

# Alonso, José Luis

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## The 'bibliothekē enkteseōn' and the alienation of real securities in Roman Egypt

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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

José Luis Alonso

**THE BIBLIOTHEKE ENKTESEON  
AND THE ALIENATION OF REAL SECURITIES  
IN ROMAN EGYPT\***

1. *POTESTAS ALIENANDI*

REAL SECURITIES COUNT among the best studied legal institutions in Graeco-Egyptian law. Much of the scholarly interest behind this result was stirred by an unexpected feature that very soon caught the attention of a generation of papyrologists educated in the categories of Roman Law: in the papyri, the debtor appeared deprived of his faculty to alienate. For the likes of Mitteis and Rabel, this was a rather exotic feature, that called for an explanation.<sup>1</sup> In Roman law, as we know it through Justinian's *Digest*, the debtor kept his *potestas alienandi*. This did not harm a Roman creditor, who had what we call a 'real' claim, that is, a claim on

\* This article elaborates on some of the ideas I presented at the 64th session of the Société Internationale d'Histoire de Droit d'Antiquité «Fernand de Visscher» in Barcelona, in September 2010. I would like to thank Jakub URBANIK (Warsaw) for the fruitful discussions and suggestions, and Jolanta URBANIKOWA (Warsaw) for her linguistic assistance.

<sup>1</sup> Hence some of the first monographic studies on the real securities in the papyri are devoted to this question: most notoriously, E. RABEL, *Die Verfügungsbeschränkungen des Verpfänders*, Leipzig 1909, and R. DE RUGGIERO, *Il divieto d'alienazione del pegno nel diritto greco e romano*, Cagliari 1910. The latest study is H.-A. RUPPRECHT, 'Veräußerungsverbot und Gewährleistung in pfandrechtlichen Geschäften', *PapCongr.* XXI, pp. 870–880.

the thing against anyone, including the new owner.<sup>2</sup> Alienation was possible for the Roman debtor, because the right of the creditor was not constructed as ownership, but as a limited ‘real’ right,<sup>3</sup> thus compatible with the debtor’s ownership, which therefore needed not be suspended. These principles were so well established that for the Roman Jurisprudence even a voluntary agreement to the contrary, by which the debtor renounced his faculty to alienate, posed a problem as potentially *contra ius*.<sup>4</sup>

There was a restriction to the Roman principle, though. Even in Roman law, freedom to alienate was held only for immovables, and with

<sup>2</sup> The Greek notion that the sale of the hypothecated property is incompatible with the right of the creditor seems to survive behind the anxiety of some provincial creditors who presented such cases to Diocletian, who paternally reminds them of the basics of Roman Law, that grants them a claim against any new owner. The ensuing constitutions were promulgated in 293, and are preserved in Justinian’s Codex. *Cf.* 8.27.12: ‘Idem AA et CC. [Impp. Diocletianus et Maximianus] Zotico: Si debitor rem tibi iure pignoris obligatam te non consentiente distraxit, dominium cum sua causa transtulit ad emptorem.’ – ‘The Same Emperors and Caesars to Zoticus: If your debtor sold the property, which was pledged to you, without your consent, the ownership of the same together with its encumbrance passes to the purchaser’. *Cf.* 8.13.15: ‘Idem AA et CC. [Impp. Diocletianus et Maximianus] 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.’ – ‘The Same Emperors and Caesars to Basilida: It is certain that a debtor cannot prejudice the rights of a creditor by either selling, donating, bequeathing, or leaving under a trust the property pledged, and therefore if you can prove that it was pledged to you, you can assert your right to the same.’ (trans. SCOTT).

<sup>3</sup> For the emergence of these limited real rights in Roman Law, cf. a short summary with lit. in J. L. ALONSO, ‘Hypallagma or the Dangers of Romanistic Thinking’, *PapCongr.* XXVI (in print), *sub* VI.

<sup>4</sup> *D.* 20.5.7.2 (Marcianus *sing. ad form. hyp.*): ‘Quaeritur, si pactum sit a creditore, ne liceat debitori hypothecam vendere vel pignus, quid iuris sit, et an pactio nulla sit talis, quasi contra ius sit posita, ideoque venire possit. et certum est nullam esse venditionem, ut pactioni stetur.’ – ‘If the creditor has obtained an agreement that it shall be unlawful for the debtor to sell the hypothecated or pledged property, it is asked what the law is, and whether an agreement of this kind is void as contrary to the law, and therefore the property can be sold. And it is certain that the sale will be void, so that the agreement is kept’. The unexpected final sentence has made the text into a crux, on which the literature is inexhaustible. For a review of the problem and the scholarship, cf. G. SCHLICHTING, *Die Verfügungsbeschränkung des Verpfänders im klassischen römischen Recht*, Karlsruhe 1973.

good reason. The sale of a movable could very easily lead to the creditor's losing track of it, turning his theoretical right to claim it from any new owner into a useless one. Hence, in the case of movables, their sale by the debtor was considered theft, even when he did not have to physically steal them from the creditor, because they had remained in his possession.<sup>5</sup>

Regarding immovables, instead, the situation of the Greek debtor is radically different to that of the Roman one. True, any buyer of a pledged object who has not been deceitfully kept unaware of the pledge, normally takes care that the amount of the price necessary for its cancellation arrives to the creditor. We may assume that this was also usually the case when a security was bought under Roman law. But the fact that the majority of sales imply immediate cancellation of the security does not diminish the practical consequences of the difference between the Roman and the Greek systems. The Roman debtor is free to sell. For the Greek debtor, instead, even when the price is destined to the creditor, selling is only possible with the latter's consent.<sup>6</sup> Since Greek securities tend to imply forfeit, this consent is most unlikely when most needed, *i.e.* when the value of the security is higher than the secured debt, as some well known cases painfully illustrate.<sup>7</sup> The non-alienation principle con-

<sup>5</sup> *D.* 47.2.67pr. (Paulus 7 *Plaut.*): Si is, qui rem pignori dedit, vendiderit eam: quamvis dominus sit, furtum facit, sive eam tradiderit creditori sive speciali pactione tantum obligaverat: idque et Iulianus putat. – 'If someone should sell the object that he has given in pledge, although he is the owner, he commits a theft, whether he should deliver it to the creditor or merely hadbound himself by agreement. Julianus holds the same opinion'. In the case of hypothec, the theft consists in the sale itself: the object was not given to the creditor, so the debtor does not need to physically steal it. For the more obvious theft against the creditor who is in possession of the pledge and from whom it must be stolen, *Gai.* 3.200, *D.* 41.3.4.21 (Paulus 54 *ed.*), *D.* 41.3.49 (Labeo 5 *Pith. a Paul. epit.*).

<sup>6</sup> Under Roman law, the creditor's consent was unnecessary for the debtor: the sale was perfectly valid without it, and the buyer acquired full ownership, although the lien subsisted and was fully enforceable against him: cf. the sources quoted *supra*, n. 2. The creditor's consent was interpreted as a renounce to his right, unless he declared otherwise: cf. M. KASER, *Das römische Privatrecht* I (2nd ed.), Munich 1971, p. 469 n. 74, with sources and lit.

<sup>7</sup> In a forfeit system, a great unbalance in value between debt and security is an anomaly, that falls more easily upon debtors who have only one valuable asset to offer as security. In that case, when forfeit is much more lucrative than payment, it cannot be expected

spires here with forfeit to sanction whatever profit the creditor may obtain from a difference in value between the security and the secured credit.<sup>8</sup>

Some uncertainties remain regarding the law of the papyri. The non-alienation agreement seems to have been essential to *hypallagma*, a type of real security that consists solely in such agreement, thus securing the object for execution.<sup>9</sup> In some hypothecs, instead, the clause is lacking,<sup>10</sup> and we cannot know if this omission had any consequence. We also ignore how effective the non-alienation agreement was. Invalidity for the

that the creditor will allow the debtor to sell and cancel the debt with part of the price. For one such case, cf. the petition of Demetrius in *P. Ryl.* II 119 (AD 54–67, Hermopolis), where furthermore the creditor benefited from an antichretic agreement that, to believe the debtor, had more than paid for the debt.

<sup>8</sup> From a purely formal point of view, such profit is balanced by the loss that the real liability principle imposes on the creditor when the difference in value turns negative. Under normal circumstances though, it goes without saying, it is only the creditor who is in the position to calculate risks. In the Roman system, the pledge was executed in auction, and the debtor was entitled to recover the possible surplus (*superfluum*): cf. KASER, *Privatrecht* I<sup>2</sup> (cit. n. 6), pp. 470–471.

<sup>9</sup> J. L. ALONSO, 'The Alpha and Omega of Hypallagma', *JfurP* 38 (2008), pp. 21–27.

<sup>10</sup> Leaving aside the incomplete documents, where we cannot know whether the clause was or not included, RUPPRECHT, 'Veräußerungsverbot' (cit. n. 1), p. 871 n. 12, mentions ten cases where he deems sure it was not. The list is misleading: it consists mostly of documents that actually do contain a non-alienation clause, although not one fashioned *καὶ μὴ ἐξέστω αὐτῇ πωλεῖν μηδὲ ἑτέροις ὑποτίθεσθαι μηδ' ἄλλο τιπερὶ αὐτῆς κακοτεχνεῖν ὑπερναντίον τούτοις τρόπῳ μηδενί (ἢ τὰ παρὰ ταῦτα ἄκυρα εἶναι)*, but rather *καὶ παρεχέσθω αὐτῇ ἀνεπαφον καὶ ἀνενεχύραστον καὶ ἀνεπιδάνεστον ἄλλον δανείον καὶ καθαρὰν ἀπὸ βασιλικῶν*. The two clauses must indeed be differentiated, and attention must be paid to the connection between the latter and the *bebaiosis*, but it seems arbitrary to admit only the former as 'Verfügungsverbot'. The more so, since the crucial words denying validity to an attempted sale (*ἄκυρα εἶναι*) are equally rare in both: with *μὴ ἐξέστω* in three papyri (*P. Erl.* 127, *P. Flor.* I 1, *P. Stras.* I 52); with *παρεχέσθω* in two (*P. Mert.* III 109, *P. Oxy.* XVII 2134). If we take away from the list the *παρεχέσθω*-documents (*BGU* III 741, *P. Bas.* 7, *P. Hamb.* I 28, *P. Mert.* III 109, *P. Oxy.* XVII 2134, *PSI* VIII 922, *SB* XIV 11705, *P. Tebt.* III 1 817, *P. Tebt.* III 2, 970), Rupprecht's catalogue of hypothecs lacking a non-alienation clause is reduced to three documents: *P. Brem.* 68 (AD 99, Hermopolis), *P. Ross. Georg.* II 30 (2nd cent. AD, unknown provenance), *SB* I 4370 (AD 228/9, Herakleopolis), to which still the very atypical *PUG* II 62 (AD 98, Oxyrhynchos) must be added.

attempted sale is prescribed in practically no *hypallagma* and in very few hypothecs.<sup>11</sup> In hypothec, even when invalidity is not explicitly agreed upon, a full effect of the non-alienation clause, allowing the creditor to claim the object from any buyer, may be conjectured on the basis of the widely held opinion that sees the contract as a conditional sale, in the tradition of the ancient Greek *πρᾶσις ἐπὶ λύσει*, and therefore the creditor as a conditional owner.<sup>12</sup> For *hypallagma* instead, despite the fact that it consists merely in the non-alienation agreement, there are hints that the agreement as such had no ‘real’ effect, *i.e.*, it would not prevent a buyer from becoming owner.<sup>13</sup> A strong piece of evidence in this sense are the manifold indirect mechanisms devised to prevent the sale from actually taking place, all quite unnecessary if the sale itself were indisputably void. The first of such mechanisms appears in the very first documented *hypallagmata* so far discovered: a group of well known Alexandrine *synchoreseis* from the early Augustan times.<sup>14</sup> In these earliest *hypallagmata*, the debtor is deprived of his title deeds, which he will recover only when he pays his debt. In the meantime, without the title deeds, it will obviously be difficult for him to find a buyer.<sup>15</sup>

Practices such as this re-dimension the difference between the Greek and the Roman traditions. Strictly speaking, the *hypallagmatic* debtor

<sup>11</sup> For *hypallagma*, the only exception is *P. Lond.* III 1166 *recto* (p. 1045) (AD 42, Her-mopolis). For hypothec, the invalidity of the attempted sale is prescribed in five cases (*supra*, n. 10).

<sup>12</sup> Thus already L. MITTEIS, *Grundzüge und Chrestomathie der Papyruskunde* II, 1, Leipzig – Berlin 1912, pp. 146–147: ‘suspensiv bedingtes Eigentum’. Cf. also H. J. WOLFF, *Vorlesungen über Juristische Papyruskunde (1967/68)*, Berlin 1998, pp. 109–110; IDEM, ‘Hellenistisches Privatrecht’, *ZRG RA* 90 (1973), p. 89. For Greek law, lately, G. THÜR, ‘Ownership and security in Macedonian sale documents’, [in:] G. THÜR & E. M. HARRIS (ed.), *Symposion 2007*, Vienna 2009, pp. 173–187. Contra, RUPPRECHT, ‘Veräußerungsverbot’ (cit. n. 1), p. 880 and n. 67–68.

<sup>13</sup> ALONSO, ‘Alpha and Omega’ (cit. n. 9), pp. 26–27, 35, 49–50.

<sup>14</sup> *BGU* IV 1147, ll. 24–26; 1148, ll. 28–35; 1149, ll. 23–24; 1150 I, ll. 10–11; 1152, ll. 21–26; 1167 II, ll. 30–31. All from the Protarchos archive, in Alexandria, and from the years 13–10 BC. For the Ptolemaic documents generally believed to be *hypallagmata*, cf. ALONSO, ‘Alpha and Omega’ (cit. n. 9), pp. 38–44.

<sup>15</sup> On this practice, its function and its relevance for the early history of *hypallagma*, cf. ALONSO, ‘Alpha and Omega’ (cit. n. 9), pp. 27–37.

seems to keep his *potestas alienandi*, just as the Roman one, although he agrees not to make use of it, and mechanisms are devised to make sure he does not. From the point of view of the *potestas alienandi* we get nearer to the Roman system, but further than ever from the point of view of the ‘real effect’ of the guarantee: mechanisms such as this surrender of the title deeds seem in fact to arise from the creditor’s anxiety that he would be defenceless in front of a buyer.

## 2. THE *BIBLIOTHEKE ENKTESEON*

The rather primitive method to enforce the non-alienation clause that has just been described, depriving the debtor of his title deeds, appears in most of the earliest preserved examples of *hypallagma*: the early Augustan *synchoreseis* from the *Protarchos* archive. Later, in the major bulk of *hypallagmata*, from the late 1st to the mid-4th century, it is almost never mentioned again.<sup>16</sup> Something seems to have happened in the 1st century that made the old trick unnecessary. This something was very likely the creation of the *bibliotheke enkteseon*.<sup>17</sup> With this new property record-office, a much more effective way to enforce the non-alienation agreement became available. As we know through the famous Edict of Mettius Rufus<sup>18</sup> reordering the allegedly chaotic affairs of the *bibliotheke enkteseon* of the Oxyrhynchites, not only owners were expected to register their

<sup>16</sup> The only exception is *BGU I 301* (AD 157, Arsinoites). The practice seems to have left echoes in some Roman imperial sources: a jurisprudential fragment from the 2nd century, *D. 13.7.43pr.* (Scaevola 5 *dig.*), and an imperial constitution from AD 207: *C. 8.16.2*. Interestingly, also the contracting parties in *BGU I 301* happen to be Romans.

