

## THE INTERACTION BETWEEN ROMAN IUS CIVILE AND LOCAL PROVINCIAL LEGAL TRADITION: POPYRI P. YADIN 21 AND P. YADIN 22 AS ROMAN STIPULATIO / Valéria Terézia Dančiaková

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**Abstract:** *When Babatha, a Jewish woman living in Maoza, conducted her legal affairs in the early second century CE, her homeland was already under the rule of the Romans as the province of Arabia Petraea. Although people were granted the right to use their original legal system, the situation with respect to legal disputes was not that straightforward. The nearest judiciary authority was the appointed Roman governor. Since Babatha was not a Roman citizen, in case of litigation, the governor would apply ius gentium, which was, in fact, more of an idea than a specific legal system. The Greek documents in the Archive are a precious testimony not only for the life of Babatha herself but also for how Roman dominion over various regions influenced how local legal affairs were conducted. The discussion continues relating the archive, whether traces of the Roman ius civile can be found in the papyri, and if so, what it means considering the law that was used in the provinces. The papyri P. Yadin 21 and P. Yadin 22 are presented as purchase and sale, which, however, poses a question as to what tradition lies behind the contract. In this article, we want to present how the Roman ius civile could possibly interact with local provincial legal tradition on the example of the papyri P. Yadin 21 and P. Yadin 22, comparing them to the Roman contracts, treating the possible use of stipulatio.*

**Key words:** *Ius Civile; Babatha Archive; Stipulation; P. Yadin 21; P. Yadin 22; Roman law*

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## 1. INTRODUCTION

The discovery of the Babatha Archive (along with the Salome Komais Archive) can undoubtedly be compared to (and in fact was) to finding an extremely valuable treasure. It is not a treasure of gold and precious stones, but a treasure made up of documents relating to the everyday life of a Jewish woman and her family in Arabia Petraea, one of the Roman provinces added to the empire in 106 AD, former Nabatean Kingdom. It has even greater value for us, Roman law researchers, as it contains various documents of a legal nature, such as contracts or documents relating to legal procedure (summons, petitions). We would argue that all the documents of legal character included

in the archive are influenced by the legal procedure available to the inhabitants of the province once it was under Roman jurisdiction.

What we have in the form of the archive is a material source not for one legal system, but for a mixture of legal systems that needed to find a way to blend together to function effectively in the changed situation, and so what we have in the archive is a “legal cocktail” made of local traditions influenced by place and affinity of the parties (they are described as Jewish), with a portion of Roman law brought to the area by the governor and his apparatus. Such an interaction of legal traditions was a necessary result of Rome’s expansion into territories with different cultures along with the personality principle of ancient citizenship and reluctance to bestow it *en bloc* on subjugated people until 212 AD. The result of the clash of various legal systems existing within one empire is the concept of *ius gentium* as described by Gaius (Gai. Inst. 1.1.1):

.... and what natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations, as being the law which all nations employ. Therefore, the Roman people partly make use of their own law, and partly avail themselves of that common to all men, which matters we shall explain separately in their proper place.

One of the best examples of this clash of legal systems brought by Roman territorial expansion is the Babatha Archive. Of course, We will not treat all the documents from the Archive here, but rather we want to focus on a few contracts in the Greek language, namely papyri P. Yadin 17 (in relation to 5), 21, and 22, including deposit, sale, and purchase. Concerning these documents all scholars address the question of the legal tradition preserved in the documents. Some roots for Roman origin, others for oriental, whether Egyptian or Jewish, which was the cultural background of the parties. The question that has followed me everywhere for the past few months is: Do we have to look for one legal tradition to which to subsume the content of the contracts? No matter how much we elaborate on the idea of the local tradition at hand, we always must admit that there is at least one little piece of evidence of the Roman law present in the mentioned papyri captured in a few words, a sentence, at the end of each, *stipulatio*.

## 2. THE CHARACTER AND CONTENT OF P. YADIN 21 AND 22

The papyri designated as P. Yadin 21 and P. Yadin 22 contain a legal act that is identified by many scholars as a sale-purchase even though, as we will present below, the character of the documents is not so straightforward. Both papyri are dated very specifically, to September 11 of the year 130 CE as the text includes information about the date stating that it was composed three days before the ides of September (*πρὸ τριῶν εἰδῶν Σεπτεμβρίων*) and the year is stated as the fourteenth year of the rule of the emperor Hadrian, during the consulship of Marcus Flavius Apro and Quintus Fabius Catulinus.<sup>1</sup> The legal act was created in the city of Maoza, Zooron region (*ἐν Μαωζα περιμέτρῳ Ζοορων*), and its parties are identified as Simon son of Jesus, son of Annas (*Σίμων Ἰησοῦ Ἀνανίου*) and Babatha, the daughter of Simon (*Βαβαθα Σίμωνος*), both residing in the already mentioned city of Maoza.<sup>2</sup>

An important element to consider when thinking about the character of the legal act is the object of the contract specified as dates, which, however, are not yet ripe, meaning that according to Roman *ius civile* these would be still unseparated fruits and as a result, these are not yet *re*, a thing that can be an object of commercial activities.

