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Private Law in Transylvania as Part of the Habsburg Monarchy

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Abstract. In the course of our following study, we present the transformation of feudal institutions of private law in force in Transylvania in the early modern period and their modernization during the time when this historical region was under the control of the Habsburg Monarchy both in its absolutist (imperial) and dualist forms. We show that the sources of private law in this period were initially those enacted during the Middle Ages, which were gradually updated by the enlightened absolutist Habsburg rulers, resulting in norms fit for the bourgeois period of capitalist development at the end of the 19th century. We observe that law applicable to legal capacity and its exercise by natural persons and to families gradually developed to undo the feudal bonds and incapacities prevalent during the Middle Ages. The same was true for property law, as well as the law which governed inheritance. Also, a previously less significant field of law, commercial law, evolved spectacularly in this era, creating the framework for modern economic exchange, vibrant trade, and security of credit. The perspectives of Romanian legal history literature regarding this era are also presented.

Keywords: legal history, Transylvania, Habsburg Monarchy, dual monarchy, modernization, Romania

1. The Sources of Law

The diploma signed by Emperor Leopold I in the month of October 1690 and solemnly proclaimed on 4 December 1691 (*Diploma Leopoldinum*) determined the integration and positioning of Transylvania within the Habsburg Empire from the point of view of public law. Legislative power was still vested in the Diet with a single chamber, while executive duties were performed by the government elected by the Diet. Its members and the governor who led the executive had to be confirmed in their positions by the emperor. Administration of the territory

of Transylvania remained in the hands of the Hungarian counties as well as the Szekler and Saxon seats.

The *Diploma Leopoldinum* mainly regulated the public law status of Transylvania within the Habsburg Empire, yet some of its provisions confirmed the continued existence of some institutions of private law. This also applied to sources of law in force in Transylvania because from the point of view of the development of private law the Diploma did not constitute the boundary between various periods of regulation. Relationships between people remained defined during the period of the Habsburg Empire by the sources of law of previous centuries. The two main sources of law were constituted by customary law and statutory law; daily judicial practice was also based in Transylvania on István Werbőczy's *Tripartitum* and on collections of laws in force, the *Approbatae Constitutiones* and the *Compilatae Constitutiones*. This was also confirmed by the *Diploma Leopoldinum*. Empress Maria Theresa also ordered the collection of norms adopted later, thus giving rise to the *Articuli Novellares* ('the New Articles'). Among the members of the Szekler community as well as among the Saxons, however, the norms recorded in their own statutes continued to regulate private law relationships, of which the laws of the villages acquired a special significance for the Szeklers.[1]

> As the statutes and laws that have long been confirmed by the customs of Sepsiszemerjafalva are recorded in part in writing and partially corroborated usu antiquo, for this reason we proceeded comuni voto et unanimi consensu, so that our beautiful ordinances and the old laws accepted by our ancestors when ratio status ac temporis allows, to confirm them both untouched and unaltered [...] (Szemerjafalva, 1771)[2]

In addition to confirming the old sources of law, the Diploma also confirmed the old donations of estates made by kings and princes of Transylvania and ensured that the assets which fell to the royal treasury with the title of extinction of a family on the male lineage can be donated exclusively to worthy inhabitants of Transylvania (those 'of the land').

Preservation of the sources of law and privileges in force in Transylvania – with the exception of the right to insurrection – was confirmed by Leopold II in his inaugural diploma, its content being summarized in Act II of 1790.

> [...] all common freedoms, immunities, privileges and local government bylaws, common rights, laws and customs [...] of our ancient kings and ancestors of illustrious memory permitted and confirmed [...] of Hungary

1 Dósa 1861a, Haller 1865, Imreh 1983.

2 Imreh 1983. 16. Translation by the author. All translations in this work of non-English quotations are by the author unless otherwise specified in the footnotes.

> and the Parts annexed to it [...] we will keep with strength and sanctity [...] (Act II of 1790)

Although the Diet convened in 1790, similar to the case of Hungary, the so-called 'regnicolar commissions' were constituted, but they did not adopt significant measures affecting private law. Acts XVI and XVII of 1791 provided that the nobles who lived on the territory of Transylvania would have the same rights as the nobles of Hungary.

> [...] on the status and freedoms of the nobles and sons of the homeland, the principle of reciprocity, like nobility, will continue to apply as in Hungary also here in Transylvania, and the nobility of Transylvania in noble Hungary shall be considered without any impediment that could be invoked as veritable members of the same Crown and as beneficiaries of the same noble privileges.

Act XXVI of 1791 ordered the cessation of obligations of serfs in terms of disposition over their persons, and if they fulfilled the services due to the lord the right to free relocation was also ensured for them. Other property issues linked to feudal property were debated only by the Diet of 1847, after the Hungarian Diet of 1840 had allowed the voluntary release of serfs, and Miklós Wesselényi published his work *On Prejudices*, in which he also demanded the abolition of feudal duties for the Transylvanian serfs.

In the matter of marriages, Act XXXIV of 1791 kept the right of the secular authorities to proceed, and Act LII provided for the care of orphans and guardianship. By Act LIII of 1791, the freedom of religion was confirmed as a privilege attributed by Leopold I to the four accepted denominations (Catholics, Lutherans, Reformed Protestants, and Unitarians). Significant changes in the development of private law intervened only in 1848, when the Diet convened on 29 May 1848 pronounced by Act I the union of Transylvania with Hungary and through the same law enshrined full equality of rights between citizens.

> [...] in the homeland of Hungary, the equal rights of all inhabitants is stipulated and is in force and in the same way as here with regard to all the inhabitants of our homeland, without distinction of nation, language, and religion, stands recognized as an eternal principle and unchanged, and all contrary laws thereby are declared repealed.

Through this law, 'the estates abrogated those privileges which they enjoyed under the old feudal laws'.[3]

3 Egyed 2001.

In connection with equality before the law stood also the declaration by law of religious freedom (Act IX), freedom of the press (Act VIII), equal bearing of fiscal burdens owed to the public budget (the principle of fiscal equality, Act VII), and to all this was added the liberation of serfs (Act IV). According to the last normative act, including in Transylvania, the institution known as *avicitas* (ius aviticum), which provided for family land ownership in the form of the property of the *gens* – a whole feudal system for the limitation of property rights over property inherited from ancestors –, was abolished, the feudal property rights being themselves repealed, and the system of obligations of the serf to the lord was also abolished as a result of the liberation of the serfs. In the Hungarian counties of Transylvania, in the provinces of the Szeklers and Saxons, all obligations in kind imposed on serfs were repealed, and – as was provided by law – the households used by them were transferred to the ownership of liberated serfs. Compensation of landlords for the liberation of the serfs was to be achieved – similarly to the solution used in Hungary – from public funds. By this measure, the peasantry would have been exempted from the burden of paying any compensation. A special problem consisted in the situation of the *coloni*, who did not have much land which they farmed in their own right but who lived on the domains of the mansion, granted to their use by the lord, because these lots remained in the lord's property, and, despite the fact that the *coloni* became free in their person, they still had to bear the burden of providing work and other benefits in exchange for the use of the lot. Moreover, although they were the owners of the house built on the lot of the landlord, this was not applicable to their ownership of the lot on which their house stood. The *coloni* who lived on the lots subject to the regulation of a Szekler estate faced similar difficulties as the law considered the Szekler estate as equivalent to the domains of the mansion, which could only be used by the *coloni* in a temporary, precarious fashion. (The historical development of the Szekler estate and its legal meaning was described by Ákos Egyed.)[4]

> In the Szeklerland, the Szekler estate (siculica haereditas) is considered the domain of the mansion free of any burden and for this reason – because the wealth of the Szeklers who pay their dues and come under arms most often constitutes, as commonly known, a burden-free Szekler estate – to the coloni who inhabit these lots, the exemption which to other serfs by effect of this law shall extend as soon as it enters into force, shall be extended only in those cases in which [...] the Szekler owners [...] should be unable to prove that the lot or any other land in the hands of their coloni belongs to the Szekler mansion or estate. (Law IV of 1848, paragraph 6)

4 Egyed 2016. 348–367.

Laws adopted by the Cluj Diet and promulgated by the emperor in 1848 ensured equality of rights, religious freedom and, by removing the regime of feudal property, have established the principle of sanctity and inviolability of the right to property for the nobility and peasantry alike. Formation of the state and a bourgeois society created an opportunity for the transformation of legal relations under private law in accordance with this model. The problem was caused by the lack, both in Hungary and in Transylvania, of a code that brings together the main rules of civil law and that the legal institutions that formed the basis of feudal society had to be replaced by new rules.

Following the proclamation of the union, it would have fallen to the Diet of Hungary – in accordance with the provisions of Act XV of 1848 – to require the competent ministry to draft a bill to regulate legal relations under private law. The period of the Revolution and that of the War of Independence of 1848, however, did not allow the peaceful finalization of the codification, so the solution to this problem was given by the Austrian imperial court following the crushing of the independence movement. Although Ignác Frank[5] was asked to prepare a proposal to this effect, he did not accept the task. Following his refusal, the court decided to forcibly apply to Hungary (as of 1 May 1853) and to Transylvania (starting with 1 September 1853) the Austrian Civil Code (ABGB) adopted in 1811, which had already been in force in the hereditary provinces of Austria since 1812. Thus, the imposition of foreign law to these territories was achieved. But not even the entry into force of the ABGB did in itself solve all problems. Although the ABGB's structure corresponded to the customary regulation of private law applicable to property relationships, the rules that governed property and inheritance relations, still characterized by feudal concepts, could not be immediately replaced by new norms. Also, the ABGB did not produce retroactive effects, and therefore transitional measures were required, which were intended to be implemented by the so-called *Patent on the Abolition of the Property of the Gens* (1852). Through this, not only was the repeal of the feudal limitations of the right of disposition in matters of inheritance and property confirmed, but the system of donations from the Crown to the nobility was also abolished. By these measures, the limitations of the right of disposal over the property of the (feudal) *gens* could be finally supressed, but the ABGB maintained the institution of perpetual *fideicommissary substitution*, a form of trust (*fideicommissum familiae*) which prevented the alienation of property from the family estate by the heirs; this led to significant difficulties in Hungary, but not in Transylvania.

