ΕΓΓΥΗ

IN CLASSICAL ATHENS

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ABSTRACT

In Athens in the period of the orators, ἐγγύη was a legal term used to refer to an oral contract made between two parties. Having the basic meaning of "pledge" or "promise", ἐγγύη takes the meaning of "suretyship", "guaranty". The situations in which the term ἐγγύη was used were marriage and suretyship.

During the classical period the ἐγγύη (the "promising" or "pledging of the bride") was the essential element of marriage; it was a prerequisite, without which a marriage was not valid. It was an oral, private contract of marriage (legally valid) concluded with the bridegroom by the woman's κύριος (father, brother or nearest male relative). The most important effect of marriage, the legitimacy of children, depended on the existence and propriety of the ἐγγύη.

Ἐγγύη as surety was employed, in classical Athens, in a wide range of cases:

Ἔγγυητοὶ (guarantors) were required in loan transactions, in many private agreements and in arbitration proceedings.

Ἔγγυητοὶ appear also to play a significant role in the function of the banks in relation to loans paid out by the banker.

Contracts made between the state and (an) individual(s) who bought the right to collect a tax or leased public property could not exist without the existence of ἐγγυητοί.

The initiation of a legal action in some cases could lead into the precautionary imprisonment of the accused man until his case came before the appropriate magistrates for trial, unless ἔγγυητοὶ were nominated by him who would guarantee his appearance in court for trial.

Ἐγγύη was the means for the attainment of an act at a future day.

CONTENTS

PREFACE

The subject of this thesis is ἐγγύη in Athens in the period of the orators. Ἐγγύη means "pledge", "surety", "guarantee"; it was a term used to refer to an oral contract made between two parties and the situations in which this term was used were marriage and suretyship.

Starting with an account of the epic verb ἐγγυαλίζω found in Homer (because I think that there is an etymological connection with the verb ἐγγυᾶν from which the noun ἐγγύη derives), I examine the word ἐγγύη and its derivatives where they occur from Homer to Thucydides, concentrating on the meaning of the word ἐγγύη which it may have in each passage.

In my discussion about ἐγγύη, both in the context of marriage and of suretyship, I have concentrated on the period from Perikles to Demosthenes (approximately 435 to 322 B.C.) because that is the period about which the Attic orators tell us. My chief source of information is the texts of the relevant law-court speeches, in which the speakers either discuss a case of ἐγγύη in some detail or just briefly mention something relating to ἐγγύη. These are supplemented by allusions in comedy, history or even philosophy. Sometimes, when I think that it is necessary, I discuss in detail the context in which a referrence to ἐγγύη is found, in order to understand better the nature and the purpose of the ἐγγύη in that particular case.

In part II I discuss the ἐγγύη in the context of marriage. I start with the earliest appearance of ἐγγύη in this context (Herod. VI,130) trying to define what ἐγγύη was and who had the right to exercise it. I have incorporated a discussion about the dowry trying to see if there was a connection between ἐγγύη and dowry. Finally, I examine the significance of the ἐγγύη for a union of a man and a woman and the consequences of that union on their offspring. I concentrate on how the

formality of marriage, or lack of it, affected the children of a union and especially whether those whose parents were both Athenian, but not united by ἐγγύη (or ἐπιδικασία), were excluded from citizen rights, equally with the children of mixed marriages according to Perikles's citizenship law.

In part III I discuss the cases where ἐγγύη as surety was employed: loan transactions, arbitration proceedings, the banking system, collecting a tax or leasing public property were all cases in which the appearance of ἐγγυηταὶ (guarantors) seem to be necessary. I have, though, concentrated on the ἐγγύη with the meaning of "release on bail" attested in cases of εἰσαγγελία, ἔνδειξις, φάσις, δίκη ἀφαιρέσεως, δίκη βλάβης which were all legal procedures employed (according to the alleged offence) by a prosecutor to initiate legal action against an alleged offender.

PART I

THE VERB *ΕΓΓΥΑΛΙΖΩ*

The verb ἐγγυαλίζω is an Epic and Lyric verb which means literally "to put into the palm of the hand", as it derives from the word γύαλον compounded with the preposition ἐν; so, **ἐν + γύαλ- > ἐγγυαλ-** .

Τὸ γύαλον means "hollow", "the hollow of the hand" and ἐγγυαλίζω means "to put into the hand" and generally "to give, grant, commit, bestow", as it seems from the use of this verb in Homer.

In the *Iliad* this verb is found eleven times and in the *Odyssey* three times. It also appears twice in the Homeric Hymn to Hermes.

The quotations from the *Iliad* are the following:

- μῆτερ, ἐπεί μ᾽ ἔτεκές γε μινυνθάδιόν περ ἐόντα,
  τιμήν πέρ μοι ὄφελλεν Ὀλύμπιος **ἐγγυαλίξαι**
  Ζεὺς ὑψιβρεμέτης· νῦν δ᾽ οὐδέ με τυτθὸν ἔτεισεν.

  [1. 352- 354]

- Ἀτρείδη κύδιστε, ἄναξ ἀνδρῶν Ἀγάμεμνον,
  μηκέτι νῦν δήθ᾽ αὖθι λεγώμεθα, μηδ᾽ ἔτι δηρὸν
  ἀμβαλλώμεθα ἔργον, ὃ δὴ θεὸς **ἐγγυαλίζει**.

  [2. 436]

- Νέστωρ . . . ἀγορήσατο καὶ μετέειπεν·
  "Ἀτρείδη κύδιστε, ἄναξ ἀνδρῶν Ἀγάμεμνον,
  ἐν σοὶ μὲν λήξω, σέο δ᾽ ἄρξομαι, οὔνεκα πολλῶν
  λαῶν ἐσσι ἄναξ καί τοι Ζεὺς **ἐγγυάλιξε**
  σκῆπτρόν τ᾽ ἠδὲ θέμιστας, ἵνα σφισι βουλεύῃσθα . . .".

  [9. 98]

- αὐτὰρ ἐπεί κ' ἢ δουρὶ τυπεὶς ἢ βλήμενος ἰῷ
εἰς ἵππους ἅλεται, τότε οἱ κράτος **ἐγγυαλίξω**
κτείνειν, . . .

[11. 192]

- τότε τοι κράτος **ἐγγυαλίξει** κτείνειν

[11. 207]

- ἔνθα Ζεὺς Πυλίοισι μέγα κράτος **ἐγγυάλιξε**·

[11. 753]

- ῥεῖα δ' ἀρίγνωτος Διὸς ἀνδράσι γίγνεται ἀλκή,
ἠμὲν ὀτέοισιν κῦδος ὑπέρτερον **ἐγγυαλίξῃ**
ἠδ' ὅτινας μινύθῃ τε καὶ οὐκ ἐθέλῃσιν ἀμύνειν,
ὡς νῦν Ἀργείων μινύθει μένος, ἄμμι δ' ἀρήγει.

[15. 491]

- ὅς ῥα τόθ' Ἕκτορι κῦδος ὑπέρτερον **ἐγγυάλιξε**.

[15. 644]

- ἀτάρ τοι νῦν γε μέγα κράτος **ἐγγυαλίξω**.

[17. 206]

- πεζὸς γὰρ τὰ πρῶτα λιπὼν νέας ἀμφιελίσσας
ἦλυθε, καί κε Τρωσὶ μέγα κράτος **ἐγγυάλιξεν**,
εἰ μὴ κοίρανος ὦκα ποδώκεας ἤλασεν ἵππους.

[17. 613]

- ἴστε γὰρ ὅσσον ἐμοὶ ἀρετῇ περιβάλλετον ἵπποι·
ἀθάνατοί τε γάρ εἰσι, Ποσειδάων δὲ πόρ' αὐτοὺς
πατρὶ ἐμῷ Πηλῆι, ὁ δ' αὖτ' ἐμοὶ **ἐγγυάλιξεν**.

[23. 278].

The quotations from the Odyssey are:

- ἀλλά σφωε δόλος καὶ δεσμὸς ἐρύξει,
εἰς ὅ κέ μοι μάλα πάντα πατὴρ ἀποδῷσιν ἔεδνα,
ὅσσα οἱ **ἐγγυάλιξα** κυνώπιδος εἵνεκα κούρης
[8. 319]
- νῦν αὖ Θεσπρωτῶν ἀνδρῶν παρὰ νηὸς ἀποδρὰς
ἦλυθ' ἐμὸν πρὸς σταθμόν, ἐγὼ δέ τοι **ἐγγυαλίξω**·
ἔρξον ὅπως ἐθέλεις· ἱκέτης δέ τοι εὔχεται εἶναι.
[16. 66]
- ἐνθα δ' ἔπειτα
φρασσόμεθ' ὅττι κε κέρδος Ὀλύμπιος **ἐγγυαλίξῃ**.
[23. 140].

Finally, the two quotations from the Hymn to Hermes are the following:

- ὣς εἰπὼν ὦρεξ', ὁ δ' ἐδέξατο Φοῖβος Ἀπολλων,
Ἑρμῇ δ' **ἐγγυάλιξεν** ἔχων μάστιγα φαεινήν,
βουκολίας τ' ἐπέτελλεν·
[Hymn to Hermes, 496-498]
- καὶ τὰ μὲν Ἑρμῆς
Λητοίδην ἐφίλησε διαμπερὲς ὡς ἔτι καὶ νῦν,
σήματ' ἐπεὶ κίθαριν μὲν Ἑκηβόλῳ **ἐγγυάλιξεν**
ἱμερτήν, δεδαὼς ὁ δ' ἐπωλένιον κιθάριζεν.
[id. 507-510].

In these quotations the subject of the verb ἐγγυαλίζω is Zeus (~~eight~~ nine times) and ~~only twice~~ Seven times is another person (not Zeus). As far as the objects are concerned, they vary (κράτος - five times; κῦδος - twice; σκῆπτρον, τιμήν, ἔργον, ἵππους, κέρδος - and four times it is something else once each), but they are not far away from the idea of power and glory given in most cases by Zeus.

Therefore, the verb ἐγγυαλίζω seems to have a meaning more dignified and powerful than the verb δίδωμι used to express mainly and simply the act of giving something to somebody. Perhaps it is like the English "bestow" rather than "give", and comes closer to the idea of promising and committing oneself to somebody for doing something and seems, more or less, to have a meaning not very different from the meaning of ἐγγυῶ.

Probably they derive from the same root [γυαλ - (from the word γύαλος)] with the loss of λ from the latter and so we have:

*** ἐν + γυαλ + ιζω > ἐγγυαλίζω**

*** ἐν + γυαλ + ω > ἐγγυάλω > ἐγγυάω > ἐγγυῶ.**

* * *

THE WORD ΕΓΓΥΗ FROM HOMER TO THUCYDIDES.[1]

HOMER

The earliest appearance of the word is in Homer *Od.* 8. 351. Aphrodite and Ares have been surprised in the act of adultery by Hephaistos who then holds them bound. Poseidon intervenes between them and asks Hephaistos to release Ares:

Λῦσον· ἐγὼ δέ τοι αὐτὸν ὑπίσχομαι, ὡς σὺ κελεύεις, 347

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[1] In this chapter I examine the word ἐγγύη and its derivatives where they occur in the Greek texts from Homer to Thucydides. First of all, I have concentrated on the meaning of the word ἐγγύη (or its derivatives) which it may have in each passage, and sometimes I have tried to interpret the context within which the word occurs, in order to shed light on the function (where it is possible) that the word ἐγγύη might have. However, many questions remain unanswered, and maybe others arise.

τίσειν αἴσιμα πάντα μετ' ἀθανάτοισι θεοῖσι. 348

Hephaistos replies:

μή με, Ποσείδαον γαιήοχε, ταῦτα κέλευε· 350

δειλαί τοι δειλῶν γε καὶ ἐγγύαι ἐγγυάασθαι. 351

πῶς ἂν ἐγώ σε δέοιμι μετ' ἀθανάτοισι θεοῖσιν, 352

εἴ κεν Ἄρης οἴχοιτο χρέος καὶ δεσμὸν ἀλύξας; 353

And then Poseidon says:

Ἥφαιστ', εἴ περ γάρ κεν Ἄρης χρεῖος ὑπαλύξας 355

οἴχηται φεύγων, αὐτός τοι ἐγὼ τάδε τίσω. 356

Then Hephaistos releases the lovers and Ares takes himself off to Thrace and Aphrodite leaves for Cyprus.

Poseidon's first undertaking is that Ares will pay up: "ἐγὼ δὲ τοι αὐτὸν ὑπίσχομαι . . . τίσειν. . .", "I promise that he will pay". Hephaistos refuses Poseidon's offer here by saying that "δειλαί τοι δειλῶν γε καὶ ἐγγύαι ἐγγυάασθαι" There has been much controversy on this line. Some scholars think that δειλῶν refers to Hephaistos and others think that δειλῶν refers to Ares. The *Scholia* are perplexed whether to refer δειλῶν to Ares [αἱ ὑπὲρ τῶν κακῶν καὶ δειλῶν ἐγγύαι καὶ αὐταὶ κακαί εἰσι, τὴν πίστιν ὑπὲρ τῶν τοιούτων μηδενὸς τηρεῖν δυναμένου, ("pledges given on behalf of a worthless fellow")] or to Hephaistos [αἱ πρὸς τοὺς δειλαίους καὶ ἀσθενεῖς γινόμεναι ἐγγύαι οὐδὲν δύνανται, τῶν ἀδικουμένων ἐπεξελθεῖν μὴ δυναμένων δι' ασθένειαν, ("pledges given to one of low status")]. But the reason for their perplexity is that δειλῶν may refer to both of them at the same time.

On the one hand, Hephaistos is pretty sure that Ares will avoid paying the μοιχάγρια[2] because he is δειλός and so pledges given on behalf of a worthless fellow are worthless. On the other hand, Hephaistos wonders how he would be able to keep Poseidon (the guarantor) bound, if Ares who is δειλός went off; Hephaistos is δειλός too (weak) to do this, so pledges given to one of low status are weak.

However, Hephaistos' weakness becomes evident only in case of Ares going off. If Ares stays and pays his debt, Hephaistos' weakness does not play any role, because he has no need to keep Poseidon bound. Therefore, δειλῶν first refers to Ares (as a "wretched" person) who will go off and then, as a result of Ares escape, to Hephaistos (as a "weak" person) who will not be able to keep Poseidon bound.

But what is it that makes Hephaistos reply in this way? In my opinion, this is the form of guarantee that Poseidon offers. Poseidon gives surety for a third party (Ares) and the surety he offers consists of Ares paying. So, it is Ares who must carry out the ἐγγύη. But, if Ares goes off, how can Hephaistos bind Poseidon to pay the debt? For this reason Hephaistos refuses this form of surety which Poseidon offers. Then Poseidon alters the form of his undertaking. He promises that he will pay himself, if Ares goes off and evades his debt. In responce to this second promise, Hephaistos releases Ares and Aphrodite.

This second promise is complementary to the first; the extra element here is Poseidon's promise that he will pay himself. This is what makes Hephaistos accept the guarantee. When Hephaistos refuses to accept the first guarantee by saying δειλαί τοι δειλῶν γε καὶ ἐγγύαι ἐγγυάασθαι, he has a reason for that

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[2] μοιχάγρια: the penalty for having been taken in adultery, from μοιχός "adulterer" and ἀγρέω "seize, take".

rejection; the reason was the form of the ἐγγύη which shifted the responsibility to Ares first and then to Hephaistos. But now Poseidon's second undertaking is accepted by Hephaistos who while in the first case said δειλαί τοι δειλῶν γε καὶ ἐγγύαι ἐγγυάασθαι in the sense that "pledges given on behalf of a worthless fellow to one of low status are worthless", now may think that *ἀγαθαί τοι ἀγαθῶν γε καὶ ἐγγύαι ἐγγυάασθαι* in the sense that "pledges given by good men on behalf of themselves are good to accept".

Let us turn now to line 352: πῶς ἄν ἐγώ σε δέοιμι μετ' ἀθανάτοισι θεοῖσιν;

δέοιμι means "put you in chains" and, as Merry and Riddell have properly said in their commentary on Homer's *Odyssey*, it must not be diluted to some such meaning as "keep a hold on you". Thus, according to line 352 we may suppose that a guarantor will be arrested by an accuser if an accused for whom he has stood surety does not carry out the provisions of the surety.

Therefore, the giving and receiving of sureties for a third party was risky. In this spirit, probably, on the temple of Apollo at Delphi was inscribed the warning "Ἐγγύη· πάρα δ' ἄτη.", "Disaster is close to pledging", (cf. Epicharmos, fr.268).

* * *

PINDAR

A derivative of the word ἐγγύη is found in Pindar *Olympian* 11; this is the verb ἐγγυάσομαι at line 16.

Olympian 11 and Olympian 10 were both written for the victory of Agesidamos of Epizephyrian Locri in the boys' boxing contest at the Olympic Games of 476 B.C. These poems have been the subject of extremely controversial interpretation. Most scholars (except E.L. Bundy, *Studia Pindarica* I, *The Eleventh Olympian Ode*) believe that there is a relation between *O.*11 and *O.*10. According to Scholia (Scholia *O* 11 inscr. b τῷ αὐτῷ . . . τόκον) *O.*11 is the "interest" referred to in the poem of *O.*10. That is why the Alexandrians

placed the Eleventh after the Tenth in their editions, because the word τόκος in *O.*10 seemed to designate *O.*11 as interest paid on a debt long overdue.

Modern scholars[3] have tended to reverse this relationship, making the eleventh earlier than the tenth. They base their arguments on the brevity of *O.*11 and a couple of future tenses that appear in its final stanza. The brevity of the poem (*O.*11) would indicate that Pindar composed it at Olympia immediately after the victory (such miniatures as *O.*11, 12 and 14, and *P.*7 have been categorized as a special type of epinicion, sung at the place of victory during the festival of the games)[4] and the future tenses would mean that Pindar will go to Western Locri sometime later and celebrate Hagesidamos' victory on a grander scale, as he eventually did with *Olympian* 10. In other words, they argue that *O.*11 was written and performed at Olympia immediately after the victory and it contains the promise of a longer ode (*O.*10) to follow, a promise kept after some delay.

But this interpretation has been rejected by Elroy L. Bundy in the first of his *Studia Pindarica*. Bundy argued that the future tenses do not refer to anything outside the ode in which they occur. Bundy's argument is basically that the poem ought to be taken on its own merits, by which it must stand or fall.

The future tenses which occur in this ode are κελαδήσω (14) and ἐγγυάσομαι (16); ἐγγυάσομαι: In this context when Pindar says ἐγγυάσομαι "I will guarantee" the good qualities of the Locrians, he means "I guarantee them now for the future". When we are promising or committing ourselves now to some future action, by a natural emphasis the verb of promise or committal is sometimes stated in the future tense.

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[3] L.R. Farnell, *Works of Pindar*, Vol.2, Critical Commentary, London, 1932; G.S. Conway, The *Odes of Pindar*, London, 1972.

[4] See, C.M. Bowra, *Pindar*, Oxford, 1964

However, κελαδήσω does not mean "I am singing now", as Bundy argued, but "I will sing" and it may refer outside its ode. Κελαδήσω, then, may hint that he knew that he would be writing the second ode (*O.*10). Lines in both odes indicate that *O.*11 was composed at an earlier date than *O.*10 :

- *Olympia 11*

14 κόσμον ἐπὶ στεφάνῳ χρυσέας ἐλαίας
ἁδυμελῆ *κελαδήσω,*
15 Ζεφυρίων Λοκρῶν γενεὰν ἀλέγων.
ἔνθα συγκωμάξατ᾽· *ἐγγυάσομαι*
μη μέν, ὦ Μοῖσαι, φυγόξενον στρατὸν
μηδ᾽ ἀπείρατον καλῶν
ἀκρόσοφόν τε καὶ αἰχματὰν ἀφίξε-
σθαι. τὸ γὰρ ἐμφυὲς οὔτ᾽ ἄϊθων ἀλώπηξ
20 οὔτ᾽ ἐρίβρομοι λέοντες διαλλάξαιντ᾽ ἂν ἦθος.

- *Olympia 10*

3 γλυκὺ γὰρ αὐτῷ μέλος ὀφείλων
ἐπιλέλαθ᾽.
--- --- --- --- --- --- --- --- ---
7 ἔκαθεν γὰρ ἐπελθὼν ὁ μέλλων χρόνος
8 ἐμὸν καταίσχυνε βαθὺ χρέος.
9 ὅμως δὲ λῦσαι δυνατὸς ὀξεῖαν ἐπιμομφὰν
τόκος·

Therefore, Pindar in *O.*11 promises another ode (κελαδήσω) which will follow this one. He invites the Muses to go to Locri "ἔνθα συγκωμάξατ᾽", "Go there and join the revels, Muses". The laudator assures (ἐγγυάσομαι) the Muses that

among the Locrians they will be well received and understood; φυγόξεινον points to the hospitality they will enjoy, and μήτ' ἀπεῖρατον καλῶν to the frequent experience their audience can be presumed to have had of *enkomia*.

Thus, the poet guarantees the Locrians' credentials to his listeners. Ἐγγυάσομαι is a powerful word which makes his promise stronger. It is as if he says that it will be worth while to compose a beautiful ode suited to the audience. Finally, he bases his guarantee on the opinion that an inborn nature cannot be changed.

