GERHARD THÜR

Nr. 373 (Aufsatz / *Essay*, 2022)

The Phrase καθάπερ ἐκ δίκης in Greek and Hellenistic Documents

Our beloved Polites: Studies presented to Peter J. Rhodes, hg. v. Delfim Leão, Daniela Ferreira, Nuno Simões Rodrigues, R. Morais (Oxford 2022) 191–206

Schlagwörter: Zwangsvollstreckung — Gerichtsurteil — Papyri — Inschriften — Ehre und Schande

Key Words: Enforcement — judicial sentence — papyri — inscriptions — honor and shame

<gerhard.thuer@oeaw.ac.at>
https://www.oeaw.ac.at/m/thuer-gerhard/

Our beloved *Polites*

Studies presented to Peter J. Rhodes

Delfim Leão, Daniela Ferreira,
Nuno Simões Rodrigues, Rui Morais

Archaeopress Archaeology

Archaeopress Publishing Ltd
Summertown Pavilion
18-24 Middle Way
Summertown
Oxford OX2 7LG
www.archaeopress.com

ISBN 978-1-80327-170-5
ISBN 978-1-80327-171-2 (e-Pdf)

In Memoriam Professor Peter J. Rhodes

(1940–2021)

Contents

The Phrase καθάπερ ἐκ δίκης in Greek and Hellenistic Documents

Gerhard Thür

Austrian Academy of Sciences
gerhard.thuer@oeaw.ac.at

Abstract
When, in papyrus contracts of the Ptolemaic and imperial era, a καθάπερ ἐκ δίκης formula was inserted inside a πρᾶξις-clause, enforcement (*praxis*) apparently could be carried out "as if a verdict was pronounced." This legal fiction would therefore suppose that the creditor could act as if a law court had already rendered a judgment (*dike*) in his favor, and therefore he would be entitled to seize the properties of the debtor without having to turn to a judge first: without a verdict. However, Wolff (1970) considered that the expression would mean: "(enforcement shall take place) following the rules of the *dike*" — and was of no practical legal relevance. For outside Egypt Meyer-Laurin (1975) claimed executive force in Dem. 35.10–13 and in several Hellenistic inscriptions, followed by Rodríguez Martín (2019), who furthermore disputed Wolff. Concentrating on sources beyond the Graeco-Egyptian papyri, in this paper I will show that the phrase had a great variety of meanings, depending on the context: from full executive force down to legal irrelevance (the latter in Ptolemaic papyrus documents and in Hellenistic funerary inscriptions as well).

Keywords
Enforcement, judicial sentence, papyri, inscriptions, honor and shame

The Problem[1]

When a lawyer of our times encounters the clause ἡ πρᾶξις ἔστω καθάπερ ἐκ δίκης ('enforcement shall take place just as following from a judicial sentence', or better, 'from a court procedure') in a papyrus document he or she straightforwardly will associate it with a provision bestowing right of immediate enforcement: that means the creditor would be enabled to execute his title directly, without a judicial sentence against the debtor. Since Wachsmuth (1885) this was orthodoxy until disputed by Wolff (1970).[2] Based on his study on the judicial system of the Ptolemies, Wolff suggested that the phrase καθάπερ ἐκ δίκης was *de iure* meaningless.

In a *diagramma* enacted some years before 263 BC, Ptolemy II Philadelphos installed *dikasteria* for the Greek population.[3] From that date on, in contract deeds an enforcement clause κατὰ τὸ διάγραμμα was used ('according to [the judgement of a court installed through] the

[1] In a different context a similar topic is alluded to in my contribution "Gewalt, Zwangsvollstreckung und Rechtsstaatlichkeit im Achäischen Bund" (in S. Freund, ed., *Hamburger Studien zu Gesellschaften und Kulturen der Vormoderne*, Franz Steiner Verlag, Stuttgart, in German, forthcoming).

[2] Wachsmuth (1885: 195) spoke of *Exekutivurkunde*; for nearly one century followed by the most prominent scholars on juristic papyrology quoted by Wolff (1970: 527 n. 2 and 3).

[3] Wolff (1962: 37–48).

diagramma'), referring in no way to immediate enforcement but rather to a sentence that had been actually delivered.[4] When, in the beginning of the second century BC, the *dikasteria* had ceased functioning, contemporaneously, the *diagramma* phrase was replaced by καθάπερ ἐκ δίκης.[5] This clause survived up to Roman times, and was included in the overwhelming majority of private contract deeds. Thus, already the strict rules governing enforcement[6] speak against an executive force of the clause, and there are a lot of cases, also of considerable economic importance, where the καθάπερ phrase is omitted in the *praxis* provision; it is impossible to detect any principle in that.[7] Creditors had no advantage in using the clause; herewith the notaries just ensured them that a sentence rendered by the *chrematistai*, now replacing the *dikasteria*, had the same validity as a former one.[8] The notaries simply adapted the deeds to the procedural mutations; technically, they made use of transferring the legal consequences from the old situation to the new one (*Rechtsfolgenverweisung*).

By the way, in a footnote Wolff remarks that in the sources outside of Egypt the clause πρᾶξις ... καθάπερ ἐκ δίκης has the same impact, not replacing a judgement.[9] With some reason Meyer-Laurin countered: this cannot be correct; where *dikasteria* still existed, the clause did replace a court sentence.[10] However, just the existence of a *dikasterion* cannot be the criterion for the executive effect of a deed. One must take a closer look at the circumstances under which the clauses were used. — I hope that Peter Rhodes, the classicist of ancient Greek *dikasteria*, will benevolently accept this small, unorthodox contribution.

The Topic

The topic of the present paper is individually studying the sources outside of Egypt. Compared to the huge number of the quite uniform papyrus texts these sources are only few but manifold in character and different explanations may result. In the following, *praxis* dispositions will be divided into three groups by their appearance: 1) in contracts, 2) in penal sanctions of statutes, 3) in private penal sanctions (funeral charters).

