XXX.—The *Praxis*-Provision in Papyrus Contracts

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The occurrence among Greek contracts on papyrus of arrangements which, in contrast with established principles of contemporary Roman law, reserved the right of enforcement to persons not formally participating in the covenant is explained on the theory that in the Greek conception the right to the *praxis* was a separate element within the obligatory relation created by a contract, capable of being the object of special agreement and not restricted to the promisee or inseparably linked up with the right to collect the debt. This was an effect of the separation of liability and duty. By way of an analysis of decisions rendered by the court of the *chrematistae*, it is shown that this primitive notion, first discovered in Greek law by Partsch, persisted in Hellenistic Egypt.

I

Among the Greek papyri of both the Ptolemaic and Roman epochs there are a number of contracts in which the right of execution in case of default on the part of the debtor is stipulated for a person who is not a party to the agreement. No agency or succession is indicated or even implied, while, nevertheless, the beneficiary is not only entitled to receive payment (*solutionis causa adiectus*) but acquires a right of his own to proceed against the debtor.

Examples are found in the first place in marriage settlements concluded with relatives of the brides, but founded on the principle that the dowry, once given by the relative for the bride, should always belong to the bride. For this purpose it is provided that the woman shall not only have the right to collect the dowry after the dissolution of the marriage but the exclusive right of execution in case the return is not effected in accordance with the terms of the contract.[1] In other instances the right to collect, or only the right to bring execution, is reserved for the contracting relative as

[1] *PEleph* 1 (Mitteis, *Chrestom.* 283, Meyer, *Jurist. Pap.* 18; 311 B.C.), if its interpretation as proposed in note 3 is correct; *BGU* IV.1100 (Alexandria, time of Augustus); *CPR* 27 (re-edited as *PStudPal* XX.15; Mitteis, *Chrestom.* 289; Fayûm, A.D. 190). *PSI* X.1116 (Tebtunis?, second century A.D.), a dowry agreement between the mothers of the bride and the groom, provides for the *apodosis* of the *pherně* to the wife who also seems to be entitled to enforce the *praxis*, although no names are given in the *praxis*-clause. *PSI* X.1117 (Tebtunis, second century A.D.) is a dowry *homologia* issued by the father of the bridegroom to the mother of the bride. The latter is to receive the dowry after divorce, but the text does not seem to contain a *praxis*-provision; this

long as he lives, while after his death these rights are to belong to the woman.[2] An essential feature common to all these arrangements is the fact that the bride is not herself the promisee, that is to say, the person to whom the promise is formally declared. She is only a beneficiary of a contract drawn up, exclusively and in their own name, between persons other than herself.[3] It should be noted especially that this is also true with respect to those contracts which postpone her own right till after the death of the contracting relative, for the clause in question is drafted in such a fashion as to leave no doubt that her right is none the less considered as originally emanating from the contract, and not merely devolving upon her by succession;[4] in other words: she is to acquire the right regardless

may indeed be due to the fact that the text is only a draft for a contract. As an illustration to *BGU* IV.1100, *BGU* IV.1102 (Alexandria, 13 A.D.) may be cited, a receipt issued in the form of *synchoresis* by a wife to her husband after divorce; she promises never to proceed against him, having received *ὃ ἔλαβεν παρὰ τῶν γονέων αὐτῆς— — φερνάριον*. Somewhat related is the rather obscure *PTeb* II.444 (first century A.D.), a contract between a husband and a third person who owes money which seems to belong in some way to the *phernē* of the wife of the promisee; the *praxis* is given to the wife. This papyrus, however, seems to reflect Egyptian conditions.

[2] *PRyl* II.154 (Fayûm, A.D. 66); *CPR* 24 (re-edited as *PStudPal* XX.5; Mitteis, *Chrestom.* 288; Fayûm, A.D. 136). In *POxy* III.496 (Mitteis, *Chrestom.* 287; A.D. 127) the dowry is to be returned to the father of the bride who acts as *ekdotes*, and after his death to the wife herself, while the *praxis*-clause is made out *τῇ γαμουμένῃ καὶ τοῖς αὐτῆς*; this probably is meant to have the same effect as the clauses in *PRyl* II.154 and *CPR* 24. In a similar way *POxy* III.497 (early second century A.D.) was drafted, if the editors' supplement to line 19 is accurate. Note also *POxy* X.1273 (A.D. 260). In *POxy* III.603 descr. (ed. P. Wessely, *Studien zur Paläographie und Papyruskunde* 4 [1905] 115) the *apodosis* is provided for in the same way; the fragmentary condition of the papyrus allows no conclusion with regard to the *praxis*-clause, if there was any.

[3] This is, in my opinion, also the case in *PEleph* 1. It is true that this contract may at first sight appear to be a joint statement by the spouses of the conditions on which they are about to start their marital union. But the opening words: *λαμβάνει Ἡρακλείδης Δημητρίαν Κώιαν γυναῖκα γνησίαν παρὰ τοῦ πατρὸς Λεπτίνου Κώιου καὶ τῆς μητρὸς Φιλώτιδος* make it clear that the transaction testified to by the document was an *ekdosis* of which the bride was only the object. Thus the text following the opening sentence should be considered as a unilateral declaration by Heraclides, the addressees of which are Leptines and Philotis. This interpretation is also suggested by the docket: *συγγραφὴ συνοικισίας Ἡρακλείδου καὶ Δημητρίας* (see H. J. Wolff, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law* [*APhA Philol. Monogr.* 9; Lancaster, Pa., 1939] 17), as well as by the early date of the papyrus. The first Greek immigrants brought with them their native custom of arranging marriages for their daughters through the procedure of *ekdosis*. Only gradually, and only by passing through the intermediate state of a self-*ekdosis* as testified to by *PGiess* 2, this ancient custom was overcome, and the marrying woman herself became the contracting party (see Wolff, *op. cit.*, 25ff.).

[4] See, for example, *PRyl* II.154, lines 33f.: *γει[νο]μένης τῆς πράξ[ε]ως τῶν κατὰ τὴν συνγραφὴν τῶι Σισόιτι ἢ, μὴ περιόν[το]ς, τῆι Θαισαρί[ωι] καὶ τοῖς [παρ' α]ὐτῆς.*

of whether or not she will be the heir of the relative to whom the promise is declared.

Evidence that arrangements of the same type also occurred in business life is *POxy* IV.728 (A.D. 142). Pathotes and Livius sell the right to reap their prospective crop of hay to Diogenes with the understanding that the price of 276 drachmas will be paid to their landlord, Apio, who is also the one for whom the right of *praxis* is stipulated, although he takes no part in the conclusion of the contract. Accordingly, the receipt for the price was later issued by Apio alone (lines 36ff.). The legal theory behind this arrangement is not different from that governing the dowry contracts mentioned, and there is no need to construe the transaction as a case of agency or delegation in the Roman sense.[5]

In view of the fact that contemporary Roman law did not permit, at least in principle, contracts immediately creating enforceable rights of persons not formally participating in the covenant,[6] the obvious circumstance that no objection to this sort of arrangement was felt under the legal system of Hellenistic and Roman Egypt deserves attention. Its explanation is found in certain conceptions peculiar to Greek legal thought, which persisted in the period represented by the papyri of Egypt and influenced its law of contracts.[7]

The clue to these conceptions clearly lies in the part which the *praxis*-provision played in the mutual relations between the promisor, promisee, and beneficiary. It is significant that in all the

[5] This is suggested by L. Wenger, *Die Stellvertretung im Rechte der Papyri* (Leipzig, 1906) 248, note 2. The interpretation given here is also that of B. Frese, *Aus dem graeko-aegyptischen Rechtsleben* (Halle, 1909) 25; A. Berger, *Die Strafklauseln in den Papyrusurkunden* (Leipzig, 1911); R. Taubenschlag, *Studi in onore di Pietro Bonfante* 1 (Milan, 1930) 418, note 391; F. Weber, *Untersuchungen zum gräko-ägyptischen Obligationenrecht* (*Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte* 15 [1932]) 182ff.

