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WHEN IS A SALE NOT A SALE? THE RIDDLE OF ATHENIAN TERMINOLOGY FOR REAL SECURITY REVISITED

In Athens during the late Classical and Hellenistic periods, it was customary for a man who was borrowing a large sum of money to pledge some property as security for the repayment of his loan. To show that this property was legally encumbered, a flat slab of stone, called a *horos*, was set up, and an inscription, indicating the nature of the lien on the property, was inscribed on the *horos*.[1] These *horoi* served to warn third parties that the man who pledged the property as security was not free to sell it or otherwise alienate it until the loan was repaid.[2] The terminology which is used on these *horoi* to indicate that the property has been pledged as security varies. On a relatively small number of *horoi*, only seven, the property is described as 'lying under (an obligation)' (ὑποκειμένου, -ης, -ων) for a debt, the amount of which may or may not be specified.[3] The texts found on a far greater number of *horoi*, some 128 in all, use a different type of expression.[4] On these *horoi*, the property is said to have been 'sold on condition of release' (πεπραμένου, -ης, -ων, ἐπὶ λύσει).[5] The terminology used on the *horoi* to describe this kind of lien presents a striking contrast with that employed by the Attic orators: in their speeches we find the verbs ὑποκεῖσθαι and ὑποτιθέναι when it is a question of pledging security for a loan, but never πέπρασθαι with the addition of the prepositional phrase ἐπὶ λύσει.[6] In other words, the type of expression which is found on the vast majority of *horoi* does not figure even once in the works of the Attic orators. And the terminology which the orators prefer when talking of this kind of lien on property is hardly used at all on the *horoi*.

[1] For a description of the physical characteristics of the *horoi*, see J. V. A. Fine, *Horoi: Studies in Mortgage, Real Security and Land Tenure in Ancient Athens* (*Hesperia* Supp. 9 [1951]), pp. 44–6. This work will hereafter be cited by the author's name only.

[2] For the purpose of this kind of *horos*, see Fine, pp. 42–3; M. I. Finley, *Studies in Land and Credit in Ancient Athens, 500–200 B.C.* (New Brunswick, 1952), pp. 10–21. Finley's work was reprinted by Rutgers University Press in 1985 with a new introduction by P. Millett which contains the texts of all the *horoi* published since the appearance of Finley's work. All references in this article will be to the 1985 edition which will be cited by the author's name only. Millett's introduction to this edition will be cited as 'Millett in Finley'. When citing the texts of the *horoi*, I will follow the system devised by Finley and followed by Millett (e.g. *horos* no. 34, *horoi* nos. 6, 8, 10).

[3] *Horoi* nos. 1, 2, 2A, 4, 5, 6, 7. The term is restored on *horos* no. 3A. Since *horos* no. 3 does not actually contain the actual term ὑποκειμένης, I have excluded it from this category although Finley placed it under the rubric *hypotheke*. Nor have I included *horoi* nos. 80A and 81A – on these, see the discussion in Section II. The term is also found on a *horos* from Amorgos (*horos* no. 8) and another from Lemnos (*horos* no. 10).

[4] This sum includes all those texts in which the formula is found or reasonably restored. Following the lead of Finley and Millett, I have also included those which omit the phrase ἐπὶ λύσει. There are 92 in Appendix I of Finley, 22 in Appendix III of Finley, and 14 in Millett in Finley. Unlike Millett, I have excluded *horoi* nos. 80A and 81A. For discussion of these, see Section II.

[5] For the translation, see Finley, p. 31.

[6] While it is true that various forms of the verb πέπρασθαι are used to describe transactions involving real security in Dem. 37, they are nowhere in that speech coupled with the phrase ἐπὶ λύσει. For a discussion of the terminology used in this speech, see Section IV.

Although there has been much dispute about the precise nature of the transactions referred to by these two expressions, scholars have by and large assumed that each one denotes a different and distinct form of security transaction, one called *hypotheke*, the other *prasis epi lysei*. Despite their unanimity on this one central issue, they have been unable to agree about how these two forms of security differed from one another. Several theories have been put forward. Some, for instance, have held that *prasis epi lysei* was a 'real sale' ('rein Verkauf') whereas *hypotheke* was not.[7] Others have put forward the view that *hypotheke* represented a collateral form of security and that this set it apart from *prasis epi lysei*, which was substitutive in nature.[8] Neither of these two theories – nor any of the other alternative proposals – has been able to win general acceptance. As a result, the issue still remains unresolved.

A new approach is clearly required. In this article I hope to show that we can arrive at a solution to the problem by questioning the basic assumption that has been shared by all previous treatments of this topic – namely, that the two types of expression encountered on the *horoi* refer to two different forms of security. In my opinion, it has been this assumption which has prevented scholars from arriving at a satisfactory answer to the riddle of Athenian terminology for real security. But the problem is not just one of terminology; it involves important questions about the nature of Athenian law and the evolution of credit and real security during the Archaic and Classical periods.

It would be impossible within the space of this article to review all of the numerous theories about the alleged differences between *hypotheke* and *prasis epi lysei*, much less to undertake detailed criticisms of each of them. Instead, I will begin in Section I by examining the two theories which have been most influential in recent decades, those of J. V. A. Fine and M. I. Finley respectively. In Section II reasons for adopting a new approach will be put forward. Section III will be devoted to an analysis of the terminology used by the Attic orators and in some inscriptions to describe transactions involving hypothecation. The most extensive piece of evidence for the use of this terminology, Demosthenes' speech *Against Pantainetos* (37), will be dealt with in Section IV. In Section V a new solution will be proposed to answer the question of why the terminology found on the *horoi* differs from that used by the Attic orators. The final part, Section VI, will contain some reflections on the 'origins' of real security in Classical Athens.

I

In our examination of recent views we will take those of Fine first. Fine's views about *hypotheke* and *prasis epi lysei* are in part derived from the work of previous scholars, in part his own original contribution. He does not restrict himself to the narrow question of the differences between the two forms of security, but elaborates an ambitious theory about the evolution of credit in ancient Athens. Though several general objections can be brought against his overall theory, I think it is more fair to

[7] The main proponent of this view was E. Günter, *Die Sicherungsübereignung im griechischem Recht* (diss. Königsberg, 1914), pp. 16–25 (see p. 17 n. 3 and p. 18 n. 1 for references to earlier views on the subject).

[8] This view was fully presented by D. P. Pappulias, *Real Security in Greek and Roman Law* (in modern Greek) (Leipzig, 1909), Part I. Pappulias' view was thoroughly criticized by L. Raape, *Der Verfall des griechischen Pfandes* (Halle, 1912), pp. 1–48 and by A. Manigk, *Phil. Woch.* 34 (1914), 205–13.

examine his argument in detail and to see whether or not the evidence he cites can be used to support his theory.[9]

Building on the traditional assumption that in *hypotheke* 'the debtor retained possession and ownership of the security', Fine argued (p. 94) that 'he was able to borrow further on the ὅσῳ πλείονος ἄξιον'.[10] The only text he cites to support this contention is [Dem.] 53.10 where the speaker Apollodorus relates how Nicostratus had borrowed money from Arethusius on the security of his farm. When Nicostratus wished to contract an additional loan on the same security or to sell it to obtain more cash, no one could be found to buy it or accept it as security for a loan (οὐδεὶς ἐθέλοι οὔτε πρίασθαι οὔτε θέσθαι) since Arethusius would not permit it. If anything, this passage would appear to indicate that the debtor did not have a right to contract additional loans on a property once it had already been pledged as security and that the debtor's ability to do so depended entirely on the consent of the creditor, not on any right implicit in this type of security. Nevertheless, Fine pressed on with his argument and claimed that 'the very fact that the debtor was allowed to give a second mortgage on the ὅσῳ πλείονος ἄξιον implies that the rights of the original mortgagee over the security extended only to the amount of the loan. The natural inference, then, is that if there were no secondary creditors, the "excess" still belonged to the debtor – i.e. had to be restored to the debtor.' This inference rests on the dubious assumption that the rights of the debtor *vis-à-vis* the creditor can be inferred from what is known about the rights of one creditor *vis-à-vis* other creditors. But the relationship between the debtor and his creditor and that between one creditor and another are of a completely different order, and it is unjustifiable to use the information we have about one relationship to fill in the gaps in our knowledge about the other relationship.

Fine then adds an argument from an analogy with dotal *apotimema*. Since 'under that contract the "excess" was returned to the debtor', and 'the apotimema was very similar to the hypothec, it is logical to assume that the same procedure was followed in the case of the latter institution'. Unfortunately, Fine's view of dotal *apotimema* (pp. 139–40) is derived from a strained interpretation of Dem. 31.6. His explication of this passage needs to be quoted in full:

> Demosthenes, it will be remembered, had been hindered in collecting from his guardian Aphobos the damages awarded by the court, because Onetor claimed that the land had been assigned to him as apotimema to guarantee the restitution of his sister's dowry, which amounted to one talent. Demosthenes indignantly says to the court: Σκέψασθε τοίνυν τὴν ἀναίδειαν, ὃς γ' ὑμῖν ἐτόλμησεν εἰπεῖν, ὡς οὐκ ἀποστερεῖ μ' ὅσῳ πλείονος ἄξιόν ἐστι ταλάντου, καὶ ταῦτ' αὐτὸς τιμήσας οὐκ ἄξιον εἶναι πλείονος. Demosthenes' anger, of course, is caused by his insistence that in reality the land had not been given as apotimema and that it was not worth

[9] Millett in Finley, p. xiii delivers some telling criticisms of Fine's theory but does not refute it in detail. Cf. L. Gernet, 'Horoi', in *Studi in onore di Ugo Enrico Paoli* (Florence, 1955), pp. 345–53 ('Il semble vraiment difficile d'accepter une interprétation aussi compliquée, aussi conjecturale, qui postule un concept de la vente singulièrement affiné, et qui utilise d'un bout à l'autre une notion aussi suspecte, pour une époque très ancienne, que celle de fiction juridique.'). In my review of recent opinions I have not treated the views of L. R. F. Germain, 'Les *horoi:* exposé de la méthode littérale et des résultats obtenus', *Symposium* 1971 (Vienna, 1975), pp. 333–46 and *La publicité des sûretés foncières dans la Grèce classique et hellénistique* (diss. Paris, 1968). These are well criticized by Millett in Finley, pp. xix–xxi.

[10] The view that in *hypotheke* the debtor retained both possession and ownership goes back to H. F. Hitzig, *Das griechische Pfandrecht* (Munich, 1895), p. 1 and was endorsed by L. Beauchet, *Histoire du droit privée de la République athénienne* (Paris, 1897, II, pp. 176–80; J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905–15), pp. 690–2; A. R. W. Harrison, *The Law of Athens: Law of Property* (Oxford, 1968), p. 258.

more than a talent. It is clear from this sentence, then, that, if the land serving as apotimema had been worth over a talent, Demosthenes would have been entitled to its value beyond that sum. Since Demosthenes here can be equated with the dotal debtor (for by court decision he was authorized to seize Aphobos' property), this passage can only mean that the value of the apotimema over the amount of the dowry was to be restored to the dotal debtor.

This analysis is correct in all respects save one: it misrepresents Demosthenes' position in the matter. As Fine himself observes, Demosthenes had a claim on the property of Aphobus as the result of a legal decision and the subsequent failure of Aphobus to pay the damages awarded to him by the court. He and Onetor were thus both creditors and had rival claims to the property of Aphobus. But it is Aphobus who is the dotal debtor in his relationship with Onetor – nothing in the speech suggests that by virtue of his claim to Aphobus' property Demosthenes 'could be equated with the dotal debtor'. After all, it was Aphobus who had married Onetor's sister, not Demosthenes.

We should also note that in dotal *apotimema* there could be no 'excess'. When the dowry was agreed upon by the suitor and the *kyrios* of the woman to be married, the suitor marked off a portion of his property, the value of which was assessed (ἐτιμᾶτο) by the parties to be equivalent to the value of the dowry.[11] This is what Onetor appears to have done (Dem. 31.5). Once this assessment was made, it could not later be challenged in court.[12] In the event of divorce, therefore, the husband had to turn over the entire security since it had been evaluated as exactly equivalent to the dowry. If the security was in fact worth more than its assessed value, there was nothing the ex-husband could do about it – he had agreed to the original assessment, and the law required him to stand by it. After the assessment had been agreed upon, the price which the assessed property might fetch on the market was strictly irrelevant. If there turned out to be any difference between the assessed value of the security and the amount for which it was subsequently sold, the ex-husband had no right to any 'excess'. And if there was a shortage, the woman's *kyrios* did not have the right to demand that the ex-husband make up the difference. Thus, Fine's view of dotal *apotimema* rests not only on a questionable interpretation of Dem. 31.6, but also on a misunderstanding of the very nature of the institution. Since there is no reason to believe that in dotal *apotimema* the husband had a right to the 'excess', Fine cannot use an analogy with this institution to prove that *hypotheke* gave the debtor a right to the 'excess'.

