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SECURED CREDIT IN ATHENS: REOPENING THE DEBATE

This paper takes up the topic of secured credit in ancient Athens in order to assess the state of scholarship in the field and make some proposals for gaining a better understanding of this fundamental aspect of the Athenian economy. Ultimately, I will propose that the academic debate regarding this topic be reopened where it has appeared to have gained some closure. I will also make some suggestions about the nature of secured credit in Athens by drawing on analogous models of secured finance and taking into consideration the economic motivations underlying such transactions.

Like the modern economy, the ancient Athenian economy relied on loans to finance commercial transactions. A loan can be unsecured or secured. If unsecured, the lender (or creditor) relies entirely on the ability of the debtor to repay the loan in order to recoup the money loaned (as well as any interest charged). However, if the loan is secured on the debtor's property, the lender has recourse to that property in the event that the debtor defaults. This "security interest" in the debtor's property gives the creditor an additional layer of protection that brings significant benefits to the debtor. First, the reduced risk to the creditor will enable the creditor to charge a lower interest rate. The rate of interest is inversely proportionate to the risk of repayment since the creditor must cover potential losses from some loans by charging higher interest on other loans. This relationship between risk and cost of financing is starkly illustrated by the high cost of maritime loan transactions in Athens.[1] Second, and perhaps more importantly, the creditor may issue a loan where a loan would not have been issued at all in the absence of the security arrangement (since the debtor's lack of creditworthiness creates unbearable risk to the creditor). Although the classic secured transaction is a loan secured on the debtor's collateral, a security interest over collateral can be granted to secure other types of credit (or to secure the performance of any obligation). For example, a manufacturer of shields could sell shields to a buyer on credit (under which arrangement the buyer would pay installments on the purchase price) and this obligation to make payments could be secured on the shields or on any other property of the debtor.[2]

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[1] Cohen 1992:53.

[2] That such financing was provided by vendors in Athens see *id.* at 14 (citing Dem.27.9 among other passages).

The evidence that we have regarding secured transactions in Athens includes Demosthenic speeches (primarily *Against Lacritus* and *Against Pantaenetus* to which I direct much of this paper),[3] *horoi* found in Attica and elsewhere,[4] certain other inscriptions (including a Poletai record),[5] and the comments of the lexicographer Pollux.[6] The speech *Against Lacritus* preserves within it a unique piece of evidence: a highly sophisticated contract documenting a loan transaction and related security arrangement.[7] The *horoi* were stones that were placed on real property in order to identify the property as collateral in a secured transaction (or in an asset-backed transaction of some nature). These *horoi* contain inscriptions that contain little information other than identifying the transaction (most typically with the phrase *prasis epi lysei*) and, in some cases, the parties involved and the amounts of the secured obligations. The problematical nature of this evidence is described further below. At this point, suffice it to say that the challenges presented by this evidence make the task of developing a cohesive theory of secured transactions in Athens such an interesting endeavor.

There were no significant statutes governing secured transactions in Athens.[8] This stands in stark contrast to modern legal systems, such as Article 9 of the Uniform Commercial Code which has been enacted in all fifty of the United States and consists of a complex system of laws that allow for the granting of "security interests" in almost any type of personal (as contrasted with "real") property. The system for the creation and enforcement of security interests provides (1) clear priority rules to resolve disputes among multiple creditors that have a security interest in the same collateral, (2) protections to the creditor in the event that the debtor disposes of the collateral without the creditor's consent, and (3) a panoply of remedies for the creditor to ensure the easy enforcement of security interests in the event of the debtor's default.[9] Under Article 9, once a debtor grants the creditor a security interest, all of the mechanisms and rules of the statute automatically apply to give the creditor a reliable and easily enforceable right to gain recourse to the identified collateral.

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3 Other speeches that provide helpful evidence regarding secured transactions include *Against Apaturius, On the Estate of Dicaeogenes*, *Against Nicostratus* and Demosthenes' first two speeches against Aphobus.

4 For the evidence provided by *horoi* see Finley 1952; Thür 2008; Lalonde 1991; and Shipton 2000.

5 Crosby 1941:14–27.

6 A comment by Pollux suggests that the terms *hypotheke* and *prasis epi lysei* could be used interchangeably. Poll.8.142. See also Harris 2012: 436.

7 Dem.35.10–13.

8 See Finley 1952:16 (stating that "there is no trace of a special body of legislation dealing with security transactions."). The only preserved statute relating to the field of secured transactions is paraphrased at Dem.41.7 and is narrow in its scope in that it merely prevents certain parties to an *apotimema* from bringing suit.

