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POLYGAMY IN *P. YADIN*?

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## POLYGAMY IN *P.YADIN*?

Naphtali Lewis, in the introduction to *The Documents from the Bar-Kokhba Period in the Cave of Letters: Greek Papyri (P.Yadin)* (Jerusalem 1989) pp. 22-24, argues emphatically that the documents in the archive show that the society in which they were written practiced polygamy, overturning the prevailing view on Jewish marriage practice in that period.<sup>1</sup> Professor Lewis' authority, buttressed by that of prominent scholars who devoted review articles to the volume,<sup>2</sup> has, to judge from private communications, put this view well on its way to general acceptance. However, a caution must be sounded that it is not necessarily so.

The argument for polygamy in this archive rests entirely on *P.Yadin* 26, and in particular on the phrase "my and your deceased husband (ἀνδρός μου καὶ σου ἀπογενομένου)" at lines 7-8 and 13-14, and with slight variation in the fragmentary derivative document *P.Yadin* 34.5. *P.Yadin* 26, dated 9 July 131 CE, is the mutual summons to court of Miriam and Babatha, the first and second wives respectively, so far as we know, of Judah son of Eleazar in a dispute over some of the latter's property. Babatha charges Miriam with having seized (ἐσύλωσες, 6) "everything in the house of Judah, my and your deceased husband (6-8)." Miriam counters that she had previously enjoined (πρὸ τούτου παρήγγιλά σε, 12-13) Babatha not go near the possessions "of my and your deceased husband (12-14)," and that Babatha has no claim against Judah regarding his property (μηδένα λόγον ἔχιν σε πρὸς τὸν αὐτὸν Ἰούδα περι τῶν ὑπαρχόντων αὐτοῦ, 15-17). These phrases indicate in Lewis' view, that the two women were co-wives, that when Babatha married Judah he "already had a living, undivorced wife."<sup>3</sup>

Now, at the time of the dispute recorded in *P.Yadin* 26 Judah was clearly dead. To be perfectly precise the women might have written "my former husband etc.," and this is implied in "deceased husband." To be sure, in July of 131, when *P.Yadin* 26 was written, the deceased Judah was at one and the same time the former husband of both Miriam and Babatha. This, however, does not imply that the two women had ever simultaneously been the wives of the living Judah, rather than one after the other. What appears here could equally be serial monogamy as concurrent polygamy.

But if Judah had divorced Miriam before marrying Babatha, Lewis would argue, what claim could Miriam have to Judah's estate?<sup>4</sup> How would she be in a position to seize "everything in Judah's house," where Babatha was presumably in residence? While it would be in Miriam's interest to put herself, though a divorcee, on a par with Babatha in the phrase "my husband and yours," why would Babatha use such a phrase?

I would answer that in fact neither in *P.Yadin* 26 nor in *P.Yadin* 34 is there any indication whatsoever as to what the basis for the claims were, and we can only guess. Some possibilities are as follows:

<sup>1</sup> I wish to thank Professors Mordechai Friedman and Naphtali Lewis for their patience in discussing an earlier version of this paper with me orally and *per litteram*. They are of course not responsible for the views expressed here.

<sup>2</sup> G. W. Bowersock, "The Babatha Papyri, Masada, and Rome," *JRA* 4 (1991) 336-44 at 337; Martin Goodman, "Babatha's Story," *JRS* 81 (1991) 169-75 at 171 and 174; Benjamin Isaac, "The Babatha Archive: A Review Article," *IEJ* 42 (1992) 62-75 at 71.

<sup>3</sup> *P.Yadin* p. 22.