1. καθάπερ ἐκ δίκης in contracts (bilateral transactions)
   a. Two-sided agreements are the closest parallel to the papyrus deeds. The earliest example and the only one preserved in a private contract is the sea loan *sungraphe* inserted into Demosthenes' speech *Against Lacritus* (Dem. 35.10–13, dated before 340 BC). The clause reads (§12): ... παρὰ Ἀρτέμωνος καὶ Ἀπολλοδώρου ἔστω ἡ πρᾶξις τοῖς δανείσασι καὶ ἐκ τῶν τούτων ἁπάντων καὶ ἐγγείων καὶ ναυτικῶν, πανταχοῦ ὅπου ἂν ὦσι, καθάπερ δίκην ὠφληκότων καὶ ὑπερημέρων ὄντων ('... against Artemon and Apollodorus [personally] shall be the enforcement by the creditors as well as out of their whole property ashore and at sea, wherever they [the debtors] may stand, just

[4] Wolff (1970: 533).

[5] Wolff (1970: 534) followed by Meyer-Laurin (1975: 197). Based on new findings Kramer and Sánchez-Moreno Ellart (2017: 41) hold that the *dikasteria* were abolished in 172 BC by royal ordinance. Rodrígez Martín (2017: 156–63) detected hints of the *diagramma* even after 170 BC.

[6] See the overview in Rupprecht (1994: 149–51).

[7] Wolff (1970: 531).

[8] Wolff (1970: 534), similarly Alonso (2016: 62); doubtfully Kränzlein (1976), Rodriguez Martin (2013: 260–264).

[9] Wolff (1970: 534 n. 36). In his view *dike* means "proceeding ... something going on rather than its conclusion."

[10] Meyer-Laurin (1975: 202).

as being sentenced in a lawsuit and being in default.'). Wolff is asking whether the plaintiff, one of the creditors, did not enforce directly due to the *praxis* clause, but rather is suing Lacritus, the deceased debtor Artemon's brother and heir.[11] Under normal circumstances, against the debtors themselves, the clause would have been effective in every polis where the debtors, being travelling maritime traders, would have been seizable by the creditors, notwithstanding the complex network of interstate treaties on seizure (*symbola*). The interstate dimension of this sea loan business alludes clearly to immediate enforcement.

b. Only a few years later is the date of the two loan deeds from Arcesine on the island of Amorgos (325–275, init. 3rd cent. BC, respectively), interstate loan businesses, too.[12] Private foreigners credited the polis considerable sums. Several times, the extensive documents grant the creditors the *praxis* against the polis 'just as being sentenced in a lawsuit that is conducted by a polis established as arbitration tribunal according to the treaty (*symbolon*) between the Naxiens and the Arcesinians.'[13] The clauses relieved the creditors of troublesome interstate arbitrations, of both the contentious pleading the merits of the case and the enforcement of a favorably rendered award through *dike exoules* (*Erkenntnisverfahren* and *Vollstreckungsverfahren*). Foremost, the latter clearly shows the executive character of the deed.

c. Although not an inscription but rather a papyrus document, chronologically and factually fitting is here the marriage contract from the garrison of Elephantine, P.Eleph. 1 of the year 311 BC. At that time, the Ptolemies had not yet enacted the jurisdiction *diagramma* and the military settlers drafted their documents according to the pattern they used at home. In case of severe misconduct the husband would have to pay his wife a penalty of 2000 drachmae, enforceable as follows (l. 12): ... ἡ δὲ πρᾶξις ἔστω καθάπερ ἐκ δίκης κατὰ νόμον τέλος ἐχούσης ... ('enforcement shall be just as following from a lawsuit that is conducted all the way through according to statute'). Since in Egypt a *dikasterion* was inaccessible the deed had to be enforceable immediately. In fact, a private arbitration court first had to declare the misconduct; in any case, the title of execution, probably under military control, was the private marriage agreement.

d. An inscription from later time preserves another interstate loan. It requires mentioning here although it does not use the phrase καθάπερ ἐκ δίκης. Nicereta from Thespiae granted a huge credit to the polis Orchomenos. In an extensive document of 223 BC an arduously negotiated compromise is preserved.[14] Some citizens, personally responsible as debtors, were subject to: πραχθήσονται κατὰ τὸν νό|μον[15] ('against them will be enforcement according to the law'). It is unimaginable that Nicereta after that troublesome compromise must sue the

[11] Wolff (1970: 534 n. 36). Not conclusive is his argument that the Athenian law may not have permitted immediate *praxis*; in fact, the problem could have been that the *praxis* clause was not valid against the debtor's heir (however, Lacritus' liability as heir is discussed already in Wolff, 1966: 76).

[12] *IG* XII 67B and 69 (Migeotte, 1984) no. 49 and 50.

[13] Migeotte (1984) no. 49.24, 28–29: καὶ ἐξέστω πράξασθαι Πασικλεῖ ταῦτα τὰ χρήματ[α] ... καθάπερ δίκην ὠφληκότων ἐν τῆι ἐκκλήτωι κατὰ τὸ σύμβολον τὸ Ναξ[ί|ω]ν καὶ Ἀρκεσινέων τέλος ἔχουσαν ... (similarly ll. 12–13 and 36–38). More precisely no. 50.15, 31 and 41, respectively: ... καθάπερ δίκην ὠφληκότων ἐξούλης ('just as being sentenced in an action based on withholding ownership'), hinting to seizure of encumbered land.

[14] *IG* VII 3172 (Migeotte, 1984) no. 13. For the original order of the eight parts of the document see Migeotte (1984: p. 53–54).

[15] Migeotte (1984) no. 13 VI 105–106 (*IG* A 28–29).

polis again. The clause *praxis kata ton nomon* made the loan deed negotiated anew, immediately enforceable.

e. Chronologically fitting, though highly hypothetically in nature, one may add here a phrase from a summons (*proklesis*[16]) to undergo arbitration that the polis Megalopolis (ἐγώ) directed to the polis Messene (συ) in 182 BC (ll. 157–8, my restoration): … ὅπως κριθεῖς πὸς ἐμὲ καθὼς | αὐ[τοῖς] ἐδικάσατε ('so that you against me get the award just as you had had a trial between yourselves'). In case both reading and restoration are correct the phrase allows the Megalopolitans, being victorious, to enforce the award against the Messenians like an intrastate Messenian verdict.