9 Regarding secured transactions under the Uniform Commercial Code see Miller 2012.

The situation in Athens was quite different. In the absence of a law of secured transactions, the rights of the creditor could only be established by contract or by custom. Contracts were used extensively in Athens to document secured transactions and clarify the rights and obligations of the parties.[10] The frequency of contracts was no doubt increased by the requirement for a written contract for a *dike emporike*.[11] In addition to the contract preserved in *Against Lacritus*, a contract documenting the arrangement between Pantaenetus and his creditors is referred to in *Against Pantaenetus*, and a number of *horoi* also reference agreements. The contractual approach to creating a security interest can provide many of the elements that might otherwise be provided by a statute with one significant exception: a contract between the debtor and creditor does not bind third parties and therefore there are no priority rules that govern contests among multiple competing creditors.

One of the recurrent complications across history in the field of secured transactions is the multiplicity of forms that a secured transaction can take and the multiplicity of terms used to refer to such transactions. Under Roman law, there were three types of security: the *fiducia cum creditore*, the *pignus*, and the *hypotheca*. The *fiducia cum creditore* involved the transfer of possession and ownership of the collateral to the creditor until the underlying obligation was repaid, at which point possession and ownership would be restored to the debtor.[12] In a *pignus* transaction, the creditor would take possession of the collateral, but ownership would remain with the debtor.[13] Only upon the debtor's default would the creditor have the right to sell the collateral and keep the proceeds of the sale to discharge the underlying obligation (provided that certain requirements were met). Finally, a *hypotheca* allowed the debtor to retain both possession of and title to the collateral until default.[14] The variety of security arrangements under the common law in the U.K. and the pre-Article 9 United States was greater and more confusing. A survey of these devices reveals a long list of terms such as chattel mortgage, equitable mortgage, charge, pledge, lien, hypothecation, or conditional sale. Each of these devices had certain applications, strengths and limitations, but the complexity and resulting transactional costs inspired the drafting of Article 9 which created a single device, the "security interest," that replaced the collection of devices that had

[10] In fact, complicated security agreements are used in modern transactions as well despite the existence of statutes that provide for the rights and obligations of the debtor and creditor. Statutes generally allow parties to agree to additional terms that are not addressed by statute, such as what constitutes an event of default, warranties and representations regarding the quality of the collateral and the debtor's rights in the collateral, the duty of the debtor to insure the collateral, etc.

[11] For the requirement of a written contract for admissibility to the *dikai emporikai* see Cohen 1973: 56–57. See also Finley 1952:22 (explaining that the growth of maritime commerce gave rise to more contracts in the field of security).

[12] Mousourakis 2012:177.

[13] *Id*. at 178.

[14] *Id*. at 179.

existed before. This simplification of the law of secured transactions was a rare achievement in the history of commercial law. That said, the law of security is not perfectly unified in the United States despite the enactment of Article 9, since Article 9 only governs security interests in personal property. Transactions involving real property are subject to the laws of mortgage which vary from state to state.

The historical trend of multiple terms describing secured transactions is also found in ancient Athens. A secured transaction is termed in some cases a *hypotheke*, and the verb *hypotithenai* is used to denote the encumbering of collateral (*enechyron*). In other cases, the phrase *prasis epi lysei* is used.[15] And now we come to the heart of the scholarly debate regarding secured transactions in Athens. What was the nature of a *hypotheke*? And what exactly was a *prasis epi lysei*? It is clear that both were asset-backed transactions, but the precise features of these transactions have been debated over the years. Some of the issues that have been debated include the following:

• Which party maintained ownership of the property, the debtor or the creditor?

• Was there a true sale of the property in a *prasis epi lysei*?

• Was the nature of the security "substitutive" or "collateral"? That is, upon default, did the creditor take title to all of the hypothecated property regardless of the amount of the secured obligation (making the security "substitutive") or was the creditor only entitled to retain that portion of sale proceeds equal to the secured obligation with any surplus going to junior creditors or back to the debtor (making the security "collateral")?

• Could the debtor enter into multiple transactions backed by the same asset? If so, how was priority determined among competing creditors?[16]

• How were the rights of the creditor enforced?

• Why do almost all of the *horoi* reference a *prasis epi lysei* rather than a *hypotheke*?[17]

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[15] In the specialized case of securing the return of a dowry upon divorce or securing obligations arising in the context of the lease of an orphan's property, the term *apotimema* is used, but this paper will focus on the more general transactions described by *hypotheke* and *prasis epi lysei.* Regarding the nature of an *apotimema* see Harris 1993.

[16] Regarding the procedures for resolving disputes among competing creditors see Thür 2008:184–186. See also Harris 2006:239 regarding the possibility that the rule of *prior tempore potior iure* resolved priority contests between competing secured parties.