> In our country, the desire to create a Civil Code takes birth in the midst of the reform movements of the 1840s. After the legislature of 1848 had overthrown the feudal state and created Hungary based on the principle

5 Horváth 1993.

> of equal rights, Act XV of 1848 ordered the Minister of Justice to elaborate on the basis of the complete removal of feudal restrictions and to propose to the Diet a Civil Code. Following the suppression of the War of Independence, Austrian absolutism transformed our legal life into a *tabula rasa*, imposing the entry into force of the Austrian Civil Code and the Patent on Land Registration.[6]

Due to the desire of the bourgeois economy to achieve freedom of circulation of immovable property, old pledge contracts on immovables had to be deprived of their effects. Only so was it possible to determine exactly who the owner of a certain immovable was. The Patent for the Abolition of the Property of the Gens retained the effects of pledge contracts when the loans had not yet reached maturity, but if the duration of the contract of pledge had already expired before the entry into force of the ABGB, but no more than 10 years had elapsed, the debtor who owned the property had to declare within one year from the entry into force of the Patent whether or not he wanted to maintain his ownership of the immovable or relinquish this right in favour of the creditor. If more than 10 years had elapsed from the deadline set in the contract, the right of ownership on the immovable was transmitted by law to the creditor, the pledge extinguishing itself in this way.[7]

All this was necessary for the rules of the ABGB to become applicable in practice in Hungary and in Transylvania.

Following the issuance of the so-called October Diploma of 1860, the Palatine of Hungary (the head justice of the Crown), György Apponyi, convened in 1861 what was later called the Conference of the Palatine. In addition to restoring the rules of old Hungarian law, the collective thus established received the task to coordinate these rules with the laws of 1848 and those adopted during the time of Austrian neo-absolutism. The result of this work was the Temporary Rules of Jurisdiction, which had the effect of repealing the ABGB in Hungary, but it provided that in any matter relevant to the land registry the rules set forth by the ABGB had to be kept in force – only temporarily, until the completion of the Hungarian Civil Code (Temporary Rules of Jurisdiction, paragraph 21).

All this was not applicable to Transylvania, where the ABGB remained in force; and, moreover, Act XLIII of 1868 confirmed the Ordinance published on 27 June 1867, which provided that 'jurisdictional and judicial rules currently in force in Transylvania are to be maintained in force temporarily, and county, rural, and Szekler seat courts and judicial authorities are required to continue their activity in accordance with them.'[8]

6 Kiss Albert előadmánya a polgári törvénykönyv tervezetéről 1914.
7 Tóth 1854.
8 Menyhárt 1914a. 8.

All this had the effect of leading to the development of private law in Transylvania according to the framework of the ABGB, which entered into force in 1853, with the reservation that following the Austro-Hungarian compromise of 1867, if the National Assembly regulated any matter of private law, the provisions of Hungarian law would prevail over those contained in the ABGB – for this reason, in Transylvania – among others, the rules of: Act XX of 1877 on Guardianship and Curatorship, Trade Act XXXVII of 1875, Act XVI of 1876 on the Formal Requirements [for the Validity] of Wills, Act XVI of 1884 on Copyright, Act XXXIII of 1894 on Matrimonial Law, and Act XXV of 1896 on the Property of the *Coloni* Located on the Estates of the Mansion and on Lots Assimilated Thereto. From the point of view of the study of the sources of law, this modus of regulation resulted in the achievement on the territory of Transylvania of a reception of foreign rules of law, and in addition to this process, beginning in 1867, Hungarian laws governing certain institutions of private law also came into force. No wonder that, including in Transylvania, the urgency of codifying Hungarian private law was increasingly invoked, and in 1913, when the second draft of the Code of Private Law was finalized, Gáspár Menyhárt, professor at the University of Cluj, committed himself to preparing the scientific analysis of the Austrian Civil Code.[9] Unfortunately, the events of the First World War changed everything, the work on the Hungarian Civil Code was not completed, and the ABGB remained in force in Transylvania.

2. The Law Applicable to Individuals and Families

Following the abolition of feudal relations, some factors which had influenced legal capacity disappeared and the principle according to which any human being as a subject of law has full legal capacity, which exists between the moment of birth and the moment of death, became generally accepted. In some cases, the law would protect the foetus itself.

Feudal private law conditioned the establishment of the fact of death by the existence of a corpse. The countless cases prevalent in daily judicial practice, when, for example, a spouse drafted in the army did not return from the battlefield, demanded relief from under this regulation by legislative means. This improvement has occurred in the form of the procedure for the judicial declaration of death, regulated by the ABGB, the regulation of which was taken over into Hungarian law. The procedure could be initiated at the district court established according to the last domicile of the missing person by any person who justified legitimate interest. The district court then published an announcement on the search for the missing person, and if it remained without result, the last

9 Menyhárt 1914b.

known place of residence and the last known date on which the person was known to have been alive were set as the place and date of presumed death. The initiation of the procedure could take place at different times depending on the circumstances of the disappearance and the age of the missing person. The establishment of death by court only instituted a relative presumption of death which could later be overturned if it was proven inaccurate (ABGB paragraph 24, paragraphs 112–114).[10]

Exercise of legal capacity was influenced by several factors as follows:

Age: children under the age of seven did not have the exercise of any legal capacity, while minors under the age of 14 were considered to have restricted exercise of legal capacity as being underage, but under Austrian law they already had the right to acquire property over immovables and accept donations if they were not granted under any encumbrance a patrimonial value. Minors aged 14 years or older were considered pubescents and could hire an attorney, while upon reaching the age of 18 years consent to a valid authentic will could be granted.[11] Natural persons were considered to be of age, i.e. adults, upon reaching the age of 24 years.

Discernment: The mentally insane lacked the ability to exercise their legal capacity, but Austrian law knew the doctrine of intermittent *lucid intervals* (*lucidum intervallum*), according to which the person stricken with insanity would still have the exercise of legal capacity during the so-called moments of lucidity.

Honour: conviction for a criminal offence that attracted the penalty of infamy resulted in loss of the exercise of legal capacity. In the second half of the 19th century, laws no longer provided that this reason should result in loss of the exercise of legal capacity.

Naturalization and citizenship: a child born of legally concluded marriage acquired the citizenship of his/her father by birth, while a child born out of wedlock acquired that of his/her mother in the same way. Foreigners on the territory of Transylvania could acquire citizenship by grace of the prince and with the approval granted by the Diet by means of naturalization. Subsequently, the acquisition of Hungarian citizenship was regulated by Act L of 1879, whose significant novelty was the imposition for the acquisition of Hungarian citizenship of proof of the place of residence, instituting the necessity of having a residence in the country as a censitary condition for citizenship (thereby denying political rights to non-residents).

For people without the exercise of their legal capacity or with this exercise restricted in practice, a guardian or curator could be appointed, including according to old customary law. Hungarian law distinguishes between the guardian appointed by means of a will, the guardian established by law, and the guardian

10 Haller 1865. 32, 62–63.

11 Dósa 1861b. 7.

appointed by the authorities. If the father of the minor appointed a guardian for him/her by his will, taking this designation into consideration was mandatory. If such an appointment had not taken place, the child's legal guardians could be selected from the father's male relatives, who were followed by the mother's male relatives. If a legal guardian could not be appointed in this way, the court of guardianship established according to the domicile of the minor appointed the guardian. Guardians were required to submit an annual report. The report of the guardian[12] was regulated initially in accordance with the rules developed over the preceding centuries in the matter, by Act LII of 1791, which was subsequently amended according to the requirements of the bourgeois era by Act XX of 1877.

Act of 1877 also provided for adoption, continuing the ABGB's normative tradition in this area. In the sphere of law applicable to the nobility, based on customary law, the institution of 'adoption as a son' and 'adoption as a brother' were both known, which mainly allowed inheritance of the nobleman's estate. The adoption occurred through the contract concluded between adopter and adoptee. If the adoptee was a minor, the contract could be concluded for him/her by his/her legal representative. The ABGB permitted the institution of adoption both of the minor and of the adult. As a limiting condition, it was provided that outside the situation in which the spouses adopted together, any natural person was allowed to adopt only one other person. The adopter had to be at least 50 years old, and there had to be an age difference of at least 16 years between him and the adopted. The contract of adoption had to stipulate if the adoptee would keep his/her previously used family name or assume the surname of the adoptive parent. The adoptee would maintain kinship with his/her blood relatives, a significant aspect mainly from the perspective of his inheritance rights. The adoptee acquired civil kinship through adoption exclusively with the adopter. The adopter had an obligation to raise, maintain, and educate the adopted person.

In connection with these institutions of family law – mainly in the interest of the protection of minors and orphans –, a special role was fulfilled by the guardianship courts. Following the entry into force of the Act on Administrative-Judicial Authorities (Act XLII of 1870), all counties and cities that had the right to render decisions as administrative jurisdictions had to organize guardianship courts (dependency courts), to which a particularly broad set of attributes had been given. Their duties did not consist only in the appointment of guardians and curators but also in controlling their activity and in the insurance as well as the supervision of the orphans' estates. These courts also acted in matters that concerned the inheritance rights of orphans, and as a rule the guardianship courts represented the interests of orphans before judicial courts.

In the field of family law relations, some of the most significant institutions are those of matrimonial law. 'Marriage is the legal association of two persons

12 Dósa 1861b. 86–87.

of the opposite sex with the purpose of giving birth to and raising children.'[13] In Transylvania, the coexistence the four religions (denominations) which were legally accepted resulted in the applicability of the matrimonial law of the Reformed, the Lutheran, and Unitarian churches in addition to the ecclesiastical law of the Catholic Church. Moreover, church marriage law was influenced by the Patent on Marriage issued by Emperor Joseph II in 1786. In the imperial patent which proclaims the entry into force of the ABGB, the law of Protestant denominations was recognized, so that the matrimonial law contained in the ABGB referred exclusively to Roman Catholic marriage and to that of the Greek (Byzantine) rite denominations not united with the Catholic Church (mainly the Eastern Orthodox Church).

