband and wife, which was contracted by the parties and more importantly their families, but despite this divorce by mutual consent remained common in seventh and eight century Gaul and elsewhere. Even in the tenth century (when the church was beginning to gain exclusive jurisdiction over marriage) its view on marriage

34 BRISSAUD & HOWELL, supra note 31, at 754.
35 See e.g., LEGS BURG, 34 in MON. GERM. HIST. LEGES, supra note 27.
36 BRUNDAGE, supra note 12, at 131.
37 McNamara & Wemple, supra note 13, at 96.
38 Id.
39 Id., at 143.
40 Id., at 137.
and its indissolvability was still not universally accepted,\textsuperscript{41} since indissolvability could mitigate against the fluidity of marriages which could be disadvantageous to powerful families.

Régine Le Jan argues that the morning-gift declined because of the rise of the Germanic marriage portion or the dos\textsuperscript{42} which was favoured over the morning-gift and ‘promoted’ by the church. The dos existed alongside the morning-gift in the Germanic laws,\textsuperscript{43} and had been known of since the time of Tacitus.\textsuperscript{44} In a system where the possessions of the wife became those of her husband’s on marriage,\textsuperscript{45} the appropriation of a portion of his estate for her seems “an equitable compensation for [her]”;\textsuperscript{46} although this cannot be the sole factor, since women who did not bring a marriage portion to the marriage would have had no right to it if this were so. The agreement for the dos ex marito was usually a public act, negotiated and agreed upon before the marriage, and given to the legal spouse, whereas the morning-gift, by contrast, was very much a private act, offered on the morning after the nuptials, and could arise in marriages made only by mutual consent of the parties (Friedelehe),\textsuperscript{47} as well as those which also had the consent of the families of the parties. The dos ex marito facilitated a transparency of exchange between the two families and the relatively public nature of the negotiations meant that the church would favour it since it enabled it to have a closer control over the union.

\textsuperscript{41} Id., at 175.
\textsuperscript{43} Christian Lauranson-Rosaz, Dauaire et Sponsalicum Durant le Haut Moyen Âge in Veuves et Veuvages Dans le Haut Moyen Âge 101 (Michel Parisse ed., 1993). Originally the dos ex marito was merely a gift of movables, but it is clear from the deeds and formulae that it became a gift that could include land.
\textsuperscript{44} Tacitus, Germania 18 www.fordham.edu/halsall/source/tacitus-germ-latin.html (accessed 10 July 2013) (circa 98 A.D.) (‘Dotem non uxor marito, sed uxori maritus offert’).
\textsuperscript{45} She may, for example, have received a gift from her father or have received a share of the inheritance before her father’s death at the time of her marriage, see Brisaud & Howell, supra note 31, at 755; see also Diane Owen Hughes, From Brideprice to Dowry in Mediterranean Europe, 3 J. Fam. Hist. 272 (1978).
\textsuperscript{46} Brisaud & Howell, supra note 31, at 753.
\textsuperscript{47} This was a marriage which did not involve the transfer of the Mund. See Rainer Schulze, Eherecht, in Realelexikon der Germanischen Altertumskunde 493 (Johannes Hoops ed., 1986).
The church may have played a part in the demise of the morning-gift but it had “failed to secure clear-cut control of matrimonial matters [between 600 and 900 AD]” when the morning-gift was beginning to fade, although by the year 1000 AD, when the morning-gift was disappearing, its doctrines on sex were being converted into legal rules, and church officials were beginning to assert jurisdiction over marriage. There was an attempt to harmonize the differences to marriage between the Germanic practice (in which consummation was an essential ingredient) and church discipline (in which consent was paramount and sex was viewed as unclean and incompatible with the ascetic values of the early Christian fathers) by influential writers such as Archbishop Hincmar of Reims in the ninth century. He said, “A true coupling in legitimate marriage between free persons of equal status occurs when a free woman, properly endowed [emphasis added], is joined to a free man with paternal consent in a public wedding [followed by] sexual intercourse.” The church, by insisting on an agreement for the endowment before the marriage could shift the emphasis of the marriage away from the carnal act which took place on the wedding night, to which the morning-gift was inextricably linked, to consent, endowment and spiritual union. In continental Europe the morning-gift remained important only in relation to the marriage called the Friedelehe. It faded, fused with the Germanic marriage portion or dos ex marito and became rechristened dower.

During this evolutionary stage woman’s property rights were ill-defined; they varied in substance, although not usually in form, i.e., the method by which married women were financially provided was similar, although the detail and amount varied. The early idea of a husband’s mundium over the wife affected the way in which rights to the property originated and developed. Originally the possessions of the husband and the wife comprised one

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48 BRUNDAGE, supra note 12, at 137.
49 McNamara & Wemple, supra note 13, at 106-7.
50 HINCMAR OF REIMS, EPISTOLAE 22, in PL 126: 137-138
51 BRISALO & HOWELL, supra note 33, at 755, 765.
patrimony, which the husband both administered and enjoyed, and all property including any acquisitions made during the marriage belonged to him. In most of the Germanic laws, when the husband died first, or the marriage was dissolved without cause, the widow would keep her morning-gift, any property given by her family and the marriage portion (over which she would sometimes have a usufruct, sometimes absolute ownership), but gradually we see her taking a portion of the property which had been jointly acquired during the marriage by the parties (see post). Where the wife died first or the marriage was dissolved with cause, the morning-gift devolved to the widower as did the marriage portion, but it was usually subject to the children’s rights; any portion given to the wife from her family on marriage usually devolved to the husband, although in some laws it was limited so that he was unable to dispose of it during his lifetime.

The ‘dow’ of the Germanic laws became the customary or legal dower of the later Middle Ages, and it provided the mainstay by which a widow was financially provided on the death of her husband. During the early Middle Ages however the amount of dower, the property to which it was attached and the nature of the right was still far from clear, and it varied from place to place.

IV. DEVELOPMENTS IN THE PAYS DE DROIT COUTUMIER

Dower survived until the time of the Revolution in France, when its use by the nobility heralded its demise. The Law of the 17th Nivôse, year II, Art. 61 and Art. 49 of the Décret of the 22 Ventôse of the same year abolished dower for the wife. In northern France in the early

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52 Id.
53 Edictum Rothari 184, Laws of Liutprand 57
54 BRISSAUD & HOWELL, supra note 31, at 756ff. One-third among the Franks (Rib 37 and a Capitulary of 821) and one-half among the Westphalians according to the law of the Saxons (Sax 47, 48), and amongst the Visigoths the division of acquêts was made according to the fortunes of the spouses (Wis 4,2,15: 5,2,3 and 4).
55 Id.
56 Id., at 770.
57 WILLIAM BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAW GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER AND WITH THE LAW OF ENGLAND, VOL. 1, 391 (London, Saunders and Benning, 1838).
58 Although this did not apply in Normandy and customary law survived a little longer.
Middle Ages the form dower took varied both in amount, and the property to which it attached - it could comprise of any of the following: (i) the property which was the husband’s inheritance; and/or (ii) the property which the husband possessed on the day of the marriage, and/or (iii) by certain customs acquêts. The nature and extent of dower should have become more settled after 1214 and the controversial ordinance of Philip Augustus in which legal dower was set at one-half of all that the man possessed on the day of his marriage, thus excluding acquêts from dower. This was not universally accepted in northern France, however, which meant that variations arose.

