

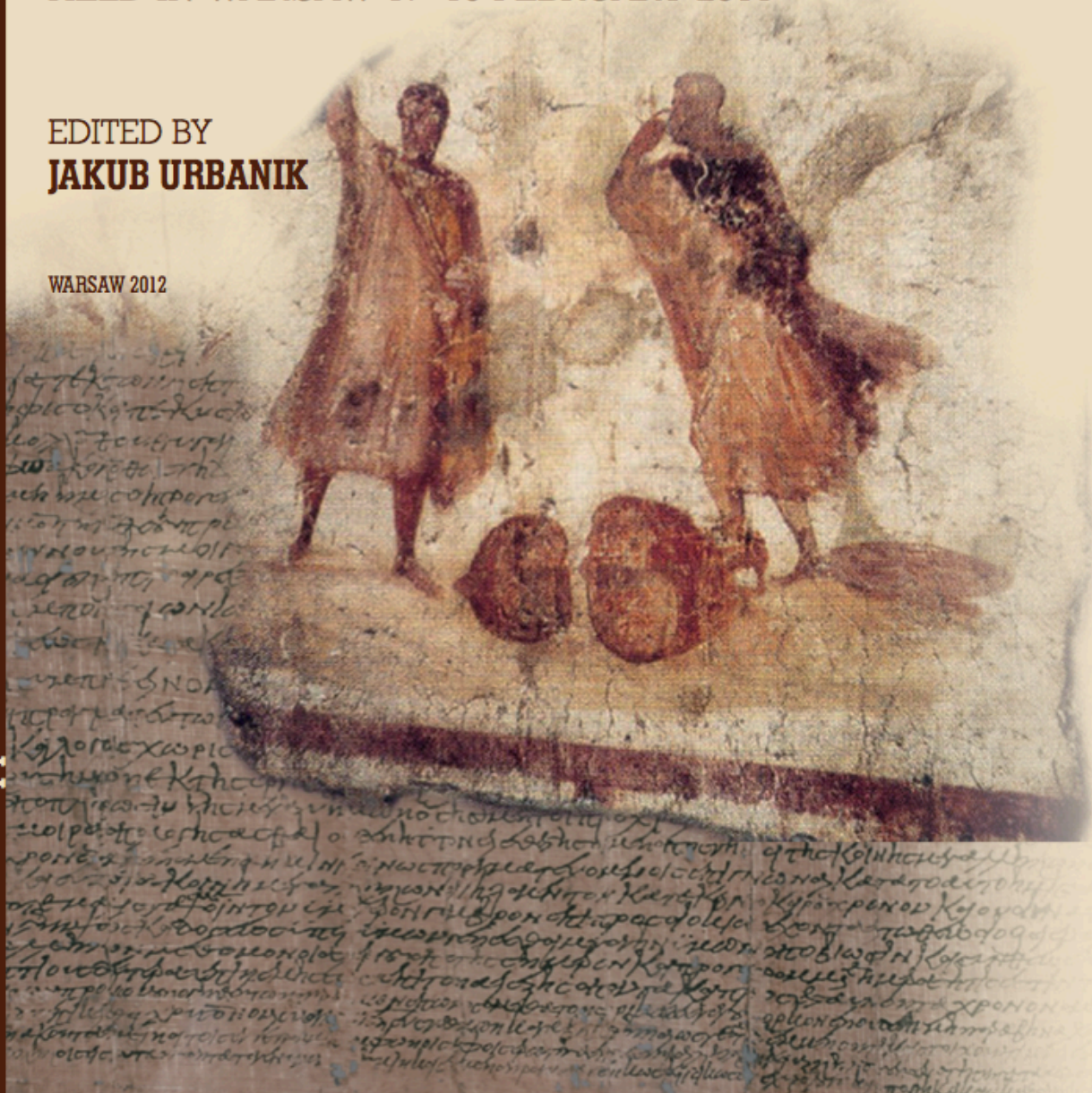
CULPA

FACETS OF LIABILITY IN ANCIENT LEGAL THEORY AND PRACTICE

PROCEEDINGS OF THE SEMINAR
HELD IN WARSAW 17-19 FEBRUARY 2011

EDITED BY
JAKUB URBANIK

WARSAW 2012



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**FAULT, STRICT LIABILITY,
AND RISK IN THE LAW OF THE PAPYRI**

1. WOLFGANG KUNKEL
ON CULPA AND DILIGENTIA

IN THE FIRST HALF OF THE TWENTIETH CENTURY, the new historical and critical approach to the sources of Roman law prompted a feverish revision of many old certainties. From the point of view of the method, this so-called hypercritical period is today perceived as an isolated episode, a long defeated disease. A closer look reveals a more complex picture, a paradigm shift operating over vast continuities. In fact, although modern Romanists shun the critic of the sources – often in an aprioristic, indiscriminate way – many of the results reached in those years still loom behind our present conceptions. On the other hand, the assumptions that prompted the critic of many solutions, constructions and expressions found in the sources were frequently rooted in the dogmatic approach of the nineteenth century Pandectists.

A case in point: the standards of liability and the relation between fault (*culpa*), diligence (*diligentia*), and *custodia*.¹ The crisis of the belief that

¹ The literature on *culpa*, *diligentia* and *custodia* is inexhaustible. Two names deserve here special mention: Carlo A. CANNATA and FRANCESCO M. DE ROBERTIS. Leaving aside their studies on specific questions, cf. C. A. CANNATA, *Ricerche sulla responsabilità contrattuale nel*

the Roman system of liability was entirely built around the binomial *culpa* – *diligentia* started long before the heyday of the historical-critical Romanistic. In a ground-breaking article published in the *Archiv für die civilistische Praxis* in 1869,² Julius Baron argued that *custodia* was not a type of *culpa*, but an instance of strict liability that made the debtor responsi-

diritto romano, Milano 1966; IDEM, *Per lo studio della responsabilità per colpa nel diritto romano classico*, Milano 1969; IDEM, 'Die Vertragliche Haftung in der Sicht der römischen Juristen', *Studi Cagliari* 47 (1971–72), pp. 19–36; IDEM, 'Una casistica della colpa contrattuale', *SDHI* 58 (1992), pp. 413–432; IDEM, 'Sul problema della responsabilità nel diritto privato romano', *Iura* 43 (1992), pp. 1–82; IDEM, 'La responsabilità contrattuale', [in:] *Estudios Murga Gener*, Madrid 1994, pp. 143–178; IDEM, *Sul problema della responsabilità nel diritto privato romano*, Catania 1996; IDEM, *Einadempimento delle obbligazioni*, Padova 2008. F. M. DE ROBERTIS, 'Spunti di responsabilità obbiettiva nel diritto postclassico', [in:] *Studi de Francisci* IV, Milano 1956, pp. 407–419; IDEM, 'Exactissima diligentia', *SDHI* 23 (1957), pp. 119–148; IDEM, 'Culpa et diligentia nella compilazione giustiniana', [in:] *Studi Betti* II, Milano 1962, pp. 347–362; IDEM, 'Scientia debitoris: causae imputandi e presupposti della responsabilità', [in:] *Syntelesia Arangio-Ruiz*, Napoli 1964, pp. 585–588; IDEM, 'I problemi della responsabilità contrattuale nelle Istituzioni di Gaio le lacune del manoscritto veronese', [in:] *Studi Biondi* I, Milano 1965, pp. 373–394; IDEM, *La disciplina della responsabilità contrattuale nel sistema della compilazione giustiniana* I–II–III, Bari 1962–1964–1966; IDEM, *La responsabilità contrattuale nel sistema della grande compilazione* I–II, Bari 1981–1982; IDEM, 'Responsabilità contrattuale – Diritto romano', in *Enciclopedia del Diritto* 39, Milano 1988, pp. 1054–1060; IDEM, *La responsabilità contrattuale nel diritto romano dalle origini a tutta l'età postclassica*, Bari 1994. Among the innumerable general studies, cf. G. I. LUZZATTO, 'Spunti critici in materia di responsabilità contrattuale', *BIDR* 63 (1960), pp. 47–127; R. CARDILLI, *L'obbligazione di praestare e la responsabilità contrattuale in diritto romano (II sec. a.C.–II sec. d.C.)*, Milano 1995; I. MOLNÁR, *Das Haftungssystem des Römischen Privatrechts*, Szeged 1998; H. ANKUM, 'La responsabilità contrattuale nel diritto romano classico e nel diritto giustiniano', [in:] *Diritto Romano e terzo milenio*, 2004, 135–152. On *culpa* and *diligentia*, H.-J. HOFFMANN, *Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte: unter besonderer Berücksichtigung der culpa levissima*, Berlin 1968; G. MACCORMACK, 'Culpa', *SDHI* 38 (1972), pp. 123–188; IDEM, 'Factum debitoris and culpa debitoris', *TR* 59 (1973), pp. 59–74; Ines DE FALCO, *Diligentiam praestare: ricerche sull'emersione dell'inadempimento colposo delle obligationes*, 1991; A. MARTÍNEZ SARRIÓN, *Las raíces romanas de la responsabilidad por culpa*, Barcelona 1993; G. MACCORMACK, 'Dolus, culpa, custodia and diligentia: criteria of liability or content of obligation', *Index* 22 (1994), pp. 189–209. On *custodia*, A. METRO, *L'obbligazione di custodire nel diritto romano*, Milano 1966; R. ROBAYE, *L'obligation de garde*, Bruxelles 1987; M. SERRANO-VICENTE, *La prestación de custodia en el Derecho Romano*, Madrid 2006.

² J. BARON, 'Diligentia exactissima, diligentissimus paterfamilias oder die Haftung für custodia', *Archiv für die civilistische Praxis* 52 (1869), pp. 44–95.

ble also when there was no lack of diligence to reproach him: in continental legal parlance, an ‘objective’ rather than ‘subjective’ liability standard.³ The oscillation of the Justinianic sources between such ‘objective’ *custodia* and ‘subjective’ *diligentia in custodiendo* was seen by the later Pandectists as the result of a historical evolution.⁴ At the turn of the century, everything was ready for the historical-critical method to take the last step: *diligentia in custodiendo* was a Byzantine idea, whilst the classical *custodia* had been purely objective. This was the thesis presented by Emil Seckel, in his 1907 edition of Heumann’s *Handlexikon*, under the headword ‘*custodia*’.⁵

This transformation of the objective classical *custodia* into a subjective Byzantine *diligentia in custodiendo* could very easily suggest a more general phenomenon: a Byzantine tendency to subjectify the standards of liability. As early as 1908, Ludwig Mitteis observed that the subjective, ‘omissive’ conception of culpa as lack of diligence had very likely been preceded by an objective, ‘commissive’ conception of culpa as involuntary causation.⁶ For Mitteis this evolution was complete in classical times: he seeks

³ *Custodia* is labelled ‘objective’ because it imposes a liability (typically, when the object is stolen) regardless of the behaviour of the specific debtor in the specific case. *Culpa* may be characterized as ‘subjective’, not because it consists, like *dolus*, in a psychological, interior state, as often assumed, but rather because it depends on the individual behaviour of the debtor: either measuring it to a predetermined, reasonable standard of diligence (thus has the notion been traditionally understood) or imposing a liability on the mere basis of the causal connection between such individual conduct and the result, despite the latter being involuntary (for this conception of *culpa*, *infra*, nn. 6 and 7). This ‘objective’ – ‘subjective’ distinction is notoriously problematic, though, *cf. infra*, n. 18 and the contributions of C. A. CANNATA mentioned *supra* in n. 1.

⁴ *Cf.* B. WINDSCHEID, *Lehrbuch des Pandektenrechts* II, Frankfurt a.M. 1906 (9 ed.), § 264 n. 9, pp. 95–96, with lit.

⁵ E. SECKEL, *Handlexikon zu den Quellen des römischen Rechts*, Jena 1907 (9 ed.), pp. 116–118, s.v. ‘*custodia*’. *Contra*, remarkably, L. MITTEIS, *Grundzüge*, p. 259 n. 3, following L. LUSIGNANI, *La responsabilità per custodia nel diritto romano* I (Parma 1903), for whom the classical law had known only one instance of objective *custodia*: namely, when there was a specific ‘*salvum fore receptit*’ of the *nauta*, *caupo* or *stabularius*; only Justinian would have extended this *custodia* to the other instances attested in the sources. *Cf.* also L. LUSIGNANI, *Studi sulla responsabilità per custodia secondo il diritto romano* II. *Emptio-venditio* (Parma 1903), *idem*, *Studi sulla responsabilità per custodia secondo il diritto romano* III. *Mandatum* (Parma 1905)

⁶ L. MITTEIS, *Römisches Privatrecht bis auf die Zeit Diokletians* I, Leipzig 1908, pp. 322–323.

for traces of the older conception in the *Twelve Tables*, in the interpretation of the Aquilian Law, and in the late Republican Quintus Mucius. Twenty years later, Wolfgang Kunkel pushed the ‘subjectification’ of *culpa* to the postclassical period. In an article published in 1925 in the *Savigny Zeitschrift* under the title ‘*Diligentia*’,⁷ Kunkel argued that the classical *culpa* had been objective involuntary causation, not subjective lack of diligence. The latter idea, Kunkel claims, emerged only in post-classical times; and with it, as its necessary corollary, also the idea of a general duty of diligence, that acquires a specific shape and degree for each contract.⁸

Kunkel’s thesis raises a question, though: if the doctrine of diligence is so alien to classical law, its origin must lie somewhere else. Kunkel points out to the Greek tradition.⁹ The archetype of the *diligens paterfamilias* derives – so Kunkel – from the ἀνήρ σπουδαῖος of Aristotle and of the Stoa. The epigraphic evidence of the Hellenistic honorary decrees shows, through the conventional expression σπουδῆ καὶ ἐπιμέλεια,¹⁰ the prominent role of the idea of diligence also in the political sphere. The contractual practice of the papyri gave legal expression to these Greek philosophical and political conceptions. A binding duty of diligence – again, ἐπιμέλεια – existed for the contracting parties in the papyri,

⁷ W. KUNKEL, ‘*Diligentia*’, *ZRG RA* 54 (1925), pp. 266–351.

⁸ KUNKEL, ‘*Diligentia*’ (cit. n. 7), p. 340: ‘Während der objectiv gebundene klassische culpa-Begriff selbst einen gewissen positiven Gehalt hat, nämlich die schuldhaftes Handeln, braucht der neue Begriff der Nachklassiker ein positives Widerspiel: denn er selbst bezeichnet nur noch die Abweichung von dem gebotenen Verhalten. So führt er mit Notwendigkeit zur Aufstellung einer Sorgfaltspflicht. Sie wird bezeichnet mit dem Begriff *diligentia*’.

⁹ Cf. KUNKEL, ‘*Diligentia*’ (cit. n. 7), pp. 341–351: ‘Wesen, Herkunft und Entwicklung der Diligenzlehre’.

¹⁰ Cf. for instance *IG XI*, 4 680 (239–229 BC, Delos), l. 5; *IG XI*, 4 820 (2nd BC, Delos), l. 4; *IG XII*, 5 830 (2nd c. BC, Tenos), l. 4; *IMagn.* 97 (2nd BC, Teos), l. 14; *IG II2 IOII* (106–5 BC Attica), l. 37; *SEG 22:III* = *IG II2 IO40+IO25* (46–45 BC, Attica), l. 9. These sources allow Kunkel to postulate continuity between the Greek and Hellenistic philosophical conceptions and the law of the papyri. He concedes, though, that in these decrees σπουδῆ καὶ ἐπιμέλεια do not describe a duty, but the praiseworthy behaviour of the individual honoured by the decree.

Kunkel writes, long before it found its way into the Roman legal sources. These would be the Greek roots of the doctrine of diligence that only in postclassical times distorted the lines of the Roman notion of *culpa*. The postclassical binomial *diligentia – culpa* would be an offspring of the binomial ἐπιμέλεια – ἀμέλεια that we find in the Greek tradition of the papyri.

As many other phenomena once dismissed as postclassical, also these have been claimed back for the classical law decades ago. Classical roots are universally accepted both for the notions of *diligentia* and *diligens paterfamilias*, for the tendency to judge as fault the breach of a certain standard of diligence,¹¹ and even for the idea of *diligentia in custodiendo*.¹² Kunkel's theses seem thus abandoned as far as Roman law is concerned. What about their papyrological side? Was contractual liability in the papyri truly built around the notion of ἐπιμέλεια as diligence? Was fault a prerequisite for liability in the Egyptian practice?

This aspect of Kunkel's article has entered the papyrological discourse mainly through what remains the reference work on animal leases in the Egyptian and Neo-Babylonian practice: Sibylle von Bolla's *Untersuchungen zur Tiermiete und Viehpacht im Altertum*.¹³ The fullest assessment of the pages that Kunkel devotes to the papyri, though, was also the most critical: in his *Lineamenti del sistema contrattuale nel diritto dei papiri*, Vincenzo

¹¹ Cf. Kunkel himself, in P. JÖRS, W. KUNKEL & L. WENGER, *Römisches Recht*, Berlin 1935, pp. 178–179, with lit. A general review of the question, in M. KASER, *Das römische Privatrecht* II, München 1975 (2 ed.), pp. 346–357.

¹² Cf., for instance, regarding Alf. D. 18.6.12, R. KNÜTEL, 'Die Haftung für Hilfspersonen im römischen Recht', *ZRG RA* 100 (1983), pp. 349–350, G. MACCORMACK, 'Culpa in eligendo', *RIDA* 18 (1971), pp. 546–547, R. CARDILLI, *Praestare* (cit. n. 1), pp. 291–295, M. PENNITZ, *Das periculum rei venditae*, Wien 2000, pp. 404–405.

¹³ Sibylle VON BOLLA, *Untersuchungen zur Tiermiete und Viehpacht im Altertum*, München 1969 (2 ed.), pp. 63–64: 'die diligentia des römischen Rechtes scheint mir die epimeleia der Papyri zu entsprechen, welche... bereits in die altgriechische Zeit zurückreicht'. Cf. also F. M. DE ROBERTIS, 'Receptum nautarum. Studio sulla responsabilità deir armatore in diritto romano, con riferimento alla disciplina particolare concernente il caupo e lo stabularius', *Annali Bari* 12 (1953), p. 45; E. SEIDL, *Rechtsgeschichte Ägyptens als römischer Provinz*, Sankt Augustin 1973, p. 177. Echoes of Kunkel's doctrine may be found also in WIEACKER, cf. *infra*, n. 30.

Arangio-Ruiz flatly dismissed Kunkel's idea as the result of a misinterpretation of the term ἐπιμέλεια:

It has been recently argued that the setting of the entire problem of contractual liability around the notion of diligence, as it appears in the Justinianic sources, has its precedent in the papyri: the Greco-Egyptian contracts would have manifestly established a duty of diligence, using the very same word, ἐπιμέλεια, that the Basilika and the other Byzantine sources employ to translate the Latin term *diligentia*. This opinion seems unwarranted to me. The misunderstanding is due to the double meaning of the term ἐπιμέλεια, which may denote the subjective disposition of a debtor determined to fulfil his duty, but more often merely describes the external activity in which this duty consists. ... In contractual arrangements, in fact, the phrase ἐπιμέλειαν ποιῆσθαι does not refer to a specific psychological disposition: on the contrary, in the light both of its literal meaning and of the context in which it is used, it refers to nothing else than the Latin *operam dare* or *curam facere*.¹⁴

With the notable exception of Sybille von Bolla, Arangio-Ruiz's judgement seems to have prevailed. It was followed, with ample argumentation, by Christoph Heinrich Brecht in his study on the liability of the *nauta*,¹⁵ and notably also by Kunkel's pupil, Dieter Nörr, in his habilita-

¹⁴ V. ARANGIO-RUIZ, *Lineamenti del sistema contrattuale nel diritto dei papiri*, Milano 1928, pp. 22–23

¹⁵ C. H. BRECHT, *Zur Haftung der Schiffer im Antiken Recht*, München 1962, pp. 147–150. To Arangio-Ruiz's remarks, Brecht adds the following: a) from the 'Volksrecht' of the papyri practical rules may be expected, but not concepts, such as diligence, that arise only from theoretical reflection; b) the frequent expression τὴν προσήκουσαν ἐπιμέλειαν, the 'pertinent' ἐπιμέλεια, proves that the term is not referred to a general duty of diligence but to a specific contractual duty of care; c) contracts like *P. Lond.* II 301 prove that ἐπιμέλεια is not intended as limiting liability to fault, since the simultaneously impose ἐπιμέλεια and unrestricted liability. None of these arguments hold up: the first (a) is merely the expression of a common prejudice, on which cf. *infra*, pp. 74–75; on the second (b) cf. *infra*, n. 25; the third would be pertinent and indeed conclusive, if only κίνδυνος referred unequivocally to unrestricted liability in *P. Lond.* II 301, which is not the case (*infra*, n. 46, and pp. 42–46).

tion book on negligence in the Byzantine law of contracts.¹⁶ The same conclusion was independently reached several years later by Johannes Herrmann in his studies on land lease in the papyri:

From these expressions, it results that in lease contracts there is no coined term, akin to the late Roman notion of *diligentia*, to designate a duty of diligence; the term ἐπιμέλεια is not the expression of an abstract legal notion, but has the same factual, concrete sense, as ἐργασία, καλλιέργια or φιλοκαλία.¹⁷

Neither Arangio-Ruiz himself nor his followers fully review the documents mentioned by Kunkel in support of his theory. It is maybe not completely useless to try here such a review, in order to confirm or refute their impression on the sense in which ἐπιμέλεια is used in the papyri.¹⁸ Among Kunkel's documents, there is a group, dated after Justinian's compilation, that I shall omit, since they fall already under the possible influence of the compilation itself. On the other hand, there is much that he does not consider: all the Ptolemaic evidence, since he confines himself to Roman times, and of course everything that has been edited since 1925. Yet, his sample is representative enough to yield a faithful picture of the sense in which ἐπιμέλεια is used in the papyri, and this will be enough for our purpose.

¹⁶ D. NÖRR, *Die Fabrlässigkeit im Byzantinischen Vertragsrecht*, München 1960, p. 187, n. 2.

¹⁷ J. HERRMANN, *Studien zur Bodenpacht im Recht der graeco-ägyptischen Papyri*, München 1958, pp. 127–128.

¹⁸ The characterization of *diligentia* as subjective and *cura* as objective, present in ARANGIO-RUIZ and exasperated in BRECHT's argumentation, shall be avoided in the discussion that follows. This characterization seems to me unnecessary and misleading. Diligence results from a subjective disposition, but it acquires legal relevance only inasmuch it manifests itself in an external behaviour. Both referred to a contract, as an abstract standard of liability, and referred to an individual, to assess his performance, diligence does not consist in intentions but in facts. What differentiates *diligentia* from *cura* is that the latter designs a specific duty of care, while the former refers to the way in which any given duty is performed. This difference has nothing to do with the opposition objective – subjective.