According to the canon law of the Roman Catholic Church, marriage is a sacrament, and for this reason it cannot be dissolved, while Protestant denominations viewed marriage as a contract concluded between two parties. The marriage covenant was also protected by these denominations, but undoing it was considered possible in certain circumstances provided by law.

In the case of mixed marriages, however, the Roman Catholic Church considered as valid only those marriages that have been officiated before the competent Catholic parish priest. In Transylvania, the denomination of children born of mixed marriages was determined by Act LVII of 1791, according to which boys followed the denomination of the father and girls that of the mother, this rule being later confirmed by Act LIII of 1868.

According to tradition, marriage could be preceded by the conclusion of an engagement, but the ABGB no longer attributed any legal effect to engagement, wherefore marriage could not be forcibly concluded by invoking it.

The conditions of validity of the marriage were regulated similarly by the different denominations themselves. Grounds for ineffectiveness of the marriage in the form of annulment, according to the rules established at the Council of Trent, remained the following: kinship in a descending line, collateral kinship up to and including the second degree (third- or fourth-degree collateral relatives could marry on the basis of a special dispensation), affinity relationships between in-laws, failure to reach the minimum age set for marriage, lack of discernment, the monastic oath, if one party was an ordained priest, the existence of a previous marriage not terminated by annulment, divorce or the death of the spouse. Christians could not marry non-Christians.

Grounds for ineffectiveness of the marriage in the form of relative nullity (reasons of annulment possible to invoke only by the spouses) were constituted by coercion, in the meaning of threat or violence, by deceit (fraud), and by error.

In addition to these, canon law also provided for so-called prohibitions, which, however, usually did not result in the annulment of the marriage. Marriage was

13 Dósa 1861b. 22.

prohibited during a fast, and the widow or widower could not enter into a new marriage in the 10 months following the termination of the previous marriage due to the death of the spouse.[14] These grounds were traditionally accepted by Protestant denominations as being also reasons for annulment of the marriage at the request of any of the spouses.

Because the Roman Catholic Church could not dissolve a validly concluded marriage covenant, the institution of separation from bed and board (*separatio a mensa et thoro*) for when the relations of the married parties were significantly altered was provided. By comparison, Protestant denominations did not qualify marriage to be a sacrament and considered the covenant thus created subject to dissolution in court in cases strictly provided for by law. These reasons were still stipulated by Emperor Joseph II in his Patent on Marriages, also adopted by the Diet of 1790 regarding Protestant denominations. These cases of dissolution of marriage were adultery and abandonment of the spouse, which constituted the oldest reasons, to which later were added irreconcilable hatred, serious crimes committed, or unjustified violence exercised against the spouse.[15]

Protestant denominations provided that before initiation of the civil procedure that results in the dissolution of the marriage, the spouses were obliged to appear before the competent pastor who was to try to reconcile them. At the same time, Protestant denominations already utilized the possibility of separation from bed and board, but only for a specified duration. The dissolution of the marriage fell within the jurisdiction of the secular courts, the court being obliged to designate in such cases a so-called marriage advocate ('marriage defence procurator' in the wording of the Patent of 1791).[16]

Act XXXIII of 1894 introduced civil marriage, which entered into force on the entire territory of Transylvania and therefore had to be respected. The marriage was concluded before the officer of the state having jurisdiction according to the domicile of one of the future spouses, who testified in the presence of two witnesses their intention to marry and, following this solemn statement, the officiating officer declared the parties to be married. Lack of the conditions of validity of the marriage provided by law resulted in annulment.

Marriage conducted in this way was considered as a contract between the spouses, and thus it could be dissolved by the courts for the expressly stated reasons provided by law. The act introduced in the matter of dissolution of marriage the principle of guilt, according to which the spouse who had given reason for or otherwise caused the dissolution of the marriage was at fault or, in case of common fault, both spouses had to be declared as being at fault for the dissolution of the marriage. The reasons based on which fault was established

14 Wenzel 1874. 316–328.
15 Dósa 1861b. 53–54.
16 Sztehlo 1885, Kolumbán 2009. 447–465.

were in fact those also recognized by Protestant denominations for dissolution of the marriage: unjustified violence against the spouse, abandonment, adultery, or if one of the spouses committed a crime against the other, for which criminal law provided for a prison sentence of minimum five years or more.

The reasons shown were designated by law as grounds for the unconditional dissolution of marriage, and proof of the existence of one of them required the judge to pronounce the divorce without any margin of appreciation. But the law also provided for reasons to conditionally dissolve the marriage, which allowed the judge to assess whether their seriousness was able to justify divorce. The institution of separation from bed and board was kept for these same situations. If the judge ordered this second measure, the wife was entitled to a so-called temporary alimony for this period regardless of whether or not the subsequent final decision established her guilt in the dissolution of the marriage.

When undoing the covenant of marriage, the court had to declare one or both spouses to be at fault for the divorce, indicating the reason for applying this measure. The judge had to decide at the same time regarding the assignment of minor children of the spouses, if it was the case, and also with regard to the patrimonial relations between the parties and to the bearing of the family name of the former husband by the former wife. In the case of the husband's fault for the dissolution of the marriage, the court also decided with regard to the maintenance and alimony obligation due to the former wife.[17]

As an effect of the ABGB, the institution of community property became generalized in the patrimonial relations between the spouses, according to which any asset acquired by the spouses during marriage, except for those gained by donation or inheritance, was considered the joint property of the spouses. In addition, the spouses had full disposal of certain separate categories of assets, a significant provision especially for women. Feudal private law recognized the husband as the main acquirer of property and expressly listed those titles under which the wife could acquire and dispose of movable or immovable property in her own name. These were the rights over the so-called paraphernalia: the engagement gift, the dowry, the douaire, and the legal reserve of 1/4 over the inheritance of the husband, the *quarta puellaris*.[18] Among the Saxons, joint ownership was previously applied as a general rule.[19]

In the bourgeois age, the norms of matrimonial law also suffered changes because, in addition to the assets held in joint ownership, the spouses could also own personal property separately. At the same time, the institution of dowry was preserved, which consisted of a donation granted to the wife for alleviating the material burdens of marriage. The dowry constituted the personal property of the

17 Grosschmid 1898, 1901.
18 Wenzel 1874. 358.
19 Wenzel 1874. 366.

wife, but the husband exercised the right to dispose of its contents throughout the existence of the marriage. Therefore, the assets which constituted the dowry could be exhausted in their entirety during the existence of the marriage. Following the termination of the marriage, the dowry had to be returned to the wife or her heirs. The dowry was, however, regarded as part of the husband's estate if he preceded the wife in death, thereby reducing the extent of the wife's inheritance rights over that estate by the amount of assets which constituted the remnant of the dowry.

3. Property Law

The ABGB's effects were felt mainly in terms of the regulation of legal relations in the field of property law. Abolition of the system of limitation of the right of disposal over the property of the *gens* liberalized the civil circulation of immovables (real estate) and led to the disappearance of the pledge of immovables, thereby resulting in the clarification of existing real estate relationships in Hungary. For this, however, a crucial institution of immovable property law, the land register was also necessary. Prior to the elaboration of the Patent on Land Registration, the name of the owner and the title under which the property right was acquired over immovables had to be registered in the so-called Books of Instruments, the *Instrumentenbücher* (similar to the Registers of Transcriptions and Inscriptions used under the regime of the Romanian Civil Code of 1864), which registered in chronological order excerpts from titles by which immovable property was transferred.

After the keeping of the land registers was assigned by the provisions of the ABGB to district courts and tribunals, the Patent on Land Registration of 1855 gave jurisdiction to the royal district courts with regard to the keeping of land registers in Hungary too. Judges delegated to the land register had to take a separate examination: in the disciplines of the institutions of material and formal (procedural) law related to land registration. The ABGB-regulated land registers had a decisive significance in the formation of property relations and in the matter of lending. 'It is a well-known truth that in well-organized states land registers form the main precondition for strengthening the security of real estate relations and property security, internal and external commerce, private and public lending, and more so the correct establishment of obligations for contribution to the public budget.'[20]

The very establishment of the land register system had a significant duration because in all cases where possible licensed cadastral engineers had to first prepare a schematic of the immovable and prepare the minutes of registration when performing measurements – because during the initial development of the

20 Herczegh 1900. 2.

land register the system of data organization was set according to the owner (called *Personalfolium*), not according to the lot (a system to be later called *Realfolium*).[21]

During the measurements, immovables located outside of settlements were registered according to their respective owner. Under this procedure, all immovables found in the property of the same person in the constituency of a commune were registered in a single sheet of the land register prepared for that person (the register itself is called the *land book*, *Landbuch* in the German language).[22] This system of land record raised multiple problems because the immovable assets in the property of the same person were physically situated in different locations. One person could own arable land, vineyards, orchards, houses, cellars, etc. If such assets formed legal units subject to a common economic purpose, such as former urbarial property or land affected by the former regime of property of the *gens*, then these were considered in the land book system as a single unitary body of property. A particular difficulty was determining the area of immovables because in different areas of the country the records of the areas of the former urbarial lands were kept in different units of measurement. In places where the old Hungarian acre, with an area of about 1,200–1,400 square fathoms was previously used, the cadastral acre of 1,600 square fathoms was introduced instead.[23] When drawing up the minutes for the registration of immovable property, the name of the locality, the cadastral number of the body of property, the name of the owner, and the elements of the property body according to their local name and their areas had to be recorded while performing measurements in the field.

When drawing up the minutes for registration, an additional problem was caused by the necessity to determine the owner of the property by the agents who drew up these minutes. In practice, it was during this period that a problem arose even after the application of the provisions of the Patent for the Abolition of the Property of the Gens, from the fact that the limitations imposed on the legal circulation of immovable property and the institution of the pledge made it difficult to establish the owners of a real estate. When drawing up the minutes of registration, officials could register as the owner of the property only the person they found during the measurements as being in possession of that property. If the immovable constituted property of the gens in a state of indivision (joint ownership), it was registered as common property co-owned in shares by the heirs, the share of each co-owner being listed separately. If the owner was the creditor secured by a pledge, the ascertaining agent had to record this creditor in the minutes of registration as the owner of the property, while the debtor could state that he wants to exercise his right to repurchase the property. In the latter case, the agents could only record this fact in the minutes. If the person found

21 Kolosváry 1902. 260.
22 Szladits 1937. 235.
23 Zlinszky 1902. 43.

in possession was a tenant, then the landowner was recorded in the minutes, mentioning the lease in favour of the tenant. After drawing up the minutes, the real owner had to state his claims and prove his ownership by the means provided for by law if he was not in possession of the immovable at the time of the first registration, under the sanction of forfeiture of the right of ownership. Exceeding the legal deadline set for performing this – by any owner – resulted in the final registration of the possessor as the owner.

