LAW IN ROMAN ARABIA 106-132 CE

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ABSTRACT

In 106 CE the former kingdom of Nabataea was incorporated into the Roman Empire as the Province of Arabia. In 132 CE Babatha and Salome Komaïse, Jewish women who had been inhabitants of the Province, fled to a cave near the Dead Sea where their archives of legal documents were later discovered.

Those archives include documents from the periods both before and after the establishment of the Province and concern Nabataean and Jewish or Mishnaic, as well as Roman law.

In this study I offer an analysis of those documents together with other evidence from the Roman Empire to establish, as far as possible, the law of the Province and the terms of the *Lex Provinciae* by which the kingdom was incorporated as a province. I show that the governor of the Province published an annual provincial edict by which Roman law was established in the Province and so far as possible its extent, including the incorporation of the provisions of the edict of the curule aediles as part of its law.

I show that the law of the province as established by the *Lex Provinciae* and the provincial edict allowed the peregrine inhabitants of the Province to be governed by their own laws and I describe Nabataean law so far as it can be established and both it and Jewish law as they continued to apply in the Province to its Nabataean and Jewish inhabitants. I also describe and examine the course of litigation in the Province showing its conformity with litigation as then conducted elsewhere in the Empire.

I show that the Jewish inhabitants of the Province adopted Roman law forms of contract but continued to govern their family relations, including marriages and inheritances, in accordance with Jewish law, and that they were able to litigate before the governor of the Province issues arising under both Roman and Jewish law.

DECLARATION

I, Giles Ian Odell Rowling, certify that the work in the thesis entitled “Law in Roman Arabia 106-132 CE” has not been submitted for a higher degree to any university or institution other than Macquarie University;

I certify that the thesis is an original work of research written by me; assistance that I have received in the preparation for and writing of it has been has been appropriately acknowledged; the sources of information and the work of others that have been used are referred to in the thesis.

Dated: July 2019

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I acknowledge also the assistance of my former Associate Supervisor, Dr Stephen Llewelyn, who was Principal Supervisor of that previous thesis, and kindly asked me to join him in the authorship of an article on aspects of the subject matter of this thesis.

Professor Alannah Nobbs was the originator of this thesis not only in her encouragement to me to undertake it but also in the suggestion of a subject for it; I am grateful to her also for great assistance as one of my supervisors during the last year, including acting as my Principal Supervisor during a period when Associate Professor McKechnie was on leave.

During the course of my candidacy and the preparation of the thesis I received significant assistance and guidance from many other sources: Associate Professor Trevor Evans in many ways, most importantly in providing me with an opportunity to present part of the subject matter of the thesis to a Macquarie University Research Seminar; Professor Hannah Cotton of the Hebrew University, who during the course of a visit to Sydney, gave much advice and provided copies of some of her work; Tyndale House, Cambridge and particularly Dr David Instone-Brewer, whose guidance on Mishnaic law has proved invaluable; Associate Professor Georgy Kantor of St John's College, Oxford, who kindly allowed me access to two chapters of his unpublished 2008 Doctoral thesis entitled "Roman Law and Local Law in Asia Minor (133 B.C. – A.D. 212)"; and Associate Professor Sabine R. Huebner and the Asiatic Studies Association of Australia who provided opportunities to present parts of the material of this thesis during separate conferences.

Material that appears in this thesis also appeared in the following articles:

"Babatha's archive: inheritance disputes in second century Roman Arabia" in Béatrice Caseau and Sabine R. Huebner (edd), *Inheritance, law and religions in the ancient and mediaeval worlds*, (Paris, 2014); and in "Babatha's Archive and Roman law" (with S. R. Llewelyn), in S. R. Llewelyn and J. A. Harrison (edd), *New Documents Illustrating Early Christianity,* Vol 10 (Grand Rapids, MI, 2012); no part of the material contributed to that paper by Dr Llewelyn has been used in this thesis.

Other such material was presented under the title “Three systems of law in Arabia in the second century CE” at the biennial conference of the Asian Studies Association of Australia held at the University of Western Australia, Perth in 2014.

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The work could not have been done without the assistance of numerous translators of difficult law materials in languages other than English: Claudia Koch-MacQuillan, Sarah Wentworth, Roberto Stevanoni, Bob Desniatnik, Odile Blandeau; I owe each of them my gratitude.

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ABBREVIATIONS

I set out in Chapter 1 of this thesis the method by which I cite the material in the archives and other primary material with which I deal.

Otherwise in this thesis:

References to the *Mishnah* and *Tosefta* are in the form of the tractate as abbreviated in Jacob Neusner (1988: xliii-xlv) prefixed by the letter "*m"* or "*t"* in a form such as "*mKet".*

Classical literary works and inscriptions are cited by the abbreviations used in the *Oxford Classical Dictionary*, 4 th edition ed S. Hornblower and A. Spawforth (Oxford, 2012), in H. G. Liddell and R. Scott, *Greek-English Lexicon*, 9th edition, rev. H. Stuart Jones (Oxford, 1940); or in *A Patristic Greek Lexicon*, ed G.W.H. Lampe (Oxford, 1961)..

Periodical literature is generally cited by the abbreviations formerly listed by *l'Année philologique;* other periodicals are referred to by their full title in the Bibliography.

References to Roman law material are cited by the following abbreviations:

Dig	*Digesta;*
CJ	*Codex Justinianus;*
Coll.	*Mosaicarum et romanarum legum collatio, FIRA* ii. 543-589;
FIRA	S. Riccobono et alii (edd), *Fontes Iuris Romani Antejustiniani,* (2nd edition) (Florence, 1940-3);
Fr. Vat.	*Fragmenta Vaticana, FIRA* ii. 463-540;
Lex Irn.	*Lex Irnitana*, Gonzáles (1986);
Lex rivi Hiber.	*Lex rivi Hiberiensis,* Beltrán Lloris (2006)
Lex Salp	*Lex municipii Salpensi, FIRA* i. No 23;
Sent. Paul.	*Sententiae Pauli, FIRA* ii. 319-417;
Tit. Ulp.	*Tituli ex Corpore Ulpiani, FIRA* ii. 261-301;

Except as set out below Papyri are cited by the abbreviations listed in E. G. Turner, *Greek Papyri: An Introduction* (Oxford, 1968).

In addition the following abbreviations refer to the papyri and inscriptions published in the works described below, where appropriate by reference to entries in the Bibliogaphy, except that I do not generally use full points:

BM 10591	See: Carol A. R. Andrews (ed), (1990).

Jur Pap	Paul M. Meyer, *Juristische Papyri: Erklärung von Urkunden zur Einführung in die Juristische Papyruskunde* (Berlin 1920);
M Chrest	L Mitteis & U. Wilcken, *Grunzüge und Chrestomathie der Papyruskunde* (2. 2) (Leipzig, 1912);
NM	See: Leila Nehmé (2003).
P Athen	Georgios A Petropulos (ed), *Papyri Societatis Archaeologicae Atheniensis*, (Athens 1939 ; reprinted Milan 1972)
P Giessen Inv 40	Otto Eger, (1911);
P Mur	P. J. Benoit, T. Milik and R. de Vaux (edd), *Les Grottes de Murabba'ât* [Discoveries in the Judaean Desert II], (Oxford, 1961).
P Naḥal Hever 36 + *P Starcky*	Ada Yardeni (2000: vol 1, 265-6) & Healey (2009: No 10, 79-89);
P Naḥal Ṣe'elim 2	Ada Yardeni (2000: vol 1, 290);
P Petra 1	Jaakko Frösén and others (edd), *The Petra Papyri* 1, (Amman, 2002).
P Schøyen	Rosario Pintaudi (ed.), *Papyri Graecae Schøyen (P.Schøyen I)* [Papyrologica Florentina 35] (Florence, 2005),
P Yale Inv No 1606	Naphtali Lewis, (1972-3);
W Chrest	L Mitteis & U. Wilcken, *Grunzüge und Chrestomathie der Papyruskunde* (1. 2) (Leipzig, 1912);

In addition I use the following abbreviation:

BL	*Berichtigungsliste der griechischen Papyrusurkunden aus Ägypten* (Berlin, 1913 -).

Chapter 1 – Introduction

Part 1 – The Scope and Purpose of this Thesis

This thesis examines the law of the Roman Province of Arabia in the period from its establishment in 106 CE in the reign of the Emperor Trajan to the outbreak of the revolt of Shimon Bar Kokhba in about 132 CE, the period of the Province covered by the documents which comprised the archives of Babatha and of Salome Komaïse. I will refer to the Province of Arabia as "the Province".

Part 2 of this chapter describes the establishment of the Province and in Part 3 those archives and their discovery. They are legal documents of Jewish inhabitants of the Province, Babatha and her family and of Salome Komaïse and her mother and husband. I describe those families in Part 4 of this chapter, basing my description on the documents in the archives, since nothing is known of either family apart from the archives. As an appendix to this chapter there are attached family trees of the families of Babatha and of Salome Komaïse, based on those published by Naphtali Lewis and by Professor Hannah M. Cotton and Ada Yardeni, in order to make clear the significance of the legal documents. They are intended to provide a firm base to the contentions I make about the propositions of Jewish law that I argue Babatha and other members of her family were seeking to litigate before the governor of the Province, through documents in her archive.[1]

Those archives are the material upon which this study is chiefly based. They include the marriage agreements of both Babatha and Salome Komaïse and also of Shelamzion the daughter of Babatha's second husband Yehudah, documents that relate to the property of both families and documents that record litigation in the court of the governor of the Province to which Babatha was a party.

In addition I have made use of legal documents recorded on papyri, and wooden tablets, and in inscriptions from other parts of the Roman Empire, where through comparison they are capable of showing the law of the Province or the significance of documents in the archives. The principal geographical source of such documents is Egypt, from where there are many available papyri of all kinds that evidence the law of Egypt at the relevant period. I give an account of these documents in Part 5 of this chapter, and Part 6 describes the legal sources upon which I

[1] Lewis (1989: 25); Cotton & Yardeni (1997: 160).

rely to show what was the then current Roman and Jewish law. No ancient account of Nabataean law has survived and in Part 6 of this chapter I also describe the inscriptions and other documents from which I have sought to establish what had been the law of Nabataea, in the period when it was still a kingdom, and the extent to which that law survived the establishment of the Province.

Since the archives include documents that disclose reliance not only on Roman law as the law of the Roman empire, but also on Jewish law as it then stood, and also the continued operation of elements of the law of the former kingdom of Nabataea, in Part 7 of this chapter I discuss the work of Ludwig Mitteis. In 1891 he published an account of the relationship between Roman law ("Reichsrecht") and local or indigenous law, the law of the peregrine inhabitants ("Volksrecht"), in the eastern provinces of the empire, and the concept of "legal pluralism" as it appears in those archives.

Since the discovery and publication of the archives there has been extensive literature on them and the documents comprising them, and the law that they evidence, some of which is discussed in Part 8 of this chapter. That discussion is, because of the very large quantity of the literature, necessarily selective.

In Part 9 of this chapter I set out the objects of this thesis, and the basis upon which I approach those documents and the law, Roman, Jewish and Nabataean, that they disclose.

Part 2 - Nabataea and the Establishment of the Province

From no later than the fourth century BCE Arab peoples known as Ναβαταῖοι or Nabataeans inhabited the area from the Sinai peninsula to the Syrian Ḥawran including the Negev and Transjordan, lying adjacent to Egypt and the later province of Judaea both of which had been incorporated into the Roman empire by 30 BCE.[2] The land, Nabataea, was in general inhospitable desert with little water.

Nabataea formed no part of the conquests of Alexander the Great, but in 312 BCE his former general and successor Antigonus I Monophthalmus, then ruler of Syria and Phoenicia, attempted to extend his power into the area by sending Athenaeus, one his commanders, to

[2] Bowersock (1983: 2-5).

invade Nabataea: ἐπὶ τὴν χώραν τῶν Ἀράβων τῶν καλουμένων Ναβαταίων. Although he had some success, the Nabataeans were able to drive him off with the loss of most of his troops.[3] At that time the Nabataeans complained to Antigonus about the conduct of Athenaeus, πρὸς δ᾽ Ἀντίγονον ἐπιστολὴν γράψαντες Συρίοις γράμμασι, which G. W. Bowersock plausibly suggests refers to the use of a dialect of the Aramaic language written in their own native script, used also in inscriptions and papyri discussed in Chapter 4 of this thesis.[4]

After the failure of the attempt, Antigonus ordered a second invasion led by his son Demetrius in order to avenge the defeat of Athenaeus, but he was forced to retire taking only gifts and a few hostages.[5]

At that time, there were of the Nabataeans, according to Diodorus Siculus, who wrote in about the middle of the first century BCE, less than 10,000, living in tents and pursuing a νομάδα βίον; and they did not plant grain, or fruit or vines, but raised camels and sheep, and some became wealthy through the carriage of incense, myrrh and spices from southern Arabia to the Mediterranean Sea.[6] Diodorus put into the mouth of a Nabataean an address to Demetrius at the time of the invasion in which he said:

> ἡμεῖς γὰρ οὐδενὶ τρόπῳ προσιέμενοι δουλεύειν συμπεφεύγαμεν εἰς χώραν πανίζουσαν πάντων τῶν ἐν τοῖς ἄλλοις χρησίμων καὶ βίον εἰλόμεθα ζῆν ἔρημον καὶ θηριώδη παντελῶς, οὐδὲν ὑμᾶς βλάπτοντες.[7]

Diodorus also explained that:

> οἱ ταύτην τὴν χώραν κατοικοῦντες Ἄραβες, ὄντες δυσκαταπολέμητοι, διατελοῦσιν ἀδούλωτοι, πρὸς δὲ τούτοις ἔπηλυν μὲν ἡγεμόνα τὸ παράπαν οὐ προσδέχονται, διατελοῦσι δὲ τὴν ἐλευθερίαν διαφυλάττοντες ἀσάλευτον. διόπερ οὔτ᾽ Ἀσσύριοι τὸ παλαιὸν οὔθ᾽ οἱ Μήδων καὶ Περσῶν, ἔτι δὲ Μακεδόνων βασιλεῖς ἠδυνήθησαν αὐτοὺς καταδουλώσασθαι, πολλὰς μὲν καὶ μεγάλας δυνάμεις ἐπ᾽ αὐτοὺς ἀγαγόντες, οὐδέποτε δὲ τὰς ἐπιβολὰς συντελέσαντες.[8]

[3] Diod. Sic. 19. 94. 1; 95. 2-6; Bowersock (1983: 13-14).
[4] Diod. Sic. 19. 96. 2-3; Bowersock (1983: 14-15).
[5] Diod. Sic. 19. 96-98; Bowersock (1983: 14).
[6] Diod. Sic. 19. 94, 96. 2.
[7] Diod. Sic. 19. 97. 4.
[8] Diod. Sic. 2. 48. 4-5.

Diodorus records an inscription erected by Pompey in 63 BCE in which he claimed he had brought into subjection βασιλέα Ἀρέταν Ναβαταίων Ἀράβων, and, according to Plutarch, at his triumph in 61 BCE he claimed to have conquered Arabia.[9] No doubt he gained some victories over the Nabataeans but their scope cannot be estimated. In 62 BCE M. Aemilius Scaurus, who had been an officer of Pompey in Syria undertook an expedition against the Nabataeans which he abandoned when paid off by the king of Nabataea, but in 58 BCE he minted coins claiming a victory over the Nabataeans.[10]

In the reign of Augustus the Romans were more active militarily in Arabia, since in about 26 BCE Aelius Gellius commanded an expedition against the Sabaeans into southern Arabia.[11] By no later than about 9 BCE the king of Nabataea had become a client of Rome, since in that year Syllaeus, a minister of the kingdom, went on an embassy to Augustus in connection with disputes the kingdom had with King Herod the Great. When King Obadas III died in that year and was succeeded by King Aretas IV, Syllaeus sought the kingdom for himself from Augustus who was angry that King Aretas had not previously sought permission to succeed.[12] Strabo, who wrote in the period of the early first century CE, says of the Nabataeans and Sabaeans that νῦν δὲ κἀκεῖνοι Ῥωμαίοις εἰσὶν ὑπήκοοι, which Bowersock argued was evidence that the Nabataeans were then subjects of Rome as provincials.[13]

It appears that in the years 3-1 BCE there were no coins minted in Nabataea in the name of King Aretas IV, although they had previously been frequent, but that in 1 CE when Gaius Caesar, the grandson and adopted son of Augustus, led an *expeditio Arabica*, minting was resumed.[14] Bowersock has plausibly argued that this is evidence supporting the establishment of a Nabataean province at that time.[15] It was thus that in about 3 BCE Augustus established Nabataea as a short-lived province, and that soon afterwards King Aretas was restored, and he and his successors as kings continued thereafter to rule Nabataea as clients of Rome with only limited independence, until the establishment of the Province.[16] Indeed Bowersock has suggested that the Emperor Trajan had previously decided to establish the Province on the

[9] Diod. Sic. 40. 4; Negev (1977: 529); Plut. *Pomp* 45.2; Bowersock (1983: 35).
[10] Joseph. *AJ* 14. 80-1; Bowersock (1983: 33-35).
[11] *RG* 26; Strabo 6. 4. 22-24 C780-781.
[12] Joseph. *AJ* 16 282-295; Bowersock (1983: 51-52).
[13] Strabo 16. 4. 21 C779; Bowersock (1983: 55).
[14] Plin. *NH* 2. 168, 6. 141; Bowersock (1983: 56).
[15] Bowersock (1983: 55-6).
[16] Bowersock (1983: 54-57).

death of King Rab'el II, who died in 106 CE.[17] During the first century CE there was a post at Leuke Kome manned by a centurion and a small military force at which customs duties were levied on goods imported into the kingdom.[18] If, as has been argued, the post was Roman rather than Nabataean, it would support the argument that the Nabataean kingdom was then a client of Rome.[19]

By the time of Strabo the Metropolis of the Nabataeans was Petra and they were always ruled by their kings with the assistance of an administrator who was one of his companions (ἐπίτροπος τῶν ἑταίρων τίς), and they were extremely well-governed.[20] They had by then become not only clients of Rome but also a sedentary people, who had become wealthy and imposed fines on those who diminished their wealth, perhaps reflected in a law by which fines were imposed for breaches of contract, discussed in Chapter 4 of this thesis; and most of the country was by then supplied with fruits of all kinds except the olive.[21] Diodorus reported that ἀγαθὴ δ' ἐστὶ φοινικόφυτος ὅσην αὐτῆς συμβαίνει διειλῆφθαι ποταμοῖς χρησίμοις ἢ πηγαῖς δυναμέναις ἀρδεύειν, and, as is shown in Chapter 4, under the law of Nabataea water rights were annexed to at least some palm groves at Maḥoza a village at the southern extremity of the Dead Sea.[22]

Not later than 93 CE the capital of Nabataea was moved to Bostra, as is shown by an inscription dated that year, in which King Rab'el was described as MR'N' DY BBṢR', or "the Lord in Bostra", and after the annexation Bostra became the seat of the governor of the Province.[23]

King Aretas III who ruled Nabataea from about 87 BCE, and Damascus for about 15 years, described himself on his coinage as ΦΙΛΕΛΛΗΝΟΣ, and the tomb inscriptions from Ḥegra which I discuss in Chapter 4 show that officers of the kingdom bore titles that were of Greek origin as 'SRTG' (στρατηγός), HPRK' (ἵππαρχος or ὕπαρχος) and KLYRK' (χιλίαρχος), and Roman as QNṬRYN' (*centurio*) perhaps as a version of κεντυρίων.[24] However, since the Nabataeans were Arabs with their own native law, and their legal documents written in Aramaic, and the Nabataean kingdom was not, before its incorporation as a province, ruled by

[17] Bowersock (1983: 82).
[18] *Peripl. M. Rubr.* 19.
[19] Young (1997); and see Chapter 4.
[20] Strabo 16. 4. 21 C779.
[21] Strabo 16. 4. 26 C783-784.
[22] Diod. Sic. 19. 98.
[23] Cantineau (1930-2: vol II, 21-22); Bowersock (1983: 73).
[24] Joseph. *AJ* 13. 392; *BJ* 1. 103; Meshorer, (1975: 86-87, Nos 5-8); Bowersock (1983: 25-6); *Ḥ* 6, 7. 29, 31.

any Greek dynasty, it is not necessarily the case that the law of the kingdom was to any significant degree influenced by the law of the Hellenistic kingdoms, or Hellenstic law. That law has been described by J. Mélèze-Modrzejewski as "nothing else but Greek law practiced by the Greek-speaking immigrants within the kingdoms stemming from Alexander's conquests".[25] Although, for example, inscriptions from the period of the Nabataean kingdom show that some Nabataean officials bore Greek titles, in my view that should not be regarded as evidence of substantial legal influence from the law of any Hellenistic kingdom. Nor, since the legal sources affecting the law of the Province can be plausibly explained as Roman, Jewish and Nabataean, do I find persuasive the suggestion of Judith Evans-Grubbs concerning evidence pointing to the influence of "a sort of Eastern Mediterranean 'koine'. It will not be among the assumptions upon which the discussion contained in this thesis will be based.[26]

Whether the Nabataeams spoke Arabic or Aramaic has been the subject of substantial debate but since their legal documents were written in Aramaic it is not necessary to resolve the question. It seems likely that inhabitants of the Province spoke a dialect of Arabic or one of the Ancient North Arabian dialects.[27]

At the time of its incorporation into the Roman empire, "there remained in the circuit of imperial provinces along the desert's edge only the space extending across the Sinai from Egypt into and encompassing the Negev, together with the entire territory of Transjordan, from the Syrian Ḥawran to the Gulf of 'Aqaba", namely the Nabataean kingdom; and in 106 CE that land was annexed by the Emperor Trajan.[28]

According to the *Epitome* of Xiphilinus, in his *Roman History* Cassius Dio, who wrote in the early third century CE, gave the following account of the subjection of Nabataea and the establishment of the Province:

> Κατὰ δὲ τὸν αὐτὸν τοῦτον χρόνον καὶ Πάλμας τῆς Συρίας ἄρχων τὴν Ἀραβίαν τὴν πρὸς τῇ Πέτρᾳ ἐχειρώσατο καὶ Ῥωμαίων ὑπήκοον ἐποιήσατο,[29]

but Ammianus Marcellinus, writing in his *History* in the fourth century CE said of the Province:

[25] Mélèze-Modrzejewski (2005: 8); nor were Babatha and Salome Komaïse and their families Greek-speaking or "Hellenized": Cotton (1998a: 168).
[26] That suggestion is quoted in Part 8 of this chapter.
[27] Fienna et alii (2015: 396-7, 429-430).
[28] Bowersock (1983: 2).
[29] Cass. Dio 68. 14. 5.

> Hanc provinciae imposito nomine, rectoreque adtributo obtemporare legibus nostris Traianus compulit imperator, incolarum tumore saepe contunso, cum glorioso Marte Mediam urgeret et Parthos.[30]

Although it is clear that the annexation of the Province was achieved by A. Cornelius Palma Frontinus, who was then governor of Syria, it is not clear whether the annexation was achieved peacefully or as a result of a successful war, as is suggested by Ammianus Marcellinus. We may however infer from legends on the coinage issued by the Emperor Trajan to commemorate the establishment of the Province, that it was achieved peacefully, since that coinage bore the legend "ARABIA ADQUISITA", or an abbreviation of it, as contrasted with that commemorating the conquest of Judaea, annexed as a province in 4 BCE and reconquered after the failure of the rebellion of Shimon Bar Kokhba in 135 CE, which bore the legend "IUDAEA CAPTA", or "IUDAEA RECEPTA", and that commemorating the conquest of Dacia in 106 CE which bore the legend "DAC(IA) CAP(TA)".[31] Moreover, Trajan never took the title "Arabicus" or any title proclaiming the conquest of the Nabataean Kingdom although he took the title "Dacicus" after the conquest of Dacia; the coin legend used for Arabia is more appropriate to a peaceful or largely peaceful annexation and we should accept that "the evidence for the annexation of Arabia implies a military presence and perhaps even some military skirmishes, but no major conflict".[32] This would be likely in view of the probable client status of the kingdom before its annexation.

From the evidence of inscriptions and graffiti from the period after the annexation of the Province it appears that it included in the South the Negev and part of the Sinai, and as far as Aqaba on the Red Sea; in the North, Bostra and three cities, Canatha, Gerasa, Philadelphia (or Amman), which were formerly part of the Decapolis; and in the East the Wadi Sirhan; and Ḥegra or Meda'in Ṣaliḥ in the Hejaz.[33] I annexe to this Chapter a map of the Province, showing places in it relevant to this thesis.

The Province formed part of the large *provincia* of the emperor, and was governed by an officer with the title "Legatus Augusti pro praetore", whom I will refer to as "the governor". At the time of the annexation of the Province, C. Claudius Severus was appointed governor of it, and

[30] Amm. Marc. 14. 8. 13.
[31] Gambash et al (2013: 89-104); Mattingly & Sydenham (1926: 250-261, Nos 94-95 & 244-245 [Arabia]; and 250, No 96 [Dacia]).
[32] Bowersock (1983: 81).
[33] *ILS* II 963, 964 & 1125; Negev (1977: 643); Millar (1993: 94, 95, 96, 138, 388); for the cities of Canatha, Gerasa and Philadelphia see Bowersock (1983: 30); Ptol. *Geog*. 5. 15; Plin. *HN* 5. 18. 74; Amm. Marc. 4. 18. 3; the inscriptions and graffiti are published by Negev (1963) and (1967).

also legate or commander of the *Legio III Cyrenaica,* which formed the garrison. A cohort of the legion had a camp at Bostra.[34] There were clearly other Roman officials including officers of that legion in the Province, but the sparseness of the sources enables the identification of only an ἔπαρχος ἱππέων or *praefectus equitum* perhaps stationed at Rabbath-Moab, who received property returns in the census which was held in 127 CE, and a *procurator* stationed at Gerasa perhaps as early as 129-130 CE.[35] The Province and others that were governed under the authority of the emperors, including Egypt, I will refer to as "Augustan provinces", in contrast to those governed by officers holding the title "proconsul" under the authority of the Senate, which I will refer to as "senatorial provinces".

Chapter 2 discusses the establishment of the Province by a *Lex Provinciae* or document through which the Province was established and the rules laid down for its government and administration, together with the contents of it and of those rules so far as can be ascertained, including those relating to the boundaries of the Province, the extent to which the peregrine inhabitants were entitled to their own law and courts administering it, the manner of taxation of the Province and the constitutions of cities in it. In that chapter I also discuss whether there was a provincial edict which applied to the Province, and its contents and provisions so far as they can be stated, and the extent to which Roman law was applied to the Province and the peregrine inhabitants of it.

Part 3 - The Archives and their Discovery

In 1960 and 1961 there were discovered in the "Cave of Letters" in the Wadi Ḥever on the west bank of the Dead Sea, letters passing between Shimon Bar Kokhba, who in about 132 CE raised a revolt against Roman rule in the then province of Judaea, and his lieutenants, from which the Cave acquired its modern name. There were also discovered legal papyri the property of and comprising the archives of Babatha, daughter of Shim'on son of Menaḥem, and of Salome Komaïse, daughter of Levi and of Salome Grapte. I will refer to these documents as "the archive of Babatha" and "the archive of Salome Komaïse" respectively. The archive of Babatha consists of documents in Greek and Aramaic, both Nabataean and Jewish: the Greek documents from the archive of Babatha were published in 1989 by Naphtali Lewis and the Aramaic

[34] Bowersock (1983: 161); *P Mich* 8. 466.
[35] *P Yadin* 16; *XḤev/Se* 61; *CIL* 3. 14157; Haensch (1993); Graf (1994: 31).

documents in 2002 by Yigael Yadin, Jonas C Greenfield, Ada Yardeni and Baruch A Levine.[36] All these papyri are here cited by number as "*P Yadin*". The archive of Salome Komaïse includes documents in Greek and one document in Jewish Aramaic: they were published in 1997 by Hannah M. Cotton and Ada Yardeni and are cited by number as "*XḤev/Se*".[37]

The documents from the archives which date from before the establishment of the Province are written in Aramaic, either Jewish or Nabataean, and those that date from after the establishment are generally in Greek, the ordinary language of the government and administration of the Province, with a few only in Aramaic together with one (*XḤev/Se* 64) that has been described as a document that was translated from Aramaic into Greek and can be translated literally back into the original Aramaic text.[38] The former include conveyances both by sale and gift and other documents which were written under the Nabataean legal system and disclose the relevant law of Nabataea. The latter were almost all written in the light of Roman law introduced into the Province by the establishment of it, but Babatha's *ketubbah* or marriage agreement and other documents reveal the use of Jewish law in the Province and some show the continuation of Nabataean law in the Province, after its establishment.

Several of the documents comprising the archives are "double documents" in which the text of the document is recorded twice on the same papyrus, the upper or inner copy being written after the lower or outer copy and then sealed as a protection against falsification of it. In Nabataea and in the Province the double document continued in use after it ceased to be used in Egypt after the Roman conquest.[39] Such a document seems to be referred to in the Old Testament book of Jeremiah (32. 10) where he says that having bought a field "I took the sealed deed of purchase, containing the terms and conditions, and the open copy." Where such a papyrus is damaged it may thus be possible to restore damaged parts by comparison with the other copy of the text and in the case of the conveyances of land by ʾAbi-ʿAdan to Archelaus and to Shimʿon, which are in similar terms, it has been possible to resort to four copies for the restoration of the text.[40]

[36] Lewis (1997); Yadin et al (2002).
[37] Cotton & Yardeni (1997).
[38] Cotton & Yardeni (1997: 206).
[39] Rupprecht (1994: 135-7); see also Lewis (1997: 6-10).
[40] *P Yadin* 2-3.

Part 4 - The Families of Babatha and of Salome Komaïse

(a) The Family of Babatha

These legal documents reveal the legal positions of two Jewish families formerly resident at Maḥoza, which was situated in the περίμετρον of which Petra was the chief city. They also reveal the relationships within the family of Babatha and to a lesser extent those within the family of Salome Komaïse.

Babatha, daughter of Shimʿon and Miriam, apparently lived during the whole of her life until 132 CE in Maḥoza.

Her father owned several date groves at Maḥoza which in July 130 he gave to his wife Miriam by a document in Jewish Aramaic by which he reserved to himself the usufruct and possession of them during his lifetime, so that she would receive full ownership only at his death; and by the same document he reserved a right of residence in a portion of the property for the use of Babatha if she should be widowed and without a husband.[41]

Babatha was married twice, first to Jesus by whom she had a son also called Jesus, but so far as we know no other children. We cannot say when this marriage took place. The father of her husband Jesus was also called Jesus and he had a brother Joseph with whom he appears to have been in a business partnership. He died in or before 110 CE since in that year Joseph acknowledged that he held over 1,000 "blacks," or "the old Nabataean silver," local currency of the Nabataean kingdom, for his nephew Jesus, whom Babatha later married.[42]

Jesus the son of Babatha and her husband Jesus was no older than 14 years in 127 CE since he was still then under *tutela*.[43] Babatha's husband Jesus must have died in or shortly before 124 CE, since in that year the βουλή of the city of Petra, then styled "Metropolis of the Province of Arabia," appointed ʿAbdoʿabdas, a Nabataean, and John of Eglas, who was Jewish, as tutors of Babatha's son Jesus; and a receipt for the maintenance of Jesus given by Babatha to Simon, son of John of Eglas, shows that in 127 CE he was appointed by that βουλή as second tutor apparently in substitution for his father, who may have died in the intervening period.[44]

[41] *P Yadin* 7.
[42] *P Yadin* 5; Cotton (2009: 166).
[43] *P Yadin* 27.
[44] *P Yadin* 12, 27.

At some time after the death of her husband Jesus, and after the establishment of the Province, but before 125 CE Babatha married Yehudah son of Eleazar Khthousion under a *ketubbah* written in Jewish Aramaic.[45] As far as we know there were no children of the marriage of Babatha and Yehudah. He died before September 130 CE, since in that month in agreements concerning the crop of two date groves Babatha described them as the former property of her late husband Yehudah.[46]

At a date we cannot determine, Yehudah had previously married Miriam and they had a daughter Shelamzion, but so far we know no other children. Miriam survived Yehudah and as late as July 131 CE was still living at Maḥoza.[47] It is not shown from the documents in the archives whether Yehudah had previously divorced her, or had taken Babatha as a second and concurrent wife, but for reasons that I discuss in Chapter 5, whether Yehudah had divorced her appears insignificant.

Yehudah had had a brother Jesus, who had predeceased him leaving not fewer than two orphan sons, his nephews, whose names are unknown. They had a tutor Besas and a ἐπίσκοπος Julia Crispina, who was associated with Besas and was enabled to act for him. I discuss her position in Chapter 7.

In April 128 CE Shelamzion married Judah Cimber under a marriage contract written in Greek, but so far as we know had no children.[48]

In a census held in the Province in 127 CE Babatha registered, in her name as her own property, four date groves.[49]

Between the second half of 124 and August 132 CE Babatha became involved in several legal proceedings before the governor of the Province, all of which are discussed in Chapter 3. In the second half of 124 CE soon after the appointment of tutors for her son Jesus, she became dissatisfied with the amount of maintenance for him being paid by the tutors who had been appointed earlier in the year, and petitioned the governor for some relief in relation to it.[50] In October 125 CE she commenced proceedings against one of them, John of Eglas, seeking an order for his removal from the *tutela,* and offering to both of the tutors that she should take

[45] *P Yadin* 10.
[46] *P Yadin* 21-22.
[47] *P Yadin* 26.
[48] *P Yadin* 18.
[49] *P Yadin* 16.
[50] *P Yadin* 13.

over the administration of the property of Jesus, leaving them in office as tutors.[51] Also in October 125 CE, Besas the tutor of the orphan nephews of Yehudah commenced proceedings against her, seeking possession of certain date groves which he asserted belonged not to her but to the orphans, and in August 132 CE Julia Crispina herself commenced proceedings against her in the absence of Besas and in support of him.[52] Lastly in July 131 CE Babatha petitioned an official of the Province for some relief against Miriam, the former wife of Yehudah, perhaps an order authorising her to summon Miriam before him, and in the same month she commenced proceedings against her over the property of Yehudah.[53]

None of this litigation appears, so far as the documents in her archive show, to have been the subject of any final judgment by the governor of the Province or any other judge. Babatha appears to have intended that after the end of his *tutela* her son Jesus should commence proceedings against the tutors in an *actio tutelae,* since she held among her archive three copies of a *formula* for such an action written in Greek.[54]

The latest possibly datable document in the archive of Babatha is a fragment which may be dated in late 132 CE, the year of the revolt of Shimon Bar Kokhba.[55]

(b) The Family of Salome Komaïse

In 127 CE Salome Komaïse, the daughter of Levi and Salome Grapte, who was then apparently married to Sammouos son of Shimʿon released all claims she had against her mother, with whom she seems to have been involved in a dispute.[56] In the same year both Sammouos and an unnamed brother of Salome Komaïse made property declarations in the census held in the Province that year.[57] In 129 CE Salome Grapte gave a date grove and half a courtyard at Maḥoza to Salome Komaïse.[58]

[51] *P Yadin* 14, 15.
[52] *P Yadin* 23, 24, 25.
[53] *P Yadin* 34, 26.
[54] *P Yadin* 28-30.
[55] *P Yadin* 35.
[56] *XḤev/Se* 63 and see Cotton & Yardeni (1997: 160).
[57] *XḤev/Se* 61-62.
[58] *XḤev/Se* 64.

In August 131 CE after the death of Sammouos or his divorce from her, Salome Komaïse and Jesus son of Menaḥem entered a written marriage agreement in Greek, having previously, according to Cotton and Yardeni, lived together under an ἄγραφος γάμος.[59]

The discovery of the archive of Salome Komaïse together with that of Babatha in the Cave of letters, as I have described above, indicates that they and perhaps other members of their families fled to it, taking with them their archives of legal documents.

Part 5 - Sources

The principal material upon which this thesis is based consists of the papyri that were discovered in the Cave of Letters. Those that are from the period after the foundation of the Province end at the time of the Bar Kokhba revolt against the government of the Roman province of Judaea, and I am accordingly dealing in this thesis with the period from the foundation of the Province in 106 CE to the beginning of that revolt 132 CE.

By reason of their character they are informative of the law of the former Kingdom of Nabataea and of the law that in my view determined the rules of marriage and inheritance by which Babatha and her family and other Jewish inhabitants of the Province felt themselves bound, together with Roman law in so far as it became the law of the Province and applicable to the peregrine inhabitants of it. In order to state the law of the Province, which in my view included elements of Nabataean and Jewish law as well as Roman law, I discuss many of those papyri in some detail.

I refer to the Egyptian documentary papyri which I discuss by abbreviations which are explained in the note entitled "Abbreviations". I have, where appropriate, relied upon the wooden tablets from Pompeii and Herculaneum which were preserved notwithstanding the eruption of Mount Vesuvius in 79 CE. They were respectively published by Giuseppe Camodeca in 1999, which are here cited by numbers as "*TPSulp"*; and by Vincenzo Arangio-Ruiz and Giovanni Pugliese Cabratelli between 1946 and 1961 and by Matteo della Corte in 1951, here cited by numbers as "*TH*".[60] I have found useful the *Lex Irnitana,* an incomplete municipal charter for Irni, a *municipium* in the senatorial province of Baetica in Spain, granted

[59] *XḤev/Se* 65 = *P Yadin* 37; Cotton & Yardeni (1997: 228-229).
[60] Camodeca (1999); Arangio-Ruiz & Gabratelli (1946-61); Corte (1951).

in the reign of the Emperor Domitian and published in 1986 by Julián Gonzáles.[61] Irni was one of several *municipia* in that province that were granted constitutions in similar terms during the Flavian period. Since the tablets upon which the *Lex* is engraved are damaged, another of those constitutions, the *Lex municipii Salpensani,* is cited where the text of the *Lex Irnitana* cannot be recovered.[62] Although constitutions of *municipia*, communities with limited self government including a council and magistrates with limited judicial powers, these *leges* are legal codes suficiently close in time to the documents in the archives to be useful in comparison with them, since, in addition to evidence of the provincial edict for that province, they contain provisions relating to the appointment of *tutores* and the exercise of jurisdiction by their magistrates.

For the contemporary Nabataean law the tomb inscriptions in Nabataean from Ḥegra, now called Madaʾin Ṣaliḥ, and elsewhere, which I discuss in Chapter 4 are essential material. They were published by John T. Healey in 1993 and are cited by number as "*Ḥ*".[63] Papyri from the period of the Nabataean kingdom other than those from the archive of Babatha, and written in Nabataean Aramaic, which I discuss in Chapter 4, are cited as indicated in the note on "Abbreviations."

Part 6 - Sources of Law

(a**)** Roman Law

The sources of Roman law are described in his *Institutes* by the jurisconsult Gaius, who lived in the second century and died at some time after 178 CE, as consisting of: *leges* and *plebiscita,* or enactments made by assemblies of the Roman people or that part called the *plebs; senatusconsulta* or commands or ordinances of the Roman senate; imperial *constitutiones* or "quod imperator decreto vel edicto vel epistula constituit"; *edicta* issued by magistrates of the Roman people, the praetors, and curule aediles, and also by governors of provinces, whose

[61] Gonzáles (1986).
[62] For the surviving text of the *Lex municipii Salpensani*, see *FIRA*, i. No 23.
[63] Healey (1993a).

edicts I refer to as "provincial edicts"; and *responsa prudentium,* or decisions on points of law by jurisconsults, such as Gaius himself.[64]

In this thesis frequent reference is made to *responsa prudentium*, which are preserved in a collection known as the *Digest* made after 530 CE, when the Emperor Justinian ordered Tribonian, then his quaestor of the sacred palace, to compile, with the help of a commission, a collection of the writings of the jurists. By a later constitution Justinian gave the collection the force of law.[65] The *Digest* contains texts dating back to the period covered by this thesis. In addition I make reference to texts from the *Institutes* of Gaius, an elementary textbook in which he states the law of the second century CE, substantially contemporaneous with that of the period covered by this thesis.

Later, after an earlier Code or collection of imperial constitutions had become superseded by later legislation, Justinian ordered Tribonian and certain other lawyers to prepare a new edition of it, including imperial constitutions or legislation made since 529 CE. The new edition ("the Code") was published in 534 CE with the force of law. The Code included constitutions dating from the reign of the Emperor Hadrian, who reigned from 117-138 CE.[66]

The editors of both the *Digest* and the Code were authorised to alter the texts of material included in them, in order to eliminate what was obsolete, and contradictions, with the result that there is always a question whether the text of an author quoted in the *Digest* or of a constitution quoted in the Code represents the original form of the text or constitution.[67] An alteration of a text or constitution included in the *Digest* or the Code is referred to as an "interpolation", an expression that is not limited to referring to additions to the text but includes also omissions and substitutions in the text of the original sources.[68] A further result is the necessity to use the texts and constitutions included in the publications of Justinian with care, and I have done so, in the case of texts included in the *Digest* indicating where appropriate, because of the date of the original text, the author of a particular text and the period in which he was writing. A particular case of interpolation of a text of Julianus on *ignominia* quoted in the Digest is discussed in relation to a contract of *depositum* in Chapter 6.[69]

[64] Gaius 1. 2-6.
[65] *Constitutio Tanta* § 23; Jolowicz & Nicholas (1972: 480-482).
[66] *Constitutio Cordi* § 5; Jolowicz & Nicholas (1972: 493-4).
[67] Jolowicz & Nicholas (1972: 481, 494).
[68] Jolowicz & Nicholas (1972: 486-9).
[69] *Dig* 3. 2. 1; *P Yadin* 17.

The codification of the Edicts by the jurisconsult Salvius Julianus during the reign of the Emperor Hadrian, which is discussed in Chapter 2, apparently resulted in a form of provincial edict, or edict issued by a governor of a province at the commencement of his term of office, that was sufficiently fixed and uniform to make it useful for Gaius to make a commentary on it. Extracts of that commentary form part of the *Digest*, and are used in this thesis and in it referred to as "Gaius' Commentary." It is controversial whether during the period of the Principate such an edict was published by the governor of an Augustan province, that applied to his province during his term as governor. In this thesis I show that there was such an edict published for both Egypt and the Province itself, and attempt to state something of their contents.

In addition to such works, literary texts, particularly the works of Cicero and of Pliny the Younger, are relied upon. In a letter to Atticus, Cicero explained the manner in which he drew up the provincial edict for the province of Cilicia of which he was proconsular governor in 51-50 BCE; and in his orations against Verres, who was propraetorial governor of the province of Sicily in 73-1 BCE, and whom Cicero later prosecuted for *repetundae* or extortion before a *quaestio perpetua de repetundis,* he gave much information about the *Lex Rupilia*, the law by which the province was then governed and the rules relating to the government, taxation and legal administration of it were laid down. Georgy Kantor has described Cicero's "overview" of his provincial edict as "the most systematic account of this sort that we possess".[70] Cicero's work informs us of the contents of a Republican *lex provinciae* and provincial edict, and although he was writing during the period of the Republic, his work is also capable of informing us of the contents of similar instruments that were in force during the second century CE. In Chapter 2 I discuss his work for that purpose. Pliny who was during 112 CE governor of the senatorial province of Bithynia-Pontus under a special commission of the Emperor Trajan, has left us in Book 10 of his *Epistles* a series of letters passing between him and Trajan which are useful for the understanding of the *Lex Pompeia* by which the province was established, and the provincial edict by which he governed it.

Several Roman comitial *leges* are relevant to this study: I cite them where possible from the collection of M. H. Crawford, as "*RS"* according to his numbering; otherwise I cite them from the collection of Salvator Riccobono by the volume and number in "Fontes Iuris Romani Antejustiniani".

[70] Kantor (2008: 88).

(b) Jewish Law

The documents that form the archives of both Babatha and Salome Komaïse disclose not only that the families were Jewish but also that they organised their family law, their marriages and the inheritance of their property on the basis of Jewish law, as is shown in Chapter 5.

The relevant Jewish law is collected in the later *Mishnah* and *Tosefta.* The *Mishnah* may be defined as "a deposit of four centuries of Jewish religious and cultural activity in Palestine, beginning at some uncertain date … and ending with the close of the second century A.D." when it was compiled by Rabbi Judah the Patriarch.[71] The *Tosefta* is a companion to the *Mishnah*, "comprehensible only when brought into relationship with it," and was compiled in about 400 CE.[72]

The *Mishnah* and *Tosefta* contain rules relating to marriage, including the terms that a Jewish or rabbinic court would imply in a Jewish marriage agreement, in the *Mishnah* and *Tosefta* called *ketubbah* (plural *ketubbot*), the giving of a dowry, which was also called a *ketubbah*, and the right of a widow married under such an agreement to recover her dowry from a deceased husband's estate. They contain also rules relating to the inheritance of Jewish deceased estates. In this thesis those clauses that a Jewish court would imply in such a marriage agreement are called "the court clauses".

Because of the period over which they were laid down, which includes a period after that covered by this thesis, it is necessary to determine the time at which any particular rule was established.

Cotton has argued that the *halakha* (or traditional law) "adopted the legal usage reflected in the documents (that is Jewish legal documents of the period of the archives)" and, writing of the period from the destruction of the Temple in 70 CE to the end of the revolt of Shimon Bar Kokhba, that "(t)he diversity and fluidity manifested in the documents from the Judaean Desert are the best evidence we have … for the state of Jewish law and the authority exercised by the rabbis at the time".[73] She said of regional traditions that "(o)nce they received halakhic

[71] Danby (1933: xiii).
[72] Neusner (1979: ix).
[73] Cotton (2009: 163); (1998a: 172).

sanction, they could be described as Jewish, not before".[74] Kimberley Czajkowski has similarly argued that:

> 'Jewish' law and justice in this period (that of the archives) in no way equate to rabbinic law or justice. Babatha's *ketubbah* may suggest some kind of awareness of the same tradition that is reflected by the later rabbinic texts, based on the mandatory *ketubbah* components that are listed in the Mishnah. These, however, can just as easily demonstrate that rabbinic sages incorporated existing Near Eastern or Jewish custom into their own law, rather than that Babatha and (Yehudah) were living under some kind of early rabbinic influence (direct or indirect) at this time.

Czajkowski described Babatha's *ketubbah* as "her marriage certificate" and as "often identified as an early example of a *ketubbah* – a Jewish marriage contract".[75]

In her study of the archives Jacobine G. Oudshoorn wrote on the assumption that "part of the rules that were later laid down in the Mishnah were already in force at the time of the papyri (comprised in the archives)".[76] In her argument that a tenancy agreement of 119 CE contained in Babatha's archive reflected Jewish law, she said of the Mishnaic sources upon which she relied, that the material seemed to have stemmed from rabbis who were active "early after the destruction of the temple", being attributed to Rabbi Shimon ben Gamliel. She described him as being "active in the wake of the Bar Kochba (Bar Kokhba) revolt" and argued that those sources could "very well be expected to present a faithful picture of actual (and common) practice in Babatha's lifetime".[77]

However, in order to establish the time at which a particular rule was laid down, it is appropriate to take account of evidence in rabbinic writings that enables an assessment of the time at which particular rulings that appear in them were made.

Herbert Danby has said that "(t)he sixty years of peace (A.D. 70-130) which the country enjoyed before the Bar Cocheba (Bar Kokhba) revolt witnessed the activities of those scholars … to whom is due the formulation and definition of the Oral law as we now have it (so far as concerns essentials) in the Mishnah" and he names as among the chief of them Rabbi Eleazar

[74] Cotton & Yardeni (1997: 154-5).
[75] *P Yadin* 10; Czajkowski (2017: 8, 39, 155).
[76] Oudshoorn (2007: 31).
[77] *P Yadin* 6; *mBM* 9; Oudshoorn (2007: 100); see Chapter 4 where I have argued that it is more appropriate to take the agreement to depend on Nabataean law.

ben Azariah who was of the second generation of Tannaim and was active during the period 80-120 CE.[78]

Since it is reported in the *Mishnah* that Rabbi Eleazar ben Azariah discussed the court clauses that distinguished the position of male and female children, that "(t)he sons will inherit and the daughters will receive maintenance," they must have been established by then.[79] Moreover others of the court clauses must be taken to have predated the period of the archives. The rule that made the whole of the husband's property liable for the repayment of the *ketubbah* was, according to the *Tosefta,* introduced by Rabbi Shimʿon ben Shetah, who was active in the first century BCE.[80] Although the authenticity of that tradition recorded in the *Tosefta* has been doubted, Andrew G. Gross has shown that the provision was operative "even before the redaction of the Mishnah at the end of the second century CE", since both the marriage agreements of Shelamzion and Salome Komaïse, and possibly also that of Babatha, contain a provision, wider than and a modification of that stated in the *Mishnah,* explicitly including property that the husband might acquire in the future, as property liable for the repayment of the dowry. Gross referred also to a demotic deed of endowment of 176 BCE from Egypt which Rabinowitz regarded as bearing "several marks of an affinity with Jewish sources": it contained an acknowledgement by a husband for the return of his wife's endowment in the terms "(e)verything that I have or shall acquire (is) the pledge of thy endowment".[81]

Further the rule of inheritance that preferred the daughter of a deceased and her issue to his brothers must, since it is based on the rule stated in Numbers 27. 8, also predate the period of the archives.[82]

Although Mishnaic law did not recognise a right of testation it was, according to the opinion of Rabbi Yohannan ben Beroqah who wrote in the period about 120-140 CE, permissible to use the verb YRŠ, signifying inheritance where it related to a bequest to the heir. It is provided in the *Mishnah* that "He who says 'Mr. So-and-so will inherit me ('YŠ PLWNY YYRŠNY)', in a case where he has a daughter , … has said nothing whatsoever, (f)or he has made a stipulation contrary to what is written in the Torah", However it is also stated in the *Mishnah* that: "Rabbi Yohannan b. Beroqah says, 'If he made such a statement (that is the use of the verb YRŠ) concerning someone who is suitable for receiving an inheritance from him, his

[78] Danby (1933: xx).
[79] *mKet* 4. 6; Cotton (1998a: 175).
[80] *mKet* 4. 7; *tKet* 12. 1; see Cotton (1998a: 173-174); Yaron (1960: 155).
[81] *BM* 10591; Gross (2013: 152-3); Thompson (1934: 25); Rabinowitz (1956: 41)..
[82] *mBB* 8. 2.

statement is valid'".[83] According to Rivlin, who relied upon a text in the *Jerusalem Talmud*, which was edited in about 500 CE, although the equivalent Greek term (διατίθεμαι) expressed the notion of bequest its use was permissible, since "we have it in the name of Rabbi Shimon ben Gamliel" that the expression was permissible. He was apparently writing during the period 140-165 CE, but it seems that the use of the expression was permissible at the time of the making of Yehudah's gift to Shelamzion.[84]

According to the *Mishnah* Rabbi Shimon ben Gamliel said also "they write two (copies of agreements made between Jews) for two parties, one copy for each", and Neusner held that this gloss applied to contracts of tenancy and sharecropping.[85] Nothing suggests that two copies of such agreements were not required under Jewish law during the period of the archives.

Thus we may conclude that the rules that are reflected in the documents in the archive and were later established as the rules of the *Mishnah* relating to marriage, including dowry and its recovery, and inheritance are likely to have received "halakhic sanction" and to have been accepted as Jewish law by the period of the archives.[86] That law is referred to in this thesis as "Jewish law".

I shall in Chapter 5 argue that those rules relating to marriage and the recovery of a widow's *ketubbah* and inheritance, were so far as they are relevant those that underlie the provisions of the documents in the archives and in particular Babatha's own *ketubbah* or marriage agreement.

Where the provisions of the *Mishnah* and of the *Tosefta* are referred to, they are quoted from the translation of Jacob Neusner.[87] Where it is necessary for the purposes of the thesis to quote the Aramaic or Hebrew text of the *Mishnah* or *Tosefta*, it will be quoted in the conventional transcription used for Hebrew and Aramaic and to assist in the comparison with documents written in Nabataean or Jewish Aramaic, all other Aramaic documents that are included in the archives will be quoted in the same form. In the case of other Aramaic documents the translation of the editor or editors of the document will be used.

[83] *mBB* 8. 5; Rivlin (2005: 181); see *P Yadin* 19.
[84] *yBB* 8. 9 16.c apud Rivlin (2005: 181); Instone-Brewer (2004: 21).
[85] *mBB* 10. 4; Neusner (1983-5: Part 3, 120); see *P Yadin* 6.
[86] Cotton & Yardeni (1997: 155).
[87] Neusner (1988) and (1981), respectively.

(c) Nabataean Law

Before the time of its incorporation into the Roman Empire as the Province, the kingdom of Nabataea was governed under its own native law, about which we have little information. No ancient record of Nabataean law has been preserved and ascertaining the law of Nabataea depends entirely on an analysis of the documents from the kingdom, mainly tomb inscriptions and other dealings in the land in the kingdom, together with some later documents from the archives in so far as they may preserve Nabataean law. Those documents are generally written in Nabataean Aramaic: that is, substantially, Aramaic written in the native script of the kingdom.

Important evidence for Nabataean law during the period of the kingdom is a body of tomb inscriptions, mainly situated at Ḥegra or Mada'in Ṣaliḥ.[88] They are instruments by which a tomb was dedicated and its use restricted to a limited number of persons, normally of the family of the maker of the tomb, and commonly a fine imposed that was payable to a god or an official, often the Nabataean king, by any person breaching the terms of the dedication. In a few cases they disclose that there was a pre-existing document of dedication and that it was deposited in a temple in the kingdom and it may be that in all cases there was such a document.[89]

In addition there are eight or so documents in papyrus, including some contained in the archive of Babatha, which are written in Nabataean and reflect Nabataean law, including conveyances and other dealings with land in Nabataea during the period of the kingdom.[90] Among those papyri is *P Starcky* which concerns redemption of mortgaged or pledged land in the Nabataean kingdom that had been seized and sold. The papyrus is damaged and parts of it were found in the "Cave of Letters" and are known as *P Naḥal Ḥever* 36.[91]

In my view some features of the law disclosed by these documents survived the establishment of the Province, and in Chapter 4 I shall offer arguments to that effect referring to the Nabataean documents that in my view establish the relevant Nabataean law.

[88] Healey (1993a).
[89] Healey (1993b: 203-204).
[90] *P Yadin* 1-4; others are referred to in the note on "Abbreviations" and in Gross (2006: 31 at fn [33]).
[91] I discuss them together in Chapter 4.".

Part 7 – The Work of Ludwig Mitteis and Legal Pluralism

In his 1891 work entitled *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs, mit Beiträgen zur kentniss des griechischen Rechts und der spätrömischen Rechtsentwicklung*, Ludwig Mitteis published an account of "the position of Roman law in the eastern provinces of the Roman empire, particularly during the period of the Principate", discussing the relationship between "Reichsrecht" or the law of Rome as the ruling power and "Volksrecht" or local or indigenous law.[92] In it he relied on the source material that was then available in the form of inscriptions, papyri and legal and literary sources to determine how far indigenous legal institutions, the "Volksrecht", were in force.

There were then available no significant materials relevant to the state of law in the Province during the period of the archives, but, with particular relevance to this thesis, he argued that not only did the Roman provincial authorities allow peregrine communities in the eastern provinces of the empire to use their own law among their own community, but that members of those communities were permitted to litigate even before Roman judges in terms of their own local customs concerning their personal rights. In relation to the most important questions in their lives.[93] Those questions included marriage, succession and guardianship. Mitteis pointed out that in the second century CE Greek laws of guardianship were in force in Athens, and that the question of who was to be guardian or "tutor" and his obligations was determined according to the personal law of the provincials: "nacht dem Personalrecht entscheiden".[94] He observed that according to the Roman view, marriage was governed by the law of the domicile of the parties (*daher dem Recht der Heimat*) and succession governed by the law of the domicile of the deceased (*nur nach dem Recht der Heimat*).[95] Mitteis thus showed that even before the *Constitutio Antoniniana* of 212 CE Roman judges were required to take into account this "nationale Recht", or peregrine or local law, which included the whole personal and family law including judicial processes after death, so that Roman and peregrine law remained differentiated.[96] Thus Mitteis concluded that "das locale Recht" continued to flourish everywhere in the provinces of the Roman empire, and that people in the cities of the eastern

[92] Mitteis (1891); Schiller (1978: 537-8).
[93] Mitteis (1891: 102).
[94] Mitteis (1891: 108).
[95] Mitteis (1891: 105, 108).
[96] Mitteis (1891: 109).

provinces of the empire retained their Hellenic way of life. He also observed that the Greek legal perspective was largely preserved through to the later Roman period.[97]

Mitteis thought that peregrines must have quickly learned the rules of Roman procedural law at least to a degree.[98] He held that peregrines were able to participate in the whole edictal law of actions, evidently based on the principle stated by Gaius that, if it appeared necessary in the interests of justice, the praetor or proconsul allowed actions by or against peregrines by means of a legal fiction of Roman citizenship.[99] He pointed out that provincials were in that respect recognised as full equals of Romans. He held it established that the procedural and substantive provisions of the proconsular edict were fully applied to peregrines as well as to Romans.[100]

Thus Mitteis accepted that Roman provincial authorities did not require the peregrine inhabitants to adopt and use Roman law in their legal transactions or relationships, and asserted that the law of those peregrines and Roman law coexisted in the empire. As explained by Clifford Ando: "The Roman Empire was legally pluralist. That is to say, in any given political space, multiple bodies of law, deriving from discrete sources, and multiple institutions of dispute resolution, potentially held authority over any given issue".[101] The concept may thus be described as "legal pluralism".[102]

Appropriately, Georgy Kantor took the expression "legal pluralism" to mean 'the situation in which two or more laws interact' essentially within the same territory, and stated that it "undoubtedly reflects a certain facet of reality in the classical world, particularly in so far as privileged 'free communities' were concerned, where the enjoyment of 'their own laws' or 'ancestral laws' was guaranteed".[103] As Ari Z. Bryen has argued, in Egypt provincial citizens had awareness of at least some of the laws made by Roman officials and applied to Roman authorities in the expectation that their rights would be enforced.[104] Of documents comprising Babatha's archives Bryen says that "litigants in early second century Arabia wrote documents in Greek according (to) forms comprehensible to Roman magistrates when they presumed that these documents would later come under the scrutiny of an imperial court, further evidence that there was an expectation of enforceable rights independent of a particular local

[97] Mitteis (1981: 110).
[98] Mitteis (1891: 135).
[99] For the *fictio civitatis* see Gaius 4.37 and Ando (2011; 8); and Chapter 2.
[100] Mitteis (1891: 137).
[101] Ando (2016: 283).
[102] See Czajkowski (2017: 17-9).
[103] Kantor (2012: 80 and fn [75]).
[104] Bryen (2012: 788, 798).

citizenship".[105] Alonso referred to "(t)he case-by-case approach to the application of peregrine law in Egypt", and held that peregrine law was in Egypt law "from the beginning" as was shown by its consistent application there, and that the Roman law enforcement of Ptolemaic laws showed that the Roman administration of Egypt was ready to retain them as "part of Roman provincial law".[106]

A consequence of this pluralism is that peregrine inhabitants of the Province were generally able to adopt and use Roman law, other than that relating to marriage, and succession, or to use the law of their own community, and since the Roman provincial authorities did not generally require their adherence to Roman law, "in the case of Babatha and her legal adviser in 'Arabia' it is the locals who do the choosing, rather than the representatives of Rome".[107]

That this was so in the Province during the period of the archives is shown by the documents comprising them. Thus those documents show that Babatha and other Jewish inhabitants of the Province made their marriage contracts following Jewish law either entirely or at least to some extent, and that the succession to their estates was governed according to that law. They also show also that those inhabitants of the Province took the benefit of Roman law in making their contracts, employing Roman law forms, including that of the *stipulatio*, which they used where they considered it appropriate even in relation to marriage contracts.

Those documents show also that the Jewish inhabitants of the Province or their legal advisers had by the period of the archives already sufficiently learned the rules of Roman procedural law to conduct their litigation in the court of the governor and in accordance with Roman law procedure. They also show those inhabitants of the Province participating in some at least of the forms of action enacted for the Province by its provincial edict.

Although the Jewish law of marriage and succession was not the law of their domicile, but of their community, it is apparent that they regarded it as binding upon themselves in relation to marriage and succession, and that the governor of the Province regarded it as having that status. Accordingly it may be regarded as the equivalent of the law of their domicile. However, as is shown in Chapter 7, Jewish law contained no provision for the guardianship or *tutela* of women but Babatha and other Jewish women resident in the Province, when making agreements or taking part in litigation, chose to be accompanied by or to express themselves as acting with the *auctoritas* of a *tutor*, as if required to do so by Roman law as the "Reichsrecht". Further

[105] Bryen (2012: 788).
[106] Alonso (2013: 359, 403).
[107] Kantor (2012: 81).

although Jewish law made provision for the appointment of guardians for infants, it is apparent that it was not applied in the case of Babatha's son Jesus, or the children of Yehudah's brother Jesus, and for them it was necessary that *tutores* be appointed in accordance with Roman law as the "Reichsrecht", and the Roman law of *tutela impuberum* applied to them..

Part 8 – Previous Literature on the Archives and the Law in the Province

The archives have, especially after their full publication, been the subject of extensive scholarly analysis, too great to enable a full discussion of it. In this chapter the work on the archives that has been prominent is discussed. In this thesis I discuss and refer to other work on the archives that is not dealt with in this Part.

In addition to editing with Ada Yardeni the documents in the archive of Salome Komaïse, Hannah Cotton has written extensively on documents from both archives. Her work has covered many aspects of the law of the archives, generally concerned with particular documents in the archives or particular issues in the law. Her work is frequently referred to in this thesis.

Some issues justify particular mention here. She and Yardeni identified a document evidencing a gift made by Salome Grapte to her daughter Salome Komaïse as written as a literal translation into Greek of "an Aramaic *Urtext"* and argued that the parties' resort to Greek was "to be explained by the desire to make the gift valid and enforceable in a Greek speaking court, such as that of the governor of the Province" and possibly also the need to deposit the document in a public archive of the Province.[108] It appears that Oudshoorn challenged this view, as I discuss elsewhere in this Chapter.[109]

In a paper written jointly with Jonas C Greenfield, Cotton also argued that gifts evidenced in the archives were made to protect the donors' daughters or wives from the consequences of the Jewish law of inheritance, which excluded from inheritance widows of a deceased and, in certain circumstances, excluded daughters.[110] The Jewish law of inheritance as it applies to the family of Babatha, and the status of such gifts, is discussed in Chapter 5. Cotton argued also

[108] *XḤev/Se* 64; Cotton & Yardeni (1997: 206-7); Cotton (1998a: 168-9).
[109] Oudshoorn (2007: 34 fn [115]).
[110] Cotton & Greenfield (1994: 218-9); see *P Yadin* 7; 19; *XḤev/Se* 64.

for the availability of local Jewish courts perhaps of arbitration and Jewish mediation in the Province since she regarded the expression παρῳχημέν[ης ἀμφισβ]ητήσεως ὅρκου ἐπ̣[ιδοθέντος] contained in the renunciation of claims by Salome Komaïse in favour of her mother Salome Grapte as showing that there had been either mediation or arbitration between them.[111] Oudshoorn thought the possibility of local courts could not be excluded, but that Cotton's argument that evidence for other possibilities for dispute settlement than Roman law courts could be found in that renunciation of claims, "not very compelling".[112] I accept that there is no direct evidence for the existence in the Province of Jewish courts exercising Jewish jurisdiction, but in Chapter 3 discuss the possibility that the governor of the Province might delegate the hearing of litigation between Jews to a person qualified to exercise it. Cotton's contentions on the state of Jewish law at the period of the archives I have described and discussed elsewhere in this chapter.

Cotton distinguished between the use in documents from the archives that were written in Greek of expressions in the form συμπάροντος αὐτῇ ἐπιτρόπου which describe her as accompanied by her *tutor,* and those in the form διὰ ἐπιτρόπου which describe her as acting through such a *tutor*.[113] Her contentions are discussed in Chapter 7.

Among the work of Cotton is a study of Roman officials and civil jurisdiction in the Province, written jointly with Professor Werner Eck and published in 2005 in *Law in the Documents of the Judaean Desert,* a collection of studies presented at a 1998 workshop and edited by Ranon Katzoff and David Schaps.[114] The papers published in the collection particularly cover questions of marriage, succession, guardianship and gifts that arise in the documents in the archives. This thesis refers to several of the papers that are collected in it.

In her 2007 study entitled *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*", Oudshoorn sought to establish the relationship between Roman and Jewish law as disclosed in the documents in the archives.[115]

After discussing the conclusions of Ludwig Mitteis on the relationship between the "Reichsrecht" and "Volksrecht", which she described as "that the law of the indigenous population, 'das Volksrecht', continued to play an important part" in the law of the eastern

[111] *XḤev/Se* 63; Cotton (2002: 23-5).
[112] Oudshoorn (2007: 74-5).
[113] Cotton (1997a: 271).
[114] Katzoff & Schapps (2005); Cotton & Eck (2005).
[115] Oudshoorn (2007).

provinces of the empire at least until the making of the *Constitutio Antoniniana* of 212 CE; that "although jurisdiction was completely in Roman hands, local custom and traditions were maintained in such areas as personal status, marriage, and the law of succession"; and that "even though people in the provinces went to a Roman court, cases in certain areas of the law might be judged on the basis of local indigenous law".[116]

Oudshoorn thus considered that a question arose from the documents of the archives whether the Roman authorities in the Province were "more than just tolerating of local custom" She considered those archives "the perfect material for an investigation into the relationship between 'Reichsrecht' ... and 'Volksrecht' … in the newly founded province of Arabia", and proposed to show that there were clear indicators in those documents that local law was understood "as a system of law, not just as some local custom".[117] She stressed that the documents were "documents by Jews" so that "it could also be assumed that there was an ongoing, perhaps even a lasting influence of Jewish law", and she instanced Babatha's marriage agreement. She described it as "a very early example of a *ketubba*(*h*), a Jewish marriage contract including the Mishnaic court stipulations", that "adhered to what became normative Jewish law not much later", and raised "expectations about the applicability of Jewish law to other legal acts in the archive".[118]

After reviewing previous work on the archives, including the work of Hannah Cotton and the essays published in 2005 in the collection of *Law in the Documents in the Judaean Desert,* Oudshoorn concluded that in that collection the cases made 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 (her) present study". However she held that the "contributions focus on showing how one law (as opposed to another) played an important part in single papyri", and that "the questions to the legal background of the documents and the relationship between laws remain unanswered".[119] She thus held that what was missed "in research into these documents in general" is that "there is a distinction between the substantive and the formal law that is applicable to a document". She argued that it was not always the case that they drew on the same legal system, and proposed the use of "a substantive-formal division" as "a strategy to deal with several possibly applicable laws", stating that in some cases "(w)hile substantively

[116] Oudshoorn (2007: 25-6).
[117] Oudshoorn (2007: 29-30).
[118] Oudshoorn (2007: 30-1); *P Yadin* 10.
[119] Oudshoorn (2017: 38-9).

one law is used, formally documents can be adjusted to the demands of another legal system".[120]

Oudshoorn appears to have defined "law or legal system", as "a set of rules" which had the distinguishing element "that it was likely that these rules were really applied in everyday life, not in single instances but consistently", or as "a general legal practice". She held that "(w)hen 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". She suggested that the only way in which those difficulties could be solved was "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".[121]

Oudshoorn discussed Jewish law at the time of the archives and concluded that what is found in the archives is "Jewish law".[122] She accepted the view of Cotton that "no claims can be made for any rule being normative at the time of the papyri (comprising the archives)", but asserted that "it could be assumed that rules that later became normative law were already being applied at the time (of the archives)", adducing the argument of Cotton that the rabbinic commentary written in Hebrew cited *verbatim* legal formulae written in Aramaic, to show that the clauses were adopted from actual contracts that must have functioned in the period before the *Mishnah* became codified.[123]

Rather than comparing the contents of legal acts with phrases known from later rabbinical literature, Oudshoorn explained that she sought to "show in what overall legal framework the document should be read", and to do this specifically from "references to the applicable law, that is, clear cut indications in the documents of what law was applicable to the document *as a whole*". Such a phrase is Yehudah's promise to take Babatha as his wife [KDY]N MWŠH WYH[W]D'Y or "according to the law of Moses and the Judaeans" in her marriage contract.[124] According to Oudshoorn this enabled the identification of the provision found in that document that the groom and all he owned were liable for the return of the dowry to be identified as

[120] Oudshoorn (2007: 39-42).
[121] Oudshoorn (2007: 43-4).
[122] Oudshoorn (2007: 44-50).
[123] Oudshoorn (2007: 44-5).
[124] Oudshoorn (2007: 48); *P Yadin* 10.

derived from Jewish law, although this liability was also "a feature of Greek marriage contracts". She argued that this approach was of great importance because "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". For Oudshoorn it showed also that Jewish law "indeed constituted a law (and not mere custom), to which documents could refer", and that "local law enjoyed a status as legal system co-equal to the Roman legal system".[125]

For the documents in Babatha's archive dating from the period of the Nabataean kingdom Oudshoorn distinguished between business matters, which "(o)ne might assume ... were arranged according to accepted traditions and customs", and "(m)ore personal matters like family matters (marriage, matters of succession)", which "could then be expected to be handled in another manner, depending on the persons involved" She concluded that "(b)usiness 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". She instanced the treatment of rights of irrigation annexed to the land sold by ʾAbi-ʿadan to Archelaus, a Nabataean official, and later, after that sale seems to have been cancelled, to Shimʿon, a Jew and apparently the father of Babatha. In the former the expression describing the times of use of the irrigation right was KDY ḤZʾ or KDY ḤZH "as is proper", but in the latter an expression restricting its use to BYWM ḤD BŠ[...] or "on the first day of the week", of which Oudshoorn explained that it "seems to have been based on the Jewish regulation regarding the Sabbath: a period is specified to avoid any possible irrigation on the Sabbath".[126] I have discussed these documents and the view of Healey in Chapter 4.[127] Thus Oudshoorn thought that "(c)onsequently, it does not seem to be 'of great interest' that Shimʿon purchased 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", so it is apparent that the thrust of Oudshoorn's argument is to establish the preponderance of Jewish law in the archives.[128]

Oudshoorn considered that after the establishment of the Province "a gradual development of merging laws and establishment of a common law tradition" was not possible and that the former distinction between general and specific law could no longer work in the same way as

[125] Oudshoorn (2007: 48-9).
[126] *P Yadin* 2-3; Oudshoorn (2007: 95-7; 188-193).
[127] Healey (2013: 176-7).
[128] Oudshoorn (2007: 96).

it had done before. She thus held that "with Roman rule, general and specific law as they stood had now both become specific law, while the new system – Roman law – was the general one".[129]

Oudshoorn thought that the lack of a clear indication in the Greek papyri from the archives that that there were other courts in the Province, suggested that "jurisdiction was completely in Roman hands and that the indigenous population had to turn to a Roman court for dispute settlement".[130] She thought that as a result "the judges came from a different legal background than the parties who made the contracts", and it became pointless to use references in the form "as is proper' or "as is customary", because "there was no framework the parties and the court shared". She held that thereafter references were no longer made to a general legal framework in that form, but "to specific rules and customs: 'according to the law of deposit' or 'in accordance with Greek custom'".[131] She argued that although "the phrase 'according to the law of deposit' does not say what law of deposit was meant: Jewish, Greek-Hellenistic or Roman?" nevertheless "(i)t seems that without a determinative adjective it was clear to what law these documents refer", and that "(e)ven a cursory overview of the references to law in the papyri in their contexts shows that the documents do not refer to Roman law".[132] She held that "(i)n 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 (Yehudah's) nephews to his inheritance". She argued that the position of the parties "did not fit with Roman legal practice", and that the "references to law in the documents were not references to Roman law". [133] In Chapter 6 I discuss the contract, novated by *stipulatio,* under which Babatha deposited money with Yehudah and the *stipulationes* by which Babatha dealt with the produce of orchards that were formerly the property of Yehudah and conclude that they were made under Roman law.[134] In Chapter 5 I discuss the respective rights of Shelamzion and of Yehudah's nephews to inherit his estate, and conclude that under Jewish law Shelamzion was his heir.[135]

Oudshoorn held that "we are faced with signals from the texts that point us in two different directions, find clues to the applicability of several laws that seem to be ultimately incompatible". She held that they were not really incompatible since a division had to be made

[129] Oudshoorn (2007: 193).
[130] Oudshoorn (2007: 193).
[131] Oudshoorn (2007: 193-4); *P Yadin* 17, 18; *P Yadin* 37 = *XḤev/Se* 65.
[132] Oudshoorn (2007: 194-5).
[133] Oudshoorn (2007: 194-5); *P Yadin* 21-2; 23-4.
[134] *P Yadin* 17, 21-2.
[135] *P Yadin* 23-5.

