STUDIES ON THE TEXTS OF THE DESERT OF JUDAH [69]

The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives

General Analysis and Three Case Studies on Law of Succession, Guardianship and Marriage

By

JACOBINE G. OUDSHOORN

BRILL

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Studies on the Texts of the Desert of Judah

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PART ONE

THE LAW BEHIND THE DOCUMENTS: EXTERNAL AND INTERNAL EVIDENCE

PREFACE

The research presented in this volume was done during an appointment as PhD student at the Faculty of Law (department of Legal History) of the Rijksuniversiteit Groningen. Having obtained MAs in both Classical Languages and Semitic Languages, and at the time completing an MA in Law, I was asked to develop a research proposal that would cover all of those fields. As the Babatha archive consists of documents in Aramaic and Greek, and represents legal documents drawn up in an area where several legal systems could have exerted their influence, it seemed natural to choose this archive as an object for a study into the relationship between laws and the possible conflict of laws as represented in the papyri from this archive. Research began in September 2000 and was completed in February 2005.

As the volume *Law in the Documents of the Judaean Desert* (ed. R. Katzoff and D. Schaps; SJSJ 106; Leiden: Brill, 2005) appeared in April 2005, I managed to include only a few brief references to this volume in the manuscript that was submitted for the PhD defense. While preparing the original manuscript for the present presentation as part of the STDJ series, I took the opportunity to include more elaborate references to the aforementioned work and where necessary full discussions of the conclusions reached there that directly relate to my arguments as presented here. As to the contents of the arguments and the conclusions reached in this study, these are identical to the ones successfully defended in November 2005.

I trust that this volume, which presents a new way of understanding the exact relationship between local and Roman law in the Judaean Desert documents in the light of conflict of law, will find its way to an interested readership, eager to investigate for themselves the arguments and conclusions presented here and their merits in understanding more about (possible) conflict of laws and the way in which this conflict of laws was dealt with in second-century Arabia.

LIST OF ABBREVIATIONS

In general footnotes use abbreviations for journals, series and short references for the major editions of the texts from the archives used in this study. Full bibliographical details can always be found in the Bibliography, but for convenience's sake a list of abbreviations is provided here.

ATTM I, E and II:

Beyer, Klaus. *Die aramäischen Texte vom Toten Meer samt den Inschriften aus Palästina, dem Testament Levis aus der Kairoer Genisa, der Fastenrolle und den alten talmudischen Zitaten. Aramaistische Einleitung, Text, Übersetzung, Deutung, Grammatik/Wörterbuch, Deutsch-aramäische Wortliste, Register.* Göttingen: Vandenhoeck & Ruprecht, 1984 (Band I), 1994 (Ergänzungsband), 2004 (Band II).

BAR – *Biblical Archaeology Review*

BASP – *Bulletin of the American Society of Papyrologists*

Cotton/Yardeni: volume containing the texts and translations of and commentary on the Salome Komaise archive:

Cotton, Hannah M., and Ada Yardeni. *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites, with an Appendix Containing Alleged Qumran Texts* (The Seiyal collection II), DJD XXVII, Oxford: Clarendon Press, 1997

CHANE – Culture and History of the Ancient Near East

Documents II – volume containing texts and translations of and commentary on Aramaic documents from the Babatha archive:

Yadin, Yigael, Jonas C. Greenfield, Ada Yardeni, and Baruch Levine, eds. *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabataean-Aramaic Papyri.* Jerusalem: Israel Exploration Society, Institute of Archaeology, Hebrew University, Shrine of the Book, Israel Museum, 2002

DJD – Discoveries in the Judaean Desert

EDSS – Encyclopedia of the Dead Sea Scrolls

HTR – *Harvard Theological Review*

ICS – *Illinois Classical Studies*

IEJ – *Israel Exploration Journal*

ILR – *Israel Law Review*

ICS – *Illinois Classical Studies*

JANES – *Journal of the Ancient Near Eastern Society of Columbia University*

JESHO – *Journal of the Economic & Social History of the Orient*

JJP – *Journal of Juristic Papyrology*

JJS – *Journal for Jewish Studies*

JQR – *Jewish Quarterly Review*

JRS – *Journal of Roman Studies*

JSJ – *Journal for the Study of Judaism*
JSS – *Journal of Semitic Studies*
Lewis – volume containing the texts and translations of and commentary on the Greek documents from the Babatha archive:

> Lewis, Naphtali, ed. *The Documents from the Bar Kokhba Period in the Cave of Letters: Greek Papyri,* with Aramaic and Nabataean signatures and subscriptions, edited by Yigael Yadin and Jonas Greenfield. Jerusalem: Israel Exploration Society, 1989

RB – *Revue Biblique*
RIDA – *Revue International des Droits de l'Antiquité*
SCI – *Scripta Classica Israelica*
SJSJ – Supplements to the Journal for the Study of Judaism
STDJ – Studies on the Texts of the Desert of Judah
TSAJ – Texts and Studies in Ancient Judaism
ZAVA – *Zeitschrift für Assyriologie und Vorderasiatische Archäologie*
ZDPV – *Zeitschrift des Deutschen Palästina-Vereins*
ZNT – *Zeitschrift für Neues Testament*
ZPE – *Zeitschrift für Papyrologie und Epigraphik*
ZSav. – *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*

GENERAL INTRODUCTION

INTRODUCTION

The general introduction will introduce the texts of two multilingual family archives that are the primary sources of information in this study for law and legal proceedings in the second-century Roman province of Arabia, and present a cursory overview of the most conspicuous legal aspects that testify to both continuity and change at the transition from Nabataean kingdom to Roman province of Arabia. The encounter between the law of the new dominating power in the region ('Reichsrecht') and the persisting legal traditions of the indigenous population ('Volksrecht') calls for an investigation of the relationship between the two. Older discussions of the laws that play a part in these documents have often been limited in view (with a primary focus on language issues) or in object (single documents, or documents covering a single topic instead of an entire archive). This study aims at discussing all papyri from the archives, taking the language issue as a first step, while adding two more steps that together present a new theory for understanding the relationship between Roman and local law in the newly founded province of Arabia.

The second part of the General Introduction will explain the treatment of the documents in this context, dealing with matters of terminology, method, sources and legal detailing.

I. THE TEXTS

The archives

The Babatha archive

In the early sixties of the twentieth century, an expedition, organized by the Israel Exploration Society and led by Yigael Yadin, explored a cave north of a wadi called Nahal Hever, situated on the western shore of the Dead Sea. In this three-chambered cave, skeletons and artefacts, and letters sent by Bar Kokhba, the leader of the famous Jewish revolt of the second century CE, were discovered. The second year of the expedition brought to light another extraordinary find. I quote from Yadin's report:

> In one of the water skins a large collection of balls of flax thread and a well packed parcel were found. The outer wrapping of the parcel consisted of a sack carefully fastened with a twisted rope; inside there was a leather case with many papyri packed tightly together. When the parcel was opened, it was found to contain the archive of Babatha the daughter of Simeon.[1]

An archive is a set of documents, belonging to one family and often, for convenience's sake, named after one person, who either features in the majority of the documents or to whom most other persons mentioned are somehow related. In our case this is Babatha, the daughter of Simeon.[2] Because the papyri were found in the original wrapping in

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[1] See Yigael Yadin, "Expedition D—The Cave of Letters," *IEJ* 12 (1962): 231. For a short description of the circumstances of the find see R. Katzoff, "Babatha," *EDSS* 1:73–75. For an eye witness account of the find with interesting pictures see: David Harris, "I was there!" *BAR* 24, no. 2 (March/April 1998): 34–35. The preceding article by Saldarini is a reconstruction of what could have happened to Babatha and her family based on the evidence from the papyri (Anthony J. Saldarini, "Babatha's Story," *BAR* 24, no. 2 [March/April 1998]: 28–33).

About Babatha's flight to the cave where the documents were found also see Broshi, discussing when and why: Magen Broshi, "Agriculture and Economy in Roman Palestine: Seven Notes on the Babatha Archive," *IEJ* 42 (1992): 230–231.

[2] The designation as Babatha archive has also led to designation of individual papyri as P.Babatha, instead of the more conventional P.Yadin: see n. 7 below.

which they were hidden, it can be assumed the archive is complete.[3] It contains thirty-five documents, covering some thirty years, from 97–132 CE. All the documents record legal acts of various types, like sale, loan, deposit, gift and marriage contract.[4] That these documents were of great importance for the parties concerned is evident from the fact that they were carefully stacked together and wrapped for protection. They were probably hidden in the cave when the persons concerned fled the violence of the Bar Kokhba revolt. It is assumed that Babatha and her family died in this revolt, and Yadin even believed that one of the skeletons in the cave must have been Babatha's; 'an assumption which, while likely enough, can of course, in the nature of the case, not be proved.'[5] Were that the case, then Babatha must have hidden in the cave and perished in an attempt to escape approaching Roman soldiers. Assuming, however, that she did not hide in the cave herself, but merely hid her documents there for safekeeping, she probably meant to retrieve the documents 'at a later, happier time. She obviously did not live to see that happier time, and her precious papers lay for more than 1,800 years just where she had hidden them so carefully.'[6]

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[3] This is not always the case, as can be seen in the example of the Salome Komaise archive, to be discussed below. Because this archive was not discovered during organized excavations its documents have become scattered, and it is still uncertain how many documents the archive originally contained. Until now six documents have been published as 'the archive of Salome Komaise' (see n. 34 below), while another five or six documents are thought to have been part of this archive too. The majority of those is still unpublished (see n. 38 below). Salome Komaise's marriage contract (P.Hever 65, to be discussed in detail below) was found in the same cave where Babatha's archive was found, and was published in the edition of the Greek papyri of the Babatha archive (see n. 5 below), as P.Yadin 37, although it was clear that it was not part of the Babatha archive, but belonged to another woman.

I note that one can of course never be completely sure that an archive is complete, nor is it always clear why certain documents that could be expected to be present are lacking. This applies to, for example, documents connected with the several lawsuits Babatha engaged in (to be discussed in Chapters 4 and 5 below).

[4] The term legal act is often used in different meanings, because it can refer to a complete transaction or to various required actions within a complete transaction. For example, in a sale one can say that the sale is a legal act, but also that the offer and the acceptance as part of the negotiation process towards the sale are legal acts (since they are actions aimed at achieving a result with a legal consequence). To refer to those actions, though, it is better to use the term judicial act. I will use the term legal act solely to refer to complete legal transactions, like sale, gift etc.

[5] Naphtali Lewis (ed.), *The Documents from the Bar Kokhba Period in the Cave of Letters: Greek Papyri,* with Aramaic and Nabataean signatures and subscriptions, edited by Yigael Yadin and Jonas Greenfield (Jerusalem: Israel Exploration Society, 1989), 5.

[6] Lewis, 5.

Babatha and her family

The 35 papyri of the Babatha archive were labeled P.Yadin 1–35.[7] A number of them were found to be written in Aramaic; a greater number, mainly of the later papyri, were in Greek.[8] The complete Greek papyri were published in 1989, the Aramaic papyri in 2002, in an edition comprising more Aramaic, Nabataean and Hebrew texts than those from the Babatha archive alone.[9] Of the Greek papyri, P.Yadin 31–35 present

[7] A less common designation is P.Babatha, P.Hever or X5/6Hev. For a helpful overview of all the designations and some clear guidelines on which to use and which to avoid, see Hannah M. Cotton, "Documentary Texts from the Judaean Desert: A Matter of Nomenclature," *SCI* 20 (2001): 114–117.

[8] P.Yadin 1–4 and 6–10 are in Aramaic, 5, 11–35 in Greek. The Greek papyri are usually not completely in Greek: subscriptions tend to be written in Aramaic; see Chapter 1 on language for full discussion of the use of several languages in the papyri.

[9] Edition of Greek papyri: Lewis, n. 5 above (see the editor's preface, xi, for the contributions others made to the volume). A few of the papyri had been published preliminary:
P.Yadin 15: H.J. Polotsky, *Eretz Israel* 8 (1967), revised edition: Naphtali Lewis, *ICS* 3 (1978);
P.Yadin 18: Naphtali Lewis, Ranon Katzoff and Jonas C. Greenfield, *IEJ* 37 (1987): 229–250 (outer text only);
P.Yadin 27: H.J. Polotsky, *Eretz Israel* 8 (1967), revised edition: Naphtali Lewis, *ICS* 3 (1978);
P.Yadin 28–30: H.J. Polotsky, *Eretz Israel* 8 (1967).
Edition of Aramaic papyri: Yigael Yadin, Jonas C. Greenfield, Ada Yardeni, and Baruch Levine, eds. *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabataean-Aramaic Papyri* (Jerusalem: Israel Exploration Society, Institute of Archaeology, Hebrew University, Shrine of the Book, Israel Museum, 2002).
It is obvious that it was worthwhile to publish the Greek documents as they became ready and not wait until the Aramaic documents could be presented as well (which was eventually thirteen years later). It is rather to be regretted that the edition of the Aramaic documents chose to present the Nabataean and Jewish Aramaic documents of the Babatha archive in different sections of the edition, not only breaking up the unity of the archive (already noted by Newman in his review of the volume; see n. 109 below) but also leading to incomprehensible differences in understanding: see my discussion of P.Yadin 8 and 9 below, 107. I was informed by Hannah Cotton that a new edition is planned by Eshel, Yardeni and Cotton, which will present the Aramaic documents of the Babatha archive together. This edition will appear first in Hebrew.
The Aramaic documents from the Babatha and Salome Komaise archives can also be found in: Klaus Beyer, *Die aramäischen Texte vom Toten Meer samt den Inschriften aus Palästina, dem Testament Levis aus der Kairoer Genisa, der Fastenrolle und den alten talmudischen Zitaten. Aramaistische Einleitung, Text, Übersetzung, Deutung, Grammatik/Wörterbuch, Deutsch-aramäische Wortliste, Register.* (Göttingen: Vandenhoeck & Ruprecht, 1984 [Band I], 1994 [Ergänzungsband], 2004 [Band II]). The first volume only contains a brief reference to the Babatha archive (styling P.Yadin 2, 3, 4, 6 and 9 all as 'Kaufverträge'). The supplementary volume of 1994 presents text and translation of P.Yadin 7 and of the Aramaic subscriptions of P.Yadin 12, 14–23, 26 and 27; the second volume of 2004 presents text and translation of P.Yadin 1, 2, 3, 4, 6, 7, 8, 9, 10, and the

documents in such a fragmentary state that no real sense can be made of their contents. Sometimes a name or a date is legible; a few words that seem to refer to business or to a person, but not much can be said

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Aramaic subscriptions of 12, 14–23, 26 and 27, as well as P.Hever 12. This latter volume designates P.Yadin 4, 6 and 9, previously all designated as 'Kaufverträge,' as 'Bürgschaft,' 'Pachtvertrag,' and 'Quittung' (*ATTM II*, 215, 216, 225).

One should bear in mind that the facts as represented in the short introductory sections to each document at times represent disputed positions: for example, the assumption that Babatha's father purchased the orchard in P.Yadin 3 'nach nabatäischem Recht' (*ATTM II*, 212) apparently follows *Documents II* (242: 'under the provisions of Nabatean law'), while there is no direct ground for this assumption in the document's text (see discussion in Chapter 2 below, 94ff.); the remark about P.Yadin 10 'Der Ehevertrag entspricht "dem Gesetz Moses und der Juden" (5) und nicht ἑλληνικῷ νόμῳ (V 18,51; 106,9f.)' (*ATTM II*, 226) disregards the fact observed by Katzoff that ἑλληνικῷ νόμῳ only applies to part of the arrangements in P.Yadin 18, while 'according to the law of Moses and the Judaeans' determines the framework of the *entire* legal act of P.Yadin 10 (see detailed discussion in Chapter 6 below, 409–410); the assumption that Babatha's proposal of P.Yadin 15 was aimed at transferring guardianship to her (*ATTM E*, 175; *ATTM II*, 229) has been refuted by Cotton (in 1993, *contra* opinions by Falk [1978] and Klein [1991)], who did maintain that Babatha sought to have guardianship transferred to her; for details see treatment of P.Yadin 15 in Chapter 5 below, 317, esp. n. 58); the assumption that Shelamzion was a minor at the time of her marriage in P.Yadin 18 (*ATTM E*, 178; *ATTM II*, 232; apparently following Lewis) has been disputed by Wasserstein (in 1989; for details see treatment of P.Yadin 18 in Chapter 6 below, 406–407); in the introduction to P.Yadin 20 Besas and Julia Crispina are styled as 'die beiden Vormünder der Kinder von Jesus' (*ATTM E*, 180; *ATTM II*, 234), apparently following Lewis, who in his edition did accept that both of them were guardians, even though Julia Crispina held another title, *but* came back to this in an article (1994; see 349 n. 162 below); in general the accepted opinion is that Julia Crispina was not a guardian like Besas (to this point for instance Cotton; for details see treatment of Julia Crispina's position in Chapter 5 below, 347ff.). Equation of the object of the gift of P.Yadin 19 with the object of the dispute of P.Yadin 20 (*ATTM E*, 180; *ATTM II*, 234) has plausibly been rejected by Cotton (see 227 n. 42 below).

It is not always clear on what grounds Beyer accepts or proposes certain readings, restorations or translations. Regarding his list of 'Talmudische Zitate aus Privaturkunden' (*ATTM I*, 324–327), it is regrettable that the quotes are given under the heading of a document type (like sale or lease), without indicating to what particular documents the quote refers (see 105 n. 34 below); there are no additions to the list in volumes E and II. The 'Wörterbuch', which is extended with new words in each volume, is useful for comparison of texts that feature the same terms, but again some caution is wanted in determining whether statements are facts or interpretations, for instance under אדון Beyer indicates that for 'Vormund einer Waise' the Greek uses the term ἐπίτροπος, but 'einer Römerin' ἐπίσκοπος: this statement starts from the assumption that Julia Crispina was a guardian and consequently, that the term ἐπίσκοπος that is used to designate her can mean 'guardian' (of an orphan). However, it is by no means certain that Julia Crispina was guardian, or that the term ἐπίσκοπος can be equated with ἐπίτροπος. Rather, it seems that the term ἐπίσκοπος is used to indicate that Julia Crispina holds another position; according to Cotton, the term does not seem to have a specific legal meaning of its own (see detailed discussion in Chapter 5, 347–348).

as to their contents or the legal act at issue.[10] Nevertheless, on reading the more or less complete documents, a clear picture of Babatha and her family emerges.[11]

Babatha, daughter of Simeon the son of Menachem, was first married to Jesus son of Jesus, and their son was named Jesus as well.[12] After the death of her husband, Babatha had a dispute with the guardians of the child, which is documented in several of the documents. It appears that Babatha disagreed with the amount of maintenance money the guardians paid her for raising the child.[13] In one of the documents connected

[10] Lewis (in his textual edition of the Greek papyri, n. 5 above) has given the documents a designation like contract or summons, in most cases followed by a question mark in parentheses (122, 123, 124). In P.Yadin 33 the document is styled as the copy of an *axioma*, a petition, but the text of the petition itself is completely missing. P.Yadin 34 opens in the same way P.Yadin 33 does, suggesting it is also a petition. Some parts of the contents are legible, making it possible to relate it to P.Yadin 26; see Lewis, 126.

Furthermore, I note that P.Yadin 1, a debenture, is drawn up between two Nabataeans, who do not seem to have any connection with the other persons mentioned in the documents, that is, they were probably not related to Babatha's family. Why the document was included in Babatha's archive is not clear, but since it does not seem to concern an act between Jews, or an act with at least one Jewish party, I will not discuss its implications. P.Yadin 2 is a document between two Nabataeans as well, but this document has a clear relation to P.Yadin 3, which features a Jewish party related to Babatha. I have only treated those documents that are clearly related to Babatha and her family because I want to address the questions frequently raised concerning the Jewishness of the documents. What is meant by the Jewishness of the documents is to be explained below, see 30–31 below.

[11] Babatha's family was already treated by Yadin in his report about the finds in the Cave of Letters, see *IEJ* 12 (1962): 247–248 (family tree on page 248). Lewis discusses 'family and society' (22–26) giving family trees on 25. He is probably too sanguine about the evidence the archive provides for the practice of poly-/bigamy amongst Jews at the time: see n. 22 and 221–222 below.

[12] The rendering of the names in these cases is always a problem, since the documents themselves present them in various renditions depending on the language used (Aramaic or Greek) or even matters of spelling. Babatha is, for instance, sometimes called Babtha. Names like Jesus and Judah are rendered differently in Greek or Aramaic (Jesus versus Yeshua, Judah versus Yehuda'). Lewis' edition obviously prefers the Greek versions of the names (or rather their renderings in English) which is not odd considering the nature of the documents in that edition. The editors of the Aramaic documents from the archive, on the contrary, use the names in their rendering closest to the original Aramaic, which includes representations of *aleph* and *ayin* in the names. In discussing the different papyri I will follow the convention of either edition, but for convenience's sake I will always render Babatha as such (i.e. ignoring the final *aleph*).

[13] P.Yadin 12–15 present us with the main documents pertaining to this conflict. P.Yadin 12 is the appointment of the guardians, P.Yadin 13 a letter of Babatha to the provincial governor complaining about the guardians' behavior, P.Yadin 14 is a summons for a court case and P.Yadin 15 is a proposed solution to the dispute, probably related to the court case. Furthermore, P.Yadin 27 and 28–30 are related to the dispute. P.Yadin 27 gives a receipt for maintenance money dated some seven years after the conflict.

with this dispute, the child is specifically described as 'a Jew,'[14] which supports the inference already drawn from the names found in the documents that the archive belonged to a Jewish family.

Babatha eventually remarried with Judah, son of Eleazar Khthousion; their marriage contract is recorded in one of the documents.[15] Judah also acted as her guardian when Babatha made a land declaration: a declaration of the property she owned for the Roman census of 127 CE.[16] Judah had been married before and had one daughter from that marriage, Shelamzion.[17] This Shelamzion appears in several documents, recording her marriage to a Judah Cimber, a gift to her by her father and the settlement of a dispute about a piece of property with her father's heirs.[18] In this latter instance it becomes clear that Judah had died. His death seems to have caused a lot of legal complications as not only Shelamzion was embroiled in a dispute about Judah's inheritance, but Babatha too. Two documents indicate that Babatha sold dates from orchards belonging to her deceased husband, basing herself on claims

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It appears that Babatha did not receive more maintenance money than she had done before. This could indicate that she lost her case against the guardians (but for a different opinion see 345 n. 144). P.Yadin 28–30 present us with the Greek translation of a Roman *formula* that might have been used in the case. Discussion of these documents in detail in Chapter 5 below.

[14] P.Yadin 12:7. This is the only instance in the archive where the origin of one of the parties is explicitly mentioned. I will discuss a possible reason for this in Chapter 5 below, 315–316.

[15] See P.Yadin 10, which is in Aramaic and presents us with a text of a marriage contract in truly Jewish style. The document contains all the elements required for a marriage contract laid down in the Mishnah. See Chapter 6 below, 379ff.

[16] Judah also acts as Babatha's guardian in P.Yadin 14 and 15; we do not know for sure whether the couple was married yet at that time. See Lewis, 58, who assumed they were (but Hanson assumes a much later date for the marriage, see discussion, 127 n. 103).

I do not discuss P.Yadin 16, because a census declaration is not the record of a legal act in the strict sense of the term (it is a copy of an official declaration, with its own legal implications). For more on a census and the various related issues I refer to Lewis' treatment of P.Yadin 16, 65ff. Also see Cotton on P.Hever 61 and 62, two census declarations comparable to P.Yadin 16 in: Hannah M. Cotton and Ada Yardeni, *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites, with an Appendix Containing Alleged Qumran Texts* (The Seiyal collection II; DJD XXVII; Oxford: Clarendon Press, 1997), 174ff., especially 175.

[17] Her name 'appears in two Greek versions: (1) Σελαμψιώνη . . . and (2) Σελαμψιοῦς . . .' (Lewis, 20). Lewis apparently does not follow the Greek renderings of the name in this case, but the rendering of the Aramaic Shelamzion. I follow his example.

[18] P.Yadin 18, 19 and 20 respectively. It is remarkable that P.Yadin 18, the 'marriage contract,' is in Greek and its contents does not resemble P.Yadin 10 at all. See discussion of P.Yadin 18 in Chapter 6 below, 398ff.

she had to his estate.[19] Three documents record legal procedures in the advent of a lawsuit between Babatha and the guardian of Judah's minor nephews, over property this guardian claims belongs to the nephews.[20] Another document records a dispute between Babatha and Judah's first wife Miryam (probably the mother of his daughter Shelamzion), concerning parts of Judah's property Miryam is holding.[21] Whether that dispute implies Judah had divorced Miryam or that he had entered into a bigamous match with Babatha is not clear.[22]

While this information about Babatha's own acts, her marriage to her second husband Judah and the consequences of his death can be gleaned from the archive's Greek documents, the Aramaic ones concern Babatha's family and the family of her first husband, Jesus. There we find a sale of an orchard to Babatha's father, who also made a gift to Babatha's mother.[23] Several other documents record business matters connected with Jesus' family. There are, for example, arrangements between Jesus and his uncle concerning a business this uncle and Jesus' father owned. After Jesus' father died, a share in the business belonged to the heir, but the money due to the heir could hardly be paid without harming the business. Therefore, it was decided that the uncle would owe the heir's share, using a deposit construction.[24] Other documents concern a guarantor's agreement,[25] acknowledgements of receipt of purchased objects[26] and a tenancy agreement.[27]

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[19] P.Yadin 21–22; Babatha bases her right to sell crops from property that is not hers on 'dowry and a debt.' See detailed discussion below, 220ff.

[20] P.Yadin 23–24 and 25. See detailed discussion below, 230 ff.

[21] See P.Yadin 26; detailed discussion below, 221–226.

[22] Lewis took P.Yadin 26 to be 'an unprecedented documentary source to the extant evidence on the subject of polygamy,' adding further on that 'polygamy . . . was indulged in as a matter of course considerably farther down the social scale than has hitherto been recognized' (24). I am not sure that the evidence is as conclusive and univocal as Lewis concludes. Besides that, a single instance of bigamy does not justify the assumption that it was 'indulged in as a matter of course.' Katzoff adduced several other possible explanations for Miryam's claims in P.Yadin 26, which I will discuss below, 222–226.

[23] P.Yadin 3 (detailed discussion on 93–97 below) and 7 (see 17, 23 and 86–87, and especially nn. 55, 79 and 115) respectively.

[24] P.Yadin 5; this document is the only 'early' document in Greek (6–10 are in Aramaic again). Detailed discussion below, 117ff.

[25] P.Yadin 4; the document is probably connected with P.Yadin 3, sale of an orchard to Babatha's father.

[26] P.Yadin 8 and 9. These documents are styled differently in their edition, see discussion below, 107ff.

[27] P.Yadin 6. This document does not concern Babatha's family or that of her first husband Jesus, but records a tenancy agreement between her second husband Judah,

The relatively large number of documents in the archive dealing with the affairs of a single family, yet covering a range of topics, enables us to get a good impression of many aspects of life at the time concerned. The fact that the documents were written in a period of change—the Nabataean Kingdom became part of the Roman province of Arabia in 106 CE—raises expectations for improving our understanding of the effects of provincialization and in particular the possible influence of Roman law on legal dealings in a province. As in most of the documents women are the main actors, important information can be gathered about the position of women at the time and possible changes in this position under Roman rule. I refer here, for example, to the well-known fact that in Roman law women needed a guardian to make legally valid acts, while this procedure was not known in oriental law.[28] The archive presents us with documents involving female parties from before and after the conquest, enabling an assessment of a possible direct influence of the Roman demand for guardianship of women on documents drawn up in a province.[29]

The Salome Komaise archive

Although the Babatha archive on its own presents perfect material for a study of the relationship between local and Roman law in the time and place concerned, the information found there can actually be compared to another archive centering on a woman, dating to the same time and found in the same region. One of its documents was found in the same cave as where the Babatha archive was discovered. Lewis, who incorporated the fragments of this papyrus text in his edition of the Greek part of the Babatha archive as P.Yadin 37, already acknowledged that it was

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the son of Eleazar Khthousion and one Jochanan, the son of Meshullam, see discussion below, 97ff.

[28] For the moment I ignore the finer details of and the gradual developments in the Roman arrangement, for example the exemption based on the *ius trium liberorum*. See full discussion of guardianship of women in Chapter 5 below.

[29] Guardianship of women is named as one of the signs of Romanization in most treatises dealing with these documents, starting with Lewis, and most notibly in an article by Hannah Cotton, aimed at discovering whether the use of guardians for women in the Greek documents can be related to a change in legal context or applicable law. I will come back to this article in detail below, 36–37, and in Chapter 5, 356ff., putting into perspective the general view that the presence of guardians of women points at a Roman legal context.

probably not a part of this archive.[30] The fragments could be composed to yield a fairly legible and sensible text, constituting a document related to marriage. The name of the woman involved was restored as Salome Komais.[31] Later, various other documents were discovered (in different places) that mentioned this same woman. Her name was then restored as Salome Komaise.[32] Consequently, another archive has been constituted that is commonly referred to as the archive of Salome Komaise.[33] Although it is not clear how many documents the archive originally contained, at least six documents have been identified as belonging to it, which have consequently also been published together.[34] Other documents identified as probably belonging to this archive are P.Hever 1[35] and P.Hever 2.[36] Since the documents again concern legal acts and in most cases acts that are comparable to the ones in the Babatha archive, a fruitful comparison can be made between the two. The Salome Komaise

[30] See Lewis, 130.

[31] See Lewis, 130 and 131, lines 4,13,15 with explanatory notes on 133.

[32] See Cotton in Cotton/Yardeni, 224.

[33] Not all documents refer to her, some are thought to have belonged to her first husband; see Cotton in Cotton/Yardeni, 160.

[34] See n. 3 above.

Preliminary to the edition Cotton published single documents in articles: "Fragments of a Declaration of Landed Property from the Province of Arabia," *ZPE* 85 (1991): 263–267 (fragm. A on 264 is part of P.Hever 61, Lewis' Inv. No. 3001), "Another Fragment of the Declaration of Landed Property from the Province of Arabia," *ZPE* 99 (1993): 115–122 (another part of P.Hever 61; together the parts are a perfect fit) and "Rent or Tax Receipt from Maoza," *ZPE* 100 (1994): 547–557 (P.Hever 60). Cotton presented the entire archive, including the at the time still unpublished P.Hever 63 and 64, as well as P.Hever 65, previously published by Lewis as P.Yadin 37, in "The Archive of Salome Komaise: Another Archive from the Cave of Letters," *ZPE* 105 (1995): 171–208. As Katzoff observed, 'the editors [of the eventual edition] must be warmly commended for having made their documents available to the scholarly public, in specialized learned journals and other fora, well in advance of their publication in this volume, and for not having withheld their texts and interpretations until the time-consuming production of the present volume was completed.' (Ranon Katzoff, review of H.M. Cotton and A. Yardeni, *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites, with an Appendix Containing Alleged Qumran Texts* [The Seiyal collection II], DJD XXVII, *SCI* 19 [2000]: 316).

[35] P.Hever 1 = P.Starcky: originally published in J.Starcky, "Un contrat Nabatéen sur papyrus," *RB* 61 (1954): 161, and re-examined in Ada Yardeni, "The Decipherment and Restoration of Legal Texts from the Judaean Desert: A Reexamination of *Papyrus Starcky* (P.Yadin 36)," *SCI* 20 (2001): 121–137.

[36] See Hanan Eshel, "Another Document from the Archive of Salome Komaise Daughter of Levi," *SCI* 21 (2002): 169–171; also see 97 below.

archive will accordingly be used to provide additional information in support of the findings in the Babatha archive.[37]

The Salome Komaise archive consists of six to eight papyri (that have been identified as belonging to it) and is therefore much smaller than the Babatha archive.[38] The time period it spans is (almost as a consequence) shorter: from January 125 to August 131. Six of the eight papyri are in Greek, two are in Aramaic. Contrary to what was found in the Babatha archive, the second Aramaic papyrus of the Salome Komaise archive is the last in time (dated to 131).[39] It is a tax receipt that closely resembles a Greek receipt from the same archive.[40] The other papyri include redemption of a writ of seizure,[41] a sale, two (parts of) land declarations, a dispute settlement, a gift and the marriage contract mentioned above.[42] As this enumeration immediately reveals, the same legal acts are represented as in the Babatha archive. In fact, the land declaration fragments in the Salome Komaise archive could only be designated as such by comparison with the (more or less complete) land declaration in the Babatha

[37] A good introduction, giving all the basic information about the archive, its discovery etc. can be found in the edition of Cotton and Yardeni referred to above (n. 16). I will just give a few relevant details here.

[38] It should be noted that a number of unpublished Nabataean papyri, which were found together with P.Hever 1 and 2, are thought to have been part of the Salome Komaise archive as well; they are presently in the Israel Museum. See Eshel, "Another Document," 169–171.

[39] The papyri were designated by reference to the Seiyal collection (XHev/Se) because they were initially not related to Nahal Hever. I will use the numbering of the edition (Cotton/Yardeni, n. 16 above): P.Hever 12, the Aramaic papyrus, and P.Hever 60–65, the six Greek papyri (the Aramaic papyrus is chronologically later than the Greek ones, but has a lower number, since the edition gives the Aramaic papyri first). For comments on the way the documents are designated in DJD volumes like Cotton/Yardeni, see Roger Bagnall, review of H.M. Cotton and A. Yardeni, *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites, with an Appendix Containing Alleged Qumran Texts* (The Seiyal collection II), DJD XXVII, *BASP* 36 (1999): 130–131.

[40] Compare P.Hever 12 to P.Hever 60. The resemblances are listed by Cotton in Cotton/Yardeni, 166–167. See discussion (in small print) below, 115–116.

[41] P.Hever 1, or P.Starcky. The classification as 'redemption of a writ of seizure' stems from Yardeni. While the original editor, J.Starcky, had described the deed as a deed of partition, Rabinowitz, who dedicated an article to corrections of translation and interpretation as offered by Starcky, called it a deed of seizure. The exact legal situation, which is quite complex, is explained in detail by Yardeni, leading her to give the new definition 'redemption of a writ of seizure' as an accurate description of what is at issue in this text ("Papyrus Starcky," 126–128). P.Hever 1 = P.Starcky will not be discussed in the present study.

[42] P.Hever 2, 61–62, 63, 64 and 65 respectively.

archive.[43] The information provided by the Salome Komaise archive is important, since comparison shows that features found in the Babatha archive do not stand alone.[44] On the other hand divergences appear that could denote that the practices found in the Babatha archive were not the only ones available. The 'marriage contract' in the Salome Komaise archive, for instance, may provide an instance of unwritten marriage, since the bride and groom are said to continue their lives together.[45] This clearly contrasts with what is found in the Babatha archive in P.Yadin 10 and 18.[46] The implications of resemblances and divergences will be discussed in detail below.[47]

Salome Komaise and her family

Like the documents in the Babatha archive, the papyri from the Salome Komaise archive provide a picture of her family.[48] Both Salome's father and brother died during the period the archive covers.[49] Salome settled a

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[43] P.Yadin 16; on its importance for our understanding of P.Hever 61 and 62, see Cotton in Cotton/Yardeni, 175, 181–182. As land declarations do not make up legal acts in the sense of the other documents in the archives, I will not treat them within the scope of this study (see 55 n. 30 below).

[44] The oath by the *tuche* of the emperor, for example, found in P.Yadin 16, can be found in P.Hever 61 as well.

[45] It has also been interpreted as an instance of premarital cohabitation, a controversial approach which has nonetheless entered the mainstream of scholarship (see 424 n. 153 below); see discussion in Chapter 6 below.

[46] P.Yadin 10 is a *ketubba*, a Jewish marriage contract, drawn up at the start of marriage. P.Yadin 18, although not a *ketubba*, explicitly styles the bride as a virgin, suggesting the document was drawn up at the start of marriage too. Further evidence for this assumption could be found in the gift the father of the bride makes to his daughter within two weeks after the drawing up of P.Yadin 18. Gifts to daughters were related to marriage as marriage changed the position of the daughter as her father's heir: see n. 51 below and full discussion in Chapter 4.

However, P.Yadin 18 and P.Hever 65 could be connected as both representing contracts referring to dowry rather than marriage contracts in the sense of a Jewish *ketubba*. Consequently, the mention of continuing a life together need not imply that the couple had not been (validly) married before. See detailed discussion of marriage contracts in Chapter 6 below.

[47] See for the interpretation of P.Hever 63 for the law of succession as it appears from the Babatha archive 234–237 and for the interpretation of P.Hever 65 in connection with the evidence of P.Yadin 10 and 18, 424ff. below.

[48] For a family tree see Cotton, "The Archive of Salome Komaise," 172.

[49] See P.Hever 63, where their deaths are mentioned. That the brother had recently died is clear from P.Hever 61, which is most probably his land declaration (see Cotton in Cotton/Yardeni, 174). The father does not act in either of the papyri, therefore his death could have preceded that of the son by some time, and it could even have occurred

dispute with her mother concerning the men's inheritance.[50] This mother made a gift to Salome in another document. The gift could be related to either a marriage of the mother or of the daughter.[51] The marriage contract mentioned above concerned Salome's marriage to her second husband. This means that her first husband also died.[52]

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before the date of the first papyrus in the archive. However, it could be argued on the basis of P.Hever 63 that it is likelier that the son had died first. That would mean that the father died in the period between the drawing up of 61 and 63, his death following that of his son. See the discussion of P.Hever 63 below, 234–237.

[50] P.Hever 63. Its implications for understanding the law of succession applicable at the time is not completely clear; see 234–237 below.

[51] P.Hever 64. A relation between gift and marriage was suggested in either of the following ways: a parent who remarried made a gift to a daughter from a previous marriage, or a gift was made upon the occasion of the daughter's marriage; see Hannah M. Cotton and Jonas C. Greenfield, "Babatha's Property and the Law of Succession in the Babatha Archive," *ZPE* 104 (1994): 219–220. For both cases a link with succession was assumed: the parent who remarried made the gift probably with respect to the possible birth of a male heir from the new marriage, which would leave the daughter without inheritance rights, and the gift at the marriage of the daughter, to a daughter who was an only child, suggests that the daughter did not have a right to inherit and the gift was used to compensate for this. Consequently, it was suggested that the presence of gifts for daughters in the archives could indicate that the daughter had no right to inherit her father's estate, even if she was an only child. The gifts were then used as means to compensate the rigid exclusion of the daughter in the order of succession. See Hannah M. Cotton, "Deeds of Gift and the Law of Succession in the Documents from the Judaean Desert," *Akten des 21. internationalen Papyrologenkongresses Berlin 13–19.8.1995* (Band I; Archiv für Papyrusforschung, Beiheft 3; ed. B. Kramer; Stuttgart: Teubner, 1997), 179–188; she came back to the conclusiveness of the evidence in another article on the subject ("The Law of Succession in the Documents from the Judaean Desert Again," *SCI* 17 [1998]: 115–123), stating that the gifts in the archives in themselves cannot prove that the daughter had no right to inherit.

The law of succession as it appears from the documents is treated in Chapter 4 of this study, where I will show that our estimation of the position of the daughter towards her father's estate need not be derived from the presence of gifts in the archives but that this position is actually dealt with in the documents' texts. This argument is based on a new interpretation of a line in P.Yadin 24 (see 233–234 below). Furthermore, I will show that the position of the daughter towards her father's estate was not always the same: this position changed upon the daughter's marriage: unmarried daughters could inherit their father's estate, but married ones could not. This means that the gifts in the archives do not imply that daughters could not inherit their father's estate in general, but functioned specifically as a way of providing the daughter with the share in the inheritance that she forfeited upon her marriage. For my full argument leading to these conclusions see Chapter 4 below, 226ff.

[52] It is assumed that this first husband was the Sammouos who features in an earlier document from the archive (P.Hever 60, possibly also in P.Hever 63; see Cotton in Cotton/Yardeni, 160–161, 166). It is precisely the fact that this document was found in Salome's archive that suggests that the marriage was ended by death and not by divorce: see Cotton in Cotton/Yardeni, 162.

Legal implications of the documents

Women's archives

In a brief sketch of the Babatha find it was remarked that women's archives differ substantially from those of men.[53] Examples comparing the archives of Babatha and Salome Komaise to three archives from men found in Nahal Hever and Wadi Murabba'at show that men's archives mostly contain documents pertaining to business (military and administrative correspondence, leases) and those of women more personal documents, like marriage contracts, renunciations of claims and deeds of gift. These documents are 'more personal' since they often reveal personal details about the woman's life. A marriage contract obviously reveals that the woman concerned was married, but it can also tell us something about the wealth of the family.[54] Similarly, a deed of gift can reveal the relationship between family members, as in P.Yadin 7, where Babatha's father provides his wife with a gift including a lodging arrangement for their daughter Babatha in case she should be widowed. This latter arrangement shows that Babatha was married at the time. Her marriage contract to Judah the son of Eleazar is damaged in the lines that should provide the date, but comparison with the data from other papyri shows that she must have been married and widowed before she married Judah.[55] From Judah on the other hand we learn that he had a daughter from a prior marriage.[56] His first wife was still alive at

[53] See Tal Ilan, "How Women Differed," *BAR* 24 no. 2 (March/April 1998): 38–39.

[54] By way of the dowry provided by the father; see, for example, the dowry Judah gave his daughter Shelamzion upon her marriage (P.Yadin 18). Lewis remarks to that papyrus: 'Shelamzion's dowry…is an impressive sum…A dowry of that magnitude attests the substantial wealth of the bride's family…' (77). It is not clear whether we should interpret the total sum supplied by the father of the bride to be two hundred or five hundred denarii: interpretations on that point vary; see 132 and 417 below.

[55] P.Yadin 7 is dated to 120; Babatha was then evidently married. She must have been widowed afterwards, because her son Jesus is said to be the son of Jesus, not of Judah. The dispute about the guardians over this boy dates to 124–125. One could assume Babatha had remarried by that time since Judah acts as her guardian in P.Yadin 14 (October 125; see Lewis, 58). Consequently, P.Yadin 10 is usually dated somewhere between 122 and 125: see Lewis, 29 for a table of papyri of the Babatha archive with their respective dates. Hanson argues for a later date for P.Yadin 10, see discussion below, 127 n. 103.

[56] See P.Yadin 18, where Judah gives his daughter in marriage to another Judah, nicknamed Cimber. This contract dates to 128, which excludes the possibility that Shelamzion was a daughter of Judah by Babatha. Her mother was most likely Miryam, mentioned in P.Yadin 26. In that papyrus Judah is styled the deceased husband of both women. Whether this meant he was married to both of them at the time of his decease, is unclear.

his death and goes into a dispute with Babatha about property. Whether their dispute meant they were both married to Judah at the time of his death, or that the first marriage had ended in divorce, is not clear.

That women's archives yield more personal information than men's is due to the simple fact that documents on personal matters like marriage, gift within a family and so on, were usually drawn up in favor of women and were therefore kept in their archives. With a man's archive, the possibility remains that he may have been married and may have provided gifts to his wife or daughter, but evidence for these facts will not be found in his archive. This means that both types of archive provide their own kind of information, men's archives focusing on military and economic matters, women's archives on family related matters.

While the documents were in all cases important—the very idea behind retaining a written document is of course in its value in later disputes or suits—it can be concluded that for a woman, documents had an added value related to their nature. Marriage contracts, deeds of gift and comparable documents ensured the women of rights they might have to claim many years after the event. The importance of the documents seems to have been on the women's minds when they had their documents stored, because Yadin noted in his report that:

> Some of the documents not found in batches were wrapped, each one separately, in sacking. These documents were of special interest to the women of the family and had been wrapped up in this way to enable them to have them for their personal keeping.... [7] is a deed of gift whereby Babatha's father made over all of his property to her mother; [10] is the ketubbah of Babatha's second marriage; and [18] is the marriage deed of Shelamzion [Babatha's stepdaughter].[57]

Due to the personal character of the evidence in the documents, our knowledge of the position of women in the area at the time is greatly improved, as can be seen in overviews on these points, for example, in several entries in the *Encyclopedia of the Dead Sea Scrolls*.[58] These publica-

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If he had divorced Miryam, she could still refer to him as her deceased husband. The plausibility of a number of suggestions for the relationship between Judah, Miryam and Babatha (and the women's subsequent claims) by Katzoff will be discussed in my treatment of P.Yadin 26, 222–226 below, where I will also add some other options.

[57] Yadin, "Expedition D," 236. Note that the numbering of the papyri was adjusted to fit Lewis' edition; the papyri were first numbered differently by Yadin.

[58] Hannah M. Cotton, "Women: The texts," *EDSS* 2:984–987. Also see Hannah M. Cotton, "Recht und Wirtschaft, Zur Stellung der jüdischen Frau nach den Papyri aus der judäischen Wüste," *ZNT* 6 (2000): 23–30 (a longer English version can be found in:

tions draw heavily on the documents to provide essential information on property rights for women, their participation in business (for example in sales), marriage (remarriage, divorce and indications for polygamy), and guardianship (of their children or of themselves). This information can be understood as being of social-historical importance, shedding further light on the position of women in ancient society, but it also has legal implications. The way in which women are represented as capable or incapable of doing certain things might give an indication of the legal system or law applicable in the acts. Judicial documents in which one of the parties is a woman reveal more about the law behind the documents than documents do in which all parties are male. Therefore, archives like the Babatha and Salome Komaise archives are especially suited to study the legal system(s) or law(s) used in the documents. The fact that women held another legal position to men required further arrangements in the documents and exactly these arrangements can show what law was behind the documents. I refer to, for example, law of succession that, when succession is all male, required different arrangements to have women share in the family estate.[59] Had the archives found not been women's archives, much of the evidence to be used in a discussion of the legal system(s) found in the documents would not be available.

Continuity and change: obtemperare legibus nostris Traianus conpulit imperator?

The period the Babatha archive covers, from 97 to 132 CE, was a period of change. The area where the parties lived was first part of the

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"Women and Law in the Documents from the Judaean Desert," in *Le Rôle et le Statut de la Femme en Égypte Hellénistique, Romaine et Byzantine, Proceedings of the International Colloquium held in Brussels and Leuven, 27–29 September 1997* [eds. H. Melaerts and L. Mooren; Studia Hellenistica 37; Paris: Peeters, 2002], 123–147). For the place of the Babatha (and Salome Komaise) archive amongst the other papyri from Nachal Hever see Hannah M. Cotton, "Hever, Nachal: Written Material," *EDSS* 1:359–361.

[59] Such arrangements could be made by way of gift; see Chapter 4 on law of succession below. There I will show that the documents' text spells out in so many words that the sons of a man's brother are his heirs, despite the fact that he has got a daughter, a fact that excludes the applicability of Roman law, which provided for (equal) shares for sons and daughters alike. I will further argue (as against older publications on the subject) that the daughter did not have no right to inherit her father's estate in general, but only if she was married, which meant that her marriage occasioned a change in her position towards her father's estate. To make up for the loss of claims on the basis of law of succession at her marriage the daughter was given a (substantial) gift at that time. For details see Chapter 4 below.

Nabataean kingdom, after 106 CE part of the Roman province of Arabia. This raises the question of whether this change left its mark in the documents. At first glance the answer should be affirmative as the language used changes from Aramaic to Greek. This is particularly interesting as the documents reveal that the parties concerned did not know Greek. A scribe wrote the documents for them and when party subscriptions were added, they were made in Aramaic.[60] It is even explained in one of the documents that Babatha herself was illiterate, which means she did not even know how to write Aramaic.[61] Therefore, the question can be raised as to why the change to Greek occurred, why people began to use Greek, a foreign language, for their documents. It seems logical to relate this to the Roman conquest: the Romans used Greek as the *lingua franca* in the eastern parts of their empire.[62]

More features have been identified that point at a Roman influence: the use of consular dating (even in Aramaic documents from after the conquest),[63] the reference to parts of the Roman administration (like the city council of Petra or the prefect who signed census declarations)[64] and the use of typical Roman phrases like 'the most blessed days of…'[65] The documents related to suits indicate that these were brought to the court

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[60] See, for example, P.Yadin 17, 18, 19 and so on.

[61] See P.Yadin 15:35, where it is literally said that Babatha did not know letters. This denotes that she could not write Greek or Aramaic: see Hannah M. Cotton, "Diplomatics or External Aspects of the Legal Documents from the Judaean Desert: Prolegomena," in *Rabbinic Law in its Roman and Near Eastern Context* (ed. C. Hezser; TSAJ 97; Tübingen: Mohr Siebeck, 2003), 61. That the phrase did not always indicate illiteracy in *all* languages can be seen in contracts from Egypt, where the declarant has someone write for him on the basis that he is illiterate but only in Greek and not in Demotic (see Mark DePauw, "Autograph Confirmation in Demotic Private Contracts," *Chronique d'Egypte* 78 [2003]: 99, n. 204).

On the phrase διὰ τὸ αὐτῆς μὴ εἰδέναι γράμματα see Jonas C. Greenfield, "Because he/she did not know letters": Remarks on a First Millenium C.E. Legal Expression," *JANES* 22 (1993): 39–44. Hanson believed that literacy in Aramaic made Judah an attractive marriage partner for Babatha, as this meant he could not only write for her, but also read Aramaic documents (Ann Ellis Hanson, "The Widow Babatha and the Poor Orphan Boy," in *Law in the Documents of the Judaean Desert* [ed. R. Katzoff and D. Schaps; SJSJ 96; Leiden: Brill, 2005], 93).

[62] See detailed discussion of language issue in Chapter 1 below.

[63] See Lewis, 16–17 and 27–28.

[64] In P.Yadin 12 and 16 respectively. See Lewis, 17–18. For more on the city council of Petra as part of the Roman administration see 315 n. 51 below, especially 320 n. 67.

[65] P.Yadin 15; discussed by Cotton, Chiusi and Hanson: see 325 n. 83 below.

of the Roman provincial governor.[66] There are no indications that there were any other (local) courts:

> The absence of any reference to Jewish courts or local officials who might have settled financial disputes between Jews is striking. Indeed, Jewish institutions are not mentioned anywhere in the Babatha archive.[67]

Jurisdiction seems to have passed exclusively to the Roman rulers, and the legal documents seem to function within a Roman administrative and judicial framework.[68] Bowersock observed:

> Perhaps the most striking feature of the evidence is the thoroughly Roman character of the law which is being applied in this frontier territory of Semitic and Hellenic traditions. The designation of guardians for the son of Babatha was made by the *boule* of Petra in the form of a *datio tutoris*, and one of Babatha's documents provides two copies of a Greek text of the Roman formula of *actio tutelae*. The litigation of Babatha under Roman law, in Greek translation but in a Semitic environment, provides new and vivid support for what had once seemed a simple periphrasis for annexation in the text of Ammianus. Writing of the creation of the province of Arabia, that fourth-century historian who came from Syria-Antioch and should therefore have known, wrote *obtemperare legibus nostris Traianus conpulit imperator*.[69]

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[66] P.Yadin 13, 14, 15, 23, 25, 26. For an opinion that P.Yadin 14 concerns a summons to appear before an auxiliary prefect see Hannah M. Cotton and Werner Eck, "Roman Officials in Judaea and Arabia and Civil Iurisdiction," in *Law in the Documents of the Judaean Desert*, 42–44.

[67] Benjamin Isaac, "The Babatha Archive: A Review Article," *IEJ* 42 (1992): 65. See also Hannah M. Cotton, "The Languages of the Documents from the Judaean Desert," *ZPE* 125 (1999): 230: 'After 70 conditions prevailing in Judaea became similar to what conditions in Arabia had always been: there was no Jewish court which had the authority to enforce its decisions. In Arabia there had never been Jewish courts of law as the exclusive use of Nabataean in the regal period demonstrates.' and later on: 'It is a remarkable fact though that no court, Jewish or non-Jewish—apart from that of the Roman governor of Arabia—is mentioned in any of the documents from the Judaean Desert—a great many of which are legal documents.' (231) See detailed discussion of the possible existence of local courts in Chapter 1 below, 73–78.

[68] The possibility of existence of local courts and forms of local jurisdiction, as treated by Cotton in several articles, will be discussed in Chapter 1 below.

[69] Glen W. Bowersock, *Roman Arabia* (Cambridge, Mass.: Harvard University Press, 1983), 79 (Ammianus 14.8.13). The same quote is adduced by Dieter Nörr: 'Wir dürfen mit einer Äusserung des Ammianus Marcellinus schliessen, die wohl nur als Metapher gemeint war, aber auch wörtlich genommen werden kann: *hanc provinciam imposito nomino rectoreque attributo obtemperare legibus nostris Traianus conpulit imperator tumore saepe contunso, cum glorioso Marte Mediam urgeret et Parthos.*' ("Prozessuales aus dem Babatha-Archiv," in *Mélanges à la mémoire de André Magdelain* [ed. M. Humbert and Y. Thomas; Paris: Editions Panthéon-Assas, 1998], 341). In this article Nörr only discusses procedural features from the Babatha archive and refers for matters

However, the question is how we should interpret this subjection to Roman laws. In speaking of 'the thoroughly Roman character of the law which is being applied in this frontier territory of Semitic and Hellenic traditions' Bowersock does not specify by whom this law was applied. His example of 'designation of guardians for the son of Babatha . . . in the form of a *datio tutoris*' sees to application of Roman law by an official body that is part of the Roman administration. The second example, the presence of the *actio tutelae* in Babatha's archive, shows that the *actio tutelae* was considered important for one of her cases, but as Nörr suggested, it seems likely that an official body within the Roman administration provided the *actio tutelae* to fit the case.[70] This means that neither example shows that Roman law applied to the legal acts that parties drew up between them.[71]

Other features of the documents should be understood as equally ambiguous. The majority of the documents from the archives consist of so-called double documents, documents in which the same text is written twice. The upper version was rolled up and sealed to make sure no changes could be made in the text, while the lower version was left open for reference. Consequently, the versions can also be designated as either inner or outer versions.[72]

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of contents to other authors. Nevertheless, it seems that Nörr does take the Ammianus quote to refer to both formal and substantive law. See discussion below, 40ff., esp. n. 136.

[70] See Nörr's assumption that Babatha was provided with the *actio tutelae* by the Roman governor's bureau or a local *nomikos*: 'It seems likely to look for its (Latin) pattern in the edict of the imperial governor from Arabia. The testimony of Gaius (inst. 1.6) confirms that also imperial governors normally issued an edict, as he attributes the *ius edicendi* to the *praesides* without reservation . . . The circumstances suggest a standard translation—either from the governor's bureau or from a local *nomikos*; one could consider whether the Roman central authority provided such translations.' (Dieter Nörr, "The *xenokritai* in Babatha's Archive (pap.Yadin 28–30)," *ILR* 29 [1995]: 89). In a later publication Nörr explained that he regarded the governor's bureau less likely, in view of the three different copies found in the archive, in two different hands (P.Yadin 28,29 and 30): Dieter Nörr, "Römisches Zivilprozessrecht nach Max Kaser: Prozessrecht und Prozesspraxis in der Provinz Arabia," *ZSav.* 115 (1998): 87. For a detailed discussion of P.Yadin 28–30 see 330ff. below.

[71] I am here already referring to a difference between substantive and formal law, a distinction which is crucial for this entire study, see detailed explanation below, 40–42. It is obvious that Bowersock did not make this distinction, neither did Goodman, whom I will come to shortly.

[72] See Lewis, 6–10, referring to Yadin's observations in his initial report "Expedition D," *IEJ* 12 (1962): 236 (also on the question of which version was written first). Not all documents retain both versions: it seems that the inner version was more vulnerable because it was rolled up and consequently, in some cases it is missing (for example

In some documents, the inner version is represented by just one line, while for the text itself reference is made to the outer version. This seems odd because the inner version served as the concealed, i.e. authentic, version. It appears that those cases concern documents that refer back to originals kept by the authorities: P.Yadin 12 is a copy of an appointment of guardianship and P.Yadin 16 a copy of a land declaration. As Lewis understood it, the original document kept by the authorities would serve as proof in case of a dispute.[73] Indeed, as Lewis pointed out, in Ptolemaic Egypt, where it had become customary to deposit documents in archives, the practice of using double documents had fallen into desuetude, implying that having a document archived replaced the part the inner version originally played. The only double documents found in Egypt after 30 CE come from Roman military circles and testify to 'the continued use of the Roman *diploma* form by Roman citizens and military in all parts of the empire.'[74] Consequently, the appearance of double documents in the archives could be associated with a Roman influence. However, it is clear that the double document structure was already in use before the Roman conquest: Nabataean Aramaic documents like P.Starcky (= P.Yadin 36 = P.Hever 1; of 58–67 CE)[75] and P.Yadin 2 and 3 (of 97 CE) are double documents. The practice was continued in the Jewish Aramaic P.Yadin 7 (of 120 CE) and eventually also in the Greek documents. Consequently, as Cotton observed, the double document structure is a remnant of Nabataean scribal practice, testifying to continuity rather than change.[76]

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in P.Yadin 10, see comments in Yigael Yadin, Jonas C. Greenfield, and Ada Yardeni, "Babatha's *Ketubba*," *IEJ* 44 [1994]: 75).

[73] See Lewis, 9.

[74] See Lewis, 8.

[75] P.Starcky is actually the earliest Nabataean document from Nahal Hever we have. See Yardeni, "P.Starcky," 126.

[76] See Cotton, "Survival, Adaptation and Extinction," 10–11 and "Diplomatics," 53: 'No Roman encouragement was needed to establish or resuscitate the use of the double document in this part of the Roman Near East.'

I note though that on another occasion Cotton mentions the double document structure as a sign of Romanization: 'the use of the double document, probably under Roman influence since elsewhere it was going out of fashion' (Hannah M. Cotton, "Jewish Jurisdiction under Roman Rule: Prolegomena," in: *Zwischen den Reichen: Neues Testament under Römische Herrschaft. Vorträge auf der Ersten Konferenz der European Association for Biblical Studies TANZ 36* [eds. M. Labahn and J. Zangenberg, Tubingen: Francke Verlag, 2002], 14). However, if the double document was already used in Nabataean scribal practice I would not call the continuing use of it under Roman rule a sign of Romanization. The only thing one could wonder about is whether the fact that the double document structure was maintained while it disappeared elsewhere, has something to do

Furthermore, the Greek documents contain Aramaic subscriptions, and even the Greek of the documents can be said to be influenced by the local language: there are a number of conspicuous Semitisms. Lewis observed that

> the pervasiveness of the Semitisms comes as something of a surprise, since it is in such sharp contrast with the resistance to the intrusion of native elements manifested in the Greek papyri from Hellenistic and Roman Egypt.[77]

Sometimes, one wonders whether the scribes writing in Greek did not work from an Aramaic original: indeed, in the edition of the Salome Komaise archive Cotton reconstructed an Aramaic 'Urtext' for P.Hever 64, a deed in very poor Greek.[78] As she showed, the Greek deed resembles P.Yadin 7, an Aramaic deed of gift, to a great extent.[79]

Indigenous custom was clearly maintained, as there is reference to 'a pre-Roman coinage system' and local measurements are used for land size, even in the context of a Roman administrative affair like the census registration.[80] The Romans 'evidently elected not to interfere.'[81]

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with the fact that the Romans also knew the double document structure. However, in that case the term Romanization would not convey correctly what was actually at issue.

On this topic see Elizabeth A. Meyer, *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice* (Cambridge: Cambridge University Press: 2004), 187–202, in particular 191, where Meyer discusses a possible relationship between the reappearance of a double document with full inner text and a Roman court context: 'In other words, scribes perceived or were informed that a traditional form to which they had been increasingly indifferent could, with care, be resuscitated for certain acts and considered, in this revived state, more pleasing in Roman legal contexts' (with reference to 'sensitivity of the Arabian scribes to Roman prototypes' as demonstrated by Cotton). With 'for certain acts' Meyer refers to those acts meant for a Roman court context, as opposed to those where the parties saw no future Roman court context ahead of them, 'as the fact that they were (e.g.) written in Aramaic indicates.' However, as I will demonstrate in Chapter 1 below, the evidence in the archives suggests that Aramaic documents could be produced in a Roman court context. Especially with a strict division between documents intended for a Roman court context and documents without that intention removed, I find it difficult to see a direct relationship between use of a double document structure and Romanization.

[77] Lewis, 13; also see Martin Goodman, "Babatha's Story," *JRS* 81 (1991): 172.

[78] See Cotton in Cotton/Yardeni, 207.

[79] Cotton: 'See DJD XXVII, p. 207 for my exercise in translating the Greek deed of gift back into Aramaic. I plundered for parallels P.Yadin 7, an Aramaic deed of gift executed by Babatha's father in favour of her mother.' ("Survival, Adaptation and Extinction," 9, n. 41).

[80] See Goodman, "Babatha's Story," 173 (referring to the 'blacks' mentioned in P.Yadin 5 and the measurements used in P.Yadin 16).

[81] Goodman, "Babatha's Story," 173.

Where the coins or measurements used did not influence the substance of the legal act, the case of P.Hever 64 is more disturbing. When a deed of gift drawn up under Roman rule results in substantially the same thing as a deed of gift drawn up before Roman rule, this seems to indicate that the legal framework had not changed. Goodman observed that the Romans 'permitted local custom to prevail in private law'[82] and concluded, consequently, that

> the documents, now that they are fully published, do not seem to bear out the claim based on them by Bowersock, *Roman Arabia*, 79, that 'in the most literal sense Trajan's annexation involved submission to the Roman legal system'; on the contrary it appears that a variety of legal systems continued in operation in the realm of private law.[83]

The examples Goodman adduces to support his case are not very well chosen: P.Yadin 20–25 do not concern a case of two guardians for orphans, because Julia Crispina is not a guardian (ἐπίτροπος) but a supervisor (ἐπίσκοπος). Also the fact that P.Yadin 26 seems to indicate that a deceased man left two wives does not necessarily indicate that polygamy was at issue.[84] However, more important than the actual examples Goodman adduced—for these could easily be replaced with a number of other more suitable ones—is the implication of his observation. If it is to be accepted that indigenous law kept playing a part in legal practice after the Roman conquest, it needs to be asked what part it played and how indigenous law was able to function within a framework of Roman jurisdiction.

'Reichsrecht und Volksrecht' and conflict of law

In his study of 1891, Mitteis already investigated the relationship between what he styled 'Reichsrecht' (the law of the ruling power) and 'Volksrecht' (indigenous law) in the eastern provinces.[85] Where scholars had previously assumed that in the Roman empire one legal system, that of the Romans, prevailed, Mitteis sought to prove that the law of the

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[82] Goodman, "Babatha's Story," 173.

[83] Goodman, "Babatha's Story," 173.

[84] Lewis assumed this (see n. 22 above), but Katzoff brought compelling arguments against this assumption (Ranon Katzoff, "Polygamy in P.Babatha?," *ZPE* 109 [1995]: 128–132), see discussion of his views below, 222–226.

[85] Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (second unrevised edition; Leipzig: Teubner, 1935).

indigenous population, 'das Volksrecht,' continued to play an important part, in any case until the *Constitutio Antoniniana* effected Roman citizenship for all free inhabitants of the Empire. He concluded that despite the influence of Roman law and the fact that jurisdiction was completely in Roman hands, local custom and traditions were maintained in such areas as personal status, marriage and law of succession. The overall idea of Mitteis' presentation was that even though people in the provinces went to a Roman court, cases in certain areas of law would be judged on the basis of indigenous law. Mitteis even believed that the indigenous laws influenced Roman law to a certain extent.

In the wake of his study other scholars wrote about the relationship between local and Roman law as it appeared from papyri. These studies concentrated on documents from Egypt as many of the documents from other areas had not yet been found or published.[86]

A related discussion that is important for a full understanding of the issues is the discussion about the existence of something like private international law in antiquity. A number of distinguished scholars shed light on that matter, coming to vastly different conclusions. A thorough explanation of the problem and a useful overview of opinions can be found in Wolff's classical study *Das Problem der Konkurrenz von Rechtsordnungen in der Antike*.[87] Wolff rightly distinguishes between accepting the existence of international private law as we know it, a system of rules that can determine what law will apply to cases, and accepting that something like 'Konkurrenz von Rechtsordnungen' existed. The first cannot be maintained for Greek and Roman antiquity:

> Weder griechische Gesetzgeber noch Rom haben jemals Bestimmungen von der Art der Art. 7–31 unseres Einführungsgesetzes zum BGB. erlassen; ebenso hat kein römischer Jurist oder sonstiger antiker Autor jemals versucht, aus zusammenfassender Betrachtung tatsächlicher Praktiken oder im Wege theoretischer Überlegungen Prinzipen zu gewinnen, mit denen dem genannten Problem beizukommen war.[88]

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[86] For example Raphael Taubenschlag, *The Law of Graeco-Roman Egypt in the Light of the Papyri, 332 BC–640 AD* (second revised edition; Warsaw: Polish Philosophical Society, 1955) and Hans Julius Wolff, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemaeer und des Prinzipats* (München: Beck, 1978 [part II], 2002 (part I, ed. by Hans-Albert Rupprecht)).

[87] Hans-Julius Wolff, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike* (Heidelberg: Carl Winter Universitätsverlag, 1979). Overview of opinions: 7ff.

[88] Wolff, *Konkurrenz von Rechtsordnungen*, 7.

On the other hand, however, Wolff indicates that the presence of foreigners in a community raised questions as to the law that would apply to cases in which these foreigners became involved. This means that the problem of several possibly applicable laws must have been a part of antiquity's legal culture. In how far it has been a part and how much of a system behind it can be traced remained to be decided: Wolff mentioned a number of scholars who held vastly differing views. The most positive view, based on examination of examples from the Greek polis, Ptolemaic Egypt and Roman rule, was held by Lewald, in a study first published in 1946, and later republished several times.[89] More reluctance was shown by Niederer (1952) and Schwind (1965).[90] A series of articles detecting something like 'römisches Kollisionsrecht' by Sturm appeared between 1978 (mentioned by Wolff) and 1981.[91] In a later article honouring Sturm (1995) Winkel discussed the term *iure competenti* in C. 4,29,21 in the light of the existence of something like private international law in antiquity.[92] Winkel rightly notes that the existence of *ius gentium*, law

[89] Hans Lewald, "Conflits de lois dans le monde grec et romain," in Ἀρχειου Ἰδιωτικου Δικαιου 13 (1946): 30ff.; reprinted in *Labeo* 5 (1959): 334ff.; in *Revue Critique de Droit International Privé* 57 (1968): 419ff., 615ff.; and partly (in a German translation) in Erich Berneker (ed.), *Zur griechischen Rechtsgeschichte* (Wege der Forschung 45; Darmstadt: Wissenschaftliche Buchgesellschaft, 1968), 666ff.

[90] Werner Niederer, "*Ceterum quaero de legum Imperii Romani conflictu,*" in *Fragen des Verfahrens- und Kollisionsrechtes, Festschrift zum 70. Geburtstag von Prof. Dr. Hans Fritzsche* (eds. M. Guldener and W. Niederer; Zürich: Polygraphischer Verlag, 1952), 115–132; Frits Schwind, "Internationales Privatrecht und römisches Recht," *Labeo* 11 (1965): 311–315.

[91] Fritz Sturm, "Unerkannte Zeugnisse römischen Kollisionsrechts," in *Festschrift Frits Schwind zum 65. Geburtstag: Rechtsgeschichte, Rechtsvergleichung, Rechtspolitik* (eds. F.A.A.W.L.M. Schwind and R. Strasser; Wien: Manz, 1978), 323–328; idem, "Gaius I 77 und das römische Kollisionsrecht," in *Maior viginti quinque annis, Essays in Commemoration of the Sixth Lustrum of the Institute for Legal History of the University of Utrecht* (ed. J.E. Spruit; Assen: Van Gorcum, 1979), 155–166 and idem, "Kollisionsrecht in Gaius 3.120?," *IVRA—Rivista Internazionale di Diritto Romano e Antico* 29 (1978, publ. 1981): 151–156.

Also see: Fritz Sturm, "Comment l'Antiquité réglait-elle ses conflits de lois?" *Journal du Droit International* 106 (1979): 259–273; idem, review of H.J. Wolff, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike*, *IVRA—Rivista Internazionale di Diritto Romano e Antico* 31 (1980, publ. 1983): 161–163; and idem, "Rechtsanwendungsrecht für lokrische Aussiedler. Ein altgriechisches Zeugnis archäischen Kollisionsrechts," in *Studi in onore di Arnaldo Biscardi* (V; Milan: Istituto Editoriale Cisalpino-La Goliardica, 1984), 463–469.

[92] Laurens Winkel, "La vente entre les droits grec et romain. Quelques observations à propos de C. 4,19,21," in *Collatio Iuris Romani, Etudes dédiées à Hans Ankum à l'occasion de son 65e anniversaire* (ed. R. Feenstra and J.A. Ankum; Amsterdam: Gieben, 1995), 633–642.

that applied to Romans and non-Romans alike, complicates the matter, a subject on which Wolff had also commented.[93]

The importance of Wolff's study obviously lies in the fact that he clearly expressed what should be kept in mind when treating this subject: questions like whether laws were indeed perceived as co-existing and co-equal systems, whether applicability of several laws to a particular case was perceived as conflict of laws, in what cases and to what extent a community was willing to apply foreign law in its own courts and whether there are indications that basic principles were developed to deal with conflict of law, comparable to the principles known from present-day private international law.[94]

Wolff's conclusion for the use of foreign law within a Roman context (that is, in his study specifically the use of foreign law by the praetor) is that the *lex fori* principle prevailed, while in specific cases a praetor could adduce foreign law. But Wolff emphasizes:

> Aber es gab *keine Konfliktslehre*, aus der sich unter bestimmten Voraussetzungen die Befolgung des heimischen Rechts einer nichtrömischen Prozesspartei als *vom Recht zwingend geboten* ergeben konnte.[95]

Wolff indicated he would treat the issue in the larger context of the legal culture of antiquity, speaking of a fundamentally different understanding of law.[96] This understanding is then responsible for the lack of a consistent treatment of conflict of laws, although this conflict must have been part of everyday legal reality. In the concluding remarks to his study[97] Wolff describes the fundamental difference between antiquity's legal culture and the present-day situation: in antiquity the applicability of another law or the applicability of a community's law to non-members of this community was always perceived as an exception rather than a rule. Consequently, conflict rules, rules that declared another law applicable as part of the law of the community, were outside the scope of the legal culture of such a community. Wolff also relates this to the lack in antiquity of a concept of 'Rechtsordnung,' that is,

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[93] Wolff noted that *ius gentium* does not mean foreign law as opposed to *ius civile* as Roman law, but that *ius gentium* also incorporated Roman legal views. Consequently, the *praetor peregrinus* did not judge according to *ius gentium*, but used the *lex fori* principle (in a broad sense; see Wolff, *Konkurrenz von Rechtsordnungen*, 67–68).

[94] Wolff, *Konkurrenz von Rechtsordnungen*, 11.

[95] Wolff, *Konkurrenz von Rechtsordnungen*, 72.

[96] Wolff, *Konkurrenz von Rechtsordnungen*, 11.

[97] Wolff, *Konkurrenz von Rechtsordnungen*, 75–76.

> eines sozusagen unpersönlichen Gewebes von Institutionen zur Regelung des Zusammenlebens *aller Einwohner* eines geographisch oder durch seine Zusammenfassung zu einer politischen Einheit bestimmten *Gebiets*—im Unterschied zum bloss persönlichen Herrschaftsbereich eines Monarchen.[98]

In this framework of Wolff one should understand conflict of law as the particular instance where two or more laws are applicable to a case and a decision has to be made which one will be actually applied, without any notion of conflict of law as a concept with a theoretical nature, allowing for the existence of conflict rules that are generally applicable.[99]

Wolff's study focused on evidence from the Greek polis, Ptolemaic Egypt and Rome, where in the last instance the question of applicability of foreign law by the Roman praetor is discussed. Wolff explicitly indicates that the relationship between Roman law and local law in the provinces is outside the scope of his study. His reasons for this are important for the present investigation:

> In ihm geht es ja nicht um die Konkurrenz prinzipiell gleichgeordneter Systeme, sondern um Duldung oder auch Beiseiteschiebung von—rechtstheoretisch gesehen—blossen örtlichen Gewohnheiten durch die übergeordnete Macht. Es gehört daher nicht in den Zusammenhang der hier zu behandelnden Rechtserscheinungen.[100]

In his review of Wolff's study Dieter Nörr remarked about this:

> Hinsichtlich des Problembereiches „Reichsrecht und Volksrecht" darf angemerkt werden, dass sich trotz des nicht zu bestreitenden Vorrangs des Reichsrechts Konflikte und Lösungsmöglichkeiten ergaben, die wenigstens auf den ersten Blick von den Verhältnissen gleichrangiger Rechtsordnungen nicht allzu verschieden sind.[101]

The question that is raised by the evidence in the Babatha and Salome Komaise archives, as I am to present it in this study, is whether in the

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[98] Wolff, *Konkurrenz von Rechtsordnungen*, 76.

[99] See Nörr's review of Wolff's study in which he explains clearly that also the scholars who differ widely in opinion about the existence of something like private international law in antiquity agree on the point that 'es einerseits keine dem modernen Internationalen Privatrecht vergleichbare Normierung in der Antike gab, dass aber andererseits das Problembewusstsein hinsichtlich von Normkollisionen an einigen Stellen auftaucht (wobei Einzelheiten unsicher bleiben können).' (Dieter Nörr, review of H.J. Wolff, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike*, *ZSav*. 98 [1981]: 410).

[100] Wolff, *Konkurrenz von Rechtsordnungen*, 13.

[101] Nörr, review of H.J. Wolff, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike,* 406–407.

province of Arabia more than just tolerating of local custom was at issue. I will show that there are clear indications in the documents that local law was understood as a system of law, not just as some local custom: references are made to local law (not just custom) and it appears that this local law was (deemed) applicable to legal acts. This indicates that local law had its own specific role to play in relation to Roman law as the legal system of the ruling power. Especially the many references to local law as the law applicable to the legal acts seem to indicate that here 'Konkurrenz von Rechtsordnungen' could be at issue. In any case, it is clear that the evidence from the archives can put views of the position of Roman law as the dominant system into perspective.

Consequently, the documents from the Babatha and Salome Komaise archives can shed further light on both the Volksrecht-Reichsrecht and the private international law discussions. The documents provide the perfect material for an investigation into the relationship between 'Reichsrecht,' Roman law, and 'Volksrecht,' local law, in the newly founded province of Arabia. Do the documents support Bowersock's conclusion that Roman law was applied, or rather Goodman's observation that 'a variety of legal systems continued in operation in the realm of private law'?

And if such a variety of legal systems is at issue, were these legal systems co-equal which would lead to conflict of laws? How was this conflict of laws dealt with? Can it be proven that there were not just concrete solutions in situations of several possibly applicable laws, but also something like a conscious attempt to deal with the ensuing issues, for instance by way of conflict rules? Evidence for the latter would go against Wolff's conclusion that in antiquity inclusion of applicability of foreign law in the law of a community, by way of conflict rules, would have been inconceivable.[102]

The question of what law can be thought to apply to these documents is especially interesting since we are dealing with documents by Jews. This means that besides the supposed influence of Roman law, being the law

[102] For those interested to know at this point whether this type of evidence will be presented in this study I refer to Chapter 2, the discussion of P.Yadin 6 (101 esp. n. 27), where I will present a conflict rule in the Mishnah. I also believe that the two levels that can be discerned within the papyri, of substantive and formal law, which combine applicability of both local and Roman law to a single act, represent a conscious strategy of dealing with the existence of several possibly applicable laws under Roman rule (see full discussion in Chapter 3, 193ff.).

of the new dominant power in the area, it could also be assumed that there was an ongoing, perhaps even a lasting influence of Jewish law, which was connected with the parties' identity. Jewish law was codified in the Mishnah by the end of the second century CE, that is, some seventy years after our documents were composed. Consequently, it can be assumed that part of the rules that were later laid down in the Mishnah were already in force at the time of the papyri. Indeed in P.Yadin 10, the marriage contract for Babatha's second marriage, the arrangements follow the requirements of the Mishnah and even present us with a very early example of a *ketubba*, a Jewish marriage contract including the Mishnaic court stipulations.[103] This very obvious example in the archive of adherence to what became normative Jewish law not much later, raises expectations about the applicability of Jewish law to other legal acts in the archive. Consequently, the archives provide a perfect opportunity to investigate the relationship between local and Roman law in the province of Arabia, or to be more precise, to investigate this relationship as it appears from these documents by Jews.[104]

Previous treatment of legal issues in relation to present study

Previous research into the Babatha archive sometimes touched upon matters of law, beginning with Lewis' observations in his edition.[105] Often these refer to a section V of the General Introduction, which was not included in the volume, but scheduled to appear in the second volume with the Aramaic papyri.[106]

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[103] Before P.Yadin 10 and other comparable Aramaic documents from the Judaean Desert were found, the earliest example of a *ketubba* incorporating the Mishnaic clauses dated to 417 CE, see Yadin et al., "Babatha's *ketubba*," 83–84; also stating that 'thanks to the efforts of M.A. Friedman, many examples of this type of *ketubba* are now known from the Cairo geniza.' (92; reference to Mordechai A. Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study* [TelAviv: Tel Aviv University, Chaim Rosenberg School of Jewish Studies, 1980]).

[104] What can be regarded as Roman and Jewish law at the time will be discussed below, 44ff.

[105] See for instance Lewis, 48: 'The naming of two guardians was presumably dictated by local custom as the Greek and Roman practice was normally content with a single guardian…'

[106] See, for example, Lewis, 63, discussion on lines 11 and 28 where it reads: 'On the παραγγελία process see §V of the General Introduction'; 77, note 2, where the reader is referred to §V of the General Introduction for information on the right of the Jewish wife to initiate divorce and 82, discussion on lines 13–15 and 46–49 where the obligation of the groom to pay out the full amount of the dowry is mentioned with reference to §V

In his review of Lewis' edition, Martin Goodman already expressed his approval of the choice to publish the Greek documents without further delay, while simultaneously pointing to the 'slight oddities' this choice produced. The volume, for example, starts with P.Yadin 5, then turning to P.Yadin 11, since P.Yadin 1–4 and 6–10 were written in Aramaic and were thus to be included in the other volume. Furthermore,

> the general introduction is structured to leave room for discussion of the Aramaic and Nabataean scribal hands and problems of language and idiom in the Semitic texts, but the reader finds nothing on these matters in Volume I except an indication that they will be fully dealt with in the next round. Such omissions do not greatly affect understanding of the papyri in Greek, but postponement of the elucidation of the use of the Nabataean calendar in the Semitic writings, and *above all the delay in producing the very important and exceedingly complex chapter on problems of law, is rather more to be regretted*.[107]

The chapter on problems of law Goodman mentions was not only meant to clarify judicial procedures that were mentioned in the papyri but also to elucidate the questions regarding the law (or laws) the papyri refer to. This can be seen in several instances where Lewis refers to section V of the General Introduction.[108]

While the research for this study was in progress, the awaited volume presenting the Aramaic documents from the Babatha archive eventually appeared, in 2002, incorporating not just the Nabataean and Aramaic documents from the Babatha archive, but all Hebrew, Aramaic and Nabataean-Aramaic papyri found in the Cave of Letters. It is a handsome book offering a wealth of information on the papyri (technical details of the find, restorations, comments on contents etc.), but the volume does not include the long awaited section on problems of law.[109]

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of the General Introduction. In discussion of lines 16 and 51 of the same papyrus, Lewis also refers to §V of the General Introduction concerning 'the significance of ἑλληνικῷ νόμῳ.' One would in this latter case expect some kind of explanation about the law behind the documents.

[107] Goodman, "Babatha's Story," 169, my italics. Also see Isaac, "The Babatha Archive," 63: 'A minor disadvantage of the arrangement is that the general introduction will remain spread over two volumes, part remaining inaccessible for the present.'

[108] See n. 106 above.

[109] As also noted in a review of the volume: 'While Lewis refers occasionally in his introduction and commentary to chapters and discussions forthcoming in the general introduction to the current volume (and especially to an anticipated discussion of 'Law'), most of these are not to be found in *Documents*. The main exception is the discussion of Aramaic and Nabatean language and idiom, which appears, as promised, in *Documents*, 14–32.' (Hillel Newman, review of Y. Yadin, J.C. Greenfield, A. Yardeni, and B. Levine,

This means that all references Lewis made in the first volume are still without a context.

In the second volume observations on legal issues are scattered throughout the introductions to and commentaries on individual papyri.[110] No attempt was made to say something as to the larger legal picture: no separate section on Law was included.[111] Such a larger picture was in any case disturbed by the choice to present Nabataean-Aramaic and Jewish-Aramaic documents from the archive in different sections of the edition.[112]

The edition of the Salome Komaise archive, in *DJD* XXVII, does not devote a separate section or discussion to law in the documents either.[113] In the commentary the frequently presented extensive lists of parallels in other documents are useful for assessing similarities or divergences, but conclusions as to the legal issues in a document are not always accurate[114] and reflection on the implications of conclusions regarding a

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eds. *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabataean-Aramaic Papyri, SCI* 23 [2004]: 240 and n. 6). Although this fact is of importance for the subject of the present study, in general the volume deserves nothing but praise and I would subscribe to Newman's conclusion that 'none of the discussion would be possible but for their [i.e. the editors] truly monumental achievement.' (254).

[110] Corrections on a number of observations made, for instance as to the alleged retribution *in duplum* in P.Yadin 2–3, were made in the detailed review article by Hillel Newman (see previous note).

[111] There are sections on single issues like waterrights, but these are not treated with a specific view to the legal context of the papyri.

[112] See discussion of P.Yadin 8 and 9 below, 107–115. Another edition is planned which will maintain the unity of the archive, see n. 9 above.

[113] I.e., to the questions of the possibly applicable law in these documents. Admittedly there is a section on 'Jewish Law and Society' but here the discussion focuses on the question when a document can be considered to be Jewish. The discussion suffers from the misconception that there was no normative Jewish law before the Mishnah: see my discussion of what can be considered to have been Jewish law at the time below, 44–50, where I also quote Katzoff's remarks about normative Jewish law, made with a specific view to Cotton's presentation in the 'Jewish Law and Society' section, 47 n. 11 and 48 n. 15.

[114] In his review of the volume Katzoff praises the presentation of the lists with parallels as 'most impressive,' but adds criticism on the legal assessment of the documents at issue: 'In matters touching on law the footing is somewhat less sure. Greek and Roman law are occasionally reported inaccurately.… In matters of Jewish law the treatment is not on the same standard as the rest, and the discussion is on occasions insufficiently informed… [follows a discussion of P.Hever 65] (Katzoff, review of Cotton and Yardeni, 324). In this latter case, of P.Hever 65, one should be aware of a huge difference in interpretation between Cotton and Katzoff, which partly explains for Katzoff's negative assessment of Cotton's opinions. Nevertheless, I can agree that Cotton's explanation for the relation between deeds of gift and law of succession is untenable: I will argue for a different view of the matter on the basis both of evidence from the documents them-

single document for a perspective on the overall legal situation of these documents is altogether absent.[115]

A number of articles from the late eighties and the nineties focused on individual legal issues, foremost concentrating on guardianship, of minors (Cotton, Chiusi)[116] and of women (Cotton),[117] on succession (Cotton/Greenfield, Cotton on several occasions)[118] and on marriage (Katzoff, A. Wasserstein, Cotton).[119] In these articles it was usually investigated for single documents whether they appeared to reflect either local or Roman law.[120] Dieter Nörr also wrote a number of articles on

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selves and the wider perspective offered by the position of the daughter towards her father's estate in other ancient oriental laws; see my detailed discussion in Chapter 4 of this study.

[115] For P.Hever 64 Cotton reconstructed an Aramaic version that might have been the original the scribe worked from. This could very well be. However, to be able to draw the conclusion that the deed was made Greek to make it valid in a Roman court context as Cotton does, one needs more evidence than that. In any case one has to make sure that other evidence from the same document does not go against this conclusion. Exactly the fact that P.Hever 64 resembles P.Yadin 7 to a great extent (Cotton acknowledges she plundered the latter for parallels) shows that P.Hever 64 refers to the same legal framework as P.Yadin 7 *where contents is concerned*. Cotton does not touch upon the pressing question that then arises of how the divergence found (adjustment to a Roman court context, but no change in terms of contents) should be explained for. If one argues as Cotton does that the change to Greek was made to facilitate use of the document in a Roman court context one has to imagine the Roman court judging on the basis of an act rooted in indigenous law. This means that although the (Greek) act was subjected to Roman jurisdiction, it was certainly not subjected to Roman law in any substantive sense. This is not noticed by Cotton, which makes the assessment of the position of the Greek deeds in a Roman court context incomplete, not to say inaccurate. See in more detail 40–42 and Chapter 1 below.

[116] Hannah M. Cotton, "The Guardianship of Jesus, Son of Babatha: Roman and Local Law in the Province of Arabia," *JRS* 83 (1993): 94–113; Tiziana Chiusi, "Zur Vormundschaft der Mutter," *ZSav* 111 (1994): 155–196; eadem, "Babatha vs. the Guardians of Her Son: A Struggle for Guardianship—Legal and Practical Aspects of P.Yadin 12–15, 27," in *Law in the Documents of the Judaean Desert*, 105–132.

[117] Hannah M. Cotton, "The Guardian (ἐπίτροπος) of a Woman in the Documents from the Judaean Desert," *ZPE* 118 (1997): 267–273.

[118] Cotton and Greenfield, "Babatha's Property," 211–224; Cotton, "Deeds of Gift," 179–188; eadem, "Law of Succession Again," 115–123, and eadem, "Marriage Contracts from the Judaean Desert," *Materia Giudaica Bolletino dell' Associazione Italiana per lo Studio del Giudaismo* 6 (2000): 2–6.

[119] Naphtali Lewis, Ranon Katzoff and Jonas C. Greenfield, "Papyrus Yadin 18," *IEJ* 37 (1987): 228–250; Abraham Wasserstein, "A Marriage Contract from the Province of Arabia: Notes on P.Yadin 18,"*JQR* 80 (1989–1990): 93–130 and Cotton, "Marriage Contracts," 2–6.

[120] With single document I mean a single document (like P.Yadin 18) or a group of documents that pertain to one topic (like P.Yadin 12–15 and 27) while the complete context of the archive, or rather the relevance of the conclusions for the entire archive, is not dealt with.

legal proceedings, clarifying some of the problems concerned with the position of the governor, the interpretation of the judges (ξενοκρίται) mentioned in P.Yadin 28–30 and the form of a suit in a Roman province.[121] These articles provide much of the information one would have expected in Lewis' section V and illuminate our understanding of Roman legal proceedings in the province in general. However, they do not directly touch upon the question of law behind the documents as Nörr does not discuss the contents of legal acts.[122]

Usually in the publications about contents of the legal acts, regardless of the conclusions that were reached, the larger context of the evidence provided by other legal acts was not dealt with: there are no conclusions as to what the specific instance under discussion meant for the archives as a whole. For instance in the articles on guardianship of a minor both Cotton and Chiusi assume that a rule of Roman law applied that barred women from guardianship. Whether one believes that the evidence from the documents supports this assumption or not (I will argue it does not in Chapter 5 below), the conclusion in itself has far reaching consequences for the interpretation of the legal situation in the material. As explained below, in Chapter 3, it means that a rule of *substantive* Roman law applied to Babatha, a non-Roman, living in a remote province. Such a conclusion has immediate consequences for the interpretation of the applicability of Roman law to provincials: would one rule of substantive law apply and another not? What is more, accepting applicability of substantive Roman law causes considerable problems with the rest of the evidence from the archive as it will be presented in this study: there it appears that substantively Roman law did not apply, but rather local law was adhered to.[123] However, since Cotton's and Chiusi's articles only deal with the issue of guardianship the implications of conclusions for the material as a whole are not addressed.

Likewise, in the publications in general, no explanation is offered for the fact that either local or Roman traits are found. The possibility that Roman and local law were co-equal and rivalling legal systems is

[121] Dieter Nörr, "The xenokritai," 83–94; idem, "Zur condemnatio cum taxatione im romischen Zivilprozess," *ZSav.* 112 (1995): 51–90; idem, "Prozessuales aus dem Babatha-Archiv," 317–341, idem, "Zu den Xenokriten (Rekuperatoren) in der römischen Provinzialgerichtsbarkeit," in *Lokale Autonomie und römische Ordnungsmacht in den kaiserzeitlichen Provinzen vom 1. bis 3. Jahrhundert* (ed. W. Eck; Munich: Oldenbourg, 1999), 257–301; and idem, "Prozessrecht," 80–98.

[122] See n. 136 below.

[123] See Chapter 2 below.

not raised and consequently, no attempts are made to understand the relationship between such rivalling systems and to trace possible strategies for determining which law applied to which part of the legal act. The only conclusion that was often reached, was that Aramaic documents had to be meant for other courts than Greek ones, which would relate choice of language to choice of court/jurisdiction.[124] A conclusion like that, however, suffered from the lack of evidence in the archives themselves for the existence of local courts. Even if one wants to maintain there were local courts, this does not prove that an Aramaic document could not be produced in a Roman court context. It is important to note in this respect that conclusions drawn about the Aramaic documents are usually merely derived from conclusions about the Greek ones: if those were adjusted to a Roman court context, the Aramaic ones, consequently, were not.[125] No internal investigation of the Aramaic documents was made, to see whether they give any indication of what law was thought to be applicable to them.[126] Therefore, despite their important contributions to our understanding of specific legal matters dealt with, the said articles cannot answer more general questions as to the relationship between laws in the Judaean Desert material, to be addressed in this study.

An exception in treatment can be found in Cotton's article on guardianship of women, which investigates in detail for both the Aramaic and the Greek documents when guardians of women occur, in what way they are referred to and what this says about the legal context of the

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[124] Most pronouncedly Cotton, who wrote at several occasions that documents began to be written in Greek to make them valid in a Roman court of law; prior Abraham Wasserstein in the same sense, repeated in a later article, and most recently Safrai, all three quoted in full below, in Chapter 1, 69–78.

[125] Cotton acknowledged as much: 'I have now come to realize that the argument which I offered in 1999 [in "The Languages of the Documents from the Judaean Desert." *ZPE* 125 (1999): 219–231; JGO] may be faulted on the ground of it being circular: it would seem that I posit limited local judicial autonomy in order to explain the use of, or the transition to, the employment of the Greek language in legal documents; and, conversely, that I infer the existence of a limited local judicial autonomy from the use of Greek.' (Cotton, "Jewish Jurisdiction," 16). See Chapter 1 below for more detailed discussion of the position of Aramaic as a legal language and the case for local judicial autonomy.

[126] In the edition of the Aramaic documents of the Babatha archive it was simply assumed for the Nabataean Aramaic documents that Nabataean law applied to them, without giving any arguments for the assumption. In fact, as I will show below, the contents of the documents show that they do not necessarily refer to Nabataean law, but rather contain explicit deviations from Nabataean law (P.Yadin 3, 95–96 below) or explicit references to the applicable law, which has remarkable parallels with later Jewish law (P.Yadin 6, 97–107 below).

documents.[127] The focus here is on a possible distinction between documents that have guardians (Greek) and that (probably) do not (Aramaic), to show that the Greek documents are adjusted to a Roman court context. This conclusion, based on a number of documents, would have been a step in the right direction, had Cotton proceeded to address the question why the documents were adjusted in exactly this aspect and how this should be seen in the light of other instances where there is no adjustment (for example those papyri where there is no mention of a guardian although they are clearly meant for a Roman court context). However, Cotton did not address those questions, but took the issue back to the question of whether the documents that do not have guardians were not meant for a Roman court context, which infers there should have been other indigenous courts. However, as indicated above, there are no indications in the documents, other than the appearance of use of Greek, that an Aramaic document could not have been produced in a Roman court. Furthermore, Cotton's discussion had to remain inconclusive as the nature of the Aramaic material makes it impossible to prove beyond doubt that guardians did not occur here. Therefore, rather than focusing on the question whether guardians did or did not occur in the Aramaic documents and whether this indicates that those documents were intended for local courts, Cotton could have focused on the clear-cut evidence that Greek documents do have guardians and that those were beyond any doubt meant for Roman courts. As Cotton did draw the conclusion that the appearance of guardians is an adjustment to a Roman court context, she could consequently have addressed the question of what the adaptation to a Roman court context in this instance of guardians of women tells us about the general problem of possibly applicable laws and perhaps even about a policy to deal with such possibly applicable laws. This logical step, however, is not made.[128]

Likewise, a discussion of the exact relation of the possibly applicable laws and a connection with a policy to determine what law is used in

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[127] Cotton, "The Guardian of a Woman," 267–273.

[128] Chiusi wrote about Cotton's article: '…I have the impression that the presence of a guardian seems to be rather a formal element which has something to do with procedural matters. Whether this suffices for the hypothesis that the presence of an *epitropos* was required by the application of Roman patterns cannot be said with certainty.' ("Babatha vs. the Guardians," 115). I assume this is due to the fact that no distinction is made between formal and substantive law in dealing with the legal issues in these papyri, as I will explain in detail below (see 40–42). Compare my discussion of guardianship of women based on a substantive-formal division in Chapter 5, 354ff.

what instance, is missing in the recently published volume *Law in the Documents of the Judaean Desert*.[129]

This volume, which incorporates twelve contributions by fifteen scholars, is the first volume completely dedicated to matters of law in the Judaean Desert material. As a general survey of the legal issues was lacking, the volume obviously fills a void. It is a collection of highly informative essays on individual legal matters in the papyri, reflecting the topics that have concerned scholars over the years and providing a gateway to older publications on those topics. The cases made in a number of contributions for more of an influence of Jewish law on the documents seem strong and compelling and fit in with the views to be presented in the present study. However, the volume is less successful in serving its overall aim, as indicated in the editorial introduction. There it is emphasized that the volume is to address questions of the laws or legal cultures reflected in these documents.

> Are the rights and obligations recorded in these papyri, then, characteristic of Jewish society, as known from literary sources, mostly rabbinic? Are they characteristic of Roman society, as known from Roman legal and other literature? Are they characteristic of Hellenistic Greek society as known from the Greek papyri, mostly from Egypt? Were these rights and duties recognized as legal by Jewish law, by Roman law, or by Hellenistic law? Do the transactions presuppose rules of Jewish law, of Roman law or of Hellenistic law? Do we learn from these documents anything new about Jewish society, about Roman society, or about Hellenistic society? Questions of this sort are addressed by the studies in this volume.[130]

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[129] Ranon Katzoff and David Schaps, eds., *Law in the Documents of the Judaean Desert* (SJSJ 96; Leiden: Brill, 2005).

The volume was published in spring 2005, some two months after the research for this volume had been completed. As the book presents the first complete volume dedicated to legal issues in the Judaean Desert material this study should of course interact with the views presented there. Therefore, in the present volume the research results include, where appropriate, references to and discussions of the views presented in Katzoff/Schaps. At times contributions to Katzoff/Schaps use the same approach (for instance to determine what can be considered Jewish law at the time of the archives, see 46–50 below) or refer to the same material for comparison (for example a family archive from second-century Egypt, see 310 n. 35 below) as the present study does. In those cases readers should bear in mind that, as references to Katzoff/Schaps were added at a later stage, my conclusions were reached independently.

For a discussion of the treatment of the questions as to the applicable law(s) in Katzoff/Schaps also see Jacobine G. Oudshoorn, review of R. Katzoff and D. Schaps, eds. *Law in the Documents of the Judaean Desert. JSJ* 37 (2006), 464–466.

[130] Katzoff and Schaps, "Editorial Introduction," in *Law in the Documents of the Judaean Desert*, 4.

However, as becomes very clear from the way in which the questions are phrased—with a repeated, almost emphatic 'or'—the focus of the contributions is not so much on the relationship between different laws that all play a part in the papyri, but more on reflection of one law as against another in a particular document or set of documents. Indeed, contributions focus on showing how one law (as against another) played an important part in single papyri. The closing contribution by Ze'ev Safrai makes a sharp distinction between Hebrew, Aramaic and Greek papyri, maintaining that 'the [Greek] documents themselves are not from the world of the rabbis'[131] and

> The Greek documents reflect a legal practice different from that manifest in the Jewish sources. The Greek documents contain virtually no violations of the rabbinic halakhah, but the writs were not produced in the study hall, even though they contain traces of halakhic influence.[132]

The editors phrase Safrai's view this way:

> the Greek documents are drawn up in a legal universe very different from that of the rabbis, though there is little that is actually contrary to rabbinic instruction.[133]

Obviously, there is a tension between the observations made: there are virtually no violations of the rabbinic halakhah, but still the Greek documents 'reflect *a legal practice different from* that manifest in the Jewish sources' and 'are drawn up in *a legal universe very different from* that of the rabbis.'[134] Yet as to what exactly is different then and foremost why, no explanation is offered. This means that the questions to the legal background of the documents and the relationship between laws remain unanswered.[135]

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[131] Ze'ev Safrai, "Halakhic Observance in the Judaean Desert Documents," in *Law in the Documents of the Judaean Desert*, 223.

[132] Safrai, "Halakhic Observance," 235.

[133] Katzoff and Schaps, "Editorial Introduction," 5.

[134] My italics for emphasis.

[135] The contribution by Hannah Cotton and Werner Eck refers to the legal documents as providing '*important new information* on the judicial system in a Roman province; from them we learn about the issuing of *vadimonia* to summon a person to the governor's court, the assize system (*conventus*), *the application of Roman law*, and other matters.' (Cotton and Eck, "Roman Officials in Judaea and Arabia," 24; my emphasis). This reference to 'important new information' to be gleaned from the documents about 'the application of Roman law' sounds most promising for the topic of the present study; however, this information is not shared in the article. While the contribution does deal with the position of the Roman governor as dispenser of justice and the assize system,

What is missed, not just in the contributions to *Law in the Documents of the Judaean Desert* but in research into these documents in general,[136]

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it is not clarified what this actually meant for our understanding of the application of Roman law. In the last paragraphs P.Yadin 14, interpreted as a case of summons to appear before an auxiliary prefect, would testify to 'the early application of a common Roman legal practice to the new province of Arabia.' Obviously this would be a matter of formal law, like the example adduced of taking a guardianship case to the governor instead of the city magistrates, concluding that 'the rule may have been in existence some hundred years prior to its attestation in the Roman legal sources.' Obviously the authors take these examples to testify to the application of Roman law in a provincial context. However, the concluding sentence reads 'Alternatively, the later Roman law reflects *ad hoc* provisions by Roman officials in the provinces or local customs adopted by them.' Taken to refer to the two examples just mentioned this would mean that instead of assuming application of formal Roman law on the basis of the later legal sources we may also assume that these later sources reflected an influence of local law on the Roman legal system. In that case we would not have immediate evidence to the applicability of formal Roman law in the provincial context. The authors refer in a footnote to publications that come to the same conclusion—what we find in the later Roman legal sources might have been Roman law at the time of the documents or be the result of the influence of a provincial context on later Roman law—but here not only formal matters are concerned, but substantive law as well (this differentiation is not made by the authors). Especially for those instances the questions are pressing of what this means for our understanding of the relationship between laws. While formal legal features of one system can be incorporated into another with relative ease, this is harder to envisage for substantive matters, where often a fundamentally different legal outlook is at the heart of the matter (see discussion of guardianship of a minor in Chapter 5 below, 328–330: Chiusi's idea of influence of Roman liberation is unlikely in a provincial context). Consequently, it remains unclear what the authors' conclusion is with regard to evidence in the documents for 'the application of Roman law.'

[136] A distinction between substantive and formal law in deciding what law is applicable to the papyri cannot be found in any of the publications referred to above, see 196ff. below. It is important to bear in mind in this context that formal in a papyrological sense and formal in a legal sense are not identical: see 200–202 below.

To avoid any confusion, I note that the articles by Dieter Nörr do make a distinction between formal and substantive law in this sense that Nörr indicates that he only discusses features of procedural law, such as the meaning of specific legal terms for types of judges and the form of the suit in the province (presence of *formulae, cognitio*). For matters of contents ('materiellrechtlichen Hintergrund') he refers to studies by Cotton ("The Guardianship of Jesus") and Chiusi ("Zur Vormundschaft der Mutter") ("Prozessuales aus dem Babatha-Archiv," 318, n. 10). However, Nörr does not make a distinction between two levels, of formal and of substantive law, within the papyri to determine the applicable law in the papyri, as I propose to do below. On the contrary, he assumes without further discussion that in legal procedures before the Roman governor Roman law was applied to the legal acts from the archives: 'Unterstellt man, dass vor dem Statthaltergericht primär römisches Recht angewandt wurde, könnte man daran die Frage anknüpfen…" ("Prozessuales aus dem Babatha-Archiv," 332). Nörr mentions a number of relevant questions in passing, indicating he will not deal with those in his study: 'Nur zu erwähnen sind die damit verbundenen sprachlichen und sachlichen Probleme. In welcher Sprache wurden die Xenokriten eingesetzt? Welcher Sprache bediente man sich beim Verfahren *in iure* (eher des Lateinischen) und *apud recuperatores* (eher der Landessprache)? Inwieweit flossen bei der Auslegung (etwa des *tutelam gerere*)

is that there is a distinction between the substantive and the formal law that is applicable to a document. Both substantive and formal law can

peregrine Rechtsvorstellungen ein? Generell: Inwieweit verbargen sich hinter der genuin römischen Fassade Konzepte peregrinen Rechts?' ("Prozessuales aus dem Babatha-Archiv," 328). I believe that what Nörr positions as an open question of possible indigenous concepts behind a Roman facade is really a matter of two levels in the papyri, one of substantive law which is indigenous (Nörr's 'Konzepte peregrinen Rechts') and one of formal law directed at Roman law (Nörr's 'römische Fassade'), see in detail Chapter 2 and 3 below.

Koffmahn also assumed applicability of Roman law (on the basis of the material published at the time): 'Aber schon heute kann gesagt werden, dass alles darauf hinweist, dass bei diesen Urkunden römisches Recht sowohl in formeller als auch in materieller Hinsicht weitgehendst in Anwendung gebracht war' and a few lines below: 'Der Vertrag [P.Yadin 15, JGO] . . . beweist, dass in diesem Gebiet der romischen Provinz Arabia jüdisches Recht nicht respektiert wurde, und auch in anderen Belangen kann festgestellt werden, dass runde 20 Jahre nach Gründung der Provinz Arabia alle römischen Untertanen, welcher Nation auch immer sie waren, sich nach römischem Recht zu richten hatten' (Elisabeth Koffmahn, *Die Doppelurkunden aus der Wüste Juda. Recht und Praxis der jüdischen Papyri des 1. und 2. Jahrhunderts n. Chr. Samt Übertragung der Texte und deutscher Übersetzung* [STDJ 5; Leiden: Brill, 1968], 99–100). Of course this is a logical assumption, and indeed one prompted by some aspects of the documents, but there is also much, not to say more, that goes against it, as I propose to show below: see Chapter 2, where I discuss references to the applicable law in the papyri, and Chapter 5, where I discuss the guardianship documents Koffmahn, Cotton, Chiusi and Nörr were concerned with; especially see 342–344 about a Roman legal text that suggests, *contra* Koffmahn's and Nörr's tentative assumptions, application of local substantive law in guardianship cases in the province.

I note that careful distinctions should be made as to what one is referring to. In "The Guardianship of Jesus" Cotton writes: 'The fact that Babatha seems to be excluded from the guardianship of her son also fits the Roman legal practice—this time substantive law rather than procedure' (102), referring in a footnote to 'the manner of appointing guardians, the *tutoris datio* described above' (n. 100). This distinction between substantive law and procedure is correct in this sense that a rule barring a woman from guardianship is indeed a rule of substantive law and a rule like the ones cited by Cotton in which the *tutoris datio* is described as the provenance of certain magistrates (95–96) a rule of procedural law. However, where Cotton contrasts the appointed guardian with the *tutor legitimus* and the *tutor testamentarius* (95, n. 11), we are again in the realm of substantive law. This means that there are both formal and substantive sides to the institute of the appointed *tutor*. Even if one wants to assume that the city council of Petra appointed guardians based on authority invested in them by Roman law (the formal side to the appointed *tutor*), this does not imply that the appointments themselves were made in accordance with Roman law, i.e. taking rules of Roman substantive law into account (the substantive side of the appointed *tutor*). In fact, one should argue the other way around: can this case be a case of an appointed tutor as described under Roman law, which implies that the appointment of P.Yadin 12 was indeed a case of *tutoris datio*? This is unlikely, as it is clear from P.Yadin 13 that the guardians were not appointed right after the father's death. Consequently, the appointment of guardians in this specific case does not see to the appointment of a guardian as provided for in Roman law, and the appointment of P.Yadin 12 is probably not a case of *tutoris datio*. The fact that under Roman formal law a city council may have been qualified to make such an appointment is another matter. See details in Chapter 5 below, 299ff.

draw on the same legal system, but this is not always the case. In fact, a substantive-formal division can be used as a strategy to deal with several possibly applicable laws, as often happens in present-day private international law. While substantively one law is used, formally documents can be adjusted to the demands of another legal system, for example that used in the court that is to judge cases based on the documents.

Therefore, rather than thinking in 'or' to identify legal backgrounds as the framework of one group of papyri versus another, we should start thinking in 'and' to distinguish different laws which are—on different levels—applicable to a single document.

Therefore, the present volume seeks to offer a close examination of all documents in the archives with a specific view to determining the relationship between Roman and local law as it appears in the documents, making a distinction between features of substantive and of formal law, to present the underlying strategies that determine what law was applicable to a specific document.

II. THE TREATMENT

Terminology

To be able to address the question of what law was behind these documents a few points require clarification, namely, what should be understood by the term legal system or law and how we can know what the law of a group of people was at a given moment.

a. *The meaning of law or legal system*

The terms 'law' and 'legal system' are often used as synonyms to refer to the applicable law in a certain area at a certain moment: 'Egyptian law,' 'Babylonian law,' 'Roman law.' Although the term 'law' is used in all instances alike, it is not immediately clear what is meant by this term. It obviously does not refer in all cases to a code of law. Where 'Babylonian law' can refer to the Code of Hammurabi, 'Egyptian law' cannot easily be connected with a single law code. There are collections of legal rules, but it is debatable whether these should be called law codes: where the Code of Hammurabi is a set of rules promulgated by a ruler, the Egyptian texts, for example from the so-called manual of Hermopolis, were probably collected in a temple context.[1] Nevertheless we can use both texts and the rules laid down in them, to understand what law was applicable in Babylonia or Egypt at the time.[2] The distinguishing element to accept a set of rules as 'law' seems to be that it was likely that these rules were really applied in everyday life, not in single instances but consistently. This can be deduced from the fact that a set of rules was issued

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[1] On this manual of Hermopolis see 246 esp. n. 82.

[2] Also see the discussion at several points in Raymond Westbrook (ed.), *A History of Ancient Near Eastern Law* (Leiden: Brill, 2003), 521 (where it is said concerning the Middle Assyrian Period that 'no code of laws in the modern sense has been discovered…') and 619–620 (where it is said concerning the Hittite laws that 'the conventional term "laws" is something of a misnomer. HL are not in the nature of a modern statute, in the sense of a juridical text issued by a sovereign body in accordance with the constitution. The "Laws" give no indication that they were issued by a ruler. Nor do they accord systematic treatment to any of the matters that they regulate, although the treaties demonstrate that the Hittites were capable of dealing with specific topics in a comprehensive way.').

and implemented by a ruler, but this is not necessary. When a real law code is lacking, or lost to us, the difficulties obviously lie in determining whether the evidence to legal practice found in, for instance, documentary evidence can be taken to constitute evidence for a general legal practice, that is, for the application of law as opposed to presenting us with single instances of legal practice that have no further implications for our understanding of a more general legal context. These difficulties can hardly be solved any way other than by explaining to what extent the idea of law, fixed rules consistently applied at the time, can be thought to be relevant for the documentary evidence concerned.

b. *Jewish law at the time of the archives*

For the Judaean Desert material we are confronted with the question of what can be thought to have been the applicable indigenous law at the time. For the specific case of Jewish law Cotton pointed out on several occasions that using the later rabbinic sources (in particular the Mishnah) to say something about normative law at the time of the papyri would 'involve us in a vicious circle.'[3] It is true that the papyri and the rabbinic sources are the only sources we have providing evidence about the use of Jewish law at the time, and Cotton is right in saying that no claims can be made for any rule being normative at the time of the papyri. However, it could be assumed that rules that later became normative law were already being applied at the time: the codification of Jewish law in the Mishnah was not created out of nothing.[4] A strong argument for this is the fact, demonstrated by Cotton, that the Mishnah,

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[3] See Cotton, "The Guardian of a Woman," 267.

[4] Compare Cotton: 'Jewish civil law, as we have it in the tannaitic and later sources (as well as in the Pentateuch), was not created *in vacuo*, but absorbed very many local, or, better, regional traditions which are reflected in its rules.' ("The Rabbis and the Documents," in *Jews in a Graeco-Roman World* [ed. M. Goodman; Oxford: Oxford University Press, 1998], 171). I agree that what was laid down in the Mishnah was not invented at the time of its writing, thus that what the Mishnah reflects was legal practice at the time. This comes down to Schiffman's interpretation, to be discussed, that the rabbis did not legislate. However, I do not agree with the distinction Cotton makes between general legal practice (before codification, reflected in the documents) and Jewish law (after codification, reflected in the rabbinic sources such as the Mishnah). As Cotton's own reference to the Pentateuch shows, we cannot claim that there was no normative Jewish law prior to the rabbinic sources. For every society it goes that the rules that are accepted as *the* applicable rules are normative law for that society, whether these rules are laid down in a (preserved) code of law or not. See my discussion about the meaning of codification below.

written in Hebrew, employs Aramaic for the rendition of actual contractual clauses:

> We may envisage the Mishnaic discussion as a process whereby the rabbis comment in Hebrew on contracts written from beginning to end in Aramaic. The commentary cites the formulae *verbatim* in the language in which they were written, namely Aramaic.[5]

This shows that the clauses were adopted from actual contracts that must have functioned in the period before the Mishnah became codified.[6]

The exact relationship between the actual contracts, or rather the legal practice of everyday life, and the later Mishnaic regulations, with clear force of (codified) law, has several sides to it. Cotton assumed that what the papyri present is actual legal practice, which was not necessarily Jewish:

> Even when the provisions in the documents do resemble what came to be normative Jewish law, we cannot assume without further proof that what we are witnessing is the influence of Jewish law on the documents rather than the reverse: the halakha adopted the legal usage of the documents, which, in their turn, reflect the legal usage of the environment. [7]

and:

> I have not found a better definition for what is Jewish than that such material eventually received halachic sanction, and is present in the halachic sources. Conversely, what is not there, or explicitly forbidden, I would designate non-Jewish. … Thus to say that Jews are using 'non-Jewish' contracts is to say no more than that the legal usage reflected in the documents is not in harmony with what eventually came to be normative Jewish law.[8]

This conclusion seems plausible enough: obviously the codification marks the moment where rules become specifically Jewish. Prior to that the contracts may have contained features of common Aramaic or specific non-Jewish laws (like Nabataean or Greek law), which means that codification could amount to accepting as Jewish law what would not have been perceived as (specifically) Jewish before. An example is

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[5] See Cotton, "Survival, Adaptation and Extinction," 8, and 5–7 for a detailed example of the procedure of changes from Hebrew to Aramaic and back to Hebrew in *m. Ketub.*

[6] Compare: '… we see the lack of codified deeds in tannaitic texts as resulting from the customary aspect of this area of legal practice which was not legislated from the top down by the rabbinic elite.' (Lawrence H. Schiffman, "Reflections on the Deeds of Sale from the Judaean Desert," in *Law in the Documents of the Judaean Desert*, 187).

[7] Cotton in Cotton/Yardeni, 155.

[8] Cotton, "The Rabbis and the Documents," 172.

liability of the groom for the dowry with all he owns, a feature found in *m. Ketub.* 4:7, but also known from Greek marriage contracts. By incorporating it in the Mishnaic regulations it becomes a feature of Jewish law, regardless of the fact that it may have been a feature common to other laws as well.

As a result, it could be deemed methodologically unsound to call any of the practices and rules found in the documents instances of adherence to Jewish law. Lawrence Schiffman wrote to this point:

> It is futile to use rabbinic parallels to conclude that specific practices represent a document's adherence to Jewish law. Such an approach is extremely oversimplified. Rabbinic sources codified the practices in customary use in this domain of life, so that the usages in evidence in our documents generated the rabbinic rulings in question. Parallels, therefore, show that the tannaim and amoraim adapted to and lived with this system which combined elements of Jewish law with the legal formulary of the ancient Near Eastern and Greco-Roman world. Indeed, Jews had behaved this way as far as we know from as early as the Persian period and most probably before that as well. In this respect, these procedures became Jewish and were totally assimilated into the tannaitic legal system. But it is clear that in some cases the tannaim envisaged other procedures, and that the rabbis were discussing common practices and their legal implications, not legislating them.[9]

Like Cotton's assessment referred to above, Schiffman's view makes a distinction between legal practice and codified law. Legal practice is described as 'the practices in customary use' and as 'usages in evidence in our documents' contrasted with 'rabbinic rulings.' The choice of terminology seems to signify that before the codification we have custom ('practices in customary use') and afterwards law ('rulings'). Codification is then seen as turning legal practice into law, a view coming close to that of Cotton, who denied that there was a system of normative and even of operative Jewish law prior to the rabbinic sources.[10] Nevertheless, the nature and meaning of codification should not be misunderstood: because of the existence of the Mishnah we know for sure what was (codified) Jewish law at that time, but it does not say anything as to

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[9] Schiffman, "Reflections on the Deeds of Sale," 186. Also see quote in n. 6 above.

[10] Cotton, "The Guardianship of Jesus," 101: '. . . the existence of a coherent and operative Jewish system of law at the time is thereby called into question. Such a system, if already being formulated in the schools of the Rabbis, had yet to become normative. It has certainly left no trace here.' For the accuracy of Cotton's observation in the context of guardianship of a minor see Chapter 5 below, 318–319.

the status of Jewish law before the Mishnah. What about Biblical law? Surely this should be considered normative law.[11] Indeed, Cotton and Greenfield's discussion of law of succession in the Judaean Desert refers to Num 27 as a source for the Jewish order of succession, next to *m. B. Bat.* 8:2, suggesting both are accepted as sources of normative Jewish law.[12] And simply logically speaking, there must have been normative Jewish law before the Mishnah: rules that are perceived by a community as *the* applicable rules should be called normative for the period concerned. Indeed, as Schiffman himself observes, the rabbis were not legislating, that is, making rules, but discussing the implications of existing rules, that is, of existing law.[13]

I specifically speak of law and not of custom (or of Schiffman's 'practices'), because the documentary evidence indicates that Jewish legal practice at the time of the documents was perceived as such: as law (and not as custom), as a system of law, a set body of rules that could be referred to. A strong indication for this are the references to law in the documents and the explanations of certain features of Jewish law, to be discussed in Chapter 2 below. I will therefore compare the evidence the documents provide as to the applicable law with the rules of Jewish law found in the Mishnah to see whether the applicable law the documents refer to can be identified as Jewish. This is not the same thing as is done in the majority of contributions to *Law in the Documents of the Judaean Desert* where the contents of the legal acts, for example phrases concerning gift, are compared to such phrases as known from later rab-

[11] Compare Katzoff, who observed that Cotton 'takes the very bold position that there was no halacha in the period under discussion, for before the end of the second century CE it had not yet received its 'final form' (Another bit of hyper-orthodoxy there. As the final form' should we think of the Shulchan Aruch, or the Mishnah Berura, or Sinai?)' (Katzoff, review of H.M. Cotton and A. Yardeni, 326).

[12] Cotton and Greenfield, "Babatha's Property," 220, n. 56. Also see Yosef Rivlin, "Gift and Inheritance Law in the Judaean Desert," in *Law in the Documents of the Judaean Desert*, 168, n. 17 (citing the same combination of sources).

[13] Compare Schiffman's observation in an article on witnesses and signatures in Hebrew and Aramaic documents from the Judaean Desert: 'In many cases, our contracts may reflect earlier stages in the history of Jewish law than the redacted texts of tannaitic tradition.' (Lawrence H. Schiffman, "Witnesses and Signatures in the Hebrew and Aramaic Documents from the Bar Kokhba Caves," in *Semitic Papyrology in Context. A Climate of Creativity. Papers from a New York University conference marking the retirement of Baruch A. Levine* [ed. L.H. Schiffman; CHANE 14; Leiden: Brill, 2003], 186). Indeed, the history of Jewish law does not begin with the redaction of rabbinic texts, and consequently, one has to assume that there was normative Jewish law at the time of our documents.

binic literature, with the aim of showing that the documents reflect a legal practice that is comparable to the rabbinic legal practice. Rather than identifying individual elements within a legal document, whether phrases or arrangements, as Jewish (or as non-Jewish, or both) I seek to show in what overall legal framework the document should be read. I am foremost and specifically concerned with references to the applicable law, that is, clear-cut indications in the documents of what law was applicable to the document *as a whole*. As far as I know this approach has not been taken before.[14] The advantage of the approach lies in its implications for the interpretation of the material, as can be illustrated with the example adduced above, of liability of the groom for the dowry with all he has. If a clause pertaining to this liability is found in a legal document in our archives, this need not prove that the parties in writing this document sought to adhere to Jewish law. For, as indicated above, this liability clause is part of Greek marriage contracts as well, and may therefore have been a feature of another legal system, or of a common tradition. Only when a feature can be found in Jewish law but not in any other law a 'strong' identification is possible.[15] When looking at references to law, on the other hand, to understand the overall framework of the legal act, another effect can be reached. In P.Yadin 10 such a reference to law can be found in the phrase 'according to the law of Moses and the Judaeans.'[16] This phrase puts the contractual obligations in the contract within a framework of normative Jewish law. This means that in the case of P.Yadin 10 the liability of the groom for the dowry with all he owns is a binding obligation *on the basis of Jewish law*. To put it differently, the fact that this liability is a feature of Greek marriage contracts as well, is irrelevant as its presence here is to be understood within the framework of Jewish law the *entire* contract is subjected to. Therefore,

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[14] The phrase κατὰ τοὺς νόμους and ἑλληνικῷ νόμῳ in P.Yadin 18 have received considerable scholarly attention (Katzoff, Wasserstein, Cotton, see Chapter 6, 408ff.), but within the context of understanding the legal background of this specific document. I am not aware of any attempts to study the references to law in all of the documents in the archive, and to understand what these references to the applicable law tell us about the legal background of these documents and more specifically about the relationship between Roman and local law.

[15] See Cotton's definition of what she considers Jewish and non-Jewish, quoted above, 45. Compare Katzoff's criticism of Cotton's interpretation when a document can be called Jewish: 'The standard for acceptance as 'Jewish' is set impossibly high. To pass as 'Jewish' a practice must either be uniquely Jewish or be explicitly incorporated into halacha.' (Katzoff, review of Cotton and Yardeni, 326).

[16] P.Yadin 10:5.

P.Yadin 10 presents us with clear evidence of normative Jewish law in a document well before codification of the Mishnah, not so much on the basis of the presence of individual elements in the document, as on the basis of the reference to the applicable law.

This approach via references to law is of great importance for the study of the relationship between Roman and local law. For if it can be shown that in the documents references to the applicable law are references to what we can identify as Jewish law, this proves that these documents could indeed be subjected to Jewish law, just because this reference to law subjects the *entire* contract to the legal system referred to. If the documents can be found to be subjected to Jewish law, this also implies that Jewish law indeed constituted a law (and not mere custom), to which documents could refer. This calls for revision of Wolff's views, positioned before the Judaean Desert material was found, that a provincial situation cannot lead to conflict of law, as only local custom was concerned that was merely tolerated by the Romans within the context of their own dominant legal system.[17] If the documents can refer not just to custom but to law, we have to accept that local law enjoyed a status as legal system co-equal to the Roman legal system. In that case a clash between applicable laws is possible and a more specific investigation of a relationship between the two laws can be conducted.

Obviously, as Schiffman observed, the papyri do not always present the same legal solutions as we find in the Mishnah. Legal practice was not simply turned into legal code: codification involved making choices, it was a process of selection, that is, of acceptance of certain legal practices and abolishment of others.[18] However, this does not warrant the

[17] See 29 above.

[18] Compare Lapin: 'The documents from southern Judaea and Arabia make clear that if rabbinic marriage practices or documentary conventions as described in the Mishnah were "standard" among second-century Judaean Jews, it is only in the limited sense that the Mishnah and related texts drew upon, and selected from among, existing practices.' (Hayim Lapin, "Maintenance of Wives and Children in Early Rabbinic and Documentary Texts from Roman Palestine," in *Rabbinic Law in its Roman and Near Eastern Context*, 195).

I would only agree partially with Cotton's conclusion that '…the halakha adopted the legal usage of the documents, which, in their turn, reflect the legal usage of the environment.' (Cotton in Cotton/Yardeni, 155). The problem lies in the second half of the conclusion: in Cotton's interpretation 'the legal usage of the environment' would reflect near eastern common law and explicitly not Jewish law, as she takes it that Jewish law only became Jewish after codification. Obviously, this view suffers from a misunderstanding

conclusion that what we find in the documents was not Jewish law. A most compelling example of a conscious choice to deviate from legal practice that was apparently normative Jewish law at the time of our documents will be presented in Chapter 4, where I will show that the evidence from the papyri describes an order of succession that was in line with general oriental succession practices, while the Mishnah chose to deviate from this by giving the daughter a position she did not hold in other oriental laws nor, indeed, in older Jewish law.[19]

c. *Roman law at the time of the archives*

Even though it is sometimes argued that little is left of the actual legislation of the Roman emperors before the fourth century CE,[20] other sources provide many details about Roman law and the way it functioned in the second century CE, both in the city of Rome and in the provinces. This particularly applies to material by jurists transmitted either directly (as in the case of Gaius' *Institutiones*) or indirectly, by incorporation in Justinian's famous codifications, together constituting the *Corpus Iuris Civilis*.[21] Through the incorporation of the material into

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of the nature of codification as explained above. Also see Katzoff's criticism on Cotton's interpretation of identification of a document as Jewish quoted above, n. 11 and 15.

[19] See Chapter 4 below, 240ff. In this chapter the importance is proven of looking at older Jewish law, like Biblical law, as well: contrary to the conclusion that the difference between the documentary evidence and the Mishnah shows that the documentary evidence did not adhere to Jewish law (Cotton/Greenfield, Cotton), comparison with Biblical law shows that the documentary evidence does adhere to Jewish law while the rule in the Mishnah presents a conscious deviation from older Jewish law and indeed from the entire oriental tradition as found in other oriental laws.

[20] 'Very little general legislation (as opposed to rescripts, sent to individuals) of emperors before the fourth century CE is actually extant. Even the famous legislation on marriage and adultery of Augustus . . . is known only from snippets in the *Digest* and from Roman historians rather than in its original form. This changes in the late antique period of Roman law. For the period from Constantine onward, we have a much fuller record of emperors' enactments than for the preceding three centuries. . . .' (Judith A. Evans Grubbs, *Women and the law in the Roman Empire. A Sourcebook on Marriage. Divorce and Widowhood.* [London: Routledge, 2002], 4). This is true as far as the comparison goes: little is left when looking at what we have from later periods. Nevertheless, there is an early law code, the law of the Twelve Tables, and there are many sources that can shed light on law and legal practice in the first centuries CE. See rest of exposition.

[21] The *Corpus* consists of four extensive works that deal with different aspects of law: the *Codex* is a collection of legislation, the *Digest* a collection of lawyers' opinions, the *Institutiones* a guidebook for the education of law students and the *Novellae* a collection of later legislation. The temporal sequence of the works is: *Codex* (529), *Digesta* (533), *Institutiones* (533), *Novellae* (535 onwards). The later *Codex* (a revised version of the *Codex* of 529, called *Codex repetititiae praelectionis*) was issued in 534 and should

one of the codifications, it lost its relevance with respect to its original date of publication and had force of law from the date of the issue of the codification onwards. This was logical because Justinian sought to solve the problems caused by the overwhelming quantity of legal material that could be used in legal procedures. The Romans used the *lex posterior* rule, which meant that when two rules were in conflict with each other, the most recent would prevail. This meant that subsequent edicts could keep replacing each other and changing the prevailing rules. In order to unify the legal system Justinian had all the legislation incorporated into one text, which was to have exclusive force. Every rule laid down before which was not incorporated no longer applied. However, since the opinions in the Digest are given accompanied by the name of the original lawyer and the work where the passage could originally be found, much is revealed of the workings of Roman law many centuries before the *Corpus Iuris Civilis* was composed. Some of the lawyers quoted in the Digest lived in the second century CE and quotations from their works provide sources of Roman law that are almost contemporary to the documents of the Babatha and Salome Komaise archives. In most cases we do not have the original sources but are entirely dependent on the quotations found in the Digest. An important exception is the case of Gaius' *Institutiones*, which was transmitted directly in various manuscripts.[22] It appears that the editors of the *Institutiones* have drawn heavily on their source: of the 901 *paragraphae* of Justinian's *Institutiones,* 414 were copied in more or less complete form from Gaius' *Institutiones*.[23] Furthermore, in many instances the editors chose to copy the opening sentence of a new title from Gaius: of 98 titles in Justinian's *Institutiones* 53 have an opening sentence of a title taken from Gaius.[24] In general, it can be concluded that the *Institutiones* of Justinian follow Gaius so faithfully that the *Institutiones* can be considered as being a 'indirekte Parallelüberlieferung zum gajanischen Institutionen-text.'[25] As the same

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thus be placed between the *Digesta*/*Institutiones* and the *Novellae*. The *Novellae* consist of several collections of imperial legislation called the *Epitome* (Latin, 124 constitutions), the *Authenticum* (Latin, 134 constitutions) and the *Collectio Graeca* (Greek, 168 constitutions).

