Alonso, José Luis

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José Luis Alonso

THE ALFA AND OMEGA OF HYPALLAGMA*

I. THE CHRONOLOGICAL FRAME OF *HYPALLAGMA*

REAL SECURITIES HAVE ALWAYS BEEN a particularly fertile field for the creativity of the legal mind.[1] In the rich variety of real securities that we find in the papyri, *hypallagma* counts among the most inspired. The origins of *hypallagma* are obscure: the institution is not attested in any other Hellenistic tradition outside Egypt, and for Egypt the first indisputable examples are relatively late – only from Augustan times –, by comparison with the twin institution of hypothec. There are nevertheless a few Ptolemaic papyri, traditionally dated third century BC, mentioning

* Part of the topics here developed have been previously presented in two Seminars, held in 2008, in Warsaw and Edinburgh, thanks to the generous invitations of Ewa WIPSZYCKA and Paul DU PLESSIS. Innumerable problems and sources have been discussed with Jakub URBANIK (Warsaw). This article is part of a broader study on *hypallagma* and the real securities in the papyri. It has been written under the support of a research Project financed by the Spanish Ministerio de Ciencia e Innovación, SEJ 2006–08570.

[1] Thus, a privileged field for Comparative Law studies: cf. the groundbreaking study by E. RABEL, *Die Verfügungsbeschränkungen des Verpfänders, besonders in den Papyri*, Leipzig 1909.

the term *hypallagma*.[2] These will constitute the 'Alfa' of our study: we will explore their value for the history of the institution, trying to determine if the *hypallagma* we find there is the same one we know from the times of Augustus onwards. A key moment in the history of the institution in Roman times was the creation of the βιβλιοθήκη ἐγκτήσεων[3] around the mid-first century AD:[4] the registration in the *bibliotheke*,[5] attested for late Trajanic times,[6] proved to be the ideal means to secure its effectiveness as

[2] *BGU* VI 1246 (3rd cent. BC, Elephantine); *C. Ord. Ptol.* 83 = *BGU* VI 1212 D. To this meagre Ptolemaic evidence a third document, recently edited by Philip Schmitz, must be added: *P. Iand. Zen.* 36 (mid-3rd cent. BC, Philadelphia, Arsinoites).

[3] On the *bibliotheke* in general the literature is inexhaustible: for an overview cf. H. J. WOLFF, *Das Recht der Griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, München 1978, pp. 222–255, and lately, K. MARESCH, 'Die Bibliotheke Enkteseon im römischen Ägypten', *APF* 48 (2002), pp. 233–246. For details on the general registration procedure, cf. L. MITTEIS, *Grundzüge und Chrestomathie der Papyruskunde* ii 1, Leipzig 1912, pp. 97–106. On its legal meaning, MITTEIS' views have been long outdated: cf. WOLFF, *Das Recht*, pp. 245–254, with lit.

[4] For this generally accepted date, cf. WOLFF, *Das Recht* (cit. n. 3), pp. 48–49; IDEM, *Vorlesungen über Juristische Papyruskunde (167/68)*, Berlin 1998, pp. 62–63 ('etwa um 60 n. Chr. [...] eingerichtete [...] ; [...] vervollkommnete Nachfolgerin der ptolemäischen Katagraphe'); H. J. WOLFF & H.-A. RUPPRECHT, *Das Recht der griechischen Papyri Ägyptens* 1, München 2002, p. 178 ('Vor allem ist hier aber die wohl originellste Reform zu nennen, nämlich die um die Mitte des 1. Jh. n. Chr. erfolgte Schaffung der βιβλιοωήκη ἐγκτήσεων, die das teilweise gleiche Zwecke verfolgende, aber anders angelegte und weniger effektive ptolemäische System der Katagraphe zu ersetzen vermochte'). The traditionally accepted first mention of the *bibliotheke* was *BGU* I 184 = *MChr.* 202 (AD 72, Arsinoites), but cf. now, G. FLORE, 'Note su *P. Mich.* IX 539 e 540', *Aegyptus* 59 (1979), pp. 119–126 (dated to AD 53). Most recently, on the introductory date, MARESCH, 'Bibliotheke' (cit. n. 3), pp. 234–235.

[5] On the registration of *hypallagma*: A. B. SCHWARZ, *Hypothek und Hypallagma. Beitrag zum Pfand- und Vollstreckunkgsrecht der griechischen Papyri*, Leipzig – Berlin, 1911, pp. 61–67; MITTEIS, *Gründzuge* II 1 (cit. n. 3), pp. 103–105, 149–151; WOLFF, *Das Recht* (cit. n. 3), pp. 235–238: 'Sperrvermerke (Paratheseis).

[6] Cf. *P. Wisc.* II 54 (AD 116, Arsinoites). Together with *P. Kron.* 18 (AD 143, Tebtynis), and *P. Vars.* 10 III (AD 156, Arsinoites), this is one of the extant requests for registration of *hypallagmata* adressed to the *bibliotheke*, to be added to the ones already considered by SCHWARZ, *Hypothek* (cit. n. 4), pp. 61–67, namely *P. Tebt.* II 318 = *MChr.* 218 (AD 166, Tebtynis), *P. Lips.* 8 = *MChr.* 210 (AD 220, Hermopolis Magna), and *P. Lips.* 9 = *MChr.* 211 (AD 233, Hermopolis Magna). Cf. also the *diastroma* mentioning a *hypallagma* as registered in the debtor's *folium* in *BGU* IV 1072 r. = *MChr.* 195 (after AD 138, provenance unknown).

a guarantee.[7] The history of *hypallagma* was thenceforth connected to that of the *bibliotheke*, and a connection therefore seems likely[8] between the extinction of *hypallagma* in the fourth century AD and the disappearance of the *bibliotheke* in the same period.[9] In 2001, though, a fragment of seven lines was published, mentioning a ὑπαλλαγή, and ascribed by the editor, on palaeographical grounds, to the fifth century AD.[10] This papyrus will be the 'Omega' of our history. It goes without saying that any result based, as ours will be, on the absence of documents for a given period will always remain conjectural, and open to correction by the publication of further materials. However provisional these results may be, they can, we hope, shed light on the structure and function of *hypallagma*.

II. *HYPALLAGMA* DISCOVERED

As is well known, the identification of *hypallagma* as a real security distinct from hypothec is one of those not so rare cases of multiple simultaneous discoveries in the History of Science. Two years before Schwarz published his groundbreaking *Hypothek und Hypallagma* (1911),[11] the kernel

Mentions, in general, of the *hypallagma* as registered, or, very often, as contracted through the *bibliotheke*: *P. Berl. Leihg.* 10 (AD 120, Arsinoe); *P. Fam. Tebt.* 29 (AD 133, Arsinoe), *SB* XII 10786 = *P. Tebt.* II 531 (AD 133, Tebtynis); *P. Teb.* II 389 = *MChr.* 173 (AD 141, Tebtynis); *BGU* IV 1038 = *MChr.* 240 (after AD 144, Arsinoites). For the right of the creditor to register the contract, by putting a distraint upon the debtor's name, *P. Oxy. Hels.* I 36 (AD 167, Oxyrhynchos), a general *hypallagma*, although the term is not mentioned (for these general securities as *hypallagmata*, cf. SCHWARZ, *Hypothek* [cit. n. 5], pp. 48 ss.), and *P. Princ.* III 144 (AD 220, Arsinoites)

[7] Cf., along with the authors quoted *supra* in n. 4, also WOLFF, *Vorlesungen* (cit. n. 4), p. 109 *in fine*.

[8] R. TAUBENSCHLAG, *The Law of Greco-Roman Egypt in the Light of the Papyri. 332 BC–640 AD* (2 ed.), Warszawa 1955, pp. 276–277.

[9] For the end of the *bibliotheke* in the fourth century, cf. WOLFF, *Das Recht* (cit. n. 3), pp. 254–255; MARESCH, 'Die Bibliotheke' (cit. n. 3), pp. 245–246.

[10] *SB* XXVI 16729 = P. Vindob. G 374 (5th cent. AD, provenance unknown), edited by G. A. XENIS, 'A Papyrus Fragment with Mention of a Loan upon Mortgage', *Tyche* 16 (2001), pp. 217–219.

[11] SCHWARZ, *Hypothek* (cit. n. 5).

of his idea, that in the papyri hypothec and *hypallagma* are to be considered two different – and in many aspect contrasting – legal institutions, had already been defended, although not yet thoroughly proved, by no lesser authority than Ernst Rabel, in a masterful comparative study on the inalienability of pledge under the title *Die Verfügungsbeschränkungen des Verpfänders*.[12] That Schwarz had already reached the same conclusion before Rabel's work had been published was generously underlined by Ludwig Mitteis in his recension to his pupil's work.[13] Rabel and Schwarz's thesis has been almost universally accepted.[14] The thesis is based upon two main differences between the documents referred to *hypothekai* and those referred to *hypallagmata*:[15]

(1.) The documents styled as *hypothekai* contain a more or less detailed forfeiture clause – the *lex commissoria* of the Roman tradition, *i.e.*, a clause that entitles the creditor to acquire the full ownership of the pledge if the

[12] RABEL, *Verfügungsbeschränkungen* (cit. n. 1), pp. 28–34, 37–39. The idea was already suggested by O. EGER, *Zum ägyptischen Grundbuchwesen in römischer Zeit*, Leipzig 1908, p. 47 n. 4.

[13] L. MITTEIS, *Zeitschrift der Savigny Stiftung für Rechtsgeschichte RA* 32 (1911), p. 485: 'Er muß dabei insofern, als sein Buch erst zwei Jahre nach jenen mittlerweile allgemein bekannt gewordenen Aufstellungen von Rabel erschien, auf die Freude der Priorität in der Hauptsache verzichten; eben deshalb will Ich aber nicht unterlassen, aus persönlicher Kenntnis – da ich den Verf. zu meinen einstigen Schülern zählen darf – es auszusprechen, daß er die Grundlagen seiner heutigen These schon vor dem Erscheinen der Rabelschen Schrift gefunden hat, also sujektiv für durchaus original gelten kann'

[14] The only notable exception, A. MANIGK, 'Gräko-ägyptisches Pfandrecht', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte RA* 30 (1909), pp. 286–294; IDEM, *s.v.* 'hypallagma', [in:] *RE* IX, Stuttgart 1916, pp. 208–210. Accepting RABEL's and SCHWARZ's theory, among others, notably MITTEIS, *Grundzüge* II 1 (cit. n. 3), pp. 141–151; TAUBENSCHLAG, *Law* (cit. n. 8), pp. 275–282; WOLFF, *Vorlesungen* (cit. n. 4), pp. 109–110; H. A. RUPPRECHT, 'Die dinglichen Sicherungsrechte nach der Praxis der Papyri – Eine Übersicht über den urkundlichen Befund.' [in:] *Collatio Iuris Romani. Études dédiées a H. Ankum* II, Amsterdam 1995, pp. 426–429; cf. also IDEM, 'Zwangsvollstreckung und dingliche Sicherung in den Papyri der ptolemäischen und römischen Zeit', *Symposion* 1995, Köln 1997, pp. 291–292, 293–299, and IDEM, 'Veräußerungsverbot und Gewährleistung in pfandrechtlichen Geschäften', [in:] *Akten des 21. Internationalen Papyrologenkongresses*, Stuttgart – Leipzig 1997, pp. 870–880.