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HERODOTOS, I. 196

There is another passage from Herodotos where two derivatives of the word ἐγγύη are mentioned: ἐγγυητέω and ἐγγυητάς.

> ἐκδοῦναι δὲ τὴν ἑωυτοῦ θυγατέρα ὅτεῳ βούλοιτο ἕκαστος οὐκ ἐξῆν οὐδὲ ἄνευ ἐγγυητέω ἀπαγαγέσθαι τὴν παρθένον πριάμενον, ἀλλ' ἐγγυητὰς χρῆν καταστήσαντα ἢ μὲν συνοικήσειν αὐτῇ, οὕτω ἀπάγεσθαι. [Herod. I. 196, 3-4].

They are used in connection with the procedure of marriage as it took place in Babylonia and the Illyrian tribe of the Eneti. It is obvious that the procedure of marriage here was a procedure of purchase, since the bride was literally sold and the bridegroom bid and bought her. The father was not allowed to give his daughter in marriage to a man of his choice.

However, the surprising thing here is that, although the marriage was one by purchase, the presence of guarantors (ἐγγυητάς) was essential in order to guarantee that the bridegroom truly intended to keep the girl as his wife (συνοικεῖν). Otherwise, the bridegroom could not take away the bride. The

guarantors were appointed by the bridegroom (ἀλλ' ἐγγυητὰς χρῆν καταστήσαντα). We are not told who might be the ἐγγυηταί or what role they would play if the bridegroom failed to carry out his responsibilities.

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HERODOTOS , VI. 57

Another example of the word ἐγγύη occurs in Herodotos. Herodotos, in VI. 57 of his history, relates the privileges and the rights which the kings had in Sparta.

According to Herodotos (VI. 57, 4-5) the kings by themselves judged only three kinds of case:

> δικάζειν δὲ μούνους τοὺς βασιλέας τοσάδε μοῦνα· πατρούχου τε παρθένου πέρι, ἐς τὸν ἱκνέεται ἔχειν, ἢν μή περ ὁ πατὴρ αὐτὴν ἐγγυήσῃ, καὶ ὁδῶν δημοσιέων πέρι. καὶ ἤν τις θετὸν παῖδα ποιέεσθαι ἐθέλῃ, βασιλέων ἐναντίον ποιέεσθαι.
>
> " They have the whole decision of certain cases, which are these, and these only: when a maiden is left the heiress of her father's estate, and has not been betrothed by him to anyone, they decide who is to marry her; in all matters concerning the public highways they judge; and if a person wants to adopt a child, he must do it before the kings."

Therefore, among the kinds of case which the kings judged were those concerning the marriage of a heiresses. If a father died leaving no sons but only one or more daughters, she was named ἐπίκληρος. Ἐπίκληρος means not that she was the heiress, but that she passed with the inheritance to the nearest male relative, whom she married in order to bear a son who would inherit the estate. A father, if he gave an only daughter in marriage, had to give her to the nearest relative or to an adopted son. If the father died without betrothing his only

daughter, the nearest male relative could claim the hand of the daughter and the inheritance. If there were several claimants someone had to decide who had the right to her according to the law. To this procedure this sentence may refer (πατροúχου τε παρθένου πέρι, ἐς τὸν ἱκνέεται ἔχειν, ἢν μή περ ὁ πατὴρ αὐτὴν ἐγγυήσῃ). We learn from Aristotle that the number of females so situated was very great at Sparta, [Arist. *Polit.* 1270a, 23-25: ἔστι δὲ καὶ τῶν γυναικῶν σχεδὸν τῆς πάσης χώρας τῶν πέντε μερῶν τὰ δύο, τῶν τ' ἐπικλήρων πολλῶν γινομένων, καὶ διὰ τὸ προῖκας διδόναι μεγάλας.].

In Sparta this duty (to decide who is the nearest male relative to ἐπίκληρος) was undertaken by the kings. In Athens, the same duty had been transferred from the ancient kings to the archon Eponymos.

However, as far as the ἐγγύη is concerned, it is uncertain whether or not the ἐγγύη was a precondition for a legal marriage, as it was in Athens, [details on this matter, see D.M. MacDowell, *Spartan Law*, (Edinburgh)1986, pp.77-82].

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HERODOTOS, VI, 130

The word ἐγγύη is also found in Herodotos VI, 130.2 and it is also used here in the context of marriage.

Agariste, the daughter of Kleisthenes of Sikyon, was to be given in marriage by her father to the best husband that he could find in the whole of Greece. A great number of men came to Sikyon as suitors and Kleisthenes had to chose one of them for his daughter's husband (Herod. VI, 126-130). He did so and gave his daughter as a wife to Megakles by saying: τῷ δὲ Ἀλκμέωνος Μεγακλέι ἐγγυῶ παῖδα τὴν ἐμὴν Ἀγαρίστην νόμοισι τοῖσι Ἀθηναίων, "I betroth my daughter,

Agarista, to Megakles, the son of Alkmaeon, according to the law of Athens". Herodotos continues: φαμένου δὲ ἐγγυᾶσθαι Μεγακλέος ἐκεκύρωτο ὁ γάμος Κλεισθένει, "when Megakles said that he accepted the engagement the marriage was ratified by Kleisthenes".

In this passage there is an agreement between Kleisthenes (the father of the bride) and Megakles (the bridegroom). The verbs used here are ἐγγυῶ (on the part of Kleisthenes) and ἐγγυᾶσθαι (on the part of Megakles). Therefore, a bride's father ἐγγυᾷ τινι τὴν θυγατέρα and a bridegroom ἐγγυᾶταί τινα.

Furthermore, the fact that Kleisthenes does not say only "I betroth my daughter to Megakles" but he adds νόμοισι τοῖσι Ἀθηναίων, "according to the Athenian law", implies two things: first that ἐγγύη - the formula of betrothal- was a prerequisite, without which a marriage was not valid, because otherwise there would have been no point in mentioning Athenian law; and second that marriage between an Athenian citizen and an alien woman was at that time (in the first half of the sixth century) recognized as legitimate by Attic Law, while by a law of Perikles in 451B.C. this was changed and a citizen could not marry an alien (Plut. *Perikles* 37,3).

* * *

AESCHYLOS *EUMENIDES* 898

Another instance of the word ἐγγύη is found in Aeschylos *Eumenides* 898:

καί μοι πρόπαντος ἐγγύην θήσῃ χρόνου;

"will you give me a security (will you guarantee)

that this privilege shall last for all time?"

The word ἐγγύη is used here in the sense of promise, suretyship. The verb ἐγγύην τίθεμαι is equivalent to ἐγγύην ποιεῖσθαι and means "to give a pledge, to guarantee".

Let us see how the word functions here. After Orestes has been acquitted by the tribunal to which Athena chose to refer the conflict between Orestes and the Erinyes, it remains for Athena to restrain the Erinyes from carrying out their threats of destruction against Athens. Athena succeeds in this difficult task by offering them the consolation of a special cult in Athens. But the most difficult task for Athena was to persuade the Erinyes to accept her offer.

At first the Furies are blinded by pride and passion to Athena's offer, but Athena does not give up. The Furies repeat their maledictions ignoring Athena's words, but Athena continues to stimulate them by reccounting the honours which they will receive, if they agree with her.

The process of persuading is difficult but finally successful. At line 892 the chorus, through their leader, begin to speak in dialogue with Athena and ask:

ἄνασσ' Ἀθάνα, τίνα με φῆς ἔχειν ἕδραν;

"Queen Athena, what seat do you say shall be mine?"

This indicates that the chorus become more willing to discuss Athena's offer. At line 898 the chorus ask Athena if she will guarantee that they will keep the honour for all time. Athena does not give a straight answer to this question but answers by saying that her word is her bond. Her power makes her word to be her bond.

From this point of the play the chorus changes its attitude and replies:

θέλξειν μ' ἔοικας, καὶ μεθίσταμαι κότου

"You seem likely to persuade me, and I am shifting from my anger".

But what is it that finally makes the chorus accept Athena's offer? The lines 898-9 (Χο. καί μοι πρόπαντος ἐγγύην θήσῃ χρόνου; /Αθ. ἔξεστι γάρ μοι μὴ

λέγειν ἃ μὴ τελῶ.) are the key lines which open the door for the agreement between Athena and the Furies. It is interesting to see how this agreement is built and how Athena solves the problem. Athena could deal with the Erinyes by force (βία), if she wished, as it seems at lines 826-8:

κἀγὼ πέποιθα Ζηνί, καὶ τί δεῖ λέγειν;
καὶ κλῆδας οἶδα δώματος μόνη θεῶν
ἐν ᾧ κεραυνός ἐστιν ἐσφραγισμένος.
"I alone among the gods know the keys of the house
where is sealed the lightning."

But she has no need to do so,

ἀλλ᾽ οὐδὲν αὐτοῦ δεῖ (829)
"But there is no need of it".

She turns away from it to λόγος and πειθώ,

σὺ δ᾽ εὐπιθὴς ἐμοὶ (829)
"let me persuade you",

and

ἀλλ᾽ εἰ μὲν ἁγνόν ἐστί σοι Πειθοῦς σέβας (885)
"if you revere Persuasion's majesty",

and through the λόγος she promises and offers them the consolation of a special cult in Athens. Finally the ἐγγύη comes to ratify the treaty and a solution has been found. The route to the solution can be shown as follows:

λόγος: offers, promises }
+ } (794-897) ⟹ ἐγγύη (898-9)
πειθώ }

Solution (900 ff.)

The ἐγγύη is a prerequisite, without which the solution cannot be achieved.

Finally, from this appearance of the word ἐγγύη we do not get any information about the ἐγγύη and its function as a legal term in Athens in the fifth century B.C. However, we may assume that Aeschylos, who used this word at this point of his play where a solution was required, had in his mind certain examples of Athenian practice where ἐγγύη had functioned in a positive and effective way for conclusion of an agreement.

* * *

SOPHOCLES *OEDIPUS COLONEUS* 94

Another derivative of the word ἐγγύη is found in Sophocles *Oedipus Coloneus*:

σημεῖα δ' ἥξειν τῶνδέ μοι παρηγγύα, (94)

ἢ σεισμόν ἢ βροντήν, ἢ Διὸς σέλας. (95)

At lines 84-110, Oedipus says that when he inquired at Delphi concerning his parentage, Apollo predicted the calamities which awaited him; but also promised him rest, so soon as he should reach a seat of the Awful Goddesses. There he should close his troubled life and when his end was near, there should be a sign from the sky.

The verb παρεγγυάω is often used as a military term and means "pass on" (the watchword or something like this), [e.g. Xen. *Cyr.*3.3,58 σύνθημα παρεγγυήσας "Ζεὺς σωτήρ'"; Polyb.7.18,4 σπεύδοντες παρεγγυᾶν ἐπὶ τινας; Xen.*An.* 4.7,24 βοώντων τῶν στρατιωτῶν "θάλαττα, θάλαττα", καὶ παρεγγυώντων].

According to Jebb[5] the word παρηγγύα in this passage cannot mean "pledged", "promised" (ἠγγυᾶτο), but only "passed the watchword to me", i.e. "told me, as a sign".

The same verb (παρεγγυάω) is also used in Euripides *Supplices* 700, as a military term meaning "pass the word" (news, encouragement or commands):

κἀσ μέσον ἅπαντα συμπατάξαντες στρατὸν
ἔκτεινον ἐκτείνοντο καὶ παρηγγύων
κελευσμὸν ἀλλήλοισι σὺν πολλῇ βοῇ.

* * *

EURIPIDES *IPHIGENIA IN AULIS* 703.

The verb ἐγγυάω (ἠγγύησε, past tense) is found in Euripides *Iphigenia in Aulis* 703.

After Klytaimnestra's desire to get information about her prospective son-in-law, Agamemnon speaks of Achilleus' ancestors. His mother is Thetis whom Zeus betrothed to Peleus, while her father (guardian) just gave her in marriage to him:

Ζεὺς ἠγγύησε καὶ δίδωσ' ὁ κύριος 703

The fact that in this incident Zeus is the person who performs the ἐγγύη and not the bride's guardian who just gives (δίδωσ') his daughter in marriage, must be regarded as an exceptional case within the framework of mythology and not as an example of an Athenian practice in the fifth century B.C.

At Athens the ἐγγύη (formal betrothal) of the bride by her guardian (κύριος)[6] was a necessary preliminary to a legal marriage. The historic present (δίδωσ')

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[5] R.C. Jebb, *Sophocles: Oedipus Coloneus*, (Cambridge) 1889, p.27.

following the past tense (ἠγγύησε) marks that the betrothal preceded the wedding.

In the same context (of marriage) the word κατηγγύησ' is used in Euripides' Orestes 1079:

> γάμων δὲ τῆς μὲν δυσπότμου τῆσδ' ἐσφάλης
> ἣν σοι κατηγγύησ' ἑταιρίαν σέβων.

* * *

THUCYDIDES III, 70.1

Thucydides III, 69-85, gives a detailed account of the events at Kerkyra (the great stasis).

After the battle of Sybota the Korinthians kept two hundred and fifty Kerkyraian prisoners. These prisoners according to Thucydides (I 55.1) belonged to some of the most influential families in Kerkyra and the Korinthians planned to use these men in order to bring Kerkyra over to their side.

After some time, in 427 B.C., the Korinthians arranged for the release of their Kerkyraian prisoners:

οἱ γὰρ Κερκυραῖοι ἐστασίαζον, ἐπειδὴ οἱ αἰχμάλωτοι ἦλθον αὐτοῖς οἱ ἐκ τῶν περὶ Ἐπίδαμνον ναυμαχιῶν ὑπὸ Κορινθίων ἀφεθέντες, τῷ μὲν λόγῳ

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[6] The natural κύριος was the father; in case of his death or absence the duty devolved upon the brother of the bride, or her grandfather on the father's side. (see Harrison, *The Law of Athens*, Vol. I, pp 97ff.).

ὀκτακοσίων ταλάντων τοῖς προξένοις διηγγυημένοι, ἔργῳ δὲ πεπεισμένοι Κορινθίοις Κέρκυραν προσποιῆσαι [Thuc. III, 70,1].

τοῖς προξένοις: A proxenos was the "guest-friend" of a city-state. It was his duty to look after the interests of a foreign state in his own country; for example, the Spartan proxenos in Athens was an Athenian citizen.

Jowett thinks that τοῖς προξένοις refers to Korinthian citizens who were the representatives of Kerkyra in Korinth.[7] But it may also refer to the Korinthian proxenoi in Kerkyra (who were Kerkyraian citizens). If it is so, then, they (the Korinthian proxenoi in Kerkyra) probably raised a sum of money (800 talents according to Thucydides)[8] which was required for ransoming the kerkyraian prisoners. So, the Kerkyraian prisoners were released with ransom on the security of their proxenoi and went back to Kerkyra.

The verb διεγγυάω in the passive voice means "to be bailed by anyone".

* * *

As we have seen the word ἐγγύη and some of its derivatives are found at least eleven times in the Greek texts from Homer to Thucydides.

Four of them have occurred in the context of suretyship [Homer *Od.* 8.351/ Pindar *O.* 11.16/ Aeschylos *Eum.* 898/ Thucydides III. 70.1]; another five in the context of marriage [Herodotos I.196; VI.57, 130/ Euripides *I.A.* 703; *Orestes*

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[7] B. Jowett, *Thucydides* II p.201.

[8] For the amount of the money see T. Arnold, *Thucydides* II p.441.

1079], and twice the word with παρ- has the meaning of a military term [Sophocles *OC* 94/ Euripides *Supp.* 700].

* * *

Apart from the word ἐγγύη itself, there are some other instances of adjectives deriving from the word ἐγγύη, such as φερέγγυος, ἐχέγγυος, ἀνεχέγγυος and ὑπέγγυος.

The adjective φερέγγυος is found nine times: five times in Aeschylos, once in Sophocles, twice in Herodotos and once in Thucydides.

The quotations from Aeschylos are the following:

-τίν' ἀντιτάξεις τῷδε; τίς Προίτου πυλῶν
κλῆθρων λυθέντων προστατεῖν **φερέγγυος**;
[*Septem contra Thebas* 395-6]

- ἀνὴρ δ' ἐπ' αὐτῷ, κεἰ στόμαργός ἐστ' ἄγαν,
αἴθων τέτακται λῆμα, Πολυφόντου βία,
φερέγγυον φρούρημα προστατηρίας
Ἀρτέμιδος εὐνοίαισι σύν τ' ἄλλοις θεοῖς.
[id. 447-450]

- καὶ τῷδε φωτὶ πέμπε τὸν **φερέγγυον**
πόλεως ἀπείργειν τῆσδε δούλιον ζυγόν.
[id. 470-1]

- στέγει δὲ πύργος, καὶ πύλας **φερεγγύοις**
ἐφαρξάμεσθα μονομάχοισι προστάταις.
[id. 797-8]

- ἄναξ Ἄπολλον, οἶσθα μὲν τὸ μὴ ἀδικεῖν·

ἐπεὶ δ' ἐπίσται, καὶ τὸ μὴ ἀμελεῖν μάθε.

σθένος δὲ ποιεῖν εὖ **φερέγγυον** τὸ σόν.

[*Eumenides* 85-7]

In Sophocles the adjective φερέγγυος occurs in *Electra*, 942:

τί γὰρ κελεύεις ὧν ἐγὼ **φερέγγυος**;

It is also found in Herodotos, V 30.15 and VII 49.8:

- Αὐτὸς μὲν ὑμῖν οὐ **φερέγγυός** εἰμι δύναμιν παρασχεῖν τοσαύτην ὥστε κατάγειν ἀεκόντων τῶν τὴν πόλιν ἐχόντων Ναξίων·

[Herod. V 30]

- οὔτε γὰρ τῆς θαλάσσης ἔστι λιμὴν τοσοῦτος οὐδαμόθι, ὡς ἐγὼ εἰκάζω, ὅστις ἐγειρομένου χειμῶνος δεξάμενός σευ τοῦτο τὸ ναυτικὸν φερέγγυος ἔσται διασῶσαι τὰς νέας.

[id. VII 49]

In Thucydides it occurs in VIII 68, 4.1:

πολύ τε πρὸς τὰ δεινά, ἐπειδήπερ ὑπέστη, **φερεγγυώτατος** ἐφάνη.

The adjective φερέγγυος literally means "one who can give surety either for himself or for another", "guarantee-bringing" (φερέγγυος<φέρειν + ἐγγύη) and generally "trusty", "assuring", "responsible", "sufficient".

The adjective ἐχέγγυος is found five times: once in Sophocles, three times in Euripides and once in Thucydides.

In Sophocles it occurs in *Oedipus Coloneus*, 284:

ἀλλ' ὥσπερ ἔλαβες τὸν ἱκέτην **ἐχέγγυον**,

ῥύου με κἀκφύλασσε·

In Euripides, it is found in *Medea*, 387:

καὶ δὴ τεθνᾶσι· τίς με δέξεται πόλις;

τίς γῆν ἄσυλον καὶ δόμους **ἐχεγγύους**

ξένος παρασχὼν ῥύσεται τοὐμὸν δέμας;

in *Andromacha*, 192:

εἶπ', ὦ νεᾶνι, τῷ σ' **ἐχεγγύῳ** λόγῳ

πεισθεῖσ' ἀπωθῶ γνησίων νυμφευμάτων.

and in *Phoenissae*, 759:

τὴν δόσιν δ' **ἐχέγγυον**

τὴν πρόσθε ποιῶ νῦν ἐπ' ἐξόδοις ἐμαῖς.

Finally, it occurs in Thucydides III 46, 1.1:

οὔκουν χρὴ οὔτε τοῦ θανάτου τῇ ζημίᾳ ὡς **ἐχεγγύῳ** πιστεύσαντας χεῖρον βουλεύσασθαι. . .

Ἐχέγγυος (<ἔχειν + ἐγγύη) generally means "able to give a pledge", "having a good security (ἐγγύη) to give", and so "trustworthy", "secure" (like φερέγγυος), as in *Med.*387, *Androm.*192, *Phoen.*759, Thuc. III.46.

However, in *Oedipus Coloneus* 284, ἐχέγγυον means "having received a pledge" (it is the promise of 176-7); it takes the meaning of "one who holds a pledge given by another person".

In *Phoenissae* 759 it is connected with ἐγγύησις, formal betrothal. But generally it is said of those who hold or are able to give sureties for their conduct.

The adjective ὑπέγγυος is found three times:

in Aeschylos *Choephoroi* 39:

κριταί τε τῶνδ' ὀνειράτων

θεόθεν ἔλακον **ὑπέγγυοι**

in Euripides *Hecuba* 1027:

τὸ γὰρ **ὑπέγγυον**

Δίκᾳ καὶ θεοῖσιν οὐ ξυμπίτνει,

ὀλέθριον ὀλέθριον κακόν ,

and in Herodotus V 71,7:

τούτους ἀνιστᾶσι μὲν οἱ πρυτάνιες τῶν ναυκράρων, οἵ περ ἔνεμον τότε

τὰς Ἀθήνας, **ὑπεγγύους** πλὴν θανάτου.

Ὑπέγγυος means "one who is under surety". When it is said of persons, it means "having given surety", "liable to be called to account or punished". When it is said of things, it means "legitimate", usually connected with γάμος (γάμος ὑπέγγυος) in contrast with γάμος ἀνέγγυος.

