Horoi, Studies in Mortgage, Real Security, and Land Tenure in Ancient Athens. By John V. A. Fine. Hesperia, Supplement IX. Baltimore: J. H. Furst Company, 1951. Pp. xi, 216, 7 plates, quarto. $7.50.

This volume was conceived merely as an edition of the unpublished horos mortgage stones from the Athenian agora excavations and therefore as a purely epigraphical task. This epigraphical task is accomplished in Chapter I which is devoted to the transcription of thirty-five hitherto unpublished mortgage stones, all but two from the agora, with commentary. Chapter II consists of references to all of the mortgage stones published in *IG* II² and *IG* XII with the addition of the transcription of twenty-eight others from Attica already published elsewhere and a few more from the Aegean islands. Hence the author claims in Chapters I and II to have provided, either by reference or by transcription of the actual text, a corpus of all known horos mortgage stones, about 214 in number. Chapter III is a general discussion of the use of horos stones. Horos means simply "boundary," and many of the extant horoi are boundary stones which either delimited actual boundaries or called attention to the nature of a particular object such as a tomb or a shrine. Other horos stones advertised leases of property. But the third category with which the present volume is concerned served to publicize liens on real property. It was to the interest of the creditor to have such notices set up and also to the interest of any third party, who was thus warned that the property was encumbered. These notices were inscribed on boundary stones or on any stone that suited the purpose and the stones vary markedly in size and workmanship, many of them being of a crude character. The very crudeness of the stones indicates that they did not constitute the official record of the transaction and the literary evidence which mentions the contracts (*synthekai*) in addition to the horoi is in accord with this view. In court it was necessary to substantiate claims based on the horoi by the introduction of the contract and the witnesses to the transaction. Scholars agree that no extant stone in the mortgage category is earlier than the fourth century B.C. Consequently the possibility of the use of wooden horoi in the earlier period suggests itself. The author considers this unlikely, a position which corresponds with the thesis evolved later in the book that the mortgage contract did not develop among the Athenians until late in the fifth century B.C. The disappearance of horos mortgage stones after the middle of the second century B.C. is explained on the hypothesis that eventually a system of official mortgage registers was developed which rendered horoi unnecessary.

Because of recent novel interpretations of the various types of contract illustrated by the mortgage stones, with most of which the author disagrees, it became evident that a re-examination and discussion of all available evidence was necessary. Chapters IV–VII are therefore devoted to analyses of the types of contract involved and become to some extent a review and rebuttal of the work of U. E. Paoli and I. A. Meletopoulos. In fact the significance of the book lies not in the publication of the new horos stones, which have added little to our

knowledge, but in the circumstance that the study of them inspired the author to re-evaluate the relevant evidence and hence to review the entire history of the mortgage contract and the system of land tenure in Athens. The result is an unorthodox, but highly interesting and important conclusion, namely, that alienation of land, which makes mortgage possible, did not occur in Athens until late in the fifth century B.C. The author presents an intricate and detailed argument lucidly and with awareness of the dangers both of the *argumentum ex silentio* and of the use of non-Attic material as evidence for Athenian procedure.

Athenian law recognized three forms of real security: *enechyron* or pledge, usually applied to movable property, the object offered as security passing immediately on the formation of the contract into the possession of the creditor; *hypotheke*, usually used with reference to immovable property, the debtor normally remaining in possession of the property until the maturity of the loan, at which time if he were delinquent the creditor could foreclose on the property offered as security; *prasis epi lusei*, in effect a sale by the borrower, subject to redemption within a specified time. On the chief features of the first and third of these institutions there has been fairly general unanimity among scholars. But the second, which has regularly been considered comparable to the modern hypothec, has been the subject of great controversy. It is a commonplace that the Greeks never developed a strictly technical legal vocabulary and that therefore in dealing with legal matters one must always be cautious in determining the precise sense in which a given term is employed. The word *hypotheke* is a case in point and has caused considerable confusion, inasmuch as the noun form is not used in fifth and fourth century authors of real property serving as security, but always of security in a maritime loan (i.e., the cargo or the ship or both). The transaction which is comparable to the modern hypothec is designated regularly by the verb forms *hypotithenai* and *hypokeisthai*, but even where these verbs occur they do not always refer to the contract which could be characterized as the modern hypothec. It is this contract which is the subject of Chapter IV. Paoli insisted on two aspects of *hypotheke*. If the debtor remained in possession of the security he determined some time before the maturity of the obligation what objects should be subject to seizure by the creditor in case of nonpayment of the loan. This gave the creditor only a simple right *in personam*. To secure a right *in rem*, to protect himself against the claims of other creditors, he had to have possession of the object. In addition Paoli insisted that both the *enechyron* and the *hypotheke* in civil law had a continuative character, i.e., they involved no maturity which allowed the security to fall into the ownership of the creditor or authorized its sale. After a searching examination of the evidence, some of which was not considered by Paoli, Fine concludes that in the *hypotheke* there was transfer neither of ownership nor, normally, of possession and that foreclosure was possible. Fine admits that sometimes transfer of possession did occur since both parties might prefer that the creditor be in possession and have the usufruct instead of interest. This transformed the transaction into *antichre-*

