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CONSENSUAL CONTRACTS IN THE PAPYRI?

On p. 233 of the second volume of his *Outlines of Historical Jurisprudence* (Oxford, 1922) Sir Paul Vinogradoff makes the following statement: "All the authorities agree that the binding force of Greek contracts did not depend on the strict adherence to any particular form. All that we know about them suggests again and again that the obligation in voluntary agreements depended on consent, on the mutual concurrence of wills." The doctrine expressed in this statement is still prevalent among students of Greek and Hellenistic law. It has since been reaffirmed by several authors[1] and, by implication, found its way into Rafael Taubenschlag's recent comprehensive treatise on *The Law of Greco-Roman Egypt in the Light of the Papyri* (New York, 1944), where — with some modification — the contracts are dealt with in accordance with the Roman system.

Nevertheless, the theory can no longer claim unanimous backing. More or less guarded doubts have been raised in recent publications as to whether the Greeks conceived at all the idea of the consensual contract. Latte, in his article on Συμβόλαιον,[2] remarks cautiously that it is still an open question just what was the constitutive element in the establishment of a contractual obligation under Greek law. Kunkel[3] states, with due reserve, that, apart from formal transactions, the Greeks may have recognized, at least in the earlier period, only a type of obligations comparable to the

[1] H. R. Hoetink, *Tijdschr. v. Rechtsgesch.* IX (1929), 253ff., L. Gernet, *Arch. d'Hist. du Dr. Or.* II (1938), 292. See also J. C. Naber, *Rechtsgeleerd Magazijn* XLIII (1924), 176f., 178, and, with special reference to the μίσθωσις, O. Schulthess in *Pauly-Wissowa* RE. vol. XV p. 2119 (*s.v.* Μίσθωσις).

[2] *In Pauly-Wissowa,* RE. second series, vol. IV p. 1086. Even earlier, any binding force of consensual contracts had been denied for the old Greek law by F. Hofmann, *Beiträge zur Geschichte des griech. u. röm. Rechts* 105.

[3] *Römisches Privatrecht* (Berlin, 1935) 190.

Roman real contract. Kunkel's suggestion is obviously based on the understanding of the Greek conception of sale, which we owe to Partsch. Ever since Partsch first published his theory on the *arrha,*[4] a large majority of students have been agreed on the non-consensual character of the Greek sale both in classical and Hellenistic times. It is in accordance with this theory that in Taubenschlag's new book sale has been assigned its place among the real contracts, where it undoubtedly belongs in view of its character as a cash-transaction.[5]

The present paper will seek to contribute to the solution of the problem mainly through an analysis of the legal nature of the various contracts comprised under the category of μίσθωσις, such as it emerges from the documents of the Ptolemaic and Roman periods of Egypt. The results of this study, if correct, seem to encourage a skeptical attitude with respect to the existence of consensual contracts even in that advanced stage of Greek legal development. I wish to emphasize, however, the provisional character of this investigation. The subject in its totality is too complex to be answered on the basis of an analysis of a limited number of types of contract. No more than an attempt to find a new approach to the problems involved is intended.

I

Throughout the Ptolemaic era the standard form of the enchoric written contract of lease—whether it concerned real property or chattels, whether it granted fructification

[4] In his review of Pappulias' book on the *arrha*: *Gött. Gel. Anz.* 1911 p. 713ff. (Now in *Aus nachgelassenen und kleineren verstreuten Schriften* [Berlin, 1932] 262ff.). Partsch did not, however, deny the existence of the conception of the consensual contract as such in Greek law; see op.cit. 718 (*Schriften* 267).

[5] See the instructive analysis of its character by Pringsheim, *Actes du V^e Congrès International de Papyrologie* (Brussels, 1938) 355. Partsch's theory was attacked, with respect to Hellenistic law, by G. Cornil, *Z.Sav.St.* XLVIII (1928), 51, and generally by Hoetink, op.cit.; see also Kunkel's reserve, op.cit., 190[14]. The arguments advanced by the opponents do not seem to me sufficient to refute the main result of Partsch's analysis; see the convincing objections by F. Wieacker, *Lex Commissoria* (Berlin, 1932) 102.

(*Pacht*) or mere use (*Miete*)—was the six-witness-instrument drawn up as a "simple protocol," beginning with the factual statement, made in the past tense (ἐμίσθωσεν), that the lessor had leased the object to the lessee. There are only four exceptions to this rule.[6] In the imperial period the protocol-style continued to be used in such documents as were drawn up in the γραφεῖον.[7] However, it now competed with other types of document: the hypomnematic offers, objectively styled homologiae, and subjectively styled declarations (with or without homologia, in hypomnematic or chirographic form, by the lessor or by the lessee). The geographical distribution of the various types is noteworthy. In Oxyrhynchus homologiae and subjectively styled declarations are non-existent, and hypomnematic offers are very rare. Elsewhere the offers are abundant; in the Fayûm they occur along with the protocol and other types,[8] in some of the other nomes—if we can trust the evidence of our sources —only with the latter.[9] This makes it clear that the use of

[6] PSI. IX 1020 (Pathyrites, 110 B.C.) is an agoranomic deed. P.Teb. I 105 (103 B.C.) is a six-witness-document drawn up as a homologia by the tenant. P.Teb. I 107 (Mitteis, *Chrest.* 134; 101 B.C.) and PSI. X 1097 (Oxyrhynchus, 54-53 B.C.) are chirographs of the lessor. P.Cair.Zen. III 59422, an offer to rent animals, does not belong in this group, since it certainly was to be followed up by a contract like P.Cair.Zen. III 59340.

[7] This fact is not obvious in the contracts from Oxyrhynchus, but is proved by those from the Fayûm, which usually show a note concerning the registration of the document: P.Ath. 14, BGU. II 538, PSI. VIII 879, 961, X 1143, P.Teb. II 311, 343.

[8] Objectively styled homologiae (by the lessor): BGU. II 526, III 920, CPR. 240, P.Flor. I 20 (Wilcken, *Chrest.* 359), PSI. X 1134, P.Warr. 11. In most of these cases the form of homologia indeed seems to have been suggested by particular circumstances which caused the parties to draw up as μισθώσεις transactions meant to fulfill purposes economically different from those of a true lease; see Rabel, *Z.Sav.St.* XXVIII (1907) 317ff., Lewald, P.Frankf. p. 6. BGU. II 636 (Karanis, 20 A.D.) is a subjectively styled homologia of the lessor (but not a chirograph). P.Oslo II 33 (Karanis, 29 A.D.) is a simple declaration: μεμίσθωμαι (perhaps merely a *hypographe;* see P.Mich. V 314, 316). P.Rein. 43 (102 A.D.) is a chirograph of the lessor without homologia.

[9] In Hermupolis, for example, the chirograph without homologia seems to have been popular: P.Amh. II 87, 89, P.Würzb. 12, 13 (issued by the lessor), P.Flor. I 85. P.Ryl. II 168 (issued by the lessee). Most of the Hermopolitan lease documents are of course hypomnematic offers with subscriptions.

one style or another was mainly due to local custom, but not to any legal requirements. While the people of Oxyrhynchus preferred to have their leases drawn up in the γραφεῖον and displayed a remarkable conservatism as regards the form,[10] the inhabitants of other regions were more prone to rely on private documents drafted more freely. Our observations confirm the commonly held view that no particular form was legally required for the contract of lease,[11] and the formal differences noted may be disregarded in the further course of this investigation.

