The Law of Succession in the Documents from the Judaean Desert Again

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In a series of articles written over the last four years I have claimed that the law of succession reflected in the documents from the Judaean Desert seems not to have been in harmony with Jewish law on the subject.[1] I have now come to believe that there are considerations and circumstances, not taken into account before, which may undermine, or at least weaken, this claim — they may even remove the apparent discrepancy between the law of the papyri and Jewish law.

Jewish law, both biblical and rabbinic, preferred the claims of children, whatever their sex, to those of the man's brother or of his brother's children. We read in Numbers 27:8: 'When a man dies leaving no son, his patrimony shall pass to his daughter. If he has no daughter, you shall give it to his brothers'; and again in *mBaba Bathra* 8.2: 'The son precedes the daughter, and all the son's offspring precede the daughter; the daughter precedes the brothers (of the deceased)'.

My argument that the law of the papyri differed from Jewish law of succession was based — perhaps impressionistically — on the indirect evidence of three deeds of gift[2] in the archives from Maḥoza/Maḥoz 'Aglatain[3] and on the

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* This paper is dedicated to the memory of Abraham Wasserstein, to whose warning 'Hold your horses' I never paid enough attention.

1 H.M. Cotton and J.C. Greenfield, 'Babatha's Property and the Law of Succession in the Babatha Archive', *ZPE* 104, 1994, 211–24; H.M. Cotton, 'Deeds of Gift and the Law of Succession in Archives from the Judaean Desert', *Eretz-Israel* 25, 1996, 410-15 (in Hebrew). For a revised English version see *Akten des 21. Internationalen Papyrologenkongress Berlin, 13.-19.8.1995*, Archiv für Papyrusforschung Beiheft 3, 1997, 179-88.

2 1) *P.Yadin* 7 published by Y. Yadin, J.C. Greenfield, and A. Yardeni, 'A Deed of Gift in Aramaic found in Naḥal Ḥever: *Papyrus Yadin* 7', in *Eretz Israel* 25, 1996, 383–403 (Hebrew); 2) *P.Yadin* 19 published in N. Lewis, *The Documents from the Bar Kokhba Period in the Cave of Letters. Greek papyri* (with Aramaic and Nabatean Signatures and Subscriptions, edited by Y. Yadin and J.C. Greenfield), 1989 (henceforth Lewis, *Documents*); 3) *XḤev/Se gr* 64 published in H.M. Cotton and A. Yardeni, *Aramaic, Hebrew and Greek Texts from Naḥal Ḥever and Other Sites with an Appendix Containing Alleged Qumran Texts (The Seiyâl Collection* 2), Discoveries in the Judaean Desert XXVII, 1997 (henceforth Cotton-Yardeni). All *P.Yadin* mentioned in this article were published in Lewis,

direct evidence of *P.Yadin* 23, 24 and 25 of 130 and 131 CE. Let me start with the first. Two facts stand out as soon as one reads the three deeds of gift: 1) the beneficiaries of the gifts in all these documents are wives or daughters; 2) in all three cases there is no sign of a male heir whose existence might have called forth the writing of the deed of gift. These two facts suggested to me that the law of succession sidestepped wives and daughters, even in the absence of a male heir, and the deed of gift came to mitigate the rigour of rules of succession which were prejudicial to women. The deed of gift was the only way in which property could devolve on women in this society. To use Roman legal terminology: wives and daughters were not the *sui heredes* of their husbands and fathers. I am not suggesting that the mere existence of deeds of gift in favour of daughters and wives is the proof that without such legal instruments the property would not have devolved on them, even when there were no male heirs. But I did think that the existence of such instruments creates a strong presumption that this was so. The writing of a deed of gift, like the writing of a will and testament, was intended to emend the legal state otherwise created by the law of succession. In denying the claims of the wife to her husband's property this law seems to have been not unlike the Jewish law of succession. It differs from Jewish law in preferring the claims of the man's brother or his brother's children to those of the daughter.