sis, a contract which undoubtedly existed in the fourth century even though the name does not appear until later. Since the debtor retained the ownership it is likely that he could continue to encumber the property up to its full value.

Two particular forms of hypothec provide the subject matter of the next two chapters. Chapter V is concerned with *misthosis oikou*, the leasing of the estates of orphans in whole or in part. A guardian frequently chose this method of dealing with an orphan's estate, thus putting the estate to work during the minority of the orphan without himself having the responsibility of the management. Paoli considered such a transaction possible only where the bulk of the estate consisted of other than real property whereas Fine's contention is that the evidence—again he makes a minute examination of all the literary evidence—points to the leasing of orphans' estates consisting largely of real property. Hence a guardian could lease an estate whether it consisted primarily of movables or immovables. The lessee had to furnish the guardian with security (*apotimema*) which seems always to have been in the form of real property and doubtless in value covered both the capital value of the orphan's property and the interest or rent contracted for by the lessee. Horoi, to publicize the lien on the property offered as security, were erected. The lessee had to return the capital value of the property and any unpaid rents or interest to the orphan on the attainment of his majority. If he proved delinquent the orphan could foreclose on the property offered as security.

Chapter VI contains a discussion of security (*apotimema*) in connection with dowry. Paoli had considered this *apotimema* a *datio in solutum*, but Fine considers it either security given by the husband to secure the dowry which he had received from the *kyrios* (legal representative) of the wife or security given by the *kyrios* for the amount of dowry which he had not yet paid. The evidence certainly substantiates this point. In cases where foreclosure occurred and the value of the security exceeded the indebtedness, the creditor had to restore the excess to the debtor.

Chapter VII is concerned with what Fine considers the earliest form of contract of loan in which real property served as security and as the one which remained the most common contract for this purpose, at least through the fourth century. It is known as *prasis epi lusei* and the traditional view of it is as follows: the borrower, as security for a loan, sold, with right of redemption, to the lender some property of sufficient value to guarantee the obligation. The loan was identical with the sale price, but not necessarily identical with the value of the property. Ownership was immediately transferred to the lender. If the borrower repaid the loan within the specified time the lender had to return the property in good condition. Under this contract actual possession could reside with either party according to the terms agreed upon. If the borrower proved delinquent the lender acquired absolute ownership with no obligation to return the excess value, if any, or to demand further payment if the value of the property did not cover the amount of the loan. Naturally the borrower could not contract a second mortgage with a third party since in effect he could not claim ownership

until the redemption occurred. The vendee would be his only source for obtaining a further loan on the property unless he succeeded in finding another purchaser from whom he could secure a higher price and so repay the first creditor. Thus he merely substituted one purchaser for another. The long detailed argument pursued by Fine on this contract is occasioned by the fact that Meletopoulos denied the passing of the ownership to the creditor and insisted that the debtor could continue to encumber the property up to its full value. The transaction was not a contract of loan, but a secondary contract to guarantee a prior transaction which was usually a contract of loan. The objections to Meletopoulos' thesis are two: First, it is difficult to understand the name if sale and transfer of ownership did not occur. *Prasis* means sale. Second, according to Meletopoulos' interpretation the transaction becomes practically identical with the hypothec, which would make it impossible to detect any evolution in the institution of real security at Athens. Fine considers Meletopoulos' contention that it was a secondary contract to be on sounder ground, but he himself seeks to substantiate the traditional interpretation.