There are also problems with Fine's conception of *prasis epi lysei*. Fine holds (p. 143) that in this form of security 'since the debtor immediately lost title to the ownership of the security, he could not contract a second mortgage on it'. (Cf. Fine, pp. 93–4, 155.) This would lead us to expect to discover multiple creditors listed on *horoi* set up to indicate the presence of a *hypotheke*, not on those advertising the existence of a *prasis epi lysei*. Multiple creditors do appear on several *horoi*, but never on stones which employ the terminology of *hypotheke*, only on those which use the language of *prasis epi lysei*.[13] Fine's way around this objection (p. 154) was to claim that when several different debts are listed on a single *horos*, they must be 'constituent

[11] Cf. Harpocration s.v. ἀποτιμηταί καὶ ἀποτίμημα καὶ ἀποτιμᾶν: εἰώθεσαν δὲ καὶ οἱ τότε, εἰ γυναικὶ γαμουμένῃ προῖκα διδοῖεν οἱ προσήκοντες, αἰτεῖν παρὰ τοῦ ἀνδρὸς ὥσπερ ἐνέχυρόν τι τῆς προικὸς ἄξιον, οἷον οἰκίαν ἢ χωρίον.

[12] See Dem. 41.7 with Finley, p. 53 and p. 245 n. 61. Finley's account of dotal *apotimema* is superior to that of Fine.

[13] *Horoi* nos. 11, 13, 19, 22, 32, 35, 41, 46, 97, 72A, 73A, 95A. This was pointed out by Millett in Finley, p. xiii.

parts of the same loan'. The evidence of another inscription, however, cannot be explained away in this fashion. This inscription records the sale of a house owned by Theosebes, the son of Theophilus.[14] Despite his pious name, Theosebes had been accused of impiety and had fled Attica before his case came to trial. He was condemned *in absentia*, and his property confiscated and sold by the *poletai* in the year 367/6. But before his property was sold, several creditors came forward with claims against Theosebes' property. The first one was made by Smicythus of Teithras to whom the house had been pledged as security (ὑπόκειται) for a loan of 150 drachmas (lines 14–15). The second lien was held by Kichonides, the son of Diogeiton, from Gargettos, and the *koinon* of the Medontidai *phrateres* to whom the house had been 'sold on condition of release' (ἀποδομένο [line 23]) by Theosebes' father Theophilus for a loan of 100 drachmas (lines 17–25).[15] The third was held by Aeschines of Melite and a *koinon* of *orgeones* who had also 'bought the house on condition of release' (πριαμένων ... ἡμῶν [lines 33–4]) from Theophilus for a loan of 24 drachmas (lines 30–5). Fine (p. 151) tries to parry the threat posed by this inscription to his theory by adopting the suggestion of M. Crosby, who published it, that the *koinon* of the *orgeones* must have belonged to the phratry of the Medontidai.[16] Finley called this assumption 'gratuitous'.[17] Not only is it gratuitous; it is also impossible. We know that *phrateres* were not subdivided into groups of *orgeones*, but into *thiasoi*.[18] The *orgeones* and the *phrateres* listed in this inscription must, therefore, have formed two separate associations which made two separate loans to Theophilus, each one secured by means of a *prasis epi lysei*. The evidence of this inscription provides an unassailable refutation of Fine's view of *prasis epi lysei*.[19]

On such a foundation Fine erected a theory about the evolution of real security in ancient Athens. Proceeding from the observation that in 'the early stages of any legal system the regulations or laws concerning loans favor the creditor rather than the debtor', Fine concluded (pp. 90–1) that *prasis epi lysei* must have been the earlier institution, since according to this view it favored the creditor, and have antedated *hypotheke*, which was more advantageous to the debtor. Fine placed the origin of *hypotheke* in the fourth century B.C. and attributed its rise to two factors, first, the increasing complexity of economic life and, second, the evolution of Athenian legal ideas. 'As Athenian legal ideas matured and as the distinction between ownership and possession became better defined, objections must have arisen – at least among the debtor class – against the πράσις ἐπὶ λύσει, because in that transaction ownership of the security, with or without actual possession, was transferred to the creditor'.[20] But the evidence we have does not support such a sequence of development. If anything, it suggests that *hypotheke* came first, since the terminology associated with that form of security is found as early as 378/77, while the earliest dated *horoi* using the

[14] The inscription was published by M. Crosby in *Hesperia* 10 (1941), 14, no. 1.

[15] The phrase ἐπὶ λύσει is omitted in the text of the inscription, but for the sake of argument I have followed previous scholars who have interpreted the claim as arising from a *prasis epi lysei*.

[16] Crosby, art cit. (n. 14), p. 22.

[17] Finley, 'Multiple Charges on Real Property in Athenian Law: New Evidence from an Agora Inscription' in *Studi in onore di Vincenzo Arangio-Ruiz* (Naples, 1953), p. 491 n. 45.

[18] See W. S. Ferguson, 'The Attic Orgeones', *HThR* 37 (1944), 70 (for his criticism of Crosby's suggestion, see p. 83).

[19] For further criticisms of Fine's interpretation of this inscription, see Finley loc. cit. (n. 17).

[20] Fine, p. 93. Fine did not offer any evidence to back up these assertions, both of which are questionable.

language of *prasis epi lysei* come from the archonship of Praxibulus (315/14).[21] However, this did not deter Fine, who asserted (p. 62, cf. p. 92) that 'it is certainly hazardous to claim without question as a hypothec every contract referred to by the verbs ὑποτιθέναι or ὑποκεῖσθαι. The possibility must not be excluded that these verbs might have had merely a general meaning, signifying any type of contract in which real security was involved.' Yet if this were so, how can Fine determine when these verbs refer to *hypotheke* and when they do not? Any criterion for determining how these verbs are used, in a general sense ('any type of contract in which real security was used') or in the specific sense, must be established on the basis of the information found in the orators; however, Fine tells us that their use of terminology is unreliable as a guide. Yet without the assistance of this evidence, how are we to formulate a definition of *hypotheke* in the first place? In short, Fine's attempt to explain away troublesome evidence creates more problems than it solves. It is clear that our sources present insurmountable obstacles to his theory, obstacles which cannot be removed by special pleading nor by forced interpretations of the evidence.[22]

We can now turn to Finley's views. Following the lead of A. Manigk, Finley holds that real security in Classical and Hellenistic Athens was substitutive in nature.[23] Despite his disagreement with Fine over this issue, Finley is in accord with him on one point of cardinal importance, namely, that the Athenians had two different forms of security. When it came to identifying the differences between *hypotheke* and *prasis epi lysei*, however, Finley is at something of a loss. In his analysis of Dem. 37, which he thought contained an account of a series of transactions involving *prasis epi lysei*, Finley (pp. 33–4) states:

> Essentially, then, the speech deals with a series of manoeuvers and deals in the field of security, not genuine sale. Though conveyance of the property occurs and recurs over his head, Pantainetos remains in continuous possession and control so long as he meets the interest payments and the mysterious unidentified terms of the agreement. When he defaults, the creditors take the security as forfeit; this they would have done whether the transaction was called *prasis epi lysei* or *hypotheke* or *apotimema*.

These considerations lead Finley to conclude (p. 35) that '*prasis epi lysei* was not a genuine, complete sale' and that 'its outward form, then, is sale, the essence hypothecation'. That does not get us very far. We are told that *hypotheke* and *prasis epi lysei* are both types of hypothecation, differing in form; but how did these differences in form affect the creditor and the borrower? Were these differences in form accompanied by differences in substance, or do we just have two dissimilar names for one and the same procedure? And, if *prasis epi lysei* was in essence hypothecation, why did the Athenians call it sale? To these questions Finley offers no answers.

On the basis of the fact that 'five out of the ten stones marking *hypotheke* obligations mention a contract, but only 8 out of 102 in the *prasis epi lysei* group refer

[21] The verb is used to describe hypothecation in *IG* ii² 43, line 40 (378/7) and is used by Isocrates (21.2) when describing how a certain Nicias hypothecated his house during the reign of the Thirty. Herodotus (2.136) also uses the verb ὑποτιθέναι when describing the Egyptian practice of pledging the corpse of one's father as security for a loan. On the other hand, the earliest dated *horoi* which use the language of *prasis epi lysei* come from the archonship of Praxibulus (315/14): *horoi* nos. 11, 14, 27, 76, 85. Kirchner (*IG* ii² 2724) restored the name of the archon in *horos* no. 13 as Apollodorus (319/18). S. Dow and A. H. Travis, 'Demetrios of Phaleron and his Lawgiving', *Hesperia* 12 (1943), 162–3, proposed Nicodorus.

[22] Although Fine's own theory is not convincing, his work does contain valuable criticisms of the views of Paoli and Meletopoulos.

[23] A. Manigk, 'Hyperocha', *RE* 9 (1916), cols. 292–321.

to such an instrument',[24] Finley (p. 24) tentatively suggests that 'the *hypotheke* was somehow more flexible than the *prasis epi lysei* and lent itself more readily to special terms and conditions, hence the more frequent need to commit the agreement to writing'. Finley appears to assume that when an inscription on a *horos* records the existence of a loan made on real security, but does not mention any συνθῆκαι, no συνθῆκαι existed.[25] That is a risky assumption: the *horoi* often omit much information, such as the name of the creditor or the amount of the loan.[26] Would Finley have asserted that the absence of the name of the creditor from a *horos* must be explained by the fact that the creditor had no name? And what was it about *hypotheke* that made it more flexible than *prasis epi lysei*? Nor does Finley account for the discrepancy between the orators, who almost invariably use the terminology associated with *hypotheke* , and the *horoi*, which employ the vocabulary of *prasis epi lysei* in all but a handful of cases.[27]

Although he does not speculate about the introduction of *hypotheke* as Fine does, Finley (p. 35) does hazard a guess about the origin of *prasis epi lysei*:

> The reasons for the creation of such a mixed institution (...) will be found historically in the rise of security transactions in the period where free alienability of landed property was difficult and socially as well as legally restricted, juristically in the problems of execution after default and in the need for a device that would strengthen the creditor's right to evict the debtor and that would protect the new owner's claim to the property.

Finley's argument rests in part on the assumption that at some time before the fourth century B.C. 'the free alienability of landed property... was legally restricted'. There is certainly no evidence for the existence of such legislation in Athens during the

[24] Finley's observation was based on the *horoi* known to him at the time. The discovery of new *horoi* has not affected it. See Millett in Finley, p. xiii.

[25] Finley's translation of συνθῆκαι as 'written contract' is strictly speaking incorrect. The word refers only to a document which recorded the terms of an agreement and could be used to prove the eixstence of an agreement. For an analysis of the term, see P. Kussmaul, *Synthekai: Beiträge zur Geschichte des attischen Obligationenrecht* (diss. Basel, 1969), 15–20.

[26] E.g. *horoi* nos. 1, 23, 45, 51, 52, 61, 62, 72, 75, 78.

[27] Although he was aware of the problem, Finley (pp. 30–1) did not offer a solution to it. Millett in Finley, p. xiv, tries to explain 'the puzzling divergence between the *horoi* and the Orators on the phraseology of security obligations' with a theory about the use, or rather misuse, of terminology for hypothecation. He begins by citing Finley's observation (p. 8) about the lack of precision in Athenian legal terminology, then goes on to claim that the 'Orators were not primarily concerned with the technical accuracy of their language; instead they were intent on giving a plausible (though possibly misleading) argument'. Finley's observation is sound, but it is irrelevant to Millett's point here. Finley was talking about lack of precision in Athenian legal terminology which did not possess an elaborate set of subtle distinctions. Millett wishes to make a point about lack of accuracy, a very different matter (one can be imprecise without being inaccurate).

Millett continues by asserting that the desire of the orators to produce a persuasive argument 'would naturally lead them to avoid the ambiguous terminology of *prasis epi lysei* with its implications of sale rather than security in favour of the more straightforward vocabulary of hypothecation'. This is implausible – if the orators 'were intent on giving a plausible and persuasive (though possibly misleading) argument', one would expect them to have opted for 'the ambiguous terminology of *prasis epi lysei*' with its greater potential for obfuscation in preference to 'the more straightforward vocabulary of hypothecation'. Millett next turns to consider the *horoi* and states that there is 'no reason to expect the *horos* inscriptions to reflect with any great precision the nature of the transactions that lay behind them'. Drawing attention to the fact that 'the prime function of the *horoi* was to warn third parties that the property was somehow encumbered', Millett came to the rather startling conclusion that it 'mattered little whether the stone said *hypotheke*, *prasis epi lysei*, or even *apotimema*'. This is not plausible either. As Finley (p. 19) correctly states, 'Whatever information the stones did give had to be accurate and up-to-date if the function of public notice were to be properly served.'

Archaic and Classical periods. Nor can one maintain that there must have been rules restricting alienability in Athens at this time by arguing that elsewhere in Greece land was inalienable for, as Finley himself has accurately noted, the few pieces of evidence we do have for these periods all 'presuppose alienability'.[28] Besides, Finley does not say how *prasis epi lysei* would have helped the creditor to overcome these hypothetical restrictions placed on the alienation of property. And finally his explanation of the origin of *prasis epi lysei* still does not answer the question of how this form of security differed from *hypotheke*.

Our examination of the respective views of Fine and Finley has revealed shortcomings in each one. Fine's theory is the more ambitious of the two, but it encounters serious difficulties and relies excessively on questionable interpretations of key texts. Finley is far more cautious in his treatment of the evidence. Yet, cautious as he is, Finley is unable to discern any concrete differences between *prasis epi lysei* and *hypotheke* and can do no better than to offer some vague speculation about how *hypotheke* 'was somehow more flexible'. Their disagreements notwithstanding, both scholars nevertheless believe that a solution to the problem can be sought by going back to the origins of real security in Athens and that *prasis epi lysei* must have been the earlier institution. The question of the 'origins' of real security in ancient Athens is an interesting one, but our discussion of it must be postponed. What we need to do first is to understand what the Athenians meant by the terms which they used to express security transactions. Only after we have analyzed how the institution functioned in Classical Athens, will we be in a position to investigate the factors which led to its rise.