"between formal/procedural and substantive law", a consideration which she held missing from the essays in the 2005 collection *Law in the Documents of the Judaean Desert*, and from research into the documents in general. She defined these terms as follows:

> "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".[136]

Professor Judith Evans-Grubbs, in a review of Oudshoorn's work, has suggested that she "works very hard to interpret even documents that ostensibly suggest a Hellenistic or even Roman cultural or legal background as "Jewish" because (she believes) the essential identity and legal framework in which Babatha and her society lived was Jewish". Evans-Grubbs argues that "this insistence upon discovering a fundamentally 'Jewish' context for all the documents results in a number of very forced readings of the texts, some of which stem from a misunderstanding of Roman law"; and that in her discussion of "the 'law of deposit' mentioned in P. Yadin 17 and of the guardianship of Babatha's fatherless son ... her desire to detect Jewish law at the core of every document leads her to ignore or distort evidence pointing to Roman law or, more likely, a sort of Eastern Mediterranean 'koine' similar to what is seen as contemporary papyri of Roman Egypt".[137]

Healey described Oudshoorn as having a focus on Jewish law in the archives "with a programmatic agenda ... (2) of identifying in the texts written for Jews specifically Jewish features linked to later known Jewish law (... on p. Yadin 3: specification of watering-rights so as not to infringe the Sabbath and ... on p. Yadin 6: specifying a method of ploughing which does not infringe Deut 22. 10)".[138] Of her argument concerning a tenancy agreement written in Nabataean Aramaic, Healey said that "her aim appears to be to undermine the claimed Nabataeanness of this document", and described her linguistic analysis as unconvincing.[139] Chapter 6 of this thesis argues that the "law of deposit" to which Oudshoorn referred was that of Roman law under a contract of *depositum*; Chapter 7 argues that the guardianship of Babatha's son was *tutela impuberum* in accordance with Roman law; and Chapter 4 discusses

[136] Oudshoorn (2007: 39-42, 196).
[137] Evans-Grubbs (2009: 2-3).
[138] Healey (2013: 175-6).
[139] *P Yadin* 6; Oudshoorn (2007: 100); Healey (2013: 177).

Oudshoorn's contentions concerning the specification of "a method of ploughing that does not infringe Deut 22. 10", in that tenancy agreement and of watering rights in the conveyance of land by ʾAbi-ʿadan to Shimʿon.[140]

Oudshoorn briefly discussed Roman law; however although she stated that "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", she did not consider whether there had been issued any provincial edict for the Province or whether the law of the Province included any provision imported by such an edict.[141] She also argued that there was a requirement, which is discussed in Chapter 6, that in the Province contracts be made in the form of *sipulationes.*[142] She neither discussed the law of the Nabataean kingdom in any detail although she accepted that the conveyance by ʾAbi-ʿadan to Archelaus and other documents in the archive of Babatha dating from the period of the Nabataean kingdom were made in accordance with Nabataean law, nor whether any part of the law of Nabataea remained in effect after the establishment of the Province. Moreover, as Healey has pointed out, she ignored the evidence of the tomb inscriptions from Madaʾin Ṣaliḥ and elsewhere in the former Kingdom, although he has shown that they are legal documents that disclose elements of Nabataean law.[143] This has led her to treat as evidence of Jewish law the presence of "a distinctive Nabataean term for that (Nabataean) customary law, ḤLYQH/ḤLYQTʾ ", and the term PQDWN or "deposit", both of which occur in Nabataean inscriptions. This is so, although, as Healey also points out, the term PQDWN occurs not only in those inscriptions but in a papyrus from the period of the kingdom which Oudshoorn had discussed.[144]

Oudshoorn argued 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", and that "(t)he 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". She held that "the language used in a lawsuit can reasonably be assumed to be Greek where 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

[140] *P Yadin* 17, 12, 6, 3.
[141] Oudshoorn (2007: 51).
[142] Oudshoorn (2007: 154-5).
[143] Healey (1993a: 42).
[144] *P Yadin* 1; Healey (2013: 177-9); see Chapters 4 & 5.

translator was used to interpret their statements for the Roman judge".[145] Although it is strictly correct that Latin was the only permissible language for verdicts and other formal acts, there is in fact no Latin text preserved in the archives, since all have been translated into Greek.[146] According to Oudshoorn "(t)he documents (of the archives) thus give the impression that Greek was the language that the Roman administration and the Roman judiciary system used", but that "(i)f 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".[147]

Pointing to the agricultural lease agreement written in Nabataean Aramaic, Oudshoorn argued that after the foundation of the Province documents in Nabataean Aramaic did not "have to draw on Nabataean law". She argued that "references to the law should be conclusive in this respect and not the language of the document".[148] After the establishment of the Province legal documents continued to be written in Nabataean Aramaic and were also written in Jewish Aramaic and Greek documents bore Jewish Aramaic subscriptions and signatures,[149] Oudshoorn accordingly held that Aramaic continued to play a part as a "legal language", and was inclined to assume that "it could play a part as a legal language in a Roman court context".[150]

Oudshoorn based her argument on Babatha's approach to the court of the governor of the Province, to enforce agreements that were written in Aramaic, to show that the use of Aramaic did not exclude invoking the jurisdiction of the governor of the Province or of a Roman law court. She relied upon Babatha's summons against Yehudah's first wife Miriam, probably based upon her *ketubbah*, which was wholly written in Aramaic.[151] Oudshoorn also based her argument upon the counterpart agreements by which Babatha arranged the harvesting of the date crop on groves formerly the property of her late husband Yehudah, "thus basing a deal laid down in a Greek contract on a right acquired through an Aramaic contract".[152] Babatha

[145] Oudshoorn (2007: 66).
[146] Oudshoorn (2007: 66); see *P Yadin 12*, extract from the minutes of the βουλή of Petra; *P Yadin* 16, subscription of the ἔπαρχος ἱππέων acknowledging receipt of Babatha's census return; and *P Yadin* 28-30, three copies of a *formula* for an *actio tutelae*, all translated from Latin into Greek.
[147] Oudshoorn (2007: 67, 73).
[148] Oudshoorn (2007: 74); and see *P Yadin* 6.
[149] For documents written in Nabataean Aramaic, see *P Yadin* 6, 9; for those written in Jewish Aramaic see *P Yadin* 7, 8, 10; for documents written in Greek but bearing Jewish Aramaic subscriptions or signatures see *P Yardin* 14-23, 26-7; *XḤev/Se* 62, 64; other documents written in Greek may have had Aramaic subscriptions and signatures that have been lost.
[150] Oudshoorn (2007: 74-5).
[151] *P Yadin* 26, 10.
[152] Oudshoorn (2007: 77).

claimed the right to seize the groves in reliance of her right of seizure under her *ketubbah* to recover her dowry from the property of her husband Yehudah.[153] Oudshoorn asserted that those documents show 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". She also asserted that parties to "a deed in Aramaic had not subjected themselves (exclusively) to local jurisdiction".[154] Healey was "in sympathy with" Oudshoorn's contention that here was "no simple correspondence between the language of a document and the legal system under which it is to be read", and found particularly convincing her argument that "Aramaic documents must have been valid in the eyes of the Roman court at Petra (and Rabbah)".[155] Evans-Grubbs thought that Oudshoorn's argument that documents written in Aramaic "were acceptable in Roman courts" might well be correct.[156]

It may indeed by accepted that documents written in Aramaic might be the subject of litigation in a Roman court, and that they could be received in evidence in such a court, since this is shown by litigation based on documents written in Aramaic or bearing subscriptions and signatures written in Aramaic. The material referred to in Chapter 3 shows that in the litigation between her and Miriam the first wife of Yehudah, Babatha's claim appears to have been based on her right to recover her dowry under her *ketubbah,* and Miriam's claim against Babatha appears also to be based on her *ketubbah,* probably also written in Aramaic, and that they both sought relief by way of Roman law possessory interdicts.[157] That material also shows that Babatha arranged the harvesting of the produce on date groves at Maḥoza in reliance on rights under her *ketubbah* and also under the *depositum* under which she deposited money with Yehudah, a document written in Greek but bearing subscriptions in Aramaic. She apparently relied upon those documents also in her defence of the proceedings brought against her by Besas and Julia Crispina.[158] Further it is to be accepted that litigation involving issues under Jewish law could also be brought before the governor of the Province as is shown by the litigation between Babatha and Miriam which was probably based on their rights of recovery of their dowries under their *ketubbot.*[159] Moreover, the litigation brought by Besas and Julia

[153] *P Yadin* 10, 21-2.
[154] Oudshoorn (2007: 77).
[155] Healey (2013: 182, 181).
[156] Evans-Grubbs (2009:3).
[157] *P Yadin* 10, 26, 34; and see Chapter 5.
[158] *P Yadin* 10, 17, 21-2, 23-5; see Chapter 3.
[159] *P Yadin* 10, 26; see Chapters 3 & 5.

Crispina against Babatha was probably based upon the Jewish law of inheritance, although in it they appear to have sought relief against her by way of Roman a law possessory interdict.[160]

Although it appears that the document by which Salome Grapte gave land at Maḥoza to Salome Komaïse was translated from Aramaic into Greek no doubt to facilitate its use in any proceedings upon it that might be brought before the governor of the Province, the suggestion of Cotton and Yardeni that it was done partly out of a "desire to make the deed of gift valid and enforceable in a Greek-speaking court such as that of the governor of the province" should thus be rejected.[161]

Lastly, Oudshoorn did not consider taxation in the Province, explaining that she did not discuss the census returns of Babatha, the son of Levi or of Sammouos, "(a)s land declarations do not make up legal rights in the sense of the other documents in the archives". She did not consider the material in them that related to the continuation under the Province of the law of Nabataea or that relating to the law of partnership in the Province. She explained that "(a)lthough 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".[162]

In his 2017 publication *Babatha's Orchard: The Yadin Papyri and an Ancient Jewish Family Tale Retold,* Philip F. Esler undertook a close study of the documents in Babatha's archive dating from before the establishment of the Province.[163] I have discussed them in Chapter 4 as evidence of aspects of the law of the Nabataean kingdom. Esler treated those documents as evidence of one transaction, the sale and conveyance of land in Nabataea first to a Nabataean official, and then, after the cancellation of that sale, to Shim'on the father of Babatha, from the point of view of archival ethnography. He described ethnography as "an exploration of a particular world of experience", with the objective "to describe the lives of people other than ourselves, with an accuracy and sensitivity honed by detailed observation and first-hand experience". He distinguished from ethnography "the modern use of legal documents and judicial records to create a vivid picture of a particular social world in the past when not approached from a specifically ethnographic point of view", instancing Bezael Porten's study of the life of Judaean mercenaries in Egypt in the fifth century BCE, which he described as "social history".[164] Archival ethnography he treated as ethnography based on an archive or

[160] *P Yadin* 23-5; see Chapter 3.
[161] *XḤev/Se* 64; Cotton and Yardeni (1997: 207).
[162] *P Yadin* 16; *XḤev/Se* 61, 62; Oudshoorn (2007: 15, fn [43], 55 fn [30]).
[163] Esler (2017). *P Yadin* 1-4.
[164] Esler (2017: 4, 8-9).

collection of documents, such as those of Babatha, rather than on field studies. [165] Thus, Esler was not primarily interested in the law that is disclosed in the documents he studied, and he referred to little of the law of the Nabataeans or of the Jewish inhabitants of the kiingdom.[166] His observations about the law of Nabataea are discussed in Chapter 4.

Also in 2017 Kimberley Czajkowski published her study of the archives under the title *Localized Law: The Babatha and Salome Komaise Archives.*[167] After a discussion of the work of Mitteis and those who followed him since 1891, she wrote of "a new concept of law and empire" and of legal pluralism and the "multiplicity of legal traditions that subjects and rulers alike were compelled to acknowledge ... choose between, decide upon, and generally deal with in their day-to-day lives", and that the focus of modern studies was not on "rules imposed from above" so that scholarship has "shifted from a concentration solely on what the letter of the law was". She wrote that "how people approached and thought about it from their situation 'at the bottom' or 'on the ground' is factored into any understanding of the law within the empire". She referred to the expression used by Caroline Humfress in a then forthcoming article, "law within lived experience", and argued that law was "firmly situated within its social, temporal, and geographical situation" or as she had described it in the title of her work "localized".[168]

Having described the question of what was the "operative law" of the community in which Babatha and Salome Komaïse lived as having become "something of a burning question" and its establishment as "a far from straightforward task", Czajkowski chose

> to take a different tack. As such, anyone hoping to find an answer to the question of which 'operative law' prevailed in the following pages will be disappointed. Rather, I wish here to take full advantage of the opportunity that evidence of this nature offers us: that is to undertake a very specific case study of the way in which these two women, their relatives, and their contacts conducted their legal transactions.

She disavowed any attempt to "identify the 'legal system(s) of these documents at all but rather to understand the 'legal culture' of this multi-legal community".[169] Citing the view of Georgy Kantor that it must be open to doubt whether it can be said of law in the Roman provinces that "every law necessarily belongs to a legal system", she argued that the notion of "systems" of law to which specific rules belonged, "may be an anachronistic attitude to associate with

[165] Esler (2017: 13-22).
[166] Esler (2017: 11).
[167] Czajkowski (2017).
[168] Czajkowski (2017: 15-9).
[169] Czajkowski (2017: 2).

ancient society when considered from the perspective of the provincial litigants themselves".[170] Czajkowski also argued that "system" was "an inappropriate descriptor in this case in this particular era, when we are generally dealing with uncodified, un-unified bodies of law, that may – in the case of both 'Roman' and 'Jewish' law, when we consider the sheer geographic spread of people who had recourse to both – have varied considerably from community to community".[171]

Czajkowski left open the question whether there was a *lex Provinciae* for the Province and did not express an opinion whether there had been issued a provincial edict for it, describing the assumption that there was a provincial edict for the Province as "far from a given". She held that "it seems that governors (of provinces) could decide their own terms on entering their province", but "(o)nce they had set these out, they were theoretically bound to abide" by their edicts, and that "(p)rovincials at least believed governors were bound by their edicts as well as, indeed, their prior decisions".[172]

Although she discussed documents from Babatha's archive written in Nabataean Aramaic and dating from the period of the Nabataean kingdom, Czajkowski said little of Nabataean law and did not discuss any of the Nabataean inscriptions referred to above.[173]

Thus, consistently with this approach, in her discussion of the litigation between Babatha and the guardians (*tutores*) of her son Jesus she said "it has again not been possible to identify conclusively under what legal framework Babatha (made) her challenge. Indeed it is usually easier to say how the case does not fit each particular family of law".[174] Nor did she identify the law under which the βουλή of the city of Petra appointed *tutores* for Jesus saying "there has been some dispute whether the appointment of two guardians followed local or Roman custom", and that the fact that Babatha as the mother of Jesus could not be his *tutor* "explicitly contradicts the provisions of Jewish law, which allowed a mother to act as guardian under certain circumstances, though it fits in with the general tenor of Roman legal provisions". However she cited no legal authority for these statements of Jewish and Roman law.[175]

It is not clear that Roman or Jewish law was then in any relevant sense "uncodified", or "un-unified". Some rules that were later incorporated in the *Mishnah,* not least those relating to

[170] Czajkowski (2017: 130); Kantor (2012: 80).
[171] Czajkowski (2017: 131).
[172] Czajkowski (2017: 98, 170-1).
[173] Czajkowski (2017: 26-30, 35).
[174] *P Yadin* 13-5; Czajkowski (2017: 51).
[175] *P Yadin* 12; Czajkowski (2017: 50-1).

marriage and succession, had, as has been argued elsewhere in this Chapter, become normative Jewish law by the period of the archives. It is also clear that, as is shown in Chapter 2, a provincial edict had been issued for the Province, the terms of which were available in the Province and were similar to those of the urban edict and provincial edicts issued for other provinces, some provisions of which were open to use by peregrine residents of the Province. It thus appears that it is possible to state sufficient of the content of both Roman and Jewish law as they stood at the period of the archives, and applied in the Province, to justify the description of those laws as comprising "systems". Further, the Nabataean tomb inscriptions and papyri written in Nabataean Aramaic referred to above are shown in Chapter 4 to disclose rules of Nabataean law some of which continued in effect in the period of the Province.

Czajkowski argued that the use of Greek, as opposed to Aramaic, in the documents in the archives may have been "a kind of prestige marker", signifying "a supposed connection with or allegiance to the Romans" and "a way of advertising one's own social status in the hope of being treated more favourably in any consequent legal proceedings".[176] Pointing to the fact that "Greek, Roman, Demotic and Jewish parallels" had been identified for various provisions in Shelamzion's marriage contract and that "the 'substantive law' behind the document ha(d) been a matter of much dispute" she argued that the parties to that document did not "seem to be under the impression that the choice of a language (had) automatically put them under the framework of a particular legal system, Roman or otherwise". She did not, however, consider whether the "impression" of those parties could rationally have been relevant to the decision of a judge called upon to decide the law to be applied.[177]

Although she had rejected the relevance of "legal systems" in the analysis of the documents in the archives, Czajkowski appears to have accepted Oudshoorn's distinction between substantive and formal law. She referred to a situation in which a "kind of mixture of laws involves a contrast between, to adopt Jacobine Oudshoorn's terminology for the moment, 'substantive' and 'formal' law". She explained that the contrast arose "when a document appears to have been drawn up with one legal 'system' in mind but adopts the format of another", instancing the documents recording the disputes over Yehudah's estate.[178]

Of Oudshoorn's argument that instead of language, "internal evidence should be considered to see whether this indicates what law was thought applicable to the document", Czajkowski

[176] Czajkowski (2017: 116-7).
[177] *P Yadin* 18; Czajkowski (2017: 119-120).
[178] Czajkowski (2017: 119).

would "agree to a large extent, but stop at her emphasis on the internal evidence as the primary, if not sole, indicator of applicable law: because of the involvement of people beyond the parties themselves, I would suggest that personal interaction and responses must also be taken into account as far as possible".[179] It is, however, unclear how "personal interaction and responses" could affect the question of whether, for example, Babatha was invoking Roman, or some other law, by depositing money with Yehudah in the form of a contract of *depositum*, novated by a contract of *stipulatio.*[180] That is surely a question to which an objective answer may be given although it may be complicated by indicators pointing to different legal systems.

Czajkowski accepted Oudshoorn's demonstration that the Romans did not require that documents be written completely in Greek. She also held, based on Babatha's seizure of date groves in reliance on rights derived from her Aramaic *ketubbah*, her dealings with the date crop upon it and her position in the litigation brought against her by Besas and Julia Crispina about it, that Babatha did "not appear to have thought that she could not make a transaction in a Greek language document based on rights laid out in an Aramaic one".[181] Czajkowski regarded language choice as "part of a wider process of flattery and appeal", but concluded that "(l)anguage was ... in no way determinative of law used", but "was indicative of the authorities whom the litigants intended to approach if problems arose".[182]

Czajkowski discussed the use of "legal formulae" from the point of view of the parties to the documents and accordingly discussed Julia Crispina's use of the expression βίᾳ in her litigation against Babatha rather as a rhetorical expression than as a reference to *vis* and the Roman law remedy of a possessory interdict to which it gave rise, although Nörr has shown that Besas and Julia Crispina were seeking such relief in their proceedings against Babatha.[183] She also suggested that the parties to proceedings may have used "legal formulae" as "informative in function" to help the Roman authorities to understand the issue better if Roman legal terms were used; or persuasive because they believed the use of such formulae would increase the probability of the Romans returning a favourable verdict and as a means by which they might impress Roman Judges; or transformative, to transform "their deeds into a Roman law act". She suggested that Yehudah or the scribe whom he commissioned believed that by the use of a *stipulatio* in his acknowledgement of Babatha's deposit with him "he was thereby placing the

[179] Oudshoorn (2007: 84-7); Czajkowski (2017: 120-1).
[180] *P Yadin* 17.
[181] Czajkowski (2017: 121-2).
[182] Czajkowski (2017: 121-4).
[183] *P Yadin* 23-5; Czajkowski (2017: 126); see Chapter 2.

entire agreement under Roman law", and "in some sense" the parties to Shelamzion's marriage agreement "thought that this *stipulatio* meant that the contract became enforceable in a Roman law forum".[184] In Chapter 6 it is shown not only that the deposit made by Babatha with Yehudah was made in accordance with a Roman law contract of *depositum,* a contract *ius gentium,* so that it was enforceable in the governor's court under Roman law, but that contracts made in the form of or novated by a *stipulatio* were also enforceable in that court since they also were *ius gentium.*

Czajkowski suggested that although it was probable that the parties to the documents in the archives had a notion of law in terms of a body of rules, it was not their primary concern or motivation behind seeking to find out about and apply specific legal formulae. She argued that they "thought more immediately in terms of imposed authority and available legal fora", "(s)eeking out legal formats and selecting a specific language as a way of appealing to those authorities".[185] According to Czajkowski this included references to Greek law and custom in the marriage contracts of Shelamzion and Salome Komaïse, which she suggested should be understood "as allusions to precedent, tradition, or that ever elusive 'custom'". She thought them employed and used in that way "in order to impress upon the Roman authorities the embedded nature of the terms of the contract in the various practices that were in use in the local area", or that "we are just following the long-established norm".[186]

In her discussion of the litigation that is evidenced in the archives, Czajkowski did not generally attempt to identify the law that the parties to it sought to invoke, nor did she discuss in any detail the relief claimed in it. Thus, although she mentioned possessory interdicts, and treated the expression βιά as "probably a Greek rendering of the Latin concept of *vis",* she did not discuss whether, in their litigation against Babatha, Besas and Julia Crispina were seeking the relief in the nature of such Roman law possessory interdicts that is discussed above and in Chapter 2.[187] Czajkowski thought that in her litigation against the *tutores* of her son Jesus, Babatha was not trying to bring "a charge of untrustworthiness", that is a *crimen suspecti tutoris,* against John of Eglas, and did not ask for the removal of either *tutor,* but did not express an opinion of what Babatha sought beyond "to arrange affairs so that she was paid a higher amount from her son's property for his care". Czajkowski suggested that the fact that the governor had allowed Babatha's complaint to proceed might be "an example of the governor

[184] Czajkowski (2017: 128-9); *P Yadin* 17, 18.
[185] Czajkowski (2017: 130).
[186] *P Yadin* 18 and *XḤev/Se* 65; Czajkowski (2017: 130-1).
[187] *P Yadin* 23-5; Czajkowski (2017: 55, with fn [104], 126).

deciding on the basis of evidence provided and the rhetoric of the petition – the case sounded like a plausible one and so was allowed to continue". She said that this "was not strictly in line with Roman law", since "complaints against a guardian were only allowable once the minor had come of age", a rule that did not apply to a *crimen suspecti tutoris*. She treated that litigation as part of tactical means for Babatha to obtain resolution of a dispute through local or Jewish arbitration or mediation, saying that the "primary point is (the governor's) presence and Babatha's invocation of him were meant to influence proceedings".[188]

Czajkowski argued that the lack of mention of peregrine courts in the archives did not "mean that we should automatically rule out the possibility that localized legal fora, if not 'courts' in the formal sense, existed".[189] She considered the possibility that without giving them formal recognition the Roman government may have permitted "tribunals or at least indigenous orderings of some kind, to exist and operate within the empire".[190] She accepted Cotton's argument that Salome Komaïse's renunciation in favour of her mother Salome Grapte represented a settlement of a controversy between them but thought that the question whether the settlement was the result of arbitration in a strict formal sense needed "further consideration".[191] She accepted however that the use of a *stipulatio* in that renunciation showed that the parties contemplated enforcement of the settlement by a Roman court.[192]

Czajkowski argued also that provincials "somehow relied on the authority, power, or threatened power of the Roman imperial government as the ultimate 'backup' of their transactions, even those conducted separately from it", and that they "relied on the Roman authorities ... as the ultimate authority and power in legal matters, believing that these outsiders were somehow more threatening than local institutions". She argued that in Babatha's litigation against the *tutores* of Jesus the governor's presence was "used in this dispute at least as a threat and a bargaining chip". She said that the "summons procedure and the appearance before the governor" in the litigation brought on behalf of the nephews of Yehudah by Julia Crispina against Babatha, were being used "as part of a power play in negotiations. Both (Julia Crispina and Babatha) attempt to deploy it as an intimidation tactic".[193] She regarded Babatha's possession of the copies of the *formula* for an *actio tutelae* that were contained in the documents in her archive principally as a means to intimidate the tutors of Jesus into settling her claim

[188] *P Yadin* 13-5; Czajkowski (2017: 51-2, 192),
[189] *P Yadin* 13-5, 23-6, 28-30 & 34; Czajkowski (2017: 133).
[190] Czajkowski (2017: 157).
[191] Czajkowski (2017: 159); *XḤev/Se* 63.
[192] Czajkowski (2017: 160-1).
[193] Czajkowski (2017: 161-5, 192, 196).

against them or as a threat: "Come to terms, or I go to court and it could cost you very dearly".[194] In Chapter 3 it is shown that the *formula* was rather intended to be used by Jesus after his *tutela* had come to an end in proceedings to recover from the *tutores* maintenance that Babatha contended ought to have been paid.[195] Czajkowski did not, however, consider whether, as suggested by Georgy Kantor, the governor might delegate litigation that had been commenced before him to peregrine tribunals.[196]

Czajkowski discussed payments to be made to the emperor apparently for breach of the terms of contractual documents, which she describes as "in all probability a government tax paid on private transactions, which seems to have corresponded to the same tax payable to the Nabataean king before 106 CE".[197] She did not discuss the census held in the Province in 127 CE or the principles under which it was conducted.

Part 9 – The Approach taken to the Archives in this Thesis

In this thesis I propose, following its title "Law in Roman Arabia 106-132 CE", to examine the law as it is disclosed in the documents in the archives, and on the basis of those documents will attempt to describe, so far as is possible, the law of the Province during that period, and to state, the law, or system of law, in accordance with which each of the documents may be expected to have been drawn, and intended to be construed and enforced.

I take law to be the body of principles and norms recognised and applied within a given body of people in the administration of justice among them. This accords with the sense accepted by Kantor who adopted the second sense of the word "law" given by Frederic L. Cheyette, namely "a conscious verbalised system of norms that people in a society are supposed to observe and that is followed in authoritative settlement of conflicts".[198] Kantor held that *ius* and *lex* and their plurals could refer to "law" in this sense.[199] During the period covered by the archives the nature and terms of documents contained in them show that "principles" or "norms" of Roman law were invoked by the inhabitants of the Province and relied upon in litigation before the governor of it in legal proceedings brought for the purpose of settlement of conflicts or

[194] Czajkowski (2017: 101-5).
[195] *P Yadin* 28-30.
[196] See Chapter 2.
[197] Czajkowski (2017: 30, 109); see Chapter 4.
[198] Kantor (2012: 67-8); Cheyette (1970: 288); no general definition of "law" appears in Alonso (2013).
[199] Kantor (2012: 68).

disputes. Likewise, during the period of the kingdom of Nabataea its inhabitants conducted their legal relations in accordance with a system of such principles or norms, which are shown to have been in operation by the terms of documents contained in the archives and which are discussed in this thesis. That disputes or conflicts in the kingdom were settled by the application of such principles or norms is shown by the availability of machinery for the making of rulings by a person of authority who might be the king, or a judge, interpreter or governor (WQBLT MLK WDYN WPTWR W'SRTG), in accordance with the such principles or norms, since they were apparently to be made in accordance with ḤLYQH or established custom of the inhabitants of the kingdom.[200] Further, the Jewish inhabitants of the Province conducted legal relationships in accordance with Jewish law, and relied upon its principles or norms in legal proceedings before the governor of the Province which were brought for the purpose of resolving disputes or conflicts among them.[201] Since each of Roman, Nabataean and Jewish law comprised a body of principles or norms which were recognised and applied by the governor of the Province in the administration of justice in it, they may each be treated as a "system" of law.

This thesis describes the legal means, a *lex provinciae,* by which a province of the Roman empire was established and the nature of the provincial edict under which a provincial governor governed his province and administered justice within it. I show that there were both a *lex provinciae* and a provincial edict that applied in the Province and describe some of the provisions of them. As part of Roman law that applied in the Province and upon which it was open to peregrine inhabitants to rely, this thesis also discusses the *ius gentium.* In his *Institutes* Gaius distinguished the *ius gentium* from the *ius civile,* or the law that each state established for itself, and described it as: "quod vero naturalis ratio inter omnes homines constituiit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur".[202] The *ius gentium* may be described as "certain rules which, whatever their origin, were a part of the (Roman) law and had been applied in dealings with peregrines".[203] The rules included those relating to slavery, and also certain contracts including some forms of the contract of *stipulatio.* I discuss the cases that arise in the documents in the archives in connection with the documents to which they are relevant.

[200] See *P Starcky*; Healey (2009: 79-89); and Chapter 4.
[201] See Chapter 4.
[202] Gaius 1. 1; Ando (2011: 2-3).
[203] Buckland & Stein (1963: 54).

In this thesis I approach the litigation of which there is evidence in Babatha's archive on the footing that it was brought by the moving parties for the purpose of obtaining a hearing either before the governor or a delegated court or judge whether Roman or Jewish; and that in it those parties sought particular relief on particular grounds, and in accordance with particular legal principles which may be ascertained by examination of the documents in the archives. I also argue that those legal principles may be assigned to particular systems of law.[204] Similarly I treat the contractual documents that are evidenced in the archives as having been drawn and as potentially requiring to be interpreted and enforced in the court of the governor of the Province in accordance with a particular system of law, whether Roman, Jewish, or Nabataean.

Accordingly, in subsequent chapters of this thesis I examine those documents for the purpose of describing that law as fully as possible and setting out conclusions about the systems of law and particular rules of them, that the parties to documents in the archives sought to invoke, and, in the case of documents intended to be used in litigation, the relief that they claimed.

It is true that the parties to the litigation may have contemplated negotiations for settlement of the litigation but nothing suggests that Babatha did not seek an order by the governor of the Province for the removal of John of Eglas as one of the *tutores* of her son Jesus if they declined to renounce administration of the *tutela* as she proposed.[205] Nor is there anything in those documents to suggest that Babatha had obtained copies of a *formula* for an *actio tutelae* otherwise than with the intention that after the end of the *tutela* of her son Jesus, he would seek relief against his *tutores* in such an action.[206] Nor does anything suggest that neither Besas nor Julia Crispina sought an order in the nature of a possessory interdict and ultimately an order granting them possession of the date groves about which they brought their litigation.[207] Nor is there anything in the archives to suggest that neither of Yehudah's widows sought to recover property from the other by means of an order of the governor against the other.[208]

Likewise I approach the remaining legal documents comprised in the archives on the footing that they evidence legal transactions that are referable to particular legal systems and that the character and legal effect of them may be ascertained by reference to that legal system. Thus in Chapter 6 I argue that the deposit made by Babatha with Yehudah was one made in the form of a Roman law contract of *depositum* and that it was therefore referable to Roman law and

[204] See Chapter 3.
[205] *P Yadin* 13-5.
[206] *P Yadin* 28-39.
[207] *P Yadin* 23-5.
[208] *P Yadin* 26, 34.

that its character and the rights and obligations created by it can be ascertained.[209] Similarly in Chapter 5 I argue that Babatha's *ketubbah* is referable to Jewish law since it was made in accordance with legal provisions that were then part of Jewish law and later codified in the *Mishnah.*[210]

In some cases it appears that an agreement was made primarily with reference to one legal system, but that the parties agreed to provisions that depended on another. Thus the arrangement that Babatha made for the working of the date orchards she had seized is, since it was in the form of *stipulationes,* to be considered as made in accordance with Roman law, but the parties to it agreed to provisions that may have been influenced by Jewish custom or practice.[211] The marriage agreements of Shelamzion and Salome Komaïse were partially based on Jewish law, but were enforceable as Roman law *stipulationes.*[212] I conclude also that Nabataean law continued in operation in the Province and is disclosed in provisions of contracts relating to land and conveyances of it by undertakings to protect a purchaser against adverse claims and to pay penalties in the event of default.[213] I also identify continuing elements of Nabataean law in the manner in which a census was conducted in the Province in 127 CE.[214]

Nothing suggests that this is not an appropriate undertaking in relation to the documents comprising the archives, although the poor state of preservation and deficiencies in our knowledge of the applicable laws must be taken into account.

I propose that the examination of the legal documents of the archives and the identification, made on the basis of that examination, of their nature and the legal systems to which they belong, stands as a distinctive contribution to the scholarship of the law of a particular newly established Roman province, and in particular of the Province.

It is apparent that Babatha and the other Jewish inhabitants of the Province whose documents are contained in the archives were able to employ provisions of both Roman and Jewish law doctrines in the conduct of their legal affairs. It is also apparent that it was for parties to contractual arrangements to decide the terms upon which they made those contracts. They were clearly not obliged to follow or employ Roman law in those contracts, since the Roman governor of the Province cannot be shown to have required that the Jewish or other peregrine

[209] *P Yadin* 17; see Chapter 6.
[210] *P Yadin* 10; see Chapter 5.
[211] *P Yadin* 21-2; see Chapter 6.
[212] *P Yadin* 18; *P Yadin* 37 = *XḤev/Se* 65; see Chapter 5.
[213] *P Yadin* 7, 9, 21; see Chapter 6.
[214] *P Yadin* 16, *XḤev/Se* 61-2 see Chapters 4 & 8.

residents of the Province employed or governed themselves according to Roman law. It was, in general, clearly for their decision, whether, for example, Babatha married Yehudah in accordance with the then rules of Jewish law and whether they should regard as binding upon them the then Jewish rules of inheritance. So too was the choice of form of contract, so that it was for Babatha and Yehudah to decide whether she would deposit money with Yehudah in accordance with Roman or some other law, and for the parties to contracts to decide whether or not to make their contracts in the form of Roman law *stipulationes*.

I will make certain observations about what may have been the reasons why the parties to those contracts may have selected one law rather than another. For example in Chapter 7 I will suggest reasons why Babatha and other Jewish inhabitants of the Province were on some occasions accompanied by *tutores* or express themselves to be acting under the *auctoritas* of a *tutor,* although I will argue that *tutela mulierum* is not shown to have applied to them. I will also suggest reasons why the parties to some agreements thought it beneficial to make them, including what are apparently intended as Jewish law marriage agreements, in the form of *stipulationes.*[215]

Since the archives include documents that reflect the former Nabataean law, I will, in order to give as full an account as possible of the law of the Province in the period up to 132 CE, make observations about the law of the kingdom of Nabataea and, in particular, that law in so far as it survived the establishment of the Province.

Although it may seem counterintuitive to place an account of Nabataean law after an account of the law that the Romans brought to the Province, since Nabataean law obviously predated Roman law as the law of the region, as Georgy Kantor said: "from the point of view of Roman law (and Roman power) adopted here, it seems more useful to begin with the institutions which the new rulers carried into (the Province)".[216] For similar reasons, although the families of Babatha and Salome Komaïse were resident in Nabataea before the establishment of the Province and were no doubt then following Jewish law, in this thesis I place the account of that law also after my account of that law brought by the Romans to the Province.

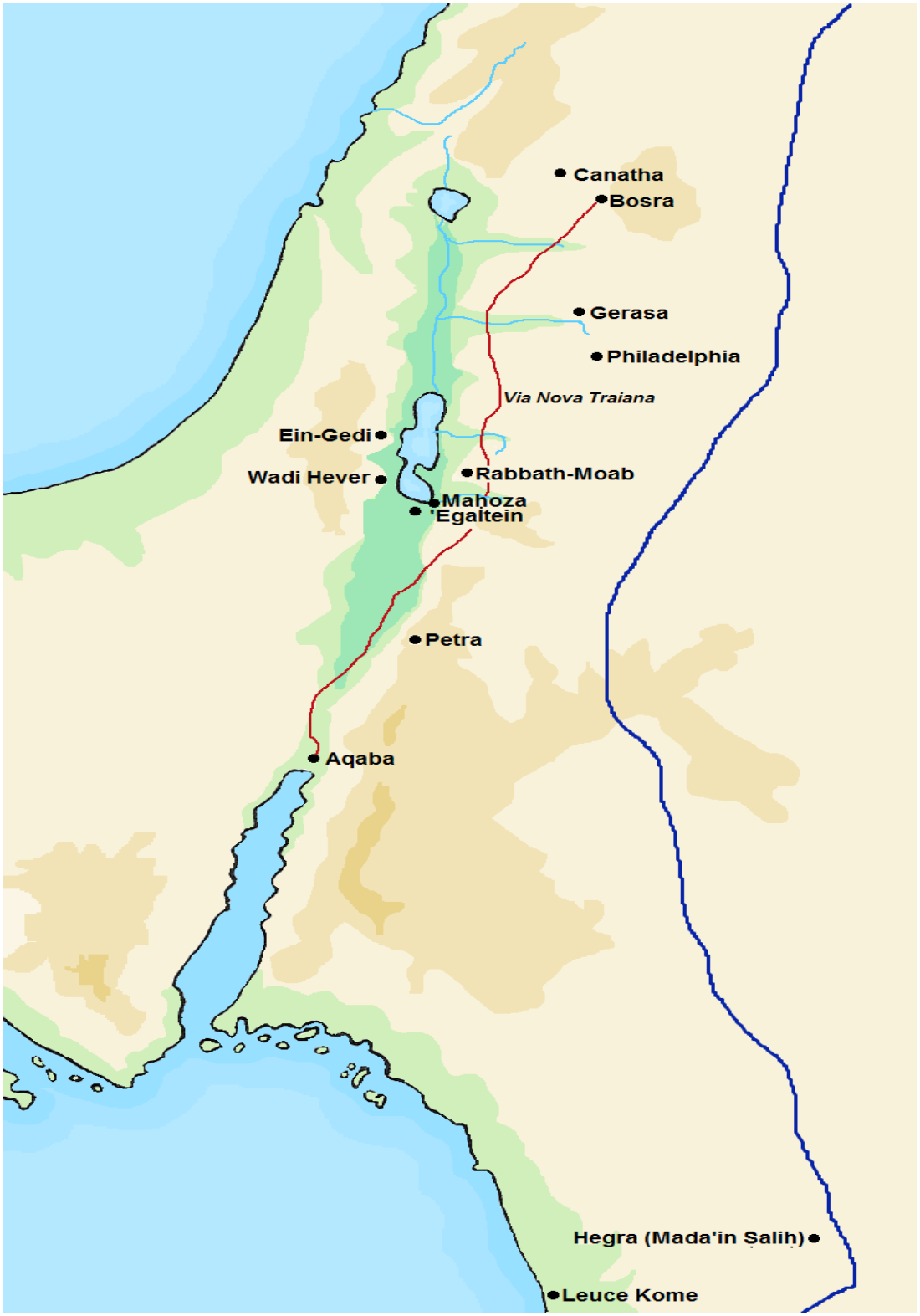
Lastly, since it is intended in this thesis to provide as full as account of the law of the Province as is made possible by the documents in the archives, I discuss the law relating to taxation in the Province. That account will be chiefly based on census returns made in connection with a

[215] *P Yadin* 18; *XḤev/Se* 65; see Chpater 5.
[216] Kantor (2008: 77).

census conducted in the Province in 127 CE. However, since the archives are those of Jewish inhabitants of the Province, I include a short account of the tax that was imposed upon Jews then resident in the empire, although no document in either archive appears to refer to it.[217]

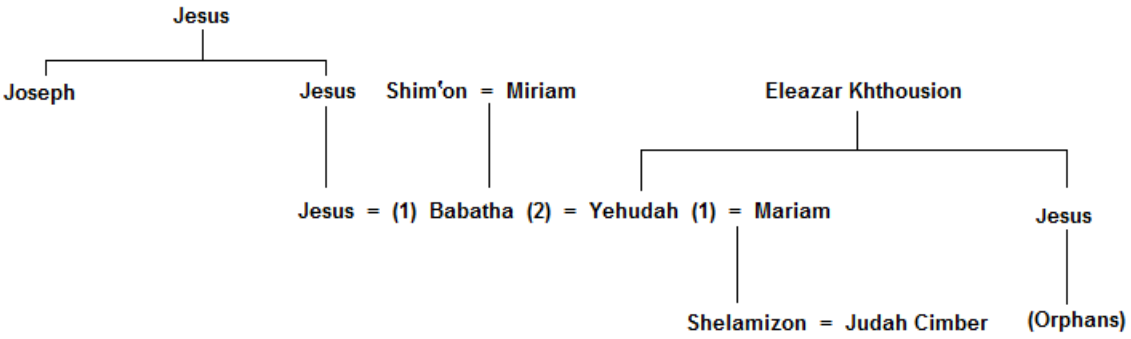
[217] *P Yadin* 16; *XḤev/Se* 61-2; see Chapter 8.

Appendix 1 – Map of the Province of Arabia

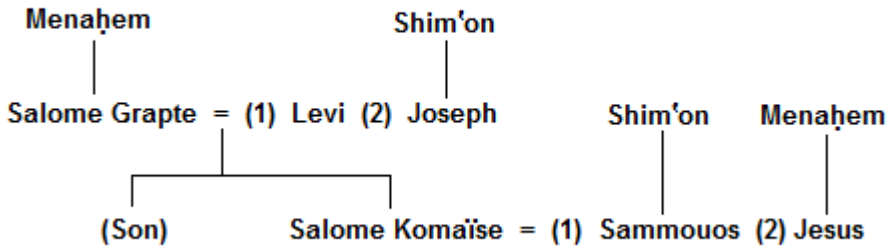


Appendix 2 – Family Trees of Babatha and Salome Komïse

The Families of Babatha and Yehudah



Family Tree of Salome Komaïse Daughter of Levi



Chapter 2 – The Legal Effect of the Annexation of the Province

Part 1 – *Leges Provinciae*

The annexation in 106 CE of the former kingdom of Nabataea as the Roman Province of Arabia brought it into the Roman Empire and more particularly into the *provincia* of the emperor and rendered its population potentially subject to Roman law. However, we have no explicit information about the legal means by which the Province was established, or of the rules under which it was governed and administered by the Roman officials to whom it was assigned.

In the period of the Roman Republic the manner of administration of a province was commonly decreed by regulations, referred to as a *lex provinciae.* Those regulations might be made either by the Senate, or by the magistrate or general by whom a new province had been conquered or brought under Roman rule, or, where the province had already been founded, by its governor, or some other magistrate with *imperium,* in some instances with the assistance of *legati* or commissioners appointed by the Senate, or confirmed by *senatus consultum*.[1] Although described as a "lex", it was, as Cicero says, rather an edict, which could accordingly be varied or departed from by a succeeding governor of the province: "ex P. Rupilii decreto, quod is de decem legatorum sententia statuit, quem illi legem Rupiliam vocant".[2] The *Lex Pompeia* which related to the province of Bithynia-Pontus was, according to Pliny, modified in particular ways by edict, not only of Augustus, but also by a subsequent proconsul Anicius Maximus, and Pliny referred to the Emperor Trajan matters requiring its further amendment.[3] Trajan had already confirmed that "hactenus edicto Augusti novatam esse legem Pompeiam".[4] Cicero, as governor of Cilicia, recommended his quaestor to follow "P. Lentuli … legem et ea quae a me constituta sunt", evidently the *lex provinciae* of the province of Cilicia and Cicero's own provincial edict by which it was amended.[5]

We have no such *lex* for the Province but *leges provinciae* are evidenced from several provinces of the Empire, and although particular *leges* address what were evidently matters relevant to the particular provinces for which they were issued, they show the matters that were generally covered by them. Some of those matters are relevant to the contents of the documents in the

[1] Cic. *Ver.* 2. 32, 39-40; Hoyos (1973: 47-50).
[2] Cic. *Ver.* 2, 32.
[3] Plin. *Ep.* 10. 79. 2; 10. 112. 2; 10. 114. 3.
[4] Plin. *Ep.* 10. 80. 1.
[5] Cic. *Fam.* 13. 48; Hoyos (1973: 52).

archives and we may infer from their contents and those of the *leges* of which we have evidence the subject matter and to some extent the content of the founding document of the Province.[6]

In 168 BCE the Senate allotted the military commands in Macedonia and Illyricum to L. Aemilius Paulus and L. Anicius "donec de sententia legatorum res et bello turbatas et in statum alium ex regno composuissent", appointed ten *legati* for Macedonia and five for Illyricum "quorum de sententia imperatores L Paulus, L Anicius componerent res", and also resolved that "liberos esse ... Macedonas atque Illyrios", that "metalli quoque Macedonici, quod ingens vectigal eat, locationes praediorumque rusticorum tolli", that "in quattuor regiones discribi Macedoniam, ut suum quaeque concilium haberet", and that both Macedonia and Illyricum should pay to the Roman people "dimidium tributi, quam quod regibus ferre soliti errant".[7] Lastly the Senate resolved "cetera ipsis imperatoribus legatisque relicta, in quibus praesens tractatio rerum certiora convertit subiectura erat consilia".[8] Thus the Senate made provision for the government and the financial management, including taxation, of the new provinces, and authorised the generals and the *legati* to complete the provisions for the establishment of them.

In 145 BCE, after the fall of Corinth, L. Mummius, as proconsul of Achaea was authorised by the Senate to act with ten commissioners, and

> ὡς δὲ ἀφίκοντο οἱ σὺν αὐτῷ βουλευσόμενοι, ἐνταῦθα δημοκρατίας μὲν κατέπαυε, καθίστα δὲ ἀπὸ τιμημάτων τὰς ἀρχάς· καὶ φόρος τε ἐτάχθη τῇ Ἑλλάδι … συνέδριά τε κατὰ ἔθνος τὰ ἑκάστων … κατελέλυτο ὁμοίως πάντα,[9]

and according to Polybius, he himself, left by the commissioners to clear up matters until the province grew accustomed to the new constitution and laws, drew up laws for the province:

> πάντες δ᾽ ἔκριναν κατὰ λόγον τοῦτο ποιεῖν· μὴ γὰρ ἐξεργασαμένου τούτου καὶ γράψαντος τοὺς περὶ τῆς κοινῆς δικαιοδοσίας νόμους ἄκριτα πάντα ἦν καὶ πολλῆς γέμοντα ταραχῆς. διὸ καὶ τοῦτο κάλλιστον Πολυβίῳ πεπρᾶχθαι νομιστέον πάντων τῶν προειρημένων.[10]

Thus Mummius, with the assistance of commissioners, established new city constitutions on oligarchic principles in place of former democratic constitutions and made laws relating to the taxation of the province, and at the same time provision was made for the administration of

[6] Much of the evidence is collected and reviewed by Hoyos (1973) and by Fournier (2010: 263-294).
[7] Livy 45. 16. 2; 17. 1; 18. 1, 3, 7.
[8] Livy 45. 18. 7.
[9] Paus. 7. 16. 9.
[10] Polyb. 39. 4. 1; 5. 1; 5. 5-6.

justice in the province. Achaea remained in an anomalous position, under the supervision of the governor of the province of Macedonia, and in a letter of perhaps 115 BCE, which he addressed to the city of Dyme, Q. Fabius Maximus as proconsular governor of Macedonia referred to τῆι ἀποδοθείσῆι τοῖς [Ἀ]χαιοῖς ὑπὸ Ῥωμαίων πολιτ[εία]ι, evidently the constitution prescribed by Mummius and the commissioners; by then Dyme had a constitution which apparently conformed to those imposed by Mummius, in which there were principally magistrates, ἄρχοντες, and a council, συνέδριον.[11]

In 132 BCE P. Rupilius, who was then consul, after the suppression of an uprising, with the assistance of ten *legati* promulgated laws for the province of Sicily, according to Cicero known in Sicily as the *Lex Rupilia,* including provisions that litigation between Sicilians of the same city should be conducted in their own courts and according to their own laws, "Siculi hoc iure sunt ut quod civis cum cive agat domi certet suis legibus", and "ut cives inter sese suis legibus agerunt"; and also extensive provisions for the administration of justice in other litigation among Sicilians and between Sicilians and Romans, including a provision that "(q)uod privatus a populo petit aut populus a privato, senatus ex aliqua civitate qui iudicet datur".[12] Those provisions also continued in operation the corn laws which Cicero described as the *Lex Hieronica*. They were earlier laws of Hiero, former ruler of Syracuse, which governed cases between *aratores* and *decumani,* and provided that no one could be summoned to a court outside his own district.[13] Some cities in the province, among them Segesta, were made exempt from the tax, the right of collection of which was sold under the provisions of the *Lex Hieronica.*[14] Further, provision was made in the laws relating to the constitutions of cities, including the election of censors in each city to carry out tax assessments, and for the election of members of local senates, in the cases of Agrigentum and Heraclea, to ensure balance between senators of two classes of citizenship.[15] Thus in the organisation of the province, provision was made for the administration of justice in the province, and for the constitution and government of cities of it, together with the assessment and collection of tax.

It appears that after the Senate ratified in 129 BCE the legacy of King Attalus III, the consul M' Aquillius with a commission of ten *legati* issued a *lex provinciae* for the new province of Asia, since in an honorific decree from Pergamum to be dated after 125 BCE the honorand is

[11] *RDGE,* No 43.
[12] Cic. *Ver.* 2. 32, 90.
[13] Cic. *Ver.* 2. 32; 3. 38.
[14] Cic. *Ver.* 3. 13, 19, 92.
[15] Cic. *Ver.* 2, 123-125, 131.

stated to have been enrolled in a βουλευτήριον, whether the senate of the city or a regional council is not clear, κατὰ τὴν Ῥωμαϊκὴν νομοθεσίαν apparently established by Aquillius as consul with ten πρεσβεῖς or *legati*.[16] The association of Roman laws with such a commission suggests, although it does not demonstrate, the making of a *lex provinciae.* It seems that it at any rate made provision for the organization of the province including perhaps the constitutions of cities in it. That what Aquillius did amounted to issuing a *lex provinciae* is also made likely by Strabo's observation that he διέταξε τὴν ἐπαρχίαν εἰς τὸ νῦν ἔτι συμμένον τῆς πολιτείας σχῆμα, which according to Fournier suggests that by the *lex* Aquillius may have then divided the province into *conventus.*[17] Although the sources give little information about the provisions of such a *lex*, it seems that it at least dealt generally with the administration of the province.

At about the time of the establishment of the province of Cilicia in about 80 BCE or soon after, P. Lentulus granted a constitution either for that province or for Cyprus, which was part of it, the only known provision being one relating to the administration of justice namely allowing the inhabitants of Cyprus the privilege of not being summoned to a court outside it.[18]

In 67 BCE L. Lucullus was sent as proconsul with a commission of ten πρεσβεῖς to regulate the affairs of Pontus, πρὸς τὴν διάθεσιν τῶν ἐν Πόντῳ πραγμάτων, and issued edicts in an attempt to do so.[19] He was prevented by Pompey who in 63 BCE, after the conclusion of the Mithridatic war, settled regulations, the *Lex Pompeia,* for the administration of the province of Bithynia-Pontus. By them Pompey distributed parts of Pontus to dynasts who had supported him and, having divided the remainder into eleven πολιτεῖαι, joined it to Bithynia to form a single province.[20] In them were also prescribed constitutions for the cities of the province, which included provisions for the election of censors, fixing age limits for the election of city magistrates and the admission of senators, and permitting a city to admit to its citizenship persons other than citizens of another, but without fixing a fee for admission by the censors to a local senate.[21] Under Pompey's provisions "the *publicani* evidently made contracts with the individual cities (πολιτεῖαι) for the amount of the tribute due, the collection of which was left to the communities themselves". [22] Thus by the *Lex Pompeia* Pompey settled the boundaries of the Province of Bithynia-Pontus as well as prescribing constitutions for the cities in it, and

[16] *RDGE,* No 11; *SEG* 50. 1211; for a discussion of the nature of the βουλευτήριον, see Fournier (2010: 269-270).
[17] Strabo 14. 1. 38 C 646; Fournier (2010: 270).
[18] Cic. *Fam* 13. 48; *Att.* 5. 21. 6.
[19] Plut. *Luc.* 35. 5; 36. 1.
[20] Strabo 12. 3. 1 C 541.
[21] Plin. *Ep.* 10. 79, 112, 114.
[22] Kallett-Marx (1995: 328).

making arrangement for its taxation. Because of senatorial opposition, his settlement was ratified only with difficulty, through the assistance of Caesar, by comitial law rather than resolution of the senate.[23]

In 66 BCE Q Metellus, who as proconsul conquered the Cretans, "liberae in id tempus insulae leges dedit", no doubt the giving of a *lex provinciae* upon the reduction of the island into a province: we must infer that the *lex*, which may have been made with the concurrence of *legati* appointed by the Senate, made provision for the future government and administration of the province.[24]

We may also infer that at the time that Egypt was incorporated into the empire in 30 BCE, Augustus established laws for the government of Egypt that may be described as its *lex provinciae*, whether in a single constitutional document or in a series of such documents. That there were such laws may be inferred, since Ulpian in his commentary on the urban edict says of the position of the prefect of Egypt "praefecturam et imperium, quod ad similitudinem proconsulis lege sub Augusto ei datum est", and Tacitus says that "(n)am divus Augustus apud equestres, qui Aegypto praesiderent, lege agi decretaque eorum proinde haberi iusserat ac si magistratus Romani constituissent".[25] Thus, although an equestrian officer, the prefect of Egypt was granted the *ius edicendi* as if he were a magistrate or promagistrate with imperium.[26] Since those laws, whatever their precise character, dealt with the government and administration of Egypt, including the administration of justice, they were evidently of the same nature as a *lex provinciae* as foundational laws for it, having been made by Augustus, no doubt by edict in his capacity as proconsul of the *provincia* in which it was situated. The making of a "great basic law regulating the legal relations of both the Romans and peregrines" in Egypt, namely a *lex provinciae*, was accepted by Raphael Taubenschlag and, following him, Joseph Mélèze-Modrzejewski, who however held that the *lex* was not a *lex data* granted by Augustus but "une loi comitiale".[27] In view of the matters with which the *lex* evidently dealt, and the special position of Egypt under Augustus, this is not shown by the use of the expression "lex" in the text of Ulpian to which I have referred, not least because Tacitus expressly attributes the *lex* to Augustus. It may be that Augustus made further provision for the government and administration of justice in Egypt by *constitutiones* having the force of *leges*, as Mélèze-

[23] Vell. Pat. 2. 40. 5; 44. 1-2.
[24] Livy *Per.* 100.
[25] *Dig*. 1. 17. 1; Tac. *Ann.* 12. 60.
[26] See Gaius 1. 6.
[27] Taubenschlag (1955: 29); Mélèze-Modrzejewski (1968: 326-327).

Modrzejewski suggested with reference to a *constitutio* by which he provided that slaves might be manumitted "apud praefectum Aegypti".[28] In my view such provisions for the government and administration of justice in Egypt made by Augustus, whether by edict or by some other form of *constitutio,* amounted to amendments to the constitutional arrangements for Egypt, just as the *Lex Pompeia* was amended not only by proconsuls as governors of the province of Bithynia-Pontus, but also by the Emperor Augustus himself.

However created, those laws probably dealt with other matters that the evidence shows were generally dealt with in a *lex provinciae,* namely the boundaries of Egypt and taxation and the constitutions of cities in it, and it is possible to identify other provisions that they probably contained: the prohibition upon senators entering Egypt without the permission of the emperor and its separation from the rest of the Empire;[29] particular provisions relating to the administration of justice including the distribution of jurisdiction between the prefect and subordinate courts and judges, which were modified by an edict of M Petronius Mamertinus, prefect between 133-137 CE and which Fournier suggests, "(i)l pourrait s'agir d'un fragment de l'*edictum provinciale* ou d'un texte qui en dépendait étroitement";[30] and a provision that prohibited the grant of Roman citizenship to an Egyptian who had not already obtained that of Alexandria.[31] Since the evidence of papyri shows that native Egyptian law continued in operation after its incorporation into the empire, it appears that those did not in general affect its operation.[32]

Edicts of the prefect of Egypt did not expire at the expiry of the term of office and the imperium of the prefect who made them. That is shown by an edict of the prefect M. Mettius Rufus made in 89 CE that was evidently still an operative provision of the law in 182 CE when it was adopted (κατακολουθεῖν) in an edict of a later prefect Flavius Sulpicius Similis, and relied upon in 186 CE in a petition to a later prefect.[33] A provision having that effect may have stood in the laws established for the government of Egypt.

The government and administration of the Spanish provinces was, until the reign of Augustus, the subject of repeated legislation to only some of which I refer. Soon after Hispania was incorporated as a province the Senate sent a commission of ten senators: ἔπεμψαν ἀπὸ τῆς

[28] Mélèze-Modrzejewski (1968: 327-328); *Dig* 40. 2. 21; for *constitutiones* of Augustus having the force of *leges,* see Gaius 1. 5.
[29] Tac *Ann.* 2. 59; Dio Cass. 51. 17. 1.
[30] *P Yale* Inv No 1606; and see Lewis (1972-3); Fournier (2010: 278).
[31] Plin. *Ep.* 10. 5, 6, 7, 10.
[32] See for example the matters the subject of *P Oxy* 2. 237 cited below.
[33] *P Oxy.* 2. 237 viii. 27-43.

βουλῆς ἄνδρας δέκα τοὺς καταστησομένους αὐτὰ ἐς εἰρήνην.[34] In 197 BCE the Senate ordered the governors of the two provinces of Hispania: "et terminare iussi (sunt) qua ulterior citeriorve provincia servaretur".[35] Shortly afterwards in 195 BCE Cato, after he had restored order in the province of Hispania Citerior "vectigalia magna instituit ex ferrariis argentariisque", which, according to Livy, resulted in the enrichment of it. Since the Senate directed μηδὲν ἀλλάττειν μηδὲ κινεῖν τῶν διῳκημένων ὑπὸ Κάτωνος, Hoyos suggests that his arrangements for the province may have involved a wider set of measures.[36] In 189 BCE L. Aemilius Paullus as proconsular governor of further Spain decreed liberty to certain slaves and the allotment of land and a town "dum poplus (*sic*) senatusque Romanus vellet".[37] Most significantly, in 13 BCE the Emperor Augustus returned from the provinces of Spain and Gaul "rebus in iis provinciis prospere gestis".[38] Dio records that in 15 BCE Augustus established many colonies in Spain (τότε δὲ πόλεις … ἐν τῇ Ἰβηρίᾳ συχνὰς ἀπῴκισε) and that he later spent and received large sums of money in, and granted freedom and citizenship to some districts and took it away from others, of both Spain and Gaul (πάντα τά τε ἐν ταῖς Γαλατίαις καὶ τὰ ἐν ταῖς Γερμανίαις ταῖς τ᾽ Ἰβηρίαις, πολλὰ μὲν ἀναλώσας ὡς ἑκάστοις πολλὰ δὲ καὶ παρ᾽ ἑτέρων λαβών, τήν τε ἐλευθερίαν καὶ τὴν πολιτείαν τοῖς μὲν δοὺς τοὺς δ᾽ ἀφελόμενος, διῳκήσατο).[39] Thus Augustus then settled the affairs of Spain in measures which Hoyos says "seem to have been extensive", and surely amounted to a *lex Provinciae* or a supplement to one.[40] We may infer that Augustus did so by edict just as he regulated affairs in Cyrene by edict, and that he did so on his own authority and did not need, although he may have obtained, Senatorial authority. To do so was clearly within his authority. The settlement of the constitutional provisions for the Spanish provinces up to those provided for by Augustus included the division between them and the regulation of taxes and cities in them. In one of those provinces, Baetica, later provision was made in the Flavian period for the constitutions of *municipia* in the province.

Lastly in 62 CE the Emperor Claudius decided "to impose direct rule on Lycia", and ἐδουλώσατό τε καὶ ἐς τὸν τῆς Παμφυλίας νομὸν ἐσέγραψεν.[41] Claudius thus revoked previous arrangements for the management of the cities of Lycia. Strabo reported a regime in which the cities elected judges and magistrates and under Roman rule retained their ancestral customs:

[34] App. *Hisp.* 6. 16. 99.
[35] Livy 32. 28. 11.
[36] Livy 34. 21. 7; Hoyos (1973: 49); Plut. *Cato Mai.* 11. 2.
[37] *CIL* 2. 5041 = *ILS* 15.
[38] *RG* 12. 2.
[39] Dio Cass 54. 23. 7, 25. 1.
[40] Hoyos (1973: 49).
[41] Jones (2001: 165); Dio Cass. 60. 17. 4.

ὁμοίως δὲ καὶ δικασταὶ καὶ ἄρχοντες ἀνὰ λόγον ταῖς ψήφοις ἐξ ἑκάστης προχειρίζονται πόλεως. οὕτω δ᾽ εὐνομουμένοις αὐτοῖς συνέβη παρὰ Ῥωμαίοις ἐλευθέροις διατελέσαι τὰ πάτρια νέμουσι.[42] It appears from an inscription dating from 45/46 CE and honouring the Emperor Claudius, that after a period of anarchy, the conduct of the affairs of the Lycians had been entrusted to councillors "drawn from among superior people": ἀπειλλη[φ]ότες δὲ ὁμό[νοι]αν καὶ ἴσην δ[ικαιοδ]οσίαν καὶ τοὺς [π]α[τρίο]υς νόμους τῆς πολειτείας τοῖς ἐξ ἀρίστων ἐπιλελεγμένοις βουλευταῖς ἀπὸ τοῦ ἀκρίτου πλήθους πιστευθείσης.[43] This evidently included the imposition upon the Lycians of city constitutions involving oligarchic in place of democratic rule together with laws for the administration of justice. Christopher J. Jones suggests that the expression relating to the restoration of τοὺς πατρίους νόμους may refer only to the cessation of anarchy, and associates these provisions with a *lex provinciae* "similar to the *Lex Pompeia* known for Pontus and Bithynia", in reliance upon certain expressions in the "famous dossier of C. Julius Demosthenes of Oenoanda" dating from 125 CE in the reign of Hadrian.[44] Provisions such as would be contained in a *lex provinciae* evidently persisted until the reign of Hadrian since in the decree honoring C. Julius Demosthenes the grant of exemption from office for the ἀγωνοθέτης, as a new magistracy created μετὰ τὰς νομοθεσίας, and freedom from tax for the festival that had been decreed by the city, were ineffective without the assent of the governor of the province.[45] I suggest that both ἡ πολιτεία and αἱ νομοθεσίαι refer to provisions in a *lex provinciae* that had been imposed upon the Lycians at the time of their incorporation into the Empire as part of a province.

We may therefore say, based upon the provisions of such *leges* as are available, that such a *lex* might be expected to contain provisions not only for the government and the administration of justice in a province, and the taxation of its inhabitants, but also adjusting the constitutions of cities within it so that they accorded with Roman preferences, and where appropriate other matters such as its boundaries. In the period of the principate one would expect that, in view of the great powers accorded to Augustus in that period, such a founding document would have been made by him or his successors.

Augustus says of Egypt and the Pannonian peoples that "imperio populi Romani adieci", and describes his army as compelling the Dacian peoples to obedience to Rome: "exercitus meus

[42] Strabo. 14. 3. 3 C 665.
[43] *SEG* 51. 1832, Face A, lines 20-30; following the translation of Jones (2001: 163).
[44] Jones (2001: 166-167).
[45] *SEG* 38. 1462, C. 99-102; D 108-112 and E 115-117.

Dacorum gentes imperia populi Romani perferre coegit".[46] These peoples thus became subject to Roman power and were then organized into provinces and governed by Roman officials as parts of the empire. Although there appears to be no express statement it may be inferred that the decision to bring them into the empire was that of Augustus, who had all the power necessary to do so. That power was exercised also by the Emperor Claudius and was probably granted to Vespasian in 70 CE at the beginning of his reign as Emperor. According to Tacitus the Senate granted him "cuncta principibus solita", a clear reference to the *Lex de Imperio Vespasiani*, which however is a *rogatio* for comitial legislation, no doubt after a resolution of the Senate, rather than a *senatus consultum*.[47] One of the two bronze tablets upon which the *Lex* is inscribed is missing and neither the surviving tablet nor records of the other contain a provision granting the power to receive Provinces into the empire; but it must be assumed that Vespasian had such power. Nor can it be supposed that Trajan as Emperor had any less power than Vespasian and the power was indeed exercised by Trajan in relation to the Province: Πάλμας τῆς Συρίας ἄρχων τὴν Ἀραβίαν τὴν πρὸς τῇ Πέτρᾳ ἐχειρώσατο καὶ Ῥωμαίων ὑπήκοον ἐποιήσατο, words reminiscent of those of Augustus, and "(h)anc provinciae imposito nomine, rectoreque adtributo obtemporare legibus nostris Traianus compulit imperator".[48] On the milestones on the Via Nova Traiana between Bostra and the Red Sea, which were erected in the name of Trajan, Arabia is stated to have been "reduct[a] in [formam] provincia[e]".[49] Since previous emperors had promulgated schemes of government for provinces incorporated into the Empire, I thus conclude that Trajan, having taken the Nabataean kingdom into the Empire as the Province, had the power to make a *lex provinciae* establishing its government, including the administration of justice, finance and taxation, and the constitution of cities within it, and I argue below that he exercised it.

Part 2 – Lex Provinciae – Application to the Province

I argued above that the power to admit provinces into the sphere of Roman rule, with the consequent power to determine the terms under which they were admitted to that rule, and the governmental, fiscal and administrative systems that would apply, had during the principate

[46] *RG* 26-7, 30.
[47] *Hist* 4. 3; *RS* No. 39; Crawford (1996: vol 1, 549-553).
[48] Dio Cass. 68. 14. 5; Amm. Marc. 14. 8. 13.
[49] Magie (1910: No 1).

passed into the authority of Augustus. I also argued above that the power to admit provinces into the Empire remained a power of the emperor including the Emperor Trajan and now argue that he exercised it in the admission of the Kingdom of Nabataea into the Empire as the Province of Arabia.

That the Emperor Trajan had that power and exercised it is made more probable by the fact that the city of Bostra, which became the residence of the governor of the Province and the seat of its military garrison, was renamed, probably at or soon after the admission of the Province into the Empire, and certainly by him, as "Nova Traiana Bostra". This name is known from inscriptions and coinage, but not from coins before the reign of the Emperor Antoninus Pius, but, as is shown by an early bilingual inscription, Bostra adopted the same era, that is the date from which the calendar was calculated and legal documents made within the Province were dated, as the Province, an indication that the city and Province itself assumed their new status at the same time.[50]

I describe the means by which the Province came into the Roman empire and its constitution fixed, as its "*lex provinciae*", while recognising that the probable way in which in which it was made was by an edict of the Emperor Trajan, under his *ius edicendi* which he held both as proconsul with authority over the newly admitted Province, and also as emperor, whose edict was a form of Imperial enactment.[51]

Matters with which the *lex provinciae* of the new Province dealt were likely to have been those that were dealt with in the Republican *leges*, namely the boundary of the Province, and the general administrative and governmental framework of it, the system of administration of justice within it, the system of taxation, and the constitutions of cities within it.