[15] RABEL, *Verfügungsbeschränkungen* (cit. n. 1), pp.29–30; SCHWARZ, *Hypothek* (cit. n. 5), pp.1–4, *passim*; MITTEIS, *Grundzüge* (cit. n. 3), pp.143–144.

debt is not paid in due time, the writ of payment (διαστολικόν) being delivered to the debtor. No single document styled as *hypallagma* contains such clause.

(2.) Of the abundant documents concerning the execution of securities, these referring to *hypallagma* mention a procedure of ἐνεχυρασία, through which the object was attributed to the creditor, culminating – in the case of land – in the registration to his name in the βιβλιοθήκη ἐγκτήσεων or the catoecic land register; it is exactly the same procedure that one would have to follow for the execution against the debtor regarding any object not previously mortgaged. Only after ἐνεχυρασία is it possible for the creditor to start a second procedure for ἐμβαδεία, the actual entry into possession of the pledge. Revealingly, the hypothecarian documents do not mention ἐνεχυρασία, the creditor being entitled to request ἐμβαδεία directly.[16]

Both differences are obviously interrelated: contrary to hypothec, *hypallagma* does not cause direct forfeit, and thus forces the creditor to go through the whole ordinary executive procedure, as if the object had not been mortgaged at all. This poses an obvious question: what is it then that the creditor acquires as security in *hypallagmata?* The right answer is ... nothing. The creditor acquires nothing: the security lies not in any-

[16] One notable exception, mentioning ἐνεχυρασία (l. 16) for a hypothec (l. 9: ἐπὶ ὑποθήκῃ) is *PSI* XII 1238 (AD 244, provenance unknown), cf. RUPPRECHT, 'Zwangsvollstreckung' (cit. n. 14), p. 297. Requisite for the forfeit that entitles the creditor to ἐμβαδεία is the so-called ἐπικαταβολή (for the catoecic land the μετεπιγραφή, as shown by the comparison between *P. Flor.* I and the otherwise quasi-identical *P. Strasb.* 52), about which our knowledge has not progressed significantly since MITTEIS, *Grundzüge* II 1 (cit. n. 3), p. 163, where it was presented as 'der dunkelste Punkt bei der Hypothekenrealisation'. It seems to have been a crucial moment in the procedure for the execution of the hypothec: the one that vests full ownership in the creditor. And the papyri make it obvious that it was an act of the creditor himself. The parallel of μετεπιγραφή suggests that it may have involved a registration. MITTEIS' conjecture – *Grundzüge* (cit. n. 3), p. 165 n. 1 – that ἐπικαταβολή – from ἐπικαταβάλλειν 'to pay' – could refer to the payment of the 3% difference between the tax for the constitution of the hypothec (2%) and the one for the transfer of ownership (5%) has not met great echo. On the problem, cf. the detailed discussion of the material by SCHWARZ, *Hypothek* (cit. n. 5), pp. 119–125, and the updated state of the question in RUPPRECHT, 'Zwangsvollstreckung' (cit. n. 14), pp. 294–298.

thing the creditor acquires but in something the debtor renounces: his right to dipose of the pledged property. A clause surrendering this *facultas alienandi vel pignerandi* – in its most usual wording: φυλάξω (or παρέξεται) ἀνεξαλλοτριώτον καὶ ἀκαταχρηματίστον – is in fact the kernel of every *hypallagma* contract.[17]

Hypallagma thus consists exclusively in this surrender of the legitimation to transfer ownership or to further mortgage or encumber the object: such surrender secures the object for the ordinary execution.

III. THE FUNCTION AND STRUCTURE OF *HYPALLAGMA*

This conclusion poses yet a further question: why should any creditor content himself with such a security if hypothec provides, through forfeit, a much simpler execution process? The reason is to be found in yet another striking difference between both:[18] in *hypallagma*, the right of the creditor to execute the security is mentioned simply as a part of his general right of execution (πρᾶξις) on the person and the rest of the belongings of the debtor; in hypothecations, on the other hand, such a general right of execution is only occasionally asserted; and then only to cover the possible loss of the mortgaged (κίνδυνος) or the debtor's not honouring the general guarantee against legal defects (βεβαίωσις chiefly concerning the case of the object being lost – before or after execution – because of the better right of a third party, typically someone who proves to be the real owner.[19] This difference has rightly aroused the conviction that

[17] RUPPRECHT, 'Veräußerungsverbot' (cit. n. 14), p. 873: 'Ein Verfügungsverbot in der einen oder der anderen Form wird in den Urkunden – soweit ersichtlich – stets vereinbart'. A non-alienation clause is also common, albeit with a different wording, in *hypothekai*. On the conception and legal meaning of these clauses, RUPPRECHT, 'Veräußerungsverbot' (cit. n. 14), pp. 870–880. The different wording has risen speculations about a different effect of the non-alienation clause in both cases: Ccf. already RABEL, *Verfügungsbeschränkungen* (cit. n. 1), pp. 30–33, and the further development of the idea in SCHWARZ, *Hypothek* (cit. n. 5), pp. 56–58. See also WOLFF, *Vorlesungen* (cit. n. 4), pp. 109–110.

[18] On this, cf. above all SCHWARZ, *Hypothek* (cit. n. 5), pp. 17–33.

hypothec totally absorbs the liability of the debtor: the whole liability falls upon the pledge (the so-called 'reine Sachhaftung'); no execution on the person of the debtor or his other belongings is any longer possible – unless, if so agreed, in the case the mortgaged object is physically or legally lost (*κίνδυνος/βεβαίωσις*). ***Hypallagma***, instead, leaves untouched the general ***praxis*** of the creditor, and in fact presents itself in the documents as only a possibility of execution: a possibility secured by the non-alienation agreement. Here lies the ***raison d'être*** of ***hypallagma*** as a legal institution. Even if we loose the forfeit of hypothec – and thus we have to go through an execution procedure in which ***embadeia*** is only reached after a previous process of ***enechyrasia***, as if no security had been given – we keep the general liability of the debtor, which disappears whenever a hypothec is contracted.[20]

The fact that ***hypallagma*** sacrifices forfeit for the sake of the debtor's liability suggests that both were seen as not compatible; thus, that a refined sense of juristic logic lies behind the creation of ***hypallagma*** as an alternative to the old Greek hypothec. This logic can be reconstructed in the following way: thanks to the forfeiture clause, the hypothecarian creditor acquires full ownership on the pledge, without the need of the ordinary executive procedure, as soon as he performs the required *ἐπικαταβολή* (n. 16); the debt is thus satisfied in advance by the hypothecation itself, and therefore the hypothec is not compatible with the debtor's liability. Hypothec can be in this sense described, with Mitteis, as anticipated substitutory payment (***datio in solutum***, in the Romanistic tradition): the creditor accepts it as substitution for the debt,[21] for which

[19] *BGU* III 741 (AD 142, Alexandria [?]); *P. Strasb.* I 52 (AD 151, Hermopolis); *P. Flor.* I 1 (AD 153, Hermopolis); *BGU* VII 1651 (2nd. cent. AD, Philadelphia, Arsinoites) *P. Mert.* III 109 (2nd cent. AD Oxyrhynchos); *SB* VI 9254 (2nd cent. AD, Arsinoites); *SB* XIV 11705 (after AD 213, Arsinoites). In both *BGU* papyri, the general liability is agreed upon also for the part of the debt not satisfied by the mortgaged object (*ἔλλειπον*); the same in *PUG* II 62 (AD 98, Oxyrhynchos).

[20] SCHWARZ, *Hypothek* (cit. n. 5), pp. 44–48.

[21] MITTEIS, *Grundzüge* II 1 (cit. n. 3), p. 145: 'antizipierte *Datio in solutum*'. The idea is sometimes expressed in the documents themselves: Cf. *P. Strasb.* I 52 (AD 151, Hermopolis Magna) ll. 7–8: ... *καὶ κτᾶσθαι αὐτὴν καὶ τοὺς παρ' αὐτῆς ταύτας κυρίως ἀντὶ τῶν ὀφει[λομένων]*: the creditor shall have the land as owner in place of the indebted sum.

the debtor will no longer be liable. In order to avoid this extinction of the debtor's liability, the cleanest way is to avoid forfeit: and that is precisely what *hypallagma* does.[22]

Only the non-alienation clause of hypothec is kept: in *hypothekai* this loss of right to dispose is an expression of the fact that the debtor is no longer exclusive owner of the pledge that he has contracted, in the tradition of the ancient Greek πρᾶσις ἐπὶ λύσει, a suspensively conditional sale, and therefore the creditor is from the first moment suspensively conditional owner.[23] In *hypallagma*, instead, the creditor has not acquired anything at all, and therefore a surrender of the debtor's right to dispose is essential as he keeps full ownership of the pledge. This, together with the fact that (with notable exception of a general *hypallagma* in *P. Lond.* III 1166 r°, p. 1045 – AD 42, Hermopolis) only hypothecation documents occasionally contain a clause nullifying the alienation attempts of the debtor, easily leads to the idea that the non-alienation clause has a different effect in both (see *supra* n. 17). It has been conjectured that only in *hypothekai* it has full 'real' effect, which would mean that despite any alienation or further mortgage by the debtor, the creditor would keep his right to execute the mortgage as if no third party were involved. This might be true, although the available sources do not prove it,[24] but it would be wrong to construct the effect of the clause in *hypallagma*, by contrast, as a 'personal' one.

[22] In a group of documents from Oxyrhynchos, from the two first centuries AD, the creditor keeps the general πρᾶξις, despite the fact that a sort of forfeit is agreed upon: in case of unfulfillment, the creditor is entitled to keep the mortgaged object. This figure, anomalous from the point of view of the logic that we have conjectured behind *hypallagma*, is the so-called μένειν-contract. Cf.: *P. Oxy. Hels.* 31 (AD 86, Oxyrhynchos); *P. Oxy.* II 270 = *MChr.* 236 (AD 94, Oxyrhynchos); *P. Oxy.* III 506 = *MChr.* 248 (AD 143, Oxyrhynchos); *P. Oslo* II 40 A/B (AD 150, Oxyrhynchos); *P. Oxy.* XXXIV 2722 (AD 154, Oxyrhynchos); *P. Oxy.* III 485 = *MChr.* 246 (after AD 178, Oxyrhynchos); *P. Coll. Youtie* I 50 (2nd cent. AD, Oxyrhynchos); *P.S.I* XIII 1328 (AD 201, Oxyrhynchos).

