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OWNERSHIP AND SECURED CREDIT IN ATHENS: A RESPONSE TO MARK J. SUNDAHL

Concentrating on two court speeches Sundahl gave an excellent paper on secured credit in the fourth century BCE Athens. In an innovative way and using clear technical language, he combines legal and economic arguments. Nevertheless, I wouldn't say that he has reopened the debate. The debate over the nature of Greek ownership was never closed. And the nature of Greek security depends on how we understand Greek ownership. In my opinion ownership of and security on real property were protected in exactly the same way: by formal intruding and formal ejecting followed by a tort action against the intruder, a *dikē exoulēs*, resulting in a penalty of double the value of the property.[1] Based on this observation, in a short response I will focus mainly on one question, fundamental to Sundahl's paper: who was owner of the encumbered assets? I appreciate his conclusion that for the Athenians there was no 'legal limbo' about the debtor's or creditor's ownership. Nevertheless I should think the problem is not to be solved by adopting our modern category of absolute legal title. In Athenian legal thinking ownership was an elastic position, differentiated by function. So, quite correctly, both creditor and debtor might have called themselves 'owners'.[2] For the same reason the modern category of ownership seems not to be helpful in distinguishing *hypothēkē* and *prasis epi lysei* along the lines that in the former device ownership of the collateral remained with the debtor, while in the latter one it vested in the creditor. And because of the unitary procedure of enforcing possession by formal intruding and ejecting, either device was 'substitutive' in nature (Verfallspfand); but I willingly accept Sundahl's conclusion that *hypothēkē* and *prasis epi lysei* were open to wide variations towards 'collateral' devices (Verkaufspfand) by contractual agreements according to the economic aims of the parties.

As a preliminary remark I would warn against cursorily comparing Greek surety systems with the Roman ones as some scholars before Sundahl already have done. In the oldest type, *fiducia cum creditore contracta*, the debtor transferred ownership to the creditor but—*pace* Sundahl—frequently retained possession of the collateral,

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[1] Thür 1982, and 2003: 58–60 (and p. 60–77: according to Dem. 32 encumbered maritime cargo kept in a storehouse is treated like real property).

[2] See Thür 2008: 175 (and the response of E. M. Harris, p. 189–200, not meeting the point).

especially in the case of real property; this device was substitutive in nature and vested the debtor with much more benefits than he needed for security. So the parties had to achieve collateral compacts through additional agreements.[3] Out of these agreements Roman jurists developed the later types of *pignus* and *hypotheca*, which by definition finally became collateral in nature. In either type, according to economic interests, possession could remain with the debtor or not. However, our knowledge of this development is blurred because Justinian's lawyers systematically interpolated the word *pignus* for *fiducia* used in the classical legal texts. Nevertheless, the rules preserved in Justinian's Digest—along with traditional indigenous devices—provided models for the modern European statutes on real security up to the Uniform Commercial Code of the United States. Returning to ancient Greece I would stress that in my opinion *hypothēkē* and *prasis epi lysei* were not a single device of security, but rather different types of it, however governed by uniform—one may call them primitive—dogmatic principles, though fully adequate to a complex and sophisticated economic system.

I. Sundahl first deals with Demosthenes 35, *Against Lakritos*, a clear instance of *hypothēkē* securing a sea loan of 3,000 drachmai. Nowhere in the speech is a *prasis* for security interest mentioned. With good reason: no debtor can encumber unspecified and varying personal goods he will trade with in a future overseas enterprise by 'selling' them to the creditor in advance. For securing the sea loan only the *hypothēkē* form meets the economic situation: all goods bought with the credited money, sold at further stopovers and replaced by others, and at last safely arriving at the appointed port of destination will be bonded to the creditor. As Sundahl convincingly suggests, only real property was object to *prasis epi lysei* (n. 17), and only here terminology sometimes varied according to rhetorical purposes with *hypotithenai*.