2. ΕΠΙΜΕΛΕΙΑ IN THE CONTRACTUAL PRACTICE OF THE POPYRI

Wet-nurse contracts are Kunkel's point of departure:¹⁹ both the Augustan *synchoreseis* published in *BGU* IV,²⁰ and the few instances preserved from later periods.²¹ The term ἐπιμέλεια, in fact, figures prominently in these contracts. In what sense, though, one of them will suffice to illustrate. In *BGU* IV 1109 (= *Jur. Pap.* 41 = *CPGr.* I 10, 5 BC, Alexandria), a Roman citizen, Gaius Ignatius Maximus, otherwise unknown to us, concludes a contract whereby his slave Chrotarion shall serve as wet-nurse for an Alexandrian lady. In the contract, we read:

ἰ¹⁷ παρέχεσθαι τὴν δούλην ἀπο τοῦ νῦν ποιουμένη[ν τὴν τε ἑαυτῆς] ἰ¹⁸ καὶ τοῦ π[αι]δίου ἐπιμέλειαν, μὴ φθίρουσαν τὸ γάλα μ[ηδ'] ἀνδροκοιτ(οῦσαν) ἰ¹⁹ μ[ηδ'] ἐπικυοῦσαν μ[ηδ'] ἄλλο παιδίον παρ[α]θη[λ]ιάζ[ουσαν] ...

Gaius, the contracting party, undertakes 'to hand over his slave from the present moment, so that she may take care (ἐπιμέλεια) of herself and of the child, not spoiling the milk, not having intercourse with men, and not nursing at her breast any other child'. A cursory reading is enough to realize that the term ἐπιμέλεια does not set here a standard of liability, a line between a liable and a non-liable debtor. In fact, it does not even

¹⁹ For a legal analysis of these contracts, cf. A. BERGER, *Die Strafklauseln in den Papyrusurkunden*, Leipzig-Berlin 1911, pp. 176–179; J. HERRMANN, 'Die Ammenverträge in den gräko-ägyptischen Papyri', *ZRG RA* 76 (1959), pp. 490–499; B. ADAMS, *Paramoné und verwandte Texte*, Berlin 1964, pp. 146–165; J. HENGSTL, *Private Arbeitsverhältnisse freier Personen in den hellenistischen Papyri bis Diokletian*, Bonn 1972, pp. 61–69; Mariadele M. MASCIADRI & Orsolina MONTEVECCHI, *Corpus Papyrorum Graecarum* I. *Contratti di balatico*, Milan 1984.

²⁰ They are (all from the Alexandrian archive of Protarchos): *BGU* IV 1058 (= *MChr.* 170 = *CPGr.* I 4, 13 BC), l. 29; *BGU* IV 1106 (= *MChr.* 108 = *C. Pap. Hengstl* 77 = *CPGr.* I 5 = *CPJ* II 146, 13 BC), l. 28; *BGU* IV 1107 (= *Sel. Pap.* I 16 = *CPGr.* I 6, 13 BC), l. 12; *BGU* IV 1108 (= *CPGr.* I 9, 5 BC), l. 14; *BGU* IV 1109 (= *CPGr.* I 10 = *Jur. Pap.* 41), l. 18. *Adde*, still unknown to Kunkel, *CPGr.* I 13 (30–14 BC, Alexandria), l. 17. Here and in the following note, only the wet-nurse contracts with ἐπιμέλεια clause; for a complete list, cf. HENGSTL, *Arbeitsverhältnisse* (cit. n. 19), p. 61.

refer to the behaviour of the debtor, but to that of the slave, who, as Arangio-Ruiz rightly underlines, is not a contracting party, but the leased object.²² Here, as in all the other preserved wet-nurse contracts, ἐπιμέλεια merely describes the basic task of the wet-nurse. As Arangio-Ruiz remarked, this is *cura*, not *diligentia*. The term does not convey the way in which the debtor must fulfil his duty, but the content of the duty itself: taking care of the child, and, in the measure required for that purpose, of herself. So much is acknowledged by Kunkel: he admits, in fact, that in these contracts ἐπιμέλεια is ‘Pflege’ (care) and not ‘Sorgfalt’ (diligence), and therefore concedes that they cannot be used to support his thesis of a general duty of diligence.²³

In Kunkel’s opinion, though, this meaning of ἐπιμέλεια was the exception and not the rule. In lease contracts, instead, he claims, the term refers unmistakably to diligence and not to mere care. Again, he considers only the papyri from the Roman period, so the earliest one is yet another *synchoresis* from the archive of Protarchos, BGU IV 1120 (5 BC, Alexandria). A married couple and their son hire three tomb-gardens, for a monthly rent and a part of the produce. The document then proceeds:

1²⁹ ... καὶ [ποιεῖσθαι τοὺς μεμι]σθωμένους τὴν προσήκουσαν ἐπιμέλειαν καὶ κατεργασίαν καθ’ ὅ[ραν καὶ] 1³⁰ κατὰ καιρὸν ἀρεσ[τῶ]ς [σκ]άπτοντας καὶ ποτίζοντας κατὰ τρόπον ἐν τοῖς δέουσι καιροῖς καταγεύων 1³¹ τῇ κατὰ καιρὸν λαχανήα καὶ μὴ χερσεύειν μηδὲ καταβλάπτειν μηδὲ παραλιπεῖν ἔργον

²¹ Among these, Kunkel mentions PSI III 203 (= CPGGr. I 24, 87 AD, Oxyrhynchos), l. 8; P. Ross. Georg. II 18 (= P. Cair. Preis. 31 a = CPGGr. I 31, 139–140 AD, Arsinoites), ll. 316, 321; P. Oxy. I 91 (= Sel. Pap. I 79 = CPGGr. I 35, 187 AD, Oxyrhynchos), l. 20. cf. also P. Reim. II 103 (= CPGGr. I 14 = SB V 7619, 26 AD, Herakleopolites), l. 17; P. Bour. 14 (= CPGGr. I 28, 126 AD, Ptolemais Evergetis), l. 22; P. Lips. I 31, ll. 17–20 (= CPGGr. I 36, AD 193–198, Oxyrhynchos), l. 20.

²² It must be observed, though, that the contracts follow the same model regardless of the free or servile condition of the wet-nurse: there is not a specific lease model for the latter case. Spot on, in this sense, the intuition of BRECHT, *Haftung* (cit. n. 15), p. 148, n. 3. Cf. VON BOLLA, *Tiermiete* (cit. n. 13), p. 76, n. 1; HENGSTL, *Arbeitsverhältnisse* (cit. n. 19), p. 63.

²³ KUNKEL, ‘*Diligentia*’ (cit. n. 7), p. 342. Cf. also HERRMANN, ‘*Ammenverträge*’ (cit. n. 19), p. 492 n. 18: ‘Das Wort ἐπιμέλεια stellt keinen abstrakten Rechtsbegriff dar, sondern meint die konkrete Sorgfaltsübung, die pflegliche Behandlung.’

ἴ³² μηδεν τῶν πρὸς εὐεργίαν ἀνηκόντων, ποιεῖσθαι δὲ καὶ τῶν ὄντων δένδρων τὴν ἀρμόζουσαν ἐπιμέλ(ειαν) ἴ³³ εἰς τὸ ζωφυτεῖν κ[αί] εὐθηνεῖν καὶ μηδὲν ἀπ' αὐτῶν ἐκκόπτειν, ἀντὶ δὲ τῶν ἐγλειπόντων ἕτερα ἀντὶ³⁴ καταφυτεύειν ταυτὰ γένη αὐτενίαυτα μηδεμί χείρονα ...

... they shall take the proper care (ἐπιμέλεια) and perform the proper tasks in season and at the proper time, cultivating and irrigating according to custom and whenever necessary consenting to work in the vegetable garden in season; and they shall not leave it unirrigated nor injure it nor omit any task needful to maintain the well-being of the property. They shall also take proper care (ἐπιμέλεια) of the existing trees for their thriving and flourishing, and they shall cut down none, and in place of those dying, they shall plant others of the same kind in the same year equal in quality ...²⁴

Despite Kunkel, ἐπιμέλεια seems here again the equivalent of the Roman *cura* ('care' is Johnson's translation) rather than *diligentia*. It does not describe the way in which the tenants must fulfil their duty, but the duty itself: the hendiadys ἐπιμέλεια καὶ κατεργασία, and the qualification καθ' ὥραν καὶ κατὰ καιρόν speak by themselves.²⁵ The 'proper care', in fact, consists, as the contract itself specifies, in performing the proper tasks at the proper time, cultivating, irrigating, and doing all that is necessary to keep the value of the property. The same unequivocal hendiadys, ἐργασία καὶ ἐπιμέλεια, figures in two late vineyard leases, *SB* xxii 15493 (= *P. Flor.* III 315, AD 435, Hermopolites), ll. 8-9, and *SB* iv 7369 (AD 512, Hermopolis), l. II: πρὸς ἀμπελοφυτικὴν ἡμῶν ἐργασίαν καὶ πᾶσαν ἐπιμέλειαν καὶ φιλοκαλίαν.

In another land lease, *P. Oxy.* xiv 1630 (AD 222?, Oxyrhynchos), the term ἐπιμέλεια figures only in an additional final clause whereby a

²⁴ Transl. A. Ch. JOHNSON, *An Economic Survey of Ancient Rome II. Roman Egypt to the Reign of Diocletian*, Baltimore 1936, pp. 134-135.

²⁵ BRECHT, *Haftung* (cit. n. 15), p. 147 n. 4, calls attention to the turn of phrase τὴν προσήκουσαν ἐπιμέλειαν ποιεῖσθαι, present in this and many other contracts: the very notion of a 'pertinent' ἐπιμέλεια would prove that the term does not convey a general idea of diligence, but merely refers to the specific contractual duty of care. The argument does not carry much weight against Kunkel's thesis, though, because the diligence whose traces he seeks in the papyri was not uniform: it acquired different shape and intensity depending on the contract, and was therefore perfectly in line with the notion of a 'pertinent' diligence for each one.

guarantor secures the contract: *παρὼν δὲ ἐ[γὼ] Αὐρήλιος Σαραπόδωρος ἐγγυῶμαι τὸν προκείμενον Ἡρώνα [εἰς] τε ἔκτεισιν τῶν φόρων καὶ ἐπιμέλειαν τῶν ἔργων, καὶ ἐπερωτηθέντες [ὡμ]ολογήσαμεν (ll. 18–20).*²⁶ In Grenfell and Hunt's translation:²⁷ 'I, Aurelius Sarapodorus, am surety for the aforesaid Heron in respect of both the payment of rent and care (ἐπιμέλεια) of operations, and in answer to the formal question we gave our consent.' The fact itself that the ἐπιμέλεια is secured by the guarantor together with the rent shows that it is seen as a specific duty, not as a standard of liability.

Kunkel calls especial attention to *PSI I 32* (AD 208, Herakleopolites), a land lease contracted as gratuitous in the first four years, in exchange for the ἐπιμέλεια: *κατεργάσασθ[αι] πάσ[η] ἐργασ]ία καὶ ἐπιμελεία ἀμέμπτως ἀντὶ τοῦ φόρου [τοῦ τε]τραετοῦς χρόνου (ll. 10–11).*²⁸ This fact, however, makes it even more evident that we are talking about a task, not about the way it is fulfilled. In order to understand the arrangement, it must be taken into account that the land in question was an exiguous patch of $\frac{1}{4}$ *aroura*, probably uncultivated; in these conditions, the task of the tenant would be initially unrewarding, and valuable in itself for the owners.²⁹ Wieacker, in the same vein as Kunkel, ignores these particulars of the contract and sees here a 'connection between payment and liability' akin to the principle that in Roman law aggravates the liability of those who are paid compared to those who are not.³⁰ The comparison is inept: if the

²⁶ The land belonged to the well-known landowner Claudia Isidora, cf. with lit., D. KEHOE, *Management and Investment on Estates in Roman Egypt during the Early Empire*, Bonn 1992, pp. 44, 124–126; Jane ROWLANDSON, *Landowners and Tenants in Roman Egypt*, Oxford 1996, pp. 114–115; J. D. THOMAS, 'Notes on papyri relating to Claudia Isidora also called Apia', *BASP* 41 (2004), pp. 139–153. On our document, KEHOE, pp. 137–139; ROWLANDSON, pp. 224–225.

²⁷ *P. Oxy.* XIV, p. 13.

²⁸ Cf. F. KOBLER, *Der Teilbau im römischen und im geltenden italischen Rechte*, Greifswald 1928, p. 54, VON BOLLA, *Tiermiete* (cit. n. 13), p. 110 n.3 (III).

²⁹ In this sense, in the edition, G. VITELLI, *PSI I*, p. 75.

³⁰ F. WIEACKER, 'Haftungsformen des römischen Gesellschaftsrecht', *ZRG RA* 54 (1934), p. 63: 'Die Verbindung von Lohn und Haftung ist ein überaus naheliegender Gedanke, der volksrechtlichen Quellen dieser Zeit nicht fremd ist: in *PSI I 32* (208 p. Chr.) verspricht ein Teilpächter ἐπιμελείαν ἀντὶ τοῦ φόρου.'

tenant is exempt from rent it is most certainly not in exchange for a limitation of his liability to ἐπιμέλεια-*diligentia*, but in exchange for the tasks comprised by ἐπιμέλεια-*cura*.

Had Kunkel known *P. Mert.* I 10 (AD 21, Philadelphia), edited some decades after his *diligentia* article, he might have reconsidered his thesis altogether. This document, in fact, makes it particularly clear that in land leases ἐπιμέλεια does not refer to a diligent performance of the tasks but to the tasks themselves:³¹

ἰ¹⁴ ... μὴ ἐξέστωι οὖν τῶι μεμισθωμένῳ¹⁵ πρὸ τοῦ χρόνου ἐγλιπεῖν τὴν μίσθωσιν, ἀλλὰ καὶ τὰ καθ' ἔτος ἔργα πάντα τοῦ κλήρου καὶ τοὺς χωματ[ι]σμοὺς καὶ ποτισμοὺς ἰ¹⁶ καὶ τὴν ἄλλην γεωργικὴν ἐπιμέλειαν πᾶσαν ἐπιτελειτωι ἰ¹⁷ ἐκ τοῦ ἰδίου ...

The editors translate: ‘The lessee shall not abandon the lease before the time but shall perform all the annual work of the allotment and the construction of dykes, irrigation and all other agricultural operations (καὶ τὴν ἄλλην γεωργικὴν ἐπιμέλειαν πᾶσαν) at his own expense’. The characterization of this ἐπιμέλεια as γεωργικὴ, and the fact that it is to be performed at the tenant’s own expense, leave no other option than to refer it to the agricultural tasks themselves. In later contracts, we find for the same notion the expression γεωργικὴ ἐργασία:³² the two terms, ἐπιμέλεια and ἐργασία were obviously interchangeable.

Instructive also, *BGU* II 606 (AD 306, Ptolemais Euergetis): τῆς τῆς αὐλῆς καὶ τῶν κελλῶν ἐκκ[αίρου]³³ ἐ[πι]σκευῆς ἢ ἀνοικοδο[μίας οὔσης] πρὸς σ[ε] τὸν κ[τήτορα, τ]ῆς δὲ κατὰ μέρος ἐπι[μ]ελείας [καὶ] φροντίδος οὔ[σης] πρ[ὸς ἐ]μαὶ τὸν μισθούμενον ... (ll. 9–12). That is: ‘... repair and reconstruction of the courtyard and cells fall to you, the owner, whilst everyday care (ἐπιμέλεια) and maintenance fall to me, the tenant ...’. The clause distributes the preservation tasks between owner and tenant.³⁴

³¹ In this sense, already HERRMANN, *Bodenpacht* (cit. n. 17), p. 128 n. 3.

³² *SB* XIV 12186 (= *P. Flor.* I 84, AD 366, Hermopolis), ll. 12–13, *P. Flor.* III 281 (AD 517, Aphroditis Kome), l. 14, *P. Ross. Georg.* III 33 (AD 522, Aphroditis Kome), l. 16, and numerous later documents.

³³ A. DEIFSMANN, in *BGU* II, p. 357: ἐκ κ[αὶ]νῆς].

Again, therefore, *ἐπιμέλεια* does not refer to the way in which the tenant must fulfil his duties, but to a specific set of tasks: here, those required by the everyday maintenance of the property.

In *P. Sakaon* 71 (= *P. Thead.* 8 = *FIRA* III 149, AD 306, Theadelphia), Aurelius Sakaon leases from Aurelius Cyrillos and Aurelius Theodoros sixty-two sheep and fifty-nine goats. The *ἐπιμέλεια*-clause reads as follows: τῆς τῶν προβάτων καὶ αἰγ[ῶ]ν γονῆς καὶ νομῶν [κα]ὶ γράστεως καὶ κερδίας καὶ, ὃ [μ]ὴ εἴοιτο, θανάτου καὶ ἐπιμελεί[ας] καὶ φροντίδος γο[ν]ῆς ὄντων πρὸς ἐ[μέ] τὸν μεμισθωμένον ... (ll. 21–23).³⁵ In the editor's translation: 'the procreation of the sheep and the goats, their pasture, green fodder, resin-oil, and, may it not occur, death, as well as the care (*ἐπιμέλεια*) of and provisioning for their offspring resting upon me, the lessee'.³⁶ Sensibly, *ἐπιμέλεια* is here translated as 'care' and not 'diligence'.³⁷ In fact, it again manifestly refers to a specific task of the lessee, this time concerning the offspring of the sheep and the goats.

Leaving aside the post-Justinianic documents, Kunkel's sample closes with a couple of work contracts where *ἐπιμέλεια* summarizes the tasks in exchange for which a wage shall be paid:³⁸ again, clearly the tasks themselves, and not the way in which they are to be performed.

In two of Kunkel's documents, instead, the term *ἐπιμέλεια* truly has the meaning that he claims, akin to the Latin *diligentia*, describing the

³⁴ The property is described as *αὐλὴ βοῶν* (l. 5): such intense use made foreseeable pressing maintenance and repair needs.

³⁵ A detailed analysis of the contract, in VON BOLLA, *Tiermiete* (cit. n. 13), pp. 102–105

³⁶ G. M. PARÁSSOGLU, *P. Sakaon*, p. 176.

³⁷ Similarly, JOUGUET, *P. Thead.*, pp. 76–77: 'Le soin de veiller à la procreation des moutons et des chèvres, au pâturage, la fourniture de fourrage et de la résine de cèdre... m'incomberont à moi le locataire'.

³⁸ *P. Lond.* II 331 (p. 154 = *WChr.* 495, AD 165, Soknopaiu Nesos), ll. 10–15: λαμβάνοντός σου καθ' ἡμέραν ἐκάστην ἀρ(γυρίου) (δραχμὰς) τεσσαράκοντα καὶ παραδώσωμεν ὅσα ἐὰν παραλαβομν καὶ ποιησόμεθα τὴν ἐπιμλι[αν καὶ] φροντίδα. *P. Oxy.* XIV 1626 (= *Sel. Pap.* II 361 = *FIRA* III 151, AD 325, Oxyrhynchos), ll. 13–18: ἐντεῦθεν δὲ ὁμολογεῖ ὁ ἐπιμελητῆς ἐσχηκέναι παρὰ τῶν δεκανῶν ὑπὲρ μισθοῦ μηνῶν δύο ἀπὸ τῆς αὐτῆς ὀγδόης ἀργυρίου τάλαντα εἴκοσι, τὰ δὲ φανησόμενα ἄχρι συνπληρώσεως τῆς ἐπιμελείας ἀπολήμφεται παρὰ τῶν αὐτῶν δεκανῶν. – 'And the superintendent forthwith acknowledges that he has

way in which the debtor must fulfil his duty. The earliest one³⁹ is *P. Lond.* II 301 (p. 256) (= *MChr.* 340, AD 138–161, Oxyrhynchos): ἀντιλήμψασθαι τῆς χρείας πιστῶς καὶ ἐπιμελῶς καὶ πᾶσαν φροντίδα ποιήσασθαι ... (ll. 6–9). Regarding a public freight of wheat, oath is made ‘that the task shall be undertaken reliably and diligently, and all care shall be employed ...’ (More on this document, *infra*, pp. 42–46). This same sense of ἐπιμέλεια as diligence is attested in a much later document, *P. Flor.* III 384 (AD 489?, Alexandria), a bathhouse lease for over ten years, whereby the lessee undertakes to actually have the facilities (λοῦσις and ὑπόκαυσις) installed at his own expense. Also in his charge are the irrigation of the floors, and, of course, the everyday maintenance. These duties are to be carried out (ll. 27–29) μετὰ πάσης προσοχῆς καὶ τῆς [δ]εο[ύσ]ης ἐπιμελείας πρὸς τὸ μηδεμίαν μέμψιν ἢ αἰτ[ία]ν ἢ κατάγνωσιν: ‘with all the attention and the necessary care, so that there shall be no reproach, blame or negligence’. It is perhaps not completely irrelevant that the author of the document feels the need to specify what must be understood for ἐπιμέλεια as *diligentia*: a further hint that the word was far from being the technical term that Kunkel had imagined, let alone the preminent canon of liability in the contractual practice of the papyri.



The results of our brief survey decidedly endorse the scepticism of Arangio-Ruiz and his followers. The term ἐπιμέλεια, used for *diligentia* by the Byzantine lawyers,⁴⁰ hardly ever has that meaning in the papyri. Leaving aside the wet-nurse contracts, clearly a bad choice for Kunkel’s purposes, we have considered ten lease and work contracts: only two of them use ἐπιμέλεια in the sense of *diligentia*. The general duty of diligence that Kunkel believed to have found in the papyri, as a precedent and possible cause of his conjectured postclassical Roman law shift, turns out to be just an illusion.

received from the decani as two months’ pay dating from the said 8th day 20 talents of silver, and shall receive from the said *decani* the sums found to have accrued up to the termination of his duties as superintendent’ (tr. GRENFELL & HUNT, *P. Oxy.* XIV, p. 2).

³⁹ Noted already by BRECHT, *Haftung* (cit. n. 15), p. 148.

⁴⁰ Cf. the sources reviewed by NÖRR, *Farhrlässigkeit* (cit. n. 16), pp. 35–69, *passim*.

