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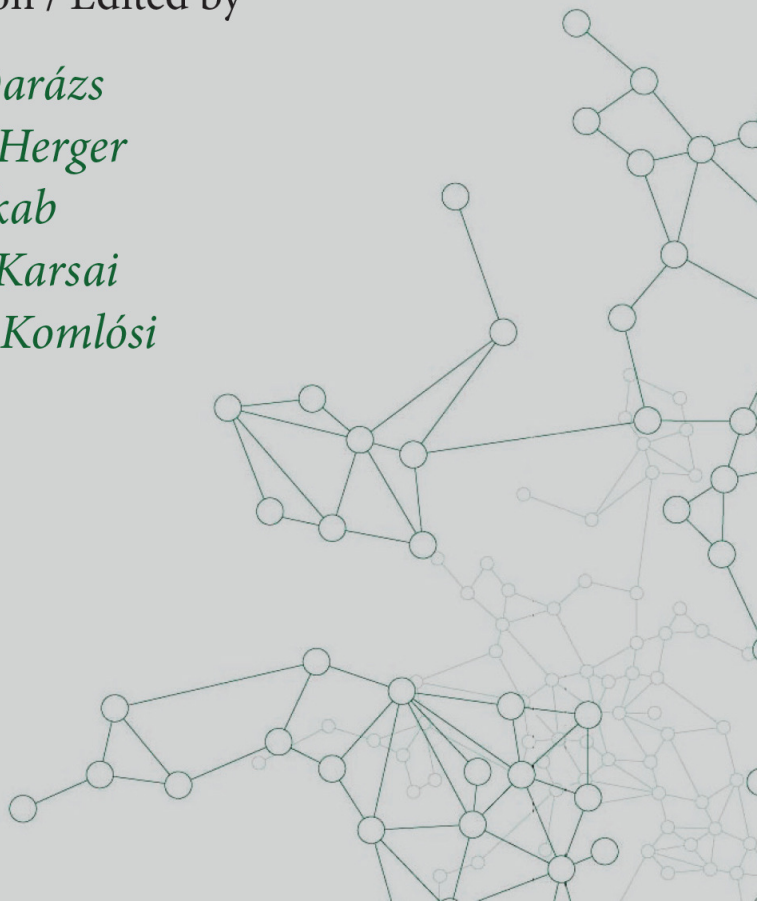
NEUE GRENZEN

NEW FRONTIERS

Herausgegeben von / Edited by

Lénárd Darázs
Eszter Cs. Herger
Éva Jakab
Krisztina Karsai
László Imre Komlósi



GONDOLAT

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Humboldt-Kolleg Budapest 2018

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H-7622 Pécs, 48-as tér 1.
Tel.: +36-30-2829654
E-mail: mail@humboldt.hu

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Vorwort

„Gebot fordert Verbot, Grenze fordert Überschreitung … an einer Grenze wird re-flektiert, entsteht Bewusstsein der Begrenzung und Verlockung der Überschreitung" (Gaier 2017). Vor zwei Jahren hat der Humboldt-Verein Ungarn eine internationale Tagung unter dem Titel „Neue Grenzen" organisiert – nichts ahnend davon, dass unser Leben in Europa so bald wieder durch rigorose, beinahe unüberwindbare Grenzen eingeschränkt wird.

Der Mensch als soziales Wesen muss natürlich immer darauf achten, dass privates, öffentliches und berufliches Leben innerhalb gewisser Grenzen abzuläufen hat. Seit den verheerenden Kriege des 20. Jahrhunderts konnten wir jedoch glücklich vergessen, wie weit unsere persönliche Freiheit, die Grundlagen unseres Daseins durch äußere Zwänge eingeschränkt werden können. Wir mussten inzwischen bitter erfahren, dass kultureller und wissenschaftlicher Austausch, internationale Zusammenarbeit von einem Tag auf den anderen einfrieren und das Leben au fein Minimum reduziert wird.

Als der ungarische Humboldt Verein diesen erfolgreichen Humboldt-Kolleg geplant und veranstaltet hat, war die Welt noch in Ordnung. Die „neuen Grenzen" wurden eigentlich als sich immer erweiternde Horizonte verstanden, die in der wissenscahftlichen Forschung und Kooperation in jeder Hinsicht grenzüberschreitend wirken: Die Grenzen des Wissens, die Grenzen der technischen Möglichkeiten, die Grenzen der Forschung, die Grenzen der Erkennbarkeit der Welt – oder die Grenzen der Solidarität, Toleranz und Nächstenliebe.

Der Humboldt-Verein Ungarn hat Wissenschaftler aus Deutschland und aus anderen Ländern Europas (bzw. der ganzen Welt) eingeladen, um jeweils in ihren Fachgebieten – in einer konsequent interdisziplinären bzw. multidisziplinären Arbeit – grenzübergreifend zu denken, die Grenzen des Wissens zu erweitern. Die Organisatoren setzten sich zum Ziel, Humboldtianer und Nachwuchswissenschaftler aus Mittel- bzw. Osteuropa mit signifikanten deutschen wissenschaftlichen Schulen zusammenzuführen.

Der vorliegende Band präsentiert die beachtlichen Ergebnisse de Tagung – und demonstriert unsere ungebrochene Hoffnung, dass wir unsere Arbeit und Zusammenarbeit bald wieder auf dem hierin vertretenen hohen Niveau weiterführen können.