Of more interest than the type of contract chosen by the parties is the juridical nature of the transaction. After recapitulating five core provisions of the sea loan contract put down in a *syngraphē*, entirely preserved in paragraphs 10–13 of the speech, Sundahl holds: 1) "that the Athenians could create security interests in collateral and that the debtor could maintain possession (unless otherwise agreed)," and 2) "that ownership of the collateral is vested in the debtor unless otherwise agreed;" and finally he is not sure about 3) "whether the security was substitutive or collateral in nature."[4]

1) The first is evidently correct. Due to the generally prevailing 'cash sale principle' (goods for money), an Athenian creditor became mortgagee by handing over the amount according to the particular *syngraphē* of the loan containing all further specifications on interest, risk, repayment and object of and agreements on

[3] For the *pactum fiduciae* see Kaser / Knütel 2014: 162–63.
[4] Sundahl, discussion at nn. 46–48.

security interests.[5] In our case, after payment, the 3,000 drachmai of the sea loan were incorporated into any personal property purchased overseas with this money wherever the property might have been located; and in this economic situation only the debtor and not the creditor could be possessor of the collateral. The crucial question of security interests in collateral is not whether the Athenians could create them or not, but rather how the creditor could enforce them. In the text of the *syngraphē* there are clear hints on how it worked, and in Demosthenes 32, *Against Zenothemis*, we can study the practice of such a case—each of these is neglected by Sundahl. The contract stipulates: "the debtors are to return the loan within twenty days after arriving at Athens and up to payment they will admit the creditors control over the collateral, which must not be liable to any (other) seizure."[6] At-risk creditors got control over a hypothecated ship immediately after entering port, and usually creditors whose loans were secured on cargo had it unloaded and kept safe in a storehouse under the parties' exclusively joint access during the first twenty days.[7] In case of any controversy between mortgagees the formal acts of seizure, with all their penal consequences, took place at the storehouse, and on the debtor's default the creditor simply could withdraw the assets in order to effectively sell or hypothecate them (Dem. 35.11–12).

2) When studying the question of who was 'owner' of the collateral one must keep in mind this kind of enforcement in the case of the successful end of the enterprise, strange enough to a modern lawyer. Challenging the category of 'absolute title' adopted by Sundahl I would suggest a different understanding of the passages, on which he bases his view that ownership was vested in the debtor. This is only partially correct. We have to reassess both types of situation: on the one hand when the merchant was trading on a safe voyage, and on the other hand after shipwrecking.

First, the provision prohibiting the taking of additional loans secured on the cargo (οὐδ' ἐπιδανείσονται, Dem. 35.11) seems to indicate debtor's ownership: "since one could presumably only hypothecate one's own property."[8] Since for both creditor and debtor the economic aim of a sea loan was to make profit on overseas trade, the merchant was permitted even to vest ownership in his customers; only by contract (and in his own interest) was he bound to replace the collateral he sold by purchasing other assets (and hopefully selling them at higher prices at his further stops). In this way, on board the vessel the financier's security interest was kept in balance. Just as selling the collateral, so too further hypothecating must have been lawful. However, security interest altered this balance, and at the port of destination

[5] Thür 2008: 173 with further discussion.

[6] Dem.35.11: παρέξουσι τοῖς δανεισάσι τὴν ὑποθήκην ἀνέπαφον κρατεῖν, see also par. 24–25, 37; misleading Sundahl (text at n. 42): "the cargo was to be delivered to the possession of the creditors."

[7] Dem. 32.14; Thür 2003: 60 n. 16, 64–5.

[8] Sundahl, text at n. 46.

the financier was facing further creditors.[9] This was the reason why the provisions forbidding *epidaneizesthai* and requiring *anepaphon kratein* were inserted into the *syngraphē* (Dem. 35.11), so that the debtors at least were personally liable for transgressing them. Nevertheless, against the strong position of the debtors stood an equally strong one of the creditors: when the collateral arrived at Athens no formal act of conveying ownership to them was necessary. The creditors just kept the collateral in joint possession with the debtors for twenty days and on their default the creditors themselves were legally entitled effectively to sell or hypothecate it. Furthermore, disputes between competing creditors were carried out exactly in the same way as those between owners. Therefore, quite correctly the creditors could also speak of the collateral as of “their own.”[10] On the sea voyage their strong legal position was just temporarily suspended.