[22] The most important source is Codex Veronensis nr. 13, but other fragments (with parts of the Gaius' text, mainly from the third and fourth book) have been discovered in Egypt in 1927 and 1933 (Hein L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* [Leiden: Brill, 1981], 46ff.).

[23] See Nelson, *Überlieferung*, 190.

[24] See Nelson, *Überlieferung*, 190, who gives all 53 places.

[25] See Nelson, *Überlieferung*, 191.

editors compiled not only the *Institutiones* but also the *Digesta*, we can assume that where Gaius is concerned the Digest paints a faithful portrait of the working of Roman law at the time of the Babatha and Salome Komaise archives.[26]

In all cases it has to be borne in mind that we are dealing with material from one of the provinces, and a province that had been, at the time concerned, relatively recently subjected to Roman rule. Consequently,

> it is important to note that although Roman law was, of course, paramount in the eastern provinces, it existed there not merely as a systematic imitation of legal practice in the rest of the empire. The case made by Mitteis for the long-term survival of local legal forms and institutions in the eastern provinces is too well known to need or to bear rehearsing here.[27]

Therefore, I would like to emphasize that in the case of Roman law there could be the same doubts as to the *normative* status of certain rules as in the case of Jewish law. For instance concerning guardianship of women, Roman law demanded that a woman was accompanied by a guardian to make a legally valid act. In the documents in the archive however, guardians do appear, but certainly not in all cases and for all women. Furthermore, the treatment of the part of the guardian seems to differ in the descriptions of the Greek main text and the Aramaic subscriptions.[28] The ambiguous picture painted by the documents themselves shows that guardianship of women might not have been a clear and undisputed matter in the provinces.[29]

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[26] For more details on the sources for Roman law and legal practice at the time of our documents see Max Kaser, *Das römische Privatrecht* (Munich: Beck, 1975), 5–15 and idem, *Das römische Zivilprozessrecht* (sec. rev. ed.; ed. by Karl Hackl; Munich: Beck, 1996), 12–16.

[27] Wasserstein, "P.Yadin 18," 118–119.

[28] Details will be given in Chapter 5 below, 366ff.

[29] There seems to be a remarkable difference between developments within Roman law, where guardianship of women was gradually abolished within the course of the first century, and the situation in the province Arabia where guardianship of women seems to have been introduced under the influence of Roman law, despite the fact that it was losing its importance in Roman law (see discussion in Chapter 5, 328–330). This phenomenon is indicative of the complicated relationship between Roman law at work in Rome and in the provinces.

Also see Chapter 5, 342–344, for discussion of a text from the Digest, pertaining to a real-life guardianship case in a province, which can be understood to convey that Roman law was adhered to, or just the opposite: that it was not adhered to, although it should have been. Such an instance illustrates the discrepancy between something like an ideal legal situation and everyday reality.

Method

Starting from these basic assumptions about the status of Jewish and Roman law for this study, the next chapters will investigate whether the references to the applicable law as found in the documents can be related to either Roman or indigenous, more specifically Jewish, law, and what this reveals about the relationship between local and Roman law at the time. The treatment has been divided into two parts, the first discussing issues of a more general nature, while the second part is devoted to three case studies of specific legal themes.

The first part of the book will discuss the papyri from a general perspective assessing the material with regards to the use of language and references to law.

In Chapter 1 the discussion of language issues will be mainly focused on understanding the use of both Aramaic and Greek in the archives and relating the use of the languages to the law behind the documents. Does the use of Greek in the later documents denote that the legal context had changed? What does the continuing use of Aramaic in subscriptions mean in this respect? When Greek and Aramaic parts of a document can be compared and differences are found, does this denote that both refer to different legal backgrounds/laws? It will appear that language does not directly determine to what jurisdiction a document was subjected or what law was applicable to a document and consequently that language-based divisions of the documents are not suitable to explain for the law behind the documents. Instead references to law in the documents' text should be used to determine to what legal context a document refers.

Chapter 2 will present references to law as used in a number of both Aramaic and Greek papyri, to investigate in what way the documents refer to law behind the documents and whether the way of referring changed as the documents began to be written in Greek. It will appear that documents can refer directly to the law that is applicable to them and that these references are indicative of the change in legal background occurring at the time of the Roman conquest.

Consequently, Chapter 3 will show it is possible to discern a new way of referring to law in documents written after the Roman conquest, which can shed light on the relationship between Roman and local law in the area. The Chapter will propose a two-level approach of the papyri: distinguishing two levels (of substantive and formal law) within each

papyrus that determine what law is applicable to that level. Both levels can refer to the same applicable law but each can also refer to a different law. Furthermore, Chapter 3 will argue that this two-level division is part of a consistent way of dealing with several possibly applicable laws in the documents.

The second part of the book consists of three detailed case studies, focusing on the subjects of succession, guardianship and marriage. All three subjects play a part in several papyri in both the Babatha and Salome Komaise archives and have been the object of continuing scholarly interest. My treatment will focus on what the documents reveal regarding the law behind the documents and how this law should be interpreted. This involves a detailed assessment of the legal aspects of the papyri concerned, connecting them with oriental law in general and Jewish law in particular, and of course Roman law. The focus will not be so much on specific legal arrangements, but on references to law and their implications for our understanding of the legal context of the material. It will appear that despite the conspicuously Roman features of some of the documents, their subject matter is thoroughly rooted in oriental indigenous law. This divergence can be explained for by the division between formal and substantive law as proposed in part I. This division offers a better understanding of the relationship between indigenous and Roman law and of the way in which several applicable laws could function within a system of sole Roman jurisdiction.

For clarity and overview, each part opens with a short section introducing the subject matter of the part and of the individual chapters in that part. Furthermore, each individual chapter has a conclusive section, presenting the arguments and conclusions of that chapter in short. Because those sections are of a summarizing nature, they do not present arguments in full, nor do they give extensive sources in footnotes. For details one is to consult the full discussion and references within the chapter. To get a quick overview of the main issues dealt with in this study, however, the conclusive sections give a good impression of older views and the new additions of this study.

Because this study does not deal with single documents but with two archives, research was aimed at maintaining the unity of the archives and discussing as many papyri as possible. However, some papyri were deliberately excluded as they do not concern the families involved in the

archives, their interpretation is doubtful, or their nature is not that of a legal act in the strict sense of the term.[30]

Furthermore, because the treatise offers a discussion of several issues and legal themes, the papyri are not presented in chronological order, nor is the treatment in each case the same. Depending on the point in the discussion where a specific document is discussed the treatment may be more or less detailed. The discussion of a single papyrus in Chapter 2, on references to law, for example, is by nature more extensive and technical-juridical than the discussion of several related papyri on the theme of succession (Chapter 4) or marriage (Chapter 6). Nevertheless, the papyri are related documents and the treatment in all cases seeks to elucidate the legal environment of the archives as a whole.

Sources

For the texts and translations of the papyri, the following editions are used (to which commentaries I will also frequently refer):[31]

Babatha archive

Lewis, Naphtali, ed. *The Documents from the Bar Kokhba Period in the Cave of Letters: Greek Papyri,* with Aramaic and Nabataean signatures and subscriptions, edited by Yigael Yadin and Jonas Greenfield. Jerusalem: Israel Exploration Society, 1989 (hereafter Lewis); and:

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[30] This concerns P.Yadin 1, 4 and P.Yadin 16, P.Hever 61 and 62 respectively. P.Yadin 1 is an act between two Nabataeans who do not seem to have any relation to Babatha or her family. As its interpretation is notoriously difficult, a discussion of this papyrus would do more to obscure matters than to clarify them.

P.Yadin 4 is probably a guarantor's agreement. Discussion of this papyrus involves highly technical-juridical argumentation (for example concerning the question of between which parties a guarantor's agreement is made and how this affects our understanding of the relationship between P.Yadin 4 and 2–3), while the conclusions are irrelevant for the argument concerning the law behind the documents.

P.Yadin 16, P.Hever 61 and 62 are (parts of) land declarations, which are not legal acts in the strict sense of the term. Although there are a number of interesting features to consider (like the oath to the *tuche* of the emperor) discussion would be unnecessarily digressive and has therefore been left out.

[31] For a full overview of the publications of texts from the Judaean Desert (not limited to the archives used here) and related literature, see Hannah M. Cotton, "Die Papyrusdokumente aus der judäischen Wüste und ihr Beitrag zur Erforschung der jüdischen Geschichte des 1. und 2. Jh.s n. Chr.," *ZDPV* 115 (1999) 2:244–246.

Yadin, Yigael, Jonas C. Greenfield, Ada Yardeni, and Baruch Levine, eds. *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabataean-Aramaic Papyri.* Jerusalem: Israel Exploration Society, Institute of Archaeology, Hebrew University, Shrine of the Book, Israel Museum, 2002 (hereafter *Documents II*).

Salome Komaise archive

Cotton, Hannah M., and Ada Yardeni. *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites, with an Appendix Containing Alleged Qumran Texts* (The Seiyal collection II), DJD XXVII, Oxford: Clarendon Press, 1997 (hereafter Cotton/Yardeni).

Note on extent of legal detailing

As observed above, no general overview of judicial aspects of the papyri, such as a running commentary in an edition of papyri, is available. The kind of argumentative discussion necessary to address a general question like the one concerning law behind the documents presupposes some prior clarification of the basic legal issues in the documents. However, since such a treatment is lacking, and too much detailing of basic legal matters seemed unwanted in the present context, in most cases general legal questions raised by the material, concerning, for instance, legal capacity, the difference between title and judicial ground, between title and contract or the difference between selling what is not yet owned and what has not yet come into existence will not be discussed. Explanations about judicial details are limited to those necessary for the argument (for example the difference between intestate and testamentary succession); at times details are provided in sections in small print or in the footnotes. An advantage of this method is that the very technical portions of the discussions are minimized, making them easier to read for those not specifically familiar with legal matters, like papyrologists, linguists and historians, who have often raised the questions so ardently discussed in prior scholarship.

PART ONE

THE LAW BEHIND THE DOCUMENTS: EXTERNAL AND INTERNAL EVIDENCE

INTRODUCTION TO PART ONE

This part of the study investigates general issues related with the question to law behind the documents. Starting from the language issue that has dominated scholarship so far[1] it takes the discussion two steps beyond and also looks at references to law in the papyri and consequently at a possible pattern in these references and its meaning for our understanding of law behind the documents.

Chapter 1 deals with the language issue, starting from conclusions drawn in previous scholarship and raising questions as to these conclusions, foremost to the role of Aramaic as a legal language after the conquest. Conclusions as to the invalidity of Aramaic as a legal language within a context of Roman jurisdiction have pervaded recent scholarship, without a due amount of critical reflection as to the tenability of such conclusions.[2] Three lines of argument will be followed to show that Aramaic was valid as a legal language:

- examining the exact role of Aramaic as shown in these specific documents;
- examining the role of Greek versus an indigenous language in general, by comparing the situation in the Judaean Desert material with that in documents from Roman Egypt;
- examining the juridical consequences of denying validity of Aramaic deeds in the context of Greek deeds that refer to these Aramaic deeds.

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[1] A division between papyri and legal contexts based on language has been positioned and maintained over and over again: see Chapter 1, 67ff. below.

[2] It is rather surprising that some questions have not been raised before. It seems that certain views, once positioned, tend to be adduced in later publications, without reflection and comment by the writer of the later publication. This goes for example for the idea that the use of Greek made a document valid in a Roman court context, a view most pronouncedly expressed and repeated by Cotton, but before already found with Wasserstein and most recently expressed by Safrai (see details on 69–70, 77 below). Wasserstein's idea to this point (based on individual papyri) is referred to in important later publications like Catherine Hezser's *Jewish Literacy in Roman Palestine*, without discussion by the authors concerned as to the tenability of the conclusion in the light of the complete evidence from the archives; see discussion 70–71 below.

All three lines of argument lead to the same conclusion, namely that Aramaic was valid as a legal language within the context of Roman jurisdiction and consequently, that the transfer to use of Greek for legal acts cannot be attributed to a need to make documents valid within a Roman judicial and/or administrative context. This means that divisions based on language, juxtaposing Aramaic documents as subjected to local jurisdiction and local law and Greek documents as subjected to Roman jurisdiction and (influence of) Roman law, cannot be maintained to explain for the legal context of the papyri.

Consequently, the language issue should not dominate interpretations of the legal situation as much as it has done so far and the legal background of these papyri should be examined from another angle: that of internal evidence as to the applicable law.

Chapter 2 will investigate the internal evidence to the applicable law in a number of both Aramaic and Greek papyri, to see whether the documents contain clear references to the applicable law; if so, how these references to the applicable law are made, and whether there is a change in the way references are made at the transition from Nabataean Kingdom to Roman province.

It will appear that the documents frequently refer explicitly to the applicable law, but in different ways before and after the conquest. These references to the applicable law in the documents are often in contrast to the indication of the applicable law based on the language of the documents: for example, in P.Yadin 6 the language of the document suggests a Nabataean legal background, while the references to law in the document point at a Jewish context. This underscores the conclusion drawn in Chapter 1 that the role of language as indication of applicable law should not be overestimated. Furthermore, a divergence can be observed between direct references to law and indications of the applicable law such as the presence of guardians of women or the occurrence of the *stipulatio*. Where direct references to law can be found to connect with indigenous law, the indications of the applicable law just mentioned connect with Roman law. An explanation is wanted for this divergence, especially in the light of the change occurring in the way direct references to law are made before and after the Roman conquest.

Consequently, Chapter 3 will discuss the change in the references to law with the legal background of Nabataean kingdom versus Roman province of Arabia in mind. It will be shown that the transition to Roman

rule required a new way of determining the applicable law for documents, causing the references to law to change. It is also with this transition to Roman rule that the documents begin to display a combination of references to law and indications of the applicable law, which seem to have a different legal orientation.

To reconcile the seemingly contradictory evidence provided by references to law and indications of law, a new approach will be proposed to understand the relationship between local and Roman law in the documents: instead of making groups of papyri and linking those groups to laws this approach distinguishes between two levels *within* each papyrus. Not only does this two-level approach fit better with the evidence to the applicable law as found in the archives, but it can also be understood as part of a conscious and consistent way of dealing with several possibly applicable laws, occurring at the time of the transition of Nabataean kingdom to Roman province of Arabia. Such a consistent way of dealing with conflict of law can shed further light on the relationship between laws in a context of sole Roman jurisdiction.

CHAPTER ONE

LANGUAGE

I. *Language and Law*[1]

An important feature of the Babatha and Salome Komaise archives is their bi- or even trilingualism.[2] The documents are written in several languages, as could already be observed from the treatment of the documents in the different volumes of their editions.[3] In the Babatha archive the first ten documents, with the exception of P.Yadin 5, are all written in Aramaic, while the later are all written in Greek. In these Greek documents, Aramaic can still be used for subscriptions and signatures, even though in some documents, Aramaic subscriptions have been included in a Greek translation.[4] Such instances, as well as the lack of any completely Aramaic document amongst the later papyri, seems to indicate that Greek became the preferred, if not required, language for legal documents.[5] The question can then be raised as to what this

[1] In this chapter I am only concerned with the use of several languages in the legal documents from the archives and its meaning for our understanding of the legal background of the archives and the relationship between Roman and local law. I do not deal with the many aspects of the use of languages, bi- and multilangualism and its socio-historical meaning in Judaea/Arabia and Roman Palestine in general. A useful overview of prior scholarship and a comprehensive treatment of the main issues can be found in Chapter V 'Language Usage' in Catherine Hezser, *Jewish Literacy in Roman Palestine* (TSAJ 81; Tübingen: Mohr Siebeck, 2001), 226ff., where the most important question is aptly phrased as 'who used which language where and when for what purposes and why.'

[2] See, for example, Lewis, 13, and Cotton, "Survival, Adaptation and Extinction," *passim* on the use of the three languages in the legal documents from Nahal Hever.

[3] See 7.

[4] This holds true for P.Yadin 11 and 16, and is probably related to the character of these documents. P.Yadin 11 can be understood as being a copy, which would not include Aramaic subscriptions, but render the complete text in Greek; see 156–157 below. P.Yadin 16 is certainly a copy of Babatha's original land declaration, in which not only the subscriptions of the parties but also that of the prefect are represented in a Greek translation. In P.Yadin 27 there is an Aramaic subscription and a Greek translation of the subscription side by side. This allows for comparison of original and translation. For the differences and their meaning see 368–371 below.

[5] The obvious exception here is the Aramaic tax receipt in the Salome Komaise archive, dated to 131 CE. See 115–116 below.

implies. It seems inevitable to relate the shift to the Roman conquest of the area (in 106 CE). This can be done on different levels with different consequences for the interpretation of the documents' legal context, as will be shown from an overview of interpretations given in previous scholarship and a discussion of the implications for understanding the relationship between language and law in the archives.

Greek as language used in legal documents

To start with, it should be observed that the use of Greek in legal documents within a Roman legal context constitutes a problem in itself. A problem that does not attract much scholarly attention as Wacke noticed:

> Welche Sprache schrieb das antike römische Recht vor für die Gültigkeit von Rechtsgeschäften? War die Verwendung des Lateinischen dafür unerlässlich, dessen Kenntnis darum nebenzu unentbehrlich, oder wie weit ging man in der Diskriminierung von Nichtlateinern? Die Problematik gehört zu den Allgemeinen Lehren vom Rechtsgeschäft. Die heute zugänglichen Handbücher übergehen sie allerdings zumeist; man muss schon bis auf Ludwig Mitteis zurückgehen, um darüber etwas ausführlichere Belehrung zu finden.[6]

In his detailed article Wacke explains that basically Latin was the only language in which valid legal acts could be conducted. Few exceptions are made, for example in the case of the *stipulatio*, the act of promising something to another party. The nature of the promise obviously prompted leniency: parties who did business with one another should be allowed to make the *stipulatio* in their own language. Therefore, the basic rule for the *stipulatio* is that both parties can understand the language in which the *stipulatio* is made. Interesting is the case, discussed by Wacke, where the question is put in one language and the answer given in another. If question and answer are compatible, the promise is binding and the legal act valid.[7] Concerning other legal acts, Wacke derives conclusions whether other languages could be used or not from

[6] Andreas Wacke, "Gallisch, Punisch, Syrisch oder Griechisch statt Latein? Zur schrittweisen Gleichberechtigung der Geschäftssprachen im römischen Reich," *ZSav*. 110 (1993): 15.

[7] See Wacke, "Gallisch, Punisch," 24, also on the question when the demand for compatibility of question and answer (*congruenter respondere*) can be considered to have been met with. For more details on the use of other languages than Latin or Greek for the *stipulatio*, see detailed discussion of the *stipulatio* below, 151ff.

a comparison with the acceptance of dumb parties in a legal act. Wacke assumes that when a person who could not speak at all was allowed to make a certain legal act this would certainly go for someone who could speak albeit in another language than Latin. Acts that fall into this group include acts that are found in our archives like sale or marriage contract. Wacke also refers to the difference between *ius civile* and *ius gentium*: one would expect that acts that were considered part of the *ius gentium* could be conducted in other languages than Latin. Ignoring all the exact details of his discussion it serves to cite his conclusion here:

> Rechtsgeschäfte unter Lebenden konnten, wie wir sahen, soweit sie dem *ius gentium* angehörten, ziemlich früh unter der sich seit 242 v. Chr. entwickelnden Gerichtsbarkeit des Fremdenprätors auch fremdsprachig formuliert werden.[8]

Wacke distinguishes the languages used in legal acts and the language used by the judge in the lawsuit ('Gerichtssprache'): according to the legal texts, in the second century CE the 'Gerichtssprache' was Latin and only in late antiquity Latin or Greek.[9] 'Gerichtssprache' then indicates the language used by the parties to bring their case and by the judge to formulate the verdict, not necessarily the language used by the parties during the hearing of their case.[10] This is important as there are no verdicts among the papyri from the Judaean Desert, while there are documents that pertain to several phases of a suit. These are all in Greek.[11]

While Wacke is foremost concerned with a discussion of the Roman legal sources to determine how Rome dealt with other languages than Latin, Werner Eck approached the issue from the angle of legal practice:

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[8] Wacke, "Gallisch, Punisch," 41.

[9] Wacke, "Gallisch, Punisch," 51.

[10] Wacke, "Gallisch, Punisch," 54: 'Auch die Parteien mussten ihre petita jedenfalls ursprünglich auf lateinisch vorbringen … Ansonsten gab es für die Sprache von Verhandlung und Entscheidung aber keine gesetzlichen Vorschriften. Fremdsprachiges Parteivorbringen beachteten spätere Magistrate in weitaus stärkerem Ausmass als ein moderner Richter, jedenfalls soweit es griechisch war (für andere Sprachen scheinen die Quellen zu fehlen)' and conclusion on 58: 'In Prozessen waren Ausländer nicht mundtot; Parteien und Angeklagte durften sich vielmehrt zumindest auf griechisch artikulieren. Gerichtliche Entscheidungen mussten allerdings bis zu der sich vermutlich auf den Osten beziehenden Reform von 397 n. Chr. auf lateinisch ergehen.'

[11] P.Yadin 13: petition to the governor, P.Yadin 14, 25 and 26 summons, P.Yadin 15: proposal to create evidence, P.Yadin 23–24: request for information related to ensuing suit. P.Yadin 28–30: *actio*, most likely to be used at some point in the dispute recorded in P.Yadin 13–15.

what do inscriptions and papyri tell us about the use of languages by the Romans in contact with their subjects?[12] In this context he also mentions several documents from the Babatha archive. His conclusions are that Greek was used in legal acts and official announcements as the language that government and population shared, if only in theory, for Eck notes that the fact that Babatha had legal acts in Greek in her archive does not say anything about her own knowledge of Greek. The documents show that local parties made and wrote statements in their own native language (Aramaic) which were sometimes included in the original, sometimes in a translation. Eck assumes that during a lawsuit the parties spoke Aramaic, while a translator interpreted their statements for the governor or his representative.[13] Eck assumes that bilingual personnel was easy to find as in most places soldiers were recruited from among the populace. These recruited soldiers spoke their mother tongue and learned Latin, which made them the ideal translators to serve at suits such as the ones conducted at the governor's court.[14]

Combining the conclusions of Wacke and Eck one can summarize that although Latin was the preferred language for legal acts, foreigners could use their own language for acts within the *ius gentium* from an early stage onwards. The reality as presented by the documents themselves shows that Greek was used for the main text of documents, while subscriptions could be in Aramaic, with or without Greek translation. The language used during a lawsuit can reasonably be assumed to have been Greek when all parties understood this, and in cases like Babatha's where the parties only spoke a local language, one should assume that the parties spoke their own language and a translator was used to interpret their statements for the Roman judge.

The different approaches by Wacke and Eck serve to illustrate an important point. Do we approach the questions regarding the languages of

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[12] Werner Eck, "Lateinisch, Griechisch, Germanisch…? Wie sprach Rom mit seinen Untertanen?" in *Roman Rule and Civic Life: Local and Regional Perspectives*, Proceedings of the Fourth Workshop of the International Network Impact of Empire (Roman Empire, c. 200 BC–AD 476), Leiden, June 25–28, 2003 (ed. L. de Ligt et al.; Amsterdam: Gieben, 2004), 3–19.

[13] Eck, "Lateinisch, Griechisch," 18.

[14] Eck, "Lateinisch, Griechisch," 17–18.

Regarding the lack of references to such interpreters, Eck points out that bilingualism among soldiers and others serving in the Roman administration probably was so common that it hardly deserved mention (Eck, "Lateinisch, Griechisch," 18).

the documents from a strict legal angle, asking what language should be used to make a legal act valid in a Roman court context, or do we approach them from reality as it presents itself from the documents? Within the strict limits of the first approach, as Wacke's article shows, Greek is as much a foreign language as Aramaic is: the only 'real' language of Roman law was Latin. Only in specific cases is the use of other languages mentioned and sanctioned, but this rather confirms the idea that in general Latin was the norm. This conclusion is obviously rather at odds with the evidence from our documents: there is not a single Latin document among them, what is more, there is not a line in Latin in the texts. In P.Yadin 16 the statement of the praefect is given in a Greek translation, in P.Yadin 28–30 a Greek version of a Latin *actio* is found. The documents thus give the impression that Greek was the language that the Roman administration and the Roman judiciary system used. If, however, this impression leads to the conclusion that Greek was *the* language that made legal acts valid in a Roman court context, this can easily cloud our judgment of the part local languages could play in a Roman context, as the following short survey of opinions from other scholars shows.

In relation to the languages used in this archive it has been remarked frequently that the use of Greek should be related to the transition from Nabataean Kingdom to Roman province of Arabia. This means that the transition of Aramaic to Greek as language for legal documents is related to a Roman court context. The way in which these observations are phrased varies and merely factual observations sometimes turn into suggestions or even conclusions as to the relationship between a change in language and a possible change in law. In such cases it needs to be asked whether the conclusions are supported by the evidence as we have it.

Merely factual, and therefore completely acceptable, are observations like

> As is well known, in their communications with the subject populations of the Roman Near East, the Romans too used the medium of the Greek language.[15]

[15] Cotton, "Survival, Adaptation and Extinction," 4. Also see Cotton, "Jewish Jurisdiction," 15: '… the Greek language—the language used *par excellence* as means of communication between rulers and subjects in the Roman Near East,' repeated *verbatim* in Cotton, "Diplomatics or External Aspects," 51.

> Roman administrators normally used Greek in dealing with the indigenous populace.[16]

and, argued the other way around

> Although Greek was the *lingua franca* of government and business in the whole eastern Mediterranean area, it was not the mother tongue of the parties and the scribes of the Babatha documents.[17]

More of a conclusive nature, but still firmly grounded in the material, is

> Thus the intimate connection between provincialization and the use of Greek in legal documents from Nabataea/Arabia is firmly established… Whereas the use of Greek by Jews in legal documents in the province of Arabia is connected with the advent of the Romans, and Romanization filters through the Greek prism, no such association can be made for the use of Greek in Judaea whose provincialization dates to 6 CE…[18]

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[16] J.A. Fitzmyer, "Languages," *EDSS* 2:474.

[17] Lewis, 13.

[18] Cotton, "The Languages," 227, 228. I emphasize that Cotton compares the situation in Arabia to that in Judaea and contrasts the both, stating that in Arabia the use of Greek is related to provincialization, but in Judaea it is not. This in itself shows that a conclusion should not immediately be drawn from the use of Greek by Jews, but an attempt to understand this use of Greek within its own context should be made. Where Cotton warns us not to take the use of Greek by Jews as immediate signs of hellenisation, or as expressions of, for example, political or national sentiments, I would like to warn the reader not to take the use of Greek in connection with provincialization as clear-cut evidence of Romanization. Even though one could plausibly argue that the use of Greek followed the advent of the Romans in the area, it might not be a sign of Romanization, in any case not on a substantial level. For the documents this means that the use of Greek might denote a Roman influence (because of the Roman presence Greek became more prevalent than Aramaic), but it need not say anything about the legal background of the papyri (that they draw on or were influenced by Roman law). That this relationship is only too easily assumed can be seen in several of Cotton's articles where a direct link is made between use of language and applicable law: "Jewish Jurisdiction," 15, where the use of Greek is mentioned in a longer enumeration of proof for Romanization, with the conclusion that 'all this implies of course that non-citizens had recourse to Roman courts of law and Roman law long before 212, and that this does not seem to have required the grant of a special privilege.' Cotton repeats this remark in "Diplomatics or External Evidence," 51, adding there 'I am not sure one should infer from the language of the documents the legal system to be applied by the envisioned court.' My study will show that indeed language is not an indication of the law that was deemed applicable to the contract. However, if Cotton is not sure whether language is indicative of the law that applied to the contract, why say that the use of Greek (amongst others) implies that non citizens had recourse to Roman courts of law and Roman law, implying not only subjection to Roman jurisdiction but also application of Roman law to the documents' contents? The other features of Romanization Cotton mentions ("Jewish Jurisdiction," 14–15), show that Cotton does believe that Roman law applied to the contents of the contracts. However, this assumption is in my opinion not supported by the documentary evidence. See in more detail 198–200 below.

Obviously there is a link between the Roman conquest and the use of Greek in administrative and legal documents. However, views can differ as to how this relationship should be understood.

Cotton wrote about this on several occasions:

> Indeed elsewhere I have argued that the use of Greek in legal documents in the Roman province of Arabia is one of the reasons for believing that these documents were intended for a Roman court of law.[19]

While this is a valid assumption, as indeed it seems logical to suppose that the use of Greek is related to the desire to use the document in a Roman court context, the next quotes go a step beyond.

> Having previously used Aramaic and Nabataean, they now resort to Greek in their legal documents, for no other reason, it seems, than to make them valid in a Roman court of law.[20]

> Nevertheless, I believe that identical reasons motivated the adoption of Greek in legal documents in both provinces [i.e. Arabia and Judea, JGO], namely the need to make the contracts valid in a court of law which had the power to enforce them when necessary, such as that of the governor of the province, or another Roman official, or the court of a polis. An additional reason could be the need to deposit deeds in a public archive, similar to what we know to have been the case in Egypt, where public archives were used to deposit private documents; having been registered there, these documents could later be produced in court as evidence.[21]

Less peremptory but still quite strong is:

> Factors other than the hellenization of the writers may well have made the use of Greek obligatory, or at least desirable, in documents of a legal nature, for example, the need to make them accessible (or valid?) in a non-Jewish court of law.[22]

In these quotes writing the document in Greek is not just associated with a Roman court context, but with making the document *valid* in a Roman court context. The other side of the coin would then be that

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[19] Cotton, "Survival, Adaptation and Extinction," 4; referring to Cotton, "Jewish Jurisdiction." In the first article Cotton repeats her remark already quoted that 'the intimate connection between provincialisation and the use of Greek in legal documents from Nabatea/Arabia is firmly established' ("Survival, Adaptation and Extinction," 3).

[20] Cotton, "The Guardianship of Jesus," 107. Compare: 'The use of Greek in my opinion is to be explained by the desire to make the deed of gift valid and enforceable in a Greek-speaking court, such as that of the governor of the province.' (Cotton, "The Rabbis and the Documents," 169).

[21] Cotton, "The Languages," 230.

[22] Cotton, "Cancelled Marriage Contract," 77.

documents in the indigenous languages would be invalid in a Roman court context.

Indeed this is the implication of Wasserstein's observations regarding P.Yadin 18, a marriage contract in Greek, as

> no more than a further safeguard (additional to the *kethubbah*) for the pecuniary interests of the bride, enforceable in a non-Jewish secular court.[23]

and regarding P.Yadin 7, a deed of gift, drawn up in Jewish Aramaic, after the Roman conquest:

> It is further to be noted that the Babatha archive includes some Aramaic documents such as sales contracts, certificates of deposit, and most important of all, a bequest of property. In the latter case certainly, and in the others probably, it seems reasonable to assume that enforceability in a provincial court would also have been in the mind of the testator, and it is therefore remarkable that the language used is not Greek but Aramaic.[24]

Wasserstein's interpretation of the alleged validity of Greek in a Roman court context is adduced as explanation for the language usage in the Babatha archive by Hezser in her important study about Jewish literacy in Roman Palestine:

> How is the language usage of the Babatha documents to be explained? The Nabataean documents were mostly written before the region became a Roman province and therefore reflect the local custom of the inhabitants. The fact that the large majority of the later documents are written in Greek, although Aramaic and Nabataean were the native languages of the involved parties, most of the witnesses, and even the scribes, may perhaps be explained with Babatha and her family's desire to make the deeds enforcible in a Roman court, as Wasserstein has suggested in connection with Shelamzion's Greek marriage contract (P.Yadin 18). One may assume that a Roman court "would prefer or even insist on the use of the Greek language" as the lingua franca of all government and legal proceedings in the East. The possibility to register documents in public archives may have been another reason.[25]

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[23] See Wasserstein, "P.Yadin 18," 121. Also see Cotton, "Jewish Jurisdiction," 18: 'the recourse to the Roman tribunals, which in Judaea and Arabia is attested in the use of Greek in documents clearly meant for a Roman court of law…' The question that arises is, of course, whether documents not written in Greek were not meant for a Roman court of law.

[24] Abraham Wasserstein, "Non-hellenised Jews in the semi-hellenised East," *SCI* 14 (1995): 123, n. 36.

[25] Hezser, *Jewish Literacy*, 317. Also see 323: 'Whereas Babatha and Salome Komaise had their documents written in Greek in order to make them enforceable in Greek-

I note here that assumptions of various orders are combined without a clear explanation of their meaning from a legal point of view. Preference for a language is obviously not the same thing as insisting on its use. A mere preference could explain for the fact that the majority of documents, but not all, are written in Greek, while no inference can be drawn as to the legal validity of Aramaic versus Greek. Insisting on its use, on the other hand, could be at issue in cases of documents that are completely in Greek while the word 'translation' indicates that certain sections had been in other languages originally. However, it is clear from a cursory overview of the documents in the archives that in the majority of cases of Greek documents subscriptions are incorporated in Aramaic and not in a Greek translation. Furthermore, it needs to be observed that the documents that are completely in Greek are copies, implying that the original acts did contain the sections in the other languages.[26] This means that one can hardly infer the demand for use of Greek from the evidence in the archives, let alone, conclude that the use of Greek was necessary to make documents valid within a Roman court context. This may be argued on the basis of specific arguments for specific cases, such as P.Yadin 18, where Wasserstein assumed that also an Aramaic marriage deed had been written, but those arguments should not be used to draw general conclusions seeing to all documents, in any case not without some more detailed discussion of the various problems connected with them.

The interpretation of the language issue, as outlined above, intimately connects language with court: Greek was chosen to ensure the document could be used in a certain type of court as against another.

This is also emphasized in the following quotes by Cotton:

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speaking courts and to deposit them in Greek archives, one may assume that some of Bar Kokhba's adherents instructed scribes to write their documents in Hebrew in accordance with the nationalistic spirit and administrative practice of their time and place, although their mother tongue was Aramaic.' Compare 327, where it is said that the use of Greek 'was required whenever the documents were meant to be accepted by the official authorities' and 490: 'All the documents were written by scribes in Greek to make them enforceable in public courts and/or to register them in public archives.' The short exhibition on 317 as well as the conclusive statements on 323, 327 and 490 do not register any possible problems with accepting either Wasserstein's argument for a relationship between use of Greek and enforceability in a Roman court context or Cotton's assumption documents had to be in Greek to be deposited in local archives. These problems will be discussed in detail below, 73ff.

[26] This is obvious for P.Yadin 16 and has been argued for P.Yadin 11, see 156–157 below.

> the fact that we have dozens of contracts written in Aramaic means that there was some sort of Jewish jurisdiction in civil cases[27]

and:

> the Jews continued to write contracts in Aramaic after 70 in Judaea and after 106 in Arabia, but they could not expect the Roman courts to enforce these contracts.[28]

Concerning recourse to certain courts Cotton remarked in other articles:

> There is nothing in the documents we have reviewed here to suggest that recourse to Roman law and Roman courts was anything but voluntarily adopted.… No other courts occur in this archive, and there is no good reason for assuming that Nabataean and Aramaic could not be used in a local court.[29]

> In other words it may not have been a matter of necessity to go to a Roman court, but a step taken out of choice. Rome's subjects could and would seek Roman justice whenever they believed that it would be more effective, more advantageous and more just than the local one.[30]

To summarize: documents in Nabataean or Aramaic could be used in a local court; there are no such courts mentioned in the archives; the people chose to use Greek and turn to a Roman court. Apparently this was a choice they could make.

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[27] Cotton, "The Languages," 231. Cotton here refers to the fact that although in the Babatha and Salome Komaise archives the majority of documents is in Greek, the other Judaean Desert documents (such as the other documents from Nahal Hever/Nahal Se'elim and Wadi Murabba'at) are mainly in Aramaic.

[28] Cotton, "The Languages," 231.

[29] Cotton, "The Guardianship of Jesus," 107.

[30] Cotton, "Jewish Jurisdiction," 18.

I note that it is not clear here whether Cotton also assumes subjection to Roman (substantive) law next to subjection to Roman jurisdiction: 'more effective, more advantageous and more just' can see to jurisdiction (the court with the power to enforce its decisions) but also to law regarding contents (substantive law). Indeed the following line points in the direction of subjection to Roman substantive law as well as Cotton writes: 'This is clearly the impression one gets from the Babatha archive: "Without coercion or attempts to impose uniformity, the very presence of the Romans as the supreme authority in the province invited appeals to their authority, to their courts as well as to their laws."' (Cotton's quote comes from her own article, "The Guardianship of Jesus," 107). The phrase 'to their courts as well as to their laws' seems to imply both subjection to formal and substantive Roman law. Subjection to formal and substantive law was the interpretation of Koffmahn and Nörr, cited on 40–41 n. 136 above. However, it is by no means certain that turning to a Roman court implied subjection to Roman law substantively as well; indeed, the evidence in the archive goes against this. See Chapter 2 below.

These assumptions presuppose two divisions: one between Roman and indigenous courts and one between Greek and Aramaic documents. But do these divisions really exist, or, theoretically speaking, is it fruitful to assume they exist?

In this context it is good to recall that Eck accepted that the language used during a lawsuit was the indigenous language which was translated for the sake of the Roman judge.[31] If translation of the proceedings during a lawsuit were necessary and accepted, why not accept a legal act in Aramaic as basis for the case to be decided? The same translator who translated the oral statements could read and interpret the document. Why would Greek be more valid than Aramaic, as Greek was, according to both Wacke and Eck, also not the 'real' language of Roman law? Besides, Wacke noted, concerning the *stipulatio*, that it could be conducted in Greek and, since Masserius Sabinus, also in other languages. The passage quoted explicitly mentions Syriac, which should be equated with Aramaic.[32] If one accepts that a *stipulatio* in Aramaic would have been valid under Roman law, it does not seem likely that a legal act written in Aramaic would be invalid in a Roman court of law solely on the basis of its language.

Consequently, a closer investigation is wanted, both of the possibility of indigenous courts and their status vis-à-vis the Roman court, and of the use of Aramaic in legal acts after the conquest, to determine the status of Aramaic as a legal language in a Roman context, as it appears from our documents.

Roman vs. indigenous courts

The problem with a division between Roman and indigenous courts is that there is no indication in any of the documents that there actually were local courts. The information from the archives, from the summonses and other lawsuit related documents we find there, concerns litigation before Roman courts, *de facto* the court of the Roman governor.

Isaac, already quoted above, remarked on this:

[31] See 66 above.

[32] Wacke, "Gallisch, Punisch," 26, n. 53. Discussed in detail in Chapter 2, 153.

> The absence of any reference to Jewish courts or local officials who might have settled financial disputes between Jews is striking. Indeed, Jewish institutions are not mentioned anywhere in the Babatha archive.[33]

Cotton, who wrote about the possible existence of indigenous courts on several occasions, initially observed:

> It is a remarkable fact though that no court, Jewish or non-Jewish—apart from that of the Roman governor of Arabia—is mentioned in any of the documents from the Judaean Desert—a great many of which are legal documents.[34]

Her conclusion for Arabia was then:

> After 70 conditions prevailing in Judaea became similar to what conditions in Arabia had always been: there was no Jewish court which had the authority to enforce its decisions. In Arabia there had never been Jewish courts of law as the exclusive use of Nabataean in the regal period demonstrates.[35]

Here again the use of language prompts the conclusion: because in the regal period only Nabataean is used, there will not have been Jewish courts. However, even if one accepts that this is true, that there were indeed no Jewish courts, this does not say anything about the law applicable to the documents in Nabataean Aramaic. As I will show in my discussion of P.Yadin 6, it is definitely not true that documents in Nabataean Aramaic have to draw on Nabataean law.[36] Internal evidence, references to law, should be conclusive in this respect and not the document's language.

Obviously the use of Greek was not exclusive after the Roman conquest. There are still documents written in Aramaic and in Greek documents Aramaic is used for subscriptions and signatures. This means that Aramaic continued to play a part as a legal language. This can lead us in two directions: either we assume, as I am inclined to do, that Aramaic could

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[33] Isaac, "The Babatha Archive," 65. Also previously, Goodman: 'However Jewish the clauses in (some of) their marriage documents, there is no evidence that Babatha or her acquaintances expected litigation to take place before Jewish courts or to be decided by Jewish authorities. The rabbis evidently did not interfere much in Maoza, where Nabataeans witnessed agreements between Jews and where Roman governors were, in the final analysis, expected to unravel them.' ("Babatha's Story," 175).

[34] Cotton, "The Languages," 231.

[35] Cotton, "The Languages," 230.

[36] See 97ff. below.

play a part as a legal language in a Roman court context, or, following Cotton's argument about the situation in Nabataea, one has to assume that the continued use of Aramaic indicates that there were indigenous courts. Cotton took this latter line of argument and investigated in detail whether there is any evidence, necessarily from outside the archives, for the existence of such local courts, possibly courts of arbitration:

> Perhaps one should think in terms of courts of arbitration acceptable to both parties to the contract of litigation. In the course of time, the Romans, even if not officially recognizing these forms of Jewish jurisdiction, nonetheless came to tolerate them.[37]

Here Cotton bases herself on evidence from the rabbinic sources that mention 'courts of different sizes in towns and villages' as well as discussions about 'the validity of contracts made in Greek, about the use of gentile witnesses, courts and archives.'[38]

In a later article Cotton investigated the possibility of the existence of local courts (perhaps of arbitration) in more detail.[39] Although this possibility cannot be excluded, it seems that the suggestion is sooner prompted by speculation (about the Roman courts' workload if all cases went there and so on) than by facts. Cotton's suggestion of thinking of other possibilities for conflict settlement than 'formal *iuris dictio* of a court of law' is attractive: indeed, it makes sense to assume that people looked for 'other solutions, less cumbersome, less expensive and less time-consuming.'[40] Yet Cotton's argument that evidence to such a practice can be found in P.Hever 63 is not very compelling.

Cotton assumes that the renunciation of claims as described in this act may well be the result of a dispute settlement in front of a arbiter. This could be, but even if it was, this says nothing about the status of this type of jurisdiction, indeed whether it should be called jurisdiction at all. No matter how the dispute was settled, the legal validity of the renunciation lies in the written act, not in the possible arbitration that preceded it. In this context I note we have no documents pertaining to this case (or indeed any other) of arbitration. What is more, as Cotton acknowledges herself, the act is written in Greek and contains a *stipulatio* clause, which makes it comparable to other acts from the archives that were clearly

[37] Cotton, "The Languages," 231.
[38] Cotton, "The Languages," 231.
[39] Cotton, "Jewish Jurisdiction," 20–23.
[40] Cotton, "Jewish Jurisdiction," 20.

intended for a Roman court context. Cotton then states that the parties might have wanted to keep recourse to the Roman court open, implying their initial legal obligation would have arisen from the assumed arbitration. However, as far as I can see, the obligation arises from the recording in the legal act of the dispute settlement reached. And there is nothing in the legal act to suggest it was envisaged as subjected to any other kind of jurisdiction but that of the Roman governor. Therefore, P.Hever 63 does not contain conclusive evidence as to the existence of local jurisdiction (in the form of arbitration), and it certainly does not position this jurisdiction as an alternative to Roman jurisdiction. On the contrary, it appears that a dispute settlement (perhaps through arbitration) gained validity through a legal act that was subjected to Roman jurisdiction.[41]

What is more, regardless of whether one finds the evidence for the existence of such local courts compelling or not, there is a technical-juridical problem with assuming that these local courts existed and had jurisdiction to judge certain cases. Both Cotton, and Wasserstein, in his assessment of P.Yadin 18, quoted above, assume that local courts had little power to actually have their decisions enforced which would mean that someone turning to those courts would have to depend on the willingness of the other party to subject itself to the court's ruling.[42] This implies that drawing up a contract in Aramaic meant for the parties involved that they subjected themselves to the jurisdiction of a local court.[43] This is clearly the conclusion by Safrai:

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[41] Cotton mentions Roebuck's suggestion to her that 'the use of *stipulatio* and Greek could just be borrowings by a legalistic arbitrator'; hence hardly 'good evidence of the parties' intentions to resort to another tribunal" ("Jewish Jurisdiction," 23). In that case we have to assume that there has been local arbitration that eventually produced a legal act very similar to the ones found otherwise in the archive which are according to well-established general opinion subjected to Roman jurisdiction. I find this difficult to believe. More important, however, is the technical-juridical problem with accepting the existence of local jurisdiction-arbitration, as I will come to explain.

[42] Cotton, "The Languages," 230: 'Nevertheless, I believe that identical reasons motivated the adoption of Greek in legal documents in both provinces [i.e. Arabia and Judaea, JGO], namely the need to make the contracts *valid in a court of law which had the power to enforce them when necessary*, such as that of the governor of the province, or another Roman official, or the court of a polis' and Wasserstein, "P.Yadin 18," 121, describing the document as: 'no more than a further safeguard (additional to the *kethubbah* [i.e., the Jewish marriage contract in Aramaic]) for the pecuniary interests of the bride, *enforceable in a non-Jewish secular court*' [my emphasis].

[43] See Wasserstein, "Non-hellenised Jews," 123, n. 36; quoted above, 70.

> If a Jew wanted a document between him and his fellow to have legal validity, he was forced to write the document in Greek, and in a manner that would meet the requirements of the court in Petra or in Rabbah. One who wrote his document in Aramaic thereby decided that he would not need the official courts. He did so either out of naivete and good will, or because he relied upon another, unofficial, court, probably a Jewish one. The Shelamzion who received an Aramaic marriage contract knew that she would not have any legal recourse to the Roman court and apparently relied upon another court, or possibly upon a second marriage contract written in Greek.[44]

Theoretically, this would be possible, but I believe that in reality the possibility is excluded by the evidence provided by the acts in the archive.

In P.Yadin 10 Babatha has her marriage contract drawn up in Aramaic. However, when an argument arises with her deceased husband's first wife Miryam, Babatha turns to the court of the Roman governor and not to some kind of local court (P.Yadin 26). It is likely that her claim in the case is based on her (Aramaic) marriage contract, which means that Babatha approaches the Roman governor in a case founded on rights established in an Aramaic deed. In any case it is clear that Babatha bases her rights recorded in P.Yadin 21–22 on her Aramaic marriage contract. There Babatha bases her right to sell dates from orchards that belonged to her deceased husband on her dowry, thus basing a deal laid down in a Greek contract on a right acquired through an Aramaic contract. If jurisdiction was determined by the language of the contract, this would be impossible. After all, the rights of the marriage contract in Aramaic would be subjected to local jurisdiction, while the contract based on those rights would be subjected to Roman jurisdiction. What the actual evidence from the archives indicates, is that an Aramaic contract could be produced as evidence in a Roman court context, or in any case that rights derived from such a contract could be subject to Roman jurisdiction. Consequently, one has to accept that parties to a deed in Aramaic had not subjected themselves (exclusively) to local jurisdiction.

Following this line of argument, a determinative relationship between language and court/jurisdiction is untenable. The existence of legal acts in Aramaic is in itself not enough to prove that there was local jurisdiction. On the contrary, it seems more likely that the Aramaic deeds did

[44] Safrai, "Halakhic Observance," 225. [Obviously, Safrai does not mean to refer to Shelamzion, as Shelamzion's contract recorded in P.Yadin 18 is in Greek and not in Aramaic. Babatha's contract in P.Yadin 10 is in Aramaic, so she is probably meant here.]

function in a Roman court context. Therefore, it is safer to concentrate on the Roman court context and try to understand what the use of several languages meant in that context.

Greek vs. Aramaic

It seems that the sole reason for assuming that the Aramaic documents were meant for local courts is that they are in Aramaic and not in Greek.[45] If it is argued that a document has to be in Greek to be valid in a Roman court, the logical conclusion is that documents that are not in Greek cannot be used in those courts.[46] However, the very fact that no evidence for the existence of local courts is found suggests that the Aramaic documents were actually used in Roman courts, or at least people believed they could use the documents for that purpose.

In a review of DJD XXVII (which incorporates the Salome Komaise archive) Bagnall observed:

> The use of Greek in these legal texts, Cotton argues, reflects a desire to have legal acts easily recognized in Greek-language courts, i.e., Roman courts; the only court actually mentioned is that of the Roman governor of the province of Arabia. This may be true, but it is all the more striking that under Roman rule legal documents were also written in the local languages; see further on this below.[47]

and below:

> The use of languages here (and in the still-unpublished part of the Babatha archive [i.e., the Aramaic part of the Babatha archive, JGO]) certainly shows that Aramaic remained usable in legal documents under Roman rule and that competent scribes in both languages were available in at least the more important villages; we still do not know accurately why one lan-

[45] Cotton admitted as much; see quote 36 n. 125. Cotton proceeded to investigate what other evidence there is for assuming the existence of such local judicial autonomy. On the relevance of her conclusions for the archives, I have just commented. In this section I will focus solely on the language issue, and the alleged invalidity of Aramaic as a legal language in a Roman court context. When it can be shown that Aramaic was by no means invalid as a legal language in a Roman court context, the focus should obviously be shifted from the possible existence of local courts to the meaning of Aramaic documents in a Roman court context.

[46] Safrai's conclusion quoted above, 77, is the epitome of this way of thinking, as he states: 'If a Jew wanted a document between him and his fellow to have legal validity, he was *forced* to write the document in Greek…' ("Halakhic Observance," 225; my emphasis).

[47] Bagnall, review of Cotton and Yardeni, 133.

guage was chosen for one document, the other for another. There is no evidence that the Romans discouraged the use of Aramaic.[48]

An important point to take into account in this respect is that even in the Greek documents subscriptions are still in Aramaic. Cotton takes this as a sign that the picture painted by the languages used in the documents need not have been true to the real linguistic situation. Consequently, it is in her opinion wrong to view the Jews involved in the papyri as hellenized or even semi-hellenized.[49] I agree with that completely, since the documents are legal documents. The language there serves a completely different function than it does in everyday life.

It is precisely this special character of the legal document that poses the problem with the use of Aramaic in the subscriptions. Considering that a legal document has the function to establish, or at least record, rights and obligations, such a document establishes legal ties. A subscription is the part of the document where the party testifies to his obligation to the arrangement. Consequently, a subscription can be considered to be an essential part of a legal document. If Greek was used to make the documents 'valid' in a Roman court of law, why have the parties' subscriptions in Aramaic? Why not always include them in a Greek translation as is done in P.Yadin 11 and 16, or at least add a Greek translation to the Aramaic subscription, as is done in P.Yadin 27?[50] A comparison with the situation in Egypt is illuminating.

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[48] Bagnall, review of Cotton and Yardeni, 137.

[49] Cotton, "Survival, Adaptation and Extinction," 4. Also see Wasserstein: 'Further, it is also true that at times non-hellenised Jews in Palestine, even those who did not know Greek, used Greek institutions, had recourse to what they called Greek Law, wrote, or caused to be written on their behalf, in Greek, documents, not only deeds of sale, petitions, land registrations, receipts, mortgage loans, promissory notes etc., but even such intimately familial documents as marriage contracts.' ("Non-hellenised Jews," 123). The reference to Greek law Wasserstein refers to is discussed in his article about P.Yadin 18 (see 34 n. 119); I will discuss this article in detail below in my discussion of marriage-related documents, 398ff.

[50] The incorporation of the subscriptions in Greek cannot denote in itself that Aramaic was not a legally valid language: in P.Yadin 16 the subscription by the prefect is also translated into Greek, a subscription which would originally have been in Latin. This can hardly mean Latin would not be valid in a Roman court of law: obviously, the entire text was rendered in Greek for the sake of uniformity.

I note that it is said in the Languages entry in the *Encyclopedia of the Dead Sea Scrolls* that some of the material from the Babatha archive is 'formulated in Greek with an Aramaic summary of its contents.' I do not think the word summary is suitable here. The Aramaic part consists of subscriptions which contain declarations by the parties. Thus in the Aramaic, various declarations can be made from various viewpoints: the party, the person writing for the party, a guardian etc. This means that the Aramaic does not

In an article about autograph confirmation in Demotic contracts DePauw touches upon a drastic change in languages used in legal documents in Egypt at the moment of the Roman conquest.[51] Before that moment typically both the main text of a document and its subscriptions, if any, were written in Demotic. After the conquest subscriptions were written in Greek, regardless of the language of the main document. To put it differently, contracts continued to be written in the indigenous language, while for subscriptions the language of the new dominant power was used. Documents that are completely in Greek are most likely translations of originally Demotic contracts with Greek subscriptions.[52] There are a few contracts that have a subscription in Demotic but this is never the first subscription. Furthermore, subscriptions become more elaborate and both parties subscribe, something that was unusual in earlier times. Subscriptions also occur far more often, where previously even a mere signature was but 'an optional feature.'[53] This shows that a greater importance was attached to subscriptions. DePauw argues that all of these changes have to be related directly to the Roman conquest and more precisely to Roman requirements:

> the evidence suggests that the first party had to sign the contract **in Greek** before a document could be registered in the grapheion. Demotic could still be used in the subscriptions, but only in addition to the Greek, or for the declaration by the beneficient [i.e. the second subscription, JGO]. Neither of these had the same importance for the validity of the contract as the subscription of the first party.[54]

This marked difference between the documents drawn up prior to and after the conquest shows that in Egypt under Roman rule subscriptions began to play a more important role in documents and that the use of language was related to this. The mandatory use of subscriptions, where first a signature had not even been obligatory, and the elaborate char-

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give a mere summary of the main text in Greek but represents the judicial act from various viewpoints, focusing on what several persons who are involved have agreed to. This is exactly the reason why it is so important that Aramaic is used for these subscriptions. Should they indeed have been a mere summary of the text in Greek, it could be viewed as a convenient extra for the parties (who did not know Greek). However, the subscription character of the parts in Aramaic makes them an essential part of the document's text, as I have explained above.

[51] DePauw, "Autograph Confirmation," 66–111. I am indebted to Dr. Brian Muhs of the Papyrological Institute in Leiden for drawing my attention to this article.

[52] See DePauw, "Autograph Confirmation," 89 and 97.

[53] DePauw, "Autograph Confirmation," 103.

[54] DePauw, "Autograph Confirmation," 103 (his emphasis).

acter of the subscriptions suggest that those were deemed to constitute important, if not essential, parts of the contract. It seems inevitable to relate the use of Greek for party subscriptions to this alleged importance: just because the subscriptions where the parties agreed to their obligations were considered to be the essential, constitutive parts of the document they had to be written in the language of the dominant power in the area, or more general, the *lingua franca*.

The situation in the Judaean Desert documents should obviously be assessed differently. Instead of maintenance of the original language for the main text of the document and change to Greek in the subscriptions we find a change to Greek in the main text of the document and maintenance of the indigenous languages in subscriptions. This is remarkable because the evidence from Egypt suggests that the use of language was related to the significance of the party declarations: they constituted the binding parts of the contract.

A single instance of a Greek contract from Egypt where the first declarant's subscription is in Demotic prompted the suggestion that subscription in Demotic was allowed when the main text of the document was written in Greek.[55] This would suggest that in Egypt two types of documents would have been valid: Demotic documents with Greek subscriptions or Greek documents with Demotic subscriptions. The latter type would obviously resemble the Judaean Desert documents: Greek documents with Aramaic subscriptions. It would then be deemed sufficient to have at least one part of the document in which the parties' obligations were expressed in the language of the dominant power, i.e. Greek. I note, however, that in the Egyptian material this occurs but once: in a comparable instance of a Greek document with a Demotic subscription the Demotic subscription is accompanied by a Greek one.[56] In the Judaean Desert documents the subscriptions were written in the indigenous languages usually without any form of translation into Greek.[57] Only in copies were the subscriptions incorporated in a translation rendering a completely Greek document.[58] This means that it seems that the Roman conquest led to different developments of the legal languages used in the Judaean Desert area than it did in Egypt. The continuing use of Aramaic

[55] DePauw, "Autograph Confirmation," 103, n. 234, and 111.
[56] DePauw, "Autograph Confirmation," 104, n. 234.
[57] An obvious exception to this rule is P.Yadin 27.
[58] Like P.Yadin 11 and 16; see n. 4 above.

for the party subscriptions seems to suggest that Aramaic could play some part in a Roman judicial or administrative context. The difference with the situation in Egypt is all the more relevant for our documents as DePauw concluded for that Egyptian situation that 'the legal value of the Demotic part [of acts] was thus reduced to next to nothing' and that 'Demotic was thus degraded to a second rank language.' The role of Aramaic in the subscriptions to the Judaean Desert documents suggests that there the indigenous languages did not suffer this same fate. Therefore, far from assuming that Aramaic became replaced by Greek as the language for valid legal acts, we should accept that Aramaic continued to play a part as a legal language.[59]

The case of the subscriptions at any rate proves that there had to be some kind of knowledge of Aramaic in a Roman court. Otherwise, the judge would not be able to understand what the parties had promised to one another, as he would not be able to compare the subscriptions with the main text, or in any case read and interpret the entire document. There may be two documents in the archive that are completely in Greek, giving a translation of the originally Aramaic subscriptions, but these are exceptions.[60] In the majority of the cases the documents include Aramaic subscriptions while they are clearly meant for use in a Roman court context, for example the summonses of P.Yadin 14 and 25, and the proposed settlement of P.Yadin 15. It is important to note that these documents were not, like legal acts in general, drawn up with the idea that they might at some future time in a dispute situation have to be produced in a court context, but they were drawn up *when the dispute had already arisen*, i.e. when it was already clear to what court the parties wanted to turn. Consequently, it cannot be maintained that documents intended for Roman courts had to be written in Greek.[61]

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[59] Of course it is difficult to be conclusive in this respect: the evidence from Egypt seems to show that it took some time before practice adapted to the new rules. The same could have been the case for the Judaean Desert, where one of the later papyri, P.Yadin 27, does have a Greek translation of Babatha's Aramaic subscription. Still the difference between Egypt and the Judaean Desert remains pronounced: the main text of the Judaean Documents is not in the indigenous language but in Greek, and the Aramaic documents drawn up after the conquest do not have Greek subscriptions.

[60] See n. 4 above, referring to arguments for understanding both cases as instances of copies of a text that originally did contain the subscriptions in the original languages.

[61] See Eck's assumption, referred to above 66, that the hearing of a lawsuit was conducted in the indigenous language, through interpreters. We could assume that such

In view of the Egyptian situation the cases in the Babatha archive where the document is entirely in Greek seem to further complicate our understanding of the language issue. For these two cases, P.Yadin 11 and 16, it has been argued that both represent copies of official acts, assuming that the original acts may have included Aramaic subscriptions.[62] At first sight this seems logical: an act was drawn up with the parties' subscriptions in their indigenous language, while the copy was made up entirely in Greek for the sake of uniformity and accessibility. But why was this copy apparently given to the parties and not kept by the authorities? It is found in the archive of the parties involved. Alternatively, taking the reverse argument, what happened to the original act containing the party subscriptions in Aramaic? The obvious answer should be: this original was kept by the authorities, or in the case of the loan in P.Yadin 11, by the creditor, the Roman centurion. This presents us with a seemingly contradictory situation: the authorities—who are presumed to have little knowledge of Aramaic—keep an original document that contains Aramaic subscriptions, while the parties, who did not know Greek, are supplied with copies that are completely in Greek! Of course, this latter practice can be explained from the viewpoint of the Roman authorities: if they had completely Greek copies of acts drawn up, for uniformity's sake, we can hardly expect them to have taken the fact that the parties could not understand Greek into account. In this light I emphasize that Babatha could not even write (and presumably read) Aramaic.[63] This already indicates that the use of documents is certainly not directly related with literacy of the parties in the languages concerned. It is therefore not so much the fact that the copies are in Greek that is extraordinary, as the related conclusion that the original acts kept by the authorities contained subscriptions in the original languages. Since such acts, even in a thoroughly Roman administrative matter like the census, were drawn up in several languages, it cannot be maintained that legal acts by private parties had to be drawn up in Greek to make them acceptable in a Roman context. Furthermore, the context of P.Yadin 16 shows that the use of Greek is also not directly related to the need to register the document in a public archive: despite the obvious need for this in a census context the language used for subscriptions

interpreters also served, if necessary, to compare the Aramaic subscriptions with the Greek main text of the document.

[62] See 156–157 below.

[63] See 20 n. 61 above.

in the original document was not Greek.[64] This supposes an acceptance of Aramaic as a language for legal acts, although it was clearly not used to represent the document's main text.

The observations made above, when put together, present the following picture: after Roman rule a gradual process led to the practice of having legal documents drawn up in Greek, maintaining party subscriptions in Aramaic. Contrary to Cotton's repeated conclusions, the apparent desire to have the main text written in Greek cannot be explained exclusively by referring to a Roman court context, as the indigenous language was still used for parts of the documents. Consequently, it cannot be maintained that Aramaic was not valid as a legal language either. Documents that are completely in Greek are copies of acts that were originally drawn up with Aramaic (and in some cases Latin) subscriptions. Those originals were apparently kept by the authorities, denoting that the indigenous language kept on playing a part not only in the context of jurisdiction but also of administration.

Choice of language is choice of law?

Above it was shown that there was no direct determinative relationship between language and court, that is, that the languages used do not indicate to what jurisdiction the parties involved subjected themselves. A related, but not identical, question is whether there is a direct and determinative relationship between language and law. Does the language chosen for the contract determine what law is applicable to the contract?

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[64] Thus *contra* Cotton, who suggested that Greek became the required language not only for legal acts but also for documents that had to be deposited with the authorities: 'An additional reason could be the need to deposit deeds in a public archive, similar to what we know to have been the case in Egypt, where public archives were used to deposit private documents; having been registered there, these documents could later be produced in court as evidence' ("The Languages," 230; compare Hezser, *Jewish Literacy*, 317: 'The possibility to register documents in public archives may have been another reason,' referring to Cotton). Cotton ignored the fact that exactly the original acts kept by the authorities did contain passages in the local language(s). Furthermore, Cotton did not register that the effect which obligatory registration had on the use of languages in legal documents in Egypt is not the same as it can be witnessed in the Judaean Desert material: as DePauw's article adduced above shows, the situation in Egypt was different from that found in the Judaean Desert material. Consequently, a comparison with Egypt can hardly be deemed to be conclusive. Therefore, one cannot maintain that the fact that a document was to be registered in a public archive determined that it had to be written in Greek.

The question is related to the question of a relationship between language and court, because one could assume that language indicates the court one wishes to turn to and therefore also the law one wishes to apply to the contract. For example, it would be logical to assume that if the choice for Aramaic implied subjection to local jurisdiction, this would include application of local (perhaps Jewish) law.

But if a choice for Greek was related to subjection to Roman jurisdiction, does this also imply subjection to Roman law on a deeper level?

A direct determinative relationship between language and law suggests itself from a comparison with bilingual family archives from Hellenistic Egypt containing Greek and Demotic documents.[65] In discussing the Tatehathyris archive Pestman maintained for this Egyptian material that the choice of language can directly be related to a choice of law: Greek documents seek to connect with Greek Hellenistic law, Demotic documents with Egyptian law. This can for instance be seen in the use of guardians: Greek documents present women acting with guardians, in accordance with the requirements of Hellenistic law. Demotic documents, on the contrary, do not mention guardians, which is consistent with Egyptian practice.[66] According to Pestman, those documents in the archives concerning marriage and divorce seem to be drawn up in Demotic, because of the more favourable position of women under Egyptian law.[67] This implies that language was chosen to put the document in a certain framework, or argued the other way around, that the language was determined by the law one wished to apply to the act.

The same idea is phrased in Isaac's observation on the Greek marriage contract of P.Yadin 18:

> Any social changes in this period must be seen against the background of the imposition of Roman provincial administration. If Jews in Arabia preferred Greco-Roman marriage contracts to traditional *ketubbot,* the

[65] See Pieter W. Pestman, *Over Vrouwen en Voogden in het Oude Egypte* (Leiden: Brill, 1969), 15–16.

[66] Pestman does not distinguish between matters of formal or of substantive law, and consequently, does not address the question whether the presence or absence of a guardian for a female party is also indicative for the law that is applicable to the substantive side of the case. In the context of the Judaean Desert material I will argue that it is not, see detailed discussion in Chapter 5 below.

[67] See Pestman, *Over Vrouwen en Voogden*, 40, n. 31, also noting that the question why contracts in bilingual archives were drawn up in one language or the other has not been satisfactorily answered.

> most likely explanation is that the former offered advantages that had been unavailable under Nabataean rule. The position of the woman, for instance, is more favorable in 'Greek law' (document 18, ll. 16, 51).[68]

The question that should be raised here is: does P.Yadin 18 connect with Greek law, because the document is written in Greek, or because the document clearly refers to Greek Hellenistic law as the applicable law to (part of) the arrangements? To put it differently, is the relationship between language and law determinative or should internal evidence decide what law was thought to be applicable to these acts?

In this light it is worthwhile to repeat Wasserstein's remark on P.Yadin 18 already cited above, indicating that it may have been

> no more than a further safeguard (additional to the kethubbah) for the pecuniary interests of the bride, enforceable in a non-Jewish secular court.

This interpretation does not regard the Graeco-Roman marriage contract as a replacement of the *ketubba*, but as an addition to it. The link between the additional character of the document and its supposed enforceability in a non-Jewish court suggests that a *ketubba* would not have been enforceable in such a court. But does this mean that the Greek document is merely a Greek version of an Aramaic document, the language required to have the document enforced in the Roman court context, or does the change in language imply more?

The first option, a Greek version of an Aramaic document, seems to apply to a document like P.Hever 64, which has been plausibly argued as being a Greek translation of an Aramaic 'Urtext.'[69] Here the contents of the document do not seem to be affected as the gift is made in the same terminology as the one of (Jewish Aramaic) P.Yadin 7.[70] This could denote that only the language of the documents changed but not the law and legal context to which they referred.

However, if a Greek document explicitly determines that Greek (Hellenistic) law is applicable to (part of) its arrangements, does this mean that the legal context changed with the language? If so, is this not due

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[68] Isaac, "The Babatha Archive," 72.

[69] See Cotton in Cotton/Yardeni, 206–207 (where an Aramaic original is reconstructed); also see Cotton, "Survival, Adaptation and Extinction," 9, for a discussion of 'some glaring Semitisms' in P.Hever 64.

[70] See Cotton, "Survival, Adaptation and Extinction," 9, n. 41: 'See DJD XXVII, p. 207 for my exercise in translating the Greek deed of gift back into Aramaic. I plundered P.Yadin 7, an Aramaic deed of gift executed by Babatha's father in favour of her mother.'

to the reference to law, rather than to the language used? To put it differently, would Greek (Hellenistic) law have applied to the contract, if it had been written in Greek but had not incorporated a reference to Greek law? The comparison with the case of P.Hever 64 seems to imply that internal evidence should determine what the applicable law probably was, rather than the language used.

Concerning the use of Greek by Jews in general Wasserstein observed that using Greek does not always 'point to direct acquaintance with the Greek sources.'[71] To put it differently, the scribe may use a Greek expression without being aware that it stems from a certain source. It is obvious that this calls for caution when drawing conclusions from the fact that the documents use Greek phrases: we do not know whether this meant that there is a direct relationship with other Greek documents or something like a Greek (Hellenistic) tradition. Wasserstein continued to call for caution when he pointed at the occurrence of Greek loanwords in both Jewish Aramaic and Syriac. Even though he was there speaking about a later era, his observations are obviously relevant here:

> This suggests, not that the Rabbis had borrowed these words directly from Greek, but rather that they found them ready-made, readily available, in the Aramaic *koine*, which they shared with their non-Jewish, non-hellenized, non-Greek-speaking neighbours, not only in Palestine but in the whole region both before and after the Christian period… It was the common Aramaic inheritance, the common Aramaic language, that served as the principal conduit for hellenistic influences on non-hellenized Jewry. Thus, hellenistic elements in non-hellenized Palestinian Judaism can, paradoxically, be seen not as deliberate and conscious adoption of foreign, Greek, ways, but, on the contrary as a sign of belonging to the home-grown culture of the Aramaic East within the Empire as well as outside its borders.[72]

Consequently, in a quest to say something about law behind the documents it is essential to question in all cases what legal context the parties and foremost the scribe wanted the document to conform to, and in what way he expressed this in the documents' use of terminology. Instead of focusing on language in the discussion, internal evidence should be considered to see whether this indicates what law was thought applicable to the document.

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[71] Wasserstein, "Non-hellenised Jews," 124.

[72] Wasserstein, "Non-hellenised Jews," 124–125. This point is especially important for the discussion of marriage documents, see Chapter 6 below.

II. *Conclusions*

It seems inevitable that the use of Greek in legal documents of the Judaean Desert should somehow be related to the advent of the Romans in the area. Where the early documents in the archives are in Aramaic, the later ones are all in Greek. Certain documents that represent copies of original documents kept by the authorities show that while original documents were made up with inclusion of party subscriptions in indigenous languages, the copies were completely in Greek. As Cotton concluded, this obviously points in the direction of a desire, if not a demand, for administrative uniformity.

Nevertheless, it is precisely the fact that copies were completely in Greek but the original documents apparently not, which raises the question of what the use of language meant in a legal context. Was it merely an administrative measure aimed at uniformity, or was there more at issue?

It seems logical to agree with Cotton that Greek would be the medium for legal documents that had to be used in a Roman court context: Aramaic documents would be less accessible and consequently less practical. However, against Cotton's ensuing assumption that Greek made documents valid in a Roman court context, Bagnall emphasized the continuing use of the local languages, suggesting that Aramaic continued to play a part as a language for legal documents. Indeed, one cannot help but wonder what the fate was of the Aramaic documents drawn up after the conquest: if those were meant for Roman courts as well, this invalidates Cotton's argument that Greek was used to make documents valid in a Roman court context.

In this light it is important to assess the possibility of the existence of local courts. Isaac already commented on the lack of evidence in the archives not only of the existence of local courts, but also of Jewish institutions in general. Cotton assumed that there were local courts, perhaps of local arbitration, for which the Aramaic documents were meant. Wasserstein also suggested that a document in Aramaic might not have been enforceable in a Roman court and Safrai argued that parties who drew up a document in Aramaic accepted that it would not be enforceable in a Roman court, which implies subjection to other forms of jurisdiction.

However, there is no ground in the documentary evidence for assuming that documents in Aramaic were not valid in a Roman court context, neither does it necessarily follow that parties in drawing up an Aramaic

deed excluded the possibility of going to a Roman court. Indeed, in P.Yadin 21–22, a Greek contract meant for Roman jurisdiction, Babatha bases her right to sell the object concerned on rights derived from an Aramaic marriage contract. It is hard to envisage that this would be possible if there was indeed a separation of local and Roman jurisdiction over deeds drawn up in Aramaic or Greek respectively and Aramaic deeds could not be adduced in a Roman court context.[73] Likewise, Babatha turns to the Roman governor in her conflict with her deceased husband's first wife, most likely basing her claims (and in any case her position) on her Aramaic marriage deed. Again, this would be difficult if not impossible if Aramaic deeds were subjected (exclusively) to local jurisdiction (arbitration).

It seems more likely that a gradual change to Greek occurred to facilitate the use of the documents in a Roman court context, without ever excluding the use of Aramaic in legal documents completely. As Bagnall observed, there is no reason to believe that the Romans discouraged the use of it. This means that, contrary to Cotton's repeated observations to that point, Greek was not used to make contracts valid in a Roman court context (implying documents in Aramaic would be invalid): Aramaic was obviously valid as a legal language. In this respect it is noteworthy that the original deeds of a census declaration and of a loan that were kept by the authorities c.q. the Roman other party included subscriptions in Aramaic, while the Jewish parties were presented with completely Greek copies. This shows that Cotton's suggestion that Greek was used to make documents valid for deposition with the authorities, as it was in Egypt, is only true to a certain degree: yes, the main text of a document meant for deposition was written in Greek and not in Aramaic, but not the entire document was in Greek. Exactly the original that was kept by the authorities, did contain passages in Aramaic.

Furthermore, Cotton's reference to the situation in Egypt cannot support her argument: although it is true that the use of Greek there should be related to the Roman conquest and the subsequent obligatory registration of legal acts with the authorities, this registration has a completely different effect on the languages used for legal documents than what we find in the Judaean Desert material. As DePauw has shown in an article on the situation in Egypt, there the Roman conquest caused

[73] See details above, 76–78.

the language of the documents prior written in Demotic to change, but only where the subscriptions to a document were concerned: those had to be written in Greek, regardless of the language of the main text of the document. This suggests that the subscriptions were regarded as the essential part of the document that for obligatory registration with the authorities had to be written in the *lingua franca*

DePauw's conclusions for Roman Egypt obviously do not fit the Judaean Desert material. The situation there is the exact opposite: the main text is written in Greek while subscriptions remain to be written in Aramaic. This shows that conclusions to the legal validity of a language cannot be drawn at face value: exactly those parts of the documents that could be considered to be essential for its validity are not written in Greek, but in the local language. This proves that Aramaic continued to play a part as a legally valid language not only in a judicial but also in an administrative context. Consequently, neither the Roman court context nor the possibility of registration with the authorities can be used as conclusive arguments to explain for the change in language used in the documents.

Even if a direct and determinative relationship between language and court/jurisdiction cannot be accepted, it needs to be asked whether there was a relationship between language used and law deemed applicable to the acts. To put it differently: would a division between Aramaic and Greek documents be acceptable on the basis of language as indication of the applicable law?

For bilingual family archives from Hellenistic Egypt, Pestman argued that choice of language directly determined choice of law: Demotic documents draw on Egyptian law, while Greek ones draw on Greek Hellenistic law. According to Pestman family-related documents, mainly marriage and divorce documents, were usually drawn up in Demotic, because of the favourable position of the woman under Egyptian law. What these documents seem to bear out is that people could make a conscious choice to use one of the two available languages, not only to make the document usable in a certain context, but also to put it in a particular legal framework.

This raises the question for the Judaean Desert material of whether such a conscious choice can be considered to have played a part there as well, and whether this means that the language of a document determines something about the applicable law. In that case a division between Aramaic and Greek documents would still be relevant, not so much as

in determining the jurisdiction to which the document is subjected, but the law that is deemed applicable to it.

Isaac stated that the marriage contract of P.Yadin 18 was put in a framework of Greek law because under this law the position of the woman was more favourable. This seems to amount to the same situation as in the Egyptian material. However, Isaac drew his conclusion apparently not solely from the fact that the document was written in Greek but also from an internal reference to Greek law. If that reference had not been there, his conclusion might not have been the same.

Wasserstein argued to the same document that it was a 'safeguard for the pecuniary interests of the bride, enforceable in a non Jewish secular court,' assuming that another, Aramaic, deed had been drawn up that would not have been enforceable in a non-Jewish secular court. This latter assumption indicates that different documents could play different parts, or perhaps even establish different legal ties. Attractive as the suggestion may seem, it is difficult to accept that a Jewish marriage contract would not be enforceable in a Roman court context. As argued above, claims in Greek contracts were based on rights granted in Aramaic ones, implying that the Aramaic contracts would also have been valid in the Roman court context. If an Aramaic contract like Babatha's marriage contract of P.Yadin 10 would have been valid in a Roman court context just as well as Shelamzion's Greek contract of P.Yadin 18, there would be no need for two separate contracts, an Aramaic one and a Greek one, as suggested by Wasserstein. On the other hand, if an Aramaic contract would have been valid just as well as a Greek one, the question arises what this implies for the law behind the documents: if language is not determinative for the law applicable to a document, what is?

It seems inevitable to let go of any *a priori* divisions between Greek and Aramaic documents within the archive, any assumptions as to the (in)validity of Aramaic in Roman courts and any assumptions about direct links between language and court and language and law, as suggested by the situation in Egypt. Since the situation in Egypt with regard to languages used in legal documents clearly deviates from that in the Judaean Desert material, as shown in the case of the subscriptions, caution is wanted in easily accepting similarities at other points.[74] Rather,

[74] See Chapter 5, 341–342, below, where I will discuss guardianship of a minor in Babatha's archive and in the archive of the Egyptian Aurelia Sarapias, to show that what appears to constitute a similar situation in reality reveals a striking difference in legal practice.

before any conclusions can be drawn as to the exact nature of the change from Aramaic to Greek and its legal implications, the relationship between language and law requires closer scrutiny, contrasting the *external* evidence, the language of a document, with the *internal* evidence, the direct references to law present in that document.

CHAPTER TWO

LANGUAGE AND REFERENCES TO LAW

This chapter investigates in what way papyri refer to the applicable law and whether the manner of referring to law changes after the Roman conquest. Each papyrus (or combination of papyri) under discussion presents a case study of the references to law in (a) document(s) of a certain type (for example sale, receipt, loan, deposit). The majority of papyri discussed here are not covered in the case studies of part II, though some overlap is inevitable. Conclusions will be presented in a descriptive section als well as in table form for quick reference.

I. *Case Studies*

P.Yadin 2 and 3: a Jew amongst Nabataeans

P.Yadin 2 and 3 are two contracts of sale, both in Nabataean Aramaic. They concern the same property that is apparently sold twice by the same vendor but to different purchasers.[1] Despite a few divergences the general structure of the documents is the same and this has been taken to indicate that the texts were written according to a standard model for an act of sale: '… they both record the purchase of the same type of property, a date palm plantation, with the result that the same, standard documentary model was utilized in both instances.'[2] The evidence of P.Yadin 2 and 3 on its own would be a bit thin to justify such an assumption.

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[1] How this should be interpreted from a legal point of view is not clear. One is led to believe the first sale was cancelled. But the papyrus does not show any signs of cancellation; see *Documents II*, 202, where it is explained that one would expect that the papyrus was 'marked or defaced in some way to indicate that it was invalid and could not be used. An actual instance of this practice is provided by XḤev/Se 69, a cancelled Jewish marriage contract, written in Greek and dated 130 CE (Cotton 1997a: 250). After the dissolution of the marriage by death or divorce, that papyrus was marked by "pen strokes crossing diagonally, as well as over the signatures on the back." No such markings appear in P.Yadin 2. There is also the consideration that invalid documents were often discarded. Why attempt to preserve them?'

[2] *Documents II*, 201.

Since the documents concern the same sale (same vendor, same object) and are written by the same scribe, one could assume that P.Yadin 3 is a slightly adjusted version of P.Yadin 2. Consequently, both documents need not necessarily represent two examples of the same *standard* model for an act of sale. However, another text that has been adduced, XḤev/Se 2 nab (a Nabataean act of sale) that bears great resemblance to P.Yadin 2 and 3,[3] lends credit to the assumption that a standard model for acts of sale did exist. Indeed, it has been remarked that this document 'exhibits only a very few minor variations in formulation, fewer than are observable between P.Yadin 2 and 3, or, at points, even between the UPPER and LOWER VERSIONS of each of the same!'[4]

The vendor, a woman named 'Abi-'adan, sells a 'plantation of date palms,' first to a Nabataean named Archelaus, and then to a Jew named Shim'on, most likely the father of Babatha.[5] Since the vendor is in both cases a Nabataean, and the purchaser in the first instance as well, it is not odd that the documents were written in Nabataean Aramaic.[6] In the edition this is remarked on as:

> It is of great interest, nonetheless, that a Jew purchased property located in the Nabatean Kingdom from a Nabatean owner, under the provisions of Nabatean law, and that the deed of sale was written and witnessed by Nabateans.[7]

While 'property located in the Nabatean Kingdom,' 'from a Nabatean owner' and 'written and witnessed by Nabateans' are clearly conclusions derived from the facts as presented in the text, this cannot be said to be the case for 'under the provisions of Nabatean law.' In fact, the editors do not explain what prompted this conclusion. It seems to be related

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[3] *Documents II*, 203–204. For the text concerned see Ada Yardeni, *Textbook of Aramaic, Hebrew and Nabataean Texts from the Judaean Desert. A: The Documents* (Jerusalem: Ben-Zion Dinur Institute, 2000), 290–292.

[4] *Documents II*, 204.

[5] See *Documents II*, 201: 'apparently Babatha's father,' and 242, where it is said that 'since the name of the father of the present Shim'on is missing in both versions of P.Yadin 3 it is not possible to identify him with certainty.' I agree with the editors that it is likely it was Babatha's father because of the inclusion of the document in the archive.

For the rendering of the name of Babatha's father as Shim'on, while it was earlier rendered as Simeon, see 9 n. 12 above.

[6] The guarantor involved in P.Yadin 3, the son of LTY, mentioned in lines 16ff./43ff., was probably also a Nabataean.

[7] *Documents II*, 242.

with the use of Nabataean Aramaic in the text.[8] Nevertheless, our having P.Yadin 2 as well, is exactly what can show that the contract was not necessarily, and in any case not completely, drawn up under the provisions of Nabataean law. I refer to lines 3–4/22 of P.Yadin 2 and 3–4/24–25 of P.Yadin 3.

In these lines the watering periods belonging to the orchard are designated. In the first instance, P.Yadin 2—the sale to a Nabataean, the watering periods are not specified but merely designated as 'as is proper.'[9] In P.Yadin 3 on the other hand, we find that the watering periods are specified: 'half of one hour on the first day of the week.' This kind of specification of a period for the watering of the orchard with a day of the week seems to have been based on the Jewish regulation regarding the Sabbath: a period is specified to avoid any possible irrigation on the Sabbath.[10]

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[8] Compare with Cotton's observation that 'In Arabia there had never been Jewish courts of law as the exclusive use of Nabataean in the regal period demonstrates.' ("The Languages," 230). Obviously, the argument is here that use of Nabataean indicates subjection to Nabataean law. For my reservations on this point see 74 above.

[9] Lines 3–4/22 (first reference to upper version, second to lower version): כדי חזא, a phrase apparently referring to general custom: see lines 7–8/28 where it is used to refer to inclusion of everything 'small or large' that is apparently by general custom taken to be part of a purchase. This general custom in the case of the inclusion of items is referred to in both the deal with Archelaus and Shim'on, as there was no need to diverge from the general idea.

[10] Mentioned in *Documents II*, 6–7, with reference to Katzoff and Schreiber ("Week and Sabbath in Judaean Desert Documents," *SCI* 17 [1998]: 102–114), who 'devote considerable attention to a convention found in three Jewish documents (P.Yadin 7: Aramaic, P.Yadin 3: Nabataean-Aramaic; XHev/Se 64: Greek) according to which times for irrigation were assigned by specific days of the week ("on the first day of the week, on the fourth day of the week, on the fifth day of the week"), not just week by week as is the case in other documents. Katzoff and Schreiber maintain that this convention is unprecedented and represents an attempt to avoid irrigation activity on the Sabbath by distancing it from that day.'

To avoid misunderstanding, it should be kept in mind that Katzoff and Schreiber do not speak of designation of a specific time for irrigation as such, which can also be found in other contracts and is therefore not a specific feature of Jewish documents (Katzoff and Schreiber refer to Cotton's list of parallels for clauses on water rights in *DJD XXVII*, 215–216), but of designation of a time of irrigation by days of the week: 'Nothing of this sort, division of water by days of the week, has been found elsewhere in antiquity, to our knowledge.' Therefore, it seems that specifying the water rights with a day of the week is a feature specific for Jewish documents. What is most important for my argument here is that exactly the availability of P.Yadin 2 and 3 shows that the change of buyer caused the designation of water rights to change too. As the specification is also found in two other contracts by Jews from the archives I believe it is safe to relate this feature to the Jewishness of the buyer and conclude that his Jewishness influenced the legal act of P.Yadin 3 to some extent. Consequently, it is not correct to state that P.Yadin 3 testifies to a subjection of Jews to Nabataean law.

The phrase, used for designation of the watering rights in P.Yadin 2, 'as is proper,' is used again in lines 7–8/28 of P.Yadin 2 and 8/31 of P.Yadin 3, where it refers to inclusion of 'everything whatsoever small and large as is proper for him [i.e. the purchaser] regarding these purchases.'[11] Here the phrase clearly denotes that the sale will encompass everything that is normally regarded as being part of the sale, i.e. to be sold together with the main object. It is not specified to which legal system (what law) this phrase refers. Consequently, the phrase 'as is proper' refers to a known legal context, a legal framework for the parties in both cases. It is obvious that normally a reference to such a known framework would be sufficient. That it is not in the case of the watering rights shows that it was possible to deviate from the general framework by referring to a specific rule or agreement that then replaced the reference to the general framework. Following this line of argument, it does not even matter much what kind of law was behind the general legal framework: whether we take this to be specific Nabataean law or more generally a common oriental tradition, or perhaps even the common Aramaic tradition. In any case, the specific designation of the watering periods in the sale to the Jewish party provides clear proof that it was possible to change details of a deal to fit the particular demands of one of the parties, and that such a change was marked by a divergence from the normal reference to 'as is proper,' i.e. to general accepted custom.

Consequently, it does not seem to be 'of great interest' that Shim'on purchased the property under the provisions of Nabataean law, but just the opposite: that he got to change certain details of the contract related to his own legal background. This means that the fact that the document is written in Nabataean Aramaic does not necessarily mean that Nabataean law applied to it (in all its details) or that one has to take references to be references to the Nabataean legal system. In this light it is telling that the specification of water rights by days of the week occurs in three documents by Jews *in three different languages*: Nabataean-Aramaic, Jewish Aramaic and Greek.[12] This indicates that it is indeed not the language here, but the reference to law (or custom) that is determinative of what law was applicable to the legal act. Even though P.Yadin 2 and 3 were written against the background of Nabataean law, the fact

[11] See n. 9 above.
[12] See *Documents II*, 6–7.

that the purchaser in P.Yadin 3 was a Jew did influence the contents of the contract.

XḤev/Se 2 nab, referred to above, has been identified as part of the Salome Komaise archive.[13] The vendor is a woman named Salome, in line 7 the name Menachem is read. The mother of Salome Komaise, also called Salome, is designated as daughter of Menachem in P.Hever 63 and 64. This means that the document is an act of sale with Salome Komaise's mother as vendor. Contrary to the upper version, the lower version is well preserved, but it is damaged in the opening lines. Therefore, we do not know in what way the watering rights were assigned, with 'as is proper' or with a specific designation. Since the purchaser was a Nabataean we could assume that specific designation of a day of the week and time would not have been necessary and consequently, would not have been found in this document.

P.Yadin 6: Jews conducting business in Nabataean

The agreement of P.Yadin 6 is made between two Jews: the owner of the land that has to be worked, Yehuda' the son of 'El'azar, second husband of Babatha, and one Yochana' son of Meshullam.[14] The document is in Nabataean Aramaic.

> Recourse to a Nabataean document, produced in the distinctive Nabataean cursive, in a case where both parties are Jews (and both witnesses as well), suggests the high degree of business interaction characteristic of the Southern Dead Sea region at the time.[15]

This remark linking language with business suggests that the use of Nabataean Aramaic is a sign of a more general adjustment to a Nabataean climate, perhaps to a Nabataean legal background. However, above it was shown that in a document in Nabataean Aramaic, with strong references to Nabataean context, a specific Jewish feature (concerning the water rights) could be incorporated. This means that it is not self-evident that a document in Nabataean Aramaic draws on a Nabataean

[13] See Eshel, "Another Document from the Archive of Salome Komaise," 169–171. *Documents II*, 203–204, discusses this document and its great resemblance to P.Yadin 2–3, without suggesting a possible relationship with the Salome Komaise archive (even though the name of the woman and of her father are mentioned).

[14] For the rendering of names (Yehuda' here versus Judah elsewhere) see 9, n. 12 above.

[15] *Documents II*, 257.

legal context, or even Nabataean law.[16] Neither is it self-evident that documents in Nabataean Aramaic cannot feature aspects from Jewish law. P.Yadin 6 is a good example of this.

It has been argued for Nabataean Aramaic in general that it can be recognized and distinguished from, for instance, Jewish Aramaic by its Arabisms, words that can be better related to Arabic than to Aramaic or Hebrew.[17] This means that the language was influenced by elements other than, for example, Jewish Aramaic. Since P.Yadin 6 is written in Nabataean Aramaic, it would be expected to find Arabisms there. I will discuss the Arabisms mentioned in the commentary of the edition commenting on their meaning for our understanding of the text in its supposed legal context.[18]

The first Arabism mentioned, lines 4–5, עללה, is a word that can also be found in P.Yadin 7, a text in Jewish Aramaic.[19] This means that the use of this Arabism here is not particular for Nabataean Aramaic as contrasted with Jewish Aramaic, and that it does not necessarily imply that a Nabataean legal context is referred to.

In lines 6–7, which give the 'duties and compensation of the tenant-manager,' some important words can be linked with an Aramaic-Hebrew background. The indication of assumption of debt or obligation, for instance, עלי, 'shall be my obligation, shall be on me,' is said to be 'a very

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[16] Thus *contra* Cotton, who wrote: 'In Arabia there had never been Jewish courts of law as the exclusive use of Nabataean in the regal period demonstrates' (Cotton, "The Languages," 230), implying that the exclusive use of Nabataean in legal acts testifies to sole Nabataean jurisdiction and consequently sole application of Nabataean law. However, if Nabataean legal acts can refer to another legal context, this direct connection cannot be maintained. While all acts may have been subjected to Nabataean jurisdiction, this does not mean that another legal system could not be taken into account, as P.Yadin 3 shows. I will argue below, that likewise all acts drawn up under Roman rule were subjected to Roman jurisdiction (hence also the Aramaic ones) while the contents of the legal act determined the applicable law. The marked difference between references to law used under Nabataean rule and under Roman rule will be discussed in Chapter 3.

[17] See for instance *Documents II*, 28, discussing 'the various forms of Arabic words occurring in the Nabataean Aramaic papyri of the Yadin collection' and 27, speaking about 'the same Arabic words and formulae that occur in P.Yadin 1, 2–3, 4, 6 and 9.' I note that here a comparison is made between P.Yadin 7 (which is in Jewish Aramaic) and the said documents. This means that the use of 'Arabic words and formulae' was apparently not restricted to Nabataean Aramaic.

[18] For this part of my study and comparable parts (discussing linguistic features of the documents) I am greatly indebted to the commentary in *Documents II*, which discusses the background of words and provides references for the various instances. Without such a treatise my work would have been much more difficult.

[19] *Documents II*, 264.

ancient West Semitic usage that persists in Hebrew, Aramaic and Phoenician-Punic.'[20] There is no mention of a link with Arabic.

The verbal root for 'to labor,' '*-m-l* (lines 6–7) is said to be 'common to Aramaic, Hebrew, and Arabic.' Therefore, the link with Arabic is not exclusive, although the example given there comes close to our text here.[21]

The word תמן found in the same lines could represent a common Arabic term but 'it is decidedly possible, however, that it is an Aramaic fraction meaning "one-eighth." '[22] This means that the link with Arabic is, again, not exclusive.

'The duties of the manager' as stated in lines 9–10 contain a couple of words which are well attested in early West Semitic sources or in Jewish and Christian Aramaic sources. The same applies to words found in lines 11–13 and 14–15.[23] In my opinion, all of this does not seem to make a convincing case for the strong Arabic flavor of the document. It is precisely those words that refer to what the tenant-manager has to do that seem to indicate a link with Aramaic-Hebrew, rather than with Arabic. Consequently, the fact that the document of two Jewish parties was written in Nabataean Aramaic should not be overrated. It seems that the flavour of the document in its choice of words is more Aramaic-Jewish than Nabataean-Arabic after all.

When we consider what the duties of the tenant manager include we see that he is supposed to work the land, providing both the work, that is, his labour, and the seed. In return he is to receive a share. Because the text is damaged at both points where the compensation is mentioned it is uncertain what it was: a share in the crop or in the price of the crop. The editors think the first option is more likely since there is no mention of payment in currency.[24] The activities of the tenant manager are specified as making improvements and keeping the land fertile, and more generally working and tilling it. In the latter instance the verb 'to till' is

[20] *Documents II*, 264, for references.
[21] See *Documents II*, 264.
[22] *Documents II*, 264.
[23] See *Documents II*, 265–266.
[24] The word חלק which is used could denote a section of the property as well (see *Documents II*, 257). Whether this meant that the tenant manager was really entitled to part of the land or to its produce is hard to tell. As referred to above, the word to designate the compensation, תמן, can be translated with 'price' or with 'one eighth.' In the latter instance the designation would be concrete: one eighth of the section or the price/yield of the field.

specified by כחליקת 'as is customary.' This refers to local custom, to custom accepted by all parties. Therefore, the question here would be what custom the parties can be expected to refer to. As the contract is written in Nabataean, it is suggested that the parties refer to Nabataean law. However, the words used seem to bear more of an Aramaic-Jewish than a Nabataean-Arabic flavour. Therefore, it could be debated whether the contract was not drawn up according to the regulations of Jewish law. The contents of the arrangements as outlined above do not go against this: in the Mishnah, *m. B. Meṣi'a* 9:1–10, we find arrangements mentioned for leasing land to one's fellow. The situation described there seems to be that of a person working another person's land and giving part of the produce to the owner. The arrangement in the present papyrus is that the worker will have (receive) one-eighth of the produce for himself, but this means that the owner will have seven-eighths. Thus, there is no essential difference between the situation described in *m. B. Meṣi'a* 9:1–10 and the situation found in this papyrus.

It is important to note in this respect that the material collected in *m. B. Meṣi'a* all seems to be relatively old (i.e. stemming from rabbis who figured early after the destruction of the temple) and thus close to Babatha's own lifetime.[25] The passages concerned in the present discussion of P.Yadin 6 are attributed to Simeon b. Gamaliel, a rabbi who was active in the wake of the Bar Kochba revolt. Consequently, the material can very well be expected to present a faithful picture of actual (and common) practice in Babatha's lifetime.

In the Mishnaic passage it is made clear that what is agreed upon between the parties is binding (such as the product the party is supposed to grow on the field, see *m. B. Meṣi'a* 9:8). Furthermore, it becomes clear that the person who had to work the field would benefit from specific arrangements. For example, *m. B. Meṣi'a* 9:2 explains that damage following the lack of an element necessary for the produce (for example water for irrigation) is deductible from what the lessee has to bring in, if he has specified in the contract that the result of his efforts depend on the presence of this element. Consequently, a contract can be expected

[25] See Hayim Lapin, *Early Rabbinic Civil Law and the Social History of Roman Galilee. A Study of Mishnah Tractate Baba' Meṣi'a* (Atlanta, Ga.: Scholars Press, 1995), 98–117, where he discusses the problem of attributions. At 114 a link is made between passages that were presumably used as a source for contracts and attributors, i.e. specific rabbis. The results found show that certain early rabbis were important for the statements on contracts in *m. B. Meṣi'a*.

to be specific about the work the worker will have to do and the result that is expected of him. This is exactly what we find in the papyrus text.

The *m. B. Meṣi'a* tractate is important for our understanding of the papyrus text in another respect, because it is suggested in *m. B. Meṣi'a* 9:1 that for parts of the arrangements concerning land tenancy *local custom* was taken into account. The method of reaping the produce is discussed there. Local custom is also mentioned in *m. B. Meṣi'a* 7:1, where it is said that workers in an area 'where it is customary not to rise early or work late' cannot be forced to do so. This prevents employers from changing the working conditions of their workers according to their whims. The passage specifically says that 'all follows the custom of the province.'[26] This reference to local custom can also be found in *m. B. Meṣi'a* 7:8, where it is said that 'watchers of produce eat according to local practice, but not according to the Torah.' This means that here the rules of local practice take precedence over the rules of the Torah: even if local practice would not be in accordance with the Torah it would still be followed.[27] However, because this rule is incorporated into the corpus of rules in the Mishnah, the reference to local custom is itself a sign of application of Jewish law.

The rule that in certain cases local practice is determinative is incorporated in a corpus of Jewish law and therefore it is itself a rule of Jewish (substantive, positive) law. The same can be found in modern-day international private law, where the law of country A can determine that in specific cases the law of country B will be applied. The rule that says so is itself part of the substantive (positive) law of country A.

In this latter instance of *m. B. Meṣi'a* 7:8 the word used to refer to local practice is not מנהג as seen before, but מחלקת the Hebrew equivalent of כחליקת in the Aramaic texts of P.Yadin 2–3 and 6. This means that the phrase with כחליקת can be taken to introduce a reference to a specific custom. In *m. B. Meṣi'a* 7:8 this is 'local practice' or literally 'the practice of the province.' In the specific case of P.Yadin 6, there is also a phrase following כחליקת that could further specify the legal context of the document—the law behind it. As mentioned above, כחליקת in

[26] This remark is repeated in the closing lines of *m. B. Meṣi'a* 7:1, where the remark is attributed to Simeon b. Gamaliel just mentioned.

[27] This presents us with an example of a conflict rule in the Mishnah. The appearance of such a rule is extraordinary, as opinions have been extremely divided about the question to what extent in the ancient world conflict of law was dealt with in any consistent fashion (see 26–30 above). The evidence from the Babatha archive indicating that conflict of law was known and dealt with prompts closer investigation of a wider group of papyri from the ancient East.

general refers to a custom that is accepted by all parties. In the present instance, however, there is not merely a reference to a custom, כחליקת as such, but there is a reference to what this custom encompasses in this specific instance: 'as is customary for working…' The line is damaged at that point, but the restoration made by the editors is telling. They read the next word as a verb, a second person singular of the verb to till: 'and you shall till.'[28] Consequently the line should be read as 'according to the customary manner of working "and you shall till."' There seems to be a reference to a specific rule that was laid down for tilling land. A link with the Hebrew Bible immediately comes to mind as the commandments there are formulated in this way: 'you shall' or 'you shall not.' The Decalogue is of course the best-known example.[29]

In Deut 22:10 we find the negative commandment: 'thou shalt not plough with an ox and an ass together.' The verb presents us with the Hebrew parallel of the Aramaic form found in P.Yadin 6.[30] There might in fact be a reference to a specific rule stemming from a Jewish tradition: the land tenant promises to work the land in accordance to the customary way of working as in 'thou shalt till…' Because the passage is damaged the exact text of the rule that might be referred to cannot be determined, but I think the context makes it likely that a specific rule was intended. There are two reasons for this.

First of all, the reference to a specific rule is the only explanation for the occurrence of a verb form in second person singular, since the tenant manager is addressing the owner of the land and should thus refer to the work that needs to be done in first person singular 'I will.' This is exactly what happens throughout the text, except for this instance. The verb form immediately following כחליקת can in my opinion only refer to a specific rule of law stemming from the Jewish tradition. The assumption that there is a link with a Jewish legal tradition is supported by the fact that all words used for the agricultural activities are Aramaic, related to Hebrew, and not related to Arabic, as one would expect in a Nabataean Aramaic papyrus. I have commented on this above.

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[28] The word is heavily damaged: 'the bottom of most letters missing in the hole' (*Documents II*, 263). However, the restoration as ותארס makes sense in the context of the papyrus text where the root *'-r-s* recurs (see *Documents II*, 265).

[29] See Exod 20:1–17.

[30] The Aramaic is described as harking back 'to the Akkadian verb erēšu, a cognate of Hebrew ḥ-r-š' (see *Documents II*, 265 for the relationship between the Aramaic, Akkadian and Hebrew variant).

Further support for the assumption that the text indeed draws upon local Jewish law can be found in lines 12–13. The editors explain that the meaning of these lines is difficult to grasp. This is mainly because of the combination of verbs that suggest either positive, desired actions or negative, forbidden actions. Consequently we find in line 12 'uprooting' and 'detaching' followed by a negated form of 'reaping.' The problem for the editors is that 'reaping' is in itself a positive activity, which should therefore not be forbidden. Why is the tenant expected to uproot and detach (which in the editors' opinion implies destruction of plants) and not reap (which in their opinion implies the positive act of harvesting)? The commentary tries to solve the problem by relating the verb 'reaping' to 'a destructive act, one to be avoided rather than the productive act of reaping.' *q-ṣ-r* should then be understood to refer to a negative way of reaping, i.e. 'cutting down.' Alternatively, there could be a link with Arabic *qaṣara* meaning 'desisting of' which would then logically precede the following ומזק 'and not causing damage.'[31] Nevertheless, the meaning of *q-ṣ-r* as 'to reap' in a positive sense (as a required duty) is the first expected, and also the one attested in the Hebrew Bible in combination with the verb *ḥ-r-š* thus yielding the combination of ploughing and harvesting.[32] Such a combination would be quite logical here. Therefore, the meaning of these verbs should be looked for in another direction.

I mentioned above that the Mishnah gives several instances where the obligations of the tenant farmer are linked with local custom, i.e. in which local custom is said to determine what the tenant farmer should or should not do. The example given above from *m. B. Meṣi'a* 9:1 refers to the way of reaping produce. In this passage it is said that local custom determines in what way produce is harvested. It can apparently be done by either cutting off (*q-ṣ-r*), uprooting (*'-q-r*) or ploughing (*ḥ-r-š*). In this latter instance, ploughing is used as a method of immediately working the land after the harvest has been taken from it, i.e. ploughing should be understood as 'ploughing afterwards' and not as a method of reaping the produce in itself.[33] This means that dependent on local

[31] See *Documents II*, 266.

[32] See 1 Sam 8:12, Job 4:8. In the latter text the words are used in a figurative meaning which strengthens the assumption that that they are a set combination (to plough *ḥ-r-š* [—to sow]—to harvest *q-ṣ-r*).

[33] See the translation 'to plow afterwards, let him plow' (Lapin, *Early Rabbinic Civil Law*, 299) and the explanatory additions in the translation: '[If the custom is] to plough after [reaping and so to turn the soil], he must plough.' (Jacob Neusner, *The Mishnah* [New Haven: Yale University Press, 1988]).

custom, two ways of harvesting could be used, denoted by the verbs *ʿ-q-r* and *q-ṣ-r*. It would therefore not be odd to have a way chosen in the contract. The tenant farmer could then say that he would not harvest by this or that method, but rather using such and such a method. This is exactly what is done in lines 12 and 13. The verb used for the required act is *ʿ-q-r*, strengthened by the verb *t-l-š*, which renders the same meaning: detaching the whole of the plant from the earth, thus together with its roots. The other verb from *m. B. Meṣiʿa* 9:1, *q-ṣ-r*, cutting off, is used for the unrequired act: the tenant is not supposed to reap the produce by cutting it off. It appears that a choice is made between two ways of harvesting, either of the entire plant with its roots, or just part of it (by cutting it off above the ground). By understanding the verbs in this way it is logical why the verb that normally denotes reaping (in a positive sense) is here negated: this way of harvesting is not acceptable in the present case. Consequently, these lines can be seen as offering further information on what local custom is to be applicable to the arrangements.

I cannot explain the exact meaning of these lines in another way. If we do not take the verbs to refer to methods of reaping that are rejected and accepted, but as acts that are forbidden or permitted it is difficult to understand how they are to be related to the produce: why is the positive act of reaping forbidden, while acts with a negative sense are allowed or required? The only explanation I could think of is to understand different objects with the verbs. There are two verbs denoting the uprooting and detaching of something, these activities are desired. The following verbs denote 'reaping' and 'doing damage to (a crop)' and these are forbidden. The only way to comprehend the meaning of the combination is to take the first two verbs as referring to weeds: it is desirable that the tenant manager uproots and detaches weeds. However, while doing so he is not supposed to 'reap,' that is, to take out the grain, and not do damage to the crop. We can thus understand why two verbs with the negative sense of destroying what grows are desired while a verb with a positive sense is forbidden. For a connection between the uprooting of weeds and the reaping of grain I refer to the New Testament parable of the land owner who found his land had been infected with weeds by one of his enemies (Matt 13:24–30). His slaves wanted to take the weeds out, but the owner forbade this stating they might take the grain out in the process. Both weeds and grain were supposed to grow together and were to be separated in the day of harvest. This latter situation is clearly not meant by the land owner here: he does want the weeds to be taken out. But the tenant manager has to ensure he does not take the grain out as well. The beginning of line 12 is damaged; I am not sure another object (i.e. weeds) can be expected to have been introduced here. Therefore, I think it is more logical to look for an explanation that fits the legible text. This explanation I find, as explained above, in the different methods of harvesting, that would be an example of a choice of custom to apply to this specific contract.

Specific detailing of the arrangements according to known rules (local custom) could also be the reason for the recurrence of the mention of the reward for the tenant farmer (תמן). This reward was already mentioned in line 7 and the repetition here in line 11 is a bit unexpected and difficult to account for. If we accept, however, that in line 10 a reference

is made to a specific rule of local Jewish law, we can view lines 11–13 (and perhaps also the following lines) as referring to details of that specific custom. Thus we could understand: according to the customary manner of working as in "you shall till…" where the share is one eighth and where such and such a way of harvesting is determined. The following remarks about not causing damage and not leaving the land untended to in winter can also be linked with this as the Mishnah gives rules for liability in case of damage.[34]

Following the above reasoning, the papyrus is an example of the applicability of Jewish law on a tenancy agreement, even though this was made up in Nabataean Aramaic. This proves that language is not decisive for the law behind the documents. As shown in other instances above, one has to look at internal evidence (references to law) to determine the applicable law for each individual papyrus.

The end of line 14 presents the beginning of a conditional clause, to be continued in line 15. Line 16 is possibly to be read in conjunction, giving some sort of liability clause. If understood this way, it is difficult to see though, what the tenant manager promises. Comparison with the liability clause in other contracts suggests that the tenant manager here states that the other can make no claims against him, 'exclusive of what I have paid (or what I have pledged).'[35] This leaves us with the question

[34] See, for example, *m. B. Meṣi'a* 9:6 about damage done by plagues.

In his list 'Die talmudischen Zitate aus Privaturkunden' Beyer mentions *m. B. Meṣi'a* 9:3 under the heading 'Pachtvertrag' (*ATTM I*, 327). As mentioned above (8 n. 9, Beyer does not indicate to what document(s) he refers. P.Yadin 6 was in any case not incorporated in volume I; in a short introduction to the Babatha archive it is styled 'Kaufvertrag', not 'Pachtvertrag' [compare *ATTM I*, 319 with *ATTM II*, 216]). If the reference to *m. B. Meṣi'a* 9:3 is taken to cover the clause in P.Yadin 6:14, about tending to the land in the winter season, the parallel is hard to maintain. One can hardly speak of a quote when there is so little literal correspondence between the two passages, and one can indeed wonder whether the arrangement of P.Yadin 6 sees to the same thing as the arrangement in *m. B. Meṣi'a* 9:3. In the latter instance, the worker declares that even if he does not tend to the land, he leaves it fallow, he will be liable for the amount of crop agreed on (i.e. he cannot detract a certain amount from what he has to deliver). This suggests that the worker can decide to leave part of the land fallow for a season, or perhaps even the entire parcel for a season, while he will still be liable to deliver the amount of the crop that he has agreed upon with the owner of the land. What we find in P.Yadin 6:14, suggests that the worker will have to tend to the land, even in the winter season, that is, the season in which there is no agricultural activity. The contract thus emphasizes that the obligation to work the land is an obligation undertaken around the year, for all seasons.

[35] *Documents II*, 267.

of what the tenant could have paid (a deposit/security). The reference to what the tenant pledged might make more sense if we understand this to mean that the tenant is only liable for what he pledged that he would do. If he does not do what he promised (he does damage the crop, he does neglect the land in the winter season) he is liable. However, if damage occurs through other circumstances (the weather, external causes), he is not liable. This would turn the liability into a limited liability. This fits well with the picture the Mishnah paints of specific determination of the obligations of the tenant farmer. The example of *m. B. Meṣi'a* 9:2 was mentioned above, where the tenant farmer is not liable for the damage done if irrigation fails, if the contract specifies that the deal was made dependent on availability of irrigation.[36]

m. B. Meṣi'a 9:6 determines that in case of disaster (locusts, blight) the tenant farmer is not liable should the disaster have struck the entire province, but he is if the disaster only struck his specific parcel. The last line determines that the tenant farmer can never deduct damage due to natural causes from his payment if the contract was made for money. Consequently, if the tenant farmer is paid for his efforts, he cannot escape liability even if the entire region suffered the same as his parcel of land. In the present case, the contract is based on payment in kind: the tenant farmer will receive part of the produce. Therefore, the last rule stated in *m. B. Meṣi'a* 9:6 does not seem to apply. This means that liability for damage due to natural causes (insects, weather/climate) was indeed limited.[37]

If we take line 16 to mean 'exclusive of what I have paid,' this could mean that the tenant farmer has paid for the lease of the land, and thus that the final line of *m. B. Meṣi'a* 9:6 is applicable. The reference to 'what I have paid' would then determine that liability for damage by natural causes could not be excluded. However, this seems to go counter to the meaning of the lines which clearly read that liability is limited, either to the amount of money paid by the tenant farmer or by the obligations he has undertaken. We could then understand the text as follows:

In the first situation, where we read 'what I have paid' we can regard payment for the lease and liability as being based *on the law*, which is unlimited even for damage through natural causes. This liability is then limited *in the contract* by determining that liability will not go beyond what the tenant farmer paid for the lease. Taken this way, the text

[36] There is a difference made between the contractual clause 'lease me the field' and 'lease me this field dependent on irrigation.' In the latter case, the tenant farmer expressed his dependence on an external factor and he cannot be blamed for the lack of produce when this external factor is absent.

[37] See Lapin, *Early Rabbinic Civil Law*, 301, notes on 9:6, where he says that 'in the last clause of this *Mishna*, [the Hebrew term denoting payment] cannot mean payment in kind.'

could show that Jewish law indeed applied to the contract and that the consequences of the general rules (as found in *m. B. Meṣi'a* 9:6) could be mitigated by making a specific arrangement (limitation of liability to the amount of money paid).

In the second situation where we read 'what I have pledged,' the clause limits liability by referring to the obligations the worker has specifically undertaken. He cannot be liable for what goes beyond that. In this case, the terms of the contract determine for what results of his work or his negligence the worker will be liable. This fits in with Mishnaic practice, which shows as we have seen in *m. B. Meṣi'a* 9:2 that liability could be excluded by making specific arrangements in the contract.

In general we can say that *m. B. Meṣi'a* 9:1–10 makes it clear that specific arrangements in the contract would determine what the parties could expect from each other and that in case arrangements were not made, local custom or practice would prevail.[38]

P.Yadin 8 and 9: different yet the same[39]

It is not obvious to relate P.Yadin 8 and 9 with each other as they are dealt with in separate sections in their edition and called by different

[38] Compare Lapin, *Early Rabbinic Civil Law*, 208, who says that 'workers typically take a customary contract,' which means an unwritten contract of which the details are dictated by local custom/practice. He refers to the example in the New Testament (Matt 20:1–16) where a man hires certain laborers for a specific amount of money and others for what will be just (δικαίον; vs. 4) to give them. The response of the first workers when they notice that the latter ones receive the same shows that they had expected them to receive less. Thus we can assume that a worker would receive a certain amount of money for a whole day's work, while he would receive a part of that for working fewer hours. Lapin remarks that the parable wants to show that it is 'God alone who decides what is just recompense' while it is thus not clear to what extent 'laborers were in practice dependent on unilateral decisions by their employers.' I think that the fact that the first workers object to the behaviour of the landlord seems to indicate that it was not normal to act that way. Thus we can indeed assume that a worker received a certain amount of money for a whole day's work and that a worker doing less expected to receive a portion of that amount, reasonable (δικαίον) compared with what a worker got for the entire day.

Of course, this case deals with day laborers and it thus differs from ours. Unwritten contracts based on convention would be practical, especially for day laborers. In the case of P.Yadin 6, an arrangement is made for the period of three successive years, consequently, it is to be expected that a written contract was made. Nevertheless, we see that custom plays an important part as it is referred to, to determine certain aspects of the arrangements.

[39] The discussion of P.Yadin 8 and 9 as presented here follows my original interpretation of these documents based on my research completed in February 2005: P.Yadin 8 and 9 present us with exactly the same kind of document, issued by the same scribe in two different languages, but in both cases confirmed by an official with a Greek signature (for this latter feature see discussion in small print below, 114–115). During editing of the present manuscript, in October 2006, an article by Hillel Newman appeared discussing these documents as possibly representing the same type of document (Hillel

names. P.Yadin 8, a document in Jewish Aramaic, is designated as a purchase contract, P.Yadin 9 as a waiver. This latter designation is followed

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I. Newman, "P.Yadin 8: A Correction," *JJS* 57 [2006], 330–335). Newman understands P.Yadin 8 as a declaration by the vendor rather than by the purchaser, and compares P.Yadin 9 to P.Yadin 8, assuming both are the same types of document. This latter conclusion is based on the similarities between the two documents in phraseology, similarities which also feature in my discussion. However, I am not sure that I can agree with Newman's suggestion that P.Yadin 8 is a declaration by the vendor. His explanation that a clause of clearance against claims by third parties is difficult to envisage from the viewpoint of a purchaser sounds like a compelling legal argument to me: indeed, it has to be the party who had ownership who gives clearance as to the validity of the sale towards the party who obtains ownership. Therefore, I would agree with Newman that a clause of clearance would sooner be found in a contract written from the viewpoint of the vendor than in a contract written from the view point of the purchaser. However, the clause declaring satisfaction makes it clear that the person speaking is not expecting anything anymore from the other party ('*you* owe *me* nothing anymore,' line 6). This is logical if we assume that the purchaser is speaking: the reconstruction in *Documents II* has him declare he has received the animals (objects of the purchase), which would indeed mean that the vendor whom he is addressing does not owe him anything anymore. If we take the vendor to be the declarant as Newman suggests, line 5 would present a difficulty: 'I have received' seems to be a logical reading, but this would not fit the context of a vendor's declaration. We would expect: 'I have delivered' unless the 'I have received' would see to the money to be paid by the purchaser. However, line 6 starts with mentioning the donkey (object of the sale mentioned in line 4), not the money. How can the vendor possibly state that the other party does not owe him anything anymore while there is no indication in the document that the money that the vendor is to receive has been delivered to him? (This question remains even if one reconstructs the final words of line 5 as reading 'you have received'; the vendor would then declare 'you have received the donkey…and you owe me nothing anymore,' the money is then still missing).

Another problem I discern in Newman's interpretation is connected with the other documents of sale Newman adduces as possible parallels for P.Yadin 8. If I am not mistaken all of these documents deal with situations in which a sale is described as a future event, not as something that has already taken place. This is in any case true for P.Yadin 2–3 (if the sale of P.Yadin 2 had been immediately effected the sale of P.Yadin 3 would not have been possible) and for P.Yadin 21–22 (the dates have yet to be picked). P.Yadin 8 strongly gives the impression of a sale that has already been completed at least by the handing over of the sale objects. In the context this is logical: the sale objects are animals which can be handed over right away, while in other cases the sale object is an orchard (P.Yadin 2–3) and dates that have yet to be harvested (P.Yadin 21–22). In the context of sale objects that have already been handed over (in Newman's interpretation 'you have received the donkeys'), it is difficult to see how the declarant can declare that he will be liable if he deviates: his obligation is already met with so how could he possibly deviate from what he has promised to do? This is only possible in a contract like the adduced parallel sale contracts where the sale is to be executed at some future time. It is also possible in my interpretation of P.Yadin 8 as acknowledgement of receipt where the clause about liability for deviation can see to the amount of money the purchaser has to pay. In fact it seems quite logical that the purchaser declares that he has received the objects worth a certain amount of money, while the clause that he will not deviate sees to a future payment of this amount of money.

by a question mark to indicate the designation is a suggestion.[40] In my opinion it is debatable whether this is a waiver. To make my point I will discuss P.Yadin 8 first.

This papyrus is described as a purchase contract, contrary to P.Yadin 2 and 3 which are described as sales contracts. This contrast seems acceptable to me, since in P.Yadin 2 and 3 the viewpoint of the vendor is taken, while in P.Yadin 8 the purchaser makes a statement focusing on his obligations.

However, I think the word purchase *contract* is a bit unfortunate as the word contract suggests reciprocity: two parties obliging themselves by a legal act. In the case of sale this is true: one party conveys something, the other pays a price for it. The contract expresses the rights and obligations of both parties. The purchase contract on the other hand presents a situation from a one-party-viewpoint: the purchaser declares he has received his object(s) and is satisfied, he declares he will not ask for more, he declares liability in case he acts contrary to these promises. Yet there is no mention of what the vendor has to do. This means that the purchase contract is not like a contract at all (conveying the sense of reciprocity) but more like a unilateral declaration on the part of one of the parties. Therefore, I would rather style it an acknowledgement of receipt.[41]

Consequently, I am not sure that as Newman states 'life would be much simpler if we could demonstrate that Yehoseph son of Shim'on did not buy a donkey and another animal from his brother, but rather sold them to him': as just demonstrated, taking Joseph as the vendor also causes some problems with the interpretation of the clauses present in the extant text. Especially in the light of lines 5 and 6 I believe we should retain the interpretation that Joseph was the purchaser. Following this assumption I understand both P.Yadin 8 and 9 as acknowledgements of receipt. Newman's comparison of the documents and conclusion that they are alike supports my conclusion that the same type of document is at issue (and my observation that documents in Jewish and Nabatean Aramaic should be compared and studied side by side).

I note that Newman makes the observation that 'both seem to have been issued by or under the auspices of a third party—perhaps some sort of official' ("P.Yadin 8: A Correction," 335). I refer to my discussion in small print below, of the possible background of this official presence and the reason (not touched upon by Newman) why this official signed in Greek to confirm the deed (*Documents II*, to which Newman refers, does not accept the signature in P.Yadin 9 as Greek [see n. 58 below], but I believe the traces read like Greek characters, which would make P.Yadin 9 into an exact parallel to P.Yadin 8: declaration with confirmation by an official in Greek; see small print below, 114–115).

[40] See *Documents II*, 268–269.

[41] I have chosen acknowledgement of receipt instead of receipt as such, since a receipt is often a specific kind of judicial document, for example, in the instances in the Salome Komaise archive (P.Hever 60 and 12). Therefore, the use of the word 'receipt' could be just as misleading as the use of the word 'purchase contract.' Acknowledgement of

The difference made by the editors between a sales contract and purchase 'contract' can be illuminative in this sense that the contracts could be seen as representing different stages of one and the same process. First the vendor expresses himself in a sales contract, stating he has received the purchase price and endows the purchaser with full power etc. In a purchase 'contract,' the purchaser states that he has received the object of the sale, that he can claim no more from the vendor and that he will be liable if he does so anyway. This means that such a purchase 'contract' follows the sale. This does not mean that every sale had to have a purchase contract as well, as in general both a sale and a purchase are valid, even if there were no contract at all. The contract merely serves to record what the obligations of a particular party are and/or what obligations have already been met. However, I think it is significant that we find these two types of contract, the sales contract and the purchase 'contract' (or rather the acknowledgement of receipt), in one archive concerning different types of objects. In the sales contract a date orchard is concerned, i.e. real estate, an immoveable, while the purchase 'contract' concerns animals, i.e. movables. It could be that this difference determined what kind of contract was written. Just imagine the scene: a person who wants to sell an orchard will meet potential buyers, negotiate, have a contract drawn up and probably hand over the property afterwards. But a person selling a donkey or a cow is in a market place, negotiates, hands the animal over and then the other party declares himself satisfied towards him. The so-called purchase 'contract' indeed serves as an acknowledgement of receipt: a notice saying that the other party has met with his obligations and no more claims can be made.

P.Yadin 9 is described as a waiver, based on the editors' observation that 'this document is not formulated in the usual manner of sales contracts, and may rather represent a waiver of claims pursuant to a sale instead of an actual record of sale.' The designation 'waiver' then denotes that the document contains a unilateral declaration by the vendor.[42] The question is, of course, whether the declaration made in the papyrus text was really made by the vendor. Reading the extant text it is obvious that P.Yadin 9 closely resembles P.Yadin 8: in comparing the two the missing parts in P.Yadin 9 could be filled by looking at P.Yadin 8. Therefore, I would suggest P.Yadin 9 presents us with the same type of contract as P.Yadin 8: a unilateral declaration by the purchaser, i.e. a purchase 'contract,' or rather (considering the objections raised above to the use of the word contract), an acknowledgement of receipt. This could explain for the editors' observation quoted above that the document is not 'formulated in the usual manner of sales contracts.'

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receipt conveys the notion that the legal act is presented from the viewpoint of one of the parties (that it is a unilateral declaration), while it also clarifies that receipt is meant in the specific meaning of receipt of an object of a sale.

[42] See *Documents II*, 268: '…that the vendor granted the usual clearance to the purchaser…' and 'The name of the purchaser, addressed in the second person…,' i.e. by the vendor.

Above I remarked that it seems sales contracts were drawn up for real estate and purchase 'contracts' for movables, like the cattle of P.Yadin 8. The object of the sale cannot be found in the extant text of P.Yadin 9, therefore the sale could well have concerned movables. The editors state that 'it is to be assumed that a parcel of land was sold,' but I do not find evidence for this in the extant text, nor for their assumption that 'the vendor granted the usual clearance to the purchaser.' The clause they specifically refer to to base their claims on ('line 6 and following') is the same clause that can be found in P.Yadin 8 where movables (cattle) are concerned and the purchaser declares his satisfaction to the vendor.[43]

Since the two documents are so alike in their structure and use of standard phrases, I think it is logical to assume they are declarations of the same type, i.e. by the same party (in both cases the purchaser), most likely also concerning the same kind of object of sale (movables).

Perhaps the editors thought of real estate because the amount of money mentioned in the text (twenty sela's) is substantially higher than the price paid for the two donkeys in P.Yadin 8 (five sela's). However, we do not know whether P.Yadin 9, for example, concerned the purchase of more than two animals, or of animals of a higher value. I further note that in P.Yadin 8 the value of the animals is given as five sela's, while there is another amount of money mentioned later on in the text.[44] Although the word cannot be read properly, the amount given there is in any case not five (the editors give eight, I think ten could be an option).[45] This means that in the later clauses of the 'contract,' an amount of money may be mentioned that is not representative for the true value of the transferred object(s) of sale, but rather represents a penalty or a compensation. The clause in P.Yadin 9 that gives the amount is probably such a later clause (connected with liability). Therefore, twenty sela's may not be the value of the goods concerned here at all. Consequently, nothing in the extant text determines what the object of the sale was; the structure and use of clauses comparable to P.Yadin 8 suggest it was the same type of contract. This means that the declaring party is the purchaser (and not the vendor), and that the object of sale most likely concerned movables.[46]

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[43] Compare P.Yadin 9:6–7: 'and nothing whatever… *remains* of mine with you, neither small [nor large…] from you [regarding] these purchases from any person, far or nea[r].' with P.Yadin 8:6–7: 'I will [not] have with you anything, neither small nor large… [regarding] these [p]urchases, from any person whomsoever, fa[r or near].'

[44] P.Yadin 8:5 vs. 9.

[45] See *Documents II*, 115. The last letter of the word that probably gives the number is a *he*'. The editors then explain that since the noun for the monetary unit is feminine the number has to be as well and the only feminine number that ends in he' is the number eight. However, 'the remains of the letters hardly resemble the expected form of תמונה.' This means that another number might well have been there. I think ten is a likely guess; retribution *in duplum* (twofold retribution) was a well known phenomenon in the ancient world (see extensive discussion below, 124–125 and 139–140). A philological argument against this assumption is that the number ten can end in *he*', but only in its masculine form. For the text concerned we then have to assume that the scribe wrote the masculine form of the number to go with a feminine noun for the monetary unit. Compare Beyer, who noted concerning P.Yadin 2 and 3 that the scribe wrote the number ten in a masculine instead of a feminine form (*ATTM II*, 208, 211; P.Yadin 8 was not written by the same scribe).

[46] This latter conclusion is more or less speculative, based on the presence of sales contracts for real estate and purchase 'contracts' for movables in the archives. The first conclusion, however, that the declaring party is the purchaser is, in my opinion, inevitable. This is clear for P.Yadin 8 and the two contracts resemble each other too closely

P.Yadin 8 and 9 then present us with two instances of an acknowledgement of receipt, a unilateral declaration by one of the parties concerning the obligations of the other party towards him. In both cases, one Yoseph is the declaring party and it can be assumed that it is the same man.[47] Indeed, there is nothing in the text that goes against the assumption that both documents were written on the same day. They are in any case written by the same scribe.[48] I therefore take it that the two documents are two acknowledgements of receipt made up on the same day by the same scribe, apparently completing business matters Yoseph had been involved in. I can imagine him having the acknowledgements written in a sales context (perhaps the market place mentioned above). If this is true, if the two documents indeed represent the same type of document, drawn up on behalf of the same person, one wonders why one of them is in Nabataean Aramaic, the other in Jewish Aramaic. This question is all the more pressing because the documents were written by the same scribe. Could it be that a division between documents in the one or the other language has less substantial implications than has hitherto been assumed? I have already discussed, concerning P.Yadin 2–3, that the assumption that the deal between ʾAbi-ʿadan and Shimʿon in P.Yadin 3 was made 'under the provisions of Nabataean law'[49] cannot solely be based on the use of Nabataean Aramaic for the deed, but should receive additional support from what the document actually shows about arrangements. The document, however, does not testify to a clear-cut adherence to Nabataean law but, on the contrary, allows for deviation from general law ('as is proper') by specific arrangements, related to Jewish law. In the case of P.Yadin 6, there is even stronger evidence that a document in Nabataean Aramaic can refer to a Jewish legal framework. Again this depends on reference to the law behind the document, by such phrases as ' as is proper,' 'as is customary according to…' etc.