<sup>4</sup> In line 16, ὑπαρχόντων, which I translated 'property,' is translated by Lewis 'estate,' which hints in the direction of a dispute over rights of inheritance.

a) Intestate succession: In both Attic law, whatever that may be worth as an indication of what Hellenistic law may have been, and Jewish law of the period under discussion wives did not succeed on intestacy at all.<sup>5</sup> In Roman law they did succeed under the praetorian scheme, but only in the absence of blood relatives (*cognati*),<sup>6</sup> and in this case there were blood relatives (*P.Yadin* 25, dated on the same day as 26). In Hellenistic and Roman Egypt wives certainly did not succeed on intestacy when there were descendants, and whether they could in the absence of descendants was a matter of dispute between Kreller and Taubenschlag, the latter's affirmative view resting on tenuous evidence.<sup>7</sup> The only way intestate succession would come into play in *P.Yadin* 26, then, is if i) Shelamzion died before her father,<sup>8</sup> and ii) "provincial" law in Arabia was the same as in Egypt, and iii) Taubenschlag was correct as against Kreller.

b) Testamentary succession: There is no mention of a will in the archive. Granted, had there been a will we would not expect Miriam to receive under it, but people do unexpected things in wills. Indeed the more unexpected the beneficiary, the more likely the will is to be contested; and there definitely was a contest here.

c) Greek marriage contracts from Egypt occasionally contain clauses on mutual succession of the spouses.<sup>9</sup> But there are no such clauses in the Greek marriage contracts from the Judaean Desert, *P.Mur.* 115 and 116, *P.Yadin* 18 and 37, and *XHev/Se Gr.* 2;<sup>10</sup> nor in the Aramaic *P.Mur.* 20 and 21. More important is that in the marriage contract of Judah and Babatha, *P.Yadin* 10,<sup>11</sup> Babatha is definitely not heir. Upon Judah's death she has rights to live in the house and to support from the *heirs* until such time as they pay off her dowry (lines 15-16). Similar clauses can be restored with greater or lesser certainty in the four *P.Mur.* marriage documents.

d) Far more likely to my mind is that the claims arose from settlements in each of the marriage contracts Judah made with Miriam and with Babatha. In this respect divorce gives rise to claims just as widowhood does. Divorces can be messy and expensive. In Jewish terms there are *ketuba* and *tosefet ketuba*, *nichsei melug* and *nichsei tson barzel* to be paid out immediately.

<sup>5</sup> A. R. W. Harrison, *The Law of Athens: The Family and Property* (Oxford 1968) 130-49; Shmuel Shilo, s.v. Succession, in Menachem Elon, ed., *The Principles of Jewish Law* (The Hebrew University of Jerusalem. The Institute for Research in Jewish Law. Publication No. 6) (Jerusalem, n.d.[1975]) 449.

<sup>6</sup> W. W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*<sup>3</sup> (Cambridge 1963) 371.

<sup>7</sup> Hans Kreller, *Erbrechtliche Untersuchungen auf Grund der Gräko-Ägyptischen Papyrusurkunden* (Leipzig 1919; repr. Aalen 1970) 175; Rafael Taubenschlag, "Die Geschichte der Rezeption des griechischen Privatrechts in Aegypten," *Atti del IV Congresso Internazionale di Papirologia, Firenze, 1936* (Milan 1936) 259-81 at 279 = *Opera Minora* (Warsaw 1959) I 573-600 at 597; and repeated in *The Law of Greco-Roman Egypt in Light of the Papyri, 332 B.C. - 640 A.D.*<sup>2</sup> (Warsaw 1955, repr. Milan 1972) 187. Hans-Albert Rupprecht, "Zum Ehegattenerbrecht nach den Papyri," *BASP* 22 (1985) 291-95 provides a bibliography, at 291 note 6, and sides with Kreller, that there was no such right of succession, at 291, 292, and note 9.

<sup>8</sup> Admittedly this would account for her papers being in her step-mother's pouch.

<sup>9</sup> Hans-Albert Rupprecht, "Ehevertrag und Erbrecht," *Miscel-lània Papirologica Ramon Roca-Puig* (Barcelona 1987) 307-11. His list on page 307 includes *P.Gen.* 21 = *MChr* 284 = *P.Mon.* III 62; *P.Freib.* III 26 and 29; *CPR* I 28 = *MChr* 312; and *P.Oxy.* III 496 = *MChr* 287, all of the second century of this era. To these may be added *P.Berol.* 25423 of ca. 23 BC, published by William Brashear, "An Alexandrian Marriage Contract," forthcoming in *Classical Studies in Honor of David Sohlberg*. I thank my student Uri Yiftach for drawing my attention to the latter.