II

The problem posed by Athenian terminology for real security clearly requires a fresh approach. In my opinion, we should begin by discarding the traditional assumption that we are dealing with two different forms of security and consider the possibility that what we have is essentially one form of security which is referred to by two or more kinds of expressions. Such an approach is far from arbitrary. Indeed, it is one which is suggested by the very nature of the evidence we have at our disposal for, as we have just seen, neither Fine nor Finley has been successful in his attempts to pinpoint any essential differences between the kinds of transactions referred to by the two types of expressions we encounter on the *horoi*.

There are other considerations which favour such an approach. As Finley (p. 8) has justly stated, the Athenians 'lacked the juristic formalism and dogmatism, and the professional jurists necessary to define and preserve the subtle lines of distinction and classification, the *elegantia iuris*, characteristic of Roman and modern law'. This absence of subtle legal distinctions can best be illustrated by contrasting Athenian terminology and practice in regard to real security with that of Roman law.[29] In Roman law there were essentially two types of real security, *fiducia cum creditore* and *pignus*. In the former, the creditor gained ownership of the security; in the latter, the

[28] 'The Alienability of Land in Ancient Greece', *Eirene* 7 (1968), 25–32. Cf. 'Homer and Mycenae: Property and Tenure', *Historia* 6 (1957), 133–59 where it is maintained that in the Homeric poems the property regime is 'one of private ownership' and that there was 'free, untrammelled right to dispose of all movable wealth'. By pointing out that land was regularly transferred by inheritance, Finley implies that this also held true for immovable wealth.

[29] The following summary of Roman practices in regard to real security derives from F. Schulz, *Classical Roman Law* (Oxford, 1951), pp. 406–10. This work will hereafter be cited by the author's name only.

debtor retained ownership. *Pignus* could take either one of two forms. The first was the earlier form of *pignus* and was referred to by that term.[30] It granted possession, but not ownership, to the creditor. In the second form, known as *hypotheca*, the creditor gained neither ownership nor possession. We know that the Athenians were also familiar with the type of arrangement whereby the creditor took possession of the security (e.g. [Dem.] 49.51-2) and that whereby the debtor remained in possession (e.g. [Dem.] 56.3). When it came to terminology, however, the Athenians made no distinction between the two transactions. In both the same verb, ὑποτιθέναι, is used to describe the act of pledging the security ([Dem.] 49.12,53)[31] and the pledged object is referred to as τὸ ἐνέχυρον ([Dem.] 49.52; 56.3). In the same fashion, the verb employed to indicate that an object has been pledged as security is the same in both arrangements (Dem. 27.9: ὑποκειμένους (creditor in possession); [Dem.] 49.11: ὑπέκειτο (debtor in possession)). Our example clearly illustrates that the Athenians did not develop a specialized legal vocabulary to distinguish between these two kinds of arrangements. On the contrary, they lumped together what the Romans regarded as different forms of security and described them both with one rough and ready set of terms.

Conversely, we find the Athenians were also in the habit of using more than one type of expression to refer to a certain procedure. For instance, in the inscription recording the sale of Theosebes' house by the *poletai* which we discussed above, two different terms (ἀμφισβητεῖ, ἐνεπεσκήψαντο) are used to express the act of bringing a claim.[32] A recently published *horos* would appear to indicate that this was also true in the case of expressions for real security. On this *horos* there are two inscriptions (*horoi* no. 80A and 81A), the text of each being almost identical with that of the other. In both of these inscriptions we do not find ὑποκειμένης *tout court*, nor πεπραμένης ἐπὶ λύσει, but something of a hybrid: ὑποκειμένης ἐπὶ λύσει. Now we have two choices: we must either arbitrarily force these texts into the category of *hypotheke* or that of *prasis epi lysei*, or invent a third category (call it *hypotheke epi lysei*) to accommodate this recalcitrant inscription. If we adopt the first alternative, we are then compelled to admit that the Athenians could refer to one type of security with two different expressions. But once we admit this, what prevents us from ruling out the possibility that the Athenians could use three different expressions to refer to the same kind of transaction? If the expressions ὑποκειμένης ἐπὶ λύσει and πεπραμένης ἐπὶ λύσει can refer to the same form of security, why cannot ὑποκειμένης also? On the other hand, we could strictly apply the principle which dictates that for each type of expression there must exist a different form of security. Rigorous adherence to this principle would compel us to create a third form of security to stand alongside the other two. At this point I think it is better to reach for Ockham's razor and to countenance the possibility that we have not three forms of security, each referred to by one type of expression, but rather one basic form of security referred to by several kinds of expressions.

The reason why modern scholars have readily assumed that the Athenians had two or more forms of real security is not hard to discern: observing that the Romans distinguished between various forms of security, they were led to infer that the

[30] This is an example of 'semantic marking'. For a discussion of this phenomenon, see J. Lyons, *Semantics* I (Cambridge, 1977), pp. 307–8.

[31] In this case it is clear that the debtor Timotheus remained in possession. See Fine, pp. 67–9.

[32] The use of these two different terms cannot be explained on the assumption that one arose from a security obligation whereas the other did not. See Finley, art. cit. (n. 17), p. 474 n. 4.

Athenians must have done likewise.[33] Such an inference is incorrect for in this case the analogy with Roman law is misleading.[34] The Romans were able to differentiate between various forms of security because they possessed formal procedures for the transfer of property (*mancipatio* and *cessio in iure*) and because their laws recognized a sharp distinction between *dominium* and *possessio*.[35] This allowed them to distinguish between *fiducia cum creditore*, in which the borrower transferred ownership of the security to the creditor by means of *mancipatio*, and *pignus*, where there was no conveyance. In *fiducia cum creditore* the creditor gained *dominium* and was entitled to protect his right to the security by *vindicatio* and *actiones in rem* whereas in *pignus* he only gained *possessio* and had to protect his right by means of a possessory interdict.[36] The Athenians, of course, knew nothing of such formal procedures for the transfer of property. For them the principle of the cash sale prevailed.[37] In the absence of anything resembling the *mancipatio* they considered that ownership was transferred once the price was paid. Thus in transactions of sale the Athenians had a simple means of determining when, and if, ownership was transferred. But without any formal procedures for conveyance, the Athenians had no way of differentiating between a form of security in which ownership was transferred to the creditor and another in which it was retained by the debtor. Nor could they distinguish between an arrangement whereby the creditor gained ownership (*dominium*) and one whereby he gained only the right of possession (*possessio*). The Athenians were well aware of the difference between ownership and possession, but their laws made no use of this distinction by granting one set of remedies to those who had ownership and another to those who merely enjoyed possession.[38] Put simply, the Athenians had nothing which resembled the possessory interdicts of Roman law. Even had they wanted to, the Athenians just did not have the legal mechanisms which would have enabled them to create, and distinguish among, various forms of security.

Our discussion in this section has revealed that there are three considerations which tell in favour of an approach which starts from the assumption that the Athenians had essentially one form of security which they referred to by various different terms. These considerations are: (1) the failure of attempts by previous scholars to unearth any concrete distinctions between the security transactions referred to by the different forms of expression used to refer to hypothecation; (2) the fact that the Athenians did on occasion use more than one term to refer to a single type of legal procedure, and (3) the absence in Classical Athens of any formal procedures for conveyance which

[33] E.g. Hitzig, op. cit. (n. 10), pp. 1–3 (*prasis epi lysei* is equated with *fiducia cum creditore*); E. Szanto, 'Hypothek und Scheinkauf im griechischem Recht', *WS* 9 (1897), p. 279; Fine, p. 61 n. 3.

[34] For a recent critique of attempts to explain Greek laws in terms of concepts drawn from Roman law, see D. Cohen, *Theft in Athenian Law* (= *Münchener Beiträge zur Papyrusforschung und Rechtsgeschichte* 74; Munich, 1983), pp. 5–7.

[35] For *mancipatio* and *cessio in iure*, see Schulz, pp. 344–9. Formal procedures for conveyance also allowed Roman law to distinguish between two forms of loan, the *mutuum* and the *commodatum* (Schulz 508). Such a distinction did not exist in Athenian law; see H. J. Wolff, 'Die Grundlagen des griechischen Vertragsrecht', *ZSS* 74 (1957), 49–50.

[36] Schulz, pp. 406–7. *Pignus* was later protected by the *actio Serviana*.

[37] For the principle of the cash sale, see F. Pringsheim, *The Greek Law of Sale* (Weimar, 1950), pp. 179–219.

[38] Awareness of the distinction can be seen in various texts (e.g. [Dem.] 7.26). See Pringsheim, op. cit. (n. 37), pp. 9–13; M. Kaser, 'Der altgriechische Eigentumsschutz', *ZSS* 64 (1944), 136–7.

would have enabled them to differentiate between forms of security. We now need to examine the evidence.

III

Our next task is to examine the terms which the Athenians used to describe transactions involving loans and real security and to determine what these terms implied by examining the contexts in which they are found. This is the only valid way of discovering what these terms mean. What we must not do is to assume *a priori* that the Athenians had formal legal definitions for the words they used to describe this kind of transaction and then try to make the evidence conform to these definitions. That kind of approach takes for granted the existence in Athens of a body of legislation which regulated transactions involving real security. Unfortunately there is no evidence at all for this kind of legislation in Athens during the Classical and Hellenistic periods.[39] On the contrary, the meanings and implications of terms like ὑποκεῖσθαι and ὑποτιθέναι were established by common usage, not by legislative or judicial fiat.[40] Naturally the best place to find how these terms were employed in common usage is in the works of the Attic orators, who not only use the terminology in several passages, but, more importantly, give us some information about the nature of the transactions which are referred to by these terms. The same cannot be said of the *horoi*. Despite their Attic provenance, the *horoi* are quite laconic about the details of the transactions which led to their creation. They are therefore of little assistance at this stage of our investigation.

We will begin by examining the more straightforward terms and leave aside for the moment the more problematic terms which employ the vocabulary of sale. The verb which is most commonly used in the orations to signify the act of lending is δανείζειν.[41] The loan is called a δάνεισμα.[42] 'To lend on security' is expressed by the verb δανείζειν with the addition of the preposition ἐπί; the object pledged as security follows the preposition in the dative.[43] The debtor who pledges something as security is said to ὑποτιθέναι the security, while the creditor is said to ὑποτίθεσθαι (med.).[44] The security itself is called τὸ ἐνέχυρον.[45] As we observed above, this term can be used

[39] Finley, pp. 113, 296–7.

[40] My approach is similar to that of Cohen, op. cit. (n. 34), pp. 6–7. Cohen, however, fails to appreciate the difference between ordinary language and legal language and in places appears to assume that words in common usage are used with the same precision and consistency as they are in statutes which often begin with legal definitions of the terms they employ. For instance, his attempt to draw a clear-cut distinction between the verbs κλέπτειν and ἀποστερεῖν breaks down in the face of passages which refer to the embezzlement of public funds, as Cohen (pp. 30–3) himself recognizes. For a shrewd assessment of the differences between ordinary language and legal language, see J. L. Austin, 'A Plea for Excuses', in *Philosophical Papers* (Oxford, 1961), pp. 132–7.

[41] E.g. Dem. 37.4; [Dem.] 56.3 and the passages listed in n. 43. The same verb is used in the middle with the meaning 'to borrow from': [Dem.] 56.3, 6.

[42] [Dem.] 49.12; 56.1; Dem. 35.9.

[43] Dem. 32.12, 14; 36.6, 18; 37.50; [Dem.] 49.53. For the term ἐπιδάνειζειν which appears to have had the same meaning in certain cases, see Finley, p. 297.

[44] For the active, see Dem. 28.17–18; [Dem.] 49.12, 52; Isoc. 21.2; Lys. 19.25. For the middle, see Dem. 28.18; [Dem.] 49.51 (the verb is mistranslated by A. T. Murray in his Loeb edition of the speech); 50.55; *IG* ii² 43, line 40. Sometimes the simplex takes the place of the compound: [Dem.] 53.10, 12, 13; Is. 5.21; *horos* no. 102, line 12. In *IG* ii² 43, lines 40–2 we find the compound followed by the simplex in the next line. This is an example of a syntactic phenomenon which has been noted by several scholars. See C. Watkins, 'An Indo-European Construction in Greek and Latin', *HSCP* 71 (1967), 115–19.

