

THE AMERICAN EXCAVATIONS IN THE ATHENIAN AGORA

HESPERIA: SUPPLEMENT IX

HOROI

STUDIES IN MORTGAGE, REAL SECURITY, AND
LAND TENURE IN ANCIENT ATHENS



BY

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TO
M. ROSTOVTZEFF
MY TEACHER
AND
MY FRIEND

FOREWORD

In the summer of 1942 when Professors B. D. Meritt and A. E. Raubitschek suggested that I edit the still unpublished horos mortgage stones from the Athenian Agora, I thought that I was undertaking a purely epigraphical task. The war intervened before I had been able to do much more than assemble the squeezes then available at the Institute for Advanced Study and make a start on decipherment. In the summer of 1946 I resumed work on the project. It soon became clear that some sort of commentary on the types of contracts publicized by these inscriptions would be necessary. At first I hoped that the commentary could be brief and that for fuller treatment of the various problems it would be sufficient to refer to the writings of such men as Hitzig, Schulthess, Beauchet, and Lipsius. After studying the novel interpretations of Paoli and Meletopoulos, however, I realized that a re-examination of all the evidence was essential. Their views may be erroneous, as I believe they are, but these two scholars have successfully revealed on what shaky foundations many of the earlier interpretations rest. Chapters IV-VII of the present work, therefore, are devoted to an analysis of *ὑποθήκη*, *ἀποτίμημα*, and *πῶσις ἐπὶ λύσει*, the usual contracts employed by the Athenians when real property served as security. Because of the nature of the evidence and the unorthodox theories of Paoli and Meletopoulos these chapters are largely polemical. Nevertheless, I have tried to present an intelligible exposition of each transaction as a whole, omitting only those undisputed matters of detail which are adequately discussed in standard works on Athenian private law.

The conclusions reached in Chapter VIII—Mortgage and Land Tenure—are in flat contradiction to certain generally accepted notions about sixth and fifth century Athens. In Part I of this chapter I have attempted to discover the date at which the mortgage contract was adopted at Athens. I could find no evidence for the existence of this transaction in Attica before the Peloponnesian War and only very few instances of its use prior to the fourth century. This lack of evidence can partly, but only partly, be accounted for by the nature of the extant sources. In Part II I have tried to find a satisfactory explanation for this apparent late appearance of the mortgage contract in Athens. This attempt naturally led to an examination of the Athenian system of land tenure, for it is obvious that the fully developed mortgage cannot exist unless real property is alienable. The results of this investigation were startling, for both the evidence and the significant absence of evidence point to the conclusion that Attic land remained inalienable until the old taboo on alienability was gradually undermined by the terrific impact of the Peloponnesian War and the plague.

I realize that the subject matter of this book belongs to a field of research more

appropriate for a trained jurist than for a general student of Hellenic antiquity. I suspect, moreover, that my lack of formal legal training may have caused me to make certain statements which, in the eyes of legal experts, will seem unprofessional and possibly even naïve. Nevertheless, in studying Athenian private law the novice has one advantage which is denied to the professional. He can approach the subject free from all preconceived notions derived from other legal systems. I have a suspicion that this advantage is of some value, for Athenian legal institutions in the fifth and fourth centuries were very flexible and can be interpreted, I believe, only by means of contemporary Athenian evidence.

It is a pleasure to express my gratitude to those friends who have helped me in the writing of this book: to Professor B. D. Meritt for inviting me to edit these Agora inscriptions and permitting me to use all the facilities of the Institute for Advanced Study; to Professor Paul Clement, the former editor, and to Professor Lucy Shoe, the present editor of *Hesperia*, for many courtesies and helpful suggestions; to Professor John H. Kent, who, while at Athens, took time from his own researches to examine various horos stones for me; to Professor A. E. Raubitschek, who, particularly in the early stages of this work, was the source of innumerable stimulating suggestions; and above all to Professor Allan Chester Johnson. My debt to him in all respects can properly be understood only by those who have had the privilege of close association with him.

JOHN V. A. FINE

PRINCETON UNIVERSITY
MAY 1951

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ABBREVIATIONS

The following books to which frequent reference is made are ordinarily designated by the name of the author only.

Beauchet, L., *Histoire du Droit Privé de la République Athénienne*, 4 volumes, Paris, 1897

Hitzig, H. F., *Das Griechische Pfandrecht*, München, 1895

Lipsius, J. H., *Das Attische Recht und Rechtsverfahren*, 3 volumes, Leipzig, 1905-1915

Paley, F. A. and Sandys, J. E., *Select Private Orations of Demosthenes*, third edition, 2 volumes, Cambridge, England, 1896-1898

Pappulias, D. P., *Ἡ ἐμπράγματος ἀσφάλεια κατὰ τὸ ἐλληνικὸν καὶ τὸ ῥωμαϊκὸν δίκαιον*, Leipzig, 1909

Pringsheim, Fritz, *The Greek Law of Sale*, Weimar, 1950

Schulthess, Otto, *Vormundschaft nach Attischem Recht*, Freiburg I. B., 1886

Wyse, William, *The Speeches of Isaeus*, Cambridge, England, 1904

* * *

The following works of U. E. Paoli to which constant reference is made in Chapters IV, V, and VI are abbreviated as follows:

Studi. = *Studi di Diritto Attico*, Pubblicazioni della R. Università degli Studi di Firenze, Facoltà di Lettere e di Filosofia, N. S., vol. IX, Firenze, 1930

“Datio in Solutum” = “La ‘Datio in Solutum’ nel Diritto Attico,” *Studi Italiani di Filologia Classica*, N. S., X, 1933, pp. 181-212

Sul Diritto Pign. = “Sul Diritto Pignoratizio Attico,” *Archivio Giuridico*, IV Serie, vol. XXIV, 1932, pp. 161-178

* * *

The following two reviews of U. E. Paoli, *Studi di Diritto Attico*, are usually referred to only by the names of the authors of the reviews.

V. Arangio-Ruiz, *Archivio Giuridico*, IV Serie, vol. XXIII, 1932, pp. 245-253

G. La Pira, *Bullettino dell' Istituto di Diritto Romano*, XLI, 1933, pp. 305-320

* * *

A.J.A. = American Journal of Archaeology

A.J.P. = American Journal of Philology

Annuario = Annuario della Regia Scuola Archeologica di Atene

Ἀρχ. Δελτ. = Ἀρχαιολογικὸν Δελτίον τῆς δημοσίας ἐκπαιδείσεως

Ἀρχ. Ἐφ. = Ἀρχαιολογικὴ Ἐφημερίς

Arch. Pap. = Archiv für Papyrusforschung und Verwandte Gebiete

Ath. Mitt. = Mitteilungen des deutschen archäologischen Instituts. Athenische Abteilung

B.C.H. = Bulletin de Correspondance Hellénique

B.S.A. = The Annual of the British School at Athens

C.A.F. = Comicorum Atticorum Fragmenta, edited by Th. Kock, 3 volumes, Leipzig, 1880-1888

Daremberg et Saglio, *D.d.A.* = Dictionnaire des Antiquités Grecques et Romaines, 1877-1919

Et. Magn. = Etymologicon Magnum, edited by T. Gaisford, Oxford, 1848

- G.D.I. = Sammlung der griechischen Dialekt-Inschriften, edited by F. Bechtel, H. Collitz, and others, 4 volumes, Göttingen, 1884-1915
- Inscr. Jur. Gr. = Recueil des Inscriptions Juridiques Grecques, edited by R. Dareste, B. Haus-soullier, and Th. Reinach, 2 volumes in 3, Paris, 1891-1904
- Jahrbuch = Jahrbuch des deutschen archäologischen Instituts
- Jahreshefte = Jahreshefte des österreichischen archäologischen Institutes in Wien
- J.H.S. = The Journal of Hellenic Studies
- J.R.S. = The Journal of Roman Studies
- Mnem. = Mnemosyne, Bibliotheca Classica Batava
- P.A. = Prosopographia Attica, edited by J. Kirchner, 2 volumes, Berlin, 1901-1903
- R.E. = Pauly's Real-Encyclopädie der classischen Altertumswissenschaft, edited by Georg Wissowa and others, Stuttgart, 1894-
- Rev. de Phil. = Revue de Philologie de Littérature et d'Histoire Anciennes
- R.E.A. = Revue des Études Anciennes
- R.E.G. = Revue des Études Grecques
- Savigny-Stiftung = Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung
- S.E.G. = Supplementum Epigraphicum Graecum, edited by J. J. E. Hondius and others, Leyden, 1923-
- Sitzb. Berlin Akad. = Sitzungsberichte der preussischen Akademie der Wissenschaften
- Syll.³ = W. Dittenberger, Sylloge Inscriptionum Graecarum, third edition, 4 volumes, Leipzig, 1915-1924
- T.A.P.A. = Transactions and Proceedings of the American Philological Association
- Tod = A Selection of Greek Historical Inscriptions, edited by M. N. Tod; volume I, second edition, To the End of the Fifth Century B. C.; volume II, from 403 to 323 B. C., Oxford, 1946-1948

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CHAPTER I

NEW HOROS MORTGAGE STONES FROM THE ATHENIAN AGORA

A

ΜΙΣΘΩΣΙΣ ΟΙΚΟΥ

1 (Plate 1). Fragment of Pentelic marble, found on January 14, 1936, in Section T. The top and left side apparently preserve their original surfaces, but elsewhere the stone is broken.

Height, 0.164 m.; width, 0.065 m.; thickness, 0.076 m. Height of letters, 0.013 m.
Inv. No. I 3280.

ὄρο[ς χωρίου καὶ]
οἰκία[ς ἀποτίμημα]
Φρα[----- παι]
σὶ ᾿Ω[αθεν ---]

The type of contract recorded here is the subject of Chapter V.

The name of the deceased father—in the genitive case—was inscribed on line 3. The restoration of several names is equally possible. In line 4 the demotic seems assured. The names of the orphans also may have been inscribed, but, if so, all recognizable traces of the letters have been obliterated.

2 (Plate 1). Fragment of Pentelic marble, found on April 21, 1937, in a modern wall in Section ΘΘ. The stone has been broken at the top, and a slight amount has been lost from each side.

Height, 0.223 m.; width, 0.165 m.; thickness, 0.092 m. Height of letters, 0.013 m.-0.018 m.

Inv. No. I 4759.

[ὄρος χωρ]
[ίο ἀποτι]
[μ]ήματο[s]
[Δ]ωρο ---
5 · ωνο[s] πα
[ί]δων Φιλο
κλέος κα[ί]
[Φ]ιλόργο
vacat

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Lines 4 and 5 should contain the name and demotic of the deceased father, but the right half of line 4 has been so thoroughly worn and damaged that the traces of the letters are almost illegible. John H. Kent, who was kind enough to examine the stone for me, reads line 4 as follows: ΩΡΟ / ΑΗ. The line could be read as *ωρονμη*, but this seems to make no sense. The name of the father, of course, may have been simply *Δῶρος*. According to Kent there are three possibilities for the first letter of line 5. In order of descending probability they are kappa, chi, and upsilon. *ωνο*[ς] suggests the genitive of a proper name rather than a demotic, but in this type of document the substitution of the patronymic for the demotic would be most unusual (but see *I.G.*, II², 2734, 2741, and No. 26, below; also Chapter II, No. 24). The third from the last letter in line 8 was obscure until Eugene Vanderpool, by removing some cement which was adhering to the face of the stone, showed that it was clearly rho.

3 (Plate 1). Fragment of Hymettian marble, found on June 8, 1939, in a cistern in Section BB. Parts of the top and bottom are preserved. The right edge is broken and the left side, although preserving all the letters, is probably not original. The back is rough, but the inscribed face is chisel-dressed.

Height, 0.175 m.; width, 0.175 m.; thickness, *ca.* 0.055 m. Height of letters, 0.009 m.-0.013 m.

Inv. No. I 5873.

ἐπὶ Πει[θιδήμον ἄρ]
 χοντος [ῶρος χωρίου]
 ἀποτίμη[μα παιδὶ]
 Ἄντιφίλ[ου ----]
 5 Προξέν[ωι]
vacat

267/6

The letters are unusually neat for a horos inscription, but, even so, the stone-cutter made an extra vertical stroke after the nu in line 4. The name of the archon is certain, for no other archon's name begins with the letters Πει except that of Peisistratos in the sixth century B. C. If [παιδί] is correct in line 3, line 4 probably ended with the demotic of Antiphilos. If [παισί] is the correct restoration, the name of the other child must have been cut either at the end of line 5 or in line 4 in place of the demotic. It would also be possible to restore [προικός] in line 3. Then lines 4-5 would presumably read: Ἄντιφίλ[η θυγατρὶ] | Προξέν[ου demotic (?)].

4 (Plate 1). Fragment of Pentelic marble, heavily veined with greyish-green quartz, found on June 8, 1939, in Section NN. The stone, which is broken on all sides, is a very thin sliver.

Height, 0.105 m.; width, 0.065 m.; thickness, 0.014 m. Height of letters, 0.01 m.-0.015 m.

Inv. No. I 5878.

[ὄρο]ς χω[ρίου]	
[ἀπο]τίμη[ημα]	
[...]οκλε[----]	(genitive)
[πα]ιδι Τί[----]	(dative)
5 [Δ]αμπ[τρέως]	

Restoration of the names of the deceased father and the orphan in lines 3 and 4 respectively is undesirable since there are too many possibilities.

5 (Plate 1). Fragment of Pentelic marble, found on April 21, 1948, in Section **OO**. The top and right side are preserved, but elsewhere the stone is broken. Height, 0.165 m.; width, 0.09 m.; thickness, 0.061 m. Height of letters, 0.01 m.-0.02 m.

Inv. No. I 6107.

ὄρος
[χ]ωρίο
[κα]ὶ οἰκία
[ς ἀ]ποτιμ
5 [ήμ]ατος
[πα]ιδὸς
τ Λ

B

ΑΠΟΤΙΜΗΜΑ ΠΡΟΙΚΟΣ

6 (Plate 1). Fragment of Pentelic marble, found on October 10, 1938, in Section **BB**. The back is rough-picked. The stone is broken on the bottom and the left side, but the top may preserve its original surface. A slight amount of the stone apparently has been lost on the right edge.

Height, 0.13 m.; width, 0.13 m.; thickness, 0.04 m. Height of letters, *ca.* 0.011 m.

Inv. No. I 5579.

[ἐ]πὶ Κλεάρ[χου]	301/0
[ᾶ]ρχοντος ὄρ[ος]	
[οἰ]κίας προικ	
[ὸς ἀ]ποτίμη	
5 [μα ^{α, β}]χα ----	

The type of contract recorded here is the subject of Chapter VI.

If [μαρος] is restored in line 5, then the first letter of the wife's name might begin with the trace of a horizontal stroke which seems to be present before the chi. It is also possible, however, since this inscription is not stoichedon and since mu occupies a large space, that the horizontal stroke belongs to the sigma of [ματο]ς. In that case the wife's name would begin with chi, a common initial letter for a woman's name.

7 (Plate 2). Fragment of Hymettian marble, found on November 22, 1938, in Section EE. Parts of the top and sides may be preserved, but elsewhere the stone is broken.

Height, 0.145 m.; width, 0.182 m.; thickness, 0.078 m. Height of letters, 0.014 m.-0.02 m.

Inv. No. I 5629.

ὄρος
 οἰκίας
 προικὸς
 Ἄρχιλλ[ηι]
 5 [Ϟ] -----

For the omission of ἀποτίμημα, compare *I.G.*, II², 2666, 2670, and see the discussion below in Chapter VI, p. 118, note 20.

8 (Plate 2). Fragment of Hymettian marble, found on March 10, 1939, in the wall of a modern house in Section BB. The top and part of the left side are broken away, but elsewhere the stone probably preserves its original surfaces.

Height, 0.15 m.; width, 0.19 m.; thickness, 0.05 m. Height of letters, 0.012 m.-0.03 m.

Inv. No. I 5698.

[ὄρο]ς
 [χ]ωρίο
 [π]ροικός
 vacat

For the omission of ἀποτίμημα, compare the preceding inscription.

C

ΠΡΑΣΙΣ ΕΠΙ ΛΤΣΕΙ

9 (Plate 2). Fragment of Pentelic marble, found on May 17, 1932, in Section ΣΤ. The back is rough-picked. Part of the top and right side may be preserved.

Height, 0.084 m.; width, 0.074 m.; thickness, 0.047 m. Height of letters, 0.027 m. (line 1) and *ca.* 0.016 m.

Inv. No. I 238.

[ὄρο]ς
 [χωρίου καὶ] οἱ
 [κήματος] πε
 [πραμένων ἐ]
 5 [πὶ λύσει - - -]
 - - - - -

The type of contract recorded here is the subject of Chapter VII.

For *οἰκήματος*, lines 2 and 3, compare *I.G.*, II², 2735. It satisfies the requirements of spacing better than the word *οἰκίας* which is usual in such documents.

10 (Plate 2). Fragment of blue-white marble, found on April 24, 1934, in the mouth of the aperture in the round basin beneath the second Temple of Apollo Patroos in Section OE (Compare *Hesperia*, VI, 1937, p. 88). The stone, rough-picked behind, is broken on all sides.

Height, 0.135 m.; width, 0.228 m.; thickness, 0.097 m. Height of letters, *ca.* 0.015 m.

Inv. No. I 1888

[ὄρο]ς οἰκίας [πε]
 [πρα]μένη[ς ἐπὶ]
 [λύσει - - - - -]

The letters are very crudely cut. The wide spaces between omicron and iota in line 1 and between epsilon and nu in line 2 and the fact that the omicron is so much out of line are probably to be explained by some imperfection which was present in the stone when it was inscribed (compare *I.G.*, II², 2676 and No. **15** below).

John H. Kent, who has examined this stone, comments as follows: "There was a line three, apparently, but the letters are rubbed off. Below this third line the inscribed surface has been roughly picked off, and there are no further traces of anything."

11 (Plate 2). Fragment of bluish stone, probably granite, found on November 3, 1934, in Section O. The bottom and right side have been broken off, but the top and left edge apparently preserve their original surfaces.

Height, 0.141 m.; width, 0.152 m.; thickness, 0.047 m. Height of letters, 0.010 m.-0.023 m.

Inv. No. I 2058.

ὄρος
 χωρίο [ν]
 πεπραμ [ένου]
 [ἐπὶ λ]ύσει [ι --]

Line 3 was either erased or has been badly worn. At the lower right, part of the word λύσει seems to be visible, but it is strange that no other traces of a line 4 are discernible.

12 (Plate 2). Two fragments of white marble, found on December 21, 1934, in Section II. When fitted together, they form probably most of the original stone. The inscribed face is pitted and worn, and the stone has been burned.

Height, 0.285 m.; width, *ca.* 0.32 m.; thickness, 0.044 m. Height of letters, *ca.* 0.013 m.

Inv. No. I 2251.

[ὄρο]ς χωρίου καὶ οἰκίας
 [πεπ]ραμένων ἐπὶ λύ[σει]
 προ[ικ]ὸς XX
 Μ...^{ca. 7}... ΑΙΚΥΡΙΩ
 5 Δ...^{ca. 7}... ΛΙΤΕΙ
vacat

The readings of lines 4 and 5 have been checked by John H. Kent who has examined the stone. He writes that in place of mu, line 4 might possibly begin with lambda upsilon, while the last two letters of the line could be tau omicron. The most reasonable restoration of these two lines seems to be:

Μ[...^{ca. 6}...κ]αὶ κυρίῳ [ι]
 Δ[...^{ca. 5}...Με]λιτέι

If this restoration is correct, apparently we are to understand that the farm and house were sold ἐπὶ λύσει as security for the dowry to Μ—and her kyrios, Δ—of Melite. This interpretation would be strengthened if there were traces of the kappa in the [κ]αί and of an iota, the final letter in a woman's name in the dative case, but in view of the condition of the stone the absence of any sign of these letters is not strange. Just before the space where the iota would be expected, there are certain marks which on the squeeze and photograph look somewhat like sigma. Kent, however, states that all that can be ascertained from the stone is that some letter had been cut there.

It should be remarked that there may have been other numerals after the XX in line 3. That part of the inscription is badly mutilated; possibly the line was deliberately erased after the expiration of the contract.

This is the first occurrence on an Attic horos of the word kyrios (before mar-

riage, the father or some male relative; during marriage, the husband). In horoi from the islands, reference to the *kyrios* is common; e. g., *I.G.*, XII, 7, 57-58 (Amorgos). For the use of the *πρᾶσις ἐπὶ λύσει* contract as security for a dowry, see the discussion in Chapter VII, pp. 162-163.

13 (Plate 3). Fragment of Hymettian marble, found on March 30, 1935, in the destruction debris near the floor of the Polygonal building (L.R.) in Section II. The top and back apparently preserve their original surfaces.

Height, 0.05 m.; width, 0.082 m.; thickness, 0.045 m. Height of letters, 0.01 m. Inv. No. I 2728.

[ἐπὶ -- ^{ca. 6} -- ἄρ]χον[τος]
 [ὄρος χωρίου] πεπρ[αμέ]
 [νου ἐπὶ λύσει -----]

14 (Plate 3). Block of Hymettian marble, found on February 18, 1936, in a modern wall in Section T. The surface is very badly weathered, but the stone probably preserves roughly its original dimensions.

Height, 0.281 m.; width, 0.25 m.; thickness, 0.09 m. Height of letters, *ca.* 0.015 m.

Inv. No. I 3450.

[ὄ]ρος οἰκ[ιῶν πεπρα]
 μένω[ν ἐπὶ λύσει]
 [-]εν -----
 [Π]αία[νι]ε[ῖ]
 5 X
vacat

For one horos serving as a marker for more than one house, compare *I.G.*, II², 2725. In line 5 the only numeral now visible is X, but originally there may have been others.

15 (Plate 3). Fragment of Hymettian marble, found on February 29, 1936, on the ground near the foundations of a modern house in Section Σ. Parts of the top and left edge preserve their original surfaces.

Height, 0.108 m.; width, 0.113 m.; thickness, 0.028 m. Height of letters, *ca.* 0.016 m.

Inv. No. I 3647.

ὄρο[ς οἰκίας]
 καὶ χ[ωρίου πεπρ]
 ἀμ[ένων ἐπὶ λύ]
 σ[ει -----]

The fact that the chi in line 2 is out of line and smaller than the other letters is probably to be explained by some flaw in the original stone (compare No. 10 above).

16 (Plate 3). Fragment of Hymettian marble, broken on all sides except the left, found on March 6, 1936, in Section N. The left edge, although damaged, is probably original.

Height, 0.115 m.; width, 0.23 m.; thickness, 0.172 m. Height of letters, 0.014 m.-0.025 m.

Inv. No. I 3682.

ὄρος κοπ[ρῶνος]
 [κ]αὶ οἰκημ[ατίου]
 [πεπ]ρ[αμένων ἐπὶ]
 [λύσει - - - - -]
 - - - - -

Above the first line transcribed here there are certain marks on the stone which could be traces of letters. Thus this inscription may have begun with an archon's name. Regarding line 3 John H. Kent, after examining the stone, writes in answer to my query: "The spacing favors the letter in the fourth letter space; hence I prefer [πεπ]ρ[αμένων] to [ἀπ]ο[τίμημα]."

The restorations in lines 1 and 2 can be supported by reference to *I.G.*, II², 2742, [ὄρ]ος οἰκίας καὶ κ[οπρ]ῶνος, and to *I.G.*, II², 2496, lines 9-12, where we find that a group of men leased τὸ ἐργαστήριον τὸ ἐν Πειραεὶ καὶ τὴν οἰκησιὴν τὴν προσοῦσαν αὐτῶι καὶ τὸ οἰκημάτιον τὸ ἐπὶ τοῦ κοπρῶνος εἰς τὸν ἅπαντ|α χρόνον.

Epigraphically it would be equally possible to restore κόπ[ρου] in line 1. A manure pile obviously can be of considerable value, but, since it would have been so easy for either the creditor or the debtor to reduce its value through use, it seems unlikely that it would have been employed as security.

17 (Plate 3). A slab of Hymettian marble, found on March 7, 1936, in Section P. The inscribed face has a rough uneven surface, but the back is smooth-finished. The stone probably preserves its original shape except for the surface break in the upper right corner.

Height, 0.18 m.; width, 0.225 m.; thickness, 0.055 m. Height of letters, 0.012 m.-0.02 m.

Inv. No. I 3701.

ὄρος χωρί[ου]
 καὶ οἰκίας [πε]
 πραμένης Ἀ[σ]
 φάλ[ει ἐ]π[ὶ λ]ύσει
 5 ο - - - - - vacat εν
 XXX οφειλ - - - - -

For the singular ending of the participle, line 3, modifying two nouns, compare *I.G.*, II², 2687 and 2701. Lines 4 and 5 are very difficult. John H. Kent, who has kindly examined the stone for me, writes: "I don't think lines 4-5 are erased. I think the surface there was badly worn *before* engraving, and has been worn some more since." Concerning line 4 in particular he says: "I am not at all sure of the second letter; if it is alpha, it is very crowded. Next comes the bottom left tip of a diagonal stroke, then two empty spaces, then something that is either pi or $\iota\tau$. Then two more empty spaces, then either dotted kappa or dotted iota sigma." The restoration given above diverges from what Kent suggests only by having three letters— $\epsilon\acute{\epsilon}$ —in his two empty spaces and by substituting dotted upsilon sigma for his dotted iota sigma. Since Ἀσφάλης is an attested Attic name (*P.A.*, 2666) and since the name of the purchaser (creditor) can precede the expression ἐπὶ λύσει (*I.G.*, II², 2722), the restoration of line 4 can be considered as almost certain.

Line 5 may have begun with the demotic. The epsilon nu at the end is puzzling. The only suggestion I can offer is that those letters should be connected with the letters in the next line which follow the numerals. Kent reads those letters as οφελ which could be part of the name Ὀφέλας, but it is hard to explain the presence of another name in this part of the inscription. The photograph seems to show an iota before the lambda. Could we not have, therefore, at the ends of lines 5 and 6 some form of the verb ἐνοφείλειν? (In earlier inscriptions the simple verb was sometimes spelled ὀφελ-; cf. *I.G.*, I², 91, line 3). In *I.G.*, II², 2762, the following expression occurs: [δ]ρος| χωρίου τιμῆς| ἐνοφειλομέν|ης. In our inscription the verb may have been abbreviated to ἐν|οφειλ, or the appropriate ending may have been crowded into the space at the end of line 6 and just below. If the verb was not abbreviated, probably the form was ἐν|οφειλ[ομ|ένων], in agreement with the case of the numerals which, if they had been written out in full, presumably would have been in the genitive. Even if this restoration is correct, admittedly it does not explain why the verb ἐνοφείλειν was inscribed, for it seems merely to repeat the idea of indebtedness which is inherent in the rest of the inscription.

18 (Plate 4). Fragment of Pentelic marble, broken on all sides except the left, found on May 6, 1936, in the wall of a cesspool in Section Σ. The inscribed face is very much worn.

Height, 0.128 m.; width, 0.176 m.; thickness, 0.065 m. Height of letters, *ca.* 0.014 m.

Inv. No. I 4134.

[δ]ρο[s]
 [ο]ικίας [ἐπὶ]
 λύσει πεπ[ρα]
 [μ]ένη[s --]

In this inscription the usual order of the formula is reversed by placing the participle after the words *ἐπὶ λύσει*.

19 (Plate 4). An unworked stone of Hymettian marble, found on June 1, 1936, in Section P. It is probably complete except for the upper left edge of the inscribed face.

Height, 0.33 m.; width, 0.28 m.; thickness, 0.08 m. Height of letters, 0.01 m.-0.02 m.

Inv. No. I 4231.

[ὄρο]ς οἰκίας καὶ κα
[π]ηλείου καὶ κήπ
ου πεπραμένων
ἐπὶ λύσει Καλλίπ
5 πωι Φαληρεῖ: Π^Α
vacat

A Kallippos Phalereus is mentioned in the great inventory of the priests of Asklepios, *I.G.*, II², 1534 B, lines 244 and 246. This record covers the period from Peithidemos, 267/6, to Diomedon, 247/6 (See W. K. Pritchett and B. D. Meritt, *The Chronology of Hellenistic Athens*, pp. 32-34). If *καπηλείον* is to be translated as “tavern,” it is interesting to note the association of a garden with it.

20 *a* and *b* (Plate 4). Fragment of Hymettian marble, inscribed on two faces, found on June 10, 1936, in Section KK. The stone is broken all around, but the original dimensions may be roughly preserved.

Height, 0.11 m.; width, 0.12 m.; thickness, 0.045 m. Height of letters, 0.01 m.-0.015 m.

Inv. No. I 4245 *a* and *b*.

Face <i>a</i>	Face <i>b</i>
[ὄ]ρος οἰ[κ]	Ἀρίστω[ν]
[ί]ας πε[πρ]	ος Γαργη[τ]
[αμένης ---]	[τίου ---]
--- σς ---	-----
-----	-----

Face *a* is very rough and the letters are crudely cut. False strokes were made in the two sigmas and in the pi of lines 1 and 2; also the epsilon was not completed. All definite traces of line 3, which presumably was inscribed as restored, have disappeared. I see no way of determining where the *ἐπὶ λύσει* was written; possibly it was omitted as in *I.G.*, II², 2763 and 2764. The two sigmas in line 4 may belong to a proper name or may form part of the word *ἐρανωσ(σ)ταῖς*, misspelled as in No. **26** below. The latter possibility

would explain why face *b* begins with a proper name in the genitive case. The restoration, following the usual formula (compare *I.G.*, II², 2699), would then be: [ἐρανι]σ{σ}[ταῖς τοῖς μετὰ] Ἀρίστω[ν]ος. Since the first line of face *a* is preserved, Ἀρίστω[ν] must have constituted the first line on face *b*. The trace of a horizontal mark at the top left of face *b* is puzzling. To assume that it is the tau of μετὰ, thus postulating an elision of alpha, is hazardous, since such an elision, I believe, would be without parallel in this type of document. This mark, however, is probably a nick in the stone rather than part of a letter. It is possible, of course, that a considerable portion of the bottom of the stone has been lost. In that case, line 1 of face *b* might be the continuation of a second document which began at the bottom of face *a*.

In answer to my query about line 2 of face *b*, John H. Kent, after examining the stone, writes: "The third letter could be epsilon or *gamma*; the fourth, lambda, *alpha*, or delta; the fifth, *rho* or beta; the sixth, tau, epsilon, sigma, or *gamma*. Following this are two upright strokes that seem to belong to an *eta*." (Italics mine). The restoration of the demotic Gargettios, therefore, seems certain.

21 (Plate 4). Fragment of Hymettian marble, broken on all sides, found on January 25, 1937, in Section X.

Height, 0.13 m.; width, 0.135 m.; thickness, 0.057 m. Height of letters, *ca.* 0.015 m. Inv. No. I 4468.

ρ
 [-- π ϵ] πρ[αμένων --]
 -- καὶ Ἡρ --
 -- Θυμαι[τάδηι --]
 5 φράτρα[ι -----]

There are too many unknowns in this inscription to permit certain restorations. There seems to be no way to determine how much of the stone has been lost on both sides. Consequently the ρ in line 1 could belong either to ὄρος or χωρίου. Presumably καὶ οἰκίας, or its equivalent, was also inscribed, but there may have been no ἐπὶ λύσει (compare No. 20). Before and after καί, line 3, proper names apparently were inscribed. The demotic in line 4 seems assured; a dative plural ending might be preferable. Line 5 is puzzling. The usual expression is φράτεροι τοῖς μετὰ and then a proper name in the genitive case (compare *I.G.*, II², 2723), but here we obviously have the dative singular (or plural) of φράτρα.

22 (Plate 4). Fragment of Hymettian marble, found on March 22, 1938, in Section Ψ. The top and bottom, except for minor fractures, may preserve their original surfaces, but elsewhere the stone is broken. The inscribed face is badly battered and worn.

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Height, 0.22 m.; width, 0.155 m.; thickness, 0.055 m. Height of letters, 0.02 m.-0.03 m.

Inv. No. I 5357.

ὄρος [χωρίου]
[κ]α[ὶ οἰκίας πεπ]
[ρα]μένω[ν ἐπὶ]
[λύσει -----]

John H. Kent has examined the stone and he assures me that the last preserved letter in line 3 is omega and not omicron.

23 (Plate 5). An irregularly shaped slab of poor quality Hymettian marble, found on March 29, 1938, in Section Ψ. The front is roughly dressed with a toothed chisel, and the back is rough-picked. The edges are irregular, but, except for minor fractures, the stone is intact.

Height, 0.26 m.; width, 0.275 m.; thickness (maximum), 0.063 m. Height of letters, 0.014 m.-0.024 m.

Inv. No. I 5376.

ὄρος οἰκίας
πεπραμέν
ης ἐπὶ λύσει
τῶι δήμωι τ
5 ὦι Κεραμέω
ν XXX

Until the discovery of this inscription, *I.G.*, II², 2670 was the only ὄρος mortgage stone extant which recorded a deme as one of the contracting parties. In that document an estate was established as security for the restitution of a dowry of one talent. The excess value of the estate was mortgaged (*ὑπόκειται*) to a tribe (Kekropis), a genos (the Lykomidai), and a deme (Phlya); see below, Chapter VI, note 100. According to the Agora inscription, the deme Kerameikos had made a loan of 3000 drachmas to the mortgagor, receiving as security a house which was subject to redemption by the debtor.

Demes possessed considerable amounts of real property which they were accustomed to let to lessees (compare *I.G.*, II², 2492). From the accruing rents, from the tax known as τὸ ἐγκτητικόν, and from fines they derived the major part of their revenues. The money not needed for current expenses they would frequently lend at interest on good security as illustrated in the present inscription. A typical procedure is given in *I.G.*, II², 1183, a decree concerning the administration of the revenues of the deme Myrrhinous, where it is stated in lines 27-29: ἐὰν δέ τ[ινι δέ]|ει

ἀργύριον, δανείζειν τοὺς ἱερέα[s] ἀξιοχρείωι ἐπ[ὶ χωρίω] | ι ἢ οἰκίαι ἢ συνουκίαι καὶ ὄρον ἐφ[ισ]τάται. For the financial affairs of the demes, see B. Haussoullier, *La Vie Municipale en Attique*, Paris, 1884, pp. 62-79; Schoeffer in *R.E.*, s. v. *Δῆμοι*, pp. 17-20.

24 (Plate 5). Fragment of Hymettian marble, found on May 31, 1938, in Section Ψ. Part of the left edge may be preserved, but elsewhere the stone is broken. Height, 0.115 m.; width, 0.13 m.; thickness, 0.035 m. Height of letters, ca. 0.02 m.

Inv. No. I 5507.

[ὄρος χωρί]
ου πε[πραμ]
ένου - - - -
τετ - - - - -

Apparently the name of the purchaser preceded the ἐπὶ λύσει as in No. **17** above, or possibly the ἐπὶ λύσει was omitted as in *I.G.*, II², 2763 (compare No. **20** above).

25 (Plate 5). Fragment of grey stone, found on March 30, 1939, in a modern wall in Section BB. Part of the top may preserve its original surface, but elsewhere the stone is broken away.

Height, 0.145 m.; width, 0.16 m.; thickness, 0.058 m. Height of letters, 0.014 m.-0.025 m.

Inv. No. I 5748.

[ὄρο]ς χω[ρί]
[ου]πεπρ[α]
[μ]ένου [πρ]
[ο]ϊκός - - -
- - - - -

The bottom of the stone has probably been lost where the wife's name, the formula ἐπὶ λύσει, and the value of the dowry were presumably recorded. Compare *I.G.*, II², 2681, and see the discussion of this type of document in Chapter VII, pp. 162-163.

26 (Plate 5). Two fragments of Hymettian marble, found on June 17, 1939, in the wall of a modern house in Section NN. When fitted together, they form most of the original stone, although parts of the top and left side have been lost.

Height, 0.25 m.; width, 0.20 m.; thickness, 0.07 m. Height of letters, 0.012 m.-0.022 m.

Inv. No. I 5881.

First Hand

[ῥ]os [χωρίον]
 [καὶ οἰ]κ[ο]πέδο[v]
 [πε]πραμένων
 [ἐπ]ι λύσει Η
 5 Δ ΔΙ
 κ^ιτ
 vos Βατήθεν
vacat

Second Hand

ΧΗΗΗ
 5 [ἐ]ρανισ{σ}ταῖς τ[ο]
 [ι]ς μ[ε]τὰ Βλεπαίο[v]

A glance at the photograph of this inscription will show that it is a difficult one to read. After prolonged study of the squeeze and photograph, since I was still in doubt about certain letters, I appealed once again to John H. Kent. After examining the stone carefully he reached what I believe is the proper explanation of some of the peculiarities and difficulties—namely, that the stone is a palimpsest. He writes: “You note that in the first three lines, and down to ΛΥΣΕΙ in line 4, the letters are all the same kind. They are scrawly, out of line, and on the whole pretty awful, but at least they are consistent in two respects: first and most important, they are cut with fairly deep and very thin strokes—the letter-cutter has used a thin and very sharp blade; second, they are all approximately the same size, within a millimeter or so. Following the word ΛΥΣΕΙ, however, the lettering changes character. Letters are all at least twice as clumsy as before, twice as wide, twice as high. Also they are much shallower than before, and broader—the engraver has used a thicker and a blunter cutting tool. This second hand takes up with the numerals of line 4 and goes all through lines 5 and 6.”

The following comments are based on, or quoted directly from, Kent's letter, unless stated to the contrary.

Line 4. Under the cross of the chi there is visible part of an upright stroke cut by the first hand—probably part of the numeral Η. [I cannot detect this stroke either on the squeeze or in the photograph.]

Line 5. The first preserved letter is rho (second hand), but within the loop of the rho is visible a letter—probably delta—(first hand). “The third letter, nu (second hand), has been cut on top of another delta, and between this nu and the following iota (second hand) is a very clear iota which was cut by the first hand. At the end

of the line, following the sigma (second hand), is something that I read τ , but I am not sure which hand cut it.”

Line 6. At the left edge there is a tip of a horizontal stroke (second hand)—possibly belonging to a tau or a sigma. Then alpha (?) (second hand?)—[restored as mu in my transcription above]. “The next space has a very clear kappa, cut by the first hand, with heavy strokes by the second hand above and below it—.” Then tau (second hand). “It is followed by an alpha (second hand) in whose right diagonal there is preserved part of a vertical stroke by hand number one. The next space is the worst mess of all. As I read it, hand number one cut a tau, but it is surrounded by crazy circular strokes by hand number two — — —. The only reading I can get out of the second hand is an uncial delta — — —, possibly the letter should be read ϕ , but I think β is impossible.” [As stated below, I question Kent’s interpretation here.] Next comes probably the right diagonal of lambda, alpha, or delta (mu, unlikely), then epsilon and pi (second hand), then alpha or delta (second hand), iota (second hand), and, at the edge of the stone, gamma or tau. [As stated below, I question Kent’s interpretation concerning the gamma or tau.]

Line 7. Kent believes that this whole line was engraved by the first hand.

If Kent is right in recognizing this inscription as a palimpsest, as I believe he is, the documents recorded on it can probably be explained as follows. Originally the property was sold $\epsilon\pi\iota$ $\lambda\upsilon\sigma\epsilon\iota$ for a sum which no longer can be identified in full. The name of the creditor (vendee) was written on line 6—possibly beginning at the end of line 5. Kent believes that the first letter in line 7 is iota. I suggest that it is nu and that in $\nu\omicron\varsigma$ we have the ending of a patronymic. Patronymics are very unusual in such documents, but *I.G.*, II², 2734 and 2741 (cf. No. 2, above, and Chapter II, No. 24) are examples. At some later period the same (?) property was again sold $\epsilon\pi\iota$ $\lambda\upsilon\sigma\epsilon\iota$ —this time to some *eranistai*. The same horos stone was used to record the transaction, and, since the wording through $\lambda\upsilon\sigma\epsilon\iota$ (line 4) was still applicable, the words were left unchanged. The new amount and the new creditors were engraved over the former lettering, which was somewhat erased. In line 6, I have restored the name Blepaios despite the fact that Kent thinks beta is impossible here. Phi, however, makes no sense, as he readily admits. Kent believes that the last visible letter in line 6 is gamma or tau, but in the photograph and even more so on the squeeze an omicron seems to be discernible. Possibly the gamma or tau which he saw was a remnant of hand one. The name Blepaios is well attested for the middle of the fourth century B.C. (*P.A.*, 2876).

If the Blepaios restored in this inscription was from Bate, that would probably explain why the demotic inscribed by the first hand in line 7 was not erased.

27 (Plate 5). Fragment of blue limestone, found on April 4, 1947, in Section OO. The stone is broken on three sides, but the right side, except for chipping, may represent the original surface.

Height, 0.12 m.; width, 0.10 m.; thickness, 0.045 m. Height of letters, 0.01 m.-0.014 m. Inv. No. I 5970.

[ὄρος χωρ]ίω

[πεπρα]μένο

[ἐπὶ λ]ύσ[ει]

— — — ι 'Ανα

5 [φλυ]σ[τ]ί[ωι]

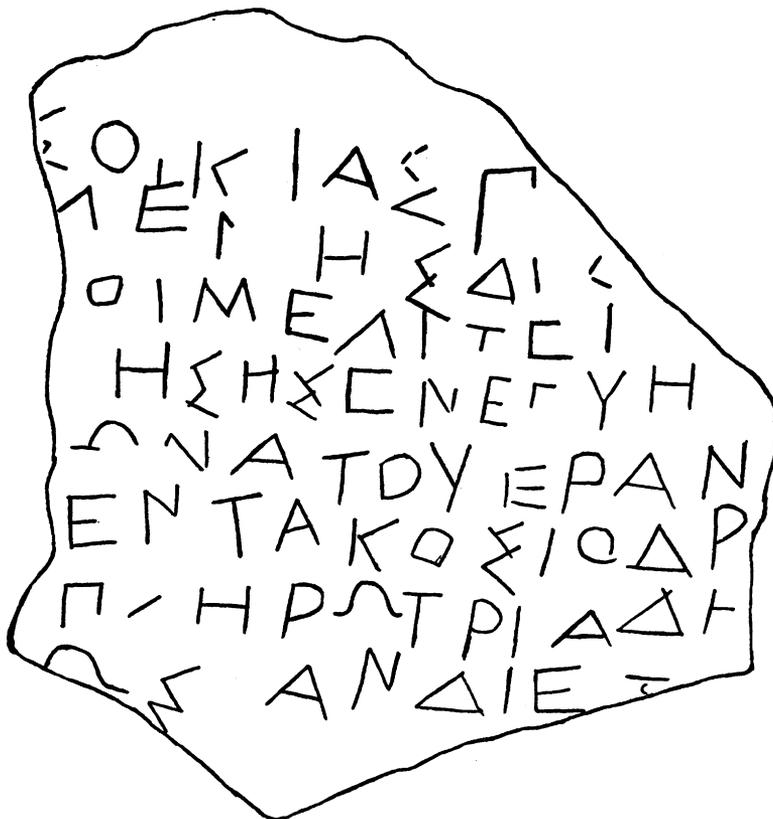
Above line 1, as recorded here, an archon's name was probably inscribed. In line 4 the iota almost certainly is the last letter in the creditor's name and 'Ανα—the beginning of the demotic. If the sigma in line 5 is correct, then, since there is one letter space between it and the iota, Anaphlystios must be the demotic.

D

ΠΡΑΣΙΣ

28 (Plate 5). Fragment of Hymettian marble, found in the period January 16-21, 1939, in Section NN. The stone is broken on all sides, although parts of the top and the bottom may be preserved.

Height, 0.167 m.; width, 0.143 m.; thickness, 0.039 m. Height of letters, 0.006 m.-0.014 m. Inv. No. I 5639.



No. 28

It is hard to make an accurate drawing of this inscription because certain strokes may be merely dents in the stone rather than parts of letters. Of the preserved letters only two, I believe, are really questionable: the iota at the end of line 2 and the eta at the end of line 7. The first letter of line 8 which looks somewhat like an omicron in the photograph appears as an almost certain omega on the squeeze. Although the major portion (including parts of the top and the bottom) of this document has been preserved, restoration is very difficult because the formula and the transaction recorded appear to be unique. This very uniqueness, naturally, makes restoration and interpretation particularly desirable. Consequently, with great hesitation and many doubts I submit the following restoration and commentary.

[ὄρο]ς οἰκίας π[ε]
 [πρα]μένης Δι[ο]
 [τίμ?]οι Μελιτέι
 [τιμ]ῆς ἧς ἐνεγύη[σε]
 5 [ἀραβ]ῶνα τοῦ ἐράν[ου]
 [τοῦ π]εντακοσιοδρ[άχ]
 [μου] πληρώτρια Δη
 [μῶ?ἔ]ως ἂν διεξ
 [έλθηι]
vacat

Before proceeding to a detailed commentary on this inscription, I should make a few general remarks on the principles of restoration I have tried to follow. The first two lines suggest that about three letters should be restored in each succeeding line at the left edge. Certainty in this matter is impossible, however, since the inscription is not stoichedon and since the length of lines on horos stones is frequently irregular. The stone probably had a slanting fracture on its upper right side when it was inscribed. This assumption would explain why down to line 6 the lines extend progressively further to the right although in no line is it necessary to restore more than two letters at the right edge. The restoration of line 8 is somewhat dependent on the length of the woman's name of which the first two letters are preserved at the end of line 7. I have assumed that the stone (at the time of inscribing) came to a point at the end of line 6 and then fell away sharply to the left. Consequently, it has seemed unnecessary to make any restorations at the ends of lines 7 and 8. Since the letters in line 8 are rather widely spaced, it is reasonable to believe that the letters ΕΛΘΗΙ formed part of a line 9 rather than that some of them were crowded into the end of line 8. If we assume that the stone did not fall away to the left after line 6, then it might be possible to restore the relative pronoun οὗ before the first preserved letter of line 7 and also (not so probably) the copula ἐστὶ at the beginning of line 8 (the woman's name having been completed in line 7). Although the restoration of

these two words might make the Greek a little smoother and although such phraseology would be natural in view of the definite article in line 5, the restoration given above seems preferable to me from an epigraphical point of view. The sense, however, would be the same in either case.

The inscription, as restored above, can be translated as follows: Horos of a house sold to "Diotimos" of Melite, for the price of which he has pledged his deposit (payment, contribution) in the five hundred drachma eranos loan. "Demo" is plērōtria until the loan shall have expired.

Commentary

Lines 1-3. The restoration of these lines can be considered certain except that the name "Diotimos" is given merely *exempli gratia*. The dative singular ending omicron iota rather than omega iota is uncommon, but an example of this usage can be seen in a horos inscription from the year 315/14 (see below, Chapter II, No. 17, line 13). It should be noted that no ἐπὶ λύσει was inscribed. Hence, this document publicized not a mortgage, but a sale (cf. *I.G.*, II², 2763-2764; also Chapter II, No. 28, below, and possibly Nos. 20, 21, and 24, above).

Line 4. Although [ἐγγύ]ης is epigraphically possible, [τιμ]ῆς seems necessary because of the general context. At the end of the line, after the eta, John H. Kent, who kindly examined the stone for me, thinks there is an empty letter space. This may be correct, but, to judge from the photograph, the stone is sufficiently worn there so that traces of a letter could have been obliterated. Even if the suggestion is accepted that the word ended with eta, the letters ἐνεγνη must be an abbreviation for a verb form rather than for, e. g., ἐνεγνητής (an impossible spelling), because the first word in the next line is apparently in the accusative case. This can only be explained by assuming that ἐνεγνη represented a verb. The aorist form, ἤγγυ[σε], would be more normal, but the verb is sometimes treated as a compound, as it is here (cf. Liddell and Scott, *A Greek-English Lexicon*, new ed., 1925-1940).

Lines 5-6. Epigraphically the restoration of a proper name—e. g., [Κίμ]ωνα—is most suitable. Such a restoration, however, is subject to serious objections: (1) The lack of an identifying demotic. (2) The difficulty in explaining the genitive—τοῦ ἐράν[ου]. (3) The peculiarity of emphasizing that the surety had 500 drachmas involved in an eranos loan. Was this the only evidence for his financial soundness? The restoration [κοιν]ῶνα makes sense as far as translation is concerned, but it seems inexplicable that a surety should be identified only by the appellation "partner." The context appears to require a word meaning "share." The most plausible suggestion I can offer is [ἀραβ]ῶνα—sometimes written with a single rho (see Liddell and Scott, *op. cit.*). It is true that the basic meaning of ἀραβών is "the earnest," i. e., part-payment of

the price in advance (see most recently, Fritz Pringsheim, *The Greek Law of Sale*, Weimar, 1950, pp. 333-429), but it may be legitimate to assume that the word could also signify more generally the ideas of deposit, payment, contribution, etc. Such a meaning, at any rate, would make sense in this inscription. According to this interpretation, then, "Diotimos," who had bought the house on credit, guaranteed the payment of the price to the vendor by pledging his contribution in an eranos loan. An eranos loan, as is well known, was a "friendly" loan, presumably with no interest charged. It usually was a joint loan by several persons to a needy friend (for a discussion of eranos loans, see Th. Reinach in Daremberg et Saglio, *D. d. A.*, s. v. *Eranos*, pp. 805-808; Beauchet, IV, pp. 258-271; Lipsius, pp. 729-735; E. Ziebarth in *R.E.*, s. v. *Ἐρανος*, pp. 328-330). In the inscription under consideration each of the lenders (including "Diotimos") had apparently contributed 500 drachmas. A parallel to the wording of lines 5-6 can be found in the register of dowries from Mykonos (*Syll.*³, 1215, lines 1-11). There it is stated that Sostratos had furnished his daughter with a dowry of 1300 drachmas. Of this amount 1000 drachmas were ἐν τῷ ἐράνωι τ[ῶι] | πεντακοσιοδράχμωι, ὃν συνέλεξεν Ἀλεξικλῆς, οὗ μετέιχ[εν] | Καλλισταγόρας. Presumably Sostratos had lent to both Alexikles and Kallistagoras 500 drachmas each, or possibly, since Sostratos and his father agreed, if necessary, to help the son-in-law exact the repayment of the loan, we are to understand that father and son each had lent 500 drachmas. It is interesting that in both the Mykonos and the Agora inscriptions the money placed in the eranos loans was used to guarantee a future obligation. In the Agora inscription, the 500 drachmas which "Diotimos" had put in the eranos loan may have been equal to the full amount he had agreed to pay for the house, or they may have represented only the balance due after an initial down payment.

Lines 7-8. These lines are difficult and exceedingly interesting. To begin with, I should remark that if the form—δρ[άχ] | [μου] had been abbreviated to δραχ. (cf. *I.G.*, II², 2758, line 3) or to δρ., there would be space to restore another word. The word πληρώτρια occurs here, I believe, for the first time. It is certainly to be interpreted as a feminine form of the masculine noun πληρωτής; cf. κομμωτής—κομμώτρια, ἐραμιστής—προεραμιστρια (*I.G.*, II², 1292, line 23). Πληρωτής means one who fills out or completes, and is used technically of one who contributes to an eranos loan—πληρωτής ἐράνου; cf. Demosthenes, XXI, *Against Meidias*, 184; XXV, *Against Aristogeiton*, 21; Hyperides, *Against Athenogenes*, 9. Presumably, then, in this inscription πληρώτρια signifies a female contributor to an eranos loan. Consequently, the following letters—ΔΗ—are probably the initial letters of her name. For the purposes of this discussion we may call her "Demo," although epigraphically a longer name might be preferable. Her name was recorded to identify the loan. When a person took the initiative in soliciting contributions to an eranos loan for a needy friend, the loan apparently was called after the name of the initiator (cf. Aeschines, II, *On the False Embassy*, 41, and Hyperides, *Against Athenogenes*, 11; see Lipsius, p. 731).

It is strange to find that a woman was a contributor to an eranos loan, but the word *πληρώτρια* seems to demand this explanation. Since there is no reference to “Demo’s” *κύριος*, presumably she was not an Athenian citizen. She may have been a metic—possibly a hetaira. In [Demosthenes], LIX, *Against Neaira*, 30-32, we are told how the hetaira Neaira collected an eranos for herself. This “Demo” may have belonged to an eranos society. Such associations had female members (cf. *I.G.*, II², 2354; 2358); in one inscription (*I.G.*, II², 1292, lines 23-25; 29-30), there is mention of a Nikippe who held the office of *προερανίστρια*. The Agora inscription is certainly concerned with an eranos loan, but, of course, that loan could have been granted by members—including a woman—of an eranos society. The term *πληρώτρια*, however, has reference to the loan, not to the society. It is true that Reinach, *op. cit.*, p. 806, and Beauchet, IV, p. 259, note 3, claim that the expression, *πληρωτής*, used in connection with eranos loans, was borrowed from eranos associations. Their references, however, are to the *πληρωταὶ ἐράνου*, mentioned above, who were contributors to a loan. To the best of my knowledge, there is no evidence to connect the term *πληρωτής* with the eranos association.

Since *πληρωτής* means a contributor to an eranos loan, it may be possible to reinterpret certain inscriptions which have always been explained as referring to eranos societies. *I.G.*, II², 2721, reads: [ὄρ]ος χωρίο πε|[π]ραμένον<ι> ἐπὶ λύσει| Δεωχάρει πληρωτέ|[κ]αὶ συνερανισταῖς| XXX. Since *πληρωτής* is the technical word for a contributor in an eranos loan, it seems to me that the natural translation for this document is: horos of a farm sold with right of redemption to Leochares the contributor and his associates in the eranos loan. These men may or may not have been members of an eranos society, but certainly there is nothing in the inscription to compel us to recognize them as such. If it is possible—or even probable—that this document recorded the security offered for an eranos loan, how should we interpret such inscriptions as *I.G.*, II², 2699-2701, 2719, 2722, 2743, 2763, 2764, and those transcribed in this book: Nos. 20 and 26, above, and Chapter II, below, Nos. 14 and 28? Three of these inscriptions almost certainly refer to eranos societies. *I.G.*, II², 2763 (cf. 2764), reads: ὄρος χωρίο πε|πραμένο ἐρα|νισταῖς τοῖς| μετὰ Καλλ[ι]|τέλος ΗΗ|ΗΗΔΔ. Unless we assume that the words ἐπὶ λύσει were carelessly omitted, the statement that property was sold to eranistai seems to preclude the possibility that these men were contributors to an eranos loan. In *I.G.*, II², 2701, it is recorded that some real estate was sold ἐπὶ λύσει to an individual, to Δεκαδισταῖς—καὶ ἀποτίμημ|α ἐρανισταῖς τοῖς| μετὰ Θεοπέθους| Ἴκαριῶς. The linking of these eranistai with two other creditors, one being some sort of association, inclines one to recognize the eranistai as members of an eranos society. The other inscriptions, however, leave room for doubt. The formula, in those cases where it has been sufficiently preserved not to be questionable, is: ὄρος χωρίου πεπραμένου ἐπὶ λύσει ἐρανισταῖς τοῖς μετὰ Α. Such documents certainly can be explained as referring to eranos societies. The person

mentioned after the preposition *μετά*, then, is to be thought of, presumably, as the leader or president of the association. In view of the interpretation of *I.G.*, II², 2721, suggested above, however, it seems possible to me to translate *ἐραμισταῖς τοῖς μετὰ Α* as “the lenders in an eranos loan associated with A.” A, therefore, would be the *πληρωτής*—the initiator of the loan and the person after whom it was called—, while his associates in the loan—*ἐραμισταί*—would be the equivalent of the *συνεραμισταί*.

Lines 8-9. The first preserved letter in line 8 is either omicron or omega; the photograph suggests the former, whereas the squeeze strongly favors the latter. After the sigma there is an unexplained blank space. John H. Kent writes that no letter was ever cut there. A probable restoration for the first half of the line is [ε]ως ἄν. If this is correct, then the following letters presumably are the beginning of a verb in the subjunctive. Since the sense of lines 7-9 seems to be—“Demo” is *plērōtria* for the duration of the loan—, and since the horizontal stroke at the end of line 8 probably belongs to a zeta, xi, or tau, I suggest, *exempli gratia*, the verb form *διεξί* [ἐλθῆμι]. The restorations offered for lines 8-9, I realize, have no counterpart in any preserved Attic horos stone, but, as stated above, this inscription is unique. The nearest parallel for these lines which I have been able to discover occurs in a manumission document from Chaeronea in Boeotia (*I.G.*, VII, 3376, lines 10-11): *ἕως ἄν τέλος λάβῃ ὁ ἔρανος*. The meaning of lines 7-9 in the Agora inscription is clear, I believe. The *plērōtria* “Demo” was the initiator of this particular eranos loan which, accordingly, was identified by her name. At the expiration of the loan “Demo” presumably would be the person responsible for seeing that the other contributors recovered the money which they had subscribed. Since the 500 drachmas which “Diotimos” had contributed were pledged to pay for the house which he had bought on credit, it was necessary that this information about the *plērōtria* “Demo” be included in the notice of the sale.

In conclusion it will be well to summarize the results which have emerged from my interpretation—admittedly somewhat speculative—of this interesting, but perplexing document. (1) The inscription publicized not a mortgage, but a sale on credit. Throughout his book on *The Greek Law of Sale*, Pringsheim emphasizes that in a Greek sale ownership was not transferred until the full price had been paid. In the transaction recorded by the Agora inscription, “Diotimos” had agreed to buy the house and presumably had taken possession. Since he had not yet paid the price and, consequently, had not acquired ownership, the horos stone was set up to notify any third party that the vendor still retained ownership and would continue to retain ownership until “Diotimos,” after recovering the 500 drachmas which he had contributed to an eranos loan, paid the price in full. (2) A woman could contribute to an eranos loan. Since “Demo” was designated as *πληρώτρια*, presumably she was the initiator of the loan, the person after whose name it was called, and the person

responsible for seeing that the other contributors recovered the money which they had subscribed. (3) Since in this inscription the term *πληρώτρια* is employed in connection with an eranos loan, it seems probable that in *I.G.*, II², 2721, the *πρᾶσις ἐπὶ λύσει* creditors—*Δεωχάρει πληρωτέῃ καὶ συνεραμισταῖς*—were fellow contributors in an eranos loan rather than members of an eranos society. It has always been uncertain whether in Athens an eranos loan was ever guaranteed by security (cf. Lipsius, p. 733, note 209). If the suggestion about *I.G.*, II², 2721, is correct, it is clear that the borrower in an eranos loan sometimes offered security by selling *ἐπὶ λύσει* some real property to the lenders. Presumably the borrower remained in possession and, since the loan was a “friendly” one, paid no interest on his debt. The creditors, however, since they had acquired ownership of the property through the *πρᾶσις ἐπὶ λύσει*, were protected in case the debtor did not pay back the loan at the stipulated time. The inscriptions listed above (p. 20) with the formula—*ὄρος χωρίου πεπραμένου ἐπὶ λύσει ἐραμισταῖς τοῖς μετὰ Α.*—can also, like *I.G.*, II², 2721, probably be interpreted as recording security offered to contributors in an eranos loan rather than to members of an eranos association.

E

TYPE OF CONTRACT UNCERTAIN

29 (Plate 6). A slab of Hymettian marble, found on February 1, 1935, in Section N. Although the top and both sides are battered, the stone probably preserves roughly its original shape.

Height, 0.28 m.; width, 0.18 m.; thickness, 0.07 m. Height of letters, *ca.* 0.018 m.
Inv. No. I 2339.

ὄρος

About 4 lines erased

X

The erasing was so thorough that any restoration of the surviving traces of letters is probably impossible. This stone may have been used to mark a boundary as *I.G.*, II², 2562, or it may have been a mortgage horos. The amount of the numeral and the very fact that trouble was taken to eradicate the inscription would lead one to believe it was a mortgage stone. In either case it is a good illustration of the custom according to which frequently only the surface intended to bear the inscription was smoothed, while the bottom was left unfinished, presumably for insertion in the ground (see Chapter III, p. 45).

30 (Plate 6). Fragment of Pentelic marble, found on February 15, 1935, in the cellar wall of a modern house in Section II.

Height, 0.207 m.; width, 0.128 m.; thickness, 0.053 m. Height of letters, *ca.* 0.017 m.

Inv. No. I 2441.

— — δ[— —]
 ς Ἐρχι[έω]
 s

This stone was reported as having its right side preserved. It seems more probable, however, that what remains of the rough left side is the original surface and that the right edge was cut away when the stone was used for some new purpose. Two considerations, namely that the inscription ends with what is presumably a demotic (compare No. 4 above), and that the bottom of the stone was left rough, probably for insertion in the ground (compare No. 29), suggest that this is a fragment of a horos mortgage stone.

31 (Plate 6). Fragment of Hymettian marble, broken on all sides, found on April 25, 1935, in Section N.

Height, 0.165 m.; width, 0.15 m.; thickness, 0.053 m. Height of letters, 0.015 m.-0.02 m.

Inv. No. I 2817.

[ὄρος — — κτλ.—]
 ΠΗΗ'Α[π]
 ολλ[ο]δ[ώρωι] ?
 Κυδαθ[ηναιεῖ]

In the space immediately below the numerals there are certain traces which might have been letters. It seems probable, however, that only three lines were ever inscribed on this fragment and that the wide space between the preserved lines 1 and 2 is to be explained by some original defect in the stone—possibly the indentations in the present fragment (compare No. 10 above). An Apollodoros, son of Apollodoros, of Kydathenaion (*P.A.*, 1426) is known from a tomb inscription (*I.G.*, II², 6562) assigned to the second or first century B.C. The name Apollodotos, of course, could equally well be restored. The proper name and demotic have been restored in the dative case on the assumption that this is a *πρᾶσις ἐπὶ λύσει* inscription.

32 (Plate 6). Fragment of Hymettian marble, found on May 26, 1939, in Section NN. The stone was roughly tooled. The right edge may be original, but elsewhere the stone is broken.

Height, 0.12 m.; width, 0.13 m.; thickness, 0.042 m. Height of letters, 0.01 m.-0.02 m.

Inv. No. I 5851.

[ὄρο]ς ἔργασ
 [τηρί]ων τῶν
 [ἄνοι]κοδομη
 [μέν]ων καὶ [ἀν]
 5 [δρα]πόδ[ων - -]

This stone was originally reported as showing traces of letters above line 1. The squeeze and the photograph, however, reveal nothing definite. If there were letters above the present line 1, it is necessary to assume that two lines have been lost from the top of the inscription—a space sufficiently large to hold the formula ἐπὶ ----- ἄρχοντος.

33 (Plate 6). Fragment of whitish limestone, found on April 16, 1947, in Section OO. The original top is preserved, but elsewhere the stone is broken.

Height, 0.095 m.; width, 0.133 m.; thickness, 0.045 m. Height of letters, *ca.* 0.015 m.

Inv. No. I 5971.

[ὄρο]ς συνοικία[ς]
 ΣΤΗΣΓ
 ἸΤ\

This is almost certainly a horos mortgage stone, but it is too fragmentary to permit satisfactory restoration. The final letter in line 2, which I have written as Γ, could be gamma. The trace of a vertical stroke at the right edge, then, would belong to another letter. Possibly in line 3 we should understand ΤΧ. If so, the apartment house was mortgaged for at least 7000 drachmas.

ADDENDUM I

UNPUBLISHED EPIGRAPHICAL MUSEUM INSCRIPTION

a (Plate 6). E.M. 12867.

Height of letters, 0.015 m.-0.02 m.

ὄρος χω[ρ]
 [ί]ου καὶ οἰκ[ί]
 [α]ς πεπρα[μ]
 [ένω]ν ἐπ[ί]
 5 [λύσει - - - -]

UNPUBLISHED INSCRIPTION FROM THE KERAMEIKOS AREA

b (Plate 7). Permission to publish this inscription, of which a squeeze is available at the Institute for Advanced Study, has kindly been granted by Dr. John Threpsiades, Director of the Acropolis, Athens, Greece.

Height of letters, 0.015 m.-0.02 m.

λό[ρος]
χωρίο
πεπρα
μένο

The letters, arranged stoichedon, are unusually neat for a horos mortgage stone. The presence of the *spiritus asper* is uncommon in such inscriptions (cf. Chapter III, p. 49). The words ἐπὶ λύσει may have been inscribed below line 4, or this document may have publicized a sale rather than a mortgage (cf. No. 28, above; see also Chapter III, note 5).

ADDENDUM II

The following two horos stones from the Agora have been published previously in *Hesperia*, but without photographs. They are republished here in order to make the photographs available and, in the case of the second, to offer a different restoration.

a (Plate 7). *Hesperia*, III, 1934, p. 65, no. 58 (B. D. Meritt). Pentelic marble. Part of the top and left side is preserved.

Height, 0.16 m.; width, 0.11 m.; thickness, 0.065 m. Height of letters, 0.023 m. and 0.013 m.

Inv. No. I 273.

ὄρ[ος]
ἀποτ[ιμή]
ματος [..]
ι στ[. .]
5 θε---

This is one of the few horos mortgage stones from the Agora or elsewhere which were inscribed by a skilled stone-cutter. After the first line the letters are arranged stoichedon. As Meritt remarks, the wording was probably similar to that of *I.G.*, II², 2653. The failure to mention the property designated as security is unusual.

b (Plate 7). *Hesperia*, III, 1934, p. 65, no. 57 (B. D. Meritt); *Hesperia*, XI,

1942, p. 313 (A. E. Raubitschek); *Hesperia*, XII, 1943, pp. 163-164 (S. Dow and A. H. Travis).

Hymettian marble. The top is damaged and the right side is broken away.

Height, 0.139 m.; width, 0.195 m.; thickness, 0.07 m. Height of letters, *ca.* 0.013 m.

Inv. No. I 293.

ἐ[πὶ — — — — — ἄρχ]
 οντος ὄρος ο[ικίας E]
 ὑμ<ἐ>νει Τη[— — — —]
 [Δ]<ε>κελέ<ω>ς π[αἰδὶ]
 5 [ἄ]ποτίμημ[α]
vacat

The restoration of the archon's name in line 1 has caused great difficulty. A definitive answer to the problem, I believe, is impossible. Meritt, the original editor, tentatively suggested Chairondas, Raubitschek proposed Simonides, and Dow and Travis argued for Phanomachos. With the photograph herewith published as a control for the reading of the squeeze, I thought that Kleomachos might be a possible restoration. John H. Kent, however, to whom I appealed for help, writes as follows:

“Line 1. I fear that your restoration doesn't look possible from the stone. I read the following: First letter the bottom of an epsilon, followed by two empty letter spaces. Then a letter that could have been kappa, but more probably chi, then a faint diagonal stroke that could belong to anything, then an upright (or rather the bottom of it), then iota, then a curious curved stroke that could be the bottom of an omicron, then a space, and last a slanted stroke that could belong to alpha or lambda (delta not possible). On the whole, I think the best reading would be ἐ[πὶ] Χαρῖο[υ] ἄ[ρχ] but I don't guarantee it.”

In the four centuries from 500 to 100 B.C. only two archons by the name of Charias are known, one for the year 415/14, and the other, an obscure figure, who is assigned to the year 164/3 by W. K. Pritchett and B. D. Meritt in *The Chronology of Hellenistic Athens*, p. XXIX. Either date would be surprising for this inscription, for the former would make it by far the earliest dated horos mortgage stone, while the latter would place it almost a century after the inscription bearing the name of Lykeas, *ca.* 259/8, the latest dated horos mortgage stone known up to the present (see Chapter II, No. 27). Dating private documents of this sort by letter forms is extremely hazardous (cf. Chapter III, pp. 48-50), but, since W. S. Ferguson has shown that the practice of including the archon's name on these horos stones did not begin until 315/14 under the regime of Demetrius of Phalerum (see Chapter III, pp. 53-54), the year 415/14, I believe, can safely be eliminated as a possibility for this inscription. The year 164/3, admittedly, is suspiciously late, but is not impossible.

The matter, then, must be left with the statement that an able epigraphist, after examining the stone itself, considers Charias to be the most probable restoration.

Previously $\pi[\rhoοικός]$ has been restored in line 4; $\pi[αιδί]$ obviously is equally possible. The name in lines 2 and 3, then, would have to be that of the orphan son. The restoration as given above has the advantage of making the lines of the inscription more consistent in length. If $\pi[\rhoοικός]$ is restored, then the name in lines 2 and 3 would have to be that of the wife. Raubitschek's restoration $[\Phiιλο]|υμ(έ)νει$ is attractive, because of the known connection of a woman of that name with a Dekelean family, but it makes line 2 suspiciously long. A preferable suggestion might be $[\Κλ]|υμ<έ>νει$, a name attested at Athens in an inventory of dedications to Asklepios from the year 340/39 (*I.G.*, II², 1533, line 11).

Concerning line 3, Kent believes that $τη$ is preferable to $τιτ$, a reading suggested as a possibility by Dow and Travis. Kent writes: "The horizontal stroke seems to have been intended to touch the left vertical. Notice that the top stroke of the [unquestioned] T comes nowhere near the iota that precedes it."

As is evident from lines 3 and 4 the stone-cutter had an unexplained predilection for eta rather than for epsilon. The omega in $[\Delta]<ε>κελέ<ω>ς$ seems to be a compound of omicron, rho, and omega.

Werner Peek, *Ath. Mitt.*, LXVII, 1942, p. 163, has reached the same conclusion about restoring this inscription as that offered above except that he believes the archon should be $[\Χαιρ]ών[δου]$. His restoration of the father's name in line 3— $Τη[λέφου]$ —should be considered *exempli gratia*.

CHAPTER II

PREVIOUSLY PUBLISHED HOROS MORTGAGE STONES

The previous chapter was devoted to the editing of thirty-five new horos mortgage stones, all but two of which were found in the excavations of the Athenian Agora. In this chapter I have attempted to give transcriptions of, or references to, all other known inscriptions of this sort. Chapters I and II together, therefore, provide a corpus of all the horos mortgage stones which I have been able to discover. For the large number of these inscriptions published in *I.G.*, II², and *I.G.*, XII, it has seemed sufficient to give the proper references without repeating the texts. For those published elsewhere, I have presented the texts and brief descriptions and, where necessary, a few comments.

I

ATTICA

I.G., II², 2642-2770 ¹

ΜΙΣΘΩΣΙΣ ΟΙΚΟΥ

1 and **2**. *Hesperia*, III, 1934, p. 65, nos. 57 and 58. For the texts, see above, Chapter I, pp. 25-27, Addendum II, *a* and *b*. It should be noted that the assignment of these two inscriptions to this type of contract is uncertain.

3. *Hesperia*, X, 1941, p. 52, no. 14 (B. D. Meritt). Photograph. Pentelic marble. Broken slightly on all sides. Athenian Agora. Inv. No. I 3031.

Height, 0.16 m.; width, 0.151 m.; thickness, 0.05 m. Height of letters, *ca.* 0.012 m.

[ὄρ]ος χωρ[ί]

[ο]ν καὶ οἰκί

[α]ς ἀποτιμ

[ή]ματος π

5 [α]ιδὶ Φιλοκλ

[έους]

¹*I.G.*, II², 2631-2632, although not mortgage horoi in the usual sense, should be mentioned. These two identically worded inscriptions, erected probably simultaneously by an association termed *Eikadeis*, state that no one should make any kind of contract (*συμβάλλειν*) on the *χωρίον* concerned. An ordinary horos mortgage stone, since it publicized an existing lien, gave warning to a third party of the encumbered status of the property. These two inscriptions apparently gave public notice that no member of the association was allowed to encumber any part of the common property.

4. *Ath. Mitt.*, LXVII, 1942, p. 35, no. 38 (Werner Peek). Grey limestone. Width, 0.35 m. (only dimension given). Fine letters of the second half of the fourth century.

Height of letters, 0.022 m.-0.025 m.

ὄρος χωρίου ἀπο
τιμήματος παι
σὶ τοῖς Εὐθυκρά
τους Ἐρχιέως

5. *Ibid.*, no. 39 (Werner Peek). Grey limestone, broken on the right side and the bottom. Peek speaks of clumsy letters of about the middle of the fourth century. The squeeze, however, reveals unusually neat letters for a horos mortgage inscription. Found at Liopesi.

Height, 0.23 m.; width, 0.295 m.; thickness, 0.06 m. Height of letters, *ca.* 0.015 m.

ὄρος χωρίο ἀποστ[ίμημ]
α Τιμοκράτος Π[αία]
νιδῶς παισί

Peek apparently did not realize that this stone, which had been overlooked by Kirchner, was originally published (somewhat inaccurately) by N. Kyparisses in *Ἀρχ. Δελτ.*, X, 1926, *Παράρτημα*, p. 76, no. 24.

6. *Ἀρχ. Δελτ.*, XIV, 1931-1932, *Παράρτημα*, p. 31, no. 2 (I. Threpsiades). White marble. Faint letters. Found at Eleusis.

Height, 0.35 m.; width, 0.24 m.; thickness, 0.03 m. Height of letters, *ca.* 0.015 m.

ὄρος χωρί[ο]ν
ἀποτιμήματ
ος παισὶν Πυθ
οδήλου Φαλη
5 ρέως

Threpsiades read lines 2 and 3 as ἀποτίμημα τ|[οῖ]ς-, but the squeeze shows clearly that the reading should be as given above.

ΑΠΟΤΙΜΗΜΑ ΠΡΟΙΚΟΣ

7. *Hesperia*, X, 1941, p. 54, no. 18 (B. D. Meritt). Photograph. Pentelic marble. Broken on the left side and the bottom. The first four lines, which have been erased, contained a *πρᾶσις ἐπὶ λύσει* inscription (see below, No. 14). On the lower half of the stone, the following inscription was engraved. Athenian Agora. Inv. No. I 1978.

Height, 0.128 m.; width, 0.195 m.; thickness, 0.041 m. (both inscriptions).
Height of letters, 0.006 m.-0.01 m. (both inscriptions).

[ἐπὶ Καί]ρίμου ἄρχοντος
[ἄρος ο]ϊκίας προικὸς ἀπ
[οσίμη]μα Σιμάλει

308/7

8. *Hesperia*, Supplement VII, 1943, pp. 1-2, no. 1 (A. E. Raubitschek). Photograph. Hymettian marble. The top and most of the left side are preserved. Found in the area of the Pnyx.

Height, 0.189 m.; width, 0.29 m.; thickness, 0.05 m. Height of letters, 0.013 m.

ὄ[ρ]ος οἰκίας ἀποτε[τιμ]
ημένης προικὸς Ε[ἰρή?]
νει Ἀντιδώρου Δευ[κονοι]
έως θυγατρὶ Χ δρα[χμῶν]
5 ὄσῳ πλέονος ἀξία ἐ[τιμήθ]
η Ἀγλαοτίμει ὑπόκε[ιται]
ΗΗ καὶ Γεφυραίοις ΗΗ[...]
⋈⋈⋈⋈ καὶ ἐπὶ τοῖς α[.ca.4.]
[. . .] ὕ[.ca.5.] τευμ[.ca.6.]

See the discussion of this inscription below, Chapter VI, p. 141.

9. *A.J.P.*, LXIX, 1948, pp. 202-203, no. 2 (D. M. Robinson). Photograph. Stele of white marble, complete except for chipping. The lower part of the stone was left rough. Found at Anavysso.

Height, 0.28 m.; width, 0.29 m. (max.); thickness, 0.06 m. Height of letters, 0.01 m.-0.015 m.

ἄρος
χωρίο : ἀπο
τιμήματο
ς : Ἴπποστρ
5 ἀτει : προ
ικὸς ΗΗ
vacat

The numerals are difficult to read, but Professor Robinson, who has studied the stone, squeezes, and photographs, feels certain that 5200 is the correct amount.

10. *Hesperia*, XIX, 1950, pp. 23-24 (D. M. Robinson). Photograph. Complete rectangular stone of rough schist, rather micaceous. Much of the surface not

smoothed, in particular the upper and lower right-hand corners. Found at Dionysos (ancient Ikaria).

Height, 0.195 m.; width, 0.475 m.; thickness, 0.290 m. Height of letters, 0.01 m.-0.02 m.

ὄρος χωρίου καὶ
οἰκίας ἀποτίμημα
πρὸς Φανομάχει Κτήσωνος
ἐκ Κερ XXX

ΠΡΑΣΙΣ ΕΠΙ ΑΤΣΕΙ

11. *Hesperia*, VII, 1938, pp. 93-94, no. 14 (B. D. Meritt). Photograph. Rough fragment of Pentelic marble, broken on all sides. Athenian Agora. Inv. No. I 1117.

Height, 0.133 m.; width, 0.209 m.; thickness, 0.031 m. Height of letters, *ca.* 0.011 m.

ὄρος χωρίο[υ]
πεπραμένον
ἐπὶ λύσει: ΠΗ
Κίρωνι Πιθῆι

12. *Hesperia*, X, 1941, p. 53, no. 16 (B. D. Meritt). Photograph. Fragment of Hymettian marble, broken on all sides except the bottom. Athenian Agora. Inv. No. I 1455.

Height, 0.176 m.; width, 0.132 m.; thickness, 0.055 m. Height of letters, *ca.* 0.02 m.

[ὄ]ρ[ος χωρί]
[ο]πε[πραμ]
[έ]νο ἐπ[ὶ λύ]
[σ]ει: ΧΗ ---

As the original editor states, the bottom of the stone was left rough, but I believe there are traces of a fifth line—presumably containing the name of the creditor (vendee).

13. *Ibid.*, p. 54, no. 17 (B. D. Meritt). Photograph. Irregular fragment of Hymettian marble, broken slightly on the left and right sides, but elsewhere the stone probably preserves its original dimensions. Athenian Agora. Inv. No. I 1973.

Height, 0.205 m.; width, 0.215 m.; thickness, 0.063 m. Height of letters, 0.014 m.-0.026 m.

ὄρος
 [οἰ]κίας πεπραμένη[s]
 ἐπὶ λύσει
 Χ|^Π
vacat

14. *Ibid.*, p. 54, no. 18 (B. D. Meritt). Photograph. This inscription, which was slightly erased, was written above the inscription transcribed above, p. 30, No. 7. The lettering of the two documents is very similar.

[ἐπὶ Δη]μητρίου ἄρχον
 309/8
 [τος ὄρ]ος οἰκίας πεπραμ
 [ένης] ἐπὶ λύσει: |^ΠΗΗ
 [ἐρα]μισταῖς

15. *Hesperia*, XIII, 1944, pp. 16-21 (D. M. Robinson). Photograph. Hymettian marble, almost complete except at the bottom. Probably found at Marousi.

Height, 0.19 m.; width (max.), 0.18 m.; thickness, 0.03 m.-0.04 m. Height of letters, 0.01 m.-0.02 m.

ὄρος χωρίο
 πεπραμέν
 ο ἐπὶ λύσε[ι]
 καὶ οἰκίας
 5 ΧΧ Φιλοκτή
 μονι Ἴθμο
 νεῖ Θεοκλε
 [ἰ] Ἴθμονεῖ

16. *A.J.P.*, LXIX, 1948, pp. 201-202, no. 1 (D. M. Robinson). Photograph. A rough stone, but probably preserving approximately its original dimensions. Letters badly cut. Found near Sounion.

Height, 0.30 m.; width (max.), 0.245 m.; thickness, 0.05 m. Height of letters, 0.015 m.-0.02 m.

ὄρος χωρίο
 καὶ οἰκίας πεπρ
 αμένων ἐπὶ λ
 ύσει Φιλοθέ
 5 ωι Φρεαρρί
 ωι Χ|^Π

17. *Ibid.*, pp. 203-204, no. 3 (D. M. Robinson). Photograph. A fine stele of Hymettian marble, broken somewhat at the upper right and lower left corners. Red paint remains in almost all the letters. Found at Vari.

Height, 0.59 m.; width, 0.24 m.; thickness, 0.06 m. Height of letters, 0.008 m.-0.02 m.

315/14

ἐπὶ Πρα
 ξιβούλου
 ἄρχοντος
 ὄρος οἰκία

5 s καὶ χωρίου
 καὶ οἰκίας τῆς
 ἐν ἄστει πεπ
 ραμένων ἐπὶ
 λύσει XXX

10 Μνήσωνι Ἄλ
 αεὶ Μνησιβο
 ὕλῳι Ἄλαῖ
 Χαρίνοι Ἄλ
 αεὶ
 vacat

18. *Ath. Mitt.*, LIX, 1934, p. 42, no. 4 (Werner Peek). Brown limestone, almost complete, tapering towards the bottom. Found in Herakleion.

Height, 0.30 m.; width, 0.20 m. (at top), 0.11 m. (at bottom); thickness, 0.055 m. Height of letters, 0.015 m.

ὄρος χωρίου
 καὶ οἰκίας
 πεπραμέν[ω]
 ν ἐπὶ λύσ[ει]
 5 Ἄγνοδῆμ[ω]
 ι καὶ συνεν
 γνηταῖς
 XXX

19. *Ath. Mitt.*, LXVII, 1942, pp. 35-36, no. 40 (Werner Peek). Limestone fragment, broken or damaged on top, bottom, and right side.

Height, 0.17 m.; width, 0.17 m.; thickness, *ca.* 0.05 m. Height of letters, lines 1-5, *ca.* 0.017 m.; line 6, *ca.* 0.014 m.

ὄρος χ[ωρίο]
 πεπραμέν
 ο ἐπὶ λύσει
 Εὐθυμέν[ει]
 5 ΠΗΗΗΗ
 Εὐωνυμ[εῖ]

Peek believes that line 6 was inscribed at some later time.

20. *Ibid.*, p. 36, no. 41 (Werner Peek). Bluish limestone, broken at bottom.
 Height, 0.185 m.; width, 0.14 m.; thickness, *ca.* 0.07 m. Height of letters, 0.01 m.-
 0.015 m.