[17] Of the 154 stones that Finley studied, 102 refer to a *prasis epi lysei* (10 refer to a *hypotheke* and 42 to an *apotimema*). Finley 1952: 29. Could there perhaps be some reason why a *prasis epi lysei* was more amenable to transactions involving real property

• Why is the phrase *prasis epi lysei* never used in the extant speeches?

• Why do contracts seem to have been used more frequently in connection with a *hypotheke*?[18]

Twenty-five years ago, Edward Harris published his landmark article "When is a Sale Not a Sale? The Riddle of Athenian Terminology for Real Security Revisited."[19] In this article, Harris squared off against the two leading scholars at the time in the field of secured transactions in Athens, John Fine and Moses Finley, and proposed his innovative theory that the Athenians utilized a single form of security that could be described either as a *hypotheke* or as a *prasis epi lysei* (rather than accepting the traditional view that these terms described two distinct types of transaction). Before discussing Harris's theory, I will provide a brief synopsis of the approaches taken by Fine and Finley.

Fine supported the traditional view that the *hypotheke* was a security arrangement in which the debtor retained ownership of the collateral.[20] In contrast, he viewed the *prasis epi lysei* as a sale of certain assets of the debtor to the creditor with the sale price being the amount given as a loan.[21] The sale was subject to "release" when the debtor repaid the loan in full which resulted in title being transferred back to the debtor.[22] Fine believed that an asset could be subject to a *hypotheke* and then subsequently "sold" by the debtor in a *prasis epi lysei*—in which case the "buyer" would take the asset subject to the existing *hypotheke* (meaning that if the debtor defaulted on the creditor with the *hypotheke*, that creditor could enforce its *hypotheke* against the asset that was owned by the second creditor).[23]

Finley also viewed the *hypotheke* and the *prasis epi lysei* as two different transactions, but he was somewhat more circumspect in his description of the *prasis epi lysei*. His views on this are best represented by his own words:[24]

> Clearly *prasis epi lysei* was not a genuine, complete sale; it is significant that the literal meaning of the term is "sale on condition of release," not "sale with the right (or option) to re-buy" as in the French *vente à réméré*. Nor can it be described as a fictitious sale or a fiduciary sale, as some historians have suggested. Only a hybrid

as opposed to personal property, *i.e.*, moveables? Might a comparison be drawn to the modern distinction between mortgages (applied to real property) and Article 9 security interests (applicable to personal property)? See Fine 1951:92–93 regarding his theory that *prasis epi lysei* evolved in connection with the use of real property as security.

18 See Finley 1952: 24 (proposing that "the *hypotheke* was somehow more flexible than the *prasis epi lysei* and lent itself more readily to special terms and conditions, hence the more frequent need to commit the agreement to writing.").

19 Harris 1988.

20 Fine 1951:94.

21 *Id*. at 148.

22 *Id*.

23 *Id*. at 150.

24 Finley 1952:35.

> category will fit, such as "security in the form of conditional sale.… The outward form, then, is sale, the essence hypothecation.

In another passage, Finley translates *prasis epi lysei* as "sale on condition of release," but then provides an expanded definition of the term that he believes more fully reflects its true meaning by describing it as a "sale on condition that the seller may release the property from the buyer's claim on it."[25] In other words, the sale of the property to the creditor is nullified when the debtor pays off the underlying obligation.

In his 1988 article, Harris rejected the bifurcated view of secured transactions in Athens and proposed that the terms *hypotheke* and *prasis epi lysei* were used interchangeably to refer to the same transaction. This view is concisely stated in the following passage:[26]

> Previously it was believed that the Athenians had at least two forms of hypothecation, one in which the borrower retained ownership of the security, the other where the creditor gained ownership …. We can now see that the Athenians did not have two or more forms of security, but essentially one type of security where the borrower and the creditor each considered himself the owner of the security.

His theory is further elucidated in this excerpt: [27]

> By hypothecating [a] piece of property the borrower temporarily lost his right to alienate it and the creditor gained the right to seize it if the borrower defaulted. But who owned it? … Without [procedures such as the Roman *mancipatio* or *in iure cessio*] … the Athenians, like Socrates' companions, were not capable of giving a definitive answer to this question. For them the ownership of the security remained in a legal limbo in which there reigned a sort of free-for-all with everyone guided only by his own self-interest, not by juristic precepts.