[23] For this immediate 'real' effect of the hypothecation, WOLFF, *Vorlesungen* (cit. n. 4), pp. 109–110; IDEM, 'Hellenistisches Privatrecht', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte RA* 90 (1973), p. 89. Against this construction, RUPPRECHT, 'Veräußerungsverbot' (cit. n. 14), p. 880 and nn. 67–68.

[24] In this sense, with detailed argumentation, RUPPRECHT, 'Veräußerungsverbot' (cit. n. 14), p. 880. Cf. already RABEL, *Die Verfügungbeschränkungen* (cit. n. 1), pp. 94–96.

A 'personal' effect would consist in the personal liability of the debtor, and for that, in the case of *hypallagma*, there is no need of the debtor's breaching the non-alienation clause: his full liability exists in any case. Actually, as I will try to argue (cf. *infra* in section v *in fine*), it is not unlikely that the non-alienation clause in *hypallagma* had by itself, no legal effect.

IV. THE ALEXANDRINE *SYNCHORESEIS* AND THE HANDING OVER OF THE TITLE-DEEDS

When Schwarz was finishing his manuscript for *Hypothek und Hypallagma*, the fourth volume of the *Berliner Griechischen Urkunden* was also being prepared for publication: with it, a great number of papyri concerning real securities, and, among them, quite a few *hypallagmata*; the most numerous group, in fact, in any collection still to our days. Thanks to the aid of Wihelm Schubart, Schwarz could include this crucial material in his book.[25] Within it, a most remarkable group: a series of documents from Alexandria, years 13 to 11 BC, all belonging to the *Protarchos* archive, thanks to which the nature of the *synchoresis* form was definitively clarified: a contract stylized as a ficticious court settlement.[26] The *hypallagma-synchoreseis* of *BGU* IV,[27] some of them contracts, some of them receipts, were by far the earliest documented *hypallagmata*, and revealed a practice for which the later sources, previously available, offered hardly any hint: the debtor handed over to the creditor the title-deeds of the mortgaged property, title-deeds which were to be returned to the debtor as soon as he discharged his debt.[28]

[25] Cf. SCHWARZ, *Hypothek* (cit. n. 5), 'Vorwort', p. VI, and the long list of papyri he used from *BGU* IV, in his 'Quellenregister', pp. 148–149.

[26] Cf. WOLFF, *Das Recht* (cit. n. 3), pp. 91–95, with the lit. therein cited.

[27] *BGU* IV 1053 = *MChr.* 105; 1147 = *MChr.* 103; 1148; 1149; 1150 I and II; 1152; 1153 II; 1167 II and III.

[28] Cf. *BGU* IV 1147 (13 BC, Alexandria), ll. 24–26; *BGU* IV 1148 (13 BC, Alexandria), ll. 28–35; *BGU* IV 1149 (13 BC, Alexandria), ll. 23–24; *BGU* IV 1150 I (13 BC, Alexandria), ll. 10–11; *BGU* IV 1152 (11–10 BC, Alexandria), ll. 21–26; *BGU* IV 1167 II (12 BC, Alexandria), ll. 30–31.

By way of example, let us consider *BGU* IV 1149 (Alexandria 13 BC):[29]

Πρωτάρχωι
παρὰ Γαίου Ἰουλίου Φιλίου καὶ παρὰ Μάρκου Μουνατίου Ἐπιν̣α...
Πέρσου τῆς ἐπιγονῆς καὶ τῆς γυναικὸς Ἰσιδώρας τῆς Ἀρείου Περσεινη(ς)
μετὰ κυρίου τοῦ ἀν̣δρός. περὶ τῶν διεσταμένων συνχωρεῖ ὁ Γάιος Ἰούλ(ιος)
Φίλιος εἰληφέναι παρά τε τοῦ Μάρκου καὶ τῆς Ἰσιδώρας δι[ὰ]
τῆς Κάστορος κολλυβιστικῆς τραπέζης εἰς ἃ ⸢ἔλαβον π̣α̣(ρὰ)⸣⟦.....⟧
αὐτοῦ ὅ τε Μᾶρκος καὶ Ἰσιδώρα σὺν Σέξστωι ⟦....ν̣τίῳ⟧
Ποπιλλίωι Σαραπίωνι ὅσπερ μετήλλαχεν δάνεια δύο
κατὰ συγχωρή⟦σις⟧⸣σεις΄ τὰς διὰ τοῦ αὐτοῦ κριτηρίου γεγονυίας τ̣ῷ̣ι . (ἔ̣τ̣ει̣)
Καίσαρος ⟦Μεχεὶρ⟧ μίαν μὲν Μεχεὶρ δραχμῶν τετρακοσί[ων],
τὴν δὲ ἑτέραν τῶι Φαμενὼθ δραχμῶν ἑκατὸν πεντήκο(ντα)
εἰς τὰς ἐπὶ τὸ αὐτὸ δραχμὰς φν ἐπ̣ὶ̣ λόγωι ⸢⟦παρὰ Σ̣α̣(ραπίωνος)⟧΄
ἀργυ(ρίου) (δραχμὰς)
διακοσίας εἴκοσι δύο ⸢⟦Μάρκου καὶ Ἰσιδώρας⟧΄ ⟦κ̣α̣ὶ̣ ε̣ἰ̣ς̣ .....μενον⟧,
ἐκπ̣ε̣π̣λη̣ρ̣ῶ̣σ̣θ̣α̣ι̣
δὲ καὶ τοῖς ἀμφοτέρων τῶν δανείων τόκοις μέχρι Φαμενὼθ
τοῦ ἐνεστῶτος ιξ (ἔτους) Καίσαρος διὰ χειρὸς ἐξ οἴκου, ὥστε λοιπ(ὰς)
ὀφείλεσθαι αὐτῶι Γαίωι Ἰουλίωι Φιλίωι ὑπό τε τοῦ
Μάρκου καὶ τῆς Ἰσιδώρας ἀργυρίου δραχμὰς τριακο-
σίας εἴκοσι ὀκτώι, ἃς καὶ κομισάμενος ὁ Φίλιος ⟦..⟧ κ̣α̣ὶ̣
....[. *ca* 18]δ̣ε̣κα̣σ̣τ̣η̣ν̣ μ̣η̣τ̣ε̣κ̣α̣ . . .
ἐν̣ ᾧ̣ μ̣ε̣μ̣έ̣ρ̣ικεν αὐτοῖς χρόνωι μ̣η̣[νῶν δύο]
ἀπὸ Φαρμοῦθι τοῦ αὐτοῦ (ἔτους) λύσιν ποήσασθαι τῶν προκ(ειμένων)
δανειστικῶν συγχωρή(σεων) δύο καὶ ἀν̣α̣δ̣ώσειν τῇ̣
Ἰσιδώρᾳ ⸢ἢ τῶι καταβαλόντι αὐτῷ̣ν΄ ἃς εἴληφεν παρ' αὐτῆς ἐν
ὑπαλλάγματι ἀσφαλ(είας)
⟦ἀσφαλείας δύο ⟧ ἀντίγραφόν ⸢τε΄ συγχωρήσεως καὶ διαθή-
κην κατὰ τοῦ ὑπάρχοντος αὐτῇ̣ δούλου Ζ̣ω̣σ̣ί̣μ̣ου
⟦οἷα καὶ εἴληφεν⟧, ἐὰν δὲ μὴ ἀποδῶσιν οἱ ὑπόχρεοι Μ̣ᾶ̣ρκ(ος)
καὶ Ἰσιδώρα διελθόντων τῶν δύο μηνῶν τὰς τοῦ ἀργυ(ρίου) (δραχμὰς) τκη
καὶ ταύτης γείνεσθαι τὴν πρᾶξιν τῷ̣ Γαίωι Ἰουλίωι
Φιλίωι ἔκ τε αὐτῶν τῶν δύο ⸢ὄντων ἀλληλ(εγγύων) εἰς ἕκ(τισιν)΄ καὶ ἐξ ἑνὸς
καὶ ἐξ ὁποτέρ̣ο̣υ̣

οὗ ἐὰν αὐτῶν αἱρῆται [[καὶ ἐκ τῶν ὑπαρχόντων αὐτοῖς πάντων, ἔτι δὲ]]
καὶ ἐκ τοῦ δούλου Ζ̣ω̣σ̣ίμου καὶ ἐκ τῶν ἄλλων αὐτ⟨οῖ⟩ς ὑπαρχόντ(ων)
ταῖς προκειμέναις σ̣υ̣ν̣χ̣ω̣ρ̣ή̣(σεσιν) ἀ̣κ̣ο̣λ̣ο̣ύ̣θ̣ως, ἐὰν δὲ συν-
βῇ τὸν δοῦλον διαδρᾶναι ἢ καὶ παθεῖν τι ἀνθρώπινον,
καὶ οὕτως εἶναι τὰ ὀφιλόμενα ἀκίνδυνα παντὸς
κινδύνου ἀκύρων οὐσῶν καὶ ὧν ἐὰν ἐπενέγκωσιν
πίστεων [πασ]ῶν σκέπης πάσης. (ἔτους) ιξ Καίσαρος Φαρμοῦθι ιβ

10: corr. from συγχωρη[[σιν]] || 19 l. ὀκτώ || 22 l. ποιήσασθαι || 32: l. αὐτῆς.

The document is a receipt for a partial payment of two loans, that Marcus Munatius Epinas and Isidora, presented in the document, despite the obvious Roman citizenship at least of the former,[30] as Persians of the

[29] English translation in A. Ch. JOHNSON, *Roman Egypt to the Reign of Diocletian*, Baltimore 1936, pp. 454–455, and P. VAN MINNEN, at <http://classics.uc.edu/-vanminnen/Alexandria/BGU%204.1149.html>

[30] *Hypallagmata* contracted by Roman citizens pose a legal problem because of TAUBENSCHLAG's conjecture on the basis of *Gnomon* § 2 (see *Law* [cit. n. 8], p. 276, – already E. SCHÖNBAUER, *Beiträge zur Geschichte des Liegenschaftsrechtes im Altertum*, Leipzig – Graz 1924, p. 105), that at least from Hadrian onwards any contract which should make an object unalienable, would be ineffective against Roman citizens. This would make it impossible for the Romans to contract *hypallagmata* as debtors. The problem does not affect our document, dated 13 BC, but is not easily compatible with two others. The first one, *P. Berl. Leihg.* 10 (AD 120, Arsinoites), *hypomnema* of a Marcus Antonius Titanianus to the *strategos* for the execution of a *hypallagma* by means of *embadeia* against the debtor Terentia Gemella, may have been prior to Hadrian's decree. But the second, *BGU* I 301 (AD 157, Arsinoites), is clearly posterior. It is a *hypallagma* given by a Lucius Longinus Gemellus as guarantee for a loan received from a Antonia Amerilla. After the *Constitutio Antoniniana*, we have no less than eight *hypallagmata*, many of them in executive phase, that are very difficult to explain if a prohibition had been expressly formulated: *P. Princ.* III 144 (AD 219–220 ?, Ptolemais Euergetis, Arsinoites); *P. Iand.* VII 145 (AD 224–225, provenance unknown); *P. Strassb.* VIII 732 (AD 228–229, Hermopolis.); *P. Flor.* I 56 = *MChr.* 241 (AD 234, Hermopolis); *P. Lips.* I 10 = *MChr.* 189 (AD 240, Hermopolis); *P. Ryl.* II 177 (AD 246, Hermopolis); *P. Cair. Isid.* 62 (AD 297, Karanis, Arsinoites); *P. Strassb.* VII 636 (end of the 3rd cent. AD, Hermopolis). With Romans as creditors, there are yet many more examples of *hypallagma*.

epigone,[31] had received, together with the deceased Xestos, from a certain Gaius Iulius Philios.[32] The rest of the debt shall be paid in two months, and on receiving it, the creditor will return to Isidora the title-deeds – a copy of a *synchoresis* and a will – that he had previously received from her ἐν ὑπαλλάγματι, concerning a slave named Zosimos.