[45] Dem. 33.10; [Dem.] 49.2, 52, 53; 56.3.

of a security which is held either by the debtor or by the creditor; the use of this word to describe a security implies nothing about the actual possession of the security. The security is said to ὑποκεῖσθαι or ὑποτίθεσθαι (pass.) – the name of the creditor may follow in the dative and the amount of the loan in the genitive.[46] The debtor who defaulted was called ὑπερήμερος.[47] The verbs used to describe the taking of possession by the creditor after default are ἐμβατεύειν and various forms of λαμβάνεσθαι (med.).[48]

Certain passages indicate that the creditor could be regarded as the owner of the security. For instance, in his second speech against Aphobus, Demosthenes (28.18) told the jury that he would be reduced to an awful plight if their vote went against him since an adverse verdict would leave him with no property; much of what he did own had been pledged as security for a loan which he had taken to perform a trierarchy. The hypothecated property was no longer his, but belonged to his creditors (ἀλλὰ τῶν ὑποθεμένων ἐστίν).[49] More evidence for this view can be found in the inscription which recorded the charter of the Second Athenian League. In this document (*IG* ii² 43, lines 37–40) we learn of the guarantees granted by the Athenians to the cities which joined the league. Among them is a provision making it illegal for any Athenian 'to acquire a house or land in the territory of the allies' (ἐγκτήσασθαι ἐν ταῖς συμμάχων χώραις μήτε οἰκίαν μήτε χωρίον) either 'by buying' (πριαμένῳ) or by 'receiving as a security' (ὑποθεμένῳ). The verb ἐγκτήσασθαι clearly means 'to acquire ownership' for it is applied to the person who buys property.[50] What is notable in this decree is that the person who buys property is put on exactly the same footing as the one who accepts it as security and both are described as gaining ownership. One should not attempt to evade the implications of this passage by claiming that 'Most probably it is an elliptical way of saying that the Athenians shall not be permitted to accept real property as security because the potential consequence is foreclosure and thereby the acquisition of property.'[51] Such an interpretation certainly reads too much into the text, the meaning of which is clear as it stands. The ineluctable conclusion which follows from this passage is that the creditor could be considered the owner of the security.

Further evidence for this observation can be found in Demosthenes' account (Dem. 27.9–11) of his father's estate. Among the items listed there are twenty slaves engaged in manufacturing couches, from which his father received an annual revenue of twelve *mnai*. These slaves had been received as security for a debt of forty *mnai* owed him by a certain Moerades.[52] Now we would make a distinction between his possession of these slaves and his ownership of the thirty-two or thirty-three engaged in making knives, who are also included in Demosthenes' inventory. But the orator makes no such distinction, listing them alongside each other and making them both objects of

[46] [Dem.] 49.11; *horoi* nos. 1, 2, 4, 5, 6, 7.

[47] Dem. 21.11; 33.6; 45.70. Cf. Pollux 3.85.

[48] Dem. 27.26; 37.7; [Dem.] 35.25. Note also the verb ἐνεχυράζειν at Ar. *Nub.* 241; *Ec.* 567 with Finley, pp. 222–3 n. 6.

[49] For the genitive denoting ownership as opposed to mere possession, see Kaser, loc. cit. (n. 38). Note also that Nicobulus calls the property that was pledged by Pantaenetus to Evergus and himself 'ours' (Dem. 37.7, 9, 29).

[50] Note also that the noun ἔγκτησις which is formed from the same roots means 'the right to own land'. For a study of this term, see J. Pečirka, *The Formula for the Grant of Enktesis in Attic Inscriptions* (Prague, 1966).

[51] Finley, p. 263. If the author of the decree had meant to refer to the acquisition of property by means of foreclosure, he would surely have used one of the verbs normally used for that procedure.

[52] For the name of the debtor, see Dem. 27.27.

the same verb κατέλιπε. This is strange to our way of thinking – we would regard the slaves pledged as security to be the property of the debtor Moerades; in drawing up an inventory of the estate of Demosthenes *père*, we would list Moerades' debt of forty *mnai* as owing to the estate and indicate that the twenty slaves were pledged as security for this debt. In calculating the total value of the estate, we would not add in the capital value of the slaves pledged as security, but only the amount of the debt owed by Moerades. This is in fact what modern commentators do, but it is not what Demosthenes *fils* appears to have done.[53] Demosthenes says that the slaves in the cutlery shop were worth 'five or six, and not less than three *mnai*'. This seems to point towards an average value of about five *mnai*, a figure which would give us a total of about two talents, forty or forty-five *mnai* for all thirty-two or thirty-three slaves in the cutlery shop. Further on Demosthenes tells us that the total value of the slaves in the cutlery shop, those engaged in making couches, and one talent lent out at interest came to a sum of four talents, fifty *mnai*. If we assume that Demosthenes assumed a value of forty *mnai* (the amount of the loan for which they were hypothecated) for the slaves in the furniture shop, we are forced to conclude that his arithmetic is 'hopelessly inaccurate'.[54] Such an unsatisfactory explanation should cause us to question the method by which it was arrived at. It is true that Demosthenes does tend to round off sums in his calculations elsewhere in this speech, but he does not make serious errors (e.g. Dem. 27.11,17,37). Luckily there is another method of approach: we can assume that Demosthenes used the capital value of the slaves in the furniture shop in assessing the value of this part of his father's estate. By simple arithmetic, we then arrive at a figure of about sixty-five or seventy *mnai* as the capital value of these slaves.[55] This is well within the limits of probability, for we know that it was not unusual for the value of the security to be as much as double the amount of the loan.[56]

One might try to discredit this evidence by arguing that Demosthenes is being dishonest and misrepresenting the situation (it would not be the only time). But if the Athenians thought that all encumbered property belonged to the debtor and that the creditor could not claim to be the owner of the security, Demosthenes, when attempting to misrepresent the extent of his father's estate, would not have admitted that the slaves in the cutlery shop had been pledged as security. Quite the opposite, he would have simply said that these slaves formed part of the estate and suppressed any mention of the fact that they were being held as security for that would have

[53] For the traditional analysis of the problem posed by this passage, see J. K. Davies, *Athenian Propertied Families, 600–300 B.C.* (Oxford, 1971), pp. 129–30.

[54] Finley, p. 116 ('Yet Demosthenes ... does not think of re-calculating the value of the slaves in market-terms.'). Finley curiously ignores the additional loan of 500 *drachmai* made on the security of the slaves (Dem. 27.27). That Moerades was able to contract this additional loan on the slaves from Aphobus clearly indicates that foreclosure had not taken place before the death of Demosthenes' father. One cannot, therefore, argue that Demosthenes regards Moerades' slaves as part of his father's property because he had obtained them through foreclosure.

[55] If we calculate the market value of the slaves in the furniture shop at about 65–70 *mnai*, the annual income of 12 *mnai* would represent an annual return on investment of about 18% which is comparable to that received from the slaves in the cutlery shop (30 *mnai* a year on an investment of about 160–5 *mnai*). I do not think that the Athenians actually calculated such things with any precision. Nevertheless, we would expect the price of slaves to be proportional to the value of goods they were able to produce. For the prices of slaves varying in relation to the value of their skills, see R. Meiggs and D. M. Lewis, *A Selection of Greek Historical Inscriptions to the End of the Fifth Century* (Oxford, 1969), p. 247.

[56] For securities worth twice as much as the amount of the loan, see [Dem.] 34.6; 35.18; Dem. 37.4, 31.

immediately given away his deceit. The only way to make sense of the passage is to assume that Demosthenes considered his father the owner of these slaves and that when assessing the value of his father's property, he accordingly used their capital value, not the amount of the loan for which they had been hypothecated. Evidently the jury saw nothing amiss in Demosthenes' method of book-keeping for they awarded him the amount he claimed.[57]

Athens was apparently not the only Greek city during this period where the creditor might consider himself to be the owner of the security. In an inscription dated to about 300 from the island of Amorgos (*horos* no. 102), we read that a certain Niceratus along with Hegecrate and her *kyrios* Telenicus had pledged three properties as security (ἀπέδοτο ... ἐπὶ λύσει) to a man named Ctesiphon in return for a loan of 5,000 *drachmai*. To show that he was the legitimate owner of these properties pledged as security, Niceratus specified how he had acquired each of them. The first he had received as the result of a division of an inheritance with his brother (lines 7–9); the second was bought from a man named Ischyrion (lines 9–11). It is the third which is of interest to us; this property, we are informed, Niceratus had received from someone called Exacestus (lines 11–14: ἔχει θέμενος).[58] In much the same way as Demosthenes did in describing his father's estate, the inscription lists the hypothecated property alongside the two other properties which are owned outright. Despite the fact that he has only received it as security, Niceratus treats the property of Exacestus as if it were his own and uses it as security for a loan from Ctesiphon. The implication should be clear – Niceratus regards the security as his own property, just as Demosthenes *fils* considered Moerades' slaves to form part of his father's estate. The inscription from Amorgos cannot of course be used as evidence for practices in Attica. Amorgos was probably influenced by Athenian customs in regard to the use of *horoi*, but this should not be taken to indicate that the practices of both states were completely similar in other respects.[59] Nonetheless it does reveal that elsewhere in the Greek world the creditor might regard himself as the owner of the security, and thereby provides some support, albeit indirect, for our analysis of Demosthenes' account of his father's estate.

Since the creditor could be considered the owner of the security, the act of pledging a security could be regarded as a sale. We find evidence for this in the speech *Against Apaturius* ([Dem.] 33). In the part of the speech which concerns us the defendant recounts how Apaturius had failed to make payment on a loan and was being pressed by his creditors, who were about to seize his ship (6: ἐνεβάτευον εἰς τὴν ναῦν, εἰληφότες τῇ ὑπερημερίᾳ). Parmeno, a friend of Apaturius, agreed to give him ten *mnai* and asked the defendant to contribute thirty *mnai*. The defendant had no cash on hand, but was able to convince the banker Heracleides to lend Parmeno the

[57] For Demosthenes' victory, see Dem. 30.2. To judge from Demosthenes' reply to Aphobus' defence (Dem. 28), it does not appear that Aphobus disputed this part of Demosthenes' calculation of the amount owed to him.

[58] ἔχει θέμενος is a perfect periphrastic and means 'has received as security'. ἔχει is only an auxiliary verb and has no independent meaning. For the construction, see W. J. Aerts, *Periphrastica* (Amsterdam, 1965), pp. 128–60. U. E. Paoli, 'Ipoteca e ἀποτίμημα nel diritto attico', in *Studi di diritto attico* (Florence, 1930), pp. 153–4, did not recognize the construction and misconstrued the force of ἔχει which he took to imply that the creditor had possession. Finley, p. 205 made the same mistake and asserted incorrectly that the inscription indicated 'that there had been default ...'.

[59] For a decisive refutation of the view that the legal practices of the Greek city-states were roughly similar, see M. I. Finley, 'The Problem of the Unity of Greek Law', in *Atti del 1° Congresso Internazionale della Società del Diritto* (Florence, 1966), pp. 129–44 (= *The Use and Abuse of History* (New York, 1975), pp. 134–52).

necessary sum and to accept him as guarantor of the loan. Shortly thereafter, Parmeno had a falling-out with Apaturius and requested that the defendant assume responsibility for the loan. Parmeno had already given Apaturius three *mnai*; the defendant came up with the balance which he handed over to Apaturius and then drew up an agreement in which he listed himself as the creditor for the entire loan of ten *mnai*. According to the terms of the agreement, Apaturius pledged his ship as security for the money owed both to the defendant and to the bank. Later on in the speech, after describing how the money was finally repaid, the defendant refers to the entire transaction as a loan (12: ἐδανείσθη) which it undoubtedly was. Yet, when the agreement was drawn up by which the ship was pledged as security, the transaction is called a sale (8: ὠνὴν ποιοῦμαι τῆς νεὼς καὶ τῶν παίδων). The text also makes it clear that the defendant was to remain owner only until Apaturius repaid the loan (ἕως ἀποδοίη). Just the same, the transaction is labelled a sale.

Such a conception of lending on security seems terribly mistaken to our way of thinking. We do not interpret a secured loan as a form of sale; in our eyes, as for the Romans, the pledge of security has a purely accessory character, serving only to ensure repayment of the loan in case of default.[60] We do not view hypothecation as a form of sale whereby the creditor 'pays' the loan and receives a right to the security in exchange for cash, since the aim of the transaction is not an exchange of goods for cash as it is in a sale. The creditor enters into the agreement to reap interest, not to gain ownership of the security. Similarly the debtor consents to the agreement with the intention of making temporary use of the cash provided by the loan, not of parting with the security in return for the cash. But we should not let our own conception of the transaction stand in the way of our attempt to understand how the Athenians construed it.

The habit of regarding the creditor as the owner of the security and the act of hypothecation as a form of sale did have one curious side-effect – it led to confusion about the proper label to be attached to the repayments made by the debtor to the creditor. Since the transaction was in essence a loan, the monthly payments could be called interest (τόκος) and the final payment of the total sum given to the creditor as the repayment of the principal (κεφάλαιον). Yet, since the security was thought of as having been sold to the creditor, the debtor who remained in possession of the security which consisted of a house or a workshop was in a position analogous to that of the lessee who had rented the property of another (μίσθωσις).[61] As a result, the repayment of the principal could also be regarded as a sale whereby the debtor bought back his security by paying its price (τιμή) to the creditor. We find an example of this phenomenon in a passage from Isaeus' speech *On the Estate of Dicaeogenes* (5.21). Here we are told by the speaker Menexenus how Dicaeogenes had consented to renounce two-thirds of the estate he had inherited from his father (also called Dicaeogenes), then reneged on this agreement. It is also pointed out that at the time of the agreement Dicaeogenes was no longer in possession of the entire estate; instead it was held by those who had bought it from him or had received it as security (21: οἱ παρὰ τούτου πριάμενοι καὶ θέμενοι). Menexenus insists that Dicaeogenes should have handed over this land unencumbered, that is, that he should have bought it back from those to whom he had sold it and have paid off the loans to those who had received it as security. We would think of these two transactions as fundamentally

[60] For the accessory character of real security, see Schulz, pp. 420–2.