We have little information about the southern and eastern boundaries of the Province but it is likely that the effective limit of Roman occupation was originally fixed by the Emperor Trajan. Since the boundaries of a province were likely to have been fixed by provisions of the *lex provinciae,* and cities that had previously been governed by a legate of the governor of the province of Syria were fully incorporated into the Province upon its institution, it is difficult to see any other authority of the Empire than the emperor who could give effect to these matters. It is therefore likely that provision was made for the incorporation of those cities into the

[50] See Kindler (1983: 52); Milik (1958: No 6, 244-245); Bowersock (1983: 82-83).
[51] Gaius 1. 5.

Province at the time of the establishment, and that it was by a provision of the *lex provinciae* of the Province.

Among what we may take to be the fundamental rules of the Province, it is probable that it was provided that the emperor was to stand in the position of the former king of Nabataea, so that his prerogatives were now to be those of the emperor, just as Augustus and his successors succeeded to that of the kings of Egypt, having control over the former βασιλικὴ γῆ of Egypt.[52] Among those prerogatives were penalties formerly paid to the king for breaches of contractual obligations and of the terms of the dedication of tombs at Mada'in Ṣaliḥ. The most probable source of such a provision is the *lex provinciae* of the Province.

We may be satisfied that appropriate provision was made for the Province's position within the *provincia* of the emperor and accordingly for it to be entrusted to appropriate officers although we know only of the Governor with the title "Legatus Augusti pro praetore", of one equestrian officer who held the title of "praefectus equitum", and a *procurator* who was stationed at Gerasa, perhaps from as early as 129-130 CE.[53] However, there was a military garrison of the Province from its establishment or from soon after, and the officers of the garrison were available to assist the governor in the administration of it.

Provision was made for the taxation of the Province, apparently in a similar manner to that under the former kingdom of Nabataea, as is shown by documents of registration of land for the purpose of taxation from the period after the establishment of the Province.[54] Although, the returns were Roman law documents and the tax was now payable to the Roman authorities, the tax was assessed on the same basis as it had been assessed under the Nabataean kingdom. We may thus compare such provisions with those of the *Lex Rupilia* by which the former taxation system known as the "Lex Hieronica" was confirmed, and accordingly the provision was likely to have been made in the same manner, namely by a provision in the *lex provinciae* of the Province.

It is clear that the peregrine inhabitants of the Province were potentially subject to Roman law, and in some respects were in fact subject to it, since peregrine infants were subject to *tutela* so that they required the insertion of the *auctoritas* of a tutor to validate some legal acts that they undertook, and peregrine males became liable to act as *tutores* although they were ineligible in

[52] Tac. *Hist.* 1. 11; Strabo 17. 1. 12 C797 (the prefect having the rank of the king); *P Giss* 1. 4 = *W Chrest* 351 of 118 CE, an order by which the Emperor Hadrian regulated such land, in substitution for the former Ptolemaic regulation; Mélèze-Modrzejewski (1968: 323, 330).
[53] *P Yadin* 16*; XḤev/Se* 61-2; *CIL* 3. 14157; Haensch (1993); Graf (1994: 31).
[54] *PYadin* 16; *XḤev/Se* 61-2.

Rome.[55] It is, however, also clear, that the property law of the former kingdom of Nabataea in some respects continued in its operation, and that the Jewish peregrine inhabitants of the Province continued after its foundation to conduct their marriages and regulate their inheritances under the provisions of Jewish law. It is accordingly reasonable to conclude that the *lex provinciae* made provision affecting the law of the Province only so far as was necessary and that in other respects it did not preclude the continuing effect of the law of the Nabataean kingdom or of Jewish law as far as it affected the Jewish inhabitants of the Province.[56] Indeed the continuation of those laws is implied by the right which the peregrine inhabitants also had of conducting their litigation under their own laws, as is shown by the fact that Babatha and other Jewish inhabitants of the Province brought their litigation involving issues of Jewish law before the governor of the Province, and he granted authority for its commencement.[57] We may thus conclude that the peregrine inhabitants of the Province had rights similar to those that the Sicilians had under the provisions of the *Lex Rupilia,* namely to litigate against each other in their own rather than Roman courts and under their own laws, "ut quod civis cum cive agat domi certet suis legibus" and "ut cives inter sese legibus suis agerent", the Greek inhabitants of Cilicia had under the provincial edict of Cicero "ut Graeci inter se disceptent suis legibus", and the Greek inhabitants of Cyrene had under the provisions of Augustus' Cyrene decrees to be assigned Ἕλληναι κρίται.[58]

Such a rule appears to be consistent with the practice of allowing the continuing operation of native laws in Egypt and elsewhere in the Empire. According to José Luis Alonzo, referring to a statement made by the prefect in 117 CE that κάλλιστόν ἐστιν αὐτοὺς [δικ]αιοδοτεῖν π[ρὸ]ς τοὺς Αἰγυπτίων νόμους, "(p)eregrine law was unfailingly applied in the Roman courts" in Egypt.[59] Although that is not universally true, as late as the second century CE a demotic Egyptian legal code of the third century BCE was copied apparently because of its continuing effect, since it was from time to time applied by Roman judges; and a native Egyptian law that allowed a father to terminate the marriage of his daughter, even against her will, continued in force until in effect abrogated by the prefect Flavius Titianus in a judicial decision in 128 CE,

[55] Buckland and Stein (1963:150); Thomas (1976: 457); *Tit. Ulp* 11. 16
[56] *P Yadin* 10, 18, 23-6 and 37= *XḤev/Se* 65.
[57] *P Yadin* 23-26.
[58] Cic. *Ver*. 2. 32, 90; *Att.* 6. 1. 15; *FIRA* i. No. 68, IV; and see the views of Georgy Kantor, who treats as parallels to the arrangements for the province of Cilicia described by Cicero, "the Sicilian arrangements, known to us in detail from the Verrines, guaranteeing the Sicilians local judges in all trials in which they were defendants, and by a more limited guarantee in the fourth Cyrene Edict, providing for the appointment of Greek judges in the private law cases in which both parties to the dispute were Greek": Kantor (2008: 89)..
[59] *P Oxy* 42. 3015; Alonso (2016: 61); Ando (2016: 290).

which was later followed by an *epistrategos* in litigation in 134 CE.[60] In relation to the payment of entrance fees by persons elected as *decuriones* of cities in the province of Bithynia-Pontus, the Emperor Trajan advised Pliny "(i)d ergo, quod semper tutissimum est, sequendam cuiusque civitatis legem puto".[61]

The principal law court of the Province was that of the governor which can be seen in operation through the legal proceedings evidenced in Babatha's legal documents. It is clear that, as Ulpian said, he had full jurisdiction next after the emperor "(p)raeses provinciae maius imperium in ea provincia habet omnibus post principem", and could, if he chose, hear proceedings brought by and against peregrines including claims based on Nabataean and Jewish law.[62] It is also clear from that litigation that he sat to hear legal proceedings in Petra and Rabbath-Moab and I suggest that in all probability he sat also in Bostra and perhaps in other centres.[63] It is shown that there were records including judicial records kept in the Ἀφροδείσιον or temple of Aphrodite in Petra and taxation records kept in the Basilica in Rabbath-Moab, and one may presume that similar records were kept at other *conventus* centres and perhaps elsewhere in the Province.[64]

There is no explicit evidence of any law courts other than that of the governor, but we would expect, considering the evidence referred to above, that provision was made for local courts to try litigation to which peregrines were parties.[65] Indeed we know that Petra, the capital of the Nabataean kingdom until about 93 CE, when it was replaced by Bostra, had during the period of the kingdom apparently busy law courts exercising jurisdiction particularly among the many resident Romans and other foreigners, and there seems no reason to suppose that the inauguration of the Province brought those courts to an end.[66] Amongst the litigation in which Babatha was involved was that brought by her against the tutors of her son Jesus who had been appointed, probably in accordance with Roman law, by the βουλή or senate of the city of Petra.[67] This suggests that at that time the senate operated as a court with jurisdiction at least in relation to the appointment of tutors for infants resident within its administrative area, just as under the provisions of chapter 29 of the *Lex Irnitana*, it was provided that in some circumstances a grant of *tutela* could be made "ex decreto decurionum" or of the senators of

[60] *P Oxy* 46, 3285 and vol 46, 30; *P Oxy.* 2. 237 vii.19-29, 29-38.
[61] Plin. *Ep* 10. 113; Ando (2016: 290).
[62] *Dig* 1. 18. 4.
[63] Petra and Rabbath-Moab: *P Yadin* 25.
[64] *P Yadin* 12, 16.
[65] *FIRA* i. No. 68.
[66] Bowersock (1983: 73); Strabo 16. 4. 21 C779.
[67] *P Yadin* 12; for a discussion of the jurisdiction under which the appointment was made, see Chapter 7.

the *municipium* of Irni. In other cases the senate or βουλή of a city might be assigned as a court, such as in a provision of the *Lex Rupilia* "(q)uod privatus a populo petit aut populus a privato, senatus ex aliqua civitate qui iudicet datur", and in the first century BCE *Formula Contrebiensis* in which the assignment of a court to try a dispute between two communities in Spain was that "Senatus Contrebie[n]sis quei tum aderunt iudices sunto".[68]

Further, Babatha had among her legal documents copies of a Greek translation of a *formula* for a Roman law *actio tutelae* which she apparently intended should be used in litigation between her son and his tutors after he came of age.[69] The terms of the *formula* contemplate the appointment of ξενοκρίται, whether *recuperatores* or *peregrine iudices*, as judges with jurisdiction limited to 2,500 *denarii*. Such a limitation may imply litigation before a local court rather than before the governor, who had unlimited jurisdiction in his province, and the senate of the city of Petra may have had limited jurisdiction similar to that allowed to the *duumviri* of the *municipium* of Irni under its constitution, the *Lex Irnitana.* By chapter 84 of that constitution the *duumviri* of the *municipium* were granted jurisdiction limited to 1,000 *sestertii* over certain kinds of action, and in the case of actions based on *tutela* jurisdiction that was conditional upon the consent of both parties. This also suggests that the city of Petra and perhaps others were granted constitutions which included government by a senate and magistrates, and, since it probably had some jurisdiction to make orders under Roman law, perhaps also limited and local jurisdiction over disputes between residents of its administrative area. The most probable date for the granting of such a constitution to Petra is upon the foundation of the Province, but another possible date is 114 CE, when the Emperor Trajan granted to Petra the title ἡ τῆς Ἀραβίας μητρόπολις Πέτρα.[70]

It is likely that Bostra, a city that was the effective capital of the Province, also received a constitution which included similar provisions to those in the constitution granted to Petra, including limited and local jurisdiction, and the most probable date for its grant would be upon the institution of the Province. There is evidence from undated inscriptions that Bostra had a council with members with the title βουλευτής or *decurio* and a chairman with the title πρόεδρος, together with magistrates with the titles of ἀστυνόμοι or *aediles municipii* and *quaestores aerarii*, no doubt magistrates appropriate to a provincial *municipium*, since the magistrates of Irni included both *quaestores* and *aediles*, but we cannot say when they were

[68] Cic *Ver*. 2. 32; Richardson (1983: 33-34).
[69] *P. Yadin* 28-30.
[70] *SEG* 32. 1550; Bowersock (1982: 197-198); (1983: 84-85, 110); Spijkerman (1978: 220-223).

created.[71] If it were shown that such offices existed in the period soon after 106 CE then there would be very good reason to infer that Bostra had a municipal constitution from the institution of the Province. That Bostra then had that status is not inconsistent with the grant of the title "colonia" by Severus Alexander in the following century.[72] In any event it appears that at some time on or soon after the institution of the Province, legal provisions were made for the establishment of constitutions for cities in the Province, which were probably established by provisions contained in the *lex provinciae.*

Part 3 – The Provincial Edict in the Province

In Roman practice of the Republican period, at the commencement of his term of office, each magistrate and the governor of each province who had the *ius edicendi*, published an edict in which he announced the principles upon which he intended to act, including the principles upon which he intended to exercise his legal jurisdiction. The most important of the edicts of magistrates were those of the *praetor urbanus* who conducted the ordinary civil jurisdiction between Roman citizens, and of the curule aediles, who had control of the markets at Rome and whose edicts required vendors of livestock and of slaves to give warranties about the livestock and slaves they were selling. In each case the successive magistrates tended to follow and adopt the edicts of their predecessors and the edicts became tralatician. Because a Roman citizen resident in a province would otherwise be deprived of rights and remedies under praetorian law and left to his rights under the *ius civile,* governors in their edicts followed or adopted the provisions of the edict of the *praetor urbanus*, which I will here refer to as "the urban edict". As we know from Cicero's accounts of his own edict for the Province of Cilicia and the edict of C. Verres for the Province of Sicily, it was normal for governors of Provinces to follow or adopt the provisions of the urban edict and provisions in the provincial edict of earlier governors, so that it also tended to become tralatician. Verres had been *praetor urbanus,* and although he had introduced in his edict as *praetor urbanus* innovations in the law *de hereditatum possessionibus dandis,* one of which was described by Cicero as "ridiculum", he had in his edict as governor of Sicily "edixit idem quod omnes Romae praeter istum".[73] Cicero

[71] *IGLS* 9008-9009, 9028-9029, 9054-9055; see *Lex Irni,* ch. 19-20.
[72] Spijkerman (1978: 80-1); Bowersock (1983: 121).
[73] Cic. *Ver.* 1. 117.

in his account of his own provincial edict for the Province of Cilicia, of which he was proconsular governor in 50-51 BCE, says:

> multaque sum secutus Scaevolae, in iis illud in quo sibi libertatem censent Graeci datam, ut Graeci inter se disceptent suis legibus. breve autem edictum est propter hanc meam διαίρεσιν, quod duobus generibus edicendum putavi; quorum unum est provinciale, in quo inest de rationibus civitatum, de aere alieno, de usura, de syngraphis, in eodem omnia de publicanis; alterum quod sine edicto satis commode transigi non potest, de hereditatum possessionibus, de bonis possidendis, magistris faciendis, <bonis> vendendis, quae ex edicto et postulari et fieri solent. tertium de reliquo iure dicundo ἄγραφον reliqui. dixi me de eo genere mea decreta ad edicta urbana accommodaturum, itaque curo, et satis facio adhuc omnibus. Graeci vero exsultant quod peregrinis iudicibus utuntur.[74]

Thus, Cicero's edict included both matters relating to the administration of the province and the finances of it and the cities in it, and matters that concerned the *publicani,* which must have included the taxation of the province and the currency circulating in it and the rate of exchange. Moreover in his edict, he followed many of the provisions of the edict published by Q. Mucius Scaevola when proconsular governor of the province of Asia in about 97 BCE, which had been recommended by the Senate as an "exemplum atque formam officii" to later governors of Asia.[75] He also, as is clear from his account, adopted clauses from the urban edict and says "dixi me de eo genere mea decreta ad edicta urbana accommodaturum", that is that he would follow the provisions of it. John Richardson has argued that Cicero "like other governors, constructed his edict as he himself saw fit, rather than using a standard form taken over from his previous governors".[76] Further, Czajkowski, who regarded the assumption of the issue of a provincial edict for the Province as one "that is in fact far from a given", argued that "it seems that (governors) could decide their own terms upon entering their province" and that "there may have been little uniformity (in the terms of the provincial edict) from province to province or, theoretically at least, from governor to governor".[77] Weiss had, however, pointed out that even in Cicero's time attempts had been made to harmonise the form of the edicts of provincial governors, and we may conclude from Cicero's account of his own provincial edict and that of

[74] Cic. *Att.* 6. 1. 15.
[75] Val. Max. 8. 15. 6; Hoyos (1973: 51-52).
[76] Richardson (2016: 116).
[77] Czajkowski (2017: 98, 171).

Verres, that they, and no doubt other governors, followed the substance at least of the edicts of their predecessors.[78]

It is clear from commentaries written by Gaius in the mid second century CE and by Paul in the late second and Ulpian of the early third century CE on them, portions of which are preserved in the *Digest*, that in the period of the principate the urban edict and that of the curule aediles continued to be published, and continued to be in force in Rome and Italy. The need for Roman citizens resident in the provinces to have the benefit of the provisions of those edicts continued, and we must enquire whether and by what means they acquired them.

That a provincial edict was published in senatorial provinces in the Flavian period is clear, since a provision of the *Lex Irnitana* required the magistrates of the *municipium* of Irni to have in their possession and to display the *edicta* and the accompanying *formulae iudiciorum* of the governor of the province, and to administer justice in the *municipium* in accordance with them.[79] The *edicta* of the governor must have contained provisions regulating legal proceedings in the province generally and included provisions such as were included by Cicero in his own edict, since Roman citizens resident in the province would otherwise have been deprived of them. Not all *municipes* of Irni were Roman citizens, since they were generally Latins, as is shown by provisions of the *Lex* providing for the acquisition of Roman citizenship by former *decuriones* and magistrates of the *municipium*, and the effect of manumission of slaves by *municipes* who were not Roman citizens, but the provisions of the provincial edict clearly applied to them, just as to Roman citizens resident there, so that the benefits of praetorian law and remedies were available to them. [80] Since the provisions of the *Lex Irnitana* were imposed also on *incolae*, who were peregrines, those benefits were available also to peregrines.[81] Moreover, the terms of Gaius' Commentary and the preservation of parts of it in the *Digest* show that a provincial edict continued to be published in senatorial provinces until at least the end of the second century CE, and no doubt peregrines also had the benefit of its provisions.

Whether a provincial edict was likewise published by governors of Augustan provinces is controversial. In my view, although we have no example of a provincial edict, such as Cicero described, published during the principate for an Augustan province we may infer that

[78] Weiss (1914: 66-8, 112-3).
[79] *Lex Irni.* ch 85.
[80] *Lex Irni.* ch 21, 97, 85.
[81] *Lex Irni.* ch 94.

publication took place, although we cannot say that it occurred in the same way at the commencement of each term of governorship.

It seems clear that at the time of the foundation of the Province, the urban edict continued to be published and that it continued to be necessary for its provisions to be applicable in Augustan, as well as senatorial, provinces. It is stated, although the matter is controversial, that in about 131 CE in the reign of the Emperor Hadrian the jurist Salvius Julianus, on his instructions effected some editing of the "edict", which was later adopted by a *senatus consultum*.[82] It is known that Julianus introduced only one new substantive rule, and its name "nova clausula Iuliani" suggests that "there were at any rate not many others", and in his *Institutes* Gaius "says nothing of any change in the text of the edict".[83] Thus, whatever the scope of editing carried out by Julianus, nothing suggests that it fundamentally altered the terms of the edict or edicts to which it actually applied, except that it was intended that any defect in them should thereafter be remedied by the authority of the emperor. It is probable that the "edict" referred to the urban edict but the editing may also have applied to the edicts of the *praetor peregrinus* and of the curule aediles and the provincial edict, and in view of the close relationship between the urban and provincial edicts that is shown by the manner in which Cicero composed his provincial edict, any editing of the urban edict affected also the form of the provincial edict.[84] It may be accepted that evidence of the form of those edicts from the period after the editing of Julianus, may be treated as evidence also of their form in the period before it. It has been possible to reconstruct the order of titles in the edict from fragments of the commentaries which survive in the *Digest* and it is "plainly an arrangement which is the result of gradual accretion", which suggests that whatever changes were made as a result of imperial action they did not fundamentally affect its arrangement.[85]

It can be said that by the time of Gaius, who wrote after that editing, the urban edict and that of the curule aediles and the provincial edict were each in such a form that it was useful to write commentaries upon them, as did Gaius, Paul and Ulpian. Nevertheless it seems that the praetor and other magistrates retained the power to publish their edicts since Gaius says that in his day the magistrates of the Roman people "ius … edicendi habent" as did all provincial governors since Gaius says that they had the same jurisdiction as the praetors, "quorum in provinciis

[82] Constitutio *Tanta* 18; Honoré (1962: 46ff, 54f); Jolowicz & Nicholas (1972: 356-357).
[83] *Dig* 37. 8. 3; Jolowicz & Nicholas (1972: 357).
[84] In the view of Lenel (1927: 48) Julianus attached the edict of the curule aediles to that of the praetor as an appendix, which implies that it too was then edited.
[85] Jolowicz & Nicholas (1972: 357).

iusdictionem praesides earum habent".[86] That each successive praetor issued an edict after its editing by Julianus is shown also by the terms of the *formula* for proceedings against a freedman for suing his *patronus,* contrary to the provisions of the urban edict: the *formula* for such an action referred by name to the praetor whose edict the freedman had breached.[87] W. W. Buckland has argued that the praetors and governors of provinces could no longer amend their edicts, but in his Commentary Gaius refers to the issue by proconsuls of senatorial provinces of a new edict on the subject of soldiers' wills in response to imperial *constitutiones,* showing that in his day proconsular governors of senatorial provinces continued not only to have the right to publish edicts, but also a limited power to amend them, at least when required to do so by Imperial legislation or *mandata*.[88] Further, Ulpian quotes from an edict of the urban praetor made in response to a *rescriptum* of the Emperors Caracalla and Geta dating from 211 CE, which is introduced with the words "praetor ait", and included the expression "ex edicto meo", which indicate that it was treated as at least formally published by the each successive praetor.[89]

In his Commentary Gaius generally refers to the proconsul but in a few texts (see for example at *Dig.* 26. 5. 5 in relation to the appointment of tutors and at *Dig* 27. 10. 5 on the appointment of curators to sell the property of senators or their wives) refers rather to the "praeses", according to Macer the general term for the governor of a province whether proconsul or legate of Augustus.[90] In my view this tends to show that at any rate Gaius was stating that a provincial edict was published not only in senatorial, but also in Augustan provinces; and although he says that because no quaestor was sent to Augustan provinces the edict of the curule aediles was not published in them, he does not say that no provincial edict was published in them.[91]

There are papyrus copies of many documents which are clearly *edicta* (in Greek διατάγματα) of the prefect of Egypt and copies of other documents, including records of judicial proceedings, that contain evidence of the making of them.[92]

Some of those made provisions for the administration of justice in Egypt just as Cicero issued an edict that made provision for the administration of justice in Cilicia. Those edicts include

[86] Gaius 1. 6.
[87] Gaius 4. 46.
[88] Buckland (1934: 91); *Dig* 29. 1. 2.
[89] *Dig* 25. 4. 1. 10.
[90] *Dig* 1. 18. 1.
[91] Gaius 1. 6.
[92] Extensive lists of such edicts have been published by Katzoff (1980) and by Wilcken (1921: 137-139).

edicts fixing the places for the *conventus* in Egypt;[93] prescribing procedural rules including one dealing with the delayed attendance of petitioners at the *conventus*, and warning against bribery and delegating the hearing of proceedings to a subordinate magistrate;[94] limiting the kinds of delicts and offences that the prefect would himself hear at first instance, and prescribing the amount of security to be paid in the case of an appeal to him in others;[95] prescribing that defendants in actions for debt were to raise immediately defences of fraud or forgery, and otherwise forfeit the right to do so;[96] prohibiting the making of anonymous accusations without evidence;[97] perhaps fixing a time limit for the commencement of some legal actions;[98] and concerning the hearing of applications in the absence of a party.[99] It was perhaps an edict by which in 94 CE the prefect had it proclaimed that some parties to proceedings before him who did not come forward at the *conventus* would be treated as if they were absent.[100]

In his edict of 68 CE which was inscribed in the Temple of Hibis, the prefect Ti Julius Alexander ordered that judgments of the prefect and of the *Idios Logos* in favour of a defendant should be final and not the subject of further litigation; and following the order of Augustus (ὁ θεὸς Σεβαστὸς ἐκέλευσεν, no doubt by *mandatum*) he upheld the right of πρωτοπραξία and ordered payment of dowries out of the *Fiscus*; and ἐπόμενος τῆι τοῦ θεοῦ Σεβα<σ>τοῦ βουλήσει prohibited officials from transferring to themselves debts that they had not contracted.[101]

In addition there are edicts made by proconsular governors of the senatorial province of Asia relating to the administration of justice: an inscription evidencing an edict in which the governor ordered the provision of security in an appeal to him [κατὰ] τὸ προτεθὲν ὑπ̓ ἐ[μ]ο[ῦ διάταγ]μα διὰ τοὺς φυγοδ[ικοῦντας, and an inscription reproducing an edict in which the governor ordered that in Ephesus there should be no *conventus* during the whole of the month of Artemisium.[102]

Each of these edicts shows the governor of a province exercising an edictal power for the purpose of regulating the administration of justice, and in my view tends to show that the

[93] *P Ryl* 2. 74 = *Jur Pap* 82b = *FIRA* iii. No 166 of 133-137 CE.
[94] *P Oxy* 36. 2754 of 111 CE.
[95] *P Yale* Inv No 1606; and see Lewis (1972-3).
[96] *P. Oxy* 2. 237 viii. 7-18 of 142 CE.
[97] *P Mich* 9. 522 of 142-143 CE.
[98] *P Flor* 1. 61 = *M Chrest* 80 of 86-88 CE.
[99] *BGU* 1. 288 of 144-147 CE.
[100] *P Hamb* 1. 29 = Meyer, *Jur Pap* 85 = *FIRA* iii. No 169.
[101] *CIG add* 4957 = *OGIS* 669 paras 8, 3, 2 = *BGU* 7. 1563 = *FIRA* i. No 58.
[102] Paton & Hicks (1891: No 26); *BM Inscr* 2. 482, A, 9-16.

governor of a province might do so also by the issue of a provincial edict.

That governors of Augustan provinces had the *ius edicendi* is shown also by evidence of the issue of edicts in the first century CE by the governor of the province of Cappodocia-Galatia concerning the corn supply in Pisidian Antioch, and in 202 CE by the governor of the province of Thrace concerning the establishment of a settlement at Pizus there.[103]

In my view it is to be expected that a provincial edict of the period of the principate contained provisions similar to those that Cicero says were included in his own, by which he made provision for the grant of *bonorum possessio*, and for the same reason, namely that without such provisions Roman citizens would be left to those of the *ius civile* and without the benefit of edictal relief. Such provisions can have been no less necessary in Egypt during the principate, since Roman citizens were resident in the province and were likely to wish to have the benefit of the edictal provisions.

The provincial edict upon which Gaius made his Commentary clearly contained provisions in which the proconsul promised to grant *bonorum possessio*, for example *Dig* 38. 8. 2, "hac parte proconsul … omnibus cognatis promittit bonorum possessionem", which indicates that the edict "unde cognati" applied in any province to which the provincial edict applied, and it may be presumed that the provincial edict contained provisions for each case of the grant of *bonorum possessio* provided for in the edict of the urban praetor. The form of the part of the edict under which in the Republican period the urban praetor granted *bonorum possessio secundum tabulas*, and which was followed by Verres as governor of Sicily, is given by Cicero as:

> SI DE HEREDITATE AMBIGETVR ET TABVLAE TESTAMENTI OBSIGNATAE NON MINVS MVLTIS SIGNIS QVAM E LEGE OPORTET AD ME PROFERENTVR, SECVNDVM TABVLAS TESTAMENTI POTISSIMVM POSSESSIONEM DABO,[104]

which he says was "translaticium".

In substantially similar terms is the form that Lenel gives as that of the part of the edict relating to the grant of *bonorum possessio secundum tabulas* as it stood in that of Julianus:

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[103] *TAPA* 55 (1924), 5ff = *JRS* 14 (1924), 180 = Abbott & Johnson (1926) No 65a, 381-2; *IGRR* 1. 766 = Ditt *Syll* 800 = Abbott & Johnson No 131, 458-9; Martini (1969: 135-7); Weiss (1914: 91 fn [104]).
[104] Cic. *Ver* 1. 117.

SI TABULAE TESTAMENTI NON MINUS QUAM SEPTEM TESTIUM SIGNIS SIGNATAE EXTABUNT, SECUNDUM SUPREMAS TABULAS TESTAMENTI POTISSIMUM POSSESSIONEM DABO.[105]

There are papyri from the third century CE evidencing petitions to the prefect of Egypt or his deputy, in which petitioners sought grants of *bonorum possessio* relating to estates in accordance with the provisions of the edict relating to them, and substantially following the wording of it. These petitions are generally in Latin with a Greek translation and the *subscriptio* of the prefect either in Latin or in Greek, The papyri are the following:

- *P Giessen* inv 40 of 249 CE, a petition in Latin with a Greek translation (*SB* 9298) by an *impubes*, an Aurelius, acting with the *auctoritas* of his tutor, his father, for a grant of *bonorum possessio* of the estate of his late mother, in which he wrote "(r)ogo domine des mihi bonorum possessi[o]nem matris meae … ex ea parte edicti qua(e) [legi]timis heredibus b(onorum) p(ossessionem) daturum te polliceris", and the prefect granted it in the form "[do b(onorum) p(ossessionem)] ex edicto. recogn[o]vi";[106]
- *P Oxy* 9. 1201 of 258 CE, an incomplete petition in Latin with a Greek translation in which the petitioner, also an Aurelius, wrote "rogo domine des mihi b(onorum) p(ossessionem)" of the estate of his late father; it appears from the Greek translation that the father had died intestate and that the petitioner sought relief ἐξ ἐκ̣είνου τοῦ μέρους τοῦ διατάγματος τοῦ τοῖς νομίμοις κληρονόμοις τ[ὴ]ν διακατοχὴν διδόντος that is it was an application under the edict "unde legitimis", and the deputy prefect granted relief in the form "ex edicto: legi",[107] and
- *PSI* 10. 1101 of 271 CE, an application in Greek for bonorum possessio of his mother's estate "secundum tabulas" in which the petitioner, likewise an Aurelius, wrote ἐρωτῶ, κύρι(ε), ὅπως δῷς μοι δι[α]κα[τοχὴ]ν ὑπαρχόντων Αὐρηλίας Τασαραπ[. . . . .]. . μητρὸ̣ς Σινθεῦτος ἀπὸ τῆς αὐτῆς [πόλεως, μητρός μου] τετελευτηκυίης ἐπ᾽ ἐμ[οὶ κλ]η[ρονόμωι] ἀκολούθως ⟦τηκ̣ε ελυ[.]. . . . [. .]⟧ διαθήκη αὐ[τ]ῆς ἐξ ἐκε[ίν]ου το[ῦ] μέρου̣ς τ[οῦ δ]ιατάγματος ἀφ᾽ οὗ τ̣οῖ̣ς ν̣[ομίμο]ις κλη[ρο]νόμοις διδ̣όναι σ̣ε ὑπέσχ[ου] αὐ̣τ[ήν]; there is no *subscriptio* of the prefect.

[105] Lenel (1927, 348-9, § 149).
[106] = *FIRA* iii. 61 = *Jur Pap* 27 = *SB* 1010 = *CPL* 216; see also: Eger (1911).
[107] = *CPL* 218.

From approximately the same period there are extant records of the registration in local registries, and other documents that refer to grants of *bonorum possessio* made by the prefect, of which I refer only to those the effect of which is clear. Those records are: *P Oxy* 19. 2231 of 241 CE, an application by an Aurelia, the mother of her deceased daughter, for registration as her heir according to Roman law, relying on a διακατοχῆς Ῥωμαϊκῆς κληρονομίας; *P Oxford Wegener* 7 of 256/7 CE, an application also by an Aurelia for registration as heir based upon an [ἀ]ντίγραφον ταύτης τῆς κατὰ τὰ Ῥωμαίων ἔθη διακα[τοχῆς]; *P Got* 12, a private letter of the second half of the third century CE referring to τὴν λεγομέ[ν]ην διακατοχὴν, evidently a grant of *bonorum possessio*; and *P Amh* 2. 72 of 246 CE (= *FIRA* iii. No 62), an application also by an Aurelia for registration of herself as an heir supported by a διακατοχή.

There are thus a small number of extant grants of *bonorum possessio* made in Egypt by the prefect or his deputy, all during the period after the promulgation of the *Constitutio Antoniniana* in 212 CE. Most if not all of the petitioners were "Aurelii" which probably indicates that they were peregrines who gained Roman citizenship by virtue of the *Constitutio*, or were descended from them, and the *Constitutio* itself greatly increased the number of Roman citizens resident in Egypt, and thus the possible occasions for applications for grants of *bonorum possessio*. Otherwise there seems no explanation why there are no extant petitions for the period before its promulgation other than simply the chance of discovery, a position which is supported by a papyrus copy of a letter of Hadrian dated between 99 and 103 CE addressed to the prefect of Egypt, which the Emperor ordered to be published in military barracks in Egypt, and by which he allowed children of soldiers to seek *bonorum possessio* of the estates of their fathers as if they were *cognati* or blood relatives, and stated that he would adjudge it to them:

> Οὔκ εἰσιν νόμιμοι κληρο[νόμ]οι τῶν ἑαυτῶν πατέρων οἱ τῷ [τ]ῆς στρατε[ί]ας χρόνῳ ἀναλ[η]μφθέντες, ὅμως κατ[ο]χὴ[ν] ὑ[πα]ρχόντων ἐξ ἐκείνου τοῦ με[ρ]οῦς διατάγματος, οὗ καὶ τοῖς πρὸς [γ]ένους συνγενέσι δίδοται, αἰτεῖσθαι δύνασθαι καὶ αὐτοὺς κρε[ίν]ω. [108]

Since serving soldiers were then and until 193 CE prohibited from marriage, their children were necessarily illegitimate and could not succeed to their estates upon intestacy, so the letter had the effect of amending the edict *unde cognatis* by enlarging the category of *cognati* in favour of those who were not previously entitled to claim under it. Weiss thought that the letter

[108] *BGU* 1. 140 = *FIRA* i. No 78.

should probably be understood to mean that those who were advising the Emperor acted on the assumption that there was an at least substantially uniform provincial edict that applied in all provinces, so that the extension of the provisions of the edict *unde cognatis* was sufficient to secure the position of the children of soldiers.[109] In my view such an assumption, if it was made, was correct, and the letter allows us to be sure that that there was as early as the reign of Hadrian, and no doubt from soon after the annexation of Egypt, a provincial edict applicable to it, and that it contained provisions applying the provisions of the urban edict relating to *bonorum possessio.* It seems likely that the prefect of Egypt amended the Egyptian provincial edict in accordance with this letter – a form of *constitutio* or legislation of the emperor according to Gaius "constitutio principis est quod imperator decreto vel edicto vel epistula constituit" – just as according to the statement of Gaius in his Commentary the proconsul of a senatorial province issued a new edict about soldiers' wills in response to imperial constitutions.[110] Accordingly there is in my view good reason to conclude that there was published a provincial edict for Egypt, and that it covered the whole of edictal law just as Gaius' Commentary on the provincial edict shows.[111]

Against the proposition that these grants of *bonorum possessio* were made by the prefect of Egypt under the provisions of the provincial edict for Egypt, Ramon Katzoff argued that each of the petitions of which we have copies appears to be have been made under a misunderstanding of the applicable law, since the father of the applicant in the first of the petitions set out above should have ordered his son to take possession, rather than act as tutor by inserting his *auctoritas,* and both of the other petitioners for grants of *bonorum possessio* sought a grant under a head of relief that was inapplicable. Katzoff suggested that this indicated that the draftsmen of the petitions were unfamiliar with the proper forms, although he accepted that none of the objections was fatal and that each petition could be construed so as to make it correct according to Roman law.[112]

Katzoff also argued that "(g)enerally in the empire during the principate Latin was the official language of the courts, especially in verdicts", but that in Egypt "Greek was a fully official language." He therefore argued that the use of Latin in the grants of *bonorum possessio* showed

[109] See Weiss (1914: 104).
[110] Gaius 1. 5.
[111] See Katzoff (1969: 428).
[112] Katzoff (1969: 419-421).

that the edict in accordance with which they were made was that of the urban praetor.[113] He relied also on the use of regnal years of emperors in Egypt "alone".[114]

However, a papyrus record of the judgment of *recuperatores* in a trial before the prefect of Egypt in 148 CE shows that even in Egypt Latin was used, and was I suggest used probably because it was required to be used in at least some cases, including the verdicts and judgments of courts.[115] That papyrus records in Greek that the votes or *sententiae* of 15 named *recuperatores* were taken (ἀναγνωσθεισῶν ἀποφάσεων ξενοκριτῶν), and then records in Latin what appears to be the substance of the judgment of the court, which concerned a woman whose status, whether or not *libertina*, seems to have been at issue, "mulier de qua agitur". Declarations of birth made to the prefect of Egypt by Roman citizens resident there, in accordance with the *Lex Aelia Sentia* and *Lex Papia Poppaea,* were written in Latin, often on wooden tablets, and in one made in 242 CE the subscription of the prefect was made in Latin in the form "Recog[novi]".[116] Other forms of order of the prefect were made in Latin including orders for the appointment of *tutores*. Orders of the prefect appointing a tutor made between 126 and 132 CE and in 198 CE are recorded in the words "tutorem dedit", and one made in 247 CE bears the subscription apparently of the prefect in the form "do".[117]

Thus the fact that the grants of *bonorum possessio* from Egypt are in Latin does not preclude them from being made by the prefect in accordance with the provincial edict of Egypt. In the Province there are also indications of the use of Latin for formal records such as the appointment of tutors for Jesus which Lewis, plausibly in my view, suggests "reads like a Greek translation of a Latin original" pointing no doubt to such Latinisms as "acta" and its dating in the wholly Roman manner by consular year and the Roman calendar.[118] Nor does the use of the regnal years of emperors for the purpose of dating documents distinguish documents of Egypt from those of other Augustan provinces since by regnal years of the emperors was one of the ways in which both private and official documents from the Province were dated, others being the consular years and the date according to the epoch of the new Province: κατὰ τὸν ἀριθμὸν τῆς νέας ἐπαρχείας ἔτους with the number of the year, as well as the consular year and

[113] Katzoff (1969: 418, 426, 430).
[114] Katzoff (1969: 430).
[115] *P Oxy* 42. 3016.
[116] *CPL* No 163.
[117] *BM Add MS* 40. 723 = *CPL* 200; *SB* 3. 6223 = *FIRA* iii. No 25; P *Oxy* 4. 720 = *FIRA* iii. No 24 = *M Chrest* 324 = *Jur Pap* 13; I quote other parts of these orders below.
[118] *P Yadin* 12; Lewis (1989: 48).

the Roman calendar. Those documents include records of summonses and *testationes*, as well as agreements made within the province and forming part of the archives.[119]

Katzoff argued that this unfamiliarity with the form of application, and the fact that the original of the petitions and grants appeared to have been in Latin rather than in Greek, showed that the edict on which both petitioners and prefect relied was the urban edict and not the provincial edict.[120] In a sense this is correct, since the two edicts were in relevant matters apparently in substantially the same form, and the effect of any provincial edict that was in force was to adopt or re-enact for a particular province provisions of the edict of the urban praetor, but one must ask the basis upon which the prefect, as governor of Egypt, could have granted relief under the provisions of the urban edict. Katzoff suggested a number of bases upon which the institute of *bonorum possessio* could have been established in in Egypt, namely "by a special edict of the prefect, by an imperial constitution, by a general rule that Roman citizens in Egypt could appeal to the city law of Rome in all its parts, or indeed by a provincial edict". Except that he rejected "the existence of a provincial edict" in Egypt, it is not clear which of these alternatives he would propose.[121]

Arangio-Ruiz thought the application of 239 CE was the result of a desire to imitate Roman law and pointed to the inappropriate *peregrinus mos* since the father of the applicant ought rather to have ordered his son to take possession of the inheritance than to have acted as tutor to his son in an application to the prefect.[122] Mélèze-Modrzejewski thought that since the formulary system was never applied in Egypt, the function of a provincial edict as a means of extending praetorian law to Roman citizens living there seemed pointless. He thought that the prefect implemented in Egypt institutions derived from the urban edict, instancing *bonorum possessio,* but thought tenuous the assumption that each prefect on entering office issued a complete provincial edict modelled on the urban edict. He thought also that the prefect's edictal provisions applied only to Roman citizens resident there.[123] Alonso also thought that in Egypt a provincial edict was unlikely since most of such an edict was tied to the formulary procedure of which there was no trace in Egypt.[124] Martini, however, suspected that the applicants for the orders did not know the edict under which they were making their applications, but thought that the orders indicated that the edict or part of it was in force in Egypt and the entrusting of

[119] See *P Yadin* 8, 14-15, 20-22.
[120] Katzoff (1969: 418-422).
[121] Katzoff (1969: 426, 435).
[122] Arangio-Ruiz, *FIRA* iii, 183 in relation to No 61.
[123] Mélèze-Modrzejewski (1968: 342).
[124] Alonso (2013: 359 fn [27]).

the governor who was in office with the issue of the edict.[125] Weiss thought that the effect of Gaius' account of the jurisdiction of *praesides* or provincial governors was that he intended to say that an edict analogous to the praetors' edicts was publicly displayed in similar form in all provinces.[126]

The application of these provisions of the urban edict to Egypt most probably occurred by virtue of provisions of a provincial edict for Egypt adopting provisions of the urban edict, and making them part of the edictal law of Egypt in the same manner as Cicero and Verres made them part of the edictal law of Cilicia and Sicily under their governorships. Gaius' Commentary is evidence of this.

There are several good reasons why we should hold this view. First, the form of two of the petitions shows that the petitioner made application to the prefect in reliance upon part of the edict in which the prefect himself "promises" that is "daturum te polliceris" and διδ̣όναι σ̣ε ὑπέσχ[ου] respectively and the prefect himself made a grant under that provision. In other words he made a grant in accordance with a document, the provincial edict, in which he promised to grant relief in particular circumstances, and he did not purport to make a grant under the urban edict in which it was the urban praetor who promised to make the grant.[127] The form of petition and order substantially follows the form of the urban edict as set forth by Cicero and also the form given by Lenel. Gaius' Commentary shows that the form of the provincial edict was relevantly in similar terms, except for a reference to the governor rather than to the urban praetor, and that a grant of the relief could be made by provincial governors under the provincial edict.

This is suggested also by texts of Ulpian in the *Digest* which show that an *edictum de ventre*, under which the praetor granted *possessio* of an estate to an unborn child whose father was deceased, was known to the republican jurist Servius Sulpicius who died in 43 BCE.[128] Further, from no later than the time of Neratius who wrote during the reigns of the Emperors Trajan and Hadrian, *bonorum possessio* was granted under the "Carbonian Edict", by the praetor, to an *impubes*, whether male or female, where there was a dispute whether he or she was a child of a deceased.[129] Those edicts were thus in effect by no later than the time of Neratius, and Gaius'

[125] Martini (1969: 147).
[126] Weiss (1914: 106-8).
[127] *P Geissen* Inv 40; *PSI* 10. 1101.
[128] *Dig* 37. 9. 1. pr, 24, 25; Watson (1974: 39); Evans Grubbs (2002: 325 fn [122]).
[129] *Dig* 37. 10. 1, 9.

discussion of the edict *de ventre* in his Commentary shows that the provincial edict included provisions bringing that edict into effect in a province.[130]

By an edict which was no later than Julianus, provision was made by the urban praetor for the examination of pregnant women and the observation of their delivery.[131] It appears from a papyrus record of a petition made in 147 CE to the *iuridicus* or δικαιοδότης of Egypt that an order had been made for the examination of the petitioner who had been pregnant, in accordance with that edict, which we must conclude was brought into effect in Egypt by a provision of the provincial edict, and accordingly that the edict was in force in Egypt.[132] The connection of this material with *bonorum possessio* suggests not only that the whole of the law relating to praetorian rules of succession was in force in Egypt, but that a provincial edict was in force there and made those provisions part of the edictal law in Egypt.

An additional reason for this conclusion, in my view an important one, is that in contracts for the sale of slaves and of a horse in Augustan provinces in the first and second centuries CE, the sellers gave warranties in accordance with the terms of the warranties that the curule aediles required to be made by sellers of slaves and *iumenta* in Rome. That edict was published in senatorial provinces where the jurisdiction was exercised by quaestors.[133] The relevant terms of that edict, as it applied to sales of slaves and was in force in about 180 CE, and as reported by Aulus Gellius were:

> In edicto aedilium curulium, qua parte de mancipiis vendundis cautum est, scriptum sic fuit: "Titulus servorum singulorum scriptus sit curato ita, ut intellegi recte possit, quid morbi vitiive cuique sit, quis fugitivus errove sit noxave solutus non sit",[134]

in terms similar to those later reported by Ulpian:

> Aiunt aediles: Qui mancipia vendunt certiores faciant emptores quid morbi vitiive cuique sit, quis fugitiuus erroue sit noxaue solutus not sit: eademque omnia, cum ea mancipia venibunt, palam recte pronuntianto.[135]

According to the *Digest,* Ulpian stated the relevant terms of the edict so far as it applied to *iumenta,* or beasts of burden, as follows:

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[130] *Dig* 37. 9. 5.
[131] *Dig* 25. 4. 1. 10; 25. 4. 2.
[132] *P Gen* 2. 103; Evans Grubbs (2002: 267-269).
[133] Gaius 1. 6.
[134] Aul. Gell. 4. 2. 1.
[135] *Dig* 21. 1. 1. 1.

> Aiunt aediles: Qui iumenta vendunt, palam recte dicunto, quid in quoque eorum morbi vitiique sit,[136]

and also that the purchaser evicted from a slave or *iumentum* sold was entitled to redress against the vendor:

> Sive tota res evincatur sive pars, habet regressum emptor in venditorem.[137]

In a damaged papyrus contract for the sale of a slave at Seleucia Pieria in Syria in 166 CE, and in contracts for the sale of slaves in 139, 142 and 160 CE recorded in damaged wooden tablets from Dacia, both Augustan provinces, warranties were given by *stipulatio* about a slave, that correspond with those required by the curule aediles under their edict, and substantially with those known from damaged tablets from Herculaneum and Pompeii in Italy from the first century CE. Those latter tablets, so far as they can be reconstructed, show the form of warranty that was appropriate where the edict of the curule aediles applied, and in each case the warranty, by *stipulatio*, was expressly given in accordance with that edict, in the case of that from Herculaneum in the terms:

> [eam pu]ellam q(uae) s(upra) s(cripta) sanam es[se, furtis] noxaque solutam, fugiti[vam erronem] non esse praest[ari, vel quanta]m pecuniam ex [i]mp[e]rio aedi[liu]m curulium;[138]

and in the case of that from Pompeii in the terms

> [solutum e]sse, fugit[i]vum, [err]onem [non] esse [et] cetera in edicto aed(ilium) cur(ulium), [q]uae huiusque an[n]i scripta conprehensaque sun[t];[139]

with, in each case, an express reference to the annual edict of the curule aediles.

The vendor in the contract from Seleucia Pieria appears to have been a Roman citizen and the contract included the stipulation of the seller that the slave, in that case a male:

> Eum puerum sanum esse ex edi[cto], et si quis eum puerum partemue quam eius euicerit simplam pecuniam sine denuntiatione recte dare.[140]

[136] *Dig.* 21. 1. 38. pr; Lenel (1927: 565, §294).
[137] *Dig.* 21. 2. 1. pr.
[138] *TH* LX.
[139] *TPSulp* 43.
[140] *FIRA* iii. No 132 = *Jur Pap* 37.

In the contracts from Dacia some vendors appear to have been peregrines, since they were described by name and patronymic; in the agreement for the sale of a female slave in 139 CE the vendor warranted by *stipulatio* that,

> eam puellam sanam esse <<a>> furtis noxisque solutam, fugitivam erronem non esse praestari;[141]

the vendor of a male slave sold in 142 CE warranted by *stipulatio* that,

> furtis noxaque solutum, erronem, fugiti<u>m caducum non esse praestari;[142]

and the vendor of the female slave sold in 160 CE warranted, also by *stipulatio,* that

> eam mulierem sanam traditam esse emptori s(supra) s(cripto).[143]

In each of the contracts the vendor warranted by *stipulatio* that he would pay compensation if the purchaser were evicted from possession of the slave.

Further in a contract from Egypt of 77 CE for the sale of a horse, an animal that was a *iumentum,* the seller warranted by *stipulatio* that the horse that he sold:

> Eum [e]quom esse bibere ita uti bestiam veterinam asdole[t], extra [quam si recte di]ctum descriptum quod palam corpore esset;

and undertook that *si quis eum evicerit,* then, as plausibly restored by the editor, he would pay on account of the value of the horse:

> ... Ute a[d] Solet p (roam) r (act) d (air) stipule (at us) EST C. VA[l]erius, spop (ondit) C. Iulius Rufus.[144]

Thus, each vendor undertook to pay compensation in the event of eviction of the purchaser.

In the contract for the sale of a slave from Seleucia Pieria, then, the vendor warranted in accordance with an edict but the edict is not stated to be that of the curule aediles. It is reasonable to infer that the warranty was given in accordance with an edict but not that of the curule aediles. Since the form of the warranty in the contracts from Dacia and Egypt substantially follows that given in the contract from Seleucia Pieria, it is likely that the warranty was likewise given under an edict, although not that of the curule aediles. That agrees, I suggest,

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[141] *FIRA* iii. No 87 = *CIL* 3, no. vi, pp 937-9.
[142] *FIRA* iii, No 88 = *CIL* 3, no. vii, pp 940-3; Lenel treated this form as corresponding with the form of the aedilician *stipulatio* (1927: 567-8, §296).
[143] *FIRA* iii. No 89 = *CIL* 3, no. xxv, p 959.
[144] *FIRA* iii No 136 = *PSI* 6. 729.

with the statement of Gaius that because no quaestors were sent "in provincias Caesaris", that is to Augustan provinces, the edict of the aediles "in his provinciis non proponitur".[145]

Katzoff says of the contract from Seleucia Pieria in Syria that the warranty that the slave was healthy "ex edi(cto)" was a warranty that the slave was healthy as defined by the edict of the curule aediles and because it was not published in Syria "no one would attempt to argue from this phrase the existence of the aedilician edict in Syria".[146] In fact the warranties in those contracts, although corresponding to those required by the curule aediles in their edict, do not cite it, and may well refer to the provincial edict. Arangio-Ruiz had previously pointed out that the edict was mentioned in contracts from Egypt and Syria, and Giambatista Impallomeni had observed that officials of Augustan provinces having jurisdiction applied aedilician law.[147] Martini cited these opinions without any evident disapproval.[148] In any event, since in senatorial provinces the warranty of the vendor was required by an edict, that of a quaestor, it seems likely that in an Augustan province it was also required by an edict. Indeed the warranty given by the vendor in the contract from Seleucia Pieria was given "ex edic[to]" which was most likely to have been the provincial edict published by the governor of it. I suggest that the provincial edict of the Province included provisions bringing those of the edict of the curule aediles into effect there.

Since Cicero included in his provincial edict provisions concerning "de bonis possidendis, magistris faciendis, <bonis> vendendis", it is likely that the power to allow *bonorum cessio* or surrender of assets to one's creditors, was exercised by the prefect under a provision of the provincial edict. The exercise is shown by a collection of decisions that were made by the prefect Munatius in 150 CE, in which the applicants were, as shown by their names, peregrines, so that we must conclude that by the provision of the provincial edict peregrines as well as Roman citizens might apply for the relief.[149] The right of *bonorum cessio* was created by a *Lex Iulia* of the beginning of the principate but was also the subject of provisions in the urban edict, as texts in the commentaries of Ulpian and Paul show, and the subject of provisions in the provincial edict as texts in Gaius' Commentary on the procedure for the sale of the property of

[145] Gaius 1. 6.
[146] Katzoff (1969: 426).
[147] Arangio-Ruiz (1954: 363, fn [1]); Impallomeni (1955: 135-6).
[148] Martini (1969; 139-140, with footnotes [23} and [24])
[149] *P Ryl* 2. 75.

debtors also show.[150]

It seems clear that the imperial constitutions concerning soldiers' wills, and the right of children of soldiers to seek *bonorum possessio* of their fathers' estates did not become effective in a province, without the making of an edict by its governor. Accordingly, if the prefect of Egypt had power to make a "special edict" of the kind envisaged by Katzoff, that is one by which the institution of *bonorum possessio* was established in Egypt, it seems difficult to argue that he had no power, and did not publish an edict which made also other provisions of the urban edict effective there. In my view such an edict would have amounted to a provincial edict of the kind upon which Gaius made his Commentary. Such a "special edict", and "a general rule that Roman citizens could appeal to the city law of Rome in all its parts" amount to a provincial edict such as was published by provincial governors of the Republican period, one that gave Roman citizens resident in a province the benefit of all the provisions of the edict of the urban praetor. In any event contracts made in Dacia show that the part of the provincial edict that made the aedilician edict effective in an Augustan province applied to peregrines as well as to Roman citizens, and there is no reason to doubt that parts at least of the provincial edict applied, as Buckland said, to all inhabitants of a province whether or not Roman citizens.[151]

It is now appropriate to consider in the light of these findings whether the governor of the Province had the power to publish and published a provincial edict for the Province and if so, what provisions it contained. Just as no copy of any *lex provinciae* applicable to the Province is extant, no copy of any edict of the governor of the Province, including a copy of any part of a provincial edict that was published for the Province has been discovered. Nor do any of the documents in either archive refer to an edict, except for the copies of the *formula* that were part of the archive of Babatha, since Dieter Nörr regarded her possession of them as "ein kaum widerlegbares Zeugnis" of the existence of a provincial edict for the Province. [152]

However, we may infer from the evidence of the contents of a provincial edict that is available from the period of the Republic, from what may be inferred of the provincial edict for Egypt, and also from the contents of the documents forming the archives of Babatha and Salome Komaïse, not only that there was such a provincial edict for the Province, but also something of its contents.

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[150] Buckland & Stein (1963: 645); *Dig* 42. 3; 42. 5. 1, 3, 7, 13, 16, 21; Mélèze-Modrzejewski (1968: 337) also suggests that the provision of the edict of Ti Julius Alexander based on ἡ βουλευσίς of Augustus forbidding the transfer of debts to officials shows the introduction into Egypt of the *Lex Iulia de cessione bonorum.*
[151] Buckland (1934: 86).
[152] Nörr (1998a: 86).

Although Egypt, because of the circumstances of its annexation into the Roman Empire and the particular legislative arrangements that Augustus made for it, was to some extent differently governed and administered, there is no reason to suppose that it was unique among Augustan provinces in there being a provincial edict by which provisions of the urban edict, and that of the curule aediles, were made effective. Although we know of few Roman citizens who were resident in the Province, as opposed to Egypt, it was in their interest that various provisions of those edicts be made effective there also, since otherwise, as Cicero says, they would be unable to rely upon the provisions of the urban edict and would accordingly be left to their rights under the *ius civile*.[153] It would be to the advantage of some of those citizens to have been able to rely upon those parts of the urban edict by which they could obtain grants of *bonorum possessio*, and the provisions of the edict of the curule aediles by which sellers of livestock were required to give warranties about the livestock they were selling. Some of the Roman citizens who were resident in the Province were serving soldiers, as there were in all provinces, and the letter of Hadrian, is likely to have been of considerable benefit to them. We are aware from documents forming part of Babatha's archive that soldiers stationed in the province of Judaea engaged in lending money at interest and it cannot be doubted that some soldiers stationed in the Province engaged in lending money and the sale and purchase of livestock, so that it would be to their advantage for the provisions of the edict of the curule aediles to be made effective in the Province. Moreover, it is apparent from documents forming part of those archives, that there were peregrine inhabitants of the Province who wished to obtain the benefit of Roman law in the ordering of their commercial and contractual relations, and the resolution of their legal disputes in proceedings in the governor's court, and it would have been to their advantage to have the benefit of the edictal law. We may therefore take it as likely that, by some means, the provisions of the urban edict and the edict of the curule aediles were made effective as part of the edictal law of the Province by provisions in a provincial edict. Since we are aware that there was such an edict published in at least the senatorial provinces and in Egypt and that it was in substantially the terms of the urban edict, it is a reasonable inference that it was published also in the Province.

That provincial edict seems therefore to have contained provisions similar to those that were included in the provincial edict of Egypt, and in particular provisions bringing into force in the Province provisions of the urban edict and that of the curule aediles, but generally leaving in

[153] Cic. *Att.* 6. 1. 15.

operation in the Province the law of Nabataea and, so far as it affected Jewish residents of the Province, the Jewish law.

In the province of Sicily a provision allowing the peregrine inhabitants to litigate under their own law in local courts stood as part of the *Lex Rupilia*, the *lex provinciae* of the province, but in the province of Cilicia a similar provision formed part of the provincial edict published by Cicero as its governor. It is probable that similar provisions had effect in the Province, either as part of the *lex provinciae* or as part of the provincial edict, but we cannot be sure by which of these provisions it took effect. However, in view of the importance to be accorded to measures relating to the administration of justice in a province, it is likely that other provisions relating to it also appeared in the provincial edict.

The importance of the administration of justice in a province also suggests that the provincial edict for the Province contained provisions regulating the exercise of the jurisdiction of the governor and of any peregrine courts in it. Indeed Georgy Kantor has argued that "(i)t is also not impossible that (the) governor's edict could, similarly to the better-known edict of the urban praetor, which by the time of Salvius Julianus opened with the titles *de his, qui in municipio colonia foro iure dicundo praesunt* and *de iurisdictione,* open with some brief regulations of civic jurisdiction in subject communities".[154]

However, as Alonso has pointed out, the provincial edict may not have contained provisions concerning regulating the governor's discretion to apply peregrine legal rules in the exercise of his jurisdiction: "whatever position one takes regarding the existence of a general provincial edict for Egypt, it is clear that the subsistence of the peregrine legal rules and institutions cannot be linked to any conceivable edictal provision regulating their application by the Roman jurisdiction".[155]

Just as the prefect of Egypt exercised his jurisdiction at *conventus* centres in Egypt, the governor of the Province exercised his at centres at least at Petra and Rabbath-Moab.[156] The establishment of those centres, and the ordering of the *conventus* generally, were the subject of edicts of the prefect of Egypt and probably also the subject of provisions in the provincial edict of the Province, unless provision had been made in the *lex provinciae* for the Province.

[154] Kantor (2008: 90-1); Lenel (1927: 51- 9 §§ 1-2).
[155] Alonso (2013: 359).
[156] *P Yadin* 14 and 25.

It appears from a papyrus copy of a petition of the year 177 CE that in Egypt under edicts of the prefect issued in response to *mandata* of various emperors, widows were allowed πρωτοπραξία or right of first recovery of their dowries, a right not apparently confined to Jewish women: πάντων τῶν κυρίων ἡμῶν αὐτοκρατόρων καὶ τῶν κατὰ καιρὸν ἡγεμόν[ων] κελευσάντων πρωτοπραξίαν ἔχειν τὰς προοῖκας ἐγὼ μόνη παρὰ τὰ διατεταγμένα ὑπὸ τῆς τοῦ ἀνδρός μου Λιμναίου ἀδελφῆς Ἐ[λ]ένης ἱκανῶς διετέθην ἐναντιουμένης τοῖς καθολικῶς διατεταγμένοις.[157] In view of the terms of the edict of Ti. Julius Alexander, those emperors must have included Augustus.[158] The substance of this is that various emperors had by *mandata* ordered that a widow have πρωτοπραξία or the right of priority repayment of her dowry and various prefects of Egypt had embodied the provision in edicts, presumably their respective provincial edicts. We cannot be sure when the edicts were issued since "all" emperors had issued *mandata* and many prefects had issued edicts, but we may say that the earliest dates from the reign of Augustus. This is made more probable by the fact that certain cities of the province of Bithynia-Pontus had the right of *protopraxia* in claims against their citizens, in some cases "a plerisque proconsulibus concessam eis protopraxian, eamque pro lege valuisse", and in response to an enquiry by Pliny, the Emperor Trajan replied that it should be allowed only where embodied in their constitutions: "ex lege cuiusque animadvertendum est".[159] This no doubt indicates that the privilege was allowed in some of those constitutions, by provisions of the *Lex Pompeia,* the *lex provinciae* of that province, and also that it might be allowed by a governor of a province in his provincial edict, as I suggest the prefect of Egypt and the governor of the Province allowed it. The text in Gaius' Commentary concerning property "quae pondere numero mensura constant" shows that it was the subject of provisions in the provincial edict.[160]

From contracts for the working of three named date orchards in Arabia it appears that Babatha claimed them under a provision in her *ketubbah* for the repayment of her dowry, and also apparently under the right of πράξις or execution granted to her under the agreement that she made for the deposit of money with her late husband Yehudah: κατέχω αὐτὰ ἀντὶ τῆς προ{ο}ικός μου καὶ ὀφιλῆς.[161] Those contracts are consistent with Babatha having such a right, and the claims made by Babatha and Miriam in their proceedings against each other, apparently in order to recover their dowries from the estate of Yehudah are also consistent with them

[157] *BGU* 3. 970 = *M Chrest* 242.
[158] *CIG add* 4957 = *OGIS* 669 paras 8, 3, 2 = *BGU* 7. 1563 = *FIRA* i. No 58.
[159] Plin. *Ep.* 10. 108-109.
[160] *Dig* 23. 3. 42.
[161] *P Yadin* 21-22; *P Yadin* 10, and see the provisions of *mKet* 4. 7; *P Yadin* 17.

having it.[162] The position taken by Babatha in response to the proceedings brought against her by Besas the *tutor* of the orphan nephews of Yehudah and Julia Crispina their ἐπίσκοπος, that is her denial that she held the orchards by force, is also consistent with her having such a right.[163] Babatha's claim to take possession ἀντὶ τῆς προ{ο}ικός is also consistent with a claim under a provision of the provincial edict for the Province granting πρωτοπραξία, and it is in any event probable that a provision allowing πρωτοπραξία by a widow for the recovery of a dowry stood in the provincial edict for the Province.

In addition to those date orchards, Yehudah had, according to Besas' statement in his deposition in proceedings against her, registered other date orchards in Babatha's name ἐν τῇ̣ ἀπ[ο]γραφῇ̣, which was apparently an ongoing register other than that in which she registered date groves for the purpose of the census.[164] In his summons Besas claimed on behalf of the orphans a date orchard, but in his deposition in the proceedings he stated that if she did not disclose to him her right to those orchards: ἀποδῖξέ μ[οι π]ο[ί]ῳ [δ]ικαιώματι δι[α]κρατῖς τὰ αὐτὰ εἶδη, he would register them [ἐν τῇ̣ ... ἀπο]γραφῇ̣ in the name of the orphans no doubt based upon their claim as grandsons, and accordingly as heirs to the estate of the deceased father of Yehudah to the exclusion of Babatha. That such a registration was possible is suggested by the known registration of claims under grants of *bonorum possessio* made by the prefect of Egypt. Further in the document by which claims made by Besas as tutor of the nephews of Yehudah against Shelamzion were settled, and land at Ein-Gedi in the province of Judaea was released to her, he undertook to register that land in her name in the public registers διὰ δημοσίων, presumably of that province, and Yehudah, when he settled a courtyard there upon his daughter Shelamzion, likewise undertook to register it in her name in the public registers.[165] It is probable that there were similar public registers in the Province and that they were not those made for the purpose of the census, which presumably were made at intervals for the purpose of assessment and collection of tax. In Egypt an edict of the prefect M. Mettius Rufus of 89 CE required married women to insert copies of claims against their husbands under Egyptian law with their husbands' property statements.[166] Those claims no doubt included those for the return of dowries which in Egypt might be secured by ὑπάλλαγμα, described by Raphael Taubenschlag as a form of charge by which the debtor renounced voluntarily his right

[162] *P Yadin* 26; see Chapter 3.
[163] *P Yadin* 23-5; see Chapter 3.
[164] *P Yadin* 24.
[165] *P Yadin* 20, 19.
[166] *P Merton* 3. 101= *P Oxy* 2. 237 viii, ll 27-43.

to dispose of his property, "until it was redeemed from its pledge", that is by the repayment of the debt.[167] A ὑπάλλαγμα might be registered in a local land register, as is shown by a papyrus agreement of 132 CE, which was held by Fr. Pringsheim to be such a document and was stated to have been registered in the registry at Karanis, [ἀναγ]έγρ(απται) διὰ τ[ο]ῦ ἐν Καρα(νίδι) γραφείου, and by another papyrus agreement of 148 CE stated according to the reconstruction to be an ὑπ[αλλαγή], an equivalent expression, which was registered in the register at Heracleia, [δι]ὰ τοῦ ἐν Ἡρα[κλ]είᾳ γραφείου.[168] Both agreements contain a provision allowing the lender πρᾶξις or a right of execution. A fragmentary ὑπαλλαγή evidently given to support the return of a dowry is to be seen in a papyrus of 178-9 CE which however is defective at the end so that it does not contain any note of its registration.[169] Further, according to Taubenschlag, in Egypt a ὑπάλλαγμα might also be recorded on the register of the property of the debtor "when the βιβλιοθήκη ἐγκτήσεων provided for such recording".[170] Accordingly it seems that in Egypt a document by way of charge that contained a grant of a right of execution (or πρᾶξις), including one to secure the repayment of a dowry, might be registered in a γραφείον or local registry and also in the βιβλιοθήκη ἐγκτήσεων.

Since married women, including Jewish women, resident in the Province had, in certain circumstances, rights of execution against the estates of their husbands it is likely that provision was made for the registration of those rights in registers in the Province just as it was in Egypt. It may be that the registration of the date groves in the name of Babatha was in such a register. In Egypt that provision was made by edict of the prefect, so that it is likely that it was made by edict also in the Province. That the making of such registers appears to have been for the protection of rights in property and thus the government of the Province and the administration of justice within it, suggests that provision for the making of them may have been by the provincial edict.

In Egypt declarations of the birth of children were made by Roman citizens from no later than 62 CE in Latin on wooden tablets and were recorded *in atrio magno* or *in foro Augusti* in Alexandria and elsewhere in Egypt, no doubt under the authority of the provincial edict, or a special edict issued by the prefect of Egypt.[171] It appears from a letter of Trajan to Pliny that

[167] Taubenschlag (1955: 275-7).
[168] Pringsheim (1941: 142-3); *P Athen* 21; *P Lond* 2. 311 = *M Chrest* 237.
[169] *P Athen* 30.
[170] Taubenschlag (1955: 275-7)
[171] Tablets recording those declarations are collected and published by S. de Ricci (1906) and as *CPL* Nos 148-164.

grants of *ius trium liberorum* were recorded in Trajan's *commentarii*, and from a petition to the prefect of Egypt of 225 CE that at that time the prefect of Egypt kept a register of women who had established that right.[172] We know of few Roman citizens resident in the Province, but registration of the births of their children was necessary there as in Egypt. Among the Roman citizens resident in the Province was Julia Crispina, who may have had the *ius trium liberorum,* and whose right would apparently have been required to be registered, if she wished to act without the *auctoritas* of a *tutor* in a case where the rules of *tutela mulierum* otherwise required it. A part of an attested copy of a petition that had been registered μεθ' ἑτέρων ἐν ταῖς ἰαθμεῖσι bears markings of overscored λβ ς which Lewis has, in my view plausibly, interpreted as references to the entry of the document into a register in the Province, showing a developed system of registration.[173] Since the expression ταῖς ἰαθμεῖσι appears to have no meaning in Greek, Lewis treated it as derived from an Aramaic YTM', meaning "orphan".[174] This would indicate a register divided into sections by subject matter, and presumably of some size and organisation.

Registration of documents in public registers in Egypt was a subject upon which prefects of Egypt issued frequent and repeated edicts, as is shown by the edicts of various prefects.[175] Due administration of the Province, both as to the registration of property claims, including registration at a time outside the census, and the administration of justice in the governor's court, would dictate the need for the keeping of ordered records and the regulation of them by the governor's edict. The need to establish permanent registers and to maintain them in an effective manner makes it probable that such registers were regulated by provisions in the provincial edict of the Province, just as it is suggested that they were in Egypt. Before its annexation there had been one, and probably more than one, place of registration of documents relating to title to land in the kingdom of Nabataea, as is shown by a tomb inscription from Mada'in Saliḥ of 31/2 CE: KNSḤT DNH YHYB[BB]YT QYŠ', that is "according to the copy deposited in the temple of (the god) Qaysha", so that those registers of the Province may have been continuations of those of the former kingdom.[176] Where they were continuations it is likely that a provision either of the *lex provinciae* or of the provincial edict would have ensured

[172] Plin. *Ep.* 10. 95; *FIRA* iii. No 27 = *P Oxy* 12. 1467 = *Jur Pap* 14.
[173] *P Yadin* 33; Lewis (1989: 125).
[174] Lewis (1989: 126); see Jastrow (1903: 604).
[175] *P Oxy* 2. 237.
[176] *Ḥ* 36.

continuity of the rights acquired or established by registration under the laws of the kingdom of Nabataea.

Census returns of Babatha and Sammouos and a further fragmentary return that were lodged at Rabbath-Moab show that in 127 CE a census was conducted in the Province by the governor of it.[177] Nothing shows that there was at the time of the annexation any alteration in the rate of tax or the currency in which it was payable but there must have been some legislative act by which the census and the manner in which it was to be carried out were ordered. Since it appears that the first part of the provincial edict of Cicero was concerned with "omnia de publicanis", it appears that taxation of a province might, in the republican period, be the subject of provisions of the provincial edict relating to its collection.[178] Although it would have been the responsibility of any *procurator* of the Province that had been appointed to supervise collection of the land tax, the decision to hold a census appears to have been made by the governor and its conduct was probably regulated by provisions in the provincial edict.[179] Although the prefect of Egypt had responsibility for the taxation of his province, that the governor of the Province regulated the census in that way is supported by the circumstance that the prefect regulated by edict the census that was taken periodically in Egypt for the assessment and collection of *tributum capitis* or poll tax.[180] Since, however, we have no relevant legislative provision, either of the *Lex Provinciae* of the Province or of its provincial edict, it is impossible to state with certainty the instruments by which tax was imposed on the Province or its collection regulated.