The force of the foregoing conclusions is weakened by the following two considerations:[4]

1) There could be other reasons to write a will or a deed of gift — for the latter amounts to the same thing as a will. For example a second marriage of the father or the mother might lead to it. Judah son of Eleazar was married to Babatha[5] when he wrote *P.Yadin* 19 in favour of his daughter from a previous marriage, Shelamzion,[6] and Salome Grapte (or Gropte) was married to Joseph son of Shim'on when she wrote *XḤev/Se gr* 64 in favour of Salome Komaïse, her daughter from her marriage to Levi.[7] It could be argued, therefore, that they wrote deeds of gift in favour of their daughters in anticipation of the birth of a

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Documents unless otherwise indicated. All *XḤev/Se gr* were published in Cotton-Yardeni.

3 See H.M. Cotton and J.C. Greenfield, 'Babatha's Patria: Maḥoza, Maḥoz 'Eglatain and Ẓo'ar', *ZPE* 107, 1995, 126–34.

4 These were but briefly mentioned in previous studies.

5 Between 125 and 128; the marriage contract *P.Yadin* 10 was published by Y. Yadin, J.C. Greenfield, and A. Yardeni, 'Babatha's *Ketubba*', *IEJ* 44, 1994, 75–99.

6 Nowhere in the archive is it said that she is the daughter of Miriam daughter of Beianos, his other (or previous) wife; see family tree at the end.

7 Levi was dead by 127, see *XḤev/Se gr* 63 in Cotton-Yardeni.

male child who would deprive the daughter of their previous marriage of her right to inherit.

2) At least in one instance, and perhaps also in two, the occasion for the bestowal of property in a deed of gift seems to have been the marriage of the daughter. Thus Judah son of Eleazar writes the deed of gift *P.Yadin* 19 on 16 April 128, eleven days after Shelamzion's marriage to Judah Kimber, attested in *P.Yadin* 18 written on 5 April 128. Likewise, Salome Grapte (Gropte) may have written *XḤev/Se gr* 64 of 9 November 129 CE in favour of her daughter, Salome Komaïse, when the latter started her *agraphos gamos* with Yeshua' son of Menaḥem, which the couple turned into an *engraphos gamos* only on 7 August 131.[8] Like the property given *en prosphora* in Egypt, the property given in a deed of gift was meant for immediate use, to help the new household;[9] and, as in the case of the *prosphora,* the daughter gains absolute ownership over this property.[10] In other words the deed of gift does not imply in itself that daughters could not inherit; it simply makes the devolution of property immediate. Thus deeds of gift need tell us nothing about the law of succession.

What direct evidence is there for the assertion that a daughter did not have the right to inherit from her father when in competition with sons of her father's brother?

I believed that direct evidence could be found in *P.Yadin* 23, 24 where, after the demise of Judah son of Eleazar (Babatha's second husband), the guardian of the children of his dead brother (Yeshua'), Besas son of Judah, threatens Babatha that he will register three date orchards of her dead husband in Maḥoza in the nephews' name, unless she produces written evidence that she has a right to them:[11]

> I, therefore, summon you to disclose to me what document you possess as proof (π]ο[ί]ῳ δι̣κ̣αι̣ώματι) that you have the right to hold the said entities. If

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8 The unwritten marriage, ἄγραφος γάμος, was, as its name implies, a marriage without a contract: it did not require a contract in order to become valid. Its legal validity was no different from that of the written marriage, the ἔνγραφος γάμος; see H.J. Wolff, *Written and Unwritten Marriages in Hellenistic and Post Classical Roman Law*, Philological Monographs published by the American Philological Association, no. 9, 1939, 66–7; see Cotton-Yardeni's introduction to *XḤev/Se gr* 65 on Salome Komaïse daughter of Levi's marriage.

9 See J. Rowlandson, *Landowners and Tenants in Roman Egypt*, 1996, 164.

10 The dowry or *ketubba* recorded in the documents, whether written in Greek or in Aramaic, consists exclusively of valuables (jewelry and clothes) or sums of money; real property is never recorded as part of the dowry.

