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Development of real security for obligations fulfillment in Ancient Greece

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Abstract. The article is devoted to the development of real security for fulfillment of obligations in Ancient Greece. The article proves that the first form of real security for fulfillment of obligations was a possessory pledge. The creditor sought to obtain possession of the pledged object. This is due to underdeveloped archives in Greece (unlike in the countries of the Ancient East), the lack of land register and encumbrance registry, creditor was not sure that the debtor would not alienate pledged property by fraud. The genesis of sale on condition of release is due to emergence of signs of encumbrance of property (in Athens — horoi). A hypothec came into being later than other real security for fulfillment of obligations.

Keywords: Real security, hypothec, pledge, Ancient Greece, sale on condition of release, loan, mortgage

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Развитие вещных форм обеспечения исполнения обязательств в Древней Греции

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Аннтотация. Статья посвящена развитию вещных форм обеспечения исполнения обязательств в Древней Греции. В статье доказывается, что первой формой вещного обеспечения исполнения обязательств был посессорный залог. Кредитор стремился получить во владение предмет залога. Из-за неразвитости архивов в Греции (в отличие от стран Древнего Востока), отсутствия земельного кадастра и кадастра обремененных вещей кредитор не был уверен, что должник не произведет отчуждение предмета залога с помощью мошенничества. Развитие обеспечительной купли продажи оказалось возможным из-за появления знаков обременения имущества (в Афинах — horoi). Ипотека появилась позднее других форм обеспечения исполнения обязательств.

Ключевые слова: ипотека, залог, Древняя Греция, продажа с условием освобождения, кредит

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Real security for fulfillment of obligations[1] in Ancient Greece has been in the focus of research since 19th century and gave rise to various reconstructions. R. Dareste was of the opinion that in Ancient Greece the original form of real security for fulfillment of obligations was a form of sale on condition of release[2] (πρᾶσις ἐπὶ λύσει) which invested the creditor with the right to take the pledged thing into his possession. This institution, similar

[1] «Real security implies that creditor is entitled to satisfy his requirements against the debtor from a particular property provided by the debtor himself or by a third party as security. Besides, real security involves that creditor takes priority over other creditors of the person who provided real security» [2].

[2] See security sales: "Economically sale on condition of release is a form of a secured loan (the purchase price is the amount of loan; the repurchase price is the amount of loan adjusted by interest; the repurchase period is the period for which the loan is accommodated; subject to sale is security remaining at the disposal (ownership) of the creditor until the amount of loan adjusted by interest is paid)" [28. C. 4].

to roman *fiducia,* was later replaced by hypothec, implying neither transfer of possession nor transfer of ownership of the pledged object to the creditor [1. P. 171–173]. E. Szanto disagreed with the concept, considering handing-over of a hostage (nexus) to be the oldest form of security for fulfillment of obligations, which the hypothec formula could also be derived from [2. S. 283, 285, 287]. The development of historiography of the XIX century was summed up in H.F. Hitzig's monograph [3. S. 1–3.] on Ancient Greek pledge. H.F. Hitzig thought that Ancient Greeks had three types of pledge: ἐνέχυρον «pawn» (Faustpfand) provided by a creditor for the possession of the pledged object, ὑποθήκη — pledge under which the possession is retained by a debtor, and πρᾶσις ἐπὶ λύσει — sale on condition of release. However, at the beginning of the 20th century, the dispute about the origin of the hypothec went on: H. Swoboda spoke out against R. Darest's statement that hypothec originated from πρᾶσις ἐπὶ λύσει. According to H. Swoboda, πρᾶσις ἐπὶ λύσει and hypothec appeared simultaneously [4. P. 79].

A new period in historiography is characterized by important works on Athenian law published in the 1950s.

M. Fine's monograph on the Athenian ὅροι appeared in 1951. However, M. Fine focused mostly on the history of Greek forms of securing for fulfillment of obligations. He discerned three forms of real security for fulfillment of obligations at the end of the 5th — beginning of the 4th centuries BC in Greece: 1) pledge of predominantly movable property — ἐνέχυρον — with the transfer of possession to creditor; 2) sale on condition of release — πρᾶσις ἐπὶ λύσει which goes back to Solon's time; 3) ὑποθήκη, involving possession of the pledged object by a debtor, primarily associated with maritime loans security (bottomries) and perceived as mortgage of land [5. P. 61–62, 90–93] only from the 4th century BC. Analyzing Athenian sources, M. Fine came to the conclusion that in Athens, even in the 4th century BC, sale on condition of release πρᾶσις ἐπὶ λύσει was the most common form of securing for fulfillment of obligations [5. P. 91–92].