<sup>17</sup> For a foundation date around AD 72 (as a special section of the δημοσία βιβλιοθήκη, created around AD 53, cf. *P. Mich.* IX 539–540), on the basis of a first mention of the *bibliotheke enkteseon* as such in *BGU I 184* (= *MChr.* 202, AD 72, Arsinoites), cf. H. J. WOLFF, *Das Recht der Griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, München 1978, pp. 48–49. On the question, most recently, K. MARESCHE, ‘Die Bibliothek Enkteseon im römischen Ägypten’, *APF* 48 (2002), pp. 234–235.

<sup>18</sup> Preserved in the papyrus that contains the famous petition of Dionysia, *P. Oxy II 237* (after AD 186, Oxyrhynchos) VIII, ll. 27–43. The Edict itself is dated to the 9th year of Domitianus (AD 89).

property: the Edict wants also creditors to register their hypothecs, and wives and children to register the liens they may have on their husbands' and parents' property.<sup>19</sup> *Hypallagma* is also soon attested as registered in the *bibliotheke*,<sup>20</sup> as well as many other instances whereby someone's property or part of it secures a debt, actual or potential.<sup>21</sup> Although many details of the procedure are obscure, we know that the registration of such liens and securities left a trace in the *folium* assigned to the debtor in the *diastroma* (the 'general overview' of the registered transactions that constituted the cornerstone of the *bibliotheke*). That trace was an 'addition' (*parathesis*),<sup>22</sup> that caused the 'arrest' of the asset, that our sources often call a *katoche*.<sup>23</sup>

How this mechanism could be used to enforce the non-alienation agreement may be illustrated by *P. Wisc.* II 54 (AD 116, Arsinoites), a *hypallagma* over a slave to guarantee a loan of 456 drachms contracted through the *bibliotheke enkteseon* of the Arsinoite nome. The debtor, a certain Isarous, daughter of Apollonios, addressing the *bibliophylakes*, requests them 'not to cooperate with me in anything whatsoever until I bring forward the receipts of the payment of everything'.<sup>24</sup> The *bibliophylakes* are therefore expected, until she repays the loan, to refuse their authorisation (*epistalma*) until she repays the loan, if she tries to sell or further mortgage the slave. And, as we know through the Edict of Mettius Rufus,<sup>25</sup> it was

<sup>19</sup> *P. Oxy* II 237 VIII, ll. 31–36.

<sup>20</sup> Cf. ALONSO, 'Alpha and Omega' (cit. n. 9), p. 20 n. 6. The earliest document connecting *hypallagma* with the *bibliotheke* is *P. Wisc.* II 54 (116, Arsinoites), on which more *infra*, in text.

<sup>21</sup> For a list, still essentially complete, cf. MITTEIS, *Grundzüge* (cit. n. 12), pp. 96–97.

<sup>22</sup> In the Edict of Mettius Rufus the term is used for the registration of the holds of wives and children (ll. 34–35: παρατιθέτωσαν δὲ καὶ αἱ γυναῖκες ταῖς ὑποστάσει τῶν ἀνδρῶν ξὰν κατὰ τινα ἐπιχώριον νόμον κρατῆται τὰ ὑπάρχοντα, κτλ.). It appears in our sources not only for the registration of *katochai* in the debtor's *folium*, but also for the registration of property, even when it is not provisional: for the prevailing but misleading assumption that *parathesis* means provisional registration, cf. *infra*, n. 36.

<sup>23</sup> For this *katoche-parathesis*, WOLFF, *Das Recht* (cit. n. 17), pp. 235–238.

<sup>24</sup> ... [καὶ] μὴ συνχρηματίζεσθαί μοι μ[η]δὲ[ν] ἀπλῶς οἰκογνομύση ἄρχι οὐδ' ἐπειρέγκω ἀποδώ(σεως) ἀπάντ(ων) ἀποχ(ήν) (ll. 17–19).

<sup>25</sup> *P. Oxy* II 237 VIII ll. 36–38: cf. *infra*, n. 31.



forbidden to notaries to execute any contract without such *epistalma*.<sup>26</sup> Identical requests to deny cooperation to any alienation attempt appear in the parallel *hypallagma* contracts preserved in *P. Kron.* 18 (AD 143, Tebtynis) and *P. Vars.* 10 III (AD 156, Arsinoites).<sup>27</sup>

The humble old trick of depriving the debtor of his title deeds looks now even humbler, by comparison with this bureaucratic machinery. Yet also this system was far from perfect.<sup>28</sup> First of all, it depended on a diligent keeping of the *diastromata* and the archived documents that seems to have been an often unfulfilled ideal, as some alarmed reports reveal.<sup>29</sup>

<sup>26</sup> On this so-called *epistalma*-system, see, after MITTEIS, *Grundzüge* (cit. n. 12), pp. 97–103, above all F. VON WOESS, *Untersuchungen über das Urkundenwesen und den Publizitätsschutz im römischen Ägypten*, München 1924, pp. 175–201, and WOLFF, *Das Recht* (cit. n. 17), pp. 247–253.

<sup>27</sup> These three documents form an important group for the history of the registration of *hypallagma*. Contrary to all the previously edited *hypallagma* registration requests (*P. Lips.* 8 [= *MChr.* 210, AD 220, Hermopolis]; *P. Lips.* 9 [= *MChr.* 211, AD 233, Hermopolis]; and *P. Tebt.* II 318 [= *MChr.* 218, AD 166, Tebtynis]), these are not styled as *apographai* or *paratheseis*, but as *ὑπαλλαγῆς ὑπόμνημα*, or simply *ὑπαλλαγή*. They are, in fact, not mere registration requests for a previously contracted *hypallagma*, but the contracts themselves, formalised through the *bibliotheke*. In this sense, already G. FLORE, [in:] G. R. CARRARA & G. FLORE, 'Due Papiri inediti di Milano', *JffurP* 15 (1965), pp. 124–127 (*sub* 5–7). The expression 'contracted through the *bibliotheke*', so frequent in second-century Arsinoites for *hypallagmata*, is thus to be taken literally: *P. Berl. Leihg.* 10; *P. Fam. Tebt.* 29; *P. Tebt.* II 531 (= *SB* XII 10786); *P. Tebt.* II 389 (= *MChr.* 173); *P. Tebt.* II 440 (= *P. Tebt. Wall.* 7 = *SB* XVIII 13788); *BGU* IV 1038 (= *MChr.* 240); *SB* XVI 13070; cf. also *Stud. Pal.* XX 13 (AD 254, Arsinoites) and *P. Erl.* 76 (4th. cent. AD, Oxyrhynchos).

<sup>28</sup> Cf., in detail, VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 201–224.

<sup>29</sup> *P. Oxy* II 237 VIII, ll. 28–31: in AD 89, not even two decades after the foundation of the *bibliotheke enkteseon* (for the foundation date around AD 72, *supra*, n. 17), the *strategus* of the Oxyrhynchites already complains before the Praefect that 'neither private nor public business is receiving proper treatment owing to the fact that for many years the abstracts in the property record-office have not been kept in the manner required' (transl. A. S. HUNT & C. C. EDGAR, *Sel. Pap.* II, 219). The problems were not limited to the Oxyrhynchites: for Fayum, where serious trouble with the building kept lingering for decades, cf. *P. Fam. Tebt.* 15 (AD 114/5, Arsinoites), and therein, ll. 110–130 (= *SB* IV 7378): 'His excellency Classicus the procurator of our lord has informed me that the property record-office of the nome is unfit for its purpose and that the documents stored in it are disappearing and are most of them unfindable'. (trans. A. S. HUNT & C. C. EDGAR, *Sel. Pap.* II 422). Together with the

Secondly, for the event of a public deed executed by a notary without *epistalma*, we know through the *Gnomon* of the *Idios Logos* of a not inconsiderable fine of 50 drachms,<sup>30</sup> but not whether the document was considered void. Grenfell and Hunt postulated so, but the relevant part of the Edict of Mettius Rufus is merely their integration;<sup>31</sup> without it, there would certainly be a penalty for the notary, but a valid transaction would have been made in default of the *katoche*.

Leaving aside these possible instances of malfunctioning, the *epistalma* system itself, working to perfection, leaves many doors open to an effective sale despite a registered *katoche*. The system, first of all, seems to have been compulsory only for immovables.<sup>32</sup> If so, Isarous of *P. Wisc.* II 54 would have been able to sell the slave even through public deed despite the recorded *hypallagma*.<sup>33</sup> But even for immovables there was an obvious, and for sure frequent, way out of the *epistalma*-requirement, simply by selling without a notary, through a *cheirographon*. The use of *cheirographa* was always possible, and fully valid. True, we know that in this case the acquisition could not be registered in the *bibliotheke*. Furthermore, a mere *cheirographon* was not enough to found an executive claim on immovable property.<sup>34</sup> Yet, both limitations could be overcome by a procedure of *ekmartyresis* or *demosiosis*, designed to transform the private deed into a public one. And, contrary to what we may expect, it seems that at least

problems, the documents show, it must be admitted, the keen interest of the public authorities in a proper functioning of the *bibliotheke*.

<sup>30</sup> § 101 of the *Gnomon*: *BGU V 1210* (2nd cent. AD, Alexandria) x, ll. 227–228: [ἐάν τινες] χρηματις [μ]οῦ ὑποθηκῶν ἢ ὠνῶ[ν] συνάλλ[αγμα γράψωντ]αι χωρ[ίς ἐ]πιστάλματος, κατακρίνονται (δραχμάς) ν.

<sup>31</sup> *P. Oxy* II 237 VIII, ll. 36–38: παραγγέλλω δὲ καὶ τοῖς συναλλαγματογάφοις καὶ τοῖς μνήμοσι μηδὲν δέχα ἐπιστάλματος τοῦ βιβλιοφυλακ[ίου τελειῶσαι, γνοῦσιν ὡς οὐκ ὄφελος τὸ] τοιοῦτο ἀλλὰ καὶ αὐτοὶ ὡς παρὰ τὰ προστεταγμένα ποιήσοντες δίκην ὑπομενοῦσι τὴν προσήκουσαν. On the question, VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 220–222.

<sup>32</sup> WOLFF, *Das Recht* (cit. n. 17), pp. 224–225 and n. 14–16, with lit.

<sup>33</sup> Precisely for this reason, *P. Wisc.* II 54 has been invoked as an argument that slaves must also have been subject to the *epistalma* requirement. Sceptical, WOLFF, *Das Recht* (cit. n. 17), p. 255 n. 15 with lit.

<sup>34</sup> WOLFF, *Das Recht* (cit. n. 17), pp. 173–177.

the *demosiosis*, carried out by the high office of the *archidikastes* in Alexandria, did not involve the local *bibliothekai*. The Alexandrine *synchoreseis* seem to have been equally out of the *epistalma* system, even when used by the inhabitants of the *chora* for property that may have been registered in the local *bibliothekai* under *katoche*.<sup>35</sup>

Furthermore, both for *synchoreseis* and for *cheirographa* after *demosiosis* and *ekmartyresis* we have full evidence that the *bibliotheke* did not even force a provisional registration, until receiving proof of the lack of obstacles for a definitive one. The requests regarding *synchoreseis* are *P. Oxy.* X 1268 (3rd cent. AD, Oxyrhynchos), *P. Oxy.* XXVII 2473 (AD 229, Oxyrhynchos), *SB VIII* 9878 (AD 259, Oxyrhynchos), *SB XVI* 12345 [= *P. Mil. Vogl.* IV 210] (AD 127/8, Tebtynis). For private documents after *demosiosis* we have *P. Oxy* XII 1475 (AD 267, Oxyrhynchos), *P. Coll. Yout.* I 65 [= *P. Oxy* XLVII 3365] (AD 241, Oxyrhynchos), *P. Coll. Yout.* II 73 (AD 289, Panopolis). A registration request for a deed after *ekmartyresis* is preserved in *P. Oxy* IX 1199 (3rd cent. AD, Oxyrhynchos). None of these requests include a clause announcing a future *apographe* with full proof of ownership and freedom from liens, nor a clause safeguarding the rights of previously registered owners or creditors. In short, there is nothing provisional in them.<sup>36</sup>

<sup>35</sup> VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 181–182, and WOLFF, *Das Recht* (cit. n. 17), pp. 244–245 and n. 103. A conjecture to explain the exclusion of *cheirographa*, in WOLFF, *Das Recht* (cit. n. 17), p. 254. A detailed discussion of the exclusion of *synchoreseis*, in G. FLORE, 'A proposito di P. Mil. Vogl. iv, 210', *Bullettino dell'Istituto di Diritto Romano* 82 (1979), pp. 1–10.

<sup>36</sup> This is not the prevailing opinion. WOLFF, *Das Recht* (cit. n. 17), pp. 238–239, classifies most of these requests as provisional *paratheseis* or as 'Mischformen': equally provisional *paratheseis* that follow the model usually reserved for definitive registrations. The truth is that, as underlined above, none of these requests show any of the elements that define a provisional registration: the clause promising full proof of ownership and freedom from liens on presenting the future *apographe*, and the clause safeguarding the rights of previously registered owners or creditors. The only reason behind Wolff's reticence to admit that, in the absence of such clauses, these are definitive registrations, is the remark 'παρε(τέθη)', added by the record official on top of some of them, and the final clause in others, requesting *parathesis* to be performed (ἐπιδίδωμι τὸ ὑπόμνημα πρὸς τὸ τὴν δέουσαν παράθεσιν γενέσθαι, *vel sim.*). For Wolff, as for many others, the term *parathesis* has become synonymous with provisional registration. This is not how it was understood by the officials behind these documents, as it clearly results from the numerous documents where:

## 3. KATOCHÉ AND EPISTALMA

So far, we have only considered the gaps in the *epistalma* system, i.e., the cases that fall out of the grasp of the *bibliotheke*. We have taken for granted that, for those within its grasp, the *bibliophylakes* would enforce the registered *katoche* and deny their cooperation, just as they are requested to act in the *hypallagmata* of *P. Wisc.* II 54, *P. Kron.* 18 and *P. Vars.* 10 III.<sup>37</sup> A *katoche* would lead the *bibliotheke* to refuse the authorisation (*epistalma*) required to

a) all the clauses that mark a registration as provisional are lacking and yet a *parathesis* is requested or the label *παρε(τέθη)* is added; b) despite the *παρε(τέθη)* or the *parathesis* request, the document is introduced by the *ἀπογράφομαι* distinctive of definitive registrations. Cf., for the registration of a *hypallagma*: *P. Lips.* I 9 (AD 233, Hermopolis), I. 7: ἀπογραφόμεθα, I. 23: ἐ[ἰς τὸ] παράθεισιν γενέσθ[αι]. For the registration of sales: *P. Coll. Youtie* II 73 (AD 289, Panopolis), I. 3: ἀπογράφομαι παρ' ὑμῖν; II. 13–15: καὶ ἀξιῶ, ἀναδοῦσα ὑμῖν ἐν ἐκτάκτῳ τὴν δημοσίωσιν, τὴν δέουσαν παράθεισιν τῷ ὀνόματί μου γενέσθαι ὡς καθήκει; *P. Vindob. Bosw.* 3 (AD 277/8, Hermopolis), II. 3–4: ἀπογράφ[ομαι ε. ?] παρ' ὑμῖν; II. 15–16: δι' ὃ ἀναφέρω εἰς [τὸ τὴν δ]έουσαν παράθεισιν παρ' ὑμῖν γενέσθαι; *SB VI* 9219 (AD 319, Hermopolis), I. 2: ἀπογράφομαι; I. 6: ἦν καὶ ἐπεσταλμένην ὑμῖν ἀπ' αὐτοῦ ἐντεῦθεν ἀνέδωκα ὑμῖν [σὺν τῷ προσφω(ν)ήσεως ἀντιγρ(άφῳ), ὡ]ς περιέχει, πρὸς <τὸ> [τ]ὴν δέουσαν παράθεισιν π[αρ'] ὑμῖν γενέσθαι; *P. Oxy* X 1268 (3rd cent. AD, Oxyrhynchos), I. 1: παρε(τέθη); I. 4: ἀπογράφομαι; *SB VIII* 9878 (AD 259, Oxyrhynchos), I. 1: παρε(τέθη); I. 8: [ἀπο]γράφομαι. These documents show that, at least in 3rd- and 4th-century Oxyrhynchos, Hermopolis and Panopolis, the antinomy *apographe* vs. *parathesis* was not referred to definitive vs. provisional registrations: rather, as the quoted documents show, *apographe* was the presentation of a document for (definitive) registration, and *parathesis* its (definitive or provisional) registration by the *bibliotheke*. In this sense, taking *SB VIII* 9878 as a point of departure, E. KIESSLING, 'Ein Beitrag zum Grundbuchrecht im Hellenistischen Ägypten', *JfJrP* 15 (1965), pp. 73–90, especially p. 76: 'Im Hinblick auf den allgemeinen Gebrauch des Wortes ist es daher irreführend, wenn man daneben die *παράθεσις* als feststehenden Terminus für die provisorische Buchung einer Vormerkung herausstellt', and p. 81: 'Als *ἀπογραφή* bezeichnet man im Grundbuchrecht jede pflichtgemäße, schriftliche Meldung an das Grundbuchamt, welche eine Buchung (*παράθεσις*) in den Grundbuchblättern (*διαστρώματα*) zum Ziele hat.' Cf. also already MITTEIS, *Grundzüge* (cit. n. 12), pp. 101, with KIESSLING'S remark (p. 81 and n. 33–34), and VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 204–206, 251–260. More lit. in WOLFF, *Das Recht* (cit. n. 17), p. 299 n. 80 *if.*

<sup>37</sup> Cf. also *P. Lond.* III 1157 (p. III) (= *MChr.* 199, AD 146, Hermopolis), where an unsecured creditor addresses the *bibliophylakes* in fear that his debtor may alienate some property before he gets his *cheirographon* through *demosisis* in Alexandria: the creditor seems to take for granted that a registered *katoche* would block any sale attempt.

sell or mortgage by public deed. And yet, there is in the scholarship a common belief that this was not necessarily so. The *bibliophylakes* would rather merely deny the buyer a definitive registration, usually called *apographe*, forcing him to a provisional one, usually called *parathesis*, explicitly acknowledging the primacy of the creditor's right over his own.<sup>38</sup>

Thus, in his detailed, careful chapter on the *bibliotheke enkteseon*, Hans Julius Wolff admits, together with the denial of *epistalma*, the possibility of its concession with restrictions. The *epistalma* was denied, he writes, or at least subject to a restriction, explicitly safeguarding the rights of a third person, when such rights were known to the *bibliotheke* and impeded the alienation or in any case could be enforced against a buyer.<sup>39</sup> In this sense, Wolff argues, must be understood the part of the Edict of Mettius Rufus referred to the liens of wives and children on the property of their husbands and parents. And, in fact, in the words of the praefect, the aim of the registration of such rights seems to be to make them public, so that the potential buyers may not be defrauded by their ignorance (*ἵνα οἱ συναλλάσσοντες μὴ κατ' ἄγνοιαν ἐνεδρεύωνται*), but not at all to block the sale itself.

The idea has a long tradition. It had been first suggested by Ernst Rabel in 1909, in his ground-breaking study on the inalienability of the pledge.<sup>40</sup> After reviewing the (at that point scarce) documentary evidence for the registration of real securities, Rabel cautiously favours the hypothesis that a *katoche* securing a debt of private law would not prevent the sale and even its registration through provisional *parathesis*, but only an unconditioned registration, that is, one without explicit safeguard of the previously registered right of the creditor.<sup>41</sup> Rabel invokes *BGU I 243* (= *MChr.* 216, AD 186, Arsinoites), where a buyer requests provisional *parathesis*, and his request concludes precisely with a clause safeguarding

<sup>38</sup> *Parathesis* appears in our documents for any registration performed by the *bibliotheke*: of a *katoche* or of property, provisional or definitive. *Apographe* instead refers to the act of presenting a title deed for a definitive registration of property. On the question, *supra*, n. 36.

<sup>39</sup> WOLFF, *Das Recht* (cit. n. 17), p. 248.

<sup>40</sup> Cf. in the same year, but as a mere theoretical possibility, O. EGER, *Zum ägyptischen Grundbuchwesen in römischer Zeit*, Leipzig – Berlin 1909, p. 86.

<sup>41</sup> RABEL, *Verfügungsbeschränkungen* (cit. n. 1), p. 65.

the rights of previously registered owners or creditors who may hold a *katoche*: εἰ δὲ φανείη εἶναι κύριον τ[ὸ] προκατεσχ(μένον) ἢ προπαρακεί(μενον) διὰ τοῦ βιβλ(ιοφυλακείου) κωλ(ύειν) πρὸ τῆς παραθέσεως καὶ μὴ τῷ ἔσεσθαι ἐμπόδιον ἐκ τ[ῆς]δε τῆς παραθ(έσεως) (ll. 13–16).

Together with this text, Rabel mentions other similar *parathesis* requests explicitly safeguarding the rights of possible previously registered owners or creditors: *P. Chic.* I 2, *P. Gen.* I 44, the by then still unpublished *P. Hamb.* I 16, and *P. Tebt.* II 318. This evidence, together with the similar documents edited after Rabel, will be discussed *infra*, in section 4. Rabel's idea was immediately adopted by Mitteis in the *Grundzüge*:<sup>42</sup>

As it has often been conjectured, and *P. Hamb.* 14 and 15 prove, a definitive transmission and *apographe* require that the property be free from real securities; in other words, a real security carries with itself a prohibition of (definitive) alienation. It seemed, however, undesirable to unduly bind the hands of the owner, and hence a transmission was allowed with the provisional effect that the right of the buyer would be registered at least by *parathesis*.<sup>43</sup>

For Mitteis this situation is a likely explanation for the unregistered (μὴ ἀπογεγραμμένος) seller that we find in some *parathesis* requests.<sup>44</sup> It is not that the seller was not registered at all, for in that case the public deed necessary for the *parathesis*-request would be impossible to obtain by lack of *epistalma*.<sup>45</sup> Rather, the seller himself would be, possibly due to

<sup>42</sup> Even before, cf. P. M. MEYER, *Griechische Papyrusurkunden der Hamburger Staats- und Universitätsbibliothek* I, 1, Leipzig – Berlin 1911, p. 56, in the introduction to *P. Hamb.* I 14, and p. 61 s., in the introduction to *P. Hamb.* I 15. On these important documents, more *infra*, *sub v*.

<sup>43</sup> MITTEIS, *Grundzüge* (cit. n. 12), p. 104. The same assumption, that a registered real security does not exclude the sale but merely its definitive registration by *apographe*, in L. MITTEIS, 'Neue Urkunden', *ZRG RA* 33 (1912) 641, for *P. Oxy* IX 1199. In this *parathesis* request there is not the slightest hint of provisionality, though: merely the term *parathesis* and MITTEIS' assumption that it implies provisionality: on this, *supra*, n. 36.

<sup>44</sup> In his time, *BGU* I 243, l. 9, *P. Hamb.* I 16, l. 14. Edited later, *P. Graux* II 18 (= 19), l. 11, *P. Mich.* XII 627, l. 11.

<sup>45</sup> In such cases, possibly the only way to a registration would be a private deed followed by *demosiosis* or *ekmartyresis*.

a previous *katoche*, provisionally registered by mere *parathesis*, as we know it was the case in *P. Gen.* I 44.<sup>46</sup> It further follows, as it is today generally accepted,<sup>47</sup> that a sale authorised by the *bibliotheke* was possible not only for the owner who had presented full *apographe*, but also for the owner with a mere provisional *parathesis*.

After Mitteis, the idea seems to have become established as part of our common stock, both in reference books such as Weiss<sup>48</sup> and Taubenschlag's,<sup>49</sup> and in monographic studies, like those by von Woelf<sup>50</sup> and Flore.<sup>51</sup> Its importance is difficult to overestimate, and yet it has not been,

<sup>46</sup> *P. Gen.* I 44 (= *MChr.* 215), ll. 16–18: διακαμμέν[ου κ]ατὰ παράθασ[ι]ν διὰ σοῦ ἐπὶ [τοῦ . . . . . ἔτους] μὴρὸς Φαῶφι ἐπ' [ὄν]όματος τοῦ ὑποχειρίου [αὐτῷ ὄντος Αὐρηλ(ίου)] Λογγεῖνά τοῦ καὶ Ἀμμωνίου ἀφήλικος.

<sup>47</sup> WOLFF, *Das Recht* (cit. n. 17), p. 248 *sub a*.

<sup>48</sup> E. WEISS, *Griechisches Privatrecht* I, Leipzig 1923, 271 s. and n. 92: 'Daneben stehen jene Fälle, wo der Eintrag vorbehaltlich bücherlich älterer vom Gesuchssteller zu entkräftender Rechte Dritter erfolgte; dazu kann es zunächst dann kommen, wenn der Veräußerer durch ein, ein Veräußerungsverbot darstellendes Pfandrecht an der Übertragung zu vollem Rechte gehindert war. Man spricht dann von *παράθεσις*, nicht von *ἀπογραφή*, und will der nunmehrige Erwerber, ohne das Pfandrecht gelöscht zu haben, weiter veräußern, so liegt nach der Ausdrucksweise der Quellen Erwerb von einem *μὴ ἀπογεγραμμένος* vor.'

<sup>49</sup> R. TAUBENSCHLAG, *The Law of Greco-Roman Egypt in the Light of the Papyri*, Warsaw 1955, p. 228: 'Sometimes *ἐπίσταλμα* was granted even if the examination of the title had revealed that there was a positive obstacle, a *κατοχή*. In such a case this grant was made without prejudice regarding the *κατοχή*, which in reality prevented the closing of the transaction and thus resulted again in *παράθεσις*'.

<sup>50</sup> VON WOESS, *Urkundenwesen* (cit. n. 26), p. 197: 'Übrigens wurde gelegentlich auch eine etwas weniger strenge Praxis gehandhabt. Man gab das *ἐπίσταλμα*, wie schon früher angedeutet wurde, trotz der *κατοχή* hinaus, machte aber einen Vorbehalt zugunsten des durch die *κατοχή* gewährten Rechtes, der vom Notar in die Urkunde hineingenommen wurde und diese natürlich entwertete. Diesen Vorgang scheint zB. das *ἐπίσταλμα*-Gesuch *Stud. Pal.* 20 nr. 12 im Auge zu haben.' On this document that VON WOESS brings into the discussion as his main source, cf. *infra*, *sub*. v.

<sup>51</sup> G. FLORE, 'Sulla βιβλιοθήκη τῶν ἐγκτήσεων', *Aegyptus* 8 (1927), pp. 56–58; 60–62, 68–70, cf. especially p. 61: 'Sino a qual punto questo complicato sistema di garanzie impedisse la emanazione di un *ἐπίσταλμα*, non è chiaro; si sostiene però, generalmente, che perfino la presenza di una sola di esse fermasse la trasmissione di un fondo. Non lo credo: troppe deviazioni ci mostrano che, nonostante le *κατοχαί*, i fondi si vendevano', and n. 1,

in my opinion, fully acknowledged, despite the theory itself remaining unchallenged. If the theory held true, it would mean that the non-alienation principle was virtually abandoned, in one of the deepest changes in the history of the Greek real securities. The *katoche* arising from the security would have been transformed, from a rigid hold that blocked the alienation into a guarantee for the creditor that his registered right would prevail over the provisional registration of the buyer. The solution would come remarkably close to the Roman one. The debtor would be free to sell, as the Roman one was, and, as in the Roman system, it would be ensured that the creditor's right would prevail over the new owner's. Only the means that would assure the creditor's prevalence differ. The Roman system extended the claim *erga omnes* typical of owners to a non-owner like the creditor, making him thus prevail even over a new owner in good faith. In this *parathesis*-system, instead a definitive registration is denied to the buyer, who will only obtain a provisional one explicitly acknowledging the creditor's right as prevailing over his own.

The following paragraphs will be devoted to reviewing the evidence, in order to assess how much of the theory may be actually proven by the available sources. The crucial questions are the following:

a) The first concerns the safeguard clause reproduced above. *Prima facie*, it could seem that it merely shows that the *bibliotheke* accepted provisional registrations despite the possibility of a *katoche*. Is this all its value, or does it allow to conclude that the *bibliotheke* would register (and hence also previously authorise) a sale despite the certainty of a recorded *katoche*? This question will be addressed in section 4.

b) The second question refers to the remaining evidence. Is there any documentary evidence beyond the safeguard clause? In particular: do we have evidence of an actual sale being authorised despite a real security? The relevant documents will be presented in sections 5, 6, and 7.

c) Most of the sales of a pledged object are made, in any legal system that permits them, with immediate cancellation of the pledge. The buyer, unless deceitfully kept unaware of the pledge, will usually make sure that

where he quotes as evidence *P. Gen.* I 44, *P. Hamb.* I 16 and *Stud. Pal.* XX 12, on which cf. *infra*, in sections 5 and 6.



the secured debt is paid for.<sup>52</sup> The best way to proceed is to pay the price, up to the amount of the debt, directly to the the creditor, rather than trusting the seller.<sup>53</sup> It will therefore be of no surprise, if most of the evidence we find refers to sales whose price is destined to satisfy the secured debt. But any indication of an interest of the record office in this circumstance has a very different value. It raises the suspicion that not every sale was allowed, but merely those aimed at cancelling debt and security with the price. Was that the case? The question will be considered throughout sections 5, 6, and 7.

#### 4. THE SAFEGUARD CLAUSE IN THE PROVISIONAL *PARATHESIS* REQUESTS

Rabel's main argument came, as we have seen, from *BGU* I 243 and the other provisional *parathesis*-requests known in 1909: *P. Chic.* I 2, *P. Gen.* I 44,<sup>54</sup> and *P. Hamb.* I 16 (still unpublished at the time), as well as *P. Tebt.* II 318 (referred not to a sale but to a non-alienation agreement). Rabel high-

<sup>52</sup> In Graeco-Egyptian law, this was especially crucial when buying a hypothecated object, because the hypothecarian creditor, unlike the hypallagmatic one, had no claim against the debtor but merely on the hypothecated object itself. For this difference between hypothec and *hypallagma*, cf. ALONSO, 'Alpha and Omega' (cit. n. 9), pp. 24-26 and n. 21.