[6] Recent literature is listed by W. Kunkel, *Römisches Privatrecht* (Berlin, 1935) 101, note 3. Add G. Cornil, *Studi in onore di Salvatore Riccobono* (Palermo, 1936) 4.241–58. Cornil holds that under the classical Roman law the principle was confined to verbal contracts, its reason being the technical formality of the *verba solemnia*. But in two of the cases cited by Cornil himself, namely, *Dig.* 13.7.13 *pr.* and 19.2.25.1, contracts *consensu* are involved.

[7] In this paper I am confining myself to the papyrological sources. That the principle to be discussed is Greek is evident from the fact that it probably can be traced back to the earliest (and purely Greek) contract on papyrus, *PEleph* 1. As for the Greek law of the classical period, I only wish to mention that the assignment of credits mentioned by Dem. 36.5–6 (see L. Goldschmidt, *ZRG* 10 [1889] 379; L. Beauchet, *Histoire du droit civil de la République Athénienne* [Paris, 1897] 4.539f.) is illuminated from this angle.

contracts cited, with the exception of *PSI* x.1116, where the insertion of the daughter's name in the *praxis*-clause may have been forgotten, and 1117, which is not a finished contract, it is carefully laid down that the beneficiary is entitled to bring execution (*praxis*) in case the debtor fails to perform the fulfilment (*apodosis*) of his promise.[8] It is apparent that the *praxis* was not considered, as was the right to bring action in the classical Roman law, as functionally inherent in the obligatory relation created between the promisor and the promisee through the latter's acceptance of the promise, but as a separate element capable of forming the object of special agreement.

Most revealing from this point of view is *PRyl* II.154, inasmuch as it illustrates how completely the right to collect what is paid by the debtor on the occasion of the *apodosis* and the right to enforce the *praxis* might be separated from one another and vested in different persons. In this dowry contract, drawn up in Bacchias in the Fayûm in A.D. 66 as a *homologia* made by a husband to the father of his wife, basic features of the Roman action for the return of the dowry (*actio rei uxoriae*) are repeated so faithfully that one may wonder if the parties consulted a person who knew something about Roman law.[9] However, if there was some Roman influence, it was confined to the substantial effects of the *actio rei uxoriae*. In both its form and the procedure which it provides for the recovery of the dowry in case of divorce the contract is Greek. The father of the woman, and she herself after his death, are to have the *praxis* if the *apodosis* of the *phernē* is not made in accordance with the terms of the agreement. It is interesting to see that the *apodosis* here is to be made to the daughter alone under any circumstances,[10] while

[8] *PStrassb* I.2 (Hermupolis Magna, A.D. 217), which was classified as a contract for the benefit of a third person by L. Wenger, *Aus römischem und bürgerlichem Recht, Ernst Immanuel Bekker zum 16. August 1907 überreicht* (Weimar, 1907) 82f., does not belong to this group. It is not likely that the lessor's slave, who was to give the lessee a hand on the farm, was to have a claim of his own for the μισθωτικόν promised in line 14. See also P. Koschaker, *ZRG* 29 (1908) 511.

[9] Note the reservation for the daughter of everything that the contracting father gives on account of the marriage and, especially, the elaborate provisions for the distribution of fruits to be gathered during the last year of the marital union from the *kleros* given under the title of *prosphora* (similar provisions in *CPR* 22 and 27). For general information on the *actio rei uxoriae* consult W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*[2] (Cambridge, 1932) 109, note 11, 110.

[10] Lines 27f.: προ[σα]ποδώσιν αὐτῇι ὁ Χ[αιρ]ήμων καὶ τὴν προγ[εγρα]μμένην φερνὴν καὶ τὰ παράφερνα. The *kleros* given as *prosphora* will go to the woman only if her father is dead at the time of divorce. This is a consequence of the principle that the title to the *prosphora* remains with the person who gives it.

the *praxis* is reserved to the father as long as he lives. Such an arrangement would have been void under contemporary Roman law. Based on the principle that, on the one hand, acceptance of a promise involved the promisee's right to the action resulting from the promise, whereas, on the other, no obligatory relation could be established except between the promisor and the promisee themselves, the Roman law would not allow either such separation of the rights to collect the dowry and to enforce its return or the immediate investment through a private agreement by the parties of the daughter, who formally was a stranger to the contract, with the *praxis* after the promisee's death.[11] It would permit only an alternative *apodosis*-stipulation (*mihi aut filiae*), thus reserving to the father both the collection and the enforcement, and merely designating the daughter as a person to whom payment might be made with the effect of liberating the debtor. The practical difference would become apparent if the husband had returned the dowry to the father and the latter not turned it over to his daughter. Under Roman law she would only have a claim against her father's heir for separation of her dowry from the inheritance; under the regime of *PRyl* II.154 she might after her father's death proceed against her former husband.

II

What was the reason and purpose of the habit of fortifying contracts through the insertion of a *praxis*-clause? The answer to this question is found in the manner in which Greek courts of the Ptolemaic period drew up their judgments in cases concerning personal claims. The principle to be derived from an analysis of the formula used by the courts will, simultaneously, provide us with the clue to the problem put before us by the separate existence within the obligatory relation of the right to the *praxis*.

PTor 13 (Mitteis, *Chrestom.* 29; Meyer, *Jurist. Pap.* 79; *UPZ* I.118) is an order issued in 147 B.C. by the *eisagogeus* of the court

[11] It is indeed possible that the law itself (see below, p. 429) had the right of *praxis* pass to the daughter after her father's death, as in the Roman system of the *actio rei uxoriae*. Even so the above statement remains valid. Even if in this case and the others cited in note 2 the parties only repeated what followed immediately from the law, the consonance of all the contracts cited in notes 1 and 2 and the fact that in other dowry contracts concluded by parents or guardians (*BGU* III.717 [Fayûm, 149 A.D.]; *POxy* VI.905 [A.D. 170]) no provision for a passing of the *praxis* to the woman was made show that dispositions concerning the right to the *praxis* were considered as being within the power of the contractants.

of the *chrematistae* to the bailiff (*ξενικῶν πράκτωρ*) of Memphis to execute a judgment rendered by the court. The full text of the decision is attached, and here we read after a statement of the facts: [12] *σ[υ]νεκρίναμ[ε]ν ἐπικεχωρῆσθαι τῶι ἐντετευχότι τὸ ἀξίωμα καὶ γρ[αφῆναι τῶι ση]μαινομέ[νωι] πράκτορι συντελεῖν αὐτῶι τὴν πρᾶξιν τῶν κατε . . μένων κεφαλαίων [καὶ ὧν(?) ὑπ]ερβάλλει* (lines 23–25). The court decides that an execution shall take place against the defendant, but it does not, as would a modern court, formally rule that the defendant be requested to pay to the plaintiff what he is deemed to owe him. The same conclusion follows from *PPetr* III.25, since the ingenious supplements suggested by the papyrologists of Freiburg [13] have made the text intelligible. In this document, composed in the Fayûm in the second century B.C., the court of the *chrematistae* rules for a hearing to be held at Alexandria that in case of default on the part of the defendant *δ[ο]θήσετ[α]ι τῶι Ἀπ[ο]λλωνίωι*, viz. the plaintiff, *τὸ ἀξίωμα* (lines 55f.). This *axioma*, i.e., the request made of the court by the plaintiff,[14] is rendered in lines 41ff. as follows: *γράψ[αι]*, in case the defendant defaults, *Ἀφθονήτωι συντάξαι τοῖς παρ' αὐτοῦ εἰ[σπρᾶξαι] Ἀμμώνιον*. The restoration *εἰ[σπρᾶξαι]*, suggested by the Freiburg group, is doubtless correct. It is true that in the papyri *πράσσειν* is found more frequently than *εἰσπράσσειν*, but the latter term was by no means unusual and occurs in documents of the earlier period.[15]

It has been suggested [16] that judgments of the type as represented by *PTor* 13 and *PPetr* III.25 may have been peculiar to default proceedings, while in case the defendant pleaded the court's decision considered the claim substantially and a separate order of execution was issued subsequent to the judgment. Support for this theory has been found [17] in the wording of the plaintiff's *enteuxis* in *PTor* 13, which is indeed recorded as follows (lines 13ff.): *ἠξιώκει ἐ[κ]τεῖσαι αὐτόν*, viz. the defendant, *--καὶ ἐὰν μὴ ἀπαντήσῃ ἐπὶ τὸ κριτήριον, ἐπισταλῆναι τῶι τῶν ξενικῶν πράκτορ*ι

[12] I am quoting Wilcken's text as given in *UPZ*.

