

Course Reading

Westbrook, Raymond. "Introduction: The Character of Ancient Near Eastern Law." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, 1-90 (selection: 44-62). Leiden: Brill, 2003.

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is a wife; to Y she is a slave." (The one exception was that a person could not be both spouse and owner of the same slave.) Where a slave owned by a third party was married to a free person, married status provided some protection against the owner's property rights. For example, LH 175-76 rule that the offspring of the marriage remain free, although this principle was often overridden by contractual clauses (cf. LU 5). Where a married couple were enslaved for debt, they would be released together, but if the master had given the slave a female slave of his own as wife, property law prevailed and he would have to leave without her (Exod. 21:2-6; LU 4).

4.5.6.2 Since a female slave was property, her owner could exploit her sexuality and her fertility like any other beneficial aspect of property. She could thus be made her owner's concubine. Where concubinage resulted in motherhood, the slave might be accorded some qualified protection from the consequences of her status as property. She and her offspring might even gain their freedom on the death of the master/father (LH 171). The intention appears to have been to accord the slave concubine some of the rights of a married woman, not including, the sources emphasize, the right of inheritance for her children.

5. FAMILY LAW

5.1 *Marriage*

Marriage was a private arrangement, involving neither public nor religious authorities. Intermarriage between different societies and cultures was not seen as anything out of the ordinary. It is not until the Persian period that the question of a religious or ethnic bar on intermarriage is raised in certain Biblical texts. A man could marry more than one wife, but in practice the incidence of polygamy (strictly speaking, polygyny) varied greatly between cultures. Slaves could make a valid marriage, either to another slave or to a free person.

5.1.1 *Formation*

There were at least three possible stages in the formation of marriage:

1. An agreement between the person(s) under whose authority the bride was (i.e., parent or guardian) and the groom (or his father, if the groom was still young). The bride was the object of this agree-

ment, the purpose of which was her release from the authority of the former into that of the latter. If the bride was independent, for example, a divorcée or a widow, she could contract on her own behalf. Provisions in several law codes declare a formal contract between the parties a necessary condition to the validity of the marriage (LE 27; LH 128).

2. Betrothal, indicated by payment of the "bride-price," an amount usually in silver or other metals, which had perhaps been settled in the preceding agreement. The consequence of the "bride-price" was to create what has been called "inchoate marriage": the couple were deemed married as far as outsiders are concerned, but the arrangement was still subject to rescission by the parties to the contract. The nature of the "bride-price" has been much debated. It is intimately linked to the nature of marriage itself, which will be discussed below. As well as initiating betrothal, the "bride-price" acted as a measure of damages (*in simplum* or in multiples) for breach of betrothal, and, in some systems, for divorce without cause. At the end of our period, in Demotic and subsequent rabbinic law, this last function takes over entirely: the bride-price is transmuted into a fictional payment, becoming in effect agreed damages payable to the bride if the husband should divorce her.
3. Completion, the point at which the bride passed *de facto* into her husband's authority. The ancient sources are remarkably reticent on the subject of what is regarded in modern cultures as the most important stage—the wedding itself—perhaps because of the prominence of betrothal in establishing the legal context. There were, it seems, religious ceremonies and elaborate celebrations, but they were not legally dispositive. It would seem that there were several alternative ways of completing marriage, according to the different circumstances of the parties:
 - (a) by a speech act, such as is recorded in a marriage contract from Elephantine: "She is my wife and I am her husband from this day (and) forever" (EPE B28:4; cf. MAL A 41).
 - (b) by entry into the husband's house, as is mentioned in Demotic marriage contracts. In LH 151-52, entry is significant as the point at which a wife becomes liable for her husband's debts. A widow is often referred to as entering the house of her second husband. A wife could, however, continue to live in her father's house, being visited by her husband occasionally (MAL A 32-34, 38).
 - (c) by consummation. LH 155-56 marks consummation as the point at which marriage is complete also as regards the contracting parties, but in special circumstances: the bride had moved into her father-in-law's house already on betrothal (and evidently before puberty).
 - (d) by cohabitation for a minimum period (LE 27; MAL A 34). For a widow, this can repair the lack of a formal contract (MAL A 34).

Perhaps this wide variety of possibilities reflects not so much modes of completion as modes of proof, *ex post facto*, that the bride had passed into the groom's authority.

5.1.2 *Nature*

Marriage created a relationship of status between husband and wife. The essence of that status was that the wife, while remaining a free person, became subordinate in law to her husband. The husband's authority replaced that of her father, but it was not the same in content. In order to determine its nature, it is necessary first to resolve the problem of the "bride-price" adumbrated above.

