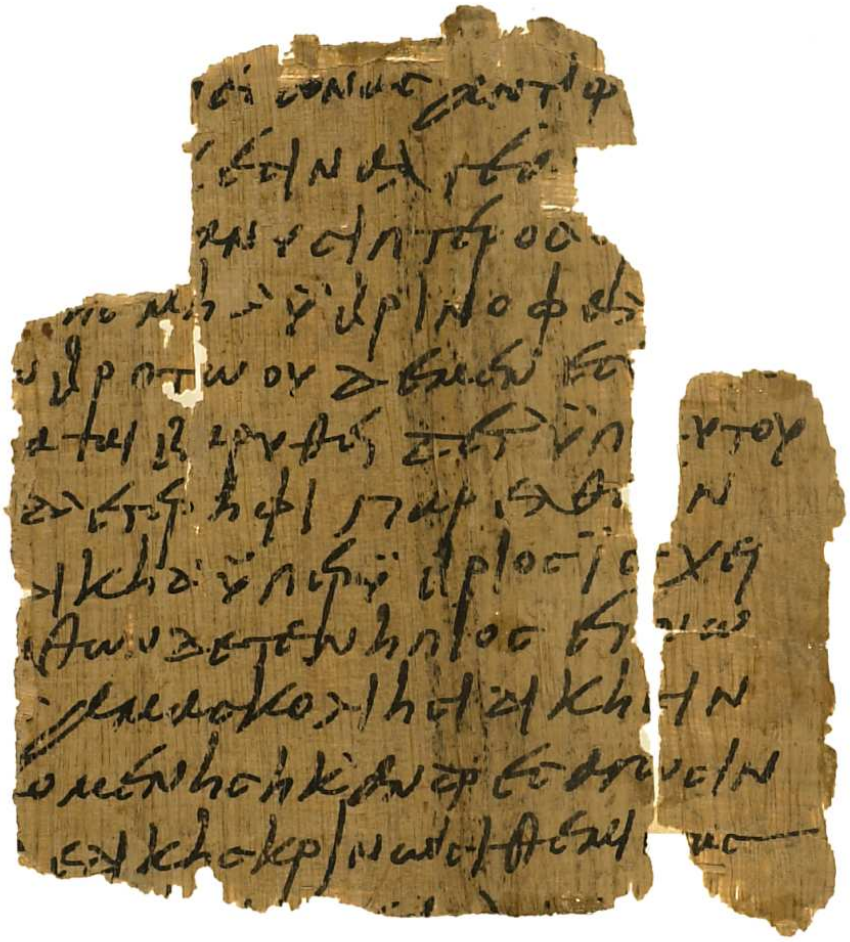
Actes du 26e Congrès international de papyrologie

Genève, 16–21 août 2010



Textes réunis par Paul Schubert

Recherches et Rencontres

Tiré à part

DROZ

Recherches et Rencontres
Publications de la Faculté des Lettres de l'Université de Genève
Volume 30

www.droz.org
ISBN : 978-2-600-01612-4
ISSN : 1422-7606

Image de couverture : P.Gen. inv. 94 verso, fragment d'Hésiode, *Les travaux et les jours*.

TABLE DES MATIÈRES

TABLE DES MATIÈRES

TABLE DES MATIÈRES

TABLE DES MATIÈRES

HYPALLAGMA OR THE DANGERS OF ROMANISTIC THINKING

José Luis Alonso

I. This paper discusses some documents relevant for the registration of a *hypallagma* in the *bibliotheke enkteseon*. My main point, though, does not concern so much the documents themselves as the way they were explained by some of the founding fathers of Juristic Papyrology. From their time to our own, part of the discussion on real securities keeps turning around their « real effect », or even whether they were or not « real rights ». The core of this paper is thus methodological : it aims at a reflection on the danger of using Roman Law categories such as « real rights » or « real effects » for the law of the papyri.

II. What *hypallagma* is was clarified by A.B. Schwarz[1]. He fully proved what also Rabel had suspected, namely that a *hypallagma* is not a *hypotheke* (mortgage), not even a special kind of *hypotheke*, but a totally different type of security, in many aspects actually opposed to the old hypothecary model[2]. It may be worth restating the differences between *hypotheke* and *hypallagma*[3].

Hypallagma contracts lack a forfeit : failure to pay is not enough to make the debtor's property fall to the creditor. This is confirmed by the executive procedure : the hypothecary creditor, becoming owner by forfeit, needs only to request ἐμβαδεία from the praefect, that is, the material possession of the pledge. The hypallagmatic creditor instead needs first to claim for ἐνεχυρασία : only through it does he acquires ownership, and only then may he start a second procedure for ἐμβαδεία. This means that he needs to go through the very same two-step procedure he would use if no security at all had been given.