The origin of community in the pays de droit coutumier is hazy and vague, and it is difficult to point to a precise moment when it came into being – there is no ‘singularity’ as such, but the process is gradual. Important developments occurred from the seventh century when co-ownership of acquêts developed between the spouses, and this evolved alongside dower of acquêts, so that a couple could choose to which system they wished to be subjected. There are a few early charters in which we see evidence of the joint ownership of acquêts, but these

59 In the regions of Poitou, Touraine, Anjou, Maine and Brittany we find charters which suggest that dower amounted to one-third for nobles and one-half for others (see AUGUSTE BERNARD & ALEXANDRE BRUEL, RECUEIL DES CHARTE DE L’ABBAYE DE CLUNY Vol. I (Paris, 1876); Vol. II (Paris, 1880) [hereinafter CLUNY]) – numbers 190, 496, 1211, 1331, 1412, 1777 and 2875.

60 In Amiens, the Artois, Brittany and Touraine-Anjou dower included a share in the acquêts (Charter of Customs of Amiens (1190) § 21 in 1 RECUEIL DES MONUMENTS INEDITS DE L’HISTOIRE DU TIERetat [A. Thierry ed., Paris, 1850]; COUTUMIER D’ARTOIS §§ 25, 32 (E. Tardif ed., Artois, 1883); COUTUMIER DE BRETAGNE § 30, 41 (M. Planiol ed., Rennes, 1896); ETABLISSEMENTS DE SAINT LOUIS, Book 1 § 15-8, 145 (P. Vollet ed., Paris, 1881-6)). In 1193 in the marriage agreement made between Baudouin, the Count of Flanders and the Count of Nevers espousing their son and daughter, dower over acquêts is seen (Lemaire, op cit, fn 5, 603). Certain coutumiers show us that dower over acquêts existed in the regions of France where customary law operated. For example, in Normandy dower over acquêts was seen in the second part of the twelfth century (Lemaire, supra note 7, at 599; TRES ANCIEN COUTUMIER DE NORMANDIE 792 (E. Tardif ed., Paris, 1881) [hereinafter referred to as TAC]. See also TRES ANCIENNE COUTUME DE BRETAGNE 30, 40 (M. Planiol ed., Rennes, 1896). Dower over acquêts also appears in the charters of certain nobles in the later Middle Ages, so it never completely disappears – Lemaire, supra note 7.

61 See BRISSAUD, supra note 31, at 772.

62 In fact there was not merely one but several different community regimes. Community of movables and acquêts in the northern area of France in the land of the Coutumiers and in parts of Germany; partnership of acquêts found in parts of Spain and the south west of France; and absolute community found in parts of Germany.

63 Lemaire, supra note 7, at 610ff.
should not be taken as being representative of a standard regime in operation at the time. For example, in *Recueil de Marculf*, formula II, 7 a wife gives her husband, if she predeceases him, all her goods “*tam de hereditate parentum quam de comparatum, vel quod pariter laboravimus*”. Co-ownership of *acquêts* could be substituted for dower over *acquêts* as we can see in Formula 17 of the *Recueil de Marculf*. In this formula we witness more of a true sharing of property since there is a joint will made by the husband and wife. In the first part the husband made various gifts and then recognised that the wife had a right over part of the *acquêts*, which pre-dated the termination of the marriage, and was not dependant on her survival. The wife, by making a disposal in favour of her husband, demonstrated that she had a right to the goods over which she made the disposal, even if she were to predecease him. Moreover, the idea of the wife having an interest in the property before the death of the husband is further reinforced by the phrase ‘*absque repetitione heredum meorum*’, whereby we see that the wife can exclude the heirs. The formula is interesting since there is no question here of the wife receiving merely an interest for life after her husband’s death, and we can see a much truer sharing of the property. Later charters also demonstrate that co-ownership of *acquêts* existed. For example a charter of Laon of 1128 c.13 speaks of what is tantamount to

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64 Id.
65 *MONUMENTA GERMANIAE HISTORICA, FORMULAE MEROWINGICI ET CAROLINI AEVI* [K. Zeumer ed., Hannover, 1882]. The most important parts of formula II 17 are as follows, ‘…*Ego ille et conjux mea illa…, testamentum nostrum condidimus…; villas vero illas et illas…, filius noster recipiat…, villas illas basilica illa … recipiat… Sed dum in villas aliquas, quas superius memoravimus, quas ad loca sanctorum, hereditibus nostris deputavimus, quod pariter stante conjudio adquisivimus, prædicta conjux nostra tertiam inde habere potuerat, propter ipsam teriam villas nuncupantes illas… in integritate, si NOBIS SUBPRESTIS FUERIT in compensatione recipiat… Itemque ego illo, auxilla tua, Domne et jugalis meus ille,in hoc testamentum… scribere… rogavi, ut, si TU NIHI SUBPRESTIS FUERIS, omni corpore faculat mea, quantumcumque, ex successione parentum habere videor, vel in tuo servitio pariter laboravimus, et quod in tertia mea accepi, in integrum, absque repetitione heredum meorum, quod tua decrevit voluntas, faciendi liberam habeas potestatem. Et post discessum vestrum, quod non fuerit dispensatum, ad legitimos nostros revertatur heredes.’
66 See e.g., *Recueil de Marculf*, formula II, 7.
a ‘community’ of acquêts between the spouses; \textsuperscript{68} and a charter of Amiens of 1190 c.35 says that if a man and woman jointly own acquêts, and one of them dies, the surviving spouse has one-half of the acquêts and the children the other half.

Although dower over acquêts was conceptually different from co-ownership of acquêts, their legal effect may have been \textit{de facto} the same in their early development, in as much as a right (in favour of the wife) was attached to the acquêt in both cases from the moment it became part of the patrimony, and both achieved the object of providing for the widow on the decease of her husband. Until the end of the tenth century/ beginning of the eleventh century dower was usually (although not always) a right of full ownership of the property, although there is charter evidence which shows it could be a life interest.\textsuperscript{69} Under the influence of the Roman theories of dower, and the rule that allowed the wife to dispose of her dower to the detriment of her children, \textsuperscript{70} it was reduced to a life interest only. \textsuperscript{71} Once full ownership of dower faded\textsuperscript{72} it had less in common with co-ownership of acquêts and also community of property.

