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From International Treaties to the Binding Nature of Contract. A Historical and Comparative Study

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Indice

Regulatory Autonomy in Eastern Roman Provinces: the Babatha Archive

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The Babatha Archive[1] is an incredible source about life in the province of Arabia Petraea, on the border of Iudaea. These documents[2] are a relevant testimony on social and economic relationships for I-II centuries CE and they show

[1] Principal editions: *The Documents from the Bar-Kokhba Period in the Cave of Letters. Greek Papiry, Aramaic and Nabatean Signatures and Subscriptions (*eds. Y. Yadin, J.C. Greenfield, N. Lewis), Jerusalem, 1989; *Aramaic, Hebrew and Greek Documentary Texts from Naḥal Ḥever and Other Sites, with an Appendix Containing Alleged Qumran Texts* (eds. H. M. Cotton, A. Yardeni), Oxford, 1997; *The Documents from the Bar-Kokhba Period in the Cave of Letters. Hebrew, Aramaic and Nabatean-Aramaic Papiry* (Yadin, Greenfield, Yardeni, B. A. Levine), Jerusalem, 2002; K. Beyer, *Die aramäischen Texte vom Toten Meer, samt den Inschrifen aus Palästina und den alten talmudischen Zitaten*, II, Göttingen, 2004. Recently, a translation of Greek texts has been edited: *Archivio di Babatha*. I. *Testi greci e ketubbah* (a cura di D. Hartmann), Brescia, 2016.

[2] They are deeply analysed since the '50 years of the XX century, the most recent are: H. M. Cotton, J. C. Greenfield, *Babatha's Property and the Law of Succession in the Babatha Archive*, in *Zeitschrift für Papyrologie und Epigraphik*, 104, 1994, 211 – 224; H.M. Cotton, *Land Tenure in the Documents from the Nabataen Kingdom and the Roman Province of Arabia*, in *Zeitschrift für Papyrologie und Epigraphik*, 119, 1997, 255 – 265; B. A. Levine, *The Various Workings of the Aramic Legal Tradition: Jews and Nabateans in the Naḥal Ḥever Archive*, in *The Dead Sea Scrolls Fifty Years After Their Discovery: Proceedings of the Jerusalem Conference, July* 20-25, 1997 (L. H. Schiffmann, E. Tov, J.C. Vander Kan eds), Jerusalem, 2000, 836 - 851; L. Migliardi Zingale, *Diritto romano e diritto locale nei documenti del Vicino Oriente*, in *SDHI*, 65, 1999, 217 – 231; Ead. *Storie di donne nel II secolo d.C.: il deserto di Giudea restituisce le 'chartae' di famiglia*, in *Atti dell'Accademia Ligure di Scienze e Lettere*, 5, s. VI, 2002, 441 – 445; *Law in the Documents from the Judean Desert* (eds. R. Katzoff, D.M. Schaps), Leiden, 2005; J.G. Oudshoorn, *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*, Leiden, 2007; J. F. Healey, *Fines and Curses: Law and Religion among the Nabataens and their Neighbours*, in *Law and Religion in the Eastern Mediterranean: From Antiquity to Early Islam* (A. C. Hagedorn, R.G. Kratz eds.), Oxford, 2013, 167 - 186; K. Czajkowki, *Localized Law. The Babatha and Salome Komaise Archives*, (*Oxford Studies in Roman Society and Law*), Oxford, 2017; Ph. F. Esler, *Babatha's Orchad. The Yadin Papyri and an Ancient Jewish Family Tale Retold*, Oxford University Press, 2017.

that Roman principles were absolutely known even before this territory came into the Empire. At the beginning of the 2nd century, the Arabian territory was part of Nabataean kingdom with a capital at Petra. It was bordered by the Roman empire, on the north by Syria, on the west by Iudaea and Aegyptus and on the south and east by the rest of Arabia, known as *Arabia Deserta* and *Arabia Felix*. The melting-pot with Roman legal culture was surely deeply embedded before the annexion due by Emperor Trajan in 106 CE. An excellent proof is precisely given by the documents of Babatha's archive.