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to allow for a completely different viewpoint (and, consequently, a completely different interpretation of clauses) for P.Yadin 9.

[47] See P.Yadin 8:3,5,10 (perhaps also in 7; see *Documents II*, 116); 9:5 (and also perhaps in 10; see *Documents II*, 269, s.v. special notes concerning the signatures).

[48] See *Documents II*, 111 designating the scribe of P.Yadin 8 as 'Yochanan the son of Makkuta'; the same hand as that of P.Yadin 6, 9 and 22 (subscription)' and 269, designating the scribe of P.Yadin 9 as 'Yochanan the son of Makkuta'; the same hand as P.Yadin 6, 22 (subscription) and the Aramaic P.Yadin 8.' It is significant that one scribe wrote the two documents, one in Nabataean Aramaic and one in Jewish Aramaic. See my discussion.

[49] See *Documents II*, 242.

If the same person has two documents drawn up on the same day as part of his ongoing business exploits, while the two documents display great similarity in structure and contents, it is unlikely that they would refer to two different legal contexts. Indeed, since they are so alike in their structure and style, it is obvious that they refer to one legal context or perhaps to a common aspect of different (merging) traditions. One type of acknowledgement of receipt was obviously used by this Yoseph, a Jew, to deal with business matters. One type of acknowledgement, nevertheless, featured in two different 'languages.' Why was this done, if it did not have any significance for the legal context? I want to suggest that it related to a convention of addressing a party in the most common script (or language). This means that Yoseph can be expected to use Nabataean Aramaic in his dealings with Nabataeans, while he might have used Jewish Aramaic in dealings with fellow Jews. We will come to see that the documents with the strongest Jewish flavour are written in Jewish Aramaic.[50] In P.Yadin 8 and 9 we could find an instance of the tendency to use Jewish Aramaic in dealing with fellow Jews: the other party in P.Yadin 8 is a Jew, namely Yoseph's own brother.[51] The party in P.Yadin 9 cannot be found in the extant text, but if my argument concerning the languages holds true, it must be assumed that he was a Nabataean.[52] P.Yadin 8 and 9 would then paint us the picture of Jews and Nabataeans conducting business in languages that were familiar to them, or that best suited the context, while the overall legal framework seems to have been the same. This implies that the documents need not refer to Nabataean law specifically but rather to a more general indigenous tradition or custom.[53] The example of P.Yadin 8 and 9 shows that even when different languages were used—perhaps to accommodate

[50] P.Yadin 7 (deed of gift) and 10 (marriage contract). Both documents draw on rules of Jewish law: P.Yadin 7, in giving the daughter a right to live on her father's property in case she is widowed; P.Yadin 10, in presenting us with a traditional *ketubbah*, in good Mishnaic style. See 17 above and 379ff. below.

[51] P.Yadin 8:4: 'his brother, so[n of Shim]'on.'

[52] There are two fragments that belong to the body of the contract, styled A and B (see *Documents II*, 272–273, and 268/276 for commentary). Fragment A contains two personal names, one of them is 'well attested in Nabataean Aramaic' (*Documents II*, 276). The other one seems to have a Jewish background (see *Documents II*, 268). The names cannot be related to the other party in the contract; the editors imputed guarantorship: 'The fact that two persons are listed raises the possibility that at least one of them may have been a guarantor, but this is mere speculation.' (*Documents II*, 268).

[53] See, for example, *Documents II*, 226, where a defension clause (a specific clause to protect the rights of the purchaser or donee) is related to 'Aramaic common law tradition,' to explain for the fact that the clause in P.Yadin 2–3 (sales contract in Nabataean

different business partners—reference was made to this general framework. Nevertheless, both types of papyri can make distinctions as to the applicable law for certain arrangements, thereby adding rules of specific law to a framework of general law.[54]

An interesting detail of P.Yadin 8 is the Greek signature in the last line. In *Documents II* this signature is apparently attributed to a witness: 'and a third witness signed in Greek.'[55] Another suggestion is made however in the special notes in the physical description of the document. Here it is said that 'the Greek signature may be that of an official who confirmed the deal.'[56] This raises the question of what kind of an official could be meant here and what his part in the legal act was. The Commentary does not clarify this point. Did the official indeed merely confirm the deal in the sense that he acknowledged the validity of the acknowledgement of receipt? This could be easily envisaged if we keep the market scene suggested above in mind. The animals have been handed over and the purchaser declares himself satisfied. An official who has witnessed the deal, scribbles his signature underneath to give the acknowledgement of receipt official recognition.

Regardless of the exact role of the official in the legal act it is worthwhile to pose the question of why he chose to use Greek. We have to assume he could understand Aramaic, otherwise he could not have understood the deed he was sanctioning. Nevertheless, he chose to add his signature in Greek. This is all the more remarkable when one notices that the acknowledgement of receipt was in Jewish Aramaic, as well as all of the signatures, including the signature of the scribe, who signed in Nabataean in other documents.[57] This latter fact makes the appearance of a Greek signature stand out even more.

The suggestion that an official was concerned leads to the assumption that he used Greek for an official purpose: since he represented the Roman presence in the area or at least had a connection with the Roman government. In that case we have to conclude that the official could read Aramaic but chose to use Greek, the official language, to add his confirmation. This then presents us with an interesting instance for the language issue: Jews drawing up a deed in their own language and having it sanctioned by an official in the official language.

Since I have linked P.Yadin 8 with P.Yadin 9, suggesting that the documents were drawn up on the same day as part of the business transactions of Yoseph, it would be logical to expect a Greek signature in P.Yadin 9 as well (preferably the same signature as in P.Yadin 8). However, the Greek signature of P.Yadin 8 cannot be properly read and for that reason comparison with a signature in P.Yadin 9 would already be extremely difficult. A further problem is the damaged state of the signatures in P.Yadin 9 itself. The

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Aramaic) looks a lot like the clause with the same purport in P.Yadin 7 (gift in Jewish Aramaic).

[54] Again I refer to P.Yadin 2–3, where we have seen a reference to a general framework by 'as is customary,' a framework that was referred to whether all parties were Nabataeans or where one of them was a Jew. The same papyri reveal the possibility of differentiation as the reference to general law in P.Yadin 2 'as is proper' is changed into a specific designation to fit the Jewish party's demands in P.Yadin 3. The phrase 'as is customary' is again used in P.Yadin 7, a document between Jewish parties in Jewish Aramaic.

[55] *Documents II*, 110. Beyer also reads this line as Greek, actually reconstructing the word μάρτυς (*ATTM II*, 224). The question is, however, whether this person was a witness. See rest of exposition.

[56] *Documents II*, 111.

[57] See *Documents II*, 111.

last signature found there, in my opinion, presents us with Greek characters, and I even think that close comparison of the traces found in P.Yadin 8 and 9 leaves room for the idea that the signatures were by the same hand. I point to the remark in *Documents II*, 269, that the last signature may have been by 'an official confirming the deed.' The editors take the signature to have been 'in the Nabataean script' though.[58]

P.Hever 60 and 12: Aramaic where Greek is expected

P.Yadin 8 and 9 discussed above show that the use of two different types of Aramaic need not imply that the documents refer to different legal frameworks. The same thing could be argued for the use of Aramaic and Greek. An obvious example is provided by the Salome Komaise archive. P.Hever 60 and 12 of that archive present two receipts with virtually the same structure and contents. I refer to the edition where the resemblances are detailed.[59] The main difference is that in the receipt of P.Hever 60, the tax collectors address the tax payer and ascertain that they have received the amount he had to pay by way of a middle man. The receipt was apparently accordingly kept by this middle man. It ended up in the archive because the middle man was probably Salome Komaise's husband.[60] In P.Hever 12, the tax payer is addressed directly: it was Salome Komaise and she kept the receipt herself. The receipts were written in 125 and 131 respectively, the latter presenting us with a case of a late document in Aramaic. The choice of Greek in P.Hever 60 seems to be obvious: when we look at the Babatha archive we see that by 125 all documents are written in Greek. Opting for Aramaic in P.Hever 12 is unexpected: why was the receipt not written in Greek like the other one? This question presents itself all the more strongly when we consider that the structure of the Aramaic document is very much like the Greek one. The receipt has the dating at the end of the document instead of in the beginning, which is very unusual for documents in Aramaic.[61] It has further been remarked that the lines making the receipt declaration are exact parallels of the Greek version found in P.Hever 60, the obscure Aramaic צמי/דמי rendering Greek τιμή.[62] This seems to imply that P.Hever 12 and 60 were drawn up according to the same model, or that P.Hever 12 was an Aramaic rendering of a Greek text. This makes it even more difficult to understand why Aramaic was used. In my opinion, it shows that Aramaic could still be used for legal documents. After all, why would anyone bother to make an Aramaic rendering of a Greek model if such a rendering would serve no purpose? Apparently, even though Greek seems to have been preferred as the language for legal documents, Aramaic could still be, and was, used.[63]

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[58] See *Documents II*, 269. Newman followed their assumption, observing that both P.Yadin 8 and 9 'seem to have been issued by or under the auspices of a third party—perhaps some sort of official,' ("P.Yadin 8: A Correction," 335), without commenting upon the significance of the use of Greek in P.Yadin 8 in this context or raising the possibility that the signature in P.Yadin 9 could have been Greek as well.

Like the editors of *Documents II*, Beyer takes line 14 to have been in Nabatean characters (*ATTM II*, 225). As far as I can judge from the plates, the traces of the signature in P.Yadin 9:14 strongly suggest Greek characters.

[59] See Cotton in Cotton/Yardeni, 166–167.

[60] See Cotton in Cotton/Yardeni, 166, referring back to 160–161.

[61] See Cotton in Cotton/Yardeni, 167: '…the date in both receipts comes at the end. This is unlike all other Aramaic deeds from the Judaean Desert; it seems to follow the conventions of receipts in Greek.'

[62] See Cotton in Cotton/Yardeni, 166 sub (3).

[63] This underscores the conclusions to the use of Aramaic as a legal language drawn in Chapter 1 above.

Whether the use of Aramaic could be linked with a custom within a certain group is difficult to say. The first tax collector mentioned styles himself vis-à-vis Salome as 'your brother,' which could indicate a real blood tie or an affectionate relationship.[64] In line 6, Levi, Salome's father, is described as בב. This could be understood to designate a common tie, 'father Levi,'[65] indicating that he was father both of the tax collector and the tax payer. This inference is induced by the mention of 'your brother' above. However, the patronymicon of the tax collector concerned shows that he was not a son of Salome's father. Perhaps they were related on the mother's side. This latter assumption could explain the mention of 'your brother,' but obviously not for the reference to Levi as father of both parties. I think it is safer to assume that the mention of 'father' refers to Salome, thus to Levi as Salome's father.[66] From other documents in the archive one can infer that Salome's father died.[67] Perhaps the tax payment had to do with his death; perhaps Salome paid the taxes in his stead. In paying taxes over the property of her deceased father, Salome could be considered to be paying taxes in his stead. Legally, this would not be correct since the heir is considered to be the new owner of the property from the testator's death onwards. Consequently, it would have been pointless to refer to the property of a deceased person as if it was still his with another person taking care of it and paying taxes over it in his stead. However, it is possible that the situation was considered as such, especially by people who were close to both the deceased and the heir. In this specific situation, one can imagine the tax collector referring to Levi's property as if it were still his and to Salome as acting (as heir?[68]) on her father's behalf. Considering the vocabulary used to refer to people in this text, vocabulary which draws on more or less affectionate ties between the parties, we can assume that the parties shared a common background, that they were indeed part of one, specific, group. This could have caused the writing of the document in Aramaic. There does not seem to be a difference in the legal framework the Greek and Aramaic receipts refer to.[69]

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[64] P.Hever 12:1. Beyer translates: 'Dein Bruder (= Mitjude)…' (*ATTM II*, 254).

[65] See Yardeni in Cotton/Yardeni, 63–64 for the interpretation that בב could be a shortened form for the appellative בבא 'father.'

[66] There is a 'your father' immediately following in line 7, therefore בב might be a special designation or title. See Yardeni in Cotton/Yardeni, 63, referring to an Aramaic list from 3rd century BCE Egypt, in which 'בב appears with every occurrence of a previously mentioned name. In that context, too, the precise meaning of the word is unclear.' That בב occurs with 'a previously mentioned name' could be significant: could the use of בב amount to something like 'the said…' (in the sense of 'the aforementioned…') in present-day legal acts? In P.Hever 12 this would amount to an interpretation as: 'Salome daughter of Levi… (line 1),… from the said Levi, your father (lines 6–7).'

Beyer translates differently: 'vom Posten (= Anteil) deines Vaters Levi.' In his 'Wörterbuch' he also renders בב as 'Posten einer Liste, Kapitel' (*ATTM II*, 359).

[67] P.Hever 63. Perhaps Salome was her father's heir: P.Hever 63 could be read to render this meaning. Interpretation of P.Hever 63 depends upon the relationship between the death of the father and the death of Salome's brother which is recorded in the same act. I will argue below that the document presents us with difficulties regarding matters of succession no matter what sequence of deaths is accepted. See 234ff.

[68] See Chapter 4, 234ff., for the possibility suggested by P.Hever 63 that Salome was heir to her father's estate.

[69] P.Yadin 27 is not treated in this section on sales and receipts, although it could be styled a receipt as well. This document will be discussed alongside the other documents related to the issue of guardianship (P.Yadin 12–15 and 28–30), with which it is more closely related (see Chapter 5 below, 344–345 and 368–371).

P.Yadin 5, 17: depositing 'according to the law of deposit'

This subgroup consists of two papyri, both written in Greek. P.Yadin 5 is the earliest papyrus of the corpus in Greek. In fact, it is hard to explain why it was written in Greek at all. The date, 110 CE, could suggest that the Jews began to use Greek in their legal contracts right after the conquest of 106. However, later papyri like P.Yadin 6–10 (119–122/125 CE) are all still in Aramaic. This shows that the use of Greek was not self-evident.[70]

Lewis suggests a restoration for the first word of the legible part of the papyrus: ἑρμηνεία, 'translation.'[71] This would mean that Greek was not the original language of the document, but that this part of the papyrus contains a Greek translation of an otherwise (probably) Aramaic original.[72] In that case this papyrus does not show a transfer from the use of Aramaic to the use of Greek in legal documents, but the prolonged use of Aramaic combined with the introduction of a Greek translation. The question is then of course what the function of this translation was. Is it proof of foreign influence?

The Aramaic papyri that follow (P.Yadin 6–10) do not have a translation of the full text in Greek (at least such a translation has not been recovered), although P.Yadin 8 has a signature in Greek that could be the confirmation of the act by an official.[73]

I explained in my discussion of P.Yadin 8 above that there does not seem to be a need for a Greek signature there: the document was written in Jewish Aramaic and the signatures of the purchaser, the witnesses and scribe are in this script.[74] This is significant for the signature of the scribe, since in other documents from the archive he signs in Nabataean. Thus it appears that all persons involved used the Jewish script and this makes the appearance of a Greek signature all the more remarkable. It was suggested to take this

[70] For a general discussion of the use of languages in the archive see Chapter 1.

[71] See Lewis, 39.

[72] It is interesting to note that Lewis thinks the document would have been in (Jewish) Aramaic rather than in Nabataean (Aramaic) (39). He does not give a reason for this, but the likely reason would be that of the following Aramaic documents, three are in Jewish Aramaic (P.Yadin 7, 8 and 10). I add that P.Yadin 6 may be in Nabataean Aramaic but has a distinct Jewish flavour to it. I refer to my treatment of this papyrus above, 97ff.

[73] See my remarks (in small print) in the discussion of P.Yadin 8 and 9, 114–115 above.

[74] Contrary to P.Yadin 9, which is in Nabataean Aramaic but which bears close resemblance to P.Yadin 8. See my discussion above, 107ff.

I do not discuss the position of Yehonathan, son of Yishma'el, whose part in the act is not clear, I have included him amongst the witnesses. See *Documents II*, 111 and 116–117 for a possible explanation of this man's role.

signature to be from an official who confirmed the deed. This is an attractive suggestion, which could denote that Greek was used for official purposes.[75]

It can then be assumed that the present act was originally made up in Aramaic and translated into Greek. The use of the specific legal term παραθήκη at least seems to suggest that the translation was made for a specific legal reason. It is unfortunate that we do not know what the Aramaic original read. The Aramaic counterpart of παραθήκη might have been able to cast an interesting light on the nature of the legal act concerned and the use of several languages for the main text.[76]

It is in any case clear that the fact that the (recovered part of the) papyrus is in Greek does not in itself mean that there is a breach with the previous papyri; in any case not with their legal orientation. As argued above, indications of the legal background of the papyrus text should foremost be sought in its contents.

The parties concerned are Joseph, son of Joseph, and his nephew Jesus, son of Jesus. Joseph states that he acknowledges that he owes Jesus an amount of money.[77] Then the word παραθήκη is used (in the accusative case) followed by a row of genitive cases: 'assets of silver, contracts of debt, investment in factory, value of figs, value of wine, value of dates, value of oil, and of every manner [of thing] small and large, from everything which was found [to belong] to your father and me, between me and him.' This phrase makes two things clear: the objects concerned were part of a business and this business belonged to Joseph and Jesus' father (also called Jesus, and the brother of Joseph). The fact that the son is now entitled to these items makes it clear that the partnership between Joseph and Jesus had ended on Jesus' death and that his son Jesus was entitled to the property in his position as his father's rightful

[75] See my remarks above, 114–115.

[76] The later Greek papyri sometimes include statements of the parties in Aramaic or parts in Greek are denoted as translations of apparently otherwise Aramaic (or even Latin) lines: see, for example, P.Yadin 16. See also P.Yadin 27, where the Aramaic subscription of (the person writing for) Babatha and its Greek translation do not seem to convey exactly the same meaning. I will argue for this instance that it is an example of a tendency to make the Greek part of a document adhere to Roman formal law, while this was apparently not done (deemed less important?) in the Aramaic part (see 368–371 below). This case of different renderings can be compared to the instances in P.Yadin 15 and 17, where there are different words used for a woman's guardian in Greek and Aramaic. I think the difference is telling, as will be explained in my discussion of guardianship below (Chapter 5, 366–368).

[77] Expressed by the typical Semitic construction 'you have got with me' i.e. I owe you; see Lewis, 39, 15.

heir.[78] We can easily imagine that the remaining business partner could not simply give the share to the heir: some items could not be divided; some items were not capitalized (like the contracts of debt). The items were part of the business and could not very well be taken from it and given to a third party. Therefore it is sensible—and this is in fact common procedure in similar situations nowadays—to determine the value of the share the heir is entitled to and pay the share to him in money or acknowledge a debt to this amount. The papyrus presents the latter situation.[79] The use of παραθήκη has to be understood in this context. Lewis translates 'as a deposit of.' Perhaps it would be better to read, or in any case understand, 'in the form of a deposit of,' denoting that the speaker expresses a value in money that is equal to a deposit of the following items. He makes clear that he does not owe the money as such, but that there are items in his care that belong to the other person and together constitute the value he mentions. This was probably done to formalize the relationship between the remaining partner and the heir.

This was necessary since neither Roman nor Jewish law had the heir become partner: the partnership was considered to be personal and consequently it ended with the death of the heir's testator.[80] The heir

[78] See line 17, where it is said right after the enumeration of what has been between the speaking party and the father of the other party: καὶ τοῦτό σοι 'and that is yours.' In the same line the word for heir could possibly be restored. See Lewis, 37.

[79] Contrary to what Satlow wrote to this point (Satlow, "Marriage Payments and Succession Strategies in the Judaean Desert Documents," in *Law in the Documents of the Judaean Desert*, 51) deposit is not a sort of will: it does not effect transition of ownership of the father-business partner to his son-heir. Transition of ownership occurred at the father's death (intestate succession). The deposit serves to make sure that the remaining business partner can use the property that belongs to the heir, while the heir can be assured he is entitled to the value in money as put down in writing in the deposit. See Chapter 4, 214–215, where I quote Satlow and discuss the factual and legal inaccuracy of his presentation in detail. The purpose of the deposit here in P.Yadin 5 is not related to succession, but sees to formalization of an otherwise obscure legal relationship; see rest of my exposition.

[80] For Roman law see, for example, *Dig.* 17.2.1 pr.: *societas coiri potest vel in perpetuum, id est dum vivunt, vel ad tempus vel ex tempore vel sub condicione* 'A partnership can be formed either for all time, that is, *so long as the contracting partners live,* or for a limited period or under a condition.' and *Dig.* 17.2.4.1: *Dissociamur renunciatione morte capitis minutione et egestate.* 'It [the partnership] is dissolved through renunciation, *death*, change of civil status, and poverty'; for Jewish law see Elon, *Principles*, 279: 'The existence of a partnership is also terminated when its capital has been exhausted, its defined tasks completed or on the death of any of its members.' Text and translation of all cited Digest passages in this study stem from: Theodor Mommsen and Paulus Krueger, eds., *The Digest of Justinian* (trans. A. Watson; Philadelphia, Pa.: University of Pennsylvania Press, 1985).

was entitled to the property his testator held in the business and consequently he could be considered a creditor of the business. But to what was he entitled: the actual property or a value in money? It would be difficult for the partner to hand over the property and for the heir it might not even be convenient to receive property of that nature. Therefore, it was important for both to formalize their relationship. By the present document the heir gives the property to the partner by way of deposit and is declared to be entitled to the value of the goods expressed in a fixed amount of money. Thus the partner can continue the business and the interests of the heir are secured.[81]

Lewis made a comparison with Roman soldiers in Egypt, who could not marry during active service but did live with women in long-term relationships. If they received dowries, they called them deposits, suggesting that the woman had entrusted them with money for safekeeping. Lewis says this was done 'to conceal the true nature of the transaction and thereby to circumvent a legal impediment.'[82] This is true for the example he mentions: dowries are called deposits since a soldier cannot receive a dowry.

Lewis mentions M.Chr. 372 (= Jur.Pap. 22a i.9–10), for a remark by the prefect that 'we realize that the deposits are dowries.'[83] See for a discussion of more cases of 'concealed dowry,' Sara E. Phang, *The Marriage of Roman Soldiers (13 B.C.–A.D. 235): Law and Family in the Imperial Army* (Leiden: Brill, 2001), 22ff. In all of the cases Phang discusses (from P.Catt. I, III and VI) the return of money to the woman based on the *actio depositi* is refused, because the matter at issue is said to be a concealed dowry and not a real *depositum*. Since the woman was not married to the soldier, she could not ask for return of the dowry. Only wives could do so, basing themselves on the *actio rei uxoriae*, the action of the wife to ask for return of her dowry.

In the present case I find it hard to see what would have to be concealed or what legal impediment is circumvented. It would be better to say that a deposit is used to enable the transfer of money or things in a situation where there is no formal legal relationship between the parties or it would be hard to make such a relationship plausible. In the case of the soldiers it is not logical they would receive money or items without a good reason for it. Since the woman is not the wife of the soldier, the receipt of money cannot be related to their relationship (marriage/

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[81] The deposit sees to a solution for the situation where the heir has already become owner of his deceased father's share in the business (by intestate succession); it does not arrange for succession as such (see n. 79 above and 214–215 below).

[82] See Lewis, 35.

[83] This papyrus stems from Egypt and is dated to 117 CE. See Lewis, 35.

dowry). Therefore, the deposit is used to be able to express that money has been received by the man and is owed to the woman without stating for what reason. In the present case the relationship between partner and heir is, as explained above, problematic as well. The choice of a deposit arrangement helps to formalize this relationship. In my opinion therefore, deposits are used in cases where there is no regular legal foundation for the act and where a relationship between the parties is established or formalized that can provide such a legal foundation.

The value of the share of the deceased partner is determined and explicitly set apart from another debt: an amount of money that has to be paid to the wife of the deceased. She received, as the papyrus stated, the money as 'wedding money' and had it (held it) 'against' her husband. Wedding money most likely refers to a dowry.[84] As we shall see in P.Yadin 10, the marriage contract of Babatha and her second husband, the husband acknowledged receipt of the dowry and the obligation to repay it on demand. The dowry was in any case repaid at the death of the husband. Since under Jewish law a wife could not inherit from her husband, the dowry had to provide for her. Until the dowry was paid to her by the heir(s), the widow was maintained out of the deceased's estate. Originally, the widow had to be maintained from the estate during her widowhood (thus the arrangement only ended at her remarriage). But in local Judaean custom it became accepted that the maintenance ended when the heir(s) had repaid the dowry.[85]

It was stated explicitly in marriage contracts that all the property of the husband was pledged to meet the obligation to repay the dowry.[86] This meant that the wife had a right even to sell the property for maintenance. Her right to it was established by the marriage contract and needed no further title or proof. The security arrangement can be found in P.Yadin 10, and in P.Yadin 21–22 Babatha actually used her rights to

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[84] The Greek phrase used here is ἀργύριον γαμικόν 'wedding money' instead of προίξ, the usual Greek word for dowry (for example used in P.Yadin 21–22, to be discussed below). The phrase might have been used to designate that all the money involved in the husband's marriage obligation to the wife was concerned (i.e. not only the dowry she brought in but the total sum that the *ketubba*, or marriage contract, determined, see discussion in small print below, and especially Cotton's article on marriage contracts, n. 92 below).

[85] See *m. Ketub.* 4:12 and the discussion of P.Yadin 10 below, 384–385.

[86] The demand that this be done is made in *m. Ketub*. 4:7, where it is said that even if a man did not write this provision for his wife, it is valid. See P.Yadin 10, where the arrangement has been restored in the damaged lines (see next note).

her deceased husband's property by selling crops of groves that had been his.[87]

In the present case, the right of the widow to the dowry is mentioned explicitly and apparently apart from the debt of the partner to the heir. This makes it in my opinion clear that the husband had put the money of the dowry into his business thus burdening the business with the claims of the wife in case of repayment of the dowry. This means that since the partner-husband died, there were two claims that had to be met with: the claims of the heir to the inheritance (the share of the deceased in the business) and the claim of the widow to her dowry. Both are acknowledged. That this is done in two separate statements shows that the claim to the dowry is indeed separate from the claim of the heir(s). This confirms that the dowry is not part of the inheritance of the deceased. At the death of the husband, the dowry reverted to the wife as her own property, based on (arrangements in) the marriage contract. All the heirs had to do was actually hand over the property, or pay the sum of money determined in the marriage contract.

It could be debated in whose ownership the dowry is *during marriage*. If the husband is not entitled to sell, I would accept he does not have ownership, since he does not have power of disposal. It would also depend on what we take to be returned at dissolution of the marriage. If the original property should be returned, this suggests the husband cannot dispose of this property and that implies that he is not the owner (at least not in the usual sense of ownership). It would in such a case be better to say the property is entrusted to him or he is holder of the property. However, if we take the sum of money determined in the contract to denote what has to be returned, it would be easier for the husband to really use the property during marriage (and perhaps even sell it) since he would always be able to return the agreed sum in money. I do not think the discussion is of much importance for the instances in the Babatha archive, though, since we are not concerned there with a situation during marriage, but after the marriage ended (after the husband died).[88] Even if the husband were considered to be owner during his lifetime, the property would not become part of his inheritance: his power over the property is connected with his position as husband. On his death the wife can claim the property (or the sum of money equal to the dowry) as her own property. A further indication for

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[87] The security arrangement is considered to be part of the damaged final part of P.Yadin 10. Since most of the later standard clauses in marriage contracts can be found in it, it seems likely the security arrangement was in it as well. See discussion of P.Yadin 10 in Chapter 6, 387–388.

In P.Yadin 21–22 it is said that Babatha can sell the crop of a date orchard that belonged to her deceased husband because of her dowry and a debt. See discussion of P.Yadin 21–22 below, 168–181.

[88] Both P.Yadin 5, under discussion here, and P.Yadin 21–22 mentioned above present situations where the husband has died and the wife is entitled to return of her dowry.

this is that the claims of the wife are not based on the law of succession (or on a will or gift), but on the marriage arrangements. P.Yadin 5, where the dowry obligation is mentioned separately from the debt the business owes the heir, supports this view.

A distinction has to be made between the property the wife brought in, the actual dowry, and anything the husband added to that in the marriage contract. In Jewish law, it was usual that the husband promised something to the wife on top of her actual dowry. The so-called *ketubba* (or marriage settlement) determined the total sum of money that had to be paid to the wife on dissolution of the marriage.[89] After the death of the husband, the property the wife brought in, the actual dowry, reverted to her as her own property, while what the deceased husband owed her on top (the *ketubba*) had to be paid by the heirs. Therefore, the wife can claim her own property back,[90] while she is at the same time entitled to the amount of money based on the *ketubba*, which is part of her husband's estate and needs to be paid by the heirs.

It does not seem to be clear whether the marriage contracts drawn up at the time dealt with a dowry as such (and possible addition by the husband) or with a *ketubba* obligation (for the return of a value in money). For example, in P.Yadin 10 the value of the dowry is determined (four hundred denarii or zuzin), while no actual property is mentioned (like silver, gold, female adornment, household utensils etc.). The Commentary mentions: 'his [the husband's] obligation for the amount of the dowry that the wife is bringing with her in marriage.'[91] It seems that the property the wife brought with her was expressed in terms of money, thus facilitating a later return.[92]

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[89] See Cotton, "Marriage Contracts," 2.

[90] Following on from the question of who owns the dowry during marriage, one can say that the wife can claim the property back since it is hers (she maintained ownership during marriage even though the dowry is actually in the hands of the husband), or the wife can claim the property back since ownership reverted to her on her husband's death. Since the husband is only entitled to the property in his position as husband, he ceases to be entitled to it as his death; consequently, the property does not become part of his inheritance. This can be seen in P.Yadin 5, where the inheritance (obligation towards the heir) and the dowry (obligation towards the widow) are treated as two different debts.

[91] See *Documents II*, 133.

[92] Cotton explains that the Judaean Desert documents (amongst which we find P.Yadin 10) do not seem to refer to a *ketubba* payment as such, they all mention the dowry (Cotton, "Marriage Contracts," 3). Yet there is mention of 'the silver (money) of your *ketubbah*' in P.Yadin 10 (and DJD 21; Cotton, "Marriage Contracts," 3–4). It is not clear whether the four hundred denarii Judah mentions represented the value of the dowry the bride brought in (the items are not mentioned) or there was an addition in some form. Consequently, it is difficult to determine whether 'silver of your *ketubbah*' simply refers to return of the dowry or to payment of the *ketubba* (marriage settlement) encompassing an additional sum of money as well. Cotton refers to P.Yadin 21–22 where Babatha sells dates from orchards belonging to her deceased husband's estate, basing her rights on 'dowry and debt' ("Marriage Contracts," 4). Cotton interprets this as a hendiadys: 'debt of your ketubbah money.' I do not think a hendiadys is at issue here: debt refers to a separate claim on Judah's property Babatha holds (a claim based on P.Yadin 17, the deposit to be discussed below). See discussion of P.Yadin 21–22 below, 175.

The part described as col. ii of fragment a in the textual edition probably contained arrangements for repayment connected with security clauses. Plausible restorations are 'I will give back,' 'with certainty' (part of the guarantee clause), 'twofold.' Most likely this part of the papyrus contained the clause about immediate repayment (a deposit could be demanded back at any time by the depositor) and about liability.[93]

In any case, there is a clear mention of 'twofold' to refer to the liability. If the party speaking does not meet his obligations (in casu most likely repayment of the deposit) he has to pay twofold. Lewis already pointed to the fact that retribution *in duplum* is not attested in papyri from Egypt in the period prior to Roman rule, suggesting that the Romans brought the idea with them, but that does not signify much for the present papyrus since, as Lewis adds, retribution *in duplum* is known in Jewish law

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[93] See Lewis, 38 and 40.

These elements can be found in P.Yadin 17, to be discussed in this same section.

I point to the fact that the liability clause contains the phrase 'and to the emperor likewise' a phrase that seems parallel 'to Rab'el the king likewise' found in P.Yadin 2–3 and 4. There the party professing himself to be liable towards the other acknowledged liability towards the ruler as well. It is uncertain what the liability towards the king/emperor encompasses. In the case of P.Yadin 2 and 3, where an obligation towards the king is mentioned ('the share of the king') it could be assumed liability for this obligation was meant. This is the interpretation given in *Documents II*. However, as noted by Newman in his review of *Documents II*, the phrase can be found in other transactions (for example the purchases of P.Yadin 8 and 9) where there is no mention of 'the share of the king.' Consequently, it seems more likely to understand the phrase as denoting that the party who undertook the obligation contracted liability towards the government as well: see Newman, review of *Documents II*, 249ff., going back to Yadin's preliminary report, where Yadin already indicated that there is liability contracted both towards the other party and the authorities. 'The truly remarkable thing about this clause, though, is that upon closer examination we see that it is but a local manifestation of a widespread practice extending from Egypt to Parthia, attested over a period of hundreds of years. The *Fiskalmut* or payment of fines for breach of contract into the treasury of the sovereign or state, is widely known from the papyri, where we often find that this fine is equivalent to that being paid to the injured party' (251; with reference to Cotton, who first made the comparison to the *Fiskalmut*). Newman discussed the phrase further in the light of tomb inscriptions, and eventually briefly touched upon P.Yadin 5, indicating that the retribution *in duplum* there could refer to 'a double fine to be paid to Jesus son of Jesus and a simple fine to the treasury, or perhaps to one simple fine each, which together constitute a double penalty' (251). Newman also refers to P.Yadin 17, where liability is contracted towards the other party for the double amount, in case of breach of contract. Consequently, in speaking of double penalty, two things should be carefully distinguished: double liability, which is liability contracted towards two different parties (as indicated by the clause 'and to the emperor likewise'), and retribution *in duplum*, which is liability towards the same person for the double amount. Also see next note.

from Exodus onwards.[94] This means that the fact that the depositary has to pay twofold can be connected with both laws.[95]

In Jewish law there are several cases in which property of one person is entrusted to the care of another. There are several types of deposit attached to degrees of liability, one coming close to actual loan. The system is derived from Biblical rules but developed and extended by the rabbis. It is thus not clear to what extent it was known and used in the time of the present papyrus.[96] In any case, it is clear that Biblical law knew cases of retribution *in duplum*.[97]

In Roman law entrusting an object to another person for safekeeping was arranged for by the *depositum*. There were various types of

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[94] I do not understand what Lewis means by '2 and 3 now provide evidence of the same practice under the Nabataean kings' (40). I do not find mention of a 'double penalty' in P.Yadin 2 and 3. There is an acknowledgement of liability for the value of the sale and further claims (thus a single penalty) and liability towards 'our lord, Rab'el, the King' (see previous note for the exact meaning of this clause). But this is not the same as a double penalty, if only because the party to whom the penalty has to be paid is not the same: the vendor contracts liability towards two different persons: the other party and the king. P.Yadin 2 and 3 do not have a designation for 'twofold,' which is logical considering that the 'penalty' is really 'onefold' towards two different persons. In contrast, the present papyrus mentions a twofold retribution (which is not the same as the penalty of contractual liability anyway, see below), and then adds: 'to the emperor likewise.' This latter reference denotes the liability towards the ruler. This proves that the reference to 'twofold' (retribution *in duplum*) should be distinguished from liability towards the ruler (a single penalty, if one chooses). By comparison it can be deduced that in P.Yadin 2 and 3, the liability towards the ruler should be distinguished from liability towards the other party. Consequently, P.Yadin 2 and 3 do not testify to a practice of double penalty under the Nabataean kings at all.

Lewis' suggestion might have been caused by his use of the designation 'double penalty' for what is not really a penalty but a retribution *in duplum*. A penalty is a payment in case of contractual liability (like we find in P.Yadin 2 and 3), while the matter at issue in the present papyri is return of the money entrusted (retribution *in simplum*) or return of the double amount of the money entrusted (retribution *in duplum*). Of course, the extra amount of money to be paid functioned as a penalty (in case of liability of the depositary) but the designation 'double penalty' is unfortunate, since half of the 'double penalty' is not a penalty at all, but simply return of the sum the depositary was entrusted with. Because of this terminological incongruity, I will use the term retribution *in duplum* to refer to the retribution in case of deposit as given in P.Yadin 5 (and 17; to be discussed below).

[95] Roman law knew a retribution *in duplum* for the so-called *depositum necessarium*, a deposit out of necessity. In specific cases of threat by violence or disaster a person would feel obliged to entrust property to another person and in such a case liability was extended to retribution *in duplum*. See 139–140 below.

[96] See Elon, *Principles*, 256ff.

[97] See Exod 22:4,7,9 for different cases in which a retribution *in duplum* is stipulated.

depositum, for example, *depositum irregulare*, that was so described because it deviated from the normal rule that the property deposited was returned. *Depositum irregulare* was used for the deposit of money or in general fungibles. Contrary to the idea with *depositum* that the property was only kept and not used (consumed), with *depositum irregulare* the person entrusted with the *depositum* consumed the goods or used the money and returned its equivalent. This comes close to the present transaction where the property is evidently used by the depositary. However, there seems to be a difference between returning the equivalent of property and the present case where the value of entrusted property is estimated and this value in money remains owed. In my opinion, the idea of the arrangement here is not to deposit property with someone for use and later return the equivalent, but to convert a debt of the amount of that property into a debt in money. As I have explained above, the deposit here helped to formalize the relationship between the parties involved.

Considering the context of the papyrus (the relationship between the parties) it seems more likely that the deposit form was chosen for practical purposes than to assume it was used to specifically connect to Roman law (or legal terminology known from Roman law).[98] Since the deposit was used to formalize otherwise obscure relationships, this may have induced the parties to style the act a deposit. The retribution *in duplum* seems to have been due to a Biblical rather than a Roman influence.

Col. ii appears to have contained an addendum (see the word ἐπιγραφή used in line 14), but it seems it is here not used to add some words to the main text as in P.Yadin 22, but rather to start a sort of short rendering of the main text or a declaration by the parties (compare Lewis, 40. It is in any case clear that this part is followed by the list of witnesses (see col. ii of fragm. b). I think col. i of fragm. b contains information about the exact nature of some of the items encompassed in the partnership between the person speaking and the deceased father of the other party as it is said 'that we have bought, me and your father' and there is mention of 'three declarations of debt without written proof.' There are further sums of money mentioned and there is a reference to future payment of 'the above mentioned silver' and the division of a courtyard. But what all this exactly means escapes us due to the fragmentary status of the papyrus. Perhaps the debts are mentioned because they had been (until then) 'without written proof.' By mentioning them here the speaker can give the heir further certainty about financial matters.[99] It appears that he promises to

[98] There is a notable difference in referring to the act as an act of deposit between P.Yadin 5 and P.Yadin 17, to be discussed below. There the act is placed specifically within a framework of law, by several clear references to a 'law of deposit.'

[99] Perhaps the papyrus can even serve as written proof of the debts since it appears that both debts (the sums of money involved) are mentioned (in reversed order, first that of Azas, then that of Thennas).

pay at least some money[100] and divide property. I am not sure whether this property was part of the *depositum*. Since the deceased was a brother of the speaker there may have been other undivided property between them (for example an inheritance from their father?) that needed to be divided between the entitled parties.[101]

I have argued above that the deposit arrangement need not necessarily point to Roman law. Indeed considering the arrangements in the papyrus and the context of other papyri with a thoroughly oriental, in some cases specifically Jewish background, I think it is logical to assume P.Yadin 5 does not draw on a Roman form of deposit. It seems the deposit form was only used to formalize the relationship between the remaining partner and the heir, or to convert a debt in property into a debt in money. Consequently, P.Yadin 5 might not be the best example to determine what law was applicable to the deposit. Fortunately, P.Yadin 17 presents us with a deposit as well. Not only has this papyrus suffered less damage but arrangements are also made more explicitly, even referring to a specific legal background.

P.Yadin 17 dates to February of the year 128.[102] Judah, the son of Elazar Khthousion, whom we have met as the land owner in P.Yadin 6, is the declaring party. He acknowledges to Babatha, here explicitly styled his wife,[103] that he has received from her three hundred denarii

[100] The money to be paid is referred to as 'written above.' The name of Azas is given, he could be one of the debtors. This is not clear as the name of the third debtor is damaged. Maybe the speaker promised to cash this specific debt and pay it to the heir.

[101] See, for example, P.Yadin 7, where the boundaries are often designated by referring to property of 'the heirs of X.' In those cases the property was evidently (still) undivided. Compare Cotton, who gives a number of references for the Greek phrase κληρονόμοι (+ personal name in genitive) 'to refer to joint owners of real property' (Hannah M. Cotton, "Courtyard(s) in Ein-Gedi: P.Yadin 11,19 and 20 of the Babatha Archive," *ZPE* 112 [1996]: 199, n. 7). Cotton also indicates that the persons described as heirs to certain property in P.Yadin 7 are still described that way in another papyrus, dated to some nine years later, concluding that 'the property remained undivided for at least nine years' ("Courtyard(s)," 199, n. 8).

[102] This papyrus is a double document presenting an upper and lower version between which some six lines are missing. These probably represented the last four lines of the upper and the first two lines of the lower version. In his edition, Lewis has restored these six missing lines on the basis of comparison with the matching lines of the legible text. There are minor differences between the two versions; the most important one for the judicial meaning of the document is the interlinear addition of a phrase in the upper version, which is represented in the continuous text in the lower version. This phrase designates the act as a deposit.

[103] Line 4/22. This means that Babatha and Judah had been married before the date of this papyrus. Judah acts as Babatha's guardian in 14 and 15, 'a function normally performed by a woman's husband.' (Lewis, 58). Lewis places P.Yadin 10 between 122 and 125, but see Hanson, suggesting the marriage took place between December 127 and February 128 ("The Widow Babatha," 90). Her suggestion partly depends on an assumed

'on account of a deposit.' The word deposit recurs in the phrase that he will 'have and owe' the money 'on deposit,' that Babatha can request 'the aforesaid denarii of the deposit' and that Judah will be liable 'in accordance with the law of deposit' for a twofold repayment of the deposit.[104] Thus it is clear, far more than it appears to have been in P.Yadin 5, that there is reference to a defined legal framework. For P.Yadin 5 it could be argued that the deposit was chosen to clarify an obscure legal relationship between a former business partner and the heir of his deceased associate. The choice for a deposit instead of an ordinary loan seems to have been dictated rather by circumstances than by a desire to stay within a certain legal framework. Here the situation is clearly different, as the word for deposit is repeated several times and liability is said to be 'according to the law of deposit.' This infers that there are clear legal rules the parties refer to. The question is of course to what law these rules belonged.

Judah is said to acknowledge something 'of his own free will and consent.' Lewis states that it is hard to determine whether this expression stems from a Roman or a Semitic source. He points to the fact that the Greek word for 'will' (θέλησις) is not found in the papyri from Egypt or Dura, the Egyptian ones use ἑκών.[105] The expression found here, therefore, seems to be a translation of an Aramaic expression מן רעותי 'of my free will, according to my desire.'[106]

If we accept an Aramaic original, this is apparently translated into Greek by two terms: θέλησις and συνευδόκησις. Although there might not be a particular reason for this, it could have been caused by the lack of a Greek word to adequately convey the meaning of the Aramaic word רעות. רעות means both 'desire, will,' in the sense of your will to do something, and your agreement to it.[107] In a Hebrew contract the word is used both in its sense of will and agreement/permission.[108] In this latter case it is used to express the agreement of one of the parties to have another person sign on his behalf. Perhaps the

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relationship with the drawing up of P.Yadin 19, the gift to Shelamzion; I am not convinced that this relationship existed, see 239–240 below. Koffmahn also placed Babatha's marriage to Judah in 128, without further explanation as to the reasons for this assumption ('seine eigene Ehe mit Babatha—um 128 geschlossen—war nur…,' Koffmahn, *Die Doppelurkunden aus der Wüste Juda*, 97).

[104] Lines 8–9/26–27, 9/29, 10/30–31, 11/31–32.

[105] Lewis, 74, referring to 18 and 16. ἑκών expresses a simple 'willingly,' denoting that the act is made by the party of his own free will. The expression in papyri from the fourth century and later is ἑκών καὶ πεπεισμένος.

[106] See Lewis, 16; for example, found in P.Yadin 7:2.

[107] See *Documents II*, 92, where examples are given of use of the word in a variety of legal acts like gift, sale, division of property and marriage contracts.

[108] P.Yadin 44:2 and 28 respectively.

scribe sought to express these different meanings of the word by translating them into two separate Greek words.

The arrangements are pretty clear: Judah acknowledges the receipt of three hundred denarii of Babatha as a deposit. It is said he is to hold them and owe them as a deposit. On Babatha's request or the request of someone acting through her or for her he will return the denarii 'of the deposit.' If he is requested but does not do so, he is liable 'according to the law of deposit' for a twofold repayment and damages. He is further said to be 'answerable to a charge of illegality in such matters.' Babatha or the person producing the contract on her behalf has the right of execution 'upon Judah and all his possessions everywhere—both those which he possesses and those which he may validly acquire in addition—in whatever manner the executor may choose to carry out the execution.'

Especially in comparison with P.Yadin 5 there is a strong emphasis on the fact that the act is an act of deposit, as this is said several times in a couple of lines. Furthermore, the phrase 'according to the law of deposit' makes it clear that the arrangements made are taken from a set of rules applying to deposit. However, a clear reference to a certain law, with a description ('according to the law of Moses and the Judaeans' in P.Yadin 10) or an adjective ('according to "Greek Hellenistic" custom' in P.Yadin 18) is not found. Closer consideration of the arrangements' contents should therefore determine what law of deposit was meant.

The sum put on deposit is said to have been received by Judah, he is to hold and owe it in deposit. On request of the other party he has to return the money. This is fairly general: the idea behind deposit is that the money can be requested to be returned at any time, contrary to loan where there is a fixed period for the loan to last. That another person can act on Babatha's behalf is not odd either; the phrase 'through her or for her' is found in P.Yadin 11 as well.[109]

[109] In P.Yadin 11 the extended formula is used: the right of execution will be 'available both to you and to your representative and to every other person legally presenting this document through you or for you' (lines 9–10/24–25). This phrase is represented in Greek by some short words, mainly prepositions, that express the relationship between the original party and the other persons meant. The right is first of all available to the party himself, then to a person who is 'in your stead' and then to persons who bring the document in 'through you or for you, i.e. in your interest.' The difference between the latter two groups seems to be that the first, 'in your stead,' designates people who act on their own, in the party's stead (thus exclusive). An example would be an heir. The other group concerns people who can produce the document while acting for the party, for example, a creditor or guarantor. Their right is not exclusive but complementary: anyone producing the document while acting through or for the party can execute the party's

Liability is said to be for the double amount of the deposit and damages, Judah is at the same time 'answerable to a charge of illegality in these matters.' Since it is not completely clear what this could mean, these remarks seem to provide the best clues for identification with rules from a specific law.

In Roman law, the deposit usually concerned goods, not money. This was due to the fact that *depositum* was originally the transfer of a thing to another party for safekeeping (without any kind of reward), while the thing had to be returned to the owner on request. The essence of *depositum* was that the thing itself would be returned.[110] *Depositum* was a real

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right. It is important that this is stated because it has to be clear whether a right is given to a party to be solely his, or whether the right can be transferred to legal successors (on the basis law and/or act). Some rights automatically end at the death of the person entitled, for example, the usufruct in Roman law. If one wanted to transfer the right to another person, a new right would have to be established for that person. Consequently, in Roman law someone enjoying usufruct could have it transferred to his son, but only if the owner of the bare property rights agreed to give the son a new right.

A person can be another person's legal successor either by law, for example, an intestate heir, or by a legal act, for example, a testamentary heir or a purchaser of property. That there could be a difference between successors by law and by act can be seen in the Elephantine papyri where it is determined for certain rights that they can only be transferred to (legal) heirs, excluding legal successors on the basis of an act like gift or sale. See, for example, K9 and 10, which deal with transfer of (part of) a house by a father to his daughter by way of gift. In K10 it is determined that the property can only devolve on heirs ('and your children have right after you' in the investiture clause). In K9, the donee is also entitled to dispose of the property by way of gift ('your children have right after you *and you may give it to whomever you love*' [my emphasis]). In both instances the right to alienate by way of sale, that is, to alienate to someone outside the family circle, is clearly not granted: compare K12, a sale, which gives full capacity to dispose (i.e. also through sale): 'your children have right after you and (so does) anyone whom you give it to lovingly *or whom you sell it to for silver*.' [my emphasis] Translation from: Porten et al., *The Elephantine Papyri in English*.

[110] See the description of *depositum* in *Inst*. 3.14.3: *Praeterea et is apud quem res aliqua deponitur re obligatur, et actione depositi, qui et ipse de ea re quam accepit restituenda tenetur.* 'Furthermore, a person with whom a thing is deposited is under a real obligation and liable to the deposit action, being liable for the restoration of that which he receives.' For all texts and translations of passages from the *Institutiones* quoted or referred to in this study see Joseph A.C. Thomas, *The Institutes of Justinian. Text, Translation and Commentary* (Amsterdam: North-Holland Publishing Company, 1975).

This passage is originally by Gaius, a lawyer from the second century. It is not from his *Institutiones,* which served as a model for Justinian's (see 51–52 above), but from his *Res cottidianae*. For the relationship between the *Institutiones* and *Res cottidianae* by Gaius and the *Institutiones* (and *Digesta*) by Justinian concerning this specific passage, see Nelson, *Überlieferung, Aufbau und Stil*, 229ff.

Also see the definition of *depositum* in the opening section of the treatment of *depositum* in *Dig.* 16.3.1 pr.: *Depositum est, quod custodiendum alicui datum est, dictum ex eo quod ponitur: praepositio enim de auget depositum, ut ostendat totum fidei eius commissum, quod ad custodiam rei pertinet.* 'A deposit is what has been given to another for safekeeping. It is so named from the word *ponere*, to place. The preposition *de* makes

contract: the legal tie between the parties was established by the handing over of the object.[111] It was determined that the depositary could not use the thing; doing so would constitute *furtum* (theft). In early Roman law, based on the law of the Twelve Tables, the only action thus available was the *actio furti*, the action against a thief. However, as this *actio* was found to be too strict, the praetor created the *actio depositi*.[112] This *actio* could only be brought in cases where no kind of remuneration was determined. If it was, the act was not *depositum*, but *locatio et conductio* (contract of letting and hiring).[113] The lack of remuneration was deemed to be vital for *depositum* because the entrusting of the object to the depositary benefits the depositor, which goes against him asking for interest (contrary to a loan, where it is not the person supplying the object but the person receiving it that benefits from the act, and remuneration is justified). In our case we see that there is no remuneration, which sustains the idea of the *depositum*.

The most important question for a correct interpretation of the situation here is whether we should expect Judah to have used the money. An affirmative answer is the most logical as people usually seek to

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up the term *depositum* to show that everything which pertains to the safekeeping of the property had been committed to the good faith of the depositee.'

[111] In the *Institutiones* of Justinian depositum is treated in a section with other real contracts like *mutuum*. The relationship of *mutuum* and *depositum* will be discussed below, 135–139.

[112] This *actio* is mentioned in the *Institutiones* fragment quoted above (n. 110) as the applicable *actio* in cases of *depositum*.

The praetor originally saw to legal matters on the Forum. He could give edicts and played an important part in creating customary law (*mos*). In 130 CE praetorian edicts were consolidated into a form of code and this code was given force of law. About the relationship between *ius civile* and *ius praetorium* (or broader, the *ius honorarium*) see Kaser, *Das Römische Privatrecht* I, 201, 205ff.

[113] *Quibus casibus sine mercede suscepto officio mandati aut depositi contrahitur negotium, his casibus interveniente mercede locatio et conductio contrahi intellegitur.* 'While in cases where the obligation is undertaken without remuneration *mandatum* or *depositum* are contracted, in cases where remuneration occurs it is understood that *locatio et conductio* is contracted.'

See also the famous case of the pool attendant (*balneator*) in *Dig.* 16.3.1.8: *Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri…puto; quod si accepit, ex conducti.* 'If clothes given to the keeper of a bath for safekeeping are lost and if the keeper has received no fee for the safekeeping, I think that he is liable in an action on deposit,…; but where he has received a fee, he is liable to an action on hire.' This passage is from Ulpian, who was a lawyer from the early third century. This material is therefore later than the material from Gaius cited above.

I note that I omitted part of the passage; I will come back to the contents of that part below, 142.

acquire money to use it. Upon my first reading of the documents from the archive in temporal sequence I was inclined to assume that the deposit of P.Yadin 17 had a direct link with the marriage document of P.Yadin 18. In P.Yadin 17 Judah receives three hundred denarii by way of deposit, in P.Yadin 18, where Judah's daughter Shelamzion is married off, there is mention of an extra dowry addendum of three hundred denarii. The correspondence in amount and the fact that P.Yadin 17 was written some six weeks before P.Yadin 18 suggested to me that the dowry addendum in P.Yadin 18 was made by the father, Judah, and consisted of the deposited money of P.Yadin 17. However, there is a problem with this interpretation. Although the relationship between the two acts suggests itself quite compellingly, the Greek of P.Yadin 18 provides a strong counterargument, as it does not lend itself for the interpretation that the father supplied the three hundred denarii.[114] Obviously, if we assume that not the father but the groom provided the three hundred denarii mentioned in P.Yadin 18, no evident relationship of P.Yadin 18 with P.Yadin 17 needs to exist. Still it is possible to assume, as Satlow does, that Judah used some of the money he acquired by the deposit for the dowry of his daughter (which amounted to two hundred denarii).[115]

The question of whether we can expect Judah to have used the money and the related question of what this says about ownership of the deposited sum, is extra interesting in the light of evidence from Egypt. As shown in several cases above, comparison with Egyptian practice can bring interesting parallels and divergences to light. In her comparison of Babatha's position as widow with that of widows in Egypt, Ann Ellis Hanson discusses P.Yadin 17 as 'a deposit-loan,' briefly referring in a footnote to 'a similar marriage practice in early Roman Egypt.'[116] In the publication she refers to several documents are discussed that constitute what the authors describe as 'marriage loans.'[117] To summarize their findings in short, the marriage loans are loans between husband and wife, while no formal, written marriage contract exists. The loan has to

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[114] I was informed that Dieter Hagedorn once replied negatively to a detailed query to this point; see 417 below.

[115] See Satlow, "Marriage Payments," 54–55.

[116] Hanson, "The Widow Babatha," 89, n. 12.

[117] See Traianos Gagos, Ludwig Koenen and Brad E. McNellen, "A First Century Archive from Oxyrhynchos or Oxyrhynchite Loan Contracts and Egyptian Marriage," in *Life in a Multi-Cultural Society. Egypt from Cambyses to Constantine and Beyond* (ed. J.H. Johnson; Studies in Ancient Oriental Civilization 51; Chicago: The Oriental Institute of the University of Chicago, 1992), 181–205.

be returned within a set period of time from the moment that the wife requests return. The loans seem to provide extra security for the wife: divorce was made more difficult because the husband would have to return the loan, which could be substantial. In fact, the authors show that a loan of a relatively low sum was sometimes followed by one of a substantially higher sum, relating this to an initial trial period and later the real marriage. At the end of their article the authors have added an addendum, mentioning P.Yadin 17 and 18, stating that 'the partial similarities . . . seem to be obvious, but need further study.'[118] In my assessment the main difficulty in linking this Egyptian practice with P.Yadin 17 (and 18) lies in the fact that the 'loans' of P.Yadin 17 (and 18) are related to marriages that are written, that is, entered into by written marriage contracts. In the case of P.Yadin 18 the addendum by the groom would have to constitute the marriage loan, which means that the marriage loan is part of the marriage contract. Consequently, I am reluctant to accept that P.Yadin 18 would contain a case of marriage loan, comparable to the Egyptian practice: the extra sum that is provided is provided within the context of a marriage contract. Where P.Yadin 17 is concerned, a marriage contract has been drawn up between the husband and wife concerned (P.Yadin 10). Therefore, the loan cannot provide that much as security as it will have done in the Egyptian context, where, as the authors emphasize, the loans were drawn up for marriages where no marriage contract existed:

> The loans, consisting either of money or goods, were not accompanied by written marriage contracts. . . . In the absence of marriage contracts, the loan agreements became an indirect legal base for such marriages.[119]

What is interesting, however, is the idea behind the Egyptian practice of the deposit-loan: the loan provided extra security for the wife, in case she is divorced or widowed. For the Egyptian cases the authors have determined explicitly that the husband could use the loans, but 'the ultimate ownership rested with the woman.'[120] This observation seems to me most relevant in the present discussion of the interpretation of the deposit, because it indicates that the fact that Judah would probably have used the money does not go against assuming that ownership rested, ultimately, with Babatha. I will come back to this below.

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[118] Gagos et al., "A First Century Archive," 199.
[119] Gagos et al., "A First Century Archive," 197.
[120] Gagos et al., "A First Century Archive," 197.

Assuming that Judah could, and did, use the money he received on account of the deposit has immediate implications for understanding to what law of deposit our act refers. As mentioned above, it was the rule under Roman law that money received on deposit could not be used by the depositary. If he did use it, this was even considered as theft. The only exception to this rule was the so-called *depositum irregulare*, the special form of deposit especially for the deposit of money and consumables. One deposited the things with the depositary who used them and returned an equal amount of goods of the same kind or the equivalent amount of money on request. The important thing here is that ownership is supposed to pass to the depositary. Therefore, contrary to the real deposit, the depositary in a *depositum irregulare* becomes the owner of the money. When he uses the money, this is legitimate, as he uses his own property. Therefore, if we are to interpret the depositum of P.Yadin 17 as a *depositum irregulare*, Judah could use the money. However, this would also mean that Judah had become owner of the money, a fact that seems to be contradicted by other evidence from the archive. To explain this properly a short survey has to be made of the development of *depositum irregulare* in Roman law and its close relationship with *mutuum*.

A reference to the idea of *depositum irregulare* might be found in *Dig.* 16.3.24 (a quote from Papinian's book nine of the *Quaestiones*),[121] where a case is discussed of a person who deposits a hundred coins with another person. The text is mainly concerned with the question of whether payment of interest is supposed to be part of the deal, but information can also be found about the difference between real *depositum* and *depositum irregulare* in the text. It is said that the *actio depositi* applies when the same coins are to be returned. If, however, the contract serves to denote that the same amount of money will be returned but not necessarily the same coins (i.e. the objects of the *depositum*) *egreditur ea res depositi notissimos terminos*, 'the matter exceeds the very well-known limits of a deposit.' This means that in such a case the matter is not considered to be a real *depositum*.

The odd thing with this passage is that it seems that the author meant to say that interest could be expected in a normal case of *depositum*, but not with the *depositum irregulare*. This is peculiar because a real *depositum* does not offer the depositary the chance of using the object of the *depositum*. Therefore, it would be unjust to have him pay inter-

[121] Papinian was a famous lawyer from the second century CE. There has been some controversy whether this specific passage is really completely by Papinian or whether an interpolation should be assumed. I will come back to this below, 136.

est. This would make the *depositum* very unbeneficial for him: he has to take care of an object, keep it and accept liability for its loss while being unable to use it, but having to pay interest for it. In the case of the *depositum irregulare* on the other hand, where the depositary can use the object (i.e. the money), interest would be far more logical. After all the *depositum irregulare* is more like a loan (where the borrower also uses the borrowed goods). Because of this incongruity it is difficult to understand what Papinian meant to say here. [122]

Since Papinian stresses the difference between return of the same coins and return of the same amount of money, it could be inferred that he meant to say that the latter case is more like *mutuum* (loan for consumption).[123] In this case, the object of the loan was not returned but the same amount of the same kind of goods.

Where *mutuum* is a loan where the object is not returned itself but the same amount of the same kind of goods, *depositum irregulare* is a *depositum* where not the same coins but different coins to the same value of money are returned. It is important to note that with *mutuum* and *depositum irregulare*, ownership is transferred to the borrower and the depositary respectively. This is logical since to be able to use the object they need the capacity to dispose. I refer here to *Dig.* 12.1.9.9, where it is concluded that when a person has deposited money and then gives permission to use it (turning a regular *depositum* into *mutuum*) the ownership of the money is transferred by his permission. This means of transferral of ownership rights is called *brevi manu*: the ownership is transferred to someone who already had the money in his keeping (for the *depositum*). This means that in the case of the real *depositum*, the depositary is only in possession of the money, while he does not own it. When the deal is transferred into *mutuum*, he becomes owner and can act with the money as he pleases.

In this passage, the transferral is thus from *depositum* to *mutuum*. While Papinian in *Dig.* 16.3.24, cited above, does not specifically mention the name of the contract in which not the same coins but the same amount of money is returned, Ulpian does so here: he categorizes it under *mutuum*. This is significant: in the time of Ulpian the deposit that

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[122] The meaning of the passage has been extensively discussed, as early as in the time of the Pandectists. For an overview of interpretations see Hannu T. Klami, *"Mutua magis videtur quam deposita." Über die Geldverwahrung im Denken der römischen Juristen* (Helsinki: Societas Scientiarum Fennica, 1969), 46ff.; in particular about the interest 126ff., with conclusions on 141–142.

[123] As noted above *mutuum* is a real contract, like *depositum*; it is treated in the same passage of the *Institutiones* (*Inst.* 3.14 pr; *depositum* is discussed in *Inst.* 3.14.3; see n. 110 above).

concerned return of the same amount of something and not the exact thing was understood to be a case of *mutuum*. This makes it likely that Papinian did not know the *depositum irregulare* as such either. Consequently, we can assume that the Roman sources closest in time to our documents took the contract in which the same amount of money was returned to be a sort of *mutuum*. In that case, it is self-evident (as Ulpian explains in *Dig.* 12.1.9.9) that ownership passed to the depositary. This latter fact is important for our understanding of P.Yadin 17.

In the case found in P.Yadin 17 we are dealing with a deposit of money. Since it is likely that the *depositum* saw to the return of the same amount of money (thus resembling *mutuum* rather than a real *depositum*), it is comparable to the case mentioned by Papinian in *Dig.* 16.3.24, cited above.

The question has been raised for *Dig.* 16.3.24 whether part of it might be an interpolation, that is, a later addition to the original fragment by Papinian. This addition could have been by Ulpian or Paul (both pupils of Papinian) or by Tribonian (an advisor of Justinian, who played a major part in Justinian's codification projects). A later interpolation could mean that the *depositum irregulare* as referred to was not known to Papinian but was of later date. However, as noted above, the words *depositum irregulare* are not used in the fragment and one can indeed question whether Papinian (or one of his students) knew of such an institute. Indeed, in *Dig.* 12.1.9.9, referred to above, Ulpian does not speak of *depositum irregulare* but rather of *mutuum*. This idea that the return of the same amount was *mutuum* (not *depositum*) could also be behind the phrase '*egreditur ea res depositi notissimos terminos*,' 'the matter exceeds the very well-known limits of a deposit,' in *Dig.* 16.3.24. Regardless of the origin of the fragment it is clear that the idea of *depositum irregulare* as such was not known in the time of the lawyers of the second and even third century whose texts are incorporated in the Digest.

> The classical Roman lawyers were content, at first, to make available the standard remedy of *condictio* and thus to accommodate the new practice within the framework of the established rules of *mutuum*.[124]

Later there seems to have been a development towards granting the *actio depositi* for *depositum irregulare* as well, which indicates that the *depositum irregulare* was no longer seen as a form of *mutuum*, but rec-

[124] Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990), 218.

ognized as a form of *depositum*. There is controversy as to when this transition occurred: it is in any case clear that the term *depositum irregulare* to denote the special form of *depositum* where the depositary can use the goods deposited does not occur in the *Corpus Iuris Civilis* and was probably developed in later legal discourse.[125] For the present texts we can assume that return of the same amount instead of the same thing occurred while the phrase *egreditur ea res depositi notissimos terminos*, 'the matter exceeds the very well-known limits of a deposit' (*Dig*. 16.3.24) and the contents of the Ulpian passage cited above (*Dig*. 12.1.9.9) seem to suggest that it was treated as *mutuum*. In that case, the act found in P.Yadin 17 would not be a case of *depositum* but of *mutuum*. This makes it unlikely that 'according to the law of deposit' would refer to Roman law.

Phang's study about the marriage of Roman soldiers, already quoted above in connection with the deposit of P.Yadin 5, also touches upon the use of the *depositum irregulare* in second century Roman law: 'It is obvious that the prefects denied the *actio depositi* in order to discourage the soldiers' unions outright, basing the denial on *fraus legis*. However, it is possible that a conflict of laws and interests may have motivated them to deny the *actio depositi* itself. The Hellenistic παρακαταθήκη eventually became the Roman *depositum irregulare*. The use of loan contracts to constitute dowries was perhaps originally an Egyptian custom; it was taken into Greco-Egyptian custom.… Nevertheless, *depositum irregulare* itself (for banking) was slow to be accepted by the Roman jurists, and the use of the *depositum* as dowry does not appear in the Roman jurists till around A.D. 200. In the early second century, the Roman prefects may have been unprepared to recognize either *depositum irregulare* or its use even by civilians to constitute dowries.'[126] This suggestion can support my conclusion given above that it is unlikely that the *depositum irregulare* as such was known and recognized in Roman law in the time of the papyri under discussion. Therefore, P.Yadin 17 most probably does not refer to Roman law.[127]

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[125] It is taken to have been coined by the commentator Jason de Mayno (1435–1519), see Zimmermann, *The Law of Obligations*, 219, n. 229. For discussion of the various opinions about the transition from *condictio* (*mutuum*) to *actio depositi* (*depositum irregulare*) see Zimmermann, *The Law of Obligations*, 217–219, especially references in n. 227.

[126] Phang, *The Marriage of Roman Soldiers,* 37.

I note that Phang mentions the controversy about the institute of *depositum irregulare* in note 58, where she says that 'some hold that it is post-classical. J.A.C. Thomas (1976), 278 regards it as classical. Zimmermann (1990), 217 warns that *depositum irregulare* is "one of the most controversial institutions in the science of Roman law." ' I note that Zimmermann there quotes Litewski ("Le dépot irrégulier," *RIDA* 21 [1974]: 215). Phang also refers to Klami, who discussed the relationship between παρακαταθήκη and *depositum irregulare* (Hannu T. Klami, "*Depositum* und *Παρακαταθήκη*," in *Iuris Professio: Festgabe für Max Kaser* [ed. H.-P. Benöhr and M. Kaser; Vienna: Böhlau, 1986], 89–100).

[127] It is interesting that Phang speaks of 'conflict of laws' as possible reason for the Roman reluctance to grant the *actio depositi* in the case of the concealed dowries, and indicates that the Hellenistic παρακαταθήκη may have been of Egyptian origin. The suggestion that a construction of deposit where someone can use the deposited good(s) has

In Roman law the transfer of ownership seems to have been the consequence of a *depositum irregulare*. It is in any case the consequence of *mutuum*, as we have seen in *Dig.* 12.1.9.9, discussed above. Consequently, if we assume that the early lawyers treated a *depositum* with return of the same amount instead of the same object as *mutuum*, it is clear that ownership passed to the depositary. If this has to be assumed as the consequence of the deposit contracted in P.Yadin 17, Judah had indeed become owner of the three hundred denarii. In P.Yadin 21–22, however, Babatha is selling the date crop of orchards that belonged to her (then late) husband Judah. She claims a right to them by referring to her dowry and a debt. Although there is no absolute certainty to this point, I think it is likely this debt was the deposit found in the present papyrus. Upon his death, Judah was found to owe two things to Babatha: her dowry and the money she had put on deposit with him in P.Yadin 17.[128] A dowry did not pass into the property of the husband; he did not become owner of it.[129] This is clear as the heirs, who have to pay the dowry to the widow, cannot deduct her maintenance from it. The estate that has to provide the maintenance does not include the dowry. Babatha can sell the crop since it is hers considering her right to the dowry: she is owner of the dowry. Since the debt is mentioned alongside the dowry as a second similar ground for Babatha's right to sell, the debt also has to represent property of Babatha that was in her husband's keeping but

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an oriental origin could indicate that the reference to 'the law of deposit' in our document should be related to an oriental context.

[128] I note that I take the debt to refer to a real debt and not as Lewis takes it, to the debt as part of the dowry arrangements, namely the debt for maintenance owned by the heirs to the widow, see 175 below. Cotton has pointed out that 'dowry and debt' could be read as a hendiadys, 'the debt of your dowry' ("Marriage Contracts," 4). I think however that the relationship between P.Yadin 17 and 18 in connection with the mention of a debt in P.Yadin 21–22 justifies the assumption that a real (separate) debt was meant. This would then have to be the debt of the *depositum* of P.Yadin 17. Also see 220–221 below.

[129] It could be debated whether the husband became owner of the dowry *during marriage*. In my opinion this would depend on his power to dispose. If he lacked such power, I would not accept that he had become owner of the dowry (in the usual sense of ownership). Obviously the husband had control over the dowry during marriage; the dowry is out of the hands of the wife. Also, see my more extensive discussion in small print above, 122–123. Whether the husband does or does not have ownership of the dowry during marriage is not important for the matter at issue here, since the papyri concern the position of the widow, that is, of the wife after her husband has died. It is clear that in that case the dowry belongs to the wife: it does not become part of the inheritance of the deceased. Therefore, one can say that Babatha claims the dowry as owner. Since dowry and debt are mentioned side-by-side as reasons for Babatha's behaviour, this could denote that in both instances Babatha claims her own property.

that was not his. This is only possible if we assume that the deposit did not pass into Judah's ownership. Therefore, the Roman *depositum irregulare* (or indeed a *mutuum* construction) would not fit the present case. The arrangement seems to come closer to the Egyptian marriage loan, referred to above, where the husband could use the money but the ownership of the money ultimately rested with the woman.

The assumption that the reference is not to Roman law is supported by several other elements in the text.

First, there is a retribution *in duplum* in case of default. Such a retribution *in duplum* could apply to a *depositum* in Roman law, when the *depositum* was originally treated according to the strict rules of the law of the Twelve Tables. According to these strict rules, the failure to return the *depositum* was treated as theft. This was changed later by the praetor, who instituted two kinds of *depositum, depositum* and *depositum necessarium*. In the latter there was a retribution *in duplum* in case of default. The praetorian edict is cited in *Dig.* 16.3.1, part of a longer treatment of *depositum*. It is decided there that in case of certain circumstances forcing a person to entrust another person with his property this person is liable for twice the value in case of default. This is logical since the depositary could be expected to take more care with objects entrusted to him by necessity on part of the depositor.[130] Such a case does not seem to be at issue in the papyrus. On the contrary, it might well be that Judah had requested the *depositum*, to enable him to give money to his daughter on the occasion of her wedding.[131]

I note that Phang states that 'if the prefects followed Greco-Egyptian law, the suit for the return of παρακαταθήκη caused the sum to be doubled.'[132] This means that *depositum irregulare* could cause a retribution *in duplum*, if indeed Greco-Egyptian law was

[130] This is stated explicitly in *Dig.* 16.3.1.3–4, where it is explained that the necessity forces the depositor to deposit and that the depositary is therefore expected to be extra careful with his charge. (esp. 4: *Haec autem separatio causarum iustam rationem habet: quippe cum quis fidem elegit nec depositum redditur, contentus esse debet simplo, cum vero extante necessitate deponat, crescit perfidiae crimen et publica utilitas coercenda est vindicandae rei publicae causa: est enim inutile in causis huiusmodi fidem frangere.* 'This distinction in causes is well founded; indeed, when someone has chosen to rely on the trustworthiness of another and the deposit is not returned, he ought to be content with simple damages. However, when he deposits through necessity, the crime of perfidy increases and the public welfare demands retribution for the sake of protecting the common interest; for it is harmful to betray trust in cases of this kind.')

[131] See 132 above and the discussion of P.Yadin 18 in Chapter 6 below, 417.

[132] Phang, *The Marriage of Roman Soldiers*, 38.

followed. In the cases Phang discusses we are of course in an Egyptian realm, therefore, there could very well be this influence of Greco-Egyptian law. In the case of P.Yadin 17 it is more likely to interpret the retribution *in duplum* in the light of (strict) Roman law. There the sum was only doubled in the case of *necessarium*, and therefore, I do not think it is likely that the reference in P.Yadin 17 to a retribution *in duplum* is a clear indication that Roman law is referred to. On the contrary, I think that the retribution *in duplum* points at an influence of Jewish, or if one prefers, oriental, law, which assumption is strengthened by other elements in the text as I will explain below. I also refer to Klami, who discussed the relationship between παρακαταθήκη and *depositum* (*irregulare*) and concluded that the retribution *in duplum* is not a feature specific to Roman law but is indeed found in many ancient systems.[133] He explains that the retribution *in duplum* in case of *depositum necessarium* developed from a change in function of the formula. Instead of denoting reasons for liberating the depositary from his liability (because the object could not be returned), the cases of emergency became reasons for the depositor to entrust his property to others, which called for greater demands for care in the safekeeping and therefore more substantial liability.[134] Consequently, two distinct institutions developed: the real *depositum* with retribution *in simplum* and the *depositum necessarium* with retribution *in duplum*.

It is interesting that Klami relates the retribution *in duplum* to the formula κατὰ τὸν τῶν παραθηκῶν νόμον found in papyri, wondering whether this reference to a law of deposit could be a reference to an old institution of retribution *in duplum*. The meaning of νόμος in this phrase, however, is heavily debated as he shows in quoting the opinions of a number of scholars on the subject.[135] For the present discussion it is important to note that in one opinion, νόμος is taken to refer to a specific imperial constitution dated to 30–40 CE. This could mean that the reference to 'law of deposit' in P.Yadin 17 could be a reference to a specific rule of Roman law. It seems doubtful, however, whether νόμος can refer to a specific imperial constitution, in any case at this time. I refer to Klami's discussion and references on page 95. The formula appears late, that is after 86 CE, and Klami concludes (in my opinion justly) that 'es ist aber wenig glaubhaft dass es die Römer gewesen wären, die so spät eine duplum-Haftung eingeführt hätten.' He thinks it more likely that the retribution *in duplum* stems from old sources of Roman and Indoeuropean law (like the Codex Hammurabi) while it was later replaced by a general retribution *in simplum*. This means that the mention of a retribution *in duplum* here is not a clear-cut indication for the applicability of Roman law but rather points at an adherence to more general oriental law and perhaps specifically Jewish law, where retribution *in duplum* in the case of *depositum* is already mentioned in the Biblical sources.[136] In the context of the whole of arrangements found in P.Yadin 17, it is unlikely that 'law of deposit' refers to Roman law, see my discussion of ownership above and liability directly below.[137]

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[133] See Klami, "*Depositum* und *Παρακαταθήκη*," 94, designating the doubling as 'eine uralte indoeuropäische Institution; auch in Rom waren solche Sanktionen seit alters bekannt.' This latter reference is to the law of the Twelve Tables, mentioned above.

[134] See Klami, "*Depositum* und *Παρακαταθήκη*," 94.

[135] See Klami, "*Depositum* und *Παρακαταθήκη*," 94–95.

[136] See Exod 22:2,6.

[137] I want to emphasize that the clause referring to the law of deposit used in P.Yadin 17, κατὰ τὸν νόμον τῆς παραθήκης, is different from the clause normally found in Greek papyri. There it reads κατὰ τὸν τῶν παραθηκῶν νόμον (see Klami, "*Depositum* und *Παρακαταθήκη*," 95). Yadin/Greenfield suggested that the Aramaic נמוש פקדנה, found in Judah's subscription at the end of the papyrus, 'is a direct translation of κατὰ τὸν νόμον τῆς παραθήκης' (in Lewis, 141). However, is this the right relationship, the Aramaic

Secondly, if we assume that Roman law was applicable, it is also not clear what 'damages' refers to or the said claim of illegality. This latter remark could have to do with the idea that a depositary who used the deposit was guilty of *furtum*, but we have just seen that this was *not* the case with the *depositum irregulare* (or *mutuum*). The idea behind a deposit in money is that the depositary can use the money; indeed Roman law has him become owner of it. Therefore, it is hard to explain what 'a claim for illegality in these matters' would encompass within a Roman legal context. Generally speaking, a depositary could only be liable for *dolus* (fraud).

This liability could never be excluded, as appears from *Dig.* 16.3.1.7: *Illud non probabis, dolum non esse praestandum si convenerit: nam haec conventio contra bonam fidem contraque bonos mores est et ideo nec sequenda est.* 'If it is agreed that there is to be no liability for fraud, you will not approve it; for this agreement is contrary to good faith and good morals and therefore is not to be followed.'

See Dig. 16.3.1.6: *Si convenit, ut in deposito et culpa praestetur, rata est conventio: contractus enim legem ex conventione accipiunt.* 'If it is agreed that there is also to be liability for fault with regard to the deposit, the agreement is valid; for contracts take their law (i.e. applicable rules) from the agreement.'[138] Because the extension to *culpa* has to be agreed upon, it is obvious that normally a *depositum* only involved liability for *dolus*.

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being a direct translation of the Greek? In view of the evidence of P.Hever 64 I would rather suspect the opposite: the Greek (which is as just stated different from the normal formula) being a direct rendering of the Aramaic. With regard to P.Hever 64 Cotton has discussed 'some glaring Semitisms' ("Survival, Adaptation and Extinction," 9–10), assuming that the document is a Greek rendering of an Aramaic original. I wonder whether the Greek phrase κατὰ τὸν νόμον τῆς παραθήκης could also be a Greek rendering of an originally Aramaic phrase. For P.Hever 64 it seems obvious to me that the legal background (and thus the law referred to) is indigenous (considering the comparable Aramaic deed of gift of P.Yadin 7; see 24 n. 79 above). Consequently, the use of the Greek phrase κατὰ τὸν νόμον τῆς παραθήκης in P.Yadin 17 (as derived from Aramaic) could also indicate that this document has to be read within the context of indigenous law.

[138] I deviate from the translation by Watson, who translates: 'For the principle underlying contracts is agreement.' The word translated by Watson with 'principle' is *legem* (*lex*), which clearly means 'law,' 'the applicable rules.' Precisely that fact makes the passage so interesting, since it actually says that contracts take their law, the rules applicable to them, from the agreement. I am almost tempted to translate: the agreement between the parties serves as the law contracts are based on. In the light of this study this would mean that what the parties decide in their contract—and what kind of legal background they refer to—will serve as the applicable framework for their deal. This also infers that the contract will serve as the basis for judgement in case of legal dispute, i.e. that the judge will try to extract the applicable rules from that contract. I will come back to this in Chapter 3 below, 192–193 and 203.

Compare: 'What Roman law did have, however,… is the rule that parties to a contract might by agreement impose standards different from those settled in law. Thus: "Digest of Justinian, 16,3,1,6. If it is agreed in a deposit that there will be liability even for negligence, the agreement is ratified; for the contract becomes law by agreement."

See also the latter (and previously omitted) part of Dig. 16.3.1.8*: Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri et dolum dumtaxat praestare debere puto; quod si accepit, ex conducto.* 'If clothes given to the keeper of a bath for safekeeping are lost and if the keeper has received no fee for the safekeeping, I think that he is liable in an action on deposit *and that he ought to be responsible only for his fraud*; but where he has received a fee, he is liable to an action on hire.' This latter instance, liability based on the *actio locati et conducti*, extended liability beyond the mere case of *dolus*.[139]

See also the sequel of *Inst.* 3.14.3 cited above:[140] *Praeterea et is, apud quem res aliqua deponitur, re obligatur et actione depositi, qui et ipse de ea re quam accepit restituenda tenetur.* ***sed is ex eo solo tenetur, si quid dolo commiserit, culpae autem nomine, id est desidiae atque neglegentiae, non tenetur: itaque securus est qui parum diligenter custoditam rem furto amisit, quia, qui neglegenti amico rem custodiendam tradit, suae facilitati id imputare debe****t.* 'Furthermore, a person with whom a thing is deposited is under a real obligation and liable to the deposit action, being liable for the restoration of that which he receives. ***He is liable, however, only for his fraud; not for non-intentional fault, i e inertia or negligence. Hence a man is safe who loses through theft a thing of which he takes little care, for a person who entrusts his property for safekeeping to a negligent friend must regard the fault as his own***.'

There were different opinions as to the question of whether *culpa lata* (gross fault) was to be equated with *dolus* and consequently whether liability in *depositum* extended to *culpa lata*. In *Dig*. 16.3.3.32, Nerva is said to have argued thus and Proculus to have gone against it. Celsus, to whom the fragment is ascribed, chose the side of Nerva saying: *nam et si quis non ad eum modum quem hominem natura desiderat diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salua fide minorem is quam suis rebus diligentiam praestabit.* 'For even if a person is not careful in the degree required by the nature of man, still, unless he shows in the deposit the care customary with him, he is not free from fraud; for good faith is not maintained if he shows less care than in relation with his own affairs.'[141]

Liability was limited to *dolus*, mainly because the depositary kept the deposit without receiving any remuneration. Since the act was not profitable for him, liability was limited. In the case of the *depositum irregulare,* the depositary became owner of the money. In that case he could act with it as if it were his own property. In the end he did have to return the money, but that could not pose a problem: since money is, unlike things, always replaceable, the depositary could not claim that he was unable to return the deposit. Therefore, one can even wonder whether a plea of *vis major* or *casus fortuitus* (force majeure) would have been acceptable: even if the money had been lost due to some cause, the depositary could be expected to return some money (he could not claim that the object was no longer there to be returned). [142]

(Alan Watson, *Roman Law and Comparative Law* [Athens: University of Georgia Press, 1991], 240).

[139] See also *Dig.* 16.3.1.9–10 for an example where in the case of *locatio et conductio* liability is for both *dolus* and *culpa*, while in the case of *depositum* it is only for *dolus*.

[140] See n. 110 above.

[141] Celsus was a lawyer from the late first, early second century CE (the rule of Domitian and Hadrian). Nerva and Proculus, whom he mentions, were lawyers from the first century (possibly around 70 CE).

[142] About the later, postclassical, developments concerning liability see Kaser, *Das Römische Privatrecht*, II, 372.

I note that Kaser mentions the disappearance of the verb *deponere* in favor of *commendare* (by the end of the third century). *Commendare* is the verb used in *Dig.* 16.3.24,

The word παρανομία used in the papyrus text does not express the concept of *dolus*, as it designates a transgression of law, decency or order, thus a violation of current law.[143] Thus an act can be qualified as an act of παρανομία or a person can be liable concerning a charge of παρανομία (like it is said in P.Yadin 17). This is not the same idea as with *dolus* or *culpa*, which are expressions to denote the failure of a person to meet a certain obligation, attributing this failure to a certain cause (the person's intent to go against the contract or his fault/guilt concerning the wrong outcome).

It is interesting to note that παρανομία is not used in Greek poetry but it is in prose, mainly in rhetoric. It is used once in the New Testament, where it denotes a transgression of divine law: 2 Pet 2:16. The word is used to refer to Balaam, a magician referred to in the Hebrew Bible, who was hired to curse the people of Israel but could not do so in the end, see Num 22–24.[144] For transgression of the law the word ἀνομία is used more often, which literally means 'being without the law' thus acting as if no law existed. παρανομία on the other hand expresses more of an explicit will (decision) to go against the law. This applies in particular to Balaam, who set off to curse the people of Israel even though he knew of the God who protected them. Thus his sin is qualified differently, by using another word than is used in the rest of the chapter to denote wickedness (for example ἀδικία, injustice, or ἁμαρτία, sin). The verb παρανομεῖν is used once in the New Testament as well, in Acts 23:3, where Paul addresses the High Priest who is said to sit 'according to the law' but to judge 'contrary to the law.' It is obvious that here divine, Jewish, law is meant. The same use of the verb παρανομεῖν can be found with Flavius Josephus where it is used to denote the transgression of divine law, as in *Ant.* 11.149, where Ezra condemns the mixed marriages: '…Ezra arose and accused them of having broken the law by marrying outside their own nation…'[145] For transgression of human commandments other words are used as can be seen in *Ant.* 10.254–256, where people take care not to transgress specific orders of the Persian king.[146] Thus παρανομία is closely linked with (transgression of) divine law. This could explain the use of the term here: the withholding of the *depositum* would be a transgression of divine law (as it is given in Exod 22).

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where Papinian explains that *commendare* is the same thing as *deponere*. Consequently, it could be understood that *commendare* was first used as an alternative (probably a more common form) for *deponere*, while it became the accepted verb for referring to a *depositum* later on. (The Papinian passage is thought to be interpolated, but not in the phrase that contains the *commendare*. Consequently, the explanation equating *commendare* with *deponere* does not seem to be a later addition.)

[143] See LSJ, s.v. παρανομία.

[144] Balaam is also referred to in Num 31, where people are said to have followed the advice of Balaam and therefore have brought havoc to the people of Israel.

[145] Translation from the Loeb Classical Library edition, by R. Marcus.

[146] This is a part from Josephus' retelling of the Biblical book of Daniel, where some court officials plot to have Daniel killed. They induce the king to make a commandment that no man is allowed to make a request either with a human or a god during a certain period. When Daniel is found to be praying during this period he is brought before the king for having transgressed the commandment.

It seems that the idea is that the depositary will be liable in person ('answerable') to a charge of having acted against the law, that is the basic principles of the *depositum*. This is logical since the prompt return on request is the heart of the *depositum* arrangement. Consequently, the charge of illegality has to be seen as a personal charge of going against the law rather than a reference to *dolus* or the like. From the above it thus appears that the law referred to is not Roman law.

Although it is clear that the reference to the law of deposit is not to Roman law, it remains to be seen whether the described arrangements can be connected with Jewish law. In Jewish law there are several types of deposit. Since in the present case the deposit concerns money and is without remuneration, it seems to come closest to the case of *shomer chinnam*: a person who accepts money or goods for safekeeping.[147] In case Judah should use the money—a likely situation and a possibility that is not explicitly excluded in the deed's text—Judah would be seen as a *sho'el*, a borrower. The liability for a borrower is much more extensive than for a *shomer chinnam*, in fact the liability of the *sho'el* encompasses even inevitable accident, theft or loss.[148] This means that the money has to be returned *under any circumstances*. If the *sho'el* does not return the money he can be considered to have 'put forth his hand,' that is embezzled the property. This means that under Jewish law a depositary of money, like Judah here, is treated as a borrower. The ownership does not pass and the depositary-borrower is in all cases liable for loss or perishing of the property concerned. If he does not repay on request, there is a suspicion that he has put forth his hand, that is, has used the money for his own expenses. In such cases, the depositary has to take an oath that he did not put forth his hands. I suggest that this is what is meant by 'answerable to a charge of illegality,' of having acted against the law by appropriating the property that was entrusted to him. Since in Roman law ownership passed to the depositary, we can hardly be dealing with a charge of illegality there: *furtum* (theft) is not possible of something one owns.

In a Roman context the charge of illegality could then only be understood regarding a false plea of *vis major, casus fortuitus* etc. However, in Roman law the plea of *vis major* etc. had to do with liability. In case of a successful plea there would be a limited liability

[147] See Elon, *Principles*, 256–257.
[148] See Elon, *Principles*, 257–258.

or no liability at all. Here it is clear that the depositary is in all cases liable to pay the double value of the deposit plus additional damages. There are no circumstances mentioned or a possible investigation into his liability. The charge of illegality seems to have been a different matter, apparently related to the depositary's acts during his charge.

We have two elements here, double liability (retribution *in duplum*) and a charge of illegality, which better fit the Jewish law background: the depositary is in all cases liable for double payment plus damages while he is also answerable to take the oath on not having put forth his hand. The retribution *in duplum* is logical since this was required in Jewish law, see Exod 22:2, which specifically treats the matter of deposit. In Roman law, as explained above, retribution *in duplum* in case of *depositum* did occur, but not for the *depositum irregulare*.[149]

It is then likely that 'deposit' here refers to a Jewish institution, with typically Jewish rules. Consequently, the phrase 'according to the law of deposit' refers to Jewish law. Yet the Jewish parties in their contracts refer to their own law while leaving out the adjective (they do not say *Jewish* law).[150] This implies that they considered their own law to be not just their law, but *the* law. In such a case, divergences from that law have to be marked, as is the case in P.Yadin 18.[151]

P.Yadin 17 deviates in this respect from what we have found in P.Yadin 2–3, 6 and 8–9. There reference is made to an unspecified legal background, accepted by all parties, while deviations have to be marked, as in the case of the water rights in P.Yadin 3 and the specific Jewish rules for tending to land in P.Yadin 6 ('you shall till'). Where there is no specification but a mere כחליקת, this seems to refer to the system the parties

[149] It could be argued, as I have explained above (small print 144–145), that the depositary in a case of *depositum irregulare* could not make a plea of *vis major* etc. either, since the money would have been replaceable. Therefore, unlimited liability could befit the case of *depositum irregulare*. However, both the retribution *in duplum* and the claim of illegality do not fit in with the Roman system and especially not with the *depositum irregulare*. As ownership of the deposited sum passes to the depositary, he can never act illegally even if he uses the money for his own benefit. Indeed, the idea behind the *depositum irregulare* (and the transfer of ownership) is that the depositary will use the money.

[150] That Jewish law could be qualified as such can be seen in P.Yadin 10, where there is reference to 'the law of Moses and the Judaeans.' See discussion of this papyrus in Chapter 6 below, 379ff.

[151] See discussion of P.Yadin 18 in Chapter 6 below, 398ff. The overall legal framework of P.Yadin 18 is denoted by reference to 'according to the laws' (κατὰ τοὺς νόμους) in the opening lines, while later on a specific arrangement is related to 'Hellenic' (or 'Greek') custom (ἑλληνικῷ νόμῳ).

accept as applicable. This can be Nabataean law as in P.Yadin 2–3, but also Jewish law as in P.Yadin 6. This depends upon context and upon the arrangements made in the text. When two different laws apply to one document (like in the case of P.Yadin 3, Nabataean law and a specific rule of Jewish law or custom) the relationship between the two can be characterized by general-specific: both type of references refer to contents and differ only in scope.[152]

In the case of P.Yadin 17, we can assume that the reference to 'the law of deposit' serves to denote the law deemed applicable by both parties, which was in the context most likely Jewish law. This latter assumption is supported by the Jewish background of other papyri in the archive, like P.Yadin 23–24, where the order of succession is clearly determined by Jewish law.[153] This makes it clear that the references to 'law' in documents from after the conquest were not necessarily to Roman law. On the contrary, the parties can refer to 'the law' without specifying what law they mean, while it is clear from the contents of the arrangements that they meant Jewish law. However, while the documents show an adherence to Jewish law when it comes to the contents of the arrangements, there is also an (albeit marginal) role for Roman law. For we see that even though the document adheres to Jewish law internally, Babatha does act with a guardian.[154] This appearance of a guardian is an indication that Roman law played a part here, but it cannot be called a reference to law in a strict sense: the presence of the guardian does not indicate the applicable law like a phrase 'as is proper' or 'according to the law of deposit.'[155] Therefore, a document like P.Yadin 17 presents us with references to law and indications of the applicable law that are not references to law in the strict sense. This combination of aspects of several legal systems in one and the same document can be found in other documents as well, for instance P.Yadin 21–22 and 23–24 to be discussed below. The relation-

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[152] More on this classification in Chapter 3 below, 188ff. I will argue that this general-specific classification as it functioned under Nabataean rule was replaced with a formal-substantive division under Roman rule.

[153] See Chapter 4 below, especially 233–234.

I note that in P.Yadin 10 Babatha is said to become Judah's wife 'according to the law of Moses and the Judaeans.' There the law is specified since it is distinguished into two areas: general Jewish law ('the law of Moses') and specific Judaean custom. See treatment of P.Yadin 10 in Chapter 6 below, especially 383–385.

[154] Guardianship of women is treated in detail in Chapter 5.

[155] See my table below where I only list references to law in the strict sense as such and mention things like appearance of a guardian or inclusion of a *stipulatio* separately, being indications of the applicable law in another sense.

ship between the several laws here cannot be described with general-specific as the appearance of a guardian does not see to contents of the legal act. This means that P.Yadin 17 presents us with a different relation between legal systems within a legal act than the previous acts did. I will come back to this in detail in Chapter 3 below.

The idea that Jewish law is referred to is strengthened by the repetition of the phrase 'according to the law of deposit' in the Aramaic subscription by Judah. Judah at first states that he received the denarii 'on account of deposit' (rendering Greek ἐν παραθήκῃ) and then concludes his statement by referring to 'according to the law of deposit' (rendering the similar Greek expression in lines 30–31). The word used there for deposit is פקדון. This word is also found in P.Yadin 1, a Nabataean Aramaic deed, in an enumeration of items included in a debenture. There are factual items, like land parcels, houses, garden, wool, items of silver and gold, but also rights to things and their proof, like payment, purchase, record, valid document. In this enumeration there is mention of 'proclamation pertaining to it, and deposits, and penalties.'[156] The editors assume that the intention is that the property is free of these things, since both proclamation and penalty carry the negative meaning of encumbrance on value.[157] A proclamation refers to a document used to seize another person's property (comparable to a writ of execution). In this sequence פקדון has to carry the meaning of possibly diminishing the value of the property concerned. The editors explain that no part of the property is deposited with others, that it is under the control of the owner.[158] It is, however, more logical to argue the other way around: that there are no deposits in the property. The meaning of the enumeration is evidently to express that the property does not look more substantial than it is. If there are writs of execution pertaining to it or penalties outstanding, this could mean that the property turns out to be less valuable than has been assumed. If there are deposits outstanding with other persons, like the editors assume, this means that there is money somewhere out there that does belong to the property but is currently not part of it. This would actually denote that the property is *more* substantial than it appears to be, instead of less. Since the person who deposited retained

[156] P.Yadin 1:24.
[157] See *Documents II*, 195.
[158] See *Documents II*, 195.

ownership and could request the property to be returned at any time, outstanding deposits cannot pose a problem. I therefore think what was meant is that there are no deposits in the property, that is, no part of it is a deposit that had to be returned some day.

The use of the word פקדון in P.Yadin 1 shows that it was used as a legal term, which did not need clarification. Consequently, it has to refer to a clear institution and, I note, an institution that pre-existed the Roman conquest since P.Yadin 1 is dated to 92–93 CE. Furthermore, if my interpretation given above is correct (פקדון referring to deposits in the property diminishing its value), this proves that in a פקדון construction, ownership did not pass to the depositary. Since this is the situation we find in P.Yadin 17, this strengthens the assumption that 'law of deposit' refers to indigenous law rather than to Roman law.[159]

In his Aramaic subscription Judah mentions the deposit twice, once to refer to the receipt of the money and once in the end of his statement, mentioning the above discussed 'law of deposit.'[160] The question is to what exactly Judah refers when he mentions this law, for he first states that he will act 'according to what is written above.' This is usually the way to state that one will stick to the arrangements made in the papyrus. What then does the addition 'according to the law of deposit' add? The explanation is most likely to be found in the few words in between Judah's reference to 'what is written above' and 'the law of deposit.'[161] The

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[159] The word used here for law is an Aramaic rendering of Greek νόμος, rather than an Aramaic term like דין or דת. Compare the phrase 'according to the law (דין) of Moses and the Judaeans' in P.Yadin 10.

Also compare the use of the word פקדון in P.Yadin 42, a document dating to the rule of Bar Kochba, where in line 9 the sanctions envisioned are described as being directed against the property of the other party or deposited property, that is, property that is temporarily out of the control of the other party, but that does belong to his estate (see *ATTM II*, 240–242). This text also indicates that with a פקדון construction ownership did not pass to the depositary. In general, one can observe that in this text the reference to deposit has to mean deposit under indigenous law, as Roman law probably played no part at the time (compare the clause 'as is proper' in P.Yadin 42:5, recalling P.Yadin 2–3, while more direct descriptions of the applicable law had replaced this phrase under Roman rule; see detailed discussion of references to law under indigenous and Roman rule in Chapter 3 below, 188ff.).

[160] P.Yadin 17:41–42.

[161] For a detailed discussion of the readings of this passage see Yadin and Greenfield in Lewis, 141.

Beyer translates: 'ausser <wenn> sie irgend etwas annuliert,' interpreting this as a mitigation of the sanction on failure to repay upon request present in the Greek main text (*ATTM E*, 177 and *ATTM II*, 231). However, this interpretation is difficult in view of

first two words are usually followed by a noun and then denote exclusion. Consequently, we have 'excluding…' The next word is a verb followed by the object 'something.' The editors emend the verb, rendering a meaning of withholding: 'excluding that I withhold anything.' The phrase then denotes: 'provided that I do not withhold anything according to the law of deposit.' I think this refers back to the charge of illegality mentioned explicitly above. As I have explained, there could be a demand for a judiciary oath to have the depositary declare he had not embezzled anything ('put forth his hand'). Judah declares here that he will stick to the arrangements of the papyrus emphasizing that he will not withhold anything, as the Jewish law of deposit so explicitly requires. The repetition of the phrase here in connection with the specific act of withholding (the charge of illegality) could indicate the legal system referred to is indeed Jewish law.

That there is such a strong emphasis on the legal act concerned and the applicability of a set of fixed rules unto it could *in itself* denote that we are dealing with Jewish law. As we have seen in the other papyri, the act is not always labeled in the document and in no other case there is a repetition of the rules applicable as we find it here (the repeated reference to the 'law of deposit'). In Jewish law it was determined regarding deposit/bailment that the parties could deviate from the rules by mutual agreement. I refer to *m. B. Meṣi'a* 7:10, where it is said: 'An unpaid bailee may stipulate that he is exempt from [having to take] an oath; and a borrower that he is exempt from having to pay compensation, and a paid bailee and a hirer, that they are exempt from [having to take] an oath or from having to pay compensation.' Since it is stated here that they can exempt themselves, it is clear that normally they are liable. But such an opportunity for exemption may have prompted people to exempt themselves frequently, thereby turning normal practice more to accepting exemption than liability. In our case, where a substantial amount of money is concerned, the parties might have wanted to emphasize that they did not mean to exempt the depositary, but on the contrary, have him accept liability for both the compensation and the taking of the oath ('the charge of illegality'). By stressing that they would follow the law of deposit it was made clear that this law indeed governed the

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what precedes, 'according to what is written above,' as well as what follows, 'according to the law of deposit.' Both clauses seem to indicate that the normal sanctions would apply. Therefore, the interpretation offered by Yadin and Greenfield seems to be more logical.

parties' relationship and not the arrangements in the document. Therefore, after having said that he will conform to all that is written above, Judah emphasizes that he will withhold or exclude nothing, according to the law of deposit. This may then refer to the actual property (he will not withhold any money) but also to the exemption: he will not exclude anything (compensation and oath) for which he is liable/answerable according to the Jewish law of deposit.

It is interesting to note that in the Babylonian Talmud, *b. B. Qam.* 107a-b, the four persons mentioned above are discussed: the unpaid bailee, the borrower, the paid bailee and the hirer. With respect to the oath that a bailee may have to take it is discussed whether this oath is connected with partial admission. Without going into all the details here it serves to note that there was apparently a controversy regarding the requirement of the oath, in several cases of bailment. In the case of deposit as mentioned in Exod 22:6, 'money or goods,' it is remarked that 'a deposit of money might in accordance with B.M. III, 11 amount to an implied *mutuum* involving all the liabilities of a loan. In other systems of law it is indeed called *depositum irregulare* for which see Dig. 19,2,31 . . . The phrase in Ex. 22:8 confining the oath to part admission is thus said to be ascribed to dealing exclusively with this *depositum irregulare*, i.e. with the bailment of money when it became a loan to all intents and purposes . . .' This quotation supports my reasoning above that the reference to 'law of deposit' is not to Roman, but to Jewish law. For if it were a reference to Roman law, it would be a case of *mutuum* in which ownership had passed to the depositary. I have explained above that such a case is unlikely here (regarding Babatha's behaviour in P.Yadin 21–22 and the claims of illegality). On the other hand, the explanation given here in the notes on *b. B. Qam.* 107a–b makes good sense: the deposit at hand is really a sort of loan, thus with the liability attached to a loan, which in Jewish law included the oath (connected with the charge of illegality: the charge of having put forth the hand, that is, embezzled the property). The reference to Exod 22: 6,8 respectively could denote that these passages were regarded to be conclusive when it came to deposits and loans, thus the reference to the 'law of deposit' may indeed be to these rules, thus to Jewish law.

In lines 16/38–39 we find the phrase 'in good faith the formal question was asked and it was agreed in reply that this is thus rightly done.' This is a reference to the *stipulatio*. This phrase clearly refers to the *stipulatio* as we know it from Roman law, where one of the parties asks the other if he will do what he has obliged himself to and he answers that he does.[162]

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[162] Evans Grubbs, *Women and the Law in the Roman Empire*, 297, n. 135, unfortunately speaks of stipulating in relation to the answer given. In Latin the verb *stipulari* relates to the act of asking the question (the person who does so is called the *stipulator*) while the act of answering is designated as promising (the person who does so is called the *promissor*). Therefore, it is better to avoid the (English) verb to stipulate to refer to the answer (the agreement of the other party). Evans Grubbs' assertion that P.Yadin 18 is 'the earliest extant example of a *stipulatio* clause in a Greek document; it becomes common only in the third century,' follows the same observation in Lewis, Katzoff, Greenfield, "P.Yadin 18," 236–237. The remark is not completely accurate since the Babatha archive contains five documents that all refer to the *stipulatio* clause, of which P.Yadin 17 is the earliest. However, at the time when the article by Lewis, Katzoff

'In good faith' is an unfortunate translation here: 'πίστει entspricht wiederum dem latein. *fide* (und nicht *bona fide*, wie Lewis S. 18 annimmt).'[163] As πίστει in the context of a *stipulatio* does not refer to good faith (*bona fides*), but to the element of promising in the *stipulatio* itself (*fidepromittere*), it is logical that in the *stipulatio* clause πίστει is used without an adjective, while we find it with adjective in other contexts as, for instance, in P.Yadin 16 and P.Yadin 28–30. Obviously the reference there is to 'good faith,' in the sense of *bona fides*.[164] The reference to the *stipulatio* can be found in P.Yadin 17, 18, 20–22 and 37 (= P.Hever 65).

The *stipulatio* could be used to undertake any obligation. The *stipulatio* itself then bound the parties.[165] In such cases it was deemed sensible to write the act of taking the *stipulatio* down, to make sure that there was proof of the obligation. The *stipulatio* was often also used in combination with codified legal acts, to stress the willingness of the parties to oblige. As we find it here, it denotes that the question belonging to the *stipulatio* had been made and the answer given.[166] This explicit notification of the

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and Greenfield was published, in 1987, the edition of all the Greek papyri of the Babatha archive had not yet been published, which did not offer them the easy overview a present-day scholar has.

Note that Lewis (17) mentions six documents because he took (what became) P.Hever 65 to be part of the Babatha archive as well (it was P.Yadin 37 in his edition). This is a marriage-related contract, like P.Yadin 18.

[163] Hein L.W. Nelson and Ulrich Manthe, *Gai Institutiones III 88–181. Die Kontraktsobligationen. Text und Kommentar* (Berlin: Duncker & Humblot, 1999), 477. Above on the same page it is observed (regarding another group of papyri) that 'Dass πίστει das lateinische *fide* wiedergibt und nichts mit der *bona fides* zu tun hat (die beim Verbalkontrakt nichts zu suchen hat), hat Simon, Studien zur Praxis S. 49, gegen ältere Missverständnisse dargelegt.'

πίστει should be read with the verb forms to denote the way in which the *stipulatio* question was put and answered. See the enumeration of verbs used for the *stipulatio* below, two of them are compounds with *fide-*.

[164] P.Yadin 16 is a land declaration, Babatha declares: 'I have in good faith registered.…' P.Yadin 28–30 present three copies of the same text, a judiciary rule, in which part of the case is described as: '… A is obligated to give or do [something] to X in good faith.…' In both cases, the expression makes it clear that the party who declares or acts should do this according to his own knowledge, not lying or consciously going against what he knows is right (for example by giving a false account).

[165] See Gaius, *Institutiones* 3.92: *verbis obligatio fit ex interrogatione et responsione, velut*…'The obligation comes into being by words from a question and an answer like…' (follows an enumeration of verbs to be used in question and answer).

[166] The traditional Roman procedure in Latin was to ask '*spondesne?*' while the other party answered '*spondeo.*' The use of those words was reserved for Roman citizens. Non-citizens used comparable words, either in Latin or Greek (see rest of exposition). The phrase as it is found here in the papyrus text therefore does not represent the original

stipulatio is probably a consequence of the role it played in Roman law, where proof of the *stipulatio* was important in proving that indeed an obligation had been undertaken.

In Roman law one of the parties made the question and the other answered. The verb *stipulari* was taken to denote only the act of asking the question. The person who did so was called the *stipulator*. The person answering was the *promissor.* He was bound by the obligation. Consequently, *stipulatio* could be understood to be a unilateral contract: only one obligation was created. In a contract like P.Yadin 21–22 where there are mutual obligations undertaken, one could expect both parties to make a *stipulatio*. Indeed this is what we see: there are two separate deeds in which the party who is obliging himself probably took the *stipulatio*.

It was determined explicitly that the *stipulatio* could be used in a language other than Latin, consequently we need not envisage the parties here saying the traditional *spondesne? spondeo* (do you promise? I promise) to one another. Indeed it was determined by Gaius for just these words that they were so particularly Roman that they could only be used by Roman citizens.[167] Other verbs, like *dabis? dabo, promittis? promitto, fidepromittis? fidepromitto, fideiubes? fideiubeo, facies? faciam* could be used by all people, but *spondesne? spondeo* only by Roman citizens. In the same passage it is determined that the *stipulatio* was also valid when made in Greek, if both parties understood Greek.[168] It is added with some emphasis that this even goes for Roman citizens. This denotes that the language of the *stipulatio* did not necessarily have to be Latin, but had to be a language that both parties could understand. Non Romans could use the Latin formulae, but not *spondesne? spondeo*. For the present context we can assume that the *stipulatio* could be made in Aramaic, since both parties understood that language. In this context see *Dig*. 45.1.1.6 (Ulp. 48 ad Sab.):

> *Eadem an alia lingua respondeatur, nihil interest, proinde si quis Latine interrogaverit, respondeatur ei Graece, dummodo congruenter respondeatur, obligatio constituta est: idem per contrarium. Sed utrum hoc usque ad*

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question and answer but merely notes that the question was asked and the answer given.

[167] See Gaius, *Institutiones* 3.93. The work of Gaius is contemporary to the documents from the archives, see 51–52 above.

[168] Gaius, *Institutiones* 3.93 where several Greek verbs are given for the *stipulatio* including πίστει κελεύω.

> *graecum sermonem tantum protrahimus an vero et ad alium, Poenum forte vel Assyriumvel cuius alterius linguae, dubitari potest. Et scriptura Sabini, sed et verum patitur, ut omnis sermo contineat verborum obligationem, ita tamen, ut uterque alterius linguam intellegat sive per se sive per verum interpretem.*

Here the obligation is considered to be contracted even when the language of the question and of the answer are not the same: someone can put the question in Latin and the other can answer in Greek. Whether this is also allowed in other languages can be doubted, but Sabinus accepted that it was possible: for him the rule should be that parties can contract an obligation if they can understand what the other one is asking c.q. answering, whether they can understand the other one's language themselves or use an interpretor. Since the emphasis is clearly on the understandability of question and answer to both parties this passage seems to support my assumption that the *stipulatio* could be contracted in Aramaic if that was the language both parties understood. Wacke, who discusses this passage in his article about the position of local languages in a Roman legal context, remarks in passing that *Assyrium* could be understood to mean Aramaic.[169] This remark is especially relevant for our archives, because this interpretation of the passage supports the idea that Aramaic could (and was) accepted in a Roman legal context.[170]

The occurrence of the *stipulatio* here is remarkable because the instances in the Babatha archive are actually the earliest appearances of a *stipulatio* in Greek documents.[171] This shows there is not an exclusive link between language and law: the use of Greek in other documents did not automatically prompt the reference to the *stipulatio* there. Even within the Babatha archive we can see that the use of Greek did not

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[169] Wacke, "Gallisch, Punisch," 26, n. 53 and 54.

[170] Also see *Inst*. 3.15.1 where it is determined that the *stipulatio* could be contracted in Latin, Greek or indeed any other language, as long as both parties understand this language. The relevance for our case here could be doubted, as the quote itself refers to prior stricter rules as to the way in which the *stipulatio* should be phrased, denoting that the acceptance of any other language may have been a later addition: compare with Gaius, who mentiones Latin and Greek, but no other languages (*Institutiones* 3.92–93). However, as *Dig*. 45.1.1.6 refers to Sabinus, who was contemporary to Gaius, we can accept that the use of any other language was already accepted in the period concerned in our documents.

For a full discussion of the position of Aramaic as a legal language in a Roman context see Chapter 1 above.

[171] See Lewis, 17, especially n. 10.

immediately bring the reference to the *stipulatio* in tow: we have seen a deposit in P.Yadin 5 and there are no traces of reference to the *stipulatio* in the extant text there.[172] Below it will also be found lacking in P.Yadin 11, a document that records a deal between a Jew and a Roman centurion. If reference to a *stipulatio* could ever be expected to be present, it would be there. However, there is no sign of it, despite the Roman influence found otherwise in this papyrus.[173]

The phrase here in P.Yadin 17 is more extensive than in the *stipulatio* clause in, for example, P.Yadin 21–22. It has been noted in an article on P.Yadin 18, which presents the same *stipulatio* clause as we find here, that the wording resembles the Latin more closely than the wording usually found in later Greek papyri which contain the clause. This could mean, if I understand it correctly, that the later shorter clause was an abbreviated version of a previously used Greek phrase.[174]

Lewis referred to the situation in Egypt, remarking that 'the established view' for Egypt is that 'an imperial (or more likely) prefectural order introduced the *stipulatio* into the notarial practice of that province in A.D. 220.'[175] This raises the interesting question of whether there was a requirement to include the *stipulatio* in the province of Arabia as well. All of the papyri that include the *stipulatio* are relatively late for the archives: P.Yadin 17 and 18 128 CE, P.Yadin 20–22 130, P.Yadin 37 (= P.Hever 65) 131. This could mean that the introduction of the *stipulatio* was relatively late.[176] As to a possible requirement to include a *stipulatio* the evidence could be read to imply that an obligation to use the *stipulatio* clause in contracts was imposed at some time, but we cannot

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[172] P.Yadin 5 is in a fragmentary state and therefore we cannot be sure about the absence of reference to the *stipulatio*.

[173] See discussion below, 156ff.

[174] See Lewis, Katzoff, Greenfield, "P.Yadin 18," 236 and n. 10. I draw attention to the fact that one document from Egypt mentioned in this note does have the same formula we find here in our documents. There does not seem to be, however, any chronological explanation for this (there are also early documents which have the abbreviated version).

[175] Lewis, 17; with reference to Dieter Simon, *Studien zur Praxis der Stipulationsklausel* (Munich: Beck, 1964), 17 and 25. It is important to note Lewis' comment in this respect that this view 'should perhaps be reviewed in the light of today's accumulated evidence.'

[176] Note in this respect that P.Yadin 17 presents us with the earliest reference to the *stipulatio* in the archive and the earliest reference to the *stipulatio* in a Greek document in general, see Lewis, 17.

precisely define this moment, since the majority of Greek documents prior to P.Yadin 17 may not have contained a reference to the *stipulatio* anyway, because of their nature. P.Yadin 23–27 do not contain a reference to the *stipulatio* either, even though they are later than the ones that do. These documents, P.Yadin 23–27, contain summonses to suits, comparable to what we find in P.Yadin 14 and related 15. P.Yadin 12 and 13 furthermore, cannot be expected to have contained a *stipulatio*, since they present a copy of an official record and a petition to the governor. Such documents would not need a reference to a *stipulatio*. This means that the evidence of the Babatha archive is not sufficient to determine a moment in time when a formal obligation to use reference to the *stipulatio* may have been introduced in Arabia.

Whether we take the reference to the *stipulatio* to follow a demand to include it or not, it is in any case clear that the phrase refers to a feature of *formal* law: it has nothing to do with the contents of the legal act. The clause merely serves to denote that the parties have agreed to the arrangements outlined in the contract. Therefore, the reference to the *stipulatio* is a reference to a feature of *formal* Roman law.[177] Consequently, P.Yadin 17 presents us with a clear case of substantive adherence to Jewish law and (features of) formal adherence to Roman law.

[177] It is not clear to me whether Dieter Nörr understands the use of the *stipulatio* in these documents as adjustment to formal or substantive Roman law, as he writes: 'Was das materielle Recht angeht, so bedarf es zur Analyse der neuen Quellen guter Kenntnisse des gleichzeitigen jüdischen Rechts, wie es uns vor allem in der Mischna überliefert ist. So wundert es nicht dass es vor allem von israelischen Gelehrten bearbeitet wird; genannt seien Hannah Cotton und Ranon Katzoff. Der nicht sprach- und sachkundige Rechtshistoriker wird auf die angekündigte umfassende Kommentierung durch Katzoff warten müssen. Erwähnt sei immerhin die breite Verwendung der Stipulationsklausel (*fideipromissio*) als Versuch der Anpassung an das römische Recht.' (Nörr, "Prozessrecht und Prozesspraxis," 82). The mention of the *stipulatio* within a paragraph commenting on 'das materielle Recht' suggests that Nörr takes the appearance of the *stipulatio* to be a sign of applicability of substantive Roman law. At the same time it is obvious that the phrase 'Anpassung an das römische Recht' could also be understood to denote 'Anpassung' in a formal sense only. I believe that the inclusion of a reference to the *stipulatio* denotes adjustment to Roman formal law, as this inclusion has nothing to do with the contents of the acts as such. Furthermore, it is impossible in view of the evidence from papyri like P.Yadin 17 and P.Yadin 21–22 as presented in this study to accept that Roman law applied substantively: obviously the acts refer to Jewish law as the applicable law (for P.Yadin 17 I have explained this in detail above, for P.Yadin 21–22 see discussion below, 168ff.).

P.Yadin 11: loan from a Roman centurion[178]

P.Yadin 11 is one of the few documents from the Judaean Desert that are completely in Greek. A comparison with P.Yadin 16 would suggest that P.Yadin 11 is also a copy of a document that did contain an Aramaic subscription. Indeed the lower version has a translation (described as such!) of the declaration by Judah.[179] We have already seen in P.Yadin 5 that there the word ἑρμηνεία 'translation' might have preceded the entire text, making it into a Greek document by way of translation from an (Aramaic) original. Lewis thinks that there have been two versions of the present papyrus, the recovered one and another 'with Judah's signature in Aramaic.'[180] This would explain the fact that the document is found among the documents of the debtor, while one would expect it to have remained with the creditor as long as the debt was not repaid. That it was repaid and the document returned seems unlikely as the document shows no signs of cancellation. In an article about *Mur* 114, a text that greatly resembles P.Yadin 11, Cotton and Eck remarked on this:

> Warum der Kreditnehmer den Vertrag [Mur 114, JGO] bei sich trug, obwohl er sich beim Kreditgeber befunden haben sollte, solange die Schuld nicht bezahlt war, lässt sich nicht schlüssig beantworten. Veilleicht war dieser Papyrus eine Kopie, obwohl er nicht so aussieht. Die gleiche Frage stellt sich für P.Yadin 11, bei dem es sich gewiss nicht um eine Kopie

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[178] A comparison suggests itself between this document and P.Hever 66 (previously known as P.Se'elim Gr. 3), a document that is assumed to come from the same cave as the Babatha and Salome Komaise archives. This is, however, not certain (see Hannah M. Cotton, "Loan on Hypothec: Another Papyrus from the Cave of Letters?" *ZPE* 101 [1994]: 53–59). It is in any case clear that the document does not seem to come from 'the Jewish and Nabataean milieu with which we have become familiar through the Babatha archive: there are no obvious Jewish or Nabataean names in this fragment, and consequently no evidence that the document was written in Arabia.' (Cotton, "Loan on Hypothec," 54). My impression is that there are not many parallels between this document and P.Yadin 11, with respect to substance: nearly all the phrases are different: compare, for example, the description of the loan (with ἔχειν καὶ ὀφείλειν in P.Yadin 11 and δεδανισμένοι in P.Hever 66); the description of the hypothec is missing in P.Hever 66; the reference to repayment at a set time is different (P.Yadin 11 refers to the 'specified terminal date' [προθεσμία], P.Hever 66 has a reference to 'time' [χρόνος]) (see Cotton, 58; she occasionally comments on the lack of parallel clauses for the ones found in P.Hever 66; referring to P.Yadin 11 to note that the praxis formula found there 'is missing and cannot be read in the traces of line 9.…') Since the document obviously does not concern a legal act involving (a) Jew(s) and the contents cannot be compared fruitfully to P.Yadin 11, I will not discuss P.Hever 66.

[179] Lines 29–30. See Lewis, 42.

[180] See Lewis, 42.

> handelt, da auch die Unterschriften der sieben Zeugen vorhanden sind. Auch ist keines der beiden Dokumente ungültig gemacht.[181]

Hannah Cotton informed me that she now believes that P.Yadin 11 was a copy anyway, *the signatures of the witnesses serving to make the copy authentic*. If we assume that indeed a version existed that was in both Aramaic and Greek, we see that none of the documents in the archive were originally drawn up completely in Greek. All original documents apparently contained Aramaic subscriptions and signatures, while copies of documents, like P.Yadin 11 and 16, were completely drawn up in Greek. This had the slightly peculiar consequence, already referred to above, that the documents with the indigenous language in it ended up with the government, or here a Roman centurion, while the copy in Greek ended up with the indigenous party involved, who did not know Greek.[182]

P.Yadin 11 concerns a loan and in general one can say that a loan and a deposit look alike, since they both encompass entrusting money to another person for a period of time. In the case of a deposit where the depositary can use the money the deposit can even be equated with a loan. Lewis explicitly points at the parallel between P.Yadin 17:7/26–27 'to hold and owe to you as deposit' and P.Yadin 11:2–3/14 'to hold and owe to you in loan.'[183] However, with a loan there is usually a fixed date for return of the money, which is not the case with deposit. A loan also encompasses interest as the case of P.Yadin 11 shows.[184]

The dating does not refer to the establishment of the province,[185] since the document was written in En-gedi, which was in Judea and not in Arabia.[186] There seem to have been strong ties between En-gedi and Maoza, even though the villages were situated on different sides of the

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[181] See Hannah M. Cotton and Werner Eck, "P.Murabbaʿat 114 und die Anwesenheit römischer Truppen in den Höhlen des Wadi Murabbaʿat nach dem Bar Kochba Aufstand," *ZPE* 138 (2002): 182.

[182] See Chapter 1, 83–84 above.

[183] See Lewis, 74.

[184] The document is complete, with both versions preserved as well as the individual signatures on the back.

[185] P.Yadin 5 refers in its dating formula to the 'establishment of the province' (τῆς δὲ καταστάσεως τῆς ἐπαρχείας) while the later papyri in Greek use a reference to the 'compute of the province' (κατὰ δὲ τὸν ἀριθμὸν τῆς ἐπαρχείας; see Lewis, 39). The Greek ἀριθμός comes close to מנין, used in Aramaic (*Documents II*, 91; see, for example, P.Yadin 7 and 8, while the word is restored in P.Yadin 6 and 9).

[186] There are different ways to spell the name of the locality. I have used Lewis' spelling as En-gedi, while in references from other sources Ein Gedi or Ein-Gedi is used.

provincial borders. In the documents we see, for example, that Judah, who is acting here, is described as 'an En-gedian,' or as being 'of the village of En-gedi,' while he is also said to be 'domiciled in Maoza.'[187] Cotton has concluded that the Jews living in En-gedi and Maoza were part of one Jewish community.[188] One of the parties is a man named Magonius Valens, a clearly Roman name, and he is designated 'a centurion.' The first person named in the enumeration of witnesses is a Gaius Julius Procles, obviously a Roman and possibly also a soldier. Evidence of a military presence in En-gedi is adduced by the papyrus text itself, since the courtyard (which is described in the papyrus as the object of security connected with the loan) is said to be bordered by tents and a *praesidium*, a military post.[189] The presence of the military force has been related with the production of balsam in the area and the attempt by the Jewish community to destroy the balsam during the first revolt in 70 CE.[190] Lewis already noted that the military presence disappeared between the drawing up of P.Yadin 11 in 124 and the drawing up of P.Yadin 19 in 128.[191] In this latter papyrus, the same courtyard is mentioned as in P.Yadin 11 but in the designation of borders, the tents and *praesidium* are no longer mentioned. Instead of the tents there is said to be an empty space of land. This suggests that the military moved and Cotton noted that the *cohors* mentioned in P.Yadin 11 was in fact later stationed in Hebron.[192]

While one of the parties is a Roman centurion, the other one is a Jew: Judah son of Eleazar Khthousion, Babatha's second husband, whom we have encountered in P.Yadin 6 and 17 as well. He declares that he has

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[187] P.Yadin 16/17/19, P.Yadin 16 and P.Yadin 16/19 respectively.

[188] See Hannah M. Cotton, "Ein Gedi between the two revolts," *SCI* 20 (2001): 152–154.

[189] P.Yadin 11:4–6/17–19. Cotton points out that Lewis' translation of *praesidium* with 'headquarters' is incorrect ("Ein Gedi," 148, n. 42; also see Cotton, "Courtyard(s)," 197, n. 3).

[190] See Cotton: 'The Jewish attempt to destroy the balsam during the revolt and the intensive cultivation of the orchards after 70 fully account for the presence of a military force in Ein Gedi' ("Ein Gedi," 147).

[191] See Lewis, 83 and more extensively Cotton, "Ein Gedi," 148–149. The disappearance of the military presence is mentioned as well in Cotton, "Courtyard(s)," 198. In both instances Cotton refers to the find of a bath house in En-gedi that might have served the unit.

[192] See Cotton: 'Later on it is attested in Hebron by a tile stamp of the *cohors I miliaria Thracum* and a military diploma from 186 whose recipient belonged to the unit' ("Ein Gedi," 149). The *cohors* is mentioned by Bowersock as well: *Roman Arabia*, 107 (probably attested in Syria in 88 and in Arabia in 212–213).

borrowed an amount of money from the centurion. Considering that Valens held a military position, it is to be expected that he had cash money to his disposal.[193] It seems logical to me that he had one of his men draw up the document. The line which could have mentioned the scribe is severely damaged; Lewis reads ἐγράφη διὰ ('was written by') in the lacuna and restores the scanty letters that are still legible into the name Justinus. If this reading is correct, Justinus could well have been a Roman soldier.[194]

The reference to En-gedi as 'village of Lord Caesar' can be considered part of a Roman influence. En-gedi is mentioned in several other papyri in the archive, but not with this epitheton.[195] Lewis takes the epitheton to affirm his suggestion that En-gedi and its surroundings had become part of the Roman Emperor's estates after the suppression of the Jewish revolt of 70 CE.[196] Lewis also refers to 'Hadrianic Petra' in P.Yadin 25. Cotton has discussed the epitheton and its implications, contrasting a merely honourific epitheton (as in 'Hadrianic Petra') with an epitheton with substantial implications (as with 'village of Lord Caesar').[197] Like Lewis she relates the epitheton to the incorporation of the area into the Emperor's estate, but she does not think that this meant that all the

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[193] See Lewis, 41.

[194] I wonder whether the Gaius Julius Procles mentioned could have been the scribe, for he is the only one in the list of witnesses without the word for witness behind his name. If this Procles was indeed the scribe of the document, it is doubtful whether he was considered to be a witness as well. The lack of the word for witness behind his name seems to suggest that he was not. In that case the number of witnesses is not seven, but six. I am reluctant to comment on the number of witnesses, however, as it is a notoriously difficult matter and one that is still receiving closer scrutiny by the original editors of the texts (see for example Cotton, "Diplomatics or External Aspects," 56, on the number of witnesses in P.Hever 64, correcting the number originally given in *DJD* XXVII).

There is one detail in the document that could go against the assumption that a Roman wrote the document and that is the mention in line 20 (lower version) of 'the same consulship.' For a Roman it would be obvious that the date designated (the Kalends of January) were not in the same consulship as the date of the document of loan, see Lewis, 46: 'The scribe here inadvertently confused the consulship, geared to the Roman calendar year (1 January–31 December), either with the local calendar year, which began on 16 January (= 1 Peritios), or more likely with the provincial year, which began on 22 March.' It would be more likely that an indigenous scribe would make such a mistake. However, it becomes understandable if we assume that what was usually said was 'in the same year during the said consulship.' The scribe might simply have used this standard phrase not realizing that in the present case the date mentioned would fall outside the said consulship. If the upper version was written later, it is telling that there this wrong reference is left out.

[195] See, for example, P.Yadin 16, 18, 19, 20.

[196] See Lewis, 42, 44.