ὄρος χωρίο
 πεπραμένο
 ἐπὶ λύσει Εὐ
 τέλωνι ἐκ Κε
 5 ραμέων
 Π

This stone, overlooked by Kirchner, was first published in 'Αρχ. Δελτ., XI, 1927-1928, Παρ., p. 51, no. 163, by Kyparisses who, according to Peek, incorrectly read the creditor's name Εὐ|τέλωνι as Εὐ|τράωνι. The name Eutelon seems to occur here for the first time in Attic prosopography.

21. Werner Peek, *Kerameikos. Ergebnisse der Ausgrabungen. III. Inschriften, Ostraka, Fluchtafeln*, Berlin, 1941, pp. 19-20, no. 19. Photograph. (Photograph also in *Jahrbuch, Arch. Anz.*, 1940, p. 336). Bluish limestone, probably complete. Fine letters.

Height, 0.32 m.; width, 0.22 m. Height of letters, 0.02 m.-0.022 m.

ὄρος χωρ
 ἰον καὶ οἰκί
 ας πεπρα
 μένων ἐ
 5 πὶ λύσει
 XX
vacat

Peek transcribes the inscription as having 5 lines, but the photographs show clearly there were 6 lines as given above. This inscription was also transcribed by T. J. Dunbabin in *J.H.S.*, LXIV, 1944, p. 80.

22. *Ibid.*, no. 20. Fragment of bluish limestone (?), broken on the right side and the bottom.

Height, 0.14 m. Height of letters, 0.02 m.

ὄρ[ος χωρί]
ο πε[πραμέ]
νο [ἐπὶ λύσει]
ι Πρ - - - -

5 √

The pi rho in line 4 could be the beginning either of a proper name or of the word *προικός*. Cf. No. 25 below.

23. *Ibid.*, no. 21. Irregularly shaped stone of Hymettian marble, broken on the top, elsewhere complete. Put together from 10 pieces. Photograph.

Height, left side, 0.20 m.; right side, 0.38 m.; width, 0.46 m.; thickness, 0.095 m. Height of letters, *ca.* 0.02 m.

[ὄρος χωρίου πε]
[πραμένον ἐπὶ λύ]
[σει τῶι δέϊνι Ἀναγυρ]
ασίωι [Ῥ] κατὰ τὰς σγν
5 θήκας αἱ κείνται παρὰ
Πρωταί Ἐξηκέστου
Ἀνακαεῖ
vacat

The dative case of the demotic, line 4 ([Φυλ]|ασίωι equally possible) makes it almost certain that this stone recorded a *πρᾶσις ἐπὶ λύσει* or a *ὑποθήκη* (cf. No. 26, below) contract.

24. *Ἑλληνικά*, VIII, 1935, pp. 223-228 (Ch. N. Petrou-Anagnas). Photograph. Whitish-yellow limestone, complete except for slight chipping. Found a little to the west of Kalyvia Kouvara.

Height, 0.51 m.; width, 0.32 m.; thickness, 0.06 m. Height of letters, 0.017 m.-0.029 m.

ὄρος χωρίου
καὶ οἰκίας πεπ[ρ]
αμένων ἐπὶ λ
[ύ]σει Δισχύλωι
5 Διφιλίδου Πρ
οσπαλτίωι: ΧΧ
ΧΗΗΔΔΔΔ: κ
ατὰ συνθήκα[ς τ]
[ὰ]ς κειμένας πα
10 ρὰ τοῖς θεσμο[θ]
έταις

25. *Πολέμων*, III, 1947-1948, p. 133, no. 10 (G. D. Androutsopoulos). Fragment of stone found at Marathon (Arnos) on November 12, 1932. Careless, shallow letters.

Height, 0.24 m.; width, 0.26 m.; thickness, 0.19 m. Height of letters, 0.02 m.-0.04 m.

[ὄρ]ος χωρίο[ν]
 πεπραμέ[νον]
 ἐπὶ λύσει π
 [ροι]κὸς - - -
 - - - - -

For the use of the *πρᾶσις ἐπὶ λύσει* contract as security for a dowry, see the discussion in Chapter VII, pp. 162-163.

ΤΠΟΘΗΚΗ

26. *Ἄρχ. Δελτ.*, XIV, 1931-1932, *Παράρτημα*, pp. 31-32, no. 4 (I. Threpsiades). Unworked stone, complete except on right side. Found at Eleusis.

Height, 0.21 m.; width, 0.21 m.; thickness, 0.065 m. Height of letters, 0.01 m.-0.015 m.

ἐπ' Ἀριστωνύμου ca. 291/0
 ἄρχοντας ὄρος οἰκίας
 ὑπ[οκ]ειμένης Ναυσιστ[ρ]
 ἀπὸ Ἐλευσινίῳ
 5 ΗΗ κατὰ τὰς συν[ν]
 θήκας τὰς κειμένας
 παρὰ Θεοδώ
 [ρ]ωὶ Οἶν

27. *Ath. Mitt.*, LXVII, 1942, pp. 36-37, no. 43 (Werner Peek). Photograph. Left half of an oblong (when complete) slab of Pentelic marble. Back roughened (as if for placing on wood ?) except for raised band (on left) 0.035 m. wide. Fine letters.

Height, 0.147 m.; width, 0.182 m.; thickness, with raised band, 0.045 m.; without band, 0.04 m. Height of letters, ca. 0.01 m.

ἐπὶ Δυκέου ἄρχ[οντος] ca. 259/8
 ὄρος χωρίου καὶ [οἰκίας ὑποκειμένη]
 ὦν Σαλαπιῶν Σι - - - -¹³⁻¹⁴- - - -
 Χ δραχμῶν τι[μῆς] - - -¹⁰- - - -
 5 εἶον κατὰ συν[ν] [θήκας τὰς κειμέν]
 ας παρὰ Λάχῃ[τι] - - -¹²- - - -
vacat

Peek writes the iota at the end of line 3 without a dot. Since a demotic is to be expected after the name, kappa or eta, I believe, should be considered as possibilities. For the last half of line 4 and the beginning of line 5, Peek suggests restoring—*τι[μῆς οὐσης τοῦ δαν]|είου*. As he admits, this is awkward, but I have been unable to discover anything more satisfactory.

ΠΡΑΣΙΣ

28. *Hesperia, Supplement VII*, 1943, pp. 2-3, no. 2 (Raubitschek). Photograph. Fragment of Hymettian marble, broken all around. Letters carelessly cut on a surface badly damaged by a later incised rectangle. Found in the area of the Pnyx.

Height, 0.16 m.; width, 0.24 m.; thickness, *ca.* 0.04 m. Height of letters, *ca.* 0.013 m.

[ὄρος]
 [ο]ικίας π[επρ]
 αμένης ἐρα[ν]
 [ι]σταῖς τοῖς μ[ετ]
 5 ἀ Τιμοσστράτο Ἄ[μα]
 [ξαν]τέως ΧΧ Διε[ύ]
 [χει Μυρ]ρινοσ[ίωι]

Unless the words *ἐπὶ λύσει* were omitted by mistake, this inscription presumably publicized the sale of the house to the eranistai. The horos stone probably recorded the fact that the eranistai, although they had not yet taken possession, were now the owners. See Chapter III, note 5. The name inscribed in lines 6-7 is puzzling. Restoration in the genitive case would apparently place it in a parallel construction with the name in line 5. If the dative is correct, then Dieuches must have been either (1) a co-vendee with the eranistai or (2) the vendor. A “dative of agent” construction referring to the vendor would certainly be unusual.

II

AEGEAN ISLANDS

AMORGOS

I.G., XII, 7, 55-61; 412. The types of contracts recorded on these inscriptions are as follows: 55,² *πράσις ἐπὶ λύσει*; 56-57, *ἀποτίμημα προικός*; 58 and probably 412,

² No. 55 does not include the word *ὄρος*, but it records, in much greater detail than was customary at Athens, a *πράσις ἐπὶ λύσει* transaction. For a discussion of this inscription, see below, Chapter IV, pp. 71-72.

ὑποθήκη. Nos. 59-61 are very fragmentary, but they are almost certainly horos mortgage stones.

I.G., XII, *Supplementum*, p. 143, no. 331³, μίσθωσις οἴκου.

LEMNOS

I.G., XII, 8, 18-22. No. 18 is re-edited in *I.G.*, XII, *Supplementum*, p. 147. These inscriptions are all concerned with *πρᾶσις ἐπὶ λύσει* except no. 22 which apparently publicized a *πρᾶσις*.

Mario Segre. "Iscrizioni Greche di Lemno," *Annuario della Regia Scuola Archeologica di Atene*, XV-XVI, 1932-1933, pp. 289-314, nos. 6; 11-13:

ANTICHRESIS (?)

6. Dark stone, broken on right. Photograph.

Height, 0.20 m.; width, 0.21 m.; thickness, 0.035 m. Height of letters, *ca.* 0.01 m.

ἐπὶ Μεναίχμου [ἄρχοντος ὄρος]
οἰκήματος ὑποκ[ειμένου - - -]
ἡ μετὰ κυρίου Α[- - - - Ὅτρ]
υνέως δραχμῶν [- - - ὥστε ἔχ]
5 εἰν καὶ κρατεῖν [κατὰ τὰς συν]
θήκας τὰς κειμ[ένας]
παρὰ Καλλιστ[ράτῳ]
Λαμπτρέϊ

Despite the fine lunar sigmas, Segre believes that the other letter forms point to a date not later than the third century.

11. (Plate 7). Numerous fragments, found at Mudro, put together by Goffredo Ricci, who sent his copy of the inscription to Segre. Segre reproduces the drawing.

Segre transcribes the inscription as follows:

Right side of the stone

	[Ἡόρος]	
	χωρίο	
	καὶ οἰ[κ]	H
	ία[ς] π[επ]	HH
5	ρα[μέν]	H
	ο[ν] ἐπὶ [λ]	
	ύσ[ει] Α	
	γων(ο)	
	[τ]ίμω[ι] ? - -	

³ E. Ziebarth, "Neue attische Grenzsteine," *Sitzb. Berlin Akad.*, 1898, p. 784, reports a mortgage stone from Amorgos which apparently has been lost: "Im Inventar der Archaeologischen Gesellschaft steht: 2981 Amorgos (ἐν τάφῳ), 1878 für 4 Dr. angekauft. Ὅρος προκὸς ἐπὶ λύσει, κολοβὸς ἐν μέρει, ὕψ. 0. 20, πλ. 0. 15."

Since the letter forms of this inscription are most interesting, it is very unfortunate that our evidence consists only of a drawing of the assembled fragments. In lines 3 and 5 Λ occurs (reproduced as Λ in Segre's commentary). At the beginning of line 2 Segre believes χ should be recognized. This seems very questionable to me. Since the reported vertical stroke presumably occurs at the edge of a fragment and since no trace of a horizontal stroke is recorded, it is rather hazardous to speculate on the shape of the chi. Beside these older forms, there occur open H , Σ , and Ω . Segre is impressed by the archaic characteristics and believes that the later letter forms can be explained by Ionian influence. Consequently he recognizes in Λ at the beginning of line 8 an archaic gamma and restores the uncommon name Ἄγων(ὀ)τιμος . He concludes that this inscription cannot be dated later than 480—thus placing it in time almost a century earlier than any other horos mortgage stone, Attic or Island.

I find it very difficult to believe that the Λ at the beginning of line 8 is a gamma. I suggest, therefore, for lines 7-9 the following restoration. The names naturally are only *exempli gratia*.

ύσ[ει Γε]
λωνῶ[ι]
[Κ]ίμων[νος]

For Γελωνός, son of Herakles, see Herodotus, IV, 10. A name reminiscent of the Herakles legend is not inappropriate for Lemnos. The same can be said of the name Κίμων. Such a restoration does not necessitate assuming with Segre that at the end of line 8 the stone-cutter by mistake wrote omega when he should have written omicron. If this, or a similar restoration, is possible, then the initial letter of line 8 would be lambda rather than archaic gamma. If the creditor recorded in this inscription was an Athenian, as is probable, his demotic may have been engraved on line 10. In Attic horoi the patronymic is usually not included, but there are at least three exceptions: *I.G.*, II², 2741, containing both the patronymic and the demotic, and *I.G.*, II², 2734, where the demotic also may have been written on the following line which is lost. No. 24 above is another example of the inclusion of the patronymic, as may also be Nos. 2 and 26 in Chapter I.

In opposition to Segre, therefore, I see no valid reason for making this inscription unique by assigning it to the early fifth century. B. D. Meritt, who has studied Segre's drawing, expressed the opinion that the letter forms could perfectly well belong to the end of the fifth or the early years of the fourth century.

It may be relevant to call attention to *I.G.*, II², 2689. In this Attic horos mortgage stone the name of the creditor in line 5 was erased and a new creditor, Charias, was recorded in large crude letters. This Charias Phalereus, although his name was written in rather archaic letters, may well have been the Charias son of Theunion of Phaleron, a *diatētēs* known from the second half of the fourth century (*I.G.*, II², 1927, lines 114-115).

12. Five fragments of a dark stone which tapered to a point for insertion in the ground. Photographs. Found at Parachiri, not far from Kaminia.

Height of letters, 0.025 m.

ὄρος χωρίο
 πεπραμένο
 ἐπὶ λύσει
 ὑπὸ Νικίο
 5 Εὐαινέτωι
 Ἐρχιεῖ [τῶι
 δεῖνι -----
 Διομ]ειεῖ
 Διοδώ]ρωι Ἐρ
 10 χιεῖ]
 ----- X

Segre assigns this inscription to the late fifth century because it was found near a tomb presumably dating from that period. Such an argument obviously is not very convincing. The fourth century is certainly an equally possible date for this stone.

13. Stone found at Vounochori, not far from Kalliopi. Photograph. Segre gives the following dimensions from a squeeze.

Height, 0.39 m.; width, 0.35 m. Height of letters, *ca.* 0.05 m.

[ὄρ]ος χωρ
 [ί]ου πεπρα
 μένου ἐπὶ [λ]
 ύσει Μεγ[εκ]
 5 λίδει Ἄμ[αξ]
 αντεῖ [ῥ]

The height of the letters, as reported (*ca.* 0.05 m.), seems excessive. Segre dates the inscription about the middle of the fourth century.

NAXOS

I.G., XII, *Supplementum*, p. 104, nos. 193-195. The types of contract recorded on these inscriptions are as follows: 193, uncertain; 194, *μισθωσις οἴκου*; 195, *ἀποτίμημα προικός*.

SKYROS

I.G., XII, *Supplementum*, p. 173, no. 526,⁴ *πρᾶσις ἐπὶ λύσει*.

⁴ *I.G.*, XII, 5, 707, from Syros, deserves mention. It resembles a horos mortgage stone in appearance, but the word *ὄρος* is not included. It reads: Ἐγγησοῦς| τῆς Κλεομ|όρτου θυγατρὸ|[ς] προῖξ τὸ χωρί|ον. This inscription, therefore, instead of stating that the property was security for the wife's dowry, merely records that the *χωρίον* was her dowry. See below, Chapter VI, p. 118, note 20.

CHAPTER III

HOROI

Horos stones were a common sight throughout Attica. Generally speaking, they were used for three different purposes. First, and most commonly, they served as the so-called boundary stones, a large number of which have been published in *I.G.*, I², 854-907, and II², 2505-2641. Many of these stones presumably did not delimit actual boundaries, but rather called attention to the nature of a particular object, for example, a tomb or a shrine.¹ The employment of such boundary horoi, of course, was not restricted to Attica. There are numerous references to them in Greek literature and many of the stones themselves have been discovered throughout the Greek world. The frequency of their use is well illustrated by an inscription from Chios² where it is recorded that the city sold an estate which was bounded by seventy-five horoi.

Horos stones were also employed in connection with the leasing of property. A good description of the procedure adopted is to be found in the letting of some land by the deme Aixone (*I.G.*, II², 2492). In lines 20-24 the following instructions are given to the treasurers: τὴν δὲ μίσθωσι ἀναγράφαντας ἐἰσθήλας λιθίνας τοὺς ταμίαις τοὺς ἐπὶ Δημοσθένου|s δημάρχου<s> στῆσαι τὴν μὲν ἐν τῷ ἱερῷ τῆς Ἑβης ἔν|δον, τὴν δ' ἐν τεῖ λέσχει, καὶ ὄρους ἐπὶ τῷ χωρίῳ μὴ ἔ|λαττον ἢ τρίποδας ἑκατέρωθεν δύο. The horoi mentioned in this inscription may have been uninscribed or inscribed with the word ὄρος alone,³ serving merely to delimit the property, but it is possible that, like certain horos mortgage stones (e. g., *I.G.*, II², 2701), they contained a reference to the contract with some such formula as κατὰ τὰς συνθήκας τὰς κειμένας παρὰ Α. — —.⁴ To the best of my knowledge this is the only Attic inscription in which instructions are given as to the number and size of the horoi to be erected. The height was considerably greater than that of most of the preserved mortgage stones.

¹ It is possible, of course, that, although often only one stone referring to a particular piece of property is extant, originally a sufficient number were set up actually to define the boundaries. Examples of real delimitation are four horoi for the Kerameikos (*I.G.*, II², 2617-2619, and *Hesperia*, IX, 1940, p. 267), two horoi for the Agora (*Hesperia*, VIII, 1939, pp. 205-206; IX, 1940, p. 266), five horoi for the trittyes of Akamantis, Leontis, Oineis, and Antiochis (*Hesperia*, VIII, 1939, pp. 50-51; IX, 1940, pp. 53-56), and two horoi for the tomb (σῆμα) of Onesimos (*I.G.*, II², 2581). For a discussion of such boundary stones, which are beyond the scope of this study, see the old, but interesting work of C. F. Hermann, *Disputatio de Terminis eorumque Religione apud Graecos*, Göttingen, 1846; also E. Caillemer in Daremberg et Saglio, *D.d.A.*, s.v. *Horos*, and W. Larfeld, *Handbuch der griechischen Epigraphik*, I, pp. 569-570; II, pp. 187 and 930-931.

² *B.C.H.*, III, 1879, p. 231, lines 6-7 (= *G.D.I.*, 5653; E. Schwyzer, *Dialectorum Graecarum Exempla Epigraphica Potiora*, Leipzig, 1923, no. 688). The penalties set for tampering with the horoi are somewhat similar to those suggested a century later by Plato, *Laws*, VIII, 842e-843.

³ Cf. H. J. W. Tillyard, *B.S.A.*, XI, 1904-1905, p. 64.

⁴ The lines quoted in the text below (p. 42) from *I.G.*, II², 1165, might well refer to such horoi.

The third purpose for which horoi were used was to publicize liens on real property. These are the so-called mortgage stones, of which thirty-five new specimens have been edited in Chapter I. These three categories⁵ of horoi were in such extensive use that no matter where an Athenian went in Attica he was constantly aware of them. The important part played by these stones in the daily life of the Athenians is well illustrated by the following ancient documents. Theophrastos in his description of the *μικρολόγος*⁶ says: *καὶ τοὺς ὄρους δ' ἐπισκοπεῖσθαι ὁσημέραι εἰ διαμένουσιν οἱ αὐτοί.* In a decree of the tribe Erechtheis in honor of Antisthenes of Lamptrai we read:⁷ *ἔγραψε δὲ καὶ ψήφισμα ὅπως ἂν [Ἐρεχ]θεῖ|δαι εἰδῶ[σιν ἅπ]αντες τὰ ἐαυτῶν κτήματα καὶ οἱ ἐπιμεληταὶ| οἱ αἰεὶ καθιστάμενοι κατ' ἐνιαυτὸν βαδίζοντες ἐπὶ τὰ κτήμ|ατα δις τοῦ ἐνιαυτοῦ ἐπισκοπῶνται τὰ τε χωρία εἰ γεωργεῖτ|αι κατὰ τὰς συνθήκας, καὶ τοὺς ὄρους εἰ ἐφεστήκασιν κατὰ τὰ αὐτά.* In neither of these cases is it possible to identify with certainty the type of horos referred to, but the concern felt for the horoi is none the less obvious. Another document which specifically mentions horos mortgage stones reveals very clearly the importance assigned to the horoi. It is a decree of the deme Myrrhinous⁸ concerning the administration of its finances, and in lines 27-32 the following instructions are given to the priests: *ἐὰν δέ τ[ινι δέ]|ει ἀργύριον, δανείζειν τοὺς ἱερέα[s] ἀξιοχρεῖω ἐπ[ὶ χωρίω]|ι ἢ οἰκίαι ἢ συνοικίαι καὶ ὄρον ἐφ[ισ]τάνας, οὗ ἂν εἰ [θεοῦ πα]|ραγράφοντα ὁ[υ]του ἂν εἰ τὸ ἀργύριον[υ· εἰ] ἂν δὲ μὴ ὀρί[σῃ αὐτά ?],| ὀφείλειν τὸν ἱερέα οὗ ἂν εἰ θεοῦ ἱερεὺς καὶ τὰ χρ[ήματα αὐ]|τοῦ ὑποκείσθω τῶι θεῶι οὗ ἂν εἰ ἱερε[ι]ωμένος.*

Since horoi were so closely associated with the business life of the Athenians, it will be appropriate, in a study devoted to various aspects of the Athenian mortgage, to allot some space to an examination of the use and the physical characteristics of the stones. The discussion will be limited to the mortgage stones, for the other types, except for occasional references, are irrelevant to our subject. When Adolf Stölzel⁹ wrote the first article on these horoi, only about a dozen of the mortgage stones were known. Thirty years later E. Ziebarth¹⁰ had many more at his disposal on which to

⁵ It might be better to add a fourth category, for there are extant a few horoi, usually grouped among the mortgage stones, which publicized sales rather than mortgages. This category includes *I.G.*, II², 2762 (probably), 2763-2764; *Syll.*³, 1193 (Lemnos); possibly Nos. **20**, **21**, and **24** in Chapter I, above; Chapter I, No. **28**; Chapter II, No. **28**. These stones apparently recorded one of two situations. (1) Some real property had been sold on credit and the purchaser had taken possession. The horos stone, therefore, gave notice that the vendor was still owner, since he had not yet received the full price (see the discussion of inscription No. **28** in Chapter I). (2) The sale had been completed by full payment of the price, but the new owner had not yet taken possession. The horos stone, accordingly, recorded the fact that the purchaser was now owner. Cf. Pringsheim, pp. 163-165.

⁶ *Characters*, X, 9.

⁷ *I.G.*, II², 1165, lines 17-22.

⁸ *I.G.*, II², 1183.

⁹ "Ueber die ὄροι des attischen Rechtes und die Tabulae der 1. 22. § 2 Dig. quod vi aut clam," *Zeitschrift für Rechtsgeschichte*, VI, 1867, pp. 96-108.

¹⁰ *Sitzb. Berlin Akad.*, 1897, pp. 664-675; 1898, pp. 776-784.

base his observations. In the intervening years up to the present still more such stones have been discovered until now the number known is about 192 from Attica and about 22 from certain islands of the Aegean. Accordingly, the following remarks will be made on the basis of about 214 stones. (See Chapters I and II.)

The fullest definition of the purpose of these horoi—affording an explanation which is substantially correct¹¹—is to be found in Bekker's, *Anecdota Graeca*, I (*Lexica Segueriana*), p. 285, lines 12-19: "Ὅρος: — — — ἔστι δὲ ὁ ὄρος καὶ σανίδιον τὸ ἐπιτιθέμενον ταῖς οἰκίαις καὶ τοῖς χωρίοις ἐγκαταπηγνύμενον τοῖς ἐνεχυριαζομένοις πρὸς ἁ ὀφείλουσιν οἱ δεσπότες, καὶ ἐπιγέγραπται αὐτοῖς αὐτὸ τοῦτο, ὅτι πρὸς δάνειον κατέχεται τὸδε τὸ χωρίον, ἦδε ἡ οἰκία, ἔνεκα τοῦ μηδένα συμβάλλειν τοῖς προκατεσχημένοις.

The horoi, then, since they publicized the fact that there was a lien on the property concerned, were set up in the interest of the creditor and of any third party, who, thereby, was warned that the property was encumbered. To achieve this end any available stone was used. Since the limits of many private properties were often marked by uninscribed stones, it is only natural that the mortgage notice was frequently cut on them.¹² Although, judging from certain inscriptions,¹³ it would seem that one horos was sufficient to call attention to the encumbered status of several objects, it is certainly wrong to imply that only one mortgage notice was ever set up to publicize a particular transaction.¹⁴ Demosthenes on various occasions uses the plural when he speaks of the placing of horoi on one item of mortgaged property.¹⁵ Thus it is conceivable that, if the creditor so desired, each one of the existing boundary stones was inscribed with the mortgage notice. If no boundary horoi were at hand, then any stone capable of receiving an inscription was employed. The following two examples illustrate clearly the varied forms these notices could assume.

¹¹ The identification of ὄρος and σανίδιον is questionable; see below, pp. 56-60. The verb ἐνεχυράζειν usually means to seize as a pledge—i. e., to attach some movables of a delinquent debtor; see Chapter IV, note 4, and Chapter VIII, note 9. The words τοῖς ἐνεχυριαζομένοις in this definition, however, should be translated "which are offered as security." This is clear from the use of the present participle and also from the final clause. If the creditor had already attached the property of the debtor, there would have been no need to erect a horos to warn a third party not to make a loan on that property. The horoi, of course, were set up when the contract was first made in order to publicize the fact that the property concerned had been offered as security. This is proved by [Demosthenes], XXV, *Against Aristogeiton*, I, 69; XLII, *Against Phainippos*, 5; Isaeus, VI, *On the Estate of Philoktemon*, 36. See also the following definitions: Pollux, III, 85; IX, 9; Harpocration, p. 226, lines 3-4, s.v. "Ὅρος; p. 62, lines 14-16, s.v. "Ἀστικτον χωρίον; Bekker, *Anecdota Graeca*, I, p. 455, lines 20-23, s.v. "Ἀστικτον χωρίον. The final clause in the definition quoted in the text correctly emphasizes that the horoi served as a warning to a third party. It should not be taken to mean, however, that "second mortgages" were impossible, for, as will be seen later (see especially Chapter IV, pp. 94-95), they were permissible under certain conditions.

¹² Cf. A. Stölzel, *op. cit.*, pp. 97-98.

¹³ E. g., *I.G.*, II², 2718, 2725, and No. 14 in Chapter I, above.

¹⁴ As does H. T. Wade-Gery, *Mélanges Gustave Glotz*, Paris, 1932, II, p. 879.

¹⁵ E. g., XXXI, *Against Onetor*, II, 3; XLI, *Against Spoudias*, 6; 16.

Ziebarth calls attention to an unusually large unhewn boulder, still lying in his time at the northern part of the Amyneion in the path leading to the Acropolis, on which space for inscribing only three lines had been slightly smoothed.¹⁶ Very possibly this rock was lying before the house at the time it was mortgaged. *I.G.*, II², 2678, is an even better example of the use of any available stone for a horos notice, for this inscription, recording the mortgaging of a house, was cut on a segment of a round marble bowl.

The great majority of these horoi consist of slabs of Hymettian or Pentelic marble or of various sorts of limestone. They do not have any prescribed size or shape. A few are very large while others are only small plaques. The following table will serve to illustrate the range in size and shape.¹⁷

	<i>Height</i>	<i>Width</i>	<i>Thickness</i>
<i>I.G.</i> , II ² , 2657.	0.79 m.	+ 0.46 m.	0.18 m.
“ “ “ 2735.	0.63 m.	0.73 m.	0.34 m.
<i>A.J.P.</i> , LXIX, 1948, p. 203, No. 3.	0.59 m.	0.24 m.	0.06 m.
<i>I.G.</i> , II ² , 2728.	0.48 m.	0.15 m.	0.05 m.
“ “ “ 2665.	0.315 m.	0.215 m.	0.055 m.
No. 23 (Chapter I, p. 12).	0.26 m.	0.275 m.	0.063 m. (max.)
<i>Hesperia</i> , XIX, 1950, p. 23.	0.195 m.	0.475 m.	0.290 m.
<i>I.G.</i> , II ² , 2660.	0.18 m.	0.13 m.	0.03 m.
“ “ “ 2705.	0.14 m.	0.20 m.	— — —
“ “ “ 2741.	0.10 m.	— — —	— — —

Most of the stones naturally fall somewhere between the extremes given in this table. Just as the stones vary greatly in size, so do the letters inscribed on them. For example, *I.G.*, II², 2659, has unusually large letters, measuring 0.035 m. in height, while the letters of *I.G.*, II², 2660 and 2741, are only *ca.* 0.01 m. and 0.007 m. high respectively.¹⁸

With a few exceptions these stones are comparatively flat slabs. The majority are rectangular in shape, but a good number are roughly square.¹⁹ Some were

¹⁶ *Sitzb. Berlin Akad.*, 1897, p. 665, no. 2, and p. 670; the inscription is now edited as *I.G.*, II², 2671.

¹⁷ Only completely preserved (or practically so) stones are recorded here except for *I.G.*, II², 2657, which is somewhat broken on the left side and, consequently, was originally wider than 0.46 m. No. 4 in Chapter I, with a thickness of 0.014 m., would be the thinnest stone known if it were certain that the original back is preserved. A few of the dimensions given by Kirchner in *I.G.*, II² need correction. Judging from the squeeze, 2643 has a width of 0.17 m., not 0.07 m. The original editor of 2754, Skias, in *Ἐφ. Ἀρχ.*, 1894, p. 200, no. 17, gives the thickness as 0.08 m.; Kirchner's 0.95 m. is most unlikely. Similarly the figure 0.85 m., reported by Kirchner as the thickness of 2664, is almost certainly a misprint. The height of the fragment, 2646, listed by Kirchner as 0.91 m., must be a mistake.

¹⁸ In *I.G.*, II², 2742, the height of the letters is reported as 0.07 m.; they are really *ca.* 0.02 m.

¹⁹ See Plate 5, No. 23 (Chapter I).

obviously meant to be sunk in the ground.²⁰ In such horoi usually only the upper part of the stone was somewhat smoothed to receive the inscription, while the bottom was left rough. The fact that some of these stones were driven into the ground is even clearer in those cases where the stone tapers downward to a point; *I.G.*, II², 2670, 2711, and 2728 are horoi of this shape.²¹

When one realizes that many of these horos stones were only about a foot high and some only a few inches high, it is evident that frequently they could not have served their publicity purpose if placed on the ground where they soon would have been covered with vegetation. It is only logical to assume, therefore, that the mortgage notice was often cut on a stone which formed part of the house wall. In the case of *I.G.*, II², 2761, this assumption becomes a fact, for the stone belonged to the ruins of the walls of an ancient house and until recently, at least, was *in situ*. *I.G.*, II², 2729, was found in the front wall of a house dating from the late Greek or early Roman period and, according to Dörpfeld,²² was probably transferred there from an older building. These examples, then, are in accord with Harpocration's definition of ὄρος — — — τὰ ἐπόντα ταῖς ὑποκειμέναις οἰκίαις καὶ χωρίοις γράμματα — — —. If the house wall offered no proper surface for the cutting of an inscription, it was apparently possible in various ways to insert the inscribed stone in the wall. *I.G.*, II², 2758, was probably so inserted, and Ziebarth calls attention to traces of mortar still visible on the stone.²³ In connection with this problem of where and how a mortgage notice was recorded, the horos inscription recently published by Werner Peek is instructive.²⁴ The right half of the stone is missing, but its height, 0.147 m., is apparently intact. The original stone, therefore, was rectangular in shape with a width of *ca.* 0.40 m. On the preserved left side of the back there is a raised band, which presumably was present also on the right side. In a stone so shaped it seems clear that we have an example either of a mortgage notice cut on a stone which formed part of the house wall or of a horos stone which was fitted somehow to the wall at the time when the house was offered as security. *I.G.*, II², 2759, is an interesting stone, the location of which unfortunately is no longer known. Kumanudes, the original editor,²⁵ described it as a rectangular stone, cut with straight lines on all four sides. He gave the dimensions as, height, 0.217 m.; width, 0.305 m.; thickness, 0.050 m. He remarked that the stone was probably made to be inserted in the face of the mortgaged building just as to-day metal tablets are affixed to buildings. Technically speaking, this stone is not an inscription, for the lettering was not cut with a chisel, but *γεγραμμένη μέλανι*. *I.G.*,

²⁰ See Plate 4, No. 19 (Chapter I), and Plate 7, a and b.

²¹ See Plate 7, c.

²² *Ath. Mitt.*, XIX, 1894, p. 504.

²³ *Sitzb. Berlin Akad.*, 1897, p. 670. It seems somewhat hazardous, however, to assume that the traces of mortar date from the period when the inscription was first set up.

²⁴ *Ath. Mitt.*, LXVII, 1942, pp. 36-37, no. 43; see above, Chapter II, No. 27.

²⁵ *Ἀθήναιον*, IX, 1880, pp. 235-237.

II², 2741, must also have been fitted in some way on a wall. It is a very small stone with a height of only 0.10 m. The neat letters are arranged stoichedon and are so minute (0.007 m.) that they can be read only at close range. The same statement can be made about *I.G.*, II², 2660, a completely preserved stone, the dimensions of which are: height, 0.18 m.; width, 0.13 m.; thickness, 0.03 m.; height of letters, *ca.* 0.01 m.²⁶

These horos stone have long been known as among the crudest and most difficult to read of all Attic inscriptions. A glance at the photographs of the new Agora horoi published in this study is sufficient to confirm this opinion. A few of these inscriptions were unquestionably cut by professional stone cutters. In this group belong such stones as the one transcribed in Chapter I, Addendum II, a, and *I.G.*, II², 2747, a good-sized slab of marble with well-cut letters, at the top of which, in imitation of official style, the word ΘΕΟΙ was inscribed. The great majority, however, apparently were cut by one of the contracting parties himself or by some unskilled local stone cutter. This assumption explains why almost any available piece of stone was considered adequate for recording these mortgage notices. Sometimes only that part of the stone which was to be inscribed was smoothed, while at other times the whole stone was left rough. In certain cases the letters had to be spaced so as to avoid flaws in the stone.²⁷ On occasions both the front and back surfaces of the stone were inscribed. In No. 20 (Chapter I), apparently the same mortgage notice was continued on the back, but in *I.G.*, II², 2697, the inscriptions on the two surfaces probably referred to two different contracts.²⁸ *I.G.*, II², 2693, has two inscriptions on the same surface, the second one being upside down in relation to the first. In what was probably the first inscription, it is recorded that some property has been sold ἐπὶ λύσει to two men for 1100 drachmas; in the second document it is stated that the same(?) property had been sold ἐπὶ λύσει to only one of the previously mentioned two men for 2200 drachmas. Presumably one creditor had been repaid his share of the original loan and the other creditor had agreed to lend an additional sum. It is strange that the notice of the original contract was not erased. Possibly, since the stone was large (height, 0.62 m.), the end which bore the record of the cancelled contract was inserted in the ground. *I.G.*, II², 2735, also has two mortgage notices inscribed on the

²⁶ *I.G.*, II², 2705 (height, 0.14 m.; width, 0.20 m.; height of letters, 0.012 m.), although a ὄρος χωρίου, would have been almost invisible if set up in a field, unless placed on some sort of stand; cf. *I.G.*, II², 2680, 2702, and 2704.

²⁷ E. g., No. 10 in Chapter I above, and *I.G.*, II², 2676.

²⁸ The stone is too fragmentary to permit the drawing of any certain conclusions. Two separate contracts referring to the mortgaging of distinct pieces of property to different creditors may have been recorded. On the other hand, if the same property was listed in both inscriptions, presumably the second inscription registered an increase or decrease in the sum borrowed, according as the debtor had made an additional loan from his creditor or a partial repayment. It is possible also that the two inscriptions recorded simultaneous loans on the same property made by two or more creditors. On the problem of several creditors in a πρᾶσις ἐπὶ λύσει transaction, see Chapter VII, pp. 154-156.

same face. Since two creditors are recorded and since in one document an *οἰκία* and in the other an *οἶκημα* are mentioned as the security, it seems clear that this stone recorded two different contracts according to which two distinct objects were sold *ἐπὶ λύσει*. The lettering of the two inscriptions seems to differ somewhat—a fact which may suggest that the second contract was made and recorded at a later date. There are examples also where, before a horos stone was used to record a second contract, the first inscription was erased.²⁹ In such cases the first contract presumably had expired either through repayment of the loan or through default.

Even a rapid perusal of the horos inscriptions published in *I.G.*, II², 2642-2770, and of those edited subsequently would reveal numerous cases of erasures, and of mistakes and misspellings committed by the stone cutter. A few examples will suffice for illustration. In *I.G.*, II², 2686, line 7, the last two numerals of the sum Η Η Η Η Η were deleted, presumably after part of the debt had been paid. In *I.G.*, II², 2689, line 5, the name of the former creditor was erased and another name was inscribed in large clumsy letters. In *I.G.*, II², 2726, line 5, the name of the creditor was somewhat erased; in line 6 the stone cutter apparently failed to record the full amount of the loan, for in the next line an additional sum is inscribed in smaller numerals. *I.G.*, II², 2673, line 2, reads *προικὶ ἀπο-*, but the squeeze shows very clearly that the stone cutter first wrote ΠΡΟΙΚΑΠΟ and then, realizing his mistake, corrected matters as best he could.³⁰ Similar mistakes are frequent among the newly discovered Agora horoi, but, since they have been commented upon in Chapter I, it will not be necessary to repeat those remarks here.

A small but interesting point is raised by such inscriptions as *I.G.*, II², 2694, 2706, 2711-2715, and Nos. 13 and 21 in Chapter II, above. They are all documents belonging to the category known as *πράσις ἐπὶ λύσει* in which normally both the creditor's name and the amount of the loan were recorded. The inscriptions listed above, however, omit either the sum or the name of the creditor—and in two cases both—although on each stone there is an ample *vacat* below the last inscribed line. *I.G.*, II², 2714 for example, reads: *ὄρος χωρίου | πεπραμένου | ἐπὶ λύσει | vacat*. Such a notice, of course, would advertize the fact that the property was encumbered, but the omission of the sum and the name of the creditor is somewhat puzzling. Since the lettering of these particular inscriptions (so far as I can judge from the available squeezes) is either good or reasonably good, a plausible explanation is that it was possible for one of the contracting parties to go to a stone cutter's shop and purchase a ready made horos stone, i. e., a stone already inscribed with the appropriate formula

²⁹ See, for example, Chapter I, No. 26 and Chapter II, Nos. 7 and 14.

³⁰ In *I.G.*, II², 2760, line 3, *ὑποκειμέ* -, the stone cutter wrote rho rather than omicron as is clear from the squeeze and also from the photograph published in *Ἀρχ. Ἐφ.*, 1911, p. 242. For the last line of *I.G.*, II², 2769, Kirchner records *πώραι Ἱερῶ[ν* -. Actually, as is clear from the squeeze, there is only one iota in the line.

and in some cases with such round numbers as represented amounts commonly borrowed. If this suggestion is correct, then we can recognize in these inscriptions which have come down to us either unsold stones from the stone cutter's shop or stones which had been sold but on which, for any of a variety of reasons, the purchaser had neglected to inscribe the name of the creditor or the value of the loan, or both. It is possible also that the pertinent data were added to these ready made stones in paint, all traces of which have disappeared in the course of time. The use of paint would obviously make the inscription more conspicuous, a desirable quality in a stone set up to publicize a lien.³¹

The dating of these Attic horos mortgage stones raises a difficult problem. Only 21 of them contain an archon's name and consequently can be referred to a particular year.³² The archons mentioned span the period from Charikleides, 363/2 (*I.G.*, II², 2654), to Lykeas, *ca.* 259/8.³³ A few stones can be dated approximately because the names of the persons recorded on them are known. *I.G.*, II², 2670, for example, contains the name of Demochares of Leukonoe, the uncle of the orator Demosthenes. The great majority of the mortgage horoi, however, possess no criterion for dating except the letter forms. To a person with a sceptical turn of mind, dating an inscription by the character of the writing is always unsatisfactory. Such scepticism is especially justifiable in the case of documents like the horoi, since many of them were inscribed not by professional stone cutters who would conform to current usage, but by the contracting parties themselves, a large number of whom, to judge from the results, were not particularly literate. Nevertheless, on few matters are the majority of scholars so uniformly in agreement as in insisting that none of these horoi on the one hand goes back to the Peloponnesian War or on the other hand extends down to the Roman period.³⁴ Their almost unanimous verdict is that the time span of these

³¹ The supposition that paint was sometimes used on these horos stones is corroborated by *I.G.*, II², 2728 where traces of red coloring are visible in the numerals recorded in lines 7-8, and by the horos inscription published in *A.J.P.*, LXIX, 1948, p. 203, No. 3 (see above, Chapter II, No. 17), concerning which Professor Robinson reports that "red paint remains in almost all the letters."

³² *I.G.*, II², 2654-2657, 2678, 2679 (two archons), 2680, 2724-2727, 2744, 2745, 2762; Chapter I, Nos. 3, 6, and Addendum II, *b*; Chapter II, Nos. 7 and 14 (one stone, but two archons), 17, 26, 27. Nos. 17 and 27 in Chapter II were published after the appearance of the article by Sterling Dow and Albert H. Travis, *Hesperia*, XII, 1943, pp. 144-165. Their list of "Dated Boundary-Stones" includes *I.G.*, XII, Supplement (1939), p. 147, No. 18, and *I.G.*, XII, 8, No. 19. Since these stones are from Lemnos, I have omitted them, although the Lemnian archon Nikodoros may be the same as the Athenian archon for 314/3 (Dow and Travis, p. 164). I have also omitted *I.G.*, II², 2630 because it is not a mortgage horos stone.

³³ Chapter II, No. 27. For the date, see W. K. Pritchett and B. D. Meritt, *The Chronology of Hellenistic Athens*, Cambridge, Mass., 1940, pp. xx and 99. If Charias should be restored in Chapter I, Addendum II, *b*, then the last recorded archon is to be dated *ca.* 164/3.

³⁴ E. g., S. A. Kumanudes, *Ἀθήναιον*, IV, 1875, pp. 122-123; IX, 1880, pp. 236-237; Beauchet, III, pp. 348-349; E. Ziebarth, *Sitzb. Berlin Akad.*, 1897, p. 664; Larfeld, *Handbuch der Griech-*

mortgage horoi is from the fourth century to the middle of the second century B.C., with the majority falling in the second half of the fourth century.

At first glance the spelling $\text{HOPO}\Sigma$ in *I. G.*, II², 2712 and 2728, is reminiscent of an earlier period, but the shapes of the other letters and the knowledge that the sign for the *spiritus asper* in certain conventional formulae did not disappear with the archonship of Eukleides have convinced many epigraphists that these are fourth century inscriptions.⁵⁵ Conversely the occasional use of the lunate or cursive epsilon and sigma on certain horos stones would lead one to think that at least those inscriptions on which these letter forms appear must belong to a period later than the second century B.C. As stated above, however, there is general agreement that no mortgage horoi are later than the middle of the second century. The relevant inscriptions are: *I.G.*, II², 2677, 2679, 2758, and 2759. Kirchner, who, except for 2759, had squeezes at his disposal, follows Koehler and Kumanudes in recognizing the cursive letter forms in these four inscriptions. According to Dow and Travis⁵⁶ the lunate sigma does not occur in 2758. Koehler had reported one at the end of line 1. Since the squeeze available to me is defective at the edges, I cannot control the reading. For 2759 we are dependent on Kumanudes' account,⁵⁷ since the location of the stone is no longer known. Kumanudes reported that the letters were painted, not cut, on the stone, and he explained the cursive epsilon and sigma by suggesting that the letters had been painted rapidly with a brush. He insisted that all the other letter forms in the document were clearly those of the pre-Roman period. The lunate sigma occurs twice in 2677, a document which is unusually well inscribed for a horos stone. Koehler,⁵⁸ who copied the inscription himself, states categorically that it is to be dated before the Roman period. Certainly, except for the form of the sigma, there is no reason to question the ascription of this stone to the third or fourth century. Number 2679 should be of significance for this discussion. In this document which is dated by two archons, Euxenippos (305/4) and Leostratos (303/2), the original editor,

ischen Epigraphik, II, pp. 188-190; Kirchner, commentary on *I.G.*, II², 2642; *Inscr. Jur. Gr.*, I, pp. 122-123.

Hiller von Gaertringen, *I.G.*, I², p. 233, however, insists that, since Ionic letters were used at times by private Athenian citizens in the fifth century, the possibility should not be excluded that some of these horoi date from that period. G. A. Stamires tells me that he is of the same opinion. M. Segre maintains that a fragmentary horos mortgage stone discovered in Lemnos should be assigned to the early fifth century. A much later date, I believe, is equally or more probable (see above Chapter II, pp. 38-39). Evidence from Lemnos, moreover, cannot be considered as evidence from Attica.

⁵⁵ E. g., E. S. Roberts and E. A. Gardner, *An Introduction to Greek Epigraphy*, Cambridge, England, 1905, II, p. xiii; Tillyard, *B.S.A.*, XI, 1904-1905, p. 64; Wade-Gery, *Mélanges Gustave Glotz*, II, p. 877, note 2.

⁵⁶ *Hesperia*, XII, 1943, p. 163.

⁵⁷ *Ἀθηναίων*, IX, 1880, pp. 235-237.

⁵⁸ Commentary on *I.G.*, II, 1152; cf. *Ath. Mitt.*, II, 1877, p. 281.

Koehler, reported that the first letter of line 8 was a lunate epsilon.³⁹ The squeeze which I have seen is too blurred at the edge to offer a check on Koehler's reading, but Kirchner, who had both a squeeze and a photograph, also recognizes the lunate form in this inscription. On the basis, then, of the reports of two distinguished epigraphists it seems that there is definite evidence for the occasional use of cursive letter forms as early as the end of the fourth century B.C.

In the following pages the probable reasons for the gradual discontinuance of the use of the horoi will be discussed. There is nothing inherent in these reasons, I believe, to preclude the possibility of isolated instances of the employment of horoi in a later period, in case one is loath to accept the sweeping statement that none of the mortgage stones can be assigned to a period subsequent to the middle of the second century B.C. As to the insistence of epigraphists that none of these stones antedates the fourth century, since I feel incompetent to pass judgment myself on this question, I am obliged to defer to the verdict of experts in the field. I might mention at this point, by way of anticipation, that the results of the investigation in the final chapter of this work corroborate the opinions of the specialists, for it is pointed out there that there is no evidence for the existence of the mortgage contract in Athens until the last quarter of the fifth century. To infer from the absence of evidence that the contract was not in use is, of course, an *argumentum ex silentio*, but one which receives some support from the conviction of most scholars that all the preserved mortgage horos stones are subsequent to the fifth century.⁴⁰

³⁹ *Ath. Mitt.*, II, 1877, pp. 278-281; *I.G.*, II, 1137. If it is desirable to include evidence from Lemnos, it should be noted that a horos mortgage stone from that island, containing five lunar sigmas, is assigned by its editor, M. Segre, to a date not later than the third century (see above, Chapter II, p. 38). Cf. also *I.G.*, XII, 8, 22—late fourth century (?).

⁴⁰ Wade-Gery, *Mélanges Gustave Glotz*, II, pp. 879-882, argues that horos mortgage stones were used in the fifth century, although he agrees (p. 877) that none of the extant stones can be dated with certainty before the fourth century. He bases his conclusions on Thucydides, IV, 92, 4, where the Boeotarch Pagondas, while addressing the Boeotians after the Athenian invasion in 424, says: (χρῆ) καὶ γνῶναι ὅτι τοῖς μὲν ἄλλοις οἱ πλησιόχωροι περὶ γῆς ὄρων τὰς μάχας ποιοῦνται, ἡμῖν δὲ εἰς πᾶσαν, ἣν νικηθῶμεν, εἰς ὄρος οὐκ ἀντίλεκτος παγήσεται· ἐσελθόντες γὰρ βίᾳ τὰ ἡμέτερα ἕξουσιν. Wade-Gery maintains (p. 881) that, since a single boundary-pillar cannot delimit a property, it is necessary to see in this passage a reference to "a 'single pillar recording' the contract between Attica and Boeotia, or the status of Boeotia." Thucydides could employ this figurative language because he and his audience were familiar with horos mortgage stones. This interpretation of εἰς ὄρος, in my opinion at least, is unconvincing. Since the majority of scholars believe that none of the extant horos mortgage stones antedates the fourth century (Wade-Gery has no quarrel with this verdict), it is rather hazardous to infer the existence of mortgage horoi in the fifth century, unattested elsewhere, from a passage in Thucydides which itself stands in need of explanation. It seems more natural, therefore, to assume that Thucydides, when he wrote εἰς ὄρος, had in mind those horoi which were so extensively used in the fifth century (cf. *I.G.*, I², 903-907) and later, such as ὄρος μνήματος or ὄρος σήματος. These stones were frequently singletons and, hence, were not always strictly speaking boundary stones, but served to proclaim the nature and sometimes the owner (or the person interred therein) of a particular object (that such horoi were often singletons seems assured from

It was stated above that the purpose of these horoi was, in the interest of the creditor and any third party, to publicize liens on real property. When one stops to think about these stones, however, considering the irregularities of their shapes, the crudeness of the lettering, the difficulty of seeing those which were set up in a field,⁴¹ and the ease with which they could be tampered with,⁴² the conclusion seems inescapable that these horoi did not serve as an official record of indebtedness. The literary sources support this inference, for, except possibly in the case of the ἀποτίμημα offered in the leasing of an orphan's property⁴³ and less probably in the case of the ἀποτίμημα offered as security for a wife's dowry,⁴⁴ there is no evidence that the setting up of horoi was required by law. The presence or absence of mortgage stones could furnish a presumption as to the status of the property concerned, as is clear from the eagerness of certain persons mentioned in the orators to set up or remove horoi, depending on the particular circumstances,⁴⁵ but in court a litigant could not rely on the evidence of horoi alone. To support one's claim in a trial it was necessary, in addition to arguments based on horoi, to produce the contract and above all to furnish witnesses, the most important type of evidence recognized by Athenian law. The need for the evidence from the mortgage stones to be coupled with that from the contract is demonstrated by a passage in the orators where it is explicitly stated that the presence of both the contract and the horoi was definite proof of the existence of the debt.⁴⁶

the common practice of inscribing on them the dimensions of the property; cf. *I.G.*, II², 2561-2566 etc.). Since mortgage horoi were not always singletons as Wade-Gery maintains (see above, p. 43, and note 15), his argument loses much of its force. When it is remembered that a mortgage contract ordinarily was an ephemeral transaction, which could be entered into and terminated at the will of the debtor, it is evident that Thucydides' εἰς ὄρος, if referring to such a horos, would have less poignancy than if it contained an allusion to the absolute ownership of the conqueror. One further observation may be ventured. Since stones marked ὄρος μνήματος were so common in Thucydides' time, might not his εἰς ὄρος have suggested to his readers an inscription worded something like ὄρος μνήματος τῶν Βοιωτῶν?

In Chapter VIII it is argued that the mortgage contract slowly began to develop in the course of the Peloponnesian War. Consequently, mortgage horoi may have been employed occasionally in the last years of the fifth century (see Chapter VIII, p. 207, and note 145). Their employment, however, must have been so uncommon and spasmodic—if they were used at all—that Thucydides' εἰς ὄρος could hardly have referred to them figuratively as Wade-Gery suggests.

⁴¹ See above, p. 45. The procedure described in [Demosthenes], XLII, *Against Phainippos*, 5, is revealing. The speaker with some friends makes the circuit of his opponent's farm to ascertain whether any horoi had been placed upon it and then, to be sure that he had not overlooked something and to protect himself against chicanery, he calls upon his adversary to state whether there was any horos on the land.

⁴² See note 45.

⁴³ Isaeus, VI, *On the Estate of Philoktemon*, 36. This institution, μίσθωσις οἴκου, is the subject of Chapter V.

⁴⁴ Demosthenes, XLI, *Against Spoudias*, 6; 16. This type of contract is discussed in Chapter VI.

⁴⁵ Demosthenes, XXXI, *Against Onetor*, II, 1-4; 12-13; [Demosthenes], XLIX, *Against Timotheos*, 12.

⁴⁶ [Demosthenes], XXV, *Against Aristogeiton* I, 69. This passage, which is quoted in full on p. 56, is probably authentic fourth century testimony (see below, note 68).

The significant rôle of witnesses is well illustrated by the speech of [Demosthenes], XLII, *Against Phainippos*, 28-29. In that passage the speaker, in order to prove that Phainippos' farm was not encumbered as alleged, is not content merely to emphasize that no horoi were on the land, but he presents the testimony of former creditors to whom Phainippos had been forced by a court decision to repay their loan.⁴⁷

It is clear, then, that the horoi, although they were of service to the creditor and to any third party, were not an official record of mortgages. If the evidence which they afforded was not considered conclusive, it may reasonably be asked why was the use of them so widespread in Attica in the fourth century and later. The answer to this question is to be found in Theophrastos' famous work, *Περὶ νόμων*, a few fragments from which fortunately have been saved.⁴⁸ In a passage preserved by Stobaeus,⁴⁹ Theophrastos describes the means employed by various Greek cities for publicizing not only the transfer of ownership of property but also the establishment of mortgages. He says: ἔνιοι δὲ (κελεύουσι) προγράφειν παρὰ τῇ ἀρχῇ πρὸς ἡμερῶν μὴ ἔλαττον ἢ ἐξήκοντα, καθάπερ Ἀθήνησι, καὶ τὸν πριάμενον ἑκατοστὴν τιθέναι τῆς τιμῆς, ὅπως διαμφισβητήσῃ τε ἐξῆ καὶ διαμαρτύρασθαι τῷ βουλομένῳ, καὶ ὁ δικαίως ἐωνημένος φανερός ἢ τῷ τέλει. παρὰ δέ τισι προκηρύττειν κελεύουσι πρὸς τοῦ κατακυρωθῆναι πένθ' ἡμέρας συνεχῶς, εἴ τις ἐνίσταται ἢ ἀντιποιεῖται τοῦ κτήματος ἢ τῆς οἰκίας· ὡσαύτως δὲ καὶ ἐπὶ τῶν ὑποθέσεων, ὡσπερ καὶ ἐν τοῖς Κυζικηνῶν. A few lines further on occurs the following important sentence: οὐ χρὴ δ' ἀγνοεῖν, ὅτι αἱ προγραφαὶ καὶ αἱ προκηρύξεις καὶ ὅλως ὅσα πρὸς τὰς ἀμφισβητήσεις ἐστὶ πάντ' ἢ τὰ πλείστα δι' ἔλλειψιν ἐτέρου νόμου τίθεται παρ' οἷς γὰρ ἀναγραφὴ τῶν κτημάτων ἐστὶ καὶ τῶν συμβολαίων, ἐξ ἐκείνων ἔστι μαθεῖν, εἰ ἐλεύθερα καὶ ἀνέπαφα καὶ τὰ αὐτοῦ πωλεῖ δικαίως· εὐθὺς γὰρ καὶ μετεγγράφει ἢ ἀρχῇ τὸν ἐωνημένον. It is clear, then, that in Theophrastos' time Athens was one of the Greek cities which had no ἀναγραφὴ τῶν κτημάτων καὶ τῶν συμβολαίων.⁵⁰ The Athenians

⁴⁷ On this unofficial character of the mortgage horoi, see the excellent remarks of Beauchet, III, pp. 355-358.

⁴⁸ A useful collection of these fragments with translation and commentary was made by R. Dareste in *Rev. de Légis. ancienne et moderne*, 1870, pp. 262-294. For the text of the fragment with which we are concerned, I have used Otto Hense's edition of Stobaeus, vol. IV, Berlin, 1909.

⁴⁹ *Anth.*, IV, 2 20 (Hense)—XLIV, 22 (Meineke).

⁵⁰ By ἀναγραφὴ τῶν κτημάτων καὶ τῶν συμβολαίων Theophrastos was probably referring to records of the type known for the Hellenistic period such as the famous register of sales of real property from Tenos (*I.G.*, XII, 5, 872; *Inscr. Jur. Gr.*, I, pp. 63-106). This document, in addition to providing detailed information on the transaction of each sale, occasionally records a lien on the property concerned. The register of dowries from Mykonos (*Syll.*³, 1215; *Inscr. Jur. Gr.*, I, pp. 48-62) also offers some data on mortgages which were given to guarantee the payment of the dowry. The records maintained at Athens by the collectors of the ἑκατοστή (*I.G.*, II², 1594-1603), apparently kept only in connection with immovables sold by temples, associations, etc. (see Lipsius, p. 740, note 236), with their meagre data on the price paid and the amount of the tax collected, certainly cannot be considered the equivalent of the ἀναγραφὴ, mentioned by Theophrastos, from which it was possible to ascertain, εἰ ἐλεύθερα καὶ ἀνέπαφα καὶ τὰ αὐτοῦ πωλεῖ δικαίως. See the interesting discussion of this question of publicity in Beauchet, III, pp. 319-344.

apparently had no official machinery for giving publicity to mortgages except the requirement, mentioned by Theophrastos in the passage just quoted, to give public notice of the intent to enter into such a contract. Because of this lack of any official registry of mortgages (*δι' ἔλλειψιν ἐτέρου νόμου*), therefore, they had recourse to the rather primitive system of setting up horoi to provide the necessary publicity concerning liens existing on real property. It is interesting to note that a similar custom prevailed in those islands which were in particularly close relations with Athens—Lemnos, Skyros, Naxos, and Amorgos.⁵¹

Theophrastos in that part of his work from which the passage quoted above has been preserved was clearly recommending that cities adopt the system of public registration of sales and mortgages. His recommendation did not go entirely unheeded in Athens as W. S. Ferguson brilliantly demonstrated in an article published in 1911.⁵² Ferguson (pp. 268-270) discusses the debt of Demetrios of Phaleron, the law-giver, to Theophrastos, the jurist, and shows how the former, without actually enacting such a law as the latter had urged, attempted at least to accomplish some of the objects which the philosopher had contemplated. To prove his point Ferguson calls attention to the fact that of the horoi known to him at the time the earliest one dated by an archon belongs to the year 315/4. Consequently, from the list of dated horos mortgage stones, he draws the following inferences (p. 265): “(1) that the practice of indicating the year in a boundary record was established by the law-code of Demetrius of Phalerum, and (2) that this code was promulgated in the year 316/5 B.C.” He also shows (p. 266) that there is no evidence for the recording on a horos of the name of the person with whom the contract (*συνθήκαι*) was deposited prior to 315/4. From these facts he draws the following conclusions as to the measures taken by Demetrius in partial fulfillment of the teachings of his master Theophrastos (p. 270): “To create a new bureau for the public *ἀναγραφὴ τῶν κτημάτων καὶ τῶν συμβολαίων* would have doubled the work of administration and led to violent interferences with the traditional ways of doing business. It would have precipitated, in fact, an administrative and economic revolution With much less machinery and much less inquisition into private affairs than a public *anagraphē* would have involved Demetrius seems to have aimed to provide the courts with a working basis for settling disputes over real estate by requiring the deposit of the *συνθήκαι*, *διαθήκαι*, or other documents carefully dated, with third parties, who were, doubtless, made legally responsible for their safe-keeping.”⁵³

⁵¹ See above, Chapter II, pp. 37-40.

⁵² “The Laws of Demetrius of Phalerum and their Guardians,” *Klio*, XI, pp. 265-276.

⁵³ When Ferguson wrote his article, only 12 dated horos mortgage stones were known. The subsequent discovery of other horoi has confirmed his conclusions, however, as has been clearly shown by Sterling Dow and Albert H. Travis. In a section (pp. 159-165) of their article on “Demetrius of Phaleron and his Lawgiving,” *Hesperia*, XII, 1943, pp. 144-165, they reexamined

The use of written contracts and the custom of depositing them with a third party was common practice, of course, in the fourth century as is clear from the evidence of the orators,⁵⁴ but Ferguson's study has made it clear that Demetrios apparently was the first Athenian to incorporate definite regulations to this effect in an official code of laws. By insisting that all contracts be carefully dated and deposited with a reliable third person Demetrios was attempting to make investment in real estate a safer transaction for the well-to-do than it formerly had been. Demetrios, naturally, was concerned with the original contracts and not with the notices of them inscribed on the horoi.⁵⁵ Consequently, although the horoi reflect the usage required for the contracts, it is not surprising that after 316/5 examples are found of mortgage stones containing the archon's name without a reference to the contract, or a reference to the contract without the inclusion of the archon's name.⁵⁶ Unless a horos mortgage stone is found, however, dated by an archon prior to 315/4,⁵⁷ there is no reason to doubt Ferguson's conclusions that in Demetrios' code, promulgated in 316/5, there were stipulations concerning the dating and depositing of contracts concerned with transactions in real estate.

It was stated above⁵⁸ that it is the unanimous verdict of scholars that none of the extant horos mortgage stones should be dated later than the middle of the second century B.C. Since no reasons are given in the ancient sources for the discontinuance of the use of these stones, any attempt to explain their abandonment can only be in the form of speculation. It has been suggested⁵⁹ that after the practice of depositing

Ferguson's theory on the basis of the 22 dated stones known to them (including Nos. 3 and 6 in Chapter I, above). The following results of their study should be noted: In *I.G.*, II², 2654, the archon Charikleides (363/2) is mentioned. Since, however, his name occurs at the end of the preserved inscription where the notice of another contract was recorded, it is logical to explain the presence of his name as an attempt to distinguish the two contracts. *I.G.*, II², 2655, archon Euboulos, on the basis of letter forms probably should be referred to the third century (*ca.* 272/1) rather than to 345/4 (Kirchner). *I.G.*, II², 2656: the archon's name should be restored as Philippides, 265/4, rather than Simonides, 311/10 (Kirchner). *I.G.*, II², 2724: Nikodoros, 314/3, is a more probable restoration than Apollodoros, 319/8, (Meritt and Kirchner). *I.G.*, II², 2762: both in 340/39 and 313/2 a Theophrastos was archon; since the stone is lost, the choice of the latter date is dependent, of course, on Ferguson's dating of the legislation of Demetrios (For *Hesperia*, III, 1934, p. 65, no. 57, see above, Chapter I, pp. 25-27). The results of the investigations of Dow and Travis, accordingly, corroborate Ferguson's conclusions.

Since the appearance of their study, two more dated horos mortgage stones have been published (see above, notes 32 and 33): archon Lykeas, *ca.* 259/8 (Werner Peek, *Ath. Mitt.* LXVII, 1942, pp. 36-37, no. 43), and archon Praxiboulos, 315/4 (D. M. Robinson, *A.J.P.*, LXIX, 1948, p. 203, no. 3). The dates on these inscriptions also conform to Ferguson's conclusions.

⁵⁴ Cf. Beauchet, IV, pp. 60-64.

⁵⁵ Ferguson, *op. cit.*, pp. 267-268; *Hellenistic Athens*, London, 1911, p. 43.

⁵⁶ Dow and Travis, *op. cit.*, pp. 160-161; 164-165.

⁵⁷ Unless an earlier archon can be readily explained as in the case of *I.G.*, II², 2654; see above, note 53.

⁵⁸ Pp. 48-50.

⁵⁹ *Inscr. Jur. Gr.*, I, pp. 122-123.

contracts with a trustworthy person was adopted—from Ferguson's study we know this became a legal requirement—the need for the unofficial notices on the horoi was no longer felt and hence their use gradually declined. This explanation is only partially satisfactory, for, although the depositing of a carefully dated contract would offer protection to the first creditor, it did not publicize the lien on the property, thereby giving to a third party the necessary warning about the status of the property on the security of which he might have intended to make a loan. A more comprehensive hypothesis to account for the disappearance of the horoi from the Attic scene is that, to assure proper publicity, a system of official mortgage registers was ultimately developed. These records may have been kept on perishable material and accordingly have not been preserved.⁶⁰ If this supposition is correct, then presumably the Athenians in the course of the second century adopted the use of some kind of *ἀναγραφὴ τῶν κτημάτων καὶ τῶν συμβολαίων* such as Theophrastos had advocated, from which one could discover *εἰ ἐλεύθερα καὶ ἀνέπαφα καὶ τὰ αὐτοῦ πωλεῖ δικαίως*. To judge from these words an *ἀναγραφὴ* of this type was an official register of properties and contracts, open to the public, and hence different from the records maintained in various Greek cities in the Hellenistic and Roman periods in a place frequently designated as the *χρεωφυλάκιον*.⁶¹ The *χρεωφυλάκιον*, it is believed, was an office maintained by the state as a depository for contracts; it thus performed a useful service to each contracting party, but, presumably, unlike the *ἀναγραφὴ*, it was not open to the public.⁶² I am unaware of any reference to a *χρεωφυλάκιον* in Athens, but the formula in one horos inscription⁶³—*κατὰ συνθήκας τὰς κειμένας παρὰ τοῖς θεσμοθέταις*—suggests that at some time the thesmothetai, in addition to their regular duties, may have assumed responsibilities similar to those of the custodians of *χρεωφυλάκια* in other cities.

Before ending this general discussion of the use and physical characteristics of horos mortgage stones, there is one extremely perplexing problem which deserves consideration. As is well known, the earliest allusion to horoi, which presumably had some connection with the employment of real property as security,⁶⁴ occurs in Solon's famous line, *ὄρους ἀνείλον πολλαχῆ πεπηγότας*.⁶⁵ After this solitary example a full two centuries elapse before there is another certain reference to a horos of this type.⁶⁶ Turning from the literary to the epigraphical sources, we find a similar situation obtaining, for, as was stated above, the majority of scholars agree that none of the

⁶⁰ Beauchet, III, p. 349.

⁶¹ See the list of cities which had such an office, and the various synonyms for *χρεωφυλάκιον*, given by R. Dareste, *B.C.H.*, VI, 1882, pp. 241-245.

⁶² Beauchet, IV, pp. 65-66.

⁶³ *Ἑλληνικά*, VIII, 1935, pp. 223-228; see above, Chapter II, No. 24.

⁶⁴ See below, Chapter VIII, pp. 181-184.

⁶⁵ Aristotle, *Ath. Const.*, XII, 4.

⁶⁶ Wade-Gery, *Mélanges Gustave Glotz*, II, pp. 879-882, sees such a reference in Thucydides, IV, 92, 4,—incorrectly, I believe; see above, p. 50, and note 40.

extant mortgage stones antedates the fourth century. In view of the large number of fifth century inscriptions which have been preserved, this apparent lack of horos mortgage stones among them is certainly surprising. A possible explanation, of course, for the absence of mortgage horoi among sixth and fifth century inscriptions is that in that period they were made of wood and hence have not survived. Scholars, in general, have either accepted the existence of wooden horoi or, at least, have admitted the possibility that they could have been made of that material.⁶⁷ The problem is important and requires investigation, for the question as to whether mortgage horoi of some type were in use before the fourth century is intimately connected with the obscure subject of the date at which the mortgage contract was adopted by the Athenians.

Since some 192 horos mortgage stones belonging to the fourth century and later have been discovered in Attica, it is obvious that they were commonly used in this period. Consequently, it is logical to assume that the numerous references in the orators to horoi are allusions to these stones. Since, however, the orators naturally did not define what they meant by horoi, the possibility must be considered that to the Athenians this word also connoted a different kind of mortgage notice from the ones with which we are acquainted. In this connection a passage from [Demosthenes], XXV, *Against Aristogeiton*, I, 69-70, is very instructive. In an effort to emphasize the fact that Aristogeiton is a State debtor, the speaker draws a contrast between the ways in which private and public debts are recorded and publicized. He says: ἐγὼ γὰρ οἶμαι δεῖν ὑμᾶς, ὥσπερ ἂν εἰ χρέος ἐσκοπεῖτ' ἴδιον, οὕτως ἐξετάσαι τοῦτον καὶ τὰ τουτουὶ τοῦ ἀγῶνος δίκαια. εἰ τοῖνυν τις ὀφείλειεν τιν' ἠτιάτο χρήματα, ὁ δ' ἠρνεῖτο, εἰ μὲν ἐφαίνονθ' αἶ τε συνθήκαι καθ' ἃς ἐδανείσατο κείμεναι καὶ οἱ τεθέντες ὄροι ἐστηκότες, τὸν ἀρνούμενον ἠγείσθ' ἂν ἀναιδῆ δηλονότι, εἰ δ' ἀνηρημένα ταῦτα, τὸν ἐγκαλοῦντα· οὕτω ταῦτα πέφυκεν. εἰσὶ τοῖνυν ὧν Ἀριστογείτων ὀφείλει τῇ πόλει συνθήκαι μὲν οἱ νόμοι, καθ' οὓς ἐγγράφονται πάντες οἱ ὀφλισκάνοντες, ὄρος δ' ἡ σανὶς ἢ παρὰ τῇ θεῷ κειμένη.

In these lines [Demosthenes], when referring to a private debt, uses the terms with which we are familiar—*συνθήκαι* and *ὄροι*. In the comparison with a public debt *συνθήκαι* are likened to *νόμοι* and *ὄροι* to *σανὶς*. It is important to observe that there is no identification of *ὄροι* with *σανὶς*. On the contrary, it is specifically stated that for publication purposes *ὄροι* were the medium for private obligations and *σανὶς* for a public obligation.

On the basis, then, of what is most probably authentic fourth century testimony,⁶⁸ it is clear that the wooden tablet known as *σανὶς* was not used as a synonym for *ὄρος*. This fact, although it is not proof that horoi were never made of wood, must be kept in mind as we examine the pertinent definitions of the lexicographers, the relevant passages from whom are quoted below.

⁶⁷ E. g., *Inscr. Jur. Gr.*, I, p. 128; Beauchet, III, p. 350; Lipsius, p. 694, note 61.

⁶⁸ See Georges Mathieu, *Démosthène, Plaidoyers Politiques, Tome IV*, 1947, pp. 134-139 (Budé).

Two definitions of *σανίς* may be mentioned first. Bekker, *Anecdota Graeca*, I (*Lexica Segueriana*), p. 303, 23-24: *Σανίς: σανίδες, ἐν αἷς ἀνεγράφοντο οἱ τῇ πόλει ὀφείλοντες καὶ οἱ ἄλλοι τι ἡδίκηκότες. Etymologicon Magnum*, 708, 13-15: *Σανίς: Οἶον τανίς, παρὰ τὸ τετάσθαι, τὸ ἐπίμηκες ξύλον. Σανίδες δὲ, ἐν αἷς ἐγγράφονται οἱ ὀφείλοντες τὶ καὶ οἱ ἡδίκηκότες τί.*

Since the definition in the *Anecdota Graeca* specifically refers to debtors *τῇ πόλει*, it seems probable that *οἱ ὀφείλοντες* in the almost identical wording of the *Etymologicon Magnum* are also debtors *τῇ πόλει*. Thus in these two passages *σανίς* apparently is defined as in the lines of [Demosthenes] quoted above—with the addition of the well known fact that indictments were commonly written on *σανίδες* which were then posted in public.⁶⁹

Pollux, III, 85 (Bethe): *ὄρους ἐφιστάναι χωρίῳ· σανίς δ' ἦν ἡ στήλη τις δηλοῦσα ὡς ἔστιν ὑπόχρεών τιμι τὸ χωρίον.*

In this definition, contrary to the evidence already given, there seems to be a clear identification of *ὄρος* and *σανίς*. Two manuscripts (A and C) of Pollux, however, read *λίθος* for *σανίς*. Despite Bethe's preference for the reading *σανίς*, *λίθος* seems more probable to me, for it is rather difficult to understand the likening of *σανίς* to *στήλη*. In fact, the reading *λίθος δ' ἦν ἡ στήλη τις* is an apt definition of *ὄρος* since, as we have seen, many of the preserved horoi are nondescript stones while others are shaped like *stelai*. If the reading *λίθος* is accepted, then we have in this passage a definite statement that a horos was a stone. This interpretation is confirmed by Pollux IX, 9 (Bethe): *ὁ δ' ὀρίζων ὀριστής, καὶ τὸ ὑπόχρεων χωρίον ὠρισμένον, καὶ ἡ ἐνεστηκυῖα στήλη ὄρος*, and by Hesychius (Schmidt): *ὄρος· νόμος, θεσμός. ἡ στήλη, ἡ καταπεπηγυῖα ἐπὶ χωρίῳ ἢ οἰκίᾳ.*

Bekker, *Anecdota Graeca*, I, 192, 5-6: *Ὅρον ἐπιθεῖναι χωρίῳ: τοῦ δανεισαμένου τὸ ὄνομα ἐγράφετο εἰς σανίδα, καὶ ἐκρεμάτο ἐπὶ τοῦ ἀγροῦ.*

In these words *ὄρος* and *σανίς* are explicitly equated. Anyone familiar with the horos mortgage stones, however, will immediately recall that on them the name of the creditor only was inscribed. If this passage were a correct definition of a mortgage horos, *τοῦ δανείσαντος* rather than *τοῦ δανεισαμένου* should have been written.⁷⁰ The statement that the name of the borrower, i. e., the debtor, was inscribed *εἰς σανίδα* is similar to the information given in the passage of [Demosthenes] quoted above. It seems probable, therefore, that the author of this definition has confused the mortgage *ὄρος* on which the name of the creditor in a private transaction was inscribed with the *σανίς* on which the names of public debtors were listed.

The final words of this notice—*καὶ ἐκρεμάτο ἐπὶ τοῦ ἀγροῦ*—are untranslatable as

⁶⁹ Lipsius, p. 820.

⁷⁰ A similar remark can be made concerning the definition from *Et. Magn.*, 708, 13-15, quoted above, for *οἱ ὀφείλοντες* were not recorded on horos inscriptions. The only horos including the name of the debtor also is one from Lemnos, published by M. Segre. See above, Chapter, II, p. 40.

they stand. They should be considered in connection with the following definition given by Hesychius (Schmidt): *σανίς*: *θύρα*. *λεύκωμα*, *ἐν ᾧ αἱ γραφαὶ Ἀθήνησιν ἐγράφοντο πρὸς τοὺς κακούργους*. *τίθεται δὲ καὶ ἐπὶ τοῦ (σ)ταυροῦ*. The statement that the *σανίς* was a whitened tablet on which indictments were recorded we know is correct.⁷¹ What is meant, however, by the remark that it was placed *ἐπὶ τοῦ (σ)ταυροῦ*? The manuscript reading is *ταύρου*; as emendations Scaliger and Casaubon suggested *σταυροῦ* and *πεταύρου* respectively. Strange as it may seem, the manuscript reading is the most likely one. In a recent study G. P. Stevens has shown that the location of the bull dedicated by the Areopagus on the Acropolis,⁷² mentioned in Pausanias, I, 24, 2, was probably just to the northwest of the Parthenon. It is entirely possible, then, that the definition in Hesychius contains a reference to this *ταῦρος*. Such an assumption provides a reasonable explanation for the unintelligible words—*ἐκρεμάτο ἐπὶ τοῦ ἀγροῦ* (Bekker, *Anecdota Graeca*, I, 192, 5-6), quoted above. A *σανίς* cannot be hung on a field, but it can be hung on the statue of a bull. The passage, consequently, should probably read *ἐκρεμάτο ἐπὶ ταύρου*—or possibly *ἐπὶ τοῦ ταύρου*; it is easy to imagine how the corruption in the text could have occurred. In this connection the phrase describing the *σανίς* in the passage of [Demosthenes] quoted above assumes importance—*ἡ σανίς ἢ παρὰ τῇ θεῷ κειμένη*. If the location suggested by Stevens is correct, the statue of the bull of the Areopagus was bounded on one side by the Parthenon and on another by the Athena Promachos.⁷³ Since we know that state debtors were publicly registered on the Acropolis ([Demosthenes], LVIII, *Against Theokrines*, 48; cf. 19 and 50-52), it seems very likely that certain *σανίδες* were exposed to view suspended from the bull of the Areopagus,⁷⁴ just as other *σανίδες* were posted in such places as *πρὸ τῶν ἐπωνύμων* in the agora.⁷⁵

There is one further definition which must be considered. It was quoted earlier in this chapter,⁷⁶ but, in order to have all the relevant passages grouped together, the pertinent words are repeated here. Bekker, *Anecdota Graeca*, I, 285, 12-16: *Ὅρος — — — ἔστι δὲ ὁ ὄρος καὶ σανίδιον τὸ ἐπιτιθέμενον ταῖς οἰκίαις καὶ τοῖς χωρίοις ἐγκαταπηγνύμενον τοῖς ἐνεχυριαζομένοις πρὸς ἃ ὀφείλουσιν οἱ δεσπότες . . .* The same word-

⁷¹ Lipsius, p. 820.

⁷² *The Setting of the Periclean Parthenon, Hesperia, Supplement III*, 1940, pp. 19-24. Professor A. E. Raubitschek kindly called to my attention Stevens' study on the location of the bull of the Areopagus.

⁷³ Walther Judeich, *Topographie von Athen*², Munich, 1931, p. 241 and note 1 (following Pausanias) locates the bull of the Areopagus, which he believes was dedicated in the fourth century or earlier, on the north side of the Processional Way, an area which also could be described as *παρὰ τῇ θεῷ*.

⁷⁴ If the above reasoning is correct, it seems certain that the definition in *Anecdota Graeca*, I, 192, 5-6, refers to a public, not a private debt.

⁷⁵ Demosthenes, XXI, *Against Meidias*, 103; see Lipsius, p. 820, and C. Wachsmuth, *Die Stadt Athen im Alterthum*, Leipzig, 1890, II, 1, pp. 387-390.

⁷⁶ See p. 43.

ing is to be found in the *Etymologicon Magnum*, 632, 27-30. In these lines ὄρος and σανίδιον are unequivocally identified. Σανίδιον, of course, is the diminutive of σανίς and whenever it occurs in Greek literature in the meaning of tablet, record, etc. it refers, like σανίς, to some sort of public register. To the best of my knowledge, it is only in the tenth or eleventh century *Lexica Segueriana* and in the even later *Etymologicon Magnum* that the word is used in reference to a mortgage horos. The information contained in these volumes is often extremely valuable, but, when one reflects that even second century A.D. lexicographers like Pollux and Harpocration deemed it necessary to explain an obsolete meaning of ὄρος, one is certainly justified in questioning the accuracy of the information available to these compilers of the Middle Ages. It seems to me that scepticism is particularly called for in this case in view of the careful distinction made between ὄρος and σανίς in [Demosthenes], XXV, *Against Aristogeiton*, I, 70. Is it not possible that these mediaeval lexicographers or their sources were misled by the juxtaposition of the words—ὄρος δ' ἢ σανίς—employed by the orator?

One might expect that the expressions used to designate the setting up or the removing of horoi would throw some light on the physical characteristics of these mortgage notices. For the sake of completeness, therefore, there are listed below those phrases from the ancient sources which give some information on this topic.⁷⁷

Expressions for setting up or removing horoi, referring to land.

Demosthenes, XXXI, 1. τίθησιν ὄρους — — — ἐπὶ τὸ χωρίον.

Demosthenes, XXXI, 3. τοὺς (ὄρους) ἐπὶ τοῦ χωρίου τέθηκεν.

[Demosthenes], XLII, 5. οὐδεὶς ὄρος ἔπεστιν ἐπὶ τῇ ἐσχατιᾷ.

Pollux, III, 85. ὄρους ἐφιστάναι χωρίῳ.

Pollux, IX, 9. ἡ ἐνεστηκυῖα στήλη ὄρος.

Hesychius. ὄρος: στήλη, ἢ καταπεπηγυῖα ἐπὶ χωρίῳ.

Anecdota Graeca, I, 192, 5. ὄρον ἐπιθεῖναι χωρίῳ.

Anecdota Graeca, I, 285, 13-15. ἔστι δὲ ὁ ὄρος καὶ σανίδιον τὸ — — — καὶ τοῖς χωρίοις ἐγκαταπηγνύμενον.

Demosthenes, XXXI, 4. ἀνείλεν τοὺς ὄρους.

[Demosthenes], XLIX, 12. τοὺς ὄρους ἀνέσπακεν.

Such phrases merely indicate that when horoi were set up in a field, they were either placed on the surface or were driven into the ground. They could be removed by pulling them up (ἀνασπᾶν). The verb ἀναιρεῖν need imply nothing more than to destroy or to remove them.

Expressions for setting up or removing horoi, referring to houses.

Demosthenes, XXXI, 1. τίθησιν ὄρους ἐπὶ τὴν οἰκίαν.

Demosthenes, XXXI, 3. τοὺς ἐπὶ τῆς οἰκίας ὄρους — — — ἔθηκεν.

⁷⁷ Some of these expressions will be found listed in Beauchet, III, p. 350.

Demosthenes, XLI, 6. ὄρους ἐπιστηῆσαι — — ἐπὶ τὴν οἰκίαν.

Harpocration, 226, 3. ὄρος. οὕτως ἐκάλουν οἱ Ἀττικοὶ τὰ ἐπόντα ταῖς ὑποκειμέναις οἰκίαις καὶ χωρίους γράμματα.

Hesychius. ὄρος. στήλη, ἢ καταπεπηγυῖα ἐπὶ χωρίῳ ἢ οἰκίᾳ.

Anecdota Graeca, I, 285, 13-14. ἔστι δὲ ὁ ὄρος καὶ σανίδιον τὸ ἐπιτιθέμενον ταῖς οἰκίαις.

Demosthenes, XXXI, 3. τοὺς ὄρους ἀπὸ τῆς οἰκίας ἀφαιρεῖ.

Absolute certainty about the mechanical procedure referred to in these expressions is impossible, but it is probably justifiable to interpret them as meaning that horoi were laid against houses, were affixed somehow to them, were actually imbedded in the walls, and that sometimes the inscription was cut on a stone in the house wall.