Finally, the adjective ἀνεχέγγυος occurs only once, in Thucydides IV 55,4,3: ἀτολμότεροι δὲ δι' αὐτὸ ἐς τὰς μάχας ἦσαν, καὶ πᾶν ὅ,τι κινήσειαν ᾤοντο ἁμαρτήσεσθαι διὰ τὸ τὴν γνώμην **ἀνεχέγγυον** γεγενῆσθαι ἐκ τῆς πρὶν ἀηθείας τοῦ κακοπραγεῖν.

Ἀνεχέγγυος is the opposite of ἐχέγγυος and means "unwarranted".

PART II

THE ΕΓΓΥΗ IN THE CONTEXT OF MARRIAGE

As a result of the fact that marriage was essential for the preservation of the οἶκοι,[9] because it ensured the continuation of the family through legitimate children, and the preservation of its property through proper inheritance procedures, every Athenian man and woman was expected to be married. The fulfilment of the female role was marriage and motherhood, while a man could choose not to marry.[10]

In many modern societies mariage is brought into being by the consent of a man and a woman to live together as husband and wife. Both, man and woman, decide to join their lives, to share the same house and bed, in order to create a family. The act of living together is called marriage, the man is then qualified by the word husband; the woman by the word wife. This is regarded as a valid marriage, when both man and woman are the parties to the contract of marriage.

Did the same happen in Athens in the period of the orators? Certainly not. In Athens the woman's consent was not required since she was not a party to the contract but an object. She was given in marriage by her κύριος through ἐγγύη or by ἐπιδικασία. As far as the terminology of the institution of marriage is concerned, we learn from Aristotle that ἀνώνυμον γὰρ ἡ γυναικὸς καὶ ἀνδρὸς σύζευξις "the union (syzeuxis) of a man and a woman is without name" [*Politics*:

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[9] For the different senses of the word οἶκος, see D.M.MacDowell, "The οἶκος in Athenian Law", *CQ* 39, 1989, 10-21, espec. 15-16.

[10] See Dem.44.10, 47.38; MacDowell, *Law* p.86.

1253b 9-10]. So there is not a single word for marriage. The words γάμος and συνοικεῖν are used in the context of marriage but they do not express the full sense of the institution as a well-defined legal, religious, or social institution; for γάμος means "the wedding" and συνοικεῖν means simply "to live together", "to cohabit".

But what constituted marriage in Athens? Was there a single element to make a union into a valid marriage? Or, in other words, by what means did the Athenian community recognize that the "living together" (συνοικεῖν) of a man and a woman had validity?

The essential element of marriage during the classical period was the ἐγγύη, (the "promising" or "pledging" of the bride).[11] The verb ἐγγυᾶν has the basic meaning "to pledge" or to "promise" with an etymological connection to a gesture involving the hand or hands, either pledging by putting something into the hand of someone or promising with a handshake. The father's act then at the ἐγγύη was to pledge or engage (ἐγγυᾶν) his daughter to the bridegroom as wife, to promise her in marriage.

It is in Herodotus VI,130 that we find for the first time in connection with marriage the term ἐγγύη with the verbs in active and middle forms. Agariste, the daughter of Kleisthenes of Sikyon, was to be given in marriage by her father to the best husband that he could find in the whole of Greece. A great number of men came to Sikyon as suitors and Kleisthenes had to choose one of them for his daughter's husband. He did so and gave her as a wife to Megakles by saying: τῷ δὲ Ἀλκμέωνος Μεγακλέι ἐγγυῶ παῖδα τὴν ἐμὴν Ἀγαρίστην νόμοισι τοῖσι Ἀθηναίων- "I betroth my daughter, Agarista, to Megakles, the son of Alcmaeon, according to the law of Athens". Herodotus continues: φαμένου δὲ ἐγγυᾶσθαι

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[11] ἐπιδικασία was possible instead under certain circumstances.

Μεγακλέος ἐκεκύρωτο ὁ γάμος Κλεισθένει- "when Megakles said that he accepted the engagement the marriage was ratified for Kleisthenes".

In this passage there is an agreement between Kleisthenes (the father of the bride) and Megakles (the bridgroom). The verbs used here are ἐγγυῶ (on the part of Kleisthenes) and ἐγγυᾶσθαι (on the part of Megakles). Therefore, a bride's father ἐγγυᾷ τινι τὴν θυγατέρα and a bridgroom ἐγγυᾶταί τινα. The verb ἐγγυάω is used in the active voice to describe the action of the bride's κύριος, who pledges to give her in marriage; in the middle voice by the bridegroom, who accepts the pledge; and it is also used in the passive voice to denote the woman, (Isai.VI,14 ἀλλὰ πάνυ πάλαι συνοικεῖν, ἢ ἐγγυηθεῖσαν κατὰ τὸν νόμον ἢ ἐπιδικασθεῖσαν).

Furthermore, the fact that Kleisthenes does not say only "I betroth my daughter to Megakles" but he adds "νόμοισι τοῖσι Ἀθηναίων"- "according to the Athenian law", implies two things: first that ἐγγύη - the formula of betrothal- was a prerequisite, without which a marriage was not valid in Athens, because otherwise there would have been no point in mentioning Athenian law; and second that marriage between an Athenian citizen and an alien woman was at that time (in the first half of the sixth century) recognized as legitimate by Attic law, while by a law of Perikles in 451BC this was changed and a citizen could not marry an alien (Plut. *Perikles* 37,3).

But who had the right to give a woman in marriage through the act called ἐγγύη? Since the law refused to see women as independent beings, their position in it made them at all times dependent on men as their masters, protectors and representatives. A woman's status in Athenian law is indicated by the long supervision by a guardian, her κύριος. As Harrison observes: "there can be no doubt that a woman remained under some sort of tutelage during the whole of her life. She could not enter into any but the most trifling contract, she could not

engage her own hand in marriage, and she could not plead her own case in court. In all these relations action was taken on her behalf by her κύριος, and this was so during her whole life".[12] In Demosthenes 44 *Against Leochares* 49: καὶ ὁ νόμος ταῦτα μαρτυρεῖ λέγων, "ἢν ἄν ἐγγυήσῃ πατὴρ ἢ ἀδελφὸς ἢ πάππος, ἐκ ταύτης εἶναι παῖδας γνησίους", and in 46 *Against Stephanus II* 18: Ἦν ἄν ἐγγυήσῃ ἐπὶ δικαίοις δάμαρτα εἶναι ἢ πατὴρ ἢ ἀδελφὸς ὁμοπάτωρ ἢ πάππος ὁ πρὸς πατρός, ἐκ ταύτης εἶναι παῖδας γνησίους, a law is quoted to show who has the right to give a woman in marriage. The categories of male relatives capable of giving a woman in marriage by ἐγγύη are:

Father,
homopatric brother,
and grandfather on the father's side.

The last clause of the law (Dem. 46.18) is difficult to interpret:

ἐὰν δὲ μηδεὶς ᾖ τούτων, ἐὰν μὲν ἐπίκληρός τις ᾖ,
τὸν κύριον ἔχειν, ἐὰν δὲ μὴ ᾖ, ὅτῳ ἂν ἐπιτρέψῃ,
τοῦτον κύριον εἶναι.
"If there are none of these, if the woman is an epikleros
(heiress) her κύριος shall have her; if she is not an epikleros,
he shall be her κύριος to whom (she?-her κύριος?) has
committed (herself?-her?)".

In case there are none of these (father, homopatric brother, paternal grandfather) and she is an epikleros, then her κύριος will be the man who will marry her by the process of epidikasia. But in case she is not an epikleros, then ὅτῳ ἂν ἐπιτρέψῃ, τοῦτον κύριον εἶναι. Harrison summarises the views of earlier authors and gives three different meanings which have been suggested for

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[12] A.R.W. Harrison, *The Law of Athens: The Family and Property*, (Oxford 1968) p.108.

the sentence ὅτῳ ἂν ἐπιτρέψῃ : either "he to whom she has committed herself", or "he to whom the archon has committed her", or "he to whom her father has committed her" shall be her master.[13] The problem here is the subject of the verb ἐπιτρέψῃ. Since the woman would not have been allowed to choose her own κύριος, Harrison assumes that a word has dropped out before ἐπιτρέψῃ and this word is probably ὁ πατὴρ which will stand as the subject of ἐπιτρέψῃ and the sentence takes the meaning "he to whom her father has committed her shall be her master". However, there is a number of passages (Dem. 36.8, 28-30; 57.41; Plut. *Perikles* 24) which show that in some cases a woman was given in marriage by ἐγγύη by her previous husband acting as her κύριος. The most famous case is that of Demosthenes' mother. Her husband, on his deathbed, engaged her to his friend Aphobos.[14]

The law quoted by Demosthenes (46.18) does not concern only the person who has the right to give a woman in marriage by ἐγγύη, but also qualifies the offspring of such a union as legitimate (γνήσιοι). Whether this law is one on marriage by ἐγγύη or a law on legitimacy is not very clear. But it is clear enough to demonstrate that there is an important relationship between ἐγγύη and the legitimacy of children. To the question who has the right to give a woman in marriage the answer is: her κύριος- whoever is her κύριος.

Therefore, the ἐγγύη was a contract of marriage concluded with the suitor not by the woman, but by her κύριος- father, brother or nearest male relative. It was a commitment rather between two domestic households, two οἶκοι, than between two individuals, a man and a woman. The bride was the passive object of this contract and it was not legally necessary for her to be present or to consent to

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[13] Harrison,op.cit., 20.

[14] Dem. 27 *Aphobos I* 5; 28 *Aphobos II* 15-16; 29 *Aphobos III* 43.

it.[15] The verb ἐγγυῶ is used in the passive voice to denote the woman, since she is not a contracting party but the object of the agreement. As Sealey remarks: "an Athenian woman did not marry; she was given in marriage".[16]

The ἐγγύη resulted in the woman's becoming a γυνὴ ἐγγυητὴ- a *pledged* or *promised* woman (examples of the use of the term can be found in Isai. 3.8; 5.27; Dem.40.26; etc.). The ἐγγύη was a necessary step towards a full marriage but not constituting a marriage by itself. It did not complete the marriage; it needed to be followed by ἔκδοσις. The ἐγγύη was a necessary element in marriage, but not its sufficient condition. If it was not followed by cohabitation between the woman and her husband it had no effect. The case of Demosthenes' mother and sister is the best example to illuminate this point.

Demosthenes, the father of the orator, left at his death a considerable estate and a widow with two children, a son (the orator) aged seven, and a daughter aged five. By his will he appointed as guardians of his children Aphobos and Demophon (nephews of his) and Therippides, an old friend. At his deathbed he engaged his wife to Aphobos and his daughter to Demophon; so Aphobos should marry the widow and Demophon should marry the daughter when she came to marriageable age, that is, at least in nine years' time on reaching maturity. Although the ἐγγύη took place, neither of these marriages was ever consummated and the ἐγγύη by itself provoked no legal consequences. Therefore, from the example of Demosthenes' family, it seems that the ἐγγύη was simply a non-binding betrothal which neither created the marital state nor required a formal dissolution.

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[15] Harrison, op.cit. 21; Macdowell, *Law*, 86.

[16] R. Sealey, *Women and Law in Classical Greece*, 1990, p.25.

Another example, where the ἐγγύη did not lead into marriage, comes from Isaios 6 *On the estate of Philoktemon* 22-24. Euktemon arranged a contract of marriage (ἐγγύη) with Demokrates of Aphidna in order to take the latter's sister in marriage. Euktemon's purpose was to force his son to allow the recognition of a prostitute's sons as Euktemon's own legitimate sons. Finally, Philoktemon, the son of Euktemon, gave in and agreed with his father for the children's entering into the phratry. Then Euktemon who had succeeded in his goal, simply "gave up the woman"- ἀπηλλάγη τῆς γυναικός, (section 24). We can then assume that if it was difficult for Euktemon to dispose of the ἐγγυητὴ γυνή or legal actions were brought against him in order to enforce him to complete the ἐγγύη with ἔκδοσις and γάμος, then probably he would have been more careful in binding himself to such a contract, since his initial aim was not to marry the woman, even though he engaged himself to her. Furthermore, considering the case of Demosthenes' mother and sister, we can also note a few points in the form of a hypothesis: if there had been a way in which the mother or sister of Demosthenes could enforce the promise or pledge (the ἐγγύη) through a legal action, they would have probably acted so. But no indication is given by Demosthenes that such a means really existed or that for the nullification of the ἐγγύη a sort of divorce was required.

Therefore, we cannot regard ἐγγύη as in itself constituting a marriage. Ἔκδοσις after ἐγγύη was required to make a full marriage, since from that point (ἔκδοσις) the "living together" (συνοικεῖν) of the couple started. Ἐγγύη and ἔκδοσις usually were simultaneous acts but sometimes there was an interval of time between them, when it was needed, and the woman's entry into the house of her husband occurred whenever it was mutually convenient.[17] In very general

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[17] MacDowell, *Law*, 86.

terms, as MacDowell observes, the legal difference between ἐγγύη and γάμος or ἔκδοσις was that ἐγγύη was making a contract and γάμος was carrying it out.[18]

So ἐγγύη was brought to fulfil ment by ἔκδοσις. Ἔκδοσις is the act of transferring the woman to the bridegroom's house after having been given in marriage to the bridegroom by her κύριος through the act called ἐγγύη. Ἐκδιδόναι is the verb which describes the act of ἔκδοσις and is used of the κύριος of the woman, and ἔκδοτος or ἐκδεδομένη are the words used of the woman who is given - transferred - to the bridegroom's house. A woman through the act of ἐγγύη becomes a γυνὴ ἐγγυητὴ and through the act of ἔκδοσις she becomes a γυνὴ γαμετή. And while ἐγγύη was the first step and essential element towards a full marriage, the second step, after ἐγγύη, which converted an ἐγγυητή into a γαμετή or ἐκδεδομένη, was the ἔκδοσις and γάμος.

Therefore, it was the factual living together (συνοικεῖν) of the pair as husband and wife after ἐγγύη and ἐκδοσις that was required to make a marriage a complete and legally valid marriage.

Some passages from the orators, where ἐγγυᾶν and ἐκδιδόναι are very closely conjoined, have led Erdman[19] to argue that ἐγγύη is not a simple betrothal but marriage itself. These passages are the following:

1. Isaios 3.70: ὅτε δ' ἠγγύα καὶ ἐξεδίδου ὁ Ἔνδιος τὴν γυναῖκα . . .
2. Isaios 8.14: τίνας δ' εἰδέναι τὰ περὶ τὴν ἔκδοσιν τῆς μητρὸς ἀνάγκη;
   τοὺς ἐγγυησαμένους καὶ τοὺς ἐκείνοις παρόντας ὅτε ἠγγυῶντο.
3. Isaios 8.29: δὶς ἐκδοθεῖσαν, δὶς ἐγγυηθεῖσαν.
4. Dem. 57.41: ἐπικλήρου δὲ κληρονομήσας εὐπόρου, τὴν μητέρα βουλη-

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[18] MacDowell, *Law*, 86; *see* also S.C.Todd *The Shape of Athenian Law* (1993) 210-15.

[19] W. Erdmann, "Die Ehe im alten Griechenland", *Munchener Beitrage Zur Papyrus Forschung und antiken Rechtsgeschichte*, 1934, p.233.

θεὶς ἐκδοῦναι πείθει λαβεῖν αὐτὴν Θούκριτον τὸν πατέρα τὸν ἐμόν, ὄνθ' ἑαυτοῦ γνώριμον, καὶ ἐγγυᾶται ὁ πατὴρ τὴν μητέρα τὴν ἐμὴν παρὰ τοῦ ἀδελφοῦ αὐτῆς Τιμοκράτους. . .

As it seems from the examples above there are cases where ἐγγύη and ἔκδοσις occurred within a short period. Yet there is at least one case (the case of Demosthenes' sister) where the ἐγγύη took place long time (at least nine years) before the expected ἔκδοσις. If there was not the case of Demosthenes' sister it would seem that ἐγγύη and ἔκδοσις were very closely tied together, "two phases of the same act", as Erdman argued, and that ἐγγύη and ἔκδοσις took place simultaneously, the same day and time. But the case of Demosthenes' sister shows that it was possible for the ἐγγύη to precede the ἔκδοσις; the latter could follow the former even after many years. So it becomes clear that there could be an interval of time between ἐγγύη and ἔκδοσις or γάμος. In addition, the same case shows that these two acts (ἐγγύη - ἔκδοσις) were in principle distinct. Probably, when there was not a particular reason for these two acts to be distinguished, then they would take place within a short period, and this seems to be the most common practice.

The ἐγγύη was an oral contract made between the woman's κύριος and the bridegroom, and because of the absence of any form of registration the existence of an ἐγγύη was not easy to prove or disprove. Not only the consent of the woman, who was to be married, was not required but also her presence at the time of the contract was not necessary. So, her κύριος and the bridegroom were the only parties without which the contract could not be concluded.

However in many cases, where the ἐγγύη is mentioned, witnesses appear very often to play their own role. It is true that in all these cases witnesses are called to prove that the contract really took place. So Harrison recognizes that it was customary for both parties to bring their own witnesses to the transaction but he

assumes that they were needed not to validate the act of the ἐγγύη but to prove, if the need arose that the ἐγγύη had taken place.

That witnesses were necessary rather to prove a marriage than to give validation to it becomes clear from Dem. 30.21:

μὴ γὰρ ὅτι πρὸς τοῦτον τοιοῦτον ὄντα, ἀλλ' οὐδὲ πρὸς ἄλλον οὐδ' ἂν εἷς οὐδένα τοιοῦτον συνάλλαγμα ποιούμενος ἁμαρτύρως ἂν ἔπραξεν· ἀλλὰ τῶν τοιούτων ἕνεκα καὶ γάμους ποιοῦμεν καὶ τοὺς ἀναγκαιοτάτους παρακαλοῦμεν, ὅτι οὐ πάρεργον, ἀλλ' ἀδελφῶν καὶ θυγατέρων βίους ἐγχειρίζομεν, ὑπὲρ ὧν τὰς ἀσφαλείας μάλιστα σκοποῦμεν.

Most likely family and friends were present at the undertaking of the ἐγγύη, and witnesses derived from these two categories. Although witnesses were not necessary for giving validation to the act of ἐγγύη, the absence of them was used in court to argue that a woman had not been given in marriage by ἐγγύη. Not only the entire absence of witnesses was used as a proof against the existence of the ἐγγύη, but sometimes even the number of them counted at proving the ἐγγύη; and when the number was very small it counted negatively. So, when the speaker of Isaios (3.29) is trying to prove that his uncle Pyrros was not married to Phile's mother by ἐγγύη, one of the arguments he uses is that when the act of the alleged ἐγγύη took place (as Nikodemos claims), Nikodemos had only one witness, although he was the contracting party of the bride's side: καὶ μάρτυράς γε πολλῷ πλείους εἰκὸς ἦν τὸν ἐγγυῶντα παρακαλεῖν ἢ τὸν ἐγγυώμενον τὴν τοιαύτην. This sentence shows that the κύριος of a woman, who was given in marriage by him through ἐγγύη, was or at least should be more interested in the presence of witnesses (the more, the better) than the bridegroom.

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The dowry was not obligatory at Athens and it was a matter of custom rather than a legal requirement. The history of this institution in Athens is not very clear. It is probably a practice introduced after the time of Solon. In Homer we find the exchange of gifts between the bride's father and the bridegroom. These gifts called ἕδνα were given to the bride's father by the bridegroom but they were requited by gifts - μείλια - from the bride's father to the bridegroom. These gifts were a component of a marriage in the heroic age, as the dowry was in Athens in the period of the orators. But they were not the same thing. As Harrison observes: "the ἕδνα were simply gifts while a dowry was rather a fund or an estate created by the bride's relatives to give her as it were a stake in the οἶκος to which she is by the marriage transferred".[20]

Although the dowry was not obligatory at Athens, as it seems from some cases where men married women by ἐγγύη without a dowry [*see* Lys.19.14-15; Is.2.5; Dem.40.25-26], it was the social and moral, though not legal, responsibility of a κύριος of a woman to give dowry with her to the prospective husband and it was generally accompanied the bride on her marriage, as it seems from several cases mentioned by the orators [*see* Lys.16.10, 32.6; Is.5.27, 10.19; Dem.27.17, 28.15, 30.19f, 40.59, 41.5-6,26, 42.27, 45.28, 59.7-8,50-52,113]. But it does not seem from these cases that the fixing of the dowry was a normal component of the marriage. In spite of the fact that dowry was not an essential ingredient for a valid marriage, the absence of it could be used sometimes in court as evidence that no marriage by ἐγγύη had taken place [Is. 3.8-9, 28-29, 35-39, 78].

The grantor of the dowry was the woman's κύριος who had also given her in marriage by ἐγγύη. When the ἐγγύη took place, it was the natural moment for the

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[20] Harrison (1968) 45; see also S. C. Todd, *The Shape of Athenian Law*, pp 215-16.

bestowal of the dowry.[21] The woman's κύριος either gave the dowry to the bridegroom at that point or, if not so, an agreement on the dowry was made by both parties (ὁμολογία προικὸς). Sometimes a dowry was agreed upon at the ἐγγύη, but was not handed over at the time or was only handed over in part, as a passage from Demosthenes indicates:

ὅτι τὴν προῖκ' οὐ κομισάμενος ἅπασαν, ἀλλ' ὑπολειφθεισῶν χιλίων δραχμῶν καὶ ὁμολογηθεισῶν ἀπολαβεῖν ὅταν Πολύευκτος ἀποθάνῃ [Dem. 41.5].