[61] For the custom of calling the agreement between the creditor and the debtor who remained in possession of the security a lease, see Section IV. Note also the use of the word μίσθωμα on *horos* no. 102, line 15, where we would expect to find the word τόκος.

different. In one property is bought back by means of a sale, while in the other a loan is paid off and the security is thereby redeemed. Yet that is not how Menexenus saw it. He says that Dicaeogenes should have handed over the property after having 'given back the price' (ἀποδόντα τὴν τιμήν) both to those who had bought the property and to those who had received his property as security. No difference is made between buying back one set of properties and removing the lien on another set. The latter transaction is viewed as analogous to the former, and the same expression is employed to describe both. We would say that Dicaeogenes should have repaid the principal on the loan in order to redeem the hypothecated properties. Being an Athenian who could consider the creditor to be the owner of the security, however, Menexenus says that he should buy them back from the creditors by paying them the price.

All the evidence we have examined thus far appears to indicate that the Athenians regarded the creditor as the owner of the security and interpreted hypothecation as a form of sale. Yet other evidence seems to reveal exactly the opposite. Take, for instance, the inscription recording the sale of Theosebes' house by the *poletai* which we examined in Section I. From that inscription we learn that the house of Theosebes had been pledged as security for several loans, two contracted by his father Theophilus, another by himself. If the creditors could be regarded as the owners of the security, the house of Theosebes should have belonged to those who had received it as security and the *poletai* would not have been entitled to confiscate it. But that is exactly what did happen – the house is consistently called 'the house of Theosebes' and the *poletai* seized it as part of their confiscation of Theosebes' property and sold it to a certain Lysanias (lines 35–6). Evidently the *poletai* regarded the security as still belonging to the debtor.[62]

We should also note that three successive loans were made on the same security in this case. Yet, if the security was thought to pass into the ownership of the creditor, how could Theophilus have then pledged it as security for another loan? And how could Theosebes have inherited it and pledged it as security for a loan if it had already passed into the hands of his father's creditors? It is clear that not only the *poletai*, but Theophilus and Theosebes as well, were operating on the assumption that the security belonged to the debtor.

The same implication emerges from a passage in the pseudo-Demosthenic speech *Against Lacritus* ([Dem.] 35.21–2). According to the speaker Androcles, he and Nausicrates lent to Artemo and Apollodorus three thousand *drachmai* on the security of a cargo of three thousand jars of wine. As part of the agreement, Artemo and Apollodorus promised not to make any further loans on this security (cf. 10–11). If the creditors Androcles and Nausicrates could be regarded as the owners of the security, it would not have been possible for Artemo and Apollodorus to contract further loans on the cargo since they no longer owned it; in the event that they tried to, Androcles could have argued that the claims of these additional creditors were invalid because Artemo and Apollodorus no longer owned the cargo and were thus

[62] I do not understand how Finley, art. cit. (n. 17), p. 481, can state that this inscription 'offers the first unequivocal instance of collateral security in Athens'. To provide an 'unequivocal instance of collateral security' we would have to come upon a case where the creditor foreclosed on a defaulting debtor and was required either by law or by contract to sell the security and to return to the debtor the difference between the sale price and the amount of the loan. But all the inscription tells us is that the *poletai* confiscated the house, paid off the debts owed by Theosebes, and then sold the house. It deals with confiscation, not foreclosure, and is thus not relevant to the issue of the existence of collateral security.

not entitled to hypothecate it to anyone else. But that is not the argument which Androcles employs. Instead, he attacks Artemon and Apollodorus for contravening the terms of the agreement and never questions the validity of the claim made by the other creditor to whom his opponents hypothecated the cargo.

At this point, one might be tempted to ask 'What is going on here? Who owns the security, the creditor or the debtor?' To answer this question, we need first to recall the observations we made in Section II where we noted that the Athenians had no formal procedures for conveyance and thus lacked a means of answering the question 'Who owned the security?' Because there was no legally prescribed method of resolving the question, each person naturally tended to answer it in the way which was most advantageous to himself. And so the creditor regarded himself as the owner of the security, and the debtor acted as if it belonged to him. For instance, it was obviously in Demosthenes' interest to represent the slaves which had been pledged by Moerades as security to his father as part of his father's estate. That way he could use the capital value (about sixty-five or seventy *mnai*) rather than the amount of the loan (forty *mnai*) when reckoning the losses he had suffered at the hands of his guardians. The same is true of Niceratus, the citizen of Amorgos who hypothecated to Ctesiphon the property he had received as security from Exacestus. He too found it advantageous to regard himself as the owner of the property Exacestus had hypothecated to him since it enabled him in turn to pledge it as security to Ctesiphon.[63]

In similar fashion it was in the interest of the debtor to regard the security as remaining in his ownership. The main attraction of such an interpretation of the transaction for the debtor was that it allowed him to contract further loans on the same security. When Theosebes pledged the house which his father had already hypothecated to the *koinon* of the Medontidai *phrateres* and to the *koinon* of *orgeones* as security for a loan to Smicythus he obviously considered it his own property, not that of his father's creditors. So did the *poletai* and Theomnestus, the man who filed the *apographe* with them. For all these men it was advantageous to regard the security as the property of the debtor. For Theosebes it meant that he could contract additional loans on the house; for the *poletai* it meant that they could confiscate the house and sell it; for Theomnestus it meant that he could receive his reward from the proceeds of the sale.

A debtor might, however, wish for rhetorical reasons to represent the security as belonging to his creditors. Take, for example, the passage where Demosthenes (28.18) describes to the jury the dire straits to which he had been reduced by the trierarchy which he had been compelled to undertake as a result of the challenge made by Thrasylochus. To show how desperate his situation was, Demosthenes points out that he had no further resources to draw on – he could not use his own property since *τῶν ὑποθεμένων ἐστίν*. The fact of the matter is that he could probably have contracted further loans on his property. But mention of this possibility would have been contrary to his rhetorical aim in this passage where he is trying to stress his helplessness in an effort to win the sympathy of the jury.[64]

The confusion which reigned in the field of hypothecation about the ownership of the security is not without parallel in other areas of Athenian law. The suit which

[63] The creditor who delivered the speech *Against Apaturius* was also of the same opinion ([Dem.] 33.8). For other creditors who regarded themselves as the owners of the security see Dem. 37 with the discussion in Section IV.

[64] The law recorded on *IG* ii² 43 considers the creditors the owners of the security for the sake of completeness; it is trying to cover all possible ways of acquiring ownership.

Dareius brought against Dionysodorus ([Dem.] 56) affords an example of the sort of confusion which could arise in the area of maritime loans as a result of the absence of legislation regulating the language of maritime contracts. The dispute in this case concerned a loan of 3000 *drachmai* which Dareius and his associate Pamphilus had lent to Dionysodorus and Parmeniscus on the security of their ship (3). The terms of the loan recorded in the *syngraphe* specified that the money was lent for a voyage from Athens to Egypt and back; if the borrowers used the money for a voyage to any other port, they were to pay double the amount of the principal as a penalty (5–6, 10–11, 20). As was customary in maritime loans, the *syngraphe* included a clause that stated that the lenders had to pay only in the event that the ship returned safely to the Peiraeus (22, 31). Parmeniscus sailed the ship to Egypt and upon his arrival there bought wheat and other goods. According to Dionysodorus the ship was damaged on the return voyage and forced to put in at Rhodes where its cargo was unloaded (20–21). When Dareius and Pamphilus learned of this, they confronted Dionysodorus, who offered to pay them the principal and the interest that had accrued as far as Rhodes (12–13, 33–4, 38, 41), an offer which several other creditors had accepted (22). Still insisting that they were entitled to the full payment agreed to in the *syngraphe*, Dareius and Pamphilus expressed their willingness to follow the suggestion of some bystanders who advised them to take what Dionysodorus had offered and to submit the dispute about the remaining interest to the court (13–14). Dionysodorus responded by asking them to destroy the *syngraphe* in return for his consent to this compromise (14–16). This request was naturally turned down by Dareius and Pamphilus who knew that the *syngraphe* was their only means of proving their claim to the disputed interest (14–16). Unable to reach a settlement out of court, Dareius brought a suit against Dionysodorus. In the speech he delivered at the trial, Dareius indicated that Dionysodorus would defend himself in part by claiming that he did not have to repay the loan since his ship was damaged and could not have returned safely to the Peiraeus, thereby releasing him from the terms of the loan which specified that he had to repay only in the event that the ship returned safely (31–2, 35, 41). In other words, Dionysodorus gave a broad interpretation to this clause which he argued gave exemption to himself and to his partner not only if the ship sank, but also in the eventuality that it suffered damage and was unable to continue safely on its journey. Dareius not unexpectedly ridiculed this interpretation and offered a narrower one of his own. In his view the condition σωθείσης τῆς νεώς had indeed been fulfilled since the ship had not sunk and was at present plying the seas. Dionysodorus, therefore, owed him and his partner the entire amount he had agreed to pay in the *syngraphe*. Once again, we have a case where there are two possible interpretations of a key phrase and each litigant selects the one that suits his position.[65] What is interesting about this case is that neither Dareius nor Dionysodorus (at least as far as we can tell from his opponent's speech) appealed to any laws to justify his interpretation of the disputed phrase. Their failure to do so strongly suggests that there was no relevant legislation to guide them in this matter and consequently each man was left free to interpret the clause as he wished. The situation was much the same in the field of real security where in the absence of any legal regulations there was no way of resolving the question of who owned hypothecated property.

We must be careful not to draw the wrong conclusions from our discussion and

[65] My interpretation of this speech owes much to the fine analysis of H. Meyer-Laurin, *Gesetz und Billigkeit im attischen Prozess* (Weimar, 1965), pp. 12–15.

attempt to explain Athenian practices regarding real security in terms of a conception of ownership that differs from our own and that of the Romans. The concepts of ownership and of the transfer of ownership are well nigh universal, shared by all civilizations. What sets one civilization apart from another is the way in which each one goes about protecting ownership and resolving disputes about ownership. One society may also have ways of determining how and when ownership is transferred which differ from those of another society. The Romans had formal modes of conveyance and a large body of legal doctrine about *traditio* to guide their judges in cases arising out of disagreements about ownership. When two Roman citizens quarrelled about who owned a piece of land, they had recourse to a legal system which possessed a set of criteria which judges could use to clarify the issues at stake and perhaps even to resolve the dispute. The Athenians were very different and tended to rely more on common-sense notions such as the principle of the cash sale. When asked at what point ownership is transferred, they replied with the answer that seemed most obvious to them, namely, when the buyer pays the price to the seller. Such an approach worked adequately in most of the situations they encountered. But not in all. In the field of hypothecation their common-sense notions were insufficient, and the upshot was uncertainty about the ownership of property pledged as security. So everyone interpreted the transaction in the way that suited him best.

When using the vocabulary of sale and ownership, the Athenians of the Classical period were very much like Socrates' interlocutors in the earlier dialogues of Plato. Socrates' companions always know how to use words like 'courage', 'piety', and 'justice' and can tell in most cases when these terms are used correctly and when they are not. What they cannot do is produce satisfactory definitions of them. Their inability to formulate satisfactory definitions does not imply that they do not understand what these terms signify; it simply means that they are incapable of formulating criteria that can explain why one usage of a given term is correct while another is not. One does not need to have a satisfactory definition of a word in mind to be able to employ that word correctly in conversation. The need for a satisfactory definition only becomes pressing when there is a disagreement about how to use a word; for instance, when one person calls an action just while another deems it unjust. To resolve this kind of dispute it is necessary to have definite criteria that can be applied to determine which usage is the correct one.[66] The average Athenian found himself in an analogous position with regard to the terminology of ownership and the transfer of ownership. He knew how to use words like πέπρασθαι, ἀποδίδοσθαι, and ὠνεῖσθαι and employed them in conversation to communicate with others in the *agora* and elsewhere. He knew what a sale was when he saw one and understood that when Nicodemus paid Astyphilus a sum of money for a plot of land, the former gained ownership and the latter lost it. The absence of any formal procedures for the transfer of property such as the *mancipatio* did not prevent the Athenians from transferring property, nor did it render them incapable of comprehending the implications of this transaction. The absence of any formal modes of conveyance or legal doctrines about transfer of ownership only became a problem when the Athenians encountered an ambiguous situation such as pledging some property as security for a loan. In hypothecation the creditor loaned money to the borrower who in return pledged some of his property as security. By hypothecating this piece of property the borrower temporarily lost his right to alienate it and the creditor gained

[66] Of course, Socrates and Plato viewed the problem somewhat differently. See R. Robinson, *Plato's Earlier Dialectic*[2] (Oxford, 1953), pp. 49–53.

the right to seize it if the borrower defaulted. But who owned it? The Romans had an easy way of answering this question: they simply asked whether *mancipatio* or *in iure cessio* had been performed. If either one had been performed, the borrower lost ownership; if neither had been, the borrower was still the owner. Without such procedures as these the Athenians, like Socrates' companions, were not capable of giving a definitive answer to this question. For them the ownership of the security remained in a legal limbo in which there reigned a sort of free-for-all with everyone guided only by his own self-interest, not by juristic precepts.

Previously it was believed that the Athenians had at least two forms of hypothecation, one in which the borrower retained ownership of the security, the other where the creditor gained ownership. A rather different picture has emerged from our review of the evidence. We can now see that the Athenians did not have two or more forms of security, but essentially one type of security where the borrower and the creditor each considered himself the owner of the security. Our next step will be to apply this conclusion to that piece of evidence that has so far proven to be the most difficult to make sense of.