Documents from the archives show that in the Province infants were subject to *tutela*, and peregrine women took part in legal acts either accompanied by a *tutor* or described as διὰ τοῦ ἐπιτρόπου. Since by the *Lex Iulia et Titia* it was enacted that the governor of a province had the power to appoint tutors both to infants and to women, that power was exercisable in the Province and in relation both to *impuberes*, whether Roman citizens or peregrines and to women who were Roman citizens but not to those who were peregrines.[181] Whether he had power to appoint *tutores* for peregrine women may be doubted since, although it is clear that peregrine women resident in the Province had and acted through *tutores*, there is no evidence in the archive of the appointment of such a such a *tutor*, unless statements in documents that a

[177] *Dig* 50. 15; *P Yadin* 16; *XḤev/Se* 61-62.
[178] Cic. *Att.* 6. 1. 15.
[179] See: Millar (1964:182).
[180] See Wallace (1938: 292-3); *P Hamb* 1. 60, a return made in the census of 90 CE κατὰ τὰ κελεύσθεντα ὑπὸ τοῦ [κρα(τίστου)] ἡγεμόνος and *P Lond.* 3. 904 = *W Chrest* 202, an edict of the prefect C Vibius Maximus of 104 CE requiring those subject to the census (τῆς κατ' οἰ[κίαν ἀπογραφῆς ἐ]νεστώ[σης]) to return to their own homes; see also Bagnall & Freir (1994: 11).
[181] Gaius 1. 185.

peregrine women was accompanied by a *tutor* or described herself as acting διὰ τοῦ ἐπιτρόπου can be so regarded. Further *tutela mulierum* was an institute of the *ius civile* and peregrine women were not subject to it unless under some special provision of the law. Mélèze-Modrzejewski suggests that the *Lex* was made effective in Egypt by a *senatus consultum,* relying on appointments of tutors made by prefects in the later second century and third century CE: by the prefect Q Aemilius Saturninus in 198 CE of a tutor "e lege Julia et Ti<ti>a et ex s(enatus) c(onsulto)", and in a damaged copy of an order by the prefect C. Valerius Firmus in 247 CE, of a tutor "e lege Iulia Titia et", where a following hiatus in the papyrus may have included a reference to a *senatus consultum*.[182] These references may, however, be to a *senatus consultum* by which Gaius says women were allowed to apply for a tutor in place of one that was absent, even one not far away.[183] However statements in Gaius' Commentary make it clear that the provincial edict contained provisions bringing the law of *tutela* into effect in a province, including an Augustan province, to which it applied. They include texts on the general principles, on testamentary tutelage, on the most closely related agnate obtaining tutelage, the right of a governor of a province including an Augustan province to appoint as tutor someone who was absent from the province and to a *pupillus* who was absent from the province, the obligations of a tutor in the tutorship, that a *pupillus* could not be made liable on every contract without his tutor's *auctoritas,* and where a pupillus was affected by *bonorum possessio.*[184] It is shown from a text of Ulpian that the power to fix the place where a *pupillus* was to be maintained and brought up, was to be exercised by the governor of the province, and I suggest that he also had the power to determine the level of maintenance to be paid to a *pupillus*.[185]

Among the documents in the possession of Babatha in her archive were copies of a Greek translation of the formula for an *actio tutelae,* and a text in Gaius' Commentary stating the periods during which a tutor might be liable under an *actio tutelae* shows that the *actio tutelae* was available in a province and could be the subject of the jurisdiction of the governor of an Augustan province.[186] Since Ulpian in his commentary on the urban edict says "(d)amus autem ius removendi suspectos tutores Romae praetoribus, in provinciis praesidibus earum" which clearly refers to all governors, since he then says that there had been doubt whether the power

[182] Mélèze-Modrzejewski (1968: 338); *SB* 3. 6223 = *FIRA* iii. No 25; *P Oxy* 4. 720 = *FIRA* iii. No 24 = *M Chrest* 324 = *Jur Pap* 13; an order made by the prefect of Egypt between 126 and 132 CE was also described as having been made "e leg(e) Iulia Titia et ex s(enatus) c(onsulto)": *BM Add MS* 40. 723 = *CPL* 200.
[183] Gaius 1. 173.
[184] *Dig* 26. 1. 16; 26. 2. 1; 26. 4. 9; 26. 5. 5; 26. 7. 13; 26. 8. 9, 11.
[185] *Dig* 27. 2. 1. pr; 27. 2. 3. pr, 4; 27. 2. 5.
[186] *P Yadin* 28-30; *Dig* 27. 3. 14.

was exercisable "apud legatum proconsulis", there can be no doubt that the whole of the law of *tutela,* so far as it concerned *impuberes* and women who were Roman citizens, including that relating to *suspecti tutores*, was in force in the Province, and in appropriate circumstances both infants and women required the intervention of a tutor and the insertion of his *auctoritas.*[187] Since peregrines were appointed as tutors, at least to peregrine infants who were orphans, and those tutors were able to be parties to proceedings before the governor of the Province, it is apparent that they were eligible to be tutors there although they were ineligible in Rome.[188] The most probable source of this is the provincial edict of the Province.On the limited information about the *senatus consultum* to which Mélèze-Modrzejewski refers, it cannot be concluded that it was through it that the law of *tutela* became effective in a province, and in view of the statements in Gaius' Commentary, and the *senatus consultum* to which Gaius refers, it must be taken that the most probable source by which the law of *tutela* came to be in force in the Province was the provincial edict for it.

No document in either archive relates to *bonorum possessio,* no doubt because no document relates to the estate of a deceased Roman citizen or to property of a Roman citizen, so there was in them no case, such as was envisaged by Cicero, for the need to make an application for *bonorum possessio* in the Province. However, passages in Gaius' Commentary show that the provincial edict upon which he was commenting contained provisions that show that the remedy of *bonorum possessio* was available to Roman citizens in the Province, just as it was made available to citizens in Cilicia by the provincial edict for it. Since those provisions were capable of being adopted in each province, including Augustan provinces and since it had been adopted for Egypt, one must conclude that the provisions of it were incorporated in the provincial edict of the Province. There is no evidence from Egypt of a grant of *bonorum possessio* of the estate of a peregrine, no doubt because all grants of which there is evidence date from after the *Constitutio Antoniniana*.[189] However, there may have been occasions for a provincial governor to grant that relief, since those cases where *bonorum possessio* was granted to fill the gap because there was no *ius civile* heir might relate to the estate of a peregrine inhabitant, who necessarily could not have such an heir. It may be accepted that such jurisdiction would have been available equally before the governor of the Province. [190]

[187] *Dig* 26. 10. 1. 3, 4.
[188] Buckland and Stein (1963:150); Thomas (1976: 457); *Tit. Ulp* 11. 16.
[189] Kaser (1971-5: Vol 1, 220, fn [37]),
[190] Kaser (1971-5: Vol 1, 675).

It is likely that, as in Egypt, the provincial edict of the Province made provision for the grant of *bonorum possessio* to unborn and disputed children of a deceased. Because of its relationship with *bonorum possessio* it likely also that it made provision also for the examination of pregnant women and the observation of their delivery, as in Egypt.

I suggest that, as in Egypt, there were in the provincial edict for the Province also provisions under which orders might be made allowing *bonorum cessio.*

No document from either archive directly shows that the effect of the edict of the curule aediles was in force in the Province as part of the law of it, and no legal proceedings that are recorded in the archives relate to the sale of a slave or animal, or are in the nature of an action on the edict, whether an *actio quanti minoris* or *redhibitoria.* However its publication in senatorial provinces shows that the effect of it was likely also published in Augustan provinces. There is in my view some evidence in Babatha's archive for the application of the edict in the Province. In an agreement for the sale of a donkey or more probably donkeys, written in Aramaic and made in the Province in 122 CE one of the parties undertook that W'ŠN' MN DNH … YHW' LK 'MY KWL …. KSP SL'YN …. WLMR'N' QYSR KWT, that is the party undertook to pay a penalty both to the other party and to the emperor in the event of a breach on his part.[191] The editors of the papyrus treat the warranty as given by the purchaser, and indeed the agreement is initially framed from his point of view, as an acknowledgement of a completed purchase, with a receipt for the donkeys.[192] However the agreement also includes a statement that LY 'MK MND'M L' Z'YR WL' SGY['], that is "you do not owe me anything", which appears more appropriate when treated as a statement by the vendor acknowledging receipt of the whole of the purchase price. A purchaser who had paid the whole of the purchase price would normally have no further obligation to the vendor, and one would not expect him to undertake any liability to him. The papyrus is too damaged to enable one to be certain to which party the undertaking to pay the penalties should be attributed, but a comparison with the warranties given in the sale contracts from the period of the Nabataean kingdom suggests that the warranty was given by the vendor.[193]

I therefore suggest that the agreement may be one in which the vendor gave a warranty of fitness of the animals that he sold, and undertook to pay damages upon breach, that is the

[191] *P Yadin* 8.
[192] Yadin et al (2002: 113, 116); see Newman (2006: 333); Gross (2013: 157); for further discussion of this document see also Chapter 4.
[193] *P Yadin* 2-3.

existence of defects in them. If that is so then the warranty may be one given by a vendor of "iumenta" or beasts of burden, which included donkeys, in accordance with provisions of the edict which applied to sales of them.[194] Although Nabataean law made provision for penalties for breach of warranties by sellers, and the available material does not enable us to say whether the agreement was intended by the parties to operate under Roman or Nabataean law, we may treat this document as capable of being a Roman law contract of *emptio venditio* and showing the application of the edict of the curule aediles to the Province by provisions of the provincial edict, especially as I have shown above that it was in force in other Augustan provinces by provisions of the provincial edict.

Many of the documents which formed part of the archives include undertakings which were confirmed by a *cautio* of a *stipulatio* in a Greek translation of the form of the question "FIDEPROMITTISNE?" with the response "FIDEPROMITTO", a form which according to Gaius was *ius gentium* and permissible "inter omnes homines, sive cives sive peregrinos" and that this was so "et quamvis ad Graecam vocem expressae fuerint".[195] Accordingly stipulations formed part of the law of the Province and were enforceable in the court of its governor. However, stipulations were also the subject of provisions in the provincial edict as is shown by a text in Gaius' Commentary concerning certain and uncertain stipulations.[196] It therefore appears that stipulations were made part of the law of the Province also by the provincial edict. It appears that parties to such agreements required obligations to be confirmed by stipulations in order that in the event of litigation on the agreements in the governor's court, they would be more readily enforceable, such as the stipulations for the performance of the groom's obligation to repay the dowry, contained in the marriage agreements of Shelamzion daughter of Yehudah, and of Salome Komaïse daughter of Salome Grapte, agreements otherwise partially in accordance with Jewish law.

Other Roman law forms of contract are evidenced in the documents in the archives, namely *depositum* (gratuitous deposit), *mutuum* (loan for consumption), *pignus* or *hypotheca* (pawn or mortgage), and the agreements of 123 CE for the sale of goods may have been Roman law contracts of *emptio venditio*.[197] Each was *ius gentium*, but they were also the subject of texts

[194] *Dig.* 21. 1. 38. pr, 7.
[195] Gaius 3. 92-93.
[196] *Dig* 45. 1. 74.
[197] *Depositum: P Yadin* 5, 17; *mutuum* with *pignus* or *hypotheca*: *P Yadin* 11; *emptio venditio*: *P Yadin* 8-9.

in Gaius' Commentary, and thus of provisions in the provincial edict of the Province and formed part of the edictal law of it.[198]

In a text in the *Digest* Ulpian sets out the edict of the urban praetor by which he gave an action, the *actio depositi*, for breach of a contract of *depositum*, and Gaius discusses in his Commentary the rights of the heirs of a depositor.[199] A text of Ulpian shows that a contract of *mutuum* gave rise to an obligation that was enforceable by a *condictio* based upon the edict of the urban praetor, and Gaius in his Commentary discussed a particular case of the enforceability of it.[200] There are texts in Gaius' Commentary on the possible subject matter of *pignus,* on ending *pignus* or *hypotheca,* and on actions on a pledge.[201] Further, Gaius discussed in texts in his Commentary contracts of both *emptio venditio* and *locatio conductio,* and provisions in contracts of *locatio conductio*, and also compared the terminology of Republican jurists in relation to both forms of contract.[202]

No document in either archive shows that any party to legal proceedings relied upon the defence of *res iudicata*, but it is apparent from provisions of the edict of 68 CE of the prefect Ti Julius Alexander that the defence was available in suitable cases in Egypt, and texts in Gaius' Commentary in which he discusses particular applications of the rule show it to have been in force in Augustan provinces, and I suggest that it was the subject of provisions in the provincial edict of the Province.[203]

In some of the documents forming part of the archive of Babatha, parties brought proceedings which were interrogatory actions the subject of texts in the *Digest.*[204] Those proceedings suggest that the law relating to such actions formed part of the law of the Province and a text of Gaius' Commentary in which he says that a person interrogated is to be given time to consider the matter, shows that the action was available in a province and I suggest was adopted for the Province by a provision in the provincial edict for it.[205]

Roman citizens who became resident in the Province, for whatever reason, remained subject to the *ius civile* as they had been in Rome, and also were subject to the Roman statutes and other

[198] For contracts that were *ius gentium* see also Chapter 6
[199] *Dig* 16. 3. 1. 2; 16. 3. 14.
[200] *Dig* 12. 1. 9. pr; Buckland and Stein (1963: 463); *Dig* 12. 1. 28.
[201] *Dig* 20. 1. 9; 20. 6. 2; 13. 7. 10.
[202] *Dig* 19. 2. 6, 25; 19. 1. 19, 20.
[203] *Dig* 44. 2. 15, 17.
[204] *Dig* 11. 1; and see Chapter 3.
[205] *Dig* 11. 1. 5

imperial legislation. This is illustrated by the edict of the prefect M Petronius Mamertinus of the period 133-137 CE, in which he limited the matters that he would hear at first instance to certain offences and delicts that are listed in the edict, and to complaints by patrons against their freedmen and parents against their children.[206] The offences and delicts that are mentioned have been shown by Lewis to have been actionable under the *ius civile* and the complaints of patrons and parents to have referred to the *accusatio ingrati*, a cause of action available to Roman patrons against their freedmen and parents against their children.[207] Lewis has also argued that this ruling effectively limited the persons who could be parties in proceedings before the prefect to Roman citizens. This is not strictly correct since it is possible that a peregrine inhabitant of Egypt might be subject to a provision of the *ius civile* as is shown by a transcript of a hearing before the prefect in the period 133-137 CE of a dispute between a freedman and his former master, both of whom were peregrines.[208] The prefect, having found no applicable rule of Egyptian law: [ἐν μὲν τοῖς τῶν] Αἰγυπτίων νόμοις οὐδὲν περὶ τῆς [καὶ τ]ῆς ἐξουσίας τῶν ἀπελευθερωσάντων, made his order ἀ[κο]λούθως τοῖς ἀστικοῖς νόμοις, an expression which according to Lewis is a reference to the *ius civile*.[209] In questions arising under provisions of the *Lex Papia* that concerned *vacatio et excusatio munerum* the *ius civile* might apply where there was no other possible rule:

> De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet.[210]

Similarly the *Lex Irnitana* provided that in default of a provision in the statute, the magistrates of the *municipium* were to apply the law as in force in Rome:

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[206] *P Yale* Inv No 1606; Lewis (1972-3).
[207] Lewis (1972-3: [1972] 7-8).
[208] Lewis (1972-3: [1972] 12); *P. Oxy* 4. 706.
[209] Lewis (1973-3: [1973] 9-10).
[210] *Dig* 1. 3. 32. pr; although Mélèze-Modrzejewski (1968: 336) treated this text as being of general application, Lenel in his *Palingenesia* (Julianus 819) treated it as applicable only to those provisions of the *Lex Papia-Poppaea* that concerned exemption from undertaking tutorship and curatorship; it appears later to have been treated as a general definition of custom; see Humfress (2011: 26-8); Alonso (2013: 380-5) and Czajkowski (2017: 171-3); Oudshoorn (2007) seems not to have discussed this text. Silvio Perozzi (1906: vol 1, 31, fn [1]) thought the expression *scriptis* interpolated on the ground that it was ridiculous in Julianus for whom all laws were to be written, and according to Alonso (2013: 385 fn [98]) Flume saw problems in the expression *scriptae leges* since the text ought to be a commentary on the *Lex Papia* and lacked explicit connection with that statute; Alonso said nothing of the view of Perozzi, and without quoting Flume's text, rejected his view on the ground that the text's detachment from its original context was a sufficient explanation for such problems; I accept his view that "against (the text's) authenticity no significant arguments can be raised" (2013: 384-5).

> Quibus de rebus in h(ac) l(ege) nominatim cautum{ue} scriptum<ue> non est, quo iure inter se municipes municipi [Flaui] Irnitani agant, de iis rebus omnibus ii inte[r se] agunto, quo ciues Romani inter se iure civili agunt agent.[211]

Entries in the *Gnomon of the Idios Logos*, a consolidated guide written in the first half of the second century CE to assist an officer of revenue in Egypt in exercising his powers, show according to Mélèze-Modrzejewski that several *leges* and *senatus consulta* were in force there.[212] They included Augustus' marriage and caduciary legislation: cl 22 concerning the confiscation of the property of deceased Latins who had not yet acquired νομίμη ἐλευθερεία, showing the adoption of the provisions of the *senatus consultum Largianum* of 42 CE which according to Gaius altered the devolution of the estates of deceased Iunian Latins;[213] cl 23 which concerns the prohibition on a Roman citizen marrying his sisters or his aunts, showing the adoption of the provisions of the *senatus consultum* passed in 49 CE, apparently that by which the Senate authorised the marriage of the Emperor Claudius to his niece Agrippina the daughter of his brother;[214] and cll 24, 25 and 26 which concern the forfeiture to the *fiscus* of dowries of Roman and Latin women who married at an age that gave rise to penalties under provisions of the *senatus consultum Calvisianum* and the *senatus consultum Persicianum*, to which Suetonius refers.[215] That the Augustan marriage laws were in force in Egypt is shown also by the declarations of birth of children by which Roman citizens resident in Egypt acknowledged the birth of children, in some cases expressly stated to be *e lege Papia Poppaea et Aelia Sentia*, which related to the marriage of Roman citizens and the registration of children. They included one made in 62 CE in which children were registered by parents "qui e lege Pap [P]opp et Aelia Sentia liberos apud [ ] natos sibi professi sunt", and one made in 138 CE by a soldier resident in Egypt in which he stated that he made it "ex lege [A(elia] S(entia) [et Papiae] Poppaeae quae de filis [procreandi]s latae sunt".[216] It is shown also by numerous papyri, including several damaged papyri of the period before 161 CE, in which a woman appears to have entered a legal transaction without the intervention of her tutor using a formula of the type χωρὶς κυρίου κατὰ τὰ Ῥωμαίων ἔθη δικαίῳ τέκνων τρίων, a right given by the *Lex Iulia et Papia Poppaea*.[217] Since the documents to which Mélèze-Modrzejewski refers depend upon

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[211] *Lex Irni.* ch 93.
[212] *FIRA* i, No 99; Mélèze-Modrzejewski (1968: 337-338).
[213] Gaius 3. 63-64.
[214] Tac. *Ann.* 12. 6; Gaius 1. 62.
[215] Suet. *Claud.* 23; *Tit. Ulp.* 16. 1; Parkin (2001: 221-224).
[216] *Tablette du Caire* 29. 812 & *P Mich* 7. 436; = *CPL* Nos 148 & 161.
[217] Sijperstein (1965: 180-181); *BGU* 3. 717; *P. Oslo* 2. 31; *P Freib* 2. 9 = *SB* 3. 6292; Gaius 1. 145, 3. 44; *Tit. Ulp.* 29. 3; *RS* No 64; Mélèze-Modrzejewski (1968: 337).

the operation of *leges*, they show that those *leges* were in force in Egypt. One may accept that the *ius civile* and also the Augustan marriage laws and other *leges* applied to Roman citizens resident in Egypt and there is no reason to doubt that the statutory law also applied to Roman citizens resident in the Province. However, beyond a limited extent nothing suggests that peregrines resident in the Province were generally subject to the *ius civile* in it.

In the litigation brought by Besas and Julia Crispina against Babatha, both Besas and Julia Crispina asserted that Babatha held the date orchard the subject of the proceedings by force, βίᾳ διακρατῖς, and in the latter case Babatha described Julia Crispina as βίαν μοι χρωμένῃ ϙυ̣ϰ̣ο̣[φ]ᾳ̣υ̣τ̣οῦϙᾷ μοι.[218] Dieter Nörr has suggested that since Besas and Julia Crispina were asserting that Babatha was holding land by βία or *vis*, this litigation corresponded with litigation under an *interdictum unde vi*, a form of possessory interdict that applied to the recovery of immoveable property, and argued that it should be assumed that a procedure similar to *interdict* procedure could be used to determine the respective roles of the parties in future property litigation.[219] The litigation between Babatha and Miriam included Babatha's demand that Miriam answer ο̣ὗ χάριν ἐσύλωσες τ̣ὰ̣π̣[άν]τα ἐν τῇ οἰκίᾳ Ἰούδου Ἐλ̣εαζ̣ά̣ρου Χθουσίωνος ἀνδρός μου καί σου ᾳ̣[πογενομένου] and Miriam's counter summons against Babatha requiring that σε μὴ ἐνγίσε εἰς τὰ ὑπάρχοντά μοῦ <καί> [σο]υ ἀνδρὸς ᾳ̣π̣[ο]γ̣ε̣ν̣[ομ]έ[νου].[220] Although there was no express assertion of the use of βία or *vis*, Nörr argued that since the parties were charging arbitrary conduct against each other, their allegations might be a reference to the *interdictum (duplex) utrubi*, a form of possessory interdict applicable in the case of moveable property, which is apparently the subject of the proceedings.[221] According to Gaius, interdicts were used in certain cases where "praetor aut proconsul principaliter auctoritatem suam finiendis controversiis interponit", so that they were available both in the urban praetor's jurisdiction and in senatorial provinces.[222] The procedure was governed by provisions of the urban edict as is shown by texts in Gaius' *Institutes* and in the *Digest*, and texts in Gaius' Commentary show that it was also the subject of provisions in the provincial edict.[223] Thus relief provided by those interdicts was available in the Province, to peregrines as well as to Roman citizens, under provisions of the provincial edict that applied to it.

In my view the provincial edict as it applied in the Province was published by each successive

[218] *P Yadin* 23, 25.
[219] Nörr (1998b: 312-314): Gaius 4. 149.
[220] *P Yadin* 26.
[221] Nörr (1998b: 332-334); Gaius 4. 149.
[222] Gaius 4. 139.
[223] *Dig* 43. 17; 43. 31; Gaius 4. 141; *Dig* 43. 26. 3, 9; 43. 32. 2.

governor in Latin. That the provincial edict was published in Latin is suggested by the lack of any indication in Gaius' Commentary that the provincial edict as he knew it was not in Latin. Priscus' Latin note of registration of Babatha's census return translated into Greek, is probably not such an indication, since the use of Latin presumably reflects rather his position as *Praefectus Equitum* in which he would be expected to use Latin.[224] That litigation was largely conducted in Greek both in Egypt and the Province indicates the need for there to have been a translation of the edict into Greek, and Babatha is shown to have had a translation of a *formula* translated into Greek.[225] Whether such translations were issued officially cannot be stated, but the publication by the Prefect of Egypt of edicts apparently in Greek (since none from there survives in Latin) suggests the possibility that in the Province as in Egypt edicts of the governor might be published in or translated into Greek. It was accompanied by *formulae* just as was the urban edict and the provincial edict as it was published in senatorial provinces.

[224] See *P Yadin* 16.
[225] *P Yadin* 28-30.

Chapter 3 – Litigation in the Province

Part 1 – Introduction – the Jurisdiction of the Governor and the *Conventus.*

The administration of justice in a province was one of the principal tasks of the governor of it and he had jurisdiction over all persons of his province and authority greater than all persons except the Emperor.[1] He had all the jurisdiction of all the magistrates of the city of Rome.[2] That jurisdiction included the power to grant *bonorum possessio* and to order *missio in possessionem* and included also all powers necessary for the administration of justice including the power to appoint judges and to enforce his orders by penal judgments.[3]

Just as did the prefect of Egypt, the governor of the Province exercised his jurisdiction by the procedure of *cognitio extra ordinem* or *cognitio extraordinaria*, a procedure that originated in the reign of Augustus.[4] Civil proceedings by *cognitio extra ordinem* were assigned to holders of *imperium*, including, in a province, the governor, who had complete control over the proceedings. They were no longer voluntary as had been proceedings by way of *formula* granted by the praetor, and the holder of *imperium* might hear them himself or at his discretion delegate them to an official or assign them to a judge, *iudex datus* or *iudex pedaneus*, or a panel of *recuperatores,* whose power was derived exclusively from himself.[5] His power included power to appoint peregrines as judges.[6]

The twofold procedure used in such formulary proceedings was abandoned in proceedings which the governor heard himself. Since the proceedings were based upon *imperium* it became possible to conduct a trial in the absence of a defendant and to enforce the decision against him, at least in proceedings *in personam*, and legal proceedings could be brought on claims that were not cognisable under either the *ius civile* or the *ius honorarium*, those allowed by the provisions of the edict of the urban praetor.[7] Those additional proceedings included proceedings in relation to *fideicommissa* and for maintenance[8]

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[1] *Dig* 1. 18. 3, 4.
[2] *Dig* 1. 18. 10, 11.
[3] *Dig* 2. 1. 1, 2, 3; 2. 3. 1. pr.
[4] Wlassak (1919: 6).
[5] Buti (1982: 43, 32-33); Metzger (2013: 26).
[6] Kantor (2008: 88, with fn [256]).
[7] Buti (1982: 33, 46); Metzger (2013: 27-28).
[8] Gaius 2. 278; Buti (1982: 32); Metzger (2013: 26); Rüfner (2016: 259).

Proceedings by way of *cognitio extra ordinem* were no longer commenced by private summons, *in ius vocatio* or by *vadimonium,* but by a summons, *denuntiatio* or παραγγελία, which had to be requested of a magistrate, including the governor of a province, by the plaintiff, by *postulatio* or ἀξίωμα. The summons was an order in writing by the magistrate that the defendant appear before him, and ordered or authorised service upon the defendant.[9] Egyptian records show that the summons might be served by the plaintiff or alternatively by an *apparitor* or ὑπηρέτης of a judicial authority. Failure by the defendant to appear could result in a hearing in his absence, and the magistrate's judgment could be enforced under his power of *coercitio.* The compulsory attendance of the parties was the distinctive feature of the procedure.[10] Litigants did not frame their claims as specific actions as under a *formula*, but as rights supported by the law.[11] Judgments were no longer restricted to money damages, and a defendant could be ordered to perform the duty that was the subject of the dispute.[12]

The governor of a province exercised that jurisdiction at various places in his province which he visited regularly during his term of office as governor. G. P. Burton has said of proconsuls of senatorial provinces that they "did not administer justice by permanently holding court in the capital city … of their province. Instead they toured their area of administration and held judicial sessions at certain privileged towns – assize centres – of the province".[13] A similar system prevailed in the province of Bithynia-Pontus while Pliny was governor, since he held judicial hearings at *conventus* or assize centres at two cities at least in his province, Prusa and Nicaea, and in the Augustan province of Egypt, as is shown by an edict of the prefect fixing the places at which he would hold the *conventus* or διαλογισμός in Egypt.[14]

Burton describes the *conventus* procedure in Egypt as follows:

> The assizes in Egypt were also held at fixed times of year, and the first task of a plaintiff who wished to institute a suit before the prefect was to address a petition (παραγγελία or *litis denuntiatio*) to the most accessible official … . If this request was accepted, an officer of the bureau of the strategus informed the defendant of the summons, and the suit was included in the list of those which the prefect would hear, or at least delegate, at the forthcoming assize. The most interesting effect, from our viewpoint, of the

[9] *Dig* 39. 2. 4. 8; *Fr. Vat.* 162; Buti (1982: 33, 44); Metzger (2013: 27).
[10] Buti (1982: 33); Metzger (2013: 27-28); Rüfner (2016: 264).
[11] Metzger (2013: 28).
[12] Metzger (2013: 28); Buti (1982: 33); Rüfner (2016: 265).
[13] Burton (1975: 92).
[14] Plin. *Ep.* 10. 58. 1; 10. 81. 1-2; *P Ryl* 2. 74 = *Jur Pap* 82b = *FIRA* iii. No 166.

serving of the *denuntiatio* on the defendant was to ensure that he would be present at the prefect's tribunal for the whole period of the assize, or at least until the suit was heard.[15]

In a similar manner the governor of the Province exercised his jurisdiction and heard cases at *conventus* centres, probably at the city of Bostra where the legionary garrison of the province was stationed, and certainly at Petra and Rabbath-Moab.[16] These sittings were probably normally at regular centres fixed in advance but subject to change, as is shown for Egypt by the edict of the prefect to which I have referred.[17]

Part 2 – Procedure -- Litigation in Egypt

Records of legal proceedings contained in the archive of Babatha show that the procedure in the Province substantially followed that of Egypt as Burton describes it. The proceedings were commenced by a summons called παραγγελία or *denuntiatio*, service of which by the plaintiff under the authority of the governor had the effect of requiring the defendant to attend before the governor at a *conventus* centre in the Province to answer the plaintiff's claim and to attend there until the case against him had been heard.

In a petition from Egypt dated 99 CE a plaintiff applied to a *strategos* asking that he cause a copy of a summons that she presented for the hearing of a dispute by the prefect of Egypt, to be served on the defendant by one of the ὑπηρέται or *apparitores* of the *strategos*, and a note on the petition states that it was served by a named ὑπηρέτης or *apparitor*, showing that service of it must have been ordered or at least authorised by an official.[18]

That in Egypt a summons might be served under the authority of an official by the plaintiff in the proceedings rather than by an officer of the court is shown by a record of proceedings before the prefect of Egypt in 94 CE in which the defendant had not appeared. It includes a record of a discussion between the prefect and the plaintiff in which the plaintiff asserted that he had himself summoned the defendant and had evidence of it, παρήνγει]λ̣α̣ κ̣αὶ ταβέλλας ἐσφράγι[σα]. However, from a question by the prefect, πῶς ἀποδεῖξαι δύνασ[αι], ὅτι

[15] Burton (1975: 100).
[16] *P Yadin* 25.
[17] *P Ryl* 2. 74 = *Jur Pap* 82b = *FIRA* iii. No 166 of 133-137 CE.
[18] *BGU* 1. 226 = *FIRA* iii. No 167 = *M Chrest* 50.

παρήνγειλας, [ὡς] ὔποπτος μάρτ[υς], it appears that the plaintiff had no suitable witness present.[19] Thus the *denuntiatio* procedure was available in Egypt in proceedings before the prefect at his *conventus* at the end of the first century CE.[20]

Thus in Egypt an official subordinate to the prefect, a *strategos* or *epistrategos*, had power to order that a summons be issued and recorded in his records and that a copy of it be served on the defendant. The summons required the defendant to attend the prefect wherever he might be exercising his jurisdiction at the διαλογισμός or *conventus*, showing that the prefect exercised his jurisdiction at various *conventus* centres and that the place at which he would be doing so at a particular time was not necessarily known in advance. Similarly, since it was not necessarily known where the governor of a senatorial province would be present exercising his jurisdiction at any time, under the provisions of the *Lex Irnitana* a *vadimonium*, or bond by which a defendant undertook to appear before the governor in cases in which the municipal magistrates did not have jurisdiction, required the defendant to attend the governor wherever he was or was expected to be:

> et omnium rerum [dumtaxa]t de vadimonio promittendo in eum [locum in] quo is erit qui [e]i provinciae praerit futurusve esse videbitur eo die in quem ut vadimonium promittatur postulabitur IIvir(i), qui ibi i(ure) d(icundo) praeerit, iuris dictio.[21]

That this was the normal practice in Egypt is shown by a petition dated 107-8 CE in which the petitioner who as plaintiff was seeking a judgment of the prefect, asked that the *strategos* order that the ὑπόμνημα or petition be registered and that an officer serve the παραγγελία upon the defendant, requiring his attendance at the *conventus*.[22]

The record concludes with a note that the summons was served by a named ὑπηρέτη[ς]. The terms of the order sought show that neither the place of the prefect's next conventus nor the date upon which is was to commence was then known.

A petition from Egypt dated 138 CE shows a petitioner applying to a *strategos* asking for an order that a copy of a summons be served upon the defendant so that he was required to attend the prefect at the *conventus* centre where the prefect was exercising his jurisdiction, and also to remain there until the case against him was heard and adjudicated.[23]

[19] *P Hamb* 1. 29 = *FIRA* iii. No 169 = *Jur Pap* 85.
[20] Wlassak (1919: 38, fn [7]).
[21] *Lex Irni.* ch 84.
[22] *SB* 5. 7870
[23] *P Oxy* 3. 484.

The requirement that the defendant attend the court until the proceedings against him had been heard is shown also by a record of an application relating to proceedings before the *Idios Logos* in the second century CE in which the petitioners said that they had lodged a βιβλίδιον or petition, and had obtained an order or ὑπογραφή of an official to attend him for trial: παραγγείλασα τῷ Ἡρώδῃ ἔντυχέ μοι δικάζοντι. In response the official to whom the application was made ordered that the petitioners serve the summons in the presence of three witnesses:

> ἀπόδος· κατὰ τὸ ἀναγκαῖον παραγγέλλετε διὰ τῶν ὑπογεγραμμένων τρίων μαρτύρων ἵνα προσκαρτέρῃ[σ]ῃ τῷ ἱερωτάτῃ βήματι.[24]

This practice continued into the third century CE as is shown by several petitions in which the plaintiff sought similar orders that the defendant attend the prefect at his *conventus* until called upon.[25]

The prefect of Egypt might exercise his jurisdiction in proceedings if the defendant did not attend the *conventus* or if he was not present when the proceedings against him were called for the second time, as is shown by a record of an order, perhaps by edict, of the prefect by which at a *conventus* in 90 CE the prefect Mettius Rufus made an order to that effect.[26]

It appears however that he would not exercise the power without the presentation of adequate proof of service.[27]

Part 3 – Procedure – Babatha's Litigation

Although there are documents among those forming Babatha's archive that are described by their editor as summonses and counter-summonses, those documents appear to be rather records of the service of such summonses personally by Babatha or by the other moving party or perhaps, although it is not indicated in the records, by their representatives.[28] In two cases they are accompanied by documents that are records of a μαρτυροποίημα or *testatio* made in

[24] *P Strasb* 4. 196; I adopt the readings προσκαρτέρῃ[σ]ῃ of the *Papyrus Navigator* and ἐπὶ (l. ἐπεὶ) βιβ[λί]διον of *BL* XI 255.
[25] See for example *P Ross-George* 2. 27 (161-2 CE); *P Amh* 2. 80 (232-3 CE) and *P Amh* 2. 81.
[26] *P Hamb* 1. 29 = *FIRA* iii. No 169 = *Jur Pap* 85.
[27] *P Hamb* 1. 29 = *FIRA* iii. No 169 = *Jur Pap* 85.
[28] *P Yadin* 14, 23, 25-26.

the presence of witnesses by Babatha and by Besas in connection with their summonses, and in each case recording the issue of the summons.[29]

No later than 28 June 124 the βουλή of the city of Petra appointed ʿAbdoʿabdas son of Illouthas and John of Eglas as *tutores* of Babatha's son Jesus, and it appears that Babatha decided to commence proceedings against them as early as the second half of 124 CE, since at that time she petitioned the governor for relief, the nature of which is not stated in the extant part of it, against them.[30] Sometime before mid-October 125 CE Babatha presented to the governor a summons against John of Eglas and on 11 or 12 October 125 CE served it on him at Maḥoza in the presence of witnesses as is shown by the record of the proceedings between her and John of Eglas, in which Babatha said that she had previously summoned (παρήνγειλ[εν]) the defendant, and that she now summoned him:

> διὸ παρανγέλλω σοι παρεδρεῦσαι [ἐπὶ βήμα]τος Ἰουλίου Ἰουλιανοῦ ἡγεμῶνος ἐν Πέτρᾳ ... [μέχρι οὗ διακουσθῶμεν ἐ]ν τῷ ἐν Πέ[τρᾳ τριβουναλίῳ τῆ]ς δευτέρας ἡμέρας τ[οῦ Δίου μηνός ἢ εἰς τὴν αὐτοῦ ἔνγιστα][. .]ι ἐν Πέ[τρᾳ π]αρου[σίαν].[31]

It appears that παρήνγειλ[εν] refers to the presentation of the summons in the office of the governor and may refer to the petition to the governor to which I have referred, and παρανγέλλω to the actual summoning of the defendant by service upon him which took place in the presence of witnesses, five of whom are named. The procedure employed by Babatha was accordingly similar to that ordered by the officer of the *Idios Logos* of the second century CE and the defendant John of Eglas was required to attend the governor at his *conventus* at Petra from a named date until the proceedings had been heard.[32] It appears that the date of the commencement of the *conventus* sittings at Petra was already known, perhaps fixed by edict of the governor. ʿAbdoʿabdas was present when the summons was served, and Babatha then made a deposition against him and John of Eglas, also in the presence of witnesses and stated that she had previously summoned (παρήνγειλα) the defendant, and deposed against both *tutores*:

> ἐμαρτυροποιήσατο Βαβαθα Σίμωνος τοῦ Μαναήμ[ου κατὰ Ἰωάνου Ἰωσή]που τοῦ Ἐγλᾶ καὶ Αβδοοβδᾶ Ἐλλουθα ἐπιτρόπων Ἰησοῦ Ἰησοῦτος [υἱοῦ αὐτῆς ὀρφανοῦ]. [33]

[29] *P Yadin* 15, 24.
[30] *P Yadin* 12-13.
[31] *P Yadin* 14.
[32] *P Strasb* 4. 196.
[33] *P Yadin* 15.

A similar procedure for issue and service as that of Babatha's summons against the *tutores* of her son Jesus, took place in the proceedings in which in November 130 CE Besas, tutor of orphan nephews of Yehudah, summoned Babatha for recovery of a date orchard, which Besas alleged Babatha held by force.[34] That document records that in the presence of attesting witnesses, of whom there are four signatures, he summoned Babatha to appear before the governor either at Petra or elsewhere in the Province, and to remain until judgment in the proceedings was pronounced, so that it appears that it was not then known where the proceedings could be heard before the governor:

> παρήνγιλεν … [Β]αβαθαν Σίμωνος Μαωζηνὴ<ν> ἐπέρχεσθαι αὐτῷ ἐπὶ Ἀτερίῳ Νέπωτι πρεσβευτ[ῆ] καὶ ἀντιστρατήγου [ε]ἰς Πέτραν ἢ ἄλλου ἐν τῇ αὐτοῦ ἐπαρχίᾳ, … οὐδ[ὲν δ]ὲ ἧσσο[ν] καὶ παρεδ[ρεύι]ν [πρὸ]ς πᾶσαν ὥραν καὶ ἡμέραν μέχρ[ι] δ[ι]αγ[ν]ώσεω[ς],

In his deposition, made presumably on the same day, in the presence of witnesses, Besas said:

> παρανγέλλω σοι ἀποδῖξε μ[οι π]ο[ί]ῳ δικαιώματι διακ[ρ]ατῖς τὰ αὐτὰ εἴδη. εἰ δὲ ἀπι[θῖς τοῦ μὴ ἀ]ποδεῖξαι [γί]νωσκε ὅτι ἀπογράφο[μαι] αὐτὰ [ἐν τῇ. . . . . ἀπο]γρα[φῇ ἐ]π' ὀνόματος τῶν αὐτῶν [ὀρ]φ[ανῶν],

so that he evidently served his summons personally on Babatha in the presence of those witnesses.[35]

Neither in the records of the issue of these summonses nor in the depositions of Babatha or of Besas does it appear that either the governor or any other official ordered or authorised the service of the summons on the defendant. Each of those depositions appears to be a *privata testatio* of a nature similar to that identified by Wlassak. He considered that institutions shaped after the Egyptian model existed in other provinces before the reign of Marcus Aurelius, in whose reign, according to Aurelius Victor, "vadimoniorumque sollemni remoto denuntiandae litis operiendaeque ad diem commode ius introductum (erat)".[36] It thus appears that the *denuntiationes* of Babatha and of Besas conform generally to the procedure followed in Egypt no later than the end of the first century CE. Accordingly, although the record of those proceedings does not disclose that the service of the summonses was made with the authority of an official, they appear to have been served also with the authority of the governor as an official of the Province.

[34] *P Yadin* 23.
[35] *P Yadin* 24.
[36] Wlassak (1919: 39, fn [7]; 41; Aurel. Vict. *Caes.* 16. 11.

It appears that both Julia Crispina, the ἐπίσκοπος of the orphan nephews of Yehudah who summoned Babatha over that date orchard, and Babatha who counter-summoned her over an unspecified claim that she had against her, also served their summonses personally in the presence of witnesses, who signed the record. Each required the other to attend: Julia Crispina required that Babatha attend at Hadrianic Petra until they were heard:

> [π]αρανγέλλω σοι κατὰ τὴν ὑ̣[πογραφ]ὴν τοῦ κρατίστου ἡγεμόνος συνεξελθῖν αὐτὴ<ν> εἰς [Π]έ̣[τραν πρ]οσ̣. [.]. [.]ημ̣ιασθαι ̣τὰ νόμιμα ἐξαυ̣τῆ̣[ς] χρᾶ̣ς̣[θαι-ca.10-] ... οὐδὲν δὲ ἧ[σσον καὶ] π̣αρ̣ε̣[δ]ρεύιν ἐν Ἀδριανῇ Πέ̣π̣τρᾳ μέχρι <οὗ> δι-[ακουσθῶμε]ν,

and Babatha, who had presented a πιττάκις, no doubt a petition, to the governor, required Julia Crispina to attend at Rabbath-Moab, closer to both Maḥoza and Bostra:

> [πα]ρα̣[γγέλλω σοι π]ρ[ώ]τ[ως π]ρὸ̣ς̣ ̣τὸν κ̣ρ̣ά̣τ̣ι̣σ̣τ[ον ἡγεμόνα εἰς Ῥα]ββ̣α̣θμω̣α̣β̣α̣ … κ[ατ]ὰ̣ [τὴ]ν διά̣γ̣ν̣ω̣σιν ̣τ[ο] ῦ̃ κ̣ρ̣α̣τ̣[ίστο]υ̣ ἡγε̣[μόνο]ς ̣τὰ̣ νόμιμα ἀ̣ρ̣ν̣[ο]ῦ̃μαι.[37]

Evidently both Julia Crispina and Babatha had petitioned the governor and had received his authority to serve her summons upon the other. That is shown by the reference by Julia Crispina to the ὑ̣πογραφή and that of Babatha to a δ̣ι̣ά̣γ̣ν̣ω̣σις of the governor.[38] Thus the procedure adopted was similar to that used in first and second century Egypt. Julia Crispina required Babatha to take part in τὰ νόμιμα, evidently the legal procedures for commencement of proceedings and the service of a summons, and Babatha asserted that the governor had ordered her to carry them out and rejected those required by Julia Crispina. If Lewis is correct, the governor was then at Rabbath-Moab and the next *conventus* centre was at Petra, so that Babatha was forestalling Julia Crispina.[39] However in neither summons was the date of commencement of the *conventus* at Petra or Rabbath-Moab stated, so that it appears that the date was not then known.

Lastly the record of the summonses of Babatha and Miriam, Yehudah's previous wife, in which each sought an order against the other in relation to his estate, shows that at a meeting at Maḥoza each served her summons on the other in the presence of witnesses. Babatha required the defendant to attend

[37] *P Yadin* 25.
[38] *P Yadin* 25; the form ὑ̣πογραφή is confirmed by the parallel readings ὑ[̣πογραφ]ήν in the inner text (l. 7) and [ὑ]̣πογραφήν in the better preserved outer text (l. 38) of the papyrus.
[39] Lewis (1989: 112).

> συνεξέρχεσθαι αὐτὴν ἐπὶ Ἀτέριον Νέπωταν πρε<σ>βεύτου Σεβαστοῦ ἀντιστρατηγου ὅπου ἂν ᾖ ὑπ᾽ αὐτοῦ ὑπαρχ[εί]α ο̣ὗ χάριν ἐσύλωσες τ̣ὰ π̣[άν]τα ἐν τῇ οἰκίᾳ Ἰούδου Ἐλ̣εαζ̣άρου Χθουσίωνος ἀνδρός μου καί σου ἀ̣[πογενομένου - ca.10-]. [.]. την. [.]ας πάντ̣ας ε̣[.]. . δ̣ε. [-ca.18]. . , οὐδὲν δὲ ἧσσον καὶ παρεδρεύιν ἐ̣πὶ τ̣ὸν α̣ὐτὸν Ν̣έπωτα μέχρι διαγνώσεως,

and in her answer Miriam apparently said that she had already summoned Babatha seeking a particular order in relation to the estate of Yehudah:

> πρὸ τούτου παρήνγιλά σε μὴ ἐνγίσε εἰς τὰ ὑπάρχοντά μο̣υ̣ <καί> [σο]υ ἀνδρὸς ἀ̣π̣[ο]γ̣ε̣ν̣[ομ]έ̣[νου. . . . .],

but did not require Babatha to remain in attendance until the hearing.[40] Lewis translates the expression ὅπου ἂν ᾖ ὑπ᾽ αὐτοῦ ὑπαρχ[εί]α as "wherever (the governor's) venue may be" and it is apparent that where the case would be heard was at that time unknown.[41] It appears that by petition Babatha had previously sought an order relating to her claim against Miriam, perhaps giving authority to serve her summons on her.[42] The record is insufficiently full to show the procedure followed but nothing in the papyrus shows that a similar procedure was not followed. That neither Babatha in her counter-summons against Julia Crispina, nor Miriam in her counter-summons against Babatha, required that the other attend until judgment was no doubt because the governor had already ordered it, in connection with the summonses of Julia Crispina and Babatha.

While these records do not all expressly refer to the governor authorising the summons to be served, we may nevertheless infer from the practice in Egypt that an order to that effect was made. Moreover, in the case of all the proceedings to which Babatha was a party it appears that the summons or counter-summons was served by the party or perhaps his or her representative, and there is nothing in the records to show the intervention of an officer of the governor in the service of them. However, we cannot exclude the possibility that the summons might be ordered or authorised by the governor to be served by an officer, and, in view of the practice in Egypt, we may infer that the governor might make such an order in a particular case. Nor is there any indication in the records of litigation in the archive of Babatha of the participation of

[40] *P Yadin* 26.
[41] Lewis (1989: 114-115).
[42] *P Yadin* 34.

any inferior official performing a function similar to those performed by the *strategos* or *epistrategos* in the proceedings in Egypt, in the issue or service of the summonses.

The papyri show that civil proceedings in Egypt were from no later than the end of the first century CE normally commenced by *denuntiatio* lodged by the plaintiff with a magistrate or official, normally a *strategos* or *epistrategos*, and that the procedure continued in use in the second century CE. The evidence is that the proceedings in which Babatha was a party were commenced also by *denuntiatio* lodged by the plaintiff with a magistrate, in all cases the governor, and that at least some of them were served with his *auctoritas*. Since such a procedure was already in use in Egypt by the end of the first century CE, nothing shows that the procedure could not have been in use in the Province in the second century, and it was clearly within the power of the governor to direct in the provincial edict that civil proceedings were to be commenced by *denuntiatio.*

Nothing in the documents forming that archive shows any further proceedings in relation to any of the summonses, except a receipt given by Babatha to Simon son of John of Eglas in August 132 CE for the payment of maintenance for her son Jesus, since it may show that she was then receiving no greater sum on account of maintenance for Jesus than she had been receiving in 124 CE at the time of the commencement of her proceedings against the tutors.[43]

Nor does any document in that archive show any hearing of any proceedings by the governor, or the entry of a judgment or order by the governor or judge to whom the hearing of any proceedings was delegated, or the enforcement of one. However, the similarity of procedure in the Province, so far as we know it from the documents in the archive, compared with that in proceedings before the prefect of Egypt, who certainly heard proceedings by *cognitio*, requires the inference that they were generally also conducted by that procedure before the governor of the Province.

Nor does any document in the archive of Babatha show the enforcement of a judgment that had been entered, and accordingly no document shows by what procedures a judgment might be enforced. It is however clear that the governor had power to grant *cessio bonorum* just as did the prefect of Egypt and we must infer that, since his jurisdiction depended upon his *imperium*, he had power to enforce a judgment by exercise of his power of *coercitio*.[44]

[43] *P Yadin* 27; and see Lewis (1989: 117).
[44] *P Ryl* 2. 75; *Dig.* 2. 3. 1. pr; and see Chapter 2.

The governor was not expected to hear the case as judge or to pronounce judgment himself, but in so far as he dealt with the case, he would normally be assisted by a *consilium.* It might include senior officers, including the military tribunes, of the legion, and the *praefectus equitum* and other prefects in command of the auxiliary troops, that were part of the garrison of the Province, and any *procurator* in office in it, together with the assistants that accompanied him as his *cohors*.[45]

It was also open to the governor to delegate the hearing of proceedings to those officers, and it may be assumed that the hearing of legal proceedings in the Province was duly delegated to them from time to time.[46] Indeed it is clear that Priscus as *praefectus equitum* acted as registrar of returns of property lodged at Rabbath-Moab in the provincial census of 127 CE and he may have been assigned delegated jurisdiction.[47] Hannah M. Cotton and Werner Eck suggest that the use of the expression Ἰουλιαν[ο]ῦ ἐπά[ρχου] in the inner, though not in the outer, text of the record relating to Babatha's summons against John of Eglas shows that the governor had delegated the hearing of the proceedings to a prefect with the surname "Iulianus", which happened to be the same as that of the governor, as *iudex datus*.[48] The hypothesis is not susceptible to proof but one may accept that it was within the authority of the governor to delegate the hearing to such an officer as *iudex datus*.

Part 4 – *Formulae, Recuperatores* and Peregrine Courts

The governor would be required to delegate some litigation between peregrines under provisions of the *lex provinciae* or provincial edict of the Province if it allowed peregrines to litigate in their courts and under their own laws. Amongst the documents held by Babatha were three copies of a *formula* in Greek for an *actio tutelae,* a *bonae fidei* action, following the form given by Gaius for the closest possible parallel, an action for *depositum*, which was also a *bonae fidei* action.[49] That *formula* contemplates the appointment of ξενοκριταί as judges in the terms μέχρι (δηναρίων) /Bφ ξενοκριταί ἔστωσαν, which may be a limitation of jurisdiction to 2,500 denarii, and contains a *taxatio* which limits to that amount the compensation that could

[45] For a discussion of Roman officials in the Province see Czajkowski (2017: 168-198).
[46] Cotton & Eck (2005: 28-29).
[47] See *P Yadin* 16 and *XHev/Se* 61.
[48] Cotton & Eck (2005: 41-44); *P Yadin* 14.
[49] *P Yadin* 28-30; Gaius 4. 47; Lewis (1989: 118); Turpin (1999: 511 with fn [23]).

be awarded. A *formula* was normally a document appropriate to a voluntary procedure in which it was agreed on by the parties, and in which a private judge was chosen by their agreement, rather than in compulsory proceedings by *cognitio extra ordinem,* in which the procedure was within the discretion of the magistrate and the attendance and participation of the parties could be compelled.

The use of the formulary procedure in senatorial provinces during the principate seems clearly established, since the *duumviri* of the *municipium* of Irni and no doubt of other *municipia* in Baetica, a senatorial province, were required to have in their possession and to administer the law in accordance with the edicts and *formulae* of the proconsular governor of the province.[50] However, whether litigation in an Augustan province could be conducted during the principate in accordance with such a formula has been controversial. Wlassak**,** writing before the publication of the archive of Babatha, came to the conclusion that there was no evidence of formulary procedure having been applied in Egypt and that the most likely assumption was that the edict of the prefect of Egypt was without procedural formulae, although he accepted that it might be impossible to exclude the use of *formulae* in legal proceedings there altogether. He accepted that litigation was conducted by *formulae,* at least in senatorial provinces, during the first and second centuries CE. He also thought that it was probable that *formulae* were used in proceedings in the courts of the governors of other Augustan provinces.[51] He thought that in *cognitio* proceedings such a formula served as a guideline for how a dispute would be handled.[52]

Kaser, also writing before the publication of that archive, rejected as evidence of the use of *formulae* in Egypt two papyrus records, of a contested application for *bonorum possessio* of 41-42 CE; and of a decision of the prefect of the second century CE refusing to appoint a judge to hear a claim to recover a deposit held by a deceased soldier who had died intestate, because νοοῦμεν ὅτι αἱ παρακαταθῆκαι προῖκές εἰσιν, given in connection with an illegal marriage.[53] He held both more likely to be delegations to a *iudex pedaneus* under the *cognitio* procedure. Although writing after the publication of the archive, Professor Karl Hackl adhered to this view in his revision of Kaser's work.[54] However Kaser thought it impossible to prove that the formulary procedure was not introduced into individual Augustan provinces, and accepted that

[50] *Lex Irni.* ch 85.
[51] Wlassak (1919: 4-36).
[52] Wlassak (1919: 27-8).
[53] Kaser (1966: 119, 343); Kaser-Hackl (1996: 165-6); *P Mich* 3. 159 = *FIRA* iii. No 64; *M Chrest* 372 = *Jur Pap* 22a = *BGU* 1. 114 = *FIRA* iii. No 19(a).
[54] Kaser-Hackl (1996: 165-6).

the formulary procedure was used in senatorial provinces in the first century CE.[55] He suggested that there was in any province a lack of trained jurists such as would, in Rome, have advised the praetor on the form of *formulae* to be assigned to the parties to proceedings, and that where judges were selected from officials, rather than private persons qualified for the duty, the litigation programme tended to become a set of official instructions.[56] He referred to several papyri from Egypt, of which it is appropriate to refer to one only, in which a *strategos* exercising delegated jurisdiction, having made a finding of fact, gave judgment κατὰ τὰ ὑπὸ τοῦ κυρίου ἡγεμόνος κριθέντα, no doubt a decision of the prefect delegating to the *strategos* the finding of a fact and directing judgment in accordance with it.[57]

Since they wrote, however, the issue of *formulae* by the governor of the Province with or as part of his edict seems established by the presence of copies of a *formula* in the archive of Babatha.[58] Further, the use of a *formula* in proceedings before a local court in an Augustan province is also established by the so-called *Lex rivi Hiberiensis*, a set of irrigation regulations, with an edict issued in the reign of the emperor Hadrian by the governor of the Augustan province of Hispania Citerior or his *legatus iuridicus.* The *Lex* provided for certain disputes to be heard in local courts under a *formula* prescribed in it, which its editor treats as "perfectly in line with the model supplied by Gaius".[59] As Kantor says, the controversy whether procedure under *formulae* was available in an Augustan province has been decided "in favour of Wlassak's views".[60]

H. J. Wolff, writing after the publication of the archives, was of the view that justice was administered in the Province in a manner similar to that in Egypt, except that there was no established Greek judicial and bureaucratic system to which recourse could be had.[61] He thought that in the Province justice was administered according to the *cognitio* procedure and proposed that, since it was clearly not intended for a *iudex privatus* appointed with the assent of the parties, the *formula* was a system for instructing *iudices pedanei*, who were appointed by the governor, drafted according to established praetorian wording, or standard instructions available for use by the parties in their legal proceedings.[62] William Turpin discussed the

[55] Kaser (1966: 120); the view of Hackl is to the same effect: Kaser-Hackl (1996: 166)
[56] Kaser (1966: 344); the view of Hackl is to the same effect: Kaser-Hackl (1996: 440-1).
[57] *P Oxy* 1. 37 = *M Chrest* 79 = *FIRA* iii. No 170 = *Jur Pap* 90.
[58] *P Yadin* 28-30.
[59] *Lex rivi Hiber*. III. 38-43; Beltrán Lloris (2006: 157, 159, 186); Gaius 4. 41, 43.
[60] Kantor (2008: 82-3).
[61] Wolff (1980: 787).
[62] Woolf (1980: 785-786).

proceedings in which Babatha's *formula* might be used, but not its function in them.[63] Chiusi considered but did not resolve the "possibility of some kind of formulary procedure" in the Province, and Nörr came to the conclusion that it was not possible to determine how litigation by the *cognitio* procedure in the Province would have been structured in which the *formula* in the archive of Babatha could have been useful.[64] Thomas Rüfner held that "(t)he abandonment of the two-phased model (of litigation) entailed the abandonment of the *formula*", but treated Babatha's possession of copies of a *formula* for an *actio tutelae* as "strong evidence that the formulary procedure was known in the Roman province of Arabia at the beginning of the second century AD, (but) is no proof that the use of the two-phased system was universal or that the procedural rules applied were exactly the same as in the capital". He thought it likely that provincial governors at times chose to by-pass the formalities of the formulary procedure.[65] The availability of copies of a *formula* to litigants before the governor of the Province makes it probable and I conclude that in the Province the provincial edict was published with procedural *formulae.* Since proceedings before the governor were conducted by *cognitio* rather than in a two-stage procedure for which a *formula* would have been appripriate, I conclude that in such proceedings a *formula* probably functioned as the instructions of the governor to the judge or judges to whom he delegated the hearing of them.

There is, indeed, no reason to suppose that, except in Egypt, the provincial edict which was published in Augustan provinces did not also include *formulae*. Since by the time of Gaius the provincial edict was in a form that could usefully be the subject of a commentary upon it, it is apparent that it must have applied in all provinces both senatorial and Augustan in substantially similar terms, and accordingly that the form of it published in Augustan provinces was very likely to have included *formulae*.

The copies of the *formula* which were in Babatha's archive should be considered a translation of a *formula* written in Latin that originated in the office of the governor as part of or accompanying the provincial edict of the Province. This is because of its form and since it also contains as the names of the parties those in a non-specific and non-Roman form, as does that given by Gaius for proceedings in which a *peregrinus* was plaintiff, but without containing any fictional allegation of Roman citizenship, which Gaius says would be inserted in the *formula* for an action under the *ius civile* where a *peregrinus* was plaintiff: SI CIVIS ROMANUS

[63] Turpin (1999: 510-512).
[64] Chiusi (2005:116); Nörr (1998b: 334-335).
[65] Rüfner (2016: 257, 261).

ESSET.[66] Its variations from those forms are that it is in Greek and refers to ξενοκριταί with a *taxatio* both in the appointment of judges and also in the condemnation, which limited the amount of the judgment to an amount in *denarii* rather than *sestertii* as was normal in Rome, since *sestertii* were there the coinage of account.[67] Whether there was an official translation of the formulae into Greek cannot be stated.

According to the Glossators, the expression "κριτηριον ξενον" may be translated as either "iudicium peregrinum" or "recuperatorium", which Nörr treats as equivalent to "iudicium recuperatorium"; and we may accept "iudicium peregrinum" and "recuperatorium" (or "iudicium recuperatorium") as equivalent to "iudices peregrini" and "recuperatores" respectively.[68] "Recuperatores" were a court consisting of a board or panel of judges whose origins and jurisdiction are controversial, but which was capable of delivering swifter and more efficient justice. In my view there may have been local courts other than the βουλή of the city of Petra exercising jurisdiction in the province, as it did, and it is likely that they were comprised of peregrines and had limited jurisdiction.[69] Further it would have been open to the governor to delegate proceedings before him to judges who were *peregrinı* and in such a case the judges could properly be described as "iudices peregrini" as they were described by Cicero.[70] Nörr argues that Cicero's usage is "untechnical" and that in the *formula* the expression refers to *recuperatores.* He argues this on the basis that in an inscription from Cnidos of 100 BCE, which is a Greek version of the Latin inscription, another Greek translation of which from Delphi is known as the *lex de piratis persequendis*, the expression δικαιοδοτεῖν κρείν[ειν κ]ριτὰς ξενοκριτὰς δίδοναι is the equivalent of "iurisdictio iudici iudicis recuperatorum datio" of the *Lex Agraria* of the second century BCE.[71] He also suggests that "(i)f we assume" that the case between Hermippos and Heracleides decided by *recuperatores* in 62 BCE at the *conventus* of Asia was an *actio mandati contraria*, a *bonae fidei* action, it would be evidence supporting the trial of an *actio tutelae*, also a *bonae fidei* action, by *recuperatores.*[72]

Certainly the governor was empowered to appoint a court consisting of *recuperatores* to decide cases and in some cases he was required to do so, since a practical requirement for the

[66] Gaius 4. 37, 47.
[67] Nörr (1998a: 85).
[68] Sic*; Corpus Glossariorum Latinorum* 3. 336; Nörr (1995: 84).
[69] For a discussion of possible local courts in the Province see Czajkowski (2017: 133-165).
[70] Cic. *Att* 6. 1. 15.
[71] Nörr (1995: 84 fn [3]; 85); Hassall et al (1974: 204); *FIRA* i. No 9, Col IV, 34-5 = *RS* No. 12; *FIRA* i. No 8 = *RS* No 2.
[72] Nörr (1995: 93); Cic. *Flac.* 42ff.

manumission of a slave aged under 30 years was that it take place after proof of *iusta causa* made before a *consilium*, which in a province consisted of 20 *recuperatores*, all of whom were Roman citizens, sitting on the last day of a *conventus* session.[73] It is probable that proceedings involving a dispute about whether a person was of free or unfree status would be heard in a province before a panel of *recuperatores*, since in a trial in Egypt in 148 CE concerning a woman ("mulier de qua agitur"), and related to her status, whether free or unfree, the decision was taken after reading the votes of 15 ξενοκριταί who, since they were all Roman citizens, must have been a panel of *recuperatores*, and it may be presumed that the procedure was available also in the Province.[74] If the prefect of Egypt maintained an *album* or list of judges, from which judges or *recuperatores* could be selected and assigned, as is suggested by an edict of the prefect of the period 138-161 CE, in which he said that ἐκέλευσα τοῖς ἐν τῶι λευκώματι[-ca.?-]αμεῖναι τοῖς διαδικαζομένοις καθ̣α[-ca.?-] δ̣ικαιοδοσίας, it is likely that the governor of the Province kept a similar list.[75] The association of *recuperatores* with cases of free status is confirmed by a papyrus copy of an oration of the Emperor Claudius discovered in Egypt, so that the legal provisions it contained were probably in effect there, in which in connection with *recuperatores* he referred to "servitutis libertatisque iudicare".[76] Under the provisions of the *Lex Irnitana* there was power in the magistrates who exercised civil jurisdiction in the *municipium*, the *duumviri*, to grant *recuperatores* "si Romae ageretur, quantacum<que> esset, recuperatores dare oporteret".[77] However, "(t)heir exact competence is not known, but it seems that, apart from the provinces and municipalities, their jurisdiction was mainly, though not exclusively in actions with a certain delictal character".[78]

No text appears to show a case of an *actio tutelae* being decided by *recuperatores* and it is not shown that a *bonae fidei* action, of which an *actio tutelae* would be one, would be so decided. Although a case in which an unpaid creditor sought recourse upon a security could indeed be based upon an *actio mandati contraria*, it cannot be assumed that the case between Hermippos and Heracleides was in fact an *actio mandati contraria*, or that the matter that brought it within the jurisdiction of *recuperatores* was its character as a *bonae fidei* action.[79] In the absence of clear evidence that that case was framed on the basis of a *bonae fidei* action so that it could be

[73] Gaius 1.18-20.
[74] *P Oxy* 42. 3016.
[75] *BGU* 1. 288.
[76] *BGU* 2. 611.
[77] *Lex Irni*. ch 89.
[78] Buckland & Stein (1963: 636).
[79] Cic. *Flac.* 42ff; Gaius 3. 155-162; Nörr (1995: 93); Buckland & Stein (1963: 519-521).

concluded that such actions, whether in a province or in Rome, could be tried before *recuperatores*, it should not be concluded that the action to be brought in which the *formula* from the archive of Babatha was to be used was one that would be tried by *recuperatores.*

The limitation in the amount for which judgment could be given appears in the *formula* both in the *taxatio*, where it would be nominated by the plaintiff, and in the nomination of ξενοκριταί as the judges of the court. The amount of 2,500 denarii is, as Nörr pointed out, the equivalent of the 10,000 sestertii which is included in the *taxatio* in the *formulae* set out by Gaius as precedents in proceedings to be tried by both single judges and by *recuperatores*: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERIUM X MILIA CONDEMNA, SI NO PARET, ABSOLVE, or RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE.[80] However, the inclusion of the limitation of the amount for which judgement might be given in the provision for the appointment of ξενοκριταί, which Nörr thought a variation without specific meaning, may point to litigation before a court the jurisdiction of which was limited in amount, rather to that of the governor, whose jurisdiction was not so limited.[81] Since the *duumviri* of the *municipium* of Irni had power to assign *recuperatores* in proceedings before them, it is likely that local courts in the Province had also such power.

However, since the extent of jurisdiction of *recuperatores* at Rome is unclear, even if a constitution had been granted to the city of Petra with similar provisions to those of the *Lex Irnitana*, under which the *duumviri* had jurisdiction in an *actio tutelae* only by consent, it would be unsafe to assume that the courts of the city of Petra (or of other cities in the Province) had jurisdiction in such actions or to assign *recuperatores* in actions of *tutela.* I therefore conclude that the *formula* does not demonstrate that the trial of the proceedings for which it was intended would be by *recuperatores* or to what judges it would be delegated. However, the likelihood is that any judge or judges assigned to hear proceedings to be tried in Petra would be *peregrini* who would have been appropriate if either the *lex provinciae* or the provincial edict made provision, such as that which stood in Cicero's provincial edict, for peregrine courts to try litigation to which peregrines were parties.[82] If a *formula* operated only as a guideline for a judge or *recuperatores* as to the matters they were to decide, it seems that Nörr's argument that

[80] Nörr (1998a: 85); Gaius 4. 46, 50.
[81] Nörr (1998b: 329).
[82] Cic. *Att.* 6. 1. 15.

Cicero's use of the expression was untechnical should not prevent us from holding the view that in the *formula* the expression ξενοκριταί had the meaning *iudices peregrini.*

According to Kantor, a provision such as stood in the provincial edict that Cicero issued contemplated that proceedings in peregrine courts would be brought initially before the governor and heard by him at the *in iure* stage of it, and that he would delegate the *apud iudicem* stage to peregrine judges. Such a delegation would accord with what was apparently appropriate in Sicily under the *Lex Rupilia,* since disputes between Sicilians of different cities, "were submitted to proconsular jurisdiction and only then delegated to a local judge by the governor *ex P. Rupili decreto*".[83] The treaty made between Rome and the Lycian league in 46 BCE provided for a Roman magistrate or pro-magistrate to deal with litigation between a Lycian and a Roman by giving the parties a hearing *in iure* and assigning a court for the trial of it: οὗτος αὐτοῖς δικαιοδοτείτωι κριτήριον συνιστανέτω.[84] The provisions of the Cyrene edicts allowing Greek judges to Greek defendants contemplated the same procedure, since the expression Ἕλληνας κριτὰς δίδοσθαι ἀρέσκει, was, as Kantor argues, a reference to *datio iudicis.*[85] That was also the procedure adopted for the litigation the subject of the *Tabula Contrebiensis*, in which, after the hearing *in iure* before him, the governor of the province delegated the hearing to the Senate of a neutral community and granted a *formula* for its further hearing, and in the *Lex rivi Hiberiensis,* in which it was directed that litigation under it, in that case in the reign of the emperor Hadrian and an Augustan province, was to be conducted before a local court under a *formula*.[86]

Part 5 -- Babatha's Litigation – The Course of Proceedings.

The governor of the Province had jurisdiction to appoint tutors under the *Lex Iulia et Titia* for *impuberes* and women who were Roman citizens resident in the Province.[87] The βουλή of the city of Petra also had jurisdiction to appoint *tutores* to *impuberes* probably under a provision in its constitution, limited to its administrative area.[88]

[83] Cic. *Verr.* 2. 2. 32; Kantor (2008: 90, 92, 97.)
[84] *P Schøren* 1. 25; Kantor (2008: 85).
[85] *FIRA* i. No 68, IV. 67; Kantor (2008: 92).
[86] Richardson (1983: 33-34); Beltrán Lloris (2006: 157); Kantor (2008: 92).
[87] Gaius 1. 185; *Dig* 26. 5. 1; I discuss in Chapter 7 the appointment in the Province of *tutores* for peregrine women.
[88] *P Yadin* 12.

Although the record of the appointment of tutors for Jesus does not state on whose application the appointment was made, the most probable applicant was Babatha as his mother, since she probably had an effective obligation to apply, as is shown by late texts in the *Digest* to the effect that αἱ (mothers) μὲν ζημιοῦνται … εὰν μὴ αἰτήσουσι ἐκ τῶν νόμων κηδεμόνας.[89] That this rule was probably in effect is shown by a *constitutio* of the Emperor Septimius Severus of the late second century CE by which he imposed a further disability on mothers who did not apply for tutors for their orphan sons. By that *constitutio* he deprived them of rights of inheritance, which had been granted by a provision of a *senatus consultum Tertullianum* of the period of the Emperor Hadrian, to mothers who had the *ius trium liberorum*.[90]

The governor probably had jurisdiction to exercise the power of the urban praetor to order the amount of maintenance to be paid to the *pupillus*.[91] In her petition presented to the governor in 124 CE Babatha asserted that the tutors of Jesus:

> οὐδ[ὲ] α[ὐτοὶ τρ]οφῖα τ̣ο[ῦ ὀρ]φανοῦ ἔδωκα[ν] ̣ε̣ἰ μὴ μ[όν]ον δ̣η̣νάρια δυ̣ω̣ [κατὰ μ]ῆ̣να, κα[ὶ δι]ὰ ̣τὸ μ[ὴ] ἀρκε̣ῖ[ν] ̣ταῦ[τα εἰ]ς τρ[ο]φὴν κατ[. . . . .]κ̣ε[. .]. . π̣αρ[ὰ] τῷ̣[ν. .]. ιο[. .]ω κ̣ι. . δ. . ν̣ο̣[. . . . .]τοα[. . . .]ἐ̣π̣ιταξ̣. [. πρὸ]ς τὴν δύ̣ν̣α̣μ̣ι̣ν ̣τῶν [ὑπαρ]χ[ό]ν̣[τω]ν̣ [αὐτο]ῦ̣ ̣τ̣ρ̣οφη[- ca.9 -]ἀ̣ξ̣ι̣οῦσι [τῷ] ὀ̣ρφα̣[νῷ].[92]

She thus asserted that the tutors were paying an insufficient amount for maintenance of Jesus, no more than two denarii per month, but since the papyrus is defective it does not appear from it what relief she was seeking from the governor.

