

## “WHY THE NAME NEW *TESTAMENT*? ”\*

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ABSTRACT: Both theology and philology suggest that the title of the Christian scriptures should have been “The New Covenant” rather than “The New Testament”.<sup>1</sup> Why then did the Church Fathers from at least Tertullian in the 2nd century adopt *novum testamentum*? Was it simply a confusion of the LXX (covenant) and *koine* (a will) meanings of *diatheke* (διαθήκη)? I first review the translation history and the methodological issues it raises (section 1) and then turn to two very different theological approaches to the question (section 2): I reject the attempt of Behm to impose (a version of) the *koine* meaning (in his view, as a unilateral disposition) on the LXX (and subsequent literature, and even extending back to *berit* in the Hebrew Bible) as both theologically and legally inappropriate. Far preferable is the more recent account of Schenker, who sees the use of *diatithemi* and *diatheke* in reference to *meta ten teleuten* transactions as having been chosen as appropriate to the terms of God’s covenant regarding the land and its use, and rightly shows the range of succession institutions to which this terminology could be applied. Both Behm and Schenker need to take positions on the forms of succession in vogue at the relevant periods (LXX and NT) in the Hellenistic and Jewish worlds. In section 3, I summarise the current state of knowledge and debate in legal historical studies, stressing the danger of assuming the features of modern “wills”, and noting the close relationship to political alliance (cf. covenant) in the “will” of the 2nd cent. BCE Ptolemy Neoterus of Cyrene. More generally, I argue that there *is* a connection between covenant and inheritance in the Hebrew Bible, including (but not restricted to) “spiritual inheritance” (section 4); that this was sharpened in the “Testament” genre of 2nd commonwealth (pseudepigraphical) literature, developing a model found already in the Hebrew Bible (section 5); that two New Testament texts explicitly associate covenant and (by analogy) testament (section 6); and finally that some aspects of the Roman *testamentum* (even more than the Jewish and Hellenistic forms of will) may well have proved theologically appealing to Tertullian, resulting in his adoption of the terminology of *testamentum vetus* and *novum* (section 7). In particular, the Roman *testamentum* took effect *in its entirety* only on death and *automatically* revoked any earlier will.

### 1. FROM *BERIT* (ברית), TO *DIATHEKĒ* (διαθήκη), TO *TESTAMENTUM*

Why the name New *TESTAMENT*? There is a fairly obvious, if superficial, linguistic explanation, which has long been known.<sup>2</sup> The term for “covenant” in the Hebrew Bible is

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<sup>1</sup> So Lincoln’s conclusion to her article: 1999:27f.

<sup>2</sup> According to the *Catholic Encyclopedia*, “Testament, New. 1. Name”, as at <http://www.newadvent.org/cathen/14530a.htm>: “Testament come from *testamentum*, the word by which the Latin ecclesiastical writers (from at least Tertullian in the late 2nd century) translated the Greek *diatheke*. With the profane authors this latter term means always, one passage of Aristophanes perhaps excepted, the legal disposition a man makes of his goods for after his death. However, at an early date, the Alexandrian translators of the Scripture, known as the Septuagint,

*berit*. The expression “new covenant” appears there only once, in the famous (eschatological) prophecy of Jeremiah 31:31–33 (MT 31:30–32):<sup>3</sup>

(31) Behold, the days are coming, says the LORD, when I will make a new covenant (*berit ḥdashah*) with the house of Israel and the house of Judah (32) not like the covenant which I made with their fathers when I took them by the hand to bring them out of the land of Egypt, my covenant which they broke, though I was their husband, says the LORD. (33) But this is the covenant which I will make with the house of Israel after those days, says the LORD: I will put my law within them, and I will write it upon their hearts; and I will be their God, and they shall be my people.<sup>4</sup>

The Septuagint translates *berit ḥdashah* here as διαθήκην καινήν, in accordance with the standard LXX translation of *berit* as διαθήκη (though διαθήκη is sometimes used in the LXX also for other terms<sup>5</sup>). This is followed in New Testament citations of *Jer.* 31:31, quoted directly in *Heb.* 8:8 and paraphrased in *2 Cor.* 3:6. It is found also in the context of the eucharistic claim<sup>7</sup> in *1 Cor.* 11:23: “This cup is the new covenant in my blood” and in the synoptic versions of the last supper: *Mark* 14:24 and *Luke* 22:20.<sup>8</sup>

However, in *koine* Greek διαθήκη is not the normal term used for a treaty or agreement,<sup>9</sup> but most typically refers to a ‘will’.<sup>10</sup> Could it be, then, that the Church fathers, when writing in Latin, arrived at *testamentum* by adopting the *koine* meaning of διαθήκη rather than that of the LXX?<sup>11</sup>

Neither “new covenant” nor “new testament” are actually used in the Christian scriptures to refer to themselves, although *2 Cor.* 3:14 does use παλαιᾶς διαθήκης (rendered *veteris testamenti* in the Vulgate) to refer to the literary manifestation of the old covenant.<sup>12</sup> Rather

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employed the word as the equivalent of the Hebrew *berith*, which means a pact, an alliance, more especially the alliance of Yahweh with Israel.” It adds: “. . . the expression Old Testament (*he palaiā diatheke*) is found for the first time in Melito of Sardis, towards the year 170. There are reasons for thinking that at this date the corresponding word “testamentum” was already in use amongst the Latins. In any case it was common in the time of Tertullian.” In fact, παλαιᾶς διαθήκης is found already in *2 Cor.* 3:14. See further n.12, *infra*.

<sup>3</sup> Biblical quotations are from the RSV, unless otherwise indicated.

<sup>4</sup> On the significance of the context, see Jackson, “Historical Observations . . .”, 7–9.

<sup>5</sup> Jaubert 1963:311, noting (n.2) only three possible exceptions. Behm 1965:126 notes the use of συνθήκη for *berit* in LXX only once, in *2 Kings* (4 Bas.) 17:15 (Alex), “though Aquila, Symmachus and Theodotion later substituted [throughout] . . . what seemed to them to be the more literal συνθήκη”. Harl 1986:55 takes the substitution (also by Josephus) as motivated merely by the desire to keep to the most usual term in Attic Greek. The only other exception appears to be τὰς ἐντολάς in *1 Kings* (3 Bas.) 11:11. Similarly, Hughes 1979:39 notes that the verb διατίθημι occurs 80 times in the LXX, on 74 occasions translating the Hebrew *karat*, as in the standard LXX rendition of כרת ברית (the exceptions are all single occurrences, none suggestive of testamentary activity). On the significance of this standardisation, see the last four paragraphs of section 2, *infra*.

<sup>6</sup> *torah, edut* (see below, at n.17), *davar* and *katuv*: see Behm 1965:126.

<sup>7</sup> On its origins in Jewish eschatological thought and its survival in the *afikoman* (“*tsafun*”) ritual of the Passover *seder*, see Daube, “He That Cometh”. See also LXX *Jer.* 38:8, which anticipates the restoration of Israel – and by implication the establishment of the new covenant – on Passover (though MT 31:7 has *piśeah* = lame).

<sup>8</sup> See further Jaubert 1963:447–49.

<sup>9</sup> For which συνθήκη is commonly used: see Liddell & Scott, *ad loc.* (noting that the plural συνθήκαι, for articles of a treaty, is the more common usage). See, however, the example in Aristophanes (text at n.20, below), and the context in the will of Ptolemy Neoteris, discussed in s.3, *infra*.

<sup>10</sup> On the range of testamentary dispositions to which διαθήκη may refer, see text at nn.124–136 and section 3, *infra*.

<sup>11</sup> On the dependence of the Old Latin fragments of the Pentateuch on the LXX, see Swete 1914:93f.

<sup>12</sup> “But their minds were hardened; for to this day, when they read the old covenant, that same veil remains unlifted, because only through Christ is it taken away” (kindly drawn to my attention by Walter Houston, noting that the reference is not necessarily to the Hebrew Bible as a whole, but certainly to the Torah, in the light of vv.14–15). It thus appears to be wrong to claim that the term ‘Old Testament’ occurs for the first time in Melito of Sardis

we find “the Testimony of Jesus” (τὴν μαρτυρίαν Ἰησοῦ).<sup>13</sup> *John* 8:13–14<sup>14</sup> uses μαρτυρία to refer to Jesus’ testimony as to his mission, which might suggest a possible Latin confusion of *testamentum* and *testimonium*,<sup>15</sup> perhaps reinforced by the fact that the Hebrew *edut*, literally testimony, is also used of the covenant<sup>16</sup> and, though normally translated in the LXX as μαρτύριον / μαρτυρία (= *testimonia*, Vulg. *Deut.* 4:45, 6:20), is also occasionally itself rendered there as διαθήκη.<sup>17</sup>

## 1A FROM *BERIT* (ברית) TO *DIATHEKĒ* (διαθήκη)

The very formulation of the question as a choice between a “theological” (LXX/NT) and a “legal” (*koine* Greek) meaning of διαθήκη begs important linguistic questions. Is διαθήκη indeed a homonym, and if so is it a “true” homonym – one word used to express two completely independent meanings unrelated in origin – such as *skate* (glide on ice) and *skate* (the fish) – or is it a polysemous homonym, with a shared origin, such as *mouth* (of a river) and *mouth* (of an animal). Though I doubt that any of the commentators on this issue would claim that the term is a “true” homonym, discussion often appears to proceed as if that were the case (perhaps reflecting underlying binary oppositional assumptions such as Jew v Greek, legal v theological).

Yet a linguistic analysis by a classicist, Frederick Norton, already challenged such assumptions as long ago as 1908. Norton confined his study to classical Greek sources no later than 300 BCE; he stressed the importance of taking account of the διά in διαθήκη

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(c.170 CE), as does the *Catholic Encyclopedia* (*supra* n.2) and Hengel 2002:60. Like the *Catholic Encyclopedia*, Hengel 2002:61 goes on to infer a parallel use already at that time for the Christian scriptures, but significantly uses the translation ‘covenant’ rather than ‘testament’: he argues that Melito’s use of ‘Old Covenant’ “suggests the hypothesis that the growing body of Christian Scriptures regarded as ‘apostolic’ were already sometimes designated as the ‘New Covenant’”. We meet this still somewhat unclear terminology – not yet found in Irenaeus, a generation after Melito – in Clement of Alexandria and Tertullian”, citing (at n.10) Eusebius, *Hist. Eccl.* 5:6:3 (ὁ τῆς τοῦ εὐαγγελίου καινῆς διαθήκης λογός); Clement, *Stromata* 1:28:1 (GCS 52:17:37); 5:3:3 (327:26); 5:58:1 (382:17); and the more extensive treatment in Zahn 1888:104–06.

<sup>13</sup> *Rev.* 12:17, 19:10, ascribed to John of Patmos, and elsewhere, with reference to the 27 books. See Martin, “What is the ‘New Testament’? Is it the same as the New Covenant?”. Hengel 2002:61 notes that Justin Martyr, *First Apology* 67:3 (155–157 CE), still refers to the New Testament as ‘the reminiscences of the apostles’.

<sup>14</sup> “The Pharisees then said to him, ‘You are bearing witness to yourself; your testimony is not true.’ Jesus answered, ‘Even if I do bear witness to myself, my testimony is true (ἀληθῆς ἐστὶν ἡ μαρτυρία μου), for I know whence I have come and whither I am going, but you do not know whence I come or whither I am going.’”

<sup>15</sup> The Vetus here uses *testimonium* (all witnesses in the digital edition of Burton et al, accessible from <http://www.iohannes.com/vetuslatina/index.html>). See also *John* 3:33: “he who receives his testimony sets his seal to this, that God is true (ὁ λαβὼν αὐτοῦ τὴν μαρτυρίαν ἐσφάγισεν ὅτι ὁ θεὸς ἀληθῆς ἐστίν).”

<sup>16</sup> *Deut.* 4:45, 6:20 and frequently elsewhere, esp. *Ps.* 119. It is used also of the tablets at *Exod.* 32:15. On *edut* as indicating covenant, cf. Weinfeld 1975:257.

<sup>17</sup> Mould, “Eduth in the Scriptures”, observes: “The words the LXX translators used to translate *eduth* are instructive. They used *marturion* or *marturia* with but four exceptions (all relating to ark of the covenant: *Ex.* 27:21; 31:7 (*aron la’edut*, construction of); 39:35 (similar); *Joshua* 4:16 (carriers of *aron ha’edut*), when they used *diatheke* instead. In six occurrences *eduth* was not translated, but its nontranslation makes no significant difference to the passages concerned. Both *marturion* and *marturia* mean “a witness.” They therefore are most suitable Greek words by which to translate *eduth*, and it is not surprising that the LXX translators rarely depart from using them. . . . *Diatheke* also means “compact,” “covenant,” “agreement.” . . . There can be little doubt that in the four instances where the LXX translators rendered *eduth* by *diatheke* they had in mind that *eduth* (the Ten Commandments) was the basis of Jehovah’s covenant with Israel.”

(1908:11f.) and argued that writers on Greek law have failed to notice that διαθήκη is used not only for a will but also “to designate what might be called a solemn agreement or compact” (1908:5). Amongst six usages which he identified for the middle voice of the verb (διατίθεσθαι), he included (alongside “to dispose of one’s property according to his will, to make a disposition of it, to devise, to bequeath, to make a will”) “to dispose for one’s own interest, to make an arrangement or settlement for oneself in which another person or persons are necessarily involved . . . ; . . . to settle the terms of (a dispute or quarrel), to make a covenant.” He explained the latter as “a solemn<sup>18</sup> compact in which one party lays down the terms and the other agrees to them and binds himself by oath. This agreement is mutual,<sup>19</sup> but in a sense one-sided”, and cited Aristophanes, *Birds*<sup>20</sup> (1908:27–29). Similarly, with the noun διαθήκη: though one sense is indeed “disposition or arrangement which a man makes with reference to his property in view of death” (1908:31), “. . . the sense of arrangement or disposition is always present in a greater or less degree, together with some idea of mutuality” (1908:30). In his account of the noun, Norton clearly distinguishes different aspects of mutuality.<sup>21</sup> One sense is: “4. *A disposition of relations between two parties, where one party lays down the conditions which the other accepts.* This is a “one-sided” transaction, in so far as one party does all the disposing; but, as another party is necessarily involved, and his consent is necessary to a settlement, it becomes to a certain extent a mutual agreement. διαθήκη is not used, like συσθήκη, of an ordinary bargain or contract, but of a more dignified and solemn compact or covenant. In the case of συσθήκη the convention is entirely mutual, both parties having an equal part in arranging the terms” (1908:31). Within this, he includes (1908:32f.) both “4a. *An agreement, or settlement, arrived at by means of a disposition or arrangement of points in dispute, a mutual settlement*”, citing Isaeus 6.23–32, on which he notes that in this context “This instrument served the purpose of a will as well as that of a compact”<sup>22</sup> (including the fact that here, unlike a “mere will”, consent was required for its revocation) and “[4b] *A disposition or settlement of relations between two parties, wherein one party*

<sup>18</sup> Distinguishing συντίθεμα as denoting “an ordinary contract or bargain” (1908:28). Cf. at 1908:30 in relation to διαθήκη: “. . . this term is always used in a dignified sense, referring to a solemn transaction originally connected with religious rites and obligations.” See further 1908:31 (Sense 4), quoted in the text below.

<sup>19</sup> Cf. 1908:29: “. . . in the middle voice the meanings are all very closely allied. There is always a *disposition, laying-down, or setting-forth in order* of something in one’s own interests, and then the idea of a second party being affected or involved, on whose course often the completion of the act depends; e.g. in the most common meaning, *To dispose of one’s property by will*, the one party makes dispositions which affect another party, and which do not have complete fulfilment without the concurrence of the second party. Here the idea of agreement is usually remote, but in some instances it becomes quite evident (esp. 3 and 6).”

<sup>20</sup> This appears from his Chronological Concordance (1908:14) to be the earliest attested use of διαθήκη. At 1908:36–38 he provides a full translation of Aristophanes, *Birds* 435–61, “as sufficient context has never been given” (36), commenting that “This is evidently not a mere bargain or contract, but a solemn compact or covenant, ratified by oath” (37). Here, “Peisthetaerus will not put down his weapons until the birds agree to make a covenant with him, the terms of which he lays down . . . I do not think it would be possible to find a more definite and explicit example of the meaning of a word than that of διαθήκην in this passage. If there were no other occurrences of it in the language, this would be sufficient to establish clearly the signification of *solemn compact, or covenant*” (38).

<sup>21</sup> At 1908:35 he comments on the “error” of eliminating “all elements of mutuality from it and make it so general as “legal transaction” or “instrument”. In its widest signification it is used to mean *covenant, engagement, dealings*, and undoubtedly always refers to some relation or relations between two parties.”

<sup>22</sup> He notes at 1908:34: “In these passages Isaeus classes διαθήκαι amongst συμβόλαια” (contracts) [cf. Plato, *Laws* 922A at 1908:35], and observes at n.1: “The senses of “testament” and “compact” were so closely allied that the same word could be used for both, and the orator could have either or both in mind as suited his argument.”

lays down the conditions, and the other accepts them and binds himself by oath or solemn promise to keep them; a settlement, arrangement, compact, covenant”.<sup>23</sup>

In the same year as Norton’s book appeared, the New Testament theologians James Moulton and George Milligan published “Lexical Notes from the Papyri” (a precursor article to their later book), in which they strongly advanced a homonym model for διαθήκη, contrasting in oppositional form the *koine* and biblical uses,<sup>24</sup> and implying a conceptual distinction between them based on the presence or absence of mutuality,<sup>25</sup> reinforced by the distinction with συνθήκη: “. . . συνθήκη (which Aquila substitutes in Regn xxiii.21 for LXX διαθήκη) is to the last the word for compact, just as διαθήκη is always and only the word for will.” Moulton and Milligan characterised the usage of διαθήκη in Hebrews 9 (discussed in section 6 below), where they accepted that both senses are found,<sup>26</sup> as one where the author used the “obsolete, Biblical word . . . then dropping into the modern use of it for the purposes of illustration” (one has to wonder whether “obsolete” here carries connotations beyond the purely linguistic<sup>27</sup>). In their fuller treatment of 1914 (at 148), they were equally categorical about the limited range of διαθήκη in the *koine*: “In papyri and inscr., the word means *testament, will*, with absolute unanimity, and such frequency that illustration is superfluous” (at the same time begging the question of what is meant by a will in these sources). However, they here acknowledged Norton’s point<sup>28</sup> that the meaning in classical Greek was wider:<sup>29</sup>

Any thought of some special “Hebraic” flavour about the use of διαθήκη for *covenant* [in the LXX] is excluded by the isolated<sup>30</sup> but absolutely clear passage of Aristophanes (*Birds* 439), where *compact* is the unmistakable meaning. This passage is enough to prove that διαθήκη is properly *dispositio*, an “arrangement” made by one party with plenary power, which the other party may accept or reject, but cannot alter . . . A will is simply the most conspicuous example of such an instrument, which ultimately monopolized the word just because it suited its differentia so completely. But it is entirely natural to assume that in the period of the LXX this monopoly was not established, and the translators were free to apply the general meaning as a rendering of *berit*. For this course there was an obvious motive. A covenant offered by God to man was no “compact” between two parties coming together on equal terms. Διαθήκη in its primary sense, as described above, was exactly the needed word.

<sup>23</sup> 1908:35, citing here the Aristophanes passage (n.20, *supra*), but also referring to the use of διατίθεμαι, discussed at 28f., citing also Xenophon, *Mem.* 2.6.23 and Plato, *Laws* 834A.

<sup>24</sup> Although in their review of examples of *koine* vocabulary in the NT (1914:xv–xix), including legal terms (1914:xviii), διαθήκη is omitted.

<sup>25</sup> Compare the attempt of Ferguson to eliminate any notion of mutuality from his account of the Macedonian inscriptions which refer to conditional wills, leaving money to the municipality in exchange for a monument or some other memorial to the deceased. For example, inscription 258 of c.79 C.E. records a conditional gift κατὰ διαθήκην to the βουλή of 1500 denarii on condition that an annual festival be conducted at a stated time. Ferguson 1913:42f. observes: “The transaction between the βουλή and the testator was not mutual. The testator took the initiative, named the recipient or beneficiary, and the conditions attaching to it, and his terms were authoritative.” More generally, he claims (at 46): “the most noticeable feature of the διαθήκη as it appears in the Macedonian inscriptions is that it always contains certain injunctions or commands which are to be executed after the decease of the person who gave them, and that the requirements are imposed without consulting the persons who are to execute them.” How can he know, and on what basis assume, that there were never such prior negotiations?

<sup>26</sup> 1908:563f., strongly but politely rejecting the view of Westcott that it always means covenant in this chapter.

<sup>27</sup> Cf. their use of “archaic” at 1914–29:148f., quoted *infra*, text at n.303.

<sup>28</sup> Norton is included, amongst “recent monographs” (along with Behm, on whom see s.2, *infra*), at the end of the entry on διαθήκη.

<sup>29</sup> 1914:148 (2nd column).

<sup>30</sup> This overlooks the sources in Isaeus, Xenophon and Plato cited by Norton: see text at n.22, and n.23, *supra*.

But this overlooks a point strongly made and documented by Norton (distinguishing *συσθήκη* and *διαθήκη*<sup>31</sup>). A “compact” does not have to be on equal terms. It can be a standard form “take it or leave it” contract, but even that requires acceptance by both parties (a prominent feature of the *berit* narrative of the Sinai pericope in Exodus<sup>32</sup>). Moulton and Milligan prefer to see *συσθήκη* and *διαθήκη* as quite distinct (in the papyri and other non-literary sources): “*συσθήκη* [which they note is not found in the NT]. . . is to the last the word for *compact*, just as *διαθήκη* is always and only the word for *will*” (1914:148).

It is, of course, possible (and often necessary) to distinguish usages of the same word as found in different corpora – classical Greek literature on the one hand, non-literary papyri and inscriptions on the other; the LXX on the one hand, the NT on the other – and to arrive at different conclusions regarding their relationships. But the waters appear to be muddied by conceptualising the issue in terms of an opposition between “biblical” and “*koine*” Greek. Apart from anything else, there seems to be little consensus on the very conception of *koine*. Moulton and Milligan maintain that the main feature of New Testament Greek is that it was “the ordinary vernacular Greek of the period, not the language of contemporary literature” (1914:xi), and in their account of “anticipations of this view” they cite James Donaldson, who writes that “. . . the language used by the Septuagint and N(ew) T(estament) writers was the language used in common conversation, learned by them not through books but most likely in childhood from household talk, or, if not, through subsequent oral instruction”.<sup>33</sup> But it is surely impossible to maintain that the language of either the LXX or the NT is no more than that of the contemporary Greek spoken in the street,<sup>34</sup> not least in the light of more recent studies of the relationship between oral and written language.<sup>35</sup> Moreover, such broad claims elide any consideration of genre, linguistic level,<sup>36</sup> (literary) intertextuality and the pragmatics of address to different audiences. At the very least, we surely have to restrict our claims to saying that the LXX and NT *include* expressions taken from the *koine*, and not seek to reduce everything in them to *koine*.

Interestingly, the more recent work of Louw-Nida, applying a quite different linguistic approach based on “semantic domains”<sup>37</sup> (and here directed towards the vocabulary of the New Testament), arrives at conclusions close to those of Norton. They see the meaning of *διαθήκη* as itself presupposing a reciprocal agreement, and view the LXX usage as a

<sup>31</sup> See Norton 1908:31, Sense 4(a), quoted *supra*.

<sup>32</sup> *Exod.* 19:8, 24:3,7. This is less prominent in the account in Deuteronomy (with Moses as narrator). But see *Deut.* 5:23.

<sup>33</sup> Moulton and Milligan 1914:xii, citing “Greek Language: Biblical” in Kitto 1876:ii.170. Moreover, they quote Masson 1859:viii. for the view that “. . . the New Testament may be considered as exhibiting the only genuine *facsimile* of the colloquial diction employed by *unsophisticated* Grecian gentlemen of the first century . . .” (emphases as in the original).

<sup>34</sup> Danker and Bauer 2000:xv still understand *koine* as “colloquial common speech”, but include Philo amongst our sources for it!

<sup>35</sup> Especially after Ong’s 1982 classic.

<sup>36</sup> Thus Decker 1994, summarizing Wallace 1994:8–23: “Part of the confusion lies in the failure to recognize that in any language there are three “levels”: the vernacular (the “language of the streets”, popular speech, rustic, colloquial), conversational (the spoken language of educated people; grammatically correct, but lacking the subtleties, etc. of literature), and literary (the polished Koine as written by scholars/academics; artistic expression in writing). Most NT writings fit the conversational category, though there are some that lean toward either end of the spectrum. The “mainline” group is represented by (most of) Paul and Matthew. On the edge of conversational, but leaning toward vernacular are Revelation, Mark, John, and 2 Peter. On the other side, leaning toward literary, are Hebrews, Luke-Acts, James, Pastorals, 1 Peter, and Jude.”

<sup>37</sup> See Pitts 2006 for a description and n.1 there for further bibliography.



particular appropriation of this broad understanding. The choice of διαθήκη rather than συνθήκη is, for them, precisely “to emphasize the fact that the initiative for such a covenantal relationship existed with one person rather than being the result of negotiation and compromise”.<sup>38</sup> Indeed, support for an understanding of the διαθήκη as often, in effect, a ‘testamentary pact’ (after family consultations) may be taken from Stanley Porter’s discussion (2003:276–79) of the approach of Louw and Nida, in the context of their review of the account of Moulton and Milligan.