11 παρανγέλλω σοι ἀποδῖξαι μ[οι π]ο[ί]ῳ δι̣κ̣αι̣ώματι διακρατῖc τὰ αὐτὰ εἴδη. εἰ δὲ ἀπι[θῖc] [τοῦ μὴ ἀ]π̣οδε̣ῖξαι [γί]ν̣ωσκε ὅτι ἀπογράφο[μαι] α̣ὐ̣τ̣ὰ̣ [ἐν τῇ *ca.* 8 ἀπο]γρα[φῇ ἐ]π' ὀνόματος τῶν αὐτῷν [ὀρ]φ[ανῶν *ca.* ?].

you refuse to disclose know that I am registering them (ἀπογράφο[μαι]) in the ἀπογραφή in the name of the said orphans (*P.Yadin* 24 lines 6-9).[12]

In *P.Yadin* 25 Iulia Crispina, who describes herself as the *episcopos* of the same orphans, insists that Babatha is detaining property which belongs by law to the orphans.[13] It is striking that nothing whatsoever is said about the claims of Judah's own daughter Shelamzion. She was still alive on 19 June 130 (*P.Yadin* 20), five months before Besas charges Babatha with illegal distraint of her late husband's property. Unless we assume that she died between 19 June and 17 November of 130, or that Judah wrote a will in favour of his nephews,[14] we can infer that the law of succession in force at that time (at least among the Jews) in the province of Arabia did not automatically grant a daughter the right to inherit from her father when in competition with sons of her father's brother.[15]

Is this argument unassailable? The legal status of the date groves of *P.Yadin* 23 and 24[16] of November 130 may not have been unambiguous on Judah son of Eleazar's death (by 11 September 130).[17] It is possible that the sons of Eleazar Khthousion,[18] Yeshua' (the orphans' father) and Judah (Shelamzion's father), had not divided their father's property between them after their father's death,[19] but continued to hold them in joint ownership. This was common practice as we learn from the papyri; it has left its mark in the frequency of the locution κληρονόμοι τοῦ δεῖνος to refer to joint owners of real property.[20] Such a

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12 See Cotton, 'Deeds of Gift' 1997 (n. 1), 184 on the meaning of ἀπογραφή, ἀπογράφομαι and δικαίωμα in this context.

13 P.Yadin 25 lines 9-10: ... ὑπαρχόντων τῶν αὐτῶν ὀρφαν[ῶ]ν βίᾳ διακρατῖς ἃ οὐκ ἀνῆκέν σοι.

14 An assumption made by Lewis (*Documents*, 107) who suggests that we restore ἐν τῇ διαθήκῃ αὐτοῦ in *P.Yadin* 24, line 6.

15 All this is argued at much greater length in the articles mentioned in n. 1.

16 In fact it is only in *P.Yadin* 24 that the plural appears.

17 See *P.Yadin* 21 lines 8-9: Ἰούδου Χθουσίωνος ἀνδρός σου ἀπογενομένου; cf. *P.Yadin* 22 lines 8-9.

18 See family trees at the end.

19 I assume he was dead by the time of *P.Yadin* 20, see below on *P.Yadin* 20.

20 E.g. *P.Yadin* 16 line 28: γεί̣τ̣ο̣νε̣[c κλ]ηρο̣νόμοι Θησαίου Σαβακα; *XḤev/Se gr* 64 lines 9-11 (= lines 30-33): ἧc γείτωνεc ... δυcμῶν κληρο̣νό̣[μ]οι Αρετας ... βορρᾶ κληρονόμοι Ιωcηποc Βαβα; cf. H. Kreller, *Erbrechtliche Untersuchungen auf Grund Gräko-Ägyptischen Papyrusurkunden*, 1919, 63ff. In *XḤev/Se gr* 62 the declarant, Sammouos son of Shim'on, is one of two brothers holding properties in partnership (μετοχῆ) in Maḥoza. I suppose that as neighbours they could be described as κληρο̣νό̣μ]οι Cιμωνοc, although they do not make a joint land declaration.

situation might last for years.[21] The heirs of Yosef son of Baba —יוסף בר יוחי בבא— found in *P.Yadin* 7 (lines 6, 11 = lines 38, 45) of 120 CE[22] as neighbours to two pieces of land owned by Babatha's father, reappear nine years later in *XḤev/Se gr* 64, line 11 (= lines 32-33) dated to 129, still as a single body of owners: κληρονόμοι Ιωσηπος Βαβα, i.e. the property remained undivided for at least nine years.[23]