In her summons of October 125 CE against John of Eglas Babatha complained that:

> διὰ τό ̣σ̣ε μὴ δε[δωκέναι τῷ] υ̣[ἱῷ μου - ca.10 - τῷ] αὐτῷ ὀρφανῷ ἐξ ο̣ὗ̣. [. .]. [. . .]. εστ. [-ca.?-] καθάπερ δέδωκεν Ἀβδ̣ο̣ραβδας Ἐλλο[υ]θα ὁ κολλ̣ή̣[γας σου] δι’ ἀποχῆς,[93]

and substantially repeated it in her *testatio* in which she said:

> διὰ τὸ ὑ̣μᾶς μὴ δεδ̣ω̣κ̣έναι τῷ̣ υἱῷ̣ [μου ὀρ]φ̣α̣ν̣ῷ̣ δ. [.]ε-[. . τροφεῖα πρὸς τὴν δύν]αμιν τόκου [ἀ]ρ̣γυρ̣ίο̣υ̣ [αὐ]τοῦ [κ]α̣ὶ [τῶν] λ̣ο̣ιπῶ̣[ν] ὑ̣[παρχόντων αὐτοῦ][κ]α̣[ὶ μ]ά̣λ̣[ιστα πρὸς ὁμιλία]ν ἣν [. .]. . . [.]α̣[. .]. . [. .]. [. καὶ μὴ χορηγεῖν αὐτῷ τόκον] ̣τ̣ο̣[ῦ] ἀρ[γυρ]ίου ̣ε̣[ἰ μὴ τροπαι]εϊκὸν ἕ̣ν̣α̣ ̣εἰς ἑκ̣α̣τὸν δ̣η̣ν̣ά̣ρ̣ι̣α̣ ... ἐπὶ οὗ̃ περὶ τῆς ἀπειθαρχείας

[89] *Dig* 26. 6. 2. 1.
[90] *Dig* 26. 6. 2. 1-2; 38. 17. 2. 23; Evans Grubbs (2002: 236-237); Buckland & Stein (1963: 372).
[91] See *Dig* 27. 2. 3. pr; see Chapter 2.
[92] *P Yadin* 13.
[93] *P Yadin* 14.

ἀποδόσεως τῶν τροφίων παρήνγειλα ἐγὼ Βαβαθα Ἰωάνῃ τῷ προγεγραμμένῳ ἐνεὶ τῶν ἐπιτρόπων τοῦ ὀρφανοῦ.

In that *testatio,* Babatha also offered, δι' ἐπιτρόπου μου Ἰούδα Χαθουσίωνος:

ἔ[χουσ]α ὑπάρχ[οντα] ἀξι[όχρεα] τ̣ο̣[ύτ]ο̣υ̣ [τοῦ ἀργυρίου] ο̣ῦ̣ ἔχετε τοῦ ὀρφανοῦ, διὸ προεμαρτυροποίησα ἵνα εἰ δοκεῖ ὑμεῖν δ̣ο̣ῦ̣ναί μ[οι τὸ] ἀργύριον δι' ἀσφαλίας . . . περὶ ὑποθήκης τῶν ὑπαρχόντων μου, χορη[γ]οῦσα τ̣όκον τ̣οῦ [ἀργυρίο]υ̣ ὡς ἑκατὸν δηνα̣ρίων δηνάριν ἓ̣ν ἥμισυ , ὅθεν λαμπρῶς διασωθ[ῆ μου] ὁ υἱὸς.

She claimed also to use her *testatio* as evidence that John of Eglas had profited from the estate of Jesus (εἰς δικαίωμα κέρδους ἀργυρίου τοῦ ὀρφανοῦ), in the event that he refused her offer.[94]

Thus, in her summons Babatha asserted that John of Eglas and in her *testatio* that both the *tutores* had defaulted in the payment of a proper amount of maintenance, and in her *testatio* she also accused John of Eglas of profiteering from the estate and of "disobedience against official instructions", no doubt meaning any order of the governor fixing the maintenance, if one accepts the translation of ἀπειθαρχεία proposed by Wolff.[95] Babatha also offered to administer the property of the estate of Jesus, and to grant to the tutors a *hypothec* over all her property as security. She asserted that her property was equivalent in value to that of Jesus, and that she would pay him a greater income than the tutors had done. However, both papyri are defective and no account of the orders that Babatha sought from the governor survives.

Chiusi argued that by her petition Babatha was seeking an order determining the amount of the maintenance the *tutores* were to pay to Jesus and that in her summons she sought an order for the removal of John of Eglas from the *tutela* based on his default in paying the amount of maintenance ordered by the governor and his disobedience of the order. According to Chiusi, the reason that she apparently sought no such order against 'Abdo'abdas was presumably that he had paid his share of the maintenance that was payable by the order of the governor. It seems from the receipt for maintenance that Babatha received in 132 CE from the son of John of Eglas, who was then one of the tutors, that the amount he was paying was no greater than the tutors were paying at the time of the petition. Accordingly, it may be that if she made an application to the governor to determine the amount of maintenance, he either declined to do so or fixed it at the rate at which it was then being paid. Chiusi, however, suggests that the

[94] *P Yadin* 15.
[95]Wolff (1980; 777); Chiusi (2005; 122).

governor may have made an order fixing the amount of maintenance at "two *denarii* per guardian", and, although this would partly explain the terms of that receipt, she accepts that "we cannot substantiate this hypothesis by other documentary evidence".[96] The assertion that John of Eglas had disobeyed an official instruction suggests that the governor had fixed the amount of maintenance to be paid and, since it seems that 'Abdo'abdas had complied with it and John of Eglas had not, supports the suggestion of Chiusi that each tutor was to pay an amount of two *denarii* per month.

Lewis, however, appears to have been of the view that by that petition Babatha sought an order for the service of her summons for the recovery of maintenance, or perhaps for embezzlement, against John of Eglas.[97] He thought that this was the ground of her complaint against the tutors but did not state an opinion on the relief that she sought from the governor.

Cotton and Eck, who do not suggest what relief Babatha sought in her summons against the tutors, point out that she brought her proceedings against the tutors not before the court that had appointed them, namely the βουλή of the city of Petra, but before the governor. They point to later imperial legislation, a *constitutio* of the Emperor Caracalla of 215 CE, by which they argue the jurisdiction over tutors was assigned to the governor of a province rather than to the council of the city that had appointed them.[98] By that *constitutio* the Emperor ruled that "(p)upillus, si ei alimenta a tutore suo non praestantur, praesidem provinciae adeat".[99] According to Nörr no application to recover maintenance from a tutor during the *tutela* was possible in the ordinary course of regular civil litigation under Roman law, but such an application could be brought before the governor in his jurisdiction by way of *cognitio extra ordinem.*[100] It is not clear by whom the tutors referred to in the *constitutio* were appointed, but it appears that at the time of Babatha's summons the governor had jurisdiction to hear an application for payment of maintenance by tutors, however appointed, and since such proceedings depended upon the *imperium* of the governor, to the exclusion of any other court in the Province. This proposition put by Nörr would fully explain why, on the assumption that her summons was for payment of maintenance, Babatha made her application to the governor. However, Babatha was apparently at risk of being held to have no standing to make any

[96] Chiusi (2005: 111-6).
[97] Lewis (1989: 54, 58).
[98] Cotton & Eck (2005: 44).
[99] *CJ* 5. 50. 1. pr.
[100] Nörr (1998b: 338, 334).

application for maintenance to be paid to Jesus. She seems to have made no such application but made applications in relation to that maintenance that were open to her.

Cotton had previously suggested the possibility that Babatha's summons against the tutores was based on a *crimen suspecti tutoris*.[101] Chiusi referred to several imperial *constitutiones* relating to the *senatus consultum Velleianum*, but, since those *constitutiones* were issued 150-200 years later than the proceedings brought by Babatha against the *tutores*, said that "it is difficult to regard this as evidence of Roman influence" and thought it possible that the offer contained in Babatha's *testatio* was a case in which "provincial practice was adopted by Roman law".[102]

Oudshoorn suggested that the more likely ground of Babatha's *petitio* to the governor was that she "requested more maintenance money", perhaps suggesting that Babatha had applied for an order fixing the amount of maintenance to be paid, as argued by Chiusi. Oudshoorn also suggested that Babatha used it to obtain "a governmental go ahead in a case against both guardians", that is the tutors of Jesus, as argued by Nörr. She also suggested that "at least one of those copies (of the *formula* for an *actio tutelae*) was sent to Babatha with her petition, when it was returned with the governor's *subscriptio*".[103] Thus she suggested that the purpose of Babatha's proceedings against the tutors of Jesus may be found in her possession of copies of the *formula* for an *actio tutelae* since "it seems obvious to relate them to the matter at issue" in those proceedings.[104] She agreed with Nörr who argued that the copies of the formula were probably supplied by a legal expert or even by the governor's office.[105] An *actio tutelae* could be brought only after the *tutela* had ended, and since Jesus' *tutela* had not ended, and on neither view of the grounds upon which the petition may have been presented, was the *actio* appropriate, this should be rejected.[106]

Oudshoorn appears to have considered that Babatha's *testatio* may have been based upon the *crimen suspecti tutoris.* She described Babatha's offer as "rather singular" but thought it modelled on Roman practice. She held that the real aim of Babatha's proposal was clearly the use Babatha could make of a refusal of the tutors to agree to her proposal.[107] Treating Babatha as "*de facto* guardian" of Jesus under local Jewish law (there is no suggestion that a woman

[101] Cotton (1993: 103, 104).
[102] Chius (2005: 124-9).
[103] Oudshoorn (2007: 320-323); Chiusi (2005: 111); Nörr (1999: 268); *P Yadin* 13.
[104] Oudshoorn (2007: 330-1); *P Yadin* 13-15, 28-30
[105] Oudshoorn (2007: 332, 334); Nörr (1995: 89).
[106] *Dig* 27. 3. 4. pr.
[107] Oudshoorn (2007: 325-330).

could be a Roman law *de facto tutor*), Oudshoorn argued that Babatha could in that capacity "easily request to be allowed to administer the property too", and "use the *actio tutelae* against the guardians herself (instead of, as suggested by Chiusi, keeping it until her son was of age)".[108] It is by no means clear that any such status, which Oudshoorn had not established, would permit Babatha to bring an *actio tutelae,* a Roman law action. Although she accepted that "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," she nevertheless held that it "(had) to have indigenous roots" and that "Babatha's substantive position (could) be more easily explained for by (*sic)* looking at local law", referring to her supposed position as "*de facto* guardian of her infant son".[109]

Czajkowski considered that in her petition Babatha complained that the tutors were paying insufficient maintenance for Jesus, but did not consider that she was bringing a *crimen suspecti tutoris* against John of Eglas, and held that Babatha did not ask for the removal of a tutor for any reason. Without expressing a view on the relief sought in the summons, Czajkowski treated Babatha's offer to take over the administration of the estate as a threat: "agree, or I shall proceed". She referred to Chiusi's discussion of Babatha's offer to the tutors but did not state its basis or effect.[110]

The proper interpretation of Babatha's petition to the governor is that of Chiusi, namely that by her petition of the second half of 124 CE she sought an order of the governor fixing the amount of maintenance payable by the *tutores* to Jesus, since the governor probably had jurisdiction to make such an order.[111] It is likely that the governor made such an order and that Babatha then caused the issue and service of her summons in October 125 CE, because John of Eglas had not paid maintenance in accordance with it.[112] This interpretation is consistent with the delay between the second half of 124 CE when Babatha presented her petition, and October 125 when she probably presented her summons to the governor.

It is most probable that in her summons Babatha sought an order for the removal of John of Eglas on the grounds that he was a *suspectus tutor.* The governor of the Province had jurisdiction to make an order for removal and Babatha, as mother of the *pupillus,* was entitled

[108] Oudshoorn (2007: 329-330), Chiusi (2005: 123-4).
[109] Oudschoorn (2007: 327-330).
[110] Czajkowski (2017: 190, 51-2, 192).
[111] *P Yadin* 13; *Dig* 27. 2. 3. pr; see Chapter 2.
[112] *P Yadin* 14.

to apply for it.[113] In her summons and *testatio* she accused John of Eglas of failing to pay a proper amount as maintenance for Jesus, less than appropriate to the size of the estate, of profiteering from the estate, and of disobedience of "official instructions" of the governor.[114] Her charges against John of Eglas therefore appear capable of justifying his removal, since a *tutor* might be removed as *suspectus* "aut ob dolum in tutela admissum …. si forte grassatus in tutela aut sordide egit vel perniciose pupillo vel aliquid intercepit ex rebus pupillaribus iam tutor", or if he "ad alimenta pupillo praestanda copiam sui non faciat".[115] Although her summons is fragmentary and does not show that she sought an order for the removal of John of Eglas, that is therefore the most probable interpretation of it. It is supported by her offer to take over the administration of the estate and there is no reason to hold, with Oudshoorn, that some other purpose was intended by the summons and the offer contained in the *testatio,* than that John of Eglas should be removed from the *tutela* or the *tutores* surrender the administration of the estate.[116]

Ulpian stated that "omnes tutores" could be the subject of the *crimen suspecti tutoris*, but Kaser held that the *crimen* originated with testamentary tutors and that it was doubtful whether during the classical period it was applicable to *tutores* appointed by magistrates.[117] The proposition that it did not involves an argument that the text of Ulpian had been interpolated, together with a text of Paul in which he referred to proceedings, brought on the grounds that he was *suspectus*, against a tutor appointed by a magistrate in place of a deceased testamentary tutor.[118] Although he accepted that simple removal without an *accusatio* applied to tutors appointed by a magistrate, Siro Solazzi thought it impossible to exclude the possibility that the *crimen suspecti tutoris* never appled to them and he held the doubt to be worsened by the interpolation of the text of Ulpian, without there specifying the nature of the interpolation.[119] Kaser, however, did not think it certain that the text was interpolated.[120] Solazzi also questioned the genuine nature of the text of Paul but not but not in relation to the application of the *crimen* to tutors appointed by magistrates.[121] Ernst Levy held part of the text of Paul, "tunc … dicatur", to be a Byzantine interpolation and Solazzi followed him in holding the expression "suspectum facere" to be

[113] *Dig* 26. 10. 1. 3, 7.
[114] *P Yadin* 14-5.
[115] *Dig* 26. 10. 3. 5, 14.
[116] Oudshoorn (2007: 326).
[117] *Dig* 26. 10. 1. 5; Kaser (1971-5: vol 1, 364).
[118] *Dig* 26. 10. 1. 5; 26. 7. 46. 6.
[119] *Dig* 26. 10. 1. 5; Solazzi (1915: 157).
[120] Kaser (1971-5: vol 1 364, fn [11]).
[121] Solazzi (1912: 155).

interpolated, without affecting the text in so far as it affirmed that the *crimen* applied to tutors appointed by magistrates.[122] Kaser referred to the latter view of Solazzi without comment.[123] In discussing a *senatus consultum* quoted by Gaius as allowing the replacement of a tutor removed as *suspectus*, which he argued applied only to testamentary tutors, Solazzi had however accepted that a magistrate could in any event replace a tutor appointed by him who had been disqualified.[124] I conclude that it is not clear that those texts of Ulpian and Paul are interpolated, or that the *crimen* did not apply to tutors appointed by magistrates, Oudshoorn mentioned but did not discuss "the caution called for by Kaser" that the *crimen* may have applied only to a *tutor testamentarius*, and without deciding whether it was correct, assumed that Babatha might have brought the claim as mother of Jesus.[125] Since the most probable explanation of the nature of the claim of Babatha is that it was a *crimen suspecti tutoris*, we may, in my view, take it that by the time of the institution of the Province the *crimen* was available in relation to tutors appointed by the governor and subordinate authorities of the Province that had the power to appoint tutors, including the βουλή of the city of Petra.

In her summons Babatha asserted misconduct as a *tutor* only against John of Eglas, but in her *testatio* she alleged misconduct against both *tutores*, and stated that she had previously proposed that the *tutores* should pay her the proceeds of the estate of Jesus.

This was an offer by Babatha to take over the administration of the estate of Jesus, though not the *tutela* itself since as a woman she was debarred from doing so, and to indemnify the tutors against liability to Jesus arising out of her administration of his estate. Babatha offered also to support the indemnity by a *hypotheca* over her own property, which she asserted was sufficient security. The charges Babatha made against John of Eglas were not only an assertion that he should be removed as a *suspectus tutor* but also that he had acted dishonestly in his administration of the estate of Jesus, and amounted to a charge of *dolus.* Since they amounted to *dolus* rather than merely *culpa*, if John of Eglas were removed as a *suspectus tutor* by order of the governor he would have suffered *infamia.*[126] The result of his acceptance of Babatha's offer would have ensured that he remained *tutor* and accordingly would not have suffered *infamia*, and this consideration supports the argument that by her summons Babatha sought an order that John of Eglas be treated as a *suspectus tutor.*

[122] Levy (1916: 52-3); Solazzi (1929: 207 and fn [1]).
[123] Kaser (1971-5: vol 1, 364 fn [12]).
[124] Gaius 1. 182; Solazzi (1919: 955).
[125] Oudshoorn (2007: 333); Cotton (1993: 103 fn [104]); Kaser (1971-5: vol 1, 364).
[126] *Dig* 3. 2. 1; 26. 10. 3. 18; Greenidge (1894: 138-139); Kaser (1956: 251-3).

Babatha's offer is established as an offer made under Roman law in accordance with the provisions of the *senatus consultum Velleianum* of 46 CE, since it conforms to its provisions, and although she did not otherwise require the *auctoritas* of her *tutor* to commence the proceedings against the *tutores*, she made the offer διὰ ἐπιτρόπου αὐτῆς τοῦδε τοῦ πράγματ[ος Ἰούδου Χ]θουσίωνος ὃς παρὼν ὑπέγραψεν, or with his *auctoritas.* apparently showing that she believed that she needed it to validate her offer.[127]

Her offer raises an issue of the proper application of the *senatus consultum Velleianum*, the effect of the provisions of which was "ne pro alio feminae intercederent", or that a woman was prohibited from undertaking liability for another person, so that in an action against her on her undertaking, she would be entitled to an *exceptio* or defence.[128] It appears from texts in Gaius' Commentary that the *senatus consultum* applied in the Province by virtue of provisions in the provincial edict and accordingly the governor of the Province would allow such a defence where it applied.[129] By her offer, Babatha was undertaking to indemnify the *tutores* and her undertaking amounted to an *intercessio*, but according to Paul a "(m)ulier, quae pro tutoribus filiorum suorum indemnitatem promisit, ad beneficium senatus consulti non pertinent", so that her offer, if accepted, would have resulted in an enforceable obligation against her, and she would not have had the benefit of the *senatus consultum* or a defence under it.[130] It does not appear expressly from the archive whether John of Eglas accepted Babatha's offer but one may assume that he did not since Simon, the son and apparent successor to John of Eglas as one of the *tutores*, was in possession of the estate in 132 CE when he paid some maintenance to Babatha on behalf of Jesus.[131]

That Babatha had in her possession copies of a *formula* for an *actio tutelae* suggests that she contemplated that after the termination of the *tutela* of her son Jesus, either because he had come of age or because one or both of the *tutores* had been removed by a judgment of the governor in a *crimen suspecti tutoris*, Jesus or another *tutor* would take proceedings by such an *actio.*[132] In such an *actio*, for all his defaults, "(tutor) rationem reddet hoc iudicio, praestando dolum, culpam et quantam in suis rebus diligentiam", but the proceedings could not be brought against him until after the termination of his tutorship.[133] By provisions of the provincial edict

[127] *P Yadin* 15; *Dig* 16. 1. 1. pr; see Chapter 7.
[128] *Dig* 16. 1. 1. pr; Buckland & Stein (1963: 448-449); Evans Grubbs (2002: 55-60).
[129] *Dig* 16. 1. 5, 13.
[130] *Sent. Paul.* 2. 11. 2; to the same effect is a rescript (*CJ* 4. 29. 6. pr of 228 CE) of the Emperor Severus Alexander.
[131] *P Yadin* 27.
[132] *Dig* 27. 3. 4. pr; Nörr (1998b: 321).
[133] Gaius 1. 191; *Dig* 27. 3. 1. pr, 24.

an *actio tutelae* was within the jurisdiction of the governor of the Province, and since it was a *bonae fidei* action it may have been also *ius gentium*, so that it would have been open to peregrines to litigate in accordance with it.[134] However no such *actio* was in fact commenced no doubt because both 'Abdo'abdas and Simon son of John of Eglas remained tutors until 132 CE, so that the occasion for the commencement of such proceedings did not arise.[135]

In his summons against Babatha, Besas, as *tutor* of orphan nephews of Yehudah and sons of his brother Jesus, claimed from Babatha a date grove, that is immovable property, which he asserted had passed to those orphans from Eleazar Khthousion the deceased father of both Yehudah and Jesus, and was not the property of Babatha.[136] In the summons he asserted that she held it by force: ὃν βίᾳ διακρατῖς. In her summons which she also brought on behalf of those orphans, Julia Crispina also asserted that Babatha held it by force (βίᾳ διακρατῖς).[137] Besas and Julia Crispina were thus claiming relief in the nature of a possessory interdict *unde vi*.[138] In the proceedings between Babatha and Miriam, which concerned moveable rather than immovable property, both made allegations of arbitrary conduct against the other.[139] Babatha claimed from Miriam an answer why she had seized the contents of the house of Yehudah: ο̣ὗ χάριν ἐσύλωσες τ̣ὰ π[άν]τα ἐν τῇ οἰκίᾳ Ἰούδου Ἐλ̣εαζ̣άρου Χθουσίωνος. Miriam complained that Babatha had approached the property of Yehudah to which she alleged Babatha had no claim: σε μὴ ἐνγίσε εἰς τὰ ὑπάρχοντά μο̣υ <καί> [σο]υ ἀνδρὸς ἀ̣π[ο]γ̣ε̣ν[ομ]έ[νου. . . . .]ε.σ̣ίας καὶ πα[ρα]γραφὰς Ἰούδ̣ο̣[υ] ἀ̣ν̣δ̣ρ̣ό̣[ς] μ̣ο̣υ̣ μηδ̣ε̣ναν λόγον ἔ̣χ̣ι̣ν. In these proceedings Babatha and Miriam were seeking relief by way of possessory interdicts *(duplex) utrubi*.[140] None of those parties were disqualified from making those claims since possessory interdicts were available to peregrines.

In his *testatio*, made in his proceedings against Babatha, Besas stated that παρανγέλλω σοι ἀποδ̣ῖ̣ξε μ[οι π]ο̣[ί]ῳ δ̣ι̣κ̣α̣ιώματι διαϰ[ρ]α̣τ̣ῖς τὰ αὐτὰ εἴδη and threatened to register certain date groves in the names of those orphans if she failed to do so.[141] Similarly the record of a summons by Babatha against Miriam and counter-summons by Miriam against Babatha, shows that Babatha summoned Miriam to answer οὗ χάριν ἐσύλωσες τὰ π[άν]τα ἐν τῇ οἰκίᾳ Ἰούδου.[142]

[134] See Chapter 2.
[135] *P Yadin* 27.
[136] *P Yadin* 23.
[137] *P Yadin* 25.
[138] Nörr (1998b: 332-4); see Chapter 2
[139] *P Yadin* 26.
[140] Nörr (1998b: 332-4); see Chapter 2.
[141] *P Yadin* 24.
[142] *P Yadin* 26.

It seems that at least by the time of the Emperors Septimius and Caracalla, interrogatory proceedings had fallen into disuse, as Callistratus, who wrote during those reigns, said, but it was possible to administer at least certain types of interrogatories during an *actio*.[143] Such interrogatories were often to discover whether the defendant was an heir and if so in what share, or whether a slave in respect of whom the plaintiff sought to bring a noxal action was in the *potestas* of the defendant; but they were not confined to such cases, as texts in the *Digest* make clear: a defendant could be required to answer an interrogatory about his age and it is apparent that other questions could be asked.[144] Clearly in formulary proceedings, questions could be asked *in iure* before a magistrate, whether the defendant was heir, or whether a slave was in his *potestas*, and examples of such interrogatories may be found among the tablets from Pompeii, in which we find an interrogatory about an inheritance put in the *in iure* stage of proceedings:

> In iure aput L Granium Probum II virum C Sulpicius Faustus interrogavit A Castricium Onesimum essetne 'her[e]s' A Castricio Isochryso {heres}et quota ex parte;[145]

and at the same stage in proceedings, an interrogatory about the ownership of a slave:

> In iure aput L Clodium Rufum duumvirum C Sulpicius Cinnamus inter[rogavit C Iuli]um Prudentem esse[ntne homin]es … s[ervi ei]us et in potestate eius.[146]

Similarly interrogatories could be put in proceedings before the governor in his *cognitio extra ordinem* and his *imperium* clearly gave him power to require a party to answer. Those proceedings between Babatha and Besas and Miriam, are proceedings in which interrogatories were sought to be put, and the governor of the Province had jurisdiction to compel them to be answered.[147]

Part 6 -- Other Jurisdiction of the Governor of the Province.

An account may be given of jurisdiction that the governor of the Province had power to exercise, in addition to that evidenced in documents from the archives, based on papyri other

[143] *Dig* 11. 1. 1. 1.
[144] *Dig* 11. 1. 11.
[145] *TPSulp* 23.
[146] *TPSulp* 25.
[147] *P Yadin* 23-4, 26.

than those of the archives and other legal records and also the contents of the provincial edict so far as it can be reconstructed. I give below such an account that, however, cannot be a complete and comprehensive account of that jurisdiction.

No document in Babatha's archive relates to an application for *bonorum possessio*, but the governor of the Province had power to grant it and to do so pursuant to a provision of the provincial edict of the Province. The jurisdiction to grant *bonorum possessio* supports the proposition that amongst the jurisdiction of the governor was jurisdiction in relation to the administration of estates of deceased Roman citizens in accordance with the praetorian rules of succession, since Cicero says that without the remedy of *bonorum possessio* Roman citizens in a province would be deprived of them, and left to the *ius civile* rules of succession. That is, the grant of *bonorum possessio* was available in aid of the enforcement of the praetorian rules of succession.[148] It thus appears that the governor had jurisdiction in relation to succession to the estates of Roman citizens resident in the Province. In relation to Jewish peregrine residents in the Province he is shown to have exercised jurisdiction in relation to succession to their estates, and also the terms of their marriage agreements in accordance with Jewish law: the proceedings brought before him by Besas and Julia Crispina against Babatha, and those between Babatha and Miriam as wives of Yehudah concern such issues, and, at least in relation to the proceedings between Julia Crispina and Babatha, the summonses were served with his authority.[149] Nothing suggests that he did not exercise a similar jurisdiction in relation to the marriages and estates of Nabataean peregrine inhabitants of the Province in accordance with native Nabataean law.

The jurisdiction of the governor of the Province included jurisdiction to hear disputes about property, and those records of the summonses by which Besas and Julia Crispina brought proceedings against Babatha disclose disputes about property in which Besas and Julia Crispina sought to recover from Babatha property which they asserted was that of the orphans.[150] It appears also that the summonses between Babatha and Miriam were also proceedings over property, namely their respective rights to his property after the death of Yehudah, and their rights of execution over it to recover money owed by him.[151] It is clear that each of these proceedings was within the jurisdiction of the governor, particularly since the record of proceedings between Julia Crispina and Babatha discloses that the governor gave authority for

[148] Cic. *Att* 6. 1. 15.
[149] *P Yadin* 23-26; see Chapter 5.
[150] *P Yadin* 23-25.
[151] *P Yadin* 26.

the service of the summonses. The fact that both Babatha and Julia Crispina had authority granted by the governor to serve their summonses on each other strongly suggests that the governor had accepted jurisdiction in relation to disputes over property that arose under Jewish law, including Babatha's claim to a right of execution over Yehudah's estate to secure the repayment of her dowry, which arose under her *ketubbah*.[152]

Among the archives are several documents in which the obligation of a party was incurred or novated in a *cautio* of a *stipulatio*, including the obligations to repay the dowry under the marriage agreements of Shelamzion and of Salome Komaïse.[153] Those archives also contain agreements made after the establishment of the Province some of which are nevertheless in Aramaic, of the nature of *depositum*, for lease of land, and for the sale of animals.[154] It seems clear that the governor of the Province had jurisdiction to hear proceedings upon those contracts, since they formed part of the law of the Province, in the case of contracts made under Roman law not only because of provisions of the provincial edict of the Province, but also because they were in general *ius gentium.*[155] He clearly also had jurisdiction to hear actions based upon contracts made under Jewish and native Nabataean law, as is shown by the proceedings brought before him that involved the enforcement of Jewish law.[156]

The peregrine Jewish inhabitants of the Province are shown to have had full access to the court of the governor for the purpose of litigation involving issues that affected them or their property, whether those issues were under Roman law, as is shown by the litigation brought by Babatha against the *tutores* of her son Jesus, or Jewish law, as is shown by the litigation over the estate of Yehudah and the claims made against it all of which were in accordance with Jewish law.[157] That litigation might be heard by the governor or delegated by him to judges including peregrine judges. We may assume that they had such access to any other court in the Province. Although no document in the archives discloses any litigation involving the peregrine Nabataean inhabitants of the Province, we may be sure that they also had such access to each court in the Province, and that they also were enabled to litigate before them issues under both Roman law and native Nabataean law.

[152] *P Yadin* 10, see Chapter 5.
[153] *P Yadin* 18, 37 = *XḤev/Se* 65; see Chapter 6.
[154] *P Yadin* 5, 6, 8, 9, 17.
[155] *P Yadin* 6, 8, 17-8, 20-2; see Chapter 6.
[156] *P Yadin* 23-6.
[157] *P Yadin* 13-5; 23-6.

The provisions of the edict of the curule aediles are shown to have been in force in the Province by virtue of provisions of the provincial edict, and in a contract for the sale of donkeys made in the Province, the vendor of them may have given the warranty required by it. Although there is in the archives no papyrus evidencing any litigation arising out of such a warranty, it is likely that that amongst the jurisdiction of the governor was power to enforce such warranties.[158]

No document in Babatha's archive shows the operation of the rules relating to *fideicommissa* but from the reign of the Emperor Claudius jurisdiction over them was exercised in a province by the governor, and Gaius says that it was exercised by *cognitio* even at Rome. [159] Accordingly one may accept that the governor of the Province had jurisdiction to enforce *fideicommissa,* and to do so by *cognitio.*

It appears from papyri from Egypt of the first and second centuries CE, that in Egypt there were time limits for the commencement of at least some kinds of legal proceedings.[160] It is at least likely that there was in force in the Province some provision limiting the time within which some legal proceedings could be commenced, probably fixed by edict, and perhaps by the provisions of the provincial edict. It also appears that by an edict the prefect Ti Julius Alexander ordered that certain judgments given in courts in Egypt should be final and not the subject of further litigation.[161] It is likely that there was in force in the Province a rule making final such judgments of the governor and possibly of any other court in the Province.

Among the documents contained in the archives are three which concern land at Ein-Gedi which was in the province of Judaea, and in two of them a party undertook to register the land in the name of Shelamzion if required to do so.[162] In each of the agreements a party undertook an obligation that was to be performed in the province of Judaea. Each of the agreements must be taken to be enforceable primarily in Judaea.

No text in the *Digest* appears to relate to the enforcement of a contract made in one Province but to be performed whether wholly or partly in another. Although it is clear that an accused person could be sent by the governor of a province to another to answer charges of offences arising there, no similar procedure appears to have been available for the purpose of enforcing a contract. We may suppose that the governor of the province where the defendant resided might in the exercise of his *cognitio extraordinaria* determine issues arising out of such a

[158] *P Yadin* 8; see Chapter 2.
[159] Suet. *Claud.* 23. 1; Gaius 2. 278 and see Buckland & Stein (1963: 353-7); Kaser (1966: 370),
[160] *P Flor* 1. 61 = *M Chrest* 80; *PSI* 4. 281; see Chapter 2.
[161] *CIG add* 4957 = *OGIS* 669 = *BGU* 7. 1563 = *FIRA* i. No 58; see Chapter 2.
[162] For the nature and terms of those contracts see Chapter 6, Part 1.

contract and order a defendant to perform his obligations under it; he could treat any failure to perform in accordance with his order as *contumacia* under his power of *coercitio,* but in the absence of texts in which the issue is discussed we can go no further.

The procedure applied by the governor in the resolution of litigation that was brought to him was that of Roman law, but it is shown to have been compatible with the adjudication of issues arising not only under Roman law, but also under Jewish law, and no doubt would have proved compatible also with the adjudication of issues under Nabataean law. It had proved possible to resolve issues that arose under peregrine law under the system of litigation by *formulae,* since in the first century BCE an issue between Spanish communities was resolved by the application of local Spanish law under the *Tabula Contrebiensis,* a *formula* "which resembles a Roman private law *formula* such as a Roman magistrate would use with a Roman judge or *recuperatores* in Italy".[163] Even when conducted under such a *formula,* peregrines could be parties to litigation under Roman law and in Roman courts by the use of *formulae* containing a fictional allegation of Roman citizenship, so that in proceedings in the *cognitio extra ordinem* of the governor of the Province, where the parties did not frame their claims in particular forms, the governor might where appropriate base his adjudication on principles of peregrine law.[164]

Part 7 – Court Records and Officials and Legal Advisers.

Many papyri comprising ὑπομνήματα or *commentarii*, the prefect's records of his decisions in judicial matters, and collections of precedents have been recovered from Egypt.[165] Of them Jolowicz said that in Egypt "there existed a definite practice of citing decided cases as authority in courts of law, that judgments were sometimes expressly based on such authority, and that the practice was facilitated by the use of official diaries and collections made from the reports that they contained". Jolowicz also observed that they were systematically filed with reference numbers and that parties to litigation might obtain copies of them, no doubt because it was for parties to litigation to produce copies of *constitutiones*, judgments and other precedents and authorities upon which they were to rely.[166] Burton likewise argued that copies of the "judicial

[163] Richardson (1983); (2016: 115, 117); Lintott (1993: 155); Fournier (2010: 544).
[164] Richardson (2016: 117).
[165] Jolowicz (1937); Crook (1995); Coles (1966), where many examples are collected and discussed; and Burton (1975: 103-104).
[166] Jolowicz (1937: 12, 3-4).

decisions of successive proconsuls" were maintained in provincial public archives".[167] Among those papyri are the record of Dionysia's petition in which the parties refer to previous edicts and judicial decisions of prefects and Egyptian judges, and an opinion of a νομικός.[168] Also among the papyri are collections of precedents on *cessio bonorum* and limitation of actions, evidently compiled in the late second century CE for use in litigation.[169] It was apparently normal for precedents to be read out by advocates in other provinces, since Pliny records an occasion in which various pieces of imperial legislation, an edict and several letters of emperors, were read by advocates, which he referred to the Emperor Trajan "quia et parum emendata et quaedam non certae fidei videbantur".[170]

Because it was settled practice for Roman magistrates and officials to keep such records of their judicial decisions we must assume that, although there are no extant records of their decisions, nevertheless successive governors and subordinate officials of the Province who exercised judicial power kept such records, and that copies of them were available to parties to litigation in the Province for use in it. An archive of such decisions was clearly no less necessary there than in Egypt for the due administration of justice, not only for the purpose of conducting litigation before the governor and other courts in the Province but also for the enforcement of judgments and the maintenance of defences based upon judicial decisions.

Such records from Egypt commonly show the presence of ῥήτορες or advocates appearing for and arguing the cases of litigants before the prefect and other judicial officers, and there were in Egypt νομικοί or lawyers practising in the courts of the prefect and subordinate judges. Advocates might be assisted in their court appearances by νομικοί, who in Egypt, however, are more commonly seen as advising judges.[171] Although there is little evidence of the presence of lawyers or other persons with legal experience or knowledge of Roman, Nabataean or Jewish law practising in the Province, we must assume the presence of such persons there. They may have been members of the *consilium* of the governor when appropriate. Certain of the documents in the archives are stated to have been written by Germanus son of Judah or Theënas son of Simon, both of whom were described as "librarius", or scribe or secretary, who appear to have had some legal knowledge or at least access to precedents of legal documents.[172] The

[167] Burton (1975: 103).
[168] *P Oxy.* 2. 237; see Czajkowski (2017: 91, 179-180; Bryen (2015: 210-2).
[169] *P Ryl* 2. 75; *PSI* 4. 281; Bryen (2015: 213) suggests that although the individual decsions can commonly be dated by internal evidence, dating the makingof the collection depends upon palaeography.
[170] Plin. *Ep.* 10. 65. 3; Crook (1995: 187)
[171] Czajkowski (2017: 90-1); Bryen (2015: 210).
[172] *P Yadin* 15, 17-18, 20-23, 25-27, and perhaps also 19; for the scribes and legal advisors appearing in the archives, see Czajkowski (2017: 60-106).

presence of persons resident in the Province who possessed some legal training is also suggested by the existence in the archives not only of records of the commencement of legal proceedings and the service of legal process, but also of contracts that conform to those forms of contract current in Roman law, including, most notably, documents in forms of *depositum* and *stipulatio*. As Czajkowski argues, Babatha's possession of copies of the *formula* for an *actio tutelae* is evidence of the presence in the Province of persons with some specialised legal knowledge, that is legal practitioners, advisors or experts and we must also suppose that there were in the Province advocates performing their functions in the courts there.[173]. Since it is apparent that legal authorities, of the nature of Imperial *constitutiones*, *responsa* of jurists and records of judicial decisions were necessarily obtained by the parties to proceedings or agents engaged on their behalf, we must suppose also that, in the Province during the period of the archives, there were resident persons with sufficient skill to obtain any documents required for the presentation of the cases of those for whom they appeared. Since the legal documents of the archives were apparently largely written and executed at Maḥoza, it may be that there were some persons there who had the appropriate experience and skills, which indicates that such assistance was probably available throughout the Province. However, it has been suggested that there was in any province a lack of trained jurists able to advise the governor on settling the form of *formulae,* and on the information we have there is unlikely to have been a sufficient pool of private persons whether Roman citizens or *peregrini* qualified to be appointed *iudices dati* or *pedanei.*[174]

No document from the archives shows the existence of any official attending the governor or his court, but we may assume the presence of any necessary officers. *Apparitores* or ὑπηρέται, and heralds are known from Egyptian papyri and similar officers are likely in to have been present in the Province.[175] That the procedure in the Province differed from that in Egypt has been explained by a lack of officials exercising the powers of the στρατηγοί and ἐπιστρατηγοί in Egypt.[176]

[173] Czajkowski (2017: 98).
[174] Kaser (1966: 344); see Kaser/Hackl (1996: 440).
[175] *BGU* 1. 226 = *FIRA* iii. No 167 = *M Chrest* 50; *P Hamb* 1. 29 = Meyer, *Jur Pap* 85 = *FIRA* iii. No 169.
[176] Czajkowski (2017: 189); Burton (1975: 100).

Chapter 4 – Nabataean Law in the Province

Part 1 -- Nabataean Tomb Inscriptions.

The material available for the study of Nabataean law includes material both from before and after the establishment of the Province, and it is my view that in several aspects Nabataean law can be shown to have continued after the establishment of the Province as part of its law.

Important sources for Nabataean law are the tomb inscriptions written in Nabataean Aramaic mainly from Mada'in Ṣaliḥ, in a few cases from elsewhere in Nabataea, all from the period of the Nabataean kingdom.[1] The inscriptions appear to be copies of registered documents by which the tombs were dedicated for the purpose of use as tombs for a designated person or set of people, with prohibitions on use for the burial of persons other than those named and on dealing with them by sale and by mortgage (MŠKN "give in pledge" or "mortgage", the term used also in one document from the archive of Babatha).[2] The dedicator of almost all tombs was also the maker, but a recently published tomb inscription from Saudi Arabia that cannot be dated shows the dedicator describing himself as having purchased from the maker a tomb named as that of the maker: "the tomb and the [eternal] dwelling called QYŠW's tomb that {'}{Ḥ}[YN] (the purchaser and dedicator) bought (ZBN) from QYŠW (the maker and vendor)".[3]

The prohibition was normally to be enforced by religious sanction and also the payment of a fine, in many cases to a god such as Dushara and to an official, commonly the king, as is shown by an inscription dated 26/27 CE in which, referring to prohibitions contained in the inscription, it is provided:

> and anyone who writes for this tomb a document carrying out anything of what is above will be liable to Dushara in the sum of 3000 Haretite sela'ṣ and to our lord King Haretat (WLMR'N' ḤRTT MLK') for the same amount.[4]

The inscriptions are "legal foundation texts" or effective legal documents cast in legal language, as Healey has recognised, since they also make provision for the use and inheritance of the tombs, and in one case the maker of the tomb recorded that he had given it to his wife

[1] Healey (1993a).
[2] See *Ḥ* 1; *P Yadin* 1.
[3] Alzoubi and Smadi (2016: 80): the inscription is damaged at the position of the dating formula.
[4] *Ḥ* 19.

"from the date of the deed of gift which is in her hand (ŠṬR MWHBT' DY BYDH), that she might do with it whatever she wishes".[5] That the prohibitions were of full legal effect is also shown by the statement contained in some inscriptions that the tomb was:

> inviolable according to the nature of inviolability among the Nabataeans and Salamians (a neighbouring Arab tribe) forever (ḤRM KḤLYQT ḤRM NBṬW WŠLMW Lʿ LM);[6]

referring to "inviolability laws or customs", and in my view showing that the dedications were protected by law or established custom which provided rules that allowed an owner of land to restrict its use, and the persons to whom it might be conveyed and who were entitled to use it.[7] These expressions also show that the land the subject of the dedications was held in perpetuity and under a tenure unlimited in time. Healey translates 'ṢDQ B'ṢDQ, a common expression in the inscriptions as meaning "by hereditary title", and if that is correct, some at least of the tombs were held on terms that descendants of the dedicator might be "buried in it forever by hereditary title (Lʿ LM 'ṢDQ B'ṢDQ)".[8] Nothing in the dedications indicates that any tax or rent was payable to the king for the tomb or that there were any conditions of tenure or inheritance other than those imposed by the dedicator.

In addition to the deed of gift referred to above, in other inscriptions there is reference to the prior existence of a document of dedication, of which the inscription is evidently a copy or perhaps an abbreviated copy, and which in one inscription is stated to have been registered in a temple "according to the copy of this deposited in the temple of Qaysha (KNSḤT DNH YHYB[BB]YT QYŠ)" and in another the terms of dedication are described as set out "in the documents of consecration (BŠTRY ḤRMY') according to their contents".[9] Healey suggests that a copy of the text of the dedication was placed in a temple, probably in all cases, and also in a civic registry, since the *strategos* ('ŠRTG'), apparently an administrative rather than a military official, in one case received the fine for the breach of its terms.[10] Registration is in my view probable, since from the terms of two conveyances forming part of the archive of Babatha it appears that registration was necessary to ensure the transfer of title and was

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[5] Healey (1993a: 42); *Ḥ* 27.
[6] See, for example *Ḥ* 1, 8.
[7] Healey has suggested "established custom" as a better translation of ḤLYQT than "law": (1993a: 72); (2013: 179). Since, however, these rules, whether described as "law" or "established custom", were manifestly a body of principles recognised and applied within the kingdom of Nabataea and its residents in the administration of justice among them, I will refer to them as the "law" of Nabataea: see Chapter 1 and Salmond (1902: 11).
[8] Healey (1993a: 91-92); see *Ḥ* 22.
[9] *Ḥ* 36; *The Turkmaniye Inscription* (Petra): *CIS* 2. 530 for which see Healey (1993a: 238-242); (2009: No 6, 63-68); (2013: 168).
[10] Healey (1993a: 42); *Ḥ* 38.

associated with payments due to the king.[11] That tenure depended upon the registration of documentary conveyances is supported by the many tomb inscriptions that refer to a person having the right to be buried in a tomb upon production of "a deed of entitlement (TQP) from the hand" of the dedicator.[12]

Part 2 -- The Dedicators of Tombs – Disabilities.

The dedicators of those tombs included women, in some cases a mother jointly with her daughters, and in one case the donee of the tomb was a woman.[13] However the terms of the inscriptions show that they were under no discernible legal disability and could hold and dispose of land in the same way as male inhabitants of the kingdom. In particular there is no indication that they were under any disability similar to that of *tutela mulierum* of Roman law.[14] That by an inscription "(Š)ubaytu son of 'Ali'u, the Jew (YHWDY')" was able to dedicate a tomb shows that Jews also were under no disability.[15] The documents forming part of the archive of Babatha from the period of the kingdom confirm this, since a woman appears as conveyor, and as a consenting party, and Shim'on, who was probably the father of Babatha and Jewish appears as the purchaser of land, without any apparent restriction.[16] Among those documents there are three, two conveyances by ʾAbi-ʿAdan as conveyor, and a document by which ʾAmat-ʾIsi consented to a loan to her husband being paid out of her dowry, in which a woman was a conveying or consenting party and in no case is she shown to have required the consent or approval of her husband or any other person.[17] That the "son of LTY", who is otherwise unknown, joined in some of the undertakings of the vendor in the second of the two conveyances does not derogate from this, since nothing in it shows that this was required by any legal disability of the vendor.[18] This is so although, according to Esler, he was the husband of ʾAbi-ʿAdan and agreed to convey land to her.[19]

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[11] *P Yadin* 2-3.
[12] See *Ḥ* 5.
[13] *Ḥ* 12, and see above *Ḥ* 27.
[14] See Chapter 7.
[15] *Ḥ* 4.
[16] *P Yadin* 2-4.
[17] *P Yadin* 2-3; 1.
[18] *P Yadin* 3; the editors of the papyrus suggest that he may have been acting as a guarantor: Yadin et al (2002: 202-203).
[19] Esler (2017: 161-7; 212-4).

The existence in Nabataea of a register relating to orphans to which I refer above implies that the law of Nabataea included provisions for their protection and presumably for the protection of their property, but on the available evidence we cannot say what those provisions were.[20] There is no material to suggest that they were under any disability.

Part 3 –- Sale of Land in 99 CE.

The two conveyances mentioned above were made by ʾAbi-ʿAdan in 99 CE about one month apart and dealt with land at Maḥoza with annexed rights to water (ʿNYMYH) from an irrigation system. Both were double documents and in substantially the same terms so that it was possible for their editors to reconstruct them on the basis of their common terms.[21] In the first ʾAbi-ʿAdan sold one date grove to Archelaus, a Nabataean *strategos,* and in the second she sold it and another date grove to Shimʿon. It appears that the second superseded the first, which was not however cancelled or destroyed, and apparently passed to the father of Babatha as purchaser under the second. No entirely satisfactory explanation has been found for this, but if the passing of title was dependent on registration of a conveyance, then cancellation of the document would not have been necessary if registration was impossible because it was held by the purchaser under the later conveyance. Esler has argued that Shimʿon obtained the earlier conveyance from Archelaus the purchaser under it and other documents because they all related to the land he was buying, an argument that was regarded as "extremely plausible" by Czajkowski, and also in order to prevent "Archelaus or an heir or assignee" from later claiming the land.[22]

In each conveyance ʾAbi-ʿAdan wrote that on the date of it the purchaser had "bought (the groves) from me (YWM[ʾ] HW ZBN ... MNY)" and that he had amongst other rights the right "to do with these purchases all that he wishes ... from the day on which this deed is written and forever (LMʿBD BZBNYʾ ʾLH KL DY YṢBH ... MN YWM DY KTYB ŠṬRʾ DNH WʿD ʿLM)". She also acknowledged the receipt of the whole of the purchase price: "and this silver, the entire price of these purchases has been received by me ... for the fixed price sale price in funds" and that the purchase price was hers and "beyond release forever (ḤLṬYN LʿLMYN)".[23] Healey treats ZBN as a perfect or past tense and in his discussion of the

[20] *P Yadin* 33.
[21] *P Yadin* 2-3.
[22] Esler (2017: 173-5); Czajkowski (2017: 27).
[23] *P Yadin* 2-3.

conveyance to Archelaus translates it as "bought".[24] The documents appear to evidence immediate sales although their editors describe them as "Sale Contracts" and Oudshoorn treats them as ones that deal with "situations in which a sale is described as a future event, not as something that has already taken place", arguing that "if the sale of P Yadin 2 had been immediately effected the sale of P Yadin 3 would not have been possible". The approach of Esler that "P Yadin 2 is a signed original contract recording the purchase of a date-palm orchard that had come into effect, with the title passing to the purchaser, on the date it was executed" and that Archelaus later rescinded it, is to be preferred, although the position is made clearer by the description "conveyance".[25]

Part 4 –- Land Tenure in Nabataea.

The land sold by ʾAbi-ʿAdan appears to have been held under some form of tenure from the king of Nabataea since the vendor speaks in the second conveyance of the apportionment of:

> what is owed from this (grove) the share of our Lord (MRʾNʾ), the leasing tax (ʾKRY) for a year, as well, in it(s amount of) ten seʾahs until such time as there will be a new binding agreement (ʾSR) and this (grove) will be registered in the name of this (same) Shimʿon (as) in this document.[26]

The editors of the document say that it was necessary for the vendor and the new owner to apportion the leasing tax payable to the king for an interim period between the dates of conveyance and upon which the tax was payable, after which the new owner would assume the obligation. They also say, based upon the hypothesis of Hannah Cotton, that sales of Nabataean land "required title registration in the form of a new ʾSR 'binding agreement, order' to be issued when the new owner assumed responsibility for the royal tax".[27] Cotton had argued that the "new binding agreement" referred to in the conveyance was "a new order" or "a periodic reorganisation of all land leased from the king which was likely to be accompanied by a readjustment of the terms of lease".[28] Whether this interpretation of the expression is correct

[24] Healey (2003: 95).
[25] Yadin et al (2002: 201-244); Oudshoorn (2007: 108, fn 30); Esler (2017: 122-138); Czajkowski (2017) does not expressly discuss this issue. I print a text of *P Yadin* 2-3 that takes into account all four texts in the papyri.
[26] *P Yadin* 3.
[27] Yadin et al (2002: 203, 228-229);
[28] Cotton (1997b: 256).

or not, the "new binding agreement" appears to have been one by which the relations between king and the holder concerning the land, its tenure and the amount of the "leasing tax" applicable to it, would be regulated and adjusted, presumably in the light of the terms of the conveyance. Such a requirement implies a system of compulsory lodgment of conveyances, and no doubt registration in a register kept for the purpose of revenue, whether rent or tax, collection. A requirement for registration is in my view probable in view also of the terms of the tomb inscriptions and an indication, in a petition from Babatha's archive, that the Nabataean registration system was comprehensive and organised.[29]

It is however not possible to be definite about the system of tenure of Nabataean land other than that covered by the tomb inscriptions, except that it seems to have been held of the king, to whom "the leasing tax" was payable. Whether "the leasing tax" is better regarded as a tax or a rent for the use of the land cannot be stated, and will depend upon whether the land was held in perpetuity or for terms limited in time. The land so held was clearly alienable by sale and, so far as the available evidence is concerned, without the consent of the king, since there is no such requirement expressed in the conveyances, and heritable, since it was to be held by the purchaser "forever (LʿLMYN)" and the transmission of it was stated to be within the purchaser's power.[30] Neither a form of tenure that continued only so long as the "leasing tax' was paid, nor a form of holding that was perpetual but subject to payment of tax, the equivalent of the "leasing tax" can in my view be excluded on the limited evidence available. The possible terms of tenure of the tombs at Mada'in Ṣaliḥ show that different forms of tenure may have applied.

Since the land to which the water rights (ʿNYMYH) were annexed consisted of palm groves, requiring a considerable amount of water, it is probable that such land had rights annexed for the provision of water necessary for their cultivation.[31] Based on the provisions of the gift of groves at Maḥoza made in 120 CE by Babatha's father Shimʿon to her mother Miriam, it is likely that those rights might be held in common with others, as "with the heirs of Yoseph (ʿM YRTY YWSP)", and consist of the right to use a particular measure of water, and more than one measure might be allotted to a particular grove, as "three (allotted) shares of water (TLT QYSM')".[32] The particular water rights evidenced in the Nabataean documents contained in

[29] *P Yadin* 33; see Chapter 2.
[30] *P Yadin* 3.
[31] *P Yadin* 3.
[32] *P Yadin* 7; the editors of the papyrus interpret the expression QYSM' as combining two Arabic words meaning together "measures of water": Yadin et al (2002: 97).

Babatha's archive were allocated for each grove and limited to a period on one day in each week and for a period measured by the hour or half-hour. It is probable that the law of Nabataea provided for such rights, and protected them, and also possible that the law required that they be annexed to such land.[33]

In the conveyance by ʾAbi-ʿAdan to Archelaus those rights were stated to be "as is proper (KDY ḤZH)", whereas in that to Shimʿon the rights were stated to be for a fixed time "half of one hour on the first day of the week, week [after wee]k forever (PLGWT Šʿ H ḤDH BYWM ḤD BŠ[....]' KWL ŠB' WŠBH 'D 'LM)". Oudshoorn argued that the "specification of a period for the watering of the orchard with a day of the week seems to be based on the Jewish regulation regarding the Sabbath: a period is specified to avoid any possible irrigation on the Sabbath", but this is unlikely to be correct. As Healey has pointed out, the specification of the day must simply have made explicit fixed irrigation arrangements, since a rearrangement in favour of Shimʿon would affect other landowners who were parties to the irrigation system, and, one might add, may not have been permissible under the terms of the arrangements.[34] The view of Healey is supported by the occurrence in the gift of Shim'on to Miriam, his wife, of water rights described in relation to one grove by the expression "as is proper (KDY ḤZ' or ḤZH)" and to others by the length of time and the day of the week for its exercise.[35]

Not all land in Nabataea had been alienated by the king and some continued to be held by him, since the land conveyed by ʾAbi-ʿAdan had as one of its abutters "the (grove) of our lord, Rabʾel the King (GNT MRʾN' RB'L MLK')", which must refer to land retained by him.[36]

Part 5 -- Mortgages and Guarantees.

An imperfectly preserved document from the archive of Babatha described by its editors as a "debenture" shows that the law of Nabataea included rules making provision for and regulating guarantees (ʿRB or "surety"), and the making and receiving of loans upon security for their repayment (MŠKWN "pledge' or "mortgage"), repayable with interest (RBYT), with no rate

[33] Cotton & Yardeni (1997: 215-216).
[34] Oudshoorn (2007: 95); Healey (2013: 176-7); see Esler (2017: 155).
[35] *P Yadin* 7.
[36] *P Yadin* 3; Cotton (1997b: 261).

stated so that we cannot say how it was fixed.[37] That document appears to be one in which a husband acknowledged that he had borrowed money at interest from the dowry of his wife for the purpose of investment, and to show that it was permissible only with her assent, apparently because she had a charge over the property of her husband for its repayment. Esler argued that Nabataean law or custom required her consent to be in express terms. He left open the question whether part of a woman's dowry might be lent to someone other than her husband, and there is nothing in the available material that shows whether it was so.[38] Thus the husband listed his available property and, no doubt because the wife required it, the debt was secured also by a guarantee.[39] By the document she is said to have ṬRQT, which the editors of the document treat as meaning "prepared", so as to indicate that she consented to the arrangement.[40] If this is so, she was surrendering some right, but the document does not show that she executed it, and it is not expressed that she was accompanied by or authorized by any person. Accordingly, the law of Nabataea must have included provisions giving a wife a charge or mortgage over the property of her husband to secure the repayment of the dowry, and have allowed her to permit its use by her husband.

It appears also from a papyrus of approximately 60 CE that Nabataean law made provision for the enforcement of a mortgage or pledge (MŠKWN) over land and perhaps other property to secure the repayment of a loan.[41] The property mortgaged or pledged might be the subject of a ŠṬR ʿDW', normally translated "writ of partition" or "writ of seizure", and seized and sold under its authority at auction to repay the debt, after the issue of a KTB KRWZ', or a "writ of proclamation" or "document authorising sale by auction", which apparently authorised the sale itself.[42] This document, which is badly damaged, appears to record such a mortgage or pledge by the father and uncle of El'azar of commercial property, namely stores in the market place of Maḥoza, and a palm grove, and the subsequent redemption by El'azar, the heir of the mortgagors or pledgers, both of whom were dead. There may have been irrigation ditches situated on the palm grove, if the translation of the expression ŠQY' offered by Ada Yardeni and Healey is correct, but the meaning is uncertain.[43] If indeed the meaning is correct it is possible that rights to use water such as I discuss above were annexed to the palm grove. The

[37] *P Yadin* 1; Esler (2017: 85, 214) suggests by comparison with of the rate implied by Babatha's offer to the *tutores* of Jesus that the customary rate was around 9 per cent per annum.
[38] Esler (2017: 93, 96).
[39] Yadin et al (2002: 170-2, 193-7).
[40] Yadin et al (2002: 172, 197, 199-200).
[41] *P Naḥal Ḥever* 36 + *P Starcky*; see Yardeni (2000: vol 1, 265-6; vol 2, 85-6); Healey (2009: No 10, 79-89).
[42] Hoftijder & Jongeling (1995: 828 s.v. ʿdw, 534, s.v. "krwz$_1$").
[43] Yardeni (2000: vol 2, 85); Healey (2009: 81); Hoftijzer & Jongeling (1995: 1185-1186 s.v. "šq$_1$").

KTB KRWZ' is stated to have been written in accordance with all such writs (KKL KTB KRWZ') which probably indicates that there was a prescribed form of such writs to which they had to conform in order to be valid. It may be that a writ of proclamation was issued for a fee since it is said that the mortgagee or pledgee had "paid the price" of it (WPR' DMY KRWZ' HW).

It is not on the material available possible to say whether the security over the land was of the nature of a pledge by which possession passed to the pledgee, or one by which title passed to the mortgagee, without also possession of the land. Clearly however the security had the effect of granting to the mortgagee or pledgee a power of sale which he appears to have exercised, according to Healey, by the sale of part of the property, since an account was to be taken between him and El'azar, who, as heir to both his father and uncle, had the right to redeem the property. He may also have had some obligation to do so since he was to pay what he owed (MH DY LK 'MY).[44] There appears to be provision for a decision on the amount due to be made by a person who might be the king, or a judge, interpreter or governor (WQBLT MLK WDYN WPTWR W'SRTG), in accordance with the law since there is reference to ḤLYQH, a word which in the tomb inscriptions from Mada'in Ṣaliḥ refers to an obligation under the law of Nabataea.[45]

The original mortgage or pledge appears to have been for an amount of "four hundred silver sela's" and may have borne interest since it is stated to be KPS R'Š RBYN which Healey translates as "increasing in proportion to the principal" and Yardeni translates with a reference to "principal".[46] Nothing in the document however allows an inference about the rate of interest or the circumstances under which the obligation to pay it arose, although it is possible that it arose under a provision of the agreement for the loan.

In the document there is no mention of registration, and we cannot say whether registration of mortgages or pledges was required or even permitted in the law of Nabataea, although there was a general system of registration of ownership of land and tax upon it was payable by the holder of it. That there was a prescribed form for use in such cases is supported by the conjecture of Healey that Afteḥ mentioned in the text "may have been a local official or scribe"

[44] Healey (2009: 83).
[45] Healey (2009: 89); for the use of the expression in conveyances of land in Nabataea during the kingdom (*P Yadin* 2-3) see below.
[46] Healey (2009: 81); Yardeni (2000: vol 2, 85).

since preparation of such documents might require the intervention of local officials with knowledge of the relevant law and procedure.[47]

In that document we see a system that allowed loans at interest under security and the enforcement of them by sale of property, but controlled the exercise of the rights of enforcement, not only by the intervention of officials, but also by the provision of courts no doubt empowered to decide issues arising in its enforcement.

Part 6 – Inheritance in Nabataea.

The same document relates also to the laws of inheritance that applied in the kingdom of Nabataea.[48] In it El'azar referred to the mortgagors or pledgers as NYQRKS 'BY and BNY DD[Y] that is "Nikarchos my father" and "Banay my (paternal) uncle" and he claimed to be the 'ṢDQ WYRT or "legitimate heir and inheritor" of both his father and his uncle, stating that WL' ŠBQ BNY DDY WL' 'YTY LH YLD, that is that his uncle Banay did not have or leave children. Whereas YRT refers to "natural heir", 'ṢDQ may refer to a testamentary heir; so that if that is its meaning here, then El'azar was claiming under the wills of both father and uncle.[49] Healey treats the words as "synonyms, or at least to carry only a narrow nuance of legal difference", and this is a plausible interpretation, and one that is more probable since in the context for El'azar to have been testamentary heir to both his father and uncle would have required both to have made a will which merely adopted the law of intestacy in favour of the same person.[50] We may thus conclude that the document contemplates rules of inheritance under which a son of a deceased would be his heir on intestacy, and under which in default of issue the heirs on intestacy were the brother or brothers of the deceased, or, if they had predeceased him, their son or sons. We cannot on the material contained in the document be more specific and say whether daughters of a deceased could be his heirs or among his heirs. Nor so far as this material is concerned can we say whether the rules contemplated, or allowed a right of testation. However, so far as we can tell those rules were consistent with those of Jewish law.[51] That they were the rules of Jewish law is supported by the facts that the land was

[47] Healey (2009: 86).
[48] *P Naḥal Ḥever* 36 + *P Starcky*.
[49] Hoftijzer & Jongeling (1995: 98 s.v. "'ṣdq").
[50] Healey (2009: 87).
[51] See Chapter 1 Part 6(b) and *mBB* 8.

inherited by Yehudah the son of El'azar, second husband of Babatha, and that this document was written in a Jewish form of script.[52] The document was among the documents found in the Cave of Letters, where the documents in Babatha's archive were found. If indeed the rules contemplated are Jewish, one must with Healey ascribe similar meanings to the expressions YRT and 'ṢDQ, since there was no right of testation under that law.[53]

On this material I conclude that, although the law of inheritance in the kingdom of Nabataea was no doubt similar since it was based on partilineal descent, it is most probable that the rules of inheritance by which El'azar was the heir of his father and uncle were those of Jewish inhabitants of the Nabataean kingdom, rather than those of Nabataean law and applicable to the Nabataean inhabitants of it. Further, it is apparent that by the law of that kingdom Jewish inhabitants were permitted to provide for the succession to their property in accordance with the rules of Jewish law, just as they were permitted to do in the Province, and we may infer that those rules were enforceable in the courts of the kingdom.

In an account of the continuity of Nabataean law after the establishment of the Province and thereafter Hannah Cotton has contended, taking into account in the archives of Babatha and Salome Komaïse "claims of uncles and their male descendants", and the presence of "deeds of gift in favour of females *only*", that the only way that property could devolve on women was by deed of gift since "the law of intestate succession simply sidestepped wives and daughters, even in the absence of a male heir". She contended that the law that appears from those archives was

> neither Jewish law nor Roman law … In all likelihood the local law of the Nabataeans which is reflected in the papyri from the Judaean desert and what we read in lines 11-16 of *P Petra 1* suggests that it had survived into the sixth century not necessarily as part of a legal code, perhaps merely as a compelling social custom. [54]

The papyrus to which she referred dates from 537 CE and is a record of a family arrangement under which the dowry of a deceased woman, the mother of Theodoros and the sister of Patrophilos, who was accordingly the uncle of Theodoros, had been ceded (ἐξεχωρή[θη]) by Patrophilos to Theodoros.[55] Cotton accepted an explanation for the arrangement, the first of those put forward by A. Arjava and C. A. Kuehn, that the dowry had been returned to the

[52] See *P Yadin* 21; Healey (2009: 83).
[53] See Chapter 5.
[54] Cotton (2009: 164-170).
[55] *P Petra* 1.

deceased woman's father on the ending of the marriage by her death, and that Patrophilos her brother had inherited the dowry on intestacy from their father, and she suggested that the papyrus and those in the archives reflected a Nabataean law of succession that favoured brothers of a deceased ("paternal uncles") over daughters of the deceased.[56]

In fact, the terms of this papyrus do not show how the dowry was in the possession of Patrophilos, and, since it records a case of cession not to a niece but to a nephew, son of the deceased, is in my view quite incapable of showing that even in the particular case the law of intestate succession preferred an uncle, brother of a deceased, to a niece, daughter of the deceased. Moreover, the documents contained in the archives of Babatha and Salome Komaïse record the transactions of Jewish families, who governed their marriages and dealt with inheritance in accordance with Jewish law. In those archives there is no case of a brother of a deceased actually inheriting an estate in preference to a daughter of the deceased. The only asserted such case in them, that of Joseph's dealings in the estate of his brother Jesus the father-in-law of Babatha, is one of administration during the period of the Province of jointly held property on the dissolution of a partnership by the death of one of the partners.[57] The document shows that Joseph paid the partnership debts and then held one half of the balance for his nephew the son and therefore heir of the deceased partner.[58] Further, in my view, the explanation for the gifts to women is appropriately explained by Cotton elsewhere as a means of ensuring financial provision for a widow or daughter; under Jewish law a widow did not inherit and a daughter inherited from her father only in the absence of sons.[59]

In my view the documents from the archives do not inform us of the Nabataean law of intestate succession, and we cannot state it. It does not appear that during the period of the Nabataean kingdom, Jewish inhabitants of it governed themselves under that law rather than in accordance with Jewish law.

Esler argued that the existence of laws of universal succession in "the legal systems of Mesopotamia, Rome and the Aramaic speaking Judaeans" made it likely that there was such a rule in Nabataean law. He described universal succession as a system under which "an heir succeeds to the entirety of the estate, which includes all the rights and obligations, the assets and liabilities of the deceased". He accepted that there was no direct evidence of a Nabataean

[56] *P Petra* 1. 1, with pages 24-6.
[57] *P Yadin* 5; see Chapter 6.
[58] See also Lewis (1989: 35).
[59] Cotton (1995: 183-185).

law of universal succession.[60] In the absence of any such evidence, it cannot be stated whether or not universal succession was part of Nabataean law.

Part 7 – Sale of Land – Vendors' Obligations.

Each of the conveyances by ʾAbi-ʿAdan contained a provision by which she undertook not to contest the transaction, which Andrew D. Gross described as a "no-contest clause": "(t)hat it not be subject to lawsuit or contest or oath whatsoever (DY L' DYN WL' DBB WL' MWM' KLḤ)", Each of them also contained a provision by which she undertook to "clear" or to exonerate (ṢPY) the property, that is to exonerate it from adverse claims of third parties, "as is customary for purchases and clearances (KḤLYQT ZBNY' WBR'WN')". According to Gross, such a provision, which he described as a "warranty clause", occurred only in transactions "in which the seller (or alienor) receive(d) consideration for the property, such as sales or barters", and "the Nabataean sale formulary include(d) both clauses".[61] Similar provisions, no-contest and warranty clauses, apparently occurred also in a further conveyance of land in Nabataea dating from about 100 CE, in which the editor Ada Yardeni has plausibly restored them.[62] The translation of the expression BR'WN', namely "clearances" offered by the editors of the former conveyances is based upon a derivation from an Arabic source (bariya = barra'a) meaning to "clear".[63] The undertaking to exonerate the land from adverse claims was clearly necessary and appears to have been the normal conveyancing practice. The use of the word ḤLYQT in the expression KḤLYQT ZBNY' WBR'WN' points to such an undertaking by the vendor being required by a provision of the law of the Nabataeans.

In each of those conveyances, ʾAbi-ʿAdan undertook that if she breached its terms she would owe a penalty of "the entire price of the purchases and all and everything that we may claim or that may be claimed in our name against you regarding them (KL DMY ZBNY' 'LH WBKLKL DY NB'' WYTB'' BŠMN' 'LYK BHM)", both to the purchaser and to the king (WLMR'N' RB'L MLK').[64] In the document described as a debenture the expression LCY 'NTY 'MT'YSY D' BKL KL DY BŠṬRKY DNH WLMR'N' RB'L MLK['], "to you … as regards

[60] Esler (2017: 143-9).
[61] Gross (2013: 149); Hoftijder & Jongelin (1995: 972 sv ṣpy).
[62] *P Yadin* 2, 3; *P Naḥal Ṣe'elim* 2, 15-20; see Yardeni (2000: vol 1, 290; vol 2, 95).
[63] Yadin et al (2002: 228).
[64] *P Yadin* 2 & 3; I print the particular form of the undertaking as it stands in the inner text of *P Yadin* 2..

all that is (stipulated) in this deed. And to our Lord, Rab'el, [the] King" may indicate that a similar obligation was undertaken by the borrower under that agreement.[65] Although the Nabataean sale agreement of 100 CE has lacunas where one would expect such an undertaking, one may conclude that the undertaking of such a liability was a normal contractual term in sales of land under the law of Nabataea.[66] In a damaged papyrus from Babatha's archive described by its editors as "A Possible Guarantor's Agreement", there appears a reference to the price of sales and the land that had been sold (KWL DMY ZBNY' 'NW WKWL DMY 'QRN').[67] This was plausibly taken by Esler to be an undertaking by the husband of ʾAbi-ʿAdan to repay the purchase money in the event of a breach of his obligations under an agreement. From this Esler inferred that the document "concerned a transaction of purchase (or something very like one, for example a grant)".[68] Since there seems no reason why a vendor of land should undertake the obligation to repay the purchase price of the land in the case of a breach of the terms of the sale, unless required by the law of Nabataea, it is, I suggest, probable that such an undertaking was required by that law.

