*ratione naturali inter omnes homines*:

A Case Study of Local Law in Roman Provinces

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Abstract:

In recent decades, there has been growing recognition that examination of the relationship between Roman law and Jewish law illuminates our understanding of Roman imperialism. Research of Roman law in the provinces tends to rely upon authentic, but randomly discovered, provincial documents. From such documents, it is very difficult to ascertain theoretical conceptions of the law and even more difficult to reconstruct the process underlying their development. In contrast, Rabbinic literature presents an organized, theoretical, and multi-layered legal system similar to that found in Roman legal literature. Through a diachronic analysis of rabbinic and Roman legal literatures, it is possible to identify the developmental processes that occurred in each and to understand the relationships between them. In this article, I demonstrate this possibility by examining a parallel legal process that occurred in rabbinic and Roman literature. Elucidation of this process can lead to the development of new models for ascertaining Roman influence on local law in the provinces.

# Introduction

In recent decades there has been growing recognition that examination of the relationship between Roman law and Jewish law can illuminate our understanding of Roman imperialism. The primary sources of rabbinic law, the Mishnah, the Tosefta, and the Tannaitic Midrashim, were created under Roman rule.[[1]](#footnote-1) The authors of these works lived for several generations in a Roman province and by 212, following the *Constitutio Antoniniana* at the latest, they were also Roman citizens. That their works would have been influenced by Roman culture and law is almost self-evident. Indeed, for many decades, scholars have been working on identifying and analyzing parallels between Jewish and Roman law.[[2]](#footnote-2)

The vast majority of the studies were motivated by an interest in Jewish law and history and they contributed primarily to those fields. However, the trend has been changing.[[3]](#footnote-3) Several recent studies have focused on the influence of Roman law on Jewish law, specifically as a unique case study within the broader concern with the general influence of Roman law in the provinces. The Roman Empire covered a vast territory and incorporated many provinces. Under its rule were various peoples, each with its own legal tradition and particular legal practices. As is generally accepted today, the Roman imperial system acknowledged a central principle of legal pluralism and did not categorically reject other legal systems,[[4]](#footnote-4) permitting provincial law systems that varied in the ways they combined local laws and customs with Roman law. This phenomenon poses a difficult challenge for the scholar. The central literature of Roman law was written by jurists and Roman authorities, mostly in Rome and referring to Roman citizens. Mention of local provincial legal practices or references to them is relatively rare. Scholars learn about local customs in the provinces from random hints in the literature, primarily from epigraphic findings: contracts, inscriptions, and sometimes even law collections that were preserved for one reason or another for future generations.[[5]](#footnote-5) By comparing these fragments with Roman legal literature, scholars try to reconstruct the legal situation in the provinces.

In this context, the Jewish legal system stands out as a unique case. The Mishnah, a work edited and published in the Land of Israel in the early third century, is the most comprehensive legal text preserved from the provinces of the Roman Empire. Although most of the Mishnah deals with religious matters that have no direct relevance to the legal system, large parts of it deal with civil law, personal status, criminal law, and more. A comparative historical analysis of the Mishnah can demonstrate how a local legal system developed in a Roman province. Such an analysis would impact our understanding of Roman imperialism as well as our perceptions of the socio-political perspectives of its provincial residents. The analysis could serve as a model for understanding processes that occurred in other provinces as well, of course, with the proviso of excluding characteristics relevant only to the Jewish situation.

The advantage of the Mishnah in this context is not merely quantitative. Starting from the late twentieth century there were multiple critiques of the classic studies of Roman law in the provinces. Generally, until the late twentieth century (and somewhat to this day) the approach was to treat the subject from the perspective of a struggle between the Roman legal system and the local legal system. Scholars assessed where the Roman system dominated and where local laws ‘survived’. In recent years criticism of this approach has come from several directions.[[6]](#footnote-6) Among other things, it has been argued that one cannot simply compare Roman legal literature with legal documents from the provinces. Whereas the former represents the ‘law on the books’, the latter are the ‘law in practice’. Many of the differences between them therefore derive from their nature rather than from their socio-political contexts. Beyond this, scholars have proposed additional models of legal development. Until the mid-twentieth century, the dominant theory was of ‘top-down’ development, i.e., the authority determines the law and enforces it among the population. However, awareness of alternative models has been growing, such as ‘bottom-up’ development, i.e., the adoption of prevailing practices by the authorities, and various other processes of acceptance by the population that influence the creation of the law.

Recent research has shown that the conceptual frameworks ‘Roman law’ and ‘local law’ are not rigid, and change according to the context. What is defined as a law or local custom often reflects a foreign influence and what is perceived by the locals as Roman law is not necessarily the law that appears in the legal literature. In addition, some scholars have questioned the concept of ‘law’ itself, arguing that the term blurs the distinctions between different phenomena such as customs, social agreements, religion, and so forth.[[7]](#footnote-7) These critiques make comparisons between legal systems very difficult. In addition, the extensive scholarship on Roman law has undergone many tumultuous developments. it is not always simple to know what was ‘Roman law’ at a particular point in time.

Given the above issues, the comparison between the literary sources of Jewish law and the literary sources of Roman law provides a unique perspective. Like Roman legal literature, Jewish legal literature is to a large extent the product of an elite (at least in its own eyes) that seeks to impose law from top to bottom.[[8]](#footnote-8) It reflects the law of the book, not necessarily legal practice. Much as Roman legal literature represented Roman law, the Mishnah was perceived by its creators as representing specifically Jewish law even though both systems drew from foreign sources. Furthermore, reconstructing the textual development of rabbinic literature and Roman legal literature largely entails similar problems.[[9]](#footnote-9) These characteristics permit the comparison between rabbinic and Roman legal literatures to serve as a test case that barely exists elsewhere. The comparison can illuminate the intellectual connections between jurists as well as theoretical conceptions of law, things that are very difficult to ascertain solely from the practical manifestations of the law. Furthermore, it can provide a complex account of Roman influence on local law, such as how Roman influence impacted the form of the law without necessarily influencing its content.[[10]](#footnote-10)

As will be demonstrated in this article, exploiting the unique potential of rabbinic literature requires the comparative analysis of rabbinic and Roman law from a diachronic rather than a synchronic perspective. To identify how Jewish law was influenced by Roman law, we need to examine the literary and legal development of the Roman and Jewish sources. The diachronic view proposed here reveals, for the first time to my knowledge, a common textual and conceptual process that occurred roughly at the same time in Roman and Jewish legal literatures. This case study makes it possible to develop new models of the relations between Roman jurists and provincial residents.

# The Sources

This study involves a comparison between two Jewish and Roman legal texts. On the Jewish side, I cite several laws from the Tosefta (literally ‘Addition’) and on the Roman side, I will use a selection from *Res cottidianae* *sive aurea* (Common Matters or Golden Things) composed by the Roman jurist Gaius. For readers who are not familiar with these works, I offer a brief introduction.

The Mishnah (from the Hebrew root *shin*-*nun*-*yod*, [שנ"י] to repeat) is the first and most important codex of rabbinic law. It is a comprehensive compilation edited according to tradition by Rabbi Judah the Prince at the beginning of the third century CE. The compilation is primarily based on traditions from the second century CE, but it also includes some traditions from the end of the first century and the beginning of the third. All halakhic works composed thereafter derive from the Mishnah or one of the compilations created in its wake. The Sages mentioned in the Mishnah are called *‘tannaim’* (from the root, *taf*, *nun*, *yod* [תנ"י], the Aramaic form of the Hebrew root, *shin*, *nun*, *yod* [שנ"י], to repeat). The Tosefta is a compilation that is structured as a supplement to the Mishnah. It is usually arranged in parallel to the Mishnah and expands the discussion by adding explanations, additional opinions, relevant discussions, and more.[[11]](#footnote-11) According to current scholarship, the Tosefta was compiled about half a generation after the Mishnah, that is, in the middle of the third century. However, the materials in the Tosefta are largely tannaitic, that is, they belong to the same period as the materials in the Mishnah.[[12]](#footnote-12)

We know only a little about the life of Gaius. He probably worked around the middle of the second century CE, but only in the fifth and sixth centuries did he become well-known. Gaius’s main works are introductory writings composed for beginner students of Roman law. From a legal perspective, they are considered relatively simple writings, without in-depth analysis. For this reason, they probably gained popularity and may have found their way even to distant audiences (like the Rabbis?).[[13]](#footnote-13) Gaius’s best-known work is the *Institutes*, a sort of introduction to Roman law divided into four books. Discovered at the beginning of the 19th century, a large manuscript of this work is the only work from the classical period of Roman law that has survived almost completely. Unfortunately, the manuscript is physically damaged and it may be a corrupted version of the original work. Consequently, there is some dispute regarding the extent to which it may be relied upon for the reconstruction of classical law.[[14]](#footnote-14)

The rest of Gaius’s works, including *Res cottidianae*, are quoted in Justinian’s *Digest* (abbreviated *Dig*.). The *Digest* was edited by the jurist Tribonian in the third decade of the sixth century CE at the order of the Byzantine emperor, Justinian I. The purpose of the *Digest* was to collect and summarize the writings of Roman jurists from the classical period and it quotes extensively from hundreds of legal writings. The majority of these works have reached us solely through the *Digest*, which is our main source of knowledge of classical Roman law.[[15]](#footnote-15) However, the composition of the *Digest* involved adapting material to update legal concepts and decisions. Scholars who seek to reconstruct the law in the classical period must determine to what extent the text in the *Digest* is faithful to the source and to what extent it reflects Justinian processing.[[16]](#footnote-16)

The Tosefta and Gaius are not far from one another in time and place. Gaius’s work was probably written around the seventh decade of the second century.[[17]](#footnote-17) Gaius’s place of activity is unclear, but scholars assume that he spent some time in the eastern provinces, and even in Berytus in Roman Syria.[[18]](#footnote-18) The Tosefta was created in Galilee, not far from Berytus. Although it was edited, as mentioned, in the middle of the third century, the main material in the Tosefta (and in the Mishnah) is attributed to the Sages of Gaius’s generation. The passage from the Tosefta that I cite below refers to Rabban Shimon ben Gamliel who was active more or less at the same time as Gaius. It is therefore not impossible that there was some historical connection between the Jewish and Roman compositions. Still, it should be emphasized that the works are very different from one another, and, for the time being, the example that follows is to be regarded as an exception.