<sup>53</sup> Notorious cases where a debt is cancelled by the buyer of the hypothecated object are mentioned by MEYER, *P. Hamb.* I (cit. n. 42), p. 55 n. 5. In *BGU* II 362 (AD 215, Arsinoites) IX, ll. 15-24, from the accounts of the temple of Jupiter Capitolinus in Arsinoe, we learn of a certain Olympia, who apparently had received from the temple, on the hypothec of a house, a loan that she now repays through the purchasers of the house. And in *P. Oxy* III 486 = *MChr.* 59 (AD 131, Oxyrhynchos), ll. 22-26, Dionysia addresses the praefect Flavius Titianus to defend herself against the accusations of a certain Sarapion, concerning some property that she claims to have bought, paying the price to the father of Sarapion and to some creditors of the father, who had a hypothec over the property. Naturally, taking into account the context of both documents, there is in them no mention of the *bibliotheke*. Cf. further *P. Hamb.* I 14 (AD 209/10, Arsinoites), *infra*, in section 5, and *P. Hamb.* I 15 and 16 (both AD 209, Arsinoites) *infra*, in section 6.

<sup>54</sup> *P. Gen.* I 44, *BGU* I 243 and *P. Chic.* I 2 (quoted by Rabel as *Class. Phil.* 2) were re-edited by MITTEIS in the *Chrestomathie* as nos. 215, 216 and 217.

lighted these texts not because he conjectured that in these specific cases a creditor's right was the obstacle for a full *apographe* but rather because of a clause that appears towards the end of all of them. It reads:

εἰ δὲ φανείη (φανείησαν, φανείεν) ἑτέρῳ προσήκον (προσήκοντα, προσήκουσαι) ἢ προκατεσχρημένον (προκατεσχρημένα, προκατεσχρημέναι) (διὰ τοῦ βιβλιοφυλακείου), μὴ ἔσεσθαι ἐμπόδιον ἐκ τῆσδε τῆς παραθέσεως.<sup>55</sup>

Since Rabel, the clause has reappeared in identical fashion in every *parathesis*-request that presents itself as provisional, that is, foreseeing a future *apographe*.<sup>56</sup> We can therefore be sure that it was imposed by the record-office for such registrations. I will refer to it as 'safeguard clause', for, despite some dissenting opinions, it clearly aims at safeguarding previously registered rights.<sup>57</sup> Such rights are described by two alternative terms:

<sup>55</sup> *P. Chic.* I 2 (= *MChr.* 217, 2nd. cent. AD, Arsinoites), ll. 9–11; *P. Gen.* I 44 (AD 259, Arsinoites), ll. 22–24; *P. Hamb.* I 16 (AD 226, Arsinoites), ll. 21–23. I shall leave aside *P. Tebt.* II 318 (= *MChr.* 218, AD 166, Tebtynis), where the clause appears in identical fashion (ll. 22–24), but the registration refers to a non-alienation agreement securing a credit, not to a sale. In *BGU* I 243 (AD 186, Arsinoites), the clause reads somewhat differently (ll. 13–16): εἰ δὲ φανείη εἶναι κύριον τ[ὸ] προκατεσχρη(μένον) διὰ τοῦ βιβλιοφυλακείου κωλύ(ύν) πρὸ τῆς παραθέσεως καὶ μὴ τῷ ἔσεσθαι ἐμπόδιον ἐκ τ[ῆ]σδε τῆς παραθ(έσεως).

<sup>56</sup> *SB* VI 9625 (AD 177–192, Tebtynis), ll. 21–24; *BGU* XI 2031 (AD 180–192, Karanis), ll. 24–26; *SB* XIV 11399 (2nd cent. AD, Theadelphia), l. 15–17; *P. Diog.* 20 (AD 226, Arsinoites), ll. 5–6; *P. Mich.* XII 627 (AD 298, Philadelphia), ll. 15–17; *PSI* X 1126 (3rd cent. AD, Arsinoites), ll. 22–23; *PSI* X 1127 (3rd cent. AD, Arsinoites), ll. 15–17; *P. Graux* II 18 (= 19, AD 307, Philadelphia), ll. 13–14; *P. Alex.* inv. nr. 266 (date and provenance unknown), ll. 7–8.

<sup>57</sup> EGER, *Grundbuchwesen* (cit. n. 40), p. 135, understands the clause inversely, as a safeguard for the petitioner against someone else's future *parathesis*: 'eine frühere *παράθεσις* geht einer späteren vor'. Similarly, E. KIESSLING, 'Die Vormerkung im ägyptischen Grundbuchrecht', *ZRG RA* 82 (1965), p. 313 and IDEM, 'Grundbuchrecht' (cit. n. 36), pp. 88–89, refers ἐκ τῆσδε τῆς παραθέσεως to a possible future *parathesis* in favour of someone else, from which no obstacle should arise for the present petitioner. Against such interpretations, it must be observed that: a) ἐκ τῆσδε τῆς παραθέσεως can only refer to the present *parathesis*, not to a future one; b) there can be no legal value for a unilateral declaration whereby I decree the superiority of my own position against others: it is in my hand to yield to someone else's right, but certainly not to decree that he yield before mine. Against KIESSLING, cf. WOLFF, *Das Recht* (cit. n. 17), p. 243 and n. 95.

προσῆκον ἢ προκατεσχημένον (διὰ τοῦ βιβλιοφυλακείου). The former points to possible previously registered owners, the latter to previously registered creditors who may hold a *katoche* on the asset.<sup>58</sup> In these terms, imposed by the record office, the buyer is thus forced to acknowledge the pre-eminence of such previously registered owners and creditors.<sup>59</sup>

This safeguard clause is crucial for Rabel's conclusions on the impact of the *bibliotheken enkteseon* on real securities and on the limitations they imposed on the debtor's faculty to alienate.<sup>60</sup> Contrary to what one may have expected, the *bibliotheken* seems not to have helped to enforce inalienability. Quite the opposite: the *katoche*-part of the safeguard clause shows – Rabel argues – that a real security, even registered as *katoche*, would not prevent the registration of a buyer or newly secured creditor. A provisional *parathesis* would be granted all the same; only a definitive, unconditional registration would be excluded (that is, an *apographe* with no safeguard of the previously registered *katoche*).

<sup>58</sup> Similarly, in the less fortunate version of BGUI 243 (*supra*, n. 55), we find the alternative προκατεσχη(μένον) ἢ προπαρακεί(μενον), where the second term must be referred to a previously registered owner, the first again to a *katoche*. This version is translated by F. PREISIGKE, *WB*, s.v. προπαρακέιμαι, thus: 'Sollte es sich ergeben, daß vor dieser meiner Besitzhinterlegung eine vorausgegangene Sperre oder Hinterlegung derselben Besitzes zu Recht besteht, dann soll ihr auch aus dieser meiner Hinterlegung kein Nachteil erwachsen'.

<sup>59</sup> VON WOESS, *Urkundenwesen* (cit. n. 26), p. 208, understands the clause in a very different way: 'Die παράθεσις soll kein Hindernis sein, für die ἐπίσταλμα-Erteilung nämlich, sofern der in Wahrheit bücherlich Legitimierte darum einkommt'. For von Woeß, the petitioner does not acknowledge the primacy of previously registered rights over his own. He merely admits the right of those previously registered to obtain an *epistalma* that his *parathesis* should – so von Woeß – have blocked. Against such interpretation we may put forward that: a) it is not likely that a *parathesis* registered to the name of a buyer Y (or to the name of the seller X, since it has been argued that provisional *paratheseis* were marginal annotations in the *folium* of the seller: cf. WOLFF, *Das Recht* [cit. n. 17], pp. 244–245) can lead the *bibliophylakes* to refuse *epistalma* to a fully *apograpbed* Z, whose right is free from the uncertainties that prevented Y's *apographe*, and in whose *folium* there is no trace of the conflicting *parathesis*, which would thus very likely remain unnoticed for the *bibliophylakes*; b) von Woeß' reading works relatively well in reference to a previously registered owner, who may wish to sell or encumber his property. Yet, the clause wants the petitioner to yield also to previously registered holders of a *katoche*. And for these, von Woeß' interpretation makes absolutely no sense.

<sup>60</sup> RABEL, *Verfügungsbeschränkungen* (cit. n. 1), p. 65.

*Prima facie*, it may seem that the clause does not prove quite so much as Rabel would wish. It certainly shows that the *bibliophylakes* would register a sale despite the possibility of conflicting previously registered rights.<sup>61</sup> It may instead not seem enough to prove beyond doubt that they would equally register the sale despite the certainty of a *katoche* recorded to the name of the seller. This scepticism may not be wholly justified, for the following reasons.

Provisional *parathesis*-requests contain, together with our clause, also another one foreseeing a future full *apographe*, when the buyer shall prove that the object belongs to him and is free (ὁπόταν γὰρ τὴν ἀπογραφὴν ποιῶμαι, ἀποδείξω ὡς ὑπάρχει καὶ ἔστι καθαρὸν). It is precisely such clause that justifies labelling these *paratheseis* as ‘provisional’. We do not know what the disadvantages of a provisional *parathesis*, as compared to a full *apographe*, were (if any), other than the explicit safeguard of previously registered rights. But it seems clear that the easiest situation for the buyer is to be entitled to a direct *apographe*. In the documented cases it is not always possible to ascertain why such full *apographe* was unfeasible. For some of them, the evidence seems to point directly to a *katoche*: these will be our main sources, *infra*, sub 5, 6, and 7. In others the reason has been found in the mention of the seller as not fully registered himself (μὴ ἀπογεγραμμένος). But this second reason usually points to something else: if there were no obstacle for a full *apographe*, the seller could just register the property on the very same day of the sale, as it often was the case,<sup>62</sup> making thus a full *apographe* possible also for the buyer. On the other hand, a μὴ ἀπογεγραμμένος cannot simply be someone not regis-

<sup>61</sup> It might be argued that it does not prove even this, since we do not have decisions but only requests. Yet, these are not freely formulated by the petitioners: the perfectly constant formulation shows that the model was, as always, imposed by the record office, and within it also our clause, that never fails to appear.

<sup>62</sup> Among the many documented cases where the registration is only made in order to sell, *P. Wisc.* II 54 (AD 116, Ptolemais Euergetis), *P. Tebt.* II 472 (AD 120/1, Tebtynis); *P. Hamb.* I 62 (= *P. Fam. Tebt.* 23, AD 123, Tebtynis); *P. Tebt.* II 323 (= *MChr.* 208, AD 127, Tebtynis); *P. Lond.* II 299 (p. 150) (= *MChr.* 204, AD 128, Ptolemais Euergetis); *Stud. Pal.* XXII 85 (AD 128, Alabanthis); *P. Bon.* 24b (AD 135, Tebtynis); *P. Hamb.* I 16 (AD 209, Arsinoites); *P. Mich.* IX 542 (3rd cent. AD, Karanis). Cf. A. M. HARMON, ‘Egyptian property returns’, *Yale Classical Studies* 4 (1934), pp. 213, 221.

tered: a not registered seller could not have obtained the *epistalma* required for the sale contract to be a public deed.<sup>63</sup> Leaving aside the cases of *demosiosis* and *ekmartyresis*, the μὴ ἀπογεγραμμένος must therefore have obtained a provisional *parathesis* himself, on the basis of which he was later granted the sale-*epistalma*. Hence, again, someone for whom a full *apographe* had been for some reason excluded.

In short: the seller's lack of *apographe*, that the scholarship tends to favour as explanation for our provisional *parathesis* requests,<sup>64</sup> is usually not a full explanation. Behind it, there tends to be a seller for whom only *parathesis*, not *apographe*, had been possible. Why, the documents do not say, but the best candidate to be the obstacle is a *katoche*. A *katoche* may have arisen from a registered real security, a hypothec or a *hypallagma*.<sup>65</sup> It may also have arisen from the registration of a simple, unsecured credit, as our evidence shows.<sup>66</sup> Another source thereof may be the rights of wives and children mentioned in the Edict of Mettius Rufus, or, as mentioned in the Edict of Tiberius Alexander, the *protopraxia* of the *fiscus* against those assuming liturgies or that of the wives securing the restitution of their dowries.

True, the difficulties of the seller may not be connected to a *katoche*: he may simply have not sufficient proof of his right. For this possibility, the clause included the reference to a possible previously registered owner. But together with it, it also included our reference to a previously registered *katoche*, showing that also this was foreseen as a *parathesis* case.

It could still be argued that the clause is sufficiently explained by the possibility of such *katoche*: that it does not postulate the certainty of it. But a possible *katoche* means here an undetected one, and the clause simply can-

<sup>63</sup> The preserved *parathesis* requests often explicitly underline that the document is a public deed; in any case, the registration of a private deed was possible only after *demosiosis* or *ekmartyresis*: *supra*, section 2 and n. 34.

<sup>64</sup> Cf. WOLFF, *Das Recht* (cit. n. 17), p. 240.

<sup>65</sup> In this case, one must conjecture a real security contracted not by the seller himself, but by the previous owner: since the security prevented the seller's full *apographe*, it must have existed already when he acquired.

<sup>66</sup> *P. Lond.* III 1157 (p. 111) (= *MChr.* 199, AD 146, Hermopolis), *supra*, n. 37. Cf. also *P. Hamb.* I 14 (AD 209/10, Arsinoites), *infra*, section 5 and n. 77.

not refer to them. Admittedly, it is not unconceivable that something goes undetected in the registration process. When authorising the sale, the presence of a previously registered right, inscribed to the name of someone else than the seller, could for instance easily escape the attention of the record office. The same could happen with unregistered *katochai*, as the Edict of Mettius Rufus underlined, when warning that the liens of wives and children should be registered ‘in order that those who make agreements with them may not be defrauded through ignorance’ (*P. Oxy.* II 237 VIII, ll. 34–36). Our clause refers, however, only to recorded *katochai* (προκατεσχημένον διὰ τοῦ βιβλιοφυλακείου).<sup>67</sup> And, as we well know, *katochai* as such are not registered in the *folium* of the beneficiary, but in the *folium* of the encumbered owner.<sup>68</sup> By definition, therefore, they can hardly go undetected. Hence: it is not to undetected ones that the clause refers.<sup>69</sup>

Concluding: the safeguard clause proves that a provisional *parathesis* was feasible not merely despite the possibility of a previously registered *katoche*, but despite the certainty of it. And, if such a possibility was foreseen by the *bibliotheke*, it must have been because in such case the *bibliotheke* itself did not necessarily deny authorisation (*epistalma*) to the seller.<sup>70</sup>

<sup>67</sup> From thirteen occurrences of the clause, διὰ τοῦ βιβλιοφυλακείου is left out in three: *BGU XI 2031* (180–192, Karanis), *P. Chic.* 2 (= *MChr.* 217, AD 217, Arsinoites), *SB XIV 11399* (2nd cent. AD, Theadelphia). There is no geographical or chronological pattern, nor is any different effect conjecturable. The best hypothesis seems to be that these three documents simply present a somewhat shorter version implying what has been left out.