According to this theory, whether a party characterized a secured transaction as a "hypothecation" or a type of "sale" was a matter of choice and depended on which term best served the party's interests. The question of who owned the collateral could not be answered due to the primitive state of Athenian law regarding the transfer of ownership. This state of "legal limbo" resulted in rhetorical flexibility that allowed each party to the transaction to characterize it as he chose at any particular time. Harris arrives at this conclusion after an exhaustive and careful reading of the evidence which contains a number of instances where the chosen characterization of a transaction benefits the speaker. To restate his theory, the choice of terms when describing a secured transaction was an entirely rhetorical question (although the rhetorical choice was driven by the legal interests of the

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[25] *Id*. at 31.

[26] Harris 1988:370.

[27] *Id*. at 370.

party, i.e., whether it benefited the party to be considered the owner of the collateral or not). Thür made this same observation in his 2007 Symposion paper—an observation that was roundly rejected by Harris in his response.[28] However, I think that Thür's observation is an accurate interpretation of the theory put forth in Harris's article. That Harris sees the interests of the party dictating the choice of terms not only when speaking in court, but also when inscribing *horoi* is reflected in the following passage from his article:

> Since the creditor was the one who had the *horoi* set up, we should expect the inscriptions on them to serve the needs and to reflect his view of the transaction. What were the needs of the creditor? To warn other third parties that the hypothecated property could not be sold, to discourage others from accepting it as security for another loan, and to express his claim in the strongest possible language. All of these needs were well served by the expression [*prasis epi lysei*].

Harris's theory has been widely accepted by a number of scholars over the last twenty-five years, which has brought to some extent a sense of closure to this long-standing problem in Athenian law.[29] Although I cannot in the space of this paper disprove Harris's theory, I find it unsatisfying for a number of reasons. First, the uncertainty regarding ownership would likely be highly unpalatable to any creditor. If the debtor owns the collateral, the debtor would have the right to use the collateral, further encumber the collateral, or even sell the collateral. In contrast, if the creditor owns the collateral, the debtor would not have the right to use collateral without the creditor's consent—and would not have any power to encumber or sell the collateral (under the fundamental doctrine of property law *nemo dat quod non habet*). When a creditor has placed a large sum of money at risk and the creditor is protected only by the value of the collateral, clarity regarding the ownership of the collateral would be a significant issue. Second, while Harris emphasizes the need to rely on the evidence of the speeches, he resolves the complexities of the evidence by proposing a theory that, in effect, discounts the evidence. Rather than trying to explain that the terms *hypotheke* and *prasis epi lysei* refer to different transactions, Harris evades this challenging problem by saying that the language means nothing in a juridical sense and can be used interchangeably to refer to the same transaction. Third, as far as I am aware, the existence of a unified system of secured transactions that provides for a single type of security interest that encompassed all types of collateral is a feat that has not been accomplished by even the most sophisticated legal systems. As I discuss above, the historical tendency is for a variety of security devices rather than a single type. Those legal systems that did have a single device were primitive systems, such as Roman law in its early stage when only a *fiducia cum creditore* was utilized.[30] It could be argued that Athens was primitive in this

[28] See Thür 2008:175; Harris 2008:196n.22.
[29] See Harris 2006:189 for citations.
[30] Mousourakis 2012:177.

respect, but the complexity and sophistication that we see in the lending practices of Athens militates against primitivist arguments.[31] Fourth, there is at least one passage that is inconsistent with Harris's theory that speakers will characterize a transaction in a manner that benefits them. In *Against Lacritus*, the creditor Androcles, who is delivering the speech, uses the terminology of a *hypotheke* when discussing the maritime loan given to his debtors. Under Harris's theory, one would expect a creditor to use language of sale to strengthen his claim to the collateral. This would have been helpful to Androcles who faced competing creditors to whom the debtors subsequently hypothecated the same collateral (which Harris himself recognizes).[32] Moreover, why would Androcles (assuming he drafted the contract) allow for the language of hypothecation to be used in the contract if language of sale would have strengthened his claim to the collateral? Finally, the contention that creditors were free, when inscribing the *horoi*, to choose the language of sale when the language of hypothecation was also possible is hard to accept. Characterizing the transaction as a sale would put the debtor at a disadvantage by potentially preventing him from further encumbering or selling the property. Although creditors have power, debtors also have some leverage in the course of negotiating a transaction and it is hard to believe that debtors would leave this important matter to the discretion of the creditor in so many cases.