<sup>1</sup> ἔτους τεσσαρσεκαιδεκάτου Αἰτοκράτορος Τραιανοῦ Ἀδριανοῦ Καίσαρος Σεβαστοῦ, ἐπι ἰπάτων Μάρκου Φλαοῦιου Ἀπρου καὶ Κοεῖντου Φαβίου Κατυλλίνου.

<sup>2</sup> The word used is *οἰκοῦντες*, a participle present active, nominative plural masculine from the word *οἰκέω*, with the meaning „to reside, to have residence“ or „to live“ (Panczová, 2012, p. 876).

Another aspect creating a lot of discussion about the documents, whether it is indeed a contract of sale-purchase, is the provision, according to which Simon is to pick the dates himself, and the price is set as a portion of the dates that are to be delivered to Babatha.

Another significant fact is that the legal act, identified by the parties as sale-purchase, is not captured in one document, but two separate papyri, one including only the obligations of Babatha towards Simon and the other including solely the obligations of Simon towards Babatha (Oudshoorn, 2007, p. 168). The designation of the documents as sale-purchase comes from the papyri themselves, where in P. Yadin 21 we find a phrase *ὁμολογῶ ἡγορακέμαι*, and in P. Yadin 22 a phrase *ὁμολογῶ πεπρακέμαι*. The words *ἡγορακέμαι* and *πεπρακέμαι* are both infinitives of perfect active and are related to the already mentioned *ὁμολογῶ* in indicative present active, first-person singular meaning "I confirm". Concerning the meaning of the words *ἡγορακέμαι* and *πεπρακέμαι*, the word *ἡγορακέμαι* comes from *ἀγοράζω*, which means to walk around a square (*ἀγορά*) that, however, in the period concerned, was also connected with selling and purchasing goods in local markets that were situated at city squares. That is why the word is also translated as "to buy", or "to acquire by purchase" (Panczová, 2012, p. 69). The other used term, *πεπρακέμαι*, is derived from the word *πέρνημι*, whose meaning the Attic Greek was "to sell".<sup>3</sup> In sum, P. Yadin 21 then contains the purchase and the obligation of Simon towards Babatha, while P. Yadin 22 contains sale and the obligations of Babatha towards Simon.

### 3. OBJECT AND PRICE – SALE AND PURCHASE?

According to Roman *ius civile*, the contract of *emptio-venditio* (sale and purchase) required that the goods will be exchanged for money, not for other goods. However, this requirement was still the object of discussion among the Roman jurists, especially the two significant Roman legal schools, the Proculians and the Sabinians. The discussion can be seen in the fragments of the Digest *D. 18.1.1* and *D. 19.4.1.1*. The Proculians supported the opinion that if a legal act is to be characterised as a purchase, it is necessary that goods would be exchanged for money. On the other hand, the Sabinians reasoned that the will of the parties is more important, and the barter was the oldest type of purchase (Brtko, 2020, pp. 62-63). The controversy itself is mentioned in the Institutes of Gaius, namely *Gai Inst. 3, 140 – 141*, which dates to the second half of the second century (Ibbetson, 2015, p. 29). It is then possible, that the character of the contract of purchase as a legal act that involves exclusively the exchange of goods was not yet firmly established in the time when the papyri P. Yadin 21 and 22 were written.<sup>4</sup> Since both documents are dated to the year 130 CE, we cannot exclude the possibility that it was indeed *emptio-venditio*, if we consider the element of exchange it involves, the missing price expressed in terms of money.

The real problem emerges in relation to picking the dates, since as it seems, Simon seems to pay for the dates from Babatha's orchards with his own work, which led some scholars to the conclusion that the contract is, in fact, a hire (*locatio conductio operarum*), not sale-purchase. Their argumentation is based on the provision in the papyri according to which Simon is supposed to keep the rest of the harvest as a counter-value

<sup>3</sup> Epic poets used the word to designate activities connected with the trade with slaves (export, transport, or selling someone to slavery), however, the word was also used to refer to commercial activities connected with bribe, and even in the meaning of betrayal (Panczová, 2012, p. 992).

<sup>4</sup> According to duPlessis the definitive solution to the controversy came in the late classical period (duPlessis, 2020, p. 269).

for his labour (or effort) and expenses<sup>5</sup> (Radzyner, 2005; Katzoff, 2007; Broshi, 1992, pp. 230–240; Oudshoorn, 2007, p. 5; Isaac, 1992).