The five instances treated so far prove bilateral agreements about immediate enforcement. However, they are valid not because of the real existence of *dikasteria* (Meyer-Laurin) but rather due to the parties' private autonomy foremost in cases beyond the narrow jurisdiction of the *dikasteria* existing in the *poleis*. Likewise, the phrase καθάπερ ἐκ δίκης does not at all refer to an ongoing trial (Wolff), rather the parties feigned a condemnation in an orderly conducted lawsuit. It is important to note that in the classical and Hellenistic polis private creditors had to enforce (*eis-prattein*) their claims by personally seizing the debtors' assets. A *praktor* was in charge only of public claims.[17]

2. καθάπερ ἐκ δίκης in penal sanctions of general statutes

Chronologically quite close to the earliest loan documents a further field of applying the phrase καθάπερ ἐκ δίκης (and similar ones) can be found in orders to execute fines in penal clauses of statutes. On the one hand private persons can sue incorrectly acting officers (a), on the other officers must pursue disobedient private persons (b) and, finally, private persons vested with public competences penalize fellow citizens (c).

a. Enforcement against officials

It seems to be sufficient to deal here with three significant examples.

(1) An amnesty decree from Telos[18] (about 300 BC) orders: ἀ δὲ πρᾶξις ἔστω ‹τῶ›ι ἰδιώται καθάπερ ἐκ δί[κ]ας ('enforcement for the private person shall be just as following from a court procedure'). After readmitting oligarchic exiles, the *tamiai* and the *hierapoloi* of the polis had to restore to them their previously confiscated estates. If the officials disobeyed each of them had to pay a penalty of 5000 drachmae to the gods and double the value of the estate to the private owner. How to enforce the sacred penalty was no problem and is not even mentioned; normally a volunteer citizen, a *boulomenos*, interfered after the official was sentenced in an action of accountability or a similar one. However, this sentence did not help the private claimant. Instead of suing the officials for

[16] Preserved in the yet unpublished part of *SEG* 58.370, see my contribution quoted above, n. 1 and Thür (2013). I am grateful to Prof. Petros Themelis for the permission to discuss a few words here.

[17] Rubinstein (2010: 193–4 and 204 n. 37); differently, in Egypt the *praktor* is intervening in private cases too, Rupprecht (1994: 149).

[18] *IG* XII 4/1.132 lines 117–8; for the phrase see Rodriguez Martín (2013: 261–2) and Thür (2011: 349). The inscription is extensively discussed by Scafuro (2021) and Thür (2011).

private damage (*dike blabes*), here, the claimant could enforce immediately his loss against the officials because they had already been convicted in a public lawsuit for their misconduct. The value of the estate had already been estimated during the retrial procedure. The καθάπερ clause did not refer to a fictitious court procedure but rather was a legal-technical reference to the consequences of a privately conducted *dike* trial.

(2) In an honorary decree from Kyaneae[19] (ll. 14–15,) the clause prohibiting amendments is formulated similarly to the Telos text: ... ἢ αὐτὸς πρακτὸ]ς ἔστω εἰς τοὺς προγεγραμμένους θεοὺς καὶ τ[ὰ ὑπάρ|χοντα αὐτῶι· εἶναι δὲ τ]οῖς ἀγχιστεῦσιν [α]ὐτοῦ ἐπίτιμον καθάπερ ἐγ δί[κης.] ('...otherwise, against the [proposer] himself[20] shall be enforcement in favor of the aforementioned gods and against his fortune; the additional penalty shall be [accorded] to his relatives just as following from a court procedure'). The honored person had established a foundation the rules of which also were published in the present, fragmentarily preserved inscription. Whoever will move an amendment (which means acting in an official function) shall be fined twofold and subject to enforcement: first, in favor of the gods in the usual public way not further mentioned, and thereafter in favor of the founder's relatives according to the rules of the private *dike* (the amounts of the penalties are not preserved). Based on the public conviction, the polis bestowed immediate enforcing of the additional penalty (*epi-timon* in its original sense) to the private creditors through a legal-technical reference. Thus, the relatives didn't need to file an extra private suit.

(3) Legal-technical reference is to be supposed in another foundation document, also fragmentary.[21] If the managers (*dioiketai*) don't observe the statutes the following is ordered (ll. 6–12): ... ἀποτεισάτω ἕκαστος τῶν αἰ|τίων τῶι ἀνατιθέντι τὸ διάφορον δραχμάς τρισχιλί|ας[22] παθόντος δέ τι αὐτοῦ, ἐὰμ μὴ ἐπιτελέσωσιν | οἱ διοικηταὶ τὰ ἐπιτεταγμένα, ἀποτεισάτωσαν | τὸ αὐτὸ πρόσ[τι]μον τοῖς κληρονόμοις τοῖς Φαινίπ|που, τῆς πρά[ξεω]ς [οὔσ]ης κατ' αὐτῶν καθάπερ ἐγ δί|κης. ('... each culprit shall pay 3000 drachmae to the donator of the funds; if something had happened to him and the *dioiketai* don't perform the orders, they have to pay the same (additional) penalty to Phaenippus' heirs, whereupon against them [the *dioiketai*] enforcement shall be just as following from a court procedure'). In the inscription the passage ordering what persons are to be installed as managers is lost. If they were private persons, it is uncertain who is determining their disobedience and a *praxis* clause καθάπερ ἐκ δίκης makes no sense. Most probably an existing board of polis officials was appointed and first, before enforcing privately, the actual culprits out of them (ll. 6–7) were to be specified by demanding a public account. Apparently, private enforcement was permitted only in connection with a public verdict.

