Ἀκαταχρημάτιστος: the aporiai of Gnom. §2 *

1. Gnomon §2: the problem

In 1963, Fernand de Visscher introduced his study of Gnomon §2 with these words: "The whole burial law of the Romans is based on the religious character of the tombs ... The ground and the monument occupied by the body or the ashes of the deceased are by this very fact placed extra patrimonium and extra commercium".[1] This is certainly beyond doubt, in the provinces as in Italy. Even an elementary treatise like Gaius' Institutions states so much, cf. Gai. 2.5-7:

> Sed sacrum quidem hoc solum existimatur, quod ex auctoritate populi Romani consecratum est, ueluti lege de ea re lata aut senatus consulto facto. [6] Religiosum uero nostra uoluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. [7] Sed in prouinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est uel Caesaris, nos autem possessionem tantum et usumfructum habere uidemur; utique tamen, etiamsi non sit religiosum, pro religioso habetur. item quod in prouinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.[2]

Provincial ground, since it formally belongs to the Roman people or to the Emperor, we read, does not become, strictly speaking, solum religiosum, but it must be regarded as if it were such: pro religioso, in Gaius' words. This construction ensures that, provincial or Italic, all tombs shared the same basic regime of the res religiosae: ownership (dominium) as such was not possible over them,[3] because that would have entailed unrestricted freedom, including the

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[1] De Visscher 1963: 225.

[2] 'We consider sacred only what has been consecrated by the authority of the Roman people, be it by a law, or a decree of the senate. [6] We render things religious, instead, by our own will, when we bury a body in our own ground, provided that the funeral of the deceased competes to us. [7] In the provinces, though, ground does not become religious, since its ownership belongs to the Roman people or to the Emperor, and we have on it only possession and usufruct. but such places, though not properly religious, are to be regarded as if they were religious. Likewise, what is consecrated in the provinces without the authority of the Roman people strictly speaking is not sacred, but must be held as if it were sacred'. Regarding the consecration of temples, the text appears in contrast with Trajan's response to Pliny's scruples before a request of the city of Nicomedia to move the temple of the Magna Mater: nec te moveat, quod lex dedicationis nulla reperitur, cum solum peregrinae civitatis capax non sit dedicationis, quae fit nostro iure (Plin. epist. 10.50). On Gaius' text, and its contrast to Pliny, cf. David-Nelson 1960: 233-236, and Frateantonio 2003: 134-137, with lit.

[3] Alex. C. 3.44.4pr.: Si sepulchrum monumenti appellatione significas, scire debes iure dominii id nullum vindicare posse, sed et, si familiare fuit, ius eius ad omnes heredes pertinere nec divisione ad unum heredem redigi potuisse. Labeo in Ulp. 71 ed. D. 43.24.13.5: nam et sepulchri nemo dominus fuit et tamen, si quid in eo fiat, experiri possum quod vi aut clam. Ulp. 14 ed. D. 8.5.1: Actiones de servitutibus rusticis sive urbanis eorum sunt, quorum praedia sunt: sepulchra autem nostri dominii non sunt: adquin viam ad sepulchrum possumus vindicare. On this iter ad sepulchrum as a servitus privati iuris, unaffected by the religious nature of the sepulchrum itself, cf. also Paul. 15 Sab. D. 8.1.14.1, and de Visscher 1963: 83-92, with sources and lit.

freedom to change the function of the land.[4] Tombs belonged therefore with the res quorum commercio non est.[5] Not only those of Roman citizens: any tomb, even, as is well known, that of a slave,[6] shared that same basic condition of being substracted from the traffic, inalienable.[7]

Long before the publication of the Gnomon of the Idios Logos, these principles had seemed challenged by the abundant epigraphic evidence of sale and donation of funerary monuments, aediculae, cineraria, sarcophags and ollae. In truth, as de Visscher argued,[8] this epigraphic evidence merely shows how the idea of inalienability must be understood here: it is the notion of dominium as such,[9] and the absolute freedom that it entails, that is excluded. Excluded are also, therefore, the negotial and procedural mechanisms that belong with such dominium, like mancipatio and reivindicatio.[10] It is in this sense that tombs are extra commercium. The epigraphs do not challenge this at all: they merely attest the alienation of the use of the tomb as such: the ius mortuum inferendi[11] and the other faculties that the later Roman legal language ended by subsuming under the notion of ius sepulchri.[12] Also the innumerable prohibitions to alienate,[13] a priori puzzling for something theoretically inalienable,[14] become thus understandable.[15]

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[4] Also possession is de iure (i.e. as a legally relevant fact) admitted only regarding items susceptible of private property, and therefore not more possible over a tomb than it would be over a free man, as we read in Paul. 15 Sab. D. 41.2.30.1: Possessionem admittimus multis modis, veluti si mortuum in eum locum intulimus, quem possidebamus: namque locum religiosum aut sacrum non possumus possidere, etsi contemnamus religionem et pro privato eum teneamus, sicut hominem liberum.

[5] Juxtaposed to them in Pomp. 9 Sab. D. 18.1.6pr.: ut sacra aut religiosa loca aut quorum commercium non sit. Res extra patrimonium, in the initial divisio of Gai. 2.1; nullius in bonis, as the other res divini iuris, in Gai. 2.9.

[6] Ulp. 25 ed. D. 11.7.2pr., but cf. Paul. 27 ed. D. 47.12.4 (infra ad n. 19) for the sepulchra hostium.

[7] Ant. C. 3.44.2: ... monumentum neque venire neque obligari a quoquam prohibente iuris religione posse in dubium non venit. Phil. C. 3.44.9: Locum quidem religiosum distrahi non posse manifestum est. verum agrum purum monumento cohaerentem profani iuris esse ideoque efficaciter venumdari non est opinionis incertae. PS 1.21.7: Vendito fundo religiosa loca ad emptorem non transeunt nec in his ius inferre mortuum habet. Cf. also, e contrario, Ulp. 25 ed. D. 11.7.6.1. The sale is null and void also as contract, i.e. regarding the obligationes ex empto and ex vendito, cf. Ulp. 28 Sab. D. 18.1.22, and Kaser 1978: 36-38, with further sources (also for stipulatio: n. 92) and lit. For the exclusion of pignoration, cf., together with Ant. C. 3.44.2, also Ant. C. 8.16(17).3.

[8] De Visscher 1963: 65-73. On the alienation of tombs cf. also Murga 1984: 248-273.

[9] Cf. in particular the texts supra in n. 3: iure dominii id nullum vindicare posse (C. 3.44.4pr.), nostri dominii non sunt (D. 8.5.1).

[10] The exclusion of sepulchra from reivindicatio (as from actio familiae erciscundae) is quite clearly implied in Alex. C. 3.44.4pr. and Ulp. 14 ed. D. 8.5.1, supra n. 3. Categorically, Paul. 21 ed. D. 6.1.23.1: Loca sacra, item religiosa, quasi nostra in rem actione peti non possunt. Cf. also Paul. 27 ed. D. 6.1.43. For actio familiae erciscundae, Mod. 6 resp. D. 10.2.30. The exclusion of mancipatio is inherent to the withdrawal from commercium, just as commercium originally implied, when granted to non citizens, first and foremost the admission to mancipatio.

[11] Diocl. Max. C. 6.37.14: Monumenta quidem legari non posse manifestum est, ius autem mortuum inferendi legare nemo prohibetur. Precisely because the religious nature of the sepulchrum imposes a sharp distinction between the cession of the ius mortuum inferendi and the alienation of the ordinary dominium, the latter, when referred to land that contains a sepulchrum, does not include the former: PS. 1.21.7 (supra n. 7). The same logic underlies Ulp. 2 resp. D. 11.8.4: Longa possessione ius sepulchri non tribui ei, cui iure non competit. For the apparent contrast with Alex. C. 4.33.6, cf. Kaser 1978: 74-75, with lit. in n. 261.

[12] Cf. Kaser 1978: 68-82.

[13] Partial overview in de Visscher 1963: 106-112, with n. 11; Kaser 1978: 39-42 with nn. 106, 113-118, with examples referred to sale, donation, alienation, pignoration, division; for the indivisibility, 72-73 with epigraphic examples in nn. 253-254; 47 and n. 143, for examples using the language of

Against this backdrop, Gnom. §2 seems prima facie quite bewildering:

> |[17] [. . . . .] . . . . ιας τάφους άκαταχρηματίστους |[18] [πω]λε̣[ῖν ούδ]ε̣νὶ ἐξὸν ἢ μόνοις Ῥωμαίοις. Ὁ γὰρ θε|[19][ὸς Ἁ]δρι[ανὸ]ς ε̣ἶπεν μηδὲν εἶναι παρὰ Ῥωμαίοις |[20] [άκ]α[τ]α̣χ̣[ρημ]άτιστον.[16]

If we provisionally (infra §3 i.f.) translate ἀκαταχρημάτιστος with 'inalienable', [17] as it is most common, the text would read:

> |[17] [...] [selling] inalienable tombs |[18] is not lawful [for anyone] except for the Romans; for the divine |[19] Hadrian stated that for the Romans there is nothing |[20] inalienable.

How is it possible that our text refers to 'inalienable' tombs as if they were a special category, as if others were alienable? Worse: how is it possible that even these 'inalienable tombs', that cannot be sold by anybody, can all the same be sold precisely by the Romans, whose burial law was thoroughly based on the inalienability principle?

Quite absurd would be any attempt to connect Hadrian's dictum to the old principle according to which conquest deprived the tombs of the conquered of their religious status. In the 2nd century CE formulation of Pomp. 26 Muc. D. 11.7.36:

> Cum loca capta sunt ab hostibus, omnia desinunt religiosa vel sacra esse, sicut homines liberi in servitutem perveniunt: quod si ab hac calamitate fuerint liberata, quasi quodam postliminio reversa pristino statui restituuntur.[18]

It is in connection to this same principle that sepulchra hostium are denied the status of res religiosae in Paul. 27 ed. D. 47.12.4.[19] But provincial tombs, it is hardly necessary to underline it, are not sepulchra hostium. At the time of Hadrian, more

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the fideicommissum; 84 n. 307, for examples with penalties against the acquirers. Cf. also Desanti 2003: 211-213, nn. 81-91. Selections in FIRA III §81, Bruns §172, ILS 2,2, 8215-8239. For the rich Greek epigraphic evidence, cf. Harter-Uibopuu 2010 and 2014, Harter-Uibopuu and Wiedergut 2014.

[14] Cf., both for the prohibitions and for the actual alienations, a state of the question in Klingenberg 1983: 607-610.

[15] Cf. de Visscher 1963: 106-112, who refers the prohibitions to personal tombs and, most often, sepulchra familiaria. On these, in the light of the epigraphic evidence, Kaser 1978: 37-51. On the prohibitions, Kaser 1986: 192-195. The prohibitions secure also the inalienability before the tomb is first occupied and becomes locus religiosus: ibid. 193, and Kaser 1978: 33.

[16] For the initial lacuna (l. 17), Schubart suggested [έκ] or [άπὸ κληρο]ν̣ο̣μ̣ίας ('from the inheritance') [κατενεχ]υ̣ρ̣α̣σ̣ίας ('regarding execution'), or even [τοὺς άπὸ or έκ σ]τ̣ρ̣α̣τ̣ίας ('those from the army'). Schmidt 1922: 148, [λόγῳ ένεχ]υ̣ρ̣α̣σ̣ίας ('due to execution'). As alternatives to the uncertain [πω]λε̣[ῖν] at the beginning of l. 18, Schmidt, l.c. suggests [ὑπέ]χ̣ε̣[ιν]; Arangio-Ruiz 1922: 200, [ἔ]χ̣ε̣[ιν] or [κατέ]χ̣ε̣[ιν]. On these, cf. infra in text.

[17] In most uses, ἀκαταχρημάτιστος may be translated as 'unalienated' rather than 'inalienable' (thus, in the non alienation clause examples in nn. 23-25 infra). Such translation would obviously make no sense in our case.

[18] "When a place is taken by the enemy, everything ceases to be religious or sacred, just as free men pass into slavery; yet, if freed from this calamity, they are restored to their former condition by a kind of postliminium, as it were". [Tr. Scott with emendations]. Against [quasi-reversa], 'detestabile tanto per la forma quanto per la sostanza', Solazzi 1947: 330.

[19] Paul. 27 ed. D. 47.12.4: Sepulchra hostium nobis religiosa non sunt: ideoque lapides inde sublatos in quemlibet usum convertere possumus: non sepulchri violati actio competit. (The tombs of the enemies are not religious for us, and therefore we may use for any purpose the stones taken from them, without becoming liable of violating a sepulchre).

than a century after the defeat of Cleopatra, Egypt had long ceased to be enemy territory: it was since Augustus a province subjected to the empire of the Roman people. No need to invoke here as a parallel Cicero's accusations of sacrilege against Verres for carrying the statues of the Gods away from the chapel of Heius Mamertinus.[20] Tombs in Egypt were protected under the same principles described by Gaius for all provincial sepulchres and temples.

Equally unhelpful would be to conjecture that, since the tombs in question are those of fiscal and private debtors, they were in the Gnomon assumed to be still unoccupied and therefore not yet locus religiosus. Not only because such assumption would have been preposterous, taking into account the practice of the sepulchra familiaria and hereditaria, but also because this conjecture would still leave unexplained the different treatment of Romans and peregrini in the Gnomon rule.

2. Τάφος ἀκαταχρημάτιστος: Lenel-Partsch and Reinach.

There seems to be only one way out of the aporia. Ἀκαταχρημάτιστος, in our text, cannot mean 'extra commercium': it cannot refer to the general inalienability of the tombs themselves.

A first attempt in this direction was made by Lenel and Partsch, although their result was in their own opinion far from conclusive. Their reasoning goes as follows. Roman law certainly knew inalienable things, as res extra commercium: in this respect, Hadrian's dictum is inaccurate. A difference between Roman law and the peregrine practices of the papyri existed, though, regarding prohibitions to alienate introduced ex negotio. Under Roman law, these lacked 'real' effect:[21] they

[20] Cic. II Verr. 4.2.3-4.8.18, passim. On the affair, Cancik and Cancik-Lindemaier 2001: 49-58. Cicero confirms the old principle when praising M. Claudius Marcellus, who had respected the sacred images of the Syracusans, even though these were after their defeat, 'profane': cum omnia victoria illa sua profana fecisset (II Verr. 4.55.122).