[13] R. Feist, J. Partsch, F. Pringsheim, E. Schwartz in *APF* 6 (1920) 357f.

[14] See the instances listed in F. Preisigke's *Wörterbuch der griechischen Papyrusurkunden, ss.vv. ἀξιοῦν, ἀξίωμα*. Therefore, Preisigke's translation: *Klageantrag* is preferable to Wilcken's: *Klagansprucb*. The latter term implies the plaintiff's claim against the defendant, but not the request made by him to the court.

[15] See Preisigke's *Wörterbuch, ss.vv. εἴσπραξις, εἰσπράσσειν*. The terms were employed chiefly when an administrative execution was concerned, but also occur with reference to executions carried out on account of judgments; see, for example: *PHal* 1. (*Dikaiomata*) lines 53, 59, 67; *PSI* IV.384 (248–47 B.C.), line 6.

[16] P. Jörs, *ZRG* 40 (1919) 22, note 1.

[17] Jörs, *loc. cit.*

συντελεῖν αὐτῶι, viz. the plaintiff, τὴν πρᾶξ[ιν] τῶν προκειμένων κεφαλαίων. Nevertheless, and even in spite of the fact that *PPetr* III.25, lines 41ff., and *BGU* VIII.1826 (Heracleopolis, 52–51 B.C.) seem to point in the same direction, the inference mentioned is a fallacy. Evidence to the contrary is *PFay* 11 (Mitteis, *Chrestom.* 14), a complaint of about 115 B.C., where we read in lines 24ff.: δ[έ]ομαι ἀπο[σ]τεῖλαί μου τὴν ἔντευξιν ἐπὶ τ[ο]ὺς ἐπὶ τῶν [τ]όπων χρηματιστάς,—ὅπως διαλέξαντες αὐτὴν εἰς κατ[ά]στασιν καὶ ἀνακαλεσάμενοι τὸν Θέωνα—κρίν[ω]σιν πραχθῆναί μοι αὐτὸν τ[ὴ]ν ὡρισμέν[η]ν τειμήν. The requests presented by the plaintiffs in *UPZ* II.170 (Thebais, 127–26 B.C.) and *PFay* 12 (Mitteis, *Chrestom.* 15; about 103 B.C.) are worded in a virtually identical manner. These requests clearly envisage a judgment rendered after a hearing with both parties pleading, as well as a judgment in default, and the consonance of three documents comparatively distant from one another both locally and temporally shows that we are faced with an official style, and not merely with a casual wording which might not be reliable enough to form the foundation for a legal theory. The inference that the chief content of the judicial sentence was the initiation of the *praxis* is further supported, as will soon become clear, by the fact that two of the complaints cited, namely, *UPZ* II.170 and *PFay* 12, are concerned with torts. No conclusion to the contrary, on the other hand, should be drawn from the seeming analogy of the *missio in bona* which the Roman *praetor* granted against the defendant who failed to accept the *iudicium*,[18] though the *iudex* decided only on the claim and execution had to be sought through the separate procedure of the *actio iudicati*. Such differentiation was quite natural to the Roman procedure with its two stages before the magistrate, who by virtue of his *imperium* exercised the powers of coercion and enforcement, and the *iudex*, who was a private citizen called upon by the parties, and authorized by the *praetor*, to decide the issue.[19] It would have been out of place, however, under the judicial system of the Ptolemaic monarchy which conceived the court as an authoritative board vested with the power of decision. Unlike the Roman *missio in bona*, the ruling in *PTor* 13 and the decision anticipated in *PPetr* III.25 are not merely measures of coercion against a defendant who failed to coöperate in the arrangement of the lawsuit, but judgments in the true sense of the word. No reason can be seen why these judgments should have differed basically from those rendered upon a contentious hearing.

The judicial judgment did not, like the sentence of a modern court in Civil Law countries, determine that the defendant owed a debt to the plaintiff, performance of which might be enforced, but simply established the plaintiff's right to proceed against the defendant by way of execution.[20] It reflected the idea, already ob-

[18] See L. Wenger, *Institutes of the Roman Law of Civil Procedure*,[2] translated by O. H. Fisk (New York, 1940) 106.

[19] See Wenger, *op. cit.* 24–28, 32.

[20] No objection to this result of our inquiry arises from *PPetr* III.25, lines 56–61, where we read: ἐὰν δὲ παραγενομένου αὐτοῦ Ἀπολλώνιος [μ]ὴ λάβηι τὸ ἀξίωμα,

served by E. Rabel [21] with reference to the legal systems of the Hellenistic period, as well as of classical Athens, that the sentence of the court was not to create, but merely to implement the creditor's right to realize the debtor's liability. No objection to our result arises from the circumstance that in Egypt the decision actually was drawn up as a resolution to issue an order of execution to the bailiff, instead of allowing the *praxis* to the plaintiff. This was due to the natural aversion of the authoritarian monarchy against private execution.[22] It is, therefore, not accurate to hold [23] that the court, in the case of *PTor* 13, acted in the capacity of a judge supervising the execution of a judgment (*Vollstreckungsrichter*) as separate from its capacity of a judge rendering the substantial decision.

It is not difficult to discover the legal theory behind this state of things.

It is important to note that a judgment ordering *praxis* did not always require a previous agreement on the plaintiff's right to the execution. It is indeed likely that the loan *syngraphai* on which the action rested in the case of *PFay* 11 were equipped with provisions for execution,[24] and the συγγραφὴ τροφῖτις cited in *PTor* 13 contained at least an equivalent provision.[25] This cannot be de-

[ἀ]πο[τ]είσει αὐτῶι τὰ γενόμενα [εἰς τὸ]ν κατάπλουν [ἀ]νηλώ[μα]τα. It should be borne in mind that the court here does not render a judgment, but only sets forth a rule for a judgment to be given by another court. Moreover, the term ἀποτίνειν implies that there will be a *praxis* (see below, p. 427); this may also explain *PTeb* III.1.783. *PTeb* III.2.933, lines 5–7: τὸ δὲ ἐπ[ι]δέκατον τῆς κρίσεως ἀποτῖσαι Ἀσκληπιάδην τὸν καὶ Πετῶυν, obviously are not part of the judgment rendered by the court, but a quotation from the sentence pronounced by an arbitrator whose decision is merely upheld by the court (line 9: κρίνομεν (?) κυρίαν \ αὐτοῖς / εἶναι τὴν διάλυσιν). The arbitrator probably was not in a position immediately to order the execution, as was the public court.

[21] *ZRG* 36 (1915) 359.

[22] Cf. L. Mitteis, *Grundzüge der Papyruskunde, Juristischer Teil* (Leipzig, 1912) 19f.; E. Weiss, *Griechisches Privatrecht* 1 (Leipzig, 1923) 465ff.

[23] Jörs, *op. cit.* (see note 16), 19ff. Cf. G. Semeka, *Ptolemäisches Prozessrecht* 1 (Munich, 1913) 51, note 1.