<sup>10</sup> Published by Hannah Cotton, "A Cancelled Marriage Contract from the Judaean Desert (*XHev/Se Gr.* 2)," *JRS* 84 (1994) 64-86, whom I thank for a pre-publication copy.

<sup>11</sup> Now published in Yigael Yadin, Jonas Greenfield, and Ada Yardeni, "Babatha's *Ketubba*," *IEJ* 44 (1994) 75-101.

In the Greek terms commonly used in Egypt there are *pherne*, *parapherne*, and *prosphora*. Even if we assume good faith on all sides, Judah may have left Engedi<sup>12</sup> without settling his obligations to *Miriam's* satisfaction. A dispute between the two former wives, even though one divorced and the other widowed, over conflicting obligations due them in their respective marriage documents would be enough to account for whatever parity is implied in the phrases 'my husband and yours.'

e) Finally, when people live together they treat their household possessions (for that is all that was seized, 26.6-7) as common, and when they separate misunderstandings arise on the assignment of ownership. Whose is the dog? the stereo? the Picasso sketches? Or rather in this case the fine fabrics and glassware?<sup>13</sup> These sorts of misunderstandings could be enough to account for attempts by each of the former wives to take hold of personal objects leading to the law suit in *P.Yadin 26*.

Why, on explanations d) and e), did Miriam not press her claims earlier?<sup>14</sup> Perhaps she feared Judah and felt confident in pressing her claims only after he was safely in his grave.

<sup>12</sup> Or wherever he was living with Miriam. Judah, Miriam and their (presumed) daughter Shelamzion are all identified in these documents as Engedians (Judah:11.2,13; 16.16-17; 17.4; 19.11-12. Miriam: 26.3. Shelamzion: 18.36-37; 20.25.) This does not in itself mean that they lived in Engedi at the time the particular documents were written. On 2 and 4 December 127 and 16 April 128 Judah was identified as an "Engedian living in Maoza (κώμης Αίνγαδδών περι Ἱερειχοῦντα τῆς Ἰουδαίας οἰκοῦντος ἐν ἰδίῳ ἐν ἀντῇ Μαωζα), 16.16-17; 19.11-12;," and several days earlier, on 5 April 128, Shelamzion and her new husband, Judah Cimber, were identified as "both from the village of Engedi, Judaea, staying here, sc. in Maoza (ἀμφότεροι ἀπὸ κώμης Αίνγαδδών τῆς Ἰουδαίας ἐνθάδε καταμένοντες), 18.36-37." On the other hand, on 6 May 124 Judah (11.2,13), on 9 July 131 Miriam (26.3), and on 19 June 130 Shelomzion and Judah Cimber (20.25-26) were described as Engedians with no indication of residence anywhere else. Babatha is always described as Maozene. These data, it is true, are consistent with a reconstruction that would have all the persons mentioned in these papyri live in Maoza during the entire period covered by the documents. In these documents the absence of indication of residence elsewhere than at the *idia* is not conclusive evidence that the person resided in his *idia*. For on 21 February 128 Judah was identified as Engedian with nothing said about residence elsewhere (17.4) though by 2 December 127 he was already residing in Maoza (16.16-17) and was, in February 128, already married to Babatha. On the other hand, they are at least as consistent with a reconstruction which would have Judah, originally from Engedi, living there with his first wife Miriam and moving to Maoza by December 127, while Miriam and Shelamzion remained in Engedi except for a brief period at the time of her wedding when Shelomzion "stayed" (not "resided") in Maoza.

<sup>13</sup> Lewis, *P.Yadin* p. 24, with reference to Y. Yadin, *Bar Kokhba*, Jerusalem/New York 1971) 67-111 and elsewhere.