Second, in the event that the ship is wrecked and some of the pledged cargo is saved, the *syngraphē* stipulates: ἐὰν δὲ τι ἡ ναῦς πάθῃ … σωτηρία δ’ ἔσται τῶν ὑποκειμένων, τὰ περιγενόμενα κοινὰ ἔστω τοῖς δανείσασιν (Dem. 35.13). This doesn’t mean: “ownership of the collateral only passes to the creditors in the event…” (of shipwreck and) “…otherwise remained with the debtor.”[11] In fact, the clause belongs to risk management: if the ship with all her cargo gets lost, the creditor (financier) also loses all his money invested in that enterprise; according to the clause σωθέντων τῶν χρημάτων (par. 11) all provisions on returning the sea loan together with its high interest are voided when the ship and her cargo doesn’t reach the port of destination. However, if at least some of the collateral has been saved, as anticipated by the clause of paragraph 13, the debtor (merchant) shall not be unjustly enriched. Therefore the value of the saved assets belongs to the financier; the assets themselves, far away from Athens, do not concern him; and the merchant—on a different vessel and perhaps headed to a different final destination—may continue his voyage in order to trade and seek profit from these and other assets. In the contract the clause created nothing other than a secured title for compensation up to a certain amount, and if the merchant was not ready to pay, the financier, through his agent, was permitted to seize and to sell the merchant’s other property up to the value of the saved assets “wherever the Athenians have the

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[9] This was the case in Zenothemis *vs.* Demon, Dem. 32; here not Protos, the debtor, further hypothecated, but rather the *naukleros* Hegestratos encumbered Protos’ cargo to Zenothemis (for details see Thür: 2003: 70). As I demonstrated in 2008: 185, irrespective of the question of ownership, the Greeks addressed the problem of further hypothecating real property by using the clause ὅσῳ πλείονος ἄξιον (however much more it is worth) conceded by the creditor. In our case, by forbidding *epidaneizesthai* the creditors expressively stated that they would not agree to such a transaction.

[10] Expressively said of the 100 Cyzicene staters (Dem. 35.36–39) representing a small part of the 3,000 Athenian drachmai paid down (a possible connection with shipwreck, par. 33, is concealed in par. 36).

[11] Sundahl, text after n. 45.

right of seizure."[12] In this way an agent could bring home the scraps of a miscarried business venture. In the clause the word κοινά means that our two co-financiers, Artemon and Apollodoros, jointly authorized only one agent to accompany the enterprise for controlling the debtors and interfering in his masters' favor.[13] If compensation was deferred until the merchant's return to Athens, the creditor could sue the latter for 'depriving' him of his goods by filing a *dikē blabēs*.[14] In any case, the assets themselves were not subject of the action.

Summing up, the modern term 'ownership' cannot delineate satisfyingly the legal situation. a) On the voyage, on the one hand the merchant was entitled to sell effectively the encumbered goods he had bought with the loan, on the other hand the agent of the financier had to agree to a jettison in a storm (both in par. 11). b) Collateral saved after shipwrecking was no more bound by the provisions on performance of the sea loan because the provision "if the goods arrive safely" (at the port of destination, par. 11) was unfulfilled. From the short 'ownership' clause (par. 13) and the specific circumstances of overseas enterprise one can infer, on the one hand that the merchant still could effectively convey ownership of the (former) collateral, and on the other hand that the agent of the financier could enforce a claim for the value of the saved objects. Depending on the merchant's facilities overseas the financier could enjoy his 'ownership' only in a very restricted way. c) Finally, when arriving at the port of destination the functional splitting of the ownership vanished without any legal act of conveying. During the first twenty days the debtor, who had brought the encumbered cargo in, was to enclose it in a storehouse under his and the creditors' exclusively joint access. When the debtor was solvent the creditor released the collateral against cash; otherwise the debtor had to find a purchaser for his goods. When he did so, one can imagine that the three involved persons met at the storehouse: the debtor cashed the price and settled his debt, and both debtor and creditor released the collateral to the buyer. There was not even one moment of insecurity remaining. According to the cash sale principle, the three participants conducted two acts of 'performance against counter-performance': the first one 'money for goods' between buyer and seller/debtor vesting ownership in the buyer conditional on the second one, 'money for release' between debtor and creditor vesting full ownership in the debtor—but more likely all three of them made these arrangements at the same effect with a banker in his office. Once again: modern ownership is a tool much too rough for explaining this most effective mechanism.