This was recovered in 1960 during further archaeological explorations in the Judean Desert[3] under the direction of Yigael Yadin, in one of the biggest caves of the northern side of Naḥal Ḥever, later known as Cave of Letters, where Babatha and others found refuge during the Bar Kokhba revolt, which began in 132 CE.[4]

Babatha's documents, kept in a leather bag, are thirty-six papyri, written in Nabataean Aramaic or in Jewish Aramaic or in Greek, dated from 94 to 132 CE.[5] They include sales and purchase contracts, deposits, marriage contracts,[6] petitions, and summonses.[7] Babatha bat Šimʿon bar Menahem (from now on Babatha) was a Jewish landowner, attested by a great deal of property in her archive; she lived in a Nabataen village called Mahoza, in the district of Zo'ar, on the southern coast of the Dead Sea, which from 106 CE became the north-western end of the Roman province Arabia Petrea.

The subdivision of the documents in groups shows how Babatha was worried about her own patrimony and would have kept on hand the documents that legitimate her right of property, disputed in the lawsuit attested by group A and C.[8]

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[3] About ten years after the discovery of the Qumran Texts in the year 1947. *Archivio di Babatha* ... 13 f.

[4] They had revolted from Rome under the leadership of Šim'on bar Kosiva, called Bar Kokhba, and found refuge in this cave, where they were trapped and died of exposure or of suffocation from smoke inhalations because of the fires caused by Roman soldiers. *Archivio di Babatha* ... 24 f.

[5] These represent just a cross-section of the documents kept by Babatha, surely the most important ones, the necessary ones to get back her properties management, after the revolt of Bar Kokhba.

[6] They are: *ketubbah* of the second Babatha's marriage; the nuptial contract of her stepdaughter, Šelamsion.

[7] Bundle A: documents relating to the guardianship of Yešua' bar Yešua' (from now on Yešua' iunior), son of Babatha and her first husband, he also named Yešua' bar Yehosef (from now on Yešua' senior).

[8] The numbering system Yadin edition follows the chronological drawing up of the documents and does not follow this partition, described in the text, made by Babatha and archivally more correct and more relevant for the legal aspects. In the paper, it will be referred to the archival partition.

These lawsuits are widely studied in the literature, because of their richness of information about legal procedure *per formulas* in Roman provinces.[9] They are written in Greek too and proof how Roman authorities should be deliberately or necessarily involved in the resolution of the conflicts.

But even the deeds, strictly associated to the procedural acts, are extremely interesting to deepen the study of the trade practice in the Mediterranean area and to show the influence exerted by Roman legal principles in the affirmation of the regulatory autonomy between the parts in the contracts.

Particularly, it is compelling a deep study of the most ancient documents, the P. Yadin 1-4;[10] they are written at the time of the Nabatean kingdom and could show the use of Roman law principles in the commercial trade before the political Roman dominance on this territory because these principles would be conveyed in the local legal practice by international law rules.

These documents are maybe the most ancient papyri of the Nabatean kingdom and they have been probably written between 94 and 99 CE, what means before the annexion to the Roman empire and that would explain why they are written only in Nabatean-Aramaic. But this assumption is confuted by the presence of other papyri written in Nabatean-Aramaic after the constitution of the Roman province, Arabia Petrea, in 105 CE (P. Yadin 7 and 8, dated to 120).

P. Yadin 1 describes a mandatory relationship between a husband, Moqimu bar ‘Autillahi (from now on Moqimu) and his wife ’Amat’isi barat Kamanu[11] (from now on ’Amat’isi). The deed has been drawn up in Moab, at 10 september 94 by ʿAzur. The text is divided into two parts, In the first Moqimu recognizes a debt to his wife Amat’isi of 150 *sela’s* (600 *denarii*) and he promises to recover

[9] Above all works of D. Nörr, *The xenokritai in Babatha’s Archives (Pap. Yadin 28-30)*, in *Israel Law Review*, 29, 1995, 83-94; Id., *Prozessuales aus dem Babatha-Archiv*, in *Mélanges à la mémoire de André Magdelain: droit, histoire et religion de Rome* (dir. M. Humbert, Y. Thomas), Paris, 1998, 317 – 341; Id., *Römisches Zivilprozessrecht nach Max Kaser: Prozessrecht und Prozesspraxis in der Provinz Arabia*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 115, 1998, 80 – 98; Id., *Zu den Xenokriten (Rekuperatoren) in der römischen Provinzialgerichtsbarkeit*, in *Lokale Autonomie und römische Ordnungsmacht in den kaiserzeitlichen Provinzen vom 1. bis 3. Jahrhunder* (Hrsg. W. Eck), München, 117 – 301; H.M. Cotton, W. Eck, *Roman Officials in Judaea and Arabia and Civil Jurisdiction*, in *Law in the Documents from the Judean Desert* ... 23 – 44. About Babatha as guardian for her son, especially: T. Chiusi, *Babatha vs. the Guardians of Her Son: A Struggle for Guardianship-Legal and Practical Aspects of P. Yadin 12-15, 27*, in *Law in the Documents from the Judean Desert* ...m 105 – 132.