Part 8 – Taxation in Nabataea.

We have little information about the "leasing tax" which is evidenced in the conveyance of ʾAbi-ʿAdan to Shimon, and we cannot say upon what land in the kingdom it was imposed and at what rate.[69] So far as the evidence contained in that conveyance extends we can say only that it was payable in kind, since a "se'ah" was a measure of volume applicable to grain, equivalent to the Greek σάτον, as is shown by the parallel use of the terms in the agreements by which in 130 CE Babatha arranged the harvesting of a date crop.[70] However it appears from returns made by Babatha and by Sammouos son of Shimʿon in the census of 127 CE that a form of land tax, perhaps that "leasing tax", was levied in the period of the kingdom. In those returns, which were evidently lodged for the purpose of assessment of *tributum agri* in the period of the Province the date groves upon which that tax was levied were described not by a Roman measure but by the area that could be sown by grain measured by σάτα, and κάβοι, the latter

[65] *P Yadin* 1.
[66] *P Naḥal Ṣe'elim* 2.
[67] *P Yadin* 4.
[68] Esler (2017: 183-6).
[69] *P Yadin* 3.
[70] Hoftijzer & Jongeling (1995: 772, s.v. "s'h_1"); *P Yadin* 21-22.

being a Semitic and local Nabataean measure applied to grain.[71] Lewis described the Greek expression found in those returns, which was in the form σπόρου κρειθῆς σάτου ἑνὸς κάβων τριῶν, as "a literal translation of a Hebrew/Aramaic locution" found in the Hebrew Old Testament and in Rabbinic Literature.[72] Where the tax was payable in kind it was assessed in σάτα, κάβοι or κόροι, the last of which was a local Nabataean measure applied to grain and dates.[73] Where it was payable in money it was assessed in "blacks", (in various forms of μέλας) and λεπτά, which were Nabataean currency.[74] The use of Nabataean rather than Roman terminology in those returns enables the inference that the tax imposed upon land in the period of the Province was a continuation of that imposed during the Nabataean kingdom, and that the returns are evidence of the existence and nature of a tax imposed during that period. Since those returns show that in the period of the Province the tax was payable in kind, in dates, or in money, we may infer that in the kingdom the tax may also have been payable either in kind or in money.[75]

There is some evidence, also from those returns, that there was payable in respect of some land in Nabataea an annual tax, later, in the period of the Province, called στεφανικόν, since in them it was stated to be payable upon groves which were registered by them. The evidence of the returns does not enable us to say to what extent it was levied in the Nabataean period.

It appears that in the first century CE a tax amounting to one quarter of the value of goods imported into the kingdom, at least by sea through Leuke Kome, a port on the Gulf of Suez, may have been levied by the kingdom, since the first century CE *Periplus Maris Erythraei* shows that a customs officer and small military force were present at Leuke Kome on the Red Sea to collect customs duties there.[76]

If, as argued by Bowersock, the post was Nabataean rather than Roman, we may say that some taxes on goods were levied under the kingdom.[77] Although it is likely that the Nabataean kingdom levied customs duties upon imports, by the period referred to in the *Periplus* it was a client kingdom of Rome and it has been argued that the post was Roman, so that we can say

[71] Hoftijzer & Jongeling (1995: 977, sv "qb$_{1}$").
[72] Lewis (1989: 69); the Aramaic locution is found also in conveyances of land from the Judaean desert: see *P Mur* 30: - [BYT ZR]' ḤṬYM (Hebrew, 134 CE) and Milik (1957: 258-260): BYT ZR' ḤNṬYN (Aramaic, undated).
[73] Hoftijzer & Jongeling (1995: 533-4, sv "kr$_{1}$").
[74] See Chapter 1.
[75] *P Yadin* 16; *XḤev/Se* 62; see Chapter 8.
[76] *Peripl. M. Rubr.* 19; and see Chapter 1.
[77] Bowersock (1983: 70-71).

no more than that some customs duties were levied and not by whom.[78] Nor can we say whether there were levied any other taxes on goods, though it is likely enough that there were such taxes since Diodorus Siculus, writing in the first century BCE, said that Nabataeans were engaged in the trade in spices, and Strabo wrote that cargoes of spices were transported through the kingdom and exported.[79]

Part 9 – The Effect of the Establishment of the Province – Continuation of Nabataean Law.

That neither the *lex provinciae* nor the provincial edict for the Province included provisions that precluded the continuation of the effect of parts of the law of the Nabataean kingdom is shown by documents contained in the archives that were written after the foundation of the Province, in Jewish and Nabataean Aramaic as well as in Greek, that show their continuation as part of the law administered in the Province.

Thus, the manner in which the *tributum agri* was levied in the Province after its establishment suggests that it was assessed upon land in the Province on a basis similar to that upon which Nabataean land tax was assessed.

After the establishment of the Province, land that consisted of palm groves might continue to have annexed rights to water, acknowledged by the law of the Province. This is shown by the provisions of the gift by which Shim'on gave his wife Miriam several date groves in Maḥoza, to some of which were annexed a right to water (ʿNYMYH), and also by a gift made in 129 CE by which Salome Grapte gave to her daughter Salome Komaïse land in Maḥoza, which included a date grove to which was annexed a right to water (σὺν ὕδατος) for a period of one half-hour on a particular day of each week.[80]

In a fragmentary agricultural lease between two Jews made in the Province in about 119 CE and written in Nabataean Aramaic, showing the continuing use of that language, the lessor required of the tenant that "working and tilling (the land) according to the customary manner (KḤLYQT) you shall [till] (WT[ ])". The editors of the papyrus say that "it might be possible to read: WT'RS "and you shall till".[81] The tenant also agreed with the lessor that "there shall

[78] Young (1997).
[79] Diod. Sic. 19. 94. 5; Strabo 16. 4. 24 C781.
[80] *P Yadin* 7; *XḤev/Se* 64.
[81] *P Yadin* 6; Yadin et al (2002: 265).

accrue to me (a share) from all .... (WYHW' LY MN KL)", no doubt a reference to the crop to be grown on the land. During the period of the kingdom the expression ḤLYQT referred to Nabataean law, so that its continued use probably shows that agreements for sale and lease of land in the Province continued to be conducted substantially in accordance with the law of Nabataea that applied in the period of the kingdom.[82]

Oudshoorn accepted that the conveyances of land by ʾAbi-ʿAdan were made against a Nabataean background, which included the use of the expression KḤLYQT, and pointed to Jewish custom only in one respect. She did not take into account the tomb inscriptions at Mada'in Ṣaliḥ, but asserted that in that tenancy agreement the expression ḤLYQT referred to local custom at Maḥoza or "the custom accepted by all parties". However she thought that "the words used seem to bear more of an Aramaic-Jewish than a Nabataean-Aramaic flavour", and accordingly argued that "(t)herefore, it could be debated whether the contract was not drawn up according to the regulations of Jewish law".[83] She pointed to Mishnaic provisions relating to agricultural leases, in which it was provided that:

> He who leases a field from his neighbour [as tenant farmer or as sharecropper], in a place where they are accustomed to cut [the crops], he must cut them. [If the custom is] to uproot [the crops] he must uproot them. [If the custom is] to plough after [reaping and so to turn the soil], he must plough. All is to accord with the prevailing custom in the province (KMNHG HMDYNH).[84]

She argued that "(t)he 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".[85] Relying on her assertion that in the conveyance made by ʾAbi-ʿAdan to Shimʿon "a specific Jewish feature (concerning the water rights) could be incorporated" in a document otherwise cast in Nabataean law, she also argued that "it is not self-evident that a document in Nabataean Aramaic draws on a Nabataean legal context or even Nabataean law", and that it is "not self-evident that documents in Nabataean Aramaic cannot feature aspects from Jewish law" and instanced this lease agreement as a good example.[86] Elsewhere in the *Mishnah* where the text reads "(t)hose who keep watch over produce [have the right to] eat [it] by the laws of the province (MHLKWT MDYNH) but not by [what is commanded in] the Torah", the expression

[82] Healey (2013: 179).
[83] Oudshoorn (2007: 100); Healey (2013: 179).
[84] *mBM* 9. 1; Oudshoorn (2007: 100-1).
[85] Oudshoorn (2007: 101).
[86] *P Yadin* 3; Oudshoorn (2007: 97-8).

relating to local custom (or law) was given by Oudshoorn as MḤLQT, which was, she argued, "the Hebrew equivalent of KḤLYQT in the Aramaic texts of P Yadin 2-3 and 6".[87] From this Oudshoorn argued that the expression KḤLYQT "can be taken to introduce a specific custom". She argued that the passage in the agricultural tenancy agreement should be read as 'according to the customary manner of working "and you shall till"', which she thought a reference to a specific rule such as Deut 22. 10: "thou shalt not plough with an ox and an ass together", although she accepted that the particular rule could not be recovered because of damage to the passage in the papyrus.[88] She concluded that the agreement was "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."[89]

However, Oudshoorn has failed to establish that the law reflected in that lease was Jewish rather than Nabataean. Healey argues that the papyrus "displays linguistic conformity with its having been written in the Nabataean script" and that "these documents in Nabataean script represent *Nabataean* legal practice." He argues also that "the best etymological explanation of it (ḤLYQT) is provided by Arabic" and it "can be entirely explained within the Nabataean context'. He further points out that Oudshoorn's argument on the Hebrew MḤLQT in the Mishnaic passage as a Hebrew equivalent of KḤLYQT is "based upon a misreading of the Hebrew text (of the *Mishnah*)".[90] Since the only express reference to law in the agreement, which Oudshoorn elsewhere characterised as determinative of the legal system to which documents refer, is to Nabataean law it is better to accept that this agreement is one depending upon Nabataean law.

Similarly the gift of Shim'on to Miriam made in the Province in 120 CE shows that in other respects Nabataean land law continued to operate in the Province under Roman rule.[91] He gave to Miriam "all that I have at Maḥoza" (KL MH DY 'YTY LY BMḤWZ') expressing the gift to be "during my lifetime and after I go to my eternal home, and forever; as is customary for (such) gifts and clearances (KḤLYQT MTNT' WBR'WNY' DY MTKTBYN), that are (granted) in written form in perpetuity". He also wrote that "(f)rom (claims regarding) all that I have written above I hereby grant you clearance (MBR['] YTKY)" and "I have granted written clearance to you from (the claims of) my heirs, and from any person (acting) in my

[87] *mBM* 7. 8; Oudshoorn (2007: 101).
[88] Oudshoorn (2007: 101-2).
[89] Oudshoorn (2007: 101-5).
[90] The manuscript reading is MHLKT but the reading in printed texts is MHLKWT as set out above: Healey (2013: 177-180)
[91] *P Yadin* 7.

name, regarding all that is written above, from any vow or oath or suit or contest, and from any cause whatsoever (KTBT W'BRYT YTKY MN YRTY WMN KL 'NWŠ BŠMY ʿL KL DY ʿL' KTYB MN NDR WMWM' WDYN WDBB WMN ʿLT KL MND[ʿ]M)". Thus Shimʿon, who received no "consideration", as expressed by Gross, for the conveyance, undertook to Miriam to exonerate the land from claims of his successors, or that claimants through him would not contest the gift (a no-contest clause) but did not promise clearance from adverse claims of third parties (a warranty clause). The document contained forms of the verb root *b-r-'/b-r-y* meaning "to clear", other forms of which the editors identify in the conveyances made by 'Abi-ʿAdan and in use under the Nabataean kingdom.[92] The expressions KḤLYQT and forms of the verb root *b-r-'/b-r-y* refer to Nabataean law relating to the clearance or exoneration from adverse claims of land to be conveyed, showing its continued application in the Province. Oudshoorn does not appear to argue that the expression ḤLYQT in Shimʿon's gift to Miriam refers to local or Jewish custom although they and Babatha, to whom some rights of occupation in the land were reserved, were all Jewish and the papyrus was written in Jewish Aramaic.

It seems therefore that after the establishment of the Province the rule of Nabataean law that required a person conveying land even by way of gift to undertake that the land would not be subject to claims by his successors (a no-contest clause) continued in effect as part of the law of the Province. It is accordingly likely that an obligation to undertake to clear land sold or transferred for "consideration" from adverse claims by other persons (a warranty clause) continued as part of the law of the Province upon its establishment, although it cannot be firmly stated since there is among the documents of the archives no conveyance of land through a sale. However, in the *stipulationes* by which she arranged for the harvesting of the crop on land in the Province, describing herself as selling the crop for a quantity of dates, Babatha promised: ἐμοῦ καθαραποιοῦντός σοι τοὺς προγεγραμμένους κήπους ἀπὸ παντὸς ἀντιποιουμένου. ἐὰν δέ τίς σοι ἀντιποιήσῃ τοῦ ἀγοράζματος καὶ μὴ σταθῖσα κυριοποιήσω σοι καθὼς προγέγραπτε, ἔσομαί σοι ὀφίλουσα ἀντὶ τῶν σῶν κόπων καὶ ἀναλωμάτων ἀργυρίου δηνάρια εἴκο[σ]ι κατὰ μηδὲ[ν] ἀντ[ι]λέγων. Her undertaking was to exonerate the land of adverse claims and to pay compensation if she failed to establish in favour of the cultivator the right to possession of the groves.[93] Likewise in the document by which Besas and Julia Crispina ceded land at Ein-Gedi in Judaea to Shelamzion, giving up any claim they asserted against the land, they undertook: ἐὰν δέ τις ἀντιπο[ι]ήσῃ τῆς προγεγραμμένης αὐλῆς, σταθόντες ἐκδικήσωμεν καὶ

[92] *P Yadin* 2-3; Yadin et al (2002: 104).
[93] *P Yadin* 22.

καθαροποιήσωμέν σοι ἀπὸ παντὸς ἀντιποιουμένου ταῖς εἰδίαις ἀναλώμασιν κατὰ μηδὲν ἀντιλεγων. Their undertaking was evidently to clear the land they ceded from adverse claims, and although the land was situated in Judaea, since their undertaking was given in the Province it suggests that they gave it in accordance with its law.[94] It appears that Babatha's arrangement and the cession by Besas and Julia Crispina were both for "consideration" so as to require the giving of the warranty clause. However, since neither agreement contains an apparent equivalent of KḤLYQT, it cannot be definitely stated that the undertakings were given because required by law or by the necessities of the arrangements. According to Gross one of the elements of "the (Nabataean) Aramaic warranty clause", which were obligations assumed by the "seller" was "to 'arise' or 'stand up' - expressed by the verb QWM – in order to defend the purchaser's property rights".[95] Since the warranty clause as it appears in the conveyances of ʾAbi-ʿAdan does not include that element we should regard the use by Babatha and Besas and Julia Crispina of the expressions σταθῖσα and σταθόντες as an element of Jewish custom contained in documents that otherwise pertained to Roman law since they were in the form of *stipulationes.*[96]

The requirement under the law of Nabataea that in conveyances there would be a contractual term obliging the vendor to pay penalties to the purchaser and the king in the event of a breach of the terms of the sale may also have continued in effect in the Province under its law. In an agreement for the sale of donkeys written in Jewish Aramaic in 122 CE after the establishment of the Province one party agreed "(a)nd if I deviate from this …. I will owe you the entire (amount) of the … silver (in the amount of) … sela's. And to our lord, Caesar as well (W'ŠN' MN DNH … YHW' LK 'MY CWL … KSP SL'YN … H WLMR'N' QYSR KWT).[97] The editors of the papyrus treat the undertaking as one made by the purchaser but a comparison with the terms of the conveyances of land by ʾAbi-ʿAdan and probably also her husband suggests that it would be more reasonable to treat it as being an undertaking made by the vendor.[98] Hillel I Newman indeed relied upon comparison with the undertakings of ʾAbi-ʿAdan in making his suggestion that the warranty was that of the vendor.[99] Further in a fragmentary agreement written in Nabataean Aramaic and dated in the same consulship it is provided that

[94] *P Yadin* 20.
[95] Gross (2013: 150); see ; Hoftijzer & Jongelin (1995: 997-1003, s. v. "qwm$_1$").
[96] See LSJ s.v. ἵστημι, B. II. 2. 1; nor does the text of the Nabataean conveyance of 100 CE (*P Naḥal Ṣe'elim* 2, 15-20) as restored by Yardeni contain that element of the warranty clause.
[97] *P Yadin* 8.
[98] Yadin et al (2002: 116).
[99] Newman (2006: 333); see also Gross (2013: 157).

"And all the costs of these purchases ... in silver, twenty sela's, Tyrian: and to our lord, Caesar, as well (WKL DMY ZBNY' 'LH [ ] BKSP SL'YN 'ŠRYN ṢRY WLMR'N' QYSR KWT)", which may be part of a similar undertaking of liability.[100] The editors of it describe it as a "waiver", but it appears to relate to a sale, although we cannot say what was the subject of it.[101] Unless these undertakings are to be regarded as having been made in accordance with the requirements of the edict of the curule aediles, which was in force in the Province, it may be accepted that they were made in accordance with the law of Nabataea continued in effect after the establishment of the Province.[102]

Oudshoorn referred to the editors' description of the agreement for the sale of donkeys written in Jewish Aramaic as "a purchase contract" but because it speaks only for the purchaser, with "no mention of what the vendor has to do", she treated it "more like a unilateral declaration on the part of one of the parties" and thus styled it "an acknowledgement of receipt". [103] One party to each of the two agreements was named Yoseph and Oudshoorn stated that "it can be assumed that it is the same man". She considered it "obvious that P Yadin 9 closely resembles P Yadin 8" and that they represented similar documents. She assumed that they were written on the same day and since they were written by the same scribe and were "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". The other party to *P Yadin* 8 was Yoseph's brother, also a Jew, and Oudshoorn assumed, although the name of the other party to *P Yadin* 9 cannot be identified, that he was a Nabataean.[104] This is not unlikely but cannot be assumed since an agricultural tenancy agreement made in the Province by two Jews, which I discuss above, was written in Nabataean Aramaic.[105] Oudshoorn suggested that the two documents "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".[106] It is by no means certain that the two documents were made on the same day, since only the year of the second is known, nor that they deal with the same overall legal framework, except to the extent that they both seem to

[100] *P Yadin* 9.
[101] Yadin et al (2002: 268).
[102] See Chapter 2.
[103] *P Yadin* 8; Oudshoorn (2007: 109).
[104] Oudshoorn (2002: 110-3).
[105] *P Yadin* 6.
[106] Oudshoorn (2007: 113).

relate to sales and purchases. Oudshoorn did not consider whether the wording of the documents would support an inference that the documents are to be connected with any particular legal system, or whether they were undertakings made in accordance with the law of Nabataea.

Those two documents show that the *lex provinciae* of the Province contained a provision that the emperor succeeded to the rights of the king of Nabataea, since they each contain a provision for a fine to be paid to the emperor where previously it had been paid to the king of Nabataea in accordance with its law.[107] Further it is apparent that as in Egypt he succeeded to land of the former kings, the emperor succeeded also to any land held by the king of Nabataea since, whereas the land the subject of the conveyances discussed above is described as having an abutter "the land of our Lord, Rab'el, the King ('RṢ MR'N' RB'L MLK')", after the institution of the Province no such land continues to appear in documents in the archive, but two parcels of land are then described as having as abutters land of the emperor.[108] The land given by Salome Grapte to her daughter Salome Komaïse is described as having as an abutter κῆπον κυριακόν which is certainly land of the emperor, and one grove declared by Babatha in her census return is described as having as an abutter μοσχαντικὴ κυρίου Καίσαρος.[109] Μοσχαντική has been explained by Bowersock as "almost certainly a translation of the local toponym ʿEgaltein ('calves')", so that the land was an estate of the emperor at ʿEgaltein or ʿEglatain "within the boundaries of Maḥoza" ἐν ὁρίοις Μαωζων.[110] In Aramaic documents in the archives Maḥoza is called MḤWZ ʿGLTYN or MḤWZ' the latter no doubt the emphatic of the name which may be translated "forum", "town" or "region".[111]

These documents are consistent with the land in Nabataea being held after the establishment of the Province on terms that were similar to those under which it was held in the period of the kingdom, except that the position formerly held by the king was now held by the emperor.

[107] *P Yadin* 8-9.
[108] *P Yadin* 2-3; *P Yadin* 16, XḤev/Se 64 and see also Chapter 2.
[109] *XḤev/Se* 64; *P Yadin* 16.
[110] Bowersock (1991: 341); Hoftijzer & Jongelin (1995: 824 s.v. "ʿgl$_1$").
[111] *P Yadin* 3 & 7; Hoftijzer & Jongelin (1995: 611 s.v. "mḥz$_2$").

Chapter 5 – Jewish Law in the Province

Part 1 – Introduction

In this chapter I discuss, so far as the documents comprising the archives show, the legal position of Jewish inhabitants of the Province after its establishment. In the New Testament Roman governors of provinces are represented as refusing to hear complaints about the nature of the Jewish religion, for example the refusal of Gallio as governor of Achaia to hear charges against the Apostle Paul because they were not allegations of "wrongdoing or vicious crime" but of "words and names and your own law" and inviting the Jewish residents of Achaea to "see to it yourselves".[1] Again, it seems that Festus, as governor of Syria, did not wish to judge issues between Paul and the Jerusalem priesthood over "certain points of disagreement … about their own religion and about a certain Jesus, who had died, but whom Paul asserted to be alive".[2] There is no material in the archives showing the commission of any "wrongdoing or vicious crime" but nevertheless the governor of the Province would, when adjudicating inheritance and other disputes, matters of importance for the good order and the taxation of a province, take into account the respective rights of Jewish residents of the Province according to Jewish law.

Litigation between Jewish inhabitants of the Province was commenced in the court of the governor, although the Rabbis disapproved of Jews making applications to gentile courts, but might be delegated by him to a Jewish court or tribunal, if any existed in the Province.[3] A Jewish woman could be divorced from a husband only if he issued a bill of divorce, and if he was unwilling, only if he was compelled to do by a court. It was controversial whether such a bill was valid if it was imposed by a gentile court, unless "(i)n the case of gentiles, they beat him (the husband) and say to him, 'Do as the Israelites tell you to do'".[4] However there is no evidence of the existence of a Jewish court in the Province, and according to Ze'ev Safrai to make application to a gentile court was "a normal and accepted deviation" from Jewish law.[5]

In this chapter I therefore discuss the rules relating to marriage, including dowries, divorce, inheritance and guardianship that the Jewish inhabitants of the Province appear to have

[1] Acts 18. 12-17.
[2] Acts 25. 6-27. 32.
[3] See Chapter 2.
[4] *mGit* 9. 8; Rabello (1996: 156-7).
[5] Safrai (2005: 225).

followed, and by which they appear to have regarded themselves as bound. Among the documents in the archives are several evidencing gifts of land and since those gifts were made in circumstances that suggest that they were connected with the inheritance of land, I discuss the law relating to such gifts.[6] Two documents evidence the settlement of disputes: that by which Besas ceded land to Shelamzion which I discuss in connection with inheritance of land;[7] and a release by Salome Komaïse of claims against her mother which I discuss in connection with gifts.[8] There is no material in the archives that touches upon any tax specifically imposed on the Jewish peregrine inhabitants of the Province but it is likely that Jewish inhabitants of the Province were liable to it.[9]

Babatha and other Jewish inhabitants of the Province made their marriage agreements either wholly or partially in accordance with contemporary Jewish law, but made commercial agreements either in Roman law forms and in accordance with the Roman law of contracts, or in accordance with Jewish law. The marriage agreements of Shelamzion and Salome Komaïse and the cession of land by Besas and Julia Crispina to Shelamzion and the release by Salome Komaïse of claims against her mother were all novated by a *stipulatio*. Several contracts in the archives thus partake of both Jewish and Roman law.[10] Documents in the archives disclose partnerships between Jewish residents of the Province, which they might have formed under Roman law. However, they appear to have formed them based upon the relationship between heirs of estates that were undivided in accordance with Jewish practice, and therefore to have formed them in accordance with Jewish law.[11] Since the law of the Province allowed the parties to choose the system of law under which they made their agreements and Jewish inhabitants of the Province made other agreements under Roman law, I treat these arrangements as agreements rather than as aspects of Jewish law effective there.[12]

It is thus apparent that Babatha and other such inhabitants were empowered to make their contractual arrangements either following Jewish law, as in their marriage agreements, or in accordance with Roman law, the benefit of which they also received by the *ius gentium* and provisions of the provincial edict. Nothing suggests that the Jewish inhabitants were required to make their contracts in accordance with Roman law and the choice of the law in accordance

[6] *P Yadin* 7, 19; *XḤev/Se* 64.
[7] *P Yadin* 20.
[8] *XḤev/Se* 63.
[9] See Chapter 8.
[10] *P Yadin* 18, 20, 37 = *XḤev/Se* 65; *XḤev/Se* 64.
[11] See *P Yadin* 17; *XḤev/Se* 62,
[12] See Chapter 6, Part 5.

with which they made their agreements was no doubt governed by the nature of those contracts and the potential need for their recognition and enforcement by the governor of the Province and any other court the Roman law jurisdiction of which they might invoke.

Part 2 – Marriage and Divorce

Among the documents in the archives are three examples of a marriage agreement entered into by Jewish inhabitants of the Province after its establishment, those of Babatha to her husband Yehudah, the year of which is unknown, written in Aramaic;[13] and those of Yehudah's daughter Shelamzion to Judah Cimber of 128 CE, and of Salome Komaïse to Jesus of 131 CE, both of which were written in Greek, and in each of which the obligations of the husband were novated by the *cautio* of a Roman law *stipulatio.*[14]

Babatha brought into her marriage a dowry of 400 *zûzîn*, the equivalent of 100 Tyrian tetradrachms or 400 *denarii*, indebtedness for which Yehudah acknowledged, and under the provisions of the *ketubbah* he accepted her as his wife according to the law of Moses and the Judaeans or Jews ([KDY]N MWŠH WYH[W]D'Y), which partly corresponds with the form of Jewish marriage contract current in the time of Hillel the elder, who was active in the first century BCE: "(w)hen you will enter my house, you will be my wife in accord with the law of Moses and Israel" (KDT MŠH WYŠR'L), and the terms upon which Raguel gave his daughter Sarah to Tobias as his wife κατὰ τὸν νόμον καὶ κατὰ τὴν κρίσιν τὴν γεγραμμένην ἐν τῇ βίβλῳ Μωυσέως, later writing out a copy of a marriage contract "to the effect that he gave her to him as wife κατὰ τὴν κρίσιν τοῦ Μωυσέως νόμου".[15]

According to the later provisions of the *Mishnah* it was an implied condition in a *ketubbah* that the husband agreed that "(a)ll property which I have is surety for your marriage contract (KL-NKSYM D'YT LY 'ḤR'YN LKTWBTYK)", including the repayment of the dowry, since "this is [in all events] an unstated condition imposed by the court (TN'Y BYT DYN)", that is a Jewish court envisaged by the *Mishnah.*[16] Although the agreement is damaged and the provision does not occur in the papyrus as we have it, we may be sure that such a provision stood in Babatha's *ketubbah* since in agreements which she later made for the working of date

[13] *P Yadin* 10.
[14] *P Yadin*18, 37 = *XḤev/Se* 65.
[15] See *tKet* 4. 9; Hoftijzer & Jongeling (1995: 309, s.v. "zz"); Tobit 7. 13-14, dated between the fifth and second centuries BCE with a dramatic date in the sixth century BCE: Soll (2000: 1317-8).
[16] *mKet* 4. 7.

groves which had been the property of Yehudah, she asserted that she held them on account of her dowry and also a debt that Yehudah independently owed her: κατέχω αὐτὰ ἀντὶ τῆς προ{ο}ικός μου καὶ ὀφιλῆς, a clear reference to the existence of such a provision in her *ketubbah.*[17]

Also imposed by a Jewish court in such marriage contracts were provisions that "(I)f you are taken captive, I shall redeem you and bring you back to my side as my wife", that "(f)emale children which you will have from me will dwell in my house and derive support from my property until they will be married to husbands", and among the Judaeans "(y)ou will dwell in my house and derive support from my property (u)ntil such time as the heirs will choose to pay off your marriage contract (ʿD ŠYRṢW ḤYWRŠYN LYTN LYK KTWBTYK)".[18] In Babatha's *ketubbah* Yehudah made promises in accordance with these obligations. A provision that "(m)ale children which you will have with me will inherit the proceeds of your marriage contract, in addition to their share with their other brothers", was also imposed by a Jewish court and, although no such promise by Yehudah appears in Babatha's *ketubbah*, we may take it that such a provision stood in it, since the papyrus is illegible where such a provision would be expected in accordance with the order of provisions implied by the *Mishnah*.[19]

This close correspondence of the terms of Babatha's *ketubbah* with those implied by the later rules of the *Mishnah* requires a conclusion that the marriage agreement of Babatha and Yehudah was a Jewish marriage agreement which accorded with those rules, and is "generally reflective of the halakhot of the rabbis and (is) close to the Jewish practice and context".[20] It was thus made in accordance with Jewish law. Oudshoorn accepted that that the agreement "can be considered as an early example of the later Jewish *ketubba"* and that it was written in accordance with Judaean custom, and Czajkowski appears to have accepted this also since she referred to a rule concerning the dowry contained in the later *Jerusalem Talmud* that "in Palestine the *ketubbah* must be paid in the currency of the sanctuary" or tetradrachms. [21]

In the agreement for the marriage between Shelamzion and Judah Cimber, her father gave her to Judah to be his wife, stating that she was bringing in a dowry of goods valued at 200 *denarii*:

> ἐξ[έδ]ο̣τ[ο Ἰούδα]ς ... Σ]ελαμψ[ι]ώνη̣ν τὴν ἰδίαν θυγατέραν αὐτο̣ῦ παρ̣θ̣έν̣ο̣ν Ἰού̣δατι ... ε̣ἶ̣ν̣α̣ τ̣ὴν Σ̣ε̣λαμψιών[ην] Ἰούδατι Κίμβερι γυνα̣ῖκαν γαμετὴν π̣ρὸς γάμου κ̣[οι]νωνίαν

[17] *P Yadin* 22.
[18] *mKet* 4. 8; 4. 11; 4. 12.
[19] *mKet* 4. 10.
[20] Safrai (2005: 222-223).
[21] Oudshoorn (2007: 378, 384-5); Czajkowski (2017: 31, 39).

> κατὰ τοὺς νόμους, προ̣σφερομένην αὐ̣τ[ῷ] εἰς λόγον προσφορᾶς κοσμίαν γυναικίαν ἐν ἀργύρῳ κα[ὶ] χρυσῷ καὶ ἱματισμῷ.

The laws to which he referred were in my view those of Moses and the Judaeans, and the value of the dowry that she brought into the marriage was the minimum dowry for a virgin prescribed by the later provisions of the *Mishnah*, by which it was provided that a virgin's "marriage contract is two hundred (that is *zuz*, or denarii)", and by which it was a condition imposed by a Jewish court that "a virgin [nonetheless] collects two hundred [*zuz*, in the event of divorce or widowhood]".[22] To that amount Judah promised to add a further 300 denarii all to be accounted εἰς λόγον προι{ο}κὸς αὐτῆς and he undertook to feed and clothe Shelamzion and their children to come ἑλλενικῷ̣ νόμῷ̣. He undertook that his obligations were:

> ἐπὶ τῆς τοῦ αὐτοῦ … πίστεως καὶ κινδύνου καὶ πάντων ὑπαρ[χόν]των, ὧ̃ν τε ἔχει ἐν τῇ̣ αὐτῇ̣ πατρίδι αὐτοῦκαὶ ἐνθ[ά]δε καὶ ὧ̃ν ἂν ἐπικτήσηται πάντῃ πάντων κυρίως,

that is on the security of all his property, including his property wherever it was situated and whenever acquired, so that it included property acquired after the making of the agreement, and granted her the right of execution or πρᾶξις. His obligation thus followed one made in accordance with that later provision of the *Mishnah* by which the whole of the property of the husband was made security for the repayment of the dowry, but was more favourable to Shelamzion.[23] The expression ἑλλενικῷ̣ νόμῷ̣ does not mean in accordance with Greek law, but that Judah undertook to feed and clothe his family in Greek "style, fashion".[24] The parties, Yehudah and Judah Cimber, subscribed to the agreement in Aramaic, but Shelamzion was not a party to it.

Cotton and Yardeni hold that at the time of the making of their marriage agreement, Salome Komaïse and Jesus were already married under an "unwritten marriage" (ἄγραφος γάμος) which was legally valid and that the occasion upon which the parties made their agreement and converted their marriage into an ἔγγραφος γάμος was the payment of a dowry, and it includes terms that substantially accord with those later contained in the *Mishnah.*[25] This was rejected by Ranon Katzoff who treated the document as no more than "a dowry receipt".[26] The papyrus

[22] *P Yadin* 18; *mKet* 2. 1; 4. 7.
[23] *mKet* 4. 7; Gross (2013: 152).
[24] Katzoff (1991: 174-5); (2005: 136).
[25] *P Yadin* 37 = *XḤev/Se* 65; Cotton & Yardeni (1997: 228-229).
[26] Katzoff (2005: 141-143).

is substantially damaged but in it Jesus agreed that he would take Salome as his wife to live together as they had previously done:

> ὡμολογήσ]ατο Ιησους Μαναημου τ[ῶν ἀπὸ κώμης . . . . .] Σοφφαθε[. .]. . . . πε̣ρὶ πόλιν Λιουιάδος τῆς Ι̣[εραίας - ca.9 - πρὸ̣ς Σαλ]ωμην κ̣αλο̣υμένην Κ̣[ομαϊσην Λημουειουτὴν] γυ̣ναῖκα, Μ̣[α]ωζηνὴν ὥστε αὐτοὺς {ὥσ̣τε α̣[ὐτοὺς]}[- ca.17 -].ε̣τ. . . . συμβιως. . . [- ca.14 -]α̣ὐτῆς ᾧ[ς κ]αὶ πρὸ τούτου τοῦ χρόνου.

He also undertook to feed and (according to the reconstruction of a lacuna in the papyrus proposed by Cotton and Yardeni) also clothe Salome and their children "in accordance with Greek custom and Greek manner ... on peril of all his possessions, both those that he has now and those that he will acquire" (νόμ[ῳ ἑλληνικ]ῷ λαὶ ἑλλ[η]νικῷ τρόπῳ ἐπὶ ... κινδύνου πάν[των ὑπα]ρχόντων ὧν τε νῦν ἔχει κ̣α̣ὶ ὧν ἂν ἐπικτήσηται). Thus his obligation to Salome was also more favourable to her than that implied by the later provisions of the *Mishnah.*[27] Although the relevant part of the papyrus is poorly preserved, it seems clear, as Cotton and Yardeni accept, from the expression τρόπῳ ᾧ̣ ἂν αἱρῆτται ἡ αὐτὴ Κομαϊ[ση] which follows the form in the marriage agreement of Shelamzion and Judah Cimber, that he granted Salome a right of execution over all his property to secure his compliance with the agreement, substantially an undertaking imposed by Jewish courts according to the later provisions of the *Mishnah.* Accordingly, the agreement accords rather with a marriage agreement than a dowry receipt and the view of Cotton and Yardeni is to be preferred. One may accept that the occasion for the making of the agreement was the receipt of the dowry since Cotton and Yardeni state that "(i)n the majority of cases, the receipt of a dowry constituted the occasion for drawing up a contract".[28] The agreement contains a note that Salome Komaïse was accompanied by a tutor who was not expressed to have interposed his *auctoritas,* but the subscriptions of the parties have not survived.

That these marriage agreements written in Greek may be regarded as *ketubbot* has been denied: Katzoff found some Jewish elements in the marriage agreement of Shelamzion and Judah Cimber but held that it was not in its entirety "Jewish", and Wasserstein held that it was "not a specifically 'Jewish' document in the sense of one conforming to the normative practice of formally registering certain conditions conventionally agreed upon by the parties to the marriage" and showed an "assimilation to an environment that … use(d) Hellenic elements",

[27] Gross (2013: 152).
[28] Cotton and Yardeni (1997: 228-9).

but was not to "be thought of as Hellenized".[29] Writing of both those marriage agreements, Ze'ev Safrai holds that "(t)here is a low level of *correspondence* between Jewish law" and those marriage agreements, but that "the *deviation* from the practice indicated by the rabbinic literature is much smaller than is generally assumed"; he holds that in those agreements "it is difficult to find and identify Jewish elements and characteristics" and that they were, among agreements from the Judaean desert "the farthest from what is indicated by the rabbinic tradition".[30]

However, although these agreements contain elements of Greek marriage contracts, since in Egyptian agreements a parent of the bride gave her away to be the lawful wife of the bridegroom for the purpose of marriage, after an extensive review of the literature, Oudshoorn held that "the law referred to for substantive side of the cases was obviously indigenous", that is Jewish. She also accepted that "it seems safer to assume that P. Hever 65 (*XḤev/Se* 65) in fact sought to turn (valid) marriage without a contract into (valid) marriage with a written contract, which need not necessarily have been Jewish practice or be related to a *ketubba".*[31]

It is perhaps not necessary to resolve the question whether these agreements should be regarded as *ketubbot,* and in my view, however, the presence in those marriage agreements of terms that were implied in such agreements by the later provisions of the *Mishnah* if not expressly agreed, shows that the parties to them regarded themselves as bound by Jewish law, although their agreements were written in Greek and were made enforceable as Roman law agreements by novation by *stipulationes*.[32] The agreements are not however agreements relating to marriages made according to the *ius civile.* None of the parties to any of the agreements appears to have been a Roman citizen and none of them purports to be such an agreement. Although Judah the husband of Shelamzion had an additional "Roman-sounding name", "Cimber", he described himself in the agreement by his patronymic and not as a Roman.[33]

Upon the ending of a marriage by divorce or the death of a husband, unless the rights under her *ketubbah* were more favourable to her, under Jewish law the wife was entitled to the return of her dowry in accordance with the obligation of the husband with security over all the property he had at the time of the agreement, and to dwell in his house and derive support from his

[29] *P Yadin* 18; Katzoff (1991: 176); Wasserstein (1989: 117, 125).
[30] Safrai (2005: 215, 223).
[31] Oudshoorn (2007: 398-433, 421, 431).
[32] For *stipulationes* see Chapter 6.
[33] Katzoff in Lewis, Katzoff and Greenfield (1987: 237) says that "he was presumably a Roman citizen"; Czajkowski (2017: 46).

property until his heirs chose to pay off her dowry, and Babatha appears to have been entitled to these rights.[34]

Nothing in the documents in her archive shows whether Shelamzion, the heir of Yehudah chose to pay off Babatha's dowry but it is clear that Babatha chose to rely upon a right of execution which she had both under the charge given to her by the provisions of Jewish law and under the right of πρωτοπραξία in accordance with the provisions of the provincial edict, either of which would fit the expression κατέχω αὐτὰ ἀντὶ τῆς προ{ο}ικός μου, which appears in the agreement for the working of date groves.[35] Yosef Rivlin suggests that Babatha's possession of the palm groves that Babatha made arrangements for working, was the result of a decision by the successors of Yehudah and was "the form of payment chosen … to pay off her marriage contract following his death".[36] However this is unlikely in view of Babatha's assertion in her arrangement for the working of the groves (κατέχω αὐτὰ ἀντὶ τῆς προοικός μου καὶ ὀφιλῆς), the apparent reservation by the other party to it (ἃ κατέχις, ὡς λέγις, ἀντὶ τῆς σῆς προ{ο}ικὸς καὶ <ὸ>φιλῆς,) and the allegations made by Besas and Julia Crispina that Babatha held them by force. These statements appear not only consistent with each other but also inconsistent with the suggestion of Rivlin. Nothing suggests that those statements may not be treated as statements of the positions of the makers of them.[37]

Yehudah and his first wife Miriam may be presumed to have been married under a *ketubbah* in accordance with the provisions of Jewish law, but the material in Babatha's archive does not show the terms of it. Accordingly, except to the extent that they were those imposed by Jewish courts according to the later provisions of the *Mishnah,* neither its terms, nor whether he had previously divorced her, can be stated. It seems that at the time polygamy was permissible for Jewish men so that they could have two concurrent wives.[38] In a record from 131 CE of summonses by which each of them brought proceedings before the governor over the estate of Yehudah, Babatha referred to Yehudah as ἀνδρός μου καί σου ἀ[πογενομένου], and Miriam referred to him as μοῦ <καί>[σο]υ ἀνδρὸς ἀπ[ο]γεν[ομ]έ[νου].[39] Lewis was of the view that at the time of his death Yehudah had Miriam as a "living undivorced wife", and Tal Ilan held that Yehudah was concurrently married to both Babatha and Miriam.[40] Katzoff, however, thought

[34] *P Yadin* 10; *mKet* 4. 7, 12.
[35] *P Yadin* 22.
[36] Rivlin (2005: 171); *P Yadin* 21-22.
[37] *P Yadin* 21, 23-25.
[38] Ilan (1995: 85).
[39] *P Yadin* 26.
[40] Lewis (1989: 22); (1997); Ilan (1995: 87-88).

that the evidence could bear "a plausible alternative interpretation of serial monogamy". [41] I do not think that the language used by them in the record of their proceedings against each other is capable of deciding the question and there seems no other material that bears upon the issue, so that it is not possible to say whether Yehudah was at the time of his death married to both Babatha and Miriam. However whether or not Miriam remained the wife of Yehudah at the time of his death, she had, unless it had already been repaid, as does not appear to have happened, similar rights for the recovery of her dowry to those of Babatha. Moreover by the provisions of the *Mishnah* "(h)e who was married to two wives and died – the first [wife] takes precedence over the second", so that her right to execute should in accordance with Jewish law have had priority over that of Babatha; but she may also have had and relied upon the same right of πρωτοπραξία to which I refer above.[42] It appears that among the matters upon which Miriam relied in the proceedings she brought against Babatha were certain παραγραφαί which she asserted precluded Babatha's claim. Lewis translates the expression as "prescriptions(?)", perhaps intending some statements of Yehudah excluding Babatha's rights, or preferring those of Miriam with the same result, but it is difficult to identify any way in which he could have done so without the assent of Babatha, since her claims seem reasonably based both in Jewish and Roman law.[43]

The fact that the proceedings between Babatha and Miriam were initiated in the court of the governor and there is no indication of delegation to a Jewish court, may suggest that each of Babatha and Miriam relied upon her right of πρωτοπραξία, or if they were relying upon their rights under Jewish law only, there was no Jewish court exercising jurisdiction in Jewish law in the Province. It has been said that "rabbinical courts were especially strict in enforcing payment of the *ketubbah"* and that provisions in the Greek marriage agreements by which the husband undertook to support his wife and children ἑλλενικῷ νόμῳ, or νόμ[ῳ ἑλληνικ]ῷ καὶ ἑλλ[η]νικῷ τρόπῳ may, although referring to the manner of support rather than the law that applied, have "indicated an attempt to avoid the obligation of paying the value of the *ketubbah* when it was brought to a gentile court".[44] However, it was open to the governor to delegate the proceedings to a court that would adjudicate the rights of Babatha and Miriam in accordance with Jewish law, if there was in the Province a court able to do so.[45]

[41] Katzoff (1995: 132).
[42] *mKet* 10. 1.
[43] Lewis (1989: 114).
[44] Ilan (1995: 93-94).
[45] See Chapter 2.

It appears that Babatha had previously presented a petition to an officer of the Province for some relief against Miriam, probably an order authorising commencement of proceedings against her.[46] No document in Babatha's archive shows that there took place any further step in these proceedings so that it is not possible to state the grounds upon which the proceedings were brought, the manner in which the governor might have decided the issues between Babatha and Miriam, or indeed the result of the proceedings.

Part 3 – Guardianship of Women and Children

There was in Jewish law no institution corresponding to the *tutela mulierum* of Roman law, and no document in the archives evidences any provision of that law requiring that legal acts of adult Jewish women who were inhabitants of the Province be authorised by a tutor or guardian in order that they might become binding or enforceable against them. However, Ze'ev Falk treats Babatha as acting, apparently in accordance with Jewish law, by a guardian, her husband Yehudah, called ἐπίτροπος in Greek and 'DWN or "Lord" in his Aramaic subscription, in "negotiations between her and the guardians of her fatherless child", although he also accepts that "the practice … did not become binding in the Talmudic law".[47] This is evidently a reference to her deposition in the proceedings she brought against the tutors of Jesus.[48]

Although peregrine women resident in the Province appear not to have been subject to the rules of *tutela mulierum*, it seems that the presence of tutors shown in documents in the archives was caused by an understanding that their presence was required by rules of Roman law and not Jewish law. That is shown by the fact that Babatha's deposition was made in connection with proceedings before the governor of the Province against the Roman law *tutores* of her son, against whom she sought relief under that law.[49] It is also shown by its appearance in other Roman law contexts, and in particular by the apparent insertion of the *auctoritas* of a *tutor* when Babatha and Salome Komaïse undertook obligations by *stipulatio,* and when Babatha made her offer to the tutors of Jesus in her deposition against them.[50]

[46] *P Yadin* 34.
[47] Falk (1978: 327).
[48] *P Yadin* 15.
[49] See Chapter 3.
[50] *P Yadin* 22; *XḤev/Se* 63.*P Yadin* 15.

Babatha's *ketubbah* is expressed to have been executed by her "on her own behalf" although she was illiterate and made no undertaking in it, and it appears to have been executed by a male using the form MMR[H] or, as translated by the editors of the document, "by [her] verbal order".[51] There is no indication in the document that he did more than authenticate the agreement on her behalf because she was illiterate; nor does it indicate that he authorized her execution or that the agreement was ineffective unless he or some other male executed on her behalf. Accordingly, although the *ketubbah* was clearly made in accordance with Jewish law, it is not evidence for the existence in Jewish law of any institution such as guardianship of women.

Nor is such an institution shown by the marriage agreements written in Greek presented in the archives which appear to have been made partially in accordance with Jewish law, those of Judah Cimber and Shelamzion and of Jesus son of Menehem and Salome Komaïse.[52] Each appears to have been intended to be also effective under Roman law since the obligations of each of Judah and Jesus were novated by a *cautio* of a *stipulatio.* Nothing in the agreement for the marriage of Salome Komaïse shows the presence of a tutor or guardian for her, but the agreement for the marriage of Shelamzion shows the presence of a tutor for her without showing whether he was present merely or whether she acted with his assent: συμπαρόντος … Μα[ναημο]υ ἐπιτρόπου τ[ῆ]ς αὐτῆς Κομαϊσης.[53] Since the expression ἐπίτροπος was the normal translation of Latin "tutor" and appears in the Roman law context of a *stipulatio*, the presence of a tutor in relation to the making of this agreement does not establish any necessity for the presence of a guardian under Jewish law.

In a cancelled marriage agreement in Greek dated in the Roman manner from the province of Judaea, which appears to have been intended to depend upon the provisions of Jewish law, the bride was given away apparently by her mother who is expressed to have acted διὰ … ἐπιτρόπ[ου] αὐτῆς τοῦδε τοῦ πράγμα[τος χάριν].[54] If the dowry, gold and silver articles brought to the groom εἰς λόγον προσφορᾶς προικ[ός], was provided by her, then it was perhaps thought that Roman law required the insertion of the *auctoritas* of a tutor, and the agreement does not support any requirement of Jewish law for the intervention of a guardian. Nor do other marriage agreements and instruments of divorce apparently dependent upon Jewish law show any such requirement: in none of the Jewish marriage and remarriage contracts in either Greek or

[51] *P Yadin* 10; Yadin et al (2002: 127).
[52] *P Yadin* 18; *XḤev/Se* 65 = *P Yadin* 37.
[53] *XḤev/Se* 65 = *P Yadin* 37.
[54] *XḤev/Se* 69.

Aramaic from Murabbaʿat nor in a Jewish instrument of divorce in Aramaic was the female party accompanied or authorized to enter the agreement by a tutor or guardian.[55]

I conclude that nothing in the contemporary Jewish legal requirements or practice required either the presence or participation of a guardian or tutor of an adult woman.

Nor is it apparent that the Jewish institution of guardianship of orphans was applied in relation to Jesus the orphan son of Babatha or in the appointment of Besas as ἐπίτροπος of the orphan nephews of her husband Yehudah.[56] Under the rules of Jewish law it was open to a father, when about to die, to appoint a guardian, including the child's mother but no other woman, for his infant child, and if this were not done, a Jewish court had power to appoint a guardian.[57] The only possible case in the archives is that reflected in the acknowledgement of Joseph, brother of Jesus the deceased father of Jesus the first husband of Babatha that he had administered the estate of the deceased, and held on deposit for the heir Jesus the balance of the estate after repaying the dowry of the widow of the deceased: ἔχ[ει]ν σε παρ᾽ ἐμ[οὶ ἀργυρ]ίου … παραθήκη[ν].[58] However, Joseph appears to have acted as former business partner of the deceased with whom he held property in common, and his acknowledgement probably indicates that the heir Jesus, who later becme the first husband of Babatha, was then of full age and that ir did not act as his guardian. In her petition of 124 CE Babatha asserted that Joseph, who appears to have been the brother of her husband Jesus, had οὐδέ̣ποτε τροφῖα Ἰη[σ]ούου ἔδωκεν, although he had available ample family resources to do so.[59] This does not show that he was a guardian of Jesus under Jewish law, and ʿAbdoʿabdas, and John of Eglas, had already been appointed *tutores,* and Babatha also complained that they were in breach of their duties:

> καὶ οἱ πρὸ̣ μη̣νῶν τεσσ̣[άρ]ω̣ν κ̣[α]ὶ πλείω κατασ̣τα̣θ̣έντες ἐπίτροποι [ὑπ]ὸ βουλῆς τῷ̣[ν] Πετρα[ί]ων Αβδοοβδα<ς> Ελλουθα καὶ Ἰω̣άνης [Ἐγλ]α̣ οὐδ[ὲ] α[ὐτοὶ τρ]οφῖα τ̣ο̣[ῦ ὀρ]φανοῦ ἔδωκα[ν] ε̣ἰ μὴ μ[όν]ον δ̣η̣νάρια δυ̣ω̣ [κατὰ μ]η̃να.[60]

Czajkowski treats the appointment of ἐπίτροποι, whom she describes as "guardians", of Babatha's son Jesus made by the βουλή as showing that "a mother could not be her son's guardian: this explicitly contradicts the provisions of Jewish law which allowed a mother to act

[55] *P Mur* 19-21, 115-116.
[56] *P Yadin* 12-15; 23-5.
[57] *mGitt* 5. 4; *mKet 9. 4*; *tBB* 8. 17; Ilan (1995:172); (1992: 378-9); Yaron (1960: 141).
[58] *P Yadin* 5.
[59] *P Yadin* 13; Lewis (1989: 51, 53).
[60] *P Yadin* 13.

as guardian under certain circumstances".[61] However nothing suggests that the father of Jesus made such an appointment and it may be accepted that the βουλή of the city of Petra was acting not as a Jewish court under the authority of that provision of Jewish law, but as a court exercising jurisdiction under Roman law. Falk describes the appointment by the βουλή as "the townsmen, by their council, performed the function that had previously been that of the relatives and which subsequently became that of the Sages".[62] In my opinion this statement is in error. The βουλή purported to act as a court exercising a jurisdiction under Roman law whether as a delegate of the governor's jurisdiction under the *Lex Iulia et Titia* or under a provision of its constitution. This is shown by the terminology used which reflects that of Roman law. Further, nothing suggests that any appointment of Julia Crispina as ἐπίσκοπος or "supervisor" of the orphan nephews of Yehudah was made in accordance with the rules of Jewish law.[63]

Part 4 – Inheritance

The rules of inheritance prescribed by Jewish law were essentially those of the *Torah* and were that any sons of the deceased and their offspring took in priority to all others, with the eldest son receiving two portions from his father's but not his mother's estate.[64] In default of sons or their offspring surviving the deceased, then any daughters or their offspring inherited the estate.[65] In default of sons or daughters and their offspring, the brothers of the deceased and their offspring inherited.[66] In default of brothers of the deceased the nearest kinsman of the clan inherited.[67] A wife did not inherit from her deceased husband, but was entitled to repayment of her *ketubbah* or dowry.[68]

Although the daughters of the deceased did not inherit if there were surviving sons or their offspring, they received maintenance out of the estate until they married and where the estate was small this might be to the detriment of the sons.[69]

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[61] Czajkowski (2017: 51).
[62] Falk (1978: 328); *P Yardin* 12.
[63] See Chapter 7.
[64] *mBB* 8. 2; 8. 4.
[65] Numbers 27. 8-9; *mBB* 8. 2.
[66] *mBB* 8. 2.
[67] Numbers 27. 8-11.
[68] *mBB* 8. 1.
[69] *mKet* 13. 3; *mBB* 9. 1.

These rules could not be varied by way of inheritance of an estate and if a person attempted to do so "he has said nothing … for he has made a stipulation contrary to what is written in the Torah".[70]

However, as the *Mishnah* makes clear, one could in effect vary the actual destination of one's estate by gift as opposed to inheritance: as Neusner says:

> in transferring property there is a difference between inheritance and donation. If one transfers property through inheritance, he must carry out the Torah's stipulations in that regard. If he hands it over as a gift, he is free to do as he likes.[71]

Moreover it was permissible to make a present gift of property to one's son and apparently also to one's daughter or wife "[to take effect] after his death – the father cannot sell the property because it is written over to his son, and the son cannot sell the property because it is yet in the domain of the father".[72] However the donor was not permitted to dispose of the whole of his property by gift, no doubt because that would have the effect of excluding one or more of the heirs altogether: "A dying man who wrote over his property to others [as a gift] but left himself a piece of land of any size whatever – his gift is valid. [If] he did not leave himself a piece of land of any size whatever, his gift is not valid".[73]

Thus, one could by gift but not by varying the rules of inheritance make provision for one's daughters and wife by way of supplement to their other rights and it appears to have been usual to make gifts to a daughter shortly after her marriage. Yaron suggests that "(g)reater freedom in depositions in contemplation of death tended to counteract, at least to a certain degree, the extreme preference accorded to the male by the law".[74] In "gifts in contemplation of death" Yaron included "a gift of property with the donor retaining usufruct for life", such as that made by Shim'on to his wife Miriam.[75]

The effect of these rules of inheritance is shown by documents from Babatha's archive relating to the proceedings brought by Besas and Julia Crispina against her and their claims made on behalf of the infant nephews of Yehudah, the sons of his brother Jesus the son of Eleazar.[76] Jesus had died and Besas had been appointed *tutor* of them.

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[70] *mBB* 8.5.
[71] Neusner (1983-5: part 3, 91).
[72] *mBB* 8. 7.
[73] *mPe'ah* 3. 7; *mBB* 9. 6; Falk (1978: 340).
[74] Yaron (1960: 155).
[75] Yaron (1960: 1); *P Yadin* 7; Cotton & Yardeni (1997: 203).
[76] *P Yadin* 23-25.

In 130 CE in a summons in proceedings before the governor against Babatha, Besas asserted that she held by force date orchards which had devolved not on her but on the orphans whose *tutor* he was: ἀνήκοντα τοῖς αὐτοῖς ὀρφαν[οῖ]ς ὃν βίᾳ διακρατῖς.[77] Presumably at the same time, he made a deposition in relation to that summons, in which he appears to have asserted (the papyrus is damaged) that Yehudah had registered in the census date orchards in the name of Babatha and that those date orchards had devolved on the orphans from their father Jesus: δίκεον ὀρφαν[ῶν ... τ]ῶν αὐτῶν εἰδῶν ἐξ ὀνό[ματο]ς Ἰησούο[υ πατρὸς αὐτῶν]; he sought that Babatha disclose by what right she held them: [ο]ὗ χάριν παρανγέλλω σοι ἀποδῖξε μ[οι π]ο[ί]ῳ δικαιώματι διακ[ρ]ατῖς τὰ αὐτὰ εἴδη, and gave notice that in default of her doing so he would register them in the names of the orphans.[78] Some time later, in July 131 CE, Julia Crispina the ἐπίσκοπος or "supervisor" of those orphans herself summoned Babatha, in the absence of Besas, because he was ill, asserting that the date groves had not devolved on Babatha and that she held them by force, ὑπαρχόντων τῶν αὐτῶν ὀρφαν[ῶ]ν διακρατῖς ἃ οὐκ ἀνῆκέν σοι, which Babatha denied.[79] No means of identification of the date groves appears in these papyri but they may be those that were the subject of the contracts that Babatha made in September 130 since in those contracts she had described them as being held by her on account of her dowry.[80] It thus appears that in the proceedings brought by Besas and Julia Crispina, Babatha was asserting that the date groves had been the property of Yehudah and, based upon the contracts for their working, that she was entitled to seize them, and Besas and Julia Crispina were asserting that they had been the property of Yehudah's brother Jesus.

There may also have been a dispute in 130 CE between Besas and Julia Crispina on behalf of the orphans and Shelamzion the daughter and only child of Yehudah because in July 130 CE they ceded or surrendered to her property, that is a courtyard and rooms at Ein-Gedi, in the province of Judaea, that had descended to her from the property of Eleazar Khthousion her grandfather:

> ὁμολογοῦμεν ⟦παρα⟧συνκεχωρηκέναι σ[οι ἐξ ὑ]παρχόντων Ἐλεαζάρου τοῦ καὶ Χθουσίωνος, ‘Ιούδο[υ π]άπου σου αὐλὴν σὺν παντὶ δικαίοις αὐτῆς ἐν Ἠνγαδοῖς καὶ πᾶσιν ἐν αὐτῇ οἰκίαι. [81]

[77] *P Yadin* 23 and 21-22.
[78] *P Yadin* 24.
[79] *P Yadin* 25.
[80] *P Yadin* 21-22.
[81] *P Yadin* 20; the papyrus is damaged and the text printed here is a composite of the versions in the inner and outer texts.

They agreed to register it for her at her request and at her expense. It has been shown by Cotton from the descriptions of the adjoining properties that the courtyard described as descending to her from the property of Eleazar, was not the courtyard that had been given to her by her father Yehudah in 128 CE.[82] Accordingly we may consider the matter on the footing that the source of the courtyard had been the property of Eleazar.

It is probable that the proceedings brought by Besas and Julia Crispina against Babatha and the cession by them to Shelamzion are connected and that the date groves that were the subject of those proceedings had devolved on Yehudah from his father Eleazar Khthousion.

Since it appears that all the relevant parties, and in particular the parties to the two marriages of Yehudah and his wives Miriam and Babatha, were not Roman citizens but Jewish peregrines, the rules relating to the succession to his estate were not those of the *ius civile* that applied to Roman citizens, but those of Jewish law which Babatha and the other parties to the marriage agreements acknowledged as binding on them. Under those rules Shelamzion as a daughter of Yehudah, who does not seem to have had any son, was his heir, to the exclusion of any brother he had, including Jesus, and their offspring including his orphan nephews. In my view the cession or surrender of the date grove by Besas and Julia Crispina on behalf of the orphans was an acceptance that Shelamzion was the heir of Yehudah and that the courtyard had descended to Yehudah from his father Eleazar and thence to Shelamzion in accordance with Jewish law.

However Besas and Julia Crispina also asserted that date groves that were apparently those of Yehudah and had been seized by Babatha were not his property and that she was not therefore entitled to seize them, even if her claims to rights of seizure were valid, and they claimed them for the orphans. The dispute was whether the groves had been property of Yehudah or of Jesus, and since Yehudah and Jesus were brothers, the most likely source of the dispute is that relationship, and the descent of the groves from their father Eleazar, from whom property at Ein-Gedi had descended through Yehudah to Shelamzion. That the groves had been the property of Eleazar would be consistent with the cession or surrender of land by Besas and Julia Cripsina to Shelamzion. We do not know whether Eleazar had any sons other than Jesus and Yehudah but upon his death they and any other sons of Eleazar were his heirs in accordance with the rules of Jewish law.

No other basis for their claim on behalf of the orphans is put forward by Besas or Julia Crispina, and although there are other means by which the groves could have become the property of

[82] Cotton (1996: 200); *P Yadin* 19.

Jesus, such as a gift to him by Eleazar, there is no evidence for any other basis for their claim than descent. A basis such as a gift put forward on behalf of the orphans would, it appears, render unsupportable Babatha's claim to the groves. Thus the apparent failure of Besas and Julia Crispina to put it forward makes it unlikely that it was the basis of their claim. The most likely basis upon which they claimed the groves is an assertion that the properties descended from Eleazar but to Jesus and not to Yehudah.

Oudshoorn argued that daughters of a deceased inherited under Jewish law only when they were unmarried or had married within their tribe, and that in default of sons, the brothers and in the event that they had predeceased him, their sons, his nephews, were the heirs of the deceased. She based her argument upon the statement in Numbers 36. 5-9 that Moses commanded the Israelites saying

> "This is what the Lord commands concerning the daughters of Zelophehad: 'Let them marry whom they think best; only it must be into a clan of their father's tribe into which they are married, so that no inheritance of the Israelites shall be transferred from one tribe to another, ... Every daughter who possesses an inheritance in any tribe of the Israelites shall marry one from the clan from her father's tribe, so that all Israelites may continue to possess their ancestral inheritance. No inheritance shall be transferred from one tribe to another; for each of the tribes of the Israelites shall retain his or her own inheritance'".

Further she treated the statement of Besas in his deposition against Babatha δ̣ίκεον τῶν ὀρφαν̣[ῶν - ca.25 -][τ]ῶν αὐτῶν εἰδῶν ἐξ ὀνό[ματο]ς Ἰη̣σ̣ο̣ύ̣ο̣[υ πατρὸς αὐτῶν, that is his claim on behalf of his wards, the nephews of Yehudah, that they were his heirs, as "direct evidence as to the daughter's status", and argued that the fact that the daughter, Shelamzion, was not mentioned in any of the court documents relating to the dispute between Besas and Julia Crispina on behalf of the nephews of Yehudah and Babatha showed that "the daughter was apparently not his heir".[83]

Oudshoorn supported her argument that a daughter could inherit only if she were unmarried or were married within her tribe, by a comparison with the legal position of daughters in numerous eastern legal systems from the laws of Ur-nammu of ca 2100 BCE to those of the Elephantine Jewish settlement of the fifth century BCE, together with an excursus of the position of the daughter in the laws of fourth century BCE Athens. She did not explain how the legal position

[83] *P Yadin* 23-25; Oudshoorn (2007: 233-4).

of daughters in those systems might be relevant, except that she pointed to the "relationship between succession and marriage, as it is found in Numbers 36 (in addition to Numbers 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: it depended upon her marital status".[84]

There are several considerations that require the rejection of her proposition: no such rule appears in the Jewish passage, and a text in the *Babylon Talmud* which Oudshoorn cited is the effect that the rule in Numbers 36 was "applicable only to the particular generation to whom the rejoinder was directed".[85] Oudshoorn herself declined to argue that the rule in Numbers 36 still applied in the lifetime of Babatha, since "it would be hard to say how a distinction between tribes would have been made", and nothing in the archives refers to the tribe of any Jewish person, which "does not seem to have been important", and thus accepted the effect of the passage in the *Babylon Talmud*. Her argument, stressing that the text in the *Talmud* was made "*three centuries later"*, that this "suggests that the enjoinder's application was still under consideration", is unjustified and indeed inconsistent with her reluctance to argue the continued relevance, in the light of the Mishnaic rule, of the rule in Numbers 36.[86] Further, nothing suggests any significant relationship between the legal systems that Oudshoorn surveys and the provisions of either Numbers 36 or the *Mishnah,* except those of the fifth century CE Jewish military colony at Elephantine under the law of which Oudshoorn argued that only unmarried daughters were entitled to succeed their father on intestacy even in the absence of sons of the deceased.[87] On the question whether daughters might inherit under that law she stated that Reuben Yaron "is in fact obviously inclined to believe that they did not". The basis for the statement of Oudshoorn is not obvious since Yaron in fact says of a daughter's right to inherit "(i)t is fairly certain that she had a claim in the absence of sons of the deceased (as laid down also in Biblical law, Numbers 27. 8)".[88]

The statement of Besas was his contention in his litigation against Babatha and no more and in any event does no more than to make a claim that his wards, who were in fact nephews of Yehudah, were his heirs. Although neither he nor Julia Crispina mentions Shelamzion or a

[84] Oudshoorn (2007: 246-298, especially 297-8).
[85] Oudshoorn (2007: 243); *bBBat* 120a
[86] Oudshoorn (2007: 243).
[87] Oudshoorn (2007: 291-2).
[88] Oudshoorn (2007: 291); Yaron (1961: 67).

daughter of Yehudah in their court documents, that cannot prove that she was not his heir since the documents related only to the claims of the wards of Besas against Babatha, to whose position any claim of Shelamzion was irrelevant. Nor is there any evidence that Shelamzion had married outside her tribe, so as to disqualify her, on Oudshoorn's argument, from inheriting from her father Yehudah. Lastly if Shelamzion was not the heir of Yehudah, there can be no explanation of the cession of land by Besas and Julia Crispina to Shelamzion, whose claim to inherit property of her grandfather Eleazar, the father of Yehudah, can have been based only on being heir of Yehudah.[89]

Czajkowski remarks that "(a)t least at first glance, Shelamzion there does not seem to have had any claim to her father's property; the nephews appear to have been next in line". She refers to the issue whether "this operative inheritance law truly did contradict that which we find in Jewish sources has proved a contentious issue", but expresses no concluded opinion on the rules of inheritance that applied to the estate of Yehudah.[90]

It is apparent that Eleazar was the owner of more date groves than one and other land, including at least a courtyard at Ein-Gedi, which passed to Yehudah presumably on his death, since in 128 CE he gave it to his daughter Shelamzion.[91] Eleazar may have been the owner of other land and no doubt there was a question of apportionment of them, and any other land he held, among his sons. Cotton has shown from the descriptions of abutters of land that it was not unusual for an estate to remain unapportioned, and it may be that the land of Eleazar remained unapportioned and in the possession of Yehudah who survived his brother Jesus.[92] If that is so then there may have been a real question what land in the estate of Eleazar was to be treated as passing to Yehudah, and thus available to meet the claims of Babatha, and what land was to be treated as passing to Jesus and his sons the orphans. Indeed in my view this is the most probable explanation of the events that happened, and Czajkowski suggests that behind the dispute between Besas as guardian of Yehudah's nephews and Shelamzion was "an implication that, when Eleazar died, his property was not divided in the way that it should have been between (Yehudah) and his brother Jesus".[93]

Accordingly the explanation given by Cotton and Yardeni and to the same effect that of Cotton and Greenfield that "the law of succession in force in the early second century (at least among

[89] *P Yadin* 20, 23-25.
[90] Czajkowski (2017: 56-7).
[91] *P Yardin*, 11, 19; Cotton (1996: 199).
[92] Cotton (1996: 199-200); (1998b: 119-120).
[93] Czajkowski (2017: 53-4, 57).

the Jews) in the Province of Arabia did not automatically grant a daughter the right to inherit from her parents, when in competition with the sons of her late father's brother" and that it "differs from Jewish law in preferring the claims of the man's brother or his brother's children to those of the daughter" should be rejected.[94] The contention of Cotton that the documents in the archives relating to the inheritance of property of Jewish residents in the Province reflect what was "(i)n all likelihood … the local law of the Nabataeans" in which the law of intestate succession "simply sidestepped wives and daughters even in the absence of a male heir" should also be rejected.[95] Since all the parties to the dispute between the nephews of Yehudah and Babatha and, if there were such a dispute, his daughter Shelamzion, were Jewish, the presumption must be that any dispute among them about inheritance would be one based on Jewish law. That was their personal law, which the governor of the province must have applied as the personal law of the parties, described by Mitteis as the law of their domicile.[96]

Part 5 – Gifts

In 127 CE in a damaged document and after a dispute had been settled (παρῳχημέν[ης ἀμφισβ]ητήσεως) Salome Komaïse renounced claims against her mother Salome Grapte apparently concerning the estates of her father Levi, husband of Salome Grapte, and of her brother whose name is not preserved in the document.[97] Cotton and Yardeni suggest that the renunciation was occasioned by the death of the brother of Salome Komaïse and perhaps also of Levi.[98] The controversy cannot be identified but it should be said that Salome Komaïse had no claim under Jewish law, which was probably in issue since the family was Jewish, against the estate of her father since he had left a son who was her brother, or against the estate of her brother, since the rules of Jewish law made no such provision.

In 129 CE by a document written in Greek, Salome Grapte made an immediate gift to Salome Komaïse of land at Maḥoza, a date orchard and one half of a courtyard ᾗς δόσιν ἀπὸ τῆς σήμερον δόσιν αἰωνίου.[99] Cotton and Yardeni suggest that it may have been connected with the second marriage of Salome Komaïse, who was in 127 CE married to Sammouos son of

[94] Cotton & Yardeni (1997: 204-205); Cotton & Greenfield (1994: 219-220).
[95] Cotton (2009: 164-170).
[96] Mitteis (1891: 105, 108, 109).
[97] *XḤev/Se* 63.
[98] Cotton & Yardeni (1997: 195).
[99] *XḤev/Se* 64.