It has also been justly stated that as a rule the ἐμίσθωσεν-protocol was the only instrument drawn up in connection with a lease and that there was no exchange of instruments between landlord and tenant.[12] The only case where we know that two documents were drawn up—one, P.Teb. I 158, as a normal ἐμίσθωσεν-protocol, the other, P.Teb. I 105, in the form of a homologia of the tenant—has remained isolated; moreover, even in this case it can by no means be safely asserted that the two documents were meant to be exchanged between the parties.[13] We are therefore justified in basing the following inquiry primarily on the ἐμίσθωσεν-protocols, chiefly those of the Ptolemaic epoch, as the most

[10] The protocol-style was here occasionally used as late as the fourth century when subjectively styled documents had long become prevalent in Oxyrhynchus as elsewhere; see P.Oslo III 138, P.Harr. 82, PSI VI 707. The conservatism of Oxyrhynchus is apparent also in other transactions; see, for instance, the marriage contracts with ἔκδοσις (see Wolff, *Written and Unwritten Marr. in Hell. and Postcl. Rom. Law* [Lancaster, Pa., 1939] 17, 68).

[11] Waszyński, *Die Bodenpacht* (Leipzig and Berlin, 1905), 11, Mitteis, *Grundzüge* 195, Berger, *Ztsch.f.vgl.Rechtswiss.* XXIX (1913) 348f., Sibylle von Bolla, *Untersuchungen zur Tiermiete und Viehpacht im Altertum* (*Münch. Beitr.* XXX; Munich, 1940) 7, 32, Taubenschlag, *Law of Gr.-R. Eg.* 268. See also Schulthess, op.cit. 2099 (with reference to pre-Hellenistic law).

[12] P. M. Meyer, *Berl.Philol.Woch.* 1906, p. 1610f.

[13] As long as the custom of depositing the instrument with a συγγραφοφύλαξ persisted, such exchange was unnecessary. Later the same protection was afforded by the original which remained on file in the office of the notary. The notary may, as he did in other cases, too, have issued copies to the parties, with or without their subscriptions. But this was no constitutive element in the conclusion of the contract.

representative group among the contracts of lease. But there will be no harm in also utilizing P.Teb. I 105 along with the other contracts.

In the protocol the opening statement: ἐμίσθωσεν indicates the *causa* of the obligations laid down in the contract. In the earlier Ptolemaic documents, where it forms a separate sentence preceding the specification of the conditions which are to govern the relationship, this is implied. But soon a new and more explicit style begins to make its appearance. In the later Ptolemaic contracts and in most of the Roman contracts the ἐμίσθωσεν is grammatically connected with the rest of the text, so as to make the latter appear to be its consequence; the connection is usually made by such expressions as ὥστε or ἐφ' ᾧ.[14] Even more clearly is the idea expressed in some of the Alexandrian *synchoreseis;* see, for instance, BGU. IV 1116: συνχωροῦμεν ἐπὶ τοῖσδε ὥστε ἐπεὶ μεμίσθωται ὁ Σαραπ(ίων) παρὰ τῆς Ἀντωνίας Φιλη̣ματίου εἰς χρό(νον) κτλ. (Cf. also BGU. IV 1120 and 1121). An analogous style had been used in pre-Hellenistic times in the Greek motherland; in Attic inscriptions we find the formula: κατὰ τάδε ἐμίσθωσεν.[15]

The legal import of this opening statement depends on the meaning of the term μισθοῦν. If it merely expressed the fact that the parties had reached an agreement on the conditions laid down in what follows in the text, the transaction would indeed be a consensual contract in the full sense as understood by the classical Roman jurists (Gaius, Inst. 3.136). It is, however, evident that μισθοῦν implied the actual, physical yielding of the object to the lessee. To give or take under the terms of a lease is in Greek legal terminology expressed by ἐκδιδόναι and ἐκλαμβάνειν.[16] That these words were not understood merely to denote acts performed

[14] The earliest instance of this style seems to be P.Oxy. XIV 1628 of 73 B.C.

[15] See Michel, *Rec. des Inscr. Gr.* nrs. 1354 (*Syll.*[3] 966), 1355 (*Syll.*[3] 1216), 1357; cf. 1361 (*Syll.*[3] 1217): ἐπὶ τοῖσδε ἐκδέδοται [κῆπος] Ἡρακλέος.

[16] See Partsch as quoted by Rabel, *Grundzüge des römischen Privatrechts* (in Holtzendorff-Kohler's *Enzyklopädie der Rechtswissenschaft* vol. I [Munich, Leipzig, Berlin, 1915]) 465, and by Weiss in *Pauly-Wissowa* RE. vol. XIII, 939; Schulthess, op.cit. 2098.

in execution of a μίσθωσις previously contracted, but were fully synonymous with μισθοῦν and μισθοῦσθαι, becomes clear from a variant formula which occurs in one of the oldest of our sources from Egypt. P.Col.Zen. I 54 (SB. IV 7450) is a lease of agricultural land made in 250 B.C. by Zeno to a Macedonian and his two sons. It begins, after the prescript: ἐξέλαβεν Ἡγησάρχος—παρὰ Ζήνωνος. Save for this opening, the covenant does not differ greatly from other contemporary contracts of lease and can therefore be taken for a typical instance exemplifying the legal conceptions on which transactions of this kind rested. It is, in my opinion, a clear testimony that these involved the principle that the obligations undertaken by the tenant followed, not from the mere agreement of the parties, but from his actual "taking out" of the property.[17]

No objection to this conclusion arises, if it is true that oral μισθώσεις were capable of bringing forth an action. Failure to require any specific form is not necessarily equivalent to recognizing as valid mere agreements not followed up by the entry of the lessee into the premises. Nor is it possible to find any evidence for the consensual character of the μίσθωσις in the ὑπογραφαί which frequently occur under the hypomnematic offers of the imperial period. It is of course true that these indicate the actual conclusion of the contract proposed.[18] But regardless whether it was the lessee himself or the lessor who added his signature, there is nothing that compels us to read more into them than what seems natural in the light of the connotation of μισθοῦν which is suggested by the contracts of the Ptolemaic era, that is to say, a note that the object of the lease was turned over to the tenant in accordance with his proposal. This note might be written by either party. There is no proof whatsoever that the parties exchanged identical copies, each bearing the signature of the other contractant.[19] As a matter of fact, inasmuch

[17] Cf. also the inscriptions cited by Partsch *apud* Weiss, l.c. See also the *hypomnema,* P.Cair.Zen. III 59422: εἴ σοι δοκεῖ ἐγδοῦναι.

[18] Waszyński, op.cit. 20, Mitteis, *Grundzüge* 196.

[19] Such was the opinion of Waszyński, op.cit. 21; see also pp. 29 and 35, with regard to other types of lease contracts.

as the offer—almost without any exception—specified only obligations of the lessee, it is not even likely that he received a copy.

On the other hand, the theory that the contract of lease under Greek law required the actual entry of the lessee may claim some support from the circumstance that its normal form was not the homologia but the simple protocol. This it had in common with the earlier loan instruments (*ἐδάνεισεν ὁ δεῖνα*) and with the *ἐκδόσεις*, whether for marriage or for apprenticeship. Both of these were transactions of an undoubtedly "real" character. The assumption that the style of the *μισθώσεις* is due to the fact that they likewise recorded a real act of the creditor, which produced the obligation, seems to be called for.