[197] See Cotton, "Ein Gedi," 140–142.

property within the area belonged to the Emperor (was part of his *patrimonium*). She explains that exactly the papyri found in the Babatha archive show that persons did own private property in En-gedi, as can be seen in, for example, P.Yadin 11 and 19. This means that the fact that an area was part of the Emperor's property did not denote that no one could own private property there.[198]

The amount of money borrowed presents us with an obscurity. In the inner text it is first written as forty denarii, then forty is changed to sixty. In the outer text sixty is written right away. At first sight it would appear that Judah changed his mind and demanded a more substantial loan (having forty changed to sixty and having sixty written directly in the lower version). However, it is important to keep in mind that there is evidence that the upper version was written last.[199] If we read the lower version first and explain the difference with the later upper version, Lewis' suggestion that 'there is concealed here a usurious squeeze exerted upon the borrower: he was compelled to sign the note for sixty denarii, but actually received only forty denarii in hand' makes sense. We then have to assume that the scribe had forgotten this in writing the upper version and coincidentally first wrote the true amount of the loan, hastily correcting his mistake. The presence of the correct text immediately beneath should have prevented the scribe from having made such mistakes, yet we shall see that there are differences between the upper and lower versions of the texts again. This could be due to the fact that the upper text was written more hastily and thus less accurately.[200]

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[198] Cotton warns for easy answers in this respect when she quotes Millar who spoke of 'the insoluble problem of the juridical status of imperial property in the established empire' ("Ein Gedi," 141). But she adds at the same time that the papyri of the Babatha archive may provide clues to our understanding of the status of imperial property, just because they do refer to private property in an area that was (most likely) part of the imperial estate (142).

[199] See Lewis, 9, *contra* Yadin, who assumed that the upper version was written first. Lewis refers to the editors of the Dura Europos papyri who 'had already observed the inner (upper) was written after the outer (lower) text,' which since then became the *communis opinio.* He also refers to cases like P.Yadin 18 and 20 where it seems that 'the disposition of the last lines of the upper text reveals that, the lower version being already written, the scribe now had to crowd his writing in order to squeeze it into the available space. Again, the frequent interlineair insertions in the inner (upper) texts also bespeak hastily written repetitions of an already existing text. And finally, there is the mute but eloquent testimony of 34, an unfinished double document, with the outer text written and the upper part of the papyrus blank.'

[200] The handwriting in the upper text is often more cursive and the words and lines are sometimes squeezed together. See previous note.

Yet there is another change made in the upper version: the property of Judah and his father is not pledged but only that of Judah.[201] This is a considerable change as it makes a difference whether the centurion can merely sell off the property of the son or also that of the father as well. Since it is the father's courtyard that is explicitly mentioned as the object of the security arrangement it would be more logical to mention the father's property than that of Judah solely. In my opinion, the combination of a lower amount of money and Judah's property versus a higher amount and the property of both Judah and his father could mean that there was first the intention to borrow just forty denarii, pledging Judah's property for security, while Judah changed his mind and asked for sixty, extending the security arrangement to his father's property as well, eventually having the scribe change the amount in the upper version. It is of course clear that for this assumption to make any sense one has to assume that the upper version was written first.[202]

In the lower text the security arrangements entail Judah's property and that of his father. That the latter is included should probably be related to an explicit mention of the object of security (hypothec) in the previous lines. Judah says that he borrows the money under a hypothec of a courtyard he manages for his father. It is explicitly stated that this management encompassed the competence to mortgage and to lease out.[203] Thus Judah can make arrangements with the property as object, while he is not the owner of the object. The extension in the security clause to his father's property in general suggests, as Lewis already noted, that he was

[201] Lewis, 45, describes the situation in the upper text, where only Judah's property is mentioned, as a case where 'the distinction between father and son has disappeared,' explaining for this as either a mistake of the scribe or a situation where Judah administered all of his father's property, not just the mentioned courtyard. However, this latter explanation does not make sense from a legal point of view: If Judah administers all of his father's property and this would allow for an equation of his father's property with his own property, why make the distinction in the lower version? The fact that the lower version does make a distinction and the upper one doesn't, in combination with the different amounts of money mentioned, seems to call for another explanation; see rest of exposition.

[202] I am not sure this is likely in the light of the evidence of other papyri. Yet I do think this papyrus provides a challenge for the 'upper version last' argument. If Lewis is right in arguing that the upper version was written last, the change in the upper version is only understandable in the light of a real and a supposed sum of money, a real amount received and an amount mentioned encompassing built-in interest. If this is the case, the interest taken by the centurion would be fifty percent of the borrowed sum, on top of the normal interest rate that is determined in the papyrus text ('one denarius per hundred denarii per month').

[203] P.Yadin 11:4.

in charge of more of his father's property than just the mentioned courtyard.[204] The courtyard's abutters are given and the fact that these abutters served to identify the object is beautifully illustrated by the recurrence of the same courtyard in another papyrus to be discussed below.[205]

It is said in the security arrangement that if Judah fails to repay the loan in due time the other party will have the right to 'acquire, use, sell and administer the said hypothec.' Lewis relates this enumeration to Aramaic למקנא…ולזבנה 'to buy and to sell.' I note, however, that the Aramaic enumeration continues with 'to pledge, to bequeath, and to grant as gift, and to do with these purchases all that he wishes.'[206] This means there is no real equivalent of 'to use' or 'to administer,' since there is no mention of use for the good of the party himself. In Aramaic the emphasis is clearly on the power to dispose, declaring that this power is not in any way limited. I note that in P.Yadin 7 the phrase is extended: 'to buy and to sell and to inherit and to bequeath, and to pledge as security and to grant as gift and to sow and to plant and to build and to remit their payments and to do with them anything that you wish.'[207] Here one could say that 'to use' and 'to administer' are expressed by way of the clause 'to sow and to plant and to build and to remit their payments.' I agree that here the stress is not solely on the power to dispose, but on the powers of the new owner to use the property for herself as well. Yet the picture painted by the Aramaic and the Greek phrase seems to be different. When one reads the Aramaic, it is clear what is meant: the new owner will have a complete and unlimited power to dispose of the property or use it himself, to do, as it is summatingly stated at the end of the line, 'all that he wishes.' In the Greek statement, however, there seems to

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[204] See Lewis, 45.

[205] P.Yadin 19, see below.

The word abutter is used by Lewis to translate Greek γείτων, a word that generally means 'neighbour' (referring to a person). In a designation like this it obviously refers to the neighbour who is owner of the adjacent property. Since some objects do not have an owner (like a market place, a road or, in another papyrus, the sea), the objects themselves are mentioned as 'neighbours.' In the Aramaic papyri the word תחום is used: 'boundary,' denoting 'in first instance a physical boundary' (*Documents II*, 7). The designation by way of abutters is 'a widespread ancient tradition, well attested in Aramaic and Greek records and persisting into Medieval Arabic legal documents' (*Documents II*, 7, also for references to studies about this).

For a discussion about the identity of the courtyard (as the same as the one mentioned in P.Yadin 19 and possibly 20), see Cotton, "Courtyard(s)," *passim*.

[206] See P.Yadin 2: 9 = 30,31, 3:10 = 33,34.

[207] P.Yadin 7:17–18/56–57.

be more of a development, a phase-like description of what will happen: in case of default the other party can acquire the property, use it, sell it and administer it. Using is the same as administering, expressing that the party can keep the property to himself, while both are the counterpart of selling which denotes that the party can dispose of the property. Selling is of course in itself again the counterpart of acquiring. We see the property transferring into the power of the other party (to acquire) after which it can either stay there or be transferred again. The idea in both the Aramaic and Greek expression may be the same: a complete power for the new owner to either keep the property or dispose of it, but the way in which it is expressed is different. I therefore assume that the expression here can sooner be expected to have a Roman source than be the result of Semitic influence. This is supported by the Roman character of the document in general and the aforementioned possibility that it was drawn up by a Roman.

Lewis seems to argue the other way around. He does acknowledge that the expression seems to have originated in Latin, but in discussing sources that could provide evidence for this he seems to argue that those sources draw on a Semitic background, thus that the expression came into Latin by way of a Semitic influence.[208] I do not think this is true. The expressions he mentions (from much later Latin sources) strongly stress the use the new owner can make of the property and thus not the power to dispose of it. In expressions like *habere possidere uti frui recte liceat* and *ut rem habeat teneat possideat utatur fruatur ipse heredesve eius in perpetuum* the idea of disposal is absent and consequently, the Latin phrases come closer to the Greek phrase found here than to the cited Aramaic expression. The emphasis is clearly on the ownership of the new owner, on his capacity to have the object, hold it, possess it, use it, enjoy it etc. Even the mention of his heir does not denote disposal but possession that will extend beyond the life of the new owner: it is emphasized that the object will become part of the property (estate) of the new owner and will stay there (by way of his heir even 'into eternity'). This completely different approach to what was probably considered to be most important when ownership passed on, shows, in my opinion, that the expressions found in the later Latin sources have a clearly Latin

[208] See Lewis, 15.

and at least an unsemitic origin. The emphasis in the Aramaic expression (and acts) is on the power to dispose.[209]

In the above I referred to 'the new owner.' There is a new owner after the right of the centurion to the courtyard has been effected, that is after default by Judah. Ownership passes when the condition given in the arrangement is fulfilled, i.e., when the money borrowed is not duly returned. Consequently, the arrangement could be seen as providing the centurion with a conditional right of ownership to the property (a conditional title to it).

One could also take the arrangement to encompass a limited right *in rem* for the centurion, providing him with a right to execution of the property and reparation for damages from the result of the execution; or take it to be a transaction of pledge. Various types of pledge were possible both in Roman and Jewish law: those in which the object of the pledge stayed in possession of the debtor or was handed over to the creditor. In Roman law, this latter instance is designated with *pignus*, the other instance, where the object is not handed over, with *hypotheca*.[210] In both cases the default of the debtor would allow the creditor to sell the object; this implies that ownership passed at the moment of default.[211]

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[209] Compare the Aramaic tradition of the Elephantine documents, which often have a repeated investiture clause (and even a reaffirmation clause, which can be repeated), emphasizing the ownership of the new owner and his or her capacity to dispose. This is sometimes limited: very limited when only heirs can become entitled to the property or less limited when gift is allowed, or (in some instances) even sale. See details in n. 109 above.

[210] See *Inst*. 4.6.7: *inter pignus autem et hypothecam quantum ad actionem hypothecariam nihil interest: nam de qua re inter creditorem et debitorem convenerit ut sit pro debito obligata, utraque hac appellatione continetur. sed in aliis differentia est: nam pignoris appellatione eam proprie contineri dicimus quae simul etiam traditur creditori, maxime si mobilis sit: at eam quae sine traditione nuda conventione tenetur proprie hypothecae appellatione contineri dicimus.* 'There is no difference between pledge and hypothec so far as concerns the action; for both kinds of thing, in respect of which it is agreed—between creditor and debtor—that it shall be under charge for the debt, are comprised within this designation. But, in other respects, there is a difference: for, strictly speaking, when we use the term 'pledge,' we mean the thing which is, at the same time, handed over to the creditor, especially when it is a moveable: but that which becomes charged without delivery by mere agreement is properly within the definition 'hypothec.'

[211] Default created a right to sell for the creditor (*ius distrahendi*). Originally with *pignus* the creditor was not allowed to use or sell the object of the pledge, doing so would constitute *furtum* (theft). However, there were the possibilities of *antichresis* (an agreement by which the creditor could use the object) and *pactum distrahendi* (an agreement by which the creditor could sell the object). Eventually no *pactum distrahendi* (explicit agreement that the creditor could sell) was necessary anymore, but the creditor was understood to have a *ius distrahendi*. See Kaser, *Das Römische Privatrecht*, I, 470ff.

In Jewish law, the type of pledge in which the object of pledge stays in the debtor's possession is called *apoteke*, the type in which the object of pledge is transferred to the creditor is called *mashkon*.[212] This word means pledge and this type of pledge can be seen as the real pledge, since the transfer of the object of pledge is essential for a real pledge. *Apoteke* is really a special kind of lien, limited to a certain part of the debtor's assets.[213] Instead of determining that all the assets will serve for security, a certain part of it could be determined. Because this property remains in the debtor's possession, *apoteke* is not a real pledge (like *mashkon*).[214]

In the present case the object of the security arrangement is a courtyard. It is not clear whether the creditor can be seen as having possession of the courtyard. Since the last lines could be taken to imply that the creditor had rights of lease to the land, one could argue he had possession. This would make an eventual pledge a real pledge (*mashkon*). This is, however, dependent on the interpretation of the last lines, which I will come back to below. The arrangements can also be interpreted as being based on *apoteke* since the property of Judah (and his father) is the object of security arrangements in general (general lien), while the courtyard is specifically designated as the object of security arrangements (specific lien). In that case the act should not be qualified as 'loan on hypothec' since *apoteke* is not the same as hypothec.

> …*apoteke* does not create a new charge on the property in question since all the debtor's property is included in the implied, comprehensive charge that comes into existence upon creation of the obligation, but merely serves to restrict an already existing charge to particular assets.[215]

In the present instance we see that there is a comprehensive charge on all the property, which is not implied but stipulated explicitly in the deal. From this comprehensive charge a specific charge on the courtyard is singled out.[216] The phrase 'under hypothec' in the papyrus text could then be understood as 'with *apoteke* of…' singling out a specific object for the security arrangements. With *apoteke* the object stayed in the

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[212] See Elon, *Principles*, 294.

[213] Compare Elon, *Principles*, 294 with 291–292.

[214] I note that *mashkon* is an indigenous word, while *apoteke* is clearly Aramaized Greek. This seems to denote that the institute developed under a foreign influence (or was even accepted from another legal tradition). Yet there seems to be a difference between the impact of *apoteke* and hypothec, as I will discuss in detail below.

[215] Elon, *Principles*, 292.

[216] In Aramaic *apoteke* was denoted as the singling out or setting aside of an object, see Elon, *Principles*, 292.

possession of the debtor. This means that if we accept that the papyrus refers to *apoteke* the lease to the centurion mentioned in the closing lines cannot be understood as giving him possession of the object. One can indeed wonder whether lease is sufficient to accept that the centurion had possession. In any case, the reading 'to you' designating the lease right of the centurion, could be debated, and therefore there may not have been a lease to the centurion at all. This means that the debtor indeed retained possession of the object of the security arrangements, as it happened with *apoteke*. Consequently, it is not obvious that ὑποθήκη refers to a hypothec as it is known in Greek and Roman law.

In both versions there is a lacuna after 'without.'[217] Since the line concerns the right of the other party to the object of hypothec, it is probably meant to convey that the party could execute his rights without any further formalities or without the possibility of opposition by the borrower. If this were the first, meaning that execution does not require any further formality and is thus guaranteed by the document, it would mean that a right granted like this, in a loan, provides a writ of execution. This means that the event of default is in itself enough to have ownership pass to the other party and that he can do with the property as agreed to (in this case acquire, use, sell and administer) without any further formality. This means at the same time that the borrower cannot object to this, since he has lost his rights by way of the default.

Even if the document would not provide a writ of execution in itself, the phrase that the right to acquire etc. is given without the possibility of opposition would lead to the same result: the other party can execute his rights without any further consideration.

In the outer text it is said that the 'lease which I hereby (?) leased to you' will remain valid.[218] The question mark indicates that the word 'hereby' is read by Lewis into a lacuna. The phrase is somewhat obscure since it is not clear what is meant here. What lease is leased to the centurion? Lewis seems to take the lease to refer to the present act, for he says that 'while this contract is for a loan upon hypothec, in the terminal clause… the document is termed a lease.' (41). I wonder whether this is true. It does not say that the act presented in the document is a lease; it merely says that the lease that is leased to the centurion will remain valid. Since 'hereby' is added by Lewis, this sentence might as well refer to a prior lease. I can imagine that Judah had leased the property of his father concerned to the centurion; this could also explain for his choice to borrow money from a Roman: he was already into a legal relationship with the centurion.[219]

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[217] Lines 8–9=23–24.

[218] Lines 27–28; this part of the text is missing in the inner text (or upper version).

[219] It is telling that in line 4 of the document both the power to hypothec and to lease out are mentioned.

Judah then decided to borrow money and give the courtyard as security, determining that the lease remained valid.

Another possibility could be to assume that the clause was a general remark stating that leases leased in the past would remain valid. Of the word σοι 'to you' the first letter is a ligature and the last is restored.[220] Since there is a lacuna right after it I can imagine the letters of the supposed σοι need to be read together with this lacuna. It might have been some kind of temporal designation. I do not intend to make any concrete suggestions for this; I merely note that it would be more logical from a legal point of view to have a general clause concerning the validity of prior leases, than a clause specifically referring to a lease between the parties. In the latter instance the clause would imply that the centurion would have a valid lease of the courtyard even after he had used his right of execution, thus after the courtyard had become his. This would mean that he would have a valid lease of his own property, which is difficult to imagine.[221]

Lewis suggests that the clause might have slipped in because the scribe had just written 'the standard right-of-execution clause which he had doubtless written many times before in both leases and loans.'[222] Lewis here seems to think that the scribe somehow confused two things: he was dealing with loan on hypothec, but he wrote a clause on leases. I do not think this needs to be true. When a loan on hypothec is concerned it is always a question of what the effect of execution will be on other rights to the property. Will they end or remain valid? Therefore, it is not at all odd to add a remark on (a) lease(s) to the execution clause in a document of loan on hypothec. This does not mean that the document *is* a lease, nor does it imply that the lease meant was leased out to the person concerned in the act (in casu the centurion). It merely denotes that, in a case of default and execution, rights to the property based on lease will remain valid. Therefore, the clause fits with the purport of the entire document, regardless of the question of whether the lease concerned was a lease to the centurion (σοι) or not.[223]

One can wonder why there are two different types of documents, deposit and loan, found in the archive, since in Jewish law the depositary (who can be expected to use the deposited goods) is treated like a borrower (*sho'el*). The main element of the deposit structure, however, was its lack of remuneration. Since there was interest determined in P.Yadin 11, this

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[220] See Lewis, 43.

[221] It is of course possible that the scribe did not think this consequence over before he wrote the clause down.

[222] See Lewis, 42.

[223] I have mentioned that it is hard to explain what a lease to the centurion would mean in case of default if the centurion were to acquire the property. But even if σοι would be correct, it is still more likely to assume that the scribe meant a general clause on validity of prior leases than that he meant to denote that the act in the document was lease instead of loan. One can easily imagine that a scribe wrote a general clause without thinking about the illogical consequences for the case at hand.

It is interesting to note that the lines containing this problematic clause are missing in the upper version. We cannot be sure whether they were really omitted or have been added in an abbreviated form. There is a considerable number of illegible letters after the last legible word of the upper version. Lack of space cannot have been the cause of an omission or abbreviation: there is a blank space between both versions. I note that Lewis uses this papyrus as evidence for the fact that the inner text (upper version) was written last: he notes that the handwriting becomes 'faster and less calligraphic in the last lines of the outer (lower) text, and it continues thus all through the inner (upper) text' (41).

alone sufficed to exclude the applicability of a deposit there. The situation is different from that in P.Yadin 5, where someone provides the possibility for deposit to help another person out. The depositor will not demand the deposit back, at least not immediately, and he therefore enables the other party to act with the goods concerned. Consequently, the business can be conducted as usual. In the context of P.Yadin 11 we are dealing with a completely different situation. The parties are not family, they have their own economic interests in the deal. Therefore, a loan, with its more profitable aspects for the lender, is the most logical choice. Deposit and loan were two options for financial dealings, both of which served a certain purpose and could be applicable according to the circumstances. On what regulations the parties based themselves, to what law they referred, should be derived from the descriptions of rights and obligations in the contract, or, if present, from direct references to law. Both in the case of P.Yadin 5 and 11 we have seen that the language used and the legal terms (παραθήκη, ὑποθήκη) suggest a connection with a non indigenous legal context while closer examination reveals information supporting links with indigenous legal arrangements. Both papyri can be argued to have a connection with indigenous law substantively.

P.Yadin 21–22, 23–24: a sale without capacity to dispose?

P.Yadin 21–22 present us with an interesting case, as they represent a sales contract that is written down in two separate documents, each one giving the viewpoint of one of the parties. Consequently, even though sale is a reciprocal act, the documents present us with unilateral declarations, in this sense that each document discusses the obligations from the viewpoint of one of the parties. The difference with the 'purchase contract,' or acknowledgement of receipt, as we have seen it in P.Yadin 8 and 9, becomes clear when we compare the papyri. P.Yadin 21 discusses obligations the purchaser has yet to meet. Consequently, it is not a declaration of satisfaction; it is not an acknowledgement of receipt. On the contrary, P.Yadin 21 appears to be a version of P.Yadin 22, the sale, from the viewpoint of the purchaser. It is noteworthy that the persons, or their viewpoints, are distinguished even to the extent that both contracts incorporate the details relevant for one of the parties solely in the document that relates to his viewpoint. The guardian Babatha acts with, for example, is only mentioned in her document (P.Yadin 22:28–29,34), while the guarantor who supports the purchaser is only mentioned in

his document (P.Yadin 21:25,35).[224] It can be argued for the first instance that the guardian need not be mentioned in the purchaser's contract (P.Yadin 21) since Babatha is in that document not acting herself. She is being addressed and therefore a guardian might not have to be mentioned. In deeds of gift like P.Yadin 19 where a woman is the donee a guardian is not mentioned either.[225]

But the guarantor, only mentioned in P.Yadin 21, is indeed of importance in both instances: his role is in any case the same. Therefore, the only explanation for his mention in P.Yadin 21 and the lack of it in P.Yadin 22 is that he is solely mentioned by the party who introduces him (the party whom he is supporting; whose side he is on). The legal act is clearly broken down into two parts and accordingly represented in two documents.

The question is whether this had anything to do with an influence of Roman law, of the *emptio-venditio* (purchase-sale) Lewis mentions in passing.[226] The sequence of the documents seems to have prompted the suggestion: based on internal evidence Lewis concluded that P.Yadin 21 was written first and thus the purchase 'contract' precedes the sale 'contract.'[227] However, the problem with the texts is whether they represent a regular sale.

Babatha can be regarded as entitled to the crop, even though she is not the owner of the orchards: she is said to distrain the properties 'in lieu of your dowry and debt.'[228] As the person entitled to the crop Babatha sells the crop to the other party, in this sense that she gives him the right to go to the orchards and pick the dates. Afterwards he will come to her house and weigh out an agreed amount of dates for Babatha, while all that he picks above that amount will be his. It seems that the sale of the dates is in fact more like a share cropping arrangement: the person who works the orchard seeing to the picking of the dates, hands in part of the produce

[224] In both instances the first reference is to the mention of the guardian/guarantor in the main text, while the second reference is to the guardian's/guarantor's subscription.

[225] A possible relation between guardianship and the part the woman plays in the legal act has been investigated by Cotton, see discussion in Chapter 5 below, 357ff.

[226] See Lewis, 94.

[227] See Lewis, 94.

[228] See P.Yadin 21:11–12; P.Yadin 22:10.

to the person entitled to it, while he keeps another share himself.[229] Questions about the nature of the agreement had been raised by Isaac:

> Is this the sale of a datecrop (thus Lewis), or rather a lease of the right of working the orchard in exchange for a share in the produce? Babatha is to receive dates or money. Who would sell a crop of dates in exchange for dates?[230]

In a response Lewis maintained that it was a sale:

> . . . there is no question of 'working the orchard,' but merely of starting in a few days to pick the ripe dates. The buyer would harvest and own the crop, and would pay Babatha a stated return in kind or, failing that, in money. Such sales of 'standing crops' are numerous in Greek papyri and are still common practice today.[231]

I was inclined to agree with Lewis that the phraseology of the papyrus suggests a sale and not a lease. However, some pertinent questions are raised in Radzyner's treatment of P.Yadin 21–22.[232] Radzyner quotes Isaac and Lewis' response just mentioned and then explains that there are a few problems with Lewis' defense.

First of all,

> an examination of Greek documents from Egypt dealing with the sale of crops prior to harvest shows that they do indeed contain elements of lease[233]

and secondly, there are two versions of Broshi's article that seem to convey different notions. Radzyner explains that in the English version Broshi speaks of a sharecropping arrangement (also referred to above), but in the Hebrew version Isaac used for his argument Broshi appears to describe the 'buyer' Simon as a lessee and uses the Hebrew root for 'to lease' four times in his exposition of the contract. As Radzyner observes, 'this discrepancy highlights the difficulty of pinning down definitions within this legal system.'[234]

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[229] See Broshi, "Seven Notes on the Babatha Archive," 233, who links the arrangements in P.Yadin 21–22 to share cropping.

[230] Isaac, "The Babatha Archive," 75, with reference to a Hebrew article by Broshi about agriculture and economy in the Babatha archive (in *Zion* 55 [1990]).

[231] Naphtali Lewis, "The Babatha Archive: A Response," *IEJ* 44, 3–4 (1994): 246.

[232] Amihai Radzyner, "P.Yadin 21–22: Sale or Lease?," in *Law in the Documents of the Judaean Desert*, 145–163.

[233] Radzyner, "P.Yadin 21–22," 146.

[234] Radzyner, "P.Yadin 21–22," 146. I am not sure to what legal system Radzyner refers with 'this legal system.'

Radzyner also refers to Broshi's explanation of the amount of work involved in harvesting dates constituting 'about half of the annual labor investment in the plantation. This renders problematic Lewis' assertion that "there is no question of working the orchard" '[235]

Consequently, the arrangements of P.Yadin 21–22 have to be studied in the light of both lease and sale.

The agreement could be compared to P.Yadin 6, discussed above, where two parties agree to the tending of land and the recompense for it.[236] There the arrangement is made in that way that the worker will receive

[235] Radzyner, "P.Yadin 21–22," 147.

[236] Radzyner does not discuss P.Yadin 6 in relation to P.Yadin 21–22. This is probably due to the fact that the exact nature of the act of P.Yadin 6 had not yet been related to Jewish law. Following my discussion provided above (97–107) the comparison makes sense, especially as in his discussion of P.Yadin 21–22 Radzyner adduces several passages from *m. B. Meṣi'a* that I believe are also relevant for understanding P.Yadin 6. In my discussion of P.Yadin 6 I have emphasized the importance of the reference in the passages concerned to 'the custom of the province.' Radzyner refers briefly in a footnote to the frequency of this phrase and the comparable 'the law is according to local custom' ("P.Yadin 21–22," 153, n. 25). In his opinion this is proof for the fact that in the field of labor law and leasing Jewish law as we have it in the Mishnah and later sources was particularly influenced by local custom, which means that our documents that are prior to the Mishnah can offer insight into this local custom. I think we should reflect carefully on how this relationship is to be understood. Do we have to understand the documents as reflecting local custom and the Mishnah as distinguishing between this local custom as it functioned in documents and requirements according to the Torah, where then and there a decision in favour of local custom was made, or should we rather understand the documents as representations of various stages of developments in law that were ultimately sanctioned in the Mishnah? The question is related to the problem of whether we accept something like normative Jewish law before the rabbinic sources; above I have argued it is inevitable that we do (46–49). Therefore, I think the question should be decided in favour of the second option: the documents reflect what was accepted Jewish practice at the time, which could coincide with local practice, and this accepted Jewish practice was accepted in the Mishnah where it was explicitly decided that in cases where local practice contradicted the requirements of the Torah, local practice would prevail. A strong argument in favour of this interpretation is the reference to 'as is proper' and 'as is customary' in papyri like P.Yadin 2–3 and 7, where Jews can make an agreement while referring to local law/custom. In this context it is important to bear in mind that Radzyner pointed out that 'leasing laws are entirely absent from the Torah, especially when seen in contrast with the highly developed body of law in this regard found within Oriental law' ("P.Yadin 21–22," 158, n. 37). This means that the Torah is excluded as possible 'pre-existing halakic source,' but it also means that we have to assume that other rules had been developed or accepted from other legal traditions that dealt with this area of law in contacts between Jews. The case of P.Yadin 6 in my opinion shows that leasing law was developed within a Jewish context (see especially the reference to the 'you shall till,' 102–105) to an extant that came close to what we find in *m. B. Meṣi'a*, denoting that we do not have to assume that the regulations eventually accepted in the Mishnah are local custom, in the sense of local non-Jewish custom.

a share from the owner, while it was more common to determine that the worker had to give an amount of the produce to the owner.[237] This is apparently what is determined here in P.Yadin 21–22 for the dates from the orchards. Consequently, even though the act is described as a sale, we could say that the contract deals with work that the other party will do and the recompense he will receive for this. If he does not hand in the share of the dates that is due to the entitled person he will have to pay a fine (expressed as an amount of money per unit of dates). For this payment in cash the guarantor declares his liability. Of course the words for 'to purchase' and 'to sell' are used in the text, but it is clear that the object has not been transferred yet. Thus there is a fundamental difference with P.Yadin 2–3 (for the vendor's perspective) and P.Yadin 8 and 9 (for the purchaser's perspective). P.Yadin 21–22 seem to present more of an agreement like P.Yadin 6, about future labor and recompense, than a real sale.

The same line of argument is followed by Radzyner, who points at both the terms for sale and purchase employed in the deeds and the clear reference to an employment agreement as well, referring to the Aramaic deeds P.Yadin 42–46 and the fragments of P.Mur. 24. Both in these fragments and in P.Yadin 21–22

> the payment is stated as a quantity of produce which is to be measured and weighed in the presence of the owners according to a standard weight mentioned in the bill. However, the P.Mur. fragments lack any element of warranty or surety, either of the lessee or of the lessor, and also lack specification of the labors to be obligated.[238]

Radzyner compares the form of the contract, with this combination of aspects of selling and leasing, with contracts from Egypt (καρπωνεία) and with possible Tannaitic parallels. His conclusion is that the deeds come closest to the καρπωνεία contract, where the element of sale served to give the lessee a better protection. This would indeed explain very well for the fact that Simon is said to buy the crop while in fact the description in the deed makes it clear that he harvests the crop for Babatha, while he will retain part of the crop as compensation for his labor.[239] At the same time

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[237] See discussion of P.Yadin 6 above, 100.
[238] Radzyner, "P.Yadin 21–22," 158.
[239] Radzyner, "P.Yadin 21–22," 161.

> the Tannaitic halakha recognizes a kind of lessee, whose only duty is to reap or to harvest, and who is treated as a buyer, in terms of sale and purchase. That is to say, in Eretz-Israel also we find a relation to that certain kind of lessee for harvest as a kind of buyer, whose level of ownership in the crop is higher than that of other kinds of lessee. The most similar model to that sort of deal in the Jewish sources is a lease contract, to which P.Yadin 21–22 is comparable. The Tannaitic leasing bill reflects Palestinian local practices, not necessarily Jewish. Indeed, the bill which is found in the Tannaitic sources does not contain the terminology of 'sale' or 'purchase.' However, the Tannaitic lease contract is the only source which contains an exact parallel to the formulation by which the fruit which Simon received is a compensation for his labor and expenses. Hence in both the linguistic and juristic aspects there is a similarity between P.Yadin 21–22 and a deal of leasing.[240]

Radzyner's exposition makes it clear that a type of contract like P.Yadin 21–22 that deals with both selling and leasing resembles both the Egyptian καρπωνεία document and the Tannaitic lease contract. This

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[240] Radzyner, "P.Yadin 21–22," 161.

I do not address the discussion here of what the exact origin of the clauses in the Tannaitic halakha could have been. Radzyner's exposition about the 'layman's formula' is plausible: the rabbis might very well have accepted elements into the halakha that were of common oriental or common Aramaic origin, also in the case of the leasing contract (Radzyner, "P.Yadin 21–22," 156–157). The problem here is what one can accept as Jewish law before a codification like the Mishnah was available. Above (45ff.) I already referred to Cotton's assumption that actual legal practice, which was oriental and not specifically Jewish, was laid down in the Mishnah. However, it seems inevitable to accept that even before the Mishnah there was something like normative Jewish law: those legal practices that were accepted by Jews as pertaining to their legal acts. A strong indication for this is the phrase found in P.Yadin 10: 'according to the law of Moses and the Judaeans.' If we assume that the actual arrangements given in the text reflect this law of Moses and the Judaeans, and we see that the arrangements come down to exactly the same thing as is found in *m. Ketub.*, one can argue that there was Jewish law before the Mishnah. In other cases like P.Yadin 17 a clear and repeated reference to 'the law of deposit' suggests that here a reference is meant to law and not custom. As I showed above there is every reason to believe this law was Jewish law. Of course we do not always have a clear indication that what we find in the Mishnah that is comparable to what we find in the documents was once Jewish law and not general oriental or common Aramaic tradition. Cases like P.Yadin 2–3 and 7 where reference is made to custom, indicate that references to a common legal framework (shared with for example their Nabataean neighbours) were accepted among Jews. However, where this common legal framework could no longer function (i.e. after the Roman conquest) references to law had to become more explicit and can be expected to refer more specifically to a certain law, as indeed we see in P.Yadin 17 and in explanation of legal rights in P.Yadin 21–22 and P.Yadin 23–24. As an aside one may observe that certain legal traits can be found in different laws which we will now perceive as being common to those laws, while they may have been perceived as traits of their law by the people using them, as they obviously did not have the overview we have now.

indicates that the type of document has an oriental origin, which makes a clear link with the Roman *emptio-venditio* as suggested by Lewis less likely.

In addition to Radzyner's observations I want to look closer at the contents of the act, the same way I did with the other deeds treated in this chapter, to reveal that there some more information can be gleaned as to the law applicable to this document.

The document is written in Greek and contains a *stipulatio* clause, suggesting that the document was written with a Roman court context in mind (compare to P.Yadin 17). Indeed, while in other cases a dispute might have been a theoretical matter, in the situation of P.Yadin 21–22 the documents were written with the possibility of a dispute fully on the parties' minds, as is reflected in the documents' wording. After all, the text makes it very clear that Babatha is selling the crop of an orchard that is not hers, i.e., she is selling property that does not belong to her: P.Yadin 21:11 'properties you distrain, as you say, in lieu of…' and P.Yadin 22:9–10: '[properties] I distrain in lieu of.'[241]

I mentioned above that a person could lack the power of disposal, i.e. the power to make a valid legal act concerning a certain object, for example, if he was not the owner of the object.[242] In this case Babatha sells an object that is not hers and this fact is acknowledged in the act of sale. The fact does not invalidate her as vendor, because it is counterbalanced by another fact: it is explained that Babatha may not be owner, but that she is nevertheless entitled to sell the produce of the property on basis of specific rights to this property.[243] These rights are specified as rights based on dowry and on debt.

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[241] Referring to these phrases in his appendix on the reasons for two bills instead of one Radzyner rightly noted that Babatha appears to be more certain of her rights than Simon as he adds 'as you say' (Radzyner, "P.Yadin 21–22," 162). Also see Satlow, who touches upon these phrases in his exposition of marriage payments and succession strategies: ' "As you say," Simon of Jesus states, absolving himself of responsibility should someone challenge Babatha's legal possession of these date groves' (Satlow, "Marriage Payments," 63).

[242] See for example 122–123 (small print) above, concerning the position of the husband towards his wife's dowry.

[243] Satlow touched upon the question whether Babatha's seizure of the date groves was legal ("Marriage Payments," 63). Satlow mentions the fact that the contracts on which the seizure of the groves is based, the marriage contract and the deposit, were found in Babatha's archive, both uncancelled. His implication is then apparently that Babatha seized the property to cash in on her rights from the contracts without the contracts being cancelled to denote that the obligations were met with, which would then make her seizure illegal. In a footnote Satlow points at the possibility that the obligations

One can argue whether these are two different rights or the construction should be read as a hendiadys: 'the debt of your dowry.'[244] Lewis writes:

> Upon the husband's death a Jewish widow was entitled to the return of the amount of money stated in her *ketubba* (i.e. the dowry plus the bridegroom's promised gifts, if any; cf. V of the General Introduction), or, in lieu thereof, to maintenance at the expense of the deceased husband's estate. Having received neither, Babatha proceeded to take possession of the orchards.[245]

This seems to imply that Lewis takes the debt to refer to the maintenance owed to Babatha by the heirs: the debt is dowry related. In any case he does not explain what the debt could mean when it is taken to be independent of the dowry.

I think there is mention of two rights, dowry and debt, which are based on two different contracts that we find in our archive: P.Yadin 10, Babatha's marriage contract, and P.Yadin 17, an act of deposit in which her husband borrows money from Babatha in a deposit construction.[246]

Babatha bases her right to the crop of the orchards, her right to sell property that is not hers, on her dowry and a debt, that is, on arrangements she made with her husband in connection with her marriage to him and a debt he owed her. In this way Babatha explains that she is entitled to sell the produce of the property even if this would normally not be the case. Babatha's rights that are the reason for her unexpected capacity to sell may have been rooted in Jewish law. There it was

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were met with without this being indicated on the original acts ("Marriage Payments," 63, n. 55). Regardless of this point I think that it is wrong to make a connection between (il)legality of Babatha's move and the question whether the obligations were met with. What Babatha is doing here is exactly something one does when obligations are *not* met with. Exactly because the heirs are not giving Babatha what she is entitled to on the basis of both her marriage contract and the act of deposit, she can seize the date groves and sell their produce. This means that in such an instance we cannot expect Babatha's behaviour to amount to the same thing as a fulfilment of obligations that would lead to cancellation of the original contracts on which Babatha's rights were based.

[244] See Cotton, "Marriage Contracts," 4. She translates the combination as 'the debt of your *ketubbah* money' but explains that the Greek word used (προίξ) is dowry rather than *ketubba* money. For the difference between the two and the question whether the Judaean Desert documents deal with dowry, fictional *mohar* or *ketubba* payment, see Cotton, "Marriage Contracts," *passim*.

[245] See Lewis, 94. I note that the reference here to V of the General Introduction is without context, since this part of the General Introduction did not appear. See discussion above, 31–33.

[246] P.Yadin 17 was discussed above, 127ff. For P.Yadin 10 see discussion below, 379ff.

determined that a widow was entitled to the return of her dowry and to maintenance from her deceased husband's estate until the return.[247] All the husband's property was entailed to meet this obligation. This was explicitly determined in the Mishnah, but it is also thought to have been part of Babatha's marriage contract with Judah.[248] Consequently, when Babatha mentions her dowry it is obvious that she refers to her rights stemming from her *ketubba* and the fact recounted there that the husband's estate is entailed to meet the obligations he has undertaken towards his wife. Cotton and Greenfield have mentioned in an article that in Egypt

> wives were ordered to deposit a copy of their marriage contract in the same public archives in which their husbands' properties were registered in order to warn prospective buyers that these properties were entailed.[249]

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[247] This is the rule according to the Judaean tradition, where heirs paid maintenance until they had paid the dowry to the widow. In the Galilean tradition the widow was maintained from the estate until her death or remarriage (see *m. Ketub*. 4:12). Consequently, the Jerushalmi Talmud says that Galileans cared more for honor, while Judaeans cared more for money (*y. Ketub*. 4,15 29a). See detailed discussion in Chapter 6 below, 384–385.

[248] See *Documents II*, 126–127 for reconstruction of the *ketubba* to contain this phrase in lines 17–18. Explanations about this can be found on *Documents II*, 140.

[249] See Cotton and Greenfield, "Babatha's Property," 213, n. 17; repeated in: Cotton, "Deeds of Gift," 185. Also see Cotton, "Rent or Tax Receipt," 549, n. 15, relating the groves of P.Yadin 23–24 to those of P.Yadin 21–22.

I note that the situation as described by Cotton and Greenfield, that of depositing a marriage contract in the same archive as where the husband's property is registered, is not the same thing as singling out a certain part of property to serve as surety. This is how Rivlin seems to take Cotton and Greenfield's reference to Egyptian practice: 'Furthermore, Cotton's assertion that Judah registered these properties in the name of Babatha in lieu of the marriage contract payment—an action contrary to the norm in Jewish law—is equally lacking in basis. All of the Judaean Desert documents pertaining to marriage relate that all of the husband's belongings are to be assigned for the redemption and payment of the marriage contract, in a fashion identical to the obligations of a debtor to a creditor. Nowhere in these documents is it stated that a particular property was registered in the name of a creditor' (Rivlin, "Gift and Inheritance Law," 170–171). In P.Yadin 10 the liability of the groom with all he owns is established for the marriage between Babatha and Judah. Therefore, Rivlin is right in ascerting that this complete surety applied to Babatha's marriage. Still, we are confronted with Besas' clear statement in P.Yadin 24 that property belonging to Judah was registered in Babatha's name. This registration in Babatha's name cannot mean that she had become owner: then Besas would not have to inquire into her exact rights to the property. Clearly, property is at issue that was Judah's but had been registered in Babatha's name. The only way to explain for this is to accept Cotton and Greenfield's suggestion that registration of a right of the wife to this property on the basis of her marriage contract was meant. If we assume that the practice here was similar to that in Egypt where as Cotton and Greenfield said explicitly marriage contracts were deposited in the archives where the property of the husband was registered, we need not assume that the registration saw to a specific sin-

Cotton plausibly argued that this registration of property could very well be the registration Besas refers to, in P.Yadin 23–24, where he asks Babatha to prove her right to orchards which are 'registered in her name.'[250] This cannot mean 'registered as her property,' for instance during the census: Babatha's ownership would then be obvious and there would hardly be a reason for Besas' demand. Therefore, it is likely as Cotton suggested that 'in the registration' refers to registration in a public archive to indicate that the property was entailed and that the orchards of P.Yadin 23–24 would then be the same ones as those meant in P.Yadin 21–22.[251]

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gling out of these particular orchards as surety for Babatha's marriage contract, but that Besas had encountered a registration of Babatha's right to Judah's property as a whole, while the case at hand concerns the particular orchards Besas inquires after. To put it differently, Besas had discovered that Judah's property that had now become his nephews, was encumbered, and as legal representative of these nephews he investigates the legal basis of Babatha's registered right. That he specifically inquires after the orchards is not remarkable as those had been seized by Babatha (see P.Yadin 21–22; for an identification of the orchards of P.Yadin 23–24 as the same as the ones in 21–22 see Cotton and Greenfield, "Babatha's Property," 213; Cotton, "Rent or Tax Receipt," 549, n. 15, and discussion below, 230–231).

[250] Lewis took ἀπογραφή to refer to the census, but Cotton plausibly argued that it 'must refer to an official registration of property, presumably in the public archives' (Cotton, "The Rabbis and the Documents," 170; *contra* Lewis, 105–107).

Cotton relates the registration to registration of a mortgage on Judah's property in favour of the return of the deposit of P.Yadin 17, although she refers to the Egyptian situation of registration of marriage contracts, implying that the registration sees to the encumbrance on the property based on rights acquired through the marriage contract (P.Yadin 10) and not a later legal act like the act of deposit of P.Yadin 17 (Cotton, "Rent or Tax Receipt," 549, n. 15). This is a bit confusing in view of Cotton's interpretation of the phrase from P.Yadin 21–22 'dowry and debt' as a hendiadys 'debt of the dowry,' i.e. rights based on the marriage contract (see n. 128 above). If P.Yadin 21–22 does not refer to rights based on P.Yadin 17 but solely to rights based on the marriage contract of P.Yadin 10, why does Cotton understand P.Yadin 23–24 to refer to registration of a mortgage based on the deposit of P.Yadin 17? It is more logical to read 'dowry and debt' as I have done above: indeed 'dowry and debt,' that is, rights based on the dowry and a separate debt, contracted in P.Yadin 17. That way both options remain open: the registration Besas refers to might have been the registration of the claims based in the marriage contract or based on the deposit of P.Yadin 17.

[251] Thus *contra* Lewis, who argued that the orchards of P.Yadin 23–24 were not the same ones as those meant in P.Yadin 21–22 (also see n. 249 above and n. 260 below).

I note that Lewis bases his rejection of the identification on the argument that Babatha would then in P.Yadin 21–22 have mentioned that 'those properties had actually been made over to her by Judah.' However, this argument misunderstands the meaning of the phrase 'registered in your name.' Registration in someone's name does not necessarily mean that ownership had passed, i.e. Besas' question of P.Yadin 24 does not necessarily imply that the orchards had been made over to Babatha by Judah as Lewis phrases it. On the contrary, Babatha's explanation of her rights in P.Yadin 21–22 (she distrains the

The reference to an Egyptian context could indicate that the position of the wife towards her husband's estate, based on dowry, was not an exclusive feature of Jewish law. Indeed it seems that Babatha could have made the same claims she is making here, if her marriage contract of P.Yadin 10 had not been a real *ketubba*, but, for example, a Greek marriage deed like P.Yadin 18.[252] Still, the liability of the groom for return of the dowry with all he owns is in P.Yadin 10 part of a contract that is set in the framework of Jewish law (with the phrase 'according to the law of Moses and the Judaeans'). Therefore, it can be claimed that Babatha's right to return of the dowry is established under Jewish law,[253] and consequently, that her right to sell Judah's property as recorded in this act is based on a right acquired under Jewish law. This very fact places P.Yadin 21–22 in a framework of Jewish law.[254]

The debt Babatha mentions might have been the dowry debt; I mentioned Cotton's interpretation as an hendiadys to mean 'the debt of your dowry.' Yet the mention of a debt could be taken to point at a distinct, i.e. second, right Babatha had to her husband's estate based on a debt he owed her. This debt might have been the one mentioned in P.Yadin 17. Above I discussed P.Yadin 17 in the light of Roman and Jewish law and showed there is reason to believe the references to 'law of deposit' in P.Yadin 17 are references to Jewish law.[255] This means that when 'debt' here in P.Yadin 21–22 is to be understood as the debt of P.Yadin 17, Babatha bases her right to sell on rights to Judah's property acquired in two different legal acts that are both rooted in Jewish law. Babatha would then be reclaiming the money at the time of Judah's death, that is the moment of the drawing up of these documents, P.Yadin 21–22. At that time, Babatha's position as a widow would require financial arrangements to secure her income. If what Lewis has suggested is true and the heirs did not pay the dowry and the maintenance, Babatha had to resort to sale of crops to ensure her income. This shows that a widow's

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orchards) indicates that she was not owner. Therefore registration must see to registration of another type of right than full ownership of the orchards concerned.

[252] See Chapter 6 below, 388–396, where I discuss the features of the *ketubba* and the question of whether Babatha's behaviour as it appears in the archive can be related to specific legal consequences the *ketubba* arrangements had, as opposed to arrangements in, for example, a Greek marriage contract like P.Yadin 18.

[253] For a more detailed explanation see 48–49 above.

[254] Note that P.Yadin 21–22 thus draw on rights acquired in an Aramaic act, while the acts are subjected to Roman jurisdiction: see discussion above, 76–78.

[255] See 127ff.

rights based on the prior arrangements were indeed of great importance to her.

Roman law did not know the same arrangements for wives and widows as oriental law did. Therefore, Babatha's behaviour would have been out of order, and more importantly she could not validly make the legal act of P.Yadin 21–22. The mention of the arrangements at the heart of her sale, i.e. the explanation of her rights to make the sale despite her lack of ownership of the groves concerned, should therefore be understood as an explanation of the applicable law. Even if Babatha does need a guardian, a formal requirement made by Roman law, she is apparently referring to her own legal system where the substance of the matter is concerned.

P.Yadin 21–22 are treated here because they concern an act of sale, or a share cropping agreement, but I could just as well have treated them in combination with P.Yadin 23–24, 25 and 26, which all present documents that deal with the situation after Judah's death. In this context it is particularly clear to see that the order of succession and the consequences of a person's death were determined by Jewish rather than Roman law.[256] In P.Yadin 23–24, the guardian of the minor sons of Judah's deceased brother investigates into Babatha's right to part of Judah's estate. It is clear that the man is acting as representative of Judah's heirs. This implies that the sons of Judah's brother are his rightful heirs, even though Judah had a daughter, Shelamzion. Consequently, Roman law does not apply: contrary to Jewish law, Roman law gave female children an equal right to inheritance and therefore under Roman law Shelamzion would have been her father's heir. Since the order of succession here was not Roman, one might expect it required an explanation, like the explanation of Babatha's rights to her husband's estate in P.Yadin 21–22. Indeed, we find such an explanation in P.Yadin 24, where it is said that the sons take the place of their father in inheriting Judah's estate, i.e. in being the rightful and legal heirs to Judah's estate.[257] The importance of the remark is not in the mention of substitution (children taking the place of a deceased parent), since this was common in most legal systems, but exactly in the mention of the word 'inheriting.'

[256] For full details see Chapter 4 below.

[257] I deviate from Lewis' translation and interpretation of the lines concerned (for details see Chapter 4, 233–234 below).

The children take the place of their father with regards to their right to *inherit* Judah's estate, i.e. to be his rightful heirs. In that way the remark seeks to explain the order of succession: in the present case the children of the deceased brother of the deceased are the legal heirs (despite the presence of a daughter of the deceased).[258] This means that the matters at issue were treated from the basic assumption that Jewish law applied to the relationship between the parties, i.e. to the order of succession and the rights certain family members did or did not have.

Yet the presence of this explanation of the order of succession suggests that the order followed was not obvious. Apparently, the reference is made to clarify what law should be applied in the present case, or at least what law is behind the case itself. This law is clearly not Roman and can be identified with Jewish law. This means that the explanation of the order of succession does not only indicate that Jewish law was behind the case, but also that the overall context, most probably the context of the court to judge the dispute, was not Jewish. Had the applicability of Jewish law been obvious, an explanation might not have been necessary. The same situation occurs in P.Yadin 21–22 where Babatha explicitly explains why she is entitled to sell dates from orchards she does not own.

A formal aspect of the papyrus that does point at an influence of Roman law can be found in P.Yadin 21:27–28 and 22:29–30, where it reads: 'the formal question having in good faith been asked and acknowledged in reply.' I refer to the detailed discussion of the *stipulatio* clause above.[259] In this instance, it would be tempting to assume that there was a demand to include the *stipulatio* in the acts, since this could explain the fact that two deeds were drawn up pertaining to one legal act in P.Yadin 21–22.[260] Since *stipulatio* was a unilateral contract, obliging only

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[258] This clear-cut reference to the applicable order of succession in the documents' texts means that it is not necessary to derive the position of the daughter towards her father's estate from for example the presence of deeds of gifts in the archive (as has been done by Cotton/Greenfield and Cotton on later occasions), but one can actually see *in the documents' text* that the daughter did not have a right to her father's estate as the sons of the deceased father's brother are declared to be his rightful heirs. I will discuss my interpretation of the position of the daughter towards her father's estate in detail, in the context of a number of oriental laws, in Chapter 4 below.

[259] See 150–155 above.

[260] The question of why two deeds were drawn up is discussed by Radzyner too, in an appendix (Radzyner, "P.Yadin 21–22," 162–163). He raises the interesting suggestion that Simon's bill (P.Yadin 21) was the primary bill, but Simon demanded Babatha to draw up a bill too, to give security in case the arrangement would not work out. Radzyner relates

one of the parties, the *promissor*, it can be imagined that it would be hard to incorporate it into an act where both parties would be bound. This fact might have induced the scribe to write two deeds, having each party take the *stipulatio* for his own obligation.[261] Consequently, the two deeds of P.Yadin 21–22 may testify to a Roman influence anyway, although not on the basis of the *emptio-venditio* as Lewis assumed. Obviously, this Roman influence is only of a formal nature.

II. *Overview of Conclusions*

The evidence given above is first presented in a table form. This way, data can easily be compared and related to answer the questions that were raised in the General Introduction and Chapter 1, like: is there a chronological development showing that a transition of language and law occurred? is there a (direct and determinative) relationship between the background of the parties and the choice of language? is there a (direct and determinative) relationship between the language used and the law behind the documents?

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this demand on Simon's part to a possible dispute over Babatha's *ownership* of the date groves concerned. I note that Babatha is not owner of the groves, nor does she claim to be, as she only speaks of distraining the groves. This means that Babatha had taken possession of the groves (possession is not the same thing as ownership) and was entitled to sell their produce to recover the money Judah's heirs owed her. If therefore an extra bill was drawn up to ensure Simon's rights to go and work in the orchards, this has to do with ascerting that Babatha was entitled to distrain the groves, not with ascerting that she owed them (which she did not). In fact what the acts say is that Babatha is entitled to sell the produce of the groves, exactly as a *non*-owner of the groves, because she has rights based on other legal acts.

Radzyner assumes that a claim over ownership of the groves had arisen because of the nature of P.Yadin 23–24. He refers to the controversy over the identity of the groves,—are those in P.Yadin 23–24 the same as in P.Yadin 21–22? --: Lewis denied this, while Cotton and Greenfield answered to the affirmative. I am inclined to believe the same groves were concerned, but that does not mean that ownership is at issue here. In P.Yadin 23–24 the guardian of the sons of Judah's deceased brother asks Babatha to prove why the groves concerned are registered in her name. This, however, does not refer to registry of ownership, but of the rights of the wife to property of her husband based on her dowry (see n. 251 above). This means that what is at issue in P.Yadin 23–24 and what is explained for in P.Yadin 21–22 is exactly the same thing: Babatha is entitled to property of her deceased husband because of certain rights granted to her in her marriage contract. See the detailed discussion of P.Yadin 23–24 in Chapter 4 below, 230ff.

[261] In the other documents in the archives where the *stipulatio* occurs, only one of the parties obliges himself (in 17 the depositary, in 18 and 37 (= P.Hever 65) the groom, in 20 the guardian of the minor heirs of the deceased). In such cases it is easier to envisage a (single) *stipulatio* than in the case of a clearly reciprocal contract like sale.

These questions will be addressed briefly under separate headings after the table.

Pap.	Year	Language	Legal act	Parties	Reference to law	Law behind the documents
2	99	Nabataean Aramaic	Sale	Two Nabataeans	'as is proper'; 'as is customary'	References to general legal framework accepted by parties
3	99	Nabataean Aramaic	Sale	Nabataean (same vendor as in 2)—Jew	Instead of 'as is proper' reference to specific rule; 'as is customary'	References to general legal framework accepted by parties; specific arrangement according to law of one of the parties
5	110	Greek	Deposit	Two Jews	None specific (contrary to 17); papyrus is damaged in lines that concern, for example, liability; possibly reference to a retribution *in duplum;* explanation of legal position points at non -Roman law (wedding money)	No clear reference to 'law of deposit' (contrary to 17); possibly no real deposit but attempt to formalize obscure relationship; reference to retribution *in duplum* might be due to an influence of oriental law
6	119	Nabataean Aramaic	Tenancy agreement	Two Jews	'according to the customary manner of working "and you shall till" followed by specific arrangements	Specific reference to Jewish law (for example to two different ways of harvesting based on local custom)
8	122	Jewish Aramaic (Greek signature)	Acknowl of receipt	Two Jews	None specific, standard form (compare 9)	General legal framework accepted by parties; same form as document in Nabataean Aramaic (9)
9	122	Nabataean Aramaic (Greek signature?)	Acknowl of receipt	Jew and Nabataean?	None specific, standard form (compare 8)	General legal framework accepted by parties; same form as document in Jewish Aramaic (8)

Pap.	Year	Language	Legal act	Parties	Reference to law	Law behind the documents
11	124	Greek (completely)	Loan	Jew and Roman centurion	None specific	Roman features in wording and style; no *stipulatio* though (see 17, 21–22 below).
17	128	Greek (Aramaic subscriptions and signatures)	Deposit	Two Jews	'on account of a deposit,' 'on deposit,' 'of the deposit,' 'in accordance with the law of deposit,' 'the deposit' (Greek) and 'on account of deposit,' 'according to the law of deposit' (Aram. subscription)	Formal features: Roman (*stipulatio*, guardianship of women), substantive: Jewish law (in any case no link with the Roman *depositum irregulare*).
21–22	130	Greek (Aramaic subscriptions and signatures)	Share cropping arrangement	Two Jews	None specific; explanation of legal position points at non -Roman law (right to sell while not owner based on dowry and debt)	Formal features: Roman (*stipulatio*, guardianship of woman); substantive: position widow towards deceased's estate based on indigenous (Jewish) law
23–24	130	Greek (23 with Aramaic signatures)	Summons and related document	Jews	Explanation of right of orphans; points at Jewish law	Formal features: 23 summons to court of Roman governor (comparable to 14 and 25), substantive: explanation of order of succession indicates non-Roman legal context where contents is concerned
P.Hever 60	125	Greek (Aramaic subscription)	Receipt	Jews	None specific (see resemblance to 12)	General legal framework (no clear difference between Greek and Aramaic receipt)
P.Hever 12	131	Aramaic	Receipt	Jews	None specific (see resemblance to 60)	General legal framework (no clear difference between Greek and Aramaic receipt)

Chronological development

The conquest of the area (in 106 CE) does not coincide with the use of Greek. After P.Yadin 5 (of 110) we find documents in Aramaic until P.Yadin 11 starts off a series of documents in Greek.[262] We do see that after a certain moment the documents are all (but one) in Greek. This shows that there was a tendency to use Greek for legal documents. At the same time, we see that these documents have Aramaic subscriptions. This means that Aramaic continued to play a part in legal documents. That Aramaic was sometimes translated into Greek to yield a completely Greek document need not say much about the use of Aramaic as a language for legal documents: both P.Yadin 11 and 16 concern copies of documents that originally did contain subscriptions in Aramaic, and in the case of P.Yadin 16 also in Latin. It appears that for some documents, a completely Greek version was preferred or was simply conventional.[263]

The use of languages against the background of the parties

The overview shows that the use of languages can partly be related to the background of the parties. If we accept that Greek became the predominant language for legal documents after a given moment, we cannot relate the use of language to the background of the parties after that point. This means that the use of Greek in an act between two Jews after 125 cannot be explained in this way. However, even before that period the divergences the material presents are telling. On the one hand, there seems to be a clear relationship between the background of the parties and the language they choose for their dealings. In P.Yadin 2, two Nabataeans have an act drawn up in Nabataean Aramaic, in P.Yadin 8, a Jew has Jewish Aramaic employed in an acknowledgement of receipt after a deal with his brother. An acknowledgement of receipt of the same nature (and written by the same scribe) is issued in Nabataean Aramaic, perhaps for a Nabataean party. In P.Yadin 3, sale of the same orchard of P.Yadin 2 by the same vendor to a Jewish purchaser, Nabataean Aramaic

[262] Of course the overview is not complete since I do not treat all documents in this chapter. However, the conclusions drawn about the use of Greek are made with the other material in mind (P.Yadin 7 and 10 are in Jewish Aramaic; after P.Yadin 11 all documents are in Greek).

[263] For all details concerning the use of Aramaic and Greek and the position of Aramaic as a legal language see Chapter 1.

is used as well. However, on the other hand, we see that two Jews can use Nabataean Aramaic (P.Yadin 6) and that Jews use Greek amongst each other, even as early as in 110 (while Aramaic is still used until 122 or 125). This means that the documents do not show unequivocally that the choice of language was based on the background of the parties. This is important because the use of language has also been related to the use of law. I referred above to assumptions that Nabataean Aramaic documents refer to Nabataean law.[264] In some cases this seems to be obvious. When two Nabataeans make a deal in Nabataean Aramaic, like in P.Yadin 2, there needs to be no doubt as to whether they wanted Nabataean law to apply to their deal. Phrases like 'as is proper' and 'as is customary' have to refer to a common legal context, probably of Nabataean law. Yet the presence of P.Yadin 3, a deal between a Nabataean and a Jew, that is almost a copy of the deal we find in P.Yadin 2, presents us with the intriguing case of divergence from the general legal framework (referred to by 'as is proper') in using reference to a specific arrangement. This arrangement could have its origin in the legal background of the Jewish party.[265] A more explicit example can be found in P.Yadin 6, a document in Nabataean Aramaic, that clearly refers to Jewish law ('according to the customary manner of working "and you shall till").[266] This means that the language of the document does not determine *a priori* what law is referred to. This has to be deduced from the actual references or arrangements in the documents. That the same applies to the Greek documents can be seen in P.Yadin 17, where reference is made to 'the law of deposit.' This reference is clearly not to Roman law.[267] Furthermore, documents like P.Yadin 21–22 take certain rights for granted that are part of a non-Roman legal context (the position of the widow towards her deceased husband's estate).[268] These rights are explicitly

[264] See discussion of P.Yadin 2–3 above, 93–97. The assumption that the document is drawn up 'under the provisions of Nabataean law' (*Documents II*, 242) seems prompted by the overall Nabataean context of the deal. However, this completely disregards the influence the Jewishness of the purchaser of P.Yadin 3 did have on the deal, in determining a specific day of the week for the watering periods, see 95–97.

[265] See 95–97 above.

[266] See 97ff. above.

[267] See 127ff. above.

[268] The same goes for P.Yadin 23–24, where the order of succession is explained; see 179–180 above.

Cf. P.Yadin 5 where 'wedding money,' probably referring to a dowry, is mentioned as a separate debt of the deceased (independent of his estate).

described in the papyrus text, as the foundation of and the reason for the legal act. This means that external features like language or wording are not what should guide us in determining the law behind the documents but rather internal evidence, like references to the applicable law or descriptions of rights and legal positions.

References to law in the documents

The documents seem to determine what the applicable law was in two ways. On the one hand, documents can refer to a general legal background (with 'as is proper,' 'as is customary') and give specific rules for specific cases (as in P.Yadin 3 with the watering rights). On the other hand, they can refer to a specific applicable law (as in P.Yadin 17) or explain specific legal positions (as in P.Yadin 21–22 and 23–24).

In these later papyri the references to the applicable law and descriptions of rights and legal positions should be distinguished from other indications of the applicable law, like the appearance of guardians for women or mention of the *stipulatio*. In the table these indications are not classified under references to law, since they are not references to law in the strict sense of the term. Yet these indications do connect with a specific legal system that was applicable to the legal act: Roman law required women to act with guardians, Roman law knew of a *stipulatio* to have a party declare himself bound. But although in P.Yadin 17 a guardian occurs for Babatha and there is mention of the *stipulatio*, the law of deposit referred to is clearly not Roman. This means that there is a contrast in legal orientation between the references and descriptions of legal rights and positions, and the other indications of the applicable law as found in the documents.

Law behind the documents

Unlike the references to law and the descriptions of rights and legal positions, the other indications of the applicable law do not see to contents of the legal act (to the law that is applicable to the legal arrangements in the act, such as the sale, or the deposit) but that arrange for legal matters that can be qualified as formal. The difference between indications of the law that applies substantively and the indications of the law that applies formally is crucial for our understanding of the relationship

between several applicable laws in these documents. This division seems to develop after the Roman conquest. The reasons for the development in references to law and for the presence of features that point at different legal systems that are applicable to the same act will be the subject of Chapter 3.

CHAPTER THREE

A NEW APPROACH TO UNDERSTAND THE RELATIONSHIP BETWEEN LOCAL AND ROMAN LAW IN THE ARCHIVES

In Chapter 2 it appeared that different ways of referring to the applicable law can be distinguished. The overview in table form allows for the immediate observation that these different ways are not co-existent, but appear subsequently. This suggests that there was a change from one way of referring to the applicable law to the other, a change that can possibly be related to the Roman conquest. Rather than grouping papyri according to language (Aramaic versus Greek) and linking these language-based groups to law or jurisdiction as has usually been done before, the different ways of referring to the applicable law in the period under Nabataean and under Roman rule should guide us to understand more about the relationship between laws.

I. *Determining the Applicable Law*

Under Nabataean rule

Language and references to law

Usually only the use of Greek as opposed to Aramaic in the archives is studied, and the use of different types of Aramaic in the early documents is recorded, but not discussed. However, exactly the use of these different types of Aramaic can show that the use of languages is not conclusive for the applicability of a certain law, thus calling for caution in assuming this is the case with documents in Aramaic as opposed to documents in Greek. Above it was shown that P.Yadin 6 may be in Nabataean Aramaic, but can still refer to Jewish law, while P.Yadin 8 and 9 are virtually the same kind of contract, one in Nabataean Aramaic, the other in Jewish Aramaic. Consequently, one cannot use the document's language as a direct indication of the law applicable to this document. Instead, the documents contain references to law, which can be listed and studied. Certain expressions appear in several documents,

for example 'as is proper,'[1] and 'as is customary,'[2] others are specific to one document, such as 'according to the customary manner of working 'and you shall till'[3] or phrases giving specific arrangements that present a divergence from a general rule.[4] These references can be found in Nabataean and Jewish Aramaic contracts alike, contracts made between Nabataeans, Nabataean and Jew, and Jews. The overall picture the documents present is that there was a general legal framework to which parties could refer, apparently Nabataean and Jewish parties alike, while divergences were marked by giving specific rules.

This latter conclusion can take us in two different directions. We could assume that the overall legal framework referred to was Nabataean law as the predominant law of the ruling power in the area, or that the documents do not refer to Nabataean law specifically, but rather to a more general indigenous tradition or custom.

Nothing in the extant texts proves beyond doubt that they referred specifically to Nabataean law. In any case, it is not clear what the Nabataean law they referred to would have encompassed. Nabataean law might have resembled Jewish law and perhaps there was no pronounced distinction between different laws when it came to conducting business. One might assume that business matters were arranged according to accepted traditions or customs, as referred to by כחליקת in P.Yadin 2–3. More personal matters like family matters (marriage, matters of succession) could then be expected to be handled in another manner, depending upon the persons involved. The tendency of the Jews to use Jewish Aramaic in their dealings with one another could point in the direction of a differentiation between general law and more specific law. Business matters would then be conducted according to the general (and generally accepted) law, while more personal matters could be arranged according to personal law or traditions specific to a certain group. This difference could be behind the divergence we have seen in P.Yadin 2–3: Shim'on's deal with 'Abi-'adan is the same as Archelaus' deal with her, except for some specific rule coming from Shim'on's personal law. This rule is then incorporated into the contract. P.Yadin 8 and 9 provide instances of adherence to general law: business was conducted according to one set legal framework. This legal framework need not

[1] P.Yadin 2–3; see discussion above, 95.
[2] P.Yadin 2:13/36, P.Yadin 3:14/40 and P.Yadin 7:24/65.
[3] P.Yadin 6; see discussion above, 99–105.
[4] The arrangement for the watering period in P.Yadin 3; see discussion above, 95–97.

necessarily have been Nabataean law, but rather a common oriental tradition, which could coincide with what is called in scholarship the Aramaic common law tradition. This tradition is for example adduced to explain for the fact that certain clauses in papyri in Nabataean Aramaic closely resemble clauses of the same purport in papyri in Jewish Aramaic.[5] Nevertheless, both types of papyri can make distinctions as to the applicable law for certain arrangements, thereby adding rules of specific law to a framework of general law. This shows that different oriental people cooperated with each other in the public field on the basis of a shared legal framework, by making general references to this framework ('as is customary') or using clauses of a general nature, while divergences were specifically described.

General-specific

A division as outlined above can be seen as having developed over a long period, more or less as a natural process of shifting the general from the specific, a process of retaining specific elements for a group while the overall perspective merged. Merging then denotes the development where the laws of various groups within a population might have been alike in general respects and thus a common tradition or a mutual framework could be established. On the other hand, specific rules stayed in force within the groups, distinguishing them from others. Consequently, the legal context could be seen as consisting of two parts: a larger general legal context related to the populace as a whole, and a more specific legal context related to specific groups within society.

The distinction looks like what Roman law denoted as a distinction between *ius gentium* and *ius civile*. *Ius gentium* encompassed legal acts common to all nations, like sales. In Roman legal texts *ius gentium* is sometimes adduced to explain the nature of a procedure or the justification of a rule.[6] *Ius civile,* on the other hand, denoted the specific civil law

[5] See, for example, *Documents II*, 226, where a defension clause (a specific clause to protect the rights of the purchaser or donee) is related to 'Aramaic common law tradition,' to explain for the fact that the clause in P.Yadin 2–3 (sales contract in Nabataean Aramaic) looks a lot like the clause with the same purport in P.Yadin 7 (gift in Jewish Aramaic).

[6] For example *Dig.* 16.3.31 pr. A person who is charged with a capital offence deposits money with another. After he is convicted, his assets are forfeited to the state. The question is then raised of to whom the deposit should be returned. *Ius gentium* (and natural law) would say that the depositor should recover the deposit. However, *ius civile* (and

of one nation; in a Roman legal context this will obviously be Roman law. The civil law of one nation can have developed specific rules for an act that is known to all nations in general: sale in its basic form of exchanging an object for another object or money (part of the *ius gentium*) is developed differently in legal systems (civil laws) with regards to, for example, the act of handing over the object. Consequently, we could assume that the common law tradition of the area before the conquest served as sort of *ius gentium* for the populace there, while divergences were possibly based on the various laws of the different peoples (the *ius civile* of a certain group within society).

The general framework could be called public since it was related to the relationships between the different groups and thus with society as a whole, while the specific law of a group could be called private since it was used within a group and served to meet with the needs of this specific group. Nevertheless, because of the specific connotations of the terms public and private in a legal context, I will adhere to my terminology of general and specific as used above.

As mentioned above, such a division can be expected to have developed over time. As people lived together within an area and had business dealings with one another, a common tradition was established, sharing features that systems had in common, or striving for a form of legal act (for example sale) that incorporated all the important issues. To put it differently, a legal tradition can be expected to develop to incorporate those features that are so essential to a particular legal act that all systems recognize these features in one way or another. Since these features were the same in the different laws, it was easier to draw up contracts that resembled these laws by incorporating what was common to them. In such a case, the question of to which law a contract referred, in the sense of law as the law of a specific group of people (Nabataean, Jewish), need not be put. The contract refers to 'what is customary,' what all parties accept as applicable to this legal act. In cases of divergence from 'what is customary,' this is indicated. As can be seen in Chapter 2, these references are usually more detailed and specific, and considering the legal context this is logical. Since the Aramaic documents do not make it clear how disputes would be settled—for example, in what type of court—we cannot say what the difference between general and specific law meant in a case of dispute. If we accept that the Jews could refer to

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legal order) would say that the state is entitled to it (because the depositor had been convicted for a capital offence and his punishment should serve to deter others from wrongdoing).

their own law in certain legal acts they made (concerning marriage and succession matters), it needs to be asked how a court, a Nabataean court in all likelihood, would deal with that. The evidence from the papyri suggests that the starting point for the court would have been the general legal framework, referred to in contracts with 'as is proper' or 'as is customary,' while the court would take divergences from this general framework into account *as they were described in the contracts*. This would explain the explicit designation of watering periods in P.Yadin 3. Such arrangements served to explain matters later on. In case of dispute, a court would probably consult the document for clarification of rights and obligations. The very fact that documents were drawn up to set legal acts down in writing suggests that these documents, recording the party agreement, would play a vital part in the settlement of later disputes. The more explicit a contract is about the parties' obligations, the easier later dispute settlement becomes. Indeed, in the Mishnah it is made clear at various points that certain legal obligations could be established by the contract drawn up between the parties. This serves particularly to enable deviation from the normal procedure as foreseen by the law: for instance in case of a deposit the depositary was liable for loss of the deposit, unless the arrangements between the parties determined that his liability would be limited or altogether excluded.[7] In such a case the party arrangements replace the regular rules of the law. In this context it is worthwhile to quote from *Dig*. 16.3.1.6:

> *Si convenit, ut in deposito et culpa praestetur, rata est conventio: contractus enim legem ex conventione accipiunt.* 'If it is agreed that there is also to be liability for fault with regard to the deposit, the agreement is valid; for contracts take their law (i.e. applicable rules) from the agreement.'

I deviate from the translation of Watson, who translated: 'For the principle underlying contracts is agreement.' The word translated by Watson with 'principle'—*legem* (*lex*)—clearly means 'law,' 'the applicable rules.' Precisely that fact makes the passage so interesting, since it actually says that contracts take their law, the rules applicable to them, from the agreement. One is almost tempted to translate: 'the agreement between the parties serves as the law contracts are based on.' And indeed in an earlier publication, where Watson referred to this passage from the Digest in a discussion, he gives the translation: 'If it is agreed in a deposit that there

[7] See 149–150 above.

will be liability even for negligence, the agreement is ratified; for *the contract becomes law by agreement*.'[8]

In the light of this study this would explain why the arrangements that deviate from general law are described more specifically: what the parties decide in their contract—and what kind of legal background they refer to—will serve as the applicable framework for their deal. This also means that the contract will serve as the basis for judgement in case of legal dispute, i.e. that the judge will try to extract the applicable rules from that contract. This argument is important for understanding the issues of law behind the documents as Roman rule was established in the area.

Under Roman rule

Language and references to law

When the area became part of the Roman Empire the situation changed in the sense that a gradual development of merging laws and establishment of a common law tradition, as described above, was not possible. A distinction between general and specific law as outlined above could no longer work in the same way it had done before. In the period prior to the Roman rule, general and specific law shared a common background: they were oriental. One could even say that all specific laws were part of general law in the sense that general law was a blend of several laws, of features they shared. When people dealt with each other they referred to this common background of general oriental law. But with Roman rule, general and specific law as they had stood had now both become specific law, while the new system—Roman law—was the general one. The later Greek papyri show that the Roman governor was expected to judge cases, there is no clear indication that there were other courts. This suggests that jurisdiction was completely in Roman hands and that the indigenous population had to turn to a Roman court for dispute settlement.[9] This means that the judges came from a different

[8] Watson, *Roman Law and Comparative Law*, 240: 'What Roman law did have, however,… is the rule that parties to a contract might by agreement impose standards different from those settled in law. Thus: "Digest of Justinian, 16,3,1,6. If it is agreed in a deposit that there will be liability even for negligence, the agreement is ratified; for the contract becomes law by agreement."'

[9] About the possible evidence for the existence of other courts and the 'obligation' to turn to a Roman court see 73–78 above.

legal background than the parties who made the contracts. References to 'as is proper' or 'as is customary' would be pointless: there was no framework the parties and the court shared. The use of a document like P.Yadin 3 would have been problematic in a Roman court context. Not only would the language cause problems but the contents of the arrangements as well. Therefore, the situation after the conquest called for drastic change. The Roman court had to be able to understand the contracts that were underlying the disputes. This could explain for the use of Greek in these documents. However, this begs the question whether the law in the documents had to be Roman law as well. This seems to be logical: a Roman governor has to know the law according to which he is judging his cases. But parties need to know the law they are basing their contracts on just as well. Can provincials be expected to have known the rules of Roman law, which in many cases diverged significantly from their own well-known laws, and to take those rules into account in their dealings amongst each other? Obviously this is about as difficult to envisage as envisaging a Roman court judging according to indigenous law. However, the documents show that provincials took their cases to a Roman court. Somehow, a new way of dealing with the problem of the different laws had been found.

What we see in the documents is that references are no longer made to a general legal framework ('as is proper,' 'as is customary') but to specific rules or customs: 'according to the law of deposit' or 'in accordance with Greek custom.'[10] In other instances, certain starting points for the legal act are specified in the contract: Babatha's right to sell the produce of orchards she does not own or the right of Judah's nephews to his inheritance.[11] It seems that the documents become more specific in their description of what is at issue, apparently with the purpose to clarify the legal context of the act. Nevertheless, it is remarkable that when referring to law the documents do not usually determine the law with an adjective: 'in accordance with Greek custom' is an exception found in a document otherwise put in a legal framework by the phrase 'according to the laws.'[12] The phrase 'according to the law of deposit' does not say what law of deposit was meant: Jewish, oriental, Greek-Hellenistic or

[10] P.Yadin 17 and 18 respectively. See discussion of P.Yadin 17 above, 127ff. and P.Yadin 18 below, 398ff. Also see overview of references to law in Chapter 2 above, 181–187.

[11] P.Yadin 21–22 and 23–24 respectively. See discussion of P.Yadin 21–22 above, 168–179 and of P.Yadin 23–24 briefly above, 179–180, and detailed below, 230–234.

[12] P.Yadin 18: κατὰ τοὺς νόμους (lines 7=39), ἑλληνικῷ νόμῳ (lines 16=51).

Roman? It seems that without a determinative adjective it was clear to what law these documents refer.

Even a cursory overview of the references to law in the papyri in their context shows that the documents do not refer to Roman law. For example the position of the widow referred to in P.Yadin 21–22 and the position of the nephews explained for in P.Yadin 23–24 do not fit with Roman legal practice. This means that it was in any case clear that the references to law made in the documents were not references to Roman law. However, it is equally obvious that the formal situation has been tailored to fit with Roman legal practice as much as possible. The use of Greek, the appearance of guardians of women, the inclusion of a *stipulatio* clause, all of these features clearly indicate that there was a Roman influence, an influence that seems to get stronger as time goes on.[13] Consequently, the documents present a seemingly contradictory picture: at face value the documents are adjusted (by degrees) to Roman demands, while internal references, although more specific than before, clearly do not refer to a Roman legal context.

Formal-substantive

In the contributions to *Law in the Documents of the Judaean Desert* it is concluded repeatedly that the Greek documents do not reflect anything that is contrary to halacha. Still, as pointed out in the General Introduction, the conclusion drawn by Safrai as to the general legal context of the archives is that the Greek documents 'reflect *a legal practice different from* that manifest in the Jewish sources,' a view represented by the editors as stating that the Greek documents 'are drawn up in *a legal universe very different from* that of the rabbis.'[14] No explanation is offered for these statements. The conclusion seems to be prompted by the very fact that the Greek documents despite their contents deviate from the Aramaic ones in their style. However, one can hardly argue that the Greek documents reflect another legal practice as contents does not deviate. What is meant with legal practice then?

To solve this problem one should accept that there is not necessarily one legal culture or law applicable to a document. On the contrary, in

[13] Greek is used from P.Yadin 11 onwards; this papyrus does not give the *stipulatio*. We find this clause incorporated from P.Yadin 17 onwards (though not in all documents). Guardians of women appear in P.Yadin 14 and onwards (though not in all instances where they might be expected).

[14] See 39 above; my emphasis.

fact each and every legal document consists of two levels. The reason that we are usually not conscious of that is that the two levels can relate to the same law. When this happens they seem to blend and no longer present themselves to us as two levels. However, where they do not relate to the same law, we stumble on the problem as articulated in *Law in the Documents of the Judaean Desert*: we are faced with signals from the texts that point us in two alternative directions, find clues to the applicability of several laws that seem to be ultimately incompatible. However, they are not really incompatible as both laws referred to can play their part on different levels in the text. Accepting these levels actually means accepting the basic structure of each and every legal act. The division that has to be made here is the division between formal/procedural and substantive law.

Formal or procedural law is that part of the legal system that arranges for the settlement of disputes. It determines before which court a case should be brought, what terms should be adhered to, what person can be heard etc. Substantive law on the other hand determines the contents of the legal act. Substantive law determines things like order of succession or eligibility for a certain function.

That this distinction has been completely ignored can already be seen in Bowersock's remark about the subjection of the conquered territory to Roman law. His examples do not distinguish between substantive and formal law, prompting the incorrect (or in any case inaccurate) conclusion that the area was subjected to Roman law. Goodman's contradiction of this did not distinguish between formal and substantive law either. Although he observes that 'a variety of legal systems continued in operation in the realm of private law,' he does not clarify this statement.[15] As discussed above, his examples of what he considers an influence of other legal systems than Roman law are not well chosen. It is also unclear what he means by 'private law.' The term appeared before in Goodman's remarks on the use of coinage and measurements from the pre-Roman era, where he concludes that the Romans 'elected not to interfere, just as they permitted local custom to prevail in private law.'[16] It seems logical to understand 'private' as opposed to public: where private matters (as contrasted to public, i.e. state, affairs) were at issue, local custom prevailed. This assumption functions as long as one envisages Romans

[15] Goodman, "Babatha's Story," 173.
[16] Goodman, "Babatha's Story," 173.

on the public level and locals on the private level, each to their own, but problems occur when both levels intersect: what if a local wants to sue another local before the Roman governor?

Goodman touches upon this matter in discussing what he calls 'the general adoption by locals of distinctively Roman (rather than Greek) customs and words.'[17] As an example he names 'Babatha's attempt to use Roman law in order satisfactorily to settle the conditions of her 'orphan' son by her first marriage.' Evidence for this attempt is according to Goodman provided by 'her possession of three copies of a Greek version, slightly emended, of the praetor's formula about guardianship found in Gaius, *Institutes* 4.47 (*P.Yadin* 28–30).'[18] Goodman consequently observes:

> The governor faced by a local Jewish woman brandishing the praetor's edict could find himself facing the same woman soon afterwards demanding adjucation between herself and a fellow widow over the property of her deceased bigamous husband (*P.Yadin* 26). For such a problem nothing in the tomes of Roman law would prepare him…[19]

However, one can wonder whether this would really have been a problem for a governor. First of all, Goodman does not distinguish between formal and substantive law in the detected attempt of Babatha 'to use Roman law.' Obviously, the use of a *formula* is nothing but the use of formal law, to be regarded independently of the contents of the case. The references to law as investigated in Chapter 2 make it clear that the parties referred to local law in their legal acts as the law applicable to the substantive side of their cases. If a case of bigamy had been at hand, the governor might very well have accepted the situation if it was allowed in local law. In this context Goodman's observation is relevant that the governor probably 'relied on the advice of local experts.'[20] Indeed, one does not even need the dubious example of P.Yadin 26 as referring to bigamy to conclude that the governor would be confronted with cases where local law was at the heart of the matter. I only refer to P.Yadin 21–22 where Babatha bases her right to sell on rights granted to her in local law and P.Yadin 23–24 where the position of the nephews as Judah's heirs is based on an order of succession of oriental origin.[21] In those instances

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[17] Goodman, "Babatha's Story," 171.
[18] Goodman, "Babatha's Story," 171.
[19] Goodman, "Babatha's Story," 171.
[20] Goodman, "Babatha's Story," 171.
[21] See discussion on 168–179 and 179–180 above.

no one doubts that any ensuing suits would be dealt with by the Roman governor, which means he would then indeed be confronted with cases based on rights not granted by Roman law. Unless one wants to assume that people mistakingly believed that their own law would be taken into account and that the pronounced references to the applicable law in the legal acts were completely irrelevant when it came to a court case, the conclusion has to be that the governor took local law into account to judge the substantive side of cases. This is not at odds with the find of the *actio tutelae* in the archive, as this formula sees to the formal side of the suit.

The difference between substantive and formal law can help to clear up priorly posed confused arguments concerning the applicable law in the papyri from the archives. The examples of Bowersock and Goodman given above are by no means the only ones in which a general term 'Roman law' is used without indicating what the term covers: substantive law, formal law or both. For example:

> Without coercion or attempts to impose uniformity, the very presence of the Romans as the supreme authority in the province invited appeals to their authority, to their courts as well as to their laws.[22]

The juxtaposition with courts here suggests that laws should be understood as referring to substantive law. In the article from which the quote is taken Cotton assumes that Babatha was not guardian of her son, because Roman law barred women from the exercise of guardianship. Such a rule, determining who could (not) be guardian, is a rule of substantive law, and therefore it can be deduced that Cotton accepts that a rule of substantive Roman law applied to Babatha's case. Accepting adherence to Roman substantive law on the basis of adduced evidence to such adherence in a papyrus is acceptable. However, I do not see how a single instance allows for a general observation, especially as many papyri (in particular the Aramaic ones) had never been surveyed with specific regard to references to the applicable law in the papyrus text. This means that no firm conclusions could be drawn as to applicability of Roman law to these acts.

Nevertheless, after an enumeration of features that point at Romanization Cotton states that

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[22] Cotton, "The Guardianship of Jesus," 107. Quoted in "Jewish Jurisdiction," 18.

> all this implies of course that non-citizens had recourse to Roman courts of law and Roman law long before 212, and that this does not seem to have required the grant of a special privilege.[23]

Again 'courts of law' and 'law' are mentioned as separate entities, but without explaining what is meant exactly. Again, one has to derive from the context that substantive Roman law is included: in her preceding enumeration of features in Greek documents that point at Romanization, Cotton mentions 'legal arguments in the documents,' referring to her article on guardianship of Babatha's son Jesus and to two articles by Tiziana Chiusi, who also understands part of the dealings in the guardianship matters of P.Yadin 12–15 to be inspired by arrangements found in Roman substantive law.[24]

Understood as incorporating substantive law, however, the quote seems at odds with the next observation: 'I am not sure one should infer from the language of the documents the legal system to be applied by the envisioned court.'[25] If Cotton argues that Greek documents are meant for Roman courts, but she is not sure that the language indicates 'the legal system to be applied by the envisioned court' this implies that in a Roman court context another legal system than the Roman could be applied. In that case, however, one wonders how to understand Cotton's preceding bold assertion as to the 'recourse to Roman law.' This can then only be taken to mean 'Roman formal law.' Taken in that sense, however, the link with citizenship and 212 becomes unclear: if the local population does not have to adhere to Roman substantive law, but only has to meet with the formal demands of the Roman court, this would hardly have required a special privilege, especially not if one assumes that the Roman court was the only court with jurisdiction in the area.[26]

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[23] Cotton, "Jewish Jurisdiction," 15. Repeated almost *verbatim* in "Diplomatics," 51: 'As an aside one may observe that all this implies of course that non-citizens had recourse to Roman law and Roman courts of law long before 212, and that this does not seem to have required the grant of a special privilege.'

[24] Cotton, "Jewish Jurisdiction," 14–15.

[25] Cotton, "Diplomatics," 51. This line is not in the parentheses with the just quoted 'aside' (see n. 23 above), but is clearly related to the issue under discussion: the use of Greek in documents that suggests they were meant for a Roman court context.

[26] See Cotton, "Jewish Jurisdiction," 15, n. 18, which speaks of '*a choice between local courts and Roman courts*…is presented as a special privilege…' [my italics]. The question is of course whether such a choice between courts was really available; I am inclined to deny this; see discussion in Chapter 1 above, 73–78.

Cotton's list of features of Romanization contains features that pertain to formal law and features that pertain to substantive law,—and even features that I would claim fit neither of the two categories—, without Cotton indicating anything of that nature. Still, all of these features are heaped together to present evidence as to the suggestion that non-citizens had access to Roman jurisdiction and Roman law.

A complicating factor here is the difference in meaning between the word formal used in a papyrological and in a legal sense. Cotton distinguishes between "diplomatics," external features of the documents, and contents or legal formulae in the documents. Both should be studied side by side to understand the true nature of the documents.[27] I would agree with this, as of course all evidence should be taken into account in determining the legal background of these papyri. However, the distinction between "diplomatics" and legal formulae does not amount to the distinction between formal and substantive law, as can be seen from Cotton's treatment: certain aspects of the documents are classified as "diplomatics," but they are not all features of formal law.[28] Likewise, some features are not dealt with, because they are not matters of "diplomatics," while they are matters of formal law.[29]

Most importantly, "diplomatics" and legal formulae do not relate to each other as substantive and formal law do. Cotton states that:

> the diplomatics of ancient documents can often give us important clues about the legal system (or systems) in operation in the documents themselves.[30]

Diplomatics are here adduced as indicative of the legal system(s) used in the documents. I find this assumption difficult to maintain, even within Cotton's own framework of what is considered diplomatics and what

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[27] Cotton, "Diplomatics," 50.

[28] For instance, Cotton discusses the guardian and the subscriber. The presence of a guardian for a woman is a feature of formal law, as the woman cannot make a valid legal act without her guardian (see detailed discussion in Chapter 5). The position of the subscriber however is hardly a legal one: his role is important but not legally relevant. Therefore it would not be a feature of formal law. This list could be extended to incorporate for instance consular dating and double document structure (diplomatics but not formal law).

[29] I take it that Cotton would take things like the *stipulatio* or the presence of the *actio tutelae* in the archives not as external evidence or diplomatics, but rather as legal formulae, while they really are features of formal and not of substantive law (see my treatment of the *stipulatio* above, 150–155, and of the *actio tutelae* below, 330–342).

[30] Cotton, "Diplomatics," 50.

is considered legal formulae. Cotton identifies the double document structure and the use of Greek as diplomatics pointing at Romanization.[31] But certainly this cannot mean that in a papyrus in which those features are present Roman law is in operation? On the contrary, I am inclined to believe that what the diplomatics tell us is often not representative for what is really at issue in the legal act, i.e. for the law behind the documents.

A judicial division between features of formal law and of substantive law has the immediate advantage that formal features are not necessarily directly related to (and consequently, not always indicative of) the substantive law applicable to the document. Furthermore, by using this division for the documents one can actually combine several applicable laws within the context of one document, which obviously would accommodate the observations made by various scholars that the Greek documents do and at the same time do not deviate from the Aramaic ones. A solution for this discrepancy cannot be found, as long as one keeps thinking in terms of diplomatics and legal formulae, and accepting the one as indicative of the other.

This means that the notions of external and internal evidence as used by papyrologists (and historians) should be put aside in order to work with the distinction between formal and substantive law as proposed here. In each individual document two levels should be discerned: one of substantive law, one of formal law. The law that is applicable to the first level can be discerned by looking at the references to law as given in the documents' texts. As shown in Chapter 2, these references are directed at local law. The law applicable on a formal level should be determined by looking at features of formal law in the documents. Here there can be

[31] Thus in "Jewish Jurisdiction," 14–15; however, in "Diplomatics," the double document structure is according to Cotton not a sign of Romanization, as the double document structure was used in Nabatean scribal practice and consequently, 'no Roman encouragement was needed to establish or resuscitate the use of the double document in this part of the Roman Near East.' (53). See 23 n. 76 above. This example warrants caution in easily accepting certain features of the documents as signs of Romanization: one should also carefully reflect on the question what Romanization means in the context of that specific feature: can we expect it to be related to a Roman court context (as for example the appearance of guardians of women; see full discussion in Chapter 5 below) or is the feature related to Roman substantive law and should we therefore question whether Roman substantive law can be expected to have played a part in a provincial context? The use of the term 'diplomatics' for certain features (for example the number of witnesses) can further obscure the legal division between substantive and formal law: not all elements that Cotton discusses in her article on "Diplomatics, or external features" are features of formal law. See rest of exposition.

an overlap with features that papyrologists call formal, but there are also features of formal law that papyrologists would group under contents rather than form (like the *stipulatio* and the *actio tutelae*). Considering the exclusive position of the Roman courts in the area, it is not odd that formal law is found to be directed at the Roman system. However, it cannot be maintained that the documents show subjection to Roman law in general, as contents is directed at local law.

This two-level approach can help to assess the exact relationship between several laws that play a part in these documents. What is more, the pattern discernible in the two levels, substantively maintenance of local law and formally adjustment to the system of the court, indicates that the possible conflict of laws was acknowledged and dealt with, in a consistent manner. This goes against older views that the situation in the east amounted to a mix of elements that cannot be distinguished from one another. It also shows that conflict of law was not a theoretical concept, but a matter of practical importance, dealt with in a way that ensured clarity and workability for all parties involved. Indeed, this two-level approach is found in modern-day private international law as well, as an important strategy of dealing with conflict of laws. The discovery that this same strategy was employed in the second century CE is truly remarkable, as it goes against existing views, as for instance positioned by Wolff, that there was no equality of legal systems under Roman rule and (consequently) no consistent dealing with conflict of laws in antiquity.[32]

Wolff did not take the material from the archives into account, but he did pose his argument for non-equality of legal systems in a Roman context like a universally applicable truth: this non-equality was his reason for excluding the Reichsrecht-Volksrecht questions from his treatment of 'Konkurrenz der Rechtsordnungen.'[33] That Jewish law was a law co-equal to Roman law (and not some tolerated custom) is proven by the references to law in the papyri as discussed above in Chapter 2.

In another publication Wolff did argue that some sort of principle should be behind the way in which the Romans dealt with the legal situation in the provinces, speaking of

> ein Versuch, das Prinzip herauszuarbeiten, nach welchem die Römer den Einheimischen das eine Mal den Gebrauch der griechischen Amtssprache

[32] See discussion of Wolff's views to this point above, 25–30.
[33] See 29 above.

> und die Beachtung römischer Formen und Grundsätze aufnötigten, mochten diese mit den den Provinzialen vertrauten übereinstimmen oder nicht, das andere Mal, wie es scheint, der Bevölkerung die Freiheit liessen, ihre Rechtsverhältnisse in den eigenen Sprachen und nach altgewohnter Weise zu regeln.[34]

Wolff argued that the main concern for the Romans in deciding whether to demand adherence to their law or not was politically motivated: they sought to consolidate their dominance in the region. Consequently, it mattered little to them whether the indigenous population maintained their own personal law in matters of for example marriage.[35] Wolff concluded with his idea that local law was tolerated on a case to case basis by the Roman authorities who were not bound to follow local law, but rather voluntarily decided to do so.[36] This argument is based on a number of presumptions that cannot be maintained in light of the evidence from the archives as presented in this study. Wolff differentiates between acts in Greek which take Roman forms into account and acts in the indigenous languages which adhere to local law. This suggests a relationship between language and law. As shown above, in Chapters 1 and 2, the Greek acts also adhere to local law substantively. Second, tolerance of local law cannot have been a matter outside the scope of Roman official power, whether judicial or administrative, as there would always come a moment of intersection: an act drawn up according to local law arriving at an archive or being adduced in a lawsuit before the Roman governor. Consequently, there had to be a consistent practice of dealing with acts drawn up according to local law. This in itself discards the possibility of random, case to case assessment of such acts. What is more, Wolff's idea that the Roman authorities were not bound to apply the law indicated in the acts finds no support in the documents: on the contrary, the clear references to law and the emphasis on the applicable law (as in P.Yadin 17) or the explanation of legal positions (as in P.Yadin 21–22 and 24) suggests that the Roman judge would indeed consult those references and explanations in judging the case based on the legal acts brought before him.[37] Therefore, the evidence in the documents

[34] Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 802. Note the differentation between Greek acts that adhere to Roman forms and principles and acts in the indigenous languages that adhere to local custom.

[35] Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 803–804.

[36] Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 805.

[37] For an actual instance of a Roman governor accepting arrangements of local law in a legal act in deciding a case see Chapter 5 below, 342–344.

themselves shows that there was a binding principle that determined how cases were dealt with by a Roman judge in a provincial setting, a principle that accepted the applicability of local law to the substantive side of the cases, thereby also accepting local law as binding law and not as mere tolerated custom.

II. *Conclusions*

The documents of the Babatha and Salome Komaise archives bear testimony to the development of legal practices in a time of transition. When the Nabataean Kingdom was transformed into part of the Roman province of Arabia, the legal context the documents had formally referred to had disappeared. This can be seen in the archives as documents written after the conquest gradually cease to refer to a general custom and begin to give more explicit references to law. Nevertheless, in those references, law is usually not qualified by a determinative adjective. This indicates that there was an understanding of what law was meant, even though no longer reference was made to 'as is proper,' but to applicable sets of rules, like 'the law of deposit.'

The references to law in the papyri, which obviously denote what law should be applied to the arrangements found there, contrast sharply with the distinctly Roman outer appearance of the documents. Disregarding the references to law and solely focusing on the Roman flavour of the documents in wording and style, one would grow to believe the documents were written with a Roman legal context in mind. For the formal side of things this is obviously true: Lewis already noted that the appearance of formulas like a *stipulatio* clause and the introduction of the guardian for women should be considered as a Roman influence, related to the Roman court context in which these documents were (going to be) used. Nonetheless, closer scrutiny of what these documents determine regarding the applicable law shows that the documents did not seek to adhere to what Roman law determined otherwise. When explaining about certain rights or practices the scribes sought to explain features foreign to Roman law, as can be seen for example in P.Yadin 21–22 and 23–24. As references to law like 'the law of deposit' are studied within the context of several possibly applicable legal systems it can be proven that they seek to connect not with Roman, but with indigenous law. This leaves us with a discrepancy in the evidence: on the one hand

the evidence for adjustment to Roman law cannot be denied, on the other hand there is just as much, if not more, evidence that indigenous law remained determinative where contents was concerned.

The key to understanding the nature of these documents should be sought in the basic legal distinction between formal and substantive law—law applicable to procedure and to substance. Previous assessments of the legal situation have failed to make this distinction and consequently remained vague, for example Goodman's observation that several laws kept playing a part without indicating what part, or the contributions to *Law in the Documents of the Judaean Desert*, registering something like different legal backgrounds for Aramaic and Greek acts without indicating how these relate to each other. The formal-substantive division shows that several applicable laws played a part on different levels in the papyrus, allowing several laws to play a part *in one and the same document*. This means that what has been observed as a marked difference between Aramaic and Greek acts, is in fact nothing but a formal matter, which does not effect the substance of the legal acts. Therefore the situation is not one of different legal backgrounds at all. Instead of dividing the papyri into two groups based on language, there is one continuous underlying whole of local law in both the Aramaic and the Greek documents cloaked in different formal guises. This two-level approach will be the basis for the case studies in part II of the book.

Not only does this distinction between substantive and formal law fit better with the evidence provided by the papyri themselves than older language-based divisions do, but the division also opens up the possibility of studying the documents in the context of a policy or strategy to determine the applicable law. By allowing documents to be drawn up according to indigenous law, with clear indications in the documents' text of what this law implied, while at the same time maintaining adherence to Roman formal law, that is, the demands for the procedure in front of the Roman court, the Romans ensured that both parties and judge stood on solid ground where their part in the legal proceedings was concerned. A division between substantive and formal law is still an important strategy of dealing with several applicable laws in modern-day private international law. The discovery that this same strategy was employed in the second century CE obviously calls for reassessment of the generally accepted view that in antiquity there were no consistent ways of dealing with conflict of law.

PART TWO

THE LAW BEHIND THE DOCUMENTS: CASE STUDIES

INTRODUCTION TO PART TWO

Introduction

This part presents case studies on three specific themes or issues, devoting a chapter to each issue.

Chapter 4 deals with law of succession, and in particular the position of the daughter-only child as possible heir to her father's estate. There are a number of documents in the archives that are related to the death of a person and that can reveal something about the law of succession that was applicable amongst Jews at the time. Although things can be said about the position of a son and a wife, the most important thing to be learned is about the position of a daughter who is an only child. Shelamzion, Judah's daughter from his first marriage, appears to have been his only child, but when Judah dies she does not appear to have been his heir. This fact, in combination with the occurrence of deeds of gifts in favour of daughters, has led scholars to believe that the daughter-only child had no rights to her father's estate, while she was compensated for this by a gift. As these scholars have argued, if a daughter-only child did not have a right to inherit her father's estate the law applicable here would not be Jewish law, as Jewish law, both biblical and rabbinic, gave the daughter-only child a right to inherit. However, a closer look at the material, especially at P.Yadin 24, can reveal that we need not derive the position of the daughter-only child from for example the presence of deeds of gift, but that this position is actually dealt with in the papyrus text. Furthermore, the fact that the daughter is not her father's heir does not imply that Jewish law is not at issue here, as an element in the Jewish regulations has been overlooked: the relation between the daughter's position according to the law of succession and her marital status. Starting from this relation which is important for understanding Shelamzion's position as described in the archive, Chapter 4 will discuss the position of the daughter-only child in other ancient oriental laws, to show that there as well marital status is crucial for a daughter's position according to the law of succession. Therefore, conclusions as to the position of a daughter towards her father's estate should take marital status into account.

Chapter 5 deals with guardianship both of minors and of women. Guardianship is a subject that has attracted much scholarly attention over the years, especially as a number of documents in the Babatha archive, P.Yadin 12–15, 27 and 28–30, are all related to guardianship issues. The question that should be raised in this context is whether these documents can provide a general picture of guardianship as an institution, or whether they should be seen as giving guardianship arrangements in a specific situation. I will argue for the latter interpretation. Consequently, these documents cannot and should not be used to draw general conclusions as to guardianship of minors in a Roman province. Furthermore, the chapter will look at guardianship of women, a phenomenon in the documents frequently associated with a Roman legal influence. However, if one wants to accept the appearance of guardians of women as an adjustment to a Roman legal environment, one would have to explain how this related to the legal context of the documents in general. This question is pressing in the light of Chapter 2, where I have shown that the documents adhere to local law substantively. This suggests that the appearance of guardians should be understood as an adjustment to Roman formal law, leaving the background against which the documents were written untouched. In fact, this can be shown for a number of documents in which guardians of women appear. This is all the more interesting as a striking difference with the situation in Egypt can be observed.

Further proof for the fact that the appearance of guardians of women was in fact indicative only of an adjustment to Roman formal law, can be found in the different terminology employed for the guardian of a minor and the guardian of a woman. Where the Greek text of the papyri uses a single term for both institutions, a fact commonly remarked upon as proof of Romanization, the Aramaic parts of the same documents do not use a single term, but differentiate between the two institutions. This is telling as neither guardianship of minors nor of women was an issue in oriental law and therefore no terminology for the institutions existed. It seems that the use of terminology testifies to an understanding of different legal concepts, and consequently, to an awareness of the different meaning that legal concepts could have under different legal systems.

Chapter 6 deals with marriage contracts, or marriage related documents. The main focus will be on the legal background of these documents, not foremost concentrating on phrases or terminology, as has

been done before, but on determining the general legal background of these documents, using the references to law as given in the documents' texts. It will appear that where language and terminology (of single words or phrases) can give confusing evidence as to the applicable law, the references to law in the documents' text present a clearer picture of the legal background against which these documents were written. Especially the marriage documents testify to the development of Jewish law in this pre-Mishnaic period: several formulations of obligations were in circulation, which nevertheless formed part of one, Jewish, tradition. Clearly, some practices eventually became part of the Mishnah and others did not: the marriage contract as described in the Mishnah looks distinctly like P.Yadin 10, while it has much less in common with P.Yadin 18. What is interesting about this, is the fact that the Mishnah obviously did not always codify the most common practice: P.Yadin 18 comes closer to other oriental and non-oriental marriage contracts than P.Yadin 10 does. Therefore, what we see here is a selection of particular practices that deviate from common patterns. The same goes for the position of the daughter-only child as discussed in Chapter 4 where the ancient oriental laws under discussion all have different arrangements for the position of the daughter-only child than the arrangement eventually accepted in the Mishnah. The fascinating thing is that both the instance of the daughter-only child as heir to her father's estate and of the marriage contract show that there was something like Jewish law, normative Jewish law, before the Mishnah: in the first instance the law of succession is based on Num 36, in the second instance the marriage contract of P.Yadin 10 can refer to 'the law of Moses and the Judaeans' as the applicable law. Therefore, we cannot describe the making of the Mishnah as a selection from among practices and customs without force of law turning these into law by the codification process, but rather as a description of the status of Jewish normative law at a certain point in time. This could also explain for the fact that the Mishnah does not formulate its arrangements as legislation, but rather as descriptions of actual situations and solutions of legal problems. In this respect both the Mishnah and the documentary evidence testify to the status and development of Jewish law at the time, each giving a different perspective on it: the Mishnah representing a general description of applicable regulations, while the documents testify to the application of regulations in actual practice.

CHAPTER FOUR

LAW OF SUCCESSION

The Babatha and the Salome Komaise archives contain a number of documents that may, indirectly, reveal something about the law of succession current at the time. These are documents that are in some way or the other related to the death of a person and may thus tell us something about the legal consequences of this death. A document could in such a case reveal what the order of succession was: who the deceased's legal heir was considered to be at the time of his death. The order of succession in this sense always refers to intestate succession, succession according to the law, i.e. without possible interference of legal acts made by the testator during his lifetime (such as wills). Because the order of succession was determined by the law and not by a legal act, the order of succession is often taken for granted: it will not be explicitly mentioned in the documents. This is logical, as the death of the deceased caused his legal heir to take up his position as such, without any further judicial act.[1] Accordingly it was assumed, taken for granted, that this or that person was the deceased's legal heir. Starting from that assumption, legal acts were made regarding the property of the deceased. Documents in the archives that are in one way or the other related to the death of a person and management of his property are P.Yadin 5, 12–15, 20, 21–22, 23–24, 25 and 26 and P.Hever 63.[2] None of these documents concerns a

[1] Succession based on a will (or testamentary succession) was less common in antiquity and if a will was made, it is clear that not every choice of heir was allowed. In general there was a preference for family members. Wills could be made as such (for example in Roman law) but other legal systems did not know a will (a disposition of one's entire property to take effect after death) and therefore used gifts to reach the same effect. I will come back to this in detail below.

[2] Deeds of gift (P.Yadin 7, 19 and P.Hever 64) are not included at this point since I am, for the moment, only concerned with succession based on the law. The relationship between deeds of gift and law of succession will be discussed below, 237–241.

I am aware of the fact that this division is subjective in a sense, since P.Yadin 21–22 do not have to do with order of succession, succession based on the law, in the strict sense of the term. Babatha's right there is not based on law of succession, but on her marriage contract and a debt, that is, on prior legal acts between her and her deceased husband. Nevertheless, I think it is sensible to discuss all documents that contain legal acts that follow the death of someone and concern the management of his property together. We

will; only one of them gives a direct clue as to who was considered to be legal heir.[3] Therefore, these documents give only indirect evidence as to the order of succession at the time and consequently as to the applicable law. Each papyrus will be discussed individually to see what it reveals about the order of succession, in particular the rights of inheritance of the son, the wife and the daughter. On the basis of this evidence I will formulate a possible explanation for the position of the daughter towards her father's estate and investigate whether this explanation can be supported by evidence of the position of the daughter towards her father's estate in legal documents (both law codes and legal acts) from other ancient eastern legal systems.

I. *Evidence for Applicable Law of Succession in the Archives*

Son

In the instance of **P.Yadin 5** Joseph son of Joseph surnamed Zaboudos declares that he holds certain items on deposit in favour of Jesus, son of his brother Jesus.[4] These items as is clarified have been part of a business that Joseph and Jesus, the father, had together.[5] The situation suggests that Jesus, the father, died and that the son as his legal heir was entitled to half of the business. Although there is no explicit mention of the word for heir in the papyrus, this is the most likely explanation for the transaction between uncle and nephew.

See Lewis, 35, who understands the situation this way: 'In 5 the situation appears to be that the brothers Joseph and Jesus had been in business together, and, Jesus having recently died, Joseph here records the money value of his various properties and enterprises, and acknowledges that he has that sum "on deposit" to the credit of the heir, the younger Jesus.'

Satlow seems to take the situation as being the result of a disposition by the deceased father: he writes 'Jesus, or his brother and business partner Joseph, left his share of the family business to his minor son in the form of a bill of deposit.'[6] I do not think this statement is factually or legally correct, whether Jesus is supposed to be the subject or Joseph.

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can thus get a clear picture of who is acting as heir (on the basis of the law) and who apparently has other claims (based on legal acts).

[3] P.Yadin 24; see my discussion (deviating from Lewis' commonly accepted translation and interpretation) below, 233–234.

[4] P.Yadin 5:5ff. (fragment a).

[5] P.Yadin 5:12–13 (fragment a).

[6] Satlow, "Marriage Payments," 51.

To start with Jesus: deposit is not a form of will. The act as we have it in P.Yadin 5 is an act between Joseph, the remaining business partner, and Jesus, the heir; the deceased Jesus plays no part in it whatsoever.

It is also incorrect to say that Joseph left the share of his deceased brother to the son: at the deceased's death his son has become owner. Joseph cannot leave something he does not own to someone else. Furthermore, the deed of deposit as such implies that someone declares that he will hold what is not his own property. This means that Joseph, as the declarant, cannot be the owner of the share in the business concerned here. The deposit is only used to prevent Joseph from having to hand over part of the property to the heir, which would effectively mean the end of the business. The deposit is a tool to keep the property that Joseph cannot afford to hand over right now in the business until a later time. It could be seen as a strategy to keep a business and the business' property together, but it is not legally accurate to call this a 'strategy of succession'[7] as it creates the notion that a legal act was necessary for succession, that is, that the son would not be heir to the property otherwise. This is clearly not the case: the very fact that the uncle needs to make an act of deposit with the son of the deceased indicates that the son has become owner of his deceased father's share in the business *upon this father's death*. See rest of my exposition, also about the question whether the son was indeed a minor (I will argue that he was not).

The reasons for using a deposit form are discussed in detail in the treatment of this deed in Chapter 2 above.[8]

By declaring that he had the items on deposit with him in favour of the heir, the remaining partner could ensure that he did not have to return the goods immediately to the heir. The fact that the brother of the deceased is obviously not the owner of the property but the son is, would then be evidence for inheritance by the son over the brother of the father.

One cannot be one hundred percent sure about this since it is not clear what the sum of the business encompasses and what share the heir is entitled to. From πάντων in line 8 of fragment a one could even get the impression that the nephew is entitled to all of the business: 'as a deposit of *all* the assets of silver. . . .' Nevertheless, line 12 speaks of 'from everything which was found [to belong] to your father and me, between me and him.' This suggests that the nephew was entitled to a share in the business. To the parties to the contract it would of course have been obvious since there is an amount of money mentioned that represented either half or the whole of the value of the business. I think that it would be best to understand it as being that the heir is entitled to all the assets that belonged to his father, amounting to half of the value of the business that the father and the uncle had together. Obviously, the entitlement of the nephew is related to his father's death: he is heir, even though he is not styled as such in the papyrus text.

Perhaps the brother was in charge of the property as long as the heir had not yet come of age. This is in any case the interpretation of Satlow, who speaks of a 'minor son' (without any further explanation) and suggests that 'Uncle Joseph may well also have served as a guardian to his

[7] Satlow, "Marriage Payments," 51.
[8] See 117–127.

nephew, thus again keeping outsiders away from the family property.'[9] The situation could then resemble that of **P.Yadin 12–15**. The question is, however, whether the two situations are really alike and whether the evidence from P.Yadin 5 supports the assumption that Jesus was a minor at the time of the act, or rather goes against it.

P.Yadin 12–15 concern the guardianship over Babatha's minor son, Jesus, or rather the management of the property of this minor son by guardians. P.Yadin 12 deals with the appointment of the guardians, two men, one a Jew, the other one a Nabataean, appointed by the city council of Petra.[10] One could get the impression that this appointment of guardians immediately followed the death of the father, but I think this is unlikely when one reads P.Yadin 13. In this document, a petition to the provincial governor, Babatha complains about having received too little maintenance money for her son.[11] Lewis described her complaint as follows: 'the gravamen of her complaint is that the two guardians, "appointed four months ago and more" (line 20), have been giving her an insufficient sum, only two denarii a month, toward the maintenance of her orphan son (lines 22–24).'[12] The appointment of guardians obviously refers to the decision of the city council mentioned in P.Yadin 12.[13] The way in which the appointed guardians are introduced in P.Yadin 13, however, suggests that their appointment did *not* automatically follow the death of Jesus' father. I point to lines 17–19, where there is men-

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[9] Satlow, "Marriage Payments," 51.

[10] For the appearance of a city council, 'which conducted its business in Greek,' see Fergus Millar, *The Roman Near East. 31 BC–AD 337* (Cambridge, Mass.: Harvard University Press, 1993), 417 (418–419 about the transformation of cities in general). For the council as body for appointing guardians (instead of the city magistrates) see Cotton, "The Guardianship of Jesus," 95–96. Also see 315 below (n. 51). For the details concerning the appointment see my treatment of guardianship below, 301ff.

[11] That P.Yadin 13 is a petition to the governor can be inferred from the use of the word ἀξίωμα in line 1. The name of the Roman governor to whom the petition is addressed is missing (there is a lacuna in the first line), but Lewis has convincingly argued that it was Julius Julianus, who is mentioned in P.Yadin 14 and 15 as well (Lewis, 52). For Julius Julianus as governor of Arabia see Bowersock, *Roman Arabia*, 86 (with references) and 161. A petition was used to explain about a dispute and to have permission granted to proceed with the case, as can be seen in P.Yadin 25, where a petition to the governor and his permission to go ahead are mentioned (but another interpretation of P.Yadin 13 was offered by Chiusi, see details in Chapter 5 below, 321).

[12] See Lewis, 51.

[13] This dates P.Yadin 13 some four months after P.Yadin 12. Since P.Yadin 12 can be dated 'between 27 February and 28 June 124' (Lewis, 47), P.Yadin 13 can be dated to 'second half of 124' (Lewis, 51). P.Yadin 12 cannot be dated to an exact month since the ending of line 9 is too damaged to restore the name of the proper month. Any of the months from February to June is possible (see Lewis, 50).

tion of the appointment of someone to see to debts and maintenance money. These lines follow a damaged part of the papyrus in which, according to Lewis, Babatha 'details some of the financial interests of her late husband.'[14] Lewis does not relate this to the complaint about the guardians.[15] However, in my opinion, it is obvious that the two matters are closely connected. In lines 7–8 Babatha mentions Joseph 'his brother,' obviously the brother of the deceased Jesus, referring to 'his own property' but also 'the share of the orphan.' This latter phrase is used twice, once to refer to 'the half' of something. There is furthermore mention of 'in name of the orphan…,' 'to his brother an expenditure in silver,' something 'handwritten' and 'merchandise.'[16] Then the more or less complete lines 17–18 mentioned above refer to the appointment of someone to take care of debts for maintenance and supervision of money, and she complains that *Joseph has not provided maintenance* nor the guardians, who have been appointed for more than four months.[17] Consequently, we have a clear reference to the guardians, *in connection*

[14] See Lewis, 51.

[15] Neither does Chiusi, "Zur Vormundschaft der Mutter," 181: 'In welchem Zusammenhang diese Aufzählung erfolgte, lässt sich nicht mehr sagen. Mann könnte vorsichtig vermuten, dass Babatha dem Statthalter die Ereignisse darlegen wollte, aufgrund derer ihre ökonomische Situation schwierig geworden war.' and Chiusi, "Babatha vs. the Guardians," 110 [published after the present study was completed]: 'One may assume that Babatha told some details of the economic situation of her family or of her late husband's family in the first part of the petition, because the text mentions the fortune of Joseph, her late husband's brother, the shares of Babatha's son Jesus in the family property, a chirographon and a receipt of business affairs. The context of this enumeration of topics cannot be recontructed. One might assume that Babatha wanted to explain the circumstances of her economic situation to the provincial governor.'

I note that I do not think P.Yadin 12–15 are concerned with 'a struggle for guardianship' as Chiusi styled it in her article's title: in my opinion the papyri are not so much concerned with the question of who could be guardian, but of what should be done in case of mismanagement of property by appointed guardians. I refer to my detailed discussion of P.Yadin 12–15 and 28–30 in Chapter 5 below.

[16] Lines 11, 12, 14 and 17 respectively.

[17] Lines 19–22. I take Joseph to be the subject of the 'he has given' in line 19; regarding context he seems to be the most logical choice.

Hanson also seems to understand the passage this way: she refers to 'the niggardliness of a male kinsman, who, "though he had sufficient funds, neither paid family debts, nor contributed to the orphan's maintenance"…' (Hanson, "The Widow Babatha," 96 [published after the present study was completed]). My interpretation differs from that of Hanson, in that I take the male kinsman to have been guardian of Babatha's son, and understand the debts to be mentioned not so much because Joseph would have had to pay them, but because there is mention of someone who should sort out the debts and the maintenance matters. This is in my opinion the link with the appointment of the guardians, who should have undertaken this task. See rest of my exposition.

with this Joseph. As it is put by Babatha, it appears that neither Joseph nor the appointed guardians have provided maintenance for the child. Their relationship appears to be that the guardians were appointed to take care of the maintenance money and make sure that it was paid. The fragmentary state of the papyrus makes it difficult to decide whether Joseph had promised the appointment or Babatha had requested it. In any case it is clear to me that Babatha was in some kind of dispute with her brother in law over property that belonged to her son and in that context guardians had been appointed.

What exactly the position of the brother of the deceased was is hard to tell. It is in any case clear that he had something to do with the management of the property of the deceased. This could mean that he was considered a sort of guardian to see to the property of the minor heir until he would come of age. This is apparently how Satlow understands the situation of P.Yadin 5: 'Uncle Joseph may well also have served as a guardian to his nephew, thus again keeping outsiders away from the family property.'[18] However, in my opinion the situations might have been the same, but the legal solution to them was obviously different.

In the fragmentary first lines of P.Yadin 13 all kinds of words are legible that could refer to a business situation. We would then have to envisage that the father of the orphan had been in a business with his brother Joseph and that this business had to be split up like the one in P.Yadin 5. Joseph was still effectively in control of the property, while the orphan was entitled to his share (the share of his father) in that.[19] There is no mention here, though, of formally turning the situation into a deposit construction. Instead it appears that there had been agreement about the naming of someone to see to debts and maintenance money. This could refer to the appointment of the guardians, who had then been appointed either on Babatha's request, Joseph's proposal or an agreement between them. Still the construction had not worked, because neither Joseph nor

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[18] Satlow, "Marriage Payments," 51. That the situations of P.Yadin 5 and 13 could be comparable had also been suggested to me by Hannah Cotton; my conclusions that the situations may have been alike, but a different legal solution is at issue, were initially conceived in response to her suggestion, but they can also counter Satlow's assumption of minority of the nephew, as the different legal solutions used in these papyri strongly indicate that in one instance we are dealing with a minor, in the other we are not. See rest of exposition.

[19] I refer to lines 8–15 that speak of his own property (obviously Joseph's, line 8), 'from the belongings of' (should have been followed by a plural noun, perhaps 'brothers' or 'partners'?, line 9), 'in the name of the orphan' (line 11), 'share of the orphan' (lines 13 and 15). In line 15 the share of the orphan is specified as half of something.

the guardians had given enough maintenance money, enough that is in Babatha's opinion. This means that P.Yadin 5 and 12–15 indeed refer to a situation of a deceased man's brother holding property of a business that belonged to the deceased's heir, but there is an important difference in the way in which this situation is dealt with. In the first instance, of P.Yadin 5, brother and son, remaining partner and heir, formalize their relationship by way of a deposit construction, enabling the partner to keep holding the property, while the heir has his claims acknowledged and will receive his share in due time. In P.Yadin 12–15 on the contrary we find no such transaction, but the brother who is holding the property is somehow supervised by guardians who should see to the payment of maintenance money to properly raise the orphan. The difference is in my opinion caused by the position of the heir. In P.Yadin 12–15 we are obviously dealing with a minor, else he would not need a guardian to see to his property interests, but he could do so himself. Indeed, in that case, we would have expected him to write his own petition to the governor to complain about the behaviour of his uncle who was in charge of the property of his father that was part of the business the two of them had. In P.Yadin 5 on the other hand the heir makes a deal with the uncle in person; there is no mention of a guardian. This strongly suggests the heir there was of age.[20] This means that P.Yadin 5 and 12–15 testify to different solutions for the management of property that was part of a business after one of the business partners died. The element both documents share is the idea that the property remained in the remaining partner's possession probably to allow him to continue the business. In the case of an heir who was of age the remaining partner made a deal with him to keep the property by way of a deposit, while in the case of a minor heir it seems that the remaining partner managed the property for him, paying maintenance money. In this latter instance the part the remaining partner plays, looks like that of a guardian. I will come back to the position of the brother of the deceased in relation to the appointment of guardians in my discussion of guardianship below. For the present

[20] Thus *contra* Satlow, who assumed that Jesus in P.Yadin 5 was a minor (see 214 small print above). We do not know Jesus' age and minority cannot be excluded *a priori*, since the document dates to 110 CE. Jesus was probably married to Babatha in 120 and had his son before his death, i.e. somewhere before 124. This leaves the possibility open that he was a minor in P.Yadin 5. But as I have explained above, the transaction he engages in personally without interference of any outsider strongly suggests that he was of age and could manage his own (property) affairs.

discussion of law of succession it seems clear both from P.Yadin 5 and 12–15 that the son inherited from his father.

Other children/wife in presence of a son

In both instances there is no indication that there were other children. Nor is there an indication that the mother of the child, the wife of the deceased, had any claims to the deceased's estate. In P.Yadin 5 a debt the deceased had towards his wife is singled out from the claims the heir can make and is acknowledged as another separate debt resting on the business: 'over and above seven hundred ten "blacks" of silver which your mother has received as [repayment of] her wedding money, which she had [as a lien] against Jesus your father.'[21] The claim of the wife is thus related to her marriage with the deceased, therefore it is not a claim based on succession. This means that P.Yadin 5 seems to indicate that the wife did not inherit from her husband.

P.Yadin 12–15 do not reveal much about the position of the wife regarding her husband's estate, but there are interesting details in P.Yadin 21–22. In these documents Babatha sells the produce of orchards that belonged to her late husband Judah the son of Eleazar Khthousion. Obviously, this man was her second husband, she married him before 128.[22] Since she refers to him as her late husband, it is clear Babatha was widowed again. She sells the produce of the orchards which she, as

[21] P.Yadin 5:14–16 (of fragment a). For "blacks" see Lewis, 35–36; Y. Meshorer ("The Money called Blacks," *The Israel Museum Journal* 10 [1992]: 67–74) tried to identify the "blacks" with a kind of denarii but this attempt has met with criticism from Naphtali Lewis ("Again the Money called Blacks," in: *Classical Studies in Honor of David Sohlberg* [ed. R. Katzoff, Y. Petroff and D. Schaps; Ramat Gan: Bar-Ilan University Press, 1996], 399–401), who is certain of a Semitic origin of the monetary unit. In a postscriptum he refers to an article by Cotton, who mentions in passing that identification of "blacks" with denarii would be in her view unacceptable (*ZPE* 100 [1994]: 553, n. 20). New bibliography on the "blacks" can be found in Wolfram Weiser and Hannah M. Cotton, "'Gebt Dem Kaiser, Was Des Kaisers Ist…': Die Geldwährungen der Griechen, Juden, Nabatäer und Römer im syrisch-nabatäischen Raum unter besonderer Berücksichtigung des Kurses von Sela'/Melaina und Lepton nach der Annexion des Königreiches der Nabatäer durch Rom," *ZPE* 114 (1996): 237–287.

[22] Their marriage contract is recorded in P.Yadin 10; this document's dating has not been preserved. Babatha is explicitly styled Judah's wife in P.Yadin 17 of February 128 CE (see lines 4/22). However, Judah acts as Babatha's guardian in P.Yadin 14, 15 and 16, as Lewis remarked: 'a function normally performed by a woman's husband' (58). This could mean they were already married in October 125 (but see 127 n. 103 above for other views).

she says explicitly, distrains in lieu of her dowry and debt.[23] This means that in P.Yadin 21–22 we find a widow selling produce of orchards that belong to the property of her deceased husband, while she is entitled to do so based on rights related to dowry and debt. This suggests that the widow did not have a right based on succession. Like in P.Yadin 5 the claim the wife can make on the property of her deceased husband is related to her marriage to him, and more precisely her dowry.[24] In the specific instance of P.Yadin 21–22 Babatha is also entitled to the property because of an unpaid debt,[25] but this does not have anything to do with succession either. A creditor of the deceased was entitled to repayment of his money at the debtor's death and could enter his claim(s) with the heirs. This claim on the property of the deceased, his estate, was obviously not based on succession but on the legal act the creditor had made with the deceased during his lifetime.

P.Yadin 26 presents us with a number of difficulties as it deals with a dispute between Babatha and a woman named Miryam concerning certain property of Babatha's deceased husband Judah. Miryam, who only appears here, was apparently Judah's first wife, probably the mother of his daughter Shelamzion, whose position I will discuss in more detail below. Babatha designates Judah as 'my and your deceased husband.'[26] Miryam seems to do the same, but this is not completely certain as part of her statement is damaged.[27] Whether that dispute implies Judah had divorced Miryam or that he had entered into a bigamous match with Babatha is not clear. Lewis took P.Yadin 26 to be 'an unprecedented documentary source to the extant evidence on the subject of polygamy,' adding further on that 'polygamy…was indulged in as a matter of course considerably farther down the social scale than has hitherto been

[23] Babatha uses this formulation in P.Yadin 22:9–10 and the purchaser also expresses himself along these lines in P.Yadin 21:11–12. Since P.Yadin 21 was presumably written first, we may assume that the 'as you say' of line 11 should be taken literally: 'as you have just said, told me,' perhaps even 'dictated me' (see Lewis, 94, on the sequence of writing of these documents). It could also express uncertainty as to the legal basis for Babatha's rights: 'as *you* say'; see 174 n. 241 above.

[24] Dowry here referred to by *proix* (προίξ), in P.Yadin 5 the term wedding money (ἀργύριον γαμικόν) is used. See 121 n. 84 above.

[25] When reading 'dowry and debt' as referring to two separate rights; see 138 n. 128 above.

[26] P.Yadin 26:7–8.

[27] P.Yadin 26:13–14 (the Greek for 'my' and 'your' is restored, see Lewis, 113), in line 15 she speaks only of 'my husband' (but this could have to do with the fact that she is there referring to arrangements Judah made specifically for her, probably within the context of their marriage).

recognized.'[28] I am not sure that the evidence is as conclusive and univocal as Lewis concludes: as Katzoff argued, 'what appears here could equally be serial monogamy as concurrent polygamy.'[29]

Katzoff discusses five possibilities when considering the claims the women could bring: intestate succession, testamentary succession, succession based on marriage contract, settlements from marriage contract, and misunderstanding concerning personal possessions. The first option, intestate succession, is rejected by Katzoff on the same grounds as described above regarding the description of the wife's entitlement in P.Yadin 5 and 21–22: Jewish law does not know intestacy inheritance for the wife and, as Katzoff adds, neither does Attic (Hellenistic) or Roman law. Roman law does acknowledge the wife as an intestate heir if there are no other blood relatives (*cognati*), but there are in this case (foremost Shelamzion, Judah's daughter). Consequently, it seems that neither Babatha nor Miryam could in any case under whichever system of law be the legal (i.e. intestate) heir.[30]

The second option, testamentary succession, could play a part if Judah had left a will. Katzoff does not mention this, but he probably thought of this possibility, because Miryam mentions written instructions by her husband.[31] Katzoff grants that there is no will found in the archive and that it would not seem likely that Judah would leave something to a wife he had divorced. He adds, however, that people may do unexpected things in wills and that the more unexpected the beneficiary is, the more likely his (in this case her) position will be contested. True as that may, there is not only no will found in the archive pertaining to this argument, but none in general. This is probably due to the fact that gifts were used to the effect of wills.[32] It is therefore rather surprising Katzoff did not mention the possibility of a gift. Suppose Judah had made Miryam a gift during their marriage and Miryam now saw herself

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[28] Lewis, 24.