Professor Dr. Éva Jakab
Präsident, Humboldt-Verein Ungarn

SEKTION II / SECTION II

Sektionsleiter: *Éva Jakab* • *Eszter Cs. Herger*

Rechtsgeschichte – Römisches Recht

Legal History – Roman Law

Textual Evidences of the Executive Legal Effects of a 'καθάπερ ἐκ δίκης' Formula in Early Roman Egypt*

JOSÉ-DOMINGO RODRÍGUEZ MARTÍN

In the frame of the discussion on the legal nature of the contractual clause 'καθάπερ ἐκ δίκης' (the most important legal formula used in Egyptian legal papyri during the Roman period) and on its hypothetical practical function, this paper offers what appears to be the first textual evidence of the executive legal effects of the clause.

THE PROBLEMATIC LEGAL NATURE OF THE 'ΚΑΘΑΠΕΡ'ΕΚ ΔΙΚΗΣ' FORMULA IN ROMAN PAPYRI

'Καθάπερ ἐκ δίκης' is, without any doubt, the most important legal formula used in Egyptian legal papyri during the Roman period,[1] for it can be found in all sorts of contracts, from obligational (loan, selling renting, promises, etc.) to real-state conventions (cessions of land), as well as matrimonial agreements or *donationes mortis causa,* just to mention a few.

In addition to the aforementioned examples, the formula was clearly used all throughout the Roman period, from the annexation of Egypt as a Roman province (31 BC) to the latest documents of the Byzantine era (7th century AD), and there are testimonies of it geographically widespread all along the Egyptian territory. Furthermore, it can be found not only in Ptolemaic papyri, but also in epigraphical documents all around the maritime Greek domains.

* The oral version of this paper was presented in the Humboldt-Kolleg „Neue Grenzen – New Frontiers" (Budapest 2018) in German, under the title: „Erste Indizien einer Anwendung von Exekutivtiteln im römischen Ägypten". The author developed this research in the frame of he Spanish National Research Project PGC2018-096572-B-C22 ("Leyendo Vidas: Religion, Derecho y Sociedad en los papiros de las colecciones españolas").

[1] «C'est sans doute la plus importante des clauses contractuelles qui apparaissent dans les papyrus grecs d'Égypte» (Modrzejewski 1963, 114).

But despite the great number of testimonies and the variety of the documents in which the formula is found, its exact nature, meaning, and legal function have been recently under discussion among romanists.

This may be surprising, since for a long time its use had been a settled and undiscussed matter: since the first time the clause was identified (1843 edition of *P.Leid.* O[2]) and after the first detailed studies were done about it (Dareste,[3] Wachsmuth,[4] Revillout,[5] Goldschmidt,[6] and especially Mitteis[7]), legal scholars were almost unanimous in considering it an 'enforcement clause', that is to say, a formula that allowed the creditor to seize the debtor and his belongings in case the latter had not accomplished his or her obligations included in a contract.

According to this interpretation, the approximate meaning of the expression 'καθάπερ ἐκ δίκης' could be: '(the execution will take place) as if a verdict was announced'.[8] In other words, the creditor could enforce the contractual obligations without having to resort to a judge in order to obtain a previous verdict in his favour. Therefore, the inclusion of a καθάπερ ἐκ δίκης formula into a document would make the contract turn into what German scholars used to call an 'Exekutivurkunde', nowadays 'vollstreckbare Urkunde' – or a document that allows the direct enforcement of unfulfilled obligations without the intervention of the court.

This view was developed by scholars such as Hitzig,[9] Brassloff,[10] Schwarz[11] or Jörs,[12] and followed afterwards by research done by later generations like Wenger,[13] Taubenschlag,[14] Seidl[15] or Cantarella.[16]

But, as said, more recent Roman Law studies have put this generally assumed interpretation under discussion. One of the main critics is based on the fact that Roman legal sources of the Imperial period seem to limit or even banish direct enforcement practices (in this sense mainly Kaser[17]). But if it were truly the case, it

[2] Leemans 1843, 81; on this work see Mitteis 1891, 402 nt. 4; Velissaropoulos-Karakostas 2011, 423–424.

[3] Dareste 1884, 362–376.

[4] Wachsmuth 1885, 283–303.

[5] Revillout 1886, 73.

[6] Goldschmidt 1889, 352–396.

[7] Mitteis 1891, 402.

[8] So for example David and Van Groningen 1965, 44 fn. 12. See nevertheless below other translation options.

[9] Hitzig 1895, 59–62.

[10] Brassloff 1900, 374–381; idem 1902, 1–25.

[11] Schwarz 1911, 70–136.

[12] Jörs 1919, 12–18.

[13] Wenger 1925, 319–321; Wenger 1953, 797.

[14] Taubenschlag 1955, 531–537.

[15] Seidl 1962, 99–102.

[16] Cantarella 1965, 30–37; specific bibliography on this question in Cantarella 1965, 35 nt. 100.

[17] Kaser 1971, 330 nt. 4, 5 and 6, with commented bibliography on the topic.

would be then very difficult to explain why the καθάπερ ἐκ δίκης formula managed to become so long-lasting and geographically so widespread.

In order to explain this apparent contradiction of the sources, an original (and quite successful) new interpretation was proposed by German scholar H.J. Wolff in 1970:[18] the expression 'καθάπερ ἐκ δίκης' would have been created by Ptolemaic notaries about 170 BC, the hypothetical date in which the traditional Ptolemaic judicial system based on *dicasteria* was apparently substituted by a new one based on the *chrematistai*-courts; but also the chronological point from which a sudden increase in the number of papyri containing the καθάπερ ἐκ δίκης formula can be attested.