Harris may be correct in his theory—but rather than abandoning the Athenians to a primitivist system and diminishing the meaning of the language that they used, we should continue to explore how they may have had a more sophisticated system with multiple security devices that were denoted by different terms. However, before discussing how a more sophisticated system of secured transactions in Athens may have looked, I would like to briefly discuss the impact of Harris's 2012 article on hypothecation on the operation of his previously proposed theory.[33]

In 2012, Harris published a colloquium paper in which he compares Athenian security arrangements to secured transactions in ancient Rome. In this piece, Harris restates much of what he says in his 1988 article, such as explaining that the Athenians had only one form of secured transaction since the lack of "formal modes of conveyance … that would have made it possible to differentiate between different forms of real security."[34] However, Harris's view of secured transactions in Athens appears to have evolved between 1988 and 2012 in that rather than seeing the issue of ownership remaining in "limbo" (as he wrote in 1988), he explains in his 2012

[31] This complexity and sophistication is seen in the careful assessment of risk in landed and maritime transactions, the complexity of the terms of the contract in *Against Lacritus*, and the highly developed banking and lending industry. See, *e.g.*, Millett 1991:17 (saying of his landmark work on lending in Athens that "[o]ne of the main conclusions to emerge from this study should be the way in which a refined and extensive structure of credit can exist apart from developed or developing capitalist institutions.").

[32] Harris 1988:367.

[33] Harris 2012.

[34] *Id*. at 436.

paper that ownership remains with the debtor in both the *hypotheke* and the *prasis epi lysei*, as reflected in the following excerpt:[35]

> [T]he pledge of real security does not transfer ownership to [*sic*: from?] the borrower, who has the right to contract further loans on the same security. A pledge of security in Athenian Law gave the creditor a lien on the debtor's property, which he could exercise only in the event of default, but nothing more.

Again, at the close of the paper, Harris posits that "the Greek form of real security was in its essential features identical to *hypotheca* in Roman Law," i.e., the creditor took a security interest in the collateral while ownership and possession remained with the debtor.[36]

If Harris now views ownership as clearly remaining with the debtor in a *hypotheke* and *prasis epi lysei*, this undermines his 1988 explanation of why the language of hypothecation would be used in some cases and the language of sale in other cases. Harris's theory in 1988 was that the uncertainty of ownership allowed each party to characterize a given transaction as either a sale or a hypothecation depending on whether the party wanted to give the impression that he owned the collateral or not. If ownership clearly resided with the debtor, then the "legal limbo" that allowed for this rhetorical wordplay did not exist.

This state of affairs brings us full circle to a study of secured credit in Athens published in 1949—before Fine, Finley or Harris published their works on the subject—written by a Greek scholar, I. A. Meletopoulos.[37] In his article, Meletopoulos concludes, as does Harris in his 2012 paper, that in the case of both a *hypotheke* and a *prasis epi lysei* the debtor retained ownership of the collateral.[38] Fine raises two objections to this theory, which objections can be raised anew with respect to Harris's view of a unitary device of security with ownership remaining with the debtor. First, why would the language of sale ever be used if ownership was to remain with the debtor? Second, why would the same type of transaction be referred to by different terms? As a discipline, it seems that we stand not far from where we stood in 1951.

At this point, I hope to have provided reasons to reopen the debate regarding the nature of secured transactions in Athens. I will now make some observations about the evidence that has come down to us on this issue and propose some theories that may contribute to our understanding of this area of Athenian law.

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35 *Id*. at 439. It makes no sense that "the pledge of real security does not transfer ownership *to* the borrower" since the borrower would own the collateral upon pledge, so I assume this is a typographical error and that the text should read "*from* the borrower," which is substantiated by the broader discussion in the paper.

36 *Id*. at 440.

37 Meletopoulos 1949.

38 *Id*. at 66–67.

I will begin with Demosthenes's speech *Against Lacritus* which deals with a maritime transaction in which the creditors issued a 3,000 drachma loan on the security of the jars of wine to be purchased with the money (as well as on any other return cargo). [39] The language used in the agreement is the language of hypothecation[40] and the agreement provides, among other things, that (1) the debtors were not to borrow additional money secured on the cargo,[41] (2) the cargo was to be delivered to the possession of the creditors upon return to Athens,[42] (3) if the debtors defaulted, the creditors had the power to sell the cargo or give the cargo as security,[43] (4) if the proceeds of the sale following default did not discharge the loan obligation, the creditors had recourse to the debtors' other property in order to recover the deficiency,[44] and (5) if the ship was wrecked but the cargo was saved, the cargo would become the property of the creditors.[45]

The terms of this contract provide clear evidence that the Athenians could create security interests in collateral and that the debtor could maintain possession (unless otherwise agreed). The contract, as well as evidence from the body of the speech, indicates that ownership of the collateral is vested in the debtor unless otherwise agreed. In the contract, the ownership of the collateral only passes to the creditors in the event that the ship is wrecked and the cargo saved. This must mean that ownership otherwise remained with the debtor. Moreover, there would be no need for a prohibition on further hypothecating the cargo if the debtors did not own the cargo (since one could presumably only hypothecate one's own property). [46] However, the debtor's ownership of the collateral is somewhat clouded by the speaker's words in section 37 where he refers to the one hundred Cyzicene staters (which in the speaker's opinion constituted a portion of the return cargo) as "our property," i.e., the creditors' property.[47] However, this turn of phrase was likely a rhetorical ploy and does not outweigh the other evidence pointing to ownership remaining with the debtors.