<sup>14</sup> The earliest certain reference to Judah's marriage to Babatha, and, by implication on my hypothesis, to his divorce from Miriam, is in 17.4 dated 21 February 128, when Judah explicitly refers to Babatha as his wife (ιδίαν γυναῖκα ἀποτοῦ). In *P.Yadin 10*, the Aramaic document of the marriage of Judah and Babatha, the date is lost. Lewis dates that marriage to sometime earlier than 11 or 12 October 125, when in *P.Yadin 14* and *15*, written in Maoza, Judah appears as Babatha's guardian. Judah appears again as Babatha's guardian in *P.Yadin 16*, written in Rabbath-Moab on 2 and 4 December 127. As Lewis observes, if Judah was her husband at the time we would expect him to be her guardian. The obverse, of course, does not necessarily follow, that if he was her guardian he must also have been her husband at the time, for when she was not married someone still had to function as guardian. Indeed, during the years 130-132 Babatha is found with three different guardians, John son of Makhouthas (22.28-29), Maras son of Abdalagos (25.14-15), and Babelis son of Menahem (27.4-5,18). That in the documents written in October 125, *P.Yadin 14.22* and *15.31-32*, Judah appears as "guardian for this transaction (ἐπιτρόπου ἀντῆς τοῦδε τοῦ πράγματος)" only and is not identified as Babatha's husband as well, as would regularly be done in Greek papyri from Egypt, could lead to the inference that he was not then her husband. However, the very same is said of Judah Cimber in *P.Yadin 20.25-27*, in June 130, acting as guardian of

Conversely, perhaps her claim was bogus, and she thought she could bluff her way past the widowed Babatha. Those who imagine Julia Crispina on the model of a 1990's feminist lawyer/activist, breezing through the halls of power of various provinces bending the male system to serve the needs of her favored beneficiaries, may wish to see her hand behind the events in *P.Yadin* 26 as well as in *P.Yadin* 25. To my mind the most likely reconstruction of the events is that Miriam was and had been in possession of those of Judah's goods in dispute since her marriage. Though apparently Judah did not take those goods with him, Babatha did try to seize them, but was warded off by Miriam. (*P.Yadin* 26.11-14: "Miriam replied saying: Before this I summoned you not to go near the possessions of my and your late husband, πρὸ τούτου παρήγγιλά σε μὴ ἐνγίσει εἰς τὰ ὑπάρχοντά μου (καὶ) σου ἀνδρὸς ἀπογενομένου.") Having failed in that attempt, Babatha tried the courts and sued Miriam in the present document *P.Yadin* 26 claiming that she, Miriam, was the one who seized unlawfully. What the outcome of this attempt was we do not know.

Nothing else in the archive indicates whether Judah divorced Miriam or not before marrying Babatha, in other words whether the two wives were simultaneous or not. Given the ambiguity of the evidence in the document, the relative likelihood of serial monogamy as against polygamy must come from other, literary, evidence of the cultural context. That evidence strongly favors serial monogamy.

Though there was much debate in previous generations on the question of polygamy in Jewish society of the first centuries of this era, debate occasionally marred by hostility or apology, scholars who have examined the evidence directly during the last half-century have repeatedly come to the same conclusion, much as Lewis represents the prevailing opinion. To wit, on the one hand Jewish law firmly maintained the biblical legal tolerance of polygyny (but not of polyandry), and there are some recorded cases, notably of rabbis of the early second century of this era, the period from which these documents date, who entered into polygynous unions. Justin Martyr, a generation later than those rabbis, was correct in his *obiter dictum* (*Dialogus cum Tryphone Iudaeo* 134, 141, Migne, *PG VI* 785, 799) that Jewish scholars took as many wives as they wished. However, on the other hand Jewish practice, particularly in Palestine, during the first several centuries of this era, kings and princes aside, was predominantly, some would say overwhelmingly, monogamous. The tiny handful of instances recorded in rabbinic literature are all in exceptional circumstances and presented in the sources as exceptional. The case of Rabbi Tarfon, perhaps the model for the name of Justin's interlocutor, though extreme, is instructive. This rabbi, being of priestly descent, betrothed (*kidesh*, a very strong form of betrothal, with most of the conditions of marriage short of cohabitation) three hundred women during a period of extended drought in order to enable them to eat priestly tithes, on the view that these tithes were permissible food for non-priestly women betrothed to priests (Tosefta *Ketubot* 5.1).<sup>15</sup> This is not an instance of a familial institution, let alone the familial institution,<sup>16</sup> but rather the use of one legal institution to gain an effect in the realm of another, in

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Shelamzion, whom he married two years earlier (April 128, *P.Yadin* 18) and to whom he was presumably still married.