In the early Middle Ages co-ownership of acquêts was not the same as community of property, since, there were no legal rules which subjected the acquêts to form an indivisible mass of property, which could be divided on the termination of the marriage, and it was very much a matter of custom and practice whether the parties chose to subject themselves to such a system. Moreover, in the case of a sale of an acquêt the husband would receive the purchase price, the wife’s role being merely to consent to the alienation of the property. \textsuperscript{73} Acquêts could be ‘jointly owned’ by the spouses during their marriage and on the death of one of the spouses be divided between the surviving spouse and the heirs of the deceased spouse.

\textsuperscript{68} ‘Si vir et mulier de mercimonii quaestrum facientes, substantia fuerint ampliati et heredes non habuerint altero eorum mortuo, alteri tota substantia remanebit.’ See also, for example, Cluny, \textit{supra note 59}, at No. 476, No. 937 (where a wife gives her husband half of the jointly owned property) and No. 670.

\textsuperscript{69} See Cluny, \textit{supra note 59}, at 1412 of 975 A.D.

\textsuperscript{70} O. Stobbe, \textit{Handbuch des Deutschen Privatrechts}, IV, Besser’sche Buchhandlung 115 (Berlin, W. Hertz, 1884).

\textsuperscript{71} See e.g., Cluny, \textit{supra note 59}, at 1412, 1413, 2618, 2628, 2633, 2659, 2875.

\textsuperscript{72} See R. Callemer, \textit{L’Origine du Droit des Enfants} (Nabu Press US, 2012) [1905].

\textsuperscript{73} Lemaire, \textit{supra note 7}, at 626.
In effect the protection afforded to them was not so great as that afforded to family property.\(^\text{74}\)

It is therefore unsurprising that it is in relation to *acquêts* and in particular the co-ownership of *acquêts* that we see ‘community’ of property developing, although it is not until the fourteenth century that such a term would be used to describe the system.\(^\text{75}\) Writers like Tardif\(^\text{76}\) and Ourliac and Malafosse,\(^\text{77}\) who place community of property’s emergence as earlier, are in error and this misconception is due to several factors. Firstly, as we have seen, there is difficulty in interpreting some of the early formulae (infra), so it can appear community arose much earlier. Concepts which are similar to community appear in some of the earlier formulae, but this does not mean to say that any formalised community regime was in operation. Secondly, the definition ascribed to community of property by some of the earlier writers is much wider than the one formulated at the beginning of this paper, with the result that community appears to arise earlier because of the broader definition they ascribed to community. By the fourteenth century (but not before) there is evidence of a community of property regime in fifty-three of the *coutumiers*;\(^\text{78}\) there are restrictions in relation to the testamentary disposition of the *acquêts* which are subject to community of property;\(^\text{79}\) and there are special rules which applied to *acquêts* with the result that half devolved to the surviving spouse and half to the heirs of the deceased spouse, i.e., the wife’s ‘share’ of the *acquêts* did not depend on her survival.\(^\text{80}\)

Thirdly, in the thirteenth century the division between separation of property and community of property was blurred\(^\text{81}\) since the wife’s power to possess, enjoy and convey the property

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\(^{74}\) The ordinance of Philip Augustus (infra) had excluded them from dower, although we still see examples of dower of *acquêts*.


\(^{76}\) Id.

\(^{77}\) PAUL OURLIAC AND JEAN DE MALAFOSSE, *HISTOIRE DU DROIT PRIVE* (1968).

\(^{78}\) ADOLPHE TARIDE, *DES ORIGINES DE LA COMMUNAUTÉ DE BIENS ENTRE ÉPOUX* 33 (Paris, A Durand 1850).

\(^{79}\) A. LOYSEL, *INSTITUTS COUTUMIÈRES* 171 (Geneve, Slatkine Reprints, 1971)(1848). Although under the Coutume de Lorraine II, 7 he was allowed to dispose of the community possessions by his last will and testament – BRISSAUD & HOWELL, *supra* note 31, at 835.

\(^{80}\) There was however, still no consensus as to what property comprised of community property, with it differing between regions.

\(^{81}\) Donahue, *supra* note 75, at fn 81.
was suppressed in both regimes making it difficult to distinguish one from the other. The administration and ownership of the property in both systems was vested in the husband, and the wife given a set of rights to prevent the property being disposed of by her husband. In both community of property and separation of property the emphasis is upon the rights of the wife on the death of her husband, although that is not to say that she does not have some rights in relation to the property during the husband’s life.

The economic revival in Europe in the eleventh century meant that movables became important, since wealth in the form of movables increased. In the burgeoning ‘middle class’ in France the role of the woman within the marriage became more outward looking, since she may well have directly contributed to the acquisition of the chattels. There is however little trace of chattels in texts before the thirteenth century. When they do appear they were treated in the same way as acquêts on the dissolution of the marriage in that they were partitioned into halves, although the husband had an unrestricted right to dispose of them inter vivos. Movables and debts became incorporated into the community regime at some point during the fourteenth century. In cases where the movables are acquired during the course of the marriage it would seem logical that they were treated in the same manner as acquêts, but this rule was extended to movables which one of the parties possessed on the day of the marriage. And this may have been due to the lack of an inventory of movables at the date of the marriage, and hence uncertainty as to whom they belonged.

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82 Li Livre de Justice et de Plet, XII 24,5 (Rapetti & Chabaille ed., Paris, Firmin Didot 1850)
83 Egypt and the Byzantine Empire had started to trade with Europe again, and this in turn helped revive the Italian towns, and trade towns grew throughout Europe, especially in Flanders and Italy, but also in France and German principalities.
84 Although this is not so in all customs. See, for example, in the west of France the division into thirds. J. Yver, Les caratères orinaux du groupe des coutumes de l’Ouest de la France, 30 Revue Historique de Droit Français et Étranger 18, 39-40 (1952).
85 Briassaud & Howell, supra note 31, at 833.
86 Briassaud & Howell, supra note 31, at 634.
88 Briassaud & Howell, supra note 31, at 827.
V. THE ENGLISH POSITION

The law codes and charters of the early Anglo-Saxon period demonstrate that the *weotuma* and the morning-gift co-existed, and endured in England throughout the Anglo-Saxon period. The laws of Cnut from the eleventh century, dealing with the remarriage of a woman within twelve months of the death of her first husband, makes a distinction between the morning-gift and that property which descended to the wife on the death of her husband, and there are several charters and wills that demonstrate the morning-gift was still used in the eleventh century.

The decline and ultimate disappearance of the morning-gift in England occurred sometime during the twelfth century, between 1115 and 1188, which is markedly later than in northern France. By the time Glanvill was writing towards the end of the twelfth century no mention is made of the morning-gift in his discussion of the wife’s property. This is in stark contrast to the references in the *Leges Henrici Primi* some seventy years earlier to the morning-gift.