The 3rd edition of Danker and Bauer (2000:228f.), while not following Louw-Nida, takes elements from both Moulton & Milligan and Norton, applying them differently to the LXX on the one hand, the NT on the other. They take διαθήκη to be used “exclusively” in Hellenistic times as “last will and testament”, and understand the LXX translation of ברית by διαθήκη as retaining both “the component of legal disposition of personal goods while omitting that of the anticipated death of the testator” and “another essential characteristic of a testament . . . namely that it is the declaration of one person’s initiative, not the result of an agreement betw. two parties, like a compact or a contract”.<sup>39</sup> They do, however, accept (citing Norton amongst others) that there is a usage (their 3) of διαθήκη as *compact, contract* which “seems firmly established for Gr-Rom times” but appear to doubt that this meaning significantly influenced the New Testament, though they remark that the usage of the term διαθήκη in such a sense would serve again as a bridge to LXX usage.

## 1B FROM *DIATHEKĒ* (διαθήκη) TO *TESTAMENTUM*

The *Vetus Latina*<sup>40</sup> appears, on the evidence of Tertullian<sup>41</sup> (and, probably within decades, by Irenaeus,<sup>42</sup> followed in the next century by Cyprian<sup>43</sup> and Lactantius<sup>44</sup>) to have used

<sup>38</sup> Louw and Nida 1988:IL.452, quoted with approval by Porter 2003:278.

<sup>39</sup> “This is beyond doubt one of the main reasons why the LXX rendered by ברית by δ. In the ‘covenants’ of God, it was God alone who set the conditions; hence *covenant* . . . can be used to trans. δ. only when this is kept in mind. So δ. acquires a mng. in LXX which cannot be paralleled w. certainty in extra-biblical sources, namely ‘decree’, ‘declaration of purpose’, ‘set of regulations’.”

<sup>40</sup> In addition to published sources, I have accessed the on-line (subscription) Beuron database (at <http://www.brepolis.net/>), which reproduces the Institute’s (still incomplete) card-index system whose “goal is the complete collection and critical edition of all surviving remnants of the Old Latin translations of the Bible from manuscripts and citations in ancient writers”: see further [http://www.vetus-latina.de/en/institut\\_vetus\\_latina/institut.html](http://www.vetus-latina.de/en/institut_vetus_latina/institut.html). A full study would involve analysis of the data on every verse where διαθήκη occurs in the LXX. I have contented myself, for present purposes, with an examination of all such verses in Genesis, Exodus and Jer. 31:31–33, and a sample from almost all other books of the Hebrew Bible. Within each verse, each card is numbered in the form (as in the next note) 80/84 (here normally within square brackets), meaning card number 80 of a total of 84 (of which card 1 is a heading for the verse and card 2 is always the rendering of Jerome’s Vulgate, from the Hetzenauer edition of 1906).

<sup>41</sup> *Adv. Jud.* 3, 7: Ecce enim dies veniunt, dicit dominus, et disponam domui Iudae et domui Iacob testamentum novum . . . [Beuron 80/84 on Jer. 31:31, cf. [http://www.tertullian.org/latin/adversus\\_judaeos.htm](http://www.tertullian.org/latin/adversus_judaeos.htm), ch.III.6]; cf. *Adv. Marcionem* 4, 1, 6: Ecce veniet dies, dicit dominus, et perficiam domui Iacob et domui Iudae testamentum novum [Beuron 83/84]; *Adv. Marcionem* 1, 20, 4: Sic et Hieremiam: et disponam testamentum [Beuron 82/84]; *Adv. Marcionem* 5, 11, 4: testamentum novum non alterius erit qui illud repromisit [Beuron 84/84].

<sup>42</sup> *Adversus haeres* 4, 9, 1: Ecce disponam ( - ) testamentum novum [Beuron 63/84]; 4, 33, 14: qui dicunt, dispositurum Deum Testamentum novum hominibus [Beuron 64/84].

<sup>43</sup> *Testimioniorum libri*, 1, 11 (p.46, 19 Hartel ed., 1868): Ecce dies veniunt, dicit Dominus, et consummabo domui Israel et domui Iuda testamentum novum [Beuron 48/84]; *ibid.*, 3, 20: Ecce dies veniunt, dicit Dominus, et consummabo in domum Israel et in domum Iuda testamentum novum [Beuron 49/84].

<sup>44</sup> *Divine Institutes*, 4, 20, 6 (Brandt ed., p.365, 6): ecce dies veniunt, dicit dominus, et consummabo domui Israhel

*testamentum* in *Jer.* 31:31. Fischer adopts it in his *Vetus Latina* edition of Genesis, in almost every instance where the LXX rendered *berit* as *διαθήκη*.<sup>45</sup> Augustine also adopts *testamentum* in citations of *Jer.* 31:31 in a host of sources,<sup>46</sup> though in other contexts he appears to express some surprise at this translation,<sup>47</sup> but defers to what he takes as the LXX *koine* meaning.<sup>48</sup> But Jerome, when he translated directly from the Hebrew (and often, but not always<sup>49</sup> in his exegetical writing), used the more accurate *foedus*<sup>50</sup> or *pactum*<sup>51</sup> (anticipating modern scholarship's interest in the relationship between *berit* and the ancient Near Eastern treaty tradition<sup>52</sup>) both

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et domui Iuda testamentum novum [Beuron 69/84]; *ibid.*, 4, 20, 10 (Brandt ed., p.366, 4) consummaturum se domui Iuda testamentum novum [Beuron 69/84]. See further text at n.292, *infra*.

<sup>45</sup> *Gen.* 6:18, 9:9, 12, 13, 15, 16, 15:18, 17:2, 4, 7, 9, 10, 11, 13, 14, 19, 21:27, 31:44, the exceptions being *Gen.* 9:17 (apparently following Quentin) and 26:28.

<sup>46</sup> Beuron cards 21-41/84 on *Jer.* 31:31, including *De civitate dei* 17, 3: Ecce dies veniunt, dicit Dominus, et consummabo domui Israel et domui Iuda testamentum novum [Beuron 21/84]; cf. *ibid.*, 18,33 [Beuron 22/84]; *Quaestiones de Deuteronomio* 11 [Beuron 23/84]; *Ep.* 82, 18 (370, 2): per Hieremiam promissum est daturum deum testamentum novum domui Iuda [Beuron 24/84]; cf. *Ep.* 82 [Beuron 25/84]; *Contra Faustum Manichaeum* 32 [Beuron 27/84]; *De gestis Pelagii* 14 [Beuron 28/84]; *Adv. Jud.* 8, 6, 8 [Beuron 29/84]; *Contra Iulianum* 3, 84 [Beuron 31/84]; *Enarrationes in Psalmos* 73, 23, 10 (1020) [Beuron 32/84]; *Sermones* 155, 6 [Beuron 36/84]; *Sermones* (Dolbeau ed.) 17, 17-18 [Beuron 37-39/84]. Pepino 2011:168 cites *Ep.* 138.1 (7) *Corpus Scriptorum Ecclesiasticorum Latinorum* (CSEL) 44:132, 16–20, for the use of *testamentum* in *Jer.* 31:31. However, he is clearly wrong when he claims: “This *Vetus Latina* variant of *Jer.* 31:31 is specific to Augustine: Beuron n° 29 *Adv. Judaeos* 6.8 (PL 42:56) and n° 40 *Serm. Étaix* 2.71, 60–61. It is found nowhere else.” Indeed, he himself also cites Eucherius (ca. 380–449) as using *testamentum* in another briefer citation of Jeremiah in Form 1011–12 of *Formulae spiritalis intelligentiae. Instructionum libri duo* (*Corpus Christianorum, Series Latina* (CCSL) 66:62): “in propheta: Et confirmabo testamentum super domum Iuda”.

<sup>47</sup> Both involving a *berit* between two humans, resolving a dispute. Thus, in *Gen.* 21:27 (Abraham and Abimelech), Augustine, *Locutionum in Heptateuchum* 1, 68 (388, 264) observes: Et disposerunt ambi testamentum, vel testati sunt ambo; amat scriptura testamenti nomine pactum appellare [Beuron 7/9]; cf. in *Gen.* 26:28 (Isaac and Abimelech), *ibid.*, 1, 96 (390, 354): “Et disponemus tecum testamentum. Amant scripturae pro pacto ponere testamentum, id est *διαθήκην*. Quod latini habent: et disponemus tecum testamentum” [Beuron 6/9].

<sup>48</sup> *Exod.* 6:4, in *Locutionum in Heptateuchum* 1, 68 (388, 264): Statui testamentum meum ad illos, ita ut darem illis terram Chanaanacorum et terram, quam incoluerunt, in qua et incoluerunt in ea. Sic enim habet graecus, quod utique et in graeca lingua absurde videtur sonare. Et tamen Septuaginta interpretum auctoritas tanta est, quos ita loqui non piguit [Beuron 4/4].

<sup>49</sup> *Commentariorum in Malachiam* 2 (Migne 25, 1556B) . . .testamentum sacerdotii [13/20 of *Num.* 25:13]; *Origenis in Ieremiam homiliae* 6: maledictus homo qui non audierit verba Testamenti huius [5/6 of *Jer.* 11:3]; *Commentariorum in Hiezechielem* 4 (Migne 25, 130C: ingressus sum in testamentum tecum [10/25 of *Ezek.* 16:8; cf. 14/25, 17/25, 18/25]; *Commentariorum in Malachiam* 2 (1556A): Testamentum meum fuit cum eo . . . [11/25 of *Mal.* 2:5].

<sup>50</sup> Barrows, *Companion*, 91: “A striking example of the superior accuracy of Jerome’s independent version above his simple revision of the old Latin is the passage *Jer.* 31:31–33 as compared with the quotation of the same, *Heb.* 8:8–10. In the former, where the translation is made immediately from the Hebrew, we read: “Behold the days shall come, saith the Lord, that I will make for the house of Israel and the house of Judah a new covenant (*foedus*): not according to the covenant (*pactum*) which I made with their fathers,” etc. In the same passage, as quoted in the epistle to the Hebrews, where we have only a revision of the old Latin, we read: “Behold the days shall come, saith the Lord, that I will accomplish for the house of Israel and for the house of Judah a new testament (*testamentum*): not according to the testament (*testamentum*) which I made for their fathers. . .” See further instances of Jerome’s adoption of the VL in nn.55–56, *infra*.

<sup>51</sup> *Jer.* 31:31 (quoted in n.50, *supra*) is not the only place where Jerome adopts both *foedus* and *pactum* to translate two occurrences of *berit* in the same verse, the stylistic variation clearly indicating that he regarded the two terms as essentially synonymous. See also his translations of *Gen.* 17:7, 13, 19. From a review of Jerome’s use of *foedus* and *pactum* in all the passages in Genesis and Exodus where the LXX renders *berit* as *διαθήκη*, it is difficult to discern any distinguishing criterion for his choice of the one rather than the other.

<sup>52</sup> McCarthy 1963; Kitchen 1989. For further literature, see Hahn 2005:65 n.2, who stresses in his article the cultic-liturgical dimension of the ANE treaty-covenants.



in his rendering of *Jer.* 31<sup>53</sup> and elsewhere,<sup>54</sup> though he too uses *testamentum* twice in *Jer.* 31:31, apparently here following the VL,<sup>55</sup> and once where he offers both *testamentum* and *pactum* as alternatives.<sup>56</sup> However, the Vulgate rendering of *berit* in *Jer.* 31:31 as *foedus* did not inhibit later writers from using *testamentum*,<sup>57</sup> many no doubt influenced by the fact that Jerome's Vulgate itself uses *testamentum* when translating New Testament citations of *Jer.* 31.<sup>58</sup>

We may doubt that Tertullian, who uses *testamentum* both in translating *Jer.* 31:31<sup>59</sup> and in referring to the biblical scriptures<sup>60</sup> (though he more commonly uses *instrumentum* for the latter<sup>61</sup>) simply made a linguistic mistake. Though credited with some knowledge of Roman law,<sup>62</sup> he

<sup>53</sup> *Explanationum in Esaiam* 2: Ecce dies veniunt, dicit Dominus, et feriam domui Israel et domui Juda foedus novum [Beuron 61/84 (*Jer.* 31:31)]; cf. *Adversus Jovinianum* 2, 27: apparently with Jacob instead of Juda [Beuron 59/84 (*Jer.* 31:31)].

<sup>54</sup> See card 2 in the Beuron database for each of the following verses: *foedus* in *Gen.* 6:18, 9:12, 13, 15, 17, 18, 17:2, 11, 21:27, 26:28, *Exod.* 2:24, 6:4, 23:32, 24:7, 24:8, 31:7, 34:27, 28; *pactum* in *Gen.* 9:9, 11, 17:4, 9, 10, 14, *Exod.* 6:5, 19:5, 31:16, 34:10, 15; both *foedus* and *pactum* in *Gen.* 9:16, 17:7, 13, 19. See also *amicitias* in *Exod.* 34:12 (forbidding Israel from entering into a *berit* with the inhabitants of the land).

<sup>55</sup> *Epistulae* 112, 14: ecce dies veniunt, dicit dominus, et consummabo domui Israhel et domui Iuda testamentum novum [Beuron 57+58/84 (*Jer.* 31:31)], apparently (from the identical spelling of Israhel) following Lactantius (n.44, *supra*). Cf. *Explanationum in Esaiam* 12: ecce dies veniunt, dicit Dominus, et ponam testamentum novum [Beuron 62/84 (*Jer.* 31:31)]

<sup>56</sup> *In Hieremiam prophetam* 6, 26 (Reiter ed. p.406, 1): disponam domui Israhel et domui Iuda pactum – sive testamentum [Beuron 60/84 (*Jer.* 31:31)].

<sup>57</sup> E.g. 5th cent.: Evagrius Gallicus, *Alleratio* (c.430 CE) 5: et hieremias dicit: ecce dies veniunt, dicit dominus, et consummabo domui Israel et domui Iuda testamentum novum [Beuron 51/84]; Hesychius (d. after 451) *Commentarius in Leviticum* 5, Migne 1865 18 p.1009D: dabo vobis testamentum novum [Beuron 55/84], *ibid.*, 7 Migne 1865 26 p.1143C: et constituam vobis testamentum novum [Beuron 56/84]; Pope Leo I (440–461), *Sermones* 95:1 (Migne 1881, 54 p.461B) [Beuron 70/84]; *Sermones* 95:2 [Beuron 71/84]; Quodvultdeus (Bishop of Carthage), *Liber promissionum et praedictorum Dei* 3, 34 (445/51): Hieremias propheta: ecce dies veniunt, dicit dominus, et consummabo super domum Israhel et super domum Iuda testamentum novum [Beuron 78/84]; *idem*, *De cantico novo* 1, 2 (381, 6 & 7) [Beuron 76/84]; 6th cent.: Flavius Cassiodorus, *Expositio Psalmsorum* 73, 20 (682, 440) [Beuron 43/84]; *idem*, *Espositio in Epistulas S. Pauli, Rom* 3, 31 (433A): sicut dicit Jeremias: Dabo vobis testamentum novum [Beuron 44/84]; Fulgentius (Bishop of Ruspe, d 527–32), *Epistulae* 14, 46 [Beuron 53/84]; *ibid.* 14, 46 [Beuron 54/84]; 7th cent.: Julianus (d.690), *Antikeimemon* 2, 70 (Migne PL 96, 698A), quoting from Augustine [Beuron 68/84]; 9th cent.: Sedulius Scotus (9th cent. Irish Monk), *Collectaneum in Apostolum*, Rm 1, but attributing the quotation to Isaiah [Beuron 79/84].

<sup>58</sup> Thus Vulg. *Heb.* 8:8–10, 10:16.

<sup>59</sup> See n.41, *supra*.

<sup>60</sup> *Against Marcion*, book 4, chapter 6: “For it is certain that the whole aim at which he [Marcion] has strenuously laboured even in the drawing up of his Antitheses, centres in this, that he may establish a diversity between the Old and the New Testaments (Veteris et Novi Testamenti diversitatem), so that his own Christ may be separate from the Creator, as belonging to this rival god, and as alien from the law and the prophets”, as quoted by Martin, “What is the “New Testament?”. . .”, citing also book 3, chapter 14. Marcion advocated the complete rejection of the “Old Testament” by Christians, but his original writings – reconstructions of New Testament texts in accordance with his theology, thus in Greek – have not survived.

<sup>61</sup> Hengel 2002:61 n.10 claims that Tertullian does so because the legal term possessed the special meaning of “evidence” or “the document to be produced before the court” (citing Zahn, 1888:106). Barrows, *Companion*, 91, notes that “another Latin term for the two great divisions of the Bible was *instrumentum*, instrument, document; a term applied to the documents or body of records relating to the Roman empire, and very appropriate, therefore, to the records of God's dealings with men”, but maintains that as early as the time of Tertullian, *testamentum* was more common. The term *instrumentum* may well reflect the NT terminology of μαρτυρία.

<sup>62</sup> Quintus Septimius Florens Tertullianus, 155–230, Carthage (where he ultimately became Bishop) is thought to have been the son of a Roman *centurio proconsularis*, who had legal functions: see Eusebius, *Church History*, II, ii. 4, and Jerome's *De viris illustribus*, chapter 53. His knowledge of Roman law (Eusebius, ii. 2) is discussed by Barnes, *Tertullian*, 24, 27. His identification with the classical Roman jurist Tertullianus, whose work is used in Justinian's Digest, is nowadays doubted.

also wrote some (now lost) works in Greek,<sup>63</sup> and would surely have been aware that *testamentum* did not fit the standard uses of *διαθήκη* as a translation of *berit* in the LXX. For while *διαθήκη* is the *standard* translation of the Hebrew *berit* throughout the LXX,<sup>64</sup> *testamentum*, though a common translation of *διαθήκη* from very early times (as early as the Latin translation of the Epistle of Barnabas<sup>65</sup> and Irenaeus<sup>66</sup>), is not adopted as the *standard* (i.e. almost invariable) Latin translation in those passages: *pactum* and *foedus* are also found, in both pre-Vulgate Old Latin (Vetus Latina) versions<sup>67</sup> and later<sup>68</sup> sources, and other terms are also occasionally found.<sup>69</sup> On the other hand, there is far greater consistency in the choice of *testamentum* in those passages which appear to have carried the heaviest theological weight for the church, namely “new covenant” in Jeremiah 31<sup>70</sup> and “blood of the covenant” in *Exod.* 24:8,<sup>71</sup> the allusion in the eucharistic claim<sup>72</sup> (again here reinforced by the Vulgate’s use of *testamentum* in NT passages that cite or allude to them<sup>73</sup>). Conversely, there appears to be an avoidance of *testamentum* in passages (at least in Genesis<sup>74</sup>) where the *berit*/*διαθήκη* is to resolve a dispute between humans.

<sup>63</sup> At the very beginning of his *De virginibus velandis* (available in English at [http://www.tertullian.org/anf/anf04/anf04-09.htm#P545\\_113997](http://www.tertullian.org/anf/anf04/anf04-09.htm#P545_113997)), he refers to an earlier non-Latin version. On his lost treatise on Heretical Baptism, see “Early Christian Writings: Tertullian”, at <http://www.earlychristianwritings.com/info/terullian-wace.html>. Jason E. Schaitel, “The Life of Tertullian”, <http://www.nolittlepeople.com/2011/12/the-life-of-terullian.html>, also lists as lost Greek works treatises on *The Defense* and *On the Spectacles* (on the surviving Latin of which, see [http://www.tertullian.org/works/de\\_spectaculis.htm](http://www.tertullian.org/works/de_spectaculis.htm)).

<sup>64</sup> See n.5, *supra*.

<sup>65</sup> *Epistula Barnabae* (mid 2nd cent.) 4.7 (Heer 1908, p.30, 18) on *Exod.* 34:28 (where, in the MT, Moses wrote the words of the *berit*): et accepit testamentum a domino [Beuron 50/80]; *ibid.*, 14,2 (Heer 1908, p.77, 10) on *Exod.* 24:18 and 31:18: (where the tablets of the *edut* are given to Moses): Et erat Moyses ieiunans in monte Sinai, ut acciperet testamentum a domino, quadraginta diebus et quadraginta noctibus, et accepit a deo tabulas scriptas manu dei [Beuron 57/121 of *Exod.* 31:18].

<sup>66</sup> See n.42, *supra*.

<sup>67</sup> Fischer appears to adopt *pactum* in *Gen.* 9:11, following Quentin, and in *Gen.* 26:28, based on Rufinus.

<sup>68</sup> E.g. *pactum* in Bede, *Libri 1 in Genesim* (109C) [7/13 of *Gen.* 9:9] and elsewhere; *foedus* in Isidorus, *De Natura rerum* 31, 2 [10/15 of *Gen.* 9:11]; *Breviarium Gothicum* (Migne (1850) 86, 303A [42/84 of *Jer.* 31:31].

<sup>69</sup> E.g. in *Josh.* 9:6 we variously find *iuratio* (Augustine [9/14]), *pax* (*Breviarium Gothicum* [10/14]) and *amicitia* (Cassiodorus [11/14]).

<sup>70</sup> See nn.46 and 57, *supra*. In the Beuron database for *Jer.* 31:32 there are 11 occurrences of *pactum*, 1 of *foedus*, 41 of *testamentum* (a significant proportion from Augustine, who is consistent in his usage). There are 7 entries for Jerome: 4 have *testamentum*, 2 have *pactum*, 1 has *pactum sive testamentum* (cf. n.56, *supra* for *Jer.* 31:31). A similar pattern is found in the entries for *Jer.* 31:33: 8 occurrences of *pactum*, 0 of *foedus* and 21 of *testamentum*. In this context, Jerome, *In Hieremiam prophetam* 6, 26 (Reiter ed. p.405, 1) observes: quod autem pactum pro testamento ponimus, Hebraicae veritatis est, licet et testamentum recte pactum appellatur, quia voluntas in eo atque testatio eorum, qui pactum ineunt, continetur [Beuron 38/58 on *Jer.* 31:33].

<sup>71</sup> In the Beuron database for *Exod.* 24:8 there are 2 occurrences of *foedus* (one being the Vulgate) and 12 of *testamentum*. Quodvultdeus, *Liber promissionum et praedictorum Dei* 2, 1 has in *testimonium accipiens* [Beuron 16/18].

<sup>72</sup> See text at n.8, *supra*.

<sup>73</sup> Thus Vulg. *Matt.* 26:28, *Mark* 14:24, *Luke* 22:20, *1 Cor.* 11:25.

<sup>74</sup> *Gen.* 21:27: 2 occurrences of *testamentum*, both from Augustine; 2 (apart from the Vulgate) of *foedus*, 2 (also from Augustine) of *pactum*; *Gen.* 26:28: 2 occurrences of *testamentum*, both from Augustine; 2 (apart from the Vulgate) of *foedus*, 1 each of *execratio* and *coinjuratio*; *Gen.* 31:44 (Jacob and Laban), where *testamentum* is used again by Augustine (here joined by Cassiodorus), while *foedus* occurs 3 times. However, Fischer adopts *testamentum* in *Gen.* 21:27 and 31:44 but not 26:28. On Augustine in the first two of these sources, see further n.47 *supra*.

## 2. TWO LEGAL-THEOLOGICAL INTERPRETATIONS OF διαθήκη

In 1912, Johannes Behm<sup>75</sup> published a 116 page monograph<sup>76</sup> entitled *Der Begriff Diatheke im Neuen Testament* (Leipzig: Deichert), whose potential influence<sup>77</sup> has remained, insofar as Behm penned the article on διαθήκη in the widely-consulted *Theologisches Wörterbuch zum Neuen Testament* (1935), now available also in English.<sup>78</sup> In the latter article he quotes (at 125) the statement of Moulton and Milligan<sup>79</sup> that “διαθήκη is properly *dispositio*, an “arrangement” made by one party with plenary power, which the other party may accept or reject, but cannot alter. A will is simply the most conspicuous example of such an instrument, which ultimately monopolized the word just because it suited its differentia so completely”,<sup>80</sup> but adds, apparently with reference Jewish sources, that “the existing examples of the more general sense of “disposition” are all to be found in the religious sphere”. Yet even in following Moulton and Milligan in support of a more general meaning of διαθήκη in the *koine* as “ordinance” or “disposition”, he has to concede that this finds literary expression “only in [one] disputed passage”.<sup>81</sup> He maintains that the usage as “agreement” or “treaty” is found “only” in Aristophanes’ *Birds*.<sup>82</sup>

Behm sought to reduce the distance between the LXX and *koine* meanings<sup>83</sup> in the light of a theology of unilateral grace.<sup>84</sup> Though this was immediately recognised as reflecting “one

<sup>75</sup> 1883–1948, Lutheran Theologian, Göttingen.

<sup>76</sup> Behm cites the work of Norton (1908) in his 1912 monograph, noting at 1912:2 that it is limited to classical sources.

<sup>77</sup> See the use made of Behm’s linguistic analysis in Selb, “διαθήκη im Neuen Testament”, summarised by Llewellyn, “Revocation”, 43. See also Lincoln 1999:4-5 (citing Behm’s article as, and seemingly attributing it to, “Kittel”).

<sup>78</sup> Behm, Sections B-D of “διαθήκη”, *TDNT* II:124–34.

<sup>79</sup> 1919:148. In *TWNT/TDOT* (see 1965:106 n.5) Behm lists Norton in the bibliography for his article on διαθήκη, but does not otherwise refer to it.

<sup>80</sup> Cf. Jaubert 1963:312.

<sup>81</sup> Behm, *ibid.*, quoting Dinarchus, *Fragments or Orations* 1, 9 (see now the Loeb edition of *Minor Attic Orators*, Vol.2), referring to the decrees or statutes of the Areopagus.