[29] Ranon Katzoff, "Polygamy in P.Yadin?" *ZPE* 109 (1995): 128. As an aside, one may observe that a single instance of bigamy does not justify the assumption that it was 'indulged in as a matter of course.'

[30] Whether wives in Hellenistic and Roman Egypt could inherit as intestate heirs in the case of absence of *cognati* was a matter of dispute between Taubenschlag and Kreller as Katzoff explains ("Polygamy?" 129). This dispute is only of interest if we assume that the law in Arabia was the same as in Egypt and if we could assume Shelamzion died before her father (Katzoff, "Polygamy?" 129). The latter assumption is in my opinion unlikely.

[31] P.Yadin 26:14–15.

[32] To be discussed in detail below, see 228, 233, 234–237, 237ff.

as entitled to the property concerned in the gift. It might well be that the validity of such a gift was disputed after the husband's death. Was the gift still valid after the divorce or not? In the gift of P.Yadin 7, for instance, it is determined that the donee has to stay the wife of the donor and take care of him. This can be understood to be a *conditio sine qua non*. In that case Miryam would not be entitled to the gift anymore. A complication connected with the assumption of a gift is that it is not clear whether the property Babatha alludes to has recently been seized by Miryam or whether she was holding it for a long time, perhaps the entire period after her divorce. It could be that Judah never did anything about this, but Babatha intends to do so. This could have been the case because Judah's estate did not offer enough to satisfy Babatha's claims: the amount of money concerned in the dowry and the loan of P.Yadin 17 could amount to some seven hundred denarii, a very substantial sum indeed.

Katzoff's third explanation is based on the clause, sometimes found in Greek marriage contracts from Egypt, of mutual succession of the spouses. He notes though that these clauses are not found in any of the seven marriage contracts from the Judaean Desert (whether Greek or Aramaic). The clause is in any case not there in Babatha's marriage contract of P.Yadin 10. It therefore seems unlikely that such a clause was behind the present dispute. I add that it could be disputed whether Miryam could invoke such a clause when she was divorced by Judah.[33]

A clause found in marriage contracts, for example, those from Elephantine, that Katzoff does not mention, is a clause determining the consequences of a second marriage, while the first is not terminated yet. The clause is a bit ambiguous since it says that the husband is not allowed to bring in another wife next to the one he is marrying now, but it is at the same time said that if he does so, this will cause the first marriage to end.[34] This means that taking a second wife will amount to divorcing the first: the second marriage effects divorce. If such a clause had been part of the marriage contract between Miryam and Judah the clause would not have made the match with Babatha invalid, but

[33] In a polygamy scenerio she probably could, but since we do not know whether her marriage to Judah should be considered terminated or not, we cannot say anything conclusive to this point.

[34] See for example K7.

Miryam's own marriage with Judah. Therefore, it does not seem likely she is basing her claims on such a clause.[35]

Katzoff suggests as a fourth possibility that Miryam's claim was based on a prior divorce: she might have been promised something which she never received. I think Katzoff is right in remarking here that the claims of the wives in their individual positions, as divorcee and widow, could explain the use of the phrase 'my and your deceased husband' to refer to Judah. Therefore, we do not necessarily have to accept polygamy behind the conflict.

The last possibility Katzoff mentions is that there was a dispute concerning what property belonged to which person. He points out that household possessions are often treated as communal by the spouses and then concludes that 'these sorts of misunderstandings could be enough to account for attempts by each of the former wives to take hold of personal objects leading to the lawsuit in *P.Yadin* 26.'[36]

Katzoff also discussed the question of why, in the latter two cases, Miryam presses her claims after Judah has died, while she could have done so right after the divorce. Fear of Judah or awareness of the weakness of her claims could indeed have been a reason, although I think it is more likely to argue, as Katzoff has done himself earlier on in the article, that Miryam held the goods under dispute from the start of her marriage, thus that she had never given up on them. Babatha now presses her that she should, even taking the case to court. I argued above that a reason for this could be that Judah's estate did not encompass enough to

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[35] We do not know of course how well founded Miryam's claim was anyway. Maybe she simply tried to hold on to property that was still in her possession while she really had no right to it at all. Therefore, we need not assume that she based her claims on invalidity of Babatha's marriage. I add here that if the contract Judah made for Babatha can be expected to have been like the one he made for Miryam before, the clause about a second marriage is not likely to have been in it.

[36] Katzoff, "Polygamy?" 130. A problem with this argument is, in my opinion, that the presentation in the papyrus text gives the impression that Miryam held the property while Babatha wanted her to hand it over. If we assume that here personal belongings are concerned that were, as Katzoff says, communal to the spouses, that is, during marriage, it would have been more likely that Babatha, the second wife, had been the one having possession while Miryam would demand back what she (still) considered as hers. I have the impression that Babatha had never had any contact with the properties concerned and is only asking for them to satisfy her claims arising from the debts Judah owed her (based on dowry and debt of P.Yadin 17). Katzoff indicates as much on 130, when he paints the picture as: 'Miriam was and had been in possession of those of Judah's goods in dispute *since her marriage*.' (my emphasis). In that case it is not likely that there was confusion over personal belongings that Judah had shared with Babatha during their marriage, which excludes Katzoff's fifth possibility.

satisfy Babatha's claims. I then envisage the following scenario: Judah, who originally came from En-gedi, has left possessions there in the keeping of Miryam. Whether this was the result of a divorce settlement, or a personal decision by Judah, we cannot know. Babatha is now, after Judah's death, intending on having her dowry and the debt returned to her. She cannot have her claims satisfied from the property within the estate (perhaps only the property in Mahoza?) and thus she turns to the property still in En-gedi.[37] She may have warned Miryam before to hand the property over, since it is said by Miryam that she has told Babatha on an earlier occasion to stay away from the property.[38] This could indicate that Babatha had requested her to hand the property over (for example in a letter) or that Babatha had actually been to En-gedi in person. Having been unsuccessful in this respect she is now pressing charges to have the property given to her. I wonder whether she was induced to try this by

[37] See Katzoff, "Polygamy?" n. 12, where he explains that Judah, Miryam and Shelamzion are all styled En-gedians in several papyri. His argument is plausible that Judah moved to Maoza, before (or perhaps due to) his marriage to Babatha. Babatha might have had no earlier inclination to interfere with the property in En-gedi. Judah gave a gift of property in En-gedi to his daughter from his first marriage (P.Yadin 19), which could suggest that he chose to give away property that was somehow related to his old life and for which he had no, or less, use now that he had started anew in Maoza. This wish to leave the old behind might have been his reason for leaving property in Miryam's keeping, although she had no formal legal rights to it.

Lewis has explained that the epithet En-gedian is not indicative of the real place where someone lived, but rather indicated where he came from originally: 'Miriam would remain identified as an 'En-Gedian throughout her life, wherever she lived or travelled' (Lewis, "Where did Judah's Wives Live?" *IEJ* 46 [1996]: 257). True as this may be, it does not say anything about the location of the property concerned in P.Yadin 26. Lewis argued that it was situated in Maoza, and as Miryam has seized the property first, she has to live in Maoza ("Where Did Judah's Wives Live?" 257). But where does it say that the property was situated in Maoza? Doesn't the fact that Miryam is keeping the property (even though she is according to Babatha not entitled to this) suggest that the property was situated in En-gedi, where Judah had lived with his first wife? After all, Judah is styled an En-gedian, too, even after he has moved to Maoza (also see Katzoff, "Polygamy?", n. 12: '…a reconstruction which would have Judah, originally from Engedi, living there with his first wife Miriam and moving to Maoza by December 127, while Miriam and Shelamzion remained in Engedi…'). Therefore, I think the evidence from the papyri suggests that Judah had lived with his first wife in En-gedi and left property there in her keeping, either because he had really wanted to leave it with her or because he had simply factually left it behind and had never reclaimed it. Miryam is obviously not the one who has seized the property recently, but who has been keeping it ever since she split from Judah. Babatha is the one whom we can expect to have travelled from Maoza to En-gedi to make an attempt to lay hands on the property, a fact Miryam explicitly refers to (unless we have to understand the warning Miryam has given to Babatha to have been one in writing).

[38] P.Yadin 26:12–14.

the acts of Besas, who summoned Babatha to explain her holding of the orchards belonging to Judah (P.Yadin 23–24). For Babatha uses exactly the same strategy: she asks the other party to explain her behaviour, inferring that the grounds for it should be given. Should these grounds be lacking, then the property should be given to the person entitled to it. It is therefore not that illogical that Babatha summons Miryam on the same day she is herself summoned again in the suit by Besas (and Julia Crispina). She might have decided to try her luck in a suit as well.[39]

Regardless of the exact interpretation of the claims brought by Babatha and Miryam in P.Yadin 26 it is clear from the documentary evidence that a wife had no rights to her husband's estate based on the law of succession.

In absence of a son

Contrary to Babatha's first husband Jesus, who left a son at his death, Babatha's second husband Judah did not have any son we know of from the archive. The only child of Judah that is referred to is his daughter from a previous marriage, Shelamzion.[40] Assuming that Judah indeed had no sons at the time of his death, the question would be whether his daughter would be his legal heir. P.Yadin 20, a document that testifies to the settlement of a dispute, could be interpreted to mean both that she was and that she was not.

In the document, Besas, 'guardian of the orphans of Jesus son of Khthousion' and Julia Crispina, 'supervisor,' acknowledge the right of Shelamzion to a courtyard.[41] It has been disputed whether this courtyard is the one donated to her in P.Yadin 19. In my opinion Cotton has

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[39] This idea is interesting in the light of Nörr's suggestions to relate the phrases used in P.Yadin 25 and 26 to various types of *interdictum* known from Roman law (Nörr, "Prozessuales," 332; see 339 n. 131 below).

[40] See P.Yadin 18, where Judah marries Shelamzion off to another Judah (nicknamed Cimber). This man functions as Shelamzion's guardian in P.Yadin 20.

[41] The position of Julia Crispina is unclear. Her name suggests she was a Roman citizen (see Lewis, 92). Her relationship to the orphans is also unclear. Lewis takes her to be a guardian like Besas, even though she clearly has another title, ἐπίσκοπος, 'supervisor' (see Lewis, 92). I believe that this title, together with the role she plays in the disputes suggests she was not a guardian like Besas (not an ἐπίτροπος). I tend to agree with Cotton that if Julia Crispina was indeed a Roman citizen this makes it less rather than more likely that she was a guardian (see Cotton, "The Guardianship of Jesus," 97, n. 39). Perhaps her function can be compared to that of the Egyptian ἐπακολουθήτρια as John Rea has suggested (see Cotton, "The Guardianship of Jesus," 97). I will discuss Julia Crispina's position in Chapter 5 below, 347–354.

convincingly argued this is unlikely.[42] This means that Shelamzion's right to the courtyard, acknowledged in P.Yadin 20, did not come about by a deed of gift found in the archive. The matter is complicated by the fact that the courtyard is said to have belonged to Khthousion, the father of Judah and Jesus, and Shelamzion's grandfather. This implies that the dispute here concerned competing claims to a courtyard of a grandfather by the sons of one deceased son and the daughter of the other. Obviously, the daughter's right is acknowledged. This could have various reasons. We could assume that both the sons of the one deceased son and the daughter of the other were heirs to their father's share in the estate of the grandfather. The estate may not have yet been divided and at the death of both sons, the grandchildren had to decide which parts of the estate would belong to whom. Perhaps a sort of provisional division had been made by the deceased sons, which entitled Shelamzion to this specific courtyard.[43] In any case, in such a scenario we would have to assume that both the sons and the daughter would take the place of their father in being rightful heirs to the estate of the grandfather. This means that P.Yadin 20 can be read to imply that the daughter, in absence of a son, inherited her father's estate. The challenge made to her rights by the guardian of the minor sons of the deceased's brother would then have concerned the division of the property of the grandfather between the sons, or to put it differently, whether Shelamzion could be considered to be entitled to this piece of property because her father had been.

Cotton suggested that the guardian might have challenged Shelamzion's right to take the place of her father in inheriting part of her grandfather's estate.[44] In that case the dispute does not concern the question of whether the daughter is entitled to this specific piece of property, this

[42] See Cotton, "Courtyard(s)," 197–201.

[43] Cotton raised the question whether the gift of P.Yadin 19 can have concerned a part in an as yet undivided estate, which would mean that the nephews are here not so much questioning the validity of the gift (Shelamzion's title to the property) but Judah's capacity to bestow the gift, as the property was not formally his (the inheritance had not been divided yet; Cotton, "Courtyard(s)," 200). As Cotton herself indicates that the identification of the courtyard of P.Yadin 20 with that of P.Yadin 19 is difficult in view of the many changes in abutters, this argument is not relevant for our discussion here. I accept Cotton's argument that the courtyard of P.Yadin 20 is not the one of P.Yadin 19, and thus argue from the assumption that the right to the courtyard Shelamzion has either stems from her right to inherit her father's estate (she is his substitute in being entitled to a share of the deceased grandfather's estate) or a gift made by the grandfather to Shelamzion directly. See rest of exposition.

[44] See Cotton, "Courtyard(s)," 201.

part of the deceased grandfather's estate, but the more fundamental question whether a daughter can take the place of her father in inheriting his father's (her grandfather's) estate. This could suggest that daughters were not equal to sons in this respect. The outcome of the case, however, shows that the nephews were forced to acknowledge Shelamzion's right to the courtyard. Were they simply mistaken in their assumption that Shelamzion held no valid right to the property concerned, or should we assume that Shelamzion did indeed hold no direct obvious right to the courtyard, based on law of succession (in casu substitution) but had been able to prove her right to the courtyard in another way?

It would be logical to think of a deed of gift.[45] However, there is no deed of gift to that point in the archive. The only deed of gift to Shelamzion we have is P.Yadin 19, where the deed is made by the father, Judah. As indicated above, Cotton argued plausibly that the object of this deed of gift is not the same courtyard as the one concerned in P.Yadin 20. Nevertheless, the mere fact that Judah made a gift of a courtyard to his daughter is telling. Why make a deed of gift to a daughter who would be heir anyway by virtue of her position as an only child? Could it be that the deed of gift functioned to provide the daughter with part of the estate she could not receive by way of succession? Obviously, there is room to suggest that the daughter would not inherit her father's estate, even in the absence of sons. This could mean that the gifts were used to provide the daughter with property anyway.[46]

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[45] Likewise a deed of gift is a good possibility to explain for Miryam's rights to part of Judah's estate, see 222–223 above. I find Cotton's conclusion 'the only way to transfer property to a daughter was through a deed of gift' a bit strong, especially in the context of P.Yadin 20, where not the property of the father but of the grandfather is concerned. We should then understand that the deed of gift of the grandfather was made because he knew that Shelamzion could not be her father's heir and thus could not inherit the property the grandfather wanted her to have via her father. This would mean that the grandfather had been certain at the moment of making the gift that Shelamzion would not be her father's heir. This would indeed imply that a daughter had no rights to inherit her father's estate (as Cotton argued on other occasions, see next note). However, the legal reality seems to have been more complicated than that; see rest of discussion.

[46] Speculatively to this point, Cotton and Greenfield, "Babatha's Property," 219 and Cotton, "Deeds of Gift and the Law of Succession," 182. In both articles it is emphasized that provisions by a father in favour of his daughter may have been made when he married again, that is, speculating on the possible birth of a son-heir (Cotton and Greenfield, "Babatha's Property," n. 50; Cotton, "Deeds of Gift and the Law of Succession," 183). This means that a gift to a daughter who is at that time an only child need not automatically and unequivocally imply that the daughter would not inherit *in the absence of sons*. I will come back to this in my detailed discussion below.

If we assume that Shelamzion proved her right to the courtyard in another way, i.e. that it was not based on her right to inherit her father's estate (including the share in the undivided estate of the deceased grandfather) this has important consequences for our understanding of the law of succession at the time. In the scenario where we accept that Shelamzion's right that is acknowledged was based on the law of succession, the situation is one of heirs opposing an heir: the orphaned sons of Judah's brother as *heirs to their father's share* in the undivided estate of the grandfather as opposed to Shelamzion as heir to her father's share in the undivided estate of the grandfather. Nevertheless, the question remains whether the guardian was not acting as representative of the legal *heirs to Judah's estate*, that is, whether the nephews are not entitled to the estate of both their own father and Shelamzion's father, while she has to prove her right to part of this estate by a legal act. This would imply that Shelamzion is not heir to her father's estate but that the heirs of her father's brother are actually also Judah's heirs. To put it differently, is it possible that Besas is acting as the representative of Judah's heirs investigating into Shelamzion's right to the courtyard concerned, *as the right of an outsider*? In that case, the order of succession would be very different from what we assumed above: Shelamzion is not heir to her father's estate, but the sons of his deceased brother are.

That a brother played a part in estate affairs after a man's death has been observed above in both P.Yadin 5 and 13. In both cases I have assumed that the brother was in a business with the deceased and that he managed the business even after the heir had become entitled to half of it by virtue of his right to his father's property. This means that the brother managed a business consisting of both his own property and another's which he either held as a deposit or until the heir came of age. In both cases the part of the business that belonged to the deceased does not belong to the brother but to the heir: the brother has possession but not ownership. This is especially clear in the case of the deposit construction of P.Yadin 5: deposited property passes into the possession of the depositary but not into his ownership. The depositor is owner and can therefore reclaim his property at any time. This is important since in both cases the deceased has left a son. This son is obviously owner of the property, by virtue of being his father's heir.

However, what about a man who only leaves a daughter? What position does she hold towards her father's estate? I explained above that P.Yadin 20 is not the best example since the courtyard obviously belonged to the grandfather and one could argue Shelamzion was Judah's heir, like

the orphans were Jesus' heirs. Nevertheless, it is important, I think, that the dispute was raised by the sons of the deceased's brother. This at least opens the possibility they had a claim to the property of the deceased Judah in their own rights. Could the sons of a deceased man's brother be his heirs?

The idea that Besas is acting as representative of the legal heirs of Judah is supported by what we find in P.Yadin 23–24. Here Besas investigates into Babatha's rights to certain orchards, demanding proof of her that she is entitled to these orchards. If this proof is not delivered he will register the orchards *in the name of the orphans*. This latter fact implies that the orphans were considered to be entitled to Judah's property on the basis of the law. Their right does not have to be proved by any legal act, but is taken for granted. Babatha's right, on the other hand, requires proof, which suggests that she could only be entitled to her husband's property by way of a legal act. Indeed, we have seen in the instances of P.Yadin 5 and 21–22 that the claims of a widow were not based on law of succession but on her marriage contract or other legal acts. Only by legal acts drawn up during her husband's lifetime could she have claims to his property after his death. In the case of P.Yadin 23–24, Babatha would probably produce proof of her marriage contract and the debt she adduced for her right to sell in P.Yadin 21–22. There, as I mentioned above, she sells the produce of orchards that are not hers (she is not heir) because she is entitled to the orchards on the basis of her dowry and a debt. Although Besas inquires into the registration of the orchards in her name, it is clear he is referring to the same orchards: he cannot be referring to the registration of P.Yadin 16 since Babatha there is clearly registering her own property.[47] What Besas wants to know is why property that belongs to Judah is registered in Babatha's name. It has plausibly been argued by Cotton that this concerned the practice, known from Egypt, to have women register their claims on their hus-

[47] See P.Yadin 16, a census declaration in which Babatha is registering her own property; see also Lewis on P.Yadin 23–24: 'Can the reference be to the fact that Judah signed for Babatha in **16**? Hardly, since those properties belonged to Babatha in her own right and would therefore offer no grounds for their ownership to be claimed by relatives of Judah' (Lewis, 107). In P.Yadin 16 Judah was with Babatha as her guardian but he is obviously not registering himself. The presence of a guardian did not mean that the guardian himself got involved in the deal: he was not a party. See my treatment of guardianship in Chapter 5 below. Also see Cotton, "Rent or Tax Receipt," 549, n. 15, relating the groves of P.Yadin 23–24 to those of P.Yadin 21–22.

bands' property based on their marriage contract. The debt the husband acknowledged towards his wife in her marriage contract would create a lien on his entire property and the demand to register this fact was made to protect future purchasers of the property.[48] Besas is thus probably referring to the fact that the property is registered with Babatha's claim on it. If Babatha cannot prove her right to the property (by producing her marriage contract and in this case also her document of debt) the property will be registered in the name of the orphans. Since Besas simply speaks of registry without referring to any legal act that made the orphans owner of the property, it is logical to assume they have become owners of the property on the basis of succession. This means that the registration will not make them owners—they have been owners ever since Judah died—but that the registration will mark them as owners of the *unencumbered* property. Following Cotton's argument, referred to above, there rested a claim in favour of the wife on all the husband's property. At Judah's death, his heirs became owners of this property by way of law of succession. There is no legal act required for the transfer of ownership but the property is still registered in Judah's name with the claims concerning Babatha on it. Babatha now either has to prove her rights, after which the heirs will have to satisfy her, or she will fail in doing so and be deprived of those rights. The claim the wife has on her husband's property then becomes a defunct right. In either case, the heirs will in the end be owners of the unencumbered property.[49]

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[48] See Cotton and Greenfield, "Babatha's Property," 220; Cotton, "Deeds of Gift," 185: 'In Egypt, as we learn from the prefects' edicts cited in the celebrated petition of Dionysia, wives were ordered to deposit a copy of their marriage contracts in the same public archives in which their husbands' properties were registered, in order to warn prospective buyers that these properties were entailed. Something similar must have taken place in Judea as we know from two deeds of sale, one in Aramaic from Feb./March 134 and one in Hebrew, from Sept./Oct. 135 (*DJD* II, no. 30), where the wife renounces all claims to the property sold, presumably because her husband's entire property was put in lien to secure the return of the money of her kethubbah or dowry on the dissolution of the marriage, and he had to get her acquiescence before selling any part of it.'

[49] The question of whether registration was constitutive for the transferral of ownership is obviously not relevant here. What is at issue is not registry of ownership but a case where a factual situation does not correspond with what is registered. The orphans have become owners by Judah's death, but judging by the registered facts Babatha has a claim to that property. The demand of Besas to reveal the right Babatha has to the property concerned is obviously aimed at clearing the property of the claims.

It is clear that registry was not constitutive for transferral of ownership from the instance of P.Yadin 19, where Judah transfers a courtyard to his daughter by way of gift, indicating that he will register the right of the daughter, if she wants him to (see P.Yadin 19:25–27, outer text). This denotes that registry was not a part of the transferral itself: in

Lewis proposed another interpretation when he argued that the reference to registry in name of the wife is to a practice of registering property the husband bought for the wife during marriage in her name, meaning to have the ownership revert to the husband in case of a divorce or to his estate in case of his death.[50] This interpretation of the registration in Babatha's name does not influence the argument that the orphans were Judah's legal heirs: if registry that had ownership revert to the estate was concerned, after Judah's death the orphans could also inquire into Babatha's exact rights. In fact, one can imagine that exactly the possibility that either Cotton's suggestion or Lewis' was at issue prompted the guardian of the orphans to inquire into Babatha's rights: was there a relationship with dowry and a lien on the property until the dowry was repaid to the widow, or could her rights be based on registry in her name which could be regarded as defunct now that Judah had died? In the first instance Babatha had to be satisfied to clear the property of her claims, in the latter Babatha had no rights to the property whatsoever.

Besas' approach only makes sense if the orphans are indeed Judah's heirs. Why ask Babatha to prove an apparently registered right if the orphans did not have a stronger claim of their own? Only if Judah's death brought the right of the orphans into existence can Besas act as he plans to. This conclusion is supported by the evidence found in P.Yadin 25, which

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that case it would have to be done, regardless of the wishes of the donee. I also refer to P.Yadin 20, where Besas acknowledged Shelamzion's right to a courtyard and promises to register with the authorities, wherever she wants him to (see P.Yadin 20:12–13/34–36). This is not the same situation as in P.Yadin 19, as 'when you demand it' can suggest that it will or will not be done, according to the wish of the donee, while 'wherever you wish' suggests that the donee gets to choose the place of registry while it is already decided that registry will take place. This difference corresponds with the different situation of P.Yadin 20, where no new right is created (as in the gift of P.Yadin 19 where ownership is transferred from Judah to Shelamzion) but registration in P.Yadin 20 sees to registry of an already existing right: Shelamzion had to be owner at the time of the dispute or she would not have been able to prove her right to the courtyard. What Besas will probably register is the fact that the ownership of the courtyard is not disputed anymore.

It is interesting to note that the instance of P.Yadin 23–24 seems to indicate that in case of a dispute over registered facts, the person who claimed to have rights based on these facts had to prove that he did. This was probably so because this right was based on a legal act and not on a rule of law.

[50] See Lewis, "In the World of P.Yadin," *SCI* 18 (1999): 125–127.

Lewis is probably not right when he takes the registry referred to in P.Yadin 24 to be the census. I tend to agree with Cotton and Greenfield that ἀπογραφή does not seem to have that specific meaning here (see Cotton and Greenfield, "Babatha's Property," 213, about the meaning of the word ἀπογραφή). Taking ἀπογραφή to mean 'registry that was not directly related to a census' does not invalidate Lewis' argument as such.

concerns the same dispute. Julia Crispina there summons Babatha to court saying she is holding the property of the orphans to which she is not entitled.[51] 'Entitled' here clearly refers to ownership or the passing of ownership. Babatha is holding property that did not pass into her ownership. Since the property is styled as the orphans', it is clear it did pass into their ownership. Obviously, this happened on the basis of succession.

Nowhere in all of this is the daughter even mentioned. What was already inferred by the dispute in P.Yadin 20 is here proven: Judah had a daughter when he died but she was apparently not his heir. This implies that it is indeed likely that the daughter did not have claims to her father's property based on succession, *even if there were no sons*. Obviously, the brother of the deceased was his legal heir and in his absence, his sons.

A conclusion that the daughter apparently did no inherit since she is not mentioned in the proceedings of P.Yadin 23–24 and 25 could be called a derivative conclusion: such a conclusion is derived from the fact that the daughter is not mentioned; it is not based on direct evidence in the archives. Such derivative conclusions as to the status of the daughter towards her father's estate based on lack of mention of the daughter and the presence of deeds of gift were drawn by Cotton and Greenfield and Cotton in several publications.[52] As Cotton indicated in the most recent publication on the subject, this type of argument can never be called completely conclusive: there can be other reasons why a deed of gift was made, than the wish to circumvent an exclusion of the daughter based on the law of succession.

However, a derivative conclusion is not necessary as we have direct evidence as to the daughter's status in the papyrus text, I refer to some damaged lines in P.Yadin 24. Lewis suggests as a restoration for line 7: 'the right of the orphans of his brother to inherit.'[53] Lewis supposes that Judah had left a document, for instance a will, that had established a right for his brother Jesus to inherit his estate and, as the brother has died, the sons of this brother now have a right to inherit. Consequently, Lewis translates: 'to inherit . . . from the name [i.e. the registered ownership] of

[51] P.Yadin 25:10: ἃ οὐκ ἀνῆκέν σοι.

[52] See 34 n. 118 above.

[53] See Lewis, 105: lines 7–8: κ̣ο̣ῦ δ̣ίκεον τῶν ὀρφαν̣[ῶν ±25
τ]ῶν αὐτῶν εἰδῶν ἐξ ὀνό[ματο]ς Ἰη̣σ̣ο̣ύ̣ο̣[υ πατρὸς αὐτῶν, ο]ὗ
for the twenty five missing letters Lewis proposes to read τοῦ ἀδελφοῦ αὐτοῦ κληρονομεῖν *aut sim.*

Jesus their father.' However, there is no basis for this interpretation in the text. The property concerned clearly belonged to Judah and a claim in favour of Babatha is registered as well. But the property is not registered in the brother Jesus' name. The existence of a will to this point is unlikely as there is no reference to such a document in the extant text and no wills are found in the archives in general.[54] What the clause is meant to convey in my opinion is that the orphans have a right to inherit *Judah's* estate as the legal successors of their father, i.e. using his right to the estate. What is thus explained here is that the orphans are the legal heirs by way of substitution. This means that the text of P.Yadin 24 states in so many words that the brother of the deceased (and after his death his sons) was indeed his legal heir. As in the cases of P.Yadin 5 and 12–15, where the deceased left a son, a brother of a deceased is obviously not his heir, the only conclusion we can draw from the combined evidence is that sons inherited their father's estate and in their absence the father's brothers (and their offspring) did. The presence of a daughter clearly did not change this latter fact.

P.Hever 63 presents an interesting case: the daughter Salome Komaise declares that she has no claims against her mother concerning the property of her deceased father *and her deceased brother*.[55] This means that P.Hever 63 presents us with a case where there is a deceased brother. It is unclear whether he died before or after the father. Neither is it clear in what capacity both mother and daughter act. It is unlikely that the mother had any rights based on intestate succession either to her husband's or her son's estate and therefore the rights that are acknowledged here were most likely based on gift. We would expect, however, that those rights were acknowledged by the heir(s) to the estate, as we have seen in P.Yadin 20: the legal heirs of the deceased, Judah, acknowledge Shelamzion's right to a courtyard. In the present instance of P.Hever 63, this would imply that Salome Komaise was heir. This would present the

[54] As line 6 ends in ἐν τῇ with some 18 letters missing Lewis suggests this clause might have contained a reference to a will: ἐν τῇ διαθήκῃ αὐτοῦ. Although we cannot exclude this possibility completely, there is little in the text that supports it. There are for example no clearly legible letters or traces of letters of the word διαθήκῃ. The observation that there are no wills in the archives, also goes against assuming the arrangements here were based on a will.

[55] The impression of the document is that the mother had written a similar document in favour of the daughter because the text reads: and also she Salome daughter of.... See Cotton in Cotton/Yardeni, 195.

sole instance in the two archives of a daughter being heir to her father's estate, although P.Yadin 20 could also be read to yield that a daughter could be substitute for her father in inheriting a share in the grandfather's estate.[56] P.Hever 63 could present a case of a daughter inheriting in the absence of sons especially considering the evident fact that the son-heir has died. However, Salome is not explicitly called an heir and the extent of the claims either of the women had to the estate is not clear. Reading the text of the document one gets the impression that the daughter declares she has no rights at all to the estate, as she declares she has no claims vis-à-vis her mother regarding 'the properties left by Levi her late husband and by…los/las her late son and brother of her who agrees.'[57] Since the property is described from the viewpoint of the mother-wife, it is almost as if she was entitled to these properties. Salome's renunciation of her claims seems to support that assumption. However, it might be true that this renunciation of claims followed a renunciation by the mother as is implied by the phrase 'and also she Salome.…'[58] Accordingly, both documents read together would then yield a mutual recognition on the part of both parties that their rights to the property (and probably to specific properties within it) would be acknowledged by the other. What kind of rights were meant remains unclear: the mother might recognize the position of the daughter as heir and the daughter that of the mother as donee, or both might recognize each other's rights as donees.[59] In the latter instance, however, there would have to be heirs, probably brothers of the deceased husband or their sons but we find no mention of them. The matter seems to have been settled between mother and daughter.

Since the rights of the mother-wife will almost certainly have been restricted to the possibility of rights based on gift, we have to assume the daughter is the heir here. This situation would present difficulties for the overall interpretation of the position of the daughter in absence of sons in the archives. As we have seen above, Shelamzion obviously did not inherit her father's estate, even though no brother was ever mentioned.

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[56] See 227–228 above.

[57] P.Hever 63:6–7.

[58] P.Hever 63:4. See Cotton in Cotton/Yardeni, 195 about the possibility there was 'a separate deed of renunciation of claims by another person; probably the mother, Salome Grapte, for her part, had written a deed of renunciation in favour of the daughter.'

[59] For this latter option compare Cotton: 'It could be that the controversy concerned property made over to mother and/or daughter in deed(s) of gift with provisions to become effective after the donor's death.' ("The Archive of Salome Komaise," 177).

If P.Hever 63 indeed shows that Salome Komaise was heir to her father's estate (after her brother died), this would provide completely different evidence. I think it likely to assume that she was heir since there is no mention of other heirs to the estate concerned, given that those would have been expected to be involved in any settlement concerning the estate. The only heirs mentioned in the text are 'her heirs' in line 9, probably referring to heirs of Salome Grapte, the mother.[60] From a logical point of view, this phrase seems to be out of place: the most likely heir of Salome Grapte would be Salome Komaise. How can she declare something towards her mothers' heirs if she is that heir herself? Nevertheless, it is possible that Salome Grapte had children from another marriage who were her heirs or that she was expected to remarry and bear other children who would be her heirs. It is also possible that the phrase was simply customary, denoting that the claims were renounced not only for the present but for always: in the future they cannot be brought against legal successors by way of succession either. Thus it is ensured that the property concerned really became the unchallenged property of the other party. Because Salome Komaise is only renouncing her own claims to the property concerned, we do not know whether she acted as owner of this property or as claimant (for example, based on a deed of gift).

I also want to emphasize that we do not know the sequence of the deaths in this family: did the son actually predecease his father or did he survive him? To put it differently, are we talking about a daughter possibly inheriting her father's estate in the absence of a son, or is this a case of a mother and sister arguing over the estate of their deceased son and brother?[61] In this latter instance the content of P.Hever 63 would not be

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[60] I imply this since the word is in the accusative case, probably connecting with the accusative case of Salome Grapte's name following the preposition πρός ('vis-à-vis'). Cotton does not discuss this line or its implications.

[61] Cotton's remark that 'it is likely to have concerned the property left after the death of both father and son' ("The Archive of Salome Komaise," 177) is not very helpful, as the sequence of deaths is essential for understanding the law of succession. Unless we assume that father and son died at exactly the same moment, which is unlikely, there are two separate deaths with consequences for the order of succession. Therefore, one cannot speak of 'property left after the death of both father and son': either we are talking about the father's estate (to which the son's property had reverted at his death) or we are talking about the son's estate that contained the property of the father (son=only heir). The latter situation would indicate that daughters could not inherit in the presence of sons. A complicating factor here is that we have no idea as to the age of the son: was he older or younger than Salome? If he was (much) younger, it would be more likely that he had no descendants at the time of his death and his property would revert to his father's

relevant for our investigation into the position of the daughter towards her father's estate. This means that twofold caution is wanted here: first of all it is not obvious that Salome Komaise actually acts in capacity of heir, secondly it is not clear whether the estate of the father is the one concerned, or if the brother initially survived the father and his estate is at issue. Consequently, intriguing as it may be, P.Hever 63 cannot be understood as presenting clear evidence about the daughter's position towards her father's estate.

Order of succession based on documentary evidence

The instances of P.Yadin 5, 20, 21–22, 23–24 and 25 show that the order of succession in the Babatha archive was most likely that the son is legal heir of his father's estate and in his absence the brother of the deceased is legal heir. Whether there is a son or not, the wife never has any claims based on the law of succession. The daughter does not inherit, even in the absence of a son.

What law determined the order of succession found in the documents?

The conclusion reached above is based completely on direct evidence in the documentary sources.

Previously Cotton and Greenfield observed that the daughter did not seem to have a right based on the law of succession, even in absence of a son, when in competition with brothers of the deceased or their sons,[62] but this conclusion was merely derived from the fact that the daughter plays no part in the dispute between Besas and Babatha[63] and from the

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estate. If we may assume that the land declaration of P.Hever 61 was his (as Cotton suggested, "The Archive of Salome Komaise," 176), he must in any case have been of age. The fact that he makes a land declaration could indicate that he had inherited his father's property. Accepting Cotton's suggestion that he is the declarant of P.Hever 61, his death must have occurred somewhere in the course of 127 CE. His mother and sister then had to settle several claims they both held towards the deceased son's estate, but these claims could concern rights harking back to the death of the father, like a claim by the mother of return of her dowry, or maintenance.

[62] See Cotton and Greenfield, "Babatha's Property," 220; also see Cotton, "The Archive of Salome Komaise," 177 (cited above in n. 59) and Cotton, "Deeds of Gift," 186.

[63] See Cotton, "Law of Succession Again," 117–118 and Rivlin, who phrases Cotton's derivative conclusion as follows: 'Cotton finds basis for the preferred status of the nephews over daughters within the order of succession from other documents, namely P.Yadin 23 and 24. Here, Besas son of Judah, guardian of the orphan nephews, challenges Babatha's claim to the date palm grove that her husband had assigned to

presence of deeds of gift in the archives. The clause in P.Yadin 24, giving the order of succession, plays no part in their argument.[64] On the contrary, Cotton and Greenfield took it that the presence of deeds of gift made to daughters (like P.Yadin 19) is the indication that daughters had no right to their father's estate based on succession. Cotton wrote about this subject on two other occasions, in the first instance coming to the same derivative conclusion reached in the article written with Greenfield.[65] However, in the later article Cotton actually retreated from her original position, having become more reluctant about the conclusiveness of the evidence from the archives, in the form of the presence of deeds of gift, to this point.

> While I still suspect that the deeds of gift were indeed intended to bypass the existing law of succession to the benefit of daughters, it now seems to me, in particular on the basis of these newer considerations, that it is not possible to demonstrate this conclusively from the evidence at our disposal at present.[66]

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her. Cotton assumes here that Shelamzion, Judah's daughter, was alive at the time and yet is not mentioned as a party to the claim, thereby demonstrating that the claim of the nephews is stronger than the claim of his daughter' (Rivlin, "Gift and Inheritance Law," 170).

Rivlin does not agree with Cotton's assessment of P.Yadin 23 and 24, because he assumes that not Babatha's right to the date grove concerned was at issue for Besas, but Judah's ownership of it and consequently his right to 'cede it to Babatha. Because the basis of the claim in these cases is unclear, I maintain that we cannot categorically conclude that these documents demonstrate a legal norm that stands in contradiction to the laws of succession of Jewish law. Biblical law clearly delineates the order of succession: first the son and daughter, and only afterwards the brothers and their offspring.' I do not think that the basis for the claim is unclear, as not Judah's ownership of the grove is at issue but Babatha's right to it. After all, Besas asks her to demonstrate her right and threatens to register the nephews as owners in case she fails to do so. This implies that the nephews were owners and Babatha had to prove her right to what they owned to them, to prevent them from becoming owners of the unencumbered property (see 231 above). The very fact that the nephews could be considered owners of Judah's property indicates that they were his heirs and not his daughter. But what is more, this is even said in so many words in the text of P.Yadin 24 as I have demonstrated above. In the light of this phrase in which the nephews are explicitly described as being entitled to inherit Judah's property the documentary evidence does go against Biblical law as delineated by Rivlin. (However, Rivlin's description of the Biblical order of succession—'first the son and daughter, and only afterwards the brothers and their offspring'—is not completely accurate. The evidence of Num 36 is completely ignored here, while this passage is so essential for understanding the order of succession as it is presented in the documentary evidence. See my exposition below, 242–245.)

[64] Probably because it was not read the way I read it, see my interpretation on 233–234 above, which deviates from Lewis.

[65] See n. 46 above.

[66] Cotton, "Law of Succession Again," 122.

Indeed, the relation of the presence of deeds of gift with succession strategies was denied by Satlow, who maintains that

> deeds of gift to women might have secondarily served to circumvent these laws [i.e. laws of succession, JGO] but their primary function had nothing to do with them.[67]

Obviously, when one merely looks at the presence of deeds of gift in the archives, it cannot be maintained that this presence *alone* is enough to prove that daughters had no rights whatsoever to their father's estate based on succession. As Cotton and Greenfield had observed the deeds of gift were at times drawn up at the time of the remarriage of the parent who made the gift, that is, with view to the birth of a male heir.[68] Ann Ellis Hanson has argued for the case of P.Yadin 19, the gift to Judah's daughter Shelamzion, that the gift followed Judah's marriage to Babatha:

> If Judah were a recent bridegroom himself making Babatha his wife after early December 127 (16) and before 21 February 128 (17), his hopes for a son from the new union rested, naturally enough, with the young Babatha's

[67] Satlow, "Marriage Payments," 62, n. 51. Satlow views the deeds of gift as instruments for having property devolve on a daughter in such a way that it would not end up in her husband's family. Where dowry, as Satlow argues, could be squandered by the husband, leaving the daughter empty-handed (despite the security given in the marriage contract) a gift ensured that the daughter had control over the property and the husband had not: 'it was no doubt the fear of irresponsible use of the dowry that led parents to grant property to their daughters in a way that would prevent their sons-in-law from alienating it. Property given to a woman by deed of gift rather than as dowry fulfilled this function well, for unlike dowry, it could not be alienated or mortgaged by the husband' (64). Although it cannot be denied that the effect of deed of gift and dowry are different where the capacity of the husband to influence the property is concerned, this is not the main reason for writing deeds of gift at the time of marriage. I will argue below, *contra* Satlow, that there is a relation between law of succession and gift, but another one than Cotton and Greenfield suggested (and Satlow contradicts): Cotton and Greenfield assumed that the daughter was not heir to her father's estate in general; I will argue that she was, *until she married*. Exactly the loss of rights based on law of succession occasioned by the marriage induced fathers to provide their daughters with gifts at that time.

Satlow takes the timing of the gifts, around marriage, to relate to the restraint a father wanted to exercise on his daughters' behaviour: 'But deeding property to one's daughter or wife, from the perspective of her father or husband, had a potential downside: it gave her freedom. This is the fact that governed the timing of these gifts. Fathers, who may have been insecure about their ability to govern the marital choices of their daughters under normal conditions, could use the deed of gift as additional leverage. Once a woman married an appropriate man, the father would write over his property.' (64). I hold a completely different explanation for the timing than Satlow offers: he assumes that the father would write over property if the daughter married the *right* man, I will argue that the deed of gift was made if—and actually because—the daughter married the *wrong* man (that is, a man that was not a relative). See details below, 244–245.

[68] Cotton and Greenfield, "Babatha's Property," n. 50; Cotton, "Deeds of Gift," 183.

> proven fertility and the fact that she had already produced a male heir for her first husband.[69]

Regardless of the fact whether Judah and Babatha married that late (Lewis set the date for their marriage between 122 and 125)[70] it is important to note the consequences for reconstructing the law of succession of assuming a relation between gift and a second marriage of the parent. Instead of assuming that the daughter had no rights to her father's estate at all, it implies that she had those rights as long as she was an only child. The gift would then compensate her for the loss of claims based on the law of succession if a male heir was born from the new union. Rivlin painted the legal picture poignantly:

> As Cotton rightly hypothesizes, a father may bestow a gift upon his daughter in anticipation of the eventuality that a son may later be born, *thus removing the daughter from the process of succession*.[71]

Consequently, assuming a relationship between gift and remarriage of the parent means that the presence of deeds of gift in the archive cannot show that the daughter had no right to inherit her father's estate: if the deed of gift was made with a view to a new marriage of the parent, this could indicate that the daughter had a right to inherit as long as she was an only child.

However, this is a different situation from the one painted in our documents. As I have shown above, P.Yadin 24 explains about the order of succession current at the time: the sons of Judah's deceased brother Jesus are his legal heirs, despite the fact that he has got a daughter Shelamzion. This means that Shelamzion was not her father's heir, although she was an only child.

This conclusion has major consequences for our understanding of the applicable law. Cotton and Greenfield pointed out that the situation where a daughter has no rights to her father's estate at all is unlike Jewish law. After all, they argued, Jewish law does recognize the rights of the daughter to inherit her father's estate in the absence of sons, referring both to the Bible, Num 27, and the Mishnah, *m. B. Bat*. 8:2, where it is determined that if a man dies without leaving a son, his daughter will inherit his estate. In the Mishnah it is even said explicitly that the

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[69] Hanson, "The Widow Babatha," 90.
[70] Lewis, 29.
[71] Rivlin, "Gift and Inheritance Law," 168. My italics for emphasis.

daughter is preferred over the brother of the deceased and his offspring. Rivlin wrote:

> …a daughter has a normative place of standing in the line of succession, when there are no sons alongside her. This biblical ruling remains unchallenged throughout the entire corpus of halachic literature.[72]

In the light of both Cotton and Greenfield's and Rivlin's argument it seems that the order of succession as clearly laid down in the clause of P.Yadin 24 discussed above, is contrary to what is determined in Jewish law. This clause states in so many words that the sons of Judah's deceased brother were his rightful heirs. This means that Judah's daughter did not inherit, *even though she was, at the time of her father's death, an only child*. This means that the possible birth of a male heir would not have meant loss of claims for the daughter: apparently she did not have such claims as an only child either. Therefore, the anticipation of the birth of a male heir at the time of a new union of the parent cannot have been the reason for drawing up a deed of gift at the time of this union. Consequently, the evidence in the archive goes against assuming that deeds of gift served to counterbalance the loss of claims of a daughter towards her father's estate at the prospect of the birth of a male heir. The order of succession indicated in the documentary evidence gives the (offspring of) the brother of the deceased precedence over the daughter, even if she is an only child. Does this mean that Cotton and Greenfield were right in suggesting the daughter had no claims to her father's estate whatsoever and that the law of succession was unlike Jewish law? Or is there another way of explaining for the daughter's position towards her father's estate that can account for the order of succession as laid down in the clause of P.Yadin 24, while being in accordance with Jewish law?

In view of the strong influence of Jewish law on the substantive side of the cases found in the archive, as demonstrated in Chapter 2 of this study, it is likely to search for a connection with Jewish law in this instance as well. Roman law clearly cannot qualify here, as sons and daughters there have equal shares in their father's estate: 'there was never any systematic

[72] Rivlin, "Gift and Inheritance Law," 168, referring in n. 17 to the same sources Cotton and Greenfield adduced, Num 27 and *m. B. Bat*. 8:1, and some later sources that are not immediately relevant here.

exclusion of daughters.'[73] I would even assume that Roman law did not apply, because of the fact that Besas explains about the order of succession in P.Yadin 24. If this order had been obvious to the Roman court, he need not have mentioned it.

The order of succession must then follow some other, probably indigenous law. The interesting point is why, in assessing a possible connection with Jewish law, both Cotton and Greenfield, and Rivlin, disregard the background and the full extent of the Biblical evidence. To begin with, it should have been observed that in the original order of succession given in Biblical law, there was no room for the daughter to inherit her father's estate: in the absence of a son an inheritance went to the deceased's brothers. The events and the ruling described in Num 27, quoted by Cotton and Greenfield, and Rivlin, particularly served *to change* this original order of succession in favour of the daughter. *m. B. Bat.* 8:2, also adduced by them, obviously goes back to this. Nevertheless, the conclusion drawn by Cotton and Greenfield that the situation in our documents does not resemble Jewish law, as well as Rivlin's statement—'Biblical law clearly delineates the order of succession: first the son and daughter, and only afterwards the brothers and their offspring'—completely disregard what I would call the other half of Biblical law: the developments in the Biblical narrative directly following the change of the daughter's position as described in Num 27. In Num 36 a specific element is introduced concerning the position of the daugh-

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[73] Mireille Corbier in *Women's History and Ancient History* (ed. S.B. Pomeroy; Chapel Hill: University of North Carolina Press, 1991), 185. She mentions, however, that in practice there were cases of unequal sharing between male and female heirs and that jurisconsults discussed special bequests for a daughter if she married a relative in the *familia*. However, these appear to have been isolated instances. In general, all children were entitled to a share in their father's estate regardless of their sex or marital status.

The complications of the Roman system were not so much in differentiation dependant on gender but were related to the concept of *patria potestas*. Initially, only those in a household who became *sui iuris* at the *pater familias*' death could inherit. This meant that, for example, daughters who were married *cum manu* could not inherit part of their father's estate because they were already *sui iuris* before their father's death. Children who were emancipated could not inherit either and this applied to sons and daughters alike. For these instances, the praetor gave a series of rulings, based on the idea that a praetor cannot change the order of succession because he cannot make a new law (*praetor heredem facere non posset*—'the praetor cannot make a person heir'). What the praetor did was opening a way to give all legitimate children (*liberi*) the possibility to ask for possession of their share in their father's estate and if the praetor thought they qualified, this possession would be granted. Basically, this came down to a division of the inheritance amongst the children, even though they were possibly not all heirs in the strictly formal sense of the term.

ter with respect to her father's estate, which will prove to be crucial for understanding the law of succession as reflected in our documents.

In Num 27:11, it was originally stated that the order of succession given there (including the right of the daughter to inherit in the absence of a son) was a 'legal requirement.'[74] However, the rule established is debated in Num 36, as the relatives of the deceased object to the consequences of the daughter's right to her father's estate, in the case of her marriage. It is then determined that daughters can inherit when they have no brother but *only if they marry within their tribe*. This makes it clear that there was awareness that the marriage of the daughter could affect the family property and that this was unwanted. The property had to stay within a certain defined group, the tribe (obviously, since the whole passage is closely related to the shares the tribes received in the Promised Land). It is logical to assume that this example created an ongoing awareness of the risk involved in having a daughter inherit her father's estate. I do not wish to argue that the rule given in Num 36 still applied in Babatha's lifetime: it would be hard to say how a distinction between tribes would have been made. There is, in the documents, no evidence that people were designated to a certain tribe. This kind of distinction does not seem to have been important. Furthermore, the Mishnaic passage on order of succession, quoted above, does not mention a possible marriage of the daughter in relation to her position with respect to her father's estate. Indeed, it was determined in *m. B. Bat.* 8:4 that the position of the son and the daughter was the same where inheritance was concerned.[75] Nevertheless, it was determined in Talmudic times, i.e. *three centuries later*, that the enjoinder of Num 36 was 'applicable only to the particular generation to whom the enjoinder was directed.'[76] This suggests that the enjoinder's possible application was still under consideration.

The link found in Num 36 between law of succession and marriage of the daughter is important for understanding the nature of the deeds of gift in our archives.

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[74] NIV, the Hebrew reads: חקת משפט, ordinance (or statute) of law. This presents the only clear case of a rule of inheritance law in the Hebrew Bible, see also Zafrira Ben-Barak, "Inheritance by Daughters in the Ancient Near East," *JSS* 25 (1980): 25–26.

[75] The only exception is the double share the son receives in the estate of his father (but not in that of his mother). The daughter only receives the maintenance she is entitled to from her father's estate and not from her mother's.

[76] See *b. B. Bat.* 120a, also the commentary of Rashbam at this point (see Elon, *Principles*, 446).

As Cotton and Greenfield argued, all gifts found in the Babatha and Salome Komaise archives are made to women, in one instance a wife (Babatha's mother in P.Yadin 7), in the two others a daughter (Shelamzion in P.Yadin 19 and Salome Komaise in P.Hever 64). They presume that on the occasion of the gift to the wife in P.Yadin 7, the husband concerned also drew up a deed of gift in favour of his daughter, Babatha. This deed of gift would then have been the means by which Babatha eventually came to own the orchards she registers as her own property in P.Yadin 16. Indeed it is likely that Babatha became owner of this property by way of a gift, since there were few other ways by which a woman could become owner of real estate at the time. The interesting detail about Cotton and Greenfield's suggestion for this presumed gift to Babatha is that they think it was presented to her on the occasion of her marriage to her first husband Jesus.[77] The gift to Shelamzion, in P.Yadin 19, is clearly related to marriage of the daughter-donee as well (the gift is drawn up within two weeks after the marriage deed of P.Yadin 18),[78] and the same was assumed for the gift to Salome Komaise in P.Hever 64.[79] This is significant for understanding the relationship between law of succession and gift. It need not be true, as Cotton and Greenfield assumed, that daughters could not inherit their father's estate at all and that gifts were used (in various instances) to counterbalance the consequences of this rule. On the contrary, I propose that the gifts were made *at a specific moment in time*, namely at the time of a daughter's marriage, *because it was this marriage that occasioned a change in the daughter's position based on the law of succession*, which the gift then sought to counterbalance. Such a change is in fact already implied in the rule laid down in Num 36, adduced above: a daughter who is heir to her father's estate by virtue of her position as an only child can only inherit if she marries within her tribe. If she does not do so, she cannot

[77] They also take this to be the occasion for the gift the husband gave to his wife; see Cotton and Greenfield, "Babatha's Property," 218: 'Having provided for his daughter Babatha,…, her father, Shimeon the son of Menachem, wanted to make sure that in the event of his death, his widow, Miriam daughter of Yosef would keep the rest of his property.'

[78] Thus *contra* Hanson, who relates the drawing up of the deed of gift of P.Yadin 19 to remarriage of the parent (Judah's marriage to Babatha); see 239–240 above.

[79] See Cotton and Greenfield, "Babatha's Property," 220, n. 54. Another possibility is that the mother who bestowed the gift wanted to make sure her daughter got some of her property either in case a male heir would be born or in case of her death (220, main text; this has to do with the second marriage of the mother which might occasion the birth of a son or at least leave the second husband heir in case of the mother's death).

inherit. This means that this Biblical rule indicates that marriage could change the position of the daughter towards her father's estate. In both the case of Babatha and Shelamzion the gifts were substantial and could thus be seen as ample compensation for loss of claims based on the law of succession.[80]

If my assumptions above are true, the law of succession at the time would not deny a daughter her right to inherit her father's estate, as long as she was unmarried or married to the next of kin. In such cases, the family estate would stay within the family. However, where the daughter was married to an outsider, her marriage would mean losing her position towards her father's estate. This would not be unlike Jewish law at all but a consequence of the Biblical rules.

It is true, of course, that the Mishnah does not mention any relationship between the law of succession and marriage or marital status of the daughter but it seems to give the daughter a right to inherit over the brothers of the father without further detailing. However, in our documents it is obvious that the daughter-only child does not inherit her father's estate and that she is presented with a gift on the occasion of her marriage. It is therefore worthwhile to pursue the argument for a relationship between marriage, marital status and law of succession further and investigate whether this can be related to a broader oriental context. How did other oriental laws treat the (un)married daughter, specifically in the absence of sons?

[80] Rivlin assumed that the fact that an immediate gift is concerned (instead of a gift taking effect after death) would go against assuming a relationship between gift and succession (Rivlin, "Gift and Inheritance Law," 168–169). Where I agree with him that the fact that an immediate gift is given does not imply that this is done to compensate for any lack of rights under the law of succession (as the donor may also wish to grant the donee property at this time, instead of later, after his death), the argument cannot be turned around: one cannot claim that a gift to compensate for lack of rights under the law of succession should be a gift taking effect after death. A gift could be used to effect the same thing as a will, but a gift was not a will. Therefore, a gift could take the form of a gift to be effected after death, but this was not necessary: it could also be immediate, according to the donor's wishes. Especially when taking into account that the change in the daughter's status under the law of succession and the consequent need for a gift to counterbalance this occurred at her marriage, i.e. the moment when she would set up her own household, an immediate gift would be much more attractive than a gift taking effect after death.

II. *Discussion of Legal Position of Daughter in Ancient Eastern Legal Systems*

Egypt

Evidence from legal code and documents

There are two types of evidence for Ancient Egyptian rules of inheritance: more or less direct evidence for rules from legal codes or legal manuals, and indirect evidence for rules deduced from their application in wills, testaments, and other instruments, as well as from patterns of succession to office and divisions of property. Direct evidence for the rules of succession to priestly offices are provided by the Gnomon of the Idios Logos.[81] Direct evidence for the rules of inheritance of property are provided by the Legal Code or Manual of Hermopolis.[82] These two sources make it clear that the rules for succession to offices, which were not partable among multiple heirs, were different from the rules for succession to property, which was partable among multiple heirs, both male and female. Only succession to property will be discussed here.[83]

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[81] BGU 5, lines 181–215 (¶71–96).

[82] See Girgis Mattha, *The Demotic Legal Code of Hermopolis West* (text in transliteration ed. with transl. and notes; pref., additional notes and glossary by George R. Hughes; Le Caire: Institut Français d'Archéologie Orientale du Caire, 1975) or Koenraad Donker van Heel, *The Legal Manual of Hermopolis: [P.Mattha]: Text and Translation* (Leiden: Papyrologisch Instituut, 1990). Those unfamiliar with Ancient Egyptian will probably find the last one easier to work with. It also incorporates later suggestions of, for example, P.W. Pestman.

There are now other similar texts known from Egypt, see Sandra Luisa Lippert, *Ein demotisches juristisches Lehrbuch, Untersuchungen zu Papyrus Berlin P 23757 rto* (Ägyptologische Abhandlungen 66; Wiesbaden: Harrassowitz, 2004). This text does not contain references to law of succession and will not be discussed here.

[83] When discussing inheritance and succession in ancient Egypt, a distinction is usually made between the transfer of property and the accession to offices or positions that cannot be divided. For the latter, the term succession is used as the heir succeeds the testator in the office or position, while the term inheritance is then reserved for the transfer of property (that can be divided). The distinction is made because women could not succeed their fathers in offices and positions but could inherit from their fathers. Consequently, their position is different when it comes to succession or inheritance. However, from a legal point of view the difference between inheritance and succession is otherwise. The term succession is used for the heirs stepping into the shoes of the testator, both regarding his property and eventual offices or positions. The term order of succession, for example, denotes in what order certain family members are named heirs, for example, first the children, then the brother of the deceased, then his parents etc. In the same way we can speak of intestate and testamentary succession: succession that is determined by the law or by a will. In the following I will not be discussing the

The rules for inheritance found in the Legal Code or Manual of Hermopolis make a distinction between inheritance with and without a will. For it says: 'in case a man dies…having not written shares for his children…'[84] This makes it clear that it was possible to make a will and thereby change the shares that the rules of law that are to follow determine.[85] Wills were made to deviate from the law of intestate succession, for example when a large estate was at stake.

In the instance where a man did not write shares for his children it is described that it is the eldest son who gains possession of the inheritance, unless the other children demand their shares. Then the eldest son has to write out all the names of the children that have a claim to the inheritance.[86] When a child dies before having received his share, his eldest son takes his place. If he does not have a son, the eldest son (i.e. the deceased son's eldest brother) takes his share.[87] We can therefore see that Egyptian law knew rules of substitution, that is, rules that determine what happens when an heir died before he received his share.[88] It was also determined that a share that was allotted to a certain child would go back to the eldest son if the child died *after* having received the share, without himself having sons who could inherit.[89] This solves the problem of family property ending up with non-relatives.

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succession of heirs to offices and positions but only matters of transfer of property. In accordance with legal terminology, I will call these instances succession, succession then referring to the way in which certain persons are called to be heirs.

[84] Legal Manual Column VIII,30. [When referring to the Legal Manual I use Donker van Heel's edition, mentioned above, n. 82; he uses the transliteration and translation as provided by Pestman in a forthcoming article "La succession *ab intestat* selon le droit démotique (reconstitution imaginaire d'un chapitre du <code civil démotique>"]

[85] It is important to point out in this respect as Seidl already did, that the way in which the Legal Manual phrases it ('in case a man dies, having not written shares for his children') seems to imply that the will would concern a division of the estate amongst the children (Erwin Seidl, *Ägyptische Rechtsgeschichte der Saiten- und Perserzeit* [2nd rev. ed.; Glückstadt: Augustin, 1968], 81). This means that the reference to a will does not necessarily imply that a person could make his estate over to anyone he chose (an outsider). Indeed the examples the Legal Manual gives for wills and the consequences of those wills for the division, all concern division amongst the children (for example giving the estate to one child or giving a certain child a bigger share; see for example Column IX,21–22).

[86] Column VIII,31–33.

[87] Column IX,3–4.

[88] The system for this was quite elaborate as can be seen from the fact that an eldest son takes the shares of his siblings who died before the division and did not have children, while an eldest daughter (i.e. a daughter in absence of a son, acting like the eldest son) does not: compare Column IX,3–4 to Column IX,16–17.

[89] Column IX,3–4. In case he did have sons, those would take his place.

The child who initially gained possession of the inheritance was clearly the eldest son. But it is not self-evident that this means that only sons inherited. The role of temporary possessor of the estate and also divider of it is granted to the eldest son, but all children, whether male or female, can receive shares.[90] It is also clear that all children can receive shares from either their father or their mother. This means that the children always inherit the estate of their parents, regardless of their or the parents' sex.

There is a specific passage devoted to the case where a man dies having a daughter (or daughters), but no son.[91] There the eldest daughter acquires the rights of the eldest son in receiving two shares of the inheritance, but it is determined that she does not have the right of the eldest son to inherit the shares of predeceased children. This means that the daughter is not equal to the son in that respect.[92] That a female child was not considered equal to a male in general, can be seen in the remark where it is determined that when a man first begets a daughter and then a son, the son will be considered to be the eldest son.[93] In general one can say that always as soon as there is a male child, no matter whether he is firstborn or not, he acts as the eldest son, who manages the property until the other children demand division of it. He can also take the extra share, when appropriate.

The Demotic legal documents from Egypt bear out the same: children inherit their parents' estate, sons and daughters alike. It appears from both literary sources and legal texts that remarriage of a parent was considered a serious threat for the claims of the children from the first marriage.[94] After the marriage they had to share the inheritance with children born from the second marriage.[95] It is obvious, however, that the children are considered entitled to their share, even while their parent is still alive. This means that often measures are taken to make sure that a child

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[90] Column VIII,32 (where the word for children is used en not merely a word for sons) and Column IX,2–3, where both sons and daughters are mentioned explicitly.

[91] Column IX,14–16.

[92] Column IX,16–17; see n. 88 above.

[93] Column IX,29–30.

[94] See for a discussion of some texts: Pieter W. Pestman, "The Law of Succession in Ancient Egypt," in *Essays on Oriental Laws of Succession* (ed. J. Brugman et al.; Studia et Documenta ad Iura Orientis Antiqui Pertinentia IX; Leiden: Brill, 1969), 59ff.

[95] Pestman, "Law of Succession," 59–60: the case of Senhor (P.BM 10.120 A/B, P.Bibl. Nat. 216 and 217 and P.Tur. 2126).

will receive something of his paternal property. Because there are a great number of variations in the texts it is difficult to determine what kind of division was made when the deceased had made no arrangements at all. Pestman has enumerated a number of cases in which it seems that one of the heirs does not receive anything (is perhaps disinherited) while evidence from other papyri shows that the heir concerned did receive something (for instance because he was bought out).[96] In a case of a son and a daughter the son seems to inherit his father's estate as he sells a house that is part of the estate without intervention of his sister. Nevertheless, another document shows that the daughter had received her share.[97] For the present investigation it is important to note those instances referred to by Pestman where daughters receive some of the paternal estate upon their marriage and consequently relinquish their claims to the estate that are based on succession.[98] Pestman also observed that where daughters appear to receive less substantial shares than sons this may be due to the fact that they received property upon marriage (thus that this property together with what they received upon their father's death made up their intestate inheritance share).[99] This indicates that even though daughters inherited on equal basis with sons there was a relation with marriage as the property they received then was viewed either as their share or as part of their share. The relationship between marriage and succession will play an important part in the discussion of other legal systems below.

An interesting case with respect to P.Yadin 20 is P.Louvre 2430 where the children of two deceased sons divide the inheritance of the grandfather. For one son a son acts as his heir, for the other son his four daughters. This makes it clear that under Egyptian law the daughters of a deceased son-heir could act as heirs in his stead. As I discussed above, this is not clear in P.Yadin 20. There Shelamzion can be acting as heir of her father Judah, in a conflict with the heirs of her father's brother, which would present us with the same situation as in P.Louvre 2430, but her right could also be challenged by the brother's sons as heirs of her father's estate. I have mentioned above that the combination with evidence from P.Yadin 23–24 suggests that the orphans of the brother were

[96] Pestman, "Law of Succession," 66.
[97] Pestman, "Law of Succession," 66: the case of Paret's estate (P.Phil. 7,8 and 9).
[98] Pestman, "Law of Succession," 66, the case of Herakleia (P.gr. Mich. II 121 verso xii 3/4/10 and V 341.9).
[99] Pestman, "Law of Succession," 65.

indeed Judah's heirs. In that case P.Yadin 20 has to be read as a conflict between the legal heirs of a deceased and his daughter, who is apparently not his heir. This would present us with a completely different situation than the one found under Egyptian law.

Conclusions

Under Egyptian law both sons and daughters inherit the paternal estate. Their position on the basis of succession appears to be equal, except for some privileges of the eldest son: when first a daughter is born and then a son, the son is regarded eldest son and the eldest son inherits the shares of his siblings who die without children (whether before or after the division of the inheritance), while the eldest daughter does not.

From documents it appears that daughters indeed shared the estate with sons; in some cases where they seem to be excluded they did receive a share by some kind of arrangement. This arrangement was obviously not meant to *create* a right to the share (that right was based on intestate succession), but to pay the share to the daughter by some other means.

Where the daughter's share is related to a portion received upon marriage (whether this portion makes up the entire share or part of it) there could be a link between marriage and succession as assumed for the Judaean Desert documents and to be discussed for other legal systems below. Nevertheless, it is important to keep in mind that under Egyptian law daughters are entitled to a share in their father's estate alongside their brothers: *the daughters are heirs on the basis of intestate succession*.[100] This means that when they receive a portion of the father's estate upon marriage this portion is given to them by way of a share in the inheritance based on their rights to it as intestate heirs. For the Judaean Desert documents one could argue that a gift upon marriage is made to make up for loss of claims on the basis of succession, but this is a different legal situation: the gift does not provide the daughter with her

[100] This seems to have been a specific feature of Egyptian law as opposed to the other laws in the ancient Near East; Westbrook speaks of 'a major dichotomy' that 'existed between Egypt and Asiatic systems as regards daughters as heirs' noting on the next page that 'the heirs of the first rank who inherited automatically were the deceased's legitimate sons, namely, sons born of a legitimate marriage. Where a son had already died but had left sons, the grandchildren would take his share alongside their uncle (*per stipes*) and divide it between them. Under Egyptian law, although the same principle prevailed, it applied also to daughters, who ranked equally with sons' (Raymond Westbrook, "The Character of Ancient Near Eastern Law," in *A History of Ancient Near Eastern Law*, 56–57). See my detailed discussion of these 'Asiatic systems' below.

share, but provides her with property she could not (or rather no longer) acquire on the basis of succession. The gift then takes the place of the right to the property on the basis of succession.

Mesopotamia

Under this heading I will treat early Mesopotamian law (anterior to Hammurabi's Code), Old Babylonian law (Code of Hammurabi), with a few remarks on Neo-Babylonian law, and Assyrian law, covering Old, Middle and Neo-Assyrian law. I will also include a short excursus on Athenian law since it is mentioned in several commentaries on Old Babylonian law of succession, comparing Athenian and Biblical Jewish law.

Mesopotamian law anterior to Hammurabi's Code

Between 1947 and 1952, three collections of laws were brought to light that contain legal material that is older than the Code of Hammurabi (of 1750 BCE): the Laws of Ur-nammu (2100 BCE), the Laws of Lipit-Eshtar (1930 BCE) and the Laws of Eshnunna (1770 BCE).[101]

The Laws are comparable in content, that is, as far as the preserved text reveals. For example, the Laws of Ur-nammu and those of Eshnunna do not contain information about law of inheritance and succession. Our understanding of the contents of the legislation of Lipit-Eshtar suffers from substantial lacunae in the text, for example, a gap of 34 lines where

[101] The names can be spelled in various ways, for example, Ur-nammu or Ur Namma, Lipit-Eshtar or Lipit-Ishtar.

For more details about the finds and early law in general see Ephraim Avigdor Speiser, "Early Law and Civilization," in *Oriental and Biblical Studies: collected writings of E.A. Speiser* (ed. and with introd. by J.J. Finkelstein and M. Greenberg; Philadelphia, Pa.: University of Pennsylvania Press, 1971); reproduced in: Aaron M. Schreiber, *Jewish Law and Decision-Making: A Study through Time* (Philadelphia, Pa.: Temple University Press, 1979), 66ff.

I note that Speiser describes the laws of Eshnunna as 'a still older body of law' (compared with the Laws of Lipit-Eshtar), which suggests that the Laws of Eshnunna would have to be placed between the Laws of Ur-nammu and those of Lipit-Eshtar. Yet he remarks that the language of the laws is Akkadian rather than Sumerian. I adhere to the sequence as presented in the recent edition of the laws by Roth: Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor* (Atlanta, Ga.: Scholars Press, 1995): Laws of Ur Namma (LU, 2100 BCE) 14–22, Laws of Lipit-Ishtar (LL, 1930 BCE) 23–35, both under the Sumerian section, and Laws of Eshnunna (LE, 1770 BCE) under the Babylonian section. I do not distinguish between Sumerian and Babylonian material in my presentation.

a part about inheritance and succession probably began.[102] What is still legible conveys the impression that children can inherit independently of their gender.[103] However, whether this was true can immediately be questioned looking at another provision in the same text: 'If the father is living, his daughter whether she be an *entu*, a *nadītu* or a hierodule, shall dwell in the house like an heir' or in another translation: 'If during a father's lifetime his daughter becomes an *ugbabtu*, a *nadītu* or a *qadištu*, they (her brothers) shall divide the estate considering her as an equal heir.' Obviously, an unmarried daughter is concerned, as she is described as a priestess.[104] According to the first translation, the priestess daughter dwells in her father's house like an heir, the other seems to denote that the moment she becomes a priestess she gains the status of heir alongside her brothers. In both instances it is clear that her position as a priestess is closely connected with her status as heir. First of all, this implies that daughters would not normally inherit alongside their brothers and secondly, it indicates that a daughter could only be heir equal to her brothers if she was a priestess, that is, a woman who was to remain unmarried. Only if she was a priestess of some kind, i.e. an unmarried woman, did she live in the house of her father *like an heir*. In other instances, it is implied that this was different.

Of course one could question whether marital status was of foremost importance or rather the fact that she was a priestess. However, the implication of the fact that she was a priestess was that she was unmarried. This was the fact that really mattered: a daughter who was a priestess did inherit not because she was a priestess but because this status implied that she was unmarried. That way, her share in her father's estate

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[102] See Schreiber, *Jewish law*, 87, where it is noted that some ten and thirty-four lines located close to each other are destroyed. Roth has restored more of the text (she presents a section 20 a, b and c) but these parts do not reveal more about inheritance, dealing rather with the way in which a man has to take care of children he promised to raise. This seems to connect with the contents of 20, which deals with the rescue of a child. Yet the arrangements in 22 and 23 obviously deal with inheritance (and specifically the position of the daughter) which could suggest that the gap between 20c and 21 contained more information on inheritance. See discussion.

[103] See parts 24–27 where there is mention of children without specifying whether they are male or female (the word *dumu* is used, meaning child, without specifying the sex). Compare n. 109 below.

[104] All the terms used to refer to the daughter have a connection with priesthood, although the degrees may vary: an *ugbabtu* was really a priestess, while an *entu*, a *nadītu* and a *qadištu* were more of temple dedicatees or female temple attendants. *Entu* referred to the highest class of such temple attendants, *qadištu* to the lowest. A *qadištu* was usually a minor girl (Roth, *Law Collections*, under *ugbabtu, entu, nadītu* and *qadištu*).

would ultimately revert to her brothers. In that context it is important to note that classes of priestesses/temple attendants that were allowed to marry, were not allowed to bear children.[105] From a legal point of view this meant that their share in the estate of their father would indeed revert to the brothers as the daughters would never have legal heirs of their own. Therefore, having a daughter who was priestess inherit would not damage the family property. This idea can be found in later Mesopotamian law as well, for example, in the Code of Hammurabi to be discussed below.

In addition to the law texts that are often fragmentary or do not reveal details about succession and inheritance at all, there are also documents from those early periods that explicitly mention the position of the daughter regarding her father's estate. A text from Gudea (Lagash; 2150 BCE), for example, declares that 'in the house in which there is no son, the daughter enters into the position of heiress.'[106] It is remarked though that 'this declaration may well express the ideal aspirations of society' and that a daughter did not usually inherit even though she was apparently entitled to do so under this provision.'[107]

Nevertheless, an Old Babylonian legal text from Nippur reads something to the same effect: 'If a man dies and he has no sons, his unmarried daughters shall become his heirs.'[108] For the word heir the term *ibila* is used, interpreted as denoting only male heirs.[109] The text thus expresses that a daughter is instituted in the position which normally only a son

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[105] See Roth, *Law Collections*, 271, under *nadītu*.

[106] Statue B, vii: 44–46, mentioned by Ben-Barak, "Inheritance by Daughters," 23, and Claus Wilcke, "Early Dynastic and Sargonic Periods," in *A History of Ancient Near Eastern Law*, 165, stating that this text 'introduced the right of a daughter to become an heir to her parental estate, that is, not just to her mother's property.' Division of the estate of a woman by her daughters is discussed by Wilcke ("Early Dynastic and Sargonic Periods," 165), where obviously a daughter renounces her claim to her mother's property in favour of her sister.

[107] Ben-Barak, "Inheritance by Daughters," 23.

[108] UM 55–21–71: ii: 8–11. Classified by Ben-Barak, "Inheritance by Daughters," 23, as Old Babylonian, discussed by Lafont and Westbrook in the section about Ur III 'according to one law code, if the father died leaving no son, his unmarried daughter should become his ibila' ("Neo-Sumerian Period (Ur III)," in *A History of Ancient Near Eastern Law*, 206). See their n. 94 and their discussion at the beginning of the chapter on the Ur III period about the difficulties in assigning texts stating that this is 'indicative of the continuity of the legal tradition between the Ur III and early Old Babylonian periods.'

[109] See Lafont and Westbrook, "Neo-Sumerian Period (Ur III)," 206: 'The term for heir, ibila, might equally well be translated "son and heir". In n. 93 they explain that 'the sign is, in fact, composed of the signs for 'child' (dumu) and 'male' (nita2), but in some legal documents it is spelled phonetically.'

could hold. Contrary to the text cited above, this text explicitly mentions the daughter's marital status: *unmarried* daughters become *ibila*, heir, implying that married daughters do not. This link between marital status and inheritance rights could also be at the heart of a legal case recorded in a document from the Ur III period, concerning the disinheritance of an adopted daughter at her marriage.[110] A man adopted two girls and made them his legal heirs (*ibila*). When one of them was about to marry a certain Nibaba she was disinherited. Ben-Barak suggested that the disinheritance might concern 'a declaration that Nibaba had no intention of joining the family of the bride.'[111] Following this suggestion, the situation implies that disinheritance followed when the adopted father realized that his property would pass out of his family. This is often the reason behind arrangements for daughters as heirs. For this reason, marriage is so essential in this respect. Only if the marriage ensures that the property will stay within the family does it not change the position of the daughter towards her father's estate.

> This contrasts with the statement at the end of an Old Babylonian letter from Sippar: "There is no right to inheritance for daughters in Sippar, be they the eldest or not."[112]

Indeed, this remark which seems to altogether exclude the daughter as heir seems to deviate strongly from the positions assumed above. However, I think that the addition 'be they the eldest or not' could imply that the remark sees to a situation where there are sons.[113] The rule would then express that even if a daughter is the firstborn child, she cannot inherit. In that case the remark does not necessarily denote that a daughter could not inherit *if there were no sons*.

In general it seems that daughters could inherit if there were no male descendants, while in one instance it is specifically determined that this provision applies to *unmarried* daughters. The Ur III document about the disinheritance of the adopted daughter at her marriage shows that

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[110] See Lafont and Westbrook , "Neo-Sumerian Period (Ur III)," 206: 'In NG 204:34–37 two apparently adoptive daughters are called ibila.' They mention the case immediately following the discussion of the rule that in case a man dies leaving no son his unmarried daughter can become his heir. They do not, however, expound on the relevance of the disinheritance for our understanding of the (unmarried?!) daughter as *ibila*.

[111] Ben-Barak, "Inheritance by Daughters," 23.

[112] Kraus AbB I,92:16; Ben-Barak, "Inheritance by Daughters," 23.

[113] Thus *contra* Ben-Barak, who discusses this instance under the heading 'daughters inheriting without sons.'

the choice of a marriage candidate was vital for a daughter who was heir. Ben-Barak has even concluded that 'according to the Ur III document the daughter was obliged to marry someone with a certain affinity to her father.'[114] Such an obligation would obviously be aimed at securing the family property and would thus come close to the arrangement found in Num 36. A clear link existed between marital status or future marriage and the position of the daughter as possible heir to her father's estate in the absence of sons.

Old Babylonian law

The matter of succession in Babylonian law is rather complicated as the Code of Hammurabi[115] does not give clear rules on the order of succession.

> The Laws deal only with certain special cases of succession and give no statement of the general law which has to be discovered by inference from isolated provisions and from the documents which deal with the division of property at death.[116]

The position of daughters is especially difficult to determine as there seems to be contradictory evidence and developments might have occurred over time.

The most important point for the whole discussion is the question of whether *māru*, the word used in the Laws to denote the heirs, can only refer to males or can include females as well.[117] Driver and Miles

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[114] Ben-Barak, "Inheritance by Daughters," 24.

[115] This is the primary source on Babylonian law as it is transmitted fairly intact and seems to contain a lot of older material, for example, from the laws of Bilalama, see Godfrey Rolles Driver and John Charles Miles, *The Babylonian Laws* (2 vols.; rev. ed.; Oxford: Clarendon Press, 1968), 2:5ff. This edition discusses all available sources of Babylonian law, giving text and translation not only of Hammurabi's Code but also of other laws like the law of Lipit-Eshtar, Susian land law and so-called Neo-Babylonian laws.

Roth presents text and translation of the Code of Hammurabi (76–142) but gives no (legal) commentary. For that, one still has to turn to Driver and Miles, just cited. A general overview of legal issues in the Code of Hammurabi (i.e. not a full commentary on the complete text) is given in Raymond Westbrook, "Old Babylonian Period," in *A History of Ancient Near Eastern Law*, 361ff.

[116] Driver and Miles, *Babylonian Laws*, 2:324.

[117] In the Assyrian laws the terms seem to refer exclusively to males, see Godfrey Rolles Driver and John Charles Miles, *The Assyrian Laws* (Ancient Codes and Laws of the Near East 2; Oxford: Clarendon Press, 1935), 295 ('In Assyria it seems that only males inherit; for in §§ 1–4 the persons who inherit are described as brothers (Ass. aḫḫē), and this term is obviously restricted to males. Consequently, when the persons who inherit a man's property are described as his 'sons' (Ass. mārē) it must be assumed

produced an extensive excursus on the subject, referring to instances where inclusion of daughters indeed seems likely.[118] In documents it could in any case occur that daughters were designated by the word *māru*. However, it is important to note that in the Laws the only right to inherit her father's estate clearly granted to a daughter is granted to an unmarried priestess.[119] The idea behind this was obviously that in such a case the woman would not have children of her own and that the property would therefore revert to the family (her brothers and their children) after her death. This shows that the position of daughters with respect to their father's estate concerned considerations of keeping the family property within the family. If it was guaranteed that the property would revert into the family the daughter was entitled to inherit alongside her brothers. This suggests a link between the daughter's right to inherit part of her father's estate and her marital status comparable to the one suggested above with regard to the Judaean Desert documents.

'The Laws do not refer to the case where a man has no sons.'[120] This is a bit unexpected since we have seen in the older material that several references are made to a situation where a man dies leaving no sons, for example in the statue from Gudea (Lagash) and the Old Babylonian documents from Nippur, discussed above. One can assume that this idea of the (unmarried) daughter inheriting if there were no sons was accepted and practiced.[121] Nevertheless, the Laws do not refer explicitly to this case. The only thing that is determined is, as mentioned above, that the unmarried daughter inherits alongside her brothers. One could

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that the term is employed in its strict and literal sense.' I refer to the interpretation of *ibila*, used in the early Mesopotamian material above (n. 109).

[118] Driver and Miles, *Babylonian Laws*, 2:338–341.

See also Westbrook, "Old Babylonian Period," 395, where he discusses the terminology in the Laws: 'The law codes use Sumerian terminology, which can be ambiguous as to gender. Dumu means "son" (Akk. *mārum*) and dumu.mi2 means "daughter" (Akk. *mārtum*), but especially in the plural, dumu can be gender non-specific. Nonetheless, dumu is paradigmatically a son and should be taken as such unless the context demands otherwise. It should be noted that Sum. ibila/Akk. *aplum* can mean "son", "heir", "son-and-heir", or "first-born son", depending on context. Only rarely could it be interpreted as applying to female heirs. See Kraus, "Erbrechtliche Terminologie…" 18–24.'

[119] Driver and Miles, *Babylonian Laws*, 2:334ff. This has to be understood as 'an inheritance-share in lieu of a dowry' while normally the dowry functions in lieu of inheritance: see Raymond Westbrook, *Old Babylonian Marriage Law* (Horn, Austria: Ferdinand Berger, 1988), 89 and Westbrook, "Old Babylonian Period," 397.

[120] Driver and Miles, *Babylonian Laws*, 2:334.

[121] 'Since this is a legal document, it may be assumed that this custom was the accepted practice in that society.' (Ben-Barak, "Inheritance by Daughters," 23)

argue, *a fortiori*, that this would be expected even more so if there were no brothers.

I note, though, that in the Laws it is determined that the unmarried daughter is priestess, while this is not determined in the (older) document from Nippur. Nevertheless, it is important to note that in both cases the daughters are required to be *unmarried*. Apparently, marital status was important in determining whether a daughter could be heir or not. The fact that a daughter is priestess determines that she will *remain* unmarried, while the document from Nippur does not make any demands on that point.[122] In this respect, I think it is interesting to recall the example of the disinheritance of an adopted daughter following her marriage, discussed above.[123] If a daughter was made heir and subsequently married, this could cause problems. This realization could be at the heart of the rule laid down in the Laws which only gives a share in the estate to the priestess, that is, the unmarried daughter *who remains unmarried*. Comparing the older evidence with the rule in the Laws, one gets the impression that the position of the daughter changed in that unmarried daughters-priestesses could inherit in any case, even alongside their brothers, because they would remain unmarried and their share would always eventually revert to their own family. This implies that unmarried daughters that would not stay that way would not have a right to inherit, in any case, not alongside their brothers. It is obvious that married daughters would have no rights to the inheritance whatsoever.

Driver and Miles mention the implication of some documents that daughters inherited *if there were no sons*: 'in the documents property is occasionally divided between daughters alone, in which case it may be that they inherit in default of sons.'[124] The question is, however, whether they inherit *in default of sons* or simply inherit as children of the deceased. To put it differently, did all children inherit regardless of their sex and did daughters in absence of sons inherit as such, or did sons inherit and could daughters only inherit in default of sons? I do

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[122] Compare Ben-Barak: 'Neither here [in the document from Nippur] nor in the Lagash inscription is there any stipulation concerning the marriage of the daughter who inherits the estate.' ("Inheritance by Daughters," 23)

[123] Adduced by Ben-Barak, "Inheritance by Daughters," 23; see also Lafont and Westbrook, "Neo-Sumerian Period (Ur III)," 206.

[124] Driver and Miles, *Babylonian Laws*, 2:341.

not think the material is conclusive in that respect. On the one hand, the Laws only determine that daughters who are unmarried priestesses can inherit alongside their brothers. As mentioned above this resulted in reversion of the property to the sons/brothers after the woman's death. Therefore, this way of allowing a daughter to inherit cannot be taken to apply to other daughters as well: indeed, the concept behind it would go against this. Therefore, it seems likely that the Laws started from the assumption that only sons inherited and daughters could inherit if they were unmarried priestesses. Further support for the idea can be found in my opinion in the arrangements in the Laws that sons who inherit have to provide their sisters with a husband and a dowry.[125] This would come down to a share in the father's estate anyway.[126] Precisely because an unmarried priestess could not benefit from this arrangement, she would inherit a share of her own at her father's death.

While the Laws seem to restrict the right of a daughter to inherit part of her father's estate to the unmarried daughter-priestess, the documentary evidence is not so univocal. Daughters did receive a part of their father's inheritance designated as their share, but it is not clear what this share encompassed, thus whether it was equal to the share of the brother(s). In some cases, where the daughter is said to take part in the division, it is clear that her share is granted to her on the basis of inheritance/succession. Driver and Miles mention the example of a daughter who shares with her brother 'whatever belongs to their father' and of two sisters who receive their share as 'part of their father's estate.'[127] In the latter instance Driver and Miles point out that the sisters could be heirs in default of male children. Of course this does not apply to the first example. Therefore, we cannot be sure whether the sisters would not have inherited a share, had there been a brother.

What is significant about the examples Driver and Miles give is that the daughters concerned are *all unmarried*. It is not clear though whether they were all priestesses as well. If they were, they would inherit

[125] See Westbrook, *Old Babylonian Marriage Law*, 89: 'CH makes the provision of a dowry obligatory in certain cases. In paragraph 184, if a *šugītum* has not been provided with a dowry and married off during her father's lifetime, her brothers are obliged to perform both these tasks after his death.'

[126] See Westbrook in Westbrook, "Old Babylonian Period," 397: 'In lieu of inheritance a daughter would receive marital property.' For the details of the arrangements concerning the marital property see Westbrook, *Old Babylonian Marriage*, 89–102.

[127] See Driver and Miles, *Babylonian Laws*, 2:337.

on the basis of the rule given in the Laws that allowed a daughter who was an unmarried priestess a share in her father's estate alongside her brothers. Driver and Miles remark that if not all women were priestesses there could be a link with *šeriktum*, dowry.[128] As long as a daughter had not received a dowry yet, she could inherit a share in her father's estate. Driver and Miles suggest that the daughter could benefit from this share, while it was managed by her brothers. The property thus stayed within their control. The question they do not raise, however, is what the status was of a married daughter. From the evidence as it can be inferred both from the Laws and the documents I get the impression that married daughters did not inherit. The Laws only mention the unmarried priestess, the documents concern daughters who are not married. This would effectively mean that the daughter's position towards her father's estate changed upon marriage. Before her marriage, she was entitled to a share in the estate and after her marriage obviously no longer. I think this is very important for our understanding of the Judaean Desert documents. Could it be that there as well succession rights for daughters were related to marital status? In both the Babatha and the Salome Komaise archive, the daughters concerned are married when their father dies. In fact, they are all married when gifts are made to them providing them with some of their father's property. This makes it likely that the reason for providing them with a gift was not a desire to change the consequences of the law of succession as such, but to counterbalance a change on the basis of this law of succession at that specific moment, i.e. in connection with marriage. The situation in Babylonian law suggests that a daughter's position towards her father's estate was indeed linked with her marital status.

Excursus: the daughter-heir in Athenian law

In their discussion of Babylonian inheritance law, Driver and Miles also mentioned the possibility of succession by brothers of the deceased, if the deceased had left no descendant at all (whether male or female).[129] They mention Jewish law as showing a preference for the brother as heir if there were no descendants of the deceased. They also refer to the marriage rule of Num 36, explaining that a daughter had to marry a man of

[128] For the specific meaning of *šeriktum* 'dowry' as part of the marital property, see Westbrook, *Old Babylonian Marriage Law*, 24–28, 89.

[129] Driver and Miles, *Babylonian Laws*, 2:342.

her own tribe to keep the property together. Then they refer to ancient Athenian law as similar to Jewish law in the preference for male heirs. The daughter does not have any right of inheritance if she has brothers. If a man dies leaving only a daughter behind, the daughter functions as ἐπίκληρος, daughter-heir. She is married off to 'a near agnatic relative to whose son by her the inheritance passed at his majority.'[130]

The term used for this daughter should not be translated with 'heiress' since it is obvious from the arrangements concerning her position that she is not really an heiress at all.[131] She does not actually inherit but is considered as keeping the property with her, that is, until a real heir is available. At the death of their father she becomes 'adjudicable' by the nearest male relative of her father, to whom she is married off with the prospect of producing a son to maintain the father's estate.[132] This explains why the daughter-heir should really not be regarded as an heir at all: the property does not really become hers but she 'stands in, as it were, for her non-existent brother until she has produced a son.'[133] Since the Athenian system recognised adoption as a way for a man to provide his estate with an heir, it would have been common that a man who had only a daughter made the husband of his daughter into his son and thus heir by way of adoption.

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[130] Driver and Miles, *Babylonian Laws*, 2:342, n. 4. The same idea as in Athenian law seems to have existed in Gortyn, where the daughters were designated by the term πατροιοκοι: see Josef Kohler and Erich Ziebarth, *Das Stadtrecht von Gortyn und seine Beziehungen zum gemeingriechischen Rechte* (unrev. reprod.; Hildesheim: Gerstenberg, 1979), 67–70: the daughter was required to marry a close male relative (for exact details see reference). The strict view that in the event that she was married, her marriage ended at the moment her father (or brother) died was not maintained in Gortyn: the daughter was expected to end the marriage herself and then marry the person required. There were different rules for cases where a daughter already had children at the time she had to end her earlier marriage or she did not (for details see Kohler and Ziebarth, *Das Stadtrecht*, 69–70).

[131] See Roger Just, *Women in Athenian Law and Life* (London: Routledge, 1989), 96.

[132] See Just, *Women*, 96, about the exact procedure and its consequences.

[133] See Just, *Women*, 98. In this respect Athenian law differed from, for example, law at Gortyn where an ἐπίκληρος 'was permitted to keep part of the patrimony and marry outside her father's lineage' (Sarah B. Pomeroy, *Families in Classical and Hellenistic Greece: Representations and Realities* [Oxford: Clarendon Press, 1997], 53). At Gortyn in general daughters had a better position regarding their father's estate than in Athens: 'daughters inherited half as much as sons' (Pomeroy, *Families*, 53). Pomeroy suggests for both cases that law at Sparta might have been the same as at Gortyn. This (and an apparent general shortage of men) resulted in a relatively high percentage of female ownership of land at Sparta: Pomeroy believes that the number Aristotle gives, two-fifths, is credible (Pol. 1270a; Pomeroy, *Families*, 54).

The question is, of course, what happened if a man died having only a daughter, who was married to a man who had not been made into the father's legal heir. At the death of the father, the daughter inevitably became daughter-heir and adjudicable as described above. A passage in Isaios (a Greek orator, 420–350) suggests that a daughter-heir who was already married nevertheless passes 'into the legal control of their next-of-kin.'[134] Isaios then adds: 'Indeed it has frequently happened that husbands have thus been deprived of their wives.'[135] This makes it clear that in such a case indeed the daughter's marriage was ended to enable the marriage with the next-of-kin, required by law.

The arrangements in Athenian law outlined above make it clear that there was a strong preference for inheritance by males, even going so far as to require the daughter who inherited in absence of sons to marry her father's next-of-kin to bear an heir for his estate. This arrangement seems to resemble the rule found in Num 36, where daughters who inherit in the absence of sons are required to marry someone of their father's tribe. Indeed, the rules are discussed by Driver and Miles as 'similar.'[136] However, I think the rules are fundamentally different. The Athenian rule only determines something for the moment the father died: at that moment a daughter becomes daughter-heir and is adjudicable. Before that time nothing regarding the order of succession is determined. I think this has to do with the possibility of adoption in the Athenian system: a man could make his son-in-law his son and thereby his heir. This meant that a daughter was not required to marry someone of her father's family in all cases. In fact she was free to marry whomever she wanted, and there could only occur a problem if her father died without a (natural or adopted) son. Thus marriage did not change her position: if she remained the only child and her father did not adopt her husband as his heir, she would automatically become daughter-heir and be married off to the nearest male relative of her father.

The Biblical requirement worked in a completely different way: it determined that daughters who were (likely to be) heirs were only allowed to marry someone of their father's tribe. Since the Bible did not

[134] Just, *Women*, 98.

[135] Isaios 2.64; quoted by Just, *Women*, 96.

[136] Driver and Miles, *Babylonian Laws*, 2:342, n. 4. See also Driver and Miles, *Assyrian Laws*, 245, n. 3, where they compare the rules at Athens to 'Semitic practice' referring to the daughters of Zelophehad (Num 27 and 36). See Westbrook, "The Character of Ancient Near Eastern Law," 57: 'Biblical law (Num. 36:1–12) insists on their marrying their cousins, like the contemporary Greek *epikleros/patroiokos*.'

know adoption, the family property could only be kept in the family by relationships with family members with whom a real blood tie existed. Therefore, it would be possible in that context that a daughter's position towards her father's estate changed upon her marriage. If she married someone who was not related to her father's family, it was from that moment on clear that she could not be her father's heir. Regardless of what would happen next, her position had already changed. Therefore, gifts to counterbalance that effect might have been required.

Despite this crucial difference, the comparison with the Athenian rules is important because it shows, again, that a daughter's marriage was linked with matters of succession and inheritance. The cases of both Babylonian and Athenian law show that it is not odd to assume that a daughter had certain rights to her father's estate as long as she was unmarried, or provided she married the right person. In all cases, arrangements were aimed at keeping the family property within the family.

Assyrian laws

Three periods can be distinguished: Old Assyrian (early second millennium), Middle Assyrian (around 1200–1000 BCE) and Neo-Assyrian (1000–617). Of these periods only the second has yielded a real corpus of law, the Middle Assyrian Laws, while the others provide documentary evidence in the form of thousands of texts of which many 'qualify as sources of law.'[137]

a. Old Assyrian

> No law code has been found but from some quotes and references in letters and verdicts, which refer to "words written on the stela" we know that laws existed and had been published.[138]

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[137] See Klaas Veenhof, "Old Assyrian Period," in *A History of Ancient Near Eastern Law*, 431 concerning the 20,000 cuneiform texts found in the commercial quarter of the ancient Anatolian city of Kanish.

The main sources of law for the Neo-Assyrian period are private legal documents of which more than thousand are known. 'The earliest texts date to the late ninth century, but the majority stem from the seventh century.' Besides those there are royal decrees and letters from archives in Nineveh, Kalhu and Guzana. See Karen Radner, "Neo-Assyrian Period," in *A History of Ancient Near Eastern Law*, 884.

[138] Veenhof, "Old Assyrian Period," 431.

The evidence for legal practice and procedure is mainly found in administrative orders, judicial records and private legal documents.

> Our knowledge of inheritance law is based on a few testaments and scattered references in letters and records. The relationship of the testaments to traditional law is difficult to discern: they may, for example, have ameliorated the entitlements of women.[139]

This latter observation is important, since records show that daughters received a share alongside their brothers. It is not clear whether this happened based on intestate succession or on a will; consequently, the records do not provide any evidence on the position of the daughter in the order of intestate succession. This means that we cannot decide whether daughters had the right to inherit based on law. To me the evidence suggests they did not: for example, a daughter who is heir requests to see the will of her father, which could suggest that she expects to find her share recorded there and not so much given by law.[140] This would mean that a daughter's position was not necessarily safeguarded in rules of intestate succession. Regarding this matter, it is noteworthy that a daughter who is a priestess and thus unmarried receives additional items (a bigger share?). Veenhof seems to relate the receipt of something extra to the position of the woman as unmarried, i.e. independent: 'Frequently the (eldest?) daughter, who had become a priestess (*ugbabtum*) and thus was unmarried and had to live independently, received additional items.'[141] It could be, however, that the special position of the unmarried daughter was related to considerations of protecting the family property: money given to an unmarried daughter would eventually revert to the family. If Veenhof's suggestion is true that the unmarried daughter was often the eldest daughter, this idea would make even more sense: the eldest daughter could take the first share, after the eldest son, before the other children, and consequently, a certain part of the estate would be entrusted to a daughter whose position ensured that the property would eventually revert to the family. But even if the daughter

[139] Veenhof, "Old Assyrian Period," 457.

[140] AKT 3 94, referred to by Veenhof, "Old Assyrian Period," 458, n. 140. He adduces the example to support the observation that 'both sons and daughters shared in the deceased's estate.' However, this does not necessarily mean 'share in the deceased's estate based on intestate succession,' see my remarks about this below, 265. In my opinion the example of AKT 3 94 suggests that a daughter derived her rights to a share in her father's estate from his will rather than from rules of intestate succession.

[141] Veenhof, "Old Assyrian Period," 459.

concerned was not necessarily the eldest, the arrangements still show that the position of a daughter towards her father's estate was related to marital status.

b. Middle Assyrian

The main sources of law for this period are the so-called Middle Assyrian Laws, preserved on three clay tablets.[142] They represent what was not the law of Assur but of an Assyrian colony in Asia Minor.[143] The tablets date from the twelfth century BCE, but the laws contained on them may date back to the fifteenth century BCE. They have probably been influenced both by Babylonian and Sumerian law. Although they are quite extensive and offer material for comparison with other laws, there are no rules on succession of daughters. From a regulation on tablet A it could be inferred that 'in intestate succession, the heirs are ranked in the following order: son of deceased, then his undivided brothers.'[144] Driver and Miles concluded that the Assyrian laws were stricter than the Babylonian ones in this respect, not allowing a daughter part in her father's estate.[145] They add: 'although her *šeriktum* may be regarded as a satisfaction for her share of it.'[146] I take this to come close to what the Babylonian laws convey: a married daughter has received a *šeriktum* and therefore does not inherit a share in her father's estate. The unmarried daughter still living in her father's house (i.e. waiting for marriage) will be provided with a *šeriktum* by her brothers, which will then serve as her share in her father's estate. This does not mean that she is an heir, however, as the brothers are heirs, with the obligation of providing their sister(s) with a *šeriktum*. In the Babylonian laws it is then determined that only the unmarried daughter who is priestess (i.e. will not marry at all) can inherit alongside her brothers (be a real heir). We do not find any reference to this latter situation in the Assyrian laws. This means that we cannot be sure that this specific link with marriage existed there.

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[142] It has been suggested that the collection does not present a code of laws but was 'compiled in the manner of modern "restatements" which organize laws broadly by subject matter' (Sophie Lafont, "Middle Assyrian Period," in *A History of Ancient Near Eastern Law*, 521). In this study I use the word law(s) in a broad range of meanings, not defined by or restricted to a modern sense of legal code (see 43–44 above). Compare n. 172 below.

[143] Driver and Miles, *Assyrian Laws*; see n. 117 above.

[144] MAL A 25; see Lafont, "Middle Assyrian Period," 542.

[145] Driver and Miles, *Assyrian Laws*, 239.

[146] Driver and Miles, *Assyrian Laws*, 239.

Nevertheless, the relationship with *šeriktum* does suggest that a daughter's position towards her father's estate was indeed related to her marital status.

From the documents it can be gathered that daughters sometimes 'inherited on an equal basis with their brothers (OBT 105:8–10) or were the object of special provisions (OBT 2037).'[147] It should be noted that OBT 105 is clearly a will; consequently, it does not say anything about the position of daughters under the law of succession.[148] One could even argue that the fact that wills in favour of daughters were made suggests that the daughter would not inherit by law of succession, certainly not if she had brothers.

The 'special provisions' concern a specific designation of property that will be the daughter's, consisting of both movables and immovables. Concerning the immovables (a house), it is determined that after her death it will be her sons', but if she never begets any sons, the property will pass to the sons of the testator.[149] This indicates that the testator had sons and that he made the provisions for his daughter to grant her a share in his estate. This suggests that daughters did not automatically inherit: they were not heirs based on intestate succession. Indeed, the sons are obviously the favoured heirs, as it is determined that in the event of the daughter dying without heirs the property will revert to the original heirs, the deceased's sons. This indicates that giving a share to a daughter, at least a share in immovables, was only done on the condition that it would pass to her sons. These were obviously seen as

[147] Lafont, "Middle Assyrian Period," 544.

[148] See terminology in lines 3–5: 'PN has settled his estate by testament.' It is obvious that in such cases the daughters only inherit 'on an equal basis with their brothers' because the will says so.

[149] Lines 39–42; Lafont, "Middle Assyrian Period," 544. The division between movables and immovables is apparent as it is only determined that her sons should inherit regarding the house she gets and otherwise the sons of the testator. This denotes at the same time that the testator did have sons and made up this document to favour his daughter. See the text and translation of OBT 2037 in Claus Wilcke, "Assyrische Testamente," *ZAVA* 66 (1976): 224–229. Wilcke points out that the document could be interpreted either as a will (a disposition of property to become effective at the testator's death) or a 'Mitgift.' Since no mention is made in the document of a wedding or a husband of the daughter named, it can be assumed that the document concerned a will rather than a 'Mitgift' (however, note the provisions in case the daughter does or does not bear children in lines 39ff.). This relation with inheritance and succession indicates that documents like these were indeed drawn up to ensure that a daughter who could not inherit in the presence of sons could receive a part of her father's estate (albeit under certain conditions).

continuing the testator's family.[150] The persons who would have inherited if the daughter had not (the 'original' heirs) are the beneficiaries of the arrangement if the daughter died without having sons. We have seen in the rule in Num 36 as well, that the rule there was made to protect the interests of the 'original' heirs, the father's brothers.

c. Neo-Assyrian

As mentioned above, like the Old-Assyrian period, the Neo-Assyrian period has not left us a collection of laws. Although many excavations were conducted at various sites (of archives and libraries), not even one fragment of a law collection was ever found. Documents from the period do not refer to a law collection either, which is remarkable considering their familiarity with the older collections, of which copies have been found in Neo-Assyrian libraries.[151] This means that documentary evidence (private legal documents, royal decrees and letters) is the most important source for information on legal practice and procedure in this period.

What is in my opinion striking about the evidence regarding inheritance is that the position of sons and daughters seems to have become more defined. Sons divide the inheritance between them, in general in equal shares.[152] If a father wants to deviate from this he can make a gift of the property he wants to bestow on a particular son. The rest of his estate will be divided amongst the other children.[153] This principle of favouring one heir over the others was already known from earlier periods, but probably gained more importance as the shares became, in general, equal. Daughters seem to have been favoured by gifts, like wives. Precisely these two categories are found as donees in the Judaean Desert documents.[154]

There might have been a development in the position of the wife as the Old-Assyrian evidence seems to show that the widow inherited a

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[150] For views that the sons of a daughter continue a father's family and are thus regarded as heirs via the daughter see the discussion of the daughter-heir in Athens and Gortyn above, 259–262, and the discussion of documents from Nuzi directly below, 267–271.

[151] See Radner, "Neo-Assyrian Period," 883.

[152] This was obviously a difference with the preceding Middle-Assyrian period, as observed by Radner, "Neo-Assyrian Period," 900.

[153] ADD 779, referred to by Radner, "Neo-Assyrian Period," 900, esp. n. 101.

[154] See 244 above, with reference to Cotton and Greenfield's observations to this point.

house and some money while the Middle Assyrian evidence does not allow her a share in her husband's estate, but has her sons support her, that is, 'if her husband has assigned her nothing in writing.'[155] This latter phrase probably referred to a gift. This meant that a wife either received a gift from her husband to maintain herself after his death, or if such a provision was lacking she received maintenance from her sons (the heirs).[156] The phrase referring to assigning one's wife something may have resulted in an increase of deeds of gift. In any case, it suggests that the wife was not entitled to a share in the inheritance based on succession. The same could go for the daughter.

Nuzi

'Some seven thousand tablets, from both official and illicit excavations at the sites of Yorghan Tepe (= ancient Nuzi), Kirkuk (= ancient Arraphe/al ilani), and Tell el-Fahhar (= ancient Kurruhanni), in a small region east of the Tigris and south of the lower Zab, provide the major documentary evidence for reconstructing the legal institutions and practice of northern Mesopotamia.'[157] There are official and private documents, both of which refer to legislation like royal edicts, orders and proclamations. Something like a real code or a collection of law, however, has not been found. The material covers a period of about a century: 1450–1340 BCE.

The bulk of the material consists of private legal documents that cover all kinds of transactions. The documents related to inheritance and succession mainly concern testaments, which means these documents will reveal nothing directly about the order of intestate succession. Nevertheless, they could reveal what persons would not be heir according to that order since the testaments might be aimed at making them heir anyway. It is important to note that the Nuzi system primarily worked

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[155] MAL A 46; Driver and Miles, *Assyrian Laws*, 415.

[156] An interesting connection can be made with Jewish law, where the heirs were obliged to maintain the widow until they had paid her the dowry or until she remarried (see 384–385 below). This means that the maintenance obligation there was not connected with any provision the husband had made during his lifetime. The obligation was connected with the rights the woman had acquired at the start of her marriage, and thus existed regardless of legal acts by the husband during the marriage. Of course, this did not mean that the husband could not make his wife a gift: we see Babatha's father doing just that in P.Yadin 7. But this gift was not related with any maintenance obligation for the future. To put it differently, the gift was not directly related with matters of inheritance.

[157] Carlo Zaccagnini, "Nuzi," in *A History of Ancient Near Eastern Law*, 565.

via adoption: a testator adopted a person as son and made him heir accordingly. This means that in general, dispositions of property would not be directed at an outsider but at a family member or a person who had become a family member. This is important because in the case of daughters we see that a father adopted a man as his son and then married him to his daughter.[158] The purpose behind this was obviously to continue the family, to keep the family property together, via the children the daughter would bear to the adopted son. A good example of this can be found in a tablet where a man is adopted on the condition that he marries a particular girl, obviously the adopter's daughter, and the children from that match are to inherit all of the adopter's property. It is important to note that it is determined explicitly that this also applies for a daughter born from the match, if there are no sons.[159]

It is fascinating to trace, though, what really happened after this arrangement was made. As Ben Barak showed, other tablets allow us to follow developments concerning the adopter's estate.[160] The daughter born from the match between daughter and adoptee bestows her property upon her father, the adoptee. This means that the property that was to belong to the grandchildren becomes property of the adoptee, a violation of the arrangements made in the adoption document. But it becomes even worse when the adoptee adopts his brother as his son and makes him his sole heir. This brother leaves the property to his own sons. This means that the property of the original adopter will eventually end up in the adoptee/son-in-law's family![161] Of course this has never been the intention of the adopter and it is obvious from the arrangements in other tablets that new ways were found to prevent things from

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[158] Gadd 51, HSS 19 49 and 19 51; see Zaccagnini, "Nuzi," 589 (Adoption of Young Men for Marriage). It is important to note that the father does not marry the adopted son to his daughter in all cases: 'alternatively, the adopter will choose an outsider to become the adoptee's spouse.'

[159] HSS 5,67; 19,73; 5,59 and 19,18: Ben-Barak, "Inheritance by Daughters," 24 and in more detail (relating the text to other texts pertaining to the same or related persons) "The Legal Status of the Daughter as Heir in Nuzi and Emar," in *Society and Economy in the Eastern Mediterranean (c. 1500–1000 BC)* (ed. M. Heltzer and E. Lipinski; Leuven: Peeters, 1988), 90–91.

[160] See Ben-Barak, "Daughter as Heir," 90–91.

[161] Ben-Barak remarks about this: 'We may conclude that in a patrilineal society, the adopted son-in-law continued to regard himself as belonging to his own father's line and was prepared to use any means to return to his original origin' ("Daughter as Heir," 91).

taking this unwanted turn. The father adopted his daughter as his son, using the terminology of the son-adoption (previously used for making an outsider son) and then bestows all of his property upon his daughter *in her legal capacity as son*.[162] This development is not encountered elsewhere in Mesopotamia, where as we have seen the daughter could at times inherit, but not as son-heir. A similar instance however, can be found in Emar. There we find the same practice of giving a daughter a status as male, referred to by the words 'I have established my daughter as female and male.'[163] The Emar evidence will be discussed in detail below.[164]

The Nuzi evidence shows that the awareness of the risks involved in having a daughter inherit the paternal estate led to different approaches at different times. At first the daughter was married off to an adopted son but this son could try to transfer the property of his bride's family to his own family. Therefore, the fathers reverted to making their daughters heirs as if they were sons, by giving them the legal status of males. The problem that occurred in Nuzi law was caused by the adoption procedure: the daughter was married off to someone who was made a family member but *who retained a position within another family*. This meant that the adopted son could indeed transfer property to his own family. Needless to say that this would not happen when a daughter was married off to a family member. Again we see that marriage is essential for the way in which the family property devolves and consequently for the choices people made in their estate provisions. It was precisely the problem of transfer of family property to another family that caused the legal practice of adoption of an outsider to change. The Nuzi answer to the difficulties was to change the legal status of the daughter: by making her male she could become a real heir. I note, however, that this still did not solve the entire problem. Obviously, the daughter could transfer the

[162] IM 6818 and YBC 5142: Ben-Barak, "Daughter as Heir," 91–93.

[163] It is interesting that in the material from Emar in the Anatolia and Levant sphere a same sort of solution is used: see Ben Barak, "Daughter as Heir," 95–96 on the identical features and the differences of the proceedings in both cases, also giving reasons why a choice for this type of solution might have been made: society was not yet ready to accept the daughter as heir in her position as daughter.

The Emar material covers the thirteenth and twelfth century BCE which means it is later than the Nuzi material discussed here.

[164] See 277–281 below.

property to her own children, as the intention of the original adoption procedure had been as well. However, if the daughter failed to have children the property might still disappear into another family. The Nuzi documents do not provide an answer to that problem. We will see in the discussion of the comparable Emar tablets that there the testator nominated other heirs if his daughter would not procure the necessary children-heirs.[165]

Obviously, in the instances where the daughter is established as male, she inherits as son. She is made son, consequently made heir. As Ben-Barak has observed this development probably followed the strict social order at that time, which required the *pater familias* to be a man.[166] Only if the daughter was granted male status could she really become the head of the family, continue the paternal line and keep the paternal property together. This is especially clear in the Emar instances where the daughter who is established as female and male also becomes entitled to perform rites from the ancestral cult, a task otherwise obviously reserved for male descendants.[167] This means that at Emar the nomination as male also enabled the daughter to perform tasks that would normally require male performance. Establishment as female and male therefore served more purposes than solving an inheritance problem alone. Therefore, it is not so surprising that other cultures chose other solutions. Ben-Barak has related the Nuzi and Emar evidence to the Biblical reference to Zelophad's daughters in Num 27 and 36, remarking they inherit as daughters.[168] Indeed they do and that is in my opinion reason to rather view the Nuzi and Emar evidence as opposite to the Biblical reference than as possibly revealing a continuing development as Ben-Barak assumes. Concerning both Nuzi and Emar Ben-Barak stresses that the daughter needs to be established *as son-heir*. This change of her legal

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[165] See 277ff. below.

[166] Ben Barak, "Daughter as Heir," 96.

[167] Ben Barak, "Daughter as Heir," 93–94. The clause in the Emar sources is there present in all cases where daughters are instituted as male and female, suggesting this institution brought the right to perform the ancestral cult along. This contrasts with the situation in Nuzi where only one instance is found of 'a remarkable clause which grants the daughter legal possession of the gods of the family and the right to call on its dead, this being the only known case in Nuzi in which the family gods are bequeathed to a woman' (Ben Barak, "Daughter as Heir," 93).

[168] Ben Barak, "Daughter as Heir," 97.

status is vital for the whole of the arrangement. A next step in the development could be that the daughter was established heir as daughter, that is, no longer needing the change of legal status of female to male. Therefore, Ben-Barak argues that the instance where a daughter inherits as a daughter could show a further development of the daughter's position towards her father's estate. However, the Biblical solution of establishing the daughter as heir on the condition of marrying a member of her father's tribe comes closer to the older Nuzi institution of securing the paternal estate by way of marriage and (grand)children than to the later developments of giving the daughter an *independent* right (by establishing her as son-heir). Therefore, the Biblical evidence does not present a further development (daughter can inherit as daughter, in contrast with inheriting as son), but a different solution to the problem of securing the paternal estate for the father's family. It was precisely the link with marriage that shows that the daughter is not accepted as heir as such, but only on condition of procuring heirs. By demanding their marriage to men from their father's tribe it is made clear that the daughters are to continue their father's family and estate by way of their descendants, while it is ensured that these descendants are part of the same family! Precisely that latter fact posed the problem in Nuzi society, where the adopted male that was to marry the daughter remained part of another family. This problem eventually found its solution in the new adoption of daughter as son. Such a solution is not necessary if the daughter is required to marry someone of her father's lineage. Therefore, *contra* Ben Barak I do not think the Biblical Jewish legal evidence provides an example of a continuing development but rather of a solution from a different angle.

Overview of Sumerian/Babylonian/Assyrian laws (in chronological order) and their arrangements for the daughter with regard to her father's estate

Laws of Ur-nammu: 2100 BCE: no arrangements in extant text; documentary evidence shows that in the absence of sons *unmarried* daughters could be their fathers' *heirs*, and that an adopted daughter who was appointed heir was *disinherited at her marriage*;

Laws of Lipit-Eshtar: 1930 BCE: *unmarried* daughter who is priestess lives in her father's house as *heir*;

Laws of Eshnunna: 1770 BCE: no arrangements in extant text;
Code of Hammurabi: 1750 BCE: whether daughters are incorporated in the general term, *māru*, heirs, is unclear; specific arrangement: an *unmarried* daughter who is a priestess shares inheritance with her brothers as *heir*;
Documents show that daughters sometimes act as *heirs* (in sharing the estate with their brothers), in all of these cases the daughters are *unmarried*;
Assyrian Laws: 1400–1100: no arrangements in extant text;
Nuzi: 1450–1340: no code of law found; documentary evidence shows two phases: adoption of an outsider as son-heir to marry daughter, while grandchildren would inherit; later, adoption of daughter as son, change of legal status from female to male comparable to developments in Emar (to be discussed below);
Neo-Babylonian Laws: 600–500 BCE: arrangement that in case of first and second marriage, children from first marriage take bigger share of inheritance, impression could be that both sons and daughters would inherit but it is not clear whether the word used for heirs could be used for both sons and daughters (see Code of Hammurabi above).

It is obvious that the Nuzi material presents a more or less unique answer to the position of the daughter regarding her father's estate. The general impression of the other Mesopotamian material, spanning some seventeen hundred years, is that the daughter could act as heir, even equal to her brothers, if she was unmarried (and would probably remain that way). The obvious link with *šeriktum*, dowry, implies that generally the idea was that a daughter received her share in the paternal estate by way of a dowry upon marriage. This suggests that afterwards she did not have any claims based on inheritance. This means that there could have been several situations:

If a man has sons and daughters:

– daughter lives in father's house upon his death and will in the future marry: her brother-heirs are obliged to provide her with a *šeriktum*; she is not heir;
– daughter lives in father's house upon his death and will in the future not marry: daughter is heir alongside her brothers;

– daughter is already married: daughter has no claims based on inheritance.

If a man dies without leaving a son:

– his daughter becomes his heir, at first without further conditions (early documentary evidence),[169] later on the condition she is unmarried (later documentary evidence[170] and Code of Hammurabi). Comparison with the link with marriage in general seems to suggest that the daughter will not become heir to her father's estate if she is married.

In all situations, the idea is that the daughter's share in her father's estate consists of the *šeriktum*, dowry, and only if she does not receive a *šeriktum* (because she will remain unmarried) can she be an heir (even alongside her brothers). This means that marital status determined whether a daughter could be heir to her father's estate at his death. This clear link with marriage connects the Mesopotamian material with the Biblical evidence, although the notion of granting the unmarried daughter a share in the paternal estate *alongside her brothers* seems to have been alien to Biblical thought. There, only in the case of a man leaving no sons can a daughter become her father's heir.[171]

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[169] Gudea (Lagash) 2150 BCE. See 253 above.

[170] Ur III legal texts (on position of daughter and concerning disinheritance of daughter upon marriage); see 253–254 above.

[171] Ben-Barak mentions the daughters of Job, as a possible example of daughters inheriting with their brothers ("Inheritance by Daughters," 27–28). Regardless of the remarks she herself makes to the usability of this example as showing practices of inheritance law in ancient Israel, I think one can question whether it refers to a case of intestate succession. The very mention of Job giving his daughters inheritance with their brothers suggests that we are here dealing with a case of testate succession. This means that the example of Job's daughters does not tell us anything about intestate succession at the time and does not suggest that daughters could have a right to inherit their father's estate in case they had brothers. It was precisely the phenomenon of dispositions of property by deeds of gift, bequests and wills that we find in ancient Near Eastern societies which suggests that those benefiting from such dispositions would have no rights (wives) or limited rights (daughters) based on intestate successions in those societies. (With limited I mean rights that are related to certain conditions or positions, as opposed to the rights of, for example, sons that were unrelated to conditions and positions.)

Anatolia and the Levant

Hittite Laws[172]

This body of law (c. 1500 BCE)[173] was originally probably preserved on two clay tablets, since scribes refer to two tablets distinguishing them by giving the opening words.[174] A third tablet must have existed but has not been discovered so far.[175] The available text contains numerous rules regarding compensation for bodily injury, stealing, arson etc. The extant text does not contain a specific section on law of inheritance or succession but only three provisions that could be linked with inheritance and succession are found dispersed through the corpus. HL 27 regulates what happens after the wife dies (who inherits her dowry),[176] HL 192 regulates what happens if the husband dies[177] and HL 171 is 'a obscure provision, apparently concerning the disinheritance of a son by his mother.'[178] None of these rules concern the position of the daughter.

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[172] For the text of the Hittite Laws see Roth, *Law Collections*, 217–240.

Richard Haase disputed the use of the word laws for this corpus: 'HL are not in the nature of a modern statute, in the sense of a juridical text issued by a sovereign body in accordance with the constitution. The "Laws" give no indication that they were issued by a ruler. Nor do they accord systematic treatment to any of the matters that they regulate, although the treaties demonstrate that the Hittites were capable of dealing with specific topics in a comprehensive way' ("The Hittite Kingdom," in *A History of Ancient Near Eastern Law*, 619–620). Since I do not limit the use of the word law(s) to laws 'issued by a sovereign body in accordance with the constitution' I will use the word laws for the Hittite laws as well. It is important, however, to keep in mind that the laws are less structured and comprehensive than, for example, the Babylonian laws. This could indicate that the corpus is really a collection of legal verdicts, and indeed the outcome of individual trials is mentioned in several instances and corrections are made in the text regarding rules (that had probably been outdated by new ones) and the level of fines; see Haase, "The Hittite Kingdom," 620.

[173] The corpus seems to consist of texts denoting different stages in the development of the legal system. The fourth and perhaps final stage is attributed to a king who ruled around 1500 BCE. See Haase, "The Hittite Kingdom," 623.

[174] Tablet: If a man and Tablet: If a vine, see Haase, "The Hittite Kingdom," 620.

[175] This is known from a label found, *AboT*, 52; see discussion in: Schreiber, *Jewish Law*, 95ff. Also see reference to yet a fourth tablet (KBo IV 4; Haase, "The Hittite Kingdom," 621).

[176] The man takes her dowry, but 'if she dies in her father's house and there [are] children, the son(s) is/are his, but the man shall not [take] her dowry' (Roth, *Law Collections*, 221).

[177] Haase only refers to HL 192, while HL 193 also arranges for a situation where the husband dies. It seems likely both should be read in conjunction: see discussion.

[178] Haase, "The Hittite Kingdom," 640. See Roth, *Law Collections*, 234, the rule seems to pertain both to disinheritance and reinstitution as heir. See Roth's notes 54 and 55 (on 239–240) about the obscurities in the text and the most likely interpretation.

HL 192 is a difficult provision as various versions have different readings. The first and generally accepted reading is: 'If a man's wife dies, he may take her sister as his wife. It is not an offence.'[179] Obviously, this rule does not apply to inheritance but to permitted and forbidden unions as discussed in the previous rules. However, another version reads: 'If a woman's husband dies, the wife shall take the man's inheritance share.'[180] This version can also be read to yield: 'If a woman's husband dies, the husband's partner shall take his wife.' Haase commented on this that: 'The rationale for this rule may be for the partner to maintain the enterprise, in that by marrying the widow he receives her inheritance.'[181] The rule would then be related to the next: HL 193 where it is said that 'If a man has a wife, and the man dies, his brother shall take his widow as wife. (If the brother dies,) his father shall take her. When afterwards his father dies, his (i.e., the father's) brother shall take the woman whom he had.' Read in combination, the rules seem to imply that normally when a man died the brother of the man would marry the widow, but if there is a business partner he has the first right to marry the widow.

> In other words, among the Hittites the economic motive of preserving the wife's dowry in the family of her husband (which motive probably lies behind all the levirate laws known in the ancient Near East) was restricted by the prior right of his business partner. This protection of the interests of a business partner is also reflected in other laws, where the exemptions from *luzzi* etc., once covered not only a man but also his business partner(s).[182]

Concerning inheritance in the Hittite laws in general, Haase also notes that 'the land grants . . . contain an inheritance element. If claims of ownership may not be made against the donee and his descendants, then it amounts to transfer of the estate; the donee is the equivalent of an heir' ("The Hittite Kingdom," 640). Of course 'heir' then denotes heir by way of testate succession: the land grant is a gift that serves like a will.

[179] See Roth, *Law Collections*, 236 and Harry A. Hoffner Jr., *The Laws of the Hittites: A Critical Edition* (Leiden: Brill, 1997), 151. Also see Goetze, A., "The Hittite Laws," in *Jewish Law and Decision-Making*, 99: 'If a man's wife dies [and] he marries his wife's sister, there shall be no punishment.'

[180] See Roth, *Law Collections*, 240, n. 62 and Johannes Friedrich, *Die hethitischen Gesetze* (Leiden: Brill, 1971), 85: 'Wenn einer Frau der Mann stirbt, nimmt des Mannes (Erb-)Teil seine Gattin.'

[181] Haase, "The Hittite Kingdom," 640.

[182] Hoffner, *Hittite Laws*, 226. The laws referred to are laws 50–53, where it is determined that the associates of a man who is exempted from *luzzi*-services were formerly exempted as well. Apparently that situation does no longer apply, so that the associates do have to render *luzzi*-services.

The institute of levirate marriage is also known from Biblical law. There it is applied to cases of a man dying without an heir and clearly serves the purpose of producing an heir for the deceased, to inherit his property and carry on his name.[183] Here in HL 193 there is no reference to lack of children/heirs.[184] The reason for a brother or other male relative of the deceased to marry the widow will then most likely be property related. Indeed, the sequence described, brother of deceased, after his death father, after his death brother of father, is the usual sequence for succession in Near Eastern law. The implication would be that the wife was heir to her deceased husband's estate, the same implication as conveyed by an interpretation of HL 192 based on a business partner marrying the widow. It is unclear why the wife would have such rights to the estate. It seems more likely that the idea behind the levirate marriage of HL 193 was that the wife would eventually bear a son who would carry on the deceased's family, name and property.[185]

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[183] See Deut 25:5–6.

[184] See Trevor C. Bryce, *Life and Society in the Hittite World* (Oxford: Oxford University Press, 2002), 131–132. His suggestion is that the rule did not see to levirate marriage as a means to 'perpetuate the name and family of the dead man, and also to preserve his estate within his family' but 'it seems that the Hittite law's main concern here, as elsewhere, is to ensure that the widow is adequately provided for after her husband's death. Special provisions were made in various Mesopotamian laws for protection by the state of widows and orphans. In Hittite society, such responsibility was largely shifted to the extended family. Here the onus is on the dead husband's family to provide for the widow. Moreover, perhaps the main reason for inserting the clause at this point is to emphasize that this responsibility may be fulfilled without violating the list of prohibited sexual relationships.' True as this may be, I think there is a significance in the fact that 'the onus' is put on the dead husband's family and not, for example, on the family of the widow (return to the father's house). In the latter instance, the widow could marry another man outside her deceased husband's family. By laying down the rule of HL 193, however, it is ensured that the widow will marry a male relative of her deceased husband. The reason behind this must, in my opinion, have had some kind of link with inheritance. This could denote that the widow herself had a share in her husband's estate, or that the children the widow would bear would eventually carry on the deceased's name, family and property.

[185] The obligation for the male relatives of the deceased to marry the widow could cause polygamy, as these men could very well be married at the time of death of their brother/son/nephew. This means that whereas the other evidence indicates Hittite society was probably monogamous, this arrangement could create exceptions to that rule. Nevertheless, it is uncertain in what way the obligation functioned in everyday life and we cannot make any definitive statements about monogamy or polygamy in Hittite society (see Bryce, *Life and Society*, 132–133).

Emar

Emar, modern Meskene in Northern Syria, has yielded over five hundred legal documents, in the form of cuneiform tablets, excavated both at structured and illicit excavations. The texts date to the thirteenth and twelfth century BCE. Most of them concern private legal transactions, although there are also some royal orders and a few records of litigation. 'Our knowledge of inheritance law comes entirely from testamentary documents,'[186] which means we do not have direct evidence pertaining to intestate succession. The law governing inheritance can only be inferred from the documents: we see that grandsons inherit in the absence of sons, while in the absence of direct descendants the deceased's brothers inherit. For my argument here it is important to note that Westbrook regards brothers as incorporating more distant family members, 'possibly members of the same clan.'[187] This clan idea is at the heart of the Biblical arrangements for inheritance as contained in Num 27 and 36.

Testate succession obviously served to appoint those heirs who could not be heirs by intestate succession. In this group we find both wives and daughters. Without a testament, a daughter was considered to have received part of her father's property when she received her dowry. This means that the married daughter did not have a share in her father's estate. That a testament could change this can be seen in the case where two daughters, one married, the other unmarried, are to divide their father's estate.[188] It is important to note what happened to the property after the daughter had received it. It is seen in documents that the daughter could 'pass on the inheritance to her offspring or dispose of it

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[186] See Raymond Westbrook, "Emar and Vicinity," in *A History of Ancient Near Eastern Law*, 657.

[187] See Westbrook , "Emar and Vicinity," 676–677.