[10] The analysis of texts in Nabatean-Aramaic has been based on their English translation made by Esler.

[11] Nabatean names are indicated with their transliteration. See: *Archivio di Babatha* cit., 28 nt. 2.

the amount after two years; in the second part, his wife Amat'isi confirms to have loaned the above-mentioned sum to her husband.[12]

P. Yadin 2 and 3 would concern the sale of the same date-palm from a woman called 'Abi-'adan, bat 'Aptaḥ bar Manigares (from now on 'Abi-'adan) in the first instance to a Nabatean Archelaus bar ʿAbad-ʿAmanu[13] (from now on Archelaus) and thereafter to Babatha's father, Šimʿon bar Menahem (from now on Šimʿon).[14]

About the last papyrus, P. Yadin 4, there are many doubts because of its extreme fragmentation, but according to the dominant interpretation it would be a guarantee for the debt of Moqimi to Amat'isi,[15] and that could justify the presence of P. Yadin 1 among these documents, otherwise it would not have any connection to the other papyri. Recently Esler[16] has been pointed out a few critical flaws of this interpretation and following Lewis[17] he regards this papyrus as a sale of a plot.[18] This interpretation is very suggesting and if correct, P. Yadin 4 could be another property deed as P. Yadin 2 and 3. Surely, the presence of P. Yadin 1 remains unclear, but the missing part of P. Yadin 4 could maybe contain a connection with P. Yadin 1.

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[12] *Idem*, 28; Czajkowki, *Localized Law* ... 26 f.

[13] The name could be read: ʿAbad-ʿAmiyu.

[14] First deed should be nullified, although on the text there is no evidence of annulment. About the question see: *The Documents from the Bar-Kokhba Period in the Cave of Letters. Hebrew, Aramaic and Nabatean-Aramaic* ..., 202-205 and Oudshoorn, *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives* ...11, 93-97 and *passim*.

[15] Beyer, *Die aramäischen Texte* ..., 215; Oudshoorn, *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives* ... 55 nt. 30.

[16] Esler, *Babatha's Orchad* ... 177 ff.

[17] 'Sale of Property" for Lewis in *The Documents from the Bar Kokhba Period in the Cave of Letters: Greek Papyri* ... 29.

[18] Esler rejects the hypothesis of a guarantee on the basis of three assumptions. First, in the text of P. Yadin 4 would not be any reference to third person, according to Levine (*The Various Workings of the Aramic Legal Tradition* ... 837. But in the edition of these documents, *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabatean-Aramaic Papyri* ... 837, Levine comes back to the hypothesis of guarantee for the presence of someone called 'Yehoseph'); Second, in the Nabatean legal practice the guarantee was written in the contract. Examples found in P. Yadin 1 e 3.

P. Yadin 1, r. 7: And the said Abad-'Amanu is a guarantor in relation to everything that (is) written above. [Trad. in Esler, *Babatha's Orchad* ... 235].

P. Yadin 3, r. 43: And everything that is written in a grant, in it, the said son of Lutay, <agrees> and (also) concerning what the said 'Abi-'adan (has agreed) pertaining to you. [Trad. in Esler, *Babatha's Orchad* ... 250.]

Third, the length of P. Yadin 4 would confirm the nature of sale, because a text of nineteen rows is rather a sale then a guarantee. In fact, P. Yadin 2 has twenty-four rows and P. Yadin 3 twenty-seven ones and they both are deeds of sale. Esler, *Babatha's Orchad* ... 178 ff.

The focus of this paper will be P. Yadin 2 and 3, two complete deeds of sale. The sale is, indeed, a perfect example of a contract with clauses influenced by international rules. The Roman *emptio-venditio* is in fact a source of obligations *iuris gentium*, i.e there is a standard form of this contract known and applied by every people. Limiting the research to the Mediterranean area, it is possible to see how Roman legal science made a relevant contribution to the development of the deed of sale, by supplying existing rules with typical clauses of Roman law. The above-mentioned papyri show exactly the reception of these integrations in local legal rules of contracts of sale.