# Gaius

In the second book of *Res cottidianae*, Gaius presents a discourse on the difference between acquiring ownership by civil law (*iure civili*) and acquiring ownership by the law of nations (*ius gentium*). The discourse begins with the following:

Of some things we acquire ownership under the law of nations (*iure gentium*) which is observed, by natural reason (*ratione naturali*), among all men generally, of others under the civil law (*iure civili*) which is peculiar to our city. And since the law of nations is the older, being the product of human nature itself, it is necessary to treat of it first... (*Dig*. 41.1.1).[[19]](#footnote-19)

Thereafter Gaius enumerates various modes of acquisition suitable for both, but primarily the second type. In the following discussion, I focus on four modes of acquisition that Gaius enumerates in paragraph 7.7-13:

7. When someone makes something (*speciem aliquam*) for himself out of another person’s materials, Nerva and Proculus are of the opinion that the maker owns that thing because what has just been made previously belonged to no one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be owner of what is made from them since a thing cannot exist without that of which it is made (*quia sine materia nulla species effici possit*)

In later legal literature, this mode of acquisition is called *specificatio*, that is, turning ‘material’ (*materia*) into a specific thing (*species*). Gaius adds examples to clarify the matter:

Let us say, by way of example, that I make some vase from your gold, silver or copper, or a ship, cupboard or benches from your timber, a garment from your wool, mead from your wine and honey, a plaster or eye-salve from your drugs, wine, oil, or flour from your grapes, olives, or ears of corn.

In all these cases, the raw material turns into a finished product. Gaius indicates that the Proculians and the Sabinians, two schools of classical Roman law, disagreed about ownership but that there also is an intermediate approach that distinguishes between different cases:

There is, however, the intermediate view (*media sententia*) of those who correctly hold that if the thing (*species*) can be returned to its original components (*materiam*), the better view is that propounded by Sabinus and Cassius. But if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus, a finished vase can be again reduced to a simple mass of gold, silver, or copper; but wine, oil, or flour cannot again become grapes, olives, or ears of corn; no more can mead be reconstituted as wine and honey or the plaster or salve as the original drugs…[[20]](#footnote-20)

Gaius then refers to other similar examples, such as a case where the materials of two people are mixed together. Thereafter he turns to another legal matter:

10. When someone builds on his own site with another’s materials, he is deemed to be owner of the building because all that is built on it becomes part of the soil (*omne quod inaedificatur solo cedit*). However, the owner of the materials does not thereby lose his ownership of them; but he meanwhile cannot bring a vindicatio for them or an action for their production (*ad exhibendum de ea agere*). by reason of the Law of the Twelve Tables which provides that no one is required to give up materials of another built into his premises but that he must pay double their value (*ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet*). The term used is ‘beam’ (*tignum*) but, in fact, covers any building materials. Hence, if the house should collapse for some reason, the owner of the materials can have a vindicatio for them and have an action for their production...

Here Gaius relies on a law originating from the *Twelve Tables* (from the fifth century BC). The original law prohibited removing a beam from a building whereas Gaius expanded the law to prohibit dismantling if the building was constructed using another person’s materials. He treats the opposite situation, a building constructed with the owner’s materials but situated on land belonging to another person in the next section:

12. Conversely, if a person were to build with his own materials on someone else’s site, he would make the building the property of the owner of the site, and if he knew that the site belonged to another, he would be treated as voluntarily parting with his materials so that even if the house should collapse, he would have no vindication for them.

This form of acquisition was later dubbed *inaedificatio*. Here too Gaius adheres to the principle that the land owner acquires the building materials, but he also addresses the question of compensation for the owner of the materials.

Of course, if the owner of the site were to claim the building but was unwilling to pay the value of the materials or the workers’ wages, he could be resisted with the defense of bad faith (*poterit per exceptionem doli mali repelli*), assuming the builder to have been unaware that the site belonged to someone else and to have genuinely built as though on his own land; but, if he knows the facts, his own fault will be imputed to him; for he rashly built on what he knew to be another’s land.

Gaius concludes with a similar law regarding planting (*implantatio*):[[21]](#footnote-21)

 13. If I plant someone else’s cutting in my land, it will be mine; conversely, if I plant my own cutting in someone else’s land, it will be his, provided, in each case, that it roots itself. For until it takes root, it remains the property of its former owner...

In these paragraphs, Gaius describes four forms of acquisition that were later referred to as *specificatio*, *tignum* *iunctum*, *inaedificatio*, and *implantatio*. In all these cases, the original owner loses possession of the item and another person acquires it. I return to a more detailed analysis of Gaius’s discussions after my presentation of the passage from the Tosefta.

# The Tosefta

In chapter nine of tractate *Bava Qamma,* the Mishnah deals with the law of a stolen item that has changed. Mishnayot (plural of mishnah) 1-2 address the many types of changes that may occur to the item. In each instance, the text specifies whether the thief must return the actual item and, if not, what compensation he must give to the victim.

One who has stolen pieces of wood and made them into utensils, wool and made it into clothing – he pays according to the time of the theft. If he has stolen a pregnant cow and it gave birth... If he has stolen an animal and it grew old, slaves and they grew old...a coin and it was invalidated... (*m. B.* *Qam*. 9:1-2).[[22]](#footnote-22)

The corresponding treatment of these laws appears in chapter 10 of the Tosefta. Dealing with the issue of change, the first laws in the Tosefta generally parallel the laws of the Mishnah (1-2).[[23]](#footnote-23)

 [1-4] One who has stolen a cow... If he has stolen wool and bleached it...This is the principle: Any stolen thing which persists (שהיא בעינה) and [the thief?][[24]](#footnote-24) did not change it from its original condition (מברייתה) – he [the thief] may say to him [the victim]: ‘Here, your property is before you’. But if [he] changed it from its original condition – he pays according to the time of the robbery.

Thereafter the Tosefta presents three laws that are without parallels in the Mishnah.

 [5] One who has stolen a beam (מריש) and builds it into a large house (בירה)[[25]](#footnote-25) – the School of Shammai says: the owner may demolish the house to recover the beam; but the School of Hillel says: he calculates all that [the beam] was worth and gives it to the owner, because of the ‘regulation of the repenters’ (תקנת שבין).[[26]](#footnote-26)

In content and style, this law is connected to the previous laws. The placement of the stolen beam in the building is similar to the change in a stolen object (laws 1-4) and the formulation, ‘one who has stolen’, at the beginning of the passage is identical to the opening of the law regarding a change in the stolen object. According to this law, the early schools of the *tannaim* disagreed regarding the stolen beam. The Tosefta then addresses the opposite case:

[6] If one enters the ruin (היורד לחורבתו) of his neighbor and erects it without permission (שלא ברשות), and when he departs and says: ‘Give me my wood and stone’ – they do not listen to him. Rabban Simeon b. Gamaliel says: the School of Shammai says: He had the right to it’ (הרשות בידו). But the School of Hillel says: ‘They do not listen to him’.

 In this case, a man has built with his own materials on another person’s property. According to Rabban Simeon b. Gamaliel, in this situation, the School of Shammai and the School of Hillel again disagree. However, according to the anonymous part of the Tosefta, it is clear in this case that the builder cannot dismantle the building. So in the end the Tosefta rules on the compensation due to the builder:

 [7] If one enters a ruin (היורד לחורבתו) of his neighbor and erects it without permission (שלא ברשות), [what does he get for his expenses?] They evaluate [the building] so that he [the builder] is at a disadvantage (lit. his hand is lower [ידו על התחתונה]). But if he enters with permission (ברשות), they evaluate so that he is at an advantage (lit. his hand is higher [ידו על העליונה]). How is ‘his hand higher?’ If the improvement was greater than the outlay [expenditure], he gives him the improvement; if the outlay was greater than the improvement, he gives him the outlay.