<sup>15</sup> It is noteworthy for the question of the popular loyalty to Jewish law that Jewish food producers even in times of stress offered more priestly tithes than priests could, or would, consume. This matches the general view in the Talmud that though the population at large (if this is what is meant by *am ha'arets*) could not be relied on to offer levitical tithes, it was not suspected of failing to offer priestly tithes.

<sup>16</sup> On the distinction see Peter Laslett, in Peter Laslett, ed., *Household and Family in Past Time* (Cambridge 1972) 65.

David Daube's phrase, a "dodge."<sup>17</sup> Functionally it is similar to the survival of citizen bondage, *mancipium*, in classical Roman law, not as an economic institution but as a means to effect the exit of *filiifamilias* from *patria potestas* during the life of the *paterfamilias* and the exchange of *tutores mulierum*. On the contrary, the mass of Jewish literature presents a picture of monogamous marriage. This is not the appropriate forum for presentation of the evidence of, and argumentation on, rabbinic literature, and beyond the illustration given above I must content myself with reference to studies of the subject during the last half century or so,<sup>18</sup> and the suggestion that there is considerably more literary evidence to bring to bear and analysis to be made.

In conclusion, I do not argue that the marriages documented in *P. Yadin* were in fact monogamous. Rather I make the much more limited assertion, that the documents cannot be used to argue for polygamous marriages because they can bear a plausible alternative interpretation of serial monogamy. Furthermore, even if the marriages in this group of documents were polygamous, we do not know enough about the attendant circumstances to judge if these were typical or exceptional. Rather than shedding a bright new light on the social life of the Jews the documents themselves require illumination from other sources. For sure, new documentary evidence can and should overturn traditional doctrines. In this case, however, the ambiguous phrase "my and your late husband" in *P. Yadin* 26 does not have the force to do so.<sup>19</sup>

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<sup>17</sup> Model no. 1 in David Daube, "Dodges and Rackets in Roman Law," *PCA* 61 (1964) 28-30.

<sup>18</sup> Louis M. Epstein, *Marriage Laws in the Bible and Talmud* (Cambridge, Mass., 1942) 16-21. A. C. Freimann, *Kiryat Sefer* 23 (1947) 108-13 (Hebrew), an important review of Epstein, *Marriage Laws*. Salo Wittmayer Baron, *A Social and Religious History of the Jews*<sup>2</sup> II (Philadelphia 1952) 223-229, with bibliography at 410 note 12. S. Lowy, "The Extent of Jewish Polygamy in Talmudic Times," *Journal of Jewish Studies* 9 (1958) 115-38. Zeev W. Falk, *Marriage and Divorce. Reforms in the Family Life of German-French Jewry* (Jerusalem 1961) 1-11 (Hebrew). Mordechai Akiva Friedman, *Jewish Polygyny in the Middle Ages. New Documents from the Cairo Geniza* (Jerusalem/Tel Aviv 1986) 1-13 (Hebrew).

<sup>19</sup> Scholars who take the view of A. Wasserstein, "A Marriage Contract from the Province of Arabia Nova: Notes on Papyrus Yadin 18," *Jewish Quarterly Review* 80 (1989) 93-130, and Hannah Cotton, "The Guardianship of Jesus Son of Babatha: Roman and Local Law in the Province of Arabia," *JRS* 83 (1993) 94-108, that rabbinic literature is an inappropriate reference for interpretation of these documents, would have to search elsewhere for illuminating social context. Assimilation to Hellenistic society would provide an even stronger argument in favor of monogamy. Arabic and Persian societies were polygamous, but to use that to tip the scales in favor of Judah son of Eleazar's polygamy would be very hypothetical.