The content of the agreement can be summarised as follows: Simon as the purchaser will acquire from Babatha dates from three of her orchards identified as Perora, Nicarchos, and Molchaios, for which he is obliged to deliver to Babatha a specific amount and kind of dates at the time of drying as a counter-value.<sup>6</sup> This is the reason why some scholars suggest that the contract could be letting (*locatio conductio rei*) as letting of the said orchards instead of sale-purchase (Radzyner, 2005; Isaac, 1992, pp. 62–75). This conclusion, however, is not plausible as well, since the contract was created right before the time of harvest, while the *locatio conductio rei* presupposed all-year care. Besides, the work itself is not mentioned in the papyri, and the mention of transferring possession for a set period of time is missing as well along with the mention of rent (Chiusi, 2020, pp. 107–108; Lewis, 1994). Nicholas identifies the contract with *locatio* cases when the “seller” offers either his service or the use of a thing (Nicholas and Metzger, 2008, p. 172). Although, according to the content of the documents, Simon does not offer anything and identifies himself as a purchaser. Against the *locatio* (in this case, it would be tenancy), also speaks the fact that Babatha is obliged to secure the object of the purchase against any claims of third parties. The provision aiming at the protection of the possession of the acquirer was specifically used in the contracts of purchase and sale since it did not require the transfer of ownership and as a result, the seller did not need to be an owner of the thing sold. The seller was, however, obliged to protect the purchaser from eviction. The stipulation was used for this purpose and the sixth table of the Law of the Twelve Tables dated to the 5<sup>th</sup> century BCE mentions the sanction of double the value of the original if the seller denied any defects of the thing sold, which was later called *stipulatio duplae*. These stipulations later became the usual practice (duPlessis, 2020, p. 273).

The contract of sale-purchase (*emptio-venditio*) was in Roman *ius civile* a consensual (*Gai. Inst. III. 135*), bilateral (*Gai. Inst. III. 137*) agreement, that became perfect at the moment when the parties agreed on the object of purchase and price for it (*Gai. Inst. III. 139*), while the price needed to be certain and expressed in terms of money<sup>7</sup> (*Gai. Inst. III. 140 – 141*).<sup>8</sup>

The object of the contract is not specified precisely, but it can be determined to be certain enough as it is presented as the harvest from the three orchards in Babatha’s possession (Perora, Nikarchos a Molchaios), while in the time when the contract was created, the fruits forming on the date palms, as fruit-bearing things, would already be visible. The parties could estimate what would be the approximate value of the harvest. Since the object of the purchase would be the future harvest, we could consider the

<sup>5</sup> *λήψομαι εἰς ἑμαυτὸν ἀντὶ τῶν ἐμῶν κόπων καὶ ἀναλωμάτων – ἀναλωμάτων* – explicitly „I will take for myself against my labour and expenses “.

<sup>6</sup> Specifically, he is obliged to deliver to Babatha 42 talents of dates called *patététes* (*πατητήτης*), as well as another two kinds, namely, two *cors* (*κόρους δύο*) of dates called *συροῦ*, and 5 *satas* (*σάτα πέντε*) of dates called *νααροῦ*. The weighting of the dates is supposed to be done according to the measures and customs valid in the area that both reside in. This is especially important since the measure called talent did not have a standardised value in the whole Empire but differed according to the custom in specific areas and its value could be anywhere between 26 – 38 kg (Sherwood, 2020, p. 8). In biblical texts, we can also find mentions of a heavy and light talent (in our case the talent mentioned would be the light one since the heavy talent was around 60 kg). In the areas inhabited by Jewish people, just like *Arabia Petraea*, the value of the light talent would be approximately 30 kg, more precisely 28,53 kg as is mentioned in 1 Kor 18:14 (Scott, 1959). According to Broshi, however, in this case, it would be the Nabatean talent weighting 24 kg, which was closer to the attic one (25,86 kg) (BROSHI, 1992, p. 235).

<sup>7</sup> We have already addressed the controversy above.

<sup>8</sup> For *emptio-venditio* see the work of Zimmermann (Zimmermann, 1992, p. 230ff).

purchase of a future thing (*emptio rei speratae*) as a possible solution. In this case, should the situation occur, that the fruits would not come into existence (or would be destroyed), the purchaser is not obliged to pay the price (Nicholas and Metzger, 2008, pp. 173–174; Chiusi, 2020, pp. 103–104). The problem is that a provision like this cannot be found in the papyri and would result solely from the identification of the contract as *emptio rei speratae*. On the other hand, it is possible that being so close to the harvest, the parties did not anticipate an event that would destroy the fruits. The number of dates, unfortunately, is not specified and was known only to the parties involved.<sup>9</sup>

Concerning the price, it is stated as a specific amount of dates that Babatha is to receive from Simon as a counter-value.<sup>10</sup> The problem is that the contract seems to imply that the price for the dates should be Simon's work in the form of picking the fruits. In this relation, we need to mention fragment *D. 19.1.6.1*, according to which, it was possible to specify the price in case of purchase in a way that part of it was paid in money and part of it was paid in work done.<sup>11</sup> If we agreed with the Sabinian point of view, this could be the case of purchase with the price paid in money (or produce) and work as well in the form of harvest.