[21] This was an unquestionable dogma in the time of Lenel and Partsch. Cf. Buckland 1932: 189 (§68): "It was impossible in classical law to convey property with a restriction against alienation, operative in rem: an alienation, though a breach of contract, would be valid". Mortis causa arrangements, especially family trusts (fideicommissum familiae relictum), were the main acknowledged exception: Girard 1929: 308: "Quant a la volonté de l'homme, un bien peut être rendu inaliénable, pratiquement plutôt que légalement, par une disposition de dernière volonté, par example par un fiéicommis de famille, le deférant à une personne après un autre; mais il ne peut en principe être rendu inaliénable para une convention entre vifs". A more nuanced synthesis in Mitteis 1908: 254-255, who conjectures that the dogma crystalised only under Severus and Caracalla (ex Marc. 8 inst. D. 30.114.14, on which infra §4 i.f.), while in the early Principate Sabinus could still claim that an agreement excluding division of the common property deprived the co-owners of their potestas alienandi (Ulp. 30 Sab. D. 17.2.16.1, corrected by Ulpian, cf. also Paul. 3 Plaut. D. 10.3.14.3); even in the later classical period, the clause ne manumittatur in testaments and in sales survived as a true exception, sufficient to nullify the attempted manumission (Ulp. 6 disp. D. 40.1.4.9, Ulp. 24 Sab. D. 40.4.9.1, Paul. reg. D. 40.1.9, Marcian. 1 inst. D. 40.9.9.2). In truth, the Roman jurisprudence remained always far from forcing a general rule on prohibitions to alienate that could arise in the most different ways and contexts: an overview of the different solutions for each different case, in Kaser 1977. Particularly important -and problematic- is the apparent exception in Marcian. form. hyp. D. 20.5.7.2, clearly referred to the hellenistic practice of the non alienation clause in real securities. Also under Roman law, conventio pignoris, when referred to movable property, deprived the debtor of his potestas alienandi, turning the sale into a furtum (even in case of hypothecation, despite the lack of contrectatio, cf. Julian in Paul. 7 Plaut. D.

could not be opposed to third parties, who acquired all the same. In Egypt, instead, we see that they actually prevented such acquisitions, once registered in the bibliotheke enkteseon (as a katochê, i.e. a 'hold' on the property: infra sub 4 and n. 60). This would seem to explain the difference between Romans and non-Romans, were it not for the fact that from the Roman point of view tombs were in themselves always inalienable as res religiosae. As with the prohibitions to alienate the tomb (and the cases of actual alienation) epigraphically attested, one might refer the inalienability ex negotio in our case to the ius sepuchri rather than to the tomb itself. Yet, precisely in this respect we would not expect the Romans to be exempt, they argue: why, they do not say, but it is enough to remember how common such prohibitions are also in the Latin epigraphic record (supra n. 13), and how intimately connected they are to the legal articulation of the Roman sepulchra familiaria.[22] Gaius' distinction between Italic solum religiosum and provincial pro religioso does not help either: it certainly does not allow to imagine the latter as alienable; pro religioso habetur can only mean (as argued above, sub §1) that provincial tombs are to be treated as if they were res religiosae stricto sensu, and therefore, as inalienable as the Italic tombs. All that is left are more or less arbitrary assumptions, such as referring the rule only to still unoccupied tombs. At this point, in view also of the irreparable lacuna at the beginning of the first line, Lenel and Partsch conclude that the only advisable position may be an exercise of ars ignorandi.

Since Theodor Reinach,[23] the connection of our text with Gnomon §1, with which it forms a small section on tombs, has been used as a way out of these difficulties. Gnomon §1 concerns those who, because tombs were excluded from confiscation and execution, made great investments on them in fraud of the fisc and the creditors. In view of this practice, Trajan, sparing only the monuments themselves (μνήματα), ordered the rest, i.e. quite likely any sumptuary additions like gardens or porticoes, to be sold.[24] The tombs themselves, therefore, that is, the

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47.2.67pr.), although a buyer in good faith would acquire by usucapio (Paul. 54 ed. D. 41.3.4.21: through an audacious application of the old reversio in potestatem domini: in one and the same instant, the res becomes furtiva and stops being so, since the theft is commited by the owner: a further example of the s.c. 'juristische Sekunde', cf. Wieacker 1962).

[22] De Visscher 1963: 106-112; Kaser 1978: 40-42, and n. 121. Cf. infra ad n. ???.

[23] Reinach 1920: 43-45.

[24] Gnom. §1: |[8] [Ὧ]ν ὁ φίσ[κος ἀν]α̣λαμβάνει τὰς οὐσίας, τούτων τοὺς |[9] τ̣άφ[ο]υς [περιε]ω̣ρᾷτο. ὁ δὲ θεὸς Τραιανὸς μαθὼν |[10] ὅ̣[τι ἀ]πλ[ῶς ἐπὶ] π̣ρ̣[οσ]τ̣ροφῇ τ[οῦ] φίσκου καὶ τῶν δα|[11]γ[ι]στ̣[ῶν] π[λε]ί̣ον[ος] ἐπιμελεία[ς] τοὺς τάφους καταξι|[12][οῦ]σ̣ι̣, [τ]ὰ̣ [μὲν] μ̣ν̣[ή]ματα αὐτοῖς [σ]υ̣νεχώρη[σεν], τὰ δὲ |[13] [κη]π̣[οτάφια ἢ τοι]αῦτα πωλεῖσθαι ἐκέλευσεν καὶ |[14] [έντεινάμε]ν̣ος μόν̣οις χρεώ[σ]ταις τοῦ φίσκου |[15] [. . .]ε̣λη̣μ̣[. . . . .]ς μένειν̣ συνεχώρησεν τοὺς τάφους |[16] [αὐτῶ]ν [οἷ]ο̣ι ἐὰν ὦσι. As with §2, the bad condition of the left margin seriously compromises our chances of a good understanding of the text, the lacunae of ll. 13 and 15 being particularly harmful. Bärbel Kramer has proposed [ὑ]π̣[άρχοντα] αὐτά in l. 13, instead of [κη]π[οτάφια ἢ τοι]αῦτα or any other of the previously suggested integrations, all referred to the sumptuary additions to the tomb (Lenel-Partsch 1920: 9: [πε]π̣[οιημένα περὶ] αὐτά; Schmidt 1922: 148: [γή]π[εδα τὰ περὶ] αὐτά; Vandoni 1972: [σ]υγ[κύροντα περὶ] αὐτά), and all of which she deems too long for the lacuna: Kramer 1998. Kramer's integration is presented in the context of a thorough reinterpretation of the text: the opposition in ll. 12-13 would not be between the funerary monuments themselves (μνήματα) and the tomb gardens (κηποτάφια), but between the former and the rest of the debtor's property (ὑπάρχοντα). This is untenable: Trajan's intervention, we read in ll. 9-11, was motivated by tomb expenses made in fraud of fisc and creditors; his decision, therefore, cannot have been the mere confiscation of the ὑπάρχοντα, which would have been confiscated anyway, but must have been referred specifically to the results of such funerary expenses, that is, to the sumptuary parts of

portio fundi occupied by them[25] and the possible monumentum,[26] were never confiscated: neither before Trajan, nor after him.[27]

This distinction between the tomb itself, radically extra commercium, and the sumptuary additions, like the gardens, which can be sold, may help explain Gnomon §2. Also our text -so Reinach- may concern these additions, and the possibility that they were somehow made inalienable by their owner; [28] such inalienability, not ex lege but ex negotio, would have beeen binding for the peregrines, but not for the Romans.

3. Ἀκαταχρημάτιστος in the epigraphic and papyrological record

At this point, the crucial questions are: a) what was the source of the inalienability ex negotio that made these annexes ἀκαταχρημάτιστοι? b) what is the reason for the difference between peregines and Romans?

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the tomb complex. The decision is in line with an ulterior one of Hadrian referred to the deduction of the sumptus funeris for the calculation of the vicensima hereditatis, in Macer 1 vicens. hered. D. 11.7.37.1: Monumentum autem sepulchri id ese divus Hadrianus rescripsit, quod munimenti, id est causa muniendi eius loci factum sit, in quo corpus impositum sit. itaque si amplum quid aedificari testator iusserit, veluti incircum porticationes, eos sumptus funeris causa non esse. Untenable seems also Kramer's integration [ἀν]ᾳλημ[πτοῖ]ς in l. 15, referred to those fiscal debtors subjected only to confiscation of the revenue (γενηματογραφία). It would be wholly unnecessary -absurd, in fact- to decree that the debtor's tomb is free from confiscation, if no property at all is to be confiscated, but only its revenue.

[25] As de Visscher 1963: 55 underlines, the tomb, as locus religiosus, is a locus, i.e. a portio fundi (cf. Ulp. 69 ed. D. 50.16.60), to be distinguised from the fundus as a whole, the remaining parts of which are considered ager purus, cf. Phil. C. 3.44.9. Trajan's intervention is more likely to have merely stressed this distinction, and therefore the subjection of the ager purus to execution (regarding confiscation, cf. infra n. 48), than to have innovated, risking to be deemed sacrilegous by transforming into purus an ager that would have previously been considered religiosus, as suggested by Riccobono Jr 1950: 96.

[26] There is no doubt that, together with the land, the monumentum was part of the sepulchrum in every respect: cf. PS 1.21.8, and Ven. 2 interd. D. 43.24.22.4, regarding actio de sepulchro violato; Ant. C. 4.44.2, Phil. C. 3.44.9, and Diocl. Max. C. 6.37.14 (supra nn. 6 and 10), regarding inalienability; Macer 1 vicens. hered. D. 11.7.37.1 (supra n. 12), regarding sumptus funeris. The term itself could carry certain ambiguity, though, cf. Alex. C. 3.44.4pr. (supra n. 3), since it was used for memorials (κενοτάφια) as well as for tombs: Flor. 7 inst. D. 11.7.42, cf. Kaser 1978: 31 n. 65. For the religious character of such κενοτάφια, cf. Marc. 3 inst. D. 1.8.6.5 (invoking Aen. 3.303 and 6.505; under the influence of ius sacrum for Kaser 1978: 30-32, and. n. 67), and its rejection by Marcus Aurelius and Verus, in Ulp. 25 ed. D. 1.8.7 and D. 11.7.6.1. This imperial intervention appears inspired by the same restrictive criterium of Trajan's in Gnom. §1.

[27] The charis of Antoninus Pius invoked in BGU iv 1085 (after 170 CE, unknown provenance) for the exemption of a tomb from confiscation is best understood, in the light of Trajan's constitution in Gnomon §1, as a mere confirmation of the same rule.

[28] Reinach 1920: 43: 'En tant que cette défense vise spécialement le monumentum ... elle constitue une simple superfétation; lorsque, au contraire, elle est conçue en termes généraux, elle s'applique, ou prétend s'appliquer, également aux annexes ... Il semble que la décision d'Hadrien ... vise des servitudes de ce dernier genre'. Reinach refers Hadrian's decision to those tombs that were established as inalienable ex testamento, and therefore to the prohibitions to alienate so common in the epigraphic record (supra n. 13).

The most complete answer to these questions was given by Fernand de Visscher in his "Droit des Tombeaux Romains".[29] De Visscher builds his explanation on that of Reinach, and on ideas already present in Lenel and Partsch. He shares Reinach's assumption that the licence given to the Romans by Gnomon §2 does not refer to the tomb, but to its sumptuary extensions. The term ἀκαταχρημάτιστος, therefore, is not meant to translate the Roman notion of res extra commercium. Quite the opposite, it is, as already Lenel and Partsch had observed,[30] a terminus technicus of the peregrine law in Egypt: one, de Visscher underlines, following Schönbauer (infra §5 g), particularly associated with a type of real security peculiar to the Greco-Egyptian tradition, that the papyri label as hypallagma.

Hypallagma had been first identified as a type of real security different than hypothec by Andreas B. Schwarz in 1911.[31] A hypallagma is basically a non alienation agreement between debtor and creditor that secures an item for distraint: until the debt is cancelled, the debtor undertakes not to dispose of it, so that, whatever may happen to the rest of his property, at least the item in question will be unalienated, available for execution. [32] In the earliest preserved hypallagmata, dated around 13 BCE, the non alienation clause takes the form παρέξεσθαι ... ἀνεξαλλοτρίωτον καὶ ἀκαταχρημάτιστον.[33] The same hendiadys, ἀνεξαλλοτρίωτον καὶ ἀκαταχρημάτιστον, appears, with φυλάξειν instead of παρέξεσθαι, in numerous Fayum and Hermopolis hypallagmata from the second to the fourth century.[34] A similar clause, with οὐκ ἐξέσται, μὴ ἐξέστω vel sim., excluding sale, hypothecation, or any other transaction - πωλεῖν, ὑποτίθεσθαι, ἄλλως καταχρηματίζειν- is constant in the hypothecary agreements known as menein-contracts[35] and a frequent fixture of hypallagmata.[36]

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[29] de Visscher 1963: 225-237. Cf. also de Visscher 1948, and a first formulation of the idea in de Visscher 1947.

[30] Lenel-Partsch 1920: 10.

[31] Schwarz 1911. Before Schwarz's thorough demonstration, the idea that hypallagma may not have been a type of hypothec, but an entirely different type of real security, had already been proposed by Rabel 1909: 28-34, 37-39, and, more cursorily, by Eger 1909: 47 n.4.

[32] Cf., with Schwarz 1911, the overview in Mitteis 1912: 141-151, and now Alonso 2008, with further lit.

[33] BGU IV 1147 = MChr. 103 (13 BCE Alexandria), l. 26-28: καὶ μέ|χρι τοῦ δι[ευλυ]τῆσαι παρέξεσθαι αὐτὴν | [ἀνεξαλλο]τρίωτον καὶ ἀκαταχρημάτιστ(ον), referred to a female slave (l. 23-24). A similar non alienation agreement, despite the absence of the term hypallagma, in BGU IV 1151 II (13 BCE Alexandria) l. 42-43: καὶ μέχρι τοῦ διε̣υ̣λυ̣τ̣ῆσ̣α̣ι̣ | παρέξεσθαι αὐτὰ ἀνεξαλλοτρίω(τα) καὶ ἀκαταχρη(μάτιστα), referred to two woodselling ἐργαστήρια (l. 40). In these Augustan examples, the term hypallagma seems to be linked to the handing over of the title deeds, and therefore avoided when, as in the latter example, this does not take place: Schwarz 1911: 14; Alonso 2008: 36-37.

[34] BGU XI 2043 (150 CE Soknopaiu Nesos), ll. 16-19, and its receipt for partial payment, P. Lond. II 360 (p. 216) = dupl. SPP XXII 43 (151 CE Soknopaiu Nesos), ll. 8-11; P. Tebt. II 318 = MChr. 218 (166 CE Tebtynis), ll. 8-10, ll. 14-15; P. Flor. I 28 = MChr. 238 (179 CE Hermopolis), ll. 16-17; P. Strasb. VIII 732 (228/229 CE Hermopolis), ll. 8-9; P. Ryl. II 177 (246 CE Hermopolis), l. 11; CPR XVII A 5 a-b (316 CE Hermopolis), ll. 4-5. Among these, there are self styled hypallagmata and non alienation agreements built along the exact same lines, like P. Tebt. II 318; cf. also P. Princ. III 144 (219/20 or 239/40 CE Ptolemais Evergetis), ll. 16-17. The term ἀκαταχρημάτιστος is not preserved in the otherwise similar non alienation clauses of P. Lips. I 10 = MChr. 189 (240 CE Hermopolis), col. I, ll. 40-41, and P. Charite 34 = CPR I p. 59 = SB I 5344 (318 or 348 CE Hermopolis), l. 19-20.

[35] So, in P. Oxy. xxxiv 2722 (154 CE), ll. 34-38: καὶ μέχρι ἀποδόσεως οὐκ ἔξεσταί μοι τὰ αὐτὰ μέρη | τῶν ἐνγαίων οὐδὲ μέρος πωλεῖν οὐδὲ ὑποτίθεσθαι οὐ|δ' ἄλλως καθαχρηματίζιν κατ' οὐδένα

The use of ἀκαταχρημάτιστος in these clauses helps also understand the ordinary legal meaning of the term. A priori, χρηματίζω refers rather generically to any binding legal transaction, just as χρηματισμός refers to any binding legal document.[37] Precisely because the term is so general, it is useful for rounding up clauses like the ones described above. Yet, it is universally and reasonably assumed that the purpose of those clauses is not to exclude every conceivable legal transaction on the property, but only those that would challenge or diminish the creditor's position. Thus, for instance, there is little doubt that property under hypallagma or menein-contract, or any other form of real security, may still be included in a Roman testament, a Greek diatheke or a meriteia,[38] so that the heirs will acquire it cum onere. Leases also were certainly lawful despite the clause.[39] In

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τρόπον οὐδὲ ἀπο|γράφεσθαι ἐπ' αὐτῶν οὐδένα ἢ πᾶν τὸ ὑπεναντίως πρα|χθησόμενον ἄκυρον εἶναι. The clause is attested in all sufficiently preserved examples, P. Oxy. Hels. 31 (86 CE), ll. 20-22, P. Oxy. III 506 = MChr. 248 (143 CE), ll. 39-42, P. Oslo II 40 A (150 CE), ll. 15-18, P. Oslo II 40 B (150 CE), ll. 47-49. In hypothecs, instead, this type of μὴ ἐξέστω clause is attested mainly in Hermopolis, where it follows a different model, with κακοτεχνεῖν instead of καταχρηματίζειν, cf. P. Flor. I 1 = MChr. 243 (153 CE Hermopolis), ll. 8-9: μὴ ἐξέστω [α]ὐτῇ | πωλεῖν μηδ' ἑτέροις ὑποτίθεσ[θ]αι μηδ' ἄλλο τι περὶ αὐτῆς κακοτεχνεῖν | ὑπεναντίον τούτοις τρόπῳ μηδενὶ ἢ τὰ παρὰ ταῦτα ἄκυρα εἶναι; the same formulation in P. Strasb. I 52 (151 CE Hermopolis), ll. 9-10, and, quite likely, P. Flor. I 81 (103 CE Hermopolis), ll. 15-16. Rabel's reconstruction of P. Bas. 7 = MChr. 245 = SB I 4434 (117-138, Arsinoites), ll. 15-16, είς τὸ μὴ ἐξεῖναι αὐτῇ πωλεῖν μηδὲ | [ὑποτίθεσθαι ἑτέροις μηδ' ἄλλως καταχρηματίζειν ἄχρι οὗ ἀ]ποδώσι ἡ ὁμολογοῦσα, is far from certain, precisely because it borrows from a model attested only in menein contracts and (infra n. 36) hypallagmata, never in hypothecs. Cf. also the very fragmentary P. Erl. 62 (2nd cent., unknown provenance) l. 12.