What is then the point of a *hypallagma* ? What does the creditor acquire with it ? The right answer is : nothing. The security here lies not in anything the creditor acquires, but in something the debtor renounces, i.e. his right to dispose of the property. Every *hypallagma* contains a non-alienation clause, by which the debtor promises not to sell or further mortgage the pledge until payment. But such a clause is also present in *hypothekai*, so that one wonders why would any creditor choose *hypallagma* if *hypotheke* provides the same with a much easier executive procedure.

The reason is to be found in yet another significant difference : in *hypallagma*-contracts, the execution of the pledge is mentioned only as part of the general πρᾶξις, the right of execution on the person and the rest of the belongings of the debtor. In hypothecations, on the contrary, the creditor's right is confined to the pledge : failure to pay turns the creditor into an owner, and he cannot claim anything else from the debtor. In other words, the debtor's liability is totally absorbed by the *hypotheke* : this is the so-called « reine Sachhaftung », purely « real » liability. For the creditor, this means bearing the risk of the *hypotheke* being destroyed or damaged or successfully claimed by someone else (hence the frequent clauses that address those risks, κίνδυνος- and βεβαίωσις-clauses). Here, in my opinion, lies the advantage of a *hypallagma*, and possibly the reason for its invention : one loses the forfeit of *hypotheke*, and is thus forced to a more complex executive procedure, but one keeps the general liability of the debtor, which would disappear with a *hypotheke*[4].

III. The documents I will consider pertain to the registration of the *hypallagma* in the *bibliotheke enkteseon*. The registration was, as I have argued elsewhere, a key element for the effectiveness of the *hypallagma*, securing non-alienation better than any of the pre-

1 Schwarz (1911).
2 Rabel (1909) 28–34 and 37–39 ; see already Eger (1908) 47, n. 4.
3 See the summary provided by Mitteis (1912) 141–151.
4 The idea is presented in full by Alonso (2008) 24–27 and 49–50.

vious mechanisms devised for this purpose[5]. In the second century AD, the *hypallagma* starts being actually contracted « through the *bibliotheke* », as many documents imply and others prove directly[6] ; the two become so closely intertwined that the eclipse of the *bibliotheke* in the fourth century AD seems to have brought about the extinction of the *hypallagma* as well[7].

Of all the documents relevant for the registration of the *hypallagma*, I will consider only the registration requests, and from this group only those already known at the time of Schwarz and Mitteis : it is precisely Mitteis' explanation of these texts that concerns us here ; and those edited later (P.Vars. 10 III, P.Kron. 18 and P.Wisc. II 54) all belong to a different model. They are not requests for registration of an already constituted *hypallagma*, but *hypallagmata* contracted directly through the *bibliotheke*.

The first document to be considered is the well known P.Lips. I 8 (= M.*Chr.* 210 ; Hermopolis, AD 220). It was edited by Mitteis himself in 1906, under the title « Apographe über eine Hypothek ». The document is indeed an *apographe* (3 : ἀπογρά(φομαι)), *i.e.* the declaration of a right to the *bibliophylakes enkteseon*, in this case to those of the Hermopolite nome (1). This right, though, is not a *hypotheke* but a *hypallagma* (7–9 : δίκαιον ὃν ὑπήλλαξέν μοι | … κλήρων κατο[ι]κικῶν | [(ἀρουρῶν) τριῶ]ι̣). The notion of the *hypallagma* as something other than a simple type of *hypotheke* was in fact introduced by Rabel, Schwarz and Mitteis himself only some five years later.

The *apographe* is presented by Aurelius Tithoetion also called Sarapammon (in spite of the lacuna in l. 2, see the subscription in l. 15), from Hermopolis, in AD 220/221[8]. He declares his right arising – according to a *diagraphe* of the same year – from the *hypallagma* of three arouras of catoecic land at the village of Moirai, as well as – according to the same *diagraphe* – the right to recover with an interest rate of 12% a capital of 840 drachmai, to be paid in the month of Thoth of the following year. The debtor, who gives her consent to the *apographe* (4 : μετ᾽ εὐδοκήσεως Αὐρηλίας Κολλαύχ[ιος]) by means of subscription is Aurelia Kollauchis, from the village of Moirai in the nomos of Kusai[9].

[5] Alonso (2008) 33–35 and 47–51. Leaving aside several dubious mentions in Ptolemaic documents (see Alonso 38–44), the history of the *hypallagma* begins for us with an large group of Alexandrinian *synchoreseis* published in BGU IV. In most of them, a mechanism is to be found that seems to have been devised to enforce the non-alienation clause : in order to prevent the debtor from selling or mortgaging the pledge, the title deeds that prove the debtor's rights as owner are kept by the creditor until full payment ; see Alonso (2008) 27–37. The otherwise mysterious name *hypallagma* could be explained precisely through this practice.