The agreement on the content of the legal act, the will of the parties, is expressed clearly and explicitly, in the written form even. Besides the content of the legal relationship, their will to identify it as sale-purchase is expressed as well, by identifying Simon as the purchaser in P. Yadin 21 (*ὁμολογῶ ἡγορακέναι*), and Babatha as the seller in P. Yadin 22 (*ὁμολογῶ πεπρακέναι*), which disqualifies the objection of the Proculians that in case of barter, it is not clear which party is the purchaser and which is the seller<sup>12</sup> since the parties themselves defined the position in both papyri.

The documents also include other obligations, such as compensation in the case one of the parties would not fulfil their part of the agreement. P. Yadin 21 as a document including the obligations of Simon states that in the case he does not deliver the agreed amount of the dates at the time of drying, he will be obliged to pay a "contractual fine", either himself (*ἐκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντων μου* – from his own property) or through a guarantor (*ἢ παρὰ τοῦ ἐγγύου μου*).<sup>13</sup> Then, P. Yadin 22, as a document including the obligations of Babatha states that she is to ensure acquisition and uninterrupted possession of the fruits (and the orchards) for Simon (*ἐμοῦ καθαροποιούσης σοι τοὺς προγεγραμμένους κήπους ἀπὸ παντὸς ἀντιποιουμένου* – I will clear the prescribed orchards from anyone with counter-claim) and in the case, she fails to fulfil her obligation, she will be obliged to pay a fine of 20 silver denarii for Simon's labour and expenses (*ἔσομαι σοι ὀφειלוσα ἀντὶ τῶν σῶν κόπων καὶ ἀναλωμάτων ἀργυρίου δηνάρια εἴκοσι* – I will owe you for your labour and expenses 20 silver denarii). According to Chiusi, the fines (or their value) point to the fact that in the case of the papyri, we indeed witness the contract of Roman *emptio-venditio* (Chiusi, 2020, p. 109). Also, the mention of uninterrupted possession would point to this conclusion, since as we have already mentioned, the contract of sale did not require the transfer of ownership, only possession and surety against eviction (both are mentioned in the documents).

<sup>9</sup> Katzoff is trying to estimate Babatha's share of the dates which however is impossible to know since we do not have the acreage of the orchards or information on the number of palm trees or yearly yield. (Katzoff, 2007, p. 553).

<sup>10</sup> It is not mentioned whether they have to be from the same orchards, but it can be presupposed.

<sup>11</sup> "Si **vendidi** tibi insulam **certa pecunia** et ut **allam insulam meam reficeres**, *agam ex vendito, ut reficias: si autem hoc solum, ut reficeres eam convenisset, non intellegitur emptio et venditio facta, ut et neratius scripsit.*"

<sup>12</sup> *D. 18.1.1.1*

<sup>13</sup> The fine is specified as 2 denarii for each talent of patétés and one "black one" (currency designated as *μέλανα*) for the rest.

To consider the texts of P. Yadin 21 a 22 as a form of *locatio conductio*, it is also necessary to consider the question of the influence of various local traditions on the legal relationship. One of the possible solutions is the so-called *καρπωνεία* known from the Hellenistic environment as a contract combining elements of purchase and letting that used to be contracted right before the picking of fruits (Radzyner, 2005, pp. 148–152; Oudshoorn, 2007, pp. 173–174; Pringsheim, 1950; Czajkowski, 2017, p. 53). This theory would also be supported by the content of P. Oxy IV 728 dated to the year 142 CE, which combines the elements of purchase-sale and letting with the difference that although the purchaser picked the fruits himself, the price was supposed to be paid in money and not a portion of the fruits, as is the case of Babatha (Taubenschlag, 1944, p. 340). Similar arrangements can be found in Aramaic and Hebrew texts from the same period such as P. Yadin 42 – 46 and P. Mur. 24, or P. Yadin 6 (Radzyner, 2005, pp. 152–160.; Katzoff, 2007, p. 552; for P. Yadin 6 see Oudshoorn, 2007, pp. 171–172). According to Cohen, what we encounter here is the solution to a situation, where there was no suitable contract available in the region that would enable the parties to transfer ownership of not yet separated fruits, and thus these were sold through the hire of services, *locatio conductio operarum* (Cohen, 2018, p. 573).

As can be seen from the scholarly debate presented so far, the problem of the legal act captured in P. Yadin 21 a 22 is that it cannot be subsumed under *emptio-venditio* nor *locatio conductio* without raising doubts. The most plausible solution seems to be that what we have here is a very specific kind of a legal act arising from local traditions. This does not, however, mean that it cannot contain elements of Roman *ius civile*. Katzoff finds its origin in rabbinic jurisprudence on one hand, as well as in the historical context of Babatha. He proposes a reverse order that in fact, *locatio conductio* for the picking of the dates is masked with a sale-purchase contract the reason being that although both parties were Jewish, there were no Jewish judicial authorities available near their area to resolve any subsequent legal disputes. As a result, they would need to approach Roman officials in such cases. Also, what Babatha is trying to do, is to go around the Jewish legal tradition according to which, she could hold only immovable against the claim for her dowry, but not movables (the dates).<sup>14</sup> To be able to dispose of the fruits, she sells those to Simon, and he offers them a portion of the produce as a counter-value (Katzoff, 2007, p. 565). According to Katzoff what we have here is a case of simulation (*fraus legis facta*) that would not hold in Roman law the result being the summons that we find in P. Yadin 23, which is aimed at the question of the validity of the legal act contained in P. Yadin 21 a 22 (Katzoff, 2007, pp. 566–573). A reference to simulation, *fraus legis facta*, can be found in *Gai Inst. 1.46*,<sup>15</sup> *D. 1.3.29*,<sup>16</sup> or in *Ulpianus D. 1.3.30*<sup>17</sup> referring to evasion of legislation in a sense if someone does something that the laws do not forbid, but the behaviour is clearly contrary to the aim of the law (fraud committed on a provision of law). However, this was not yet an elaborated and generally accepted rule (Berger, 1980, s. 477). The fragment in Gaius refers to a specific law, the *lex Fufia Caninia*, while fragments contained in the Digest of Justinian are attributed to lawyers who lived either at the time