[24] Differently D. Pappulias, Ἡ ἐμπράγματος ἀσφάλεια κατὰ τὸ Ἑλληνικὸν καὶ τὸ Ῥωμαϊκὸν δίκαιον 1 (Leipzig, 1909), 109, note 37; A. B. Schwarz, "Die öffentliche und private Urkunde im römischen Aegypten," *AbhSächsAkad* 30.3 (1920) 46, note 2.

[25] This type of contract, the so-called alimentary contract, is well known from the Demotic source materials. See the list compiled by W. Spiegelberg, *Demotische Papyri* (*Veröffentlichungen aus den badischen Papyrussammlungen* 1; Heidelberg, 1923) 38, and add now *PBritMusEg* 10591 *col.* VI–VII (ed. Sir Herbert Thompson, *A Family Archive from Siut* [Oxford, 1935] 25f.) and *PBritMusEg* 10593 and 10594 (ed. Thompson, *op. cit.* 68ff.). The contracts range from the fourth through the first centuries B.C. All of them present the pledge of the husband's entire fortune, which is mentioned in *PTor* 13, line 12. One of them, namely, *PLeid* 373a (newly translated by K. Sethe in K. Sethe-J. Partsch, "Demotische Urkunden zum ägyptischen Bürg-

cisive, however, in the face of *UPZ* II.170 and *PFay* 12, both of which bear witness to the fact that an action for tort [26] led to a judgment ordering *praxis* in exactly the same fashion as did an action based on a contract expressly providing for the right of execution. It goes without saying that the same procedure must have been followed by the court when a contract not bearing a *praxis*-provision was capable of forming the foundation of the action.

The reason why the judgment ordered *praxis* instead of performance must be sought in the fact that the idea of enforcing the performance of a duty had not yet developed. As a matter of fact, it apparently was only in a late stage of its evolution, if ever, that Greek legal thought advanced to a full recognition of the right to demand and enforce performance of a promise.[27] The usage of fortifying the obligation by the stipulation of "penalties," as well as the fact that at Athens frustrated creditors rather frequently resorted to a mere *δίκη βλάβης*, indicates that liability was not understood as aimed at securing fulfilment, but as a consequence of the failure to fulfil,[28] which could then no longer be escaped by mere fulfilment. The primitive notion that default on a promise is a kind of tort probably was never quite overcome, and the function of the judicial decision was merely to authorize the wronged party to realize the liability which, either by agreement or by law, might result from that wrong. The scope of the execution was kept within certain limits,[29] to be sure, but the sum for which it was carried out

schaftsrechte vorzüglich der Ptolemäerzeit," *AbhSächsAkad* 32 [1920], 731f.), contains an express provision for execution in addition to the pledge. As this text, on account of its date (Memphis, 129 B.C.), is a close parallel to *PTor* 13, it is not impossible that the *συγγραφὴ τροφῖτις* cited there was drafted in the same fashion. In any event the universal pledge of property brought about an equal result, as it should be interpreted to the effect that the debtor put his property at the creditor's disposal for the purpose of execution (Partsch in Sethe-Partsch, *op. cit.* 577f.).

[26] Trespass in *UPZ* II.170, *hybris* in *PFay* 12.

[27] As for the Greco-Egyptian law, a different theory has been advanced by F. Weber, *op. cit.* (see note 5), 4, 193. His statement needs to be re-examined. As far as I can see from a preliminary inspection of papyrus contracts, an evolution of notions, perhaps partially influenced by Roman conceptions, took place.

[28] Cf. W. Kunkel, *op. cit.* (see note 6), 61, note 2.

[29] *PTor* 13, lines 24f.: *συντελεῖν αὐτῶι τὴν πρᾶξιν τῶν κατε . . μένων κεφαλαίων [καὶ ὧν(?) ὑπ]ερβάλλει*; *UPZ* II.170 (b), lines 43–45: *πραχθῆναι δ' ἐμοὶ αὐτοὺς τοῦ ἀδικίου κατὰ τὸ διάγραμμα χα[λκο]ῦ (τάλαντα)ϵ*; *PFay* 11, lines 29–32: *πραχθῆναί μοι αὐτὸν– – τὰ συναγόμενα χαλκοῦ (τάλαντα) λη (δραχμὰς) 'Δφ*; *PFay* 12, lines 30–32: *πραχθῆναί μοι ἕκα.[..]ρ.[.....σ]υνεχομένους τῆς ἀδίκου ἀγωγῆς ἀργυ(ρίου) (δραχμὰς) ρ. καὶ τῆς ὕβρεως χα(λκοῦ) υκ καὶ τὰς τοῦ χα(λκοῦ) 'Βψ.*

was not the original debt, but was conceived, in the last analysis, as a ransom to be paid in order to avert execution. The technical terms to express its payment were ἀποτίνειν and ἐκτίνειν, etymologically related to ποινή. They contrasted with ἀποδιδόναι which was the term for *to pay in fulfilment of a debt.*[30] At least in the earlier period an ἀποτίνειν-provision is found in practically every contract, and it is significant that its amount usually exceeded the value of the promise proper, even when the latter's object was an amount of money.[31]

This statement has a bearing upon our problem. It implies that no immediately binding force was attributed to the promise; in other words: that duty (*Schuld*) and liability (*Haftung*) still were felt as two elements not necessarily combined. The practical importance even in the advanced Greek law of this archaic separation [32] has been known, since Partsch demonstrated its effect upon the conception of guarantee under the legal system of the classical period.[33] The formula used by the Ptolemaic *chrematistae* reflects the preservation of the same idea as late as the end of the second century B.C.

This enables us to determine the import of the contractual *praxis*-provision. It is commonly assumed that it was merely to facilitate the procedure of execution by obviating the necessity of a judicial sentence.[34] This theory, however, faces the difficulty that *praxis*-clauses patently disposing of the need of a judicial decision through qualifying the execution as enforceable καθάπερ ἐκ δίκης, as

[30] Documentation is so abundant in literary, epigraphical, and papyrological sources from the classical period down to the Byzantine age, that no examples need be cited. The terminology was hardly ever confused.

[31] The above theory was already advanced by J. Partsch, *APF* 5 (1913) 478; 6 (1913) 60. See also P. Koschaker, *ZRG* 37 (1916) 354, and E. Rabel, *ibid.* 38 (1917) 300, note 2. English law offers a close parallel, see M. Rheinstein, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht* (*Beiträge zum ausländischen und internationalen Privatrecht* 5; Berlin, 1932) 125ff.

[32] Its actual existence in Germanic law was first discovered by K. von Amira, *Nordgermanisches Obligationenrecht* (Leipzig, 1882–95), and has since been shown to be a common feature of many primitive laws. Literature listed by R. Hübner, *Grundzüge des deutschen Privatrechts*[5] (Leipzig, 1930) 493, note 1. For information consult pp. 463–89 of the English edition of Hübner's work (*A History of Germanic Private Law*, translated by F. S. Philbrick [in *The Continental Legal History Series*, published under the auspices of the Association of American Law Schools]; Boston, 1918).

[33] J. Partsch, *Griechisches Bürgschaftsrecht* 1 (Leipzig, 1909). See especially Partsch, 54ff.

[34] To the best of my knowledge, the theory now prevailing has last been set forth by Schwarz in his book mentioned above, note 24.

well as other clauses also apparently providing for a simplified execution (such as the πρᾶξις ὡς πρὸς βασιλικά, which sometimes was stipulated in private contracts of the Ptolemaic period) are found along with clauses simply setting forth that somebody will be entitled to bring execution in case the promisor fails to perform the *apodosis*. At least as far as the Ptolemaic period is concerned, it is admitted that no solution to the dilemma has yet been found.[35] This problem disappears, if it is possible to define the primary purpose of the contractual *praxis*-provision as creating the debtor's liability and subjection to a possible execution to be carried out by the person for whom the clause was made out, in cases not covered by any liability specifically provided for by the law. The actual initiation of such execution ordinarily might still depend on a judgment rendered upon a judicial examination of the case, the parties only being at liberty to dispense with this necessity and to provide for a more summary procedure.