It is apparent that the Tosefta corresponds to the treatment by Gaius in content, phrasing, and order. The first law examined in the Tosefta is referred to in halakhic literature as *shinui* [change], and it is parallel in many respects to the Roman *specificatio*.[[27]](#footnote-27) The Tosefta then deals with the law of the stolen beam, which closely resembles the law of *tignum* *iunctum*, and thereafter with the law of one who squats in his neighbor’s ruin, which corresponds to the law of *inaedificatio*. An allusion in the Jerusalem Talmud suggests that the version of the Tosefta before them also included a law regarding planting, which corresponds to the law of *implantatio*.[[28]](#footnote-28) In the law of *shinui*, the Tosefta cites examples that are also found in Gaius, and the phrasing of the other laws is very similar to the language in Gaius. Particularly striking is the sequence – the Tosefta and Gaius present these laws in the same order. For the reader’s convenience, I present the comparison in a table:

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| --- | --- | --- |
| ***Res ottidianae*** | **Tosefta**  |  |
| 7. Let us say, by way of example, that I make… a ship, cupboard or benches from your timber, a garment from your wool,...There is, however, the intermediate view…[[29]](#footnote-29) | **{Mishnah**: One who has stolen pieces of wood and made them into utensils, wool and made it into clothing…}**Tosefta:**[1–4] …This is the principle… | ***Specificatio***(*shinui*/change) |
| 10. … by reason of the Law of the *Twelve Tables* which provides that no one is required to give up materials of another built into his premises...  | [5] One who has stolen a beam and built it into a large house... | ***TignumIunctum***(‘stolen beam’ /*marish hagazul*) |
| 12. Conversely, if a person were to build with his own materials on someone else’s site, …Of course, if the owner of the site were to claim the building but was unwilling to pay the value of the materials or the workers’ wages…[[30]](#footnote-30)  | [6] If one enters the ruin of his neighbor and erects it without permission…[7] If the improvement was greater than the outlay, he gives him the improvement; if the outlay was greater than the improvement, he gives him the outlay.[[31]](#footnote-31)  | *Inaedificatio*(‘one who enters’ *hayored*) |

The similarity in the content of the laws was noted by scholars many years ago, and we will discuss it below.[[32]](#footnote-32) In his book, *Jewish and Roman Law*, Boaz Cohen devotes attention to the similarity between *specificatio* and *shinui*, to the principles and examples discussed in each legal system at different times and in different sources. He emphasizes in his discussion the similarity in the order of the laws between the Tosefta and the *Digest* and concludes: ‘Note that the arrangement of the rules in the Tosefta corresponds more closely with the arrangement in the *Digest*…We are not suggesting that the Rabbis were familiar with the contents of the Digest, but they were certainly thinking along the same lines as the Roman jurisconsults’.[[33]](#footnote-33)

This quotation matches Cohen’s general approach, which is to refrain from arguing that the Roman system influenced the Jewish one. Cohen analyzes the systems primarily from a synchronic perspective. He compares the details and principles of the two systems but tends to ignore the developmental trends within each. Although certainly beneficial, his research obscures the true significance of the comparison between legal systems. That significance becomes evident from a diachronic analysis of the development of the sources. In the following section, I undertake such an analysis. To do so requires a deeper dive into the textual history of the compositions which the inexperienced reader may struggle with it. I have therefore limited the discussion to the minimum necessary to clarify my arguments.

# Development of the Laws in *Res cottidianae*

I begin with Gaius’s formulation, which is relatively simple. Above I cited the opening paragraph of Gaius’s discussion.

Of some things we acquire ownership under the law of nations (*iure gentium*) which is observed, by natural reason (*ratione naturali*), among all men generally, of others under the civil law (*iure civili*) which is peculiar to our city...(*Dig*. 41.1.1).

As indicated in the introduction, forms of acquisition in the laws of nations are not based on the laws of Rome, but on natural reason. Against this background, the law regarding the attached beam (*tignum iunctum*) stands out in its strangeness. First, Gaius himself writes (Paragraph 10) that the law is not property law and the stolen beam does not at any stage become the property of the thief. In other words, the issue is not ownership, but a limitation on the possibility of a claim (*vindicatio*). Moreover, there is nothing ‘natural’ about this limitation, for it is based on the *Law of the Twelve Tables*. The *Twelve Tables* are the oldest written source of Roman law, and its laws are peculiar to the city of Rome. It is unclear how one might consider the *Law of the Twelve Tables* as *ius gentium*.

It is possible that Gaius (or a later editor of his work) incorporated the law of *tignum iunctum* into the discussion even though it was not quite suitable. This incorporation probably would have been justified by the great similarity between this law – as Gaius presents it – and the law of *inaedificatio*. Gaius sets forth these two laws as mirror images of one another. *Inaedificatio* refers to someone who builds his own materials on the land of another person. *Tignum iunctum* is expanded to include anyone who builds on his own land with materials belonging to another person. The textual combination leads to a conceptual change. Whereas the *Law of the Twelve Tables* primarily relates to the issue of dismantling the building, Gaius views it as related to the principle that ‘all that is built on it becomes part of the soil’ (*omne quod inaedificatur solo cedit*). In other words, the problem is not related to the dismantling of the building, but to a perception of property that sees what is attached to the ground as part of the ground.

Parallels within Roman legal literature support the reconstruction that I have proposed. The *tignum iunctum* law is found in the *Twelve Tables* and is cited throughout Roman literature.[[34]](#footnote-34) In those citations, *tignum iunctum* involves the prohibition against uprooting the beam, not the question of ownership.[[35]](#footnote-35) Hence, those citations reinforce Gaius’s position that the issue is not ownership, but rather it relates to an ancient prohibition against uprooting a beam from a building.

More important is the parallel to the discussion of ownership found in the Gaius’s *Institutes*. Many sections of *Res cottidianae* have close parallels in the *Institutes*, among them, the discussion we are currently dealing with. Roman legal scholars disagree regarding the relationship between the compositions in general and with regard to this discussion in particular.[[36]](#footnote-36) For our purposes, it is significant the law of *tignum iunctum* is not mentioned in the discussion in the *Institutes*.[[37]](#footnote-37)

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| ***Gai.* II. §65-79** | ***Res cottidianae*** |
| 65. It appears, then, from what we have said, that alienation takes place sometimes under natural law, as where it is by delivery, and sometimes under civil law … | Of some things we acquire ownership under the law of nations (*iure gentium*)... |
|  | 7. When someone makes something (*speciem aliquam*) for himself out of another person’s materials…[[38]](#footnote-38)  |
|  | 10. When someone builds on his own site with another person’s materials, he is deemed to be owner of the building *because all that is built on it becomes part of the soil**(omne quod inaedificatur solo cedit)...* [[39]](#footnote-39)  |
| 73. Furthermore, what a man builds on my land becomes mine by natural law, although he built on his own account *because a superstructure goes with the land (superficies solo cedit).* | 12. Conversely, if a person were to build with his own materials on someone else’s site, he would make the building the property of the owner of the site… |
| 74. Much more is this the case with a slip which someone has planted in my land, provided it has taken root there… 76. But if I bring an action against the other man for the recovery of the fruits[[40]](#footnote-40) or the building and refuse to pay him his expenses on the building, for the young plants, or the seed, if he was a bona fide possessor, he will be able to defeat me with the *exceptio doli mali* at any rate.  | 13.If I plant someone else’s cutting in my land, it will be mine… |

In the *Institutes*, only the law of *inaedificatio* appears, and the rationale *superficies solo cedit* applies to it. In the *Digest*, the law of *tignum* *iunctum* is added, and, even though it is unsuitable, the rationale is transferred to it. It seems clear to me that in this case at least, the text in the *Digest* is a revision of the text in the *Institutes*.

# Textual Development of the Tosefta

A process similar to what I have shown with the reconstructed words of Gaius occurred in the Tosefta, but the nature of the Tosefta makes it more difficult to trace. For the sake of clarity, let me recall the order of the laws in the Tosefta. The first laws (1-4) deal with the return of a stolen object that has changed and include a principled formulation of the law of *shinui*. As I have shown above, Halakhah 5 (the stolen beam) is related to these laws both in terms of its subject matter and its wording. Halakhot 6-7 are formulated differently for they do not deal with the thief, but in content, they are related to Halakhah 5. The law of the man who builds the ruin of his neighbor is largely a mirror image of the law of the beam. In the law of the beam, a person builds his own house using the materials of another, while in the law of squats in another’s ruin, a person builds with his materials on the property of another. In other words, the laws deal with two sides of the same problem.

However, the apparent similarity between Halakhah 5 and Halakhahs 6-7 exposes a gap and perhaps even a contradiction between them. From the law of the stolen beam, it is clear that according to the letter of the law, the building should be dismantled and the beam returned, as held by Beit Shammai. Beit Hillel rules that the value of the beam is returned because of the regulation regarding repenters. According to the same logic, the opposite ruling would have been appropriate in the law of the one who squats on ruined property. The man who enters the ruined house of his neighbor is the thief, but when he leaves, he is the ‘repenter’ who must be cared for. If the repentant squatter wants to take his building materials, both the letter of the law and the ‘regulation of the repenters’ should allow him to take them. Nevertheless, the determination of the Tosefta (and according to the view of Rashbag, Beit Hillel) does not allow him! To explain the law of the squatter, one must assume that there is another legal reason that prevents the reconstructed building from being dismantled. If there is such a reason, it should also apply in the case of the stolen beam. Therefore, even in the case of the law of the beam, the building should not be dismantled regardless of the ‘regulation of the repenters’.