3. ΕΠΙΜΕΛΕΙΑ AS AN IMPLICIT LIABILITY STANDARD

One could still argue that, even though *ἐπιμέλεια* usually does not refer to diligence, it may have been understood as implicitly setting a standard of liability. As we have seen, the term serves in most cases to summarize a set of specific duties, often described with quite fastidious detail. It seems inevitable to assume that in this way a standard is defined against which the behaviour of the debtor shall be measured.⁴¹ And, in fact, this is the shape that Kunkel's theory seems to adopt in the reasoning of Sybille von Bolla.⁴²

Things are not so simple, though. There is no doubt that the general duty of care, and the specific set of tasks it comprises in each case, were intended to be binding for the debtor. He would certainly be considered liable if damage resulted from not fulfilling them. But this is not enough to conclude that we are in front of an implicit standard of liability. To state the obvious, what defines a liability standard is that it sets the conditions of the debtor's liability, so that he is exempt when those conditions are not met. In our case, *ἐπιμέλεια* would be an implicit standard if it worked not merely as a duty for the debtor, but also as a limit to his liability; that is, if it were understood in the sense that the debtor is liable for damages only when caused by his lack of care.

Such interpretation was hardly inevitable: so much can be established even without sources. Contractual duties are set in the interest of the creditor; liability standards, in that of the debtor, since they limit his responsibility. The difference is too relevant to be ignored, even in a notarial practice, like that of Egypt, developed in the absence of a proper legal science.

⁴¹ Law historians tend today to question the pertinence of the sharp modern distinction between contractual duties and standards of liability to grasp the developments of ancient legal thought in this respect: in Roman law, great attention has been paid in this sense to the use of the expressions *dolum*, *culpam*, *custodiam praestare*, cf. the works of C. A. CANNATA mentioned *supra*, n. 1, as well as CARDILLI, *Praestare* (cit. n. 1).

⁴² VON BOLLA, *Tiermiete* (cit. n. 13), pp. 166–168, where the duty of care imposed on the lessee by the Neo-Babylonian contracts is resolutely understood as a limit to his liability.

The Neo-Babylonian leases studied by Sibylle von Bolla are enough to prove this point.⁴³ In these contracts, the lessee undertakes a duty, secured by guarantors, ‘of pasture, care and custody’ of the leased animals. Yet his liability is clearly not limited to lack of diligence. In fact, when the object of the lease is a flock, it is stipulated that for each dead animal a certain amount shall be paid, and that up to a tenth per cent of deceases are to be assigned to the owner per year.⁴⁴ These stipulations can only mean, despite von Bolla, that the lessee carries the risk of all deaths beyond that ten per cent, and shall owe for them the stipulated amount of money regardless of intent or fault.

Also the Egyptian practice was demonstrably aware of the difference between imposing on the debtor a duty of care and limiting his liability to lack of care. Two examples will suffice to show that the duty of care was not intended as an implicit limitation of liability:

a) The first one is a lease contract, *P. Princ.* III 151 (after AD 341, Ibion):

ἰ⁵ βούλομαι μισθώσασθαι παρ' ὑμῶν ἕκ⁶ τῶν ὑπαρχόντων ὑμῖν [τ]ὰς δύο
 ἰ⁷ ἀθάνατου[ς], μία μὲν τελειαν φυραν ἰ⁸ ὀνόματι Εἰσαρίων, ἡ δὲ ἑτέρα δ[.] is
 λευ⁹ κῆ ὀνόματι Τεσευρις ... ἰ¹³ ... ἐπὰν δὲ ὃ μὴ γίνῃ¹⁴ το θάνατος ἐκβῆ ὄντος
 πρὸς ἐμέ¹⁵ τὸν μισθούμενον, τῆς δὲ τούτων ἰ¹⁶ γονῆς οὐσης πρὸς τὸν α[ὐ]τὸν
 μισ¹⁷ θούμενον [κ]αὶ τῆς τούτων θρ[έ]ψ[εως] καὶ πάση[ς ἐ]πιμελείας καὶ
 μετὰ τὸν ἰ¹⁸ [χρόνον - ca. ? -]

I wish to lease from you two immortal (cows) belonging to you, one full-grown, tawny, named Isarion, the other ... white, named Teseuris ... If death occurs, which I pray may not happen, the loss falls upon me, the lessee, the offspring of these belonging also to me, the lessee, as also (falls upon me) their nourishing and entire care, and after the term ...

Two cows (initially believed by the editors to be two slaves: *infra*, n. 110) are here leased as ‘immortal’ (on this ἀθάνατος-clause, cf. *infra*, pp. 56–61). This means that, as far as the contract is concerned, they are not

⁴³ VON BOLLA, *Tiermiete* (cit. n. 13), pp. 166–168.

⁴⁴ For a list of the contracts that include these provisions, cf. VON BOLLA, *Tiermiete* (cit. n. 13), p. 167, nn. 3 and 5.

capable of dying. Their death, therefore, does not release the lessee from his duty to return them: he shall have to provide a replacement at his own expense. This duty, needless to say, is totally independent from the lessee's fault. The loss, as the contract states, falls upon him.

The nourishing and general care of the cows, on the other hand, corresponds equally to the lessee, as it is obvious, and the contract explicitly states in l. 17. This duty is clearly not referred to the offspring, mentioned immediately before, but to the leased cows themselves: the offspring, in fact, belongs to the lessee, so it makes no sense to impose on him any duty in its regard.⁴⁵

The conclusion is clear: the duty of care was not understood as implicitly limiting the lessee's liability, since he is at the same time made liable for the death of the cows irrespective of fault or intent.

b) The lessee's duty of care coexists with unrestricted liability also in *SB* v 8086 (= *Mél. Maspero*, pp. 335–336 = *P. Chept.* 9, AD 268, Arsinoites), another ἀθάνατος-lease, this time referred to a flock, on which *cf. infra*, pp. 57–61:

l⁴ ... βούλομαι μισθώσασθαι παλῶρὰ σοῦ ἀπὸ τῶν ὑπαρχόντων τῇ εὐσχήμ[ο]νι ... πρόβ[ατα] ῥωμαλέα ἀ[θά]νατα ἀρσενικὰ [καὶ] θηλυκὰ ἐξ [ἴσ]ου l⁸ ἀριθ[μ]ῶ πεντήκοντα αἰγα[ς] πέντε, ... l¹⁴ ... ἐφ' ᾧ πάσαν ἐπιμέ¹⁵λειαν π[ο]ιήσομαι κατανέμων νομὰς καλλίστας l¹⁶ καὶ ἐπι[χο]ρηγῶν ὀψώνια ποιμένων καὶ τῆς καλουμένης l¹⁷ [.]. [...].ο. ... l¹⁸ ... καὶ μετὰ τὸν l¹⁹ χρό[νον] παραδώσω τὰ θρέμματα ῥωμαλέα καλὰ l²⁰ εὐάρεσ[τ]α ἀριθμῶ πλήρεις ἔνποκα καὶ ἀπὸ κού²¹ρας, δι[ι]ὰ τὸ παρειληφέναι ἀθάνατα ἀκίνδυνα l²² ἔκτος [κι]νδύνου καὶ πάσης ἐπηρείας ...

I wish to to take in lease, from the belongings of your most illustrious ladyship ... an immortal flock of sheep, male and female in equal numbers, amounting to fifty, and five goats ... on condition that I take all the necessary care in making them pasture in the best pastures, and in paying the wages of the shepherds and what is called [...] ... and when the term has passed I shall return the animals, strong, beautiful, of good quality, integrally, sheared or not, since I have accepted them as immortal and free from all risk and all fraud ...

⁴⁵ Offspring and duties may be here connected as an instance of *cuius commodum eius incommodum*, if at all.

Here, unrestricted liability results not so much from the ‘immortal’ condition of the animals (which in flock leases did not necessarily imply full assumption of risk: on this, *infra*, pp. 59–60), as from the clause that makes them not merely ἀθάνατα but also ἀκίνδυνα ἐκτὸς [κι]νδύνου (ll. 21–22).

In the contractual practice of the papyri, in sum, the duty of care was clearly not understood as a limitation of the liability of the debtor.⁴⁶ Also this version of Kunkel’s theory must be rejected.

4. TAUBENSCHLAG’S THEORY OF UNRESTRICTED LIABILITY

Rafael Taubenschlag’s *The Law of Greco-Roman Egypt in the Light of the Papyri* is an impressive but inevitably imperfect work that for better and for worse has long been the reference handbook on legal papyrology for non-German speakers. In the brief overview on contractual liability that precedes his account of the singular contracts, Taubenschlag completely ignores Kunkel, and presents a thesis equally radical, but of opposite sign. In an extremely apodictic way, as if there were no room for doubts, he states the following:

Under Egyptian law the debtor is liable even if he fails to discharge his obligation on account of circumstances beyond his control. The same rule is followed in Greek law. This unrestricted liability is stressed in loans, deposits, leases and *recepta nautarum*. In all these cases the debtor is liable

⁴⁶ BRECHT, *Haftung* (cit. n. 15), p. 148, seeks to make the same point on the basis of *P. Lond.* II 301 (p. 256) (= *MChr.* 340, AD 138–161, Oxyrhynchos), a freight of public wheat regarding which oath is made ‘that the task is undertaken reliably and diligently, and all care employed, that the ἐπίπλοοι remain present until the weighing in the city, and to deliver the cargo safe and undamaged, to my own risk’. Here, indeed, the duty of care would seem again to coexist with an assumption of unrestricted liability. But in truth (*infra*, pp. 42–46) it is far from certain that this κίνδυνος-clause in freight contracts was meant to imply unrestricted liability, or to set any specific standard of liability at all.

for *casus* and even for *vis maior*. ... The application of different Roman rules on *custodia* and *culpa* is seen in contracts ... from the v–vi cent. AD.⁴⁷

Since these brief considerations on liability were intended by Taubenschlag as a mere introduction, he limits his evidence to one document per contract. For the Egyptian law, he calls attention to *P. Adl. dem. 5* (108–7 BC, Pathyris), which turns out to be a loan of wheat. No wonder, then, that the debtor's liability is unrestricted. In any legal tradition, loans for consumption are given as a rule at the risk of the borrower. It belongs to their essence that the borrower owes the '*tantundem*', not the specific items received; these he acquires, since he must be entitled to consume them. In such a situation, the risk falls on the debtor, unless otherwise agreed, due to the force of two principles felt as natural even in the absence of a jurisprudence able to formulate them: *genus numquam perit* and *casum sentit dominus*. The Egyptian tradition could not be an exception in this regard; neither, obviously, was the Greek. No value as evidence of a general principle of unrestricted liability can be therefore assigned to the Greek loans that Taubenschlag invokes as example, which are equally loans for consumption.⁴⁸ The stipulation ἀκίνδυνον παντὸς κινδύνου, frequent in such loans, is a mere reminder of such natural unrestricted liability.⁴⁹

⁴⁷ R. TAUBENSCHLAG, *The Law of Greco-Roman Egypt in the Light of the Papyri*, Warsaw 1955 (2 ed.), pp. 316–317, possibly inspired by RABEL, *cf. infra*, n. 144.

⁴⁸ His example is *P. Adl. Gr. 4* (109 BC, Ptolemais).

⁴⁹ *BGU IV 1147* (= *MChr. 103* = *Jur. Pap. 45*, 13 BC, Alexandria), ll. 31–32, *P. Oxy. III 507* (AD 146, Oxyrhynchos), l. 36, *P. Oslo II 40* (AD 150, Oxyrhynchos), l. 25, *BGU VII 1651* (2nd. cent. AD, Philadelphia), l. 12, *P. Oxy. XLV 3266 r* (AD 337, Oxyrhynchos), l. 3, *P. Lips. I 13* (AD 364, Hermopolis), l. 11, *P. Oxy. LXXII 4903* (AD 417, Oxyrhynchos), l. 10, *P. Oxy. LXXII 4904* (AD 417, Oxyrhynchos), l. 9, *P. Lugd. Bat. XXV 66* (AD 427, Oxyrhynchos), ll. 8–9, *P. Oxy. LXXI 4831* (AD 429, Oxyrhynchos), l. 15, *BGU XII 2140* (AD 432, Hermopolis), l. 12, *P. Wisc. I 10* (AD 468, Oxyrhynchos), l. 10, *P. Oxy. VIII 1130* (AD 484, Oxyrhynchos), l. 14, *P. Oxy. XVI 1969* (AD 484, Oxyrhynchos), l. 3, *SB XXVI 16756* (AD 467–497, Oxyrhynchos), ll. 6–7, *P. Mich. xv 728* (4th–5th cent. AD, unknown provenance), ll. 2–3. H.-A. RUPPRECHT, *Untersuchungen zum Darlehen im Recht der graeco-ägyptischen Papyri der Ptolemäerzeit*, München 1967, p. 94. Different is the case of the κίνδυνος-clause in hypothecarian loans: this

Loans for use, instead, have left very little documentary trace in the papyri. The scarce available material does not allow for any conclusion as to the apposite standard of liability.⁵⁰ The Laws of Gortyn imposed on whomever had received a fowl or quadruped, in deposit or loan or for any other reason, a liability for the single value, increased *adversus infitiantem* to the *duplum*, plus a fine to the *polis*.⁵¹ Listiscrecence is therefore imposed on those who in trial deny having received the animal, simple liability on those ‘not able to return it’: *μη νυνατὸς εἴη αὐτ[ὸν ἀ]ποδόμην*. This suggests unrestricted liability, but the assumption is far from certain, and, in any case, the rule has no parallel among the preserved papyri.

According to Taubenschlag, also deposits would have imposed an unrestricted liability on the debtor. Again, he substantiates his claim with just one document: *BGU* III 856 (= *MChr.* 331, AD 106, Psenyris, Arsinoites), where indeed the depositary acknowledges that the deposit is ‘free from all risk and not subject to any deduction’: *παραθήκη[ν ἀκίνδυνον παντὸς] κινδύνο[υ] καὶ ἀνυπόλογον [παντὸς ὑπολόγου]* (ll. 13–14). The clause is actually very frequent in deposits.⁵² It proves nothing, though,

aims at restoring the debtor’s liability, initially absorbed by the hypothec itself, in the event of a total or partial loss of the hypothecated object, cf. A. B. SCHWARZ, *Hypothek und hypallagma. Beitrag zum Pfand- und Vollstreckungsrecht der griechischen Papyri*, Leipzig-Berlin 1911, pp. 17–33; U. WOLLENTIN, *Ὁ κίνδυνος in den Papyri*, Köln 1961, pp. 27–29, 37–44.

⁵⁰ Cf. TAUBENSCHLAG, *The Law* (cit. n. 47), pp. 353–4, and IDEM, ‘Der Leihvertrag im Rechte der Papyri’, *Aegyptus* 13 (1933), pp. 238–240 = *Opera Minora* II, Warszawa 1959, pp. 527–529.

⁵¹ The rule belongs to the so-called ‘second Code’ (ca. 450 BC), *IC* IV 41, col. III (= *Nomima* II 65), ll. 7–17: *αἴ κα τετράπος ἢ ὄνν[ι]θα παρακαταθ[ε]μένῳ ἢ κρησάμενος ἢ [ἀλ]λάι δεκσάμε[νο]ς μη νυνατὸς εἴη αὐτ[ὸν ἀ]ποδόμην, τὸ ἀ[πλ]όον καταστασεῖ. αἰ δ[έ] κ’ εἴπῃ τῶι δίκαι [μῶ]λίῳ ἐκσανθήσεται, δι[πλ]εῖ καταστᾶσ[αι κ]αὶ θέμημ πόλι. A discussion, with lit., in P. SCHEIBELREITER, *Zwischen furtum und Litiskreszenz. Überlegungen zur poena dupli der actio ex causa depositi*, *RIDA* 56 (2009), pp. 147–148, also on the disputed meaning of παρακαταθεμένοι.*

⁵² *SB* XIV 12105 (AD 29, Theadelphia), ll. 14–15, *P. Tebt. Wall.* 9 (= *SB* XII 11040 = *SB* XVIII 13790, AD 33, Tebtynis), ll. 31–32, *P. Mich.* II 121 1, 2 X, 3 VI (AD 42, Tebtynis), *P. Athen.* 28 (AD 86, Theadelphia), ll. 14–15, *SB* VI 9291 (AD 93, Theadelphia), ll. 20–21, *BGU* XI 2042 (AD 105, Soknopaiu Nesos), ll. 11–12, *P. Lond.* II 298 (p. 206) (AD 124, Ptolemais Evergetis), ll. 11–12, *P. Ryf.* II 324 (AD 139, Theadelphia, Arsinoites), ll. 17–18, *P. Lond.* II 310 (p. 208, = *MChr.* 334, AD 146, Pelusion, Arsinoites), ll. 12–13, *P. Prag.* I 31 (AD 148, Herakleia, Arsinoites),

since they all happen to be deposits of money. These, for the same reasons as loans for consumption, are typically given at the risk of the depositary, also in systems, like the Roman, where there is no general rule of unrestricted liability.⁵³

Deposits of non-fungible goods, which must have been frequent, have left scarce documentary trace. Some fleeting mentions⁵⁴, and very rarely a claim or a contract: these in such terms, that no conclusion can be drawn from them regarding the standards of liability.⁵⁵ An interesting exception may be *P. Grenf.* II 17 (= *P. Lond.* III 668 *descr.* = *MChr.* 138, 136 BC, Thebais):

... Πατοῦς Πατούτος¹² Τακμήτι Πατούτος χαίρειν. ὁμολογῶ¹³ ἔχειν παρὰ σου κῶνον σιδηροῦν ἐν ὑπο¹⁴θήκῃ, ἐφ' ᾧ εἶν με ἀπαιτῆς καὶ μὴ¹⁵ ἀποδίδω σοι ἀποτίσω σοι χαλκοῦ (τάλαντον) α 'B¹⁶ τιμὴν τοῦ προγεγραμμένου κῶνου.

ll. 11–12, *BGU* III 702 (AD 151, Arsinoites), ll. 17–18, *P. Louvre* II 110 (AD 139–160, unknown provenance), ll. 7–9, *SB* VI 9247 (AD 169–170, Karanis), l. 10, *P. Warr.* 6 (= *SB* V 7535, AD 198–9, Ptolemais Evergetis), ll. 15–16, *P. Louvre* I 17 (2nd. cent. AD, Soknopaiu Nesos), ll. 11–12, *P. Lond.* III 943 (p. 175) (= *MChr.* 330, AD 227, Hermopolis), ll. 5–6, *Stud. Pal.* xx 45 (AD 237, Mochchyris, Marmarike), l. 5, *P. Oxy.* XIV 1714 (AD 285–304, Oxyrhynchos), ll. 6–7, *P. Oxy.* I 71 (= *MChr.* 62, AD 303, Oxyrhynchos), l. 6, *P. Aberd.* 180 (early 4th cent. AD, unknown provenance), ll. 3–4, *P. Ryl.* IV 662 (AD 364, Antinoopolis), ll. 11–12, *P. Pintaudi* 33 (late 4th cent. AD, Antinoopolis), ll. 9–11, *P. Mich.* XIII 671 (6th cent. AD, Aphrodites Kome), ll. 12–13.

⁵³ Cf. *Coll.* 10.7.9. This allocation of risk is typical, but by no means necessary, as it is not necessary in loans for consumption, cf. the case of *pecunia traiecticia*. Cfr. MITTEIS, *Grundzüge*, p. 258 and n. 1: 'Daß bei unverzinslichen Depositen auch eine andere Auffassung denkbar ist und in den Quellen wenigstens an einer (allerdings zunächst das Mandat behandelnden) Stelle anklingt, habe ich Sav. Z. R.-A. 19, 209 fg. gezeigt. In dem lateinischen Depotschein über Geld CIL 3, 949 XII (= Bruns, Fo.7 Nr. 155) ist übrigens die Gefahrklausel nicht enthalten'. The fact that the specification ἀκίνδυνον is added in the records of the *grapheion* of Tebtynis, as also in the petition of *P. Oxy.* I 71, suggests by itself that other arrangements were considered *a priori* possible.

⁵⁴ Cf. *P. Par.* 37 (= *UPZ* I 5, 163 BC, Memphis), l. 21, *P. Dryton* 37 (= *P. Lond.* III 609 *descr.* = *P. Grenf.* I 14, 139 BC, unknown provenance), *P. Mich.* VIII 514 (2nd cent. AD, Alexandria), *P. Ross. Georg.* V 21 (3rd. cent. AD, unknown provenance).

⁵⁵ *SB* V 7652 (= *P. Ryl.* IV 569 = *P. Ryl. Zen.* 16, 3rd cent. BC, Philadelphia), cf. H. J. WOLFF, *ZRG RA* 71 (1954), p. 394, is a letter from Patumis to Zenon requesting the cows of Isis and Osiris that the latter had received from him in deposit, and offering Zenon to keep one of them for himself. In *P. Thead.* 3 (= *P. Sakaon* 61, AD 299, Theadelphia), the buyer of a mare keeps the offspring in deposit until reared, but nothing is further established, e.g., for the case of death.

Patous acknowledges that he has received from his sister an iron cone, on the condition that if he fails to return it on demand, he shall pay its price, one talent and two thousand bronze drachmas. If we take the text at face value, Patous would have received the cone in guarantee, as a hypothec. But in such case the duty to pay the sum would be his sister's and not his. This, and the fact that the cone can be claimed at any moment, make it reasonable to presume, with Grenfell and Mitteis, that *ὑποθήκη* is used here in the sense of *παρακαταθήκη*.

The contract would thus be a deposit with a penalty clause. The penalty is likely to be due by the mere fact of failing to return the cone, irrespective of fault or intent: this strict interpretation is, in fact, the most natural, the most probable in the intention of the creditor when imposing the terms of the contract, and the most likely in the absence of a professional jurisprudence.⁵⁶ If so, the appraisal had the effect of placing the risk on the depositary.⁵⁷ The mechanism is well known to those acquainted with Roman law, where it was a general phenomenon,⁵⁸ not limited to the notorious case of *dos aestimata*.⁵⁹

⁵⁶ It was very likely the original one in Roman law (*cf.* Lab. D. 22.2.9), initially challenged only by the school of Sabinus (*cf.* D. 45.1.115.2). On the question, *cf.* R. KNÜTEL, *Stipulatio poenae*, Köln 1976, pp. 195 ss. For the papyri, the question is explored by BERGER, *Strafklauseln* (cit. n. 19), pp. 75–78: occasionally there is explicit exclusion of penalty in case of *mora debitoris* or, in reciprocal agreements, in case of non-performance by the counterparty; but in the immense majority of the papyri there is no restriction whatsoever, particularly not to fault or intent. This is not adequately described by saying that the papyri 'leave the question aside' (so BERGER, p. 75): the absence of restrictions seems rather to mean that the clause was intended to be subject to none.

⁵⁷ In this sense, WOLLENTIN, *Κίνδυνος* (cit. n. 49), p. 30 and n. 2.