The land book is a system for registering immovable property, which ensures publicity of rights constituted over immovables, with the effect of general opposability, so 'its purpose is: that from it everyone should be able to know the legal status of the property, by which the legal quality of the property is understood, as are its owner, the limits of his right of ownership, and the encumbrances applied to the immovable'.[24] For the system of land books to be able to fulfil this role, certain principles had to be applied consistently, these being the principle of the constitutive character of the registration, the principle of publicity, the principle of specialty, the principle of legality, and the principle of priority of rank. *The principle of constitutive character of registration* means that the right of ownership over an immovable registered in the land books could be acquired or transferred by instruments concluded *inter vivos* exclusively by registration of the new owner (the title would pass to any owner only as an effect of registration). When acquiring the right of ownership over an immovable, of special significance was the fact that *simple consent of the parties to the deed was insufficient to cause the transfer of title on its own*. Property over immovables could be acquired exclusively as an effect of registration. Rights encumbering an immovable – such as an easement or other encumbrance (e.g. immovables transmitted in exchange for maintenance), a mortgage, etc. – could be brought to fulfilment only upon registration.The records in the land books could be accessed by any person, while copies and extracts could be requested of them, whereby the principle of publicity was put into practice. Following this principle, no one could invoke ignorance of the content of the land book. *The principle of legality* was defined by Mihály Herczegh as follows:

> [...] to be binding according to the law and the dispositions of the court [...] the right subject to registration may be acquired only if the land registry authority having jurisdiction, after examining the application and the deed on which it is based, considers it to be valid and of such a nature that no objection to the agreement of the parties nor to that of the wording of the text and its content can be made.[25]

24 Szladits 1937. 233; Kolosváry 1902. 259.
25 Herczegh 1900. 2.

This principle ensures the character of general opposability of records in the land books since the ABGB established that the transfer of property rights over immovables and their encumbrance can be registered exclusively on the basis of a written instrument recording the agreement of the parties, valid from the point of view of formal requirements and having the required content. 'Only those rights produce effects over immovables which are registered in the land book.'[26]

Realizing the principles that have developed as a result of introduction of the immovable property registration system through land books was possible only if these land books were supported by a unitary code of private law. In Transylvania, this requirement was met by the ABGB.

In view of the rights and obligations that concerned or encumbered the immovable, the same rules of the Austrian Civil Code had to be applied in Hungary and in Transylvania regarding the contracts that substantiate the acquisition of a right of ownership or possession over immovables. The land book registration of each immovable was composed of three parts: the inventory sheet, the property sheet, and the encumbrance sheet.[27]

The inventory sheet contained the description of the registered property, the cultivation method and category, and the area determined in cadastral acres. By the *principle of specialty*, it was understood that registered immovables were to be recorded according to the units of cadastral measurement because they formed the basis for calculating the tax due after each immovable. The encumbrance that burdened the immovable had to also be determined according to its nominal value. During the implementation of the land books, inventory sheets had to show what the category of real property of the immovable had been prior to registration. For this reason, property formerly belonging under the regime of feudal property, the existence of perpetual fideicommissary substitution, and, in the case of immovables owned by the peasantry, whether the lot was owned by liberated serfs ('former urbarial fund' – formerly affected by the property regime of the *gens*) had to be displayed in the land books. This aspect had significance in terms of compensation for former landlords. In addition to these, the character of an immovable subjected to a secular or church purpose was also subject to registration. If an immovable belonging to church property was registered, then the inventory sheet had to include the denomination and the diocese or, as the case may be, the parish which was the owner of the immovable. From this moment on, compliance with the provisions of Act LV of the year 1791 became extremely significant.

> [...] to the churches of the four accepted denominations, it is provided that during the use of places of worship, bell towers, cemeteries, lower and

26 Zlinszky 1902. 26.
27 Gościński–Kubacki 2020.

> higher schools owned by them at the date of entry into force of the cited law and erected anywhere and anytime in the future they should be in no way hindered.[28]

The name of the owner was recorded on the *property sheet*, just as their share of ownership, the title by which the right of ownership was acquired as well as any restrictions affecting the rights of the owner such as: the owner being a minor, or an adult under guardianship, the extension of the status of minor, the right of pre-emption or an option to redeem the property.

The *encumbrance sheet* showed any rights of third parties that encumbered the immovable as, for example, praedial servitude or personal easement, a mortgage which burdens the immovable, etc. After the entries were recorded in order of their calendar date, it could be easily determined based on them exactly who had priority in the realization of the claims and in the case of several competing creditors who invoked rights over the immovable.

Ordering of registration into or deletion from land books of any information was the exclusive right of the courts and was possible only on the basis of original documents. Recording data in land books was called 'tabulation' and could manifest itself by registration or deletion. Anticipated registration was also known in Hungarian judicial practice. This gave the entitled person the opportunity to request, for example, the early registration of his ownership and to prove the title for tabulation within 15 days by presenting the original document in case s/he did not have the appropriate document at hand (ABGB, paras. 438–439).[29] The basis of tabulation was the body of immovable property, and only those rights could be tabulated which were known by law as the so-called main or accessory real property rights: 'possession, ownership, pledge, easement, and right to inheritance' (ABGB, para. 308).[30]

The royal district court as the land registration authority operated the land register in a non-contentious procedure. It could decide to make a registration or a deletion only on the basis of a tabulation application. Within the limits of the application, the judge was obliged to examine the title for which tabulation is requested, i.e. whether the transfer of ownership is to take place on the basis of sale and purchase, property exchange, donation, inheritance, or usucaption, and, taking into account the principle of legality, he had to check whether the conditions set for tabulation are met. Thus, the right of ownership could not be tabulated if the contract on the basis of which it was acquired or the document which constituted the annex to that contract did not contain express permission granted by the current owner to the future owner, authorizing the latter to proceed

28 Dósa 1861b. 232.
29 Szladits 1937. 241.
30 Zlinszky 1902. 83.

to the tabulation in the land books of the newly acquired property right to his name. If an authorization was required from the guardianship authority or the guardianship court for the acquisition of the property right over an immovable owned by a minor, the existence of such authorization had to be verified by the judge operating the land book. In the case of the rights encumbering the immovable, they had to be indicated with their respective nominal values expressed in currency. For tabulation, the ABGB did not provide the need for the transaction to be recorded in an authentic instrument.

Because the title by which the tabulation was performed was given by the contract underlying the transfer of ownership, the question was raised in the literature as to whether a contract of sale and purchase in which the object consisted of an immovable was valid only if it was recorded in writing by the parties or if even an oral agreement was valid.[31] Because the contract arises from the agreement of the parties, it was considered as being validly concluded if the parties had agreed on each of its essential elements. From the point of view of registration in the land book, however, the permission for tabulation had to be granted in writing by the seller and in accordance with the concluded agreement. Thus, the position was outlined according to which a written instrument was not necessary for the validity of the contract itself. This solution gave rise to significant controversy and, as a consequence, in the late 19th and early 20th centuries, the written form became a condition of validity for all contracts having an immovable as object. If one desired to extinguish any right that encumbers an immovable, a written authorization had to be issued to the entitled person to request the deletion of the right from the land books.

During neo-absolutism, the Austrian authorities withdrew the right of authentication from the 'authentic places' where contracts were recorded in authentic instruments in previous centuries, replacing them by notaries public as persons entitled to draw up such authentic instruments.

The conditions of validity of the contract were set out in the ABGB: the parties had to have full exercise of their legal capacity; the object of the contract could not consist of an impossible obligation; the contract could not contravene the imperative provisions of law and was required to respect public morals; the contract concluded under duress (coercion), threat, as a result of violence, fraud, or by a person in error could be annulled. If the object of the contract consisted of an immovable it had to be drawn up in writing. If a contract met the conditions of validity, the registration or deletion of a right subject to registration in the land book could be requested based on the authorization granted by the registered party. The question arises: in the case of which contracts was it possible to request tabulation? Such contracts were those by which rights subject to registration in the land register were transferred from one party to another: the contract of sale

31 Fekete 1908.

and purchase, exchange, and donation. Paragraph 431 of the ABGB provided in the sense that the property right which refers to an immovable item of property could be validly transmitted only if it was tabulated in the land books, the property right being transmitted to the buyer only as an effect of tabulation.

Tabulation in land books was a precondition for the acquisition of the property right even in case of inheritance, being established as such by the ABGB. 'If the property right over the immovable must be transmitted as an effect of a final judgment, letter of judicial partition, or the surrender of a certain inheritance in court, then it is also necessary to tabulate these documents' (ABGB, para. 436). A similar condition was provided in the case of testamentary inheritance, where, in addition to the will, the minutes finalizing the procedure by which the inheritance was devolved (the certificate of inheritance) were also required.

If a person invoked usucaption (acquisition by prescription), he could request the tabulation of his property right. In the regulation of usucaption, the Hungarian customary law system operated with rules different from the Austrian ones as a requirement of good faith was not listed among the conditions of usucaption in the legal system of Hungary. If the prescribed term expired, the possessor acquired the benefits of usucaption regardless if he was of good faith or not.[32] As an effect of the influence exerted by the ABGB, this situation changed as only the possessor of good faith was granted the right to acquire the property of an immovable by usucaption, after the expiration of a prescribed term of 32 years and only after the tabulation of his property right under this title of acquisition.

When implementing the land books, so-called *old burdens*, such as a tabulated invoice, a letter of debt, dowry, engagement gift, lease, or easements, were registered on the encumbrance sheet.