Shim‘on, but by 131 CE was married to Jesus, since in that year he agreed that they should continue to live together, and to repay a dowry of which he then acknowledged receipt.[100] Cotton and Yardeni suggest that the occasion of that marriage agreement may have been the provision of the dowry. This would require an assumption that Salome Grapte intended that her daughter would either apply the land or sell it and apply it or the proceeds of it to her dowry. The document appears to have remained in the possession of Salome Komaïse, so that one cannot be sure that the land was indeed applied to the dowry. In any event, the dowry that Salome Komaïse brought into her marriage to Jesus consisted of “feminine adornment”: κοσμίαι γυναικίαι ἐν ἀ[ργύρῳ καὶ χρυσῷ καὶ ἱμα]τισμῷ καὶ ἑταίροις γυ[ναι]κίοις γυ[ναι]κία.[101]

Thus, the most probable reason for Salome Grapte to have made the gift was that her estate would pass in accordance with Jewish law to her son and that she desired to make economic provision for her daughter. Since Salome Grapte had a son, he would have been her heir to the exclusion of her daughter. The gift made by Salome Grapte to her daughter is thus to be explained by the operation of the Jewish law of inheritance, and accordingly its legality is likewise to be judged according to the rules later set out in the *Mishnah.* Those rules did not render invalid such a gift which was immediate and in “a binding and permanent manner”. It was irrevocable and, being without reservation by the donor of any right in the land, was according to Rivlin effective immediately under Jewish law.[102] Whether there was any connection between the release by Salome Komaïse in favour of her mother and the later gift to her by her mother is not clear.[103]

In April 128 CE, a few days after the marriage of Shelamzion and Judah Cimber, by a document made at Maḥoza, in the Province, Yehudah gave property at Ein-Gedi, in Judaea, a courtyard and surrounding buildings, to Shelamzion, one half immediately and the other half upon his death, excluding from the gift a small courtyard:

> [δι]έθε̣τ[ο Ἰο]ύδας … [Σελ]αμψιο̣ῦς θυ[γατ]ερ π̣άν̣[τα τὰ ὑ]πάρ[χον]τα αὐ[τ]ῷ [ἐ]ν Ἠν̣γαδῆς ἥμισυ οἰκοιμάτω̣ν καὶ ὑπερωαις ἐνο[ῦ]σι χωρὶς αὐλῆς μικκῆς π̣αλ̣εὰν ἐ̣νγὺς τῆς α̣ὐ̣τ[ῆ]ς αὐλῆς, καὶ τ[ὸ] ἄλλ̣ο̣ ἥμισυ τῆς αὐλῆς καὶ οἰκ̣οιμ̣άτων διέθετο̣. . [. Ἰ]ο̣ύδας .τῇ̣ αὐ[τ]ῇ̣ [Σελ]α̣μψιοῦ[ς] μετὰ τὸ αὐτὸ[ν] .τε<λε>υτῆσαι,

and later in the document made it clear that he gave the property to her irrevocably:

[100] *XḤev/Se* 65. Cotton & Yardeni (1997: 203-208).
[101] *XḤev/Se* 65.
[102] Rivlin (2005: 167-8, 182).
[103] *XḤev/Se* 63, 64.

ὥστε ἔχειν τὴν προγεγραμμ[έ]νην Σελαμψιοῦ[ς] τὸ ἥμισυ τῆς προγεγραμμένης αὐλῆς καὶ οἰ[κοι]μ[ά]τῳν ἀ[πὸ τῆς σήμερον καὶ τὸ] ἄλλο ἥμ[ι]συ μετὰ τὲ τελ[ευ]τῆσαι τοῦ αὐτοῦ Ἰούδα κυρίω[ς] [καὶ βε]βαίως εἰς τὸν ἅπαντα χρόνον. [104]

It appears from an earlier transaction by which Yehudah had, with the authority of his father Eleazar, charged it, that this courtyard was previously the property of his father.[105]

At the time Yehudah was married to Babatha and they had no child; however it cannot then have been clear that they would have no son. If a son was born to the marriage of Yehudah and Babatha, then according to the provisions of Jewish law he would be Yehudah's heir to the exclusion of Shelamzion. In that event, being a daughter of Yehudah she would receive nothing from his estate. It was permissible under Jewish law to make such a gift including, I suggest, a gift to take effect on the death of the donor in favour of a daughter; and such a gift would ensure economic provision for her in the event that she was not the heir. Cotton and Greenfield have suggested that this is the explanation for the gift and in my view this is the most probable explanation for it.[106] Rivlin treats this gift as one in which Yehudah, who was then so far as we know in good health, made two gifts, one immediately, and the other by διαθήκη to take effect upon his death.[107] The expression διέθετο which Yehudah used in the gift normally imported a bequest to take effect after death rather than an immediate gift. It was, however, permissible to use the Hebrew verb YRŠ, meaning to inherit, where it related to a bequest to the heir, and then "(i)f he made such a statement concerning someone who is suitable for receiving an inheritance from him, his statement is valid".[108] According to Rivlin, who relied upon a text in the *Jerusalem Talmud*, although the Greek term similarly expressed the notion of bequest its use was permissible at the time of the making of Yehudah's gift to Shelamzion.[109] Although the subject of Yehudah's gift to Shelamzion was land situated not in the Province but in Judaea, there is no reason to suppose that the rules of Jewish law did not apply to such a gift in the same manner whether made in the Province or in Judaea, and that the gift would not have been effectual under the rules of Jewish law as they applied in both provinces.

Accordingly the whole of the gift of Yehudah to Shelamzion was valid according to the provisions of Jewish law, since the immediate gift of one half of the property was valid as was

[104] *P Yadin* 19.
[105] *P Yadin* 11, Cotton (1996: 199).
[106] Cotton & Greenfield (1994: 219).
[107] Rivlin (2005: 180-182).
[108] *mBB* 8. 5; Rivlin (2005: 181); see Chapter 1.
[109] *yBB* 8. 9 16.c apud Rivlin (2005: 181); see Chapter 1.

that of Salome Grapte to Salome Komaïse, and the gift to take effect after his death was valid since Shelamzion was then heir.[110] Rivlin says that it is of "no juridical significance", but the fact that Yehudah excluded from his gift the small courtyard suggests that in making the gift he may, if he then owned no other land, have had in mind the provisions of Mishnaic law that prevented a dying man from making a gift in contemplation of death of all his land and retaining none. Such a gift was not valid because it would "uproot the law of inheritance".[111]

A gift of the same nature was made by Raguel and his wife to Tobias at the time of his marriage to their daughter Sarah: καὶ τότε λαβόντα τὸ ἥμισυ τῶν ὑπαρχόντων αὐτοῦ πορεύεσθαι μετὰ ὑγιείας πρὸς τὸν πατέρα· καὶ τὰ λοιπά, ὅταν ἀποθάνω καὶ ἡ γυνή μου.[112] Although Yaron has said that the book of Tobit is "late, perhaps of the third century B.C., and it cannot be relied upon as evidence for Old Testament law, or for Jewish law at all", the similarity of the gift with that of Yehudah confirms at least the permissibility in Jewish law of making such a gift.[113]

In 120 CE by an instrument written in Aramaic, Shim'on, the father of Babatha, made an immediate gift of all his property at Maḥoza, which included date groves, to his wife Miriam in perpetuity ('LM) subject to his right to "enjoy the usufruct, and retain possession, and remit the payment of their property taxes, and reside and install (others) as residents ... all the days of my life".[114] He gave also her all property that he would afterwards acquire and reserved a right to sell or pledge any part of the property to provide for his needs. She was to become the rightful possessor of the property "when I go to my eternal home (WKDY 'HK LBYT 'LMY)". The gift was also subject to a reservation of the right of Babatha their daughter, if she was later widowed and had no husband, to reside in part of the property. It appears that at the time Babatha was married to Jesus her first husband and one must infer that Shim'on wished to secure property to his widow Miriam, who had no right of inheritance in his estate, but only the right to the repayment of her dowry; while by his reservation in favour of Babatha he desired also to make provision in case she should not be his heir or one of his heirs, and she would have no right in the estate of her husband Jesus beyond repayment of her dowry. If Miriam had no son, then her daughter Babatha would be her heir or one of her heirs.

Cotton and Greenfield have connected the date grove purchased by Shim'on in 99 CE with one of those registered by Babatha in her census return of 127 CE and have suggested that all were

[110] Rivlin (2005: 182).
[111] Rivlin (2005: 181-182); *mBB* 9.6; Falk (1978: 340).
[112] Tobit 8. 21.
[113] Yaron (1960: 7).
[114] *P Yadin* 7; Yadin et al (2002: 98).

given to her by her father Shim‘on, son of Menaḥem, with whom they identify the Shim‘on who was the purchaser of a date grove in 99 CE.[115] In the absence of any record of the name of the father of that Shim‘on, however, the editors of the papyrus warn that this identification is not certain. Nor does any document in Babatha’s archive evidence such a gift.[116] Such a gift is not impossible and one would infer that if given, it was intended to secure property to Babatha since she would have no right of inheritance from Shim‘on if he was succeeded by a son, Babatha’s brother or half-brother, and be left with no claim against the estate of her first husband Jesus except for the recovery of her dowry.

According to Rivlin, such a gift, which included property acquired after the date of the gift, to take effect after the death of the donor, who reserved to himself a usufruct over the land, was permitted by the rabbis although it had the effect of making an effective assignment of property at the death of the donor. He describes it as a gift “whereby the substance of the possession is ceded immediately to the donee, while the donor retains usufruct for the remainder of his life” and says that the norm reflected in it “does not necessarily conflict with those set out in Jewish law”.[117]

The gifts which are included in the documents in the archives appear to be connected with the particular situation of the donees, and each of them can be explained in terms of the Jewish law of succession that was accepted by the families of Babatha and Salome Grapte, as applying to them, and which was the subject of litigation in the court of the governor of the Province. It appears also that they were in each case made in terms that accorded with, or at least did not conflict with the Jewish law.

[115] Cotton & Greenfield (1994: 217-218); *P Yadin* 3; *P Yadin* 16.
[116] Yadin et al (2002: 242).
[117] Rivlin (2005: 168, 183).

Chapter 6 – The Law of Contract in the Province

Part 1 – Introduction

The archives contain several documents that form agreements, or evidence agreements. I do not discuss all of them in detail in this thesis since some at least are insufficiently well preserved to justify the formation of an opinion about their provisions: an agreement in Nabataean Aramaic but dating from 119 CE which appears to be for the lease by Yehudah of land he owned at Maḥoza to Yoḥana', who was to work it for a share of the crops;[1] a document also in Nabataean Aramaic of 123 CE described by its editors as a waiver, which may relate to the sale of property since it provides for the payment of a fine to the emperor but which is otherwise too fragmentary for extensive analysis;[2] and an agreement in Jewish Aramaic of 123 CE for the sale of one or more donkeys, which I have discussed in relation to a fine payable to the emperor for which it provides, and in relation to warranties imposed upon vendors in contracts for the sale of animals.[3]

The archive of Babatha also contains a form of contract of *mutuum*, or loan for consumption, the repayment of which was secured by a form of mortgage by way of *hypotheca* or *pignus*, made in Ein-Gedi in the province of Judaea, where the land charged was situated.[4] The agreement is not therefore directly relevant to the law of the Province but is discussed below on the footing that it is capable of enabling inferences to be drawn relating to the law of the Province. Two documents, one of gift in favour of Shelamzion daughter of Yehudah and one of cession of rights in her favour in each case relating to land at Ein-Gedi, were made in the Province and include an undertaking to register a document, if required by her, in each case novated by *stipulatio*.[5] These documents are discussed in relation to Jewish law, and the enforceability of an undertaking to register the transaction in another province.[6]

[1] *P Yadin* 6; Yadin et al (2002: 257); see Chapter 4.
[2] *P Yadin* 9; Yadin et al (2002: 268); see Chapter 4.
[3] *P Yadin* 8; see Chapters 2 and 4.
[4] *P Yadin* 11.
[5] *P Yadin* 19-20.
[6] See Chapters 2 and 5.

Elsewhere in this thesis I have also dealt with agreements relating to the sale and other dealings in land from the period of the kingdom of Nabataea, and, in terms of Jewish law, three marriage agreements made by Jewish inhabitants of the Province.[7]

Otherwise I discuss several forms of Roman law contract concluding with a discussion of *stipulatio,* of which there are several examples in the archives, some novating contracts of other characters and in one case of two counterpart documents as apparently a pair of reciprocal unilateral undertakings.[8] In connection with the contract of *societas,* I discuss both the Roman and the Jewish law of partnership and argue that the examples of partnership evidenced in the archive are to be treated as having been made under Jewish rather than Roman law.[9]

Part 2 – *Depositum*

Lewis says that the peoples of the eastern Mediterranean in the Roman period "found the contract of deposit a convenient vehicle for a variety of different business transactions", and examples are known from Egypt.[10] A papyrus record of proceedings in the second century CE before the prefect of Egypt shows the use of the form of deposit to disguise a soldier's receipt of a dowry, since soldiers were then incapable of valid marriage.[11] An example from the Province is an acknowledgement of debt dated 110 CE made by Joseph, whose nephew Jesus was the first husband of Babatha. It appears that Joseph and his brother Jesus, father of Babatha's husband Jesus, were in partnership and when the partnership was dissolved by the death of his brother in or before 110 CE, Joseph used such a form to acknowledge his indebtedness to Jesus in a particular sum of money, as his share of the proceeds of the sale of the partnership property.[12] The document apparently served as a form of accounting for the proceeds, the excess over the debts including the discharge of the dowry of the widow of his partner, as Jewish law provided: ṗερισσ[ό]τερǫι ὑπὲρ ἀρ̣γυρίου μέλανας ἑπτακοσίους καὶ δέκα οὓς εἴλ[η]φεν ἡ μήτηρ σου ἀρ̣γύρι̣ǫν γαμικὸ̣ν ἀὐτῆς [ὁ]ν ε̣ἶχ[ε]ν κατ[ὰ] Ἰ̣ησǫῦ πατ[ρ]ός σου.

[7] *P Yadin* 1-4; *P Naḥal Ṣe'elim* 2; *P Naḥal Hever* 36 + *P* Starcky; P *Yadin* 10, 18; *XḤev/Se* 65; see Chapter 5.
[8] *P Yadin* 21-22.
[9] *P Yadin* 5; *XḤev/Se* 62.
[10] Lewis (1989: 35).
[11] *M Chrest.* 372 = *Jur Pap* 22a = *BGU* 1. 114 = *FIRA* 3. 19(a).
[12] *P Yadin* 5.

Although the context is unclear since the papyrus is severely damaged, the use by Joseph of the expression δ[ι]πλοῦ[ν] suggested to Oudshoorn that he was undertaking to pay double if he failed to repay the deposit and that this was required by Biblical law, where provision is made for double payment, but not by a defaulting holder of a deposit to a depositor.[13] She concluded that the document did not "draw on a Roman form of deposit".[14] It is at least possible that Joseph was giving such an undertaking but it may be doubted that he was invoking Biblical law in so doing, since the papyrus is not sufficiently preserved to show clearly the basis upon which he was giving it.

Although the papyrus is fragmentary it appears partially to follow the form of a Roman law contract of *depositum*, since it amounts to an acknowledgement by Joseph that he held for his brother a particular sum of money, but this acknowledgement clearly did not result from a gratuitous delivery of goods or money for safekeeping, as in a contract of *depositum* as defined by Ulpian "quod custodiendum alicui datum est".[15] Accordingly he was clearly not obliged, as a holder of a deposit under a contract of *depositum* was in principle obliged, to return the very goods or money that were deposited with him, as was made clear in a text of Papinian: "nam si ut tantundem solveretur convenit, egreditur ea res depositi notissimos terminos".[16]

According to Ulpian the contract of *depositum* was *ius gentium*, so that it was available to peregrine inhabitants of the Province and the governor had jurisdiction in relation to breaches of it under an *actio depositi*.[17] The contract was wholly for the benefit of the depositor and the depositary was not permitted to use the goods deposited.[18] Damages for breach of such a contract were generally *in simplum* but in certain cases "quae continent fortuitam causam depositionis ex necessitate descendentem" *in duplum*.[19]

In a papyrus example of a contract of *depositum* made between two women at Dura-Europus in 251 CE the holder of a deposit acknowledged:

> ὡμολόγησεν … ἠριθμῆσθαι καὶ ἔχειν παρ' αὐτῆς ἐν παρακαταθήκῃ [ἀκίν]δυν. . παντὸς κινδύνου τῇ ἐνεστώσῃ ἡμέρᾳ ἀργυρίου καλοῦ δοκίμου δηνάρια ἑκατὸν

[13] Oudshoorn (2007: 124-125); Exodus 22: 4, 7, 9.
[14] Oudshoorn (2007: 127).
[15] *Dig* 16. 3. 1. pr.
[16] *Dig* 16. 3. 24; Buckland & Stein (1963: 467).
[17] *Dig* 2. 14. 7. pr -1; 16. 3. 1. 1.
[18] Buckland & Stein (1963: 468); Gaius 3. 196; *Sent. Paul.* 2. 12. 5.
[19] *Dig* 16. 3. 1. 1-3

ἀδιάγραφα καὶ ἀπρόσθετα, ἃ ἀναφυλάξει παρ᾽ ἑαυτῇ καὶ ἐπὶ τοῖς ὑπάρχουσι αὐτῆς καὶ ἀποκαταστήσει … ὁπότε … ἀπαιτηθῇ ἄνευ ἀναβολῆς καὶ ὑπερθέσεως· ἐὰν δὲ ἀπαιτηθεῖσα μὴ ἀποδῷ, ἐνσχεθήσεται τοῖς διηγορευμένοις ἐπιτίμοις τῶν τὰς πίστεις τῶν παρακαταθηκῶν παραβαινόντων, … καὶ ἔσται ἡ πρᾶξις .... [ἐ]ξ [αὐτῆ]ς … καὶ ἐξ ὑπαρχόντων αὐτῇ παντῇ γε παντῶς.[20]

The acknowledgement concluded with a *cautio* for a *stipulatio* recording a promise by the holder in the form πίστι ἐπηρώτησεν .... πίστι ὡμολόγησεν, and a statement that she had sworn τὸν Σεβάσμιον ὅρκον. Nothing suggests that this was anything other than a Roman law contract of *depositum* since it contemplated a deposit of money which was to be held at the risk of the holder and to be returned, rather than a loan of money to be repaid. This is in my view shown also by the confirmation of the obligations of the holder by a stipulation and an oath apparently in the name of the emperor, and by her acknowledgement that upon default she would be liable to penalties imposed upon those who breach faith in relation to deposits. This is in my view a reference not only to the payment of damages but also to *infamia* since according to Julianus "(i)nfamia notatur … qui … depositi suo nomine non contrario iudicio damnatus erit" and Gaius "(q)uibusdam iudiciis damnati ignominiosi fiunt, veluti …. depositi", that is a defendant who is condemned in such an *actio* suffers *infamia.*[21] Although the text of Julianus has been identified as interpolated, it substantially agrees with that of Gaius, and we may accept that a person condemned in an *actio depositi* was then called *"ignominiosus",* "ignominia" being synonymous with "infamia", because he suffered the disabilities in litigation imposed by the praetor.[22] It appears from Gaius' Commentary that at least some cases of *infamia* were treated in the provincial edict.[23] *Depositum* was a contract that gave rise to an *actio bonae fidei* and it seems that it is this that is referred to as τὰς πίστεις τῶν παρακαταθηκῶν for the breach of which the holder accepted that she would suffer a penalty.[24] Those declared *infames* suffered penalties which included a prohibition on representation in litigation.[25]

We have from Egypt in the second century CE a *pro forma* for a contract of *depositum* apparently available for adaptation by parties to such a contract, since it set out the terms that were required and described the parties by indefinite pronouns as τις for the holder of a deposit

[20] *P Dura* 29.
[21] *Dig* 3. 2. 1; Gaius 4. 182.
[22] Kaser (1956: 245-7); Gaius 4. 182.
[23] *Dig* 3. 2. 3, 18.
[24] *Dig* 16. 3. 1. 23.
[25] Buckland & Stein (1963: 91-92).

and τινι for the depositor. Of it the editor of the papyrus says: "(t)here is no lack of documents which take on the same general outline".[26] The essential form set out in the papyrus is:

> ὁμολογῶ ἔχειν παρὰ σοῦ διὰ χ[ει]ρ[ὸ]ς ἐν παραθέσει ἀργ(υρίου) (δραχμὰς) ποσὰς γί(νονται) (δραχμαὶ) ποσαί· ἅς κ[α]ὶ [ἀ]ποδώσω σοι ὁπηνίκα ἐὰν αἱρῇ ἀνυπε[ρθ]έτως· εἰ δὲ μή, ἐκτείσω σοι κατὰ τὸν [τῶν] παραθηκῶν νόμον γεινομένης σοι τῆς πράξεως ἔκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντων μοι καθάπερ ἐκ δίκης.

The *pro forma* contemplated a real deposit of actual money by the depositor and expressly referred to it as ἐν παραθέσει and to the obligation of the holder, if he failed to return the money without delay, to pay a penalty according to the law of deposit: ἐκτείσω σοι κατὰ τὸν [τῶν] παραθηκῶν νόμον, which no doubt included monetary compensation. It appears to have contemplated the return of the same coins since there is no reference to any obligation to pay interest up to the demand for its return.

A contract of *depositum* is to be distinguished from one of loan, *mutuum*, described by Paul as one in which "damus recepturi non eandem speciem quam dedimus (alioquin commodatum edit aut depositum) sed idem genus".[27] However, as a text from Papinian, who was killed in 212 CE, shows, a form of deposit arose in which the holder of a deposit might return equivalent but different goods of the same kind, money or other goods, and "si tamen ab initio de usuris praestandis convenit, lex contractus servabitur".[28] Although anomalous this form of deposit was accepted as a contract of *depositum* to which an undertaking by the holder to pay interest could be annexed, and was called *depositum irregulare.* Whether it arose in the classical period is unclear and, according to Peter Birks, "doubtful", but in the opinion of J. A C. Thomas "there are good arguments for regarding it as classical and in existence already in the Republic".[29]

On the other hand the contract made in 128 CE between Babatha and her then husband Yehudah appears to be an example of such a contract of *depositum irregulare*.[30] In it Yehudah recorded that in that year he received from Babatha a deposit of 300 denarii, apparently by delivery, returnable on demand and acknowledged receipt "according to the law of deposit", and agreed to return the deposit upon demand:

[26] *P Oxy* 33. 2677; vol 33, 113.
[27] *Dig* 12. 1. 2. pr.
[28] *Dig* 16. 3. 24.
[29] Birks (2014: 144); Thomas (1976: 278).
[30] *P Yadin* 17.

> [ἐπὶ τῆς θ]ε̣λ̣ήσεως καὶ συ̣νευδοκήσεως α̣ὐ̣[τοῦ ὡμολογήσατο Ἰούδας Ἐλεα]ζάρου … πρὸς Βαβ̣α̣θαν Σ̣ίμ̣ω̣ν̣ος ἰδίαν γυναῖκα αὐ̣τ̣[ο]ῦ̣, … ὥστε τὸν Ἰούδαν ἀπεσχηκέναι π[αρ’] α[ὐτῆς] εἰς λόγον παραθήκης ἀργυρίου κάλου δοκίμ[ου] νομίσματος δηναρίων τριακοσίων ἐπὶ τῷ̣ αὐτὸν ἔχειν αὐτὰ καὶ ὀ[φ]είλειν ἐν [πα]ραθήκῃ μέχρι οὗ̣ ἂν χρόνου δόξῃ τῇ̣ Βαβαθ̣α̣ ... ἀπαιτεῖν τὸν αὐτὸν Ἰουδαν τὰ τῆς παραθήκης δηνάρια.

Yehudah also agreed that if he did not do so he would be liable not only to return double the deposit with damages, but also to a charge of illegality in the matter:

> καὶ τάδε ἐαν ἀπαιτούμενος μὴ ἑτοίμως ἀποδοῖ ὁ Ἰούδας, κατὰ τὸν νόμον παραθήκης ἔνο̣χος ἔσται ἀποδοῦναι αὐτῇ̣ τὴν παραθήκην δι[π]λῆν μ̣ετὰ βλάβους, ὑπεύθυνος δὲ καὶ τῷ̣ τῆς παρανομίας [τῶν] τοιούτων ἐνκλήματι,

and granted Babatha a right of execution against himself and all his property, present and future:

> γε[ινο]μένης δὲ τῆς πράξεως τῇ̣ Βαβαθ̣α̣ ... ἀπό τε Ἰούδου καὶ τῶν ὑπαρχόντων αὐτοῦ πάντῃ̣ πάντων, ὧ̣ν τε ἔχει καὶ ὧ̣ν ἂν ἐπικτήσηται κυρίως.

Lastly in the agreement Yehudah confirmed his promises by a *cautio* of a *stipulatio* in the form

> πίστει ἐπηρωτήθη καὶ ἀνθωμολογήθη [ταῦ]τα οὕτω[ς] καλῶ[ς γ]είνεσ̣θαι.

Yehudah subscribed the agreement in Aramaic, acknowledging receipt of three hundred denarii from Babatha LḤŠBN PQDWN, the equivalent of εἰς λόγον παραθήκης and undertook to return them without deduction KNMWŠ PQDNH, the equivalent of κατὰ τὸν νόμον παραθήκης.

Babatha was accompanied by a tutor, although she did not require the *auctoritas* of a tutor to enter the agreement. There is room for the signatures of seven witnesses to the document but it does not appear that she or her tutor subscribed.

Although Yehudah’s obligations were confirmed by a *cautio* of a *stipulatio* that he made, so that in terms of Roman law it was enforceable against him as a *stipulatio*, it remains useful to

analyse the nature of the underlying agreement in order to judge whether he undertook obligations under Roman law, or, as has been argued by Oudshoorn, Jewish law.[31]

It can be seen that Yehudah's undertaking substantially followed the *pro forma,* since it contained an acknowledgement of receipt on deposit, together with: an undertaking to return the deposit on demand; an undertaking that if he failed to do so he would forfeit a penalty according to the law of deposit; and the grant of a right of execution against him and his property. Although it was not required in a contract of *depositum,* Yehudah also acknowledged that he would be guilty of a charge of illegality, if he failed to return the deposit on demand. It may also be seen that the undertaking of Yehudah contains elements similar to those of *depositum* in both the *Digest* and the agreement from Dura-Europus including an acknowledgement of receipt of the money on account of a deposit and an undertaking to return it.[32] Penalties for failure to return on demand were accepted by Yehudah in the form of τὴν παραθήκην δι[π]λῆν μέτα βλάβους and although he would not have been liable to the payment of double damages under the praetor's edict there seems no reason why he might not by *stipulatio* have agreed to pay them.

It seems to me that his acceptance that he would be liable to a charge of illegality according to the law of deposit (ὑπεύθυνος δὲ καὶ τῷ τῆς παρανομίας [τῶν] τοιούτων ἐνκλήματι) ought to be seen as the equivalent of the undertaking in the agreement from Dura-Europus, which was that the holder would be liable to penalties incurred by those who breached the faith involved in contracts of *depositum* (ἐνσχεθήσεται διηγορευμένοις ἐπιτίμοις τῶν τὰς πίστεις τῶν παρακαταθηκῶν παραβαινόντων). Since condemnation in an *actio depositi* resulted in the *infamia* of the person condemned, it would seem that in both these contracts the holders were accepting that condemnation in such an action by a failure to restore the subject matter of the contract would amount render him or her liable to incur *infamia*.

Yehudah acknowledged that he "owed" Babatha the sum deposited with him (ὀ[φ]είλειν) but the expression does not necessarily imply that property in the money had passed to him so that he was obliged to repay the equivalent rather than the identical coins to Babatha. By no provision of the agreement did Babatha authorise Yehudah to use the deposited money as his own, but it would have been open to her to do so by a later arrangement.

[31] See Thomas (1976: 261-262); Buckland & Stein (1963: 468); *Dig* 45. 1. 126. 2; 17. 2. 71. pr; Oudshoorn (2007: 144-150).
[32] *P Dura* 29.

Several considerations show that the contract between Babatha and Yehudah ought to be considered a contract of *depositum* under Roman law, although one that was exceptional since Yehudah expressed himself to "owe" Babatha the sum of money that she deposited with him: not only did Yehudah refer to the law of deposit but he also, in my view, accepted the applicability of *infamia,* particularly an institute of Roman law. That the agreement was confirmed by the use of a *stipulatio,* also a particularly Roman law contract, is consistent with a Roman law character.

Oudshoorn argued that the *stipulatio* made by Yehudah should be regarded as a feature of "formal" law.[33] She argued that the references to the law of deposit in the agreement are not to Roman law but to Jewish law, pointing to the provision for the payment of double damages and the "charge of illegality", which "better fit the Jewish background". She referred first to the provisions in Exodus 22. 2 which do not however impose retribution *in duplum* on a holder, and then to the Jewish rules of deposit. According to those rules a holder who failed to restore could "be considered to have 'put forth his hand,' that is embezzled the property", and would have to take an oath that he had not done so. She suggested that the expression "charge of illegality" refers to this institution and that the deposit made by Babatha with Yehudah was in accordance with the Jewish institution. She did not however point to any rule under which a holder of a deposit could be liable for double damages or to any punishment other than judgment against him for failure to restore, that would be suffered by that holder who was found to have "put forth his hand". In any event a rule imposing a liability for double damages does not necessarily point to Jewish law, since they could be imposed under Nabataean law, as is shown by a provision in a tomb inscription from Mada'in Saliḥ that anyone who acted contrary to the terms of the dedication would be "liable for double the price (KPL DMY) of this whole burial-place".[34]

Oudshoorn also argued that "(t)he idea that Jewish law is referred to" in the agreement was strengthened by Yehudah's repeated use in his subscription of the Aramaic expression PQDWN although it is not used in the operative part of the agreement. She regarded this as "strengthening the assumption that 'law of deposit' refers to indigenous rather than to Roman law".[35] However, the use of the expression PQDWN cannot be said to refer particularly to

[33] Oudshoorn (2007: 144-155); see Chapter 1 for Oudshoorn's use of the expressions "formal law" and "substantive law".
[34] *Ḥ* 31.
[35] Oudshoorn (2007: 147-8).

Jewish law. The expression may bear the meaning "deposit" in Jewish Aramaic, but it occurs also in Nabataean Aramaic inscriptions, namely in *The Turkmaniye Inscription* and two Nabataean funerary inscriptions at Petra, in the form: PPQ[D]WN DWŠR' or PPQ[DWN DW]ŠR'.[36] Blane W Conklin attributes to the expression as it occurs in *The Turkmaniye Inscription* the meanings "order", "command" or "deposit".[37]

An important consideration is that by the use of the form of *stipulatio* the parties to the agreement contemplated enforcement according to Roman law since the *stipulatio* itself made the contract a Roman law contract and one which could be enforced by a court applying Roman law. The Roman courts of the Province had jurisdiction to enforce and did enforce contracts that were made in accordance with Jewish law, but this contract clearly was in substance made in accordance with Roman law as one of *depositum* and the stipulation was not a mere formal addition, but transformed the agreement, to the possible advantage of Babatha, into a contract of *stipulatio.* Although Oudshoorn held that the agreement was made in accordance with Jewish law, it must, since it was in Roman law form, have been enforceable under that law.

Part 3 – Harvesting a Date Crop – *P Yadin* 21-22

By counterpart documents made in September 130 CE Babatha and one Simon son of Jesus made an agreement relating to three date groves formerly the property of Yehudah which Babatha held, claiming the right to do so under both the provisions of her *ketubbah* and a debt owed by Yehudah, κ̣α̣τ̣έχω αὐτὰ ἀντὶ τῆς προ{ο}ικός μου καὶ ὀφι̣λ̣ῆς.[38] This debt was no doubt the money to be returned to her under the provisions of the deposit she made with Yehudah in 127 CE by which Yehudah granted Babatha πρᾶξις or a right of execution.[39]

Of the counterparts, in one Babatha acknowledged that she had sold the crop from the date groves, and would receive from Simon a quantity of dates of various kinds, ὁμ̣ο̣ι̣[ογῶ πεπρακέ]ν̣α̣ι σ̣ο̣ι κ̣αρ[πίαν] φ[οινι]κ̣ῶ̣ν̣ο̣ς [κήπ]ω̣ν̣,[40] and in the other Simon acknowledged that he had bought the crop from Babatha and would pay her that quantity of dates, ὁμολογῶ

[36] Healey (1993: 238); (2013: 177); *CIS* 2. 530; Nehmé (2003: 114-7); MP 325.1 & 325.2.
[37] Conklin (2004: 70).
[38] *P Yadin* 22: a similar expression occurs in the counterpart *P Yadin* 21.
[39] *P Yadin* 17.
[40] *P Yadin* 22.

ἠγορακέναι παρά σου καρπίαν φοινικῶνος κήπων Ἰούδου Χθουσίωνος ἀνδρός σου ἀπογενομένου, weighing out and delivering the dates through a surety: στάν{ν}ων σοι αὐτὰ ἐν τῇ οἰκίᾳ σου ζυγῷ Μαωζας ὁμοίως μετρῶν σοι ἐν τῇ οἰκίᾳ σου μέτρῳ Μα<ω>ζας διὰ ἐνγυίου καὶ ἀναδόχου Σαμμοῦος Μαναήου τῆς αὐτῆς Μαωζας.[41] Simon was to be entitled to the surplus of dates over those he delivered to Babatha "in return for my labors and expenses": καὶ εἴ τι ἂν περισσευθῇ εἰς τοὺς προγεγραμμένους κήπους, φοίνικα λήμψωμε εἰς ἐμαυτὸν ἀντὶ τῶν ἐμῶν κόπων καὶ ἀναλωμάτων [42] In default of delivering the dates to Babatha at drying time, Simon was to be liable to make a payment in money to Babatha, and she undertook to secure his title to the groves and in default to owe him a money sum, again ἀντὶ τῶν σῶν κόπων καὶ ἀναλωμάτων.[43]

The undertakings of each party were novated by a *cautio* of a *stipulatio* in Greek in the form πίστεως ἐπερωτημένης καὶ ἀνθομολογημένη[ς].

It appears that the date crop would then have been beginning to ripen and although there was no express obligation imposed on Simon to harvest the crop, it seems that it was intended that he do so and deliver the share of Babatha to her at drying time.[44]

The nature of this agreement has been controversial. Lewis, relying on the promises to sell and buy contained in the documents, held it to be in the nature of the sale and purchase of a date crop, in Roman law terms *emptio venditio*, but B. Isaac, posing the question "(w)ho would sell a crop of dates in exchange for dates?" seems to have regarded the transaction as one of "a lease of the right of working the orchard in exchange for a share in the produce".[45] A. Radzyner concluded that the documents contained two transactions and that in them "Babatha sells a share of the fruit for a share of the fruit while Simon sells his labour and expenses in exchange for the share that Babatha sells".[46] He regarded the agreement as reflecting "the local law in Eretz-Israel, whose sources are probably oriental", and, accepting the opinion of Cotton about "the absorption of local juridical customs and formulae into Tannaitic halakha", he suggested also that the parties "drew up their contract as a fruit-selling agreement, in accordance with

[41] *P Yadin* 21.
[42] *P Yadin* 21.
[43] *P Yadin* 22.
[44] Lewis (1989: 94).
[45] Lewis (1989: 94); (1994: 246); Isaac (1992: 75).
[46] Radzyner (2005: 160).

Egyptian practice. Yet, because legal practice did not recognise a sale of this sort, a small element of leasing was added".[47]

Oudshoorn had been "inclined to agree with Lewis that the phraseology of the papyrus (that is P Yadin 21-2) suggests a sale and not a lease".[48] However she also thought that the papyri "seem to present more of an agreement like P. Yadin 6, about future labor and recompense, than a real sale", and that the oriental origin of the arrangement that Radzyner had identified "makes a clear link with the Roman *emptio-venditio* as suggested by Lewis less likely".[49] Oudshoorn considered that Babatha relied upon two rights, to recover her dowry and to recover the deposit she had made with Yehudah. Since Babatha's right to recover her dowry arose under her *ketubbah*, Oudshoorn thought that "(t)his very fact places P Yadin 21-22 in a framework of Jewish law." Since she considered that the deposit Babatha made with Yehudah was in accordance with Jewish law, she thought that Babatha based "her right to sell on rights to Yehudah's property acquired in two different acts that (were) both rooted in Jewish law".[50] She described the "Roman influence" of the stipulations as "(o)bviously ... only of a formal nature".[51]

Although Oudshoorn regarded the expression κατέχω αὐτὰ ἀντὶ τῆς προοικός μου καὶ ὀφιλῆς as Babatha's acknowledgement that she was "selling the crop of an orchard that (was) not hers", that is she was "selling property that (did) not belong to her", it appears that she accepted that Babatha was entitled to "sell the produce of the property on the basis of specific rights to this property", namely the rights of execution against the property of Yehudah.[52]

Czajkowski suggests, although she gives no reasons, that Babatha's arrangement was "probably some sort of labour contract that allowed her to get the crop harvested". She does not state to what system of law she thinks it related. She leaves open the possibility that Babatha relied on her right of recovery of the money deposited with Yehudah, as well as on her rights under her *ketubbah*.[53]

Contracts of *emptio venditio* and *locatio conductio* were contracts that were *ius gentium* and therefore available to peregrines and enforceable in the governor's court of the Province.[54]

[47] Radzyner (2005: 153, 160), and see Cotton (1998a: 172).
[48] Oudshoorn (2007: 170).
[49] Oudshoorn (2007: 172, 173-4).
[50] Oudshoorn (2007: 175-8).
[51] Oudshoorn (2007: 181).
[52] Oudshoorn (2007: 174).
[53] Czajkowski (2017: 53-4).
[54] *Dig.* 2. 14. 7. pr – 1.

However, in my view it is inappropriate to regard the contractual arrangement between Babatha and Simon as one of either *emptio venditio* or *locatio conductio*. The contractual positions of the parties under the agreement are set out separately; those of Babatha as an acknowledgement primarily of having sold the crop, with collateral provisions, and those of Simon as an acknowledgement that he had bought it, together with particular undertakings to deliver dates as his part of the bargain and to pay money in the event of his default in so doing. Neither Cotton nor Radzyner pointed to any particular local source for an agreement of the kind that Radzyner suggested, nor to a practice of adding "a small element of leasing". Indeed Radzyner accepted that local "legal practice" did not accept a sale of the kind he suggested, which, in my view, makes it implausible as a source for the agreement between Babatha and Simon. This does not exclude the adoption by the parties of particular terms based on the then Jewish custom. Since each of the parties confirmed the obligation by means of a unilateral contract, namely a *stipulatio*, in my view the arrangement is best considered as two Roman law *stipulationes*, each binding on one of the two parties to the transaction.

In any event, in my view the documents, taken together, could not amount to an agreement that could be taken to be one of Roman law *emptio venditio* for sale of the date crops. Because it was necessary under such an agreement to distinguish vendor and purchaser, a sale had to be at a price fixed in money, as Gaius says: "(i)tem, pretium in numerata pecunia consistere debet".[55] Under the agreement Simon was not liable to pay a price in money, and the money that he agreed to pay was to be by way of agreed damages for a failure to comply with his obligation to deliver the dates at the due time, not the price of the crops that he was to receive.

Nor do I think that the agreement could be treated as an enforceable Roman law contract of *permutatio*, or barter. Gaius says nothing about such a contract but in a text of Paul it is stated that "permutatio autem ex re tradita initium obligationi praebet: alioquin si res nondum tradita sit, nudo consensu constitui obligationem dicemus, quod in his dumtaxat receptum est, quae nomen suum habent, ut in emptione venditione, conductione, mandato", so that it would appear that a wholly executory agreement for *permutatio* was not possible.[56] As a contract of *locatio conductio* it seems that it would more accurately be regarded as a case of *locatio operis faciendi* rather than of *locatio operarum* since the contract was for "quod Graeci ἀποτέλεσμα vocant, non ἔργον" namely the completion of the harvest of the date crops; but this cannot be regarded

[55] Gaius 3. 141.
[56] *Dig* 19. 4. 1. 2.

as clear.[57] In either case Simon as conductor of the *opus*, or harvest, or locator of the *operae*, his services in harvesting the fruit, would receive the hire, namely the surplus of the dates over the amount that he was obliged to supply to Babatha.

Since the arrangement was made by *stipulationes* and thus in accordance with Roman law, the difficulty of classification of the agreement shows that the better analysis is that of two *stipulationes* each enforceable according to its terms. One may assume that the reason why the agreement was cast in the form of *stipulationes* was that the parties wished to be able to enforce the agreement before the governor or some other court administering Roman law. Accordingly, it would be expected that if a question of enforcement of the agreement were before such a court it would be in the form of proceedings on the *stipulatio* of the party alleged to be in breach. In such proceedings the case must be determined by the terms of the *stipulatio* rather than the classification of the agreement as a whole.

Although the agreement between Babatha and Simon was cast in the form of Roman law stipulations, particular terms of it may have been influenced by Jewish custom. Neither the *Mishnah* nor the *Tosefta* "provide us with the (leasing) bill's precise formulation", preserving only two provisions from an agricultural lease. However Radzyner argued that the terms of a clause preserved in the *Tosefta* by which the tenant was entitled to half of the grain and straw harvested "for my work and expenses I shall take half (W'N' B'MLY WBNPQWT YTY PLG')", seemed "an exact Aramaic counterpart of ἐμαυτὸν ἀντὶ τῶν ἐμῶν κόπων καὶ ἀναλωμάτων". He held this to be a translation of the formula contained in the *Tosefta*.[58] He also pointed to provisions, similar to that in the agreement for the harvesting of the date crop, in substantially contemporary agricultural leases granted by the administrator of Simon Bar Kokhba in Judaea during his rule requiring the tenant to "weigh out" the rent. He regarded those leases as ones that "clearly were written for Jews for whom halakha played a central role", so that it appears that they followed contemporary Jewish custom. In leases written in Hebrew the obligation of the lessee to pay rent was expressed by a form of the word ŠQL meaning "to weigh", and in a lease written in Aramaic by a form of the cognate word TQL.[59]

In addition the Mishnaic provisions required that "(t)hey write documents of tenancy and sharecropping only with the knowledge and consent of both parties," and, according to the

[57] *Dig* 50. 16. 5. 1; Buckland & Stein (1963: 505-506).
[58] Radzyner (2005: 154-5 with fn [27]) *tBM* 9. 13; I cite here the text of the *Tosefta* according to the numeration of the edition of Dr. M. S. Zuckermandel and of the translation of Neusner; *P Yadin* 21.
[59] Radzyner (2005: 158); Hebrew: *P Yadin* 44, 46 (Ein Gedi), *P Mur* 24, Entries B & C ('Ir Naḥaš); Aramaic: *P Yadin* 42 (location unknown).

Mishnah, "Rabban Shimeon b. Gameliel (Rabbi Shimon ben Gamliel) says, they write two for the two parties, one copy for each", a gloss which Neusner says applied to documents of tenancy and sharecropping.[60] Here the agreement was composed in two parts and was evidently agreed upon by Simon, since in the counterpart executed by him Babatha's right to execute is qualified by his words ὡς λέγις, but, not being identical, it is unclear whether they can reasonably be described as "two copies, one for each".

In my view, however, the elements of these agreements that may reflect Jewish custom and practice of the period, cannot be regarded as making the agreement Jewish rather than Roman. Although one of the two rights of execution and sale upon which Babatha relied was Jewish in origin, the agreement remained one enforceable in a court administering Roman law primarily because it was framed in the form of two stipulations. The form of stipulation was not merely formal in the sense that was "procedural law" or that it "arrange(d) for the settlement of disputes", but was the *ius gentium* and Roman law basis upon which the arrangement between the parties was made.[61] Nothing suggests that the *stipulationes* were enforceable in a Jewish court.

Part 4 – *Mutuum* and *Hypotheca* or *Pignus*

No example of a contract of *mutuum* or of *hypotheca* or *pignus* from the Province is contained in either of the archives, but amongst the documents in Babatha's archive is an agreement made at Ein-Gedi in the province of Judaea in 124 CE by which Yehudah borrowed money at interest from a centurion, and accordingly a Roman citizen, and charged a courtyard situated there, the property of his father, with its repayment.[62] It appears from the description of the abutters in both documents, that the courtyard was later given by Yehudah to Shelamzion probably to make provision for her in the event of a son being born to the marriage of Yehudah and Babatha.[63] The agreement follows the form of agreement for a *mutuum* or loan for consumption, and contains also words apt to create a charge over property and a right of execution in default of repayment:

[60] *mBB* 10. 4; Neusner (1983-5: Part 3, 120); see Chapter 1.
[61] Oudshoorn (2007: 196).
[62] *P Yadin* 11.
[63] *P Yadin* 19; see Chapter 5.

> ὁμολογῶ ἔχειν καὶ ὀφείλειν σοι ἐν δάνει ἀργυρίου Τυρίου δηνάρια ἑξήκοντα ... ἐπὶ ὑποθήκῃ τῇ ὑπαρχούσῃ αὐλῇ Ἐλαζάρῳ Χθουσίωνος πατρί μου ἧς ἔχειν ἐπιτροπὴν ὑποτιθέναι κα[ὶ ἐγ]μισθο[ῖν πα]ρὰ τοῦ αὐτοῦ Ἐλαζάρου.

Yehudah undertook to repay the loan on the following 1 January 125 CE and the interest monthly at the rate of 1% per month: κατὰ μῆνα ὡς τῶν (ἑκατον) δυνά[ρ]ων δυνάρο[ν ἕ]ν, and granted the centurion a right of execution over himself and all his property including after acquired property:

> [ἡ] πρᾶξ[ις ἔσται σο]ι ... ἔκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντων [μου πάντῃ] πάν[των] ὧν κέκτημαι καὶ ὧν ἐὰν ἐπικτήσωμαι.

An agreement of *mutuum* or loan for consumption was *ius gentium*, and was defined by Gaius as being "re contrahitur obligatio" created "quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eaedem, sed aliae eiusdem naturae reddantur".[64] According to Paul it was one in which "damus recepturi non eandem speciem quam dedimus (alioquin commodatum edit aut depositum) sed idem genus".[65] Interest was not payable unless it was expressly agreed upon, and according to Africanus, Salvius Julianus held that interest was not payable unless under a *stipulatio*, and that remained the law.[66]

In Roman law an agreement for a charge, whether described as *pignus* or *hypotheca*, was an agreement that might be made orally or in writing and if in writing by any appropriate form of words, and the purpose of any writing was to render proof easier.[67] Marcian said that "(i)nter pignus autem et hypothecam tantum nominis sonus differt" but, although there was no legal difference, "there was the physical fact that in the former (*hypotheca*) the thing was left with the debtor".[68]

Normal forms of the contract of *mutuum* in the first century CE, to which Yehudah's agreement substantially conforms, are as follows, from Pompeii novated by a stipulatio:

[64] *Dig* 2. 14. 7. pr, 1; Gaius 3. 90.
[65] *Dig.*12. 1. 2. pr.
[66] *Dig* 19. 5. 24; Buckland & Stein (1963: 463).
[67] *Dig* 20. 1. 4.
[68] *Dig* 20. 1. 5. 1; Buckland & Stein (1963: 475).

> … [scripsi] me accepi[sse et debere … HS] MM n(ummum) [quae ab eo mutua] et numerata a]cc[epi e]aq[ue HS MM] nummu[m, q(uae) s(upra) s(cripta) s(unt), p(roba) r(ecte) d(ari)] stip[ulat]us est … [spopo]ndi; [69]

and from Herculaneum:

> … scripsi me h[a]bere … in so[l]utum denarios mille quam summam debere;[70]

and:

> … scripsi me hab[ere …] HS XX m[ilia nummu]m numerata accep[ta] XX m(ilia) q(uae) s(upra) s(cripta) [s(unt)] [stipul]atus est,[71]

where again the contract of *mutuum* is novated by *stipulatio*.

The form in which Yehudah mortgaged the land at Ein-Gedi substantially follows the form of *mutuum* secured by a *pignus* found in a pledge from Pompeii of 40 CE, which includes provision for the pledgee to have a power of sale of the pledged property on default of repayment and reads:

> [Scripsi me dedisse …] … [pignoris nomine …], [quae per chiro]graphum scripsi me ei debere …, Si … non de[dero], sol[vero] satisve fecero, tum liceat tibi … sub [p]raecone de condicione pig[nor]is … [vendere].[72]

This agreement made by Yehudah was clearly considered by both parties to be enforceable in the province of Judaea, and in my view contracts of both *pignus* and *hypotheca* had been made enforceable there by the provisions of the provincial edict, as is shown by a discussion in texts in Gaius' Commentary on questions arising from such contracts.[73]

In my view therefore such contracts were also, by provisions of the provincial edict that applied in the Province, and being *ius gentium*, enforceable there.

Yehudah, by the agreement, charged property of his father to secure the repayment of his own debt acting under the authority of his father to charge and lease his property (ἐπιτροπὴ

[69] *TPSulp* 50.
[70] *TH* VIII.
[71] *TH* XLII.
[72] *TPSulp* 79.
[73] *Dig* 20. 1. 9; 20. 6. 2.

ὑπ̣οτιθέ̣[ν]αι καὶ ἐγμισθοιν), as his agent. He did so in a manner which appears to have been treated as binding upon the father and creating a valid charge over his property. In Roman law at this period there was no general law of agency to render a contract made with the authority of the principal, such as Yehudah's father as owner of the property to be charged, binding upon him, so that we cannot tell whether the transaction was indeed binding upon him to the extent of effectively charging his land or the manner in which it could have been made binding.

However, since he later became its owner Yehudah's charge of the land then became enforceable against him by an *actio utilis*, unless the debt had already been repaid, as indeed appears to have happened.[74] The method by which Yehudah was authorised by his father is unknown and in those circumstances it is not clear that Jewish law allowed the enforcement of the *hypotheca* of Yehudah against the property of his father.[75]

Further Yehudah undertook to pay interest at the rate of 12% per annum, that allowed under the then current law, but made no *stipulatio* so that no action lay for its recovery. In addition to the provision for the payment of interest in terms that

> τὸν δὲ τόκον χορηγήσω σοι τοῦ αὐτοῦ ἀργυρίου κ̣ατὰ μῆνα ὡς ̣τῶ[ν] ἑκατὸν δ̣η̣[νά]ρων δ[η]̣νάρον ἕν κατὰ μῆνα

the agreement contained also a provision that the creditor had the right to recover the loan, and I suggest also the interest, by means of the property:

> ἐὰν δέ σ̣οι μ[ὴ ἀποδώσω τ]ῇ̣ [ὡρισμένῃ προθεσμίᾳ κα]θ̣ὼ̣ς̣ προ[γ]έ̣γρα[πται τὸ δ]ί[καιο]̣ν ἔσ[ται σοι κτᾶσθαι χρᾶσθαι πωλεῖν διοικεῖν τὴν αὐτὴν ὑποθ]ή̣κ̣η̣[ν].

It is possible but unlikely that Yehudah had previously granted a lease to the creditor since the outer text of the agreement concludes [κυρ]ίας τῆς μισθώσεως ἧς σ̣ο[ι] . . . [. . .]υ ἐμίσθωσ̣α̣, which Lewis translates as "the lease that I (Yehudah) hereby (?) leased to you remaining valid" and explains as a slip by suggesting that the scribe had in mind Yehudah's authority to charge and lease he land, and followed the "standard right-of-execution" clause.[76] There is no other indication whether under the agreement for a charge possession of the property charged by

[74] *P Yadin* 19; Lewis (1989: 83); *Dig.* 13.7. 41.
[75] Falk (1978: 191-4, 322-6).
[76] Lewis (1989: 41-2).

Yehudah was given to the lender, and it cannot be stated whether Yehudah granted a *hypotheca* or a *pignus.*

By rescripts issued in about 202 CE the Emperors Septimius Severus and Caracalla declared that a creditor could retain interest paid under a *mutuum* even where the obligation to pay interest arose under a pact and not under a *stipulatio,* and could also recover it by detention of a pledge where it was made liable for interest, even by simple pact.[77] Such provisions gave rise to an *obligatio naturalis*, so that if interest was in fact paid it was unrecoverable by the debtor.[78] In view of the provisions of the agreement of Yehudah, it must be assumed that those rescripts stated the rule applicable to the agreement.

It appears that in the inner but not in the outer text of this agreement the amount of the loan was first entered as δηνάρια ⟦τεσσαράκοντα⟧ then amended to ἑξήκοντα. Lewis wrote that this "prompts the suspicion that in addition to the normal rate of interest … there is concealed a usurious squeeze exerted upon the borrower" who was compelled to agree to repay 60 denarii on a loan of 40 denarii.[79] This explanation was accepted by Oudshoorn.[80] There is no proof of this, and Esler argued that the wording τεσσαράκοντα in the inner but not outer copy of the papyrus was a scribal error duly corrected.[81] If, however, Lewis were right then it would support the proposition that the lawful rate of interest in Judaea was then 12% per annum and that the agreement was intended to be enforceable under Roman law and no other.

Oudshoorn pointed also to a "change made in the upper (inner) version: the property of Judah (Yehudah) and his father is not pledged but only that of Judah (Yehudah)".[82] In fact the difference lies in the description of the entitlement of the creditor to execute against person and property in the event of the default of Yehudah: in the inner text the creditor is said to be entitled to execute against Yehudah and his property present and future (ἔκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντων̣ [μου πάντῃ] πάν[των] ὧν κέκτημαι κ̣αὶ ὧν ἐὰν̣ ἐπικ̣τήσωμαι) whereas in the outer he is said to be entitled to execute against Yehudah and the property, also described as property of his father, which he and his father owned or might acquire, present and future (ἔκ τε ἐ]μοῦ καὶ ἐκ τῶν Ἐλαζάρου̣ πατρός μου ὑ̣παρχ[ό]ντω̣ν̣ [πάντῃ] π̣ά̣[ν]τ̣ω̣[ν], ὧ̣[ν κεκτήμεθα] κ̣α̣[ὶ ὧν

[77] *CJ* 4. 32. 3, 4.
[78] Buckland & Stein (1963: 549).
[79] Lewis (1989: 41).
[80] Oudshoorn (2007: 160).
[81] Esler (2014: 5); see also Czajkowski (2017: 31-2).
[82] Oudshoorn (2007: 161-2).

ἐ]ὰν ἐπικτησώμεθα). Lewis though that the discrepancy between the inner and outer texts expressed "the reality that Eleazar's property as a whole, not just the courtyard of instant reference … was administered by his son (Yehudah)".[83] Oudshoorn accepted this but also suggested that "there was first the intention to borrow just forty denarii, pledging (Yehudah's) property for security, while (Yehudah) changed his mind and asked for sixty, extending the security arrangements to his father's property as well, eventually having the scribe change the amount in the upper version". She accepted that "for this assumption to make any sense one has to assume that the upper version was written first".[84] This explanation is to be rejected since it was the lower or outer copy that was normally written first, and there is no apparent alteration to the property pledged, but to the property against which the creditor might resort in the event that the property pledged was insufficient to discharge the debt. In my view it is best to take the description in the outer text as intended to refer to property of both Yehudah and his father or perhaps their joint property, as is suggested by the use of plural verbs in the relative clauses in the papyrus, but to accept that the discrepancy cannot adequately be explained.

After a comparison between the expressions used in the agreement for the rights granted to the creditor and those used for the rights granted in the gift of land in Nabataea by Babatha's father to her mother, Oudshoorn said: "I therefore assume that the expression here (in the agreement) 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".[85] However, relying on statements by Menachem Elon, Oudshoorn also referred to Jewish institutions of pledge with transfer of possession (*mashkon*) and "the type of pledge in which the object of the pledge stays in the debtor's possession" (*apoteke* or Aramaicised Greek ἀποθήκη) which is "a special type of lien, limited to a certain part of a debtor's assets", and said that the arrangements between Yehudah and the centurion "can be interpreted as being based on *apoteke* since the property of (Yehudah) (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".[86] She quoted Elon as stating that a comprehensive charge would have come into effect on creation of the obligation so that the *apoteke* served to restrict the already existing charge to

[83] Lewis (1997: 45).
[84] Oudshoorn (2007: 161-2).
[85] Oudshoorn (2007: 162-3); *P Yadin* 7.
[86] Oudshoorn (2007: 165).

particular assets. She said that in this *hypotheca* the comprehensive charge is express and from "this comprehensive charge a specific charge on the courtyard is singled out", and that "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". Thus she said that if the papyrus refers to *apoteke* then the lease that is referred to in the papyrus as remaining valid (κυρ]ίας τῆς μισθώσεως ἧς ϙο[ι] . . . [. . .]υ ἐμίσθωϙα) cannot be regarded as giving the creditor possession and suggests that there may not have been a lease at all, and "(t)his means that the debtor 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." She then concluded that "closer examination reveals information supporting links with indigenous legal arrangements. Both papyri (*P Yadin* 5 and 11) can be argued to have a connection with indigenous law substantively".[87] Her explanation of "substantive law" suggests that she considered that the rules under which the creditor lent the money to Yehudah were those of Jewish law.[88]

It is by no means clear why a Roman centurion should agree to lend money under a Jewish institution rather than one that was Roman law, and indeed Oudshoorn does not supply one. It is to be expected that the centurion, as a Roman citizen and the lender of money in a Roman province, with the power to decide whether to lend and the terms upon which he would lend, would require that the operative law applicable to the loan would be Roman law, and the terms of the agreement are in conformity with that law. Nothing in the document shows that any other law than Roman is involved.

We may in my view conclude from the agreement made by Yehudah that such contracts were enforceable not only in the province of Judaea but also in the Province, under provisions of the provincial edict for the Province in terms similar to those for the province of Judaea. We may also conclude that the provisions of the provincial edict for the Province made effective similar rules concerning the payment of interest.

[87] Oudshoorn (2007: 165-6, 168, with fn [214]).
[88] Oudshoorn (2007: 196).

Part 5 – Partnership or *Societas*

Two documents in the archives may evidence partnerships, although there is among them no formal partnership agreement under either Jewish or Roman law.

The acknowledgement of indebtedness of 110 CE by Joseph, uncle of Babatha's first husband, to his nephew, Jesus, may relate to the balance payable upon the dissolution of a partnership between Joseph and his brother Jesus by the death of his partner, Jesus the father-in–law of Babatha.[89] Since the property distributed appears to have been commercial in character, including an investment in a factory (ἐργαστήριον) and what were probably contractual documents by which others were indebted to Joseph and Jesus (χ[ι]ρόγραφα ὀφ[ι]λήματος), the arrangement may well have been one of partnership.

In the return he made in the census held in the Province in 127 CE Sammouos son of Simon declared a one half share in several properties each described as μέροϛ ἥμισυ ϰήπου φοινικῶνος ἐν ὀρίοις [Μ]αῳζων or [ἐ]νιαύσιον μέρος ἥμισυ χώρας ἐν ὀρίοις Μαωζων and in each case in partnership or joint ownership with his brother: μ[ε]τοχῆ[ς τ]ῆϛ πρὸς Ἰωναθην Σ[ιμωνο]ϛ ἀ[δ]ε[λ]φόν μου.[90]

Nothing can be stated of the terms of any partnership between Joseph and his brother Jesus or of the relationship between Sammouos and his brother Jonathan other than that it appears to have concerned land held equally by them and to have involved no other persons.

Agreements of *societas* were enforceable in the Province, since they were contracts that were *ius gentium*, and also the subject of provisions in the provincial edict.[91] A Roman law partnership could be formed by act, by words or through a messenger (et re et verbis et per nuntium) and was dissolved by the death of a partner.[92]

[89] *P Yadin* 5.
[90] *XḤev/Se* 62.
[91] Gaius 3. 154; *Dig* 2. 14. 7. 1; see Chapter 2.
[92] *Dig* 17. 2. 4; *Dig* 17. 2. 63. 10: Thomas (1976: 303).

It appears that Jewish partnership was "probably an extension of practices customary between brothers" and "originally patterned after the arrangement between heirs to an undivided estate", and there were no rules concerning the duration of a partnership.[93] There are several cases in the archives in which land is described as having abutting land whose owners were described as "heirs": the land given in 120 CE by Shim'on father of Babatha to his wife Miriam consisting of parcels of land at Maḥoza, some of the abutters to which are described as the property of heirs to an estate, that must have been undivided and included some land left in the common ownership of the heirs, the properties of YRTY YWSP BR DWRMNS and YRTY YWSP BR BB';[94] land at Maḥoza that was given in 129 CE by Salome Grapte to her daughter Salome Komaïse, which had abutting land that included land owned by the heirs of several persons, including κληροṿό[μ]οι Αρετας, κληρονόμοι Ιωσηπος Βαβα, and ϰ[λ]ρο[ήν]μο̣ι Ιακω̣[βου;[95] and one of the groves declared by Babatha in the census of 127 CE which had as abutting land that owned by [κλ]ηρο̣ṿόμοι Θησαίου Σαβακα̣ ϰαὶ Ἰαμιτ Μανθανθου.[96]

Cotton has pointed out that it was common practice not to divide an inheritance and that an inheritance might remain undivided for years.[97] It is therefore possible that each of these arrangements originated in an inheritance of land or other property that remained undivided until in the case of the arrangement between Joseph and Jesus it was dissolved by the death of Jesus, and was accordingly a partnership created under Jewish law.

Although the arrangement between Joseph and Jesus was, so far as we may judge from the evidence available, consistent with being a Roman law *societas,* it is more reasonable to treat it as a partnership under Jewish law, since they were both Jews and one of its incidents was the payment of the dowry of Jesus' widow out of his share of the property, repayment of which was an obligation imposed by Jewish law, and it may have been formed before the establishment of the Province.

So far as we can ascertain, the arrangement between Sammouos and his brother was solely based on joint ownership of land which they held as a joint inheritance, since μετοχή may bear that meaning.[98] Such a relationship did not, without more, amount to *societas* in Roman law.[99]

[93] Falk (1978: 229, 231, 233).
[94] *P Yadin* 7.
[95] *XḤev/Se* 64.
[96] *P Yadin* 16.
[97] Cotton (1996: 199).
[98] LSJ s.v. μετοχή, 1.
[99] *Dig* 17. 2. 31.

Gaius however speaks of another form of partnership peculiar to Roman citizens, "aliud genus societatis proprium civium Romanorum", and that "olim" when a *paterfamilias* died, there was a partnership of positive and natural law, "quaedam est legitima simul et naturalis societas", which was called "ercto non cito".[100] Shammouos and his brother were not Roman citizens and accordingly they could not be *sui heredes* of their father, but Gaius says that other persons could set up a partnership of the same kind "apud praetorem certa legis actione".[101] Gaius appears to say that the institution was by his time obsolete and we may in any event suppose it unlikely that Sammouos and his brother took advantage of the *legis actio* procedure, particularly since there are in the archives clear Jewish examples of continued joint ownership of inherited property.[102] The partnership between Sammouos and his brother should therefore be treated as having been formed under Jewish law. The information contained in the census return of Shammouos does not permit a statement of the date upon which the partnership commenced.

The material in these contracts of partnership show, however, Jewish inhabitants of the Province making or maintaining agreements made in accordance with Jewish law. Since they made other agreements of a commercial nature in the form of Roman law agreements we may infer both that they were empowered to make such agreements in accordance with either Roman or Jewish law, and that they exercised that power of choice.

Part 6 – *Stipulatio*

The archives contain agreements made by peregrines after the establishment of the Province cast in the form of *stipulationes* and it seems that the parties to such agreements adopted Roman law contractual forms and in particular the form of a *stipulatio,* it must be assumed to aid them in any litigation to be conducted before the governor, or any other court of the Province that was administering Roman law.

Among the contracts that are contained in the archives are several other contractual documents which were novated by a *stipulatio,* including the marriage agreements of Shelamzion daughter

[100] Gaius 3. 154a.
[101] Gaius 3. 154b.
[102] De Zuluetta (1946-1953: Part II, 175).

of Yehudah, and of Salome Komaïse daughter of Levi and Salome Grapte, both of which were written partially in accordance with Jewish law, but were novated, by a *stipulatio* made by the husband, into a Roman law contract and enforceable against him as one.

The release by Salome Komaïse of claims against her mother Salome Grapte was also novated by a *stipulatio*, an apparent reason why her assent to the agreement was thought to require the interposition of the *auctoritas* of a tutor.[103] However it is not clear why it was thought necessary to novate the agreement by a *stipulatio* since in its present, fragmentary form it contains no executory promise that could effectively be novated by a *stipulatio.* A further agreement cast in the form of a *stipulatio* and novated by it is a document of cession or release of rights in land at Ein-Gedi in the province of Judaea in 130 CE by Besas the *tutor* and perhaps also by Julia Crispina the ἐπίσκοπος of the orphan nephews of Yehudah, which included undertakings by Besas and Julia Crispina to register the document in the public archives, no doubt in the province of Judaea, and to secure her title against adverse claimants, confirmed by a *stipulatio* of Besas and perhaps also of Julia Crispina.[104]

The two counterpart documents by which in 130 CE Babatha entered into an arrangement with Simon son of Jesus in relation to three date groves in Maḥoza, should be regarded as simple contracts of *stipulatio* rather than as agreements of the character of *emptio venditio* or *locatio conductio* as elsewhere argued.[105] No other document in the archives shows a simple contract of *stipulatio*, but each of the agreements in the archives novated by *stipulatio* was one in which there were executory promises enforceable against one party only: Yehudah as holder of a deposit promising to return it;[106] Judah Cimber and Jesus son of Menaḥem as bridegrooms promising to repay the dowries of their wives;[107] Besas and perhaps Julia Crispina promising to secure Shelamzion's title to land at Ein-Gedi and to register the cession if required;[108] and perhaps Salome Komaïse confirming her cession to her mother.[109]

A *stipulatio* was a unilateral verbal form of contract which depended upon an oral question asked by the *stipulator* or promisee and an oral answer in the same terms given by the promisor. According to Gaius: "Verbis obligatio fit ex interrogatione et responsione", and he gave

[103] *XḤev/Se* 63.
[104] *P Yadin* 20.
[105] *P Yadin* 21-22.
[106] *P Yadin* 17.
[107] *P Yadin* 18; *P Yadin* 37 = *XḤev/Se* 65.
[108] *P Yadin* 20.
[109] *XḤev/Se* 63.

examples of permissible forms of words of which it is necessary to notice only "FIDEPROMITTIS? FIDEPROMITTO, FIDEIUBES? FIDEIUBEO", which were forms of words which were *ius gentium* and might be used by peregrines: "ceterae vero iuris gentium sunt, itaque inter omnes homines, sive cives Romanos sive peregrinos, valent".[110] Moreover a *stipulatio* might be made in Greek, such as Ὁμολογεῖς· Ὁμολογῶ· Πίστει κελεύεις· Πίστει κελεύω, even among Roman citizens "si modo Graeci sermonis intellectum habent", which must be taken to have included cases where interpreters were used, since according to Ulpian it was consistent with the writings of Sabinus of the first century CE that all languages could produce a stipulatio "ut uterque alterius linguam intellegat sive per se sive per verum interpretem".[111] The subscriptions of Babatha and other parties to the contracts in her archive that were cast in the form of *stipulationes* were made by them or on their behalf in Aramaic so that we can assume that they were illiterate in Greek and cannot be sure that they were able to speak Greek, so that it is reasonable to assume the use of interpreters. Each bears a note in Greek that it was written by a named λιβλάριος or "librarius" who no doubt supplied any translation that was necessary. Nothing in the archives indicates that these agreements were not enforceable as *stipulationes,* and the parties to them appear to have accepted them as enforceable. The documents from the archive of Salome Komaïse that are cast in the form of *stipulationes* are fragmentary and the subscriptions to them have not survived.[112]

Gaius does not mention in his *Institutes* a written *cautio* to an oral *stipulatio* and treats the *stipulatio* as a purely oral contract. De Zulueta in his edition of Gaius' *Institutes* says that in Gaius' day the *cautio* was "merely evidentiary; for its binding force it depended upon the confirmation by an oral *stipulatio*".[113] However it seems that by the first century BCE a *stipulatio* was commonly reduced to writing and regarded as a written agreement since Cicero refers to *stipulationes* as "rebus quae ex scripto aguntur".[114] By no later than 200 CE, the date of a rescript of the Emperors Septimius Severus and Caracalla in which it was ruled that where a *cautio* alleged that a *stipulatio* had been made, "tamen si res inter praesentes gesta est, credendum est praecedente stipulatione vocem spondentis secutam", it was accepted that if in such a case the transaction took place in the presence of the parties, it would be presumed that the answer of the promisor followed a question by the *stipulator* so as to give rise to an

[110] Gaius 3. 92-93.
[111] *Dig* 45. 1. 1. 6.
[112] *XḤev/Se* 63; *P Yadin* 37 = *XḤev/Se* 65.
[113] De Zulueta (1946-1953: Part II, 155).
[114] Cic. *Top.* 96.

enforceable *stipulatio.*[115] This had, I suggest, already become the position at the time of the establishment of the Province, when a *cautio* was clearly accepted as evidence of the making of the oral *stipulatio*: most of the parties to the *stipulationes* were resident in Maḥoza, and nothing suggests that they were not present together at the time of the making of the *stipulationes.*

The *cautio* of the *stipulatio* used in the contracts to which I have referred was generally in the form πίστεως ἐπερωτημένης καὶ ἀνθομολογημένης, or πίστει ἐπ̣ηρωτήθη καὶ ἀνθωμολογήθη, forms which represent a record of the equivalent in Greek translation of "FIDEPROMITTIS? FIDEPROMITTO" one of the *ius gentium* forms allowed by Gaius.[116]

A similar form of *cautio* was used in the novation of the *depositum* from Dura-Europus of 251 CE: πίστι ἐπηρώτησεν .... πίσ[τει ὡμολόγησεν].[117]

It might be thought that the use of the form of a *stipulatio* in connection with the release of claims (those of Salome Komaïse against her mother Salome Grapte) represented an *acceptilatio* which Gaius described as "velut imaginaria solutio", but an *acceptilatio* was effective to release "illae obligationes quae in verbis consistent, non etiam ceterae", that is only obligations incurred by *stipulatio,* and nothing suggests that the claims that Salome Komaïse was releasing were of such a kind.[118] Moreover Gaius gave as an effective form of *acceptilatio* only "QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM?" with the response "HABEO", and Justinian in his *Institutes* allowed effect only to that form and a Greek equivalent of it, ἔχεις λαβὼν δηνάρια τόσα; ἔχω λαβών. Even if the Greek equivalent form allowed by Justinian had effect also in the period of the archives, the Greek form that was current in the Province and has been restored in the papyrus is not such an equivalent.[119]

Lewis says that the established view was that in Egypt "an imperial or (more likely) praefectural order introduced the *stipulatio* into the notarial practice of that province in AD 220", and that the earliest examples of the practice of concluding an agreement with a record of a *stipulatio* in the eastern provinces of the Empire were the documents in the archive of Babatha.[120] Oudshoorn treats this as raising the "interesting question of whether there was

[115] *CJ* 8. 37. 1.
[116] Oudshoorn (2007: 151).
[117] *P Dura* 29.
[118] Gaius 3. 169-170.
[119] Gaius 3. 29. 1; *Inst. Iust.* 3. 29. 1.
[120] Lewis (1989: 17).

requirement to include the *stipulatio* in the province of Arabia as well", and she suggests that "the evidence of the Babatha archive is not sufficient to determine a moment in time when a formal requirement to use reference to a *stipulatio* may have been introduced into the province of Arabia".[121]

In my view there is no evidence of a requirement imposed upon the inhabitants of the Province that they make all contracts in the form of a *stipulatio*, and that it is unlikely that there was such a requirement; but it seems that residents of the Province perceived an advantage in having agreements cast in the form of a *stipulatio*, presumably since the agreements would apparently be litigated, if litigated at all, in a court administering Roman law, and in accordance with that law. This was so although the governor had jurisdiction to decide issues of Jewish and Nabataean law and apparently exercised it at least in relation to issues of Jewish law.[122] Notwithstanding the view of Oudshoorn, casting an agreement in the form of a *stipulatio* was a matter of substantive law, making the agreement, whatever its terms, an agreement enforceable under Roman law. Moreover texts in the *Digest* continued to discuss particular agreements, and the use of the form of *stipulatio* did not mean that the agreement no longer had to be construed and enforced according to its terms.