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89 In Æthelbiht §81 from around 600AD (*see supra* note 24, at 10) we see the first mention of the morning-gift in a code and if we give credence to the Historia Brittonum ascribed to Nennius it is claimed that the seventh century King Æthelfrith gave a morning-gift of Bamburgh to his wife Bebbe (*see Constine Fell, Women in Anglo-Saxon England* 56 [1984]).

90 The weotuma is seen in charters of the tenth and eleventh centuries. See the Wifmannes Beweddung or Kentish Betrothal of Edmund dating from the middle of the tenth century, “§ 3. Then ... let the bridegroom declare what he will grant her if she chooses his will...”, and the so-called ‘Kentish Marriage Agreement’ from about 1016AD, ‘Here is declared by this writing the contract which Godwine wrought with Beorhtric when he married his daughter; that is, first, he gave her one pound’s weight of gold for that she should choose his will...’

91 See *supra* note 24, at 178; II Cnut 73a: “and if then, within the space of the year, she chooses a husband, she shall lose her morning-gift and all the property which she had from first husband, and his nearest relatives shall take the land and the property which she had held.”

92 See for example, the will of Wynflæd (from between 946-951) shows a wife granting her morning-gift to Eadmaer, [K. 1290, in Anglo-Saxon Wills 10 (Dorothy Whitelock ed., 2011)]; in the will of Ælhelm (from between 975 and 1016) there is a declaration by Ælhelm of the morning-gift he gave his wife (K.1329, *id.* at 30 and 32); in the confirmation of Ælhelm’s will by King Ethelred (997 AD) there is a reference to the morning-gift of Ælhelm’s widow (K. 704, *id.* at 44); in the will of Ælfflæd (1002 AD) there is a grant of an estate, which was Ælfflæd’s morning-gift (K. 685, *id.* at 40); and a charter from between 984-988 AD, entitled ‘History of the Estate of Wouldham, Kent’, speaks of the wife’s morning-gift (*see A.J. Robertson, Anglo-Saxon Charters* [2009] Charter XII, History of the Estate of Wouldham, Kent).

93 GLANVILL, TRACTATUS DE LEGIBUS ET CONJUETUDINIBUS REGNI ANGLIE QUI GLANVILLA VOCATUR [G. D. G. Hall ed. and trans., 1965] [hereinafter GLANVILL].

94 *Leges Henrici Primi* [L.J. Downer ed., 1972].

95 See *id.*, *Leges* c.11,13 and c. 70,22, the former being remarkably similar to the law of II Cnut 73a.
There is no doubt that the *Leges* are ‘incomplete and defective’ and it is difficult to evaluate to what extent they accurately reflect the law at that time. Moreover whether the appearance of the morning-gift in the *Leges* means that it was in frequent use at the beginning of the twelfth century or not is difficult to determine. (See post for a further discussion).

A ‘portions system’ existed in Anglo-Saxon times as can be seen in the law codes and the charters, for example, the Kentish Betrothal, whereby the wife was entitled to take a portion of the husband’s property on his death. In the early laws of Æthelberht, law §78 states “§ 78 If she [the wife] bears a live child let her have half the property if the husband die first”; and the Kentish Betrothal states, “§ 4. It be so agreed, then it is right that she shall be entitled to half the property, and to all, if they have children in common…”. The Germanic nature of this ‘portions system’ can be demonstrated by examining other Germanic codes, to which the laws of Æthelberht bear a remarkable resemblance. Chapter 10 of the mid-eighth-century Bavarian laws, for example, states that a childless widow was entitled to ‘half the property’ until she died or remarried. The laws of Æthelberht and the Kentish Betrothal indicate that the right of the widow to a portion of the husband’s property existed alongside the morning-gift and the weotuma, with the widow who had borne a child entitled to a greater portion than one who had not. It is unclear how extensive the portions system was in Anglo-Saxon times, since extant codes and charters from this early period are sparse, and the only references to the ‘portions’ entitlement of a wife are contained in Æthelberht and the Kentish Betrothal.

The relationship between the morning-gift and the portions system is difficult to evaluate. Earlier writers, such as Young, suggest that by the laws of Æthelberht the morning-gift is superseded in cases where the wife has produced a child and replaced by a portion of her

96 Id.
97 Liebermann, according to Downer, thought that the Leges were ‘current and applicable in Henry’s reign’. Id., at 2.
98 *Laws of the Alamans and Bavarians* [160] [T. J. Rivers ed. and trans., 1977].
99 Although there are references in other laws to a portion (one-third) of the husband’s chattels in the context of the property which the wife of a thief could retain See Ine 57 and Athelstan 1.1
100 Young, *supra* note 37.
husband’s property. Modern writers, such as Klinck, believe that the ‘portions system’ and the
morning-gift existed alongside one another, and the charters do seem to indicate that a
husband could make an express endowment of wealth to his wife by means of, for example, the
morning-gift, and that such express endowments would operate independent of the legal
portions system.
Several writers have suggested that community of property was present during the Anglo-
Saxon period. Young, accepting Schroeder’s view of community of property in relation to the
Westfalian Saxons, states that the ‘higher principles of community of property’ replaced the
morning-gift in cases where the wife had borne a child in Anglo-Saxon law. He said that the
laws of Æthelberht demonstrate that community of property operated in early Anglo Saxon
law in the case where the wife had borne a child. This it is suggested is a leap of logic by
Young, and there does not appear to be any evidence upon which to base this assumption.
Moreover, the evidence that is available illustrates that the morning-gift and the weotuma were
both still in existence at the end of the Anglo-Saxon era, and both could be given to the wife
by means of an express charter, which could in effect create its own endowment regime.
Alongside this the legal ‘portions system’ operated. It is difficult to see how this demonstrates
the existence of community of property, or even that England was on the road that would lead
to a community of property regime. Moreover the morning-gift never faded in the way it did in
northern France, making room for other devices to replace it; nor is there evidence for the
mutation of the brideprice into the *dos ex marito*. The property interests of a married woman
were evolving ‘more quickly’ in northern France relative to England, which meant that there
could be incremental shifts in the fundamental nature of a woman’s property rights which
provided the opportunity for developments to take place. Linked to this was the manner in

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102 See e.g., Young, *supra* note 17; Florence G. Buckstaff, *Married Women’s Property in Anglo-Saxon and Anglo-
103 Young, *supra* note 17, at 175.
which property was classified in northern France and the importance that a classification had on the ability of the owner to alienate such property. While the rules in relation to movables or chattels might have been somewhat vague on both sides of the channel, this was not the case in relation to immovable property. The classification of land in England was based on land tenure, with land being classified as book-land and folk-land. The former was granted by the kings (with the consent of the witen in the ninth and tenth century) in charters or books to bishops, lay nobles etc., and the right of alienation of book-land depended on the terms of the original grant.\textsuperscript{104} Folk-land, by way of contrast, was not held by means of book or written title, but held by means of the customary law.\textsuperscript{105} In northern France by contrast property was classified according to its origin. Propres was land that had devolved from the lineal family, so that the husband’s (or wife’s, if the property was from her family) power to alienate such land was tightly controlled in order to protect the interests of the heirs. Land that had been acquired by a person, other than by means of inheritance, during a person’s lifetime was classed as an acquêt, or if acquired during the marriage a conquêt. (See ante fn 8 for a discussion of this point). This division facilitated the preservation of family land within the lineal family, with acquired land being available for the ‘new’ family which included the wife.