Since ownership could only be acquired through tabulation, during the implementation of the land book system, special attention had to be paid to those tabulations that concerned common (joint) property rights according to shares or special categories of common property. Under *common property rights according to shares* we understand situations when a certain determined object is held in co-ownership by several persons, in this case the nominal shares of property of each co-owner being recorded separately on the property sheet. Each co-owner could freely dispose of his nominal share from the co-owned property. Repeal of rules specific to the regulation of the property of the gens – with their characteristic limitations regarding the right of disposal over certain immovables – did not mean the simultaneous dissolution of the co-ownership which existed on some of these estates; more precisely, the owners of estates in co-ownership could not be obliged to partition those estates. If the owners wanted to put an end to the state of indivision, then, according to the norms of the feudal age regarding partition of property, the division of the co-owned property had to have

32 Frank 1845. 241; Zlinszky 1902. 114.

been carried out according to the principle of proportionality (*divisio*) by creating lots and tabulating them as new property units in the land books. Subsequent to this partition, the former co-owners were obliged to issue to each other the authorizations for tabulation of the ownership over the newly created lots. If sharing by agreement of the parties was not possible, the state of indivision could be terminated by litigation.

The property owned in co-ownership could have components that were not divisible in kind without causing a significant decrease in value. The so-called *noble commonages* also belonged to the category of indivisible jointly owned property. Pastures, forests, or the right to receive minor benefits subject to the monopoly of the Crown, such as the right to operate mills, taverns, fish farming in ponds, etc., were usually exercised jointly by the members of such commonages. These remained unchanged under old feudal law and were later tabulated as jointly held property in the land books.

A significant consequence of the implementation of land books was the possibility of knowing the rights that encumbered an immovable tabulated by any person, namely that rights which encumbered the immovable were also passed *ope legis* onto the new owner at the time when transfer of ownership took place. From the point of view of the science of legal regulation (legal dogmatics), the concept of so-called real property over the things of another person (*iure in re aliena*) what modern law calls dismemberments of ownership – has developed as an effect of the influence of the ABGB. The birth, content, and extinction of such dismemberments were all subject to the rules provided by the ABGB and later legal norms.

> As a result of the dispositions of our laws after 1848, which in this respect were left untouched by the Conference of the Palatine, both the easements regarding lots and personal ones have acquired a certain and independent legal existence.[33]

The various codification projects of private law had already regulated in detail the legal institutions belonging to these new categories, based on the judicial practice formed following the adoption of the Temporary Rules of Jurisdiction, which later evolved into drafts for the codification of private law, the most important being the one from the year 1928, these rights being called ‘limited real property’, giving rise to a genuine and independent new institution of property law. The rights ‘of encumbrance’ had to be tabulated according to the norms of procedural law applicable to the land books. Of the limited real property rights (dismemberments of ownership), Hungarian law knew easements, the right of superficies, the right of pledge, and the burden of immovables.

33 Wenzel 1874. 52.

Easements were already known in the old system of feudal law even though neither *Tripartitum* speaks of them nor do the authorities of legal literature of the time. The generally accepted perception, including the one in the legal literature of the bourgeois age, was that easement rights could not be realistically incorporated in the system of Hungarian private law preceding 1848.

> Hungarian and Transylvanian private law existing until the year 1848 [...] apart from the right of pledge, was not very conducive to the emergence and independent legal development of real property rights which would bear on another person's possessions, as special easements would.[34]

János Suhayda recorded the following: '[...] easements, in our country, although they may have been in vogue from the very beginning, have not appeared either by the name "servitus" or by regulation of easement as a right as they appear, for example, in Roman law or in the laws of other states'.[35] In judicial practice, both the system of personal easements and that of easements bearing on a lot can be recognized, this fact allowing the definition of the notion of easement by Bálint Ökröss: 'Easement is either linked to a certain lot – and then it exists either as a right or as an obligation to another lot – or it is granted to a person to allow him the proper use according to his own needs of a certain property, without being allowed to exhaust it.'[36]

Following the liberation of serfs, the need to ensure use of pastures and forests as related measures imposed the exact stipulation of rules on rural easements. During the delimitation of pastures intended for the use of the peasantry and of their former feudal landowners, the easement both to access drinking water and for passage with animals had to be ensured, just as passage for accessing land used for logging and harvesting of firewood or timber used in construction. In regulating these rights, the Austrian Civil Code was without doubt helpful. In reality, the entry into force of the ABGB did not create a new institution in the system of easements but reconfirmed with the force of law the norms formed by local custom. The introduction of procedural law applicable to the land books allowed registration of easement rights with the application of the principle of constitutive character. Easements over lots needed to be tabulated on the encumbrance sheet of the subject lot as well as the related right to them on the property sheet of the dominant lot, thus ensuring that the owner of the dominant lot could benefit from the given easement.

Serfdom was abolished in exchange for the compensation of the landlords, the feudal lands in the possession of the former serfs being assigned to the full

34 Wenzel 1874. 52.
35 Wenzel 1874. 51.
36 Ökröss 1861. 82.

property of the now liberated peasants. However, this legal measure did not refer to the *coloni* (serfs on the lot of the mansion and servants) who lived on the lots attributed to mansions; the landlords continued to claim from them benefits in kind because the houses of the *coloni* were built on land owned by the landlord. At the suggestion of Ferenc Deák, this situation was remedied by replacement of benefits – in cash, in natural or industrial fruit, purchase of gifts, etc. owed to the landlord by *coloni* in exchange for use of lands on the lots of the mansions according to contracts under feudal norms – with periodic annual instalments set in a predetermined amount of money as 'rent' or 'lease'. In this way, the perpetual lease was introduced into Hungarian private law, according to which the tenant was 'entitled to use the property of another person for a definite or even an indefinite period in exchange for annually determined benefits, without restrictions, as a usufructuary [...] to alienate this right and pass it on as an inheritance, the owner being able to object against the entitled person only if he sees the property endangered in his hands'.[37] This solution gave rise to numerous misunderstandings and created a unique situation when the minutes for the registration of immovables in the land book were drawn up. The ABGB called perpetual lease a 'divided property'– *geteiltes Eigentum* –, where 'the main owner' was the owner of the lot and 'the owner of use' was the person who used that lot. This situation was attenuated when drawing up the land books by registering the landlord as the owner of the lot, and the person in whose ownership the house built on that lot was became a usufructuary of the lot, the right of the latter being recorded on the encumbrance sheet of the property in the land book. The fact that the usufructuary was at the same time the owner of the building erected on the lot had to be indicated there as well. Thus, the lot and the building were transformed into one and the same property item from the point of view of the land book, which could no longer be separated subsequently.[38] This solution was not optimal, and many times there was a need to find a way to unify the right to ownership of the lot and of the building standing thereon. The solution became possible as a result of Act XXV of 1896, according to the provisions of which the holder of the lot could acquire it by accession (with the payment of a fee); at the request of the landlord, he was even obliged to acquire the right of ownership over the lot this way – a provision that is found also in the Urbarial Patent of 1853. The law required proof that the owner of the structure erected on the lot or his predecessors had already been in the ownership of the lot before 1 January 1848. The law allowed the advance of the value of the lot by the state, the 'debtor' being required to repay the advanced amount directly to the state as a loan, in instalments.[39]

37 Kolosváry 1907. 422.
38 Szladits 1937. 302.
39 Kolosváry 1907. 519.

Among limited real property rights (dismemberments of ownership), the *burden on immovables* was listed, an obligation *propter rem* by virtue of which the landowner was obliged as a consequence of his right of ownership to render to the entitled person certain benefits in natural or industrial fruit, currency, or labour. In the feudal era, serfs provided under this principle 'the equivalent' of their right to use and possess the land subject to the regime of feudal property in the form of tithe to the church, set at 1/10 of the harvest, and also an amount equal to the tithe (called in Hungarian 'the ninth part') to the lord, obligations in labour and various gifts due in money and in kind, also to the lord, and, finally, the rent due to the state. Even after the abolition of serfdom, such obligations persisted in the legal category of burdens on immovables, instituted by law: the disbursement of compensation to replace the tithe due after viticultural lands, compensation due for gaining property of the land now owned by the *coloni* located on the domains of the mansions, compensation due for the remainder of the lot, and payments of loans contracted to finance the fight against the effects of grape phylloxera (a pest of the vine plant introduced from North America which obliterated Hungarian viticulture almost entirely at the end of the 19th century).[40]

Mortgage also appears among the limited property rights, a collateral that allowed the secured lender in the general sense that in the event of non-performance of the debt due to seek enforcement in accordance with the contractual provisions from the debtor and to cover the debt by foreclosure and the subsequent sale of the property affected by this guarantee.

Significant changes occurred after 1848 in the field of regulations applicable to various forms of collateral. Feudal private law knew the system of *pignus*, which involved handing over an immovable (pledge) or a movable (pawn) possession to the creditor, the immovable property being affected by this form of guarantee. The pledge contract was mentioned by Werbőczy among the temporary acts of disposition (which do not lead to the transmission of naked ownership), and thereby, from the point of view of legal science, it has become an institution of real property law. In reality, the pledge contract concealed the fact that a mortgage had been constituted over an inalienable property item to secure a loan contract. After the Patent on the Abolition of the Property of the Gens abolished the pledge contract by prohibiting the delivery of the possession over real estate to the creditor to guarantee the contracted claim, the accessory character of mortgage – as an institution of real property law – was highlighted, and it was classified among limited property rights, in compliance with the system established by the ABGB, as a guarantee of an obligation. From then on, over time, the mortgage came to exist in Hungarian private law in two distinct forms: the *pawn*, where the object could be exclusively a movable item, and the right of *mortgage*, a guarantee which could be constituted exclusively of immovables. Following the entry into force of the ABGB,

40 Kolosváry 1927. 181.

immovables could be encumbered exclusively with a mortgage, in such a way that the mortgaged immovable remained the property of the debtor, while the creditor was bound to tabulate his guarantee on the encumbrance sheet of the land book in which the immovable was registered, along with the amount of the claim due in nominal terms, with prior authorization received from the debtor. The mortgage could be set up only on the property units registered in the land books, and the tabulation could be authorized exclusively by the owner of the immovable, himself being registered in the land books as such. An exception to this rule was setting up a mortgage as collateral for debts owed to the creditors of an heir of the tabular owner, himself not yet being registered as owner of the immovable.