Ptolemaic notaries, according to Wolff, would have added the 'καθάπερ ἐκ δίκης' formula to the '*praxis* clauses' of the documents, in order to expressly clarify that, despite the derogation of the *dicasteria,* enforcement could still be carried out according to the old system ('καθάπερ ἐκ δίκης' meaning accordingly: 'As one did when bringing a δίκη to the *dicasteria*'). The formula would, therefore, resort to an analogy, not to a legal fiction.[19]

METHODOLOGICAL PROBLEMS AND LACK OF TEXTUAL TESTIMONIES OF THE USE OF THE FORMULA IN DAILY LEGAL PRACTICE

But all these perspectives suffer from some exegetical limitations: first of all, the 'apparent' contradiction between Roman Law and papyrological testimonies may be explained by the methodological prejudices by means of which Kaser and other romanists approached the papyri, since there is only a 'contradiction' if you assume an exegetical perspective that forces every document in the Roman Empire to match the pandectistic conception of Roman Law –a methodological burden that did not determine the papyrological studies of Mitteis' generation, as above commented. On the contrary: the enforcement procedure of executive documents in Roman Egypt is well-known and widely attested ('Mahnverfahren', via διαστολικόν, intervention of the πράκτωρ χενικῶν, ἐνεχυρασία and afterwards ἐμβάδεια of the goods, possibility of ἀντίρρησις, etc.).[20] A prejudice-free exegesis of legal documents of Egypt under Roman rule displays an accepted, widespread daily practice that does not seem to come into conflict with any official regulation.

[18] Wolff 1970, 527–535. The German scholar had also previously supported the traditional view of the formula as producer of 'Exekutivurkunden' (see Wolff, 'Die Praxisklausel in Papyrusverträgen', 1961, 102–128).

[19] Wolff 1970, 535.

[20] See for all Rupprecht 1994, 149–150, with related bibliography.

Besides, we possess numerous testimonies of enforcement clauses (πρᾶξις) without the καθάπερ ἐκ δίκης-Formula, whose executive character is not under discussion; it is therefore not surprising that some scholars, sharing Wolff's exegetical doubts and lacking other textual testimonies, consider the 'καθάπερ ἐκ δίκης' formula nothing more than a mere *Floskelklausel,*[21] an empty formality inherited from previous times but with no real effect in Roman legal practice.[22] The formula 'καθάπερ ἐκ δίκης' would be nothing more than an empty formal clause, whose survival in legal documents was only due to the well-known formal rigidity of documentary papyri;[23] that would also explain the presence of a clause that 'apparently' collided with imperial Roman Law.

It is nevertheless important to point out that all these researches were based, on the other hand, on a restricted number of testimonies, since until the moment there has been no scientific attempt to collect a comprehensive corpus of all the papyri containing the 'καθάπερ ἐκ δίκης' formula, in order to obtain a complete and therefore reliable overview of the whole textual basis. It is indeed significant that Wolff himself had to admit the 'tentative character' of his proposal, «being restricted entirely to circumstantial evidence».[24]

Besides, all these discussions about nature, function or survival of the 'καθάπερ ἐκ δίκης' formula under Roman rule stumbled upon the same obstacle: they have to stand on theoretical conjectures or legal speculation, since there is no textual testimony of the use of the formula in daily legal practice. In other words: even though the formula is to be found in hundreds of legal documents all along the Roman period – and being to our disposal so many documents describing the enforcement procedure –, until now there is no official proceeding, imperial constitution, jurisprudential text nor literary source that describes the application of this specific formula in legal practice and its hypothetical legal consequences: a creditor avoid-

[21] In Schwarz's own words (Schwarz 1911, 73–74): "Ob den Worten 'καθάπερ ἐκ δίκης' in solchen Fällen eine exekutive Wirkung auch zukam, erscheint aber als sehr zweifelhaft und ich möchte vielmehr meinen, daß dieselben als bloße Floskel zu beurtelien sind".

[22] In this sense Meyer-Laurin 1975, 204; Primavesi 1986, 112–113; Llewelyn 1994, 215–218; Rupprecht 1994, 143, 184. Meyer-Laurin 1975, 204 even comes to the conclusion that between the Greek, Ptolemaic and Roman testimonies of the 'καθάπερ ἐκ δίκης' formula there is no connection, "außer einer zufälligen Ähnlichkeit des Wortlauts"; a conclusion that surely exceeds the cautious interpretation of Wolff himself (in this sense see Grotkamp 2018, 150: the discussion aroused by Wolff should be considered "eine Randfrage").

[23] "It bears witness to the stability of the documentary style throughout the centuries" Wolff 1970, 535.

[24] Wolff 1970, 527: "I should not, of course, conceal its tentative character. Being restricted entirely to circumstantial evidence, a hypothesis is all I am able to offer…"; "I am fully aware of the hypothetical character of my proposal…", (533); "With all the reserve imposed on us by the scantiness of our sources…" (534).

ing the judge and proceeding directly against the goods (or person) of the debtor, thanks to the insertion of a 'καθάπερ ἐκ δίκης' formula in the contract.

Being such an interesting question still open,[25] in the past years I have been gathering and studying all testimonies of Roman papyri containing 'καθάπερ ἐκ δίκης', as well as all the Ptolemaic and Greek precedents, not only in papyrus but also in legal epigraphy and literature. Although this research is about to be finished and its final results will be soon published, it can already be stated that a first exegetical analysis of the corpus has been very fruitful, since in my opinion, it is now already possible to provide, for the first time, a textual evidence of the legal meaning of the 'καθάπερ ἐκ δίκης' formula and its consequences in daily legal practice in early Roman Egypt. The aim of this paper is thus to identify these testimonies in order to add some more exegetical clues to the problem of the legal nature and real applicability of the 'καθάπερ ἐκ δίκης' formula.