IV. THE POSITION IN NORMANDY

Until the end of the twelfth or the beginning of the thirteenth century, when Norman customary law was reduced to writing in the TAC\textsuperscript{106} and later the Summa de Legibus Normandie in curia laïcali or Grand Coutumier de Normandie\textsuperscript{107} (hereinafter referred to as the Grand Coutumier), dower over acquêts existed in Normandy,\textsuperscript{108} and there are several legal texts from the time that demonstrate this. Lemaire, for example, speaks of a case which was

\textsuperscript{105} Id., at 61.
\textsuperscript{106} ROBERT BESNIER, LA COUTUME DE NORMANDIE \textbf{53-54} (Librairie du Recueil Sirey, 1935) dating from 1200-1245. The dating of the TAC is approximate and based on references in the texts to datable events.
\textsuperscript{107} Id., at 105, dating from 1235-1258.
\textsuperscript{108} Lemaire, \textit{supra note 7}, at 599.
referred to the assembly at Lisieux, where a husband, whose marriage was annulled, refused to return to the wife “sa dot et sa part des acquêts”. Earlier evidence is difficult to find because of the paucity of written material; in fact no document survives from this area of northern France before the latter part of the tenth century. Two documents from around this time, demonstrate the existence of dower in the region; the first records the dower land granted by Richard II of Normandy to his wife, Judith, and the second records dower granted by Richard III of Normandy to his wife, Adela. In the eleventh century dower is recorded in a number of charters where the wife’s consent to the alienation of the dower which had been given to her was required. At this time dower took the form of an endowment of the wife with specific property, although later an alternative form of dower (customary dower) which comprised one-third of the husband’s property developed. Moreover, by the end of the second half of the eleventh century we see that the distinction between acquêts and propres was recognised in Normandy, although it is likely that it had developed before this. At the beginning of the thirteenth century, there was a series of decisions in the Echiquier in which dower of acquêts was excluded; it is conceivable that these decisions formed the basis for the later TAC, and as Yver states the result was to, ‘fixant la droit normand dans cette attitude de défiance’. Certainly by the time the TAC was reduced to writing property that had been acquired by the husband during the marriage was expressly excluded from dower, and the Grand Coutumier states that property which had been acquired by the parties during the

109 Id., at 600-601. This decretal is dated at somewhere between 1185 and 1187.
112 TABUTEAU, supra note 110, at 176-7.
113 Id., at 176.
114 Id., at 177.
115 J. Yver, Le douaire sur les conquêts en Normandie, REVUE HISTORIQUE DE DROIT FRANÇAIS ET ETRANGER 827 (1936).
116 Id.
117 TAC, supra note 50, at 69, “la femme ne peut pas demander douaire ès choses que son mari acquiert durant le mariage”.

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marriage belonged to the husband. Such a system would mitigate against the development of a community regime. Moreover, by the time the Norman coutumiers were redacted again in 1583 article 389 of the Coutume de Normandie expressly forbade community of property. What is curious, however, is that there were local customs operating within Normandy which differed in their approach. For example, in Caux, certainly at the time of Terrein, half of the conquêts were the wife’s as her dower, and in the bailiage of Gisors, the widow was given half the conquêts made during the marriage on the death of her husband. Property held by means of burgage tenure was always treated differently, and in this respect Normandy followed the rest of the towns in northern France where property situated within towns and burroughs was treated as community property. In Normandy if burgage property had been purchased by the husband during the marriage then half of it was the widow’s on the death of the husband. Nevertheless the general approach to marital property in Normandy, certainly amongst the higher classes, was the exclusion of dower over acquêts and of community of property, an approach that differed from most of the customs of the rest of northern France. It is difficult to pinpoint the reasons for this difference in Normandy, but it may in part be due to the rapid and early crystallisation of the customary law compared to the rest of northern France, and this in turn did not give time for community to evolve before the customs were...
This rapid crystallisation may have been the result of the Dukes’ strategy to stabilise the duchy in the light of their relatively recent acquisition of Normandy, and to impose themselves as true sovereigns both on the population at large and on the Norman barons. Moreover the influence of French law in Normandy ‘remained nearly non-existent’ This may be due to the political situation in Normandy, since the Dukes of Normandy asserted their independence as regards the Kings of France so that often the latter were their suzerain in theory only. By the time of the forfeiture of John’s continental fiefs in 1204 Norman customary law had formed so that the customs of the Île-de-France did not have a profound influence over Norman customary law. It was only at the edges of Normandy in Gisors and Caux, for example, that the custom of the Île-de-France had any influence, and this resulted in a different marital system from that in the rest of Normandy.

The law of Normandy which formed between the tenth and the twelfth centuries exhibited three key characteristics, which Besnier summarised as follows - it was a ‘droit féodal, patrimonial et familial’. The Normans (like the rest of northern France) put the ancient value of lineage and the family above all else, and in order to facilitate the devolution of property in accordance with these ideas there had to be strict rules in relation to matrimonial property interests and successorial inheritance. The aim of Norman law was to avoid the prospect of property, both the husband’s and the wife’s (which was her dowry), from passing by means of marriage into a different family line. As a result the wife’s family’s property was protected by the rule known as l’inaliénabilité dotale, and the husband’s family’s property,

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125 Yver, supra note 122, at 811.
128 Id.
129 Besnier, supra note 106, at 16.
130 Id., at 16-19; Poirey, supra note 127, at 23ff. As Poirey says, lineage ‘gave structure and cohesion to Norman society’, and it enabled power to remain with the Norman aristocracy. Rules evolved so that family property was not ‘lost’ to persons outside the blood line, and hence power remained in the hands of the seigneurs. Community of property of even acquêts could threaten the interests of the Norman aristocracy.
which was the widow’s dower, was merely a usufructuary right and subject to the control of the heirs. While it is obvious that a system which protects lineage and places the preservation of family property within the family at the forefront is going to produce rules that will protect propres, it is more difficult to see why dower and co-ownership over acquêts (and conquêts), and ultimately community of property, did not exist in Normandy. For acquêts and conquêts were not ‘family property’ as such, and there is evidence that dower over acquêts occurred in Normandy in the eleventh century (which was consistent with the Frankish usage elsewhere).\textsuperscript{131} While acquêts and conquêts were not family property in the hands of the person who received the property, they had the capability to be family land in the hands of the donee of the property. What we mean by this is if a husband receives property as an acquêt, and the property devolves to his heir by means of inheritance, then in the heir’s hands it is a propre. It is the capability of an acquêt or a conquêt to become a propre that may have resulted in acquêts and conquêts being excluded from dower.