⁵⁸ *Cf.* the lease with *instrumentum aestimatum* in Pomp. (Proc.) D. 19.2.3 and Paul. D. 19.2.54.2, and the lease of an appraised flock in Ulp. D. 17.2.52.3. For appraised commodatum, Ulp. D. 13.6.5.3. The most notorious case may be the transaction concerning gladiators described in Gai. 3.146. Although specifically commenting on *actio de aestimato*, Ulpian states a general principle when he writes, in D. 19.3.1.1: *Aestimatio autem periculum facit eius qui susceperit: aut igitur ipsam rem debet incorruptam reddere aut aestimationem de qua convenit.* – 'The estimate of property, however, is made at the risk of the person who receives it, and hence he must either restore the property itself in an undamaged condition, or pay the amount of the appraisal agreed upon.' (transl. SCOTT).

A nice confirmation of the connection intended between appraisalment and *periculum* can be found in *BGU* III 729 (= *MChr.* 167, AD 144, Alexandria), a noted instance of dowry disguised as deposit, because received by a soldier for a forbidden marriage⁶⁰ – a failed attempt, therefore, at a ‘*dos aestimata*’:⁶¹

l⁸ ... συνχωρεῖ l⁹ ὁ Γάιος Ἰούλιος Ἀ[πολι]νάριο[ς] εἰληφέ[ναι] παρὰ τῆς l¹⁰
 Πετρωνίας Σαρα[πιά]δος παραθήκην ἀκίνδυν[ο]ν l¹¹ παντὸς κινδύν[ο]ν
 ἱμάτια γυν[αι]κεῖα συντετειμη^{l2}μένα ἀργυρίου δραχμῶν τριακοσίων καὶ
 χρυσᾶ κοσ^{l3}μάρια ἐν εἶδεσι ἐπὶ τὸ αὐτὸ τετάρτων τριάκοντα δύο

Gaius Iulius Apolinaris acknowledges that he has received from Petronia, daughter of Sarapias, a deposit, free from all risk, of female clothes at a value of three hundred drachmas and ornaments of gold of different forms at a total value of thirty two quarters.

The clause ‘ἀκίνδυν[ο]ν παντὸς κινδύν[ο]ν’ makes explicit the intention of the parties through the appraisalment.

These ‘appraised’ deposits, of which *BGU* I 4 (= *BGU* xv 2458, AD 177, Arsinoites) could still be a further example,⁶² would thus be a relevant instance of unrestricted liability, of the sort that Taubenschlag’s examples were not. It goes without saying, though, that no general theory of unrestricted liability could be built on such a scant basis. In fact, these contracts rather suggest that in absence of appraisalment the liability of the depositary would not have been unrestricted.

⁵⁹ Cf. Ulp. D. 23.3.10, Diocl. C. 5.12.10, and the papyrological evidence of *P. Mich.* VII 434 and 442. F. M. MAZZANTE, *Dos aestimata, dos vendita? Die geschätzte Mitgift im römischen Recht*, Marburg 2008, with lit.

⁶⁰ The true nature of the arrangement is fully disclosed one year later, in *P. Lond.* II 178 (p. 207) (AD 145, unknown provenance). Cf. now Claudia KREUZHALER, in J. G. KEENAN, J. G. MANNING & U. YIFTACH-FIRANKO, *Law and Legal Practice in Egypt from Alexander to the Arab Conquest*, Cambridge 2014 (in print).

⁶¹ Cf. WOLLENTIN, *Κίνδυνος* (cit. n. 49), pp. 57–61.

⁶² The document is a petition addressed to a centurion by a veteran who, when still in service, had deposited military equipment with a fellow soldier, at a valuation of eight hundred drachmas: ... ἡνίκα ἐστρατευόμην, κύριε, ἐν Πηλουσίῳ, παρεθέμην Πετεσοῦχω τινὶ συνστρατ[ιώτ]η μου καὶ φίλῳ σκευή ἐν συντιμήσει δραχμῶν ὀκτακοσίων. ... (ll. 3–9).

5. RESTRICTED AND UNRESTRICTED LIABILITY IN FREIGHT CONTRACTS

Leaving leases aside for the moment (*infra*, pp. 49–61), from Taubenschlag's purported evidence of unrestricted liability only freight contracts (ναυλωτικάί; in Taubenschlag's terms, *recepta nautarum*: on this, *infra*) remain to be considered. His claim would seem here *prima facie* better supported by the sources. In the already mentioned (*supra*, p. 32) *P. Lond.* II 301 (p. 256) (= *MChr.* 340, AD 138–161, Oxyrhynchos), a carrier⁶³ makes oath⁶⁴ by the *tyche* of the Emperor 'that the task is undertaken reliably and diligently, and all care employed, that the ἐπίπλοοι⁶⁵ remain present until the weighing in the city, and to deliver the cargo safe and undamaged, to my own risk':⁶⁶

ἰ⁶ ... ἀν⁷τιλήμψασθαι τῆς χρείας πισί⁸τῶς καὶ ἐπιμελῶς καὶ πᾶσαν
ἰ⁹ φροντίδα ποιήσασθαι τοῦ πα¹⁰ραμείναι τοῦς ἐπιπλόους μέ¹¹χρι τῆς ἐν
πόλει ζυγοστασίας ἰ¹² καὶ παραδώσιν τὸν γόμον ἰ¹³ σῶον καὶ ἀκακούργητον
ἰ¹⁴ τῷ ἐ[μ]αυ[τοῦ] κινδύνῳ

⁶³ I shall use the term 'carrier' as translation of the Greek ναύκληρος and the Latin *nauta*: whoever deals in the transport of goods, whether he is or not the ship-owner.

⁶⁴ On these oaths, cf. E. SEIDL, *Der Eid im römisch-ägyptischen Provinzialrecht* I, München 1933, *passim*; A. J. M. MEYER-TERMEER, *Die Haftung der Schiffer im Griechischen und Römischen Recht*, Zutphen 1978, pp. 53–54.

⁶⁵ On these ἐπίπλοοι, originally soldiers, later under liturgy, who, when the freight was public, guarded it and supervised its transportation in the interest of the administration, cf. MEYER-TERMEER, *Haftung* (cit. n. 64), p. 56, with lit.

⁶⁶ I follow here the traditional interpretation of the text as a freight contract (ναυλωτική), and therefore of the oath as made by the carrier himself. P. S. SIJPESTEIJN, in MEYER-TERMEER, *Haftung* (cit. n. 64), p. 86 n. 3, suggested instead that the document may be a security for the liability of the ἐπίπλοοι: the oath would have been given not by them but by their guarantor (the ἐγώ in l. 14). According to Meyer-Termeer, this reinterpretation of the document was connected with the reading παραδώσιν (*i.e.* παραδώσειν) in l. 12, instead of the original παραδώ[σω] of Kenyon and Mitteis. But the correction, which was made already by U. WILCKEN, 'Neue Nachträge zu P. Lond. II', *APF* 3 (1903–6), p. 246, is by no means incompatible with the traditional interpretation; nor is the new one forced by the fact that the oath comprises the presence of the ἐπίπλοοι: in an oath made by the ναύκληρος, this would simply mean that he and his crew shall not impede their task.

Since Mitteis included the document in the *Chrestomathie* as evidence of *receptum nautarum*, its interpretation got entangled with the disputes about liability *de recepto* in Roman law, within the broader controversy about *custodia* in classical and Byzantine law.⁶⁷ *A priori*, this linking may seem reasonable: in a matter so relevant for maritime commerce, in fact, it would not be absurd to expect the Roman jurisdiction in Egypt to have followed the Roman rule. This would have excluded liability for *vis maior*, in certain cases at least: in the event of shipwreck or piracy, in fact, an *exceptio* was granted to the *nauta* since Labeo, according to Ulp. D. 4.9.3.1.⁶⁸ And yet, in our document the carrier accepts to undertake the task at his own risk. The same phrase, τῷ ἑμαυτοῦ κινδύνῳ, is conjectured by Mitteis in *P. Amb.* II 138 (= *MChr.* 342, AD 326, Arsinoites), l. 17, and by Meyer in *P. Oxy.* X 1259 (AD 212, Oxyrhynchos), l. 24.⁶⁹

⁶⁷ On the whole question, cf. the overview by BRECHT, *Haftung* (cit. n. 15), pp. 1–12. His first chapter, pp. 13–82, is devoted to proving that this and the other available Pre-Justinianic papyri have nothing to do with Roman law and with the Roman *recipere salvum fore*; a summary, *ibidem*, pp. 130–1, and IDEM, ‘Zur Haftung der Schiffer im antiken Recht’, *ZRGRA* 62 (1942), pp. 391–396. His arguments are pertinent, but hardly conclusive. In the same sense as Brecht, MEYER-TERMEER, *Haftung* (cit. n. 64), pp. 225–228.

⁶⁸ Hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res perit vel damnum datum est, nisi si quid damno fatali contingit. inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari – ‘under this Edict, the party who received the property is absolutely liable, even though the goods were lost or damaged without his fault, unless something occurred to cause inevitable injury. Hence, Labeo holds that, where anything is lost through shipwreck, or by the violence of pirates, it is not improper to grant the owner an exception.’ For the abundant literature, cf. E. STOLFI, *Studi sui libri ad edictum di Pomponio* I, Napoli 2002, pp. 398–409.

⁶⁹ BRECHT, *Haftung* (cit. n. 15), pp. 60–69, devotes to the κίνδυνος-clause a long, detailed chapter. For him, the assumption of risk in freight contracts is a mere consequence of the fact that the cargo consists in fungibles; a consequence, therefore, of the principle *genus numquam perit*. It is certainly not a coincidence that the surviving freight contracts concern fungibles: this must have been the most common case. There is nothing, however, that makes unconceivable a freight consisting in non-fungibles, and, in such case, a contract with κίνδυνος-clause, just as we find the clause in the lease of a mill in *P. Oxy.* II 278 (*infra*, nn. 96 and 102). Brecht feels forced to declare this case an anomaly, but it was not: the same effect could be reached with an estimation clause, and such is attested for non fungible items both in deposits (*supra*, pp. 39–41) and leases (*infra*, pp. 53–56). Moreover, even in freight contracts of fungibles the duty of the carrier is ordinarily conceived as

Soon after its publication, this alleged papyrological evidence of *periculum nautarum* was used by some Roman law scholars to support their suspicion that the *exceptio* in D. 4.9.3.1 was in fact interpolated: an innovation of the Byzantines, not of Labeo. Under classical Roman law, the *nauta* would have borne the full risk, as attested in the papyri. Those, instead, who defended the *exceptio* as classical, notably Mitteis himself and Arangio-Ruiz, felt compelled to reconcile our documents with this thesis. The phrase τῶ ἐμαυτοῦ κινδύνῳ would not have meant full assumption of risk: the term κίνδυνος may have referred merely to *casus minor*, as *periculum* often in the Roman sources; if the document does not explicitly exclude *vis maior* is because such exclusion was taken for granted.⁷⁰

In truth, both parties in the controversy shared the same unwarranted assumptions: that these documents are truly *recepta*; that the Roman jurisdiction in Egypt had necessarily applied the Roman rule in this point; that the contractual practice perfectly accommodated to the jurisdictional one; that it was therefore perfectly homogeneous; that the Roman

specific, referred, that is, to the specific shipped cargo. Only if he acquired ownership on the cargo could his obligation be considered generic, and only then would risk arise for him from the situation itself. One such instance is the famous case of Saufeius in Alf. D. 19.2.31, and even here it is with reason disputed whether there is true displacement of risk with the acquisition, cf. Éva JAKAB, 'Vertragsformulare im Imperium Romanum', *ZRG RA* 123 (2006), pp. 87–100, with lit. Much of Brecht's profuse discussion of the κίνδυνος-clause is unfortunately vitiated by this insufficient awareness of the difference between generic obligations and obligations merely referred to fungibles, and of the difference between a debtor that owns what he owes and one that does not.

⁷⁰ Cf. MITTEIS, *Grundzüge*, p. 260: 'Ein Vorbehalt für Vis major wird nicht gemacht, wohl weil man diesen für selbstverständlich erachtete'. ARANGIO-RUIZ, *Lineamenti* (cit. n. 14), p. 79: '... gli studiosi della responsabilità contrattuale romana sanno bene che la voce *periculum*, indicante di solito i rischi della forza maggiore, suole anche scambiarsi con *custodia* ed esprimere i minori rischi derivanti dalla convivenza umana'. For very different reasons, also BRECHT, *Haftung* (cit. n. 15), pp. 38–47, has argued that in these documents the κίνδυνος-clause did not include *vis maior*. In his opinion, the clause covered only for the risks comprised in the σωος-clause, and this did not comprise natural events, but merely *casus (minor)* and the misconduct of the crew described as ναυτική κακουργία. For a wider interpretation of this latter term, though, cf. MEYER-TERMEER, *Haftung* (cit. n. 64), pp. 112–113. Also JAKAB, 'Vertragsformulare' (cit. n. 69), pp. 93–95, adheres to this opinion, that sees in the exclusion of *vis maior a naturale negotii*.

rule was imperative and did not tolerate *pacta in contrarium*. Leaving aside these assumptions, there is not much certainty to be gathered from these documents on our question.

Fully justified are Mitteis' and Arangio-Ruiz's reservations regarding the meaning of τῶ ἐμαυτοῦ κινδύνῳ. The phrase does not necessarily refer to *periculum* in the technical sense, *i.e.* to liability for *vis maior*. This becomes clear if we consider the circumstances of the contract. The service provided by the carrier involves the activity of other people, slave or free, employed or not by him. When the cargo is public (as it happens in all the occurrences of the clause so far), this includes also persons acting on behalf of the administration, as officials or under liturgy: in *P. Lond.* II 301, for instance, the εὐσχήμονες assisting at the loading and the ἐπιπλόου guarding the cargo. Taking into consideration the amount of people involved, the most likely purpose of the clause τῶ ἐμαυτοῦ κινδύνῳ is to exclude any future attempt of the carrier to avoid liability by deflecting fault on them. The clause is merely an anticipated assumption of vicarious liability: it concentrates the liability in him, but it does not allow conclusions about the extent of such liability; in particular, it does not prove that he would be held liable in case of *vis maior*.

A confirmation of this meaning of κίνδυνος can be found, in a very different context, in the documents from the Tebtynis family-archive dealing with the dilapidation of the *bibliotheke enkteseon* of the Arsinoites.⁷¹ With the appointment of Herakleides and Patron as new *bibliophylakes* (AD 109),⁷² the chief clerk Leonides found himself trapped between their reluctance to take over from the previous *bibliophylakes* the damaged documents (risking to become financially responsible for their condition), and the pressure from the *strategos* and the prefect himself to do so immediately (*infra*, p. 70). When summoned by the *strategos*, Leonides' main concern is at whose risk he shall

⁷¹ Cf. Andrea JÖRDENS, 'Reparaturen in arsinoitischen Gauarchiven', *Pap. Congr.* xxvi, Genève 2012, pp. 371–380.

⁷² For a summary of the long and complicated conflict, cf. B. A. VAN GRONINGEN, *P. Fam. Tebt.*, pp. 97–108; Th. KRUSE, *Der königliche Schreiber und die Gauverwaltung* II, Leipzig 2002, pp. 784–786.

take over the damaged documents.⁷³ Months later, the *strategos* dismisses his request that the *bibliophylakes* be present when he takes the documents: as their *grammateus* -the *strategos* says-, he acts in any case at their risk.⁷⁴ In the oath he is forced to make, Leonides does not forget to state that, as ordered, he shall take the documents at the risk of the *bibliophylakes*.⁷⁵ This κίνδυνος has nothing to do with liability for *vis maior*. It is perfectly possible that the liturgical liability of the *bibliophylakes* was unrestricted, but that is not what Leonides and the *strategos* mean by saying that the former shall act at their risk. Leonides, in particular, has no power to define the extent of their liability, nor any interest in doing so. His aim is simply to have officially acknowledged that he acts on their behalf, as their employee, and that whatever liability may arise, restricted or unrestricted, is exclusively theirs.

As far as our freight contracts are concerned, all this merely means that the clause τῷ ἐμαυτοῦ κινδύνῳ does not necessarily imply liability for *vis maior*. It is very far from proving, though, that such liability was excluded, as commonly assumed. There is nothing ‘inevitable’ or ‘natural’ in such exception: the example of Roman law, where the liability of the *nauta* was originally unrestricted, is eloquent in this respect. In the papyri, some hints might actually point towards unrestricted liability:

a) The emphatic formulation of the κίνδυνος clause that with certain confidence can be reconstructed in *P. Meyer* 14 (AD 159–160, unknown provenance) is not so easy to dismiss as referred to *periculum* proper: [καὶ παρ]αδώσω τὸν [γόμον ἐν τῇ Ν]έα Πόλει εἰς [τοὺς δημοσί]ους σῶον κα[ὶ ἀκακούργητον] ἀπὸ πάσης [ναυτικῆς κακουργί]ας ὡς τοῦ ἄ[παντος αὐτοῦ κιν]δύν[ου ὄντος πρὸς με τὸν Διον]υσιος (ll. 6–12): ‘I shall deliver the cargo in Neapolis at the public granaries, safe and undamaged by any nautical malpractice, since the full risk of it falls upon me, Dionysios.’

⁷³ *P. Fam. Tebt.* 24 (AD 124, Arsinoites), ll. 74–76: δι’ οὗ τοῦ Λεωνίδου ἐπιζητοῦντ[ο]ς, τίνος κεινδύνου ὁ Λεωνίδης παραλαμβάνει τὰ βιβλίδια ...

⁷⁴ *P. Fam. Tebt.* 15 (AD 114–115, Arsinoites), ll. 142–143: περισσῶς τοὺς αὐθέντας ἐπιζητεῖς ἔχοντας ἀποδεδιγμένον σαι γραμματέα. εἰς τοῦτο γὰρ κατεστάθης ἵνα κινδύνῳ αὐτῶν πάντα διοικῆς.

⁷⁵ *P. Fam. Tebt.* 15 (AD 114–115, Arsinoites), ll. 152–153: καθὼς ἐπέτρεψας δι’ ὑπομνηματισμῶν, παραλαβε[ῖ]ν μαι κινδύνῳ τῶν βιβλιοφυλάκων.

b) All the documents considered so far concern transportation on behalf of the government. *P. Ross. Georg.* II 18 (AD 140, Arsinoites), instead, contains several purely private contracts, where the carrier promises to pay the freight's price in the event of non-delivery: *ἐὰν μὴ παραδώσει δώσει τὴν ἐν ... τῶν ὁμοίων τιμὴν* (ll. 34, 134, 150). This is not a case of appraisalment (*supra*, pp. 39–41, *infra*, pp. 53–56), yet the duty to pay the price is made dependent merely on the lack of delivery, which is hard to imagine in any other case but *vis maior*.

c) Among all preserved freight contracts, only one may have included exception of *vis maior*: *P. Laur.* I 6 (AD 98–103, unknown provenance).⁷⁶ This does not help the assumption that the exception was elsewhere taken for granted: the papyri tend to the superfluous and to err on the side of caution; if exclusion of *vis maior* were the rule, one would expect to find it much more often in the documents. Significant also how the clause is fashioned here:

l⁷ ... παραδῶση τὰ] l⁸ ἐμβεβληθησόμενα σῶα ἀ[κακούργητα ἀπὸ ναυτι]l⁹ κῆς
κακουργίας, ἐὰν μὴ τις κ[ίνδυνος ἢ βλάβος] l¹⁰ γένηται ἤτοι ἀπὸ Διὸς βίας
αλ[– ca. ? – ἢ λησ]l¹¹ τῶν ἐφόδου ...

You shall receive the freight safe, undamaged by nautical malpractice, if no risk or damage takes place, either by a higher force ... or the attack of pirates.

The reconstruction is not indisputable.⁷⁷ The reading *Διὸς βίας* has been questioned, but the term *ἔφοδος*, probably meaning ‘attack’, maybe, as suggested, from pirates, seems certain. This latter specification, that in ship leases is part of a triad together with storms and fire (*cf. infra*, pp. 51–52), may speak against the assumption that the carrier's liability was limited *ex lege*. The integration *τις κ[ίνδυνος ἢ βλάβος*

⁷⁶ The exception figures also in *P. Oxy.* I 144 (= *MChr.* 343, AD 580, Oxyrhynchos), but this is a contract executed under the rule of Justinian's compilation.

⁷⁷ *Cf.* the reservations of R. HÜBNER, *P. Köln* III, p. 103 n. 4.

(where βλάβος would refer to damages caused by a human agent, and κίνδυνος would cover any other *casus*) is not supported by any parallel, but κίνδυνος seems, in the context, a likely possibility. If the term was truly present here, referred to *vis maior*, its interpretation in the same sense becomes less unlikely when used by the carrier to undertake liability, as in *P. Lond.* II 301.

In any case, Taubenschlag's hurried conclusion, that through the κίνδυνος-clause the carrier assumes full risk, is far from certain. And among the extant contracts there is at least one, *P. Laur.* I 6, where unrestricted liability is explicitly excluded.⁷⁸



Provisionally, since we have not yet considered the abundant available lease contracts, the result of our survey in this and the previous section is much more nuanced than the monolithic canon postulated by Taubenschlag. His universal unrestricted liability turns out to be no less an illusion than Kunkel's universal ἐπιμέλεια-*diligentia*. Unrestricted liability seems to have been the rule only in those contracts where we would expect it in any legal tradition: loans for consumption (p. 37 and n. 49) and money deposits (p. 38 and n. 52). Beyond these cases, there is no evidence of a general principle of unrestricted liability. 'Appraised' deposits (pp. 39-41), as attested in *P. Grenf.* II 17, *BGU* III 729, and possibly also *BGU* I 4, may have been understood as entailing unrestricted liability; yet they can hardly be presented as evidence for a general rule of *periculum debitoris*; in fact, they would rather suggest that the debtor would not have carried the risk were it not for the appraisal. And in freight contracts, exclusion of *vis maior* was possible (*P. Laur.* I 6), if not the rule.

⁷⁸ The coexistence of freight contracts excluding *vis maior* with others imposing unrestricted liability has for long remained the isolated opinion of Meyer-Termeer (cf. also M. DAVID, B. A. VAN GRONINGEN & J. C. VAN OVEN, *P. Warren*, p. 16). Cf. the negative remarks by J. HERRMANN, *ZRG RA* 97 (1980), p. 346, and JAKAB, 'Vertragsformulare' (cit. n. 69), p. 95.

6. RISK AND LIABILITY IN LEASES

Among Taubenschlag's alleged instances of unrestricted liability, leases are by far the best documented in our sources. Here, he draws his argument from the clause *καὶ μ[ε]τὰ τὸ[ν χρόν]ον παραδώσω τὸ ἔδαφος ὡς καὶ ἐγὼ [π]αρέλαβ[ο]ν* (CPR I 31, AD 153, Arsinoites, ll. 31–33): 'and after this time I shall return the land to you as I have received it'. The clause is in fact typical for leases,⁷⁹ but it most certainly does not imply unrestricted liability.⁸⁰ In any legal tradition, the lessee will be expected to return the property as received, but this duty is not tied to a specific standard of liability, and it definitely does not imply that the lessee will be liable for *vis maior*. Under Roman law, for instance, he was not, and yet he obviously was expected to return the object as received, cf. Ulpian in D. 19.2.11.2: *Item prospicere debet conductor, ne aliquo vel ius rei vel corpus deterius faciat vel fieri patiatur*. Contractual duties are not to be confused with standards of liability.