IV

We are at last in a position to examine the relevant parts of the oration that Demosthenes composed for Nicobulus to be delivered in his *paragraphe* against his former debtor Pantaenetus (Dem. 37). This speech contains an extensive account of a complex series of transactions involving real security. Besides shedding much light on the topic of security transactions in Classical Athens, the speech also affords a rare glimpse into the practices of Athenian businessmen.[67] Most important, it reveals how different sets of creditors viewed their relationship with one another and what informal procedures they employed to resolve disputes involving two separate loans made on the same security. Because of the complexity of the case, it will be best to analyze in chronological order the events that are narrated by Nicobulus and to digress where appropriate.[68]

After a short introduction stating the nature of the case and containing the customary appeal to the good will of the jury, Nicobulus begins his narration with a

[67] I do not consider it anachronistic to speak of 'businessmen' and 'entrepreneurs' in Classical Athens. For the presence of 'economic activities of a capitalist kind' in the Ancient World, see the sensible comments of J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge, 1986), pp. 177–84. For Athens in particular, see W. Thompson, 'The Athenian Entrepreneur', *AC* 51 (1982), 53–85.

[68] There have been several discussions of this speech. Among the more recent are Harrison, op. cit. (note 10), pp. 274–9; Finley, pp. 32–5; Fine, pp. 146–50. C. Carey and R. A. Reid, *Demosthenes: Selected Private Speeches* (Cambridge, 1985), pp. 105–59 provide a very detailed and generally helpful commentary on the speech, but make no original contribution to the discussion of problems involving real security. On most issues they tend to follow Finley. Finley's analysis of the speech is flawed by his refusal to accept the implications of Nicobulus' use of the language of sale. Finley, p. 224 n. 11, tries to justify his interpretation of the use of the language of sale in contexts dealing with hypothecation by appealing to a passage from Pollux, *Onomasticon* 8.142 (= Hyperides fr. 193 Blass): *Ὑπερείδης δὲ ἐν τῷ πρὸς Χάρητα ἔφη ἀποδόμενος ἀντὶ τοῦ ὑποθείς*. Finley claims that in this entry Pollux 'had noted the use of *ἀποδίδωμι* without the appended *ἐπὶ λύσει*, and indicated that in that passage it meant "hypothecate", not "sell".' That is not what Pollux indicates at all. The lexicographer merely indicates that in the passage in question Hyperides used the word *ἀποδόμενος instead of* (*ἀντὶ*) the word *ὑποθείς*. All this means is that in this passage the word *ἀποδόμενος* is a virtual synonym of *ὑποθείς*. Nowhere in the entry does Pollux deny that the verb means 'sell' or that it carries the implications associated with ownership. (I owe this observation to Professor M. Dilts.)

straightforward description of his relationship with the defendant Pantaenetus; we are told that Nicobulus and his friend Evergus lent 105 *mnai* to Pantaenetus on the security of a workshop in Maroneia and the thirty slaves in it (ἐδανείσαμεν πέντε καὶ ἑκατὸν μνᾶς ἐγὼ καὶ Εὔεργος ... Πανταινέτῳ ... ἐπ' ἐργαστηρίῳ ... καὶ τριάκοντ' ἀνδραπόδοις). Of this sum, Nicobulus had contributed 45 *mnai*, Evergus a talent (4).[69] Next we learn that Pantaenetus had previously owed an exactly identical sum to another set of creditors, Mnesicles, Phileas, and Pleistor, and that Mnesicles was the one who sold (πρατὴρ ... ἡμῖν γίγνεται) the workshop to Nicobulus and Evergus (5).[70] This appears confusing at first; if Mnesicles sold the workshop to Nicobulus and Evergus, it would belong to them, and Pantaenetus would not have been capable of offering it as security for a loan. Yet we have just learned shortly before that Pantaenetus did indeed pledge the workshop as security for a loan from Nicobulus and Evergus. If we keep in mind our previous discussion about the ownership of the security, it becomes possible to make sense of the transaction that Nicobulus is attempting to describe in this passage. What appears to have happened is that Mnesicles and his associates had lent their 105 *mnai* to Pantaenetus on the security of the workshop and slaves, thereby becoming (at least in their own eyes) the owners of this property in precisely the same way that all creditors regarded themselves as the owners of the securities that had been pledged to them. Mnesicles then invited Nicobulus and Evergus to take over this loan by paying him and his associates the 105 *mnai* Pantaenetus owed them. By paying Mnesicles, Nicobulus and Evergus became Pantaenetus' new creditors, and the workshop was now hypothecated to them. As creditors, they naturally considered themselves the owners of the security (7, 9, 29). From the creditors' point of view, the entire transaction could be interpreted as a sale since Mnesicles and his associates were transferring their ownership of the security to Nicobulus and Evergus in return for a cash payment. The language of sale used by Nicobulus in this passage to describe how he and Evergus took over Mnesicles' loan to Pantaenetus is readily comprehensible once we realize that these creditors thought of themselves as the owners of the security.

After paying Mnesicles, Nicobulus and Evergus drew up an agreement with Pantaenetus (5). In this agreement Pantaenetus is described as 'leasing' (μισθοῦται) the workshop from Nicobulus and Evergus in return for payment of interest (τόκου). The agreement itself is called a lease (μίσθωσις. Cf. 6). And later on when Pantaenetus fails to make a payment (7), the payment is not referred to as rent, but interest (τόκους). Here again we find one of our previous points confirmed. We have already noted how Athenian creditors tended to treat a loan on security as a single

[69] Carey and Reid, op. cit. (n. 68), pp. 114–17, fail to realize that the Athenians, like the Romans, did not share our modern notion of legal personality and thus had nothing akin to the modern juristic concept of the corporation. (On this topic, see Finley, p. 275 n. 5, with the literature cited there.) As a result, their discussion of the relationship between Evergus and Nicobulus is confused and misleading.

[70] The position of Telemachus (5) can be explained in either of two ways. The first, that of Fine, p. 147, is that Telemachus had been the owner in the sense that he had lent money to Pantaenetus and had accepted the workshop and slaves as security. He then 'sold' them to Mnesicles and his associates in the sense that Mnesicles and his associates had paid Telemachus the amount owed by Pantaenetus and thereby became Pantaenetus' creditors and the owners (at least in their own eyes) of the security. The other view, maintained by Finley, p. 32 and Harrison, op. cit. (n. 10), p. 275, is that Telemachus was the actual owner of the workshop and slaves and sold them to Pantaenetus. 'Presumably to pay for his purchase, he borrowed 10,500 drachmas, (...). The mill and the slaves were to serve as security for the loan and this was accomplished by having Telemachus, the original owner, "sell" directly to Mnesikles, the principal creditor' (Finley, p. 32).

transaction, not as a combination of two separate transactions with one (the pledge of security) accessory to the other (the loan). This habit led to confusion about the proper name to apply to the resulting relationship between the creditor and the borrower in regard to the security. In the mind of the creditor the debtor who remained on a piece of land pledged as security was exactly like a lessee who had rented property from its owner. Just as the lessee paid rent at fixed intervals, the debtor paid interest every month. If the lessee failed to make a payment, he could be evicted from the leased property. The situation of the debtor was similar: in the event of default, that is, failure to make a payment, the creditor would foreclose on the property and evict the debtor. When the period of the lease expired, the lessee had to leave the leased property unless the lease was extended or he could buy the property from its owners. In similar fashion, when it came time to pay the principal on the loan, the debtor had either to 'buy back' the encumbered property or to allow the creditor to take it over. Obviously there was one essential difference: if the lessee offered to buy the property he was renting when his lease came to an end, the lessor was under no obligation to sell it to him. The debtor who borrowed on security was in a very different position: if he wanted to 'buy back' the encumbered property by paying off the loan, the creditor had no right to refuse his offer. This constituted the debtor's 'right of redemption' (λύσις) which was contained in the agreement that Nicobulus and Evergus concluded with Pantaenetus (5). By including this provision in their agreement, they made it clear how this lease differed from normal leases.

We can now return to Nicobulus's story. Soon after the agreement with Pantaenetus was drawn up, Nicobulus set off on a voyage to Pontus while Evergus remained in Athens. Sometime later Nicobulus returned to discover that trouble had erupted during his absence. Not surprisingly there were two versions of what had taken place. Pantaenetus claimed that Evergus had used force to eject him from the workshop contrary to the terms of the agreement. Prevented from carrying on his business, Pantaenetus was unable to make payments on the mine he had leased from the state and became a public debtor (6). Evergus' account was somewhat different. He assured Nicobulus that he had seized the workshop only after Pantaenetus had failed to make several interest payments and denied the accusation that he had used force when taking over the workshop (7). The trouble did not end here. After Evergus took possession, Pantaenetus went away and returned with another set of creditors who said the workshop had also been hypothecated to them. We should not be sceptical about the existence of this other loan; although Mnesicles derided the claims of the other creditors, Nicobulus and Evergus dealt with them in the subsequent negotiations as if their declaration was trustworthy (13–15).

Our hypothesis is once more corroborated. We have just seen how the creditors Nicobulus and Evergus considered themselves to be the owners of the security; here we see that Pantaenetus acted as if the workshop still belonged to him even after he had hypothecated it to the first set of creditors for he went ahead and proceeded to pledge it again as security for another loan to a separate set of creditors.

With his partner Evergus in possession of the workshop, Nicobulus found himself compelled to make a choice between two alternatives, neither of which pleased him. Either he could join with Evergus in running and managing the workshop, or he could become Evergus' creditor and draw up a new lease (μίσθωσιν) and a new agreement with his former partner. Once more we come upon the word μίσθωσις being used to describe the relationship between the creditor and the debtor who remains in possession of the security. Nicobulus obviously thought that if he were to become Evergus' creditor, the workshop would stand as security for the loan and would

therefore belong to him as sole creditor. For that reason he uses the word μίσθωσις to describe the agreement that would have been drawn up between himself and Evergus were he to decide to become Evergus' creditor.

Before we move on to the last part of the speech that is relevant to our discussion, some preliminary observations about the Athenian procedure for resolving disputes about ownership and the implications of the word πρατήρ are necessary. It is widely recognized that the Athenians did not have a public land registry.[71] In the absence of such an institution the only way an Athenian could prove that he was the rightful owner of a piece of property was to provide evidence to show that he had acquired it in a legitimate fashion. If the property had been acquired by sale, the buyer, when challenged to prove title, would have to summon the man who sold him the property and have him testify about the sale. The seller (πρατήρ) who did respond to the summons and testified was said to 'warrant' the sale (βεβαιοῦν) and to become a co-defendant in the case (συνίστασθαι τὴν δίκην).[72] If the seller refused to obey the summons and the buyer lost his case, the buyer could bring an action against him. By granting this action, Athenian law in effect required every πρατήρ to act as the warrantor of each sale he made.[73] That is not to say that in any given passage the word πρατήρ can mean 'warrantor' without any implications of sale. The word means 'seller'; it only carries the implications of warranty because all sellers were required by Athenian law to act as warrantors.[74]

Back to Nicobulus' story. When we left him, Nicobulus had returned to discover Evergus in possession of the workshop as well as to learn that Pantaenetus had another set of creditors who also had a claim on the workshop. Curiously enough, Nicobulus did not go to Pantaenetus at this point and question him about the other creditors, nor did he seek them out and challenge them to prove the validity of their claims. He went instead to Mnesicles, the man who had sold him his loan to Pantaenetus in return for a payment of 105 *mnai*. Why did Nicobulus complain to Mnesicles? Mnesicles no longer had any contractual relationship with the various parties in the dispute. Moreover, Evergus' and Nicobulus' claims against Pantaenetus derived solely from the μίσθωσις they had agreed to earlier, an agreement in which Mnesicles had no part. But rather than regarding him as *hors d'affaire*, Nicobulus appears to have held Mnesicles responsible for supporting his claim against that of the other creditors. In the light of our remarks about the word πρατήρ, that should come as no surprise. As creditors, Nicobulus and Evergus considered the transaction whereby they bought the loan that Mnesicles had made to Pantaenetus on the security of the workshop to be a sale which conferred ownership of the workshop on them. They accordingly viewed Mnesicles as the πρατήρ, who in Athenian law was required to act as the warantor of the purchase. When troubles arose about the ownership of the workshop after the discovery of the other creditors, Nicobulus went to Mnesicles and expected him to fulfil his duty as warrantor by supporting the claim of Evergus and himself. Mnesicles, evidently an honest and reliable businessman, did not shirk his duty and took on the responsibility of backing up their claim (11). When all the

[71] For the absence of a public land registry in Classical and Hellenistic Athens, see Finley, pp. 13–15.

[72] For the procedure, see Kaser, art. cit. (n. 38), pp. 159–78. For a convenient summary of the evidence in English, see W. Wyse, *The Speeches of Isaeus* (Cambridge, 1904), pp. 435–7.

[73] Harpocration s.v. βεβαιώσεως mentions a δίκη βεβαιώσεως, but there is no contemporary evidence for the action. Even if it did not exist, the buyer whose claim was not supported by the seller could still have proceeded against him with a δίκη βλάβης for failing to testify on his behalf ([Dem.] 49.19–20).