VII. WOMEN’S PROPERTY RIGHTS IN ENGLAND POST-CONQUEST

We have seen (infra) that at the end of the Anglo-Saxon period the wife and widow were provided for, either by means of the legal portions system, or by means of express endowment, in which the morning-gift and the weotuma formed a central part. By the time of Glanvill\textsuperscript{132} (around 1188), the position of the wife and widow in relation to their marital property can be gleaned from his writings. The wife was entitled, by both the secular and ecclesiastical law, to an endowment (dower) at the time of the marriage,\textsuperscript{133} whereby she was given the use of a portion of her husband’s lands during her widowhood. The amount of dower could be chosen by the husband, or, in cases where he did not nominate property as dower, one-third of the

\textsuperscript{131} See Astoul, Ch., \textit{La constitution et l’assiette du douaire en Normandie avant le Grand Coutumier}, \textit{Bulletin du Comité des Travaux Historiques, Sciences économiques et sociales} 132-137 (1911).

\textsuperscript{132} Glanvill, supra note 93, at fn 108

\textsuperscript{133} \textit{Id.}, at Book VI I. There was an inherent distrust in English law of any death-bed endowments and death-bed marriages, with the result that the common law would only recognise dower which was made at the time of the marriage \textit{see} T.F. Plunkett, \textit{A Concise History of the Common Law}, 566 (2010).
whole of his free tenement of which he was seised at the time of the marriage was deemed to be dower.\textsuperscript{134} Dower could be increased where the husband had little land at the date of his marriage, by including one-third or less of his later acquisitions.\textsuperscript{135} In the 120 years between the Norman Conquest and Glanvill’s writings the nature of a wife’s property rights changed: the weotuma and the morning-gift had disappeared, and dower had become the mainstay of a wife’s financial provision.\textsuperscript{136}

Earlier writers suggested that ‘Norman law [did] not exist in a portable, transplantable shape…’, and that it had little influence on the pre-existing Anglo-Saxon rules.\textsuperscript{137} While no Norman ‘code’ as such emerged until the end of the twelfth century, to say that there was no ‘consciously perceived legal system’ in Normandy by the end of the eleventh century would be wholly inaccurate;\textsuperscript{138} modern day scholars believe that a legal system existed in the early period of Norman history, which was influenced primarily by Carolingian practice and custom.\textsuperscript{139} We have seen that dower, the dowry and the division of property into propres, acquêts and conquêts existed in Normandy at the time of the conquest. Did the Normans bring these ideas to England?

Traditional wisdom always held that William the Conqueror did not intend to sweep away the Anglo-Saxon laws: on the contrary, in Laws of William, Select Charters c.7 William said that all men were to have and hold the law of King Edward,\textsuperscript{140} and so it has generally been accepted that both he and William II legislated on few matters. Nevertheless more recent scholarship suggests that this may not be so. Tabateau argues that the outlook and the

\textsuperscript{134} Id.
\textsuperscript{135} Id., at Book VI 2.
\textsuperscript{136} The maritagium, which was a gift to the woman from her family, also took root during this period: this was not a concept that was familiar to the Anglo-Saxons, although payments from the bride’s family to the husband were not unknown in Anglo-Saxon England but they played a far less prominent and significant role than payments in the other direction, i.e., by the husband to the wife or her family. See Whitelock, supra note 92, at 24.
\textsuperscript{137} POLLOCK & MAITLAND, supra note 102, at 57.
\textsuperscript{138} TABATEAU, supra note 110, at 2.
\textsuperscript{139} Id., at 2-6. There was some Scandinavian influence in certain areas.
\textsuperscript{140} Laws of William, Select Charters c.7, in THORPE, supra note 24, at 15.
orientation of both William I and William Rufus remained Norman through their reigns, that the barons of Normandy were the same men as the barons of England and their outlook too remained Norman. William Rufus, at the time that he held England, held Normandy in mortgage from Robert Curthose. Moreover Hudson maintains that Anglo-Saxon and Norman practices, together with the impact of conquest and colonization all combined to form an important substantive and administrative basis for the common law, and that Norman innovation was clearly seen in relation to land-holding higher in society. Thus the influence of Norman legal processes on English law seems more profound than previous scholars thought. The Domesday Book, the Coronation Charter of Henry I and the *Leges Henrici Primi* provide us with an insight into marital property law post conquest. In the Domesday Book both the wife’s dower and her *maritagium* are mentioned; the Coronation Charter of Henry I §3 and §4 speaks of a widow’s *dotem* and *maritagium*, and the *Leges Henrici Primi* Law 70 § 22, rather confusingly, combines Anglo-Saxon ideas with the Frankish *Lex Riburiae*, when it describes a widow’s right to her *dos*, the morning-gift, one third of the *acquêts* of the marriage and the *maritagium*. The widow’s right to her *dotem* and the *maritagium* become embedded in England. Although the documentary evidence from Normandy at this time is scarce, we have already seen that Tabateau found charter evidence for the existence of dower and classification of property into inherited and acquired property.

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141 *Tabateau, supra* note 110, at 4.
143 See Downer’s commentary in *Leges Henrici Primi*, *supra* note 94, at 79 for a discussion of the general problems with it.
144 See e.g., *Domesday Book: A Complete Translation* (Penguin, 2003) at i.138b ‘*dedit cum nepte sua in maritagio*’. See also 197 and 214b, and 218r where it is clear that Azelina widow of Ralf Taillebois, sheriff of Bedfordshire is holding lands *de maritagio* and *de dote*. The problem with the references to the *maritagium* in the Domesday Book is that they are rare and rather brief, and although they indicate the existence of the *maritagium*, they do not shed any light on its actual operation at this time.
145 From 1100.
Thus it is arguable that the Normans introduced or reinforced these concepts in England. It is likely that they would apply their own laws to their own disputes, rather than adopt the laws of the conquered Anglo-Saxons. There is a ‘mixing’ of Anglo-Saxon (the morning-gift) and Norman ideas in these early documents, which suggests that Norman concepts were infiltrating, blending and usurping Anglo-Saxon ideas, the later of which still held sway in the early post-conquest years, but only amongst the Anglo-Saxons.

VIII. THE REASONS FOR LACK OF COMMUNITY

We have seen in post-conquest England, northern France and Normandy that woman’s property rights have common features. In most of northern France community of property evolved in a way that it did not in Normandy and England, and while we have touched upon some of the factors (for example, the classification of property and the relative lateness of the reduction to writing of most of the coutumiers of northern France) which may have influenced this dichotomy, these factors do not seem to give us the complete picture. Other issues too have contributed to this lack of community of property.