Another passage from Demosthenes indicates that witnesses were required at the procedure of bestowing the dowry:

καίτοι τῷ τοῦθ' ὑμῶν πιστόν, ὡς ταλάντου τῆς προικὸς οὔσης ἄνευ μαρτύρων Ὀνήτωρ καὶ Τιμοκράτης Ἀφόβῳ τοσοῦτον ἀργύριον ἐνεχείρισαν; [Dem. 30.20].

Their role probably would be to provide proof of the act of the bestowing the dowry rather than to give validity to it. They would also be the same witnesses who attended the act of the ἐγγύη, since the ἐγγύη and the bestowal or the agreement of the dowry were simultaneous acts [see, Dem.41.6: μάρτυρας παρέξομαι τοὺς παραγενομένους ὅτ' ἠγγύα μοι Πολύευκτος τὴν θυγατέρ' ἐπὶ τετταράκοντα μναῖς.].

A dowry was usually in the form of cash [Lys.16.10: δύο μὲν ἀδελφὰς ἐξέδωκα ἐπιδοὺς τριάκοντα μνᾶς ἑκατέρᾳ.] and when it was a house or something else except money, then it had to be valued in the presence of witnesses [Dem.45.28: καὶ προῖκα ἐπιδίδωμι Ἀρχίππῃ τάλαντον μὲν τὸ ἐκ Πεπαρήθου, τάλαντον δὲ τὸ αὐτόθεν, συνοικίαν ἑκατὸν μνῶν] because only

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[21] Men. *Dyskolos* 842-7.

what was included in the valuation was legally a dowry [Is.3.35: οὐκ ἔξεστι πράξασθαι τῷ δόντι ὃ μὴ ἐν προικὶ τιμήσας ἔδωκεν].

Though the dowry was given for the benefit of the wife, it did not belong to her; it merely went with her. The word for bestowing a dowry was ἐπιδιδόναι which very often is followed by the bride in the dative [see, Lys.16.10: ἐπιδοὺς τριάκοντα μνᾶς ἑκατέρᾳ ; Is.2.5: ἀλλὰ τὴν ἴσην προῖκα ἐπιδόντες ἥνπερ καὶ τῇ πρεσβυτέρᾳ ἀδελφῇ ἐπέδομεν ; Dem.45.28: καὶ προῖκα ἐπιδίδωμι Ἀρχίππῃ τάλαντον]. The bestowal of a dowry could also be expressed by phrases like προῖκα ἐπ' αὐτῇ δίδωσι (Dem.59.50) or ἔλαβεν ἐπὶ τῇ ἀδελφῇ προῖκα (Is.2.5). These phrases, where the meaning of the preposition with the dative indicating the bride is "for the bride", have inclined Harrison to suggest that in this context (of the dowry) the simple dative of the bride with the verb ἐπιδιδόναι means rather "for the woman" than "to the woman".[22] Another passage from Demosthenes comes to indicate this sense of ἐπιδιδόναι used in the context of dowry, as it is distinguished from the verb διδόναι, in the same passage, in order to express two different things:

Τάδε διέθετο Πασίων Ἀχαρνεύς· δίδωμι τὴν ἐμαυτοῦ γυναῖκα Ἀρχίππην Φορμίωνι, καὶ προῖκα ἐπιδίδωμι Ἀρχίππῃ τάλαντον μὲν τὸ ἐκ Πεπαρήθου, τάλαντον δὲ τὸ αὐτόθεν, συνοικίαν ἑκατὸν μνῶν, θεραπαίνας καὶ τὰ χρυσία, καὶ τἄλλα ὅσα ἐστὶν αὐτῇ ἔνδον, ἅπαντα ταῦτα Ἀρχίππῃ δίδωμι.

[Dem. 45.28]

This is a very good example to show the difference between δίδωμί τινί τι (when τινι refers to the bride and τι is the object other than the dowry, and then it means "I give something to the bride") and ἐπιδίδωμί τινι προῖκα (τινι refers again to the bride and προῖκα is the object which is given).The difference is that

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[22] Harrison (1968) 49.

ἅπαντα ταῦτα Ἀρχίππῃ δίδωμι means "I give all of them to Archippe (to have them personally)", while προῖκα ἐπιδίδωμι Ἀρχίππῃ seems to mean "I give dowry for Archippe, on the behalf of her" and it is probably equivalent to ἐπὶ Ἀρχίππῃ δίδωμι. Otherwise, if there was not a difference between these two expressions, there would have been no point in using both of them at the same time, if Pasion did not want to say two different things. Another point which must be noted here is that on the one hand προῖκα, the object of ἐπιδίδωμι, includes things which are valued, on the other hand ἅπαντα ταῦτα, the object of δίδωμι, include things not valued. So, we have the pairs:

ἐπιδίδωμι --- προῖκα = valued objects and money,

δίδωμι --- other objects = not valued.

Both verbs, ἐπιδίδωμι and δίδωμι have the same indirect object, Archippe, who was to take only what was not actually προῖκα, and merely to carry the προῖκα with her into the new household which she was entering.

And though the husband is described as κύριος of the dowry during the continuance of the union [Dem.42.27: ταύτῃ χρέως φησὶν ὀφείλεσθαι Φαίνιππος τὴν προῖκα, ἧς οἱ νόμοι κύριον τοῦτον ποιοῦσιν] and could use the income for the maintenance of the house, he was bound to return it or its value on the wife's death or divorce [Dem. 59.52: κατὰ τὸν νόμον ὃς κελεύει, ἐὰν ἀποπέμπῃ τὴν γυναῖκα, ἀποδιδόναι τὴν προῖκα]. On the ending of the union the dowry passed back to the original κύριος of the woman with her, if divorce was the reason of the ending, and her κύριος could arrange a new marriage by ἐγγύη for her, giving the same dowry. If death of the woman was the reason of the ending of the union, the dowry again went back to her original κύριος, apart from the case when she had a son (or sons) of that marriage living, to whom the dowry went. The dowry may be regarded as a kind of protection of the woman. It

intended to protect her interests within the marriage and it was the means of discouraging divorce on the part of the husband [see, Is.3.35].

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Let us examine briefly a case which will shed light on the significance of the ἐγγύη for a union of a man and a woman and the consequences of that union on their children. This case comes from Isaios, or.3 *On the Estate of Pyrros*.

The speaker is the son of Pyrros' sister. Before his death Pyrros had adopted the speaker's brother, named Endios, who inherited the estate and possessed it for twenty years without opposition. When he died, since he had not produced heirs for the estate, the property was claimed by his mother, Pyrros' sister, represented by the speaker. At the same time another claimant appeared, named Xenokles, acting on behalf of his wife Phile, the alleged legitimate daughter of Pyrros. The speaker maintained that Phile was not legitimate and therefore she had no place in the *anchisteia*; consequently she could not inherit the estate as the epikleros of it.

Although the title of this speech is "*On the Estate of Pyrros*", the case itself concerns a charge of false testimony against Phile's maternal uncle, Nikodemos. His testimony was that he "entrusted" his sister to Pyrros, and so the union of Pyrros with Nikodemos' sister was legal, she was Pyrros' wife and the bearer of legitimate heirs to his estate.

The concern of the speaker in this speech is to show that this testimony was false, that ἐγγύη never took place and Nikodemos' sister was not legally married to Pyrros and so Phile was not the legitimate daughter of Pyrros. If Phile was to inherit the estate of Pyrros, she had to be his legitimate daughter; to be his legitimate daughter, it meant that she had to be the offspring of the valid marriage

between Pyrros and Nikodemos' sister; this marriage would be valid only in case it was based on the act of ἐγγύη between Pyrros and Nikodemos, the κύριος of the alleged wife of Pyrros. Therefore, if the speaker managed to prove that ἐγγύη never took place, then automatically he would prove that Phile was not to have any claims to the estate of Pyrros, since she would not be his legitimate daughter. The speaker uses primarily arguments from probability intending to convince the jury how unlikely it was that Nikodemos ever so entrusted his sister or that Pyrros ever received her. It is not my intention, at least at the moment, to examine all the arguments in this speech, but I should notice that the two crucial points on which the prosecutor concentrates are the witnesses and the dowry.

Although these two (witnesses and dowry) were not required by a law to be obligatory components of the ἐγγύη, the absence of these two is used here by the prosecutor (in court) to strengthen his arguments or even to prove by itself that the ἐγγύη never happened.

Therefore, as it seems also from the case of Pyrros, according to Athenian law the ἐγγύη was the necessary condition of a valid marriage (except in the case of an ἐπίκληρος). And it was on the existence and propriety of this procedure that the most important effect of marriage, the legitimacy of children, depended.

The connection between the ἐγγύη and the legitimacy of children is clear in the law quoted in Demosthenes' speeches, 44 *Against Leochares* 49 and 46 *Against Stephanos* II 18, [see also Hyper. 3.16]. So, according to the law γνήσιος (legitimate) is that child who was born from a γυνὴ ἐγγυητή. And a γυνὴ is "pledged" and given in marriage for the very specific purpose of procreating legitimate children:

ἐγγυῶ παίδων ἐπ' ἀρότῳ γνησίων
τὴν θυγατέρα
"I pledge this woman to you

for the purpose of the cultivation of legitimate children".

[Men. *Dyskolos* 842-3]

The son of Athenian parents was presented first to the phratry and later to the deme. On each occasion the father swore an oath. Several forensic speeches mention the oath, sworn by the father on presenting his son to his phratry, the content of which seems to be that the son was born to him by a woman who was a citizen (ἀστῆ) and married to him under a contract of ἐγγύη.

* Is. 8.19: ὅ τε πατὴρ ἡμῶν, ἐπειδὴ ἐγενόμεθα, εἰς τοὺς φράτερας ἡμᾶς εἰσήγαγεν, ὀμόσας κατὰ τοὺς νόμους τοὺς κειμένους ἢ μὴν ἐξ ἀστῆς καὶ ἐγγυητῆς γυναικὸς εἰσάγειν.

* Dem. 57.54: ἀλλὰ μὴν ὁ πατὴρ αὐτὸς ζῶν ὀμόσας τὸν νόμιμον τοῖς φράτερσιν ὅρκον εἰσήγαγέν με, ἀστὸν ἐξ ἀστῆς ἐγγυητῆς αὐτῷ γεγενημένον εἰδώς καὶ ταῦτα μεμαρτύρηται.

* Dem. 59.60: προκαλοῦνται αὐτὸν οἱ γεννῆται πρὸς τῷ διαιτητῇ ὀμόσαι καθ' ἱερῶν τελείων ἢ μὴν νομίζειν εἶναι αὐτῷ υἱὸν ἐξ ἀστῆς γυναικὸς καὶ ἐγγυητῆς κατὰ τὸν νόμον.

However, two texts [IG II 2, 1237 ll.109-11, and Is.7.16] indicate that the wording of the oath could differ.

The inscription, which states the rules adopted by the phratry of the Dekeleieis early in the fourth century, reads at lines 109-11:

ὅρκος μαρτύρων ἐπὶ τῇ εἰσαγωγεῖ τῶν παῖδων·

Μαρτυρῶ ὃν εἰσάγει ἑαυτῷ ὑὸν εἶναι

τοῦτον γνήσιον ἐγ γαμετῆς.

Thus, we learn from this that when a father introduced his son to the phratry, his witnesses should swear that the son was γνήσιος and born of a woman who was γαμετή.[23]

The other text is from the seventh speech of Isaios, *On the Estate of Apollodoros*, where the speaker says that Apollodoros adopted and presented him to his genos and phratry for admission. In section 16 he mentions the law according to which one introduces his born son or an adoptive son to the phratry; for both cases the law is the same:

> ἔστι δ' αὐτοῖς νόμος ὁ αὐτός, ἐάν τέ τινα φύσει γεγονότα εἰσάγῃ τις ἐάν τε ποιητόν, ἐπιτιθέναι πίστιν κατὰ τῶν ἱερῶν ἢ μὴν ἐξ ἀστῆς εἰσάγειν καὶ γεγονότα ὀρθῶς καὶ τὸν ὑπάρχοντα φύσει καὶ τὸν ποιητόν.

So, in these texts mentioned above, instead of the normal formula of the oath (that is, ἐξ ἀστῆς καὶ ἐγγυητῆς) we have ἐγ γαμετῆς, in the first text, and ἐξ ἀστῆς καὶ γεγονότα ὀρθῶς, in the second. Sealey[24] supposes that γεγονότα ὀρθῶς was a circumlocution for "born to a woman united by ἐγγύη to the father", something which seems very likely, though he had earlier[25] made the hypothesis[26], based on these passages, that in some phratries a father who presented his son was not required to swear that the parents were united by ἐγγύη; "a union of a different kind would suffice". And he draws the conclusion that sons born in *engyetic* marriage were not the only sons admitted to membership in phratries.

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[23] On this inscription see C.W.Hedrick *The Decrees of the Demotionidai* (1990).

[24] Sealey (1990) 34.

[25] R. Sealey, "On Lawful Concubinage in Athens" *ClAnt* 3 (1984), pp.111-133.

[26] ibid 122

There is, however, another passage bearing upon the topic of the introduction to the phratry which implies a different conclusion about the significance of the ἐγγύη in relation to the acceptance of new members into the phratry. This passage comes from Dem. 59 *Against Neaira*. In sections 59-60, the prosecutor describes the unsuccessful attempt of Phrastor to introduce his son to his phratry. When Phrastor was asked to take the accustomed oath before the arbitrator, he refused to do so. His refusal to swear would probably be taken as a *prima facie* evidence that the boy did not fulfil the requirements of the law to be introduced to the phratry, because Phrastor had not married the boy's mother with ἐγγύη.

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Significance of ἐγγύη in the context of Marriage

In this chapter is examined how the formality of marriage, or lack of it, affected the children of a union; and especially whether those whose parents were both Athenian, but not united by ἐγγύη or ἐπιδικασία, were excluded from citizen rights, equally with the children of mixed marriages according to Perikles' citizenship law.

Let us take first a taste of what scholars have concluded in works on this subject.

In a series of three discussions of Athenian marriage law[27] Ledl argued that the children who were born out of wedlock were not citizens and emphasized the

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[27]Ledl, "Das attische Burgerrecht und die Frauen", *WS* 29 (1907) 173- 227; ibid. 30 (1908) 1-46, 173-230.

significance of marrige in the Athenian polis by saying that " *anchisteia* and *politeia* are inseparable"[28].

In 1994, H. J. Wolff accepted Ledl's thesis, but the case of phile in Isaios or.3 made him modify the argument for illegitimate children of two Athenian parents and he suggested that they were νόθοι and lacked anchisteia and politeia, but as νόθοι of two Athenians were classed among the ἀστοί, not among the πολῖται (who were full citizens),[29] and they had rights superior to those of aliens, such as marriage with citizens. So Wolff suggested that the children born out of wedlock but from Athenian parents enjoyed a lesser kind of citizenship. However, he insisted on the principle of the connection between *anchisteia* and *politeia*.[30]

On the other hand, Harrison assumed that νόθοι whose parents were both Athenians were full citizens. He based his opinion on two arguments, which in fact are rhetorical questions. He asked : Why did Perikles' law not simply say that from then on the children of mixed marriages were to be νόθοι, if legitimacy was required? And why did this law speak only of birth from two ἀστοί and not of legitimate birth? And, finally, what was the object of Solon's law excluding bastards from inheritance? Eventually, he admitted that the children of citizen parents not united by ἐγγύη were illegitimate and had only a limited capacity of inheritance, but he maintained that such children had Athenian citizenship.[31]

MacDowell, in his turn, has accepted Harrison's reasons for believing that bastards were admitted to citizenship and found his arguments positive and

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[28] *WS* 30 (1908) 230.

[29] In this distinction between ἀστός and πολίτης, Wolff followed U. E. Paoli, *Studi di diritto attico*, (Florence, 1930) chapt. 3.

[30] Wolff, H. J., " Marrige Law and Family organisation in ancient Athens ", *Traditio* 2 (1944) 43-95.

[31] A.R.W. Harrison , *The Law of Athens : The Family and Property*, (Oxford 1968) pp. 61-68.

logical but not factual. So, in order to strengthen Harrison's arguments, he suggested that three texts[32] provide more definite support for this conlusion.[33]

But P.J.Rhodes has challenged the theses of Harrison and MacDowell and found himself not convinced by the evidence which MacDowell suggested.[34]

Sealey, however, has argued that Athenian law on inheritance and citizenship was concerned solely with the identity and status of actual parents, not with the nature of the union between them.[35]

In very general terms, on the one side are those who argue that the basis of one's membership in the state was his membership in the phratry; children born out of wedlock were illegitimate and such people were formally outside this system (phratry-demos).

On the other side are those who held the opposite view that the phratries and the demes were separate systems, and that νόθοι born from Athenian parents were not barred from citizenship.

Thus, it is clear that there is not a general agreement about the answer to the que stion whether the children of unmarried but citizen parents were citizens or not. This is not without reason; as Todd has noted[36] there is very little evidence to resolve this question and, indeed, what has caused this inconclusiveness of this debate is that most of the evidence is capable of varying interpretations.

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[32] Each one of these texts will be examined later in this chapter.

[33] D. M. MacDowell, "Bastards as Athenian Citizens", *CQ* 26 (1976) 88-91.

[34] P.J.Rhodes, "Bastards as Athenian Citizens", *CQ* 28 (1978) 88-92.

[35] R. Sealey, "On Lawful Concubinage in Athens", *CLAnt* 3 (1984) 111-33.

[36] S.C.Todd, *The Shape of Athenian Law*, (Oxford 1993) p. 178.

Arist. *Ath. Pol.* 42.1 : MacDowell argues that illegitimate birth was not a bar to citizenship and suggests that three texts provide support for this view.[37]The first text comes from Aristotle's *Athenaion Politeia*, 42.1: μετέχουσιν μὲν τῆς πολιτείας οἱ ἐξ ἀμφοτέρων γεγονότες ἀστῶν, ἐγγράφονται δ'εἰς τοὺς δημότας ὀκτωκαίδεκα ἔτη γεγονότες. ὅταν δ' ἐγγράφονται διαψηφίζονται περὶ αὐτῶν ὀμόσαντες οἱ δημόται, πρῶτον μὲν εἰ δοκοῦσι γεγονέναι τὴν ἡλικίαν τὴν ἐκ τοῦ νόμου, κἂν μὴ δόξωσι ἀπέρχονται πάλιν εἰς παῖδας, δεύτερον δ' εἰ ἐλεύθερός ἐστι καὶ γέγονε κατὰ τοὺς νόμους.

Here we do not have the law of citizenship itself, but a paraphrase of it by Aristotle. MacDowell argues that, since nothing is said here about marriage, the only requirement for citizenship was both citizen parents and the age of eighteen; nothing else. However, this argument from silence has been challenged by Rhodes[38] who proves with examples that omissions in the *Athenaion Politeia* are very frequent, especially in the second part of it and concludes that *Ath. Pol.*'s silence, even in such a passage as 42.1, is an insecure basis for argument.

Furthermore, the ensuing account of the procedure of registration contains two points which sould be considered carefully. The first is the clause εἰ ἐλεύθερος ἐστὶ and the second is the phrase καὶ γέγονε κατὰ τοὺς νόμους.

εἰ ἐλεύθερος ἐστὶ: MacDowell does not comment at all on this point, and from his silence it seems to me that he takes the adjective ἐλεύθερος in its normal meaning as "free". However, there are texts in which ἐλεύθερος seems to mean something more than "free". Newman[39] suggests that ἐλευθερία

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[37] D.M.MacDowell, (1976), 89.

[38] Rhodes, (1978), 89; cf. *A Commentary on the Aristotelian Athenaion Politeia*, (Oxford, 1981), p. 496.

[39] Newman, *The Politics of Aristotle*, vol. I, p. 248 n.1; cf. vol.IV, p. 173.

occasionally seems to mean something more than "free birth", in fact "citizen birth", and that ἐλεύθερος is sometimes used in contradistinction to ξένος[40]. The passages he quotes are: Arist. *Polit.*, 1292b 39: τρίτον δ'εἶδος (δημοκρατίας) τὸ πᾶσιν ἐξεῖναι, ὅσοι ἂν ἐλεύθεροι ὦσι, μετέχειν τῆς πολιτείας, μὴ μέντοι μετέχειν διὰ τὴν προειρημένην αἰτίαν, ὥστ' ἀναγκαῖον καὶ ἐν ταύτῃ ἄρχειν τὸν νόμον. Where ἐλεύθεροι seems to answer to πολίτης in 1292a 3 : ἕτερον δὲ εἶδος δημοκρατίας τὸ παντί μετεῖναι τῶν ἀρχῶν, ἐὰν μόνον ᾖ πολίτης, ἄρχειν δὲ τὸν νόμον. He also quotes Arist. *Polit.* 1290b 9 : οὔτ' ἂν οἱ ἐλεύθεροι ὀλίγοι ὄντες πλειόνων καὶ μὴ ἐλευθέρων ἄρχωσι. . . and 1291b 27 : τὸ μὴ ἐξ ἀμφοτέρων πολιτῶν ἐλεύθερον. . . . In addition, Diogenes Laertius[41] says that Antisthenes was born not ἐκ δυοῖν Ἀθηναίοιν and later in another passage he says that he was born not ἐκ δύο ἐλευθέρων. So it is clear from D.L.'s use of ἐλεύθερος in this passage that ἐλεύθερος has the meaning of citizen.