P. Yadin 2, datable between November/December 99[19] CE is a deed of sale of date-palm located on the shore of Dead See for 112 *sela's* (448 *denarii*) where the vendor is a woman called 'Abi-'adan and the purchaser is a man called Archelaus. According to Esler, this papyrus is the document received by Archelaus,[20] identified as *strategos*.[21]

P. Yadin 3, datable to December 99/January 100 CE, is a sale of date-palm for 168 *sela's* (672 *denarii*) between the vendor 'Abi-'adan and the purchaser, Šimʿon, father of Babatha. It is a common opinion that the object of the sale is the same plot, sold a few months before by 'Abi-'adan to Archelaus and this second sale could be explained by assuming a rescission of the first contract by the purchaser. Recently, Esler questioned whether the date-palm of P. Yadin 2 was really the same as P. Yadin 3.[22] Based on an accurate analysis of the texts, he has found such differences between the papyri that it is possible to argue that the objects of the sale of P. Yadin 2 and that of P. Yadin 3 was not the same. Indeed, according to the not identical description of the western boundary in P. Yadin 3 and in P. Yadin 2,[23] the date-palm purchased by Šimʿon had probably a larger extension than the one purchased by Archelaus. The date-palm of P. Yadin 2 would be only a part of

[19] *Idem*, 109 For the dates, I follow the hypothesis of Esler, in line with Lewis (*The Documents from the Bar Kokhba Period in the Cave of Letters: Greek Papyri* ... 29,); instead, it is indicated the year 97/98 in Yadin, Greenfield, Yardeni, B. A. Levine, *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabatean-Aramaic Papyri* ... 216.

[20] The purchaser does not subscribe the contract of sale, where is attested the payment of the price and the delivery of goods. This is a legal practice in use not only in the Nabatean law, but also in Roman law, further confirming the uniformity of the rules of sale in the entire area of Mediterranean Sea. The Roman *emptio-venditio*, indeed, is a contract *iuris gentium*, that means with rules which each people shall know and apply.

[21] Further information about the parts of this contract: Esler, *Babatha's Orchad* cit 111 ff.

[22] *Idem,* 135.

[23] *Idem*, 137, The western border was longer, because it included the house of *Il Hunainu* son of *Tayim-'Ilahi'* (P. Yadin 3, r. 4. Trad. Esler, 247).

the date-palm of P. Yadin 3 and that justifies the higher price of the sale of P. Yadin 3 (fifty per cent more of the price of the sale of P. Yadin 2).[24]

The structure of P. Yadin 2 and P. Yadin 3 is a typical form of *emptio venditio*,[25] contract of sale *iuris gentium*

1. Date and place
2. Purchaser and vendor
3. Description of the selling object
   a. boundaries (for real estates)
   b. soil types (assigned watering periods)
   c. entitlement of the vendor
4. Price and *pretii traditio*
5. Entitlement of the purchaser

[24] About how Šimʿon has been entered into possession of date-palms of Archelaus, see for the hypothesis of rescission of the contract, without document evidence, supported by the common doctrine: Cotton, *A Cancelled Marriage Contract from the Judaean Desert (XHev/Se/Gr.2)*, in *Journal of Roman Studies*, 84, 64-86, Piatti I-II, 1994; Cotton, Yardeni, *Discoveries in the Judean Desert*. *Volume 27. Aramaic, Hebrew and Greek Documentary Texts* ..., 250-274, Piatti XLV e XLVI.. For Egypt: P. Col. 10.249: *Papyri from the Washington University Library Collection, Part 2* (K. Maresch, Z. M. Packman eds) Opladen, 1990, 75-78. In particular, Healey, *Fines and Curses* ... 2013, 176, affirms that the deed of sale of Archelaus was non effective, because the document was just a draft; rather Oudshoorn, *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives* ... 108 argues that if the sale of P. Yadin 2 had been effective, the sale of P. Yadin 3 would be impossible. Contra, Esler (*Babatha's Orchad* ..., 142 s.) suggests a connexion between P. Yadin 1 and P. Yadin 2 and argues that Archelaus as the son of the guarantor for Muqimu, after his father's death, has been forced to fulfill the guarantee and to rescind the contract of sale for the need of money. Certainly P. Yadin 2 was not a draft and the efficacy of the contract is proved by the assumption of the vender 'Abi-'adan: P. Yadin 2, r. 8-9: *This silver, the full price of these purchases, has been received by me, I, the said 'Abi-'adan, the fixed price of the purchases ……in full value, mature and non-refundable in perpetuity*. Following Esler's hypothesis I have suggested another theory based on the rules of transmission of possession of a provincial land of Roman Law [S. Tarozzi, "*Brevi cenni sull'archivio di Babatha*", in (a cura di G. Bassanelli Sommariva) *Ravenna Capitale. Tracce e localizzazioni di atti negoziali*, Sant'Arcangelo di Romagna, 2020, 69 ff.]