Regarding the question of whether the security was substitutive or collateral in nature, the evidence is not as clear—although, on the whole, I think that the evidence weighs in favor of collateral security. On the one hand, the fact that multiple security interests could be created in the same assets indicates that the

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[39] Dem.35.10.
[40] Dem.35.11. See also Dem.35.18, 21.
[41] Dem.35.11.
[42] *Id.*
[43] Dem.35.12.
[44] *Id.*
[45] Dem.35.13.
[46] In the course of the speech, the speaker complains about the fact that the debtors violated the agreement by borrowing additional funds from a certain Aratus of Halicarnassus on the security of the cargo. Dem.35.22–23. This action is treated merely as a breach of agreement and not as a conversion of the creditors' property.
[47] Dem.35.37.

security was collateral. Substitutive security would strongly discourage multiple security interests since one creditor keeps all the collateral for himself upon default (rather than selling the collateral and keeping only those proceeds needed to discharge the outstanding obligation).[48] On the other hand, while the agreement provides for the recovery of a deficiency, it makes no mention of the return of any surplus to the debtors. Perhaps this was to be implied, whereas the right to seek the deficiency in the manner specified in the agreement could not be as easily implied.[49]

The richest speech regarding asset-backed financing in Athens is Demosthenes' speech *Against Pantaenetus*, a speech delivered in a *paragraphe* by a certain Nicoboulus.[50] The transactions are in the form of a *prasis epi lysei* and therefore this speech provides critical evidence regarding the nature of this transaction. The speech concerns the repeated sale of a workshop and the slaves who worked the shop to process silver ore extracted from a public mine. Pantaenetus leased the right to work the mine, but needed to acquire the use of the workshop and slaves to operate the venture. Rather than purchase the workshop (including the slaves) himself, he leased the workshop from other parties who owned the workshop. The first owner of the workshop appears to have been Telemachus, who sold the workshop to Mnesicles for 105 minas (with 45 minas of this amount contributed by Phileas and Pleistor).[51] Pantaenetus leased the workshop from Mnesicles and his partners while they were the owners. Mnesicles subsequently sold the workshop to the speaker, Nicoboulus, and his partner, Evergus, for the same amount previously paid, 105 minas (with Nicoboulus contributing 45 minas and Evergus 60 minas). Pantaenetus leased (*misthoutai*) the workshop from Mnesicles for 105 minas.[52] The speaker explains that in addition to the lease amount (which he explains was equivalent to the interest (*tokos*) accruing on the principal), the agreement provided that the workshop would be subject to "release" (*lysis*) to Pantaenetus at a stated time.[53] The speaker mentions that Mnesicles purchased the workshop "for Pantaenetus," which is also likely true of Nicoboulus's purchase as well.[54] With the result of causing some confusion for the reader, the speaker also characterizes the 105 minas paid for the workshop as a "loan" (*edaneisamen*) to Pantaenetus.[55]

48 That said, one might argue that the prohibition on prior or subsequent hypothecations could reference substitutive hypothecations since the creditor stood to lose the collateral in its entirety to prior secured parties and would face potential challenges from subsequent secured parties who believed they had the better claim.
49 For differing views on whether security in Athens was "substitutive" or "collateral" in nature see Finley 1952:115; Thür 2008:173–174; Harris 2008:189–194.
50 Dem.37.
51 Dem.37.4.
52 Dem.37.5.
53 *Id*.
54 *Id*.
55 Dem.37.4.

When Pantaenetus failed to pay rent as it became due, he was ejected from the workshop by Evergus, which ejection Pantaenetus claimed was wrongful and resulted in various damages.[56] In the wake of this ejection, two new purported creditors came forward claiming that they had issued loans to Pantaenetus secured on the workshop.[57] The nature of the transactions entered into by these new creditors is uncertain. MacDowell suggests that they helped finance the purchase of the workshop from Telemachus by contributing 101 minas (which would have brought the purchase price to 206 minas).[58] However, whether the claim of these new creditors was valid at all is questionable since they are described, in the opinion of Nicoboulus, as "speaking all manner of falsehoods."[59]