'ΚΑΘΑΠΕΡ'ΕΚ ΔΙΚΗΣ' IN THE MARRIAGE ΣΥΓΧΩΡΗΣΕΙΣ OF AUGUSTAN ALEXANDRIA

A textual evidence – or at least, a significant trace – of an effective application of the 'καθάπερ ἐκ δίκης' formula and its specific meaning can be detected, in my opinion, in the Alexandrian marriage συγχωρήσεις of Augustan times.

As it is well known, these documents were extracted from mummy cartonnage discovered in the Abusir el-Meleq (former Busiris) excavations, conducted by Otto Rubensohn between 1903 and 1908. The cartonnage were sent to Berlin, where Schubart was in charge of the extracted papyri. At the moment the papyri were

[25] See in this sense already Modrzejewski 1963, 116: "Il semble cependant que le problème posé par la *Praxis-Klausel* ne soit pas épuisé […] C'est dire assez que la discussion sur la *praxis* est loin d'être close"; and again Modrzejewski 1970b, 326: „Tout le problème de la clause exécutoire mériterait d'ailleurs une étude d'ensemble nouvelle"; Cantarella 1965, 31 confirms „la necessità di riesaminare il problema sotto la luce gettatavi [by Wolff]"; Rupprecht 1967, 104: „eine ausfürhliche Behandlung der damit zusammenhängenden Fragen, auch aufgrund der Inschriften, wäre dringend zu wünschen", *uid.* también *ibid.* 106; Hengstl 1976, 343: „Zu dieser bedeutsamen, grundsätzlich sicherlich zutreffenden These bestehen immer noch oder ergeben sich immer wieder Einzelfragen, die zu gesonderter Erörterung anregen, allerdings auch den Wunsch nach einer profunden, insbesondere auch die epigraphischen Quellen berücksichtigenden Gesamtuntersuchung dieses Themas wecken"; Mitthof 2009, 221: „Die hier behandelten Papyri werfen Fragen auf, die zwar das Verfahren der Zwangsvollstreckung im ptolemäischen und frührömsichen Ägypten betreffen, meines Erachtens aber auch für das Verständnis der Pfändungspraxis in der Poliswelt von Relevanz sind und daher am inschriftlichen Material geprüft werden sollten"; Jördens 2012, 400: „Den unbefangenen Historiker und Papyrologen lassen diese Ausführungen zunächst perplex zurück, steht ihm doch unmittelbar eine ganze Reihe von Fällen aus dem Vertragswesen vor Augen, in denen die Fiktion eine nicht unwesentliche Rolle spielt". Even Kaser himself, after expressing his own doubts on the nature of the formula, still considered the matter far from being solved, cf. Kaser and Hackl 1996, 624.

expected to come from Abusir el-Meleq or other from its vicinity, but instead, the extracted papyri were about to reveal a great discovery: a part of the new documentation came from the city of Alexandria. In other words, for the first time, we had documents produced in one of the most important cultural, political and legal placemarks of the whole Ancient Egypt, at the very beginning of Roman rule. The publication of those texts in the fourth volume of *BGU* (1912) logically aroused great expectations among specialists.[26]

Among those Alexandrian texts there is a group of marriage contracts, which were written up in the form of a συγχώρησις, that is to say, private nuptial conventions written up following the model of a judicial transaction.[27] In particular, those marriage agreements of interest for the present study are *BGU* IV 1050, 1051, 1052, 1098 and 1101.[28]

In these nuptial agreements the obligations of husband and wife are recorded in detail, and – following the old Ptolemaic tradition even since *P.Eleph.* 1, the oldest dated preserved documentary papyrus, which by the way already contains a 'καθάπερ ἐκ δίκης' formula – fines are provided for both of them in case of breach.[29] The relevant information for this study is preserved in this part of the συνχώρησις text.

Let us begin with the husband's obligations: in case of unfulfillment on his side, the wife can resort to the πρᾶξις clause of the agreement, by means of which the recovery of the dowry can be enforced 'καθάπερ ἐκ δίκης'. Let's take a look at *BGU* IV 1050 (12-11 BC, l. 11-19) an example of this:

[26] See Schubart 1913, 35–131, where the author describes the discovery in detail; on its significance see also Brashear 1996, 367–368. Wolff 1939, 34, refers to them as the 'well-known marriage συγχωρήσεις of Alexandria'.

[27] On συγχώρησις als document type see for all Wolff 1978, 91–95, who defines them as 'gerichtsnotarielle Urkunde'. They would have originally consisted in real judicial transactions, but with the passage of time they would have evolved to become an abstract contrat model, destinated to be filed upon the *Katalogeion* of Alexandria (see examples of these two types of συγχώρησις in Preisigke 1915, v 'συγχώρησις', 161). The documentation procedure of nuptial agreements by means of this type of document is a discussed matter among scholars, for it suggests a double formality while documenting marriages: first συγχώρησις and then a subsequent register upon the city's *hierothytai;* on this see Montevecchi 1936, 16; Erdmann 1940, 165 nt. 4; Wolff 1939, 34; Wolff 1978, 29 nt. 90a and 138 nt. 7; Modrzejewski 1981, 256–258; Yiftach-Firanko 1997, 178–182; Vérilhac and Vial 1998, 18–21; Velissaropoulos-Karakostas 2011, 278–283.