There is, as a matter of fact, reason to assume that such was the state of affairs at least under the Ptolemies. Inasmuch as decisions rendered by the *chrematistae* concerned only the defendant's liability, it is inconceivable that judgment could be given for the plaintiff, unless his liability had been established expressly and specifically. Liability might of course follow immediately from the law. This was doubtless the case with regard to torts, which indeed must be supposed to have been specified by the law.[36] It is also most likely that a liability created by the law itself might spring from a contractual relation. To imagine, however, that under a legal system so comparatively archaic as that of Ptolemaic Egypt every contractual assumption of duties was naturally and necessarily accompanied by a liability would be contrary to all that is known from comparative legal history about the typical evolution of the law of contracts. Actually there is evidence, or at least a strong indication, that such legal liability was restricted to a few types of transaction, while in all other cases the *praxis* was

[35] Schwarz, *op. cit.*, 46, 46, note 1.

[36] In a forthcoming paper, entitled "The Δίκη Βλάβης in Demosth. *or.* LV," I expect to demonstrate that *dikē blabēs* was only a common name for a number of strictly defined claims, most of which resulted from specific legal provisions. This principle of specification must still have governed the Ptolemaic law of torts, as otherwise the *praxis*-judgment would not have been possible. This statement may be made regardless of the fact that as yet no clear picture of the formal foundations of Ptolemaic law can be drawn.

possible only if expressly agreed upon between the promisor and the promisee.

This seems to be the logical inference from a comparison of the instruments equipped with a provision for the *praxis* with those lacking such a provision but no doubt considered enforceable. An examination of the documents concerned yielded the result that such an omission, despite the insertion of an ἀποτίνειν-provision, was an almost invariable feature of certain typical transactions, but, at least under the Ptolemies, was practically limited to them. These are, in the first place, the pledge for *bebaiosis* as attached to sales, mortgages, and leases, and the so-called deed of renunciation (*Abstandsurkunde*), through which a vendor or satisfied creditor promised under a penalty that neither himself nor anyone else on his behalf or as his successor would ever proceed against the purchaser or debtor on account of the property or claim. An express permission to bring the *praxis* is also frequently missing in contracts of lease [37] and, apparently, dowry arrangements,[38] although these classes of instruments, too, usually provide for a penalty for breach of contract. The practical restriction of the omission of an express *praxis*-provision to certain types of transaction, as well as the latter's own nature,[39] strongly suggest that only in the cases mentioned

[37] Ptolemaic instances are: *PTeb* III.1.815, frg. III recto *col.* II, frg. IV recto lines 46ff., frg. VI recto *col.* II lines 31ff., frg. VII recto lines 28ff.; *BGU* VI.1262, 1263, 1266, 1271 (third century B.C.); *PTeb* I.107 (Mitteis, *Chrestom.* 141; second century B.C.); *PSI* X.1098 (first century B.C.).

[38] No *praxis*-clauses present the *homologiai*, *PTeb* III.1.815 frg. IV recto *col.* 1 lines 1ff. (228–21 B.C.) and I.104 (Mitteis, *Chrestom.* 285; 92 B.C.); and from the Roman period: *PSI* V.450 recto *col.* I (Oxyrhynchus, second century A.D.) and, apparently, *POxy* II.265 (81–95 A.D.); the latter text is remarkable in this connection, inasmuch as its style resembles that of the Ptolemaic marriage contracts. Doubtful are *PGiess* 2 (Crocodilopolis, 173 B.C.), where a *praxis*-provision is missing after the ἀποτίνειν-clause where it should be expected, and *PGen* 21 (Mitteis, *Chrestom.* 284; probably second century B.C.). The final parts of both these contracts are lost, however, and the *praxis*-clause may have been given at the end of the whole, as, for example, in *PBerol* 16121, a συγγραφὴ συνοικισίου of about 100 B.C. (ed. Wolff, *op. cit.* [see note 3], 104ff.).

[39] Schwarz, *op. cit.* (see note 24), 39, suggests explaining the omission of a *praxis*-provision in deeds of renunciation on the theory that in these cases the question of whether or not the promise had been broken might have appeared too complicated to warrant an immediate execution. But, as we have seen, the *praxis*-clause also was frequently omitted in contracts of lease, although it was no more difficult to ascertain whether a lessee had failed to pay his rent than it was to ascertain whether a borrower had failed to refund his loan. At least with reference to the Roman epoch, Schwarz himself, *op. cit.* 59, ponders the possible existence of special rules concerning the enforcement of contracts of lease. Furthermore, the penalties provided for in deeds of renunciation recall the *epobelia* which in Athens was in many cases imposed upon a

and, perhaps, a few more,[40] the courts were in a position to allow the execution without requiring evidence that the defendant had subjected himself to the *praxis*.

This conclusion seems further to be backed by a striking difference which exists between the overwhelming majority of *praxis*-clauses in private contracts and those occurring in a number of early Ptolemaic instruments concerning obligations contracted with the state. While the former very rarely fail to name the person who might bring the *praxis*,[41] execution is provided for in the latter

plaintiff who failed to secure at least 20 per cent of the votes cast by the members of the popular court (see J. H. Lipsius, *Attisches Recht und Rechtsverfahren* [Leipzig, 1915] 937, R. J. Bonner-G. Smith, *The Administration of Justice from Homer to Aristotle* 2 [Chicago, 1938] 58). The vendor's warranty for the purchaser's undisturbed enjoyment of the object of a sale is everywhere one of the oldest causes for liability, see E. Rabel, *Die Haftung des Verkäufers wegen Mangels im Rechte* 1 (Leipzig, 1902). As for the liability springing from receiving a dowry, the Athenian *δίκη προικός* is recalled.

[40] I do not exclude the possibility that there may have existed more types of contract essentially involving liability. In any event the principle as stated above remains unaltered. As far as deposits and, perhaps, loans are concerned, the possible existence in Greek law of an action for tort based on the idea of embezzlement should be considered. Such at least seems to have been the foundation of the *δίκη βλάβης* brought against Pasion the banker by Callippus against whom Demosthenes' *or.* 52 was delivered by Pasion's son, Apollodorus. The same speech also possibly indicates what might have been the advantage for the creditor in a special agreement on the *praxis*, even if he did not insist on a *πρᾶξις καθάπερ ἐκ δίκης*. The *δίκη βλάβης*, which at Athens implied a penalty in the double amount of the money deposited or lent (sect. 16 of the speech), ceased when the defendant died (Lipsius, *op. cit.* [see note 39] 727), the heir being liable to a *δίκη ἀργυρίου* (sect. 14) which apparently covered the *simplum* or, perhaps, only *id quod pervenit* (see *Lex. Seguer.* 4.201: *ἀργυρίου δίκη· ὄνομα δίκης ὁπότε τις ἀπαιτοίη ἀργύριον ὡς προσῆκον αὐτῷ, καὶ μὴ λαμβάνων δίκην ἀργυρίου λαγχάνει τῷ ἔχοντι*; the complete parallelism and even partial interchangeability of the *δίκαι βλάβης, συνθηκῶν παραβάσεως*, and *ἀργυρίου*, as suggested by Lipsius, *op. cit.* 726f., is inconceivable). The contractual *praxis*-clause, at least when binding the debtor's property, besides himself, might be enforced after his death as well and so secured for the creditor the full amount of the penalty agreed upon in the contract.