[36] The clause appears occasionally in self-styled hypallagmata (a), and more often in non alienation agreements built as hypallagmata but not labelled as such (b): (a) P. Vindob. Worp. 10 (143/44, Soknopaiu Nesos, Arsinoites), keeps the hypothec style, l. 13-16: πρὸς τὸ μὴ ἐξεῖνε αὐτῷ πωλέσαι μηδὲ ὑποδίθεσται μηδὲ ἄλλως καταχρημαδίσιν διὰ μηδενὸς ἄλλου μέχρι ἀποδοῖ τὸ προκίμενον κεφάλαιον; P. Lond. II 311 (p. 219) = MChr. 237 (149, Herakleia, Arsinoites) l. 17-18: καθ' ὧν πάντων [ο]ὐ[κ] ἔξει τὴν ὀλοσχερῆ ἐξουσίαν τοῦ πωλεῖν ὑποτίθεσθαι οὐδὲ ἄλλως [καταχρημα]τίσαι ἄχρι οὗ ἀ[ποδῶ]ι τὸ προκίμενον κ[ε]φάλαιον καὶ τοὺς τόκου; (b) BGU IV 1167 III (13 BC Alexandria) l. 60-63: καὶ μὴ ἐξεῖν[αι] τῷ Δράκο(ντι) μηδ(ὲ) ἐπιτελεῖν μήτ(ε) κ[αταχρη(ματίζειν)] ἢ ἐξαλλοτριοῦσθαι μέχρι τοῦ κομί[ζ]εσθαι [τὸν] Ἡρώ(δην) τὰ ἴδια; P. Mich. IX 566 (89, Hiera Nesos, Arsinoites), l. 14-19: καὶ μὴ [ἐξέστω τῷ ὁμο]λογοῦντι ἀπὸ τοῦ νῦν μήτε πωλεῖν μηδὲ ὑποτίθεσθαι μηδ' ἄλλως καταχρηματίσαι τὸ ὑπάρχον αὐτῶι τέταρτ[ον] μέρος ψιλοῦ τόπου ἐν κώμῃ Καρανίδι μέχρι οὗ ἀποδῆ τὸ προκείμενον ἀργύ[ριον]; P. Athen. 21 (131, Karanis, Arsinoites), ll. 17-18: μέχρις οὗ ἀποδῷ μὴ ἐξεῖναι τ[ῇ] Θασῶτι πωλῖν μηδὲ ὑποτίθεσται(μηδὲ ἄλλως καταχρηματίσαι.

[37] Cf. Preisigke, s.v. χρηματίζω (vol. II, col. 751) sub 1; s.v. χρηματισμός (vol. II, col. 754) sub 1.

[38] This would be presumable even in the complete absence of sources, but cf. the testamentary draft in P. Oxy. VII 1034 recto (2nd cent. CE), mentioning a share on a house and courtyard that secured what one of the heirs had received from his wife (as dowry?), seemingly in order to leave it to that same heir: κληρονόμους καταλείπω τὴν θυγατέρ[α] | μου τινὰ καὶ τὸν {τον} σύντροφον αὐτῆς | τινὰ καί τινα, τὸν μέν τινα ἧς προϋπήλ|λαξα πρὸς τὴν ἐπενεχθεῖσαν αὐτῷ ἐπὶ τῇ | γυναικὶ αὐτοῦ κειμένην αὐτοῖς γαμικ(ὴν) | συνγραφὴς ἐπ' ἀμφόδ(ου) οἰκίας καὶ αὐλῆς (ll. 1-6), where προϋπήλλαξα must be referred to a hypallagmatic type of security, i.e., to a non alienation agreement in favour of the heir's wife (cf. a parallel in the will of Hermogenes, in P. Oxy. VI 907 = MChr. 317 = FIRA III 41 [276 CE Oxyrhynchos], ll. 16-18, where the wife herself whose dowry was secured receives the land that secured it: Αὐρηλίᾳ Ἰσιδώρᾳ τῇ καὶ Πρείσκᾳ τῇ συνούσῃ μοι [γυναικὶ ...] | ... καταλ[εί]πω κυριευτικῶς ἃς ἔχω κοινὰς ... | ... ἀρούρας πάσας προυπαλλαγείσας αὐτῇ ὑπ' ἐμοῦ πρὸς τὴν προσενεχθεῖσάν μοι ἐπ' αὐτῇ τ[ότε φερνήν]). A reference to possible debts under pledge or mortgage can be found also in the Greek translation of the Roman will of Gaius Iulius Diogenes, P. Select. 14 (2nd cent. CE Arsinoites), ll. 20-22: ἐάν δέ τι φανῶ ὀφείλων ἐν|[εχύρου λόγῳ καὶ ὑποθήκης δικαίῳ] ἐκ τῶν ὑπαρχόντων Ἰουλίας Ἰσαροῦτος καὶ Ἰουλίου | [Διογένους -ca.?-] . . . .α ἀποδοθῆναι θέλω.

[39] This is not attested in case of hypallagma, but it results, for instance, from the epitaph of Mousa (SEG xxiv 1189 = Breccia 401 = SB i 364 = SB x 10693 = I Prose 66): against the provision that the

this sense, the usual label 'non alienation clause' is not unreasonable. Yet, it would be good to keep in mind that the sharp romanistic criteria for what is and what is not an alienation do not necessarily apply to the Greek tradition: it is not entirely certain, for instance, whether a second hypallagma was considered excluded by such clause.[40] In general, it seems reasonable to assume that the clause wishes to exclude not only immediate alienations, of the whole or a part, and suspended alienations (as hypothecations may also be conceived), but also encumbrances; and of these, quite likely not only those that could deprive the creditor of the asset, but also those that would limit his faculties.

Hypallagmata make an item ἀνεξαλλοτρίωτος καὶ ἀκαταχρημάτιστος as a guarantee for a creditor. But the same hendiadys was used, relevantly for us, in tomb inscriptions. De Visscher mentions only one instance, from the El Gabbari necropolis in Alexandria, variously dated from the 1st to the 4th century: SEG xxiv 1189 (= Breccia 401 = SB i 364 = SB x 10693 = I Prose 66), were we read (ll. 9-12) that the tomb is to be kept κοινὸς καὶ <άδι>αίρετος | καὶ ἀνεξαλλοτρί|οτος <καὶ> ἀκαταχρη|μάτιστος. But he knew well, and studied extensively in his book,[41] a much more interesting example: the famous epitaph of Pompeia Mousa. In the first century CE, Mousa dedicated a κηπόταφος, a garden tomb, to her husband and son, and to their freedmen and their descendants; as we read in the 2nd-3rd century Alexandrian epitaph (SEG xviii 646 = SB viii 10044 = Kayser, Alexandrie imp. 25 = I Prose 60), everything should remain (ll. 4-6) κοινὸν καὶ άδι|[αίρετον καὶ] ἀνεξαλλοτρίωτον καὶ ἀκαταχρημάτιστον ἐκ παντὸς τρό|[που καὶ ἀκληρο]νόμητον εἰς τὸν αἰε[ί] χρόνον. As their innumerable Latin equivalents (supra ad nn. 13-15), these prohibitions are best understood, when it comes to the tomb and not the gardens, porticoes, etc., not as ends in themselves -intent merely on withdrawing the tomb from private legal transactions-, but as means of preventing unwanted future burials: alienation and encumbrance is excluded (as is division), so that nobody but the predetermined person or persons may be buried in the tomb.[42]

The addition of ἀκαταχρημάτιστος to ἀνεξαλλοτρίωτος serves to emphasise that the clause applies also to cases that are stricto sensu no immediate alienations. Given the extremely general meaning of χρηματίζω, the hendiadys must be understood as partially pleonastic: ἀκαταχρημάτιστος comprises and expands on ἀνεξαλλοτρίωτος, explicitly excluding a restrictive interpretation of the latter. The epigraphic record points in the same direction. In fact, while

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κηπόταφος had to be kept κοινὸν καὶ άδι|[αίρετον καὶ] ἀνεξαλλοτρίωτον καὶ ἀκαταχρημάτιστον ἐκ παντὸς τρό|[που καὶ ἀκληρο]νόμητον εἰς τὸν αἰε[ί] χρόνον (ll. 4-6), an attempt was made to sell it under the appearance of a lease (ll. 7-20: the attempt was rejected as unlawful by the idios logos Claudius Geminos, under the prefecture of Marcus Mettius Rufus, 89-90 CE). At least in Roman times, therefore, something that has been made ἀνεξαλλοτρίωτος καὶ ἀκαταχρημάτιστος could nevertheless be leased, even if not sold.

[40] Hypallagmata are strictly speaking not alienations (not even suspended alienations, as hypothecs may be constructed), but mere non alienation agreements. Yet, it seems natural to assume that, when a hypallagma is contracted, the ἀκαταχρημάτιστος of the non alienation clause excludes further hypallagmata on the same property. Our material is not enough to be certain, though: the epistalma of the bibliotheke enkteseon, necessary for hypothecations (cf. P. Strasb. 52, 151 CE Hermopolis, l. 12; P. Flor I 1 = MChr. 243, 153 CE Hermopolis, l. 11), is not attested for hypallagmata, and Schwarz interpreted this silence as a hint that it may have been unnecessary. On the concurrence of different katochai on the same item, infra n. ??.

[41] De Visscher 1963: 197-224.

[42] On Greek tomb prohibitions in general, lit. supra n. 13 i.f.

ἀνεξαλλοτρίωτος is attested in different kinds of inscriptions from Smyrna, Pergamon, Apollonia in Phrygia, and Pisidia,[43] none of them feel the necessity to add ἀκαταχρημάτιστος: the hendiadys is so far attested only in Egypt.[44] Ἀκαταχρημάτιστος, on the other hand, appears on its own in tomb inscriptions from Laodicea in Syria (the only occurrences so far of the term in the epigraphic record outside from Egypt).[45] Nobody would imagine that these differences have substantial meaning: geographically concentrated as they are, it is clear that they reflect merely the existence of different local models. The common translation 'inalienable and unencumbered', if almost inevitable, must therefore be taken cum grano salis, avoiding the untenable assumption (unfortunately prominent in de Visscher's argumentation[46]) that ἀκαταχρημάτιστος was a terminus technicus with the specific meaning of 'free from charges', 'unencumbered', as opposed to ἀνεξαλλοτρίωτος, 'inalienable'. Since this correction does not touch the kernel of his theory, I will in the following pages keep for ἀκαταχρημάτιστος the translation 'inalienable', in the wide sense just discussed: it is clear that, if the τάφοι ἀκαταχρημάτιστοι of Gnomon §2 were wanted by their founders free from encumbrance, alienation stricto sensu was also excluded.

4. De Visscher's theory

On the basis of these types of evidence for the term ἀκαταχρημάτιστος, de Visscher formulated his hypothesis. The term refers, also in Gnomon §2, he claims, to the situations described in these sources: not to the specific legal condition of the tombs as res extra commercium, but to the legal condition of any item made inalienable by its owner. For de Visscher, τάφοι ἀκαταχρημάτιστοι are, therefore, the tombs that are wished as permanently inalienable, so that they remain restricted to the person or group of persons for which they were created.[47] And, while confiscation or distraint of the tomb itself is in any case out of the question, sumptuary annexes are, instead, as it results from §1, susceptible to distraint in

[43] CIG 3203 = IGRR IV 1429 = Laum II 87 = ISmyrna 709 (Smyrna), l. 6; IvP II 590, l. 6 (Pergamon, Roman period); Herrmann-Polatkan, Testament 7,1 (Lydia, 2nd cent. CE), l. 86; Sterrett, WE 372, 539 (Phrygia), l. 9-10; MAMA VIII 349 (Pisidia), ll. 12-13. Much more common still is the prohibition referred to ἐξαλλοτριῶσαι or ἀπαλλοτριῶσαι.

[44] Together with the papyri and the tomb inscriptions already mentioned, cf. SEG VIII 533 = SB V 7687 = I Prose 48 (1st cent. BCE Ptolemais Evergetis, Arsinoites), ll. 8-14: ὁ δὲ σηκὸς καὶ | τὰ περὶ αὐτὸν | οἰκόπεδα πάν|τα ἀνεξαλλο|τρίωτα καὶ ἀκα|ταχρημάτιστα | ἐπὶ τὸν αἰεὶ χρόνον; SB VIII 10190 (1st cent. CE Hawara): οἰκία καὶ τάφος | ἀκαταχρηματιστὰ καὶ ἀνεξαλλοτριωτὰ | ἐπὶ τὸν ἀπάντα χρόνον.

[45] SEG XXVII 980: Ὑγεινοῦ· ἀκαταχρη|μάτιστον; 981: Ἀκαταχρημάτισ|τον. Both first or second century CE.

[46] De Visscher 1963: 231-233.

[47] De Visscher 1963: 233: "Toute difficulté s'efface si le terme ἀκ. désigne, non un caractère spécifique du tombeau, mais la condition juridique résultant pour un objet quelconque de l'engagement pris par son propriétaire de ne le grever d'aucune charge, soit que cet engagement ait pour but de réserver les droits d'un créancier détérminé, soit qu'il tende à maintenir cet objet entre certaines mains. Ceci est précisément le cas des tombeaux, dont les défenses d'aliéner et de grever d'aucune charge visent à réserver l'usage exclusif aux membres de la famille ou à quelques personnes détérminées".

favour of ordinary creditors (and, in de Visscher's opinion, in certain cases at least, also to confiscation[48]).

This still leaves the main riddle unanswered: why the difference between peregrines and Romans? De Visscher believes to find the answer in Marcian. 8 *inst*. D. 30.114.14:

> Divi Severus et Antoninus rescripserunt eos, qui testamento vetant quid alienari nec causam exprimunt, propter quam id fieri velint, nisi invenitur persona, cuius respectu hoc a testatore dispositum est, nullius esse momenti scripturam, quasi nudum praeceptum reliquerint, quia talem legem testamento non possunt dicere: quod si liberis aut posteris aut libertis aut heredibus aut aliis quibusdam personis consulentes eiusmodi voluntatem significarent, eam servandam esse, sed haec neque creditoribus neque fisco fraudi esse: nam si heredis propter testatoris creditores bona venierunt, fortunam communem fideicommissarii quoque sequuntur.[49]

The text is not free from problems,[50] but the main lines are recognisable, and plausible without the need to postulate postclassical corruption or justinianic interpolation.[51] The question is closely linked to our problem: under discussion is the effectiveness of prohibitions to alienate set by testament. A rescript of Severus and Caracalla, we read, declared such prohibitions void (nullius momenti), as mere advice (nudum praeceptum), when they do not include a motivation (i.e. the explicit intention to preserve the property for someone)[52] and no specific

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[48] De Visscher 1963: 235-236: since ll. 14-15 in Gnomon §1 do not seem to admit any other interpretation than Trajan's concession to fiscal debtors to keep their tombs with all their annexes (for Kramer's alternative conjecture, cf. supra n. 24), and yet such unmitigated concession would condone the fiscal fraud that motivated Trajan's intervention in the first place, de Visscher suggests, in connection to §17, that such concession would hold only inasmuch someone can be found who is in charge of the funerary cult. Some support for De Visscher's connection between the confiscation of property consacrated to the funerary cult in §17 and that of the tomb annexes in §1 comes from the second century funerary foundation practice (Blanch Nougués 2007a and 2007b, with lit), that ascribed the produce of the tomb land to the funerary rites and the care of the sepulchrum (as in the famous case of Iunia Libertas [Calza 1939]; leaving aside the problematic testamentum Dasumii [CIL VI 10229 = FIRA III 48], cf. also CIL V 7454); since these foundations were typically entrusted to freedmen (Bürge 1988), it is perhaps not a coincidence that the immediately previous §16 concerns fideicommissary substitutions involving freedmen and their descendants.