[28] For a description of their legal content see Wolff 1939, 34–35. Apart from the here studied testimonies some other different marriage documents were discovered, such as two divorce agreements (*BGU* IV 1102 and 1103), a separation between mother- and daughter-in-law after the husband's death (*BGU* IV 1104) and a claim on the recovery of a dowry after a divorce (*BGU* IV 1105). On these documents as a whole and on their value as source of information about Greek-Egyptian marriage law under Augustus see Vérilhac and Vial 1998, 15–28.

[29] On the relationship between this kind of penal clauses and the freedom of divorce in the context of Roman law see Urbanik 2016, 1044. The author studies specifically *BGU* 4 1050 in relationship with the imperial constitution of Alexander Serverus in *Cod.Iust.* 8,38,2 (223 AD).

(…) τὸν Διονύσιον ἀπεσχη-
κότα τὴν προκειμένην φερνὴν τρέφειν καὶ
ἱματίζειν τὴν Ἰσιδώραν ὡς γυναῖκα γα[μετὴν]
κατὰ δύναμιν καὶ μὴ κακουχεῖν αὐτὴν μήδ' ὑ-
βρίζειν μήδ' ἐγβάλλειν μήδ' ἄλλην γυναῖκα
ἐπεισάγειν ἢ ἐκτίνειν τὴν φερνὴν σὺν ἡμιο-
λίᾳ τῆς πράξεως γινομένης ἔκ τε αὐτοῦ
Διονυσίου καὶ ἐκ τῶν ὑπαρχόντων αὐτῷ πάντων
καθάπερ ἐγ δίκης (…)

19 l. ἐκ

"(They marry on the understanding that) Dionysios, taking the aforementioned dowry, supports and clothes Isidora as befits a married woman, according to his means, and that he not mistreat her or abuse her or throw her out or bring another woman into (the house) or (if he does), he pays back in full the dowry plus 50 percent, there being the right (to Isidora) to exact payment from the same Dionysios[30] and from all his possessions as if by a court judgement[31] […]"

As it can be seen, the agreement provides the wife with a typical πρᾶξις clause, in which the type of enforcement is qualified by a 'καθάπερ ἐκ δίκης' formula, as in a great number of Roman documentary papyri containing πρᾶξις clauses. And the same model of enforcement clause including a 'καθάπερ ἐκ δίκης' formula is also followed in all the other marriage συνχωορήσεις of Augustan time; little modifications are only due to the specific details of each individual agreement:

[30] The expression 'ἔκ τε αὐτοῦ' refers to the personal execution on the body of the debtor; in this sense, the text could also be translated as: 'there being the right (to Isidora) to exact payment from Dionysios himself'. About personal execution see Weiss 1935, 1935, cols. 56–59; Mitteis 1891, 445–446; Rupprecht 1994, 149–150, with bibliography. A very good summary in F.v. Woess 1931, 426. See also Seidl 1962, 103; Modrzejewski 1962, 78.

[31] Text translation by Grubbs 2002, 124–125. For other translation examples of the 'καθάπερ ἐκ δίκης' formula, see Jörs 1919, 13 nt. 1: „wie aus einem Urteil", „als ob er einen Prozeß verloren hätte", „ebenso wie ein Urteil"; Wenger 1953, 797: „[…] der Verpflichtete sich für den Fall der Nichterfüllung der Obligation unter Verzicht auf ein weiteres Prozeßverfahren sofort der Exekution wie ein rechtskräftig Verurteilter unterwirft"; Modrzejewski 1963, 115: „comme à la suite d'une sentence judiciaire"; Kaser 1975, 330 nt. 4: „wie aus Urteil"; Platschek 2013, 273: „come sulla base di una sentenza".

BGU IV 1051, 30-14 BC, l. 20–28:

20 […] ἢ ἐκτ[ι-]
νειν αὐτόν τε καὶ τὴν Διδύμην παρα-
χρῆμα τὴν προκειμένην φερνὴν σὺν
ἡμιολίᾳ τῆς πράξεως γεινομένης
τῇ Λυκαίνῃ ἔκ τε αὐτοῦ Ἱέρακος καὶ
25 ἐκ τῆς ἐνγύου Διδύμης καὶ ἐξ ἑνὸς οὗ
ἐὰν αὐτῶν αἱρῆται καὶ ἐκ τῶν ὑπαρχόν-
των αὐτοῖς πάντων καθάπερ ἐγ δί-
κης [..]

"[…] or (if he does), he and Dydyme pays back immediately the handed dowry plus 50 percent, there being the right to Lucaina to exact payment from the same Hierax and from Dydyme's security and from one of them chosen by her and from all his possessions as if by a court judgement […]"

27 l. ἐκ

BGU IV 1052, 13 BC, l. 18–22:

ἢ ἐκτίν[ειν] παραχρῆμα τὸ φερνάριον
σὺν ἡμ[ιολίᾳ] τῆς πράξεως γινομένης
20 ἔκ τε [αὐτο]ῦ Ἀπολλωνίου τοῦ Πτολεμαίου
[καὶ] ἐκ τῶν ὑπαρχόντων αὐτῷ πάν-
[των κα]θάπερ ἐγ δίκης […]

"[…] or (if he does), he pays back immediately the dowry plus 50 percent, there being the right (to her) to exact payment from the same Apollonius son of Ptolemaios and from all his possessions as if by a court judgement […]"

22 l. ἐκ

BGU IV 1098, 19-15 BC, l. 27–32:

27 [. . . . .]. . . . ἐὰν δέ τ[ι τούτων παραβαί-]
[νῃ, ἐκτίν]ειν αὐτὸν παρ[αχρῆμα τὴν προκει-]
μένην φερνὴν σὺν ἡμ[ιολίαι τῆς πράξεως]
30 [γειν]ομ[έ]νης τῆι Ἀπολλω[ναρίωι ἔκ τε αὐ]τοῦ
Τρ[ύφω]νος καὶ ἐκ τῶν ὑ[παρχόντω]ν αὐ-
τοῦ πάντων καθάπερ ἐγ δ[ίκης […]