<sup>82</sup> Behm 1965:125. He comments: “This is a treaty between two parties, but binding only on the one according to the terms fixed by the other.” Perhaps this explains why (on Behm’s own account) it is so rare: the biblical covenant is binding on God, in terms of the commitment of protection, even if the specific rules laid down relate only to human conduct, and are there on a take-it-or-leave-it basis. At 1912:11, he mentions Norton’s treatment of Aristophanes’ *Birds*. Elsewhere, he notes the use of δῖέθεντο in Ditt. Syll.3, 205, 10ff; see n.88, *infra*. See also Jaubert 1963:311 and the context in the will of Ptolemy Neoteris, discussed in s.3, *infra*.

<sup>83</sup> Behm 1965:126 (under the rubric “The Transition from תּוֹרָה to διαθήκη in the LXX and Jewish Literature”; see also 1912:17-34), argues from the fact that *diatheke* (in the LXX, apparently) “in both poetic parallelism and lists in prose . . . is related to such concepts as *nomos*, *prostagma*, etc. . .” and then jumps to “As a synonym of *nomos* etc.” At 126, he translates διαθήκην εἰρηνης in LXX Num. 25:12f. as “an ordinance which brings salvation”. Again at 126: “διαθήκη is especially used for the declaration of the divine will at Sinai which is the divine disposition *par excellence* in the OT. . .”.

<sup>84</sup> See Behm, *ibid.*, at 126f., commenting on *diatheke* in the LXX as a concept which “hovers between the senses of “covenant” and “disposition” . . . [to be explained not only in terms of the Greek term itself but also] “the complex content of the word *berit* which the translators were seeking to grasp”, one which transcended the “originally legal” meaning and came to indicate “a free declaration of the divine will to man’s salvation . . . the exclusively determinative will of the divine author emerged in clearer focus” (127). This leads ultimately to *Jer.* 31:31 where *berit* is “the free gift of God, as the declaration of His saving will, as the revelation of grace, in relation to which Israel can be only a recipient”, so that the LXX *diatheke* is a religious concept, representing a “significant development of the Hebrew term even while preserving its essential content”. See further *infra*, text at nn.97–114.

specific line of the part played by the covenant-idea in Reformed Theology”;<sup>85</sup> Behm also claimed that the term is technical for “last will and testament” “in Gk jurisprudence in every age”<sup>86</sup> but noted that it was also found in literary and popular Greek.<sup>87</sup>

Behm argued also from the meanings of the middle voice (especially διέθετο) of the verb διατίθημι (1965:104f.). Despite acknowledging the meaning “less frequently, and only in older texts . . . to come to an arrangement or to order things with others”;<sup>88</sup> he applies his (theological) conclusion not only to the LXX but also to the Apocrypha,<sup>89</sup> Philo<sup>90</sup> and the NT: “The term is obviously a formula for the gracious will of God disclosed in history. . .”<sup>91</sup> Indeed, he seeks to project this back even to the *berit* of the Hebrew Bible<sup>92</sup> (for which there is a – purely etymological – argument<sup>93</sup>). He concludes:

In both form and content the NT use of διαθήκη follows that of the OT. The only difference is to be found in the step from prophecy to fulfilment . . . Neither “covenant” nor “testament” reproduces the true religious sense of the religious term διαθήκη in the Greek Bible. διαθήκη is from first to last the “disposition” of God, the mighty declaration of the sovereign will of God in history, by which he orders the relation between Himself and men according to His own saving

<sup>85</sup> Vos, Review: “All this is very fine and it may even seem beautifully to fit into one specific line of the part played by the covenant-idea in Reformed Theology. If διαθήκη stands for the sovereignty and monergism of God in salvation, then it is an eminently Augustinian and Calvinistic idea.”

<sup>86</sup> Behm 1965:124. But see the first paragraph of section 3, *infra*.

<sup>87</sup> Citing, e.g., Plato Leg IX.923e, Epictetus, IDISS, II, 13,7, and Papyri such as BGU 19.

<sup>88</sup> Behm, 1965:105, citing Xenophon, Mem., 2.6.23 (cf. Norton, *supra* n.23). He argues that even here “The emphasis . . . does not fall on the reciprocal nature of the action. The element of reaching a decision being still strong, it falls rather on the legally binding character of the decision reached either in relation to or with respect to others”, despite having earlier in the same paragraph cited not only the usage in Aristophanes, *Birds* (*supra*, n.9), but also Ditt. Syll.3, 205, 10ff: τὴν φιλίαν καὶ τὴν συμμαχίαν . . . ἣν διέθεντο πρὸς ἀλλήλας αἱ πόλεις (“to establish friendship and covenant relationship”).

<sup>89</sup> Behm 1965:127: “The OT Apocrypha and Pseudepigrapha present much the same picture as the LXX . . .” [with parallels i.a. to νόμος in *Jub.* 30:21] . . . In several passages in Sirach it is used to translate קח. . . It is also used for the whole Law (βιβλίον διαθήκης, “book of the law” in *1 Macc.* 1:57, *Sir.* 24:23 [the Hebrew original of the latter is ספר ברית Segal ed., 146] . . . All this goes to show that the primary thought is that of (God’s) disposition, “order” or “institution”, συσθήκη being used for “covenant” or “treaty” in *1 Macc.* 10:26, *2 Macc.* 12:1, *Wis.* 1:16 etc.) (But “an extreme development of legalism is combined with eschatological hope in the *ḥit* concept of the Damascus writing” (citing *השדשה ברית* in 6:19, 8:21). On διαθήκη in the Greek Sirach, see also Jaubert 1963:313.

<sup>90</sup> Behm 1965:128 argues that Philo uses συσθήκη for “treaty”, “covenant” except where quoting from the LXX: “He lays the strongest possible stress on the element of the absolute one-sidedness of the expression of the will of the gracious God, *Som.* II, 223 . . . As an allegorist, however, he imports into the LXX concept the everyday sense of “testament”” [citing DSL II, 16, but Philo is not citing the LXX here, and the text διαθήκαις has been doubted: see Loeb edition ad loc.]: “The majesty of the divine διαθήκαι in the OT is seen by contrast with human testimonies [citing *Som.* II, 224 and *Mut. Nom* 52 on *Gen.* 17:2]. . . . Philo obviously realised that his figurative interpretation of the divine διαθήκη as a testament differed from the true biblical sense. His knowledge of this sense could in fact be deduced, even if there is no direct evidence, from his hermeneutical principles (the literal and allegorical sense). Even in Philo the firmly developed religious concept of the LXX shines through the enveloping imagery.” See also Behm 1912:34-37. On *Mut. Nom.* 52, see further n.101, *infra*.

<sup>91</sup> Behm 1965:128 (concluding his account of Philo), and at 129f. on the religious sense of διαθήκη in Paul: *Rom.* 11:27, *Rom.* 9:4, *Eph.* 2:12 (διαθήκαι τῆς ἐπαγγελίας: Harl 1986:55 has noted that the latter term (promise) is not found in the LXX), *2 Cor.* 3:6. See also Behm 1912:44-49. But see further, on Galatians, s.6 *infra*.

<sup>92</sup> Behm 1965:134, but see s.4, below. He also has some brief comments on *berit* in rabbinic Judaism and its interpretation of *Jer.* 31:31: see Behm, *ibid.*, at 128f. and (late) sources there cited.

<sup>93</sup> On *berit* as disposition in the Hebrew Bible, see Weinfeld, *TDOT* II.255, arguing that the original meaning, based on an etymology from Akk. *biritu* (clasp, fetter) is the idea of a bond rather than an agreement, so that it implies first and foremost the notion of “imposition”, “liability” or “obligation” [citing *Ps.* 111:19, *Judg.* 2:20] . . . *berith* is synonymous with law and commandment . . . and the covenant at Sinai in Ex. 24 is in essence an imposition of laws and obligations upon the people (vv.3-8). Yet those very verses twice record the *acceptance* of the terms by the people (see n.32, *supra*).

purpose, and which carries with it the authoritative divine ordering, the one order of things which is in accordance with it . . .<sup>94</sup>

But not only does such a construction project back a later Christian model of covenant on to the LXX (a Jewish translation) and the Hebrew Bible itself. It is also far too “systematic” to do justice to the complexity (and interest) of the legal historical development. Behm takes it for granted that διαθήκη is a technical term in Greek jurisprudence, corresponding to our understanding of “last will and testament”. But neither aspect of this assumption is solid. We find in fact that “testamentary succession” was weakly institutionalised in Greek and Hellenistic times,<sup>95</sup> and that the terminology of διαθήκη (and the verb from which it derives) could be applied to a range of arrangements,<sup>96</sup> none of which have all the incidents of the “last will and testament” with which we are familiar: a secret, written instrument, taking effect only at death (and thus covering the “estate” as it existed at that moment) but entirely revocable by the “testator” up to that time.

Paradoxically, a more satisfactory account of the theological development of the covenant concept may now be derived from studies of the Greco-Roman background of χάρις (grace), whose use in Christian theology clearly informs Behm’s analysis.<sup>97</sup> In the Hebrew Bible, covenant is associated in some sources with *hesed*, variously translated lovingkindness or mercy: God is said to keep the covenant and show mercy.<sup>98</sup> Such “covenant love”<sup>99</sup> “always has strong elements of reciprocity in its usage.”<sup>100</sup> Philo goes further, in using the expression διαθήκην χάριτος.<sup>101</sup> But his use of χάρις is not to be taken in the later Christian sense. In fact, even that latter theological concept, it has recently been argued, must be understood in the context of the Greco-Roman patron-client relationship,<sup>102</sup> which involved *reciprocal* duties, *officia*, on the part of the client. But these duties were social rather

<sup>94</sup> Behm 1965:134.

<sup>95</sup> Yaron 1960:18 comments similarly on the tannaitic institutions: “At first these practices were probably extra-legal, and depended for their effect upon the readiness of those concerned to acquiesce in the changes brought about by the deceased.”

<sup>96</sup> See further s.3, *infra*, esp. at n.125. Yaron 1960:34 observes: “. . . as far as Greek (and Hellenistic) law is concerned, the distinction between unilateral and bilateral dispositions means much more to us, trained to distinguish and classify, than it meant to Greek lawyers.”

<sup>97</sup> See n.84, *supra*.

<sup>98</sup> See Zobel, *TDOT* V:60 on the “stereotyped formula” that links *hesed* and *berit*: “keeping the covenant and showing kindness/mercy as attributes of God”: *1 Kings* 8:23 (= *2 Chron.* 6:14); *Deut.* 7:9, 12; *Neh.* 1:5, 9:32; *Dan.* 9:4.

<sup>99</sup> Freedman and Lundblom, *TDOT* V:25, contrasting the mutuality of the relationship of דָּבָר with that of יְהוָה (*hen*): “Unlike *hesed*, *hen* can be withdrawn without consequence, since it is given freely.”

<sup>100</sup> Harrison 2003:109.

<sup>101</sup> Philo, *de mutatione nominum* 51–52, on the covenant with Abraham: “With good reason then did He say, ‘Become blameless’, for he holds that freedom from sin and guilt is a great furtherance towards a happy life. And to him who was elected to live in this fashion He promises to leave a covenanted portion (κλήρου κατὰ διαθηκᾶς ἀπολείπειν) such as is fitting for God to give and man to receive, for He says ‘I will set my covenant between me and between thee’ (*Gen.* xvii.2). Now covenants are drawn up for the benefit of those who are worthy of the gift, and thus a covenant is a symbol of the grace (διαθήκην χάριτος) which God has set between Himself who proffers it and man who receives.” Translation of F.H. Colson, *Philo* vol.5 (London: Heinemann, 1934; Loeb Classical Library). We may note that in this passage Philo apparently uses the term διαθήκη in both the theological and the *koine* senses, linked by the association with χάρις in the hellenistic patronage sense. See further Harrison 2003:125, in the context of an overall account of χάρις in Philo (114–33).

<sup>102</sup> See particularly DeSilva 1999, Harrison 2003, who observes at 352 that the Hellenistic view of grace “seems to be somewhat neglected in modern New Testament scholarship.”

than legal.<sup>103</sup> The relationship was one of benefaction on the one hand, gratitude<sup>104</sup> on the other. It could be expressed in the public sphere, in inscriptions,<sup>105</sup> or in private relationships, manifest in the papyri.<sup>106</sup> The gratitude of the client/recipient entailed loyalty,<sup>107</sup> and this, I would suggest, provides a conceptual link with the notion of covenant,<sup>108</sup> whose deep structure may be described as an exchange (or bond<sup>109</sup>) of protection for loyalty.<sup>110</sup> Both the protection and the loyalty could assume different forms: in the ancient Near East vassal treaties and covenants of grant;<sup>111</sup> in the Hebrew Bible monotheistic commitment and laws;<sup>112</sup> in the New Testament works and faith. Of course we have to pose the question of the forms of both *διαθήκη* and *χάρις* separately for each of our sources.<sup>113</sup> But it is only

<sup>103</sup> DeSilva 1999:38, 44. Compare Zobel, *TDOT* V:53 on *hesed* in the Hebrew Bible, citing A.R. Johnson: “the term connotes more than can be defined in the legal terminology of *berit*. . . *hesed* is ‘the virtue that knits together society’ (Robertson-Smith)”.

<sup>104</sup> DeSilva 1999:42 on Cicero, *De Off.* 1.47–48 (gratitude an absolute duty); 74 n.36 on Seneca, *Ben.* 1.4.3 (“debt of gratitude”). On Paul’s attitude to benefaction, Harrison 2003:287f. observes: “Paul endorses conventions from the honorific inscriptions that stress the obligation of the beneficiary to respond worthily to the Benefactor”; contrast Philo’s critique of such acknowledgements of benefaction in the inscriptions (Harrison 2003:130–33, citing *De Cherubim* 122–23). The latter may be compared to attitudes in the early Church, discussed in Wheatley 2011. See also DeSilva 1999:39, 51 on *χάρις* as gratitude/thanks in some New Testament sources.

<sup>105</sup> Harrison 2003:ch.2, concluding (at 63) with the observation: “Wetter was correct in seeing the bestowal of *χάρις* by the Caesars as the linguistic springboard for the NT. But the dominant use of the word was subsumed under the ethos of reciprocity. Thus as a semantic starting point for the NT understanding of grace, *χάρις* – unless carefully defined – carried as many dangers as advantages.” See also Harrison 146–50 on “*Charis* in Jewish Synagogal and Funerary Inscriptions”.

<sup>106</sup> See Harrison 2003:80–84 on “*Charis* and the Ethos of Reciprocity in the Papyri”. At 2003:24, Harrison compares the “private world of benefaction relationships” (seen in the papyri) to that of Pauline house churches.

<sup>107</sup> See Zobel, *TDOT* V:62 n.52, quoting Weinfeld in Fee and Hubbard 2011:141f.: “. . . the most important stipulation in any suzerain/vassal treaty was loyalty (Heb. *hesed*) . . . (in this context it means covenantal faithfulness)”. DeSilva 1999:45f. notes that one component of gratitude in personal patronage is loyalty to the giver, entailing an obligation not to become entangled in a web of crossed loyalties, and observes (at 63) that *πίστις* in the New Testament may refer to both loyalty and trust.

<sup>108</sup> See also the interpretation by Campbell 1972:110 of a Macedonian Inscription of 93 CE described by Ferguson 1913:43, where a conditional gift is given to the city *κατὰ διαθήκην*.

<sup>109</sup> DeSilva 1999:46 cites Seneca, *de ben.* 6.41.1–2 on the point of a gift as not to obtain a return but to create a “bond” that “binds two people together”.

<sup>110</sup> In discussing Paul’s concept of *χάρις*, Harrison 2003:287 comments: “While God demands loyalty of the dependants in His household, God’s reign of grace provides a security and status that totally surpasses the lucrative career prospects within the *familia Caesaris*.”

<sup>111</sup> Weinfeld’s distinction (1970; 1975:266–69), applied to *Gen.* 15 by Campbell 1972:108f. But see Hughes 1979:49–51. In fact, Weinfeld qualifies his view of the unconditional nature of the covenant of grant in several respects. Thus: “the ‘grant’ serves *mainly* [emphasis supplied] to protect the rights of the servant” (1970:185); “. . . in contradistinction to the JE source where the loyalty of the Patriarchs is a matter of the past, in the priestly source it is anticipated” (1970:186 n.16); he concedes that the unconditional nature of the grant in the ancient Near East is not universal: see the two counter-examples (Nuzi and Hitite) at 1970:193, where he observes: “in *most* [emphasis supplied] of the cases rebelliousness brought about the dissolution of sonship, be it a real son or an adopted”; “It was the Deuteronomist, the redactor of the Book of Kings, who put the promise of David under condition (I Kings II, 4, VIII, 25, IX, 4f) and so did Deuteronomy with the promise to the patriarchs”; moreover, “It is true, even in the predeuteronomist documents the loyalty of David’s sons and the sons of the patriarchs is somehow presupposed [n.102: “cf. Gen. XVIII, 19. This is an expectation and not a condition”] but it is never formulated as the condition for national existence as it occurs in the deuteronomist literature” (1970:195); “In regard to the Davidic covenant, it should be admitted that the conception of conditionality is implied in Ps. CXXXII (v. 12) which seems to be an ancient Psalm. It is indeed possible that alongside the conception of unconditional promise of the dynasty there was also in existence the concept of a conditional promise. The conception of conditionality might have especially developed after the division of the kingdom” (1970:196).

<sup>112</sup> The Abrahamic covenant on the one hand, the Mosaic on the other.

<sup>113</sup> Harrison 2003:11 comments that most Christian writers write as if grace is a timeless construct.



when faith is itself viewed as predestined<sup>114</sup> that the deep structure of covenant reciprocity comes to be threatened.<sup>115</sup>

A different theological explanation of the LXX's use of διαθήκη to render the HB's תְּרִיב, one which avoids both the theological and legal anachronisms of Behm's arguments, has been offered by Adrian Schenker.<sup>116</sup> Schenker notes correctly that the *koine* meaning of διαθήκη includes grants in contemplation of death, where there is *shared* ownership between the "testator" (during his lifetime) and the beneficiary "after his death" – μετὰ τὴν τελευτήν (*meta ten teleuten*).<sup>117</sup> This, he argues, fits the Torah's account of the covenantal grant of the land,<sup>118</sup> and the limitations on its use.<sup>119</sup> Though the Hebrew Bible itself shows no awareness of a comparable social institution involving such divided ownership<sup>120</sup> (unless we read it into Esau's "sale" of his birthright while Isaac is still alive<sup>121</sup>), Hellenistic Jews will have been familiar with the *meta ten teleuten* (an expression used, we may note, in a non-legal sense in the LXX<sup>122</sup>), which was to become the *matenat bari* of the Mishnah.<sup>123</sup> Indeed, we read in LXX *Sir.* 33:24(32): "In the day of the completion of the days of your life and at the moment of death, distribute an inheritance (ἐν καιρῷ τελευτῆς διάδος κληρονομίαν),"<sup>124</sup> which though not using the technical vocabulary certainly hints at a two-stage form of inheritance. Schenker notes that διαθήκη and its verbal forms covered a range of arrangements including both the *meta ten teleuten* gift in contemplation of death and the Hellenistic "will".<sup>125</sup> However,

<sup>114</sup> Not, apparently, an exclusively Christian notion. Harrison 2003:165 observes that "Electing and predestinating grace occupies a dominant position in the synagogal sermons of Pseudo-Philo."

<sup>115</sup> Dunn 2003:320f. comments on Paul's preference for χάρις (the LXX translation for *hen*) over ἔλεος (the LXX translation for *hesed*): "... presumably because in its usage he could combine the most positive features of the two Hebrew words: *charis* denotes, as it were, the unilateralness of *chen* and the lasting commitment of *chesed*", and then goes on to offer as "part of the explanation" the association of *charis* with benefaction, citing particularly Harrison's study. The latter (2003:106–10, 348f.) agrees that Paul wants to avoid the idea of reciprocity attached to *hesed* in the Hebrew Bible, but notes the "irony that in choosing the word χάρις Paul opts for the central *leitmotiv* of the Graeco-Roman reciprocity system."

<sup>116</sup> Schenker 2000 (though not addressing Behm's analysis). Schenker is a Dominican priest, as well as a prominent academic scholar.

<sup>117</sup> Cf. the *donatio mortis causa* practiced by the Egyptians, e.g. BGU III.993 of 127 BC, with the *meta ten teleuten* terminology, cited by Taubenschlag 1955:205, noting that such *donationes mortis causa* were more frequent among the Greeks, some stressing their revocability. On BGU III, 993, see also Yaron 1960:26–28 (and n.199, *infra*); Hughes 1979:74 (though wrongly dating the papyrus to 127 AD); Kloppenborg 2008:179–80 (disputing Kreller's interpretation that the usufruct in the land remained with the testator until his death), 182, 188–89, 191.

<sup>118</sup> Both to Noah and Abraham: on *berit* in *Gen.* 6:18, 9:9–11, 15:18, 17:8 (where the inclusion of descendants in the covenant is taken to presuppose the grant of the land as their living space, so that the passage in this sense reiterates *Gen.* 15:1): Schenker 2000:176f. A similar view is attributed to Philo by Jaubert 1963:314f., while denying that this was contemplated by the LXX translators.

<sup>119</sup> God is the owner and the gift is to take effect in the future; *Lev.* 25:23 stresses that this is possession for enjoyment: Schenker 177.

<sup>120</sup> Cf. Yaron 1960:4–10 (ch.1).

<sup>121</sup> See further n.224, *infra*.

<sup>122</sup> LXX *Josh.* 1:1, *Judg.* 1:1, 2 *Chron.* 24:17, 1 *Macc.* 9:23 (all referring to events "after the death of").

<sup>123</sup> See *infra*, at nn.184–187.

<sup>124</sup> New English Translation of the Septuagint, at <http://ccat.sas.upenn.edu/nets/edition/>. On the expression "from today and after my death" (*mehayom ule'ahar mitah*) in Mishnah *Baba Batra* 8:7 (where R. Yehuda requires these words; R. Yose does not) see Yaron 1960:114–18; Llewellyn, "Allotment", 32f. On outright gifts during lifetime, with or without clauses imposing a reciprocal duty of maintenance, see Kloppenborg 2008:183–90.

<sup>125</sup> Schenker 2000:178: In Egypt the law of succession knew not only [1] testaments (citing those by soldiers from Fayoum between 238 and 225 BCE from the Flinders Petrie collection: notarised, witnessed, with set formulae; on P. Petr. III 2 (238/7 BCE) see Kloppenborg 2008:184f.), but also [2] division of property by parents in contemplation of death and [3] succession agreements between spouses. Schenker notes (2000:178f.) that Greco-Roman law did not distinguish rigorously between these three forms, although Llewellyn, "Allotment", 38, may be correct in that

the latter falls significantly short of the Roman and modern institutions in that it could include provisions taking effect already within the testator's lifetime,<sup>126</sup> and was not fully and automatically revoked by a later will.<sup>127</sup> In short, the LXX use of διαθήκη is both legally appropriate to a grant of land in which the owner (here, God) retains rights, and theologically appropriate to a *bilateral* covenantal relationship in which that grant remains subject to the good behaviour of its recipients (as the history of exile, and its interpretation by the prophets, well attests).

As an example of the *meta ten teleuten* arrangement in a succession agreement<sup>128</sup> between parents and children, Schenker cites P. Upps. Frid. 1 (of 48 CE):<sup>129</sup> a written contract (συγγραφή), written by only one party, the father, but including a ὁμολογία, an acknowledgement by the children. The division is made explicitly in contemplation (Schenker: "pour cause") of death (μετὰ τὴν τελευτήν). It uses a verb typical of testaments, καταλείπω,<sup>130</sup> but while it does not take effect immediately in respect of the heirs' ownership rights to either immovable or movable property, it cannot (being a pact rather than a testament, and in the absence of an explicit clause reserving a right to revocation<sup>131</sup>) be revoked by the "testator" alone;<sup>132</sup> the heirs, who may enter into possession, already have rights over the property (which Roman law later required to be registered,<sup>133</sup> for taxation purposes). Nevertheless, Schenker describes the arrangement as one which "équivalent pratiquement à un testament" in that the parents retain title until their death even though the children already enter into possession.<sup>134</sup> It is this feature which Schenker identifies as explaining the theological attraction of διαθήκη to the LXX translators: under the covenant (conceived as a bilateral agreement, not a unilateral gift<sup>135</sup>), God (whose death is not contemplated<sup>136</sup>) remains owner of the land, while his people enter into possession.<sup>137</sup> There was, however, at least one<sup>138</sup> alternative form of this arrangement, one which did not explicitly reserve the ownership rights of the testator: here the heirs gained future ownership while the "testator" retained enjoyment (as in the rabbinic *matenat bari*<sup>139</sup> – and, as I have

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generally the Greek μετὰ τὴν τελευτήν was bilateral, involving an agreement, while the διαθήκη was unilateral (even though some of its provisions could come into effect during the testator's lifetime).

<sup>126</sup> See text at nn.152–153 *infra*.

<sup>127</sup> See text at nn.168–169 *infra*.

<sup>128</sup> Schenker 2000:179f. At 182, he notes that marriage contracts could also contain comparable testamentary clauses.

<sup>129</sup> Schenker 2000:179f., following the discussion by Llewellyn, "Allotment" (including the full text and translation).

<sup>130</sup> Lines 10 and 14: see Schenker 2000:180.

<sup>131</sup> Schenker 181f. He notes at 182 that with such a reserve clause the law combined the advantages of the two institutions, and that in some papyri this institution is called συγγραφοδιαθήκη.