5.1.2.1 A preliminary payment from the groom's party to the bride's party is attested in most of the legal systems, signified by a dedicated technical term (Sum. *ni.mí.ús.sá/ku.dam.tuku*; Akk. *terhatu*; Hitt. *kusata*; Heb. *mohar*; Aram. *mhr*; Dem. *šp n hm.ḥ*). It was translated as "bride-price" by early scholars on the assumption that marriage was a purchase of the bride from her father by the groom and that this payment therefore represented the purchase price. The traditional view has been hotly contested by later scholars, including contributors to this volume, who have offered a variety of translations: "bridal gift" (on the basis that it was a mere liberality), "bridewealth" (based on modern anthropological parallels), or "betrothal payment" (on the basis of its initial effect).

5.1.2.2 On the one hand, the existence of a dedicated term might be thought to negate any connection between the world of marriage and the world of sale of goods. On the other, in a few instances sources do speak of "price" in the context of marriage, using the standard commercial term (Old Assyrian: TPK 1 161; MAL A 55: *šim batulte* "price of a virgin"). Nevertheless, the "bride-price" did not always behave like a normal price, often finding its way into the property of the wife herself. Thus "bride-price" and commercial price were not identical, but an association between the two existed in ancient juridical consciousness.³³

³³ It is sometimes stated that with respect to marriage arrangements (e.g., at Nuzi), in which poverty-stricken parents received a payment for their daughters, the transaction was one of sale. This may have been true in economic reality, but that

5.1.2.3 Purchase is a mode of acquiring ownership, and ancient Near Eastern law knew ownership of women. As slaves, they could be bought, used, pledged, and sold like any other property, and they could be exploited sexually. The law distinguished between wives and slaves, both in legal terminology and in the rules that applied to each. For example, unlike a slave, a wife could own property herself and have heirs. In all languages, there were entirely different technical phrases for marrying a wife and buying a slave. Where a wife herself had slave status, the law can be seen navigating between the law of property and the law of persons, favoring one or the other or finding a compromise between the two. For a master who married his own slave, it was the law of persons that triumphed: the marriage emancipated her.

5.1.2.4 Nonetheless, the boundaries between the two legal categories were not as sharp as a modern perspective would lead one to expect. The husband is sometimes called his wife's "master" (Akk. *bēlu*; Heb. *'adon*), a term that can refer to legal ownership but is looser than "owner" in modern law. If in dire financial straits, a husband was entitled to pledge his wife or sell her into slavery. It is true that she did not cease thereby to be his wife, as she would have ceased to be his property. Still, these powers demonstrate that, to some extent, the authority of a husband and the rights of an owner overlapped. Ancient jurisprudence recognized their commonality and at the same time, the limits set by the exclusive nature of marriage as a status with its own unique rules.

5.1.2.5 Of the rules for which we have evidence, the most important are the following:

1. The husband had exclusive sexual rights over his wife. They were not alienable and were fiercely protected against third parties by severe punishments for adultery and rape. By contrast, the owner's sexual rights over his slave woman were protected only by compensation for damage to property.
2. Children of the marriage were the legitimate heirs of both the husband and the wife.

is not the same as law. However pedantic it may seem, reductionism of this sort should be avoided; law is as different from social or economic reality as reality is from metaphor.

3. The marriage was in theory dissoluble by a unilateral act of either husband or wife.

5.1.3 *Status and Contract*

Marriage was a status, but the many marriage documents inform us of a variety of contractual arrangements that could be made ancillary to the status. There are three types of documents:

1. A protocol of the completed marriage, sometimes containing a receipt for the "bride-price" and/or the dowry, with terms added on to the initial betrothal agreement. Those terms bind husband and wife and relate to future contingencies such as misconduct, polygamy, and divorce.
2. Adoption documents or wills that also record marriage arrangements made by the adopter or testator with regard to the adoptee and other persons under his authority.
3. Post-nuptial settlements between husband and wife.

While contractual terms could not directly abrogate rights of the husband or wife under the rules of the status of marriage, they could affect them indirectly, by imposing penalties on their exercise, for example, on divorce (see 5.1.4.1 below). Those penalties could be pecuniary, physical, or even capital. The contract was thus a prior condition for the status and an important way of fixing subordinate issues, such as property arrangements, but it was also a continuing influence on the status, the contours of which it helped to determine.

5.1.4 *Dissolution*

Marriage could be terminated by divorce, death, or desertion.

5.1.4.1 Divorce was a unilateral act, which in theory either the husband or the wife could perform. It was effected by a speech act: "You are (/she is) not my wife" and "You are (/he is) not my husband" respectively. In practice, many systems precluded the wife's right to divorce.