I assume that the date groves of *P.Yadin* 23 and 24 are the three date groves mentioned by name in *P.Yadin* 21 and 22,[24] which Babatha distrained after Judah son of Eleazar's death: 'in lieu of my dowry and a debt' (ἀντὶ τῆς προ{ο}ικός μου καὶ ὀφιλῆς),[25] i.e. for the debt of her *ketubba* money attested as 400 *zūzīn* (= 400 *denarii*) in *P.Yadin* 10,[26] and for the three hundred *denarii* which Judah borrowed from her in a deed of deposit (*P.Yadin* 17) on 21 February 128, a few months before the marriage of his daughter Shelamzion.[27] The terms of the marriage contract (*P.Yadin* 10) and the deposit (*P.Yadin* 17), gave her the right of execution upon Judah's possessions everywhere. This 'pledging clause' has been preserved in *P.Yadin* 17:[28]

> γε[ινο]μένης δὲ τῆς πράξεως τῇ αὐτῇ Βαβαθᾳ ἢ τῷ ὑπ‹ὲρ› αὐτῆς προφ[έ]ροντι τὴν συνγραφὴν ταύτην ἀπό τε Ἰούδου καὶ τῶν ὑπαρχόντων αὐτοῦ πάντῃ πάντων, ὧν τε ἔχει καὶ ὧν ἂν ἐπικτήςηται κυρίως (lines 33-37 = lines 12-15).

However, Babatha claims that her late husband had registered the date groves in her name:

> ἐπιδὴ ἀπεγράψατο Ἰούδας Ἐλεαζάρο[υ Χθουσίωνος] ἀπογενμένου cου ἀνὴρ ἐπ' ὀνόματός cου ἐν τῇ ἀπ[ο]γραφῇ κήπους φοινικῶνος ἐν Μαωζα (*P.Yadin* 24 lines 4-6).

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21 Kreller (n. 20), 65.

22 Above n. 2.

23 There must have been sound economic reasons for avoiding the parcelling of land into smaller units, but this is not the place to go into these.

24 *P.Yadin* 21 lines 7-12: ὁμολογῶ ἠγορακέναι παρά cου καρπίαν φοινικῶνος κήπων Ἰούδου Χθουσίωνος ἀνδρός cου ἀπογενομένου ἐν Μαωζᾳ λεγόμεναι γανναθ Φερωρα καὶ γανναθ Νικαρ[[ι]]κος καὶ ἡ τρίτη λεγομένη τοῦ Μολχαίου, ἃ κατέχις, ὡς λέγις, ἀντὶ τῆς cῆς προ{ο}ικὸς καὶ ‹ὀ›φιλῆς; cf. *P.Yadin* 22 lines 7-11.

25 *P.Yadin* 22 line 10; cf. *P.Yadin* 21 lines 9-10.

26 *P.Yadin* 10 line 6 'and I owe you the sum of four hundred *denarii* (*zūzīn*) which equal one hundred tetradrachms (*ṣōrīn*)'.

27 Unless ἀντὶ τῆς προ<ο>ικός μου καὶ ὀφιλῆς is to be construed as hendiadys for 'the debt of my dowry'.

28 It is missing in *P.Yadin* 10 but we know that the 'pledging clause' was a standard feature in contemporary marriage contracts: *Mur* 20 line 12, 115 line 17, *P.Yadin* 18 lines 24-26 (= lines 62-64), *XḤev/Se gr* 65 lines 11-12.

In other words, notwithstanding the wording of the 'pledging clause' that all of Judah's property was put in lien to pay his debt to Babatha,[29] it seems that specific properties were earmarked to guarantee its return. Babatha's claim to have the groves registered in her name as security for her *ketubba* money and the debt seems plausible enough: we have evidence for dowries being secured on specific pieces of property in documents from Egypt, and some evidence that this was practised elsewhere.[30] The objection that Judah would not have registered in her name property which he, at least formally, shared with his brother, could be met by pointing out that on 6 May 124 he mortgaged a courtyard in Ein Gedi which belonged to his father Eleazar Khthousion as security for a loan which he took from Magonius Valens, a centurion of a detachment of the *Cohors I milliaria Thracum* then stationed in Ein Gedi.[31]

However, the guardians of Judah's nephews may not have known of any consensual agreement between the brothers concerning the date groves in question. This is precisely the reason for Besas son of Judah to demand from Babatha that she produce proof (δικαίωμα) that the groves were registered in her name, as she maintained.[32] Having been appointed to guard the interests of the orphans, Besas need not, at this stage at least, be concerned with Judah's own daughter's claims to these properties. This would fully account for her name not being mentioned in this context, and no inferences should be drawn about the daughter's right of succession.