<sup>132</sup> Compare Mishnah *Baba Batra* 8:7 (quoted in n.187, *infra*), requiring the consent of both father and children to the disposition of the property during the father's lifetime.

<sup>133</sup> Lines 34–36; Schenker 2000:180f.

<sup>134</sup> Schenker 2000:179.

<sup>135</sup> Yaron 1960:32 maintains: "The step from bilateral gift to unilateral testament was never taken in Jewish law." See further *infra*, at nn.197–206.

<sup>136</sup> An issue that troubled Behm 1965:129.

<sup>137</sup> Schenker 2000:183f.

<sup>138</sup> Both the content and the terminology of the papyri discussed by Kloppenborg 2008 (see n.183, *infra*) indicate a far greater flexibility in practice than might be suggested by a "rule book" like the Mishnah.

<sup>139</sup> See *infra*, at nn.184–187.

argued, the relationship between the father and the older son in Luke's Parable of the Prodigal Son<sup>140</sup>).<sup>141</sup>

Of course, this particular legal analogy does not hold good for every use of *διαθήκη* in the LXX to render the Hebrew Bible's *berit*. But LXX scholars have established that the Pentateuch was translated first and influenced the translations of later books.<sup>142</sup> The same argument may, however, be made in relation to consistency *within* the Pentateuch itself, and in particular in relation to the Mosaic covenant. Moreover, different translation styles have been observed as between the five books, leading to the inference that they come from the hands of different translators.<sup>143</sup> The probable solution is that there was a subsequent editing process which imposed terminological consistency,<sup>144</sup> and here priority was given to the Genesis translation of *berit* (itself thought to have been the first book to be translated<sup>145</sup>).

Indeed, the choice of *διαθήκη* has attracted the attention of students of the general character of LXX Greek,<sup>146</sup> and its relationship to the *koine*.<sup>147</sup> There has been recognition of a "stereotyped" mode of translation, in which "simples symbols représentant l mot hébreu" could have been understood differently by the translator and by readers unfamiliar with that Hebrew (who may indeed have been taken by surprise by them). *διαθήκη*, as the "équivalent fixe" for *berit*, might then appear even where the context indicates a meaning other than "alliance", but the reader could accept "l'approximation de cette traduction stéréotypée".<sup>148</sup> Muraoka comments: "Within the LXX, once such an approximation was established, it became a standard, stereotype translation equivalent whenever the Hebrew word occurred irrespective of the possibility that the translator was aware that at times the precise nuance of the Hebrew did somewhat differ from that of the Greek."<sup>149</sup>

Yet this goes beyond mere convenience, or consistency for its own sake. The absence of any "complete overlap in meaning between the Hebrew and the Greek" (Muraoka) is a function not only of the challenge to any translator (traddutore traditore), but also the fact that even within the same natural language there will be differences in the use of the same

<sup>140</sup> Jackson, "The Jewish Background . . .", 117–19, and see n.183, *infra*. See also Llewellyn, "Allotment", 37f.

<sup>141</sup> Thus, Yaron 1960:1 defines gifts in contemplation of death as either (a) a gift of property with the donor retaining usufruct for life (= *maternal bari*, the Egyptian *meta ten teleuten* and the Roman *donatio deducto usufructu*) or (b) a gift of property which is finally irrevocable only on the donor's death (= *shekhiv mera*, *metsaveh mehamath milah*, and the Roman *donatio mortis causa*).

<sup>142</sup> Tov 1999:183; Fernández Marcos 2000:22.

<sup>143</sup> Wevers 1991:55f., 59f.; Dines 2004:14–16, 121.

<sup>144</sup> Dines 2004:59, 122 ". . . too much regularity may be a sign not of a translator but of an editor or reviser."

<sup>145</sup> Dines 2004:14.

<sup>146</sup> See Jaubert 1963:311–15; Lee 1983:11–30, commenting at 30 on *διαθήκη* as a term for a specifically Jewish idea and one which may have entered the spoken language of Jews (though in general he rejects the idea of a Jewish-Greek dialect); Harl 1986:55f.; Dines 127, suggesting, with Harl, that much of the technical vocabulary may have been forged before the first translations were made, even though the LXX provides the earliest written evidence; Rajak 2009:167f., comparing the LXX lexical choice of *diatheke* over *suntheke* with the contrary choice of Aquila and Symmachus, and the use of *diatheke* by Josephus *only* in the sense of 'testament'.

<sup>147</sup> See also Aitken 1999; Fernández Marcos 2000:3–31.

<sup>148</sup> Harl, Dorival and Munnich 1986:249, citing Muraoka 1984:442 (quoted in n.149).

<sup>149</sup> Muraoka 1984:442: "The statistically incontestable fact that in 99 per cent of its occurrences in the LXX the word *διαθήκη* renders בְּרִית does not necessarily mean that there is a complete overlap in meaning between the Hebrew and the Greek, . . . one must seriously reckon with the possibility that the translator(s) used *διαθήκη*, not because he believed that its range of meaning completely overlapped with that of בְּרִית . . . one is bound to come up against cases where it would not be easy to determine whether the translator is translating or mechanically substituting a Greek symbol for a Semitic one without bothering to ask himself if the resultant translation is likely to convey the meaning he believes is to be attached to the original text." See also Joosten 2011:7.

term in different semantic registers (here legal and theological). The use of one register as an analogy in another cannot be a process of reducing the sense of one to that of the other. Neither the authors of the Hebrew Bible nor those of the New Testament were writing legal treatises: when they used legal terms, they did so in order to invoke those aspects of the legal analogue which were most pertinent to the particular theological message they were conveying. It is that context which is the best indicant of what use they were seeking to make of the legal analogue, as we shall see (in section 6, *infra*) in analysing the two New Testament texts which play on the double sense of διαθήκη.

Nevertheless, our biblical authors did not invent the legal senses of the terminology they use, and we must always be sure that our view of the use they made of such vocabulary is consistent with what we know of the complex history of the relevant institutions in their respective Greek, Hellenistic, Roman and Jewish contexts. The next section seeks to outline that history.

### 3. FORMS OF SUCCESSION IN THE GREEK, HELLENISTIC AND JEWISH WORLDS

While P. Upps. Frid. dates from the Roman period, Schenker is able to point to indirect evidence of the use of διαθήκη terminology as including this form of agreement as early as the 3rd cent BCE in Ptolemaic Egypt: a Greek contract (ὁμολογία) from Elephantine<sup>150</sup> includes the formula τάδε δίδετο. Taubenschlag's review of the papyri supports the view that testamentary arrangements (even "wills"<sup>151</sup>) in the 3rd cent. BCE had important *inter vivos* effects. Thus he notes instances in III cent BCE Egyptian law of 'wills' executed by parents during their life-time. These were of immediate effect, transferring unrestricted ownership during the life-time of the parents.<sup>152</sup> Moreover the *diatheke* of the papyri frequently contained clauses "expressing the testator's wish for keeping in good health, to enjoy his property, and to dispose of it also in the future by acts *inter vivos* and *mortis causa*".<sup>153</sup>

There is also earlier evidence. Yaron has identified one example of a "gift with effect deferred till the donor's death" in the 5th cent BCE Aramaic Papyri.<sup>154</sup> He observes, moreover: "It is not nowadays disputed that that type of Greek will which involved no adoption (*Legatentestament*<sup>155</sup>) grew out of the gift in contemplation of death. The same terms and stock phrases are used in both types of disposition, so much so that it is often difficult to

<sup>150</sup> Schenker 2000:182f. on P. El. 2, citing it from Mitteis and Wilcken 1912:II.354–56. See more recently the edition in Hunt and Edgar 1932:I.236–38 (no.82).

<sup>151</sup> Taubenschlag 1955:190 indicates that the *diatheke* adopted from ancient Greek law had to be drawn up before, or handed to, a notary, in the presence of witnesses.

<sup>152</sup> Taubenschlag 1955:207f.

<sup>153</sup> Taubenschlag 1955:191. Cf. Yaron's examples, e.g. P. Petrie i.19 of 225 BCE, and his comparison of terminology of the *deyathiqi* at 23f., but noting at 1960:25 that in the Jewish sources this is in the context of a sick man hoping for a change for the better.

<sup>154</sup> Yaron 1960:11–17 on P. Brooklyn 9, where a half house is gifted to Yehoyishma (the daughter of the donor), "at my death" and with an irrevocability clause.

<sup>155</sup> In classical Greece this was often in the form of adoption by the "testator" of his intended heirs: see Norton 1908:48f., 51 (noting that it required the consent of the adoptee and was regarded as "a solemn covenant"), 52, 53f., 58f., and 69–71 on its eventual supersession.

decide to which of the two a particular disposition belongs.”<sup>156</sup> Moreover, this is supported by evidence from classical Athens, where, A.R. Harrison indicates,<sup>157</sup> the normal words for a will and the making of a will were διαθήκη and διατίθεσθαι,<sup>158</sup> but the words δόσις and δίδοναι (indicating the inter vivos “gift” basis of the original testament in Greek law) were also used. The verbal form διαθέσθαι was also used and Harrison observes that “by the fourth century the words διαθέσθαι and δοῦναι were in this context synonymous,”<sup>159</sup> arguing that “the word is quite appropriate to describe a transaction between two parties<sup>160</sup> . . . as against [the view that] that the word necessarily implied disposal of one’s property after death.”<sup>161</sup> This supports the earlier observations of Norton that the technical use of διαθήκη in Greek law did not correspond with accuracy to our terms “will” and “testament”: “In fact, we have no one word that exactly expresses the idea conveyed by διαθήκη to the Greeks.”<sup>162</sup>

We may note that these terminological issues reflect the weak institutionalisation of the substantive law itself. Norton finds evidence that it was customary on making a will to consult the prospective heir and obtain his consent (1908:57); this is not inconsistent with the fact that though the will was sometimes read to the witnesses, “on account of the usual desire for secrecy, this was seldom done” (1908:61). Harrison observes: “In consonance with the general looseness of Athenian legal institutions, there seem to have been no strict rules as to the form a will must take. Normally no doubt it was in writing, though there is one passage in Demosthenes which strongly suggest an oral will.”<sup>163</sup> While it was normal practice to have witnesses, Harrison finds “no conclusive evidence that they were legally needed”.<sup>164</sup> Practice regarding the deposit of copies<sup>165</sup> also appears to have varied.<sup>166</sup> Though codicils, modification, and revocation of wills was entirely possible,<sup>167</sup> it appears doubtful that a will could be revoked merely by making a subsequent will<sup>168</sup> – as also in Greco-Egyptian wills.<sup>169</sup>

Further evidence of the character of testaments in the Hellenistic world as including bilateral arrangements taking effect in part before the death of the testator may be found in a remarkable 2nd cent. BCE inscription from Cyrene:<sup>170</sup> the ‘will’ of Ptolemy Neoterus of Cyrene (155 BCE). In the 2nd cent BCE Cyrene was ruled by a Ptolemaic dynasty as client kings of Rome. There was a major dynastic dispute between Ptolemy VIII Physcon (otherwise Neoterus, the younger) and his brother. Neoterus claimed that his brother

<sup>156</sup> Yaron 1960:32.

<sup>157</sup> Harrison 1968:150.

<sup>158</sup> *Ibid.*, the noun owing its origin to the use of διατίθεσθαι in a formula that goes back to Solon: see Demosthenes, c. *Stephanus* ii.14 quoted by Harrison 1968:84f. n.6.

<sup>159</sup> Harrison 1968:150 n.3.

<sup>160</sup> We may compare Jacob’s adoption of Ephraim and Menasch: *Gen.* 48:5.

<sup>161</sup> Harrison 1968:150 n.4.

<sup>162</sup> Norton 1908:5, 31, quotation from 1908:34 n.1.

<sup>163</sup> Harrison 1968:153, citing at n.3 Demosthenes (41) *Spoudias* 16.

<sup>164</sup> Harrison 1968:153.

<sup>165</sup> ἀντίγραφα, the same term used in the Testaments of the Twelve Patriarchs: see s.5, *infra*.

<sup>166</sup> Norton 1908:61f.: normally with friends (sometimes, more than one), occasionally with officials, but no evidence of registration.

<sup>167</sup> Norton 1908:63–65.

<sup>168</sup> Norton 1908:65; Harrison 1968:154.

<sup>169</sup> Taubenschlag 1955:204.

<sup>170</sup> A photograph of the top of the stele may be seen at <http://www.livius.org/ct-cz/cyrene/cyrene.html>.

had tried to assassinate him,<sup>171</sup> and sought the support of Rome, through the following will:<sup>172</sup>

In the fifteenth year, in the month of Loios. With good fortune. This is the will (τάδε διέθετο) of king Ptolemy the younger, son of king Ptolemy and queen Cleopatra... a copy of which has been sent to Rome. . . Should any mortal fate befall me before I can leave behind heirs to the throne, I bequeathe my kingdom that belongs to me to the Romans, for whom I have from the beginning preserved friendship and alliance with sincerity. To them also I entrust the task of protecting my interests, praying to them in the name of all the gods and with their own consent, that if any enemies attack either the cities or the country, they should give help with all their power in accordance with the friendship and alliance we concluded with each other and in accordance with justice.<sup>173</sup>

From the fact that the king had already sent a copy of the will to Rome, it is obvious that the assistance he is seeking is during his lifetime (as indeed is confirmed by Polybius<sup>174</sup>), not after his death. Volterra argues, in fact, that the “will” must have been preceded by intensive diplomatic negotiations.<sup>175</sup> In short, we have here a “will”, using the terminology of the verb which generated the noun διαθήκη, which reflects a bilateral treaty between the king and the Romans, in effect, a ‘testamentary pact’ (the *Erbvertrag*, apparently still recognised in Swiss law). We may note that this evokes the scholarly analysis of the origins of the biblical *berit* in ancient near eastern treaties. There is an alliance in which one side offers protection, the other loyalty to the protecting ruler.<sup>176</sup> Nor does this text from Cyrene stand alone.<sup>177</sup>

Thus we have in the Greek and Hellenistic worlds (in addition to outright gifts, immediately effective although intended to function as an inheritance, found also in the Hebrew Bible<sup>178</sup>

<sup>171</sup> Polybius 33:11: “At the time when the senate dispatched Opimius to make war on the Oxybii the younger Ptolemy came to Rome and appearing before the senate accused his brother, asserting that he was responsible for the plot against himself. Exhibiting the scars left by his wounds, and laying full stress besides in his speech on the atrocity of the deed, he pleaded for pity. Neolaïdes and Andromachus also came as envoys from the elder king to defend him against these accusations, but the senate would not even listen to their defence, so much were they prepossessed by the younger brother’s charges. Ordering these envoys to leave Rome at once, they appointed five legates, headed by Gnaeus Merula and Lucius Thermus, to support the younger brother, and furnishing each of them with a quinquereme ordered them to re-establish Ptolemy in Cyprus, writing to their allies in Greece and Asia to the effect that they had their permission to assist his return” (Loeb translation, at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Polybius/33\\*.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Polybius/33*.html)).

<sup>172</sup> Oliverio, *La stele di Tolemeo Neòteros* (1932), kindly drawn to my attention by Daniela Piattelli.

<sup>173</sup> Translation of M.M. Austin at [http://www.livius.org/ct-cz/cyrene/cyrene\\_t\\_01.html](http://www.livius.org/ct-cz/cyrene/cyrene_t_01.html).

<sup>174</sup> *Supra* n.171.

<sup>175</sup> Volterra 1991:554f.

<sup>176</sup> See literature cited at n.52, *supra*.

<sup>177</sup> Volterra, 1991:561–74, discusses other wills bequeathing kingdoms to the Roman people: those of Attalus, king of Pergamum (138–33 BCE), also found in an inscription (OGI no.338) as well as in literary sources, which also here use the noun διαθήκη (which, Volterra notes, the Romans called *testamentum*); Cicero on the will of Nicomedes, king of Bithynia; and the will of Alexander (II?), king of Egypt. He suggests that all of them, if not apocryphal, will have resulted from suggestions made by the Romans or from bilateral agreements with them. As to why this form, rather than that of a *foedus*, was used, he concludes (573f.), following Bonfante and Sciajola, that the Romans conceived of the acquisition of a kingdom in terms of inheritance because the original Roman significance of the *testamentum* was the designation by the *paterfamilias* of who would succeed him as sovereign of the family group: this was now applied to the transfer of sovereignty over a political group. For Attalus, see also Moulton and Milligan 1908:563f.

<sup>178</sup> *Gen.* 25:5–6, Abraham’s gift to the sons of Keturah, before he “sent them away”. Rabbinic interpretation includes Ishmael here, since v.6 refers to “the sons of the concubines” (plural, taken to include Hagar). See Jackson, “Prodigal”, 123–26.



and the New Testament<sup>179</sup>) both bilateral dispositions taking effect partially immediately and partially on death (μετὰ τὴν τελευτήν) and unilateral dispositions, themselves sometimes taking effect partially during the testator's lifetime.<sup>180</sup> The term διαθήκη is typically used of the latter, but may also, especially in its verbal forms (τάδε διέθετο), be used of the former.

We find no evidence of these forms in the Hebrew Bible, which gave preference to what today we would call intestate succession, although there is abundant evidence from the narratives that the will (in the non-legal sense) of the head of the family could, in various ways, achieve much the same thing. Thus we hear that Job (42:14) “gave” (*vayiten*) his daughters an “inheritance” (*nahalah*) alongside<sup>181</sup> their brothers; Ishmael (*Gen.* 21:8–21) and Esau (*Gen.* 25, 27) are both excluded, and Joseph (via Ephraim and Menasseh) supplants Reuven in respect of the double portion (*Gen.* 48:5). Moreover, the story of the “sale” of the birthright in *Gen.* 25 appears to presuppose that the expectancy is transferable before the death of the father.<sup>182</sup> However, the texts provide no information in any of these cases as to the point of time at which these various arrangements were intended to take effect.

By the time of the Mishnah, two forms of testamentary disposition<sup>183</sup> had developed:

- (a) the *matenat bari*,<sup>184</sup> the (inter vivos) “gift of a healthy man”, a form of gift – requiring a normal form of property transfer (*qinyan*),<sup>185</sup> which could take the form of a written deed<sup>186</sup> – some aspects of which took effect immediately while others were delayed until after death<sup>187</sup>, and

<sup>179</sup> The issue in the parable of the prodigal son (Luke 15:11–32): did the advance to the younger son effectively disinherit him from any later entitlement?; see Jackson, “Prodigal”, 119–34.

<sup>180</sup> *Pace* the view of E. Bammel, “Gottes ΔΙΑΘΗΚΗ (Gal. 3.15–17) und das jüdische Rechtsdenken”, *NTS* 6 (1960), 313–19, reported by Llewellyn, “Revocation”, 44, that both Greek and Roman wills took effect (entirely) on the death of the testator.

<sup>181</sup> Heb: *betokh*, the same term as is used of the plea of the daughters of Zelophehad and the decision in their favour (*Num.* 27:4, 7), but not in the rules laid down for the future. It is thus possible to argue that the decision in the case was a compromise: the daughters shared the estate with their uncles, while for the future daughters would inherit the full estate.

<sup>182</sup> See further, *infra*, text at n.224.

<sup>183</sup> In addition to outright *inter vivos* gifts, such as that given to the “prodigal son” in Luke 15. Kloppenborg 2008:177 notes the distinction in Tosefta *Baba Batra* 8:10 between the דייתיקי (“will”) and the מתנה (gift) expressed (only) as “from today” (מהיום, cf. ἄπὸ τὸς ὑῦς in P. Mich. V 322 of 46 CE), rather than “from today and after my death” (מהיום ולאחר מיתה). It is the outright gift that is the subject of rabbinic (and see earlier, *supra* at n.124, on *Siv.* 33:24(32)) criticism in *Baba Metsia* 75b (following Yaron 1960:27). Most of the papyri discussed by Kloppenborg (BGU III 993, P. Mich. V 322, P. Petr III 2, P. Cair. Goodsp. 6, P. Lond. III 880, BGU IV 1013, P. Oxy. II 273) are viewed as parallels to such outright gifts, as background to the division of the estate in Luke 15, and the position of the prodigal son in particular. But the terminology is not always consistent: Kloppenborg 2008:181 notes that P. Mich. V 321 (of 42 CE) includes the *meta ten teleuten* formula, but its terms indicate that the land had in fact become the property of the donees immediately. He also comments (at 182) that the frequent use in Greco-Roman deeds of the title *homologia* “is strictly formulaic”.

<sup>184</sup> The terminology *bari* occurs in Mishnah *Baba Batra* 9:7.

<sup>185</sup> See Mishnah *Baba Batra* 9:7.

<sup>186</sup> Mishnah *Baba Batra* 8:5, 7.

<sup>187</sup> Mishnah *Baba Batra* 8:7(b): “If a man assigned his goods to his son to be his after his death, the father cannot sell them since they are assigned to his son, and the son cannot sell them since they are in the father's possession. If his father sold them, they are sold [only] until he dies; if the son sold them, the buyer has no claim on them until the father dies. The father may pluck up [the crop of a field which he has assigned] and give to eat to whom he will, and if he left anything already plucked up, it belongs to [all] his heirs.” Thus, the donor retained a usufruct and the donee a future interest, which could be alienated (with the consent of the donor, during his lifetime): see Jackson, “The Jewish Background . . .”, 117f. It is thus misleading to speak, as does Llewellyn, “Revocation”, 44, in terms of a division between ownership and possession. On the exclusion of after-acquired property, see n.140, *supra*.

- (b) the *matenat shekhiv mera*,<sup>188</sup> the revocable<sup>189</sup> disposition of an estate by one “lying sick”, which some argued should be subject to fewer formalities<sup>190</sup> and which took effect on death.<sup>191</sup>

It has, however, been persuasively argued that these two forms – and particularly the distinction between a healthy and a sick (in fact, terminally ill) “testator”<sup>192</sup> – represent a Jewish adaptation of the earlier Hellenistic forms<sup>193</sup> – designed in part to restrict freedom of testation, seen as an encroachment on the biblical rules of (“intestate”) succession,<sup>194</sup> with their superior status as part of the written Torah. Thus, it is thought that there was a stage when Jews adopted the Hellenistic forms: the *meta ten teleuten* (some examples of which have survived in 2nd cent CE papyri<sup>195</sup>) but without its restriction to a “healthy” man, and the *διαθήκη*, the principal difference between them being that the former, taking effect in part immediately, was irrevocable, while the latter was revocable (until death).<sup>196</sup>

However, the expansive range of the Greek *διαθήκη* was received also in the rabbinic Hebrew loan-word *דייתיקי* (*diatiki*), clearly referring to a written document,<sup>197</sup> though it remains debatable whether the word is being used simply as a name for the rabbinic *shekhiv mera*<sup>198</sup> (though it could also be used of a *bari*<sup>199</sup>) or whether it reflects the genuine adoption of

<sup>188</sup> The terminology occurs in Mishnah *Baba Batra* 9:6. Often conventionally referred to (as here) simply as the *shekhiv mera*.

<sup>189</sup> Yaron 1960:77, 81–84, noting that Tosefta *Baba Batra* 8:10 (which speaks of a *diatiki*, though Yaron takes it to be referring to a *shekhiv mera*; *aliter* Rivlin, n.200, *infra*) allows revocation after recovery, thus implying that the *shekhiv mera* is then revocable rather than automatically void, whereas the preferred solution was that of Mishnah *Peah* 3:7 as interpreted by Jerusalem Talmud *Peah* 3:9, restricting such revocation to the period of illness, and making the *shekhiv mera* automatically void on recovery. He goes on to discuss Amoraic sources which support the latter conclusion. By Amoraic times it was clearly revocable by a later such declaration: see Yaron 1960:72f., on Jerusalem Talmud *Baba Batra* 8:8; Babylonian Talmud *Baba Batra* 151a.

<sup>190</sup> Yaron 1960, esp. at 61f., on Mishnah *Baba Batra* 9:7, and B.B. 175a (etc.): “The words of a *shekhiv mera* are as if written and delivered.”

<sup>191</sup> For Amoraic texts requiring that the death must result from the sickness during which the “will” was made, see Yaron 1960:83f.

<sup>192</sup> Yaron 1960:47–49.

<sup>193</sup> Katzoff 1989:204 argues that the Jewish *diatiki* and *matenat bari* can have been modelled on analogous Greek institutions only before the middle of the first century CE, since from that time until the Byzantine period the Greek *meta ten teleuten* was assimilated to the *diatheke* and “usually made revocable” (*scil.* by an explicit clause). In the middle ages, the Jewish *matenat bari* also came to be revocable, by the insertion of an appropriate clause.

<sup>194</sup> Yaron 1960:48f.

<sup>195</sup> On P. Yadin 7 and 19, see Rivlin 2005:165–67, 180–82. *Aliter*, on P. Yad. 19, Katzoff 1994.

<sup>196</sup> Yaron 1960:47f.

<sup>197</sup> See the quotations in Sperber 1984:84–86, e.g.: Mishnah *Moed Katan* 3:3, “And these may be written out during mid-festivals . . . testaments (*diatiki*); Mishnah *Baba Metsia* 1:7, “If [a man] found . . . a will . . .”. The citations of Behm 1965:125, from Strack-Billerbeck III, 545, for the loan word’s meaning in Hebrew and Aramaic as “order” or “disposition”, are all several centuries later.

<sup>198</sup> Llewellyn, “Revocation”, 45, claims that in the amoraic period the *diatiki* was called *matenat shekhiv mera*. Some sources require a form of *qinyan*. Yaron 1960:32 insists: “Jewish law does not know any unilateral disposition in contemplation of death . . . (rather, it involves) the co-operation of two parties, donor and donee . . . a formal ‘act of acquisition’ is indispensable . . .”. See esp. Mishnah *Baba Batra* 8:6, discussed in n.203, *infra*. For earlier literature which takes a different view, see Rivlin 2005:172 nn.25–26.