Faced with this complicated situation, Nicoboulus was given the choice of either (1) paying off the new creditors by giving them the amounts owed to them by Pantaenetus or (2) accepting payment from the creditors for his and Evergus's interest in the workshop.[60] After choosing the latter, the new creditors demanded that when they paid Nicoboulus that this constitute a sale with Nicoboulus and Evergus being the sellers (*prateres*).[61] Nicoboulus and Evergus agreed with this and sold the property. The property was subsequently sold by these new creditors for three talents and 2600 drachmas (or 206 minas).[62]

In his 2012 paper, Harris argues that the transactions described in *Against Pantaenetus* are similar to a Roman *hypotheca*, which means that Pantaenetus maintained ownership of the workshop throughout and that the language of sale was merely a rhetorical device used by Nicoboulus.[63] He explains that Nicoboulus chose this language of sale because if this were a true lease transaction, the ejection of Pantaenetus by Evergus would have been lawful upon the failure to pay rent (whereas the failure to make interest payments did not permit ejection in a hypothecation).[64] The single inscription cited by Harris as a basis for this conclusion about the right to rejection only upon the failure to pay principal is not on its own

[56] Dem.37.7.
[57] Dem.37.12.
[58] MacDowell 2004:174. MacDowell arrives at the sum of 206 minas because it is equivalent to the amount that the workshop was ultimately sold for at the end of the string of transactions. It is also possible that Pantaenetus himself contributed his own money to the purchase of the workshop and sought only partial financing from Mnesicles and his partners. Fine proposes yet another theory: that Pantaenetus was the original owner of the workshop and set this chain of events into motion by borrowing 105 minas from Telemachus to cover operating costs and secured the loan on the workshop by means of a *prasis epi lysei*. Fine 1951:147..
[59] Dem.37.12.
[60] *Id*.
[61] Dem.37.13.
[62] Dem.37.31. Nicoboulus tells us that the new creditors claimed that the workshop was worth far more than the 105 minas that Nicoboulus and Evergus had paid. Dem.37.12.
[63] Harris 2012: 437–38.
[64] *Id*. at 438.

particularly convincing. Moreover, although the word "interest" (*tokos*) is used to describe the monthly payment owed by Pantaenetus, it seems to have been something more than that. The arrangement was for Pantaenetus to make a monthly payment that would, at the end of the term of the lease, result in the transfer of ownership to Pantaenetus. The monthly payment therefore must have constituted something more than interest, otherwise Nicoboulus and Evergus would never have recouped their principal.[65] Harris also bases his conclusion that Pantaenetus owned the workshop on the fact that Pantaenetus granted a security interest in the workshop to the new creditors.[66] However, this presumes that Pantaenetus entered into the transaction with these new creditors after Nicoboulus and Evergus purchased the workshop. It is not clear that this is so. As discussed above, MacDowell, for one, proposes that these creditors gained their interest in the workshop as part of the financing involving Mnesicles.

One cause of confusion regarding the nature of the transaction arises when Nicoboulus states that Pantaenetus urged him to be the seller of the workshop since, he says, nobody would accept Pantaenetus as the seller. Finley takes this as evidence that either Nicoboulus or Pantaenetus could have sold the property—thus indicating uncertainty about who had ownership.[67] Finley theorizes that Pantaenetus urged Nicoboulus to be the seller because the seller provided a warranty of title and nobody would have faith in Pantaenetus's ability to stand behind such a warranty.[68] The idea that either Pantaenetus or Nicoboulus could act as seller is hard to accept. This once again requires that ownership was not clear and that either had the ability to transfer title. If, *per* Harris, ownership remained with the debtor, then it is not clear how the creditor could have possibly been the seller. One way out of this conundrum could lie in the analogue of the Uniform Commercial Code which allows the debtor to sell collateral free of the security interest with the consent of the creditor—and allows the creditor to sell the collateral upon the default of the debtor. Another solution, as Fine proposes, is the possibility that Pantaenetus urges Nicoboulus to sell the workshop because he (Pantaenetus) simply could not do so since he did not own the workshop.[69]

We have yet to resolve the question regarding the nature of the transactions described in this speech. To dispose of the language of sale that plays such a prominent role in this speech is a drastic step to take.[70] A more reasonable approach

