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PENALTY CLAUSES IN COMMODITY LOANS
AND SALES ON DELIVERY

It is self-evident and fully acknowledged since an early date in the study of Greek documents from Egypt (see A. Berger, *Die Strafklausen in den Papyrusurkunden*, pp. 52–54 and *passim*) that it was the chief purpose of penalty clauses in ancient contracts to enforce the fulfilment of obligations by penalizing non-performance. In loans (see H. Kühnert, *Zum Kreditgeschäft in den hellenistischen Papyri Ägyptens*, pp. 79–80 and *passim*), including loans of commodities, the penalty is directed specifically against failure to repay within the period of time designated in the contract; this is the case as well in sales on delivery, which, like commodity loans, call for the delivery of specified amounts of goods at specified times. Less well described in modern scholarship is the degree of variation in the penalty clauses attached to different sorts of contracts and in different periods of Greco-Roman Egypt.

Loans of commodities and sales on delivery, for example, have a great deal in common. Both describe an obligation (most often with the formula ὁμολογῶ ἔχειν ... καὶ ἀποδώσω or the equivalent in either subjective or objective form; in the earliest period, with the formula X ἐδάνεισε ... Y ἀποδότω or the equivalent) to deliver goods at a specified time. Goods whose delivery is promised on more than one example of either of these two sorts of documents (chiefly wheat, barley, beans, vegetable seed, olyra, hay, and wine) invariably appear in the other sort as well. Delivery is called for in the season of harvest (among published documents I find wheat delivery called for in the month of Payni in 15 out of 16 sales on delivery where the date of delivery is preserved; of loans of wheat, 42 out of 61 are to be repaid in Payni), while the contracts themselves are drawn up from less than one to more than nine months earlier in both sorts of document. Executive clauses are normal in both (τῆς πράξεως σοι γενομένης ...); penalty clauses in either may be included or omitted.

The proportions of commodity loans and sales on delivery incorporating or omitting penalty clauses seem roughly comparable with each other in varying from one period to another; of examples sufficiently well-preserved to permit the determination, they are as shown in Table 1.

It appears that the penalty clause was regarded as a necessary part of both kinds of contract during the Ptolemaic era, while only optional—and resorted to with

ever diminishing frequency—during the Roman period. It may be that the function of the penalty clauses was at least partly fulfilled by statutory provisions under the Roman administration. The figures for the Roman era suggest that factors in that period favored the inclusion of penalty clauses in sales on delivery, though still in a minority of examples, more than in loans of commodities.

Table 1

	Ptolemaic		Saec. I-II-III		Saec. IV-V-VI	
	with penalty	without	with penalty	without	with penalty	without
Sales	9	0	12	6	11	21
Loans	43	0	13	9	3	16

Moreover, the contents of the penalty clauses differ in the two sorts of contract during the first centuries of our era. Contracts of sale on delivery in that period either omit the penalty clause (6 examples) or specify a late-payment penalty of *hemion* ($1\frac{1}{2}$ the amount due if delivered on time, 5 examples), or *duplum* (twice the amount due if delivered on time, 5 examples). In a similar fashion, contracts of commodity loans sometimes omit the penalty clause (9 examples) or specify a late-payment of *hemion* (4 examples) or *duplum* (2 examples); one example calls for a *διάφορον ἐκ τρίτων* ($1\frac{1}{3}$ the amount due if delivered on time). But 4 out of 13 penalty clauses in the contracts of loan specify as penalty for late payment the highest going price for the goods undelivered, while two call for payment either of a specified sum or the highest going price for the goods undelivered. At issue in these cases, clearly, is not so much enforcement of timely compliance with the contract—since the “penalty” specified is equivalent to, rather than greater than, the value of the goods whose delivery is overdue—but the capability of the