<sup>14</sup> According to both papyri, Babatha is a widow, and she is entitled to the estates as a dowry and payment of a debt that existed towards her.

<sup>15</sup> „... nam et si testamento scriptis in orbem seruis libertas data sit, quia nullus ordo manumissionis inuenitur, nulli liberi erunt, quia lex Fufia Caninia, quae in fraudem eius facta sint, rescindit. sunt etiam specialia senatus consulta, quibus rescissa sunt ea, quae in fraudem eius legis excogitata sunt.”

<sup>16</sup> „Contra legem facti, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit.”

<sup>17</sup> „Fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit: et quod distat hryton apo dianoias, hoc distat fraus ab eo, quod contra legem fit.”

or later than Babatha, which is why we cannot be certain, that *fraus legis facta* would be taken into account when judging legal acts by Roman administration in the first half of the 2<sup>nd</sup> century in the province of *Arabia Petraea*.

#### 4. STIPULATIO AS A SOLUTION?

Concerning the reservations about subsuming the content of the papyri under either of the Roman law type of contract (*locatio conductio* or *emptio-venditio*), we agree with the proposal that what we have in front of us is indeed a legal act based on the local tradition. However, it does not exclude the presence of elements of Roman *ius civile*.

In our opinion, the answer to the question of what type of a legal act according to Roman *ius civile* is presented in the papyri does not lie in hire or sale, but in Roman *stipulatio*. Here, we want to support our view with Katzoff's argumentation that the parties did not have Jewish judicial institutions at their disposal to resolve any legal disputes that might arise, and that is why they had to rely on the authority of the Roman officials in the province. Concerning the issue of law that would be applied in such a situation, it would be either local law or *ius gentium*. However, the content of *ius gentium*, as a law common to all nations, is a problem for a separate study.<sup>18</sup> We dare to state that the Roman officials would rely on the legal system they knew the best (*ius civile*) when dealing with legal disputes of foreigners, perhaps looking for institutes similar and acceptable to parties involved. It is then entirely possible that Babatha and Simon purposely formed their contract to resemble a legal act that Roman officials would easily identify and make a decision about. Stipulation itself as a form of arranging legal relations between the parties preceded the emergence of a contract of sale and it cannot be excluded that it would be used for these purposes even later on (Johnston, 1999, pp. 80–81; duPlessis, 2020, p. 261).

Stipulation was the most flexible, unilateral type of a legal act that could be used for any kind of legal relationship, although it was a contract *stricti iuris* and at the beginning required a strict form to be kept. Later, however, only a simple exchange of a question and an answer that agreed in the content would suffice to create the contract. The unilateral character never changed (Zimmermann, 1992, p. 68ff; Smith, 1859, pp. 817–818). The stipulation would only create an obligation pertaining to one of the parties, and should the other party have any obligation towards the first party, another stipulation was needed, in sum, two stipulations were required to create mutual obligations of two parties of a legal relationship. This agrees with the character of the legal act we have in Papyri P. Yadin 21 and 22.

There is no doubt that the documents do include stipulation. This can be found at their very end, where we encounter the word *πίστις* that could lead us to interpret the term in the sense of Roman *bona fide*, which would, in fact, be in favour of *emptio-venditio* as *bona fide* excluded stipulation as a contract *stricti iuris* (Chiusi, 2020, p. 101). But just like in Latin, the Greek equivalent of the phrase was constituted of two words, *καλή πίστις* meaning "good faith" (Liddell and Scott, 1996, p. 1408). We can find the phrase *καλή πίστις* with the same meaning in the Babatha archive comprised of the two words as the equivalent of the Latin *bona fide* in P. Yadin 16, 28, 29 and 30.<sup>19</sup> Both words can be found in other documents as well, in P. Yadin 17, 18 and 20, however, not in next to each other and we cannot interpret them in terms of *bona fide*, since the grammatical analysis shows that the words do not relate to each other. The word *πίστις* is a noun and the other one

<sup>18</sup> The definitions of *ius gentium* from the Roman legal sources can be found in *Gai Inst. 1.1.1*.