The legal effects of the transaction fit in with the conception thus suggested by the structure and style of the instruments. Such duties of the lessee as are covered by stipulated liabilities all depend on his having obtained actual control over the object of the lease. While provisions forbidding the tenant to desert the premises before his term of lease expires are not infrequent, there is no lease arrangement of the Ptolemaic or Roman epochs providing for a liability of the tenant in case he fails to take over the object in fulfilment of a previously incurred obligation to do so. It is significant that it is not before the post-Antoninian period, when Roman law governed the relationship, that contracts openly concluded before the actual beginning of the relationship occur.[20] There is likewise no clause in any

[20] See Waszyński, op.cit. 66f., who points out that in the Byzantine era *μισθώσεις* were sometimes contracted years in advance. This is in contrast with the leases of the earlier periods, where such clauses as *ἀπὸ τοῦ εἰσιόντος ἔτους* only indicate the beginning of the agricultural period with respect to which the land has been ceded to the tenant (as to the relation between the dates of the contracts and the agricultural calendar, see Waszyński, op.cit. 63ff.). The formula employed in several instruments of the earlier Ptolemaic period makes this perfectly clear; see P.Frankf. 1, lines 10f.: *ἄρ[ξ]ει δὲ ὁ σπόρος τῆς μισθ[ώσ]εως ἐν τῶι δεκάτ[ωι ἔτ]ει ὧν οἱ καρποὶ εἰς τὸ ἐν[δέκα]τον ἔτος* (similarly P.Frankf. 2 and 4, BGU. VI 1268, P.Ent. 59, line 3; see also P.Teb. III 1, 815 frg. 3 recto col. II, lines 10f., verso col. I, lines 30f.; cf. P.Hib. 90: *ἐμίσθωσεν εἰς ἐνιαυτὸν [ἕνα σ]πόρον [ἕνα] καὶ θερισμὸν ἕνα ἀπὸ σ[πόρου τοῦ ἐν τ]ῶι ἕκτωι καὶ εἰκοστῶι ἔτει.*

of the contracts that would entitle the tenant to proceed against the landlord, if the latter fails to make the premises available for the entry of the tenant or to convey to the lessee the chattel leased.

As a matter of fact, it can be shown that the transaction of lease was much rather a conveyance of property, accompanied by a covenant providing for certain obligations incurred with respect to, and in connection with, this conveyance, than a simple agreement on mutual obligations. Unlike the Roman *locatio conductio rei,* the μίσθωσις did not create merely obligatory relations between the lessor and the lessee, but seems to have resulted in the acquisition by the latter of a temporally and qualitatively limited title to the object.[21] Not only is this in full agreement with the legal

[21] In one case this is plainly said in so many words; see SB. V 7569, lines 9ff. (after the βεβαίωσις-clause): καὶ μηθὲν ἧσσον κυριευέτω Διόδωρος [τοῦ χωρίου καὶ . . . . . .π]ρώτας, ἕως ἂν <ὁ> χρόνος τῆς μισθώσεως διέλθηι καὶ τὰς πεντακοσίας δραχμὰς τὸ ἐνοίκιον [καὶ τὸ ἀνάλωμα τὸ γενόμενο]ν κομίσηται κατὰ τὰ γεγραμμένα. It is true that the contract involves an *antichresis* (Wilcken, *Arch. f. Papyr.* XI [1935] 295, Taubenschlag, *Law of Gr.-R. Eg.* 218[75]), but the words ἕως - διέλθηι show that the tenant was to have the κυριεία, not only in his capacity of creditor, as would follow from Partsch's discussion, P.Freib. III p. 30, but of tenant as well. The passage also disagrees with Wilcken's theory, ibid. p. 83f., that under Greek law, in contrast with the Egyptian law, title to the object of the lease remained with the lessor. P.Teb. I 105 (lines 36f.) does not prove Wilcken's point. This right of the tenant to act in self-defense was of course supplementary to the landlord's warranty, more so, since it primarily referred to an immediate, extra-judicial defense. Nor does the frequent clause which reserves to the landlord title to the crops until such time as he receives his dues exclude the lessee's title to the premises. The idea of the Greek κυριεία was not the same as that of the Roman *dominium.* It was not exclusive. It included any title to hold, and dispose of, property (cf. Wolff, *Traditio* II [1944] 63), and there is no reason why the lessor should not temporarily reserve for himself this right with respect to the crops, while at the same time conferring upon the lessee the particular title to the land, which is involved in the leasehold.

In support of this theory I should like to point out that it seems to offer an explanation for the peculiar contract, P.Teb. III 1, 815 frg. 5, lines 45-52. Nicanor "sells" (ἀπέδοτο) to Apollodorus and two other men the crops of the fruit-trees and of a vineyard in a παράδεισος; the consideration is called a φόρος, and the purchasers are to pay the royal dues on the παράδεισος and to return, in addition to the φόρος, the crops of a φοινικών. I suggest that a plot kept under mixed culture (see Schnebel, *Die Landwirtschaft im hellenistischen Aegypten* [*Münch. Beitr.* VII; Munich, 1925] 254) was involved. The arrangement was virtually a lease, but it

idea implied by the term *ἐκδιδόναι*,[22] as well as with the fact that *μίσθωσις*, as Partsch has shown,[23] was originally conceived as a particular type of *πρᾶσις*. It is also, in my opinion, the necessary conclusion to be drawn from what the sources reveal with regard to the protection of the lessee's right to enjoy the object, on the one hand, and, on the other, with regard to the action by which the lessor was enabled to recover it after the term of the lease had expired. It is here where the deep gulf that separates the *μίσθωσις* from the *locatio conductio rei* becomes most apparent.

Normally—special duties occasionally undertaken, such as the payment to the tenant of a grant in aid for the improvement of the farm (P.Teb. I 105, 106) or the refund of a *πρόδομα*, are of no interest here—a liability of the landlord can result only from a *βεβαίωσις*. It is not necessary here to enter upon a detailed inquiry into the history of the *βεβαίωσις*-clause in Greek contracts of lease. However, the following observations are of importance for our purpose. The warranty was—at least in the original Greek conception—no essential and necessary concomitant of the lease, but followed only if expressly undertaken by the lessor.[24]

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granted to the lessees only the crops of part of the species grown on the premises. As leaseholders, however, Apollodorus and his partners would have acquired a title to the land itself, and in order to avoid this effect Nicanor chose to draw up the contract in the form of a sale of the crops. A certain protection of the possession of the tenants indeed seems to have been afforded even in this case: P.Ent. 64, line 12; cf. Taubenschlag, *Law of Gr.-R. Eg.* 189, 257. (I do not think that the contract has anything in common with P.Col.Zen. II 85).

[22] Wolff, *Traditio* II (1944) 48f. *Ekdosis* implies a transfer of title, which is made for a specific purpose and does not definitely sever the relationship between the transferor and the object.

[23] *Griechisches Bürgschaftsrecht* (Leipzig, 1909) 79f. Cf. Rabel, *Grundzüge des röm. Privatr.* 465.