[49] 'The Divine Severus and Antoninus stated by rescript that, when those who forbid in testament to alienate something do not express the reason why they wish it so, unless a person is found regarding whom this was established by the testator, the provision is void, as if they had left mere advice, because such a provision cannot be included as binding in a testament. But if they manifested such will with regard to their children, descendants, freedmen, heirs, or any other persons, it must be complied with; yet, this cannot be done in fraud of the creditors or the fisc: for if the heir's own property should be sold in behalf of the testator's creditors, the trust beneficiaries must share the common fortune'.

[50] Thus: the accusativus cum infinitivo 'rescripserunt eos' is left without the infinitive: when an infinitive finally arrives, it is referred to a new accusative (nullius esse momenti scripturam); and, in the phrase 'nisi invenitur... dispositum est', the reference to the testators, elsewhere plural (eos, reliquerint, consulentes, significarent) unexpectedly becomes singular (a testatore). Unsurprisingly, this phrase has often been deemed interpolated: cf. Krüger, ad leg.; Eisele 1897: 31; and, due to 'cuius respectu', Pringsheim 1961: 409.

[51] Against the entire text, Beseler 1911: 77, cf. also Beseler 1930: 67. For its substantial authenticity, in detail, Impallomeni 1967: 45-48, and Kaser 1977: 187 and n. 58.

[52] Examples of such explicit 'causa', formulated as the destination of the property to a circle of beneficiaries, are frequent in the sources: fundum libertis legavit eumque alienari vetuit, *sed*

beneficiary can be found on whose behalf the prohibition was introduced. The rescript implies that otherwise the prohibition can be enforced as a trust (fideicommissum), precisely by those beneficiaries:[53] that much is confirmed by Marcian's final remark, labelling these as fideicommissarii. The legal logic behind this solution is easy to reconstruct. Its (implicit) point of departure seems to be that these prohibitions cannot be enforced if not as trusts (fideicommissa).[54] For a trust to be enforceable, a beneficiary (fideicommissarius) is required, who may enforce it. Hence, as the text continues, the prohibition is enforceable only when introduced in the benefit of a specific circle of people, such as the testator's children, his descendants, his freedmen, or his heirs.[55] "Still", the rescript

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pertinere voluit et ad filios libertorum vel ex his natos (Scaev. 14 dig. D. 33.1.18pr.); pater filium heredem praedia alienare seu pignori ponere prohibuerat, *sed conservari liberis ex iustis nuptiis et ceteris cognatis fideicommiserat* (Scaev. 19 dig. D. 32.38pr.); βούλομαι δὲ τὰς ἐμὰς οἰκίας μὴ πωλεῖσθαι ὑπὸ τῶν κληρονόμων μου μηδὲ δανείζεσθαι κατ' αὐτῶν, *ἀλλὰ μένειν αὐτὰς ἀκεραίας αὐτοῖς καὶ υἱοῖς καὶ ἐκγόνοις εἰς τὸν ἅπαντα χρόνον* (Scaev. 3 resp. D. 31.88.15). The 'causa, propter quam id fieri velint' is in all these examples the explicit will to preserve the property within a certain circle, also after the death of its first holders.

[53] When referred to property, fideicommissa imposed on the fiduciarius the duty to preserve it, so that it could be passed on to the fideicommissarius: they comprised, therefore, a prohibition to alienate (Desanti 2003: 113-120, with sources and lit.; cases where alienation came to be exceptionally deemed lawful, in pp. 120-125). This made them into the ideal vehicle to make enforceable prohibitions to alienate in general: on condition, though, that the specific prohibition can be built as a fideicommissum, for which -on this, immediately- a fideicommissarius is necessary.

[54] Despite Johnston 1985: 272-281, this aspect of the rescript seems to be ius novum. It contrasts, in particular, with a group of texts by Scaevola (Scaev. 19 dig. D. 32.38.3-5 and 7, and Scaev. 3 resp. D. 32. 93pr., cf. Johnston 1985: 227-235, and Desanti 2003: 256-263, with further lit.), which reject in casu a claim ex fideicommisso (against a heres extraneus, in all three cases, and, in all three, quite obviously, because only alienation had been forbidden, without any visible limitation of the freedom to dispose mortis causa, cf. also infra n. 109: this is true also of the 'conservent successioni suae' in D. 32.38.7, since also an extraneus is a successor), and yet do not treat the prohibition as ineffective: in D. 32.38.5, its effect is secured by a 'penal' fideicommissum in favour of the res publica Tusculanorum; in D. 32.38.7, by reciprocal penal stipulations; and, in D.32.38.4 = D. 32.93pr., Scaevola's 'nihil proponi contra voluntatem defuncti factum', even if from a coldly logical point of view not incompatible with the ineffectiveness of the prohibition, would be a strikingly misleading justification if the prohibition did not need to be respected; 'nudum praeceptum' there, far from linking the text to ours, has been universally recognised as a postclassical gloss: Kaser 1977: 191 n. 73, Desanti 2003: 257 n. 243. It is possible, of course, that the contrast between Scaevola's openness to alternative mechanisms of enforcement and the rescript's apparent rejection of any prohibition that cannot function as fideicommissum is less a change in the law than the result of the specific facts submitted to the Emperor: Marcian's paraphrasis may have generalised into an absolute rule the imperial reaction to a case where, unlike in these Scaevola texts, no other mechanism of enforcement was available (or mentioned in the petition).

[55] Despite Kaser 1977: 188 ('nur an bestimmte, bezeichnete Personen'), the text seems to imply that this reference does not need to be explicit in the testamentary disposition itself, as long as it can be determined (i.e. through other traces of the testator's intent): notice, in this sense, 'nisi invenitur persona, cuius respectu hoc a testatore dispositum est', and the use of 'consulentes' (despite the reprobation of the term by Beseler 1911: 77). In the same sense, Desanti 2003: 271 and n. 285, with further lit. Notice also the contrast between all this and 'exprimunt': the difference between the initial 'nec causam exprimunt, propter quam id fieri velint' and 'nisi invenitur persona cuius respectu hoc a testatore dispositum est' becomes thus understandable, as opposing explicit to implicit beneficiaries. In this sense, the imperial chancellery is more flexible than Scaevola had been: in Scaevola, the lack of an explicit 'causa' (of the type exemplified supra in n. 52), even when the beneficiaries were obvious, made impossible to raise a mere prohibition to alienate inter vivos into a fideicommissum (supra n. 54). An entirely different question is whether the reference to the posteri implies that the text comprehends also perpetuities, as conjectured by Desanti 2003: 272-

concludes, "this cannot be done in fraud of the creditors or the Fisc"; to which Marcian (rather than the chancellery, if we stay true to the text, that departs here from reported speech) adds: "for if the property of the heir should be sold because of the creditors of the testator, the beneficiaries of the fideicommissum must follow the common fortune".

It is in this final part of the rescript that de Visscher believes to find the answer to our riddle. In his opinion, this had been exactly the content of the decision of Hadrian mentioned in the Gnomon. Prohibitions to alienate formulated according to peregrine law were binding for both peregrines and Romans, preventing them from selling; but they could only be opposed to peregrine creditors, not to Roman ones. Peregrine creditors could not claim such property, Roman creditors, instead, could. It was a true conflict of laws, de Visscher writes, Roman and peregrine, and it was resolved along the lines of the personality principle: the peregrine institution could be opposed to a peregrine creditor, but not to a Roman one.[56]

5. Objections and alternatives

De Visscher's explanation is seductive, but also highly conjectural in several crucial respects. It postulates a Hadrianic anticipation of Severus' rescript, including, most especially, the defence of the rights of creditors and fisc in front of the fideicomissarii favoured by the prohibition to alienate. This is of course possible, but has left no trace in our souces, other than - if we accept de Visscher's hypothesis - Gnomon §2 itself. Equally conjectural is that already in Hadrian's time prohibitions to alienate introduced by testament were denied any effect if not as fideicommissa: in truth, several crucial texts by Cervidius Scaevola suggest otherwise (supra n. 52), at least for the later Antonine period. De Visscher's theory postulates also, implicitly, that this construction, referred in Marcian's text to testamentary prohibitions to alienate property of any nature, was used also to articulate the legal effect of prohibitions, however they may have been introduced, banning the alienation of tombs and their possible sumptuary additions.[57]

All this is, nevertheless, possible, even if with various degrees of likelihood. More damning for de Visscher's hypothesis are the following considerations:

a) In the papyrological evidence, the personality principle appears confined to the fields of status, family and inheritance, as the Gnomon itself richly illustrates. Beyond these fields, in everything related to property and contracts, the law that those who happen to have the Roman citizenship follow in second century Egypt is the same followed by the peregrines.[58] This is enough to make de Visscher's conjecture unlikely: the discrimination between Roman and peregrine creditors that he imagines is completely unparalleled; it would have been the only instance of Roman creditors standing on a different footing than peregrines. De Visscher, it is true, links this discrimination to the Imperial regulation of fideicommissa, where

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273: this was in any case excluded, even if the text does not mention it, by the Hadrianic prohibition of fideicommissa in favour of postumi and incertae personae (Gai. 2.287): infra sub 6.

[56] de Visscher 1963: 236-237.

[57] Of these three assumptions, this is the only one that I would subscribe as undisputable: infra sub 'h' and nn. 88-91.

[58] Alonso 2013: 354-355.

an impact of the personal law would be in order: yet, that personal law would have been the one of those involved in the fideicommissum -reasonably, of those charged with it-[59] not that of the third-party creditors.

b) Hadrian's constitution, the Gnomon tells us, referred to 'the Romans'; it led, in Gnomon §2, to a rule about inalienable tombs formulated also in general for 'the Romans'. Since Gnomon §1 seems to save sumptuary tomb additions from confiscation, subjecting them to execution merely for private debt, de Visscher assumes that also §2 refers to private creditors -these would be 'the Romans'-, rather than to confiscation. This interpretation leaves a crucial question unanswered, though: why, if the question is mere private execution, is the precept included in the Gnomon at all? The hypothesis that it was included for the cases where de Visscher conjectured Gnomon §1 allowed confiscation (supra n. ??) seems untenable: it would force us to assume that Gnomon §2 served merely to remind the Idios Logos that peregrine inalienability was in such cases no obstacle for confiscation, the Idios Logos being a Roman; there is no need to underline how absurd is the notion that the author of the Gnomon would refer to the Idios Logos, a high official endowed with his own jurisidictional power, merely as 'one of the Romans'.

c) De Visscher refers Hadrian's rule to any property made inalienable ex negotio under peregrine law. If that was so, if the rule affected any confiscation of any item, one wonders why the Gnomon, oblivious to most cases where it should apply, refers it merely to the very specific case of tombs. Also in this respect, de Visscher's interpretation is at odds with the text.

d) In the papyri, the phenomenon of inalienable property goes well beyond the cases of hypallagmata and tomb prohibitions. Virtually every real security contains a non alienation clause[60] that gives rise to a katochê,[61] secured, from late first to

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[59] For this latter possibility, cf. Murga's (untenable) hypothesis, infra sub 6 and n. 69.

[60] For hypallagma, which is essentially a non alienation agreement, Alonso 2008, passim; supra nn. 36, 37 and 39 for the clause formulation. A similar agreement, that it shall be unlawful for the debtor to sell or hypothecate or otherwise dispose of the security, seems to have been included in every 'menein' contract, and to have been the rule in Hermopolis also for ordinary hypothecation: supra n. 38. Other hypothecs contain a παρεχέσθω-clause, often connected to the bebaiosis, merely excluding further encumbrances: this model, common also in sale contracts, goes back to the Ptolemaic period (P. Tebt. iii 1 817 = SB I 4232 = C. Pap. Iud. i 23, 182 BCE Krokodilopolis, ll. 21-24; P. Tebt. iii 2. 970, 2nd cent. BCE Krokodilopolis, ll. 19-26; P. Hamb. i 28 = C. Ptol. Sklav. i 19, 2nd cent. BCE Arsinoites, ll. 7-13); it survives well into the third century (P. Erl. 62, 2nd cent. CE unknown provenance, ll. 13-17, comprising a reference to alienation, καθαρὰν ἀπό τε ἐξαλλοτριώ[σεως]; P. Bas. 7 = MChr. 245 = SB i 4434, 117-138 Arsinoites, ll. 21-23; BGU iii 741 = MChr. 244 = FIRA iii 119, 143 CE Alexandria, ll. 36-41; SB xiv 11705, 213 CE Arsinoites, ll. 6-8; the first two examples contain also a μὴ ἐξεῖ[ναι] non alienation clause: l. 8, ll. 15-16). In Oxyrhynchos, the παρεχέσθω clause disappears into the bebaiosis (παρέξομαι ταύτας βεβαίας διὰ παντὸς ἀπὸ πάντων πάσῃ βεβαιώσει καθαρὰς): P. Oxy. xvii 2134 (170 CE Oxyrhynchos), ll. 23-24; P. Mert. iii 109 (2nd cent. CE Oxyrhynchos), ll. 11-16. On these clauses, Rupprecht 1997b. In other hypothec deeds, inalienability is secured by explicitly foreseen registration (infra n. ??), or by the hypothecated goods being deposited and sealed, as the natron in the quite peculiar P. Genova ii 62 (98 CE Oxyrhynchos). Such non alienation arrangements are lacking only in P. Brem. 68 (99 CE Hermopolis); SB I 4370 (229 CE Herakleopolis); also, remarkably, outside of Egypt (cf. P. Babatha 11, P. Euphrates 13, and the general hypothecations in P. Dura 17, 18, 20-23).

[61] The notion is documented for every type of real security: for hypallagma and hypallagmatic agreements, cf. BGU iv 1148 (13 BCE Alexandria), ll. 16-17, P. Oxy. Hels. I 36 (167 CE Oxyrhynchos), ll. 31-33; for menein contracts, P. Oxy. xxxiv 2722 (154 CE Oxyrhynchos), ll. 39-41, P. Oxy. III 506

mid-fourth century Egypt, through registration in the bibliothêkê enktêseôn.[62] Wives and children, as we know through the Edict of Mettius Rufus (89 CE),[63] could have, by virtue of native marriage arrangements, katochai on the property of their husbands and parents.[64] Also the Edict of Tiberius Iulius Alexander (68 CE) refers to katochai, securing the executive privilege of the fisc and the wives' position regarding their dowry.[65] If the discrimination between Romans and peregrines extended to all these cases, as de Visscher's theory forces us to assume, it would have left traces in our sources. There is none.

e) How these katochai affected other creditors is not directly illustrated in our sources, but can, to a certain extent, be inferred from what we know about each of them. Widely diverse as they were in extension and function, one must, above all, differentiate between them. Starting with the most general ones, those of children and wife in Mettius Rufus' edict: it is unlikely that such permanent katochai over the whole paternal estate, that serve merely to secure inheritance rights, could have been sufficient to exclude the creditors, whether Roman or peregrine.[66] Also

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(143 CE), ll. 49-51, P. Oslo II 40 B (150 CE), l. 50; for hypothec, P. Oxy. xvii 2134 (after 170 CE Oxyrhynchos), l. 15-16, and PSI xii 1238 (244 CE Tamais, Arsinoites), ll. 14-16; cf. also, for an unspecified real security, P. Wisc. I 16 (140 CE, unknown provenance), ll. 9, 13. A general katochê -κατοχῇ παντὸς τοῦ πόρου- securing a loan, in SPP xx 18 = CPR i 228 (205 CE Herakleopolites), l. 7, and, as katochê 'of the names' of the debtors, ἐπὶ κατοχῇ τῶν ὀνομάτων ἡμῶν, in P. Oxy. xiv 1634 (222 CE Oxyrhynchos), l. 11.