<sup>19</sup> *καλή πίστει* in P. Yadin 16; *ἐκ καλής πίστεως* in P. Yadin 28, 29 and 30.

is in the form of an adverb, *καλῶς* (well) and relates to the previous adverb *οὕτως* (like that).

The grammatical analysis of the sentence, where we can find the word *πίστις* used in P. Yadin 21 and 22 shows as well that it is not used in the sense of *bona fide*. The word is related to two verbs participle perfect medium in genitive singular feminine, *ἐτηρωτημένης καὶ ἀνθωμολογημένης*,<sup>20</sup> while *πίστις* itself is genitive singular feminine as well, which means that what we encounter here is a grammatical phenomenon called absolute genitive when the noun in genitive will be translated as nominative. The meaning of the word *πίστις* is important as well since it can be translated and most commonly is translated as “faith”, but another meaning is “a solemn promise” (Panczová, 2012, p. 1001). The sentence featuring *πίστις* can be translated as: “*The question about a solemn promise has been asked an answer has been given*”. The promise itself in form of a question and answer is the crucial element of *stipulatio* according to Roman *ius civile*.<sup>21</sup>

We argue, however, that the papyri not only contain stipulation somewhere in the text of the contract but that the whole contract was created in a form of stipulation precisely because the parties involved anticipated the legal dispute and the circumstances along with the legal tradition at hand did not offer other ways to arrange their legal relations. There are more features that would point to a stipulation in P. Yadin 21 a 22. The first hint lies in how the documents are composed as they seem to be one contract captured in two separate papyri each containing only the obligations of one party towards the other, Simon towards Babatha (P. Yadin 21) and Babatha towards Simon (P. Yadin 22). Chiusi sees this as the proof for *emptio-venditio*, with which we cannot agree since what we have here are not simply two copies of the same contract but two documents with separate obligations addressed only to one of the parties. (Chiusi, 2020, p. 105). Then there is the stipulation included at the end of the document that related to the cases of the breach of the contract, which could be part of the sale contract. The absolute genitive at the end of each papyrus, however, could be seen as a stipulation that is related to the whole content of the documents, not just the provision concerning breach of obligations.

In our opinion, however, the most important proof of the use of stipulation for the whole legal relationship between Babatha and Simon lies at the very beginning of the papyri in the sentence, where they describe the contract using the words purchase (*ἡγορακέναι*) and sell (*πεπρακέναι*). Both sentences start using the word *ὁμολογῶ* (*ὁμολογῶ ἡγορακέναι* and *ὁμολογῶ πεπρακέναι*), which is commonly translated as “*I confirm to buy*” and “*I confirm to sell*”. However, the word also has a meaning parallel with the meaning of the Latin *spondeo*, which was used precisely to create stipulation.<sup>22</sup> Simon then does not confirm that he is buying the dates from Babatha, but he promises to buy them. The reference to the question and answer along with the mention of a promise (*πίστις*) at the end of each text, could then indeed be explained as pertaining to the whole legal relationship captured in P. Yadin 21 and 21.

Here we would also like to mention other papyri from the archive that share the structure of P. Yadin 21 and 22, namely P. Yadin 17, and compare the purchase-sale documents with the structure and terminology in P. Yadin 18, 20 and 57 (P. Hever 65).

The same problem as in P. Yadin 21 and 22, subsuming the contract under *ius civile*, is with P. Yadin 17 which is designated as a deposit and uses the Greek term for deposit several times in its text (*λόγον παραθήκης, ὀφείλειν ἐν παραθήκῃ, τῆς*

<sup>20</sup> Meaning to “ask” (*ἐτηρωτημένης*), and to “answer” (*ἀνθωμολογημένης*).

<sup>21</sup> Oudshoorn argues as well that the documents contain stipulations in this part (Oudshoorn, 2007, p. 151).

<sup>22</sup> The word in its basic form *ὁμολογέω* also has meanings such as “to promise, to bind, to make a contract”.



παραθήκης, τὴν παραθήκην διπλῆν). The problem with the deposit here is twofold, as Oudshoorn explains (Oudshoorn, 2007, pp. 127–155). First, it seems that money in the deposit is allowed to be used, which could be explained by *depositum irregulare*, however, another problem arises, which is the transfer of ownership, which as it seems does not occur in this case but is necessary for Roman law (Bělovský, 2002, pp. 190–191). Again, what we have in P. Yadin 17 is a local tradition where the deposit of fungibles is possible allowing the depositee to use the object of the deposit while leaving the ownership with the depositor. All in all, it seems we would leave the *ius civile* at the boundary of the province Arabia Petrea. Is that so?

In P. Yadin 17, 21, and 22, as well as, 18 and 57 (marriage contracts), and 20 (concession of rights), we can notice certain features that these papyri have in common, the most prominent being that they include the stipulation clause at the end of the text and we would argue that the papyri not only include elements of the Roman *ius civile* contract in form of stipulation but that its composition refers to the character of *ius gentium* in the everyday praxis of the provincials.