[41] I have examined more than 350 contracts with *praxis*-clauses, ranging from the fourth century B.C. to the sixth century A.D. Among the more than 100 Ptolemaic texts, I have found only four or five private contracts in which the *praxis*-provision was drafted impersonally. Of these, in *PRein* 29 (second century B.C.) the *σοι* was obviously forgotten, as is proved by other contracts of the group. More serious is *PEleph* 2 (Mitteis, *Chrestom.* 311; Meyer, *Jurist. Pap.* 23; 285–83 B.C.). Here the omission seems to be due to the fact that execution is reserved for the testator himself and his wife. The other two or three instances, *PFreib* III.30 (Philadelphia, 179–78 B.C.), a dowry contract (the impersonal style is not certain), and *BGU* VIII.1732 and 1733, first century B.C. sales of cleruchic lots, belong to types which did not require an express statement on the *praxis*. As for the Roman period, impersonal *praxis*-provisions appear in some of the Alexandrian *synchoreseis* of the time of Augustus (*BGU* IV.1050, 1052, 1106, 1108, 1109, 1116, 1142; *PBerol* 13062, ed. W. Schubart *ad* A. Calderini; *PMilan* 7 [*Pubblicazioni di "Aegyptus"*; Milan, 1928]), but in all the

without designating an official who was to put it into effect.[42] This was hardly due to the circumstance that it was not always possible to name the official who would be in charge at the time of the execution, since it would have been easy to add a general provision for the substitute or successor of the official named, as was also done in private contracts through phrases like ἢ τῷ ὑπὲρ αὐτοῦ πράσσοντι, καὶ τοῖς παρ' αὐτοῦ, or the like.[43] The explanation must be sought in the peculiar nature of the obligations involved. The position of the state was different from that of a private creditor. Debts to the state were enforced under special statutes (πρᾶξις πρὸς βασιλικά), and it may be assumed that these made needless the express designation of an individual official. The *praktor* probably was conceived, figuratively speaking, as a mere "handle" in the hands of the king who was naturally and invariably the creditor and the one to whom the *praxis* belonged. As it is obvious that in private contracts the need was felt to designate the person who might enforce the execution, it must be inferred that in private relations the promisee's investment with the right to the *praxis* was not considered as a matter of course. Execution was possible only if all its details, including the designation of the individual who was entitled to enforce it, had been arranged by the parties. The descent of the contractual obligation from a transaction merely constituting a liability is still discernible in these clauses.

other texts of this group the person who might bring the *praxis* is named. Frequent omission of an express statement that the lessor may bring the *praxis* in Oxyrhynchus contracts of lease (the earliest preserved instance is of A.D. 109 [*PSI* IX.1030], all the others being of the late second and third centuries, beginning with *PSI* VII.739 of A.D. 169) is explained by the special rules that probably existed for the enforcement of claims resulting from contracts of lease. Outside the groups mentioned there are only *PSammelbuch* I.5244, *PFouadI* 44, *PSI* X.1116, *PBad* III.86, *BGU* II.445, *PStudPal* XXII.82, *PSammelbuch* I.7, *POxy* XIV.1640, *PThead* 10. The first of these (written in 8 B.C.) is without significance because it is only a badly drafted subscription to an Egyptian contract. The second is a *synchoresis* addressed to the *archidicastes* and can be listed with the Alexandrian texts just quoted. *PSI* X.1116 is a dowry contract. In *PBad* III.86 the reason for the omission may be the fact that the document was issued by the creditor to the debtor. As a whole, I do not think that any of these exceptions testifies against the conclusions drawn above.

[42] *PSI* V.509; *PEleph* 6 in its revised edition by W. Schubart (in Sethe-Partsch, *op. cit.* [see note 25], 325; see Schubart's note on line 8 [p. 326]), *PPetr* I.16 frg. II, *PSammelbuch* I.5680, III.6090, 6301, *PHib* 94, 95, *BGU* VI.1226, 1228, all of the third century B.C. Demotic contracts with similar contents may have been drawn up in a different manner; see the document nr. 22 in Sethe-Partsch, *op. cit.* 464ff.

[43] This was actually done when no obligation to the royal fiscus was involved; see *PHib* 92 (Mitteis, *Chrestom.* 23; 263–62 B.C.).

Hints that there existed a tendency to overcome the rigidity of these traditional concepts are certainly to be found, and it is quite possible that for all practical purposes the Ptolemaic administration of the second and first centuries B.C. had already gone a long way toward the recognition of the binding force of a promise not accompanied by a *praxis*-agreement or enforceable under a specific legal provision.[44] An investigation of the details of this evolution must be reserved for a general inquiry into the history of the contractual obligation under Greek law, which will have to consider the classical and epigraphic sources as well as the papyri.[45] Here we may content ourselves with the statement that the ancient conception was still at least the theoretical basis of decisions rendered by the ordinary courts of the Ptolemaic kingdom. It is not impossible indeed that in Hellenistic Egypt, as elsewhere, the progressive forces first became active outside of the sphere of the strict law.[46]

[44] There are, even from the Ptolemaic period, a few contracts which contain no *praxis*-clause whatsoever, although they belong to types normally equipped with such a provision. Nevertheless, it is likely that they were intended to be enforceable, as otherwise the *ἀποτίνειν*-provision, which all of them present, would make no sense. See the loan contracts, *PTeb* III.1.818 (174 B.C.), *PAmh* II.32 (Mitteis, *Chrestom.* 140; 114 B.C.), *PTeb* I.110 (first century B.C.), the deposit, *PGrenf* II.17 (Mitteis, *Chrestom.* 138; Thebais, 136 B.C.). All of these, with the exception of *PTeb* III.1.818, are very small chirographs. *PTeb* III.1.818 is in a special category, as the contracting parties are Jews, whose *πολιτικὸς νόμος* (see *PGurob* 2 and *PEnt* 23 with the supplement suggested by Wolff, *op. cit.* [see note 3] 24, note 86) may have contained a special provision regarding the liability resulting from a loan.

[45] This inquiry will have to deal also with the problems of the import of the different forms in which the *praxis*-provision occurs and of the relation between immediate execution and execution authorized by judgment. The problems need to be reexamined.

[46] The sphere where the new conception first developed was, perhaps, the office of the *strategos*, whose jurisdiction (see Semeka, *op. cit.* [see note 23], 47ff.; E. Berneker, *Die Sondergerichtsbarkeit im griechischen Recht Aegyptens* [*Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte* 22; Munich, 1935] 65ff.) was a sort of administrative coercion. It seems to be here that we find the earliest traces of the use of executive force aimed at specific performance. The request *ἐπαναγκάσαι ἀποδοῦναι*, which is not infrequent in petitions of both the Ptolemaic and Roman epochs, often occurs when the petitioner has in mind steps to be taken by the *strategos*. A characteristic example is *PEnt* 2 (Magdola, 218–17 B.C.). A purchaser of wool who has paid an *arrha* asks to order the *strategos* *ὅπως– –ἐπαναγκάσῃ[ι αὐ]τὸν ἀποδοῦναί μοι τὰ ἔρια* (lines 7–9), although ordinarily the non-fulfilment of a contract of this type resulted only in the purchaser's right to claim a penalty in the double amount of the *arrha* (see, most recently, F. Pringsheim, *Actes du V^e Congrès International de Papyrologie* [Brussels, 1938] 358). *PEnt* 35 (222–21 B.C.) also deserves attention, inasmuch as the *eispraxis* to be forced by the *strategos* is to bring about specific performance if possible: *εἰσπρᾶξαι αὐτὸν τοὺς λ χο(ῦς) ἢ τὴν [τιμήν* (line 7). In *PRyl* II.65 (Oxyrhynchus?, about 67 B.C.) the request *ἐπαναγκάσαι ἀποδοῦναι* actually occurs in connec-

III

We have now reached the point from which we can proceed toward an understanding of the phenomena observed in the opening paragraphs of this paper. As liability, at least from the viewpoint of the strict law, was only at a late moment, if ever, recognized as a natural concomitant of the duty assumed through a promise, it always remained a possible object of special transaction. It was by way of an analogous application to the creditor's side of their conception of the liability that the Greeks found themselves in a position likewise to isolate the right to realize the liability, and to acknowledge a contract providing the *praxis* for a person other than the recipient of the promise. The investment of a third party with the *praxis* was the counterpart of the possibility of laying liability on sureties, pawns, or mortgages. No further explanation is needed for the fact that the right of *praxis* might be disposed of even when provided for by the law itself, as may have been the case in some of the dowry agreements. Once the disponibility of the right of *praxis* was acknowledged, this of course was not confined to those cases in which it had first to be created through a special transaction.