Also irrelevant for our question is the clause *ἀκίνδυνος παντὸς κινδύνου καὶ ἀνυπόλογος παντὸς ὑπολόγου*, extremely frequent, in various fashions, in land leases throughout the Ptolemaic and Roman Eras, whereby the lease shall be 'free from all risk and not subject to deductions for loss'.⁸¹

⁷⁹ Cf. HERRMANN, *Bodenpacht* (cit. n. 17), pp. 174–175, VON BOLLA, *Tiermiete* (cit. n. 13), pp. 64–66.

⁸⁰ Cf. VON BOLLA, *l.c.*, and BRECHT, *Haftung* (cit. n. 15), p. 31 n. 1.

⁸¹ Cf. HERRMANN, *Bodenpacht* (cit. n. 17), p. 143. PSI IV 400 (mid-3rd cent. BC, Philadelphia, Arsinoites), l. 8, *P. Iand. Zen.* 1 (= *P. Cair. Zen.* IV 59666 = SB XIV 11659, 256 BC, Philadelphia), l. 8, CPR XVIII 2 (231 or 206 BC, Theogonis, Arsinoites), l. 7, CPR XVIII 3 (231 or 206 BC, Theogonis), l. 7, CPR XVIII 15 (231 or 206 BC, Theogonis), l. 309, CPR XVIII 19 (231 or 206 BC, Theogonis), l. 7, CPR XVIII 33 (231 or 206 BC, Theogonis), l. 13, *P. Tebt.* III 1, 815 (228–1 BC, Tebtynis), fr. 1 r., l. 8, fr. 2 r., l. 34, fr. 3 r., l. 5, fr. 3 v., ll. 28–29, fr. 4 r., ll. 41–42, l. 49, fr. 5 r., l. 5, fr. 6 r., ll. 20–21, fr. 8 r., l. 9, *P. Enteux.* 59 (= *P. Lille* II 3 = *C. Pap. Jud.* I 37, 222 BC, Magdola, Arsinoites), l. 4, SB XII 11061 (= *P. Hamb.* II 188, 218 BC, Tholthis, Oxyrhynchites), ll. 8–9, *P. Frankf.* 4 (216–5 b.c., Tholtis), ll. 10–11, BGU VI 1263 (215–4 BC, Tholtis), l. 10, BGU VI 1264 (215–4 BC, Tholtis), l. 12, BGU X 1943 (215–4 BC, Tholtis), l. 7, BGU XIV 2383 (215–4 BC, Tholtis), l. 5, *P. Frankf.* 2 (215–4 BC, Tholtis), l. 13, BGU XIV 2385 (214–2 BC, Tholthis), l. 4, *P. Frankf.* I (213 BC, Tholthis), l. 12, BGU XIV 2386 (= BGU VI 1266, 203–2 BC, Takona, Oxyrhynchites), ll. 19–20, BGU VI 1268 (end 3rd cent. BC, unknown

We have discussed a similar clause in deposits (*supra*, pp. 39–41), but its function in leases is very different: it does not refer to the restitution of the property but to the payment of the rent, which is to remain unaffected by any losses that the tenant may suffer in his agricultural activity:⁸² this is confirmed by the frequent exception for the case of insufficient or excessive flooding of the Nile (πλήν ἀβρόχου καὶ καταβρόχου).⁸³ If anything, the ubiquity of this and similar κίνδυνος-clauses⁸⁴ show that

provenance), ll. 6–7, *BGU* XIV 2388 (= *BGU* VI 1270, 191 BC, Takona), ll. 19–20, *P. Yale* I 51 (184 BC, Kerkesucha, Arsinoites), ll. 16–17, *P. Freib.* III 21 (178 BC, Philadelphia), ll. 7–8, *BGU* XIV 2390 (160–159 BC Herakleopolites), l. 6, *SB* XVI 12373 (158 BC, Arsinoites), l. 12, *P. Tebt.* I 105 (103 BC, Tebtynis), l. 18, *P. Tebt.* I 106 (= *MChr.* 134, 101 BC, Tebtynis), ll. 16–17, *BGU* XIV 2389 (72 BC, Herakleopolites), l. 25, *PSI* X 1098 (51 BC, Tebtynis), ll. 11–12, *PSI Corr.* 1150 (= *SB* XIV 11933 = *PSI* X 1150 *descr.*, 27 BC, Tebtynis), ll. 30–31, *P. Oxy.* VIII 1124 (AD 26, Oxyrhynchos), ll. 2–3, *BGU* II 644 (AD 69, Soknopaiu Nesos), ll. 26–27, *P. Lond.* II 216 (p. 186) (= *WChr.* 192, AD 94, Soknopaiu Nesos), pp. 16–17, *BGU* IV 1067 (AD 101–102, Euhemeria), l. 12, *P. Oxy.* XXII 2351 (AD 112, Oxyrhynchos), l. 34, *P. Oxy.* III 499 (AD 121, Oxyrhynchos), ll. 19–20, *P. Oxy.* IV 730 (AD 130, Oxyrhynchos), ll. 15–16, *P. Oxy.* I 101 (AD 142, Oxyrhynchos), ll. 20–21, *PSI* I 33 (AD 150 or 173, Philadelphia), ll. 19–20, *PSI* I 31 (AD 163–4, Arsinoites), ll. 14–15, *BGU* II 603 (AD 167–8, Arsinoites), ll. 21–22, *BGU* II 604 (AD 167–8, Arsinoites), l. 18, *P. Oxy.* III 501 (= *MChr.* 349, AD 186, Oxyrhynchos), ll. 26–27, *P. Oxy.* VIII 1125 (2nd. cent. AD, Oxyrhynchos), ll. 9–10, *P. Flor.* I 16 (AD 239, Euhemeria), ll. 13–14, *PSI* IX 1069 (AD 247–8, Oxyrhynchos), ll. 16–17, *P. Haun.* III 55 (AD 325, Dinneos Koite, Arsinoites), l. 11–12, *P. Grenf.* I 54 (AD 378, Arsinoites), l. 14, *SB* XXVI 16722 (= *P. Oxy.* XVI 1968, late 6th cent. AD, Oxyrhynchos), ll. 6–7, *P. Oxy.* LVIII 3955 (AD 611, Oxyrhynchos), l. 22.

⁸² Cf. HERRMANN, *Bodenpacht* (cit. n. 17), pp. 143–145, with lit; WOLLENTIN, *Κίνδυνος* (cit. n. 49), pp. 31–35, 61–72. These clauses are connected with the question of *remissio mercedis*, much discussed in the recent Romanistic literature: cf. among others B. W. FRIER, ‘Law, economics, and disasters down on the farm’, *BIDR* 31–32 (1989–90), pp. 237–270, R. FIORI, *La definizione della locatio conductio*, Napoli 1999, pp. 98–III, P. DU PLESSIS, *History of Remissio Mercedis and Related Legal Institution*, Rotterdam 2003, L. CAPOGROSSI COLOGNESI, *Remissio mercedis*, Napoli 2005.

⁸³ For the discussion whether this exception belonged to the *naturalia negotii*, cf. HERRMANN, *Bodenpacht* (cit. n. 17), p. 144. Cf. also πλήν πολεμίων, in *BGU* VI 1266.

⁸⁴ BRECHT, *Haftung* (cit. n. 15), pp. 60–69, refers to the principle *genus numquam perit* both the allocation of risk on the carrier in freight contracts (*supra*, n. 69) and the ubiquity of the κίνδυνος-clause in land leases. For land leases, the same idea had been emphatically asserted by MITTEIS, *Grundzüge*, p. 198. Yet, despite Mitteis, the risk to which land leases refer is obviously not the perishing of the rent, but that of a poor harvest, and this was not likely seen as a mere case of *genus numquam perit*.

the contractual practice tends everywhere to be more alert to securing the creditor's position regarding predictable risks than to limiting the debtor's liability. Yet this, by itself, does not mean that it was unlimited.

That, in fact, it was not necessarily unlimited results from a couple of ship leases that exclude liability in cases of *θεοῦ βία* – a notion familiar to Roman law scholars, due to its mention by Gaius in D. 19.2.25.6, as equivalent to the Roman *vis maior*.⁸⁵ The earliest of these contracts, point of departure of a detailed study by Éva Jakab on the risk management of the *ναύκληροι*,⁸⁶ is a ship lease from the time of Augustus, *P. Köln III 147* (30 BC–AD 15, unknown provenance), whereby the lessee undertakes ‘to return the ship, with all the appurtenances, in Alexandria within the agreed time, not damaged in any way except for wear and tear or some other excusable reason, except if some higher force (*τι βίαιον ἐκ θεοῦ*) should interfere, by means of a storm, or the ship should take fire from the land, or be robbed by pirates, which I shall make manifest’:

^β ... τὴν συνάλλαξιν ἐντὸς τοῦ χρόνου. [...] [...] [- ca. 23 -] ^γ σὺν τοῖς σκεύεσι ἐπὶ τῶν κατ[ὰ] Ἀλε[ξ]ανδρε[ίαν] ὄρμων] ἐμ μηδενὶ κατα^δβεβλαμμένα πλὴν τριβῆς καὶ σκῆψεως, πλὴν ἐὰν μὴ τι βίαιον ἐκ θεοῦ ^ε γ[έ]νη[τ]αι κατὰ χιμῶνα ἢ πυρὸς ἀπὸ γῆς πάθη τὸ πλοῖον ἢ ὑπὸ πολεμίων ^ς ἢ ληστῶν περισπασθῆ ὃ κα[ὶ] συμφανὲς καταστήσῃ. ...

Similarly, in *P. Oxy. Hels. 37* (AD 176, Herakleopolites), a charter contract, that is, a lease limited to a specific shipment, the carrier and captain (*ναύκληρος καὶ κυβερνήτης*) undertakes ‘to deliver the ship completely furnished for sailing, with sufficient crew; to leave the city on the appointed day; and to sail the ship in the accustomed manner, not at night or during tempests, bringing it to moor each day in designated safe

⁸⁵ Cf. R. MASCHKE, *Die Willenslehre im griechischen Recht*, Berlin 1926, pp. 63–69; A. STEINWENTER, ‘*Vis maior* in griechischen und koptischen Papyri’, in *Symbolae Taubenschlag I*, Warszawa 1956, pp. 261–271; W. DAHLMANN, ‘*H βία im Recht der Papyri*’, Köln 1968, pp. 48–60; C. ARMONI, *P. Heid.* IX, p. 66. The term hardly needs explanation, cf. already *Codex Hammurabi* § 249, *infra*, n. 137; *vis divina* also in D. 39.2.24.4.

⁸⁶ Éva JAKAB, ‘Risikomanagement bei den *naukleroi*’, [in:] *Antike – Recht – Geschichte: Festschrift P. Pieler*, Wien 2008, pp. 73–88, with lit.

harbours, with the proper care’;⁸⁷ all this ‘except if due to some higher force (*Διὸς βία*), something should happen for some cause, either fire from the land, or a storm, or falling upon thieves, which, once made manifest, shall free the *ναύκληρος* and his crew from liability’:

ἴ⁵ ... παραστήσι[ς δὲ τὸ πλοῖον ἐξηρ]τισμένον πρὸς τὸν πλοῦν σὺν τῇ αὐτάρκῃ ναυτ[ια], τὸν δὲ ἀπόπλου ἀπὸ τῆς ἴ⁶ πόλεως ποιήσῃ τῇ ἐξεστῶσῃ ἡμέρᾳ καὶ πλεύσῃ τὸν πλοῦν εἰθισμένως οὐ νυκ[τοπλοῶν οὐδὲ χιμ]ῶνος ὄντος, προσορμίζων δὲ καθ’ ἐκάστην ἡμέραν ἐπὶ τῶν ἀποδεδιγμ[ε]ῶν καὶ ἀσφαλεστάτων ὄρμων ταῖς καθηκούσαις ὥραις, πλὴν ἐάν, ὃ μὴ γεί[νοιτο, ἀπὸ Διὸς βί]ας αἰτίον τι σύμβη ἢ πυρὸς ἀπὸ γῆς ἢ χιμῶνος ἢ κακούργων ἐπιβα[λ]λόγτων, ὃ ἴ⁸ συνφανές ποιῆσας ἀνεύθυνος ἔσῃ σὺν καὶ τῇ ναυτία. ...⁸⁸

These two contracts were published decades after Taubenschlag’s death. Yet, the clause *χωρὶς θεοῦ βίας* appears also in a document known to him, *P. Oxy.* xxii 2347 (AD 362, Pela, Oxyrhynchites), l. 11, a contract whereby a surety guarantees the duty to return a leased ship.⁸⁹ Taubenschlag mentions this papyrus with some wonder, as if it anticipated an exception that otherwise would appear in the papyri only after Justinian. In truth, as we now know, the clause is attested throughout the whole Roman Era, in all sorts of *μισθώσεις*: together with the charter contracts and ship leases just considered,⁹⁰ work contracts for performers (*P. Oxy.* xxxiv 2721, AD 234, Oxyrhynchites, l. 24, and *P. Oxy.* lxxiv 5015, 3rd cent. AD, Thosbis, Oxyrhynchites, l. 21), and apprenticeship contracts (*SB* xxiv 16320 = *P. Kell.* i 19 a, Appendix, AD 293–304, Kellis, Oasis Magna, l. 18).

⁸⁷ On these cautions, cf. MEYER-TERMEER, *Haftung* (cit. n. 64), p. 55, and p. 71, n. 90; C. ARMONI, *P. Heid.* ix, p. 71. These rules go back to the Ptolemaic legislation, cf. *P. Hib.* ii 198 r, col. v (242 BC, Arsinoites), ll. 121–122. For *προσορμίζω* as ‘mooring’, cf. A. CONNOLLY, ‘The meaning of *ἀνορμίζω* and the possible *addendum lexicis ἀνορμέω*’, *ZPE* 86 (1991), pp. 35–40.

⁸⁸ Cf. MEYER-TERMEER, *Haftung* (cit. n. 64), pp. 117–118, and IDEM, review of Julie VÉLISAROPOULOS, *Les naucleres grecs*, *TR* 50 (1982), p. 216; S. VINSON, *The Nile Boatman at Work*, München 1998, pp. 44, 62, 83; Bärbel KRAMER & D. HAGEDORN, *P. Heid.* iv, pp. 201–202.

⁸⁹ DAHLMANN, *Βία* (cit. n. 85), pp. 54–55; P. J. SIJPESTEIJN, ‘*P. Oxy.* xxii 2347 Reconsidered’, *BASP* 15 (1978), pp. 225–226.

⁹⁰ Cf. also the freight contract *P. Laur.* i 6 (AD 98–103, unknown provenance), *supra*, pp. 47–48.

It is very commonly assumed that *vis maior* would have always exonerated the debtor, whether specifically stipulated or not;⁹¹ as far as I know, there is no evidence to support this conjecture.⁹²

The stipulation of an amount of money for the received property, that we have already considered for deposit (*supra*, pp. 39–41), is not infrequent in lease contracts. The preserved instances show a great diversity, which cannot be reduced to a uniform scheme.⁹³ In SB XII 11298 (= *P. Amst.* I 41, ll. 1–44, 9–8 BC, Ptolemais Evergetis), the owner has the right to choose between the leased sheep or their market value, to be then determined.⁹⁴ The same right is stipulated in *P. Oxy.* IV 729 (AD 137, Oxyrhynchos), for the animals included in a vineyard lease, but together with an initial estimation of 2500 drachmas, so that if the final one results higher or lower the difference shall be reimbursed.⁹⁵ In these cases, since the amount was intended to be due even when the object subsisted, it is quite likely that

⁹¹ Cf. DAHLMANN, *Bia* (cit. n. 85), pp. 54–56, and, regarding freight contracts, MITTEIS, ARANGIO-RUIZ, BRECHT and JAKAB, mentioned *supra*, n. 70.

⁹² The example of the Roman *receptum*, with liability initially unrestricted, should suffice to prevent hurried assumptions in this respect. *P. Hib.* I 38 (252–251 BC, Hibeh), does not seem enough to draw conclusions for the Roman era, or even definitive ones for the Ptolemaic times, due to lack of context.

⁹³ On these contracts and the interpretative problems they pose, cf. L. WENGER, *Zum Wohn- und Wirtschaftsrecht in den Papyri*, *Festschrift für E. I. Bekker*, Weimar 1907, p. 81; BERGER, *Strafklauseln* (cit. n. 19), pp. 113–114, 163, *passim*; F. WEBER, *Untersuchungen zum gräko-ägyptischen Obligationenrecht*, München 1932, p. 154–163; HERRMANN, *Bodenpacht* (cit. n. 17), pp. 145–146; BRECHT, *Haftung* (cit. n. 15) pp. 52–56; H. KÜHNERT, *Zum Kreditgeschäft in den hellenistischen Papyri Ägyptens bis Diokletian*, Freiburg 1965, pp. 77 ss.; S. D. HENNIG, *Untersuchungen zur Bodenpacht im ptolemäisch-römischen Ägypten*, München 1967, pp. 74–76; H.-A. RUPPRECHT, *Untersuchungen zum Darlehen im Recht der graeco-aegyptischen Papyri der Ptolemäerzeit*, München 1967, pp. 99–101; VON BOLLA, *Tiermiete* (cit. n. 13), pp. 82–93; J. HENGSTL, ‘Die Ἀθάνατος-klausel’, in *Pap. Congr.* xv, Bruxelles 1979, pp. 231–237.

⁹⁴ τοῦ δὲ χρόνου πληρωθέντος [ἀποδότωσαν] οἱ μεμισθωμένοι τὰ πεντήκοντα πρόβατα καὶ τὰς δύο αἰγὰς [ὕγιη ἀσινῆ εὐ]τροφοῦντα τέλεια τὰ μὲν πρόβατα... σὺν πόκοις ἀλλὰ δὲ τὸ... [–ca. ? – τ]ὸ δὲ λοιπὸν... ἠ ἐκάστου ἀργυρίου δραχμῆ. [τῆς ἐκλ]ογῆς οὐσης τῶι Γαίωι ἔχειν ἔαν αἰρήται τὰ πρόβατα... [–ca. ? –]ν τιμὴν ἐν τῇ ἀγορᾷ... (ll. 22–27). Cf. HENGSTL, ‘Ἀθάνατος’ (cit. n. 93), pp. 234–235.

⁹⁵ τὰ <δὲ> [δέο]ντα κτήνη παρὰ τῷ ὑδροπαρόχῳ βόας πέντε καὶ μόσχους τρεῖς παραλήμψονται οἱ αὐτοὶ μεμισθωμένοι ἐν συντιμῆσει τῇ εἰκάδι τοῦ [Φαῶφι τοῦ τρίτου καὶ

it was equally intended to be due if it had perished, irrespective of the debtor's fault.

Other contracts do not grant the owner a right to choose, but merely establish the duty of the lessee to pay the price of the unreturned items. In *P. Oxy.* II 278 (= *P. Lond.* III 795 *descr.* = *MChr.* 165, AD 17, Oxyrhynchos), for instance, the lessee of a mill 'shall restore it safe and undamaged in the condition in which he received it, or else pay its value as agreed upon, namely a hundred drachmas of silver' (plus the rent augmented by half for each month of delay).⁹⁶ In *BGU* III 912 (AD 33, Soknopaiu Nesos), an ass and a foal are leased at a valuation of 120 and 48 drachmas, and are to be returned 'well nourished, healthy and undamaged, or else the lessee shall pay the prices as fixed above'.⁹⁷ Similarly, the lessees in *PSI* VIII 961 A (= *Sel. Pap.* I 45, AD 176, Ptolemais Evergetis) receive twenty three brood geese, valued at 920 drachmas; in one year they are bound to return the geese, or else pay the 920 drachmas of the valuation.⁹⁸ In these three contracts, the price had been established in

είκοστοῦ ἔτους, καὶ συ]γγράφονται τῆς συντιμ[ήσ]εως ἀπόδοσιν τοῦ λήγοντος χρόνου (ll. 16–17) ... μετὰ δὲ τὸν χρόνον τῆς μισθώσεως αἰρέσεως καὶ ἐγλογῆς οὕσης σοι τῷ Σαραπίωνι ἐὰν μὲν αἰρῇ τὴν συντείμησιν τῶν κτηνῶν λαβεῖν [– ca. 31 –] τῆς τότε ἐσομένης α[ὐ]τῶν συντείμησεως, κὰν μὲν ἐλάσσονες συντείμηθῇ ἀποδώσομεν τὸν ἰς συνπλήρωσιν τῆς προκει[μένης] συντείμησεως, ἐὰν δὲ καὶ μείζο]νος ἀποδώσεις ἡμῖν σ[ὺ] δὲ Σαραπ[ί]ων τῷ τρου... ἢ [ἴ]σον, ἐὰν δὲ αἰρώμεθα ἀλλάσσειν κτήνη ἢ πωλεῖν ἕξεσται ἡμῖν μετὰ γνώμης [– ca. 30 – τὰ ἴ]σα. (ll. 41–44). Cf. VON BOLLA, *Tiermiete* (cit. n. 13), pp. 83–84.

⁹⁶ μετὰ τὸν χρόνον ἀπ[οκα]ταστησάτωι ὁ μάνης τὸν μύλον ὑγιει καὶ ἀσυνη, οἶον καὶ παρείληφεν, ὅπου [ἐ]ὰν συντάσση ὁ Ἰσίδωρος ἐν Ὀξυρύνχων π[ό]λει, ἢ τὴν ἐσταμένην τούτου τ[ι]μῆ[ν] ἀργυρίου δραχμὰς ἑκατόν, ἑκάστου δὲ μ[η]νὸς οὐδ' ἐὰν μὴ ἀποδώι, τὸ ἐνόκιον μεθ' ἡμολίας (ll. 16–23). Cf. BERGER, *Strafklauseln* (cit. n. 19), p. 163; BRECHT, *Haftung* (cit. n. 15), pp. 55–56.