Although the bottom line in both laws is the same, the basic logic reflected in each is contradictory to the other. In other words, it appears that Halakhah 5 and Halakhot 6-7 come from different sources and are based on different (and somewhat contradictory) legal principles. This conclusion arises not only from an internal analysis of the legal rationale but also from a comparison of the laws in the Tosefta with parallels in other rabbinic sources.

The law of the stolen beam in the Tosefta is not found in the parallel mishnah, but it is mentioned in two other places in the Mishnah where it is presented as a ‘testimony’ of R. Yohanan b. Gudgada, a sage who was active at the end of the Second Temple period (before 67 CE).[[41]](#footnote-41) Testimony is a special genre in the Mishnah, usually used for the transmission of ancient laws, suggesting that the law of the stolen beam is ancient. The contexts of these mishnayot strengthen the hypothesis that this ancient law is not related to ownership. Especially important is another testimony of the same sage that appears immediately after the law of the stolen beam:

…concerning a purgation offering – if [the animal] was stolen property, and this was not known publicly, [nevertheless] it effects atonement. [It does so] for the betterment of the altar.[[42]](#footnote-42)

This law strongly resembles the law of the stolen beam. In both cases, the stolen property is treated fictitiously as if it is not stolen. In the first case, it is done for the benefit of the thief; in the second, it is for the benefit of the altar.[[43]](#footnote-43)

The law of one who builds on the land of another has a parallel in another place in the Tosefta, in tractate *Ketubot* Chapter 8, which I present below:

|  |  |
| --- | --- |
| **t. Ketub. 8:10–11[[44]](#footnote-44)**  | **t. B. Qam. 10:6–7**  |
|  |  [5] One who has stolen a beam and built it into a large house… |
| [9] If one enters the ruin of his neighbor… |  [6] If one enters the ruin of his neighbor… |
| [**E, G**: Rabban Simeon b. Gamaliel says: the School of Shammai says: ‘He had the right to it’. But the School of Hillel says: ‘They do not listen to him’.][[45]](#footnote-45)   |  Rabban Simeon b. Gamaliel says: The School of Shammai says: ‘He had the right to it’. But the School of Hillel says: ‘They do not listen to him’.  |
| [10] If one enters the ruin of his neighbor… | [7] If one enters the ruin of his neighbor… |
| How is ‘his hand is lower’?[[46]](#footnote-46)If the improvement was greater thanthe outlay, he gives him the outlay; if the outlay was greater than the improvement, he gives him the improvement. | How is ‘his hand higher’?If the improvement was greater than the outlay, he gives him the improvement; if the outlay was greater than the improvement, he gives him the outlay. |

Identical parallels are not rare in rabbinic literature. Scholars usually try to determine whether one parallel is older than the other or if both were derived from a third source no longer available to us. In this case, scholars are divided; Abraham Goldberg argues that Tosefta *Bava Qamma* was derived from Tosefta *Ketubot*, while Robert Brody argues the opposite.[[47]](#footnote-47) Goldberg’s arguments seem the more convincing to me. Goldberg shows that the law of the builder in the property of another stylistically fits into the sequence of laws in Tosefta *Ketubot*. Several laws in Tosefta *Ketubot* begin with the phrase, ‘One who enters’, and so do our laws. But more than the stylistic similarity, it is important to emphasize a conceptual connection. Most of the laws in this chapter of Tosefta *Ketubot* deal with the same legal issue: what to do when the moveable property of one person is attached to land belonging to another. In all these laws one legal principle stands out: the attached assets belong to the land owner who is to compensate the owner of the properties accordingly.[[48]](#footnote-48) The laws concerning entering the ruined house of another integrate well into this sequence and it seems that they are related to it. In contrast, the law regarding the ‘beam’, which does not belong to this issue, is not mentioned in Tosefta *Ketubot*.

The law of the ‘beam’ is thus found in the Mishnah in connection with regulations that include a legal fiction, while the laws of ‘entering’ are found in the Tosefta in the context of laws relating to items attached to the land. The Tosefta in *Bava Qamma* combines these two laws, which developed from completely different halakhic backgrounds, because of the common ground between them. The Tosefta may contain a hint to the identity of the editor who combined the laws, namely Rabban Simeon ben Gamaliel (hereafter RSBG). According to the approach of RSBG, the School of Shammai and the School of Hillel are divided on the question of whether one who has built on the property of another is entitled to take the building materials. On the one hand, perhaps RSBG was reporting halakhic knowledge that had been passed down to him through the tradition. Accordingly, the Schools of Shammai and Hillel happened to disagree both on the law of the stolen beam and on the law of the builder in the property of another. However, it seems much more likely that RSBG’s approach is based on an analogy. That is, RSBG knew about the dispute between the Schools of Shammai and Hillel concerning the stolen beam and, because of the common logic of the two laws, he transferred it to the law of the builder in the property of another. If that was the case, the connection between the two laws likely occurred in the study house of Rabbi Simeon ben Gamaliel.

In this context, it should be noted that the approach of RSBG is missing in the **V** and **P** versions of Tosefta *Ketubot*. These versions fit well with the approximate reconstruction that I have proposed: Since the law of the stolen beam is not found in Tosefta *Ketubot*, the approach of RSBG, which is based on it, is also not found in Tosefta *Ketubot*. RSBG, the editor of the passage of the Tosefta in *Bava Kama*, connected the law of the stolen beam with the law of the builder in the property of another and added his halakhic approach there. If this reconstruction is correct, the **E** and **G** versions of tractate *Ketubot* may be explained as an erroneous supplement based on the parallel in tractate *Bava Qamma*. On the other hand, it is also possible that the version in **E** and **G** is the original one, and in **V** and **P,** a haplographic error occurred due to the similar phrasing (‘they do not listen to him’ – ‘they do not listen to him’). If this is what happened, then the approach of RSBG originally appeared also in tractate *Ketubot*. One cannot rule out this possibility, but there also is good evidence for the alternative possibility.[[49]](#footnote-49) The final word on the issue is unclear.

In any case, it seems that the editor of the Tosefta in *Baba Qamma* (perhaps from the study house of Rabban Shimon ben Gamliel) composed the law of the beam and the law of the builder in the property of another. If so, the very same textural process occurred in the Tosefta and *Res cottidianae*. In both, the law of *tignum iunctum* was artificially combined with the law of *inaedificatio*. This is a theoretical interpretive process that has no direct practical implications. For the judge who determines whether it is permissible or forbidden to dismantle the beam from the building and similarly for the litigants who dispute the matter, it is irrelevant whether the judgment is by natural property laws or by a regulation instituted in the civil law. That is a theoretical matter for jurists, Roman jurists in one case and Jewish law scholars in the other.[[50]](#footnote-50)

# The Connection between the Tosefta and *Res* *cottidianae*

The example I have presented is a striking instance of texts that are so similar to each other that it is difficult to determine how the similarity between them came about. Bernard Jackson formulated different possible levels of Roman influence on Jewish law. First and foremost is the distinction between influence on form and influence on content.[[51]](#footnote-51) In the case before us, the similarity exists both in content and form. The laws themselves are similar in content and perhaps also in their underlying legal principles. In addition, the laws are formulated quite similarly and use the same examples. Moreover, the laws compiled in the *Digest* and the Tosefta appear in exactly the same sequence, so there also is a similarity in the way of ordering. Finally, as I have demonstrated here, there is a similarity in the textual development, so much so that it encompasses the degree of connection between parallel texts. Specifically, the relationship between the Tosefta in *Bava Qamma* and *Ketuvot* is comparable to the relationship between the two compositions of Gaius. The similarity in textual development probably reflects a similarity in conceptual development as well. Each system has reinterpreted the ancient law of *tignum iunctum* and given it a new legal rationale

One might suppose that the Tosefta was nothing but a translation and adaptation of Gaius (or vice versa); i.e., there was direct textual borrowing and not a complex or prolonged process of influence. However, the analysis of the parallels shows that such a possibility makes no sense. As we have seen, the law of the beam and the law of one entering the ruin are found in other parallels in the literature of the Sages. Analysis of the sources indicates that the parallels do not depend directly on the Tosefta in *Bava Qamma* and perhaps the reverse is the case. That is to say, the laws existed within the rabbinic legal system even before the text of the Tosefta in *Bava* *Qamma* was created and the textual process described above took place solely within the confines of rabbinic literature. In other words, the common textual process that took place in the Tosefta and within the laws of Gaius belongs to a different stage of development than that of the similarity in the content of the laws.

Were the rabbinic laws borrowed from the Roman system at an early stage and did the parallel textual processes in the two systems happen later by chance? Or, were similar laws created independently within each system, and the textual process in the Tosefta took place under the inspiration of Roman literature? Or, perhaps the Roman influence took place at several times and in several ways? A definitive response to such questions is impossible. However, the possibility that the compositions and their content developed within the two systems without any interdependence seems implausible. As for the origin of the laws, the law of the beam is found both in the earliest layer of Roman law (*Twelve Tables*) and in the earliest layer of tannaitic literature (Second Temple period). The Roman sources tell us that the council that legislated the Twelve Tables (the *decemviri*) went to Athens and other Greek cities to learn their laws.[[52]](#footnote-52) Consequently, the law of the beam may be a Greek law or a law that prevailed in the East that found its way into both Roman law and tannaitic literature.