It is striking that in the formulation of the document, it is not the slave, but the documents themselves that are given in *hypallagma* (on this question, see further on, pp. 36–37). The impression that this practice was central to the institution is, as Schwarz observed, further enhanced by the fact that the very term *hypallagma* seems to be avoided in these *synchoreseis* when no conveyance of title deed had taken place.[33]

[31] On Persians of the epigone the literature is inexhaustible. Cf., most recently, Katelijn VANDORPE, 'Persians soldiers and Persians of the epigone', *APF* 54 (2008), pp. 87–108, according to whom people of any ethnic origin who enrolled as soldiers in Upper Egypt would be termed as 'Persians soldiers serving for pay' when employed (this class included also their descendants), and as 'Persians of the epigone' – lit. 'Persians by descent' – when unemployed and unpaid (as the actual service was only temporary), which therefore would tantamount 'Persians of the reserve'. Whatever the origin of the category may have been, it is widely agreed that at least from the late Ptolemaic times – when the mentions of such 'Persians' impressively increase in the documents, while the 'epigones' of other nationalities vanish, and when the denomination starts to appear frequently also for women – it came to be used as a mere fiction, possibly, as PRINGSHEIM suggested, in order to aggravate their liability. In fact – cf. MITTEIS, *Grundzüge* (cit. n. 3), pp. 20–21, 46) – the denomination frequently appears in cases where the debtor accepts a especially tough executive procedure on his person, through the so-called ἀγώγιμος-clause: being subject to private *ductio*, without the need for an intervention of the *praktores*. For a different interpretation, see WOLFF, *Vorlesungen* (cit. n. 4), p. 74, connecting the denomination with the joint and severe liability of several debtors through the ἀλληλεγγύη. This may have come to the Ptolemaic practice via oriental influence: the qualification as Persian would then only mean 'I act in this business transaction in the typically Persian way', that is, with joint and severe liability.

[32] This Gaius Iulius Philios was most probably an imperial freedman. There are two other *hypallagmata* – *BGU* IV 1053 (13 BC, Alexandria) and *BGU* IV 1151 II (13 BC Alexandria), and yet other two loans without *hypallagma* – *BGU* IV 1156 (before 15 BC, Alexandria), 1166 (13 BC, Alexandria) connected to him. The whole dossier of five documents has been examined by M. SCHNEBEL, 'Die Geschäfte des Gaios Ioulios Philios', *Aegyptus* 13 (1933), pp. 35–41; Cf. the critical note by P. VAN MINNEN at <http://classics.uc.edu/~vanminnen/Alexandria/Philios.html>

[33] That is, in SCHWARZ's opinion, the reason for the term's absence from *BGU* IV 1151 II (13 BC, Alexandria) and BGU IV 1167 III (13 BC, Alexandria): *Hypothek* (cit. n. 5), p. 14 and n. 4.

However, the practice appears to be systematically followed only in the Alexandrine *synchoreseis* of *BGU* IV, all dated 13–11 BC Later, it practically vanishes, or at least it is not mentioned, save in very few isolated cases.[34] And, as Schwarz himself underlined, it is not to be excluded that the same deed conveyance could occasionally accompany the constitution of any other real security, such as a hypothec, and hence a document attesting the practice could not be, just on that basis, automatically classified as *hypallagma*.

All these reservations were unfortunately not underlined clearly enough by Taubenschlag in his *Opus Magnum*,[35] and on his authority, the wrong assumption that *hypallagma* required the debtor to hand over his title deeds has become widespread.[36] This extended conviction that the

[34] The only occurrence in the papyri is *BGU* I 301 (AD 157, Arsinoites), where both parties are Romans (*supra* n. 30). Interestingly, echoes of this practice can be found precisely in the Roman legal sources. In a constitution of Septimius Severus and Caracalla, from AD 207, preserved in the *Code of Justinian*, and addressed to a certain Rogato, we read: *Cum constet pignus consensu contrahi, non dubitamus eum, qui emptiones agrorum suorum pignori posuit, de ipsis agris obligandis cogitasse* (*CJ.* 8.16.2). The text was already mentioned by SCHWARZ, *Hypothek* (cit. n. 5), p. 14 n. 3 *in fine*. Yet another striking example, that so far has not been connected to our question, is Scaev. D. 13.7.43 pr.: *Locum purum pignori creditori obligavit eique instrumentum emptionis tradidit: et cum eum locum inaedificare vellet, mota sibi controversia a vicino de latitudine, quod alias probare non poterat, petit a creditore, ut instrumentum a se traditum auctoritatis exhiberet: quo non exhibente minorem locum aedificavit atque ita damnum passus est. quaesitum est, an, si creditor pecuniam petat vel pignus vindicet, doli exceptione posita iudex huius damni rationem habere debeat. respondit, si operam non dedisset, ut instrumenti facultate subducta debitor caperetur, posse debitorem pecunia soluta pigneraticia agere: opera autem in eo data tunc et ante pecuniam solutam in id quod interest cum creditore agi.*

[35] TAUBENSCHLAG, *Law* (cit. n. 8), p. 275: 'From the Egyptian practice originates the *hypallagma*. The *hypallagma* required the debtor to hand over his *asphaleiai* (certificates of origin of his title) to the creditor. The debtor thus renounced voluntarily his right to dispose of his property until it was redeemed from its pledge. The purpose of the *hypallagma* is thus to keep in check of any kind of disposition until the debt is settled.'

[36] A wonderful example may be found in P. W. PESTMAN, 'Some aspects of Egyptian Law in Graeco-Roman Egypt. Title-deeds and *ΥΠΑΛΛΑΓΜΑ*', [in:] E. VAN'T DACK, P. V. DRESSERL & W. V. GUCHT (eds.) *Egypt and the Hellenistic World* (*Studia Hellenistica* 27), Leuven 1983, p. 281 ss.: 'When I was looking for a subject for my paper, I received a telephone call from a colleague of mine asking me if it was true that the *hypallagma* required the debtor to hand over the title-deeds of the property pledged and if this requirement really was of Egyptian origin. Since I felt certain that this was the case, I answered in the affir-

conveyance of the title deeds remained essential to *hypallagma* is all the more surprising taking into account that the initial reception of Schwarz's much more nuanced idea, confined to the Alexandrine *synchoreseis*, was negative, due no doubt to Mitteis' skepticism.[37] In any case, Mitteis' dismissal of the importance of this early practice for the history of *hypallagma* is, in my opinion, wrong. A brief reflection on its function and early extinction will be enough to show why.

V. THE FUNCTION OF THE CONVEYANCE OF THE TITLE DEED

Reflecting on the function of conveyance of the title deeds, Schwarz considers two possibilities:[38] its purpose could have been either to assure the inalienability of the pledge, or to help the creditor's execution. Obviously, one function does not exclude the other,[39] and yet Schwarz is surprisingly skeptical regarding the first one. It would be confirmed, he asserts, only if the conveyance of the title deeds could be proven to be mandatory for the transfer of ownership in the law of the papyri: in this case,

mative, but immediately after having done so, I started wondering why I felt so certain and on what kind of documentary proofs my certainty was based. TAUBENSCHLAG, it is true, explicitly states that the *hypallagma* comes from Egyptian practice and that it requires the debtor to hand over his title-deeds. Yet the texts he quotes in this respect are all of Roman date, which is rather late for proving an Egyptian origin'. The whole purpose of PESTMAN article, actually, challenges solely the idea of the Egyptian origins, leaving untouched the assumption that the deed conveyance was essential in Roman times.

[37] MITTEIS, rec. SCHWARZ (cit. n. 13), p. 486: 'In vielen Einzelheiten ist es außerdem der eingehenden Untersuchung des Verfs. gelungen, auch über das bisher Bekannte hinaus noch neue Gesichtspunkte zu gewinnen. Zwar wenn er betont, daß in den alexandrinischen συγχωρήσεις der augusteischen Zeit bei der hypallagmatischen Verpfändung die Übergabe der Erwerbsurkunden eine besondere Rolle spielt (S. 13f.), ist das eine Tatsache, der ich keine besondere Bedeutung für die Geschichte des Instituts beimessen möchte.'

[38] SCHWARZ, *Hypothek* (cit. n. 5), p. 16 and n. 2.

[39] And for this reason, *BGU* I 301 (AD 157, Arsinoites), quoted by SCHWARZ, *Hypothek* (cit. n. 5), p. 16 n. 3, that seems to confirm the second function, cannot be used as an argument against the first.

alienation would indeed be impossible for a debtor deprived of the title deeds. But in the contracts of sale, Schwarz observes, the transfer is rarely mentioned; this of course does not exclude that the practice was much more common than the documents suggest – one would imagine that as a rule the buyer would be interested in having the title deeds –; but the fact that it was not systematically documented in the contract itself proves indeed, and here Schwarz is right, that it was not a condition for the transfer of ownership as such: otherwise, every single sale document would have mentioned it, in the interest of the buyer, as performed.

True, then: being deprived of the title deeds does not make it *de iure* impossible to alienate; but in a legal culture, like the Graeco-Egyptian, whose cornerstone is the written document,[40] it makes it *de facto* extremely difficult, as it would be extremely difficult in our world to find a buyer for a piece of real estate without any documents or registration entries to prove our ownership. Schwarz's reasoning is in this point a striking example of legal pedantry, almost Pandectistic in spirit, an approach particularly misleading when the object of study is the legal practice of the papyri.

Of the two possible functions of the title deed conveyance, the primary one is thus in my opinion, despite Schwarz, assuring *de facto* the compliance with the non-alienation clause. Also because, turning Schwarz's reasoning against the function he favours, the title deeds that the creditor may have in his possession seem to have had no weight whatsoever in the procedure for the execution of the *hypallagma*: in no document concerning the execution procedure – and we have plenty of them – are the title deeds even mentioned, and no wonder: the *hypallagma* contract itself is enough to justify the right of the creditor to execution, right to execution that on the other hand (*supra* II *sub* 2) is not stronger than that of a creditor without *hypallagma*, who would have no title deeds whatsoever in his possession.