Furthermore, there are passages from the orators where the use of ἐλεύθερος indicates rather the meaning of "citizen" than "free". For example, Dem. 57, 45 : οὐδὲ περὶ τύχης οὐδὲ περὶ χρημάτων ἡμῖν ἐστὶν ὁ παρὼν ἀγών, ἀλλ' ὑπὲρ γένους. πολλὰ δουλικὰ καὶ ταπεινὰ πράγματα τοὺς ἐλευθέρους ἡ πενία βιάζεται ποιεῖν. . . .

One could say that ἐλεύθερος here means only "free", because it is used in contrast with δουλικά. But the speaker in this speech claims his citizenship and defends (in this section) his mother against the accusation that she is not an Athenian citizen. The accusation was not that the speaker was a slave man by a slave mother, so that he had to prove that, altough his mother did a job which is

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[40] cf. Platonis, *Ὑπέρβολος*, Fr. 182, in *Poetae Comici Graeci* by R. Kassel-C. Austin, vol. VII, p. 505.

[41] Diogenes Laertius, *Vitae Philosophorum*, Liber VI, Antisthenes 1,4.

fitting to a slave, she was not a slave but a free woman. As he claims citizenship, he uses the adjective ἐλεύθερος referring to the category of people which he claims that he belongs to - i.e. citizens.

This meaning of ἐλεύθερος becomes more clear later in the same speech, in section 69: Dem. 57, 69: καὶ γὰρ ὅτι κατὰ τοὺς νόμους ὁ πατὴρ ἔγημεν καὶ γαμηλίαν τοῖς φράτερσιν εἰσήνεγκεν μεμαρτύρηται. πρὸς γὲ τούτοις καὶ ἐμαυτὸν ἐπέδειξα πάντων μετειληφόθ' ὅσων προσήκει τοὺς ἐλευθέρους.

Here we have reference to the phratry. The speaker has proved in section 54 that he was introduced to his father's phratry. So the speaker is a member of this phratry and participates in the ὅσια καὶ ἱερά, things which suit τοὺς ἐλευθέρους. Therefore ἐλεύθερος here seems to mean something more than "free"; it rather takes the meaning of "citizen".

So, if we accept this meaning of ἐλεύθερος in this passage of Aristotle (*Ath. Pol.* 42.1), then the second thing that the demesmen had to judge was whether the candidate was of citizen birth. Thus the clause εἰ ἐλεύθερος ἐστί, according to this interpretation, covers the standard required by the law for admission to the deme, the standard that μετέχουσιν μὲν τῆς πολιτείας οἱ ἐξ ἀμφοτέρων γεγονότες ἀστῶν.

However, Rhodes[42] finds that the requirement of citizen birth should be covered by the following clause- καὶ γέγονε κατὰ τούς νόμους- and tends to believe that ἐλεύθερος has its normal meaning here, because of the fact that a candidate judged not to be ἐλεύθερος was sold as a slave. But it seems to me that a candidate, if it was found that he was not ἐλεύθερος (a "citizen"), was sold into slavery by the city, not because he was a slave but because it was a

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[42] P.J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia*, (Oxford 1981) p. 499.

punishment for seeking registration as a citizen in a deme, although he was not a citizen; he could either be a slave or a free alien.

Καὶ γέγονε κατὰ τοὺς νόμους: MacDowell insists that the phrase κατὰ τοὺς νόμους must not be mistranslated "legitimately" and offers the Greek for "legitimate" which is γνήσιος. He is correct not only at this point but also in saying that κατὰ τοὺς νόμους means "according to the law", although I would say "according to the laws" which state the requirements for Athenian citizenship. MacDowell, followed by Rhodes who agreed with him at least at this point, finds that κατὰ τοὺς νόμους refers to the law, that both parents must be Athenians, which has been stated in the erlier sentence.

However, in the earlier sentence it has been also stated that ἐγγράφονται δ' εἰς τοὺς δημότας ὀκτωκαίδεκα ἔτη γεγονότες. And when the demesmen had to take the decision about a candidate's introduction to the deme, they had to vote whether the candidate had reached the age required by the law. The wording of Aristotle is the following : . . .διαψηφίζονται. . . οἱ δημόται . . . εἰ δοκοῦσι γεγονέναι τὴν ἡλικίαν τὴν ἐκ τοῦ νόμου. . . , where the phrase τὴν ἐκ τοῦ νόμου undoubtedly refers to the law stated above - ἐγγράφονται. . . ὀκτωκαίδεκα ἔτη γεγονότες. The phrase ἐκ τοῦ νόμου is singular and implies only one law, and this one law is stated in this text. If we see the phrase κατὰ τοὺς νόμους as if it refers only to one law stated above (both Athenian parents), then, one could ask, why does Aristotle here use plural κατὰ τοὺς νόμους instead of singular- κατὰ τὸν νόμον? Does this plural here indicate that there might be more than one law, which this phrase refers to? It is true that *A.P.* does not mention legitimacy *per se*, but I cannot understand why these νόμοι (κατὰ τοὺς νόμους) should not include a further requirement of birth from parents lawfully married.

Here, I think, it is the proper place to consider Harrison's rhetorical question. Harrison asked : why did Perikles' law speak only of birth from "two astoi" and not of legitimate birth, if legitimacy was required for citizenship? First of all we should consider that we do not have Perikles' law *per se*; we have a paraphrase of the law by Aristotle. Moreover, Perikles' law did not change everything concerning citizenship but simply put forth a new standard requirement for citizenship. And the new standard was "both parents citizens". So we can assume that everything else stayed unchanged. Until then a person was a citizen if his father was a citizen. It was not necessary for his mother to be a citizen also. But his parents had to be married by ἐγγύη, as we learn from Herodotus VI, 130,2, for the marriage between Megakles, a member of the Alkmeonid family, and Agariste, daughter of Kleisthenes, the ruler of Sikyon: τῷ δὲ Ἀλκμέωνος Μεγακλέι ἐγγυῶ παῖδα τὴν ἐμὴν Ἀγαρίστην νόμοισι τοῖσι Ἀθηναίων, where νόμοισι τοῖσι Ἀθηναίων implies two things: first that ἐγγύη was a prerequisite, without which a marriage was not valid in Athens, because otherwise there would have been no point in mentioning Athenian law; and second that marriage between an Athenian citizen and an alien woman was at that time recognized as legitimate by Attic law and the offspring of such a union would be legitimate children, recognized as Athenian citizens. Megakles' and Agariste's children included Kleisthenes, the reformer of the Athenian constitution.

On this view, if the whole hypothesis above is correct, we may interpret the clause εἰ ἐλεύθερος ἐστὶ καὶ γέγονε κατὰ τοὺς νόμους as "whether he is of citizen birth and born in lawful wedlock". Therefore, although in *Ath. Pol.* 42,1 there is not mention of legitimacy *per se*, we can find, in some way, ground to base on it the assumption that the phrase "according to the laws" might include a requirement of legitimacy.

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Atimia[43] is one of the most difficult topics in the study of Athenian law. *Atimia* was a penalty for various offences and it affected a citizen's status; a person who had been punished with *atimia* lost rights and privileges. In the sixth and early fifth centuries *atimia* was outlawry: if a man was *atimos*, anyone could kill him or plunder his property without becomig liable to prosecution or penalty. Hence this would make it impossible for him to remain in Athenian territory and such *atimia* was nearly equivalent to expulsion from Attica and it could be imposed on aliens as well as Athenians. However, by the late fifth century *atimia* had come to mean less than this. In general terms, it meant expulsion from the privileges of Athenian public life, and it was a penalty imposed only on citizens, not applicable to aliens. It is translated "disfranchisement".[44]

The formal condemnation of Arkheptolemos and Antiphon for their part in the oligarchy of 411 B.C., quoted in [Plut.] *Ethika* 834 a-b, is suggested by MacDowell as another piece of evidence that the Athenians admitted bastards to citizenship. Among others, one of the condemnation's stipulations is : ἄτιμον εἶναι Ἀρχεπτόλεμον καὶ Ἀντιφῶντα καὶ γένος τὸ ἐκ τούτοιν, καὶ νόθους καὶ γνησίους. Their descendants are to be disfranchised, both bastard and legitimate. And MacDowell concludes that illegitimate descendants of Athenians normally have citizenship, because otherwise there was not point this decree

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[43] In general on this topic, see: M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B. C.* (Odense 1976) pp. 54-98.

[44] I am indebted to D. M. MacDowell, *The Law in Classical Athens*, (London1978) pp. 73-75, for most of this paragraph.

declaring Antiphon and Arkheptolemos to be *atimoi* to include both categories of their children, *gnesioi* and *nothoi*, if in fact *nothoi* were not citizens.

However, Rhodes has challenged this evidence arguing that everything here depends on the meaning of ἄτιμον. As it has been mentioned before, in early Athens ἀτιμία denoted total outlawry and only later in the fourth century it took a weaker sense and came to mean "disfranchisement". Arkheptolemos and Antiphon have been sentenced to death, confiscation of their property, demolition of their houses, and exclusion of their mortal remains from all land under Athenian control and they are to be ἄτιμοι themselves and their descendants both illegitimate and legitimate, and anyone who adopts any of their descendants will himself become ἄτιμος. Harrison believed that ἀτιμία retained its sronger, archaic sense when combined with death, confiscation of property, and extension to the whole family.[45]So Rhodes argued that ἄτιμος here is used in its stronger sense, meaning "outlawry", which, at least in early Athens, was applicable to a non-citizen, and concluded that Arkheptolemos and Antiphon were declared outlaws together with all their offspring, and, since this kind of ἀτιμία could be imposed on aliens as well as Athenians, the fact that these illegitimate descendants of Arkheptolemos and Antiphon were subjected to this kind of ἀτιμία, does not prove that they had citizenship before.

I find difficult to believe that ἄτιμος in this text means "outlawry" instead of "disfranchisement", but not impossible. But even if Rhodes is wrong at this point and ἄτιμος in this text means what it normally meant in the fourth century, it is uncertain whether we can use this source as evidence that νόθοι had citizenship, for the following reason: As Humphreys notes[46], during the Peloponnesian

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[45] A. R. W. Harrison, *The Law of Athens, II: Procedure*, (Oxford 1971) pp 169-76.

[46] S. C. Humphreys, "The Nothoi of Kynosarges", *JHS*, 94 (1974) 94.

war it was not difficult to gain entry illicitly to demes and phratries, especially those based on villages evacuated for fear of Spartan invasions. In the later years of the war Perikles' law was disregarded or repealed. Antiphon and Arkheptolemos were sentenced in 411. The νόθοι mentioned here were probably born or came of age during the Peloponnesian war when the Athenians disregarded the regulations of citizenship imposed by Perikles in 451/0. So, although they were νόθοι, they could have managed to gain citizenship under certain conditions which, however, were not the normal ones.

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Isaios 3, 45.

In Isaios 3,45 the speaker says :

> ἐπειδὴ δὲ τῷ Ξενοκλεῖ ἠγγύα ὁ Ἔνδιος τὴν ἀδελφιδῆν σου, ἐπέτρεψας, ὦ Νικόδημε, τὴν ἐκ τῆς ἐγγυητῆς τῷ Πύρρῳ γεγενημένην ὡς ἐξ ἑταίρας ἐκείνῳ οὖσαν ἐγγυᾶσθαι;

And MacDowell argues that the case of Phile in this speech proves that an illegitimate daughter of Athenian parents could be given in marriage to a citizen. But in the fourth century marriage or cohabitation of a citizen and a non-citizen as husband and wife was forbidden ([Dem.] 59.16 and 52). Therefore, MacDowell concludes, the daughter must have been a citizen.[47]

Actually, in this case here, a double question arises: Is Phile both νόθη and the wife of an Athenian citizen? And, does this fact establish that νόθοι were citizens in Athens? Phile was really given in marriage by ἐγγύη to Xenokles as the child

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[47] D. M. MacDowell, (1976) 90.

of a *hetaira* (ὡς ἐξ ἑταίρας)- sections 45, 48, 52, 55. However, her husband, Xenokles, had testified that Endios gave her as his γνησίαν ἀδελφὴν (section 58) and Xenokles thought that she was legitimate: ἄλλως τε καὶ εἰ, ὥς φασιν οὗτοι, ἠγγυήκει αὐτὴν τῷ Ξενοκλεῖ ὡς γνησίαν ἀδελφὴν οὖσαν αὐτοῦ. (section 58). If Phile was νόθη, and if the laws recorded in [Dem.] 59.16, 52, prohibiting marriage between an ἀστὸς/ἡ and a ξένος/η, were in force at the time of Phile's marriage, then it could be argued that νόθοι were citizens, since the speaker never says that the marriage was illegal. But what was Phile's status? Rhodes has argued[48] that Phile's status was ambiguous and not addressed by those laws. Although she was illegitimate (if she really was), as the child of both Athenians she would not have been ξένη in the ordinary meaning of the word. On the other hand, if the marriage was in fact illegall, namely the laws were in force and Phile was not an ἀστή, the speaker might not want to emphasize it, since his own brother had given Phile in marriage.[49] Finally, Patterson concludes on this problem that this speech does not prove that νόθοι were citizens for two reasons; first, because it is not clear that Phile really was νόθη, and second, because, if she was νόθη, it is not clear that her marriage to Xenokles was technically legal.[50]

However, from another point of view, I think that it could be argued that the marriage between Phile and Xenokles was perfectly legal, in spite of the fact that she was illegitimate daughter of Pyrrhos, without proving that νόθοι in general had citizenship during the period when this speech was delivered.

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[48] P. J. Rhodes (1978) 91

[49] W. Wyse, *The Speeces of Isaeus*, (Cambridge 1904), pp. 278-82.

[50] C. B. Patterson, "Those Athenian Bastards", ClAnt. 9 (1990) 73.

This speech was delivered approximately in the 380s[51]. In the prooimion of the speech we are told that Pyrrhos died more than twenty years before the date of the speech. In paragraph 31 we are also told that Phile at the time of the trial had been married for eight years. Thus, it indicates that her birth goes back at least twenty-two years form the date of the speech, if we assume that she was married in the age of fourteen. Therefore, if the date of the speech is correct, she must have been born before 403/2.

But, during the period before 403/2 matters concerning citizenship were fluid, probably because of the war, and so we can assume that many sorts of person were accepted as citizens. The re-enactment of the Periklean law 403/2 strongly indicates that Athenians had left aside laws and rules ruling citizenship. Furthermore, this decree contained the proviso that no investigation was to be made about those who had been accepted as citizens or were born before the archonship of Eukleides -

τοὺς δὲ πρὸ Εὐκλείδου ἀνεξετάστως ἀφεῖσθαι (schol. Aesch. 1.39)[52].

Therefore, it is precarious reasoning to use instances of νόθοι, accepted as citizens or born before 403/2, as evidence for their status after that date. The re-enactment of Perikles' law as well as the law about νόθοι were not made retroactive but they took effect from the year 403/2 forwards.

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[51] cf. R.F. Wevers *Isaeus, Chronology, Prosopography and Social History* (Mouton 1969) pp. 16, 18, 25.

[52] *See* also: Dem. 43.51: νόθῳ δὲ μηδὲ νόθῃ μὴ εἶναι ἀγχιστείαν μήθ' ἱερῶν μήθ' ὁσίων ἀπ' Εὐκλείδου ἄρχοντος.

Dem. 57.30: τοῖς χρόνοις τοίνυν οὕτω φαίνεται γεγονὼς ὥστε, εἰ καὶ κατὰ θάτερ' ἀστὸς ἦν, εἶναι πολίτην προσήκειν αὐτόν: γέγονε γὰρ πρὸ Εὐκλείδου.

So, on this view, Phile's marriage could be regarded as not illegal.

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Demosthenes' speeches 39 and 40.

In Dem. 39, a certain Mantitheos, son of Mantias of Thoricus, brings suit against his halfbrother, Boeotos, to prevent him from calling himself Mantitheos. According to the speaker, Mantias, an Athenian citizen, had legally married a daughter of Polyaratos and Mantitheos was the legitimate son of him by the daughter of Polyaratos. Mantitheos was formally recognised by the father at the festival held on the tenth day after his birth; he was entered into the phratry and upon reaching the age of eighteen was inscribed by Mantias on the register of the deme under the name of Mantitheos (39.29).

However, Mantias had a connection with another woman of Athenian birth, named Plangon, whom, according to the speaker, Mantias kept as a mistress. Two sons were born to her and she claimed that they were Mantias' sons. Mantias was unconvinced that Boeotos and Pamphilos were his sons, and refused to recognise them as such. But, when Boeotos came of age, he brought a suit against Mantias to compel him to recognize Boeotos as his legitimate son. For political reasons Mantias did not want the suit to come to trial, so he made a private arrangement with Plangon before the case came to arbitration. He gave her thirty minai and was to challenge her to declare under oath that he was the father of her sons. Plangon agreed that she would refuse the oath, but, when the case came before the arbitrator, she broke her promise and swore that Boeotos and Pamphilos were Mantias's sons, (39.2-4; 40.2, 9-11). So Mantias had no choice, he acknowledged the boys as his and introduced them to his phratry (39.4; 40.11). Mantias died before the sons of Plangon were entered on the register of the deme and Boeotos proceeded to enrol himself in the deme by the name Mantitheos, the name of the

paternal grandfather, which had been borne by the speaker since birth with Mantias's full approval. So Mantias has brought a suit to compel Boeotos to resume his former name.

The first thing we have to indicate is that the union between Mantias and Plangon was not a concubinage but legal marriage by ἐγγύη. In both speeches nothing is said about the marriage between Mantias and Plangon in a direct way (Mantitheos implies rather the opposite), but Mantias's reaction and attitude, as it seems through the speeches, implies that he was married to Plangon by ἐγγύη. Mantitheos never explicitly denied that Plangon was married to Mantias. From or. 40.10 it appears that Mantias's only reason for rejecting Boeotos was that he did not believe that Boeotos was his son, not that he had never been married to Plangon. Mantias's eventual acknowledgement of Boeotos's legitimacy is very important. It shows clearly that Mantias and Plangon were married by ἐγγύη for the following reason: After the acknowlegment of the children's paternity, Mantias presented them to the phratry for admission, where he had to swear that the boys were his by a formally married wife of citizen birth (ἐξ ἀστῆς καὶ ἐγγυητῆς). If Mantias was not married to Plangon by ἐγγύη and Plangon was simply Mantias's mistress, then it would be very easy for him to refuse to take such an oath, which, in that case, would be a lie. The fact that he did enrol them into his phratry proves that the ground for such an enrolment existed - (i.e. ἐξ ἀστῆς καὶ ἐγγυητῆς). Furthermore, the fact that Mantias recognized not only Boeotos but also Pamphilos can stand as a proof that both children were born before Mantias's divorce from Plangon. Otherwise, Mantias could agree to enroll Boeotos in his phratry by swearing the oath ἐξ ἀστῆς καὶ ἐγγυητῆς, but, if Pamphilos was born after his divorce from Plangon, then it is difficult to accept that Mantias would take an oath which would be a lie, namely that Pamphilos was born to him ἐξ ἀστῆς καὶ ἐγγυητῆς.

Sealey[53] following another interpretation argues that Pamphilos was born to Plangon and Mantias long after they had ceased to be united by ἐγγύη. It is true that the sworn testimony of Plangon asserted merely that Mantias was the father of Boeotos and Pamphilos and it did not say anything about the nature of the union in which each of the two children was conceived. But the sworn testimony of Plangon is one thing and the oath which the father (in this case, Mantias) had to swear at the procedure of admission of his son(s) in his phratry is another; and the oath was that the offspring was born ἐξ ἀστῆς καὶ ἐγγυητῆς. So I cannot accept Sealey's conclusion that, when Pamphilos was introduced to the phratry, the phrateres had to be convinced of his actual parentage but not of the nature of the union obtaining between his parents when he was born. Sealey goes further and uses the case of Pamphilos as evidence to argue that the child of citizen-parents enjoyed citizenship and *anchisteia*, even if the parents were not united in consequence of *engyesis* when the child was born.

Let us now look at the case of Boeotos from another point of view; let us count as correct the view that Athenian parents only and not necessarily legal marriage between them is required by the law for their offspring to have citizenship. Mantias was an Athenian; Plangon also was an Athenian. Boeotos had to prove that Mantias was his father; but Mantias refused to recognize him as his son. If Boeotos had only to prove that his parents were Athenian citizens, and that was enough for him to enter the deme and gain citizenship, then he had the opportunity to follow another procedure: Ignoring Mantias completely, he could have appeared in the deme in order to claim his citizenship, proving that both his parents were Athenians. But how could he prove that Mantias was his father? He could do so by referring to the ἐγγύη which had occured between Mantias and

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[53] R. Sealey, "On Lawful Concubinage in Athens", *CLAnt.* 3 (1984) 124.