[19] Heberdeyand Kalinka (1897) no. 28 (2nd cent. BC); friendly communicated by Prof. Kaja Harter-Uibopuu, Hamburg. Cf. also *I.Milet* I 3.134.22–28 and (in non punitive sense) I 3.145.63–64 (1st cent., 200–199 AD, respectively).

[20] Cf. the clause in Dem. 35.12 (above, section 1a) and in many papyrus contracts (e.g. *P.Eleph*. 1.13, mentioned above, section 1c). The (outdated) enforcement against the person (*Personalexekution*) is not the problem of this paper.

[21] *I.Iasos* 245 (1st cent. BC or Imperial time), foundation of Phaenippus; see Harter-Uibopuu (2013: 88–90).

[22] In line 8 the editors set a full stop. By the semicolon I would suggest that the *praxis* clause is concerning both alternatives.

b. Enforcement by officials

To punish private persons or minor counterparts disobeying the law was one of the polis officials' essential duties. Examples of statutes empowering officers to do so run from the early fifth century to Hellenistic times are comprehensively collected by Lene Rubinstein (2010). However, within the penalty clauses rules how to enforce the fines are rare. The few ones, normally, refer to other statutes, whose content is mostly unknown, though never to the consequences of a private *dike* in general.[23]

c. Enforcement by private persons invested with public competences

Poleis farm out some public duties or benefits by auction to private entrepreneurs, for example collecting taxes or customs, cultivating public land, or constructing public buildings. From the island of Kos a series of *diagraphai* is preserved, farming out priesthoods to the best offer.[24] The *diagraphai* determine the rights and duties of the respective priest, a private man or woman, and with the acceptance of the bid the documents become contract deeds. Some deeds contain the phrase καθάπερ ἐκ δίκης and others don't. Penalty clauses without the phrase concern fines in favor of gods.[25] Gods have no need of it; there are special means to secure their revenues, public ones because sacred debtors are state debtors. The phrase occurs in cases where the priests' revenues are concerned, mostly from sacrifices for private persons. One may suppose that the polis grants the priests, who had paid a lot for their offices, immediate enforcement against their defaulting clients.[26]

For enforcement by priests, the opposite is probable: the priest or the priestess, being private persons, have a weaker position than the gods. The system is disclosed in one text (no. 319.29–35): αἰ | δέ τίς κα μὴ ἐπιτελέσηι τι ... | ἢ μὴ θύσει κατὰ τὰ ποτιτεταγμένα, ἀποτεισάτω τᾶι ἱεραίαι τὰ ἐφ' ἑκάσ|τοις γεγραμμένα ἐπιτίμια, ἁ δὲ πρᾶξις ἔστω αὐτᾶι καθάπερ ἐγ δίκας·| κατὰ ταὐτὰ δὲ καὶ αἴ τινά κα ἁ ἱέρεια μὴ ποιῇ τῶν ποτιτεταγμένων αὐ|τᾶι κατὰ τὰν διαγραφὰν, ἀποτεισάτω δραχμὰς χειλίας ἱερὰς Ἀφροδί|τας, φαινέτω δὲ ὁ χρῄζων κατὰ τὸν νόμον. ('if someone doesn't ... perform something or doesn't sacrifice according to the instructions he shall pay the priestess the fines stipulated in each case, she shall have enforcement just as following from a court procedure; on the same terms, also when the priestess doesn't perform something ordered to her by the diagraphe, she shall pay one thousand drachmae holy to Aphrodite; the phasis shall file whoever intends according to the law.')

[23] See Rubinstein (2010: 203–208). Texts similar to the καθάπερ ἐκ δίκης phrase are: ἐόντος πρ[άξεος ...]...|... κὰτ τὸν νόμον τὸν ὑβριστ[ή]ριον (*SEG* 50.1195.37–8, Cyme, 3th cent.; cf. ὡς δίκην ὕβρεως in *IK Lampsakos* 9.34, 2nd cent.); τὰς δὲ πράξεις ...|... ἐπιτελείτωσαν οἱ εὔθυναι καθάπερ καὶ τῶν ἄλλων τῶν δημοσίων δικῶν (*Syll.*[3] 578.58–9, Teos, 2nd cent.); τὰς δὲ πράξεις εἶναι ...|... κατὰ τὸν νόμον τῶν τοῦ ἐμπορίου ἐπιμελητῶν (*I.Milet* I 3.140C, lines 62–3, *StV* III 482, after 260 – all BC; for the last inscription = *IC* I 23.1.63–64 see the contribution of Gagarin in this volume).

[24] Published now in *IG* XII 4.1 (in the following quoted only by number and line). They date from the 3rd to the 1st cent. BC; see the extensive commentary by Parker and Obbink (2000); generally for sale of priesthoods Wiemer (2003), and Scafuro 2021 for contracting out in Kos.

[25] In favor of gods nos. 298.146–51, 315.21–2, 319.22–24, 325.15–16; in favor of humans nos. 302.26; 315.18–23; 319.1-2, 13–16, 29–32; 324.11–14; 325.22–23.

[26] Parker and Obbink (2000: 432–3), Wiemer (2003: 300).

Again, enforcement in favor of a god is contrasted with that in favor of a human. If the priestess transgresses the statute every citizen can file a *phasis* (denouncement action[27]) in favor of Aphrodite. After conviction in this 'contentious proceeding' in a second step the fine will be publicly enforced in support of the goddess; how this occurs was not worthwhile of mentioning. Outside persons are also authorized to exact fines in favor of priests (no. 315.20–21). In contrast, in that provision, just as here in no. 319, enforcement is mentioned (καθάπερ ἐκ δίκης) and the contentious proceeding is not. One may suppose that in these instances a *phasis* was effective too. However, because the fines were to pay private persons, the priests, not to support a god, a special provision was necessary: despite the public lawsuit, the *phasis*, enforcement follows private rules, καθάπερ ἐκ δίκης. This seems to have been the rule also when the priests themselves charge the penalty. First, they must file a suit, a *phasis*, and only afterwards, when the transgressor has been convicted, they are authorized privately to enforce the payment they are personally entitled to. In no way did the clause allow immediate enforcement to the priests. The clause was necessary because a public contentious proceeding, *phasis*, was combined with an enforcement in favor of a private person. He or she was worthy of protection through exercising public duties, the priesthood. Again, the clause is a legal-technical reference to applying private procedure.