"[…] but if (the husband) commits any of these, he pays back immediately the handed dowry plus 50 percent, there being the right (to her) to exact payment to Apollonaria from the same Triphon and from all his possessions as if by a court judgement […]"

32 l. ἐκ

BGU IV 1101, 13 BC, l. 12–14:

(12) […] ἢ ἐκτίν(ειν) τὴν φερνὴ(ν) σὺν ἡ(μιολίαι)
τῇ(ς) πράξ(εως) γεινο(μένης) τῇ Διο(νυσίαι)
ἔκ τε αὐτοῦ Ἀμμω(νίου) καὶ ἐκ τῶν
ὑπαρχ(όντων) αὐ(τοῦ) πάντων
καθ(άπερ) ἐκ δίκ(ης) […]

"[…] he pays back the dowry plus 50 percent, there being the right to Dionysia to exact payment to Apollonaria from the same Ammonios and from all his possessions as if by a court judgement […]"

But the relevant information for this research is revealed while reading the document text just after the πρᾶξις clause, where the wife's obligations are recorded and accordingly also her husband's prerogatives in case of unfulfillment on her side. Let's take again *BGU* IV 1050 as a sample:

καὶ τὴν δὲ Ἰσιδώραν μήτε ἀπό-
κοιτον μήτε ἀφήμερον γείνεσθαι ἀπὸ τῆς
Διονυσίου οἰκίας ἄνευ τῆς Διονυσί[ου] γνώμης
μηδὲ φθείρειν τὸν οἶκον μήδ᾽ ἄλλῳ ἀνδρὶ
συνεῖναι ἢ καὶ αὐτὴν τούτων τι διαπραξαμέ-
νην κριθεῖσαν στέρεσθαι τῆς φερνῆς.

"And (on the understanding that) Isidora does not sleep away or be away for a day from Dionysios' house without Dionysios' approval, or damage the home, or be with another man, or (if she does), after being judged guilty of having done so, she is deprived of her dowry."[32]

The comparison between the legal positions of husband and wife reveals an absolutely precious information: while the wife, as it was already stated above, is legally entitled to act directly against her husband in case of breach of contract on his side, the husband, on the contrary, can deprive his wife of the dowry only after having obtained a judicial decision in his favour, proving her guilty ('κριθεῖσα').

Just like the πρᾶξις clause in favour of the wife recurs in all the other Alexandrian συγχωρήσεις, also this opposition between 'καθάπερ ἐκ δίκης' and the passive aorist participle of κρίνω is included in all the marriage agreements:

BGU IV 1051, l. 32–35:

ἢ καὶ αὐτὴν τούτων τι διαπραξαμέν[ην]
κριθεῖσαν [καὶ] τέρεσθαι τῆς φερνῆς χορὶς
τοῦ τὸν παραπαίνοντα ἐνέχεσθαι τῷ
ὡρισμένῳ προστίμῳ

"[…] or if she does, after being judged guilty of having done so, she is deprived of her dowry, and besides she, as an offender, will be subjected to the provided fine"

33. l. <σ>τέρεσθαι 34. l. παραβαίνοντα

BGU IV 1052, l. 29–33:

[…] ἢ καὶ αὐτὴν
τούτ[ω]ν τι διαπραξαμένην κριθῖσαν
στέρεσθαι τοῦ φερναρίου χωρὶς τοῦ
τὸν παραβαίνοντα ἐνέχεσθαι καὶ τῷ
ὡρισμένῳ προστίμωι.

"[…] or if she does, after being judged guilty of having done so, she is deprived of her dowry, and besides she, as an offender, will be also subjected to the provided fine"

30. l. κριθεῖσαν

BGU IV 1098, l. 39–40:

[ἐὰν] δέ τι τούτων ἐπιδειχθῇ ποιοῦσα
κ[ριθεῖσαν] στ̣έ̣ρεσθαι αὐτὴν τῆς φερνῆς

"[…] but if it is proved that she has done so, after having been judged she is deprived of her dowry"

[32] Translation by Grubbs 2002, 124–125.

BGU IV 1101, l. 17-18:

(17) ἢ καὶ αὐτὴ(ν) τούτων <τι> διαπραξαμέ(νην) κριθ(εῖσαν) στέρεσθαι τοῦ φερνα(ρίου) χωρὶς τοῦ τὸν παραβ(αίνοντα) ἐνέχ(εσθαι) τῷ ὡρ(ισμένῳ) προστ[ί]μ(ωι)

"[…] or if she does, after being judged guilty of having done so, she is deprived of her dowry, and besides she, as an offender, will be also subjected to the provided fine"

Although in *BGU* 4 1098 y 1101 the term 'κριθεῖσαν' has been restored or developed by the editors, the exact syntactical and semantical parallelism between all the nuptial συνχωρήσεις leave no space for doubt about its presence in the text.[33]

As it has been pointed out, the comparison between the fact that the wife is entitled to enforce directly without any previous judicial decision ('καθάπερ ἐκ δίκης') while the husband must always take her to court ('κριθεῖσα') first, is very significant. If we begin by submitting these pieces of evidence to a semantical analysis, the clear technical (i.e., procedural) meaning of the passive aorist participle of κρίνω cannot be questioned, and so it is understood by scholars, both in their translations[34] as well as in the very few cases in which the meaning of the expression: 'ἢ καὶ αὐτὴν τούτων τι διαπραξαμένην κριθεῖσαν…' has briefly drawn their attention while studying other problems – such as the substitution of Ptolemaic arbitration by court procedures[35] or the history of *actio dotalis.*[36]

[33] In this sense, if 'κριθεῖσα' cannot be found also in other Alexandrian *synchoreseis* must be only due to their fragmentary state of preservation: in fact both *BGU* IV 1099 and 1100 are interrupted in the part of the text where the list of obligations for the wife should begin.