The same is true for the law of *inaedificatio*. This law refers to a common case that is echoed in other legal systems, among them the Hammurabi Code, a collection of Demotic laws from the third century BCE.[[53]](#footnote-53) The laws there deal with a person who sues his fellow for building on his plot and with the legal process in which the defendant is required to prove that the plot is his or force the plaintiff to prove his case. Following the proof, the plot is given to the winner of the lawsuit. Thereafter, it continues:

If the defeated party wishes to dismantle the house he himself built on the plot, and carry away the construction, it is permitted to him to purge himself by carrying away the construction.

The content differs from the tannaitic and Roman law (or perhaps it matches Beit Shammai’s ruling), but it is evident that a law relating to this situation existed long before the Roman occupation of Judea. Perhaps the Roman legislation influenced the content of the tannaitic halakhah in that the builder loses the building, but that is not necessarily the case.[[54]](#footnote-54)

The similarity between the content of the Roman laws and the content of the Jewish laws does not necessarily indicate a direct historical connection and it certainly does not prove influence. Moreover, Gaius himself defines all these laws as part of the *ius gentium*, that is, laws that apply in every human society.[[55]](#footnote-55) Gaius thus may be evidence that these laws also were practiced in non-Roman nations.

By contrast, the parallelism between the arrangement of the material in Tosefta *Bava* *Qamma* material and the composition of Gaius is surprising, and against its background, it is reasonable to assume Roman influence. I refer not only to the order of the discussion but also, and primarily, to the parallel textual process in which the laws were reinterpreted. Since we are dealing with a theoretical literary arrangement of textual materials, the influence should be a textual influence that involves the exposure of Sages to the principles of arrangement and organization of Roman legal literature. Although it is difficult to prove, it is not inconceivable that some of the Sages were exposed to such legal literature (perhaps in Greek rather than Latin). This is especially true if we accept the connection of the series of laws in the Tosefta to the Nasi (the president of the Sanhedrin) Rabban Shimon ben Gamliel and his retainers. RSBG was linked to the ruling Roman culture, and at least some members of his household certainly knew Greek.[[56]](#footnote-56) As I have indicated above, Gaius and RSBG are not far from each other in time and place, and an intellectual encounter between them (perhaps through human or various literary intermediaries) is conceivable.

Other sources indicate that RSBG recognized the foreign legal system and ascribed legitimacy to it. These sources refer to the foreign system as ‘the law of the nations’, terminology that is a literal parallel to *ius gentium*.[[57]](#footnote-57) The concept of *ius gentium* itself may reflect a correspondence between the words of Gaius and those of RSBG. If there were a rabbinic concept parallel to *ius gentium*, it might have contributed to the process that I have described. After all, if we were to show Gaius the comparison between his work and the Tosefta, he probably would not be surprised. According to him, the laws he describes are based on natural logic and are common to all mankind. If the Sages also believed in this principle, it is possible that they would have understood these principles as relevant also to them and would have incorporated them into their law. In any case, we have here an instance where what Gaius calls *ius gentium* is indeed so, for it is common (at least on paper) to other legal systems throughout the empire.

# Intellectual Contact Between Jewish and Roman Jurists

That a similar textual and conceptual process occurred simultaneously in texts belonging to different legal traditions is a surprising phenomenon. In the current case, there is almost no doubt that it is related to the fact that the Jewish legal tradition was shaped under Roman rule. Among the many studies that have identified similarities between Roman law and Jewish law, I do not know of such a clear example of a similar textual process.

Other scholars have already acknowledged the possible familiarity of the Sages with Roman law literature. Orit Malka and Yakir Paz have presented several examples where Jewish sources took Roman laws almost literally, translated them into Hebrew, and in the course of doing so, fully borrowed Roman legal concepts.[[58]](#footnote-58) These cases seemingly prove that the Sages were familiar with Roman legal literature, but they do not testify to the textual and conceptual processing that took place within Jewish law. Moreover, the cases they bring are taken from the field of personal status, which is inherently more susceptible to governmental influence. By contrast, the example I have brought is taken from the field of private law and it testifies clearly to a multi-stage legal development.

The development of Jewish internal legal thought as a result of Roman influence was demonstrated in several of Yair Furstenberg’s studies. For example, in his discussion of the laws of guardians, Furstenberg shows how the laws in the Mishna were reorganized in accordance with Roman categories.[[59]](#footnote-59) In another article, yet to be published, Furstenberg deals with the concept of *possessio/usucapio* (*hazaqa* in Jewish law) and shows the various textual processes that changed the meaning of the Hebrew term in the wake of contact with Roman legal principles.[[60]](#footnote-60) In the same discussion, Furstenberg deals with the similarity between Mishnah *Kiddushin* Chapter 1 and the Gaius collection regarding property law (*Gai*. I.108-123). The resemblance between the texts had previously been recognized, but Furstenberg shows that the Mishnah in *Kiddushin* reshapes the original Jewish materials following exposure to Roman legal literature.[[61]](#footnote-61) Still, these studies do not describe a parallel process within Roman literature itself (it is possible that no such process existed). The uniqueness of the case I have brought is that the processing and interpretation by the scholars of Roman and Jewish law took place almost simultaneously. The case that I have set forth greatly increases the likelihood that there was intellectual (physical or literary) contact between some Jewish and Roman legal scholars. The formulation of the halakhic sources occurs parallel to the formulation of the Roman sources because the Sages discuss the halakhic content under the influence of Roman jurisprudence. Additional examples, if found, would strengthen this argument and lead to the development of another model to describe the relationship between Roman law and local law. In this model, the creation of local law is integrated into the creative process of Roman law and runs parallel to it.

# Conclusion

This connection between Roman law and local law is almost totally neglected in scholarship, perhaps because the influence here is intellectual rather than practical. Moreover, it is hard to reconstruct such influences with the materials available from other provinces. It is difficult to define the influence here as ‘top-down’. It is unlikely that Gaius or another Roman jurist pressured Jewish legal scholars to accept his new interpretation of the law. On the other hand, it is clear that there is no ‘bottom-up’ influence here. This is an intellectual encounter between legal scholars who seem to be discussing legal issues together, a kind of ‘horizontal influence’ so to speak. Moreover, the encounter in question involves the Roman and local elites, not the simple citizen or the consumer of law as is reflected in the papyri.

That the case that I have presented belongs to property law is particularly important. Most of the scholarly research dealing with parallels between Roman and Jewish law belongs to the areas of personal status (citizenship, and hence also marital relations, family, and slavery), commercial law, and the like. In these matters, real contact between Jews and the Roman ruling systems was necessary, and therefore relationship and influence are to be expected. By contrast, the theoretical field of property law seems to be an internal matter in each system and there is no reason to expect contact between systems.[[62]](#footnote-62) From the example I have presented here, we can learn about surprising influence even at these levels and consider the possibility that the influence is related to a theoretical partnership in the concept of *ius gentium.*

Since this is a single case study, it is difficult to draw broad, general conclusions from it. However, there is enough evidence to encourage scholarly attention in this direction, which has the potential to enrich research on the relations between Roman rule and the inhabitants of the provinces. Beyond its contribution to understanding the development of Jewish law in the Roman Empire, there is also a methodological lesson. Time and again we see how comparisons between Jewish and Roman legal literature without philological work miss the mark. Comparative research must be based as much as possible on source criticism and diachronic reconstruction of the law. Such reconstructions of the law permit comparison of developmental trends rather than static data. In this way, the static picture of the laws is animated and becomes a kind of film, giving new meaning to all the data.