[25] Above all: V. Arangio-Ruiz, *La compravendita*, Napoli, 1954; *Studies in the Roman Law of Sale. Dedicated to the Memory of Francis de Zulueta* (Daube ed.). Oxford, 1959; A. Watson, *The Law of Obligations in the Later Roman Republic*, Oxford, 1965, 40 ff.; A.J. Kerr, *The Law of Sale and Lease*, Johannesburg, 1984; L. Vacca, *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica. Materiali per un corso di diritto romano*, Torino, 1998; L. Garofalo, *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano*, Padova 2007; *Kaufen nach Römischem Recht. Antikes Erbe in den europäischen Kaufrechtsordnung* (E. Jakab, W. Ernst eds.) Berlin-Heidelberg, 2008; T. Dalla Massara, *Fondamenti e modelli nel diritto della vendita*, Napoli, 2020.

6. Covenants
7. Penalties in case of breach of the agreement
9. Registration requirement (for the purchaser)
8. Vendor, purchaser and witness signatures

In the texts of P. Yadin 2 and 3 concerning the covenants (P Yadin 2 10-11; P. Yadin 3 11-12) and the penalties in case of breach of the agreement (P. Yadin 2 11 [from *And as well*] -13; P. Yadin 3 12 [from *And as well*] -13) is it possible to see a connection with the principles of Roman law.

P. Yadin 2

Upper Version, verso

10. ... (I covenant) that (these purchases are) not (affected by) lawsuit, nor by contest, nor by oath …… and that I, the said ‘Abi-‘adan will clear these purchases from anyone,

11. anyone at all, distant or near, and I will leave (them) unencumbered for you, you, the said Archelaus, for you and for your sons after you in perpetuity. And as well, you, the said Archelaus, are indemnified … by me, I, the said ‘Abi-‘adan, against

12. all that I may claim, or that may be claimed in my name against you in relation to these purchases, pertaining to houses and courtyards, and (in relation to) requital and specification, and agreements and oath, that may still be claimed concerning thorn bushes and …. And there is agreement in relation to exchanges and profits …

13. …….. (concerning) purchases and clearances, as is customary for purchases and clearances as is written in perpetuity.

P. Yadin 3

Upper Version, recto

11. ... (I covenant) that (these purchases) not (affected by) lawsuit, nor by contest, nor by any oath whatsoever and that I, the said ‘Abi-‘adan will clear these purchases from anyone,

12. anyone at all, distant or near, and I will leave (them) unencumbered for you, you, the said Shim’on, for you and your sons after you in perpetuity. And as well, you, the said Shim’on, are indemnified … by me, I,

13. the said ‘Abi-‘adan, against all that I may claim, or that may be claimed in my name against you in relation to these purchases, pertaining to houses and courtyards, and (in relation to) requital and specification, and agreements and oath, that may still be claimed

14. concerning thornbushes and …; And there is agreement in relations to exchange and profits ……. entirely, (concerning) purchases and clearances, as is customary for purchases and clearances as is written in perpetuity.

The purchaser's rights are safeguarded not only by the general rules of the contract of sale, but also by further covenants in which the vendor makes other promises to the purchaser. First, the vendor vouchs that the sale is not encumbered by any kind of burden. There are no legal matters on it, and it is free from usufruct or predial servitude. And moreover, if someone else should disturb the purchaser in the possession, the vendor and his heirs will take responsibility for compensation for damage.