[34] Since Alexandrian συνχωρήσεις have drawn the scholars' attention since the very beginning, there are plenty of translations of the term of interest to this research ('κριθεῖσα'): so for example Johnson 1936, 293 § 182: "after trial"; Lewis 1983, 55: "if tried and found guilty"; Hunt and Edgar 1988, 11: "if guilty of these actions, shall after trial." similar Katzoff 1995, 43; Sherk 1988, 243: "will be judged (an deprived of…)"; Migliardi Zingale 1992, 33 § 16: "sia condannata in giudizio"; Pestman 1994, 102, n. 23–24: "'κρίνεσθαι': to be declared guilty of having perpetrated – 'διαπράσσω' – something"; Brashear 1996, 383: "after having stood trial"; Grubbs 2002, 124: "after being judged guilty…"; Manning 2014, 152: "after trial". On the other side, Berger 1911, 222 points out the specific use of 'ἐπιδειχθῆι' ('to prove') together with 'κριθεῖσαν' in *BGU* IV 1098, a fact that does not leave space for doubts about the procedural meaning of the participle.

[35] Berger 1911, 222 mentions the term 'κριθεῖσα' but only to prove that the old Ptolemaic arbitration system, to which the marriage legal conflicts were submitted (as documented in *P.Eleph.* 1, l. 7–8 and 10, with three arbitrators: 'ἐναντίον ἀνδρῶν τριῶν') had in the 1st century BC already been substituted by a judicial procedure. On arbitration in *P.Eleph.* 1 see Wolff 1960, 191–223.

[36] Häge 1968, 88 is the other author that considers the term 'κριθεῖσα' to have a clear procedural meaning, although — in my opinion — he understands it the wrong way: Häge considers that the term 'κριθεῖσα' reveals that the woman had to go to court in order to get back the dowry in case her husband did not want to render it. According to the German scholar, the husband had no reason to bring his wife to court, since he would be already in possession of the dotal goods in any case. This hypothesis is however conditioned by Häge's assumption that there was no specific action for recovery of the dowry in Hellenistic law (*ibidem,* 82–83), since the πρᾶξις clause in favour of the wife would have make it

The logical deduction is to assume that also the expression 'καθάπερ ἐκ δίκης' belongs to the same semantic field, and therefore, that also its original meaning must be strictly procedural. By comparison with the procedural meaning of 'κριθεῖσα', an appropriate translation of the formula 'καθάπερ ἐκ δίκης' seems to be: 'as if by a court judgement', that is to say, 'without having to bring the debtor to trial first'. In this sense is not irrelevant that in three of the documents – *BGU* IV 1051, 1052 and 1098 – it is specifically stated that the husband ought to give the dowry back 'immediately' (παραχρῆμα).

This view, on the other hand, is also coherent with the fact that both in Greek and Roman marriage law the wife has the possibility to get the dowry back from the husband in case of divorce, as it is well known. This rule, being especially respectful of the wife's rights over those of the husband – for the financial and thus social survival of the woman without husband will depend on the recovery of the dowry –, matches perfectly the legal difference established in these contracts between the two parties: while she has the privilege to enforce directly against her husband without any previous judicial decision ('καθάπερ ἐκ δίκης'), he must always bring her to court ('κριθεῖσα') first, before he can deprive her of the dowry.[37]

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unnecessary (*ibidem,* 85). Häge's view is however difficult to accept, for several reasons: although it is indeed significant that almost all marriage documents include the πρᾶξις clause in favour of the wife (in this sense Mitteis 1891, 435, who considered it to be a general rule), some testimonies such as *P.Tebt.* I 104 (marriage document of 92 BC, entirely preserved and without πρᾶξις clause) prove that the wife beared right to recover her dowry independently of the presence or not of an enforcement clause (supporting this critical opinion already Modrzejewski 1970a, 58 nt. 26; it must be pointed out that also in *P.Tebt.* I 104 appears the term 'κριθεῖσαν', although it is just an editorial conjecture. On this question see Winter 1933, 119–121; Vérilhac and Vial 1998, 202, nt. 161; Velissaropoulos-Karakostas 2011, 290 and in detail Yiftach-Firanko 2003, 235–237; summary of marriage documents in Montevecchi 1981, cit. nt. 150, 4–6). On the other side, Häge's interpretation does not match, in my opinion, with the technical meaning of the term 'στέρεσθαι' ('deprive of'), used in the papyri to describe the fact that the husband is forced to go to trial in order to judicially 'deprive' his wife of the dowry (on the technical-procedural sense of 'στέρεσθαι' see Häge 1968, 73–75; Modrzejewski 1970a, 56–57; Modrzejewski 2011, 267–268. See also *ibidem* 267 nt. 38 on the esssencial literature relating the controversial question on the property of dowry goods, which Modrzejewski considers to belong to the wife even though they had entered his husband's patrimony; hence the need for the husband to take her to court in order to judicially prove her unfullfilment – 'κριθεῖσα' – and by these means be entitled to lawfully adquire the dowry, although it may already be in his possession). Yiftach-Firanko 2003, (cit. *supra*), 232 points out that the πρᾶξις had indeed substituted the old judicial procedure against the husband.