[24] Waszyński, *op.cit.* 84, Mitteis, *Grundzüge* 198. — As regards the Roman period, the question may be posed whether a *βεβαίωσις* was understood to be inherent in every contract of lease, at least of real property. It is true that no *βεβαίωσις*-clause is found in most of the hypomnematic offers (exceptions: P.Lond II 168 [p. 190; 162 A.D.], perhaps P.Ath. 19 [Fayûm, 154 A.D.]). The clause is also missing in a majority of the contracts, whether protocols or other, from places other than Oxyrhynchus. However, a comparatively large part of the non-Oxyrhynchite leases equipped with the clause belong to the early decades of the Roman period:

It is, furthermore, likely that in its original conception it was definitely and characteristically limited in scope. Just as in the contract of sale where it had originated, it seems to have involved only the case that third persons raised claims to the object of the lease or to the crops.[25] Accordingly, Ptolemaic parties who wished to secure a strong protection of the tenant from ejectment by the landlord himself and from similar injuries found it necessary to provide for this con-

P.Ath. 14, P.Princ. III 146, P.Mich. V 310-312, 316, all from the Fayûm (the latest of these, P.Princ. III 146, is of 36 A.D.); among the contracts bearing later dates, I found only: P.Teb. II 311 (134 A.D.), 373 (110-111 A.D.), PSI. X 1134 (92 A.D.) and 1143 (164 A.D.) (these two also from Tebtunis). On the other hand, in contrast with the people of other nomes, Oxyrhynchites almost invariably inserted a *βεβαίωσις*-clause; among the protocols sufficiently preserved to allow judgment, I found it omitted only in P.Oxy. II 278 (17 A.D.), PSI. IX 1030 (109 A.D.), P.Oxy. VIII 1128 (173 A.D.), XVIII 2189 (220 A.D.), P.Harr. 82 (345 A.D.), perhaps P.Oxy. IV 729 (137 A.D.); P.Oxy. II 278 concerns a millstone, PSI. IX 1030 an *ὄργανον ἐλαιουργικόν*, P.Oxy. VIII 1128 a dining room. These are opposed by nearly thirty contracts displaying the clause, most of them concerning real property; they range from 19 B.C. (P.Oxy. II 277) to 351 A.D. (PSI. VI 707). It is difficult to imagine that the usage of Oxyrhynchus in so important a matter should have differed from that of the other nomes, or that in these a change should have taken place about the middle of the first century A.D. The latter is the less likely, as there are several Fayûm leases of land of the first half of the first century, which show no *βεβαίωσις*-clause: BGU. II 636 (20 A.D.), P.Oslo II 33 (29 A.D.) P.Mich. V 313 (37 A.D.), 315 (44-45 A.D.). I am rather inclined to believe that the custom of inserting the clause gradually disappeared, because it was no longer needed. Only conservative Oxyrhynchus (see above p. 58) made an exception. This inference is supported by the fact that even in Oxyrhynchus the clause took on a rather colorless form, so as to make it appear a natural condition of the obligation of the lessee, inserted for the sake of mere completeness (cf. Berger, *Ztsch. f. vgl. Rechtswiss.* XXIX [1913] 391); see, as a typical example, PSI. VII 739: *βεβαιουμένης δὲ τῆς μισθώσεως ἀποδότω ὁ μεμισθωμένος κτλ.* The earliest text of this kind is P.Oxy. VIII 1124 of 26 A.D., while P.Oxy. II 277 still contains an express, though brief, promise, as do also the non-Oxyrhynchite contracts which are equipped with the clause. With reservations I should like to suggest the possibility that such statutes as in the Roman period may have regulated the lease relationship (see Schwarz, *Die öffentliche und private Urkunde* [Abh. Sächs. Akad. XXX 3; Leipzig, 1920] 59, Wolff, *Transact. Amer. Philol. Assoc.* LXXII [1941] 429[39]) provided for a duty of *βεβαίωσις* inherent in every lease of real property.

[25] Cf. Partsch, *Griech. Bürgschaftsr.* 340ff., on the nature of *βεβαίωσις*. See also Mitteis, *Grundzüge* 188, 269.

tingency by the insertion of clauses specifically naming these causes of liability. Such clauses are found in P.Petr. II 44,[26] SB. V 7569, and P.Teb. I 105. In the third of these texts they are combined with, but distinctly separated from,[27] the *βεβαίωσις*-provisions. It is true that these clauses disappear in later contracts, and the question may be posed whether, by custom or legislative act, the liability for *βεβαίωσις* was sooner or later extended to disturbing acts committed by the landlord himself. An early tendency toward a more liberal construction of the duty of *βεβαίωσις* is indeed indicated by the wording of P.Petr. II 44, lines 11f.: *μηδὲ ἐγβα[λεῖ]ν—ἀλ]λὰ βεβαιούτωσαν*, and of SB. V 7569, line 4: *ἐὰν δὲ μ]ὴ βεβαιώσηι, [ἀ]λλ' ἐγβάλλη[ι] Δαΐμαχος —προσαποτεισάτω* (see also P.Ent. 59, line 8). Nevertheless, in view of the meaning of *βεβαίωσις* in the field where it certainly had its original and proper application, i.e., in the contract of sale, P.Teb. I 105 appears to display the more correct style.[28] However this may be, the fact remains that in principle the contract of lease involved no obligations on the part of the landlord, unless they had been undertaken expressly and specifically.

This does not necessarily mean that a tenant who had failed to secure the pertinent promises from his landlord was left entirely to his mercy. Some of the contracts give clear expression to this idea by specifically stating the causes for which the lessor may transfer the lease to another lessee before the term of the present contract expires.[29] But in such a case the protection enjoyed by the tenant was not afforded by way of a personal action analogous to the Roman

[26] This is "rather a contract of partnership than an ordinary lease" (Grenfell-Hunt, ad P.Hib. 90, line 19 [p. 257]), but may be utilized here.

[27] This was not sufficiently heeded by Waszyński, op.cit. 83, 84.

[28] Occasionally cautious parties inserted such fuller provisions also in contracts of the imperial period: BGU. IV 1118, lines 50f., P.Ath. 14. As late as 256 A.D. we find in an Oxyrhynchite *μίσθωσις* of pigeons and a pigeon-house, SB. V 7814, the following clause (lines 28ff.): *βεβαιουμένης δὲ τῆς μισθώ[σ]εως ἐπάναγκον ποιήσει ὁ μεμισθ[ω]μένος τὴν τοῦ περιστεῶνος ἐπιμέλειαν κτλ., οὐκ ἐξόντος τῷ γεούχῳ ἐντὸ[ς] τοῦ χρόνο[υ] ἀπ[οβ]αλέσθαι τ[ο]ὺς μεμισθωμένου(ς).*

[29] See, for instance, P.Col.Zen. I 54, lines 18f.

actio conducti. It was rather based on the idea that the authorities lent him their help in maintaining the possession which he had acquired.