3) Regarding the next question—whether the security of the sea loan was substitutive or collateral in nature—I totally agree with Sundahl's conclusion. By

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[12] See the opposite clause in Dem. 35.13; for Athenian influence in international seafaring see Dem. 32.11, 14 (Cephallenia; Thür 2003: 69).

[13] Normally each creditor delegates one person (*epiplous*, or as in par. 11 *symplos*, par. 33 *symplein*) for accompanying the voyage; see Gofas 1989.

[14] See the crucial word ἀποστερεῖν in Dem. 35.42, 46, 50 (cf. 26).

agreeing upon the creditors' duty to sell the collateral at the market price and upon their right to recover the deficiency from the debtors, the parties created a practicable device of meeting collateral security. Sundahl is only worried about missing a clause about returning the surplus to the debtors. I don't think this was to be implied tacitly within the contract (text at n. 49). Rather, this situation would not occur when the collateral returned to Athens. Within the first twenty days the debtors by themselves would do their best to sell the goods at a profit and satisfy the creditors. Only if they couldn't manage to sell the goods at a price at least covering the amount of loan and interest would they default, and then no surplus would occur at all.[15]

Until now I have tried to demonstrate how skillfully, despite the 'primitive' juristic devices, Greek practice could meet the demands of a highly-developed economy. The 'cash sale principle' resulting in the consequences that on the one hand security was substitutive in nature and on the other the money lent was 'incorporated' in varying encumbered assets, provided the basis of sophisticated agreements. By concentrating on ownership Sundahl resolved only a minor part of the problems. In this response my additional considerations encompass only contracts securing sea loans; other types of *hypothēkai* remain outside my consideration.

II. The second speech Sundahl addresses is Dem. 37, *Against Pantainetos*, and he achieves most interesting and innovative results. In this response I cannot discuss the whole very complicated case.[16] Very confusingly the speaker, a financier named Nikoboulos, is referring to a chain of *praseis epi lysei* and maybe real sales of a workshop and slaves processing silver ore; for the listeners ownership always remains in the dark. Pantainetos, the debtor and his opponent, had leased a public mine from the state, which he exploited by digging ore and smelting silver. First I will roughly sketch my idea of the juridical background of the transactions and then bring forward an objection against Sundahl's astonishing interpretation that Pantainetos concluded a "financial lease"[17] with Euergos and Nikoboulos, who for exactly this purpose had bought the property from a syndicate around Mnesikles.

In order to run his risky business of exploiting and producing silver Pantainetos needed steady credit from a chain of capital providers. As surety he used the shop and the slaves—in my opinion continuously belonging to him—by selling them *epi lysei*, always on certain, sometimes probably overlapping time limits. The first creditor (mentioned in the speech as first and only "owner") was Telemachos, who in fact may have obtained only a surety by *prasis epi lysei* at a share of 12,000 drachmai (probably together with further creditors). Then followed Mnesikles,

[15] Only deficiency also in Syll.^{3} 672.70 (160/59 BC); for the first mentioned clause on surplus in a Greek sea loan document (P.Vind.Gr. 40.822, 2nd cent. AD) see Thür 1987.

[16] See also my note Thür 2006.

[17] Discussed by Sundahl after n. 71.

Phileas, and Pleistor. Next were Euergos and Nikoboulos, who bought, expressly mentioned "*epi lysei* on a certain time limit," a share of 10,500 drachmai together with the so called "new" creditors, and thereupon followed the persons who in a new deal bought the whole shop for 20,000 drachmai—I think this sale was *epi lysei* too because I cannot imagine that Pantainetos would have stopped his mining business at that point. From all these creditors Pantainetos leased back the shop for a rent of 1% per month (12% per annum) of their shares. This was the usual and modest interest of a loan and therefore called *tokos* (par. 5). Through these leases the creditors got additional securities because they could just expel the debtor, Pantainetos, from the shop when he defaulted on the monthly due rent.[18] That was what Nikoboulos' partner, Euergos, finally did. Against a simple 'buyer *epi lysei*' the creditors had no right to expel the debtor because of overdue interest; they would have had to wait until Pantainetos defaulted on the principal due at the fixed time limit.