Lack of source materials prevents us from determining when arrangements of the type under discussion were for the first time actually recognized under Greek law. It may well be that this was not done before a comparatively late date. But the possibility was inherent in the Greek conception of the contractual liability. If, as may be assumed, the *praxis*-agreement had developed from an original acquisition of power over the liable party and his property,[47]

tion with a judicial decision, probably by the *chrematistae*. But the past tense (line 10: ἠξίουν) shows that this request was made in proceedings before those which led up to the judgment. The latter merely rules that the Egyptian contracts on which the action rests are valid, lines 16–18. The fragmentary condition of the document keeps us from determining what relation existed between the judicial sentence and the earlier petition. A detailed inquiry into the problem is not possible here, and these hints of course do not pretend to be more than a suggestion for further investigation. It may be noted, however, that general legal history seems to furnish parallels. I should like to call attention to the fact that in English law the action aimed at specific performance originated under the jurisdiction of the chancellor.

[47] H. Swoboda, *ZRG* 26 (1905) 203f. (*Beiträge zur griechischen Rechtsgeschichte* [Weimar, 1905] 55f.) seems to assume an independent origin of the right to enforce execution against a defaulting debtor, which would have existed side by side with the custom of immediately pledging one's own body and property; but see Partsch, *op. cit.* (see note 33), 75, note 1.

there was at least no insurmountable conceptual obstacle to such power being handed to a third person, just as it might be handed to the promisee himself. This situation remained unchanged when actual power faded into a mere legitimation of bringing execution in case the debtor failed to perform his duty. On the other hand, the desirability of its practical results, and also the natural conservatism of a legal system relying largely on written instruments with their traditional style and their fixed formulas, preserved the principle in a period when the conceptions in which it had originated possibly were forgotten.

IV

In their conception of the right to the *praxis* as a separate element within the complex of relations created by a contract the Greeks of the Hellenistic age possessed a convenient means to bring about legal effects necessitated by their intense business life. It seems to provide us with an approach to the disputed questions of negotiable instruments and agency in papyrus contracts. It is not within the scope of this paper to go into the details of these problems, but attention may be called to a few documents which are illuminated from this angle.

PSammelbuch IV.7467 (Theadelphia, A.D. 147) presents the following clause for order or bearer[48] (lines 11ff.): καὶ τὴν ἀπόδοσιν ποιησάσθω ὁ Ἥρων τῇ Ἰσιδώρᾳ ἢ [....].. ἢ τῷ ἀπὸ αὐτῶν προ[φαν]ησομένῳ{ν}——γινομένης τῷ ἀνακομιζομένῳ τῆς πράξεως. It becomes clear from this text that any attempt to determine the rights implied in a clause for an unspecified holder of the paper must start from the *praxis*-provision.

In a more primitive fashion the same fact is evident in two documents of the Ptolemaic period. *PSammelbuch* V.7532 is a contract concerning a loan of money made in 74 B.C. in Nilopolis in the Fayûm to a certain Irenaeus and his wife. The document is drawn up in the normal form of a simple record (ἐδάνεισεν) with an abbreviated inner text, but the scribe left vacant spaces wherever the creditor's name should appear in the inner text as well as in the outer. It has already been suggested by the first editor[49]

[48] In the latter sense Weber, *op. cit.* (see note 5), 29, note 5. I am rather inclined to understand ἀπὸ αὐτῶν προφανησομένῳ to the effect that a third ἀνακομιζόμενος had to prove his title to the instrument through a written declaration issued by the original creditors.

[49] A. E. R. Boak, *Aegyptus* 13 (1933) 108.

that the parties may have intended to make the document negotiable, and this interpretation seems to be supported by *PHib* 89.[50] In this loan contract, written in 239–38 B.C. in Tholtis in the nome of Oxyrhynchus, a space to be filled in with the name of a person entitled to it was left vacant in the *praxis*-provision, although the name of the lender, Theodote, was given elsewhere and even the ἀποτίνειν-clause was drafted in her name. The intention of the parties to reserve the right of execution for a person still unspecified is clear. The circumstance that the penalty was stipulated for Theodote indeed suggests that in this particular case she only expected to send somebody else to bring the *praxis* on her behalf. But this would have been of importance only in so far as her own relation with that person was concerned. As against the debtor, the person whose name was to be filled in might as well execute the contract in his own interest, and the instrument could circulate until the space was filled with a name. From the viewpoint of legal construction the contract is of the same type as those cited in the beginning of this paper. By the simple device of leaving the *praxis*-provision in blank the parties reached the effect of making the document an instrument for bearer.

As for the matter of agency, *PGen* 8 (Fayûm, A.D. 141; cf. the parallel, *PGen* 8*bis*, A.D. 140) is worth mentioning. This is an objectively styled *homologia* made by Stotoetis to Flavia Diocleia through (διά) her general manager (φροντιστής), Didymus. The promisor acknowledges ἔχειν--παρὰ [τοῦ Διδύμου] ἐκ τοῦ [τ]ῆ̣[ς Φ]λαουίας Διοκλεί[ας] λ[όγο]υ 432 drachmas, which constitute the price for *lachanospermon*, and promises to deliver the seed τῷ̣ Διδύμῳ ἢ τῇ Φλαουίᾳ Διοκ[λείᾳ], the *praxis* likewise being stipulated for Didymus or Diocleia. In the eyes of a Greek lawyer the contract most probably was one of Didymus, and the effect for Diocleia was brought about by a transfer of the *praxis*, just as in the dowry contracts or in *POxy* IV.728.[51] The fact that the *homologia* never-

[50] Boak also ponders the possibility "that the document before us is a copy deposited at the *grapheion*, and hence the absence of the lender's name would be of no importance since it would appear in the originals retained by the contracting parties." But the fact that the text, the docket, and the subscription are all written in different hands rather suggests that the document was one of the originals.

[51] Wenger, *Stellvertretung* (see note 5), 246 (see also Weber, *op. cit.* [see note 5], 49), sees in the contract a combination of agency in the modern sense (i.e., immediate creation of rights and duties for the principal through the action of the agent) and of a sort of *adstipulatio* in the Roman sense. Wenger's theory, however, that direct

theless was drafted as a declaration to Diocleia through Didymus is justified by the economic situation. It referred exclusively to her estate and business, while no interest of Didymus' own was involved.

Finally, the conception of the right to the *praxis* as a separate element within the obligatory relation made it possible to assign a credit [52] by a transfer of the *praxis*,[53] *BGU* IV.1170.IV (Alexandria, 10 B.C.), lines 2ff.: συγχ(ωρεῖ) ὁ Ψενανοῦφις παραχωρ̣ῆ(σειν) τῷ Ἀμμωνίῳ τὴ(ν) πρᾶ(ξιν) τῶν ὀφειλομ(ένων); *POxy* II.271 (A.D. 56), lines 2ff.: ὁ[μολο]γεῖ Ἡράκλεια--Παποντῶτι--παρακεχωρηκέναι αὐτῷ πρ[ᾶ]ξιν καὶ κομιδὴν--δραχμῶν [δ]ιακοσίων, ὧν καὶ αὐτὴ Ἡράκλεια τυγχ[άνε]ι παρακεχωρημένη; lines 14f.: π[ρο]σπ[αρ]ακεχωρηκέναι δ' αὐτῷ ὁμ[ο]ίως ἣν καὶ αὐτὴ παρακεχώρηται πρᾶξιν; line 17: συν[κεχ]ωρηκέναι αὐτὴν ἑαυτῷ τὴν π[ρᾶξιν] καὶ κομιδήν.[54] The *parachoresis* of a *praxis* is also mentioned

agency was recognized in Hellenistic Egypt has recently met with serious opposition on the part of E. Rabel (see *Aegyptus* 13 [1933] 378, and *Atti del Congresso Internazionale di Diritto Romano* [Pavia, 1934] 1.237ff.).