[65] Even if the arrangement were a loan secured by a *hypotheke*, interest-only payments would not have enabled the creditors to ever recapture the principal.
[66] Harris 2012:437.
[67] Finley 1952:34.
[68] *Id*.
[69] Fine 1951:148.
[70] That the language of sale was actually used by the parties in the course of the negotiation of these transactions is supported by Nicoboulus' statement that the "new creditors" demanded that Nicoboulus and Evergus be sellers (*prateres*). Dem.37.13. I do not believe

is to consider what types of transactions involving a sale best fit the evidence and the economic motivations of the parties. To assist in this task, it may be helpful to consider other models of asset-backed financing. Helpful analogues may be the sale-leaseback transaction and the financial lease, which are common tools used today to allow a company to realize the equity in property it owns and to assist a company in financing the use of capital-intensive equipment (such as aircraft). In a sale/leaseback transaction, the debtor is the original owner of the property and needs to raise money by selling the property to a bank, which then leases the property back to the debtor (with the title reverting back to the debtor upon the expiration of the lease term, either at no additional cost or at the payment of an agreed-upon price). A financial lease enables a company to acquire the use of an asset (such as an aircraft) by arranging for a finance company to purchase the asset from a third party for the purpose of leasing it to the debtor (and ultimately transferring title to the debtor). In addition to realizing financial benefits from these transactions, the lessee may also receive certain accounting or tax benefits.

How might these models of asset-backed finance involving leases shed light on the transactions described in *Against Pantaenetus*? If we adopt MacDowell's suggestion, that the "new creditors" were part of Mnesicles's financing syndicate (which is one of multiple ways in which they may have figured into the string of transactions), then the transactions could be described thus in terms of a financial lease: Pantaenetus needed financing to gain the use of the mining workshop because he did not have sufficient funds himself. At Pantaenetus's request, Mnesicles's syndicate purchased the workshop for 206 minas from the original owner, Telemachus, in order to lease the property (and ultimately transfer ownership of the property) to Pantaenetus. The members of the syndicate (Mnesicles, Phileas, Pleistor, and the "new creditors") would have owned the property in a sort of joint tenancy (each owning an undivided share of the property in proportion to their contribution to the purchase price). Nicoboulus and Evergus then purchased that ownership share held by Mnesicles, Phileas, and Pleistor (perhaps being led to believe by Mnesicles that they had purchased the total ownership rights). The purchase of the workshop would have been subject to the lease with Pantaenetus.[71]

But what were the terms of the ultimate transfer of title to Pantaenetus? Would the workshop be transferred to Pantaenetus at the end of the lease term for no additional cost? Or did Pantaenetus have an option (or obligation) to purchase the property at the end of the term? If so, at what price? If the lease payments were truly merely equivalent to interest on a loan (*tokos*), that would suggest that Pantaenetus

that Nicoboulus is putting words in the mouths of the "new creditors," but is repeating what was actually said.

[71] That the successive purchasers of the workshop took title to the workshop subject to the lease to Pantaenetus is evidenced in Nicoboulus's statement at Dem.37.29–30 where he says that he sold the workshop to the "new creditors" on the same terms that he had acquired the property from Mnesicles.

would have to pay the purchase price to take title to the workshop (since the capital amount of the loan would never be paid off by the interest-only payments). If this were true, it would no longer look like a financial lease since the rent payments would not go toward the purchase of the workshop. If the lease payments included some amount that went toward the purchase price, then Pantaenetus may have been able to purchase the workshop at the end of the lease term for little or nothing. This makes more sense from an economic perspective, but runs contrary to repeated statements that the rent was equivalent to an interest-only payment.[72]

The many questions surrounding the nature of these transactions and the nature of secured transactions in Athens in general are not resolved in this paper. Nor was that the goal of this paper. I have merely attempted to reopen the debate about a fascinating aspect of the Athenian economy that I believe had been closed too soon. If a solution to these questions is to be found, not only must a new analysis of all the evidence be undertaken, but various models of asset-backed finance from various legal systems, both ancient and modern, should be considered in order to find an analogue that could shed light on Athenian practice. Consideration of the historical development of the Athenian economy and its attendant transactional devices could also help explain the eventual existence of different forms of secured transactions.[73] Finally, the economic costs and benefits to the parties should also be considered when determining the viability of a proposed solution. These benefits need not be limited to raising money for the debtor and facilitating the purchase or use of property, but may take other forms. For example, there may well have been tax benefits that flowed from participating in certain transactions. The sale and leaseback of property is frequently undertaken today in order to reduce tax liabilities. Perhaps tax advantages could have motivated similar transactions in Athens. For example, if an Athenian citizen wanted to avoid taxation or a liturgy, he could perhaps reduce his visible (*phaneros*) wealth by selling his property in a *prasis epi lysei*, concealing the money received in the sale, and then leasing the property from the buyer. The speaker in *Against Phaenippus* alleges that Phaenippus used this very ploy (or something similar) so that he would not be forced to exchange estates with the speaker in an *antidosis*.[74]

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72 "Interest-only" loans are not impossible (having made an appearance in the recent history of the United States housing market), but are financially ruinous for the borrower.
73 Fine uses a historical approach in the development of his theories. Fine 1951:90ff.
74 [Dem.] 42.5,28.

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