1. 1 For historical and literary introductions to these compositions, see: S. Safrai (ed.), *The Literature of the Sages,* vol. 1 (Compendia Rerum Iudaicarum ad Novum Testamentum 2/3a) (Assen, 1987); H. L. Strack and Günter Stemberger, *Introduction to the Talmud and Midrash*, Translated and edited by Markus Bockmuehl (Minneapolis, 1996). [↑](#footnote-ref-1)
2. 2 For an historical treatments, see: Boaz Cohen, *Jewish and Roman Law: A Comparative Survey* (New York, 1966), 1-14; Jay M. Harris, ‘Fitting In or Sticking Out: Constructs of the Relationship of Jewish and Roman Law in the Nineteenth Century’, in Hayim Lapin and Dale Martin (eds.), *Jews, Antiquity and the Nineteenth Century Imagination* (Bethesda. Md, 2003); and the many studies of David Daube, Reuven Yaron, and Bernard Jackson. In recent decades, the field has rebloomed. Some of the current generation of scholars have critiqued the comparison with the claim that the Roman influence on Jewish law was negligible or non-existent. See for example: I. Rosen-Zvi, ‘Is the Mishnah a Roman Composition?’, in C. Hayes et al. (eds.), *The Faces of Torah: Studies in the Texts and Contexts of Ancient Judaism in Honor of Steven Fraade* (Göttingen, 2017). In response, other scholars have developed new methods of identifying the centers of Roman influence. The main sources for this recent debate have been compiled by Orit Malka & Yakir Paz, ‘In Civitate: Captivity and Inheritance in Tannaitic Halakha in Light of Roman Law’ (forthcoming). See also: K. Berthelot, *Jews and Their Roman Rivals: Pagan Rome’s Challenge to Israel* (Princeton, 2021), 276-85; Catherine Hezser, ‘The Mishnah and Roman Law: A Rabbinic Compilation of *ius civile* for the Jewish *civitas* of the Land of Israel Under Roman Law’, in Shaye J.D. Cohen (ed.), *What is the Mishnah? The State of the Question* (Cambridge MA, 2023); Yair Furstenberg, ‘The Rabbinic Movement from Pharisees to Provincial Jurists’, *Journal for the Study of Judaism*, 54 (published online ahead of print 2023). For extensive collections of comparisons between Roman law and rabbinic literature, see: Cohen, *Jewish and Roman Law*; B. S. Jackson, ‘On the Problem of Roman Influence on the Halakah and Normative Self-Definition in Judaism’, in E. P. Sanders et al. (eds.), *Jewish and Christian Self-Definition II, Aspects of Judaism in the Greco Roman Period* (Philadelphia, 1981). Furstenberg has built a database that centralizes comparisons between Roman law and Tannaitic law (ISF grant, 1026/18). The database is in an advanced stage and is expected to be available to the research community soon. [↑](#footnote-ref-2)
3. 3 For example, see the two rich compilations that treat connections between Roman law and Jewish law: Catherine Hezser (ed.), *Rabbinic Law in Its Roman and Near Eastern Context* (Tübingen, 2003); K. Berthelot et al. (Eds.), *Legal Engagement: The Reception of Roman Law and Tribunals by Jews and Other Inhabitants of the Empire* (Rome, 2021) and especially, the introductions to these compilations. [↑](#footnote-ref-3)
4. The literature on this is very extensive. For some relatively recent sources that also relate to the history of the research, see: Caroline Humfress, ‘Thinking Through Legal Pluralism: “Forum Shopping” in the Later Roman Empire’, in Jeroen Duindam et al. (eds.), *Law and Empire: Ideas, Practices, Actors* (Leiden, 2013); José Luis Alonso, ‘The Status of Peregrine Law in Egypt: “Customary Law” and Legal Pluralism in the Roman Empire’, *Journal of Juristic Papyrology*, xliii (2013); Clifford Ando, ‘Legal Pluralism in Practice’, in Paul J. du Plessis et al. (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford, 2016); Kimberley Czajkowski, ‘The Limits of Legal Pluralism in the Roman Empire’, *Journal of Legal History*, 40 (2019). [↑](#footnote-ref-4)
5. The study of local law in Roman provinces, primarily involving the papyri from Egypt and Arabia, has seen tremendous growth in recent decades,. For some primary studies that also provide a review of the literature and a reflective look at the history of the research, see: Caroline Humfress, ‘Law and Custom under Rome’, in Alice Rio (ed.), *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages: Proceedings of the 2008 Byzantine Colloquium* (London, 2011); Anna Dolganov, ‘Empire of Law: Legal Culture and Imperial Rule in the Roman Province of Egypt’, Dissertation (Princeton University, 2018), 219-30; Yair Furstenberg, ‘Imperialism and the Creation of Local Law: The Case of Rabbinic Law’, in Berthelot et al., *Legal Engagement*. For other provinces, see for example, Kimberley Czajkowski & Benedikt Eckhardt, ‘Law, Status And Agency in the Roman Provinces’, *Past & Present*, 241 (2018), as well as the many studies by Georgy Kantor. [↑](#footnote-ref-5)
6. For a summary of objections to the classic research, see for example: K. Czajkowski, Localized Law: The Babatha and Salome Komaise Archives (Oxford, 2016), 9-24; Dolganov, Empire of Law, 219-30. [↑](#footnote-ref-6)
7. See for example, Caroline Humfress, ‘Law and Custom’. [↑](#footnote-ref-7)
8. Many have written about the possible similarity between the Jewish Sages and the Roman jurists. See for example, Martin Goodman, *State and Society in Roman Galilee, AD 132-212* (Totowa NJ, 1983), 127, 160; C. Hezser, ‘Roman Law and Rabbinic Legal Composition’, in C. Fonrobert & M. Jaffee (Eds.), *The Cambridge Companion to the Talmud and Rabbinic Literature* (Cambridge, 2007); Amram Tropper, *Wisdom, Politics, and Historiography: Tractate Avot in the Context of the Graeco-Roman Near East* (Oxford, 2004), 189-201; N. S. Cohn, ‘Rabbis as Jurists: On the Representation of Past and Present Legal Institutions in the Mishnah’, *Journal of Jewish Studies*, 60 (2009); Furstenberg, ‘The Rabbinic Movement’. See also the sources in the following note. [↑](#footnote-ref-8)
9. ‘…no other legal tradition of the ancient Mediterranean – save in complex respects Jewish law in the Roman period – develops any remotely similar practices that we might denominate a theory of autonomous law, or traditions of statutory interpretation, or rules of precedent, or institutions of legal education and practices of jurisprudence’ (Clifford Ando, ‘Roman Law’, in Markus D. Dubber and Christopher Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford, 2018), 668. See also A. Watson & K. Abou El Fadl, ‘Fox Hunting, Pheasant Shooting, and Comparative Law’, *The* *American Journal of Comparative Law*, 48 (2000).