[62] For the registration of hypallagma, Alonso 2008: 20 nn. 5-6. For menein contract and hypothec, cf. the documents quoted supra in n. 59. Registration of a creditor's general katoche 'of the name' of the debtor in P. Oxy. L 3560 (163-164 CE Oxyrhynchos).

[63] P. Oxy. ii 237 (186 CE Oxyrhynchos), ll. 34-36: παρατιθέτωσαν δὲ καὶ αἱ γυναῖκες τ̣ᾷ̣ῖς̣ ὑποστάσεσι τῶν ἀνδρῶν ἐᾷ̣ν̣ κατά τινα ἐπιχώριον νόμον κρατῆται τὰ ὑπάρ|χοντα, ὁμοίως δὲ καὶ τὰ τέκνα ταῖς τῶν γονέων οἷς ἡ μὲν χρῆσις διὰ δημοσίων τετήρηται χρηματισμῶν, ἡ δὲ κτῆ|σις μετὰ θάνατον τοῖς τέκνοις κεκράτηται, ἵνα οἱ συναλλάσσοντες μὴ κατ᾽ ἄ̣γ̣ν̣ο̣ι̣αν ἐνεδρεύωνται.

[64] For the Demotic tradition, Pestman 1961. The native practice of the 'general sale' securing the position of wife and children (as, for instance, in P. Mich. inv. 4526 (199 BCE Philadelphia), cf. Lüddeckens 1960: 148-153), wonderfully illustrated by the Tabubu dream in the story of Setna (P. Cair. 30646, col. v, ll. 19-26, cf. Goldbrunner 2006, with lit.), was certainly alive in 2nd cent. Egypt: cf. the reference to the πανπράσιον, as grating the children a hold on their father's property, in Similis' decision in P. Oxy. xlii 3015 (after 117 CE), and the early second century petition in P. Tebt. iii 776. Also among Greeks, judging from P. Oxy. iv 713 = MChr. 314 (97 CE), the position of the children came to be secured through the same general katochê.

[65] OGIS II 669, ll. 18-24, and ll. 25-26, cf. Chalon 1964: 123-136, 137-143. The Edict declares the fiscal protopraxia unopposable to third parties, unless there has been public proscription of the debtor or registered katochê of his name or part of his property. These measures are conceived as exceptional, to be taken only against debitores suspecti: our evidence suggests that they were in fact imposed on every public debtor, and particularly on everyone under liturgy, the katochê frequently constructed as hypallagma: cf. BGU IV 1047 (after 131 CE Arsinoites), ll. 9-10; P. Tebt. II 329 (139 CE Tebtynis); P Turner 23 (144-5 CE Arsinoites); P. Thmouis I (180-192 CE, Thmuis), col. 74, l. 19, col. 75, l. 3, col. 81, l. 11; BGU ii 599 = WChr. 363 (2d cent. CE Arsinoites); cf. also, quite likely, PSI viii 944 (364-366, unknown provenance). The practice was not new, cf. P. Lips. II 132 (25 CE, Leukos Pyrgos, Hermopolites). On these measures, and on the notion of protopraxia, still essential Mitteis 1908: 369-375; cf. Wieacker 1939; Wesenberg 1957; Kupiszewski 1964: 77-79; Wagner 1974; Wieling 1989. On the Roman privilegium exigendi of the dotal claim, Pérez Álvarez 2003, and Stagl 2009: 260-262, with sources and lit.

[66] In the petition of Dionysia, P. Oxy. ii 237 (186 CE Oxyrhynchos), her katochê seems connected to the consent that Dionysia and her mother gave to the hypothecation of some οὐσία by Dionsia's father, Chairemon, in col. 6, ll. 24-25. It is wholly unsurprising that hypothecation, which in the local tradition led to forfeit, required the consent of the katochê holders. But this is still far from proving that ordinary execution, by means of enechyrasia, would be unavailable to all creditors of a debtor under family katochê. The frequent practice of having loans documented to the name of husband

in the case of the fisc and the wife's dotal claim, their katochai do not exclude, in the Edict of Tiberius Iulius Alexander, the execution rights of other creditors: they merely ensure an executive privilege (protopraxia) in front of them; and this, again, irrespective of whether the other potential creditors are Roman or peregrine.[67] When the katochê arises from a hypothec or hypallagma, instead, it is unthinkable that an unsecured creditor could be granted execution on the mortgaged items: the whole purpose of the security would then be lost.[68] Equally unthinkable is an exception in favour of the Romans in this case: it would have amounted to an executive privilege in front of holders of a real security, based merely on the citizenship; something unimaginable in itself, that would certainly have left a trace in our sources.

f) When it comes to the Romans, de Visscher carefully distinguishes two situations: as creditors, peregrine inalienability could not be opposed to them; as owners, instead, they were bound by it as anyone else.[69] In short: Romans were, as creditors, free to foreclose on such property; as owners, instead, they were not free to sell. And yet, what we read in the Gnomon is the exact opposite: Romans may sell. If Hadrian's rule, as de Visscher wishes, concerned their execution rights, why is it referred to selling?[70] The difficulty is all the more pressing since the private debt execution system adopted in Egypt by the Roman jurisdiction did not lead to

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and wife does not postulate that otherwise the creditor would lack execution due to the potential wife's katochê.

[67] Decades later, a hypothecation that had already led to distraint in favour of the creditor was challenged by Drusilla on the basis of her claimed dotal protopraxia (not, as often assumed, of the wife's enchoric rights mentioned in Mettius Rufus edict: cf. BGU xi 2070 = SB v 7561 = P. Berl. Frisk. 2 R [ca. 138-148 CE Alexandria], col. 2, l. 31: . . . πρ̣[οῖ]κα· πρ̣ωτοπραξ[ί]ον γὰρ ἔχω κατα[...]), despite the fact that the creditor, the veteran Iulius Agrippianus, was a Roman. On Drusilla's lawsuit, Rupprecht 1999 and Schubert 2000, with lit.

[68] This seems the most likely solution for the case of an unsecured creditor attempting execution on items subject to katochê. A different question is whether concurrent katochai were possible on the same property. Since a katochê merely guarantees that the affected property will not be alienated or encumbered, it is not certain whether it would have been considered itself an encumbrance excluded by the non alienation clause esential to hypallagma, present in all preserved cases of 'menein' contracts, and common also in ordinary hypothecations (supra n. 59). In that sense, the discussion supra in n. 43 regarding hypallagma can be extended to the other types of real security. Some relevance here has P. Oxy. i 3560, an application to the bibliophylakes enkteseon for the registration of a general katochê, explicitly acknowledging previous katochai (we ignore whether from hypallagma or hypothec) on specific items registered in favor of other creditors. Regarding these items, this seems a case of concurrent katochai, the concurrence regulated by a prior tempore rule (enforced, as it seems, by the bibliothêkê itself, at whose initiative, we must assume from the degree of detail in their identification, the preexistent katochai are explicitly acknowledged). An alternative interpretation, leading to the same practical result, cannot be excluded, though: that the new katochê is understood as restricted to the rest of the property until those previous katochai are cancelled. Only a case of specific katochai on the same item would provide a final answer to this question.

[69] de Visscher 1963: 233-234: "Certes, les clauses qui frappent un bien d'indisponibilité sont reconnues comme valables et obligent ceux qui s'y sont soumis: le système des fidéicommis qui se développe au IIe siècle leur assurera une large application. Mais d'autre part, aucune convention, aucun acte de dernière volonté ne saurait faire obstacle à la saisie d'un tel bien par le fisc ou par les créanciers".

[70] The question is posed in very different terms regarding πωλεῖσθαι in §1 (l. 13): there, in fact, the verb does not refer to private creditors, but to the Idios Logos, implicitly comprehending the confiscation that makes the ulterior sale possible. This fundamental difference detracts some weight from de Visscher's invocation of πωλεῖσθαι in §1 as an argument in favour of Schubart's [πω]λε[ῖν] in §2: de Visscher 1963: 230-231.

bonorum venditio,[71] but to the creditor's acquisition of the distrained property.[72] The paradox is exacerbated by Murga's inverse (in itself unlikely) interpretation, that Roman tombs, not those of peregrines, were subject to confiscation.[73]

The problem, it is true, arises from a largely conjectural word: [πω]λ̣ε̣[ῖν], in l. 18. A word, though, for which no reasonable alternative seems possible. All proposed alternatives -[ὑπέ]χ̣ε̣[ιν] (Schmidt), [ἔ]χ̣ε̣[ιν] or [κατέ]χ̣ε̣[ιν] (Arangio-Ruiz)- are unlikely already from a palaeographical point of view: the first legible letter shows a ligature to the right that never occurs in the Gnomon with chi: the letter in question is, as Schubart saw, most likely a lambda. Also from a substantive point of view Schubart's πωλεῖν seems practically inevitable, as de Visscher admitted.[74] Hadrian's dictum, μηδὲν εἶναι παρὰ Ῥωμαίοις [άκ]α[τ]αχ[ρημ]άτιστον, suggests by itself that the faculty the first sentence reserves to the Romans must be a form of alienation or encumbrance. Schmidt's alternative, [ὑπέ]χ̣ε̣[ιν], even accepting the term (as he proposes it) in the sense of ὑποτιθέναι, leads to the exact same problems as πωλεῖν: tombs could certainly not be hypothecated under Roman law, [75] no more than sold, and a hypothetic Roman prerrogative to hypothecate sumptuary extensions declared inalienable would pose the same problems as a prerrogative to sell, and would additionally raise the question why the Gnomon would be interested in a rule concerning the validity of a private hypothecations. Arangio-Ruiz's [ἔ]χ̣ε̣[ιν] makes the text say that only Roman tombs are unalienable, in blatant contradiction with Hadrian's constitution as reported in the second sentence; [κατέ]χ̣ε̣[ιν], if referred to possession, leads to the same absurdity; if referred to a katochê, to one even worse: τάφους ἀκαταχρηματίστους κατέχειν would mean 'making inalienable (through katochê) inalienable tombs'.

g) The theory does not fare much better if, taking [πω]λ̣ε̣[ῖν] into account, we refer it to sale instead of execution. This was Ernst Schönbauer's interpretation, presented by de Visscher as a main inspiration of his own: non alienation agreements such as hypallagma were allowed and protected in Egypt in the Ptolemaic period,[76] but later, in Roman times, only for non Romans; Hadrian's constitution would have declared such agreements wholly ineffective among

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[71] Auction sales within private execution are attested only in the Ptolemaic period, cf. P. Tebt. iii 284 (227 BCE) and especially BGU xiv 2376 (35 BCE). In Roman times, the property is invariably adjudicated to the creditor - although the term prosbole, that in fact suggests an auction sale, was kept, now seemingly referred to this adjudication.

[72] Under this system, execution was carried out without a declarative trial, directly on the basis of the credit deed, upon its notarisation (if it had not been notarised ab initio), and comprised: a) a notification procedure, whereby a notice of payment due (diastolikon) was served upon the debtor; b) an enechyrasia procedure, analogous to a pignoris capio, whereby the property chosen by the creditor was adjudicated to him by the praktores, and transcribed to his name in the record-office; c) an embadeia procedure, analogous to a missio in possessionem, that put the creditor into possession of the property. All three steps were initiated at creditor's petition, to the archidikastes (a) or the prefect himself (b-c). A still useful overview of this complex execution procedure procedure, in Mitteis 1912: 124-129. Cf. also Rupprecht 1997a, and Id. in Keenan, Manning, Yiftach-Firanko 2014: 259-265. The most comprehensive study is still Jörs 1915, 1918, and 1919.

[73] Murga 1984: 277. This interpretation mutates into disadvantage what in the text appears unmistakably as a Roman prerogative: τάφους ἀκαταχρηματίστους | [πω]λε[ῖν οὐδ]ενὶ ἐξὸν ἢ μόνοις Ῥωμαίοις.

[74] De Visscher 1963: 230-231. For πωλεῖσθαι in §1 (l. 13) as an argument (ibid. 230), cf. supra n. 67.

[75] Cf., if a source were necessary, C. 8.16(17)3, rightly brought up by de Visscher 1963: 230.

[76] This may have been the case, but in truth there is so far no evidence of hypallagma as a private real security before Augustus: Alonso 2008: 38-46.

Romans; these were, therefore, according the Gnomon, free to sell tombs even when they had been made unalienable, through hypallagma, in guarantee of a debt.[77] This interpretation, to which also Taubenschlag initially adhered,[78] is unfortunate. Even wishing to accept that the use of tombs as security for debt was a phenomenon common enough to elicit a response in the Gnomon (and understanding that the encumbrance was in effect restricted to the tomb's sumptuary additions), one wonders why the a rule that affected all property under hypallagma would have been formulated for the rather specific case of tombs. In truth, among all hypallagmata, among all hypothecs preserved in the papyri, there is not a single one whose object is a tomb. One also wonders, once more, what interest may the fisc have had in the validity of purely private real securities. Worse: in Schönbauer's interpretation, Hadrian would have proclaimed the Romans' right to sell their property, even if previously made akatachrematistos in guarantee for a debt; such imperial invitation to defraud creditors and break contractual duties -even if undertaken in peregrine form- is unthinkable.[79] It is also incompatible with our sources. As so many other non-Roman institutions in the fields of credit, contracts and property (supra n. 57), hypallagma was practiced both by peregrines and Romans: the papyri offer abundant examples of Romans contracting hypallagmatic security, also after Hadrian, both before[80] and after the Constitutio Antoniniana;[81] more decisively, they attest their registration as katochê

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[77] Schönbauer 1924: 105, within the discussion of hypallagma: 'Dieser vereinbarte "Realarrest" war von der staatlichen Rechtsordnung zugelassen und geschützt, in der ptolemäischen Zeit anscheinend allgemein, in der römischen Zeit bei allen Nichtrömern. Dies bezeugt der Gnomon, dessen §2 sich hierauf beziehen dürfte. Hadrian edizierte, daß bei römischen Bürgern keine Sache durch Vereinbarung dem Verkehre entzogen werden könne, d.h. ein vereinbarter Realarrest ist für sie ohne Geltung. Deshalb können Römer nach derselben Gnomonstelle verpfändete und daher arrestierte Grabstätten verkaufen.'

[78] Taubenschlag 1930: 379 = Taubenschlag 1959 I: 196-197: 'Derselbe Kaiser erklärt, dass bei römischen Bürgern keine Sache durch Vereinbarung dem Verkehr entzogen und dass deshalb bei ihnen, verpfändete, mithin arrestierte Grabstätten verkauft werden dürfen'. Cf. also Taubenschlag 1944: 21: 'burial plots mortgaged and attached by them may be sold'. For Taubenschlag's later interpretation, cf. infra in text and n. ??

[79] Such position would not only run against the tendency to accept as valid, also for Romans, the peregrine contractual traditions (supra n. ??); it would, in truth, run against Roman law itself: the fact that prohibitions to alienate introduced ex negotio often had not effect in rem, against a third acquiror, does not mean (supra n. 21) that they were seen in themselves as undeserving juridical sanction: a survey of the ways in which the jurisprudence made them effective, in Kaser 1977.

[80] BGU i 301 (157 CE Arsinoites) is a loan secured by hypallagma, between Lucius Longinus Gemellus and Antonia Amerilla, both Antinoites, and, as it seems, also Roman citizens. Cf. also (infra n. ??) the hypallagmata brought to execution in P. Berl. Leihg. 10 (120 CE Arsinoites), and BGU iii 888 = MChr. 239 (160 CE Karanis, Arsinoites).