It is in Chapter VIII that the legal historian will perhaps find his greatest interest centered. An examination of all available evidence reveals the fact that there is no reference to the mortgage contract in Athens prior to the period of the Peloponnesian War. While the author is apprehensive about the use of the *argumentum ex silentio*, he yet considers that in the present case where there is a rich supply of both literary and epigraphical documents it is justifiable to assume, in the absence of all evidence to the contrary, that real property was not used as security at Athens until the period in which reference to it actually occurs. The problem then is to discover a satisfactory reason for the late development. Obviously the mortgage cannot be used so long as land is inalienable, and the date of its introduction will therefore approximately coincide with the right to alienate land. The argument for the pre-Solonian inalienability of land rests on two facts: 1) Solon prohibited the mortgaging of the person and it would therefore appear that mortgaging of the person was practiced simply because it was impossible to alienate property. Otherwise why should a man ever have mortgaged his own person? 2) The strict regulations of the fourth century regarding intestate succession and testamentary rights were aimed at keeping real property in the family or the *genos*. This must be a survival from days when alienation of land was prohibited at least by custom if not by actual law. But the belief in the pre-Solonian inalienability of land calls for an explanation of the famous lines of Solon in which he says that he took up the horoi and that the land which was formerly enslaved was free. Following Woodhouse and Lewis, Fine explains the situation thus: the nobles desired land for production of olives and wine which were becoming the most profitable forms of agriculture. When peasants had borrowed on the security of their persons and were unable to pay, the nobles, desiring the use of the land far more than the enslavement of the insolvent debtor allowed them to remain on their land, but required its cultivation according to their own wishes and the debtor became in effect merely a renter of

the property, continually threatened with enslavement if he fell into arrears with his rent. This interpretation seems plausible. The reference to the system as a sort of seventh century *prasis epi lusei* seems to me unfortunate and confusing. As to the actual character of the horoi mentioned by Solon nothing is known.

Although for two centuries after Solon there is no reference to the *prasis epi lusei*, many have argued that after Solon the right to alienate land developed rapidly, largely as the result of Solon's testamentary law. Fine discusses this law at some length and arrives at the conclusion that the law merely gave the right to adopt an heir and thus to prevent the extinction of a household. Its purpose was to keep the property in the testator's family. The function of such an heir was to beget a son, and he himself could not bequeath the property through adoption if he failed to have a son. The property in that case reverted under the rules of intestate succession to the relatives of his adoptive father. This was true also in the fourth century. Wills without adoption probably did not come into existence until the Hellenistic period. Solon's innovation, then, was the recognition of the right of a man without issue to adopt an heir who by a legal fiction carried on the family. Hence the law had nothing to do with alienation of the property outside of the family.

Up to the time of the Peloponnesian War there is only one possible reference to the alienation of land. But since this occurs in a late list of anecdotes about Themistocles it is scarcely to be considered.

With the Peloponnesian War the evidence begins to appear. The famous offer of Pericles, reported by Thucydides, to give over his land to be public property in case Archidamus should spare his estates on his first invasion into Attica in 431 B.C. may be interpreted with Fine to mean that he gave the usufruct of the property to the state for the duration of the war. It seems to me more likely that Pericles was simply saying, "Confiscate my property if this happens." It is in the war situation that Fine sees the reasons for the abrogation of the long persisting custom of inalienability. The tremendous changes in social and economic life occasioned by the war must have had their effect on ideas of property. Fine sees three factors which contributed to weaken the almost religious feeling for the inalienability of land: the selling of confiscated property; the conferring on state benefactors of the right of possessing property; and the introduction of new citizens. The practice of selling and mortgaging property grew up almost imperceptibly under the impact of the general collapse of the old order of things. No statutory act was involved.

If the thesis of the book is correct—and it is cogently and logically presented —it is interesting to note that the practice of alienating property in Athens appeared only about fifty years earlier than in Sparta.

The book contains an index to the names occurring in the new inscriptions of Chapter I and a useful index to the many texts discussed—literary, epigraphical, papyrological, and parchment. The very clear plates are a great aid in understanding the new horoi.

GERTRUDE SMITH*

* Chairman, Department of Greek, University of Chicago.