[6] The *hypallagma* is mentioned as contracted διὰ τῆς βιβλιοθήκης in documents that span from the second to the fourth century AD, from the Fayyum and from Oxyrhynchos : SB XII 10786 (= P.Tebt. 531 ; Tebtynis, AD 133) ; P.Tebt. II 389 (= M.*Chr.* 173 ; Tebtynis, AD 141) ; P.Tebt.Wall. 7 (= P.Tebt. II 440 = SB XVIII 13788 ; Tebtynis, mid-second cent. AD) ; SPP XX 13 (Arsinoite nome, AD 254) ; P.Erl. 76 (Oxyrhynchos, 4th cent. AD) ; also possibly SB XVI 13070 (Arsinoite nome, AD 187). Proven cases : P.Wisc. II 54 (Arsinoite nome, AD 116) ; P.Kron. 18 (Tebtynis, AD 143) ; P.Vars. 10 III (Arsinoite nome, AD 156). These show that the expression διὰ τῆς βιβλιοθήκης has to be literally understood. Contrary to all previously edited *hypallagma* registration requests, P.Lips. I 8 (= M.*Chr.* 210 ; Hermopolis, AD 220) and 9 (= M.*Chr.* 211 ; Hermopolis, AD 233), as well as P.Tebt. II 318 (= M.*Chr.* 218 ; Tebtynis, AD 166), are not styled as *apographe* or *parathesis* but as *hypomnema hypallages* or simply *hypallage*, and are to be thus considered as the formalization of the contract of *hypallagma* itself. See already Flore (1965) 125–127.

[7] The idea was suggested by Taubenschlag (1955) 276–277 ; see Alonso (2008) 47–48. On the end of the *bibliotheke* in the fourth century, Wolff (1978) 254–255 ; Maresch (2002) 245–246.

[8] For the so-called « archive of Tithoetion » (or « archive of Arethous », his wife, who will appear in our second document, P. Lips. I 9), see also P. Flor. I 46, 47a and b, 48, 58 ; P.Giss. I 33 ; P.Strasb. I 41, IV 280, V 392 and 393v, VIII 732 ; SB I 5671. See Montevecchi (1988) 256. The papyri cover a span from AD 186 till 259.

[9] The fact that, for a debtor residing in Moirai, Ano Kusai, and regarding a plot of land located also there, the *apographe* is presented by the Hermopolitan creditor to the *bibliophylakes* of the Hermopolite nome requires no special explanation ; contrary to all common assumptions about the way a *hypallagma* is registered (see below), the *parathesis* would be made not in the *folium* of the debtor but in that of the creditor. In fact, it seems that Ano Kusai was already in AD 220 merely a toparchy of the Hermopolite nome ; at the latest in AD

The whole scheme was designed for a short duration : the following year, the debtor was supposed to pay back the loan, and this seemed indeed well secured, with a *hypallagma* and also a collateral, Aurelius Castor, mentioned in line 6. And yet, thirteen years later, the loan was still unpaid ; what is more surprising, no measures at all were taken against the debtor or the collateral, no attempt was made for the execution of the *hypallagma*[10]. This we know because we encounter the same business in P.Lips. I 9 (= M.*Chr.* 211 ; AD 233). Aurelius Tithoetion, the loan giver, is now dead, and in his testament – a Roman testament, as is made clear in this document – his instituted heirs are his three children, Achilleus, Heron and Eudaimonis, who are all still underage. Acting through their mother, Aurelia Aretous, they now submit again to the *bibliophylakes* of Hermopolis an *apographe* for the very same right, acquired as part of their inheritance, namely : the credit arising from the loan itself and the right on the land under *hypallagma*. Together with the petition, they submit a copy of the testament and of the initial loan-*diagraphe*, the original of which had already been deposited by their father.

These documents were the first pieces of evidence for the registration of the *hypallagma* : that is, the first conclusive proof that to the registrable rights mentioned in the Edict of Mettius Rufus – namely *kteseis*, *hypothekai* and preferential rights of wives and children –*hypallagmata* had to be added[11].