No definite conclusions on the possible use of wooden horoi, it is clear, can be drawn from the language employed to describe the setting up and removal of these mortgage notices, for, except in those cases where it is specifically stated that a horos was a stone, the phrases are appropriate to designate wooden objects or stones of the type discussed earlier in this chapter.⁷⁸

The results of this investigation into the possible existence of wooden horoi can be summarized briefly. Horos mortgage stones were widely used in the fourth century and later, and presumably the numerous references to horoi in the orators are to these stones. Because of its durable quality, stone seems a more likely substance than wood for the recording of notices, set up in public, intended to publicize a lien. The only unequivocal references to wooden horoi occur in two mediaeval lexica, the *Lexica Segueriana* and the *Etymologicon Magnum*. The definition in those compilations of horoi as *σανίδια* is completely at variance with the contrast between ὄρος and *σανίς* made in [Demosthenes], XXV, *Against Aristogeiton*, I, 69-70. It seems strange, also, if such a simple device as a wooden *σανίδιον* could serve as a mortgage notice, that the Athenians had recourse to the more troublesome methods not only of inserting stones in, or affixing them to, house walls, but also of cutting the appropriate inscription either on a stone which formed part of the wall or which happened to be lying in the vicinity.⁷⁹ Since wooden horoi, if they ever were used, naturally would have perished, it cannot be dogmatically asserted that they never were employed. The evidence for their existence, however, is too tenuous to offer a satisfactory basis for any hypothesis. Consequently, it does not seem justifiable to explain the fact that no horoi are extant from the time of Solon until the fourth century by assuming that in the intervening two centuries the Athenians used perishable wooden *σανίδια* rather than the horos stones with which we are familiar for a later period. The mystery concerning the lack of any preserved mortgage horoi from the fifth and sixth centuries, therefore, still requires explanation. We shall return to this problem in Chapter VIII.

⁷⁸ See pp. 42-46.

⁷⁹ See note 78.

CHAPTER IV

ΠΠΟΘΗΚΗ

A glance at the inscriptions edited in Chapter I or at those listed in Chapter II reveals the fact that the great majority of the horos mortgage stones publicized contracts concerned with ἀποτίμημα (whether μίσθωσις οἴκου or ἀποτίμημα προικός) or the transaction known as πρᾶσις ἐπὶ λύσει. The following three chapters will contain discussions of these institutions. Before approaching that task, however, it will be advisable to investigate certain aspects of the Attic hypothec, the institution which is usually considered to be similar to the modern mortgage. An examination into the nature of the hypothec will necessitate a discussion of various other problems concerning the Athenian system of real security¹ and, therefore, will provide a useful background for the study of those institutions with which the horoi were particularly associated. Such an investigation is especially needed at the present time since many of the generally accepted ideas about the Athenian hypothec have recently been vigorously challenged by U. E. Paoli.²

According to the traditional view, Athenian law recognized three forms of real security: ἐνέχυρον, ὑποθήκη, and πρᾶσις ἐπὶ λύσει.³ In ἐνέχυρον,⁴ which referred

¹ Real security is used throughout this work in the sense of the holding of property as security in contrast with personal security, i. e., suretyship, or the use of one's own person as security.

² See the works listed on p. vii.

³ Hitzig, p. 1; Beauchet, III, pp. 176-180; Lipsius, pp. 690-692; La Pira, *Bullettino dell' Istituto di Diritto Romano*, XLI, 1933, pp. 305-306. These three forms of real security can be roughly equated with certain institutions in Roman law as follows: ἐνέχυρον and *pignus*, ὑποθήκη and *hypotheca*, πρᾶσις ἐπὶ λύσει and *fiducia (cum creditore)*; cf. W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, Cambridge, England, 1921, pp. 470-474.

⁴ The word ἐνέχυρον and its cognates are used in a wide range of meanings. In Aristophanes, *Ecclesiazusae*, 753-755, and *Plutus*, 450-451, σκενάρια, and θώραξ and ἀσπίς, respectively, are referred to as ἐνέχυρα. [Demosthenes], XLIX, *Against Timotheos*, 48-54, is enlightening on the procedure followed when a movable was offered as security for a loan. According to Timotheos, the Boeotian admiral had borrowed 1000 drachmas from Pasio and had offered χαλκός as ἐνέχυρον. The speaker, who denies this statement, asks who brought the copper to Pasio, who received it, and who weighed it. This passage also proves the important fact that it is incorrect to characterize as ὑποθήκη every contract which is described by the verb ὑποτιθέναι, for frequently in reference to the ἐνέχυρον the appropriate form of that verb is employed; cf. Demosthenes, XLI, *Against Spoudias*, 11. In bottomry loans sometimes the security was called ἐνέχυρον; cf. [Demosthenes], LVI, *Against Dionysodoros*, 3 (a ship). In [Demosthenes], XXXIII, *Against Apatourios*, 10, the ship, which served as security in a πρᾶσις ἐπὶ λύσει contract, is designated as ἐνέχυρον. The term apparently could be used even of immovables; cf., for example, Harpocration, *s.v.* Ἀποτιμηταί. In extant Attic sources, however, ἐνέχυρα regularly denote movables.

To be distinguished from this use of ἐνέχυρον referring to security for a loan is its employment

usually, if not always, to movable property, the object offered as security passed immediately on the formation of the contract into the possession of the creditor. In *ὑποθήκη*, which referred usually to immovable property, the debtor remained in possession of the security until the maturity of the loan, at which time, if he were delinquent, the creditor could foreclose on the property which had been offered as security. In *πρᾶσις ἐπὶ λύσει* the borrower sold, subject to redemption presumably within a specified time, the object offered as security to the creditor who accordingly immediately became the new owner. The actual possession, depending on the terms of the contract, could either remain with the debtor or pass to the creditor.

Concerning *ἐνέχυρον* and *πρᾶσις ἐπὶ λύσει*, although there is disagreement on matters of detail, most scholars have been in accord on the chief features of the institutions. The nature of *ὑποθήκη*, however, has given rise to considerable controversy. Before entering into this controversy one significant and, I believe, previously unnoticed peculiarity of the hypothec should be emphasized. Although scholars universally speak of the Attic hypothec, the word *ὑποθήκη*, in the meaning of real property serving as security, never occurs in fifth or fourth century Attic authors. When the word is used in the Attic orators, it always refers to the security (ship or cargo, or both) in a maritime loan.⁵ The contract, called hypothec by modern scholars, is invariably designated by some form of the verbs *ὑποτιθέναι* or *ὑποκείσθαι*. This does not mean, of course, that the hypothec did not exist in fourth century Athens, but the restricted meaning of the noun *ὑποθήκη* is interesting and perhaps significant. In view of this fact, it is certainly hazardous to claim without question as a hypothec every contract referred to by the verbs *ὑποτιθέναι* or *ὑποκείσθαι*. 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.⁶

Until recently two main theories concerning the hypothec have held the field, one advocated by Pappulias and the other by Hitzig. Pappulias,⁷ reviving an older idea, maintains that the Attic hypothec gave to the creditor only a *ius vendendi*. According to this doctrine, if the debtor had not repaid the loan by the time of maturity, the

to designate movables seized by the creditor from a delinquent debtor; cf. [Demosthenes], XLVII, *Against Euergos*, 37-38; 41-42 and *passim*; Demosthenes, XXIV, *Against Timokrates*, 197; Aeschines, III, *Against Ktesiphon*, 21. Such a seizure was called *ἐνεχυρασία* and the verb to describe the act was *ἐνεχυράζειν* (see Chapter VIII, p. 170, on this word in Aristophanes' *Clouds*). *Ἐνεχυρασία* could be authorized by an executory clause in a contract (*I.G.*, II², 1241, lines 33-39; 2492, lines 7-9—in connection with non-payment of rent), by a court decision ([Demosthenes], XLVII, *Against Euergos*, 57), by governmental decree (*ibid.*, 36-38), and in various other ways. For a general discussion of *ἐνεχυρασία*, see Beauchet, III, pp. 223-234; C. Lécrivain in Daremberg et Saglio, *D.d.A.*, s.v. *Enechyra*, p. 617, and E. Caillemer, *ibid.*, s.v. *Foenus*, p. 1218.

⁵ E. g., [Demosthenes], XXXIV, *Against Phormio*, 6-8; 22; 50; XXXV, *Against Lakritos*, 10-13, 18; 52.

⁶ Cf. note 4 above.

⁷ Pp. 141-174.

creditor had the right to foreclose, but he had to sell the security on which he had seized. If the sum resulting from the sale was greater than the value of the obligation, the creditor was bound to return this “excess” (τὰ ὑπερέχοντα, ἢ ὑπεροχή) to the debtor. If the proceeds of the sale, however, were less than the amount of the debt, the creditor had the right to exact the balance (τὸ ἐλλείπον) from the debtor. Hitzig,⁸ on the other hand, argues that, if the debt was not repaid by the time of the expiration of the contract, the creditor by means of ἐμβάτευσις took possession and acquired ownership of τὰ ὑποκείμενα. Since the relative values of the security and the obligation were not considered, the creditor did not have to return to the debtor τὰ ὑπερέχοντα and, conversely, he was unable to exact τὸ ἐλλείπον from the debtor.

In the theories of Pappulias and Hitzig, although there is disagreement on the ultimate effects of the hypothec, there is complete agreement that for the duration of the contract the debtor remained in possession of the property offered as security. Paoli,⁹ however, insists that in the term ὑποθήκη it is necessary to recognize two different institutions—or at least two different aspects of the same institution. In the first case possession remained with the debtor. He determined at some time before the maturity of the obligation what objects should be subject to seizure by the creditor in case of non-repayment of the loan. Such contracts, according to Paoli (pp. 144-145) were common both in commercial and civil transactions, but they gave to the creditor only a simple right *in personam* and not a right *in re* (p. 147). For the creditor to have a right *in re*—a “real right” (*diritto reale*) which protected him against the claims of other creditors—it was essential for him to have possession of the object offered as security (pp. 147-148). This second aspect of the hypothec Paoli (p. 144) describes as follows: “the transfer by the debtor to the creditor, as security for the payment of the obligation, of the possession of an object; thereby there is constituted in favor of the creditor a preferential right (*diritto di prelazione*) over all the other creditors.”

Not only does Paoli insist that for a creditor to possess a “real right of security” (*diritto reale di garanzia*) he must be in possession of τὰ ὑποκείμενα, but he also rejects the theories of both Pappulias and Hitzig concerning the ultimate effects of the hypothec contract. According to Paoli (p. 157) the civil hypothec (which granted a “real right”), as contrasted with the commercial hypothec, was not subject to maturity in the Attic period. Both the ὑποθήκη and the ἐνέχυρον had a continuative character (*carattere continuativo*); they were institutions by means of which a transfer of possession and not of ownership was effected, and they operated in a provisory and not in a definitive way. Paoli expresses his view very clearly in the following sentences (pp. 157-158): “The pledge and the hypothec, in short, in the form which they assume in the civil law, do not have a maturity whose effect is

⁸ Pp. 81-94; cf. Beauchet, III, pp. 264-282.

⁹ *Studi*, pp. 141-165.

either the falling of the security (*cosa*) into the ownership of the creditor, or the authorization of the sale. This explains why in the Attic sources references to the maturity of the pledge and the civil hypothec never occur, while it is mentioned so frequently for those forms of pledge (*forme pignoratizie*) in which maturity is certain; and this also explains why the institutions of the *πρᾶσις ἐπὶ λύσει* and of the *ἀποτίμημα* were so flourishing,—institutions which are more efficacious, because not provisory, than the continuative hypothec and pledge, but which would be useless and less perfect duplicates if the hypothec admitted of a maturity, and above all if the maturity gave rise to sale. But from the sources it constantly appears that the pledge in civil law, by effecting the transfer of possession and not of ownership, has a continuative character.”¹⁰

Paoli (pp. 163-165) lays stress on the importance of evolution in legal institutions and emphasizes that the pledge (*pegno*) of commercial law influenced the development of the pledge of Attic civil law. Under such influences “the *ὑποθήκη* (of the Attic period), which either is not a ‘real right,’ or, if it is a ‘real right,’ is a pledge, was transformed into an institution more akin to the modern hypothec”—but this development was not completed until the Hellenistic Age.

Such, in brief compass, is Paoli’s thesis concerning the Attic hypothec, a thesis which he attempts to support by an analysis of specific evidence. The only way, obviously, to test the validity of his conclusions is to examine the sources he marshals in behalf of his theories. Before investigating his contention that a hypothec (conferring a right *in re*) was marked by possession of the security on the part of the creditor and by a continuative character, however, a few comments should be made concerning his insistence that the hypothec, in which the creditor was not in possession, did not furnish him a “real right” which protected him against the claims of other creditors. To substantiate this statement he¹¹ refers to a passage in Aeschines and to two inscriptions from Arkesine in Amorgos.

Aeschines,¹² after explaining why Demosthenes had a claim for one talent against the city of Oreos, says: *ἀναγκαζόμενοι δὲ οἱ Ὠρέϊται καὶ οὐκ εὐποροῦντες, ὑπέθεσαν αὐτῷ τοῦ ταλάντου τὰς δημοσίας προσόδους, καὶ τόκον ἤνεγκαν Δημοσθένει τοῦ δωροδοκήματος δραχμὴν τοῦ μηνὸς τῆς μῶας, ἕως τὸ κεφάλαιον ἀπέδοσαν*. Since Demosthenes, although obviously not in possession of the security, nevertheless received both interest and principal, it is rather difficult to discover in these words any evidence for the contention that this contract—the various clauses of which are unknown to us—afforded inadequate protection against the claims of other possible creditors.

¹⁰ In their reviews (for references, see p. vii), Arangio-Ruiz and La Pira both reject Paoli’s contention that for the duration of the contract possession resided with the creditor. The continuative character of the hypothec is rejected by Arangio-Ruiz, but accepted, with slight modifications, by La Pira (see below, p. 83).

¹¹ *Studi*, pp. 144-145.

¹² III, *Against Ktesiphon*, 104.

Hellenistic inscriptions from Amorgos are not good evidence for legal procedure in fourth century Athens, and the two documents¹³ cited by Paoli certainly do not support his thesis. Since their wording is almost identical, it will be sufficient to comment on only one of them (no. 67). It is recorded there that a certain Praxikles lent to the city of Arkesine a sum of three talents—ἀκίνδυνομ πα[ν]|[τ]ὸς κινδύνου Πραξικλεῖ (lines 39-40). In lines 42-44 the security covering the loan is described as follows: ὑπέθετο δὲ Πραξικλῆς τὰ τ[ε]|[κ]οινὰ τὰ τ[ῆ]ς πόλεως ἅπαντ[α κ]αὶ [τ]ὰ ἴδια τὰ Ἀρκεσινέων καὶ τῶν οἰκούν[τ]ων ἐν Ἀρκεσίνῃ ὑπάρχ[οντα] ἔγγαια καὶ ὑπερπόντια. Then follow detailed and drastic executory and penal clauses which were agreed upon for the protection of the creditor, and finally it is stated emphatically that nothing whatsoever shall take precedence over this contract with Praxikles (lines 76-81): τῆς δὲ συγγραφῆς τῆσδε|[ὠ]μολόγησαν Ἀρκ[εσι]εῖς μηδὲν εἶναι κυριώτερον μῆτε νόμον μῆτε ψ[ή]|[φ]ισμα μῆτε δ[ό]γμα [μῆ]τε στρατηγὸν μῆτε ἀρχὴν ἄλλα κρίνου|[σ]αν ἢ τὰ ἐν τ[ῆ]ι συγγ[ρα]φῆι γεγ[ρ]αμμ[ένα] μῆτε ἄλλο μηθὲν μῆτε τέχ[νη] μῆτε πα[ρ]ε[υ]ρέσει μηδεμιᾷ, ἀλλ' εἶναι τὴν συγγραφὴν κυρίαν|[οὔ]δ' ἂν ἐπιφέρει ὁ δανείσας ἢ οἱ πρᾶσ[σοντ]ες ὑπὲρ αὐτοῦ. Since it would be difficult to imagine a contract in which the rights of the creditor are more scrupulously protected,¹⁴ Paoli's comment "Da una convenzione simile non sorge un diritto reale" is somewhat surprising, to say the least.¹⁵

Paoli¹⁶ also insists that it is not the priority of the loan but the possession of the security which affords real protection to the creditor. To support this statement he assembles evidence from certain speeches of [Demosthenes].¹⁷ The transactions referred to in these orations, however, are all concerned with maritime loans, and Paoli himself elsewhere¹⁸ quite properly emphasizes that evidence derived from a contract established according to commercial law is valueless for the interpretation of a contract based on civil law. Maritime loans were notoriously hazardous. Unless the creditor went on the voyage himself, or despatched a trusted agent, the debtor was

¹³ *I.G.*, XII, 7, 67 and 69.

¹⁴ Cf. W. W. Tarn, "The Social Question in the Third Century" (in *The Hellenistic Age*, Cambridge, England, 1923), pp. 108-112, and M. Rostovtzeff, *Social and Economic History of the Hellenistic World*, Oxford, 1941, p. 223.

¹⁵ Regarding these inscriptions Paoli (p. 145) writes: "in questi casi il negozio ha senso solo se si intende che nella convenzione vi sia una semplice predeterminazione dei beni sottoposti all'eventuale esecuzione: inammissibile l'ipoteca, a costituire la quale gli ὑποκείμενα sono disadatti per natura e sproporzionati per valore all'obbligazione garantita." Such an interpretation is certainly not borne out by the Greek quoted in the text above, or by lines 57-64 of the inscription where it is stated that in case of non-payment of the debt Praxikles or his agents may exact with impunity double the amount of the loan in any way they wish from the public and private property of all the inhabitants of Arkesine.

¹⁶ *Studi*, pp. 146-147.

¹⁷ XXXIV, *Against Phormio*; XXXV, *Against Lakritos*; XLIX, *Against Timotheos*.

¹⁸ *Studi*, pp. 157; 161-164.

completely free from the creditor's supervision until the return to the original port. Naturally the creditor tried to protect himself by a carefully worded contract¹⁹ and by taking possession of ship and cargo on their arrival.²⁰ To judge from one passage,²¹ if the debtor did not pay principal and interest within twenty days after the return of the ship, the creditor had the right to sell the security. This taking of possession on the return to port was necessary, for, since the security consisted of movables, an unscrupulous debtor could easily abscond with them.²²

In a maritime contract, then, it is clear that the creditor derived his best protection from taking possession of the security as soon as the ship returned to port. Otherwise he was dependent on the honesty of the debtor and the hope that the courts would uphold the validity of the contract.²³ It is obviously erroneous, however, to use the procedure followed in such maritime contracts as evidence for the procedure adopted in the matter of loans secured by real property. A debtor cannot abscond with immovables. Consequently, in any effort to ascertain the nature of the fourth century Attic civil hypothec—i. e., a loan secured by real estate—it is imperative to rely on evidence derived from civil and not from commercial law.

This brief discussion of the passage in Aeschines, of the inscription from Amorgos, and of the maritime contracts treated in certain orations of Demosthenes is sufficient, I believe, to demonstrate that such evidence does not prove Paoli's theory that the hypothec established according to civil law, in which the debtor retained possession of the security, did not furnish the creditor a "real right." It is now necessary to examine his fundamental contentions that in a civil hypothec which granted the creditor a right *in re* the creditor was always in possession of the security, and that such a contract had a continuative character. If the texts which he adduces in support of this thesis are convincing, then, since there is abundant evidence for possession on the part of the debtor, it would appear that Paoli is correct in maintaining that the Attic hypothec comprised two different kinds of contracts. The problem is a basic one for the understanding of Athenian economic and legal institutions and will require extensive investigation. It must be remembered, however, that the transactions called hypothecs by modern scholars are designated by fifth and fourth century authors only by the verbs *ὑποτιθέναι* and *ὑποκείσθαι*.²⁴ Consequently, in the ensuing pages we must attempt to ascertain not only whether the creditor or debtor was in possession of the security, but also what type of contract is under consideration.

¹⁹ [Demosthenes], XXXV, *Against Lakritos*, 10-13.

²⁰ Demosthenes, XXXII, *Against Zenothemis*, 14; XXXV, *Against Lakritos*, 11; XLIX, *Against Timotheos*, 35.

²¹ [Demosthenes], XXXV, *Against Lakritos*, 11-12.

²² For an attempt to abscond, see [Demosthenes], XXXIII, *Against Apatourios*, 9.

²³ [Demosthenes], LVI, *Against Dionysodoros*, 1-2; 48-50.

²⁴ See above, p. 62.

This examination into the nature of the Attic civil hypothec will be divided into three parts. Part I (pp. 67-80) will be devoted to an analysis of the evidence adduced by Paoli. This evidence, I believe, will appear inadequate to prove his contentions. Part II (pp. 80-89) will contain a discussion of evidence, not mentioned by Paoli, which seems completely to refute his theories. In Part III (pp. 89-95) an attempt will be made to describe the evolution of the Athenian system of real security and the rôle played therein by the hypothec.

I

Paoli²⁵ first examines certain cases which Hitzig,²⁶ in order to explain the fact that the creditor is (or seems to be) in possession, claims are examples of security which has passed into the ownership of the creditor as a result of foreclosure. Two of the passages²⁷ can be dismissed without discussion since one refers to a maritime loan and the other to a *πρᾶσις ἐπὶ λύσει*. Sections 11-12 of [Demosthenes] XLIX, *Against Timotheos*, however, are very germane to our problem, but unfortunately they are exceedingly difficult to interpret. Since Paoli makes frequent use of them to support his contentions, it will be useful to quote the pertinent sentences. After mentioning that Timotheos was in great need of money, the speaker (Apollodoros) proceeds: ἡ μὲν γὰρ οὐσία ὑπόχρεως ἦν ἅπασα, καὶ ὄροι αὐτῆς ἔστασαν, καὶ ἄλλοι ἐκράτουν ὁ μὲν ἐν πεδίῳ ἀγρὸς ἀποτίμημα τῷ παιδὶ τῷ Εὐμηλίδου καθειστήκει, ἐξήκοντα δὲ τριηράρχοις τοῖς συνεκπλεύσασι αὐτῷ ἑπτὰ μινῶν ἑκάστῳ ἢ ἄλλη οὐσία ὑπέκειτο, ἃς οὗτος αὐτοὺς στρατηγῶν ἠνάγκασε τοῖς ναύταις τροφήν διαδοῦναι. ἐπειδὴ δὲ ἀποχειροτονηθεὶς ἐν τῷ λόγῳ ἀπήνεγκεν ἐκ τῶν στρατιωτικῶν χρημάτων αὐτὸς δεδωκὼς εἰς τὰς ναῦς τὰς ἑπτὰ μινᾶς ταύτας τότε, φοβούμενος μὴ καταμαρτυρήσωσιν αὐτοῦ οἱ τριηράρχοι καὶ ἐξελέγχηται ψευδόμενος, δάνεισμα ποιεῖται ἰδίᾳ παρ' ἑκάστου αὐτῶν τὰς ἑπτὰ μινᾶς καὶ ὑποτίθησιν αὐτοῖς τὴν οὐσίαν, ἃς νῦν αὐτοὺς ἀποστερεῖ καὶ τοὺς ὄρους ἀνέσπακεν.

Thus Timotheos was in dire need of money, because *all* his property was encumbered (*ὑπόχρεως*), the farm in the plain serving as *ἀποτίμημα* for the son of Eumelidas,²⁸ and the *rest* of the property serving as security (*ὑπέκειτο*) for the sixty trierarchs, to the amount of seven minas each. Timotheos had forced these trierarchs to dispense seven minas each as subsistence to the sailors; in his official account he reported that he himself had distributed this sum from the military fund, but, afterwards, fearing prosecution at the hands of the trierarchs, he regularized the compulsion he had exerted upon them by admitting that he had obtained a loan (*δάνεισμα*

²⁵ *Studi*, pp. 150-154.

²⁶ Pp. 82-83.

²⁷ Demosthenes, XXXII, *Against Zenothemis*, 14 (bottomry); XXXVII, *Against Pantainetos*, 10 (*πρᾶσις ἐπὶ λύσει*). From such contracts obviously no safe conclusions can be drawn concerning the civil hypothec.

²⁸ According to the contract known as *μισθωσις οἴκου*; see Chapter V.

ποιείται) from them. As security for the loan he offered that part of his property which was not already designated as ἀποτίμημα; thus each trierarch obtained security for his particular loan of seven minas.²⁹ Subsequently, according to Apollodoros, Timotheos tried to deprive them of their money, and he had dug up the horoi.

The chief difficulty in this passage lies in the sentence: ἡ μὲν γὰρ οὐσία ὑπόχρεως ἦν ἅπασα, καὶ ὄροι αὐτῆς ἔστασαν, καὶ ἄλλοι ἐκράτουν. Hitzig deduces from the ἄλλοι ἐκράτουν that the creditors were in possession as a result of foreclosure. Paoli correctly rejects this explanation by pointing out that appropriation would have ended the transaction and consequently the property no longer could be called ὑπόχρεως. He adds (p. 152), "We ought to see here a sure indication that from the possession of the creditor it is not legitimate to infer the expiration of the contract (*vincolo obbligatorio*)." Thus here and also later (pp. 168-169) when he is discussing the ἀποτίμημα given in the μίσθωσις οἴκου, Paoli uses the expression ἄλλοι ἐκράτουν as evidence that in that form of hypothec and of ἀποτίμημα which provided a "real right," the creditor was in possession of the object offered as security from the moment the contract was made. The trouble with this assertion obviously lies in the fact that despite the expression ἄλλοι ἐκράτουν, it is clear from the words in section 12— ἄς νῦν αὐτοὺς ἀποστερεῖ καὶ τοὺς ὄρους ἀνέσπακεν—(cf. section 61) and from the tone of the rest of the speech that the debtor Timotheos remained in possession. In regard to the ἀποτίμημα we shall see in the next chapter that Paoli (pp. 190-194) argues that, when the ἀποτίμημα was serving as a "real right of security," it became customary for the horoi to symbolize a fictitious possession on the part of the creditor, the actual possession remaining with the debtor. In his review of Paoli's book Arangio-Ruiz³⁰ remarks that in regard to the debtor retaining actual possession, Paoli, through his theory of fictitious possession, admits for ἀποτίμημα what he denies for ὑποθήκη. Paoli³¹ in response to this comment admits that possibly the theory of fictitious possession on the part of the creditor should be extended to the hypothec also. He insists, however, that this admission does not impair his theory that in Athenian law, as contrasted with custom, a "real right of security" was provided only by possession on the part of the creditor.

Probably no definitive answer can be given to the problem raised by the words ἄλλοι ἐκράτουν. One thing, however, is certain. Since it is clear from the speech as a whole that the debtor Timotheos remained in possession of his encumbered property,

²⁹ Paoli, *Sul Diritto Pign.*, p. 166, note 1, seems to imply that Timotheos' debt to the trierarchs described in section 12 is different from the one mentioned in the preceding section. It is clear, however, that in section 12 we merely have an explanation of how the contract mentioned in 11 was constituted.

³⁰ Pp. 249-250. Arangio-Ruiz also quite properly emphasizes the difficulty of interpreting this passage of the *Against Timotheos*, because part of the property was encumbered as ἀποτίμημα and part (presumably) as ὑποθήκη.

³¹ *Sul Diritto Pign.*, p. 166, note 1.

the creditors obviously could not also have been in material possession. Incidentally, the picture of sixty creditors in actual possession of Timotheos' property is somewhat startling. Regarding Paoli's theory of fictitious possession, I question whether such a thesis is capable of proof or disproof, but it seems to me there is a simpler solution to the difficulty raised by the word *ἐκράτουν*. Why is it necessary to insist on assigning a technical meaning to the word? The Athenians, as is well known, were very careless in their use of technical terms, and the orators were particularly—and undoubtedly deliberately—vague in distinguishing between ownership and possession.³² It is true that in the expression *ὥστε ἔχειν καὶ κρατεῖν*³³ we may have a technical formula for the idea of possession, but that does not mean that *κρατεῖν* is invariably so used. I believe it is quite possible that the *ἄλλοι ἐκράτουν* of *Against Timotheos*, 11, may mean nothing more than "others had the upper hand," i. e., had Timotheos at their mercy. Some such translation would fit the context perfectly and would eliminate the need of postulating so questionable a theory as that of fictitious possession. If this rendering should be proper, the passage would merely state that all Timotheos' property was encumbered, that his creditors were pressing him hard, but he was still in possession. It must be admitted that this interpretation harmonizes well with the content of the speech as a whole.

It should also be noted that the term *ὑποθήκη* is not used in reference to this transaction. The verbal forms *ὑπέκειτο* and *ὑποτίθησκω* only are employed, and, as remarked above,³⁴ it is extremely arbitrary to maintain that these words always designate a hypothec. Since the horos inscriptions show that the *πρᾶσις ἐπὶ λύσει* was the commonest type of contract to furnish real property as security for a loan,³⁵ the possibility must not be excluded that Timotheos, to satisfy the trierarchs, entered into such a transaction with them. In this particular case the sale price would have been the sums already owed to the creditors, who, according to the contract, now became owners. They, as frequently happened in a *πρᾶσις ἐπὶ λύσει*, allowed Timotheos, now a rent paying tenant, to remain in possession of the property which he had sold *ἐπὶ λύσει*.³⁶

In *I.G.*, II², there are two similar inscriptions, 2758 and 2759, which are very pertinent to the subject under discussion. No. 2758 reads as follows: *ὄρος χωρίου καὶ οἰκίας | ὑποκειμένων ΠΗΗΗ | δραχ: ὥστε ἔχειν καὶ κρα|τεῖν [τ]ὸν θέμενον κατὰ | συνθήκας τὰς κειμένας | παρὰ Δεινίαι Εὐωνυμεῖ*. Paoli³⁷ misrepresents Hitzig when he says that the German scholar claims that the immovables have passed into the ownership of the creditor as a result of the maturity of the debt and the consequent *ἐμβάτευσις*. Actually

³² Cf. Arangio-Ruiz, pp. 247-249.

³³ *I.G.*, II², 2758.

³⁴ P. 62.

³⁵ See below, Chapter VII, p. 142.

³⁶ Cf. *Inscr. Jur. Gr.*, I, pp. 125-126.

³⁷ *Studi*, pp. 153 and 158, note 2; *Sul Diritto Pign.*, p. 173, note 1.

Hitzig³⁸ says: “Die Meinung ist, dass bei Verfall der *θέμενος ἔχειν καὶ κρατεῖν* dürfe, d.h. dass er dann Besitz ergreifen dürfe.” Paoli is certainly correct in denying that this inscription describes the effects of a foreclosure, for the word *ὑποκειμένων* implies very clearly that the contract was still in existence. It seems impossible to decide, however, whether he is right in maintaining that we have here a reference to a present rather than to a future possession of the creditor.³⁹ The precise significance of *ὥστε* (or *ἐφ’ ᾧ τε* as in 2759) *ἔχειν καὶ κρατεῖν τὸν θέμενον*, of course, is dependent on the terms of the *συνθήκαι*, about which we shall never know. Hitzig, Arangio-Ruiz,⁴⁰ and La Pira⁴¹ all believe that the reference is to a possible future possession of the creditor. Manigk⁴² also adopts this interpretation and remarks concerning the controversial formula that “es weist vielmehr auf den aus der *lex commissoria* folgenden Eigentumsverfall des Grundstücks selbst.” Another possible explanation of these inscriptions is to recognize in them examples of the contract known as *ἀντίχρησις*.⁴³ This suggestion raises a very difficult problem. Were the fourth century Athenians familiar with such an institution? Although the transaction termed *antichretic loan* is well known from the papyri,⁴⁴ until recently the only occurrence of the word *ἀντίχρησις* itself was to be found in two brief passages in the *Corpus Iuris Civilis*.⁴⁵ In 1933, however, A. G. Roos published a papyrus in which the word occurs twice, but in a context which adds little to the understanding of the institution.⁴⁶ Manigk, in his book on *ἀντίχρησις*, discusses fully the various ways in which the contract was used, but, since the evidence is almost exclusively from the Hellenistic and Roman periods, it is irrelevant to our purposes. The only example he claims for Attica is a transaction described in Demosthenes’ first oration against Aphobos, a problem which

³⁸ P. 9.

³⁹ *Sul Diritto Pign.*, p. 173; “*Datio in Solutum*,” p. 203.

⁴⁰ Pp. 248-249.

⁴¹ Pp. 310-311.

⁴² Alfred Manigk, *Gläubigerbefriedigung durch Nutzung*, Berlin, 1910, p. 40.

⁴³ Cf. Beauchet, III, pp. 212-214. Paoli himself, on one occasion (*Studi*, p. 158, note 2), calls these two inscriptions examples of *ἀντίχρησις*.

⁴⁴ See the list of such contracts in A. C. Johnson, *Roman Egypt*, Baltimore, 1936, p. 156. Cf. E. P. Wegener, *Some Oxford Papyri* (*Papyrologica Lugduno-Batava*, III, A, 1942), pp. 45-48, no. 11.

⁴⁵ D. XIII, 7, 33, *Idem* (Marcianus) *libro singulari ad formulam hypothecariam* Si pecuniam debitor solverit, potest pigneraticia actione uti ad recipiendam *ἀντίχρησιν*: nam cum pignus sit, hoc verbo poterit uti. D. XX, 1, 11, 1, Marcianus (*ibid.*) Si is qui bona rei publicae iure administrat mutuum pecuniam pro ea accipiat, potest rem eius obligare. Si *ἀντίχρησις* facta sit et in fundum aut in aedes aliquis inducatur, eo usque retinet possessionem pignoris loco, donec illi pecunia solvatur, cum in usuras fructus percipiat aut locando aut ipse percipiendo habitandoque: itaque si amiserit possessionem, solet in factum actione uti.

⁴⁶ *Papyri Groninganae* (Verhandelingen der Koninklijke Akademie van Wetenschappen te Amsterdam; Afdeeling Letterkunde, Nieuwe Reeks, Deel XXXII, No. 4, 1933) pp. 32-34, No. 11. The papyrus gives an account of receipts and expenditures. Col. I, line 12, reads: ‘*Ἀρποκράτει ἀντιχρήσεως* $\xi \bar{\iota} \beta$; in the mutilated col. II, line 5, there is left only the word *ἀντιχρήσ[εως]*.

will occupy our attention shortly.⁴⁷ The essence of *ἀντίχρησις* is implied in the word itself. In certain cases the creditor preferred, rather than to receive interest on the loan from the debtor who remained in possession of the security, to take possession himself of the property, thereby having the usufruct in lieu of interest. The chief difference between *ἀντίχρησις* and *πρᾶσις ἐπὶ λύσει* would seem to be that in the former the creditor received provisory possession of the property offered as security whereas in the latter he received provisory ownership. The similarity between the two institutions may explain why *ἀντίχρησις* (if it existed at all) was apparently so uncommon among the Athenians—at least in the period when the *πρᾶσις ἐπὶ λύσει* was flourishing.

These few remarks are sufficient, I believe, to show how difficult, if not impossible, it is to reach a definitive interpretation of the contract referred to in these two inscriptions. Because of this uncertainty, therefore, these documents should not be used as evidence in an attempt to discover whether the creditor in a civil hypothec was, or was not, in possession.

An inscription from Amorgos,⁴⁸ belonging probably to the fourth or third century B.C., has figured prominently in this controversy. Although Amorgos is one of the few places where horos mortgage documents somewhat similar in content to Athenian ones have been found, it should never be forgotten that any conclusions drawn from evidence provided by Amorgos must be applied to Athenian institutions with great caution. The pertinent part of this inscription, which, although publicizing a *πρᾶσις ἐπὶ λύσει*, does not contain the word horos is as follows: Νικερατος ἀπέδοτο τοῦ Κτησιφῶντος ἀπὸ τῶν πραγμάτων τὰ χωρία ἃ ἔχει θέμενος Νικ[κ]ήρατος παρὰ Ἐξακέστου, ἅπαντα ἀργυρίου δραχμῶν πεντακισχιλίων, ἐπὶ λύσει. ὑποτελεῖ δὲ μίσθωμα Νικηράτος Κτησιφῶντι καθ' ἕκαστον ἐνιαυτὸν ἀργυρίου δραχμᾶς πεντα[κ]οσίας ἀτελεῖς. In other words Nikeratos had borrowed 5000 drachmas from Ktesiphon and as security had sold to him, subject to redemption, the properties listed in the inscription. Thus Ktesiphon acquired the provisory ownership, but Nikeratos remained in possession as a rent paying lessee. How should the words τὰ χωρία ἃ ἔχει θέμενος be interpreted? Hitzig⁴⁹ and Pappulias⁵⁰ think that Nikeratos was owner of the farms when he made the contract with Ktesiphon, because as creditor (θέμενος) he had foreclosed on Exakestos through *ἐμβάτευσις*. Raape⁵¹ also is certain that we have here an example of a *Verfallpfand*. Since τὰ χωρία ἃ ἔχει θέμενος are placed in the same

⁴⁷ Manigk, *op. cit.*, pp. 27, note 1; 39; 43.

⁴⁸ *I.G.*, XII, 7, 55; *Syll.*³, 1200.

⁴⁹ P. 85. It is worth noting that in *I.G.*, II², 43 (formation of the Second Athenian Confederacy), lines 36-42, the verbs *ὑποτίθεσθαι* and *τίθεσθαι* are used to signify ownership acquired through foreclosure.

⁵⁰ Pp. 129-130. La Pira, pp. 315-316, believes that foreclosure had occurred and that the creditor had taken possession, but, since he accepts Paoli's "continuative" theory, he does not believe the creditor acquired absolute ownership; hence, the "*vincolo obbligatorio*" remains.

⁵¹ Leo Raape, *Der Verfall des Griechischen Pfandes*, Halle, 1912, pp. 6-9.

category with properties of which Nikeratos had become owner through inheritance or outright purchase, he argues that Nikeratos must also have been owner of the farms under discussion—and this ownership would have been acquired by means of foreclosure. This is a possible explanation. The objection that, if Nikeratos owned the farms, it was unnecessary for the method (*θέμενος*) by which he acquired ownership to be stated can be answered by calling attention to the fact that comparable data were given in the case of the other properties “sold” by Nikeratos to Ktesiphon.

Paoli⁵² suggests that this may be an instance of possession of the security by the creditor during the existence of the contract. If the creditor was in possession, then presumably we have here an example of *antichresis*—the mortgagee having the usufruct from the security in lieu of interest on his loan. There is nothing in the Greek to exclude this interpretation, but it does complicate the transaction recorded in this inscription. We must understand, then, that Nikeratos sold to Ktesiphon ἐπὶ λύσει not only the properties of which he had ownership but also the farms which he possessed as security for his loan to Exakestos. Since Ktesiphon now became the provisory owner of all the properties, presumably he had supplanted Nikeratos as creditor to Exakestos. Consequently, if Exakestos wished to recover his land, he would have to pay back the original loan not to Nikeratos, but to Ktesiphon. If this were done, it would be necessary to assume that the principal and the rent owed by Nikeratos to Ktesiphon would have been reduced accordingly.

Another possible interpretation of the expression—τὰ χωρία ἃ ἔχει θέμενος is “the farms which Nikeratos, as mortgagee, has as security from Exakestos.” If some such translation is permissible, then it would be proper to think of the debtor Exakestos as still in possession. According to this explanation, Nikeratos, when he borrowed 5000 drachmas from Ktesiphon, transferred to his creditor, as part of the security, the debt owed to him by Exakestos and the claim to the security guaranteeing that debt. Since Ktesiphon thus became the creditor of Exakestos, Exakestos could have paid the interest on the debt directly to Ktesiphon, or the arrangement might have been for the interest still to be paid to Nikeratos, in which case it presumably formed part of the 500 drachmas rent owed by Nikeratos to Ktesiphon.⁵³ If the latter was the case, then if Exakestos paid back the original loan to Ktesiphon, the principal and the rent owed by Nikeratos to Ktesiphon would have had to be reduced proportionately.

Possibly still other interpretations of this inscription are conceivable, but enough has been said, I believe, and more than enough, to show how foolhardy it would be to build any theory on a text susceptible to so many different explanations.

To summarize the results from the investigation of these five cases, it cannot be said that any one of them proves Paoli’s theory that in a hypothec which conferred a

⁵² *Studi*, pp. 153-154; *Sul Diritto Pign.*, p. 173.

⁵³ In a succinct document such as this one, both rent and interest might well be expressed by the one word *μισθωμα*.

“real right of security” the creditor was in possession of the security from the establishment of the contract.⁵⁴ The examples which refer to a maritime contract and to a *πράσις ἐπὶ λύσει* have no bearing on the problem. Evidence from Amorgos, even if it could be definitively interpreted, is not a safe guide for the understanding of Attic institutions. The inscriptions sometimes referred to as examples of antichresis are too rare and too inadequately understood to serve as a sound basis for any hypothesis. The speech against Timotheos, moreover, in which the debtor so clearly is in possession offers support to Paoli’s arguments only if one accepts his theory, which probably is incapable of actual proof, that the *horoi* frequently symbolized a fictitious possession. One other passage which Paoli⁵⁵ cites seems to me also to lead to a negative conclusion. In Isokrates XXI, *Against Euthynous*, 2, we are told that Nicias, after the Thirty Tyrants had established themselves in power, *δεδιώς τὰ παρόντα πράγματα τὴν μὲν οἰκίαν ὑπέθηκε, τοὺς δ’ οἰκέτας ἔξω τῆς γῆς ἐξέπεμψε, τὰ δ’ ἔπιπλα ὡς ἐμὲ ἐκόμισε, τρία δὲ τάλαντα ἀργυρίου Εὐθύνω φυλάττειν ἔδωκεν, αὐτὸς δ’ εἰς ἀγρὸν ἔλθων διητᾶτο.*⁵⁶ Paoli maintains that these lines are evidence that in a hypothec which provided a “real right” the possession of the security passed to the creditor at the moment of the formation of the contract. The passage, however, certainly does not justify this categorical statement. Nicias’ aim was to remove what he could from the clutches of the Thirty—himself, his slaves, his furniture, and three talents of silver which he deposited with his friend Euthynous. The mortgaging of the house was also motivated by fear of the Thirty. If they confiscated it, he might hope at least to preserve the money he had borrowed on it. Since he went to live in the country, it is obvious that temporarily he abandoned material possession of his house, but that does not mean that the creditor immediately took possession. It might almost be argued that the fact that he stripped the house of the furniture militates against the idea that the creditor took possession. This passage, consequently, like so many others in the sources, furnishes no definite evidence as to who was in possession of the security offered in the contract known as *ὑποθήκη*.⁵⁷

Paoli adduces several other passages in support of his contention that in the civil hypothec which granted a “real right” not only did the creditor take possession as soon as the contract was constituted but also such a contract had a continuative character. He believes that there is evidence to show that the debtor always had the possibility, by paying, of recovering the mortgaged property—a fact which signifies that he had lost the possession and not the ownership—, and that the debtor continued

⁵⁴ *Studi*, p. 154.

⁵⁵ *Ibid.*

⁵⁶ The problem concerning the authenticity of this speech need not concern us since there is general agreement that it should be assigned to the period *ca.* 400 B.C. Cf. Münscher in *R.E.*, *s.v.* *Isokrates*, pp. 2156-2158.

⁵⁷ In fact, can we even be certain that the contract was a hypothec?

to employ, as a means of credit, the property in the possession of the creditor long after he had lost possession of it.⁵⁸ The passages which he cites and discusses are so important that it will be necessary to examine them at some length.

In Isaeus, VI, *On the Estate of Philoktemon*, 33, there occur the following words: οἰκίαν δὲ ἐν ἄστει τεττάρων καὶ τετταράκοντα μνῶν ὑποκειμένην (Euktemon) ἀπέλυσε τῷ ἱεροφάντῃ. Paoli⁵⁹ thinks this passage refers to the restitution of an immovable, which had been offered as security, by the creditor to the debtor. In this interpretation I believe he is correct, but if these words are to lend support to his theory of the continuative character of the hypothec, it would be necessary to show that the *liquidazione* had occurred after the normal expiration of a contract, but such a meaning cannot be extracted from the Greek. When he adds that the restitution of the immovable was one of the steps by which the patrimony of Euktemon was transformed from οὐσία ἀφανής into οὐσία φανερά, he obviously has made a slip, as a rapid glance at the situation depicted in sections 30-34 will demonstrate. According to the speaker, the old Euktemon under the influence of the defendants proceeded to sell his immovables (and some animals and slaves) and realized from the sale more than three talents. Thus, contrary to what Paoli says, Euktemon's οὐσία was being transformed from φανερά to ἀφανής. Since the whole point of the passage is to show how Euktemon obtained more than three talents in cash, the transaction described in the Greek quoted above clearly explains how forty-four minas of that sum were collected. The translation probably should run: "Euktemon released (on repayment of the loan) to the hierophant a house in the city which had been mortgaged to him for forty-four minas;" i. e., Euktemon recovered the sum which he had lent on the security of the house. The use of the verb ἀπέλυσε and the fact that no interest is mentioned (the house apparently being redeemed for the exact amount of the loan) seem to show that the transaction had been a πρᾶσις ἐπὶ λύσει,⁶⁰ according to which Euktemon, by taking possession of the security, had had the usufruct in lieu of interest. Thus for two reasons—the fact that the contract was probably a πρᾶσις ἐπὶ λύσει and the fact that there is no evidence as to when the redemption occurred—, this passage most certainly does not support any of Paoli's views.

In Isaeus, V, *On the Estate of Dikaiogenes*, 21, the speaker says: οὐδὲ γὰρ πρὶν (Dikaiogenes) ἠττηθῆναι τὴν δίκην εἶχεν ὧν ἡμεῖς δικάζομεθα, ἀλλ' οἱ παρὰ τούτου πριάμενοι καὶ θέμενοι, οἷς ἔδει αὐτὸν ἀποδόντα τὴν τιμὴν ἡμῶν (the plaintiffs) τὰ μέρη ἀποδοῦναι (cf. 22 and 28). Paoli⁶¹ paraphrases this passage as follows: "Dikaiogenes

⁵⁸ *Studi*, p. 154.

⁵⁹ *Studi*, pp. 154-155.

⁶⁰ Hitzig, pp. 9, note 1, and 106, note 1, also recognizes in the passage a πρᾶσις ἐπὶ λύσει; *contra*, Wyse in his inadequate note on ἀπέλυσε (William Wyse, *The Speeches of Isaeus*, Cambridge, England, 1904).

⁶¹ *Studi*, p. 155 and note 1.

ought to restore to the purchasers (probably ἐπὶ λύσει) and to the creditors in possession of the property the money owed to them and to give to us that part of the immovables which belong to us." He thus interprets θέμενοι as referring to hypothecary creditors who are in possession, and in his discussion he implies that we have here an example of the continuative character of the hypothec. I fail to see any support for his continuative theory in this passage, since it is not stated when Dikaiogenes contracted the loan, and I also question whether the word θέμενοι refers to creditors in a hypothec. Paoli himself might have had doubts if he had read Wyse's long note on this passage.⁶² The key to the understanding of Isaeus' words may well be in the expression ἀποδόντα τὴν τιμὴν. The speaker says that Dikaiogenes ought to "return the price" to his creditors and thus redeem the property. Returning the price does not seem a natural phrase to be used in connection with a hypothec, but it is very appropriate if we understand οἱ παρὰ τούτου πριάμενοι καὶ θέμενοι to refer to one class of creditors—namely, those in a πρᾶσις ἐπὶ λύσει. The situation alluded to by Isaeus can probably be reconstructed as follows: Dikaiogenes, in need of money, sold some immovables ἐπὶ λύσει to certain purchasers who gave a definite price for them. By this transaction the purchasers became provisory owners and, if they took possession, they had the usufruct in lieu of interest. Regarding the status of the purchasers Isaeus uses the verb ἔχειν which can denote ownership or possession, or both, but from the words in the following section (22)—πλὴν γὰρ δυοῖν οἰκιδίον ἔξω τείχους καὶ <ἀγροῦ> ἐν Πεδίῳ ἐξήκοντα πλέθρων οὐδὲν κεκομισμεθα, ἀλλ' οἱ παρὰ τούτου θέμενοι καὶ πριάμενοι· ἡμεῖς δὲ οὐκ ἐξάγομεν· δέδιμεν γὰρ μὴ ὄφλωμεν δίκας.—it seems clear that the creditors were in physical possession. If, then, the purchasers (i. e., the creditors) were in possession, Dikaiogenes could redeem the property merely by repaying the purchase price (i. e., the amount of the loan); no interest payments would be required since for the duration of the contract the creditors had had the usufruct of the property. The words ἀποδόντα τὴν τιμὴν—returning the purchase price—, therefore, fit perfectly the interpretation that in πριάμενοι and θέμενοι we should recognize the creditors in a πρᾶσις ἐπὶ λύσει. If this explanation is sound, then obviously this passage also is not evidence for any of Paoli's ideas on the hypothec.⁶³

Paoli⁶⁴ attempts to support in support of his theories the συμβόλαιον which was made between Demosthenes' father and Moiriades. References to this contract appear in the three orations⁶⁵ against Aphobos, but especially in the first one. It is stated that in the property left by Demosthenes' father there were included twenty κλινοποιοί (couch-makers)—ὑποκείμενοι to the elder Demosthenes for 40 minas by Moiriades.

⁶² There is no evidence in Paoli's book that he is familiar with Wyse's remarkable edition of Isaeus.

⁶³ Hitzig (see above, note 60) and E. Ziebarth, *Philologus*, LXXXIII, 1927-1928, pp. 205-206, also recognize in this passage a reference to a πρᾶσις ἐπὶ λύσει alone.

⁶⁴ *Studi*, pp. 155-156.

⁶⁵ The pertinent passages are: I, 9; 24-29; II, 12; III, 37.

These slaves and their equipment (καὶ τὰλλα τὰ μετὰ τούτων ὑποτεθένθ' ἡμῖν, II, 12) constituted an ἐργαστήριον (I, 9; 27). There is no question that the possession or ownership, or both, of this security resided with the creditor; apparently the ἐργαστήριον was set up in the house of Demosthenes' father (οἴκοι, I, 24-25). The profits accruing to the creditor from the labors of these slaves amounted to 12 minas a year (I, 9; 24; 29), and according to Demosthenes his guardians continued to reap these profits for ten years after the death of his father (I, 26). At the time when Demosthenes delivered his first oration against Aphobos, however, he claims that the slaves (the security) had disappeared; according to him (I, 29) he had been defrauded of the principal—the 40 minas—and also of two talents—τὸ ἔργον of these slaves for ten years (i. e., revenues from the labor of the slaves at 12 minas a year for ten years = 2 talents).

Paoli sees evidence for the continuative character of the hypothec in the fact that the creditors were in "possession" of the security over such a long period of time. Before accepting this interpretation it is necessary to try to ascertain the nature of the contract concerned. Paoli obviously considers it a hypothec, presumably because Demosthenes, in referring to it, employs such words as ὑποκείμενοι, ὑποτεθέντα etc. As we have frequently emphasized, however, it should not be assumed automatically that these expressions always refer to a hypothec. In the discussions of Isaeus VI, 33, and V, 21, above,⁶⁶ it was seen that the words ὑποκειμένην and θέμενοι very probably refer to a πρᾶσις ἐπὶ λύσει. In the transaction under discussion, the fact that the creditor is in possession of the slaves and has the usufruct of them in lieu of interest suggests that we may have to do here with either πρᾶσις ἐπὶ λύσει or *antichresis*. Paoli, apparently, did not consider this possibility.⁶⁷

Paoli sees further evidence for his theory of the continuative character of the hypothec in the fact that, although Moiriades was not in possession, he used that same security as credit to borrow 500 drachmas from Aphobos in addition to the initial loan of 40 minas (I, 27-28). Since, however, this additional loan may have been made early in the life of the original contract, it is hard to see where there is any evidence here to support Paoli's contention. Furthermore, the loan of 500 drachmas seems to have been a separate transaction between Aphobos and Moiriades, because Aphobos received interest on his loan whereas in the original contract usufruct was to serve as interest. Presumably, Aphobos, realizing that the security in the form of the twenty slaves was more than adequate to guarantee the loan of 40 minas,⁶⁸ was

⁶⁶ See pp. 74-75.

⁶⁷ Manigk (see above, note 47, for references), R. Dareste, *Les Plaidoyers Civils de Démosthène*, I, p. 29, note 8, and Hitzig, pp. 95-96, term this transaction *antichresis*.

⁶⁸ It may be possible to calculate roughly the worth of these slaves. Demosthenes' father had also left some thirty-two or three μαχαιροποιοί, valued at between three and six minas each (*Against Aphobos*, I, 9). There is no reason to assume that the value of the κλωνοποιοί was much less (cf. Otto Schulthess, *Die Vormundschaftsrechnung des Demosthenes*, Frauenfeld, 1899, p. 4). If we

willing to advance a further sum to Moiriades in the hope (which was fulfilled) of collecting some interest.

Demosthenes complains that the security—the twenty slaves—had disappeared. What happened to them? In view of the lawless conduct of Aphobos, any number of replies could be suggested for this question. Certainly a plausible answer would be that Moiriades paid back the 40 minas—which were immediately pocketed by Aphobos—and thereby redeemed the slaves. Such a procedure would be normal in *ἀντίχρησις* (if that institution existed among the Athenians) and in a *πρᾶσις ἐπὶ λύσει*. Consequently, this contract, which has given rise to so much dispute, may have been one of those two institutions. Since the *πρᾶσις ἐπὶ λύσει*, to judge from the extant horos mortgage inscriptions, was infinitely more common, it seems quite possible that Moiriades had sold *ἐπὶ λύσει* to Demosthenes' father those twenty slaves with their equipment for 40 minas. This is only a suggestion, of course, but a sufficiently probable one, I believe, to justify refusing to recognize in this transaction any satisfactory evidence for Paoli's theories.

This seems to be an appropriate place to raise a question which may have perplexed the reader already and has perplexed me throughout the various writings of Paoli on the Attic hypothec. What is the difference between *antichresis* and Paoli's conception of a hypothec (offering a "real right") except that in the former there may have been a maturity clause at the expiration of which, if the debtor had not paid back the loan, the security passed definitely into the ownership of the creditor?⁶⁹ Although Paoli makes only one passing reference to *antichresis*,⁷⁰ it would seem, nevertheless, that, except possibly in the matter of maturity, the hypothec, as he interprets it, corresponds with that institution.⁷¹ This failure on Paoli's part to discuss *antichresis* is most unfortunate, for it leads to confusion and doubt about his conception of the Attic hypothec.

Arangio-Ruiz in his review of Paoli's book⁷² criticizes particularly Paoli's

set the rate at three or four minas each, then the total value of the twenty slaves would have been between sixty and eighty minas—well in excess of the loan of 40 minas which they were securing. W. Schwahn, *Demosthenes gegen Aphobos. Ein Beitrag zur Geschichte der Griechischen Wirtschaft*, Leipzig and Berlin, 1929, p. 14, arbitrarily states that the slaves were worth two minas each (or possibly slightly more in view of the additional loan on them of 500 drachmas). He does not explain why their value should be so much less than that of the *μαχαίροποιοί*.

⁶⁹ Opinion differs as to whether or not in antichretic loans known from the papyri the debtor had to repay the principal by a stipulated date in order not to forfeit all claim to the property serving as security. Cf. E. P. Wegener (see note 44 for reference), p. 48. Possibly the practice was flexible.

⁷⁰ His only reference to *antichresis*, I believe, is in *Studi*, p. 158, note 2, where he remarks that the editors of *Inscr. Jur. Gr.* are correct to recognize *I.G.*, II², 2758-2759 as examples of *antichresis*.

⁷¹ Paoli, *Studi*, p. 158, remarks: "Quando il pegno era una cosa fruttifera, si intende che il frutto tenesse luogo degl' interessi." Since in the civil hypothec the security almost always consisted of real property, it would seem that in the above quoted sentence Paoli is really offering a definition of *antichresis*.

⁷² P. 250.

theory of the continuative character of the Attic hypothec. In his reply to this criticism Paoli⁷³ adduces two further passages in an effort to support his position. These passages deserve to be analysed in the same way as the previous ones have been. The first passage is to be found in Xenophon's *Symposium*, IV, 31. In it, Charmides, who has been reduced from wealth to poverty, remarks: *νῦν δ' ἐπειδὴ τῶν ὑπερορίων στέρομαι καὶ τὰ ἔγγεια οὐ καρποῦμαι καὶ τὰ ἐκ τῆς οἰκίας πέπραται*— Paoli argues that in these words Charmides was making a careful distinction between the property possessed abroad of which he had lost the *ownership*, the movables which have been sold, and the immovables of which he had lost the *enjoyment* (*τὰ ἔγγεια οὐ καρποῦμαι*). Of *τὰ ἔγγεια*, therefore, Charmides has lost the possession but not the ownership, and by paying his debt he could regain possession. Such a situation, according to Paoli, could arise only from a contract which had a continuative character.

For at least three reasons it can easily be shown that Paoli's interpretation is open to grave doubt. First, in a literary document such as the *Symposium*, it is hazardous to look for such a precise legal distinction in the use of the verbs *στέρομαι*, *καρποῦμαι*, and *πέπραται*. Xenophon, as a literary man, may have been aiming only at variety of expression. It certainly cannot be proved that in *οὐ καρποῦμαι*—I am not enjoying (reaping profits from) my lands—the reader is expected to realize there is a technical distinction between possession which has been lost and ownership which has been retained. Second, it should be noted that Charmides in section 32 remarks concerning the pleasures of poverty: *νῦν δὲ ἀποβάλλω μὲν οὐδέν (οὐδὲ γὰρ ἔχω), αἰεὶ δέ τι λήψεσθαι ἐλπίζω*. The *οὐδὲ γὰρ ἔχω* surely can mean "I have nothing"—i. e., I own nothing—as well as technically "I possess nothing." Furthermore, if it were a question of *recovering* possession of property to which Charmides still had a title, as Paoli maintains, certainly Xenophon, if he were being so legally precise in his choice of words, would carefully have written *ἀπολήψεσθαι* rather than an inaccurate and misleading *λήψεσθαι*. Third, if we must look for a technical meaning in *καρποῦμαι*, a reference to a *πρᾶσις ἐπὶ λύσει* can be seen there quite as readily as to a hypothec. Under the former contract the creditor often took possession, and the debtor—in this case Charmides—had the right of redemption. It should be remarked, moreover, that it is far from certain whether Charmides' words refer to a mortgage contract at all. Since the dramatic date of the *Symposium* is 421 (Athenaeus, V, 216 d), one could understand Charmides to mean only that his vineyards, orchards, etc. had been so thoroughly destroyed by recurring Spartan raids since 431 that his lands no longer were a source of profit to him. For these various reasons, therefore, it can be stated emphatically that this passage of Xenophon affords no evidence in support of the continuative character of the hypothec.

In Isaeus X, *On the Estate of Aristarchos*, 24, this interesting sentence occurs:

⁷³ *Sul Diritto Pign.*, pp. 171-172.

τῶν ἀμφισβητησίμων χωρίων δεῖ τὸν ἔχοντα ἢ θέτην ἢ πρατῆρα παρέχεσθαι ἢ καταδεδικασμένον φαίνεσθαι. The usual interpretation of these words, to which Paoli subscribes, is: when lands are subject to dispute, the holder (or possessor) of them must furnish either mortgagor or vendor or show that they have been adjudicated to him by court decision.⁷⁴ Paoli naturally finds proof in this passage for his contention that in a hypothec the mortgagee was in possession. There is no doubt that this sentence can be interpreted so as to offer support for his theory. If θέτην means mortgagor, presumably τὸν ἔχοντα, in its relation to θέτην, would have to refer to the mortgagee. It can be questioned, however, whether τὸν ἔχοντα has the technical meaning of the possessor; it could refer to the owner or, in general terms, to the holder of the security. Although I believe that θέτην means “mortgagor,” it is wise to emphasize how uncertain the meaning of the word really is. According to the Greek-English Lexicon of Liddell and Scott (New Edition, 1925-1940), this rare word occurs in three different senses: (1) ὀνομάτων θέτης (Plato, *Cra.*, 389 d); (2) mortgagor (in the present passage); (3) adoptive father (Didymos ap. Harp.). Apparently only once in all Greek literature is the word used in connection with a mortgage. The lexicographers⁷⁵ were obviously puzzled by the term; Harpocration defines it as perhaps (μήποτε) meaning *mortgagor*; in Photius and Bekker's *Anecdota Graeca* the interpretation *mortgagee* is given. With this warning about the uncertainty of the meaning of the word in mind, let us assume that it should be translated as mortgagor. Does the passage then have to be interpreted as evidence that in a hypothec the mortgagee was in possession? Although this is one possibility, it seems to me that it can be argued that in such a succinct sentence Isaeus intended to express the following idea: if there is a dispute about lands, the (former) mortgagee, to justify his occupation of the lands on which he has foreclosed, must point out the man who had mortgaged them to him and subsequently lost title to them through foreclosure because of defaulting on the loan at maturity.⁷⁶ It should also be remarked that, if the contract *antichresis* was in use among the Athenians, this sentence could be a reference to that institution. Furthermore, if *πρατῆρα* refers to an outright sale, the θέτην presumably could refer to the mortgagor in any kind of contract in which real property served as security—e. g., a *πρᾶσις ἐπὶ λύσει*. In this connection it is relevant

⁷⁴ E. S. Forster, in the Loeb Edition, is almost (if not) alone (among modern scholars) in translating θέτην as mortgagee.

⁷⁵ Harpocration, Θέτης: μήποτε θέτην λέγουσι τὸν ὑποθήκην τεθεικότα, οὐχ ὡς Δίδυμος τὸν εἰσποιησάμενον—; Photius (cf. *Et. Magn.*, p. 448, 23), θέτης: ὁ εἰσποιησάμενος θετοῦς τινός· μήποτε δὲ θέτης ὁ εἰς ὑποθήκην λαβὼν ὀτιοῦν. Bekker's *Anecdota Graeca*, I p. 264, 3-5, Θέτην: τὸν εἰσποιησάμενον παῖδας θετούς· τοὺς γὰρ εἰσποιήτους καὶ θετοῦς ἔλεγον. ἢ θέτης ὁ εἰς ὑποθήκην λαβὼν ὀτιοῦν.

⁷⁶ It is interesting to note that Paoli himself apparently is willing to admit that these words could be interpreted as a reference to foreclosure, for in *Sul Diritto Pign.*, p. 172, note 1, he says he understands how this passage could be reconciled with Hitzig's point of view, but not with Pappulias' (cf. above, pp. 62-63). For ownership acquired through foreclosure, see note 49 above.

to recall that the *πρᾶσις ἐπὶ λύσει* described in [Demosthenes], XXXIII, *Against Apatourios*, 8, is later (section 12) referred to as *θέσις*.

It seems, therefore, that this is another example of a passage whose meaning is ambiguous, and an ambiguous passage is a weak foundation for a theory. Paoli, however, not content with seeing evidence here for his belief that in a hypothec the creditor was in possession, finds support also for his thesis that the hypothec had a continuative character. He says that the joining of the pledge with the sale and the court decision in one hypothesis shows that Isaeus was referring to a possession *sine die*. I assume that Paoli means that since there is no time limit on ownership acquired by sale or court decision, it is to be understood that similarly there was no time limit for the duration of the hypothec contract. This line of reasoning is hardly convincing, since the former transactions resulted in absolute ownership while the hypothec, as interpreted by Paoli, gave to the creditor only possession—a possession which could be terminated whenever the debtor repaid the loan. As a matter of fact, the grouping together of hypothec, sale, and court decision can have the significance which Paoli wishes to assign to it only if the hypothec contains an allusion to foreclosure, because foreclosure, as a recognized method of acquiring ownership, can logically be joined with sale and court decision.

II

This long analysis of the evidence adduced by Paoli in support of his theories has been undertaken from what may be termed the negative point of view. It has been shown that such evidence cannot prove that in a civil hypothec (“real right”) the creditor was in possession of the security from the formation of the contract and that the hypothec had a continuative character. Too many other interpretations of the relevant passages and inscriptions are possible. A more positive approach to this problem of “possession” obviously is desirable, and I believe that sufficient data are available to justify attempting such an approach. Consequently, we must turn to an examination of certain documents, which, although not completely unambiguous, nevertheless by their cumulative effect seem to demonstrate that in a hypothec contract the debtor remained in possession of the security.

[Demosthenes'] speech, XLII, *Against Phainippos*, as is well known, is concerned with the subject of *antidosis*. In section 5 the plaintiff tells how he went to Phainippos' outlying farm (ἔσχατιά) and searched the land carefully to see if any mortgage horoi had been set up. He also asked Phainippos, who was living on the farm, to declare if there were any horoi present. When no mortgage stones were discovered, the plaintiff returned home, convinced that the land was unencumbered. Is it not clear from this passage that, even if the farm had been mortgaged, it would have been perfectly normal for the debtor Phainippos to continue in possession? Of course, it can be argued that the allusion here is to a *πρᾶσις ἐπὶ λύσει* rather than to a

hypothec or that the horoi, if present, would have marked a fictitious possession of the creditor. Nevertheless, the impression created by the passage is that a “mortgagor” remained in possession of the security.

Some light may be thrown on our problem by [Demosthenes’] speech, L, *Against Polykles*. Apollodoros, who had served as trierarch beyond his appointed term, had been subjected to great expenditures. In section 61 he states that his οὐσία was ὑπόχρεως and that the drought had ruined his crops; then he adds: οἱ δὲ δεδανεικότες ἦγον ἐπὶ τοὺς τόκους, ἐπειδὴ ὁ ἐνιαυτὸς ἐξῆλθεν, εἰ μὴ τις ἀποδοίῃ αὐτοῖς κατὰ τὰς συγγραφάς. It is clear from this passage that the debtor and his family were in possession of the encumbered property. The type of contract is not stated. It might have been a πρᾶσις ἐπὶ λύσει,⁷⁷ but there is no reason to exclude the possibility that it was a hypothec. If it was the latter transaction, then, unless we bring to the fore again Paoli’s theory of fictitious possession on the part of the creditor, we have evidence in this passage that the debtor in a hypothec contract remained in possession of the security.

In [Demosthenes’] speech, LIII, *Against Nikostratos*, there occur a few lines which are germane to the present discussion. In section 10 Apollodoros tells how Nikostratos, desperately in need of money, came to him and explained why he himself could not raise any money: ὅτι τὸ χωρίον τὸ ἐν γειτόνων μοι τοῦτο οὐδεὶς ἐθέλοι οὔτε πρίασθαι οὔτε θέσθαι· ὁ γὰρ ἀδελφὸς — — — — οὐδένα ἐφή οὔτε ὠνεῖσθαι οὔτε τίθεσθαι, ὡς ἐνοφειλομένου αὐτῷ ἀργυρίου. From section 28 it seems clear that Nikostratos and his two brothers owned their property individually. The passage quoted in the Greek, accordingly, must signify the following. Since Nikostratos wanted to sell or mortgage the farm, presumably he was in possession of it. This farm, however, had already been mortgaged to his brother who, as first creditor, refused to allow the status of his security to be altered. Thus, once again, unless we wish to see in the transaction between Nikostratos and his brother a πρᾶσις ἐπὶ λύσει or unless we wish to accept the notion of a fictitious possession on the part of the brother, we seem to have a case of a hypothec in which the debtor (Nikostratos) remained in possession of the security.

In section 13 Apollodoros proceeds to tell how he borrowed 16 minas to help Nikostratos: τίθημι οὖν τὴν συνοικίαν ἑκκαίδεκα μνῶν Ἀρκέσαντι Παμβωτάδῃ — — — — ἐπὶ ὀκτῶ ὀβολοῖς τὴν μνᾶν δανείσαντι τοῦ μηνὸς ἐκάστου. Since Apollodoros paid 16% interest on this loan, it is clear that he remained in possession of the συνοικία. Consequently, unless this transaction should be considered a πρᾶσις ἐπὶ λύσει (which Paoli

⁷⁷ Since in a πρᾶσις ἐπὶ λύσει the debtor, if he remained in possession of the security, really became a rent paying tenant, one might expect the statement that the creditors had come for their rents (μισθώματα or some cognate word) rather than for their interest (τόκους). The contract, however, although in form a sale, was thought of as a loan on real security. Consequently, the notion of interest is as fitting as that of rent. In Demosthenes, XXXVII, *Against Pantainetos*, 5-7, both ideas are expressed (μισθοῦνται, μίσθωσις, τόκοι). For further discussion, see Chapter VII.

presumably would deny because of the *τίθημι*), we have further evidence for possession of the security in a hypothec residing with the debtor.

To summarize the evidence afforded by the passages just discussed, it seems clear that in the various transactions referred to the debtor retained possession of the security for the duration of the contract. If we could be certain that all these transactions were hypothecs, then presumably we would have almost a complete rebuttal of Paoli's theories. The very fact, however, that in every case it is necessary to suggest that they may have been instances of *πράσις ἐπὶ λύσει* is significant, for it emphasizes how fallacious any argument is which automatically recognizes a reference to a hypothec in the verbs *ὑποτιθέναι* or *ὑποκείσθαι*.⁷⁸

At this point a few observations on the mortgage horoi will be relevant to the problem of possession. Paoli⁷⁹ is entirely correct when he states that nothing which was written on a horos tells who was in possession of the security. Nevertheless, to me at least, the most plausible explanation of the purpose of the horoi can be expressed thus: they were set up on property which was in possession of the debtor to record the lien on that property, thereby offering protection to the creditor and a warning to others, who might have intended to make a loan to the debtor, that the property was already encumbered.⁸⁰ It is true that Paoli⁸¹ argues that the horoi in the course of time were employed to symbolize a fictitious possession on the part of the creditor and that the debtor on occasion remained in possession, but, as he himself states, a fictitious possession presupposes an evolution from an actual possession. Reasons have been given, however, for considering it most improbable that a hypothec with creditor in possession was a part of the general scheme of Athenian real security. Does not the fact that on the horoi the name of the creditor only was recorded^{81a} support the argument that the debtor remained in possession? If the creditor took possession, dispossessing the debtor, one would expect that the horos would have mentioned the name of the absent debtor rather than that of the creditor, who, since he was in possession, did not need to publicize the fact that he was the man who held the lien on the property.

⁷⁸ See above, p. 62. A case in point is *I.G.*, II², 1183, the decree concerning the administration of the finances of the deme Myrrhinous. In lines 27-32, where instructions are given to the priests to lend money on good security and to set up horoi, it seems clear that the "creditor god" was not expected to be in possession of the security, but it is not stated according to what type of contract the loans should be made.

⁷⁹ "*Datio in Solutum*," pp. 201-205.

⁸⁰ See Chapter III, p. 43.

⁸¹ *Studi*, pp. 189-190.

^{81a} On the Attic horos mortgage stones the name of the debtor in any kind of contract is never recorded. In Lemnos the debtor is recorded once in a *πράσις ἐπὶ λύσει* contract (see Chapter II, p. 40). In Amorgos, however, the name of the debtor in various types of transactions is frequently inscribed on the horos stones—e. g., *I.G.*, XII, 7, 55, *πράσις ἐπὶ λύσει*; 56, *ἀποτίμημα προικός*; 58 and 412 (?), hypothec; *I.G.*, XII, *Supplementum*, p. 143, no. 331, *μισθωσις οἴκου*.

If the debtor remained in possession of the security, as seems almost certain, it is obvious that Paoli's theory of the continuative character of the Attic hypothec cannot be accepted in its entirety. According to his theory, as was seen above,⁸² the creditor took possession at the beginning of the contract, but, since no fixed date for maturity was set, the debtor always had the opportunity, by repaying the loan, to recover possession of the property offered as security. La Pira,⁸³ who rejects the notion that the creditor took possession at the formation of the hypothec, is convinced by the arguments concerning the continuative character. He maintains that the procedure in a hypothec should be reconstructed as follows: at maturity, if the debtor had not repaid the loan, the creditor took possession of the property offered as security. This taking of possession, however, was not the equivalent of definitive appropriation, for, since the contract was continuative, the debtor could redeem the property at any time by repaying the loan. Thus, to a certain degree, La Pira's conception of the hypothec is a compromise between the traditional view and that of Paoli.

It has been shown in the preceding pages, I believe, that the evidence cited by Paoli to prove his continuative theory is unsatisfactory. The fact that the sources do not support his arguments as much as he claims, however, does not necessarily mean that they corroborate the traditional view. The crux of the matter obviously lies in the question of foreclosure, and in this connection Paoli has performed a real service in emphasizing how slight and ambiguous the evidence is.⁸⁴ A quick glance at the state of the evidence will illustrate once again on what shaky foundations many ideas on Athenian legal institutions have been—and have to be—built.

Before Paoli challenged the traditional view, it had usually been stated that at the maturity of the hypothec, if the debtor was delinquent, the creditor seized possession of the property offered as security by a process known as *ἐμβάτευσις*.⁸⁵ Although the verb *ἐμβατεύω* and the noun *ἐμβαρτεία* are attested, to the best of my knowledge the word *ἐμβάτευσις* does not occur in any extant source; ^{85a} presumably it was coined by some scholar to express in noun form the meaning inherent in the verb *ἐμβατεύω*. This verb occurs in the Attic Orators in the sense of entering into possession of property through adoption or inheritance,⁸⁶ but only once, and then in reference to a maritime loan, is it used with the meaning of seizing possession because of non-payment.⁸⁷ Thus the verb *ἐμβατεύω* itself, as used by the orators, certainly

⁸² See pp. 63-64.

⁸³ Pp. 314-316.

⁸⁴ *Studi*, pp. 154-165.

⁸⁵ E. g., Hitzig, pp. 81-84; Beauchet, III, pp. 263-271; Lipsius, pp. 667; 675; 701; 949-952.

^{85a} [*ἐμβατεύει*]σῆσις has been restored in a first century A.D. papyrus (*Pap. Oxyrh.*, no. 274); cf. L. Mitteis und U. Wilcken, *Grundzüge und Chrestomathie der Papyruskunde*, Leipzig-Berlin, 1912, vol. II, 2, no. 193, lines 24-25.

⁸⁶ [Demosthenes], XLIV, *Against Leochares*, 16 and 19; Isaeus, IX, *On the Estate of Astyphilos*, 3.

⁸⁷ [Demosthenes], XXXIII, *Against Apatourios*, 6.

affords no information on the question of foreclosure in a civil hypothec. In the lexicographers⁸⁸ we find the following definition: Ἐμβατεύσαι καὶ ἐμβατεία: ἐμβατεία ἐστὶν ἡ νυνὶ λεγομένη δια τοῦ δ' ἐμβαδία, τὸ τὸν δανειστὴν ἐμβατεύσαι καὶ εἰσελθεῖν εἰς τὰ κτήματα τοῦ ὑποχρέου, ἐνεχυριάζοντα τὸ δάνειον. This definition seems clear enough, but unfortunately no certain conclusions can be drawn from it since there is no reference to the type of contract. In the famous Ephesian debt law,⁸⁹ dating probably from the early third century B.C., the process of entering into possession on the part of the creditor is expressed by the words ἐμβαίνειν and ἔμβασις, but, as has been stated before, evidence from a city in Asia Minor in the Hellenistic period cannot be used to interpret conditions in fourth century Athens.

If the decision on this problem of foreclosure were dependent exclusively on the word ἐμβατεύειν and its cognates, the verdict would have to be: *non liquet*. Fortunately there are several documents which, although they do not contain the word *embateusis* or its cognates, are extremely pertinent to the present discussion. An analysis of them, I believe, will show that in Athenian law, if the debtor was delinquent at the time of the maturity of the hypothec, it was customary for the creditor to foreclose on the security.

The first passage to consider is in Demosthenes' speech XXXVI, *For Phormio*, 4-6. Pasio had leased the bank to his manumitted slave Phormio. Eleven talents of the bank's deposits had been lent by Pasio on the security of land and apartment houses. Phormio insisted that Pasio remain creditor for this sum, thus becoming debtor to him, because he knew that a metic like himself, who was not allowed to own real estate, would be unable to exact (εἰσπράττειν) the money in case of nonpayment.⁹⁰ Since it is impossible to believe that the bank was in possession of all the security it received for its loans, we must assume that possession remained with the debtors. The most natural interpretation of this passage, then, is that the normal procedure was for the creditor to foreclose if the debtor did not repay the loan on the expiration of the contract. I do not believe it is possible to interpret the εἰσπράττειν as a reference to seizure by the process known as ἐνεχυρασία, for this procedure was usually restricted to movables and, hence, presumably was not forbidden to metics.⁹¹ It is noteworthy that Demosthenes does not name the contracts according to which the money had been lent. Consequently, one could argue that the transactions had been πράξεις ἐπὶ λύσει

⁸⁸ Bekker, *Anecdota Graeca*, I, p. 249, 18-21; cf. *Et. Magn.*, p. 334, 35.

⁸⁹ *Syll.*³, 364, lines 75 ff.

⁹⁰ Section 6: (Phormio) ὁρῶν ὅτι, μήπω τῆς πολιτείας αὐτῷ παρ' ὑμῖν οὔσης, οὐχ οἷός τ' ἔσοιτ' εἰσπράττειν ὅσα Πασίων ἐπὶ γῆ καὶ συνοικίας δεδανεικῶς ἦν, εἴλετο μᾶλλον αὐτὸν τὸν Πασίωνα χρῆστην ἔχειν τούτων τῶν χρημάτων ἢ τοὺς ἄλλους χρήστας, οἷς προειμένος ἦν. F. A. Paley and J. E. Sandys, *Select Private Orations of Demosthenes*, third ed., in their note on this passage also see an allusion to foreclosure, but their reference to [Demosthenes], XXXV, *Against Lakritos*, 12, as a parallel case is misleading, for the contract under discussion there is concerned with a maritime loan.

⁹¹ See above, note 4.

rather than *ὑποθήκαι*. We have seen above that the *πρᾶσις ἐπὶ λύσει* was far commoner than the hypothec in the fourth century, but, unless we intend to deny the existence of the latter institution in this period, it is only reasonable to assume that some of the transactions in which foreclosure seems to be attested were hypothecs.

[Demosthenes'] speech XLII, *Against Phainippos*, has already been discussed⁹² as furnishing presumptive evidence that in a hypothec the debtor remained in possession of the security. It also contains a passage which is most easily explained as a reference to foreclosure. The plaintiff, who has challenged Phainippos to an *antidosis*, had been assured by his adversary that his farm was unencumbered. Subsequently Phainippos, to whom it was advantageous to appear to be in bad financial condition told the court that his farm was heavily mortgaged (sections 9 and 28). The plaintiff maintains that this is a lie and in section 29 clinches his argument with these words: *λαβέ μοι, γραμματεῦ, τὴν τοῦ Αἰαντίδου καὶ Θεοτέλους μαρτυρίαν, οἷς οὗτος ἀπογέγραφεν ὀφείλονθ' αὐτὸν τετρακισχιλίας δραχμὰς ψευδόμενος καὶ πάλαι ἀποδεδωκώς, οὐχ ἑκῶν, ἀλλὰ δίκην ὀφλῶν*. If Phainippos had borrowed the money according to a hypothec—and some of these undesignated contracts presumably were hypothecs—, these lines are very damaging to Paoli's theories of creditor-possession and of continuative character, for why would the creditors, if they were in possession *sine die*, have gone to court to recover their 4000 drachmas? It seems to me that, if this contract was a hypothec, the following interpretation is the only logical one for this passage: Phainippos, the debtor, was in possession of the farm offered as security. At the expiration of the loan, when he had not repaid the money, his creditors proceeded to try to foreclose, but were driven off the land. Thereupon they instituted suit against him and won. Consequently, Phainippos—*οὐχ ἑκῶν, ἀλλὰ δίκην ὀφλῶν*—, rather than surrender his farm, paid back to his creditors the money owed to them.⁹³

Further evidence for the existence of the procedure of foreclosure among fourth century Athenians probably is discernible in Demosthenes, XLV, *Against Stephanos* I, 70. Apollodoros, after reviling Stephanos for his usurious methods in lending money (*τοκίζων*), climaxes his abuse with this sentence: *οὐδεὶς δὲ πάποθ' οὕτω πικρῶς οὐδ' ὑπερήμερον εἰσέπραξεν ὡς σὺ τοὺς ὀφείλοντας τοὺς τόκους*. These words conceivably could be translated as follows: "No one ever has exacted interest so cruelly even from a defaulter as you exact interest from your debtors." According to such a

⁹² See above, p. 80.

⁹³ The only alternative to this interpretation (concerning merely a legal technicality) which seems possible is that before attempting to foreclose the creditors brought suit against Phainippos. Most scholars, however, believe that creditors proceeded to foreclosure without court authorization and had recourse to the courts, through a *δίκη ἐξούλης*, only if they met resistance at the hands of the debtors. Cf. Lipsius, p. 701; Beauchet, III, pp. 262-265. It was also possible for a contract to contain an executory clause according to which the debtor agreed, if he did not fulfill the terms of the contract, to submit to execution on his property as if a court had passed sentence against him in favor of the creditor; the usual formula was *καθάπερ ἐκ δίκης*, cf. Beauchet, IV, pp. 439-450.

translation, however, we have merely a lame repetition of the idea of interest, and the climax of the abuse towards which Apollodoros was striving falls flat. Does not the speaker intend to suggest that Stephanos, even in the comparatively small matter of exacting interest, is more ruthless than others are in the more serious business of making exactions on those who are over-due in the payment of the principal of their debts?