In none of the instances dealt with in this section, where the phrase καθάπερ ἐκ δίκης is inserted in penal clauses of general statutes, is the beneficiary empowered to immediate enforcement. The phrase is used in cases where the culprit has previously been sentenced in a public lawsuit and on that basis a private person also could enforce a penalty on his or her own. Here, the phrase refers to the rules of jurisdiction in private cases. Similar phrases in favor of officials exacting fines simply refer to other statutes ruling public enforcement more precisely.

3. καθάπερ ἐκ δίκης in private penal sanctions unilaterally ordained

Returning to private documents funeral inscriptions from Asia Minor also relate to our subject. The founder of a tomb was highly interested in ordaining who should have the right to be buried there afterwards. To ensure his or her disposition there were two options both published as their 'charters' at the gravesite: on the one hand to curse every transgressor and on the other to fix fines for illicitly burying. Treading the secular way, the founder ordered that every fellow citizen who wanted to do so (ὁ βουλόμενος) should intervene against any future violator (*Popularklage*). Primarily, the penalty has been in favor of the polis or a sanctuary and later, additionally, to the imperial *fiscus*; the intervening actor was to get a share of the fine. Here, the problem is not to be discussed on what legal base the private founder could authorize a random citizen to claim the money after his, the founder's, death. Anyway, it seemed to have worked. There are some hints that the actor had to file a public lawsuit first, and there is one example that, afterwards, a *praktor* was competent to enforce the fine.[28] Astonishingly under these circumstances, from the several thousand funeral inscriptions of Asia Minor just seven texts contain a clause πρᾶξις … καθάπερ ἐκ δίκης or a similar one. Did

[27] For the *phasis* procedure in Athens see Macdowell (1991), beyond Athens Rubinstein (2016: tab. I) within the *boulomenos* cases.

[28] In the regions and *poleis* of Asia Minor the rules were different; see the survey of competent magistrates by Schweyer (2002: 86–7). For the *praktor* see Schuler and Zimmermann (2012: 575–82; no. 3, Patara in Lycia, 1st cent BC).

they permit the *boulomenos* immediate enforcement? The texts will be discussed according to their provenance from different regions, from Lycia and Caria.

a. Lycia

Four texts are relevant, three with the phrase καθάπερ ἐκ δίκης and one differently worded.

(1) The main source apparently to prove the doctrine of immediate enforcement has been *CIG* III 4300v 10–12 (*LBW* 1301, Simena, Central Lycia, Hellenistic; sarcophagus): ... καὶ ἀποτισάτωι ἐπιτίμιον[29] | τῶι δήμωι (δραχμὰς) ,ς τῆς προσανγελίας οὔσης παντὶ | τῶι βουλομένωι ἐπὶ τῶι ἡμίσει καθάπερ ἐγ δίκης ('... and he shall pay as fine to the demos 6000 drachmae whereupon the denouncement[30] shall be [possible] for everyone who wishes, [obtaining] the half [of the fine], just as following from a court procedure'). One has concluded that, because of the eminent public interest in funeral matters, immediate enforcement of the sum was allowed.[31] However, two inscriptions up to now not yet considered[32] point in another direction.

(2) *TAM* II 526.7–12 (Aloanda, West Lycia, 1st cent. BC; sarcophagus): ... ἢ ἀπο|τισάτω ὁ θάψας τῶι τε υἱ|ωνῶι μου Ἑρμολάωι δρα|χμὰς τρὶς χιλίας καθάπερ | ἐγ δίκης καὶ τῶι δήμωι τὸ ἴσον | πλῆθος ('... or the person who buries shall pay three thousand drachmae to my uncle Hermolaus just as following from a court procedure and to the *demos* the same amount.')

(3) *Petersen and Luschan, Reisen* II 56, no. 108.4–5 (Timiussa, Central Lycia, 1st cent. BC; sarcophagus): ... ἢ ὀφειλήσει ὁ παρὰ ταῦτα θάψας ἐπιτίμιον | καθάπερ ἐ[γ] δίκης Θρασυμάχῳ ἢ τοῖς ἐγγόνοις αὐτοῦ δραχμὰς χιλίας ... ('... or the person, who buries against these [orders], shall owe as a fine, just as following from a court procedure, to Thrasymachus or his progeny one thousand drachmae.')[33]

Exceptionally, only in the last two texts private persons who would get the penalty are specified by name, Hermolaus, the uncle of the deceased, and Thrasymachus, apparently being close to him, respectively. Normally founders left open who shall persecute violations of their charters on entitling to be buried. Overwhelmingly, they used the system that a *boulomenos* is encouraged to sue and get — as award — a share of the fine. In fact, painful disputes over gravesites occur between relatives, in the circle of the extended family, and a member feeling discriminated usually prosecuted as *boulomenos*; but also, it made sense if a powerful outsider was ready to take the duty upon himself. Funeral inscriptions need not explain how both contentious and enforcement proceedings in the *boulomenos* cases are to perform. This worked differently in the individual *poleis* of Asia Minor and we have very little knowledge of the legal proceedings there.

[29] *CIG* ἐπίτιμον : corr. Kalinka in his notebook, communicated by Dr. Christoph B. Samitz, Vienna.

[30] For the *prosangelia* see below, section c).

[31] See Rodriguez Martin (2013: 246–7 and n. 15) with further references.

[32] Friendly communicated by Dr. Karin Wiedergut, Vienna.

[33] It is unclear why in this inscription the *demos* is not involved; furthermore, one thousand drachmae is a low amount of a fine.