Noticeable differences notwithstanding, there is a certain similarity in literary style between the Jewish and Roman works. Scholars disagree as to the extent of the similarity. See Catherine Hezser, ‘The Codification of Legal Knowledge in Late Antiquity: The Talmud Yerushalmi and Roman Law Codes’ In Schäfer, Peter (ed.), *The Talmud Yerushalmi and Graeco-Roman Culture*, Vol.1 (Tübingen, 1998)‏; Hillel Newman, ‘Early Halakhic Literature’, in Robert Bonfil et al. (eds.), *Jews in Byzantium: Dialectics of Minority and Majority Culture* (Leiden, 2011), 631; Y. Elman, ‘Order, Sequence, and Selection: The Mishnah’s Anthological Choices’, in D. Stern (Ed.), *The Anthology in Jewish Literature*, (Oxford, 2004)‏; Moshe Simon-Shoshan, *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah* (Oxford, 2012), 80-2; J. Neusner, ‘The Mishnah in Roman and Christian Contexts’ in A. Avery-Peck & J. Neusner (Eds.), *The Mishnah in Contemporary Perspective* (Leiden 2002). [↑](#footnote-ref-9)
10. On these concepts, see: Jackson, ‘On the Problem of Roman Influence on the Halakah’; Bernard S. Jackson, ‘History, Dogmatics, and Halakhah’, in B. S. Jackson (ed.), *Jewish Law in Legal History and the Modern World* (Leiden, 1980). [↑](#footnote-ref-10)
11. The Mishnah (sometimes abbreviated, ‘m’.) is divided into six ‘orders’ each of which is divided into several tractates. The tractates are divided into chapters and the chapters into laws (*‘mishnayot’*). The division of the Tosefta (sometimes abbreviated, ‘t’.) into orders and tractates is similar to that of the Mishnah with a similar but not identical division of the chapters. The sequence of the laws in the Tosefta generally follows the sequence of the laws in the Mishnah, but there is no full correspondence between the works. In addition to the Mishnah and the Tosefta, there are also two Talmuds, one Babylonian (BT) and one Palestinian (PT), also called the Jerusalem Talmud. The Talmuds are also organized according to the order of the Mishnah, but they are not complete (each has four ‘orders’ out of the six in the Mishnah). The Talmuds are works that include the words of Sages later than the Mishnah and the Tosefta (approximately the third to fifth centuries). Within the Talmuds there are many quotations from the Mishnah and Tosefta, as well as additional material that pertains to the Mishnaic period but for various reasons was not included in it. This material is called *baraitot* (literally: externalities), meaning, material that belongs to the doctrine of the *tannaim* (authors of the Mishnah) but which is external to the Mishnah. At times in the discussion that follows I refer (mainly in the notes) to parallels or additions found in the Talmuds. [↑](#footnote-ref-11)
12. At times, material in the Tosefta is fully parallel to the material in the Mishnah. This material raises the possibility that the Tosefta may at times preserve alternative, and perhaps earlier, versions of the material in the Mishnah. See Shamma Friedman, ‘The Primacy of Tosefta to Mishnah in Synoptic Parallels’, in H. Fox and T. Meacham (eds.), *Introducing Tosefta* (New York, 1999). [↑](#footnote-ref-12)
13. On Gaius and his works, see A. M. Honoré, *Gaius* (Oxford, 1962). Honore emphasizes the many mysteries surrounding the figure of Gaius. On the works of Gaius, also see: U. Babusiaux & D. Mantovani (Eds.), *Le Istituzioni di Gaio: avventure di un bestseller: trasmissione, uso e trasformazione del testo* (Pavia, 2020)‏. [↑](#footnote-ref-13)
14. There is extensive research on this subject. In addition to what has been mentioned above, see H. W. L. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden, 1981) and the review of: Detlef Liebs, ‘[Review of *Überlieferung, Aufbau und Stil von Gai Institutiones*, by H. L. W. Nelson]’, *Gnomon*, 55 (1983). [↑](#footnote-ref-14)
15. At the end of the 19th century, Otto Lenel published two large volumes in which he sought to reconstruct these compositions from the quotations in the *Digest*. See: O. Lenel, *Palingenesia Iuris Civilis: Iuris Consultorum Reliquiae quae Iustiniani Digestis continentur, ceteraque iuris prudentiae civilis fragmenta minora secundum auctores et libros I-II* (Leipzig, 1889). The cited material that follows above is from volume A, pages 251-261. [↑](#footnote-ref-15)
16. These issues are discussed in almost all scholarship dealing with Roman law. For some general sources, see Tony Honoré, *Justinian’s Digest: Character and Compilation* (Oxford, 2010). [↑](#footnote-ref-16)
17. Honoré, *Gaius*, 68. [↑](#footnote-ref-17)
18. For a detailed discussion see Honoré, *Gaius*, 70-96. [↑](#footnote-ref-18)
19. The English translation of the *Digest* is based on Alan Watson (trans.), *The Digest of Justinian*, vol. 4, (Philadelphia, 1998), 1-4. [↑](#footnote-ref-19)
20. For an historical analysis of this discussion see: A. Plisecka, ‘Accessio and specificatio reconsidered’, *Legal History Review*, 74 (2006). [↑](#footnote-ref-20)
21. Some have also differentiated between acquisition following sowing (*satio*) and acquisition following planting (*implantatio*). See: David Daube, ‘*Implantatio* and *Satio’*, *Acta Juridica*, 1 (1958). [↑](#footnote-ref-21)
22. Except for minor changes, I quote the Mishnah according to the translation of Hayim Lapin in Shaye J.D. Cohen et al. (Eds.), *The Oxford Annotated Mishnah*, (Oxford, 2022), 370-71. [↑](#footnote-ref-22)
23. I have translated the Tosefta from the Hebrew text in Saul Lieberman (ed.), The Tosefta according to Codex Vienna, *The Order of Nezikin* (New York, 1988), 50-51, which includes various versions. I thank my friend Jonathan Howard for assisting me in the translation work. For a detailed explanation of the laws, see: Saul Lieberman, *Tosefta Ki-fshutah: A Comprehensive Commentary on the Tosefta* (New York, 1988), 112-16 [Hebrew]. [↑](#footnote-ref-23)
24. The Hebrew verb translated ‘changed’ appears in the third person singular past tense and apparently refers to the action of the thief. However, there also is a rare usage of this form that describes a generic action in which case the translations would be ‘and it did not change from the time of its creation’. The difference between translations relates to whether the law applies specifically to cases where the thief changed the stolen item or also in cases where the item changed for other reasons. [↑](#footnote-ref-24)
25. The law employs two relatively unusual Hebrew terms, מריש (here translated ‘beam’) and בירה (here translated ‘large house’). The latter translation follows Pinchas Mandel who associated בירהin the language of the Sages with the Greek βᾶρις or the Roman insula, that is, a large building that generally served as housing for several families (*‘Birah* as an Architectural Term in Rabbinic Literature’, *Tarbiz*, 61 (1992) [Hebrew]. It is possible that these terms reflect the early formulation of the law or its translation from a foreign source. [↑](#footnote-ref-25)
26. The exact meaning of ‘regulation of the repenters’ is not clear. In any case, the purpose of Hillel’s interpretation is to encourage thieves to rectify their deeds, possibly for a social reason (that robbery victims receive compensation) or possibly for a religious reason (a concern that thieves may too easily repent). [↑](#footnote-ref-26)
27. The two Roman study houses, the School of Proculus and the School of Sabinus, are often compared to their contemporary Jewish counterparts, the School of Hillel and the School of Shammai. See, for example: E.S. Rosenthal, *Studies In Talmudic Literature* (Jerusalem, 2021), 739-56 [Hebrew]. It is interesting that sometimes the Jewish and Roman schools are divided in the same dispute. In the case before us, Gaius testifies to a dispute between the two schools regarding *specificatio*. In the *tannaitic* sources we do not have a clear dispute between the Shammai and Hillel that parallels the Roman dispute, but according to the Babylonian Talmud they indeed disagreed on it (*Bava Qam*., 65b, 93b and Cohen, *Jewish and Roman Law*, 502-03). [↑](#footnote-ref-27)
28. PT. *Bava. Qam*. 6d asks a question about the *baraita*: ‘But if he built in a place where it is unfit to build, and planted in a place where it is unfit to plant?’ The phrasing of the question suggests that this *baraita* also addressed the law of planting. See also BT. *Bava. Meṣiʿa*. 101a and the Migdal ʿOz, commentary on Maimonides’ *Mishneh Torah*, Hilkhot Sekhirut [Laws of Hiring], 10:4. [↑](#footnote-ref-28)
29. Phrasing similar to the Roman one appears in Amoraic literature. See: Cohen, *Jewish and Roman Law*, 498-99. [↑](#footnote-ref-29)
30. It is possible that there is a connection between the division in the Tosefta between ‘entering with permission’ and ‘entering without permission’ and Gaius’ division between the builder who knew or did not know that the building belonged to another. However, neither in Gaius nor in the Tosefta are the definitions clear. Hence, I do not address the issue here. [↑](#footnote-ref-30)
31. It is possible that the original version of the Tosefta included a parallel to the following law of Gaius. See above next to note 29. [↑](#footnote-ref-31)
32. Particularly striking is the similarity between the law of *tignum iunctum* in the *Twelve Tables* and the law of ‘the stolen beam’ in the Tosefta. I do not know who was the first to notice the similarity, but already in 1887 it was mentioned in a newspaper article. See: Y. Rosenthal, *‘Maʿamarey Madaʿa: Teshuva MeʿAhava*’, *HaMelitz*, April 6th, 1887, 748-50 [Hebrew]. Since then, many authors have mentioned the similarity. [↑](#footnote-ref-32)
33. Cohen, *Jewish and Roman Law*, 385-86. Emphasis mine. [↑](#footnote-ref-33)
34. In the accepted editions the beam law is located in Tablet 6, Laws 7-9. For texts and translations see: E. H. Warmington (ed.), *Remains of Old Latin*, vol. III (Cambridge, 1938), 465. The most complete citation is found in the work of the Roman grammarian Sextus Pompeius Festus: *Tignum non solum in aedificiis, quo utuntur, appellatur, sed etiam in vineis, ut est in XII: ‘Tignum iunctum aedibus vineave et concapit ne solvito*’. (Tignum is a term used for the material which men employ not only in buildings, but also in vineyards, as for example, in the *Twelve Tables*: ‘A person shall not dislodge from framework a beam fixed in buildings or vineyard’.) The word *concapit* is unique and not understood. On the many suggestions for it, see: Alan Watson, ‘*Tignum Iunctum:* The XII Tables and a Lost Word’, *Revue Internationale des Droits de l’Antiquite*, Ser. 3, 21 (1974). [↑](#footnote-ref-34)
35. The classical jurists add the obligation to pay the owners. See the words of Gaius cited above, Paul (*Dig*. 6.1.23.6; 10.4.6), and Ulpian (*Dig*. 47.3.1). Since all the sources are found only in the *Digest*, some have suggested that the double payment is a Justinian addition and not part of classical law. For an extensive discussion of and research concerning the tignum iunctum law, see: H. H. Jakobs, *‘Tignum iunctum* *und Pandektenkritik’*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 124 (2007). [↑](#footnote-ref-35)
36. See the sources I cite in notes 13-14 and primarily the articles of Platschek and Battaglia in Babusiaux & Mantovani*, Le Istituzioni di Gaio*. Scholars have suggested that one of the compositions is a reworking of the other (usually that the *Res cottidianae* is a reworking of the *Institutes*), that both are reworking of a made written by Gaius himself or by his students, or that one or both of the compositions were mistakenly attributed to Gaius. Regarding the *Institutes*, scholars have claimed that Gaius may have published several versions of the composition or that the composition was reworked over the years. In this context it is also worth mentioning the *Institutes of Justinian*. In addition to the *Digest*, Justinian published a basic study book for Roman law that is primarily based on *the Institutes of Gaius*. However, the content is updated to Justinian’s time and includes other materials as well as reworkings and changes. In the case before us, the material in Justinian’s *Institues* is more similar to the material in the *Res cottidianae* than it is to the material in the *Institutes* of Gaius. [↑](#footnote-ref-36)
37. With minor changes, the translation is based on F. De Zulueta (trans.), *The Institutes of Gaius*, I (Oxford, 1958), 83-85. [↑](#footnote-ref-37)
38. Later in the discussion this law is quoted in the *Institutes of Gaius*. [↑](#footnote-ref-38)
39. Justinian adds that the purpose of the law in the Twelve Tables is to prevent the dismantling of buildings. See: *Ins*.2.1.29. A similar rationale is found in the Talmud, but there it specifically refers to the law parallel to *inaedificatio*. [↑](#footnote-ref-39)
40. In the manuscript *fructum* (fruits); but most editors, following Husehke, emended it to *fundum* (land). In my opinion, the manuscript version is to be preferred. See: J. E. Goudsmit, *Studemund’s Vergleichung Der Veroneser Handschrift*, (Utrecht, 1875), 31. [↑](#footnote-ref-40)
41. m. ʿEd. 7:9 and m. Giṭ. 5:5. The parallels are almost identical to one another. The Mishnah states that the beam is not uprooted and does not mention that Beit Shammai disputes this. In addition, the rationale ‘for the regulation of the repenters’ is missing in the vast majority of manuscript witnesses to the Mishnah and it seems that the omission is original. See: I. Brand, *‘Takkanat Hashavim* (for Regulation for Penitents)’, *Dine Israel: 20-21 Studies in Jewish Law In Honor of Professor Aaron Kirschenbaum* (2001), 439 [Hebrew]. [↑](#footnote-ref-41)
42. With minor changes, the translation is based on: Cohen et al., *Annotated*, 672-73. [↑](#footnote-ref-42)
43. In tractate *Gittin*, the testimonies of Yohanan ben Gudgada are integrated into a large collection dealing with ‘repairing the world’, that is, laws established to solve social problems. It appears that the editor of tractate *Gittin* saw this legislation as regulations that circumvent the law rather than as legal opinions. On the collection in the Mishnah see: M.I. Kahana, *Tiqqun Olam (Repairing the World): Babylonian Talmud Tractate Gittin Chapter 4* (Jerusalem, 2020), 21-40 [Hebrew]. [↑](#footnote-ref-43)
44. Four manuscript versions of the Tosefta, each with significant variations, are presented here. I have selected the text according to MS Vienna - Austrian National Library, Cod. Hebr. 20 (**V**). Variations were taken from MS Erfurt - now housed in Berlin State Library, MS Or. Fol. 1220 (**E**); editio princeps, Venice 1521 (**P**); and a Spanish fragment of the Cairo Genizah - Cambridge University Library, T-S E2.141 (**G**). To avoid overwhelming the reader, I have chosen to present only the textual variations that I intend to discuss below. For a full description of the variations, see: S. Lieberman (ed.), *The Tosefta According to Codex Vienna, The Order of Nashim* (New York, 1967), 85-86; R. Brody*, Mishnah and Tosefta Ketubbot: Text, Exegesis and Redaction* (Jerusalem, 2015), 223-24 [Hebrew]. [↑](#footnote-ref-44)
45. This sentence is missing in **V, P**. See below. [↑](#footnote-ref-45)
46. From here to the end of the citation, the text in **E, G** is similar to the parallel passage in the tractate *Bava Qamma*. [↑](#footnote-ref-46)
47. A. Goldberg, *Tosefta Bava Qamma: A Structural and Analytic Comme*ntary (Jerusalem, 2001), 191 [Hebrew]; Brody, *Mishnah and Tosefta*, 211. [↑](#footnote-ref-47)
48. Halakhah 3 in the Tosefta dealt with a woman who is being divorced. In that case the land she brought into the marriage is returned to her but the produce already harvested belongs to her husband. The Tosefta discusses who owns the produce that is still attached. The same halakhah later relates to property whose owner has been taken prisoner and which was managed while the owner was imprisoned by another, who was entitled to consume the produce grown there. When the prisoner, returns, the property reverts to him. The Tosefta discusses the status of the unharvested produce at the time of his return. See O. Malka & Y. Paz, 'Ab hostibus captus et a latronibus captus: The Impact of the Roman Model of Citizenship on Rabbinic Law', *Jewish Quarterly Review*, (109) 2019. Halakhot 6-7 address a complicated inheritance issue, wherein a person has inherited property that is attached to that of another. Halakhah 7 continues with the law concerning a sharecropper who has resigned but some of the unharvested produce belongs to him.