The key to the understanding of this passage depends largely on the interpretation of the word *ὑπερήμερον* as used here. The word *ὑπερήμερος* (abstract noun, *ὑπερημερία*) means literally—beyond the day; defaulting and defaulter (when used substantively) are adequate English translations. The word is frequently used of a man who had defaulted in the payment of a penalty assigned by a court.⁹⁴ It is also used of a man who in a bottomry loan had not paid back the principal which was over-due.⁹⁵ In Pollux, III, 85, we find this statement: *καλεῖται δὲ τὸ μὲν κεφάλαιον ἀρχαῖον, τὸ δ' ἔργον τόκος. ὁ δ' οὐκ ἐκτίσας κατὰ προθεσμίαν ὑπερήμερος, καὶ τὸ πρᾶγμα ὑπερημερία*. Although the language is not as precise as one could wish, Pollux presumably meant that the man who did not pay either the principal or the interest at the appointed time was called *ὑπερήμερος*. A similar usage of the word occurs in Demosthenes, XXI, *Against Meidias*, 11. Referring to a law concerning the regulation of conduct during festival time, Demosthenes says: *ἐν τούτῳ (νόμῳ) καὶ κατὰ τῶν τοὺς ὑπερημέρους εἰσπραττόντων ἢ καὶ ἄλλ' ὅτιοῦν τινὸς λαμβανόντων ἢ βιαζομένων ἐποιήσατε τὰς προβολάς*.

It is clear from these examples that the word has a comprehensive meaning and signifies anyone who has defaulted in a payment—whether of a penalty, or of the principal or interest of a loan. In the passage we are examining, the word may have purely a general significance—any kind of defaulter. It may be possible, however, to assign a more specific meaning to the word in its particular context. It is important to remember that Apollodoros is trying to emphasize the brutality of Stephanos' usurious methods by contrasting them with something which ordinarily would be much worse than demanding and exacting exorbitant rates of interest. Consequently, I believe that we can eliminate the possibility that the *ὑπερήμερον* in our passage alludes to a man from whom *ἐνέχυρα* are seized by the creditor as compensation for the interest which is not forthcoming.⁹⁶ A reference in this context to the seizure of a few movables would not be particularly graphic—and also Apollodoros is apparently intending to contrast the exacting of interest with something else which is on a greater scale. It is possible, of course, that in this sentence the *ὑπερήμερος* refers to a man who has defaulted in the payment of a penalty assessed by a court. Certainly, as we learn from the speech against Euergos,⁹⁷ the man to whom damages had been awarded could

⁹⁴ E. g., [Demosthenes], XLVII, *Against Euergos*, 49-51, and passim; cf. Demosthenes, XXX, *Against Onetor*, I, 27. This is the definition given by Harpocration.

⁹⁵ [Demosthenes], XXXIII, *Against Apatourios*, 6.

⁹⁶ For this practice, see Aristophanes, *Clouds*, 33-35; 240-241, and note 4, above.

⁹⁷ [Demosthenes], XLVII, 52-61.

be ruthless enough in exacting them. I submit, however, that, because of the emphasis throughout the passage on the exaction of interest, the most telling contrast, and the one which makes the most dramatic climax to Apollodoros' tirade against Stephanos, requires an allusion here to the principal of a debt. Should not the sentence be translated: "No one ever has exacted payment so ruthlessly even from a man who has defaulted in the principal as you exact interest from your debtors."? Is not a contrast between principal and interest the most effective one which Apollodoros could make in this connection? If, therefore, we are justified in seeing here a reference to defaulting on the principal, what else can the brutal exacting signify than the exacting of the security? Is this not a definition of foreclosure?⁹⁸

A passage from Demosthenes' speech, XXVIII, *Against Aphobos*, II, 17-18, deserves consideration in any investigation of the problem of foreclosure among the Athenians. When Demosthenes was preparing to bring suit against his guardians, he was forced through the machinations of his opponents to undergo the expense of a liturgy. From another oration⁹⁹ we learn that the liturgy was a trierarchy with a cost, on this occasion, of 20 minas. To meet this service, for which he did not have the available funds, Demosthenes says: ἀπέτεισα τὴν λητουργίαν ὑποθεῖς τὴν οἰκίαν καὶ τὰ μαντοῦ πάντα. As usual the type of contract is not specified. Consequently, the following discussion is relevant only if one recognizes in this transaction a hypothec rather than a πρᾶσις ἐπὶ λύσει. Of one thing I believe we can be certain—namely, that Demosthenes remained in possession of the mortgaged house. There is not the slightest suggestion in the three speeches against Aphobos and the two against Onetor that a creditor had taken possession, and, considering the nature and contents of those orations, that is tantamount to proof. What further can be learned about this contract which we are assuming is a hypothec? In section 18 Demosthenes appeals to the court not to decide against him in his suit against Aphobos. He says: ποῖ δ' ἂν τραποῦμεθα, εἴ τι ἄλλο ψηφίσαισθ' ὑμεῖς περὶ αὐτῶν; εἰς τὰ ὑποκείμενα τοῖς δανείσασιν; ἀλλὰ τῶν ὑποθεμένων ἐστίν. In this passage he asks where, if the verdict goes against him, will he find the money to pay the fine assessed. He cannot turn to the security he offered for the money which he borrowed, because that security τῶν ὑποθεμένων ἐστίν. Since it is clear that Demosthenes had retained possession of the house, these words cannot mean technically that the security is in the possession of the mortgagees. If one translates—"belongs to (i. e., is in the ownership of) the mortgagees"—, then the contract presumably is characterized as a πρᾶσις ἐπὶ λύσει, according to which Demosthenes had been allowed to remain in the house as a rent paying tenant. It is probably

⁹⁸ Theophrastos, *Characters* X, 10 (Μικρολογίας) reads: δεινὸς δὲ καὶ ὑπερημερίαν πράξαι καὶ τόκον τόκου. The ὑπερημερίαν πράξαι very plausibly can be interpreted as a reference to foreclosure, although it is possible to understand the words as alluding to the seizure of property because of non-payment of interest by the debtor.

⁹⁹ Demosthenes, XXI, *Against Meidias*, 80.

a mistake, however, to seek a technical translation for the words. They may mean nothing more than that the creditors have control over the security. Considering the context of this passage—the fact that if Demosthenes loses his suit he will be bankrupt and obviously unable to repay the loan—it is possible, I believe, to recognize in those words an allusion to the inevitability of what will happen to the security if the verdict should go against him—namely, that the creditors will foreclose on it. The inevitability is so vivid in his mind that he speaks of the foreclosure as a *fait accompli*. Demosthenes then continues: ἀλλ' εἰς τὰ περιόντ' αὐτῶν; ἀλλὰ τούτου (Aphobos) γίγνεται, τὴν ἐπωβελίαν εἰς ὄφλωμεν. If τὰ περιόντα is taken as a synonym for τὰ ὑπερέχοντα, we would seem to have here a statement that, on foreclosure, the creditor had to return that part of the security which was in excess of the value of the debt. In the situation which Demosthenes is envisaging if he loses his suit, this “excess” would fall to Aphobos. It is certainly better, however, with Lipsius,¹⁰⁰ to recognize in τὰ περιόντα a reference to the non-mortgaged part of Demosthenes' property. Since Demosthenes had had to borrow only 20 minas, it seems likely that he was indulging in rhetorical exaggeration when he said that he had mortgaged *all his property*.

One further piece of evidence relevant to the problem under consideration should be discussed briefly—the famous inscription recording the establishment of the Second Athenian Confederacy in the year 378/377 B.C.¹⁰¹ Lines 36-42 of this document read as follows: — — μὴ ἐξείναι μήτε ἰδίαι μήτε δημοσ[ί]αι Ἀθηναίων μηθενὶ ἐγκτήσασθαι ἐν τ[α]ῖς τῶν συμμάχων χώραις μήτε οἰκίαν μήτε χωρίον μήτε πριαμέ|νωι μήτε ὑποθεμένωι μήτε ἄλλωι τρόπω|ι μηθενί· εἰ δέ τις ὠνήται ἢ κτᾶται ἢ τι|θήται τρόπωι ὁτιῶν, — — —. These regulations apply to transactions which the Athenians had been carrying on, not in Attica itself, but in states which now had become allies. Nevertheless, it is reasonable to assume that in the fourth century, when the mortgage contract had become common, the mortgage procedure followed by the Athenians was the same both at home and abroad. In the lines just quoted, the Athenians are forbidden to acquire real property in the territories of their allies through purchase or through mortgage. Paoli might claim that the words ὑποθεμένωι and τιθήται should be understood as referring to the possession of the security by the creditor. Such an interpretation obviously would be wrong, however, for ἐγκτήσασθαι signifies acquisition of ownership—not temporary possession—of real estate. This passage, therefore, clearly means that the Athenians are not allowed to acquire the ownership of houses and lands either through purchase or through foreclosure. If the forbidden contracts were not exclusively πράξεις ἐπὶ λύσει, then this inscription affords almost irrefutable evidence that in Attic law the creditor in a hypothec could resort to foreclosure if the debtor was delinquent at the maturity of the contract.¹⁰²

¹⁰⁰ P. 702, note 95.

¹⁰¹ *I.G.*, II², 43; Tod, vol. II, no. 123.

¹⁰² The following three quotations, I believe, show clearly that fourth century Athenians were

It seems, therefore, that Paoli's statement ¹⁰³ that *nelle fonti attiche un accenno alla scadenza del pegno e dell' ipoteca civile non si riscontri mai* is not in conformity with the facts. The evidence which has just been examined certainly justifies the conclusion that fourth century Athenians were familiar with the procedure of foreclosure in case a loan secured by real property was not repaid by the time of the expiration of the contract. General considerations not only support this conclusion but also, I believe, satisfactorily eliminate La Pira's compromise interpretation of the civil hypothec.¹⁰⁴ If the debtor had had the right to reclaim his property whenever he could produce the money, the creditor would have been condemned to remain indefinitely only in *possession* of the immovables of the delinquent mortgagor. The creditor would have been unable to transform the property according to his own interests and he would have been obliged to spend his own money in order to derive any profits from it. Furthermore he would not have been able to sell the property (even if Paoli admitted the possibility), because no purchaser would have been willing to put himself in the same unfavorable position.¹⁰⁵ One wonders how many men would have been inclined to lend money on a hypothec if that contract placed them in such a strait-jacket as Paoli maintains.

III

The detailed analysis of specific data with which we have been concerned so far has shown conclusively, I believe, that Paoli's conception of the fourth century Attic civil hypothec is erroneous. His distinction between two aspects of the hypothec, one affording and one not affording a "real right of security" to the creditor, does not seem to be demonstrable. Evidence, both literary and epigraphic, appears to disprove his two major contentions—namely, that in the hypothec the creditor took possession of the security as soon as the contract was constituted, and that such a contract did not have a maturity date but was of a continuative character. It would seem, then, that the traditional definition of the Athenian hypothec is the correct one,¹⁰⁶ but a word of caution, I believe, should be uttered. According to the conven-

familiar with the procedure of foreclosure. (1) Demosthenes, XXXVII, *Against Pantainetos*, 49: *καὶ τοὺς μὲν ἄλλους τοὺς δανείζομένους ἴδιοι τις ἂν ἐξισταμένους τῶν ὄντων.* (2) Demosthenes, XLV, *Against Stephanos*, I, 70: *ἀλλὰ τοκίζων καὶ τὰς τῶν ἄλλων συμφορὰς καὶ χρείας εὐτυχήματα σαντοῦ νομίζων, ἐξέβαλες μὲν τὸν σαντοῦ θεῖον Νικίαν ἐκ τῆς πατρῴας οἰκίας — — .* The continuation of this passage has been discussed above, pp. 85-87. (3) Isaeus, I, *On the Estate of Kleonymos*, 12: *τὴν δ' οὐσίαν ἀφελείσθαι τῶν χρηστων ἐπιβουλευσάντων ἔσωσεν ἡμῖν.*

Certainly these three passages should be interpreted as references to foreclosure rather than as allusions to hardships experienced by debtors because of usurious rates and cruel exactions of interest.

¹⁰³ *Studi*, p. 157.

¹⁰⁴ See above, p. 83.

¹⁰⁵ Arangio-Ruiz, p. 250, summarizes excellently these objections to Paoli's theory.

¹⁰⁶ See above, pp. 61-63.

tional view, as we have seen, Athenian law recognized three forms of real security: *ἐνέχυρον*, *ὑποθήκη* and *πράσις ἐπὶ λύσει*. The endeavor in this chapter, however, to obtain an understanding of the hypothec has constantly emphasized how difficult it often is to classify with certainty the contracts referred to in the sources. This difficulty is caused in part by a lack of precision in the legal language of the Athenians, but the evolutionary nature of the system of real security and the consequent divergences from the norm are also contributory factors. These considerations suggest the danger inherent in establishing too schematic a definition of the Athenian system of real security. With this warning in mind, I believe it will be advisable, nevertheless, to end this chapter, which up to this point has been concerned with matters of detail, by attempting to present a synoptic view of the development of the institution of real security among the Athenians. Such a survey is bound to be somewhat subjective and speculative, but, since we have already examined meticulously the relevant data, it obviously will be desirable to place this specific evidence in some sort of historical framework.

To begin with, two statements should be made, the first of which I believe will be universally accepted as a fact, whereas the second should be honestly recognized as an assumption, no matter how probable it may be. These two statements are: (1) In the early stages of any legal system the regulations or laws concerning loans favor the creditor rather than the debtor.¹⁰⁷ (2) Since in early Athens land was probably inalienable, it seems likely that *ἐνέχυρα*, in the strict sense of movables, was the first form of real security employed by the Athenians.¹⁰⁸ These movables were delivered

¹⁰⁷ Cf. Henry Sumner Maine, *Ancient Law* (The World's Classics, Oxford University Press), Chapter IX, p. 267, "—the extraordinary and uniform severity of very ancient systems of laws to *debtors*, and the extravagant powers which they lodge with *creditors*."

¹⁰⁸ Did *ἐνέχυρα* originally signify the movables offered as security when a loan was contracted or the movables seized in requital for a debt not repaid? The basic meaning of the verb *ἐνεχυράζειν* suggests the second alternative. The practice of distraining movable property to reimburse oneself for a debt due is very ancient. In Homer the word *ῥύσιον* is used in this sense. Nestor, *Iliad*, XI, 670-707, tells how he and the Pylians drove off as *ῥύσια* (674) from the Epeians many cattle, horses, etc. in reprisal for a debt (*χρεῖος*: 686, 688, 698) owed to the Pylians. The word does not occur again in extant literature, I believe, until the fifth century (the *ῥύσια* in a fragment of Solon preserved by Diogenes Laertius, I, 52, should probably be read as *ῥύματα*; cf. E. Diehl, *Anthologia Lyrica*, Leipzig, 1922, *Solon*, 8, line 3). Aeschylus and Sophocles used the word, or some cognate, rather frequently; e. g., Aeschylus (*O.C.T.*, Gilbert Murray), *Suppliants*, 315, 412, 424, 610, 728; *Agamemnon*, 535; Sophocles (Jebb), *Philoctetes*, 959; *Oedipus Coloneus*, 858; cf. Euripides, *Ion*, 523, 1406. In all these cases, despite various metaphorical overtones, the fundamental meaning seems to be something—or rather someone—seized (or the actual seizing) from enemies in reprisal. Later authors used the word in the same sense—e. g., Polybius, IV, 53, 2; XXII, 4, 13; XXXII, 7, 4; Josephus, *A.J.*, XVI, 9, 2; 10, 8; Dionysius Halicarnassus, V, 33—, although the meaning of pledge (security, hostage) also evolved; cf. Josephus, *B.J.*, I, 14, 1. See the comments of Adolf Wilhelm on *ἄγειν*, *ῥυσιάζειν*, and *συλᾶν*, *Jahreshefte*, XIV, 1911, pp. 195-200. It seems probable that this custom of seizing movables in reprisal may have been introduced into civil life in early times. It is possible, therefore, that in Athens, after Solon prohibited loans on the borrower's person

into the possession of the creditor, although it may be questioned whether in early times any clear legal distinction was made between possession and ownership on the part of the creditor. If the reasoning in Chapter VIII that land may not have become alienable in Attica until well along in the fifth century is correct, then presumably until that time *ἐνέχυρα* was the only method of furnishing real security available to the Athenians.

After land in Attica was recognized as alienable, it became possible to use real property as security. The question naturally arises as to the nature of the first transaction according to which real estate was employed as security. Some scholars find the answer to this question by maintaining that the hypothec and the *πρᾶσις ἐπὶ λύσει* came into existence independently and more or less simultaneously.¹⁰⁹ Others believe that the *πρᾶσις ἐπὶ λύσει* was the earliest contract under which immovables served as security.¹¹⁰ They argue that the custom which evolved in regard to the *πρᾶσις ἐπὶ λύσει* of allowing the debtor to remain in *precarious* possession of the property offered as security was the chief factor which led to the development of the hypothec. In Chapter VII it will be seen that, since the *πρᾶσις ἐπὶ λύσει* was in form a sale, the creditor (purchaser) acquired the ownership and also the physical possession, if he so wished, of the security, subject only to the restriction that the property be returned on payment of the debt. This transaction, accordingly, afforded the creditor the maximum of protection. In view of the first statement made just above regarding the privileges conferred upon the creditor in early systems of law, therefore, it seems only logical to conclude that the *πρᾶσις ἐπὶ λύσει* antedated the hypothec.¹¹¹

(Aristotle, *Ath. Const.*, 6, 1; 9, 1), the seizure of movables—*ἐνέχυρα*—on non-payment of a debt was one method employed by a creditor to protect his interests. Unfortunately no examples of the word *ἐνέχυρα* or its cognates, to my knowledge, have been preserved until the last half of the fifth century, by which time both practices—seizure of movables and the offering of movable security—were current; e. g., *seizure*: *I.G.*, I², 45, lines 2-3 (cf. B. D. Meritt, *Hesperia*, X, 1941, pp. 317-319), and *I.G.*, I², 140, lines 7-8 (both passages fragmentary); Antiphon, VI, *Choreutes*, 11; *security*: Herodotus, II, 136, and Hermippos, fragment 29 (Kock, *C.A.F.*, I, p. 232). In Aristophanes and throughout the fourth century the customs both of providing movable security and of seizure of movables on non payment (*ἐνεχυρασία*) were common (see above, note 4).

The notion of personal security (suretyship)—expressed by the words *ἐγγύη*, *ἐγγυητής*, *ἐγγυᾶν*—probably was of early origin in Athens; cf. Aeschylus, *Eumenides*, 898. The practice is attested for Greece as a whole in Homer, *Odyssey*, VIII, 351-358; cf. the proverb inscribed at Delphi, quoted by Plato, *Charmides*, 165a: Ἐγγύη πάρα δ' ἄτη.

¹⁰⁹ E. Szanto, *Wiener Studien*, IX, 1887, pp. 279-296. Hitzig, pp. 4-13, concludes that both institutions arose and developed separately, but he believes that at first the *πρᾶσις ἐπὶ λύσει* was by far the more common contract of the two.

¹¹⁰ E. g., R. Dareste, *Nouvelle Revue Historique de Droit Français et Étranger*, 1877, pp. 171-173; Beauchet, III, pp. 180-182; Lipsius, p. 693; Arangio-Ruiz, p. 247; La Pira, pp. 306-307. In Roman law it is generally believed that *fiducia*, which has many similarities with *πρᾶσις ἐπὶ λύσει*, was the first form of real security; cf. W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, p. 471.

¹¹¹ It is probable that even before the time of Solon a transaction somewhat similar to the

This conclusion is very strongly corroborated by the evidence from the mortgage horoi. Of these inscriptions, which belong almost exclusively to the fourth and third centuries B.C. (with none apparently from an earlier period), practically all, except those concerned with ἀποτίμημα, record πρᾶσις ἐπὶ λύσει contracts. Of about 192 stones which are extant from Attica only nine contain some form of the verb ὑποκέσθαι and hence bear witness to a transaction presumably different from the πρᾶσις ἐπὶ λύσει—in all likelihood a hypothec.¹¹² Such statistics lead to only one conclusion—namely, that in the fourth century, and even down into the third, πρᾶσις ἐπὶ λύσει was the usual contract which was employed when a loan was secured by real property. These figures cause one to suspect, therefore, that in the Attic Orators the majority of the transactions involving loans secured by real estate which are mentioned, unless there is clear evidence to the contrary, are examples of πρᾶσις ἐπὶ λύσει rather than of hypothec. The strangely restricted use of the word ὑποθήκη which was noted at the beginning of this chapter¹¹³ may be further evidence for the conclusion that the πρᾶσις ἐπὶ λύσει antedated the hypothec and that in the fourth century, at least, it was the common method of obtaining a loan on the security of real estate. It was stated there that the noun ὑποθήκη, in the sense of real property serving as security, never occurs in fifth or fourth century authors. When the word is used, it is always in reference to a maritime loan. The contract which modern scholars designate as hypothec is always expressed by the appropriate forms of the verbs ὑποτιθέναι or ὑποκέσθαι. If the civil hypothec had been a common form of mortgage in the fourth century, however, one would expect that a special name would have been applied to it in contradistinction to the widely used πρᾶσις ἐπὶ λύσει rather than that it should have been designated merely by a verb of such general significance as ὑποτιθέναι.

These various considerations, therefore, justify the conclusion that when loans first were able to be secured by real property they were made according to the πρᾶσις ἐπὶ λύσει contract. Only gradually did another type of transaction for securing loans emerge which, for lack of a special name, was long designated merely by the verb ὑποτιθέναι. This new contract apparently was not widely employed until the Hellenistic Period, by which time, for reasons which naturally no longer can be traced, the term ὑποθήκη, formerly used only in connection with a maritime loan, had broadened its meaning so as to designate also a loan secured by real estate.

πρᾶσις ἐπὶ λύσει had been used as a legal fiction to circumvent the inalienability of land. After the Seisachtheia this practice apparently fell into abeyance for a long period. See Chapter VIII, pp. 181-185.

¹¹² *I.G.*, II², 2758-2759, may be examples of *antichresis*; see above, pp. 69-71. *I.G.*, II², 2760 and 2761, *a* and *b*, presumably record hypothecs, as also do No. 26 and probably No. 27 in Chapter II above. These last two inscriptions are dated by the archons Aristonymos and Lykeas, 291/0 and ca. 259/8, respectively. *I.G.*, II², 2670 (first half of fourth century) and No. 8 in Chapter II above are similar in content. At the beginning the security for a dowry is recorded; then follows the formula—ὄσω πλείονος ἄξιον—ὑπόκειται and the names of other creditors.

¹¹³ See above, p. 62.

At the end of the fifth century or the beginning of the fourth, accordingly, a man who could obtain a loan only by providing real security had two alternatives before him. He could either offer movable security (*ἐνέχυρα*) which would immediately pass into the possession of the creditor or he could sell some real property *ἐπὶ λύσει*. Both transactions could be described by the one word *ὑποτιθέναι*,¹¹⁴ but the second one, as we know from the mortgage horoi, was more technically designated by naming the property serving as security and adding the expression *πεπραμένον ἐπὶ λύσει*. Possibly at first in the *πρᾶσις ἐπὶ λύσει* the new owner (creditor) took physical possession of the property he had “bought,” thereby having usufruct in lieu of interest on his loan, but certainly at an early stage it became customary for the vendor (debtor) often to retain possession of the property “sold” as security, thereby becoming a rent (interest) paying tenant to his creditor. The important point is that there was no rigid regulation which had to be followed. The procedure would vary depending on the wishes and convenience of the contracting parties. For example, a man who “sold” a field *ἐπὶ λύσει* in order to obtain capital for some commercial venture which would take him abroad might well have preferred to have the creditor take possession so that he (the debtor) would not be obligated to pay interest. On the other hand, a man who borrowed in order to have additional money to make improvements on his farm would presumably have wanted to retain possession of the security himself.

In the fourth century, as is well known, economic life in Athens tended to become increasingly complex. From the orators and inscriptions we learn that loans secured by real property became extremely common. We have seen that *πρᾶσις ἐπὶ λύσει* was the usual form of contract for these loans, but in view of the economic activity of the period it is not surprising that there gradually developed a need and desire for other methods by which money secured by real estate could be borrowed.

Various reasons for the emergence of a contract different from the *πρᾶσις ἐπὶ λύσει* can be suggested. 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 *πρᾶσις ἐπὶ λύσει*, because in that transaction ownership of the security, with or without actual possession, was transferred to the creditor. The influence of the familiar maritime hypothec must also have made itself felt. In that contract, of course, there was no such thing as the transfer of ownership to the creditor (except in case of foreclosure). The opposition on the part of the debtor to a transaction in which he lost the ownership of the security had a very practical basis. Since he no longer possessed title to the property, naturally he was unable to borrow further on that security even though its worth far exceeded that of the loan which he had received.¹¹⁵ This inability to make an additional loan

¹¹⁴ See above, note 4.

¹¹⁵ On occasions the creditor might lend additional money, but obviously the debtor could not

on valuable security must frequently have caused hardship and dissatisfaction. Whatever the reasons and influences may have been, it is clear that in the fourth century the civil hypothec slowly began to take shape.¹¹⁶

As we have seen, the hypothec was a contract for securing a loan on real estate according to which the debtor remained in possession of the security and lost it to the creditor only if he did not repay the loan by the time of the expiration of the contract. By foreclosure the creditor became owner of the security. Since the debtor retained possession and ownership of the security for the duration of the hypothec, he was able to borrow further on the ὄσφ πλείονος ἄξιον. Probably, however, permission to grant a second mortgage was dependent on the consent of the original mortgagee.¹¹⁷ If a second mortgage was possible, it is only reasonable to believe that the debtor could continue to encumber the security up to its full value. When several creditors had rights over the same piece of property, it seems clear that in case of default by the debtor their claims usually were settled in order of priority by the sale of the property. The question as to whether, after foreclosure, the creditor was obligated to return the “excess” (τὰ ὑπερέχοντα) to the debtor has been hotly debated.¹¹⁸ The evidence to give a definitive answer to this problem is hopelessly inadequate. Two reasons, however, lead me to believe that the creditor was so obligated. First, the very fact that the debtor was allowed to give a second mortgage on the ὄσφ πλείονος ἄξιον implies that the rights of the original mortgagee over the security extended only to the amount of his 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 by the creditor. Second, it will be shown in the discussion of the dotal apotimema¹¹⁹ that almost certainly under that contract the “excess” was returned to the debtor. Since 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. If this reasoning is correct, the obligation to restore the “excess” emphasizes a further fundamental difference between the hypothec and the πρᾶσις ἐπὶ λύσει,

contract a further loan with another party on security to which he no longer held title. See Chapter VII, pp. 155-156.

¹¹⁶ The earliest specific date for the employment in Athens of what is surely a civil hypothec is furnished by a Poletai record of the year 367/6, published in *Hesperia*, X, 1941, pp. 14-27. For a discussion of this important inscription, see Chapter VII, pp. 150-154. I obviously do not mean to imply that the hypothec first came into use in 367/6. For the use (outside of Attica) by Athenians of the mortgage contract, possibly both hypothec and πρᾶσις ἐπὶ λύσει, before 378/7, see above p. 88 (discussion of *I.G.*, II², 43).

¹¹⁷ [*Demosthenes*], LIII, *Against Nikostratos*, 10. Cf. Hitzig, pp. 121-122; Beauchet, III, pp. 298-302; Lipsius, p. 700.

¹¹⁸ E. g., Hitzig, pp. 85-92, and Beauchet, III, pp. 271-282, believe there was no such obligation in the Attic period; Lipsius, pp. 701-702, and Pappulias, pp. 141-151, on the other hand, believe that the obligation existed. See above, pp. 62-63.

¹¹⁹ See Chapter VI, pp. 139-141.

for in the latter transaction, because of its very nature, no such restitution was necessary.¹²⁰ The obligation to restore the “excess” was probably not counterbalanced by the right to exact the deficit from the debtor if the proceeds from the sale of the security resulted in a sum less than that of the loan.¹²¹ In any event, the existence of a deficit would have been exceptional, for in the great majority of cases the creditor before making the loan must have satisfied himself as to the adequacy of the security offered.

One final question should be raised. Did *antichresis* exist in the fourth century? The answer probably should be in the affirmative. It seems to me that once the civil hypothec began to be employed, it would have been only natural for the Athenians on occasions to adopt that institution which actually did not acquire the name *antichresis* until much later. We must remember that the civil hypothec did not come into existence by fiat. For reasons which have just been suggested it gradually developed as an alternative to *πρᾶσις ἐπὶ λύσει*. In this last institution we have seen that it depended on the convenience of the contracting parties as to whether debtor or creditor should be in possession of the security. A similar situation may have obtained with the civil hypothec. Circumstances must have arisen at times in connection with a hypothec contract which made it more convenient for both parties if the creditor took possession of the security. He thereby would have had the usufruct in lieu of interest, and thus a hypothec would have been transformed into an *antichresis*. In the fourth century, however, both transactions presumably were rather uncommon because of the conservative adherence to *πρᾶσις ἐπὶ λύσει*.

In conclusion, I believe the following generalization is relevant. It is a mistake to think that the Attic system of real security was so rigid as to admit of no variations. Divergences from the norm certainly occurred, and these divergences which no longer can be surely detected may well be the reason why it is so difficult, if not impossible, for modern scholars (not to mention the ancient lexicographers) to formulate an absolutely satisfactory general statement about the Athenian system of real security.

¹²⁰ See Chapter VII, pp. 160-161.

¹²¹ Lipsius, pp. 702-703. Certain contracts, of course, may have contained clauses on this subject. There is evidence for such a clause in a maritime contract, [Demosthenes], XXXV, *Against Lakritos*, 12.

CHAPTER V

ΜΙΣΘΩΣΙΣ ΟΙΚΟΥ

ὄρος
χωρίο ἀποτι
μήματος Θε
αιτήτο παιδὶ
Κηφισοφῶντι
Ἐπικηφισίῳ

This inscription¹ is reproduced here to illustrate a type of document of which about 27 examples are now known from Attica.² They all follow a similar formula, although there are slight variations such as the substitution of the perfect passive participle of ἀποτιμᾶν for the noun ἀποτίμημα, which occurs in either the nominative or genitive case. These documents are humble enough in their wording and physical appearance, but they were intimately associated with an important aspect of the institution of guardianship, namely, the contract known as μίσθωσις οἴκου. In this chapter no attempt will be made to discuss guardianship as a whole,³ since many aspects of that institution are beyond the scope of this work. Our task will be to analyze the chief characteristics of the μίσθωσις οἴκου and to try to obtain a better understanding of the Athenian system of real security by an investigation of ἀποτίμημα which, to judge from the inscriptions, is intimately associated with that contract.

In Athens every minor child of citizen parents, whose father had died, was required to have a guardian.⁴ The guardians, or guardian, were generally appointed

¹ I.G., II², 2642.

² I.G., II², 2642-2657; see above, Chapter I, Nos. 1-5; Chapter II, Nos. 1-6.

³ For detailed discussions of the institution of guardianship at Athens, see the old, but still standard, work of Otto Schulthess, *Vormundschaft nach Attischem Recht*, Freiburg I. B., 1886, hereafter referred to as Schulthess; Beauchet, II, (especially) pp. 147-325; Lipsius, pp. 520-537; also pp. 342-353.

⁴ The reason why a guardian was necessary, obvious in itself, is characteristically expressed by Aristotle, *Politics*, 1260 a: ὁ μὲν γὰρ δοῦλος ὅλως οὐκ ἔχει τὸ βουλευτικόν, τὸ δὲ θήλυ ἔχει μὲν, ἀλλ' ἄκυρον, ὁ δὲ παῖς ἔχει μὲν, ἀλλ' ἀτελής (quoted by Beauchet, II, p. 326, note 3). The boy, as is well known, attained his majority at eighteen (Aristotle, *Ath. Const.*, 42, 1). Since women never were *sui iuris* in classical Athens, the term majority is somewhat inappropriate to use in relation to them. At fourteen years of age a girl ceased to be a minor and, consequently, through marriage frequently passed from the control of a guardian to that of a husband (Demosthenes, XXIX, *Against Aphobos*, III, 43; cf. XXVII, *Against Aphobos*, I, 4; in this case the guardian was to become the husband). Even if marriage was postponed, it seems that after puberty the girl's guardian was called κύριος rather than ἐπίτροπος (cf. Beauchet, II, pp. 327-330). Concerning the "majority" of an heiress (ἐπίκληρος) there is the following statement in Aristotle, *Ath. Const.*, 56, 7: μισθοὶ δὲ (the archon) καὶ τοὺς οἴκους τῶν ὀρφανῶν καὶ τῶν ἐπικλη[ήρων, ἕως ἂν τις τετταρ]ακαίδεκέτις γένηται. If the text is correctly

in the will. Naturally they were usually selected from relatives, or at least from close friends, of the testator. Frequently it was stipulated that a guardian should marry the widow.⁵ If, through neglect of the father, a testamentary guardian had not been appointed, a legal guardianship was established under the general supervision of the archon from the nearest of kin according to a definite scale of relationships. If relatives of the requisite propinquity were lacking, then it fell to the archon to appoint a guardian or guardians (dative guardianship).⁶

Guardianship naturally involved many obligations concerning the maintenance, education, and legal representation of the orphan, but the most important duty was the proper managing of the orphan's estate.⁷ In regard to the property, the testamentary guardian was bound by the terms of the will; he was supposed *ἐπιτροπεύσαι κατὰ τὴν διαθήκην*.⁸ Such speeches as the first two orations of Demosthenes against Aphobos show clearly that frequently detailed instructions were given by the testator concerning the management of the property. If no instructions were provided or if the guardian was not a testamentary one, he had the option of administering the estate personally or of leasing it to another—*μισθοῦν τὸν οἶκον*.⁹ In order to relieve himself of the burden of managing the property, especially since the administration was supposed to be gratuitous,¹⁰ it is not surprising that the guardian often availed himself of the *μισθωσις οἴκου*.

Since the word *οἶκος* commonly signifies property in general—*οὐσία*,¹¹ it is natural

restored, as is probable, we seem to have evidence here that the heiress reached her "majority" at fourteen; at this time she would be married to the nearest eligible agnate.

⁵ Lysias, XXXII, *Against Diogeiton*, 3-7; Demosthenes, XXVII, *Against Aphobos*, I, 4-5; 40-43; XXXVI, *For Phormio*, 8; XLV, *Against Stephanos*, I, 3; 37. The law ascribed by Diogenes Laertius, I, 56, to Solon—*τὸν ἐπίτροπον τῇ τῶν ὀρφανῶν μητρὶ μὴ συνοικεῖν, μηδ' ἐπιτροπεύειν, εἰς ὃν ἡ οὐσία ἔρχεται τῶν ὀρφανῶν τελευτησάντων*—is completely at variance with the evidence afforded by the Attic orators. It is certainly spurious; cf. H. F. Jolowicz, *J.R.S.*, XXXVII, 1947, p. 82.

⁶ Aristotle, *Ath. Const.*, 56, 6-7. For the material mentioned in this paragraph, see Schulthess, pp. 52-87; Beauchet, II, pp. 159-187; Lipsius, pp. 522-526.

⁷ On these aspects of guardianship, with many of which we are not concerned in this investigation, see Schulthess, pp. 88-138; Beauchet, II, pp. 198-238; Lipsius, pp. 527-529.

⁸ Demosthenes, XLV, *Against Stephanos*, I, 37; of. XXVII, *Against Aphobos*, I, 13.

⁹ Lysias, XXXII, *Against Diogeiton*, 23; Demosthenes, XXVII, *Against Aphobos*, I, 58-59; XXVIII, *Against Aphobos*, II, 5-7; XXXVIII, *Against Nausimachos*, 23. Cf. O. Schulthess in *R.E.*, s.v. *Μίσθωσις*, p. 2112.

¹⁰ The scornful words of Demosthenes regarding his guardians—*ἐξὸν — — αὐτοῖς τε, εἰ χρημάτων ἐπεθύμουν, μέτρι' ἐξ αὐτῶν λαβεῖν* (XXVII, *Against Aphobos*, I, 60-61)—seem to imply that the guardian's rôle normally was a gratuitous one. It should be remembered, however, that guardians frequently were recipients of legacies which could be considered as a form of remuneration for their services; cf. Demosthenes, *ibid.*, 5-6; 40.

¹¹ Xenophon, *Oecon.*, I, 5: *Ἐμοὶ γοῦν — — δοκεῖ, καὶ εἰ μὴδ' ἐν τῇ αὐτῇ πόλει εἴη τῷ κεκτημένῳ, πάντα τοῦ οἴκου εἶναι ὅσα τις κέκτηται. 7: ὅτι τοι ἡμῖν ἐδόκει οἶκος ἀνδρὸς εἶναι ὅπερ κτήσις. VI, 4: οἶκος δ' ἡμῖν ἐφαίνετο ὅπερ κτήσις ἢ σύμπασα. Cf. Ammonius, s.v. *οἶκος*: *οἶκος μὲν λέγεται ἢ πᾶσα οὐσία· οἰκία δὲ, ἢ ὑπὸ ἐνὸς ἢ ὑπὸ δευτέρου κατοικουμένη*. In Demosthenes, XXVII, *Against Aphobos*, I, 15, we are*

to see in the expression *μισθωσις οἴκου* a reference to the leasing of the whole estate of the orphan, whether it consisted of movables or immovables, or both.¹² Paoli,¹³ however, believes it is necessary to recognize the following characteristic about the *μισθωσις οἴκου*: “The opportunity to proceed to a leasing rather than to continue in the direct administration of the patrimony could present itself to the guardian only when the patrimony consisted, at least in great part, of cash or money invested in industry or in banking or commercial operations.” Since the restriction of the *μισθωσις οἴκου* to *οὐσία ἀφανής* would have greatly limited the applicability of the institution, we must examine the evidence he adduces in support of this contention.

Demosthenes,¹⁴ while emphasizing the profits which could be made from a *μισθωσις οἴκου*, says that a lessee of three talents and 3000 drachmas in six years paid back to the orphan over six talents, counting out the money in the agora. Paoli is probably correct in maintaining that this in an instance of the leasing of movables, although, considering the lack of precision in the terminology of the orators when referring to matters of business, it may be possible to suspect that in the three talents and 3000 drachmas there was included also the estimated value of certain immovables which had been leased. The “over six talents,” then, would have included the total interest or rent due on those immovables.

Aphobos¹⁵ had charged that Demosthenes' father was unwilling to have the property let, because, in view of the fact that the grandfather was a state-debtor, he hoped to conceal the amount of the family wealth. Paoli thinks that the linking of the two notions—forbidding of the leasing and the desire to conceal the value of the estate—shows that the *μισθωσις οἴκου* was concerned primarily with *οὐσία ἀφανής*. If one takes this passage in isolation, possibly it would lead logically to the conclusion which Paoli draws from it, for naturally at a public leasing supervised by the archon the value of the property could not be concealed. This conclusion, however, is clearly disproved in several places in the first two orations against Aphobos¹⁶ where it is definitely stated that the guardians had been instructed to let the property. Furthermore, in the inventory of the estate furnished by Demosthenes there are listed two *ergasteria* valued at about four talents, not to mention stocks of ivory, iron, copper, wood, etc. assessed at two and a half talents.¹⁷ In an estate, therefore, which was worth about fourteen talents¹⁸ there was included property valued at over 6 talents in a

told that the guardian Aphobos was unwilling *τὸν οἶκον μισθοῦν*; the house would not have been included in the leasing, for we learn from section 5 that the use of the *οικία* had been granted to Aphobos by the testator for the duration of the guardianship.

¹² Cf. Schulthess, pp. 139-140; Beauchet, II, pp. 238-239.

¹³ *Studi*, pp. 166-169.

¹⁴ XXVII, *Against Aphobos*, I, 58.

¹⁵ Demosthenes, XXVIII, *Against Aphobos*, II, 1-2.

¹⁶ I, 15; 40; 58; II, 15.

¹⁷ I, 9-10.

¹⁸ I, 4; 11.

form which can hardly be designated as *οὐσία ἀφανής*. The evidence of the two speeches against Aphobos, accordingly, would seem clearly to refute Paoli's contention.

Two other passages¹⁹ cited by Paoli seem to me to be inconclusive. In each case the property left by the deceased consisted almost exclusively of movables, but the only inference which can be drawn is that these estates could have been let. It certainly is hazardous to see here evidence that only *οὐσία ἀφανής* could be leased.

Paoli also finds support for his contention in certain passages in Isaeus, II, *On the Estate of Menekles*. In section 9 we read that Menekles, after divorcing his wife, *τὴν τε προῖκα ἐπιδίδωσιν αὐτῷ* (the new husband), *μετασχὼν τοῦ οἴκου τῆς μισθώσεως τῶν παίδων τῶν Νικίου*. The dowry amounted to twenty minas (section 5). Paoli is probably correct in saying that the Greek implies that Menekles was able to refund the dowry promptly because he was participating in a *μισθωσις οἴκου*, but does it necessarily follow that "questa circostanza ci mostra che il patrimonio relitto da Nicia era mobiliare"? If Menekles had become lessee for a particularly profitable *ergasterion* or lodging house or for an unusually fertile farm, might not his profits from such leases explain why he was able to pay the twenty minas so readily? The concluding phase of this episode, however, may support Paoli's interpretation. In sections 28 and 29 we discover that when the orphan came of age Menekles was unable to pay him the one talent and seven minas which were due until he had sold a plot of land to obtain the cash. Paoli, I presume, would argue that Menekles had consumed so large a percentage of the movables, which he had taken on lease, to pay back the dowry of twenty minas that from the balance he was unable to make sufficient profits to repay the orphan when the *μισθωσις οἴκου* expired. Although this seems to be a logical explanation, certain difficulties still remain. It is noteworthy that the whole sum which Menekles paid to the orphan was derived from the sale of the land (sections 29 and 34). Why was the orphan not repaid in part from the profits accruing to Menekles from the balance of his share in the lease? Or are we to suppose that the twenty minas which he paid out when refunding the dowry represented his entire share in the lease? Is it reasonable, however, to assume that Menekles alienated the whole sum for which he was lessee—a sum which he knew he was obligated to return together with interest? Questions like these, to which there probably is no satisfactory answer, emphasize how little we really know about these transactions which Isaeus, for reasons of his own, alludes to so obscurely.

There is further evidence in Isaeus, not discussed by Paoli, which is relevant to the subject under consideration. In the speech, VI, *On the Estate of Philoktemon*, 29-34, we read that the "guardians" of the alleged sons of the old Euktemon, in their plan to get control of Euktemon's property, persuaded the old man to sell certain parts of his real estate (*φανερὰ οὐσία*). Then they proceeded to plot how to lay their

¹⁹ Lysias, XXXII, *Against Diogeiton*, 23; cf. 4-6; Demosthenes, XXXVIII, *Against Nausimachos*, 7; cf. 23.

hands on the rest of the property—*περὶ δὲ τῶν ὑπολοίπων εὐθὺς ἐπεβούλευον* (section 35). Presumably *τῶν ὑπολοίπων* refers to the rest of the estate, movables and immovables. The details of their conspiracy, as outlined in sections 36 and 37, have been frequently discussed because of their obscurity. We shall have occasion to examine the passage more extensively below. For our present purpose only the following matters should be noticed. The “guardians” arranged to have a *μίσθωσις οἴκου* (of Euktemon’s property) conducted by the archon. They planned that—*τὰ μὲν μισθωθείη τῆς οὐσίας, τὰ δὲ ἀποτίμημα κατασταθείη*. The *ἀποτίμημα*, as we shall see later, was the security which the lessee in a *μίσθωσις οἴκου* had to provide, and it is universally agreed that this security was in the form of real property. Concerning our passage, admittedly it seems fantastic that in a *μίσθωσις οἴκου* part of the estate should be leased and part of the same estate should serve as security for the lessees. Nevertheless, the very fact that the “conspirators” suggested that part of the property should be designated as *ἀποτίμημα* implies that immovables were included in the property which was to be put up for leasing.

Isaeus XI, *On the Estate of Hagnias*, also contains information relevant to the problem we are considering. In section 34, the speaker, Theopompos, who is guardian for the son of his deceased brother Stratokles, tells his fellow guardian (the plaintiff), if he wishes, to apply to the archon *εἰς τὴν μίσθωσιν τῶν ἐκείνου χρημάτων*. The word *χρήματα* is probably more often associated with movables than with immovables. Did the estate of the orphan, then, consist primarily of *οὐσία ἀφανής*? Fortunately a definite answer can be given to this question, for in sections 42-43 a complete inventory of the property of Stratokles, the orphan’s father, is listed. We learn there that Stratokles left an estate (*οὐσία*) valued at five and a half talents. Included in this estate were certain *ἐδάφη* assessed as follows: land at Thria, two and a half talents; a house at Melite, one half talent; another house at Eleusis, 500 drachmas. In the eyes of Isaeus and his contemporaries, therefore, it was considered perfectly normal for an orphan’s estate, of which more than half was in the form of real property, to be submitted to the *μίσθωσις οἴκου*.

It can be considered certain, then, that an orphan’s estate, whether it consisted primarily of movables or immovables, could be let if the guardian so wished or if he had been so instructed in the will. The leasing of the property occurred under the supervision of the archon.²⁰ The fullest account of the procedure adopted in the *μίσθωσις οἴκου* is to be found in Isaeus, VI, *On the Estate of Philoktemon*, 36-37. This passage, to which reference was made a little above, poses various problems,²¹ but on the basis of it and certain evidence from other sources the following statements can be made with considerable confidence. Guardians who wanted to let their wards’ estates appeared before the archon and requested him *μισθοῦν τοὺς οἴκους* of the

²⁰ Aristotle, *Ath. Const.*, 56, 7; cf. Pollux, VIII, 89.

²¹ See Wyse, pp. 524-527.

orphans. At the same time the archon had to be provided with an inventory (*ἀπογραφή*) of the property to be let.²² Then the magistrate had a public proclamation made of the leasing. Subsequently, in the presence of a panel of dicasts, who were authorized to stop proceedings if cause were shown, an auction was held, at which the property was let, presumably to the party offering the highest bid and the best security.²³ The rates at which orphans' estates were leased naturally varied according to circumstances. Schulthess and Beauchet estimate that the average rate was about 12% of the value of the property.²⁴ Although, for Athens, satisfactory figures on rental rates are lacking, there is abundant evidence to show that the contract was frequently very profitable to both the lessor and the lessee.²⁵

For the next step in the procedure our best source of information is Harpocration.²⁶ Under the heading *Ἀποτιμηταί* the following information is provided: *οἱ μισθούμενοι τοὺς τῶν ὀρφανῶν οἴκους παρὰ τοῦ ἄρχοντος ἐνέχυρα τῆς μισθώσεως παρέιχοντο· ἔδει δὲ τὸν ἄρχοντα ἐπιπέμπειν τινας ἀποτιμησομένους τὰ ἐνέχυρα. τὰ μὲν οὖν ἐνέχυρα τὰ ἀποτιμώμενα ἐλέγοντο ἀποτιμήματα, οἱ δὲ πεμπόμενοι ἐπὶ τῷ ἀποτιμήσασθαι ἀποτιμηταί, τὸ δὲ πρᾶγμα ἀποτιμᾶν.*

Thus, in conformity with his duties as supervisor of the interests of orphans,²⁷ the archon sent out assessors to evaluate the security offered by the lessee.²⁸ To judge

²² Isaeus does not mention the inventory, but it is hardly conceivable that the archon should have supervised the leasing without having an accurate knowledge of the nature and value of the property concerned. There are frequent references to the inventories contained in wills; cf., for example, Demosthenes, XXVII, *Against Aphobos* I, 40; XXVIII, *Against Aphobos* II, 14; Isaeus, XI, *On the Estate of Hagnias*, 41-43.

²³ This statement, although there is no supporting evidence in connection with the *μισθώσις οἴκου*, certainly seems justified. Parallels can be found in other leases and loans; e. g., *I.G.*, II², 1172, lines 18-22, and 1241, lines 52-53.

²⁴ Schulthess, pp. 149-156; Beauchet, II, pp. 247-249. They dispose successfully of the notion (in itself improbable because the property was let at a public auction) derived from Demosthenes, XXVII, *Against Aphobos*, I, 58-59 (cf. XXIX, *Against Aphobos*, III, 60) that the rental rate was fixed by law—presumably at 18%.

²⁵ Isaeus, II, *On the Estate of Menekles*, 9; VI, *On the Estate of Philoktemon*, 36; Demosthenes, XXVII, *Against Aphobos*, I, 58; 64 (estates doubled or trebled for orphans).

²⁶ Cf. Bekker, *Anecdota Graeca*, I, p. 437, lines 15 ff.

²⁷ Aristotle, *Ath. Const.*, 56, 7; Lysias, XXVI, *On the Dokimasia of Evandros*, 12; [Demosthenes], XXXV, *Against Lakritos*, 48; Aeschines, I, *Against Timarchos*, 158.

²⁸ Reference to this appraisal is to be found in only one horos—an inscription from Arkesine in Amorgos, an island where Athenian influence was strong (*I.G.*, XII, Supplementum, p. 143, no. 331). In lines 7-12, we read: *μισθωτ|ῆς Δεξίβιος· ἀπερί|μ|ησε| Ἄριστότιμος Ξα(νθιάδο) κατὰ τ|ρίτον μέρος, ἐπιπεμ|ψάντων τῶν ἀρχόν|των - -*. The original editor, Mlle. J. Vanseveren (Mme. Louis Robert), *Rev. de Phil.*, LXIII, 1937, p. 317, calls attention to how this inscription confirms the definition of Harpocration.

Kirchner in his introductory note to this type of inscription found in Attica (*I.G.*, II², 2642) writes: "De apotimemate i. e. accurata aestimatione fundorum, qui pro pupillis aut pro dotibus administrabantur, cf. Ziebarth ad Dittenb.³ 1186." It is unfortunate that he quoted Ziebarth here, for the statement is incorrect. As the passage of Harpocration reproduced in the text shows, it

from the horos inscriptions concerned with *μίσθωσις οἴκου*²⁹ and from the scanty literary evidence,³⁰ this security always was in the form of real property—usually a farm or a house, or both. As Beauchet remarks,³¹ if the security had consisted of movables, it would not have been necessary for the *ἀποτιμηταί* to be sent out to evaluate the property, for the lessees could have brought the movables to the archon for assessment.

The *ἀποτίμημα*, then, consisted of real property. The question naturally arises whether this security furnished by the lessee was intended to guarantee the entire amount of the orphan's estate which he had leased or only the rentals or interest which he had contracted to pay. Schulthess,³² largely on the analogy with the *ἀποτίμημα προικός*,³³ argues for the former interpretation, while Beauchet³⁴ decides for the latter. Beauchet reasons chiefly from Harpocraton's statement that the lessee had to offer *ἐνέχυρα τῆς μισθώσεως*, and he shows from a passage like—*λαμβάνων μίσθωσιν ὀγδοήκοντα μνᾶς ἐκ τῶν Δικαιογένους — — χρημάτων*³⁵—that *μίσθωσις* can mean rental, revenue, etc. He admits, however, that circumstances dictated conditions and that, if the lease involved movables or immovables subject to deterioration, the archon would have seen to it that the value of the security was considerably superior to that of the stipulated rental or interest. The trouble with this method of reasoning, of course, is that *μίσθωσις* can signify the general notion of leasing or a lease³⁶ as well as a specific rate of rent. To find the probable answer to this question, therefore, it will be necessary to turn to certain of the horoi which provide some pertinent data.

I.G., II², 2646, is a badly mutilated inscription, but it almost certainly refers to a *μίσθωσις οἴκου*. In the last line the numerals XXXX are preserved. If the 4000 drachmas represent the value of the security guaranteeing only the stipulated rental, then, figuring on the basis of an interest rate of 12%, the value of the orphan's property was about five and two thirds talents. So large an estate is possible, of

was the property offered as security by the lessee which was accurately appraised by the *ἀποτιμηταί* sent out by the archon. Later in the same note Kirchner gives the correct definition: "Hic et deinceps *ἀποτίμημα* = fundus aestimatus et oppigneratus."

²⁹ See above, note 2.

³⁰ [Demosthenes], XLIX, *Against Timotheos*, 11: ὁ μὲν ἐν πεδίῳ ἀγρὸς ἀποτίμημα τῷ παιδί τῷ Εὐμηλίδου καθειστήκει.

³¹ II, p. 253. Beauchet suggests (pp. 251-252) that while security in the form of real estate was certainly the rule, it might have been possible for a lessee, who lacked immovables, to offer sureties (*ἐγγυηταί*) as was sometimes done in the case of leases granted by the state or by temples. The suggestion is plausible, but there is no supporting evidence in the literary sources; the horoi, of course, are concerned only with real property.

³² Pp. 166-167.

³³ See Chap. VI, pp. 119-134.

³⁴ II, pp. 254-255.

³⁵ Isaeus, V, *On the Estate of Dikaiogenes*, 11.

³⁶ E. g., Demosthenes, XXVII, *Against Aphobos*, I, 59; Aristotle, *Ath. Const.*, 47, 4.

course, but, following the law of averages, it seems more probable to recognize in the 4000 drachmas a sum securing the capital amount rather than the interest due on it. In *I.G.*, II², 2654, however, where the numerals ΠΗΗΗ are recorded, it is more natural to think in terms of interest than of capital.

The information afforded by these two Attic inscriptions is unsatisfactory, for it could lead to opposite conclusions. At this point, I believe, we should examine some evidence from Naxos. Throughout this work an effort has been made to restrict the argument to Athenian evidence, but this particular horos inscription, in its first lines at least, is so similar to the Attic horoi that we cannot neglect to take it into consideration. It is probably to be dated in the fourth century, a period when there were close relations between Athens and Naxos. The inscription reads: ³⁷

[ὄ]ρος χωρίων καὶ
οἰκίας καὶ κεράμου
ἀποτετιμημέ-
νων τοῖς παιδίοις
τοῖς Ἐπίφρονος· τοῦ
ἀρχαίου ΧΧΧΠ^ϛ καὶ
τῶν μισθωμάτων
τετρακοσίων δρα-
χμῶν τοῦ ἔνιαυ-
[το]ῦ ἑκάστου ἐπὶ
... ἤτου. τούτου
[δὲ τοῦ χω]ρίου ἅπα
[ν ἀποτετί]μηται
[κ]αὶ τὰ ἐν Ἐλαι-
οῦντι καὶ τὰ
ἐμ Μέλανι

The only logical interpretation of the wording on this stone is that various items of real property had been offered as security to the orphans for the capital value of their property which had been leased, 3500 drachmas, and for the payment of rent at the rate of 400 drachmas a year (roughly 11½%). Certainly a farm, whose location is unknown to us, and other farms, whose sites are stated, not to mention a house and a pottery factory, were not all offered as security for the payment of a rent of merely 400 drachmas. There is no doubt, then, that in this particular transaction the apotimema was security for the entire amount of the orphans' estate and also for the annual rentals which the lessee had contracted to pay.

An inscription from Arkesine in Amorgos, which has been referred to earlier,³⁸

³⁷ *I.G.*, XII, *Supplementum*, p. 104, no. 194.

³⁸ See above, note 28.

should be considered in this discussion. Lines 4-7 of the inscription³⁹ read: ὄρος ἀποτιμήματος ἐν [τ]οῖς Δεξιβίου τῶν Σίμων[ν]ος θυγατρῶν Σιμών[η]ς Δημοδίκης. It is interesting to observe that in this transaction the orphans, whose property was leased to Dexibios, were girls. This is the only instance in the extant horoi concerned with μίσθωσις οἴκου where girls' names—at least in recognizable form—are preserved. Presumably these two daughters were ἐπίκληροι (heiresses) and, if the law of Amorgos was similar to that of Athens, they would have reached their “majority” at fourteen years of age.⁴⁰ In the following lines it is recorded that Aristotimos was sent out as appraiser and that he ἀπετίμησε the property of Dexibios κατὰ τρίτον μέρος.⁴¹ One third of the lessee's property, accordingly, was to serve as apotimema, but unfortunately no information is given as to whether it was to secure all the orphans' estate or merely the interest or rent which was due to them.⁴² If the Naxos inscription can serve as a guide, the former alternative would be the correct one.

If we look for other uses of the word apotimema, we find ourselves in the same difficulty. The term was most frequently employed in connection with μίσθωσις οἴκου and to designate the security for a dowry,⁴³ but it, or its apparent equivalent, τίμημα,⁴⁴ also appears in certain other inscriptions concerned with leases or loans. A brief glance at the pertinent parts of these inscriptions will be in order. *I.G.*, II², 1172, deals with the finances of the deme Plotheia. In lines 19-22 we read that the magistrates are to lend to ὁ[σ]τι|[ς] ἂν πλείστον τόκον διδώι, ὅς ἂ[ν] πεί|[θ]ημι τὸς δανείζοντας ἄρχοντα[ς τιμ]| [ή]ματι ἢ ἐγγυητήη. As far as the Greek is concerned the τίμημα could be security either for the principal of the loan or for the interest due on it. In *I.G.*, II², 2498 (321/0 B.C.) there are recorded general regulations for the leasing of certain lands owned by the deme Piraeus. Lines 3-5 read: τοὺς μισθω|[σ]αμένους ὑπὲρ: Δ: δραχμὰς καθιστάναι ἀποτίμημα τῆς μ|[ι]σθώσεως ἀξιοχρεων. Again, there is ambiguity in this statement. Nevertheless, since a rent as low as ten drachmas seems ridiculously small to be guaranteed by real property, it is more reasonable to suspect that the apotimema was to serve as security for the property leased.⁴⁵ *I.G.*, II², 2701, also, is a perplexing inscription. In the first part it is stated

³⁹ Lines 1-3 were cut more deeply and in larger letters than the following lines. They may have no connection with the transaction recorded in lines 4-14; cf. Mille. J. Vanseveren (Mme. Louis Robert), the original editor, *Rev. de Phil.*, LXIII, 1937, p. 317.

⁴⁰ See above, note 4.

⁴¹ Cf. note 28, above.

⁴² Mme. Robert (cf. note 39 for reference), states categorically that it served as security for the payment of the rent.

⁴³ See Chapter VI.

⁴⁴ Harpocration, *s.v.* Τίμημα.

⁴⁵ This inscription records general instructions for the leasing of deme property, not an actual lease; see Otto Schulthess in *R.E.*, *s.v.* Μίσθωσις, pp. 2100-2101; *Inscr. Jur. Gr.*, I, p. 252. *I.G.*, II², 2494, lines 7-8 (if properly restored), furnishes no new evidence: — — ἀποτίμημα δὲ καταστήσει|[τῆς μισθώσεως ἀξιοχρεων]. *I.G.*, II², 2767,—ὄρος χωρίου ἀποτίμημα ἐπὶ συνθήκαις| Διονύσιωι [HHH]— can lend itself to numerous interpretations.

that a farm and a house have been sold ἐπὶ λύσει to two different creditors for 500 and 130 drachmas respectively; then there is added (lines 9-12)—καὶ ἀποτίμημα|α ἐρανισταῖς τοῖ[s]| μετὰ Θεοπέιθους| Ἰκαριῶς. Since in the πρᾶσις ἐπὶ λύσει the farm and the house were serving as security for the loans, it seems logical to assume that they also (or part of their value) were securing a debt owed to the *eranistai* rather than the interest owed on the debt. Why the contract was changed from πρᾶσις ἐπὶ λύσει to ἀποτίμημα is a mystery.^{45a}

This brief glance at the employment of the word *apotimema* in inscriptions other than those concerned with orphans' estates or dowries does not lead to any positive conclusions, although it seems to me that the wording of the various texts favors slightly the interpretation that the term *apotimema* signified security for the principal rather than for the interest. What should be our decision in regard to the meaning of *apotimema* when used in connection with the special type of lease with which we are concerned? In view of the positive evidence of the *horos* inscription from Naxos and in view of the fact that in relation to dowries the *apotimema* signified security for the value of the whole dowry⁴⁶ and not just for the interest due on it, it seems to me almost certain that in the *μισθωσις οἴκου* at Athens the *apotimema* served as security for the capital value of the orphan's property and also for the interest or rent which the lessee had contracted to pay. On reflection, this is the more natural interpretation. An orphan's estate often consisted of various forms of movable and immovable wealth. What better way was there to discourage a lessee from dishonest manipulation—especially of the οὐσία ἀφανής—than to compel him to risk as *apotimema* an equivalent amount of his own real property? This explanation of the nature and purpose of *apotimema* accords perfectly with the well attested concern for orphans which was exhibited by the Athenian State.⁴⁷

The definition of *apotimema* given by Pollux (VIII, 142) is interesting. It reads: ἀποτίμημα δ' ἐστὶν οἶον ὑποθήκη, κυρίως μὲν πρὸς τὴν προῖκα, ἤδη δὲ καὶ πρὸς τὰς μισθώσεις. Restricting the application of the word to dowries and leases is certainly in conformity with the majority of our evidence. The noun ἀποτίμημα and the verb ἀποτιμᾶν seem to have been the appropriate terms to use in connection with security in the form of real property when there was emphasis on the idea of evaluation. As we have seen in the case of the *μισθωσις οἴκου* and as we shall discover in the following chapter on ἀποτίμημα προικός, an effort was made to have the *apotimema* securing the orphan's estate or the dowry equivalent in value to the thing secured. When properly used, the word *apotimema* probably always had this notion of evaluation, although the Athenians undoubtedly on occasions employed this term, as they did other technical expressions, rather loosely. In the case of the πρᾶσις ἐπὶ λύσει and the hypothec, which

^{45a} For further discussion of this inscription, see Chapter VII, note 23.

⁴⁶ See Chapter VI.

⁴⁷ Cf. Plato, *Laws*, XI, 926d-928d. See note 27, above.

were the usual contracts for securing loans by real estate, however, there is no evidence in the extant sources that the Athenians, on entering into these transactions, took such pains to equate the value of the security to the value of the obligation. This distinctive feature of the apotimema, in conjunction with its restricted use and the fact that it did not serve as security for an ordinary loan, may have influenced Pollux to define the term apotimema not as a hypothec but as “like a hypothec.” Furthermore, if the reasoning in the preceding chapter was correct that the hypothec developed only gradually in the fourth century, the apotimema may have been the first institution of security based on real property, after the *πρᾶσις ἐπὶ λύσει*, to be adopted by the Athenians.⁴⁸ This possible temporal priority of the apotimema, which in its early stages was probably limited almost exclusively to matters intimately connected with the family, may also have contributed to Pollux’s characterization of it as *οἶον ὑποθήκη*.

The lessee, then, had to furnish security in the form of real property equivalent in value to that of the orphan’s estate which he had leased. On this security horoi, similar to the one quoted at the beginning of this chapter, were erected to publicize the lien which the orphan had on the property.⁴⁹ Since the apotimema consisted of real property and was *οἶον ὑποθήκη*, the question arises as to whether the lessee or the lessor had possession for the duration of the contract. The almost universal opinion is that the lessee retained possession as long as he abided by the terms of the agreement.⁵⁰ Paoli, as might be expected, since he sees in the apotimema offered in the *μισθωσις οἴκου* a “real right of security,” insists that the orphan took possession of the security immediately upon the formation of the contract.⁵¹ In the preceding chapter I argued at length against Paoli’s contention that a creditor did not enjoy a “real right” unless he was in possession of the property serving as security. Consequently it would be largely repetitious to try to rebut the arguments which he marshals in support of his conception of the apotimema in the *μισθωσις οἴκου*. His reasoning, which he develops at great length in his replies to the reviews of Arangio-Ruiz and La Pira,⁵² seems to me to be far too theoretical and subjective.⁵³ I believe that, without indulging in any philosophical speculation, it is possible to show the fallacy of his position by revealing the inadequacy of the specific evidence he adduces to support his

⁴⁸ Cf. La Pira, p. 306.

⁴⁹ Cf. Isaeus, VI, *On the Estate of Philoktemon*, 36.

⁵⁰ E. g., Schulthess, p. 167; Beauchet, II, pp. 255-256; Arangio-Ruiz, pp. 249-250; La Pira, pp. 317-318.

⁵¹ Studi, p. 169; *Sul Diritto Pign.*, pp. 173-177; “Datio in Solutum,” pp. 181-212.

⁵² See note 50.

⁵³ In *Sul Diritto Pign.*, pp. 166-167, for example, Paoli says that under the word *ἀποτίμημα* there can be grouped four distinct institutions which represent so many stages of historical development. At least two of these stages he admits are hypotheses, but he claims they represent the necessary conditions for passing to the next stages. Subjective argumentation like that can be answered only by equally subjective argumentation. I believe it is the part of wisdom to refrain from the attempt.

contention and, if I may be so bold as to make the claim, by looking at the institution of the *μισθωσις οίκου* from the point of view of plain common sense.

As far as specific evidence is concerned, Paoli⁵⁴ makes use of three passages from the literary sources. At the beginning of the second speech against Aphobos, Demosthenes expresses indignation at Aphobos' allegation that Demosthenes' father was unwilling to have the property let because the grandfather was a state debtor. In other words, the father feared that, since in a *μισθωσις οίκου* the value of the estate would be revealed, the state would confiscate the property in order to obtain payment for the debt. Demosthenes insists that the debt had been discharged and remarks (section 2)—*οὐτ' ἦν κίνδυνος οὐδεὶς ἡμῖν φανερά κεκτημένοις τὰ ὄντα*. Paoli translates as follows: "Non vi era per noi alcun pericolo se (in conseguenza della *μισθωσις*) fossimo venuti in possesso di beni immobili." Thus he thinks that Demosthenes' words prove that as a result of a *μισθωσις οίκου* the lessor acquired possession of *οὐσία φανερά* in the form of apotimema. This interpretation is a good example of the absurdity of attaching a technical meaning to a word regardless of the context. In conjunction with *οὐσία, φανερά* does have a technical sense in contrast to *οὐσία ἀφανής*. The fact remains, however, that the usual meaning of the adjective is "visible," "out in the open." Just a few lines below (section 4)⁵⁵ the word is employed in precisely this sense in reference to property: *νῦν δὲ καὶ Δημοχάρης καὶ ὁ πατήρ καὶ αὐτοὶ οὗτοι φαίνονται φανερά ποιούντες*. I submit that, unless one has a preconceived notion as to the meaning of the controversial passage, the natural translation—and the only one which is in accord with the context is: "Nor did we incur any risk through having our property known." These words, therefore, contain no reference to property serving as apotimema, but merely state the obvious fact that at a public auction the value of the property to be leased could not be concealed.

Paoli also finds support for his contention in [Demosthenes], XLIX, *Against Timotheos*, 11, a passage which was discussed at length in the preceding chapter.⁵⁶ It will be remembered that all Timotheos' property was encumbered—some of it as *ἀποτίμημα* for an orphan's estate—and that *ἄλλοι ἐκράτουν*. The previous argument need not be repeated except to say that the verb *κρατεῖν* does not have to have the technical meaning of "possess" and that it is clear from the rest of the speech, as Paoli admits, that the lessee (Timotheos) retained possession of the apotimema. The only method by which Paoli can extricate himself from the quandary is to develop the theory of fictitious possession on the part of the creditor. Rather than accept a questionable hypothesis it seems preferable to me to recognize in the *ἐκράτουν* only an allusion to the ascendancy which creditors had over a hard pressed debtor.

⁵⁴ *Studi*, pp. 168-169.

⁵⁵ Cf. sections 3 and 7. It need hardly be remarked that the participle *κεκτημένοις* can mean "having" or "possessing" as well as "having come into possession of."

⁵⁶ Chapter IV, pp. 67-69.

Finally Paoli believes that there is confirmation of his position in Aristotle's words⁵⁷ on the duty of the archon towards orphans: *μισθοῖ* (the archon) *δὲ καὶ τοὺς οἴκους τῶν ὀρφανῶν* — — — — *καὶ τὰ ἀποτιμήματα λαμβάν[ει]*. Again, unless one is convinced in advance that the lessor took possession of the apotimema on the formation of the contract, it is difficult to understand how this passage can be interpreted as Paoli suggests. Does Paoli mean that the archon "received"—either physically or figuratively—the *ἀποτιμήματα*? Of course, he did neither. His function was to supervise the leasing. Part of the procedure in a *μισθωσις οἴκου*, as we have seen, was the dispatching by the archon of *ἀποτιμηταί* to evaluate the security offered by the lessee. The apotimema, which was finally agreed upon, was not assigned to the archon, but to the lessor. In regard to the security the archon's duty merely was to accept or approve it, if he found it adequate to guarantee the orphan's estate. This, I believe, is the only meaning which can be attributed to Aristotle's very concise statement. The words have no bearing on the problem as to whether the security was in the possession of the lessee or lessor.

The passages which Paoli adduces in support of his contention, then, prove on examination either not to corroborate his position or to be irrelevant to the problem. The answer to this problem, however, seems obvious if one regards the *μισθωσις οἴκου* objectively. In that transaction an orphan's estate, composed frequently of both movable and immovable property, was leased at a public auction to a man who agreed to pay a certain rate of interest and to designate some of his own real property as security for the estate he was taking on lease. Under the eyes of the government great care was taken to assure that the apotimema offered should be equal in value to the orphan's property. Is it credible that any lessee would ever have presented himself if, in order to obtain the management of property on which he must pay interest or rent, he had to abandon all profits from an equivalent amount of his own property which, as soon as the lease began, was transferred to the possession of the lessor?⁵⁸ Since the answer to this question obviously must be in the negative, it seems certain that, in the case of the apotimema as in that of the hypothec, possession of the security remained with the debtor (lessee) as long as he abided by the terms of the agreement.

Did the lessee always have to furnish security for the orphan's property which he had leased? The evidence from Aristotle and Harpocration, which has been discussed above, points so strongly to an affirmative answer that the question seems superfluous. There is a controversial passage in Isaeus, however, which has raised doubts in the minds of various scholars. In Oration II, *On the Estate of Menekles*,⁵⁹ we learn that Menekles was a co-lessee of the estate of the orphan children of Nicias

⁵⁷ *Ath. Const.*, 56, 7.

⁵⁸ Cf. the remarks of La Pira, p. 317.

⁵⁹ See above, p. 99.

(section 9). Subsequently (sections 28-29), we are told that, when the contract expired, Menekles did not have the cash to pay to the orphan the principal and the accumulated interest. Consequently, to obtain the necessary sum, he tried to sell τὸ χωρίον. Menekles' brother, who was on bad terms with him, attempted to prevent the farm from being sold ἵνα κατοκώχμιον γένηται καὶ ἀναγκασθῆ τῷ ὀρφανῷ ἀποστῆναι. To achieve his purpose the brother laid claim to a certain part of the farm and tried to discourage any purchasers. Menekles, therefore, sold the part of the land not claimed by his brother for seventy minas, three minas more than the sum owed to the orphan.

The more one reflects on this transaction, the more confused one becomes and the more convinced that Isaeus, for his own purposes, has either omitted or distorted some essential details. Scholars are in disagreement as to whether or not τὸ χωρίον served as ἀποτίμημα.⁶⁰ If the farm was serving as security, it is certainly strange that there is no statement to that effect and more than strange that the lessee (debtor) should have proceeded to sell it. It is possible, nevertheless, that the orphan, wanting cash rather than land, gave Menekles permission to sell the apotimema. If no security had been offered, then, presumably, the vengeful brother hoped that the orphan would compensate himself by seizing on the farm in lieu of payment.⁶¹ The brother's purpose, however, is obscure, for the difference between the value of the part of the farm which was sold and the debt owed to the orphan was only three minas.

I question whether it is possible to obtain a certain interpretation of this transaction, the account of which apparently has been deliberately garbled by Isaeus. Consequently, unless definite evidence to the contrary can be found, it seems most probable that an orphan's estate, when leased, was always protected by the furnishing of adequate security. In view of the fact that the μίσθωσις οἴκου took place under the supervision of the archon, one of whose duties was to look out for the welfare of orphans, it is hard to believe that this obvious precaution was ever omitted.⁶²

The phrase μισθοῦν τὸν οἶκον (or with slight variations) occurs frequently in the orators. Although the implication usually is that the reference is to the whole property of the orphan, Beauchet⁶³ is probably correct in stating that occasions must have arisen when, without violating the law, it was more advantageous to both the orphan and the guardian that only part of the estate be let. Certainly the testator

⁶⁰ Schulthess, pp. 185-186, Hitzig, pp. 109-110, Pappulias, p. 123, and Wyse, pp. 258-259, recognize the χωρίον as ἀποτίμημα; *contra*, Ernst Rabel, *Die Verfügungsbeschränkungen des Verpfänders*, Leipzig, 1909, pp. 14-16; Leo Raape, *Der Verfall des Griechischen Pfandes*, Halle, 1912, p. 5; Paoli, *Studi*, p. 168, note 1.

⁶¹ Moeris defines the word κατοκώχμιον as: τὰ κατεσχημένα ἐνέχυρα, Ἀττικῶς. See Wyse's note in which he collects various references to the word.

⁶² For a discussion of *I.G.*, II², 2658, a πρᾶσις ἐπὶ λύσει inscription grouped with documents dealing with μίσθωσις οἴκου, see Chapter VII, pp. 161-162.

⁶³ II, pp. 246-247.

could achieve this end by granting the usufruct of definite parts of the property to the guardians during the minority of the orphan.⁶⁴

More than one lessee could be concerned with the same *μισθωσις οἴκου*. This is proved by the statement concerning Menekles—*μετασχὼν τοῦ οἴκου τῆς μισθώσεως τῶν παίδων τῶν Νικίου*.⁶⁵ We have no information, however, as to the procedure followed when there was more than one lessee. Did one man bid for the estate with the understanding that others would be associated with him in its administration?⁶⁶ I doubt whether such an arrangement would have been classified as an instance of several lessees. In the eyes of the orphan (and his guardian) and the archon, the man who made the winning bid and offered satisfactory security presumably would have been considered the lessee. Provided he paid the interest or rent and returned the principal (including any immovables involved in the transaction) at the proper time, he probably was free to contract with as many others as he wished for the management of the property. To explain the cases of joint lessees, it seems to me that we must assume that at the auction several men bid for different parts of the property or offered equal bids and adequate security for the whole. In this event, under the supervision of the archon the estate may have been distributed among the several bidders, and each lessee would have become responsible for the share assigned to him.

It was stated above⁶⁷ that a guardian on the death of the father had two alternatives before him: he could either manage the orphan's estate personally, or if he preferred or if instructions to that effect had been included in the will, he could appear before the archon with a request that the estate be let. Actually there seems to have been a third possibility, which really is a subdivision of the second alternative. Isaeus' speech, VI, *On the Estate of Philoktemon*, 36-37, contains evidence implying that the guardian himself could become lessee. The passage, like so many in Isaeus, is a controversial one, and certain scholars⁶⁸ refuse to recognize in it evidence for a guardian lawfully becoming the lessee of his ward's estate. The speaker, however, although he casts many aspersions on the two "guardians," does not suggest that there was anything illegal in their wish to become lessees of the "orphans'" estate. Consequently, I believe that we should accept as a fact that on rare occasions the guardian did lease his ward's property. Ordinarily, probably, a guardian was glad to have the estate leased to another. He thereby was relieved of the responsibility of administration⁶⁹ which, except for whatever legacies might have been left him, was apparently

⁶⁴ Cf. Demosthenes XXVII, *Against Aphobos*, I, 4-5; 40.

⁶⁵ Isaeus II, *On the Estate of Menekles*, 9; cf. VI, *On the Estate of Philoktemon*, 36.

⁶⁶ Cf. Schulthess, p. 148; Beauchet, II, p. 243.

⁶⁷ See p. 97.

⁶⁸ E. g., Wyse, pp. 526-527. Schulthess, p. 146, note 2, and Beauchet, II, pp. 244-246, believe that the guardian could become lessee.

⁶⁹ Cf. Lysias, XXXII, *Against Diogeiton*, 23: (τὸν ἐπίτροπον) μισθῶσαι τὸν οἶκον ἀπὸ ἀλλοτρίων πολλῶν πραγμάτων; Demosthenes, XXVII, *Against Aphobos*, I, 58: τούτῳ (the guardian) γὰρ ἐξῆν μηδὲν ἔχειν τούτων τῶν πραγμάτων, μισθῶσαντι τὸν οἶκον κατὰ τουτουσὶ τοὺς νόμους.

an unremunerative task.⁷⁰ A conscientious guardian may have been glad to manage his ward's property personally, but, since in this personal administration the guardian did not have to furnish security⁷¹ and faced only the accounting when the orphan reached his majority,⁷² there was always danger that he might be guilty of misappropriation of funds.⁷³ This helps explain why the *μισθωσις οίκου* seemingly was so common. If we are correct in inferring from the passage in Isaeus cited above that a guardian could lease his ward's estate, this would have provided an opportunity for an energetic guardian both to attend to the orphan's affairs personally and also to make a legitimate profit for himself. In such a transaction the guardian certainly must have been in the same position as any other prospective lessee. He would have entered the bidding before the archon and, if his bid was accepted, he would have had to furnish security in the form of *apotimema* for the estate he had leased. Since we know that the *μισθωσις οίκου* could be mutually profitable to lessee and orphan when the former was a stranger,⁷⁴ there is no reason that the same situation could not have obtained when one and the same man happened to be both guardian and lessee.

In every contract concerned with *μισθωσις οίκου* there must have been a stipulation as to when the payments of rents or interest were due. In the sources only two passages bear specifically upon this subject. According to one of them⁷⁵ the lessee, when he settled with the orphan who had attained his majority, paid back the principal and also interest which had accumulated over a long period. In the second, Demosthenes' wording⁷⁶ implies that on the expiration of the contract the principal and the total amount of income due to the orphan were paid down simultaneously. Despite this testimony, however, it is probable that this postponement of payment of all, or a large part of, the rents or interest until the termination of the lease was unusual, for the guardian must have needed the periodic payment of these revenues to meet the expenses of his ward's maintenance and education and to pay the *eisphora*, the only tax, apparently, to which an orphan's estate was liable.⁷⁷ Since in other types of leases

⁷⁰ See note 10, above.

⁷¹ It seems certain that in the case of personal administration of the ward's estate the guardian did not have to provide *apotimema*. As Paoli (*Studi*, p. 170) points out, it would have been impossible for a comparatively poor guardian to furnish security equivalent in value to the property of an orphan much richer than he. This conclusion is confirmed by the sarcastic words of Demosthenes (XXX, *Against Onetor*, I, 7)—*ὥσπερ εἰ τὰ τῶν ἐπιτροπευόντων χρήματ' ἀποτίμημα τοῖς ἐπιτροπευομένοις καθεστάναι νομίζων*—, which clearly imply that the guardian did *not* have to offer *apotimema*; cf. the remarks of Schulthess, pp. 235-236.

⁷² See below, pp. 113-114.

⁷³ Cf. Demosthenes, XXX, *Against Onetor*, I, 6.

⁷⁴ See above, p. 101, and note 25.

⁷⁵ Isaeus, II, *On the Estate of Menekles*, 28-29.

⁷⁶ XXVII, *Against Aphobos*, I, 58.

⁷⁷ There are numerous references to the orphan's liability to the *eisphora*; e. g., Demosthenes, XXVII, *Against Aphobos*, I, 7-8; 36-37; XXVIII, *Against Aphobos*, II, 4; 7. Lysias, XXXII, *Against Diogeiton*, 21-24, is the *locus classicus* for the immunity of orphans' estates from liturgies.

it was common for rents to be paid annually or semi-annually,⁷⁸ it seems reasonable to assume that a similar procedure ordinarily applied to the *μίσθωσις οἴκου*.

During the minority of the orphan various legal actions were available for the protection both of him personally and of his property. Since this chapter is concerned with the *μίσθωσις οἴκου* and not with the institution of guardianship as a whole, however, it will not be necessary to examine all the complex problems to which the subject of the safeguarding of the orphan and his interests gives rise.⁷⁹ A few remarks, I believe, will be sufficient for our purposes. The archon had general supervision over the affairs of the orphan as is clear from Aristotle's attribution to him of the following duties: ⁸⁰ [ἐπιμελείτ]αι δὲ καὶ τῶν ὀρφανῶν — — — — — καὶ κύριός ἐστι τοῖς ἀδικοῦσιν ἐπιβάλλ[λειν ἢ εἰσάγειν εἰς] τὸ δικαστήριον. It is naturally questionable how effective the supervision of one magistrate and his two *πάρεδροι* could be.⁸¹ If the guardian personally administered the estate of his ward, then, of course, as *κύριος τῶν ὄντων*,⁸² he was responsible for the proper management of the property. In the case of a *μίσθωσις οἴκου*, however, this responsibility, for the duration of the lease, fell to the lessee. This statement, which seems logical, is confirmed by a passage in Isaeus ⁸³ in which one guardian says in reference to a co-guardian with whom he is quarreling about the status of certain property: ἀπογραφάσθω πρὸς τὸν ἄρχοντα εἰς τὴν μίσθωσιν τῶν ἐκείνου χρημάτων, ἣν ὁ μισθωσάμενος εἰσπράξει με ταῦτα ὡς ὄντα τοῦ παιδός.

Aristotle ⁸⁴ lists two public suits (*γραφαί*) which could be instituted before the

Diogeiton is rebuked for having charged against his wards expenses for certain festivals and for the trierarchy. Section 24 reads: οὐς ἡ πόλις οὐ μόνον παιδας ὄντας ἀτελεῖς ἐποίησεν, ἀλλὰ καὶ ἐπειδὴν δοκιμασθῶσιν ἐνιαυτὸν ἀφήκεν ἀπασῶν τῶν λητουργιῶν.

⁷⁸ E. g., *I.G.*, II², 2492, lines 3-7, and 2493, lines 13-14, annually; 2496, lines 13-15, and 2499, lines 18-24, semi-annually. A new contract of lease (annual payment) discovered recently in Athens has been published by P. G. Ballenda and N. I. Pantazopoulos in *Πραγματεῖαι τῆς Ἀκαδημίας Ἀθηνῶν*, vol. 13, fasc. 2, 1948, pp. 5-23. See also Adolf Wilhelm, "Attische Pachturkunden," *Archiv für Papyrusforschung*, XI, 1935, pp. 189-217.