The right to divorce was exercisable at will but was restrained by penalties imposed by the general law or by contractual terms. Since a wife was entitled to restoration of her dowry on termination of the marriage, the consequences of her husband divorcing her would be the loss of that property together with his spouse. Typically, the contract provided for a further financial penalty upon the husband. In the absence of contractual provisions, some systems imposed

financial penalties by operation of law, although they varied in severity from the amount of the "bride-price" where there were no children (LH 138), up to the whole of the husband's property where there were children (LE 59; LH 137), to nothing (MAL A 37).

The existence of contractual penalties on its exercise proves that the wife had a right to divorce under the rules of status. The severity of the penalties varies from system to system and between individual cases within systems. In some contracts, there is effective parity between the penalties on husband and wife. Others condemn her to be sold into slavery or even to be killed, for example, "if (the wife) says (to her husband), 'You are not my husband,' she shall be thrown into the water." Clearly, this was tantamount to an absolute bar on divorce by the wife.

Penalties for divorce could be avoided if the divorcing spouse could show sufficient grounds. A husband who divorced his wife for adultery, for example, did not have to pay her compensation and could probably keep her dowry. Even when he had grounds, however, the husband might find himself obliged to negotiate a divorce settlement, as in the case of a royal divorce at Ugarit (RS 17.159).

5.1.4.2 Death of the spouse ends the marriage, but a widow might not be free to remarry a man of her own choice. Since her late husband's family did not wish to lose her dowry, contractual provisions sometimes penalize her departure from the marital home. The Middle Assyrian Laws (MAL) allow a widow to depart only when she has neither sons or sons-in-law to support her nor any relative of her husband to marry her. The biblical law of levirate obliges a childless widow to marry her brother-in-law or closest relative.

5.1.4.3 The case of a husband who is missing on active service abroad is a classic scholarly problem considered by three law codes (LE 29; LH 133a-35; MAL A 36, 45). The wife is allowed to remarry on certain conditions, notably that sufficient time has passed and that there are insufficient means in her husband's house to sustain her, but should her first husband later return, she is to return to him. Both her marriages are deemed valid, but the second is voidable on restoration of the first.

5.1.4.4 The same scholarly problem also considers the possibility that the husband has fled his city voluntarily (LE 30; LH 136). If

his wife remarries under those circumstances, he may not claim her back. Note that desertion of his wife is not the cause but abandonment of his city and his civic obligations. On the other hand, a wife who deserts the matrimonial home may be divorced without compensation (MAL A 24).

5.2 *Children*³⁴

5.2.1 The father and mother had the right to give their children in pledge for their debts or to sell them into slavery. The latter right appears to have been exercised only by necessity due to debt or famine. There is no historical evidence of a "right of life and death" over one's children; all examples are from legends set in an earlier age. Deuteronomy 21:18–21 provides for the execution of a rebellious son but by court order on application by the parents.

5.2.2 It was the duty of sons and sometimes of daughters to support their parents in their old age. Some sources also mention a duty to bury them and mourn them. A term often used in this context is "honor" (Akk. *palahu/kubbudu*; Heb. *kbd*)—which implies that more than mere material support was expected; the child had to serve the parents with respect.

5.3 *Adoption*

5.3.1 Adoption was far more widely practiced than in modern societies. The reason is as much juridical as social. It is true that the prevalence of disease, famine, and war left many couples childless and many children orphans, with adoption as the obvious cure. But adoption was by no means confined to childless couples or to the sphere of family affection. It developed into one of the most powerful tools of ancient jurisprudence, a flexible juridical instrument that was used to facilitate matrimonial, property, and even commercial arrangements.

The relationship of parent and child is a natural, biological phenomenon. The concept of legitimacy, by contrast, is purely legal, the result of an artificial legal construct, namely marriage. A legitimate

³⁴ Fleishman, *Parent and Child* . . . ; Westbrook, "Life and Death . . ."

son or daughter is a person with certain recognized rights and duties in law—a legal status. Only the qualifications for that status are biological. Adoption is a legal fiction that creates the same legal status for persons who lack the biological qualification. The essential quality of adoption in the ancient Near East is that it did not merely create filiation, called "sonship" or "daughtership" in the native terminology; it created *legitimate* sonship or daughtership.

The ancient law of property, inheritance, and contract contained certain limitations in the assignment of rights and duties. Legitimate filiation was a conduit for such rights and duties. Adoption was therefore used as a mode of transferring rights and duties, employing family law to circumvent limitations in other legal spheres. It could be used within a family, where gaps had appeared in its biological structure, to restore it in law to an integral unity of persons and property. It could be used beyond the family, to negotiate arrangements of mutual benefit between strangers, since adoption was not confined to children. The more the benefits incidental to filiation became the essence of the relationship between adopter and adoptee, the more the family relationship was reduced to a mere fiction. In its most extreme commercial forms, adoption became a legal fiction upon a legal fiction.