M. Fine's theory of the primacy of πρᾶσις ἐπὶ λύσει as real security for fulfilment of obligations for loans secured by land is incompatible with M. Finley's hypothesis developed in his book about ὅροι published in 1952. According to M. Finley, Athenian sale on condition of release πρᾶσις ἐπὶ λύσει appeared in the period of complication of debtor's land alienation by new legal and social institutions. Therefore, πρᾶσις ἐπὶ λύσει gave the creditor advantage over the debtor [6. P. 35]. However, M. Finley gave no precisions about when it happened. On this issue, M. Finley opposed the position of R. Dareste, suggesting that the history of the formation of the Greek pledge was similar to the genesis of the Roman pledge. However, M. Finley focused mainly on non-Athenian sources [6. P. VII-VIII].

A new stage of historiography began with important works of E. M. Harris. He summed up the controversies on debts in co-relation between hypothec and πρᾶσις ἐπὶ λύσει in his paper. According to E. M. Harris, ὑποθήκη and πρᾶσις ἐπὶ

λύσει were the same thing [7. P. 358–359; 8. P. 74]. In later work E. M. Harris proved that the term πρᾶσις ἐπὶ λύσει was identical to hypothec [9. P. 433–441].

The theory of E. M. Harris gave rise to considerable controversies. M. Youni [10. P. 145] supported it, whereas A. Kränzlein [11. P. 265] and G. Thür [12. P. 175] disapproved.

In recent years, works by A. Colorio concerning pledge ἐνέχυρον in Athenian law have been published, which involved the transfer of possession of the pledged object to creditor. According to A. Colorio, ἐνέχυρον denotes both property that creditor seized by force as the pledged object, and property that became the pledged object by agreement of the parties [13. P. 46; 14. P. 84)].

This issue should be elaborated on.

The type of pledge, named as ἐνέχυρον, has long been the subject of attention of researchers. There is an opinion generally held in historiography that ἐνέχυρον should be understood as a pawning, that is, pledge of movable property, involving transfer of possession of the pledged object to creditor-pledgee[3]. Regarding the verb ἐνεχυράζω, however, it has been suggested that it can also mean foreclosure after default on debt[4]. However, we should agree with A. Colorio's opinion, who believed that the verb ἐνεχυράζω denoted forms of enforcement for fulfillment of obligations [14. P. 86].

The assumption that ἐνεχυράζω could mean the foreclosure was based on the fact that the process ἐνεχυρασία was fraught with violence[5]: see, e.g., D. 24 (in Timocratem) 197. We can agree with A. Colorio that ἐνεχυρασία is a creditor's acquisition of the pledge by force with a purpose of psychological coercion of the debtor to fulfill the obligation [13. P. 46–47]. However, A. Colorio suggested that acquisition of the pledged object by creditor (ἐνεχυρασία) might have preceded the emergence of the possessory pledge ἐνέχυρον [14. P. 71]. Thus the process of taking over a pledge determined its form. However, violent seizure of pledge must have an explanation: a creditor sought to take possession of the pledged object. Therefore, it is necessary to answer the question why creditors in Greece wanted to take possession of the pledge.

It should be highlighted that hypothec appeared quite late in Ancient Greece. The earliest mention of the hypothec can only be found in literary sources of the 4th century BC [5. P. 77–78; 15. P. 262–265]. We can state the lack of any evidence of hypothec in the 5th century BC. It may be due to characteristics of the sources, but in Attic ὅροι dated 363/362 — 259–258 BC [6. P. 6–7], hypothec is much rarer than πρᾶσις ἐπὶ λύσει: according

[3] The fact that in Athens a pawn is concealed under ἐνέχυρον was pointed out by: G.F. Hitzig (ἐνέχυρον = Faustpfand [3. S. 1; 29. S. 690–691; 30. C. 192–193; 31. C. 57; 5. P. 61–62; 15. P. 254].

[4] M. Finley considered that the verb ἐνεχυράζω denotes foreclosure after default on debt [6. P. 29, 222–223].