Authorizing an associated person instead of a *boulomenos* seems to be the answer to an ongoing or threatening family dispute. By nominating a person of confidence as beneficiary of the fine the founder of the grave primarily entrusts him to prosecute violations of the funeral charter. In Aloanda a certain Hermoas, son of Menneus, furnished the sarcophagus exclusively for himself, his wife, and their children. In case of violating this order Hermoas' uncle Hermolaus is addressed as recipient of the fine that is to be paid to the *demos*, too, together 6000 drachmae.[34] The text ends with a curse against the violator. The uncle, Hermolaos, had no proper right on the tomb. His only task was to uphold Hermoas' charter on burying. In this situation one can assume that a dispute with another competing relative was at stake.

A little bit different was the situation in Timiussa. Hegias, son of Sedeplemis, furnished the sarcophagus exclusively for himself and his wife. A violator shall owe Thrasymachus or his offspring 1000 drachmae. The text continues that also Thrasymachus, son of Archius, 'furnished' for himself, his wife, their children, and their offspring. Apparently Hegias was childless (in l. 3 of the inscription is a blank space exactly where one should expect the words καὶ τέκνοις). Probably Hegias had adopted Thrasymachus or had planned to do so (at least he had granted his family the right to be buried). This right should be protected by the charter. Disputes with Hegias' relatives were to be expected. When someone of them would violently open the sarcophagus to bury one of their members the beneficiary or one of his offspring and not a random *boulomenos* were the most competent persons to defend their rights.

It is not believable that a person specifically nominated would proceed in a different way than the *boulomenos*, generally not armed with the πρᾶξις ... καθάπερ ἐκ δίκης. First, differently to contracts where immediate enforcement is stipulated bilaterally, the present opponent or future violator did not agree to the unilaterally imposed fine. Thus, a court decision seems unavoidable. And because the violator would not bear any contractual or tortious liability, the nominated prosecutor, like the *boulomenos*, had to file a public lawsuit. Second, it is implausible that the system of enforcement by privately seizing the debtor's assets as practiced in the Classical polis survived in late Hellenistic Lycia. As in Ptolemaic Egypt, enforcement by self-help probably has vanished. Therefore, also in Lycia the clause seems to have been of no more legal relevance. The question remains: what was the reason for inserting it in those few funeral charters?

In the Classical polis enforcing a private claim against the convicted debtor was a task exclusively burdened upon the creditor. He relied on legitimated private self-help, and sometimes the issue ended in abuses and atrocities.[35] In contrast, a reluctant public debtor lost his civil rights and was threatened by public auction of his property. Thereby he was indirectly forced to pay. We have no sources that private self-help was the legal way of enforcement in Hellenistic *poleis*. Thus, the πρᾶξις ... καθάπερ ἐκ δίκης clause had lost its original scope of application. However, even if self-reliant private enforcement was no more practiced people may have known how it formerly had worked and remembered the dishonor involved. It seems possible that the founder of the grave wanted to furnish his confidant with an additional moral weapon: morally discrediting his relatives when they would disregard

[34] Cf. the case mentioned below, in n. 46.

[35] Enforcing monetary verdicts was performed through *enchyrasia* (taking in pledge), see Dem. 47.37 and Harrison (1971: 187–90), for violence Dem. 47.58–9; for seizing *enechyra* (enforcing penalties) beyond Athens see Rubinstein (2010: 195 and 208 n. 48). For private formal (ritualistic) violence in litigation in Greek *poleis* see Thür (2003).

his burying charter. Beside paying the fine, people violating his last will shall be socially humiliated too. Otherwise, because the *boulomenos* was not addressed personally this weapon normally was not put in the hands of the random citizen who would interfere as *boulomenos* against future violators, also uncertain persons. In these cases, the dispute remained at an impersonal level.

To sum up, the clause πρᾶξις ... καθάπερ ἐκ δίκης inserted in the inscriptions from Aloanda and Timiussa, above (2) and (3), was just moral reinforcement and had no legal importance.[36] Until now only in the Simena text (1) is the clause combined with appointing a *boulomenos*. In view of hundreds of *boulomenos* texts without the clause this instance is of no weight.[37] If there was, in fact, a background of familiar dispute we have no clue to it.

(4) Finally, a misunderstanding of ancient forms seems to have occurred in the inscription Schweyer (2002: p. 269) no. 89.5–8 (*SEG* 43.980; Turant Assari, Myra, 1st cent. BC – init. 1st cent. AD): ... ἢ ὀφειλήσει ὁ θάψας τῇ Ἐλευθέρᾳ κιθαρη|φόρους ἑξακισχιλίας ὡς ἀπὸ καταδίκης τέλος ἐχού|σης, τῆς πράξεως οὔσης παντὶ τῷ βουλομέ|νῳ ἐπὶ τῷ τρίτῳ μέρει. ('... or the person burying shall owe [the goddess] Eleuthera six thousand citharephor [coins] as from a 'conviction' that is conducted all the way through whereupon the enforcement shall be [possible] for everybody who intends at [obtaining] the third.') In enforcement clauses the phrases ὡς ἀπὸ καταδίκης[38] and κατὰ δίκην ... τέλος ἔχουσαν[39] occur separately. Though, in combination they make no sense. The first designates the terminus of the lawsuit, the condemnation (*kata-dike*; to say "to bring it to an end" is odd); and the second means — inconsistent with the first — the whole length of the lawsuit. As it stands, the clause has just ornamental character.[40]

b. Caria

Only marginally to be mentioned is a well-known inscription from Aphrodisias, *I.Aph.* 2007 12.1205.10–11 (*LBW* 1639, 2nd–3rd cent.): ... καὶ εἰσοίσει ἕκαστος αὐτῶν εἰς τὸν κυριακὸν φίσκον ἀ|νὰ (δηνάρια) μύρια ὡς ἐκ καταδίκης, ὧν τὸ τρίτον ἔσται τοῦ ἐκδικήσαντος. ('... and each of them shall bring ten thousand denars to the Imperial *fiscus* as from a conviction, a third of which shall belong to the intervening party.') Like the foundation inscription from Oinoanda[41] the text dates to Roman times. It stands completely isolated within the Carian funeral inscriptions and is of no value in informing us about the law of enforcement neither for the Hellenistic nor for the Roman time.[42]

---

[36] Already Mitteis (1891: 410) doubted the "*rechtliche Bedeutung*" of the clause in funeral inscriptions, followed by Wörrle (1988: 207 n. 141). See also below, n. 42.