⁹⁷ ... ἐμίσθ[ω]σεν [Στοτ]ο[ή]τις ... [... Φάσι]τι ... ὄνον [θή]λειαν] τελέαν λευκόχρουν καὶ πῶλον λευ[κό]χρουν ἀξίας τῆ[ς] μ[έν] [ὄ]νου ἀργυρίου δραχ(μῶν) ἑκατόν εἴκοσι καὶ τοῦ πῶλου δραχμῶ[ν] τεσσαράκοντα ὀκτώ (ll. 5–13) ... καὶ μετὰ τὸν χρόνον παραδότω ὁ Φ[άσις] τὰ ὀνικά κτήνη ὡς καὶ παρε[ί]λη[φεν] εὐτροφουσας [ὕ]γῃ ἀ[σ]ινῇ ἢ τὰς ἐσ[τα]μένας τιμὰ[ς] ὡ[ς] π[ρό]κίται (ll. 23–26). Cf. BRECHT, *Haftung* (cit. n. 15), p. 56.

⁹⁸ χῆνες τοκάδες εἴκοσιτρεῖς οὐς καὶ παρέλαβαν τῇ ἐνεστώσῃ ἡμέρᾳ, συντετειμημένους ἀργυρίου δραχμῶν ἑνακοσίων εἴκοσι (ll. 16–18) ... καὶ μετὰ τὸν χρόνον ἐπάναγκον τοὺς περὶ Νειλάμμωνα παραδώσειν ὁμοίως ἐξ ἀλληλεγγύης τῷ Ἀματίῳ τῷ καὶ Παυλεῖν τὸν

advance: they are instances of *aestimatio* proper, or *συντίμησις*.⁹⁹ Not so *P. Oxy.* XIV 1694 (AD 280, Oxyrhynchos), a lease of a house that the lessee ‘shall return free from all dirt and filth, together with the doors and keys that he received, or, if he does not return them, he shall pay the price that they are worth’.¹⁰⁰

It is not clear, in these last four documents, if the estimation was understood as an alternative for the lessee, which he could freely choose, or as possible only when the items had perished or were damaged.¹⁰¹ In any case, they seem to consider the estimation due by the mere fact of the failed restitution, *i.e.*, irrespective of fault or intent. We cannot know if the jurisdiction would have enforced such interpretation, but the documents seem to point in that direction. And, in fact, in *P. Oxy.* II 278, this part of the contract is introduced by the statement that both the mill and the rent are guaranteed against all risks.¹⁰² Such seems also the most likely interpretation of *P. Flor.* I 16 (AD 239, Euhemeria, Arsinoites), where the lessee of a vegetable garden further receives a cow from the owner: the cow, taken at a valuation of a hundred drachmas, is not even mentioned among the items to be returned.

If this last conclusion is true, the estimation had in these contracts, as probably also in deposits (*supra*, pp. 39–41), the effect of placing the risk on the debtor. This further suggests that in the absence of estimation the debtor would not have borne the risk, *i.e.*, that his liability would not have been unlimited. Appraised leases, in sum, were very possibly intended as

προ[κει]μένους χῆνες τοκάδες εἰκοσιτρέις, [ἢ ἄ]ποδότωσαν αὐτῷ τ[ὰς τ]ῆς συντεμῆσεως ἀργυρίο(ν) δ[ραχ]μὰς ἑνακοσίας εἴκ[οσι]ι [ἄ]νυπερθέτως (ll. 20–25).

⁹⁹ Cf. also possibly *P. Cair. Zen.* III 59340 (= *SB* III 6759, 247 BC, Philadelphia), l. 14.

¹⁰⁰ καὶ ἐπὶ τέλει τοῦ χρόνου παραδότω τὴν οἰκίαν καθαρὰν ἀπὸ κοπρίω(ν) καὶ δεισῆς πάσης καὶ ἂς ἐὰν παραλάβῃ θύρας καὶ κλεῖδας ἢ ἀποτεισάτω οὐδὲν ἐὰν μὴ παραδῶ τὴν ἀξίαν τιμὴν (ll. 23–29).

¹⁰¹ Cf. VON BOLLA, *Tiermiete* (cit. n. 13), p. 86, for the second possibility, understanding the estimation as established in the interest of the owner (whom she further grants the right to choose, p. 85, unduly extending to this case the system stipulated in the documents mentioned *supra* in nn. 94 and 95). For the first possibility, cf. HENGSTL, ‘*Ἀθάνατος*’ (cit. n. 93), p. 236.

¹⁰² ἀκίνδυνος δὲ ὁ μύλ[ος] καὶ τὸ ἐνοίκιον παν[τὸ]ς κινδύνου (ll. 15–16).

contracts with unrestricted liability, but they are very far from supporting Taubenschlag's theory.



This – necessarily incomplete – review of the abundant trove of lease contracts preserved in the papyri confirms our initial scepticism regarding Taubenschlag's rule of unrestricted liability. Although land leases frequently impose on the tenant an explicit assumption of risk (pp. 49–50 and n. 81), this is not referred to *periculum rei* but to the rent, that is not to be affected by a poor harvest. As far as *periculum rei* is concerned, it is not rare to find liability for *vis maior* (θεοῦ βία *vel sim.*) explicitly excluded (pp. 51–52): cf. the ship leases in *P. Köln* III 147, and *P. Oxy.* XXII 2347; the charter contract in *P. Oxy. Hels.* 37; the work contracts for performers in *P. Oxy.* XXXIV 2721 and *P. Oxy.* LXXIV 5015; and the apprenticeship contract in *SB* XXIV 16320. Occasionally, instead, the contract explicitly places the risk on the lessee (*P. Oxy.* II 278, *supra*, n. 102, also *SB* V 8086, *infra*, p. 61) or, what probably was intended to have the same effect (pp. 53–55), the duty to pay for the unreturned property its value (*P. Oxy.* XIV 1694) or a predetermined estimation (*P. Oxy.* II 278, *BGU* III 912, *PSI* VIII 961 A, *P. Flor.* I 16), or even the duty to pay the market value to the lessor who chooses to claim it instead of the item (*SB* XII 11298, *P. Oxy.* IV 729). From these possible instances of *periculum debitoris* a general rule does not result, though; in fact, they would rather suggest that the lessee would not have carried the risk were it not for the specific stipulation to that effect.

7. THE ΑΘΑΝΑΤΟΣ-CLAUSE AND THE ALLOCATION OF RISK

Among the stipulations attested in lease contracts, one still remains to be considered: the so-called ἀθάνατος-clause, present in leases of animals, typically flocks, and in wet-nurse contracts. The implications of the clause for the allocation of risk are less straightforward than usually acknowledged, and deserve careful consideration.

For the case of flock leases¹⁰³ one example will be sufficient: *SB v 8086* (= *Mél. Maspero*, p. 335–336 = *P. Chept.* 9, AD 268, Arsinoites).¹⁰⁴ It belongs to a dossier of twenty documents, from AD 260 to 305, that records the activities of two brothers, Neilammon and Kalamos, and their children, Pasis and Pabous. They all lived in the region of Theadelphia in the Arsinoites, and were regular lessees of flocks belonging to large estate owners, an activity that seems to have been for decades their main means of subsistence.¹⁰⁵

The wide social gap between lessor and lessee is manifest in the form of *hypomnema* that these leases tend to adopt. In our case, the addressee of the petition is Valeria Elpinike, a most illustrious lady who seems to reside in Alexandria, and acts through her *procurator*, the *bouletes* Aurelius Statianus. The petitioner is Kalamos, who wishes to renew the lease of a flock that he already had from the previous owner of the estate, Flavia Isidora, probably the mother of Elpinike:

¹⁴ ... βούλομαι μισθώσασθαι πα¹⁵ρὰ σοῦ ἀπὸ τῶν ὑπαρχόντων τῆ εὐσχῆ-
μ[ο]νι καὶ προσεχοε¹⁶ ἐν . . . οσι πρότερ[ον] Φλαυίας Ἰσιδώρας τῆ[ς κα]ὶ
Κυρίλλης¹⁷ πρόβ[ατα] ῥωμαλέα ἀ[θά]νατα ἀρσενικὰ [καὶ] θηλυκὰ ἐξ ἴ[σ]ου
¹⁸ ἀριθ[μ]ῶ πεντήκοντα αἶγα[ς] πέντε, ... ¹¹ ... ἐπὶ χρό¹²νον [ἐτ]η πέντε ἀπὸ
μηνοῦ Θῶθ τοῦ ἐνεστῶτος (πρώτου) (ἔτους), ¹³ φόρου [κατ'] ἔτος τῶν ἴσων
καὶ προτελουμένων ὑπ' ἐμοῦ ¹⁴ ἀργυρ[ίου] δραχμῶν ὀκτακοσίων, ἐφ' ᾧ
πάσαν ἐπιμέ¹⁵λειαν π[ο]ιῶμαι κατανέμων νομὰς καλλίστας ¹⁶ καὶ ἐπι-
[χο]ρηγῶν ὀψώνια ποιμένων καὶ τῆς καλουμένης ¹⁷ [.]. [. . . .] .ο. . το(ν)
κατ' ἔτος φόρον ἀποδώσω δ(ι') ἑξαμῆ¹⁸νον [τὸ α]ίρου ἔξ ἴ[σ]ου Φαμενώθ
καὶ Θῶθ, καὶ μετὰ τὸν ¹⁹ χρό[νον] παραδώσω τὰ θρέμματα ῥωμαλέα καλὰ
²⁰ εὐάρεσ[τ]α ἀριθμῶ πλήρες ἔνοκα καὶ ἀπὸ κού²¹ρας, δ[ι]ὰ τὸ παρελιη-
φέναι ἀθάνατα ἀκίνδυνα ²² ἐκτὸς [κι]νδύνου καὶ πάσης ἐπηρείας, ἐὰν
φαίνηται ²³ [μισ]θῶ[σαι], καὶ ἐπερωτ(ηθεῖς) ὡμολ(όγησα).

¹⁰³ Cf. VON BOLLA, *Tiermiete* (cit. n. 13), pp. 66–93; HENGSTL, 'Ἀθάνατος' (cit. n. 93), pp. 231–239, with a list of occurrences in p. 231 n. 4. More lit. in Orsolina MONTEVECCHI, *La Papirologia*, Milano 1988 (2 ed.), p. 219.

¹⁰⁴ Cf. P. COLLOMP, 'Un bail de troupeau', [in:] *Mélanges J. Maspero* II, Caire 1934–37, pp. 335–344.

¹⁰⁵ Cf. J. SCHWARTZ, 'Une famille de chepteliers au III^e s. p.C.', [in:] *Recherches de Papyrologie* III, Paris 1964, pp. 49–101.

I wish to to take in lease, from the belongings of your most illustrious ladyship, what I had already obtained as a lessee, then belonging to Flavia Isidora, also called Kyrilla: an immortal flock of sheep, male and female in equal numbers, amounting to fifty, and five goats ... for a period of five years from Thoth of the present year, and for the same annual rent previously paid by me, of eight hundred drachmas, on condition that I take all the necessary care in making them pasture in the best pastures, and in paying the wages of the shepherds and what is called [...] I shall pay the annual rent in equal semestral instalments, in Phamenoth and Thoth, and when the time has passed I shall return the animals, strong, beautiful, of good quality, integrally, sheared or not, since I have accepted them as immortal and free from all risk and all fraud, if it seems right to accept the lease request, and so after interrogation I promised.

The dossier of Neilammon and Kalamos provides ample information about these leases. Their economic logic has been deftly reconstructed by Dominic Rathbone.¹⁰⁶ The contracts show that the great estate owners, like our Valeria Elpinike, did not limit themselves to providing the flock and imposing the rent, as one might expect. They also determined the area where pasturage had to be found and the main economic purpose of the flock. This, in fact, Rathbone has argued, depended largely on the proportion between rams and ewes, that the lessees had to keep as decided by the owner: the finer quality credited to the ram's fleeces made desirable, for the production of wool, flocks with a higher proportion of rams than the one best suited for pure breeding purposes. Even the shepherds were supplied by the owner. The task of the lessees was obviously not to provide their own labour, but rather, in Rathbone's terms, their managerial skills: finding pastures, paying the shepherds' salaries, selling the produce; and – Rathbone adds – replacing the whole flock, if they were so unlucky that it succumbed to a disease.

This duty of the lessees to cover for all losses would be, in Rathbone's analysis, one of the main advantages for the owners in leasing their flocks. The function of the ἀθάνατος-clause would have been precisely to impose

¹⁰⁶ D. RATHBONE, *Economic Rationalism and Rural Society in Third-Century AD Egypt*, Cambridge 1991, pp. 202–211.

such duty on them. The immortality of the flock is the same of Xerxes' ten thousand in Herodotus' account (Hdt. VII 83). Any dead or sick animal must be replaced by another one of the same breed and sex and equally reared, so that the size and configuration of the flock remains unchanged. It would seem to follow, as Ratbhone assumes, that in the event of a disease-ridden flock the unfortunate lessee would have to replace the whole of it at his own expense. The ἀθάνατος-clause would have the effect of placing the risk on him,¹⁰⁷ as in the French 'cheptel de fer' and the German 'Eisernviehvertrag'.¹⁰⁸ The clause would be a relevant instance of Taubenschlag's unrestricted liability.¹⁰⁹

This assumption is certain when the object of the lease is an individual a limited group of individuals. In such case, the only possible meaning of the clause is that the lessee shall be equally liable whether the animal lives or dies, and whether this happens, or not, by his fault. But, significantly, the ἀθάνατος-clause seems to have been rare in leases of individual animals. The only attested occurrence is the already considered (*supra*, pp. 34–35) *P. Princ.* III 151 (after AD 341, Ibion), referred to two cows identified by their names. Here, the contract itself makes explicit that their 'immortal' nature places the loss on the lessee:

ἴ βούλομαι μισθώσασθαι παρ' ὑμῶν ἐκ ἴ τῶν ὑπαρχόντων ὑμῶν [τ]ὰς δύο
 ἴ ἀθανάτου[ς], μία μὲν τελειαν φυραν ἴ ὀνόματι Εἰσά[ρ]ιον, ἡ δὲ ἑτέρα δ[.]ις
 λευ[κ]ή ὀνόματι Τεσευρις ... ἴ¹³ ... ἐπὰν δὲ ὀμῆ γίνῃ¹⁴ το θάνατος ἐκβῆ ὄντος
 πρὸς ἐμέ ἴ¹⁵ τὸν μισθούμενον ...

¹⁰⁷ In this sense, resolutely, also HENGSTL, 'Ἀθάνατος' (cit. n. 19), p. 238.

¹⁰⁸ The parallel between the Greek and the old Germanic tradition reaches an uncanny affinity in the metaphors employed by both: the rule 'Eisern Vieh stirbt nicht' echoes the Greek ἀθάνατος, and 'Eisernviehvertrag' seems prefigured in the problematic ζῶον σιδήραιοι of *SPP* XX 217: cf. Th. F. BRUNNER, 'Σιδήραιοι: *SPP* XX 217', *ZPE* 79 (1989), pp. 281–282, with lit.

¹⁰⁹ TAUBENSCHLAG, in fact, goes even further, cf. *The Law* (cit. n. 47), p. 369: 'The hirer was bound to return the livestock in the same condition as he had received it. He was therefore responsible for casus whether the ἀθάνατος clause was inserted or not'. Against this assumption, rightly, VON BOLLA, *Tiermiete* (cit. n. 13), p. 65 and n. 6.

I wish to lease from you two immortal (cows) belonging to you, one full-grown, tawny, named Isarion, the other ... white, named Teseuris ... If death occurs, which I pray may not happen, the loss falls upon me, the lessee ... ¹¹⁰

The same implication, although generally accepted, is far from certain when the object of the lease is a flock. The Roman legal sources, for instance, tell us that the usufruct of a *grex* equally comprised the duty to replace the dead animals with new ones;¹¹¹ and yet under Roman law the liability of the usufructuary did not comprise *vis maior*: the usufructuary of a *grex* would not be held liable if the whole of it perished from a disease without his fault.¹¹² When referred to a flock, the ἀθάνατος-clause does not impose a specific standard of liability: it merely means that there is a limit to the part of the offspring that can be treated as produce, to be sold or sacrificed, since part of it has to be kept to replace the older animals.

¹¹⁰ JOHNSON and GOODRICH edited the papyrus as referred to two female slaves, calling attention to the anomaly of a rent in wheat, and a strikingly low one at that, and also to the provision that assigns the offspring to the lessee, as if it were a product, a provision *contra ius* under Roman law (*nota bene* AD 341). To these anomalies, the strange lack of a substantive for [τ]ὰς δύο ἀθανάτου[ς] should be added, and also the odd description of one as φυραν, *i.e.* πυρρά, and of the other as λευκή. Soon the integration [βό]ας was suggested for l. 6 instead of [τ]ὰς: C. W. KEYES, *AJP* 65 (1944), p. 187. Compared to the oddities created by the interpretation of the editors, it is much easier to accept that two cows receive proper names. *cf.*, in the same sense, the considerations of Iza BIEŻUŃSKA-MAŁOWIST, *Lesclavage dans l'Égypte gréco-romaine II. Période romaine*, Wrocław 1977, p. 92 and n. 77.

¹¹¹ I. 2.1.38: Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex fetu fructuarius summittere debet, ut et Iuliano visum est, et in vinearum demortuarum vel arborum locum alias debet substituere. recte enim colere debet et quasi bonus pater familias uti debet. – The usufructuary of a flock, as Julian held, ought to replace any of the animals which die from the young of the rest, and, if his usufruct be of land, to replace dead vines or trees; for it is his duty to cultivate in a proper manner and use them like a careful head of a family (transl. Moyle). *Cf.* Ulp. D. 7.1.68.2, Pomp. D. 7.1.69, Ulp. D. 7.1.70, and O. PALLUCCHINI, *Usufrutto del gregge*, Milano 1940. In the law of the papyri, the ἀθάνατος-clause substitutes for the lack of a legal notion of *grex*: VON BOLLA, *Tiermiete* (cit. n. 13), pp. 68–70; it is therefore unsurprising that the immortality construction is not attested in Roman law.

¹¹² Paul. D. 7.9.2. *Cf.*, for the lease of a *grex*, Caracalla's rescript in Ulp. D. 19.2.9.4: the conductor is not liable for the goats that the thieves may have robbed.

In the specific case of *SB* v 8086, though, the animals are not only ἀθάνατα but also ἀκίνδυνα ἐκτὸς [κι]νδύνου καὶ πάσης ἐπηρείας (ll. 21–22). The addition certainly makes it arguable that Kalamos was expected to bear the full risk. And yet this is the only case of an ἀθάνατος-clause reinforced by an explicit mention of risk. There is no way to determine whether the sheep are here ἀκίνδυνα precisely because ἀθάνατα, so that the risk is mentioned merely *ad abundantiam* and therefore implicit whenever the ἀθάνατος-clause is included, or, conversely, the reinforcement is added because the ἀθάνατος-clause would not have sufficed to place the risk unequivocally on the lessee.¹¹³ The latter possibility, in my opinion, cannot be dismissed.

8. THE ΑΘΑΝΑΤΟΣ-CLAUSE IN WET-NURSE CONTRACTS

Also in wet-nurse contracts the risk implications of the ἀθάνατος-clause are less simple than they would seem at first sight. A careful study will prove worthwhile.¹¹⁴

The wet-nurse usually receives her payment, or part of it, in advance. This is a form of credit, and was registered as such, for instance, by the *grapheion* of Tebtynis, where wet-nurse contracts appear always associated to a loan.¹¹⁵ This practice helps making sure that the wet-nurse will be

¹¹³ For VON BOLLA, *Tiermiete* (cit. n. 13), pp. 74–75, if the ἀκίνδυνος-clause adds something to the ἀθάνατος-clause, it must be a guarantee not merely for the number but also for the condition of the animals. The reasoning is wrong, because it ignores the possibility of a total loss of the flock: in the face of such possibility, it is not likely that the clause would be understood as limited to the event of a marginal worsening in the condition of the animals.

¹¹⁴ BERGER, *Strafklauseln* (cit. n. 19), pp. 176–179; HERRMANN, ‘Ammenverträge’ (cit. n. 19), pp. 490–499; ADAMS, *Paramoné* (cit. n. 19), pp. 146–165; VON BOLLA, *Tiermiete* (cit. n. 13), pp. 76–78; HENGSTL, *Arbeitsverhältnisse* (cit. n. 19), pp. 61–69; HENGSTL, ‘Athanatos’ (cit. n. 93), pp. 237–238; MONTEVECCHI, *CPGr.* 1, *passim*.

¹¹⁵ Cf. HENGSTL, *Arbeitsverhältnisse* (cit. n. 19), p. 60, n. 7, p. 68 and nn. 54–57, with sources and lit. This is actually not restricted to wet-nurse contracts: the records of the Tebtynis *grapheion* show a tendency to dissociate complex transactions into their basic con-

in the position of taking care of herself and the child, as contracted. The advanced payment, on the other hand, further complicates the situation if the child happens to die before the end of the nursing period. Unsurprisingly, the contracts frequently include provisions for such case. The most notorious among these is precisely the ἀθάνατος-clause. Let *BGU IV 1058* (= *MChr.* 170 = *CPGr.* 1 4, 13 BC, Alexandria) serve as illustration:

1¹⁹ ... καὶ ἐὰν συνβῆ τὸ δηλούμενον 1²⁰ παιδίον Ἀ[γαλ]μάτιον παθεῖν δι ἀνθρώπινον 1²¹ ἐντὸς τῶν δύο ἐτῶν, ἐπάναγκες τὴν Φιλῶν 1²² τέραν [ἀ]νελ[ο]μένην ἕτερον παιδίον παρασ[τ]ῆσαι 1²³ χέσθαι τὴν [δο]ύλην τροφεύουσαν καὶ παραστή[σ]αι 1²⁴ πᾶσαν [ἐφ'] ὃ ἐὰν ἀνέληται ὄντων ὄλων ἐτῶ[ν] 1²⁵ δύο μῆθ[ε] [τ]ὸ καθόλου λαβοῦσα διὰ τὸ ἀθά[ν]ατον αὐτὴν ἐπιδεδέχθαι τροφεύειν ...

And if the above mentioned child should happen to suffer something mortal within the two years, Philotera must take up another child and furnish her slave as nurse, disposing her completely (to the task) for the two years to which she has agreed, receiving nothing more, because she received an 'immortal' child to nourish.¹¹⁶

The clause is further preserved, in almost identical fashion, in another contract from the archive of Protarchos in Alexandria, *BGU IV 1106* (= *MChr.* 108 = *C. Pap. Hengstl* 77 = *CPGr.* 1 5 = *CPJ* II 146, 13 BC, Alexandria), where the contracting party is not, as here, the owner of a slave wet-nurse, but a free wet-nurse herself.¹¹⁷

stituents, as if translating complex figures into an elementary legal vocabulary. The phenomenon deserves further study.

¹¹⁶ Trans. Jane ROWLANDSON, *Women and Society in Greek and Roman Egypt: A Sourcebook*, Cambridge 1998, p. 213.