The stipulation is most clearly presented at the end of each document:

1. P. Yadin 17: ...πίστει ἐπρωτήθη καὶ ἀνθρωμολογήθη ταῦτα οὕτως καλῶς γείνεσθαι.
2. P. Yadin 18: ...πίστει ἐπρωτήθη καὶ ἀνθρωμολογήθη ταῦτα οὕτως καλῶς γείνεσθαι.
3. P. Yadin 20: ...πίστεως ἐπρωτημένης καὶ ἀνθρωμολογημένης.
4. P. Yadin 21: ...πίστεως ἐπρωτημένης καὶ ἀνθρωμολογημένης.
5. P. Yadin 22: ...πίστεως ἐπρωτημένης καὶ ἀνθρωμολογημένης.
6. P. Yadin 57 (P. Hever 65): ...οὕτως καλῶς γείνεσθαι **πίστεως ἐπρωτημένης καὶ ἀνθρωμολογημένης**.

The question I would like to pose is: Where does the stipulation begin? Is it for the final provision concerning any fines at the end of documents or does it protect the whole contract based on the local tradition?

We want to focus on three features included in the chosen documents, as something they all have in common: 1) stipulatio at the end; 2) the use of the Greek word *ὁμολογῶ* at the beginning; 3) and the mention of scribe under the text. We have already treated the issue of *πίστις* as bona fide earlier, so here we want to focus on other features.

Here, I would like to point to the word *ὁμολογῶ* that is used at the beginning of each of the mentioned contracts:

1. P. Yadin 17: ...ἐπὶ τῆς θελήσεως καὶ συνευδοκῆσεως **ὁμολογήσατο**...
2. P. Yadin 18: ...ἦν τιμογραφίαν **ὁμολόγησεν**...
3. P. Yadin 20: ...**ὁμολογοῦμεν** συνκεχωρηκέναι....
4. P. Yadin 21: ...**ὁμολογῶ** ἡγορακέναι....
5. P. Yadin 22: ...**ὁμολογῶ** πεπρακέναι....
6. P. Yadin 57 (P. Hever 65): [...] **ὁμολογήσατο** Ἰησους Μαναημου τῶν ἀπὸ κώμης...

In P. Yadin 21 and 22, Katzoff translates the word as “I acknowledge” (to buy/to sell), which is one of the possible translations. As was already mentioned, the word can also be used in the meaning of “to promise, to buy,” or “to make a contract,” which are meanings parallel to Latin *spondeo*. What is even more important, the term *ὁμολογῶ* is used as a Greek substitute for Latin *sponedo* by Gaius in Gai. Inst. III. 93:

“Sed haec quidem uerborum obligatio DARI SPONDES? SPONDEO propria ciuium Romanorum est; ceterae uero iuris gentium sunt, itaque inter omnes homines, siue ciues Romanos siue peregrinos, ualent. et quamuis ad Graecam uocem expressae fuerint, uelut hoc modo δώσεις ; δώσω· **ὁμολογεῖς ; ὁμολογῶ**· πίστει κελεύεις ; πίστει κελεύω·

*ποιήσεις ; ποιήσω, etiam hae tamen inter ciues Romanos ualent, si modo Graeci sermonis intellectum habeant; et e contrario quamuis Latine enuntientur, tamen etiam inter peregrinos ualent, si modo Latini sermonis intellectum habeant."*

If we look at the *ἀμολογῶ* as a statement of promise then the stipulation at the end of the papyri could be, in fact, a statement confirming that the whole contract is actually a stipulation that was used to embrace a local legal tradition (perhaps the *καρπωνεῖα* in case of P. Yadin 21 and 22) into a legal scheme that would be known to the Roman judicial authorities in case of a legal dispute (which was anticipated as the summons in P. Yadin 23 show). Since the institutes are dated to the year 160 CE, and the contracts of the Archive were created some 40 to 30 years earlier, it is possible that the stipulation was indeed known to the parties involved and used in such a manner.

In the case of P. Yadin 21 and 22 also the composition of the contract being written on two separate papyri, one including the obligations of Babatha towards Simon and the other including the obligations of Simon towards Babatha would support such an explanation. Also, the identical content of the first part of the document concerning the sale/purchase would meet the necessity of the identical content of the question and answer in *stipulatio*. This is not the case in P. Yadin 17 since the deposit did not impose duties on both parties, where however we have two identical texts preserved.

Oudshoorn argues that the *stipulatio* was used as a confirmation that the contract in fact was created (Oudshoorn, 2007, p. 151). The decision to include the stipulation clause is meaningless unless it was expected to be used as a proof in front of Roman judicial authorities. *Stipulatio* was the most universal contract, and very simple to make. Besides making a promise is perhaps the simplest way to bind a person to certain actions and promises have been part of every society. Another opportune feature is that it was a contract *stricti iuris* meaning that only the form would be considered at the court. Since the form was met in the documents, the use of the equivalent term *ἀμολογῶ* for *spondeo*, the clause at the end confirming that the question had been asked and answered, the obligation created would stand.