Table 2

	Ptolemaic			Saec. I-II-III			Saec. IV-V-VI		
	Cash	Cash or Kind	Kind	Cash	Cash or Kind	Kind	Cash	Cash or Kind	Kind
Sales	9	0	0	9	2	3	8	0	0
Loans	35	2	4	7	0	6	0	0	3

obligation to be met in cash rather than in kind. One contract of loan without a penalty clause (P. Fay. 90) seems to aim at the same goal by requiring that the creditor may choose between repayment in kind and in cash. Let us compare the terms of the penalty clauses in sales on delivery and commodity loans for the pro-

portions of each which call for late payment to be delivered in kind and in cash. In the case of contracts for sale on delivery, the majority of penalty clauses sufficiently well-preserved to permit the determination call for late payment in cash rather than in kind. Cash payments are called for exclusively in the Ptolemaic period and again from the fourth century of our era; in fact, I find no exceptions later than A.D. 130. Of the three early Roman contracts whose penalty clauses call for *hemiolion* without specifying cash (P. Ath. 12, P. Mey. 7, P. Mil. 8), two (P. Ath. 23 and P. Mey. 7) require also interest—*τόκοι*—for late payment, and it is quite possible that the scribe understood the *hemiolion* to refer to the cash value of goods undelivered, rather than, as I have indicated in the chart above, to $1\frac{1}{2}$ the quantity (plus interest, however that might be determined in such case) of goods due.

The case in penalty clauses in contracts for loans of commodities is rather different. The great majority in the Ptolemaic period either require or allow for late payment in cash, and are therefore comparable with the penalty clauses on contracts of sale on delivery during that period. In the Roman era, however, late payment in kind is called for, at first equally often as late payment in cash, and at last exclusively. In this period, therefore, the characteristics of penalty clauses in these two sorts of contracts are increasingly divergent.

It seems likely that the different terms of the penalty clauses in these two sorts of documents during the Roman period are related to the differences in the transactions described upon them. Though both kinds of contracts promise delivery of goods, one—sale on delivery—acknowledges receipt of cash; the terms of the penalty clauses included in such contracts also refer to cash. The other kind of contract—commodity loan—acknowledges receipt of goods; penalty clauses in such contracts increasingly refer to goods. The tendency during the Roman period was for each kind of contract to specify penalties, if any, in the same material as that whose receipt is acknowledged within it. This was a marked departure from Ptolemaic practice, which made no such distinction between the two kinds of contract. The unpunitive “penalties” of cash equivalent to the value of goods undelivered in early Roman contracts for commodity loans may represent confusion at the time of transition.

I have elsewhere argued (*Chronique d'Égypte* L, 1975) that, as the overwhelming majority of post-Ptolemaic contracts of sale on delivery (52 out of 61 published examples sufficiently well preserved to permit the determination) record a cash “price” either in a penalty clause or in the acknowledgement of receipt within the body of the contract, but not in both places, it was evidently the intention of the Roman system of jurisprudence that a return of this “price” might serve to cancel the obligation in place of delivery of the goods promised in the contract. This is no doubt the meaning of the Gnomon, 104:

[A]τρώγητα γενήματα οὐκ ἐξὸν πωλεῖν ο[ὐ]δὲ γένημα ἀνεπίγραφον ... not that contracts for the sale in advance of future commodities might not be drawn up, but only that the deliveries promised in such contracts could not be enforced. Evidently

the most that the creditor could apply for in case of default was a cancellation of the sale by return of the price whose receipt had been acknowledged by the debtor. No such limitations affected the validity of contracts for loans of commodities, of course, and this difference in the enforcement of the two kinds of contracts under consideration no doubt accounts not only for the figures in Table 2, but for those in Table 1 as well, where contracts for commodity loans include penalty clauses significantly less often than do contracts for sales on delivery during the Roman period.

Table 3

	Ptolemaic		Saec. I-II-III		Saec. IV-V-VI	
	specified sums	market rates	specified sums	market rates	specified sums	market rates
Sales	8	2	0	6	8	2
Loans	37	5	0	4	0	0

The terms of the penalty clauses in both sorts of contracts exhibit a chronological development in the manner in which cash penalties were computed.