[37] Modrzejewski pronounces himself for the full compatibility between Roman and Greek legal policies towards the divorced wife's protection; see Modrzejewski 1970a, 81, where he studies the legal Hellenistic traditions and those of Roman law on the base of the Alexandrian *synchoreseis*: the Polish scholar speaks of "faktische Kontinuität landesüblicher Rechtsgebräuche", although nuancing: "Von 'Geltung' im strengen Sinn des Wortes kann keine Rede sein". Velissaropoulos-Karakostas 2011, 289 considers that even the famous definition of marriage in Mod., *Dig.* 23,2,1 could perfectly match both Roman and Greek coneptions of marriage in this periode.

The semantical opposition 'καθάπερ ἐκ δίκης' vs. 'κριθεῖσα' is, therefore, a crucial piece of information. If this view is correct, it would mean that we have found for the first time evidence – or at least an indirect one – for the real (and not fictional or merely formal) executive and procedural meaning of the 'καθάπερ ἐκ δίκης' formula under early Roman rule, referring to an actual avoidance of the trial. The formula would be, at least in this case, no '*Floskelklausel*', but quite the opposite: provided with full technical meaning, it would grant one of the contractual parties a great advantage in the moment of enforcement of unfulfilled obligations.

Anyway, one has to be cautious, since the significance of this evidences is restricted to a specific geographical and chronological space: the opposition 'καθάπερ ἐκ δίκης' vs. 'κριθεῖσα' does not take place in any other documents apart from those produced in Alexandria. In fact, only one other document[38] can be added to those studied in this paper, namely *SB* XXIV 16073, another marriage *synchoresis* belonging to the same group of papyri originally published in *BGU* IV – and dated in the same period of Augustan Alexandria, 12 BC –, but only recently published.[39]

SB XXIV 16073, l. 37–38:

ἢ καὶ αὐτὴν τούτων τι [δι]απραξαμένην κριθίσαν στέρεσθαι τῆς φερ[ν]ῆς· "[…] or (if she does), after being judged guilty of having done so, she is deprived of her dowry"

30. l. κριθεῖσαν

It is also very interesting that in the back side of *SB* XXIV 16073 we can find the draft of the document,[40] in which both the καθάπερ ἐκ δίκης formula is to be found (l. 13), as well as the reference 'κρι`θ´(εῖσαν)' in line 16.[41]

Maybe the formal and material specificity of the Alexandrian documents would explain the fact that only in them can be found the opposition between the contractual party that can avoid the court and enforce 'καθάπερ ἐκ δίκης' and the one that has to wait for a favourable sentence ('κριθεῖσα') before being entitled to execute his claim; but they have preserved for us the valuable testimony of the survival, already under Roman rule, of a 'καθάπερ ἐκ δίκης' formula with full, procedural meaning,

[38] Apart from the above mentioned papyrus, only another remote precedent can be found in *P.Freib.* III 30 (179 BC), but the document has no 'καθάπερ ἐκ δίκης' formula and 'κριθεῖσαν' is just a conjecture of the editor, due to the poor state of the papyrus. On this other testimony see Häge 1968, 73 and 87; Vérilhac and Vial 1998, 202, nt. 161.

[39] Edited by Brashear in 1996 (Brashear 1996, 376–378). The editor explains in p. 368 that the document remained unedited because it lied under the minor scraps of the papyri edited by Schubart, "to expend the next 80 years of its existence the way it spent the first 1900 – in oblivion".

[40] Edited separately as *SB* XXIV 16072.

[41] For the draft transcription see Brashear 1996, 26 and 373–374; on the whole document see Yiftach-Firanko 1997, 178–182.

still attesting direct executive consequences clearly inherited from the Ptolemaic and Greek legal tradition.

In any case, it is a very significant piece of information: while, on the one hand, it seems that in future Roman Egypt the possibility of enforcement did not depend any more on the addition of a 'καθάπερ ἐκ δίκης' formula to the πρᾶξις-clauses – and therefore testimonies of the documents including formula would mean no more than an obvious statement, since *superflua non nocent* –, on the other hand the examples above commented may be the last and precious testimonies of a specific, still technical – and not merely formal – meaning of the wording 'καθάπερ ἐκ δίκης'. It is in any case an interesting evidence that should be kept in mind in future researches on the legal nature 'καθάπερ ἐκ δίκης' formula and its practical effects.[42]

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[42] It is nevertheless striking that this relevant piece of information has remained unnoticed by scholars. The explanation may lie in the fact that scholars before Wolff's groundbreaking study took for granted that documents with a 'καθάπερ ἐκ δίκης' formula adquired executive force: "It follows that there can be no quarrel with accepted opinion as to its premise that there existed in the legal system of Roman Egypt ways of extrajudicial enforcement of claims embodied in documents", Wolff 1970, 528. Therefore the opposition 'καθάπερ ἐκ δίκης' vs. 'κριθεῖσα' did not draw their attention, for they would consider the alternative between judicial and extrajudicial claims as something common both in Greek and Roman law (in this sense for example Bozza 1934, 240, regarding *BGU* IV 1050; Erdmann 1940, 182; Erdmann 1941, 44; and even Häge 1968, 82, oddly enough following Wolff's previous view of the 'καθάπερ ἐκ δίκης' formula in Wolff 1961, 102–128). But as usual, an special mention is due to Pestman, who with great intuition detects a semantical opposition between 'καθάπερ ἐκ δίκης' and 'κριθεῖσαν' in one of his succint but rich translation notes to *BGU* IV 1050, cf. Pestman 1994, 102.

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