<sup>199</sup> Tosefta *Baba Batra* 8:9: “a *bari*” who wrote a *deyathiqi* . . .”, discussed by Yaron 1960:64f. See also Yaron 1960:26–28, on the *matanah* as following the terminology of the Egyptian μετά τήν τελευτήν, translated as *le’ahar mitah* (preceded by *mehayyom*, “from today”), citing as the earliest example of the latter BGU 993 of 127 BCE.

a foreign institution (the Greek form of will<sup>200</sup>),<sup>201</sup> perhaps by adaptation of a rabbinic form.<sup>202</sup> No actual example of such a *diatiki* has survived. There is, however, a tannaitic source which is taken to rule that the written document, unlike the Hellenistic διαθήκη, had to be delivered to the heir or other recipient,<sup>203</sup> and once delivered could not be revoked until after recovery<sup>204</sup> (thus, in effect, a conditional *matenat bari*). There is an amoraic dictum that a later *diatiki* (automatically) revokes an earlier one: *diatiki mevattelet diatiki*, but its status has been disputed.<sup>205</sup> Yaron is clearly of the view that it never generated a “will” in the sense of the Roman *testamentum*.<sup>206</sup>

The methodological difficulties involved in ascertaining the inter-relationships between some of these different forms include: (1) the lack of terminological precision and consistency, particularly as regards the term διαθήκη and its associated verbal forms, which could refer to both gifts in contemplation of death or wills, even though the latter appears to have been the more typical;<sup>207</sup> (2) the fact that the Greek *meta ten teleuten* is found in papyrological practice documents<sup>208</sup> rather than formal statements of law, while the converse largely applies to the Rabbinic *matenat bari*; (3) while the Rabbinic *diatiki* is mentioned in the Mishnah

<sup>200</sup> On which see *supra*, text at n.156–168. Most significant is Tosefta *Baba Batra* 8:10, cited by Rivlin 2005:172f., which gives the formula to be used by one who “writes a *diyatiqi*” (הכותב דייתיקי) and distinguishes it from that for a מתנה.

<sup>201</sup> Llewellyn, “Revocation”, 47, cites Tosefta *Baba Batra* 9:14: “He who writes διαθέμεν in Greek, behold this is a gift (*matanah*)”. But even this is not conclusive. It could mean either that the rules of *matenat bari* apply to it, or that it is classified in Jewish law as a gift (thus harmonising it with Jewish rules), even though it operates according to hellenistic practice. See also Katzoff 1989:203, citing διαθέμεν as an example of “quotations from language which might have been used by laymen in transactions concerning whose legal significance the rabbis had to decide . . . Many words appear as terms for foreign institutions whose legal effect in Jewish law had to be determined specifically because they were foreign.”

<sup>202</sup> The rule that it required the agreement of the recipient (Tosefta *Baba Batra* 11:6) suggests that it may have been conceived as an adaptation of *qinyan shtar*.

<sup>203</sup> Mishnah *Baba Batra* 8:6 rules: “One who died and a *deyathiqi* was found bound to his thigh, – this is nothing. But if (he had delivered it and) through it had caused another – whether of his heirs or not of his heirs – to acquire (יכיה בה לאחר), his words stand” (translation of Yaron 1960:65). The Hebrew does not mention delivery, but this is (rightly) supplied by Yaron as the appropriate form of acquisition (*qinyan*) for a *shtar*. See also Kloppenborg 2008:176.

<sup>204</sup> Yaron 1960:66 interprets the second clause of Mishnah *Baba Batra* 8:6 in the context of the first, as presupposing death, so that the *deyathiqi*, once delivered, was *not* revocable prior to recovery (such revocability being a creation of the Amoraim: Yaron 1960:64). He sees Tosefta *Baba Batra* 8:10–11, discussed at 1960:65f., as representing a later stage, but one which allows revocability only before delivery. On the other hand, Rivlin 2005:173f. takes Tosefta *Baba Batra* 8:9 to mean that “delivery of the deed itself did not constitute cession of the possession, but rather final intent to bequeath the possession. Since the bequest would only take effect after death, the donor could retract it at any time”; he does not here address the contrary arguments of Yaron on Tosefta *Baba Batra* 8:9–11.

<sup>205</sup> Yaron 1960:71f. regards Jerusalem Talmud *Baba Batra* 8:8 as spurious. But see also Cohen 1966:I.33–35, citing (at 34 n.26) Jerusalem Talmud *Sanhedrin* II:6 (20c), “any *diatiki* which is partly annulled is entirely void”, in the context of a discussion of 2 *Cor.* 3:6. On this text, see also Llewellyn, “Revocation”, 45–46. See also Babylonian Talmud *Baba Batra* 135b, 152b; Jerusalem Talmud *Baba Batra* 8.16 (16b 59).

<sup>206</sup> Yaron, quoted *supra* n.198. Of course, this does not mean that the latter institution, and its Hellenistic partial forerunner, were unknown to and never used by Jews. See Katzoff, quoted n.201, *supra*. Rivlin 2005:172–79 (and see further Rivlin 1999:chs.7–8, esp. at 138–42, 161–70) finds evidence of an early but limited use of the *diatiki* in Jewish sources which did take effect only on death: see n.200, *supra*. Milgram 2012 (who does not here address the issue of the *diyatiqi*) sees a reflection of this issue in the view of Rabbi Yoḥanan ben Berokah in Mishnah *Baba Batra* 8:5 (despite the fact that he appears to be referring to an oral declaration, the context there being the *matenat bari*): “If he said [*amar*] this of one that was qualified to inherit from him, his words remain valid, but if of one that was not qualified to inherit from him, his words do not remain valid.”

<sup>207</sup> See text at nn.156–161, *supra*.

<sup>208</sup> See n.195, *supra*.

and related documents, its legal characteristics are not systematically set out, so that it remains debatable whether the loan word is simply an earlier name for the rabbinic *shekhiv mera*, or the genuine adoption of a foreign institution, perhaps by adaptation of a rabbinic form.<sup>209</sup>

#### 4. THE RELATIONSHIP BETWEEN COVENANT AND INHERITANCE IN THE HEBREW BIBLE

Before proceeding further in our quest, it will be useful to review some aspects of the relationship between covenant and inheritance in the Hebrew Bible itself. For the relationship between covenant and inheritance involves issues with close parallels in theology and law, including the nature of that which is inherited (material and/or spiritual); inclusion in and exclusion from the inheritance; the nature of the testamentary “act” and the time of its coming into effect; its revocability and the relationship between successive testamentary acts.

The close relationship between the concepts of covenant and inheritance is apparent already in the covenant with Abraham (to which particular significance is attached in the New Testament<sup>210</sup>). In *Gen.* 17 we read:

(1) When Abram was ninety-nine years old the LORD appeared to Abram, and said to him, “I am God Almighty; walk before me, and be blameless. (2) And I will make my covenant (ברית)<sup>211</sup> between me and you, and will multiply you exceedingly.” (3) Then Abram fell on his face; and God said to him, (4) “Behold, my covenant is with you, and you shall be the father of a multitude of nations. (5) No longer shall your name be Abram, but your name shall be Abraham; for I have made you the father of a multitude of nations. (6) I will make you exceedingly fruitful; and I will make nations of you, and kings shall come forth from you. (7) And I will establish my covenant between me and you and your descendants after you throughout their generations for an everlasting covenant (לברית עולם), to be God to you and to your descendants after you. (8) And I will give (ונתתי)<sup>212</sup> to you, and to your descendants after you, the land of your sojournings, all the land of Canaan,<sup>213</sup> for an everlasting possession (לאחזת עולם<sup>214</sup>); and I will be their God.”

<sup>209</sup> See the previous paragraph, *supra*.

<sup>210</sup> Both in its own right, and by contrast with the Sinaitic covenant (on which, see the discussion of *Gal.* 3 and 4 in section 6, below). See further Forman 2011. For a discussion of the Abrahamic passages in the New Testament in the context of a theology of justification by faith, see Alexander 1994.

<sup>211</sup> Even here, Behm 1965:132f. tries to avoid “covenant” in his account of Luke’s reference to the Abrahamic narrative: in 1:72 “. . . διαθήκη is used of the promise to Abraham. . . . the context here is so fully in line with the OT and Judaism that there can be no doubt that the word is used in the traditional sense of the declaration of the will of God concerning future salvation, promise and self-commitment”, though covenant is clearly in the text: “to perform the mercy (ἔλεος) [promised to] our fathers, and to remember his holy covenant (διαθήκης), the oath which he swore to our father Abraham” (RSV 1:72–73).

<sup>212</sup> Note the future verb; not apparently a speech act (such as *hinei ani noten lekham*), even though the making of the covenantal promise itself does appear as a speech act, with *hinei*: הנה בריתי אתך (v.4). So this appears to be a promise rather than an immediate gift to Abraham (perhaps reflecting the same juridical notion, that the recipient must “take possession”: see, however, Daube’s interpretation of the acts of viewing the land by Abraham (*Gen.* 13:14–15) and Moses (*Deut.* 34:1) and the temptation of Jesus (*Matt.* 4:8–9, cf. *Luke* 4:5ff.) as symbolic takings of possession, comparable to the Roman *finium demonstratio*: Daube 1947:24–39 and Daube 1957. On the absence of covenant terminology in the promise of the land in Deuteronomy, see Jackson 2000:257f.

<sup>213</sup> The promise of the land occurs several times in the Abrahamic narrative: *Gen.* 13:15 and 15:18, as well as here. The promise is presented as part of a covenant in chs.15 and 17, but not ch.13. On the Pauline interpretation of the Abrahamic covenant tradition, see *infra*, s.6.

<sup>214</sup> The terminology of inheritance, in relation to the land, is even clearer in Solomon’s prayer (*1 Kings* 8:36):

(9) And God said to Abraham, “As for you, you shall keep my covenant (את בריתי תשמור), you and your descendants after you throughout their generations. (10) This is my covenant, which you shall keep (זאת בריתי אשר תשמור), between me and you and your descendants after you: Every male among you shall be circumcised (המול לכם כל זכר<sup>215</sup>). (11) You shall be circumcised in the flesh of your foreskins, and it shall be a sign of the covenant (וזהיה לאות ברית) between me and you. (12) He that is eight days old among you shall be circumcised; every male throughout your generations, whether born in your house, or bought with your money from any foreigner who is not of your offspring, (13) both he that is born in your house and he that is bought with your money, shall be circumcised. So shall my covenant be in your flesh an everlasting covenant. (14) Any uncircumcised male who is not circumcised in the flesh of his foreskin shall be cut off from his people; he has broken my covenant.”

Even without the element of circumcision (whether regarded as a condition or a sign of the covenant – or, indeed, both<sup>216</sup>), this is more than either unilateral grace or justification by faith: the basic covenantal model, of an exchange of loyalty for protection, is here instantiated by the imperative “walk before me, and be blameless” on the one side, the promise of posterity and the land on the other. This covenant is, in principle, permanent, as is the promise of the land.<sup>217</sup> But this clearly does not make it either unconditional,<sup>218</sup> or guaranteed to all of Abraham’s progeny, as the later narrative clearly demonstrates. Rather, it reflects a particular position on an issue on which the biblical narratives reflect different views: can a covenant “descend” automatically to subsequent generations, or must it be reaffirmed by successive generations? Despite the language of *Gen.* 17, there are indications that the latter view may originally have prevailed.<sup>219</sup> Indeed, this very passage continues with Abraham raising with God the status of Ishmael,<sup>220</sup> to which God replies (v.19): “Sarah your wife shall

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“give rain upon *your* land, which you have given to *your people* for an inheritance (לנחלה).” Does that mean an inheritance from the original donees or an inheritance from God, or both? The latter possibilities are not theologically excluded, since inheritance of property is typically effected during the lifetime of the owner in the Bible. See, e.g., the succession to Isaac (below), and the (happy) conclusion to the book of Job: *Job* 42:15: “And in all the land there were no women so fair as Job’s daughters; and their father gave them inheritance among their brothers.”

<sup>215</sup> Despite the RSV, here quoted, the verb is active.

<sup>216</sup> See further Bernat 2009:36-40.

<sup>217</sup> Note the parallel expressions לברית עולם and לאחוזת עולם in vv.7 and 8.

<sup>218</sup> Pace Weinfeld *TDOT* II.270–71, who argues (based on ANE, esp. Hittite, grants), that “loyalty to God is presupposed, [but] it does not occur as a condition for keeping the promise.” He suggests that for Abraham (here citing *Gen.* 15 and 17 together, *aliter* in Weinfeld 1970) that it is a reward for past loyalty (*Gen.* 26:5, cf. 22:16–18). But these are (in terms of the narrative) later than *Gen.* 17). At II.278 he comments on the idea of exclusive loyalty as stressed by Hosea, Jeremiah and Ezekiel in the form of the marriage metaphor. But idolatry is the prime cardinal sin in the Bible, and the reason for God’s withdrawal of protection (and exile). See further n.111, *supra*.

<sup>219</sup> I have argued at some length, in 2000:ch.9, that the covenantal relationship was originally conceived to be personal (like a contract) to the parties, and hence needed to be renewed in each generation. In *Deut.* 5:2–5 this problem is addressed through the fiction of presence: “The LORD our God made a covenant with us in Horeb. Not with our fathers did the LORD make this covenant, but with us, who are all of us here alive this day.” Cf. *Deut.* 29:14–15: “Nor is it with you only that I make this sworn covenant, but with him who is not here with us this day as well as with him who stands here with us this day before the LORD our God.”

<sup>220</sup> *Gen.* 17:18: “And Abraham said to God, ‘O that Ishmael might live in your presence!’ (19) And God said, ‘Sarah your wife shall bear you a son indeed; and you shall call his name Isaac; and I will establish my covenant with him for an everlasting covenant (לברית עולם), and with his seed after him. (20) And as for Ishmael, I have heard you; Behold, I have blessed him, and will make him fruitful, and will multiply him exceedingly; twelve princes shall he father, and I will make him a great nation. (21) But my covenant will I establish with Isaac, whom Sarah shall bear to you at this set time in the next year.’” Blessing and promise (Ishmael) are clearly distinct from a covenant relationship (Isaac). See, however, Paul’s interpretation of the relationship in *Gal.* 4, discussed in s.6, *infra*.

bear you a son indeed; and you shall call his name Isaac; and I *will establish* my covenant with him for an everlasting covenant (והקמתי את בריתי אתו לברית עולם), and with his [Isaac's] seed (לזרעו) after him." Within one and the same verse, there is no perceived contradiction between the principle of an everlasting covenant and the promise to renew an (already everlasting) covenant with the next generation.<sup>221</sup>

When we reach the narratives of the succession to Isaac, the pattern of disinheriting of the non-favoured elder son (Esau) is repeated, but this time with an interesting additional dimension. We have two narratives (which source critics might assume are alternative accounts of the same outcome),<sup>222</sup> that of the sale of the mess of pottage (*Gen.* 25:27–34), and that of Jacob's impersonation of Esau, prompted by Rebekkah (*Gen.* 27). But the two use different terminology:<sup>223</sup> the object of Jacob's acquisition in *Gen.* 25 is the "birthright" (*bekhorah*, v.32), impliedly of property, resulting in a sale: "So he (Esau) . . . sold his birthright to Jacob" (וימכר את בכורתו ליעקב). We may note that Isaac is still alive. If he had already conveyed the birthright to Esau, this was an *inter vivos* gift (and, by implication, one taking immediate effect, insofar as Esau was able, without further reference to Isaac, to sell it on).<sup>224</sup> However, the terminology of the narrative of *Gen.* 27 is different: it concerns not Jacob's acquisition of the *bekhorah* but rather of the *berakhah*, the blessing. This is not to be explained away as a scribal error:<sup>225</sup> what is at stake in *Gen.* 27 is most definitely a blessing, and one which is directed to the future leadership of the household: "Be lord over your brothers, and may your mother's sons bow down to you" (*Gen.* 27:29). True, property is also mentioned, but that too is a promise of future divine benevolence, not of present property: "May God give you of the dew of heaven, and of the fatness of the earth, and plenty of grain and wine" (*Gen.* 27:28, cf. Esau's complaint in v.37). Again, we may note that this is *not* a deathbed scene. Though blind, Isaac was to survive at least another 20 years, since he was still alive when Jacob returned from the household of Laban (*Gen.* 35:27–29),<sup>226</sup> and finally settled scores with Esau.<sup>227</sup> Nevertheless, we do have to ask whether Isaac's blessing was really

<sup>221</sup> Though the Genesis narrations in respect of both Isaac and Jacob speak in terms of renewals of the blessings (*Gen.* 26:3–5, *Gen.* 28:3–4, 13–14; see Jackson 2000:241–43) rather than the covenants.

<sup>222</sup> Daube 1947:199 is attracted to this view.

<sup>223</sup> Recognised explicitly in the text, when Esau complains to Isaac in *Gen.* 27:36: ". . . he has supplanted me these two times. He took away my birthright; and behold, now he has taken away my blessing." For comparison of the two narratives, indicating the presence of fraud also in *Gen.* 25, see Daube 1947:191–200.

<sup>224</sup> If, on the other hand, Isaac had not already conveyed the birthright to Esau, perhaps Esau was not so stupid or cavalier as is normally thought: he is selling only an expectancy, and may already have seen the straws in the wind. Taubenschlag 1959:I.618 notes that in Gortynian and Attic law children "have already in the time of their parents the right of expectancy, of agreement and consent", citing earlier secondary literature; he also observes (at 620) that the satisfaction (of inheritance rights) during the life-time of the father is known in Attica, Gortyn and with the hypomnematic Locrians.

<sup>225</sup> We may note that the two terms have the same three letters in their root, though in a different order: בכרה and ברכה. Klitsner 2006:52f. n.7 suggests that "the switching of the order of letters subtly reflects and underscores the switching of the order of the sons", and proposes further instances later in the story. I am indebted to Peretz Rodman for the reference to Klitsner.

<sup>226</sup> Cf. Lincoln 1999:16 and 14f. in relation to Hebrews 12:17.

<sup>227</sup> I recently heard an interesting new interpretation of this, in a sermon by Rabbi Ariel Abel. *Gen.* 33:11 has Jacob say to Esau: "Accept, I pray you, ברכתי that is brought to you, because God has dealt graciously with me, and because I have enough." Though the RSV (along with, e.g., ASV, ERV, JPS, NASB), translates ברכתי as "my gift" (in line with Rashi) rather than "my blessing" (as in KJV and many others), Rabbi Abel suggested that it refers back to the blessing fraudulently obtained by Jacob in *Gen.* 27. But the context is against this. The text continues: "Thus he urged him, and he took it." Moreover, the text in vv.5–9 shows clearly that Esau understood that he was being offered gifts (including servants), and *Gen.* 33:10 uses the term מנחתי in relation to them.



irrevocable. Esau challenges it, on the grounds of fraud, but Isaac replies that there is nothing he can do: “Your brother came with guile, and he has taken away your blessing.”<sup>228</sup> Yet there is a special feature in both narratives which may explain the irrevocability. In *Gen.* 25, the fraudulent sale is fortified by an oath.<sup>229</sup> The blessing (and associated curse) has a similar status: it involves an invocation of the deity.<sup>230</sup>

When Jacob is himself on his deathbed, he blesses his sons in turn. The sequence commences with: “Gather yourselves together, that I may tell you what shall befall you in days to come”<sup>231</sup> (*Gen.* 49:1), but concludes with a colophon clearly identifying what has been said as a series of “blessings”: “All these are the twelve tribes of Israel; and this is what their father said to them as he blessed them, blessing each with the blessing suitable to him” (*Gen.* 49:28, using the terminology of ברכה). But these “blessings” are far from universally positive. On several occasions they are closer to curses, linked to moral rebuke of past behaviour: thus, Reuben,<sup>232</sup> Simeon and Levi,<sup>233</sup> Benjamin.<sup>234</sup> We are, indeed, already approaching the genre of “Testament” literature (s.5, below). Nowhere here is there any reference or allusion to property inheritance; the practical significance of this “testament”, like that of Isaac’s ברכה (*Gen.* 27), is in the realm of family (in future, national) leadership: Reuben, the natural firstborn, is deprived of leadership (*Gen.* 49:4), which is conferred on Judah (*Gen.* 49:8: “your father’s sons shall bow down before you”, echoing the language of Isaac to Jacob in *Gen.* 27:29).

Elsewhere in the Pentateuch, the issues of property and “spiritual inheritance” are linked. Of Levi, it is written (*Deut.* 10:9): “Therefore Levi has no part nor inheritance with his brothers; the Lord is his inheritance (נחלתו)”. And the *torah* itself is described in *Deut.* 33:4 as “the inheritance (מורשה) of the congregation of Jacob”.<sup>235</sup> Even more striking is the description of Israel as God’s נחלה,<sup>236</sup> as in *1 Kings* 8:53: “For you did set them apart from among all the people of the earth, to be your inheritance”. Lipiński comments: “The use of this figurative expression does not emphasize the transfer or inheritance of property, but rather the constant, enduring nature of its possession.”<sup>237</sup> But the spiritual aspect of this enduring relationship is surely not to be excluded.

<sup>228</sup> v.35. Cf. the conclusion of v.33.

<sup>229</sup> Daube 1947:196.

<sup>230</sup> As in *Gen.* 27:29 (part of Isaac’s blessing of Jacob): “Cursed be every one who curses you, and blessed be every one who blesses you.”

<sup>231</sup> Despite באחרית הימים, this is not an eschatological prophecy; rather, it refers to events within the knowledge of the biblical writers. On Simeon and Levi, see n.233, *infra*.

<sup>232</sup> *Gen.* 49:4: “Unstable as water, you shall not have pre-eminence because you went up to your father’s bed; then you defiled it – you went up to my couch!”, referring to Reuben’s attempt to “anticipate his inheritance” (cf. Absalom with David’s concubines: *2 Samuel* 16:21–25) by bedding Bilhah (*Gen.* 35:2).

<sup>233</sup> One might take *Gen.* 49:7 (“I will divide them in Jacob and scatter them in Israel”) as referring to the post-conquest tribal division of the land, with Levi not given a tribal allocation. But the verse refers jointly to both Simeon and Levi, alluding in vv.5–6 to their behaviour towards Shechem after the rape of Dinah (*Gen.* 34).

<sup>234</sup> *Gen.* 49:27: “Benjamin is a ravenous wolf, in the morning devouring the prey, and at even dividing the spoil” appears to refer to the behaviour of members of the tribe in *Judg.* 19 and its repercussions in chs.20–21.

<sup>235</sup> Perhaps more accurately “heritage”. The term ירושה, more commonly used for inheritance, is not used here (though the two terms come from the same root, ש-י-ר). Lohfink *TDOT* VI.376 rejects altogether this “metaphorical” interpretation (מורשה in apposition to *torah*), that the Torah is the “possession” or “heritage” of the sons of Jacob, and translates: “Moses gave us a law (thus translating *torah*), [and in addition he gave to us,] to the assembly of Jacob, a land for possession”, based on “the double duty of words in poetic parallelism”.

<sup>236</sup> Many sources cited by Lipiński, “נחל”, *TDOT* IX.331.

<sup>237</sup> Lipiński, *ibid*.

## 5. THE TESTAMENT GENRE

Against this background,<sup>238</sup> the development in intertestamental times of the Testament genre<sup>239</sup> appears to be a natural development. Indeed, the foremost<sup>240</sup> example follows directly on from *Gen.* 49, being the “Testaments of the Twelve Patriarchs”,<sup>241</sup> which, though it has survived in a Greek version (with Christian editing) from the 2nd century CE,<sup>242</sup> has antecedents at Qumran – in particular an Aramaic antecedent of the Testament of Levi<sup>243</sup> and a Hebrew text of the Testament of Naphtali.<sup>244</sup> Schiffman has argued that such testaments most likely go back to the Hasmonaean period, although some appear to be even earlier, perhaps emanating from circles that preceded the Qumran sect.<sup>245</sup>

Both the title of the “Testaments of the Twelve Patriarchs”, and that of each individual “Testament”<sup>246</sup> use the term διαθήκη<sup>247</sup> and Origen<sup>248</sup> refers to it as *testamentum*. No doubt

<sup>238</sup> Frey 2010:346 takes the Hebrew Bible antecedents to include also the farewells of Joshua (*Josh.* 23–24, on which see Jackson 2000:267–70), Samuel (*1 Sam.* 12), and David (*1 Kings* 2:1–10; *1 Chron.* 28–29).

<sup>239</sup> A distinction is sometimes made between testamentary literature and “literary testaments”, the latter being more narrowly defined in terms of genre. See, most recently, Frey 2010:349–51 and n.270 below; DeSilva 2012:175–76.

<sup>240</sup> On other examples of the testamentary genre in the Pseudepigrapha, including the Testaments of Abraham, Isaac and Jacob (sometimes combined as the Testaments of the Three Patriarchs), the Testaments of Job, Moses (*assumptio Moysis*) and Solomon, the Ascension of Isaiah and some other testamentary texts found within larger collections such as 1 Enoch, 2 Enoch and the *Liber Antiquitatum Biblicarum*, see Frey 2010:347.

<sup>241</sup> Again, the 12 sons of Jacob, not the Twelve Tribes. DeSilva 2012:175–236 (ch. 8) and notes at 294–303 is entirely devoted to the Testament of the Twelve Patriarchs.

<sup>242</sup> For the most recent discussion of Jewish or Christian origins of the Testaments of Twelve Patriarchs, see DeSilva 2012:194–222, arguing for a Jewish origin.