[37] Two similar inscriptions yet unpublished (from Timioussa, again, and Corba, both Central Lycia) friendly communicated by Dr. Christoph B. Samitz, Vienna, cannot blur the statistical evidence.

[38] In a foundation text from Oinoander (*SEG* 38.1462.83; 124 AD); See Wörrle (1988: 204–7). Cf. also ὡς ἐκ καταδίκης in Aphrodisias, quoted below, at n. 41.

[39] S. above II 1b (n. 13) and 1c.

[40] Rodríguez Martín (2019: 488 n. 18) designates the phrase as "a lexical variation of καθάπερ ἐκ δίκης."

[41] See above, n. 38.

[42] See Mitteis quoted above, n. 36.

To sum up the section on funeral inscriptions one has to face the problem that there are only very few hints how penalty clauses even without the phrase καθάπερ ἐκ δίκης were enforced. Grave founders don't need to explain this item generally known to every citizen. Fragmentarily we know from Lycia that a *prosangelia* (denouncement, probably to an official[43]), an *apographe*[44] (registration, probably of the charge), and a *praktor*[45] (executory officer) were involved in such cases. Evidently, interfering in funeral matters the *boulomenos* had to follow strict rules we have no explicit knowledge about. Lawsuit and enforcement seem to have been public matters even when private persons were acting.[46] In this legal situation it seems unthinkable that a person, even a confidant of the grave founder, would be authorized to immediate enforcement against a future perpetrator who didn't submit to this kind of execution. Therefore, the *praxis* clause καθάπερ ... ἐκ δίκης in Hellenistic funerary inscriptions couldn't have had any legal relevance. Most likely it was a means of additionally humiliating the transgressor. Public enforcement, then up to date, should disgrace the culprit in the same way as personal seizure of his assets used formerly just as following from a *dike* procedure.

Ptolemaic contract deeds reconsidered

Against Wolff, Meyer-Laurin has come back to early orthodoxy whereupon in contract deeds of the Classical and Hellenistic *poleis*, beyond Egypt, by accepting the praxis clause καθάπερ ἐκ δίκης the debtor had agreed on immediate enforcement. However, the same clause used in penalty sanctions of statutes has been proven as a reference to enforcement orders stated in provisions elsewhere, just as Wolff has assumed for the papyrus contracts. In Egypt, in his opinion — not yet refuted, the phrase καθάπερ ἐκ δίκης was a special reminiscence to the *dikasteria* established by the *diagramma* no more in force. There, the phrase was of no further legal impact. Surprisingly a similar use of the phrase appears in some funerary inscriptions from Lycia. There, as sheer reminiscences to privately seizing the debtor's assets, the phrase probably had no legal effect, either.

Is this possible parallel occurring just by chance? One must not overlook the psychological components in Greek legal thinking. Especially in legal disputes honor and shame mattered. On that base I propose a — hypothetical — answer. As long as the *dikasteria* established by Ptolemy II Philadelphos administered justice the clause κατὰ τὸ διάγραμμα included the reference to the authority of the lawcourts of the ancient *poleis*. Even no more executed by private seizure but rather by public measures, enforcement of a *dikasterion* sentence could still have been feigned conducted like in Classical times. When substituted by the *chrematistai* courts the *dikasteria* had vanished, the phrase καθάπερ ἐκ δίκης referred to the authority of the earlier Egypt *dikasterion* system. And in the same way it referred to the dishonoring effects of the much older system of privately seizing the debtor's assets. In the Lycian funeral inscriptions the clause was used only rarely. In his lifetime the founder of the grave normally

[43] See above no. 3a(1) and at n. 30.

[44] *SEG* 56.1735, 1739, 1741.

[45] See above n. 28.

[46] Even when a private person is intervening, he enforces the penalty in favor of the polis (the *boule*: 3000 denars) whereas he may deduct 1500 for himself, *TAM* III 1.295.5–8 (Termessos, imperial time): ... ἐπεὶ ἐκτείσει τῆ | βουλῆ (δην.) ,γ ἅπερ ἐξέσται παντὶ εἰσ|πράσσειν εἰς ἑαυτὸν καὶ τῆ βουλῆ | εἰσφέρειν τὰ ,αφ' (δην.) ('... or [the perpetrator] shall pay 3000 denars to the *boule* to be enforced by anybody for himself and bring in to the *boule* 1500 denars'). In that times *eisprassein* has no more the meaning of self-reliant private seizure.

did not know which person would eventually violate his burial charter; a random *boulomenos* should intervene against a random violator. Only in a threatening or ongoing dispute the founder sometimes made use of this dishonoring weapon backing an entrusted prosecutor against an already existing opponent. In addition to the fine, the opponent should be struck by the same shameful effect of the enforcement as formerly in the Classical polis. Similarly, in a contract between two parties the creditor knows exactly the person of the debtor who eventually would default. Here a dishonoring clause makes perfect sense. In Egypt after 172 BC the phrase καθάπερ ἐκ δίκης — in my opinion — referred not only to the abolished *dikasteria* but also, and perhaps mainly, to the old way of shamefully enforcing. In both regions, in Lycia as well as in Egypt, the clause was of no legal relevance.[47] Nevertheless, Egyptian notaries automatically inserted it in the *praxis* clause of contract deeds. There, in daily use it might have lost a great deal of its dishonoring impact.

Bibliography

Alonso, J.L. 2016. Juristic Papyrology and Roman Law, in P.J. Du Plessis, C. Ando and K. Tuoriu, (eds) *Oxford Handbook of Roman Law and Society*: 59–69. Oxford: Oxford University Press.

Bagnall, R.S. 1976. *The Administration of the Ptolemaic Possessions Outside Egypt*. Leiden: Brill.

Harrison, A.R.W. 1971. *The Law of Athens*. Oxford: Clarendon Press.