Yet stronger evidence that keeping the debtor in check was the main function of the deed conveyance is paradoxically provided by its prema-

[40] A quotation is here superfluous, but cf. in any case, with lit. WOLFF, *Das Recht* (cit. n. 3), pp. 3–5: 'Schriftlichkeit'.

ture vanishing: after the Alexandrine *synchoreseis*, where the conveyance is systematically performed, there is a gap in our material. From Julio-Claudian times we have just two documents, *P. Lips.* II 132 (AD 25, Leukos Pirgos, Hermopolis), and *P. Lond.* III 1166 r°, pp. 104–105 (AD 42, Hermopolis), and the *hypallagmata* in both concern not just one item of the debtor's belongings but all of them, present and future, a case where handing over the title deeds – possibly lacking in regards to many of the present belongings and to all of the future ones – turns out to be problematic. Only singular *hypallagmata* are relevant for the custom of the title deed conveyance, and we have no such document for the time between Augustus – the last of the Alexandrine *synchoreseis* being dated 11–10 BC – and Trajan.[41] When *hypallagma* re-emerges, at the beginning of the second century AD, the tradition regarding the title deeds has vanished, and is practically never mentioned again (*supra* n. 34).

What happened in the meantime? There is one obvious answer: in the mid-first century AD, the *bibliotheke enkteseon* was created (see, *supra* nn. 3–4). The deed conveyance was no longer necessary because its function to secure the debtor's compliance with the non-alienation clause could be now with greater efficiency be absolved by the registration of the *hypallagma*: the *bibliotheke* would not grant ἐπίσταλμα for any alienation attempt of the debtor, at least if a κατοχή (arrest) is found in his records in the διαστρώματα; and without ἐπίσταλμα no notary would document the transaction.[42] This does not mean that an alienation was impossible –

[41] The first undisputable *hypallagma* of our Era is a small fragment, *P. Bodl.* I 104, from Arsinoites, dated (l. 11) to the first year of an emperor whose name began Ne, who could be Ne[ro] – then AD 54 – or Ne[rva Trajan] (then AD 98) which is more plausible also for palaeographical reasons according to the editor, R. P. SALOMONS. In two earlier fragments, *P. Flor.* I 55 (AD 88–96, Hermopolite nome) and *P. Strassb.* IX 826 A (AD 96–98, Soknopaiou Nesos), the nature of the guarantee is uncertain.

[42] Cf. *P. Oxy.* 237 VIII (after AD 186, Oxyrhynchos), the part of the famous Dionysia-petition containing the even more famous Edict of the Praefect Mettius Rufus of year 89, on which cf., with lit. WOLFF, *Das Recht* (cit. n. 3), pp. 223–224. On the *epistalma*-system, cf. MITTEIS, *Grundzüge* (cit. n. 3), pp. 97–101; and in many aspects correcting him, WOLFF, *Das Recht* (cit. n. 3), pp. 247–253. On the registration of *hypallagma*, see *supra* nn. 5–7. As an illustration of the connection between the registration of the *hypallagma* and the surrender of the *facultas alienandi*, cf. the request for inscription in *P. Wisc.* II 54 (AD 116, Arsi-

it could be performed by means of a mere *chirographum* – but the lack of notarial document meant for the buyer the impossibility to register his acquisition in the *bibliotheke*, and would thus made it difficult to find a buyer for the real price of the object.[43]

The fact that such indirect mechanisms had to be found to keep the debtor's *facultas alienandi* in check clarifies the somewhat provocative assertion that closed the previous section III: the non-alienation clause in *hypallagma* seems in general to have had, by itself, no legal effect. There is a general consensus that it did not have 'real' effect, that is, that it did not make the alienation void or ineffective or in any other way entitle the creditor to claim the object from a new owner.[44] As I understand it, the mechanism of the deed conveyance, and later the registration in the *bibliotheke*, compensate for that lack of real effect. And a 'personal' effect, that is, the liability of the debtor for breach of contract in his person and in the rest of his belongings would be of no moment regarding a debtor who is anyway fully liable despite the guarantee.[45]

Taking into account that, as we explained *supra sub* II, this non-alienation clause is the only legally relevant element of *hypallagma*, the fact that it seems to have had by itself no legal effect, makes it tempting to go a step further. *Hypallagma* was, strictly speaking just a legal practice, borrowing some efficacy from ancillary mechanisms such as the title deed conveyance or the registration, but not truly a legal act – 'Rechthandlung' – if by such we understand, in the good dogmatic tradition, one that has legal effects on its own, creating, extinguishing or altering rights or faculties of the parties.

noites): |[17] —— *καὶ μὴ συνχρηματί-* |[18] *ζεσθαί μοι μηδὲν ἁπλῶς οἰκονομού-* |[19] *σῃ ἄρχι οὗ ἐπενέγκω ἀποδώσεως ἁπάντωον ἀποχήν* |[17] —— 'and I do not want you to cooperate |[18] with me in anything whatsoever until I bring |[19] forward the receipts of the payment of everything' (in similar terms cf. as well, *P. Kron.* 18.18–23 [AD 143, Tebtynis] and *P. Vars.* 10 III. 18–24 [AD 156, Arsinoites]).

[43] On the effectiveness of the registration of the *hypallagma*, cf. WOLFF, *Vorlesungen* (cit. n. 2), p. 110.

[44] See, *supra ad* n. 23, and lit. in n. 17. Cf. however, *P. Lond.* III 1166 r° (AD 42, Hermopolis), a general *hypallagma* with the clause *ἢ τὰ παρὰ ταῦτα ἄκυρα εἶναι*.

[45] *Supra* III ad nn. 18–20.

VI. THE TERM *HYPALLAGMA*

An enigma that the considerations above could contribute to clarify is the name of the institution itself. *Hypallagma* means ordinarily 'substitution', particularly 'subsidiary replacement, something provided in lieu of other thing'.[46] This has generally been interpreted in the sense that the creditor accepts the pledge in place of the money due.[47] The explanation is rather puzzling: so understood, the term would much better suit the hypothec,[48] where the object substitutes indeed for the payment and there is no further liability of the debtor (*supra* III and n. 21); but *hypallagma* contrasts with the older institution precisely in that respect.

A re-reading of the Alexandrine *synchoreseis* may be instructive here. Let us return to *BGU* IV 1149, used *supra sub* IV to illustrate the handing over of the title deeds to the creditor. Precisely in the lines referred to the title deeds we read:

|[23] ... καὶ ἀναδώσειν τῇ |[24] Ἰσιδώρᾳ ἢ τῶι καταβαλόντι αὐτῶν ἃς εἴληφεν παρ' αὐτῆς ἐν ὑπαλλάγματι ἀσφαλ(είας) |[25] [[ἀσφαλείας δύο]]

[46] Cf. *Thesaurus Linguae Graecae*, coll. 115–116, *s.v.* ὑπαλλαγή (*Inmutatio*); ὑπάλλαγμα (*Commutatio subsidiaria, res succedenea et quae vicem alterius praebet*).

[47] SCHWARZ, Hypothek (cit., n. 5), p.12: 'Daß man diese Form der Sicherung gerade ὑπάλλαγμα nannte, was wörtlich "Tausch", "Ersatz" bedeutet, läßt sich nur damit erklären, daß die gebundenen Objekte einigermaßen als Gegenwert der zu sichernden Forderung aufgefaßt wurden' In similar terms, RABEL, 'Veräußerungsverbot' (cit. n. 1), p. p.75: "Ὑπάλλαγμα heißt nämlich "Ersatzsache", ὑπάλλαγη ist der Tausch, *submutatio* (*Corp. Gloss. Goetz.* 2, 463, 15). Als ὑπάλλαγμα für ihre eigenen Leiber geben die Menschen die Körper anderer Lebenswesen zum Opfer hin, Porphyr. de abstinentia 2, 27. Das ὑπαλλάττειν muß also wohl die Hingabe der Sache als Ersatz des Geldes sein. ...' A different explanation in MITTEIS, *Gründzuge* (cit. n. 3), p. 147: 'Dürfte man freilich das ὑπό in der Komposition hier im Sinn der bloßen Annäherung an den Begriff des Simplex fassen, so ließe sich das Wort verstehen als eine "Destination" zu künftiger Ersatzleistung; ob dies angesichts der sonstigen Verwendungen, wo das Wort das gegenwärtige Austauschobjekt bezeichnet, zulässig ist, müssen Sprachkenner entscheiden'. And yet another, in K. SETHE & J. PARTSCH, *Demotische Urkunden zum Ägyptische Bürgschaftsrechte*, Leipzig 1920, p. 642, underlining the idea of surrogation and the equivalent value of debt and security.

[48] In that sense, MANIGK, *'hypallagma'* (cit. n. 14), col. 208.

ἀντίγραφόν τε συγχωρήσεως καὶ διαθή- |[26] κην κατὰ τοῦ ὑπάρχοντος αὐτῇ δούλου Ζ̣ω̣σ̣ί̣μου

[23] ... to return |[24] to Isidora or to whomever of them makes the payment the documents which he received from her in *hypallagma*, |[25] a copy of a synchoresis and a will |[25] concerning the slave Zosimos belonging to her (trans. by van Minnen, cit. n. 29).

As Schwarz himself underlined,[49] what in this document appears as given '*en hypallagmati*' – in substitution, literally translated – is not the slave but the documents themselves. The same in all the other *synchoreseis* of the group, to the point that the word *hypallagma*, as Schwarz noted,[50] is avoided when the title deeds are not mentioned. Here lies, in my opinion, the key to a right understanding of the term *hypallagma*: a *hypallagma* is a 'substitution' indeed, but not because the pledge substitutes for the debt. It is a 'substitution' because the documents substitute for the object on which the hypallagmantic creditor (contary to the hypothecarian one) acquires initially no right at all.[51]

The name given to the institution illuminates the reasons behind its creation. The main idea must have been (*supra sub* III) to build a guarantee that granted the creditor what the traditional Greek hypothec did not: the freedom to choose between the security itself and the debt. Thus: forfeit, that is, conditional transfer of ownership, is avoided; instead of conditional ownership, the creditor will receive only the ownership documents, securing that the object will remain unalienated and unencumbered, ready for execution. The documents substitute for the thing, hence *hypallagma*.

[49] Schwarz, *Hypothek* (cit., n. 5), p. 14 and n. 3.

[50] Schwarz, *Hypothek* (cit., n. 5) p. 14 and n. 4.

[51] A similar, but not identical, idea in Schönbauer, *Beiträge* (cit. n. 30), p. 105: 'Wollte nun ein Darlehensschuldner besondere Sicherheiten für die Rückzahlung des Darlehens leisten, so übergab er dieses Beweisdokument seiner Verfügungsberechtigung im Tausche zur Sicherung dem Gläubiger; daher der Ausdruck *ὑπ-αλλάσσω, ὑπ-άλλαγμα*.'