<sup>243</sup> 1Q21 and 4Q213–14: see Frey 2010:363–66, noting that it was originally thought to be the original of the Greek TLevi in the Testaments of Twelve Patriarchs, but it differs significantly from the literary testament genre in that Levi speaks as if he is already dead. See also DeSilva 2012:204, 297 n.71.

<sup>244</sup> 4Q215, first plate. DeSilva 2012:204 points out that the Testament of Naphtali’s genealogy of Bilhah and Zilpah is found elsewhere only in 4Q215 1:2–5.

<sup>245</sup> Schiffman 1994: “The Testaments of Levi and Naphtali are traditionally placed in the context of the Testaments of the Twelve Patriarchs, a collection of twelve such texts preserved in Greek. The Greek text is surely not the original version, for throughout there are Christian additions. That at least some of the twelve testaments were originally Jewish, not Christian, has been proven conclusively by the finding at Qumran of an Aramaic version of the Testament of Levi and a Hebrew text of the Testament of Naphtali. Some of the messianic material in these texts, previously believed to be Christian, is now understood to be Jewish, reflecting various messianic doctrines evident in the Qumran texts, sectarian and otherwise. Further, it seems that for the entire collection of testaments, the Christian interpolations are actually secondary additions to a Jewish core. The testaments are most likely dated to the Hasmonaean period, although some books are earlier, perhaps emanating from circles that preceded the Qumran sect. Noteworthy is the presence in the Greek Testaments of the Twelve Patriarchs of the idea of two messiahs—one descended from Aaron and one from Israel—a notion prominent among the Qumran sectarians.”

<sup>246</sup> On the MS evidence, see further Charles 1913:II.283. Specially, *Inventory* s.v. Testament of Reuben, 1.1.5: “Important text witnesses attest to a heading which is not integrated with the body of the text or the introductory frame, implying one or more of the kinds of information under 1.1.1–4, namely “The Testament of Reuben, the first-born son of Jacob and Leah”, or “The Testament of Reuben regarding thoughts” (*diathēkē Reubem peri ennoion*). This is a second heading, following an initial heading with the text “The Testaments of the Twelve Patriarchs” (so that the word “testament” occurs three times in as many small text units, each time in incomplete sentences).”

<sup>247</sup> See de Jonge 1978, e.g. at 1 (Reuben). Frey 2010:373 notes that the text “remarkably” uses *diathēkē* “according to the general, non-religious usage, not according to the LXX usage rendering the Hebrew *berit*”, and points out (at 347 n.8) that (only) in the Christian passage at tBenj 3:8 is διαθήκη used in the sense of covenant.

<sup>248</sup> Origen, *Hom. in Jesu Nave (Joshua)* 15.6: Sed et in aliquo quodam libello, qui appellatur *Testamentum duodecim patriarcharum*, quamvis non habeatur in canone, talem tamen quemdam sensum inveniimus . . . (Migne XXVI.904). Jerome, *Tractatus de Psalmo XV (Corpus Christianorum, Series Latina)* (CCSL) 78:376) also refers to it, but does not include

this may have been fortified by the use of διαθήκη in Hellenistic literature to refer to “a philosophical testament, i.e. the spiritual legacy of a sage”.<sup>249</sup> Particularly interesting in this respect is the Testament of Kahat,<sup>250</sup> son of Levi<sup>251</sup> and father of Amram,<sup>252</sup> found at Qumran.<sup>253</sup> In it, Kahat entrusts Amram, his son, with all the books he received from Levi, who in turn had received them from his forefathers.<sup>254</sup> We have here a concrete link between property and “spiritual” inheritance. One version of the Testament of Abraham also mentions property. Abraham is commanded by the archangel Michael: “Now, therefore, Abraham, make a will (governing) the things of your household and concerning your sons”,<sup>255</sup> though there is no record in the document of Abraham having actually done so.

It is not quite correct to describe the *Testaments of the Twelve Patriarchs* as a “pseudepigraphical work comprising the dying commands of the twelve sons of Jacob”.<sup>256</sup> Each Testament has a brief narrative framework,<sup>257</sup> enveloping the words ascribed to the patriarch (who speaks frequently in the first person<sup>258</sup>). That envelope consists in an opening formula recording the convening by the Patriarch of a deathbed assembly of his sons, to whom he spoke orally,<sup>259</sup> and a concluding statement recording his death and burial after he had finished his discourse.<sup>260</sup> Only five of the twelve Testaments use διαθήκη in the opening formulae<sup>261</sup>

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*Testamentum* in the title: “In libro quoque Patriarcharum, licet inter apocryphos computetur, ita inveni . . .” (the apparatus identifying the precise source of what follows: Migne, *Patrologia Graeca*, 2, 1108A).

<sup>249</sup> Behm 1965:124, citing Menippus, according to Diogenes Laertes VI, 101 (though he mentions only that Menippus left a text entitled “Wills”); Apollonius, according to Philostratus *Vit. App.* VII.35 (which tells us only that Apollonius “wrote his testament in the Ionian style of language”); Peregrinus Proteus (of Parium, 2nd cent CE), according to the (satirical) Lucian, *De Peregrini Morte* (on which see Bremmer 2007).

<sup>250</sup> 4Q542: see Frey 2010:367.

<sup>251</sup> To whom an Aramaic Testament is also ascribed: see n.243, *supra*.

<sup>252</sup> To whom is ascribed the Vision of Amram, 4Q543-495, which Frey 2010:361 regards as “the work from the Qumran library for which the genre “testament” is most appropriate”.

<sup>253</sup> Frey 2010:369 attaches particular significance to this group of texts: “The origin of the particular genre of the literary testament as developed in Second Temple Judaism and adopted in the early Christian tradition is, therefore, not the tradition of the patriarchal blessings in Genesis, nor the book of Deuteronomy, but a type of priestly wisdom which was shaped in a particular literary form as testaments of the heroes of the priestly line, Levi, Kahat, and Amram.”

<sup>254</sup> Schiffman, *Reclaiming*, points out that a similar notion – Levi’s inheriting the books of Jacob – appears in *Jub* 45:16.

<sup>255</sup> Recension B 7:17 (written in Greek during the first century CE in Egypt). The Greek is διάθεσ τὰ τοῦ οἴκου σου. The issue is prompted by *Gen.* 25. The LXX of *Gen.* 25:5-6 uses simply ἔδωκε, translating the HB *natan*. See Sanders 1983:869. The Greek text of M.R. James 1892 is available from the SBL Online Critical Pseudepigrapha, at <http://ocp.tyndale.ca/testament-of-abraham>; see Sanders 881 for later editions. An English translation (not that of Sanders, also based on James) is available at [http://reluctant-messenger.com/testament\\_of\\_abraham.htm](http://reluctant-messenger.com/testament_of_abraham.htm).

<sup>256</sup> [http://en.wikipedia.org/wiki/Testaments\\_of\\_the\\_Twelve\\_Patriarchs](http://en.wikipedia.org/wiki/Testaments_of_the_Twelve_Patriarchs).

<sup>257</sup> Schiffman 1994 describes the genre thus: “These are essentially the last words of famous personages, in the form of discourses delivered before death. The classic examples begin with a frame narrative declaring that what follows is the testament of the relevant character. Often, these texts, like the last words of Joseph or Moses in the Torah, include revelations of the future of the Jewish people or calls for repentance.”

<sup>258</sup> E.g. Testament of Reuben, 1:4, 5, 6, 7, 8, 9, 10; 2:1, 2; Testament of Simeon, 2:1, 2, 3, 6, 7, 9, 11, 12, 13, 14.

<sup>259</sup> Thus Samely, *Inventory*, on the Testament of Reuben: “The overall package provides a double characterization of the text’s existence: as something that once was said (commanded) by Reuben to his sons; and as something that is now being said.”

<sup>260</sup> E.g. Testament of Levi 19:4–5: “And thus Levi ceased commanding his sons; and he stretched out his feet on the bed, and was gathered to his fathers, after he had lived a hundred and thirty-seven years. And they laid him in a coffin, and afterwards they buried him in Hebron, with Abraham, Isaac, and Jacob.” Cf. Testament of Judah 26:4, etc.

<sup>261</sup> E.g. TReuben: “The copy of the Testament (Ἀντίγραφον διαθήκης) of Reuben, even the commands which he gave his sons before he died in the hundred and twenty-fifth year of his life”. See also TNaphtali, TGad, TAsheh, TJoseph. The others use “words” (λόγων) rather than “Testament”.

(though all do in the present titles), but all presuppose that the words were spoken orally (as in the Hebrew Bible, e.g. Isaac, Jacob, above) before being written down. Some (e.g. Asher and Levi) actually state that the speaker was still healthy,<sup>262</sup> adding in Levi's case "for it had been revealed to him that he should die", but all imply that the scene occurred in the last year of life and was in fact followed by the "testator's" death; by contrast, some date the speech as "before he died" (TTSimeon, Levi, Zebulun, Judah), or even more specifically "When he was about to die" (TJoseph) or "at the time of his death" (TNaphtali).

In addition to this narrative framework (the enunciation of the oral testament, and its aftermath), the Testament genre displays the following features:

- 1 The "testator" speaks in the first person<sup>263</sup>
- 2 He reflects on his personal history from a moral point of view<sup>264</sup>
- 3 He gives moral advice<sup>265</sup> (sometimes formulated as "commands")<sup>266</sup>
- 4 The Testament does *not* deal with property;<sup>267</sup> in this respect, it is the forerunner of the "ethical will" genre.<sup>268</sup>
- 5 The document concludes with the testator's death *and* burial.<sup>269</sup>

Yet this is hardly unfamiliar. Do we not encounter much the same features in the book of Deuteronomy? Indeed, scholars have variously associated both the book as a whole<sup>270</sup> and chapters 31–34 in particular with the testamentary genre.<sup>271</sup> Thus:

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<sup>262</sup> TLevi 1:2; TAsher 1:2. Perhaps this alludes to Isaac's condition in *Gen.* 27 (blind, but due to survive for at least 20 years more: see above, at n.227). Or it might possibly be an anticipation to the rabbinic *matenat bari / shekhiv mera* distinction.

<sup>263</sup> See n.258, *supra*.

<sup>264</sup> E.g. TTSimeon chs.2–3.

<sup>265</sup> E.g. TGad ch.7.

<sup>266</sup> E.g. TJudah 13:1; TBenjamin 1:1.

<sup>267</sup> Explicitly so in ch.10 of TBenjamin 10:2–4: "Know ye, therefore, my children, that I am dying. (3) Do ye, therefore, truth and righteousness each one to his neighbour, and judgement unto confirmation, and keep the law of the Lord and his commandments. (4) For these things do I leave you instead of inheritance."

<sup>268</sup> See Dan, "Wills, Ethical", noting that "talmudic literature contains many aggadic passages quoting or purporting to quote deathbed instructions by great sages to their pupils" (see ch.1 of Abrahams, 1926/2006), but who identifies the prototype of the mediaeval ethical will (for two examples, from the 12th and 14th cents, see <http://www.fordham.edu/halsall/source/jewish-wills.asp>) as the Book of Proverbs.

<sup>269</sup> E.g. TReub 7:2, TLevi 19:5, TJudah 26:4; TZebulun 10:7; TDan 7:2; TGad 8:5; TAsher 8:2; TJoseph 20:6; TBenjamin 12:3.

<sup>270</sup> Frey 2010:346 takes Deuteronomy (which is "as a whole designed as an extensive farewell discourse of Moses before his death") to be the most prominent and influential example of the farewell discourse genre in the Hebrew Bible. In response to discussion (at 375), however, he distinguished Deuteronomy from the testamentary speeches in the Testaments of the Twelve Patriarchs, which adopt "numerous elements from the earlier [Levi] line of Aramaic texts preserved at Qumran. Deuteronomy is, of course, a "testamentary" text but not a literary testament of the type and genre defined above."

<sup>271</sup> DeSilva 2012:175. Priest 1983:1.923 observes: "The most obvious relationship between the Testament of Moses and the Hebrew canon is with Deuteronomy, especially chapters 31 to 34 of that book. The basic outline of the Testament of Moses follows the pattern of those chapters to such an extent that the Testament of Moses may be considered a virtual rewriting of them. This is true not only with respect to general outline but also regarding specific allusions and theological perspective. Deuteronomy 31–34 is clearly the author's model, though he has recast his own work in light of the history of the people from the conquest to his own day and through the prism of his own apocalyptic outlook."

- 1 The “testator” speaks in the first person<sup>272</sup>
- 2 He reflects on his personal history from a moral point of view<sup>273</sup>
- 3 He gives moral advice (often formulated as “commands”)<sup>274</sup>
- 4 The Testament does *not* deal directly with property<sup>275</sup>
- 5 The document concludes with the testator’s death *and* burial.<sup>276</sup>

This appears to have been recognised in antiquity, in the incompletely preserved<sup>277</sup> Testament<sup>278</sup> (or Assumption<sup>279</sup>) of Moses, whose form is that of a farewell speech (here, commissioning Joshua as his successor – a not inappropriate application of the patriarchal model of *Gen.* 27 and 49 in the new circumstances)<sup>280</sup> and whose theology also owes at least some debt to Deuteronomy.<sup>281</sup>

Arguments have been advanced for the influence of both this document<sup>282</sup> and the *Testaments of the Twelve Patriarchs*<sup>283</sup> on the New Testament, but largely in terms of matters of detail. It would not, however, be difficult to identify the recurrent themes of the Testament genre in the Gospels (in which the figure of Moses is a significant model for Jesus<sup>284</sup>), and indeed elsewhere in the New Testament, as overlapping with those of second commonwealth testamentary literature.<sup>285</sup> Thus:

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<sup>272</sup> The voice of the narrator in Deuteronomy provides a frame, with only occasional interjections between the Mosaic discourses: *Deut.* 1:1–5, 4:41–49, 10:6–9 (??), 27:1, 9, 11, 29:1–2, 31:1, 7, 9–10, 14–25 (including speeches of God), 30, 32:44–45, 32:48–33:1 (including a speech of God), 34. The blessings to each of the 12 tribes in *Deut* 33 are each prefaced by the narrator’s introduction. The use of the first person is prominent throughout the first (historical/biographical) discourse, *Deut.* 1:6–4:40 and elsewhere (e.g. 10:10–11), and also in relation to laws and immediate instructions: *Deut.* 4:8, 41, 5:1, 6:4, 7:11, 10:13, 11:8, 13, 27, 28, 32, 27:1, 4, 10, 28:1, 13, 14, 15, 30:2, 8, 11, 15, 32:44, often using the formula “which I command you this day” (even in the legal discourse of *Deut.* 12–26, as in 13:18, 15:5, 19:9). On this formula, in relation to the revelational claims of Deuteronomy, see further Jackson 2000:159–61.

<sup>273</sup> As especially in the first discourse, *Deut.* 1:6–4:40 and elsewhere, e.g. *Deut.* 9:13–21.

<sup>274</sup> E.g. *Deut.* 4, 8:2–10, 9:4–12, 11.

<sup>275</sup> Other than the “virtual” taking of possession of the land by Moses: see n.212, *supra*. There is also a transfer of leadership to Joshua at *Deut.* 31:7–8, 23 (here by God directly), 34:9 (in the voice of the narrator).

<sup>276</sup> *Deut.* 34:5–6.

<sup>277</sup> There is only one MS, dating from the 6th century, written in Latin but apparently translated from a Greek version itself translated from a semitic original: see Priest in Charlesworth 1983:I.919f. The first three lines are missing, but are part of a narrative introducing Moses’ speech. The text breaks off mid-sentence in ch.12, though it appears to be preparatory to an account of Moses’ death, and there are references in the surviving text to Moses’ impending death: 1:15, 3:3; 10:12, 14. For different views of the dating and provenance, see Priest, *ibid.*, at 920–22 (opting for the first cent. CE).

<sup>278</sup> Cf. Priest 1983:I.925. At 11:1, we read: “And when Joshua heard the words of Moses, so written in his testament, . . .”

<sup>279</sup> On the relationship of this text to the Assumption of Moses, see Priest 1983:I.925.

<sup>280</sup> Priest, *ibid.*, and 919, noting especially the dependence on *Deut.* 31 and 34. The speech, however, is largely predictive, of both Israelite history into the second commonwealth period and of the end of days: see further Priest at 919.

<sup>281</sup> Priest, 1983:I.922, in relation to the punishment of evildoers and the rewarding of the righteous (at 12:10–11), and as quoted in n.271, *supra*.

<sup>282</sup> Priest 1983:I.924.

<sup>283</sup> Charles 1913:II.291f. described the influence of the Testaments of the Twelve Patriarchs on the New Testament as “very extensive”, the Pauline borrowings, in particular, being “too numerous to be dealt with here”. Later scholarship has been more critical.

<sup>284</sup> See my “Jésus et Moïse. . .” (1981/1992, the latter in English).

<sup>285</sup> Frey 2010:347f.: “In emerging Christianity there was also a production of new testamentary passages and texts, now attributed to important figures of emerging Christianity, to Jesus and to the predominant apostles.” See further text at n.290.

- 1 Jesus uses the first person in his teaching (especially in the Antitheses of the Sermon on the Mount), which distinguishes him from contemporary Rabbis<sup>286</sup>
- 2 He reflects on his personal history from a moral (here eschatological?) point of view<sup>287</sup>
- 3 He gives moral advice (often formulated as “commands”)<sup>288</sup>
- 4 The Testamentary passages do *not* deal directly with property
- 5 The Gospels stress Jesus’ death *and* burial (the empty tomb evoking the unknown grave of Moses<sup>289</sup>).

Scholars have, however, gone beyond this in identifying specific “testamentary passages” in the New Testament. Frey cites, as the most prominent example, the Farewell Discourse(s) of Jesus in *John* 13:31–17:26, to which he adds “Jesus’ commission to the disciples in Matthew 28:16–20, Paul’s farewell address to the Ephesian elders in Acts 20:17–38, and, among the later epistles, 2 Timothy and 2 Peter, which both present a literary testament of respectively Peter and Paul in post-apostolic times.”<sup>290</sup> Moreover, we find an explicit identification of Jesus as “testator” in Lactantius,<sup>291</sup> who links this with *Jer.* 31:31 (also rendering “covenant” in that passage by *testamentum*):

But all Scripture is divided into two Testaments. That which preceded the advent and passion of Christ – that is, the law and the prophets – is called the Old; but those things which were written after His resurrection are named the New Testament. The Jews make use of the Old, we of the New: but yet they are not discordant, for the New is the fulfilling of the Old, and in both there is the same testator, even Christ (*et in utroque idem testator est Christus*), who, having suffered death for us, made us heirs of His everlasting kingdom, the people of the Jews being deprived and disinherited. As the prophet Jeremiah testifies when he speaks such things: [*Jer* 31:31–32] “Behold, the days come, saith the Lord, that I will make a new testament (*testamentum novum*) to the nation of Israel and the house of Judah, not according to the testament (*testamentum*) which I made to their fathers, in the day that I took them by the hand to bring them out of the land of Egypt; for they continued not in my testament, and I disregarded them, saith the Lord...” For that which He said above, that He would make a new testament to the house of Judah, shows that the old testament which was given by Moses was not perfect; but that which was to be given by Christ would be complete.<sup>292</sup>

Lactantius appears to have been prompted in this by two New Testament passages (discussed below), *Gal.* 3:15–18 and *Heb.* 9:15–22, which invoke the legal institution of the will as a theological analogy. Indeed, it has been suggested that these passages may allude to

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<sup>286</sup> E.g. *Matt.* 5:21–22: “You have heard that it was said to the men of old, ‘You shall not kill; and whoever kills shall be liable to judgment.’ But I say to you that every one who is angry with his brother shall be liable to judgment.” On this, see Daube 1956:55–62.

<sup>287</sup> Gerald Downing kindly points me to *Luke* 22:24–38, 52–53; *John* 14:9–25; 15:15–25; 16:4, 25–28, 33; 17:4, 6–8, 11–12[!], 14, 18, 22, 26; and the BNTC commentary of Lincoln 2005:14–17, 384.

<sup>288</sup> Again, the Sermon on the Mount, and Daube, *supra* n.286.

<sup>289</sup> *Deut.* 34:6.

<sup>290</sup> Frey 2010:347f.

<sup>291</sup> 240–320. A convert to Christianity, he ultimately became an advisor to Constantine, but is said to have been “considered somewhat heretical after his death”: <http://en.wikipedia.org/wiki/Lactantius>. According to Campenhausen 1964:62, he had a good knowledge of the law, but according to his own testimony never appeared publicly as a practicing lawyer or speaker.

<sup>292</sup> Ante-Nicene Fathers, Vol VII: Lactantius, *Divine Institutes*, Book IV, Chap. XX, available at <http://www.sacred-texts.com/chr/ecf/007/0070102.htm>, quoted by Martin, “What is the “New Testament”? Is it the same as the New Covenant?”; Latin at Migne, PL VI.514–15 and see n.44, *supra*.



*Luke* 22:29, where Jesus at the last supper “seems to leave a testament”:<sup>293</sup> “And I assign (διατίθεμαι) to you, as my Father assigned (δίεθετο) to me, a kingdom”.<sup>294</sup> We may perhaps link this to *John* 3:35,<sup>295</sup> where Jesus is presented as the heir of a spiritual inheritance, which he is seeking to pass on: “(32) He bears witness to what he has seen and heard, yet no one receives his testimony (μαρτυρίαν); (33) he who receives his testimony sets his seal to this, that God is true. (34) For he whom God has sent utters the words of God, for it is not by measure that he gives the Spirit; (35) the Father loves the Son, and has given all things into his hand.”

## 6. THE LEGAL ANALOGY IN THE NEW TESTAMENT

*Gal.* 3:15–18 and *Heb.* 9:15–22<sup>296</sup> present the same issues as the LXX use of διαθήκη: (i) does the usage derive from the legal or theological register, and (ii) if the legal, what kind of “testament” does the author have in mind? But in one important respect the issue in the New Testament passages is different: the use of διαθήκη here does not come about as a translation (we may assume that both authors took it from the LXX), but rather is used in the context of a theological argument.<sup>297</sup> The linguistic issue now is no longer that of a “complete overlap in meaning between the Hebrew and the Greek” but rather whether a legal analogy is incorporated within such a theological argument. But there are different genres of theological argument, appropriate to different audiences. Neither Paul nor the author of Hebrews was writing a treatise on systematic theology, designed for a theological peer group. Their writings were a form of preaching, designed to influence action, addressed to a *koine* lay audience. Then (as now) analogies from everyday life represent a rhetorical device designed not only to clarify otherwise potentially obscure theological concepts, but also to impress the audience that the writer/speaker is “one of them”, belongs to the same community. It is in that context that they invoke just those aspects of the legal analogue which were most pertinent to the particular theological message they were seeking to convey.

In Galatians 3:15–18, the issue is the interpretation of the Abrahamic covenant (arguably, in relation to the land), and its inviolability from the later Mosaic law:

- (15) To give a human example (κατὰ ἀνθρωπων λέγω<sup>298</sup>), brethren: no one (οὐδεις) annuls (ἀθετεῖ<sup>299</sup>) even (ὁμως) a man’s will (διαθήκην), or adds (ἐπιδιατάσσεται<sup>300</sup>) to it, once it has been ratified (κεκυρωμένην).

<sup>293</sup> Héring 1970:80 in the context of *Heb.* 9 (below). Cf. Bruce, *Hebrews*, 212 n.126.

<sup>294</sup> Moffatt 1924:127: “. . . according to one tradition he (Jesus) had spoken of himself figuratively as assigning rights to his disciples”, quoting the Greek formulation.

<sup>295</sup> Kindly drawn to my attention by Jennifer Dines.

<sup>296</sup> Commentators on one of the passages often overlook the parallel usage in the other (e.g. Lincoln 1999:4, citing Bauer; Allen 2010:479).

<sup>297</sup> Nevertheless, Porter 2003:278f. argues for an application here of the Louw-Nida approach to the LXX usage (*supra*, at n.38): “Paul apparently uses diaqh/kh in Gal. 3:15 to introduce the wider notion of the content of an agreement between two parties, in this case quite probably a testament or will, in order to reformulate his idea in terms of the specific covenant with Abraham in v.17. In other words, in Pauline usage, even if instances of the Hellenistic usage are not numerically predominant, the specific usage of the theological notion is a focused use of the broader category of testament or will – that is, a covenant is a testament or will made under particular circumstances, in which God is one of the parties.”

<sup>298</sup> For discussion of this expression, see Llewellyn, “Revocation”, 44f. and footnotes.

<sup>299</sup> The negation of τίθημι.

<sup>300</sup> The term for a codicil was ἐπιδιαθήκη.

- (16) Now the promises (ἐπαγγελίαι) were made to Abraham and to his offspring. It does not say, “And to offsprings (σπέρμασιν),” referring to many; but, referring to one, “And to your offspring (σπέρματι),” which is Christ.
- (17) This is what I mean: the law (νόμος), which came four hundred and thirty years afterward, does not annul (ἀκυροῖ) a covenant (διαθήκην) previously ratified (προκεκυρωμένην) by God, so as to make the promise void (καταργῆσαι).
- (18) For if the inheritance (κληρονομία<sup>301</sup>) is by the law (ἐκ νόμου), it is no longer by promise (δι’ ἐπαγγελίας); but God gave it to Abraham by a promise.
- (19) Why then the law? It was added because of transgressions, till the offspring should come to whom the promise had been made; and it was ordained by angels through an intermediary (ἐν χειρί μεσίτου<sup>302</sup>).
- (20) Now an intermediary (μεσίτης) implies more than one; but God is one.