4. Commercial Law

The Hungarian customary law system was not familiar with the autonomous institutions of commercial law. These began to differentiate themselves from the private law system only in the first third of the 19th century. The ABGB did not contain any rules regarding this field, and in Hungary the need arose to create a law for trade regulation that met the requirements of economic life, in the absence of a unitary codification of civil law. István Apáthy was appointed to draft the Trade Act. This draft was adopted by Act XXXVII of 1875. The new norm entered into force in Transylvania and became a source of civil law in parallel with the ABGB. The norms of commercial law contained in the act could be classified into two large groups: some contained provisions regarding traders, while other rules concerned commercial companies, regulating the general partnership, the (simple) limited partnership, the joint stock company, and the cooperative. The companies established could be considered as commercial companies and hence as legal persons if they were registered with the court having jurisdiction according to their commercial headquarters.

Persons who carried out commercial activities were considered traders in their own name (under their own firm) with a professional character and had to obtain registration as such. By registration, on the one hand, the name of the merchant's firm was protected, and it became forbidden to others to engage in a similar trade under the same name (firm) or a similar one. If, however, this took place, the trader who was registered later could be sanctioned and prohibited from using the same firm as the one registered before by another trader. On the other hand, the registered trader acquired the right to keep the commercial books of the company, which in the case of possible litigation were evidence with full evidentiary value in the hands of that trader. The company/firm as a trade name did not only serve to distinguish the trader from other traders, but it also defined the way in which the trademark or registered trademark indicated the origin of goods produced

or marketed by the trader. The name of the trader, the company/firm as a name which showed the commercial nature of its activity, and the registered trademark are those attributes of identification of the trader which are referred to by the modern expression of 'product-related intellectual rights'. The basic tenets of legal protection of these were already put into place during the application of the old customary law and then by Austrian law. The legal basis of this protection was constituted by the Trade Act and Act II of 1890 on Trademarks.[41]

The Trade Act regulated commercial companies in a detailed manner. The assets of general partnerships and limited partnerships were composed of the patrimonial contributions of the partners, which could be paid in currency, real estate, or other goods with a monetizable value. Given that the partners of the general partnership or of the limited partnership were liable jointly and severally, in a direct and unlimited fashion for the partnership's activity towards non-partner third parties, the partnerships' assets and liabilities could not be differentiated from the own assets and liabilities of the partners. For this reason, a controversy persists to this day in legal literature regarding the correct answer to the question of whether these two company types can really be considered veritable independent legal entities.

The restoration of economic life in Transylvania can be dated to the second half of the 19th century, or rather to the last third of that century. Partly due to the activity of the Transylvanian Commercial Bank and Credit (Joint-Stock) Company and partly due to the influx of foreign capital, primarily mining – gold, ferrous metals, salt – and then the steel sector based on it were the ones that allowed for the organization of joint-stock companies in addition to smaller commercial companies.[42] The first joint-stock companies could be organized in Transylvania only after the Austro-Hungarian compromise.

> The form of joint-stock company was established primarily in the network of lending as well as in industry. Maybe our statement is sufficiently proven by the fact that thirty-four industrial joint-stock companies – taken in the wide sense – were set up in Transylvania between 1867 and 1873. [...] In the lending network, in turn, 43 investment banks and savings banks were founded in the form of joint-stock companies.[43]

Revitalizing the development of economic life in Transylvania also resulted in the application of legal norms of commercial law and primarily of the rules of the Trade Act. Trading companies founded after 1875, primarily joint-stock companies and cooperatives, already had to be set up according to the rules of this act.

41 Vida 2012. 52–58.
42 Szász 1986. 1543–1563.
43 Egyed s.a. 39.

Joint-stock companies and cooperatives could start their activities only after the registration of the act of incorporation adopted by the general meeting of the resp. company, i.e. after the registration of the contract of association. The law precisely determined the structure of these two forms of companies. The share capital of the joint-stock company was formed by the subscription of shares by shareholders, each share having an identical nominal value. Shareholders could not be held liable with their own assets for claims by the company's creditors. The stock is a security that does not only embody the nominal value of the title but grants its owner the exercise of rights with regard to the operation of the company. The shareholder benefits from voting rights by virtue of the shares held, being able to elect the members of the bodies of the joint-stock company and having the right to be elected to these bodies. He has the right to challenge the decisions of the general meeting or assembly before the courts and, on the basis of the stock held as well as depending on the economic performance of the company, also the right to any dividends. The main collective management body of the joint-stock company was the general meeting, each shareholder being a member thereof. The general meeting had the right to elect the members of the board of directors and of the commission of censors. The board of directors was responsible for the operation of the company, under the control of the commission of censors, which was independent from this board.

The capital needed for business development in Transylvania was not concentrated only by bankers and banks set up by large 'foreign' industrialists as smaller agricultural enterprises also benefited from the activity of accessible and easy lending carried out by savings and loan cooperatives. One such institution was the Auxiliary House of Savings established in 1858 in Cluj, followed by the lending institutions with cooperative character established after 1867 in Bistrița, Braşov, and Târgu Secuiesc.

Mutual solidarity manifested in cooperative forms prevailed primarily in the establishment of savings cooperatives. However, the organization of consumer and trade cooperatives cannot be overlooked either. The patrimony of the cooperative as a commercial company was formed from the contributions of the cooperating members, but, unlike the joint-stock company, the contributions were not paid necessarily in currency, each member being able to contribute with any goods. The corporate form of the cooperative spread rapidly in Transylvania, in particular in rural areas, where cooperatives had gained prominence in industrial milk processing and animal insurance.[44] The Act of 1875 allowed the operation of cooperatives in the system of limited liability, but also with unlimited liability, which meant that if the cooperating members accepted the form of unlimited liability, they became liable to third parties not only with the assets of the cooperative but also with their own assets. The latter form was subsequently suppressed by an amendment to this

44 Egyed s.a. 46.

Act in 1920. From the point of view of structure, cooperatives had to be organized in a similar way to joint-stock companies.[45]

The other significant group of rules contained in the Trade Act are the rules applicable to commercial operations, more precisely the rules of commercial contracts. Commercial operations were considered to be the commercial purchase (for resale), the contract of carriage, contract of deposit in warehouses, the consignment agreement, the insurance contracts, and publishing contracts (multiplication, publishing, and marketing of publications). Only contracts expressly enumerated and qualified as such by law were considered to refer to commercial operations. These contracts were divided into two different groups by the legislator, as objective and subjective commercial operations. Subjective commercial operations were those in which at least one of the parties had to hold the status of trader according to the law, for example, consignor or carrier. In other cases, the legal object of the contract was such that it could transform the contract into a commercial operation, for example, the purchase of movable property.

Since the ABGB remained in force in Transylvania even after the conclusion of the Austro-Hungarian Compromise, in the field of contracts drawn up after 1875, the contracting parties and, in the event of a dispute, the courts had to turn their attention to two laws. Sale and exchange of real estate, lease and loan agreements were governed by the rules set out in the chapter on real property – obligations – of the ABGB, while in the case of commercial operations these rules were efficiently supplemented in daily activities by the Trade Act.

The consignment note issued by the carrier, regulated by the Trade Act, had its content set by law. It had to contain the name of the consignor and the carrier, their place of business, the object of the transport, the name and business of the consignee, the place and date of delivery and acceptance, and the transport route. Other securities, such as the stock subscribed by the stockholder, the deposit receipt issued by the warehouse keeper for the deposited goods, and the bill of exchange issued by the debtor, have all contributed to the development of securities legislation in Transylvania and Hungary.

The regulation of the publishing contract contributed to the development of copyright. The ABGB did not contain provisions on intellectual creations and, implicitly, had no provisions regarding copyright. The Temporary Rules of Jurisdiction provided for the protection of 'ideal assets'; however, this was insufficient to protect the particular rights of authors, poets, and composers. Commercial law aimed to solve this issue from the perspective of publishers and regulated the content of the publishing operation as well as the rights and obligations of authors and publishers.[46]

45 Kuncz 1928. 494.
46 Kuncz 1938, Nagy 1884.

5. Inheritance Law

Following the abolition of the feudal property system, with the rules of inalienability related to it, free disposal of property *inter vivos* and *mortis causa* could be achieved. From this, the freedom of disposition by will also resulted. Neither the right nor the possibility of drawing up a will constituted a novelty in the bourgeois age. They also existed within the rules of customary law of the feudal era, but the validity of the act of disposition was influenced by the existence of restrictions applicable to certain categories of property in the field of real property law. Wills are primary historical sources not only for the discovery of the patrimonial conditions of a nation or a smaller community but also for gaining knowledge about family relationships and a description of the history of those communities. From this perspective, the surviving wills drafted among the Szeklers constitute an especially important source.[47]

The wills of this period raise multiple questions in practice. Did *de cuius* (the person to dispose of his estate by will) have the possibility to exclude from the inheritance all members of his family? Did *de cuius* have the right to disinherit his prodigal heir?

During the existence of the system of restrictions applicable to feudal property, from the point of view of the right of disposal, and within its framework of the family property system (property of the gens), legal heirs could not be excluded from the inheritance; only the possibility of requesting the partition of co-owned assets existed against the prodigal heir. The applicable rules were precisely recorded by Werbőczy in his *Tripartitum*, but this situation changed as a result of the entry into force of the ABGB. The right to free disposal through testament provided in principle for the disposer the possibility to leave his estate as a legacy to anyone, even without taking into consideration all his legal heirs. However, the ABGB set the circle of 'necessary' heirs (heirs who benefitted from a legal reserve): the children of the one who disposed of his estate by will and, if there were no children or all children have preceded *de cuius* in death, his parents were reserved heirs (para. 762). The children as necessary heirs were entitled to half of their share of legal inheritance as a reserve and the parents to one third of their share of the legal inheritance (paras. 765–766).