[74] *Pace* Finley, pp. 228–9 n. 33.

parties met together, Mnesicles confirmed (*βεβαιοῦντος*) the claims of Nicobulus and Evergus in the very way a *πρατήρ* was expected to.[75]

Seeing that Evergus and Nicobulus were not about to abandon the case without a fight, the other creditors presented them with a formal challenge: either Nicobulus and Evergus take the money owed them and depart, or they pay them the amount that Pantaenetus owed them and thereby become sole creditors. To assure them that they would not lose if they were to accept the latter alternative, the other creditors stated that the combined amounts of both loans did not exceed the total value of Pantaenetus' workshop. Nicobulus' immediate and spontaneous response was to accept the money offered by the other creditors (13). He quite understandably wanted to wash his hands of the whole business and was able to convince Evergus of the wisdom of his choice.

It is important to understand the exact nature of the proposal that Nicobulus wanted to accept. What the other creditors had offered was either to conclude a *ὁμολογία* or to grant a release.[76] In return for a payment equivalent to the amount of their loan to Pantaenetus, they would agree to renounce all claims to the workshop. The attraction of such an agreement for Nicobulus should be readily apparent: it would enable him to get all his money back and to cut all his ties with Pantaenetus, who had so far caused him nothing but headaches.

None of this escaped the creditors, who all of a sudden realized that they had acted hastily when making their challenge. They now saw that the agreement that Nicobulus was so eager to accept contained one rather serious risk for them. They had seen how Pantaenetus had already made another loan on the security of the workshop without informing them; if Pantaenetus had done this once, might he not do it again? And was it not possible that in addition to these two loans there might be still another which Pantaenetus had borrowed from a third set of creditors? If a third set of creditors were to come forward and press their claim, the creditors who made the agreement with Nicobulus and Evergus would have to reach some sort of compromise with these new creditors. But what if the combined amounts of the loans held by these two groups came to more than the total value of the workshop? Who would take the loss in the event that Pantaenetus defaulted? With these thoughts in mind, they decided to alter their original proposal to Nicobulus and Evergus. Instead of offering to conclude a *ὁμολογία* or to grant a release, they now insisted that they buy the workshop from Nicobulus and Evergus, who would thereby become *πρατῆρες*, in the same way as the latter had bought it from Mnesicles (16, 30). In other words, the other creditors were proposing that Nicobulus and Evergus, as creditors and owners of the workshop, sell it to them for the amount that Pantaenetus

[75] Carey and Reid, op. cit. (n. 68), p. 126, misunderstand the nature of Mnesicles' declaration when they state 'Mnesicles confirmed that when he "sold" it the property did not stand as security for these other debts'. The text reads *Μνησικλέους βεβαιοῦντος ἡμῖν*; Mnesicles supported the claims of Evergus and Nicobulus. The text does not indicate that Mnesicles said anything about the claims of the other creditors.

[76] The words *διαλῦσαι* (12) and *συνεχώρησα* (13) used by Nicobulus to describe the proposals of the other creditors and his response to them make it clear that they were offering a *ὁμολογία* or a release. For other examples of these verbs employed in connection with either of these two types of agreements, see Dem. 21.122, 216; 38.24; [Dem.] 41.14; 42.10–14; Lysias 4.1. For the *ὁμολογία*, see Kussmaul, op. cit. (n. 25), pp. 30–7, esp. p. 34: 'Die *ὁμολογίαι*, (...) sind wahrscheinlich *pacta*, welche ein bestehendes Rechtsverhältnis abändern oder einen Streit darüber beenden, nicht *contractus*, welche eine neue Obligation begründen.' For releases, see Dem. 36.10, 24–5.

owed to them. The difference between the original proposal offered by the other creditors and the revised one appears at first to be only an insignificant change of name: in place of a ὁμολογία or a release, they wanted to substitute a sale. But the change in name was accompanied by an important difference in the legal implications of the two agreements. If the other creditors were to conclude a ὁμολογία or to grant a release, all the risks of doing business with the unscrupulous Pantaenetus would be theirs. Should a third set of creditors appear, they alone would be in danger of losing money. On the other hand, if the agreement were to take the form of a sale and then subsequently a third set of creditors were to come on the scene, Nicobulus and Evergus would be responsible as πρατῆρες for supporting the claim of the creditors they had sold to and would be forced to share their risk.[77] Well aware of its implications for him, Nicobulus hesitated to accept the revised form of the proposal.

With the negotiations at an impasse, Pantaenetus intervened and begged Nicobulus to consent to the new form of the proposal. One can easily understand why Pantaenetus was in favour of Nicobulus and Evergus selling to the other creditors: the latter did not wish to foreclose on the workshop and were content to allow him to continue to carry on his business, whereas Evergus had already seized control of the workshop and showed no sign of letting it go. Pantaenetus' entreaties failed to stir up any compassion in Nicobulus, who was by this point infuriated by his unprincipled behaviour. At the same time, Nicobulus must have realized that the new proposal presented by the other creditors provided the easiest way of resolving the dispute. Guided by these considerations, Nicobulus declared he was willing to sell to the other creditors provided that Pantaenetus would grant him a release from all claims (16–17). Although he could not avoid sharing some risk with the other creditors, he could at least protect himself from the unreliable Pantaenetus. Pantaenetus did not object to this condition, and a three-sided agreement was worked out which satisfied all the parties. Nicobulus' insistence on obtaining a release later proved to have been a wise move for sometime later Pantaenetus brought an action for damages against him. Armed with his release, Nicobulus was able to thwart the charge by bringing a παραγραφή against Pantaenetus.[78]

[77] None of the recent discussions of the speech analyzes the difference between the two proposals offered by the other creditors. Finley, p. 34, misses the point of the revised proposal. According to him, the other creditors wanted Nicobulus and Evergus to become πρατῆρες because 'Should the creditors (i.e. the other creditors) be compelled to accept the property, the question of title would become important.' But Nicobulus supplies a very plausible motive for the new proposal: ἐώρων γὰρ ἡμᾶς οἵ' ἐσυκοφαντούμεθ' ὑπὸ τούτου. They were worried that the same ruse that Pantaenetus had used against Nicobulus and Evergus would be used against them. This sentence does not refer to Pantaenetus' case against Evergus nor does it imply 'that the case against Evergus was at least under way at the time of the transaction with the claimants' (Carey and Reid, op. cit. (n. 68), p. 129). The verb ἐσυκοφαντούμεθ' is plural, referring to both Nicobulus and Evergus. It plainly refers to Pantaenetus' deceitful manoeuvres, especially his concealing the presence of the other creditors to Nicobulus and Evergus and his bringing them forward when it was advantageous for him to do so. The verb can be used of any attempt to extort concessions from another person and need not imply legal proceedings (e.g. Lys. 26.24).

[78] I imagine that it was Nicobulus alone who became πρατήρ, that is, the seller who would be required to warrant the sale, and was the only one who gained the release from Pantaenetus. It appears that when there were several sellers, one could be designated as responsible to warrant the sale; this seems to have been the case with Mnesicles (5). Such a hypothesis would explain why Evergus was not able to fend off Pantaenetus' prosecution with a παραγραφή (8–9) in the way in which Nicobulus attempted to.

Though difficult to disentangle, the complex negotiations that are narrated by Nicobulus are invaluable for the information they provide about the way in which different sets of creditors envisaged their relationship with one another. The most fascinating aspect of the dispute between the creditors is their use of procedures drawn from property law to resolve their differences. Nicobulus, who has bought the loan that Mnesicles had made to Pantaenetus on the security of the workshop, regards Mnesicles as a πρατήρ and expects him to perform all the duties attached to that role. In similar fashion, the other creditors want Nicobulus and Evergus to sell to them and to undertake the responsibilities of πρατῆρες. Nicobulus' reluctance to accept the revised proposal of the other creditors can only be explained by his unwillingness to accept the responsibilities inherent in being a πρατήρ. Our discussion of the speech not only lends support to our view that the Athenian creditor regarded himself as the owner of the security, but also reveals that in the absence of any statutes regulating security transactions, creditors had to resort to procedures borrowed from property law to resolve disputes among themselves.

Of equal importance is the 'negative' evidence furnished by the speech. What is especially striking is the failure to invoke the Roman principle of *prior tempore, prior iure*. When the two sets of creditors confronted each other, no one asks who was the first to make a loan on the security of the workshop. The dispute would have been handled very differently in Roman law. If both sets of creditors claimed that the workshop had been pledged to them by *fiducia cum creditore*, all that was necessary was to determine whose *mancipatio* or *cessio in iure* had occurred first. The first group to whom the debtor had pledged his property would be ruled the owners of the security, while the others would find their claim invalidated since the debtor could not transfer by *mancipatio* something that he no longer owned. While the second group had no right to the security that they thought had been pledged to them, they could nevertheless proceed against the debtor with an *actio de dolo malo*.[79] In the case where there were two creditors each holding a *hypotheca* on the same security, the rules were different. If the first creditor foreclosed and sold the security by virtue of a *pactum de vendendo*, he had to restore to the debtor the amount by which the sale price exceeded the amount of the loan (surplus). The second creditor had no right to take possession of the security and could not demand repayment from the first creditor who sold the security. He could only demand repayment from the debtor out of the surplus that was returned by the first creditor. If there was no surplus, the second creditor lost out.[80] Nothing even faintly resembling these Roman procedures is found in the negotiations described by Nicobulus.

Although the failure of Athenian law to provide guidelines in the field of real security created a certain amount of confusion, it did not prevent Athenian businessmen like Mnesicles, Nicobulus, and Pantaenetus from conducting complex security transactions. Businessmen do not fear to tread where the laws have not charted the territory. Far from showing any timidity, Athenian entrepreneurs rushed ahead, relying on their own ingenuity to devise arrangements that were suited to meet the demand for credit. Of course, we must not exaggerate the role that credit played in the economy of the Classical and Hellenistic periods, nor the complexity of the financial transactions conducted at this time. Paper money, double-entry book-keeping, commercial banks, and joint stock companies still lay far in the future. But we should not underestimate the role of credit either, nor interpret the absence of any

[79] For the *actio de dolo malo*, see Schulz, pp. 605–7.
[80] For the procedure used in *hypotheca*, see Schulz, pp. 423–5.

law about real security as an indication that credit played a negligible role in the Athenian economy.[81]

V

After our lengthy tour of the evidence found in the orations it is time to return to the *horoi* and to the question posed at the beginning of this study: why does the terminology employed by the orators differ so markedly from that seen on the *horoi*? For previous scholars who believed that the two forms of expression found on the *horoi* referred to two different kinds of security, the divergence between the vocabulary used in the orations and that encountered on the *horoi* was very perplexing. Why, they asked, did the form of security that was most frequently discussed in the speeches of the orators hardly figure at all on the *horoi*? We can now see that they were asking the wrong question. Which is not surprising given that they were working on an incorrect assumption. The question we should be asking is not 'Why did those who set up the *horoi* generally prefer to use *one type of security* as opposed to another?' but 'Why did those who set up the *horoi* generally prefer to employ *one type of expression* rather than another?' When the question is recast in this form, an answer to it can be found.

We need to begin by recalling what the function of the *horoi* was and who set them up. Despite their chronic disagreements, scholars have generally assented to the view that the *horoi* were set up by, or at the insistence of, the creditor, who obviously desired to warn others that the property to which they were affixed was not unencumbered.[82] Since the creditor was the one who had the *horoi* set up, we should expect the inscriptions on them to serve his needs and to reflect his view of the transaction. What were the needs of the creditor? To warn third parties that the hypothecated property could not be sold, to discourage others from accepting it as security for another loan, and to express his claim in the strongest possible language. All of these needs were well served by the expression πεπραμένου (-ης, -ων) ἐπὶ λύσει or simply πεπραμένου (-ης, -ων). Both expressions send a clear message to the third party who is contemplating buying or accepting as security the property on which the *horos* is placed. They warn him in unambiguous terms that he cannot buy the property since it has already been 'sold' to someone else. This form of expression was also preferred because it accurately reflected the views of the creditor, who, as we have seen, interpreted the transaction as a sale which conferred ownership on himself.

Although some creditors found the expression ὑποκειμένου (-ης, -ων) satisfactory, it is obvious that it is not as forceful as πεπραμένου (- ης, -ων) ἐπὶ λύσει. It does not reveal how the creditor viewed the transaction and does not indicate clearly that he considered himself the owner of the security. In fact, on several of the *horoi* that employ this term the creditor felt it necessary to add a clause to show that he was now the owner of the hypothecated property. On *horos* no. 1 there is added after ὑποκειμένων (line 2) the words ὥστε ἔχειν καὶ κρατεῖν τὸν θέμενον (lines 3–4). On *horos* no. 2 a similar clause is found after ὑποκειμένων (lines 4–5): ἐφ' ὥ[ι]τε ἔχειν καὶ κρατ[εῖν τὸν] ὑποθέμενον (lines 5–7). The clause should be translated 'on the

[81] *Pace* Finley, ch. 8. Cf. the criticism made by Pringsheim, *Gnomon* 25 (1953), 224. Even P. Millett, who takes a primitivist view of the Athenian economy, admits that 'The easy availability of credit was essential to the smooth functioning of Athenian society; loan transactions of one type or another are a pervasive feature at all levels of Athenian life.' ('Maritime Loans and the Structure of Credit in Fourth-Century Athens' in P. Garnsey, K. Hopkins, and C. R. Whittaker, edd., *Trade in the Ancient Economy* (Berkeley, 1983), p. 42).

[82] There is some evidence for this assumption: see *IG* ii² 1183, lines 28–9.

condition that he who has received the security is the owner'.[83] The creditors who set up these *horoi* obviously thought that the term ὑποκειμένων by itself was not sufficient to get their message across and decided that it would be a good idea to spell out in plain language what he thought his rights to the property were.