[188] Emar 31, referred to by Westbrook ("Emar and Vicinity," 679), also referring to TBR 80 which 'records such a division (in equal shares).' Beckman concluded that 'it is significant that a married daughter could still inherit property from the family fund,' giving this text, Emar 31, as an example (*Emar. The History, Religion and Culture of a Syrian Town in the Late Bronze Age* [ed. M.W. Chavales; Bethesda, Md.: CDL Press, 1996], 73). Of course 'inherit' here does not necessarily mean 'inherit based on the law of succession.' When a share is granted to a person in a will it is unclear whether the person would have inherited without the will: it might be that the person would have been heir based on the law of succession but for another share, or that the testator wanted to bestow certain property unto a particular heir. This means that wills in themselves do not prove that the person concerned would have been heir based on the law of succession. Nevertheless, the fact that daughters are usually granted shares either by gift or by a will does suggest that their position based on the law of succession was less secure than that of sons.

like a son'; Westbrook gives three documents as reference: 'Emar 32 and 128—sole heir; 185.'[189] I note that Emar 32 and 128 are different in this respect that in both cases the testator says that there is no other natural heir but that in 128 there is another daughter mentioned.[190] This means that in both cases a daughter is indeed designated sole heir but that does not necessarily mean that she is the only descendant. In Emar 128, the testator leaves two girls, of whom the first mentioned is made heir while the other is to receive a defined part of the inheritance. This means that Emar 128 actually comes closer to Emar 185, where the testator also decides what shares his children are to have in his inheritance. In the case of 185, however, there is no mention of a designation as sole heir. It is important to note that although none of the daughters is designated as sole heir, it is clear that the testator means one of them to inherit and the other not. He determines that if daughter X dies without offspring, daughter Y will inherit, but if daughter X dies while she has offspring, daughter Y will not have any right to the paternal estate.[191] This implies that daughter X is heir to the exclusion of daughter Y while daughter Y can only inherit if daughter X has died and left no descendants. The most important thing about this is that daughter X is not designated in the document as heir. The only arrangement regarding her position is that if she dies childless, her share will pass to her sister. Since daughter Y obviously has no inheritance rights as long as her sister (or offspring of this sister) is alive, we can hardly assume that this text shows that daughters could inherit by way of intestate succession: X is obviously heir but Y is not. The question is, of course, why X is and Y is not. One could assume that the arrangement in itself implies that X is sole heir, while Y can only take her place under certain conditions, that is, that by the arrangement the testator implicitly made X his sole heir. However, this is not said in so many words, as happens in, for example, Emar 128, where there are also several daughters of whom one is made sole heir. The explicit designation found there is lacking here. This could imply that X is heir for another reason, namely by way of intestate succession. If we assume that X was unmarried she might have had a right to inherit

[189] Westbrook, "Emar and Vicinity," 680.

[190] See 32 and 128 in Daniel Arnaud, *Recherches au Pays d'Astata Emar VI.3. Textes sumériens et accadiens* (Paris: Recherches sur les Civilisations, 1985–1986). In 32 a mother names her daughter as sole heir (lines 9–10). There are no other children mentioned in the extant text. In 128 a mother names her daughter as sole heir (line 7), but another daughter is mentioned in line 8.

[191] See 185 in Arnaud, *Recherches,* 198, lines 9–18.

a share alongside her brothers. Three brothers are mentioned in the text, none of them is explicitly designated as heir. Of all of them the testator says that 'they are my sons' or 'he is my son.'[192] This could be taken to mean that they are his heirs as well. In that case, the unmarried daughter might have a share alongside them. If we assume that daughter X was unmarried and Y married, this would mean that X was heir but Y was not. Therefore, Y has no rights based on inheritance, while X does. Nevertheless, it is odd that the arrangement is made that Y can inherit if X dies *without offspring*. One would assume X's share to go to her brothers in that case.[193] It is also odd that offspring would be mentioned at all if X was indeed unmarried and thought to stay that way (compare the case of the priestess in Babylonian law). Therefore, it is not clear why X is given inheritance rights while Y is not and why Y is made heir in X's place if she dies childless.[194]

A different institution found in the documents from Emar is that of giving the daughter the legal status of a male. The father is then

> said to establish her as "female and male" (*munus u níta*). In most cases she is called upon to "invoke my gods and my dead." Male status is therefore granted to enable a daughter to perform the ancestral cult—a task otherwise reserved for the eldest son, and one that is closely linked to his inheritance of the family estate.[195]

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[192] Lines 7–8 and 19–20.

[193] Compare the requirement for a *qadištu* priestess to bequeath her share to one of her brothers (see ASJ 13:23; Westbrook, "Emar and Vicinity," 680).

[194] It is important to note that this document does not make it clear what position the daughters would hold if there had been no document at all, i.e. if intestate succession had applied. If a daughter could indeed have a share alongside her brothers, this would indicate a different situation from what we find in other systems (for example in Babylonian law). But I stress that the daughter's status, married or unmarried, is not clear and therefore we do not know whether the situation did resemble Babylonian law (where the unmarried daughter could inherit alongside her brothers). I have noted, however, that it would be odd to discuss the instance of there being no offspring in case a daughter was meant who was unmarried and thought to stay that way (like the Babylonian daughter-priestess). Therefore, it seems likelier that the daughter concerned (X) was a married daughter. In that case, the testator obviously favoured one of his daughters over the other, making her heir, while the other daughter could only inherit in case the chosen daughter died (without leaving any offspring). The reason for favouring one daughter over the other could be that X was the eldest: it was common practice to give the eldest son a preferential share in the inheritance. However, here we clearly find an instance where the supposedly eldest daughter is not granted with an extra share but with all of the inheritance. It is, in any case, not possible to deduce from the text why the arrangement was made this way.

[195] Westbrook, "Emar and Vicinity," 680. Also see Thomas R. Kämmerer, "Zur sozialen Stellung der Frau in Emar und Ekalte," *Ugarit-Forschungen* 26 (1994): 173 for all

I think there is a difference between the cases where the father makes a will to give his daughter part of his estate and these instances where the daughter is almost put in the place of a son-heir. In the first instance the daughter is enabled to share in the inheritance while in the second she will become heir by virtue of assuming the identity of the eldest son. This was obviously done in cases where there was no son to perform the ancestral cult, or there was a fear of him dying before his father. One of the documents is even made out under the condition that the brother of the girl-donee will not survive his father. If he does, he will be obliged to marry her off.[196] This arrangement assumes that in that case, the son will have the position of heir and only be obliged to perform the task of a brother to his sister in marrying her off. This means that the daughter is only appointed male (thus heir) on the condition that there will be no male offspring at the time of her father's death. This is important because it shows an awareness of the need to have a child, even if it is a girl, inherit the paternal estate and perform the duties that are connected with that. The importance of that latter aspect, the performance of duties, can be seen in a document where a girl is designated both male and the mother of her three younger brothers, to ensure that she can undertake duties they cannot undertake because of their age.[197] In yet another instance the daughter is required to marry off her younger brothers while she inherits a share alongside them. This means that the daughter is effectively made co-heir alongside her brothers, assuming the responsibility of the eldest son. In this instance, she is not specifically instituted as a male but accepted as heir by the arrangements the father makes in the will. Her duty to marry off her brothers is obviously a duty normally resting on the eldest son.[198]

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formulas found concerning the position of the daughter named as 'father and mother' of the family, son or both 'woman and man.'

See Ben Barak, "Daughter as Heir," *passim*, for a comparison of the situation in Nuzi and Emar, especially 95–96 for similarities and differences and the possible reasons for having such an institution (of having a daughter become son-heir) in comparison with other solutions in other Near Eastern cultures. Also see discussion of Nuzi material above, 267–271.

[196] Westbrook, "Emar and Vicinity," 680.

[197] ASJ 13:25; see Westbrook, "Emar and Vicinity," 680. Ben Barak discusses the possibility that the sons were really sons of both father and daughter, that is, offspring of daughter and father, but she rightly rejects this interpretation saying: 'it is hardly possible to make such [a] startling assumption' (Ben Barak, "Daughter as Heir," 95).

[198] Emar 181; see Westbrook, "Emar and Vicinity," 680. See text and translation in Arnaud, *Recherches*, 194–195. This is an interesting instance as there are two sons and one daughter. A son is mentioned first, then the daughter, then the other son. For each of

In all cases it seems clear that in the absence of a son a daughter is preferred as heir and undertaker of religious duties over other possible heirs (such as more distant family members). This resembles the preference for the daughter over the brothers of the deceased we find in other laws as well. The important difference here is that the daughter is not assumed to be heir in the absence of sons (no preference of offspring, whether male or female, over more distant family members) but has to be appointed as such by her father during his lifetime. If this happened, the daughter could undertake all obligations that normally rested on the eldest son (including marrying off her brothers). It is interesting to note that this happened even if there were sons. The daughter then received a share alongside them.[199]

Alalakh

'Alalakh, modern Tell Atchana, lies on the direct road between Aleppo and the Mediterranean, in the Amuq plain, which today occupies the major part of the Turkish province of the Hatay.'[200] The evidence consists of cuneiform tablets, most of them written in Akkadian, which come from two archives, dated to two different periods. Consequently, the evidence is designated as Alalakh level VII and Alalakh level IV, dating to the seventeenth (contemporary with the Old Babylonian Period) and fifteenth century BCE.[201]

Concerning the material from level VII, it is said that 'these documents leave no doubt that sons as well as daughters were entitled to

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them a share in the inheritance is determined. This means that the daughter is effectively made heir (apparently as if she were a second son).

[199] Arrangements were obviously made to prevent strangers from getting their hands on the family property. We find examples of testators determining that their wives had to be supported by their sons and that when the sons did not do that, the wife was to seek help from a relative of her late husband (see Beckman in *Emar. The History, Religion and Culture of a Syrian Town in the Late Bronze Age*, 74–75). This prevents the widow from undertaking another marriage which could endanger the family property. In this respect it is important to note that a wife's dowry was to be inherited by her sons after her death. Another marriage could prevent this and that was obviously unwanted. Also see Ben-Barak, who refers to a clause in sources from Nuzi, Arraphe and Emar that 'the father's wife is to be dispossessed and expelled from the household, should she remarry' (Ben Barak, "Daughter as Heir," 95).

[200] Ignacio Márquez Rowe, "Alalakh," in *A History of Ancient Near Eastern Law*, 693.

[201] Edition: Donald J. Wiseman, *The Alalakh Tablets* (London: British Institute of Archaeology at Ankara, 1953). Not all the material has been published yet, see Richard S. Hess, "A Preliminary List of the Published Alalakh Texts," *Ugarit-Forschungen* 20 (1988): 69–87.

inherit the paternal estate.'[202] This remark could cause confusion as it could be read to mean that sons and daughters were entitled to inherit the paternal estate *on the basis of law, by way of intestate succession*. I think, however, that the documents point to exactly the opposite conclusion: they testify to arrangements of testate succession, of a division of shares by the father during his lifetime. See, for example, AT 9, which refers to 'my father's will.'[203] In AT 95, it is not clear whether the share referred to concerns a share in an inheritance based on law of succession or on a testamentary division.[204] Two other documents clearly refer to disputes over divisions made by the testator during his lifetime. For example, in AT 11, a sister brings a lawsuit against her brother claiming that her father assigned a certain share in the inheritance to her. The term used for assignation seems to have denoted 'the disposition of one's property to take effect after death.'[205] That a father could assign a share to a daughter does not mean that she is entitled to inherit. On the contrary, it could denote that she was not and that the disposition was used to grant her a share anyway. In this respect it is important to note that a significant number of the cases concerns suits between brothers and sisters. This could mean that the daughters' right to inherit was disputed. This is, however, difficult to determine as the text is often damaged. For example, in AT 7 a brother and sister bring a legal case.[206] The brother's point of view is given first, implying that he instituted the case against his sister claiming that 'Bittatti has nothing to do with this house.'[207] Bittatti disputes this, but unfortunately her words are damaged and it is unclear why she claims to be entitled to the property. She speaks about 'a portion which is over…,' then suggests that they will share 'the house of our father' together. Bittatti thus does not claim the entire house but

[202] Márquez Rowe, "Alalakh," 699.
[203] Wiseman, *Alalakh Tablets*, 37.
[204] Wiseman, *Alalakh Tablets*, 55. Bel zittim, line 21, means 'owner of a portion.'
[205] The same term is used in AT 6, a will; see Márquez Rowe, "Alalakh," 700. AT 6 should probably be related to AT 86 and 96, two gifts, used to transfer parts of the paternal property and with AT 95, a dispute about property, already referred to above (see Márquez Rowe, "Alalakh," 701, n. 20). Gifts were used to divide paternal property during the lifetime of the donor. Since the royal family is concerned here, we are dealing with 'hereditary transmission of royal inheritance shares' (Márquez Rowe, "Alalakh," 701, n. 20; a practice that, I add, may differ from succession practices among ordinary people). The shares concern land and cities, of the latter it is sometimes determined that they will be transferred 'exempted from services' (Márquez Rowe, "Alalakh," 701).
[206] Lines 3–4: 'Abban with Bittatti his sister brought a legal case.' See Wiseman, *Alalakh Tablets*, 34.
[207] Lines 5–6.

wants to share the house (presumably) equally. A certain Abiadu whose part in the entire deal is not clear gives witness that 'Bittatti had a share in the bequeathed property' but he does not state why. The king then judges that the son is entitled to choose first what part of the house he wants to have and the daughter is obliged to take what is left.

I think it is most likely that Bittatti was entitled to a share on the basis of some disposition her father made, although this is not stated in so many words in the extant text. The fact is that both the daughter and the witness testify to her right to a share in the property of her deceased father. Bittatti interprets this right as a right to share in the property with her brother, while he states that she has no right whatsoever. I emphasize that the son-brother does not support his claim but makes a mere statement his sister is not entitled to the property. Despite the lack of any evidence of his right to the property, this right is acknowledged and obviously preferred over the daughter's right. She does get something of the property but only after her brother has made a first choice. This suggests that the law secured the son-brother's position, i.e. that he was sole heir on the basis of intestate succession. Only because the daughter could prove that she was entitled to a share too, could she get part of the property. Obviously, her right depended on some kind of disposition the deceased made during his lifetime.[208]

This example shows that a dispute like this one does not prove that daughters had inheritance rights comparable to sons. On the contrary, it seems to show that they did not.[209]

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[208] The deceased might have been the girl's mother, see Ben Barak, who explains that this might have been a case of a paternal estate that was first owned (or perhaps only controlled) by the wife-mother, while the son and daughter dispute the way it should be divided after the mother's death ("Inheritance by Daughters," 30). The position of the daughter can then have been based on arrangements by the father during his lifetime (determining what should happen to the estate after his wife's death) or by the mother. Because of these complications this case is not the best one to argue for the position of the daughter towards her father's estate.

[209] See Ben-Barak, "Inheritance by Daughters," 30, who concludes concerning this text that 'the fact that at Alalakh daughters could inherit part of the family patrimony, even when there were male heirs, may not have been considered a natural right but could have been made possible by a special legal injunction by the head of the family.'

I do not agree with her conclusion though that 'there does seem to have been a more progressive attitude to the inheriting daughter although she had not yet attained a fully equal position in the inheritance' ("Inheritance by Daughters," 31). I do not think that a text like this shows 'a more progressive attitude.' Ben-Barak probably stated this because she classified the case in the text as a case of 'daughters inheriting after sons.' This category can be interpreted in two ways: as a case of a daughter inheriting while there is a son, and I think this is what Ben-Barak means (even though there is a male heir

I will not discuss the level IV documents in detail as there are a number of difficulties with the interpretations of this material. For instance, I do not believe that AT 87 concerns a division of an inheritance, as Márquez Rowe argues.[210] It seems to me it is rather a transfer of property in which several persons and their property seem to be included. It is not clear either whether a female person mentioned in this text was a daughter or a daughter-in-law. Márquez Rowe notes 'Indeed, the marriage documents attest to the fact that daughters and daughters-in-law could also receive a share of the estate of the head of the family, namely through dowry.'[211] If this is true, the daughter or daughter-in-law would receive the share through the dowry and would not have a right to inheritance later on. Therefore, when understanding AT 87 as a division of inheritance, like Márquez Rowe does, it is not likely that a share will be granted to a (married) daughter or daughter-in-law there, but to an unmarried daughter. I refer to Wiseman's original interpretation of the text, in which he took this female person to be 'the eldest of the marriageable daughters.' The idea that the daughter is not yet married and therefore qualifies to receive a share in the paternal estate fits with the evidence found in other laws and legal documents discussed above.

Márquez Rowe further mentions a marriage contract in which a clause seems to determine what will happen to the property of the wife 'there being no son and no daughter.' As Márquez Rowe notes, 'this suggests a right of inheritance in daughters, perhaps in the absence of sons.'[212]

Ugarit[213]

Ugarit was the capital of a North Syrian Kingdom that flourished around 1500 BCE. No codes of law are found, only legal documents both for domestic and international use. Of the first group two-thirds are royal deeds. Some types of document are conspicuously lacking, for example, the marriage contract. The documents that concern inheritance do not present univocal evidence with regard to the position of the daughter. On the one hand, daughters are not mentioned as co-heirs in divisions of paternal estates, but at the same time there is an instance of co-owner-

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the daughter still receives a share) or it could also be understood as 'daughters inheriting in a position after sons, but still based on the law of succession,' thus equality not fully attained. This notion is conjured up by Ben-Barak's statements 'a more progressive attitude towards the inheriting daughter' and 'not yet attained a fully equal position in the inheritance.' I think, however, that what this text shows is nothing new. After all we have a brother who flatly denies his sister any rights to the inheritance (which suggests, as stated above, that he was the sole heir based on the law) and a sister who can only claim something with an appeal to an arrangement or disposition by the deceased. This means that the daughter still has no claims (not even inferior ones!) *based on the law of succession*.

[210] See Márquez Rowe, "Alalakh," 712.

[211] See Márquez Rowe, "Alalakh," 712.

[212] See Márquez Rowe, "Alalakh," 712.

[213] For a discussion of all the material see Ignacio Márquez Rowe, "The Legal Texts from Ugarit," in *Handbook of Ugaritic Studies* (ed. W.G.E. Watson and N. Wyatt; Leiden: Brill, 1999), 390–422.

ship of a daughter and her adopted brother.[214] The document is discussed by Miller in his dissertation about the juridical texts from Ugarit, where he concludes that

> it is a woman . . . who owns the estate to which the adoptee brings numerous properties which they are to share. Line 5 suggests that they are legally to be considered equals. However, just as in text #8 [RS 16.344] the adopted brother loses his right to the estate if he breaks contract. On the other hand, if the adopter [the woman] initiates the dissolution, she is liable for a sum of money paid to her "brother", plus she must split their common possessions between them.[215]

The question is in my opinion whether this co-ownership that concerns the adoption the document records has anything to do with (intestate) succession. I get the impression that it is the daughter who is (or would be) sole heir, while the adoption ensures that she has to share the estate with her adopted brother. Therefore, I think that the document supports the idea conveyed by the other documents that daughters do not inherit alongside brothers. In this case, however, the daughter obviously did not have a brother. The idea behind the document is that in that case the daughter was heir to the entire estate. The adoption arrangement in the document changes this to a situation where the daughter has to share the estate with the adopted brother. But this does not mean that a daughter inherited alongside brothers. In the case concerned the daughter—only child is sole heir, while she has to share the estate with someone who is appointed her brother in a later instance. This means that RS 21.230 does not show that daughters could inherit alongside sons but just the opposite: that daughters inherited if there were no sons, i.e. no male heirs. If a male heir was added later by way of adoption, the daughter maintained a claim to her father's estate, which comes down to half of what she was originally entitled to. Consequently, the document does not show that a daughter gets a share, but that she actually loses half of the estate to her new adopted brother.

In his discussion of inheritance law in Ugarit, Márquez Rowe states about daughters that 'they possibly could have rights on intestacy in the absence of brothers (cf. the provision in the gift of paternal property RS

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[214] RS 21.230, mentioned by Márquez Rowe, "Ugarit," in *A History of Ancient Near Eastern Law*, 730.

[215] Gerald I. Miller, "Studies in the juridical texts from Ugarit." Ph.D. diss., Johns Hopkins University, 1980, 243–244. Additions-explanations in square brackets are mine.

15.138+/109+).'[216] This could support my conclusion about RS 21.230 that the daughter was the original sole heir (instead of heir alongside the adopted brother). However, I do not see how the documents Márquez Rowe mentions support his assumption. In RS 15.138 a father bestows his property unto one of his sons, saying that no son or daughter has a claim to it. In RS 15.109 the only mention that refers to inheritance is in the mention of sons and daughters in line 6.[217] This line is broken and relationship with the issue at hand is unclear. Of course it is significant that daughters are mentioned alongside sons, probably to express that they either did or did not have a claim, comparable to the phrase in 15.138. However, I think such an instance does not necessarily imply that daughters had a right to inherit *in the absence of brothers*. This would only be true if the testator made a disposition in favour of an outsider and declared that neither sons nor daughters had a claim to his property. Then we could assume he might have meant to say 'sons or daughters in the absence of sons.' In the documents referred to by Márquez Rowe however, the father bestows his property unto a son. This means that it is certain he has a son and this would exclude daughters from inheriting all together. Since the document also mentions the sons of the favoured son it could be that the testator meant that if the favoured son dies, his male offspring will inherit and not the brother or sister of the deceased favoured son. However, this does not show that daughters could inherit *in the absence of sons*, since the male offspring of the son would take his place by way of substitution and strictly speaking we would not have a case of a daughter inheriting in the absence of sons. This means that what the document seems to convey is that when one son is favoured over the other children, those children, whether male or female, cannot come up against the division their father made. This suggests that daughters could have claims to the paternal estate alongside sons. Consequently, it seems that the documents referred to by Márquez Rowe sooner suggest that daughters had certain claims to their father's estate (as possible claims were warded off) than that they imply that daughters inherited in the absence of sons.

In *Handbook of Ugaritic Studies* it is said that 'the position of the woman as heiress of the paternal goods is not so clear, although it can be supposed that, as in other Near Eastern societies and under certain conditions, she could be named as heiress by her father.' This

[216] Márquez Rowe, "Ugarit," 730.
[217] See text in Miller, *Studies*, 119.

observation does not concern the issue of intestate succession, as naming by the father implies testate succession. Indeed, in all Near Eastern societies cases can be found of daughters inheriting paternal goods by way of a legal document. This does not mean, however, that the daughter could also inherit where such a document was lacking, or that she could inherit in case there were no sons. It is important to keep this in mind as the references given, of the other Near Eastern societies referred to, do concern, at times, discussion of cases of intestate succession, for example, in the articles of Ben-Barak.[218]

That the position of women regarding inheritance law is not clear can be seen in instances where a man dies without any legitimate descendants. In RS 15.89, the property passes to the daughter of the deceased's brother.[219] This is interesting, because this could suggest that daughters took the place of their fathers in inheriting what would have been their (the brothers') share in their brother's estate. We do not know whether the daughter concerned had brothers or not, thus whether she can be heir in the absence of sons. In any case, the instance clarifies that women could inherit even an entire estate, possibly in the absence of other heirs.[220] Because the document concerns an act by the king, we cannot be sure that the disposition follows law of succession, i.e. that the niece was the legal heir according to the law of intestate succession, or whether the king decided to what relative the estate was to go. It seems likely that the order of succession was followed. The position of the niece towards her uncle's property suggests that daughters could inherit in the absence of sons.

Regarding the position of the married daughter it is worthwhile to look at RS 17.149.[221] In this text a man purchases a field which formerly belonged to the father of his wife: 'Formerly this field belonged to Izaldu, the father of Pidda, and now the field returns to Pidda and. . . .'[222] Ben-Barak suggested this could indicate that the act of the husband in buying

[218] Since Ben-Barak investigates the position of the daughter she discusses both references to intestate succession (for example in early Mesopotamia, see 253–255 above) and documents that give provisions for testate succession (for example in Nuzi and Emar, see 267–271 and 277–281 above respectively).

[219] Referred to by Márquez Rowe ("Ugarit," 731) and discussed by Miller, *Studies*, 85–86. Miller regards this type of document as a confirmation of ownership 'in which the king "grants" title and privileges to certain patrimonial estates' (85).

[220] Miller, *Studies*, 144, n. 142: 'The property is being transferred from an uncle to his niece. The uncle, Ili-salimu, is identified as a *nayyālu*. It may well be that Ili-salimu did not have any legal heirs, and the king was now transferring his estate to his niece.' On the term *nayyālu* (possibly denoting a person who died without legitimate descendants), see Márquez Rowe, "Ugarit," 731, especially n. 35.

[221] The sole example from Ugarit mentioned by Ben-Barak in her article "Inheritance by Daughters," 22–33.

[222] Lines 24–27.

the field was actually 'an act of restoration.'[223] The daughter might have been an only child, that is, rightful heir of Izaldu and the purchase of the property could have been a restoration of property to the daughter in that capacity. However, although the emphasis in the text on the return of the field to the daughter of the former owner is obvious, this need not denote that there was any real right of the daughter to this field. Even though people might have felt it was right that the field returned to the daughter of the man who originally owned it, this need not imply that any legal right of the daughter to own the field was underlying the transaction. In fact I would think that the purchase by the husband indicates that this was not the case. If the daughter had a right, this would have come into being at the death of her father and would not require any further legal act. Therefore, I tend to agree with Vita, who would rather understand the text as a sale unrelated to inheritance issues.[224] This means that the fact that the daughter is married need not affect our understanding of inheritance and succession in Ugarit.

Gifts mainly concern royal grants of real estate. 'As for the non royal gifts, women appear relatively regularly as recipients, from the husband (e.g., RS 16.253) or from the father-in-law (RS 15.85), perhaps as a means to compensate them for their secondary status in intestate succession.'[225] The gift from the husband of course concerns the position of the wife towards her husband's estate and will not be discussed here. RS 15.85, however, does not concern a gift from a father-in-law but from a brother: 'This transfer grant was likely a marriage gift from Niqmaddu to his sister, Dalaptu.'[226] The link with marriage there is interesting in that the gifts from the Judaean Desert papyri can also be linked with marriage. This means that gifts were not as Márquez Rowe styled it 'a means to compensate them for their secondary status in intestate suc-

[223] Ben-Barak, "Inheritance by Daughters," 24.

[224] Juan-Pablo Vita, "The Society of Ugarit," in *Handbook of Ugaritic Studies*, 481, n. 184. He speaks of a more moderate view on Ben Barak's part in a later article ("Daughter as Heir," 88), where she states that a woman 'was given first option in the purchase of a certain field, for the reason that the said field had previously been part of her father's patrimony.' As I just argued, this course of action is not linked with matters of inheritance as the daughter does not act based on any right she holds on the basis of intestate succession.

[225] Márquez Rowe, "Ugarit," 731–732.

[226] Miller, *Studies*, #15, 45, see 132, n. 67.

cession'[227] but that gifts were used at specific occasions (like marriage) to compensate consequences of the marriage for intestate succession. A brother might bestow a gift on his sister, because she could not inherit in any case (alongside a brother), but it might also be that she could not inherit anymore once she was married. The evidence from Ugarit provided by the documents discussed above is not completely conclusive to this point.

Overview in chronological order

Law of Alalakh

Level VII: 17th century: documents seem to show that daughters could receive a share through a disposition by the testator, apparently no right to inherit based on the law of succession;

Level IV: 15th century: documents seem to indicate that daughter received a share in the paternal estate through dowry; an arrangement in a marriage contract determining what would happen if there is no son or daughter born from the marriage, could indicate that daughters were entitled to inherit the paternal estate, probably if there were no sons;

Hittite laws (c. 1500): no arrangements concerning position of daughters in extant text;

Law of Ugarit (c. 1500): daughters can inherit on the basis of arrangements in legal documents, no univocal evidence as to intestate inheritance (regarding the obvious choice for arrangements by way of documents the daughter probably did not have inheritance rights based on intestate succession);

Law of Emar (1300–1100): daughter can be appointed heir, or even made 'female and male' giving her the status of a son-heir, this could be due to the consequences of having a daughter inherit (son-in-law can have property transferred into his family, see discussion above); compare Mesopotamian Nuzi discussed above.

Conclusions

It is obvious that the evidence does not paint the same picture as in the case of Mesopotamia where the solution for the position of the daughter

[227] Márquez Rowe, "Ugarit," 732.

is found in most cases in denying her claims to her father's inheritance once she is married (Nuzi is the only obvious exception there). Only unmarried daughters (often also priestesses) can inherit a share in their father's estate. The evidence from Alalakh seems to come closest to this picture as it could be interpreted to relate inheritance to dowry. The support for this interpretation obviously comes from marriage contracts sooner than from documents related to succession. One of the marriage documents even seems to suggest a right for the daughter to inherit if there were no sons.

For the Anatolia/Levant evidence we see that various solutions were offered, of a different nature, like granting the daughter a share in the inheritance alongside her brothers, granting her a certain defined object of her father's estate or instituting her as 'male and female' (which also gave her rights to perform certain duties normally performed by the eldest son). What these various solutions have in common is that they were effected by arrangements in legal documents. From this area we do not have arrangements for the position of the daughter in rules of law, that is, with the exception of the Biblical evidence. Num 36 can be regarded as an addition to Num 27, which is clearly a rule of law of succession. Therefore, the Jewish evidence is the only evidence in this area that presents a general rule that was applicable without the intervention of legal documents.

Excursus: Elephantine

The position of the daughter towards her father's estate and the role of deeds of gift in this context can also be studied for the documents from Elephantine of the fifth century BCE. The exact legal situation there calls for a detailed discussion that is outside the scope of this study.[228] It suffices to say that the character of the material, documents from family archives by Jews, allows for a comparison with the Judaean Desert archives. Illustrative for the position of the daughter under discussion

[228] Elephantine provides an intriguing case as it concerns a Jewish colony on Egyptian territory under Persian rule. The situation is comparable to that of the Judaean Desert in more than one way, as we are not only dealing with family archives in both cases, but the question of jurisdiction is even more pressing for Elephantine than it is for the Judaean Desert. My tentative conclusions so far are that the substantive-formal division can be applied to the documents from Elephantine as well: there are clear examples of applicability of Egyptian formal law, while substantively a strong link with Jewish law can be discerned.

here are three related deeds aimed at disposing of a house to a daughter. The daughter is at first granted with a share in the house, this happens some three months before her marriage. Sixteen years later, another deed of gift is made up that explicitly relates the gift of part of the house to the donor's death (and support in his old age). The same clause might have been contained in the first document of which the end is missing. Porten argued that:

> the first document acknowledged Jehoishma's claim as heir to a share in her father's estate. It is quite clear from the several no-suit claims that daughters might inherit from their fathers at Elephantine. Such acknowledgment was made when Jehoishma married (cf. C 8) because at that time she left her father's household to join that of her husband.[229]

This latter remark suggests a link between marriage and law of succession in this sense that apparently it was deemed necessary to determine at the time of marriage that the daughter would be entitled to part of her father's estate. I wonder, however, whether this could be called a claim based on the law of succession, i.e. whether Porten is right to call Jehoishma's right a 'claim as heir.' A claim as heir, that is, a claim based on intestate succession, does not require any kind of legal act or confirmation. Actually the fact that a right to the property is explicitly given to the daughter suggests that she would not have such a right otherwise. Porten refers to Yaron's discussion of inheritance law in the Aramaic papyri, apparently to support his claims that 'daughters might inherit from their fathers at Elephantine' but Yaron is in fact obviously inclined to believe they did not. Admittedly, Yaron says that the 'small number of documents available demands caution in our conclusions' but continues to state that it seems that a daughter would not be able to compete with the claims of a son or a brother of the deceased.[230] This conclusion is prompted on the one hand by the Biblical evidence, on the other by 'the relatively frequent occurrence of gift in Elephantine, and it is always women who are the donees. This does suggest an inferiority in intestate succession which it was sought to overcome by resort to gifts.'[231] Yaron here follows the logical line of thinking also adopted by Cotton and Greenfield for the Judaean Desert material, that the presence of deeds of

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[229] See Bezalel Porten, *Archives from Elephantine. The Life of an Ancient Jewish Military Colony* (Berkeley: University of California Press, 1968), 229.

[230] See Reuven Yaron, *An Introduction to the Law of the Aramaic Papyri* (Oxford: Clarendon Press, 1961), 68, 67 resp.

[231] See Yaron, *Law of the Aramaic Papyri*, 68.

gifts aimed at daughters suggests that they would not inherit their father's estate. In the instance of the deed of gift concerned here, the very fact that a legal act is made to transfer property, shows that Jehoishma cannot have been heir based on the law of succession, i.e. following a rule of law. However, in the light of the relationship between law of succession and marital status as proposed and proven in this chapter it is important to note when this situation, of transfer of property by way of gift, occurs: at Jehoishma's marriage. This implies that the right this daughter had to her father's estate might have been based on the law before she married, but afterwards it apparently required a legal act (deed of gift). Consequently, rather than assuming this deed of gift acknowledged an existing right (of Jehoishma as heir) it is logical to assume that it served to acknowledge a right to property, based on gift, replacing a right to property based on the law of succession *that had ceased to exist*. Obviously Jehoishma did not have a right based on the law of succession *after her marriage* but she might have had one before. To put it differently, the gift suggests that her position towards her father's estate changed upon marriage and a legal act was needed to counterbalance this, to make sure that she would receive part of her father's estate anyway. In this aspect the evidence from Elephantine is in line with the rest of the evidence from the ancient east.

III. *Conclusions*

Overview combining both Mesopotamia and Anatolia/Levant in chronological order

Laws of Ur-nammu: 2100 BCE: no arrangements in extant text; documentary evidence shows that in the absence of sons *unmarried* daughters could be their fathers' *heir*, and that an adopted daughter who was appointed heir was *disinherited at her marriage*;

Laws of Lipit-Eshtar: 1930 BCE: *unmarried* daughter who is priestess lives in her father's house as *heir*;

Laws of Eshnunna: 1770 BCE: no arrangements in extant text;

Code of Hammurabi: 1792–1750 BCE: whether daughters are incorporated in the general term, *māru*, heirs, is unclear; specific arrangement: *unmarried* daughter who is priestess, shares inheritance with her brothers as *heir*;

Documents show that daughters sometimes act as *heirs* (in sharing the estate with their brothers), in all of these cases the daughters are *unmarried*;

Law of Alalakh

Level VII: 17th century: documents seem to show that daughters could receive a share through a disposition by the testator, apparently no right to inherit based on the law of succession;

Level IV: 15th century: documents seem to indicate that daughter received a share in the paternal estate through dowry; an arrangement in a marriage contract determining what would happen if there is no son or daughter born from the marriage, could indicate that daughters were entitled to inherit the paternal estate, probably if there were no sons;

Hittite laws: c. 1500 BCE: no arrangements concerning position of daughters in extant text;

Law of Ugarit: c. 1500 BCE: daughters can inherit on the basis of arrangements in legal documents, no univocal evidence as to intestate inheritance (regarding the obvious choice for arrangements by way of documents the daughter did probably not have inheritance rights based on intestate succession);

Assyrian Laws: 1400–1100 BCE: no arrangements in extant text;

Nuzi: 1450–1340 BCE: no law code found; documentary evidence shows two phases: adoption of outsider as son-heir, to marry daughter, while grandchildren would inherit; later on adoption of daughter as son, change of legal status from female to male comparable to developments in Emar;

Law of Emar: 1300–1100 BCE: daughter can be appointed heir, or even made 'female and male' giving her the status of a son-heir, this could be due to the consequences of having a daughter inherit (son-in-law can have property transferred into his family); compare Mesopotamian Nuzi;

Neo-Babylonian Laws: 600–500 BCE: arrangement that in case of first and second marriage children from first marriage take bigger share of inheritance, impression could be that both sons and daughters would inherit, but it is not clear whether the word used for heirs could be used for both sons and daughters (see Code of Hammurabi above);

Excursus: Elephantine (Jewish colony in Egypt; 500 BCE): deeds of gift used to grant daughter right to her father's property, issued at her marriage; strong parallel with Judaean Desert material suggesting that the position of the daughter changed upon marriage and deeds of

gift were used to counterbalance the loss of rights based upon intestate succession.

Conclusions

Concerning the position of the daughter towards her father's estate as it appears from the Babatha archive it was repeatedly argued, foremost by Cotton, that the presence of deeds of gift suggests that the daughter had no right to inherit her father's estate, even in the absence of sons. Evidence to support this assumption was found in P.Yadin 23–24 where the guardian of the minor sons of Judah's brother Jesus asks Babatha to prove her right to orchards that belonged to Judah but are registered in Babatha's name. If Babatha cannot provide evidence to her right to the orchards they will be registered in name of the orphans. As Judah's daughter Shelamzion is nowhere mentioned, Cotton assumed that not she, but the sons of Judah's brother were his rightful heirs. In that case, of sons of a brother having a right to inherit over the daughter of the deceased, Cotton claimed that the law of succession prevailing in the area at the time was unlike Jewish law, as both the Biblical evidence of Num 27 and the Mishnaic ruling to the point, *m. B. Bat.* 8:2, decide that a daughter can inherit in the absence of sons.

However, the documents from the Babatha archive give *direct* evidence as to the law of succession current among Jews at the time of these documents. P.Yadin 24:7–8 was restored by Lewis and translated to yield: 'right of the orphans to inherit (?) the said entities from the name [i.e. registered ownership] of Jesus their father.' Obviously, Lewis' interpretation of 'name' as 'registered ownership' makes no sense: the orchards belonged to Judah and were registered in Babatha's name, not in Jesus'. What the clause is meant to convey is that the orphans are Judah's legal heirs, being substitutes for their father who was predeceased; one should translate: 'right of the orphans to inherit the said entities from the name of (i.e. in the place of) Jesus their father.' Consequently, these lines offer us direct evidence as to the order of succession at the time: the minor sons of the brother of the deceased are explicitly described as his heirs. The daughter of the deceased is not mentioned.

Where the presence of deeds of gift alone is not enough to support the assumption that daughters did no inherit their father's estate (as Cotton herself admitted in the most recent publication upon the subject), the direct evidence from the restored lines in P.Yadin 24 shows that in the

case of Shelamzion, Judah's daughter, this daughter-only child did not inherit her father's estate. The question is of course whether this direct evidence should lead to the conclusion that indeed the order of succession as presented here, where children of a deceased brother inherit instead of the deceased's only daughter, goes against Jewish law.

This need not be the case, as the references to Num 27 and *m. B. Bat.* 8:2, adduced not only by Cotton but also by Rivlin in response to Cotton's views, should be complemented with a reference to Num 36. There the matter of daughters inheriting their father's estate is connected with marital status: daughters can inherit as long as they marry someone from their own tribe. This actually implies that the position of a daughter towards her father's estate could change upon marriage: at that moment the daughter could lose her claims based on succession. This addition to the references to Jewish law adduced before is especially significant in the light of the Judaean Desert material, where, as Cotton and Greenfield had mentioned earlier, deeds of gift to daughters are usually made connected with marriage. Contrary to their conclusion that the daughter had no claim to her father's estate whatsoever, the conclusion should be that a daughter's position towards her father's estate could change upon marriage and a deed of gift could serve to counterbalance the loss of claims.

This conclusion is supported not only by the actual evidence in the archives, but also by the position of the daughter towards her father's estate as it can be gleaned from other ancient eastern laws. Indeed, in almost every system a solution was found to ensure that the share that would go to a daughter-heir would not end up outside the family of the testator. This was especially pressing in the case of a testator having only a daughter and no sons to inherit his estate.

In general the position of daughters regarding their father's estate in ancient oriental law seems to have been determined by their marital status: before marriage the daughter held another position than after. This is suggested by material in law codes which only designate the unmarried daughter (who will remain that way) heir alongside her brothers (Code of Hammurabi) and supported by evidence from documents (for example Babylonian ones) where the daughters who do share the inheritance with their brothers are all unmarried. Married daughters obviously had no share in their father's estate. For a full overview of all the material discussed in this chapter I refer to the overview of material presented above.

When we look at the documents from the Babatha and Salome Komaise archives, we see that the daughters are married at the time of their father's death. This would exclude them as heirs and indeed, in the case of Judah's daughter Shelamzion it is clear that the sons of her father's brother were considered her father's heirs. The best way to ensure that a daughter did receive part of her father's property seems to have been a gift. The time of providing the gift, closely following the daughter's marriage, is logical as this marriage changed the daughter's position towards her father's estate. A strong parallel can be found in the archives from Elephantine, where a daughter also receives a right to property upon her marriage, obviously to counterbalance the loss of a right that ceased to exist at the time of the marriage.

The relationship observed in other laws, especially Babylonian law, between dowry and rights of inheritance could suggest that a dowry was considered a share in the father's estate. This could raise the question of why one would still want to use a gift to provide the daughter with part of the estate. In this respect it is interesting to note that the dowry never consists of real estate, while the gifts do.[232] This could mean that there was a sort of system where a daughter received money, items of clothing and adornment by way of a dowry, while a part of the real estate of their family was given to them by way of gift. The difference between the objects concerned in the dowry and the gift suggests that dowry and gift were used in combination to provide the daughter with a share of her father's estate she could obviously not inherit at his death.

That a gift was apparently used to transfer other objects than a dowry did might have been related to the power the husband could have over the object: the objects in a dowry were in a way subjected to the power of the husband (the extent of this can vary)[233] while the objects of a gift to the daughter were not (the husband has nothing to do with

[232] Compare Cotton, who observed regarding the marriage contracts from the Judaean Desert: 'It is noticeable that the dowry never includes real property, which was given to the daughter in a deed of gift on the occasion of her marriage' (Cotton, "Marriage Contracts," 5; also see 244 nn. 78–79 and 245 n. 80 above). In the light of my survey of other Near Eastern legal systems one can conclude that this division between movables and immovables as being transferred unto daughters by dowry and gift respectively is not unique to the Judaean Desert documents, but seems to be a general feature of Near Eastern law.

[233] See small print above, 122–123.

private property of his wife).[234] I point, for example, to P.Yadin 16, where Babatha obviously registers her own property. It has been discussed how she obtained this property and it was plausibly argued that she obtained it by way of a gift, perhaps upon her marriage.[235]

It is in any case clear that the daughter could become owner of various items in various ways: of movables like money and adornment by way of her dowry and of immovables like orchards or courtyards by way of gift following her marriage.

In general we can say that it appears that a daughter would inherit in the absence of a son and probably even in the presence of a son if she was unmarried and would remain that way. This latter rule is explicitly determined for Babylonian and Assyrian law; whether it would apply to Jews is doubtful: the Biblical rule clearly refers to a situation where there is no son. This would mean that in the presence of a son a daughter, whether unmarried or not, would not inherit. However, the link with marriage seems to be important for the case where the daughter might have a claim, thus in the absence of a son. Apparently she had her claim until her marriage, but after that not anymore. A deed of gift closely following (or in Elephantine shortly preceding) marriage sought to counterbalance this by ensuring the daughter would receive some part of her father's estate anyway. This disposition did not change the order of succession (in making the daughter heir, as a will would have done), but it explicitly sought to counterbalance the effect of a change in the daughter's legal status, occurring at her marriage, which placed her outside the order of succession.

This interpretation sheds another light on the evidence found in the papyri from the Judaean desert, as it implies that the position of the daughter in the absence of sons as portrayed there does not necessarily deviate from what one would expect on the basis of Jewish law. To make such an assessment, it is not sufficient to look at Num 27 alone and the later Mishnaic evidence, but it is essential to take into account the relationship between succession and marriage, as it is found in Num 36

[234] Compare Satlow: 'The reason that parents would want to transfer their property to their daughters by deeds of gift rather than dowries is obvious: it kept the property out of the hands of their sons-in-law' ("Marriage Payments," 62; published after present study was completed).

I note that Satlow does not accept that gifts were used as succession strategies as such (see quote above, 239), an opinion I obviously do not share.

[235] See Cotton and Greenfield, "Babatha's Property," 211ff.

(in addition to Num 27) and is represented in the more general oriental context of laws and legal documents from Egypt, Mesopotamia and Anatolia/Levant. In view of this evidence as presented in detail above it is obvious that it is incorrect to conclude that a daughter did not have a right to inherit her father's estate: this depended on her marital status.

CHAPTER FIVE

GUARDIANSHIP

Several papyri in the Babatha and Salome Komaise archives mention guardianship of minors or women. P.Yadin 12–15, already referred to in Chapter 4 on law of succession, concern a child in ward, Babatha's minor son Jesus. The papyri deal with appointment of guardians for this child and a dispute between the mother of the child, Babatha, and the appointed guardians over the maintenance money they provided. The fact that there are several papyri that deal with the same matter ensures that a better picture can be formed of the situation and the judicial arrangements made. Nevertheless, a lot remains unclear and for every question answered a new one can be raised. A complicating factor is the matter of guardianship of women, a concept referred to in these same papyri. In P.Yadin 14 and 15 Babatha, the mother of the child, is accompanied by a guardian, obviously to assist her in some way in the legal dealings at issue.[1] The question is of course what his exact role was. Apart from that there is the interesting detail that where the Greek uses one word for both types of guardians, of the minor and of the woman, the Aramaic uses two distinct terms, (possibly) referring to two different legal concepts. This is all the more astonishing if one keeps in mind that the Semitic systems that are the basis for the Aramaic legal tradition did not know guardianship of a woman. This was obviously a Greek and later a Roman matter. How then are we to understand the appearance of the guardian in the Babatha and Salome Komaise archives, and the different ways in which the Greek and the Aramaic of the documents refer to this guardian?

[1] There are several ways of referring to the guardian either merely denoting his presence or expressing that the act was made 'through her guardian X.': Cotton, "The Guardian of a Woman," 269–271. Cotton assessed the material to discern a difference between the two ways of referring to the guardian, but came to the conclusion that no strict division between types of acts using the one reference as against the other can be made. See details below, 357ff.

I. *Guardianship of a Minor*

The case of Babatha's son Jesus

P.Yadin 12–15, on which I already touched briefly above in the chapter on law of succession, concern 'the orphan Jesus' or to be more specific, the raising of this child.[2] This way of describing the documents' contents is more accurate than saying they refer to guardianship, for although guardianship is an issue in the papyri, it is certainly not the only issue. Besides, to link the papyri exclusively with the matter of guardianship almost predetermines the way in which the papyri will be discussed. This can be seen, for example, in treatments that use the papyri to understand who could be guardian of a minor, and more specifically, whether the mother could be guardian of a minor.[3] It is true for the Roman legal texts under discussion there that they give a more or less comprehensive picture of the (im)possibility of guardianship of the mother of her minor children, but this has to do with the fact that these texts explicitly deal with this topic and are either rules of law or answers to legal questions raised in single cases. To put it differently, in those texts we find discussion of the (im)possibility of the guardianship of a mother of her minor children as such. P.Yadin 12–15 on the other hand do not present legal rules; they deal with a situation of a minor child having guardians who in the opinion of the mother misbehave, without making any direct and clear-cut statements as to the position of the mother. Therefore, some caution is wanted in assuming that P.Yadin 12–15 can provide direct evidence as to the position of the mother as guardian of her minor child.

Another discussion of these papyri explicitly refers to this treatment as 'a general and comprehensive analysis of the texts, in particular their importance for *the Roman law of guardianship*'.[4] Of course the papyri

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[2] See Lewis, 47, choosing 'the orphan Jesus' as a title for the section dealing with P.Yadin 12–15. In the opening lines of the introduction to this section he refers to the raising of the child.

[3] Cotton, "The Guardianship of Jesus," 94–108. Also compare Chiusi, "Zur Vormundschaft der Mutter", 155–197. The title of the latter article suggests that the discussion will present an overview to the theme of guardianship of the mother.

[4] Chiusi, "Babatha vs. the Guardians," 105, n. 1; my italics. Chiusi notes, though, in the introductory remarks to her treatment that she will not start 'from an abstract idea of Roman law, whose traces might be found in the papyri,' but will rather look for 'traces of interaction among different legal traditions' (Chiusi, "Babatha vs. the Guardians," 105).

raise questions concerning guardianship and one can look at the position of the mother as, apparently, opposed to that of the guardians, but too strong an emphasis on the institute of guardianship can obscure our understanding of the papyri, as they do not foremost deal with the question of who could be guardian, but how in a case of a child in ward differences about raising this child (in casu maintenance) were solved. The very specific situation at issue in these papyri prevents us from drawing any conclusion as to a general practice of appointing guardians in the province. Indeed, one can wonder whether there is any indication at all that Roman law played a part here, other than on a formal level.

The appointment of the guardians

That the papyri are not concerned with the question of who could be guardian can be seen in the first papyrus of the group, P.Yadin 12, which is an appointment of guardians by the city council of Petra.[5] The presence of this document in the archive means that guardians had been

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Of course in speaking of law, one should also clarify if one means substantive law, formal law or both. As Cotton and Chiusi discuss both the position of Babatha as mother of the ward and the part the *actio tutelae* might have played in the proceedings, they discuss both matters of substantive and of formal law, without differentiating between the two. The implications of the assumption that substantive Roman law applied to provincials are not discussed. One gets the impression that the strong Roman flavour of the documents, expressed in wording and style, as well as the presence of the *actio tutelae* in the archive, focussed thoughts solely on the degree of Romanization of the legal practice in a recently founded province. It serves in this context to quote from Wolff's important article about Roman law in the province of Arabia, which dealt with P.Yadin 15 and P.Yadin 28–30: 'Nicht eindringlich genug kann aber betont werden, dass es in beiden Fällen die prozessuale Verwertbarkeit war,— … —, die für den römischen Charakter der verbrieften Erklärung ausschlaggebend war. In welcher Rechtsordnung bzw.—denn auch damit ist zu rechnen—in welchen Rechtsordungen wir die materiellen Institutionen zu suchen haben, die den Hintergrund der gegebenenfalls vor römischen Justizorganen auszutragenden Konflikte bildeten, bleibt ein Problem für sich. Nichts in unseren Urkunden lässt sich, wenn ich recht sehe, als Spur einer Romanisierung auch dieses Sektors des Rechts der neuen Provinz deuten' (Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 798).

Of course Chiusi's attempts to relate the contents of P.Yadin 15 to a Roman legal background could be understood as showing, *contra* Wolff, that there are indications in the papyri (exactly in one of those two papyri Wolff discussed) for an influence of Roman law on the substantive side of cases. However, as I will discuss below, Chiusi herself is not claiming that it need be a Roman influence on local practice: it could as well have been a local influence on Roman practice. In any case the discussion in this chapter will show that the majority of the evidence points at a division between substantive and formal law in the documents concerning guardianship, with substantive law following local law, and formal law Roman law.

[5] For the city council as administrative body in Roman Arabia in general and specifically in this instance for nominating guardians see 216 n. 10 above and n. 51 below.

appointed by an official body, and what is more important, that this appointment was obviously not contested by Babatha. Not only do we have no documents to that point, but Babatha even refers to the appointment of the guardians in her letter to the governor, P.Yadin 13.[6] She accepts their appointment as a matter of fact, using it as the background of her complaint about receiving too little maintenance money. Her problem is obviously not in the appointment of the guardians or her own position vis-à-vis them, but in the way the guardians are supporting the upbringing of the child. The matter at issue is supervision of a deceased's estate by guardians during minority of his heir.

Above, in Chapter 4 on law of succession, I discussed several features of the papyri P.Yadin 12–15 in detail and I will only briefly refer to that discussion here. I argued that P.Yadin 13 shows that the brother of the deceased, Joseph, held some position vis-à-vis his deceased brother's estate and that the guardians had obviously not been appointed right after the deceased's death but at a later instance, probably on request. This request might have come from Joseph or Babatha, or have been agreed on between them. Babatha, in any case, explains to the governor that after her husband's death the part of his estate that belongs to her minor son was supervised by her brother in law and that it was decided someone should be appointed to see to debts and matters of maintenance.[7] The appointment of the guardians obviously fits with this decision she mentions. This means that an appointment of guardians in this specific instance need not denote that in general guardians were appointed for a minor. Indeed, one can assume that this was not the case as Babatha seems to describe the initial situation as that of a family member supervising the family estate. After Jesus' death his brother Joseph became supervisor of his estate, just because the heir, Jesus the son, was still a minor. We do not know whether this concerned real guardianship, that is, whether a minor heir needed an official guardian under the law prevailing in the area at the time. Perhaps we have the same situation as in P.Yadin 5: a relationship between a former business partner and the deceased business partner's son who is his heir. It is possible that the construction of the former partner supervising the heir's share in the business until he has become of age was a way of dealing with such

[6] P.Yadin 13:19–23. I believe Babatha requested their appointment or in any case agreed to it, in the context of her brother in law's management of the estate. I will come back to this below, 317.

[7] P.Yadin 13:7–19.

a situation, just as the case of P.Yadin 5 could show a different method (probably because in that instance the heir is of age).[8] In any case, it is clear that the guardians were not appointed right after Jesus' death. This implies that there was either no need for guardianship or there was guardianship, granted to a family member, based on some rule of law. We can then think of a rule that would determine that in case of death of the father the closest male relative would become guardian of the minor or in any case supervisor of the property. This latter link seems obvious as this male relative would have been heir to the estate if there had been no son. In Roman law appointment of guardians (*datio tutoris*) was just one way of instituting guardianship; in fact in most cases there was either a guardian appointed in the deceased's will (*tutor testamentarius*) or the deceased's death itself made a close male relative guardian (*tutor legitimus*). Since the Semitic systems did not know such a rigid system for guardianship it cannot be determined whether it was necessary for a minor to have a guardian, which would imply that guardianship was arranged for either by law or in legal acts like wills. Nevertheless, in the legal systems I discussed above under law of succession no provisions concerning guardianship can be found and documents which deal with the issue are scarce. Only in a few instances is it clear that a guardian was or could be appointed, but whether this was a single instance or related to accepted practice is difficult to say.

I refer to P.Kahun 1.1, a document from the Middle Kingdom, which 'apparently contains provisions for the appointment of a guardian of a child, in case of the father's death,' see Jasnow in *A History of Ancient Near Eastern Law*, 276, referring to Parkinson.[9] Parkinson's translation of the line referring to guardianship runs: 'It is the deputy Gebu, who shall act as guardian to my son.' Parkinson adds in a footnote that 'this sentence was added by another scribe.' He explains about this in the introduction to the papyrus: 'At a later date an extra line was added, which shows that a son had been born by then.' The main text indeed does seem to indicate that at the drawing up of the will, the testator and his wife did not have any children yet. Parkinson adds that 'it may also imply, from his appointment of a guardian, that Wah did not expect to live long enough to raise his son himself.' Indeed, the purport of the will is that Wah makes over his property to his wife, who is entitled to bestow it on whomever of their (future) children she wants. This means that Wah probably envisaged a situation where he would leave behind a widow and (small) children at his death. The actual birth of a son may have occasioned the addition, providing for a male guardian-supervisor for the young (future) heir. Note that

[8] For a more detailed comparison of the situations in P.Yadin 5 and 13 see 218–220 above.

[9] Richard B. Parkinson, *Voices from Ancient Egypt. An Anthology of Middle Kingdom Writings* (London: British Museum Press, 1991), 110.

no arrangements were made for guardianship of future children in the original arrangement. This could indicate that such arrangements were not necessary.[10]

Indeed, it is debatable whether this text should be related to matters of guardianship at all. The word used for 'guardian' here is better translated as 'child-educator' referring to a person seeing to a child's upbringing and education rather than to property matters. It is doubtful whether the concept of guardianship was known at all in Egyptian law, regarding the conspicuous lack of evidence of guardians. Women enjoyed mainly the same rights as men and there does not appear to have been a fixed age of majority.[11]

In a papyrus from 264–270 CE, also from Egypt, a woman makes a request to have her brother appointed guardian of her minor daughter by her late husband. In a discussion of this text in the context of the entire archive in which it was found it is stated that 'guardianship of minors is unique to Roman law' and reference is made to Taubenschlag's *The Law of Graeco-Roman Egypt*, 157 and 178–181.[12] I note, though, that Taubenschlag distinguishes between three things: guardianship of wards, guardianship of women and 'guardianship' of minors, that is, not *tutela* like with the wards and women but rather *cura*.[13] This is a different concept: until a certain age a minor had a guardian, after that he could have a curator. This was not necessary: the curator was 'only appointed upon application' and the minor was 'equally competent without him.'[14] This already implies that even under Roman law there was no strict rule for 'guardianship' of a minor in the sense of *cura*. However, Roman law did insist on *tutela* for wards, that is, legal representation of a fatherless child by a male relative. A fatherless child always had a *tutor*, either

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[10] The main text of the document concerns a number of arrangements related to the testator's death, not only concerning property, but also burial. That guardianship arrangements were not part of this original package of arrangements (which does refer to future children in several instances) could imply that an appointment of guardians was indeed not part of the usual arrangements laid down in a will. Of course this assumption gains support from the fact that there are hardly any wills that mention guardianship.

[11] See P.Assoc. Berlin 3115 (the rules of a guild from the 2nd century BC), which states that sons may join from age 10, and must join by age 16.

[12] Arthur Verhoogt, "Family Papers from Tebtunis. Unfolding a Bundle of Papyri," in *The two faces of Graeco-Roman Egypt. Greek, Demotic and Greek-Demotic texts and studies presented to P.W. Pestman (P.L. Bat. 30)* (ed. A.M.F.W. Verhoogt and S.P. Vleeming; Leiden-Boston: Brill, 1998), 148, n. 37. I will come back to this papyrus requesting appointment of a guardian below, 306ff.

[13] Taubenschlag, *Law* (1955), 157: 'Both the Greco-Egyptian and Roman systems of law make distinction between the guardianship of wards and the guardianship of women; in addition, Roman law knows of the *cura minorum*.'

[14] Taubenschlag, *Law* (1955), 179. *Cura* follows guardianship, as wards had a guardian until they were fourteen, and could subsequently have a *curator* until they were twenty-five. That a *curator* was appointed only on application, applies to the first three centuries; after that 'the minor has been given a *curator* without his having applied for one to assist him in legal transactions such as partition agreements. Sometimes such a *curator* might also be instrumental in the manumission *inter amicos*, performed by a minor woman, or would assist at the solemnizing of her marriage, and lastly, would cooperate in the making of her last will. He would also manage her property' (Taubenschlag, *Law* [1955], 179, with references).

I note that 'equally competent without him' has to be understood in this sense that the minor can make a legally valid act without the *curator* being present. This would not be possible with guardianship, where the ward is not capable of making a legally valid act without the guardian being present. A good example of the relationship between the two is that the minor can discharge his former guardian, without the assistance of a *curator*.

because one was named in the father's will (*tutor testamentarius*) or a relative became *tutor* by law (*tutor legitimus*). If there was neither a *tutor testamentarius* nor a *tutor legitimus*, a court could appoint a *tutor* (*tutoris datio*). For the papyrus concerned here the question would be whether the request made by the mother is for appointment of a guardian (*tutor*) or *curator*. I will come back to this below.[15]

These facts already imply that there was no apparent need for guardianship. The same seems to go for many of the ancient Semitic systems, which show the same features: no regulations for guardianship in the law codes and no documentary evidence as to existence of the practice.

In the case of P.Yadin 12–15 it seems clear that initially the supervision of the estate was in the hands of the deceased's brother. I cannot find another explanation for the fact that Babatha complains that '*he has not provided maintenance*, nor the guardians, who have been appointed for over more than four months.'[16] Furthermore Joseph's obligation obviously existed *prior* to the appointment of the guardians and probably ended at the moment of that appointment, as can be gathered from Babatha's statement that 'he has *never* given maintenance…*nor* have the guardians given…, except for.…'[17] It seems obvious that this phrase refers to the situation from Jesus' death until the day Babatha wrote the petition, first covering the period from the death until the appointment of the guardians (during that period Joseph *never* gave maintenance for the child) then turning to the period after the guardians' appointment (a period of four months in which the guardians have *not* given except for two denarii a month). The way Babatha explains the situation suggests that the guardians took over the supervision from Joseph, or were in any case appointed for a specific part in the estate supervision.[18] This

[15] See 306ff.

[16] See my discussion above, 216–220. One could argue that the subject of ἔδωκεν (line 19) was the person appointed to see to the maintenance (just mentioned before), but it seems unlikely to me that first Joseph had something to do with the estate matters, then there was someone appointed and then there were guardians appointed. It seems far more likely that Joseph supervised estate matters, that Babatha disagreed with the way he did this and consequently (perhaps on request) someone was appointed to see to maintenance matters, i.e. the two guardians. The contrast in the phrase where Babatha makes her complaint is then that neither Joseph who initially supervised the estate, nor the guardians who were later appointed, did what was really the right thing to do.

[17] Lines 19–21; negations for Joseph οὐδέποτε, for the guardians οὐδέ. The first negation obviously seeks to cover a period of time: never during the time of his supervision of the estate. The second negation does not include a temporal element since this is expressed in a separate statement: the four month period since their appointment.

[18] It is not clear whether they took over supervision completely, since Babatha mentions appointment of someone to see to debts and maintenance. This could denote that only for this specific part of the estate supervision Joseph was sidetracked, while he maintained supervision over and probably also control of the estate in general.

means that the guardians' appointment cannot be related to the institute of guardianship as such, that is, the case found here does not show anything regarding guardianship of a minor in general. To put it differently, the papyri cannot answer general questions as to who could be guardian, or how guardianship was instituted, since we are dealing with a very specific situation here. Appointment clearly followed earlier developments in estate supervision and cannot be considered to see to guardianship over a minor or a deceased's estate *directly following his death*. Therefore, I doubt whether it is useful to discuss the matter of who could be guardian of a minor in this context. This is clearly not at issue here. The papyri present a case of mismanagement of a deceased's estate and can only provide evidence related to that situation. Therefore, we can conclude that it was possible to have guardians appointed to see to maintenance matters, even when an estate was already managed by a family member. This also shows that appointment like the one made by the city council of Petra and documented in P.Yadin 12 did not automatically follow the death of the deceased. This is important because the appointment itself could raise questions as to how a city council arrived at an appointment: was it notified of deaths, were cases brought to the council by relatives etc.[19] In this case it was obviously the latter: someone requested the appointment of the guardians.

For this matter I refer to a papyrus from Egypt (264–270 CE), which presents us with a petition of a woman to the prefect to have her brother

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Chiusi states that the person who was to pay the debts is 'not identifiable,' and then suggests it might have referred to Joseph. The fact that he did not pay the debts may then have been the reason why he was not made guardian although he was the next agnate or the reason why he was replaced by the appointed guardians (Chiusi, "Babatha vs. the Guardians," 110–111). I believe that the legible parts of P.Yadin 13 suggest that this person who should pay the debts was not Joseph, but that this refers to someone who should be appointed, that is, to the guardians. In the sequence in the papyrus this makes sense: Babatha explains about Joseph's part in the financial situation of the ward, then refers to someone who should see to debts and maintenance and then concludes that neither Joseph paid (previously) nor the guardians (since they were appointed). Of course the fragmentary state of the papyrus does not allow for any final conclusions to this point, but considering the fact that Joseph as next agnate would have been the most logical guardian and the appointment of other guardians was obviously not made at the time of the father's death but later, the interpretation I proposed seems to be the most logical one to me.

[19] Compare, for example, Goodman, "Babatha's Story," 171: '…it is worth noting that although P.Yadin 12 provides evidence that action was taken on a matter of private law by the Nabataean city council of Petra…': action has been taken but not necessarily on the council's own accord.

appointed guardian of her minor daughter.[20] Her husband died and it is said explicitly in the papyrus text that the deceased died intestate.[21] This apparently relevant bit of information can in my opinion be interpreted in two ways. The woman could seek to express that there is no will that could contain the nomination of a guardian and she therefore requests the appointment of another person whom she specifically names. The remark could, however, also serve to denote that the order of succession follows the law. Since the deceased died leaving a minor daughter, this daughter would obviously be his heir.[22] The mother requests the appointment of a guardian 'for the administration of the child's property.'[23]

However, it is obvious that the property of the deceased had been entrusted to his brother.[24] This is interpreted by Verhoogt as denoting

[20] P.Tebt. II 326; see Verhoogt, "Family Papers from Tebtunis," 146. I mentioned above (304–305, small print) that Verhoogt here (n. 37) discusses guardianship of minors as 'unique to Roman law.' Taubenschlag, whom he refers to, however, only discusses *cura minorum* as 'unique to Roman law' (*Law* [1955],158 and 178–179) while he discusses *tutela impuberum* (guardianship of wards) with regard to both Roman and peregrine law (*Law* [1955], 159; also see nn. 13–14 above). I think it is important to make this distinction since the request for appointment of a guardian made by the mother could see both to appointment of a real guardian (*tutor*) or to the appointment of a *curator* (in the light of *cura minorum*). In this respect it is interesting to note that Taubenschlag explains that in 'local law' female family members 'were admitted as guardians' in many instances under a different name alongside men (158). Those men were then designated by the usual term for guardians (Greek ἐπίτροποι). He notes that under Roman law the women could also serve alongside male guardians, again with a difference in terminology, while the woman acting on her own is closer to a figure of *cura minorum* than *tutela impuberum* (*Law* [1955], 159). This could denote that under Roman law a woman's position with regard to wards was seen more as taking care of the ward than seeing to his legal and financial interests. This is important in the light of Babatha's position towards her son and the appearance of Julia Crispina, a woman who sees to the interests of orphans under the term ἐπίσκοπος. See detailed discussion below, 348–354.

[21] Lines 4–5: ἀδιάθετος see Verhoogt, "Family Papers from Tebtunis," n. 40.

[22] In Egyptian and Roman law daughters had an equal position with sons, which means that a daughter will in any case inherit and in absence of a son be sole heir. In other systems, as I discussed in detail above, the position of the daughter-only child towards her father's estate would depend upon her marital status. Since the child concerned is most likely unmarried, she would even under those laws be the sole heir to her father's estate. As Verhoogt observes ("Family Papers from Tebtunis," 150–151), the entire presentation of facts seems to have been aimed at making this point: the deceased is father of the child, she is a minor, he died intestate and a guardian is needed to see to administration of *the child's property* (τῶν ὑπαρχόντων τῇ παιδί).

[23] Lines 7–8.

[24] In another papyrus from the same bundle the widow-mother of the child lists the property of the deceased that has 'been delivered to Pasigenes the brother of my husband…' (see Verhoogt, "Family Papers from Tebtunis," 148, sub 4 and n. 43).

that this brother was heir.[25] However, I do not think that the fact that the property was entrusted to the deceased's brother necessarily denotes that he had ' received the inheritance'[26] in the sense that he had become owner. The brother might have been put in charge of the property as long as the minor child-heir was not of age. This would resemble the situation in P.Yadin 12–15, where the deceased's brother Joseph seems to have been entrusted with his brother's inheritance even though Jesus was obviously the heir. In fact the two situations seem to have been completely alike: in both instances a father has died, the only child is heir, this child is still a minor, the property is entrusted to the deceased's brother, and the mother requests appointment of a guardian to see to administration of the property.[27] This means that P.Yadin 12–15 could actually shed more light on the situation in the papyrus from Egypt, showing the minor daughter there is indeed heir to her father's estate. I agree with Verhoogt that the presence of a rescript of Gordian III in the same bundle of papyri, concerning the legitimacy of children, could suggest that the child's legitimacy and therefore her capacity to be heir was disputed.[28] If her legitimacy could not be proven, the deceased's brother might indeed have been the legal heir. However, the extant texts do not explicitly say that this was the case, and Verhoogt himself emphasizes that the mother in her request is 'clearly expecting that the inheritance would fall to Paulina,' the daughter.[29] This fact does not fit with Verhoogt's over-all interpretation that not Paulina was the heir, but the brother, and I believe this is due to a misunderstanding of the brother's part in the whole affair.

Verhoogt's interpretation is based on his assumption that the brother has become owner of the property. However, the documents do not show this, but, on the contrary, the mother's phrase referring to 'the child's property' suggests that she considered her daughter to be owner of her

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[25] See Verhoogt, "Family Papers from Tebtunis," 149, who wonders: 'why, then, did Paulus' inheritance not fall to his daughter?' and who concludes on p. 154 that 'his daughter, Paulina, for reasons unknown, could not succeed to his inheritance.'

[26] See Verhoogt, "Family Papers from Tebtunis," 149.

[27] Particularly compare P.Yadin 13: 17–19 with P.Tebt. II 326:7–8.

[28] P.Tebt. II 285; see Verhoogt, "Family Papers from Tebtunis," 149–151. He discusses the part the rescript might have played in the proceedings, concluding that the daughter must have been illegitimate according to the demands made in the rescript. This conclusion is based on the fact that the inheritance was entrusted to the deceased's brother. This does not necessarily denote, however, that the brother had become owner, i.e. was heir, while the daughter was not.

[29] See Verhoogt, "Family Papers from Tebtunis," 151.

husband's estate. That the brother is said to have received the property, need not denote more than that he was to keep the property until the heir was of age. In this respect it is interesting to read Verhoogt's observation at the end of his discussion of the documents pertaining to the inheritance and guardianship matter:

> there are several cases on record of orphans who are bereft of their paternal inheritance by relatives of their father and try to get the inheritance back once they are mature; see, for example, P.Cairo Isidor. 63.[30]

It is not clear how we should understand 'bereft' in this respect: was the orphan's position as heir disputed (like Verhoogt concludes for the case of Paulina) or was the property merely kept by a relative during the minority of the orphan and did a dispute arise when the relative did not want to hand the property over as the orphan became of age? I am inclined to believe that the latter option is at issue in P.Cairo Isidor. 63.[31] There a young woman, Taësis, complains that her paternal inheritance was 'stolen and appropriated' by her father's brother.[32] She declares that she did not take action during her minority but now that she has come of age she wants to have the paternal inheritance, which the brother as she states 'retains in his possession,' restored to her.[33] It is clear that the daughter does not consider the uncle to have become owner of the inheritance, it is said that he appropriated the property and that he retains it in his possession.[34] This indicates that the daughter considers herself to have been owner all along. Her right is obviously based on succession. Because the inheritance is defined as 'paternal inheritance' it is clear that here a daughter is concerned who was heir to her father's estate. The case could be interpreted in two ways: either reading it as a case of a brother of the deceased disputing the right of the daughter to inherit her father's estate by appropriating the property or as a case of a brother of the deceased taking care of the property during minority of the heir (comparable to the case of P.Yadin 12–15). In this latter instance the problem obviously

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[30] Verhoogt, "Family Papers from Tebtunis," 151.

[31] Dated to 296 CE. Text and translation in: Arthur E.R. Boak and Herbert C. Youthie, eds., *The Archive of Aurelius Isidorus in the Egyptian Museaum, Cairo, and the University of Michigan (P.Cair. Isidor.)* (Ann Arbor, Mich.: University Press, 1960), 255–259.

[32] Lines 10–12.

[33] Lines 12–17.

[34] Compare the word used for 'retaining in his possession' (διακατέχει; lines 16–17; also used in line 11 in participle form) with P.Yadin 21:11: κατέχις and P.Yadin 22:9: κατέχω, used to denote Babatha's position, who retains orchards that are not part of her property but of that of her deceased husband. See 174–179 above.

arose where the brother of the deceased refused to restore the property to the daughter-heir at her coming of age. Which interpretation we may choose, it is in any case clear that this case is related to matters of succession and could very well testify to the conflicting claims of a daughter and a man's brother to his inheritance. When compared with the case of Paulina discussed above, I am led to believe that, contrary to what Verhoogt thinks, Paulina was indeed heir to her father's property and that someone needed to be appointed guardian to see to the administration of the portion of Paulina's property that was entrusted to her uncle, the brother of the deceased father. This Egyptian papyrus would then provide an exact parallel for the case of P.Yadin 12–15, with the mother petitioning for appointment of a guardian for financial management.[35]

In the light of the case of P.Yadin 12–15 it is interesting to note that both in the case of Paulina and of Taësis in P.Cairo Isidor. 63 the child-orphan is raised by someone else than the person who sees to the inheritance. Obviously, there were instances where a brother of the father 'appropriated' the inheritance, apparently without a clear link with care for (or guardianship of the person of) the minor. His part was clearly only property related. This should warrant caution for believing that P.Yadin 12–15 can explain about guardianship as such, that is, to answer questions of who could be guardian and who couldn't. The appointment of the guardians in P.Yadin 12 followed a request and should therefore be seen in the light of a specific situation, rather than as presenting general information on guardianship matters.

This observation is important for answering a question referred to by Cotton, and before reluctantly addressed by Lewis, as to the number of

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[35] In an article, published after the present study was completed, Hanson adduces the same family archive from Egypt for comparison with Babatha's case in a completely different context: Hanson discusses Babatha's position as widow compared to the position of widows in Egypt (see Hanson, "The Widow Babatha," 93–96; Hanson accepts Verhoogt's interpretation that Paulina was not her father's heir, refuted in my discussion above). She touches in passing upon the fact that both Babatha and the Egyptian widow Aurelia 'retained copies of official Roman pronouncements that addressed the legal matter lying at the center of their struggles to safeguard the financial welfare of their children. Aurelia Sarapias retained the rescript of Gordian on the relation of a child's registration to its legitimacy, and Babatha retained three copies, written out by two different hands, of a Greek version of one of the praetor's actions dealing with guardianship of orphans (28–30, ca 125 CE)' (95). This conclusion fails to register the crucial difference between the two: the rescript of Gordian sees to applicability of Roman substantive law, the presence of the *actio tutelae* in Babatha's archive only to applicability of Roman formal law; see detailed discussion below, 341–342.

guardians appointed. Lewis already observed that in the systems that did know guardianship, the Greek and the Roman, one guardian was sufficient, while in the present instance two guardians are appointed.[36] He relates this to local custom, without explaining what custom this could have been. Cotton refers to this merely stating that local custom has been adduced as an explanation for 'the naming of two guardians instead of one.'[37] In her footnote she refers to Lewis, but also to her appendix I. There Cotton suggests 'with all due caution' that certain practices found in the papyri might have been accepted by the Romans from Nabataean practice. Although she does not mention the number of guardians appointed at that point, her earlier reference to the appendix suggests that she meant to raise the suggestion for this instance as well. Unfortunately we know next to nothing about Nabataean law making it very difficult, if not plainly impossible, to determine what Nabataean practice in such cases was. It is possible that it was customary to name two guardians, and that the city council maintained this custom even though it had become an official body within the Roman administration, but we cannot say anything with certainty to that point. Noticing that Babatha's petition clearly mentions a reason behind the appointment, the decision to have someone see to debts and maintenance, we could just as well assume that the appointment followed the request of the parties involved. Why not suggest, with the same due caution, that a Jewish feature was behind the naming of two guardians instead of one? Especially if we assume that there was already a supervisor of the estate, the deceased's brother Joseph, it is obvious that the guardians were appointed for additional supervision. This comes close to a situation referred to in Talmudic law of appointing co-guardians to see to property matters.[38] The number of guardians appointed in such an instance is two (or more). The Talmudic material is substantially later

[36] But see his addition (48): 'note two in M.Chr. 88, of AD *c.* 150.' The document is dated to AD 141 in the DDDP (location Alexandria). The two guardians have been appointed by the father of the orphan in his will (see line 26–27). This means we are not dealing with an appointment by a city council (or magistrates) in that case. Therefore, even when we disregard the obvious gap in time and space between the Babatha archive and this document, a comparison seems to be difficult: the document cannot be seen as an example of a practice of official bodies to appoint two guardians instead of one.

[37] Cotton, "The Guardianship of Jesus," 100.

[38] Resp. Rosh. 82:2. The two guardians can serve as co-guardians, or 'with a division of functions and powers between them, e.g., separate guardians may be appointed over his person and property respectively, as the best interest of the minor may dictate' (Elon, *Principles*, 443).

than our present documents, but still the suggestion could be raised that a number of two co-guardians appointed could concern local Jewish, rather than local Nabataean, custom. To reconcile both viewpoints one can even put the question of whether Nabataean and Jewish custom cannot have been alike on that point or the Talmudic (i.e. Jewish) material presents a situation common to other oriental laws or found in various local customs.

I think that the fact that the guardians were appointed on request, that is, not directly following the death of the testator, demands a great degree of caution in all conclusions based on this material. After all we cannot be sure how unusual this situation might have been. I also think one should take into account that the province was relatively young: when saying that Roman law required but one guardian, it invites questioning how well this Roman rule was known in Petra. Even though the city council had obviously become part of the Roman administration, where substance was concerned it might have continued to work along familiar lines.[39]

This does not only go for the number of guardians appointed, but also for the matter of their nationality raised by Cotton. She notices that one of the men appointed was a Nabataean, the other one a Jew, while the orphan concerned was a Jew. This latter fact, I emphasize, was mentioned specifically in P.Yadin 12, presenting a rare instance of direct evidence in the papyrus text that we are dealing with an archive of a Jewish family.[40] Cotton points out that it is peculiar that one of the men is a Nabataean, referring to this both as 'indifference to the principle of personality' and stating this 'contrasts with

[39] Chiusi pointed out, as *contra* Lewis, that Roman law did not demand one guardian: 'In Rome the number of guardians was not legally fixed, and we can often find several *tutores* (as the office of *tutor* was an office with high appreciation).' (Chiusi, "Babatha vs. the Guardians," 107). The first argument seems valid enough to me, of the latter one can question whether it would apply in a provincial context. Would provincials have appreciated the office of guardian as much, especially regarding the fact that guardianship of minors was not an established practice in Semitic law? The appointment of two co-guardians as suggested in Talmudic law probably had to do with the wish to have one keep an eye on the other.

Chiusi's observation that in Roman law the number of guardians was not fixed, serves to contradict the conclusion by Koffmahn that the appointment of a second guardian was a Roman influence (see Koffmahn, *Die Doppelurkunden*, 100, and Chiusi, "Zur Vormundschaft der Mutter," 185, n. 84).

[40] P.Yadin 12:7; the parties are elsewhere not designated as Jews. In fact it has been stated that 'their 'Jewishness' is expressed in nothing except their names' (Hannah M. Cotton, "A Cancelled Marriage Contract from the Judaean Desert (XHev/Se Gr. 2)," *JRS* 84 [1994]: 640); compare 'Without their names, in fact, we would hardly be able to feel any confidence in identifying them as Jews' (Bagnall, review of Cotton and Yardeni, 131).

Roman law which demands that the guardian should come from the same nationality as his ward.'[41]

The use of the word nationality requires some clarification as it can easily be related to a modern concept of nationality and nation, which is strongly connected with citizenship. Nationality in the case of documents like these, however, refers rather to origin and birthright, to the concept of a people, like 'the Jews' or 'the Nabataeans.' Therefore, when I refer to nationality in the papyrus text, I mean a designation of the group (people) to which a person (in this case the minor child) belonged.

The distinction between the ancient concept of nationality as reference to a group (origin, birthright) and the modern concept of a true nation makes it clear that what were called Romans in antiquity could have been two types of Romans: those who were so by birth (by belonging to a certain people) or those who had become so by obtaining citizenship. The apostle Paul, for example, was obviously a Jew, yet he could refer to his Roman citizenship.[42] Roman citizenship was bestowed on all (free men) living within the Roman Empire by the famous *Constitutio Antoniniana* in 212 CE. For the papyri we can assume that most people concerned here were not Roman citizens and nationality should therefore be taken to refer to origin (belonging to a group or people). Both the Nabataean and the Jewish guardian appointed were most likely not Roman citizens, nor was their ward. This is important, because Cotton refers to a demand of Roman law that the guardian should come from the same *nationality* as his ward. Nationality should here obviously be understood in the sense of origin, as the case concerns a Nabataean guardian for a Jewish ward. It can be debated, however, whether the references Cotton adduces deal with cases of nationality, or rather of citizenship.

Taubenschlag, to whom Cotton refers, states that 'in accordance with the principle of personality, a person of the same nationality as the ward is usually qualified to be his guardian though in peregrine law we find this principle already disregarded in the early Ptolemaic period when even women of Egyptian nationality would become guardians of Greek wards. The Romans were much stricter in this respect. As a rule, the guardian of a Roman ward must be a Roman though exceptions to this rule are known.'[43] This is logical since the institute of guardianship is based on the capacity to make legal acts: a guardian assists the ward, who cannot make legally valid acts on his own. If the guardian would not be a Roman citizen he would not be able to perform certain legal acts, which would obviously frustrate the purpose of guardianship. Nevertheless, Taubenschlag indicates that there were cases where Roman wards had non-Roman guardians.

In the provinces, where in general non-Roman wards and guardians were concerned, the principle of personality might have been less strictly adhered to in appointing guardians, since the above mentioned problem did not occur there. Mitteis, to whom Cotton also refers, does not mention a demand, but a regular practice.[44] He gives an example of a Roman woman, married to an indigenous man, who had a Roman citizen for her guardian, but he immediately adds that practice might have been more lenient, especially where it came to guardianship of women.[45]

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[41] Cotton, "The Guardianship of Jesus," 100 and n. 73.

[42] See, for example, Acts 22:25–29 and 23:27.

[43] Taubenschlag, *Law* (1955), 158.

[44] See Ludwig Mitteis, *Grundzüge und Chrestomathie der Papyruskunde: Zweiter Band Juristischer Teil (II.1)* (Leipzig: Teubner, 1912), 252.

[45] Mitteis, *Grundzüge Juristischer Teil (II.1)*, 253. I note here that he seems to consider *tutela* of women more of a procedural matter (therefore taken more lightly) than *tutela* of minors. This agrees with my own views about guardianship of women, see below, 360.

Juster, also referred to by Cotton, discusses the position of the Jews after the *lex Antoniniana de civitate* was brought into effect, thus after the difference between Jews who were Roman citizens and those who were not has disappeared. The text from the Digest Cotton gives (as cited by Juster) refers to this issue, for the text mentions that Jews can exercise guardianship over non-Jews (thus not vice versa!), because they can be called into any public office.[46] This concerns citizenship as Juster explains: Jews who were Roman citizens could be guardians of non-Jews, but a Jew who was not a Roman citizen could not be guardian of a person (even a Jew) who was.[47] Thus the issue seems to centre on citizenship and not on nationality.[48] It rather seems that the discerning element the text gives to determine who could be guardian of whom, is not nationality (in the sense of origin, birthright), but Roman citizenship.

To sum up: when we understand nationality as referring to origin there is no reason to assume that the appointment of P.Yadin 12 would go against Roman law: Roman law did not require guardian and ward to be of the same nationality, that is, of the same origin/people. Roman law did require, or in any case prefer, that a guardian of a ward who was a Roman citizen was a Roman citizen as well. Since we are dealing with a provincial situation here in which most likely neither ward nor guardians were Roman citizens, such a requirement is irrelevant for our case. This means that it may be considered remarkable that a Nabataean is appointed as guardian of a Jewish ward, but this cannot be said to go against Roman law.[49]

Obviously, the number of guardians appointed deviates from what one would expect.[50] Above I have argued that the appointment should be

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[46] *Dig.* 27.1.15.6

[47] See Jean Juster, *Les Juifs dans l'Empire romain: leur condition juridique, économique et sociale* (Paris: Geuthner, 1914), 24, n. 1, and 64.

[48] Cotton notices this herself when she mentions that Juster takes the text 'to refer to Jews who possessed Roman citizenship, and thus not to constitute an infringement of the principle of personality.' This means that the text is really not relevant for understanding the case of P.Yadin 12. We are not dealing with Roman citizens there. Besides that, it is important to note that the text comes from a part of the Digest that is called *De Excusationibus*, a discussion of all kind of objections and legal answers to those objections. The text seeks to explain that Jews can no longer refrain from undertaking guardianship over non-Jews when other public offices are also open to them. This merely indicates that a Jew with the full rights of a Roman citizen has to undertake the obligations of such a citizen as well. It does not necessarily imply that in other instances guardianship of Jews over non-Jews would impose an infringement on the principle of personality. In any case this situation, where the Jew undertakes the guardianship of a non-Jew, is a completely different situation from the one found in the documents where a non-Jew is appointed guardian of a Jew.

[49] It is important to keep in mind here that the whole issue should be seen in the light of capacity to make legal acts. Therefore, the question will not be foremost who is of the same nationality as the ward, but who, considering the nationality of the ward, can be thought to be capable to make legal acts. In this light it is obvious that in an indigenous situation an indigenous person can be thought to be capable of making legal acts, whether he is a Nabataean or a Jew. A problem could only occur when the ward was a Roman citizen and it could be doubted whether an indigenous person could make legal acts on his behalf. This is clearly not the case here.

[50] For a contrary view see Chiusi, "Babatha vs. the Guardians," 107: 'I doubt, however, whether the note of the editor N. Lewis is correct that the number of guardians was presumably dictated by local custom, on the grounds that in Greek and Roman practice

seen in the context of the arrangements concerning Jesus' estate, arrangements that need not necessarily follow Roman law either. It is distinctly possible that the initial arrangement with the brother as supervisor of the estate followed local, perhaps Jewish, custom, while the Roman authorities only became involved where the original arrangement failed. After all, that was the moment when guardians were appointed by the city council of Petra, leading up to Babatha's eventual complaint about their behaviour in her petition to the governor. We have to assume that the appointment somehow fitted with Roman legal practice, that Roman law in any case allowed for such an appointment by an official body within the Roman administration.[51] Nevertheless, this does not explain why the appointment was made this way: with two guardians appointed and such a clear reference to the nationality of the ward. Had two Jews been appointed guardian, one could have understood the connection. The child is a Jew, therefore the guardians are Jews as well.[52] But why mention the child's nationality when it cannot be linked with the guardians' nationality? This is especially interesting as the nationality of the parties is never mentioned in any of the documents: P.Yadin 12 presents the sole instance where a person figuring in these documents is specifically designated a Jew. It is almost inevitable to conclude this designation was somehow important for the legal purport of the document. If

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generally only one person was appointed guardian. In Rome the number of guardians was not legally fixed, and we can often find several tutores (as the office of a tutor also was an office with high appreciation).'

[51] On the city council of Petra as institution for appointing guardians see Cotton, "The Guardianship of Jesus," 95ff. Illuminating additions c.q. corrections in Chiusi, "Babatha vs. the Guardians," 108: 'With respect to the insufficient information on the administrative structures of the city of Petra two models of explanation could be offered: 1) The appointment by the boule was in accordance with the laws of the town of Petra and was not affected by Romanization. This opinion presupposes a municipal structure, which the Romans left unchanged. 2) Alternatively, Petra might have been administrated in a manner (e.g. directly by the King) that did not fit the municipal organization familiar to the Romans. In this case there would have been no administrative structures which could be adopted. On the contrary the Romans would have had to invent adequate structures. It seems likely that in this case the Romans would have tended to make use of the forms of the Roman municipal organization.'

Goodman speaks of 'artificial city institutions imposed on a Semitic society by the Roman state' claiming that these were 'not very effective: so far the documents show, it was not to the Petra authorities that Babatha appealed when she found their arrangements unsatisfactorily' ("Babatha's Story," 172). The question is of course whether one could have expected Babatha to appeal to the Petra city council: that an institution makes appointments does not necessarily mean it can judge cases arising from these appointments as well: see n. 67 below.

[52] See discussion of nationality issue in small print above.

there is no connection with the nationality of the guardians, the connection must almost inevitably lie in the number of guardians appointed. The fact that the child is a Jew prompted the appointment of *two* guardians. This would support my suggestion made above that the naming of two guardians was local Jewish custom and could consequently link the evidence found here to the Talmudic practice of naming two co-guardians to see to property matters. The fact that an initial agreement was made to have someone see to debts and maintenance, as referred to in P.Yadin 13, suggests this was not unusual. This could indicate that the arrangements found in P.Yadin 12–13, both when it comes to the initial supervision of the estate after Jesus' death and to the appointment of guardians, should be read in the light of Jewish legal practice.

Jewish legal practice might also explain Babatha's position vis-à-vis her son, that is, the question of whether she could not have been a guardian herself. This question is discussed in detail by Cotton in the article on guardianship of Jesus, already referred to repeatedly above. Cotton explains that in Jewish law a mother could be appointed guardian by her husband during his lifetime, either as guardian over his property or over that of his orphans. Appointment by a court (after the husband's death) or in his will seems to have been more difficult, but not impossible.[53] Cotton also specifically mentions the *de facto* guardianship: 'guardianship acquired by virtue of "orphans boarding with the householder"' and says that 'this could offer a way for women to become *de facto* guardians of their children.'[54] This situation seems to be perfectly suited for Babatha's position since it is clear that the child is residing with her. However, Cotton states that 'it seems that boarding with his mother did not have the legal consequence of turning Babatha into the guardian of her orphaned son, Jesus.'[55] Even though she does not explicitly say so, I think her reason for assuming this and thus dejecting *de facto* guardianship for Babatha is the fact that Babatha nowhere expresses that she is guardian. There is thus no 'awareness' to stay in the terms Cotton uses in the article.[56] However, the fact that something is not said can simply

[53] See Cotton, "The Guardianship of Jesus," 99.
[54] See Cotton, "The Guardianship of Jesus," 100.
[55] See Cotton, "The Guardianship of Jesus," 99.
[56] See Cotton, "The Guardianship of Jesus," 100: 'None of the Jewish practices and rules delineated above regarding the orphan's mother is present in this archive. Indeed there is nothing to show that Babatha was aware of any of them.' The latter remark seems to constitute the reason for the first conclusion. Nevertheless, in my opinion the fact that

mean that it was assumed. Babatha need not say that she was guardian, since precisely the fact that the child lived with her had turned her into a *de facto* guardian. The whole principle behind something *de facto* is that it does not require a specific legal act: the fact that a minor child resides with his mother turns this mother into a *de facto* guardian. That is also what Cotton seems to believe, for she feels obliged to state explicitly that the boarding did *not* have this consequence. There is, however, nothing in the papyri to justify this assumption. On the contrary, it seems obvious that the combination of facts—child lives with mother and in such a situation mother is considered *de facto* guardian—leads to the conclusion that, from a Jewish legal point of view, Babatha was indeed guardian of her minor son. Cotton explicitly denies that this was so, without saying in so many words why. She draws a general conclusion that 'none of the Jewish practices and rules delineated above regarding the orphan's mother is present in the archive.'[57] Of course it is true that Babatha does not discuss her own position in any of the documents: nowhere does she mention that she is herself the boy's (*de facto*) guardian. But on the other hand, I add, she does not say that she is not, either. Babatha does not contest the guardianship or asks to be made guardian herself, as Cotton herself emphasizes.[58] Indeed, we have a copy of the act of appointment in the archive, Babatha refers to the appointment, even seems to use it in her argument in favour of her case. Although P.Yadin 13 is not absolutely clear about this, it could be read to mean that Babatha had herself requested the appointment of guardians, to see to the debts and the maintenance money concerning her deceased husband's estate. It is also possible that Joseph had proposed it or agreed upon it with Babatha, to

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the child is residing with the mother could in itself be evidence that *de facto* guardianship could exist in this case. That there is no reference to this guardianship is logical exactly because it is *de facto*, that is, based on a factual situation rather than on a legal act or proof from a document. See the rest of my exposition.

[57] Cotton, "The Guardianship of Jesus," 100.

[58] See Cotton, "The Guardianship of Jesus," 105. Cotton emphasizes that the documents do not prove Babatha sought to have the guardians removed, but that it, on the contrary, shows that she 'recognized their ultimate authority.'

The characterization of the issue in the title of Chiusi's article as 'a struggle for guardianship' can be misleading, as Babatha does indeed request handing over of the property of her minor son, but this does not make her a guardian. On the contrary, the Roman sources Chiusi adduces as examples of a practice where a mother requests handing over of the property of a minor against security show that the guardians remain in office and retain liability towards the ward. Once he has come of age, he can sue the guardians, who in turn can approach the mother who gave security (see Chiusi, "Babatha vs. the Guardians," 125–129).

end a dispute between them about management of the estate.[59] This fact that the guardians were appointed later, and not right after the death of the father, implies that the child had a legal guardian (*tutor legitimus*) right after his father's death. This could very well have been Babatha (for the person of the child). This means that the information in the documents does not prove beyond doubt that Babatha was not guardian. On the contrary, the information provided leaves this possibility open, as the presence of the appointed guardians does not go against *de facto* guardianship by the mother.

It is important to mention this since Cotton uses Babatha's alleged exclusion of guardianship to show that Jewish law played no part in the documents, at least that there is no evidence that any of the later institutions of Jewish law were known to Babatha. Consequently, Cotton assumes that there was not only no *normative* Jewish law at the time, but also no *operative* law:

> …the existence of a coherent and operative Jewish system of law at the time is thereby called into question. Such a system, if already being formulated in the schools of the Rabbis, had yet to become normative. It has certainly left no trace here.[60]

For a legal system or law to be called operative it seems inevitable that there was a sort of systematic treatment (in any kind a set of fixed rules) and some kind of exclusiveness (people understood this was the law they had to take into account). Both implications can raise the same problems as the concept of legal system discussed in the General Introduction above.[61] However, one can speak of operative Jewish law, if one takes this to mean that there were (set) rules of Jewish law which apparently functioned as decisive rules at the time. The example of P.Yadin 10, adduced in the General Introduction above, shows that people could refer explicitly to Jewish law as the legal framework for their legal act.[62]

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[59] Lines 17–18 seem to be best read as yielding that Joseph proposed or agreed to have someone see to the maintenance while in the end nor he nor the appointed guardians provided sufficient money for the upbringing of the child.

[60] Cotton, "The Guardianship of Jesus," 101.

[61] See 43–44 above.

[62] See 48–49 above. I also refer to my discussion of P.Yadin 17, where it is likely that the explicit references to a 'law of deposit' are references to Jewish law. The presence of such references in the documents presupposes that Jewish law was indeed (normative operative) law and not mere custom. I find support for this assumption in documents where legal positions are explained which obviously go back to Jewish law, while it is

Consequently, Jewish law did apparently enjoy an operative, even a normative status also before codification.[63]

It is in any case possible to look at the rules of later normative Jewish law and see whether the practice in the documents already testifies to the working of these rules. Cotton proceeds along that line and discusses Babatha's position as mother of a fatherless child, from the viewpoint of later normative Jewish law. However, her conclusion that Babatha did not know the rules of later normative Jewish law, is apparently solely founded on her judgment that Babatha did not consider herself a guardian. Since Babatha nowhere explicitly discusses her own position this is hard to ascertain. Besides that, it is doubtful whether these papyri can give conclusive evidence as to the question of who could be guardian: the situation makes the evidence specific to this situation rather than applicable to general issues of guardianship. Nevertheless, it is obvious that the evidence of the papyri leaves room for the assumption that some sort of framework of rules, an operative law, existed, which, for example, caused two guardians to be appointed instead of one. This framework or operative law need not have been exclusively Jewish, as it may have borrowed or absorbed features from, for instance, Nabataean law, which practices are almost completely unknown to us.[64] What is clear is that the evidence of the papyri allows for the interpretation that there were rules active at the time that determined matters of *substantive* law, while these rules were part of a non-Roman indigenous tradition, which manifested itself mainly on the substantive side of the documents.

The dispute about maintenance

Although the arrangements we find here seem to be rooted in indigenous, perhaps even specifically Jewish legal practice, the whole situation is pervaded with Roman interference as the appointment of the person

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clear that these legal positions are the basis for what is at issue in the documents. See for instance P.Yadin 21–22 where sale of dates is based on rights acquired through a marriage contract (the Aramaic P.Yadin 10, which is explicitly put in the framework of Jewish law) and a debt (P.Yadin 17, as argued above in Chapter 2, also based on Jewish law), and P.Yadin 24, where the order of succession is explained (this order is rooted in Jewish law, where as argued above in Chapter 4 marriage caused a change in the daughter's position towards her father's estate).

[63] Contrary to what Cotton seems to assume, codification does not make rules normative. See discussion above, 45–47.

[64] See my discussion above for the example of liability of the groom for the dowry as feature of more than one legal tradition and at the same time a specific feature of Jewish law (48–49).

who should see to debts and maintenance ends up with a body within the Roman administration and even results in an official document concerning guardianship issued by this body.[65] And even if the number of guardians or the choice of their nationality were matters that were not influenced by Roman law at all, it is clear that the functioning of the guardians was regarded as a matter to be judged by the Roman authorities: as soon as a dispute arises, Babatha turns to the Roman governor.[66] This may simply have been a consequence of sole Roman jurisdiction, i.e. the lack of any other court to turn to.[67]

In P.Yadin 13 Babatha turns to the governor explaining the (local) situation in her letter and making a request.[68] Unfortunately we do not know what this request encompassed. P.Yadin 13 is in a fragmentary state, not only at the beginning where Babatha details the situation concerning the estate and Joseph's part in that, but also at the end where she

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[65] The use of the term *acta* in P.Yadin 12 is much discussed, see Lewis, 48, 50 and 18; Goodman, "Babatha's Story," 171; Cotton, "The Guardianship of Jesus," 95; Chiusi, "Babatha vs. the Guardians," 109.

[66] 'As soon as' could be taken literally here as Babatha waits but four months after the guardians have been appointed to begin complaining about their behaviour (see P.Yadin 13). 'If other property owners shared even a fraction of her enthusiasm for litigious confrontation, the life of the governor must have been miserable…' (Goodman, "Babatha's Story," 171).

[67] For a general discussion of the possible existence of other courts see Chapter 1 (74–78). For this specific situation it has been assumed that Babatha could have addressed the city council of Petra, which appointed the guardians: see Goodman, "Babatha's Story," 172: 'The impression is that such artificial city institutions imposed on a Semitic society by the Roman state were not very effective: so far as the documents show, it was not to the Petra authorities that Babatha appealed when she found their arrangements unsatisfactory.' However, it is by no means certain that an administrative body that was entitled to make appointments would also have been entitled to make judgments about cases ensuing from these appointments. Consequently, the fact that Babatha does not appeal to the city council of Petra may not say much about the effectiveness of this body. Compare Cotton, who put the question of why Babatha did not approach the city council, adding in a footnote 'assuming that nomination implies jurisdiction in matters arising from it' ("The Guardianship of Jesus," 104, n. 118). She refers to Isaac, who discussed the position of Petra, and stated that 'the *boule* of Petra apparently had direct jurisdiction in family legal and financial affairs throughout the territory of the huge *hyparchia*' ("The Babatha Archive," 64). There is no direct evidence for the latter statement in the papyri: what we do see is that the *boule* appointed guardians, but this does not say anything as to who had jurisdistion to judge cases concerning family law and financial matters related to family law. Actually, what we see in the papyri, Babatha approaching the local governor with her complaints about the maintenance money, suggests that the *boule* appointed guardians, but that matters arising from the appointment, in casu a financial matter, were judged by the Roman governor and not by the *boule*.

[68] With 'local' I refer to Babatha's explanation of the position of Joseph as original guardian and the later appointment of the guardians appointed by the city council of Petra (see 302 and 305–310 above).

probably suggested a solution or in any case made a request: line 27 possibly reads 'to ask of you' while of the following lines only a scanty 'silver' can be read. Babatha may have requested more maintenance money or a turn over of the estate property like she suggests in P.Yadin 15. The first option is the more likely one, since Babatha is in P.Yadin 13 not concerned with proving that the guardians were fraudulent, while she is in P.Yadin 15. Chiusi argued that Babatha wanted the governor to fix the sum for the maintenance, an interpretation that fits with what can be read in lines 27–30.[69] Chiusi then takes P.Yadin 14 and 15 to see to another, or in any case a separate, phase in the dispute: with the sum already fixed one of the guardians is found to have not paid at all and Babatha proceeds to sue this guardian. Admittedly, this would explain for the fact that only one of the guardians is addressed in P.Yadin 14 and not both. Nevertheless, it could be assumed that Babatha used the petition to get a governmental go ahead in a case against both guardians. Nörr discusses P.Yadin 13–15 as 'vorbereitenden Rechtshandlungen für einen Prozess vor dem Statthalter der Provinz Arabia,' subject would be the amount of maintenance money paid.[70] In another article he suggests that the governor might have ordered her to take the guardians to court, referring to a discussion of P.Yadin 25.[71] In this discussion Nörr suggests for the background of P.Yadin 25 (which is not a petition like P.Yadin 13, but a *denuntiatio* like P.Yadin 14) that

> Iulia Crispina (oder der Vormund Besas) hatte sich anscheinend mit einer Petition an den Statthalter gewandt und durch eine *subscriptio* die Anweisung erhalten, mit Babatha vor dem Statthalter in Petra zu erscheinen…[72]

Nörr thus supposes that P.Yadin 25, comparable to P.Yadin 14, had also been preceded by a petition like the one we have in P.Yadin 13. This

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[69] Chiusi, "Zur Vormundschaft der Mutter," 182: 'Deswegen wendet sich Babatha an den Statthalter, damit dieser—wie aus der Rekonstruktion des fragmentierten Teils des Papyrus zu entnehmen sein dürfte—einen Betrag festsetzt, der den finanziellen Möglichkeiten des Mündelvermögens entspricht,' with reference to Ulp. 1 de omn. Trib. D. 27,2,3 pr.: *Ius alimentorum decernendorum pupillis praetori competit, ut ipse moderetur, quam summam tutores vel curatores ad alimenta pupillis vel adolescentibus praestare debean* (see Chiusi's n. 73 for the question as to the origin of the Ulpian excerpt: classical or post-classical).

[70] Nörr, "Zu den Xenokriten," 268.

[71] Nörr, "Prozessuales," 335.

[72] Nörr, "Prozessuales," 336–337; see P.Yadin 25:6–7/33–34 where the *subscriptio* is mentioned: κατὰ τὴν ὑπογραφὴν τοῦ κρατίστου ἡγεμόνος.

petition, he then continues, was answered by the governor with a *subscriptio* that indicated that the parties should take their adversary to court (at the next *conventus*).

If we assume that indeed the petition of P.Yadin 13 was answered with such a *subscriptio* I am inclined to believe we should not regard P.Yadin 13 as a separate piece (as Chiusi does) but as part of the proceedings that lead up to the court case envisioned in P.Yadin 14. Nörr refers to parallels from Egypt to explain for the nature of the *subscriptio* that was probably an order to complete the requirements as referred to in P.Yadin 25: Nörr speaks of

> Erledigung der gesetzlichen Voraussetzungen (*ta nomima*). Wahrscheinlich bestehen diese in der Ladung zum *conventus* unter Angabe des Klaggrundes und der Aufforderung, beim Konventsort die Entscheidung des Statthalters abzuwarten.[73]

This would come down to what we find in P.Yadin 14. Of course this does not solve the question as to why Babatha does not address both guardians in P.Yadin 14, but only one of them.[74]

A *subscriptio*, as referred to by Nörr, thus served as the governor's response to the complaint given in the petition. Nörr briefly discusses a fragmentary text from second century Egypt that could provide a close parallel to P.Yadin 25.[75] The text shows that a complaint is answered with a *subscriptio* that orders the writers of the petition to take their adversary to court. In doing so they will have complied with their side of the legal requirements. Applying the example of this Egyptian papyrus to our P.Yadin 13, this means that the petition to the governor of P.Yadin 13 resulted in a *subscriptio* that ordered Babatha to take her adversaries, the guardians, to court. P.Yadin 13 would then directly result in P.Yadin 14. What is interesting, is the question of what exactly the *subscriptio* of P.Yadin 13 would have said. The one in the Egyptian papyrus is very short, only indicating that the petitioners should take their adversary to court. There is not a single word as to the case at hand. Nevertheless, the idea of a *subscriptio* by the governor is interesting in the light of the questions as to why the *actio tutelae* is found in Babatha's archive and

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[73] Nörr, "Prozessuales," 337.

[74] Nor does it explain why we find the *actio tutelae* (P.Yadin 28–30) in the archive: as Nörr emphasizes at various points in his discussion, the proceedings as envisioned in P.Yadin 13–15 would lead to a *cognitio extra ordinem*, not to use of a *formula* (Nörr, "Prozessuales," 321, 330–331, 335–336, 340).

[75] P.Strasb. IV 196; Nörr, "Prozessuales," 339.

why three copies of it, in two different hands. As Nörr repeatedly suggested that the *actio* found its origin in the provincial edict and a standard translation of an individual *actio* could very well come from the governor's office,[76] one could venture to suggest that at least one of those copies was sent to Babatha with her petition, when it was returned with the governor's *subscriptio*. If this was the case, then we have to assume that the way in which Babatha presented her case in P.Yadin 13 led the governor to believe that the *actio tutelae* would be applicable. This is obviously not the case if we assume that the case as presented was a dispute over maintenance money: this would, as Nörr explained, amount to a *cognitio extra ordinem* and not to the use of a formula like the *actio tutelae*. Assuming that the governor's bureau supplied one of the copies, one could also assume that a local *nomikos* supplied another in preparation for the actual suit (initiated by P.Yadin 14), or perhaps even at a later stage when Babatha was convinced that the *actio* would only serve her once her son would have come of age. I will come back to this in detail in my discussion of P.Yadin 28–30 below.

Accepting, with Nörr and against Chiusi, that P.Yadin 13 was a petition aimed at obtaining a governmental go ahead, we must assume that this go ahead was granted and led directly to the summons, found in P.Yadin 14, where Babatha summons one of the guardians, John the son of Joseph Eglas.[77] As she complains about both of them in P.Yadin 13, it is not clear why the other guardian is not involved. It is said in lines 26–29 that he (i.e. John) has not given while the other guardian has given. What has (not) been given is not clear: did one of the guardians agree to a higher amount of money or did one of them stop paying? Chiusi takes P.Yadin 14 to see to a different matter than P.Yadin 13 (*contra* Lewis):

[76] Nörr, "Zu den Xenokriten," 270; "Prozessuales," 323. In both instances Nörr suggests a local *nomikos* as an alternative.

In a later publication Nörr explicitly corrected his previous views, rejecting an origin at the governor's bureau, leaving the local *nomikos* as the likely source for the *actio* (Nörr, "Römisches Zivilprozessrecht nach Max Kaser," 87). I am not sure why the governor's bureau as a source is suddenly discarded: if there is one place where one would expect to find standard translations of the provincial edict it would be there.

[77] The obvious translation of the Greek here would be John son of Joseph son of Eglas. It becomes clear from P.Yadin 12, however, that Eglas was another name of John's father: see Lewis, 57. Compare the case of Judah son of Elazar Khthousion (where the translation also appears to be: son of Elazar, son of Khthousion; see Lewis, 45).

> Es geht hier nicht um die Fortsetzung der Beschwerde, die P.Yadin 13 wiedergibt, wonach die Vormünder zu geringen Unterhalt leisten würden. Dort war Babathas Hauptzweck, dass der Statthalter den zu zahlenden Betrag festsetzen sollte, nicht aber, gegen jemand Klage zu führen… In P.Yadin 14 beklagt Babatha, dass einer der beiden Vormünder, Johannes, Son des Joseph, seinen Teil nicht bezahlt, während sein Kollege dieser Pflicht nachkommt. Es geht hier also nicht um die zu niedrige Höhe der an Babatha zu zahlenden Summe, sondern nur um die fehlende Zahlung des Mitvormundes Johannes.[78]

Chiusi consequently assumes that the court case was to be conducted against one of the guardians. The matter of dispute is not further explained about, it is merely stated that John has to attend a court session, in the court of Petra on a certain day.[79]

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[78] Chiusi, "Zur Vormundschaft der Mutter," 183.

It is noteworthy in this respect that the guardian sued here was replaced later: in P.Yadin 27 his son appears, apparently appointed guardian in his stead (see Lewis, 116). It is not clear, however, why the replacement was made: Lewis assumes that the father had died (Lewis, 116; see also Chiusi, "Zur Vormundschaft der Mutter," 185: 'Wahrscheinlich war Johannes mittlerweile gestorben (zwischen der Ladung vor den Statthalter und dieser Quittung liegen sieben Jahre).'; compare Nörr: 'Ob die Vormundschaft des Johannes (wie naheliegend) durch seinen Tod oder aus anderen Gründen beendet war, muss dahinstehen' ("Prozessuales," 321). When we have to assume that the father was replaced following the court case concerned in P.Yadin 12–15, it does not seem logical, at least to my mind, that a son of the same man would be appointed in his stead.

[79] This is the usual way of summoning someone as can be seen in P.Yadin 25 and 26. The complaint is usually given in very short terms, perhaps since it was already explained for in the petition, requesting permission to go ahead?

In P.Yadin 14 a specific date is set for the suit, which is to take place in Petra. We know from other summonses that the date was usually not specified, but it is said the other party has to attend until the case is heard; see, for instance, P.Yadin 23:7–8/18–19, 25:11–12/42–43 and 26:10–11 (see Lewis, 57). It is noteworthy that another term is mentioned: Chiusi suggested that this might have referred to another census or, alternatively, that the first (set) date might have indicated the beginning of the *conventus*, while the real date on which the suit would take place would be determined later (thus keeping in line with the other papyri where the date is not specified but the other party is ordered to attend until the case is heard; see Chiusi, "Babatha vs. the Guardians," 115–116).

Petra was not the only place where the governor would sit in judgment as is clear from P.Yadin 25 where Babatha responds to a summons by summoning the other party to appear before the governor in Rabbathmoab. It appears that the *conventus* in Rabbathmoab was prior to that in Petra so that the case could be judged sooner (Lewis, 112; but see Cotton and Eck, who argue that Babatha was playing for time by asking for a conventus centre 'where the governor is present only once a year'; Cotton and Eck, "Roman Officials," 40–41). For the presence of the governor in certain towns for the *conventus* and the use of the technical term παρουσία, see Lewis, 57; Bowersock, *Roman Arabia*, 85–86, and Cotton and Eck, "Roman Officials," 34–41.

P.Yadin 15 is closely connected with P.Yadin 14, as both papyri were written on the same day by the same scribe.[80] Following the summons of 14, Babatha in 15 proposed a settlement. This proposal is directed at both guardians, while she only summoned one of them in P.Yadin 14.[81] Babatha states that the guardians do not provide the orphan with sufficient money for maintenance, sufficient regarding the 'income from the interest on his money and the rest of his property' and the lifestyle that would befit him.[82] Babatha then proposes to take over management over the money providing the guardians with a mortgage on her own property for security. She would then pay interest on the money to maintain the child from, thrice the amount the guardians provide her with. Referring to 'the most blessed times of the governorship of Julius Julianus'[83]

[80] Lewis, 54, 58. Also see n. 86 below.

[81] Lewis explained for this: 'There may be a suggestion in lines 28–29 here [i.e. in P.Yadin 14, JGO] that the other guardian was willing to accede to Babatha's demand. Or perhaps the naming of a single defendant was simply a procedural technicality' (54). One can wonder whether the fact that the guardians were jointly responsible for the property concerned would not have required both of them to agree to any settlement concerning it (thus explaining for the fact that the both of them are addressed in P.Yadin 15 rather than explaining for the fact that but one of them is addressed in P.Yadin 14). Chiusi drew attention to the term ἀπειθαρχεία (line 28) denoting 'disobedience against official instructions' and relating this to P.Yadin 13: apparently, Chiusi argues, in response to the petition of P.Yadin 13 the governor had determined a certain amount of maintenance money and John refused to pay this (Chiusi, "Babatha vs. the Guardians," 122). This would then constitute the 'disobedience against official instructions.' Nevertheless, the translation of the term was suggested by Wolff, at the time when, as Chiusi notes herself, P.Yadin 13 had not been published yet. This already indicates that the fact that John's negligence amounts to 'disobedience against official instructions' need not necessarily be related to P.Yadin 13 (or Chiusi's interpretation of this papyrus). In general one can say that the fact that a guardian who is appointed to see to payment of maintenance to the ward and who does not pay this maintenance is disobedient to an official instruction, that is, to the instruction given him at his appointment. This interpretation is in line with the evidence supplied by the *actio tutelae*, as I will discuss it below: there we find the three elements necessary for applicability of the *actio*: the guardian has to have been appointed, he has to have been appointed to pay money, and he has to have been negligent in paying this money. The documents P.Yadin 12–15 all have their part in proving these three points: P.Yadin 12 is the appointment, P.Yadin 13 (and P.Yadin 15 as well) discuss the guardians' obligations and P.Yadin 14 and 15 testify to their negligence to this point. I will come back to this in detail below, 332–333.

[82] P.Yadin 15:7–8/21–22. For a possible link with Roman rhetoric see Cotton, "The Guardianship of Jesus," 103–4; also see discussion of meaning for understanding the legal context below, 337ff.

[83] For the meaning and purpose of the phrase see Cotton, "The Guardianship of Jesus," 103–104, who takes it to be part of the Roman rhetoric also present in other phrases in the document, see previous note. Chiusi interprets it as 'a rhetorical and, in this kind of document, a recurrent topical argument *ad captandam benevolentiam*' (Chiusi, "Babatha vs. the Guardians," 124, n. 45). Also compare Hanson, who contrasts

she almost casually mentions the summons she has made to one of the guardians to appear before this said governor. She then adds that if the guardians do not agree to her proposal the proposal will serve as evidence that they have been 'profiteering from the money of the orphan.'[84] At first sight it appears odd that P.Yadin 15 is addressed at both guardians, obviously intending to create evidence to use in an eventual lawsuit, while the summons of P.Yadin 14 was only addressed at John. However, it is likely both guardians had to decide upon such an important matter as transfer of the entrusted property, even if the evidence resulting from a denial would be used against John alone.[85]

The transaction itself can be seen as a loan with Babatha providing security for it by way of a mortgage and paying interest that will be spent on the maintenance of the child, who is the owner of the money. But the real aim of the proposal is clearly the use Babatha can make of a refusal by the guardians. If they do not agree to this scheme which is profitable for the child, they will be accused of being self-interested. P.Yadin 15 is thus closely connected with P.Yadin 14 since it has to provide Babatha with evidence she can use in her court case.[86]

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the use of these phrases (and Babatha's self-assured attitude in general) with the 'widows' rhetoric' employed in documents from Greek and Roman Egypt: Hanson, "The Widow Babatha," 99–103.

[84] P.Yadin 15:12/30. Chiusi remarked that 'this *martyropoiema* does not deal with the quota of the maintenance costs, as might be the case in P.Yadin 13 and 14, but only with the interest which is or can be realized from the ward's property' (Chiusi, "Babatha vs. the Guardians," 123, n. 43). True as this may be, the one interpretation does not exclude the other: even if the interest is at issue, the document can still provide proof that the guardians are not doing their job properly, thus in the context of the case as started with P.Yadin 13 and 14. The emphasis on the interest may indicate that 'profiteering from the money of the orphan' meant that the guardians 'appropriated the profits' (Cotton, "The Guardianship of Jesus," 103, n. 111, with reference to Lewis, who understood the guardians to be 'pocketing the rest of the interest themselves').

For the overall purpose of P.Yadin 15 as creating evidence for later use see Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 780–782.

[85] See Chiusi, "Zur Vormundschaft der Mutter," 187–189 about the possible interpretations of P.Yadin 15 in relation to P.Yadin 14: '…Der Zweck des Dokuments könnte in der formellen Unterbreitung dieses Angebots liegen. Das lässt sich aus der Tatsache vermuten, dass für den Fall der Ablehnung des Angebots durch die Tutoren eine Alternative erwähnt wird. Die Erklärung soll dann als Beweisdokument für den Ertrag des Mündelvermögens dienen' (188) and 'Der Grund für die Gleichzeitigkeit der beiden Dokumente könnte darin gelegen haben, ihm zeitgleich zur Ladung einen Kompromiss anzubieten, wonach ihm und seinem Kollegen die Aufgabe erleichtert würde' (189).

[86] It is not completely clear in what context Babatha wanted to use the evidence created by the proposal of P.Yadin 15. The date, which is identical to that of P.Yadin 14, suggests that the evidence of P.Yadin 15 was to be used in the context of the suit initiated by the summons in P.Yadin 14 (thus Chiusi: 'For reasons of the identical dating there

The deal Babatha wants to make appears to be rather singular: 'Wolff observed that this formulation does not have linguistic parallels in the Greek evidence.'[87] It has been suggested she was really after obtaining guardianship herself, but this has already been plausibly refuted.[88] After all Babatha nowhere says that she wants to become a guardian—perhaps she can even considered to be (*de facto*) guardian[89]—and it is doubtful whether the deal of P.Yadin 15 could ever suffice to make her one. The matter at issue here is not who should be guardian: Babatha had clearly accepted the appointed guardians, and P.Yadin 13 even leaves room to assume she asked for their appointment herself. The case presented in these papyri is a matter of mismanagement of property.

Chiusi discussed Babatha's proposal in the light of later Roman law pointing at several legal sources, where a comparable situation is described:

> Eine Mutter begehrt die Verwaltung des Vermögens ihres Kindes und bietet zu diesem Zweck den Vormündern als Sicherheit ihr eigenes Vermögen an, ohne aber eine rechtliche Befugnis in Anspruch zu nehmen.[90]

She notes that an offer like this is to her knowledge only known from Roman sources, although Wolff had previously argued that Babatha's behaviour here was incomprehensible. The latter conclusion was probably prompted by Wolff's assertion referred to above that the phrases used here have no parallels in Greek papyri. Indeed, the idea that Babatha's offer was modelled on a Roman practice, seems plausible, as the entire suit against the guardians seems to be set against a Roman legal background, including Roman rhetoric as referred to above[91] and recourse to a Roman legal *actio*, to be discussed in detail below.

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should be a connection between P.Yadin 15 and the summons before the court of the provincial governor' ["Babatha vs. the Guardians," 122]). Nevertheless, considering the problems with the presence of the *actio tutelae*, which could not have been used within the context of the suit initiated by P.Yadin 14, one can also think of use of P.Yadin 15 at a later stage, when the *actio tutelae* could be used (for example after the ward had come of age); see discussion of *actio tutelae* below.

[87] Chiusi, "Babatha vs. the Guardians," 129; likewise previously "Zur Vormundschaft der Mutter," 190, n. 100; referring to Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 798 (Chiusi's references to 768 and 788 respectively are obviously misprints).

[88] See Cotton, "The Guardianship of Jesus," 105.

[89] See my argument above, 316–318.

[90] Chiusi, "Zur Vormundschaft der Mutter," 189–190; C. 4.29.6 pr.; C. 5.46.2; see also Chiusi, "Babatha vs. the Guardians," 125ff. where the same texts are discussed, as well as Paul. Sen. 2.11.2 and C. 5.51.9.

[91] See nn. 82–83.

A few specific points of Chiusi's interpretation are important to mention.

Transferral of the property as envisaged in the Roman sources she quotes does not mean transferral of guardianship, as the guardians remain liable towards the ward.[92] This would fit in with the situation found here, where Babatha is obviously not after guardianship. It also leaves room for use of the *actio tutelae* against the guardians once the ward has come of age.[93]

If indeed as Chiusi claims the deal described here is only found in Roman sources, it seems like Roman *substantive* law did have an influence here. However, as Chiusi rightly observes, as all the Roman sources adduced

> are 100 or 150 years later than P.Yadin 15, it is difficult to regard this as evidence for Roman influence. One could argue that in those cases the provincial practice was adopted by Roman law. In view of the Roman sources in which the mother's administration of or influence on the administration of the child's property is revealed, Leopold Wenger had already assumed this sort of movement from the provinces to Rome with respect to Greek papyri from Egypt dealing with the assumption of guardianship and the administration of a ward's property by the mother or the grandmother. Nevertheless, the question of mutual influence cannot be answered with mere chronological arguments. Roman sources from the first century onwards attest the tendency to hand over the administration of the ward's property to the mother, both by de facto approval of her administration and by appointment of the woman as heir under a *fideicommissum*.[94]

As reasons for the development in Roman law Chiusi adduces social and judicial factors that contributed to liberation of the position of women. What is interesting there, is that both her examples, the solution of the agnatic bonds at the end of the Roman republic and liberation from *tutela mulierum*, see to guardianship of women. As women became accepted as capable of administering their own property they also became accepted as capable of administering their children's property (albeit apparently on security of their own property towards the guardians of the child concerned, that is, not as a real guardian). Chiusi also notes that where in Hellenistic practice a mother could administer the property of her children, a Roman influence caused the mother to adopt another role,

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[92] See C. 5.51.9 and C. 5.46.2 (Chiusi, "Babatha vs. the Guardians," 127–128).

[93] The *actio tutelae* is mentioned as the applicable *actio* in C. 5.51.9 and C. 5.46.2 (Chiusi, "Babatha vs. the Guardians," 127–128).

[94] Chiusi, "Babatha vs. the Guardians," 129–130.

that of the ἐπακολουθήτρια, next to a real tutor. There again the mother has a certain part but specifically not under a title that Roman law forbids her to hold. As Chiusi observes, this could be interpreted as an influence of Roman law on Hellenistic practice. Consequently, she argues that no easy answers can be provided as to the influence of one legal system upon another.[95] This is certainly true, but the adduced relationship between developments with regard to guardianship of women and developments in a mother's guardianship of a minor's property may be able to provide some clues. As has been observed by Cotton, it is likely that the reference to guardians of women in the Greek papyri represent a concession to the court context for which these acts were intended, i.e. the court of the Roman governor.[96] However, this concession is found in papyri from the second century CE, while Chiusi pointed out that already in the first century a change with respect to the mother's position had begun under the influence of gradual liberation from the *tutela mulierum*. Indeed, when one takes into account in which cases *tutela mulierum* no longer applied, one has the impression that guardianship of women was not a very actual legal issue anymore.[97] Still we do find guardians of women prominently in our papyri, also in the same papyri where the matter of guardianship over a minor's property is at issue: Babatha can make the offer registered in P.Yadin 15 but only in the presence of her guardian. Therefore, it seems difficult to assume that the liberation of the *tutela mulierum* and the acceptance of a woman as administrator of her child's property were related in this provincial context. Apparently, formal demands were maintained rigidly: no immediate effect of developments in the *tutela mulierum* can be discerned. Consequently, no interaction with substantive law can be expected: where in Rome liberation of the

[95] Chiusi, "Babatha vs. the Guardians," 130.

[96] See 359ff. below.

[97] Compare Chiusi: 'Damit [i.e. with the gradual liberation from the *tutela mulierum*, JGO] bestand eine Situation, in der die Unterwerfung der Frau unter die Vormundschaft mehr als Formsache denn als materielle Beschränkung erscheint' ("Zur Vormundschaft der Mutter," 164). 'Formsache' and 'materielle Beschränkung' should here be interpreted in a general meaning of 'a matter of outer form' and 'a matter of contents,' and not, I presume, in the strict sense of formal and substantive law, as an institute can hardly be part of substantive law and then become part of formal law. Taken in this general meaning, Chiusi is right in noting that as the position of women developed *tutela mulierum* became more of an empty form than of an institute with real meaning. However, this development cannot be taken to apply to the provinces, as there *tutela mulierum* was obviously introduced by the Romans at a moment when the liberation as described by Chiusi had already been concluded in Rome. See rest of exposition.

tutela mulierum prompted acceptance of women as administrators of their children's property, such a development would not be possible in the provincial context. Therefore, the proposal as found in P.Yadin 15 is not likely to have been based in Roman law, but rather has to have indigenous roots. Indeed, Babatha's substantive position can be better explained for by looking at local law: if she was indeed *de facto* guardian of her minor son she could easily request to be allowed to administer the property too. In this context I refer to Chiusi's observation that P.Yadin 15 reminds one of a *satisdatio*.[98] As Chiusi remarks, this *satisdatio* can only be given by a co-guardian, not by a third-party non-guardian (like a mother). But if, as I presume, in local law the mother held a position comparable to that of a co-guardian, an act aimed at the *satisdatio* would be logical. In fact one can wonder whether the idea of accepting a mother's pledge as a sort of *satisdatio* does not come from the province where mothers held positions as co-guardians. Babatha's position as co-guardian would also enable her to use the *actio tutelae* against the guardians herself (instead of, as suggested by Chiusi, keeping it until her son was of age).

The actio tutelae

P.Yadin 13 mentions that the guardians paid too little maintenance money, but it does not suggest there was any malignant purpose on their part behind this. Babatha's purpose seems to have been ensuring the receipt of more maintenance money, to allow her to raise the child commensurate with the extent of his property.[99] This contrasts sharply with the twist in P.Yadin 15, where the guardians are confronted with a possible accusation of fraud in managing the property. Babatha does complain about the low level of maintenance money supplied to her, even using the same expression as in her complaint in P.Yadin 13,[100] but this only makes the turn to the supposed embezzlement all the more surprising and incomprehensible. What did Babatha really want to achieve with this lawsuit? The answer might be found by looking at P.Yadin 28–30.

Although these texts are not dated (and were therefore placed at the end of the archive rather than closer to the connected P.Yadin 12–15) it

[98] Chiusi, "Babatha vs. the Guardians," 130–131.

[99] P.Yadin 13:25–26.

[100] Compare P.Yadin 13:25–26 referred to in the previous note with P.Yadin 15:6–7/21–22.

seems obvious to relate them to the matter at issue.[101] The papyri present in more or less damaged form three identical copies of the same text, reading, and I cite this in full:

> Between plaintiff X son of Y and a defendant A for up to 2500 denarii there shall be (local?) judges. Since A son of B has exercised the guardianship of orphan X, concerning which matter the action lies, whenever by reason of this matter A is obligated to give or do something to X in good faith, the judges shall award judgment against A in favor of X up to 2500 denarii, but if [such obligation] does not appear, they shall dismiss.[102]

The Greek text presented here is as Lewis has pointed out clearly a translation of a Latin *formula* for an action based on good faith (*actio bonae fidei*, or *ex fide bona*). An example of such an *actio* can be found in Gaius, *Institutiones* 4.47.[103] There deposit is concerned, but the idea is the same: if A is responsible for giving or doing something to X in good faith, the judges will condemn him to do so.

Lewis does not explain what he means by 'local?,' but it can be assumed that he thought of *iudices peregrini*, like the first editor of the papyri.[104] Nörr has plausibly argued that not *iudices peregrini*, but *recuperatores* were meant. He envisages

> a label of judges, probably containing also the names of peregrine judges. By means of *reiectio* and *sortitio* the judges for the concrete lawsuit were chosen from it. We do not know how this label was drawn up. A census is plausible. Neither do we know whether the *boule* of the city of Petra participated in drawing up this list. Certainly the province of Arabia was not as

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[101] Cotton referred to Yadin's observation that the documents concerning the guardianship were found tied together, and remarks that 'one would like to know if *P.Yadin* 28–30, the three copies of the *actio tutelae*, were tied together with them' ("The Guardianship of Jesus," 94).