The one who had left the inheritance had the opportunity to bar his necessary heirs from inheriting by disinheriting them (exheredation) if they became unworthy. The reasons for unworthiness to inherit were expressly listed by the ABGB (para. 768).

The necessary heir became unworthy to inherit if s/he:

– had threatened the life of the person who left the inheritance;

47 Tüdős 2003–2006; Rüsz-Fogarasi 2014; Tüdős 2016. 308–326.

– had committed acts of unjustified violence against the person who left the inheritance;

– had committed an offence for which the law provided for the punishment of life imprisonment or a minimum imprisonment for a duration of 20 years;

– had prevented the person who left the inheritance form drafting a will;

– being the child of the person who left the inheritance, had renounced his Christian faith;

– had not offered help to the person who left the inheritance in a time of need;

– lived an immoral lifestyle.

In the case of parents, an additional reason was provided for disinheriting them: if the parent had abandoned the upbringing of his/her child (ABGB, para. 769).

> [...] he who in bad faith has harmed the honour, the body, or the patrimony of the person leaving the inheritance or of his/her children, parents, or her husband, or attempted such injury in so severe a manner as against the perpetrator criminal proceedings could be initiated ex officio or upon complaint by the injured person according to criminal law shall remain unworthy to inherit until such circumstances arise as to determine that he who leaves the inheritance has forgiven him/her. (ABGB, para. 540)

Exheredation could take place only if the reasons were provided by the disposer for the unworthiness of the heir, by his/her will. If the person who left the inheritance had forgiven his/her heir, no unworthiness could be invoked.

The necessary heir could request from the heir who would inherit according to the will the handing over of the reserved part of the estate that was due to him/her, the testamentary heir; however, s/he was not obliged to hand the reserved part over in kind. It was considered sufficient to surrender the value of the reserve by paying a sum of money to the necessary heir. The Royal Curia (the Supreme Court) has consistently ruled in this regard in its judicial practice.[48]

Regarding the formal requirements of the will, the ABGB established no distinction between the private will (drafted under private signature) and the authentic will (authenticated by a notary). The authentic will could be drawn up in a valid manner exclusively by the notary public. According to the rules applicable to the private testamentary form, a will had to be written by the testator in person, in which case the simultaneous presence of two witnesses and the application of their signature on the will thus drawn up was required, or the testator could request the drafting of the will by another person, in the latter case the simultaneous presence and signature of four witnesses being a prerequisite to its validity (Act XVI of 1876, para. 1).[49]

48 Staud 1913.

49 Teller 1938. 233; Wenzel 1874. 458.

Privileged wills were also known in the legal system regulated by the ABGB, when the testator could dispose of his/her property orally in the presence of four witnesses, in the cases provided for by law. This will, however, was only valid for a period of three months from the date at which it was uttered. Situations in which a privileged will could be used were the following:

– in areas affected by an epidemic,
– in areas affected by military operations,
– if the testator provided exclusively in favour of the legal heirs,
– when the testator was at sea,
– when the testator ordered that his/her entire estate be used for charitable purposes.

The norms of the ABGB allowed the institution of the codicil to be preserved, this being an amendment by which the original content of a will is modified or completed without resulting in the revocation of the will regarding its unmodified parts. Thus, the testator was given the opportunity to subsequently complete a will which he had drawn up previously. As a rule, the provisions of the main will could not be altered in their entirety by the codicil, which could only include changes to them.

As to the content of the will, the rights of the testator to dispose in the form of vulgar substitution and simple fideicommissary substitution (also called a unique substitution, with the designation of a sole substituted person) were significant.

The *vulgar substitution* meant that in the event that the designated principal heir would have preceded the testator in death or could not inherit after the testator for other reasons, this first heir was replaced with a subsidiary heir designated by the same will.

Simple fideicommissary substitution was allowed if the testator stipulated a condition for the transfer of the estate from the first designated heir (the instituted) to the final heir (the substituted). Until the condition was fulfilled, the instituted came into possession of the estate but had only the right of its administration and its use because it had to be preserved in its entirety for transmission to the substituted. The substituted in this case was considered an heir apparent of the estate.

The simple fideicommissary substitution has caused many difficulties in practice. Although we cannot speak of the existence of perpetual fideicommissary substitutions in Transylvania, the simple fideicommissary substitution still presented characteristics somewhat similar to that of the perpetual version of this institution. In the case of perpetual fideicommissary substitution, the one who provided *mortis causa* in this way could establish by will the person entitled to inherit the estate or part of it. Here the principles of primogeniture, seniority, adulthood, the status of puberty or impuberty alike could also be taken into consideration in the sense attributed to them by feudal law. In this

case, the instituted heir also had to maintain the estate that was the subject of perpetual substitution to be passed on to the substituted (as in the case of simple substitution), but the substituted heir, upon receiving the estate, would him-/herself become an instituted heir in turn, thereby the estate never leaving the family of the one to leave the inheritance, into perpetuity.

Regarding the legal inheritance, the general rule was applied in the ABGB system that, based on the principle of *favor testamenti* (favouring the will of the deceased), if the will was valid, then the succession had to be devolved on its basis. If *de cuius* did not make a will or the will was ineffective for any reason, the rules of legal inheritance became applicable.

The legal heirs of the person who left the inheritance were first his/her children – sons and daughters –, who inherited the estate in equal shares (*in capita*). If one of the children was unable to inherit, his/her place was taken – based on the principle of representation (*per stirpes*) – by the grandchildren of the child.[50] If the one who left the inheritance had no descendants, then, on the basis of the parentelar-linear system, ascendants and collateral relatives up to and including the sixth degree collected the inheritance, always in equal shares, per capita, according to the principle of proximity of the degree of kinship (relatives in a degree closer to the deceased removed from his/her inheritance relatives in a more distant degree).

In the absence of legal heirs, the estate was inherited by the surviving spouse. This rule established by the ABGB was a significant difference from Hungarian practice for in the absence of descendants, according to Hungarian judicial practice, the elements of the deceased person's estate acquired during his lifetime at a certain price were inherited by the surviving spouse. The parts of the deceased person's estate which were acquired free of charge returned to the family branch whence they came, as an estate of the respective branch of the family (gens) of the deceased. The Temporary Rules of Jurisdiction provided in this sense, but their provisions were not applicable in Transylvania.[51] Based on long-time practice in the Hungarian judicial system, however, the system of parentelar-linear inheritance was applied also in Transylvania if the one who left the inheritance did not leave descendants.

On the surviving spouse – whether the former husband or the former wife –, the ABGB conferred a lifelong right of usufruct. With regard to this provision, the ABGB derogated from the right of the widow recorded by Werbőczy. In Hungarian judicial practice, only the widow was entitled to the rights of widows, which had a more extensive content than mere usufruct. The widow had not only the right of possession, use, and harvesting of the fruits of the estate left after her deceased husband but also had the right to maintenance.

50 Sándorfalvi Pap 1938. 52.
51 Sándorfalvi Pap 1938. 75.

The ABGB did not regulate this right to maintenance, referring to it within the norms in the field of family law when regulating the rights and obligations of parents and children.

Following the entry into force of the Marriage Act (1894), with regard to the granting of widow's rights, the wife separated from the husband acquired another status. Hungarian judicial practice was of the opinion that the wife was in fact separated from her husband without the dissolution of the marriage and remained entitled to claim the rights of succession that were owed to the widow following the death of her husband if she was not at fault for the separation and therefore did not become unworthy of receiving the rights conferred on the widow.[52]

Among the rules of succession law of the ABGB, the institution of imputation must be mentioned. The entire estate transmitted free of charge *inter vivos* by the one who left the inheritance to one of the legal heirs must be imputed upon (that is deducted from) that heir's legal inheritance. This rule was also applicable to property transmitted free of charge for the purpose of handing it over to the reserved heir.

The ABGB provided for the obligation by the heir to declare during the succession proceedings whether s/he accepts the inheritance or not. Until the moment of the declaration of acceptance, the heir could not take possession of the estate and could not apply even for an early registration of ownership in the land books. This solution ran contrary to previous Hungarian judicial practice in which, applying the principle of *ipso iure* transfer of title, the heir acquired the right to property over the estate from the time of the death of the previous owner from whom it was inherited.

6. Perspectives of Romanian Legal Literature on Private Law Applicable in Transylvania in the Period between 1690 and 1918

6.1. Overview

From the perspective of the Romanian population in Transylvania, in the period examined, the attempt at gaining knowledge of the legal system of the Austrian Empire by translation of sources of law deserves mention. An example of this effort is the translation into Romanian of the Prefaces of the Austrian Codes.[53] Ştefan G. Berechet indicates the fact that a large number of such codes, in fact almost the entire result of Austrian codification of the late 18th and early 19th

52 Homoki-Nagy 2009. 22.

53 See Berechet 1933. 503–504.

centuries (the Community Court Procedure of 1782–1787, the Criminal Code of 1807, the Civil Code of 1811), has been translated into the Romanian language within a few years of their publication in Latin. This trend continued in the case of the Austrian Civil Code implemented in 1853.[54] It should be noted here that in the western regions of today's Romania, which were not part of historical Transylvania (Banat and Partium, known as Crişana and Maramureş), as an effect of the Austro-Hungarian Compromise of 1867, the customary Hungarian civil legislation was (re)applied, while in historical Transylvania most civil legal relations had been regulated by the Austrian Civil Code since 1853. The legal literature in Romania does not analyse in detail the provisions of customary civil law applicable in Hungary and in the above-mentioned regions between 1868 (when resumption of its implementation occurred) and 1918.