The text has long served as a battle ground between two radically opposed approaches,<sup>303</sup> which we may term “covenant throughout” on the one hand,<sup>304</sup> “legal analogy” on the other.<sup>305</sup> While the opening κατὰ ἀνθρώπων λέγω appears to be an explicit indicant of an allusion to everyday life,<sup>306</sup> the major objection to the “legal analogy” approach has been that the legal analogy fails, since the ability of the testator (unless excluded from οὐδεις<sup>307</sup>) to annul<sup>308</sup> or add codicils<sup>309</sup> to a formally valid<sup>310</sup> is well established in contemporary law.<sup>311</sup> But

<sup>301</sup> Forman 2011 concentrates on the usage of κληρονομία and cognates, rather than διαθήκη, and specifically on four indisputably Pauline passages where the former root is used. This wider notion of “inheritance” encompasses what we would call intestate as well as testate succession (used, he notes at 64, in the LXX to render the root נָחַל), and thus avoids the theological issues prompted by the use of the latter (*testamentum*) model. For a conceptual rather than linguistic account of Paul’s concept of inheritance (though focussing on κληρονομία rather than διαθήκη), see Hester 1968, who rightly stresses the dual character of the concept, as both legal and theological.

<sup>302</sup> On μεσίτης in Gal. 3:19f. see Walker 1906:96–98 (taking the reference to be to Moses, rather than Christ, despite some patristic views to the contrary); Walker 1906:113–17 (for Paul’s view of the role of this μεσίτης as mediating between Promise and Fulfilment). See further *infra*, text at n.366, in the context of the use of the term in Heb. 9:15.

<sup>303</sup> On the earlier literature, see Moulton and Milligan 1914:148f., commenting that “even a Jew like Paul, with Greek in the very fibre of his thought, could never have used δ. for *covenant* without the slightest consciousness of its ordinary and invariable contemporary meaning. He would use the “Biblical” word – “Biblical” in this case being synonymous with archaic – but always with the possibility of a play on the later meaning of the word . . .”

<sup>304</sup> E.g. Hughes 1979; Lincoln 1999.

<sup>305</sup> E.g. Walker 1906.

<sup>306</sup> Walker 1906:94f. notes that κατὰ ἀνθρώπων λέγω appears also in Rom. 3:5 and 1 Cor. 9:8 (κατὰ ἀνθρώπων λαλῶ) and in all it means “to express one’s thought – even about the ways of God – in a form taken from human affairs”. For further discussion of this expression, see Llewellyn, “Revocation”, 44f. and footnotes.

<sup>307</sup> See Walker 1906:157–59 discussing earlier views and concluding that it means that “no other person” may annul or add to such a will, even though this is stating an obvious fact.

<sup>308</sup> George 1994:245.

<sup>309</sup> Walker 1906:101–04, citing (later) Roman law sources and arguing that Paul here presents the law as a codicil to an already valid will. See also Bruce 1982:170.

<sup>310</sup> On the criteria of formal validity (reflecting a range of legal sources from different jurisdictions and periods), see Walker 1906:136, 141f. (discussing earlier views of deposit in an official Record Office), Hughes 1979:60 (“properly drawn up, attested, sealed and deposited with the public official responsible for the safe-keeping of such documents”), Bruce 1982:170f. (“signed, sealed and delivered”), Dunn 1993:182 (“signed and witnessed”), George 1994:245 (“promulgated”), Hahn 2005:74 (“written down, witnessed and deposited with a notary”, based on an alternative formulation of Hughes).

<sup>311</sup> Llewellyn, “Revocation”, 42, notes exceptions to this in the form of grounds on which a valid will may subsequently be challenged. Moreover, though the *terms* of a valid will may not be altered, it may be revoked in favour of a later will.

does *κεκυρωμένην* refer to formal validity? The verb has a very general sense,<sup>312</sup> and is used in the NT only here and in 2 *Cor.* 2:8, the latter in a non-legal setting: “So I beg you to reaffirm your love for him”. *κεκυρωμένην* may equally refer to the coming into effect of the will (a quite different matter<sup>313</sup>) on death<sup>314</sup> – as is clearly the case with the *διαθήκη* in *Heb.* 9:16f. (discussed below), which may well have taken its clue from the Pauline text: once the testator has died, the terms of a will are inviolable (just as is a covenant, once brought into effect by God).

Paul draws an analogy between *διαθήκη* in the theological sense of *berit* (ברית) and *διαθήκη* in its everyday (*koine*) legal sense. It is difficult to see how the argument could work if *διαθήκη* had one, single sense in the passage. What kind of inviolable human covenant could Paul have had in mind in v.15?

But what kind of will does Paul here have in mind?<sup>315</sup> Those who wish to avoid the difficulty that, unlike a human testator, God does not die,<sup>316</sup> have sought to argue that Paul is referring to either the Hellenistic (*meta ten teleuten*) or Jewish (*maten bari*) forms of will,<sup>317</sup> rather than a *διαθήκη* which takes effect only at death.<sup>318</sup> Llewellyn, however, concludes in

<sup>312</sup> From *κυρῶς*, to make valid or reaffirm. Moulton and Milligan 366 show that the verb is not technical for a particular form of validation. See also Hughes 1979:67f. Yaron 1960:23 cites (Justinian’s) Digest 32.37.5, where the early jurist Scaevola quotes a clause in codicils: βούλομαι πάντα τα ὑποτεταγμένα κύρια εἶναι, and (from the same jurist) Digest 34.4.30.1: βούλομαι βέβαια εἶναι τα ὑποτεταγμένα, as having influenced the opening clauses of *deyathiqi* discussed in the Babylonian Talmud (B.M. 19a and B.B. 135b).

<sup>313</sup> This distinction is overlooked by commentators, who sometimes use the terms “valid” and “operative” as if they were synonymous. See, e.g., Hughes 1979:44, 60f., Lincoln 1999:15. The distinction may be illustrated from modern legislative practice: a UK statute may pass all its required parliamentary stages and receive the royal assent, and yet not become operative, since it may include a clause which postpones its “coming into effect” until a certain date or the fulfilment of a certain condition. On some occasions, such a valid statute has never become operative, since it has been repealed before it ever came into effect.

<sup>314</sup> Cf. Walker 1906:102; Bruce 1982:170.

<sup>315</sup> Walker 1906 discusses the earlier dispute between Halmel 1895, who sees it as a Roman will, and Ramsay 1899, who sees it as Greek. But it is clear that Ramsay (criticised by Schmiedel 1901) was using the term “will” loosely in the Greek context, as referring to *inter vivos* dispositions in contemplation of death: see s.3, *supra*. The debate was generated in part by the controversy over whether Paul’s audience was North Galatian (in terms of this issue, Roman-influenced) or South Galatian (Greek-influenced). Walker 1906 provides a summary and evaluation, concluding that the differences between the legal models is too insubstantial to form a basis for decision. The debate may now be regarded as of purely historic interest, given the growth of the available data and advances in legal historical analysis. But the view that Paul is alluding to a Roman form of inheritance has been maintained more recently by Hester 1968:20, partly because of the theological pertinence of Roman law’s concept of universal succession (including liabilities as well as assets).

<sup>316</sup> Behm 1965:129 correctly avoids this form of reductionism: “The many legal terms used in the passage make it clear that he is here using the word *διαθήκη* in the sense of Hellenistic law . . . This illustration from the legal sphere throws light on God’s dealings in salvation history. As a valid will cannot be contested or altered by additions, so the promise of God [*ἐπαγγελία*] which is His original “testament” cannot be invalidated by the Law [*nomos*] which came later.” He adds: “The point of comparison is simply that of inviolability, unalterability and therefore absolute validity. No regard is paid to the fact that in the case of God’s testament the presuppositions of this validity . . . are very different from that of a human will, i.e. the death of the testator.”

<sup>317</sup> Selb, Bammel (summarised and discussed by Llewellyn, “Revocation”, at 43f.). Hester 1968:72 wrongly takes the *maten bari* to be a death-bed disposition.

<sup>318</sup> The verbal form *τάδε διέθετο* appears to be older than the nominal form *διαθήκη*, the latter being more closely associated with a will rather than a *μετά τὴν τελευτήν*. Thus Wolff 1974:543 writes: “Hence – in Egypt at any rate – the validity of a testamentary disposition, whether drafted unilaterally and destined to take effect at the testator’s death (*διαθήκη*), as *donatio* or parental distribution taking effect immediately, or as a contact between a married couple, depended on certain formal conditions: it had to be drawn upon in writing (in Roman times, at the latest, in a notarial instrument), and in the presence of witnesses (six in Egypt).”

favour of a model such as is reflected in P. Yadin 19,<sup>319</sup> “a transaction comparable to the *matenath bari* which was irrevocable”. He argues from this that “in the second century AD the Jewish deed of gift when made in Greek used the expression *διεθέμεν* or *διέθετο* and thus could have been called a *διαθήκη*. If the same practice and terminology can be assumed to have been in use in the first century, then it is to such an instrument that Paul, a Greek-speaking Jew, referred at Gal. 3.15 . . . the term could designate both a will and a gift.”<sup>320</sup> This last observation is important and correct, but it would appear simpler to take it here as referring to a will, not least in the light of *Heb.* 9:16f.<sup>321</sup>

Paul compares the legal *διαθήκη* to the relationship between the Abrahamic covenant (itself described as a *διαθήκη* in v.17, despite the emphasis on “promise”, *ἐπαγγελία*) and the mosaic law. The law, despite its very clear association with *ברית* in the Sinaitic pericope,<sup>322</sup> is *not* here termed a *διαθήκη*; Paul here<sup>323</sup> appears to want to equate the latter term with a promise,<sup>324</sup> a unilateral disposition, which is at odds with the emphasis in the Sinaitic pericope on the people’s agreement.<sup>325</sup> The law is conceived in the continuation of this passage (3:19–29)<sup>326</sup> as a source of constraint, inevitably leading to sin, until such time as redemption through faith in Christ becomes possible.<sup>327</sup> Yet ironically Paul employs a legalistic form of interpretation<sup>328</sup> in order to reach his desired conclusion, namely that the Abrahamic covenantal promise specifically extends to (or even is fulfilled only in) Christ,<sup>329</sup> that being the

<sup>319</sup> See n.195, *supra*.

<sup>320</sup> Llewellyn, “Revocation”, 46f.

<sup>321</sup> If, then, in terms of both Paul’s own background and his intended (Judaizing) audience in Galatia, one assumes that Paul is referring to a Jewish rather than a Hellenistic practice, this would appear to be a pre-Mishnaic Jewish adoption of the Hellenistic will: see text at nn.197–206, *supra*.

<sup>322</sup> *Exod.* 19:3–8, esp. v.5; 24:3–8, esp. v.3.

<sup>323</sup> But not consistently: see *Gal.* 4:21–31, discussed below.

<sup>324</sup> A salvific promise, according to Behm 1965:179–81. It has been noted that *ἐπαγγελία* is not used at all in the LXX. Paul’s use of *διαθήκη* in v.17 serves to link the comparison with a will with what his readers may recognise as his intended LXX referent.

<sup>325</sup> *Exod.* 19:3–8 esp. v.8; 24:3–8, esp. v.7.

<sup>326</sup> (19) Why then the law? It was added because of transgressions, till the offspring should come to whom the promise had been made; and it was ordained by angels through an intermediary. (20) Now an intermediary implies more than one; but God is one. (21) Is the law then against the promises of God? Certainly not; for if a law had been given which could make alive, then righteousness would indeed be by the law. (22) But the scripture consigned all things to sin, that what was promised to faith in Jesus Christ might be given to those who believe. (23) Now before faith came, we were confined under the law, kept under restraint until faith should be revealed. (24) So that the law was our custodian until Christ came, that we might be justified by faith. (25) But now that faith has come, we are no longer under a custodian; (26) for in Christ Jesus you are all sons of God, through faith. (27) For as many of you as were baptized into Christ have put on Christ. (28) There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus. (29) And if you are Christ’s, then you are Abraham’s offspring, heirs according to promise.

<sup>327</sup> We may compare the divorce controversy in *Matt.* 19, where the Mosaic divorce law of *Deut.* 24:1–4 is presented as merely a concession to human nature (“the hardness of your hearts”), and as not modifying the original creation-based dispensation of the relations between husband and wife, the one-flesh model (*Gen.* 2:24). See further Jackson, *Essays*, 198–99, 206–10; *idem*, 2010:351.

<sup>328</sup> Bruce 1982:172 cites Walker 1906:105–07 for the view (of Halmel, which Walker rejects) that the argument reflects the Roman requirement that a will must indicate a *certa persona*, but prefers to explain the exegesis in terms of Jewish theology.

<sup>329</sup> See also Hester 1968:47–50; Forman 2011:4, 8, 9, 174–76 (in the latter passage discussing whether Paul understands this as a “spiritual inheritance”). For Forman 243, Paul’s argument is anti-imperial: “He reminds the Christians at Rome that, contrary to accepted opinion, it will not be Nero but God who brings peace and wholeness to the world.” His message is eschatological and universalist, the land no longer being Canaan but the whole (of this, physical) world and its inhabitants.

referent of the singular זרע (*zarakha*: lit. “your seed”) in *Gen.* 17:7–8.<sup>330</sup> But Paul must have known, from his background and education,<sup>331</sup> that זרע (*zera*) in Biblical Hebrew (and, indeed, its rendering as σπέρμα in the LXX<sup>332</sup>) is normally a generic or collective noun,<sup>333</sup> even if exceptionally it is used with a singular referent.<sup>334</sup> Interestingly, Philo poses a similar question regarding the formulation of LXX *Gen.* 17:16, where God promises Abraham that Sarah will bear a son (τέκνον); why not many children? (πολλά τέκνα), asks Philo.<sup>335</sup> The reply here is not in terms of a particular referent; rather, Philo argues from the superiority of quality over quantity, such quality being identified with a Platonic original, archetypal idea, and links to this an etymology of τέκνον showing that such a child is “the truly genuine and free-natured offspring of a free-born soul”.<sup>336</sup>

Paul makes no allusion to a “new covenant” in this passage,<sup>337</sup> rather, he seeks to defend the integrity of the original Abrahamic covenant, even against modification by the mosaic law. But his expression “no one annuls even a man’s will or adds to it” may well allude to *Deut.* 4:2 (cf. 13:1, MT), “You shall not add to the word which I command you, nor take from it”, which is to be found in Deuteronomic narrative rather than law.<sup>338</sup>

In *Gal.* 4:21–31, however, Paul does identify the Sinaitic law as the content of a covenant:

Tell me, you who desire to be under law (ὑπὸ νόμον), do you not hear the law? (22) For it is written that Abraham had two sons, one by a slave and one by a free woman. (23) But the son of the slave was born according to the flesh (κατὰ σάρκα), the son of the free woman through promise (δι’ ἐπαγγελίας). (24) Now this is an allegory (ἀλληγορούμενα): these women are two covenants (δύο διαθήκαι). One is from Mount Sinai, bearing children for slavery; she is Hagar. (25) Now Hagar is Mount Sinai in Arabia; she corresponds to the present Jerusalem, for she is in slavery with her

<sup>330</sup> Dunn 1993:183 notes other possible source texts: *Gen.* 13:15 (for which Daube argues at 1956:438f., taking account also of Josephus), *Gen.* 13:17 LXX, 15:18, 17:8, 24:7. Collins 2003:82 follows Bruce in rejecting *Gen.* 17 as the text which Paul is interpreting, on theological grounds: Paul would not refer to the promise of the land in seeking to address gentiles, nor does it fit with Paul’s reference some verses earlier (*Gal.* 3:8) to *Gen.* 12:3, the promise that all the nations would be blessed “in you”. He assumes that Paul’s source is the LXX (while at the same time invoking Paul’s access to the original Hebrew, citing also *Gal.* 1:14, *Acts* 22:3, at 86 n.29), and seeks to identify the target text by reference to dative usages in the LXX. He opts ultimately for a christological reading of *Gen.* 22:18, even while conceding that “since this is an allusion . . . we do not need a direct match”. But Paul may well be paraphrasing the Hebrew זרע in *Gen.* 17:7–8.

<sup>331</sup> *Acts* 26:5, cf. *Acts* 23:6 (“I am a Pharisee, a son of Pharisees”), *Phil.* 3:5 (“a Hebrew born of Hebrews; as to the law, a Pharisee”).

<sup>332</sup> George 1994:246f.

<sup>333</sup> Dunn 1993:183: “of course, it was a collective singular”, though noting that “seed” could also refer elsewhere to Isaac (citing Daube: see next note), “so that a rhetorical play on the ambiguity is invited.” Bruce 1982:172 notes that Paul was well aware that the collective noun could indicate a plurality of descendants as well as a single descendant, citing *Rom.* 4:18, where he identifies Abraham’s offspring (*Gen.* 15:5, זרע) with the many nations of *Gen.* 17:5, interpreting the latter as gentile believers. Wilcox 1979:3 notes that the Targumim translate *zera* as “sons”, but cites *Jub.* 16:17f., where the angels tell Abraham that “all the seed of his sons should be Gentiles, and be reckoned with the Gentiles; but from the sons of Isaac one should become a holy seed, and should not be reckoned among the Gentiles. For he should become the portion of the Most High. . .” (Charles’ translation). This one son would be pre-eminent in relation to fulfilment of the promise relating to Abraham’s ‘seed’.

<sup>334</sup> See Daube 1956:438–444 esp. 444 on *Gen.* 4:25, where Eve greets Seth as “another seed instead of Abel”, cf. Bruce 1982:173; Alexander (internet version) 8–9.

<sup>335</sup> *De mutatione nominum* 145, cited by Bruce 1982:172.

<sup>336</sup> *De mutatione nominum* 145–47. The conclusion of the argument is evocative of Paul’s characterisation of Sarah/Isaac as against Hagar/Ishmael in *Gal.* 4, discussed below.

<sup>337</sup> Indeed, he uses this concept only twice: in *Gal.* 4:21–31, discussed below, and *2 Cor.* 3:3–18.

<sup>338</sup> Paul’s terminology does not correspond to that of the LXX of these Deuteronomic verses. But Paul had no need for recourse to the LXX.

children. (26) But the Jerusalem above is free, and she is our mother. (27) For it is written [*Isa.* 54:1], “Rejoice, O barren one who does not bear; break forth and shout, you who are not in travail; for the children of the desolate one are many more than the children of her that is married.” (28) Now we, brethren, like Isaac, are children of promise. (29) But as at that time he who was born according to the flesh persecuted him who was born according to the Spirit (τὸν κατὰ πνεῦμα),<sup>339</sup> so it is now. (30) But what does the scripture say? “Cast out (ἔκβαλε) the slave and her son; for the son of the slave shall not inherit (κληρονομήσει) with the son of the free woman.” [*Gen.* 21:10<sup>340</sup>] (31) So, brethren, we are not children of the slave but of the free woman.<sup>341</sup> (5:1) For freedom Christ has set us free; stand fast therefore, and do not submit again to a yoke of slavery.

Here, it is clearly implied that the covenant of flesh/law (Hagar/Sinai), inherited by Ishmael as the older son, has been revoked<sup>342</sup> by disinheritance in favour of that of promise/freedom from sin (Sarah/Jerusalem), represented by Isaac. Again, the imagery of inheritance (here, disinheritance<sup>343</sup>) is used in juxtaposition to the notion of covenant, here referring to the Genesis narrative of the expulsion of Hagar and Ishmael – which is also used in early rabbinic literature in relation to claims to the promised land,<sup>344</sup> part of the very promise of God to Abraham in *Gen.* 17. Taking these two chapters of Galatians together, we see that the argument from the revocability or irrevocability of “testamentary” arrangements<sup>345</sup> depends very much upon the theologically desired outcome: the Abrahamic covenant is not revoked by that at Sinai, but that at Sinai is revoked (figuratively, by the expulsion of Hagar and disinheritance of Ishmael) by that represented by Isaac/Christ. But Paul does not pursue the mechanism of revocation or non-revocation, and in particular whether a later testament *automatically* revokes an earlier one.

The stress on death as the point at which a διαθήκη takes effect is most prominent in Hebrews 9:15–22 (a passage which has been described as “pivotal in the exposition of Jer 31”<sup>346</sup>):

(15) Therefore he (Jesus) is the mediator (μεσίτης<sup>347</sup>) of a new covenant (διαθήκης καινῆς), so that those who are called<sup>348</sup> may receive (λάβωσιν) the promised eternal inheritance (τὴν ἐπαγγελίαν τῆς αἰωνίου κληρονομίας),<sup>349</sup> since a death has

<sup>339</sup> The opposition between κατὰ σάρκα and κατὰ πνεῦμα might appear to imply a divine conception for Isaac. However, Bruce 1982:217 strongly rejects this (though citing, e.g., Marius Victorinus *ad loc.*: non ex copulatione): Abraham’s real paternity is implied in v.22, and even more clearly in *Rom.* 4:18–21.

<sup>340</sup> The whole quotation is identical to the LXX, with the exception of Paul’s omission of τὰυτη after παιδίσκη on each of its two occurrences.

<sup>341</sup> Cf. Philo, as in n.336, *supra*.

<sup>342</sup> Dunn 2003:146f. prefers to see the contrast as between two different conceptions of the covenant with Abraham: “Hagar represents the covenant misconceived. Only the free woman represents the covenant of promise” (146 n.94). Yet Hagar and Ishmael were firmly excluded (v.30) on the basis of this misconception.

<sup>343</sup> The שר, here translated ἔκβαλε, is used of both divorce and disinheritance (which in a polygamous society often went together, as here). Cf. *Judg.* 11:2 regarding Jephtha; Jackson 2008:126, 191.

<sup>344</sup> See Jackson, “Prodigal” 123–26, on the fictitious lawsuit before Alexander the Great (*Midrash Rabbah* LXI:7; Babylonian Talmud, *Sanh.* 91a on *Gen.* 25:6), and more generally on the “dismissal” of an heir by sending him away with gifts (based on *Gen.* 25:5–6).

<sup>345</sup> Here it is Ishmael’s presumptive intestate succession rights which are revoked by Abraham.

<sup>346</sup> Attridge 1989:253.

<sup>347</sup> Cf. *Heb.* 12:24. Behm 1965:131 translates μεσίτης as “guarantor” (criticized by Vos).

<sup>348</sup> On the comparison of the elect, those who are “called” (κεκλημένοι), with those named in a will, see Buchanan 1972:151.

<sup>349</sup> Taken to refer to the world to come. For its association in rabbinic sources with the land, see Buchanan 1972:150f.



- occurred which redeems them from the transgressions under the first covenant (πρώτη διαθήκη).
- (16) For where a will (διαθήκη) is involved, the death of the one who made it must be established (θάνατον ἀνάγκη φέρεσθαι<sup>350</sup> τοῦ διαθεμένου<sup>351</sup>).
- (17) For a will (διαθήκη) takes effect (βεβαία<sup>352</sup>) only at death (ἐπι νεκροῖς), since it is not in force (ἰσχύει) as long as the one who made it (ὁ διαθέμενος) is alive.<sup>353</sup>
- (18) Hence even the first (covenant) was not ratified without blood (ὄθεν οὐδ' ἡ πρώτη χωρὶς αἵματος ἐνκεκαίνισται).
- (19) For when every commandment of the law (κατὰ τὸν νόμον) had been declared by Moses to all the people, he took the blood of calves and goats, with water and scarlet wool and hyssop,<sup>354</sup> and sprinkled both the book itself and all the people,<sup>355</sup>
- (20) saying, "This is the blood of the covenant (τῆς διαθήκης) which God commanded you."

<sup>350</sup> Though not found as a technical term specific to wills (Allen 2010:482), it is used frequently in the legal context of evidence being "brought": Koester 2001:418 cites Hunt and Edgar II.no.310. See also Moffatt 1924:128; Bruce 1965:207; Attridge 1989:256; Hahn 2005:73. Lincoln 1999:25 notes that φέρεσθαι in the LXX is usually a translation for בוא in the HB, though the context in the *hiphal* and *hophal* forms is predominantly cultic (making offerings and sacrifices). Similarly, Swetnam 1965:388: "attested" (approving the view that the grammar of v.16, without a main verb, suggests a legal maxim). Hughes 1979:42, 65 and Hahn 2005:80 (in the context of a "covenant throughout" interpretation of the passage) see the death of the covenant maker as symbolically "brought" into the picture. See further *infra*, text at nn.367–377.

<sup>351</sup> Moffatt 1924:127 notes that ὁ διαθέμενος (cf. in v.17) is the technical term for "testator". Cf. Attridge 1989:256. See also Bruce 1965:212, citing i.a. (in n.126) Simpson 1946:189 on the use of ἀδιάθετος for intestate; Hughes 1979:39, who acknowledges the legal meaning but still prefers to view it as reflecting the LXX use of διατίθημι to translate *kavat* in ברית ברית. Cf. Lincoln 1999:21–24, noting Liddell & Scott, *ad loc.*, for the usage "to arrange, distribute (pieces of a sacrifice)".

<sup>352</sup> Better, with Attridge 1989:256 (comparing *Heb.* 2:2), "valid". Cf. Digest 34.4.30.1, in n.312, *supra*.