[81] Among the loans granted by the Arsinoe temple of Iupiter Capitolinus in BGU ii 362 (215-216 CE Arsinoites), several are secured by hypallagma, including (fr. 2, p. 16, ll. 20-25) the one in favour of Aurelius Demetrius, former exegetes of Alexandria. A hypallagma, probably securing a dowry, in P. Fuad. Univ. 10 (217-218 CE unknown provenance). A hypallagmatic non alienation agreement securing an antichretic enoikesis between Aurelii, in P. Princ. iii 144 (219-220 or 239-240 CE Ptolemais Euergetis). P. Strasb. viii 732 (228-229 CE Hermopolis) and P. Ryl. ii 177 (246 CE Hermopolis) are loans with hypallagma between Aurelii. In the testament of Aurelius Hermogenes, exêgêtês and bouleutês of Oxyrhynchos, in P. Oxy. vi 907 = MChr. 317 = FIRA iii 51 (276 CE Oxyrhynchos), his widow, Aurelia Isidora, receives some corn-land which until then had secured her dowry through hypallagma (ll. 16-18). In P. Cair. Isid. 62 (297 CE Karanis), in a much humbler social milieu, there is also mention of a hypallagma (over half a slave girl) as security for a dowry. Hypallagma vanishes from our sources only in the later 4th century, with the increasing Romanisation of the legal practice in Egypt and the disappearance of the bibliothekai enkteseon,

in the bibliothêkê enktêseôn,[82] and their execution in court,[83] so that there is no doubt that the contract enjoyed the exact same official recognition and was every bit as binding as when only peregrines were involved. The most inequivocal proof of this official recognition: hypallagma was, in the Roman period, the usual means of securing the fiscal liability of public debtors (supra n. 63).

De Visscher complicated the discussion mistaking Schönbauer's position for a precursor of his own, as if it referred to non alienation agreements among peregrines not being opposable to third-party creditors when Roman. Taubenschlag, who had rightly understood Schönbauer, earned for it de Visscher's censure.[84] In an astonishing double twist, he reacted rectifying his own previous position (supra n. 70) as a lapsus calami, albeit misrepresenting de Visscher's, and transforming the latter's third-party Roman creditors into recipients of the hypallagmatic guarantee:[85] 'Roman creditors had the right to sell burial plots mortgaged to them as the clause forbidding their sale were, as far as Roman creditors were concerned, null and void'. This is the interpretation that one can find for Gnomon §2 in Taubenschlag's second edition of his handbook: 'the Romans had the right to sell burial plots, mortgaged to them and held in arrest'.[86] The chain of misunderstandings ends here fully in the realm of the nonsensical. In hypallagma, in fact, as in all other real securities, the non alienation clause aims at preventing alienation by the debtor, not the creditor: if the clause had been deemed 'null and void', that would enable the debtor, not the creditor, to alienate.

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that had hitherto secured the property's inalienability (Alonso 2008: 21, 34-35, 47-48, passim). The last preserved hypallagmata come from early to mid 4th century Hermopolis: CPR xvii a 5 a-b (316 CE), P. Charite 33 (331-332 or 346-347 CE), and P. Charite 34 = CPR i p. 59 = SB i 5344 (318 or 348 CE).

[82] P. Lips. i 8 = MChr. 210 (220 CE Hermopolis) is the registration request of a credit under hypallagma contracted that same year between Aurelii; years later, the creditor's widow, Aurelia Aretous, requests the registration of the same hypallagma to name of her children, in P. Lips. i 9 = MChr. 211 (233 CE Hermopolis). In P. Lips. i 10 (240 CE Hermopolis), the same Aurelia Aretous presents to the archidikastes for demosiosis a hypallagma granted through chirograph to her father six decades earlier, in 178 CE.

[83] P. Berl. Leihg. i 10 (120 CE Arsinoites) is a petition to the strategos to carry out the chrematismos embadeias for the distraint of property under hypallagma contracted by a Terentia Gemella with a Marcus Antonius Titanianus: both, as their representatives (Lucius Valerius Expeditus and Ignatius Niger), Roman citizens. In BGU iii 888 = MChr. 239 (160 CE Karanis, Arsinoites), only the creditor is Roman: a soldier, Gaius Iulius Apollinarius, who applies to the archidikastes for enechyrasia of the property that he and his brother Sabinus had received in hypallagma from a Thenapynchis decades before, in 132 CE. P. Iand. vii 145 (224-225 CE unknown provenance) is a paradeixis eis enchyrasian for the distraint of property under hypallagma contracted between Aurelii. P. Flor. i 56 = MChr. 241 (234 CE Hermopolis) is a petition to the strategos to carry out the prefect's embadeia decree for the distraint of property under hypallagma, contracted between Aurelii in 220 CE. Additionally: in the fragmentary trial record P. Strasb. iv 275 (ca. 225 CE Arsinoites), apparently regarding a dowry, hypallagmata are mentioned in l. 15.

[84] de Visscher 1963: 231 n. 15: "D'après l'interprétation que l'auteur attribue à Schönbauer, le texte autoriserait la vente de tombeaux donnés en garantie par des Romains ... Schönbauer dit tout au contraire que les Romains ont le droit de vendre des tombeaux grevés de pareilles charges". In the same sense, de Visscher 1948: 206 n.2.

[85] Taubenschlag 1949: 165, reviewing de Visscher 1948: "I expressed the same view, with reference to Schönbauer, in my Geschichte der Rezeption des röm. Privatrechts (Studi Bonfante I 379); infortunately a mistake crept in the English translation of the passage referring to this (cf. de Visscher l.c. 206 note 2): instead of mortgaged by Roman citizens, should be read to Roman citizens.

[86] Taubenschlag 1955: 30. Notice 'mortgaged to them', instead of the original (supra n. 70) 'mortgaged and attached by them'.

The clause, on the other hand, is the only security that the hypallagmatic creditor receives; before execution, he is not even, as one could say in ordinary hypothecations, a conditional owner, but a mere katochê holder, and therefore not at all in the position to alienate. After execution, he is owner, free to do as he wishes with the property.

Summarising: the term πωλεῖν is a major obstacle for de Visscher's interpretation, that neither Schönbauer's nor Taubenschlag's alternatives help make sense of.[87]

h) In general, Taubenschlag's and Schönbauer's extension of the Gnomon's ἀκαταχρημάτιστος to the realm of real securities is, for the reasons just detailed, untenable. The term cannot be understood as including tombs under hypallagma or other kinds of katochê. It must haver referred exclusively to prohibitions imposed in the interest of the family by the founder of the tomb, of the sort that we find in the garden tomb of Mousa. This was also de Visscher's interpretation, in this respect much sounder than that of Schönbauer. But Schönbauer's misguided idea, and the frequency with which in the papyri the terms ἀκαταχρημάτιστος and καταχρηματίζειν are linked to hypallagma and other real securities, led de Visscher to imagine an 'inalienability of peregrine law', as a legal construction, common to these real securities and to the tombs founded as ἀκαταχρημάτιστοι, that would explain their effects in the local legal tradition, and would also explain, because these made them opposable to third-party creditors, their rejection by the Imperial law when these are Romans. This specific inalienability of peregrine law existed only in de Visscher's imagination. Even within the realm of real securities, prohibitions to alienate appear in the papyri under wildly diverse forms of enforcement,[88] none of which is attested for tomb prohibitions; also the effect of

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[87] One might be tempted to consider an alternative translation: instead of 'selling unalienable tombs is unlawful for everyone except the Romans', 'it is unlawful to sell unalienable tombs to anyone except to the Romans'. This would help bring de Visscher's theory in line with πωλεῖν: peregrine inalienability would affect peregrine buyers, but not Romans, the rule being relevant for the Idios Logos since in every case of confiscation it is crucial to determine who is the owner of the property (less likely: relevant for the Idios Logos in order to decide to whom the already confiscated property may be sold). Unfortunately, this translation does not seem possible: the text does not read πωλεῖν οὐκ ἔξὸν ἢ μόνοις Ῥωμαίοις, but οὐδενὶ ἔξὸν ἢ μόνοις Ῥωμαίοις, where οὐδενὶ refers quite obviously to ἔξὸν, and not to πωλεῖν.

[88] In the hypallagmata from the Augustan archive of Protarchos, in BGU iv, the title deeds of the property given as security are handed over to the creditor: Alonso 2008: 27-32. This, not as conditional forfeit of the property, or in order to make distraint easier for the creditor (he had to go through the same double procedure of enechyrasia and embadeia as if no security at all had been given), but presumably as means of enforcing the non alienation agreement: Alonso 2008: 32-33. From the second half of the 1st century CE onwards, the same aim was reached through registration of the hypallagma as a katochê in the bibliothêkê enktêseôn: supra nn. ??. In itself, the attempted sale or hypothecation seems to be treated in general as a mere breach of contract, although a few documents attach to the non alienation agreement an invalidity clause: ἢ τὰ παρὰ ταῦτα ἄκυρα εἶναι. In real securities, the clause is infrequent, attested mostly in Hermopolis, but in all types of real securities: a hypallagma, P. Lond. iii 1166 R (p. 104) (42 CE Hermopolis); an antichretic lease with non alienation agreement, P. Lond. iii 1168 (p. 135) (44 CE Hermopolis); a menein contract, P. Oxy. xxxiv 2722 (154 CE Oxyrhynchos), ll. 37-38; and few hypothecations, P. Strasb. i 52 (151 CE Hermopolis), l. 10, P. Flor. i 1 = MChr. 243 (153 CE Hermopolis), l. 9, P. Erl. 62 (2nd cent. CE unknown provenance), l. 13, leaving aside the provision of nullity without proper non-alienation clause in P. Oxy. xvii 2134 (170 CE Oxyrhynchos), l. 26 and P. Mert. iii 109 (2nd cent. CE Oxyrhynchos), ll. 16-18. How seriously we must take this invalidity clause is not clear, though: it

these katochai on third party creditors was quite likely far from uniform (supra sub 5).

Tomb prohibitions share with peregrine real securities only the terminology that both, inevitably, use for the banned alienation. Keeping them separate, as we should, is the coup de grace for de Visscher's theory. The whole theory was built on the idea that peregrine law could not be used against Roman creditors. Hypallagma and the other katochai, were certainly institutions of peregrine law, but prohibitions to sell the tomb outside of the family most certainly not: there is nothing specifically peregrine to them. We find them in the romanized West, in Italy, in Rome itself, with the same exact content of the Greek ones, variably referred to sale, donation, alienation, pignoration, division: the examples (supra n. 13) are too numerous to be collected here. The prohibition to alienate belongs, in fact, to the kernel of the Roman notion of the sepulchrum familiare.[89]

There is no doubt, on the other hand, that these prohibitions were enforceable under Roman law. It has often been noticed that they were formulated in the very same terms of the fideicommissum familiae discussed by the Roman jurists,[90] and this by itself makes it reasonable to assume -as also de Visscher does- that they could be enforced as such: not, of course, regarding the sepulchrum itself (which, as locus religiosus, could not be the object of a fideicommissum or of a claim ex fideicommisso, no more than of a legatum, or of any actio in rem or in personam: supra nn. 9-11),[91] but the locus purus attached to it, often, as we know, equally wished as inalienable, with its possible sumptuary additions, as in the case of Pompeia Mousa (supra ad nn. 39 and 41).[92] De Visscher's own crucial source, Marcian. 8 *inst*. D. 30.114.14 (supra sub 4 i.f.) confirms that much: Marcian, following Severus and Caracalla, interprets as fideicommissum, provided that a beneficiary can be identified, any prohibition to alienate, and there is no reason for excluding those concerning tombs;[93] Marcian refers to prohibitions imposed by

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is attested in numerous other contexts, including some (waivers of claims, for instance) where invalidity as such is not really an option.

[89] Kaser 1978: 39-42. The prohibition must therefore be considered implicit (so also ibid. 39 n. 107) in the usual clauses 'ne de nomine familiae exeat' vel sim. (sources and lit., ibid. 40 n. 108), and 'hoc monumentum heredem externum non sequitur' (sources and lit., ibid. 42 nn. 122-123). Explicit prohibitions to alienate are frequent only in the case of sepulchra familiaria: for sepulchra hereditaria, Kaser 1978: 42 n. 121 knows no other exception than CIL 3, 191 = CIG 3, 4452, mentioned already by de Visscher 1963: 108 n. 12.

[90] Kaser 1978: 40-41 nn. 111, 119; 46-47.

[91] I leave here aside the possibility of a fideicommissum on the ius mortuum inferendi as a way of securing the destination of the family tomb. Such a fideicommissum was possible (as also a legatum: Diocl. Max. C. 6.37.14), but could not be derived from a fideicommissum on the land attached to the sepulchrum: supra n. 11. For the occasional use of the language of fideicommissa in the institution of sepulchra familiaria, cf. the examples in Kaser 1978: 47 n. 143, with lit. Of course, a fideicommissum familiae on the locus purus attached to a sepulchrum was also possible -and natural- when the latter was a sepulchrum familiare.

[92] An entirely different question is whether it is likely that fideicommissum familiae arose precisely in connection with sepulchra familiaria: this assumption, once common (Declareuil 1907: 148-155; Le Bras 1936: 59), has been generally and rightly abandoned -since the main concern was there to secure the destination of the sepulchrum itself, which could not be reached by a fideicommissum over the land that contained it (supra nn. 11 and 91)-, and bears no weight for our question.

[93] Johnston's misguided rejection of fideicommissum as a possibility to enforce tomb prohibitions is formulated without taking Marcian's text into account: Johnston 1988: 97-103. In fact, Marcian's text seems to imply that these prohibitions could only be enforced as fideicommissum (and therefore required an identifiable fideicommissarius), even though it cannot be excluded that

testament, but, given that fideicommissa do not require testamentary form, any tomb prohibition, in whatever form it is imposed, would follow the same regime. And fideicommissa were enforceable not only against the fiduciarius who violates the prohibition but also -at least in the Severan period, but probably already since Hadrian- against the third party who may have acquired from him.[94]

i) Crucially also: De Visscher's notion that prohibitions to alienate, even when effective as fideicommissa, could not under Roman law be opposed to third party creditors or to the fisc, is based on a rescript of Severus, in Marcian. 8 *inst*. D. 30.114.14, that is far from supporting it. De Visscher refers here to the text's final section (cf. supra sub 4 i.f.):

> ... sed haec neque creditoribus neque fisco fraudi esse: nam si heredis propter testatoris creditores bona venierunt, fortunam communem fideicommissarii quoque sequuntur.

Marcian's 'heredis ... bona venierunt' refers to the form of execution foreseen by the edict of the praetor as ordinary within the formulary procedure: a venditio bonorum, following the missio in bona -or the cessio bonorum- of all of the debtor's property.[95] Because universal, such execution is not confined to the inheritance, but comprehends, as Marcian takes for granted, the heir's whole estate. In this context, 'fortuna communis sequi' means that, if the heir must suffer the distraint of his own property, and this due to the debts of the inheritance and not his own,[96] then the fideicomissarii must also accept to lose the part of the inheritance that the testator had destined to them, even if for that purpose he had wished it unalienable. If it all comes down to execution, therefore, the 'unalienable' items will not be spared. And yet:

α.- The fideicommissarii are themselves in the position of creditors,[97] even if extra ordinem (Gai. 2.278, Ulp. Ep. 25.12), and entitled therefore, even after execution, to obtain their due,[98] once the inheritance creditors have been

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before Severus other possibilities were open to ensure their effectiveness: supra n. ?? Johnston's own suggestion that they were treated as donations or bequests sub modo (Johnston 1988: 99) does not offer an alternative: a modus is not effective in itself, without a mechanism of enforcement.

[94] This, by means of missio in possessionem, labelled 'missio in rem' by Justinian (who abolished it as 'tenebrosissimus error', and replaced it by a general actio in rem): PS 4.1.15; Iust. C. 6.43.1.1 (529 CE); Iust. C. C. 6.43.3pr. (531 CE); Nov. 39pr. (536 CE). Cf., extensively, Impallomeni 1967. This 'missio in rem' is not to be confused with the missio in possessionem fideicommissorum servandorum causa of Ulp. 68 ed. D. 43.4.3pr.-1, which refers to the inheritance and is granted against the fiduciarius only, as an extension of the missio legatorum servandorum causa: cf. Lenel 1927: 269 (§§172-173), and 455 (§230).