5.3.1.1 From the point of view of the adopter, adoption brought two principal benefits. Firstly, it enabled a childless person to maintain the family line. Secondly, it ensured care and support in one's old age, which was a fundamental filial duty. Not only the childless took advantage of this benefit; it might be more convenient to impose this duty on someone adopted expressly for the purpose than on one's own children.

5.3.1.2 The principal benefit for the adoptee was the right to inherit the adopter's estate, since adoption gave the status of legitimate heir. More than this, it was the only way to acquire such a right. Inheritance law knew nothing of bequests to outsiders; to inherit a share of the estate, even under a testament, the beneficiary had to be entitled already under the rules of intestate succession, which normally meant being a member of the testator's immediate family. Anyone else wishing to receive an inheritance share had first to become a member of the family, by adoption.

5.3.1.3 *Matrimonial Adoption*

A special benefit for female adoptees was to come under the authority of the adopter for the purpose of matrimony. The idea was that the adopter, as her new parent, would give her in marriage and possibly dower her.

5.3.1.4 In the light of these advantages, natural parents might give their children in adoption in order to secure their future. Their contracts stipulated that the adopter would bequeath an adopted son a share of the estate or would marry off an adopted daughter.

5.3.1.5 Adoption was a means by which a father could legitimate his natural children born to his concubine or slave. They would be entitled to a share in his estate equally with his offspring from a legitimate wife. It could also be used by a master in manumitting a slave. Manumission was a separate legal process but was often combined with adoption, to take place immediately or on the master's death. Either way, the master gained the slave's continued services for the remainder of his life.

5.3.1.6 The flexibility of adoption allowed it to be used in creating complex family settlements. A common arrangement was for a man to adopt a son and give the adoptee his daughter in marriage, making him his son and son-in-law at the same time. In rare instances it is the adoptive daughter who is married to the son. In the Adoption Papyrus from Egypt, a man secures his succession by adopting his wife, who in turn adopts both the children of a slave woman purchased by the couple and her younger brother, who then marries one of those children. In the Old Babylonian period, a certain type of priestess (*naditum*), who could not marry, made a practice of adopting a niece, also a *naditum*, so as to ensure continuity in both the family tradition and property. At Nuzi, adoption as a brother or sister is common, alongside adoption as a son or daughter.

5.3.1.7 Often, adoption barely conceals a purely commercial arrangement. An elderly person grants his estate to a stranger in return for a pension. A financier pays off a person's debts in return for the same. In these cases, possession of the estate may already be transferred *inter vivos*. The most extreme example is from Nuzi, where apparently it was impossible to purchase land in the conventional

way. Instead, the seller had to adopt the buyer and transfer to him the land (with immediate possession) as an inheritance share. Instead of payment, he received a "gift" from the buyer. There is little attempt to maintain the pretense: the contract also contains standard clauses from a contract of sale, and the same purchaser is adopted hundreds of times.

5.3.2 Like marriage, adoption was a purely private arrangement. It was effected by a unilateral act of the adopter. Only one mode is attested, namely a speech act by the adopter: "You are my son/daughter!" Where the adoptee was an orphan child, this act would be sufficient. Where the child had parents, a contract with them was necessary first in order to release the child from their authority. Adults could also be adopted; if independent, the adult adoptee himself made the contract with his adopter.

5.3.3 Both men and women could adopt. In some systems, it is clear that adoption by one spouse does not automatically make the adoptee the child of the other spouse. In a document from Emar, for example, a man gives children, probably by his slave concubine, in adoption to his wife. In other systems the evidence is more ambiguous, in that the documents record adoption by the father alone as head of household. Whether the adopter's wife was implied therein or whether the act of one automatically ensured adoption by both is not certain. The law makes no distinction between the adoption of relatives and strangers.

5.3.4 Adoption could be dissolved unilaterally by either party. The form was a speech act: "You are not my son/daughter," and "You are not my father (and mother)," respectively. For the adopter, it meant the loss of his investment; for the adoptee, the loss of his inheritance. The contracts therefore included clauses against these contingencies. As with marriage, the contract could not directly annul rights under the rules of status, but they could penalize their exercise. For the adopter the penalty was loss of patrimony—from an inheritance share to the whole of his property, sometimes even with an extra payment. For the adoptee, it was generally being sold into slavery, but occasionally it could be harsher, such as having hot pitch poured over his head, as prescribed in a Middle Babylonian document. Where the adoption was a business arrangement with an adult,

the penalties tended to be purely loss of property (estate or preassigned inheritance share) or pecuniary.