Two ἐντεύξεις of the third century B.C. seem to illustrate this point. In P.Lond. III 887 (p. 1) a tenant who had been forcibly ejected by his landlord requests: *ἐπαναγκάσαι αὐτὸν ἐκχωρῆσαί μοι τῶν ἐμῶν μερῶν.*[30] In the case of P.Ent. 54 (Mitteis, *Chrest.* 130) the plaintiff, an Egyptian priest, had contracted with the defendants, two soldiers, a lease concerning their *kleroi;* a *syngraphe* had been drawn up before the *monographos,* but, accidentally, had not been sealed. This omission was used by the defendants as a pretext to eject the plaintiff from the *kleroi.* The plaintiff points out that, on account of the incomplete contract, he had also received a loan of seed and done the sowing. He asks the king to direct the *strategos γράψαι Στρατίωι τῶι ἐπιστάτηι ἀποστεῖλαι αὐτοὺς ἐπὶ Διοφάνην* (viz. the *strategos*) *διακριθησομένους μοι καί, ἐὰν ἦι ἀληθῆ, μὴ ἐπιτρέπειν αὐτοῖς ἐγβάλλειν με ἐκ τῶν κλήρων, ἕως δὲ τοῦ διέξοδον λαβεῖν τὴν κρίσιν μὴ θερίζειν αὐτούς.* The possessory protection sought here is only preliminary, in the form of an injunction. But it appears highly doubtful that in the main suit the plaintiff could claim anything else. The probable absence of any legally prescribed formal requirements for the contract of lease not withstanding, it is hard to believe that in a case where the parties had intended to lay down their relationship in a deed under seal[31] the contract with all its possible provisions for mutual liabilities would be considered as existent before all the formalities involved in this procedure had been fulfilled.[32] Whatever liabilities of the landlords might have been stipulated could not be claimed. If in the case of P.Ent. 54 the plaintiff's claim is

[30] Cf. Taubenschlag, *Arch. f. Papyr.* XII (1937), 187, 192.

[31] It does not matter here whether this was an Egyptian deed, as Mitteis, *Chrest.* 130 introd., *Grundzüge* 54[1], assumes, or a Greek instrument, as is suggested by Guéraud, ad loc., and authors quoted by him (see also Wilcken, *Arch. f. Papyr.* X [1931] 245). Even in the first event the principles to be applied by the court in dealing with the situation arising from the fact that the contract had failed to materialize would be those of the general law followed by the Ptolemaic government, i.e., Greek.

[32] See Mitteis, ll.cc.

justified, it proves no more than that the actual beginning of the lease relationship entitled the lessee to claim protection for his possession and enjoyment of the property.[33]

After the term of the lease had expired the property of course had to return to the lessor. Nevertheless, as far as the lease of real property is concerned, all of the carefully drafted instruments of the earlier Ptolemaic period and many later contracts fail to mention any duty of the tenant to effectuate this return. Moreover, where, from the second century B.C. on,[34] we find clauses referring to such a duty, they are not inserted for the latter's own sake but for the purpose of determining the condition in which the land was to be returned. Violation of this special duty is *παρασυγγραφεῖν* and makes as such the tenant subject to a stipulated liability.[35]

This can only mean that the right of the landlord to have his property returned was not covered by a personal liability of the lessee, to be enforced by a *πρᾶξις* and the exaction of a penalty. In other words: the tenant was under no contractual obligation to return the property. The expiration of the term simply restored the full title of the landlord who was now in a position to recover his land by such judicial and extra-judicial acts as were allowed to every *κύριος* not in possession of his property, while the tenant was no longer protected against ejectment.

This conclusion is not contradicted but confirmed by the fact that contracts of lease concerning chattels subject to damage or removal do provide for a liability of the lessee in case the property is not available at the termination of the lease; such is the case in some contracts concerning animals and other movables.[36] These clauses precisely prove

[33] See also P.Ent. 64, line 12; cf. Taubenschlag, *Law of Gr.-R. Eg.* 190[5]. For the landlord's rights in such a case see P.Ent. 9 and 55 (cf. E. Berneker, *Krit.ViertJSchr. f. Gesetzgeb.u.Rechtswiss.* LXII [1933] 389, Taubenschlag, *Arch.f.Papyr.* XII [1937] 191, 192, 193, *Law of Gr.-R. Eg.* 190).

[34] P.Teb. I 105, 106.

[35] P.Teb. I 105, lines 43, 45.

[36] Examples: P.Cair.Zen. III 59340, line 14, P.Oxy. II 278 (17 A.D.), lines 16ff., BGU. III 912 (33 A.D.), lines 25; cf. Bolla, op.cit. 82. See also the *ἐπιμέλεια* and *ἀθάνατος*-clauses in contracts of lease concerning ani-

that such liability was not essentially involved in the establishment of a lease relationship. Likewise was it necessary expressly to stipulate a liability of the lessee of real property if he was to be responsible, under the covenant, for a certain condition of the property at the time when it returned to the lessor. We have seen that provisions to this effect became customary from the second century B.C. on. It is of course probable that in the absence of such contractual responsibility a tenant who left the premises in a deteriorated condition was liable to a tortious δίκη βλάβης;[37] but the papyri, to the best of my knowledge, are silent about this point.

It is obvious that all this is a far cry from the Roman conception under which the mere agreement of the parties about the rent brings forth mutual obligations to procure the use of the property and to pay the rent and to return the property in good condition. If we are to classify the μίσθωσις by using Roman categories, it appears to be nearer to the *contractus re* than to the *contractus consensu*. In the Ptolemaic era sale and lease were definitely distinct, but the contracts of this period still reflect very clearly, as it seems to me, the idea that the κύριος, by contracting a lease, disposes of his property, on such terms as he is able to impose on him who is willing (or forced) to accept it on these terms. By accepting the property the lessee submits to the terms set by the lessor. If his economic power equalled that of the landlord—as it frequently did under the Ptolemies[38]—he would succeed, not only in exacting favorable terms for himself, but also in compelling the landlord to assume responsibilities of his own, primarily a warranty against the claims of others and a liability in case he himself disturbed the lessee's enoyment of the property leased.[39] But no such obliga-

mals (Bolla, op.cit. 62ff., 66ff.). The papyri cited seem to limit Bolla's statement, op.cit. 17. However, in so far as no liability was undertaken, the situation must have been the same as in the lease of land.

[37] See, generally, Taubenschlag, *Law of Gr.-R. Eg.* 347f.

[38] Waszyński, op.cit. 162, P. M. Meyer, *Berl.Philol.Woch.* 1906, p. 1645. See indeed Rabel's, *Dtsch.Lit.Ztg.* 1906, p. 1007, justified criticism of the arguments presented by Waszyński.

[39] In P.Teb. III 1, 819 (171 B.C.) the βεβαίωσις is undertaken by a third person.

tions were essentially involved in the transaction, and a strong landlord facing a weak tenant would not undertake them; it is not accidental that we find nothing of the kind in Zeno's leases, P.Col.Zen. I 54, P.Cair.Zen. IV 59666.[40] Insofar as the acceptance of the property was voluntary, agreement of the parties on the terms was of course necessary. But, contrary to the Roman conception, the agreement was not considered as the basis of the obligations incurred under these terms. The constitutive element in establishing the relationship of lease was the conveyance of the property.