1. The fading of acquêts

The existence of acquêts was central to the development of community of property in most of northern France, although there were isolated areas where it developed only, for example, in relation to movables and debts. Acquêts endured for a relatively short period of time in England, and there is no doubt that without them the development of community would be stymied. By the time we get to Bracton they have all but disappeared and as Holt said they were a mere ‘passing phase’. There is no doubt that acquêts played an important part in post-Conquest England. They were an integral feature of the customary succession of the

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147 The morning-gift does not appear in the writings of Glanvill.
148 For example, the Artois region.
149 Although they did endure in the context of succession of manors until the fourteenth century.
French upper-classes, in the century following the Conquest, with the eldest son being entitled to family property, and the younger son the acquired land. Moreover a man is more able to alienate his acquired property without the consent of his heirs and collaterals during the twelfth century than he was family property. Glanvill demonstrates this point, when he draws the distinction between land that is inherited and land that is acquired; if a man has only inherited land, he can give a certain part of it to any stranger he wishes. However, grants to a younger son without the heirs’ consent were not allowed. If a man had only acquired land, and wished to make a gift of part of it, he could do so, but he should not disinherit a child by giving away all his acquisitions. In the absence of heirs or children a donor could give away his acquisitions to whomsoever he pleased. If a donor had both inherited land and acquisitions then he may give the acquired land to whomsoever he wished together with a ‘reasonable part’ of the inherited land. It is accepted that Glanvill does not necessarily lay down mandatory rules, but rather he discusses principles “in a discussion of norms which generally or customarily hold true.” Moreover, the distinction between acquired and inherited property was important in that a potential donor’s family would usually prefer inherited property to pass to the heir in order to keep family property within the family, whereas the lord may feel “a particular claim to control lands which the tenants recently acquired from them.”

With this in mind the demise of the distinction between acquired and inherited property may seem puzzling, and can probably be traced to several events.

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152 See J. HUDSON, LAND, LAW AND LORDSHIP IN ANGLO-NORMAN ENGLAND 109 n.2 (1994). In fact on William’s the Conqueror’s death Normandy, his inherited lands, went to Robert Curthose, his eldest son, and England, his acquired land, went to William Rufus, with his third son taking the movable property. In the course of the twelfth and thirteenth centuries on the continent this custom developed into a rule - Joseph Biancalana, Widows at Common Law: The Development of Common Law Dower, THE IRISH JURIST 271 1988. Whether it became a rule in England during a later period is unclear, but there is evidence of younger sons often being made and answering claims to inheritance against their older brothers by saying that the father had granted them land out of purchased land. See e.g., 1 Rotuli Regis Rolls [RCR] 438, 2 RCR 88-89; 1 Curis Regis Rolls [CRR] 45, 66-7; 1 CRR 310; 1 CRR 359; 2 CRR 248. See also R. PALMER, THE WHILTON DISPUTE 1264-1380: A SOCIAL-LEGAL STUDY IN DISPUTE SETTLEMENT IN MEDIEVAL ENGLAND (1992).

153 GLANVILL, supra note 93, at 94, VII.1.

154 Holt, supra note 151 (established that the distinction existed in England before Glanvill’s time).

155 HUDSON, supra note 152, at 183.

156 Id., at 101.
(i) The division of land into inherited and acquired may not have been as clear-cut as at first it appears. This is due to the fact that a father’s acquisition would become the inherited property of the heirs, and a practice developed of the heirs succeeding to both inherited and acquired land so that the distinction would only remain important for the duration of one generation.

(ii) Land acquired by means of marriage, even if it were the wife’s inheritance, was treated as though it were an acquisition amongst the French upper class, with the result that the division between acquired land and inherited land was blurred by this custom.

(iii) The rules in Glanvill, as we have said, were not prescriptive but merely ‘cast in terms of what a donor may do’. Gifts that could be made from inherited land were limited to a *rationabilis* part, and it was open to interpretation as to what was the ‘reasonable’ part. Milsom pointed out that these rules (of which the division into inherited land and acquired land were a part) “perished because they could not well be enforced in the king’s courts”.

(iv) Charles Donahue believes a further factor which ‘obliterated the distinction’ between acquired and inherited land was the rise of the warranty system. He said the heritability of land became established in the late twelfth century because the royal courts forced lords and their heirs to honor the warranty to a man and his heirs implicit in taking homage. The rules designed to ensure that heritability also operated… unintentionally… to make land freely alienable *inter vivos* but not alienable at all by testament.” And he continues “Another result, probably also unintended, was the obliteration of the distinction between family land and acquests.” What does he mean by this? Alienability of land at the beginning of the twelfth century depended upon whether the property was inherited or acquired, and upon a series of

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157 For example Eleanor of Aquitaine’s inheritance to Richard the Lionheart. For a more complete discussion on this point see Steven Runciman, History of the Crusades (1951).
159 Id.
160 Donahue, supra note 75.
161 Id.
participations and consents of the heir and lord (in the case of a substitution). From the
1160s the charters contain fewer and fewer references to participation, and homage and
warranty became a bar to the lord or the heirs of the donor claiming the land from the donee of
the land and his heirs. The heir’s duty to maintain and warrant his ancestor’s grants did not
distinguish between grants of acquired land and inherited land, and this was a further factor in
the demise of the distinction between acquired and inherited property.
(v) The introduction of the writ of right and the assize of mort d’ancestor increased the
importance of seisin for the heir, thereby diminishing the importance of the classification of
land into acquired and inherited. While Simpson may be correct when he says that “[i]t is
perhaps mistaken to conceive of Henry II’s policy as a policy of protecting seisin… rather [he]
is concerned to prevent disseisins,” an inevitable consequence was to attribute a new
importance to the concept of seisin. An heir could bring mort d’ancestor or a writ of right to
recover both inherited and acquired lands without any need to distinguish between the two.

2. Dower and the demise of acquisitions

The classification of land into acquired and inherited for the purpose of alienation was not the
same as the distinction of land into acquisitions and inherited for the purpose of dower, with
the former distinction being important since it could determine the extent of a widow’s dower.
Glanvill said that every man is bound both by ecclesiastical and secular law to endow his
spouse at the time of the espousals. Thus either a man nominated certain lands as dower (the
dos nominata), which could not exceed one-third of his lands, or failing this, the royal justices would deem that the husband had endowed his wife with one-third of land of which he was seised at the time of the marriage (dos rationabilis). Land acquired by the husband during the marriage could not be claimed as dower, unless the husband used words at the time the dower was assigned, by which the acquisitions would become encompassed into the dower. 168 Biancalana, however, argues that acquisitions could comprise of dower where the husband used words like “a third of all my lands” since this formula could be taken to mean lands at the time of the marriage and those acquired at a latter date. 169 At some point between the Assize of Northampton in 1176, in which chapter four instructed the justices that widowers were to have their dower, 170 and Magna Carta in 1217, in which there was added to chapter seven, “She is to be assigned as her dower one-third of all the land which was her husband’s during his life, unless she was endowed with less at the church door”, 171 dower became a single entitlement encompassing the husband’s acquisitions and the property he had at the date of the marriage. 172 With the demise of the distinction between inherited and acquired lands for the purpose of the heir’s rights the distinction for the purpose of dower would be difficult to maintain.