<sup>68</sup> Cf. WOLFF, *Das Recht* (cit. n. 17), pp. 235–238, especially n. 67. Securities, like hypothec, that do not consist in a mere *katoche* but are conceived as suspended ownership, are for that very reason recorded not only, qua *katochai*, in the *folium* of the debtor, but also, qua rights, in that of the creditor.

<sup>69</sup> Unless, with VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 213–214, we imagine the occasionally chaotic conditions of the *bibliothekai* (*supra*, n. 29) as the reason behind the clause. This hypothesis, however, does not hold. The mere fact that the clause figures only in provisional registrations, and not in *apographai*, too (where a mistake due to disorder is equally possible and certainly more harmful) is enough to realise that the clause is not related to transient difficulties, but to the difference itself between provisional and definitive registrations.

<sup>70</sup> Unless the clause had been introduced exclusively for the hypothesis of *synchoreseis* and *cheirographa* after *demosiosis*, that arrived to registration without previous *epistalma*. The hypothesis does not seem very likely.

A full proof of this latter assumption requires documentary evidence of sales being authorised or registered despite a *katoche*. The following sections are devoted to documents that may provide such evidence.

## 5. NOTIFICATION OF SALE (ΕΞΟΙΚΟΝΟΜΗΣΙΣ) A REAL SECURITY NOTWITHSTANDING?

Our first document, *Stud. Pal.* XX 12 (= *SB* I 5835, 2nd cent. AD, Arsinoites) was presented as evidence by von Woëß.<sup>71</sup> It was the main proof for him that the *bibliotheke* would grant *epistalma* despite a *katoche*, with safeguard of the *katoche* itself. A certain Artemis, priestess of Osiris, Isis and Harpokrates, notifies the *bibliophylakes* of the Arsinoites her wish to sell a house with atrium, registered by *parathesis*, to a certain Helena for 2200 drachms. The last six lines before the subscription (ll. 19–24) run as follows:

- πρωτοπρα-  
 20 ξίας οὔσης Μαρ. [c. ?] ἀφήλικι  
 πρὸς τὴν οὔσαν τ[ῆ]ς Ἀρτ[έ]μειτος  
 κα[τ]οχὴν [έ]λομ[έ]νες Ἀρποκρατίωνα  
 Κρο[νί]ω[νος] τ[οῦ] καὶ Ἀρπ[ο]κρατίω[νος]  
 24 ἱερέα [εἰ]ς τὴν τοῦ ἀφήλικος ἐπιτροπήν.

The clause safeguards the *protopraxia* of a certain Mar(ion?),<sup>72</sup> a minor (ἀφήλιξ). The *protopraxia* is said to exist ‘in reference to an existing *katoche* on Artemis’, or maybe ‘in reference to the existing property of Artemis’.<sup>73</sup> The final mention of the guardianship may only be understood, if somehow connected to the *protopraxia*. In fact, in the most

<sup>71</sup> VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 197, 214 s.

<sup>72</sup> So VON WOESS, *Urkundenwesen* (cit. n. 26), p. 197: *Μαρίων* is also the name of Artemis’ husband (l. 9)

<sup>73</sup> For *katoche* as ‘possessions’, cf. PREISIGKE, *WB*, s.h.v., 4: ‘Innehaben eines Besitzes, Besitz’.

likely interpretation of the last three lines, the minor had *protopraxia* over Artemis' property because she had been responsible for the choice of his *tutor*.<sup>74</sup>

Several reasons advise to leave aside this text, despite the importance that von Woeß assigns to it. First of all, the fact that Artemis merely notifies her intention to sell, but does not request authorisation (*epistalma*) has been interpreted as a clear signal that *epistalma* would not be granted in this case.<sup>75</sup> Secondly, a registered *katoche* is here probable but not completely sure: the term may in this case mean 'property' and not 'hold', and the minor's *protopraxia* could well not have been, or not yet, registered. And, last but not least, even if there were a registered *katoche*, it would not be one arising from a real security, but from the *protopraxia* in favour of the minor, somehow connected to his guardianship. The case falls thus out of our scope.

Fortunately, we do not need it as indirect evidence either. Another document has survived, where the same type of notification is presented by someone who wishes to sell a hypothecated item: *P. Hamb.* I 14 (AD 209/10, Arsinoites). A certain Herais addresses the *bibliophylakes* of the Arsinoites notifying her wish to sell (β[ο]ύλομαι ἐξοικ[ονομη]σαι, l. 15) to a certain Sarapion two thirds of a house she has registered by *apographe* (l. 7). She furthermore declares that, from a price of 2000 drachms, only 200 are for herself: the remaining 1800 shall be paid by the buyer to a certain Serenus (l. 18–22) who had lent her 1500 under hypothec and yet 300 more without a collateral (l. 9–15).<sup>76</sup> That the hypothec (and perhaps the

<sup>74</sup> The tutor, a priest named Harpokration, son of Kronion, also called Harpokration, is very likely Artemis' brother in law, i.e., the brother of her husband, also himself a priest: Marion, son of Kronion also called Harpokration (ll. 9–11).

<sup>75</sup> A. B. SCHWARZ, 'Προσαγγελία und ἐπίσταλμα', *ZRG RA* 41 (1920), pp. 273–278; P. M. MEYER, 'Papyrusbericht', *Zeitschrift für vergleichende Rechtswissenschaft* 40 (1923) 210. *Contra*, VON WOESS, *Urkundenwesen* (cit. n. 26), pp. 179–180, 198 and n. 1. On the whole question, cf. *infra*, in this section and nn. 79–81.

<sup>76</sup> The interest for these loans, the usual 1% per month, will thus not be cancelled: whether it had been previously paid for or it would be in the future in some other way, the document does not allow to conjecture. Cf. MEYER, *P. Hamb.* I (cit. n. 42), p. 59, *sub* 22.



unsecured credit, too)<sup>77</sup> was registered seems almost sure, despite the small reconstructed gap, from l. 9–10: ὄν ἐν ὑποθήκῃ [δι' ὑ]μῶν.<sup>78</sup>

There was therefore a hypothecarian *katoche*, and in spite of it, a sale is taking place. What is more, it is not hidden from the *bibliophylakes*. On the contrary, it is notified to them, calling their attention precisely to the hypothec that should have blocked it. The purpose behind this notification has been the object of much discussion. Usually, such notifications conclude with a request to the *bibliophylakes* to authorise the sale, i.e. to give *epistalma*. But, as in *Stud. Pal.* XX 12, this key element of the so-called *proangeliai* is missing here. For Meyer, in his edition of the papyrus, there is no question of considering such request implicit. In his opinion, an *epistalma* was neither requested, nor expected, and it would have not been granted either.<sup>79</sup> Since the seller was fully registered, the reason for such exclusion is, for Meyer, the *katoche*: an *epistalma* would be feasible only after the cancellation of the *katoche* by the *bibliophylakes*, at the creditor's request.<sup>80</sup>

<sup>77</sup> For the registration of unsecured credits to prevent alienations –hence as *katochai*–, cf. the well known example of *P. Lond.* III 1157 (p. 111) (= *MChr.* 199, AD 146, Hermopolis): *supra*, n. 37.

<sup>78</sup> According to MEYER, *P. Hamb.* I, p. 57 ad 9 s., the following word, despite the four first letters, cannot be the expected παρατε[θε]σθ[η].

<sup>79</sup> Surprisingly, VON WÖESS, who, as we have seen, takes the *epistalma* for granted in *Stud. Pal.* XX 12, believes that in *P. Hamb.* I 14 it would have been denied, although in his opinion it is equally implicitly requested. He argues that in this case there is an unpaid debt blocking the sale. This reason, even if it may seem *prima facie* sensible, would lead to a completely different treatment of *katochai* depending on whether they assure an actual debt or only a potential liability or right (like those of wives and children in the Edict of Mettius Rufus and those from liturgies and securing the restitution of the dowry in the Edict of Tiberius Alexander). And for such difference there is not the slightest hint in the sources. Quite the opposite: cf. for the *katoche* of the wife, the prohibition to sell dictated by the *archidikastes* in the famous Drusilla process, in *P. Cattaoui verso* col. 1 (= *MChr.* 88, before AD 87, Alexandria) ll. 13–35; for the *katoche* of the children, cf. the argued invalidity of a sale without their consent, in *CPR* I 19 (= *Stud. Pal.* XX 86 = *MChr.* 69, AD 330, Hermopolis), ll. 18–19; for that of the wife, cf. *P. Oxy* II 237 (after AD 186, Oxyrhynchos) vi, ll. 2–3, in the famous case of Dionysia.

<sup>80</sup> An example of a request to the *bibliophylakes* for the cancellation of a hypothec, in *BGU* III 907 (AD 180–192, Arsinoites). Cf. also *P. Lond.* II 348 (p. 214 = *MChr.* 197, AD 202/3, Ptolemais Evergetis), a receipt whereby a debtor is released, and the creditor promises such record-office cancellation of the hypothec.

This conjecture, though, creates a problem. If the *epistalma* was excluded, what was the purpose of the notification? Schwarz suggested, for all these notifications without *epistalma* request,<sup>81</sup> an effect in favour of the presumptive buyer similar to the one that Mitteis had already conjectured for the *epistalma*. It would prevent a second authorised sale to a different buyer. Mitteis had, in fact, assumed that obtaining an *epistalma* would block the possibility to be granted a second one, unless the former is cancelled. In Mitteis' conjecture, the *epistalma* concession would leave some trace in the *diastromata*, a sort of 'pre-notation' ('Vormerkung') in favour of the buyer, with an effect for the seller similar to that of a *katoche*.

Mitteis himself underlines, though, that this is just a conjecture, backed by no documentary evidence, even if compatible with the surviving documents, particularly with the mention of the buyer in the so-called *prosan-geliazai*. The conjecture is understandable in the context of Mitteis' *Grundbuch*-theory. The principle of *publica fides* postulated by this theory does not seem compatible with two sale deeds in favour of different buyers that are both recordable due to two contradictory *epistalmata*. Yet without documentary support and after the fall of the *Grundbuch*-theory, conclusively proven wrong by von Woess, there is no reason to keep the hypothesis.

As far as *P. Hamb.* I 14 is concerned, there is a further reason to reject it. In her notification to the *bibliophylakes*, Herais underlines that the aim of the sale is the cancellation of the hypothec (ll. 18–21). This would not make much sense if the notification served merely to protect the buyer. It becomes instead understandable if its purpose is to obtain the *bibliophylakes'* authorisation to sell.

The importance that the document assigns to this purpose of debt cancelling also re-dimensions its value as evidence. The document does not refer to just any sale, but to one aimed at cancelling the hypothec. It therefore serves as evidence only for such sales, and could even lead to suspect that it was only in such cases that the sale was authorised.

<sup>81</sup> SCHWARZ, 'Προσαγγελία' (cit. n. 75), on the basis of MITTEIS, *Grundzüge* (cit. n. 12), pp. 98–99. Together with the already mentioned *Stud. Pal.* XX 12 and *P. Hamb.* I 14, we have three further examples: *BGU* XI 2092 (AD 140, Arsinoites), *SB* VI 9069 (3rd cent. AD, Arsinoites), and, not for sale but for hypothecation, *PSI* IV 314 (AD 195, Arsinoites).

6. *EPISTALMA* FOR A SALE  
AIMED AT CANCELLING A REAL SECURITY?

Yet another case of this sort was conjectured by Meyer behind the two papyri that immediately follow this one in his edition: *P. Hamb.* I 15 and I 16 (both AD 209, Arsinoites). *P. Hamb.* I 16 is a *parathesis* request presented by Antonia Thermutarion<sup>82</sup> regarding a share of a house that she has bought from four siblings, who had inherited it from their father but had not yet registered it to their own name by *apographe* (ll. 13–14: *μη ἀπογεγραμμένων*). *P. Hamb.* I 15 is the sale contract, executed the very same day.<sup>83</sup> The contract presents the form of a *homologia* (*P. Hamb.* I 15, l. 2) and it is termed a public document in *P. Hamb.* I 16 (l. 6: *κατὰ δημόσιον χρηματισμόν*). There is therefore no doubt that the sale had been previously approved by *epistalma*. This is also the only possible interpretation of the words *κατὰ τήνδε τὴν ὁμολογίαν καὶ διὰ τῆς τῶν ἐνκτῆσεων βιβλιοθή[κης]* in *P. Hamb.* I 15, ll. 5–6.<sup>84</sup>

The reason why these two documents may interest us is the mention, in *P. Hamb.* I 15, ll. 15 and 17, of a Dionysios Ptolemaios, *δανειστής*, as the true recipient, directly from the hands of the buyer Antonia Thermutarion, of the price obtained by the four selling siblings, who in this way cancelled a debt with Dionysios. For Meyer, the inclusion of this information

<sup>82</sup> Antonia Thermutarion is also known through *P. Yale* III 137 (AD 216/17), *BGU* VII 1617 (AD 227), and *P. Ross. Georg.* V 58 (3rd cent. AD), all from Philadelphia.

<sup>83</sup> Probably not the original contract, but the copy that was appended to the *parathesis* request: cf. MEYER, *P. Hamb.* I, p. 63, on the basis of *P. Hamb.* I 16, l. 19: *ἀκολούθως ᾧ παρεθέμεν ἀντιγράφῳ τοῦ χρηματισμοῦ*, observing that both share the same handwriting for the body of the document.

<sup>84</sup> Cf. MEYER, *P. Hamb.* I, p. 62 n. 3, and VON WOESS, *Urkundenwesen* (cit. n. 26), p. 176 and n. 4. *Contra*, EGER, *Grundbuchwesen* (cit. n. 40), p. 136, and H. LEWALD, *Beiträge zur Kenntnis des römisch-ägyptischen Grundbuchrechts*, Leipzig 1909, pp. 55–56, 58–59, with no other basis than the unfounded assumption that a *μη ἀπογεγραμμένος* could not obtain *epistalma*: *contra*, cf. *supra*, sections 3 and 4, and WOLFF, *Das Recht* (cit. n. 17), pp. 240–243, 248. KIESSLING, ‘Grundbuchrecht’ (cit. n. 36), p. 86, holds instead that the *parathesis* of a sale did not require *epistalma* when the seller was a *μη ἀπογεγραμμένος*, and therefore refers the above quoted words of *P. Hamb.* I 15 not to *epistalma* but to *parathesis*; *contra*, conclusively, WOLFF, *Das Recht* (cit. n. 17), p. 242 n. 91.

in the sale contract is an oddity that calls for an explanation: it would, in his opinion, be unconceivable, unless there is some connection between the *δανειστής* and the sold object. We must therefore assume, he concludes, that the *δανειστής* had a registered right on the house share as a guarantee for his credit.

Meyer's argumentation is not compelling. The contractual mention of Dionysios as recipient of the payment serves to prove, in the interest of the buyer, that the payment was made to him with the conformity of the subscribing sellers. For someone who pays to a third party, such proof is crucial: the payment to someone other than the creditor, it goes without saying, only releases us from liability if made with his consent. And yet, there is one reason to suspect that Meyer was right. The fact itself that Antonia does not pay the price to the selling siblings and lets them decide its destination, but personally takes care that the creditor receives the amount. This concern on the side of the buyer seems a clear signal that there was a security to be cancelled.<sup>85</sup> Whether hypothec or *hypallagma*, we cannot know.