In the Ptolemaic period, penalty clauses generally specify a sum of money per unit of goods undelivered when due; in the early centuries of our era, the amount of the cash penalty is made dependent on the market value of goods undelivered when due; in the latest period, a lump sum is given as the equivalent of the whole amount of goods due. It appears that, at least in the early centuries of Roman rule, a lump sum was acceptable for the extinction of the obligation to deliver goods only if that sum was recorded in the body of the contract as the price received for those goods. Penalties, by contrast, could only be assigned in terms of the goods whose delivery was promised in the contract—their cash value at market rates when due, or a proportional increase over the amount of goods promised or their cash value.

In summary, it is chiefly noteworthy that the penalty clauses in Greco-Roman documents calling for delivery of commodities served two purposes: not only the well-recognized function of promoting compliance by penalizing non-performance, but also that of providing a cash equivalent to the goods whose delivery these contracts promise as an alternative way of meeting the obligation incurred; the manner in which these purposes are served varies from one period to another, and from one class of documents to the other.

In the Ptolemaic era, a penalty clause specifying a cash price per unit of goods undelivered was a regular part of contracts promising delivery of commodities, whether of sale or of loan. As both kinds of contracts regularly require delivery of new crops at the season of harvest, the commodities promised were as yet non-

existent at the time the obligation to deliver them was contracted; administrative procedure seems to have required an alternative method of meeting the obligation, especially, no doubt, in case of crop failure. Without independent evidence regarding the market value of the commodities specified in a particular contract at the time it was drawn up, the degree in which these "penalties" were actually punitive cannot be determined.

In the early centuries of Roman rule, all penalties calling for cash payment in lieu of goods undelivered when due both in contracts of loan and of sale are expressed in terms of going market rates, rather than in terms of specified sums acceptable to both parties. Otherwise, however, contracts for loan of commodities were no longer enforced in the same way as contracts of sale on delivery. In the latter, no doubt on the principle that sale of unrealized goods could not be enforced, an ascertainable cash "price" was recorded in every contract whose return might extinguish the obligation to deliver; this "price" might be recorded in the body of the receipt as a specific sum rather than in a penalty clause, where it could only be expressed in terms of the market value of the goods whose delivery had been promised. As a result penalty clauses were no longer a necessary part of the contract of sale on delivery and were in fact resorted to ever less frequently. Where penalty clauses do appear in contracts of sale on delivery in the Roman period, they are clearly punitive, requiring more than the cash value at going prices of the goods undelivered. Without independent evidence regarding the prices of the commodities involved at the time the contract was drawn up, however, it cannot be determined whether the "price" whose receipt is acknowledged in the body of a contract of sale on delivery represents the actual amount of money transferred, or a sum elevated over that amount by the incorporation of interest or penalty.

In contracts for loans of commodities, on the other hand, Roman practice required no reference to cash at all; presumably, administrative procedure allowed for a regular conversion, probably in terms of market prices. Of the penalty clauses in commodity loans at this period, only those specifying an elevated amount of goods in late payments are truly punitive; those calling for a cash equivalent generally specify the mere market value at going rates.

In the later centuries of Greco-Roman Egypt, contracts for loans of commodities generally fail to include penalty clauses, suggesting that administrative procedures tended to enforce prompt delivery, possibly by means of a statutory penalty, and provided automatically for conversion to cash, probably at market rates. Such penalties as are recorded are truly punitive, calling for increased amounts of goods in case of late delivery. Contracts for sales on delivery, on the other hand, record a "price" in either the body of the contract or in a penalty clause, suggesting that sale of future commodities was still regarded as unenforceable. In either place, the price recorded is given as a lump sum—an indication of the

degree in which a cash payment was regarded not as a substitute for the goods promised, but as a withdrawal from the contract by means of return of the price paid. In the absence of independent evidence of the price of the commodity involved at the time a contract was drawn up, it cannot be determined whether such a "price", whether recorded in penalty clause or in the body of the contract, is a mere cash equivalent of the goods undelivered or an inflated punitive sum.

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