⁷⁹ For detailed discussions of this subject and of the legal actions available after the orphan attained his majority, see Schulthess, pp. 189-228; also Schulthess in *R.E.*, s.v. *Μίσθωσις*, p. 2113; Beauchet, II, pp. 258-321.

⁸⁰ *Ath. Const.*, 56, 7. For other references to these duties, see the note in J. E. Sandys' Second Edition, 1912.

⁸¹ Beauchet, II, pp. 269-276, and Lipsius, p. 344, note 20, correctly reject the existence of boards of *ὀρφανοφύλακες* and *ὀρφανισταί* etc. An orphan's estate could consist of such varied components that accurate supervision of the whole must have been extremely difficult. A good illustration of this complexity is to be found in the *Poletai Record* of 367/6 published by Margaret Crosby, *Hesperia*, X, 1941, pp. 14-27. Among the mines leased, one was located at Sounion *ἐν τοῖς Χαρμύλο παιδῶν* (line 45) and another at Sounion in Nape *ἐν τοῖς Χαρμύλο παιδῶν* (lines 79-80). The sons of Charmylos apparently were minor orphans, for, if they were adults, certainly their names would have been recorded. It is impossible to tell from this inscription whether the "fields" were under the personal administration of a guardian or whether they had been let to a lessee.

⁸² Demosthenes, XXXVI, *For Phormio*, 22; cf. XXXVIII, *Against Nausimachos*, 6.

⁸³ XI, *On the Estate of Hagnias*, 34.

⁸⁴ *Ath. Const.*, 56, 6.

archon in behalf of the orphan during his minority, the ὀρφανῶν κακώσεως and the οἴκου ὀρφανικοῦ κακώσεως. He states that these both were κατὰ τῶν ἐπιτρόπων, but Lipsius⁸⁵ is probably correct in maintaining that the former at least could also be brought against others who wronged an orphan. Isaeus' speech, XI, *On the Estate of Hagnias*, is a case of ὀρφανῶν κακώσεως, and we learn from sections 6 and 15 that this particular type of suit was classified as an εἰσαγγελία. The οἴκου ὀρφανικοῦ κακώσεως, on the other hand, was designated as a φάσις.⁸⁶ This action was a more specialized one and apparently was resorted to chiefly in cases where the guardian had neglected (presumably contrary to instructions) to have the orphan's property let. The lost speech of Lysias, Πρὸς τὴν φάσιν τοῦ ὀρφανικοῦ οἴκου, was concerned with this type of suit.⁸⁷

The actions just mentioned were public ones and therefore were instituted by ὁ βουλόμενος. The ward, because of his minority, naturally could not engage in legal proceedings himself. His guardian, however, as his legal representative, must have been able to take the necessary steps to protect the interests of the orphan when the estate had been let. The available action apparently was the ἐνοικίου δίκη—a suit which was brought against a lessee who had not been paying the rents and interest according to the terms of the contract.⁸⁸

When the orphan had attained his eighteenth birthday, he was enrolled εἰς τὸ ληξιαρχικὸν γραμματεῖον καὶ κύριος ἐγένετο τῆς οὐσίας.⁸⁹ This enrolment, which was preceded by a δοκιμασία, was normally attended to by the guardian.⁹⁰ As soon as the ward had officially reached his majority, the guardians, if they had been managing the estate personally, were supposed to turn over the property and render an account-

⁸⁵ Pp. 344-345.

⁸⁶ Demosthenes, XXXVIII, *Against Nausimachos*, 23.

⁸⁷ Harpocration, *s.v.*, Φάσις. Harpocration states that the guardian could also be prosecuted under this action εἰ ἐλάττωνος ἢ κατὰ τὴν ἀξίαν μεμίσθωτο. This statement has led to much discussion, since variant readings for ἀξίαν, such as ἄδειαν and τάξιν, occur in other lexicographers. Any of these readings is difficult to interpret in terms of an intelligible charge against the guardian. For a detailed discussion of the problems involved, see Schulthess, pp. 209-220, and Lipsius, pp. 346; 352-353. For our purposes the general statement is sufficient that a guardian, in addition to being liable to prosecution if, contrary to instructions, he did not have the property let, apparently also could be accused under the φάσις for other offences connected with the leasing of the estate. One wonders if under the φάσις there could not have been included charges of mismanagement against a guardian who was personally administering his ward's property. To the best of my knowledge, however, there is no evidence on this subject.

⁸⁸ The only passage, I believe, in which this suit is mentioned ([Demosthenes], XLVIII, *Against Olympiodoros*, 45) refers to an ordinary lease, but it is reasonable to assume that this action also could be applied to a μίσθωσις οἴκου. Cf. Beauchet, II, p. 257, and Lipsius, p. 757.

⁸⁹ Aeschines, I, *Against Timarchos*, 103; cf. 18. For the age, see Aristotle, *Ath. Const.*, 42, 1-2.

⁹⁰ Antiphon in Athenaeus, XII, 28 (525b): ἐπειδὴ ἐδοκιμάσθη ὑπὸ τῶν ἐπιτρόπων, παραλαβὸν παρ' αὐτῶν τὰ σκευῶν χρήματα — —. Demosthenes, because of his bad relations with his guardians, was enrolled among the demesmen by a certain Philodemos; Aeschines, II, *On the False Embassy*, 150.

ing to him. If the orphan was dissatisfied with the administration of his guardians, he could immediately bring suit against them by the *δίκη ἐπιτροπῆς*.⁹¹ Demosthenes⁹² summarizes the procedure very succinctly: *ἐγὼ δ' — — — δοκιμασθεῖς ἐνεκάλοιν καὶ λόγον ἀπήθουν, καὶ πάντων ἀποστερούμενος τὰς δίκας ἐλάγχανον ἐπὶ τοῦ αὐτοῦ ἄρχοντος*.

In case the estate had been let according to a *μίσθωσις οἴκου*, the lessee was obligated, as soon as the orphan reached his majority, to restore to him the property and whatever rents or interest were due.⁹³ Since the orphan now was an adult, presumably the guardian had no official responsibility in this transaction. There is no evidence that any legal formalities were observed between the lessee and the orphan, but naturally it was a wise precaution for the lessee to arrange that the discharge of his obligations should take place before witnesses.⁹⁴ Strangely enough, there is no mention in the sources of any action taken by the adult orphan against the lessee. The explanation for this presumably is that, if full payment was not made to the orphan, he could foreclose on the apotimema which had been furnished by the lessee.⁹⁵

The argument throughout this chapter has been rather complicated. It may be helpful, therefore, to end this discussion with a brief summary of the results obtained by this investigation of various controversial aspects of the *μίσθωσις οἴκου*. Guardians, to relieve themselves of responsibility, frequently had recourse to this institution, but the leasing was obligatory only if instructions to that effect had been given by the testator. The property was let at a public auction under the supervision of the archon and in the presence of a panel of dicasts. The whole estate of the orphan—both movables and immovables—was usually leased, but it is reasonable to believe that on occasions only part of the property was let. The lessee (or lessees), who rarely was the guardian himself, had to furnish security equivalent in value to the property leased. This security, apotimema, was always in the form of real property, and, since it was a type of hypothec—if not a forerunner of the later hypothec—, the lessee (debtor) retained possession. Horoi were erected on the property offered as apotimema to

⁹¹ Demosthenes' suit against Aphobos (Orations XXVII and XXVIII) was a *δίκη ἐπιτροπῆς*. Aristotle, *Ath. Const.*, 42, 5, states that for two years after attaining his majority the young man could engage in no litigation—*πλὴν περὶ κλήρου καὶ ἐπικλήρου, κἂν τι κατὰ τὸ γένος ἱερωσύνη γένηται*.

⁹² XXX, *Against Onetor*, I, 15. For a full description of an accounting, see Lysias, XXXII, *Against Diogeiton*, 19-29. The orphan had to bring suit concerning the guardianship within five years; Demosthenes, XXXVIII, *Against Nausimachos*, 17-18; 27; cf. XXXVI, *For Phormio*, 27.

⁹³ Isaeus, II, *On the Estate of Menekles*, 28-29. Demosthenes, XXVII, *Against Aphobos*, I, 58.

⁹⁴ Transactions involving the payment of money usually, quite naturally, were carried out in the presence of witnesses; *e. g.*, Demosthenes, XXVII, *Against Aphobos*, I, 58; XXVIII, *Against Aphobos*, II, 7; XXX, *Against Onetor*, I, 19-24; [Demosthenes], XXXIV, *Against Phormio*, 30-32.

⁹⁵ As suggested above, p. 109, an orphan, if he wanted cash rather than the real property represented by the apotimema, may have permitted the lessee to sell the security and thus discharge his obligation through the proceeds of the sale. In case the value of the security was greater than that of the obligation (despite the appraisal of the *ἀποτιμηταί*—see pp. 101-102 above —), this procedure would have been the equivalent of the restoration of the "excess" to the debtor.

publicize that the orphan had a lien on it. The dates at which payments of rents and interest were due must have been stipulated in the contract. Probably they were usually payable annually—or even semi-annually—as was customary in ordinary leases. If the lessee was delinquent in fulfilment of his obligations, presumably the guardian, in behalf of his ward, could bring action against him by means of the *ἐνοικίου δίκη*. When the orphan attained his majority, the lessee had to return to him the capital value of the property which had been leased and any rents and interest which had accumulated. In case of default on the part of the lessee, the orphan could foreclose upon the *apotimema* and thereby reimburse himself.

CHAPTER VI

ΑΠΟΤΙΜΗΜΑ ΠΡΟΙΚΟΣ

ὄρος χωρίου
καὶ οἰκίας ἀπ
οσίμημα προ
ικὸς Ἀρχίππη
ΤΧΧ

This inscription ¹ is reproduced here to illustrate the second type of horos mortgage stone published in the *Editio Minor* of the *Inscriptiones Graecae*. About 36 inscriptions of this kind from Attica and certain Aegean islands are still extant.² Three stones, recently discovered in the Athenian agora, have been published above (Chapter I, Nos. 6-8). It is clear from the phraseology of these inscriptions that they were intimately associated with the institution of the dowry as practiced at Athens. The purpose of this chapter is not to investigate the whole Athenian dowry system,³ but to try to explain the significance of apotimema in its relation to the dowry. Before we turn to this task, however, a few introductory remarks on Athenian dotal customs should be made. These comments will provide the necessary background for the subsequent detailed study.

The institution of the dowry at Athens was an ancient one. Aeschines ⁴ preserves the tradition that Akamas, one of the sons of Theseus, received Ennea Hodoi as dowry for his wife. Solon, probably as part of his sumptuary legislation, limited drastically the size of dowries. According to Plutarch,⁵ he allowed no woman, except an heiress (*ἐπίκληρος*), to bring as dowry more than a few articles of clothing and household furniture of small value. Solon's dotal law is a matter of controversy, but it is certain that in the course of time the restrictions prescribed by it were either repealed or forgotten. In the fifth century, we are told, Alcibiades received the huge dowry of ten talents with his wife.⁶ The state showed its approval of the institution by conferring a dowry on each of the daughters of Aristides and also on the grand-

¹ I.G., II², 2659.

² I.G., II², 2659-2683. For the inscriptions published subsequently and for the non-Attic ones, see above, Chapter I, Nos. 6-8; Chapter II, Nos. 7-10 (Attica); Chapter II, pp. 37-40 (Islands).

³ For a treatment of the institution of the dowry as a whole at Athens, see Beauchet, I, pp. 244-337; Lipsius, pp. 482-499. G. Barrilleau, "De la Constitution de Dot dans L'Ancienne Grèce," *Nouvelle Revue Historique de Droit Français et Étranger*, VII, 1883, pp. 145-190, has been largely superseded by Beauchet.

⁴ II, *On the False Embassy*, 31.

⁵ *Solon*, 20, 4.

⁶ Andocides, IV, *Against Alcibiades*, 13-14; Plutarch, *Alcibiades*, 8, 2.

daughter of Aristogeiton.⁷ By the fourth century, as is evident from the Orators and from inscriptions, the dowry system was almost universally practiced.

The dowry naturally was usually furnished by the woman's father. Frequently in his will a man would leave instructions about dowries for his daughters and widow.⁸ In the case of men who died intestate, the duty of dowering the women concerned fell upon whatever relatives were acting as their *κύριοι*.⁹ On occasions, presumably if the *kyrios* was very poor, other kinsmen or even friends would provide the dowry.¹⁰ Although it is most improbable that the giving of a dowry was obligatory by law,¹¹ still the custom was so common that absence of a dowry often cast suspicion on the legitimacy of the union.¹² Even so, it is certain that there were instances of legitimate marriages in which the wife was undowered.¹³ Three contrasting terms,¹⁴ therefore, depending on the circumstances, could be applied to a married woman—*ἄπροικος*, *ἐπίπροικος* and *ἐπικλήρος*.

The nature and the amount of the dowry were agreed upon at the time of the betrothal. No legal formalities were necessary, but, as a precaution against misunderstandings which might lead to disagreements and litigation, it was customary for the arrangements to be made in the presence of witnesses.¹⁵ Sometimes, apparently, the agreement was that the dowry would be increased if certain conditions were fulfilled. At any rate the story is preserved that Alcibiades, in addition to the initial dowry of ten talents, received another ten when his wife became a mother on the claim that this had been the original understanding.¹⁶ The betrothal and the conferring of the dowry could occur long before the marriage. In the case of Demosthenes' family, for example, the father on his deathbed betrothed his wife and his five year old daughter to two of the guardians and at the same time gave the dowries to the future husbands.¹⁷ In such a situation the designated husband, until the occasion of the marriage, was supposed to contribute to the maintenance of his future wife by paying

⁷ Plutarch, *Aristides*, 27, 1 and 4. In the third century there were *nomoi* at Athens to the effect that the council and assembly *ἐπιμελεῖσθαι* of benefactors of the State and their descendants—*διδόναί δὲ καὶ θυγατρῶν ἐ[ἰ]ς ἔγ[δοσ]ιν τὸν [δῆ]μον π[ροί]κα [ῶ]σιν ἂν βού[λ]η[τ]α[ι]* (*I.G.*, II², 832, lines 18-20, 229/8 B.C.).

⁸ Demosthenes, XXVII, *Against Aphobos*, I, 5.

⁹ Beauchet, I, pp. 259-274.

¹⁰ Lysias, XIX, *On the Property of Aristophanes*, 59; Demosthenes, XVIII, *On the Crown*, 268; XXVII, *Against Aphobos*, I, 69; XLV, *Against Stephanos*, I, 54.

¹¹ This has been demonstrated by Beauchet, I, pp. 262-269 (against Barrilleau).

¹² Isaeus, II, *On the Estate of Menekles*, 5; III, *On the Estate of Pyrrhos*, 8-9; 28-29; [Demosthenes], XL, *Against Boiotos*, II, 20-27.

¹³ Lysias, XIX, *On the Property of Aristophanes*, 14-15; 17.

¹⁴ Cf. Beauchet, I, p. 260; Lipsius, p. 489.

¹⁵ Isaeus, III, *On the Estate of Pyrrhos*, 18-29; Demosthenes, XXX, *Against Onetor*, I, 19-23; XLI, *Against Spoudias*, 6.

¹⁶ Andocides, IV, *Against Alcibiades*, 13; Plutarch, *Alcibiades*, 8, 2.

¹⁷ Demosthenes, XXVII, *Against Aphobos*, I, 4-5; 12; 45.

interest on the dowry, probably at the common rate of 12%.¹⁸ If the marriage did not occur, naturally the dowry had to be returned.¹⁹

The dowry consisted most commonly of money with the frequent addition of various other movables. Land and other real property were not often given because of the unwillingness to allow the family plot to be diminished.²⁰ The dowry left by Pasio to his widow Archippe will serve to illustrate a generous settlement. It comprised two talents, a lodging-house worth a hundred minas, female slaves, jewelry, and other personal possessions.²¹ On the occasion when the dowry was agreed upon between the *kyrios* of the woman and the prospective husband, it was very important for the former to make a declaration and evaluation of everything included in the dowry. Only the items contained in this *τίμησις ἐν προικί* constituted the dowry proper and were subject to return, under certain conditions which will be described later, to the original *kyrios* or his successor.²² Such gifts as the *ἐπαύλια* and the *ἀνακαλυπτήρια*,

¹⁸ Demosthenes, XXVII, *Against Aphobos*, I, 15-17; II, 11; III, 33; cf. Lipsius, pp. 482 and 498.

¹⁹ Demosthenes, XXVII, *Against Aphobos*, I, 69; II, 11.

²⁰ Beauchet, I, pp. 290-291; Lipsius, p. 491. Certain horoi, however, may afford evidence for dowries in real property. The purpose of most of the dotal horoi, as we shall see later, was to publicize the *ἀποτίμημα*. An inscription from Syros, however, (*I.G.*, XII, 5, 707), similar to Attic horos stones except for the omission of the word *ἄρος*, records the dowry given to the woman: 'Ἥγησούς| τῆς Κλεομ|όρου θυγατρὸ|[ς] προίξ τὸ χωρί|ον. One wonders, therefore, what is the proper interpretation of such inscriptions as *I.G.*, II², 2666, and Nos. 7 and 8, published in Chapter I, where the formula runs: *ἄρος χωρίον προικός* without any reference to *ἀποτίμημα*. It is possible, of course, that a contemporary Athenian would have instinctively supplied the word *ἀποτίμημα*, but I do not think we have the right to exclude the possibility that these stones may have recorded the actual dowry. If *I.G.*, II², 2765 and 2766, refer to dotal transactions at all, the same doubt can be felt about their proper interpretation.

²¹ Demosthenes, XLV, *Against Stephanos*, I, 28.

²² Isaeus, III, *On the Estate of Pyrrhos*, 35; Demosthenes, XLI, *Against Spoudias*, 27-28; [Demosthenes], XLVII, *Against Euergos*, 57. In this connection attention should be called to two horos inscriptions, *I.G.*, II², 2673 and *I.G.*, XII, *Supplementum*, p. 104, no. 195 (from Naxos). In the usual type of dotal horos stone, such as the one quoted at the beginning of this chapter, we shall discover below that the *apotimema* signified the security guaranteeing the payment or the restitution of the dowry. In the two inscriptions just cited, however, we meet a formula like this: *ἄρος οἰκίας ἐν προικί ἀποτετιμημένης*. It has generally been assumed that, despite the difference in phraseology, these inscriptions, like those with more normal wording, should be translated as: "a house (etc.) offered as security for the dowry." This may be correct and Beauchet, I, p. 277, note 4, may be right in warning that care should be taken not to confuse the idea of *ἀποτιμᾶν* with that of *ἐντιμᾶν*. Nevertheless, the expression *ἐν προικί* is difficult to interpret satisfactorily if in these two inscriptions the perfect passive participle of *ἀποτιμᾶν* is translated "offered as security." Since the primary meaning of *ἀποτιμᾶν* is "to evaluate," it is possible that in the inscriptions under consideration that sense is preferable to the notion of security. If, then, we translate—"a house (etc.) evaluated in the dowry"—, which certainly is a more natural translation of the Greek, we will recognize in these two inscriptions examples of the *τίμησις ἐν προικί*. These two stones, accordingly, as possibly those mentioned in note 20 above, would have recorded the dowry (or part of it) rather than the security offered for the dowry.

given to the bride by her *kyrios*, or by her husband, friends, and relatives, respectively, were not included in the *πίμνησις*. They apparently were considered to be under the ownership of the husband who, accordingly, was not obligated to return them in case of the dissolution of the marriage.²³

The dowry could either be delivered at once or, if the *kyrios* did not have the sum available at the time or was not satisfied with the security offered by the prospective husband, payment could be deferred.²⁴ In this event, interest was due on the unpaid dowry, probably at the ordinary rate of 12%.²⁵ Instalment payment of the dowry was also possible as can be learned from Demosthenes' speech, XLI, *Against Spoudias*, 3-5, where the plaintiff states that of the 40 mina dowry promised by his father-in-law Polyeuktos, 1000 drachmas were not to be paid until Polyeuktos' death.²⁶

These introductory remarks should be sufficient to enable us now to approach the basic problem which must be examined in this chapter—namely, the nature and the purpose of *ἀποτίμημα* in its relation to the dowry. According to the traditional view,²⁷ the dotal *apotimema* was security in the form of real property guaranteeing either the restitution or the payment of the dowry. When the prospective husband received the dowry from the woman's *kyrios*, he had to designate an appropriate amount of real estate as security (*apotimema*) for the restitution of the dowry in case the marriage was dissolved. Similarly the *kyrios*, if he did not deliver the dowry at the time of the union, had to provide *apotimema* guaranteeing its future payment. In both cases *horoi*, like the one reproduced at the beginning of this chapter, were placed on the property offered as security by the dotal debtor to publicize the lien which existed on that property. It should be noted that from the wording of the *horos* itself it is impossible to tell whether the dotal debtor was the husband or the *kyrios*. Since, however, the husband presumably usually had to provide *apotimema*, whereas the *kyrios* was so obligated only if he had deferred payment of the dowry, it can safely be stated that, according to the law of averages, the majority of the extant *horoi* testify to the security offered by the husband guaranteeing the restitution of the dowry if that necessity should arise. In both cases, if at the appointed time the dotal debtor had not fulfilled his obligations, the creditor had the right to foreclose on the *apotimema*.

²³ Lipsius, pp. 491-492; Beauchet, I, pp. 282-287. Beauchet discusses at some length the passage in the Digest, Book XXIII, III, 9, 3, where Ulpian identifies the *peculium* of the woman in Roman law with the *παράφερα* of the Greeks. His conclusion is that either the *παράφερα* did not exist in Attic law of the classical period or, if they did, they were of too little significance to deserve attention.

²⁴ Lipsius, pp. 489-490.

²⁵ Beauchet, I, pp. 293-295.

²⁶ For instalment payment, see also Demosthenes, XXX, *Against Onetor*, I, 20. *I.G.*, II², 2679, may also be an example of payment of the dowry by instalments; cf. R. Dareste, *B.C.H.*, II, 1878, pp. 485-489. The interpretation of this inscription, however, is still a matter of doubt.

²⁷ E. g., Beauchet, I, pp. 297-299; 331-337; Lipsius, pp. 490-491; 499.

In this view, then, the dotal apotimema, like the apotimema in the *μίσθωσις οἴκου*, was a form of hypothec. The security, of which the debtor retained possession, was established when the dotal arrangements were made, and remained in his possession unless, by violating the terms of the agreement, he furnished cause to the creditor to foreclose. This conception Paoli completely rejects.²⁸ His interpretation, which emphasizes the evolutionary aspect of the *ἀποτίμημα*, is a rather complex one and will be discussed in detail as we proceed with our investigation. At this point it will be sufficient to summarize briefly the chief characteristics which he recognizes in the institution. According to him, the *ἀποτίμησις* (the act of creating an *ἀποτίμημα*) was not a right of security (*diritto di garanzia*), but a *datio in solutum*. If the dotal debtor was in delay, the creditor could arrange that there be given him *in solutum* as *ἀποτίμημα* an appropriate amount of the debtor's property. The *ἀποτίμησις* occurred, therefore, not when the dotal agreement was first reached but at its maturity, and its purpose was not to secure the obligation but to extinguish it. As soon as the *datio in solutum* had been effected through the assignment to the creditor of apotimema in lieu of payment of the original obligation, horoi were erected on the apotimema to bear witness to the definitive transfer of the ownership of the property concerned. In Paoli's eyes this is the way in which the majority of the literary evidence has to be interpreted. In the course of time, however, as is revealed chiefly by the horos stones, it became customary for the apotimema to be established when the dotal arrangements were first made and for the creditor, as the creditor in the *μίσθωσις οἴκου*, to take actual possession of this property, thereby obtaining a "real right." Ultimately for this actual possession on the part of the creditor there was substituted a fictitious possession through the medium of the horoi.²⁹ This development was the result of custom, and Paoli questions whether it was ever sanctioned by law in the Attic period.

Paoli's arguments are difficult to reproduce, largely because the reader is often in doubt as to what period and to what type of apotimema he is referring. This synopsis, however, I believe is accurate, although, because of its brevity, it obviously cannot do justice to the niceties of his argumentation. The keystone of his theory is that the *ἀποτίμησις* was contemporary with or subsequent to maturity and that its purpose was not to secure but to extinguish the obligation. This conception we shall have to examine at length when we undertake the analysis of the relevant orations, but, before turning to that task, it will be useful to glance at certain of the definitions of *ἀποτίμημα* given by the lexicographers.

Harpocration³⁰ provides the following information about the dotal apotimema :

²⁸ *Studi*, pp. 172-194; *Sul Diritto Pign.*, pp. 163-167; 173-177; " *Datio in Solutum*," pp. 181-212.

²⁹ *Studi*, pp. 191-194; *Sul Diritto Pign.*, pp. 166-167; " *Datio in Solutum*," pp. 201-206.

³⁰ Under the heading, *Ἀποτιμηταὶ καὶ Ἀποτίμημα καὶ Ἀποτιμᾶν*. The first part of the definition is concerned with the *ἀποτίμημα* in a *μίσθωσις οἴκου*; it is quoted in Chapter V, p. 101.

εἰώθεσαν δὲ καὶ οἱ τότε, εἰ γυναικὶ γαμουμένη προῖκα διδοῖεν οἱ προσήκοντες, αἰτεῖν παρὰ τοῦ ἀνδρὸς ὡσπερ ἐνέχυρόν τι τῆς προικὸς ἄξιον, οἶον οἰκίαν ἢ χωρίον. ἐλέγετο δὲ ὁ μὲν δούς τὸ ἀποτίμημα ἐνεργητικῶς ἀποτιμᾶν, ὁ δὲ λαβὼν ἀποτιμᾶσθαι. In Bekker's, *Anecdota Graeca*, I, p. 201, lines 1-4, after a definition similar to that of Harpocration, an illustration is added: οἶον ὁ νύμφιος πρὸς τὴν προῖκα τῆς γυναικὸς ἀπειτίμησε τήνδε τὴν οἰκίαν, ἢ δὲ νύμφη, περὶ ἧς ἔδωκε προικός, ἀπειτίμησατο τήνδε τὴν οἰκίαν.

In the same lexicographical collection, I, p. 423, lines 15-17, additional data are given: ἐκλήθη δὲ τὸ ὑπάλλαγμα ἀποτίμημα, διότι ἐτιμᾶτο πρὸς τὴν προῖκα, ἵνα μὴ ἔλαττον ἢ ἄλλὰ πλέον αὐτῆς. Two statements of Pollux³¹ are also relevant to our subject: αἰ δὲ πρὸς τὴν προῖκα ὑποθήκαι ἀποτιμήματα (III, 36), and: ἀποτίμημα δ' ἐστὶν οἶον ὑποθήκη, κυρίως μὲν πρὸς τὴν προῖκα, ἥδη δὲ καὶ πρὸς τὰς μισθώσεις (VIII, 142).

It is clear from these definitions that in the eyes of the lexicographers the dotal apotimema should be classified as a hypothec. Paoli³² would probably contend that they were referring to the later development of the institution. To this it can only be answered that the lexicographers based their explanations on the same speeches with which we are familiar and also on many others no longer extant. It should be noted that these definitions explicitly refer only to the obligation incurred by the husband. For the *kyrios* as dotal debtor we shall have to examine other sources which will be discussed below. The picture painted by the lexicographers is reasonably clear. At the time of the marriage³³—not at its dissolution—the bridegroom was accustomed to offer security in the form of apotimema as a guarantee for the restitution of the dowry if the occasion should arise. To judge from the definitions and from the horos inscriptions, this security, as in the case of the *μισθωσις οἴκου*, always consisted of real property—a farm, house, garden, workshop, etc. The apotimema was to be equal in value to the dowry or even to exceed it. It is impossible to tell how literally these last words should be taken, but certainly the bride's *kyrios* would have made an effort to have the value of the security offered by the bridegroom at least equal in value to that of the dowry. No explanation is given as to how the security was appraised, but,

³¹ Cf. Hesychius: ἀποτιμήματα· αἰ πρὸς τὰς φερνὰς ὑποθήκαι; and ἀποτιμήσασθαι· τὸ λαβεῖν εἰς ὑποθήκην.

³² The definition which apparently impresses Paoli, (*Studi*, p. 173, note 2) is to be found in Bekker's, *Anecdota Graeca*, I, p. 201, lines 30-31: Ἀποτιμήματα: ὅταν τις, προικός ὀφειλομένης, κτήματι τοῦ λαβόντος τὴν προῖκα ἐνεχυριάσῃ. He infers from these words that the ἀποτίμημα was taken (in the form of a *datio in solutum*) only after the maturity of the obligation. I must confess that I see nothing in this definition to invalidate the interpretation that the creditor, when the dotal debtor was delinquent in his obligation, foreclosed on the apotimema which had been established on the occasion when the dotal arrangements were first made. It might be remarked that it is somewhat strange for Paoli to single out this one definition to the exclusion of two other more detailed ones in the same collection.

³³ Note the words *νύμφιος* and *νύμφη* used in Bekker's, *Anecdota Graeca*, I, p. 201, lines 1 and 3. Cf. the words of Harpocration, quoted in the text above— εἰ γυναικὶ γαμουμένη προῖκα διδοῖεν οἱ προσήκοντες—.

since dotal arrangements were a private matter between the two parties concerned, it is inconceivable that official assessors—*ἀποτιμηταί*—were employed as was done when the apotimema offered by the lessee of an orphan's estate was evaluated.³⁴

From the information to be gleaned from the lexicographers, therefore, it seems that the dotal apotimema was a type of hypothec. In the two preceding chapters the conclusion was reached, contrary to Paoli's thesis, that in the hypothec and in the apotimema furnished by the lessee in a *μίσθωσις οἴκου* the debtor retained possession of the security for the duration of the contract. Was a similar procedure followed in the case of the dotal apotimema? To try to find an answer to this and to other questions we must turn to the analysis of certain speeches of Demosthenes. In them Paoli finds the best—one could almost say the only—support for his contention that the dotal apotimema was a *datio in solutum*. It will be our task to ascertain whether the evidence must be interpreted as he maintains or whether it can be equally well—or even better—explained in a different fashion.

In Demosthenes' two speeches against Onetor (XXX and XXXI) there is preserved the fullest literary account of the *ἀποτίμημα προικός*. The suit was one for ejectment (*δίκη ἐξούλης*) and arose from the fact that when Demosthenes, after being awarded damages in his prosecution of Aphobos,³⁵ tried to collect from his former guardian, he was driven off the land by Onetor who maintained that the property was designated as apotimema for him.³⁶ These speeches are exceedingly difficult to interpret, for, as is well known, Demosthenes maintains that all Onetor's statements are lies, but, lies or not, it is evident that both defendant and plaintiff would have been careful to make only such assertions as did not too flagrantly contravene Athenian law and usage. Consequently, these orations should yield some definite information on the institution of the dotal apotimema.

It will be useful to begin with a brief summary of the facts of the case.³⁷ Of Onetor's account³⁸ we know only that he had married his sister to Aphobos and that he claimed to have provided a dowry after a short delay. He also maintained that the marriage terminated in divorce and that he was unable to recover the dowry, *ἦς φησι νῦν ἀποτειμῆσθαι τὸ χωρίον* (4). Demosthenes' version, naturally, is quite different. According to him, Onetor, after his sister had left her former husband Timokrates, wanted to marry her to Aphobos, but hesitated because he feared that Aphobos would be held to account for a large sum of money when Demosthenes attained his majority. He did give her in marriage, however, but, so as not to

³⁴ See Chapter V, pp. 101-102.

³⁵ Demosthenes, XXIX, *Against Aphobos*, III, 2-3; 60; XXX, *Against Onetor*, I, 2; 32; XXXI, *Against Onetor*, II, 2; 14.

³⁶ Demosthenes, XXX, *Against Onetor*, I, 2; 4; 8.

³⁷ In the following discussion section numbers will refer to *Against Onetor*, I, unless otherwise stated.

³⁸ For an account of Onetor's life, see A. E. Raubitschek in *R.E., s.v. Onetor*, (3), pp. 471-472.

jeopardize the dowry, the arrangement was that Timokrates should keep it and pay interest on it at the rate of 10% (7). After Demosthenes won his suit against Aphobos, Onetor claimed that he had paid the dowry and that, although his sister had divorced Aphobos, he was unable to recover it. Subsequently, when Demosthenes came to Aphobos' farm to collect his damages, Onetor ἀποτιμήσασθαι φάσκων τὴν γῆν ἐξάγειν μ' ἐξ αὐτῆς ἐτόλμησεν (8). Demosthenes denies both the bestowal of the dowry and the validity of the divorce, and, therefore, the possibility of an ἀποτίμησις. All the actions of Onetor and Aphobos, he maintains, were designed to thwart him in his attempt to recover damages from his former guardian (4-5; 25-30, and *passim*).

Since the dotal apotimema is frequently referred to in this speech, one would expect that it would be a simple matter to ascertain the nature of the institution. Unfortunately this is not the case. Again and again the verb ἀποτιμᾶν or the nouns ἀποτίμημα and ἀποτίμησις are so used that they can be interpreted either according to the traditional view or to that of Paoli. It would be fruitless to examine all the places where the language is ambiguous (e. g., sections 4 and 8), but certain passages, which Paoli claims as evidence for his thesis, must be carefully considered.

In section 18 Demosthenes in reference to Onetor and his friends says: οἱ γὰρ ἐν τοσοῦτῳ χρόνῳ καὶ ὀφειλῆσαι καὶ ἀποδοῦναι καὶ τὴν γυναικ' ἀπολιπεῖν καὶ οὐ κομίσασθαι καὶ τὸ χωρίον ἀποτιμήσασθαι φασιν. Paoli³⁹ is impressed by the order in which the various stages in the relations between Onetor and Aphobos are mentioned: owing the dowry, paying it, the divorce, inability to recover the dowry, and finally τὸ χωρίον ἀποτιμήσασθαι φασιν. There is no doubt that the sequence of events as expressed here lends itself easily to the explanation that as the last step in the series, when the dowry was not returned, Onetor received according to a *datio in solutum* the farm in lieu of the dowry (cf. ἀντὶ τῆς προικός, section 26). Nevertheless, the traditional interpretation is also possible. Since the fourth period was concerned with the non-restitution of the dowry, it is legitimate to translate the words characterizing the fifth stage as "they held the farm as security." If the purpose of the dotal apotimema was to guarantee the return of the dowry, a reference to it, after the statement that the dowry had not been recovered, would be perfectly natural. The pretense that the farm was serving as security was Onetor's excuse for driving Demosthenes off the land.

In section 26 we read: μετὰ τὸ γεγράφθαι παρὰ τῷ ἄρχοντι ταύτην τὴν γυναικ' ἀπολελοιπυῖαν καὶ τὸ φάσκειν Ὀνήτορ' ἀντὶ τῆς προικός ἀποτετιμήσθαι τὸ χωρίον. Paoli⁴⁰ comments as follows on this passage: "Risulta dunque la necessaria posteriorità dell' ἀποτίμησις, e della conseguente affissione degli ὄροι, all' inadempienza del debitore." Certainly the second clause can be translated "Onetor had taken the farm as a *datio in solutum* in place of the dowry," if that is the meaning inherent in the verb ἀποτιμᾶν.

³⁹ "Datio in Solutum," pp. 193-194.

⁴⁰ *Ibid.*, p. 195.

It seems to me, however, that the words can also be translated “Onetor had taken the farm as security (in return) for the dowry.” Paoli asserts that the expression *ἀντὶ τῆς προικός* leads only to his interpretation; if the idea of security were present, the Greek would be: *δοῦναι τὴν προίκα ἐπὶ τῷ χωρίῳ*. Unquestionably that is a common way to express the idea of *giving* something on security, but obviously it does not prove that the use of the preposition *ἀντί* after the verb *ἀποτιμᾶσθαι* excludes the notion of security. In this connection it is pertinent to consider the formula in the dotal horos inscriptions—*ὄρος χωρίον ἀποτίμημα* (or *ἀποτετιμημένου*) *προικός*. Paoli⁴¹ admits that many of these horoi publicized not a *datio in solutum* which had been effected but the establishment of security over which the creditor exercised a fictitious possession. Thus the translation would have to be: “Marker of a farm, security (or given in security) for the dowry.” A reasonable explanation for the genitive case of *προικός* is that in the abbreviated formula the preposition *ἀντί* on which it depends was omitted.⁴²

Section 29 of this first speech against Onetor has given rise to much discussion.⁴³

In it Demosthenes makes the following statement: *καίτοι δεινὸν τὸν μὲν λέγειν ὡς ἀπετιμήσατο τὸ χωρίον, τὸν δ' ἀποτετιμηκότα φαίνεσθαι γεωργοῦντα*. In these words Demosthenes expresses his indignation at the fact that the *ἀποτιμήσας* (Aphobos) is still in possession. Taken by itself, the passage certainly implies that it was normal for the *ἀποτιμησάμενος* to have possession. Paoli, who recognizes in the *ἀποτιμησάμενος* the man who receives some property *ἀντὶ τῆς προικός* through a *datio in solutum*, naturally finds support for his thesis in these lines. In the light of the whole speech, however, and especially sections 25-30, another interpretation is possible, if not preferable. Demosthenes claims that Aphobos and Onetor have conspired to prevent him from collecting from the former the damages granted by the court. Their strategy was to pretend that Onetor had paid the dowry to Aphobos, that a divorce had occurred, and that Onetor had been unable to recover the dowry. In such circumstances, according to the traditional view, the man who had given the dowry had the right to foreclose on the security (apotimema) which the husband had established to guarantee the restitution of the dowry. In fact, if the dotal creditor did not foreclose, the payment of the dowry and the genuineness of the divorce might properly be questioned. The lines quoted in the Greek above can easily be interpreted as a reference to such a suspicion. Demosthenes asserts very emphatically that the fact that the

⁴¹ *Studi*, pp. 191-194. See above, p. 120.

⁴² Paoli (“*Datio in Solutum*,” pp. 195-196) sees further evidence for his theory of the *datio in solutum* in I, 31 (cf. II, 11)—*εἰ τὴν προίκα δούς, ὡς φησιν, ἀντ' ἀργυρίου χωρίον ἀμφισβητούμενον ἀπελάμβανεν*. Since the verb *ἀπολαμβάνειν* is commonly used when there is reference to the recovery of the dowry (e. g., Isaeus, VIII, *On the Estate of Kiron*, 8; Demosthenes, XXX, *Against Onetor*, I, 16; XL, *Against Boiotos*, II, 14), it seems to me that in the Greek quoted above we have an allusion to the “recovery” of the security in place of the money—i. e., foreclosure.

⁴³ Paoli, *Studi*, pp. 176-177; “*Datio in Solutum*,” pp. 196-200; 211-212; La Pira, pp. 318-319.

creditor has not taken possession by foreclosure shows clearly that the payment of the dowry and the subsequent divorce were fictitious. If this explanation is correct, this passage informs us that, if there was no divorce, the dotal debtor (*ἀποτίμησας*) remained in possession of the property he had offered as security.

There are various other passages concerning apotimema in this speech which could be discussed, but the phraseology is so ambiguous that one either has to suspend judgment or interpret them according to his pre-conceived notions. Enough has been said, however, to show that Paoli's ideas are open to considerable doubt. We must now turn to the second oration against Onetor.

In this short and baffling speech Demosthenes continues his attempt to prove that Onetor had never paid the dowry, that the divorce between Aphobos and Onetor's sister was only a fiction, and that, consequently, there could have been no legitimate *ἀποτίμησις*. His argument is based chiefly on the horoi which had been set up to bear witness to the apotimema. He presents his case succinctly in the first four sections in words to this effect. When Onetor first decided to lay claim to Aphobos' property he placed horoi on the house for two thousand drachmas and on the land for a talent. After Demosthenes had won his suit against Aphobos, however, Onetor removed the horoi from the house, because he feared that public opinion would be outraged if Demosthenes could recover nothing from Aphobos. Such manipulation of the horoi, Demosthenes maintains (5-8), is proof that the alleged *ἀποτίμησις* was merely a plot by which Onetor in the interest of his sister and brother-in-law was trying to prevent Demosthenes from taking possession of the property.

Although in this speech there are constant references to horoi, it is almost impossible to draw any conclusions from them concerning the nature of the dotal apotimema for the simple reason that in these pages we have an account of a conspiracy and not of normal procedure. Nevertheless, a few observations will be in order. To begin with, we have Demosthenes' emphatic statement that the divorce was registered with the archon after Demosthenes had instituted his suit against Aphobos.⁴⁴ We also know (II, 2-3) that the horoi had been erected before the actual trial. To conform to Paoli's thesis, then, the sequence of events must have been as follows: institution of the suit (*δίκην λαχεῖν*), the divorce, erection of the horoi, the actual trial. Such a chronology is possible. According to this scheme we must assume that it was the institution of Demosthenes' suit against Aphobos which made Aphobos and Onetor realize that the property was in jeopardy and drove them to the registering of the divorce and the placing of the horoi in the interval between the institution of the suit and the actual trial itself. Even if this reconstruction of the order of events is correct, however, it does not prove Paoli's contention that the *ἀποτίμησις* by virtue

⁴⁴ *Against Onetor*, I, 17; ὕστερον δ' ἡ ἐγὼ τὴν δίκην ἔλαχον τὴν ἀπόλειψιν οὕτοι πρὸς τὸν ἀρχοντὶ ἀπεγράψαντο. Demosthenes, of course, maintains that the divorce was purely nominal; *Against Onetor*, I, 4; 25-31; 33-36; II, 10; 13.

of being a *datio in solutum* regularly followed the divorce. It would merely show that in this particular conspiracy Onetor, because of the pressure of time, proceeded in this fashion. As a matter of fact, it could equally well be maintained that Onetor, when the institution of the suit gave the alarm signal to him and Aphobos, first erected the horoi and then registered the divorce. In this case he would have pretended that the horoi really had been in place since the payment of the dowry. By such a ruse he would have had a double claim to the property; first, it had been offered to him as security for the restitution of the dowry and second, it had been forfeited to him because of Aphobos' failure to restore the dowry after the divorce.

The statements about the horoi made in this speech, therefore, cannot prove Paoli's thesis. On the other hand, they will confirm the traditional view only if it can be shown that the horoi were set up at the time of the alleged payment of the dowry. Unfortunately the evidence for the date of the erection of the horoi is inconclusive. We are merely told (2 and 12) that they were put in place before the trial and at a time when Onetor had already become convinced that Aphobos would have to pay damages to Demosthenes. Since we know that Onetor had such suspicions at the time of the marriage of his sister to Aphobos, three years before the institution of Demosthenes' suit against his guardian,⁴⁵ it is tempting to believe that the first step in the conspiracy, namely, the erection of the horoi, was carried out on the occasion of the pretended delivery of the dowry. The registration of the divorce, then, would have been the second step in the plot by means of which Onetor could claim that he had foreclosed on the security previously offered to him.

In all honesty it will have to be admitted that the evidence concerning the horoi presented in the second speech against Onetor is so ambiguous that it cannot be used to settle the controversy with which we are concerned. There is one passage in this short oration of four pages, however, which Paoli very strangely has totally neglected although it is of cardinal significance for the problem under discussion. In the concluding section (14) Demosthenes states: *ἔπειτα τὸ δεινότατον*. Then he denounces the defendant Onetor in the following words: *εἰ καὶ δεδωκότες ἦθ' ὡς μάλιστα τὴν προῖκα, ἣν οὐ δεδώκατε, τίς ὁ τούτων αἴτιος; οὐχ ὑμεῖς, ἐπεὶ <ἐπὶ> τᾶμ' ἔδοτε; οὐχ ὅλοις ἔτεσιν πρότερον δέκα τὰμὰ λαβὼν εἶχεν ἐκείνος ὧν ὠφλεν τὴν δίκην, ἢ κηδεστὴν σοι γενέσθαι;*

It is ironic that in such a key passage the text is corrupt, but an analysis of the context will leave small doubt as to the only meaning these lines can have. Demosthenes says to Onetor, "If you really have given the dowry, which you haven't, who is to blame for this? Aren't you?" The manuscripts then read *ἐπεὶ τᾶμ' ἔδοτε*. This reading is obviously impossible, for under no conceivable circumstances could Onetor have given Demosthenes' property as dowry to Aphobos. The following words justify the *τᾶμ'*—Aphobos had taken possession of Demosthenes' property, for which judgment

⁴⁵ *Against Onetor*, I, 6-7; 15-17.

has been given against him, ten years before he became Onetor's brother-in-law. What, then, should be done with the ἐπεὶ τᾶμ' ἔδοτε? It is important to note that Paoli's thesis would require ἐλάβετε rather than ἔδοτε. Since ἔδοτε is in the manuscripts, however, one can hardly suggest that it should be removed and its opposite—ἐλάβετε—be substituted. Certainly ἔδοτε must remain. Since the words ἐπεὶ τᾶμ' ἔδοτε are meaningless in this particular context, there is only one satisfactory answer to this crux—and that is to assume with all editors that the copyist, after writing ἐπεὶ, made the very easy mistake of omitting the almost identical following word, ἐπί (haplography). The reading ἐπεὶ <ἐπὶ> τᾶμ' ἔδοτε—since you gave it on my property—makes sense, although it must be admitted that ἐπὶ τοῖς ἐμοῖς would have been a more usual expression. Since there appears to be no other possible way to restore this passage and since this restoration meets all the requirements of the context, it seems justifiable to accept this reading with full confidence. The meaning of the passage, therefore, is clear. Demosthenes says to Onetor in effect: suppose you gave the dowry (which, of course, you didn't), who is to blame for this present situation? Obviously you yourself, since you gave it on the security of my property, although you knew perfectly well that what Aphobos called his property was really mine.

As stated above, it is ironic—and most unfortunate—that the wording of this passage is not above suspicion. I submit, however, that it is impossible to offer any reasonable restoration which will remove the idea of security suggested so clearly here and substitute that of a *datio in solutum*. To achieve that end ἔδοτε would have to be replaced by ἐλάβετε, and I doubt if Paoli himself, had he taken cognizance of this passage, would have proposed such a violent alteration.⁴⁶ The only conclusion to be drawn from these lines, then, is that apotimema was the security offered by the husband to guarantee the restitution of the dowry and that it had nothing to do with a *datio in solutum*.

In the two speeches against Onetor the central problem is the nature of the apotimema in those cases where the husband is the potential or actual dotal debtor. The same institution also came into operation when, because of deferment or only partial payment of the dowry, the woman's κύριος was the dotal debtor. Our literary evidence⁴⁷ for this usage is confined to Demosthenes' oration, XLI, *Against Spoudias*.

⁴⁶ The only means by which ἔδοτε could have been inserted in the text for ἐλάβετε, which I can imagine, is as follows: Suppose, for the sake of argument, that Paoli's thesis of the *datio in solutum* is correct. Then presumably Demosthenes said: ἐπεὶ τᾶμ' ἐλάβετε. This reading might have puzzled a thoughtful copyist who knew apotimema only as a form of security. To adapt the text to his understanding of the institution, therefore, he changed ἐλάβετε to ἔδοτε. Maybe he failed to realize that such an alteration necessitated the addition of the preposition ἐπί, or possibly he did write ἐπί and then some careless copyist subsequently omitted it. The conclusion to be drawn from this suggestion is obvious. If, to justify a theory, we must assume that copyists manipulated texts so as to make them conform to their own ideas, then the ancient authors are of little value as sources for the institutions of antiquity.

⁴⁷ As stated above, p. 119, some of the dotal horoi undoubtedly refer to this type of apotimema.

This speech, which is notorious for the posing of difficult problems,⁴⁸ must now occupy our attention.

The gist of the situation as told by the speaker, who is unnamed, can be given briefly. Polyeuktos, since he had no male issue, adopted his wife's brother Leokrates and gave in marriage to him the younger of his daughters. The elder daughter was married to the speaker. Subsequently a quarrel broke out between Polyeuktos and Leokrates which resulted in the divorce of the younger daughter and her marriage to Spoudias.⁴⁹ Apparently Spoudias was not adopted as heir, for there are certain passages (8-11) in the speech which imply that there was to be a division of Polyeuktos' estate between his two daughters and their husbands. The problem of the inheritance is complicated by the fact that presumably the daughters were heiresses (*ἐπίκληροι*). Fortunately this is a matter of no concern to our particular subject;⁵⁰ we are interested only in the information which can be gleaned about the dotal *apotimema*. The speaker claims that he had been promised by Polyeuktos a dowry of 40 minas. In section 5, while explaining to the dicasts his reason for giving details about Polyeuktos' family, he says: *ὅτι τὴν προικ' οὐ κομισάμενος ἄπασαν, ἀλλ' ὑπολειφθεισῶν χιλίων δραχμῶν καὶ ὁμολογηθεισῶν ἀπολαβεῖν ὅταν Πολύευκτος ἀποθάνῃ, ἕως μὲν ὁ Λεωκράτης ἦν κληρονόμος τῶν Πολυεύκτου, πρὸς ἐκείνον ἦν μοι τὸ συμβόλαιον· ἐπειδὴ δ' ὁ τε Λεωκράτης ἐξεκεχωρήκει ὁ τε Πολύευκτος μοχθηρῶς εἶχεν, τηνικαυτ', ὧ ἄνδρες δικασταί, τὴν οἰκίαν ταύτην ἀποτιμῶμαι πρὸς τὰς δέκα μνᾶς, ἐξ ἧς διακωλύει με τὰς μισθώσεις κομίζεσθαι Σπουδίας.* In the following section he states that he will provide witnesses for the following facts: *ἔτι δ' ὡς ἅπαντα τὸν χρόνον ὀφείλειν ὁμολόγει μοι Πολύευκτος, καὶ τὸν Λεωκράτην συνέστησε, καὶ ὡς τελευτῶν διέθεθ' ὄρους ἐπιστήσαι χιλίων δραχμῶν ἐμοὶ τῆς προικὸς ἐπὶ τὴν οἰκίαν.*

Paoli's interpretation of these and other passages in the oration is interesting.⁵¹ He insists that in the words—*τὴν οἰκίαν ταύτην ἀποτιμῶμαι πρὸς τὰς δέκα μνᾶς*—there is a reference to a *datio in solutum*. He emphasizes quite properly that at the time of the marriage of the speaker and throughout the period when Leokrates was heir there is no reference to *apotimema* guaranteeing the payment of the balance of the dowry. The debt was recognized only by a private agreement (*συμβόλαιον, ὁμολογία*) between the speaker, and Polyeuktos and his heir Leokrates. When Polyeuktos was on his death bed and the time for the payment of the debt (i. e., the death of Polyeuktos) as originally agreed upon was at hand, then first is there mention of *apotimema*.

⁴⁸ For an interesting discussion of the various problems, see the dissertation of Rudolf Burgkhardt, *De Causa Orationis Adversus Spudiam Demosthenicae* (XLI), Leipzig, 1908.

⁴⁹ In 1936 there was discovered in the Athenian Agora the base of a statue by Praxiteles on which was recorded a dedication to Demeter and Kore by Kleiokrateia, daughter of Polyeuktos of Teithras, wife of Spoudias; cf. *Hesperia* VI, 1937, pp. 339-342.

⁵⁰ For a discussion of the problems involved, see R. Burgkhardt, *op. cit.*, pp. 3-14.

⁵¹ "*Datio in Solutum*," pp. 186-191.

Consequently, this apotimema cannot be security guaranteeing the payment of the debt; it must be a *datio in solutum* extinguishing the obligation. The transfer of the ownership of the house was to be marked by the erection of horoi. Arguing against the notion that apotimema is security offered by the debtor, Paoli asks,⁵² “How is it possible for a hypothecary creditor to collect the rents of the mortgaged house as long as the security is in the possession of the debtor?” Spoudias, Paoli says,⁵³ rejects the legitimacy of the ἀποτίμησις (*datio in solutum*) by denying the existence of the obligation which would have brought it into effect, and maintains that the house should remain as part of the estate left by Polyeuktos until the final division of the property. The speaker naturally insists on the legitimacy of the *datio in solutum* and recites against Spoudias the law which forbade the ἀποτιμήσας (the debtor) to institute a claim for property which has been given in ἀποτίμημα: (7) --- τὸν νόμον, ὃς οὐκ ἐᾷ διαρρήδην, ὅσα τις ἀπετίμησεν, εἶναι δίκας, οὐτ’ αὐτοῖς οὔτε τοῖς κληρονόμοις. (10) --- τὸν νόμον, ὃς οὐκ ἐᾷ τῶν ἀποτιμηθέντων ἔτι δίκην εἶναι πρὸς τοὺς ἔχοντας. Paoli⁵⁴ maintains that this law is meaningless if in the ἀποτιμήσας we are to recognize the hypothecary debtor who is in possession of the security. The debtor could not bring suit to claim property of which he never had lost possession. The hypothecary debtor can only be thought of as defendant; hence, what purpose would there be in a law which denied to him an action which he would never contemplate unless it was brought against him? Consequently, the juridical possessor must be the ἀποτιμησάμενος—in this case the speaker who has received the house through a *datio in solutum*. Desire for action against him by the ἀποτιμήσας is comprehensible—and it is this which the law prohibited.

I believe that this is an accurate presentation of Paoli’s arguments. Some of his observations are keen and they emphasize how easily the vague and ambiguous statements in the orators can lead to almost diametrically opposed interpretations. Nevertheless, for two main reasons I think that Paoli’s explanation is wrong. First, it has been shown—successfully I hope—in the preceding pages that the husband normally offered security, called apotimema, to guarantee the restitution of the dowry in case the marriage should be dissolved. It is difficult, therefore, to understand why in those instances where the kyrios of the woman deferred payment of the dowry, the institution of apotimema should not have had the same function of security but should have been the equivalent of a *datio in solutum*. This objection seems especially pertinent when we remember that in the μίσθωσις οἴκου the security provided by the lessee was also called apotimema.⁵⁵ If Paoli is correct in his theory of the *datio in solutum*, it is strange that the Athenians had no other word to express that transaction except

⁵² *Studi*, p. 177.

⁵³ “*Datio in Solutum*,” p. 187.

⁵⁴ *Ibid.*, pp. 190-191.

⁵⁵ Cf. Chapter V, pp. 101-102.

ἀποτίμημα. My second chief reason for rejecting Paoli's explanation of the *Against Spoudias* has to do with the rents of the house offered as apotimema. We learn from section 5 that Spoudias was trying to prevent the speaker from collecting the rents from the house given to him as apotimema. If the speaker had taken possession of the house by a *datio in solutum*, how was Spoudias able to interfere with his rights over that house? Also one wonders why, if the speaker had received the house in lieu of the ten minas, he should have brought suit against Spoudias for the recovery of the ten minas. Or are we to understand that, because Polyeuktos died some five days after granting the *datio in solutum* to the speaker (18), the transaction was never carried out and the horoi marking the transfer in ownership had never been erected? In that event, presumably the house formed part of the estate left by Polyeuktos which was to be divided between the two daughters and their husbands. If that is the situation which we have to envisage, then it is very hard to understand why Spoudias should have complained about the collection of the rents. One would rather expect in section 5 a statement to the effect that Spoudias was contesting the *datio in solutum* itself.

Observations such as these, I realize, do not furnish a complete rebuttal of Paoli's interpretation unless another explanation can be offered which is preferable to his. I question whether any entirely satisfactory answer to all the difficulties contained in Demosthenes' account of this transaction can be given, but the reconstruction of events presented below, I submit, is more reasonable than the one furnished by Paoli.

When the speaker married the daughter of Polyeuktos, he was promised a dowry of 40 minas, but actually received only 30 minas of that sum. An agreement was reached that Leokrates, Polyeuktos' heir, should pay the balance when he received the estate on Polyeuktos' death (5). No specific information is given about the nature of this compact. The fact that apotimema is not mentioned, however, most certainly is not proof that that institution had nothing to do with security. The lexicographers make it clear that the connection of apotimema with dotal arrangements was customary rather than obligatory.⁵⁶ There is no reason to reject the suggestion that the agreement between Polyeuktos, Leokrates, and the speaker was merely a friendly, informal one. The situation changed when Leokrates ceased to be heir because of the divorce and when Spoudias became the speaker's brother-in-law. Apparently Spoudias was not made heir through adoption as Leokrates had been, for in the speech it is constantly implied that the estate was to be divided between the two daughters (8-11). Since the arrangement about the payment of the balance of the dowry which had been made with Leokrates was no longer in effect, the speaker naturally decided to take steps to assure that he would ultimately receive those ten minas. Possibly already friction had developed between him and Spoudias. In any case Polyeuktos agreed that the house should be designated as apotimema to guarantee the payment of the balance and

⁵⁶ See above, pp. 120-121. Cf. below, p. 133.

on his death bed gave instructions that horoi to that effect should be placed on the house. Paoli insists, as we have seen, that, since Polyeuktos was on the point of death, the maturity date of the original agreement had arrived. Consequently, when the cash to discharge the ten mina debt was not available, Polyeuktos consented to a *datio in solutum* to extinguish the obligation. It should be noted, however, that in the original agreement Leokrates, the former heir, was instructed to pay the balance of the dowry (5; 16). With the departure of Leokrates, then, the terms of that compact became invalidated. Now that there was no one heir to act as executor, it was up to the speaker, since Polyeuktos could not pay him the cash, to assure his collection of the debt from the estate which would be left by his father-in-law. Receiving the house as security for the payment of the money owed him was a natural way to protect his interests. The house remained in the possession of the debtor. The debtor was Polyeuktos until his death, and after that the estate. The rents from the house were to serve as interest for the ten minas still due to the dotal creditor.

The speaker charges that Spoudias was trying to prevent him from collecting the rents. To support his accusation he refers to the law (quoted above) which denied the right of action to the ἀποτιμήσας for τῶν ἀποτιμηθέντων against τοὺς ἔχοντας. It should be remarked in passing that it is clear from the different wording in sections 7 and 10 that the speaker is paraphrasing the law rather than quoting it verbatim. Spoudias obviously had denied the legitimacy of the ἀποτίμησις. The speaker, who has called witnesses to testify to its legitimacy, maintains that according to the law Spoudias has no right to protest the operation of the ἀποτίμησις. Paoli argues that a law forbidding a dotal debtor in possession of the security to bring suit for the security is ridiculous. Consequently, he says, the τῶν ἀποτιμηθέντων must refer to what was given in the *datio in solutum*—a conclusion which is confirmed by the fact that the suit cannot be brought against τοὺς ἔχοντας. In answer to Paoli's assertions the following comments are pertinent. First, since we do not know the exact phraseology of the law, there is no way to tell how much the speaker may have twisted the wording to suit his own purposes. Second, in Chapter IV it was frequently shown that the verb ἔχειν does not necessarily refer to the person who is in actual possession; it can signify the non-possessing creditor, i. e., the person, holding, or having a right over the security. Third, why should there not have been a law preventing a debtor from trying to escape from the terms of his contract? In this particular case the security was the house, and the rents were to serve as interest on the debt. The debtor actually was the estate, but Spoudias, because of his interest in the estate, denied the validity of the debt—hence the apotimema—and tried to prevent the collection of rents (i. e., the payment of interest). The speaker, the creditor (ὁ ἔχων), who insists on the legitimacy of the ἀποτίμησις, charges, therefore, that Spoudias is violating the law by denying the obligation and seeking to thwart the creditor's rights over the security which had been offered to him.⁵⁷

⁵⁷ This interpretation, in general, is similar to the one given by R. Burgkhardt, *op. cit.*, pp. 25-30.

This interpretation, namely, that the apotimema taken by the speaker was security for the payment of the balance of the dotal debt rather than a *datio in solutum* terminating the obligation, is confirmed by a sentence in section 29. The passage reads: ἐγὼ δὲ τὰς μὲν τριάκοντα (μνᾶς) καθάπερ οὗτος, τὰς δὲ χιλίας οὐ μόνον ὕστερον οὐκ ἐκομισάμην, ἀλλὰ καὶ νυνὶ κινδυνεύω περὶ αὐτῶν ὡς ἀδίκως ἔχων. In these words the speaker categorically asserts that he never received the ten minas which were owed to him. This is a strange statement for him to make if the house had been given to him as a *datio in solutum* for the debt. A *datio in solutum* terminates an obligation by transferring to the creditor the ownership of something in lieu of payment. Paoli would argue that Spoudias had prevented the realization of the *datio in solutum*, but cannot it fairly be objected that, if the apotimema taken by the speaker was a *datio in solutum*, he is greatly weakening his claim that there actually had been such a transference of ownership by denying that he ever had received payment? One would expect him to insist that the payment (the *datio in solutum*) had been made, but Spoudias had rendered it inoperative. It seems to me that the Greek quoted above should be translated as follows: “I have the thirty minas just as he does, but, so far as the 1000 drachmas are concerned, not only did I not receive them later, but even now I am in danger on that score as if my claim to security for them was unjust.”⁵⁸

⁵⁸ Paoli (*Studi*, p. 180; “*Datio in Solutum*,” pp. 200-201) adduces one further passage ([Demosthenes], LIII, *Against Nikostratos*, 19-20) in support of his thesis that apotimema is a *datio in solutum* by means of which, on non-payment of the debt at maturity, the obligation is terminated. In this speech the plaintiff insists that certain slaves belong to Arethusios, the brother of the defendant (19). He then explains in the following words (20) how Arethusios acquired ownership of one of these slaves, Manes: Τὸν δὲ Μάνην, δανείσας ἀργύριον Ἀρχεπόλιδι τῷ Πειραιεῖ, ἐπειδὴ οὐχ οἶός τ’ ἦν αὐτῷ ἀποδοῦναι ὁ Ἀρχέπολις οὔτε τὸν τόκον οὔτε τὸ ἀρχαῖον ἅπαν, ἐναπετίμησεν αὐτῷ. Paoli interprets these lines to mean that Archepolis, unable to pay the interest or the principal in full at the maturity of the debt, satisfied the creditor’s claim by transferring to his ownership according to a *datio in solutum* the slave Manes. Therefore the transaction was an ἀποτίμησις and the slave was taken in ἀποτίμημα. Possibly it is legitimate to recognize here an instance of *datio in solutum*, for the Athenians in their every day business relations must have made numerous different kinds of agreements with one another. It is obviously absurd, however, to use a transaction concerned only with one slave and characterized by the rare verb ἐναποτιμᾶν as evidence for the nature of the dotal ἀποτίμημα. Paoli ridicules the idea that the debtor was offering the slave as security. No one would want to argue that security was being furnished at the maturity of the debt. As is the case in so many of the loans mentioned in the orators, the reference here is to only one phase of the loan—the time of its maturity. For all we know, the creditor may have lent the money on adequate security. When the time for repayment came, we are told that the debtor could not pay back all the principal. Presumably he returned some of it. The result would have been that the security held by the creditor (if he held security) now more than covered the balance. In such a situation, what would have been more natural than for the creditor, rather than to foreclose, to accept in lieu of the money due some article of property which, after appraisal, proved to be of the same value as the balance of the debt? This would have been a *datio in solutum*, but most certainly it has nothing to do with the dotal apotimema and it does not exclude the previous furnishing of security.

The only other occurrence of the verb ἐναποτιμᾶν, with which I am familiar, is worth mentioning. It is to be found in Dio Cassius, XLI, 37. In 49 B.C. Julius Caesar tried to relieve the debt situation.

The conclusions to be drawn from this study of the dotal apotimema, therefore, are that it was customary in Athens for the dotal debtor, whether *kyrios* or husband, to furnish real property as security (*ἀποτίμημα*) to guarantee the payment or the restitution of the dowry. This does not mean that that procedure was always followed. There probably were many occasions when no security was given.⁵⁹ The Athenians did not always conform to a rigid rule. If no security had been provided, the maturity of the dotal debt, as we shall soon see, could lead to many different consequences. One of these possibly may have been a *datio in solutum*. Nevertheless, on the basis of available evidence relating to Athens, namely, the horoi, the orators, and the lexicographers, there can be little doubt that the *general rule* was for the dotal debtor to offer security in the form of apotimema. In corroboration of this statement it will be appropriate to quote an excerpt from the well known Register of Dowries from Mykonos.⁶⁰ This inscription dates from the Hellenistic period, by which time it is reasonable to assume that the influence of Athenian legal institutions had spread all over the Aegean. In lines 15-20 there is the following entry: Καλλιξ|ενος τὴν θυγατέρα Τιμηκράτην Ῥοδοκλεῖ καὶ πρ[οῖκ]α ἔδωκεν ἑπτακο|σίας δραχμᾶς· τοῦτου ἐσθὴν τριακοσίων· τὴν ἐσθὴν [καὶ] ἑκατὸν δ|ραχμᾶς ὠμολόγει ἔχειν Ῥοδοκλής, τῶν δὲ τριακοσίων [δρα]χμῶν | ὑπέθηκε Καλλιξενος Ῥοδοκλεῖ τὸ οἶκημα τὸ ἐμ πόλει ---. *Mutatis mutandis*, these lines furnish an excellent commentary on the transaction recorded in the *Against Spoudias*. It is interesting to note the use of the verb *ὑπέθηκε*. The hypothec here had the same function as the Athenian *ἀποτίμημα*, a fact which should remind us that in Pollux's definition *ἀποτίμημα* was called *οἶον ὑποθήκη*. In this inscription from Mykonos it is very clear that the house was serving as security; there is no suggestion of a *datio in solutum*.

It must be admitted that there are various passages in the speeches against Onetor and Spoudias where the language is ambiguous. Paoli has performed a great service in calling attention to some of these passages, for in the past there has frequently been insufficient realization on the part of scholars of the difficulties lodged in these documents. All these ambiguities, however, as I have tried to demonstrate above for certain typical cases, can be satisfactorily interpreted, I believe, without recourse to Paoli's theory of the *datio in solutum*. That thesis, on examination, seems to be untenable not only in particular instances but also on general grounds. As we saw earlier in this discussion,⁶¹ Paoli traces the evolution of the dotal apotimema from

The debtors were willing to relinquish the security which they had offered (τῶν ἐνεχύρων ἐξίσταντο), but the creditors were demanding their principal in cash. Caesar tried to relieve both parties as follows: τὰ τε γὰρ ἐνέχυρα πρὸς τὴν ἀξίαν ἐναποτιμηθῆναι ἐκέλευσε, καὶ δικαστὰς αὐτῆς τοῖς ἀμφισβητοῦσί τι ἀποκληροῦσθαι προσέταξεν. Here, then, the word which Paoli tries to make refer to an *ἀποτίμημα*—*datio in solutum*—is used in connection with security (*ἐνέχυρα*) which had been furnished when the loans were made.

⁵⁹ See below, pp. 138-139.

⁶⁰ *Syll.*³, 1215.

⁶¹ See above, p. 120.

a *datio in solutum* to a “real right.” Is not such an evolution contrary to all we know about the development of relations between creditor and debtor? In early times the creditor was always in a strong position in his dealings with a debtor.⁶² According to Paoli’s view, however, the dotal creditor would have been singularly helpless before the debtor. He paid the dowry to the husband, but received no security to guarantee its restitution. Paoli says that if a marriage was dissolved and the dowry was not returned, the dotal creditor could arrange to have property of equivalent value given to him by the debtor as a *datio in solutum*. He does not explain how the creditor could have persuaded or forced the debtor to consent to such a *datio in solutum*. If this transaction was the earliest form in the development of the dotal apotimema, as Paoli maintains, according to all the generally accepted ideas on the history of creditor-debtor relations the creditor should have had powerful means at his disposal to enforce his rights. The sources, however, say nothing about the possession of such powers by the creditor, for the purpose of the legal redress open to creditors, on which we shall comment at the end of this chapter, was certainly not to effect a *datio in solutum*. If, on the other hand, the dotal debtor had to furnish security which was publicized by means of the horoi, then public opinion, not to mention the law, would have assisted the creditor in making the debtor abide by the terms of the contract. If the debtor proved recalcitrant, the creditor could always reimburse himself by foreclosing on the property which had been designated as security.

Since the subject of this chapter is ἀποτίμημα προίκός, the main part of our investigation has now been accomplished. For the sake of completeness, however, it will be appropriate to offer a few remarks on the status of the dowry during and after the marriage. As soon as the woman was married, the husband became her kyrios.⁶³ The dowry proper which the wife brought to the new establishment remained in her ownership,⁶⁴ but, since the chief purpose of the dowry was to contribute to the support of the new household, and since a woman’s legal capacity was limited,⁶⁵ the husband naturally administered the property. He had merely the usufruct of it, and in the case of real property, at least, could not alienate it without the consent of

⁶² See Chapter IV, p. 90.

⁶³ Lipsius, pp. 482-484.

⁶⁴ See p. 118. That the property which belonged to the dowry proper (i. e., had been included in the τίμησις) remained in the ownership of the wife is demonstrated by a passage in [Demosthenes], XLVII, *Against Euergos*, 56-57. In the account of how some creditors of the husband burst into the house to seize some of his property, it is stated: τὰ δ’ ἐκ τῆς ἄλλης οἰκίας ἐξέφερον σκεύη, ἀπαγορευούσης τῆς γυναικὸς μὴ ἄπτεσθαι αὐτοῖς, καὶ λεγούσης ὅτι αὐτῆς εἶη ἐν τῇ προικὶ τετιμημένα. The phrase ἐν τῇ προικὶ τετιμημένα, which obviously refers to the τίμησις at the time of the betrothal, is mis-translated in the Loeb edition as “mortgaged to secure her marriage portion.”

⁶⁵ Isaeus, X, *On the Estate of Aristarchos*, 10: ὁ γὰρ νόμος διαρρήδην κωλύει παιδί μὴ ἐξείναι συμβάλλειν μηδὲ γυναικὶ πέρα μεδίμνου κριθῶν. Cf. the recent study of L. J. Th. Kuenen-Janssens, “Some Notes upon the Competence of the Athenian Woman to Conduct a Transaction,” *Mnem.*, 3rd ser., IX, 1941, pp. 199-214.

his wife and her former *kyrios*.⁶⁶ As long as the marriage endured no claim could be made for the return of the dowry unless the husband's property was confiscated, at which time the wife, or rather her representative, could institute a claim against the state for the refund of the dowry.⁶⁷

When the marriage was ended by a divorce or by the death of either the husband or wife, the disposition of the dowry was a matter of importance. Divorce, as is well known, was common among the Athenians. If it originated with the husband, no formalities were necessary; if, with the wife, she had to appear before the archon.⁶⁸ No matter who instituted the divorce, the dowry had to be returned to the woman's former *kyrios* or his successor.⁶⁹ This requirement of the restitution of the dowry undoubtedly acted as a partial check on irresponsible divorces.⁷⁰ In the event of the husband's death, the widow, if there were no children, had to return to her former family. The dowry, quite naturally, went with her. If there were children or if the woman was pregnant at the time of her husband's death, she had the option of returning to her former *kyrios*, in which case the dowry was restored, or of remaining in her deceased husband's house. If she chose the latter alternative, she lost her claim to the dowry which became the property of her sons if they were of age. If the sons were still minors, their guardians administered the dowry during their minority. If the marriage was ended through the death of the wife, then, provided there were no children, the dowry had to be returned to the deceased wife's former *kyrios*. If there were children, they obtained the dowry if they were of age, but, if they were minors, their father administered it for them until they reached their majority.⁷¹

Since the dowry usually consisted chiefly of money, which may have been invested and hence would not have been immediately available for repayment, it is only reasonable to assume that a certain delay was granted to the husband or his heirs in the matter of its restitution.⁷² The length of this delay, which may have varied from case to case, is nowhere stated. During this period the dotal debtor was obligated to pay interest on the dowry. In cases of divorce, if the husband was unable to return the dowry, he had to pay interest on it at the rate of 18%. There is an express statement in the sources⁷³ to this effect which reads: *κατὰ τὸν νόμον ὃς κελεύει, εἰάν ἀποπέμψη τὴν*

⁶⁶ Beauchet, I, pp. 303-309; Lipsius, pp. 492-493.

⁶⁷ Lysias, XIX, *On the Property of Aristophanes*, 32. Cf. Lipsius, p. 493. Lipsius believes that a similar claim could be made in the event of the husband's bankruptcy.

⁶⁸ Lipsius, pp. 486-487.

⁶⁹ There is no definite evidence for Athens as to whether the dowry had to be returned if the wife had been guilty of adultery. Beauchet, I, pp. 318-319, maintains that it had to be restored, while Lipsius, p. 494, argues for the other point of view.

⁷⁰ Cf. Isaeus, III, *On the Estate of Pyrrhos*, 28-29.

⁷¹ Beauchet, I, pp. 311-317; Lipsius, pp. 495-496.

⁷² Cf. Beauchet, I, pp. 323-325.

⁷³ [Demosthenes], LIX, *Against Neaira*, 52.

γυναῖκα, ἀποδιδόναι τὴν προῖκα, εἰ δὲ μή, ἐπ' ἐννέ' ὀβολοῖς τοκοφορεῖν. The reference here is to a divorce which had been brought about by the initiative of the husband, but presumably the same rule held true if the divorce originated with the woman.⁷⁴ Although this passage says that the law stipulated 18%, it naturally was possible for the husband and the woman's kyrios to reach a private agreement. This is illustrated by Demosthenes' first speech, XXX, *Against Onetor*, 7-9, where we are told that after the divorce of his wife, Onetor's sister, Timokrates retained the dowry and paid interest on it at the rate of 10%. No definite evidence is available as to the rate of interest which was customary in those cases where there was a delay in the restitution of the dowry after the death of either the husband or the wife. Some scholars argue that in such circumstances the common interest rate of 12% would have been more probable than the rather punitive 18%.⁷⁵

This sketch gives, I believe, an adequate résumé of the procedure generally followed at Athens in the matter of the return of the dowry. It should be remembered, however, that, in regard to dowries as in so many other aspects of Athenian private law, any generalization usually requires qualification. The truth of this statement is emphasized by a passage in Isaeus⁷⁶ where the speaker is telling of the dowry given by his grandfather to his mother on the occasion of her first marriage. After stating that the husband Nausimenes died without leaving any issue, he says: ὁ δὲ πάππος, κομισάμενος αὐτὴν καὶ τὴν προῖκα οὐκ ἀπολαβὼν ὅσῃν ἔδωκε διὰ τὴν Νανσιμένους ἀπορίαν τῶν πραγμάτων. In this case, then, the woman's kyrios apparently was content to acquiesce in the loss of a portion of the dowry without taking any steps to recover it, or interest on it, from the deceased husband's heirs. It may also be justifiable to infer from this passage that Nausimenes, when receiving the dowry, had not offered security (apotimema) to guarantee its return, for, if he had, one might expect to find some reference to the right of foreclosure on the part of the kyrios.

A few remarks should be made on the procedures which were available if any of the dotal agreements were violated. Since there are many references in the sources to the νόμος or νόμοι περὶ προικός,⁷⁷ one would expect to find that dotal litigation was instituted by means of specific actions. This assumption is supported by a statement in the *Constitution of the Athenians* (52, 2) where, among the monthly suits introduced by the εἰσαγωγεῖς, Aristotle includes—προικός, εἰάν τις ὀφείλων μὴ ἀποδώ. Presumably these words refer to a situation where either the husband (or his heirs) or the woman's kyrios could have been the dotal debtor. Since the purpose of monthly suits obviously was to expedite such cases, Lipsius is justified in his observation⁷⁸ that litigation introduced by the εἰσαγωγεῖς would not first have been brought before

⁷⁴ Beauchet, I, p. 325.

⁷⁵ Beauchet, I, pp. 325-326.

⁷⁶ VIII, *On the Estate of Kiron*, 8.

⁷⁷ E. g., Demosthenes, XXVII, *Against Aphobos*, I, 17; [Demosthenes], XL, *Against Boiotos*, II, 19; 59; XLII, *Against Phainippos*, 27; LIX, *Against Neaira*, 52; 113.

⁷⁸ Pp. 228, 497.

arbitrators. This fact raises a problem in connection with two speeches which are mainly devoted to dotal matters—[Demosthenes], XL, *Against Boiotos*, II, and Demosthenes, XLI, *Against Spoudias*.

In the former oration Mantitheos is bringing suit against his half-brothers for the recovery of his mother's dowry. The specific term *δίκη προικός* is nowhere used in this speech although Mantitheos does employ such expressions as *περὶ ἧς (προικός) νυνὶ δικάζομαι* (3; 55; 59) or *δίκας ἔλαχον — — κάγω τούτοις ὑπὲρ τῆς προικός* (16). One would automatically characterize this suit as a *δίκη προικός* except for the fact that it had first been heard by arbitrators (16-17; 30-31; 55). Of course, as Lipsius suggests (p. 497), *δίκαι προικός* may not yet have been classified as monthly suits at the time of this trial.⁷⁹ Nevertheless, I hesitate dogmatically to call this suit a *δίκη προικός*. This hesitation is somewhat justified by a passage in Isaeus⁸⁰ in which the speaker, who is arguing that Nikodemus had never given a dowry to his sister, asks Nikodemus *ὁποῖαν δίκην σίτου ἢ τῆς προικός αὐτῆς* he had brought concerning the dowry after the dissolution of the marriage. Since, presumably, there was only one *δίκη σίτου* and one *δίκη προικός*, the indefinite word *ὁποῖαν* inclines one to translate the phrase as—what sort of suit for maintenance or for the dowry itself did you institute. I naturally am not denying the existence of the *δίκη προικός*, but am only suggesting the possibility that it was not the action on which the second speech against Boiotos was based.

Similarly it may be doubted whether the *Against Spoudias* is a *δίκη προικός*. Nowhere in the oration is that term used, and also the case had first been heard by an arbitrator (12; 28). Since the speaker was bringing suit against Spoudias for other matters besides the balance of the dowry due (8-11), it seems very probable that he had had recourse to a more general action than the *δίκη προικός*.

If one hesitates to describe the orations against Boiotos and Spoudias as *δίκαι προικός*, how should these suits be characterized? Beauchet⁸¹ argues that the latter should be classified as a *συμβολαίων παραβάσεως δίκη*—a breach of contract. The specific name of such an action occurs, I believe, only in Pollux, VIII, 31 (cf. VI, 153), where among *ιδιωτικὰ δικῶν ὀνόματα* there is listed *συμβολαίων, συνθηκῶν παραβάσεως*. It seems impossible to decide whether the reference is to two separate actions or to alternate names for the same action. Pringsheim⁸² denies that there was any such general action in Athenian law and suggests that Pollux (or some predecessor) derived the name of this action from Plato's words in the *Crito*—52d: *ἀποδιδράσκειν ἐπιχειρῶν παρὰ τὰς συνθήκας τε καὶ τὰς ὁμολογίας καθ' ἃς ἡμῖν συνέθου πολιτεύεσθαι*, and 54c: *τὰς σαντοῦ ὁμολογίας τε καὶ συνθήκας τὰς πρὸς ἡμᾶς παραβάς*. The suggestion is ingenious—probably too ingenious—, but it does not explain, among other things, why

⁷⁹ Probably 347 B.C. Cf. F. Blass, *Die Attische Beredsamkeit*, 2nd ed., vol. III, Leipzig, 1893, p. 510.

⁸⁰ III, *On the Estate of Pyrrhos*, 9; cf. 78.

⁸¹ I, p. 297; cf. Lipsius, p. 499.

⁸² *The Greek Law of Sale*, pp. 48-51. Cf. my review which will appear in *A.J.P.* late in 1951 or in 1952.

Pollux wrote *συμβολαίων* rather than *ὁμολογιῶν*. Consequently, since there are certain objections to classifying the speeches against Boiotos and Spoudias as *δίκαι προικός*, it seems possible—if not probable—that the plaintiffs in these suits had recourse to a more general action, namely, the *συμβολαίων παραβάσεως δίκη*.⁸³

Besides the *δίκη προικός* there was another specific action—the *δίκη σίτου*.⁸⁴ The aim of the former obviously was to compel the payment or the restoration of the dowry itself, while the purpose of the latter was to obtain maintenance for the woman. Apparently the *δίκη σίτου*, in connection with dotal litigation, could be instituted under the following circumstances: (1) When the prospective husband received the dowry before the marriage, he was supposed to pay interest on it—probably at the common rate of 12%. If he did not pay this interest, the purpose of which was to cover the cost of supporting the woman, her *kyrios* could bring a *δίκη σίτου* against him.⁸⁵ (2) If the woman's *kyrios* did not deliver the dowry at the time of the marriage, he was expected to pay interest on it until payment was made. If this interest was not forthcoming, presumably the husband could prosecute his wife's former *kyrios* by means of the *δίκη σίτου* in order to obtain the interest which would contribute to his wife's support.⁸⁶ (3) After the dissolution of the marriage by death or divorce, if the dowry was not returned in the cases described above (pp. 135-136), then the woman's *kyrios* could lodge a *δίκη σίτου* against the former husband or his heirs.⁸⁷ One would expect that normally this action would have been the appropriate one only if the dotal debtor failed to pay interest in that period of delay granted after the occurrence of the event which called for the restitution of the dowry. The way in which suits for the dowry and for maintenance are linked, however, and the fact that action could be taken apparently as long as twenty years after the dissolution of the marriage seem to necessitate the conclusion that recourse to the *δίκη σίτου* also was possible throughout all those years.⁸⁸ No evidence is offered by the sources to explain why the dotal creditor sometimes brought suit for the restoration of the dowry itself and sometimes only for the interest due on it.

It may well be asked why these suits were necessary if the dotal creditor, whether husband or *kyrios*, held security (*apotimema*) guaranteeing respectively the payment or the restitution of the dowry. On the maturity of the debt, if the debtor was delinquent, why did the creditor not proceed immediately to foreclosure rather than become involved in troublesome litigation? The answer to this question, I believe, is clear. The institution of the dotal *apotimema*, as we have frequently observed,⁸⁹ was

⁸³ It is worth noting that the dotal agreement in *Against Spoudias*, 5, is called a *συμβόλαιον*.