For a foundling adopted without a contract and brought up in the adopter's house, the latter's exercise of his right to dissolve—a real danger if later natural children were born—meant homelessness and destitution. Only LH 191 offers any relief, obliging the fickle adopter to send his erstwhile son away with an inheritance share in movable property.

6. PROPERTY

Distinct categories of property can only be inferred from their different treatment in law. Land obviously was the object of many special rules, but the distinction between land and movables was not the only significant division. Legal records of sale and pledge are attested only for certain types of property: land, temple prebends (right to a share of temple income) slaves, and occasionally farm animals (such as a cow or a donkey; not herds) and cargo boats. Their common feature is that they are all major capital assets. The reason for their special treatment is probably that they were the focus of rights of inheritance and redemption.

6.1 *Tenure*³⁵

Three types of landholding are consistently attested: institutional, feudal, and private.

6.1.1 The two great institutional landowners were the palace and the temple. They controlled large tracts of arable land, which they exploited directly or through tenants.

6.1.2 The king granted land in feudal tenure: that is to say, in return for certain services. There has been a great deal of scholarly discussion about whether the term "feudal" is appropriate to the ancient Near East. In my view, it is a convenient term to describe a basic, recurrent form of landholding, as long as one does not

³⁵ Lafont, "Fief et féodalité..."; Allam, ed., *Grund und Boden...*; Renger, "Institutional, Communal, and Individual Ownership..."; Ellickson and Thorland, "Ancient Land Law..."

attribute to it all the special characteristics of medieval feudalism. It was more than a system for quartering troops on land; the services required could be military or civilian or could be commuted into payments. If any form of landholding is to be excluded from the category "feudal," it is outright land grants made by the king in perpetuity to a loyal servant, as, for example, those recorded in Middle Babylonian *kudurnu*'s. Such grants were not conditional on any continuing services (indeed, they were often exempt from taxes) and could only be forfeited for outright treason, like any land.

The allocation of land for civilian services was essentially a means of remunerating government officials, as an alternative to allocation of rations. Land for payment, on the other hand, was functionally the same as a lease of public land, except that the tenure was not for a fixed term. The native terminology sometimes distinguished between the different types of tenure, but in many cases the categories were not exclusive to begin with or lost their original focus over time. In particular, lessees or civilian officials are often found as the incumbents of martial-sounding fiefs, such as "bowman" and "charioteer."

Land held in fief could be heritable, as long as the holder continued to provide the appropriate services. There were restrictions on alienation that varied from system to system.

6.1.3 Private ownership of land existed at all periods, although scholars have argued that in certain systems it was very restricted, for example, during the Neo-Sumerian period, where there are no extant records of private sale or inheritance of arable land. Nonetheless, even in that period the sale and inheritance of private houses and orchards is attested. The question is of little importance for the law, since the evidence is quantitative, not normative, that is, there is no evidence of a legal bar on private landholding. Only at Nuzi does there appear to have been an actual prohibition on the outright sale of private land (for unknown reasons), which was circumvented by a legal fiction.

6.1.4 A classic evolutionary theory postulated that communal ownership of land by the clan or village preceded individual ownership.³⁶

³⁶ Maine, *Ancient Law*, 251–52; contra, de Coulanges, *Origin of Property...*

Traces of communal landholding have been claimed in ancient Near Eastern sources; for example, villages or towns as landowners in Late Bronze Age Syria, or joint ownership by brothers.³⁷ The evidence, however, is inferential and open to other explanations. At Emar, for example, the land that the town sells to private individuals has been confiscated from other individuals. Fratriarchy is explicable by the joint ownership of heirs, a transitional stage in inheritance (see 6.2.3.3 below).

6.2 *Inheritance and Transfer inter vivos*³⁸

The same basic principles applied throughout the ancient Near East to the transfer of property between generations. Within that framework there were regional differences, in particular in the identity and entitlements of heirs. A major dichotomy existed between Egypt and the Asiatic systems as regards daughters as heirs, in addition to which there were diverse local customs.

Inheritance was universal, direct, and collective. The whole estate of the deceased, both assets and liabilities, passed upon death directly to the legitimate heirs, who initially held the estate in common. Division of the estate into individual shares was a subsequent voluntary act of the heirs, in principle by mutual agreement.

Natural heirs (those automatically entitled on intestacy) had a vested right to inherit, at least as regards the core property of the estate, in particular family land. The owner of the property could only disinherit an heir for cause. Application of this fundamental principle varied in its severity. According to LH 168–69, a court order was necessary for a father to disinherit his son and only after a second offense. In Egypt of the New Kingdom, a father could disinherit some of his children in favor of others.