At first sight *P.Yadin* 20 of 19 June 130 seems to favour my former argument about the law of succession in force in the papyri. There we find the guardians of Judah's nephews conceding a courtyard in Ein Gedi with the rights attached to it to Shelamzion daughter of Judah:

> We acknowledge that we have conceded to you, from the property of Eleazar, also known as Khthousion, son of Judah, your grandfather, a courtyard with all its rights in Ein Gedi and the rooms with it (lines 27-30 = lines 6-10).[33]

Lewis identified that courtyard with the one mentioned in the deed of gift, *P.Yadin* 19.[34] If so, then despite the existence of a deed of gift, Judah's nephews

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29 Cited above ad n. 28.

30 E.g. *P.Oxy.* 907 (a will of 276 CE); *P.Bostra* 1 (unpublished); I am grateful to J. Gascou for providing me with the text

31 *P.Yadin* 11 lines 14-16 (= lines 2-4): ὁμο̣λο̣γῶ ἔχειν καὶ ὀφείλειν σοι ἐν δάνει ἀργυρίου Τυρίου δηνάρια ἑξήκοντα, οἵ εἰσι̣ν [c]τ̣α̣τ̣ῆρες δεκ̣απέντε ἐπὶ ὑποθήκῃ τῇ ὑπαρχούσῃ αὐλῇ ἐν Ἐνγαδοῖς Ἐλαζάρῳ Χθου̣σιω̣νο̣ς π̣α̣τ̣ρί μου.

32 See *P.Yadin* 24 lines 6-9 quoted in n. 11.

33 Ὁμολογοῦμεν [[παρα]]συ̣γκεχωρηκέναι σ̣[οι ἐξ ὑ]παρχόντων Ἐλεαζάρου τοῦ καὶ Χθουσίωνος τοῦ Ἰο̣ύ̣δο[υ π]ά̣π̣ου σου αὐλὴν σὺν παντὶ δικαιοῖς αὐτῆς ἐν{ε} Ἠνγα̣δ̣ο̣ῖ̣ς καὶ τοὺς σὺν αὐτῆς οἰκίαι.

tried to dispute the validity of the gift, and finally had to concede the cession of his property to his daughter. It could be assumed, therefore, that they were his heirs according to the current law of succession.

However, the identification of the courtyard in *P.Yadin* 20 with the one given to Shelamzion in *P.Yadin* 19 is far from certain. The neighbours are not the same,[35] nor is the original owner: the courtyard in *P.Yadin* 20 formerly belonged to Shelamzion's grandfather, Eleazar Khthousion, not to her father. To maintain Lewis' identification of the courtyard in *P.Yadin* 19 and 20 it could be suggested as above that the two brothers, Judah and Yeshua', had not formally divided their father's property between them, the courtyard had never been registered in Judah's name, and that this was the reason for the nephews' implicit counterclaim: they disputed not the validity of the gift but Judah's legal right to bestow the courtyard. This calls for some ingenuity. It would require still more ingenuity to get rid of the discrepancy between the neighbours of the two courtyards.[36]

But if the courtyard in *P.Yadin* 20 is *not* the subject of the deed of gift of Judah son of Eleazar to his daughter Shelamzion (*P.Yadin* 19), we no longer need to say that the courtyard in *P.Yadin* 20 passed into Shelamzion's hands through the mediation of a deed of gift by her father. She could have got it directly from her grandfather, either in her father's lifetime or after his death. It is possible of course that the grandfather, Eleazar Khthousion, outlived his son, Judah. It seems more likely though that Shelamzion came into possession of her grandfather's courtyard as a result of her father's recent death (though it is attested for the first time only three months later).[37] As long as Judah was alive the grandfather's property must have remained undivided between uncle and nephews. Furthermore, until then Judah may have served as their guardian, or at least looked after the common property. A similar situation is reflected in the fragmentary *P.Yadin* 5 of 110 CE, the first Greek document from the Babatha archive, where an uncle, Yosef son of Yosef, acknowledges to his nephew, Yeshua' son of Yeshua' (Babatha's first husband) monies and assets on deposit with him:

> I Yosef son of Yosef surnamed Zaboudos, inhabitant of Maḥoza, acknowledge to Yeshua' son of Yeshua' my brother, of the same place, that you have with me a thousand and a hundred and twenty 'blacks' of silver as deposit of all assets of silver, contracts of debt, investment in factory, value of figs, value of wine, value of dates, value of oil and of every manner [of thing] small and

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34 Lewis, *Documents*, 89.