⁸⁴ [Demosthenes], LIX, *Against Neaira*, 52-53; cf. Isaeus, III, *On the Estate of Pyrrhos*, 9; 78.

⁸⁵ See above, p. 118 and note 18.

⁸⁶ See above, p. 119 and note 25.

⁸⁷ [Demosthenes], LIX, *Against Neaira*, 52-53. Cf. Lipsius, pp. 494-495; 497-498.

⁸⁸ Isaeus, III, *On the Estate of Pyrrhos*, 9; 78; Beauchet, I, pp. 330-331, says that the statute of limitations for the two suits was twenty years. Isaeus, however, merely implies that an action could be lodged as long as twenty years after the dissolution of the marriage.

⁸⁹ See above pp. 130; 133.

a customary, and not an obligatory one. There must have been many occasions when no security was offered. Reasons for the foregoing of security can easily be imagined. There may have been such mutual trust between certain contracting parties that the establishment of security would have seemed superfluous, or the property of the person who normally would have been called upon to offer security may have consisted so exclusively of movables that he had no immovables to assign as apotimema. In these circumstances—and many others could be suggested—, if the dotal debtor proved delinquent on the maturity of the debt, the best method open to the creditor to reimburse himself would have been to institute the appropriate suit.⁹⁰ Even in cases where security had been furnished, the *δίκη σίτου* presumably would have been brought against the debtor if he failed to pay interest on the dowry during that period of delay granted to him before the restitution of the dowry itself was due. The existence of these suits, therefore, does not conflict with the generally accepted view⁹¹ that the dotal creditor, if the dowry was not paid or restored to him when due, could reimburse himself by foreclosing on the property which often on the occasion when dotal arrangements were made was designated as *ἀποτίμημα προικός*.

One final problem must be considered. After the creditor had foreclosed, did he become owner of all the property which had been offered as apotimema or, if the value of the security exceeded that of the debt, was he obligated to return that part of the property (or its value) which was in excess of the obligation? In our discussion of the hypothec the conclusion was reached that this “excess” (*τὰ ὑπερέχοντα*) had to be restored to the debtor.⁹² Since the argument in this chapter has shown the dotal apotimema to be a form of hypothec (*οἶον ὑποθήκη*), *a priori* it would be logical to assume that the same procedure applied to the apotimema. Pappulias, however, who believes in the restitution of *τὰ ὑπερέχοντα* in the case of the hypothec, denies it for the apotimema.⁹³ Lipsius opposes this point of view and believes that, at least in the time of the orators, according to both contracts *τὰ ὑπερέχοντα* had to be returned.⁹⁴

The passage⁹⁵ on which Lipsius bases his opinion is, I believe, decisive, as a brief analysis will show. 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 τοῖνυν τὴν ἀναίδειαν, ὅς ἐν ὑμῖν ἐτόλμησεν εἰπεῖν, ὡς οὐκ*

⁹⁰ It is possible, of course, that on occasions a friendly settlement was reached between the creditor and the debtor by means of a *datio in solutum*, but such an amicable agreement, for which there is no evidence, can hardly be considered identical with the institution of the dotal apotimema as characterized by the sources.

⁹¹ E. g., Beauchet, I, pp. 333-335; Lipsius, p. 499.

⁹² See Chapter IV, pp. 94-95.

⁹³ Pp. 151-161.

⁹⁴ P. 702 and note 95.

⁹⁵ Demosthenes, XXXI, *Against Onetor*, II, 6.

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 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 on 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 conclusion harmonizes well with everything which has been learned in this chapter about the dotal apotimema, as a brief recapitulation will show. At the time of the betrothal it was customary for the bridegroom to offer security guaranteeing the restitution of the dowry if the need should occur. The lexicographers inform us that this apotimema was supposed to be equal or superior in value to the amount of the dowry.⁹⁶ If one examines the extant dotal horoi, however, it is evident that the value of the farm, house, garden, workshop, etc.—or various combinations of such properties—could not always have corresponded to the amount of the dowry which is usually recorded on the stone. At the maturity of the obligation, if the debtor was in default, the creditor had the right to foreclose on the property marked as apotimema by the horoi.⁹⁷ Even without the convincing evidence of the passage from Demosthenes just discussed, it would be logical to conclude that this foreclosure extended only to the amount inscribed on the stone. For lack of specific data the actual procedure which was followed after the occurrence of the foreclosure can be reconstructed only on the basis of our knowledge of the various stages in dotal arrangements up to that point. Probably after the creditor had taken possession, the property serving as security was subjected to an appraisal. If it was found to be of the same value as the debt, then the transaction would have ended with the transfer of ownership to the creditor. If, however, the property was discovered to be of greater value than the dowry, then the “excess” was restored to the debtor. Presumably the usual means of effecting this restitution was to sell the property. No information is available on the question whether the creditor had the right to exact the deficit from the debtor in case the sale of the security produced a sum less than the amount of the dowry. It can only be suggested, as was done in the case of the hypothec,⁹⁸ that the creditor probably did not have such a right unless it had been granted to him by a special clause in the contract. Since the creditor must usually have insisted on apotimema of adequate value, it is unlikely that he was often faced with a deficit when the security was sold.

⁹⁶ See above, pp. 120-121.

⁹⁷ These remarks, of course, apply equally to those cases where the kyrios offered apotimema guaranteeing the future payment of the dowry.

⁹⁸ See Chapter IV, p. 95.

In ending this chapter a few words will be appropriate on an interesting inscription recently published by A. E. Raubitschek,⁹⁹ which, so far as it can be interpreted, seems to corroborate the conclusions which we have reached concerning the dotal apotimema. For the text of the document, see above, Chapter II, No. 8. Since no special identification is given to Aglaotime, it seems certain that she was the sister of Eirene. If this is true, the father must have been the dotal debtor, for it is impossible to maintain that the husband “mortgaged” (ὑπόκειται) property to his sister-in-law also. The clause concerning Aglaotime is hard to interpret. The best suggestion I can offer is that, on the occasion when the father offered security to guarantee the future payment of the dowry (or the balance of the payment) for his daughter Eirene, he also wished to make provision for his other daughter. The small sum of 200 drachmas recorded in line 7 need not be against this supposition, for possibly part of Aglaotime’s dowry was to consist of some other type of property than cash. Also it should be noted that at the end of line 6 there is space for the restoration of at least the numeral 500. The transaction relating to the Gephyraioi is even more difficult to explain, but fortunately we do not need even to hazard a guess as to its probable significance. What concerns us is that in addition to the dotal apotimema there were also two other liens on the same house. It is obvious, therefore, that, if the debtor was delinquent, the sale of the house was necessary to satisfy the claims of the three creditors. In conformity with the arguments just advanced for those cases where there was only one creditor, it is logical to conclude that any surplus over the amount of the obligations resulting from the sale would have been restored to the debtor.¹⁰⁰

⁹⁹ *Hesperia*, Supplement VII, 1943, pp. 1-2, no. 1; see above Chapter II, No. 8. For the following argument I am greatly indebted to many discussions with A. E. Raubitschek.

¹⁰⁰ *I.G.*, II², 2670, should be mentioned in this connection. It reads ὄρος χωρίο προίκος| Ἴπποκλείαι Δημοχά|[ρ]ος Λευκονοῦως Τ| [ὄσ]οι πλείονος ἄξι|[ον] Κεκροπίδαις| [ὑπό]κειται καὶ Λυκ|[ομί]δαις καὶ Φλυεῖ|[σι]. It is possible to interpret this inscription as recording that a certain part of the χωρίον—a talent’s worth—was the dowry itself (cf. above, notes 20 and 22). It seems more reasonable, however, to supply the word ἀποτίμημα and to explain this document as publicizing the security offered for the dowry. It is natural to think of the husband as the dotal debtor in this transaction, for it would have been rather unusual for a man (the father) to be indebted to a tribe, genos, and deme to which he did not belong. G. A. Stamires, however, has kindly called my attention to *I.G.*, II², 6737a (p. 891). On this lekythos Thymokles of Leukonoe is depicted shaking hands with Hippokleia of Leukonoe, presumably his wife. Kirchner suggests that this Hippokleia is the same as the one recorded on the horos stone. If this identification is correct—and it obviously is far from certain—then, whether father or husband was the dotal debtor, he was also indebted to a tribe, genos, and deme to which he did not belong. It may be better, therefore, not to identify the two Hippokleias, but to assume that in the horos inscription the dotal debtor was the husband—a man belonging to the deme Phlya. It should be noted that default at the maturity of this particular dotal debt need not have led to a sale, for, inasmuch as the security was a “farm,” presumably each creditor could have foreclosed on his appropriate amount of land. The absence of any numerals to mark the amount of the obligations to the tribe, genos, and deme is strange.

CHAPTER VII

ΠΡΑΣΙΣ ΕΠΙ ΛΥΣΕΙ

ὄρος χω
ρίο πεπρα
μένο : ἐπὶ λ
ύσει Δίσχυ
λίωνι : ἐξ
Οἴο Χ

This inscription ¹ is reproduced here to illustrate the third type of horos mortgage stone published in volume II of the *Editio Minor* of *Inscriptiones Graecae*. The contract referred to in inscriptions of this kind was known as *πράσις ἐπὶ λύσει* (sale with right of redemption, *vente à réméré*, *Verkauf auf Lösung*). About one hundred and fifteen stones from Attica ² containing this formula are now extant, a number considerably larger than the total of all the other preserved mortgage horoi. In the Attic Orators there are a few specific references to this contract, although not as many as one would expect considering the frequency of its appearance on the horos stones. Our investigations of the hypothec in Chapter IV, however, revealed clearly that many of the transactions involving loans mentioned in the literary sources, which are designated merely by the verbs *ὑποτιθέναι* or *ὑποκείσθαι*, were probably instances of the *πράσις ἐπὶ λύσει* contract.³ The conclusions reached there, based partly on the evidence from the horoi, were that the *πράσις ἐπὶ λύσει* was the earliest contract of loan developed by the Athenians in which real property served as security and that it remained the most common contract for that purpose at least throughout the fourth

¹ *I.G.*, II², 2702.

² *I.G.*, II², 2658; 2681-2757. See above, Chapter I, Nos. 9-27 and Addendum I, *a* and *b*; Chapter II, Nos. 11-25. For the non-Attic horos mortgage stones, see Chapter II, pp. 37-40.

The term *πράσις ἐπὶ λύσει* does not exist as such in the sources. Pringsheim, *The Greek Law of Sale*, pp. 117-119, argues that *ὠνή ἐπὶ λύσει* would be a more accurate expression. While it is probable that creditors (purchasers) may have called the contract by that name, the fact that some one hundred and fifteen Attic horoi are extant containing a formula similar to the one in the inscription transcribed in the text above is good evidence that from the debtors' point of view the transaction was known as *πράσις ἐπὶ λύσει*. Cf. my review of Pringsheim's book which will appear in *A.J.P.* late in 1951 or in 1952.

³ E. g., Demosthenes, XXVII, *Against Aphobos*, I, 9; 24-29; [Demosthenes], XLIX, *Against Timotheos*, 11-12; see Chapter IV, pp. 75-77 and 67-69. Isaeus, VI, *On the Estate of Philoktemon*, 33; V, *On the Estate of Dikaiogenes*, 21; X, *On the Estate of Aristarchos*, 24; see Chapter IV, pp. 74-75 and 78-80.

century.⁴ In this chapter our task will be to examine the chief characteristics of this institution as they can be gleaned from the literary and epigraphical sources.

Until very recently there has been general agreement about the nature of the *πράσις ἐπὶ λύσει*.⁵ It was believed to have been a form of real security according to which the borrower, as security for a loan, sold with right of redemption to the lender some property (usually immovables) of sufficient value to guarantee the obligation. The loan was identical with the sale price, and, since the transaction was essentially a real sale, the ownership of the property was transferred immediately to the creditor. This ownership naturally was qualified by an obligation on the part of the creditor to restore the property in good condition to the debtor if he repaid the loan within a certain specified time. The actual possession could reside either with the creditor or the debtor, depending on the terms of the particular contract. If the debtor was delinquent at the time of the maturity of the contract, the creditor (purchaser) automatically acquired absolute ownership of the property without any obligation to return *τὰ ὑπερέχοντα* to the debtor in those cases in which the value of the security had exceeded the amount of the loan. A basic feature of this interpretation of the transaction, the significance of which has not always been fully realized, is that, since the debtor immediately lost title to the ownership of the security, he could not contract a second mortgage on it (cf. Chapter IV, pp. 93-95).

In a recent article⁶ I. A. Meletopoulos has completely rejected the validity of this view of the *πράσις ἐπὶ λύσει*. He recognizes in this institution only a secondary contract—*σύμβασις παρεπομένη*—which had the sole purpose of securing a previous contract. Consequently, the ownership of the property “sold” *ἐπὶ λύσει* was not transferred to the purchaser, because neither the vendor *ἐπὶ λύσει* intended to sell it nor the purchaser *ἐπὶ λύσει*, to buy it. Since the ownership of the property remained with the debtor and since the purpose of the contract was merely to offer security for the actual amount borrowed, it follows that the debtor could use that part of the property which exceeded the value of the first loan as security for guaranteeing further loans either by means of another *πράσις ἐπὶ λύσει* or by a hypothec. In case of non-fulfillment of his obligation by the debtor, the first creditor had claims on the security only to the extent of his loan, while the later creditors sought satisfaction from the *ὄσφ πλείονος ἄξιον*—i. e., the value of the security which was in excess of the amount of the original loan. The creditor, for the duration of the contract, had the possession of the property serving as security, but he frequently left the use of it to the debtor in return for a rent, which was not calculated on the value of the

⁴ See above, Chapter IV, pp. 91-94.

⁵ Hitzig, pp. 2-3; 73-80; 105-107; 117-121. Beauchet, III, pp. 176-177; 237-252. Lipsius, pp. 692-693; 703-704. Wyse, pp. 430-432 (note on Oration, V, 21). See above, Chapter IV, pp. 61-62.

⁶ Πολέμων, IV, 1949, pp. 41-72. The author gives a resumé of his views on pp. 66-68.

property, but on the amount of the loan. “ This payment was a rent in name only, but in fact it was interest.”

The essential difference between these two views of the *πρᾶσις ἐπὶ λύσει* is that Meletopoulos believes that the ownership of the property which was “ sold ” as security did not pass to the creditor and, consequently, that the debtor, as owner, could continue to encumber the property “ sold ” up to its full value. In addition he argues that the *πρᾶσις ἐπὶ λύσει* itself was not a contract of loan, but a secondary contract whose sole purpose was to guarantee a prior transaction—usually a contract of loan. Since we are faced at the very outset of our investigation with this complete divergence of opinions, our first task must be to try to decide between them. Only after we have reached a verdict on these fundamental issues, will we be in a position to examine some of the more detailed aspects of this institution.

It should be stated at once that in my opinion, at least, despite the persuasiveness of some of his arguments, Meletopoulos’ conception runs into two great objections which he has not even attempted to answer. First, it is hard to understand why a contract which did not involve a sale and a transfer of ownership should ever have been designated as *πρᾶσις ἐπὶ λύσει*. Second, it seems to me that the *πρᾶσις ἐπὶ λύσει* as he describes it was almost identical with the hypothec. Why should two identical—or almost identical—contracts have been designated by totally different terms? This identification of the two transactions has the further difficulty of making it almost impossible to detect any evolution in the institution of real security as employed by the Athenians.⁷ His contention, however, that the *πρᾶσις ἐπὶ λύσει* was a secondary contract is on sounder ground. In certain instances, at least, this interpretation may correspond with the facts.

All discussions of the *πρᾶσις ἐπὶ λύσει* rely heavily on two speeches, [Demos-thenes], XXXIII, *Against Apatourios*, and Demosthenes, XXXVII, *Against Pantainetos*, for these are the only two literary documents in which there are unequivocal references to the contract under discussion. We shall turn to the *Against Apatourios* first, for the pertinent sections (5-12) do not raise as many problems as are to be found in the other oration. The account of the relevant transaction as given by the speaker is as follows: Apatourios, a Byzantine, needed forty minas to prevent his creditors from seizing upon his ship. A fellow countryman, Parmeno, agreed to give him ten minas, and the speaker was begged to provide thirty minas. Since the speaker did not have sufficient ready cash, he persuaded a banker to lend the money taking him as surety (*ἐγγυητής*). At this point Parmeno and Apatourios had a quarrel, but, since the former had already given three minas to the latter, he felt that to strengthen his chance of recovering those three the other seven minas should also be lent. As he wished to have no further dealings with Apatourios, he persuaded the speaker to

⁷ See above, Chapter IV, pp. 90-95.

take over the whole loan of ten minas. The speaker sums up the transaction as follows (section 8): λαβὼν δὲ [ἐγὼ] τὰς ἑπτὰ μνᾶς παρὰ τοῦ Παρμένοντος, καὶ τὰς τρεῖς ἄς προειλήφει οὗτος παρ' ἐκείνου, ἀνθομολογησάμενος πρὸς τούτον, ὠνήν ποιούμεαι τῆς νεῶς καὶ τῶν παίδων, ἕως ἀποδοίῃ τὰς τε δέκα μνᾶς ἄς δι' ἐμοῦ ἔλαβεν, καὶ τὰς τριάκοντα ὧν κατέστησεν ἐμὲ ἐγγυητὴν τῷ τραπεζίτῃ.

In this transaction the *πρᾶσις ἐπὶ λύσει* was not the means by which the bank lent the thirty minas to Apatourios and secured its loan. The bank received its guarantee of repayment in the person of the speaker who was designated as Apatourios' surety. The "purchase" of the ship and slaves was made by the speaker so that he might obtain security for the loan of forty minas for which he had become responsible. Meletopoulos (pp. 47-48; 67) sees here proof of his contention that the *πρᾶσις ἐπὶ λύσει* was only a secondary contract—in this case guaranteeing the suretyship and the loan. This interpretation may be correct from a strictly legal standpoint, but, since the speaker was ultimately responsible for the whole loan, it could be argued that, in effect, he was the lender of the forty minas. From this point of view it would be possible to maintain, I believe, that the ship was sold *ἐπὶ λύσει* to him in return for a loan of forty minas. The important matter, however, is the question of the ownership of the security. Even if we agree with Meletopoulos that in this case the rôle of the *πρᾶσις ἐπὶ λύσει* was that of a secondary contract, that admission is not evidence for his conclusion that the debtor Apatourios continued as owner of the property "sold." In regard to this particular transaction the answer to the problem of ownership must be found, if it can be found, in the subsequent history of these negotiations (sections 9-12).

Through the efforts of the speaker Apatourios had satisfied his former creditors, but he was still in debt to the amount of forty minas and, as guarantee for the payment of that sum, he had "sold" the ship and slaves *ἐπὶ λύσει* to the speaker. Since he had been left in possession of the security, he tried to escape from his obligation by absconding with the ship and slaves. This scheme was thwarted by the alertness of Parmeno. When the speaker learned of the rascality of Apatourios, his one idea was to terminate the contract by recovering the money as soon as possible. He posted guards on the ship and then turned it over to the bank. By what right did he dispose thus of the security? Was his authority to take this step based merely on the fact that Apatourios had attempted to break the contract? Since Apatourios never challenged his action in freeing himself from his suretyship by delivering the ship to the bank, it is more probable that the speaker was only exercising his rights as owner.

The speaker, after describing his dealings with the bank, proceeds to say: *ταῦτα δὲ πράξας κατηγογήσα τοὺς παῖδας, ἵν' εἴ τις ἔνδεια γίγνοιτο, τὰ ἐλλείποντα ἐκ τῶν παίδων εἶη*. This statement is puzzling since the slaves had been part of the security from the time that the speaker had made the *ὠνήν τῆς νεῶς καὶ τῶν παίδων*. Possibly in this context the verb *κατεγγυᾶν* should be understood as meaning merely "attached"—

i. e., the speaker seized possession of the slaves. In fact, the narrative at this point seems to be confused, for in section 11 Apatourios complains that the speaker has “attached” the ship and slaves to protect Parmeno’s share in the loan. The ship, however, had already been turned over to the bank to free the speaker from his suretyship. What is meant by the remark “in order that if any shortage should occur, the deficiency might be made up from the slaves”? To understand this we must remember that to guarantee his suretyship for thirty minas, the speaker had turned the ship over to the bank. Since he did not yet know how large a sum the sale of the ship would yield, he had to consider the possibility that it would take the full value of the ship to satisfy the claim of the bank. The speaker, however, was also responsible to Parmeno for ten minas. To protect himself against this obligation, he apparently felt, in view of the unreliability of Apatourios, that the safest policy was to take actual possession of the slaves. Then, if the proceeds from the sale of the ship did not exceed thirty minas, he would have in the persons of the slaves the means with which to repay Parmeno.

These confused negotiations were finally concluded by the sale of the ship for forty minas, the amount of the original loan. From this sum thirty minas were given to the bank and ten to Parmeno. Thereupon the speaker and Apatourios cancelled the contract according to which the money had been lent. Nothing further is said of the slaves. Possibly, since the terms of the contract had been fulfilled by the repayment of the forty minas, the slaves were returned to Apatourios.

Any discussion of these negotiations is bound to be disappointing, because [Demosthenes’] narration of the various transactions is so confused—either deliberately or because of compression. Possibly Meletopoulos is correct in recognizing the *πρᾶσις ἐπὶ λύσει* as a secondary contract here, but certainly there is no evidence for his contention that the debtor remained owner of the property which was sold as security. On the contrary, what evidence there is seems to point clearly to the conclusion that the creditor not only had the ownership but also did not hesitate to exercise his rights as owner.

Demosthenes’ Oration, XXXVII, *Against Pantainetos*, is the basic literary document for the study of the *πρᾶσις ἐπὶ λύσει*. A certain Pantainetos had leased from the *Poletai* a mine (*μέταλλον*) for which he owed to the state a periodic payment or rent (*καταβολή*) of 90 minas.⁸ The transactions which are of significance to us are all concerned with a metallurgical workshop (*ἐργαστήριον*), in which the ore was pro-

⁸ This information is included in the *ἔγκλημα* (section 22), one of the documents inserted in the speech. Édouard Ardaillon, *Les Mines du Laurion dans l’Antiquité*, Paris, 1897, pp. 189-190, shows clearly, however, that there is no reason to suspect the passage. Ardaillon also points out very properly that many scholars have misinterpreted the transactions described in the speech because of the erroneous tendency to identify the *μέταλλον* and the *ἐργαστήριον*. Cf. his remarks, pp. 171-172; 189-192; 207-208.

cessed, and with thirty slaves who labored in the *ergasterion*. Since these transactions are open to different interpretations, it will be necessary, for the sake of clarity, to quote the relevant passages as told by the speaker, Nikoboulos (sections 4 and 5): Ἐδανείσαμεν πέντε καὶ ἑκατὸν μνᾶς ἐγὼ καὶ Εὐεργος, ὃ ἄνδρες δικασταί, Πανταινέτῳ τουτῶι, ἐπ' ἐργαστηρίῳ τ' ἐν τοῖς ἔργοις ἐν Μαρωνείᾳ καὶ τριάκοντ' ἀνδραπόδοις. ἦν δὲ τοῦ δανείσματος τετταράκοντα μὲν καὶ πέντε μναὶ ἐμαί, τάλαντον δ' Εὐέργου. συνέβαινε δὲ τοῦτου ὀφείλειν Μνησικλεῖ μὲν Κολλυτεῖ τάλαντον, Φιλέᾳ δ' Ἐλευσινίῳ καὶ Πλείστορι πέντε καὶ τετταράκοντα μνᾶς. πρατῆρ μὲν δὴ τοῦ ἐργαστηρίου καὶ τῶν ἀνδραπόδων ὁ Μνησικλῆς ἡμῖν γίγνεται (καὶ γὰρ ἐώνητ' ἐκείνος αὐτὰ τούτῳ παρὰ Τηλεμάχου τοῦ πρότερον κεκτημένον).

One of the chief difficulties in this account is to discover the “original” status of the *ergasterion* and the slaves. The usual explanation has been that they were owned by Telemachos, from whom Mnesikles and his partners bought them for Pantainetos for 105 minas. Pantainetos was allowed to make use of the the *ergasterion* and the slaves, but, since he was now indebted to Mnesikles and his associates for 105 minas, the property was considered as security guaranteeing the repayment of the loan.⁹ This is a possible interpretation, but it seems to me that it runs into one objection which cannot be answered satisfactorily. In sections 31 and 50 we are told that the *ergasterion* and the slaves were subsequently sold for about three and a third talents. If the property was worth that much, it is rather inexplicable why Telemachos had been willing to sell it outright to Mnesikles, in the interest of Pantainetos, for only half that sum. Consequently, I believe that we must assume that Pantainetos was the “original” owner of the *ergasterion* and the slaves, having acquired this ownership in some way not stated in the text. When he began to work the mine which he had leased, he found that he needed some ready cash. He thereupon borrowed 105 minas from Telemachos and as security for the loan sold to him ἐπὶ λύσει the *ergasterion* and the slaves. According to this explanation, then, Telemachos would have been the first of several πρᾶσις ἐπὶ λύσει creditors who were concerned with this property.¹⁰

When Telemachos wished to recover his loan, Pantainetos was unable to repay

⁹ E. g., Meletopoulos, *op. cit.*, p. 42 and the references cited there. The explanation of these transactions given by Pringsheim, pp. 206-207, based largely on the *hypothesis* to the *Against Pantainetos*, I find unconvincing.

¹⁰ I realize that this interpretation also runs into difficulty, for, according to it, Telemachos was the original purchaser ἐπὶ λύσει. In sections 9 and 49, however, Mnesikles is characterized as the purchaser ἐξ ἀρχῆς. The only suggestion I can offer is that in the eyes of the speaker, Nikoboulos, the transaction with Telemachos was unimportant while that with Mnesikles was basic to his argument. Since Nikoboulos first became involved in these negotiations by purchasing the property from Mnesikles, it was natural, albeit inaccurate, for him to describe Mnesikles as the original purchaser. If this explanation is unsatisfactory, I can only remark that the difficulty arising from the ἐξ ἀρχῆς does not seem as serious as the assumption that Telemachos sold the property outright for only half its value.

the money. Since possession of the *ergasterion* and slaves was essential to Pantainetos for the working of his lease, he persuaded Mnesikles and two other men to settle the obligation to Telemachos by turning over to him 105 minas. By this transaction, then, Mnesikles (and his associates) became the purchaser-creditor in place of Telemachos who no longer had any claim on the property. Subsequently Mnesikles also wanted to recover his loan. Since Pantainetos still was unable to redeem the property, he persuaded Nikoboulos and Euergos to become his creditors by paying to Mnesikles the 105 minas which were owed. Thereupon Mnesikles became vendor of the property to Nikoboulos and Euergos who immediately entered into the following agreement with Pantainetos (section 5): *μισθοῦται δ' οὗτος παρ' ἡμῶν τοῦ γιγνομένου τόκου τῷ ἀργυρίῳ, πέντε καὶ ἑκατὸν δραχμῶν τοῦ μηνὸς ἐκάστου. καὶ τιθέμεθα συνθήκας, ἐν αἷς ἢ τε μίσθωσις ἢν γεγραμμένη καὶ λύσις τούτῳ παρ' ἡμῶν ἐν τινὶ ῥητῷ χρόνῳ.*

The basic problem in connection with this or any other *πρᾶσις ἐπὶ λύσει* transaction is that of the ownership of the property sold to secure the loan. Meletopoulos, as we have seen,¹¹ maintains, in opposition to the traditional view, that the ownership remained with the debtor. This interpretation runs counter to the language used in the oration under discussion. In the Greek just quoted, the terminology of a regular lease is employed. Unless words have no meaning, a man (Pantainetos) would not be described as lessee of property of which he still retained the ownership. In section 7 we read that Euergos, when Pantainetos did not abide by the terms of the contract, took possession of *τὰ ἐαντοῦ*. In section 9 Nikoboulos says: *οὗτος* (Pantainetos) *ἐμισθώσαθ' ἡμέτερον ὃν τὸ ἐργαστήριον καὶ τὰνδράποδα*. Finally in section 29 we find the statement: *ἐμισθώσαμεν* (Nikoboulos and Euergos) — — — — *τούτῳ* (Pantainetos) *τὰ ἡμέτερ' ἡμεῖς*. These passages certainly confirm the generally accepted view that, since the *πρᾶσις ἐπὶ λύσει* was in form a real sale, the ownership of the property offered as security was transferred immediately to the vendee (creditor). This conclusion is strengthened by evidence contained on a later page of this same speech. In sections 30 and 31 we learn that Nikoboulos and Euergos, at the urgent request of Pantainetos, sold the property to certain other men on the same terms as those upon which they had bought it from Mnesikles. Although the property was worth about twice as much as the 105 minas which Pantainetos owed to Nikoboulos and Euergos, it is stated categorically that Pantainetos himself could not sell it. *οὐδεὶς γὰρ ἤθελεν δέχεσθαι τούτον* (Pantainetos) *πρατήρα* — — — — *καίτοι τίς ἂν καθάπαξ πρατήρᾳ σ' (Pantainetos) ἔχων σοὶ δραχμὴν ἔδωκε μίαν*; Why would no one accept Pantainetos as vendor? Certainly the reason must be that, since Pantainetos had already sold the property *ἐπὶ λύσει* for 105 minas, the ownership of the *ergasterion* and the slaves had been transferred to his creditors. This explains why Pantainetos was so anxious that Nikoboulos and

¹¹ See above, pp. 143-144.

Euergos should sell the property to the other men. These men, who clearly were “partners” of Pantainetos, by paying 105 minas to Nikoboulos and Euergos, became owners. They then allowed Pantainetos to sell the property outright for three talents and 2600 drachmas and from this sum we can be certain that they received considerably more than their original investment of 105 minas.

So far the evidence from the *Against Pantainetos* confirms the traditional view that in a *πρᾶσις ἐπὶ λύσει* the ownership of the security was transferred at once to the creditor. It should be remarked that Meletopoulos ignores the passages just discussed. He does, however, seize upon certain statements in this speech which, if considered by themselves, could be interpreted according to his theory. These statements, consequently, must occupy our immediate attention.

In sections 7 and 11-16 we hear of other creditors of Pantainetos besides Nikoboulos and Euergos. They claimed that they also had lent money to Pantainetos on the security of the *ergasterion* and the slaves. These creditors were probably fictitious ones—agents of Pantainetos (cf. 39 and 48)—, but the important point for us is that nowhere does Nikoboulos explicitly say that it was a legal impossibility for creditors other than himself and Euergos to have a claim on the security.¹² Meletopoulos¹³ believes that he has proof here of his contention that property could be sold *ἐπὶ λύσει* to various creditors in succession up to the full value of the security. Nikoboulos and Euergos accordingly had a claim on the *ergasterion* and the slaves only to the amount of 105 minas, while the *ὄσφ πλείονος ἄξιον* served as security for the other creditors.

The references to these creditors are too confused and brief to lead to a certain explanation of their status, whether real or fictitious. One assumption which Meletopoulos makes, however, seems to be unwarranted. He assumes that these creditors, like Nikoboulos and Euergos, were creditors in a *πρᾶσις ἐπὶ λύσει* contract. Why could they not have been hypothecary creditors? The fact that they refused to buy off the claims of Nikoboulos and Euergos by paying them 105 minas unless Nikoboulos and his partner would become vendors of the property to them certainly seems to imply that they wished to strengthen their position. Could this not mean that they wanted to change their status from that of hypothecary creditors to that of *πρᾶσις ἐπὶ λύσει* creditors?

Since it is impossible to know whether these creditors were real ones or only fictitious ones joined in a conspiracy with Pantainetos, it would be mere idle speculation to try to reconstruct in detail their claims—legitimate or imaginary—to the security. It is obvious, however, that these men were of great nuisance value to Pantainetos and a potential menace to Nikoboulos and Euergos. They could have

¹² Possibly the legal impossibility is implied in the statement (section 12) that Mnesikles warranted their title to the property: *καὶ τοῦ Μνησικλέους βεβαιούντος ἡμῖν.*

¹³ Pp. 44-47.

pretended that their claim had priority and that Nikoboulos and Euergos had been duped into lending money on property already encumbered. Since this could have led to a troublesome law suit for Nikoboulos and his associate, it is not surprising that they were glad to recover their money by selling the property as Pantainetos wished. It is more important for our purposes to show that the same piece of property could be encumbered by both a hypothec and a *πρᾶσις ἐπὶ λύσει*, interpreted according to the traditional view rather than that of Meletopoulos. If this can be done, we shall have one possible way of giving a juridical explanation to those elusive statements in the *Against Pantainetos* concerning the additional creditors. Meletopoulos' thesis can hardly be maintained without the support of the evidence derived from these creditors, for, as we have already seen, the other pertinent passages in the oration all corroborate the traditional interpretation.

To demonstrate that the same property could serve as security according to both a hypothec and a *πρᾶσις ἐπὶ λύσει*, we must turn to an analysis of a very interesting *Poletai* record of the year 367/6 which was recently published by Miss Margaret Crosby.¹⁴ The first half of this inscription, which alone is of importance to us, records the confiscation and public sale of the house of Theosebes (the son of Theophilos), who had been convicted of sacrilege. Several claims against the house, which were all recognized, are listed. The three liens which concern us are as follows: (1) the house was mortgaged (*ὑπόκειται*) to Smikythos for 150 drachmas (lines 14-15; 38-39); (2) the father Theophilos had incurred an obligation of 100 drachmas to the *κοινὸν φρατέρων Μεδοντιδῶν* and had offered the house as security according to a contract which apparently was a *πρᾶσις ἐπὶ λύσει*¹⁵ (lines 16-25); (3) the father Theophilos had also become indebted to a *κοινὸν ὀργεῶνων* for 24 drachmas and had sold the house *ἐπὶ λύσει* to secure that debt (lines 30-35).

The fact that the house was sold *ἐπὶ λύσει* both to the phratry of the Medontidai and to a *κοινὸν ὀργεῶνων* at first glance would seem to corroborate Meletopoulos' thesis. A reasonable explanation of these negotiations, however, in accordance with the tradi-

¹⁴ *Hesperia*, X, 1941, pp. 14-27. In the interpretation of this inscription I have been greatly aided by many discussions with A. E. Raubitschek. He should not be held responsible for the views advocated here, however.

¹⁵ The phratry justifies its claim with these words: *ἀποδομένο* (to the phratry) *τὴν οἰκίαν ταύτην Θεοφίλου*. Since the phratry is claiming 100 drachmas, the *ἀποδομένο* cannot refer to an outright sale by Theophilos, for in that case it could only be a question of money owed to Theophilos. It is clear that Theophilos was debtor to the phratry. Despite the strangeness of the expression, Miss Crosby is certainly correct in recognizing the transaction as a *πρᾶσις ἐπὶ λύσει*. The nearest parallels to the language employed here, with which I am familiar, are to be found in *Syll.*³, 1200 (Amorgos): — *ἀπέδοτο Νικήρατος* — — *Κτησιφῶντι* — — *ἐπὶ λύσει* (see above, Chapter IV, pp. 71-72) and in the famous Register of Sales of Immovables from Tenos, *I.G.*, XII, 5, no. 872, line 121: (*ἡ οἰκία καὶ τὸ χωρίον*) *ἃ ἀπέδωκε Φῶκος Ἀθηνάδει δανειζόμενος παρ' Ἀθηνάδου* (the transaction recorded here is a *πρᾶσις ἐπὶ λύσει*). Presumably in our inscription the idea of *δανειζόμενος* must be understood. Compare also the *ἀπέδοτο λύσιμα* in the parchment from Doura-Europos; see below, pp. 164-165.

tional interpretation of the *πρᾶσις ἐπὶ λύσει* is possible. Miss Crosby (p. 22) is certainly correct in maintaining that this undefined *κοινὸν ὀργεῶνων* must have belonged to the previously mentioned phratry. Presumably, then, the 100 and the 24 drachmas were components of the same loan, granted by the organization as a whole and by one of its constituent parts either simultaneously or successively.¹⁶ Such an assumption is surely more reasonable than to think of the small sum of 24 drachmas as forming a completely independent loan.

It is of the utmost importance to ascertain which of the three liens on the house constituted the first mortgage. Meletopoulos¹⁷ unhesitatingly says that the house was sold *ἐπὶ λύσει* by the father Theophilos and then subsequently was mortgaged (*ὑπέκειτο*) by the son Theosebēs. If he could prove that this was the actual order of the liens, he would strengthen his thesis tremendously. Unfortunately for his theory, however, it is stated at the beginning of the inscription that the house was registered for public sale *ὄσωι πλείονος ἀξία ἢ ὑπόκειται Σμικύθωι Τειθρασίωι: ΗΨ δραχμῶν*. It is hard to believe that the contract given this prominent position in a public document did not have the prior claim. Certainly the loans of 100 and 24 drachmas furnished by the phratry and the *orgeones* according to a *πρᾶσις ἐπὶ λύσει*, which are recorded later in the inscription, must be recognized as secondary claims.

General considerations lead inevitably to the same conclusion. Suppose for a moment that the first loan was secured by a *πρᾶσις ἐπὶ λύσει* and that Meletopoulos' conception of that institution is correct. What satisfactory reason can be given to explain why the son at a later time obtained a further loan under a different kind of contract? According to Meletopoulos' thesis it would have been natural for the *πρᾶσις ἐπὶ λύσει* to continue to serve as the means for securing additional loans. Or are we to believe that the hypothec and the *πρᾶσις ἐπὶ λύσει* were so similar in nature that they were used interchangeably? In that case, it is difficult to understand, as was remarked above,¹⁸ why almost identical contracts were characterized by such different names.

The evidence of the inscription seems to be unmistakable. The hypothec held by Smikythos was the first lien on the house. If we approach the document from this point of view—and if we reason according to the traditional interpretation of the nature of the *πρᾶσις ἐπὶ λύσει*—, I believe it is possible to explain satisfactorily how a house, which had already been encumbered with a hypothec, could subsequently be sold *ἐπὶ λύσει* to other creditors.

The transactions recorded in this inscription probably should be reconstructed as

¹⁶ For simultaneous loans, and supplementary loans granted by the same creditor, see below pp. 154-156. One wonders whether the sums recorded in this inscription—particularly the 24 drachmas—could represent dues, fines, etc. owed by Theophilos to the phratry and the *orgeones*.

¹⁷ Pp. 64-66.

¹⁸ P. 144.

follows: Theophilos first borrowed 150 drachmas from Smikythos and gave him a mortgage (hypothec)¹⁹ for that amount on the house. Some time later Theophilos again was in need of money. He turned to his fellow *phrateres* and *orgeones* and was offered 124 drachmas, provided he would sell the house *ἐπὶ λύσει* to guarantee the loan. It is noteworthy that the associations demanded that type of security which was safest for the creditor and most exacting on the debtor. Presumably they considered Theophilos a bad risk; possibly rumors about his son's conduct were beginning to circulate. Since Smikythos already held a first mortgage on the house, obviously his consent to this "sale" of the security was necessary. As soon as the permission was granted, the phratry and the *orgeones* lent the 124 drachmas to Theophilos and in accordance with the terms of the contract became owners of the house which was sold as security. As owners they naturally assumed the obligation to Smikythos; to put it in different words, their loan to Theophilos in fact amounted to 274 drachmas. If the family of Theophilos was in a precarious position, Smikythos must have been pleased to have the associations become responsible for his loan of 150 drachmas.

Some time afterwards Theophilos died and his son Theosebés was convicted of sacrilege. Thereupon the state proceeded to confiscate his property which, since nothing else is listed in the inscription, presumably consisted of the house alone. This house, however, had passed into the ownership of the phratry and the *orgeones* through the *πράσις ἐπὶ λύσει* transaction. By what right, then, did the state confiscate property to which Theosebés no longer had title? The answer, I think, is obvious. Since Theosebés, through conviction and exile, had forfeited his legal personality, all rights pertaining to that personality devolved upon the state. Consequently, the state acquired the right to redeem the property which had been offered as security. The redemption was carried out by means of the sale of the house. After the creditors had been satisfied, any surplus which remained belonged legally to the state, the "heir" of Theosebés.

If Theosebés had not been convicted of sacrilege and if his property had not been confiscated, the procedure which would have been followed in these transactions can be reconstructed with considerable certainty. To redeem his house, Theosebés presumably would have had to pay 274 drachmas to the phratry and the *orgeones*, since they naturally would not have relinquished title to the house until they had received, in addition to their loan of 124 drachmas, also the 150 drachmas for which they were obligated to Smikythos. If Theosebés could not redeem the house within the time specified in the contract, then the phratry and the *orgeones* would have obtained absolute ownership of the property. As we have seen, they had become debtors to Smikythos in the matter of the hypothec at the same time that they became creditors

¹⁹ Since the other two liens are described as *πράσις ἐπὶ λύσει* it seems certain that the *ὑπόκειται* (lines 14-15) refers to a hypothec.

to Theophilos. Concerning the settlement of their debt to Smikythos, the arrangement probably was that they should pay him after Theophilos or his heir had redeemed the house, or, in case redemption did not occur, after they had acquired absolute ownership of the property. In this latter event they could have sold the house, if necessary, to procure the 150 drachmas which were due to Smikythos.

From this inscription, therefore, we learn that a man who had borrowed on a hypothec could, with the consent of the hypothecary creditor, contract a further loan on the same security by means of a *πρᾶσις ἐπὶ λύσει*. A prerequisite for this second loan naturally was that the value of the security exceed that of the prior debt. Since the creditor in a *πρᾶσις ἐπὶ λύσει* became owner of the security, obviously he assumed the obligation to the hypothecary creditor. From the point of view of the latter the transaction signified merely a change in the person of the debtor. The borrower, of course, could redeem the security only by repayment of both loans to the vendee in the *πρᾶσις ἐπὶ λύσει* contract. It is unlikely that this method of making a second loan was common.²⁰ If the security was of sufficient value, the hypothecary debtor probably was accustomed to procure a further loan by offering a second mortgage (hypothec)

²⁰ It will be noticed that an explanation similar to the one just given for the transactions recorded in the Poletai inscription could also be given for the episode of the other creditors in the speech *Against Pantainetos*, 12 (see above, pp. 149-150). Their version of the transactions may have been somewhat to this effect. Pantainetos had borrowed money from them and given them a mortgage (hypothec) on the *ergasterion* and the slaves. Subsequently (with or without their knowledge) he obtained an additional loan by selling this property *ἐπὶ λύσει*. Since the security was worth more than the 105 minas for which sum Nikoboulos and Euergos had purchased the property, the "hypothecary creditors" now claimed it was necessary for the vendees to settle their prior claim. Thus these "hypothecary creditors" looked to the creditors in the *πρᾶσις ἐπὶ λύσει* for payment just as Smikythos, the hypothecary creditor in the *Poletai* inscription, looked for payment to the phratry and the *orgeones*, the vendees in that particular *πρᾶσις ἐπὶ λύσει* transaction.

It is interesting to note that this reconstruction could give a somewhat different meaning to a variant reading adopted by Meletopoulos from the one he advocates. In *Against Pantainetos*, 27, Meletopoulos accepts the reading of mss. F. Q. D., belonging to *Familia Quarta* of the manuscripts of Demosthenes: ἀλλ' αἰρέσεώς μοι (Nikoboulos) δοθείσης ἢ ἔχειν, ἢ κτήσασθαι, ἢ κομίσασθαι τὰ ἐμαντοῦ, εἰλόμην κομίσασθαι. Other manuscripts, probably correctly, omit ἢ κτήσασθαι. In this triple choice offered to Nikoboulos, Meletopoulos (pp. 44-47) maintains there is support for his theory that at the establishment of a *πρᾶσις ἐπὶ λύσει* contract the ownership of the property was not transferred to the creditor. Nikoboulos could (1) continue in possession until the expiration of the contract, (2) become owner by paying to Pantainetos or his creditors the difference between the real value of the property sold *ἐπὶ λύσει* and his own claim of 105 minas, or (3) accept 105 minas in satisfaction of his claim. If we assume, however, that the other creditors were hypothecary ones, the triple choice could be interpreted as follows: Nikoboulos could (1) continue in possession until the expiration of the contract at which time he (or Pantainetos) would have to settle the claim of the hypothecary creditors, (2) acquire unencumbered ownership, *ἐπὶ λύσει*, by paying off the claim of the hypothecary creditors, or (3) accept 105 minas from the hypothecary creditors and leave them as the only creditors of Pantainetos.

on the ὄσφ πλείονος ἄξιον.²¹ If he could borrow additional funds only by means of a *πρᾶσις ἐπὶ λύσει*, the natural inference is that the lender was suspicious of his financial status and consequently insisted on the most rigorous form of security available.

In the discussion of this *Poletai* inscription it was argued that the loans of 100 and 24 drachmas granted by the phratry and the *orgeones* were either simultaneous loans or sums lent successively by what could be considered the same creditor. In this connection it is necessary to consider certain horos mortgage stones on which it is recorded that the same property was sold ἐπὶ λύσει to more than one vendee.²² At first glance we would seem to have here definite confirmation of Meletopoulos' contention that a piece of property could be successively sold ἐπὶ λύσει up to its full value. Closer analysis, however, shows that such a conclusion need not be drawn and, if the preceding arguments against Meletopoulos' thesis are sound, in fact, should not be drawn. In some of these inscriptions it is stated that several creditors shared in the same loan; e. g., a farm sold ἐπὶ λύσει to A and B for 1000 drachmas. Here clearly two men in partnership simultaneously lent the money and hence there is no question of a second mortgage. On other inscriptions the sums lent by individuals or groups of individuals or associations are listed separately. Unfortunately no infallible clue is offered as to whether the loans were made simultaneously or successively. If the latter alternative could be proved to be the correct one, then it would seem necessary to accept Meletopoulos' conception of the *πρᾶσις ἐπὶ λύσει*. If, however, the several sums recorded were constituent parts of the same general loan—i. e., the debtor had borrowed these various sums simultaneously—, then, presumably, all the creditors were of the first rank and we are not faced with the problem of second and third mortgages. It seems to me that this explanation is far more reasonable than the alternative one unless we are willing to admit, as Meletopoulos apparently implicitly does, that the *πρᾶσις ἐπὶ λύσει* and the hypothec were really identical institutions. The evidence from the stones themselves strongly favors my conclusion, for it seems clear that the record of the various loans was inscribed all at once, and not on different occasions, as would have been the case if the loans had been made successively. An illustration of a simultaneous loan, it will be remembered, is provided by the speech *Against Pantainetos*. In section 4 we are informed that Nikoboulos lent 45 minas and Euergos one talent to Pantainetos who furnished security for the total loan of 105 minas by selling to them ἐπὶ λύσει the *ergasterion* and 30 slaves. If a horos had been erected to publicize this loan it presumably would have read: ὄρος ἐργαστηρίου καὶ

²¹ Cf. Hitzig, pp. 121-129; Beauchet, III, pp. 298-304; Lipsius, p. 700. See above, Chapter IV, pp. 94-95.

²² E. g., *I.G.*, II², 2692, 2693, 2695, 2701, 2705, 2723-2725, 2753. See above, Chapter I, No. 21; Chapter II, Nos. 15, 17; and p. 40, No. 12. I have been able to examine squeezes or photographs, or both, of all these inscriptions except *I.G.*, II², 2695, 2701, 2724, and 2725. For a discussion of *I.G.*, II², 2693, 2697, 2735, see above, Chapter III, pp. 46-47.

ἀνδραπόδων πεπραμένων ἐπὶ λύσει Νικοβούλω XXXXΓ^Α Εὐέργωι Τ, a wording which, *mutatis mutandis*, is similar to that recorded on *I.G.*, II², 2705.

No satisfactory evidence is available as to the procedure followed in loans involving several creditors if the debtor did not redeem the security by the specified time. Various alternatives must have been open to the creditors who, if we accept the traditional view of the *πρᾶσις ἐπὶ λύσει* as seems necessary, now became absolute owners. They could manage the property jointly, or one creditor could buy up the shares of the others. If the security had been a farm, possibly each creditor could take as his own a part of the land proportionate to his contribution to the loan. Probably it was most common for the security to be sold and for each creditor to receive his proper share of the proceeds. Since by the terms of the original contract the debtor had sold the security to his creditors, there is no reason to believe that he was entitled to recover any surplus over the value of the combined loan which might have resulted from the sale of the property. The surplus, if any, presumably was divided proportionately among the creditors in accordance with the size of their respective loans.

The investigation of the traditional view and Meletopoulos' thesis on the fundamental nature of the *πρᾶσις ἐπὶ λύσει* is now completed. Although few conclusions on matters of Athenian private law are as certain as one could wish, it seems to me that on the basis of present evidence there is little doubt that the traditional interpretation is the correct one. Meletopoulos has raised some questions which may be difficult to answer with complete satisfaction, but on the other hand he has neglected to consider various types of evidence in the sources which are very damaging to his thesis. Above all, he apparently has failed to realize that the *πρᾶσις ἐπὶ λύσει*, as he envisages it, is practically identical with the hypothec, and that this identity in turn makes it almost impossible to conceive of any evolution in the Athenian institution of real security. The conclusion seems justified, then, that the ownership of property sold *ἐπὶ λύσει* was transferred immediately to the creditor-purchaser and that, consequently, such property could not be subjected to a second mortgage.²³ This last statement, however, should not be taken to mean that the vendee himself could not lend additional funds to the vendor. I see no reason to exclude the possibility that on occasions the creditor,

²³ Cf. Beauchet, III, pp. 297-298. *I.G.*, II², 2701, is not evidence against this statement. For the various interpretations of this puzzling horos mortgage stone see the bibliography given by Kirchner. The security consists of a farm and a house. The two creditors recorded for the *πρᾶσις ἐπὶ λύσει* contract were presumably simultaneous vendees. At the end of the inscription there is added—καὶ ἀποτίμημα ἐρανισταῖς —. Possibly in the contract, to which reference is made in the inscription, there was a specific statement as to what part of the security was included in the *πρᾶσις ἐπὶ λύσει* transaction. In that event, the ὄσω πλείονος ἄξιον could have been classified as ἀποτίμημα. Possibly, as has been frequently suggested (e.g. Beauchet, *ibid.*), the security offered by the ἀποτίμημα would have become effective only after the redemption of the property sold *ἐπὶ λύσει*. The most honest verdict on this inscription is: *non liquet* (see Chapter V, pp. 104-105).

if the value of the security greatly exceeded that of his original loan, might have been willing to supplement that loan.²⁴ Such considerate creditors were probably uncommon. Consequently, from the debtor's point of view, one of the great disadvantages of the *πρᾶσις ἐπὶ λύσει* was that property which had been sold *ἐπὶ λύσει*, no matter how great its value, could not serve as security for a further loan contracted with another creditor. This characteristic of the *πρᾶσις ἐπὶ λύσει*, as we saw above,²⁵ was certainly one of the reasons for the development of the civil hypothec, a contract which permitted the establishment of second and third mortgages.

The ownership acquired by the creditor, naturally, was provisional, for he was obligated to restore the property in good condition to the debtor if he redeemed it within the stipulated time. As owner, the creditor could take possession of the mortgaged property if he so desired. In the early days of the institution this probably was the normal procedure. When the creditor had possession, the usufruct of the security took the place of interest on the loan.²⁶ Since the transaction was in form a sale, presumably the vendee enjoyed all the revenues accruing from the security even though their value might have greatly exceeded the amount which would have been provided by interest at normal rates on the loan. In those cases where the security consisted of movables it was hazardous for the creditor to forego possession, since the debtor might attempt to abscond with the mortgaged property. As we saw above,²⁷ Apatourios, who had been left in possession of the mortgaged ship and slaves, tried to depart surreptitiously from Athens with them.

The *πρᾶσις ἐπὶ λύσει* contract was usually concerned with real property, since movables serving as security were generally classified as *ἐνέχυρα*²⁸ and passed immediately into the possession of the creditor. In the course of time, as the Athenians grew

²⁴ This is the most natural explanation of *I.G.*, II², 2693 (see above, Chapter III, p. 46) and of *I.G.*, XII, 8, 19 (Lemnos); cf. Lipsius, p. 704, note 102. Lending additional money on the same security was not pure altruism on the part of the creditor, of course, for the interest he received was calculated not on the value of the security but on the amount of the loan; cf. Demosthenes, XXXVII, *Against Pantainetos*, 5; see below, p. 157.

²⁵ See above, Chapter IV, pp. 93-94.

²⁶ Cf. Hitzig, p. 75; Beauchet, III, p. 242. This statement, logical in itself, is confirmed by Demosthenes, XXXVII, *Against Pantainetos*, 10. Nikoboulos and Euergos had lent 105 minas to Pantainetos under a *πρᾶσις ἐπὶ λύσει* contract on the security of an *ergasterion* and 30 slaves, which remained in the possession of the debtor. When the debtor (Pantainetos) failed to pay the interest due, Euergos in the absence of his partner seized possession of the security. On his return, Nikoboulos was faced with two possible courses of action: ἡ γὰρ κοινωνεῖν ἔδει τῆς ἐργασίας καὶ τῶν ἐπιμελειῶν τῷ Εὐέργῳ, ἢ χρηστὴν ἀντὶ τούτου τὸν Εὐέργον ἔχειν, καὶ πρὸς ἐκείνον πάλιν μίσθωσιν γράφειν καὶ συμβόλαιον ποιέσθαι. One alternative open to Nikoboulos, therefore, was to obtain the return on his investment in the form of usufruct.

²⁷ See above p. 145.

²⁸ See above, Chapter IV, pp. 61-62. The security recorded on the horoi, naturally, was always in the form of real property. By the very nature of things most movables could not have been posted with horos stones.

more familiar with the employment of immovables as security, it became customary for the creditor, who acquired the ownership of the security through the very nature of the *πρᾶσις ἐπὶ λύσει* transaction, to allow the debtor to retain actual possession.²⁹ In such cases the creditor (vendee) would lease the mortgaged property to the debtor (vendor). The procedure is well described in a passage in Demosthenes' speech *Against Pantainetos*, 5, (cf. 29), where the creditor who had lent 105 minas says: *μισθοῦται δ' οὗτος παρ' ἡμῶν τοῦ γιγνομένου τόκου τῷ ἀργυρίῳ, πέντε καὶ ἑκατὸν δραχμῶν τοῦ μηνὸς ἐκάστου. καὶ τιθέμεθα συνθήκας, ἐν αἷς ἢ τε μίσθωσις ἦν γεγραμμένη καὶ λύσις τούτῳ παρ' ἡμῶν ἔν τινι ῥητῷ χρόνῳ.* It is important to observe that it is specifically stated here that the rent corresponded to the interest on the loan, in this case 12%.³⁰ The fact that the rent was not calculated on the value of the security, which might be greatly in excess of the amount of the loan,³¹ shows clearly that the Athenians, by this time at least, thought of the *πρᾶσις ἐπὶ λύσει* not as a sale but as a loan on real security.³² This aspect of the contract is well characterized by William Wyse in the following words: ³³ "Though the transaction was in form and effect a sale, in the intention of the parties it was a loan on real security, and was sometimes described by language applicable in strictness only to hypothec."

In Athenian sources no information is given concerning the various clauses contained in a *πρᾶσις ἐπὶ λύσει* contract beyond what is stated in the passage just quoted.³⁴ It seems certain, however, that, if the debtor who retained possession of the security did not fulfill the terms of the contract, the creditor had the right to take possession. In the speech *Against Pantainetos*, we are told that when the debtor Pantainetos did not pay the interest or abide by the contract in other respects, one of the creditors, Euergos, proceeded to take possession of the *ergasterion* and the slaves which were serving as security (7). It is true that subsequently Pantainetos brought suit against Euergos and received damages to the amount of two talents (8; 46), but it appears that the question at issue was not Euergos' right to seize possession, but the violence and irregularity with which he was accused of carrying out the seizure.³⁵

²⁹ See above, Chapter IV, p. 93.

³⁰ In an inscription from Amorgos, *Syll.*³, 1200, certain properties were sold *ἐπὶ λύσει* for 5000 drachmas. The debtor, who retained possession, owed an annual rent (*μίσθωμα*) of 500 drachmas, i. e., 10%.

³¹ Demosthenes, XXXVII, *Against Pantainetos*, 12.

³² Cf. Hitzig, p. 74; Beauchet, III, pp. 240-241.

³³ Note on Isaeus, V, *On the Estate of Dikaiogenes*, 21 (p. 431).

³⁴ Such contracts are frequently mentioned in the *πρᾶσις ἐπὶ λύσει* horoi dating after 316/5. See above, Chapter III, pp. 53-54. For evidence from non-Athenian sources, see below, pp. 163-166.

³⁵ Demosthenes, XXXVII, *Against Pantainetos*, 6; 26; 45. If it had been illegal to take possession under the circumstances, it is unlikely that the speaker would have emphasized so frankly as he did in section 14 that he and Euergos were in possession. The speaker states boldly (8; 45) that Euergos was the victim of false charges, but he never considers it necessary to defend the act of taking possession.

When the debtor, as lessee, remained in possession of the property which he had sold ἐπὶ λύσει, it was desirable that there be some means of notifying a third party of the existence of the lien. Otherwise money might unwittingly have been lent on property which was already encumbered. The setting up of an appropriate horos mortgage inscription was the regular method of publicizing such a lien.³⁵ In Demosthenes' speech *Against Pantainetos* no reference is made to a horos, but it is probably safe to assume that one was placed somewhere on the *ergasterion* which had been offered as security. In the mining region of Attica several mortgage horoi have been discovered, which, with a change in the name of the creditor and in the sum involved, would record perfectly the contract existing between Pantainetos and his creditors Nikoboulos and Euergos. *I.G.*, II², 2747, for example, reads as follows: Θεοί| ὄρος ἐργασ|τηρίου καὶ ἀν|δραπόδων πε|πραμένων ἐπὶ| λύσει Φείδων|ι Αἰξωνεῖ:Τ.

The creditor, as I have tried to prove in the first part of this chapter, was owner of the security for the duration of the contract. Did this ownership confer on him the right to alienate the property? If the debtor gave his consent, the answer to this question is in the affirmative. The debtor Pantainetos, for example, begged Nikoboulos to sell the security to another creditor.³⁷ The new creditor, presumably, succeeded Nikoboulos as vendee in a *πρᾶσις ἐπὶ λύσει* contract with Pantainetos just as Nikoboulos had succeeded Mnesikles.³⁸ It is more difficult, however, to decide whether the security could be alienated without the consent of the debtor—obviously with the understanding that the new creditor would be bound by the redemption clause. This problem has been answered both affirmatively and negatively,³⁹ but on the basis of available evidence it is probably wiser to suspend judgment. Even though it may be impossible to ascertain the regulations prescribed by law on this subject, it seems permissible to assume that on occasions clauses, granting or denying to the creditor the right to alienate the security, were included in the contract. In any event, if there was a change in creditors, the debtor had to be notified immediately so as to know to whom to pay the rent and from whom to redeem the security, if he could procure the necessary funds. The horos mortgage stone also had to be altered, at least to the extent of substituting the name of the new creditor,⁴⁰ or an entirely new inscription might be erected.

As the name of the contract implies, the debtor had the right to redeem the property which he had “sold” as security. The most definite statement on this subject

³⁵ See above, Chapter III, p. 51 and note 41.

³⁷ Demosthenes, XXXVII, *Against Pantainetos*, 14-16; 29-30.

³⁸ *Ibid.*, 5; 49.

³⁹ Affirmatively, Beauchet, III, pp. 242-245; Lipsius, pp. 703-704; negatively, Hitzig, pp. 75-77. Too many other factors are involved in the transactions described in [Demosthenes], XXXIII, *Against Apatourios*, 10-12, to enable any certain conclusions on this problem to be drawn.

⁴⁰ In *I.G.*, II², 2689, the name of the former creditor in a *πρᾶσις ἐπὶ λύσει* contract was erased and the name of the new creditor was written in the erasure.

is to be found in the agreement made by the creditors Nikoboulos and Euergos with the debtor Pantainetos quoted above (p. 157)—λύσις τούτω παρ' ἡμῶν ἐν τινι ῥητῷ χρόνῳ.⁴¹ No evidence is available in Athenian sources concerning the usual duration of the “specified time,” and it can only be assumed that ordinarily a date was included in the contract beyond which redemption was not possible. Presumably redemption could occur at any time before this date,⁴² but it is necessary to believe that the contract would have contained special stipulations on this point. The need for such clauses is obvious. If the debtor remained in possession of the mortgaged property, we have seen that he was obligated to pay rent which was equivalent to interest on the loan. This rent was probably paid either monthly, semi-annually, or annually.⁴³ Consequently, each contract must have included a clause stating that, when the debtor redeemed the security, he should pay also the proportionate part of the rent which was still due at the time of redemption. In those cases where the creditor took possession, having the usufruct in lieu of interest on the loan, it is also necessary to assume that the contracts contained regulations concerning the time of redemption and necessary compensations. Otherwise preposterous situations would have frequently arisen where the possessing creditor, for example, after taking great pains and making large expenditures to assure a good crop, would have lost all the fruits of his labors because the debtor chose to redeem the land just before the advent of the harvest season.

Although in a *πρᾶσις ἐπὶ λύσει* contract the right of redemption ordinarily had to be exercised within a certain specified time, it may be asked whether in certain cases a permanent right of redemption was not granted to the debtor. Hitzig⁴⁴ maintains that in those transactions where the debtor remained in possession of the security as a rent paying tenant, it was possible for him to have *ein ständiges Einlösungsrecht*. Lipsius,⁴⁵ without adducing adequate evidence, categorically denies such a possibility. Despite Lipsius' objection, I see no sound reason for rejecting Hitzig's suggestion. In such a contract the creditor would have been thinking in terms of a long range capital investment rather than of the speedy recovery of his loan. Naturally, if the debtor defaulted in the rents, the creditor, as owner, must have been able to take

⁴¹ Cf. [Demosthenes], XXXIII, *Against Apaturios*, 8.

⁴² In *Hesperia*, X, 1941, pp. 54-55, no. 18 (see above, Chapter II, Nos. 7 and 14), B. D. Meritt published a horos mortgage stone which testifies to a speedy redemption. On the top half of the stone there is recorded for the year 309/8 the sale of a house ἐπὶ λύσει for 700 drachmas. This inscription was erased, and on the lower half of the stone it is recorded that the same (presumably) house was offered in the following year as apotimema for a dowry. It seems clear, therefore, that in the space of a year or a little more the debtor had sold a house ἐπὶ λύσει, redeemed it, and then subsequently used the same property as security for another purpose.

⁴³ Demosthenes, XXXVII, *Against Pantainetos*, 5; rent probably paid monthly. For semi-annual and annual payments of rent in ordinary leases, see above, Chapter V, pp. 111-112 and note 78.

⁴⁴ P. 80.

⁴⁵ P. 703, note 99.

possession of the security. Except for the redemption clause, this compact would have been similar to the long term leases of which there are several specimens from Athens.⁴⁶ Perhaps it may be better to qualify Hitzig's proposal by assuming that the right of redemption was subject to a statute of limitations. Unfortunately, although considerable information is available on various statutes of limitations at Athens,⁴⁷ none of this material applies to the *πρᾶσις ἐπὶ λύσει*.

When the debtor was able to exercise his right of redemption, the repurchase price was the same as the value of the original loan. This was only natural since the creditor had already received his interest, from the usufruct if he himself had taken possession, or in the form of rent if the debtor had remained in possession. Since in the original transaction the ownership of the property had passed to the creditor, a formal resale was probably necessary to effect the reversion of the title to the property to the erstwhile debtor.⁴⁸ If the creditor refused to restore the security or returned it in damaged condition, apparently the debtor could institute a *δίκη συνθηκῶν παραβάσεως* and possibly also a *δίκη βλάβης* against him.⁴⁹

If at the time of the maturity of the loan the debtor did not exercise his right of redemption, the creditor became unqualified owner of the property.⁵⁰ There was no obligation on his part to return to the debtor the difference between the value of the security and the amount of the loan (*τὰ ὑπερέχοντα*) in those cases where the former exceeded the latter. Conversely, if the security had not covered the loan completely, the creditor could not collect the balance (*τὸ ἐλλείπον*) from the debtor. Such regulations were entirely in conformity with the nature of the transaction which was

⁴⁶ E. g., *I.G.*, II², 2492, lease for forty years; *I.G.*, II², 2496, lease *eis τὸν ἅπαντα χρόνον*.

⁴⁷ J. F. Charles, *Statutes of Limitations at Athens*, Dissertation, Chicago, 1938. In the *Encyclopaedia Britannica*, 11th ed., article, *Mortgage*, the account of the Welsh mortgage bears an interesting resemblance to the Athenian *πρᾶσις ἐπὶ λύσει*. "A Welsh mortgage is one in which an estate is conveyed to a creditor, who takes the rents and profits in lieu of interest and without account, the estate being redeemable at any time on payment of the principal. Any form of property, with few exceptions, may be mortgaged." Another similar contract is the Scottish form of mortgage known as an "absolute disposition with back-bond," described by W. H. Buckler and D. M. Robinson, *A.J.A.* XVI, 1912, p. 64; cf. D. M. Robinson, *Hesperia*, XIII, 1944, p. 17. In this Scottish form, the statute of limitations for redemption of the property is forty years.

⁴⁸ The famous Register of Sales of Immovables from Tenos (*I.G.*, XII, 5, 872, lines 120-121) shows that in that island, at least, in the Hellenistic period it was customary to record officially the redemption of property which had served as security in a *πρᾶσις ἐπὶ λύσει* contract. It will be noticed that the repurchase price is the same as the amount of the original loan. *Φῶκος Φωκίωνος Θρηήσιος παρ' Ἀθηνάδου Ἀμφιθέου Θεστιάδου, οὗ κύριος Ἀναξίθεος Ἀθηνάδου Θεστιάδης, ἐπρίατο τὴν οἰκίαν καὶ τὸ χωρίον τὸ ἐν Ἐλειθναίῳ δραχμῶν ἄργυριον χιλίων τετρακοσίων, ἃ ἀπέδωκε Φῶκος Ἀθηνάδει δανειζόμενος παρ' Ἀθηνάδου χιλίας καὶ τετρακοσίας δραχμάς*. In Demosthenes, XXXVII, *Against Pantainetos*, 4-5; 49, Mnesikles and his associates, the creditors in a *πρᾶσις ἐπὶ λύσει* contract, are repaid in full when they receive 105 minas, the amount of their original loan.

⁴⁹ Cf. Hitzig, pp. 105-107; Beauchet, III, pp. 246-248; Lipsius, p. 704.

⁵⁰ The same procedure presumably would have been followed if the maturity date of a loan was fixed only by a statute of limitations.

in form a sale.⁵¹ Since the security was often of greater value than the loan, the debtor naturally made every effort to prevent it from passing into the absolute ownership of the creditor. Before the maturity of the loan, therefore, the debtor, if unable to make repayment, would attempt to find another purchaser for the property and, if successful, he could thereby reimburse his creditor. This transaction, then, consisted merely of substituting one purchaser (creditor) for another in a *πρᾶσις ἐπὶ λύσει* contract. A good illustration of this procedure is furnished by the conduct of the debtor Pantainetos. When he could not repay to Mnesikles the 105 minas which had come due, he persuaded Nikoboulos and Euergos to buy for that sum the *ergasterion* and the slaves which had been sold *ἐπὶ λύσει* to Mnesikles. Mnesikles thus recovered his loan, and Nikoboulos and his partner became creditors to Pantainetos in this renewal of the *πρᾶσις ἐπὶ λύσει* contract.⁵²

The *πρᾶσις ἐπὶ λύσει*, as was maintained above,⁵³ was the commonest method in the fourth century of contracting a loan for which real property served as security. It is clear, however, from a small number of inscriptions that the transaction could also occasionally be associated with an orphan's property or with a dowry. *I.G.*, II², 2658, for example, reads as follows: ὄρος χω|ρίο πεπρ|αμένο ἐπ|ὶ λύσει πα|ιδὶ Καλλι-σ|τράτο : Η -. The creditor is a *παῖς*—a minor—; undoubtedly he was an orphan, for otherwise the father would have been recorded as creditor (*vendee*). Have we here, then, a document similar in purpose to those discussed in Chapter V which publicized the security (*apotimema*) offered to guarantee a *μίσθωσις οἴκου*? It will be remembered that in the *μίσθωσις οἴκου* the lessee, before he was allowed to lease the orphan's property, had to furnish security which in the eyes of the assessors was adequate to protect the orphan's interests.⁵⁴ Could this security also take the form of *πρᾶσις ἐπὶ λύσει*?

It is obvious that this inscription did not record both a *μίσθωσις οἴκου* and the granting of a loan to the lessee, for, if the lessee had borrowed 100 + drachmas from the orphan (i.e., his guardian) by selling *ἐπὶ λύσει* a farm as security, that security would have guaranteed the loan and not the orphan's estate. A possible explanation of this strange document might be that, for reasons unknown, the lessee agreed to turn over to the orphan as security *ἐπὶ λύσει* the ownership of a farm equal in value to the orphan's estate. Since one of the main purposes of the *μίσθωσις οἴκου* was to relieve the guardian of the responsibility of administering the orphan's property,⁵⁵ it is probable that the lessee would have retained possession of the security. The interest

⁵¹ Cf. Hitzig, pp. 77-78; Beauchet, III, pp. 249-252; Lipsius, p. 704. This is the point of view against which, as was seen above (pp. 143-144), Meletopoulos argues—unsuccessfully, I believe.

⁵² Demosthenes, XXXVII, *Against Pantainetos*, 4-5; 49. See above pp. 146-148.

⁵³ See Chapter IV, pp. 91-94; cf. also p. 142 above.

⁵⁴ See Chapter V, pp. 101-105.

⁵⁵ See Chapter V, pp. 97, 110 and note 69.

or rent which he paid according to this fictitious *πρᾶσις ἐπὶ λύσει*, therefore, would have been the same as he had agreed to pay at the time of the leasing under the supervision of the archon. Why the lessee should have consented to provide security in this manner rather than by means of the usual *apotimema* is a mystery, but the orphan through his ownership of the property offered as security would have received the maximum protection.⁵⁶

Another interpretation of this inscription is to recognize in it a case where the guardian had decided to administer the orphan's property personally rather than to resort to the *μίσθωσις οἴκον*. According to this explanation we can assume that the guardian lent 100 + drachmas of the orphan's cash to the borrower who as security sold a farm *ἐπὶ λύσει*. A guardian was obligated to put his ward's capital to work,⁵⁷ and by this transaction the loan would bring in interest, if the debtor remained in possession, and usufruct, if the guardian took possession. To protect the orphan's interests and to keep accounts straight, naturally the orphan was considered as creditor—hence the *παιδί* on the horos stone.

A small group of inscriptions⁵⁸ links the *πρᾶσις ἐπὶ λύσει* with the dowry. *I.G.*, II², 2681, which will serve to illustrate this type of horos mortgage notice, reads as follows: [h]όρος χωρίο πε|πραμένο ἐπὶ λύ|[σ]ει Εὐθυδίκει|προ[ι]κὸς Χ¹. In Chapter VI we learned that it was customary for security (*apotimema*) to be offered either by the husband to guarantee the return of his wife's dowry in certain circumstances or by the father to guarantee the future payment of the dowry. It has generally been assumed⁵⁹ that the inscriptions under discussion refer to contracts concerned with one or the other of these transactions. It is clear, however, that in these documents the usual type of loan secured by a *πρᾶσις ἐπὶ λύσει* was not recorded. It would be absurd to maintain either that the husband guaranteed the restitution of the dowry, if the need should arise, by borrowing money from his wife (i. e., from himself) or that the father guaranteed the future payment of the dowry by borrowing money from his daughter (i. e., from her husband and his son-in-law).

These documents can be explained satisfactorily, I believe, if we recognize in them a sort of legal fiction. The transaction referred to in the inscription quoted above, then, can be reconstructed somewhat as follows: At the time of the marriage of his daughter, Euthydike, the father and the husband agreed on a dowry of a certain sum. The father, however, did not have that amount in cash, but he owned a farm of comparable value. Normally under such circumstances, he would have offered this farm as security (*apotimema*) for his debt in the matter of the unpaid dowry. For reasons

⁵⁶ Cf. Beauchet, II, p. 254.

⁵⁷ Lysias, XXXII, *Against Diogeiton*, 23; Demosthenes, XXVII, *Against Aphobos*, I, 60-61; Isaeus, XI, *On the Estate of Hagnias*, 39.

⁵⁸ *I.G.*, II², 2681-2683. See also above, Chapter I, Nos. 12 and 25; Chapter II, Nos. 22 (possibly) and 25.

⁵⁹ See the references cited in the commentary on *I.G.*, II², 2681.

which will probably always remain unknown, this particular father (or possibly the husband) preferred that the security should take the form of a *πρᾶσις ἐπὶ λύσει* contract, but naturally *no loan was involved in this transaction*. The farm accordingly was transferred to the ownership of Euthydike. The interest which was due on a postponed dowry⁶⁰ was paid in one of two ways. If the father remained in possession of the farm, he paid interest at the rate stipulated in the contract, while, if the husband and wife took possession, they had the usufruct in lieu of interest. By the terms of the contract the father had the right to redeem the farm. This he could do by paying the full amount of the dowry promised. If within the time allotted for redemption the father was unable to pay the dowry which had been agreed upon, the unqualified ownership of the farm would pass to Euthydike and her husband, her present *kyrios*. In the farm, therefore, they would receive property fully equal in value to the dowry which had been promised at the time of the marriage. The father, presumably, would make every effort to pay the dowry in cash within the specified time so as to be able to redeem the farm and thus prevent the land from passing into the absolute ownership of another family.⁶¹

Three important documents which are concerned with the *πρᾶσις ἐπὶ λύσει* have purposely been omitted from the previous discussion, because they are non-Athenian and subsequent in date to the period of our inquiry. Consequently, in dealing with them one is faced with the probably unanswerable problem as to what extent they reflect classical Athenian usage. Because of their intrinsic interest, however, it will be worth while to comment briefly on them.

The first document is the famous mortgage inscription recorded on the wall of the temple of Artemis at Sardis which was published with an excellent commentary by W. H. Buckler and D. M. Robinson.⁶² In this inscription, unfortunately partly fragmentary, there is made available for the first time a *πρᾶσις ἐπὶ λύσει* contract as distinguished from a mere *horos* notice. The document was inscribed on the temple wall in the neighborhood of 200 B.C., but the transaction referred to very probably should be dated some fifty years earlier.⁶³ We learn that a certain Mnesimachos, who had

⁶⁰ See Chapter VI, p. 119.

⁶¹ See Chapter VI, p. 118. Since in the case under discussion the land itself became the dowry, if the father was unable to redeem, presumably it was subject to return if the marriage was dissolved; see Chapter VI, p. 135.

It is improbable that we should recognize the husband as the dotal debtor in any of these inscriptions, for it is unreasonable to believe that he would have relinquished title to property for an obligation which would exist only if the marriage was dissolved. The suggestion that the *πρᾶσις ἐπὶ λύσει* was made by the husband after the dissolution of the marriage as guarantee for a later return of the dowry is also unlikely, for in such circumstances, presumably, the property would have been sold *ἐπὶ λύσει*, not to the woman, but to the *kyrios* to whom she was returning.

⁶² *A.J.A.*, XVI, 1912, pp. 11-82. Sardis, VII, *Greek and Latin Inscriptions*, Part I, W. H. Buckler and David M. Robinson, Leyden, 1932, pp. 1-7.

⁶³ Sardis, VII, Part I, pp. 5-6.

received a grant of lands from Antigonos (Antigonos I?), had borrowed 1325 gold staters from Artemis. Unable to repay when the loan was called, he sold his lands, subject to redemption, to the goddess. The terms of the contract into which he entered teem with problems for the modern investigator, but the following conclusions, I believe, can safely be drawn.⁶⁴ The right of redemption was forfeited unless effected by a certain date. This date was apparently given in the missing part of the inscription. If the debtor failed to warrant the creditor's title or violated the contract in any way, he lost all claim to the security and also had to pay to the temple 2650 gold staters (i. e., he was bound by the *stipulatio duplae*). While the temple authorities could make what improvements they wished on the land they held in provisory ownership, the cost of which was ultimately to be born by the debtor before he could redeem the property, the debtor apparently had no redress for whatever damage might be done to the estates. At the time of redemption the debtor must pay whatever proportion of the revenues of the lands was still due to Artemis.

Such a contract, binding a temple and the holder of large estates, some of which were subject to recall by the king, is obviously an unreliable guide for the interpretation of fourth century Athenian private transactions. The time limit for redemption and the clauses concerned with the debtor's obligation before redemption to reimburse Artemis for her expenditures on the land and for the proportion of the revenues which had accrued are in accord with the general description of the *πρᾶσις ἐπὶ λύσει* which has been given above. It seems clear, however, that the temple, having Mnesimachos at its mercy when he was unable to repay the original loan, had struck a hard bargain with him. In fourth century Athens it is probable that the creditor was held responsible for damage done to the security. Furthermore, there is no ground to believe that the debtor was subject to a warranty clause according to which he could be inflicted not only with the *poena dupli* but also with forfeiture of the security.⁶⁵

The second document is the parchment discovered at Doura-Europos in 1923.⁶⁶ This parchment—the oldest extant Greek one—is part of a page from the municipal register in which sales, mortgages, etc. were recorded. Consequently, we do not find

⁶⁴ Compare Buckler and Robinson, *A.J.A.*, XVI, 1912, pp. 60-65.

⁶⁵ In Athens there is evidence for the *poena dupli* in connection with bottomry loans ([Demos-thenes], LVI, *Against Dionysodoros*, 19-20), but, so far as I know, there is none to associate that penalty with mortgages. State debtors, of course, were subject to the *poena dupli* (Aristotle, *Ath. Const.*, 48, 1; 54, 2). In sales, if the purchaser was evicted, the vendor apparently was liable only to the restitution of the price and to payment of damages; see Wyse, pp. 435-437 (note to Oration V, 22). On the subject of the *stipulatio duplae*, see M. Lécrivain, "Peines et Stipulations du Double et de l' Hémiolion dans le Droit Grec," *Mémoires de L' Académie des Sciences, Inscriptions, et Belles-Lettres de Toulouse*, Sér. IX, vol. 7, 1895, pp. 302-315.

⁶⁶ Franz Cumont, *Fouilles de Doura-Europos (1922-23)*, Paris, 1926, pp. 286-296. The document was first published by Cumont in *Rev. de Phil.*, XLVIII, 1924, pp. 97-111. Cf. Pringsheim, p. 107, note 2. The restorations suggested by P. M. Meyer, *Savigny-Stiftung*, XLVI, 1926, p. 339, I believe, are improbable.

here as in the Sardis inscription the complete contract, but only a summary of its main points. The gist of the document can be summarized as follows: X bought some real property from Aristonax for 120 drachmas καὶ ἐπίτιμον τὸ ἴσον. The purchase price was paid to Amyndros (a banker?) for the account of Aristonax (ἐπὶ τῷ Ἀριστώνακτος — — — ὀνόματι) according to a contract made in the month Panemos of the year 117, Seleucid era (July 195 B.C.). This sum will be repaid [τοσοῦτον ἀποδοθήσεται?] by Aristonax in the year 123. The next line (6), as restored by the editor reads: [ἀπέτισε τὴν ἐξηκοστὴν ? εἰς ἃ]παίτησιν καὶ κηρύκειον ἀπέδοτο λύσιμα κατὰ τὸν νόμον — — —].

Although the ἀπέδοτο λύσιμα reveals that this transaction was a πρᾶσις ἐπὶ λύσει, the mutilated condition of the parchment makes the interpretation of certain matters difficult. In the first part of the document it is stated that the purchase price was 120 drachmas καὶ ἐπίτιμον τὸ ἴσον. Since the ἐπίτιμον is equal to the purchase price, we have here another instance of the *stipulatio duplae* (διπλῆ τιμή). Ordinarily this penalty was imposed upon the vendor if the vendee was evicted from his ownership.⁶⁷ In this case Cumont⁶⁸ argues: “Ici, au contraire, ajoutée au prix d’achat, elle paraît devoir garantir le vendeur contre un refus de lui restituer la terre au terme fixé ou contre des dommages qu’aurait causés au bien-fonds le propriétaire temporaire.” The suggestion is interesting, but, considering the cramped style of the summary, I do not see how it can be proved. Line 6 (quoted above) is obscure. Cumont’s translation⁶⁹ is: “[L’ acheteur a payé le soixantième (?) pour] les droits (de mutation) et le salaire du héraut. Il a vendu à réméré suivant la loi” Cumont says⁷⁰ that a new phrase begins with ἀπέδοτο as is shown by the fact that the alpha is a little larger and is preceded by a small blank space. Presumably he means, therefore, that with ἀπέδοτο the subject changes, for it is obviously absurd to speak of the purchaser as selling. But who is the subject of [ἀπέτισε]? Cumont thinks it is the purchaser, but it should be noted that the last person mentioned in the preceding line is the vendor, who is also the subject of ἀπέδοτο. Consequently, unless the custodian of records made his summary of the transaction hopelessly confusing, it seems logical to assume that in this case the vendor paid the property transfer tax and the herald’s fee.⁷¹ The words—ἀπέδοτο λύσιμα κατὰ τὸν νόμον — — ——are significant. Presumably some such

⁶⁷ See note 65.

⁶⁸ *Fouilles*, p. 291; *Rev. de Phil.*, XLVIII, 1924, p. 106.

⁶⁹ *Fouilles*, p. 296; *Rev. de Phil.*, XLVIII, 1924, p. 110.

⁷⁰ *Fouilles*, p. 294; *Rev. de Phil.*, XLVIII, 1924, p. 109.