Following the union of Transylvania with Romania, the issue of 'interprovincial law' proved problematic as the need for comparison and determining the applicability of the rules of law in force in the various regions of the country arose in the case of certain persons and legal situations.[55]

6.2. The Law Applicable to Individuals and Families

Following the Diploma Leopoldinum (1691), the privileges of the nobility were preserved and consolidated in Transylvania. During the 18th century, a significant attempt at the modernization of many legal institutions occurred by the reforms of Emperor Joseph II, which was, however, doomed to failure. Regarding the political and civil rights of the Romanian population of Transylvania, a major change occurred due to the Imperial Ordinances of 1781 and 1782, which recognized the equality of rights of Romanians living in this region with the Saxon population from the 'King's Land' (a principle called *concivility*). Although these ordinances, like the other reforms of Emperor Joseph II, were subsequently revoked, their effects could not be completely suppressed.[56]

The organization of the border regiments in the 18th century allowed the Romanian population in Transylvania to constitute a new free social class, that of border guards, which benefited from the right to own real estate and use public goods (forests, pastures) to its economic benefit. This social class later contributed to the development of Romanians' participation in the army, the education system, the clergy, and public administration.[57]

Improving the situation of dependent peasants (serfs, *coloni*) constituted a legislative priority in Transylvania during the 18th century, numerous ordinances

54 See Berechet 1933. 300–319.
55 Firoiu–Marcu 1987. 348.
56 Firoiu–Marcu 1984. 241.
57 Firoiu–Marcu 1984. 242.

and patents being issued there with this object. The *Certa puncta* Patent of Empress Maria Theresa (1769) reformulated the obligations of dependent peasants on the basis of previous acts of legislation, clarifying their rights as well. By his acts of 1783 (the Rescript of 16 August 1783)[58] and 1785, Emperor Joseph II gave the serfs the freedom of marriage and the free choice of occupation without the need for the consent of the landlord. By the Patent of 22 August 1785, he restored to the serfs the right to free movement, a measure later reconfirmed in some respects by Leopold II in 1790 as well as by the *Articuli Novellares* adopted at the Diet of Cluj in 1791.[59] Personal easements were later abolished by the revolutionary acts of 1848 and the Patents of 1853–1854.

In the matter of protection of natural persons, a significant development was the establishment of guardianship commissions within the framework of Romanian border regiments by the Regulation of 1766 in view of supervising the administration of the estate of orphans and widows and of controlling the activity of guardians. The regulation allowed the attribution of guardianship by will, in the absence of such provisions assigning it to the closest relatives. Documents from the years 1775 and 1782 were also intended to improve the situation of orphans and widows of officers of the border guard.[60]

In the matter of family law, it is necessary to mention the reorganization of the rules for drawing up, issuing, and keeping documents regarding marital and family status. The reform in the field, carried out at the beginning of the 19th century, imposed the keeping of birth certificates as well as certificates of baptism, marriage, and death by churches in the form of so-called church protocols.[61]

The regime applicable to marriages in the area of the military border should also be mentioned, this institution of family law together with its patrimonial effects being subject to oppressive and militaristic norms and the family as an institution being subordinated to the military interests of the Habsburg Empire (here we mention the need for marriage authorization by the bodies of military command, subjugation of the extended family to the power of the head of the family defined in a quasi-military manner, etc.).[62]

Implementation by the Habsburg Empire (initially with an oppressive, revanchist intent) of the Austrian Civil Code (ABGB) in Transylvania on 1 September 1853 led to profound changes in what concerns the legal rules applicable to persons. At least at a declarative level (and maintaining inequalities due to sex and social status within the family), this code was based on equality between citizens.[63]

58 Firoiu–Marcu 1984. 259.
59 Firoiu–Marcu 1984. 243.
60 Firoiu–Marcu 1984. 246.
61 Firoiu–Marcu 1984. 249.
62 Firoiu–Marcu 1984. 260–261.
63 Firoiu–Marcu 1987. 139–140.

The ABGB set the age of majority at 24. Full exercise of legal capacity was associated with attaining the status of adult in case of marriage, the minimum age for its conclusion being 16 years for women and 18 years for men, with the possibility of granting an age exemption by the Ministry of Justice. Following the union of Transylvania with the Kingdom of Hungary, special norms (Act XXIII of 1874) – by way of derogation from the ABGB – conserved in the benefit of the spouses the status of adult acquired through marriage if it was dissolved due to the death of one of the spouses or through divorce and the spouse had not yet reached the legal age of majority. Until reaching adulthood or attaining emancipation, the minor was under the parental authority of the father. In the event of the latter's death, the procedure for appointing a guardian was initiated by the effect of the law. The institution of guardianship was profoundly reorganized by acts XX of 1877 and VI of 1885 regarding the supervision of the way in which the estate of the person subject to this measure was managed.[64]

The civil status registers were secularized by Act XXXIII of 1894, this being regarded as a veritable public registration system of births, marriages, and deaths managed by civil servants.[65] Act XXXI of 1894 repealed the provisions of the ABGB on matrimonial law. Civil marriage in front of a civil servant became mandatory, and the conditions of validity of the marriage and the consequences of their absence (or the existence of a negative condition) were regulated by the same normative act. Authorization of separation of the spouses in fact and, as the case may be, divorce could be requested only if reasons expressly provided by law were met, the guilty spouse being required to provide maintenance according to his/her means to the spouse who was not at fault for the dissolution of the marriage.[66]

6.3. Real Property Rights

At the beginning of the period examined, the real property rights in Transylvania remained governed by the sources of mediaeval law (recorded mainly in *Tripartitum*) as resumed and amended by *Approbatae Constitutiones* and *Compilatae Constitutiones* as well as the statutes of the Saxon cities and towns. Organization of the border guards' regiments and the creation of the category of ownership called the border guard's lot, the continued possession of which required the continuation of military service, including in this regard, by the person of the heir, have produced profound effects on the organization of the real property rights of the serfs over their lots located in the areas affected by the organization of border defence in the Habsburg Empire. This organization of property rights, also

64 Firoiu–Marcu 1987. 140.
65 Firoiu–Marcu 1987. 140.
66 Firoiu–Marcu 1987. 145.

known among the Szeklers, was a manifestation of the *confiniary* system (under which inhabitants of border regions had supplementary military obligations for the defence of the border, being subjected in their persons and in their assets to various forms of state oppression), the land of the extended families of border guards being considered part of the family estate from ancient times (hence the name of *moşie* in the meaning of both 'ancient' and 'estate' in Romanian).[67]

The reorganization of real property in Transylvania owes much to the reforms of 1848, which, despite their retraction, had the indirect effect of imperial patents being issued in 1853 and 1854. These regulated the property regime by organizing the gradual transition and development of urban lands owned by peasants, thus initiating the process of attaining ownership. In parallel with this process (although in Transylvania land record systems had been in existence since the 15th/16th centuries, and in the border regions a separate system of land registration had already been established since the years 1770–1780), the reorganization of land records on the Austrian model took place, the system being initially applied to the military border districts but later expanded.[68]

Subsequently, the land book system was reorganized and regulated in detail; in 1855, the land books were established based on the Austrian model in the Banat, the Crişana, and Maramureş, this system being extended to historical Transylvania only in 1870. Romanian legal literature recognizes the superiority of this real estate registration system compared to the system of registers of inscriptions and transcriptions of French origin, applied at that time in the extra-Carpathian regions.[69]

6.4. The Law of Obligations

The organization of the military border had a profound effect on the law of obligations applicable to the Romanian population in the districts inhabited by border guards, the sale of lots of land being allowed, but only to another border guard, and being subject to the prior approval of the bodies of military command.[70]

The ABGB, in force in historical Transylvania (in Banat, Crişana, and Maramureş the norms of customary Hungarian civil law becoming applicable), did not regulate obligations according to the classification of the Romanian Civil Code of 1864 (as contractual, delictual, quasi-contractual, quasi-delictual) but instead considered that all obligations had their source in law, contracts, or acts which result in extracontractual liability. In the legal system of Hungarian customary law, the sources of obligations were considered to be – in addition to deeds –

67 Firoiu–Marcu 1984. 273.
68 Firoiu–Marcu 1984. 275–276.
69 Firoiu–Marcu 1987. 148.
70 Firoiu–Marcu 1984. 287–288.

any illicit actions and the law itself. The ABGB did not contain a definition of contracts, but one could be deduced from the elements required for its validity. The principle of consensualism has been applied to these, many contracts (loan for use, loan for consumption, pledge, deposit) being considered real contracts (i.e. only concluded at the moment at which the object of the contract was handed over). The categories of contracts already presented in other papers of this issue have received through the ABGB a detailed regulation, contracts of publishing, contracts between the owner and his employees, contracts by which companies are founded, prenuptial agreements, and various other contracts being added.[71]

6.5. Commercial Law

Unlike civil law, commercial law in Transylvania was regulated by the sources of law of Hungary. Thus, the main source of the rules was the Trade Act of 1875. Following the principles of commercial law of the time, this presented multiple similarities with the Commercial Code of Romania (1887), especially as regards the qualification of acts of commerce in objective and subjective acts, in order to determine the applicability of the provisions of these codes and highlight the mainly contractual nature of commercial obligations.[72]

Legal capacity to engage in commerce, as opposed to the regime of the Romanian Commercial Code, was not distinguished in the Trade Act of 1875 from the general capacity to engage in contracts. Another significant difference was that no commercial register has been established under the regime of the Romanian Commercial Code; instead, the Trade Act of 1875 established a Register of Companies (a measure emulated by the Romanian legislator only by the Act of 10 April 1931). The totality of assets of traders acquired a detailed regulation by Act LVII of 1908. Trade could be carried out by any person, with respect to the form in which the company was set up. Company registers could be kept in any language, having probative force *erga omnes* in the matter of acts of trade and only between traders in activities of trade.[73]

The sale and purchase contract, the transport contract, and the publishing contract, among others, were thoroughly regulated by the Trade Act of 1875, which did not regulate the contract of report.[74]

The late 1800s saw a dizzying increase in the number of companies in Transylvania.[75]

71 Firoiu–Marcu 1987. 154–155.
72 Firoiu–Marcu 1987. 165.
73 Firoiu–Marcu 1987. 167.
74 Firoiu–Marcu 1987. 171.
75 Firoiu–Marcu 1987. 169.

6.6. Inheritance Law

The law of succession did not undergo significant changes, at the beginning of the period examined in Transylvania there being only a series of derogations from rules established for border areas.[76]

Until 1918, the testamentary legislation of Transylvania was largely subject to customary law.[77] Form and content of the will, on the other hand, were regulated by special rules.

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76 Firoiu–Marcu 1984. 275–295.

77 Firoiu–Marcu 1987. 300.

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