A third document was published by Grenfell and Hunt just one year later, in 1907 : P.Tebt. II 318 (= M.*Chr.* 218 ; Tebtynis, AD 166). An unnamed creditor has made in AD 162 two loans, documented in two public *homologiai*, one jointly to the brothers Serenus and Didymus for 560 drachmai, the other to the former alone for an unknown amount. Each loan is secured by the declaration that a plot of land is to be kept unalienated and intact for the lender (8–9 and 14–15 : φυλάξειν μοι ἀνεξαλλοτρίωτα καὶ ἀκαταχρημάτιστα). Since the *hypallagma* is nothing but a surrender of the right to alienate, one would expect to find this one also labeled as a *hypallagma* ; surprisingly, the document seems to avoid the term (see below). The creditor, out of fear that his right might escape notice (18–20 : [φο]|[βου]μένη δ[ὲ] μὴ λάθω [κατὰ] τὸ εἴc με δίκαι[ον]), submits it for *parathesis* (20–21 : ἐπιδίδ[ω]μι εἰc τὸ τὴ[ν] | [παράθεcιν γεν]έcθαι) in order that the land may be registered in the class of property subject to a claim (the editors' suggestion for the lacuna before τῆς τ[ά]ξεως κ[ατο]χίμων). The document ends with the usual clause explicitly safe-guarding the rights of third parties : εἰ δὲ φ[άνειαν ἑτέρ]ῳ προcή[κο]υcαι ἢ πρ̣ο̣κ[α]τ̣[ε|cχημέναι] δ̣ι̣[ὰ] τοῦ βιβλιοφυλακίου μὴ ἔcεc[θαι] ἐμπόδι[ο]ν ἐ̣ᵹ̣ [τῆc|δε τῆc] π[αρ]αθέcεωc ἀκ[ο]λούθωc οἷc παρεθ[έ]μην ἀντ[ιγρ]ά̣[φοιc] (22–24). Finally, we have the signature of the secretary of the record office for registration : « I, NN *grammateus*, have recorded »[12].

IV. One obvious singularity of the Tebtynis papyrus is this mysterious reluctance to use the term *hypallagma* for a security that, as far as we can judge, has exactly the same content as a *hypallagma*, *i.e.* the surrender of the debtor's right to dispose of the object. If we compare the papyrus with P.Lips. I 8–10, it is also striking that the term ἀπογράφομαι, which we find there, is avoided in P.Tebt. II 318. This document does not present itself as an *apographe*, but merely as a request for *parathesis*. It is tempting to connect those two details, as Mitteis already did : « Denn überall, wo es sich um Verträge handelt, welche

222, Moirai already belonged to the Hermopolite nome ; see P.Flor III 382, 28 : ἐπὶ Μοιρῶν τοῦ μεγάλου Ἑρ[μοπολίτου].

10 P.Lips. I 10 shows a similar case, still more shocking : a loan given for ten months still unpaid after more than sixty years.

11 On the Edict of Mettius Rufus, see P.Oxy. II 237 viii 27–36 (Oxyrhynchos, after AD 186) ; Wolff (1978) 223–224, with literature.

12 For καταχωρίζω, see Preisigke, *WB s.v.*

nicht selbstständige Rechte, sondern bloße Verfügungsbeschränkungen bei solchen Rechten zum Gegenstand hatten, war eine eigentliche *apographe* ausgeschlossen – es wurde ja kein dingliches Recht begründet – und einfaches Gesuch um *parathesis* am Platze. Es ist möglich, daß schon bei [P.Tebt. II] 318 diese Auffassung zutrifft : hier handelt es sich scheinbar nicht um ein dingliches Recht, sondern um ein vertragsmäßiges Veräußerungsverbot zur Sicherung einer Förderung. Zwar ist diese Erklärung nicht zweifelsfrei ; denn es kann dagegen gesagt werden, daß das Veräußerungsverbot stillschweigend die Bestellung eines Pfandrechts in der Form eines *hypallagma* enthielt : doch ist formell ein *hypallagma* nicht bestellt worden. »[13] In short : there is formally no *hypallagma*, hence no real right, hence no place for an *apographe* but only for a *parathesis*.

V. The first objection that comes to mind was obvious to Mitteis himself : a *hypallagma* is nothing else but a surrender of power of alienation, so that one cannot see a reason for a difference in the registration process depending on whether the parties label it as a *hypallagma* or not, even if one accepts that they avoid the term in our document for some substantial reason[14].

A yet more compelling objection arises, in my opinion, from the following consideration. Mitteis is here transferring to the registration of securities the difference he has just presented for the registration of ownership, between a definitive *apographe* and a provisional parathesis[15] : when the seller had no right to alienate (having surrendered this right as a real security) or simply, when he was not registered, the buyer, specifying that he did not yet submit the *apographe*, asked for a mere *parathesis*, very often adding, as in our P.Tebt. II 318, that « if it be found that any other person has ownership of or claims against the property, no obstacle shall arise from this registration ».