In the light of the earlier history of the Greek lease, this conception of the way in which the lease relationship was established is not surprising. The part which the practice of disposing of public property by way of lease played in the Greek city is known. We shall hardly be mistaken in assuming that leases by public officials, temples, etc., probably along with certain methods employed by the aristocracy in farming out to their peasants land belonging to their domains, were the first, and doubtless very archaic, cases in which profits were secured from property, without either maintaining immediate control over it or giving up control peremptorily by outright sale. In view of the inequality that in these relationships existed between lessors and lessees, it was only natural for the former merely to "give out" their objects, whether on dictated terms or to the highest bidder, but formally always on terms unilaterally fixed by the lessor: *κατὰ τάδε ἐμίσθωσεν*. There was no room for negotiated transactions and mutual obligations which a refined jurisprudence might later recognize as the products of a mutual concurrence of wills. When in an economically advanced age leases between private persons of equal social and economic rank came into use, such a development might have been possible.[41] The character of the lease relationship, such as it emerges from our analysis, shows that it did not take place.

[40] For similar reasons the fiscus did not assume the liability for *βεβαίωσις*; Taubenschlag, *Law of Gr.-R. Eg.* 44.

[41] It may be mentioned that a somewhat similar theory was suggested also with regard to the origin of the Roman *locatio conductio rei;* see Costa, *Storia del diritto romano privato*[2] (Turin, 1925) 396.

If this preservation of an archaic conception reflects a certain clinging to primitive lines of thought, which is characteristic of the law of Hellenistic Egypt, it certainly did not prevent the Greeks of the Ptolemaic period from using the conception to their distinct advantage. The antichretic μισθώσεις, BGU. VI 1272, 1273, 1280, SB. V 7569,[42] or what amounts to the granting of a gratuitous twenty-year title of inhabitancy (P.Strassb. II 92),[43] testify to the technical skill with which they succeeded, perhaps under Egyptian influence,[44] in applying it to meet various needs.

The purpose of the present inquiry does not call for a discussion of the changes which the lease relationship may have undergone during the imperial period. It is quite likely that new statutory obligations assimilated to some extent the Greek μίσθωσις of Egypt to the Roman *locatio conductio rei;* it was noted before that, by the recognition of an inherent βεβαίωσις, an enhanced security for the tenant may have been achieved.[45] However this may be, to the best of my knowledge there is no text of the pre-Antoninian period that would indicate the abandonment of the fundamental principle that the constitutive element in contracting a lease was the conveyance of the object to the lessee.[46] Quite

[42] I do not mention here the μίσθωσις προδοματική, since I believe (following Arangio-Ruiz, *Lineamenti del sistema contrattuale nel diritto dei papiri* [Milan, 1927] 49ff., Kunkel, *Gnomon* IV [1928] 662ff., and Taubenschlag, *Law of Gr.-R. Eg.* 270[15]) that the πρόδομα was a down payment on account of the rent.—In the imperial period the *antichresis* was regularly no longer connected with the idea of μίσθωσις; see Partsch, P.Freib. III p. 30.

[43] See Arangio-Ruiz, *op.cit.* 52[1], and authors quoted by him. The contract is a *nachgeformtes Rechtsgeschäft;* it is an ἀντίχρησις (see Arangio-Ruiz, *l.c.,* Taubenschlag, *Law of Gr.-R. Eg.* 220) only in so far as its legal form is concerned. In the imperial period the μίσθωσις-form became rare for this type of transaction, too; see Berger, *Ztsch. f. vgl. Rechtswiss.* XXIX (1913) 333ff.

[44] Partsch. P.Freib. III p. 30.

[45] See above, note 24.

[46] The ὑπογραφαί of the parties under the protocols—in Oxyrhynchus it is usually the lessee, sometimes the lessor, who signs, in the Fayûm often both parties—only confirm the contents of the instrument, but have no constitutive importance; see also above, note 13 and p. 60.

different was of course the attitude of the Byzantine era when Roman law governed the relationship.[47]

II

As from leases, so was, at least originally, the idea of the consensual contract absent from covenants in which free persons undertook to render services or to accomplish a specified piece of work. A very instructive instance is P.Cair.Zen. II 59182 of 255 B.C., an agreement undoubtedly Greek in contents as well as form (six-witness-double-document). Several Egyptian laborers promise to Zeno to cut out brushwood[48] in a lot which they have "taken out" (ἐξειλήφασιν) from him for this purpose. If they fail to "render" (ἐὰν δὲ μὴ ἀποδῶσιν), they will pay τὸ ἀργύριον ἡμιόλιον and Zeno will have the *praxis;* this money obviously is the object, lost to us due to the mutilated condition of the papyrus, of the ἔχουσιν with which the context begins. The obligation clearly rests on the receipt of this sum which constitutes the entire consideration. That this document represents a type is evident from P.Cair.Zen. IV 59668, a fragment of a contract apparently following exactly the same pattern. In fact the legal idea underlying these contracts occurs frequently in agreements of the Ptolemaic and earlier Roman periods.[49] Advance payment of all or part of the wages and calculation of the penalty, due in case of non-performance, on the basis of the sum received are their

[47] See above, note 20.

[48] See Westermann, *Journ.Eg.Arch.* XVI (1930) 25.

[49] P.Teb. III 1, 815 fr. 2 recto col. II, lines 9ff., of 228-221 B.C.; the advance payment is called πρόδομα. Pre-Antoninian Roman contracts with advance payment (the following list may not be complete): BGU. IV 1122 (Alexandria, 14-13 B.C.), PSI. X 1120 (first century B.C. to first century A.D.), P.Mich. V 349 (30 A.D.) PSI. VIII 962[B] (131-132 A.D.): the worker has received in advance 160 drachmai out of a total of 180 drachmai. See, further, the contracts cited in the next note and numerous nursing contracts (listed by Taubenschlag, *Law of Gr. Rom. Eg.* 284[7]). The harvesters who hire themselves out in PSI. VII 789 (Hermopolites, first or second century A.D.) are to get their wages in wheat but have received an earnest of 16 drachmai (no such advance payment in the parallel, P.Flor. I 80). A post-Antoninian instance is PSI. X 1037 of 301 A.D.

typical features. Occasionally the partial advance payment is called an *ἀρραβών*, and then the obligatory effects of the contract are the same as those demonstrated by Partsch for the contract of sale with *arrha;* in other words: the employee is liable only for the double amount of the *arrha,* if he fails to perform his duties (P.Fay. 91 of 99 A.D.).[50]

All this is not very distant from the much discussed *παραμονή*-contracts in which the borrower of money puts a person in his power or himself—this is the type that interests us here in the first place—at the service of the lender in order to work off the interest and sometimes even the principal of the debt.[51] There has been some dispute as to the relation between these contracts and ordinary contracts of service.[52] However, it seems to me that in the light of what we just observed the contrast between the two types of arrangement, as attested by the papyri, becomes less pointed. Economically, there is no great difference between a person pledging his personal presence and service to work off—all or in part—a debt and a man making a living by hiring himself out to an employer who pays all or part of the wages in advance and is, in the main, confined to enforcing the refund of the advance payment plus a penalty, if the employee fails in his duties. And as the boundary line between the two phenomena is fluid from the social and economic points of view, so are the two types of legal arrangement apt to merge. Thus it has been pointed out with a great deal of justification that in the *παραμονή-synchoresis,* BGU. IV 1126, the actual intention of the parties was much rather simply to contract for services than to agree on a substitute for the payment

[50] The advance payment is called an *ἀρραβών* also in P.Oxy. II 299, P.Stud.Pal. XX 47, P.Oxy. X 1275 (first to third centuries A.D.) An *ἀρραβών* is further mentioned in P.Ent. 4 verso (243-242 B.C.), the record of a hearing held with respect to the complaint on the recto, which was directed against a person who had promised to weave some garments.—The *arrha* in service contracts was already noticed by Pappulias and Partsch; see Partsch, *Gött. Gel. Anz.* 1911, p. 725 (*Schriften* 273f.).