Plangon. Mantias did never deny that Plangon was married to him. Mantias's only reason for rejecting Boeotos was that he did not believe that Boeotos was his son, not that he had never been married to Plangon. So Boeotos would prove his birth from citizen parents united by ἐγγύη, by proving the ἐγγύη itself, although the ἐγγύη in the context of this hypothesis was not the requirement, but he would make use of it to prove that his mother (Athenian citizen) during the period of his birth had sexual intercourse only with her husband, Mantias (Athenian citizen), and not with anyone else. Mantias divorced Plangon on the pretence that Boeotos was not his son, but he never produced evidence for this. Therefore, the only possible thing to be believed by the demesmen was that Boeotos was Mantias's son, a son of an Athenian citizen. So, having proved that both his parents were Athenians, Boeotos would gain citizenship.

However, Boeotos neither followed this kind of procedure nor simply asked Mantias to admit paternity, but to acknowledge his legitimacy by enroling him in the phratry, for at this enrolment the father swore that the child was his by a formally married wife of citizen birth.

Finally, this hypothesis leads me to the question: Was the acknowledgement of a son's legitimacy eventually determinative of his right of citizenship? And if the answer is positive, then the ἐγγύη was the base on which such a legitimacy was built.

* * *

Isaeos 12 , *On Behalf of Euphiletos.*

The twelfth speech of Isaeos is a fragment quoted by Dionysius of Halicarnassus. In the archonship of Archias, 346/5 B.C., the Athenian assembly

on the motion of Demophilos passed a decree ordering a general revision of the roll of citizens by means of a vote in each deme. Euphiletos, for whom this speech was composed, was a man whose name had been struck off the roll of the deme Erchia by a vote of the members met in assembly. He then appealed to the court and brought an action against the deme represented by the demarch. The defence of Euphiletos was committed to his half-brother on behalf of him. We do not know exactly the grounds on which the assembly of the deme had condemned him, but as we are told by this speech the charge against him was that he was not the son of Hegesippos and therefore he belonged to the deme illegally.

The case, as it is given by Isaeos, is not very clear and we do not have sufficient material to make any conjecture. The only certain thing is that Euphiletos was in danger of losing his citizenship, and his representative was at pains to prove that Euphiletos had all those qualifications which the law required for citizenship. So, let us see exactly what the speaker proves here. In the first section the speaker argues that Hegesippos had no motive in adopting Euphiletos, if Euphiletos was not his son, and uses arguments with which he attempts to establish the paternity of Hegisippos. In section 3 the speaker says that it has been testified that Euphiletos was brought up in the house of Hegesippos who also introduced him into his phratry. But the speaker does not stop here; he goes on saying that Hegesippos's wife is ready to swear that Euphiletos is her son by Hegesippos and later the speaker insists that Hegesippos also wanted and still wants to swear that Euphiletos is his son by a lawfully married wife of citizen birth, (section 9, ἐξ ἀστῆς καὶ γαμετῆς γυναικός.).

Therefore, what is attempted to be proven here it is not only the paternity but also the legitimacy of Euphiletos.

* * *

Demosthenes 57, *Against Euboulides*.

As it has been mentioned in the preceding chapter, in 346/5, on the proposal of Demophilos, the Athenians decreed that the members of every deme should review their register, deciding under oath whether each name was to be retained or excluded. An appeal to the court was possible by any man excluded in this review, and Demosthenes's speech 57, *against Euboulides*, was composed for delivery in court by a man appealing against his exclusion from the deme Halimous.

This speech has been often used as a piece of evidence in support of the view that bastards were not entitled to become citizens. The main argument is that Euxitheos tries not only to prove that his parents are citizens but also to establish his legitimacy.

I would agree with those who believe so. Indeed, Euxitheos's action can be divided into three parts: First, he argues and tries to prove that his father is a citizen (sections 18-30); second, that his mother is a citizen (sections 30-45); and the third part of his action is dedicated to himself (sections 46-56). However, in sections 40-43, Euxitheos is at pains to show that his parents were united in marriage by ἐγγύη, and this is one of the points which some scholars use as an evidence that legitimacy was a condition for citizenship.

Harrison, on the other hand, finds Euxitheos's action explicable on the assumption that all he had to prove was first that both his mother and his father were Athenian and second that he was indeed their son.[54] But the charge against Euxitheos was not double; after all such a double charge cannot exist for the following reason: You cannot say that these two people are not Athenian citizens

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[54] A.R.W. Harrison, *The Law of Athens, I: The Family and Property*, (Oxford 1968) 64.

and at the same time that a person is not their offspring and then conclude that this person is not an Athenian citizen. You have to choose; there are two alternatives: You can either say that these two people are not citizens and a person who is their offspring is not a citizen, or that these two people are both citizens but a person is not their offspring, therefore this person is not a citizen. So I do not think that Euxitheos's action is certainly explicable on this assumption of Harrison.

Nevertheless, even if we accept that the sections 40-43, where he speaks about the way in which his mother and his father were united, are not independent argumentation, but contributory evidence to confirm his mother's status, even then we cannot accept that the third part does the same. It is pretty clear that Euxitheos has left aside the discussion about his parents and speaks only for himself trying on the one hand to prove his legitimacy, as it is reflected in his entry to the phratry, on the other hand to establish his right to be a citizen. He says: οὐκοῦν ὅτι καὶ τὰ πρὸς μητρός εἰμ' ἀστὸς καὶ τὰ πρὸς πατρός, τὰ μὲν ἐξ ὧν ἄρτι μεμαρτύρηται μεμαθήκατε πάντες, τὰ δ' ἐξ ὧν πρότερον περὶ τοῦ πατρός. λοιπὸν δέ μοι περὶ ἐμαυτοῦ πρὸς ὑμᾶς εἰπεῖν, . . . (section 46).

And we could ask here: why does Euxitheos go further and deal with matters of legitimacy, if it was enough for him to prove his parents' status only? The accusation against him was merely that his parents were not citizens, hence he should not have citizenship. As far as we are informed through this speech the accusation does not seem to be that he was an illegitimate son. His rejection from the deme occurred on the basis that his parents were non-Athenians. So Euxitheos could have stopped his speech of defence when both his parents would have been proved citizens (i.e. section 46), if his intention had been only this and not also to prove himself the legitimate son of these two Athenian citizens. So it seems to me

that Euxitheos's attempt in this direction is not just for contributory evidence only to his parents' status, but also to his citizenship.

Let us turn now to the sections 52-56; Euxitheos says: καὶ φασίν. . . τῶν μαρτύρων ἐνίους ὠφελουμένους μοι μαρτυρεῖν συγγενεῖς εἶναι . . . ἐξῆν δὲ δήπου τούτοις, εἰ νόθος ἢ ξένος ἦν ἐγώ, κληρονόμοις εἶναι τῶν ἐμῶν πάντων (section 52-53).

The accusers, according to Euxitheos, claim that some of the witnesses have been bribed by him to testify that they are συγγενεῖς to him, probably that Euxitheos belongs to their phratry. Euxitheos refutes this accusation by saying that ἐξῆν δὲ δήπου τούτοις, εἰ νόθος ἢ ξένος ἦν ἐγώ, κληρονόμοις εἶναι τῶν ἐμῶν πάντων, and therefore they would rather prefer to inherit the whole estate than to be bribed by him with less money. We should note here two points: First, that these alleged bribed witnesses come from his father's side, because if Euxitheos was νόθος or ξένος they would have access to his father's property as his relatives. Second, for the same reason, it seems that in no way the paternity of Euxitheos is questionable. In other words, to be able to maintain this statement here, these witnesses must be relatives to Euxitheos's father and heirs of his property if his son (Euxitheos) is νόθος or ξένος. And I understand the meaning of νόθος as the son of an Athenian mother out of wedlock and ξένος as the son of an alien mother, and of course in this case out of wedlock.

The fact that Euxitheos discusses this case, even though it is only an alleged one, requires some consideration. Let us pretend that it really happened, that Euxitheos bribed some of the witnesses to testify that he was a member of their phratry. In which case would Euxitheos have turned to the subornation of witnesses? In the case that he was νόθος or ξένος. It must be repeated that in none of these cases the paternity of Thoucritos is disputed. However, I can understand the case of ξένος; then Euxitheos, being such a person, would have

reasonably suborned witnesses, because he would not have had evidence enough to prove his mother's citizen status and perhaps he would have needed more and more evidence for this, even if he had to pay witnesses. But I cannot understand the case of νόθος; even if he was the νόθος son of Thoucritos (who was a citizen) and of an Athenian woman, would it be reasonable to act in this way? Would it be necessary to buy off some witnesses to testify that he was a member of their phratry, since claiming citizenship he could have only proved citizen parents? So I would expect Euxitheos to refute this accusation on the basis that he would have done so if he had been ξένος, but I would not expect him to put νόθος side by side with ξένος. I would rather expect him either to ignore the case of νόθος or just to say that even if he was νόθος he would not have the need to ask them to give false testimony that he was a member of the phratry.

Having in mind that Euxitheos seeks to prove his father Athenian, and at the same time the use of his membership in the phratry by him as an argument which is, let us say, contributory to his attempt, and all of this with the hint that, if he was νόθος, there would be the possibility to bribe the witnesses, let us make a general observation: a νόθος son of an Athenian man and an Athenian woman being out of the phratry, it does not prove that his father is not an Athenian citizen. Thus, it seems unnecessary for a νόθος to suborn witnesses to testify that he is in the phratry in order to prove his father's status. And I stress the father's status, because he might do so for the purpose of the inheritance. But here Euxitheos has not gone to the law-court to claim inheritance, but his first goal is to prove his father's status, because this is what is in dispute.

So, in my opinion, the alleged case of the bribery of witnesses, in this context, mentioned by Euxitheos carries more weight than it seems to carry at first sight. I think that Euxitheos refers to his phratry membership because he wants to

establish his own legitimacy. Now, if from his legitimacy the status of his father becomes clearer, this is another thing.

* * *

The grant of citizenship to the Plataians

It is known that any Athenian man of citizen status might be selected to hold some public office, either by lot or by election, and also that the nine arkhons were selected by lot among the Athenian citizens.

As we learn from Thucydides[55] the city of Plataia made an alliance with Athens in 519 and before the year 429 the Plataians were declared citizens of Athens. After the destruction of Plataia, in 427, by Spartans and Thebans, the surviving Plataians took refuge in Athens and the Athenians granted citizenship to them by passing a decree which enabled them to be registered in demes. And, although Plataians were granted citizen rights, they could not themselves hold any of the archonships or priesthoods, as the Athenian citizens did. However, their sons could do so if they were born by a formally married wife of citizen birth - τοῖς δ' ἐκ τούτων, ἂν ὦσιν ἐξ ἀστῆς γυναικὸς καὶ ἐγγυητῆς κατὰ τὸν νόμον. ([Dem.] 59.106). And this limitation of the rights of naturalized citizens is quoted earlier in the same speech as a general rule - (section 92).

So, it seems to me that this limitation was not without significance. The fact that the sons of the naturalized Athenians were to gain full citizen rights when, and only when, they were the legitimate offspring of citizen birth on both sides, leads me to the question: was this restriction - ἐξ ἀστῆς καὶ ἐγγυητῆς - a universal and necessary condition for citizenship?

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[55] Thuc. 3.55.3, 63.2, 58.5.

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Phratry membership

It is generally accepted that bastards were not entitled to membership of a phratry and that before Cleisthenes's reforms a man had to belong to a phratry to be an Athenian citizen. It follows that before Cleisthenes's reforms bastards were not entitled to citizenship.

It has been argued that after Cleisthenes's reforms it was not necessary to belong to a phratry to be a citizen. The strongest argument, according to Harrison[56], is the failure of Ar. *Ath. Pol.* 42.1 to mention such a qualification for entry on the deme register: μετέχουσιν μὲν τῆς πολιτείας οἱ ἐξ ἀμφοτέρων γεγονότες ἀστῶν, ἐγγράφονται δ' εἰς τοὺς δημότας ὀκτωκαίδεκα ἔτη γεγονότες. ὅταν δ' ἐγγράφωνται διαψηφίζονται . . . οἱ δημόται . . . εἰ ἐλεύθερός ἐστι καὶ γέγονε κατὰ τοὺς νόμους.

It is true that Ar. *Ath. Pol.* 42.1 does not say directly anything for membership of a phratry as a qualification for entry on the deme register. However, if we accept that ἐλεύθερος here has the meaning of πολίτης, namely a man born from two Athenian parents, and if we accept that the phrase καὶ γέγονε κατὰ τοὺς νόμους may incorporate a requirement for legitimate birth (i.e. ἐξ ἐγγυητῆς)[57], then the requirement of phratry membership goes with it, because I do not see any reason for two Athenian parents lawfully married not to introduce their legally born offspring into their phratry.

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[56] A.R.W. Harrison, *The Law of Athens, I: The Family and Property*, (Oxford 1968) 64 n.1.

[57] See pp. 44 - 48 above.

So I think that, although we do not have a direct mention of membership of a phratry, it could be implied by the wording of *Ath. Pol.*. Of course the deme was the essential condition for citizenship after Cleisthenes, but I do not think that it replaced the phratry in the sense that the phratry ceased to be a still necessary condition.

Three points in support of this view:

1. According to Plutarch *Per.* 37.5, after the death of his legitimate sons Pericles was allowed to have his son by Aspasia enrolled in his phratry: . . . συνεχώρησαν ἀπογράψασθαι τὸν νόθον[58] εἰς τοὺς φράτερας, ὄνομα θέμενον τὸ αὐτοῦ.

According to Suid. δημοποίητος [Δ 451] this νόθος son of Pericles was made δημοποίητος-i.e. a citizen: Suidas: δημοποίητος: ὁ ὑπὸ τοῦ δήμου εἰσποιηθεὶς καὶ γεγονὼς πολίτης. Περικλῆς γὰρ ὁ Ξανθίππου . . . τὸν νόθον οἱ παῖδα τὸν ἐξ Ἀσπασίας τῆς Μιλησίας ἐποίησε δημοποίητον. Δημοποίητος οὖν ὁ φύσει ξένος, ὑπὸ δὲ τοῦ δήμου πολίτης γεγονώς.

2.Claimants to citizenship, as it seems from the forensic speeches, are at pains to prove membership of a phratry. But Harrison[59] argued that these claimants use the phratry argument because by proving that they were phratry members it was the simplest way of proving that their parents were both Athenian. This explanation seems, in some way, to suit easily the case of Euxitheos (Dem. 57), but not the case of Boeotos (Dem. 39 and 40). In Dem. 39.2 we are told that : (Βοιωτὸς) λαχὼν δίκην τῷ πατρὶ τῷ ἐμῷ . . . ἐδικάζεθ' υἱὸς εἶναι φάσκων ἐκ τῆς Παμφίλου θυγατρὸς καὶ δεινὰ πάσχειν καὶ τῆς πατρίδος

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[58] Pericles the younger; he was born probably before 440 B.C. In 410 he was Hellenotamias and in 406 strategos.

[59] Harrison (1968) 65.

ἀποστερεῖσθαι, and later (section 4) that: ὡς δὲ τοῦτ' ἐποίησεν, εἰσάγειν εἰς τοὺς φράτερας ἦν ἀνάγκη τούτους, καὶ λόγος οὐδεὶς ὑπελείπετο. So it is clear here that Boeotos had made a claim for citizenship (καὶ τῆς πατρίδος ἀποστερεῖσθαι), won the case and the further step was his introduction to the phratry (εἰσάγειν εἰς τοὺς φράτερας), and later to the deme. And so Mantitheos says later in the same speech: σοι πόλις, οὐσία, πατὴρ γέγονεν, (section 34).

3. As all the preserved citizenship decrees show, the Athenians insisted on having naturalized citizens enrolled in the phratries.[60]These decrees, concerning grants of Athenian citizenship to foreigners, include instructions to the new citizens to seek enrolment into a deme, tribe and phratry. The enrolment clause has the general form γράψασθαι αὐτὸν (or εἶναι αὐτῷ γράψασθαι) φυλῆς καὶ δήμου καὶ φρατρίας ἧς ἂν βούληται. Naturalized citizens had a free choice of deme, tribe, and phratry.

* * *

Conclusion

A brief summary of this chapter's conclusions seems appropriate here.

I tend to believe that illegitimate birth was a bar to citizenship in Athens, in the period of the orators, for the following reasons:

1. The discussion of citizenship qualifications at *Ath. Pol.* 42.1 gives a hint of a legitimacy (καὶ γέγονε κατὰ τοὺς νόμους).

2. The decree quoted in [Plut.] *Antiphon* 834 a-b, imposing ἀτιμία on the legitimate and illegitimate descendants of the convicted men, as well as the case of Phile (Isaios 3), who though a νόθη was given in marriage by ἐγγύη to a

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[60] cf. M.J.Osborne, *Naturalization in Athens*: vols III-IV, (Brussels 1983) p. 158.

citizen, are precarious cases of νόθοι (born before 403/2) to be used as evidence for the status of νόθοι after 403/2. The re-enactment of Pericles's law in 403/2 indicates that matters concerning citizenship were fluid before 403/2.

3. Dem.39 shows that Boeotos's citizenship depended on the acknowledgement of his legitimacy.

4. In Isaios 12 and especially in Dem.57, the speaker's attempt to prove not only the status of his parents, but also to establish his legitimacy, indicates that "both Athenian parents" as a qualification for citizenship probably was not enough.

5. After Cleisthenes's reforms the deme was the essential condition for citizenship, but I think that the phratry did not cease to be a necessary condition, as it seems from the phratry argument used in forensic speeches by claimants to citizenship. Plut. *Per.* 37.5 and the preserved citizenship decrees which granted citizenship to foreigners confirm this conclusion.

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PART III

ΕΓΓΥΗ AS SURETY

ISAEOS V,
ON THE ESTATE OF DIKAEOGENES

Dikaeogenes II, the son of Menexenos I, of the deme κυδαθήναιον, was killed at Knidos in 412/11 B.C.[61] He died childless and had no brothers left, but had four married sisters who would have inherited all his property, in accordance with the law of intestate succession.[62] But after his death, Proxenos, the husband of his father's sister, produced a will under which his own son, Dikaeogenes III, was posthumously adopted as son of Dikaeogenes II and heir to one-third of his estate (καὶ ἐπὶ τῷ τρίτῳ μέρει τοῦ κλήρου . . . υἱὸς ἐγίγνετο ποιητός· section 6). The will was not challenged and Dikaeogenes III received the one-third of the estate, the other two- thirds being divided between the four sisters.

Twelve years later Dikaeogenes III alleged that this first will was invalid and produced another will under which he was heir not to one-third only, but to the whole of the estate. A stand against this second will was made by Polyaratos, the husband of the eldest sister, in defence of his wife and her sisters. The court, however, decided in favour of Dikaeogenes III, who gained possession of the

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[61] see, Wyse, *Isaeos* 405.

[62] [Dem.] 43 *Against Makartatos* 51.

whole estate, and Polyaratos, who intended to bring an action for false witness, died before he could carry out this threat (section 9).

For ten years Dikaeogenes III had the whole estate under his possession and no one so far attempted to dispute this second will. But one of the children of the sisters, Menexenos III, the son of kephisophon, brought an action for perjury against one of the witnesses to the second will. This action was successful and the defendant was convicted of perjury for giving false evidence in support of the genuineness of this will. Menexenos was preparing to attack the other witnesses when Dikaeogenes III stopped him by offering to restore to him his share of the estate, on the condition that he would not take any further action. Menexenos accepted this offer but Dikaeogenes III eventually broke faith and failed to carry out this agreement. Menexenos then made common cause with the other claimants, the children of Dikaeogenes' II sisters (Kephisodotos, the son of Theopompos, and Menexenos IV, one of the sons of Polyaratos). Their plan this time was to claim from Dikaeogenes III the whole estate on the ground of affinity. Their argumentation run as following:

"Two wills were produced under which Dikaeogenes III was adopted by Dikaeogenes II. Under the first will, Dikaeogenes III was to be heir to one-third of Dikaeogenes' II estate; according to the will which Dikaeogenes III himself produced, he was to be heir to the whole estate. Of these two wills, Dikaeogenes III persuaded the judges that the first was not genuine; those on the other hand who bore witness that the second will was Dikaeogenes' II genuine will, were convicted of perjury. Therefore, both wills being invalidated, no one had any claim to the estate under testamentary disposition, but it could be claimed on grounds of affinity by the sisters of Dikaeogenes II." (sections 15-16).

So they claimed, as next-of-kin, the whole estate on the plea that Dikaeogenes II had died intestate. But this claim was met by Dikaeogenes III by a protestation

(διαμαρτυρία); a friend of his, Leochares, testified that the estate was not adjudicable to the next-of-kin (μὴ ἐπίδικον εἶναι τὸν κλῆρον, section 16), because Dikaeogenes III was the adopted son of Dikaeogenes II. The claimants prosecuted Leochares for bearing false witness (δίκη ψευδομαρτυρίων); and while the procedure of this suit was to be concluded and decision was to be taken by the judges, and although it was obvious, according to the speaker of this speech, that the defendant was found guilty by the court and a conviction was to be imposed on him, the two parties arrived at a compromise. Dikaeogenes III was to keep his original one-third of the estate and to cede the two- thirds to the sisters of Dikaeogenes II. Leochares and Mnesiptolemos became his sureties for the performance of this engagement. But eventually, since Dikaeogenes III did not perform his agreement, the claimants sued Leochares as surety. The case came into court and the present speech was written by Isaeos for this trial, and was delivered by Menexenos IV, the son of Polyaratos. The suit was an action to compel Leochares to discharge his liability as surety.