If this holds true, the text acquires enormous importance: contrary to *P. Hamb.* I 14, the payment to the creditor is not mentioned in the notification to the *bibliophylakes*, but merely in the contract. In this case, therefore, it seems likely that the *epistalma* had been granted unconditionally, and not made dependent on the cancellation of the debt.

Before confronting our last document, it will be useful to summarise the conclusions reached for those examined in this and the preceding section:

a) In *P. Hamb.* I 14, we have full evidence of a recorded hypothec, and of the sale of the hypothecated asset being notified to the *bibliotheke*. The lack of explicit *epistalma*-request makes uncertain, instead, if an *epistalma* was in this case expected at all, although so far no other plausible aim has been suggested for this type of notifications by the scholarship. The same can be said about *Stud. Pal.* XX 12 (= *SB* I 5835). where, in any case, the obstacle for the sale was not a real security but a *protopraxia*.

<sup>85</sup> MITTEIS, *Grundzüge* (cit. n. 12), p. 104: 'Wie man schon vielfach vermutet hat und wie *Hamb.* 14 und 15 zu unterstützen scheinen, setzt die definitive Übertragung und *ἀπογραφή* des Erwerbers wohl voraus, daß das Grundstück von Pfandrechten frei ist'.

b) Accepting it as possible evidence of the cooperation of the *bibliotheke*, *P. Hamb.* I 14 would by itself only prove that the sale was admitted when aimed at cancelling the hypothec. What's more: it could even lead to suspect that it was admitted only in that case.

c) This suspicion can be dispelled in the sight of *P. Hamb.* I 15–16, both referring to the same sale. In the transaction documented in these two documents, a security, although not mentioned, is very likely from the fact that the buyer personally takes care personally in cancelling the seller's debt. Despite this security, the sellers have obtained *epistalma*. Furthermore: this *epistalma* seems not to have been issued on the condition that the security is cancelled, since such cancellation is not mentioned in the registration request addressed to the *bibliophylakes*.

#### 7. *P. GEN.* I 44

So far, *P. Gen.* I 44 (= *MChr.* 215, AD 259, Arsinoites) has been mentioned here only as an example of *parathesis* request with safeguard clause: one of those already known to Rabel, and therefore part of the evidence that convinced him of his theory. As I will try to show, the importance of this source, our last, goes way beyond containing one further example of the safeguard clause.

A certain Aurelia X, also called Thaisarion, addresses the *bibliophylax* (here exceptionally only one) of the *Arsinoites* for the provisional registration of a 1/16 share on some property (a house, and another old house with two towers, and an *atrium*, all connected) that she has bought that same day from Aurelius Rufus. As in *P. Hamb.* I 15, a *δανειστής*, Lucius Anthesthius, is mentioned as the true recipient of the price, 1,500 drachms. There is though a very significant difference between the two cases. There, the *δανειστής* was mentioned in the sale contract (*P. Hamb.* I 15), but omitted in the *parathesis* request (*P. Hamb.* I 16). The fact that the price was destined to him and not to the sellers was obviously important for the contracting parties (having the sellers' consent to that payment documented in the contract was crucial for the buyer, as apparently was to make sure that the price was received for the creditor, who very

likely therefore held a security on the sold object, as I argued *supra*, *sub* 6), but apparently irrelevant for the record office. Here, instead, the fact that the payment is made to Lucius Anthesthius is notified to the *bibliophylax*. Not only: a receipt, attesting that the payment has in fact been made, is attached to the *parathesis* request: τῶν δραχμῶν [χωρουσῶν τῇ ἐνεστώσῃ] ἡμέρα σὺν ἄλλαις εἰς ἀπόδοσιν Λουκίῳ Ἀνθεστίῳ [c. 12 Ἀ]ντινοεὶ δανιστῇ ἀκολούθως ἢ παρεθέμην αὐ[τοῦ ἀποχ]ῆ (ll. 24–26).

For all this I cannot imagine any explanation other than the presence of a real security that had to be cancelled. As a rule, *parathesis*-requests do not include confirmation of the payment, nor any information regarding the recipient of the price. If the record office departs here from the ordinary form to include all this, it must be because its relevance is not restricted to the contracting parties: for some reason, the cancellation of the debt is in this case relevant for the *bibliotheke*. And the only conceivable reason is that the debt had been recorded as a *katoche* on the asset that is being sold.<sup>86</sup> What kind of *katoche* we cannot know, except that it served to secure a loan: therefore, either it was a hypothec, or a *hypallagma* (or a recorded surrender of *potestas alienandi* equivalent to *hypallagma*), or, less likely, a general *katoche* over the seller's belongings for an otherwise unsecured debt.<sup>87</sup>

Why, unlike in *P. Hamb.* I 15 and 16, in this case, just as in *P. Hamb.* I 14 the aim of the sale is relevant for the record office, we cannot know. It is clear that it was, though. The authorisation seems to have been granted upon a condition of the price being effectively used to cancel the debt, and the condition was determinant enough to make the buyer produce evidence that the secured debt had been satisfied.

In any case, it is beyond doubt that the sale had been authorised, not so much because of the *parathesis*-request (after all, only a request, although cf. the official's subscription in ll. 27–29), but because the sale

<sup>86</sup> So, in his introduction to the text, L. MITTEIS, *MChbr.*, p. 234, invoking the parallel of *P. Hamb.* I 15 and 16, for which (*supra*, n. 85) he also supported MEYER's conjecture.

<sup>87</sup> Relevant here, from the list in MITTEIS, *Grundzüge* (cit. n. 12), p. 96, are nos. 2 and 5. Examples of recorded hypothec and *hypallagma* we have already seen plenty. The sole occurrence of a registration request for a non-alienation agreement not labelled as *hypallagma* is *P. Tebt.* II 318 (= *MChbr.* 218). The canonical example of a request to cover an unsecured credit with a general *katoche* is *P. Lond.* III 1157 (*supra*, n. 37).

contract was a public deed: ἡγόρασα κατὰ δημόσιον χρημα[τισμόν διὰ τοῦ ἀ]ρχείου ἐνθάδε τῇ ἐνεστώσῃ ἡμέρᾳ (ll. 8–9).<sup>88</sup>

From ll. 15–19 we learn as well that the seller, Aurelius Rufus, was registered by mere *parathesis*. The papyrus shows that this *parathesis* was not done on his own name but on the name of the person who had *apographe*. We cannot be sure, whether this method, that we know well for the *parathesis* of *katochai*, was also the regular one for property.<sup>89</sup> The person to whose *folium* the *parathesis* of Rufus was added happened to be a minor (ἀφηλιξ, l. 18), a certain Longinas also called Ammonios.<sup>90</sup>

It is completely certain that Rufus' *parathesis* is not that of a creditor: if his registration to the *folium* of Longinas had been that of a *katoche*, we would expect the document to mention it, and in order to be in the position to sell the share he would have needed an executive procedure culminating in the transcription of the property to his name. Rufus' *parathe-*

<sup>88</sup> I. JORNOT & P. SCHUBERT, *Les Papyrus de Genève I*, Geneva 2002 (2nd ed.), translate: 'conformément à un acte notarié déposé ici aux archives aujourd'hui même'. We know that in the 3rd and 4th centuries the very generic term *archeion* – 'office', is used also occasionally for the *bibliotheke*, cf. WOLFF, *Das Recht* (cit. n. 17), p. 27 n. 80 *if.*, but this does not seem the case here. Why would Thaisarion present twice the same acquisition to the *bibliophylax* on the same day? Furthermore, in their own very likely integration, the document is not said to have been 'deposited' in the *archeion* – as they misleadingly translate – but to have come to existence through the *archeion* ([διὰ τοῦ ἀ]ρχείου), which by itself makes it impossible to refer *archeion* to the *bibliotheke*. And finally, in l. 16 we have an example of how the document refers to the *bibliophylax*: [κ]ατὰ παράθεσ[ι]ν διὰ σοῦ. The *archeion* is thus probably the office of the *agoranomos*, that even in the third century was regularly used in the Fayum, unlike what was happening in Oxyrhynchos: cf. WOLFF, *Das Recht* (cit. n. 17), pp. 9–10, 112–113. 'Ἐνθάδε is no obstacle for this conjecture: the generic 'here' refers simply to Arsinoe.

<sup>89</sup> Together with the term *parathesis* and the model of the *katoche*, our document and some others would favour this hypothesis: cf. *P. Mil. Vogl.* I 26 (AD 127/8, Tebtynis). The main argument against this initially dominant hypothesis is the problem of the not registered sellers: would the *parathesis* be in that case registered to the name of the last owner with *apographe*? What would be done, then, in the, surely not infrequent, cases in which he is not known? The argument was put forward by VON WOESS, *Urkundenwesen* (cit. n. 26), p. 252. For the discussion and the literature, cf. WOLFF, *Das Recht* (cit. n. 17), pp. 244–245.

<sup>90</sup> JORNOT & SCHUBERT, *P. Gen.* I<sup>2</sup>, p. 181, integrate l. 18 to make him into an Aurelius Longinas, which is very likely, but, just as in the case of Thaisarion, a mere conjecture.

*sis* must therefore be that of an owner. The share that he sells now, he had previously acquired, either by sale or by any other title, from Longinas. Why a full *apographē* was not feasible for him has been the object of much speculation.

In the second edition of *P. Gen.* I, I. Jorrot and P. Schubert have suggested many integrations for gaps that had been previously left unfilled, not only by J. Nicole in the first edition, but also by L. Mitteis in the *Chrestomathie*. Particularly important are their restitutions of lines 12, 14, 18 and 19: they completely change the facts behind the request. I reproduce the relevant part of the papyrus, first in Mitteis' edition, and then with Jorrot and Schubert's integrations highlighted:

12 [..... ἑκκα]δέκατον μέρος, ὃ ἐστὶν ἀπὸ ἡμίσεως ἑκκαίδε-  
 [κατο . μερο .. οἰκ]ίας καὶ ἐτέρας οἰκίας διπυργίας παλαιᾶς καὶ αἰ-  
 [θρίου, τούτων τῶν] τόπων πάντων συνην{ν}ωμένων ἀλλήλοις  
 [..... τ]ειμῆς ἀργυρίου δραχμῶν χειλίων πεντακο-  
 [σίων ..... παρ]ὰ Αὐρηλίου Ρούφο[υ] Ἰσίωνος τοῦ Παπιρίου ἀγο-  
 16 [ρανομ(ήσαντος) καὶ ὡς χρηματ]ίζει, διακειμένο[υ κ]ατὰ παρά  
 θεσ[ι]ν διὰ σοῦ ἐπὶ  
 [τοῦ ..... ἔτους] μηνὸς Φαῶφι ἐπ' [ὄν]όματος τοῦ ὑποχειρίου  
 [..... Λ]ογγεινᾶ τοῦ καὶ ἁμμωνίου ἀφήλικος καὶ αὐ-  
 [.....] ἡμισυ ἑκκαίδέκατ[ον] μέρος

12 [..... ἑκκα]δέκατον μέρος, ὃ ἐστὶν ἀπὸ ἡμίσεως ἑκκαίδε-  
 [κατου μερους οἰκ]ίας καὶ ἐτέρας οἰκίας διπυργίας παλαιᾶς καὶ αἰ-  
 [θρίου, τούτων τῶν] τόπων πάντων συνην{ν}ωμένων ἀλλήλοις, τοῦ  
 [ἡμίσεως τ]ειμῆς ἀργυρίου δραχμῶν χειλίων πεντακο-  
 [σίων ..... παρ]ὰ Αὐρηλίου Ρούφο[υ] Ἰσίωνος τοῦ Παπιρίου ἀγο-  
 16 [ρανομ(ήσαντος) καὶ ὡς χρηματ]ίζει, διακειμένο[υ κ]ατὰ παρά  
 θεσ[ι]ν διὰ σοῦ ἐπὶ  
 [τοῦ ..... ἔτους] μηνὸς Φαῶφι ἐπ' [ὄν]όματος τοῦ ὑποχειρίου  
 [αὐτῷ ὄντος Αὐρηλ(ίου)] Λογγεινᾶ τοῦ καὶ ἁμμωνίου ἀφή-  
 λικος καὶ αὐ-  
 [τοῦ ἔχοντος τὸ ἄλλο] ἡμισυ ἑκκαίδέκατ[ον] μέρος



Noticing that the sold share seems to be divided in halves (έκκαι]δέκατον μέρος, ὃ ἐστὶν ἀπὸ ἡμίσεως έκκαιδε[κατώ, ll. 11–12; ἡμισυ έκκαιδέκατ[ον] μέρος, l. 19, that they read as genitive: έκκαιδεάκτ[ου μέ]ροϋς), a fact that Mitteis had ignored, they conjecture:

a) That the price of 1500 drachms, Rufus' *parathesis* to the name of Longinas and Thaisarion's own *parathesis* request refer only to one half (integrations to lines 12 and 14).

b) That the other half was not included in the price or the *parathesis* because it had been registered by full *apographe* to the name of Rufus (integration to line 19), and hence, despite being also bought by Thaisarion, it could be left out of the *parathesis* and presented, in a separate request, for full *apographe*.

c) The term ὑποχείριος at the end of l. 17, they understand as referred to the guardianship of the still minor Longinas. Since sharing *pro diviso* two halves of 1/16 of the property clearly points to a close family connection between him and Rufus, they hypothesize that Rufus is his tutor (integration to line 18) and, indeed, a very close relative, possibly an uncle.<sup>91</sup>

In Jornot and Schubert's reconstruction, therefore, the events would have unfolded as follows: Rufus and Longinas, as close relatives (uncle and nephew? brothers?) inherited each half of a share of 1/16 on the discussed property; as heirs, they registered each his own share by full *apographe*; since Longinas is a minor, also the guardianship on him fell to Rufus; Rufus, being already Longinas' tutor, bought his ward's half, had it registered by *parathesis*, and is now selling to Thaisarion both this half and the one registered to his own name.

This guardianship is an important piece in Jornot and Schubert's interpretation. It is the guardianship, they write, that prevents Rufus (the tutor, in their reconstruction) from presenting full *apographe* for the half

<sup>91</sup> The conjecture is plausible, but slightly capricious. According to Roman Law under which these Aurelii theoretically live, when there is no testamentary tutor, appointed in a will by the *paterfamilias* who had *potestas* over the minor, guardianship falls to the nearest agnate – that is, to the closest relative on the father's side – who fulfils the conditions of being male and having reached puberty. Therefore: only lacking a suitable brother does guardianship fall to the uncle; lacking even an uncle, it would fall to the cousin by male line, and so on. Cf. KASER, *Privatrecht* I<sup>2</sup> (cit. n. 6), pp. 354–356.

acquired from Longinas, despite the fact that the latter was ἀπογεγραμμένος. A provisional *parathesis* is possible, though, because, they conclude, the obstacle that the guardianship represents is temporary, ending with the guardianship itself. The *parathesis* will then give way to a full *apographe*.<sup>92</sup> Somewhat surprisingly, the debt cancelled by Thaisarion's payment seems to play for Jornot and Schubert no role in explaining the *parathesis*. It would for them be sufficiently justified by the guardianship. They do not further explain why the guardianship represents an obstacle, but, as we will see, it truly was, albeit of a much more radical nature than they imagine.