[51] A list of these arrangements is given by Taubenschlag, *Law of Gr. R. Eg.* 218[77].

[52] See Koschaker, *Ueber einige griechische Rechtsurkunden aus den östlichen Randgebieten des Hellenismus* (Abh. Sächs. Akad. XLII 1; Leipzig, 1931) 19f., and authors cited there.

in cash of the debt;[53] the services were limited to three years and were not only to lead to the complete amortization of the "loan" but even to earn for the "debtor" an additional payment to be made at the close of the period.

However, in contrast with those authors who considered the παραμονή-contracts merely as a special type within the general category of contracts for work,[54] as well as with those who draw a sharp line of distinction between μίσθωσις and παραμονή,[55] I would suggest the hypothesis that the pure contract for work, such as represented in its presumably earliest form by P.Cair.Zen. II 59182, developed from the παραμονή-contract. When the economic motive for the conclusion of the contract consisted rather in the employer's interest in getting the service than in a personal emergency which forced the employee to sacrifice part of his freedom to the necessity of providing himself or his family with funds, the conception of a loan with παραμονή might not appear appropriate. How strongly, nevertheless, the close relationship between the two contracts was felt is evident from another Zeno-text, SB. V 7552, where the advance payment on wages for ξυλοκοπία is called a δάνειον. BGU. IV 1126 shows that the old idea was still considered fitting when the employee did not, as in the Zeno-texts cited, act as an independent laborer but joined the employer to work under the latter's personal direction. The arrangements in PSI. X 1120 (first century B.C. or A.D.) and in P. Mich. V 355 (first century A.D.) seem to be based on the same idea, and a late instance is provided by P.Oxy. VIII 1122 of 407 A.D.

If this is correct, the conception of the consensual contract was entirely alien to the original Greek contract for work.

[53] Berger, *Die Strafklauseln in den Papyrusurkunden* (Berlin and Leipzig, 1911) 172f. See also Welles, *Yale Class. St.* II (1931) 73f.

[54] Costa, *I contratti di lavoro nei papiri greco-egizi* (Mem.R.Acc.Bologna, Sc.morali, sez.giur., vol. VI, 1911-1912) 13f., Manigk, *Gläubigerbefriedigung durch Nutzung* (Berlin, 1910) 26f., P.M.Meyer, *Juristische Papyri* (Berlin, 1920) 128.

[55] Lewald, *Zur Personalexekution im Rechte der Papyri* (Leipzig, 1910) 54, Arangio-Ruiz, op.cit. 54. Koschaker agrees in principle but warns against making too rigid a distinction, op.cit. 23.

The contract produced no obligatory relationship, in the Roman sense, between the parties. Koschaker and Schönbauer have shown that by entering into a *παραμονή* the debtor placed himself in the legal power of the creditor; in other words, the *παραμονή*-agreement involved a certain change in the legal status of the debtor.[56] It seems likely that a similar idea also governed the pure contract for work. It appeared in an attenuated form, to be sure, inasmuch as the master no longer exercised the strict personal control probably involved in the *παραμονή*[57] and was, as in any other contract, confined to an ordinary *πρᾶξις* which could be averted by the payment of a sum of money agreed upon in advance. But the basic conception of a self-delivery into a sort of servitude persisted. This seems to offer an explanation for such an agreement as *P.Oxy.* IV 731 of 8-9 A.D. Here the laborer assumes his duties without receiving an advance payment. This may have aroused doubts as to the binding force of the agreement, and I suggest that its evidently fictitious designation as a *ὁμολογία παραμονῆς* was deliberately chosen to dispel those doubts. The document is, in my opinion, a testimony, not for a gradual assimilation of *μίσθωσις* and *παραμονή*,[58] but for the fact that the former was an outgrowth of the latter (see also PSI. VIII 902 [first century A.D.]).

It is in accordance with this character of the contract that it regularly provides for no liability of the employer with respect to the wages, although there are some exceptions among the Alexandrian *συγχωρήσεις* (BGU. IV 1122 and 1126). Nevertheless, recognition of an enforceable claim for consideration and expenses seems to follow from such receipts as the Alexandrian BGU. IV 1111 and the enchoric BGU. I 297 (50 A.D.) and P.Teb. II 399 (second century A.D.). Our source materials are not yet sufficient to deter-

[56] Koschaker, op.cit. 20 (with reference to Lewald, *l.c.*), 49ff., Schönbauer, *Z.Sav.St.* LIII (1933) 439ff.; the differences between the views of Koschaker and Schönbauer are immaterial for our purpose. See also Taubenschlag, op.cit. 219[77].

[57] Koschaker, op.cit. 25ff., Schönbauer, op.cit. 441.

[58] Koschaker, op.cit. 23.

mine whether and on what legal grounds such claims were acknowledged in case the contract did not specifically provide for them. An indication, however, of how a certain protection of the servant was afforded can possibly be found in P.Ent. 48. This text is the complaint of a valet against his former master who still owes him ten drachmae on the wages agreed upon in the *syngraphe* which had been drawn up between the two. The plaintiff asks the king to direct the *strategos* γ[ράψαι Πυθι]άδει τ[ῶι ἐπι]στάτηι ἀποστεῖλαι Ἀριστοκράτην (viz. the defendant) ἐπ' αὐτὸν καί, ἐὰν ᾖ ἃ γράφω ἀληθῆ, ἐπαν[α]γκά[σαι αὐτὸν ἀ]ποδοῦν[αί μ]οι τὰς ι (δραχμὰς) καὶ ἄρασθαί μοι τὴν συγγραφήν, ὅπως μὴ ἐπιπλεκῶ ὑπ' αὐτοῦ, and the *strategos* orders Pythiades: ἐπι(σκεψάμενος) φ(ρό)ν-(τισον) ὅπ(ως) τ[ῶν δικαίω]ν [τύχηι]. This shows that only officials, but not the ordinary courts, were concerned with the matter. It may perhaps be suggested that under the Ptolemies some sort of equitable claim could be enforced through the administrative jurisdiction of the officials.[59] For the present no more can be said; nor is it as yet possible to make any statement with regard to the Roman period.

III

The foregoing discussions may suffice to support the claim that in the original Greek conception the binding effect of some of the most important transactions, acknowledged as *contractus consensu* in classical Roman law, depended on conditions considerably narrower than the mere agreement of the parties. Speaking generally, the field of possible recognition of the consensual contract becomes even more limited, if it is true, as I tried to show elsewhere,[60] that at least in the Ptolemaic period the separation of duty and liability was still a practical reality and that a majority of transactions were capable of producing an enforceable obligation only if a liability had been expressly stipulated in them. Reserving a more detailed inquiry into the fundamentals of the Greek law of contracts in the

[59] Cf. Wolff, *Transact.Am.Philol.Ass.* LXXII (1941) 432[46].
[60] Op.cit. 427ff.

papyri for future discussion, I confine myself here to calling attention to a few more facts which seem further to strengthen the doubt that the idea of the consensual contract played any part in the earlier period of the Greco-Egyptian law—that is to say, in the original Greek conception of the contractual obligation in general.