This opposition between *apographe* and *parathesis*, however, understandable for the registration of ownership, does not exist when securities are concerned : the surrender of the right to alienate is equally temporary, whether it is labeled as a *hypallagma* or not[16]. In both cases it will disappear as soon as the debt is paid. That no such opposition exists concerning the *hypallagma* should have been clear to Mitteis himself from P.Lips. I 9 : the document is an *apographe* of a *hypallagma* (7 : ἀπογραφόμεθα), but the aim of such an *apographe* is no other than the *parathesis* (21–23 : ἀκολούθως τῇ διαγραφῇ ἧς τὸ ἀντίγραφον … νῦν ἐπηνέγκαμεν ὑμῖν σὺν τῷ τῆς διαθήκης ἀντιγράφῳ εἰς τὸ τὴν παράθεσιν γενέσθαι). As far as a *hypallagma* is concerned, it seems, *parathesis* and *apographe* are not contraries, the former being the aim of the latter. It is also worth noting that, contrary to the ownership documents that expressly underline that they are not yet *apographai*, P.Tebt. II 318 simply does not use the term ἀπογράφομαι : no difference seems to exist with *apographai* regarding the substance of the inscribed situations or the inscription technique ; the document is, exactly like P.Lips. I 8 and 9, the request for the *parathesis* of the *hypallagma*, which was the typical act of the *bibliophylakes* for this kind of security.

VI. The main disturbing element in Mitteis' construction, and what makes this discussion methodologically relevant, is his use of the category of « real » rights[17]. This transcends

[13] Mitteis (1912) 104–105.

[14] In any case, a reason is not recognizable ; it does not even seem feasible to conjecture one, and even Mitteis does not suggest any such conjecture. The term *hypallagma* could even have been used in the original contracts, which we do not have, and simply been dropped here as irrelevant.

[15] Mitteis (1912) 103–105.

[16] On *parathesis*, see Wolff (1978) 235–245 ; on *apographe*, ibid. 226–235.

[17] This is particularly disturbing in the discussed cases of the *hypallagma* which, strictly speaking, was not even a « right » of the creditor, but merely a restraint of alienation accepted by the debtor. This also had a clear effect on the registration procedure : all our evidence points, as Schwarz already suspected, towards a registration not as a right of the creditor, in his *folium*, as was the case with *hypotheke*, but merely in the

Mitteis' case and is far from being a mere historical anecdote : true, legal papyrology has been for decades acutely aware of the necessity of an emancipation from the categories of the Roman Law tradition[18] ; and yet the discussion on real securities in the papyri is still all too often focused on the question whether they constitute or not « real » rights, whether they have « real » effects or not[19].

To show how misleading this apparently innocent terminology is, a brief explanation for non-lawyers of what real rights are may be necessary. This category, « real rights », *iura in rem*, in the sense of « rights on things », is in the Roman legal tradition opposed to *iura in personam*, the rights of creditors against their debtors. The opposition *iura in rem* / *iura in personam* structures our whole understanding of private law, and is so deeply engraved in the continental legal mind that it is often presented as if arising from the very nature of things. It is thus understandable that scholars like Mitteis or Rabel, who incarnated the tradition of Roman Law in the turn of the century, let the category slip in their analysis of the Law in the papyri. This is understandable, but also dangerously misleading, because it belongs to the Roman tradition. Mankind has known plenty of legal systems which completely ignored it, in particular the Graeco-Egyptian practice found in the papyri.

The category emerged in Roman Law when the type of protection characteristic of ownership was extended to other situations[20]. Since ownership is a position of exclusive privilege over a thing, the owner is protected against anyone who challenges or usurps his position. The claim of the owner is what we call a *vindicatio* or *actio in rem*, a claim on the thing itself, that can be used *erga omnes*, against whoever challenges the owner's position. In Roman mid-republican times, the same type of claim, an *actio in rem* or *vindicatio* was extended to other situations of privilege over a thing different from ownership. This result seems to have been initially reached by assimilating such situations to ownership itself.

Thus, for instance, if A has a right of way through B's property, we have reasons to believe that, in archaic law, A was considered to be the owner of the path, so that he could vindicate it even against B, and against any subsequent owner of B's property[21]. Later, the notion of a « right of way », different from ownership, emerged, and was brought into the wider category of the so-called servitudes, whereby a property provides a service to another. Yet, although by then the holders of a servitude are no more considered to be owners, they keep their *actio in rem*, their *vindicatio* – now a *vindicatio servitutis* –, to

debtor's *folium*, as a *katoche* that blocked his right to alienate. The Greek and Greco-Egyptian *hypotheke*, instead, is widely conjectured to be an assimilation to full, if only conditional, *kyreia*. For the law of the papyri, see Wolff (1978) 89 ; Wolff (1998) 109–110. For the Greek law, recently Thür (2008) 173–187. A totally different question is the type of protection granted by the Greek law to the owner (delictual ? a prejudicial claim over the fruits ?) and thus the proximity between the structure of Greek and Roman ownership.