Since, as Gaius says, the forms of *stipulatio* that were open to peregrines were *ius gentium*, it seems that it was in any event open to peregrines to cast their agreements in that form. A text of Gaius' Commentary shows that the contract of *stipulatio* formed part of the law of the Province and was enforceable there.[123] Again, Scaevola, writing in the period of the Emperors Marcus Aurelius to Septimius Severus, ruled binding a *stipulatio* made at Berytus by a man who was not evidently a Roman citizen.[124] I suggest that peregrine inhabitants of the Province adopted the form of *stipulatio* to ensure that contracts made in their favour were enforceable there, whether or not that was strictly necessary in any particular case.

[121] Oudshoorn (2007: 154-155).
[122] See Chapters 2 and 5.
[123] *Dig* 45. 1. 74.
[124] *Dig* 45. 1. 122. 1.

Chapter 7 – Tutela in the Province

Part 1 – Introduction

Documents in Babatha's archive show the existence of *tutela* or tutorship in the Province of Arabia; no document from Nabataea dating from before the institution of the Province shows the existence of such an institution and in Chapter 2 I argue that by provisions of the provincial edict, the Roman law of *tutela* came into effect both for infants (*tutela impuberum*), and for adult women who were Roman citizens (*tutela mulierum*), upon the establishment of the Province. In this chapter I describe its effect and the circumstances under which it required the intervention of a tutor and the insertion of his *auctoritas*, and discuss whether peregrine women resident in the Province were subject to it.

Part 2 – *Tutela Mulierum*

Gaius says not only that in Roman law *impuberes* were in *tutela* but also that the early Roman lawyers held that women even of full age should be in *tutela* "propter animi levitatem", but he also recognized that the ground seemed "speciosa … quam vera" and that among peregrines women were not in *tutela* in the same way they were "ut apud nos".[1] The available evidence of the law of Nabataea and that relating to the Jewish inhabitants of Nabataea is consistent with the view of Gaius, but shows peregrine women resident in the Province to have acted with the assistance of *tutores* in many of their legal transactions.

By no provision of Jewish law was it required that a woman of full age, such as Babatha or Miriam, Yehudah's wives, or Shelamzion, Yehudah's daughter, have a tutor or guardian to validate her legal transactions, or that legal acts of adult Jewish women be authorised by a tutor or guardian in order that they might become binding or enforceable against them. Nor does any document in the archives evidence any such requirement.[2]

[1] Gaius 1. 144, 190, 193.
[2] See Chapter 5

The evidence for Nabataean law is slight, and there is no evidence either in tomb inscriptions or papyri from the pre-Roman period of Nabataea, at Mada'in Ṣaliḥ or elsewhere, that women were subject to any constraint under Nabataean law in dealing with property. Nor is there evidence that in order to render them effective Nabataean law required Nabataean women to have their legal transactions approved by a guardian or a person fulfilling functions similar to those of a Roman law tutor.[3] No document from the period of the Province shows any Nabataean woman taking part in a legal act.

Since there is no case for supposing that the intervention of a tutor was required under either the Nabataean law or the contemporary Jewish law, it is appropriate to examine whether the evidence of the presence of tutors at the legal acts of adult peregrine women evidenced in the documents of the archives shows that the relevant law governing them was that of Rome.

By the *ius civile* a woman, including an adult woman, who was a Roman citizen was subject to perpetual *tutela* which terminated only at her death or upon her acquisition of the *ius liberorum* either by grant or by the birth of the appropriate number of children.[4] The *tutela* to which she was subject prevented her from effectively performing some legal acts without the *auctoritas* of her *tutor*, since many transactions were not binding upon her without the interposition of *auctoritas*, which had to be given orally and in person before she entered them.[5]

Although it may be doubted whether adult peregrine women resident in the Province were subject to *tutela*, not only Babatha but other peregrine women resident in the Province, Salome Grapte and her daughter Salome Komaïse, and Shelamzion the daughter of Yehudah, from time to time took part in legal transactions accompanied by a *tutor* or expressed themselves as acting διὰ ἐπιτρόπου. It is thus clear that they considered it desirable that they be assisted by a *tutor* whether or not they were bound to do so.

In this chapter I discuss the circumstances under which the validity of legal transactions and acts of adult women required the insertion of the *auctorita* of a *tutor* so far as relates to such women who were Roman citizens; and thus discuss the requirement in relation to adult peregrine women resident in the Province, as if it applied also to them. I will later discuss whether the validity of similar transactions and acts of peregrine women who were resident in the Province also required the insertion of the *auctoritas* of a tutor.

[3] See Chapter 4.
[4] Gaius 1. 144-145, 190, 194.
[5] *Dig* 26. 8. 9. 5.

However, an adult woman was able, without that *auctoritas,* to participate in legal transactions, including *stipulationes,* in so far as they were to her benefit.[6] Thus no Roman law rule required the intervention of a tutor for Babatha's mother Miriam to accept land by way of gift from her husband Jesus, or Yehudah's daughter Shelamzion to accept land given to her by him, or to accept the cession of land in her favour by the tutor and supervisor of the orphaned nephews of Yehudah.[7] No tutor appears to have been present with Miriam or Shelamzion or to have authorized the acceptance of those gifts of land, and it appears to have been unnecessary that Shelamzion should have been accompanied by and have had the *auctoritas* of a tutor in relation to the cession of land to her, although obligations in favour of Shelamzion were novated by a *stipulatio*. It is possible that the fact that the undertakings in her favour were novated by the *stipulatio* made by Besa and perhaps by Julia Crispina in making the cession was thought to require that she act only with the *auctoritas* of a tutor, if that is what was meant by the formula διὰ ἐπιτρόπου αὐτῆς … τοῦδε τοῦ πράγματος χάριν, which occurs in the cession of land in her favour. However nothing required that Shelamzion act with the intervention of a tutor, since the transaction was wholly to her benefit and she made no undertaking by *stipulatio*. Nor was it necessary for Babatha to have had the *auctoritas* of a *tutor* to enable her to accept undertakings, made or novated by *stipulatio,* made by Simon to harvest her date crop or by her husband Yehudah to return her deposit.[8]

Moreover an adult woman could engage in other transactions without the intervention of a *tutor*. Although an adult woman could not engage in legal proceedings by way of *legis actio* or *iudicia legitima* without the *auctoritas* of her *tutor,* she could become a party to legal proceedings that were *iudicia imperio continentia,* such as those to which a peregrine was a party or those outside Rome, without that *auctoritas*.[9] Accordingly, neither Babatha nor any other adult woman who was a party to the proceedings before the governor of the Province to which documents in her archive relate, required the *auctoritas* of a *tutor* to become a party to them. However in some cases Babatha was, in fact, accompanied by a *tutor,* and in her summons against the tutors of her son Jesus and her deposition in the proceedings, and in the record of the summons brought by Julia Crispina against her, Babatha stated that she acted διὰ ἐπιτρόπου or δι' ἐπιτρόπου, although she did not require his *auctoritas* to do so.[10]

[6] Gaius 3. 107-108; *Dig* 26. 8. 9. pr.
[7] *P Yadin* 7, 19-20.
[8] *P Yadin* 20, 17.
[9] *Tit. Ulp.* 11. 27; Gaius 4.103-105.
[10] *P Yadin* 14-15, 25.

An adult woman could alienate *res nec mancipi,* which included provincial land, without the intervention of a *tutor*, so that Babatha did not need the *auctoritas* of a *tutor* to enter an agreement for the harvesting of the crops of her palm groves, unless it was required for some other reason.[11] She could, because it involved the transfer of *res nec mancipi* only, deposit money with Yehudah under a contract of *depositum* and could provide by delivery (*datio*) a dowry (*dos*) that consisted of *res nec mancipi* only, such as money;[12] and Salome Komaïse could, without the intervention of a *tutor,* upon her marriage validly provide a dowry consisting of κοσμίαν γυναικίαν ἐν ἀργύρῳ κα[ὶ] χρυσῷ καὶ ἱματισμῷ, which were *res nec mancipi.*[13]

An adult woman could give a valid receipt and release but not a fictional release by *acceptilatio,* so that Babatha could accept the payment of maintenance for her son Jesus, and give a valid receipt for it without the intervention of a tutor.[14] Babatha was in fact accompanied by her tutor who is expressed to have subscribed ὑπὲρ αὐτῆς γράφοντος and who subscribed [διὰ ἐπιτ]ρόπου αὐτῆς Βαβελις Μαναήμου. The presence of the tutor appears unnecessary and it is not clear that he did more than execute the document on her behalf.

It is not clear that the making of her census declaration was a transaction the validity of which depended upon Babatha having obtained the *auctoritas* of a *tutor,* since no text requires it and it did not amount to a transaction to her detriment.[15] When she made her declaration, Babatha was accompanied by a *tutor*, her husband Yehudah, whose subscription, as translated into Greek, was Ἰουδάνης Ἐλαζάρου ἐπιτρόπευ[σ]α καὶ ἔγραψα ὑπὲρ αὐτῆς. It is not shown that this recorded the insertion of *auctoritas,* but in the absence of a clear requirement for it, it is better to regard it as no more than a statement that he had accompanied her and written on her behalf, since she is otherwise shown to have been illiterate.[16]

However, the *auctoritas* of a *tutor* was required by adult women, "si se obligent, si ciuile negotium gerant" and this included incurring an obligation, or releasing an obligation by *stipulatio*.[17] Gaius makes it clear that a *stipulatio* made by an adult woman without the *auctoritas* of a *tutor* was *nulla* or void.[18]

[11] Gaius 2. 14a, 80; P *Yadin* 21-22.
[12] *P Yadin* 17; *P Yadin* 10; *Gaius* 2. 80-81; Buckland & Stein (1963: 167).
[13] *P Yadin* 37 = *XḤev/Se* 65.
[14] Gaius 2. 85; *P Yadin* 27.
[15] *P Yadin* 16.
[16] *P Yadin* 15: Ἐλεάζαρος Ἐλεαζάρου ἔγραψα ὑπὲρ αὐτῆς ἐρωτηθεὶς διὰ τὸ αὐτης μὴ ε<ἰ>δένα<ι> γράμματα.
[17] *Tit. Ulp.* 11. 27.
[18] Gaius 3. 176.

Because she novated her obligations in the agreement by which she contracted for the harvesting of the date crop on groves formerly the property of her late husband Yehudah, by the *cautio* of a *stipulatio*, but apparently for no other reason, the rules of *tutela* would have required that Babatha had previously obtained the *auctoritas* of a *tutor* before making the agreement, and indeed Babatha is described as being accompanied or authorised by her ἐπίτροπος or *tutor*.[19] The papyrus is defective but appears to have read: [δι]ὰ ἐ[πιτρ]όπου αὐτῆς καὶ ὑπογράφοντος Ἰωάνης Μαχχουθας. It was subscribed in the name of Babatha and also by the ἐπίτροπος, described as κύριος, in the form YWḤN' BR MKWT' 'DWNH KTBT 'L PWM BBT' or that he subscribed at the command of Babatha. It appears therefore that Babatha's *tutor* was not only present at the time of the conclusion of the agreement, but, as I suggest, inserted his *auctoritas*.

Since the insertion of the *auctoritas* of a tutor was necessary to validate an undertaking by *stipulatio*, it is a reasonable inference that the expression διὰ ἐπιτρόπου represents the Latin "tutore auctore" which in the tablets from Pompeii and Herculaneum of the first century CE shows the insertion of the *auctoritas* of the *tutor* of a woman. *Vadimonia* made by women in the form of stipulations from the first century CE from Herculaneum are in the form "sp[op]ondit Cala[toria] Themis tutore autor[e C Petro]nio Thelesphoro" or "tutore auctore" or with the expression "tutore auctore" abbreviated to "t. a.", which shows that by that time the written notification of the insertion of the *auctoritas* of the *tutor* was treated as evidence of its actual oral insertion. In my view the use of the expression διὰ ἐπιτρόπου, at least in cases in which the insertion of the auctoritas of a tutor was required in Roman law, was the Greek equivalent of "tutore auctore".[20] The correctness of this form is shown by its use by Cicero in legal speeches, by Apuleius in his *Apology*, and also in the Flavian period in the municipal constitution of a *municipium* in the senatorial province of Baetica, the *Lex Municipii Salpensani*.[21]

The use of the expression διὰ ἐπιτρόπου in the sense of "representation" is not noticed either by Hugh J. Mason in his study of Greek terms for Roman institutions, by the editors of the Greek documents from the archives, or by the editors of the current edition of Liddell and Scotts's *Greek-English Lexicon*.[22] However Hans-Albert Rupprecht discussed the use of the expression διά with the genitive case in that sense, referring to material cited by Leopold

[19] *P Yadin* 22.
[20] *TH* XIII, LIX, XIV.
[21] Cic. Caecin. 72; Flac. 84; Apul. *Apol.* 101; Lex *Salp.* ch 34 = *CIL* 2. 1963 = *FIRA* i. No 23.
[22] Mason (1974); Lewis (1989).

Wenger, who noted also the use of διά with the genitive case in the sense of agency.[23] That usage is well attested not only in Classical Greek texts, for example: δι' ἑρμηνέως, describing Tissaphernes addressing the Greeks through an interpreter; τῶν δι' ἑαυτῶν κτησαμένων, the acquisition of rule through one's own agency; and δι' ἀγγέλων or δι᾽ ἀγγέλου, the use of messengers;[24] but also in papyri, as: δι' ἑνὸς τῶν περὶ σε ὑπηρ[ε]τῶν μετα[δο]θῆναι, service of a summons by an *apparitor*; and in papyri in Babatha's archive, ἐγράφη διὰ Γερμανοῦ λιβλαρίου or the like, that the document was written by a named scribe.[25] A similar use of the expression διὰ ἐπιτρόπου is found also in a cancelled marriage agreement made in the province of Judaea in about 130 CE.[26] In some cases, those referring to messengers or interpreters, there is little distinction to be made between uses indicating representation and agency.

Although the renunciation of claims by which Salome Komaïse released claims against her mother Salome Grapte was not by *acceptilatio*, and although in its present, fragmentary form it contains no executory promise that could effectively be novated by a *stipulatio*, since she did novate the agreement by a *stipulatio*, it appears that, if she were a Roman woman, the insertion of the *auctoritas* of her tutor would have been required, because of that novation by *stipulatio*, but also because her renunciation was to her detriment since it diminished her assets.[27] The editors of the papyrus proposed the supplement to the text [πίστει ἐπηρωτήθη καὶ ἀνθωμολογήθη ο]ὕτως καλῶς γένεσ[θαι], which corresponds with the form of *cautio* used in papyri forming part of Babatha's archive.[28] That Salome Komaïse was accompanied by a tutor follows from a reasonable reconstruction of the papyrus such as that proposed by the editors: του [... συμπαρόντος αὐτῇ ἐπιτρόπου ....]υ Σιμωνος ἀνδρὸς αὐ[τῆς] τοῦδε τοῦ ... πρ[άγματος χάριν], which would indicate the presence of a tutor but not the insertion of his *auctoritas*. However, a reconstruction which included the expression διά which would indicate the insertion of the *auctoritas* of a tutor, would not only apparently be possible but would accord with the obligations of *tutela*.

Further, in her deposition in her proceedings against the tutors of Jesus, Babatha proposed to them that they should pay or deliver to her the property of Jesus that they held, and that she should give security by hypothec over her own property for her due administration of it.[29]

[23] Rupprecht (1994: 106-7); Wenger (1906: 9-11)
[24] Xen. *An.* 2. 3. 18; *Cyr.* 1. 1. 4; Hdt. 1. 69, 6. 4; see also LSJ s. v. διά, A. III. a.
[25] *BGU* 1. 226 = *FIRA* iii. No 167 = *M Chrest* 50; *P Yadin* 20, 22, 23, 26.
[26] *XḤev/Se* 69; see Chapter 5.
[27] *XḤev/Se* 63.
[28] Cotton & Yardeni (1997: 198-199).
[29] *P Yadin* 15.

Babatha is stated to have made the deposition διὰ ἐπιτρόπου αὐτῆς τοῦδε τοῦ πράγματ[ος Ἰούδου Χ]θουσίωνος ὃς παρὼν ὑπέγραψεν, which indicates the insertion of the *auctoritas* of her *tutor,* who subscribed Βαβαθας Σίμωνος ἐμαρτυροποιησάμη<ν> κ̣α̣τὰ Ἰωάνου Ἐγλα καὶ Ἀ<βδ>αοβδα Ἐλλουθα ἐπιτρώπων Ἠσους υ<ί>ο<ῦ> μου ὀρφανοῦ δι᾽ ἐπιτρόπου μου Ἰούδα Χαθουσ̣ίωνος ἀκο̣λ̣[ο]ύθω̣ς τε̃ς προγεγραμμένες ἐρέσασιν. Ἐλεάζαρος Ἐλεαζάρου ἔγραψα ὑπὲρ αὐτῆς ἐρωτηθεὶς διὰ τὸ αὐ̣τη̣ς μὴ ε<ἰ>δένα<ι> γράμματα. Giving such security was the undertaking of an obligation that would have required the insertion of the *auctoritas* of a *tutor,* and no doubt it was for this reason that he was present and inserted his *auctoritas* although Babatha did not need the insertion of *auctoritas* to commence those proceedings.

The Greek expression ἐπίτροπος occurs in the papyri from the archives that were written in Greek as a translation of Latin *tutor* in the senses of both *tutor impuberum* and *tutor mulierum,* but, since there is no instance of a *tutor impuberis* in the archive of Salome Komaïse, in the latter sense only in that archive. Hans Julius Wolff argued that the tutorship of women disclosed in the archives did not reflect a Hellenistic view, and that, since the proper use of the Greek expression ἐπίτροπος referred only to one who administered the property of another, the use of the expression for *tutores* both of *impuberum,* in which tutors administered, and *mulierum,* in which they did not, reflected Roman influence.[30] Thus in the archives ἐπίτροπος appears as a translation of the Latin *tutor* in relation to both *tutores impuberum* and *tutores mulierum,* following the usage of Roman law.[31]

Cotton, describing this suggestion of Wolff as one of great plausibility, argued that the use of the expression ʾDWN or κύριος referred to an institution of "old Attic law", that of the κύριος or lord and master of a woman who could not hold property. She held that, when women became able to hold property, the institution "degenerated therefore into that of an assistant ... mere lip service to an older legal system," which survived in "Ptolemaic Egypt, but perhaps not in the Seleucid sphere of influence, since he is absent from the Greek papyri from Dura-Europus and from the recently published papyri from Mesopotamia".[32] She pointed out that in two cases, in which the other party to the transaction is her husband Yehudah, whom one would expect to be her *tutor,* the *tutor* is another male person "for the obvious reason that (they)

[30] Wolff (1980: 793-6)
[31] Gaius 1. 145, 189-190;
[32] Cotton (1997a: 268-9).

involve the husband and wife as the two opposing parties to a contract creating a state of obligation between them".[33]

Oudshoorn regarded Cotton's argument as being that the institution of *tutela mulierum* in the archives was "formal" in the sense of being "without contents" and rejected it on the ground that in Egypt a woman could have her husband as her tutor even when selling land to him.[34] She regarded the institution of *tutela mulierum* not as "a remnant of an older substantive institution" but as "a concession to Roman formal law, independent of the substance of the legal act".[35]

In no operative part of any of the documents in the archives is the expression 'DWN or its translation κύριος used, but in the subscriptions to some documents either Babatha's ἐπίτροπος referred to himself as her 'DWN or, in the case of her deposit with Yehudah, he acknowledged receipt of the money deposited BMND' Y'QWB 'DWN "with the knowledge of Ya'qob, her Lord".[36] In subscriptions to two documents in the archives the expression 'PTRP, a transcription of the expression ἐπίτροπος, was used to describe the *tutor* of an *impubes.*[37] Oudshoorn accepted that the eastern laws did not know the institution of guardianship of women and says that "(o)ne gets the impression that ('DWN) is the translation of ἐπίτροπος used for the guardian of a woman, *in this specific situation of Roman influence,* to express the difference", that is the scribes used the expression 'DWN not to cover the Greek κύριος, but as a translation of ἐπίτροπος as "guardian of a woman". She regarded this as showing that the scribes were aware of "the differences between Roman terminology and local understanding, or more broadly, Roman and eastern culture".[38] The only legal framework to which the apparent need for the presence of a *tutor* and the insertion of his *auctoritas* applied, is that of Roman law, to which the documents in principle conform, since in those cases in which that *auctoritas* would have been required, the record appears to state that it was inserted, shown by the use of the expression διὰ ἐπιτρόπου. 'DWN was not a translation of *tutor* and accordingly would not have been an appropriate expression for such a tutor.

[33] *P Yadin* 17; *XḤev/Se* 65; Cotton (1997a: 271).
[34] Oudshoorn (2007: 361-4). She regarded the institution of *tutela mulierum* as of "Roman formal law" since the *tutor* did not administer the property of the woman whereas in *tutela impuberum,* which Oudshoorn regarded as being of "Roman substantive law", he did administer the estate of the *impubes*; see (2007: 360-2)
[35] Oudshoorn (1997: 376).
[36] *P Yadin* 15, 22, 17.
[37] *P Yadin* 20, 27.
[38] Oudshoorn (2007: 367).

In relation to none of the papyri in which some person is expressed to have been present, or to have acted, as tutor, does it appear how the tutor was appointed or whether he in fact interposed his oral auctoritas before the conclusion of the transaction. However I suggest that by the first century CE it was sufficient that there be included in a document requiring the insertion of the *auctoritas* of a *tutor* a written notation and that in relation to *impuberes* and women who were Roman citizens such a rule was imported into the law of the Province with its establishment. It appears that peregrine women in the Province were treated as if they required the insertion of the *auctoritas* of a *tutor* but the inclusion in a document of a written notation of it was sufficient. A similar position had been achieved by Gaius' day so that a written *cautio* of a *stipulatio,* such as is found in documents from the archives and in contracts from Herculaneum and Pompeii, was evidence of an oral agreement by way of *stipulatio*.

Cotton has argued that in the Greek documents from the Judaean Desert a tutor "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", shown by the formula διὰ ἐπιτρόπου αὐτῆς, but that "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 according the presence of the ἐπίτροπος".[39] Oudshoorn does not appear to have discussed the expression διὰ ἐπιτρόπου.

In my view, however, the issue is rather whether under the rules of *tutela* the insertion of the *auctoritas* of a *tutor* was required and in those cases the use of the expression διά should be taken to show that the *auctoritas* of a *tutor* was treated as inserted; where the woman undertook no obligation or action, or undertook one for which the *auctoritas* of a tutor was not required, there was no requirement even for the presence of a tutor. Accordingly, it is my view that neither Cotton nor Oudshoorn appropriately consider the distinction between the expressions συμπαρόντος ἐπιτρόπου showing merely the presence of a *tutor* and διὰ ἐπιτρόπου showing the insertion of his *auctoritas,* or the circumstances under which Roman law, whether expressed as formal or substantive, required the insertion of that *auctoritas.*

The only cases in Babatha's archive in which we may be certain that, if peregrine women were subject to *tutela,* the insertion of the *auctoritas* of a tutor would have been required, were the agreement of Babatha for the harvesting of the date crop by Simon, and the renunciation of claims of Salome Komaïse in favour of her mother, in each case because their obligations were

[39] Cotton (1997a: 270-271).

novated by *stipulatio,* and because Salome Komaïse's renunciation was to her detriment.[40] For the reasons given above, in the former case it seems that Babatha did act with the *auctoritas* of her tutor and in the latter the form of the papyrus, because of its fragmentary state, leaves open the question whether Salome Komaïse did so. If Babatha would have required the *auctoritas* of a *tutor* to make the offer to the *tutores* of Jesus contained in her *testatio,* it seems that she had obtained it.[41]

The acknowledgement of cession of land in favour of Shelamzion by Besas the *tutor* of the infant nephews of Yehudah and Julia Crispina the ἐπίσκοπος, would normally have required the intervention of a *tutor* of Julia Crispina, since it may be, but is not certain, that her obligations, as well as those of Besas, under the agreement were novated by *stipulatio.*[42] Since she was not a *tutor* of the orphans she had no position that required her to join Besas in the cession of land to Shelamzion and accordingly it is likely that she did not join in the *stipulatio* in favour of Shelamzion. In that document Shelamzion is expressed to have acted διὰ ἐπιτρόπου αὐτῆς … τοῦδε τοῦ πράγματος χάριν, although there were no circumstances that required the insertion of the *auctoritas* of a *tutor,* but nothing suggests the intervention of a *tutor* of Julia Crispina. If she did join in the *stipulatio* in favour of Shelamzion, the most reasonable explanation for the lack of intervention by a tutor, is that Julia Crispina was entitled, on a basis that we do not know, to the *ius liberorum,* which would have freed her from *tutela* under the *Lex Iulia et Papia Poppaea.*[43] Tal Ilan suggests that she was the granddaughter of Queen Berenice and King Herod of Chalcis, and if this is correct, as she was thus a Herodian and "important and wealthy", then it is possible that the *ius liberorum* had been conferred on her.[44] However, this cannot be taken as certain since we have not sufficient knowledge of her circumstances: although her name shows her to have been a Roman citizen we cannot say whether she had the required number of children or whether she had received any grant of *ius liberorum*. The *leges* under which the institution of *ius liberorum* applied were in force in the Province in relation to Roman citizens.[45]

None of the documents in either archive in which the presence of a tutor of an adult woman is shown, discloses how such a tutor may have been appointed. The power to appoint tutors in the Province was held by the governor of the Province under the provisions to the *Lex Iulia et*

[40] *P Yadin* 22; *XḤev/Se* 63.
[41] *P Yadin* 15.
[42] *P Yadin* 20.
[43] Gaius 1. 145.
[44] Ilan (1992: 370, 377-379).
[45] See Chapter 2.

Titia.[46] That power was exercised by the prefect of Egypt and prefects are recoded as making appointments of tutors for women who were without them under the provisions of that *Lex* and a *senatus consultum*.[47]

In Italy, by the first century CE, some municipal magistrates also had power to appoint tutors for adult women under the provisions of that *Lex*, since no later than 79 CE a *duovir* of Herculaneum appointed under it a tutor for a woman who was without one. That is shown by a tablet dated no later than that year, which, according to the revised reading of Arangio-Ruiz, records such an appointment, made by a named *duovir*:

> ex decurionum decre[to quo ne ab] iusto tutore [tutela abeat ex] lege Iulia [Titia et ex s. c.],[48]

Under the provisions of the *Lex Irnitana* tutors might in some circumstances be assigned to a *municeps*, male or female, by one of the *duoviri*, in some cases after a decree passed by the *decuriones* of the *municipium*.[49] By the time of Paul, who wrote at the end of the second century CE, appointments of tutors might be made by a majority of *decuriones*, or municipal councillors, in the absence of the municipal magistrates.[50] Moreover from the time of Ulpian, who was killed in 225 CE, all municipal magistrates had power to assign tutors from their municipality, and we know also of later appointments of tutors to infants by delegates of the Prefect of Egypt.[51]

It is not clear that by the time of the archives municipal magistrates in the Province had the power to appoint tutors. However at that time the βουλή of the city of Petra certainly had power to appoint tutors of an infant, presumably by virtue of a power in its constitution and presumably limited to a particular geographical area, but we have no evidence of it having any power to appoint tutors for adult women who were Roman citizens.[52] It may have been on the basis of the situation of Maḥoza in the περίμετρος Πέτρας that the βουλή of the city of Petra had power to appoint tutors to Babatha's son Jesus who appears to have resided with her at Maḥoza.[53] If so, it may also have had power to appoint tutors for adult women who were Roman

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[46] Gaius 1. 183, 185.
[47] See those orders quoted above.
[48] *TH* 13; see Corte (1951: No 13, 228); the reading of Arangio-Ruiz is recorded *apud* Mélèze-Modrzejewski (1972: 271-272).
[49] Lex *Irni.* ch 29.
[50] *Dig.* 26. 5. 3, 19,
[51] *Dig* 26. 5. 3; those appointments include that recorded in *P Oxy* 6. 888 of the late third or early fourth century CE.
[52] *P Yadin* 12.
[53] *P Yadin* 18.

citizens and resided within the περίμετρος and who required the appointment of a tutor. It would also have been open to the governor to appoint under the *Lex Iulia et Titia*.

The insertion of the *auctoritas* of some tutors of women was, according to Gaius, a matter of form so that a tutor of an adult woman could be compelled by the praetor and no doubt the governor of a province to insert his *auctoritas.* That the insertion of his *auctoritas* might be a matter of form appears to be reflected by the subscription of Babatha's counterpart agreement for the harvesting of a date crop by a tutor who stated that he did so by her order. He apparently regarded himself as bound to insert his *auctoritas* since he was ordered to do so by her.[54] In some cases in the archives, the tutor who was present at the execution of the document was described as being tutor τοῦδε τοῦ πράγματος χάριν, which appears to represent a tutor appointed temporarily for a particular situation, such as one appointed to act where a the husband of a party could not be *tutor* since he was a party in an interest different from that of his wife: such a *tutor* was appointed to act as Babatha's *tutor* for her deposit of money with Yehudah.[55] However not all such tutors were so described and Yehuda was similarly described when he acted at *tutor* for Babatha for her summons and *testatio* against the *tutores* of her son Jesus.[56] Gaius records a *senatus consultum* under which a woman might apply, presumably to the governor of a province or to other persons empowered to appoint tutors, for a tutor *in absentis tutoris locum,* who need not have been far away.[57] The appointments by the *duovir* and by the prefect of Egypt that are set out above were such appointments.

However since it is not clear that *tutela mulierum* applied to peregrine women resident in the Province, we cannot be satisfied that this was a power that could be exercised. Nor can we be satisfied that any formal appointment of such a *tutor* was made for any peregrine woman resident in the Province. Since no record of any appointment of a tutor for a woman made in the Province, including one made in substitution for an absent tutor, is known, we cannot show that such appointments were made either under the provisions of the *Lex Iulia et Titia*, by the governor of the Province, or by any other authority with power to appoint tutors to women who were Roman citizens and resident in the Province.

In the absence of any document showing such an appointment we can say no more than that it is likely that appointments were made informally by arrangement between the women and the

[54] Gaius 1. 190; *P Yadin* 22.
[55] *P Yadin* 17
[56] *P Yadin* 14-5.
[57] Gaius 1. 173; the records of appointments made or apparently made by prefects of Egypt to which I refer in Chapter 2 are of appointments of *tutores* for women who were, to judge by their names, Roman citizens.

persons who were to act as tutors. Except for Julia Crispina, all persons who were parties to agreements or litigation evidenced in the archives were Jewish, and it is possible that such informality was accepted in the Jewish community in the Province. It seems that it was supposed by members of that community in the Province that, whether or not required by law, the presence of a tutor or the insertion of his *auctoritas* was necessary to render certain types of agreement or legal act effective when made by a woman. It may, alternatively, perhaps have been thought that the presence of a tutor or the insertion of his *auctoritas* would be advantageous in litigation in the court of a Roman official of the Province, or even useful in case any doubt arose as to its necessity. Whether Nabataean women resident in the Province took the same position on *tutela mulierum* we cannot say. However we can say that on the available material there was probably no compulsion on the part of peregrine women resident in the province to undertake the obligations of *tutela,* and that accordingly they were probably free to do as they chose.

Part 3 - *Tutela Impuberum*

No inscription from the period of the Nabataean kingdom or document among the archives shows any Nabataean infant carrying out or taking part in legal acts either before or after the establishment of the Province and there is thus no evidence of any legal requirement under Nabataean law that such an infant be accompanied or authorised to do so by a person in the position of a tutor or guardian.[58]

Although the rules of Jewish law allowed a Jewish father, or if he did not do so, a Jewish court, to appoint a guardian for an infant, no document in Babatha's archive shows the exercise of that power.[59]

Both cases of guardianship or tutorship of infants of which there is evidence in the archives are of appointments for Jewish infants but appear to be cases of *tutela impuberum* in accordance with Roman law, so that either there was no appointment under the Jewish law power or for some reason of which we have no knowledge it was not possible to put it into effect.

[58] See Chapter 4.
[59] *mKet 9. 4; mGit* 5.4; *tBB* 8. 17; Ilan (1995:172); (1992: 378-9); see Chapter 5.

Those cases of appointment of tutors or guardians are those of *tutores* for Jesus, the infant son of Babatha and her deceased husband Jesus, and of a *tutor* for the infant orphaned nephews of her second husband Yehudah.

The appointment of *tutores* for Babatha's son Jesus was made in 124 CE by the βουλή of the city of Petra, and it appears from a receipt for maintenance received by Babatha in August 132 CE that a substitutionary appointment of tutor was also made by the βουλή of Petra.[60] Those appointments were made under Roman rather than Jewish law as is shown by the use of expressions which are translations and transliterations of Roman law terminology, as ἐγγεγραμμένον καὶ ἀντιβεβλημένον the normal translation of *descriptum et recognitum* or "verified exact copy", and ἄκτα, a usual transliteration of the Latin *acta* or record of transactions and indeed by the use of the expression ἐπίτροπος in the sense of "tutor". As Lewis has observed, the record "reads like a Greek translation of a Latin original".[61]

It is clear that the βουλή had the power to appoint tutors in such cases, since Babatha was able to commence litigation before the governor of the Province, probably with his *auctoritas,* treating those *tutores* as properly appointed under Roman law. Thus in her petition to the governor she probably sought an order fixing the maintenance that the *tutores* should pay to Jesus, a matter likely within the power of the governor.[62] Further in her summons addressed to one of the *tutores* Babatha sought to remove him as a *suspectus tutor* who had breached his obligations under Roman law, a matter within the jurisdiction of the governor.[63] In her deposition made in that litigation Babatha made an offer to the *tutores* to take over from them the administration of the property of Jesus and to indemnify them against liability to him, by which she would incur a liability from which she would otherwise have been protected by the provisions of the *senatus consultum Velleianum.*[64] The offer was made since Babatha could not, as a woman, be appointed tutor to Jesus under Roman law without having petitioned the Emperor, as a text of Neratius, who wrote in the reigns of Trajan and Hadrian, shows.[65] Nothing suggests that she had made such a petition, and she did not seek appointment as tutor. Babatha also had in her possession copies of a *formula* for an *actio tutela,* an action that might be taken under Roman law at the end of a *tutela* established under that law. The assumption upon which Babatha had them was, in my view, that proceedings would be commenced against the *tutores*

[60] *P Yadin* 12, 27.
[61] Lewis (1989: 48).
[62] *P Yadin* 13; *Dig* 27. 2. 3. pr; 27. 2. 1. pr; and see Chapters 2 and 3.
[63] *P Yadin* 14; see Chapters 2 and 3.
[64] *P Yadin* 15; see Chapters 2 and 3.
[65] *Dig* 26. 1. 16, 18.

in an *actio tutelae,* after the conclusion of the tutorship of Jesus. For all these reasons it should be accepted that the *tutela* of Jesus was established under Roman and not under either Nabataean or Jewish law.

It appears probable that the appointment was made on the application of Babatha as the mother of the *pupillus* Jesus since she had an effective obligation to do so.[66]

Oudshoorn held that the papyri in the archives "cannot answer general questions as to who could be guardian, or how guardianship was appointed, since we are dealing with a very specific situation here". She said that because of that "very specific situation", "one can wonder whether there is any indication at all that Roman law played a part here, other than on a formal level".[67] She seems not, however, to have taken into account the relief that Babatha sought in her proceedings before the governor or her offer to the tutors of Jesus. As part of the specific situation Oudshoorn referred to the fact that Babatha's late husband Jesus and his brother Joseph had been in partnership, that after the death of his father the supervision of the son's property had been in the hands of Joseph, and that the appointment of the tutors was made some time after the death of the elder Jesus. She held that the appointment "cannot be considered to see to guardianship over a minor or a deceased's estate *directly following his death".* It is not, however, apparent, and she did not show, that any delay was of legal significance.[68] Czajkowski says that the appointment was "so far as we know - not at Babatha's prompting" since there is no record showing her or anyone else to have done so, but without discussing her obligation to do so. She says that the fact that Babatha was not appointed fits "the general tenor of Roman legal provisions".[69]

The suggestion of Lewis that the "naming of two guardians was presumably dictated by local custom" appears unnecessary, since it was permissible under Roman law to appoint a plurality of tutors, and indeed he points to an example of such an appointment.[70] Czajkowski says that "there has been some dispute as to whether the appointment of two guardians followed local

[66] See Chapter 3.
[67] Oudshoorn (2007: 301, 306).
[68] Oudshoorn (2007: 305-6); Joseph, referred to by Babatha in her petition to the governor, was the brother of Jesus the former husband of Babatha and uncle of her son, and not the same person as the brother of Babatha's father Jesus, also called "Joseph" who acknowledged that he held a deposit for her husband Jesus (*P Yadin* 13, 5).
[69] Czajkowski (2017: 50-1).
[70] *P Yadin* 12; Lewis (1989: 48); Thomas (1976: 460-1).

or Roman custom", without, however, offering an opinion.[71] Cotton referred to Lewis's suggestion but likewise expressed no opinion.[72]

The evidence for the tutorship of the orphan nephews of Yehudah is contained only in a summons by which Besas, as ἐπίτροπος or *tutor,* summoned Babatha before the governor of the Province and a deposition made for the purpose of those proceedings;[73] a record of proceedings between Julia Crispina as ἐπίσκοπος or supervisor of them and Babatha;[74] and an instrument by which Besas as *tutor* and Julia Crispina as supervisor acknowledged that they had ceded a courtyard to Shelamzion.[75] No copy of any instrument of appointment, or any explicit statement of the manner of the appointment has been discovered, and it is thus not possible to say by whom and by what authority Besas was appointed.

Thus associated with Besas in proceedings against Babatha and in the cession in favour of Shelamzion was Julia Crispina who is described in the archive as ἐπίσκοπος or supervisor of those orphans. Whatever her status, because she was a woman, she could no more than Babatha normally be a Roman law *tutor,* and she did not assert that she was. Although it seems that her position is to be contrasted with that of Besas it is not possible on the material available to state whether she had any responsibliltites or powers recognised by law or whether and by what authority she was appointed. Despite her lack of capacity to be *tutor,* and indeed referring to the difference in title between her and Besas, Czajkowski nevertheless points to her 'personal high status' and says that 'we should not and cannot make a blanket statement that women could not be guardians (*tutores*) in this area, since one woman, Julia Crispina, seems to act in such a capacity in another case for Judah's (Yehudah's) nephews'. Czajkowski suggests that Julia Crispina could use her high status to 'act in slightly unorthodox ways' and describes Besas as the 'male co-guardian' of Julia Crispina. I do not accept this view since we can say no more of her legal position than is set out above, although we may suppose that she looked after the orphans in some way.[76] Cotton said of her that she "seems to share the duties of guardian", and that she "is their caretaker, she looks after them and their interests." She suggested an adaptation of local custom.[77]

[71] Czajkowski (2017: 50).
[72] Cotton (1993: 100).
[73] *P Yadin* 23-24.
[74] *P Yadin* 25.
[75] *P Yadin* 20.
[76] Czajkowski (2017: 51, 57-8).
[77] Cotton (1993: 96-7).

Against Besas having been appointed as a Roman law *tutor* is the association with him, as supervisor, of Julia Crispina who as a woman was incapable of being a tutor under Roman law; however she does not seem to have purported to act as such, but only as, in some sense, a supervisor of the orphans, perhaps rather as having charge of their persons. However, she was not capable of appointment as guardian of the infants under Jewish law.

In favour of Besas having been so appointed is the fact that all claims he made against Babatha were brought on behalf of the orphans before the governor, and perhaps more significantly they were brought by Besas in his own name. We do not have independent evidence of the ages of the orphans but we may infer that none of them was one "qui iam aliquem intellectum habet" and that they were ones "qui fari non possunt," since, in those circumstances it was in accordance with Roman law for Besas to bring as he did proceedings against Babatha in his own name rather than to authorise proceedings in the name of the orphans.[78] Although the claim for the orchards that he made against Babatha appears to have been based on the Jewish rules of inheritance later set forth in the *Mishnah,* he sought relief on the basis of his assertion that she had seized the orchards βίᾳ or by force and accordingly by invoking the jurisdiction of the governor to grant possessory interdicts. That relief was available to him although he was peregrine, and his claim for it shows that he was invoking Roman law in his proceedings.[79] It does not appear that the instrument of acknowledgement of cession in favour of Shelamzion amounted to a gift by Besas as *tutor* to her since it seems to have determined a dispute between them on the basis that the courtyard had been the property of Shelamzion; in that event it was not a gift and it would have bound the orphans.[80] Moreover, that instrument contains a *cautio* of a Roman law *stipulatio* made in her favour, which shows that it was intended at least on her part that it be enforceable in proceedings before the governor of the Province as a *stipulatio*. These considerations do not compel a conclusion that Besas was Roman law *tutor* of the orphans, but we should on balance conclude that he was.

[78] Gaius 3. 109; *Dig* 26. 7. 1. 2.
[79] See Chapters 2 and 3.
[80] *Dig.* 26. 7. 22.

Part 4- *Tutela* as a *Munus Publicum.*

Tutela, whether of infants or of women, was in Roman law a *munus publicum* so that a person who was qualified was bound to serve unless excused.[81] Thus the βουλή of the city of Petra appointed tutors, neither of whom claimed to be a Roman citizen, for Babatha's son Jesus, and Besas, who was not apparently a Roman citizen, was appointed tutor for the infant nephews of Babatha's second husband Yehudah.[82] In her proceedings against those tutors of her son Jesus and in her defence of the proceedings brought aginst her by the tutor of Yehudah's nephew Jesus she says nothing to suggest that those tutors were ineligible, and they do not appear to have been entitled to an *excusatio.*[83] We may accirdingly take it that they were eligible to be appointed and had no effective *excusatio* against being appointed

[81] Buckland and Stein (1963: 149); Thomas (1976: 457).
[82] *P Yadin* 12, 20, 23-5.
[83] *P Yadin* 14-5, 23-5.

Chapter 8 – Taxation in the Province

Part 1 – The Census of 127 CE – *Tributum Agri* and στεφανικόν

Amongst the documents in the archives are copies of two returns of land and of a fragment of a third made at Rabbath-Moab in a census conducted in the Province by the governor in 127 CE. The return of Babatha is substantially complete and relates to land at Maḥoza described as being in the περίμετρον of Petra, is verified by her oath in the form ὄμνυμι τύχην κυρίου Καίσαρος καλῇ πίστει ἀπογεγρά̣φθα̣ι ὡς προγέγρα̣π̣[τα]ι, and is attested by the Aramaic signatures of herself and of five witnesses. It includes a statement that it is a copy of the original which was exhibited in the *basilica* at Rabbath-Moab, which no doubt operated as a district register, and bears a translation of the Latin record of its receipt by the officer who received it, Priscus, ἔπαρχος ἱππέων.[1] The return of Sammouos the son of Shim'on is incomplete, and also relates to land at Maḥoza of which he owned a half share as partner with his brother (με̣τοχῆς τῆς πρὸς Ιωναθην Σιμωνος) and includes a statement that it was exhibited in the *basilica* at Rabbath-Moab.[2] However, it lacks the concluding section which no doubt included his oath, the translation of the record of its receipt by Priscus, and of the attesting signatures of himself and the witnesses. In addition to declaring his land at Maḥoza, Sammouos also declared ἀπ̣ογράφομαι ἐμαυτὸν ἐτῶν τριάκον̣τ̣α̣. The fragmentary return of a son of Levi, whose name is not known, but who may have been a brother of Salome Komaïse, survives only in small fragments including the oath of the maker of it in the form ὄμν̣υμι τύχην Κυρίου Καίσ̣αρος κ[α]λῇ πίστει ἀπογεγράφθαι ὡς προγέγραπται μηθὲν ὑποστειλάμενος and a translation of the record of its receipt by Priscus, lacking not only its substance but also a record of its attesting signatures.[3]

Those returns are evidently concerned primarily with the assessment of *tributum agri* or land tax, in the case of Babatha on four date groves, and in the case of Sammouos on a one half share in a field, and in date groves and possibly a vineyard. In them Babatha and Sammouos described themselves as Μαωζηνή or Μαωζηνὸς τῆς Ζοαρηνῆς περιμέτρου Πέτρας, and their properties by name and as being ἐν ὁρίοις Μαωζων. They each described the area of their land

[1] *P Yardin* 16.
[2] *XḤev/Se* 62.
[3] *XḤev/Se* 61; see also Cotton and Yardeni (1997: 174-176).

not by the normal Roman measure of *iugera* but by what was evidently a Semitic and local Nabataean method, by the quantity of grain that could be sown upon them, in the form σπόρου κρειθῆς σάτου ἑνὸς κάβων τριῶν, but did not describe the agricultural use of their properties beyond their description. Lewis described the Greek expression contained in the returns, as "a literal translation of a Hebrew/Aramaic locution" found in the Hebrew Old Testament and in Rabbinic literature.[4] Each also declared the two nearest or abutting neighbours of their properties. Although they did not ascribe any value to their land, they each described it as "paying" tax – using a present participle of τελέω – particular amounts of dates of various types or particular amounts of money in the Nabataean currency of "blacks" (in various forms of μέλας) and λεπτά, and in the case of some properties an amount of στεφανικόν which was apparently payable in the same currency. Since they thus stated the amount of tax payable rather than the valuation and since, when in 129 CE Salome Grapte gave a date grove at Maḥoza to her daughter Salome Komaïse, she was able to state the quantity of dates payable as tax upon the grove in the future (τελέσει), it is likely that the tax on each parcel of land was fixed.[5] This is supported by the observation of Cotton and Yardeni that in relation to the land declared by Sammouos "(t)here does not seem to be any constant ratio between the rate of the tax and the size of the land, in so far as we have these".[6]

In some respects the information contained in the returns of Babatha and Sammouos is consistent with that required in the "Forma Censualis", regulations for the making of which appear in the *Digest.*[7] Ulpian, writing in the early third century CE, had set out in his treatise *de censibus* what material was to be entered in a return in a census. As it was later recorded in the *Digest* the declaration by the holder of land was to include a statement of the name of each property, the *pagus* and *civitas* in which it was situated, and its nearest two neighbours. It was to include statements of the number of *iugera* of the land that had been sown "intra decem annos proximos", and the number of vines and the number of *iugera* employed as olive groves, and for other agricultural products. The maker of the return was required to value the land: "omnia ipse qui defert aestimet". Since the purpose for making the returns was similar, the assessment and collection of land tax, the similarity in material to be entered is not surprising,

[4] Lewis (1989: 69); the Aramaic locution is found also in conveyances of land from the Judaean desert: see Chapter 4.
[5] *XḤev/Se* 64.
[6] Cotton & Yardeni (1997: 183).
[7] *Dig* 50. 15. 4.

and shows some continuity of practice taking into account the particular conditions in the Province in the second century CE.

The description of their properties as ἐν ὁρίοις Μαωζων marks them as being in that *pagus,* and we should treat the properties as declared as being in the *civitas* of Zoar, as they described themselves as from that place. Cotton has shown that Maḥoza was a village subordinate to Zo'ar as a central village giving its name to the toparchy to which it belonged, even though, as she says, the expression "toparchia" is not used in any document in the archives.[8] In other documents in the archives Maḥoza is described as being περὶ Ζοαραν or περιμέτρῳ Ζοορων or variants of these.[9]

Since both the return of Babatha and the fragmentary return of a son of Levi are verified by an oath, we must presume that the declarant was required to do so. It is unlikely that the declarant would verify by an oath unless required to do so by law. According to the editors of the *Corpus Papyrorum Judaicarum* an oath by the τύχη of the Emperor would ascribe to him superhuman origin and "contradict the principles of Judaism".[10] However, Cotton and Yardeni observe that "(w)e do not possess an example from Egypt of a Jew affixing an oath by the *tyche* of the Emperor to a census declaration", but since we possess a report of death made by an Egyptian Jew and verified by his oath by the Emperor, ὠμνύω Ἀὐτοκράτορα Καίσα[ρα Νέρουα-ca.?-] Τραιαν[ὸν-ca.?-Σεβα[στόν -ca.?-], one can accept their view that Jews of the period were less conscious of the religious implications of such an oath, and that Babatha and the son of Levi "simply followed local custom" in taking the oath.[11] That does not however render it less likely that a return made in the census was required to be verified by such an oath.

The requirement stated in the regulations contained in the *Digest* was that land was to be declared in the *civitas* in which it was situated, "agri enim tributum in eam civitatem debet levare, in cuius territorio possidetur", and it appears that the regulations for the census in the Province included a similar requirement.[12] The responsibility for the actual collection of tax appears to have been cast upon the local authorities, as is suggested by Elio Lo Cascio and Cotton.[13] It seems that the collection of tax in the Province may have been locally organised, since from an Aramaic receipt dated 131 CE it appears that dates were collected from ŠLM,

[8] Cotton (1999: 90-91).
[9] See especially *P Yadin* 18, 30.
[10] Tcherikover & Fuks (1957-64: vol 3, p 214).
[11] Cotton & Yardeni (1997: 178-9); *BGU* 4. 1068 = *CPJ* 2. 427 = *W Chrest* 62.
[12] *Dig* 50. 15. 4. 2.
[13] Lo Cascio (1999: 211); Cotton (2003: 110).

daughter of Levi, who may have been Salome Komaïse, on account of some debt payable in respect of the previous year;[14] and from a receipt in Greek addressed to M[α]να[ημῳ] and dated 125 CE that money in Nabataean currency was collected παρὰ σοῦ ἐκ χερὸς Σαμμούου Σίμωνος on account of dates due to the emperor at Maḥoza (Μαώζᾳ) for the previous year.[15] While one cannot be certain, the receipts are consistent with the collection of tax during the year following that for which it was due, and at the level of the village or perhaps at the level of Zo'ar as the local "toparchy" treated as the *civitas*, for the relief of which it was to be collected.[16] The question remains of the reason for the lodgement of the returns at Rabbath-Moab which was clearly required of the makers. Lewis suggests that Babatha "went to the office that was nearest her own home", and Isaac appears to have accepted that explanation.[17] Although Rabbbath-Moab is indeed closer than Petra to Maḥoza, some other explanation is required and Lo Cascio, in my view correctly, rejected it.[18] That the makers of the returns were free to choose the "office" at which they lodged them is unlikely, and I suggest that administrative convenience may be assigned as the reason for the requirement of lodgement at Rabbath-Moab: Rabbath-Moab was a *conventus* centre and also a place of registration of documents. Since the tax was apparently to be collected locally it was obviously more convenient that the returns be lodged at the nearest centre with the facilities available for their lodgement, collection and processing, and on the information that is available that was Rabbath-Moab.

Both Babatha and Sammouos declared that some of the land they held was liable for the payment of a tax called στεφανικόν apparently payable on some land as an annual tax and, so far as we can tell, in Nabataean currency rather than in kind.[19] This was evidently a Nabataean tax that remained payable in the period of the Province, and probably made so either by the *lex provinciae* or the provincial edict. In the absence of any additional evidence, we cannot state the circumstances under which it was payable or at what rate.

Isaac thought that the census was probably the third held in the Province since its annexation, since such a census was normally held every ten years.[20] Whether or not the requirement in the regulations recorded in the *Digest* that in the return the maker should state the area sown in the

[14] *XḤev/Se* 12.
[15] *XḤev/Se* 60.
[16] Cotton & Yardeni (1997: 60, 62, 166-8).
[17] Lewis (1989: 69); Isaac (2008: 260).
[18] Lo Cassio (1999: 202).
[19] Cotton and Yardeni (1997: 194); in Egypt a tax on land, called στεφάνικον, was levied at the close of the second century CE at least at Oxyrrhynchus: P Oxy 12. 1441; see also Chapter 4.
[20] Isaac (2008: 264).

previous ten years indicates that ten years was then the usual interval between censuses, there is no evidence available to us of any previous census in the Province, and we may doubt that it would have been possible to conduct a census in the year following the annexation of the Province.

The returns of Babatha and Sammouos, and presumably that of the son of Levi, were accepted for lodgement by Priscus and those returns must be taken to have complied with the requirements fixed for that census. The census that was taken periodically in Egypt for the assessment and collection of *tributum capitis* or poll tax was regularly taken pursuant to an edict of the prefect, and we may infer that the census taken in the Province was also conducted pursuant to an edict of the governor.[21] This is suggested also by the similarity of the returns lodged by them, which indicates that they were both complying with regulations that applied generally to residents of the Province. We may also infer that the edict gave full directions in relation to the manner in which it was to be taken, and the manner in which the returns were completed, including that they were to be verified by oath, and where they were to be lodged and where and in what currency the tax was to be paid; it appears that in the edict the governor adopted aspects of Nabataean practice in land registration and taxation, but probably otherwise followed the Roman census system as it then stood.

Since there is no mention of it in the documents in the archives dating from the period of the Province, it cannot be stated whether the leasing tax (ʾKRY) referred to in the conveyances of land made by ʾAbi-ʿAdan in 99 CE continued to be collected under the Province.[22]

Part 2 – *Tributum Capitis*

The only direct evidence relating to whether a poll tax was imposed upon the peregrine inhabitants of the Province is the declaration about himself made by Sammouos in his return which I set out above.[23]

For a census conducted for the purpose of levying *tributum capitis* or a poll tax, the regulations contained in the *Digest* required that any return indicate the age of the persons to whom it

[21] *P Hamb* 1. 60, a return made in the census of 90CE κατὰ τὰ κελεύσθεντα ὑπὸ τοῦ [κρα(τίστου)] ἡγεμόνος and *P Lond*. 3. 904, an edict of the prefect C Vibius Maximus of 104 CE requiring those subject to the census (τῆς κατ᾽ οἰ[κίαν ἀπογραφῆς ἐ]νεστώ[σης]) to return to their own homes; see also Bagnall & Freir (1994: 11).
[22] *P Yadin* 2-3.
[23] *XḤev/Se* 62.

related: “Aetatem in censendo significare necesse est, quia quibusdam aetas tribuit, ne tribute oneretur”.[24] Since liability for the *tributum* depended upon the age of a peregrine resident in a province, the regulations relating to the levy of the *tributum* in the Province during the period of the archives are likely to have included a similar requirement.[25] Accordingly Sammous’ declaration would be relevant to the levy of poll-tax conducted under such regulations.[26] The declaration was regarded by Lewis as “probably no more than a stylistic variation in the declaration formula”, and he regarded the assumption that it was a declaration for a census of persons rather than land as speculative, but Lo Cascio was of the view that it related to a poll tax payable in the province only by men and accordingly Babatha was not required to make such a declaration.[27] Cotton however rejected the view that the declaration related to a poll tax since in Egypt women, who were not liable to the poll tax, were nevertheless registered in the returns of the households of which they were members, and, if the return were to be used in connection with a poll tax, Babatha ought on any view to have registered her son Jesus who was probably resident with her and was of her household.[28] She argued that it was impossible that there was no registration of persons in the Province but that registration of property and persons in the province was separate, just as it was in Egypt.

In my view it would be speculative, for the reasons that Cotton gave, to assume that the returns of which we have copies related both to the land tax and to a poll tax levied on peregrine inhabitants of the Province. We can be sure that such a tax was levied on peregrine inhabitants of the Province, but we have no record of the regulations under which it was levied and on the basis of the evidence available to us cannot state whether it was levied on men or on both men and women, or the ages during which they were liable. Nothing in the archives shows that Babatha or any other of the peregrine inhabitants of whom we have records, had any privilege that would have relieved them of payment of the poll tax. We must accordingly conclude that it was levied by means of returns made under different circumstances, which we cannot state. We may however be satisfied, based on the practice in Egypt that such a census was conducted in accordance with an edict of the governor, determining how it was to be conducted.

[24] *Dig* 50. 15. 3.
[25] Jones (1974: 164-5); Baganall & Frier (1994: 27-8).
[26] *Dig* 50. 15. 3.
[27] Lewis (1985: 136); Lo Cascio (1999: 201).
[28] Cotton (2003: 114-115).

Part 3 – The Jewish Tax

Soon after the destruction of Jerusalem at the end of the Jewish war of 66-70 CE Vespasian diverted the former tax of one half a shekel that Jews, including those of the diaspora, paid as a tax to the Temple, to become an annual tax of two drachmae or denarii on Jews, according to Cassius Dio, τοὺς τὰ πάτρια αὐτῶν ἔθη περιστέλλοντας, to be applied to the rebuilding of the temple of Jupiter Capitolinus in Rome.[29] Although the former tax was paid only by adult males, a papyrus record of the collection of the tax at Arsinoe in Egypt in 73 CE shows that the tax as imposed by Vespasian's legislation was payable by both males and females from the age of three years, and a coin of the Emperor Nerva shows that there was established a special fund, the *fiscus Judaicus*, to which the tax was paid.[30] An account of Suetonius shows that it was collected by a *procurator*.[31]

The tax was accordingly payable by all practicing Jews wherever they resided and since it was still levied at the end of the second century CE it cannot be doubted that it was levied in the Province from its institution, and that it was payable by Babatha and Salome Komaïse and members of their families who regarded themselves as Jewish and in their legal arrangements followed the rules of Jewish law.[32] In my view we must take this to have been so, although there is no record of registration of persons liable to pay the tax, or of the collection of any such tax in any of the documents in the archives, nor of any official connected with its collection.[33]

Part 4 – Taxes on Goods and Transactions

During the first century CE in the period of the Nabataean kingdom there had been imposed a tax on the importation of goods into the kingdom at least at Leuke Kome. Whether the tax levied at the customs post there was collected by Roman or Nabataean authorities cannot be shown, but it is likely that in either case, after the establishment of the Province, customs duties were collected there under Roman governance, perhaps at the same rate. Under the kingdom

[29] Dio Cass. 65. 7. 2, and see Joseph. *BJ* 7. 218.
[30] *CPJ* 2. 421 = *W Chrest* 61; Mattingly & Sydenham (1926: No 58, 227).
[31] Suet. *Dom.* 12. 2.
[32] Origen, *Ep* 1. 14.
[33] See also Smallwood (1981: 371-378, 480).

there were imposed other taxes on goods, and it is to be presumed that any such taxes continued to be levied after the establishment of the Province. In relation to neither tax can we say more.

Fines were payable to the king of Nabataea in cases where a party breached the terms of a contract, and upon the establishment of the Province, the emperor succeeded to the rights of the former Nabataean king, and those fines continued to be levied but to the benefit of the emperor.

Nothing in the archives shows that any other tax on goods or their import was levied in the Province.

Conclusion

In Chapter 2 of this thesis I show that in 106 CE the then Emperor Trajan established the Province by incorporation of the former kingdom of Nabataea into the empire and made a *Lex Provinciae* under which its government was established. By comparison with previous *leges provinciae* of which we have records, I show that the *Lex* provided for the boundaries of the Province, its taxation and the position of the emperor as successor to the king of Nabataea and probably for the constitutions of cities within it.

Since documents contained in the archives of Babatha and of Salome Komaïse show that in some respects the law of the former kingdom continued in effect in the Province after its foundation, I conclude that the *Lex* included no provision that had the effect of precluding the continued effect of the law of the former kingdom of Nabataea. Similarly, since documents contained in those archives show that Jewish peregrine inhabitants of the Province married, and left and inherited deceased estates, in accordance with laws that were later codified in the *Mishnah,* I conclude that no provision of the *Lex* precluded them from continuing to do so.

Also in Chapter 2 of this thesis, I show that there was a provincial edict that applied to the Province, as an Augustan province, and that peregrine inhabitants of it were enabled to take advantage of provisions in it. I show also that it was accompanied by *formulae* for litigation that could operate as guidelines for the use of judges or courts to which the trial of litigation in the Province might be delegated. I show that it contained provisions bringing into effect in the Province provisions of the urban edict, and, in particular, provisions under which the governor might grant relief in the nature of *bonorum possessio.* I show also that the edict of the curule aediles was in effect in the Province, probably made so by provisions of the provincial edict. I show that the governor had power to delegate litigation to peregrine courts or judges.

In chapter 3 of this thesis, I analyse documents from Babatha's archive that evidence litigation before the governor of the Province to which she was a party. That analysis shows that litigation in the Province was conducted in the same manner as that before the prefect of Egypt, by *cognitio extraordinaria.* It shows also that the litigation concerned issues both of Roman and Jewish law, including issues of inheritance and marriage, and that although the parties were litigating over issues of Jewish law, the governor authorized service of the summons by which litigation was instituted, and so accepted jurisdiction to hear it. It shows also that such litigation might be based on or concern the interpretation or enforcement of documents that were written

in Jewish Aramaic rather than Latin or Greek, the latter of which was the normal language of the administration of the Province and of law in it, and that documents written in languages other than Latin and Greek might be received in litigation before the governor. Thus litigation between Babatha and Miriam, both of whom were married to Yehudah, was based on Babatha's *ketubbah,* not only written in Jewish Aramaic but also complying with Jewish law. Further, in the litigation brought by Besas and Julia Crispina against Babatha, although their claims were based on Jewish law they sought Roman law relief ; and in the litigation between them which was based partly on Jewish law rights they also sought Roman law relief. Contractual documents which I discuss in chapter 6 of this thesis show also that rights under Babatha's *ketubbah* might give rise to an arrangement for the harvesting of a date crop made in Roman law agreements expressed in Greek. It is thus shown that there was no necessary correspondence between the language of a document and the legal system upon which it depended.

In Chapter 4 of this thesis I analyse documents from the period of the kingdom of Nabataea and documents from after the establishment of the Province that reflect the law of Nabataea. That analysis shows that provisions of the land law of Nabataea continued to apply to land in the Province after its establishment: water rights continued to subsist and transferors continued to be obliged to give undertakings in favour of transferees that their successors would not challenge the rights of the transferees, in some cases to "clear" and exonerate the land from adverse claims made by other persons, and to pay penalties to the transferees and the emperor in the event of a breach. An analysis of land tax returns made for the purpose of a census held in the Province in 127 CE shows that the land in the Province was measured for taxation purposes, and land tax was calculated by use of the Nabataean system of measurement and in Nabataean money, thus showing a partial continuance of Nabataean land and tax law after the establishment of the Province.

In chapter 1, by an analysis of texts contained in the *Mishnah* and the *Tosefta,* I have shown that Jewish law was then substantially that stated in the *Mishnah.* In chapter 5 I state, so far as it is relevant, the Jewish law of the period of the archives. Babatha's *ketubbah,* written in Jewish Aramaic after the establishment of the Province, is shown to have accorded with the law later stated in the *Mishnah,* and contracts written in Greek for the marriages of Shelamzion and Salome Komaïse are shown to have substantially followed that law. The Jewish peregrine inhabitants of the Province are shown to have managed the inheritance of their estates in accordance with the law as stated in the *Mishnah* and gifts made by them are shown to

substantially accord with that law. Those gifts are shown also to have been made in order to make economic provision for widows who, under that law, had no rights of inheritance and daughters who inherited only in the absence of sons of a deceased. Thus the law by which marriages among the Jewish residents of the Province and the succession to estates of deceased Jewish residents of it was Jewish law and while not, as Mitteis held, the law of their domicile, it was the law of their community, which they and the governor of the Province regarded as binding upon them.

In Chapter 6, I examine contracts that form part of or are evidenced in the archives. I show that there are present in the archives examples of Roman law *depositum, mutuum* with *hypotheca* or *pignus,* together with *stipulationes.* Not all contracts examples of which are contained in or are evidenced in the archives are of Roman law, some being of Jewish or Nabataean law, and they commonly display elements of more than one legal system. The marriage agreements of Shelamzion and Salome Komaïse, while substantially following Jewish law, are cast in the form of Roman law *stipulationes* but also include undertakings by the groom to feed and clothe the bride and children of the marriage in accordance with Greek custom and manner. The agreements by which Babatha made arrangements for harvesting the date crop on land she had seized from the estate of Yehudah, are in the form of Roman law *stipulationes* but include provisions that follow Jewish custom: provisions for the amount to be paid to Babatha require dates be weighed out to her, and for the surplus dates to be taken by Simon for his work and expenses; further the parties were perhaps following Jewish custom in having a copy prepared for each. Babatha in her arrangement for the harvesting of that crop, and Besas and Julia Crispina in their cession of land to Shelamzion made undertakings to "clear" or exonerate the land from adverse claims in a form which may have accorded with Jewish custom. An acknowledgement by one partner of a partnership formed under Jewish law that he held one half of the proceeds for the heir of his deceased partner was cast in the form of a Roman law contract of *depositum.* Nothing suggests that the Roman governor of the Province made any rule by which the peregrine inhabitants of the Province were required to make their contracts in any particular form and it is shown that they had considerable freedom in how they were to make their contracts: the legal system to which they had resort was for them to decide and the governor accepted jurisdiction to decide cases that arose under any of those systems.

Thus the establishment of the Province, although it brought Roman law as part of the law of it, both through elements that were *ius gentium* but also through their introduction in the provincial edict of the Province, did not have the effect of preventing the continuing effect of

Nabatean and Jewish law. In fact the manner in which Jewish inhabitants of the Province structured or arranged for the structure of their contracts shows that the three systems of law co-existed, and the inhabitants were empowered to decide which of those systems they were to use.

Although Mitteis said that the question of who was to be guardian or tutor was determined, as were his obligations, according to the personal law of a provincial, that was not the case in the Province during the period of the archives. In Chapter 7 of this thesis I discuss the incidence of tutorship in the Province based partly on the documents in the archives. There is little evidence and it is unclear whether there was a law of guardianship or tutorship in Nabataean law. Nor was there any law of guardianship or tutorship of adult women in Jewish law, and the provisions of Jewish law under which a guardian or tutor might be appointed for an infant were not applied by Jewish inhabitants of the Province. So far as it appears from the documents in the archives, tutors of Jewish infants resident in the Province were appointed in accordance with Roman law. The Roman law of *tutela mulierum* formed part of the *ius civile* and accordingly applied only to Roman citizen women. The only Roman citizen woman who appears in the archives is Julia Crispina, and it is not certain that she took part in a transaction that required her to have the *auctoritas* of a *tutor.* She is described in documents in the archives as ἐπίσκοπος or "overseer" of infants in association with their *tutor,* but her status cannot be further stated. Although *tutela mulierum* is not shown to have applied to peregrine women resident in the province, such adult women resident there are shown in documents in the archives as being accompanied by a tutor (συμπαρόντος ἐπιτρόπου) or described as acting διὰ ἐπιτρόπου, which I have argued was the Greek equivalent of the Latin *tutore auctore,* or that the *auctoritas* of a tutor had been previously obtained. Since there appears to have been no necessity for this, I conclude that the Jewish inhabitants of the Province described themselves in this way because they saw some benefit in treating themselves as requiring the assistance of a *tutor* or thought that the presence of a tutor or the insertion of his *auctoritas* would be advantageous in litigation in the court of a Roman official of the Province, or even useful in case any doubt arose as to its necessity.

The documents contained in the archives show that the Jewish inhabitants of the Province were able to conduct marriages and the succession to estates in accordance with the law of their community. Since they appear to have adopted the Roman law of *tutela* in preference to their personal law of guardianship without any indication of compulsion to do so, it appears that they did so freely and because they considered it to be advantageous. They are shown also to

have made contracts in accordance with Roman or Jewish law according to their own preferences, adopting language, form of contract and particular clauses and working that appeared to them to meet their needs. They were enabled to do so because neither the *lex Provinciae* nor the provincial edict contained provisions preventing it. Nor did the continuance of Nabataean land law after the establishment of the Province as part of its law prevent them from making gifts that complied with Jewish law or include in documents dealing in land, provisions that accorded with Jewish custom.

The Province is shown to have been legally pluralist with Roman, Nabataean and Jewish law co-existing and the peregrine inhabitants being able to adopt, in their legal transactions, those legal systems as appeared to them to be advantageous.

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