The most important form of concluding a contract in the classical and Hellenistic periods was the *συγγραφή*, and the technical word most commonly employed in legal transactions of any kind was *ὁμολογεῖν*. Leaving aside here the fact that in many cases the issuance as such of the *syngraphe* was recognized as a sufficient basis for the obligations assumed in it (*Dispositiveffekt der Urkunde*),[61] attention is called to the very contents of the instrument. Whether private or notarial, it was always drawn up as a report,[62] not about the fact that the contractants had reached an agreement concerning the obligation incurred but that one or both of them had performed some act (*ἐδάνεισεν, ἐμίσθωσεν*, or the like), in consequence of which certain duties fell upon the one who had performed the act, or upon the other party, or upon both. We have seen that this should not be interpreted as a mere statement of the *causa* of the obligation agreed upon. Much rather seems this style to indicate that the contractants considered the performance of the recorded act itself as an element which, as its natural consequence, gave rise to such obligations as were intended by them.

Quite analogous is the meaning of *ὁμολογεῖν*, which frequently is itself the act recorded in the *syngraphe*. Its Latin equivalents are *fateri, confiteri, profiteri*.[63] Its object is a fact of the past (such as *ἐσχηκέναι* or *μισθώσασθαι*), on account of which the *ὁμολογῶν* will perform the duties described in his declaration; it can also be a fact of the future. It is true that the latter is his obligation, and in this case the *ὁμολογεῖν* indeed becomes tantamount to a promise. But never

[61] Mitteis, *Reichsrecht und Volksrecht* (Leipzig, 1891) 471ff., Vinogradoff, op.cit. 241ff., Kunkel in *Pauly-Wissowa RE. s.v.* Συγγραφή, second series, vol. IV, p. 1383.

[62] Cf. Kunkel, op.cit. 1377.

[63] See *Corp.Gloss.Lat.* II 160. 43, 44; 383. 24, 28.

is ὁμολογεῖν a term to express the psychological fact of an agreement between two parties that there be henceforth an obligatory relationship between them. It is always a solemn unilateral acknowledgment.[64] This is what made it suitable to stand for the *spondeo* of the Roman stipulation in the clause ἐπερωτηθεὶς ὡμολόγησα almost invariably inserted in the contracts of the post-Antoninian period.

The conclusion to be drawn from this state of facts is confirmed by still another observation. The chief term of the Greek language to express an agreement in the sense of the Roman consensual contract is συντίθεσθαι. This is indeed an old word, as is συνθήκη, but with the exception of a few instances found in sources coming from the later part of the pre-Antoninian Roman period, it does not seem to have assumed the character of a strictly defined legal term before the third or fourth century A.D., i.e., before it came to express the idea of the Roman consensual contract. From the fourth century on it occurs in such phrases as ὁμολογῶ ἑκουσίᾳ καὶ αὐθαιρέτῳ γνώμῃ συντετῖσθαί με πρὸς σέ (P.Oxy. X 1280, line 5).[65]

IV

For the present, these remarks are intended merely to urge caution in classifying as consensual contracts voluntary obligations of Greek law preserved on papyrus. I do not wish to contend that the idea of the consensual contract remained always alien to the Greek population of Egypt. There were certain points from which the idea might find its way into the notions of local lawyers or where Roman officials might see fit to bring their own conceptions into play when judging on relationships created by Greek contracts. Greek philosophical speculation had long before conceived the idea that the pure consent might have the effect of a

[64] Cf. Rabel, *Z.Sav.St.* XLV (1925) 527; LIV (1934) 227[2], Schwarz, *Actes du V^e Congrès International de Papyrologie* 412[1]. See also Maschke, *Die Willenslehre im griech. Recht* (Berlin, 1926) 163f.

[65] See also, for example, PSI. VI 689, lines 8f., P.Oxy. XVI 1894, line 8. See the similar wording in P.Stud.Pal. XX 78 and in P.Lips. 26, line 11 in connection with lines 5f.

binding promise.[66] In the sphere of actual legal life, the mutual *ὁμολογεῖν* was apt to offer a starting point for new theories. The conceptions of substantive law which formed the background for many of the Alexandrian *synchoreseis* of the period of Augustus need further investigation.

Most important of all, Roman ideas seem to have played their part at an early stage. I have already mentioned the pre-Antoninian occurrences of the technical *συντίθεσθαι*.[67] Two contracts may serve as further examples of how even prior to the *constitutio Antoniniana* the rigid principles of the Greek law began to be relaxed, presumably under Roman influence.

The first of these agreements, P.Lond. III 1166 (p. 104), is a contract drawn up in Hermupolis as early as 42 A.D. Two *Πέρσαι τῆς ἐπιγονῆς* promise to Dius, a *μελλογυμνασίαρχος*, the procurement of fuel for the heating of the water in the bath of the gymnasium. The parties understand this transaction to be a contract for work and of sale at the same time; see line 8: *ὑπὲρ μισθῶν αὐτῶν καὶ τιμῆ(ς) καυμάτων*. The opening phrase of the declaration: *ὁμολογοῦσι — συνπεφωνηκέναι αὐτῷ ὥστε χορηγῆσαι αὐτούς*, and, perhaps, the way in which mutual obligations are laid down, suggest, it seems to me, that the draftsman may to some degree have been familiar with the Roman theory of the consensual contract. However, such influence, if there was any, was strictly external. The basic structure of the contract is Greek; the Persians have received an advance payment and subject themselves to a typically Greek penalty and *πρᾶξις καθάπερ ἐκ δίκης*, while no liability for Dius is stipulated.

[66] Plato, Krito 51e. Cf. Vinogradoff, op.cit. 239.

[67] See the pre-Antoninian contracts BGU. III 865, P.Oxy. VI 908 (Wilcken, *Chrest.* 426), XII 1473 (only in the *hypographe,* line 36); cf. also P.Flor. I 47 col. I (Mitteis, *Chrest.* 146) of 213-217 A.D. and P.Gen. 42 of 224 A.D. BGU. III 865 is an instrument drawn up by the creditor, a Roman, and stating the obligations of the debtor. P.Oxy. VI 908 and P.Gen. 42 concern obligations assumed in connection with public duties. A peculiar use of *συντίθεσθαι* occurs in P.Oslo II 18 (167 A.D.) and in BGU. I 321 and 322 (Mitteis, *Chrest.* 114 and 124; 216 A.D.); in these texts the term corresponds to the Latin *pacisci,* referring to pacts settling the consequences of crimes. Cf. *Corp.Gloss.Lat.* II 140.25: *pacisci*tur συντίθεται, συμφωνεῖ; 444.62: *συνεθέμην pepigi.*

Much closer to Roman conceptions is the second century contract, P.Oxy. III 498, in which two stone-cutters undertake to prepare stones needed for the building of a house and agree to do any necessary stone-cutting on the building ground. There is no advance payment, the consideration—consisting in certain amounts of money for fixed quantities of stones, daily wages for the work on the building ground, and certain foodstuffs—obviously being due as the work proceeds. The contract, as far as can be seen, provides for no penalty or *praxis,* while, on the other hand, the expressly stipulated right of the promisee to hire, within a limited period, other workers indicates that in principle the arrangement was to bind both parties. The inference that its binding force was supposed to rest on the mere agreement of the parties is the more suggested as the promisee, Antonia Asclepias, was a Roman citizen.

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