18 See Rupprecht (2007) 628, reflecting on « die Erfassung der eigenständigen dogmatischen Struktur des griechischen Rechts gegenüber der des römischen Rechts und auf die damit verbundene Lösung von den Vorstellungen des römischen Rechts und von denen moderner Rechte ». That this awareness has not yet led to a systematic approach other than that inherited from the Pandectistic tradition is shown by Rupprecht himself when he adds : « Grundlegend sind die Unterschiede im Bereich des Obligationen- und des Sachenrechts. Die Besonderheiten des Familien- und Erbrechts sind hier nicht darzustellen. »

19 See – possibly forced by an audience trained in the civil law tradition and not familiar with the law of the papyri – Wolff (1998) 108–110, « Sachenrechtliche Wirkungen des Immobiliarpfandrechts », starting with the remark : « Doch haben sich gerade in Ägypten gewisse neue Formen herausgebildet, die sich untereinander vor allem auch durch ihre sachenrechtlichen Wirkungen unterschieden. »

20 The archaic precedents of these so-called « limited real rights » are summarized by Kaser (1971) 143–145. More recently, see especially Capogrossi (1976 and 1999).

21 Even in the Imperial period, rights of way were still acquirable through *mancipatio*, and thus included, as land itself, among the so-called *res mancipi* (Gai. 2, 17 and 2, 29). The only possible reason is that, before the notion of a « limited real right » emerged, they were identified with the strip of land itself. For further bibliography, see Kaser (1971) 143, n. 5.

claim their right against anyone who challenges it, including the owner of the servient estate, or anyone who may become owner after him.

A similar process took place in other situations of legitimate interest in an object, including the right of the creditor on the pledge that secures his credit[22]. That also the creditor has an *actio in rem* means that he can claim the pledge from whoever possesses it, including the owner ; and this not only if the owner is the debtor himself, but also if it is someone else, including someone who has bought it afterwards in good faith.

This was the Roman way to secure the object for the creditor : granting him a claim on the pledge like that of the owner, *erga omnes*, i.e. against anyone, new owner included. One could however imagine a very different strategy to protect the creditor, not raising him to a position stronger than that of any owner, old or new, but rather creating obstacles to the sale of the pledge, or making such sale altogether void, or weakening the position of the buyer so that he could not oppose his right to that of the creditor. Here one does not operate at the level of the creditor raising it, but at that of the buyer. This seems to have been the case in the law of the papyri, where we find all three strategies : in the earliest preserved *hypallagmata*, there is an attempt to prevent a sale by having the creditor keep the title-deeds until the debt is cancelled[23] ; in both *hypallagmata* and *hypothekai*, the registration in the *bibliotheke enkteseon* prevents alienation through public deed ; further, in some *hypothekai* a clause declares void the attempted alienation or further hypothecation[24] ; finally, when the *bibliophylakes* exceptionally deliver an *epistalma* allowing the debtor to sell the pledge – because his declared intention is to satisfy the creditor –, we find the registration of the buyer not by means of a definitive *apographe* but by a mere provisional *parathesis*, with the usual clause stating that « if another person should be proved to have a right to the object or a hold upon it recorded through the record office » – such as, obviously, the creditor until payment – « the present *parathesis* shall not stand in the way of his claim. »[25] Here the protection for the creditor rests upon the fact that the buyer will not be registered as the final owner, and has to accept that his registration has no value before the creditor. The effect is similar to that of a « real » right, but the way that leads to this result is different : it consists of depriving the buyer of a full ownership registration.

Whatever the method to prevent the sale or keep its effects in check, practically every single hypothecation, every single *hypallagma*, contains a non-alienation clause[26]. The contrast with the Roman system could not be sharper : the Roman debtor, precisely

22 Again, in archaic Roman Law, the creditor was made the owner of the pledge : *fiducia cum creditore contracta*, see Kaser (1971) 144–145, with further literature. A specific *actio in rem*, in this case the so-called *actio Serviana*, was introduced for creditors who had received full fiduciary ownership only at the end of the Republic.

23 BGU IV 1147, 24–26 ; 1148, 28–35 ; 1149, 23–24 ; 1150, i, 10–11 (all four Alexandria, 13 BC) ; 1152, 21–26 (Alexandria, 11/10 BC) ; 1167, ii, 30–31 (Alexandria, 12 BC).

24 P.Erl. 62 (provenance unknown, 2nd cent. AD ; erroneously quoted by Rupprecht [1997] 871, n. 11 and 872, n. 14 and 17, as P.Erl. 127) ; P.Flor. I 1 (= M.*Chr.* 243 ; Hermopolis, AD 153) ; P.Strasb. I 52 (Hermopolis, AD 151) ; P.Mert. III 109 (Oxyrhynchos, 2nd cent. AD) ; P.Oxy. XVII 2134 (Oxyrhynchos, after AD 170). *Hypallagmata* do not contain such a clause, with the exception of P.Lond. III 1166r (p. 1045 ; Hermopolis, AD 42).