VII. THE PTOLEMAIC *HYPALLAGMA*

In general, it is still accepted that the Alexandrine *synchoreseis*, dated from 13 BC onwards, that Schwarz used as his point of departure, are the earliest *hypallagmata* to have arrived to us. *Hypallagma* is hence usually presented as an institution of the Roman times, much later thus than hypothec, for which there is no visible break between the Greek and the Egyptian figure.[52]

So, to quote just a recent example, we read in Rupprecht's 1995 Symposion paper on execution and real securities in the papyri: 'Das Hypallagma ist erst für die römische Zeit als gebräuliche Sicherung belegt'. True, the cautious 'gebräulich' throws a note of doubt, justified by two older documents that Rupprecht himself quotes elsewhere as possible *hypallagmata* from Ptolemaic times.[53] The documents are *BGU* VI 1212 and 1246, both dated 3rd century BC On the basis of precisely these two documents, Schwarz dated *hypallagma* back to Ptolemaic times: 'Dasselbe ist jetzt bereits für die Ptolemäerzeit nachweisbar, vgl. *BGU* VI 1212 D. lin. 28, 1246 lin. 25.'[54] In the same sense, invoking again the same two papyri, Taubenschlag wrote: 'This kind of contractual real attachment was permitted and practiced in the Ptolemaic era [...]'.[55]

Our task will be now to examine these papyri in order to reassess if they may be taken as evidence for a Ptolemaic *hypallagma*.

Let us start with *BGU* VI 1246 (3rd cent. BC, Elephantine):

[52] Related to this is the question whether *hypallagma* was created precisely to avoid the disadvantages of hypothec. There is also another, different, problem, whether *hypallagma* must be imagined as autochthonous Egyptian or Panhellenic. On both of these questions, see further under VIII.

[53] RUPPRECHT, 'Die dinglichen Sicherungsrechte' (cit. n. 14), p. 428: 'Aus ptolemäischer Zeit sind nur zwei Urkunden zu verzeichnen, davon ... eine Klage mit Erwähnung eines Darlehens mit Hypallagma, aber ohne genauere Angaben.'

[54] A. B. SCHWARZ, 'Sicherungsübereignung und Zwangsvollstreckung in den Papyri', *Aegyptus* 17 (1937), p. 266 n. 2

[55] TAUBENSCHLAG, *Law* (cit. n. 8), p. 276 and n.26. For a Ptolemaic *hypallagma*, cf. already, without sources, SCHÖNBAUER, *Beiträge* (cit. n. 30), p. 105.

[? ἐ]νεχύρο[ι]ς καὶ
συνγρα(φαῖς) κα[ὶ γὰρ πε]ρὶ τούτων πυ-
θομένου α[ὐτοῦ π]αρ' ἐμοῦ εἰ δυνα[ί]-
μην πορίσα[ι αὐτ]ῷι ταῦτα, ἐφ' ὥι
κατὰ κοινὸ[ν τοὺς] τόκους ἐκ τοῦ
κατα[λ]όγ[ου ἑκάτε]ρος ἡμῶν παρὰ
τοῦ Βιήγγ[χιος λή]μψεται, μέχρι
ὧν ἂν χρ[όνων καὶ] τὰ κεφάλαια
προελώμε[θα ἀ]ποκομίσασθαι
συνεχώρησ[α] δώσειν, ἃ καὶ ἐπι-
τάξαντος α[ὐ]τοῦ παρηρίθμη-
σα τοῖ[ς π]ερὶ τὸν Βιῆγχιν
συνιστο[ρο]ύντων ἑκάστοις
τούτων τῶν τε διασαφου-
[μέν]ων ἀδελφῶν μου καὶ ἔτι
[τῆς] μητρὸς ἡμῶν νυνὶ
δὲ τοῦ πατρὸς μετηλλαχότος
τὸν βίον πρὶν ἀποκομίσασθαι
ἡμᾶς παρὰ τοῦ Βιήγχι[ο]ς τὰ
δάνει[α] καὶ τοὺς τόκους οἱ ἐγκα-
λούμ[ε]νοι οὐχ οἷοί εἰσιν τὴν ἀσφά-
λεάν μοι δοῦναι τῶν κερμάτων
ὧν ὁ πατὴρ λαβὼν παρ' ἐμοῦ
ἐξετόκισεν τῶι Βιήγχει
καὶ τὰ ἐπ' αὐτοῖς ὑπαλλάγμα-
τα καὶ ἔτι τὴν συνγραφήν,
ἣν ἔθετο ὁ [[τῶι]] Βιῆγχ[[ε]]ις τῶι
πατρὶ δι' ἧς διαζαφεῖται

Is this, as Schwarz, Taubenschlag and Rupprecht believe, a loan with *hypallagma*?

The papyrus contains part of a claim, and the claim concerns indeed a loan, received by a certain Bienchis. Key to understanding the document is identifying the – due to the fragmentary state of the papyrus, unnamed – plaintiff and defendant.

The plaintiff is not the lender himself, who had died, but one of his children, the one – we are told – to whom the money lent by the father belonged. But who is the defendant? The claim is actually not directed against one singular defendant but several. They might be the heirs of the borrower, Bienchis, but we are not told that he had also died. There is a much better hypothesis, suggested already in the edition of the papyrus by Schubart and Kühn: that the claim is directed against the brothers of the plaintiff,[56] who would want to treat the credit against Bienchis as part of the inheritance, shared equally by all, ignoring the fact that the money belonged entirely – according to his claim – to our unnamed plaintiff.[57]

The reason for his claim was, according to the document, that the defendants would want neither to produce the *syngraphe* that originally documented the loan, which would clarify the whole question – namely, that the money lent was his, and that only the interest, not also the capital, was to be paid together to father and son – nor to give security (*asphaleia*) for the coins – that is, for the capital –, nor *hypallagmata* for them.

Despite Rupprecht, therefore, we do not have here a loan with *hypallagma*, but a complaint that the defendants do not give *hypallagmata*. The document, in fact, does not mention *hypallagma* as a guarantee for the loan itself, that is, as received by the lender – *i.e.* the father – from the borrower, but rather as something that the plaintiff should have been offered by the defendants, *i.e.* his brothers.

What may these *hypallagmata* be? It would not be justified to presume without further evidence that they are the same securities we will find two centuries later in the Augustan *synchoreseis*. And the assumption that they are securities is not aided by the fact that the plaintiff's complaint is

[56] Ed., p. 44: 'Zugrunde liegt ein Darlehen, das der Vater des Schreibenden dem Biënchis aus dem Kapital des Schreibenden gegeben hat, unter den Bedingung, daß beide ihre Zinsen von B. gemeinsam beziehen bis zur Kündigung der Kapitalien. Die Klage richtet sich vielleicht gegen die Brüder.'

[57] And so, contrary to the 'Inhaltsnotiz' of *Heidelberger Gesamtverzeichnis der griechischen Papyrusurkunden Ägyptens* <http://www.rzuser.uni-heidelberg.de/~gvo/>, we do not have a 'Klage wegen der Rückzahlung eines Darlehens bzw. Gewährleistung der Sicherheit', but rather an action of the heir against his co-heirs.

based on neither having received securities – *asphaleiai* – nor *hypallagmata*. This makes it more likely that the term *hypallagma* keeps here its general, ordinary meaning of 'susbstitution': here 'for the coins', that is, substitutory payment.[58] Also the plural – *hypallagmata*, instead of *hypallagma* – makes thus more sense.

No early evidence of *hypallagma* here, then, but more likely just the use of the term in the general meaning of substitutory payment.

Prima facie, the second alleged evidence of a Ptolemaic *hypallagma*, *C. Ord. Ptol.* 83 = *BGU* VI 1212 D seems to be more promising. The papyrus appeared in the same sixth volume of *BGU*, edited by Schubart and Kühn, with the title 'aus einer Sammlung königlicher Erlasse', its content attributed – we will come back to this later – to the late third century BC Up to four royal decrees are distinguishable in the papyrus, and it is in the last one – marked by the editors as D – that we find the term *hypallagma*:

[?]...ρας στρατηγοὺς καὶ ἐπὶ τῶν δυνάμεων τεταγμένους κα[ὶ τοὺς ?]
[?]. καὶ τοὺς βασιλικοὺς γραμματεῖς καὶ τοὺς ἐν τοῖς ητ[?]
[? ὑποδέχεσθαι τοὺς χηνοτ]ρόφους μηδὲ διδόναι αὐτοῖς τρ[ο]φὴν μηδ' ἐνκ[?]
24 [? δέχεσθαι εἰς τὰς] οἰκίας καὶ κτήσεις μηδὲ σκ[ε]πάζειν μηδὲ [?]
[?]εσθαι, ἐὰν δέ τ[ι]νες π[α]ρ[ὰ ταῦ]τα ποιήσωσι τῳ[?]
[? ἀφαι]ρεθήσονται τοκίδες καὶ [αἱ .] ἐπιγραφεῖσαι διὰ το[υ ?]
[? καθ' ὁντι]νοῦν τρόπον αἰτεῖσθαι τὰ ὑπά[ρ]χοντα τῶν χην[οτρόφων ?]
28 [? ὥστε τάς τε κτήσε]ις καὶ οἰκίας καὶ πάντα κεῖσθαι ἐν ὑ[πα]λλάγματι [?]
[? κ]αὶ τὰς γυναῖκας χλωμένας τ[ο]ῖς φ[....] διὰ τὸ εἶναι ἀλληλεγγύο[υς ?]
[?]ς περιπεπτωκότων τοὺς [μη]νιαίους φόρους, ὡσαύτως δὲ καὶ [?]

26 l. τοκάδες || 29 l. χρωμένας

The text concerns the χηνοτρόφοι,[59] the goose breeders. In the first two preserved lines (ll. 21–22) several officials – the στρατηγοί, the δυνάμεων

[58] F. PREISIGKE, *WB s.v.* ὑπαλλάγμα: 'Tauschmittel, Pfandgegenstand, Ersatzsache für Geld ... ' (emphasis by *JLA*)

[59] The word is reconstructed in ll. 23 and 27, but with almost full certainty, given the preserved τὰ ὑπά[ρ]χοντα τῶν χην[. . .] in l. 27 and the [. . .]ρόφους in l. 23

τεταγμένοι and the βασιλικοὶ γραμματεῖς – are mentioned regarding measures against goose breeders that have apparently been outlawed – they are not to be received or given food or shelter or protection[60] (ll. 23–24), although we ignore in punishment for what conduct. One possible hypothesis is that the measures concern those who have fled their duties[61] – hence the prohibition to give them shelter or food or protection – and thus also their fiscal obligations – mentioned in l. 30.[62] Their belongings are also are affected (ll. 27–28): τὰ ὑπά[ρ]χο̣ν̣τα τῶν χηνο̣[οτρόφων . . . ὥστε τάς τε κτήσε]ι̣ς καὶ οἰκίας καὶ πά̣ν̣τ̣α̣. Through which measures, it is not so clear.[63] In the editor's reading, we have κεῖσθαι ἐν ὑ̣[πα]λ̣λ̣ά̣γ̣μ̣α̣τι. Needless to say, the reading *'en hypallagmati'* is extremely conjectural. Yet, accepting it, we would still have to consider what the meaning of the term *'hypallagma'* may be here. It is not impossible to think that it keeps the original meaning of 'substitution', in the sense that the goose-breeders' belongings are to be treated as substitutory payment. There is no reason, however, to exclude the alternative interpretation, viz. that they will lie in guarantee. Still, since we seem to be dealing with a penalty, this guarantee

[60] Cf. Sitta VON REDEN, *Money in Ptolemaic Egypt: From the Macedonian Conquest to the End of the Third century* BC, Cambridge 2007, pp. 230–231: 'The state normally accepted these relationships' (that is, patronage, or *skepe*) 'although occasionally legislating against them. *C. Ord. Ptol.* 83 D (= *BGU* VI 1212 [4]) from the time of Ptolemy IV is one such example. Yet even this is not a prohibition of the institution itself, but an emergency edict'.