In my opinion, all the laws in the chapter share the same theme. For an analysis of the chapter, see Brody, *Mishnah and Tosefta*, 209–11. The compensation due to a squatter who rebuilds another’s ruin recalls, in various ways the Roman law concerning one who attends to the property of a missing person (*negotium gestio*). On the parallel see: Cohen, *Jewish and Roman Law*, 489–90. [↑](#footnote-ref-48)
49. First, there is a baraita in the PT that also lacks the doctrine of R. Shimon ben Gamliel. See: PT *Bava Qam*. 6d; PT. *Giṭ*. 47a-b. The situation in the BT is more complex, but at least in its later stratum, it recognizes the doctrine of R. Shimon ben Gamliel. See: BT. *Bava Meṣiʿa*. 101a. From another perspective, as is evident in the textual variations I have presented above, the Tosefta *Ketubot* is closer to **E, G** than to its parallel in *Bava Qamma* whereas **V, P** differ from it. It could be argued that **V, P** preserve the original differences between the two tractates, whereas **E, G** altered the original text to align the two parallels. [↑](#footnote-ref-49)
50. ‘They [Roman jurists, ancient rabbis, and Muslim jurists] have little interest in what actually happens in court: their texts do not smell of the courtroom even when they invent new devices...They write for those interested in the same issues as themselves’ (Watson and Abou El Fadl, ‘Fox Hunting’, 36). [↑](#footnote-ref-50)
51. Jackson, ‘On the Problem of Roman Influence on the Halakah’; Jackson, ‘History, Dogmatics, and Halakhah’. [↑](#footnote-ref-51)
52. Primarily based on the works of Livy and Dionysius Halicarnassus, modern scholars have cast doubt on the account. See: Michael Steinberg, ‘The Twelve Tables and Their Origins: An Eighteenth-Century Debate’, *Journal of the History of Ideas,* 43 (1982) [↑](#footnote-ref-52)
53. For the text and translation see: K. Donker van Heel (ed.), *The Legal Manual of Hermopolis [P.Mattha]: Text and Translation* (Leiden, 1990), 66-68 (Col. VI lines 3-11). The translation there is by John R. Rea; translations issues are addressed in the notes and references [↑](#footnote-ref-53)
54. Furthermore, even if there had been a Roman influence on this law in the Tosefta, it would not have originated from the text of Gaius, for Roman formulations of the law are closer to the formulation in the Tosefta than that of Gaius. See: Dig. 6.1.38.pr; Dig. 6.1.27.5; Dig. 6.1.48 and more. [↑](#footnote-ref-54)
55. The term *ius gentium* has several different meanings among the classical Roman jurists, and over history its meaning has changed several times. In the current case, however, Gaius explains what he means. On the changes in the meaning of the term, see: D. Fedele, ‘Ius gentium: The Metamorphoses of a Legal Concept (Ancient Rome to Early Modern Europe)’, In Edward Canavagh (ed.), *Empire and Legal Thought: Ideas and Institutions from Antiquity to Modernity* (Leiden & Boston, 2020). [↑](#footnote-ref-55)
56. On the history of the institution of the Nesiut (the abstract noun for Nasi) and its relationship to Roman rule see: David Goodblatt, *The* *Monarchic Principle: Studies in Jewish Self-Government in Antiquity* (Tübingen,1994), 131-231. [↑](#footnote-ref-56)
57. The sources on R. Simeon ben Gamliel were collected by: Y. Furstenberg, ‘From Competition to Integration: The Laws of the Nations in Rabbinic Literature within its Roman Context’, *Dine Israel*, 32 (2018) [Hebrew]. Furstenberg deals with many rabbinic sources involving foreign judgment, but the exact term ‘The Laws of the Nations’ is relatively rare. It is possible that the phrase in these sources should be interpreted as Gaius interpreted it. Some scholars have found parallels to *ius gentium* in other Jewish sources. See for example: Hyman Klein, ‘The Sale of ‘Res Mobiles’ between Gentile and Jew in the Talmud’, *Jewish Quarterly Review*, 28 (1938); Cohen, *Jewish and Roman Law*, 24-28; D. Novak, ‘Natural Law and Judaism’, in A. M. Emon et al., *Natural Law: A Jewish, Christian, and Islamic Trialogue* (Oxford, 2014); Suzanne Last Stone, ‘Sinaitic and Noahide Law: Legal Pluralism in Jewish Law’, *Cardozo Law Review*, 12 (1991); Christine Hayes, ‘Were the Noahide Commandments Formulated at Yavne? Tosefta Avoda Zara 8:4-9 in Cultural and Historical Context’, in Joshua J. Schwartz and Peter J Tomson (eds.), *Jews and Christians in the First and Second Centuries: The Interbellum 70‒132 CE* (Leiden & Boston, 2018). It should be noted that the definition of *ius gentium* is not the same in all these sources. [↑](#footnote-ref-57)
58. See mainly: Malka & Paz, ‘In Civitate’ and idem, ‘Ab hostibus captus’. [↑](#footnote-ref-58)
59. See: Y. Furstenberg, ‘From the Literature of Early Halakhah to Roman Law: The Development of Tractate *Bava Mesi’a’*, *Te’uda*, 31 (2020) [Hebrew]; Y. Furstenberg, ‘Imperialism and the Creation of Local Law’, 287-88. [↑](#footnote-ref-59)
60. I thank Prof. Furstenberg for the permission to read his article before publication. [↑](#footnote-ref-60)
61. See also: Rosen-Zvi, ‘Is the Mishnah a Roman Composition?’ 2, n. 6. For earlier sources dealing with the topic, see Furstenberg’s footnotes there. [↑](#footnote-ref-61)
62. See: Humfress, ‘Thinking Through Legal Pluralism’, 228. [↑](#footnote-ref-62)