Testamentary disposition was possible, but given the rights of the natural heirs, the ancient testament was considerably more circumscribed in its scope than a modern will.

³⁷ Jankowska, "Extended Family Commune . . ."; Koschaker, "Fratriarchat . . ."

³⁸ See Brugman, ed., *Law of Succession* . . .

6.2.3 *Intestate Succession*

6.2.3.1 *Heirs*

The heirs of the first rank who inherited automatically were the deceased's legitimate sons, namely, sons born of a legitimate marriage. Where a son had already died but had left sons, the grandchildren would take his share alongside their uncle (*per stirpes*) and divide it between them. Under Egyptian law, although the same principle prevailed, it applied also to daughters, who ranked equally with sons.

Failing sons, the estate passed to the deceased's male collaterals—brothers or their descendants. Alternatively, some Asiatic systems did allow for daughters to inherit, albeit with conditions. LL §b allows only unmarried daughters to inherit, presumably since married daughters would have already received their share in the form of a dowry. Biblical law (Num. 36:1–12) insists on their marrying their cousins, like the contemporary Greek *epikleros/patroiokos*. The biblical narrative points to a rivalry between daughters and uncles as potential heirs, a tension that the ancient legal systems had hitherto failed to resolve, given the sporadic recurrence of the issue over millennia. Possibly, the courts had a discretion that they occasionally exercised in favor of undowered daughters, especially when there were no close relatives.

A few systems allowed an illegitimate son, that is, the deceased's natural son by a concubine (MAL A 41) or even a prostitute (LL 27), to inherit in the absence of legitimate sons. How an illegitimate son ranked against a legitimate daughter is not known. Again, the courts may have had a discretion where no close relatives were available. Otherwise, the law insisted that prior to his death, the father should have legitimized the son by way of adoption, in order for him to inherit alongside legitimate heirs.

Spouses did not in principle inherit from each other on intestacy. The property and inheritance of a wife followed a separate line of devolution (see below). Nonetheless, NBL 12 gives the court the power to grant an indigent widow some property from her husband's estate, at its discretion, according to the value of the estate (cf. an analogous grant by LH 172 in special circumstances).

6.2.3.2 *Division*

The standard method was to divide the estate into parcels and cast lots for them. In principle, the heirs divided the estate into equal shares. Many systems, however, awarded the first-born son an extra

share. There were different ways of computing the extra share, according to local custom. The first-born might also have first choice of his extra share, before the regular shares were drawn by lot (e.g., MAL B 1).

6.2.3.3 *Joint Ownership*

If the children were still young, the widow might continue to administer the estate until they came of age. Even then, the heirs might postpone division, sometimes for years. In the interim, a curious legal situation prevailed in which each heir was theoretically owner of the whole estate but at the same time owner of no particular asset within it. Special problems arose that are a favorite topic of discussion in the law codes. For example, LE 16 forbids the granting of credit to an undivided son, since the creditor could claim against the whole estate. Likewise, if an undivided brother commits homicide, MAL B 2 rules that if the victim's relative accepts composition in lieu of revenge, payment can only be to the level of a single inheritance share. Deuteronomy 25:5-10 rules that if an undivided brother dies childless, his brother must marry the widow and produce an heir to the deceased's potential share, which would otherwise disappear, since it passes by survivorship, not succession. The Demotic Legal Code (P. Mattha VIII.30-31) provides for the eldest son to be manager of the estate during indivision.

6.2.4 *Testamentary Succession*

6.2.4.1 The sources are very unevenly distributed. The highest concentration is in Late Bronze Age sites, where in a comprehensive document the testator may settle not only the estate but also a wide range of family matters, appending to the basic gift related transactions such as adoption, marriage, manumission, and disinheritance. There are no examples from early Mesopotamia, but there are references to the use of deeds of gift *mortis causa*. Testaments are found in Egypt already in the Old Kingdom, but in the Demotic record they are replaced by complex post-nuptial marriage settlements between husband and wife.

6.2.4.2 The documents allude to an oral transaction but give no details. The core of the procedure appears to have been a speech act making a gift. The speech act drew its legal effect from the use

of a completed tense: "I have given. . . ." Hence the sources are frequently ambiguous: it looks as if the gift took effect immediately, whereas in fact it only vested in the beneficiary on the testator's death. The context, which would reveal whether the gift was *inter vivos* (e.g., dowry) or *mortis causa*, is not always available to us. Where the gift was in contemplation of death, many years might still pass before the testator's death gave it effect. A document might therefore be necessary to protect the rights of the beneficiaries if disputes should arise after the testator's death. The extant documents tend to record unusual inheritance patterns.