The ἐγγύη took place in the court when Leochares was prosecuted for bearing false witness. Dikaeogenes III promised to give back two-thirds of the estate to the three cousins, sons of the sisters of Dikaeogenes II, and Leochares with Mnesiptolemos undertook to stand sureties that Dikaeogenes III would carry out his promise. But we are not told anything of the distribution of liability between the two guarantors. This suit was brought only against Leochares, one of the two guarantors, and there is not any hint in this speech that another action had been brought earlier against Mnesiptolemos, or at least that they intended to sue Mnesiptolemos later. Does this mean that Leochares was the main guarantor and Mnesiptolemos was a kind of co-guarantor with less obligation? But, if Leochares was sued and condemned in the whole amount, could he in any way compel

Mnesiptolemos to bear his share in the loss? Unfortunately these questions remain unanswered since the evidence that we have is not enough for any conclusion.

The δίκη ἐγγύης must have taken place at least one year after the ἐγγύη, since we learn from Dem.33 *Against Apatourios* 27 that ὁ νόμος κελεύει τὰς ἐγγύας ἐπετείους εἶναι. What [illegible] happened in the meantime must have been the following:

The cousins approached Dikaeogenes III first and asked him to carry out his promise. He gave back some of the estate[63], but they were not satisfied. They expected to recover the two-thirds of Dikaeogenes' II estate free of all claims and liabilities (ἀναμφισβήτητα). Dikaeogenes III denied that he had given such a promise and they turned to Leochares, his surety. They approached Leochares, probably accompanied by witnesses, and made a demand of what he guaranteed according to them. Leochares refused to satisfy them and they brought the suit against him for the unfulfilled ἐγγύη.[64]

The problem lies on the interpretation of the compact. Let us suppose that there was not any compromise between Dikaeogenes III and the cousins and the ἐγγύη did not take place. In this case Leochares would be convicted for bearing false witness and with his conviction the issue of the protestation would be over, which means that the cousins, as next-of-kin, would have taken back Dikaeogenes' II estate.

But which estate of Dikaeogenes II were they supposed to recover? They possibly knew very well that a significant part of his uncle's estate was mortgaged by Dikaeogenes III. But, when they claimed the estate, they had in mind the estate

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[63] Section 22, πλὴν γὰρ δυοῖν οἰκιδίοιν ἔξω τείχους καὶ ἐν Πεδίῳ ἐξήκοντα πλέθρων οὐδὲν κεκομίσμεθα, ἀλλ' οἱ παρὰ τούτου θέμενοι καὶ πριάμενοι.

[64] For this kind of procedure see, Dem. 33. 25-26.

which once Dikaeogenes II possessed,[65] although in the twenty-two years passed since the death of the original owner a part of the estate had passed from one party to another and fair wear and tear should be expected. What the cousins wanted most, was in the first place to recover the estate and not for Dikaeogenes III and Leochares to be convicted, since by their conviction the cousins would not succeed in their goal. Therefore, the only way out of the problem was the agreement with Dikaeogenes III. At least in this way they might have a hope that eventually they would take the property back. If the court, after the conviction of Leochares, had declared that the estate belonged to the cousins as next-of-kin, and since one part of the estate was mortgaged, I do not think that Dikaeogenes III would repay to his creditors the loans he had taken on the security of some parts of the estate.

In my opinion, the agreement between Dikaeogenes III and the cousins was imposed in a manner by the cousins themselves. Nobody had any other alternative at that certain time in the court. Otherwise, the cousins would lose a significant part of the estate and Dikaeogenes III with Leochares would be convicted. By acting in this way (compromise - ἐγγύη), the cousins intended to give more time to Dikaeogenes III to return the estate and a last chance to Leochares to avoid conviction.

It seems from the context of this speech that Leochares did not become a surety for Dikaeogenes III willingly, because he himself wanted to or because Dikaeogenes III asked him to stand as surety, but because the cousins forced it upon him. Leochares did not have any other choice. He had to choose between his

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[65] Section 3, ἀναγνώσεται γὰρ ὑμῖν ὅσα κατέλιπε Δικαιογένης ὁ Μενεξένου ἐν τῷ κλήρῳ καὶ τὰ χρήματα ἃ ἔλαβε. <ΑΠΟΓΡΑΦΗ>.

conviction or to become surety; and he chose the latter.[66] However, it is strange that the same person who was the defendant in the δίκη ψευδομαρτυρίων became the ἐγγυητής when the compromise was arranged. Now, as far as the content of the compromise is concerned I think that the provision of the agreement was that Dikaeogenes III would have to restore the two-thirds of the estate free from all claims and liabilities (ἀναμφισβήτητα), precisely as the speaker maintains here (sections, 1, 18, 20, 21), i.e. that he would have to recover and hand over everything that had been mortgaged. The reason why I tend to believe this, is because the cousins would have been able to recover exactly what they eventually managed to recover from Dikaeogenes III without any agreement with him and without Leochares being a surety. The conviction of Leochares in the suit of false witness would be for the cousins the way to the estate possessed at that certain time by Dikaeogenes III. If they were satisfied by taking back only what remained from the two-thirds of Dikaeogenes' II original estate, I do not think that they would need a particular compromise with Dikaeogenes III. Therefore, they tried to recover two-thirds of the original estate of Dikaeogenes II, part of which was mortgaged by Dikaeogenes III and therefore the only person entitled to repay his creditors in order to recover the mortgaged estate. Therefore the fact that there was a part of the estate which was mortgaged led the cousins to this compromise with Dikaeogenes III.

However, there is a problem as far as the form of the agreement is concerned. There was definitely a written agreement where such a provision

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[66] section 20, καίτοι εἰ μὴ ἐναντίον μὲν τῶν δικαστῶν, πεντακοσίων ὄντων, ἐναντίον δὲ τῶν περιεστηκότων ἠγγυᾶτο, οὐκ οἶδ' ὅ,τι ἂν ἐποίησεν.

section 22, διὰ ταῦτα γὰρ καὶ τοὺς ἐγγυητὰς παρ' αὐτοῦ ἐλάβομεν, οὐ πιστεύοντες αὐτῷ ἃ ὡμολόγησε ποιήσειν.

(ἀναμφισβήτητα) did not exist, and this was the strongest argument of the other side (Dikaeogenes III and Leochares). But the speaker says that apart from the written agreement there was an oral agreement as well, and some of the provisions were written down and some others were not, but they obtained witnesses in support of them (section 25, τῶν δὲ μάρτυρας ἐποιησάμεθα). Since it would be inexplicable if the cousins reached a compromise with Dikaeogenes III into which the provision ἀναμφισβήτητα was not incorporated, I think that such a provision existed in the oral agreement, although I am not able to explain why such an important term of the agreement did not take a written form.

* * *

In section 3 we read:

> ἴσως δὲ ἐπ' ἐκεῖνον τρέψεται τὸν λόγον, ὡς Δικαιογένης τε ἃ ἡμῖν ὡμολόγησεν ἅπαντα πεποίηκεν, καὶ αὐτὸς τὴν ἐγγύην ὅτι ἀπέδωκεν.

The phrase καὶ αὐτὸς τὴν ἐγγύην ὅτι ἀπέδωκεν does not have here the meaning that "Leochares discharged his duty as surety". After all the context does not allow here a meaning like this. The speaker says that Leochares might say that Dikaeogenes III has performed all that he agreed to do and he himself τὴν ἐγγύην ὅτι ἀπέδωκεν. If we take this phrase with the meaning that "he discharged his duty as surety", it does not make sense here. Leochares would have to do so, only in case that Dikaeogenes III had failed to fulfil his promise. A guarantor was required to take action and carry out the promise given by the person whom he had guaranteed for, only when this person had failed to carry out his promise. But, just a sentence before, the speaker says that Leochares might allege that Dikaeogenes has kept his promise and done everything that he agreed to do.

Therefore, these two sentences (ὡς Δικαιογένης τε ἃ ἡμῖν ὡμολόγησεν ἅπαντα πεποίηκε, and, καὶ αὐτὸς τὴν ἐγγύην ὅτι ἀπέδωκεν) cannot stand

side by side, if the phrase τὴν ἐγγύην ὅτι ἀπέδωκεν is to take the meaning that " he has fulfilled his duties as surety". As the whole period stands here, with the two ὡς - clauses depending on the verbal phrase τρέψεται ἐπ' ἐκεῖνον τὸν λόγον and strongly connected with each other by the cumulative conjunctions τε . . . καὶ, it cannot refer to the two different possibilities, namely that: either Dikaiogenes kept his promise or Leochares fulfilled his duties as surety. The syntactical structure of this period denotes that the sentence - καὶ αὐτὸς τὴν ἐγγύην ὅτι ἀπέδωκεν - comes as a result of the action of the subject of the verb of the previous sentence - ὡς Δικαιογένης . . . πεποίηκε.

Therefore, the meaning of καὶ αὐτὸς τὴν ἐγγύην ὅτι ἀπέδωκεν, in this context, seems to be that "he gave up his liability as surety", in the sense that he was not bound any more by the ἐγγύη previously undertaken by him. Thus the verb ἀποδίδωμι connected with the noun ἐγγύη as its object denotes release from the obligation which the subject of the verb (ἀποδίδωμι) had undertaken by being the guarantor when the ἐγγύη took place.

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In this case here we have an agreement between Dikaeogenes III and the three cousins, the sons of Dikaeogenes' II sisters. Dikaeogenes III promised to give back to them the two-thirds of the estate free of all claims and liabilities and at that point he converted himself into a debtor. For this promise two persons undertook to play the role of sureties, Leochares and Mnesiptolemos. They guaranteed that Dikaeogenes III would keep his promise. The promise of Dikaeogenes III and the agreement with the cousins formed new roles for the persons involved in this case. Through this procedure, Dikaeogenes III became the debtor with Leochares as his guarantor and the cousins were the claimants. Without this guaranty the cousins would not have accepted Dikaeogenes' III

promise, because they did not believe that he would carry out his promise. The gap between the promise and the real action was bridged by the guarantor.

But what was he supposed to do as guarantor and what was his responsibility? If, after the ἐγγύη had taken place, Dikaeogenes III fulfilled his promise, then Leochares would cease to have any responsibility. He would assume full responsibility for the fulfilment of the promise in case that Dikaeogenes III failed to do so. The obligation of the guarantor started when the debtor was unable to fulfil his obligations. If the debtor repaid what was due, the guarantor's role would be restricted to the initial proccedings for the contracting of the ἐγγύη; he was not required to proceed to any further action. But if the debtor failed to repay, then the guarantor took, in fact, the position of the debtor, and it was he who was required to undertake repayment of what was due. Eventually, in failure of the debtor to satisfy his creditor, a demand for the ἐγγύη was made to the guarantor. And if the guarantor refused to pay, then what followed was the δίκη ἐγγύης, brought against him by the unsatisfied party.

However, the ἐγγυητής might take action even before he was required to do so. He might co-operate with the debtor for the return of what was due, or he could press the debtor to carry out his obligation. Since the ἐγγυητής had put himself under such an obligation by undertaking to guarantee that the debtor would actually do all that he agreed to do, he was the person who would really care more. So, the existence of the ἐγγυητής operated as a kind of pressure upon the debtor to carry out his obligation. His quality as ἐγγυητής gave him the right to organise and plan the fulfilment of the obligation. In this example here Leochares, soon after his engagement as ἐγγυητής, took action towards the discharge of Dikaeogenes' III duties. He suggested that Protarchides should hand over to him the building which he possessed in lieu of the dowry, on the ground that he was surety, and receive from Dikaeogenes III on his wife's behalf her share

of the estate. This is an instance of co-operation between the debtor and the guarantor. The guarantor plays an active role from the very first moment of the ἐγγύη and he acts in a way like a representative of the debtor.

However, there is something here that should attract our attention. The text, as it stands at this point (section 27) with pronouns instead of the names of the persons meant here, makes not very clear whether Leochares himself, who demanded the house from Protarchides, was to hand over to him his wife's share of the estate. The translator of the speech identifies Leochares as the person meant behind all these pronouns.[67] Leochares demanded the return of the building which originally came from Dikaeogenes' II estate, before the estate was re-divided. Up to that point his demand might be comprehensible to us.

But we did not expect to hear that Leochares, after taking the building back and after the re-dividing of the estate, was supposed to return to Protarchides the share of the estate which accrued to his wife, since Dikaeogenes III was the person required to do so. So, in section 27 there might be a problem as far as the identity of the persons hidden behind the pronouns is concerned.

In the sentence "ἠξίου ὁ Λεωχάρης τὸν Πρωταρχίδην παραδιδόναι *αὐτῷ* τὴν συνοικίαν . . . , ὡς ὄντι ἐγγυητῇ *αὐτῷ*, τὸ δὲ μέρος ὑπὲρ τῆς γυναικὸς τοῦ κλήρου παρ' *αὐτοῦ* κομίζεσθαι.", the pronoun αὐτός is mentioned three times. The question that arises here is who is the person mentioned by each of these pronouns. In other words, is the first αὐτῷ identical with the second αὐτῷ and the third παρ' αὐτοῦ? Or are different persons hidden behind these pronouns?

First of all we should notice that, apart from the nominative of αὐτός, the oblique cases of αὐτός are the ordinary personal pronouns of the third person,

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[67] E.S. Forster, *Isaeus: with an English translation*, (London) 1927, p. 179. See also, Wyse, *Isaeus*, p. 446.

him, *her*, *it*, *them*. E.g. Στρατηγὸν αὐτὸν ἀπέδειξε, "he designated him as general".[68]

Now, the first αὐτῷ is the indirect object of the infinitive παραδιδόναι, which is the object of the verb ἠξίου which has Λεωχάρης as the subject. The identification of αὐτῷ with Λεωχάρει is obvious, not because Λεωχάρης is the subject of the main verb (ἠξίου), but because of the following participle - ὡς ὄντι ἐγγυητῇ.

The case of the participle (dative) indicates that it is connected with a previous dative in the sentence which must be the subject of the participle; this previous dative is the pronoun αὐτῷ. Therefore, αὐτῷ is the subject of ὄντι. From the predicative of the subject of the participle (ἐγγυητῇ) we conclude that the subject of the participle is identical with Λεωχάρει, since we know that Λεωχάρης was the guarantor. Therefore, the first αὐτῷ refers to Λεωχάρει.

The second αὐτῷ, in the phrase ὡς ὄντι ἐγγυητῇ αὐτῷ, seems at first sight to be the subject of the participle. But, if it is the subject of the participle, then the participle must be a "dative absolute participle", which does not exist in the Greek syntax, since this particular αὐτῷ, as a syntactical term, does not have any other function in the sentence. But, even though we take this αὐτῷ here as the subject of the participle, we have to explain why the participle is in the dative, which inevitably leads us to the first αὐτῷ (the indirect object of παραδιδόναι) and we have to confront the question why the speaker puts in his speech twice the subject of the participle. Does he do this because of emphasis, or because he feels that the audience needs this repetition of the participle's subject, since he has mentioned it so long before - actually ten words before? For those who will

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[68] W.W. Goodwin, *A Greek Grammar*, (London) 1894, pp 213-214.

take this second αὐτῷ as the subject of the participle, I cannot think any other explanation that they might give, apart from this of the repetition of the subject.

In my view, I would not find it unlikely that this αὐτῷ might be connected with the phrase ὡς ὄντι ἐγγυητῇ as a separate syntactical term which has nothing to do with the subject of the participle and denotes another person. According to this syntactical order, the first αὐτῷ (the indirect object of παραδιδόναι) is the subject of ὡς ὄντι; ἐγγυητῇ is the predicative of the subject, and αὐτῷ depends on ὡς ὄντι ἐγγυητῇ and indicates the person for whom the subject of the participle (Λεωχάρει) was a guarantor (ἐγγυητῇ). Namely, according to this interpretation, αὐτῷ refers to Δικαιογένει, whose name has been mentioned some lines before, at the beginning of the same period where these sentences lie (ἐπεὶ δ' οὖν ἀπέστη Δικαιογένης . . .).

The third pronoun αὐτός found in this sentence is in a prepositional form - παρ' αὐτοῦ, and connected with the infinitive κομίζεσθαι. The subject of κομίζεσθαι is Πρωταρχίδην who is "to receive what is due" παρ' αὐτοῦ. Τὸ μέρος τοῦ κλήρου is the object of κομίζεσθαι. Πρωταρχίδης would expect to receive his wife's share of the estate from Dikaeogenes III himself, not from the guarantor (at least at the stage when this dealing between Leochares and Protarchides took place - i.e., before it was certain that Dikaiogenes III did not fulfil his promise). Dikaeogenes III was required and under the obligation to return the two-thirds of the estate. The guarantor was not required to pay anything, as long as the debtor had not broken faith and did not fail to carry out his obligation. Dikaeogenes III himself gave up the two-thirds of the estate and promised to return it, while Leochares stood surety for him, that he would actually perform his promise (section 18). Therefore, the claimants of the estate would expect to receive their share of it from Dikaeogenes III and not from Leochares. Thus, παρ' αὐτοῦ refers to Dikaeogenes III, who took over the house,

through Leochares, but did not pay over the share of the estate,(παραλαβὼν δὲ τὴν συνοικίαν τὸ μέρος οὐ παρέδωκε.).

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Demosthenes xxxiii *Against Apatourios*

The Demosthenic speech 33 - *Against Apatourios* - is a speech delivered at a παραγραφή proceedings. Παραγραφή[69] is a special plea in bar of court action. It is a procedure that results from a formal objection by the defendant that his case cannot be brought to trial because the original prosecutor brought a prosecution in a way forbidden by law. Παραγραφή means "prosecution in opposition". The procedure was a separate trial (see, Isocr.18.2; Harpocration: διαμαρτυρία, διαμαρτυρεῖν) in which the man who was the defendant in the original case was the prosecutor, and the original prosecutor was the defendant. Any παραγραφή had to be grounded on some particular provision of a particular law and it was used to block prosecution in a number of cases in which the defendant claimed either that the case had already reached a judicially valid settlement (either by release and discharge - ἄφεσις and ἀπαλλαγή - or by arbitration, when the decision was accepted by both parties)[70], or that a case could not be prosecuted because the plaintiff had chosen the wrong legal procedure.[71]

Δίκαι ἐμπορικαί (maritime suits)

The nature of the maritime suits is offered by the speaker in Dem. 32.1:

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[69] Our sources for παραγραφή are: Dem. 32-38, which are called παραγραφικοὶ λόγοι; Isocr. 18 (*Pros Kallimachon)* and Lysias 23 (*Kata Pankleonos*). For a full study on this subject, see, H.J.Wolff, *Die attische Paragraphe* (1966).

[70] Dem. 20 *Lept.* 147, 24 *Timokr.* 54, 36 *For Phorm.* 25, 38 *Nausim.* 5.

[71] Dem. 32 - 5: in these cases the main plea is the alleged wrong use of the δίκη ἐμπορική.

οἱ νόμοι κελεύουσιν, ὦ ἄνδρες δικασταί, τὰς δίκας εἶναι τοῖς ναυκλήροις καὶ τοῖς ἐμπόροις τῶν Ἀθήναζε καὶ τῶν Ἀθήνηθεν συμβολαίων, καὶ περὶ ὧν ἂν ὦσι συγγραφαί·[72]

Such suits are reserved to ναύκληροι (ship-owners) and ἔμποροι (merchants) and must deal with agreements concerning maritime trade to or from Athens.[73] The plaintiff's claim must be based on a contract which is in written form and maritime suits may take place only when a contract exists. Otherwise a claim that is not based on a written agreement between the litigants must follow another legal procedure. Maritime suits are brought before the θεσμοθέται (Arist. *Ath. Pol.* 59.5, Dem. 33.1). The speaker in Dem. 32.1 closes the paragraph by adding ἂν δέ τις παρὰ ταῦτα δικάζηται, μὴ εἰσαγώγιμον εἶναι τὴν δίκην, i.e., if neither of the litigants in the case is an ἔμπορος or a ναύκληρος, or if there is not a written contract, or if the agreement does not concern maritime trade with Athens, then this legal action (the maritime suit) is not maintainable. Thus the defendant in a maritime suit has the right to present a παραγραφή if one or more of these conditions are not fulfilled - τοῖς δὲ περὶ τῶν μὴ γενομένων συμβολαίων εἰς κρίσιν καθισταμένοις ἐπὶ τὴν παραγραφὴν καταφεύγειν ἔδωκεν ὁ νόμος [Dem. 33.2].

Apatourios brought a maritime suit against the unnamed speaker of Dem. 33, alleging that he was surety for Parmenon. Apatourios had some dealings with Parmenon who was accused that he had caused damages to Apatourios. The matter was settled by arbitration and in Parmenon's absence judgement was given against him by default; the damages were assessed at twenty minai. Since Parmenon never came back to Athens, Apatourios sued against the speaker of

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[72] See also, Dem. 33.1, 34.42.

[73] Maritime loans or contracts for renting cargo space on a ship.