[102] Lewis, 120.

[103] See Lewis, 118: 'Beginning with the last two words of the first sentence the text is a Greek version of the praetor's formula recited in Gaius, *Institutes* 4.47…' Also see Nörr, "Prozessuales," 319, for a Latin rendering of the text and the version of the *actio tutelae formula* from Lenel's *Edictum Perpetuum*.

Nörr discussed the adjustments to a provincial context, such as the use of 'X son of Y' and the use of denarii as monetary unit ("Römisches Zivilprozessrecht nach Max Kaser," 85). Especially the choice of the word ξενοκρίται for the judges led Nörr to conclude about the writer of this text: 'Ohne Kenntnisse des römischen Rechts ist eine solche Übersetzung kaum denkbar' ("Römisches Zivilprozessrecht nach Max Kaser," 87). Nörr dealt with the meaning of the term ξενοκρίται in the cited article and a number of other articles (see 35 n. 121 above), arguing that *recuperatores* were meant.

[104] H.J. Polotski; see Nörr, "The *xenokritai*," 83–84.

> yet much romanised in the period of the Babatha archive. Therefore, non-Romans are likely to have participated in the governor's jurisdiction.[105]

In another article Nörr observed that there is no evidence for participation of *recuperatores* in the *actio tutelae* procedure in Rome, but it could be a particularity of provincial procedure.[106] What is interesting for the present investigation is Nörr's observation that the Greek version here is probably an authorised translation from the Latin provincial edict, provided by the governor's office or a local *nomikos*, law expert.[107] In this respect it is remarkable that the archive does not contain one copy, but three, in two different hands: P.Yadin 28 and 29 are by the same hand, P.Yadin 30 by another.[108] It seems that Babatha was supplied with several copies, which all contained exactly the same text.

The presence of these *formulae* in the archive raises considerable problems. At first sight the purport of the text is perfectly in tune with the evidence found in P.Yadin 12–14. If A exercises guardianship over X and he is liable to give or do something, the judges can condemn him to give or do this. The fact that the guardians were indeed guardians of the boy concerned is proven by P.Yadin 12. Their obligation to give is in a way given by their appointment, but it is explained in P.Yadin 13 where it is said that someone was to be appointed to see to the debts and pay the maintenance money for the orphan. P.Yadin 13 states as well that the appointed guardians have not given the maintenance money,

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[105] Nörr, "The *xenokritai*," 93–94.

[106] Nörr, "Zu den Xenokriten," 270–271. Also: 'There are no basic doubts that recuperatores were available to the governor (at least in certain periods and provinces)' (Nörr, "The *xenokritai*," 92) and 'Für Gaius (inst. 4.105, 108) sind peregrine Richter im Formularprozess eine Selbstverständlichkeit' ("Römisches Zivilprozessrecht nach Max Kaser," 90).

[107] Nörr, "The *xenokritai*," 89: 'It seems likely to look for its (Latin) pattern in the edict of the imperial governor from Arabia. The testimony of Gaius (inst. 1.6) confirms that also imperial governors normally issued an edict, as he attributes the *ius edicendi* to the *praesides* without reservation.… The circumstances suggest a standard translation—either from the governor's bureau or from a local *nomikos*; one could consider whether the Roman central authority provided such translations' and Nörr, "Zu den Xenokriten," 269–270: 'Wenn man die Existenz der Formel der *actio tutelae* im Archiv der Babatha nicht mittels eines historischen Romans erklären will, so liegt ihre Herkunft aus dem Edikt des (kaiserlichen) Statthalters der Provinz Arabia nahe,' also with reference to Gaius Inst. I.6 and discussion of earlier ideas that this text did not represent legal reality. The evidence from the Babatha archive obviously supports the assumption that Gaius did describe actual practice.

In a later publication Nörr retracted the idea that the *actio* came from the governor's bureau, see n. 76 above.

[108] Lewis, 118.

at least not enough of it. P.Yadin 14, the summons to the court case, states this again. Consequently, P.Yadin 12–14 seem to contain all the evidence Babatha needed: proof of the guardianship, proof of an obligation to provide maintenance and proof of default in meeting with this obligation.

However, the *actio* is supposed to be brought by the orphan himself (X). In Roman law it was indeed the case that complaints about guardianship could only be initiated after the guardianship had ended. This was usually when the ward had come of age. In the present case we see a mother initiating the act, during guardianship. This means that it is doubtful whether Babatha could use the *actio tutelae* in her case against the guardians. Cotton suggested that another act is more likely to be brought by a mother, namely the *crimen suspecti tutoris*.[109] That act was specifically aimed at abuses of guardians in their management. Cotton mentions several texts from the Digest and the Codex that make it clear that such cases were judged by the provincial governor and that an untrustworthy guardian could be removed from his post.[110]

It is said in *C.* 5.50.1 that *the ward* can approach the provincial governor, leading to the same problem as discussed for the *actio tutelae* above, but Cotton rightly refers to *Dig.* 26.10.1.7 where it is said that even women can bring a charge of untrustworthiness 'but only those who take this step as a family duty, as, for example, a mother.'[111] Obviously, the *crimen suspecti tutoris* was *the* charge a mother could bring during minority of her child. It is important to note the caution called for by Kaser that this may have only applied to the *tutor testamentarius*, not to a *tutor* appointed by the magistrates.[112] However, if we accept that the claim applied to appointed guardians as well, Babatha could bring the claim in her position as mother, based on her family duty towards her son.

The *crimen suspecti tutoris* had to be brought against a fraudulent guardian, thus a guardian who harmed the interests of the ward on purpose, to enrich himself. It seems that this is what Babatha argues

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[109] See Cotton, "The Guardianship of Jesus," 104.

[110] See Cotton, "The Guardianship of Jesus," 104: *CJ* V.50 (*de alimentis pupillo praestandis*) 1: *Pupillus, si ei alimenta a tutore suo non praestantur, praesidem provinciae adeat, qui, ne in alimentorum praestatione mora fiat, partibus suis fungetur*, and *Dig.* 26.10 (*de suspectis tutoribus et curatoribus*) 3.14: *Tutor, qui ad alimenta pupillo praestanda copiam sui non faciat, suspectus est poteritque removeri.*

[111] See Cotton, "The Guardianship of Jesus," 103.

[112] See Cotton, "The Guardianship of Jesus," 103, n. 104.

in P.Yadin 15 when she states in the final lines that a refusal of her proposal will serve as proof of the guardians' profiteering from the orphan's money. Consequently, the evidence provided by papyri 12–15 (a mother bringing charges and a clear accusation of fraud) points in the direction of the *crimen suspecti tutoris*. Nevertheless,

> the presence of these documents [P.Yadin 28–30, JGO] here is disconcerting; the legal proceedings and remedies envisioned in them are quite distinct from those of the *crimen suspecti tutoris*, so far discussed.[113]

The *actio tutelae* covered all cases in which a guardian did not do what he was obligated to do or give, apparently without supposing any malignant purpose on the guardian's part. Consequently, the act was directed at having the guardian condemned to do as he was obliged to do, without any malevolence on his part having to be proven. We are thus left with two concepts that seem ultimately incompatible.

Several solutions have been suggested for this problem. Of course, it is possible to assume that Babatha simply prepared the wrong *actio* for her case. This is unlikely regarding the probable source of the formulae found in the archive: as Nörr argued, Babatha was probably supplied with the formulae by a legal expert or even by the governor's office, and would not have easily received the wrong *actio*.[114] Nörr further observed that Babatha's claim for more maintenance could have been covered by a *cognitio extra ordinem*, which could have been set off by the petition she directed to the governor in P.Yadin 13 and the summons of P.Yadin 14.[115] Therefore, the presence of the *actio tutelae* in the archive suggests that it was to be used at some point in the procedures. Nörr suggests an interesting combination of the *crimen suspecti tutoris* behind P.Yadin 15 and the *actio tutelae* found in P.Yadin 28–30: Babatha as mother could have the guardian removed from his office and the other guardian or a newly

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[113] See Cotton, "The Guardianship of Jesus," 105.

[114] See Nörr, "Zu den Xenokriten," 269: 'Babatha könnte etwa der irrigen Meinung gewesen sein, dass die *actio tutelae* ihr in dem Unterhaltsprozess irgendwie nützlich sein konnte. Doch sollte man versuchen, die Geschichte so zu erzählen, dass ein nach römischem Recht sinnvolles Interesse an der Formel existierte.' Compare Nörr, "Prozessuales," 321: 'Man könnte überlegen, ob Babatha schlecht beraten war, als sie sich für ihren Streit mit den Vormündern die Übersetzungen der Formel besorgte. Doch ist das angesichts deren Herkunft unwahrscheinlich. Sieht man davon ab, dass sie sich wahllos mit prozessual irgendwie verwertbarem Material eindeckte, so könnte sie—vorausschauend—an die Beendigung nicht so sehr der Vormundschaft als solcher, sondern der Amtstätigkeit des Johannes gedacht haben.'

[115] Nörr, "Prozessuales," 321.

appointed guardian could then bring the *actio tutelae*.[116] This could be an explanation for the fact that Babatha sues only one of the guardians in P.Yadin 14. Admittedly she does address both of them in P.Yadin 15.

Another possibility is that the *actio tutelae* was intended for the moment when the guardianship would end: either at Jesus' coming of age,[117] or at the death of one of the guardians.[118] We know from P.Yadin 27 that some seven years later the son of one of the guardians had taken his place as guardian. This could indicate his father had died.[119]

Of course we cannot be sure why the guardianship of the father ended: he could just as well have been removed from his office. This could have been the consequence of a *crimen suspecti tutoris* charge by Babatha (as envisaged by P.Yadin 15).[120] Whether the *actio tutelae* was then ever used against him (or his heirs), cannot be gathered from the evidence in the archive.

To sum up: to be able to understand the evidence of Babatha's legal steps supplied by the documents P.Yadin 12–15 and 28–30 it is obvious one has to assume that the *actio tutelae* was meant to be used in a second phase of the proceedings. Either Babatha prepared to bring the *crimen suspecti tutoris*, where the guardian's death intervened and she was

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[116] See Nörr, "Prozessuales," 321: 'Hier käme einmal die *remotio tutoris* in Betracht; sie konnte auch von der Mutter des Mündels betrieben werden. Nach erfolgter Remotion hätten dann der bisherige *contutor* oder ein neuer *tutor* für das Mündel Jesus die *actio tutelae* gegen Johannes erheben können.'

[117] Chiusi, "Zur Vormundschaft der Mutter," 189.

[118] Nörr: 'Als Alternative wäre die Beendigung durch den Tod des Vormunds Johannes zu erwägen' ("Prozessuales," 321) and: 'Die *actio tutelae* konnte erhoben werden, sobald die Vormundschaft beendet war; dieser Zeitpunkt ist nicht unbedingt identisch mit dem Zeitpunkt, in dem der *pupillus* mündig wurde' ("Condemnatio cum taxatione," 55).

[119] See n. 78 above and discussion of P.Yadin 27 below, 344–345. Nörr, "Prozessuales," 321, takes the appointment of the son in his father's stead to have happened shortly before the drawing up of P.Yadin 27: 'In der Urkunde wird ausdrücklich auf die Bestellung des Simon zum Vormund durch die *boule* von Petra verwiesen. Daraus darf man schliessen, dass dieser erst kurz vorher als Nachfolger seines Vaters Johannes bestellt worden war' and 'Damit war die Vormundschaft des Johannes beendet und eine *actio tutelae* gegen ihn oder gegen seine Erben möglich' (Nörr, "Zu den Xenokriten," 269), explaining in a footnote: 'Umstellung der Formel auf die Erben, Erhebung der Klage durch einen *contutor*.' The question that remains is whether the new guardian Simon would not have been (one of the) heir(s) to be sued. This would present us with a rather complicated situation of two guardians, one original, one later appointed, where the original guardian would have had to sue the later appointed one in his position as heir of the original deceased (or removed?, see next note) guardian.

[120] One can wonder how likely this would have been, considering the fact that the new guardian is the son of the old one. Would a court nominate the son of a guardian who was removed from his office because of mismanagement?

supplied with the *actio tutelae* instead, or she expected to use *actio tutelae* after a successful removal of the guardians from their office. In the latter case the *actio* had to be brought by a co-guardian, and that could be the reason why Babatha sues only one of the guardians: once he is removed, the other one can sue him. Babatha could also have intended the brother in law Joseph to sue the guardians once they (or just one of them) were removed from their office. It can be doubted, however, whether the relationship as understood on the basis of P.Yadin 13 can have been good enough to allow for that, or whether Joseph, who never provided any maintenance for the child himself, would see the need for it.

Assuming Babatha could be considered the boy's guardian (*de facto* guardian on the basis of Jewish law), one wonders whether Babatha could have tried to have the guardians removed from their offices by a *crimen suspecti tutoris* charge and then sue them herself with the *actio tutelae*. As observed by Nörr, a guardian who was removed from office could be sued by a co-guardian or a new guardian appointed in his stead. Of course it is uncertain whether Babatha would have been recognized in her position as co-guardian. Seen against the context of P.Yadin 13 though this is not impossible: there it appears that the situation was more complicated than simply that of a ward with two appointed guardians. The guardians were appointed at a later time, probably following an arrangement between Babatha and her brother in law. Perhaps it can be alleged that this situation (and the appointment of the guardians as co-guardians, for supervision of the estate) would have led to recognition of Babatha's position. In this context I refer once more to Chiusi's observation that P.Yadin 15 reminds one of a *satisdatio* (*rem pupilli salvam fore*), an instrument 'conceived for a co-guardian.'[121] If Babatha held a position as (co)guardian under local law her proposal might have been viewed in that light.

Contents and formalities

It is surprising to find a Greek version of a Roman *formula* in a family archive from a province which had but recently been subjected to Roman rule.[122] Cotton has furthermore discussed the Roman flavour

[121] Chiusi, "Babatha vs. the Guardians," 130–131.

[122] See Cotton, "The Guardianship of Jesus," 94: 'The remarkable rate of Romanization in the new province of Arabia struck scholars first introduced to the archive,' espe-

of the other documents, especially P.Yadin 15, drawing attention to the phrases 'the most blessed times of the governorship of Julius Julianus' and 'the style of life which befits him,' i.e. the child.[123] This latter phrase seems to express the same sentiment as can be found in Roman legal sources where guardians are admonished to pay maintenance money that is in accordance with the rank and resources of the ward. This leads Cotton to conclude that

> whoever composed the document was familiar with Roman turns of thought and sentiment, and perhaps with Roman legal argumentation; he was certainly acquainted with the imperial propaganda of 'these most blessed times.'[124]

The question is of course whether the fact that the documents seem to draw on Roman sentiments and that Babatha obviously planned to use a Roman *formula*, says anything about the law behind the documents.

A *formula* is part of procedural law: the *formula* pertains to the performance of a court case, by explaining what steps will be taken in judging the case and/or indicating what kind of evidence needs to be brought. The *formula* may determine who can bring charges against whom (the pupil against the guardian), but it does not determine, for instance, who can be guardian. This is determined by rules of substantive law. Substantive law determines people's legal position, while procedural law determines how they can proceed in case of a conflict. This means that the use of the Roman *formula* only points at formal application of Roman law: when turning to a Roman court one had to take this rule into account. The substantive law pertaining to the case, however, need not automatically have been Roman. This means that in a guardianship case Babatha could have been considered guardian when her own substantive law (Jewish law) had her become guardian. We can assume that this

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cially referring to Wolff, who commented on the presence of the *formula*: 'Wie konnte ein so spezifisch römisches Gebilde wie eine Prozessformel überhaupt in das peregrine Rechtsleben dieser entlegenen und erst kürzlich eingerichteten Provinz gelangen?'

[123] P.Yadin 15:27–28 and 22 respectively. Line 22 is damaged, see Lewis' notes on this line, 62–63. See Cotton, "The Guardianship of Jesus," 103–104, where she discusses documents with comparable phraseology. She touches upon the interpretation of line 22 in note 110, referring to Lewis for the reading, and explaining that comparison shows the amount of money paid was indeed meagre: 'Babatha might have had grounds for complaint.'

[124] See Cotton, "The Guardianship of Jesus," 104.

guardianship would have been accepted by the Roman court.[125] In the present instance however, Babatha's guardianship is not at issue, since she does not act as guardian. Her position is that of the mother of the pupil, who wants to sue the appointed guardians. This raises the question of where Roman *procedural* law would put her. Strict interpretation of the *actio tutelae* excludes the possibility of application of this act by a mother like Babatha. This could explain her proposal in P.Yadin 15 and the implied applicability of the *crimen suspecti tutoris*. This charge could be brought by a mother and Babatha would then meet with the Roman *formal* demands to proceed in the case. Again this does not say anything as to her position on the basis of substantive law. It is possible to assume that Babatha would proceed (after having succeeded in having one of the guardians removed on the basis of the *crimen suspecti tutoris*) with the *actio tutelae* in her capacity as (co-)guardian of the child.

This means that the presence of the *formula* in the archive can show that the Roman governor's court in the province used Roman court proceedings,[126] but it cannot be taken to imply that the court judged cases substantively based on Roman law. This would only have been possible if the employability of the *formula* depended on Babatha's position determined in Roman law.[127] This is, however, obviously not the case here.

What the combined evidence does show, is that people turning to a Roman court were obliged to comply with the Roman formal demands.[128] Apparently they had recourse to official sources of Roman

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[125] An assumption with a basis in Roman legal sources, see below, 342–344, for a discussion of a Digest passage which indicates that in an actual guardianship case local law was followed.

[126] I leave aside here the entire discussion about the implications of the presence of a *formula* for our understanding of the way suits were conducted in the province of Arabia: for this see Nörr, "Prozessuales," *passim*. Whether we have to assume that P.Yadin 13–15 aimed at a *cognitio extra ordinem* or P.Yadin 28–30 should be taken to indicate that in the province *formulae* were used, has no immediate bearing upon my discussion of the applicable law to these papyri. In both cases the evidence as we have it from the archive suggest that formally Roman law was adhered to, while substantively local law was followed.

[127] This would have been the case if the *formula* had determined that a charge could be brought by a certain person, while it was clear from the other evidence that Babatha would hold such a position according to Roman law, but not according to Jewish (or indigenous) law.

[128] I mean formal in the sense of formal law and not in the more general 'loose' sense in which the word 'formal' or 'forms' is sometimes employed, compare for instance Chiusi, who speaks of observing Roman forms, while referring to the offer of P.Yadin 15 which is rooted in Roman substantive law ("Babatha vs. the Guardians," 131). Also see

procedural law informing them on how to proceed in their case. The steps Babatha undertakes in her dispute with the guardians may have been dictated one by one by the strict demands of the *actio* applicable to her case: as Nörr noted it is possible that removal of one of the guardians was intended as a first step towards having the other one sue him later. Therefore, Babatha had to summon only one of them, as P.Yadin 14 shows. Since P.Yadin 14 and 15 differ from P.Yadin 13 in steps envisaged or undertaken, I am inclined to believe that at least one of the copies of the *actio tutelae* found in the archive came from the governor's office, perhaps together with his reply to Babatha's petition (the go ahead).[129] It would be interesting to conjecture that go aheads were accompanied by an applicable *actio* for the case, indicating the formal demands that had to be met with.[130] Babatha must then have been advised by a local *nomikos* on the next steps: we can hardly imagine a local woman understanding the implications of the *actio tutelae*. Regarding P.Yadin 25 and 26 Nörr observed:

> Wenn es richtig ist, dass das Ambiente der Babatha mit der Unterscheidung verschiedener Interdikts-Arten umgehen konnte, so müssen wir bereits in den ersten Dezennien der Provinz Arabia eine recht intensive Praxis im römischen Recht voraussetzen.[131]

What is fascinating about this in the light of the present investigation is that the only direct evidence of the applicability of Roman law in the archive is evidence of the applicability of *formal* law. There is no Greek version of, for example, any substantive regulation on guardianship. This contrasts sharply with the case of the family archive from third century Egypt, discussed above, where a rescript is found of Gordian dealing with illegitimate children.[132] Such a rescript provides information on

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n. 97 above, about Chiusi's use of 'Formsache' in the more general sense of 'a matter of outer appearance' rather than referring to formal law.

[129] See discussion of P.Yadin 13 above, 320–323 and especially n. 76.

[130] In the case of P.Yadin 25 where a go ahead is also referred to the *actio* possibly sent must have been in the hands of Besas and Julia Crispina, the parties sueing, not with Babatha, who was charged. She obviously tried to set off another lawsuit herself, but got a reply that she had to partake in the original suit. Consequently, no *actio* pertaining to that matter could have been found in her archive.

[131] Nörr, "Prozessuales," 333. The 'Interdikts-Arten' mentioned are the *interdictum unde vi* (for P.Yadin 25) and the *interdictum (duplex) utrubi* (for P.Yadin 26): Nörr, "Prozessuales," 332. Compare Nörr's observations as to the use of the term ξενοκρίται in P.Yadin 28–30: 'Ohne Kenntnisse des römischen Rechts ist eine solche Übersetzung kaum denkbar' ("Römisches Zivilprozessrecht nach Max Kaser," 87).

[132] See 308 and 310 n. 35 above.

substantive law: if taken to apply to the case of Paulina, the rules in the rescript would determine whether Paulina is a legitimate child or not, and consequently, whether she can inherit her father's estate or not.[133] The evidence from Egypt consequently indicates that here substantive Roman law played a part in the legal matter at issue. This is obviously not the case in the Babatha archive: The *actio* found there can only testify to applicability of Roman formal law. All the other facts related to the case, whether manifested in the documents or inferred from them, indicate that the substantive side of the matter was firmly rooted in indigenous law.[134]

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[133] See 308 above.

The relationship between the rescript and the succession matter at issue is not completely clear: it was believed that Paulina did not inherit her father's estate because she was an illegitimate child. I am not sure, however, that the documents show that Paulina did not inherit her father's estate: the brother of the father to whom the property is entrusted need not be considered owner of the property. See detailed discussion on 308–310. It suffices to note here that the rescript in any case concerns a matter of substantive law: it gives a rule for the legitimacy of children: 'Registrations of children that have been omitted do not make these who are truly (legitimate) illegitimate. Nor do (the registrations), if they were actually made, introduce outsiders into the family. The central issue in this rescript is the registration of children, and the legal status that follows from registration of failure to do so. In short, the rescript makes clear that registration is not a legal cause to establish (il)legitimacy of children' (Verhoogt, "Family Papers from Tebtunis," 150).

[134] In view of the evidence as presented in this chapter, and collected in this study in general, I cannot agree with Nörr's conclusion: 'Auch wenn wir hier auf das materielle Recht kaum eingegangen sind, spricht doch vieles für einen grossen Einfluss des römischen Zivilrechts. Was das Prozessrecht betrifft, so is die Romanisierung radikal zu nennen.' (Nörr, "Prozessuales," 341). It is not clear to me what justifies the first conclusion: Nörr's reference to the *stipulatio* clause found in a number of documents cannot support the conclusion, as the use of this clause is a feature not of substantive but of formal law. For as far as Nörr based his conclusion on the articles about guardianship by Cotton and Chiusi, I refer to my detailed refutation of some of their views above: it is by no means clear that P.Yadin 12–15 can say anything about the question of whether a mother could be guardian of her minor child and thus of whether Roman substantive law applies to these documents or not. I would agree with Nörr's second conclusion, as to 'das Prozessrecht,' but then that is logical in my interpretation of the situation: formal law is not heavily influenced by Roman law, but formal law *is* Roman law, as the local populace was obliged to meet with Roman formal demands to be able to enter into suits before the Roman governor.

In this context it may also serve to note that Nörr, in discussing the provincial edict, at one point speaks of 'Jurisdiktionsedikte' apparently referring to rules of Roman law that applied to formal matters, procedure only ("Prozessuales," 322). If it has been the case that the provincial edict for the province of Arabia only provided rules for the way in which cases were to be judged (perhaps including *actiones*, like the *actio tutelae*, as Nörr has suggested), then it would be all the more likely that the cases were judged substantively according to indigenous law.

This difference is all the more remarkable when one considers what Hanson writes in the opening lines of her article comparing Babatha's position with that of widows in Egypt:

> Papyrologists who work with the Greek documents from Roman Egypt have found in Babatha and other provincials of the eastern Mediterranean confirmation for our belief that Egypt was by no means a unique province within the Roman system. The texts discovered in Palestine, Syria, and north-western Mesopotamia closely resemble the documents from Egypt and are similar in content—family papers concerned with property and inheritance, private letters, dealings with the Roman bureaucracy through the mechanics of the census, taxation, and military affairs.… The Greek in which they were written is also similar in palaeography, in morphology and syntax, in formulae, and in the habit of incorporating expressions and proper names from the various native languages that continued to dominate oral exchanges throughout the region.[135]

However, despite all of these pronounced similarities in contents of the acts and diplomatics, there are major differences of legal importance that are apparently easily overlooked. Hanson touches upon the fact that both Babatha and Aurelia

> retained copies of official Roman pronouncements that addressed the legal matter lying at the center of their struggles to safeguard the financial welfare of their children. Aurelia Sarapias retained the rescript of Gordian on the relation of a child's registration to its legitimacy, and Babatha retained three copies, written out by two different hands, of a Greek version of one of the praetor's actions dealing with guardianship of orphans (28–30, ca 125 CE).[136]

Hanson does not register, however, that the presence of these 'copies of official Roman pronouncements' paint completely different pictures as to the legal situation: in Egypt *substantive* Roman law applied, in Arabia only *formal* Roman law applied. This means that while the presence of these documents appears to constitute a similarity between both archives, in reality this presence allows us to discern a marked difference where the applicable law is concerned. Another major difference that

[135] Hanson, "The Widow Babatha," 85.

[136] Hanson, "The Widow Babatha," 95. In a note Hanson indicates that 'the appropriateness of the praetor's pronouncement to Babatha's case against the guardians, prior to termination of the tutelage has been much discussed…' referring to Cotton and Chiusi. Whether or not we can explain for the part the *actio* might have played in Babatha's case against the guardians, it remains a fact that the presence of an *actio* sees to applicability of formal and not of substantive law.

has been overlooked so far has been pointed out in Chapter 1: in Egypt the subscriptions to a legal act had to be written in Greek regardless of the language of the main document, while in our archives subscriptions are in Aramaic. This indicates that the language issue, the questions as to the use of one language as against another in legal acts and the implications for (in)validity of those languages in legal acts, should be assessed differently for Egypt and for Arabia. These two examples indicate that the similarities that present themselves all too readily should not prevent us from looking closer for what might lie beneath.

The evidence from the archive that local law was adhered to in the legal acts suggests that this local law, as the substantive law for the legal act at issue, would be accepted by the Roman governor judging a case arising from such a legal act. This assumption actually finds support in the Roman legal sources themselves.

In her treatment of P.Yadin 12–15 Chiusi adduces *Dig.* 26.2.26 pr. (4 resp.), which says:

> *Iure nostro tutela communium liberorum matri testamento patris frustra mandatur, nec, si provinciae praeses imperitia lapsus patris voluntatem sequendam decreverit, successor eius sententiam, quam leges nostrae non admittunt, recte sequetur.*[137]
>
> According to our law a mother cannot be made guardian of the communal children by a will of the father, and if a provincial governor has decided in inexperience that the will of the father should be followed, it is not right for his successor to follow his verdict, which is not allowed by our laws.

Chiusi adduces the passage to show that the rule that barred women from guardianship was also applicable in a provincial situation: despite the previous verdict by a provincial governor, the new governor is not bound to it, because he has to effect the rule that women are barred from guardianship. Chiusi interprets the text as dealing with the question whether a provincial governor is bound to the verdicts given by his predecessor. Chiusi observes that at least for the period in which the first governor ruled the woman exercised legally recognised guardianship and could act accordingly, while questions remain as to the validity of legal acts undertaken in that capacity and liability towards the ward.

One can wonder, however, whether the text does not mean something else. Does it really purport to say that a governor should not follow the

[137] Chiusi, "Zur Vormundschaft der Mutter," 173.

judgement made by his predecessor in case this judgment goes against Roman law, or does it say that if a governor follows a judgment made by his predecessor that goes against Roman law this is not right? The latter interpretation would denote that it did not only happen that governors made decisions that were contrary to Roman (substantive) law, but that their successors also tended to stick to them, which is then deemed not right. What the text thus shows is that cases were judged on the basis of a legal act adduced by the parties (the will of the father) while the outcome went counter to Roman (substantive) law.

Chiusi observed:

> der Fehler des Statthalters könnte sich dadurch erklären, dass in seiner Provinz nach dem dortigen Rechtsgebrauch Frauen eine Vormundschaft ausüben konnten, die Anordnung des Testators somit dem dortigen Recht entsprach. Dies wäre bei östlichen Provinzen durchaus denkbar, wie eine Reihe von Papyri belegt… Papinian war, da er die Eigenheit des römischen Rechts gleich zweimal betont (*iure nostro*, *leges nostrae*), die Verschiedenheit der Rechtsordnungen in diesem Punkt bewusst. Die Deutlichkeit, mit der er die römische Regelung einschärft, lässt auf den rechtspolitischen Willen, dass *ius nostrum* durchzusetzen, schliessen.[138]

The governor judged a case according to the contents of the legal act, which as Chiusi assumes would have a basis in local law. This comes down to accepting that cases were in fact judged substantively according to local law. Thus we have here a passage from a Roman legal source that testifies to application of local (in any case non-Roman) law to the substantive side of cases.[139]

The question is of course whether the text also says something about applicability of local law, that is, not about the actual application of local law, but about the desirability of this application. To the question whether a new governor should follow the verdict or not, Papinian answers to the negative, saying with much emphasis, as Chiusi notes, that Roman law does not allow it. Does this mean that applicability of non-Roman (substantive) law did happen but was not according to what the Romans wanted?

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[138] Chiusi, "Zur Vormundschaft der Mutter," 174–175.

[139] I tentatively assume that this was also Wolff's interpretation of the passage. He does not discuss it, but only refers to it very briefly in a footnote; however, as I read his main text and footnote in conjunction, the reference apparently serves to support his conclusion that 'jedenfalls fehlt auch hier jedes Indiz für eine Rezeption römischen Rechts oder auch nur römischer Praktiken' (Wolff, "Römisches Provinzialrecht in der Provinz Arabia," 801, n. 112).

In this respect it is important to note that Papinian judges the first governor's choice to follow the will of the father as a mistake made in inexperience. This judgement should be taken with a grain of salt, I believe, if only because the passage itself leaves room for the interpretation that the new governor was inclined to follow his predecessor's judgement. Would he have been inexperienced as well? Additionally, one may observe that the position of governor of a province was usually not given to someone who was inexperienced, and that it is generally assumed that the governor was assisted by local experts.[140] It seems that Papinian did his best to emphasize that even in the provinces Roman law had to be adhered to, while the actual situation was the opposite: local law or in any case the contents of the legal act at issue was followed by the Roman judge.[141]

Excursus: did Babatha win her case?

What we are of course interested in, is knowing what Babatha achieved. Did she convince the governor that the guardians paid too little maintenance money? Cotton has pointed out that there is an early third-century account of a guardian which shows that for two children eight denarii were paid, 'i.e. 4 denarii per child; twice as much as that provided for Babatha's son. Babatha might have had grounds for complaint.'[142] Yet the evidence suggests that Babatha first had to prove that the guardians were fraudulent. Only after a successful removal of one of the guardians from their office could she have the other one use the *actio tutelae* to demand compensation for the insufficient maintenance money previously supplied. Could Babatha indeed convince the governor of the guardians' 'profiteering'?

In most cases we cannot tell what the outcome of lawsuits has been. However, in the present case we can. There is a receipt for maintenance money in the archive, addressed to a new guardian of the child, dated to 132 CE, that is, some seven or eight years after the dispute of P.Yadin

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[140] See discussion about the interpretation of Aramaic deeds in a Roman court in Chapter 1 above, 66.

[141] Here we should bear in mind, I believe, that the legal situation in the Roman empire at the time of the Babatha archive will have been very different from that in the days of Papinian: in Babatha's lifetime the applicability of local law to the substantive side of cases will have been more readily accepted. Besides that, it is clear that the Digest does not always paint a faithful picture of legal reality, but expresses what should be the ideal situation.

[142] See Cotton, "The Guardianship of Jesus," 103, n. 110.

12–15. The amount of money acknowledged to have been received there is exactly the same amount that was paid before, according to Babatha in P.Yadin 13: two denarii a month.[143] Babatha seems to have been unsuccessful in her case.[144]

The receipt is addressed to Shim'on, 'the hunchback,' the son of John son of Eglas. This is obviously the son of one of the guardians of P.Yadin 12–13 and 15, the same guardian specifically addressed by Babatha in P.Yadin 14. Babatha mentions in P.Yadin 27 that the city council of Petra had appointed him. The question is why he was appointed, apparently in his father's stead.[145] The thought comes to mind whether John was found guilty of 'profiteering' and was therefore dismissed. I do not think this is likely since in such a case one would hardly expect the son of the man concerned to be appointed to replace him. It is more likely that John the son of Eglas died[146] and the council appointed his son to succeed him. The fact that the son pays the same amount of maintenance money the father did in any case suggests that Babatha had not been able to win her case. In what respect she failed cannot be judged since we do not know what claim she eventually brought.[147]

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[143] See P.Yadin 27:9–11, six denarii for three months.

[144] Perhaps we should conclude that it had never come to the legal action Babatha intended. Compare Lewis, who states the case as follows: 'We learn from this receipt that…, despite her earlier threats of legal action (**14, 15**) Babatha was here receiving the same amount of money, two denarii a month, that she had years ago complained of as being inadequate (**13**, 23–24, **15**).' (Lewis, 116).

As Lewis notes, the receipt is addressed to one of the two guardians (Lewis, 116). The guardian who is addressed, is explicitly described as being appointed as the second guardian of the minor child (P.Yadin 27:6–7), that is, we know for sure that there were still two guardians at the time. One wonders whether the payment acknowledged here was made by one of the guardians on account of both, or whether one should think that each guardian paid a certain amount of money. Chiusi suggested that the reason why Babatha addressed but one guardian in P.Yadin 14, might have been that he had not paid his due while the other guardian had (see 324 above). Consequently, it would be possible that at the time of P.Yadin 27 Babatha received two denarii a month from each of the two guardians and P.Yadin 27 represents a receipt for the money paid by one of the guardians for the amount he was obliged to pay (see Chiusi, "Babatha vs. the Guardians," 116). In that case we would have to argue that her legal action had been successful.

[145] See Lewis, 116, 117 (remark on line 7). See also n. 119 above.

[146] See n. 118 above.

[147] If indeed it ever came to a suit. Apart from that, we do not know whether the *actio tutelae* was ever used. Perhaps Babatha failed in proving the malignant purpose on behalf of the guardians, necessary for the removal of one of them from their office. Furthermore, the death of John might have influenced the legal procedures, enabling a suit based on the *actio tutelae*. If such a suit took place it must have been conducted between the guardian that remained in office (or a new guardian) and the one removed.

The case of Judah's nephews

The archive presents us with another instance of minors who obviously needed and had a guardian. These minors are the sons of the deceased brother of Babatha's second husband Judah.[148] Jesus, the child concerned in the previous section, was Babatha's child by her first husband Jesus. He died and his brother obviously managed his estate affairs, at least until guardians were appointed or perhaps even after that. Here we are discussing a later stage in family history covered by the archive, as Babatha has married her second husband Judah and is sadly widowed again. It does not appear that Judah and Babatha had any children together; Judah had a daughter Shelamzion from a previous marriage. Her position as (presumably) only child and the implications on the basis of law of succession were discussed in detail in Chapter 4.[149] What concerns us here is the appearance of the sons of Judah's deceased brother, who have apparently got an interest in the estate affairs, to be dealt with after Judah's death. Above, in Chapter 4 on law of succession, I explained that the case as presented here, both in P.Yadin 20 and 23–25, shows that the sons of Judah's deceased brother were his legal heirs.[150] On their behalf suits are started or settlements reached, by a guardian named Besas. This suggests they were minors at the time. We do not know how many sons there were, the documents in any case speak of orphans, plural.[151] Neither do we know how Besas got appointed guardian, indeed we do not know whether he got appointed at all.[152] Appointment of guardians

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This means that documents to this point cannot be expected to have been in Babatha's possession.

I note that the fact that the son of John is appointed guardian in his stead complicates our understanding. On the one hand it seems unlikely that if John got removed from his office, his son would be appointed in his stead. On the other hand the death of John could cause the *actio tutelae* to be brought against his heirs, but those would normally include his son (see n. 119 above). One can hardly envisage a suit being started against the son of a former guardian and that same son being appointed guardian in his father's stead.

[148] For family relations see the family tree in Lewis, 25.

[149] See especially 226–234 and the conclusions on 237–245.

[150] See 232–234 above.

[151] See P.Yadin 20:5/24 and 23:2/11, 6/17; 24:1,7,12 (curiously the fragments of the outer text that are preserved do not contain the word orphans); 25:3,5,10/41 (for lines 3 and 5 the corresponding lines in the outer text are damaged and do not contain the word orphans).

[152] If a copy of an official appointment was ever issued, one would, in analogy to the presence of P.Yadin 12 in Babatha's archive, expect this copy to have been part of the archive of the orphans' mother, of which we have no knowledge.

may have been an unusual situation, or in any case one secondary to other options for administration of minors' interests.[153] He might have been a relative of the orphans taking care of their monetary interests. However, this seems less likely in this case, since a close male relative would probably be a brother of the father and if such a brother existed he would have been heir to Judah's estate alongside the orphans. In any case, it is obvious that the archive does not reveal in what relation Besas stands to the orphans, or in what way he came to be their guardian. At his first occurrence in P.Yadin 20 he is merely designated as 'guardian of the orphans of Jesus son of Khthousion,' i.e. guardian of the heirs to Judah's estate.[154] Perhaps the fact that there is but one guardian could denote that Besas had become guardian by law and not by appointment. In any case, the specific circumstances of the appointment of P.Yadin 12, with (additional) estate supervision in mind, might have called for the naming of two guardians instead of one.[155] This need not imply that in all cases two guardians were named. Indeed, in this instance, Besas is probably not some additional supervisor, but the original guardian, the legal representative of the minor orphans. Nevertheless, the matter is complicated by the presence of another person in Besas' company, who is designated with the title ἐπίσκοπος, 'supervisor.' The term has no parallel in being a technical legal term of some kind and it seems likely it was chosen in this specific instance to mark off the position

[153] P.Yadin 12 could present us with an extract from a list of appointments ('a register of guardians': Cotton, "The Guardianship of Jesus," 95, n. 10, referring to Polotsky and Wolff; compare Chiusi: 'Denkbar wäre, dass sie eine Rubrik ἐπιτροπή oder ἐπιτροπαί der am Aphroditetempel hängenden Akten wiedergibt, aus der der Schreiber für Babatha einen Auszug anfertigte' ["Zur Vormundschaft der Mutter," 180]). This suggestion makes sense, especially in the light of the used ordinal number 'one caput from.' Chiusi commented on the unusual appearance of an ordinal number in the phrase: 'there is no need for stressing the "singularity" of the *caput*' ("Babatha vs. the Guardians," 109). Accepting the suggestion that an extract from a list was concerned, the ordinal number should be understood to denote 'one section from a longer whole,' 'one item from a list.' If indeed a list of appointments existed, we have to accept that appointments occurred with a certain frequency. Still we have no way of knowing how the frequency of appointment of guardians would relate to the number of actual cases in which minor orphans needed someone to see to their interests.

[154] P.Yadin 20:4–5/23–24.

[155] In P.Yadin 12–15 we are obviously dealing with guardians who got appointed for a specific reason: to supervise estate affairs. This appointment of guardians at a later stage (not right after the father's death) could imply that these guardians were more like the Talmudic co-guardians. This would explain the naming of two guardians instead of the usual one; see 310–312 above.

of this second person from that of the original guardian.[156] Besas is an ἐπίτροπος, the second person an ἐπίσκοπος. What makes the case all the more astonishing is that this second person is a woman, and one with a thoroughly Roman name: Julia Crispina. In P.Yadin 25 she is designated more specifically as a daughter of Bernicianus. All these clues point to a singular position, perhaps even one of authority.[157] However, from a legal point of view it is completely unclear what this female supervisor is doing here. Assuming she was a Roman matron only makes her appearance harder to understand.[158] Why is she involved in this lawsuit between locals? Moreover, why does she hold a position that seems completely alien to Roman law?

To understand at least something of Julia Crispina's position we have to clarify what she is and is not. Lewis stated that 'the technical distinction between the terms ἐπίτροπος and ἐπίσκοπος escapes us,' adding a few lines down that 'perhaps she had to be given another title because only a man could be named an ἐπίτροπος (= Latin *tutor*); or perhaps, as G.W. Bowersock suggests to me, her title, as a Roman citizen, was superior to that of Besas.'[159] Nevertheless, Lewis assumes that Julia Crispina 'was, to all intents and purposes, one of the two guardians of the orphans, Besas being the other.'[160] This means that Lewis assumes that

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[156] See Cotton, "The Guardianship of Jesus," 97, explaining about the use of the term and the lack of 'a technical legal sense,' which makes it suitable to use for a person who does not have a legally acknowledged position.

[157] Lewis assumed her to be a Roman citizen, see 92 (note, though, that his reference to V of the General Introduction where her position as a Roman citizen would probably have been explained, is without context, as V of the General Introduction never appeared, see 31–33 above). Ilan attempted to identify Julia Crispina with a Herodian princess (Tal Ilan, "Julia Crispina Daughter of Berenecianus, a Herodian Princess in the Babatha Archive—A Case Study in Historical Identification," *JQR* 82 [1992]: 361–384).

[158] Cotton remarked that had Julia Crispina indeed been a Roman citizen this would have made it 'less rather than more likely that she would be exercising the duties of a guardian' ("The Guardianship of Jesus," 97, n. 39).

This means that Lewis' interpretation seems to be a bit contradictory: on the one hand he seems to assume that Julia Crispina was a Roman citizen, on the other hand his conclusion that she was 'to all intents and purposes a guardian like Besas' does not seem to fit in with that (in Roman law women were completely barred from exercising guardianship, see discussion above).

Lewis came back to his interpretation Julia Crispina was a 'real' guardian later, see n. 162 below.

[159] See Lewis, 92, notes on lines 3 and 22.

[160] See Lewis, 92, notes on lines 3 and 22.

Also see Safrai, "Halakhic Observance," 213: 'The Yadin papyrus mentions a Julia Crispina who was appointed to be a guardian.' However, the term used to refer to Julia Crispina indicates the opposite. Safrai's consequent observations are not completely

even though Julia Crispina was named ἐπίσκοπος her actual legal part was that of an ἐπίτροπος. This seems unlikely as the problem is not just in the use of the term ἐπίτροπος for a woman, but in the fact that Roman law completely barred women from the exercise of guardianship.[161] If the Roman legal background here dictated that Julia Crispina was designated ἐπίσκοπος because she could not be named ἐπίτροπος, that same Roman legal background would ensure she could not effectively *be* a guardian either. Whatever the title bestowed unto her, under Roman law a woman could not exercise the powers of a guardian.[162] This shows from the mere fact that a different title is allotted to her, but it can also be seen from her behaviour that differs from that of Besas. In P.Yadin 20 where she appears alongside him her declaration is different, even though in the main text of the document a plural is employed to refer

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accurate either: he refers to Cotton, who 'correctly showed that the halakhah permits the appointment of a woman as guardian providing that this was in accordance with her late husband's wishes.' Cotton discussed this in relation to Babatha, who is mother of the orphan concerned (and dismissed it as being relevant for understanding Babatha's position). Cotton does not accept that Julia Crispina was guardian, which means her reference to the halakhic practice was not meant to see to Julia Crispina's case. Even if Safrai does believe that Julia Crispina was appointed guardian and that Cotton's reference is of importance in the context of this interpretation, the factual situation as presented in the papyri goes against applicability of this halakhic practice to Julia Crispina. The practice clearly sees to a woman becoming guardian of her own children. There is no indication in the papyri that Julia Crispina was the mother of the orphans of Judah's deceased brother. In fact, her Roman name and peculiar part in the events at issue strongly suggest that she will not have been related to them (compare Cotton: 'I find it hard to believe, though, that she is the mother of the orphans and the widow of Jesus the son of Eleazar' ["The Guardianship of Jesus," 97, n. 39]). If Julia Crispina was not the mother of the orphans concerned, clearly a rule concerning the last will of the deceased husband has no bearing upon her case. That also means that Safrai's reference to Syrian-Roman law where a rule can be found seeing to a woman claiming guardianship if her husband has given no clear directive and he has no brothers, is not relevant either. Consequently, his argument that Syrian-Roman law should also be taken into account when studying these papyri is not convincing.

[161] See Lewis' own observations as cited in next note.

[162] Lewis seems to have come back to his interpretation that Julia Crispina was a real guardian. In "The Babatha Archive" (written in response to Isaac, "The Babatha Archive," 62–75), Lewis notes that 'in fact, Roman law did not allow women to serve as guardians, a ban that was affirmed as late as 224 CE by an imperial constitution, Codex Justinianus 5.35.2. Julia Crispina is never called a guardian (ἐπίτροπος), but a supervisor (ἐπίσκοπος) associated with a male guardian (ἐπίτροπος), one Besas by name. Papyri from Roman Egypt use the words ἐπακολουθέω and ἐπακολουθήτρια for a similar female role. When Julia Crispina acts alone in P.Yadin 25, she explains that she is doing so because Besas is incapacitated by illness' (245).

For the concept of a woman acting alongside a male guardian see 328–329 above and 352–353 below.

to what both Besas and Julia Crispina are said to acknowledge.[163] Where in the closing declarations Besas makes explicit statements acknowledging that 'I will act and clear the title according to all that is written above' Julia Crispina only acknowledges that she has 'conceded accordingly.'[164] In her statement she repeats the title allotted to her, obviously emphasizing her supervisionary status. It seems that she does not have to make the same declaration Besas does, but only has to agree with it. This opens interesting possibilities for determining her position: did she in some way have an interest in the estate at issue? Why else would she be involved in (settlement of) claims that concern this estate?

Furthermore, in P.Yadin 25 Julia Crispina acts on her own, actually summoning Babatha, but she explains that she is only doing this, because Besas is ill and cannot perform these legal formalities himself.[165] This explanation seems to serve the purpose of a justification of her behaviour, suggesting she would normally not be allowed to act without Besas' presence or maybe would not act at all. As appears in P.Yadin 20 Julia Crispina could leave the dealing to Besas, while all she had to do was sign her agreement on it. However, in the instance of P.Yadin 25 Besas was ill and Julia Crispina pursued the case without him, apparently acting in his stead and possibly covered by his authority.[166] Precisely these

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[163] Compare the plural verb of P.Yadin 20:6/27 ('we concede') with the singular in lines 13/35 ('I will register') turning to plural again in lines 14–15/37–38. Lewis (93) remarks about this: 'The change from "we" (Line 6=27) to "I" is—in contrast to 11, where it occurs only in the inner text—the more interesting in view of the fact that both declarants subscribed their attestations, Besas in Aramaic, Julia Crispina in Greek (lines 41–43).' I add that it is true that both subscribe an attestation, but apparently they subscribe in a different way. This could have to do with the fact that they played different parts, which was already visible in the use of plural or singular in parts of the document.

Cotton pointed out that the use of a singular instead of a plural 'may be nothing more than inadvertence; it is quite common in Egyptian papyri (as pointed out to me by N. Lewis); thus the τευχίσω may not prove that, unlike Besas, Iulia Crispina could not register land with the authorities' ("The Guardianship of Jesus," 96, n. 33). I think the question should not be whether Julia Crispina could or could not register land with the authorities, but whether the difference in description of Besas' and Julia Crispina's parts in the legal act, in connection with their subscriptions, indicates that they had distinct positions, which could then imply that indeed their offices were distinct as well.

[164] Lines 41–44.

[165] Lines 4–6/31–33.

[166] Julia Crispina explicitly refers to Besas' illness and the fact that he cannot pursue the case. Note in connection with this that Julia Crispina refers Babatha back to Besas, to a lawsuit where he will obviously appear, suggesting that the case has to be dealt with between Babatha and Besas, apparently without her (Julia Crispina's) direct involvement: P.Yadin 25:26–28/61–63 (see Lewis, 112 for restoration of the word ἐπίτροπον).

facts show that Julia Crispina did not hold the same position as Besas did and that she was certainly not a guardian like he was. Both her formal position and her actual behaviour have to be covered by other terms and other reasons.

Even if we assume that Julia Crispina served another, perhaps secondary, function alongside Besas, it remains to be asked why a woman served this function. Cotton has contrasted Julia Crispina's position with Babatha's situation. Babatha, the mother of the orphan, does not appear to have any influence on the estate affairs concerning her minor son, while this woman, whose relation to the orphans concerned is unclear, holds a position of some authority.[167] I think this fact in itself shows that it was not impossible for women to be involved in estate affairs, but that this was not self-evident. Even though Babatha is the minor's mother and concerned with his upbringing it is nowhere suggested she can wield any control as regarding the estate. On the contrary she seems to be opposed to those controlling it, while Julia Crispina is on the same side with the guardian of 'her' orphans' property. I think it most likely to assume that this difference follows a difference in position, not towards the child(ren) concerned, but towards the estate. The reason that Julia Crispina is a supervisor, while Babatha is an outsider, must be, in my opinion, that Julia Crispina had personal interests in the estate. Julia Crispina appears in those instances where the substance of the estate is at stake: in the case against Shelamzion and the case against Babatha. Both concern questions as to whether outsiders, not heirs, are holding property that belongs to the estate. When the right of such an outsider is confirmed Julia Crispina has to sign her agreement on it. Furthermore, if Besas is unable to continue his lawsuit against Babatha Julia Crispina does so on his behalf. Note that she did not partake in the original summons of P.Yadin 23 (nor in related P.Yadin 24), which suggests that Besas could sue on his own. It seems likely that Julia Crispina only had to confirm eventual settlements like the one in P.Yadin 20. Only from this angle of a personal involvement on Julia Crispina's behalf is it understandable that Julia Crispina is involved in dealings concerning the estate and can even partake in the lawsuit if Besas is not able to do so. In that latter instance we wonder whether Julia Crispina

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Julia Crispina says that if Babatha has something against her she has to appear in the case with Besas. This seems to suggest that the moment Besas was able again to deal with the case Julia Crispina would disappear behind him (almost like a subsidiary party).

[167] Cotton, "The Guardianship of Jesus," 97.

is pursuing the case as supervisor, as secondary to Besas, or on her own behalf focussing on her own personal interests in the outcome of the case. The material does not permit us to make a proper judgment on that point, but I draw attention to Julia Crispina's response to Babatha's countersummons in P.Yadin 25. Babatha tries to initiate another suit, to take place in Rabbath Moab, focussing on her complaint about Besas' suit. However, Julia Crispina refers her back to the original suit (based on Besas' summons of P.Yadin 23 and related 24), saying 'if you have any complaint against me you have the option of attending the guardian of the said orphans before the said Nepos.'[168] This means that Julia Crispina redirects the matter to the original questions at issue, Babatha's reasons for holding property that was not hers, but her deceased husband's, and indicates that any complaints should be dealt with in that context. She explicitly refers to Babatha attending the guardian of the orphans, that is, Babatha has to address the guardians of the orphans and not her. This suggests that Julia Crispina's part in the matter is indeed secondary, she stands in for Besas at the moment he cannot pursue the case further, but as soon as he will be able to do so, Julia Crispina will disappear behind him again. This could imply that any possible personal interests on Julia Crispina's part did not make her into a separate party in the suit. Babatha is dealing with the guardian of the orphans-heirs and only in second instance or by way of replacement with Julia Crispina.

Julia Crispina may have been a family member of the orphans, perhaps someone who was taking care of them, as part of her household. The term supervisor could then be understood to be another term for the ἐπακολουθήτρια known from Roman Egypt. John Rea has explained that the term ἐπακολουθήτρια is used for women who have some kind of authority over orphans and could be seen as guardians.[169] Obviously, they could not be called guardian (ἐπίτροπος), as Roman law barred women from exercising any kind of guardianship. Rea suggested that the ἐπακολουθήτρια might have been the indigenous answer to the demands of Roman law. A woman could be given a status comparable to a guardian, giving her some authority in the affairs of her orphans, while

[168] P.Yadin 25:26–28/61–63 (see Lewis, 112, for restoration of the word ἐπίτροπον).

[169] See Cotton, "The Guardianship of Jesus," 97. Note, though, that Cotton emphasizes that normally a ἐπακολουθήτρια has a relationship with the orphans, being a family member, like a mother or grandmother. ("The Guardianship of Jesus, 97, n. 39: 'In the Egyptian papyri the relationship of the ἐπακολουθήτρια/παρακλουθήτρια towards the ward(s) is always pointed out.' I tend to agree with Cotton that in this case it seems unlikely that Julia Crispina was the orphans' mother, see n. 160 above.)

there was no clash with Roman law because no official guardianship was at issue. In this respect it is interesting that Montevecchi points out that the terms ἐπακολουθήτρια and ἐπίτροπος do not overlap: after 123 CE there is no female ἐπίτροπος anymore, while the term ἐπακολουθήτρια is attested only from the second half of the second century onwards.[170] This does indeed suggest that ἐπακολουθήτρια took the place of ἐπίτροπος to refer to a woman in a position of supervision of orphans, possibly a concession to strict Roman law. The occurrence of the term ἐπίσκοπος for Julia Crispina here could then be 'the first example for such an adaptation of local custom, and another expression of Romanization.'[171] It is in any case certain that the use of ἐπίσκοπος instead of ἐπίτροπος must have some kind of legally significant meaning.

Julia Crispina is an intriguing figure for another reason: even though she undertakes action, in acknowledging her agreement in P.Yadin 20 and summoning someone to court in P.Yadin 25 she is not accompanied by a guardian herself (as Babatha is when she acts in, for example, P.Yadin 14–15 and 25). Indeed, Julia Crispina has been said to be the only woman in the archive who is not accompanied by a guardian.[172] This is not completely accurate, for Miryam, Babatha's adversary in P.Yadin 26, is not accompanied by a guardian either. Indeed, Babatha herself does not seem to have had a guardian present in P.Yadin 26; while the document was written on the same day as P.Yadin 25, where a guardian for Babatha is mentioned. This means that the obvious fact that Babatha acts with a guardian in P.Yadin 25 while Julia Crispina doesn't, can be counterbalanced by the fact that in P.Yadin 26 guardians are not mentioned at all, neither for Miryam nor for Babatha. This means that Julia Crispina's position is not singular: apparently other women could also act without a guardian, in certain instances. This probably indicates

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[170] See Orsolina Montevecchi, "Una donna "prostatis" del figlio minorenne in un papiro del II a," *Aegyptus* 61 (1981): 115.

[171] Cotton, "The Guardianship of Jesus," 97.

[172] Lewis, 111 and Cotton: 'One notices immediately that she is not represented by a male guardian like the other women in the archive' ("The Guardianship of Jesus," 97).

Lewis' explanation for this is that she was a Roman matron. That, however, would in itself not be enough: additionally, we would have to assume that some specific feature of the Roman *tutela mulierum* applied to her situation, like the *ius liberorum*. Since we do not know anything about her personal life, this would be mere speculation. Especially in view of the fact, to be mentioned, that other local women in the archive also act without guardians at times, shows that it need not necessarily be related to Roman citizenship (or indeed to the *ius liberorum*).

that the principle of guardianship of women was not strictly adhered to. I will come back to this in detail below. Here it suffices to remark that Julia Crispina's position is not clarified by any detail the documents reveal about her and that her part in the legal dealings at issue remains obscure. Nevertheless, it can be said with certainty that she was not a guardian like Besas was: she is not called that way and she does not act that way. This means that the evidence coming from the case of Judah's nephews shows that guardianship of minors was a male affair.

II. *Guardianship of a Woman*

Evidence pro and contra

Above I discussed that the evidence for guardianship of minors in ancient Near Eastern laws is minimal. The same applies to guardianship of women, which indicates that this institute was not known in those systems. In fact evidence from Egypt shows that Egyptian law in contrast with Hellenistic law knew no guardianship of women. In a bilingual family archive from the second century BCE, a woman named Tatehathyris appears in nine documents, six in Demotic and three in Greek. In the Demotic documents she acts without a guardian, in the Greek ones with a guardian.[173] This actually means that a woman could act with and without a guardian, apparently related to the language of the document. The idea suggests itself that this indicates that a woman could act with and without a guardian depending on the law referred to, which was then expressed by the language of the document. Documents in Demotic that feature no guardians would refer to Egyptian law and Greek documents that do feature guardians to Greek Hellenistic law. This assumption is very interesting since it implies that a woman could make a choice to have a document drawn up in either of the two languages and would consequently need or not need a guardian. This implies that there was actually a choice of law and a woman could make

[173] See Pieter W. Pestman, *Over Vrouwen en Voogden in het Oude Egypte* (Leiden: Brill, 1969), 15–16, and nn. 31–32 where he refers to the unsolved mystery of the bilingual nature of the archive and comparable archives. For the archive in detail see Pieter W. Pestman, *Les archives privées de Pathyris a l'époque ptolémaique. La famille de Pétéharsemtheus, fils de Panebkhounis (*Papyrologica Lugdano-Batava 14; Leiden: Brill, 1965), 58–59 n. 90.

the choice in a way that fitted her needs. This might, for example, concern the presence of the woman's husband: when he was away serving as a soldier or for business it was convenient for her to have the document drawn up in Demotic, that is, without the need for a guardian. Where the husband was present, he could act as guardian and the document could also be drawn up in Greek.

Pestman has drawn attention to the fact that documents concerning marriage and divorce were usually drawn up in Demotic and not in Greek. He suggests this might concern the better position a woman had under Egyptian law.[174] This suggestion is also based on the assumption that the language of the documents determines what law was chosen to apply to it, this time obviously referring to substantive law. In the Egyptian situation language thus seems to be indicative of the legal background of the documents, both with regard to formal and substantive law, and apparently a conscious choice could be made to have the document drawn up in a certain language, that is, have a certain law apply to it, both substantively and formally.

This feature of bilingual family archives in Egypt could raise expectations for the bilingual archives from the Judaean Desert, where we find the same situation: two possibly applicable laws, indigenous and Roman, that are different with respect to guardianship. Indigenous law did not know guardianship, women could make legal acts on their own, just like men.[175] Roman law on the other hand demanded guardianship of women to make the legal acts by these women valid. What we would expect on the basis of comparison with the situation in Egypt is a difference between documents drawn up after 106 CE: no mention of guardians in Aramaic documents and mention of guardians in Greek documents. Indeed, in this respect, the Greek documents live up to expectations: a guardian is mentioned in P.Yadin 16, census declaration by Babatha; P.Yadin 17, Babatha as depositor; P.Yadin 22, Babatha as vendor of date crops, and P.Yadin 14–15 and 25, documents that are related to a lawsuit instigated by Babatha.[176] The Aramaic documents in the archive give no

[174] Pestman, *Over Vrouwen en Voogden*, n. 31.

[175] See, for example, P.Yadin 2–3, documents in Nabataean Aramaic, which present us with a female vendor, acting without a guardian ('the son of LTY' mentioned in P.Yadin 3 was not a guardian, but most probably a guarantor: see the possible connection with P.Yadin 4; *Documents II*, 235).

[176] P.Yadin 16:15–16, 17:4–5/22–24, 14:6/22–23, 15:31–32 (reference is missing in inner text which breaks off in line 13), 25:14–15/46–47; see Lewis, 17, who discusses guardianship of women as a feature of Romanization.

clear-cut answers, as they mainly present us with male actors, which means there would not be a need for a guardian there.[177] However, the mere fact that a guardian of women is introduced, as comparison of P.Yadin 2–3 and P.Yadin 22 shows, raises the question as to what this says about the legal system applicable to these documents. As Cotton phrased it in her introduction to an investigation of the guardian of a woman in the Judaean Desert documents:

> What does the use of different languages tell us about this society? Does the use of one language, as against others, reflect no more than the diplomatics of the documents, or does it reveal to us the coexistence of different legal systems within this society? It seems to me that the topic of this paper, the presence or absence of a guardian of a woman in a document, can profitably be used to address these questions.
>
> The legal representative, the guardian of a woman, appears only in the Greek documents, and never in the Hebrew, Aramaic or Nabataean ones. What is the implication of this absence? That the legal system reflected in the Semitic documents did not recognize, or did not call for, the institution of a guardian for a woman? In that case what legal system is reflected in the Greek documents?[178]

The relationship between language and law as assumed here would come down to the same relationship as observed in the family archive from Egypt adduced above: language is directly indicative of the legal system reflected in the documents. With 'legal system' Cotton obviously refers to the legal system or law that is applicable to the whole of the document: nowhere in her article, nor indeed in her articles in general, does a distinction between substantive and formal law play any part at all. Nevertheless, this distinction is of importance for understanding what is at issue here. In the situation in Egypt we have indications that the document's language is related both to the applicable substantive and formal law: a Demotic document does not present a guardian because this was not required under Egyptian (formal) law, but also refers to the more favourable position of women under Egyptian law, a matter

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[177] See P.Yadin 5 (discussed in detail above, in Chapter 2, 117–127, and Chapter 4, 214–220), P.Yadin 6 (tenancy agreement, discussed in detail above, 97–107), P.Yadin 8–9 (acknowledgments of receipt, discussed in detail above, 107–115). Aramaic documents outside the archives that do center on women as the main actors cannot profitably be used for a comparison as they cannot be dated (consequently, we do not know whether they were drawn up under Roman rule) or are too damaged to be sure whether a guardian was mentioned or not: see Cotton, "The Guardian of a Woman," 273.

[178] Cotton, "The Guardian of a Woman," 267.

of substantive law. Therefore, even in those cases it is clear that the fact that a guardian is present or absent need not necessarily denote that substantively the one system or the other applied; this has to be derived from other indications. As I have shown for the Judaean Desert material in Chapter 1 above, in the archives the language of a document is not directly indicative for the applicable law, and, in Chapter 2, internal references determine what the applicable law should be, rather than features like language. In Chapter 3 I proposed to use a division between substantive and formal law to get to understand the applicable law for these documents better. Therefore, in a discussion of the issue of guardianship for women this division should be kept in mind.

If we take the presence or absence of a guardian as indicative for the law that is applicable to the whole of the document, as Cotton does in her article, indeed it appears that a different legal system is applicable to the Semitic ones than to the Greek ones. However, as I have shown in Chapter 2 and in Chapter 4 above, this is not the case: Greek documents still draw on local, indigenous law where the substantive side of the cases is concerned.[179] Therefore, it is *a priori* not correct to speak of legal systems that are reflected in one kind of document as against another without being sufficiently specific about the meaning of the word 'legal system.' Contrary to Cotton's assumption that is the basis for her article, the presence or absence of a guardian cannot be taken to indicate which legal system is applicable to the legal act *as a whole*. To illustrate this, I will discuss Cotton's article in detail.

Cotton discusses the various phrases used to describe the part of the guardian in the legal act. It appears that two phrases are commonly used, one denoting the presence of the guardian 'in the presence of her guardian X' and the other suggesting a more active part on behalf of the guardian 'through her guardian for this matter X.'[180] The first phrase can be found in two instances in the Babatha archive,[181] the second in five instances.[182] In the Salome Komaise archive there are two instances where a guardian is mentioned, both merely recording the presence of

[179] See for instance the discussion of P.Yadin 17, 127–155, and of P.Yadin 21–22, 168–179 above.

[180] There are slight variations within each type of phrase, see Cotton, "The Guardian of a Woman," *passim*.

[181] P.Yadin 16:13–17, P.Yadin 17:21–24; see Cotton, "The Guardian of a Woman," 271.

[182] P.Yadin 14:22–23,15:31–32, 22:28–29, 25:46–47, 27:18; see Cotton, "The Guardian of a Woman," 271.

the guardian.[183] Cotton attempted to relate the phrases to the part the woman plays in the legal act, to see whether the position of the guardian is described differently depending on the woman's more active or more passive part in the legal act:

> …he [i.e., the guardian] seems to be taking a more active part in those contracts in which the woman is the one in whose name the *homologia* is written or another kind of legal obligation is undertaken. Here with one exception we find the formula διὰ ἐπιτρόπου αὐτῆς, that is 'through her ἐπίτροπος.'…In contrast, in those contracts in which the woman is the recipient of an *homologia*—in all but one of the cases—, we have merely the formula recording the presence of the ἐπίτροπος.[184]

It appears, however, that sometimes in contracts of the first type ('in which the woman is the one in whose name the *homologia* is written or another kind of legal obligation is undertaken') the formula of the second type ('recording the presence of the ἐπίτροπος') is found.[185] This means that there is no real dichotomy found, no clear-cut relationship between the part the woman plays in the legal act and the formula used to refer to the guardian.[186] This is interesting because it denotes that the presence of the guardian in itself was important and therefore noted, but his actual part, dependent on the part of the woman in the legal act, was not decisive: '…the two formulae might have been used interchangeably. If so, this further accentuates the minor role played by the guardian of a woman in these documents.'[187] In a footnote to this remark, as further proof Cotton adduces 'the rapid turnover' of guardians in the documents, that is, the appearance of a number of different guardians for Babatha (instead of one and the same guardian).[188] I also note that

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[183] P.Hever 64:3–5 and 65:14–15; see Cotton, "The Guardian of a Woman," 271–272 (commenting on the restoration of 65:14–15 to record the presence of the guardian on 271).

[184] Cotton, "The Guardian of a Woman," 271.

[185] See Cotton, "The Guardian of a Woman," 271.

[186] See Cotton's conclusions: 'To conclude the argument so far: in the majority of cases where the woman is the one in whose name the *homologia* is written or another kind of legal obligation is undertaken, she is said to be acting 'through her ἐπίτροπος' (διὰ τοῦ ἐπιτρόπου αὐτῆς), but sometimes even here his presence is merely recorded (συμπαρόντος αὐτῇ ἐπιτρόπου), as it is in transactions in which the woman is not the one in whose name the *homologia* is written or another kind of legal engagement is undertaken. And sometimes in such cases no ἐπίτροπος appears at all' ("The Guardian of a Woman," 272).

[187] Cotton, "The Guardian of a Woman," 272.

[188] Cotton, "The Guardian of a Woman," 272, n. 35. The rapid turnover of guardians was already noticed and commented upon by Wolff ("Römisches Provinzialrecht in der Provinz Arabia," 797, n. 98).

the point where the guardian is referred to may vary: sometimes he is mentioned at the start of the document, right after the woman he is guardian of, is introduced, but at other times he is mentioned only in her subscription. This could also suggest that it was deemed important to mention him at some point, but that he had no real part in the legal act which would probably have required his introduction within the main text of the document.

Cotton concluded that

> In view of the conspicuous passivity of the ἐπίτροπος of a woman in the Greek documents, it would seem that his absence from the Semitic documents is just a matter of form and procedure required by the courts for which the Greek documents were intended. Which courts were these?… Does the presence of an ἐπίτροπος of a woman show inconvertibly that the Greek documents were intended for a Roman court of law, and his absence from the Semitic documents that they were intended for other courts? In order to claim this we should have to prove that the Semitic documents too were written under Roman rule.[189]

As Cotton notes, unfortunately the evidence is not conclusive to this point: documents are sometimes not dated, or are too damaged to ascertain whether a guardian was present or not.[190] But what is more important is that by maintaining that documents that do not have guardians were presumably meant for other courts and trying to prove this point, the implications of the results of the survey for the Greek documents are ignored. Cotton's survey does reach the conclusion that the presence of a guardian of a woman in the Greek documents seems to be 'a matter of form and procedure required by the courts for which the Greek documents were intended.' I do not think anyone doubts that the Greek documents were meant for Roman jurisdiction, or to be more precise, the only direct evidence of jurisdiction in the area at the time is that of Roman jurisdiction. Cotton states:

> One notices that all Greek documents in which a woman appears with her guardian both in Arabia and in Judaea, were written under Roman rule, and, as suggested above, under the influence of Roman law.[191]

I wonder whether some people had themselves paid to act as guardians, like it has been suggested for witnesses (see Tal Ilan, "Witnesses in the Judaean Desert Documents: Prosopographical Observations," *SCI* 20 [2001]: 169–178).

189 Cotton, "The Guardian of a Woman," 273.

190 Cotton, "The Guardian of a Woman," 273.

191 Cotton, "The Guardian of a Woman," 273.

Perhaps it would have been clearer to simply state that the only court mentioned in the archives is the court of the Roman governor. In that case the argument can simply run: the documents that were written with a Roman court context in mind present us with guardians of women.[192] The next step should then have been, not to go and try to prove that Aramaic documents were meant for other courts, because they do not have guardians, but to explain why the Roman court context influenced the documents in just this respect. Chiusi remarked to the conclusions of Cotton:

> I have the impression that the presence of a guardian seems to be a formal element, which has something to do with procedural matters. Whether this suffices for the hypothesis that the presence of an *epitropos* was required by the application of Roman patterns cannot be said with certainty.[193]

Chiusi here touches upon the problem with Cotton's assessment: it lacks precision as to the exact meaning of 'the influence of Roman law' and therefore cannot explain whether—and if so, how—the appearance of a guardian fits with possible Roman requirements. To be more precise one has to differentiate between formal and substantive law: the appearance of guardians of women is a concession to Roman formal law, which in itself need not denote anything as to the substantive law applicable to the acts. One can then conclude that the fact that guardians of women appear after the Roman conquest is a strong indication that indeed their presence was required by Roman law, that is, by Roman formal law.

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[192] This way the phrase 'under the influence of Roman law' could have been avoided: while the fact that the guardians are present suggests a subjection to Roman formal law, it does not imply subjection to Roman law in general (i.e. including substantive law).

A more direct conclusion appears in a later article by Cotton where she describes the presence of the guardian of a woman as 'a matter of formal procedure, required by *the courts for which the Greek contracts were intended, namely Roman courts of law* where a woman could not appear without a male representative' ("Diplomatics," 60; my emphasis). Nonetheless, there also Cotton does not distinguish properly between matters of formal and substantive law as the rather vague 'matter of formal procedure' indicates: procedure in the sense of procedural law is formal (in the legal sense); apparently Cotton means to say no more than formal and procedural as opposed to 'with contents.' This is proven by her equation in the same sentence of the guardian of a woman as appearing in the Judaean Desert documents with the guardian of a woman known from Egypt, speaking of 'his passive and formal role,' formal again denoting no more than 'without contents, without any direct relation as to the legal act at issue.' The equation with the Egyptian guardian is untenable: his position differs from that of the guardian in the Judaean Desert documents as the evidence in the documents themselves indicates: see rest of exposition, especially 363–364.

[193] Chiusi, "Babatha vs. the Guardians," 115, n. 26.

Understanding the appearance of guardians of women to be a concession to formal law only is important for understanding the role the guardian plays in the material. Cotton also speaks of a formal role for the guardian, using the word formal in a non-legal sense, denoting 'without contents.' This is proven by her repeated assertion that the formula used to describe the presence of the guardian is not related to the legal act at issue or rather the woman's part in this legal act. Therefore, it seems that the presence of the guardian is only recorded for completeness' sake and not because there is a direct relation with the legal act at issue. Of course this is only logical when differentiating between substantive and formal law: if the presence of a guardian of a woman is only recorded as a concession to formal law, there need not be any relationship with the legal act which is based in substantive law.

Furthermore, Cotton describes 'the low profile kept by the guardian of a woman in the Greek documents from the Judaean Desert' as contrasting 'sharply with that of the guardian of the minor.'[194] This is comparing apples and oranges: guardianship of a minor is a matter of substantive law, guardianship of a woman one of formal law. Consequently, it is only to be expected that the two have completely different legal consequences.[195] This is illustrated by the material in the archives: the minor needs a guardian, right after his father's death to see to his property. The guardian is the representative of the orphan(s) as for example Besas

[194] Cotton, "The Guardian of a Woman," 268.

[195] Cotton's presentation of the situation is inaccurate as she writes: 'It was, therefore, suggested with great plausibility by the late Hans Julius Wolff that the use of a single term for the two kinds of guardians is due to the influence of the Roman legal system, where at least originally no legal distinction existed between the guardian of a minor and that of a woman, and, consequently, the same term, *tutor*, was used for both' ("The Guardian of a Woman," 269). That the term ἐπίτροπος is used because in the Roman system one term, *tutor*, is used for both the guardian of the minor and that of the woman is correct, but it is incorrect to say that 'no legal distinction existed between the guardian of a minor and that of a woman, and, consequently, the same term, *tutor*, was used for both.' This remark suggests that first there were two identical legal institutions and consequently the same legal term was used to refer to both. The footnote to the remark refers to Wolff ("Römisches Provinzialrecht in der Provinz Arabia," 796), but Wolff says something completely different: he only speaks of the Roman legal system as the only system that does not make a *terminological* difference between the two types of guardianship. Wolff's argument is obviously that to explain for the fact that the papyri use one and the same Greek term for both types of guardians one has to assume that Roman legal sources are followed, where one can expect the Greek ἐπίτροπος to translate *tutor*, the Roman term covering both the guardian of a minor and of a woman. This does not warrant the conclusion that 'no legal distinction existed between the guardian of a minor and that of a woman': the two institutions are fundamentally different as can be seen not only in their contents but also in the developments through time.

is of the orphans of Judah's brother. Besas represents the orphans and enters their claim. This is logical since a minor is not capable of making a valid legal act. What the documents that present us with a guardian of a woman show is that the woman herself is acting and the act is only validated by the presence (and the subscription) of the guardian. Obviously no guardian was appointed: Cotton herself notes that Babatha acts with different guardians at different times. Therefore, it is methodologically unsound to compare guardianship of minors and of women as it appears from the documents to draw conclusions as to the profile kept by the guardians and consequently, the more or less 'formal' nature of the institution. One should indicate *a priori* that guardianship of minors and of women are two different things that can be expected to function at different levels in the papyri and then illustrate this with the evidence from the papyri. The Babatha archive is perfectly suitable for this as guardianship of a minor and of a woman occur side by side in the same legal acts (P.Yadin 14 and 15) and are clearly being dealt with in completely different manners.

While Cotton observes that the low profile kept by the guardian of the woman contrasts with that of the minor, she observes that it 'resembles that of the κύριος in the Egyptian papyri.' About this κύριος Cotton has explained just above that κύριος stemmed from an old legal tradition in which women could not own property and denoted that the κύριος was in a way the master or lord of the woman concerned.

> With time women could and did own property and the κύριος was no longer the person in whose power the woman was. His function degenerated therefore into that of an assistant of the woman in the performance of certain legal actions, mere lip service to an older legal system.[196]

What Cotton does not observe here is that the κύριος in Egypt developed from an institution with a substantive legal meaning to a remnant of such an institution. In this context one could speak of 'formal' in the sense of 'still present, but without actual meaning for the contents.' However, this is something different than formal in the sense of formal law. Therefore, it is not surprising that the comparison with the κύριος does not fit the instance of guardianship of women in the Judaean Desert material.

[196] Cotton, "The Guardian of a Woman," 268.

Cotton's comparison with the κύριος from Egypt seems difficult in terms of terminology, as Cotton herself acknowledges in the article: the guardian of a woman in the Judaean Desert material is not denoted with the term κύριος, but with the term ἐπίτροπος. Cotton quotes Wolff, who remarked:

> ἐπίτροπος…kann sich niemals auf eine andere Person beziehen als einen Verwalter fremden Vermögens.[197]

Obviously this denotes that the term ἐπίτροπος covers the guardian of the minor (who supervised the minor's property) but not the guardian of the woman (where no such supervision is at issue). Cotton then discusses Wolff's plausible argument that the use of a single term for both institutions has a link with Latin where the term *tutor* is used for both the guardian of a minor and of a woman. The use of it in the papyri would then stem from the use of ἐπίτροπος for *tutor* in proclamations of the Roman authorities and have no direct bearing upon the actual legal meaning of the institutions: the use of ἐπίτροπος for the guardian of the woman does not mean that supervision of property, as usually associated with the term, is meant. Cotton then argues that the Judaean Desert material used the term ἐπίτροπος under influence of the Roman terminology, while still referring to an institute like the κύριος, that is, to an institute with no real meaning anymore. The problem with this interpretation is that it is contradicted by two instances from the archives. Cotton mentions these in passing without noticing the implication of the cases for her argument. It concerns two instances where the guardian of the woman is not the husband, as in other instances,

> for the obvious reason that P.Yadin 17 and XHev/Se gr. 65 involve the husband and wife as the two opposing parties to a contract creating a state of obligation between them.[198]

This 'obvious reason' overthrows Cotton's argument that the guardian of the woman in the Judaean Desert is anything like the κύριος: in a papyrus from Egypt where a woman sells land to a man that is also her guardian (κύριος), this man is opposing party in the legal act *and* guardian of the woman in the legal act at the same time.[199] This means that in

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[197] Cotton, "The Guardian of a Woman," 268, n. 5.

[198] Cotton, "The Guardian of a Woman," 271.

[199] See Pestman, *Over vrouwen en voogden*, 17–18: 'Whatever view one takes, it is impossible to understand in whose interest the guardian is acting. Therefore it seems

Egypt this was possible; there the guardianship of a woman was indeed no more than a formality without contents. The Judaean Desert material, however, clearly testifies to the opposite, as the examples adduced by Cotton herself show: the husband who is normally guardian is not guardian when he is opposing party in the legal act. This means that the conclusions valid for Egypt obviously do not apply here. Therefore Cotton's arguments that the position of the guardian is 'formal' in the sense of the Egyptian κύριος cannot be maintained.

Of course this does not mean that guardianship of minors and of women is the same thing: above I already indicated the difference between them: they are matters of substantive and formal law respectively. Both are mentioned in the Latin proclamations of the Roman authorities to which Cotton refers: those

> which demanded the representation of a woman in court by a guardian, and made provision for the nomination of guardians for orphans.[200]

These examples are illustrative for our documents as it shows that the term ἐπίτροπος was indeed used in Roman proclamations for matters of substantive and of formal law and can likewise be used in our documents to refer to an institution of a substantive nature (guardianship of orphans) and one of a formal nature (guardianship of a woman). An explanation for the difference between the two, the marginal role of the guardian of the woman in comparison with that of the minor, should then not be sought in the link with the guardian of the woman with the κύριος from Egypt, but in this difference between substantive and formal law. Because the presence of a guardian of a woman was only required by formal law, it need not have a relation to the legal act at issue, that is, no direct relation needs to exist between the description of the guardian's presence and the legal act concerned or the part of the woman in the legal act concerned. The guardian has to be present because his presence

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likely that the guardian is acting in no one's interest and that his participation in the legal act is just a formality' (my translation of the originally Dutch text). Also see nn. 37 and 38; in the latter Pestman refers to a number of cases where a woman acts as security for a debtor, while this debtor is at the same time her guardian. These cases can be seen in the same light as the case of the sale, just mentioned: if we are to understand the part of a guardian who is at the same time involved in the legal act as party, we have to accept that he played no real part in the legal act, that he was in any case not acting in the interest of the woman.

[200] See Cotton, "The Guardian of a Woman," 269, and n. 16: 'These are likely to have been mentioned in the provincial edict.' Also see Nörr's assumption that the formulae of *actiones* like the *actio tutelae* might have come from the provincial edict: 323 above.

validates the legal act towards the other party, regardless of the exact contents of the legal act. His subscription can serve to prove this validation, but his subscription does not represent the party declaration of the woman, that is, he is not her representative, but has his own role of validating the legal act by his declaration. This can be seen in a case where the woman subscribes and the guardian subscribes as well: the woman's subscription is her party declaration, while the guardian's subscription serves the purpose of validation only.[201] In cases where the husband is the other party he cannot be guardian at the same time, because this would go against exactly this part of being a guardian: see P.Yadin 17 where Judah, the husband-other party, makes his party declaration towards Babatha, with clear reference to the presence of her guardian. If Judah had been guardian in this instance, the declaration made towards Babatha's guardian would have been made towards himself. Obviously this would be unacceptable from a legal point of view.

It cannot be denied that an exact understanding of guardianship of women in the documents from the Judaean Desert is obscured by the different pictures the documents themselves paint. Although the presence of the guardian seems to occur from an early phase onwards, this presence is sometimes conspicuously lacking. Lewis already remarked on the appearance of Julia Crispina without a guardian. He mistakenly asserted she was the only woman in the archives who acts without a guardian:[202] Babatha and Miryam do so too in P.Yadin 26. This is remarkable since Babatha does act with a guardian in P.Yadin 25, an

[201] P.Yadin 15, where a subscriber subscribes for Babatha (who was illiterate) and Judah subscribes as guardian. See Cotton, "The Guardianship of a Woman," 270, who wonders why Judah did not subscribe for Babatha and assumes that illiteracy (in all languages) called for a subscriber to write and not a guardian. 'If Judah son of Eleazar did not write a subscription for Babatha, although he was her guardian and could write Aramaic, but Eleazar son of Eleazar did, then we must look for some legal reason: evidently she was legally competent to do so, but incapable of doing so because of her illiteracy. This is where a subscriber, and not a guardian, must have been used.' The conclusion does not follow as in P.Yadin 27 Babelis son of Menahem subscribes for Babatha, in Aramaic, while he is also her guardian (Cotton even mentions this papyrus in another article where she discusses P.Yadin 15: "Diplomatics," 60). The fact that Babelis subscribes indicates that Babatha was still illiterate, but here Babelis can subscribe although he is guardian as well. I fail to see what the difference is with the situation in P.Yadin 15. Obviously a guardian could and did subscribe for someone who was illiterate. I do not see any clear legal reason for the fact that in P.Yadin 15 two different persons function as subscriber and guardian.

[202] See n. 172 above.

act that is drawn up on the same day as P.Yadin 26. This means that the impression provided by the documents is that the practice of guardianship of women was by no means consistent. Instead of interpreting this as a sign of 'formality' that is lack of real meaning of the institution as Cotton does, this should rather be seen in the complete picture the documents provide of a gradual not yet completed process of adaptation to Roman formal law. Indeed, it can be expected that so shortly after the Roman formal demands had been introduced not everyone complied with them.[203] Perhaps the documents that do stick to them should cause more wonder than those that don't.

Two legal concepts?

An important point to be observed in the discussion of the use of terms for the guardian of a woman is that of the Aramaic terms. As Cotton observed in her discussion of the use of ἐπίτροπος instead of κύριος, the Aramaic environment did know two terms for guardian: for guardian of a minor אפטרפא, the Aramaized form of Greek ἐπίτροπος, and for guardian of a woman אדון, the Hebrew word for lord.[204] Like κύριος, אדון indicates control over the property of the woman. This is not deduced from sources outside the archives, but from the archives themselves, where the Aramaic subscriptions to the Greek documents make this distinction. One can argue as Cotton does that the presence of two terms in Aramaic and one in Greek indicates the influence of Latin terminology on the Greek: the indigenous scribes used one term for the two institutions following Greek terminology in translated Latin proclamations of the Roman authorities. I find this argument perfectly believable for the Greek side of the documents. But the other way around I find it more difficult to follow. As Cotton herself observes, the distinction in the Aramaic subscriptions is remarkable because 'the guardian of a woman is

[203] In Chapter 1 about language I compared the situation in the Judaean Desert documents to that in documents from Roman Egypt, where we see that party subscriptions begin to be written in Greek. Regarding this development in Egypt DePauw wrote: '… it seems that the rules were probably changed soon after the Roman conquest, but that it took some time before common practice adapted to them' (DePauw, "Autograph Confirmation," 104). The same might apply here: the use of a guardian for a woman was part of Roman formal law that applied to acts that were to be judged by a Roman court, but it took some time before this had become accepted and consistent in legal practice.

[204] אדון is Hebrew and not Aramaic, the Aramaic term would have been מרא: Cotton, "The Guardian of a Woman," 268, n. 10.

absent from the Semitic documents.'[205] To put it even stronger, the eastern laws did not know the institute of guardianship for a woman. This means that the use of אדון in the Aramaic subscriptions cannot draw on a indigenous legal distinction between guardians of minors and of women. And yet the fact that two terms are present proves that there was an awareness that the term ἐπίτροπος used in Greek covered two things that were not identical and not interchangeable. One gets the impression that אדון is the translation of ἐπίτροπος used for the guardian of a woman, *in this specific situation of Roman influence*, to express the difference. This shows that although the indigenous scribes indeed used one term for both institutions in the Greek parts of the documents, the same scribes were aware of the difference between the institutions covered by the single term and actually prompted subscribers to use the correct terms in their Aramaic subscriptions.[206] Therefore, the documents pertaining to guardianship of a woman do not only testify to an influence of Roman terminology and a development towards unity through terminology but also to an awareness of the differences between Roman terminology and local understanding, or more broadly, Roman and eastern culture.[207] This awareness and the desire to put emphasis on

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[205] See Cotton, "The Guardian of a Woman," 269.

[206] I assume that the scribes instructed the subscribers in what to write, as one cannot expect the parties to know in each case what the appropriate wording for an affirmative subscription should be. For uniformity's sake some kind of set wording had to be known and used.

That the scribes who drafted the documents had a certain knowledge of (technical) legal matters (or were instructed by people who had that knowledge) was also argued by Nörr with respect to a knowledge of Roman formal law in the cases of P.Yadin 25 and 26, which represent as he supposed cases of 'Interdikts-Arten': 'Wenn es richtig ist, dass das Ambiente der Babatha mit der Unterscheidung verschiedener Interdikts-Arten umgehen konnte, so müssen wir bereits in den ersten Dezennien der Provinz Arabia eine recht intensive Praxis im römischen Recht voraussetzen' (Nörr, "Prozessuales," 333). If one assumes a fair degree of knowledge of Roman (formal) law, one could *a fortiori* assume a decent knowledge of oriental law, specifically in relation to Roman (formal) law.

[207] This is remarkable, as it has been asked whether non-Romans were sufficiently equipped to understand the details of the Roman legal terminology: in the context of the presence of the *actio tutelae* in Babatha's archive Nörr discussed 'Sprachprobleme' and 'Sachprobleme' describing the latter as 'das richtige Verständnis der in der Formel auftretenden juristischen Konzepte' (Nörr, "Zu den Xenokriten," 272). The two terms used for the guardian in Aramaic suggest that local scribes, that is non-Romans, understood that the single term ἐπίτροπος covered two different legal concepts. Also see previous note, for Nörr's argument that scribes (or the people instructing them) could handle complicated technical-legal distinctions like those between several types of *interdictum*, supporting my assumption that also the use of different terms for the guardian in Aramaic testifies to an understanding of legal concepts under different legal systems.

the right elements in each part of a document is particularly illustrated in the case of P.Yadin 27.

The demands of formal law: the case of P.Yadin 27

Besides from showing Babatha lost her case against the guardians,[208] P.Yadin 27 provides interesting details in that respect that it is written in Greek, with a subscription by Babatha in Aramaic, written for her by a guardian, while this statement is then again translated into Greek. This is actually the only instance where an Aramaic subscription and a Greek translation are found side by side: most documents have Aramaic subscriptions without translations and in documents which represent copies the original Aramaic subscriptions are left out and replaced by a Greek translation, styled as such.[209]

Since Babatha could not write she has her guardian write for her.[210] In the present case her guardian is one Babelis son of Menachem. In the Aramaic it is neatly said: 'This is what Babeli the son of Menachem wrote.'[211] The fact that he acted as Babatha's guardian is not mentioned. In the Greek translation of the statement, however, it is said: 'through her guardian.'[212] This is all the more striking since it is said in the opening lines of the papyrus: 'being present with her as guardian and subscribing for her.' Here a clear distinction is made between the two functions of Babelis: he is guardian and he will subscribe. In the Aramaic and Greek texts the two things are separated: the Aramaic text mentioning only the subscribing and not referring to Babelis being guardian at all, while the Greek text states that Babatha made the statement 'through her guardian.' This of course implies a different legal outlook at the position of the woman. Babelis does not even mention that he serves as a guardian, for him the only thing worth mentioning is that he wrote for Babatha. This fact does not imply any relationship between the party

[208] See 344–345 above, and n. 144 for the opposite view, that P.Yadin 27 testifies to an amelioration of Babatha's position, implying she did succeed in her attempts to secure more maintenance money for her son.

[209] See, for instance, P.Yadin 16. Compare P.Yadin 11; see 156–157 above.

[210] The part of someone writing for a party to the contract need not necessarily be performed by the guardian, see n. 201 above.

[211] P.Yadin 27:13–14.

[212] P.Yadin 27:18. I deviate from Lewis here, who translates: 'by her guardian.…' I think 'through' is better suited to carry the meaning of the Greek διά (as it is usually done in translating the phrase 'through her guardian').

and the subscriber, for subscription was done on behalf of the party, not from a specific legal position of the subscriber himself. The Greek statement, however, implies that Babelis had a more active part in the act: his subscription further validates the act (apart from Babatha's statement as such). We have thus first in the Aramaic a valid party statement that is said to have been written by another person, while in the Greek Babatha appears to act through another person. The phrase 'through her guardian' is also used in the main text to denote the presence of the guardian. The impression is here that the guardian does not stress his own position, while the scribe in the Greek translation of the Aramaic statement does. Why did he not simply translate the statement, but deem it necessary to change the last part of the statement in his translation?

When we look at the two statements we also see that Babelis uses Jewish (i.e. originally Babylonian) designations for the months in the Aramaic subscription, while the scribe designates the months with Macedonian names. For the rest the statements are identical in contents. The change of the Jewish months to the Macedonian shows that the scribe changed things to match the usual formulation of documents.

Lewis has remarked that 'months and days continued to be reckoned according to the calendar in use in each area during the pre-Roman period.'[213] Further on, he says that 'in the Babatha documents… the months and days are given by the Roman system, with consular dates, and by the Macedonian calendar (which was common to the whole area after its conquest by Alexander the Great)….'[214] These remarks imply that the calendar in use in the area before the Roman conquest was the Macedonian calendar ('common to the whole area after its conquest by Alexander the Great') and that this calendar was consequently used by the Romans. However, it is doubtful whether the Macedonian calendar was indeed used in the Nabataean kingdom. A recent study by Stern has argued that this was not the case:

> Before the creation of the Roman province in 106 CE, documents and inscriptions from the Nabataean Kingdom are dated with exclusively Babylonian names of months. The precise nature of the Nabataean calendar is impossible to reconstruct; however, it is reasonable to assume that it was lunar and essentially equivalent to the Babylonian calendar, and that this

[213] Lewis, 27.
[214] Lewis, 28.

> legacy from the Persian period survived until the end of the Nabataean kingdom in 106 CE.[215]

This means that, contrary to Lewis' remarks, the use of the Macedonian calendar in documents in the Babatha archive does not indicate a continuation, but on the contrary, a breach with the past. Therefore, it is important to see in what documents, related to what moment, this breach occurs.

In his book Lewis only discussed the Greek documents and for those it is true that the documents dated after the conquest use Macedonian dating. Therefore, it could seem that dating according to the Macedonian calendar coincided with the moment of the conquest. In that case the conquest would have influenced the legal documents in a direct way, by causing them to use a different way of dating (reference to other months). Yet study of the Aramaic material of the archive shows that this cannot be maintained. All Aramaic documents, whether in Nabataean or Jewish, whether dated before or after the conquest, use Babylonian dating.[216] This indicates that the use of certain names for the months, the method of dating, was not clearly linked to the conquest. Even after the conquest Aramaic documents continued to refer to Babylonian (instead of Macedonian) months. This means that the Aramaic documents present continuity instead of change. This is interesting because we have seen in Chapter 3 that from a legal perspective the Aramaic documents before and after the conquest show the same tendencies (for example for reference to the applicable law). I explained there that there seems to have been a continuous legal tradition that was clearly not interrupted by the conquest as such. Only after a certain period in time is there a breach, a breach that coincided with the use of Greek for documents.

Considering the dating of documents we see the same thing: there was a continuity in the method of dating which was broken off at a particular moment, which coincides with the use of Greek for legal documents. This combined evidence suggests that the conquest as such did not immediately affect the way in which legal documents were written, neither externally (language and dating) nor internally (reference to law). Only after a certain period of time (about twenty years) do external

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[215] See Sacha Stern, *Calendar and Community—A History of the Jewish Calendar 2nd Century BCE–10th Century CE* (Oxford: Oxford University Press, 2001), 38, with references.

[216] Stern notes this in passing: 'In the Aramaic and Nabataean documents, on the other hand, 'Babylonian' names of months are still in use.' (*Calendar*, 39).

and internal features change: the language changes to Greek, for dating Macedonian months are used instead of Babylonian and internally references to law are made in another way (even based on another system: the prior distinction between general and specific law no longer applies and instead the documents seek to adhere formally to Roman law, while they obviously use the substantive law of the parties).[217] This latter development, or the internal change, has, in my opinion, directly caused the other: because the documents sought to adhere to Roman law where formal matters were concerned, language and method of dating were also adjusted. This assumption, based on the relation of Babylonian dating with indigenous law and Macedonian dating with Roman law, is supported by the evidence found in P.Yadin 27, where the scribe is clearly not only translating the Aramaic statement in Greek, but also changing it to meet with certain demands: he uses Greek, adjusts the dating and emphasizes the presence of a guardian.[218] This shows that scribes did not merely copy the text in another language but that they actually tried to capture the meaning and tried to strive for the best understanding of the text. In this light, the change of the latter part of the statement is all the more significant. Apparently the scribe thought it necessary to stress that Babelis was Babatha's guardian, rather than mention that he wrote for her. Of course from a Roman point of view the validation of the legal act by the presence of the guardian would indeed be more important than the solution for illiteracy. Thus the papyrus shows that there was an awareness of the demands the Roman legal system made on non-Roman parties acting and this awareness was voiced in the Greek part of the documents.[219] Obviously, this awareness concerned matters of formal/procedural law.

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[217] See Chapter 3 above, 193–195.

[218] Stern mentions P.Yadin 27 as an example of a bilingual document in which Babylonian and Macedonian months are 'correlated and hence implicitly equated' (*Calendar*, 39). He also refers to P.Yadin 14–15 where a Macedonian month is explicitly equated with a Babylonian one: 'Hyperberetaios called Thesrei' (P.Yadin 14:4/19 and 15:2/16). This could be the consequence of unfamiliarity with the new months: Stern has noted that the existence of several systems of dating could cause considerable confusion (*Calendar*, 40, examples in n. 168).

[219] I am aware that in other documents the guardian styles himself as such in his statement in Aramaic as well. But he uses the word אדון then, which as I have explained refers to another legal concept. Furthermore the present papyrus presents a unique case of different statements in Aramaic and Greek while the Greek is supposed to be a translation of the Aramaic.

III. *Conclusions*

The matter of guardianship in the papyri presents one of the most obvious examples of a difference between the external impression the papyri give of what law is adhered to and the internal evidence. At first sight the papyri seem to adhere to Roman law, both in the matter of guardianship of a minor and guardianship of women. For example, it was argued by both Cotton and Chiusi that the fact that Babatha was not guardian of her son, points at adherence to Roman law, which barred women from the exercise of guardianship, even of their own children. Furthermore, the case about the maintenance of P.Yadin 13–15 was presented to the Roman court, and apparently a Roman *formula*, the *actio tutelae* found in P.Yadin 28–30, was thought to be applicable. As Nörr argued, it is likely that the *actio* came from an official source: it is a Greek rendering of a Latin text, probably from the provincial edict, and official translations may have been supplied by the governor's office or local law experts. Regardless of the question, treated in detail by Nörr, how the presence of the *formula* should be related to the way in which actual lawsuits were conducted, his general conclusion is relevant to the question of the law behind the documents: the presence of several copies of a Greek version of a Roman *formula* in the archive indicates that there was a high degree of familiarity with Roman law, in any case among those who supplied the *formulae*.

Nevertheless, contrary to Nörr's tentative suggestion that cases were judged according to Roman law, the evidence in the documents themselves does not bear out that Roman law is indeed adhered to in these papyri. The appointment of the guardians should be seen in the light of the special circumstances of the case, where additional supervision of an estate was wanted. The appointment is clearly not directly related with the Roman practice of *tutela minorum*, which saw to guardianship of minors directly following their father's death. On the contrary, what we find here is initial supervision of the deceased's estate by a family member and later addition of guardians to specifically see to the maintenance of the child. Such a later and additional appointment seems to be rooted in local practice rather than Roman law. The appointment itself bears

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In P.Yadin 16 the original statement in Aramaic is left out, in Greek Judah states that he acted as guardian and wrote for Babatha. It would be interesting to know what the Aramaic said.

an indigenous character, as two guardians are appointed instead of one. This seems to be related with the Jewish background of the ward as his Jewishness is explicitly mentioned, a single instance in the entire archive where the parties are never designated as Jews.[220]

The only direct evidence that Roman law was in any way applicable to the case is the presence of the *actio tutelae* in the archive. However, while the presence of this *actio* does say something about the availability of Roman legal instruments in a recently subjected province, it does not imply that the local populace was in any way familiar with Roman law: as argued by Nörr, it is likely that the *actio* came from an official source. It is possible in my opinion that the *actio* was sent to Babatha by the governor in reply to her petition of P.Yadin 13.[221] It is unclear what role the *actio* has played in the dispute: it seems likely that several steps were envisaged and the *actio* would become relevant in a later phase.[222]

Regardless of the exact part of the *actio* in the dispute of Babatha and the guardians, a firm conclusion can be drawn as to the evidence the *actio* gives for the applicable law. The presence of the *actio tutelae* only indicates adherence to Roman formal law, not to Roman substantive law. In that light, the contrast is striking with an archive from Egypt where a copy of a rescript is found about the relationship between registration and (il)legitimacy of children. As Hanson observed, both this archive and Babatha's archive contain copies of official Roman legal material, but what she did not register is that the meaning of this is completely different in both instances. Where the copy of the rescript indicates application of Roman substantive law, the presence of the *actio tutelae* in Babatha's archive only indicates adherence to Roman formal law. Indeed, no direct reference to applicable substantive Roman law is found anywhere in the archives from the Judaean Desert. On the contrary, where we find references to substantive law, these indicate that indigenous law applied. In P.Yadin 24, for example, Besas explains explicitly about the rights the orphans he represents hold towards the property at issue. The order of succession described there does not follow Roman law.[223]

In this light it is important to note that in the Roman legal sources applicability of local substantive law is attested: *Dig.* 26.2.26 pr. (4 resp.) presents a legal problem ensuing from a provincial governor's judgment

[220] See detailed discussion above, 312–316.
[221] See detailed argument above, 322–323.
[222] See details above, 334–336.
[223] See 179–180 and 232–234 above.

of a case according to local law. Where a father named the mother as guardian in his will, a governor accepted this will, although it was contrary to Roman law. In that case, it was not right for a successor to follow the verdict of the first governor. Chiusi adduced this text to show that the Roman ban on women exercising guardianship also applied to the province, emphasizing the repetition in the text of 'our law(s)' as opposed to the situation arising from acceptance of the will. She supposed that the will followed local custom or law, which would imply that the text shows awareness of the existence of several possibly contradictory laws. This awareness then amounts to an attempt to establish Roman law as the law that should be followed, an attempt associated by Chiusi with a political purpose.[224]

The question is whether this text should be read as an indication of the applicability of the ban on women exercising guardianship in a provincial context, as Chiusi does, or rather the other way around, as an indication of the application of local law by Roman governors. A sharp distinction should be made between the actual situation described in the act (which represents a real case) and the ideal situation proposed in the reply. What is described as legal reality is that a provincial governor judged a case substantively according to the contents of a legal act, the will of the father, regardless of the fact that the arrangements in the will were not in accordance with Roman law. This confirms the hypothesis that governors judged by the contents of legal acts, by the arrangements described in them, regardless of the fact whether these arrangements were in accordance with Roman law or not. Examples can be found in P.Yadin 21–22 and 23–24 discussed in detail above, where the acts describe rights that have no basis in Roman law, and the description seems to serve as indication of the applicable law.[225] The Digest passage proves beyond any doubt that rights derived from such a legal act could be accepted by a Roman judge.[226] As the treatment of this specific legal problem was included in the Digest, and thus was no longer just a case

[224] See detailed discussion above, 342–344.

[225] See 175–179 and 179–180 and 232–234.

[226] The text even suggests, according to my interpretation, that a successor tended to follow the verdict of the first governor, that is, that another Roman judge accepted that the verdict of his predecessor was valid, again regardless of the fact that it accepted arrangements that had no basis in Roman law. What the Digest passage says is that it is incorrect that the successor does this, i.e. that it should not happen, thereby implying that it did happen. Thus we have two governors each accepting arrangements rooted in local law as legally valid and binding (see in detail 342–344 above).

but became a general example, we may assume that the situation would occur again.

What this text tells us about legal reality is that Roman governors judged cases according to non-Roman substantive law. Obviously this practice is not looked upon favourably, as it is not only condemned, but the decision of the first governor is also described as 'a mistake made in inexperience.' However, in general governors were not inexperienced, not to mention the accepted notion that local law experts assisted them in their office. Therefore, it seems that this text presents us with a sharp contrast between legal reality described in the problem and a legal ideal captured in the answer. Roman governors should not judge according to local law, but . . . they did.

In the documents concerning guardianship of women, again the first impression the documents convey is that Roman law was adhered to as in the Greek documents women bring guardians, while they did not in the Aramaic ones. However, closer scrutiny shows that the practice was not established as women sometimes do not bring guardians, for the same act for which they do bring a guardian in another document in the archive. As Cotton discussed in detail, the way in which the guardian's part in the legal act is described can vary and there is no clear distinction between the various phrases used to describe this part. What Cotton did not register is that guardianship of women is, in contrast to guardianship of minors, a matter of formal law. This means that there need not be any relation between the legal act and the part of the guardian. His role was merely to validate the legal act. This sets the Judaean Desert guardian apart from the Egyptian κύριος, adduced by Cotton. κύριος went back on the older practice of denying a woman the right to own property, but as women became owners of property, the term κύριος merely referred to a male assistant in a legal act, without actually having any substantive meaning. According to Cotton the guardian of a woman in the Judaean Desert material can be compared to that. However, what Cotton disregarded, is that the κύριος originally had a substantive role, which became empty in later times. This development even came to a point where the κύριος could be the other party of the woman he was guardian of. This is not possible in the Judaean Desert material as is illustrated by P.Yadin 17 and P.Hever 65: here the husband who is normally his wife's guardian is the other party in the legal act, while another man is the wife's guardian. This shows that the role of the guardian there should be interpreted differently: the guardian needs to

validate the legal act. In cases where he is the other party this would imply validating towards himself, which would be legally impossible.[227] Therefore, unlike the κύριος, the guardian of a woman in the Judaean Desert material does not represent a remnant of an older substantive institution, and one should not compare his part to that of a guardian of a minor, but the appearance of a guardian of a woman should be understood as a concession to Roman formal law, independent of the substance of the legal act.

In this context the terminology used in the documents for guardian of a minor and guardian of a woman can be enlightening. Cotton's comparison of the Egyptian material with the Judaean Desert archives touches upon the difference in terminology used in Egyptian documents and in the archives. Where the Greek documents from Egypt distinguish between the guardian of a minor and of a woman with different terms, ἐπίτροπος and κύριος, the Greek documents from the archives use a single term, ἐπίτροπος, to refer to both. As Cotton observes, the identification does not come from the Aramaic environment as the Aramaic subscriptions do distinguish between the guardian of a minor, אפטרפא, and the guardian of a woman, אדון. Cotton refers to Wolff, who explained the use of a single term in the Greek of the Judaean Desert documents as a consequence of the use of this term in official Roman documents to translate the single Latin term *tutor*. Indeed, Wolff's argument that in Greek translations of official Roman pronouncements the Greek word ἐπίτροπος was used to translate the single term *tutor* for both the guardian of a minor and of a woman and this consequently influenced the terminology of our documents is plausible, not to say compelling. However, the importance of this Roman influence on the documents should not be overestimated as it is counterbalanced by the use of two terms in the Aramaic subscription אדון and אפטרפא. Indeed, it seems likely that the use of these distinct terms can tell us more about the legal environment than the use of a single term in Greek. The term אדון 'lord, master,' represents the equivalent of the Greek word κύριος, used for guardian of a woman in documents from Egypt mentioned above. The term has no parallels in eastern legal sources, indeed, the eastern laws did not know the institute of guardianship of a woman. This implies that the Aramaic subscriptions use the term אדון not to cover the Greek κύριος (the part of the guardian in our documents obviously does not cover the part of

[227] See detailed discussion above, 363–365.

the κύριος in Egypt) but to specifically translate ἐπίτροπος in this context: ἐπίτροπος, guardian of a woman, as opposed to אפטרפא, guardian of a minor. This proves that the scribes understood that the single term ἐπίτροπος covered two different institutions and they chose to have the parties make the legal distinction in Aramaic, despite the use of the single term ἐπίτροπος in Greek. Obviously, they could only do this if they indeed understood the legal implications: why express a distinction that is irrelevant? This means that there was a much deeper understanding of legal issues than has previously been assumed: instead of merely copying lines from official sources the scribes sought to express legal concepts according to their own understanding, while adhering to Roman formal demands. Further proof for this can be found in P.Yadin 27, where the scribe translates a subscription by a man, who is both subscriber and guardian. While the subscriber in his own subscription only indicates the act of subscribing, the scribe in his translation emphasizes that the subscriber was guardian, thereby meeting with the demands of Roman formal law. The translation has also adjusted dating from the indigenous dating used by the subscriber to accepted dating in Greek acts under Roman rule. Apparently, an important role was performed by scribes: they were the ones responsible for accurately representing both the substantive arrangements rooted in local law and the formal demands made by Roman jurisdiction. In this light it is telling that Nörr observed that the scribes had a surprisingly profound knowledge of Roman formal law, especially regarding the relatively recent subjection to Roman rule. By contrast one can observe that nowhere in the documents there is any proof that Roman law was adhered to substantively. Consequently, one has to argue that the scribes indeed only sought to adhere to Roman formal demands, while working from local law substantively. In doing so the scribes worked at the very meeting point of indigenous and Roman law, avoiding collision by directing both legal systems into a channel of applicability of their own.

CHAPTER SIX

MARRIAGE

In this chapter I will look at those documents in the archives that have been qualified as marriage contracts: P.Yadin 10, P.Yadin 18 and P.Hever 65.[1] The documents present interesting material as they may all have been qualified as marriage contracts, but have been described as documents with a completely different spirit:

> Not one of the five marriage contracts written in Greek can be said to be a translation of an Aramaic *ketubbah.* All of them resemble both in spirit and phraseology contemporary Greek marriage contracts from Egypt.[2]

P.Yadin 10 can be considered as an early example of the later Jewish *ketubba*,[3] P.Yadin 18 seems to resemble a Greek marriage contract[4] and P.Hever 65 mentions continuation of life together and could therefore testify to a practice of 'premarital cohabitation'[5] or *agraphos gamos*,

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[1] P.Yadin 10: *Documents II*, 118; P.Yadin 18: Lewis, 76; P.Hever 65: Lewis, 130 (P.Hever 65 there styled as P.Yadin 37), Cotton, "The Archive of Salome Komaise," 204 and Cotton and Yardeni, 224.

[2] Cotton, "Marriage Contracts," 4 (five marriage contracts in Greek, that is, in all of the Judaean Desert material, not just the Babatha and Salome Komaise archives).

[3] See, for example, Yadin, Greenfield and Yardeni, "Babatha's *ketubba*," 75–101.

[4] See, for example, the interpretation of Abraham Wasserstein in: "P.Yadin 18," 93–130. Compare Cotton 'They [i.e. the marriage documents written in Greek] embody and reflect an essentially different marriage settlement from that which is reflected and embodied in the Jewish marriage contract written in Aramaic,' such as, for example, P.Yadin 10 ("Cancelled Marriage Contract," 82).

I note in this context that Wasserstein has argued that P.Yadin 18 may not have been a *ketubba* like P.Yadin 10, but a separate document arranging for financial matters. This would of course explain the difference in character and spirit between P.Yadin 10 and 18. I will come back to this in detail below.

[5] Thus Tal Ilan, "Premarital Cohabitation in Ancient Judea: The Evidence of the Babatha Archive and the Mishnah (*Ketubbot* 1:4)," *HThR* 86 (1993): 247–264. Ilan here discusses P.Hever 65 as part of the Babatha archive because it was found with this archive (and was originally also incorporated in Lewis' edition as P.Yadin 37; see 12–13 above). Ilan discusses the phrase of P.Hever 65 in the context of later Mishnaic law, which forbade a man to keep his wife without a *ketubba*, even if it was for only an hour. Of course this argument starts with the presumption that the regulations found in the Mishnah were already normative at the time. I think Cotton has justifiably argued against this that qualifications like 'premarital cohabitation' or even 'sex out of wedlock' which Ilan uses as well, can only be understood within a framework of normative law which deter-

unwritten marriage (i.e. marriage consists without any formal document drawn up at the start, while a later drawn up document concerning financial matters may turn *agraphos gamos*, unwritten marriage, into *eggraphos gamos*, written marriage).[6] The three documents together provide excellent material for a closer look at the way in which marriage related documents were drafted within one community at a particular moment, and to raise questions as to what this evidence means for our understanding of the legal environment.

I. *P.Yadin 10: Babatha's Document: A Real* Ketubba*?*

Structure and most important features of P.Yadin 10

The find of P.Yadin 10 caused great excitement among papyrologists and historians and for good reason. The document presents us with a marriage contract that follows the structure of many later marriage contracts within the Jewish tradition and actually contains several of the clauses that were made mandatory in the Mishnah.[7] The next *ketubba* known to us is dated to 417 CE, which means that the find of P.Yadin 10 actually provided an instance of the same type of contract, which was almost three hundred years younger than the first instance found so far![8] It is in this context important to mention that the later Jewish

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mines when marriage begins and thus when cohabitation is premarital or sex occurs out of wedlock (Cotton, "The Archive of Salome Komaise," 206–207). This means that such qualifications cannot be used for material from a period before the Mishnah, in which practices existed *as accepted practices* within the current legal environment that the Mishnah later changed or abolished (compare the case of the daughter-only child discussed in Chapter 4, especially my conclusions on 294–298; also see nn. 41, 146 and 170 below).

[6] See Lewis, 130 and Cotton, "The Archive of Salome Komaise," 206–207.

[7] *m. Ketub.* 4:17–20, to be discussed in detail below. See *Documents II*, 119: 'It justifies being labeled a *ketubba* by virtue of its contents and the Aramaic formulation, and because of the reference to this type of document in line 5: ובכתבתך 'and pursuant to your *ketubba*."

[8] There are other *ketubbot* from the same area and period, but these are often in fragmentary condition; see Yadin et al., "Babatha's *ketubba*," 83, n. 12. This concerns two *ketubbot* in Aramaic; the authors note that there are also marriage contracts in Greek which 'partake in many elements of the *ketubba*' (84, n. 13). The text they refer to as going to be discussed by Cotton is in her article not qualified as a *ketubba*, but rather as a marriage contract of a non-Jewish nature, comparable to P.Yadin 18 and P.Hever 65 (see Cotton, "Cancelled Marriage Contract," 82–85). About the latter two Yadin et al. conclude in note 13 that they 'cannot be considered to be ketubbot.' Combining Cotton's

marriage contracts can be divided into two groups designated as Palestinian and Babylonian. The Babylonian model 'became the one in standard use with numerous variations among Jews of various communities and rites.'[9] This Babylonian *ketubba*, however, does not contain the mandatory clauses or court stipulations recorded in the Mishnah. 'It was only during the last century that ketubbot containing the clauses mentioned in the Mishnah were discovered and published.'[10] This means that based on the evidence discovered before our finds, one would have gathered that the Mishnaic clauses were recorded, but not actually used in practice. The finds from the Judaean Desert show that such a view would have been contrary to reality.[11]

The structure of P.Yadin 10 has been discussed in detail in an article by Yadin, Greenfield and Yardeni, and their discussion is for the main part reproduced in *Documents II*.[12] I will summarize the main points of this discussion, focusing on those features that have a direct relevance for the character of the document as comparable with or distinct from the other two marriage contracts to be discussed below.

> The *ketubba*, to judge by the early ones that have reached us and by literary references, contained the following elements: 1) the date and place of its writing; 2) the names of the groom and bride as part of the groom's declaration; 3) the marriage proposal; 4) the promise to give the bride her due; 5) the mandatory *ketubba* clauses or 'court stipulations'; 6) the statement

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conclusion and Yadin et al.'s interpretation of P.Yadin 18 and P.Hever 65 I am led to believe that the document Cotton discusses would in Yadin et al. 's understanding not be a real *ketubba* either. Nevertheless, it remains to be seen what elements make a *ketubba* a *ketubba* (and consequently, what should be understood by the statement that the Greek documents 'partake in many elements of the *ketubba*') and how this would make the Greek documents fit in. See discussion below.

[9] See Yadin et al., "Babatha's *ketubba*," 92.

[10] Yadin et al., "Babatha's *ketubba*," 92; also stating that 'thanks to the efforts of M.A. Friedman, many examples of this type of *ketubba* are now known from the Cairo geniza.' (reference to Mordechai A. Friedman, *Jewish marriage in Palestine: A Cairo Geniza Study* [TelAviv/New York: Tel Aviv University, Chaim Rosenberg School of Jewish Studies, 1980]).

[11] See Yadin et al.: 'It is clear that these institutions, as well as the formal divorce document (the *get*), were well established by the first century CE and that the mishnaic prescriptions reflect actual practice.' ("Babatha's *ketubba*," 98).

[12] Yadin et al., "Babatha's *ketubba*", see *Documents II*, 118ff.: 'The present treatment of P.Yadin 10 closely follows the original publication by Yadin, Greenfield, and Yardeni (1994). In many instances, the wording of the original publication has been simply paraphrased, and some sections have even been reproduced *verbatim*. . . .'

that the document will be replaced; and 7) a statement by the groom that he accepts all the above provisions.[13]

All of these elements can be found in P.Yadin 10:[14]

1) lines 1–2; 2) lines 2–4[15]; 3) lines 3–5; 4) lines 6–10; 5) lines 10–16; 6) lines 16–17 and 7) lines 17–18.[16]

The first feature that could have pointed at the Jewish character of the document, the placing of the day of the month before the year, cannot be traced, since the lines that contained the date of the document are damaged.[17] Lewis set it between 122 and 125.[18]

The names of bride and groom are missing as well, but it can be gathered from the rest of the document that the document was indeed drawn up between them.[19] I note that this cannot be derived from the

[13] Yadin et al., "Babatha's *ketubba*," 84. Their enumeration of elements goes back on Friedman's major work on the *ketubba* already cited, other studies and oral comments (84, n. 17).

[14] I deviate here from the treatment by Yadin et al., who treat lines 10–18 under 5). The groom's declaration that he will be liable with all of his property is missing, but should be restored in lines 17–18: see Yadin et al., "Babatha's *ketubba*," 96 and *Documents II*, 130, 160.

[15] These lines are missing, but it is obvious that the parties concerned must have been introduced here. From the wording of the extant part of the document one can gather that the parties were indeed groom and bride (see the marriage proposal, lines 3–5 and the promises in lines 6–10) and not (as is the case in, for example, the documents from Elephantine) groom and father or brother of the bride. A tentative restoration to be used as 'a working hypothesis' was offered by Friedman (Mordechai A. Friedman, "Babatha's *ketubba*: Preliminary Observations," *IEJ* 46 [1996]: 62).

[16] Lines 17 and 18 are mainly restored, but they are obviously the most likely place for declarations concerning replacement of the document and agreement of the groom with all the terms of the contract (indeed a clear reference to 'all that is written above' can be read at the end of line 18). For details for restoration of broken lines see Yadin et al., "Babatha's *ketubba*," *passim* and *Documents II*, 128–130.

[17] Yadin et al. take this feature to have been incorporated since the document is otherwise obviously very Jewish in character. Nevertheless, it would come close to a vicious circle to claim that the date is a Jewish feature when this date is not actually present in the document and we only assume that the date was constructed in a certain way just because the document is Jewish in character.

[18] Lewis, 29. Since Judah is in P.Yadin 16 styled as Babatha's husband, at least the date of this document, December 127, can serve as the *terminus ante quem* for the marriage. Lewis already noted that Judah acted as guardian of Babatha in P.Yadin 14 and 15, 'a function normally performed by a woman's husband' (Lewis, 58). Thus the *terminus ante quem* could be moved forward to 125 CE. Babatha was surely widowed in 124 (this can be gathered from the documents concerning guardianship of her minor son).

See 239–240 above for an interpretation that the document should be dated to 128, and my arguments for rejecting this interpretation, 127 n. 103.

[19] See n. 15 above.

statement on the verso of the papyrus: 'for Babatha daughter of Shim'on due from Yehudah son of El'azar' since such a statement need not necessarily denote that the document was actually drawn up between groom and bride. This can be seen in the marriage documents from Elephantine, where the document is drawn up between the father (or brother) of the bride and the groom, while the endorsement (the defining line on the outside of the papyrus) states 'document of wifehood which X [the groom] wrote for Y [the bride].'[20] The endorsement thus denotes the real judicial relationship: the document sees to obligations undertaken by the groom towards the bride and not towards her family.[21]

The extant text begins in the middle of the marriage proposal (line 4–5) and immediately contains a reference to law, as the groom declares that the bride is to be his wife 'according to the law of Moses and the Judaeans.' As my discussion of references to law in previous chapters of this study has shown, it is unusual to have an identifying element in the

[20] See, for example, K2, K7. In both cases the document is made up between the groom and someone else than the bride: in K2 her owner, as the bride is a slave girl; in K7 the adoptive brother (the girl was once a slave but has been set free (see K5), and on that occasion the son of the slave owner became her adoptive brother). Friedman noticed that 'dockets identifying the document as a marriage contract issued by PN, the groom, for PN, the bride, are known from the Elephantine papyri and the Palestinian-style ketubbot from the Geniza' ("Babatha's *ketubba*," 75). In the context of such a statement it is important to note that the endorsement or docket represents the real legal relationship: the obligation undertaken by the groom towards the bride, while in some of the papyri which present such an endorsement the parties to the contract are not groom and bride, but groom and father/brother of the bride. However, in all cases the obligation undertaken is an obligation towards the bride: she can call on the arrangements in the contract.

[21] Yadin et al. merely describe the line on the verso of P.Yadin 10 as 'an identifying inscription on the outside of the folded document.' ("Babatha's *ketubba*," 75), indicating 'the main purpose of this document: to record the financial and other obligations of Yehudah towards Babatha.' Still it is interesting to note that this inscription occurs on the verso of a marriage contract and not on the verso of other types of documents establishing legal ties between the parties involved. This suggests that in the case of a marriage contract it was considered especially important to point out that a legal tie had been established between groom and bride.

I note that Yadin et al. indicate that P.Yadin 16 and 21 also have inscriptions on the verso of the papyrus ("Babatha's *ketubba*," 97), however, these are of a different nature than the endorsement of P.Yadin 10: the inscription on the verso of P.Yadin 16 is the name of the declarant and on the verso of P.Yadin 21 the declaration of the guarantor ('Shammu'a son of Menahem has written: talents forty<-two> and…k(ors) two, seahs five'; Lewis, 96).

reference to law, indicating what law is meant.[22] This makes this reference here in P.Yadin 10 stand out.

Yadin et al. note here that the usual formula was 'according to the law of Moses and Israel,' a phrase which is used until the present day.[23] They also refer to the apocryphal book of Tobit where the groom is said to wed his bride 'according to the law and decree written in the book of Moses' and to CPJ 128, where 'the phrase 'he holds me as a wife according to the law of the Jews' is reconstructed.'[24]

The question is of course whether any special significance should be attached to the use of 'Judaeans' (יהודאי) instead of Israel. Yadin et al. note that in later ketubbot one can also find יהודאי instead of Israel.[25] Whether this should be read as 'Judaeans' or more generally 'Jews' is not always clear. The Mishnah gives a reference to 'according to the law of

[22] Compare references like 'as is proper' (which refers to a generally known legal framework; P.Yadin 2) and 'according to the law of deposit' (where 'the law of deposit' is not identified as being Jewish, Nabataean, Greek or whatever; P.Yadin 17).

[23] Yadin et al., "Babatha's ketubba," 86. In both formulae a different word is employed for 'law,' but the difference does not seem to be important for our understanding of the phrase here in P.Yadin 10; I will therefore not expound upon this matter.

[24] Caution is due in both instances, see, for example, Wasserstein, "P.Yadin 18," 111–112, who discusses the employability of apocryphal material for a legal argument, and the note by Yadin et al. on CPJ 128, that this concerns a 'highly restored text' ("Babatha's *ketubba*," 87, n. 32).

The quote from Tobit Yadin et al. give, Tobit 7:12, κατὰ τὸν νόμον καὶ κατὰ τὴν κρίσιν γεγραμμένην ἐν τῇ βίβλῳ Μωυσέως, represents the text in the Codex Sinaiticus (compare Tobit 6:13: κατὰ τὴν κρίσιν τῆς βίβλιου Μωυσέως). The Codex Vaticanus and others read: κατὰ τὸν νόμον Μωυσέ.

The restoration in CPJ 128 reads [κατὰ τὸν νόμον π]ολιτικὸν τῶν Ἰου]δαίων i.e. 'according to the civil law of the Jews.' For a discussion of the law of Moses as the civil law of the Jews see Joseph Mélèze Modrzejewski, "Jewish Law and Hellenistic Legal Practice in the Light of Greek Papyri from Egypt," in *An Introduction to the History and Sources of Jewish Law* (ed. N.S. Hecht, B.S. Jackson et al.; Oxford: Clarendon Press, 1996), 81–84; idem, "Law and Justice in Ptolemaic Egypt," in *Legal Documents of the Hellenistic World* (ed. M.J. Geller and H. Maehler; London: Warburg Institute, 1995), 8–11 and idem,"The Septuagint as Nomos: How the Torah became a "Civic Law" for the Jews of Egypt," in *Critical Studies in Ancient Law, Comparative Law and Legal History. Essays in Honour of Alan Watson* (ed. J.W. Cairns and O.F. Robinson; Oxford: Hart, 2001), 183–199. In the latter article CPJ 128 is discussed in detail, also referring to the suggestion by Volterra that [κατὰ τὸν νόμον π]ολιτικὸν refers to 'according to the law of Moses and the Judaeans' used in the traditional Jewish wedding ceremony. Modrzejewski rejects this interpretation explaining that no *ketubbot* were drawn up in Egypt at the time. Nevertheless, it is a matter of speculation whether the mere fact that [κατὰ τὸν νόμον π]ολιτικὸν refers to Jewish law, does not indicate that the marriage concerned was conducted according to Jewish law, whether we directly relate this to the traditional phrase 'according to the law of Moses and the Judaeans' or not.

[25] See Yadin et al., "Babatha's *ketubba*," 86.

Moses and Jewish (law)' giving יהודית, an adjective to go with דת, law.[26] In this passage it is determined what conduct goes against 'the law of Moses' (these regulations can indeed be found in Biblical law) and what conduct goes against 'Jewish (law)' (here we find things like letting hair hang loose and talking with strangers, or even in general talking too loud). Apparently these latter regulations concerned what was considered (im)proper behaviour for a (married) woman.[27] 'Jewish (law)' then probably referred to Jewish custom, what is accepted among Jews. The wife's conduct should obviously be judged not only on the basis of what the law of Moses determines about this, but also on the basis of what is in general deemed acceptable among Jews. It is needless to say that such an addition leaves room for regional differences in judgment of specific instances of a case of assumed wrong conduct. One can wonder whether the phrase should here not be interpreted in the same way. Do we have to read 'the law of Moses and, more specifically, of the Judaeans,' that is, 'the law of Moses, with in addition the specific rules of custom adhered to by Judaeans'? This is obviously relevant in the present case, as the Mishnah records that there was a difference in interpretation between Jews in Judaea and Galilee, concerning the position of the wife after her husband's death. The Galileans determined that the widow could live in the house of her deceased husband and be maintained from his estate as long as she remained a widow (i.e. until her death or a new marriage), but the Judaeans determined she could only do so until the time the heirs paid her the money of her *ketubba*. This is explicitly explained in *m. Ketub*. 4:12, and there is even a note in the Palestinian Talmud concerning this passage, stating that 'the people of the Galilee considered their honour and not their money, while those of Judea considered their money and not their honour.'[28] What we actually find in the clauses of P.Yadin 10 is that Babatha will be maintained from her husband's estate

[26] Yadin et al., "Babatha's *ketubba*," 86: *m. Ketub*. 7:6.

[27] Yadin et al. refer to the Mishnaic passage, but disregard its meaning for the understanding of 'law' as they state 'but explains it as referring to proper behaviour on the part of the wife' ("Babatha's *ketubba*," 86). However, if taken to refer to proper behaviour of the wife, this behaviour is obviously denoted by referring to 'Jewish law,' that is, to accepted rules or regulations that determined what a wife should not do. See my exposition.