[5] In Greek law foreclosure was carried out by self-defense of the right, without the participation of the court [4. S. 80; 6. P. 28]. Therefore, creditor's violence within foreclosure is quite expected.

to M. Finley, with reference ration of 10 hypothecs to 102 cases of πρᾶσις ἐπὶ λύσει [6. P. 29] Hypothecs clearly stemmed from the sphere of maritime loans (bottomries) [5. P. 62, 93]. It is worth paying attention to the fact that land hypothec (land mortgage) and ὅροι appeared simultaneously in Athens. However, Solon's fragments Fr. 36, 37 West mentioned ὅροι, which can be interpreted as evidence of the existence of hypothec in archaic Athens. However, there are two objections to the thesis. Firstly, if we project the situation with land hypothec in Athens of the 4th-3th centuries BC to the Archaic era, then we should expect that Solon's ὅροι meant mostly πρᾶσις ἐπὶ λύσει. Moreover, different ways of title security of obligations, as a rule, are the most ancient [16. P. 7–10]. Secondly, the Solon's ὅροι did not necessarily have to be signs of encumbering of a land plot with a pledge [17. P. 39–40].

At the same time, hypothec had been mentioned in the Ancient Near East since the second half of the second millennium BC: in Mesopotamia of the Old Babylonian period [18. P. 63, 76], in the Old Assyrian colonies in Anatolia [19. P. 138], in Assyria of the Middle Assyrian period [20. P. 174], in ancient Israel [21. P. 253], in Assyria of the New Assyrian period [22. P. 270], in Babylonia of the New Babylonian period [23. P. 302], and finally, in Egypt of the era of demotic papyri [24. P. 314–316].

According to our research, in the laws of Gortyna devoted to legal lien, preserved in 15 different inscriptions (including the so-called "Great Code of Laws of Gortyna" (IC IV 72)), dating from the end of the VI to the beginning of the V centuries BC, neither hypothec nor sale on condition of release was ever mentioned. Gortyn legislation included only possessory pledge [25].

Similarly, there is no hypothec in the inscriptions mentioning purchase and sale from Northern Macedonia and Halkidiki. It mentions either sale on condition of release, or possessory pledge [26. P. 121].

Why did a creditor in Ancient Greece seek to take possession of the pledge? Several explanations could be offered that do not contradict each other.

The creditor sought to take possession of the pledge, since the debtor could use fraud to alienate the pledge — for example, to sell it. Due to the underdevelopment of archives in Ancient Greece (unlike in the countries of the Ancient Near East), the buyer of the pledged object could not check whether it had been encumbered.

The possessiveness of the pledge was very likely facilitated by its connection with purchase and sale, demonstrated by F. Pringsheim. Pledge wasn't reduced to security for fulfillment of obligations, but was also used to redeem creditors debt [27. P. 170–171]. E. M. Harris even came to the conclusion that the creditor in Greece pretended to have bought mortgaged property [7. P. 365]. If the mortgaged property was perceived by the creditor as "bought", it was natural that he sought to take possession of this thing. In other words, the institution of Greek sale-and-purchase influenced that of pledge.

Thus, the possessiveness of the pledge and the creditor's appropriation of the pledged object by force (ἐνεχυρασία) can be explained by the same processes. However, it is scarcely possible to agree with A. Colorio that ἐνεχυρασία preceded the the possessory pledge. The possessiveness of the pledge is more likely to cause its violent appropriation by the creditor than the procedural form (ἐνεχυρασία) cause the possessory pledge. The latter is due to the possibility of debtors fraud as well as to the expansion of sale-and-purchase. The possessiveness of the pledge is the reason of delayed introduction of hypothecs in Greece.

Sale on condition of release correlated positively with such institutions as ὅροι. Therefore, we can assume that in Athens of the 4th — 2nd centuries BC, where we observe no signs of encumbrance of property, there was no sale on condition of release. Both in Athens [5. P. 143; 6. P. 55; 15. P. 258, 268] and elsewhere[6] it was generally the debtor who kept possession of the security payment. If sale on condition of release took place without setting up signs of encumbrance of property, it still gave the debtor a possibility to commit fraud. Signs of encumbrance of property existed in Athens and in the polises of Northern Macedonia and Chalkidiki since the 4th century BC and were absent in Crete in the 5th century. Consequently, there is no trace of sale on condition of release in Cretan inscriptions.

To sum up, possessory pledge was likely to be the first form of real obligations security emerged in the Classic period in Greece. It was the encumbrance sign which gave rise to the sale on condition of release, which was later replaced by the hypothec.

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[6] Unfortunately, the inscriptions from Northern Macedonia and Chalkidiki, which describe sale on condition of release, have been largely unexplored. It is unknown whether the debtor retained possession within sale on condition of release. But it is natural for sale on condition of release that the debtor retained possession of the security payment object [16. C. 4–10].

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