These covenants concern the warranty of peaceable possession due to the purchaser, because, as it is known, the contract of *emptio venditio* do not imply to transfer the title. For this the vendor could be not the owner of what he sold and could be not able to transfer ownership to the purchaser; in that case, naturally, the purchaser became owner by *usucapio*, but he should meet the requirements to be able to possess, namely the vendor merely should grant the purchaser undisturbed possession and grant indemnify him for any third-party's claim in relation to the object of sale. The covenants are exactly these warranties. Basically, they concern a warranty of peaceable possession (*that I, the said vendor will clear these purchases from anyone, anyone at all, distant or near*) but specifically it is the liability for eviction. The eviction can occur if the true owner, by asserting his title, evicted the purchaser (*that (these purchases are) not (affected by) lawsuit, nor by contest, nor by oath whatsoever*) or in the case that the purchaser had become owner, but a third party could assert a real right against him (*that I will leave [them] unencumbered for you, you, the said purchaser, for you and for your sons after you in perpetuity*). In any case of eviction, the purchaser could hold the vendor responsible. This liability for eviction[26] "was the result of a long and interesting historical development, in the course of which several legal institutions, supplementing each other, eventually grew together".[27] It was a guarantee in sale by *mancipatio*, of which we can find a trace in the XII Tables, that means a typical clause proper to the Roman legal system and after its adaptation in the contracts of *iuris gentium*, it has become a general rule; furthermore, through the law of Justinian it has become part and parcel of the *ius commune.* In Roman sources, there are many cases in which the purchaser could be evicted. In the sixth book

[26] Above all: Nörr, *Probleme der Eviktionshaftung im klassischen römischen Recht*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 121, 2004, 152 - 188.; Dalla Massara, *Evizione e diritto di proprietà: matrici romane e sistema italiano vigente,* in *Diritti reali: esperienza storica, sviluppo moderno e prospettive comparatistiche nel sistema giuridico continentale. Atti del convegno di Shanghau, 7-8 aprile 2007*, 2007, 1-30; Knütel, *Hoffnungskauf und Eviktionshaftumg*, in *Kaufen nach Römischem Recht* ... 139-148; Vacca, *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, Padova, 2010.

[27] R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996, 294.

of Questions by Africanus,[28] for example, the jurist refers to a sale of property unencumbered by a usufruct which the vendor has not mentioned in the contract. Afterwards, the purchaser transfers the land to someone else, reserving himself a usufruct, the usufruct would revert to the owner of the land, according to the opinion of Julian, because a usufruct could not be validity created at a time when it had already been conveyed elsewhere, but the purchaser would be able to sue the vendor in respects of eviction, because it is only right that his position should be as it would have been if someone else had not had a usufruct at the relevant time. Further, in the twenty-seven book of Digest by Celsus,[29] it is described the case of sale of land, whose position was not known by the purchaser, with reserve of usufruct for the vendor. If in this land someone else has a usufruct for life and he brings an action for his right to use and enjoy the land, the purchaser has an action against the vendor in respect of eviction, because, if what the vendor said to the purchaser at the sale had been true, the purchaser would properly have denied that someone else had a usufruct.

These are only two examples, but Roman sources, especially the Digest of Justinian, are full of cases which for their diversity and complexity do understand that the purchaser could be protected only if the vendor shall take full responsibility with written assumptions. As the Roman jurist Pomponius said[30] in the thirty-one book on Quintus Mucius: «When land is sold, certain obligations are due, even if not stated, such that the purchaser shall not be evicted from the land or the usufruct of it».[31]

The reception of a Roman formulary in the Nabatean kingdom could be explained by the dependence of the kingdom from the Roman province of Syria, already a few years before the annexion. The use of Roman clauses in drawing up a contract of sale shows the preeminent rule exercised by the Roman legal practice even in an area not still completely romanized. That means that Roman

[28] *Dig*. 21.2.46pr.: *Fundum cuius usus fructus Attii erat, mihi vendidisti nec dixisti usum fructum Attii esse: hunc ego Maevio detracto usu fructu tradidi. Attio capite minuto non ad me, sed ad proprietatem usum fructum redire ait, neque enim potuisse constitui usum fructum eo tempore, quo alienatus esset: sed posse me venditorem te de evictione convenire, quia aequum sit eandem causam meam esse, quae futura esset, si tunc usus fructus alienus non fuisset.*