[95] The literature is inexhaustible: cf. Kaser-Hackl 1996: 388-407. For the edictal clauses, Lenel 1927: 413-414.

[96] For the heir's own debts, neither legatarii nor fideicommissarii are to suffer any harm (Herm. 4 epit. D. 36.4.11.1), to the point that they may request the same separatio bonorum of the inheritance creditors (Iul. 46 dig. D. 42.6.6pr.). To the execution suffered by the heir as a result of his own insolvency, not of that of the inheritance, must be referred also Pap. 19 quaest. D. 31.69.1, where the emptor (bonorum) is treated, since he is a (praetorian) successor of the heir, as an heres extraneus, against whom petitio fideicommissi is possible as soon as it would be otherwise, i.e. as soon as the fiduciary heir dies: the underlying principle is here, as always, that the heir's own insolvency cannot hurt the fideicommissarii.

[97] Grosso 1962: 392-394. Obligari already in Gai. 2.184, 2.277. Cf. also PS 4.1.18: ius omne fideicommissi non in vindicatione, sed in petitione consistit.

[98] It has even been suggested that they may have been able to deprive the bonorum emptor of the object itself of the fideicommissum through execution in natura: Kaser-Hackl 1996: 403 n. 21. Such

satisfied.[99] Despite de Visscher, therefore, the text does not mean that the fideicommissum is not effective in front of the creditors; it merely means that the fideicommissarii will see their right eventually reduced; reduced, but not necessarily cancelled.

β.- The subjection to distraint of the property wished by the testator as unalienable is the inevitable result of the universal character of the execution in the ordinary edictal procedure. Only when the debts are such that the situation ends up in distraint, and only because this was under the praetor's edict necessarily universal, does the prohibition to alienate lose its force. The text is, in this respect, merely a reminder that the missio in rem of the fideicomissarii does not entail an executive privilege, and therefore does not prevail over the missio in bona of the creditors.

γ.- A hypothesis as to how Marcian's doctrine would apply in a context like that of Egypt, where execution was limited, even for Romans, to enechyrasia and embadeia over the property necessary to satisfy the debt (supra n. 70), plays even more clearly against de Visscher's interpretation: the fideicommissarii would be completely unaffected by it, unless the whole rest of the property were insufficient to satisfy the creditors. In the absence of a universal missio in bona, in fact, the Roman solution would be to uphold the fideicommissum, and therefore the prohibition to alienate behind it, as long as the remaining property suffices to satisfy the creditors.[100]

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theory seems incompatible with our text, though: it is absurd to subject the asset to bonorum venditio, and then allow the fideicommissarius to claim it back from the bonorum emptor; this would lead to the same result as if from the beginning we had subtracted the asset from the general execution, keeping it for the fidecommissarius, which implies an equation between fideicommissum and legatum per vindicationem that is completely at odds with what we know of the former. Precisely for that reason, Pap. 19 quaest. D. 31.69.1 (supra n. 93) is best understood as referred to execution upon insolvency of the heir, not of the inheritance as in our case. In Ulp. 68 ed. D. 43.4.3pr.-1, 'sed melius erit dicere extra ordinem ipsos iure suae potestatis exsequi oportere decretum suum, nonnumquam etiam per manum militarem', and 'ceterum poerit uti et extraordinaria exsecutione', are generally deemed interpolated: Arcaria 1986, passim; the text concerns, in any case, the unrelated question of the enforcement of the missio in possessionem fideicommissorum servandorum causa (supra n. 91).

[99] The fideicommissarii, as the legatarii, while taking precedence over the creditores heredis (supra n. 93), are postponed to the creditores testatoris: cf. Iul. 46 dig. D. 42.6.6pr. i.f. Ant. C. 7.72.1. Solazzi 1940: 195-198; Solazzi 1943: 194-195.

[100] An analogous criterion for the case of voluntary sale against the prohibition in order to cancel the inherited debts, in Scaev. 19 dig. D. 32.38pr. A son, heir to his father, pays off the debts of the inheritance by selling land that the father had wished unalienated and preserved for the heir's own legitimate children and cognates: the sale is lawful (recte contractum), provided there were no other means of payment in the inheritance: idem quaesiit, cum filius praedia hereditaria ut dimitteret hereditarios creditores distraxisset, an emptores qui fideicommissum ignoraverunt bene emerint. respondi secundum ea quae proponerentur recte contractum si non erat aliud in hereditate unde debitum exsolvisset. The final clause, 'si non etc', has long been considered interpolated, precisely because it so clearly implies that the sale would not have been upheld if there was other property in the inheritance from which the debts could be paid: Gradenwitz 1887:200; Pernice: 60 n. 5; Beseler 1930: 70. Against them, Impallomeni, who refers the text to the missio in rem excissed by the compilers from the Digest (supra n. 91). Problematic remains, in that incise, the limitation 'in hereditate', which seems at odds with the ultra vires hereditatis rule. On the question of the ignoratia (and Cujacius' conjecture <non> ignoraverunt), Johnston 1985: 263-266.

6. A conjecture

Marcian. 8 *inst*. D. 30.114.14, therefore, does not provide the explanation for Gnomon §2. This, not just because a constitution of Hadrian cannot be explained by a rescript of Severus -unless we assume without evidence that it had anticipated the exact same doctrine of the latter-. More crucial (supra 'i') is the fact that prohibitions to alienate are upended in Marcian's text only when the owner suffers execution, and only because such execution is conceived as universal, as foreseen in the praetor's edict; in Egypt, where execution was limited to the amount of the debt, prohibitions to alienate would have been succumbed to the imperial rescript only in the absence of other sufficient property - a case where there seems to be no reason for discrimination Romans or peregrines. Otherwise, Roman law had nothing against such prohibitions (supra 'h'): they were ubiquitous in the Roman practice, central to the so-called fideicommissum familiae relictum and to the Roman tradition of the sepulchrum familiare; enforceable as fideicommissa, as we read in Severus' rescript, as long as a beneficiary could be identified who could claim them; effective, in that case, not only against the fiduciarius but also, by means of missio in rem, against a third party. De Visscher's notion of a conflict in this respect between the peregrine and the Roman conceptions is entirely imaginary.

As for Gnomon §2 itself, we are doomed to the text as it stands. The Romans must be (supra sub 'b') the Romans in general, not the Idios Logos in particular, and yet the rule must affect the activity of the Idios Logos and not merely private execution; this, also because (supra 'f') there seems to be no reasonable alternative for πωλεῖν in l. 18, and a rule formulated for sales cannot have referred to the execution of private debts, which in Egypt led to forfeit and not to bonorum venditio. Despite the frequent use of the term ἀκαταχρημάτιστος in hypallagmata and other real securities, the Gnomon rule cannot have referred to tombs given in guarantee (an unlikely occurrence, unsurprisingly unattested in the papyri) or under other kinds of katochê: all conjectures built on a right of the Romans to sell garden tombs given in guarantee, in particular, lead to a dead end (supra 'g'); as for the other katochai, it seems implausible (supra 'c') that a phenomenon that can affect all sorts of property is remembered in the Gnomon only regarding tombs; and, in any case, a difference between Romans and peregrines would be in that context unconceivable (supra 'd' and 'e'). The rule must therefore refer exclusively to prohibitions to alienate imposed on the tomb and its annexes by its founder in order to secure its intended destination, as it is so frequent in the epigraphic record. And, since it was a personal rule, restricted to Romans, its basis is likely to come from the fields of status, family and inheritance (sub 'a').

There is at least one explanation for Gnomon §2 that, while not free from difficulties (on these, infra), might fulfil these requirements. Among Hadrian's legal reforms within the law of inheritance,[101] one, quite notorious, can in fact be connected to the question addressed by Gnomon §2, and precisely with the kind of consequences we find there. The reform concerned fideicommissa, and was one of several steps extending to these the discipline that affected testamentary bequests (legata), thus ending the recourse to fideicommissa as means to circumvent such

[101] Now studied as a whole in González Roldán 2014.

limitations.[102] When first made enforceable by Augustus' own authority,[103] fideicommisa were, in fact, not affected by several key limitations that restricted legata. Among these initial advantages:

a) Fideicommissa could, unlike legata, be left to incertae personae (those whose precise identity could not have been known to the deceased)[104] and to postumi alieni (those who are not yet born, and whose birth would not cause the testament to fail, because they would not have fallen under the testator's immediate potestas).[105]

b) They could impose on the fiduciarius the duty to pass the property after his own death to the fideicommissarius, to the point that, unlike in legata, even an explicit formulation 'post mortem tuam' was deemed effective, despite the general rule 'ab heredis person obligationem incipere non posse'.[106]

c) Legata could be imposed only on heirs ex testamento, fideicommissa on anyone who would receive something mortis causa, including a fideicommissarius:[107] this opened the door to the so-called 'fideicommissary substitutions', whereby property is bestowed on the fideicommissarius with the request to pass it over, typically after his death, to a new fideicommissarius.

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[102] A summary, in Impallomeni 1996: 162-167.

[103] I. 2.23.1, cf. also I. 2.25pr. On the possible sources behind Justinian's report, Giodice 1993: 33-41, with lit. Possible attestations of fideicommissa before they were made enforceable by Augustus, sometimes in circumvention of the lex Voconia, in Longchamps de Bérier 1997: 23-38, with lit., also regarding their possible censorial protection.

[104] Gai. 2.238: Incertae personae legatum inutiliter relinquitur. incerta autem videtur persona, quam per incertam opinionem animo suo testator subicit, velut cum ita legatum sit: 'qui primus ad funus meum venerit, ei heres meus X milia dato'. idem iuris est, si generaliter omnibus legaverit: 'quicumque ad funus meum venerit'. in eadem causa est, quod ita relinquitur: 'quicumque filio meo in matrimonium filiam suam conlocaverit, ei heres meus X milia dato'. illud quoque, quod ita relinquitur: 'qui post testamentum scriptum primi consules designati erunt', aeque incertis personis legari videtur. et denique aliae multae huiusmodi species sunt. sub certa vero demonstratione incertae personae recte legatur, velut: 'ex cognatis meis, qui nunc sunt, qui primus ad funus meum venerit, ei X milia heres meus dato'. Deprived of effect because in favour of incertae personae would also have been a legatum 'for the redemption of the captives', or 'for the poor', cf. Iust. C. 1.3.48(49). On the testamenti factio passiva of the incertae personae, its evolution in Late Antiquity, and the sociological forces behind this evolution, Corbo 2012.

[105] Gai. 2.241: Postumo quoque alieno inutiliter legatur. est autem alienus postumus, qui natus inter suos heredes testatori futurus non est: ideoque ex emancipato quoque filio conceptus nepos extraneus postumus est. item qui in utero est eius, quae iure civili non intellegitur uxor, extraneus postumus patris intellegitur. Whether these postumi alieni were deemed (at least by Gaius) as an instance of incertae personae depends on the postille 'est enim incerta persona' in Gai. 2.242, often considered a postclassical gloss: Voci 1967: 415 n. 41. On the whole question, cf. von Mitschke-Collande (2016) 34-36, with lit.

[106] The rule, in truth, merely required using a formulation 'cum morieris' for the same purpose, instead of 'post mortem tuam': cf. for obligationes ex stipulatione, Gai. 3.100; for legata, Gai. 232. This scruple was unnecessary in fideicommissa, Gai. 2.277: Item quamvis non possimus post mortem eius, qui nobis heres extiterit, alium in locum eius heredem instituere, tamen possumus eum rogare, ut, cum morietur, alii eam hereditatem totam vel ex parte restituat; et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus: 'cum Titius heres meus mortuus erit, volo hereditatem meam ad Publium Maevium pertinere'. utroque autem modo, tam hoc quam illo, Titius heredem suum obligatum relinquit de fideicommisso restituendo.

[107] Gai. 2.271: Item a legatario legari non potest, sed fideicommissum relinqui potest. quin etiam ab eo quoque, cui per fideicommissum relinquimus, rursus alii per fideicommissum relinquere possumus.

These three peculiarities made fideicommissa into a potential mechanism for establishing perpetuities: property could be bestowed on a fiduciarius, with the duty to leave it after death within a circle of fideicommissarii -typically, within the familia (defined in different terms, be it the cognati or the nomen familiae, referred either to the adgnati or to the familia libertorum)-[108] who would then be under the same duty, and so forth, perpetually.[109] In this way, a fideicommissum familiae relictum could be imposed on the future generations without a temporal limit, ensuring that certain property would not leave the nomen familiae for as long as the latter survived.

As we know from the jurisprudential casuistic, on the other hand, such a fideicommissum familiae relictum could be formulated -and was in fact typically formulated- as a mere prohibition to alienate or dispose mortis causa outside the familia: the standard 'ne de nomine familiae meae exeat' vel sim. would be enough, as numerous texts of Scaevola and Papinian confirm:[110] the term 'exire' covers acts mortis causa as well as inter vivos,[111] and the reference to the familia, with or without further qualification, provides by itself the identification of the fideicommissarii, without whom no fideicommissum is possible. In this latter respect, as far as the necessity of an identifiable fideicommissarius goes, the rescript of Severus in Marcian. 8 *inst*. D. 30.114.14 was certainly not innovative: the possible innovation (supra n. 54) consisted rather in depriving from effect, as

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[108] A review of the rich casuistic in Desanti 2003: 204-208, passim.

[109] The perpetual aspect is quite explicit in the clause discussed by Scaev. 3 resp. D. 31.88.15: βούλομαι δὲ τὰς ἐμὰς οἰκίας μὴ πωλεῖσθαι ὑπὸ τῶν κληρονόμων μου μηδὲ δανείζεσθαι κατ’αὐτῶν, ἀλλὰ μένειν αὐτὰς ἀκεραίας αὐτοῖς καὶ ὑιοῖς καὶ ἐκγόνοις είς τὸν ἅπαντα χρόνον, κτλ. The clause is treated as a fideicommissum, but the question concerns merely whether an antichretic loan without hypothecation contracted by the testator's son and heir violates the testator's prohibition. For such question, the perpetual aspect of the disposition -and its contrast with Hadrian's senatusconsultum excluding postumi and incertae personae from fideicommissa- are wholly irrelevant, and therefore not discussed by Scaevola, who certainly, does not endorse it, despite Torrent (1975) 24. In this sense, rightly, Johnston (1988) 77-78. On the question, Desanti (2003) 229 and n. 153, 250-251 and n. 221. On the text, cf. now Häusler (2016) 436-438, who rightly calls attention (437 nn. 110-112) to the abundant parallels in Greek tomb inscriptions from 2nd and 3rd century Berytus, Antiochia and Palmyra.

[110] Scaev. 3 resp. D. 31.88.6: '... dari volo ... ita ne de nomine familiae exeat'. Pap. 8 resp. D. 31.77.11: 'fidei ... committo, ne fundum Tusculanum alienent et ne de familia nominis mei exeat'. Scaev. 19 dig. D. 35.1.108: 'ne de nomine exeat'. Pap. 8 resp. D. 31.77.28: 'patronus petit ut de nomine familiae non exiret'. Pap. 19 quaest. D. 31.67.5: 'peto non fundus de familia exeat'. Pap. 8 resp. D. 31.77.15: 'petierat ne ex nomine familiae alienarentur'. Pap. 8 resp. D. 31.77.27: 'petit ne id alienarent utque in familia libertorum retinerent'. Scaev. 19 dig. D. 32.38.1: 'fundum Cornelianum de nomine meorum exire veto'. Scaev. 19 dig. D. 32.38.2. Val. 2 fid. D. 32.94: 'veto autem aedificium de nomine meo exire'. 'petierat, ut curarent, ne de nomine suo exiret'.