[52] L. Wenger, "Die Zession im Rechte der Papyri," *Studi in onore di Carlo Fadda* (Naples, 1906) 4.77–95; Frese, *op. cit.* (note 5), 26; Mitteis, *Grundzüge* (see note 22), 115f.; A. Segrè, *Bull. Istituto Diritto Romano* 34 (1925) 133f.; Weber, *op. cit.* (see note 5), 85ff.

[53] This has already been observed by some authors (Wenger, *op. cit.* 88; Mitteis, *loc. cit.*; Berger, *op. cit.* [see note 5], 201; Schwarz, *op. cit.* [see note 24], 52, note 2), but not appreciated. Interestingly Beauchet, *op. cit.* (see note 7), 540, remarks that transmission was possible of the "créances ou du moins l'effet utile des créances, c'est-à-dire la faculté d'exiger le paiment du débiteur." Beauchet, however, also failed to draw conclusions from this statement.

[54] If *POxy* II.272 (A.D. 66) were to be understood with its editors and other interpreters (see those quoted in note 52) as another assignment and a parallel to *POxy* II.271, its lines 13f.: ὁμολογ[ο]ῦμεν ἔχειν σε ἐξουσί[αν σε]αυτῆι τὴν ἀπ[αί]τη[σ]ιν ποιεῖσθαι would not very well fit in with the above statement. The actual situation, as I see it, was, however, that the two declarants agreed that the recipient of their declaration collected from Heraclius separately and for herself part of a claim which belonged to all three of them conjointly, presumably as resulting from a common inheritance, rather than that they assigned to her part of their own claim. The 947 drachmas 2 obols mentioned in line 11 are not, as Grenfell and Hunt suggest (p. 256 of the edition; Wenger, *op. cit.* [see note 52] 91), the total of Heraclius' indebtedness, but the sum owed to the recipient of the declaration on the ground that they had used her share in the common estate as a loan; lines 12f.: ἀνθ' ἧς πεποιή[μεθα] (I prefer this to the editors' πεποιή[καμεν]) χρήσεως τοῦ κ[ατὰ] σὲ μέρους. Accordingly, I would suggest restoring line 12: τῶν αἰρο[ύντων σ]οι. This loan had been partially repaid and a receipt had been issued (lines 15f.). Now, in order to pay it off (line 11: εἰς [πλήρωσιν), the declarants set aside 249 drachmas of what Heraclius owed to the three of them, while the rest of the debt, as well as other claims, was to remain in common (lines 16–19). The transaction was meant to be a final settlement of any mutual claims of the contractants (lines 19–21). If this interpretation is correct, the words in lines 13f. just quoted make very good sense. As a matter of fact, it would have been improper

in *PSammelbuch* III.6663.*col.* II.30 (about 5 B.C.). A different terminology indeed occurs in *BGU* IV.1171 (Alexandria, 10 B.C.), inasmuch as the declarants say, lines 6ff.: *ϙυν[χ]ωροῦμεν--ὸ μὲν Ζαμαν̣ος [εἶ]ναι ἄκυρον ἣν ἀνήν[εγκεν] εἰς αὐτὸν ὁ Στέ[φ]ανος--συνχώρησιν--παρα[χ]ωρήσεως δανείου.* Even in this text, however, the assignee's right of *praxis* is carefully stated, lines 19ff.: *καὶ ἐξεῖναι αὐτῶι Στεφάνῳ πράσειν*(sic) *τὸν ὑπόχρεον τὸ δάνειον καὶ ὀφειλομένους τόκους καθὼς κα[ὶ] τὸ πρότερον*, that is to say, before he made over his title to the present assignor.[55] A close parallel is *POxy* III.508 (A.D. 102), as the attractive restoration by Grenfell and Hunt of its last preserved line: *ᾧ καὶ ἐ[ξεῖναι* calls for the interpretation that the true creditor of two mortgages is allowed to foreclose by a fiduciary creditor in whose name (lines 10f.: *ἐπ' ὀνόματος τοῦ ὁμολογοῦντος*) they had been contracted.[56] As for the way in which credits were bequeathed in wills and related documents, see *POxy* X.1282 (A.D. 83), lines 24ff.: *ὧν ἡ πρᾶξις σὺν ἄλλοις τοῦ Παποντῶτος προφέρεται ἡ Θνᾶς κατηντηκέναι εἰς ἑαυτὴν καθ' ὃ ἔθετο ὁ Παποντῶ{το}ς ὁπότε περιῆν διάταγμα.*[57]

The extent to which the separate existence of the right to the *praxis* was recognized in Egypt is seen in the fact that the assignment of a *praxis* does not seem to have ordinarily depended on the

to say: *παραχωρεῖν τὴν πρᾶξιν*, the more so since probably the *praxis* as such formally remained in common, the recipient of the declaration only being entitled to call (*ἀπαίτησιν ποιεῖσθαι*) for the 249 drachmas alone and in her own interest, and of course with the understanding that in case of a common *praxis* the result up to this amount should go to her benefit. This assumption is not quite certain, to be sure, as the declarants say in their subscriptions (lines 23f., 27): *συνκεχώρηκα--τὴν πρᾶξιν*. I am, however, inclined to base interpretation on the more formally worded text of the declaration. In any event, the subscriptions lend further support to our general thesis. If the *praxis* formally did remain in common, they show that the close relationship of this transaction to an assignment, which certainly was felt by the parties, suggested to them, who after all were not trained lawyers, to see its effect in a transfer of the *praxis*.

[55] *POxy* III.509 (second century A.D.), where we read: *συνέστησά σε--ἀπαιτήσαντα* is no assignment but a mere commission for collection (Weber, *op. cit.* [see note 5] 27, note 5; somewhat ambiguous Segrè, *op. cit.* [see note 52] 136). Cf. also *POxy* II.364, IV.723; *BGU* I.300 (Mitteis, *Chrestom.* 345). The *systasis PFouadI* 35 includes the *praxis:* Thaesis declares (lines 3f.): *συνεστακέναι* her husband *ἐκπράξαντα καὶ ἀπαιτ[ή]σαντα καὶ τὰ ὀφειλόμενα αὐτῇ κτλ.*

[56] O. Gradenwitz, *ZRG* 27 (1906) 336ff.; Mitteis, introduction to *Chrestom.* 247; Weber, *op. cit.* (see note 5), 48f. Analogous arrangements are testified to by *PFlor* I.86 (Mitteis, *Chrestom.* 247; Hermupolis Magna, first century A.D.) and *PRIMI* 25 (Tebtunis, A.D. 126–27).

[57] Cf. H. Kreller, *Erbrechtliche Untersuchungen auf Grund der gräco-ägyptischen Papyrusurkunden* (Leipzig, 1919) 210. See also the fragmentary texts *PPetr* III.4 *col.* II.1–2 and *PFouadI* 33 line 18.

consent of the debtor. This may be inferred from the majority of the deeds of assignment just cited, which in no way mention or imply any coöperation on the part of the debtor. An exception is *BGU* IV.1171, where the debtor's *syneudokesis* to both the fiduciary assignment and the re-assignment is stated, and to this may be added *P. Yale inv.* 1624,[58] a loan receipt of A.D. 203 (Oxyrhynchus), where in lines 9–10 an *eudokesis* is mentioned which the debtors had declared to a settlement agreed upon by the issuing creditor and her brother, and probably concerning the mutual assignment of inherited credits. Unfortunately the sources do not allow us to determine in what cases such consent was required.

[58] Ed. H. J. Wolff, *TAPhA* 71 (1940) 617–19.