25 As an example, see the *parathesis* request in P.Hamb. I 16 (Arsinoite nome, AD 209), in connection with the contract of sale to which it refers, preserved in P.Hamb. I 15 (Arsinoite nome, AD 209), both drafted on the same day. A share of a house (4/5 of 1/6) is bought by Antonia Thermutarion, who pays the price (100 dr.) not to the selling brothers, but to their creditor ; it is likely that this detail is mentioned in the contract because the share of the house secured the credit. This would also explain the registration through *parathesis* ; see Flore (1927) 68–73. See also P.Gen. I^2 44 (= M.*Chr.* 215 ; Arsinoite nome, AD 260).

26 For the *hypallagma* there seems to be, among the papyri edited so far, no exception : see Rupprecht (1997) 873, with n. 28. For *hypothekai*, only three documents lack with certainty a non-alienation clause : P.Brem. 68 (Hermopolis, AD 99) ; P.Ross.Georg. II 30 (provenance unknown, AD 151/152) ; SB I 4370 (Herakleopolis, AD 228). It is not possible to determine if the absence of the clause had any legal consequences.

because real securities are constructed as real rights, keeps his *potestas alienandi*. There is no harm in it for a creditor who can claim the pledge from anyone[27]. Things were more problematic in the case of movables – the sale in that case constituted *furtum* ; but our discussion here has been mostly confined to immovables, and for these the principle is clear : the buyer becomes owner, and is in any case exposed to the creditor's *actio in rem*[28].

Things are so different in the papyri : the concern that the documents show to prevent the debtor from selling or further mortgaging the pledge has called for many conjectures and a rich literature, especially at the beginning of the twentieth century[29]. I would suggest, also here, a less « Roman » perspective : instead of taking the Roman system as the « natural » one and seeking the reasons of a « Greek deviation », we could shift our perspective and ask ourselves, not « why could not the Greek debtor sell ? », but rather « why could the Roman debtor sell ? » The answer then seems obvious : because this did not harm the creditor, who had a claim *erga omnes*. It is thus quite likely that the concern that we find in the papyri to prevent a buyer from showing up comes from the fact that, in the Graeco-Egyptian tradition, it would be unconceivable to grant a non-owner a claim against an owner[30]. Actually, the whole idea of *iura in re aliena*, the idea of extending the protection *erga omnes* – which is typical of the owner – to certain non-owners against the owner himself, was entirely Roman.

This takes us back to our methodological question, i.e. the dangers of using – even for the sake of easier communication with the wider community of legal historians – the notion of « real » rights or « real » effects. Historically, the construction of real securities as limited real rights has been only one of the possible ways to secure the pledge for the creditor. If the discussion on the protection of the creditor against a subsequent buyer is built around whether the Graeco-Egyptian real securities are « real » rights or not, and have or not « real » effects, then the aim – the protection of the creditor against third parties, essential in any system of real securities – is being confused with the means – with one only of the possible means, namely granting the creditor a claim *erga omnes*. This confu-sion of aims and means can only create further confusion. This is made worse if, from the mechanisms devised to protect the creditor before a possible buyer, we conclude that the Graeco-Egyptian real securities had a « real » effect ; and worse again if we do it with the intention of making the papyrological practice accessible to lawyers trained in the roma-nistic tradition, since they will inevitably imagine a claim *erga omnes*[31]. We will also create

[27] *CJ* 8, 13, 15 (AD 293) : *Imp. Diocletianus et Maximianus AA et CC Basilidae : debitorem neque vendentem neque donantem neque legantem vel per fideicommissum relinquentem posse deteriorem facere creditoris condicionem certissimum est. unde si tibi obligatam rem probare posse confidis, pignora persequi debes.*

[28] *CJ* 8, 27, 12 (AD 293) : *Imp. Diocletianus et Maximianus AA et CC Zotico : si debitor rem tibi iure pignoris obligatam te non consentiente distraxit, dominium cum sua causa transtulit ad emptorem.*

[29] Among others, see Rabel (1909) and De Ruggiero (1910).

[30] For an alternative explanation, see Rupprecht (1997) 879–880, connecting the subsequent mortgage (and sale) preclusion rather with a forfeit system that only exceptionally considers the possible *hyperocha* (that in a sale system gives content to the right of the ulterior creditors), rather than with the lack of a claim *erga omnes* for the creditor. *Hyperocha* is certainly more akin to sale- than to forfeit-pledge, but not totally incompatible with the latter, so that a forfeit system with *hyperocha* and debtor's legitimation to further mortgage is not a logical impossibility.