[29] *Dig*. 21.2.62.2: *Si fundum, in quo usus fructus Titii erat, qui ei relictus est quoad vivet, detracto usu fructu ignoranti mihi vendideris et Titius capite deminutus fuerit et aget Titius ius sibi esse utendi fruendi, competit mihi adversus te ex stipulatione de evictione actio: quippe si verum erat, quod mihi dixisses in venditione, recte negarem Titio ius esse utendi fruendi.*

[30] *Dig*. 18.1.66pr.: *In vendendo fundo quaedam etiam si non dicantur, praestanda sunt, veluti ne fundus evincatur aut usus fructus eius, quaedam ita demum, si dicta sint, veluti viam iter actum aquae ductum praestatu iri: idem et in servitutibus urbanorum praediorum.*

[31] *The Digest of Justinian. English-Language Translation* (Watson ed.), Vol. 2, Philadelphia, 1985, 65.

legal principles pervade naturally other legal practices, earlier than the application of Roman law was enforced by Roman authority. In fact, in the same structure of these Nabatean contracts[32] there are similarities with Roman contracts: the indication of date and place, where the document has been drawn up, disposal part with the identifiers of the sale (identity of the parts; description of the object and its price) and with legal clauses (authenticity of the title; guarantee and indemnification). Furthermore, there are the indications of tax bills, document registration and at last penalties in case of breach of contract and another confirmation of the title and the clause of attestation.

The analysis of these texts points to an undoubted private autonomy that calls back to Roman law. Economic liberalism was absolutely not limited in Roman contract law.[33] The freedom of the parties to a deed of sale was not limited to fixing the price, but it can be seen in the additional covenants where the liability of the vendor and his heirs against the purchase is specifically regulated as shown in P. Yadin 2 and 3. Further, this liability is strengthened in penalty clauses, where the vendor assumes whatever responsibilities against the purchaser, and it is clear that the contract has not any protective functions.[34]

P. Yadin 2
Upper version, *verso*
14. ... And if I, the said ʻAbi-ʻadan will …, or will deviate from this (agreement)
15. without consent, I will owe to you, you, the said Archelaus in the entire price of these purchases and with respect to absolutely everything that I may claim or that may be claimed in my name against you regarding them, and to our Lord, Rabb'el the King as well, and claims
16. without consent. ...

P. Yadin 3
Upper Version, *recto*
16. ... And if we,

[32] Further information about the parts of these contract: Esler, *Babatha's Orchad* ..., 126-133.

[33] Zimmermann, *The Law of Obligations* ..., 258: "the law merely provides the framework within which the individuals may operate; it does not have protective functions." See too B.W. Frier, *The Rise of Roman Jurists. Studies in Cicero's Pro Caecina*, Princeton, 1985, 192: "The formal equality of Romans before the law became a shield behind which the mercantile economy of Rome could operate with greater confidence."

[34] As Zimmermann says, see fn. 33.

17. ‘Abi-‘adan and Ḥaṣmar’il, the said persons, will … or will deviate from this (agreement) without consent, we will owe to you, you, the said Shim’on, in the entire price of these purchases and with respect to absolutely everything that
18. we may claim or that may be claimed in our name against you regarding them, and to our Lord, Rabb’el the King as well, and claims without consent.

In textual forms of these contracts of sale, particularly in penalties in case of the breach of the agreement, the impact of Roman legal principles on other legal cultures could be explained by the form of international agreements. The structure and the language used in the above-mentioned penalty clause (*And as well, you, the said purchaser, are indemnified ... by me, I, the said vendor, against all that I may claim, or that may be claimed in my name against you in relation to these purchases, pertaining to houses and courtyards, and (in relation to) requital and specification, and agreements and oath, that may still be claimed concerning thorn bushes and ....*) calls clearly back to the form of *sanctio* in the Roman treaties.

The example of these deeds of sale written in the Nabatean kingdom before the annexion of its territory to the Roman empire shows as the influence of Roman law in the local legal practice is independent of some imposition by Roman authorities, but it comes from the mercantile economy, dominated naturally by Rome, as a major trading power in the Mediterranean area.[35]

[35] In an international context worked the *praefectus peregrinus* when he judged lawsuits in matters of contractual clauses among Romans and foreigners. In these cases, the *pacta*, agreements made between parties without the same binding effects of a contract, could have a relevant consideration. In effect, the *preator* could order to the judge to consider these agreements as binding covenants in the examination of evidence. See Ch. Schaertl, “*Pacta sunt servanda – Basic principles of a Modern Contract Law”*, (in this volume), 73 f.