[111] Scaevola's rejection of a claim ex fideicommisso agains the heres extraneus in the much discussed (supra n. 54) 19 dig. D. 32.38.4 (= 3 resp. D. 32.93pr.), D. 32.38.5, and 32.38.7 results from his attention to the verba fideicommissi and to the difference between 'ne de nomine familiae exeat' vel sim, and a simple prohibition to alienate: from the latter, even when its beneficiaries are obvious, Scaevola refuses to derive an unexpressed limitation of the freedom to dispose mortis causa. In this sense, leaving aside the possibly spurious reference to nudum praeceptum in D. 32.38.4 = D. 32.93pr., Scaevola's position in those texts has nothing to do with Severus' doctrine in Marcian. 8 inst. D. 30.114.14. Yet, it prefigures it in one key aspect: the 'causa, propter quam id fieri velint' alluded in Severus' rescript is best understood as the explicit wish to keep the property, beyond the life of its first holders, within a certain circle, which, already in Scaevola, makes these otherwise insufficient prohibitions to alienate inter vivos into fideicommissa: texts supra in n. 52.

nuda praecepta, any such prohibition that could not be constructed as a fideicommissum, due to the lack of an identifiable circle of fideicommissarii.

There is no reason to exclude tomb prohibitions from all this. Often formulated in the exact same terms of these fideicommissa familiae relicta, it must have been possible to enforce them as such, as far as the possible locus purus and the sumptuary additions to the sepulchrum itself are concerned (supra ad nn. 90-92). And this, thanks to the advantages of fideicommissa discussed supra sub a-c, perpetually, generation after generation for as long as there remains someone entitled to the fideicommissum within the family.

This was a way of making enforceable under Roman law the inalienability of tomb gardens: the prohibition could be understood as a fideicommissum, that forced whoever happened to own the gardens to leave them within the family. Mommsen interpreted and reconstructed like this ll. 87-97 of the famous testamentum Dasumii (CIL vi 10229 = FIRA iii 48), dated 108 CE, where 'for the purpose of cultivating my memory', Dasumius imposes on his heirs a fideicommissum over his burial park and the adjacent land in favour of his freedmen, so that all this does not leave their nomen: they may not sell it, mortgage or alienate it, so that it devolves onto their descendance when the last of them dies.[112] Also the funerary inscription of Iunia Libertas, usually dated to the early 2nd cent. CE, seems an attempt to establish a perpetuity, in favour of Libertas' freedmen and their descendance,[113] regarding certain horti, aedificii and tabernae (not necessarily adjacent to the tomb, but destined to sustain the funerary cult): although this was done in terms that appear to us quite problematic from a strictly

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[112] Cf. also Amelotti 1966, 17-19. Mommsen's version of ll. 87-97: [Memoriae | meae colendae caus]a intra biennium quam mo[rtuus ero, quisquis mihi heres heredesve erit eruntve, | eorum fidei com]mitto, uti praedium, in quo[d per eos, quorum curae mandavi ut secundum | verba testamenti hui]us reli[quias] meas cond[erent ... | ... reliquae] meae inlatae fuerint, cui[cumque sive antea sive testamento hoc libertatem | dedi sive codicillis ded]ero, prae[t]erquam Hymno pess[ime de me merito, ... | ... iis cum adiacen]tibus silvis instructum ma[ncipio dent ita, ut ne de nomine eorum exeat, neve ... | ... vendant, pig]nore dent, cedant, condonen[t; eius autem qui ex his decesserit portionem | reliquis volo adcrescere, done]c in rerum natura esset un[us eorum. Quodsi liberti libertaeque in rerum ... | ... natura omnes esse de]sierin[t, t]unc ad libertorum [meorum posteros, donec in rerum natura sit | unus eorum, idem volo perti]nere; quod si esse desierit, [ultimus eorum ...]. In Mommsen's edition, the conjecture 'ad libertorum [meorum posteros]' in l. 96 points to a perpetuity; the final 'quod si esse desierint' would then refer to the full extinction of the freedmen's descendance. For Arangio-Ruiz (FIRA III 48, p. 139 n. 3) a devolution of the property onto the posteri was unconceivable, once these had been deprived of it for as long as the last of the freedmen was alive: on the basis of the Iunia Libertas inscription (Calza 1939), ll. 5-7 (dedit concessit libertis libertabusque suis quive ab [is] | posterisve eorum manumissi manumissaeve sun(t) | eruntve), Arangio-Ruiz proposed 'ad libertorum [meorum libertos]'. The integration is unlikely, already because precisely in this point the Iunia Libertas inscription is anomalous and unparalleled. Leaving this (questionable) alternative aside, the fragility of Mommsen's reconstruction became evident when a new fragment completely obliterated his conjectures for the first nineteen lines: Eck 1978. Cf. now Tate 2005: 166-171.

[113] Calza 1939. Cf. in particular ll. 20-21: ad lib(ertos) libertasq(ue) meos primo loco ius pertineat, post | eos ad posteros eor(um). These two final lines appear in the epigraph as an addition (de Visscher 1963: 243) intent on clarifying that the posteri must be understood as among the beneficiaries, and not merely as manumissores of the beneficiaries, as it would appear from the previous dedit concessit libertis libertabusque suis quive ab [is] | posterisque eorum manumissi sun(t) | eruntve (ll. 5-7) Only 'si nemo ex familia superaverit' would the property devolve to the respublica Ostiensium: ll. 10-14.

legal point of view,[114] the posteri could have hardly been conceived as anything else but fideicommissarii.[115] The evidence of the intention to establish such memorials with gardens and other additions as permanent is too abundant to be reviewed here.[116] Unsurprisingly in a context that tends to show little interest in legal precision, the explicit recourse to the language of the fideicommissa is rare, even if not unattested: in CIL VI 10243, for instance, we find "amici et colliberti fidei vestrae committo ne quis vendat aut alienet".[117] Traces of the association between fideicommissum familiae and garden tomb perpetuities arise occasionally even when the mechanism foreseen to enforce the latter is a penalty: in the 3rd cent. CE CIL VI 10284 = ILS 7947 = FIRA III 82 c, for instance, a penalty is established in case of forbidden alienation or burial, to be claimed through a querella before the pontifices; the restriction to the familia[118] of the legitimation for the querella, that Mommsen found peculiar,[119] seems influenced by the mechanics of the fideicommissum familiae.

As far as the potentially perpetual character of the fideicommissum familiae goes, though, everything came to an end with Hadrian. The very basis of the whole structure, the possibility to establish fideicommissa in favour of postumi and incertae personae, was excluded by a Senatusconsultum promoted by the Emperor, by which fideicommissa were also in this respect equated to legata. Our main source is Gai. 2.287:

> Item olim incertae personae vel postumo alieno per fideicommissum relinqui poterat, quamvis neque heres institui neque legari ei possit. sed senatus

[114] On the numerous legal difficulties posed by this inscription, and, in particular, on the oscillation between the usufruct declaredly bestowed on the famlia libertorum and the ownership foreseen for the respublica Ostiensium, cf. de Visscher 1963: Blanch Nougués 2007b, with lit., and, among the later lit.: Bianchi 2013, Kremer 2013; Di Nisio 2014: 253-255.

[115] The mechanism of the ius adcrescendi in the usufruct, proposed by De Visscher 1963: 247-249, is inept regarding the posteri and manumissi, if these are not conceived as fideicommissarii, as was undoubtedly the case of the respublica Ostiensium. In this sense, the text may illustrate how the possibilities opened by the fideicommissum familiae relictum were taken for granted in a practice that often lacked any jurisprudential guide, even without the awareness of the proper terms necessary to establish one such fideicommissum, and of the differences between the effects of this and other legal devices, like the usufruct.

[116] Cf., to mention just examples where the tomb gardens are wished as perpetually inalienable, CIL. VI 9485 = ILS 7296, and CIL II 4332 = ILS 8271. In the former, a penalty of 50.000 sesterces is established in favour of a collegium iumentariorum, but the latter lacks any such provision, and would therefore not be enforceable if not as fideicommissum. Cf. also, even if formalised as a donation with stipulatio, the famous inscription of T. Flavius Syntrophus in CIL VI 10239 = FIRA III 94, and, in particular, ll. 16-17: quive ex vobis novissimus morietur eodem modo testamento suo [caveat, ut horti s(upra) s(cripti) per eos qui s(supra) s(scripti) s(unt), quive] ex iis prognati erint, aequaliter in familiam nominis mei permanea[nt, eodemque semper iure sint]: on the legal difficulties in this case, cf. Bruck (1954) 75-78, with lit.

[117] Sceptical, Kaser (1978) 47 and n. 143, 87 and n. 324, who sees in this case merely an exception, and in the general absence of testamentary language in tomb isncriptions the expression of a fundamental independence from testament and fideicommissum, rather than a simple lack of concern with legal precision in general.

[118] On the use of the term familia in an inscription like this, otherwise referred to a funerary association, the sodalicium Pelagiorum, cf. de Rossi (1877) 709-710.

[119] Mommsen (1877) vii n. 1.

consulto, quod auctore divo Hadriano factum est, idem in fideicommissis quod in legatis hereditatibusque constitutum est.[120]

The impact of Hadrian's senatusconsultum on fideicommissum familiae as a means to institute perpetuities is so obvious that the senatusconsultum itself has been often understood in the literature as aiming at these. Unfortunately, our sources on the measure are rather poor: both for fideicommissa as for legata, the rule excluding postumi and incertae personae was abolished by Justinian,[121] and has therefore left little trace in the Digest. The Gnomon, instead, offers a good illustration of its consequences for a specific case, in §16:

Ὅσα ἀπελευθέροις Ῥωμαί[[οις]]ων διατάσσεται ἐπὶ τῷ καὶ εἰς ἐγγόνους αὐτῶν ἐλθεῖν, ἐὰν ἀποδειχθῇ τὰ ἔγγονα μηδέπω γε[γο]νότα ὅτε διάταξις ἐγράφετο, ἐγλιπόντων τῶν λαβόντων ἀνα[λ]αμβάνεται.

The hypothesis is here that of a bequest in favour of freedmen, upon the condition that it shall pass also to their descendants.[122] The rule holds whether the initial bequest is understood as a legatum or a fideicommissum, but the descendants are clearly to be seen as fideicommissarii: the terms used by the Gnomon, διατάσσεται ἐπὶ τῷ, rendered in Latin by Lenel and Partsch as 'ea condicione relinquitur, ut', should in fact not be understood as referred to a condition proper (which would not give rise to a fideicommissum), but rather as analogous to expressions like 'dedit ut', 'dedit ita ut' vel sim.: prima facie modal expressions, but well attested in the legal sources to describe fideicommissa.[123]

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[120] 'Again, in former times, property could be left via trust to an uncertain person, or to a posthumous stranger, although he could neither be appointed heir nor legatee; but, by a Decree of the Senate, enacted at the instance of the Divine Hadrian, the same rule which applied to legacies and inheritance was adopted with reference to trusts.' [tr. Scott]. On the text and the senatusconsultum, cf. Impallomeni (1967), and now González Roldán (2014) 127-130, with lit. The text The rule was extended to soldiers via rescript already by Hadrian: I. 2.20.25.

[121] I. 2.20.25-27, with Iust. C. 6.48.1. This liberalisation was later balanced by a restriction introduced in Nov. 159 (555 CE): prohibitions to alienate could not be enforced against the fourth generation - which is here not that of the trustees, but that of the fiduciaries. In the case addressed in the Novella, the great-grandson (3rd gen.) makes testament in favor of his mother and wife, hence outside of the nomen familiae, and the surviving son of the decuius claims the fideicommissum against them, who are the 4th generation heirs. That the limitation had nothing to do with postumi and incertae personae is obvious also from the fact that the claimant was the son of the decuius: not a postumous son, and certainly not an persona incerta. The fact that the trust cannot be claimed against the fourth generation means in practice that the third generation is already not bound by it when disposing mortis causa.

[122] The rule concerns Roman freedmen (on this, infra in text): in a fideicommissum familiae typically those of the deceased, hence a Roman as well, whose will would fall under Roman law. The terms in which the bequest is described -διατάσσεται ἐπὶ τῷ-, rendered in Latin by Lenel and Partsch as 'ea condicione relinquitur, ut', should not be understood as referred to a condition proper (which would not be interpreted as a fideicommissum), but rather as analogous to expressions like 'dedit ut', 'dedit ita ut' vel sim.: these prima facie modal expressions are attested in Scaevola to describe fideicommissa, as in

[123] Cf. Scaev. 3 resp. D. 31.88.12: Damae et Pamphilo, quos testamento manumiserat, fundum dedit ita, ut post mortem suam filiis suis restituerent. The clause is inequivocally understood by Scaevola as fideicommissum: dumtaxat ex testamento superiore fideicommissum petere posse. This fideicommissary ita ut was likely used also in the actual testamentary practice, cf. Paul. Vat. 69: 'do lego eidem Seiae uxori meae bonorum meorum ... usum fructum .... et ab ea satisdationem exigi veto, ita tamen, ut ab ea filius meus alatur... et studiis liberalibus instituatur'. On the question, Sixto (1991) 68 and n. 13, with lit.

That the text concerns specifically freedmen is unsurprising. Family fideicommissa, in fact, referred frequently to the familia libertorum, as we know from the rich casuistic in the Digest. It may be no coincidence that the immediate §17 refers to the confiscation of property consecrated to the funerary cult, commonly entrusted also to freedmen (supra n. 48): yet a possible piece of evidence for the connection between fideicommissum familiae and tomb perpetuities.

The rule here -if it is proven that the descendants were not yet born when the disposition was written, it is confiscated- certainly derives from the extension to fideicommissa of the exclusion of postumi and incertae personae by Hadrian's senatusconsultum. Problematic in this respect is only the confiscation. Gaius presents the senatusconsultum as an extension of the regime of inheritance and legata regarding testamenti factio. And just as a legatum in favour of a postumus or an incerta persona is simply ineffective (cf. Gai. 2.238, 2.241, inutiliter relinquitur, inutiliter legatur),[124] that is, cannot be claimed, so that the property remains with the heirs, also when no descendant is left who can claim a fideicommissum, the fiduciaries should simply be treated as having recovered full freedom regarding the property. Confiscation could have been introduced by Hadrian in the same senatusconsultum or later as a supplementary measure, treating these fideicommissa as caduca:[125] but in that case one would have expected Gaius to mention it; worse, if it had been so, Gaius' 'idem in fideicommissis quod in legatis hereditatibusque constitutum est' would be simply wrong. There is of course the possibility that the measure was introduced only for fideicommissa in favour of freedmen,[126] but one fails to imagine the reason for such assault against the tradition linking the fideicommissum familiae to the familia libertorum. measure, particularly taking into account the attention traditionally paid to the familia libertorum. More likely seems that the Gnomon, here as elsewhere, somewhat disingenuously misinterprets a Roman rule turning it into grounds for confiscation.[127]

The jurisprudential attention to fideicommissum familiae after Hadrian, especially intense in Scaevola and Papinian, and the fact that the cases they considered seem sometimes clearly intended as perpetuities,[128] has led some to the conjecture that Hadrian's measure did not remain in force for a long time. Ferrini 133 and n. 1. Not one of these sources validates perpetuities, and the lack of explicit denial of effect when no-one who is no postumus is left may be due partly to the fact that in many cases it was irrelevant to the quesiton, partly to Justinian's excissing such considerations.

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[124] Cf. also Ulp. 13 Iul. Pap. D. 34.8.4pr. (Si eo tempore, quo alicui legatum adscribebatur, in rebus humanis non erat, pro non scripto hoc habebitur), even if manifestly referred to those whose death predates that of the testator.

[125] In this sense, Desanti 228.

[126] Uxkull-Gyllenband, 32.

[127] In this sense, Lenel and Partsch (1920) 13: 'Wir haben keine andere Erklärung dafür, als daß sich die Praxis des beutegierigen Fiskus nicht immer streng an die Grenzen des Gesetzes hielt'. Confiscation is, for instance, also immediate for caduca in §27 and §30, whithout regard to the possible capacitas of other heredes or legatarii (cf. Gai. 2.207).

[128] Cf. especially Scaev. 3 resp. D. 31.88.15, supra n. 109.