Harter-Uibopuu, K. 2013. Bestandsklauseln und Abänderungsverbote. *Tyche* 28: 51–96.

Heberdey R. and Kalinka E. 1897. *Bericht über zwei Reisen im südwestlichen Kleinasien, Denkschriften der Kaiserlichen [Österreichischen] Akademie der Wissenschaften*, ph.-hist. Cl., 45.1. Wien: Gerold.

Kramer, B. and Sánchez-Moreno Ellart, C.M. 2017. *Neue Quellen zum Prozessrecht der Ptolemäerzeit. Gerichtsakten aus der Trierer Papyrussammlung (P.Trier I)*, Berlin: De Gruyter.

Kränzlein, A. 1976. Bemerkungen zur Praxisklausel *καθάπερ ἐκ δίκης*, in D. Medicus and H.H. Seiler (eds) *Festschrift für Max Kaser zum 70. Geburtstag*: 629–634. München: Beck.

MacDowell, D.M. 1991. The Athenian Procedure of Phasis, in M. Gagarin (ed.) *Symposion 1990*: 187–198. Köln: Böhlau.

Meyer-Laurin, H. 1975. Zur Entstehung und Bedeutung der *καθάπερ ἐκ δίκης*-Klausel in den griechischen Papyri Ägyptens, in H.J. Wolff (ed.) *Symposion 1971*: 189–204. Köln: Böhlau.

Migeotte, L. 1984. *L'emprunt public dans les cites grecques*. Québec: du Sphinx.

Mitteis, L. 1891. *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Leipzig: Teubner.

Parker, R. and Obbink, D. 2000. Sales of Priesthoods on Cos. *Chiron* 30: 415–49.

Rodríguez Martín, J.-D. 2013. Sobre la supervivencia de la cláusula *καθάπερ ἐκ δίκης* en los papiros romanos y bizantinos. *Revue Internationale des Droits de l'Antiquité* 60: 243–277.

Rodríguez Martín, J.-D. 2017. La relación entre las fórmulas *καθάπερ ἐκ δίκης* y *κατὰ τὸ διάγραμμα* en los papiros ptolemaicos y romanos, in M.J. Albarrán Martínez, R. (eds) *Estudios Papirológicos*: 143–170. Madrid: Fundación Pastor de Estudios Clásicos.

Rodríguez Martín J.-D. 2019. Avoiding the Judge: the Exclusion of the δίκη in Contractual Clauses, in A. Nodar and S. Torallas Tovar (eds), *Proceedings of the 28th Congress of Papyrology*: 484–493. Barcelona: Abadia de Montserrat.

[47] Notwithstanding the Ptolemaic rule over Lycia (295/94–197 BC, Bagnell 1976: 105–9, Wörrle 2012: 359. 367) direct influence seems hardly believable; in Egyptian contracts the phrase was used not before 172 BC and the relevant Lycian funerary inscriptions are dated in late Hellenistic time.

Rubinstein, L. 2010. Praxis: the Enforcement of Penalties in the Late Classical and Early Hellenistic Periods, in G. Thür (ed.) *Symposion 2009*: 193–215. Wien: Österreichische Akademie der Wissenschaften.

Rubinstein, L. 2016. *Reward and Deterrence in Classical and Hellenistic Enactments*, in D.F. Leão and G. Thür (eds) *Symposion 2015*: 419–49. Wien: Österreichische Akademie der Wissenschaften.

Rupprecht, H.-A. 1994. *Kleine Einführung in die Papyruskunde*. Darmstadt: Wissenschaftliche Buchgemeinschaft.

Scafuro, A. 2021. Koan Good Judgemanship: Working for the Gods in IG XII 4, 1 132, in E. Mackil, N. Papazarkadas (eds), *Greek Epigraphy and Religion: Papers in Memory of Sara B. Aleshire from the Second North American Congress of Greek and Latin Epigraphy* (Brill Studies in Greek and Roman Epigraphy 16): 248–282. Leyden and Boston: Brill.

Schuler, Ch. and Zimmermann, K. 2012. Neue Inschriften aus Patara I: Zur Elite der Stadt in Hellenismus und früher Kaiserzeit. *Chiron* 43: 567–626.

Schweyer, A.-V. 2002. *Les Lyciens et la mort*. Paris: Phoibos.

Thür, G. 2003. Sachverfolgung und Diebstahl in den griechischen Poleis (Dem. 32, Lys. 23, *IC* IV 72 I, *IPArk* 32 und 17), in G. Thür and F.J. Fernández Nieto (eds), *Symposion 1999*: 57–96. Wien: Österreichische Akademie der Wissenschaften.

Thür, G. 2011. Amnestie in Telos (IG XII 4/1,132). *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Romanistische Abteilung* 128: 339–51.

Thür, G. 2013. Gebietsstreit in einer neuen Inschrift aus Messene. *Zeitschrift für altorientalische und biblische Rechtsgeschichte* 19: 127–135.

Wachsmuth, C., 1885. Öffentlicher Credit in der hellenischen Welt während der Diadochenzeit. *Rheinisches Museum für Philologie* 40: 283–303.

Wiemer, H.-U. 2003. Käufliche Priestertümer im hellenistischen Kos. *Chiron* 33: 263–310.

Wolff, H.J. 1962. *Das Justizwesen der Ptolemäer*. München: Beck (2nd ed. 1970, with addendum).

Wolff, H.J. 1966. *Die attische Paragraphe*. Weimar: Böhlau.

Wolff, H.J. 1970. Some Observations on praxis, in D.H. Samuel (ed.) *Proceedings of the Twelfth International Congress of Papyrology*: 527–535.Toronto: Hackert.

Wörrle, M. 1988. *Stadt und Fest im kaiserzeitlichen Kleinasien*. München: Beck.

Wörrle, M. 2012. Anfang und Ende von Limyras ptolemäischer Zeit, in M. Seyer (ed.), *40 Jahre Grabung Limyra*: 359–369. Wien: Österreichische Akademie der Wissenschaften.