<sup>353</sup> This last clause represents a major difficulty for the "covenant throughout" interpretation (discussed below). How can a covenant not be in force so long as the covenant-maker is alive? Lincoln 1999:19f. cites with approval the translation of vv.16–17 by Lane 1991: "For where there is a covenant, it is necessary for the death of the one who ratifies it to be brought forward, for a covenant is made legally secure on the basis of the sacrificial victims, since it is never valid while the ratifier lives." But this last clause is falsified by the fact that once the sacrifice has been made, the "ratifier" does live, yet the covenant *is* valid. Hahn 2005:80 would like it to mean: "while the covenant-maker is still ritually alive, not yet having undergone the death represented by the sacrificial animals." But at 81 he concedes that the language does not appear to be figurative and argues that "after a covenant has been broken . . . the only means of enforcing the covenant is to actualize the covenant curses, which ultimately result in the death of the covenant-maker-turned-covenant-breaker" (83, cf. 84), instancing the Sinai covenant broken at the golden calf apostasy (86).

<sup>354</sup> Hyssop appears in a range Hebrew Bible texts: *Exod.* 12:22 (in preparing to smear the blood of the paschal lamb on the doorposts of the Israelites in Egypt), *Lev.* 14:4, 6 (in the rite for cleansing the "leper"), 14:49, 51–52 (in the rite for cleansing a "leprous" house), *Num.* 19:6 (in the rite of the red heifer, for cleansing those rendered unclean by contact with a dead body).

<sup>355</sup> Apparently referring to the covenant ceremony of *Exod.* 24:3–8, though including some extra details that do not appear in Exodus (see, e.g., n.354, *supra*): "Moses came and told the people all the words of the LORD and all the ordinances; and all the people answered with one voice, and said, 'All the words which the LORD has spoken we will do.' (4) And Moses wrote all the words of the LORD. And he rose early in the morning, and built an altar at the foot of the mountain, and twelve pillars, according to the twelve tribes of Israel. (5) And he sent young men of the people of Israel, who offered burnt offerings and sacrificed peace offerings of oxen to the LORD. (6) And Moses took half of the blood and put it in basins, and half of the blood he threw against the altar. (7) Then he took the book of the covenant, and read it in the hearing of the people; and they said, 'All that the LORD has spoken we will do, and we will be obedient.' (8) And Moses took the blood and threw it upon the people, and said, 'Behold the blood of the covenant which the LORD has made with you in accordance with all these words.'"

- (21) And in the same way he sprinkled with the blood both the tent and all the vessels used in worship.
- (22) Indeed, under the law (κατὰ τὸν νόμον) almost everything is purified with blood, and without the shedding of blood there is no forgiveness of sins.

Here, too, the comparison of covenant with testament, perhaps reflecting the influence of the passage in *Gal.3*,<sup>356</sup> though widely acknowledged,<sup>357</sup> has also been vigorously contested: there are those who argue strongly for a “covenant throughout” interpretation of the passage.<sup>358</sup> The argument here is not based on any claim (as is made for Galatians) that the “legal analogy” interpretation is impossible,<sup>359</sup> although it is attacked on the grounds that the plural form ἐπὶ νεκρῶς (v.17) is inappropriate for the legal context: it is only one death, that of the testator, which is required to bring the will into force.<sup>360</sup> There is, however, evidence of a singular reading, νεκρός.<sup>361</sup> It is also argued that the figure of Jesus as μεσίτης does not fit well the context of comparison with a will.<sup>362</sup> But, as argued above, the appropriate criterion is not that of “complete overlap” (which can lead to contortions<sup>363</sup>),

<sup>356</sup> So Hoppin 2004:151, citing Witherington 1991.

<sup>357</sup> E.g. Moulton and Milligan 1908:563f.; Héring 1970:79. Allen 2010:477f. provides a lineup of 12 scholars favouring the legal analogy and 9 favouring covenant throughout, and summarises the arguments at 477-81. See also Swetnam 1965 for an attempt to view vv.16-17 as comparing the new covenant to a testament, and the old as an imperfect testament which prefigures it (largely retracted in Swetnam 2008, in the light of Hahn 2004).

<sup>358</sup> Notably: Anon 1968; Hughes 1979; Lane 1991; Lincoln 1999; Hahn 2005; Allen 2010.

<sup>359</sup> Indeed, Campbell 1972 argues that “the author of Hebrews (and his readers) was familiar not only with the true Old Testament conception of *brith* as disposition, but also with the contemporary Greek usage of διαθήκη as outlined above, and that the two words express fundamentally the same idea” (at 111).

<sup>360</sup> Hughes 1979:43f., 46; Hahn 2005:80. But the interpretation of νεκρῶς as referring to the sacrificial animals is weakened by the fact, noted by Lincoln 1999:26, that the term is used in the LXX almost only in regard to dead people, the one exception being the dead lion of *Eccles.* 9:4.

<sup>361</sup> See Tischendorf, 8th ed. (from the biblos apparatus).

<sup>362</sup> Hughes 1979:64 cites Behm 1912:79 n.1 for the absence of the phrase (v 15) μεσίτης διαθήκης from the papyri “nor indeed in the legal sphere of testaments” and argues against an argument to the contrary based on Clement, *Stromata* V.8.55.4. Attridge 1989:255 argues: “. . .because the covenant/testament requires the testator’s death, and the “living God” (9:14) cannot, by definition, die, that is the mediator’s role.” But that would assume that, for the author of Hebrews, Jesus was not divine. One could, of course, view v.15 as indicating two distinct roles for Jesus: as μεσίτης of the new covenant on the one hand, and as a redemptive sacrifice on the other. Proponents of the “covenant throughout” position include McKnight and Church 2004:205; Hahn 2005:70, who sees Christ as a mediator (*Heb.* 9:15; 12:24), not a “testator”, and one, moreover, who “does not die in order to *leave* an inheritance to the Church, but rather to *enter* the inheritance himself (*Heb* 1:3-4, 2:9, 9:11-12, 10:12-13), which he then “shares with his “brothers” (*Heb* 2:10-3:6)”.

<sup>363</sup> Thus Behm 1965:131f. sees the situation in Hebrews as “much the same as in Paul”, with here (again) the use of testament as “a general illustration from experience”. He nevertheless (perhaps because here “regard is paid to the fact that in the case of God’s testament the presuppositions of this validity . . . are very different from that of a human will, i.e. the death of the testator”) argues that this does not justify us in deducing that the term is used in the sense of “testament”. “To the depiction of the superiority of the high-priestly ministry of Christ in heaven, which through his sacrificial death accomplished an eternal redemption (9:1-14), the author adds (9:15f.) an explanation for the necessity of the death of Christ to salvation. . . . But what is the necessary connexion between the death of Christ and the new διαθήκη? The author answers in 16f. . . . If a διαθήκη is to come into force, death is presupposed. In the light of the external similarity that there is both death and a διαθήκη, he jumps from the religious to the current legal sense of διαθήκη, even at the risk of involving himself in contradictions which show that there is no real parallel. The Christ, who is μεσίτης, must act as testator for God, whose will it is, but who does not die. [But] a consistent application of the testament metaphor (which he thinks is excluded by the term translated “ratified” in v.18) would lead to the absurd idea that in the institution of the first διαθήκη the death of the sacrificial beasts represented that of the testator, i.e. God. . . . διαθήκη is everywhere else used in Hb in the sense of “disposition” . . . of God, which reveals to men His will, and especially His saving will, or it is the order thereby established as a divine institution.” He goes on (at 132) to discuss *Heb.* 8, based on *Jer.* 31:31 (see n.50, *supra*).

and it is clear that v.15, despite its use of κληρονομία, is concerned with διαθήκη as covenant,<sup>364</sup> not will. In fact, the allusion in μεσίτης may well be to the patron/client relationship (as, even more clearly, in *Gal.* 3:19-20<sup>365</sup>), in which, deSilva has argued, the patron often served as an intermediary or “broker” to a higher status patron, and which he sees as applied to Jesus as a mediator of God’s patronage.<sup>366</sup>

The alternative, “covenant throughout”, interpretation of the passage involves taking ὁ διαθέμενος in vv.16 and 17 as the covenant maker, and the requirement of his death in those verses as a cultic requirement of covenant making.<sup>367</sup> In the Hebrew Bible, animal sacrifice is often<sup>368</sup> (but not always<sup>369</sup>) involved in covenant making. Equally, various biblical sources pronounce a curse on the covenant breaker.<sup>370</sup> These sources are then combined to interpret the animal sacrifice as a symbolic self-imprecation by the covenant maker:<sup>371</sup> by the animal sacrifice, he “brings into the picture”<sup>372</sup> an image of his own death should he breach the covenant. Ancient Near Eastern documents are cited as recording such symbolic enactment of their death curses during covenant-making rituals.<sup>373</sup> However, in the new covenant, Jesus takes the place of the animals; it is his blood that “redeems them [the covenant breakers] from the transgressions under the first covenant” (v.15). That, of course, is a rather different function from that of symbolically representing the penalty for breach of

<sup>364</sup> The “spiritual testament” genre, whose history is sketched in sections 4-5 above, serves as an important bridge between the two senses of διαθήκη.

<sup>365</sup> See n.302, *supra*.

<sup>366</sup> See DeSilva 1999:33 on the role of the “mediator” in patronage (but without connecting this to μεσίτης terminology); 1999:49 on Jesus as “sole mediator” who “connects those who make themselves his clients to another patron” (1999:53), with many sources from the synoptics as well as Paul (1999:56–61). He integrates this with a traditional theological understanding in arguing that “even such a mediator is God’s gift to the world” (1999:53), stressing in particular the gift of Jesus’s death, which “has opened up for his clients access to God the Father, the great Patron” (58).

<sup>367</sup> Advanced, with some variations, by Hughes 1979, Lincoln 1999, Hahn 2005, Swetnam 2013:152–155. *Contra*, Bruce, who accepts that the basing of the new covenant on the death of Jesus is found elsewhere also in the NT; esp. (earliest) *I Cor.* 11:25 “This cup is the new covenant of my blood” (1965:209), while rejecting the view that the death of the sacrifice is the symbolic death of the maker of the covenant (1965:212).

<sup>368</sup> See Weinfeld *TDOT* II.259–61 for the range of expressions, other than *karat berit*, for making a covenant. Nor does such sacrifice always denote a symbolic self-imprecation by the covenant maker: see Hasel, *TDOT* VII.350–51 on *Gen.* 15.

<sup>369</sup> Conceded by Hahn 2005:80f., *pace* Lincoln 1999:5: “a covenant is always made over the death of a sacrificial victim”.

<sup>370</sup> Hahn 2005:76f., “Covenant Oath as Conditional self-malediction”, citing *Ezek.* 17:16 and the covenant curses of *Lev.* 26 and *Deut.* 28. But we may note that these are all threatened curses for covenant violation, not actual self-maledictions. For the latter, the self-imprecator must either utter the curse him/herself or hear it and respond “Amen”, as in the *sotah* procedure against a wife suspected of adultery in *Num.* 5:22, and the curses of Mount Ebal in *Deut.* 27:14–26 (which may or may not form part of the anticipated covenant ceremony – if that it be – after entry into the land, described in *Deut.* 27:1–8; in fact, the term *berit* is not used in this chapter at all).

<sup>371</sup> Hughes 1979:41.

<sup>372</sup> See n.350, *supra*.

<sup>373</sup> Hahn 2005:78, citing the 8th cent BCE treaty of Ashurnirari V and Mat’ilu King of Arpad (Pritchard *ANET* 1969:532–33; the text was earlier quoted by Hasel, *TDOT* VII.350), which includes: “This head is not the head of a lamb, it is the head of Mat’ilu . . . If Mat’ilu sins against this treaty, so may, just as the head of this spring lamb is torn off . . . the head of Mat’ilu be torn off.” The treaty in effect pronounces a curse, but without using the word curse and without indicating that there was an oral curse. Cf. the Vassal Treaties of Esarhaddon (at *ANET* 1969:539): “May the great gods of heaven and earth . . . curse you angrily . . .” (§56) . . . May these gods look on if we rebel or revolt against Esarhaddon” (§57). Lincoln 1999:16f. also refers to the ancient Near Eastern tradition of treaties, noting that all these cultic elements (including vows, blessings and curses, and a sacrifice) are not found in all of them.

the new covenant which Jesus is initiating. But since the function of the new covenant is in part to remedy the defects of the old (as in *Jer.* 31, but in a different way), adherents of this view attribute to the death of Jesus a dual role, on the one hand of “fulfilling” the old covenant, on the other of initiating the new.<sup>374</sup> But if the new covenant anticipates (like that of Jeremiah, but in a different way) no future sin,<sup>375</sup> why should its initiation require a death?<sup>376</sup> It is difficult to resist the conclusion that there is an element of circular reasoning in this: the Hebrew Bible is interpreted in the light of the New Testament,<sup>377</sup> and the New Testament is then seen as a fulfilment of the Old.

As in Galatians, it is clear here that the choice of legal model is driven by the theological message. This is a form of testation that takes effect only (and not merely partially, as in the *meta ten teleuten / matenat bari* model) on death — thus, as we shall see in the next section, the Roman model. The argument of the pericope is thus: (a) the new covenant (διαθήκη) initiated by Jesus, by virtue of which the elect receive an eternal inheritance (κληρονομία), involves a death which redeems them from the sins incurred under the first covenant (v.15); (b) [don’t be surprised at that], since [as you know] a will (διαθήκη) does not come into force until the death of the testator is established (vv.16–17); (c) and even the first covenant involved the sacrifice of blood, albeit the blood of animals<sup>378</sup> (*Exod.* 24) (vv.18–20), which in the law of the first covenant, too, had the function of purification and forgiveness of sins.

In both Galatians and Hebrews, the Vulgate (as elsewhere) consistently translates διαθήκη as *testamentum*.

## 7. THE ROMAN TESTAMENTUM AND ITS THEOLOGICAL ATTRACTION

While the precise legal referent of the New Testament uses of διαθήκη in these passages (a function in part of the primary audience they are assumed to be addressing<sup>379</sup>) may be subject to discussion, what is indisputable is that they use legal analogies from inheritance primarily for their connotations regarding (according to the theological context) revocability or irrevocability. Tertullian, who is credited with legal knowledge,<sup>380</sup> must have been aware of this. But when we pose the same question of the precise legal referent to Tertullian’s use

<sup>374</sup> Hughes 1979:48f., 51, 52–57, using the language of consummation in relation to the old covenant; Lincoln 1999:8.

<sup>375</sup> At least on the part of those “elected” (n.348, *supra*) to be justified by faith. Hughes 1979:82 comments on the Galatians passage: “By undergoing the curses of the Mosaic covenant, he [Jesus] makes available reception of the blessing promised to Abraham,” basing himself on the immediately preceding passage: *Gal.* 3:10–14, which commences (3:10): “For all who rely on works of the law are under a curse; for it is written, “Cursed be every one who does not abide by all things written in the book of the law, and do them.” We may note that the proof-text (*Deut.* 27:26) curses those who actually violate the law, while Paul extends this to all who rely on the law, because of the potential of violation.

<sup>376</sup> For Hughes 1979:38f., the significance of death here is that “Christ had to die in order to become the priestly mediator of the new covenant . . . not to explain why a death had to occur before there could be an external inheritance.”

<sup>377</sup> Dines 2004:145 observes that for early Christian writers “the NT . . . was the point of departure for understanding the OT.” That tradition persists.

<sup>378</sup> Not the blood of Moses: Héring 1970:80, and see further 80f. on the relationship to *Exod.* 24.

<sup>379</sup> See Llewellyn, “Revocation”, 45f. and n.58.

<sup>380</sup> See n.62, *supra*.

of *testamentum*, the answer appears less complicated. On the one hand, *testamentum* did not have a well-established theological meaning, unlike the LXX use of διαθήκη; on the other hand, the terminology and rules of the Roman law of succession were (by this time) more precise than those of their Greek, Hellenistic or Jewish predecessors.

It may be useful, first, to summarise (from the discussion in s.3) the different forms of testamentary disposition (Greek, Jewish and Roman):

Outright <i>inter vivos</i> gifts	which may be intended either as a pay-off, effectively disinheriting the donee from any later entitlement or as an advance or even a gift without any prejudice to later entitlement; <sup>381</sup>
The spiritual “testament”	not involving property at all, but moral/religious advice; <sup>382</sup>
The Greek μετὰ τὴν τελευτὴν	bilateral dispositions taking effect partially immediately and partially on death; <sup>383</sup>
The Greek διαθήκη	typically, a unilateral disposition but sometimes taking effect partially during the testator’s lifetime; <sup>384</sup>
The Rabbinic <i>matenat bari</i>	an <i>inter vivos</i> , bilateral transfer (effective immediately and thus irrevocable), in which the donor retained a usufruct and the donee a future interest, which could be alienated (with the consent of the donor) during his lifetime; full ownership passed to the donee only on the death of the donor; <sup>385</sup>
The Rabbinic <i>shekhiv mera</i>	an informal will, oral or written, by a terminally ill testator, effective on death, revocable and automatically revoked if the “testator” recovered; <sup>386</sup>
The Rabbinic <i>diatiki</i>	a written document, whose precise history and legal significance for Jewish law remains unclear, but which apparently required delivery, and once delivered was irrevocable until after recovery. <sup>387</sup> Automatic revocation by a later <i>diatiki</i> is unclear; <sup>388</sup>
The Roman <i>testamentum</i>	various <i>ius civile</i> (ceremonial) forms, replaced in practice by Tertullian’s time by the praetorian <sup>389</sup> written will, <sup>390</sup> whose characteristics are discussed below.

<sup>381</sup> See n.344, *supra*.

<sup>382</sup> *Gen.* 27, 49 (s.4, *supra*); the Testament genre (s.5, *supra*).

<sup>383</sup> See text at nn.117–141, 150–180, 185–196, *supra*.

<sup>384</sup> See text at nn.71–76, *supra*.

<sup>385</sup> See text at nn.184–187, 192–196, *supra*.

<sup>386</sup> See text at nn.188–191, *supra*.

<sup>387</sup> See text at nn.197–204, *supra*.

<sup>388</sup> See text at nn. 205–206, *supra*.

<sup>389</sup> And thus available also to *peregrini*, though this became irrelevant when the edict of Caracalla in 212 CE (18 years before Tertullian’s death) conferred Roman citizenship on all free inhabitants of the Empire.

<sup>390</sup> On Roman wills in the papyri, see Taubenschlag 1955:193–200: he notes that up to Alexander Severus, Roman testaments generally were mancipatory wills written in Latin and translated into Greek, but thereafter they were written in Greek (193f.).

We may now list the characteristics (several of them unique<sup>391</sup>) of the Roman will, which may have proved theologically significant:

- a) Writing: While the original forms of Roman<sup>392</sup> will did not require writing,<sup>393</sup> by the 2nd century CE this had become a *de facto* requirement: the praetorian will, by granting *bonorum possessio cum re* (i.e. even against the civil law heir), was termed *testamentum*, and required both writing and sealing (by seven witnesses).<sup>394</sup>
- b) Whereas the *matenat bari* came into effect (at least partially) immediately, the praetorian *testamentum* came into effect only at death, and was therefore “ambulatory”: it included everything in the “estate” at time of death.
- c) The praetorian *testamentum* was entirely unilateral, requiring no consultation with or participation of the intended beneficiaries.
- d) The Roman *testamentum* conferred complete freedom of testation,<sup>395</sup> though the disinheritance<sup>396</sup> of an heir who would have been entitled at civil law could be challenged through the *querela inofficiosi testamenti*.<sup>397</sup>
- e) The Roman *testamentum* was revocable.<sup>398</sup> Indeed, as in modern law, a later will automatically (and completely) revoked an earlier one.<sup>399</sup>

So viewed, it is not difficult to appreciate the theological attraction of describing the Christian scriptures as the “New Testament”.<sup>400</sup> A written document was required (notwithstanding the oral teaching which preceded it), especially given the relation of the Christian teachings to the earlier written text of the Hebrew Bible. If Jesus was the supposed “testator” (with Lactantius), the significance of his death was not only that of a redemptive

<sup>391</sup> Yaron 1960:34: “The differentiation between gifts in contemplation of death and testamentary dispositions is more pronounced in Roman law. Indeed, the Roman testament has been held to be of a unique nature, which renders difficult its comparison even with the Greek testament” (citing Bonfante, *Scritti Giuridici* I (1926), 328ff.).

<sup>392</sup> For the history, see Gaius, *Institutes*, II.101–104, 115–117, 119; Buckland 1963:283–86; Watson 1971:8–21.

<sup>393</sup> On the form of the mancipatory will, see Buckland 1963:284; Long, “Testamentum”, 6, 8–9 (internet version); Watson 1971:12.

<sup>394</sup> Buckland 1963:285: this was not true in theory for the civil law (mancipatory) will, but in practice was adopted even there, in order to secure the praetorian remedies.

<sup>395</sup> A rule going back to the Twelve Tables: “Uti legassit super pecunia tutelave suae rei ita jus esto” (Ulp. *Frag.* tit. XI. 14). See Long 1875:7. Some classes of heirs could be disinherited only expressly (*nominatim*): see Buckland 1963:321–324. Behm 1965:124 notes that in the Hellenistic period the testator “normally” has full power of disposition.

<sup>396</sup> See also Lactantius: “the people of the Jews being deprived and disinherited” (text at nn.291–292, *supra*).

<sup>397</sup> See Buckland 1963:327–332; Long, “Testamentum” 11–12 (internet version).

<sup>398</sup> Llewellyn, “Revocation”, 42, compares the Roman with the Greek will in this respect, as distinct from the *meta ten teleutēn*.

<sup>399</sup> Gaius, *Institutes*, II.144: “Posteriore quoque testamento quod iure factum est superius rumpitur”. The rule is ascribed to the emperor Antoninus Pius (138–161 CE) in P. Wash. Univ. 13, a papyrus of 161–169 CE from Oxyrhynchus, II.2–3 of which are restored as “in accordance with the instructions that *divus* Aelius Antoninus that in making a second will he has annulled the first”: see Llewellyn, “Revocation”, 41. This apparently contrasts with earlier Hellenistic practice, about which Llewellyn, *ibid.*, at 42, remarks: “The preparation of a new will did not of itself revoke a former will. Indeed, insofar as there was no contradiction, both wills were allowed to stand.”

<sup>400</sup> The exact historical process by which this became normative is beyond the scope of the present paper; light may be cast upon it by further study of the Beuron database. It is striking that the Vulgate translation is even more consistent in rendering occurrences of *διαθήκη* in the New Testament as *testamentum* than is the LXX in translating *berit* as *διαθήκη*. The same issues arise here in the former as in latter context (on which see text at n.149, *supra*). Yet it is difficult to imagine that Jerome’s understanding of *berit* as *pactum/foedus* was entirely erased when *testamentum* was used in NT passages referring to the covenants of the Hebrew Bible.



sacrifice,<sup>401</sup> but was also needed to render the new covenant binding and unchangeable. The “ambulatory” character of the testament also served to emphasise the totality of his teaching, up to and including the words on the cross. Its unilateral character would reinforce the teaching of grace or promise, as opposed to a bilateral covenant. Its freedom of testation served to bring within its terms a universal audience, but also to exclude those who did not fully subscribe to its teachings.

Most important, it completely revoked any earlier *testamentum*. Tertullian strongly states his supersessionism in *Adversus Iudaeos*:

Who else, therefore, are understood but we, who, fully taught by the new law, observe these practices, – the old law being obliterated, the coming of whose abolition the action itself demonstrates. Therefore, as we have shown above that the coming cessation of the old law and of the carnal circumcision was declared, so, too, the observance of the new law and the spiritual circumcision has shone out into the voluntary observances of peace.<sup>402</sup>

If so, we may ask, why was the ‘Old Testament’ included in the Christian Bible at all (evidenced at least from Origen’s Hexapla from the late 2nd cent)? We may recall that Tertullian’s reference to the two “testaments”<sup>403</sup> was in the context of his rebuttal of Marcion,<sup>404</sup> who rejected the “Old Testament” completely, on the more radical ground that its source was not the God recognised by Christians. For Tertullian equally to have abandoned the “Old Testament” entirely might have appeared to concede too much to his opponent (not to mention the value of the “Old Testament” as indicating prophecies which would be fulfilled in the “New”<sup>405</sup>). Or, more fully: the revelation to the Jews spoke of a covenant to them which would be replaced by a “new covenant” (*Jer.* 31:31), now revealed in the “New Testament”.

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<sup>401</sup> See *Heb.* 9:15ff., discussed in the latter half of section 6, *supra*.

<sup>402</sup> *Adversus Iudaeos* III.10: *Qui igitur intelleguntur alii quam nos qui in nova lege edocti ista observamus oblitterata veteri lege cuius abolitionem futuram actus ipse demonstrat. Igitur sicuti supra ostendimus, quod vetus lex et circumcisio carnalis cessatura pronuntiata est, ita et novae legis et spiritalis circumcisions observantia in pacis obsequio eluxit.* In the English translation of the Ante-Nicene fathers, ch.3 carries the title: “Chapter III. – Of Circumcision and the Supersession of the Old Law” (as at [http://www.tertullian.org/anf/anf03/anf03-19.htm#P2021\\_691723](http://www.tertullian.org/anf/anf03/anf03-19.htm#P2021_691723)), though this does not appear in the Latin text at [http://www.tertullian.org/latin/adversus\\_iudaeos.htm](http://www.tertullian.org/latin/adversus_iudaeos.htm).

<sup>403</sup> Cf., in the sense of covenants, *Vulg. Gal.* 4:24: *sunt duo testamenta.*

<sup>404</sup> See n.60, *supra*.

<sup>405</sup> I have argued, for example, that *Matt.* 5:17-18 (“Do not suppose that I have come to abolish the law and the prophets; I did not come to abolish, but to complete/fulfil. I tell you this: so long as heaven and earth endure, not a letter not a stroke will disappear from the law until all that must happen has happened . . .”) alludes to the law of the prophet in *Deut.* 18:14–19; see Jackson, “The Prophet and the Law . . .” in *Essays*, 20.

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