[61] In this sense, 'éleveurs d'oies fugitifs', Claire PRÉAUX, *L'économie royale des Lagides*, Bruxelles 1939, p. 241.

[62] These monthly fiscal obligations -[μη]ν̣ι̣α̣ί̣ο̣υ̣ς φόρους, l. 30– are considered by Claire PRÉAUX, *L'économie* (cit. n. 61), p. 241 n. 2, following S. L. WALLACE, *Taxation in Egypt from Augustus to Diocletian*, Princeton 1938, p. 95, not as taxes but as rents paid for the hiring of the royal goose-breeding, and thus the χηνοτρόφοι are taken to be βασιλικοὶ χηνοτρόφοι. The strict attachment to their task revealed – if our interpretation is correct – by the measures against the fugitives, speaks indeed in favour of this hypothesis.

[63] Misleading, in any case, Marie-Thérèse LENGER, *Corpus des Ordonnances des Ptolémées*, Bruxelles 1964, pp. 222–224, describing the text as a series of prohibitions sanctioned by a system of penalties: 'il s'agit d'un texte de loi: le dispositif principal consiste en une suite d'interdictions (ll. 21–25) que sanctionne un système de peines (ll. 25 et suiv.)'. In truth, the measures mentioned in ll. 26–27 do not punish the conducts forbidden in ll. 23–24: these are committed by those who shelter, provide food to, or protect the goose breeders, but the belongings mentioned in ll. 26–27 are not theirs but of the breeders'.

would clearly not be the contractually constituted one, which we find from Augustus onwards under the name *hypallagma*, but something very different. In any case – if the reading *ἐν ὑ̣[πα]λ̣λ̣άγ̣μ̣α̣τι* is correct – we would still be in front of the first documented use of *hypallagma* in the sense of security, even if in the field of public rather than private law.

At this point, a brief consideration regarding the dating of the document is necessary. Due to the fragmentary condition of the papyrus only the third decree (C) offers a hint to identify the ruler: in C, l. 12 we read *θεοὶ Φιλοπάτορες*. The editors thus attributed this third decree to Ptolemy Philopator – integrating [*Βασιλεὺς Πτολεμαῖος καὶ βασίλισσα Ἀρσινόη*] *θεοὶ Φιλοπάτορες* – and suggest that all the others, including ours, may have the same origin. The conjectural nature of the dating somehow faded away in the following works dealing with the problem. Both Taubenschlag and Rupprecht refer the whole papyrus purely and simply to the reign of Philopator, 221–205 BC, and thus, like Schwarz before them, together with *BGU* VI 1246, present *C. Ord. Ptol.* 83 as evidence for *hypallagma* already in the 3rd century BC.

The whole thing is rather dubious for a reason already underlined by the editors: the writing seems to belong to the end of the Ptolemaic period. Thus, if we are dealing with a late transcription of royal ordinances, there is no reason whatsoever to assume that they all come from the same ruler.

There is yet one stronger reservation: if the writing dates to the 1st century BC, there is another couple of Philopatores available to reintegrate the inscription in C, namely Cleopatra VII together with – in her sixth year, given at the end of the document – Ptolemy XIV. This would make for a new dating of the papyrus to 46 BC And, in fact, this hypothesis was supported with strong detailed arguments by Van't Dack,[64] who re-edits the heading thus: [*Βασίλισσα Κλεοπάτρα καὶ βασιλεὺς Πτολεμαῖος*] *θεοὶ Φιλοπάτορες*. The new dating has been so far undisputed – it has been also adopted in the second edition of *C. Ord. Ptol.*[65] – and in *Berichtigungsliste* VI 15.

[64] E. VAN'T DACK, 'La date de *C. Ord. Ptol.* 80–83 = *BGU* VI 1212 et le séjour de Cléopâtre VII à Rome', *Ancient Society* 1 (1970), pp. 53–67

[65] Marie Thérèse LENGER, *Corpus des Ordonnances des Ptolémées* (2 ed.), Brussels 1980, supplement *ad leg.*, correcting the date of the first edition.

For the history of *hypallagma*, the new dating means that we are left without any traces of this figure for the early Ptolemaic times, as it makes the document roughly contemporary of the Alexandrine *synchoreseis*, *i.e.* the late 1st cent. BC This, leaving aside the already mentioned fact that the *hypallagma* of this decree is not the freely contracted security of the *synchoreseis*, but rather a public distraint procedure, a sort of Roman *pignoris capio*.

This was all the evidence for a Ptolemaic *hypallagma* in the papyri, until the publication of the *Giessener Zenonpapyri* by Philip Schmitz in 2007. One of them, *P. Iand. Zen.* 36 (mid-3rd century BC, Philadelphia, Arsinoites), could contain yet another mention of *hypallagma*. Unfortunately, the condition of the papyrus does not allow any certainty. On the *verso* of the papyrus, the following can be read, and not without difficulty:[66]

[ ].ωι καλῶς ἐποίησας χιάσας
[ ]. γματατ . . . ἀκατίων κεραιῶν του
4 [ϵ]υθυνομένου ἄβαρις ὧν ἀργήσασι αὐ-
[τοῖς]ιασαμένοις τε ἕως τοῦ ἐξ Ἀλεξαν-
[δρε]ίας ἀ[ν]ελθεῖν ἀποδώσομέν σοι

The reading is obviously extremely conjectural due to the condition of the papyrus. Even taking as a point of departure the problematic γματατ in l. 3, and assuming the word written there was [ὑπαλλά]γματα τ[...], and not [συνναλλά]γματα, [πρά]γματα *vel sim.* it would be yet impossible to determine if the word has here any other meaning than the common of 'substitution'.

[66] Translation attempt of ll. 3–6, by SCHMITZ: 'Dem [Name]. Du hast gut daran getan, [die Vereinbarung ?], die Segelstangen (des Bootes ?), das repariert wird (?), betreffend, rückgängig zu machen (?), auch wenn Du jetzt ohne Boot bist. Für sie, die untätig waren und [—], werden wir Dir, bis zu dem Zeitpunkt, da wir aus Alexandria zurückkehren, zahlen (?).'

VIII. *HYPALLAGMA* IN THE LITERARY SOURCES

The fact that, after examining the available material, we are left with no evidence for *hypallagma* in Ptolemaic times does not allow to exclude its possibility altogether. In fact, it would be an unlikely coincidence if *hypallagma* had been first created in the time of Augustus and no less than ten documents from the very beginning of the institution had reached us. A somewhat earlier origin then, if not provable at the present state of the sources, is not unlikely. We may be fairly sure though that the institution is much more recent than the common hypothec, for which we have no less than five indisputable Ptolemaic documents, from the third century BC onwards, and thus a virtually continuous tradition from the Greek to the Graeco-Egyptian hypothec, between which there is no evidence of any fundamental divergence in structure or function. This more recent origin of *hypallagma* strongly suggests that the structural differences between it and hypothec were intentional, in order to provide an alternative for the older figure. Whether it was created in Egypt – as Taubenschlag wanted – or not, and further, whether it was confined to Egypt or not, we cannot say with certainty, as there is no documentation from the other parts of the Hellenistic world. If, however, it was as widespread as hypothec itself, one would expect it to have left traces in the Greek literary sources, ad even in the Roman legal writings. A brief review of the non-Egyptian material seems thus, at this point, advisable, both for the question regarding the *terminus a quo* and for the autochthonous/Panhellenic alternative.

In most of the literary sources, *hypallagma*, as *hypallage*, is used in the sense of 'substitution', which is the primary meaning of the word.[67] There are, though, two notable exceptions, both quoted by the *Thesaurus Linguae Graecae* for the use of *hypallagma* as mortgage.[68] Both, thus of the utmost importance for us.

[67] Cf. also *LSJ*, *s.v.*

[68] Cf. *Thesaurus Linguae Graecae*, coll. 115–116, s.v. ὑπαλλαγή (*Inmutatio*) ὑπάλλαγμα (*Commutatio subsidiaria, Res succedenae et quae vicen alterius praebet*) ὑπαλλάττω (*Muto, Immuto*). Cf. also *LSJ*, *s.v.* In the same sense, as a rhetorical figure of mutation, the term *hypallage* is frequently used by Latin scholiasts and rhetoricians, notably Cicero and Quintilian, cf. *Thesaurus Linguae Latinae*, *s.v.*

(1.) A Bythinian grammarian of the 2nd cent. AD, Phrynichos, includes among the expresions condemned in his *Ἀττικῶν ὀνομάτων* – the 'Atticist' or 'on Attic Words'– the use of ***hypallagma*** for pledge: *ὑπάλλαγμα ἀμαθῶς τινες ἀντι τοῦ ἐνέχυρον λέγουσι.*[69] Taking into account the likely circulation of legal models in the Hellenic world,[70] such a mention of ***hypallagma*** as pledge in a Bythinian grammarian would convince us that ***hypallagma***, whether originally Greco-Egyptian or not, had by the 2nd century AD become common stock of the Greek speaking world, were it not for the following source.

(2.) In the early Byzantine *Συναγωγὴ λέξεων χρησίμων*, edited by Bachmann and by Bekker in their *Anecdota Graeca*,[71] we read about a form of pledge called indeed ***hypallagma***, but not the one we know from the papyri. It seems rather to be an entirely different institution confined to the case in which the husband guarantees the devolution of the dowry by pledging something of equivalent – hence ***hypallagma*** (substitute) – value: *Ἀπετίμησεν καὶ ἀποτίμησισ καὶ ἀποτίμημα εἰώθασιν οἱ τῇ γυναικὶ γαμουμένῃ προῖκα διδόντες αἰτεῖν παρὰ τοῦ ἀνδρὸς ὥσπερ ἐνέχυρόν τι τῆς προικὸς ἀντάξιον, ὃ νῦν ὑπάλλαγμα λέγεται. ἐκλήθη δὲ τὸ ὑπάλλαγμα ἀποτίμημα, διότι ἐτιμᾶτο πρὸς τὴν προῖκα, ἵνα μὴ ἔλαττον ᾖ ἀλλα πλέον αὐτῆς.*

The *Synagoge* fragment is enough to cast a shadow of doubt over the nature of the ***hypallagma*** mentioned by Phrynichos. At the present state of our knowledge, therefore, the final verdict, as to the local or general character of ***hypallagma*** in the Greek world, must remain a ***non liquet***.