The crux in understanding the case is that on the one hand, the speaker, Nikoboulos, never tells the whole story continuously; he isolates the facts and we have to put them together like a puzzle.[19] On the other hand, Nikoboulos uses the term πρατήρ (literally seller) ambiguously: one time as "seller" and another time as "warrantor for the sale,"[20] confusing us and an Athenian audience inexperienced in business life as well; his aim was to depict Pantainetos as an enormously rich and greedy man whose claim for compensation is completely inequitable. I think that the 'seller *epi lysei*' always was Pantainetos himself, and that the former creditors mostly acted as warrantors in regard of the shares they gave up to the new creditors as Nikoboulos did.[21] Providing a *pratēr* or *bebaiotēs* was an essential clause in any real sale contract, and this gave the creditor an additional security in a *prasis epi lysei* too.

This highly hypothetical reconstruction overall opposes Sundahl's analysis. Further discussion will go on. However, one single point explicitly seems to contradict his interpretation of the contract as "financial lease:" Pantainetos' monthly payment covered exactly the normal interest of a loan, 12% per annum (par. 5). If he was not owner of the shop, he never would have obtained ownership by this kind of transaction;[22] and a supposed "interest-only" loan[23] secured on this asset required Pantainetos' ownership. This discussion needs a broader basis; in securing credits Greek businessmen (and women) created most surprising resorts.[24]

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[18] For expelling in land leasing see Behrend 1970: 131–2.

[19] It is not the place to do it here; for Dem. 32 see Thür 2003: 75.

[20] Ambiguously for example in Dem. 37.9, 13; warrantor in 11, 32.

[21] Dem. 37.32: γενέσθαι πρατῆρα καθ' ὃ συνέβαλον ἀργύριον.

[22] Admitted even by Sundahl, text at n. 72.

[23] Considered in n. 72

[24] See for example the discussion about a credit secured on a house in Corfu, *SEG* 53 503 (Korkyra, 200–150 BC), Vélissaropoulos-Karakostas 2006 and Harter-Uibopuu 2006 (see also *SEG* 54 572, and 56 614).

III. However these problems will be solved, the two court speeches studied by Sundahl indicate some differences between *hypothēkē* in overseas trading and *prasis epi lysei* in mining business: on the one hand a sea loan was secured only by the continuously varying assets that the merchant carried on board of a vessel the parties had agreed upon. No contract for encumbering (or even 'selling' *epi lysei*) each single piece of cargo to the creditor was necessary; through an accompanying agent the financier had control of the cargo and no guarantor was extending additional personal security to him against a third party's claim of ownership of the property.[25]

On the other hand, the loans for running a mining enterprise were secured on real property. Here the danger existed that third persons would claim ownership of the land and the creditor would lose his right of seizure. However, this problem existed in every sale transaction: the buyer took the risk of having paid the price—in vain—to a non-owner. Therefore when land was sold, additional personal security through a *pratēr* was stipulated and inserted into the standard form.[26] This form of *prasis*, developed into '*epi lysei*', was used for hypothecating real property too. Here the *pratēr* warranted that the creditor could successfully enforce his claim by seizing the land unopposed by any other person seizing it as owner or creditor.[27] The generally prevailing 'cash sale principle' (here: land for money) and the unitary procedure for owner and creditor to enforce possession enabled economically satisfying devices of land credit. The same principles governed credit on sea cargo too. Therefore my conclusion is: *hypothēkē* and *prasis epi lysei* do not differ in substance; nevertheless they are different types of security carefully attuned to specified economical needs.

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[25] In overseas trading the problem was not, that the assets for sale belonged to a third person, but rather that the debtor further hypothecated them; see above, n. 9.

[26] Thür 2008: 176.

[27] Thür 2008: 185–6.

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