Under Roman Law, which should apply to these Aurelii, the legal acts of a ward required the authorisation (*auctoritas*) of the guardian: without the guardian's supervision and approval, a ward older than seven could acquire, but not undertake an obligation or dispose of his property.<sup>93</sup> Sensibly, and this brings us to our point, a tutor could not give *auctoritas* for a transaction in which he is personally involved: *in rem suam auctorem tutorem fieri non posse*.<sup>94</sup> Such authorisation was completely void and with it, all the effects of the transaction, except what the ward may have acquired through it.<sup>95</sup> This principle, crucial for protecting wards from

<sup>92</sup> JORNOT & SCHUBERT, *P. Gen.* I<sup>2</sup> p. 178: 'C'est selon toute vraisemblance la relation de tutelle unissant Rufus et Longinas qui a conduit, dans le registre de la propriété, à une inscription provisoire de cette vente entre Rufus et Longinas. Cette inscription provisoire est placée en marge... du nom de Longinas, dans le registre, sans doute jusqu'à la cessation de la relation de tutelle'. And again in p. 179: 'dans le cas de notre document, c'est apparemment la relation de tutelle qui fait provisoirement obstacle à l'enregistrement du changement de propriétaire. L'acheteur peut alors faire une demande d'enregistrement provisoire (παράθεσις). Son droit sera inscrit en marge du nom du propriétaire précédent, et ainsi garanti en attendant que la situation soit réglée et qu'un dossier puisse être ouvert à son nom.'

<sup>93</sup> Cf. KASER, *Privatrecht* I<sup>2</sup> (cit. n. 7), pp. 275–276, 361–362.

<sup>94</sup> *Gai.* I.184, *D.* 26.8.1pr. (Ulpianus 1 *Sab.*), *D.* 26.8.5 (Ulpianus 40 *Sab.*), *D.* 26.8.6 (Pomponius 17 *Sab.*), *D.* 26.8.7 (Ulpianus 40 *Sab.*); *D.* 26.8.22 (Labeo 5 *pitb.*). Practically all these sources come from commentaries to the *libri tres iuris civilis* by the early Imperial jurist Masurius Sabinus, where the rule very likely was included: cf. F. SCHULZ, *Sabinus-Fragmente in Ulpianus Sabinus-Commentar*, Halle 1906 (= *Labeo* 10 [1964], p. 258).

<sup>95</sup> The transaction is here said to 'claudicate'. It produces for the ward all its positive effects, but none of the negative. Hence the ward acquires, but he does not become

rapacious guardians, was developed by the Roman Jurisprudence with characteristic consistence, bordering, for the layman, on the fastidious. Thus, for instance, since the use for trial of *legis actiones* was impossible without a tutor, a trial between a woman and her own tutor would have been impossible in Republican times, when *legis actiones* were the ordinary procedure. And so the praetor had to appoint a special tutor for these cases, called for that reason a 'praetorian' tutor.<sup>96</sup> A ward could not become debtor to his tutor, not even if he received from him a loan or entered a formal promise (*stipulatio*);<sup>97</sup> it was useless to try to disguise the fact by using a slave or a son under *potestas* to receive the promise.<sup>98</sup> What is more: if a tutor was indebted to his ward, the latter could not sue him or discharge him upon payment, for in both cases the transaction, even if beneficial for the ward, would make him lose his claim against the tutor, which could not happen without the tutor's authorisation, here excluded.<sup>99</sup> It was even questioned whether a tutor could authorise a ward to accept the inheritance of someone indebted to the tutor himself, since that would make the ward become his debtor.<sup>100</sup>

debtor nor he loses any of his previous rights: *I. 1.21pr.* A good illustration, in *D. 19.1.13.29* (Ulpianus 32 *ed.*): 'Si quis a pupillo sine tutoris auctoritate emerit, ex uno latere constat contractus: nam qui emit, obligatus est pupillo, pupillum sibi non obligat.' – 'If someone buys from a ward without the authority of his tutor, a contract arises only on one side; the buyer is liable to the ward, but he does not make the ward liable to him'. Cf. KASER, *Pri-vatrecht* (cit. n. 6), p. 276 n. 13, with lit.

<sup>96</sup> *Gai. 1.184*, cf. M. KASER & K. HACKL, *Das römische Zivilprozessrecht*, Munich 1997 (2nd ed.), pp. 61–62 and n. 18, 206–207, with lit.

<sup>97</sup> *D. 26.8.1pr.* (Ulpianus 1 *Sab.*). In these cases, a well known remedy introduced by Antoninus Pius allowed the tutor to claim to the extent of the increase in the ward's wealth ('in id quod ad eum pervenit') so that the ward would not be enriched at his expense: cf. especially L. LABRUNA, *Rescriptum divi Pii*, Naples 1962.

<sup>98</sup> *D. 26.8.1pr.* (Ulpianus 1 *Sab.*)

<sup>99</sup> *Arg. ex D. 26.8.22* (Labeo 5 *pith.*): 'Si quid est, quod pupillus agendo tutorem suum liberaturus est, id ipso tutore auctore agi recte non potest.' – 'If there is any action of the ward which would have the effect of discharging the tutor from liability, it cannot be done on the authority of the same tutor'.

<sup>100</sup> *D. 26.8.1pr.* (Ulpianus 1 *Sab.*): the answer is positive, because the authorisation does not aim at creating such debt, which is merely an indirect consequence of it.

Particular attention was devoted to the case that interests us: the tutor's attempt to have ward's property transferred to him with no control but his own authority. Here, as in the other cases discussed, only when there was plurality of tutors, an effective sale could take place, once authorised by a fellow tutor who, having no interest in the affair, could impartially supervise it.<sup>101</sup> Since, however, the risk of collusion between both tutors is obvious, even this sale was void when it could be proved that there was fraud. Sometimes a proof was not even necessary: so, according to a rescript of Severus and Caracalla, when the transaction was disguised by using a third party.<sup>102</sup>

As it clearly results from these examples, no discussion was admitted as to the intentions, rapacious or not, of the tutor: his authorisation for a transaction in which he was a part was simply void. Intention was only relevant when the transaction had been authorised by a co-tutor, in order to prevent a fraudulent collusion between him and the tutor that was part of the approved transaction. Hence, when Jornot and Schubert, no doubt aware that buying from one's own ward looks suspicious, save the honour of our Rufus by conjecturing that his intention is to reduce the division of the property and that the sale will not enrich him, because destined to cancel a debt (that they seem therefore to consider common with the ward, and hence probably inherited by both), all this, even if it could be proved true by Rufus himself, would be completely irrelevant from the point of view of Roman Law.<sup>103</sup> The authorisation would be equally void.

<sup>101</sup> *D. 26.8.5.2 (Ulpianus 40 Sab)*: 'Item ipse tutor et emptoris et venditoris officio fungi non potest: sed enim si contutorem habeat, cuius auctoritas sufficit, procul dubio emere potest. sed si mala fide emptio intercesserit, nullius erit momenti ideoque nec usucapere potest. ...' – 'Moreover, a tutor cannot act at the same time as buyer and seller. If, however, he has a fellow-guardian, the authority of the latter will undoubtedly be sufficient for him to buy. But if the transaction is fraudulent it will be of no effect, and hence also acquisition by lapse of time will be excluded ...'

<sup>102</sup> *D. 26.8.5.3 (Ulpianus 40 Sab)*: 'Sed si per interpositam personam rem pupilli emerit, in ea causa est, ut emptio nullius momenti sit, quia non bona fide videtur rem gessisse: et ita est rescriptum a divo Severo et Antonino.' – 'If a guardian should buy property of his ward through the interposition of a third party, the purchase will be void, because the transaction does not appear to have been concluded in good faith. This was also stated in a Rescript by the Divine Severus and by Antoninus.'

<sup>103</sup> JORNOT & SCHUBERT, *P. Gen.* I<sup>2</sup>, pp. 179–180: 'À fin de réduire le morcellement (qui

A tutor simply could not acquire anything from his own ward. Even *usucapio* (the acquisition by lapse of time) was in this case excluded for lack of *iusta causa*, for in truth there was no valid sale. There was only one possibility to acquire: to have the transaction ratified by the ward once the guardianship is over.<sup>104</sup>

The obstacle that would arise from a guardianship, thus, would be far from temporary: it would not disappear with the end of the guardianship; even then it could only be only removed by the ward's consent. In our case, this should have excluded not only *apographe* but also *parathesis*. True, all this construction was merely the 'Reichsrecht', using Mitteis' categories, and its translation to the Egyptian realities could be, as we well know, extremely unfaithful. In our case, the *parathesis* is certainly not an unconceivable translation: a temporary registration, that would be transformed into definitive only if on coming of age Longinas confirms the sale. But the whole 'guardianship' conjecture suggested by Jornot and Schubert presents a much more serious problem in its very fundament: the term *ὑποχέρριος*.

So far, the term is attested in only nine documents, including our own, all of them from the third and fourth centuries AD. Preisigke, quoting the five that had by then been edited, gives the alternative meanings of 'subject to *potestas*' or 'subject to guardianship'.<sup>105</sup> The ambiguity is strange, because the term, perfect to translate the Roman notion of *potestas*, in the archaic period as well known also called *manus*, seems for the same reason rather inadequate for the Roman guardianship at this stage of its evolution. A review of the nine documents confirms this suspicion: none of them refers to a ward and his or her guardian. Appearing around the time of the *Constitutio Antoniniana*, the term *ὑποχέρριος*, sometimes *ὑποχέρριος*

a atteint l'ordre du 1/32), Rufus rachète la part de son pupille. En vendant les deux moitiés du seizième du bien à Thaisarion, Rufus ne va cependant pas s'enrichir: le produit de la vente va en effet passer directement à un créancier'.

<sup>104</sup> *D.* 26.8.5.2 (Ulpianus 40 *Sab.*): '... sane si suae aetatis factus comprobaverit emptionem, contractus valet.' – 'If, however, the ward, having attained his majority, confirms the purchase, the contract will be valid.'

<sup>105</sup> PREISIGKE, *WB*, s.v.: 'in der Gewalt jmds stehend, unter Vormundschaft stehend'.

κατὰ νόμους ἢ κατὰ τὸν νόμον, and the connected expression ὑπὸ τῆ χειρὶ κατὰ τοὺς Ῥωμαίων νόμους, all serve to translate the subjection of the children to the father according to the (Roman) laws, that is, the Roman *patria potestas*.<sup>106</sup>

Our Longinas is thus certainly a minor, but not under guardianship: he is under *patria potestas*.<sup>107</sup> Who his father is, we do not know, but accepting Jorntot and Schubert's ingenious reconstruction of the text, it would be no other than Rufus. Roman *patria potestas* was, as the Romans were fully aware of, a singularity even among ancient nations:<sup>108</sup> a power

<sup>106</sup> The expression ὑπὸ τῆ χειρὶ κατὰ τοὺς Ῥωμαίων νόμους appears in *P. Oxy.* IX 1208 (AD 291, Oxyrhynchos); *P. Oxy.* X 1268 (3rd cent. AD, Oxyrhynchos); *P. Oxy.* XLI 2951 (AD 267, Oxyrhynchos); *SB* X 10728 (AD 318, Oxyrhynchos). Hence, there can be no doubt about the meaning of ὑποχείριος when associated to κατὰ νόμους ἢ κατὰ τὸν νόμον: *BGU* VII 1578 (2nd–3rd cent. AD, Philadelphia), *SB* I 5692 (3rd cent. AD, Oxyrhynchos); *SB* XVIII 13322 (3rd cent. AD, Oxyrhynchos). Nor can there be any doubt for the rest of the occurrences, all referred explicitly to father and children: *P. Diog.* 18 (= *P. Lond. inv.* 2540 + *P. Harr.* I 68, AD 225, Philadelphia [?]); *P. Oxy.* XIV 1703 (AD 261, Oxyrhynchos); *P. Oxy.* XIV 1642 (AD 289, Oxyrhynchos); *P. Panop.* 28 (= *SB* XII 11221, AD 329, Panopolis). In *P. Oxy.* LIV 3758 (AD 325, Oxyrhynchos) the use is ironic for a son 'very much under his mother's control'. A brief examination of the question and the sources will be published in the next number of *JJP*.

<sup>107</sup> Cf. already H. J. WOLFF, *Das Recht der Griechischen Papyri Ägyptens* I, Munich 2002, (ed. by H.-A. RUPPRECHT), p. 139 and n. 120. That the term ἀφήλιξ, used in l. 18 for Longinas, unlike the Latin *pupillus*, does not imply subjection to guardianship, but refers merely to the age, like the Latin *impuber*, and hence does not exclude *patria potestas*, which can be illustrated by *P. Diog.* 18, where the term is used for three brothers, one of which is under *patria potestas*: Μάρκος Ἀβρηλῖος Ἰουλά και [Λουκρητίω και Ρού]φω ἀφήλιξι. ὁ μὲν οὖν εἰς αὐτῶν Ἰουλάς ὑποχείριός ἐστι τῶ ἰδ[ί]ω πατρὶ Μάρκω Ἀβρηλῖω Ἡρωνι (ll. 8–9).

<sup>108</sup> *Gai.* 1.55:

'Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. quod ius proprium civium romanorum est; fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus. idque divus Hadrianus edicto, quod proposuit de his, qui sibi liberisque suis ab eo civitatem romanam petebant, significavit. nec me praeterit galatarum gentem credere in potestatem parentum liberos esse.'

'In like manner, our children whom we have begotten in lawful marriage are under our control. This right is peculiar to Roman citizens, for there are hardly any other men who have such authority over their children as we have, and this the Divine Hadrian stated in the Edict which he published with reference to persons who petitioned for Roman citizenship for themselves and for their children. It does not escape my knowledge that the Galatians hold that children are in the power of their parents.'

unlimited, both in its lifelong duration and in content, so absolute<sup>109</sup> that those subject to it could have no rights and no property. How can it be that property has been registered by the *bibliophylakes* to the name of Longinas? How, that later he transferred this property to, possibly, his own father, with the blessings of the *bibliotheke*? Nothing of this is really surprising, at least since Rafał Taubenschlag's 1937 study on *patria potestas* in the papyri.<sup>110</sup> The Roman notion of *patria potestas* was simply too Roman to be fully incorporated to the legal life in Egypt after the *Constitutio Antoniniana*.<sup>111</sup> The Roman citizens of Egypt, as well as the public institutions, such as the *bibliotheke enkteseon*, use the terms associated with it, including our *ὑποχείριος*, but ignore the lack of legal capacity that these terms should carry: hence theoretical *potestate subiecti* are treated as owners of their own property,<sup>112</sup> and even registered as such.<sup>113</sup> The logical consequence of this concept, assigning rights and property to subordinate persons is that, while children are of minor age, their father acts as their representative regarding their rights and property.<sup>114</sup>

<sup>109</sup> Livy, 8.7.11, makes Manlius Torquatus use the expression *patria maiestas*.