If we look back to P. Yadin 21 and 22 we must again refer to Katzoff arguing that the parties did not have Jewish judicial bodies available, which would try their disputes according to local legal traditions. As countless other documents from the archive show (various summons and petitions), it was the Roman official who indeed tried legal disputes concerning Babatha.

That is why we want to argue that the stipulation included in the document is not really an example of Roman *ius civile* as such but in fact an example of how Roman *ius civile* was used in the sense of *ius gentium* to allow the Roman judicial authorities decide the cases that would be based on the local legal tradition and as such perhaps unknown to them. We do not want to say that such cases never occurred, but perhaps to simplify certain processes *stipulatio* could be introduced in the governor's edict as a form of a universal contract of *ius gentium*. I would like to support this notion also with another feature that these contracts have in common, except for P. Yadin 57, which, however, is missing the last few lines. The feature is the mention of *λιβράριος*. The term has no origin in Greek but is rather a Greek transcription of the Latin term *librarius* used for a scribe or secretary.

1. P. Yadin 17: ... Θεενας Σίμωνος **λιβράριος** ἔγραψα...
2. P. Yadin 18: ... Θεενας Σίμωνος **λιβράριος** ἔγραψα...
3. P. Yadin 20: ... ἐγράφη διὰ Γερμανοῦ **λιβραρίου**...
4. P. Yadin 21: ... ἐγράφη διὰ Γερμανοῦ **λιβραρίου**...
5. P. Yadin 22: ... ἐγράφη διὰ Γερμανοῦ **λιβραρίου**...
6. P. Yadin 57 (P. Hever 65): last few lines missing.

The Greek equivalent would be *ὁ γραφεύς*. To use Greek transcription of a Latin term does not really make sense since the documents are written in Greek and other instances use proper Greek terminology (e.g., *παραθήκη* for the deposit). Possibly, the scribe was a part of the Roman administration and helped Babatha with the composition of the contracts advising her to use the stipulation to ensure the validity of documents in front of Roman courts in case there was a legal dispute.

## 5. CONCLUSION

Based on the reasoning presented above, what we have in front of us in the form of papyri P. Yadin 21 and 22 is a unique example of how the provincials dealt with the reality of Roman rule in their everyday life. The Roman system of administration was complicated in the sense, that although the Romans did rule a vast area that they conquered, they left the inhabitants of the provinces a certain level of freedom in relation. They were allowed to live according to their own laws. This arrangement was necessary since they were reluctant to make the conquered people Roman citizens, but in reality, the people either did not have their own judicial instances available (as it seems was the case of *Arabia Petraea*) or for some reason, they preferred the Roman system (Czajkowski, 2020, pp. 84–100).

This is probably what we have here. Babatha with Simon wanted to contract a business together, perhaps to allow Babatha to make use of the dates from the orchards she held, but because of Babatha's circumstances (she was a widow with a claim to dowry and inheritance), they perhaps anticipated a legal dispute with other heirs of her late husband and the guardians of her son. The reason she expected a dispute was connected to rabbinic law according to which she could hold and dispose of the orchards, but she did not have the right to dispose of the movables (the already collected dates). If she sold from the orchards, she could be left without means in the future. That is why she decided to sell the dates, while not yet separated from the palm trees, and thus still connected to the orchards she could dispose of (Katzoff, 2007, pp. 556–575).

Since the only available authority would be the Roman administration present in the province, they decided to contract their legal relationship in a form that would be known to the Romans to make the process of litigation easier. This is where the question of *fraus legis facta* comes to attention, whether the court trying the case (which happened as P. Yadin 23 shows) would take it into consideration. The stipulation being a contract *stricti iuris* did not allow to consider any circumstance making the decision quite straightforward. Even if the Roman judicial ignored the *ius civile* features and tried the case according to rabbinic law, it did not work with the concept such as *fraus legis facta*, and the contract would stand (Katzoff, 2007, pp. 572–573). Perhaps they did not have sufficient knowledge of Roman *ius civile*, but they were acquainted with the form of *stipulatio*. This anticipation is then confirmed by the summons in P. Yadin 23 concerning the very legal act that we find in P. Yadin 21 and 22.

If we compare the P. Yadin 21 and 22 with other presented documents, we can clearly see a structure consisting of the word *ὁμολογῶ* at the beginning, the text of the contract, stipulation clause at the end and the mention of *λιβράριος* in the subscription part. Here we want to mention P. Yadin 5, quite an early document, which is also a deposit, however, it does not include any of the features. Given the fact that it was attempting to resolve property issues after the dissolution of the *societas* following the death of one of the partners, it is odd that the parties would not have sought to ensure its validity. On the other hand, what is also different is that it does not mention the scribe as the other documents do. Perhaps, Babatha decided to use the help of the scribe only later to ensure

that all her dealings would be clear and stand in Roman courts should they become the object of a legal dispute. And we believe this was the case. As we would argue, again, what we have in front of us is not only an example, of Roman *ius civile*, but an example of how it could work in the sense of *ius gentium*, and the documents presented could be, in fact, sources for *ius gentium*.

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