¹¹⁷ καὶ ἐὰν συνβῆ ἐντὸς [τούτων] παθῖν τι ἀνθρώπινον τὸ παιδίον, τῆ[ν] Θεοδότην ἀ[νελο]μένην ἕτερον παιδίον τρο[φ]εύσειν καὶ θηλ[ά]σειν καὶ παραστήσειν τῷ Μάρκ[ω] ἐπὶ τῶν ἔσων μηνῶν ἐννέα μῆδὲν τὸ καθόλου λα[βοῦ]σα διὰ ἀθάνατον αὐτὴν ἐπιδεδέχθαι τρο[φ]εύειν (II. 20–26) – 'And if the child should happen to suffer something mortal within this time, Theodote will take up another child and nurse it and suckle it and restore it to Marcus for the same nine months, receiving nothing more, because she received an 'immortal' child to nourish'.

The ἀθάνατος-clause has in these contracts the same basic meaning as in animal leases. The immortality of the child (always a slave) means simply that it must be replaced if it dies. In the event of its death, therefore, the child is treated as fungible, no less than the animals in a lease, even if originally the contract referred to it as an individual: the child is regarded as valuable for its owner only as a result of the nursing, inasmuch as it has been the recipient of an investment. As in animal leases, the responsibility for the replacement seems to have fallen on the wet-nurse: in fact, rather than merely ‘accept as own’, the verb ἀναίρέω seems here to have the meaning of ‘take up’ – or, more brutally translated, ‘pick up’, *i.e.* ‘from the dung heap’, as some contracts put it when describing the origin of the child. The wet-nurse is expected not merely to accept a new child, but to actually find it herself.¹¹⁸

But this is where the analogies end. The duty to replace the animals had economic consequences, since it limited the proportion of produce, while the duty to replace the child is in itself negligible, given the unfortunate abundance of exposed infants. When a flock is leased, keeping it in its received magnitude and structure is the main contractual duty, together with the payment of the rent. For the wet-nurse, instead, the child as such is the mere recipient of her true duty, which is to provide her nursing services during the agreed period. This reflects also in the way her wages are calculated: she is paid for months, not for the result. In this respect, the arrangement departs from the model of a contract for work (*locatio conductio operis*), that someone trained in Roman law might initially take for granted, and comes close to a contract of services (*locatio conductio operarum*): the remuneration, in fact, is received for the *operae*, not for an *opus factum*.¹¹⁹

¹¹⁸ Right, in this respect, HERRMANN, ‘Ammenverträge’ (cit. n. 19), pp. 495–496, against VON BOLLA, *Tiermiete* (cit. n. 13), p. 77. From the point of view of the allocation of risk, though, this is very far from being the central question that Herrmann imagines. Cf. *infra* in text and n. 120.

¹¹⁹ Cf. BERGER, *Strafklauseln* (cit. n. 19) pp. 176–177 and n. 4; VON BOLLA, *Tiermiete* (cit. n. 13), p. 76 n. 1. The classificatory obsession is redolent of Pandectism, though: so, rightly HERRMANN, ‘Ammenverträge’ (cit. n. 19), pp. 497–498. From the point of view of the Greek tradition, the wet-nurse contracts seem to have been considered a form of *misthosis*

The death of the child, therefore, is economically significant for the wet-nurse not because of the investment necessary to replace it, which is null, but because of the duty to raise the new child for the whole established term without any right to further remuneration. This latter clause clearly implies that the duty of the wet-nurse is not merely to complete the remaining contracted months, but to recommence.¹²⁰ The later the death occurs, the more burdensome this duty becomes: as many months the wet-nurse has devoted to the deceased child, so many she shall have to devote without payment to the new one. The death of the child means the loss of the investment made in it, an investment that for the owner counts in money, and for the wet-nurse in time. The ἀθάνατος-clause, forcing the nurse to recommence, places this loss squarely on her. Thus understood, the clause seems to entail full *periculum rei*: the months of unpaid work equal those invested in the deceased child, and therefore its contractual value at the moment of its death. The result is equivalent to making her liable for the death.

(cf. the use of μισθός for the wages in BGU IV 1109, l. 12, BGU IV 1058, ll. 13–14, BGU IV 1108, l. 8). The Romanistic –rather than Roman– categories of *locatio conductio operarum*, or contract of services, and *locatio conductio operis*, or contract for work, are used here merely as an instrument of analysis, without any implication that they influenced the contractual practice of the papyri. It is hardly necessary to underline that such influence is to be excluded in our case, which is based entirely on documents from the very first years of the Roman rule in Egypt. On the general lack of differentiation between contract of services and contract for work in the papyri, cf. the sensible considerations of Andrea JÖRDENS, *Vertragliche Regelungen von Arbeiten im späten Griechischsprachigen Ägypten*, Heidelberg 1990 (P. Heid. v), pp. 231–232. It must be kept in mind that the differentiation is problematic also in Roman Law, where *locatio conductio* was essentially perceived as a unitary figure; extensively on this question, FIORI, *locatio conductio* (cit. n. 82); cf. also P. DU PLESSIS, *Letting and Hiring in Roman Legal Thought: 27 BCE–284 CE*, Leiden 2012, pp. 12–14. These considerations do not detract from the value of the distinction as an instrument of analysis, when employed with the necessary awareness.

¹²⁰ Thus, rightly, HENGSTL, ‘Athantos’ (cit. n. 93), p. 237–238. In the literature, this side of the agreement has been frequently ignored: the duty of the wet-nurse has been wrongly understood as confined to the remaining period, and the ἀθάνατος-clause has therefore been presented as favourable also to her, securing her right to the wages: so BERGER, *Strafklauseln* (cit. n. 19), p. 179, VON BOLLA, *Haftung* (cit. n. 13), pp. 77–78. Also HERRMANN, ‘Ammenverträge’ (cit. n. 19), pp. 495–497, wrongly assumes that the clause refers merely to the remaining contracted period.

This is not the only possible analysis, though. *Periculum rei* proper exists only when the object of the contract has perished, making it impossible for the debtor to fulfil his task. That is not the case here: the task is still possible, because the child trusted to the wet-nurse is, in the event of its death, regarded as fungible – in the terms of the contract, as ‘immortal’, and therefore not capable of perishing. The ἀθάνατος-clause turns *vis maior* into intentional breach of contract.

One may even say that the ἀθάνατος-clause brings the contract back closer to the type of a *locatio conductio operis*, where, no matter how the wages are calculated, only the result is paid, not the working time. The pertinence of this alternative interpretation is confirmed by a third and last occurrence of the ἀθάνατος-clause, contemporary of the other two, but this time from Fayum: SB XII 11248 (= *P. Amst.* I 41, ll. 45 – 83 = *CPGr.* I 7, 8 BC, Ptolemais Euergetis):

¹⁵⁸ ... ἀλλὰ καὶ μετὰ τὸν χρόνον παραδό¹⁵⁹τωσαν τὸ θρεπτὸν ὑγειῇ καὶ ἀθάνατον καθότι συνκε¹⁶⁰χωρηκαν τῶι Ἐπιφανείῳ ἢ τὸ ἴσον ἑάνπερ διαφω¹⁶¹νήσῃ ἀναστήσουσιν ἐπὶ τὰ αὐτὰ ἔτη δύο ἢ καὶ τὰ [ἀρ]γύρια.

After the term has expired, they shall return to Epiphanion either the child as agreed upon, sound and immortal, or, in case it has died, they will take up a child of equal value for the same period of two years or (return?) the money.¹²¹

Here, the wet-nurse is given a harsh alternative: she may return her wages, if she does not wish to work without payment. As in a contract for work, if the result is not achieved, there is no right to the remuneration.¹²² From this point of view, the ἀθάνατος-clause is the equivalent to the rule *periculum conductoris* in the Roman *locatio conductio operis*. It does not impose *periculum rei* proper on the wet-nurse, because it does not make

¹²¹ The document was edited by Sophia M. E. VAN LITH, ‘Lease of sheep and goats. Nursing contract with accompanying receipt’, *ZPE* 14 (1974), pp. 145–162. Her translation has been slightly modified in harmony with the previous ones.

¹²² For the need to reimburse the received wages, cf. also the decision of the *strategos* in the trial reported in *P. Oxy.* I 37 (= *P. Lond.* III 746 descr. = *MChr.* 79 = *Sel. Pap.* II 257 = *FIRA* III 170 = *CPGr.* I 19 = *Jur. Pap.* 90, AD 49, Oxyrynchos).

her liable for the death of the child. It merely imposes on her the duty to complete the task, by raising another child for the full contracted term, or return the money. None of these two conflicting interpretations is better than the other. The fact that both are possible reflects the hybrid nature of our contract, between contract of services and contract for work. The calculation of the wages points to the former, and makes the *ἀθάνατος*-clause appear as the economic equivalent of *periculum rei*. The *ἀθάνατος*-clause itself, instead, points to the latter, and can be understood as a mere expression of the rule *periculum conductoris*.

The very same high rate of infant mortality that prompted the owners to include the *ἀθάνατος*-clause and thus secure their investment, could make such arrangement intolerable for the wet-nurse. Unsurprisingly, the papyri show milder possibilities. The clause could be time-limited, so that the duty to replace the child would rest excluded in the most burdensome case, *i.e.* when the child dies in the last months of the nursing period: *BGU* IV 1108 (= *CPGr.* I 9, 5 BC Alexandria).¹²³ A remarkably equitable agreement (*infra*, pp. 76–77) is documented in *P. Ryl.* II 178 (= *P. Reim.* II 103 = *SB* V 7619 = *CPGr.* I 14, AD 26 Oxyrhynchos): in case of death, the wet-nurse must not recommence but only complete with a new child the contracted term; she may also refuse, and then she does not need to return the wages already earned, but only those advanced for the remaining period.



The conclusions reached in this and the previous section regarding the implications of the *ἀθάνατος*-clause for the debtor's liability can be easily summarized. Only in leases referred to individual animals does the clause unquestionably imply unrestricted liability. When the object of the lease is a flock, the immediate effect of the clause is merely to impose

¹²³ καὶ ἐὰν ὁ [μ]ὴ γένο(ι)το συμβῆ τὸ παιδί(ον) παθεῖν τι ἀνθρώ(πι)νον ἐντὸς τῶν ἑξί [[πέντε]] μηνῶ(ν) κανα() τὴν Ἐρω(τάρ)ιον ἔτερο(ν) ἀνελομ(έν)ην παιδί(ον) τρο(φ)εύειν καὶ θηλ(ά)ζειν ἐπὶ το(ύ)ς ἑξί μῆνας μὴ ἑπ(ε)λάττω(ν)]] λαβοῦσα(ν) τῶν [[ε]] προ(κειμ)ένων μηνῶ(ν) δέκα¹ – ‘If the child should happen to suffer something mortal within six months, Erotarion shall take up another child to nurse and suckle it within the six months, receiving nothing more for the aforementioned ten months’. Cf. HERMANN, ‘Ammenverträge’ (cit. n. 19), p. 495.

a limit to the part of the offspring that can be treated as produce, since the renovation of the flock has to be secured; but the clause does not necessarily imply liability if the renovation fails due to *vis maior*, i.e. if the whole flock succumbs to a disease. In wet-nurse contracts, the clause displaces to the nurse the loss caused by the death of the child, greater or smaller depending on the time already invested in its nursing. It would seem, therefore, that the full *periculum rei* is placed on her; but the clause may also be understood as switching the contractual model from contract of services to contract for work, and congruously imposing a rule of *periculum conductoris* that has nothing to do with *periculum rei*.

9. FAULT-BASED LIABILITY AND RISK-BASED LIABILITY

In our survey so far (sections 4–8) we have found the following practices:

a) In loans for consumption and deposits of money, the clause ἀκίνδυνος παντὸς κινδύνου (καὶ ἀνυπόλογος παντὸς ὑπολόγου), that places the risk on the recipient, as any legal system would do in these two cases (pp. 37–39, nn. 49 and 52).

b) In land leases, the very same clause (pp. 49–51, n. 81), securing the payment of the rent regardless of the year's yield; exceptions are frequently stipulated, typically for the event of an anomalous behaviour of the Nile by defect or excess of inundation (πλήν ἀβρόχου καὶ καταβρόχου).

c) In deposits (pp. 39–41), freight contracts (p. 47) and leases (pp. 53–56), the stipulation that for the unreturned items their price shall be paid, frequently including a predetermined estimation. This clause probably had the effect of placing the risk on the recipient.

d) In deposits (p. 41) and leases (pp. 55 and 61), the occasional characterization of the object as ἀκίνδυνος, very likely also with the intention of placing the risk on the recipient.

e) In freight contracts (pp. 42–46), the stipulation τῷ ἐμαυτοῦ κινδύνῳ *vel sim.*, whereby the carrier accepts full liability for the cargo, most likely in the sense that no matter how many people are involved in the operation, everything is done under his responsibility.

f) The exception of *vis maior* (θεοῦ βία by way of storm, fire, or pirates), attested in freight contracts (pp. 47–48), charter contracts, and ship leases (pp. 51–52); θεοῦ βία figures as exemption also in work contracts for performers and apprenticeship contracts (p. 52).

g) The ἀθάνατος-clause, that in leases of animals imposes on the lessee the duty to replace the dead with the new-born (pp. 56–61), and in wet-nurse contracts (pp. 61–66) forces the nurse to replace the child and recommence the full contracted period without extra wages, thus placing on her the economic loss that the death of the child represents.

Details aside, what is most remarkable about this list is the complete absence of provisions limiting the liability of the debtor to intention or negligence. In particular, as we have seen (*supra*, pp. 33–36), the duty of care that some contracts impose was not intended as a limitation of liability. The contractual practice of the papyri seems to have ignored fault-based liability. All we find is either allocation of risks, or strict liability limited only by *vis maior*. In this respect, the materials available to us do not change the picture presented already by Vincenzo Arangio-Ruiz in his *Lineamenti del sistema contrattuale nel diritto dei papiri*:

No less characteristic are the signs of persistent strict liability ... Maschke has shown that also here Aristotle begins to draw some subjective criteria (cfr. *Eth. ad Nicom.* 3.7.1113 b), yet the seed planted by the philosopher counts among those that bear fruit only in a much later Era, whilst for centuries the practice remained on the old tracks.¹²⁴

It must be kept in mind, though, that our material consists exclusively of contracts. It can come as no surprise that the contractual practice pays more attention to avoiding foreseeable risks than to limiting the liability of the debtor, particularly when one of the parties is in the position

¹²⁴ ARANGIO-RUIZ, *Lineamenti* (cit. n. 14), p. 21. As illustration, he mentions the well known case of *P. Bas.* 2 (AD 190, Arsinoites?), where three camels are taken for transportation purposes on behalf of the government. Those who take them shall be liable unless they present their branded skin to the owner: this implies that they are exonerated in the event of death, but not if the camels are stolen; not even, it seems, in case of robbery, *i.e.* of violence, which in Roman law would have fallen under the exception of *vis maior*. Cf. the commentary by E. RABEL, *P. Bas.*, pp. 16–19.

to dictate the conditions to the other. Such is the case in most of the leases that make the bulk of our evidence.¹²⁵ In such unbalanced situations, contracts would tend to this model in any legal tradition, even in those that are familiar with fault-based liability.¹²⁶

We do not know, instead, how these matters would have played in trial: if considerations of culpability or lack thereof would have found a role in the argumentation of the litigants and in the decision of the jurisdiction, despite their absence from the contracts themselves. In certain cases, when risk is contractually imposed on one of the parties, such a stance would require to nullify the clause in question. This is not impossible, but it is all the more unlikely the more profusely attested a clause is in the papyri. In many other cases, though, the contracts leave room for fault-based liability, even if they do not refer to it. As always when dealing with the papyri, we must keep in mind that the contractual practice is a part of the law, but it is not *the* law.

Erwin Seidl has insisted that there is at least one piece of evidence confirming that fault liability was thoroughly ignored also in trial.¹²⁷ The principle of fault, he writes, is so prevalent for us that it is difficult to even imagine how liability without fault may have been enforced at all in a fair way. This makes all the more valuable the illustration he is convinced to have found in the trial between the heirs of Leonides, *grammateus* of the *bibliotheke enkteseon* of the Arsinoites, and the heirs of the *bibliophylakes* Herakleides and Patron, as reported in the already mentioned (*supra*, pp. 45–46) *P. Fam. Tebt.* 24 (= *SB* IV 7404, AD 124, Arsinoites).

¹²⁵ The unbalance between the contracting parties must not be exaggerated, though: for the lessees' margin for bargaining and litigation, cf. D. KAHOE, 'Legal institutions and the bargaining power of the tenant in Roman Egypt', *AfP* 41 (1995), pp. 232–262.

¹²⁶ In the practice of the papyri, this approach may have been further fostered by a conception that considered above all the creditor's right to execute, rather than the liability of the debtor, cf. H. J. WOLFF, *Vorlesungen über juristische Papyruskunde* (1967/68), Berlin 1998, pp. III–II5, in line with M. KASER, *Das altrömische Ius*, Göttingen 1949.

¹²⁷ E. SEIDL, 'Juristische Papyruskunde', *SDHI* 18 (1952), pp. 357–358; IDEM, 'Juristische Papyruskunde', *SDHI* 21 (1955), pp. 460–461; IDEM, *Rechtsgeschichte* (cit. n. 13), p. 176. Cf. also, among Seidl's pupils, H.-J. GESCHWINDER, *Die Gefahrtragung nach Gefahrenbeherrschung im Recht der Papyri*, Köln 1971.

The background of the trial is full of incidents, but can be reduced to a few simple lines.¹²⁸ The ruinous condition of the *bibliotheke* could only be remedied at great expense. The *bibliophylakes*, trapped by their liturgical liability, avoided for as long as they could to even receive the deteriorated documents from their predecessors, since that would charge them with the restoration costs; their only hope was to postpone the necessary investments until someone else would take over, meanwhile trying to deflect responsibility on someone else. One obvious candidate was their employee Leonides, the chief clerk that they ‘inherited’ from their predecessors. His own understandable obsession was thus not to undertake anything without making sure that it was done under the financial responsibility of the *bibliophylakes*. Unsurprisingly, years after the death of them all, nothing had been solved. In AD 124, the prefect Haterios Nepos decreed (ll. 28–31) that in six months those responsible for the transfer of the documents should get from the archives in Alexandria copies of all that was lost, or else pay one talent. As *κριτής*, to decide who was responsible, he appointed Apollonios, former *strategos*. Having heard the parties, Apollonios decided as follows:

¹⁰³ ... ἐκ τῶν λεχθέντων καὶ ἀναγνωσθέντων ἐπ’ ἐμοῦ δοκί μοι ὅσα παρέλαβεν ὁ γραμματεὺσας τοῖς βιβλιοφύλαξι |¹⁰⁴ Λεωνίδης χωρὶς τῶν βιβλιοφυλάκων, ἀναμάξεσθαι τοὺς τούτου κληρωνόμους κινδύνου τῶν κληρωνόμων τῶν |¹⁰⁵ πιστευσάντων αὐτῷ βιβλιοφυλάκων, ὅς [[α]] καὶ τοῖς πρότερον ἀκηκοάσι τοῦ πράγματος ἔδωξε ...

From what has been said and read in my presence, I deem fit that for all that Leonides, former *grammateus* of the *bibliophylakes*, took upon without the *bibliophylakes*, the expense shall be borne by his heirs at the risk of the heirs of the *bibliophylakes* who have trusted in him, as has also been decided by those who previously inquired into the matter.

The decision of Apollonios sounds anything but straightforward. Yet he declares it consistent with the decisions of his predecessors. And, in fact, these may help understand his own. Fifteen years before, the *strate-*

¹²⁸ VAN GRONINGEN, *P. Fam. Tebt.*, pp. 97–108; KRUSE, *Schreiber* (cit. n. 72), pp. 784–786; JÖRDENS, ‘Reparaturen’ (cit. n. 71), pp. 371–380.

gos Ulpus Leonides had set a very simple rule (*supra*, pp. 45–46, n. 74): what the *grammateus* does, he does at the risk of the *bibliophylakes*. Their heirs are therefore undisputably liable. Yet, their liability does not exonerate the *grammateus* from his duties. Therefore, for the documents that Leonides had taken himself, his heirs bear the duty imposed by the prefect to get from Alexandria copies of those lost or damaged. But the risk – here, the penalty of one talent imposed by the prefect for nonperformance – falls on the heirs of the *bibliophylakes*. This seems to be the meaning of ἀναμάξεσθαι τοὺς τούτου κληρωνόμους κινδύνου τῶν κληρωνόμων τῶν πιστευσάντων αὐτῷ βιβλιοφυλάκων. In the meantime, the property of them all is set by Apollonios under sequestration (κατοχή). Months later, part of the property, we learn, was executed for a total amount of one talent and three hundred seventy-five drachmas: this means that the copies of the lost documents ordered by the prefect had not been made. The property seized, we must assume, was, in conformity with the κίνδυνος rule, that of the heirs of the *bibliophylakes*.

For Seidl, this decision proves that no less than the contractual practice, also the jurisdictional practice entirely ignored fault liability and adjudicated on the basis of risk allocation. Whoever employs a *grammateus* does so at his own risk: the *grammateus* acts κινδύνου τῶν πιστευσάντων αὐτῷ βιβλιοφυλάκων. This is a decision, Seidl writes, based entirely on ‘Gefahrtragung nach der Gefahrenbeherrschung’ – ‘risk-bearing according to risk-control’: each party in a legal transaction must bear the risk of whatever falls under his ‘sphere of influence’.¹²⁹ Fault – so Seidl – is totally absent from this kind of legal reasoning.

¹²⁹ The terms introduced here by Seidl had been coined in the German legal science in the turn of the century. Their influence has never decreased. He specifically quotes one of those pioneers: R. MÜLLER-ERZBACH, ‘Gefährdungshaftung und Gefahrtragung’, *Archiv für civilistische Praxis* 106 (1910), pp. 309–476, and 109 (1913), pp. 1–143; IDEM, *Gefährdungshaftung und Gefahrtragung*, Tübingen 1912. For this analysis of liability in terms of risk allocation and ‘spheres of influence’, cf. N. JANSEN, *Die Struktur des Haftungsrechts*, Tübingen 2003, *passim*, and, as far as Roman law and the Romanistic tradition are concerned, R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, pp. 195, 371, 385, 403–404, *passim*, with lit.