⁷¹ Cumont, *Fouilles*, p. 294, note 2 (= *Rev. de Phil.*, XLVIII, 1924, p. 109, note 3), quotes from L. Mitteis-U. Wilcken, *Grundzüge und Chrestomathie der Papyruskunde*, Leipzig-Berlin, 1912, I, 2, no. 340, line 12: καὶ τὴν καθήκουσαν (ἐξηκοστὴν) καὶ κηρύκειον τοῦ παντὸς (χιλι)οστήν. In this document the purchaser is the one who pays, but the papyrus is concerned with an auction conducted by the government; procedure in a private transaction may have been quite different. Why should a creditor consent to such expenditures?

expression as *τῆς πόλεως* is to be restored. We have here a forcible reminder that it is hazardous to generalize about points of Greek law. Doura-Europos, for example, may have had certain regulations concerning the *πρᾶσις ἐπὶ λύσει* which were peculiar to herself. Thus, although a period of six years seems a reasonable time within which redemption must be effected, it certainly cannot be argued that six years was the rule at Athens.⁷²

The third document comes from Serra Orlando near the town of Aidone in Sicily and is to be dated probably in the first century B.C.⁷³ The first three preserved lines only need concern us. They read:

[χωρίον (?) καὶ τ]ὰ ἐπόμμενα π[άντα]
 [ἐ]πὶ λύσει· λύσασθαι δ' ἐνι[αντῶι]
 [ἢ ἐ]ξαμήνωι Δίωνος εἶμ[εν]

It is here stated that the debtor must redeem in a year or in six months. The significance of the two dates allowed for redemption is plausibly explained by the editors as follows (p. 140): “Tamen conici potest debitori concessum esse ut post diem *τῆς λύσεως* ventum in semestre solvat, quod nisi faciat in commissum cadat.” This “*condicio suspensiva*,” then, would be similar to the “grace period” allowed in the paying of a modern insurance premium. The short period of time within which redemption had to be effected and the delay in payment which was granted throw interesting light on the *πρᾶσις ἐπὶ λύσει* contract as a whole, but once again it cannot be argued that this first century Sicilian practice affords any evidence for fourth century Athenian procedure.

⁷² Compare the warning about generalizing on the Graeco-Egyptian mortgage, L. Mitteis-U. Wilcken, *op. cit.*, II, 1, p. 133.

⁷³ V. Arangio-Ruiz, and A. Olivieri, *Inscriptiones Graecae Siciliae et Infimae Italiae ad Ius Pertinentes*, Milan, 1925, pp. 139-142, no. 17.

CHAPTER VIII

MORTGAGE AND LAND TENURE

In the preceding chapters I have discussed at considerable length the different forms of mortgage which were in use among the Athenians of the fourth and third centuries. One conclusion which emerged from the investigation was that the contract known as *πρᾶσις ἐπὶ λύσει* was the earliest transaction in Athens according to which real property could serve as security for a loan.¹ To complete these studies on the Athenian system of mortgage, it obviously is essential to try to ascertain when the institution of *πρᾶσις ἐπὶ λύσει* was first adopted by the Athenians. The task is a difficult one because of the inadequacy of the evidence. In order to simplify the discussion as much as possible, this chapter will be divided into two parts. In Section I the evidence for the use of the mortgage contract in the fifth century will be examined, and an attempt will be made to date its first adoption by the Athenians. In Section II the reason for the apparent late appearance of the mortgage transaction in Athens will be sought. This search, which will necessitate an investigation into the Athenian system of land tenure, will lead to the unorthodox conclusion that Attic land did not become alienable—thereby making mortgage possible—until late in the fifth century.

I

In Chapter III attention was called to the fact that in the opinion of almost all scholars none of the extant Attic horos mortgage stones antedated the fourth century.² Certainly there is no reference to them in fifth century authors. The lack of evidence for the use of horoi in the fifth century, of course, does not preclude the existence of mortgages in Athens at that time, but the absence of any trace or mention of these stones is unquestionably strange. We are not justified in assuming that the mortgage contract was in use, therefore, until all the evidence has been examined.

Scholars³ in general have maintained that fifth century Athenians were familiar with the mortgage transaction and the evidence they cite is the famous inscription⁴ dealing with the formation of the Second Athenian Confederacy, dated in the archonship of Nausinikos, 378/7. In lines 25-31 of this decree the Athenians promise to return to the states which join the alliance *τὰ ἐγκτήματα*—both private and public—possessed by the Athenians in the territories of their new allies. The *ἐγκτήματα* were

¹ See Chapter IV, pp. 91-93; Chapter VII, pp. 155-156.

² See above, Chapter III, pp. 48-50.

³ E. g., Beauchet, III, p. 195; Lipsius, p. 696.

⁴ *I.G.*, II², 43; Tod, vol. II, no. 123.

not “cleruchies”—there were no cleruchies in allied territory at this date⁵—, but in promising to restore to the allies these Athenian-owned lands, the Athenians were presumably giving assurance that there would be no revival of the system which had been so unpopular in the preceding century. Since this clause apparently was composed with the fifth century in mind, it is argued that in the provision running from lines 35 to 46 there is also a reference to the period of the Athenian Empire. It is stated in these lines that from the archonship of Nausinikos it shall not be lawful—*Ἀθηναίων μηθὲν ἐγ|κτῆσασθαι ἐν τ[α]ῖς τῶν συμμάχων χώραι|ς μήτε οἰκίαν μήτε χωρίον μήτε πριαμέ|νωι μήτε ὑποθεμένωι μήτε ἄλλωι τρόπω|ι μηθὲν*. From the year 378/7, therefore, no Athenian was to be allowed to acquire real property in allied territory through purchase, foreclosure on a mortgage, or in any other way. The emphasis on the date certainly suggests that prior to the archonship of Nausinikos it had been possible to acquire property in any of the ways now forbidden. This may imply that it was customary for the Athenians to deal in mortgages in the period of their empire, but it should not be considered as proof. It is quite possible that the Athenians adopted the system of lending money on the security of real property at some time, let us say, between 404 and 377. And furthermore, it should be emphasized that, even if it could be demonstrated that the Athenians played the rôle of mortgagees in allied or subject territory in the fifth century, no sure conclusions can be drawn from their practices abroad as to their practices in Attica itself. This inscription, therefore, is fragile testimony on which to base a dogmatic statement. More reliable evidence is needed before it can be confidently asserted that fifth century Attic land could be subjected to mortgages.

In this effort to discover the date of the adoption of the mortgage contract in Athens, the best method of procedure, I believe, will be to go from the known to the unknown. Fourth century literature and inscriptions, of course, abound in references to mortgages. As we work backwards, a definite reference to a mortgage transaction can be found in the closing years of the fifth century. Isocrates' speech, XXI, *Against Euthynous*,⁶ is to be dated probably in 403 B.C. and it deals with the period of the Thirty Tyrants. In section 2 it is stated: *δεδιῶς (Nicias) τὰ παρόντα πράγματα τὴν μὲν οἰκίαν ὑπέθηκε*. For the years 404-403, therefore, there is unequivocal evidence for the mortgage contract in Athens.

Lysias' speech, XXXII, *Against Diogeiton*, also deserves consideration. It was composed in 400 B.C., and the events alluded to in it extend back to 409 at least. In section 15, according to the reading which is now universally accepted, it is stated: *ἀπέφηνε (the mother) δ' αὐτὸν ἑκατὸν μνᾶς κεκομισμένον ἐγγείῳ ἐπὶ τόκῳ δεδανεισμένας*. The manuscripts give *ἐγγείους* or *ἐγγύους*. Naber's suggestion, *ἐγγείῳ*, may be correct.

⁵ Diodorus, XV, 29, 8, of course, is inaccurate when he speaks of restoring the cleruchies to their former owners.

⁶ See above, Chapter IV, p. 73 and note 56.

It has its parallels some two generations later in the *ἐγγείων τόκων* and *οἱ ἐγγεῖοι τόκοι* of [Demosthenes'] oration, XXXIV, *Against Phormio*, 23. If Naber's emendation is accepted, then this passage of Lysias preserves a reference to a mortgage, for *ἐγγείω ἐπὶ τόκῳ* must be translated as "at interest on land," i. e., on the security of real property. Although editors may be justified in adopting this emendation, I am not completely convinced that *ἐγγύους* is an impossible reading. The word *ἐγγυος*, when used substantively, is a common synonym for *ἐγγυητής*. Possibly in the passage under consideration the word is used adjectivally, meaning "secured." Thus, following the manuscript reading, the sentence in Lysias could be translated as follows: "and she declared that he had recovered 100 minas lent on security at interest." Since the reference here could be to movable security or to a surety rather than to security in the form of immovables, it seems prudent to classify this passage of Lysias as a possible, but not a certain, allusion to a mortgage.

Is there any evidence for mortgages in Athens before the last decade of the fifth century? Aristophanes would seem to be a likely source for references to the plight of harried mortgagors. A careful search of his comedies, however, disclosed not a single reference to a mortgage. On this matter of security, the *Clouds*, naturally, is particularly instructive. As is well known, Strepsiades had fallen heavily into debt because of Pheidippides' passion for horses. The father and son had borrowed money from Pasiast and Amynias, twelve minas from the former and three from the latter,⁷ but not a word is said about the offering of any security. Strepsiades never expresses alarm that his creditors will foreclose on any real property which he had mortgaged for the loans. His worries are concerned with the coming of the new month and the payment of the interest which will be due then (lines 17-18). He states his fears very clearly in the following two passages. In the first (lines 33-35), while addressing his sleeping son, he says:

ἀλλ' ὦ μὲλ' ἐξήλικας ἐμέ γ' ἐκ τῶν ἐμῶν,
 ὅτε καὶ δίκας ὠφληκα χᾶτεροι τόκου
 ἐνεχυράσεσθαί φασιν.

Subsequently he explains to Socrates why he wishes to learn to speak (lines 240-241):

ὑπὸ γὰρ τόκων χρήστων τε δυσκολωπάτων
 ἄγομαι φέρομαι, τὰ χρήματ' ἐνεχυράζομαι.

In neither of these passages is there any reference to foreclosure on mortgaged property.⁸ Strepsiades is only afraid that his creditors, if they do not receive their

⁷ *Clouds*, 21; 31; 1224; 1267-1270.

⁸ The *δίκαι* mentioned by Strepsiades refer presumably to actions brought by creditors whose loans were not protected by security. For such suits which could be brought against the debtor at the maturity of the loan, see Beauchet, IV, pp. 240-243.

interest or principal, may seize on some of his movables by *ἐνεχυρασία* as compensation for the money due them.⁹ The two scenes with the creditors¹⁰ are even more explicit in revealing that Strepsiades and Pheidippides had mortgaged no property when they borrowed from them. Both Pasion and Amynias are worried about the loans they had made. Amynias in desperation is ready to be satisfied with just the payment of the interest (lines 1285-6). Certainly if the creditors held as security real property which had been mortgaged to them for the loans, they would not have been so helpless in their relations with their debtors. It is clear, therefore, that neither Strepsiades nor his son had borrowed on a mortgage; in fact it is unlikely that they had offered security of any sort, for, if they had given some movables as security (*ἐνέχυρα*), which would have passed into the possession of the lenders when the loans were first made, it is more than strange that neither they nor the creditors make any allusions to them.¹¹

When we turn from Aristophanes to the fragments of the Old Comedy at Athens,¹² two passages can be mentioned which are probably allusions to mortgages.

⁹ Cf. scholia on *Clouds*, 34 and 241 (Dübner). A parallel to Strepsiades' situation can be found in Athenaeus' account of Lysias' speech against Aeschines the Socratic (XIII, 611f-612c). The speaker in Lysias' oration states that Aeschines, who had borrowed at interest from two creditors, came to him and *ἐδεῖτο μὴ περιδεῖν αὐτὸν διὰ τοὺς τόκους ἐκ τῶν ὄντων ἐκπεσόντα*. Since no reference is made to security, presumably Aeschines had offered none for the loan. The creditors, accordingly, in order to obtain the equivalent of the interest due them, were threatening to seize on his property by means of *ἐνεχυρασία*. The speaker agreed to aid Aeschines with a loan. The account of this transaction is enlightening. Athenaeus summarizes the speaker's complaint and proceedings against Aeschines as follows: *ὡς ἐδανείσατο, ὡς οὔτε τόκους οὔτε τάρχαϊον ἀπεδίδου, καὶ ὅτι ὑπερήμερος ἐγένετο γνώμη δικαστηρίου ἐρήμην καταδικασθεῖς, καὶ ὡς ἠνεχυράσθη οἰκέτης αὐτοῦ σιγματίας*. Once again, apparently, no security had been offered. Consequently, when the debtor was delinquent, the speaker (creditor) obtained a court decision against Aeschines and then, in order to reimburse himself for the money due, had recourse to *ἐνεχυρασία* against him. For *ἐνέχυρα* and *ἐνεχυρασία*, see above, Chapter IV, note 4.

Although there is no suggestion of the use of real property as security in these excerpts of Athenaeus from Lysias' oration against Aeschines the Socratic, it seems clear from an entry in Harpocration—*Ἀστικτὸν χωρίον*—that at the time of that speech the mortgage contract was known. See below, p. 171.

¹⁰ *Clouds*, 1213-1302.

¹¹ In the other plays of Aristophanes there are no allusions to mortgages, although there are occasional references to lending money at interest and to the use of *ἐνέχυρα* as movable security. E. g., in the *Thesmophoriazusae*, 843-845, there is talk of lending money at interest, but not a word is said about security; in the *Ecclesiazusae*, 753-755, and in *Plutus*, 450-451, there are references to *ἐνέχυρα*—movables—used as security.

Fragment 54 of Antiphon the Sophist (Hermann Diels, *Die Fragmente der Vorsokratiker*, 5th ed., Berlin, 1935, vol. II, pp. 361-362) contains the story of the suspicious wealthy man who rather than lend a sum of money at interest hid it somewhere. When this money was subsequently stolen, he greatly bewailed his folly. It is strange that there is no reference to security in this anecdote. If the practice of securing a loan by a mortgage had been current at the time, one would expect that the man wishing to borrow would have tried to persuade the reluctant rich man by offering security in the form of real property.

¹² T. Kock, *C.A.F.*, vol. I; vol. III, *Adespota*, pp. 397-418; 469-683; D. L. Page, *Greek Literary Papyri*, vol. I, Loeb Edition, 1942, pp. 194-226.

As fragment 333 of Kratinos, Kock (pp. 110-111) quotes the relevant lines from the scholia on Lucian, *Zeus Tragoidos*, 48, concerning a certain wealthy and debauched Kallias. The passage reads: *εἰς δὲ στιγματίαν αὐτὸν Κρατίνος κωμῶδει ὡς ἓνα τῶν κατάχρεων*. The scholiast¹³ then explains that mortgaged property was inscribed as encumbered and adds: *ὄθεν καὶ Μένανδρος ἄστικτον χωρίον εἰώθει λέγειν τὸ ἀνεπιδάνειστον*. Kock shows very clearly that the Kallias referred to is Kallias *minor* who was born probably between the years 455 and 450.¹⁴ Unfortunately it is not known in which comedy of Kratinos this denunciation of Kallias occurred, but since Kallias at the time presumably was an adult and since Kratinos died about the year 420,¹⁵ it is probably safe to date the reference to the period between 430 and 420.

Have we then in the word *στιγματίαν* an allusion to a mortgage? The scholiast obviously thought so, as is clear from his reference to Menander. If there was no other evidence on the subject than that to be found in a comic poet writing over a century later, I do not believe that we could be certain that in Kratinos' *στιγματίαν* we should recognize a man who had encumbered his real property. There is other more contemporary evidence, however. Under the heading **Ἄστικτον χωρίον*, Harpocration writes: *τὸ μὴ ὑποκείμενον δανειστῆι· ὅταν γὰρ ὑποκέηται, εἰώθειν ὁ δανείσας αὐτὸ τοῦτο δηλοῦν διὰ γραμμάτων ἐπόντων τῷ χωρίῳ. τὸ δ' αὐτὸ καὶ ἐπ' οἰκίας γίνεται· Λυσίας ἐν τῷ πρὸς Αἰσχίνην τὸν Σωκρατικόν*. If Lysias could speak of an unencumbered estate as *ἄστικτον*, it is probably correct to understand the *στιγματίαν* in Kratinos as meaning one who had branded his estate, i. e., a mortgage. It seems, then, that we have an almost certain reference to the use of the mortgage contract in Athens in the first decade of the great Peloponnesian War.^{15a}

If the fragment of Kratinos refers to a mortgage, the second passage which we must consider loses some of its significance, from the chronological point of view at least, for it almost surely belongs to a somewhat later period. This second fragment is so interesting, however, that it deserves attention. I do not think that it has ever been properly understood, and I suspect that it may contribute to an understanding of the status of the mortgage contract in Athens in the last decades of the fifth century.

The passage in question is a fragment of Pherekrates which, as given by Kock,¹⁶ reads as follows:

*οὐχ ὄρῃς τὴν οἰκίαν
τὴν Πουλυτίωνος κειμένην ὑπόβολον;*

¹³ C. Jacobitz, p. 186.

¹⁴ See Swoboda in *R.E.*, s.v. *Kallias* (3), p. 1618. Cf. *The Oxford Classical Dictionary*, 1949, s.v. *Callias* (3), p. 157.

¹⁵ W. Schmid, *Die Griechische Literatur zur Zeit der Attischen Hegemonie nach dem Eingreifen der Sophistik*, 1946, p. 70 (Müller und Otto, *Handbuch der Altertumswissenschaft*, VII Abt., I. Teil, 4. Band, 2. Hälfte, 1. Abschnitt.)

^{15a} Elsewhere in the fifth century comic poets the word *στιγματίας* has its literal meaning—a branded person, a runaway slave; cf. Aristophanes, *Lysistrata*, 331; Hermippos, fragment 63, line 19 (Kock, I, p. 243); Eupolis, fragments 159, line 14, and 276, line 2 (Kock, I, pp. 301 and 333).

¹⁶ *C.A.F.*, I, p. 161, No. 58.

This quotation has been preserved in two places. Photius,¹⁷ under the heading ὑπόβολον, says: ὑποκείμενον πρὸς δάνειον καὶ τόκον; the quotation follows. It should be noted that the manuscript of Photius has Πολυτίωνος and ὑπόβολλον, not ὑπόβολον. Eustathius,¹⁸ while commenting on words compounded with βολή and βόλος says: ἐκείθεν καὶ ὑπόβολον οὐ μόνον τὸ παρὰ νομικοῖς, ἀλλὰ καὶ τὸ ὑποβεβλημένον ἤγουν ὑποκείμενον πρὸς δάνειον καὶ τόκον, εἴτε ἀγρὸς εἴτε οἶκος εἴτε ἄλλο τι. Φερεκράτης: the quotation follows. Eustathius, likewise, writes Πολυτίωνος rather than the Attic form Πουλυτίωνος,¹⁹ and he has ὑπόβολον rather than the ὑπόβολον preferred by Kock.

The reading ὑπόβολον comes from a suggestion made by Porson²⁰ on Pollux, III, 85—τὸ δὲ ὑπόχρεων χωρίον ἐλέγετο καὶ ὑπόβολον. Porson writes: “Valde suspicor legendum ὑπόβολον, quod et metrum postulat in Pherecrate Eustathii p. 1405, 22.

— οὐκ ὄρᾶς^{20a} τὴν οἰκίαν
τὴν Πολυτίωνος κειμένην ὑπόβολον;

licit is aliter, ut videtur, censeat.” Certainly in the Pherekrates fragment, if the lines have been divided properly as seems assured, Porson was justified in reading ὑπόβολον, for ὑπόβολον is metrically impossible there. Whether the change should also be made in Pollux is another matter.

The word ὑπόβολον obviously was extremely rare. If we accept the manuscript readings, it occurs in Pollux and in later lexicographers and commentators—Photius, the *Etymologicum Magnum*, and Eustathius. These sources all assign to it the meaning “mortgaged.” There is no other evidence for its occurrence in the classical period in this or in any other sense, but in Byzantine times the term was used in connection with the dowry to designate the προγαμμαία δωρεά.²¹

Was there such a word as ὑπόβολον? Eustathius, although writing ὑπόβολον in the Pherekrates fragment, believed there was, for, after the lines quoted above he continues as follows: δῆλον δὲ ὅτι καὶ ἕτερον ἦν ὑπόβολον ἐκτείνον τὴν προπαραλήγουσαν, καὶ δηλοῦν τὸ ὑποκείμενον ἐπὶ ὀβολιμαίῳ τόκῳ. τοῦτο μέντοι, οὐκ ἀπὸ τῆς βολῆς ἢ τοῦ βόλου, ἀλλὰ ἐκ τοῦ ὀβολοῦ. This definition is very questionable, because, although Eustathius gives a different derivation for ὑπόβολον from the one he gives for ὑπόβολον, the

¹⁷ *Lexicon*, II, p. 245 (S. A. Naber, 1865).

¹⁸ *Commentarii in Odysseam*, 1405, 21-25; cf. 1406, 43-44.

¹⁹ Cf. Andocides, I, *On the Mysteries*, 12 and 14; Isocrates, XVI, *De Bigis*, 6.

²⁰ Ricardi Porsoni, *Adversaria*, Cambridge, England, 1812, p. 295.

^{20a} οὐκ ὄρᾶς—Porson's spelling.

²¹ Du Cange, *Glossarium ad Scriptores Mediae et Infimae Graecitatis*, pp. 1642-1643, s.v. ΥΠΟΒΟΛΟΝ; H. Stephanus, *Thesaurus Graecae Linguae*, vol. VIII, s.v. [Υπόβολος] Υπόβολος; E. A. Sophocles, *Greek Lexicon of the Roman and Byzantine Periods*. It is to this usage that Eustathius refers when, in the passage quoted above, he says: ὑπόβολον οὐ μόνον τὸ παρὰ νομικοῖς —.

meaning assigned to the two words is basically the same.²² The important thing about Eustathius' sentence, however, is that he was aware of a word *ὑπόβολον* and that he connected it with *ὀβολός* and not with the verb *βάλλειν*.

Scholars have universally accepted the reading *ὑπόβολον* in the line of Pherekrates and then, without hesitation, have assigned the meaning of *ὑπόβολον* to it.²³ The word *ὑπόβολον*, however, surely cannot be derived from *ὑποβάλλειν*. Eustathius, as we have just seen, links it with *ὀβολός*. This seems plausible enough, but I think we may well wonder by what reasoning a word, whose basic component is *ὀβολός*, can be assumed to mean "mortgaged."

For metrical reasons it seems certain that Pherekrates must have said *ὑπόβολον*. The problem, therefore, is to try to discover the meaning of this *ἄπαξ λεγόμενον*. An investigation of the situation which probably motivated the two lines preserved in the fragment will, I believe, offer a solution.

In the year 415, just before the departure of the Sicilian expedition, there occurred the notorious mutilation of the Hermae and also the parodying of the Eleusinian Mysteries by Alcibiades and his friends.²⁴ According to Isocrates and Pausanias the Mysteries were celebrated in the house of Poulytion.²⁵ Plutarch²⁶ states that the rites were performed in Alcibiades' own house. This seeming inconsistency is easily explained when one realizes that these parodies occurred on more than one occasion. Andocides enumerates four informations which were lodged concerning these celebrations of the Mysteries. In the first the scene was given as Poulytion's house, in the second no place is mentioned, while in the third and fourth the parodies were said to have taken place in the houses of Charmides and Pherekles respectively.²⁷ In order to interpret the fragment of Pherekrates under discussion, it is naturally important to know what rôle Poulytion played in these matters. Busolt, who believed that *ὑπόβολον* meant mortgaged, made the following statement: "Das Haus verpfändet war, so erklärt es sich, dass Pulytion selbst nicht zu den

²² Eustathius, when defining *ὑπόβολον*, hardly could have had Pherekrates in mind as a source since just a line or two above he had quoted the poet as saying *ὑπόβολον*. Hence I do not think it can be argued that when interpreting *ὑπόβολον* as *ὑποκείμενον ἐπὶ ὀβολιμαίῳ τόκῳ* he derived the notion of "mortgaged" from the participle *κειμένην* used by Pherekrates. The simple verb *κείσθαι*, to the best of my knowledge, is never used, like the compound *ὑποκείσθαι*, in the sense of "mortgaged."

It would be interesting to know where Eustathius ran across the word *ὑπόβολον*. Possibly, if the suggestion made below (pp. 175-176) is correct that *ὑπόβολον* is a pun for *ὑπόβολον*, the pun may have been repeated elsewhere in late fifth century writings no longer extant.

²³ E. g., G. Busolt, *Griechische Geschichte*, Gotha, 1904, III, 2, p. 1293, note 1; V. Ehrenberg, *The People of Aristophanes*, 2nd edition, Oxford, 1951, p. 242.

²⁴ Thucydides, VI, 27-28.

²⁵ Isocrates, XVI, *De Bigis*, 6; Pausanias, I, 2, 5. Cf. *Pap. Oxyrh.*, III, 1903, no. 411, p. 33, lines 25-28 (brief Life of Alcibiades dating from the Roman period).

²⁶ *Alcibiades*, 22, 3.

²⁷ *On the Mysteries*, 12-17.

Angezeigten gehörte.”²⁸ This is a rather odd remark, for, even if Poulytion had mortgaged his house, it does not follow that he had lost possession of it unless we are to think of a *πρᾶσις ἐπὶ λύσει* according to which the mortgagee had taken possession himself. The fact that Poulytion is not mentioned among those denounced is not so strange when one remembers that only for the first two informations does Andocides give lists of the accused,²⁹ although admittedly it is surprising that his name is not included in the first list which enumerated those who had participated in the ceremonies at his own house. There can be little doubt, however, that Poulytion’s property was confiscated along with that of the others who were convicted. Plutarch³⁰ preserves the wording of the impeachment (*εἰσαγγελία*) which Thessalos, son of Kimon, brought against Alcibiades for mimicking the Mysteries in his own house and in this indictment Poulytion is mentioned as the torch-bearer. Since Poulytion was grouped with Alcibiades in the impeachment as a participant in the parodies, and since on one occasion, at least, the Mysteries were mocked in his own house, it is hard to believe that he was not also accused and convicted.

It seems clear then that Poulytion was a friend of Alcibiades and that, because of his connection with the profanation of the Mysteries, his property was confiscated along with that of the others who had been involved in these parodies. It should further be noted that Poulytion’s house was an unusually elegant one. This is a safe inference to draw from the remarks in the pseudo-Platonic *Eryxias*, 394, c and d, 400 b, where it is implied that Poulytion’s house was a byword for luxury.

With this background in mind, it is now time to turn to Pherekrates. It is agreed that he was a slightly older contemporary of Aristophanes.³¹ The only certain date in his career is that his comedy, *Οἱ Ἄγριοι*, was performed in the archonship of Aristion, 421/0.³² From fragment 155³³ of his works it is evident that he was hostile to Alcibiades. The date of the *Ἰπνός*, the comedy from which the fragment under consideration is taken, is unknown, but in view of the notoriety which Poulytion and his house acquired as a result of the Mysteries scandal, it seems almost a certainty that the play cannot be dated before 415.^{33a} What then is the meaning of those eight words—

²⁸ See above, note 23.

²⁹ *On the Mysteries*, 13; 15. *I.G.*, I², 325-334, the records of the Poletai on the selling of the confiscated property of the Hermokopidai, retain too few names to be of value in this connection. See also *Hesperia*, III, 1934, pp. 47-49; V, 1936, pp. 382-386; VII, 1938, pp. 81-82; VIII, 1939, pp. 69-76; XII, 1943, p. 31, note 65; XVII, 1948, pp. 34-35; and *S.E.G.*, X, 237-242.

³⁰ *Alcibiades*, 22, 3; compare 19, 1. Busolt himself, *op. cit.*, p. 1318, note 3, admits that Plutarch preserves an official document: “Der Wortlaut der Eisangelie—, offenbar nach Krateros.”

³¹ A. and M. Croiset, *Histoire de la Littérature Grecque*, Paris, 1899, III, pp. 482-483.

³² Athenaeus, V, 218, d.

³³ Kock, *C.A.F.*, I, p. 194.

^{33a} A. Körte, in *R.E.*, s.v. *Pherekrates*, p. 1987, who, incorrectly I believe, accepts the meaning

οὐχ ὄρῃς τὴν οἰκίαν
τὴν Πουλυτίωνος κειμένην ὑπόβολον;

I have suggested above how difficult it is to justify the meaning of “mortgaged” for the word *ὑπόβολον*. Furthermore, if the play is to be dated in 415 or later, it is hard to understand why a comic poet could think of nothing more biting to say about a notorious house than that it was mortgaged. Even if one insists on dating this play before 415, which seems unlikely, it may legitimately be asked why the poet used such an outlandish word as *ὑπόβολον* to express the idea of “mortgaged” rather than some more standard term like *ὑποκειμένην*. If, however, the assumption is correct that the *Ἰπνός* appeared after the affair of the Mysteries, a more appropriate interpretation can be offered for these two lines of Pherekrates. Poulytion, the sacrilegious friend of the hated Alcibiades, had met with a deserved fate, and his magnificent mansion had been confiscated and sold. It is reasonable to believe that when the *Poletai* auctioned off this property, it was sold for a great deal less than its intrinsic value. The purchasing of an object cheaply at auctions is a common occurrence, and in this particular case superstitious fears may well have affected the bidding. Many a god-fearing Athenian might have hesitated to buy a house polluted through desecration of Demeter and Kore. If this line of reasoning is approximately correct, then it is possible to paraphrase the words of Pherekrates somewhat as follows: don’t you see that magnificent house of Poulytion lying there, worth about an obol—i. e., sold for a song? The comic poet presumably coined the expression to fit the occasion. He took the word *ὀβολός* and combined with it *ὑπό*, which in composition so commonly has a diminutive or qualifying effect.⁸⁴ The initial omicron of *ὀβολός* was lengthened as in *διώβολον*, *τριώβολον*, *ἡμιωβόλιον*, *ἐπωβελία*, etc.

This interpretation cannot be claimed as certain, but, at least, it has the virtues of taking into consideration the probable derivation of the word *ὑπόβολον*, of giving point to the words of Pherekrates, and of conforming to what is known of Poulytion. I suspect, moreover, that a play on words is also involved in the expression *ὑπόβολον*. We saw above⁸⁵ that the *στιγματίαν* of fragment 333 of Kratinos almost surely referred to a mortgagor. Some sort of mortgage transaction, therefore, was known to the Athenians at the time of the production of the *Ἰπνός*. We have also seen that according to the manuscripts of Pollux the Athenians at some time used the word *ὑπόβολον* in the sense of “mortgaged.” Since in the fourth century, when documenta-

ὑποκείμενον ἐπὶ ὀβολιμαίῳ τόκῳ for *ὑπόβολον*, thinks that the *Ἰπνός* was probably produced in 415 before the occasion of the Mysteries scandal.

⁸⁴ E. g., *ὑπόψαμμος*, *ὑπόκωφος*, *ὑπονείφω* etc. Paul Geissler, *Chronologie der Altattischen Komödie*, Berlin, 1925 (*Philologische Untersuchungen*, Heft 30), pp. 52-53, believes that the house of Poulytion had been confiscated, but he seems to have been unaware of the problems posed by the words *ὑπόβολον* and *ὑπόβολον*; at least, he makes no reference to them.

⁸⁵ P. 171.

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tion is abundant, that word never occurs, it is reasonable to infer that it was a word which was current in the late fifth century. Thus it seems probable that Pherokrates, when he inserted the term *ὑπόβολον*, not only coined a new word, but also indulged in a pun.

To the best of my knowledge there is no other evidence from fifth century Athens which can be interpreted as a reference or an allusion to a mortgage.⁸⁶ When mention

⁸⁶ Possibly fragments 152-153 of Eupolis (Kock, *C.A.F.*, I, p. 299) should be mentioned. They read:

ἵππον κέλητ' ἀσκοῦντα θές.
 θές νῦν ἀγρούς καὶ πρόβατα καὶ βούς.

The simple verb *τιθέναι* can on occasions mean "to mortgage," but in view of fragment 149—

δέϊπνον θές ἑκατὸν δραχμάς. B. ἰδοῦ.
 A. οἶνον θές ἐτέραν μνᾶν.—

it seems more reasonable to assign the same meaning to *θές* in both fragments—namely, "put down," "reckon". See Kock's commentary on fragment 149 where he gives various instances of the use of *τιθέναι* in this sense. If, however, one insists on understanding *θές* in fragments 152-153 as signifying "mortgage," then it must be stated that the fifth century comic poets provide a third reference to the mortgage contract—this one from the year 422/421, the date of Eupolis' *Kolakes* (Athenaeus, V, 218b).

Franz Hampl, *Hermes*, LXXIII, 1938, pp. 474-477, recognizes evidence for the mortgage contract in *I.G.*, I², 40/41. This inscription consists of several decrees passed by the Athenians concerning Hestiaia (cf. *S.E.G.*, X, pp. 24-25, no. 37). Our concern is with lines 1-12 of no. 40 which contain provisions for regulating questions of disputed land possession; the date presumably is 446/5 or shortly thereafter. Hiller von Gaertringen, *Göttinger Nachrichten*, *phil.-hist. Klasse*, 1921, pp. 62-68, had assumed that the disputes were between the Athenian cleruchs and the native Hestians, but M. Cary, *J.H.S.*, XLV, 1925, pp. 246-248, has proved conclusively that this interpretation is wrong. He pointed out, among other things, that the ancient sources state very explicitly that the Hestians were driven out *en masse* to make room for the Athenian settlers. Cary suggested that the disputes lay between two groups of Athenian settlers who went to Hestiaia at different times. The result was that the first detachment encroached on lands which had been assigned to the second group. This explanation, which is attractive despite certain difficulties, is rejected by Hampl. His interpretation is summarized in his final sentence as follows: "Ich vermute, dass die behandelte Bestimmung—sicherlich nach attischem Muster—für Hestiaia festsetzte, dass ein Mann, den ein anderer auf Grund einer erfolgten Pfändung von seinem Grundstück oder jedenfalls von einem Teil desselben vertreiben zu können glaubte, sich an das Gericht und gegebenenfalls hernach noch an den Rat in Hestiaia als Appellationsinstanz wenden und ausserdem versuchen konnte, den Gläubiger durch Abgabe von Vieh umzustimmen." This interpretation can safely be rejected. The inscription, to be sure, is very fragmentary, but among the preserved words and those plausibly restored there is not a single one that is customarily employed when mortgage matters are under consideration. It is unthinkable that in an official document the mortgagor and the mortgagee should be termed *ὁ ἐλαυνόμενος* and *ὁ ἐλαύνων*, respectively. Again, even in the fourth century the plight of the delinquent mortgagor was hard and presumably in the fifth century, if the mortgage contract was practiced at Athens, his rights would have been protected even less. It is universally true, I believe, that the mortgage contract in its early stages always favors the interests of the creditor (see above, Chapter IV, p. 90). The very fact that in this document the *ἐλαυνόμενος* is permitted to appeal first to the courts and then to the Boule in Hestiaia—not to mention attempting to persuade (?) τὸ [ν ἐλ] αὐνοντα -- [ἐ βουσί] | ἐ ἡπ[οις] ἐ ὄνοις ἐ οἰσ[ί] (lines 11-12)—before being driven from the land is sure evidence that this inscription has nothing to do with mortgage contracts and rules of foreclosure.

is made of security, the security is always in the form of movables—*ἐνέχυρα*.³⁷ In view of the abundant literary and epigraphical material from the fifth century, it is certainly strange that throughout that whole period there are only three or four allusions to the mortgage contract and that these allusions all date from the last quarter of the century. If the transaction had been in common usage, it is hard to understand why so few traces of it have survived. In this connection one other observation may be in order. For the last decade of the fifth century we have evidence for the employment of the regular fourth century legal language in reference to mortgages both in Isocrates and also in Lysias, if the reading *ἐγγείω ἐπὶ τόκῳ* is accepted.³⁸ In Kratinos and Pherekrates, however, the allusions to mortgage are expressed strangely—*στιγματίαν* and *ὑπόβολον*, which, we have seen, was probably a pun on the word *ὑπόβολον*. Comic poets, naturally, were not writing precise legal documents, but the use of these unusual words might suggest the possibility that there was no regular expression as yet to describe a new transaction which was being introduced in the troubled years of the Peloponnesian War.

II

The absence of any evidence for the existence of the mortgage contract in Athens prior to the last quarter of the fifth century is curious. The silence of the sources on the transaction, of course, is not proof that it was not in use, but, on the other hand, its prevalence should not be taken for granted merely because of certain preconceived notions about the fifth century Athenian way of life. Our task, therefore, is to try to discover a satisfactory reason for the total lack of evidence for the use of real property as security at Athens before the time of the Peloponnesian War. Before we begin this investigation, the following fundamental fact about the nature of the mortgage transaction must be emphasized, for this fact will determine the lines of the ensuing discussion. The fully developed mortgage contract, according to which the creditor on non-payment of the debt due can foreclose on and become owner of the real property which had served as security, cannot exist unless real estate is alienable. It is obvious, therefore, that we must investigate the Athenian system of land tenure, for, if Attic land was ever inalienable as I believe can successfully be demonstrated, mortgage was impossible until the removal of that restriction from the land. Once the land became alienable, however, its employment as security must have followed rapidly. Consequently, if we can discover the approximate date when Attic land became alienable, we shall also have found the date of the introduction of the mortgage contract at Athens.

³⁷ Cf. above, note 11. In Aristophanes, *Ecclesiazusae*, 567, and in fragment 484 (Kock, *C.A.F.*, I, p. 516), there are references to seizure of *ἐνέχυρα* for non-payment of debts; cf. Antiphon, VI, *On the Choreutes*, 11.

³⁸ See above, pp. 168-169.

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As every student of Greek history knows, the system of land tenure in early Attica is a problem which has exercised the learning and ingenuity of scholars for generations. For our purposes the essential question can be phrased thus: In early times did a man individually own his land—his κλήρος—or was it owned jointly by the family which in one sense had only the usufruct of the soil since it really belonged equally to both ancestors and posterity? The contradictory answers to this question are well illustrated by the remarks of two distinguished scholars. Wilamowitz³⁹ writes: “Wir haben keinerlei Überlieferung über die Entstehung des Privatbesitzes an Grund und Boden in Attika, und es wird kaum danach gefragt, und doch deutet alles darauf hin, dass dieser erst spät entstanden ist—.” More positively Heinrich Swoboda⁴⁰ maintains the opposite point of view: “Wie man auch diese älteren Zustände beurteilen mag, Eines ist ganz gewiss, dass das Privateigentum bei den Griechen von hohem Alter ist und der Fortbestand von Geschlechts- oder Familieneigentum bis auf Solon als ganz ausgeschlossen erscheint.” Despite the vehemence of Swoboda’s convictions, scholarly opinion has definitely turned in the opposite direction. The view which is now decidedly in the ascendancy is well demonstrated by W. J. Woodhouse’s excellent—if strangely worded—book,⁴¹ a work to which frequent reference will be made below. Swoboda’s arguments, as regards Attica at least, lose force largely because he relies so heavily on non-Attic evidence.⁴² It cannot be empha-

³⁹ *Aristoteles und Athen*, Berlin, 1893, II, p. 47.

⁴⁰ “Beiträge zur griechischen Rechtsgeschichte,” *Savigny-Stiftung*, XXVI, 1905, p. 241. J. H. Thiel, “On Solon’s System of Property-Classes,” *Mnem.*, IV Ser., III, 1950, pp. 1-11, subscribes to this view; see especially, p. 3.

⁴¹ *Solon the Liberator, A Study of the Agrarian Problem in Attika in the Seventh Century*, Oxford, 1938. It is not necessary here to enter into a discussion of the vast literature which has grown up around the subject of land tenure in early Greece. Sufficient references can be found in the bibliography at the end of Woodhouse’s book.

⁴² From non-Attic sources evidence can be adduced for both sides of the argument. Hesiod, *Works and Days*, 341, exhorts Perses to be devout toward the gods ὄφρ’ ἄλλων ὀνή κλήρον, μὴ τὸν τεὸν ἄλλος. This seems to be clear evidence that in Askra in the eighth or ninth century land was alienable, and it was accepted in this sense by Swoboda, *op. cit.*, p. 241. Other scholars, however, have questioned this interpretation. For example, P. Guiraud, *La Propriété Foncière en Grèce*, Paris, 1893, p. 101, speaks of “ce témoignage unique et douteux,” and W. Vollgraff, *Mnem.*, L, 1922, p. 217, note 1, argues that this line is not evidence for the abolition of family ownership in Boeotia—“poterat enim venditio fieri inter agnatos vel gentiles.” For an understanding of the passage it is necessary to remember that Hesiod’s father had migrated to Askra from Aeolian Kyme (lines 635-640). He was a poor man and presumably on arriving οἰζυρή ἐνὶ κόμῃ he cleared a homestead for himself and his sons in the ἐσχατιά. Consequently it is highly questionable whether from Hesiod’s words any conclusions can be drawn concerning the status of “family estates” in contemporary Boeotia. To use this passage as evidence for conditions in pre-Solonian Athens is obviously hazardous (compare the pertinent remarks of Woodhouse, *op. cit.*, pp. 86-87). Further evidence for the alienability of land in early times may be discernible in a fragment of Theophrastos [Stobaeus, *Flor.*, XLIV, 20 (Hense); 22 (Meineke)], where it is stated that Charondas (towards the middle of the seventh century?) established regulations for sales—apparently of both movables and immovables—(cf. M. Mühl, *Klio*, XXII, 1928, pp. 116-117). Once again, however, it may

sized too often that in the study of Greek institutions data from one state have no value *per se* for the interpretation of institutions even in a neighboring state. What justification, for example, can there possibly be for the drawing of conclusions about pre-Solonian Attica from the customs prevalent in Boeotia—or rather in Askra—in Hesiod's time or from the laws that applied to Gortyn in far-away Crete?

The study of the system of land tenure in early Attica perforce must begin with the career of Solon, for once Solon appears on the scene we have as guides not only his own words, but also the accounts of Aristotle and Plutarch, disappointing as they are in so many respects. How, then, was land held at the time when Solon undertook his program of reform? Was it owned by the individual, to do with as he saw fit, or was it held by the family with an obligation, whether legal, customary, or religious—or with all these sanctions combined—, not to alienate it? One fact immediately presents itself which points to the acceptance of the second of these alternatives. Aristotle states that until the time of Solon all loans were secured on the debtor's person and that the most democratic of Solon's acts was to prohibit this custom of personal security.⁴³ Certainly the most obvious explanation for this exclusive use of personal security is that his own person was the only form of security which the debtor

be asked what bearing laws which were in force in Katana and other Greek colonies have on conditions in seventh century Attica. Colonists, presumably, deliberately altered many restrictions and customs which they had found irksome in the mother country. Again, the Gortynian Code, now usually dated in the middle of the fifth century, reveals that mortgage (and hence the right to alienate real property) was permitted under certain circumstances to the Gortynians (VI, 1-45; IX, 1-24). Gortyn, however, is not Athens. It might be remarked, moreover, that backward as Crete was she was more advanced than Athens in certain legal ideas. The regulations concerning heiresses (VII, 15—IX, 24), for example, were more liberal than those which prevailed even in fourth century Athens.

For examples of the *inalienability* of land, the case of Sparta is too well known to require comment. Further information is offered by Aristotle in his *Politics*. In II, 7, 4 (1266 b), he writes: *καὶ παρ' ἄλλοις ἔστι νόμος ὃς κωλύει κτᾶσθαι γῆν ὀπόσην ἂν βούληται τις, ὁμοίως δὲ καὶ τὴν οὐσίαν πωλεῖν οἱ νόμοι κωλύουσιν, ὥσπερ ἐν Λοκροῖς νόμος ἔστι μὴ πωλεῖν, ἔαν μὴ φανερὰν ἀτυχίαν δείξῃ συμβεβηκυῖαν, ἔτι δὲ τοὺς παλαιοὺς κλήρους διασφύζειν (τοῦτο δὲ λυθὲν καὶ περὶ Λευκάδα δημοτικὴν ἐποίησε λίαν τὴν πολιτείαν αὐτῶν . . .)*. It should be noted that the restrictions on alienability of land mentioned in this passage were still in force in Aristotle's time. Referring to Philolaos (early seventh century? Cf. J. Schmidt in *R.E.*, s.v. *Philolaos* [3]), Aristotle says, II, 12, 7 (1274 b): *ᾠκησαν μὲν οὖν διὰ τὴν τοιαύτην αἰτίαν παρὰ τοῖς Θηβαίοις, νομοθέτης δ' αὐτοῖς ἐγένετο Φιλόλαος περὶ τ' ἄλλων τινῶν καὶ περὶ τῆς παιδοποιίας, οὓς καλοῦσιν ἐκείνοι νόμους θετικούς· καὶ τοῦτ' ἔστιν ἰδίως ὑπ' ἐκείνων νενομοθετημένον, ὅπως ὁ ἀριθμὸς σφύζεται τῶν κλήρων*. Again in VI, 4, 5 (1319 a) it is stated: *(ἦν δὲ τό γε ἀρχαῖον ἐν πολλαῖς πόλεσι νενομοθετημένον μηδὲ πωλεῖν ἐξείναι τοὺς πρώτους κλήρους· ἔστι δὲ καὶ ὃν λέγουσιν Ὀξύλου (earlier than Lyncurgus, Pausanias, V, 4, 5) νόμον εἶναι τοιοῦτόν τι δυνάμενος, τὸ μὴ δανείζειν εἰς τι μέρος τῆς ὑπαρχούσης ἐκάστῳ γῆς)*. The only general conclusion that can be drawn from such passages is that in early times in most—if not in all—Greek states family land was inalienable and that by Aristotle's time this restriction had widely been abolished. As evidence for the system of land tenure in pre-Solonian Attica, however, these passages are of no value.

⁴³ *Ath. Const.*, 2, 2: *καὶ οἱ δανεισμοὶ πᾶσιν ἐπὶ τοῖς σώμασιν ἦσαν μέχρι Σόλωνος*. 9, 1: *πρῶτον μὲν καὶ μέγιστον τὸ μὴ δανείζειν ἐπὶ τοῖς σώμασιν*. (See also 4, 5; 6, 1). Compare Plutarch, *Solon*, 15, 3.

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could furnish. What else can this mean than that he was unable to encumber his land because of its inalienability? It can hardly be doubted, as will be shown below, that the creditor frequently was more interested in gaining possession of the debtor's land than of his person, but the system of land tenure apparently prevented him from receiving real property as security for the loan. If a man were able to mortgage—and consequently to alienate—his real property, why would he offer his own person as security and thus, because of the contemporary conditions, run the almost certain risk of falling into slavery?

The conclusion that Attic land was inalienable at least until Solon's time can be reached by another line of reasoning. In the Attic Orators, as we shall see below, abundant evidence is preserved that even in the fourth century there were elaborate regulations concerning intestate succession and various restrictions on testamentary rights. The aim of all these provisions was, of course, to keep the real property in the family or at least in the *genos*. These fourth century conditions certainly must be interpreted as a survival from the days when land was the common possession of the *genos* and subsequently of the restricted family. Since Solon was the first man to grant the so-called right of testament to the Athenians⁴⁴ and since, until his reforms, all security was personal, it is only logical to see in the fourth century regulations about inheritance a survival of a custom—namely, the inalienability of land—which endured down to the time of Solon himself.⁴⁵

⁴⁴ Plutarch, *Solon*, 21, 2-3.

⁴⁵ There are two statements in the sources which do not conform with the point of view advocated above. In the description of the Draconian Constitution (Aristotle, *Ath. Const.*, 4, 2), it is said that the nine archons and the treasurers were elected from those possessing *οὐσίαν* — — — *οὐκ ἐλάττω δέκα μῶν ἐλευθέραν*, and the generals and hipparchs from those having *οὐσίαν* — — — *οὐκ ἐλάττων ἢ ἑκατὸν μῶν ἐλευθέραν*. If *οὐσία* in this context refers to real property and not just to movables, then in the stipulation that the property must be unencumbered there is evidence that the mortgage contract was in use at the time; hence land was alienable. It is now universally agreed, however, that this Draconian Constitution is an oligarchic forgery dating from the close of the fifth century. Consequently it is valueless as evidence for pre-Solonian conditions (see most recently, P. Cloché, "Remarques sur la Prétendue 'Constitution de Dracon,'" *R.E.A.*, XLII, 1940, pp. 64-73). The other statement at first glance seems to afford a more valid objection to the hypothesis that land was inalienable. In Aristotle, *Ath. Const.*, 6, and in Plutarch, *Solon*, 15, 6-7 (cf. *Praecepta Gerendae Reipublicae*, 807 E), the famous story has been preserved of how Solon was duped by his friends when he was contemplating the Seisachtheia. According to the story Solon notified some of his friends that he was planning to cancel debts. Thereupon they borrowed considerable sums of money and bought up large tracts of land with the result that when the cancellation of debts occurred they became wealthy. According to Aristotle this was the origin of the term *παλαιόπλουτοι* ascribed to certain families, and Plutarch says that these men were subsequently called *χρεωκοπίδαι*. This story has all the earmarks of an anecdote; it should be noted that Plutarch begins his account with the word *λέγεται*, and that Aristotle gives the two interpretations which were current with the opposing political parties. On analysis the story has elements of great improbability. It is hard to believe that in those critical times, when no one knew what sort of revolution might occur, certain *γνώριμοι* borrowed large sums of money from other *γνώριμοι* (?) on the security of their own

Woodhouse summarizes the state of the problem so excellently that it seems desirable to quote almost in full the pertinent paragraph. He writes: ⁴⁶ “ Naturally, it is out of the question that we should be called upon to stand and deliver chapter and verse in proof of the legal inalienability of family estate, for Attika, previous to Solon’s time. It is indeed not susceptible of direct proof in so many words referable to some primitive legal Code. We are necessarily confined to reasonable inference from such fragments of practice and statement as have survived If the hypothesis fits well all the known facts, and elucidates incidentally perplexing problems the solution of which was not contemplated in its framing, it is on all fours with the hypotheses of physical science; for science also has no other criterion of truth than just this same comprehensiveness and coherence. Fragmentary as is the evidence, it is sufficient to allow us to assert that the entire congeries of estates in Attika was historically simply a number of ‘ allotments,’ that at some time or other had been officially distributed in perpetuity to the citizen households. What legal sanctions were in operation in early days to prevent alienation, or whether there ever had been any definite sanctions at all, we cannot say. To part with family estate was one of the things that were ‘ not done;’ the group feeling was against it, let alone the fact that in the earliest times tenure of allotment was also a man’s title to citizenship.”

The belief that land in Attica was inalienable before Solon must be supported by a satisfactory explanation for those famous lines of Solon in which he says that he had liberated the earth, formerly enslaved, by destroying the *ῥοι*. The verses run: ⁴⁷

συμμαρτυροίη ταῦτ’ ἂν ἐν δίκῃ χρόνου
μήτηρ μεγίστη δαιμόνων Ὀλυμπίων
ἄριστα, Γῆ μέλαινα, τῆς ἐγὼ ποτε
ῥους ἀνείλον πολλαχῆ πεπηγότας,
πρόσθεν δὲ δουλεύουσα, νῦν ἐλευθέρα.

persons. Unquestionably all sorts of rumors were in circulation as to Solon’s intentions; this uncertainty is revealed in his own verses and is mentioned by Aristotle (*Ath. Const.*, 11, 2). Under such conditions would not the wealthy have been suspicious of *γνώριμοι* who were anxious to borrow heavily, and would not these *γνώριμοι* themselves have feared to offer their own persons as security? It is reasonable to suspect the hands of the Atthidographers in the formation of this unlikely tale. These local historians, as is well known, were greatly interested in giving aetiological explanations of obscure customs, rites, words, etc. This anecdote may well be the result of their attempts to explain such words as *παλαίοπλουτοι* and *χρεωκοπίδαι*. The political writing of the end of the fifth century also may have been partly responsible for the invention or development of this legend (cf. G. Busolt, *Griechische Geschichte*, II², pp. 41-43, note 2, and Schoeffer in *R.E.*, s.v. *Chreokopidai*, pp. 2447-2448). Whatever the origin of the terms *παλαίοπλουτοι* and *χρεωκοπίδαι* may have been, it would be hazardous, to say the least, to regard this improbable story as evidence for the system of land tenure in Attica in Solon’s time.

⁴⁶ *Op. cit.*, p. 81, quoted in part also by N. Lewis, *A.J.P.*, LXII, 1941, p. 146, note 12.

⁴⁷ Aristotle, *Ath. Const.*, 12, 4.

Woodhouse⁴⁸ is certainly correct when he maintains that these *ὄροι* had not been set up to advertize the outright sale of the lands concerned, for by no stretch of the imagination can one associate the idea of enslavement with a legitimate sale. Were these horoi boundary stones? Obviously they could not have been stones delimiting the holdings of the peasants, for then the destroying of these markers would have been the last thing that Solon would have undertaken. Also, how could stones delimiting a man's plot be described as enslaving it?⁴⁹ By these horoi was Solon referring to stones which the nobles set up as they extended their domains by encroaching on the lands of the helpless peasants? This suggestion has something in its favor, possibly, but the fundamental idea then, would seem to be highhanded robbery rather than enslavement. Presumably Solon knew what he was talking about and he was careful to emphasize and contrast *δουλεύουσα* and *ἐλευθέρα*. These horoi clearly were connected with the enslavement of black Earth, and a natural explanation is that they gave notification of the fact that the land somehow was encumbered, i. e., enslaved. But how can inalienable land be encumbered? Woodhouse's interpretation of the status of the land in Attica when Solon undertook his reforms is probably well known, but it will be necessary for our purposes to summarize the main points of his thesis. This summary will be based on the excellent article of N. Lewis⁵⁰ in which, while accepting the core of Woodhouse's arguments, he has made certain acute and necessary improvements and simplifications.

In the course of the seventh century the production of olives and wine^{50a} for export had supplanted cereal growing as the most profitable forms of agriculture in Attica. Orchards and vineyards, however, belonged to "long future" husbandry, a type of farming beyond the reach of the peasants who lacked the capital to tide them over the years until the trees and vines should become fruitful. Since the increasing use of money and the expansion of commerce were having a deleterious effect on the local prices of cereals, the small farmer was experiencing ever greater difficulty in maintaining himself on his little plot. The nobles, on the other hand, with idle capital to invest were anxious to acquire more land which could be converted into orchards and vineyards. How was this land to be obtained as long as the principle of inalienability remained in force? The answer lies in what was probably the typical procedure in a loan. The harried peasant, in need of money, would borrow from a wealthy man, offering the only security that was possible—his person. When the loan became due

⁴⁸ *Op. cit.*, pp. 75-77.

⁴⁹ Cf. Woodhouse, *op. cit.*, p. 99.

⁵⁰ "Solon's Agrarian Legislation," *A.J.P.*, LXII, 1941, pp. 144-156.

^{50a} Since Solon allowed oil alone of the products of the soil to be exported (Plutarch, *Solon*, 24, 1), and since the cult of Dionysos was greatly fostered by Peisistratos, the intensive cultivation of the vine in Attica possibly should be attributed to the tyrant. See G. B. Grundy, *Thucydides and the History of his Age*, vol. I, 2nd ed., Oxford, 1948, p. 120. Plutarch's statement, however, makes it clear that olive culture was widespread in Attica by the beginning of the sixth century.

and the debtor was unable to refund the money, the creditor was entitled to seize him as a slave. Frequently, however, it must have happened that the creditor was more desirous of acquiring the debtor's land than his person, and it goes without saying that the peasant would go to almost any length to avoid enslavement. To meet this situation a method was invented—undoubtedly by the land-grabbing nobles—which satisfied them and presumably was agreeable to the peasants. This device was really a legal fiction and, to use fourth century parlance, can be termed sale subject to redemption—*πρᾶσις ἐπὶ λύσει*. In the seventh century it can be assumed that it worked as follows. The insolvent debtor, on the day of the maturity of the loan, was confronted with two possibilities: either he could pass into slavery or as an alternative to this he could transfer the possession of his land to his creditor. The debtor, who retained a right of redemption, would remain on the land as a rent paying tenant. This scheme satisfied all the necessary requirements of the times. The prohibition against alienating land was not violated because the peasant—now a hektemor—remained on his ancestral plot with the right of redemption, to which, in keeping with the legal fiction, no time limit was assigned. The creditor, again in conformity with the fiction, did not become outright owner of the land, but he had what he most wanted—more acres which, if he desired, he could force his tenants to convert to olive and vine growing. And finally the debtor escaped the horrors of slavery and remained on the land of his fathers. Presumably the threat of enslavement still hung over the debtor's head—especially if his payments of rent fell into arrears—, but, if the creditor resorted to personal execution, he would lose his hold on the land which, by the principles of inalienability, would revert to the debtor's nearest of kin.

The arguments which are summarized above admittedly form only a theory, but, if the fact of the inalienability of land in pre-Solonian times is accepted, as in my opinion is necessary, this hypothesis offers the most satisfactory explanation of Solon's description of the land as enslaved and of Aristotle's statement⁵¹ that all the land was in the control of a few. This, then, was the status of the land to which the horoi mentioned by Solon bore testimony, and certainly Solon's use of the word "enslaved" seems not only natural but also justified to describe land so encumbered. It should be emphasized that this "*πρᾶσις ἐπὶ λύσει*" was fundamentally different from the fourth

⁵¹ *Ath. Const.*, 2, 2 (cf. 4, 5) : ἡ δὲ πᾶσα γῆ δι' ὀλίγων ἦν. Is this phraseology a deliberate attempt to avoid the connotation of ownership?

The explanation of the land system in Solon's time given by L. C. Stecchini in a recent book—*Ἀθηναίων Πολιτεία, The Constitutions of the Athenians by the Old Oligarch and by Aristotle*, The Free Press, Glencoe, Illinois, 1950—can be mentioned and dismissed. In a note (pp. 99-100) on Aristotle, *Ath. Const.*, 2, he maintains that the clients were newcomers [?] who "had to buy the land from the old settlers" according to the contract of *misthosis*. "Essentially the *misthosis* is a sale of a plot of land on credit." (sic) As evidence he refers to the later *μισθωσις οἴκων* (see Chapter V, above)—a contract which he misunderstands. . . . "Solon further improved the condition of the debtors by establishing that the restitution [?] of the land should be considered equivalent to full payment (*ἀποτίμημα*) [sic] and free the clients from all further obligations." Etc.

century contract which was discussed in the preceding chapter. That contract, although in form a sale through which qualified ownership passed to the creditor, was in intent and in fact a form of real security. The seventh century “*πράσις ἐπὶ λύσει*” had no element of security in it. It was purely a legal fiction, devised to circumvent the inalienable status of land and thereby offering the insolvent debtor an alternative to enslavement. It was a device owing its existence to the particular conditions of the seventh and early sixth centuries.⁵²

It has often puzzled scholars that none of these horoi, immortalized by Solon, has survived—at least recognizably—to the present. So many explanations can be offered for their disappearance that a few remarks on the subject will be adequate. If wooden horoi had been used in the seventh century, naturally they would have disintegrated in the course of time. A reasonable possibility is that, when Solon by cancelling debts restored their lands to the people, he with the enthusiastic coöperation of the former hektemors literally smashed those stones which had been the signs of the land’s enslavement. One may also question whether it is necessary to assume that Solon’s horoi were inscribed in a fashion similar to the mortgage stones of the fourth century and later. Those stones were notices of certain contracts which had been made. In the seventh century, however, it is hardly correct to speak of a contract. The creditor, at his pleasure, merely received the use of some land rather than the body of a slave. It is difficult to imagine just what words would have been inscribed on the stones. There is also the problem of how extensive was the knowledge of writing in the seventh century. It seems to me quite probable that these horoi, like so many boundary stones, were uninscribed, or that perhaps they bore merely some characteristic sign or mark—possibly painted rather than inscribed—which had the necessary connotation for the people of those times. If this were the case, then, even if some of the stones had survived the ages, there would be no way to identify them.

After Solon’s Seisachtheia there is no further reference to the enslavement of the land. Two centuries pass before there is evidence for the *πράσις ἐπὶ λύσει* which

⁵² It may be thought that an objection to this theory is contained in those verses of Solon which immediately follow his description of the destruction of the horoi (Aristotle, *Ath. Const.*, 12, 4). In these lines Solon speaks of men sold abroad, whom he restored to their native land, and of slaves at home, whom he set free. Since it has been maintained above that according to a “*πράσις ἐπὶ λύσει*” insolvent debtors became rent paying tenants of their creditors, it may well be asked who were those debt slaves restored to liberty by Solon. Two answers, I believe, can be given to this question. (1) The legal fiction of the “*πράσις ἐπὶ λύσει*” may not have begun to operate until late in the seventh century. Consequently, at the time of Solon’s measures many debt slaves, whether in Attica or sold abroad, were probably still alive. (2) Although Aristotle says that all the land was in the control of a few, this statement can reasonably be suspected of exaggeration. Presumably some of the nobles—i. e., those lending money—, when their debtors defaulted, preferred to seize them as debt slaves rather than to have them as rent paying tenants. The hypothesis advanced in the text above, naturally, can hope to explain only the main trend in creditor-debtor relations in the seventh century. Variations from this main trend may have been frequent.

in the fourth century was such a common form of real security. The fact that there are no traces of this new type of *πρᾶσις ἐπὶ λύσει* prior to the fourth century, of course, does not prove that it was not in use until then, but it is reasonable to assume that no method of "selling" with right of redemption was employed for a long while after Solon's reforms. Solon by his cancellation of debts had foiled the efforts of the nobles to circumvent the inalienability of the soil through a "*πρᾶσις ἐπὶ λύσει*." Presumably this device was in such bad odor that for many, many years no recourse was had to it. We are completely in the dark concerning the type of security for loans which was employed in the post-Solonian period.⁵³ All we know is that Solon abolished security on the debtor's person, and that his restoration of their lands to the debtors, his efforts to promote industry in Athens, and Peisistratos' concern for the peasants undoubtedly improved the lot of the small farmer.

If land was still inalienable at the time of the Seisachtheia, when and how was it delivered from this restriction? It is almost universally believed by those who accept its inalienability at the time of Solon's reforms that its liberation developed rapidly in the years following these measures, and the chief cause for this liberation is usually assigned to Solon's testamentary law.⁵⁴ A recent statement of this point of view is to be found in N. Lewis' article,⁵⁵ to which reference has already been made. His exposition, in which he quotes freely from Woodhouse, is interesting and, since it propounds an interpretation which I believe is totally erroneous, it will be helpful to the ensuing discussion to quote from it at some length. Lewis writes: "But he (Solon) also permitted a man without sons to bequeath his property, and thus 'made property the personal possessions of their owners.' Whether or not 'we should

⁵³ There is no evidence whatsoever for the use of real property as security. Possibly, as in the fifth century, loans were sometimes guaranteed by sureties (*ἐγγυηταί*) or by movable security (*ἐνέχυρα*). See above, notes 9 and 11, and Chapter IV, note 108.

⁵⁴ Plutarch, *Solon*, 21, 2. It would be pointless to give bibliographical references for this statement, since this point of view, or slight variations thereof, will be found in almost every work on early Athenian history. The great book of Gustave Glotz, *La Solidarité de la Famille dans le Droit criminel en Grèce*, Paris, 1904, may be cited as an example. The title of the pertinent chapter—"Solon et l'Affranchissement de la Propriété," pp. 325-349, especially pp. 342-349—reveals the point of view. Some distinguished scholars have been guilty of very loose reasoning in this matter of the liberation of the land. Take, for example, the following sentences from Beauchet, III, p. 67: "Dans tous les cas, après Solon, la vente de la terre est entièrement libre et ne dépend que de la seule volonté du propriétaire. Ni la loi, ni les mœurs n'exigent que la famille soit préalablement consultée au sujet de la vente que veut faire un de ses membres, ni qu'elle ait à donner une autorisation quelconque. Le contrat devient même une opération si aisée et si fréquente que Xénophon nous montre des spéculateurs athéniens passant leur vie à acheter et à vendre des terres." No one will deny that this was the case when Xenophon wrote his *Oeconomicus*, but to span the gulf of two centuries from Solon to Xenophon in three sentences is a rather questionable method of studying the Athenian system of land tenure.

⁵⁵ *Op. cit.*, pp. 155-156. The quotes within quotes represent Lewis' quotations from Woodhouse, except for the first one which is from Plutarch, *Solon*, 21, 2.

properly regard that enactment as but a single element in a whole body of similiar legislation,' Solon here took the first step toward making land legally alienable and permitting the aristocracy to acquire estates in outright ownership, not merely in possessory right. . . . 'Timidly at first, but with increasing frequency as time went on, the old taboo or interdiction was transgressed, so that family estate before very long became fully commercialized, and passed from hand to hand without at any rate any restraint of law.' As Woodhouse justly remarks, it is now that the true mortgage—and, we might add, the true sale—develops as a legal instrument. . . . It is true that 'from that monstrous evil, the evil of *latifundia*, Attic agrarian history, thanks primarily to Solon, continued free.' But that was not because Solon set the small landholder and farmer on such a secure economic basis that he would not part with his land; it was because his laws on inheritance assured the constant division of large estates. . . . 'Solon did not declare illegal the giving of security for loan; he declared illegal only a particular type of security. So far as his own action and regulations went, there was nothing whatever in them to prevent every newly liberated farm in Attika from being next day mortgaged up to the hilt and falling ultimately once more into the hands of noble capitalists.' "

If Solon's testamentary law was so potent that over night it could change land which had always been inalienable into land that could be "mortgaged up to the hilt," it certainly deserves to be regarded as one of the world's most astonishing laws. What was this law, then? Plutarch⁵⁶ gives the following account: *Εὐδοκίμησε δὲ καὶ τῷ περὶ διαθηκῶν νόμῳ πρότερον γὰρ οὐκ ἐξῆν, ἀλλ' ἐν τῷ γένει τοῦ τεθνηκότος ἔδει τὰ χρήματα καὶ τὸν οἶκον καταμένειν, ὃ δ' ἔβουλεται τις ἐπιτρέψας, εἰ μὴ παῖδες εἶεν αὐτῷ, δοῦναι τὰ αὐτοῦ, φιλίαν τε συγγενείας ἐτίμησε μᾶλλον καὶ χάριν ἀνάγκης, καὶ τὰ χρήματα κτήματα τῶν ἐχόντων ἐποίησεν.* Plutarch's language clearly reflects the conditions of his own times.⁵⁷ Not only are two key words, which should characterize *παῖδες*, omitted, *γνήσιοι* and *ἄρρενες*, but also it seems rather absurd to assign to Solon such senti-

⁵⁶ *Solon*, 21, 2. Concerning the final clause—*καὶ τὰ χρήματα κτήματα τῶν ἐχόντων ἐποίησεν*—, Lewis, *op. cit.*, p. 155, note 46, remarks: "Plutarch's wording is very precise, and reveals that Plutarch (or his source) understood that land in pre-Solonian Attica was held under a system of family tenure and could not pass out of the family: before Solon's law the *kleros* was something of which its holder enjoyed only the use (*χρῆμα*), thereafter it became his private possession (*κτήμα*)." If Plutarch intended to make this neat distinction, the word *χρήματα* was well chosen, but, as the subsequent discussion will show, he was mistaken if by the word *κτήματα* he meant land privately owned—i. e., land that could be alienated at will. It is doubtful, moreover, if Plutarch was writing so precisely, for a few lines above he speaks of *τὰ χρήματα καὶ τὸν οἶκον* (cf. Plutarch, *Alcibiades*, 8, 2, for the same combination of words). The word *χρήματα* in this context presumably refers to movables, since *οἶκος* was regularly used to describe property in general (see above, Chapter V, p. 97, note 11). The problem now under consideration, however, is concerned with immovables, not movables.

⁵⁷ Compare Louis Gernet, "La Création du Testament. Observations sur une Loi de Solon," *R.E.G.*, XXXIII, 1920, pp. 123-168; 249-290, especially p. 133. In the ensuing discussion on testaments I am much indebted to this excellent article.

mental motives for the creation of the will. For more official language, we should turn to the fourth century orators in whose writings numerous references to this law are preserved.⁵⁸ In Isaeus, for example, we have the following statement about Solon's testamentary law: ⁵⁹ Οὐτοσὶ ὁ νόμος, ᾧ ἄνδρες, κοινὸς ἅπασι κείται, ἐξείναι τὰ ἑαυτοῦ διαθέσθαι, εἰ μὴ παῖδες ᾧσι γνήσιοι ἄρρενες, εἰ μὴ ἄρα μανεῖς ἢ ὑπὸ γήρωσ ἢ δι' ἄλλο τι τῶν ἐν τῷ νόμῳ παρανοῶν διαθήηται. In another place ⁶⁰ there is added the important clause—ὅπως ἂν ἐθέλη τις. The passage runs: Ὁ γὰρ νόμος διαρρήδην λέγει ἐξείναι διαθέσθαι ὅπως ἂν ἐθέλη τις τὰ αὐτοῦ, εἰ μὴ παῖδας γνησίου καταλίπη ἄρρενας.

Thus Solon's law stated that a man, if he had no legitimate sons, could bequeath his property as he pleased, provided he was not mentally disqualified or the victim of some sort of coercion. Before maintaining that this proves that property became alienable, however, it is necessary to examine how this testamentary right was put into execution. The following passage from Isaeus ⁶¹ is very illuminating: Καί μοι τὸν νόμον αὐτὸν ἀνάγνωθι, ὃς κελεύει τὰ ἑαυτοῦ ἐξείναι διαθέσθαι ὅπως ἂν ἐθέλη, εἰ μὴ παῖδες ἄρρενες ᾧσι γνήσιοι. Ὁ γὰρ νομοθέτης, ᾧ ἄνδρες, διὰ τοῦτο τὸν νόμον ἔθηκεν οὕτως, ὁρῶν μόνην ταύτην καταφυγὴν οὖσαν τῆς ἐρημίας καὶ παραψυχῆν τοῦ βίου τοῖς ἅπασιν τῶν ἀνθρώπων, τὸ ἐξείναι ποιήσασθαι ὄντινα ἂν βούλωνται. Διδόντων οὖν τῶν νόμων αὐτῷ ποιέσθαι διὰ τὸ εἶναι ἄπαιδα, ἐμὲ ποιείται, οὐκ ἐν διαθήκαις, ᾧ ἄνδρες, γράψας, μέλλον ἀποθνήσκων, ὥσπερ ἄλλοι τινὲς τῶν πολιτῶν, οὐδ' ἀσθενῶν· ἀλλ' ὑγιαίνων, εὖ φρονῶν, εὖ νοῶν ποιησάμενος εἰσάγει με εἰς τοὺς φράτερας παρόντων τούτων, καὶ εἰς τοὺς δημότας με ἐγγράφει καὶ εἰς τοὺς ὀργεῶνας. We have here a straightforward statement that even down to the fourth century the procedure in making a will, if there were no legitimate sons, was to adopt as an heir ὄντινα ἂν βούλωνται. This identity between the testamentary act and the act of adoption is emphasized even more strongly in the following sentence: ⁶² Ὅτι μὲν οὖν διέθετο καὶ ἐποίησατο εὖ φρονῶν, ἐξὸν αὐτῷ, ἀποδέδεικται ὑμῖν. This same identity between making a will and adopting an heir and also the desirability of the adoption occurring *inter vivos* rather than *per testamentum* are stressed in another of Isaeus' speeches.⁶³ From this and other similar evidence which could be cited, it is impossible not to accept Gernet's conclusions that the testamentary law as

⁵⁸ Gernet, *op. cit.*, p. 123, note 4, lists various references to this law.

⁵⁹ VI, *On the Estate of Philoktemon*, 9.

⁶⁰ Isaeus, III, *On the Estate of Pyrrhos*, 68. In [Demosthenes] XLVI, *Against Stephanos* II, 14, a fuller version of the law is given. It is relegated here to a footnote because of the uncertainty concerning the authenticity of laws and decrees quoted in various orations. The clause ὥστε — — ἐπιδικάσασθαι is obscure, but the rest of the passage is in agreement with various statements made throughout the speeches of Isaeus and Demosthenes. It reads: Ὅσοι μὴ ἐπεποίητο, ὥστε μήτε ἀπειπεῖν μήτ' ἐπιδικάσασθαι, ὅτε Σόλων εἰσήει τὴν ἀρχήν, τὰ ἑαυτοῦ διαθέσθαι εἶναι ὅπως ἂν ἐθέλη, ἂν μὴ παῖδες ᾧσι γνήσιοι ἄρρενες, ἂν μὴ μανῶν ἢ γήρωσ ἢ φαρμάκων ἢ νόσου ἕνεκα, ἢ γυναικὶ πειθόμενος, ὑπὸ τούτων τοῦ παρανοῶν, ἢ ὑπ' ἀνάγκης ἢ ὑπὸ δεσμοῦ καταληφθεῖς.

⁶¹ II, *On the Estate of Menekles*, 13-14; cf. 44-45.

⁶² Isaeus, VI, *On the Estate of Philoktemon*, 10.

⁶³ VII, *On the Estate of Apollodoros*, 1-4.

propounded by Solon granted the right, if there were no legitimate sons, to adopt an heir and that this adoption occurred *inter vivos*. Even in the fourth century adoption *inter vivos* was considered preferable to testamentary adoption as can be inferred from the passages just quoted or cited and from the fact that testamentary adoption unlike adoption *inter vivos* did not confer seizin.⁶⁴

The regulations concerning heiresses (ἐπίκληροι) show still more clearly that to Solon the right to make a will meant the right to adopt an heir. This is evident from the following two passages of Isaeus: ⁶⁵ (1) οὔτε γὰρ διαθέσθαι οὔτε δοῦναι οὐδενὶ οὐδὲν ἕξεισι τῶν ἑαυτοῦ ἄνευ τῶν θυγατέρων, εἴαν τις καταλιπὼν γνησίας τελευτᾷ. (2) Καὶ τῷ μὲν πατρὶ αὐτῆς, εἰ παῖδες ἄρρενες μὴ ἐγένοντο, οὐκ ἂν ἐξῆν ἄνευ ταύτης διαθέσθαι κελεύει γὰρ ὁ νόμος σὺν ταύταις κύριον εἶναι δοῦναι, εἴαν τῷ βούληται, τὰ ἑαυτοῦ. On these passages Wyse ⁶⁶ remarks, “ According to Isaeus’ paraphrase of the clause relating to daughters . . . , for which he is our only authority, the power of testation conceded to an Athenian citizen, whose only legitimate children were daughters, was limited to the appointment of their husbands and the distribution of the estate, and did not include the right of leaving legacies to servants or friends or for other purposes.” He should have added also “ and adopting their husbands,” for, as is well known, the purpose of all Athenian legislation on heiresses was to insure that the property which devolved upon them should not pass beyond the circle of specified relatives.⁶⁷ If a man without legitimate sons could bequeath his property only through the medium of adoption, it can be confidently stated that, if he had only legitimate daughters, the sole means by which he could use his right of testation was through that same method of adoption—which in this case meant adopting the husbands. Consequently, I do not see how any objection can be lodged against Gernet’s statement ⁶⁸ that Solon was the author of two complementary regulations: “ Il a permis à celui qui n’avait ni fils ni fille de se choisir un héritier, qu’il adoptait; il a permis à celui qui n’avait qu’ une fille de choisir à cette fille un mari, qu’ il adoptait.”

It is clear then that Solon’s testamentary law gave the testator the right to adopt an heir and that one of the main purposes was to prevent the extinction of a household. This aim is so well expressed in one of Isaeus’ speeches ⁶⁹ that the passage deserves to be quoted in full: Πάντες γὰρ οἱ τελευτήσειν μέλλοντες πρόνοιαν ποιοῦνται

⁶⁴ L. Gernet, *op. cit.*, pp. 125-128; 257.

⁶⁵ III, *On the Estate of Pyrrhos*, 42 (cf. 68); X, *On the Estate of Aristarchos*, 13.

⁶⁶ *The Speeches of Isaeus*, p. 325 (note to Isaeus III, 42). Wyse does not believe that these regulations were rigorously enforced in the fourth century, but he accepts them for the sixth and apparently the fifth centuries.

⁶⁷ For a detailed discussion of the problems concerning the *epikleros*, see Beauchet, I, pp. 398-487.

⁶⁸ *Op. cit.*, p. 154.

⁶⁹ VII, *On the Estate of Apollodoros*, 30. Cf. II, *On the Estate of Menekles*, 46; [Demos-thenes], XLIII, *Against Makartatos*, 11-12.

σφῶν αὐτῶν, ὅπως μὴ ἐξερημώσουσι τοὺς σφετέρους αὐτῶν οἴκους, ἀλλ' ἔσται τις [καὶ] ὁ ἐναγιῶν καὶ πάντα τὰ νομιζόμενα αὐτοῖς ποιήσων δι' ὃ καὶ ἄπαιδες τελευτήσωσιν, ἀλλ' οὖν ποιησάμενοι καταλείπουσι. Καὶ οὐ μόνον ἰδία ταῦτα γινώσκουσιν, ἀλλὰ καὶ δημοσία τὸ κοινὸν τῆς πόλεως οὕτω ταῦτ' ἐγνώκε· νόμῳ γὰρ τῷ ἄρχοντι τῶν οἴκων, ὅπως ἂν μὴ ἐξερημῶνται, προσταττει τὴν ἐπιμέλειαν.

It is also very evident that another fundamental purpose of this testamentary right through the medium of adoption was to keep the property in the testator's family (as, of course, was the purpose of the laws concerning intestate succession).⁷⁰ This important point is well exemplified by the following passage:⁷¹ ὁ γὰρ τοῦ Σόλωνος νόμος οὐδὲ διαθέσθαι τὸν ποιητὸν ἐὰν τὰ ἐν τῷ οἴκῳ, οἳ ἂν ποιηθῆ. εἰκότως, οἶμαι τῷ γὰρ κατὰ νόμον εἰσποιηθέντι ἐπὶ τὰ ἑτέρου οὐχ οὕτως ὡς περὶ τῶν ἰδίων κτημάτων βουλευτέον ἐστίν, ἀλλὰ τοῖς νόμοις ἀκολουθῶν, περὶ ἐκάστου τῶν γεγραμμένων ὡς ὁ νόμος λέγει. 'ὅσοι μὴ ἐπεποιήντο' φησὶν 'ὅτε Σόλων εἰσήει εἰς τὴν ἀρχήν, ἐξείναι αὐτοῖς διαθέσθαι ὅπως ἂν ἐθέλωσιν,' ὡς τοῖς γε ποιηθείσιν οὐκ ἐξὸν διαθέσθαι, ἀλλὰ ζῶντας ἐγκαταλιπόντας υἱὸν γνήσιον ἐπανέναι, ἢ τελευτήσαντας ἀποδιδόναι τὴν κληρονομίαν τοῖς ἐξ ἀρχῆς οἰκείους οὖσι τοῦ ποιησαμένου.

This statement makes it clear that the adopted son did not "own" the property for which he was selected as heir. He was, as it were, an intermediary, and his function was to beget a son who, by a legal fiction, was considered to be carrying on the adopter's family—as he actually was if his father had married the adopter's daughter. If this adopted heir failed to beget a son, then he himself could not bequeath the property through adoption, but on his death the property devolved according to the rules of intestate succession on the relatives of the original adopter. In conformity with these regulations for maintaining the property in the original family, the adopted heir, if he returned to the family of his own father, lost all legal claim to the property of his adoptive father.⁷²

According to Solon's law, therefore, the testamentary right was exercised through the medium of adoption. In the early years of the fourth century Isocrates bore testimony to this fact very eloquently in the following words:⁷³ ἄξιον δ' ἐστὶ καὶ τῷ νόμῳ βοηθεῖν καθ' ὃν ἐξεστὶν ἡμῖν καὶ παῖδας εἰσποιήσασθαι καὶ βουλευσασθαι περὶ τῶν ἡμετέρων

⁷⁰ For intestate succession, see [Demosthenes], XLIII, *Against Makartatos*, 51-52; Isaeus, IV, *On the Estate of Nikostratos*, 15-16; VII, *On the Estate of Apollodoros*, 20, and Wyse's note to this last passage, *op. cit.*, p. 565.

⁷¹ [Demosthenes], XLIV, *Against Leochares*, 67-68; cf. 63.

⁷² [Demosthenes], LVIII, *Against Theokrines*, 31. The law seems certain, even if in the fourth century it was sometimes violated. See R. Dareste, *Les Plaidoyers Civils de Démosthène*, Paris, 1875, II, p. 140, note 26. According to Harpocration, p. 228, 4-7, the adopted heir could return to his original family only if he had left a legitimate son in the family of his adoptive father: "Ὅτι οἱ ποιητοὶ παῖδες ἐπανελθεῖν εἰς τὸν πατρῶν οἶκον οὐκ ἦσαν κύριοι, εἰ μὴ παῖδας γνησίους καταλίποιν ἐν τῷ οἴκῳ τοῦ ποιησαμένου, Ἀντιφῶν ἐπιτροπικῶ κατὰ Καλλιστράτου καὶ Σόλων ἐν κά Νόμων."

⁷³ XIX, *Aiginetikos*, 49. Although this speech was delivered in Aegina, it is clear from sections 50-51 that these remarks refer to Athenian law also.

αὐτῶν, ἐνθυμηθέντας ὅτι τοῖς ἐρήμοις τῶν ἀνθρώπων ἀντὶ παίδων οὐτός ἐστιν. It was not until later in the fourth century or more probably not until the Hellenistic Age that testaments without *εἰσποίησις* came into existence.⁷⁴ Thus, throughout the whole period with which we are concerned in this discussion a man could bequeath his property only by adopting an heir.