6.2.4.3 A testament was revocable, although there is no suggestion in the sources that testators did so arbitrarily. It is more likely that changes were necessitated by a supervening life event.³⁹

6.2.4.4 The rights of the natural heirs meant that a father could not make a gift of family property to a stranger.⁴⁰ The gift would indeed be valid but only for the donor's lifetime, after which it would be subject to a claim by the donor's natural heirs. As we have seen, the method for giving legacies to outsiders was to adopt them. The powers of the father as testator were as follows:

1. To assign specific property to individual heirs. How far he could affect the total value of their shares in this way is not clear.
2. To transfer the extra share from the first-born to another sibling. Apparently, the father could act out of pure favoritism, at least in some systems. Note that biblical law (Deut. 21:15-17) forbids transfer from the first-born son by a hated wife to the son of a beloved wife, that is, where the father's favoritism relates to the mothers, not the sons.
3. To give his daughters an inheritance share alongside their brothers. A daughter was a potential but not automatic heir. The father already had the power to grant her a share of the family patrimony in the form of a dowry (see below). Therefore, no adoption or other special procedure was necessary. In a testament from

³⁹ A poignant illustration is the testator at Emar who leaves a debt to be collected by whichever of his sons survives the current plague (RE 18).

⁴⁰ For the powers of a mother, see below. In Egypt, it was possible to make a gift of land to mortuary priests to cover the cost of maintaining one's mortuary cult in perpetuity. This was a special exception to the vested rights of heirs and, in turn, had special restrictions on alienation and partition.

Alalakh (AT 87), this power is exercised in relation to the "elder daughter-in-law."

4. To give his wife an inheritance share. This was part of a husband's power to make marital gifts (discussed in 6.2.5).
5. To disinherit a natural heir, for cause. In the testament of Naunakhte from New Kingdom Egypt, the testatrix disinherits four of her children on the grounds that they failed to support her—the most common reason. A testator at Emar disinherits a son who "spoke an insult" (AO 5:17). A testator at Nuzi disinherits one of his sons because he has arranged for that son to be adopted by his childless uncle instead (AASOR 10 21).

6.2.5 *Female Inheritance*

6.2.5.1 *Dowry*

6.2.5.1.1 Upon marriage, a daughter received a share of the paternal estate in the form of a dowry. Although functionally the equivalent of an inheritance share, it differed insofar as it was not in law a vested right, like a son's inheritance, but depended on her father's discretion. In Akkadian, most of the technical terms for dowry are, in fact, words for "gift" (*nudunnû*, *šeriktu*). The difference is logical, firstly, because a daughter normally received her dowry in advance of her father's death, when the size of the inheritance shares could not be determined, and secondly, because the size of the dowry might be a matter for negotiation between the bride's family and the groom's family. Nonetheless, NBL 9 gives the daughter's interest something of the character of an inheritance share in ruling that if her father, having assigned her a dowry, suffers a decrease in his wealth, he may reduce the dowry proportionately but not arbitrarily in collusion with his son-in-law. Where the father dies before his daughter is married, the question arises whether she has a legal right to a share of the estate alongside her brothers or only has an expectation that they will dower her. Although LH assigns a share in the case of certain priestesses, there does not appear to have been a general principle of entitlement (except in Egypt). It is not surprising, therefore, that fathers often explicitly gave their unmarried daughters an inheritance share by testament.

6.2.5.1.2 The dowry enters the groom's house together with the bride, on marriage. The bride's father is often expressly said to give it to the groom. Thereafter, it is subsumed into the husband's assets

for the duration of the marriage, to be restored to the wife on divorce or widowhood. Its legal status during the marriage would appear to be that of a fund owned by the wife but managed by the husband. On his death, she is entitled to be refunded its full value prior to division of the paternal estate among the heirs. In the late period, protection of the widow's interest in her dowry is strengthened: she is preferred over her late husband's creditors, making the extension of credit to the husband a more risky business. In more than one period, we find desperate attempts to keep the dowry in the husband's family, at least temporarily: clauses in marriage contracts penalized the widow with forfeiture of her dowry if she remarried or even left her late husband's house.

6.2.5.1.3 In practice, wives are found managing assets, but it is usually impossible to tell whether the assets were specifically dowry property, wealth from earned income, or undifferentiated marital property in collaboration with the husband. Certain parts of the dowry, however, could be designated for the wife's control. The Neo-Babylonian term *quppu* ("cash-box") refers to a cash fund for the wife's exclusive use. Talmudic sources refer to a category of dowry property called *melog*, which has earlier equivalents in Akkadian and Ugaritic (*mulūgu*; *mlg*). It is distinguished from the rest of the dowry (which the Talmud calls "iron sheep") by the fact that its destruction, loss, or loss of value is entirely to the wife's account—which suggests that it was in her control. An obvious example would be personal slaves, whom the husband was not obliged to replace if they died.