Seidl's analysis is seductive, but ultimately unconvincing:

a) This is not a trial about a previously incurred liability, as Seidl seems to think, but an administrative procedure instituted by the prefect in order to determine at whose expense the necessary copies shall be done. Precisely for this reason there is no question of fault here. Fault had been a relevant issue before, though, and in many ways: everyone involved had tried to blame someone else for the calamitous situation; previous *strategoï* had declared their intention to inquire into the negligence (ἀμέλεια) incurred in the past;¹³⁰ they had even linked to Leonides own negligence their harsh answer to him, making him liable together with the *bibliophylakes*.¹³¹

b) The notion of 'risk', κίνδυνος, invoked in Apollonios' decision, is central to the whole affair. But, as already discussed (*supra*, pp. 45–46), the term here does not imply full assumption of risk, *i.e.* unrestricted liability. What is relevant in this case is not the extent of the liability, but who bears it. When we read that the *grammateus* acts at the risk of the *bibliophylakes*, this is meant merely in the sense that theirs, not his, is the final liability, restricted or unrestricted as it may be.

c) This is merely a case of vicarious liability, as Seidl well knew. The question is not whether the *bibliophylakes'* liability was absolutely unlimited, but merely whether they could be made liable for the acts of their subordinates. In Roman law, this question is famously associated with Gai. D. 19.2.25.7, *qui columnam transportandam*.¹³² What our papyrus shows

¹³⁰ Together with the *strategoï* of the other *merides*, l. 92: δοκί μοι περι μὲν τῆς ἀμελίας τοῦ προτέρου χρόνου κινή διασκέψασθαι σὺν καὶ τοῖς τῶν ἄλων μερίδων στρατηγοῖς.

¹³¹ πυνθανόμενος ἀμέλειαν σεαυτοῦ ὑποφέρεις· πρότερον οὖν τῷ σεαυτοῦ παραλήμψῃ, εἶτα καὶ τῷ τοῦ βιβλιοφύλακος (ll. 75–77) – 'Your own question proves your carelessness; so you shall take over first at your own risk, then at the risk of the *bibliophylax*' (trans. VAN GRONINGEN).

¹³² Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset. Idem scilicet intellegemus et si dolia vel tignum transportandum aliquis conduixerit: idemque etiam ad ceteras res transferri potest. – 'If someone undertakes

is that, whatever Gaius meant by *ipsius eorumque ... culpa*, the contemporary jurisdictional practice was, at least in Egypt, ready to acknowledge vicarious liability as such: the *bibliophylakes* are liable regardless of their own fault. Precisely for this reason vicarious liability is here called *κίνδυνος* (and in Gaius *periculum*): because it depends entirely on the behaviour of others.

d) As fits an administrative procedure, Apollonios decides on the basis of expediency and of previous acts and decisions, especially those establishing that Leonides acts at the risk of the *bibliophylakes* (cf. *P. Fam. Tebt.* 15, *supra*, pp. 45–46, nn. 73–75). The law as such is not invoked, nor there are any legal experts present, nor is Apollonios or even the prefect likely to have been particularly acquainted with its intricacies. But, as much as the law may have been ignored here, there was in this case no other legal order to apply but the Roman. We are dealing with a decision of the Roman jurisdiction, in a case that is not tied to any Greek contractual practice. This is enough to conclude that the text cannot be evidence of what Seidl imagined, *i.e.* a legal system that ignored fault liability: second century AD Roman law was most certainly not such legal system.

No reproach, therefore, can be made to Hans Julius Wolff for ignoring altogether Seidl's insistence in *P. Fam. Tebt.*, and, in the absence of pertinent evidence from trial, making the case for strict liability in these terms:

As far as it can be ascertained, the reasons of unfulfilment played no role yet, liability arising mechanically from mere lack of performance. Of course, this claim cannot be held with complete certitude, since we possess only contractual documents, and no relevant records of trial. In contracts one perhaps did not imperatively need to mention circumstances that would exclude liability even in case of non-performance. It is how-

the transportation of a column, and it breaks when it is raised, or while it is being carried, or when it is unloaded, he will be responsible for the damage, whether this was his fault or that of those whom he employs. There is no fault, however, if all precautions were taken which an extremely diligent and careful man would have taken. And the same rule applies when someone undertakes to transport casks or lumber, and the same may be applied to other things'. Cf. ZIMMERMANN, *Obligations* (cit. n. 129), pp. 397–401, with lit.

ever unlikely that ... liability was made dependant on the debtor's fault.¹³³

Wolff's last remark, and his 'yet', seem to me to reveal an evolutionary prejudice that remains startlingly common: in the development of the law, culpability would represent a more advanced stage than strict liability. Primitive law would show, in the words of Max Weber, 'a complete unconcern with the notion of guilt'.¹³⁴ The idea itself of an evolution of the law, that progresses through certain recognizable stages, from 'primitive' to 'modern', is to be regarded with scepticism. Quite problematic would be, on the other hand, to assign the label of 'primitive' to the law of the papyri.

As for strict liability and fault-based liability, the assumption that legal systems progress from the former to the latter was natural for those nineteenth century legal scholars under whose influence the liberal principle 'no liability without fault' had been consecrated.¹³⁵ Such assumption is much more difficult to hold nowadays, after decades of an extraordinary development of instances of strict liability, prompted by the proliferation of risks unheard of before the technological revolution of the last two centuries.¹³⁶

One example may be enough to dispel the notion that fault belongs to a stage not yet reached in Ptolemaic and Roman Egypt. In the *Code of Hammurabi* we find the following series of laws:

[§ 244] If a man rents an ox or a donkey and a lion kills it in the open country, it is the owner's loss. [§ 245] If a man rents an ox and causes its

¹³³ WOLFF, *Vorlesungen* (cit. n. 126), p. 129.

¹³⁴ M. WEBER, *Economy and Society*, Berkeley 1968, p. 647.

¹³⁵ For the roots of the modern doctrine of fault, and their connection with liberalism, cf. ZIMMERMANN, *Obligations* (cit. n. 129), pp. 1033-1035. His account is limited to delictual liability, but the doctrine itself was not.

¹³⁶ Cf. ZIMMERMANN, *Obligations* (cit. n. 129), pp. 1130-1142; JANSEN, *Struktur* (cit. n. 129), pp. 361-387, with lit.

death either by neglect or by violent treatment, he shall replace the ox with an ox of comparable value. ... [§ 249] If a man rents an ox, and a god strikes it down dead, the man who rented the ox shall swear an oath by the god and he shall be released.¹³⁷

The limitation of liability to neglect or abuse (§ 245), and the clear distinction between these, *vis maior* (§ 244) and natural death (§ 249), speak by themselves.¹³⁸ The notion of fault and its role in adjudication was not, could not be, as many still seem to believe, a late Roman invention, nor an idea beyond the reach of the Ptolemaic and the Roman jurisdictions in Egypt.

In fact, the contractual practice of the papyri offers occasional glimpses of fault liability. That it was taken into consideration at least as an abstract possibility, results, Brecht has argued, from the *κίνδυνος*-clause itself. This, not because we may assume that in the absence of the clause the debtor's liability would be restricted to fault and intent: the clause is frequently attested, for instance, in loans for consumption and money deposits, where no legal system would apply by defect a rule of restricted liability. Yet, as Brecht has pointed out, when the clause refers to specific items received by the debtor, in lease or deposit or for transportation (to mention just the cases attested in the sources), its inclusion seems to show that the alternative possibility, of a liability restricted to

¹³⁷ Martha T. ROTH, *Law Collections from Mesopotamia and Asia Minor*, Atlanta 1997 (2 ed.), pp. 127–128. *LH* 44.1–5: šumma awīlum alpam imēram īgurma ina šērim nēšum iddūkšu ana bēlišuma. *LH* 44.6–13: šumma awīlum alpam īgurma ina mēgūtīm ulu ina maḥā sim uštāmīt alpam kīma alpim ana bēl alpim iriab. *LH* 44.36–43: šumma awīlum alpam īgurma ilum imḥassuma imtūt awīlum ša alpam īguru nīš ilim izakkarma ūtaššar.

¹³⁸ For mēgūto as 'neglect', cf. M. E. J. RICHARDSON, *A Comprehensive Grammar to Hammurabi's Stele*, Piscataway 2008, p. 306. For fault-based liability in the Laws of Hammurabi, J. D. HARKE, *Das Sanktionensystem des Codex Hammurabi*, Würzburg 2007, pp. 33–35. G. R. DRIVER & J. C. MILES, *The Babylonian Laws*, Oxford 1956, p. 462, hold that in § 245, neglect and violence 'merely describe the way in which a beast usually perishes', and are not intended as a condition for the hirer's liability to return the ox safe and well, which is absolute. This seems to me a *petitio principii* supported only by the very same prejudice that these laws should at least help question. The system of *Code* § 244, 245, 249, is one of typical causes, and those of § 245 are typical of fault.

fault and intent, was at least taken into account, if only in order to exclude it.¹³⁹

But there is more than this in the papyri. Some documents provide evidence of a system that cannot be adequately described in terms of pure strict liability. This system is as yet attested only in wet-nurse contracts, and its analysis will close our study.

10. THE ΣΥΜΦΑΝΕΣ-CLAUSE

So far, we have considered the wet-nurse contracts only because of the *ἀθάνατος*-clause. If the child dies before the contract ends, the *ἀθάνατος*-clause imposes on the wet-nurse as many months of unpaid work on a new child as those devoted to the deceased one (*supra*, pp. 61–66): the economic loss is thus shifted on her. In contrast with this harsh arrangement the Oxyrhynchite *P. Ryl.* II 178 (= *P. Rein.* II 103 = *SB* V 7619 = *CPGr.* I 14, AD 26 Oxyrhynchos) is remarkably equitable:

ἰ²¹ ... ἐὰν μη τι πάθῃ ἀνθρώπινον, ὃ καὶ συνφανέ[ς γέν]ηται, ἰ²² [ἡ ὀμ]ολο-
 γούσα ἀνέγκλητος ἔστωι, καὶ ἐὰν μὲν αἰρήται ὁ Πᾶπις ἕτερον ἰ²³ [αὐτῆι]
 ἐγχειρεῖ σωμάτιον, καὶ τοῦτο θρέψει ἐπὶ τὸν ἐνλείψοντα χρόνον ἰ²⁴ [εἰ]πὶ τοῖς
 προκειμένοις, ἐὰν δὲ μὴ βούληται τοῦτο ποῆσαι, ἀποδώσει αὐτῶι, ἰ²⁵ [ὄ] ἐὰν
 φανῆι ὀφείλουσα πρὸς ὃν οὐδέπωι τετρόφευκεν χρόνον.

¹³⁹ BRECHT, *Haftung* (cit. n. 15), pp. 149–150. His careful considerations deserve to be reproduced in full: ‘Wir möchten der Ansicht zuneigen, daß dem Rechtsdenken, wie es sich in den Papyri spiegelt, die theoretische Möglichkeit einer reinen Verschuldenshaftung doch dunkel bewußt war. Den Ausdruck davon erblicken wir aber nicht in den *ἐπιμέλεια*-Zusagen, sondern in der *κίνδυνος*-Klausel, soweit sie sich ... auf vom Haftenden übernommene Sachen bezieht. Wenn nämlich hier der Eintritt eines Schadensereignisses als ‘Gefahr’ bezeichnet wird, die der Haftende bewußt auf sich nimmt, so könnte das u. E. auf ein erwachendes Bewußtsein davon deuten, daß gerechterweise nicht jeder äußere Schadentatbestand gleichmäßig dem Haftenden zur Last gelegt werden kann, m. a. W. daß zwischen Verschulden und Zufall zu unterscheiden ist, auch soweit keiner der von alters her als entlastend berücksichtigten typischen Fälle von höherer Gewalt in Frage kommt. ... Vielleicht ist die *κίνδυνος*-Klausel ... als der Ausdruck einer Rechtsordnung zu betrachten, welche die reine Verschuldenshaftung bereits als theoretisch möglich erkannt hat, sie aber nicht in den Bereich des praktischen Rechts aufnehmen will.’

If the child suffers something mortal, and this is manifest, the contracting party will be blameless, and if Paapes takes up another child to place in her care, she shall nurse it for the remaining period on the aforesaid terms; but if she does not wish to do so, she shall repay whatever she appears to owe for the rest of the nursing term.

Here, the wet-nurse is only required to complete the contracted term with a new child, and even the task of finding it is assumed by the owner. She may even refuse this, and is then allowed to keep her wages for the months she actually performed, so that only those advanced for the remaining period may be claimed by the owner.¹⁴⁰ It is significant that only in the context of an agreement so favourable to the wet-nurse attention is paid to the cause of the child's death. The *ἀθάνατος*-clause, in fact, by placing on her all the consequences of the death, on one hand guaranteed that she would do her best to prevent it, and on the other made this ultimately irrelevant for the owner. Here, instead, it is explicitly established that the wet-nurse shall be free from liability and entitled to invoke the described agreements only if the cause of the death is patent: *συμφανές γένηται*. A similar clause seems to have figured in yet another Oxyrhynchite contract, *P. Oxy.* LXXVIII 5168 (18 BC Oxyrhynchos).¹⁴¹

This same *συμφανές* provision appears very frequently in the Alexandrian *synchoreseis* referred to the effects that the wet-nurse may have received together with the child. So, for instance, in *BGU* IV 1106 (= *MChr.* 108 = *C. Pap. Hengstl* 77 = *CPGr.* I 5 = *CPJ* II 146, 13 BC, Alexandria):

¹³¹ ... ἄ τε ἐὰν λάβῃ ἢ πιστευθῇ σῶα συντηρήσῃ ¹³² καὶ ἀποδώσειν ὅταν ἀπαιτῆται ἢ ἐκτίσειν τὴν ¹³³ ἐκάστου ἀξίαν πλὴν συμφανοῦς ἀπωλήας ἧς καὶ ¹³⁴ φανεράς γενηθείσ[ης ἀ]πολελύσθω

¹⁴⁰ HERRMANN, 'Ammenverträge' (cit. n. 19), pp. 494–497, is not aware of the radical difference between this arrangement and the one set by the *ἀθάνατος*-clause: who must provide the child is not so relevant as how the term is understood, *i.e.* whether the nurse must merely complete it or recommence it.

¹⁴¹ ... τὴν δὲ [πάσαν προστ]αξίαν καὶ ἐπιμέλησαν ποιήσθω καὶ μετὰ [τὸν χρόνον παραδότ]ω αὐτῷ τεθραμμένον καὶ τετευχότα [– ca. 17 – ἐὰν μ]ή τι πάθη ἀνθρώπινον, ὃ καὶ [συμφανές – ca. 9 – καταστ]ήσει (ll. 17–21).

Whatever she receives or is entrusted with, she shall keep safe and restore when demanded or else forfeit the value of each thing, except in the case of manifest loss, which will release her if it is proved’.

In identical terms, *πλὴν συνφανοῦς ἀπωλείας, ἧς καὶ φανεράς γενηθείσης ἀπολελύσθω*, we find the clause, always referred to the items received together with the child, in *BGU IV 1107* (= *CPGr.* I 6 = *Sel. Pap.* I 16, 13 BC Alexandria), ll. 14–16, *BGU IV 1108* (= *CPGr.* I 9, 5 BC, Alexandria), ll. 16–18, *BGU IV 1109* (= *CPGr.* I 10 = *Jur. Pap.* 41, 5 BC, Alexandria), ll. 19–22, *BGU IV 1058*, l. 34 (= *MChr.* 170 = *CPGr.* I 4, 13 BC, Alexandria), ll. 31–35, and *CPGr.* I 13 (30 BC – AD 14, Alexandria), ll. 19–22. The clause is not limited to the Protarchos archive: decades later, it still figures in the very fragmentary *SB XVI 12953* (= *P. Ryl.* II 342 *descr.* = *CPGr.* I 22, AD 70–71, Alexandria), l. 27: *πλὴν [συ]μφανοῦς ἀπωλείας*. It is also attested in contracts of service, both from the Protarchos archive – *BGU IV 1126* (13 BC, Alexandria) – and in the Herakleopolites, at the end of the first century, in *P. Heid.* IV 326 (AD 98, Herakleopolites), ll. 20–21.

Not much attention has been paid so far to this provision. Preisigke referred it to items that deteriorate through use: these would be exempt from the general duty to pay the value for everything not restored. He translates *πλὴν συνφανοῦς ἀπωλείας* as ‘except wear and tear resulting manifestly from use’ (‘ausgenommen offensichtliche Abnutzung durch Gebrauch’). This interpretation has become standard.¹⁴² It is almost certainly wrong, though: suffice to note that the very same term *συμφανές* appears in *P. Rein.* II 103, and possibly *P. Oxy.* LXXVIII 5168, referred to the death of the child, which is certainly not a case of wear and tear.

Both in the clause referred to the child and in the one referred to the received items, ‘patent’ or ‘manifest’ seems to describe a cause that can be proved – and must be effectively proved to be released from liability: *ἧς καὶ φανεράς γενηθείσης ἀπολελύσθω*. For the wet-nurse, proving the cause means excluding that the loss or the death were caused by her own fault.

¹⁴² P. M. MEYER, *Juristische Papyri*, Berlin 1920, p. 135 (nr. 41 = *BGU IV 1109*); HERRMANN, ‘Ammenverträge’ (cit. n. 19), p. 492; HENGSTL, ‘*Ἀθάνατος*’ (cit. n. 93), p. 233.

That *συμφανές* refers to something capable of being proved, thus exonerating the debtor, is confirmed by two documents that we have already considered (*supra*, pp. 51–52). The earliest, contemporary with most of our wet-nurse contracts, is *P. Köln III 147* (30 BC – AD 15, unknown provenance), where the lessee of a ship undertakes to return it without delay or pretext, except if some higher force should interfere, such as a storm, or the ship should take fire from the land, or be robbed by pirates, ‘which I shall make manifest’: ὁ κα[ί] συμφανές καταστήσω (l. 7). Around two hundred years later, a similar provision is included in *P. Oxy. Hels. 37* (AD 176, Herakleopolites), a charter contract whereby the ναύκληρος shall be held liable, unless due to some higher force something should happen for some cause, either fire from the land, or a storm, or falling upon thieves, which, once made manifest, shall free from liability the ναύκληρος and his crew: ὁ συμφανές ποιήσας ἀνεύθυνος ἔσῃ σὺν καὶ τῇ ναυτίᾳ (ll. 7–8).¹⁴³

These last two contracts are handbook instances of strict liability: the debtor is held liable unless *vis maior* is proved. The case of the wet-nurse, both regarding the child and the received items, is very different. The liability rule that emerges there from the *συμφανές*-clause is alien to our distinction between strict and fault liability. The burden of proof falls on her, as is characteristic of strict liability. Yet, she is not confined to a pre-determined set of exemptions: the possibilities are not limited to *vis maior*, and certainly not to wear and tear; theft, damages caused by a third party, or any other instance of so-called ‘*casus minor*’ are equally possible defences. The cause needs only to be ‘manifest’, *i.e.*, capable of being proved. By actually proving it the wet-nurse proves her own absence of fault. These traits depart from the strict liability model, and come closer to an implicit fault-liability system with shifted burden of proof.

These implications of the *συμφανές*-clause have been practically ignored, with two notable exceptions. In a brief remark in his *Grundzüge des römischen Privatrechts*, Ernst Rabel pointed out to the *συμφανές*-clause

¹⁴³ Cf. also *UPZ II 162* (= *P. Tor. Choach. 12, 117 BC*, Thebes), col. v, l. 33: ὥστε ὁμολογουμένως ἑαυτοῦ καταμαρτυροῦντα συμφανές καθεστακέναι ... – ‘so that confessedly by his own testimony he had made it clear that...’. Again, *συμφανές* is here referred to something that results proved in trial.

as an instance of attenuated guarantee for the items, tending towards fault liability.¹⁴⁴ This fleeting remark, in turn, caught the attention of Christoph Heinrich Brecht, who subjected it to a careful reconsideration, and eventually dismissed it.¹⁴⁵ In his opinion, the clause defined merely one further instance of strict liability, since *vis maior* was the only exception that it would truly admit. His argumentation can be summarized in three points, none of which is, in my opinion, convincing:

a) The term ἀπωλεία may be used for accidental or even guilty losses, but it typically refers, he claims, to those that are inexorable, such as the corruption that organic substances suffer by nature. This claim is not supported by the sources.¹⁴⁶

b) *P. Ryl.* II 178 refers the clause to the child ‘that suffers something mortal’: ἐὰν μη τι πάθῃ ἀνθρώπινον, ὃ καὶ συμφανέ[ς γέν]ηται (l. 21). It is therefore confined, Brecht argues, to natural death, which was *vis maior* also in Roman law; if, instead, the child had been stolen, the wet-nurse would be held liable; this confirms, Brecht argues, that the *συμφανές*-clause in general excludes only *vis maior*. The last assumption is unwarranted: when referred to the items received by the wet-nurse, the clause does not contain any such restriction. In truth, the restriction is questionable even in *P. Ryl.* II 178: it is far from certain that only death due to

¹⁴⁴ E. RABEL, *Grundzüge des römischen Privatrechts*, Basel 1955 (2 ed.), p. 137 n. 1: after mentioning several instances of unrestricted liability (that he seems to present as the rule in the contractual practice of the papyri), he adds: ‘Dagegen Abschwächung der Garantie zur Verschuldenshaftung in den alexandr. Ammenverträgen BGU. 1058, 1106–1109, Arbeit-santichrese BGU. 1126, indem der “deutliche” Untergang ausgenommen wird.’

¹⁴⁵ BRECHT, *Haftung* (cit. n. 15), pp. 48–52.

¹⁴⁶ In Aristotle, whom BRECHT chooses as example, the term appears four times. Out of these, only one (*Probl.* 916a, l. 26) refers to the inevitable decay of perishable things; another, to the perishing and destruction of nations (*Meteor.* 351b, l. 11). The other two concern prodigality as a way of ruining oneself (*EN* 1120a, l. 2), and the loss caused by theft (*Probl.* 952b., l. 26). Things look similar in the Christian canon: in *Philipp.* 3:19 we find ‘their end is destruction’, in *2 Petr.* 2:3 ‘their destruction is not asleep’, referred respectively to the enemies of the cross and to the false prophets; in the Gospels, instead, the term appears for the waste of the perfumed oil, in *Matt.* 26:8 and *Mark* 14:4, hardly an instance of BRECHT’s preferred meaning.

disease would exonerate the wet-nurse, not also death caused without her fault by accident or by a third party.

c) When the loss comes from accident or from a third party, *e.g.*, a thief, it is practically impossible to prove that it was not due to one's own fault, Brecht contends; only in case of *vis maior*, *e.g.* fire, would such proof have been feasible in practice. In truth, if absence of fault had to be proved, it would be equally difficult in both cases, fire and theft, to use Brecht's examples. If, instead, the wet-nurse were not asked to prove absence of fault, but merely the fact of the theft or the fire, as I have argued above, then the former would be as feasible as the latter.

There is, in sum, no reason to assume that the *συμφανές*-clause was restricted to *vis maior*. It actually does not appear restricted to any pre-determined set of exemptions. The wet-nurse would be held liable only if she could not point to an external cause for the loss and prove it in trial. Merely the burden of proof separates this from a system of fault liability.

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