Gernet⁷⁵ emphasizes that Solon's testamentary law was not created *ex nihilo*. He quotes the following pertinent observation of Gustav Glotz:⁷⁶ "Il y a des choses qui n'ont pas d'inventeur. Le premier testament fut fait par un moribond qui recommanda de marier sa fille unique au fils de son frère." Gernet shows that before Solon it was probably possible for a man to adopt an heir provided he could obtain the consent of his near kinsmen and possibly of a wider range of relatives. The great innovation of Solon was that he freed the appointment of an heir from dependence on the agreement of the family. Solon's law read that a man, if he had no legitimate sons, could select his heir—ὅπως ἂν τις ἐθέλη. Thus Solon did give freedom of choice to the individual in the matter of an heir,⁷⁷ but, since the heir was always adopted, thereby becoming a member of his adoptive father's family, there was nothing in Solon's law—for centuries the fundamental law on testation—which permitted the alienation of the land beyond the family.

Miss Freeman in her book on Solon has realized very clearly the true significance of Solon's testamentary law. Some of her remarks⁷⁸ are so excellent that they may be appropriately quoted as a summary to the above discussion. "The real purpose of the legislator, however, was far more in accordance with tribal morality, and far less 'modern,' than Plutarch supposes; it was to prevent the dying-out of the family. . . . Thus there is no question of individual freedom to dispose of property. The property is not to pass out of the family; the chosen heir receives it only as a member of the family; he has no real rights over it, and cannot bequeath it where he will; if he produces a son, that son is looked upon as continuing the line of the first testator, and on this understanding he obtains the property. If the first adopted heir has no son, then the line is considered to have died out, and the property, after being held in trust by him as raiser-up of seed to his benefactor, returns to that benefactor's kinsmen."

It should now be clear, I believe, that Solon did not permit the conveyance of land out of the hands of the family. If, then, Solon was not responsible for the alienability

⁷⁴ L. Gernet, *op. cit.*, p. 260 and note 1.

⁷⁵ *Op. cit.*, pp. 155-159.

⁷⁶ *Solidarité de la Famille*, p. 343.

⁷⁷ Gernet, *op. cit.*, pp. 139-143, collects the instances of adoption from the fourth century. As might be expected, the evidence shows that, despite the freedom of choice, the testator almost invariably chose a relative—usually a close one—for his heir.

⁷⁸ Kathleen Freeman, *The Work and Life of Solon*, Cardiff, 1926, pp. 115-116.

of Attic land, as is so confidently stated,⁷⁹ when did the Athenians obtain the right to dispose of land beyond the family group? The question is easier to ask than to answer. The sources for the history of Athens in the sixth century are notoriously scanty and from them no information relevant to this problem can be gleaned. It is known, of course, that Peisistratos was interested in the welfare of the small farmers, and presumably he aided them by distributing among them some of the estates confiscated from his exiled opponents and possibly, also, sections of state land.⁸⁰ Such information, however, has no more bearing on the subject of land tenure than the fact that Kallias, alone of all the Athenians, dared to purchase τὰ χρήματα of the banished Peisistratos when they were auctioned off ὑπὸ τοῦ δημοσίου.⁸¹ The truth is that, for the whole post-Solonian sixth century, there is no evidence for any change in the Athenian system of land tenure.

The source material for the first half of the fifth century is much more abundant, even if it is disappointing in many respects. Certainly Herodotus, who digresses on every subject under the sun, ought to furnish some information on the subject of land. A search of Herodotus, however, revealed only one reference to the purchase of land, and this was not a private transaction. About 500 B.C. the citizens of Apollonia on the Ionian Gulf, in obedience to certain oracles, bought two κλήροι and an οἰκησις from their owners and presented them to Euenios in compensation for the fact that they had previously blinded him.⁸² This story, referring to a Greek colony, Apollonia, and to the purchase of land by the state, obviously yields no information on the subject of the Athenian system of land tenure.

Plutarch, in his life of Themistocles, devotes a chapter to the ἀποφθέγματα of Themistocles. Among them there is included the following anecdote (18, 5): ἴδιος δέ τις ἐν πάσι βουλόμενος εἶναι χωρίον μὲν πιπράσκων ἐκέλευε κηρύττειν, ὅτι καὶ γείτονα χρηστὸν ἔχει. Since the implication is that Themistocles was already famous, the story presumably alludes to a period after 480 B.C. If this is an authentic saying of Themistocles, then we seem to have here a clear reference to the selling of land in Attica by a private citizen.⁸³ Apophthegms of this sort, however, both in ancient and

⁷⁹ See above, pp. 185-186.

⁸⁰ G. Glotz, *Histoire Grecque*, Paris, 1925, I, p. 449; Busolt, *Griechische Geschichte*, II², pp. 327-330.

⁸¹ Herodotus, VI, 121, 2.

⁸² Herodotus, IX, 94.

⁸³ It would be interesting to know in what words the "original" version of this apophthegm was couched. The version given by Stobaeus, *Περὶ Χρηστότητος*, 30 (Meineke, vol. II, p. 45), has πωλῶν rather than Plutarch's πιπράσκων. Certain verbs of "selling" (in the present day meaning) were also commonly used in the sense of "to let," "to rent," at least, in reference to mines and taxes. E. g., *Mines, I.G.*, II², 1589, line 2, ἀπέδοντο; *Hesperia*, X, 1941, p. 16, line 40, ἐπράθη; Aristotle, *Ath. Const.*, 47, 2, πωλοῦσι, πραθέντα, πεπραμένα. *Taxes*, Andocides, I, *Mysteries*, 133, πραθείσης; Aeschines, I, *Against Timarchos*, 119, πωλεῖ; cf. Aristotle, *Ath. Const.*, 47, 2. It is just conceivable, then, that the "original" statement, if it referred to Themistocles at all, meant "when

modern times commonly become part of the tradition concerning famous men, whether uttered by them or not. This particular apophthegm, moreover, Plutarch himself apparently thought might be appropriate to Cato. In Pseudo-Plutarch, *Moralia, Ex Commentariis in Hesiodum*, 29 (VII, p. 67 [Bernardakis]), there is the following entry: ‘Ὅσσον τ’ ἀγαθὸς μέγ’ ὄνειαρ.’ Δείκνυσι τοῦτο Πλούταρχος. Θεμιστοκλέα γάρ φησιν ἢ Κάτωνα πιπράσκοντα τὸν ἀγρὸν λέγειν ὅτι ἀγαθὸν ἔχει γείτονα. Since the author says, “Plutarch shows this, for he says . . .,” the most logical explanation of this passage is that he had found in Plutarch’s *Commentary on Hesiod* the statement that “Themistocles or Cato, when selling the field, said that it had a good neighbor.” If Plutarch, when writing his commentary on Hesiod, could not decide whether to allot this saying to a Greek or to a Roman, one may well question the accuracy of its ascription to the Greek in the Life of Themistocles. It would clearly be rash, therefore, to insist that this apophthegm records a historical fact, but, since it contains the only reference which I could find to the sale of private land in Attica prior to the Peloponnesian War, it must be kept in mind as we proceed with this investigation.

The next mention of what might imply a transfer of real property refers to a period about 50 years later than the one alluded to in Plutarch. Thucydides reports that, when Archidamus was about to invade Attica in 431, Pericles feared lest the Spartan king, out of friendship to him or in order to arouse antagonism against him, might spare his estates while ravaging the lands of others. Consequently Pericles told the Athenian assembly ὅτι — — — — τοὺς δὲ ἀγροὺς τοὺς ἑαυτοῦ καὶ οἰκίας ἦν ἄρα μὴ δηλώσωσιν οἱ πολέμιοι ὥσπερ καὶ τὰ τῶν ἄλλων, ἀφήσιν αὐτὰ δημόσια εἶναι καὶ μηδεμίαν οἱ ὑποψίαν κατὰ ταῦτα γίγνεσθαι. Plutarch gives a similar account, but other later sources state that Pericles actually carried out what in Thucydides and Plutarch he merely promised to do in case his property was spared.⁸⁴ This passage of Thucydides raises the questions whether the language signifies the outright transfer of ownership from Pericles to the state and whether such a conveyance of land should be considered evidence for the alienability of real property. Since the giving of land to the state is certainly in a different category from the transfer of land between two private citizens, it would be hazardous to use the former transaction as evidence for the system of land tenure under which Athenians lived at the time. If a suggestion made by Poppo,⁸⁵ however, is accepted, the difficulty in interpreting this passage of Thucydides is removed. Poppo writes: “Non possessionem fundorum, sed usum et fructum, seu

renting,” a verb being employed which Plutarch quite naturally understood to mean “when selling.” The remark about the good neighbor, obviously, would have been equally appropriate to the renting or to the selling of a field.

⁸⁴ Thucydides, II, 13, 1. Plutarch, *Pericles*, 33, 2: (Pericles) προεῖπε τοῖς Ἀθηναίοις — — — ὅτι τῇ πόλει καὶ τὴν χώραν καὶ τὰς ἐπαύλεις ἐπιδίδωσιν. Polyaeus, I, 36, 2: ἐχαρίσατο τῇ πόλει τὴν γῆν, ὅσων ἐκέκτητο. Aristides, XLVI, p. 118: τοὺς ἀγροὺς ἠφίει τῇ πόλει. Justin, III, 7, 9: agros ipsos dono rei publicae dederat.

⁸⁵ E. F. Poppo, *Thucydides*, Pars III, *Commentarii*, vol. II, Leipzig, 1834, p. 54.

proventum illius anni et reliquorum, quibus bellum gereretur.” This suggestion is very plausible, since it is hard to understand why Pericles should have chosen to pauperize himself and his sons⁸⁶ by an outright gift of his estates to the city when he could have achieved the same purpose of diverting suspicion from himself by merely granting to the people the usufruct of his lands for the duration of the period in which suspicion might be directed against him. Beyond the fact, therefore, that the historian believed that Pericles could transfer the usufruct of his property to the state—and possibly even the ownership—, no further deduction can safely be drawn from this passage concerning the alienation of private land.⁸⁷

There is a passage in a speech of Andocides, IV, *Against Alcibiades*, 15, which also should not be considered evidence for the alienability of Attic land. This oration, which contains both accurate and also distorted and exaggerated denunciations against Alcibiades, has recently been shown to be an authentic document, whether by Andocides or not, dating from the year 416/15 rather than a fourth century rhetorical exercise as previously maintained.⁸⁸ In sections 13-14 the story is told of Alcibiades' marriage to Hipparete, the daughter of Hipponikos and the sister of Kallias, of the granting of a dowry of ten talents, and of the subsequent exaction, after the death of Hipponikos in 422,⁸⁹ of another ten talents. According to the speaker, Alcibiades was not satisfied with this, but (15) :⁹⁰ ἀλλὰ καὶ λαθραῖον θάνατον ἐπεβούλευσε Καλλία,

⁸⁶ Plutarch, *Pericles*, 36, 1.

⁸⁷ Is there anything significant in the fact that Thucydides used the verb ἀφιέναι rather than some such verb as δίδοναι? Professor A. C. Johnson suggested to me a possible parallel in the use of the expression ἐν ἀφέσει γῆ in Ptolemaic Egypt. According to U. Wilcken (L. Mitteis und U. Wilcken, *Grundzüge und Chrestomathie der Papyruskunde*, I, 1, p. 271), land in Ptolemaic Egypt fell into two comprehensive categories, king's land, worked directly by the crown, and “die ἐν ἀφέσει γῆ, die von der Krone anderen zur Bewirtschaftung ‘überlassen’ ist, ohne dass dadurch das Eigentumsrecht des Königs beeinträchtigt wird.” In the ἐν ἀφέσει γῆ, then, the king retained ultimate ownership of the land just as, according to Poppo's suggestion, Pericles was not relinquishing the ownership of his estates when he offered (ἀφιέναι) them to the people. Was there a certain technical meaning to ἀφιέναι, which escaped Plutarch, Polyaeus and Justin, but which caused Aristides to keep in the form ἡφίει the same verb used by Thucydides?

A passage in Pericles' speech to the Athenians in 432 (Thucydides, I, 143, 5) possibly deserves mention. Pericles, after telling the Athenians not to go out to meet the Peloponnesians but to have confidence in their fleet, advised them not to mourn for οἰκίων καὶ γῆς but for τῶν σωμάτων· οὐ γὰρ τὰδε τοὺς ἄνδρας, ἀλλ' οἱ ἄνδρες ταῦτα κτῶνται. If land was alienable at this time, then, of course, κτῶνται might connote, *inter alia*, the acquisition of private land by purchase. This ethical *topos*, however, certainly means nothing more than that possessions are not masters of men, but men, of possessions; cf. the list of similar *topoi* collected by Poppo, *op. cit.*, note to Thucydides, VII, 77, 7. Consequently, I do not believe that this *topos* can be used as evidence for the status of Attic land on the eve of the Peloponnesian War.

⁸⁸ A. E. Raubitschek, *T.A.P.A.*, LXXIX, 1948, pp. 191-210.

⁸⁹ Jean Hatzfeld, *Alcibiade. Étude sur l'histoire d'Athènes à la fin du V^e siècle*, Paris, 1940, p. 24.

⁹⁰ Cf. the similar version in Plutarch, *Alcibiades*, 8, 2.

ἵνα τὸν οἶκον τὸν Ἱππονίκου κατὰσχοι, ὡς ἐναντίον πάντων ὑμῶν ἐν τῇ ἐκκλησίᾳ κατηγορεῖ καὶ τὰ χρήματα τῷ δήμῳ ἔδωκεν, εἴ πως τελευτήσειεν ἄπαις, φοβούμενος μὴ διὰ τὴν οὐσίαν ἀπόλοιτο. Although this statement that Alcibiades planned the death of Kallias is probably slanderous, we may well ask how the speaker could hope to gain credence for his charge that Alcibiades expected to gain possession of Kallias' property by causing his death. Even an Alcibiades could not acquire any estate he wanted merely by having its owner murdered. The answer to this question is suggested by the fact that the author speaks of the οἶκος of Hipponikos, not of Kallias. According to the laws on intestate succession,⁹¹ if Kallias died childless, his property would devolve upon the descendants of his father—first upon his (Kallias') brothers and then, if there were no brothers, upon his sisters. Since Hipparete, Alcibiades' wife, and Kallias were the only legitimate children of Hipponikos,⁹² it is obvious why the death of Kallias would have been financially profitable to Alcibiades.⁹³ Thus Alcibiades would have obtained control of Kallias' estate, not because land was alienable, but as a consequence of the laws on intestate succession.

Since Alcibiades' schemes would automatically be thwarted as soon as an heir was born to Kallias, it was Kallias' task to make provisions for that period until a child should be born. Accordingly he proclaimed that, if he should die childless, his property would be given to the people. The granting of land to the state, as was maintained in the discussion of the Thucydides passage just above, can hardly be considered as evidence for its alienability. In this particular case, if one wishes, it is possible to think in terms of a sort of legal fiction. In essence, what Kallias did was

⁹¹ [Demosthenes], XLIII, *Against Makartatos*, 51-52; Isaeus, VII, *On the Estate of Apollodoros*, 20 (see Wyse's note to this passage, pp. 564-565).

⁹² Hipponikos also had a son named Hermogenes (Plato, *Kratylos*, 391 b and c; Xenophon, *Apology*, 2), but it seems certain that he was not an Athenian citizen; i. e., he was a bastard. Plato, *ibid.*, says that he was not ἐγκρατῆς—τῶν πατρώων, and in two passages of Xenophon where the references surely are to this Hermogenes (*Memorabilia*, II, 10, 2-6; *Symposium*, III, 14), his poverty is explicitly or implicitly mentioned. See W. Petersen, *Quaestiones de Historia Gentium Atticarum*, Schleswig, 1880, p. 46; Swoboda in *R.E.*, s.v. *Hipponikos* (3), p. 1909.

It is sometimes erroneously stated—e. g., *Greece and Rome*, VIII, 1938, p. 24—that Hipponikos had another daughter, the husband of Theodoros and the mother of the orator Isocrates. The reference cited—Isocrates, XVI, *De Bigis*, 31 (353a)—however, is concerned with Hipparete. This mistake can be traced back at least as far as the *Dictionary of Greek and Roman Biography and Mythology*, edited by William Smith, London, 1867, s.v. *Callias and Hipponicus* (5. Hipponicus III), vol. I, p. 567. The mother of Isocrates was Hedyto (Βίος Ἰσοκράτους, line 2, Budé Ed., vol. I, p. XXXIII), and there is no evidence to connect her with the family of Hipponikos.

⁹³ Since Kallias, when his father Hipponikos died, was already an adult, it is improbable that, in the event of his death, Hipparete would have been considered an *epikleros* (cf. Beauchet, I, p. 421). Even if some Isaeus might have argued that she should be so classified, it is reasonable to assume that the speaker either did not realize this possibility or was confident that his audience would not be aware of it, or that he meant to suggest that Alcibiades somehow would manipulate the laws concerning *epikleroi* to his own advantage.

to adopt the state as a temporary heir until another heir should appear in the person of his own child.

At this point it may be desirable, for the sake of completeness, to make a few remarks concerning the evidence on the status of real property contained in the *Memorabilia*, *Oeconomicus*, and *Symposium* of Xenophon. It is generally agreed that these works were all composed at some period subsequent to *ca.* 385 when Xenophon, an exile from Athens, was living at Skillos in Elis. Their dramatic dates, however, are earlier, and thus the question arises as to how accurately they reflect the times of their supposed settings. The *Memorabilia* need not detain us, for the several references to the selling and buying of real estate⁹⁴ in this treatise, whose general dramatic date is 404 B.C. and the years immediately preceding,⁹⁵ are in accord with other evidence for the same period. In the *Oeconomicus* there is one passage (XX, 22-26) which deserves comment. In it Ischomachus tells Socrates how he and his father used to buy uncultivated farms, improve them, and then sell them for a profit. The setting for the *Oeconomicus* is Athens, but this work is clearly based on Xenophon's farming experience in Elis. In fact, it can be said that Ischomachus is really Xenophon himself. Since Xenophon was born about 430,⁹⁶ the buying and selling of farms by Ischomachus and his father, if we wish to consider this passage autobiographical, presumably should be assigned to the last decade of the fifth century. Certainly there were many neglected farms in Attica at that time as a result of the depredations of war, and speculation in them may have been common. It is legitimate to suspect, however, that Xenophon's account may have been somewhat—or largely—colored by his subsequent experiences with economic conditions in the early fourth century.

The *Symposium*, whose dramatic date is the summer of 421,⁹⁷ contains only one passage (IV, 31) which concerns our investigation. In it Charmides says: *νῦν δ' ἐπειδὴ τῶν ὑπερορίων στέρομαι καὶ τὰ ἔγγεια οὐ καρποῦμαι καὶ τὰ ἐκ τῆς οἰκίας πέπραται*. . . . In the words, *τὰ ἔγγεια οὐ καρποῦμαι*, Paoli, as we saw in an earlier chapter,⁹⁸ recognizes a reference to a mortgage. A literal translation, "I am not reaping (enjoying revenues from) my lands," need signify nothing more than that Charmides' lands—his orchards and vineyards—had been so devastated by the war that they no longer were a source of profit to him. If, however, it seems preferable to consider these words as alluding to a mortgage, and if no anachronism is involved, then this passage

⁹⁴ E. g., I, VI, 11; II, IV, 2; IV, VII, 2.

⁹⁵ II, VII, 2, and II, VIII, 1, refer to 404 B.C. I, VI, 15, conversations between Socrates and Antiphon the Sophist.

⁹⁶ *Oxford Classical Dictionary*, 1949, *s.v.* *Xenophon*, p. 962; A. and M. Croiset, *Histoire de la Littérature Grecque*, vol. IV, p. 340.

⁹⁷ Athenaeus, V, 216 d, assigns the dramatic date of the *Symposium* to the archonship of Aristion, 421/0.

⁹⁸ Chapter IV, p. 78.

merely confirms what we learned above from the fragment of Kratinos⁹⁹—namely, that mortgage, and hence the alienation of land, was probably possible in the first decade of the Peloponnesian war.¹⁰⁰

For the last decade of the fifth century there is unequivocal evidence that the buying, selling, and mortgaging of real property were practiced at Athens. Not only does Isocrates in the passage which was quoted above¹⁰¹ mention the mortgaging of a house in the year 404/403, but Lysias¹⁰² also, in a speech which alludes to events in the period from *ca.* 409 to 400, refers to the possibility of buying land in the following words: *καίτοι εἰ ἐβούλετο δίκαιος εἶναι περὶ τοὺς παῖδας, ἐξῆν αὐτῷ κατὰ τοὺς νόμους, οὐ κείνται περὶ τῶν ὀρφανῶν καὶ τοῖς ἀδυνάτοις τῶν ἐπιτρόπων καὶ τοῖς δυναμένοις, μισθῶσαι τὸν οἶκον ἀπηλλαγμένον πολλῶν πραγμάτων, ἢ γῆν πριάμενον ἐκ τῶν προσιόντων τοὺς παῖδας τρέφειν.*

It will be helpful, after this lengthy discussion, to recapitulate the evidence which has been presented in this chapter. For the final decade of the fifth century down to the overthrow of the Thirty Tyrants two unambiguous references to the alienability of real estate have been preserved, one concerning mortgage and the other, the purchase of land. For the preceding twenty years there are apparently two references to mortgage—the strangely worded allusions in the comic poets Pherekrates and Kratinos. Certain passages in Xenophon mentioning the conveyance of immovables may refer to this period and later, but, since they were written many years afterwards, anachronistic elements may be present in them. Prior to the Peloponnesian War I could find no reference to either mortgage or the sale of land except for the *ἀπόφθεγμα*, quoted above,¹⁰³ attributed to Themistocles and possibly to Cato. Land may have been

⁹⁹ P. 171.

¹⁰⁰ In Plutarch, *Nicias*, 3, 6, we are informed that Nicias, at sometime between 426 and 418, bought and consecrated to Apollo a tract of land in Delos. For the date, see B. Perrin, *Plutarch's Nicias and Alcibiades*, New York, 1912, p. 182. A transaction carried out at Delos, however, is not evidence for conditions in Attica.

¹⁰¹ P. 168.

¹⁰² XXXII, *Against Diogeiton*, 23. In connection with the rule of the Thirty Tyrants and the reconciliation following on their overthrow, there are several references to the buying and selling of real property. E. g., Lysias, *Against Hippotherses* (*Pap. Oxyrh.*, XIII, 1919, no. 1606, p. 52, lines 38-46; cf. A. Körte, *Arch. Pap.*, VII, 1924, p. 157)—*αἱ συνθήκαι* of 403 which granted former owners the right to buy back their houses and lands which had been confiscated and sold by the Thirty. Aristotle, *Ath. Const.*, 39, 3—the reconciliation after the overthrow of the Thirty Tyrants in 403. It is not clear from this passage whether those emigrating to Eleusis were to buy or rent houses. The proposed transactions, moreover, were government controlled rather than private ones. Reference should also be made to Aristotle, *Ath. Const.*, 4, 2, the “Draconian Constitution,” now universally believed to be an oligarchic forgery from the last years of the fifth century. The stipulation that certain magistrates had to be selected from men possessing specified amounts of *οὐσία ἐλευθέρα* would be evidence for the use of the mortgage contract if *οὐσία* in this context refers to real and not to movable property. See above, note 45.

¹⁰³ Pp. 191-192.

alienable in Themistocles' generation, of course, but that thesis can hardly be proved by means of such an apophthegm.

Strange as it may seem, there appear to be no references to mortgage and to the alienability of land (with the questionable exception just mentioned) for the period before the Peloponnesian War and only a few such references for the remainder of the fifth century. In view of this situation, what conclusions should be drawn regarding the system of land tenure prevalent at Athens in the period under consideration? To maintain that neither mortgage nor transfer of real property was possible in Athens before the Peloponnesian War because there is no evidence for such transactions would be to make an extreme use of the *argumentum ex silentio*. On the other hand, it is equally objectionable to insist, without evidence, on their prevalence just to satisfy a pre-conceived picture of Athens in that period. It is true that the epigraphical sources for the fifth century, although considerable, are slight when compared with those for the fourth and subsequent centuries, but certainly an abundant literary output has been preserved from the former period. This body of literature, to be sure, was concerned with subjects which gave slight occasion for mentioning prosaic matters like mortgages and property transfers. Is there anything suggestive in this choice of subject matter in fifth century literature? The speeches of Isaeus and the private orations of Demosthenes are replete with references to mortgages and property transfers. The reason, of course, is obvious. In the fourth century these transactions were common and hence there was a need for speeches in connection with the inevitable litigation which arose. In the fifth century there were no comparable speeches. The main reason for this lack, naturally, was that oratory did not really begin its long career until the middle of this century. Is it completely fanciful, however, to suggest that one reason why forensic oratory flourished more in the fourth than in the fifth century is that for a large part of the fifth century there were no such transactions as mortgages and conveyances of property and, consequently, there was no need for speeches similar to the ones which the fourth century orators subsequently produced? Certainly Antiphon and Andocides, so far as we can judge from their extant speeches and from the fragments and titles ascribed to them,¹⁰⁴ were not concerned with the type of business contracts which occupied so much of the ingenuity of Isaeus and Demosthenes.

¹⁰⁴ Among the fragments of Antiphon (J. G. Baier and H. Sauppe, *Oratores Attici*, Pars II, Zürich, 1850), nos. IV and V (p. 139) bear the title of Ἐπιτροπικός, but nothing can be ascertained about their content; no. VII, 1 (p. 139) informs us that: ἀντὶ δὲ τοῦ ἀποδεδόμεθα διεθέμεθα εἶπεν Ἀντιφῶν ἐν τῷ πρὸς τὴν Καλλίου ἐνδειξίν, but there is no way to know what was sold. According to the examples cited in Liddell and Scott, *Greek-English Lexicon* (New Edition, 1925-1940), B, 3, διατίθεσθαι, when used in the sense of "sell," refers to the sale of movables. On no. XII (p. 141), Πρὸς Νικοκλέα περὶ ὄρων, Sauppe remarks: "Haec oratio videtur in causa publica habita esse et ad metationem urbis pertinuisse." K. J. Maidment, in the Loeb edition of *Minor Attic Orators*, I, p. 299, suggests that "the dispute related to the delimitation of mine-workings leased from the state at Laurium." The word ἀργυροκοπίον in XII, 1, would seem to support this suggestion. The other fragments afford no reason to believe that the speeches to which they belonged were concerned

The unrestricted right to alienate land, as was remarked above,¹⁰⁵ must have preceded the fully developed mortgage contract, although the use of immovables as security probably came into practice rapidly once a man was permitted to dispose of his real property. For our purposes, then, it will be sufficiently accurate to think of the two transactions as appearing almost simultaneously. Once again we must ask the question—when did land in Attica become alienable? Since there seems to be no specific evidence on this fundamental question, we must seek the answer by reasoning from probabilities, unsatisfactory as that method may be. It should be remembered that we do not know that the Athenians ever had a written law forbidding them to alienate real property beyond the family group. The prohibition may have been in the form of an unwritten law—an ancestral custom—which for centuries could have been just as potent in its effects as any statute recorded in writing. In any event, whether the prohibition consisted of custom or law, one reasonable approach in this effort to find a solution for the problem is to search for that period, or for those periods, in Athenian history when conditions were conducive to the annulment of this law or the neglect of the custom. Some national upheaval or disaster would seem to be a logical cause for the breaking away from the shackles of an outmoded custom or taboo. The reforms of Solon might seem to be such an upheaval, but, we have seen,¹⁰⁶ his testamentary law, contrary to widespread opinion, did not enable a man to dispose of his property beyond the confines of the family. Land apparently remained inalienable after Solon, and, so far as the evidence goes, its status may have remained unchanged throughout the rest of the sixth century.

In the years 480 and 479 the Persian army overran Attica, and twice Athens and Attica were thoroughly ravaged.¹⁰⁷ When, after Plataea, the Athenians returned to their devastated country and started to rebuild their shattered homes, the status of property must have been in tremendous confusion. All the ancient sources are in agreement that the Persian invasions were a turning point in Athenian history, but characteristically they have little or nothing to say on any economic transformation which may have ensued. This double pillaging of Attica, however, with its consequent destruction of property¹⁰⁸ might well have been the shock necessary to force the Athenians to discard—in part, at least,—their old restriction on the alienability of

with property transfers or mortgages. The same statement holds true for the four fragments of Andocides. Since none of Lysias' speeches apparently antedated 403 B.C. (R. C. Jebb, *The Attic Orators*, 2nd ed., London, 1893, I, p. 150) they are largely irrelevant to the present discussion (but see above, note 102).

¹⁰⁵ P. 177.

¹⁰⁶ Pp. 185-190.

¹⁰⁷ Herodotus, VIII, 50-53; IX, 13.

¹⁰⁸ A vivid comment on the extent of this destruction is given by Thucydides, II, 16, 1. While describing the reluctance of the Athenians to leave their farms and move to the city in 431, he adds as a special reason for their grievance—*ἄλλως τε καὶ ἄρτι ἀνειληφότες τὰς κατασκευὰς μετὰ τὰ Μηδικά*.

land. If the chaos of the post-invasion period is the time at which the Athenians began to free themselves from the old taboo, then the passage from Plutarch's *Themistocles* quoted above¹⁰⁹ would be the first reference to this fundamental change which had occurred in Athenian social and economic life. So far as I can see there is no way to prove or disprove that real property in Attica became alienable at this time, but certainly the upheavals of 480 and 479 might have been sufficient cause for effecting so radical a transformation.¹¹⁰

During the Pentekontaetia the Athenians were confronted with various crises which could have tended to undermine long standing customs and beliefs. It was not until the period of the great Peloponnesian War, however, that Athens was afflicted by conditions which shook, *inter alia*, her social and economic life to its very foundations. I do not think that adequate emphasis has ever been placed on the effects that this war must have had on ideas on property. In 431 the Athenians, at the advice of Pericles, moved from the country districts to the city itself, carrying with them as many of their movables as possible.¹¹¹ Year after year the Peloponnesians invaded Attica and destroyed whatever fell in their way. Commenting on the destruction of property, Thucydides¹¹² remarks that the Athenians—*ἔλνπούντο, ὁ μὲν δῆμος ὅτι ἀπ' ἐλασσόνων ὀρμώμενος ἐστέρητο καὶ τούτων, οἱ δὲ δυνατοὶ καλὰ κτήματα κατὰ τὴν χώραν οἰκοδομίαις τε καὶ πολυτελέσι κατασκευαῖς ἀπολωλεκότες*. To the confusion created by the recurring enemy raids, the plague, which raged in Athens in 430 and 429 and recrudesced in 427, made a staggering contribution. It has been estimated that a third of the Athenian population perished from the pestilence.¹¹³ Whole families, including even distant relatives, must have been wiped out, with the result that various properties may have been left without any legitimate surviving claimants. Furthermore, there must have been many Athenians, despondent at the ruin of their lands and houses, despairing of the future, who would have been only too glad to resign all

¹⁰⁹ Pp. 191-192.

¹¹⁰ We are told by Aristotle, *Ath. Const.*, 24, 1, that in the early days of the Delian League Aristides advised the Athenians—*καταβάντας ἐκ τῶν ἀγρῶν οἰκεῖν ἐν τῷ ἄστει*. These few words throw no light on our problem, for there is no way to determine whether Aristides meant the farms to be entirely deserted or whether he had in mind that certain members of each family should still remain on the land. If he intended that they should *sell* their lots before moving to the city, it is strange that Aristotle did not use a less vague word than *καταβάντας*. How were these people housed when they came to Athens? Did they own houses there, did they rent dwellings, did the State help in furnishing accommodations, or were they able to buy plots and build for themselves? It seems to me that these few words illustrate only too well how abysmally ignorant we are on many fundamental matters concerning Athenian private life.

¹¹¹ Thucydides II, 13, 2; 14, 1; 16-17. It is interesting to note that there is no reference to the purchase of houses in the city by any of the incoming country people. Were there no war profiteers in Athens?

¹¹² II, 65, 2; cf. 59, 1.

¹¹³ Thucydides III, 87; Diodorus, XII, 58, 2. Compare G. Glotz, *Histoire Grecque*, II, p. 628.

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their rights to their real estate in exchange for movables which they hoped to enjoy in the little time that fate might still allot them to live. In view of the ghastly conditions which prevailed at Athens in the years following 431, it was only natural that many an old custom and belief was discarded. Thucydides describes in unforgettable words the collapse of Athenian morality and the neglect and contempt with which old laws and beliefs were treated. After speaking of the abandonment of the former burial rites, he writes: ¹¹⁴ Πρῶτόν τε ἤρξε καὶ ἐς τὰλλα τῇ πόλει ἐπὶ πλεόν ἀνομίας τὸ νόσημα. ῥᾶον γὰρ ἐτόλμα τις ἂ πρότερον ἀπεκρύπτετο μὴ καθ' ἡδονὴν ποιεῖν, ἀγχίστροφον τὴν μεταβολὴν ὀρῶντες τῶν τε εὐδαιμόνων καὶ αἰφνιδίως θνησκόντων καὶ τῶν οὐδὲν πρότερον κεκτημένων, εὐθύς δὲ τὰκείνων ἐχόντων. ὥστε ταχείας τὰς ἐπαυρέσεις καὶ πρὸς τὸ τερπνὸν ἤξιον ποιείσθαι, ἐφήμερα τὰ τε σώματα καὶ τὰ χρήματα ὁμοίως ἡγούμενοι. καὶ τὸ μὲν προσταλαιπωρεῖν τῷ δόξαντι καλῶ οὐδεὶς πρόθυμος ἦν, ἄδηλον νομίζων εἰ πρὶν ἐπ' αὐτὸ ἐλθεῖν διαφθαρήσεται. ὅτι δὲ ἤδη τε ἡδὺν πανταχόθεν τε ἐς αὐτὸ κερδαλέον, τοῦτο καὶ καλὸν καὶ χρήσιμον κατέστη. θεῶν δὲ φόβος ἢ ἀνθρώπων νόμος οὐδεὶς ἀπείργε, τὸ μὲν κρίνοντες ἐν ὁμοίῳ καὶ σέβειν καὶ μὴ ἐκ τοῦ πάντας ὄραν ἐν ἴσῳ ἀπολλυμένους, τῶν δὲ ἀμαρτημάτων οὐδεὶς ἐλπίζων μέχρι τοῦ δίκην γενέσθαι βιοῦς ἂν τὴν τιμωρίαν ἀντιδοῦναι, πολὺν δὲ μείζω τὴν ἤδη κατεψηφισμένην σφῶν ἐπικρεμασθῆναι, ἣν πρὶν ἐμπεσεῖν εἰκὸς εἶναι τοῦ βίου τι ἀπολαῦσαι.

In these lines Thucydides is not trying to enumerate the former customs and laws which fell into abeyance because of the agonizing strain under which the Athenians were living. He is merely describing in general terms a great break with the past—a momentous transition in the Athenian way of life. Is it not possible to suspect that in this transition the regulations concerning the tenure of real property also played a part? It is not necessary to think that the people through the proper legislative machinery rescinded one law on the system of land tenure and substituted another. The process could have been much simpler, much more natural. Because of the harrowing conditions in which they were living and because of the uncertainties of the future, some Athenians could have been driven, step by step, to that state of mind in which they were willing, despite age old custom, to dispose of real property, from which they no longer hoped to derive any advantage, in return for movable wealth which they might hope to enjoy in the grim present. Thus the change from the inalienable to the alienable status of land would not have been caused by any specific statutory act, but would have been brought to pass, as precedent followed precedent, over a number of years.

It is impossible, of course, to trace step by step the means by which this liberation of the land could have been effected. Since the *πρᾶσις ἐπὶ λύσει*, however, was apparently the earliest method of employing real property as security adopted by the Athenians,¹¹⁵

¹¹⁴ II, 53.

¹¹⁵ See above, Chapter IV, pp. 91-92; Chapter VII, pp. 155-156.

it is reasonable to suspect that some sort of legal fiction—inspired possibly by dim memories of pre-Solonian times—may have played a part in removing the restriction on the alienability of land. To illustrate what may have happened, it will be useful to describe an imaginary—but probable—situation. A peasant and his family seek refuge within the long walls. Despondent over the pillaging of his farm by the Spartans, terrified by the ravages of the plague, the poor man wants to enjoy life while he can. He needs money, but in the eyes of anyone with money to lend he is a hopelessly bad risk. Finally someone who is optimistic about the future—possibly one of the lucky few who have recovered from the scourge—agrees to give him money if he will “sell” his farm—naturally with the understanding that there will be an unlimited time for redemption. The peasant acquiesces—of what use is his land to him now? Time passes; the peasant, his immediate family, and even his distant kinsmen all succumb to the plague. What possibility now is there of redemption? For all practical purposes the sale ἐπι λύσει has become an outright sale. On the other hand, another peasant, who likewise has “borrowed” on his land, is more fortunate. He survives until times are better and succeeds in redeeming his property. These two cases, of course, are purely imaginary. No chapter and verse can be cited to support them. The reality, however, may not have been far different, and in the negotiations of these two fictitious peasants and their “creditors” there may reside a hint as to how outright sale of real property and the fully developed mortgage contract of *πρᾶσις ἐπι λύσει* could have grown out of a transaction which owed its origin to the exigencies of the times.

This suggestion that Attic land did not become alienable until the period of the Peloponnesian War is completely unorthodox, but it is in agreement both with what the sources say and what they do not say. From the time of Solon until the fragment of Kratinos, belonging to the years 430 to 420, there apparently is no evidence for the sale or mortgaging of land except the apophthegm ascribed to Themistocles (or to Cato) by Plutarch. This may well be apocryphal or it may be an authentic anecdote to illustrate how that untrammelled spirit flouted convention.¹¹⁶ If we divest ourselves of conceptions derived from the fourth century, the supposition that land in Attica was inalienable for at least the first seventy years of the fifth century will be found, I believe, to conform completely to what is really known of that period. Despite the Delian League and the growth of empire, the Athenians remained primarily a conservative and agrarian people until the Peloponnesian War forced them to make various changes in their way of life. Thucydides¹¹⁷ himself tells us that until 431 the majority of the citizens still lived in the country districts and he emphasizes the grief which they experienced at abandoning their farms, the ancestral shrines, and all the beloved associations of their rural life. These peasants were so passionately devoted

¹¹⁶ For another possible interpretation, see below, note 126.

¹¹⁷ II, 14; 16.

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to their land and to the customs of their fathers that one can hardly imagine them selling or mortgaging their farms even if there had been no restrictions on alienation. Can one picture a Dikaiopolis or a Strepsiades parting with his few acres?

From 431 on, however, everything conspired to lessen the importance of land and to increase the significance of movable wealth. Thousands of peasants were confined in the city where they suffered the anguish of the plague. For long periods they were separated from their farms which were subject to systematic devastation at the hands of the enemy. Many of these peasants had to seek a new livelihood. They became familiar with the methods of commercial law which had been developing under the aegis of the empire.¹¹⁸ The bottomry loan, in which ship or cargo, or both, served as security, presumably had come into use.¹¹⁹ Loans secured by movables—*ἐνέχυρα*—were probably common.¹²⁰ In this milieu it would not be surprising if the attitude towards movables began to exercise considerable influence on the attitude towards immovables—especially when many a former peasant must have sorrowfully wondered whether his land would ever again be of much use to him.

As the Peloponnesian War dragged on, three other factors may have contributed to the weakening of the almost religious feeling for the land—the selling of confiscated property, the granting of the right of *ἐγκλησις* by the State, and the extensive conferring of citizenship on loyal friends of Athens. From early times it had been customary at Athens to confiscate the property of persons convicted as enemies to the State and to society.¹²¹ Unfortunately many problems concerning the confiscatory procedure in this early period are obscure.¹²² For example, it is not known whether it was common practice to seize a man's entire property—both movable and immovable—and it is also uncertain whether the property was usually sold.¹²³ The houses

¹¹⁸ Cf. the decree of *ca.* 450, setting forth the procedure to be followed in the settlement of commercial disputes between Athenians and Phaselites (Tod, vol. I², no. 32).

¹¹⁹ On the maritime loan, see U. E. Paoli, *Studi*, pp. 9-137.

¹²⁰ See above, Chapter IV, pp. 61-62 and note 4.

¹²¹ See the statement in the scholia to Aristophanes, *Lysistrata*, 273 (Rutherford), concerning the punishment meted out to Isagoras and his followers whom Cleomenes had failed to establish in power: 'Ἀθηναῖοι τὰς οἰκίας κατέσκαψαν καὶ τὰς οὐσίας ἐδήμευσαν, αὐτῶν δὲ θάνατον ἐψηφίσαντο — —. Cf. also the decree of Demophantos, 410 B.C., probably based on an old law of Solon (Andocides, I, *On the Mysteries*, 95-98).

¹²² For a general discussion of confiscation, see G. Glotz, *La Solidarité de la Famille*, pp. 515-539; E. Caillemer, in Daremberg et Saglio, *D.d.A.*, s.v. *Demioπρατα*, pp. 63-66.

¹²³ The only references to the sale of confiscated property in this early period with which I am familiar are Herodotus, VI, 121, 2—Kallias purchasing τὰ χρήματα of the exiled Peisistratos—, and Andocides, I, *Mysteries*, 97—selling τὰ κτήματα of anyone who tries to destroy the democracy—(decree of Demophantos; see note 121). The words *χρήματα* and *κτήματα* denote movables more often than immovables. What meaning should be assigned to them is these two passages? It is interesting to note that Demosthenes, XX, *Against Leptines*, 115, distinguishes between γῆ and χρήματα and that Lysias, XII, *Against Eratosthenes*, 83, when speaking of the confiscation of real property, carefully says τὰ χρήματα τὰ φανερά.

of the condemned were sometimes demolished¹²⁴—an act which presumably symbolized the eradication of the accursed family. The land, if confiscated, may often have been added to the State domain, to be used as the government saw fit. The estate which the city gave as dowry to the granddaughter of Aristogeiton very probably was assigned from lands which had been confiscated at some earlier time.¹²⁵ As we shall see below, there is no unequivocal evidence for the sale of confiscated land before the year 414/413. If it was ever sold, as, of course, is possible, an interesting problem arises. Would such land, when purchased, belong in the same category as family estate, which, according to our interpretation, could not be alienated? Land thus acquired might well have been regarded differently from the family lot of the purchaser, in the first generation, at least. If a distinction was made, then possibly the principle of inalienability may not have applied to this newly acquired property. Because of the lack of evidence no certain conclusion can be reached on this subject, but the suggestion can be offered that the first steps towards alienation of land in Attica may have begun with the sale by private citizens of confiscated land which they had bought from the State.¹²⁶

For the major part of the fifth century we are ill-informed on the subject of confiscation.¹²⁷ With the passions unleashed by the Peloponnesian war, however, it is not surprising that the cases of confiscation multiplied greatly. It is sufficient to mention the fate which befell those convicted in the scandals of the mutilation of the Hermae and the parodying of the Eleusinian Mysteries, the leaders in the oligarchic revolution of 411, the unfortunate generals at Arginusae, and the victims of the Thirty Tyrants.¹²⁸ From the Poletai records which have been preserved in part for the year 414/413 we learn that the property—both movable and immovable—of

¹²⁴ See note 121 above, and also [Plutarch], *Lives of the Ten Orators*, *Antiphon*, 834 A.

¹²⁵ Plutarch, *Aristides*, 27, 4. The estate given by the city to Lysimachus, son of Aristides (*ibid.*, 27, 1), we learn from Demosthenes, XX, *Against Leptines*, 115, was in Euboea. See A. E. Raubitschek, *Hesperia*, XII, 1943, pp. 32-33. Demosthenes adds the remark: τότε μὲν γὰρ ἡ πόλις ἡμῶν καὶ γῆς ἠνέπορει καὶ χρημάτων. Is this a reference to land owned only throughout the empire or could it refer also to state owned land in Attica itself? On the donation of the farm of Peisander, confiscated in 411, see below, p. 205.

¹²⁶ It is possible that the field, mentioned in the apophthegm in Plutarch, *Themistocles*, 18, 5 (see above, pp. 191-192), if it really was sold by Themistocles, had been acquired by him through the purchase of confiscated land.

¹²⁷ One would expect to glean some information on the procedure followed in the confiscation of property from the famous case of the outlawing of Themistocles. Unfortunately, Plutarch (*Themistocles*, 25, 3) merely states that the government obtained either 80 or 100 talents from the *chrēmata* of Themistocles. Are we to understand τὰ χρήματα as comprising both real and movable property? Plutarch's language is more easily understood as referring to movables: τῶν δὲ χρημάτων αὐτῷ πολλὰ μὲν ὑπεκκλαπέντα διὰ τῶν φίλων εἰς Ἀσίαν ἔπλει· τῶν δὲ φανερῶν γενομένων καὶ συναχθέντων εἰς τὸ δημόσιον—. It is noteworthy that there is no suggestion in Plutarch (*ibid.*, 32, 1-2) that his sons and daughters, who subsequently lived in Athens, suffered from destitution.

¹²⁸ For references to the sources, see Glotz, *Solidarité de la Famille*, pp. 520-521.

Alcibiades and his associates was confiscated and sold.¹²⁹ Is there any significance in the fact that this inscription is the first official record of the sale of confiscated property which is extant, or should the lack of similar documents from an earlier period be ascribed merely to the chances of archaeology? Whatever the answer to this question may be, it is certain that in the years following 415 many confiscated estates were either sold by the government or donated to persons who had deserved well of the city. This large amount of land which was thus placed on the open market with the full knowledge of the whole citizen body must have made a deep impression, and may well have accelerated the tendency to transgress the principle of inalienability which we have been tracing.

The granting by the State of the right of *ἐγκτησις* to foreign benefactors of Athens may have been another factor which contributed to the breakdown of the old system of the inalienability of family land. From the fourth century and later numerous inscriptions have been preserved which record the conferment of this privilege, but from the fifth century only about six such documents are extant.¹³⁰ The two earliest of these inscriptions can be assigned to the year 424/423, but they and the others with one exception are too fragmentary to lead to any certain conclusions regarding the procedure followed in the granting of *ἐγκτησις*. The inscription from the year 409 (Tod, no. 86), however, is instructive. It records the conferring of various honors, including Athenian citizenship, upon Thrasyboulos of Kalydon, the principal assassin of Phrynichos, and the granting to him of [τὸ μέ]ρος τὸ γιγνόμεν|ον (lines 24-25)—presumably a share of the property of the slain oligarch. Certain other men were honored as benefactors [καὶ ἐγκτησι]ν εἶναι αὐτοῖς ὄμπερ| Ἀθηναίους, [καὶ γηπέδω]ν καὶ οἰκίας, καὶ οἴκησ|ων Ἀθήνησι (lines 30-32). How was this privilege of *ἐγκτησις* put into execution? Did the foreigners so honored buy land in the open market or was it donated to them by the State? If the former alternative is correct, then the granting of *ἐγκτησις* in itself presupposes the alienability of land, and by an *argumentum ex silentio* one could maintain that the reason why there is no mention

¹²⁹ *I.G.*, I², 325-334. For the fragments which have been published subsequently, see above, note 29.

¹³⁰ *I.G.*, II², 8, line 18, now dated 424/3; see *S.E.G.*, X, 83. *S.E.G.*, X, 84 (*I.G.*, I², 70), lines 11-12 (restored), 424/3; cf. *S.E.G.*, X, 114. *S.E.G.*, X, 91 (*I.G.*, I², 83), line 22, 421/0. *I.G.*, II², 174 b, line 3 (restored), now dated ca. 412; see *S.E.G.*, X, 115. *I.G.*, I², 106, line 7 (restored), ca. 411-408. *I.G.*, I², 110, lines 30-31 (= Tod, vol. I², no. 86), 410/9. *S.E.G.*, X, 81 (*I.G.*, I², 68/69), line 7 (restored), now dated 424/3, if the restoration is correct, refers to *ἐγκτησις* in the cities of the empire rather than at Athens; see B. D. Meritt, *Hesperia*, XIV, 1945, pp. 105-115.

It should be noted that the two earliest of these inscriptions are dated in 424/3 and that they all (except *I.G.*, I², 106) also record grants of *proxenia* and *euergesia*. In this connection an interesting observation can be made. For the period from ca. 450-425 there is evidence for the frequent granting of *proxenia* and/or *euergesia*; e. g., *S.E.G.*, X, 19, 20, 23, 33, 52-54, 73, 76, 79. Since none of these inscriptions refers to *ἐγκτησις*, the conclusion seems justified that the conferring of that privilege was either unknown or very rare before 424/3.

of *ἐγκτήσις* before 424 is that prior to that date land was still inalienable. In the case under consideration, however, it seems certain that the second alternative is the proper one—namely, that the city made a gift of land to the men whom it was honoring. Lysias¹⁸¹ informs us that Apollodoros of Megara received as a gift from the people the confiscated farm of Peisander. Since Apollodoros had assisted in the slaying of Phrynichos,¹⁸² it is clear that he must have received the farm on the occasion when the privilege of *ἐγκτήσις* was conferred upon him.¹⁸³ Consequently the men listed in our inscription as recipients of the right of *ἐγκτήσις* undoubtedly were presented with land from the confiscated property of the slain or exiled oligarchs. It seems legitimate to conclude, therefore, that in the late fifth century the honor of *ἐγκτήσις* was accompanied by an actual donation of land. This privilege, accordingly, was not dependent on the alienability of land. Land so acquired, however, could hardly have been in the same category as the plots which had belonged to Athenian families for generations. It is not surprising, then, that Apollodoros sold the farm of Peisander which had been presented to him and that in the course of a few years this parcel of land was sold again.¹⁸⁴ Thus the selling of land which had been originally acquired through the conferment of the right of *ἐγκτήσις* supplied the Athenians with still another precedent for transgressing the old rules concerning the inalienability of land.

The last factor contributing to the breakdown of the old Athenian system of inalienable family land which we must consider is the extensive conferring of citizenship throughout the Peloponnesian War on loyal friends of Athens. It is sufficient to mention the Plataean survivors in 427,¹⁸⁵ the Samians in 405,¹⁸⁶ and possibly the slaves who volunteered to fight at Arginusae in the preceding year.¹⁸⁷ As citizens, enrolled in demes and tribes, these new Athenians must have automatically obtained the right to own land. It is true that subsequently (in 421) the Athenians settled the Plataeans at Skione¹⁸⁸ and that the Samians intended to continue living in Samos, but some of the Samians must have decided to reside in Athens, and after Aegospotami the

¹⁸¹ VII, *On the Olive-Stump*, 4.

¹⁸² Lysias, XIII, *Against Agoratos*, 71; Lycurgus, *Against Leocrates*, 112.

¹⁸³ In the inscription under discussion (Tod, no. 86), lines 38-47, there is a reference to a previous decree which had honored Apollodoros. The right of *ἐγκτήσις* must have been among the honors conferred.

¹⁸⁴ See note 131.

¹⁸⁵ See G. Busolt, *Griechische Geschichte*, III, 2, p. 1038, note 2.

¹⁸⁶ Tod, vol. I², no. 96; cf. Busolt, *op. cit.*, III, 2, pp. 1625-1626.

¹⁸⁷ See Busolt, *op. cit.*, III, 2, pp. 1590-1591, note 2. These slaves were liberated and apparently were sent to Skione to live in sympathy with the Plataeans. After the battle of Aegospotami the inhabitants of Skione—i. e., the Plataeans and the former slaves—returned to Athens (G. Glotz, *Histoire Grecque*, II, p. 755). To the best of my knowledge there is no evidence about the status of these manumitted slaves after their return, but under the circumstances is it not probable that the Athenians were obliged to recognize them as citizens?

¹⁸⁸ Thucydides, V, 32, 1.

Plataeans returned to Athens.¹³⁹ Their presence and their unquestionable right and desire to acquire real estate must have seriously shaken the already tottering principles of the inalienability of land. In this connection a neglected passage in Plato's *Λαῖως* (V, 740e-741a) should be considered—a passage which, I believe, confirms the argument of this chapter. After discussing various methods for preventing his proposed State from exceeding the desired 5040 households, he comments as follows on the causes which might lead to a diminution of the citizen body: *ἐὰν τ' αὖ καὶ τοῦναντίον ἐπέλθῃ ποτὲ κῦμα κατακλυσμὸν φέρον νόσων, ἢ πολέμων φθορά, ἐλάττους δὲ πολὺ τοῦ τεταγμένου ἀριθμοῦ δι' ὀρφανίας γένωνται, ἐκόντας μὲν οὐδεὶς πολίτας παρεμβάλλειν νόθη παιδεία πεπαιδευμένους, ἀνάγκη δὲ οὐδὲ θεὸς εἶναι λέγεται δυνατὸς βιάζεσθαι.* Plagues and wars, of course, are the most natural causes for a decrease in population, but is it not probable that Plato, while writing these lines, was thinking of the great Athenian plague and the Peloponnesian War in particular? When he says that his State, although depleted in numbers, should not *voluntarily* admit new citizens who had been reared under a *νόθη παιδεία*, is it not reasonable to suspect that he had in mind what Athens in a similar situation had formerly done when, largely because of *ἀνάγκη*, she admitted Plataeans, Samians, and possibly even some slaves to her citizen fold? Plato then goes on to say (741 b) that in his ideal State the buying and selling of the family lots will be prohibited—in other words, that family land will be inalienable. Is it not legitimate—or even necessary—, therefore, to assume that the lines quoted above contain a clear allusion to the undermining of the old Athenian system of inalienable family land tenure which had been caused by the Peloponnesian War, the plague, and the admission of new citizens?

The conclusion, then, to which this chapter and this study as a whole lead is that land in Attica did not become alienable until the time of the Peloponnesian War. The universally accepted view that the alienability of land and the introduction of the mortgage contract were the natural results of Solon's reforms has not a shred of evidence in its support. It is possible that the shock of the Persian Wars began the undermining of the old system of land tenure and that the removing of the restriction on alienability was a gradual process which continued throughout the century.¹⁴⁰ It is much more probable, however, in the light of evidence currently available,¹⁴¹ that the

¹³⁹ See note 137.

¹⁴⁰ Woodhouse, *op. cit.*, pp. 84-85, expresses this point of view very clearly, but on p. 206 (cf. p. 205) he states that as a result of Solon's reforms there was nothing "to prevent every newly liberated farm in Attika from being next day mortgaged up to the hilt." See above, p. 186.

¹⁴¹ Despite my efforts not to overlook any evidence, I may, of course, have failed to recognize in the extant sources certain material from which it might be inferred that fifth century Attic land was alienable. The discovery also of a new inscription or a new papyrus literary fragment may weaken or overthrow my contention. Even if it could be proved, however, that *legally* Attic land was alienable throughout the fifth century, the argument of this chapter, I believe, would still be valid in so far as it would show that *in fact* land was practically never alienated until the Peloponnesian War and the plague effected a revolution in the Athenian way of life.

Athenians remained true to their ancestral, conservative, and religious attitude towards family land until the terrific impact of the Peloponnesian War and especially of the plague effected inexorably a great change in the Athenian way of life. The Peloponnesian War was a period of tremendous transition in Athenian history. Fourth century Athens, not only politically, but also socially, economically, and spiritually, was a very different place from the city of the preceding century. Scholars who rely on fourth century evidence and on data gleaned from other Greek states to reconstruct the earlier period, despite their erudition, succeed only in putting fifth century Athens completely out of focus. Thucydides knew well that he was living in a transitional age. Not only in the passage on the effects of the plague on Athenian morality quoted above,¹⁴² but throughout his whole history he bears eloquent testimony to the fact that the old order of things in Athens was giving way to the new. In this general collapse of the old order the time-honored attitude towards family land probably succumbed. As a result of a concatenation of circumstances, some of which have been suggested above,¹⁴³ land became subject to sale and to mortgage. This liberation of the land from the taboo on alienability did not occur over night as a result of some statutory act. It was achieved almost imperceptibly as precedent followed precedent. The pious and the conservative probably stoutly resisted the change. It may not be fanciful to detect a reflection of their contempt for a man who would encumber his ancestral land in the term *στιγματίας* employed by Kratinos.¹⁴⁴ Despite all opposition, however, the practice of selling and mortgaging real property gradually increased.¹⁴⁵ These procedures, presumably, were recognized and systematized in the codification of the laws which was completed after the downfall of the Thirty Tyrants. With the coming of the fourth century, therefore, a new chapter in the history of Attic land begins.

If the interpretation of the Athenian system of land tenure propounded in this chapter is correct, it will be necessary to revise our ideas on many aspects of the social, economic, and legal life of the Athenians in the sixth and fifth centuries. At this time, however, two brief observations will be sufficient. The contrast between Sparta and Athens has always, and properly, been emphasized by authors both ancient¹⁴⁶ and modern. Part of the difference between the two states was believed to be the result of their respective systems of land tenure, for, as is well known, the *kleroi* belonging to the Spartiates remained inalienable until sometime in the first

¹⁴² P. 200.

¹⁴³ Two other factors which must have contributed to the breakdown of the old land system should be mentioned: the terrible Athenian losses in Sicily and the return of thousands of cleruchs etc. to Athens after Aegospotami (cf. G. Glotz, *Histoire Grecque*, II, p. 755).

¹⁴⁴ See above, p. 171.

¹⁴⁵ It is possible, therefore, that a few of the horos mortgage stones might date from the latter years of the fifth century. See above, Chapter III, note 40.

¹⁴⁶ Cf. the famous speech of the Corinthian delegates at Sparta in 432 (Thucydides, I, 70).

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half of the fourth century.¹⁴⁷ In opposition to this generally accepted opinion, the argument set forth in the preceding pages suggests that the attitudes of the Athenians and Spartans towards family land—at least so far as its inalienability was concerned—were basically the same until the period of the Peloponnesian War. Consequently, an interval of only some two generations, or less, may have separated the abandonment of the principle of the inalienability of land by the two so fundamentally different states.

The second observation has reference to Plato. He devoutly believed and repeatedly advocated that family land should never be diminished or alienated.¹⁴⁸ In his theories on the State, Plato, of course, was greatly influenced by Sparta, or rather by the myth of Sparta which various doctrinaires like himself had created. If the conclusions reached in this chapter are correct, however, it is clear that for his ideas on land Plato could have been indebted not only to Sparta but also to his own Athens where the principle of the inalienability of family land, which he so eloquently preached, may have been abandoned only in the days of his childhood.

¹⁴⁷ W. H. Porter, "The Antecedents of the Spartan Revolution of 243 B.C.," *Hermathena*, XLIX, 1935, pp. 1-15, argues very plausibly that it was the loss of Messenia in 370 which led to the collapse of the old Spartan land system.

¹⁴⁸ E.g., *Laws*, V, 740-741; IX, 855 a; 877 d-878 b; XI, 923 a.

I

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 or } : 2 No. 3
 Ἀντιφίλος }
 Ἀ[π]ολλ[ό]δ[ω]ρος [-] Κυδαθ[ηναιεύς] : 23 No. 31
 Ἀρίστω[ν] Γαργή[ττιος] : 10 No. 20 b
 Ἀρχίλλ[η] : 4 No. 7
 Ἀ[σ]φάλλ[η] : 8 No. 17
 Βλεπαίο[s], probably Βατήθεν : 14 No. 26
 Δ[α.β.γ.δ.ε.ζ.η.θ.ι.κ.λ.μ.ν.ξ.ο.π.ρ.σ.τ.υ.φ.χ.ψ.ω.]. Με]λιτεύς : 6 No. 12
 Δη[- - -], probably πληρώτρια in an eranos
 loan: 16-17 No. 28
 Δι[- - -]ος Μελιτεύς : 16-17 No. 28
 [Δ]ωρο[- -], father of Φιλοκλῆς and [Φ]ιλοῦρ-
 γος : 1 No. 2
 Ἡρ[- - -] Θυμαί[τάδης] : 11 No. 21
 Κάλλιππος Φαληρεύς : 10 No. 19
 Κλέαρ[χος], archon in 301/0 : 3 No. 6
 Μ[α.β.γ.δ.ε.ζ.η.θ.ι.κ.λ.μ.ν.ξ.ο.π.ρ.σ.τ.υ.φ.χ.ψ.ω.], feminine name : 6 No. 12
 Πει[θίδημος], archon in 267/6 : 2 No. 3
 Πρόξεν[ος] : 2 No. 3
 Τί[- - - Δ] αμπ[τρεύς], son of [...]οκλε[- - -] :
 3 No. 4
 Φιλοκλῆς, son of [Δ]ωρο[- -] : 1 No. 2
 [Φ]ιλοῦργος, son of [Δ]ωρο[- -] : 1 No. 2
 Φρα[- - -] Ὠ[αθεν] : 1 No. 1
 [- - -] Ἄνα[φλύ]στ[ρι]ος : 16 No. 27
 [- -]δ[- -] Ἐρχι[εύς] : 23 No. 30
 [...]οκλε[- - - Δ] αμπ[τρεύς], father of Τί
 [- - -] : 3 No. 4
 [- - - Π]αία[νι]ε[ύς] : 7 No. 14
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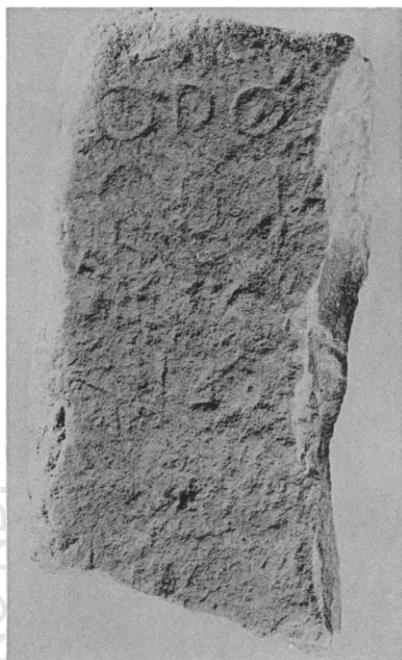
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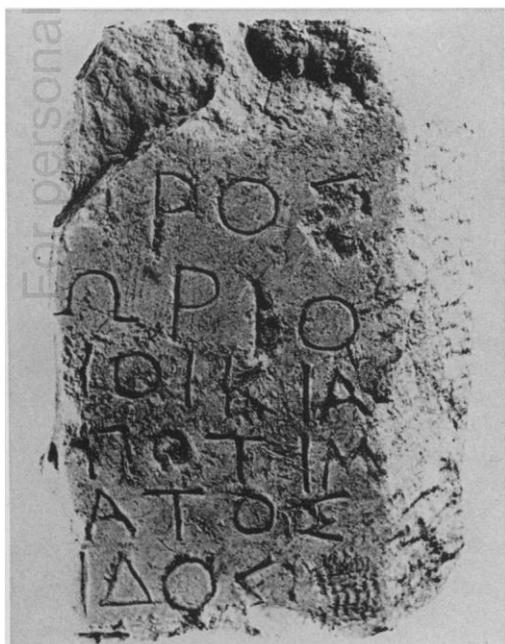
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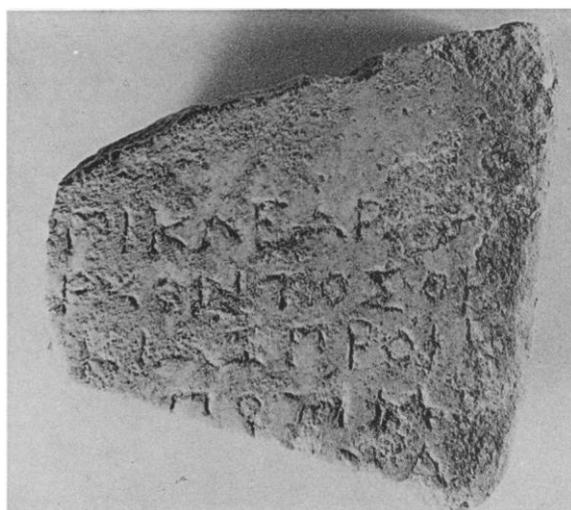
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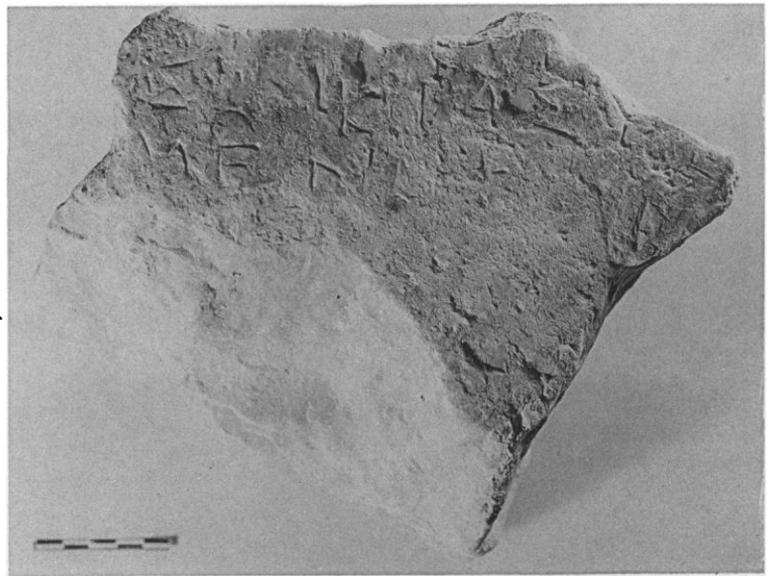
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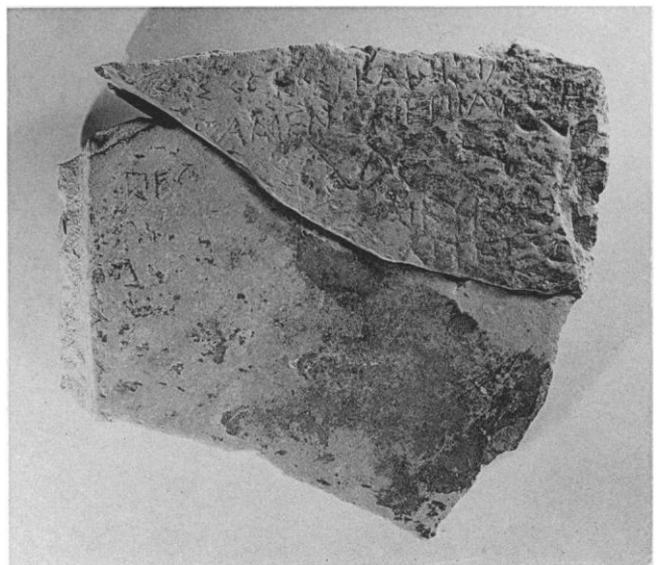
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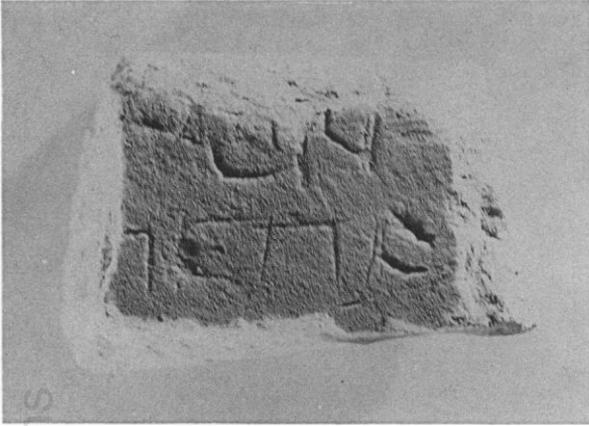
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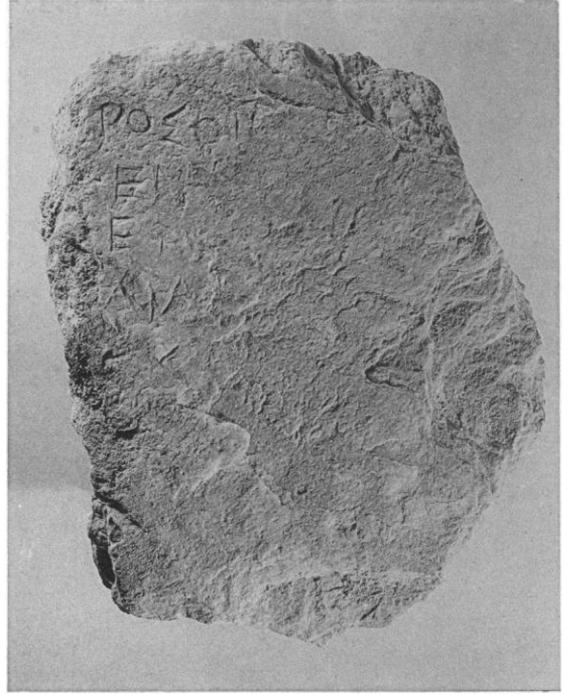
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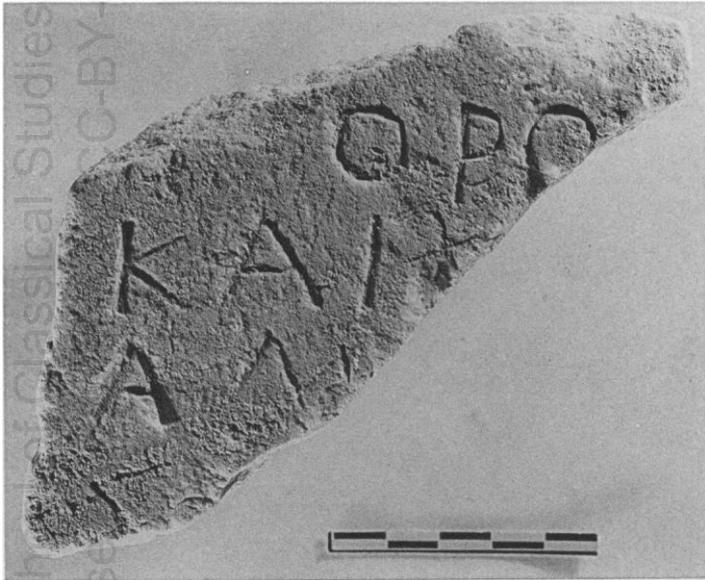
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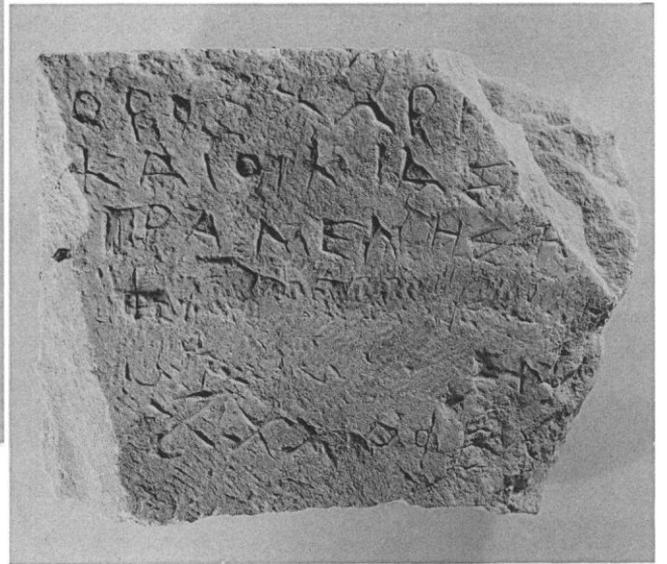
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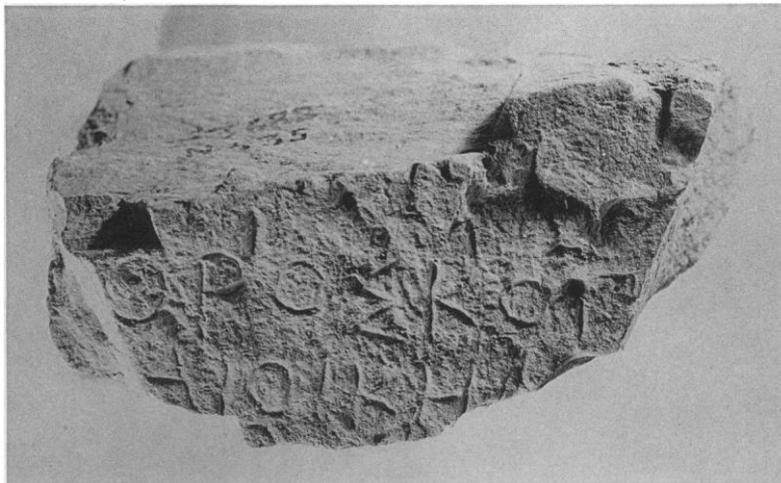
No. 14



No. 15

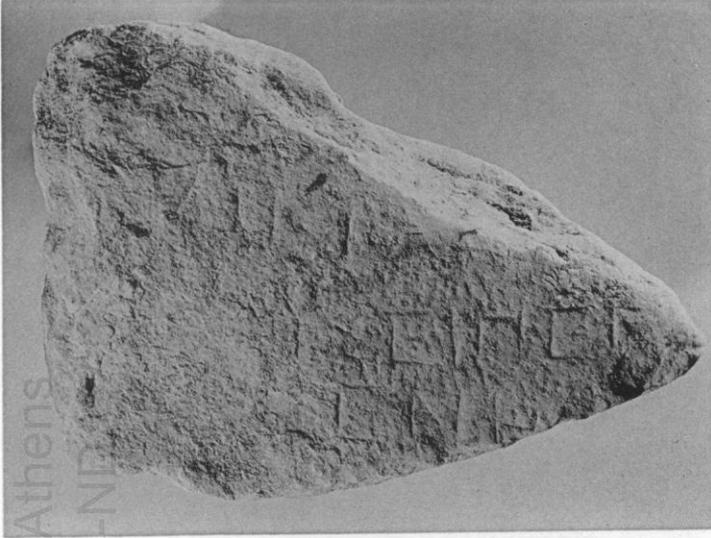


No. 17



No. 16

PLATE 4



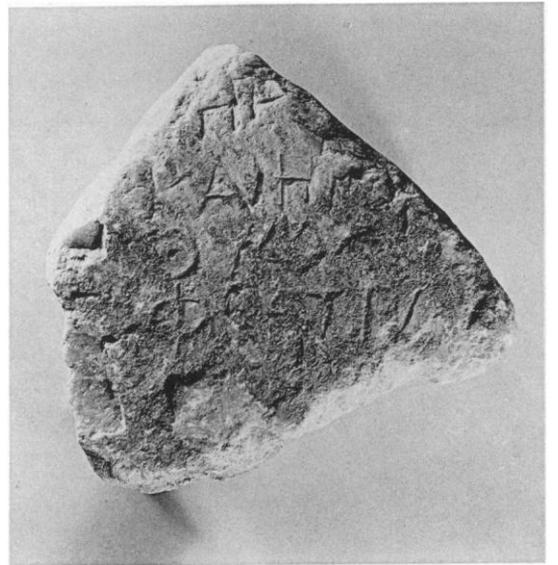
No. 18



No. 19



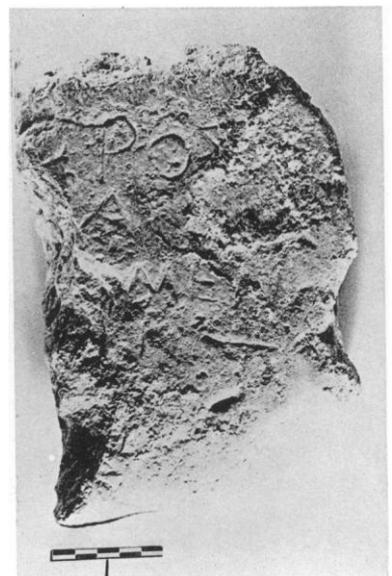
No. 20, Face *a*



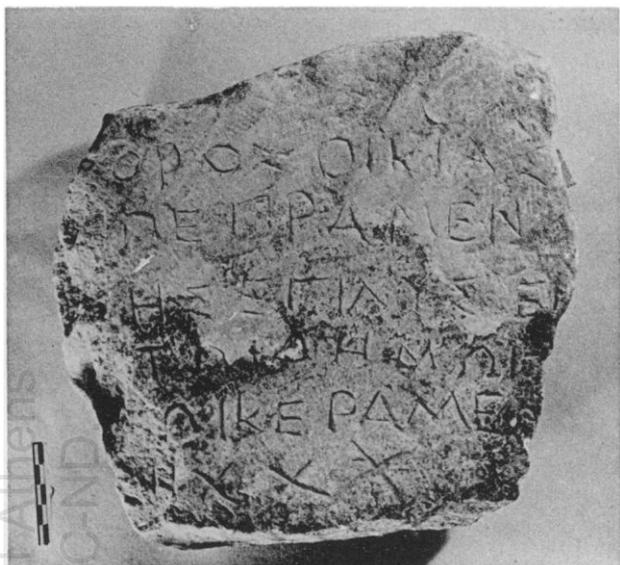
No. 21



No. 20, Face *b*



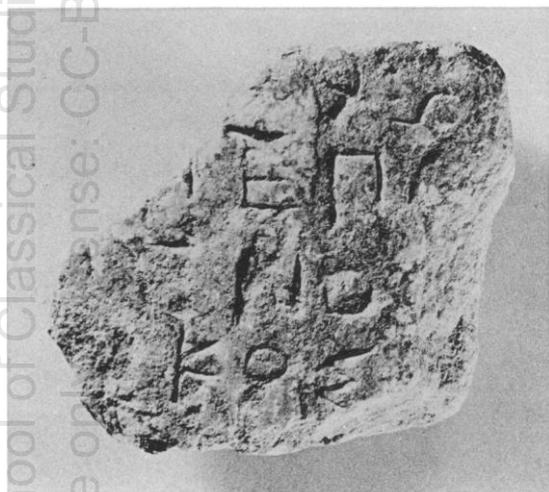
No. 22



No. 23



No. 24



No. 25



No. 26

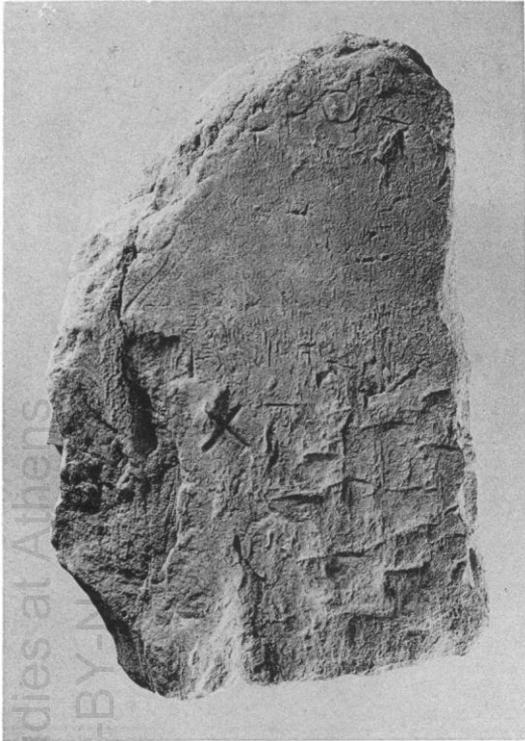


No. 27

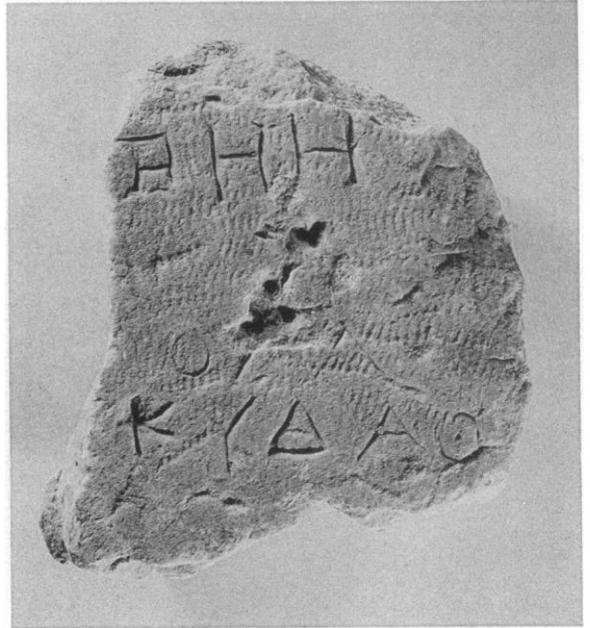


No. 28

PLATE 6



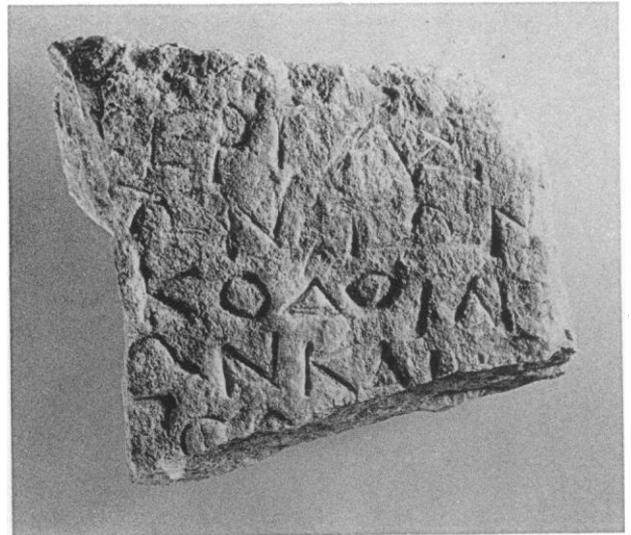
No. 29



No. 31



No. 30



No. 32



No. 33



Addendum I, *a*



Addendum I, *b*



Addendum II, *a*



Lemnos. Courtesy of *Annuario*, XV-XVI, 1932-33, p. 305, No. 11



Addendum II, *b*



a. *I. G.*, II², 2665. Courtesy of *Jabreshefte*, XV, 1912, Beiblatt, col. 92, no. 20



b. *I. G.*, II², 2723. Courtesy of *Ath. Mitt.*, XXXV, 1910, p. 104



c. *I. G.*, II², 2711. Courtesy of *Jabreshefte*, XV, 1912, Beiblatt, col. 90, no. 14