[69] *Phrynicus* 306 (ed. LOBECK)

[70] For the circulation of legal models in the Greek speaking world in Hellenistic and Roman times, cf. with lit., WOLFF, *Das Recht* (cit. n. 3), pp. 5–6: 'Standardisierung der Beurkundungspraktiken'.

[71] I. BEKKER, *Anecdota Graeca* 1, Berlin 1814, p. 423, l. 12–17; L. BACHMANN, *Anecdota Graeca* 1, Leipzig 1828, p. 119, l. 10–15. Cf. also the last edition by I. C. CUNNINGHAM, *Synagoge*, Berlin – New York 2003, *s.v.* *Ἀπετίμησεν*.

IX. A *HYPALLAGMA* IN THE FIFTH CENTURY?

For a long time the evidence available for ***hypallagma*** ended with the 3rd century AD In the last thirty years, though, a few new documents have been edited, from the beginning of the 4th century: two belonging to the archive of Aurelia Charite – *P. Charite* 33 (AD 331/2 or 346/7, Hermopolis), and *P. Charite* 34 (AD 318 or 348, Hermopolis); and one yet in the Viennese collection of the *Corpus Rainieri* – *CPR* XVII A 5 a (*BASP* 29 [1992], p. 204] (AD 316, Hermopolis).

The figure would thus have vanished around the mid-fourth century, together with the ***bibliotheke enkteseon***, through which ***hypallagma*** used to be contracted, and whose cooperation had come to be essential for the efficacy of the surrender of the right to dispose in which ***hypallagma*** basically consisted.

The situation seemed to change radically in 2001, when Georgios A. Xenis edited a papyrus fragment mentioning a ὑπαλλαγή, and ascribed to the fifth century AD: *SB* XXVI 16729 (5th cent., provenance unknown).[72] The fragment is quite short, but in the part preserved there is unequivocally a ***hypallagma***:[73]

4 καὶ καταβελεῖν ἐπ' αὐτὸν τὴν
νομίμην ἐπικέρδιαν τὴν ἐν-
κειμένην αὐτῷ τῇ γενομένῃ
παρ' ἐ[μο]ὶ ὑπαλλαγῇ κατ' ἔτος

[72] P. Vindob. G 374, ed. G. A. XENIS (cit. n. 10). The author underlines the exceptionality of the document: 'It is interesting but puzzling to find the ὑπαλλαγή at such a late date, as there is a general consensus that it disappeared in the fourth century AD together with the βιβλιοθήκη ἐγκτήσεων.' It may be though exaggerated to speak of a general consensus. XENIS quotes TAUBENSCHLAG, *Law* (cit. n. 8), p. 177, and WOLFF, *Das Recht* (cit. n. 2), pp. 254–255, but the latter refers only to the end of the ***bibliotheke***, not of ***hypallagma***. It is the authority of TAUBENSCHLAG alone that, as usual, is taken to express the common opinion of the *savants*.

[73] Editor's translation (p. 217): '... the share falling to them of my share of the cistern and the farmstead and each year to pay to him the legal interest included for his sake in the mortgage made by me ...'.

Should we then move the demise of *hypallagma* onward, to the 5th century? Not neccesairly. The dating suggested by the editor is a mere conjecture on palaeographical grounds, *BGU* XII 2141 (AD 446, Hermopolis) being used as term of comparison. However, the examination of the original leaves the dating question open.[74] A comparison to, *e.g.,* the papyri from the Nepheros Archive shows that the writing could very well be dated back to the fourth century AD Untill further indisputable fifth century *hypallagmata* are found, this re-dating of *SB* XXVI 16729 seems more consitent with our present knowledge of the institution. So far, thus, it still holds true that the history of *hypallagma* ends around mid-fourth century AD, that is, roughly together with the *bibliotheke enkteseon*.

As far as the available materials allow to ascertain, the documented history of *hypallagma* spans from Augustan (13 BC) to Constantinian times (AD 331/2, or at the latest, 348).

The very few Ptolemaic papyri mentioning the term *hypallagma* (*supra* vii) do not change this picture. *BGU* VI 1246 (3rd cent. BC, Elephantine) is not, as generally assumed, a loan with *hypallagma*, but a claim whereby the plaintiff complains that the defendants have given neither securities nor *hypallagmata*: this very alternative makes it unlikely that these *hypallagmata* are securities. The term here keeps – as it seems – its ordinary meaning of 'substitution', 'substitutory payment'. There is no reason to think that the term *hypallagma* – if indeed present in the very fragmentary *P. Iand. Zen.* 36 (mid-third cent. BC, Philadelphia, Arsinoites), was used in any other than this ordinary sense. The *hypallagma* in *C. Ord. Ptol.* 83 = *BGU* VI 1212 D, instead – although the word there is again conjectural – seems to be a guarantee, but one established through a royal decree, and thus not the real security of private law that we first find in the Ale-

[74] I am grateful to Claudia KREUZSALER and Amphilochios PAPATHOMAS for their examination of the original papyrus in the Vienese Papyrussammlung of the Austrian National Library.

xandrine *synchoreseis* of 13 BC The set of decrees to which this belongs, on the other hand, does not come, as previously believed, from Ptolemy Philopator, but very likely from Cleopatra vii, and has thus been re-dated from the late third century to the mid-first century BC, only a few decades before the *hypallagma-synchoreseis*.

However, it would be an extremely risky assumption to conclude that our *hypallagma* was born precisely in Augustan times. A somewhat earlier origin is not unlikely (*supra* VIII), but the institution is clearly, in any case, much younger than the old Greek hypothec. Its later introduction strongly suggests that *hypallagma* was deliberately conceived to compensate for the main disadvantage of the older figure (*supra* II–III), namely, the risk involved for the creditor in the so-called 'real' liability. The creditor, having accepted the hypothec, is no longer entitled to execution on the person of the debtor or on the rest of his belongings. In most of the hypothecations documented in the papyri, this risk is avoided by the so-called *bebaiosis*-clause; in a few, further, by the so-called *kindynos*-clause. These stipulations revive the general liability of the debtor, granting execution on his person and belongings, when, due to the right of a third party, the hypothec is totally or partially lost for the creditor, or when the object is destroyed prior to execution. But *hypallagma* goes much further: refraining from forfeiture clause, the very one which constitutes the core of hypothecation, it avoids real liability altogether. Forfeit is only achieved through the ordinary executive procedure, by means of *enechyrasia*, as if the object had not been pledged. The guarantee here consists solely in the debtor's surrender of his faculty to alienate or to further encumber of the object, thus securing it for the ordinary execution.

The kernel of *hypallagma* is therefore this non-alienation clause. This clause, strange as it may seem, had most probably no legal force by itself (*supra* III *in fine*, V *in fine*). If in its default, the debtor sells or further encumbers his property, it is of no moment to say that the creditor would be entitled to execution on the person of the debtor or on the rest of his property: such possibility, in fact, exists for the creditor even when there is no breach of the non-alienation clause. On the other hand, it does not seem that the alienation would have been considered void: such provision is found only

in *hypothekai* – and even there, very rarely – never, but for one isolated exception (*supra* n. 44) in *hypallagmata*.

A mechanism had to be found to force the debtor to honour the clause. In the Alexandrine *synchoresis* we come across a very simple one (*supra* IV–V): until payment the creditor was to keep the title deeds of the pledged property; without them, it would not be easy for the debtor to find a buyer. In these *synchoreseis*, in fact, what is said to be given *en hypallagmati* is not the object, but the title deeds. This may solve, in my opinion, the puzzle that for decades has represented the name of the institution itself (*supra* VI): *en hypallagmati*, *i.e.* in substitution; as the douments are given in substitution for the object; on the object itself, in fact, the hypallagmatic creditor – in contrast to the hypothecarian one – acquires meanwhile no right at all.

Hypallagma seems thus to have been born (*supra* V *in fine*) as a mere legal practice, borrowing some efficacy from ancillary mechanisms such as the title deed conveyance. Strictly speaking it was not a true legal act, if by such we understand, in the good dogmatic tradition, one that has legal effects on its own.

If this whole conjecture holds true, it speaks for the central role that the conveyance of the title deeds played in *hypallagma*. All the more surprising, then, its quick and sudden vanishing (*supra* V). For the first century AD we have very few *hypallagmata*, and only general (*i.e.*, pledging all the debtor's present and future belongings), where handing over the title deeds turns obviously problematic. When the singular *hypallagma* re-emerges, in Trajanic times, the title deeds are no longer mentioned. What happened in the meantime? The most obvious answer: the *bibliotheke enkteseon*, created probably around the mid-first century AD, provided, through the registration of the *hypallagma*, for a much better way to keep the debtor in check. Until the arrest (*katoche*) is removed from the debtor's record in the *diastromata*, he may not obtain from the *bibliotheke* the *epistalma* needed to fomalise any disposition in public document; this, again, makes it difficult to find a buyer, because the *bibliotheke* would refuse him the registration of an acquisition documented through mere *cheirographon*.

Thus, *hypallagma* got linked to the *bibliotheke*, to the point that the documents often speak of the former as contracted through the latter

(*supra* n. 6). No wonder then, that the disappearance of *hypallagma*, in the mid-fourth century AD, coincides with that of the *bibliotheke*. The *hypallagma* mentioned in *SB* XXVI 16729 (*supra* IX) does not challenge this connection: the palaeographical grounds invoked by Georgios A. Xenis for ascribing it to the fifth century are not conclusive: the writing is not dissimilar to that of the fourth century Nepheros archive.

Whether *hypallagma* was confined to Egypt or not (*supra* VIII) cannot be ascertained at the present state of our knowledge. Yet, a common Hellenistic alternative to hypothec would be expected to have left traces in the literary sources, and these are lacking. The fact that Phrynicos of Bithynia condemns the use of the term *hypallagma* for pledge would be a strong evidence for a Panhellenic *hypallagma*, were it not for the *Synagoge lexeon chresimon*. In this work, we learn that indeed there was a kind of pledge called *hypallagma*, but also that it had nothing to do with ours: the term referred to the pledge that guaranteed the restitution of the dowry to which it was equivalent in value.

José Luis Alonso

Departamento de Derecho Romano y
Derecho Eclesiástico del Estado
Universidad de País Vasco
P° Manuel de Lardizábal
20018 San Sebastián
Spain

e-mail: *joseluis.alonso@ehu.es*