35 Three out of four abutters changed between 16 April 128 and 19 June 130.

36 See in great detail H.M. Cotton, 'Courtyard(s) in Ein Gedi: *P.Yadin* 11, 19 and 20 of the Babatha archive', *ZPE* 112, 1996, 197-202.

37 Cf. *P.Yadin* 21, of 11 September 130, lines 8-9 quoted in n. 17 above.

large, from everything *which was found [to belong] to your father and me, between me and him,* [namely] one thousand and a hundred and twenty 'blacks' of silver ... etc. (*P.Yadin* 5 frg. a col. i lines 5-14).[38]

After Judah's death adjustments had to be made, and these are reflected in *P.Yadin* 20. The fact that Shelamzion did get the courtyard in the end may imply that the granddaughter acquired her father's right to the inheritance.

The material which I have looked at here is the same material which I have studied in the articles published over the last four years. However, in this paper I have tried to look at the material and the question from a slightly different angle, and in addition I have taken into account a number of new considerations and arguments. While I still suspect that the deeds of gift were indeed intended to bypass the existing law of succession to the benefit of daughters, it now seems to me, in particular on the basis of these newer considerations, that it is not possible to demonstrate this conclusively from the evidence at our disposal at present. In consequence, therefore, I submit, we must consider this a *non licet.*[39]

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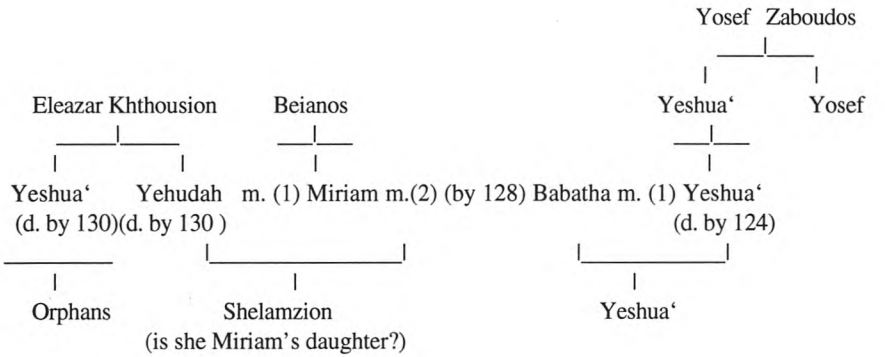
38 ὁμολογῶ ἐγὼ Ἰώσηπος τοῦ Ἰωσήπ[ου ἐπι]κ̣αλουμ[ένου] Ζαβούδο[υ] τῶι ἀπὸ Μαωζων [co]ῖ Ἰη[cῷ τ]ο̣ῦ̣ Ἰης[οῦ τοῦ] ἀδελφοῦ μου α̣ὐτόθεν ἔχ[ει]ν cε παρ' ἐμ[οὶ ἀργυρ]ίου μέ[λανας] χείλια καὶ [ἑ]κατὸν εἴκο̣ςι παραθήκη[ν] π̣άντων ὑ[παρχόν]των καὶ ἀ[ρ]γυρίου καὶ χ[ει]ρογράφων ὀφ[ει]λήματος κα[ῖ δ]απάν̣ης ἐργαστηρίου κ̣αὶ τειμῆς [ὀ]λύνθων κα[ῖ] τειμῆς οἴνου κ̣αὶ τειμῆς φοίνικος καὶ τειμῆς ἐλαίου καὶ ἐκ παντὸς τ̣ρόπ̣ου μ̣εικροῦ καὶ μ̣εγάλου ἐκ πάντω[ν] ὧν εὑρέθη π̣ατρεί c[o]υ καί μοι μετ̣αξύ μου καὶ α[ὐ]τοῦ ἀ̣ργυρίου μέλανες̣ χείλιον ἓν καὶ ἑ̣κατὸν ε̣ἴκοσι etc.

39 I thank Professor Ranon Katzoff for reading this paper and for making valuable suggestions for improvement.

Family Trees

1) Family tree of Babatha and her two husbands



2) Family tree of Salome Komaïse daughter of Levi