[31] See again Wolff (1998) 110 : « Freilich war das *Hypallagma* auch vor seiner Realisierung nicht aller dinglichen Wirkung beraubt, indem der Gläubiger es aufgrund der bestellenden notariellen Urkunde auch einem dritten Erwerber gegenüber geltend machen konnte. » There is little documentary evidence to support what Wolff writes here ; in general it is assumed that the *hypallagma* consisted in preventing alienation rather than in granting a remedy against the buyer. It is nonetheless a reasonable assumption, and one that has some docu-mentary support, that if the *bibliophylakes* allowed the sale, the acquisition would be registered by means of a mere *parathesis*, not opposable against anyone with a previous right. And yet, even if this proved true, the expression « dingliche Wirkung » would be equally misleading, pointing to a totally different legal

confusion if, identifying protection of the creditor with the « real » right structure, we deny the former in order to deny the latter : no matter how far from the « real right » model a real securities system may be, one of its main purposes all the same is to protect the creditor from a subsequent sale[32].

Bibliography

Alonso, J.L. (2008), « The Alpha and Omega of *hypallagma* », *JJP* 38, 19–51.
Capogrossi Colognesi, L. (1976), *La struttura della proprietà e la formazione dei* iura praediorum *in età repubblicana* (Roma).
Capogrossi Colognesi, L. (1999), *Proprietà e diritti reali. Usi e tutela della proprietà fondiaria* (Roma).
Eger, O. (1908), *Zum ägyptischen Grundbuchwesen in römischer Zeit* (Leipzig).
Flore, P. (1927), « Sulla βιβλιοθήκη τῶν ἐγκτήσεων », *Aegyptus* 8, 43–88.
Flore, P. (1965), « Due papyri inediti di Milano », *JJP* 15, 119–128.
Kaser, M. (1971), *Das Römische Privatrecht* I (2. Auflage, München).
Maresch, K. (2002), « Die *Bibliotheke Enkteseon* im römischen Ägypten », *APF* 48, 233–246.
Mitteis, L. (1912), *Grundzüge und Chrestomathie der Papyruskunde* II.1 (Leipzig).
Montevecchi, O. (1988), *La papirologia* (2ª ed., Milano).
Rabel, E. (1909), *Die Verfügungsbeschränkungen des Verpfänders, besonders in den Papyri* (Leipzig).
De Ruggiero, R. (1910), *Il divieto d'alienazione del pegno nel diritto greco e romano* (Cagliari, rist. Napoli 1980).
Rupprecht, H.-A. (1997), « Veräußerungsverbot und Gewährleistung in pfandrechtlichen Geschäften », *in* Kramer, B. / Luppe, W. / Maehler, H. / Poethke, G. (ed.), *Akten des 21. Internationalen Papyrologen-kongresses, Berlin 1995* (Berlin) 870–880.
Rupprecht, H.-A. (2007), « Zu Entwicklung, Stand und Aufgaben der juristischen Papyrologie », *in* Palme, B. (ed.), *Akten des 23. Internationalen Papyrologen-Kongresses, Wien 2001* (Wien) 623–631.
Taubenschlag, R. (1955), *The Law of Greco-Roman Egypt in the Light of the Papyri 332 BC – 640 AD* (2nd ed., Warszawa).
Schwarz, A.B. (1911), *Hypothek und Hypallagma. Beitrag zum Pfand- und Vollstreckungsrecht der griechischen Papyri* (Leipzig / Berlin).
Thür, G. (2008), « Ownership and Security in Macedonian Sale Documents », *in* Thür, G. / Harris, E.M. (ed.), *Symposion 2007* (Wien) 173–187.
Wolff, H.J. (1973), « Hellenistisches Privatrecht », *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Romanistische Abteilung* 90, 63–90.
Wolff, H.J. (1978), *Das Recht der Griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats* (München).
Wolff, H.J. (1998), *Vorlesungen über Juristische Papyruskunde (1967/1968)* (Berlin).

structure : not the weakening of the buyer's position that we can conjecture on the basis of the *parathesis* procedure, but a claim *erga omnes* for which the sources give no hint.

[32] See Rupprecht (1997) 880, arguing « daß der Gläubiger die Sache erst erwirbt mit Verfall (…). Eine bis dahin dinglich geschütze Position des Gläubigers ist damit nicht festzustellen, er ist auch nicht gegenüber einem Dritten geschützt. Damit liegt also noch kein beschränktes dingliches Recht vor, das auf der Sache ruht und von nachfolgenden Verfügungen nicht beeinträchtigt werden kann. » This example shows more clearly than any other the risk of using the notion of « real right », even in order to reject it : there is a danger of identifying a specific structure – that of a « real » right – with a function – with that of protecting the creditor in front of a subsequent buyer – which can be served by other constructions. Then, denying a « real right » seems to require to also deny that the creditor's position was protected against third parties – such as a possible buyer or a subsequent hypothecarian creditor –, despite the fact that the latter would be unconceivable in any system of real securities.