[28] *y. Ketub*. 4,15 29a; adduced by Yadin et al. in their discussion of the maintenance clauses of lines 14–16 ("Babatha's *ketubba*," 94), but not related to the interpretation of the line 'according to the law of Moses and the Judaeans.'

until the heirs give her the money of her *ketubba*. Therefore, the *ketubba* is indeed written in accordance with Judaean custom.[29]

Part of the proposal is the groom's promise to take the bride into his house and provide her with food and clothes. This general promise is followed by a mention of the amount of money the groom will owe the bride. This amount of money plays an important part in the entire marriage contract, as it recurs in lines 11 and 16. In line 11 the groom declares that he will still owe the bride the *ketubba* money after he will have redeemed her from a possible captivity. This phrase probably prevented the groom from deducting the costs of redemption from the *ketubba* money.[30] In line 16 the groom refers to his heirs who will have to pay the *ketubba* money to the wife in the event of his death. A reference to the *ketubba* money has probably also been part of lines 12–13, where the clause concerning male children has been restored: male children inherited their mother's *ketubba* money at her death.[31] Line 18 probably contained a guarantee that the groom would be liable with all he owned for return of the *ketubba* money. The *ketubba* money is so essential for the entire arrangement that one could even say that the demand for a *ketubba* made in the Mishnah does not see so much to the document (a written agreement) as to the payment of the *ketubba* money.[32] A

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[29] As Yadin et al. note, it was pointed out soon after discovery of P.Yadin 10 that it conforms with Judaean practice (because of the maintenance clauses) and that this was not odd since the groom came from En-gedi ("Babatha's *ketubba*," 94). In view of these observations it is rather surprising that there is nowhere a remark as to the point that the phrase 'according to the law of Moses and the Judaeans' may not mean the same as 'according to the law of Moses and Israel,' i.e. according to Jewish law, but more specifically 'according to the law of Moses and of the Judaeans,' that is, Jewish law and more specifically Judaean custom. In that case we should understand that the document confirms to Judaean practice where maintenance was concerned, not because Judah was from En-gedi, but because the reference to law in the document's text determined this.

In the context of my interpretation, 'Jewish law and more specifically Judaean custom,' it serves to quote Friedman, who observed that a marriage contract 'is primarily based on customary law' ("Babatha's *ketubba*," 70). This would fit with the interpretation of ἑλληνικῷ νόμῳ in P.Yadin 18 as 'Greek custom' rather than 'Greek law,' see 410 below.

[30] See Yadin et al., "Babatha's *ketubba*," 93, where reference is made to a *ketubba* in which it is even stated explicitly that the groom has to redeem the wife from his possessions exclusive of the *ketubba* money.

[31] No actual restoration for the entire clause is provided in the text, but a translation is given (in italics) 'in the interest of continuity' (*Documents II*, 138; see also 129–130).

[32] See Katzoff remarking about R. Meir, that 'his rulings refer to the obligations, not to the writing of them,' referring in a footnote to Friedman, who observed that 'in the Mishna the term *ketubba* appears only once (M. Ketubot 9:9) in the sense of the marriage document. Elsewhere it means the sum(s) due to the wife' ("On P.Yadin 37 = P.Hever 65," in *Law in the Documents of the Judaean Desert*, 141, n. 36).

man may not keep a wife without proper arrangements for the *ketubba* money, that is, for the payment of it and its eventual return.[33]

The main obligation of the husband is formulated as related to the value of the dowry. This remains the property of the wife and she can take from it and hold it, she has a binding claim to it on her husband. Other obligations are mentioned in a dependant clause: 'together with the rightful (allocation) of your food, and your clothing, and your bed.' This phrase goes back to Exod 21:10 where food, garment and conjugal rights are mentioned. This phrase can be found in other forms in later *ketubbot* as well.[34]

The use of the word דין (translated by 'rightful allocation') denotes a right to something in general, a right that is granted by law: one could translate 'together with the legally arranged allocation of food, clothing and conjugal rights.'[35] It is clear in what legal system these arrangements can be found, since it has been said the bride will be a wife unto the groom 'according to the law of Moses and the Judaeans.'

The obligation of the husband is further specified by the phrase 'the (fitting) sustenance of a free woman.' Free here probably refers to her freeborn status.[36] As with the term כחליקת we encountered before,[37] it is possible to speculate on what was considered to be 'fitting.' Read in the context of the entire document the standard to be applied here should clearly be a Jewish standard: the entire contract is subjected to 'the law of Moses and the Judaeans' and the reference to 'food, clothing and con-

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[33] See Cotton, "Cancelled Marriage Contract," 82–83: 'The essence of the Jewish marriage contract is the sum of money that the groom undertakes to pay for the bride, the bride price, *mohar*, as it is called in Hebrew. As one writer puts it: 'the legality of the marriage is dependent on the payment of bride-money.... The central position of the bride-price, *mohar*, is well illustrated by the fact that the term *ketubba* stands both for the written contract and for the bride-price, *mohar*. In fact the term *mohar* does not appear in the Aramaic marriage contracts from the Judaean Desert: *ketubba* does.' See Cotton's n. 190 for details on the equation of *mohar* and *ketubba* in Jewish sources. Also see Cotton's comprehensive treatment, "Marriage Contracts from the Judaean Desert," 2–3: *mohar* is not the same as dowry as *mohar* is paid by the groom to the family of the bride and dowry vice versa; our documents obviously deal with dowry. Cotton concluded: 'I would suggest that Jewish society after biblical times used dowry rather than the bride gift.'

[34] See Yadin et al., "Babatha's *ketubba*," 88.

[35] *Documents II* comments that 'usage of the term דין is unusual, but readily understandable. Like the Hebrew terms חק and משפט it may connote what is judged to be entitled to by law, or established as correct; what is rightfully his' (135).

[36] Yadin et al. refer to a comparable phraseology in Greek (ἐλευθέρα) ("Babatha's *ketubba*," 88).

[37] For example in P.Yadin 6, see 99–105.

jugal rights' goes back directly to a Jewish legal source. Indeed, general standards were developed to determine what kind of maintenance a wife could demand from her husband as can be seen in *m. Ketub*. 5:8–9 where amounts of food and items of clothing are specified. The Mishnah even determines what conjugal rights a woman had in relation to the profession of her husband, i.e. his possible absence for his business.[38] An obligation to feed and clothe the wife are common in marriage contracts, but the addition of the conjugal rights seems to me to be a specific Jewish feature. It does in any case not occur in the two Greek documents to be discussed below.[39] I find it important that despite the fact that the document in its entirety was placed under the application of Jewish law, a standard for food, clothing and conjugal rights was separately determined (by referring to a legal context as well). I will come back to this in my discussion of P.Yadin 18 below, where we also find a separate specification of the maintenance obligation.

Lines 10–16 contain the mandatory clauses seeing to redemption from captivity (lines 10–11), provision for male children (12–13), provision for female children (line 14) and provision for wife in case of death husband (line 15). The Mishnah also mentions the *ketubba* itself, 'that is the mandatory amount due to the wife in the event of divorce or of her husband's death'[40] (mentioned in line 6, 8, 11 and 16) and the pledging clause, ensuring that the husband is liable with all his property for return of the *ketubba* money (probably part of line 18). Although lines 12–13 and 18 are restored to contain the said clauses, it is remarkable that all clauses found in the Mishnah are present in this single document. It shows that the demands made in the Mishnah indeed go back

[38] See *m. Ketub.* 5:6 for the rights a wife has depending on her husband's profession (i.e. his possible absence for business) or abstinence following a vow by the husband.

The word used in P.Yadin 10 for 'bed,' פרש, is not known elsewhere; Yadin et al. indicate that it can either be derived from a root that means 'to spread out or over' or that it can be an Arabic loanword for 'bed' (Yadin et al., "Babatha's *ketubba*," 88, n. 37); in both cases the reference is clearly to conjugal rights/relations (Friedman was in favour of the first interpretation: 'a verbal noun (lit. 'spreading [a garment] over'), which here functions as a euphemism for sexual intercourse'; Friedman, "Babatha's *ketubba*," 68).

[39] Unless we interpret the phrase 'to continue our lives together' in P.Hever 65 as seeing to an obligation to maintain conjugal relations, which does not seem likely to me. I believe that the phrase there merely indicates that there is a situation which will be continued (the persons involved share a common household, or in case of unwritten marriage, have entered into a factual marital relationship). Even if the phrase sees to continuation of an obligation to give the wife her conjugal rights its place in the document is completely different from that of the phrase seeing to this in P.Yadin 10.

[40] Yadin et al., "Babatha's *ketubba*," 92.

to real life practice and that before the demands were written down and codified, people took care to make all of them part of their contracts. This is especially interesting in light of the fact, referred to above, that before the documents from the Judaean Desert were found, no *ketubbot* containing the Mishnaic clauses were known to us. It is also important in the light of the other marriage contracts found that do not contain these clauses: although the Mishnaic clauses were used in practice, they were not always used.[41] That raises the question of why they were or were not used in the documents we are dealing with here.

The ketubba and its legal implications

Often we do not know what the legal implications were of the acts in the documents drawn up, whether loans were duly repaid, whether court cases were won or in what way an inheritance was eventually divided. The Babatha archive provides a welcome deviation from this principle as it shows us in several instances what happened later concerning a certain legal act. There is for instance the case of P.Yadin 27 above, a receipt for maintenance money that seems to show that Babatha lost her case against the guardians which was the subject of P.Yadin 12–15 and indirectly of P.Yadin 28–30.[42] P.Yadin 10, Babatha's *ketubba*, plays an important part in several other documents in the archive, whether this is said in so many words or merely implied by the context. These instances where the marriage contract plays a part in the legal matter

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[41] Compare Cotton: '…the four Aramaic marriage contracts from the Judaean Desert reveal to us that the rabbinic marriage contract had indeed by then developed its own special form, its own special formulae. But had it become obligatory, normative and crystallized? Surely not. Not one of the five marriage contracts written in Greek can be said to be a translation of an Aramaic *ketubbah*' ("Marriage Contracts from the Judaean Desert," 4). One should, I believe, be careful in using the word normative in this context: one can argue that the marriage contract in its later mishnaic form had not become normative yet (as other forms of marriage contract were apparently accepted in actual practice), but one cannot understand this to relate to the normative status of Jewish law, as several different practices can have existed side by side which all were part of normative Jewish law at the time (see general discussion of the meaning of normative law in the General Introduction, 43–50). Even in the Mishnah itself one can see that opinions can stand side by side that to our mind are contradictory, without any indication that a choice is made between the opinions, or one of them is positioned as 'normative' and the other is not. Consequently, one can argue that in Jewish law not even codification necessarily means that one legal arrangement attains a dominant status over others: several can be part of normative law. See n. 146 and especially 170 below.

[42] See 344–345 above; for the interpretation that she did win her case and her position was ameliorated see 345 n. 144 above.

at issue, are suited for an investigation of whether the legal implications of the marriage contract found are a consequence of the specific Jewish nature of the contract or should be seen in the context of marriage documents in general.

Babatha's sale of the dates

In Chapter 4, on law of succession, Babatha's position after the death of her husband Judah was discussed: Babatha acted actively concerning parts of his estate, in selling crops of date groves (P.Yadin 21–22), basing her right to do so on her dowry and a debt.[43] The dowry obviously refers back to the marriage contract, recorded in P.Yadin 10, while the debt probably sees to the depositum of P.Yadin 17.[44] Lewis related the sale specifically to the widow's right to her *ketubba* money and to maintenance, both of which should be provided by the heirs.[45] The evidence here shows that if the heirs did not provide the maintenance or repaid the *ketubba* in due time, the widow could actively do something about this. The principle works like hypothec, giving the holder of the right of hypothec a right to execute property to have his claims satisfied. The dowry can therefore be mentioned in the same breath as debt, a contract that usually also provided a basis for execution of the property of the debtor if he did not duly repay the borrowed sum. Cotton and Greenfield already noted that wives in Egypt had to register their claims to their husband's estate in the same archives where his rights of ownership were registered to warn prospective buyers that the property was encumbered.[46] This means that the marriage contract effectively created a lien on the husband's property.[47] The Egyptian context of the registration obligation just mentioned already indicates that this effect of the arrangements in the marriage contract was not a special feature of Jewish contracts, in fact one can gather that where dowry is an essential part of the marital arrangement repayment of this dowry and surety

[43] P.Yadin 21:11–12 and 22:9–10.

[44] One could also understand the two as expressing the same thing: 'the debt of your dowry.' Lewis seems to interpret it that way, because he does not refer to a specific separate debt, like the one of P.Yadin 17, but only to the rights the widow had to return of her dowry and maintenance from her husband's estate (Lewis, 94; also see 175 and n. 244 there).

[45] See Lewis, 94.

[46] See 176–177 above.

[47] To avoid confusion, one should keep in mind that the marriage contract (the legal ties established between husband and wife) created the lien on the property, registration only served to make the presence of this lien known (i.e. registration was not constitutive).

therefore will be arranged for thoroughly. This is indeed what can be seen in Greek documents from Egypt, in both Aramaic and Greek documents from the Judaean Desert[48] and in the Jewish legal sources such as the Mishnah and the Talmud.

It is important to emphasize, however, that there is a feature connected with liability that seems to be unique for some of the Jewish documents. As we have seen in P.Yadin 10, the groom did not only oblige himself to repayment of the dowry, but also to maintaining his wife, i.e. feeding and clothing her and giving her her conjugal rights. A certain standard is determined for this; we have seen that this is a Jewish standard in this specific instance. In P.Yadin 18 and P.Hever 65, to be discussed below, we will see that the standard could also be related to another custom or practice. In Greek marriage documents from Egypt it can be explicitly determined that the husband is obliged to maintain his wife 'according to his means.'[49] There are, however, also instances where the husband is said to be liable with all he possesses for the maintenance of his wife. This means that an extra liability is created, comparable to the liability for repayment of the dowry, that rests on the entire property of the husband. Cotton initially noted that this feature is only found in Jewish documents, enumerating four instances: P.Yadin 18, P.Hever 65, XHev/Se Gr. 2 and the much later *Ketubba* from Cologne.[50] Although Cotton later indicated that the clause can also be found in Demotic contracts (one of them presenting a close parallel to the clause found in P.Yadin 18),[51] it remains remarkable that all three documents containing this clause from the area and period concerned here are Greek documents, not Aramaic ones. It is difficult to determine for these instances from what (legal) source this feature could come and why it was incorporated in these documents. There is a difference between P.Yadin 18 and P.Hever 65, in that P.Yadin 18 presents the liability clause for maintenance of the wife, as well as for the repayment of the dowry, while P.Hever 65 only presents us with the first. Since one would assume that liability for repayment of the dowry would be more important than for maintenance the clause probably sees to liability for the dowry as well

[48] In P.Hever 65 liability of the groom with all of his property is mentioned after the maintenance clause, but obviously sees to the sum total of arrangements agreed upon (i.e. including obligation for return of the dowry); see directly below.

[49] See Cotton, "Cancelled Marriage Contract," 79, citing from several such contracts.

[50] See Cotton, "Cancelled Marriage Contract," 79.

[51] See Cotton in Cotton and Yardeni, 270.

and is merely loosely (perhaps a bit unfortunately) connected with the previous arrangements.

Babatha's dispute with Besas

The link with hypothec and surety in general is strengthened by the instance of P.Yadin 23–24. Besas, who represents Judah's heirs, demands that Babatha disclose what right she has to the orchards *that are registered in her name*. Since Besas denotes that Babatha is holding these properties 'in possession by force,' it is clear that the matter does not concern property that Babatha owns.[52] Besas obviously considers the orchards concerned as the rightful property of the orphans he represents. Since these orphans are the heirs of Babatha's deceased husband, the orchards must concern property that belonged to Judah, but was for some reason registered in Babatha's name. The registration could, as Cotton and Greenfield suggested, refer to registration in public archives of the claim of a wife on her husband's entire property based on the pledging clause in the marriage contract. It could also, as Lewis suggested, concern a registration of property the husband bought for the wife during marriage and registered in her name. Ownership reverted to the husband in case of a divorce or to his estate in case of his death.[53] Above I indicated that uncertainty about the reason for the registration in Babatha's name might have prompted Besas' summons: in case of registration in the wife's name for the duration of marriage Babatha's rights to the orchards had obviously ended at Judah's death and Besas could register in the orphans' name without any difficulty. However, in case of lien in connection with dowry the heirs would have to pay the dowry first, to have unencumbered property registered in their name.[54]

Regarding Babatha's description in P.Yadin 21–22 of her right to sell the crops as being based on her dowry and a debt, we can assume that the registration Besas inquired about was indeed the lien based on the marriage contract. Therefore, we can assume that Babatha could prove

[52] See P.Yadin 23:6–7; compare 25:18–20, where Babatha discards the charge of 'using force' as a false charge. The conclusion that Babatha does not own the property goes against any possible explanation that this dispute concerned the orchards that Babatha registered as her own in the census of 127 CE (cf. P.Yadin 24:4–6; see Lewis's discussion there, raising and discarding the possibility that the orchards of P.Yadin 16 are concerned here; also see 230 n. 47 above).

[53] See 232 above.

[54] See more detailed discussion above, 230–232.

her rights by way of the marriage contract.[55] As observed above, registration of a lien in favour of the wife on the husband's entire property is known from an Egyptian context.[56] This fact proves that liens on property created by a marriage contract occurred outside a sphere of Jewish law, in documents that were based in other legal systems. Consequently, we have to conclude for the case against Besas that Babatha could have defended her claims with a marriage document that was not necessarily a *ketubba*.[57] Nevertheless, we do have to view the case of P.Yadin 21–22 as a case rooted in Jewish law, not because marriage contracts based in other legal systems would not be able to create a lien on the husband's property, but because the reference to the applicable law in P.Yadin 10 puts this contract within a framework of Jewish law. To put it differently, because P.Yadin 10 declares that the arrangements found there have a basis in Jewish law, the legal acts based on this contract go back on obligations acquired on the basis of Jewish law. Therefore, it is not decisive to note that Babatha could have based her claims on Judah's property on a contract drawn up under non-Jewish law as well: the fact is that she is basing them on a contract drawn up under Jewish law, which make

[55] Thus *contra* Friedman: 'Hypothetically, the background of the disputes could be reconstructed as follows: All agreed that Yehudah had registered certain properties in Babatha's name. Her fellow litigants alleged that these were in way of payment of her *ketubba* money. She claimed that the properties she held had been an outright gift from her husband, and she seized other properties for the moneys owed her' (Friedman, "Babatha's *ketubba*," 67). The strongest argument against this interpretation is the fact that Babatha herself describes her rights to the properties concerned as based on dowry and debt (in P.Yadin 21–22). If the rights had been based on gift, Babatha would have referred to that. Besides, it is obvious from the situation as explained in several documents that a gift could not have been the basis: a gift makes the donee owner and Babatha claims nowhere to be owner of the properties concerned. On the contrary, she is said to distrain them, i.e. to hold them without being owner. This fits with the idea that she had seized them to ensure that she would receive the money due to her on the basis of her marriage contract and the deposit of P.Yadin 17. The claims brought against Babatha are also based on the legal situation of someone holding someone else's property, i.e. ownership is not claimed or contested, but the right to hold the properties and make money with them. [This argument of course rests on the assumption that the properties meant in P.Yadin 23–24 are the same orchards as the ones concerned in P.Yadin 21–22; see 176 n. 249 and 177 above].

[56] See 176.

[57] Liability for return of the dowry resting on the entire property of the husband is recorded in the Greek marriage deeds of P.Yadin 18 and P.Hever 65. Neither is a *ketubba*; see discussion below.

her consequent actions actions based on rights acquired on the basis of Jewish law.[58]

In P.Yadin 26 it becomes clear that the first wife, Miryam, also considered herself entitled to certain property that belonged to Judah. On what legal act she based her rights is not clear, but Besas might have tried to solve the problem of which wife had claims to what property.[59] It is possible he sued Miryam as well: that document would have been in Miryam's archive and could therefore not be known to us.[60]

Babatha's dispute with Miryam

P.Yadin 26 presents us with another court case following the death of Judah, this time between his two wives, Babatha and Miryam. Babatha was the second wife as Judah had a daughter from a previous marriage, Shelamzion. Miryam, who only appears here, was apparently Judah's first wife, and probably the mother of this daughter. Babatha designates Judah as 'my and your deceased husband.'[61] Miryam seems to do the same, but this is not completely certain as part of her statement is damaged.[62] Whether that dispute implies Judah had divorced Miryam or that he had entered into a bigamous match with Babatha is not clear.[63]

Both women claim to have rights to property of the deceased Judah. In the case of Babatha we can assume that these rights were based on her marriage with Judah: Babatha explicitly adduced her marriage contract

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[58] Also see 48–49 above. This example emphasizes the importance of the references to law in documents for our understanding of the applicable law. Where a clause making the husband liable for the return of the dowry with all he possesses is not uniquely Jewish and we could therefore not claim that Babatha's actions based on her marriage contract are based in Jewish law, we can argue that the reference to 'the law of Moses and the Judaeans' in P.Yadin 10 puts the entire contract in a framework of Jewish law, thereby making all later legal actions based on this contract actions based on obligations established under Jewish law.

[59] If Miryam had been divorced by Judah, her claim can hardly have been based on her marriage contract. Perhaps it was based on a divorce settlement, or on a deed of gift. See next section for a full discussion of all possibilities.

[60] Besas settles a dispute with Shelamzion, Judah's daughter, in P.Yadin 20. It could very well be that he started several suits against all possible claimants involved, daughter and both first and second wife, to get the inheritance matters settled and provide the (apparently minor) heirs with cleared and unencumbered property.

[61] P.Yadin 26:7–8.

[62] P.Yadin 26:13–14 (the Greek for 'my' and 'your' is restored, see Lewis, 113), in line 15 she speaks only of 'my husband' (but this could have to do with the fact that she is there referring to arrangements Judah made specifically for her, probably within the context of their marriage).

[63] See General Introduction above, 11, esp. n. 22.

as the basis for the legal act of sale she made in P.Yadin 21–22. It can be asked what right Miryam can be thought to have had to Judah's property, as we do not know whether Judah divorced her or not. Katzoff discussed five possibilities when it comes to the claims women could possibly bring: they could be based on intestate succession, testamentary succession, succession based on marriage contract, settlements from marriage contract, or simply a misunderstanding concerning personal possessions.[64] As I discussed all options in detail in Chapter 4, here I only briefly mention those options that are relevant in the context of a marriage contract.[65]

It is rather surprising that Katzoff, in his discussion of the possibility of testamentary succession, did not mention the possibility of a deed of gift. Suppose Judah had made Miryam a gift during their marriage and Miryam now saw herself as entitled to the property concerned in the gift. It might well be that the validity of such a gift was disputed after the husband's death.[66] In the case of a wife who was most likely divorced, it could be asked whether the gift could still be valid after a divorce.[67] A complication connected with the assumption of a gift is that it is not clear whether the property Babatha alludes to has recently been seized by Miryam or whether she was holding it for a long time, perhaps the entire period after her divorce.[68]

Katzoff's third explanation is based on the clause, sometimes found in Greek marriage contracts from Egypt, of mutual succession of the spouses. He notes though that these clauses are not found in the marriage contracts from the Judaean Desert (whether Greek or Aramaic). The clause is in any case absent in P.Yadin 10, and it is not found in the

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[64] See Katzoff, "Polygamy in P.Yadin?" 128–132.

[65] For full discussion with all references see 221–226 above.

[66] A gift made to Shelamzion was disputed by her father's legal heirs (cf. P.Yadin 20; I assume that Shelamzion became owner of the contested property by way of a gift, as there are few (if any) other ways a woman could acquire property at the time: see Cotton and Greenfield, "Babatha's Property," *passim*).

[67] In the gift of P.Yadin 7, for instance, it is determined that the donee has to stay the wife of the donor and take care of him. This can be understood to be a *conditio sine qua non*. If such a clause had been present in a deed of gift made out to Miryam, she would not be entitled to the gift after her divorce.

[68] It could be that Judah never did anything about this, but Babatha intends to do so. This could have been the case because Judah's estate did not offer enough to satisfy Babatha's claims: the amount of money concerned in the dowry and the loan of P.Yadin 17 could amount to some seven hundred denarii, a very substantial sum indeed! See 225 n. 37 above, for the idea that Miryam held property based in En-gedi where Judah had lived with her, before he moved to Maoza to live with his second wife Babatha.

Greek marriage contracts P.Yadin 18 and P.Hever 65 either. It therefore seems unlikely that such a clause was behind the present dispute. I also note that it could be disputed whether Miryam could still invoke the clause if she had been divorced by Judah. Since we do not know, however, whether her marriage to Judah should be considered terminated or not, we cannot draw firm conclusions about this.

A clause found in marriage contracts, for example, those from Elephantine, which Katzoff does not mention, is a clause determining the consequences of a second marriage, while the first is not terminated yet. The clause is a bit ambiguous since it says that the husband is not allowed to bring in another wife next to the one he is marrying now, but it is at the same time said that if he does so, this will cause the first marriage to end (it will be like a divorce). This would mean that a second marriage would effect divorce. If such a clause had been part of the marriage contract between Miryam and Judah, the clause would probably not have made the match with Babatha invalid, but Miryam's own marriage with Judah. Therefore, it does not seem likely she is basing her claims on such a clause.[69]

Katzoff suggests as a fourth possibility that Miryam's claim was based on a prior divorce: she might have been promised something which she never received. I think Katzoff is right in remarking here that the claims of the wives in their individual positions, as divorcee and widow, could explain the use of the phrase 'my and your deceased husband' to refer to Judah. Therefore, we do not necessarily have to accept polygamy behind the conflict.[70]

The last possibility Katzoff mentions is that there was a dispute concerning what property belonged to which person. He points out that household possessions are often treated as communal by the spouses and then concludes that 'these sorts of misunderstandings could be enough to account for attempts by each of the former wives to take hold of personal objects leading to the lawsuit in *P.Yadin* 26.'[71]

Katzoff also discussed the question of why, in the latter two cases, Miryam presses her claims after Judah has died, while she could have done so right after the divorce. Fear of Judah or awareness of the weakness of her claims could indeed have been a reason, although I think it is more likely to argue, as Katzoff has done himself earlier on in the article, that Miryam held the goods under dispute from the start of her marriage, thus that she had never given up on them. Babatha now presses her that she should, even taking the case to court. I argued above that a

[69] See 224 n. 35 above.
[70] Thus *contra* Lewis, 23–24.
[71] I consider this option less likely: see 224 n. 36 above.

reason for this could be that Judah's estate did not encompass enough to satisfy Babatha's claims.[72]

It seems likely that Babatha tried to get Miryam to give the property to her, but being unsuccessful in this respect she decided to press charges to have the property given to her.[73] She might have resorted to this following the acts of Besas, who summoned Babatha to explain her holding of the orchards belonging to Judah (P.Yadin 23–24). Babatha uses the same strategy: she asks the other party to explain her behaviour, inferring that the grounds for it should be given. Should these grounds be lacking, then the property should be given to the person entitled to it.[74]

There are no reasons to assume that Babatha's position was specifically dependent on the Jewish nature of the regulations in her marriage contract: the contract does not contain specific clauses that pertain to conflicting claims after the death of the husband. Nor is there any indication that the conflict of P.Yadin 26 was related to a situation rooted in Jewish law. Therefore, we can assume that Babatha could have pressed the charges against Miryam also if her marriage contract had been drawn up like P.Yadin 18 or P.Hever 65. Of course the same observation made above regarding P.Yadin 21–22 and 23–24 applies here: since P.Yadin 10 determines that the arrangements found there have their basis in Jewish law, Babatha's claims based on this marriage contract, such as the ones presumably underlying the case of P.Yadin 26, are claims based on obligations contracted under Jewish law. Therefore, one has to accept that the conflict of P.Yadin 26 has a basis in Jewish law, in any case for as far as Babatha's rights based on her marriage contract of P.Yadin 10 are concerned.

Conclusions

P.Yadin 10 provides us with an early example of a Jewish *ketubba*, featuring the mandatory clauses later codified in Mishnaic law. It is remarkable that, with some restoration, all of these clauses can be found in the

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[72] See 223.

[73] See details on 224–225 above.

[74] Both suits have to do with property that someone who is not entitled to it is keeping in his possession. See Nörr, "Prozessuales," 332–333, for possible relations with the *interdictum unde vi* (P.Yadin 24 and 25, where immovables are concerned) and *interdictum (duplex) utrubi* (P.Yadin 26, where movables are concerned).

document. This seems to indicate that the clauses recorded in the Mishnah as basic parts of a *ketubba* were already in use in this set combination in real life practice at the time. Apart from that, other clauses found in the *ketubba* have a distinct Jewish flavour and can be connected with later regulations in the Mishnah, for example, concerning the provision of food, clothing and the arrangement for the conjugal rights.

The entire contract is put in the light of Jewish law, by declaring that the wife is taken 'according to the law of Moses and the Judaeans.' 'Judaeans' should in this context not be read to yield 'Jews' (or to stand for the more common "Israel") but as 'Judaeans,' denoting the specific custom of the Judaeans. That indeed Judaean custom was followed in the document's arrangements can be seen in the maintenance provision: the heirs have to provide maintenance until they have paid the money due to the widow (this in contrast to Galilean custom where the widow was provided with maintenance until she remarried or died). While the reference to 'the law of Moses and the Judaeans' obviously applies to the entire contract, a separate standard is set for provision for food, clothing and the conjugal rights, speaking of 'rightful allocation' or 'allocation that is arranged for by law.' The combination of food, clothing and conjugal rights seems to be specifically Jewish in itself, going back to Exod 21:10. Nevertheless, one cannot understand P.Yadin 10 as evidence for the actual application of Jewish *normative* law where this specific form of the contract is concerned, since it is obvious that this form of marriage contract was not the only one available at the time. Furthermore, it is clear that the rights a woman had on the basis of such a *ketubba* were not exclusively connected with the *ketubba* as such, but can be considered as basic elements of arrangements connected with marriage. To put it differently, it seems that Babatha need not have had a *ketubba* like this (with this wording, style and contents) to have the same rights she is claiming now. For example liability of the husband for return of the dowry was contracted in Greek marriage contracts as well (such as P.Yadin 18 and P.Hever 65). Consequently, we can argue that Babatha's sale of the dates in P.Yadin 21–22 could have been based on a Greek marriage contract as well. Nevertheless, we should not disregard the meaning of the explicit reference to the applicable law in P.Yadin 10. This reference makes it clear that the liability of the husband contracted through this legal deed has its basis in Jewish law (and not in any other law, which also knows this same liability). Consequently, any later acts of the wife-widow that are based on the marriage contract are acts based on rights acquired under Jewish law. This means that one cannot

say that Babatha holds the same position as for example a widow from Egypt, but that Babatha here acts on the basis of Jewish law. The example of P.Yadin 10 thus illustrates the importance of references to law for our understanding of the documents' legal context. Even though one can argue that certain elements of contracts can be found in several legal systems, the reference to law places the arrangements in the contract in which this reference occurs firmly within the framework of the law to which the reference refers. Consequently, all legal acts based on this contract are based on rights acquired on the basis of this law. Therefore, to understand the legal context of such a document one need not compare P.Yadin 10 to other contracts, for example from Egypt, to see whether there are common elements, but, in the light of the reference to law in the document itself, should understand the legal arrangements described in P.Yadin 10 as part of Jewish law at the time. This conclusion as to P.Yadin 10 is important for understanding the other marriage contracts in the archives, that have been qualified as non-Jewish, and for understanding the development of Jewish law at the time, and the role codification in the Mishnah played in this process.

II. *P.Yadin 18: Shelamzion's Document: Jewish vs. Hellenistic?*

Structure and most important features of P.Yadin 18

As referred to in the discussion of P.Yadin 10,

> The *ketubba*, to judge by the early ones that have reached us and by literary references, contained the following elements: 1) the date and place of its writing; 2) the names of the groom and bride as part of the groom's declaration; 3) the marriage proposal; 4) the promise to give the bride her due; 5) the mandatory *ketubba* clauses or 'court stipulations'; 6) the statement that the document will be replaced; and 7) a statement by the groom that he accepts all the above provisions.[75]

Even a cursory glance at P.Yadin 18, with these features at hand, clarifies that this document cannot be considered a *ketubba*.

To start with, it is clear that the document does not present an act between groom and bride, but between the father of the bride and the groom. This distinguishes the document from P.Yadin 10 and Jewish

[75] See n. 13 above.

ketubbot in general, while it recalls the earlier marriage contracts by Jews from, for example, Elephantine.[76]

Furthermore, there is no marriage proposal by the groom, but a statement that the father of the bride has given his daughter in marriage to the groom to be his lawful wedded wife. The action is described from the viewpoint of the father of the bride.

> In P.Yadin 18 the body of the contract begins with ἐξέδοτο (lines 33–34) with the bride's father as its subject. This formula, as we know from numerous references in Greek literature and examples in Greek papyri from Egypt, was characteristic of Greek marriage contracts.[77]

There is considerable focus on the dowry, its payment and return, in the document, but the way in which this is presented is completely different in wording and style from P.Yadin 10.[78]

There are no clauses concerning redemption from captivity or provisions for male and female heirs.

There is a statement on liability for return of the dowry, but we have seen above this was not unique for the *ketubba*.

There is neither a statement on replacement of the contract nor an explicit agreement of the groom to the provisions in the contract. One could argue that the reference to the formal question being asked and answered provides a form of agreement to the deal, but this *stipulatio* is not a special feature of marriage contracts, but rather a general feature of all kinds of contracts, occurring, for example, also in P.Yadin 17, 20, 21–22.[79]

Regarding references to law or a legal context one can immediately note that the phrase 'according to the law of Moses and the Judaeans' is conspicuously lacking. Instead we find a general κατὰ τοὺς νόμους 'according to the laws.'[80] The standard for the lifestyle the husband is to ensure for his wife is defined as ἑλληνικῷ νόμῳ 'according to Greek

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[76] Lewis, 76. In Elephantine the marriage contracts were made up between the father or brother of the bride and the groom notifying in the endorsement that the contract pertained to the relationship between husband and wife (thus revealing the real judicial relationships; see 382 above). These documents are marriage contracts, but cannot be considered *ketubbot*; see 379 n. 8 above.

[77] See Lewis, Katzoff, and Greenfield, "Papyrus Yadin 18," 230. Note that the contributions of the three authors are distinguished: Lewis presented text and translation, Katzoff wrote the legal commentary that will mainly concern us here and Greenfield discussed the Aramaic subscription.

[78] To be discussed in detail below.

[79] See Lewis, 17.

[80] P.Yadin 18:7/39.

custom',[81] which seems to present an explicit deviation from the Jewish references found in P.Yadin 10. Conjugal rights, by the way, are not mentioned, nor referred to.

We do find liability of the husband for maintenance of his wife with all his possessions, a feature that is found in contemporary *Greek* marriage documents by Jews.[82] This feature that connects the document with other documents by Jews seems to contrast with the over all non-Jewish impression the document gives. It is any case a completely different document from P.Yadin 10. Lewis suggested that

> it is possible, therefore, that we have here in P.Yadin 18 a first evidence of the Hellenizing tendencies of the younger generation of the family.[83]

Nevertheless, Lewis noted that the father of the bride in this contract is Judah, the same man who wrote a *ketubba* in Aramaic for his marriage with Babatha in P.Yadin 10 and added immediately:

> But, as Judah followed the Jewish *ketubba* practice when he took Babatha to wife (P.Yadin 10, in Aramaic), it is altogether likelier that he would have adhered to this tradition in the case of his daughter's marriage.[84]

A few lines down, however, Lewis returns to his initial interpretation of the document as altogether different from the marriage document in P.Yadin 10 when he says that

> it is also noteworthy that while Babatha's own marriage to Judah only a few years earlier was recorded in an Aramaic *ketubbah*, this marriage between two members of the younger generation of two rich Jewish families, originally from En Gedi but now living at the southern tip of the Dead Sea, in the Roman province of Arabia, is recorded in Greek and governed in part by Greek rather than Jewish custom.[85]

Of course it remains to be questioned what these two facts, the use of the Greek language and the reference to Greek law or custom, mean for

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[81] P.Yadin 18:16/51.

[82] See Cotton, "Cancelled Marriage Contract," 79–80. It is not found in the Aramaic marriage contracts from the same venue and period. Cotton noticed though that there are parallels with Demotic contracts, implying that the phrase is not special to documents by Jews (see Cotton in Cotton/Yardeni, 270; also drawing attention to the parallel with Demotic documents in extending the liability clause to property that is to be acquired, 'a clause common to Jewish contracts from the Judaean Desert, both marriage contracts and contracts of sale and debt, in both Greek and Aramaic').

[83] Lewis et al., "Papyrus Yadin 18," 230.

[84] Lewis et al., "Papyrus Yadin 18," 230–231.

[85] Lewis et al., "Papyrus Yadin 18," 231.

the interpretation of the document and its relation to P.Yadin 10, and the Jewish *ketubba* in general.

Jewish, Hellenistic, or is it?

The article on P.Yadin 18, presenting text, translation and notes by Naphtali Lewis, and the Aramaic subscription by Jonas C. Greenfield, also contains a legal commentary, written by Ranon Katzoff.[86] The latter notes 'the remarkable blend of Roman, Greek and Jewish elements,'[87] a feature, one notes, of the entire archive rather than of this document alone. Katzoff distinguishes between these elements by 'proposing the thesis that although the Roman and Greek are the most obvious superficially, the Jewish elements are in some respects the most fundamental.'[88] Having just observed the great discrepancy between P.Yadin 10 and 18 and the obvious lack of much specifically Jewish about P.Yadin 18 one cannot help but be curious how Katzoff will prove his point.

His views were contested by Abraham Wasserstein, in an article that dealt with two distinct issues: the administrative organization in the province of Arabia, and the interpretation of the nature of P.Yadin 18, as a contract concerning Jewish parties but nevertheless written within a wider legal context, as the Greek formulae employed show.[89] In this latter instance the document is seen as not only partly governed by Greek custom, but completely subject to 'Hellenistic' law, understood as the blend of legal traditions in the ancient east. To Wasserstein's objections Katzoff addressed a response in a rejoinder, defending his *interpretatio hebraica*.[90]

Both cases have been argued with zeal and deserve close scrutiny to come to a balanced view of the nature of this document and its relation to other marriage documents (in Aramaic and Greek). For every point under discussion I will present Katzoff's views, Wasserstein's responses, if applicable Katzoff's response from his rejoinder, and then an evaluation of the respective views. The references to law in the document's text

[86] See n. 77 above. Since Katzoff wrote the legal commentary and is mainly responsible for the views presented there, I will cite from the commentary as: Katzoff, "Papyrus Yadin 18," rather than Lewis et al., "Papyrus Yadin 18."

[87] Katzoff, "Papyrus Yadin 18," 236.

[88] Katzoff, "Papyrus Yadin 18," 236.

[89] See 34 n. 119 above.

[90] Ranon Katzoff, "Papyrus Yadin 18 Again: A Rejoinder," *JQR* 82 (1991/1992): 171–176.

will be crucial in my discussion, as well as the distinction between substantive and formal law in deciding what system was deemed applicable to this document. Furthermore, a number of publications that have appeared after the two interpretations were offered can provide useful additions and consequently, I will adduce those in my discussion.

Before the discussion of the various aspects of P.Yadin 18, as a marriage contract (un)comparable to P.Yadin 10, a few words as to the suggestion raised by Wasserstein that P.Yadin 18 was not a marriage contract like P.Yadin 10, but that Judah had a traditional *ketubba* drawn up for his daughter's marriage, while this Greek document served as an arrangement of the financial details of the match. Wasserstein then assumed that a document like P.Yadin 18 was

> a further safeguard (additional to the *kethubbah*) for the pecuniary interests of the bride, enforceable in a non-Jewish secular court. Such an additional safeguard may have been optional or it may even have been required by local law or custom. We have evidence elsewhere in the Roman period of the execution of a religiously sanctioned marriage agreement embodying provisions (e.g., pecuniary provisions) in accordance with religiously prescribed practice in addition to another document that had to be registered with secular authority.[91]

This statement seems to call for caution in several respects. First of all, even if it would have been practice to have a *ketubba* drawn up and a document in Greek arranging for financial details of the match, it is not clear that this Greek document was meant to be enforced in a secular court, that is, the court of the Roman governor. We do not have any Greek document related to Babatha's match with Judah, yet it seems that she could adduce evidence based on her marriage contract in the court cases she got caught up in after Judah's death.[92] It seems that the provisions from the Aramaic *ketubba* could be the basis for acts by Babatha that would have been recognized by a Roman court. To put it differently, the archive does not provide evidence for the assumption that Aramaic and Greek contracts were meant for different types of courts, especially since the archive only mentions litigation before the court of the Roman governor.[93]

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[91] Wasserstein, "P.Yadin 18," 121, with references.
[92] See discussion above, 389–396.
[93] See detailed discussion in Chapter 1 above, 73–78.

Furthermore, it is debatable whether a differentiation between documents of a religious and a secular nature makes any sense in the context concerned here. Jewish law might have been closely connected with Jewish religion, but that need not infer that a contract drawn up according to Jewish law was a document with a religious character as opposed to a Greek document with a secular character. I think Katzoff was right when he responded to this point by Wasserstein by explaining that a difference between religious and secular documents cannot be assumed for this early period but should be seen in the light of later developments.[94]

As we do not have any concrete evidence as to the existence of an Aramaic *ketubba* for Shelamzion's marriage, we should assume that the marriage contract as we have it in P.Yadin 18 was indeed the marriage contract and try to explain for the pronounced differences with P.Yadin 10 from there.

Katzoff begins by listing the Roman elements in the document, which, as I observed above, the document shares with many documents in the archive, for example, consular dating and the use of the *stipulatio*.[95] Katzoff does not find these Romanisms surprising as 'the bridegroom, with a name like Cimber, was presumably a Roman citizen' and 'it is clear from the other documents in the archive that the family did its court business before the Roman governor in Petra.'[96] Katzoff further notes that 'it is significant that the Romanisms are entirely superficial and do not touch the content of the transaction at all.'[97] This is true: to use the legal formulary I applied above, the features (like use of the *stipulatio*) are formal and not substantive. This means that it is possible to relate them to the Roman court context: a Roman court might demand a

[94] See Katzoff, "Rejoinder," 176, noting that the distinction between religious and civil marriage documents is 'mainly the product of the post-Emancipation nineteenth- and twentieth-century Jewish experience.'

[95] Katzoff, "Papyrus Yadin 18," 236: 'The consular dating of lines 29–30 is hardly ever found in Greek documents in Egypt in this century, but is found in quite a few of those from Babatha's archive' and 'This is the earliest example of the *stipulatio* clause in a Greek document. In Egypt it appears only from the third century, except for one document, *P.Oxy.* VI 905, which perhaps may be dated to CE 170. A sale document from Pamphylia in 142 CE, recently published as *P.Turner* 22, also from Pamphylia (151 CE) has a similar clause' (236–237). Actually, P.Yadin 18 is not the earliest document with a *stipulatio* clause, P.Yadin 17 is, but of course the authors of a preliminary publication did not have the easy overview that a published edition offers.

[96] Katzoff, "Papyrus Yadin 18," 237.

[97] Katzoff, "Papyrus Yadin 18," 237.

number of formal features based on Roman law to be part of the documents used in court cases. However, it is not necessary to relate the use of formal Roman features to possible Roman citizenship of Judah Cimber, the groom. After all, these features occur in other documents in the archive where none of the parties is a Roman citizen. It seems more likely that after a particular moment the documents adhered to a certain number of Roman formal features whether this was just customary or mandatory, regardless of (the citizenship of) the parties involved.[98]

Contrary to the superficial Roman features found by Katzoff, he finds more 'apparently essential' Roman features conspicuously lacking. The document does not represent a case of *tabulae nuptiales*, the Roman marriage document, which had, as Katzoff maintains, become customary in Roman law by the second century CE.[99] There is no clause present explicitly putting the document under the application of Roman law, such as *secundum legem Iuliam quae de maritandis ordinibus lata est* 'in accordance with the Augustan law on marriage.'[100]

> Rather, the dominant diplomatics here are Greek. The language is of course Greek, and the document as a whole is part of the Greek tradition of marriage documents. Indeed, nearly every phrase in our document appears so frequently in papyri of this type that it would be superfluous to list all parallels. Particularly striking is the similarity of the opening statement of our document to that of one of the earliest Greek documentary papyri (of 311 BCE), P. Elephantine 1 (= M.Chr. 283 = Jur. Pap. 18 = Sel. Pap. I. 1), which most scholars agree presents classical Greek tradition more than any subsequent papyrus.[101]

To this point Wasserstein observed:

> Katzoff himself remarks that the document stands in the tradition of the Greek marriage contract. . . . Thus, if this document is what it purports to be, namely a marriage contract, it is certainly not a specifically "Jewish" document, in the sense of one conforming to the normative Jewish practice of formally registering certain conditions conventionally agreed upon by the parties to a marriage. Nor does it, as Katzoff claims it does, express essen-

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[98] See discussion of the *stipulatio* phrase above, 154–155, raising the question of whether inclusion of the *stipulatio* had become mandatory in Arabia after a particular moment. Also see conclusions about dating in Chapter 5 above, 369–371.

Contrary to what Katzoff seems to assume, the appearance of the *stipulatio* in P.Yadin 18 is not related to the substantive law that is applicable to the document: see n. 137 below.

[99] See Katzoff, "Papyrus Yadin 18," 237.

[100] See Katzoff, "Papyrus Yadin 18," 237.

[101] Katzoff, "Papyrus Yadin 18," 237–238.

> tially Jewish thinking or "the Jewish context of the document" (p. 240). The document conforms exactly to the pattern of the Greek marriage contract as it is known throughout many centuries: *ekdosis*; dowry (and the groom's acknowledgement of having received it); statement of the duties of proper treatment of wife and children; sanctions envisaged in case of non-fulfilment of obligations. There are no doubt Greek, Roman, and indeed other (e.g., Jewish) elements in this marriage contract. But as a whole, it is simply a document relating to a not untypical local situation which contains, absorbs and reflects a great variety of western (i.e., Greek and Roman) and eastern (Jewish, Nabataean, and other Oriental) elements, some of which have their common origin in very remote antiquity, in some cases as early as the Code of Hammurabi. However, the important and essential point to keep in mind is that in the contract the total situation is called Hellenic. It is important to note that although Roman law was, of course, paramount in the eastern provinces, it existed there not merely as a systematic imitation of legal practice in the rest of the empire. The case made by Mitteis for the long-term survival of local legal forms and institutions in the eastern provinces is too well known to need or bear rehearsing here. Although more recently scholars have criticized and/or refined the conclusions reached by Mitteis, it seems evident that at least until 212 CE local law and custom played an important role in the dispensation and administration of justice in the eastern provinces.[102]

The question that should be raised within the context of the present study should of course be whether the role of local law and custom cannot be more clearly defined: what was the exact role local law and custom could play within a framework of Roman jurisdiction?

Wasserstein mentions a number of points that make the document fit with a Greek Hellenistic tradition of marriage contracts: *'ekdosis*; dowry (and the groom's acknowledgement of having received it); statement of the duties of proper treatment of wife and children; sanctions envisaged in case of non-fulfilment of obligations.' Katzoff also addressed those points, acknowledging their place in the Greek Hellenistic tradition. The text of P.Yadin 18, he states, connects the handing over of the bride explicitly with the handing over of the dowry: the bride is described as bringing the dowry with her. 'It thus forms a perfect transition between the two parts of the ekdosis, the giving of the bride and the giving of the dowry.'[103] Other elements like the reference to the wife as 'lawful

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[102] Wasserstein, "P.Yadin 18," 118–119.

[103] Katzoff, "Papyrus Yadin 18," 238, with explanation that the formula expressing this clear relationship had disappeared in Greek papyri from Egypt. 'The giving of the dowry is explicit; the giving of the wife goes without saying. Yet here in second century Judea the classical Greek formulary reappears.'

wife' and a double payment at breach of contract can be found in both P.Yadin 18 and P.Elephantine 1 as well. Terminology for the dowry, though originally taken from the Greek, seems to have been influenced by Roman terminology: Katzoff explains that the use of *proix* to refer to jewellery and cash money is probably due to the translation of Latin *dos* with Greek *proix*.[104]

More important than these matters of terminology is the interpretation of the internal evidence for adherence to a certain law. The *exedoto* formula so widely attested in Greek marriage contracts seems to put the contract within a Greek Hellenistic tradition. There is in any case a clear difference in focus when compared to P.Yadin 10, where the groom addresses the bride and makes her a proposal and promises.

Katzoff explains that in Jewish law the Biblical practice was to have the father of the bride give his daughter to a certain man, thus a handing over of the bride that comes close to what the *exedoto* formula describes. The Jewish *ketubbot*, and the regulation for the Jewish *ketubba* in the Mishnah, show that it was rabbinic practice to have the act conducted between groom and bride, with the groom actually writing the contract for the bride. Katzoff then argues that Biblical practice of *ekdosis* was maintained in the case of minors and that, if Shelamzion was a minor at the time of her marriage, she might have been married off by her father. The question is of course whether we can assume Shelamzion was a minor at the time of the marriage.

Wasserstein explained that the *exedoto* formula did not disappear from Egypt and reappear in Judea, like Katzoff argued: it is found in an Egyptian document that is almost contemporary to our text.[105] Wasserstein also pointed out that Katzoff himself mentions contemporary documents that contain the formula. Concerning Katzoff's explanation of the *exedoto* formula from a Jewish point of view, by referring to the Biblical practice of marrying off one's daughter, later continued in the case of minors, Wasserstein argued that there is nothing to indicate that Shelamzion was a minor at the time of the marriage, while information from some documents, for example the gift of P.Yadin 19, strongly sug-

[104] See his extensive discussion of dowry related terminology, 239, with distinctions between *proix* and *pherne*, the use of *pherne* in Aramaic (also in the Aramaic subscription to this document, line 71) and the use of *proix* here to refer not to slaves and land, but to jewellery and cash money. Katzoff also elucidates the difference between *pherne*, *parapherna* and *prosphora* in Roman Egypt and the relevance of these distinctions for our document.

[105] See Wasserstein, "P.Yadin 18," 109.

gests that this was not the case. I think that in general minority is often too readily adduced to explain deviations in documents, for example, in the case of P.Hever 65. There the continuation of life together has been linked with a marital practice applicable in the case of a minor bride.[106] Later finds of documents belonging to this same archive showed that Salome was at the time of her marriage probably not a minor: she had even been married before.[107] Consequently, it seems unfounded to relate the use of the *exedoto* formula in P.Yadin 18 to Jewish marital practice.

On the other hand, it would also not be correct to conclude that the *exedoto* formula necessarily puts the contract within a Greek Hellenistic tradition. In an article on *ekdosis* in the Judaean Desert documents Yiftach-Firanko argued convincingly that the *exedoto* formula was used to cover up a pronounced difference between an original marriage contract based on *ekdosis* and the marriage contract as used in the Judaean Desert.[108] The original marriage contract based on *ekdosis* viewed the handing over of the bride as the handing over of the dowry. Because the marriage contract in the Judaean Desert was based on a different kind of financial arrangement, the handing over of the dowry did not necessarily include handing over of the bride. Therefore, where the original Greek document could use one and the same mechanism to convey two different things, the Judaean Desert document needs two separate phrases for that. As Yiftach-Firanko phrases it poignantly:

> Paradoxically, then, the appearance of the *ekdosis*-clause of the second-century Judaean Desert may serve as an indication that the marriage recorded in these documents was of non-Greek nature. What we have here is another example of the attempt to formulate in Greek terms and according to the Greek formulaic tradition institutions and customs of non-Greek origin.[109]

This means that even if we discard Katzoff's *interpretatio hebraica* based on presumed minority of the bride, the *exedoto* clause can still be taken to be evidence of a non-Greek character of the legal act recorded here and thus possibly of an indigenous legal background for the substantive side of the case.

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[106] See Lewis, 130.

[107] See Cotton in Cotton and Yardeni, 227; for Katzoff's counterarguments see n. 166 below.

[108] Uri Yiftach-Firanko, "Judaean Desert Marriage Documents and *ekdosis* in the Greek Law of the Roman Period," in *Law in the Documents of the Judaean Desert*, 67–84.

[109] Yiftach-Firanko, "Judaean Desert Marriage Documents and *ekdosis*," 83.

Further internal evidence as to the applicable law can be provided by two references to law/legal context in the document. At first it is said that Shelamzion will be Judah's Cimber's lawful wife 'for the partnership of marriage according to the laws,' κατὰ τοὺς νόμους. Katzoff relates this reference to the Jewish formula 'according to the law of Moses and the Judaeans,' found in P.Yadin 10 and another Aramaic marriage contract from the Judaean Desert.

> The Jewish writer of our document thinks at this point a reference to the law is appropriate, and so puts κατὰ τοὺς νόμους 'according to the laws,' but since he is writing in Greek for Roman courts, he avoids specifying which laws. [110]

Wasserstein wrote to this point:

> The traditional Jewish formula 'according to the law of Moses and of Israel' (or 'according to the law of Moses and of the Jews') is absent from our document, while the conventional Greek phrase κατὰ τοὺς νόμους is found in it (line 39). This is unaccountably taken by Katzoff as evidence for the Jewish character of our document, on the grounds that 'the Jewish writer of our document thinks at this point a reference to the law is appropriate, and so puts in κατὰ τοὺς νόμους "according to the laws", but since he is writing in Greek for Roman courts, he avoids specifying which laws.' It is hardly necessary to point out that κατὰ τοὺς νόμους is an ordinary Greek phrase.[111]

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[110] Katzoff, "Papyrus Yadin 18," 241.

[111] Wasserstein, "P.Yadin 18," 113.

I am not sure whether Katzoff in his response to Wasserstein's article still took the contract to be subjected to Jewish law: 'On reflection, I would concede that my case for item 2 [κατὰ τοὺς νόμους refers to Jewish law, JGO] is weak, and I would rather leave open the question of what the phrase κατὰ τοὺς νόμους, a perfectly good and familiar Greek phrase, but not found in Greek marriage contracts, is doing here' (Katzoff, "Rejoinder," 176). Cotton in any case interpreted his remark about the meaning of κατὰ τοὺς νόμους as a retraction of his former statement that it referred to Jewish law (Cotton, "Cancelled Marriage Contract," 82). Cotton refers to Wasserstein's remark that the Greek phrase κατὰ τοὺς νόμους is conventional, meaning 'no more than it says.' The question is of course what it says. Even if it just means 'lawfully,' as Cotton suggests, this does not go against the assumption that it refers to Jewish law. Indeed, it seems obvious that lawfully always denotes 'lawfully according to the law the parties accept.' In the present case this could well be Jewish law. As emphasized by, for instance, Lewis, Judah had himself married his second wife Babatha with a traditional Jewish *ketubba* (in Aramaic) just four to six years before. It is not likely he had suddenly changed so much he would now marry his daughter off according to another system of law, *without even designating what system*. The fact that merely 'laws' without designation are mentioned while the standard for living is designated denotes that the general context was clear and accepted while for one part of the contract a specific standard was set. This is compa-

It seems logical to wonder whether a Jewish writer writing in Greek for Roman courts would not have deemed it necessary to specify the laws he referred to, as these would in such a context not have been obvious. Nevertheless, it is a given fact that in most documents where we find a reference to law, this law is not qualified by an adjective like Jewish, Greek, Roman or the like.[112] This suggests that the legal context was considered known, as can also be gathered from expressions like 'as is befitting for…' or 'as is proper.'[113] Seen in this light I think one could argue that 'according to the laws' could refer to Jewish law, not because of the specific nature of the phrase, but because it put the contract within a known legal tradition.[114] That this tradition was local and probably more specifically Jewish law, can be seen in instances like P.Yadin 24 where the explanation of the legal background of the act (the rights Judah's nephews have got to his estate) indicates applicability of Jewish law to the substantive side of the case.

According to Wasserstein, there is a clear indication in the document that the transaction was subjected to Greek law:

> And so far from avoiding any mention of specific laws, the groom refers specifically to the ἑλληνικὸς νόμος (line 51).[115]

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rable to the situation in P.Yadin 2–3, where reference to the applicable law is made by phrases like 'as is proper' while deviations from the generally accepted legal framework are marked by a clear description of the obligation undertaken (the description of the watering period in P.Yadin 3).

[112] See, for example, P.Yadin 17, where the law of deposit is repeatedly referred to without specification which law of deposit is mean.The clear reference to Jewish law in P.Yadin 10 is an obvious exception to this.

[113] See P.Yadin 10, also used frequently in the other Aramaic contracts, whether in Jewish or Nabataean Aramaic; see my discussion of the legal context above, Chapter 2 (95–96, 99–105) and Chapter 3, 188–193.

[114] Compare Katzoff, who wrote regarding Greek and Jewish marriage formulas that in general Greek marriage was not accompanied by a reference to 'laws in general or to laws of any particular people' (Ranon Katzoff, "Greek and Jewish Marriage Formulas" in *Classical Studies in Honor of David Sohlberg*, 232). He concludes that there was not something like a Greek marriage formula that can be compared to the Jewish 'according to the law of Moses and Israel.' If this holds true for documentary evidence as well (Katzoff mainly discusses literary sources as evidence for a set marriage formula in Greek, but has concluded elsewhere that the phrase κατὰ τοὺς νόμους does not occur in Greek marriage contracts ["Rejoinder," 173]) it would mean that 'according to the laws' is more likely to be used within a Jewish context, where reference to laws was more usual than in the context of traditional Greek marriage (contracts).

[115] Wasserstein, "P.Yadin 18," 113.

However, contrary to Wasserstein's interpretation,[116] this phrase does not determine the framework of the entire legal act, but only of the maintenance clause of which it is a part. One could therefore only go so far as to say that the maintenance arrangements were subjected to 'Greek law.'[117] Furthermore, as Katzoff argued, it is debatable whether νόμος here refers to law; a translation with 'custom' seems to be more logical and consistent with developments within the use of the word in Greek.[118] It is also a matter of speculation whether the expression as it stands, a dative, can denote 'according to,' in the sense that would be demanded here. Katzoff is probably right when he argues this is unlikely: after all we have just had κατὰ τοὺς νόμους in line 39 of the same document. This phrase is clearly meant to convey the meaning of 'according to the laws.' Katzoff adds that the lexica give examples of use of the word νόμος with several prepositions, but not as a dative like it is used here.[119] This means that ἑλληνικῷ νόμῳ should indeed not be translated as 'according to Greek law,' but more like Katzoff suggests 'in the Hellenic manner' or 'in the manner Hellenes consider proper.' In this interpretation the extent of the phrase should clearly be limited to the maintenance obligation and not be taken to refer to the entire contract.

This explanation of ἑλληνικῷ νόμῳ does not solve all problems, because it can still be asked why a writer of a contract pertaining to a marriage between Jews would want to make part of the contract subject

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[116] 'However, the important and essential point to keep in mind is that in the contract the total situation is called Hellenic' (Wasserstein, "P.Yadin 18," 118–119).

[117] Katzoff, "Papyrus Yadin 18," 239–240.

[118] Katzoff, "Papyrus Yadin 18," 240: 'More important, νόμος here should not be translated as 'law.' The original sense of νόμος is 'custom,' that which people or a particular group of people habitually do. This usage, with any of a wide range of degree of normative force, or with none at all, can be amply illustrated in archaic and classical Greek. Though in the course of the fifth and fourth centuries BCE the sense of 'statute' overshadowed the original sense of 'custom,' in the Hellenistic period this receded and the sense of 'custom' came back to the fore, particularly for νόμος in the singular' (with references).

[119] See Katzoff, "Papyrus Yadin 18," 240, with references. In his rejoinder Katzoff stresses that for the phrase to mean 'according to Greek law' the formulation should have been different: not ἑλληνικῷ νόμῳ but κατὰ τὸν ἑλληνικὸν νόμον or κατὰ τοὺς τῶν Ἑλλήνων νόμους (Katzoff, "Rejoinder," 174–175). Therefore, it is more likely that the phrase means 'in Hellenic fashion' or 'according to Hellenic standard of living,' then referring to 'an economic standard' (175).

That the use of a dative is not a mistake by the scribe (or a result of faulty Greek) can be seen in P.Hever 65 where the dative is again used for a reference to law in the maintenance clause: νόμῳ ἑλληνικῷ καὶ ἑλληνικῷ τρόπῳ (line 9–10). The chiastic structure used there suggests a fixed perhaps even formulaic expression.

to 'what the Hellenes consider proper.' In itself it is not odd that a standard is determined separately, even when the legal context for the entire document is set earlier: we have seen in P.Yadin 10 that the marriage as a whole is said to be conducted 'according to the law of Moses and the Judaeans,' while the maintenance is related to a Biblical commandment and standards 'as is fitting for a freeborn wife.' Since the Mishnah set standards for all three elements contained in the maintenance obligation (food, clothing and conjugal rights), we can infer that the document referred to such generally accepted standards. This would resemble reference to 'what is proper' in the Aramaic contracts from the Nabataean Kingdom, discussed in Chapter 2. A reference to what other people deem acceptable like it is written here seems to be a deviation from the principle found earlier.

Furthermore, it is known that in Greek marriage contracts it was not said that the husband would maintain his wife 'according to Hellenic custom,' but 'according to his means.'[120] This means that a reference to Greek custom does not stem from the Greek tradition of marriage contracts. Katzoff therefore argues that the explanation of the phrase must come 'from the Jewish context of the document.'[121] Indeed, Jewish marriage contracts can denote that the husband will support the wife 'according to the custom of Jewish men.'[122] Consequently, a reference to what is customary among a certain group of people seems to be connected with a Jewish rather than a Greek context. However, the drafter does not say 'according to the custom of Jewish men,' but 'according to Greek/Hellenic custom.' Katzoff remarks about this:

> The Jewish drafter of this document, feeling that a reference to the standard of living of some specific community is required here, translates the thought of 'according to Jewish custom' as 'according to Greek custom.'[123]

This is unconvincing: why would a Jewish drafter do this when he could have referred to Jewish standards as well? We know from P.Yadin 10 that phrases of a truly Jewish nature and purport were available. Like Cotton said concerning another phrase in a marriage contract, 'it is not as though the formula could not be expressed in Greek.'[124] It seems that

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[120] See Cotton, "Cancelled Marriage Contract," 79, citing from several such contracts.
[121] See Katzoff, "Papyrus Yadin 18," 240.
[122] See Katzoff, "Papyrus Yadin 18," 241.
[123] Katzoff, "Papyrus Yadin 18," 242.
[124] See Cotton, "Cancelled Marriage Contract," 82.

when the drafter wrote Greek, he meant Greek. In his rejoinder Katzoff addressed this issue by giving a further explanation of the use of 'custom' designating an economic standard. The Jewish character of the document would then appear in its desire for objectivity and predictability. This means that even though the custom referred to is foreign, the principle to refer to custom and to be specific in general does have a Jewish background.[125] Although this argument is quite plausible, a recent article by Hayim Lapin sheds another light on the matter.[126]

Lapin addresses the matter of the 'Greek custom' for maintenance: he argues that it is not self-evident that Jewish law required Jewish men to maintain their families, at least not where daughters were concerned. His discussion shows that the rabbinic sources present different views as to the father's obligation to feed his daughters during his lifetime. Lapin also discusses the obligation to feed one's wife, arguing that under Jewish law this obligation stems from the marriage itself (and need not be explicitly articulated in the marriage contract) while in the Greek marriage contracts the obligation seems to be related to the dowry. Without having to go into the details of his survey,[127] its importance for the

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[125] Katzoff, "Rejoinder," 175–176.

Also see Elon, *Principles*, 394, where it is said under the heading 'maintenance,' subheading 'scope of the maintenance,' that the husband provides for the wife 'in accordance with local custom and social standards.' He gives several references for this, which stem from much later sources. Yet it is quite logical to assume that the general obligation to give maintenance was, when it came to the scope of it, in practice determined by local custom. This means that it could have become practice to denote what kind of local custom was followed. In such a case 'Greek custom' could indeed refer to a level of maintenance, a lifestyle. Recall in this respect that in Greek marriage contracts there is no reference to local custom, but always to maintenance according to the groom's means (see n. 120 above).

[126] Hayim Lapin, "Maintenance of Wives and Children in Early Rabbinic and Documentary Texts from Roman Palestine," in *Rabbinic Law in its Roman and Near Eastern Context*, 177–198.

[127] Lapin's idea of different views on the family and therefore on the obligations connected with it is interesting, but his argumentation on the legal side of it is often not accurate: for instance he wonders whether the maintenance clause in P.Yadin 18 and P.Hever 65 could be invoked by the respective brides in a court case to force their husbands to maintain their children, 'in the way that Babatha moved against her son's guardians' (Lapin, "Maintenance of Wives and Children," 196). In a footnote he refers to P.Yadin 12–15 and says: 'Whether or not the governor would have applied Roman law (that they might is one implication of P.Yadin I 28–30, a version of a formula for the actio tutelae), in theory, at least, obligation to maintain children was recognized by Roman law (Digest 25,3,4–9).' First of all, Lapin confuses two things: the fact that P.Yadin 28–30 represent a *formula* for the *actio tutelae* does not imply that the governor would have applied Roman law to the substantive side of the cases. At most we could say that its presence shows that the Roman jurisdiction in the province used *formulae* (see

present argument is obvious. P.Yadin 18 presents us with an overall legal framework expressed by κατὰ τοὺς νόμους and a special reference to a legal background for part of the arrangement, the maintenance obligation, expressed with ἑλληνικῷ νόμῳ. As argued above, it is logical to assume that κατὰ τοὺς νόμους refers to a known legal background, comparable to references to known legal backgrounds in other papyri. As the reference is to the law that determines the substantive side of the cases, and this law is in other instances dealt with in this study local and more specifically Jewish law, we may also assume that it refers to local, Jewish law here. The maintenance clause is explicitly put in another legal framework, that of 'Greek custom.' In the light of Lapin's observations this could indicate that under Jewish law, without the additional reference to Greek custom, the father would not have been obliged to feed daughters born from the marriage. By adding the reference to Greek custom it is made clear that the husband contracts liability to feed his entire family, including any daughters to be born from the marriage.[128]

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322 n. 74 and 323 above), but this does not say anything about the way in which the cases were judged substantively. Furthermore, Lapin's remark that Roman law (and then he means substantive law) recognizes the obligation to maintain children is completely off the mark: if the contract determines that the maintenance obligation is based on 'Greek custom' the question as to whether Roman law recognized an obligation to maintain children is irrelevant: the document itself makes it clear that not Roman law is to be considered. The legal framework determined in the document is κατὰ τοὺς νόμους, with a special reference regarding the maintenance clause by way of ἑλληνικῷ νόμῳ; neither refer to Roman law. Therefore, we have to conclude that the document determines a legal framework for the substantive side of the case, which is not connected with Roman law, while the case could be brought before a Roman governor, who would then, most likely, judge on the basis of the arrangements in the contract. In fact, that latter assumption is the most plausible explanation for the fact that the documents take care to explain matters in detail (not only this document, but for instance P.Yadin 24 and 17 as well, see 179–180 and 127–155 above). For an actual instance of local law being applied substantively within a framework of Roman jurisdiction, see Chapter 5, 342–344 above.

[128] See Lapin, "Maintenance of Wives and Children," 195, where he refers to texts where children are mentioned as entitled to support, and where sometimes sons and daughters are mentioned separately.

I assume that this interpretation of 'Greek custom' was also meant by Saul Lieberman, of whom Katzoff wrote in a footnote to his legal commentary on P.Yadin 18: 'The late Prof. Saul Lieberman, who apparently noted this, is said to have suggested to Yadin in an unpublished note that the point of the clause is to obligate the husband to support the female offspring, in contrast to the lack of such a requirement in Mishnah *Ket*. 4:6' ("Papyrus Yadin 18," n. 21). Surprisingly Katzoff did not expound on this idea (he discusses the maintenance obligation as seeing to the maintenance the wife was entitled to, see "Rejoinder," 175) as it would have served his arguments that the reference to 'Greek custom' does not put the entire contract in the context of Hellenistic law and does not necessarily denote a non-Jewish influence on the contract. After all, if the clause was added to respond to a feature of Jewish law, i.e. the lack of an obligation for the husband

This interpretation allows for the presence of a reference to 'Greek custom' in a contract based in Jewish law: the two references are to different legal systems, which are not competitive, but complementary.[129]

That the reference to Greek custom recurs in another marriage contract from the same area and period (P.Hever 65, to be discussed below) suggests that it was indeed customary to indicate what level of maintenance could be expected by referring to a certain custom, manner or indeed lifestyle.[130] In this context, it is noteworthy that the reference to ἑλληνικὸς νόμος is not attested anywhere in the Roman Near East in any language, nor is there 'a single occurrence of the expression ἑλληνικὸς νόμος in all the thousands of published Greek papyri from

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to support female offspring, this would in itself show that the contract was drawn up under Jewish law and that the phrase was used to fill the lacuna existing in this law. In this interpretation the reference to 'Greek custom' does not imply that this 'Greek custom' was competitive, but rather complementary to Jewish law. Also see next note.

[129] Thus *contra* Lapin, who states that 'the references to "Greek" *nomos* on the one hand and "Jewish" *din* on the other reinforces the impression of contest. They attest at the very least, to distinctions between sets of legal practices, and perhaps to a reason to mark a *nomos* or *din* as "Greek" or "Jewish", however ambiguous either category was likely to have been in second-century Palestine or Arabia' (Lapin, "Maintenance of Wives and Children," 196). Of course, there were distinctions between sets of legal practices, but there is no sign in this papyrus at least, that the two were competitive: no choice is made between them, no claim is made that the document refers to one system as against the other. Rather, the document is put in a known legal framework that is not identified as such (as stated above, this is usual in these documents rather than unusual) and the specific arrangement of the maintenance clause is identified, but not to oppose the overall framework but to complement it. In this respect it is good, I believe, to bear in mind that Friedman wrote that marriage documents are based on customary law, thus also on regional practices and peculiarities (see n. 29 above). Especially in such a situation one can expect reference to a legal framework that requires no further explanation and more specific details of special arrangements. Compare the situation in P.Yadin 2–3 where both papyri refer to a generally accepted framework for sale, while for the watering periods P.Yadin 2 refers to 'what is customary' while P.Yadin 3 specifies a certain moment for the watering (see discussion above, 93–97). This specific arrangement is additional to the other general arrangements, which are implied in the reference to a common legal framework.

The conclusion that references to several legal systems can occur in one document is important in the light of Wasserstein's conclusion that Katzoff's recognition of Roman and Greek elements in the document serves to weaken his argument that the document is Jewish. This need not be true if we accept that documents that contain formal features that are either Greek or Roman can still connect substantively with indigenous and specifically Jewish law. One cannot assume *a priori* that the presence of Roman and Greek features in a document excludes the possibility that the document connects with Jewish law or should be read in a Jewish context.

[130] There the reference is more elaborate νόμῳ ἑλληνικῷ καὶ ἑλληνικῷ τρόπῳ I would not call it 'pleonastic' as Katzoff does ("Rejoinder," 175), but rather view the repetition combined with the chiastic structure as an indication that we are dealing with a stock phrase, a set expression with a specific legal meaning. See 423 below.

Egypt.'[131] Therefore, a reference to ἑλληνικὸς νόμος is specific to these documents by Jews. In the light of Lapin's conclusions about the lack of clarity in Jewish law concerning the maintenance of especially daughters, the inclusion of the clause may therefore very well have been the consequence of the Jewish nature of the contract.

To go back to Katzoff's discussion of P.Yadin 18:

> Finally, the most uniquely Jewish (or at any rate, not Greek or Roman) feature is that the husband adds to his wife's dowry. Nothing of this sort appears in Greek papyri before the fourth century CE. In Roman law this is definitely not valid. The Digest contains a passage of Julian to this effect. Later, a constitution of Severus and Caracalla allowed this kind of addition, provided the husband physically gave the dowry addition to the wife and subsequently physically received it back from her. Delivery, not the writing of a document, creates the dowry, remained the rule down to the sixth century. There is some irony in this: after all the trouble taken to make this document superficially acceptable before a Roman court, had the document ever come before a Roman court its provisions might not have been enforced, at least if Roman law was applied. The dowry addition, then, is not Greek or Roman, but it is certainly Jewish. There is an explicit Mishnah requiring just such an addition. This non-Greekness of the dowry arrangement may be what lay behind the idiosyncratic use of *prosphora* and *proix* mentioned above.[132]

Wasserstein explained that the addition to the dowry estimated by Katzoff as a uniquely Jewish feature, is interpreted differently in different Jewish sources, for example, when it comes to the amount.[133] More importantly he notes that the addition 'is primarily reminiscent of the "donatio ante nuptias in dotem redacta."[134] In later sources like, for example, the *Syrisch-Roemische Rechtsbuch* it is determined that the amount of the *donatio* is determined by agreement and according to local custom.[135] Wasserstein explicitly notes that

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[131] Lewis, "In the World of P.Yadin," 40–41, quoted in Cotton and Yardeni, 235.

[132] Katzoff, "Papyrus Yadin 18," 242; with references.

[133] See Wasserstein, "P.Yadin 18," 113, n. 60.

[134] See Wasserstein, "P.Yadin 18," 114, with references.

[135] See Wasserstein, "P.Yadin 18," 114. I note that if this is true in our case, the fact that it is 150 percent of the dowry given by the father of the bride would come close to the Mishnaic requirement and could thus testify to another instance of adherence to what later became normative Jewish law (see Katzoff, "Papyrus Yadin 18," n. 35, with some reservations). Of course the traditionally differing interpretations of the passage have to be kept in mind.

> it is simply not the case that Roman domination had imposed legal uniformity in such matters in the East; it is therefore supererogatory to ask (Katzoff, p. 242) whether, and in which periods, such a donatio was valid in Roman law.[136]

Whether the addition to the dowry is a unique Jewish feature or not is hard to ascertain. Wasserstein is right when he states that it is difficult to determine how strict rules of law were at the time, whether this applies to Mishnaic or Roman law. Wasserstein notes that Roman dominion did not bring legal uniformity to the eastern provinces, which means that all kinds of customs could co-exist. Besides that, the question arises as to whether, even if Roman law would not allow for an addition like this, this would affect a court case like Katzoff thinks it would. In the previous chapters of this study it appeared that the documents were drawn up with Roman formal features in mind, but certainly not with a view to having Roman law applied to them in case of a dispute. Indeed, the internal evidence in the documents shows that they connected the substantive side of the legal act with indigenous law. This means that the internal features of the document, like the *donatio*, need not correspond with external features, like consular dating, use of a *stipulatio* or of Greek terminology.[137]

Indeed, it is only relevant to ask whether a *donatio* would have been valid in Roman law or not, if we assume that Roman law applied to the substantive side of the cases. Since the evidence presented in previous chapters of this study argues against this, it need not be asked whether the dowry addition would be valid under Roman law, but only whether it would be valid under the law that applies to the substantive side of the case. This law should be derived from references to law in the doc-

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[136] Wasserstein, "P.Yadin 18," 114.

[137] Thus *contra* Katzoff, who speaks of 'what interest there may be for historians of Roman law in the presence in one and the same document of a *stipulatio* clause and a dowry addition violating the nearly contemporary D. 12.1.20' ("Rejoinder," n. 13): the two need not be contrasted: a *stipulatio* is a matter of formal law, the dowry addition a matter of substantive law. Therefore, the presence of both in one and the same document shows that as proposed in this study two layers should be distinguished within each papyrustext: one of formal and one of substantive law. Consequently, the fact that a dowry addition would not be valid under Roman law does not warrant the conclusion that such an addition would make the legal arrangements of P.Yadin 18 invalid to a Roman court (as Katzoff assumes, "P.Yadin 18," 242, quoted above): the court would take the law under which the obligations were contracted into account. In my assessment of the situation this would have been local law, under which a dowry addition would have been valid (in any case not forbidden as in *Dig.* 12.1.20).

ument itself. There are two of such references: κατὰ τοὺς νόμους and ἑλληνικῷ νόμῳ and, as argued above, both refer to a framework of local indigenous law. Therefore, if the dowry addition would have been valid under local law, it would have been accepted by a Roman court (like for example the order of succession presented in P.Yadin 24).

Excursus: was the addition to the dowry provided by the groom or the father of the bride? Upon reading the document for the first time, I had the distinct impression that the addition was not provided by the groom, but by the father of the bride. The previous document, P.Yadin 17, dated two months before P.Yadin 18, records a *depositum*, by which Judah the father of the bride borrows three hundred denarii from his wife Babatha. This is the exact sum added to the dowry here. The connection between the legal acts seems obvious: Judah wanted to add a substantial sum to his daughter's dowry and borrowed the money from Babatha, by way of a deposit construction.[138] This would ensure that there was no set time for repayment of the loan, while Babatha would remain entitled to the money and could get it back at any time, but in any case when she would most need it, that is, at Judah's death. Indeed, we read in P.Yadin 21–22 that Babatha bases her capacity to dispose of crops of orchards that belong to the deceased Judah on her marriage contract and 'a debt.'[139] It is almost inevitable that here the debt of P.Yadin 17 is concerned.[140] This interpretation would solve the point of the donation, discussed above: it can be disputed whether a groom was allowed to add to the dowry under Roman law, but the father of the bride could obviously add to the amount of the dowry that was in any case provided by him. Furthermore, this interpretation could even provide a reason for the drawing up of this document: it recorded the arrangements pertaining the *enlarged* dowry. The *exedoto* formula would then merely explain that the marriage had taken place; 'lawfully' would refer to the original marriage indicating that it had been conducted lawfully, perhaps even with a *ketubba*. I presume it would not have been possible to draw up a second *ketubba* for this, since the first *ketubba* was not merely a financial arrangement that could be replaced by a later version if so required.

In this interpretation P.Yadin 18 is not only not a *ketubba*, but it is not a marriage contract in Greek fashion either, but rather a marriage related document, seeing to financial sides of the match that were arranged for at a later stage.

Regarding this interpretation of the addition to the dowry, I was informed that a query was made to Dieter Hagedorn in 1996, proposing that the father of the bride is actually the one supplying the extra three hundred denarii. Hagedorn was of the opinion that the extant Greek does not support this assumption. Therefore, we have to accept that the addition was provided by the groom and have to discuss the legal implications of it in that light.

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[138] See Lewis, who seems to connect P.Yadin 18 with 17, when he says: 'The additional 300 denarii, which brought the total of the dowry to 500, was exactly the sum that Judah borrowed from his wife Babatha six weeks earlier, cf. 17 intro' (82). The same interpretation, addition to the dowry made by father of the bride, is behind his remark on 24: '17 and 18 tell us that she was able to lend Judah a lump sum of 300 denarii toward the 500 denarii dowry of his daughter by his first wife.' This statement contrasts with the remark on 77: 'Shelamzion's dowry of five hundred denarii—two hundred from her father and three hundred from the groom—. . .'

[139] See P.Yadin 21:11–12 and 22:9–10.

[140] One could read 'the debt of your dowry,' a hendiadys (see n. 44 above). Although this reading is possible, the simple meaning of the extant text seems to denote two rights behind Babatha's capacity to dispose: one based on dowry, the other on debt.

Katzoff ends his discussion of the document with a suggestion for the origin of the Greek formulas in the document, which has as he claims a Jewish character.

> The drafter, I suggest, worked from handbooks of notarial practice. À propos another document from the Babatha archive, Biscardi has collected a considerable body of evidence to suggest that handbooks with formulae or types of documents circulated at this period. Our drafter, then, chose from the models available in those handbooks the clauses with which he could express his essentially Jewish conceptions as to what ought to be a marriage contract in the best Greek form.[141]

Wasserstein countered:

> It is of course evident that many of the expressions in our documents are identical with, or similar to, expressions known to us from other Greek documents. However, we have no right to assume that substantive provisions, constitutive not only of specific obligations but also of the whole legal framework of the contract, should be incorporated into that contract for no reason other than that of arbitrary stylistic choice (exercised by the scribe!) from an unnecessarily hypothesized formulary.[142]

Wasserstein's argument raises the interesting question of whether the formulae used in a document have a mere formulaic value, or whether they, as Wasserstein assumes, are actually 'substantive provisions, constitutive not only of specific obligations but also of the whole legal framework of the contract.' I agree that when using a fixed formula this formula obviously serves not just to put an obligation into words, but also by being a fixed formula can be seen to be related with the obligation that is being established. I believe the *exedoto* formula could be such a formula, distinguishing the Greek marriage contract (with focus on *ekdosis*) from the Jewish contract (with focus on proposal and promises). I doubt, however, whether one can say that individual provisions can be constitutive for 'the whole legal framework of the contract.' This probably depends on understanding the nature of a provision and the question of whether it is exclusive for a certain law or can be found in several systems. I am in any case convinced that Wasserstein is right when he denotes that one cannot maintain that scribes simply copied phrases

[141] Katzoff, "Papyrus Yadin 18," 247.
[142] Wasserstein, "P.Yadin 18," 116.

from books, without investigating what this means for our understanding of the legal context of documents.[143]

Wasserstein mentions one provision in detail:

> We have seen that one such provision is that which establishes the framework of law and jurisdiction: ἑλληνικῷ νόμῳ (line 51); yet Katzoff thinks that the Jewish conception motivating the choice of this formula is "according to Jewish custom" (pp. 241–242). I submit that this interpretation does not properly take account of the plain meaning of the text before us.[144]

Obviously, when the scribe wrote Greek, he meant Greek and the provision should be read like that: 'in accordance with Greek custom.' Nevertheless, one cannot compare a provision like ἑλληνικῷ νόμῳ to a formula of a Greek contract like the *ekdosis* clause. Where one can argue that the *ekdosis* clause can be indicative of the legal tradition in which the document should be seen, ἑλληνικῷ νόμῳ is a direct reference to law, not just a formula (especially not in view of the fact as observed by Katzoff that the phrase ἑλληνικῷ νόμῳ does not appear in Greek marriage contracts). Furthermore, it remains to be seen whether this provision is as Wasserstein says a provision 'which establishes the framework of law and jurisdiction.' It does not refer to the entire contract, but serves to indicate the legal framework for the maintenance clause. In doing so it is a reference to substantive law. If Shelamzion would feel she is not maintained properly, a court would have to investigate what maintenance 'in accordance with Greek custom' would mean and if this kind of maintenance was provided to the wife and children or not. However, jurisdiction has a formal side as well: the question of to what court a person can turn and in what way a case is conducted. Obviously, jurisdiction in Arabia was completely in Roman hands: nothing in our documents testifies to the existence of other courts or juridical bodies.[145] This means that despite the references to law in the documents, despite the framework they are substantively connected with, a case would always be judged by a Roman court and therefore be subjected to Roman formal demands. It was precisely the discrepancy between what is demanded of a document formally and what is put in it substantively that makes these

[143] Whether scribes merely copied, is doubtful in the light of the terminology employed for guardians of minors and women: there it seems like scribes consciously strived for the best expressions of legal concepts both under local and Roman law, see discussion on 366–371 and conclusions on 376–377.

[144] Wasserstein, "P.Yadin 18," 116.

[145] See detailed discussion in Chapter 1 above, 73–78.

documents so complicated to understand and connect with concrete laws. This is important to note, as Wasserstein does not seem to make a difference between formal and substantive law, but regards the document as completely non-Jewish or secular because its formulae come from a Greek tradition. However, this can hardly be maintained in view of for example Yiftach-Firanko's conclusions to the use of the *ekdosis* clause: contrary to expectation this need not tie the contract to a Greek-Hellenistic tradition but quite the opposite.

Therefore, one should conclude that the formulae used do not directly indicate to what legal system the document is connected. Rather we should identify the formulae as being parts of either substantive or formal law and then try to determine their meaning for the legal background of the document as a whole. In determining this legal background references to law should play a crucial part, as they are indicative of the law that is applicable to the substantive side of the case. In P.Yadin 18 both formulae used (such as the *ekdosis* formula as understood in Yiftach-Firanko's assessment) and the references to law point at adherence to local, more specifically Jewish law. Therefore, P.Yadin 18 is no less a Jewish document (in the sense of a document subjected to Jewish substantive law) than P.Yadin 10 is, regardless of the pronounced differences between the two.

Conclusions

P.Yadin 18 presents us with a fascinating document, as it seems to contrast sharply with P.Yadin 10, drawn up by the father of the bride for his own marriage just a few years earlier. Why did Judah marry Babatha in truly Jewish style, with a full-fledged *ketubba* arranging for the legal details of their match, and did he marry off his daughter with this document of a completely different nature?

Basically the question seems to come down to what the use of Greek language and diplomatics means for our understanding of the legal context of the document. Does a document like P.Yadin 18 connect with a different legal context than, for example, P.Yadin 10? If we assume that P.Yadin 18 is a document additional to a traditional *ketubba*, as Wasserstein suggested, the answer would have to be yes. The only way to understand why a *ketubba* would be drawn up and also a Greek document like P.Yadin 18 is to assume that a *ketubba* and such a Greek document served different purposes, or to put it differently, that a Greek document was needed to reach legal effects a *ketubba* in itself could not have. Such

a conclusion is obviously not supported by the evidence we have from the archive concerning Babatha's *ketubba*. It seems this *ketubba* could serve as basis for legal rights and acts without any problem with either the fact that it was written in Aramaic, or based on specifically Jewish law. As observed above, it seems difficult (and most likely anachronistic) to assume that a sort of division into religious and secular documents, enforceable in different contexts, already existed. In addition to this it would be difficult to relate the Aramaic 'religious' document to a religious court (jurisdiction) while there is no evidence at all in the archives that there were any kind of local courts that played a part in judging cases. Indeed, it seems that all cases regardless of their nature were judged by the court of the Roman governor. It is in any case my impression of all the documents in the archive that they could have been used in this context. This applies especially to those documents that used the Greek language and adhered to Roman formal features while the law referred to for the substantive side of the cases was obviously indigenous.

In the present case it seems that assuming the presence of a *ketubba* drawn up prior to our document raises more problems than it solves. On the one hand, it could explain the formula used 'Judah has given his daughter in marriage … lawfully …' as referring back to the act of having drawn up a *ketubba*. In that context 'according to the laws' could refer to Jewish law. However, as noted above, it would be difficult to understand what additional value this document would have, what it could effect that the originally drawn up *ketubba* could not. It seems safer to assume that there has never been a *ketubba* and this document was indeed the marriage contract drawn up for Shelamzion's marriage.

From the discussion above it has become clear that although some elements of Katzoff's *interpretatio hebraica*, such as minority of the bride to explain for the *ekdosis*, are untenable, there is no reason to state that the document is particularly non-Jewish. The difference with P.Yadin 10 is obvious, but P.Yadin 18 should not just be read against other examples of marriage documents, but be seen in the light of the archive as a whole. Then it can be observed that often the expressions used come close to what we find in Greek documents from Egypt and that the references to law generally do not use an identifying adjective. What the references to law in the other documents do show, is that documents that use Greek terminology and are adjusted to a Roman court context (for example because they give a *stipulatio* clause or present a guardian of a woman) can refer to local law, where the substantive side of the cases is concerned. There is no reason to assume that this would be

different for the marriage contracts. Indeed, P.Yadin 18 testifies to this principle: here we find a marriage document that resembles documents from Egypt, that gives a general reference to the applicable law (κατὰ τοὺς νόμους) and a more specific indication of what law is applicable to part of the arrangements. If indeed, as Lapin argued, maintenance of daughters was not an uncontested issue in Jewish law at the time, exactly the fact that the document was written against the background of Jewish law called for a reference to another custom where this maintenance issue was concerned. The reference to Greek Hellenistic custom is then complementary: it determines for a specific provision in the contract to what custom it adheres, exactly because this custom deviates from the legal framework applicable to the document as a whole. The situation would then be comparable to the situation in documents like P.Yadin 2 and 3 where references to law are made to an unspecified, e.g. generally known, legal context, while deviations are marked by giving an explicit provision. This means that the fact that a reference to Greek Hellenistic custom is found by no means excludes the possibility that this contract is rooted in Jewish law. On the contrary, as Lewis observed, a reference to ἑλληνικὸς νόμος is not attested anywhere in the Roman Near East in any language, nor is it found in any of the Greek papyri from Egypt, which strongly suggests that this reference is particular to our documents drawn up by Jews. This makes a direct relationship between the Jewish background of the parties and the use of this clause all the more likely. This means that paradoxically the inclusion of a reference to ἑλληνικὸς νόμος actually supports the assumption that the contract as a whole adheres to Jewish (substantive) law.

Likewise Yiftach-Firanko's study of *ekdosis* in Greek documents shows that the fact that *ekdosis* appears in the Greek marriage contracts from the Judaean Desert is not an indication of a Greek Hellenistic background of those contracts, but the opposite: of a local indigenous background. Therefore, it seems safe to conclude that there is no need to oppose P.Yadin 18 to P.Yadin 10, but it is better to view both documents as marriage contracts within a framework of local law. Eventually one of those forms of marriage contracts was accepted as the standard form in Jewish law. In doing so, as Lapin observed, the Mishnah selected from among existing practices to reach the regulations for the marriage contract as put down in the tractate *Ketubbot*.[146]

[146] As observed above, n. 41, one should be careful in applying the word normative to the codification in the Mishnah as a whole, suggesting there normative Jewish law is

III. *P.Hever 65: Salome Komaise's Document: Premarital Cohabitation or* Agraphos Gamos*?*

Structure and most important features of P.Hever 65

P.Hever 65 was originally found with the Babatha archive and published in Lewis' edition of the Greek documents from this archive as P.Yadin 37. It was clear from the start, though, that this document did not belong to the Babatha archive, as it concerned another woman. Lewis restored her name as Salome Komais, later her name was restored as Salome Komaise.[147] The document was eventually published together with the other documents known to have belonged to the archive, first in an article on the Salome Komaise archive by Cotton, later in the full textual edition of the archive.[148]

The document is drawn up between groom and bride, like P.Yadin 10, but obviously does not resemble this document much otherwise. On the contrary, it seems to come closer to P.Yadin 18, being written in Greek, and containing several comparable clauses, like a promise to feed and clothe the wife and any future children νόμῳ ἑλληνικῷ καὶ ἑλληνικῷ τρόπῳ 'according to Greek custom and manners' with liability for that maintenance by way of a surety on all he owns.

It is interesting to see that the reference to Greek custom is here repeated and the instance can serve to clarify that in P.Yadin 18 custom is actually meant and not law. The reference is here to both custom and manners, in a phrase with a chiastic structure emphasizing its formulaic nature. That the reference to Greek custom recurs in another marriage contract from the same area and period suggests that it was indeed customary to indicate what level of maintenance could be expected by referring to a certain custom, manner or indeed lifestyle.[149] As discussed in

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concerned, while Jewish law was not normative before. Even in the Mishnah itself, contradictory opinions can stand side by side without any indication that a choice is made between them, or one of them is considered normative while the other isn't. Consequently, the fact that different forms of marriage contract were current at the time of our archives need not denote that there was not something like normative Jewish law when it came to marriage: perhaps several practices existed side by side that were all accepted as forms for establishing valid marital obligations. See n. 170 below.

[147] See 13 above.

[148] Cotton, "The Archive of Salome Komaise," 171–208 and Cotton and Yardeni, 224–237.

[149] Compare Cotton, who notes that the clause appears in the same place as the one in P.Yadin 18 and concludes: 'We can be sure, therefore, that a single model was followed'

the context of P.Yadin 18 above, in Jewish law it became customary to do so, while in Greek contracts the maintenance obligation was undertaken 'according to his means.'[150] As Lapin discussed, it was not self-evident that the groom contracted liability to maintain his wife and especially any daughters born from the marriage. Therefore, it may have become standard to indicate that the maintenance clause was subjected to Greek Hellenistic custom, denoting that both wife and children including daughters would be maintained. As the reference to ἑλληνικὸς νόμος is unique for these documents by Jews,[151] a reference to a specific custom seems to be related to the Jewish background of the parties of these specific contracts in which the clause occurs. It may very well have been the direct consequence of the lack of clarity in Jewish law, concerning the maintenance of especially daughters.

By far the most intriguing phrase of P.Hever 65 specifically is, however, to be found in the opening part where it is determined that the groom will 'live with her as also before this time. . . .'[152] If the document is to be understood as a marriage contract denoting the start of the marriage (recall P.Yadin 18, where Shelamzion is described as a virgin when she is given to Judah Cimber), this reference to continuing life together is difficult to grasp. Was the couple actually living together without a formal marriage contract having been drawn up? What did this mean for their relationship before and after the document came into existence?

Premarital cohabitation?

Tal Ilan wrote an article about P.Hever 65 with the title "Premarital Cohabitation in Ancient Judea: the Evidence from the Babatha archive and the Mishnah (Ketubbot 1:4)".[153] The title already indicates what the

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(Cotton and Yardeni, 235). As P.Yadin 18 and P.Hever 65 do not resemble each other much in general, one should conclude that the 'single model' refers to the maintenance clause that is connected with 'Hellenic custom.' This would support the interpretation offered above that the reference was added because of the Jewish background of the contract: in documents written within the context of Jewish law such a reference (that was complementary) made sense; see 412–414.

[150] See 411 above.

[151] See 414–415 above.

[152] Line 6.

[153] See n. 5 above.

The article has been regarded as rather provocative and 'more an exercise in radical writing than a scholarly essay' (Katzoff, "On P.Yadin 37 = P.Hever 65," 134). Still, 'her

article sets out to demonstrate: when the Mishnaic requirements are compared with the factual evidence from this papyrus, the suggestion rises that we are here dealing with a case of premarital cohabitation. Nevertheless, it is debatable whether the later requirement that a man is not allowed to keep his wife without a *ketubba*, if even for one hour, already applied at the time. Several types of marriage documents seem to have been current at the time and a Mishnaic passage says that a woman can be acquired as lawful wife by three things: a sum of money, a written document, cohabitation.[154] The essential question here is: do these three have to go together to make up a valid marriage or would any of the three on its own suffice? If the latter is true, the Mishnah itself shows that Ilan's conclusion is not justified: the fact that bride and groom lived together before P.Hever 65 was drawn up cannot constitute premarital cohabitation, since cohabitation naturally causes a marriage tie to come into existence. To put it differently, cohabitation would have established a valid marriage tie between the couple, despite the fact that no document was drawn up at the occasion. Although the Mishnaic passage is disputed and some scholars actually believe all three things together constitute valid marriage, it is generally believed any one of the three can establish a valid marriage tie between a couple.[155] This would, I believe, apply especially to such an early period as we are dealing with here. The evidence from the archives shows that a *ketubba* was certainly known and could be drawn up on the occasion of a marriage, but it also shows that this was not always done (P.Yadin 18 is not a *ketubba* like

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conclusions have entered the mainstream of scholarship. As prominent a scholar as John Collins has incorporated Ilan's position *in toto* in *Families in Ancient Israel*; Hannah Cotton adopted Ilan's position partially in her DJD Volume 27, as did Michael Satlow in his *Jewish Families in Antiquity*' (Katzoff, "On P.Yadin 37 = P.Hever 65," 134–135; NB the latter reference is to Satlow's *Jewish Marriage in Antiquity*, as the full reference in n. 9 shows). In view of this development I also discuss Ilan's suggestion and its relevance for understanding the legal background of P.Hever 65.

[154] See Wasserstein, "P.Yadin 18," 121, who remarked that 'in any case a marriage is valid in Jewish-rabbinic law even if the document which testifies to it is not a valid *kethubbah* and not meant to be one.' He gives a reference to *m. Qidd*. 1.1, where it is stated that 'there are three ways in which a woman is made a man's lawful wedded wife…a) by a gift of money (or its equivalent), b) by means of a written document, c) by cohabitation.'…The traditional understanding of this text has been that any one of these three suffices to validate the marriage; although it is of course to be noted that this is a rule famous in legal theory rather than practiced in actual Jewish life; and some modern scholars have argued that all three together were halakhically necessary,' with references.

[155] See previous note.

P.Yadin 10). Besides that, it is known from other legal traditions in the ancient east that marriage did not require any formal act, but that factual cohabitation caused a marriage tie to be established. In fact, the Hebrew Bible does not speak of any kind of document to arrange for marriage (although it does introduce the letter of divorce or *get*). Apparently it was deemed more important to determine when marriage was formally over, than when it formally began.[156] In Elephantine we see that arrangements concerning dowry and inheritance were made between spouses, but often at a later stage, for example, when children were born.[157] In general in Egypt marriage was *agraphos*, that is, it existed without any written proof. In a detailed study Yiftach-Firanko showed that often for marriages that had begun without any written documentation such written documentation was drawn up at a later moment, 'whenever, in the course of joint life, these arrangements became sufficiently important

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[156] In this respect it is interesting to read a later (Talmudic) commentary on the three ways of acquiring (*m. Qidd.*1:1), explaining on what grounds the three were accepted: 'If a man takes a woman (Deut. 24:1)—this teaches us that the woman is acquired with money; 'and had intercourse with her' (ibid.)—this teaches us that a woman may be acquired with intercourse; from where do we learn that (she may be acquired) even with a writ? For it taught 'and he shall write her a writ of divorce' (ibid.). Her entrance to marriage is here parallel to her exit (from marriage, i.e., by divorce): just as her exit from him is made by a writ, so too is her entrance to the other made by a writ.' (Sifre Deut. 268; Peretz Segal, "Jewish Law during the Tannaitic Period," in *An Introduction to the History and Sources of Jewish Law* [ed. N.S. Hecht, B.S. Jackson, et al.; Oxford, 1996], 122). It is clear from this commentary that the three ways were thought to each individually constitute a valid marriage and not consequently, even though, I observe, the three elements are derived from one Biblical passage that seems to combine the elements (at least of taking the wife and having intercourse with her).

[157] See Porten, *Archives from Elephantine*, 208 (in discussing K2, a marriage contract between a man and woman drawn up when they already had a child): 'There are many Egyptian marriage contracts, including two from Elephantine, which indicate the presence of children prior to the redaction of the document. This more than suggests that the Egyptian so-called marriage contract, far from concluding or even confirming the marriage itself, was necessary only to fix the property rights of the parents and the children and thus need not have been drawn up until a child was born.' Also see Pieter W. Pestman, *Marriage and Matrimonial Law in Ancient Egypt* (Leiden: Brill, 1961), who deals extensively with the different types of contracts from ancient Egypt related with marriage and concludes that these were not constitutive for the marriage, but were drawn up to arrange for property matters (especially see 11–52). It is interesting to note that marriage was accompanied by a gift (although this need not be stated in writing) and that this gift could go from bride to groom (dowry) or groom to bride (compare *mohar*; see n. 33 above); Pestman even accordingly distinguishes two types of marriage, see 51–52. Also see H.S. Smith, "Marriage and the Family in Ancient Egypt" in *Legal Documents from the Hellenistic World*, (ed. M.J. Geller and H. Maehler; London: Warburg Institute, 1995), 46–78.

to be committed to writing.'[158] Yiftach-Firanko indicates that although written documentation was important as proof of obligations, other means, such as pressure from relatives, could also be used to force a negligent spouse to meet with the obligations. This specifically applies to marriages between the next of kin, therefore the conclusion is less relevant for the present material. Pestman showed that consensus was vital for Egyptian marriage (it was understood to be based on agreement), but that cohabitation formed the heart of the matter: the bride and groom are frequently said to have 'found a house and are going to "cohabitate" in this conjugal residence.'[159] Furthermore divorce was seen as the end of marriage, because then cohabitation ended: the wife left the house either of her own accord or because her husband had repudiated her.[160]

As there is no direct evidence that a marriage document was essential for the formation of marriage at the time and in the milieu of our documents (that is, that a marriage contract had constitutive value), it is legitimate to assume that cohabitation could indicate that a marriage was contracted. Consequently, a phrase in a written document like ours denoting continuation of life together does not imply 'premarital cohabitation' but rather the opposite: it implies that marriage had already begun when cohabitation began and that is continued in the same manner after the drawing up of the document. Legally, the drawing up of this document then only serves to record obligations between the spouses as later evidence, without having a direct bearing upon the marriage as such.

Agraphos gamos

In discussing P.Yadin 37 (= P.Hever 65) Lewis already referred to the term *agraphos gamos*, unwritten marriage, employed in Greek papyri from Egypt to indicate that a couple lived together as man and wife without any written contract.[161] They could later on change their unwritten

[158] Uri Yiftach-Firanko, *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt. 4th Century BCE–4th Century CE* (Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte, 93; Munich: C.H. Beck, 2003), 104.

[159] See Pestman, *Marriage*, 51.

[160] See Pestman, *Marriage*, 51.

[161] Lewis, 130. It is important to emphasize as Yiftach-Firanko does, that unwritten marriage is not necessarily a different, possibly inferior type of marriage. For the

marriage into a written one, *eggraphos gamos*, by having a deed drawn up. Indeed, we have seen above that frequently deeds were drawn up after a couple had begun living together, often at the time when children were born to them. These deeds arranged for the financial sides of the match, for example, the amount of dowry paid, the return of this payment, or for the children to be heirs to their parents' property. Sometimes the spouses turned each other into their heirs by way of such a document.[162] Lewis discarded the possibility that P.Hever 65 should be read in this light, as he continued:

> Close as this parallel may be, however, in 37 the expression "as also before this time" more likely implies that the bride and groom had been living together since the day of their betrothal, in keeping with a Jewish practice of the time when the bride was both an orphan and a minor.[163]

As Lewis explains her being an orphan called for the presence of a guardian: normally her father would have been present at the drawing up of the deed. Now that more about Salome Komaise is known from the other documents that have been identified as part of her archive we can gather that Salome Komaise was indeed an orphan, but probably not a minor at the time of her marriage.[164] Furthermore the presence of a guardian cannot be explained by the bride's minority either: as Cotton argued, it should be linked with the presence of guardians for women

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majority of the sources Wolff's conclusion applies that *agraphos gamos* is simply a 'real' marriage without any written documentation as to prove the obligations contracted by the spouses (see Yiftach-Firanko, *Marriage and Marital Arrangements*, 81–83). However, as Yiftach-Firanko points out, this does not seem to fit all of the evidence. There is for instance a contract which records a loan between spouses who are said to live together *agraphos*, that is, in an unwritten manner (P.Oxy. II 267). The emphasis on the *agraphos* status of the marriage seems at odds with the written arrangement laid down in the document. Therefore, Yiftach-Firanko argues that not a single meaning can be given to the term 'unwritten' as in 'unwritten marriage' or 'living in an unwritten manner' but rather the meaning should be derived from the circumstances of the particular case.

[162] See K2 from Elephantine.

[163] See Lewis, 130 and 133, note on line 15.

[164] That Salome Komaise's father had died, can be learned from P.Hever 63; consequently, she was an orphan at the time of the drawing up of P.Hever 65. Concerning her being a minor, Cotton noted that Salome Komaise had already been married before, thus making it less likely that she was a minor at the time of her second marriage (Cotton and Yardeni, 227: 'Already in 127 (if not before), she had been married to Sammouos son of Shim'on, who represented her in No. 63.'). Katzoff, who suggested to Lewis that minority was behind the arrangements found here, has disputed this, noting that 'legal majority of the bride is not a precondition of marriage in Jewish law' (Review of Cotton and Yardeni, 325). Also see n. 166 below.

in the other Greek documents from the Judaean desert.[165] Therefore, Lewis' argument concerning a Jewish practice behind the continuation of living together obviously cannot be maintained.[166]

If Salome Komaise was not a minor and the continuation of life together cannot be connected with Jewish practice, Lewis' first assumption comes back to mind: does this document present a case of *agraphos gamos* turned into *eggraphos gamos*? This seems likely: the document focuses on pecuniary matters of which the arrangements for the dowry are a substantive part. As Cotton observed concerning other cases, 'the receipt of a dowry constituted the occasion for drawing up a contract…'[167] Although the contract caused the marriage to change from *agraphos* to *eggraphos* this did not imply anything for the validity of the marriage in its *agraphos* form:

> There was only one type of marriage, and it could be contracted by mere *de facto* union. If there were, in connection with this marriage, some points especially with regard to property matters, which needed a special arrangement, a document could be drawn up at any time, either at the beginning of marital life or later. However, a written contract neither modified the character of the union itself, nor was essential to it.[168]

In this context Katzoff observed that

> Wolff's point is that there was no 'institution' of *agraphos gamos*. Indeed, the very term is modern. What there was in the society reflected in the Greek

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[165] See Cotton in Cotton and Yardeni, 235–236 (notes on lines 13–15). It is 'an expression of Romanization' as Cotton states, but a strictly formal one, see my discussion of guardianship in Chapter 5 above.

[166] *Contra* this opinion see Katzoff, "On P.Yadin 37 = P.Hever 65," 140, where Katzoff explains that Salome need not have been a minor at the time of the drawing up of the contract, but when the marriage began, and that the fact that she was married before does not prove that she was an adult, 'because adulthood of the wife was not a precondition of Jewish marriage then.' If we have to assume that Salome was a minor when she married for the second time, she certainly had to be a minor when she married for the first time. Obviously, as Katzoff indicates, minority would not prevent a valid marriage, but in this case we would then have to assume that Salome was married while being a minor, widowed, then remarried still being a minor, after which this second marriage led to the drawing up of a document at a moment when Salome had reached legal majority. Whether this is unlikely or not I cannot judge. It is in any case clear that the drawing up of a document within this context is not related to validation of marriage: in this interpretation as in the others to be offered above there is no premarital cohabitation.

[167] Cotton in Cotton and Yardeni, 229.

[168] Hans Julius Wolff, *Unwritten and written marriages in Hellenistic and Post Classical Roman Law* (PMAPA 9; Haverford, Pa: American Philological Association, 1939), 66–67.

> papyri from Roman Egypt is a single institution of marriage, and that was usually, but not necessarily, accompanied by a written document.[169]

Katzoff then goes on to point out that the idea in Jewish law was about the same: a *ketubba* need not necessarily be written. He discusses the requirement already referred to repeatedly above that a man may not keep his wife without a *ketubba* even if it was for but one hour, giving a counter passage, where it is said that a man may keep his wife for two or three years without a *ketubba*. *Ketubba* should here be understood in the sense of an obligation of the groom towards his wife of at least 200 zuzin. This means that a man could marry without undertaking a specific financial obligation towards his wife (for example because no exact amount of money was determined), and the marriage would be valid for a couple of years, after which a written document was drawn up anyway.[170]

The payments referred to in both P.Hever 65 and P.Yadin 18 do not concern bride price but dowry, payment made by the family of the bride to the groom.[171] Katzoff seems to take the two to lead to the same result

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[169] Katzoff, Review of Cotton and Yardeni, 325; repeated almost *verbatim* in Katzoff, "On P.Yadin 37 = P.Hever 65," 141.

[170] Katzoff, "On P.Yadin 37 = P.Hever 65," 142. Also see his remarks on later Talmudic practice, as references is made in both the Babylonian and the Palestinian Talmud to 'places where no *ketubba* is written' ("On P.Yadin 37 = P.Hever 65," 143). Katzoff devoted attention to the background of the various opinions in his review of DJD 27, indicating that the view that a man was allowed to keep his wife for a number of years without a *ketubba*, stemmed from students of R. Akiva, a contemporary rabbi. Of interest for our argument here is his statement that the opinions of one of those students, R. Judah, can be found in several other Judaean Desert documents (Review of Cotton and Yardeni, 326). This could denote that the documents represent one of several modes of thinking that existed side by side. While Katzoff speaks of 'lines of continuity' regarding a connection with 'contemporary Jewish tradition in the Aramaic documents' and with 'Hellenistic tradition in the Greek documents' (Review of Cotton and Yardeni, 326–327; thus maintaining a division between Aramaic and Greek documents that in my opinion runs counter to what the documents themselves actually show, see Chapters 1–3 above) I would rather use the term 'lines of continuity' to understand the Jewish tradition: as Katzoff himself showed several opinions existed, supported by contemporary rabbis, that might have formed different lines of continuity, which were later incorporated in the Mishnah. This could counter the frequently found understanding of normative law as one set of applicable rules, without leaving any room for differing opinions, that is, differing practices in our documentary evidence. See my conclusion about the use of the word normative for Jewish law at the time of the archives in nn. 41 and 146 above: several practices concerning marital obligations could have existed side by side and should then all be considered part of normative Jewish law at the time. Accepting different lines of continuity (based on the authority of different rabbis) would obviously support this opinion.

[171] See n. 33 above.

as he says that the essence of the *ketubba* is in 'the obligation of no less than 200 zuz to the wife,' apparently regardless of the fact where the money the man is obliged to return came from (from him, bride price, or from the bride's family, dowry). Katzoff then notes that the amount referred to in P.Hever 65 is too low: it is not 200 zuzin, but 96 denarii.[172] This means that even in Katzoff's argument P.Hever 65 is not a document that could turn a 'match without a *ketubba*' into a 'match with a *ketubba*' or rather a valid marriage according to later normative Jewish law. Of course we can speculate whether the requirements the Mishnah makes for the amount of the obligation were already fixed, one can imagine they were not. However, on the whole, it seems safer to assume that P.Hever 65 in fact sought to turn (valid) marriage without a contract into (valid) marriage with a written contract, which need not necessarily have been a Jewish practice or be related to the *ketubba*. As mentioned above it is likely that in the stages before the actual codification of Jewish law several ways were accepted to constitute valid marriage: a gift, intercourse and a written document. Gradually apparently the written document as proof of the obligation of the husband towards the wife became essential, and even constitutive, for marriage.

Cotton assumes that in the case of P.Hever 65 the receipt of a dowry called for the drawing up of the document and indeed this seems likely: the document is mainly concerned with this dowry and as Cotton observes, relates the day of drawing up to the day of receipt of the dowry 'on this present day.…'[173] Consequently, we have to assume that groom and bride began their lives together without a dowry having been transferred or perhaps even fully agreed upon, while after a while the dowry was actually transferred and a document to this point drawn up. This need not necessarily imply, as Cotton concludes, that P.Hever 65 is not a marriage contract: Yiftach-Firanko pointed out that there are phrases in the deed that do relate it to other marriage contracts.[174] Rather, we should conclude that there are several types of marriage contracts: those that are written at the start of the marriage and also refer to this, like P.Yadin 10 ('I take you as my wife') and 18 (*ekdosis*, the bride is described as a virgin), and marriage contracts that are written at a later stage, like P.Hever 65. That the term marriage contract can apply to all, is obvious

[172] Katzoff, "On P.Yadin 37 = P.Hever 65," 143 (to the same point Review of Cotton and Yardeni, 326).
[173] Cotton in Cotton and Yardeni, 229.
[174] Yiftach-Firanko, *Marriage and Marital Arrangements*, 14, n. 8.

when we consider the legal effect of the documents: in all cases the document records the obligations the spouses have towards one another in the context of their marriage. This does not say anything as to the legal act being constitutive for the marriage itself. Indeed, the case of P.Hever 65 suggests that a marriage contract did not necessarily have a constitutive value, but that partners could contract a valid marriage without any form of written proof. This is important, I believe, in the light of the find of P.Yadin 10. Despite the fact that this document closely resembles the Misnnaic regulations for the *ketubba*, there is no indication that a document like P.Yadin 10 was constitutive for marriage, at the time.

Conclusions: Legal implications of different interpretations

The change from unwritten to written marriage was obviously from a legal point of view made for reasons of establishing written proof of the obligations undertaken by the groom towards his bride. The drawing up of the document did not change the marriage itself, that is, it did not constitute legal validity that had prior been lacking. This means that a document like P.Hever 65 is a marriage document of another nature than the later Jewish *ketubba*. As Ilan indicated in her treatment of P.Hever 65 in the light of Mishnaic evidence, a *ketubba* does have constitutive value. Without a *ketubba* the marriage is not valid, even though the couple may cohabitate. In that light P.Hever 65 could present a case of a marriage that was invalid by rabbinic standards: the couple had no *ketubba* drawn up at the start of their cohabitation. Following this interpretation, we have to conclude that the writing of a document at a later stage could not make up for this: a *ketubba* had to be written at the start of the marriage, or to put it differently, the marriage can only be taken to exist from the moment when a *ketubba* has been drawn up. This is an essential difference with the change from *agraphos* to *eggraphos gamos*, where the marriage has been valid from the start and the writing of the document does not change anything in that respect. Cotton also indicated that the drawing up of a document like P.Hever 65 cannot be taken to be the drawing up of a *ketubba*, therefore it cannot make the marriage valid in a rabbinic legal context.[175]

[175] Cotton in Cotton and Yardeni, 228: 'As already pointed out, if we follow halakha, No. 65 is not the ketubbah that would turn 'premarital cohabitation' into a proper Jewish marriage.' Note Katzoff's objections to this cited above, 430–431 (however, following his interpretation P.Hever 65 cannot serve to constitute a valid marriage according to rab-

All of this is only relevant if we assume that the regulations pertaining to the *ketubba* already applied at the time of our documents. The find of P.Yadin 10 and its close resemblance to the later Mishnaic regulations suggests that this was the case. However, exactly the presence of those marriage contracts that do not follow these regulations testify to the opposite: there was no demand to have a written contract drawn up at the start of marriage. Rather marriage could be contracted validly without any written proof, as Salome's marriage shows, while a contract dealing with the obligations of the spouses could be drawn up either at the start of the marriage or at a later stage. Which of the two options was chosen, was, I believe, a matter of circumstances. In the case of Babatha, a widow with property of her own, and the case of Shelamzion, a daughter with a substantial dowry, it was probably considered wise to have a contract drawn up right at the start of the marriage. By contrast, the marriage of Salome Komaise seems to have encompassed less property concerns: her dowry with its 96 denarii is considerably less than the 500 denarii dowry of Shelamzion. Therefore, the couple may have decided to postpone the writing of a document until a later moment and have started living together. Whether it was earlier agreed upon that a document would be drawn up at a certain moment or external circumstances called for it cannot be determined.

IV. *Conclusions: What Marriage Documents Can Show Regarding The Development Of (Jewish) Law*

The three marriage contracts present in our archives are three completely different types of document, not only written in different languages and employing different terminology, but also implying different legal backgrounds or contexts. P.Yadin 10 is obviously a real *ketubba*, incorporating all the clauses that became mandatory in later Mishnaic law. The document can therefore be taken to have a truly Jewish character, which has often been thought to be lacking in numerous other

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binic standards either because the obligation the husband undertakes does not amount to the minimum set in the Mishnah). Admittedly, this only holds true if the dowry we are dealing with here can be seen as the obligation the husband undertakes towards the wife, else the entire document should be regarded to be outside the scope of later Jewish law (see 430–431 above).

documents from the same archive. Nevertheless, if we question what makes the *ketubba* of P.Yadin 10 stand out in the company of the other marriage contracts P.Yadin 18 and P.Hever 65, there is no real answer. It is unlikely that a document like P.Yadin 10 was deemed to be constitutive for marriage, while, for instance, P.Yadin 18 and P.Hever 65 could not have had this effect. Especially in the light of the practice of *agraphos gamos*, valid marriage contracted without written proof, we have to assume that a marriage at the time could be valid whether there was written proof or not. It is important to note in this light, that written proof need not necessarily denote written proof of the formation of marriage. If the spouses later on drew up a contract regulating their financial obligations towards one another, this contract may not mention the formation of marriage and yet provide written proof as to the existence of marriage, thus effectively turning *agraphos gamos* into *eggraphos gamos*.[176]

Consequently, we have three types of marriage contracts in our archives: P.Yadin 10, a contract drawn up at the start of the marriage and incorporating the regulations later found in the Mishnah, P.Yadin 18, a contract drawn up at the start of the marriage, but not including these regulations, and P.Hever 65, a contract drawn up at a later stage, that is, applying to an *agraphos gamos* situation. It seems that the circumstances dictated at what point a document was drawn up: it is noteworthy that the dowry of P.Yadin 18 is over five times as much as the dowry concerned in P.Hever 65. Consequently, one can argue that in the first case it was wise to arrange for things as soon as possible, that is, right at the start of the marriage. In Babatha's case we can also consider that Judah had been married before (or was perhaps still married) which meant that a contract served to create clarity for all parties involved as to their rights and obligations.

Considering that P.Hever 65 was drawn up at a later stage, its aberrations from the pattern found in P.Yadin 10 are not astonishing. The differences between P.Yadin 10 and 18 are more intriguing, especially if one keeps in mind that the groom of P.Yadin 10 is the father of the bride of P.Yadin 18. However, despite the pronounced differences between the documents it is not necessary to describe P.Yadin 18 as a non-Jewish marriage contract, or a marriage contract in the Hellenistic tradition.

[176] See 426–427 and 431 above.

In fact, many elements in the document clearly go against this assumption. As Katzoff pointed out, the reference to Greek Hellenistic custom regarding the maintenance obligation should not be read in the context of Greek contracts: those do not specify a standard for maintenance.[177] Furthermore, Lewis pointed out that the term is not attested in documents from the Near East in whatever language and does not occur in the Greek papyri from Egypt.[178] This means that the phrase does not connect our document with Greek documents by non-Jews, but, on the contrary, sets it apart. As the phrase occurs in P.Hever 65 as well, we have two occurrences in documents by Jews.[179] This suggests that its inclusion should be related to a Jewish legal context. Where Katzoff had already pointed out that Jewish legal arrangements strive for clarity, a reason why such an arrangement could have been included, Lapin adduced a more compelling argument when he pointed out that in Jewish law it was not univocally clear that a father was obliged to support daughters during his lifetime.[180] If we assume that this was indeed a disputed matter, it is likely that a specific arrangement to this point was incorporated. Of course this only makes sense, if the document as a whole should indeed be read in the context of Jewish law. That means that the reference to law pertaining to the entire contract, κατὰ τοὺς νόμους, should indeed be taken to refer to Jewish law. That this is not specified by an adjective should cause no wonder: in the majority of our documents the references to law do not specify to what law.[181] This should be deduced from the situation: in the Nabataean Kingdom general references were to Nabataean law, specific arrangements could refer to Jewish law. Under Roman rule substantive arrangements referred to indigenous law, as can be seen when such arrangements are carefully analysed.[182] In P.Yadin 18, drawn up under Roman rule, we can assume that the legal background was indigenous, as in the other documents like the preceding P.Yadin 17. Consequently, the document should not be contrasted with P.Yadin 10.

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[177] See 411–412 above, 410 for the interpretation of νόμος as custom rather than law.

[178] See 414–415 above.

[179] ἑλληνικῷ νόμῳ (P.Yadin 18:16/51) and νόμῳ ἑλληνικῷ καὶ ἑλληνικῷ τρόπῳ (P.Hever 65:9–10). See nn. 119 and 130 above.

[180] See 412–414 above.

[181] See 409 above.

[182] See Chapter 2 above, see Chapter 4, 233–234, and Chapter 5, 311–312, 315–316, 330.

That the structure of P.Yadin 10 was not followed in P.Yadin 18 should not cause much wonder, I believe, if one takes the legal consequences of P.Yadin 10 into account. As argued in detail above, the legal arguments in the archive that draw on the arrangements in P.Yadin 10 do not show that the specific structure of P.Yadin 10 was essential for the arrangements to be invoked. A good example is Babatha's action to sell the dates (P.Yadin 21–22): this is based on liability for return of the dowry contracted by the husband in the marriage contract. This liability is contracted in other marriage contracts as well, for example Greek marriage contracts from Egypt. Consequently, Babatha could have invoked the same rights had they been written down in a contract like P.Yadin 18. This means that the evidence from the archive shows that the special form of P.Yadin 10 was not necessary from a legal point of view. Rather, this form should be seen as one type of marriage contract available at the time. However, it should not be seen as the Jewish type of marriage contract as opposed to a non-Jewish type, albeit used by Jews. P.Yadin 18 can, by virtue of its references to law, be placed within the same legal framework as P.Yadin 10. Consequently, the outer appearance of a document, its language, its formulae, should not be decisive in determining the legal background of the document, or the law applicable to it, but one should look primarily at references to law in the documents. In understanding the three forms of marriage contract encountered in the archives as all valid forms of marriage contract under Jewish law at the time, one is confronted with the evidence in the Mishnah that one form of marriage contract, that of the *ketubba*, was eventually selected as the most desirable form of marriage contract. One cannot claim that it was the only form of marriage contract, as apparently the possibility remained that a *ketubba* was drawn up, not at the start of the marriage, but at a later stage,[183] and the court stipulations applied to marriages even when those stipulations had not been put down in writing.[184] One could understand the court

[183] See Katzoff's argument to this point above, 430–431.

[184] Most important would have been the obligation the husband contracted for a certain amount of money, as explicitly stated in *m. Ketub*. 4:7 (it becomes clear from this passage that even when no *ketubba* was written by the husband he would be liable for paying the amount of money determined there): see Katzoff, "On P.Yadin 37 = P.Hever 65," 142–143. Especially compare Friedman's description of the court stipulations as 'tacit conditions, binding upon all, *even if not written in a specific marriage contract*' (*Jewish Marriage in Palestine*, 15; my emphasis).

stipulations rather as a framework for marital obligations than as a decisive form for a certain type of written contract.[185]

It would be interesting to know what part the Roman dominion played in the process of developing written forms for the undertaking of certain obligations. I can imagine that confrontation with Roman jurisdiction forced people to be more explicit about the rules of substantive law they wanted to apply to their contract. Evidence of such a development can be found in the Babatha archive, where the references to law seem to change as time goes by.[186] The most intriguing thing about this seems to be that what the rabbis accepted was not always what was common to the general ancient eastern tradition. It has been noted by various scholars that Babatha and her family were well integrated into their social environment: they dealt with Nabataeans, had them for guardians, had contracts drawn up in Nabataean Aramaic and so on.[187] Nevertheless,

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[185] This would fit with observations referred to above (n. 32) like Katzoff's remark about R. Meir, that 'his rulings refer to the obligations, not to the writing of them' with reference to Friedman's observation that 'in the Mishna the term *ketubba* appears only once (M. Ketubot 9:9) in the sense of the marriage document. Elsewhere it means the sum(s) due to the wife.' ("On P.Yadin 37 = P.Hever 65," 141, n. 36). Also see Friedman's description of the court stipulations quoted in the previous note.

[186] See Chapter 3 above.

[187] See for instance Lewis, 26; more emphatically *Documents II*, 242, pointing out that 'a Jew purchased property located in the Nabatean kingdom from a Nabatean owner, under the provisions of Nabatean law, and that the deed of sale was written and witnessed by Nabateans.' (I do not agree with the part 'under the provisions of Nabatean law': this conclusion is not motivated, and indeed, upon closer scrutiny, not warranted by the material, see discussion in Chapter 2 above, 94–95). Compare Cotton in Cotton and Yardeni, speaking of 'easy intercourse between Jews and Nabataeans that we witness in the Babatha Archive' (159), referring in a footnote to the fact that one of the guardians of Babatha's son Jesus was a Nabataean, and 'Nabataeans serve as witnesses to many of the documents in the archive' (n. 8).

I would not subscribe to Cotton's (unmotivated) remark that 'their successful integration into the Nabataean environment is emphasized by their use of non-Jewish legal instruments in their dealings with each other' (Cotton and Yardeni, 159). I am not sure what is meant by non-Jewish legal instruments here: in Cotton's own assessment of the situation before codification of the Mishnah the legal practice of the Jews incorporated many elements of other eastern systems like Nabataean law (see quote on 45 above). Why then describe the legal instruments used as 'non-Jewish'? When one observes the frequent references to law in the sense of Jewish law as discussed in Chapter 2 above, used in documents written under Roman rule, but not much removed in time from the Nabataean period, and in any case written on behalf of the same people, it is almost inevitable to conclude that this framework of Jewish law also existed during the Nabataean period. There are no reasons to assume that the Jews were forced to comply with Nabataean law. Indeed one could argue that Jews and Nabataeans alike drew on a

the forces that came to shape what would be exclusively Jewish law were already at work in their lifetime as can be seen from the presence of P.Yadin 10 in the archive.[188] Even if one accepts that elements of what was to become Jewish law were common to other oriental systems,[189] it cannot be denied that the codification in the Mishnah consciously sought to set certain rules apart and identify them as rules of Jewish law. Perhaps the presence of several different types of documents of one legal institution (like marriage documents) and the references to law that are sometimes general and sometimes specific can show that a process was working that slowly differentiated rules and formulas that were considered especially Jewish from those that were thought to be general.[190]

The consequences of this differentiation and selection are important to note: by selecting a certain type of contract other types were effectively abolished. This is interesting, especially in the light of legal effectiveness, as mentioned above. There is no reason to assume that a contract like P.Yadin 18 could not have had the same legal effect as P.Yadin 10 had where property was concerned. Therefore, the choices made should apparently also be attributed to other considerations than employability and legal effectiveness.

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general legal framework, leaving room for deviations on the basis of the individual laws of groups among the population (see discussion of P.Yadin 2–3 in Chapter 2 above, 93–97).

[188] I emphasize in this context that until the find of the Judaean Desert documents the earliest marriage contract with a Mishnaic structure was dated to 417 CE.

[189] Confer for instance Friedman's observation that some of the court stipulations 'reflect similar marital obligations elsewhere in the ancient Near East' (*Jewish Marriage in Palestine*, 15).

[190] At times the Mishnah even adopted positions that were foreign not only to older Jewish law, but also the Near Eastern legal systems in general, as in the case of the daughter-only child: most Near Eastern legal systems related the capacity of the daughter to inherit to her marital status, comparable to the arrangement in older Jewish law based on Num 36 while the eventual arrangement in the Mishnah granted the daughter-only child a right to inherit, without any connection with marital status being mentioned (see detailed discussion in Chapter 4 above, 226ff.).

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