3. The role of chattels

The division of property into acquired and inherited property was instrumental in the development of community of property in France, and movables came to be incorporated into the community regime. Donahue 173 says that movables were not vital to the growth of community, and while this may be correct they certainly contributed to its early development.

168 This dual entitlement to inherited lands and acquisitions has been seen as one that originated in Frankish custom see Biancalana, supra note 152, at 258.
169 Id., at 278.
171 Id., at 341. Maitland believed this was meaningless when it was written (FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW, Vol II 421 (1895)) but Biancalana has cogently argued that this is incorrect, and Magna Carta is merely recording the state of the law at the time – Biancalana, supra note 152, at 282ff.
173 Donahue, supra note 75.
It is likely that the reason for their inclusion in a community regime in France was almost accidental: the old rule by which a husband could freely dispose of a wife’s movables disappeared, and the lack of an inventory of the movables on marriage meant that they were ‘mixed’ and therefore available to be included in community property. Debts of the marriage had also become part of the community of property, since they were initially paid from the movable portion of the property and if movables became part of community of property it was inevitable that debts themselves would become an integral feature of community.

The treatment of chattels in England made it difficult for them to form part of any putative community regime. From the end of the thirteenth century the common law made it clear that the effect of marriage on a woman’s chattels was to make them the property of her husband, and the common law came to look upon the husband as the guardian of his wife and thus entitled not only to the fruits of her lands, but also ownership of all chattels that she had or which came to her during the marriage. Both Glanvill and Bracton remark that a married woman could make a will of her chattels, provided that the husband consent, and despite the support given to the making of wills by married women by ecclesiastical law the common law pointed out that there was no customary right for her to do such a thing.

4. Unifying control of property in one person

With the benefit of hindsight it appears as though there was a conscious effort in England towards unifying control of land in one person and that the land devolve intact to a single

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174 BRISSAUD & HOWELL, supra note 31, at 827.
175 BRITTON, supra note 227 (John Byrne & Co, 1901).
177 GLANVILL, supra note 93, at VII 5; Bracton, supra note 150, at fol 60b.
178 SHEEHAN, supra note 176, at 236.
179 See the Lambeth Statutes of Archbishop Boniface (1261) C 21 as one of the earliest examples, where he said that those who impede the “just customary and free” making of a will by a married woman will be excommunicated. Other examples can be found in the Statutes of Archbishop of Stratford 1342 and Giles of Bridport, Bishop of Salisbury (1257-62). See also a synodal statement of the wife’s testamentary capacity as customary (Lambeth 1261) in SHEEHAN, supra note 176, at 238-9.
Such a ‘conscious effort’ is illusory, although the law did evolve in such a way that the power of alienation was concentrated in the hands of a single living person who had seisin of the land and would pass it, usually, to a single male heir. There was a bias against partition of the land in English law, and there was a simplicity and certainty in a lord taking homage from one person, rather than a number, and this was necessary since he would have been made to provide escambium when the king’s court made him give the land to the right man. These factors mitigated against the development of community of property.

IX. CONCLUSION

It is clear from the early Germanic codes in both continental Europe and Anglo-Saxon England that common ideas pertained in relation to women, marriage and property interests. In most of these laws, as tribal society disintegrated, the bride-price or the weotuma which had been paid to the wife’s family, was paid directly to a woman (except in the case of the Lex Saxonum). The morning-gift, which was a payment for the virginity of the wife, was present on both sides of the channel, although it began to fade at an earlier time in the Frankish kingdom than in England. Nevertheless, there is no evidence in the extant codes, formulae and charters that any type of community of property regime existed during this early period. In northern France the morning-gift ‘fused’ with the Germanic portion and mutated into the dos or dower, that would accommodate a widow’s property rights, yet at the same time protect family property of the higher classes until the time of the Revolution. Alongside dower, in most of northern France, co-ownership of property was developing and it was from this that community would spring. What was pivotal in this arrangement for the financial protection of the matrimonial unit was the manner in which property was classified. Propres received a higher degree of protection since it was important that they be preserved for the lineal family:

180 Donahue, supra note 75, at 81.
181 MILSON, supra note 158.
acquêts, by contrast, seen to be less important to the lineal family, could be subject to co-ownership and ultimately community. A usufructory right of dower over propres and community of acquêts accommodated this need very well. Moreover the relative lateness of the redaction of the coutumiers (with the exception of Normandy in which community never developed in any case) compared to the writings of Glanvill in England meant that the former had time to evolve before being set down in writing. In England the morning-gift did not disappear until some time towards the end of the eleventh beginning of the twelfth century.

We have demonstrated that endowment and the morning-gift are seen in the charters of the eleventh century, with the earlier codes echoing what was the customary framework for the devolution of property amongst the lower classes. There was no classification of property corresponding to that in northern France, until after the conquest, which we have said facilitated the development of community. We have shown that the classification of property into, what would be termed in England, acquired and inherited, was introduced by the Normans. Property may have been recognised as acquired and inherited pre-conquest, but this recognition lacked any legal significance. There was an almost complete replacement of the English aristocracy by 1086, and this ensured that Norman customs were introduced into England, and in all likelihood ‘mixed’ with Anglo-Saxon customs. Endowment of a wife (by means of the morning-gift in part) was already a feature of Anglo-Saxon society, although the amount was at the discretion of the husband. Under the influence of the Normans this endowment became the dower of the thirteenth century. The widow’s right of dower represented a temporary encumbrance on the land, and enabled land to devolve to the next of kin: such a system no doubt favoured and was favoured by the nobility. Holdsworth said “… the common law [of England] made the law of the nobles the law of all.” so that dower

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182 HUDDSON, supra note 142.
183 Id.
became the means by which all widows were financially provided. In France too dower was the means by which a widow received a degree of financial stability. Amongst the merchant classes who held land in burgage tenure, however, both in Normandy and most of northern France the customs of community of property was preferred. In France, with the exception of Normandy, community was extended to the nobles. In England it was only in a small number of borough customs that customs such as gavelkind survived and applied to the lower classes: law became more ‘centralised’ in England. The building blocks for the evolution of community were present in England at an early time, but the demise of the distinction of property into inherited and acquired cannot be overstated, and this together with the rise in the importance of seisin, the manner in which chattels were treated in England and the unification of control in one person mitigated against the evolution of community.

185 J. MUSSET, LE RÉGIME DES BIENS ENTRE ÉPOUX EN DROIT NORMAND [1997]