<sup>110</sup> R. TAUBENSCHLAG, 'Die patria potestas im Recht der Papyri', *ZRG RA* 50 (1916), pp. 177–230. Cf. already MITTEIS, *Grundzüge* (cit. n. 12), p. 275, and now WOLFF & RUPPRECHT, *Das Recht* (cit. n. 107), pp. 139–142.

<sup>111</sup> The provincial perplexities regarding *patria potestas* are evident behind the consultations preserved in Justinian's *Codex* under the title *de patria potestate* (C. 8.46).

<sup>112</sup> For documented cases of *potestate subiecti* treated as owners, cf. TAUBENSCHLAG, 'Patria potestas' (cit. n. 110), pp. 223–225. He concludes (p. 229 s.): 'Noch schwächer ist der Einfluß der reichsrechtlichen patria potestas im Privatrecht. Das ihr widerstrebende Prinzip der Vermögensfähigkeit des Hauskindes war nicht zu unterdrücken und konnte auch in der Praxis einfach nicht durchgeführt werden.' The examples are abundant: a son *in potestate* who has received the share of his mother's inheritance that falls to him, in *P. Diog.* 18: an appointed *agoranomos* who will enter office 'upon the security of his property and that of the children under his power', in *P. Oxy.* XIV 1642; part of a house that had been bought from a *cosmetes* by the three sons *in potestate* of an *agoranomos*, and is now re-transferred to the *cosmetes* by the *agoranomos*, on behalf of his sons, in *P. Oxy.* XIV 1703.

<sup>113</sup> Cf. *P. Grenf.* I 49 (= *WChr.* 248, AD 220, Antinoopolis), where a father presents *apographe* of a *πλοῖον Ἑλληνικόν* with his minor son as owner.

<sup>114</sup> Cf. *SB* I 5692 (3rd cent. AD, Oxyrhynchos), where a minor under *potestas* is considered to be owner of a certain property that his father sells for him. In the *parathesis* request

This provincial *patria potestas* is substantially reduced to a sort of guardianship over the children until they come of age.<sup>115</sup> Our document presents this same reality: Longinas is registered as owner by *apographe*, and, in the reconstruction by Jornot and Schubert, he has inherited together with his own father.<sup>116</sup>

Excluded the hypothesis of the guardianship, what can have been the obstacle for Rufus' *apographe*? Certainly not *patria potestas*, if we accept that he was Longinas' father. If *patria potestas* is not an obstacle to assign ownership to Longinas, to the point of allowing him full registration of his right, it certainly can be no obstacle for transferring such right to his father, by sale or for any other cause. Nor is it easy to imagine how *patria potestas* could provide a basis for referring Rufus' *parathesis* to some sort of *katoche* rather than to an acquisition: *katochai* of the children on the parents' property we know from the Edict of Mettius Rufus, but there is no liability or right to explain a *katoche* of the father on the property of his children. Rufus must have acquired from Longinas, his son or not, and he had to yield to some obstacle that prevented a full *apographe* and accept a registration by provisional *parathesis*. And there is no obstacle left but the *δανειστής*, Lucius Anthesthius, his credit, that Thaisarion paid for, and the *katoche* securing that credit, that in this case may be conjectured beyond doubt (cf. *supra*, at the beginning of this section 7).<sup>117</sup> And, if this

*PSI X 1126*, the father acts purely and simply as tutor of his minor children to have their property registered, and presents himself as such: [μετὰ κυρίου]υ τοῦ πατρὸς Αὐρηλίου Ἐρμ[ίου] (l. 6, reconstruction practically certain).

<sup>115</sup> TAUBENSCHLAG, 'Patria potestas' (cit. n. 110), p. 229: 'Was zunächst den Begriff selbst anbelangt, so hat dieser wohl bei den Provinzialen Eingang gefunden, doch blieb neben ihm die alte Auffassung der patria potestas als Vormundschaft weiterhin bestehen.'

<sup>116</sup> For a son who owns property together with his father, cf. *P. Oxy IV 705* (= *WChr.* 153, AD 202, Oxyrhynchos). For a son who inherits from his mother despite remaining *in potestate patris*, cf. *P. Diog 18* (= *P. Lond. inv. 2540 + P. Harr. I 68*, AD 225, Philadelphia [?]).

<sup>117</sup> So *MChr.*: 'Rufus hatte seinerseits früher vom ἀφήλιξ Λογγεινῶς gekauft, dabei aber nur παράθεσις des Kaufs erlangt, nicht ἀπογραφή erstattet. ... Es lag ... auf dem gekauften Grundstück ein Pfandrecht, dessen Inhaber gerade erst mit dem Kaufgeld bezahlt wird. Es ist kaum zu bezweifeln, daß gerade dieses Pfandrecht bisher die ἀπογραφή verhindert hatte.' Cf. also KIESSLING, 'Grundbuchrecht' (cit. n. 36), p. 89.



was the obstacle for Rufus' *apographe*, it must have existed before he acquired the share.<sup>118</sup> This seems trivial, but has for us a very important consequence: the share underwent not one but two alienations despite the *katoche*. The second one, from Rufus to Thaisarion, aimed, as we know (cf. the beginning of this section), at cancelling the *katoche*. Indeed, the *bibliotheke* seems to have authorised it only on this condition, to the point that Thaisarion presented, together with her *parathesis* request, evidence that the holder of the *katoche* had received his due. The first alienation, instead, from Longinas to Rufus, if a sale at all, clearly did not bring about the cancellation of the *katoche*. Yet it was authorised and, more importantly, registered. The authorisation is proved by the registration; and the registration proves that for the *bibliotheke* the satisfaction of the creditor was this time immaterial.

With the available documents, this is as near as we may get to finding an alienation not aimed at cancelling a *katoche* and yet authorised by the *bibliotheke* despite the *katoche* itself. The only slight reservation comes from the possibility, not certainty, that the contracting parties were father and son, and that the authorisation was exceptionally granted for some unfathomable reason related to that fact.

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In the early twentieth century, the non-alienation principle behind the Graeco-Egyptian system of real securities attracted the attention of a generation of legal papyrologists educated in the categories of Roman Law. The Roman principle of alienability, that allowed the debtor to keep his *potestas alienandi*, at least for immovables, contrasted sharply with the growing awareness that in the papyri, despite many uncertainties that still remain (section 1), the rule was indeed the opposite.

<sup>118</sup> The *katoche* could have been constituted by Longinas' father, acting for him, or it could have been inherited. This wouldn't prevent Longinas' *apographe*: he is not a buyer but a successor. The hypothesis creates a difficulty for JORNOT and SCHUBERT's assumption of a shared inheritance: the *katoche* would have fallen on both shares, breaking thus their idea that Thaisarion's *parathesis* referred only to one of them because she was entitled to a full *apographe* of the other.

For the enforcement of this non-alienation agreement, a new era arrived with the introduction, in the last third of the first century AD, of the *bibliotheke enkteseon* (section 2). Compared with previous mechanisms, such as depriving the debtor of his title deeds, this new property record office, that registered not only property, but also real securities and other holds on it, would seem to provide the perfect infrastructure for preventing any alienation attempt by the debtor. Perfect it was not, though. We may leave aside the not so occasional frightening reports of inadequate keeping of the archives and *diastromata*, and our own uncertainties, regarding, for instance, the validity of a notarial deed executed without the preceptive authorisation of the *bibliotheke*. Even ignoring all this, the system itself left many unguarded flanks. It seems to have been compulsory only for immovables, and only regarding transactions executed through the local notarial offices of the *agoranomeion* and the *grapheia*. Private deeds (*cheirographa*), their transformation in Alexandria into public deeds by *demosiosis*, and the equally alexandrine *synchoreseis*, all were concluded without any control by the *bibliothekai enkteseon*.

Be that as it may, for the transactions that fell within their competence, and regarding real securities registered through them as *katochai*, the *bibliothekai* were in the perfect position to block the sale: denying authorisation (*epistalma*) and registration to the sale attempts of the debtor, as sometimes explicitly required by those contracting the security: *v. gr.* by the hypallagmatic debtors in *P. Wisc.* II 54, *P. Kron.* 18 and *P. Vars.* IO III.

And yet (section 3), according to an often repeated theory first launched by E. Rabel, contrary to what we would expect, they did not always proceed that way: Rabel argued that the *bibliophylakes* would rather merely deny the buyer a definitive registration (*apographe*), forcing him to a provisional *parathesis*, explicitly acknowledging the primacy of the creditor's right over his own.

Rabel's theory found widespread approval and remains unchallenged. Yet, it has never been thoroughly checked with the sources, and its importance does not seem to have been fully acknowledged. If the theory holds true, it implies a virtual withdrawal from the non-alienation principle, and thus one of the deepest changes in the history of the Greek real securities. The *katoche* is transmuted, from a strict hold blocking the

alienation, into a guarantee for the creditor that his registered right will prevail over the provisionally registered buyer. The system becomes immensely more flexible, and notably close to the Roman one: the debtor is free to sell, and it is made sure that the creditor's right will anyway prevail over the new owner. Only the means to protect the creditor diverge: the Roman system extends the claim *erga omnes* characteristic of owners to a non-owner like the creditor, thus making him prevail even over a new owner in good faith. Here, instead, the buyer is denied a definitive registration, and forced in the provisional one to acknowledge the creditor's previously registered *katoche* as prevailing over his own right. In other words: instead of raising the creditor to a position protected *erga omnes* like that of an owner (a position that the hypothecarian creditor, unlike the hypallagmatic one, seems to have had anyway), this system weakens the position of the buyer, as the *parathesis* formula expressly enunciates. The strategy seems coherent with the logic of the non-alienation clause, and devised, remarkably, without the aid of a legal science like that of the Romans, to which we owe the category of the 'real' rights.

How does the theory hold with the sources? Much of the direct evidence for sales authorised despite a recorded *katoche*, reviewed in sections 5–7, concerns, unsurprisingly, sales followed by immediate cancellation of the secured debt. Such is the case of: a) *P. Hamb.* I 14 (209/10, Arsinoites), a notification of sale regarding property under a recorded hypothec, where the lack of explicit *epistalma* request leaves open the question if it could be expected at all; b) *P. Gen.* I 44 (= *MCbr.* 215, AD 259, Arsinoites), a provisional *parathesis* request of a sale, undoubtedly authorised by *epistalma*, despite the fact that the debt that the sale served to cancel was in all likelihood secured by a recorded *katoche*; c) it seems also the case of *P. Hamb.* I 15 and 16, where, as Meyer suggested, the debt that the sale aims at cancelling was very probably secured by the sold object.

*P. Hamb.* I 14 and *P. Gen.* I 44 have still something else in common: they care to make the aim of the sale known to the *bibliophylakes*. In *P. Hamb.* I 14, the debtor, Herais, duly notifies, together with her intention to sell, that she will receive only part of the price: the rest shall be paid by the buyer to her creditor. In *P. Gen.* I 44, the buyer, Thaisarion, not only ends her *parathesis* request declaring to have paid to the creditor his due, but

also produces evidence to confirm it. All this raises the impression that for the petitioners, in these cases at least, the cancellation of the debt secured by the *katoche* was essential to obtain the cooperation of the *bibliotheke*.

Yet, the sources do not justify the conclusion that such cancellation was always required by the *bibliotheke* as a condition for the authorisation and registration of the sale. An argument to the contrary can be found in *P. Hamb.* I 16, where the buyer's *parathesis*-request does not care to mention this circumstance to the *bibliophylakes*. The clause safeguarding the rights of owners and holders of *katochai*, constant in provisional *parathesis* requests, deposes also in the same sense, as Rabel justly observed (section 4). The *katoche*-part of the clause cannot have merely served for a case where the secured debt had just been cancelled and therefore the *katoche* itself, although still formally in the records, had to be immediately cancelled by the creditor. Neither can it have been a mere precaution against possible *katochai* undetected by the *epistalma* and *parathesis* granting *bibliophylakes*: most *katochai* simply cannot go undetected because they exist only if recorded on the owner's *folium* in the *diastromata*.

The only possible conclusion, thus, is that, at least in some cases, the *bibliotheke* would authorise and parathetically register sales whose aim was not the cancellation of the registered *katoche*. One such case hides in all likelihood behind the same *P. Gen.* I 44. The alienation now recorded (Rufus → Thaisarion) had been preceded by another one (Longinas → Rufus), equally recorded by *parathesis*, despite the fact that the item was already under *katoche*. And, on this occasion at least, the *bibliotheke* registered the acquisition by *parathesis* although the secured debt had not been and would not immediately be cancelled: the anomalous circumstance that someone would acquire a pledged property without requesting immediate cancellation of the pledge may be explained by a close family connection between Rufus and Longinas, very probably father and son.<sup>119</sup> And, although the case concerns a *protopraxia* and not a real security, in the instance of *Stud. Pal.* XX 12 (= *SB* I 5835, 2nd cent. AD, Arsinoites), a notification of sale is presented to the *bibliotheke*, with explicit mention of the *protopraxia*, that is not destined to be cancelled until the minor who holds it comes of age.

Why the sales in *P. Hamb.* I 15-16, *P. Gen.* I 44 (first sale) and *Stud. Pal.* XX 12 could be made with the unreserved cooperation of the record

office, as many others were, if the safeguard clause in the *parathesis* formula has any sense, and yet in other cases, like *P. Hamb.* I 14 and *P. Gen.* I 44 (final sale), such cooperation seems restricted to the cancellation-case, we do not know. A difference between hypothec and *hypallagma* is not to be excluded:<sup>120</sup> the latter consisting in a mere non-alienation agreement very possibly deprived of real effect, its enforcement could seem more urgent for the creditor than to the hypothecarian one, who is, through forfeit, a conditional owner. Maybe it is not by chance that all explicit requests for *epistalma* denial (*P. Wisc.* II 54, *P. Kron.* 18 and *P. Vars.* 10 III) come precisely from the field of *hypallagma*.

A final remark. All the documents that we have reviewed come from the Arsinoites. So far, in fact, no provisional *parathesis*-request containing a safeguard clause and promising a future *apographe* has been found in any other *nomos* (a complete list, *supra*, nn. 55–56). This *parathesis* model seems to have been developed only in Fayum, and the whole new alienability system depended on it. The documents so far available, therefore, speak of Rabel's theory as a Fayum phenomenon.

### *José Luis Alonso*

Departamento de Derecho Romano  
y Derecho Eclesiástico del Estado  
Universidad del País Vasco  
P<sup>o</sup> Manuel de Lardizábal  
20018 San Sebastián  
SPAIN

Department of Papyrology  
Institute of Archaeology  
University of Warsaw  
Krakowskie Przedmieście 26/28  
00-927 WARSAW 64  
POLAND

e-mail: joseluis.alonso@ehu.es

<sup>119</sup> The possibility that they were father and son is not enough, in my opinion, to build an alternative explanation for Rufus' *parathesis*, where the *bibliotheke* would not be cooperating with sales despite registered *katochai*. Such alternative would require to postulate either that the *bibliotheke* made an exception recording the sale despite the *katoche* because the buyer was the father of the seller (which seems preposterous) or that his *parathesis* was not based on an acquisition but somehow directly on his parental power (for which we have no sources).

<sup>120</sup> A different explanation must be found for the contrast between the two alienations in *P. Gen.* I 44, since both were affected by the same security. In the father-son reconstruction, it is possible that the first alienation was not even a sale, and that would help understanding its different treatment.