Other evidence lends support to this explanation. In the *poletai* inscription recording the sale of Theosebes' house we read that when Theomnestus denounced it for confiscation, he stated that the house was pledged as security to Smicythus and used the verb ὑπόκειται. On the other hand, when the creditors came forward, they used the language of sale to express their claims to the house (line 23: ἀποδομένο; line 33: πριαμένων). The third party, Theomnestus, used the weaker term to express the claims of a creditor, while the creditors themselves preferred to use the stronger language of sale to show that they considered themselves to be the owners of the security whose claims could not be brushed aside. Something similar occurs in the inscription from Amorgos, *horos* no. 102, which was put up by the creditor Ctesiphon, who was undoubtedly responsible for the language used on it. When speaking of the property pledged to himself, Ctesiphon stated that his debtor Niceratus sold it to him (line 3: ἀπέδοτο). Yet, when describing the property that Niceratus had received from Exacestus as security, he used the words ἔχει θέμενος (lines 11–12). When Niceratus is the creditor in the transaction, he calls it a sale; when he is just a third party, he uses the expression ἔχει θέμενος.

One final question remains: why do the Attic orators never add the prepositional phrase ἐπὶ λύσει after the verb when they are using the language of sale to describe hypothecation? The best way to find the reason why the orators omit the phrase is to begin by considering what reason the creditors who set up the *horoi* had for adding it. The reason is not hard to discover: they probably added the phrase to indicate the conditions on which the sale had been made. The prepositional phrase tacked on after the perfect participle is put there to show that although the property belongs to the creditor, the borrower can redeem it once the loan is paid off. In the speeches of the orators that is not necessary when the language of sale is employed since the narrative in which the language is found makes it abundantly clear that the sale is taking place as part of a loan agreement. There was consequently no need to add the prepositional

[83] Finley, p. 204 n. 11, denied that the expression indicates ownership and translated it 'to have and to have power'. He attempted to justify his translation by arguing that 'κρατεῖν does not necessarily mean "to own"', and cited several texts in support of his assertion. In two of these passages, [Dem.] 35.25 and 49.11, the verb is used to describe the rights of creditors to a security, but nothing in the surrounding context would enable us to decide whether these rights included ownership or not. At Is. 8.2 the speaker uses the words ἔχουσι ... καὶ κρατοῦσι when describing how his opponents were enjoying ownership of Ciron's estate. He is not disputing the fact that they own it, but readily admits it; his charge is that they had obtained ownership through force and that they, therefore, were not entitled to retain ownership. In the passage from Herodotus (2.136) an old Egyptian custom which originated during the reign of King Asychis is described. At this time, we are told, a son was allowed to pledge the corpse of his father as security for a loan. It was also laid down that the creditor ἀπάσης κρατέειν τῆς τοῦ λαμβάνοντος θήκης. Once again nothing in the surrounding context allows us to determine whether or not the rights expressed by the verb κρατέειν included ownership or not. Finley makes no mention of the use of the verb to denote ownership in the law of inheritance preserved at [Dem.] 43.51 (the authenticity of the wording of this part of the statute is guaranteed by the quotation at Is. 7.20) where it occurs as a synonym for κυρίους εἶναι and μοῖραν λαγχάνειν. Nor does he cite *Ath. Pol.* 56.2 where the phrase ἔχειν καὶ κρατεῖν obviously means 'to own'. It is found in a description of the oath that the archon swore upon entering office and is clearly a promise not to deprive citizens of the property they own. This promise is equivalent to the assurance found in the heliastic oath not to carry out a redistribution of land or a cancellation of debts (Dem. 24.149).

phrase since the jurors who heard the narrative would have been aware of what the conditions of the sale were. That is not true of the *horoi*, which told those who passed by them little or nothing about the nature of the transactions that had led to their erection.[84]

In the final analysis the riddle of Athenian terminology for real security turns out to be nothing more than a problem of terminology, one to be approached from a study of the ways in which Athenians used words. Previous scholars who dealt with this problem erred in part because they did not allow for the possibility of explaining the language found on the *horoi* in this fashion. For them the occurrence of two types of expression for real security had to be explained on the assumption that the Athenians possessed two different forms of security. As I hope to have shown, that assumption is incorrect for several reasons. A much better way to attack the problem is to examine how the Athenians chose to express themselves in different contexts and why they selected the words they did to communicate what was on their minds.

VI

Before bringing the discussion to a close, I would like to return for a moment to the question of 'the origin' of the system of credit and security found in Classical and Hellenistic Athens. As we have just seen, the search for 'the origin' of real security in the Archaic period does not help us to understand how the system functioned several centuries later. That task can only be addressed by analyzing the evidence we have for Athens in the Classical and Hellenistic periods, not by speculating how the system came into existence in an earlier one. In my opinion, the search for a single origin is not only unenlightening; it is also misguided. Lending on security in the Athens of the fourth century B.C. was a complex transaction, consisting of several distinct components. The loan was made in cash and its value and the interest to be paid reckoned in Athenian coinage. The creditor's right to the security and the debtor's right to redeem it formed part of a legally enforceable agreement, the terms of which were often recorded in writing. And once the borrower received the loan of cash from the creditor, he might use it to buy goods or services in the marketplace and in turn would later sell his own goods or services to obtain cash to make interest payments and finally to pay off the principal. There were thus several factors that were essential to the functioning of the system: (1) coinage, (2) writing, (3) formal legal and political institutions, and (4) an economy in which there was a regular exchange of commodities for cash by means of sale, i.e. an established marketplace. Without coinage, the precise amount of the debt could not be reckoned, nor interest payments calculated. If both parties were illiterate, it would be impossible to draw up a written document containing the terms of the agreement.[85] And there would not have been any sense in putting up *horoi* unless rudimentary literacy was widespread

[84] If we adopt such an explanation to account for the language of the *horoi*, we can view the expression ὑποκειμένης ἐπὶ λύσει (*horoi* 80A and 81A – both inscriptions are on the same stone) as an idiosyncratic combination of elements from both of the standard formulas for real security. For those who maintain the traditional position that there were two forms of security, this unusual expression poses insoluble difficulties. One might suggest that the creditor who set up the *horos* made a mistake, but that is unlikely. If these were two forms of security, each of which was referred to by a different expression and bore different legal implications, such an error would have been quite serious, and serious mistakes do not go unnoticed. Yet on this *horos* the expression not only remained uncorrected, but was actually repeated!

[85] For written documents in loan transactions, see [Dem.] 33.15; 34.6; 35.1–13; 56.6; *horoi* nos. 1, 2, 2A, 6, 11, 13, 17, 27, 32, 39, 65.

in Attica.[86] The loan agreement itself would have meant very little had there been no formal legal institutions to enforce its provisions in the event that one of the parties failed to abide by them. Finally the debtor would have found it difficult to make cash payments to his creditor in the absence of a marketplace where he could exchange his goods and services for coinage.[87] It is impossible to isolate any one of these elements and call it the primary one which was mainly responsible for the system of credit and security found in Athens during the Classical period. Far otherwise; the system was the offspring of several different factors coalescing, none of which can claim for itself the sole honour of paternity.

All of these factors were absent in Homeric society, that is, in the Greece of the eighth century B.C.,[88] where coinage was as yet unknown,[89] alphabetic writing in its infancy,[90] formal legal and political institutions non-existent,[91] and the *agora* only an informal meeting place, not a marketplace.[92] That is not to say that the Greeks of the Homeric period did not have a concept of debt and did not recognize that the creditor was entitled to seize some object as compensation if the debtor failed to repay him.[93] What they lacked was coinage that could be used to determine with some precision the amount of the debt and the amount of interest to be paid at fixed intervals. They were also without courts that could enforce the rights of the creditor and debtor. If the debtor failed to repay, the creditor had no other recourse than to resort to self-help, or to seek the assistance of some powerful figure or pillar of the community. But there were no laws that bound them to go to his assistance. In general, the creditor had to depend primarily on the honesty of the man who borrowed from him.[94]

During the Archaic period this informal system gave way to the formal system of credit and security that flourished in Classical Athens. The transition from the one system to the other probably occurred long before 400 B.C.; what the different steps were in the transition, and when they occurred, however, are unknown to us. All we can know for certain is what the economy was like before the transition and what it was like after. Yet, although our sources tell us nothing about the steps in the transition, we can identify the cause of the transition. This was the development of formal legal and political institutions, in short, the *polis*. Despite scholarly disagreement about the original reasons for the creation of coinage in Greece, it is clear that

[86] For widespread literacy in Classical Athens, see F. D. Harvey, 'Literacy in the Athenian Democracy', *REG* 79 (1966), 585–635.

[87] For exchange of services see A. Fuks, 'Kolonos misthios: Labour Exchange in Classical Athens', *Eranos* 49 (1951), 171–3.

[88] For the Homeric poems as evidence for social conditions in the eighth century B.C., see I. M. Morris, 'The Use and Abuse of Homer', *CA* 5 (1986), 81–136.

[89] Scholars are divided over the question whether coinage was introduced in the first or second half of the seventh century, but there is a general consensus that there was no coinage before 700 B.C. For the earlier dating, see L. Weidauer, *Probleme der frühen Elektronprägung* (Freiburg, 1975), pp. 72–109; H. Cahn, *SNR* 56 (1977), 279–87; D. Kagan, *AJA* 86 (1982), 343–60. For the later dating, see R. M. Cook, *JHS* 66 (1946), 90–1; E. S. G. Robinson, *JHS* 71 (1951), 156–64; M. J. Price, *NC* 136 (1976), 274–5; J. Kroll and N. Waggoner, *ANA* 88 (1984), 325–33.

[90] For the date of the introduction of the Greek alphabet, see L. H. Jeffery, *The Local Scripts of Archaic Greece* (Oxford, 1961), pp. 12–21.

[91] M. I. Finley, *The World of Odysseus*[2] (London, 1978), pp. 74–107.

[92] E.g. *Il.* 1.490; 2.93; 7.382, 414; 11.139; *Od.* 2.10, 37, 150; 8.109; 16.361; 24.420. See also Finley, op. cit. (n. 91), p. 78.

[93] For the notion of debt, see Hes. *Op.* 404, 647; Hom. *Od.* 8.353. For seizure of body of the debtor resulting from default, see *Ath. Pol.* 2.2; 6.1.

[94] L. Gernet, *Droit et institutions en Grèce antique* (Paris, 1968), pp. 15–16.

its use was encouraged and furthered by the rise of the *polis*, which minted the coins, regulated their value, and guaranteed their worth.[95] The rise of a formal legal system with its magistrates, law codes, and courts, transformed what had been informal loans into the legally enforceable agreements we call contracts.[96] The terms of the agreement were written down in documents which often specified what objects would be subject to seizure in the event of default. The creditor no longer had to rely on self-help, the trustworthiness of the debtor, or the good will of the community, but could now summon the aid of the laws and those designated to enforce them.[97] The *agora* now became sacred ground and received the protection of the magistrates of the *polis*.[98] It could thus serve as a place where exchanges of commodities could safely be made, thus encouraging their growth. We should not exaggerate the role of commodity exchange in Classical Athens; to deny its presence, however, would be to falsify our conception of the Athenian economy in this period.[99] Nor should we forget the role of the Greek alphabet, which permitted widespread literacy. After all, why would a creditor bother to put up a *horos* with an inscription on it if only a restricted few could read it?[100]

Thus, it was the rise of the *polis* with its formal legal and political institutions that created the conditions that led to the rise of the system of credit and security found in Classical and Hellenistic Athens.[101] If there is a general conclusion to be drawn from our discussion, it is that economic institutions do not follow an autonomous line of development. Quite the opposite: they are to a large extent the product of conditions created by legal and political institutions. It was the advent of the *polis* with its magistrates, law codes, marketplaces, and coinage that brought about the transformation of the economy of the eighth century B.C. into that of the Classical period. Not the other way around.

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[95] For the role of the *polis* in the creation of coinage, see C. M. Kraay, 'Hoards, Small Change, and the Origin of Coinage', *JHS* 84 (1964), 76–91; R. W. Wallace, 'The Origin of Electrum Coinage', *AJA* 91 (1987), 385–97.

[96] The legal status of contracts in Classical Athens is complicated by the fact that the Athenians did not distingish between actions *ex delicto* and actions *ex contractu*. The analysis of Pringsheim, op. cit. (n. 37), pp. 13–85, is vitiated by his assumption that the Athenians did make such a distinction. On the topic of contracts in Athenian law one can consult Wolff, op. cit. (n. 35), but more remains to be done.

[97] For the role of the demarch in seizing the property of defaulting debtors, see Ar. *Nub.* 37.

[98] For the agora as a sacred area, see G. E. M. de Ste. Croix, *The Origins of the Peloponnesian War* (London, 1972), pp. 271–2, 397–8, 399.

[99] The volume of commodity exchange was significant enough to merit treatment by no less a person than the philosopher Aristotle; see S. Meikle, 'Aristotle and the Political Economy of the *Polis*', *JHS* 98 (1978), 57–73.

[100] For a general discussion of the effects of literacy on economic life, see Goody, op. cit. (n. 67), pp. 45–86.

[101] My position is similar to that of Finley, op. cit. (n. 28), pp. 31–2 except in regard to the rise of chattel slavery where I think he is mistaken. Despite my numerous disagreements with the views of the late M. I. Finley, I must confess that I have learned a great deal from his writings. Of all the works on real security in ancient Athens, I have found his to be the most useful.

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