6.2.5.1.4 On the wife's death, her dowry was divided by her heirs, just like the paternal estate. Her primary heirs on intestacy were her sons—from all her marriages, if she had contracted more than one. She was entitled to make a will separately from her husband and assign shares in her property among her legitimate heirs, including daughters. In the testament of Naunakhte mentioned above, the testatrix emphasizes that the children she has disinherited will still inherit from her husband's estate. If the wife died childless, the dowry reverted to her paternal family; under no circumstances could her husband or his family (including his children from other wives) inherit it. If she predeceased her husband, however, her children would, at least according to LH 167, have to wait until his death before dividing her estate.

6.2.5.2 *Marital Gifts*

Gifts of property from husband to wife, mostly post-nuptial, are frequently attested. The gift took effect after the husband's death, which meant that it remained the husband's property during the marriage, unlike the dowry. If the wife predeceased her husband, the gift was void. Alternatively, the husband could assign his wife a share in his estate, or even the whole of it, by testament.

The purpose in all these cases was to maintain the wife during widowhood, it being anticipated that the property would eventually pass to the children of the marriage. Her children from another marriage or her paternal family were not entitled to inherit it. The effect of such a gift was therefore only to delay devolution of the donor's estate, or part of it, on his legitimate heirs. However, a power often granted to the wife in the gift or testament could change the pattern of inheritance to some extent. She was entitled to give her share "to the son who loves her" or "the son who honors (i.e., supports) her" or the like. In consequence, the widow could disinherit some of the legitimate heirs from part of their father's estate. Indeed, it was theoretically possible for her to bequeath it to a stranger, contrary to the principles of male inheritance (and to the impression given by LH 150). Most documents of grant emphasize that she could not give the property to an outsider, but a few expressly allow her to give the property "wherever she pleases." A Nuzi testament applies this liberality only to a gift of movables such as perfumes, utensils, and sheep (HSS 5 70). But in a remarkable clause from Emar the husband states that his wife may "throw it in the water, give my estate wherever she pleases" (TBR 47).

6.2.5.3 By a long-established custom, already attested in the early second millennium, the bride's father upon marriage returned the "bride-price" to the groom, but as part of the bride's dowry. It thus became part of the wife's marital assets, although in recognition of its origins, it did not always devolve in the same way as the rest of the dowry.

7. CONTRACTS

The ancient Near Eastern sources on contract present us with a paradox. On the one hand, contractual documents are the most prolific legal source, especially in cuneiform. On the other, the legal

basis of contract in any or all of the systems of the region remains an enigma. There are two reasons: the lack of theoretical discussion in the ancient literature, and the oral character of the contracts (see 1.2.1 above). The written record not only omits many types of oral contract; we cannot be sure that the document contains all the terms of the contract it purports to record. It is not surprising, therefore, that in spite of the many monographs written on the form of individual contracts, no scholar has addressed the theoretical question of what made a contract binding. In this brief introduction, we can only attempt some preliminary proposals based on first principles and salient features of the data.

7.1 *Principles of Contract Law*

A contract is an agreement whose terms a court is prepared to enforce. Each legal system has its own criteria for what it will recognize as a legally binding agreement and under what conditions and to what extent it will enforce its terms. It is sometimes difficult to decide when parties have reached an agreement, but the law needs to select a point at which to freeze the bargaining between the parties, making it irrevocable.⁴¹ The simplest means from the point of view of the law—but a cumbersome one for the parties—is to require some formality. It can be *verba solemnia*, a gesture or ceremony, a written document, or the like. If the law decides to give effect to an informal agreement, the task is more complex. It may rely on mechanical presumptions⁴² or await some concrete expression of the agreement, that is, actual performance by at least one of the parties (the so-called real contract), or again it may confine itself to recognizing only certain types of transaction, according to content (e.g., sale, hire, or partnership).⁴³ Whatever criteria were applied in the ancient Near Eastern systems can only be deduced from the documents of practice.

⁴¹ It also needs to distinguish between agreements that are worthy of enforcement by the law and those that are not, either because the parties would not normally regard them as such (e.g., purely social arrangements) or because of the dictates of public policy (e.g., immoral purposes).

⁴² As in the Common Law, where the criteria of offer + acceptance + consideration provide a crude test, which does not always distinguish between social and legal undertakings.

⁴³ As in Civil Law systems, which therefore present a law of contracts, with multiple criteria, rather than a law of contract.