Dem. 33, alleging that he was surety for Parmenon. The speaker denied this accusation and used the process of παραγραφή to bar legal action against himself claiming that there did not exist between him and Apatourios any agreement (συμβόλαιον), which was needed to form the basis of a δίκη ἐμπορική (section 2 and 3). Therefore, according to the speaker, the maritime suit brought by Apatourios was not admissible (εἰσαγώγιμος). It becomes obvious from this speech that the case concerns arbitration agreements and the question of surety in these proceedings. However, it was brought as a δίκη ἐμπορική likely because it was originated from a commercial maritime loan. The backround of the case is as follows: Apatourios, a merchant and shipowner from Byzantium, had taken a maritime loan the repayment of which to his creditors was secured on his ship. We do not know details about the nature of this loan. He arrived in Athens owing forty minai on the security of his ship, but the period for which the loan had been made had expired and the creditors were pressing him to repay the money. They were ready to take over the ship (since it was security for the loan) and Apatourios avoided confiscation by raising a new loan. He first approached his compatriot Parmenon who promised him ten minai, three minai of which was paid down at the time. Then they both approached the speaker of this speech who although he had the good will to lend Apatourios the rest of the money, did not have ready money at the time. So the speaker introduced Apatourios to the banker Herakleides who lent Apatourios thirty minai. The speaker acted as guarantor for this loan. He had to guarantee that he would repay the loan if Apatourios failed to do so. This is the only known case of a bank loan with a third party acting as guarantor.[74] Parmenon happened to fall out with Apatourios, but, since he had agreed to furnish him with ten minai and had already given him

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[74] See, Bogaert, *Banques et banquiers dans les cites grecques*, Leiden (1968) p. 355.

three of them, he was compelled to pay the remainder as well.[75] However not wishing to make any agreement with Apatourios Parmenon paid the seven minai to the speaker who entered into a contract with Apatourios:

ὠνὴν ποιοῦμαι τῆς νεὼς καὶ τῶν παίδων, ἕως ἀποδοίη τάς τε δέκα μνᾶς ἃς δι' ἐμοῦ ἔλαβεν, καὶ τὰς τριάκοντα ὧν κατέστησεν ἐμὲ ἐγγυητὴν τῷ τραπεζίτῃ.

He bought Apatourios' ship with the crew (slaves), but Apatourios had the right to release this contract by repaying the loan. If the whole sum was repaid, Apatourios would take back control of the ship and the crew. This type of real security is called πρᾶσις ἐπὶ λύσει, a technical term that does not occur in the literary sources but it is known by the *horoi*, stones which were put on an immovable property to indicate that this property or some piece of it stood as security for a loan transaction. In other words πρᾶσις ἐπὶ λύσει was given publicity by way of the *horoi*. Written contracts with more details about the date when repayment was due or the rate of interest (if there was any) existed, at least in most cases of this type of real security. Eight of the *horoi* (seven from Attica and one from Amorgos)[76] include the phrase "according to the contract. . .", and in both the Pantainetos and Apatourios cases there were written agreements. The sources for this institution consist of more than one hundred *horoi* and a few law-court speeches of which Dem. 33 *Against Apatourios* and Dem. 37 *Against Pantainetos* seem to give more information for this institution.

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[75] Pringsheim, *The Greek Law of Sale*, Weimar (1950) p.58.

[76] *Horoi* from Attica, no 11, 13, 17, 27, 32, 39, 65; *horos* from Amorgos, no 104. See Finley, *Studies in Land and Credit in Ancient Athens, 500-200 B.C.*, (1985) Appendix I: The texts of the *horoi*, pp 118-176.

The borrower "sells" a piece of an immovable property (land or house) or a movable (such as a ship, as in Dem.33.8) to the lender for the sum of the loan. As the name of this institution indicates, the sale is carried out on condition that the seller may release the property from the buyer's claim on it by repaying the amount of the loan to the creditor (within a given period). Meanwhile, in most cases the borrower retains possession of the property; this is obvious from the case of Apatourios and Pantainetos and from the phraseology of the *horoi*.[77]

But let us turn now to the point where we started from. Apatourios required forty minai. For this amount of money two parties contributed: Parmenon who gave ten minai and Herakleides, the banker, who provided the rest. Interest is not mentioned, so we assume that there was not any and the loan might be classified among the "friendly loans".[78] The speaker went surety for the loan made by the banker. It means that he undertook the responsibility to repay the money in case that Apatourios defaulted to do so. Probably there would be a written or verbal agreement before witnesses between the banker and the speaker as far as the ἐγγύη was concerned.

But the question which arises here is about the involvement of the speaker as ἐγγυητής. Was not it enough for Apatourios to be introduced to the banker by the speaker? Why did the speaker undertake to stand surety for Apatourios? The banker could have followed the same procedure as the speaker did, i.e., to lend him the thirty minai and "to buy with the right of redemption" his ship. Instead of doing so, he acted through a guarantor, whose appearance might be essential. The guarantor made a purchase of the ship and the crew until the two sums are repaid;

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[77] However, there is a case in which the creditor-buyer seems to hold possession; Is. 6 *On the Estate of Philoktemon* 33- 34. see, Finley, op. cit. pp 36-37.

[78] Millett, *Lending and Borrowing in Ancient Athens*, 1991.

this is a πρᾶσις ἐπὶ λύσει transaction in which two parties usually are involved: the borrower who becomes debtor and is the "seller" and the creditor who lends the money and is the "buyer". In our case, however, the borrower-debtor is Apatourios, the creditor is Herakleides, but the "buyer" is the speaker. Thus this instance here does not match the pairs:

borrower - debtor = "seller" } of a property which
lender - creditor = "buyer" } stands as security.

We rather have the pairs:

borrower - debtor = "seller"
lender - creditor = *nothing*
guarantor = "buyer".

It seems that in order to secure his position as guarantor the speaker entered into this contract (πρᾶσις ἐπὶ λύσει) with Apatourios. So the ship and its crew stand as security not for the loans themselves directly but for the ἐγγύη itself. The concept here is that, if the debtor failes to repay the loans, then the ἐγγυητὴς will make use of the property secured by him, since he will be responsible for repayment as guarantor. Herakleides seems not to be concerned about this complex situation, he is satisfied with the speaker as ἐγγυητής and that is why he lends Apatourios the money. It does not seem that he is an easy banker-lender since he had to be persuaded by the speaker to make this loan; the whole responsibility is taken by the guarantor himself, χρώμενος δὲ Ἡρακλείδῃ τῷ τραπεζίτῃ ἔπεισα αὐτὸν δανεῖσαι τὰ χρήματα λαβόντα ἐμὲ ἐγγυητήν.

We should try to understand the significance of the ἐγγύη in this context. Although it is hardly possible to determine the legal status of this transaction by only one instance of loan for which a third person acts as ἐγγυητής, we might, however, speculate about the role of the ἐγγύη applied in this context.

The banker probably is a metic.[79] the ἐγγυητής is an Athenian citizen. As a metic, Herakleides could not own property in Athens or claim any right on it. If the property was immovable (land or building), then it would be comprehensible that, as a metic, Herakleides would need a third person, citizen, who would play the role of the ἐγγυητής. The ἐγγυητής would take legal action against the debtor in the case that the latter would fail to repay the loan. The ἐγγυητής would confiscate the property, he would sell it and he would give the money to the banker, because the banker, being a metic, cannot acquire the property. The contract of the ἐγγύη would be released and the story would be over.

But here we deal with a ship as security. And, as we know, metics could own movable property. The question why Herakleides needed a guarantor in order to lend money to Apatourios seems rather difficult to answer. But a simple explanation and a way out of this difficulty may be the following: in section 6 we hear that Apatourios αἰτιώμενος τοὺς χρήστας ἐπιθυμοῦντας τῆς νεὼς διαβεβληκέναι αὐτὸν ἐν τῷ ἐμπορίῳ, ἵνα κατάσχωσι τὴν ναῦν εἰς ἀπορίαν καταστήσαντες τοῦ ἀποδοῦναι τὰ χρήματα. The creditors had created a very negative impression of Apatourios in the trade market, so that it was extremely difficult for him to find the money needed for repayment of the original loan. So, Apatourios' bad reputation on the one hand and the type of the loan that he was asking on the other hand, they both imposed the necessity of a third person as ἐγγυητής. The responsibility and the risk undertaken by the guarantor was a great one, so that he secured his position as ἐγγυητής by πρᾶσις ἐπὶ λύσει of the ship and its crew.

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[79] We are not told anything about his political status, but we can assume that he is a metic and not an Athenian citizen, since he is a banker, a profession seldom practised by citizens. see p. 92 n. 80.

Apatourios by raising this loan satisfied his creditors and dissuaded them from confiscating his ship. But not long after these transactions, the bank of Herakleides failed and Herakleides went into hiding. Demand was expected to be made upon the speaker of this speech for the thirty minai, the liability for which he had assumed. At the same time Apatourios tried to remove the slaves and get his ship secretly out of the harbour. Parmenon who learnt this fact went to the harbour and prevented the sailing of the ship. The speaker informed of this affair by Parmenon set about considering how he might himself get free from his guaranty to the bank and how Parmenon might avoid the loss of the money he had lent Apatourios through the speaker:

> ἐσκοπούμην δὲ ὅπως αὐτός τε ἀπολυθήσομαι τῆς ἐγγύης τῆς ἐπὶ τὴν τράπεζαν, καὶ ὁ ξένος μὴ ἀπολεῖ ἃ δι' ἐμοῦ τούτῳ ἐδάνεισεν. (section 10).

He then posted men to guard the ship and approached the "sureties of the bank" - τοῖς ἐγγυηταῖς τῆς τραπέζης- to whom he told the whole story and turned the security over to them, telling them that Parmenon had a lien of ten minai on the ship:

> καταστήσας δὲ φύλακας τῆς νεὼς διηγησάμην τοῖς ἐγγυηταῖς τῆς τραπέζης τὴν πρᾶξιν, καὶ παρέδωκα τὸ ἐνέχυρον, εἰπὼν αὐτοῖς ὅτι δέκα μναῖ ἐνείησαν τῷ ξένῳ ἐν τῇ νηί. (section 10).

But he did not stop there; he attached the slaves in order that, if any shortage occurred, the deficiency might be made up by the proceeds of their sale:

> ταῦτα δὲ πράξας κατηγγύησα τοὺς παῖδας, ἵν' εἴ τις ἔνδεια γίγνοιτο, τὰ ἐλλείποντα ἐκ τῶν παίδων εἴη.

Eventually the ship was sold for forty minai, the precise amount of the loan; thirty minai was paid back to the bank and ten minai to Parmenon, and in the

presence of many witnesses the contracts, in accordance with which the money had been lent, were cancelled.

We do not know exactly what happened to Herakleides' bank when it failed. What we can assume is that there would be a demand for cash in order to overpass the crisis. The bank now would impose repayment of all the loans which had been made and Apatourios' loan was probably one of them in the list of the bank. Herakleides, the banker, had gone into hiding and other persons came to the fore - the ἐγγυηταὶ τῆς τραπέζης.

But who were these ἐγγυηταὶ τῆς τραπέζης and what were they supposed to do? Bankers in Athens were almost without exception metics, and often ex-slaves.[80] One of them was Herakleides. Among other services they offered, Athenian bankers lent money on security; but when the security was real property the situation would be rather complicated. Metics did not possess the right to own real property in Athens; not only they could not have farm land under their ownership but they could not even own the houses where they stayed. A metic banker, who would make a loan to a citizen on the security of a piece of real property, would not be able to claim this property if the debtor defaulted. Since the law did not recognize him any right of owning real property, he was blocked from the right to seize the security in satisfaction of his claim. Therefore it would be worthless for a metic banker to accept real property as security for a debt. As a result of this, Athenian citizens who required cash could not easily borrow from metic bankers.[81] In order to surmount this obstacle, a metic banker could use a citizen as an agent or middleman. Therefore, these ἐγγυηταὶ τῆς τραπέζης might

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[80] see, Bogaert, op. cit. 386-8; Whitehead, *The Ideology of the Athenian Metic*, Cambridge 1977, p.116.

[81] see, Finley, op. cit. 77-8; Millett, op. cit. 224-229.

be Athenian citizens who would be involved in loan transactions, loans made by the metic banker to Athenian citizens, secured on real property. These guarantors would take legal action against the debtor who defaulted on repayment of the loan. They would foreclose the security, probably would sell it and would return the amount of the loan to the metic banker. Apart from this, they might guarantee repayment of the bank's deposits,[82] but it is difficult to determine how they could do so. At any rate, they seem to play the role of representatives of the bank. Millett prefers to identify them with the sureties required of metics in public and private transactions.[83]

In the case that a metic lender (not banker) made a loan to an Athenian citizen on security of real property, again he would need a citizen(s) to rely on, so that, if the debtor did not repay the loan, they would act on his behalf confiscating the secured property. This seems to be the case to which a *horos*[84] refers:

ὅρος χωρίου
καὶ οἰκίας
πεπραμέν[ω]
ν ἐπὶ λύσ[ει]
Ἀγνοδήμ[ω]
ι καὶ συνεν
γυηταῖς
XXX

The transaction here is πρᾶσις ἐπὶ λύσει; the name of the borrower-debtor is not mentioned. The name of Hagnodemos has neither patronymic nor demotic and

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[82] Bogaert, op.cit. 398.

[83] Millett, op. cit. 228.

[84] Finley, op. cit. 125 (*horos* no.18)

we can assume that he might have been a metic. Hagnodemos lent the owner of the property the sum of three thousand drachmas. He accepted real property as security but only with the co-operation of some citizen-sureties (συνεγγυητοῖς-co-guarantors). Should the debtor default, these co-guarantors would foreclose the mortgaged property.

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Parmenon, who had prevented Apatourios from taking his ship out of the harbour, sued Apatourios for damages for the blows which he received from him and because he had been prevented by him from making a voyage to Sicily. However, it was agreed that the matter should be settled by arbitration (section 13-14)[85] and the rules for the arbitration were written in a contract which disappeared later. This written contract arranged who was going to be the arbitrator(s), what the matter was, and who was surety for each party. But this written agreement had been lost and there was a dispute whether the reference was to a single arbitrator or to three arbitrators.

According to the speaker, they submitted the matter to one common arbitrator, Phocritos, and each party appointed one man to sit with Phocritos; Apatourios chose Aristocles and Parmenon chose the speaker. They agreed that, if these three arbitrators were of the same opinion, their decision should be binding on both parties, but, if not, then they should be bound to abide by what any two should determine. Having made this agreement they appointed sureties for one another to

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[85] For private arbitration generally, see; Harrison, *The Law of Athens, ii: Procedure*, Oxford 1971, pp 64-66; MacDowell, *The Law in Classical Athens*, 1978, pp 203-6; Isager and Hansen, *Aspects of Athenian Society in the Fourth Century B.C.*, 1975, pp 107-8; Todd, *The Shape of Athenian Law*, 1993, pp 123-24.

guarantee its fulfilment. Apatourios appointed Aristocles, and Parmenon Archippos. At the beginning they deposited their agreement with Phocritos, but later with Aristocles. So, according to the speaker the arbitrators were three, with full authority to decide, and if the attempt at negotiation fail, then the parties should have to accept the decision of the majority (i.e. the decision of the two arbitrators). However, according to Apatourios the matter was arranged in a different way. He claimed that Aristocles was the only arbitrator who had authority to decide on the matter, and that Phocritos and the speaker were empowered to do nothing else than seek to bring about a reconciliation.

There was also disagreement about the guarantor for Parmenon. According to the speaker guarantor for Parmenon was a certain Archippos, But Apatourios claimed that the speaker himself was the guarantor.

Eventually, Aristocles pronounced judgement by default against Parmenon, who was required to pay twenty minai. Parmenon was bound to abide by this decision, in accordance with the law which made an arbitrator's judgement binding (ἀλλ' ἔστω τὰ κριθέντα ὑπὸ τοῦ διαιτητοῦ κύρια. Dem. 21.94)[86].If the losing party did not conform to the decision, he was liable to a δίκη ἐξούλης.[87] Parmenon, then, was compelled to pay the sum awarded against him but he had gone away from Athens. Apatourios, claiming that the speaker's name was entered in the articles of the arbitration agreement as security, brought suit against him, charging that he undertook to pay any sum that might be awarded against Parmenon, if Parmenon failed to do so. This is the suit against which the speaker of this speech (Dem. 33) brought the παραγραφή, claiming that there was no agreement between himself and Apatourios.

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[86] see also: And. 1 *On the Mysteries* 87; Lysias Fr. 16 *Against Arkhebiades*; *IG* ii2 179.8

[87] see: Dem. 52 *Against Kallippos* 16.

The speaker's strongest argument that he was not the guarantor for Parmenon is the time: πρῶτον μὲν οὖν τὸν χρόνον ἐμαυτῷ ἡγοῦμαι μάρτυρα εἶναι τοῦ μὴ ἀληθὲς τὸ ἔγκλημα εἶναι. (section 23).

The argument runs as follows (sections 23-27): The agreement of arbitration and the award of Aristokles took place two years ago. But Apatourios, although merchants could bring action every month fom Boedromion to Munichion (from September to April - winter period),[88] did not bring any action; not only immediately after the arbitrator's decision, but not even after a year had passed. Therefore, the speaker concludes, if he had become a surety for Parmenon, Apatourios would not have waited until two years afterward to exact the sum guaranteed, but would have proceeded to do so at once. The speaker brings a deposition that Apatourios was in Athens during the period when δίκαι ἐμπορικαί took place and that he never brought a suit against him, and closes this argument about the time by making use of a law concerning the ἐγγύη itself.

So, in section 27 the speaker says:

> Λαβὲ δή μοι καὶ τὸν νόμον, ὃς κελεύει τὰς ἐγγύας ἐπετείους εἶναι. καὶ οὐκ ἰσχυρίζομαι τῷ νόμῳ, ὡς οὐ δεῖ με δίκην δοῦναι εἰ ἠγγυησάμην, ἀλλὰ μάρτυρά μοί φημι τὸν νόμον εἶναι τοῦ μὴ ἐγγυήσασθαι καὶ αὐτὸν τοῦτον· ἐδεδίκαστο γὰρ ἄν μοι τῆς ἐγγύης ἐν τῷ χρόνῳ τῷ ἐν τῷ νόμῳ γεγραμμένῳ.
>
> ΝΟΜΟΣ.

At this point the law is read out in the court. Unfortunately we do not have this law. Certainly it is a law about ἐγγύη, but we do not know whether what mentioned here is the paraphrase of the whole law or only a paraphrase of one

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[88] see: Cohen, *Ancient Athenian Maritime Courts*, 1973, pp 42-59.

sentence (provision) of a law concerning ἐγγύη generally. Whatever it might be, the only information we get for sure here is that ὁ νόμος κελεύει τὰς ἐγγύας ἐπετείους εἶναι - "the law orders that the guaranties shall be for one year".

This provision of the law may be interpreted as follows:

1. Guaranties are valid only for one year.
2. They become invalid, if not renewed at the end of a year. Probably it would depend on the willingness of a claimant.
3. The party who is to claim a guaranty should claim it within the time specified by the law - i.e. within one year. If one year passes after the appointment of the guarantor and no action has been taken against him so far, the ἐγγύη becomes invalid, and no claim for it could be made after one year.
4. The guarantor is given a space of time (one year) within which he should fulfil the ἐγγύη, in the sense that he is not obliged to pay what is due immediately when his obligation as guarantor starts, but he can pay the ἐγγύη at any time within one year, up to the last day of this one year.

If we are to take as possible this last interpretation of the phrase τὰς ἐγγύας ἐπετείους εἶναι, then we may say that this might be the very purpose of the law. The law seems to protect the guarantor. It gives him the space to act, to press the losing party of a case, for whom he has stood as surety, to fulfil the award. If he does not manage to do so, again the guarantor has the space to face the award himself. The law probably takes account of the fact that ἐγγύη is such a risk and a guarantor may be involved in a very unpleasant situation without being himself the wrong-doer, and gives him this space of a year in order to fulfil the ἐγγύη.

The claimant, however, can demand the ἐγγύη immediately after the award is given against his opponent. The procedure is the following:

The claimant accompanied by witnesses approaches the guarantor and makes a demand of the amount guaranteed (ἐγγύη). If the guarantor offers the ἐγγύη to him, the matter is closed. But if the guarantor does not fulfil the ἐγγύη and refuses either to pay or that he is the guarantor, then the claimant brings a suit against him for the unfulfied ἐγγύη and this is the suit called δίκη ἐγγύης.

> καίτοι προσῆκεν, εἰ ὁ μὲν Παρμένων ὠφλήκει αὐτῷ τὴν δίκην, ἐγὼ δ' ἐγγυητὴς ἦν, προσελθεῖν αὐτόν μοι ἔχοντα μάρτυρας καὶ ἀπαιτῆσαι τὴν ἐγγύην, εἰ μὴ πρωπέρυσιν, ἐν τῷ ἐξελθόντι ἐνιαυτῷ· καὶ εἰ μὲν αὐτῷ ἀπεδίδουν, κομίσασθαι, εἰ δὲ μή, δικάζεσθαι. τῶν γὰρ τοιούτων ἐγκλημάτων πρότερον τὰς ἀπαιτήσεις ποιοῦνται ἅπαντες ἢ δικάζονται.
>
> (section 25-26)

In section 28, it is implied that a guarantor himself should take measures in order to avoid any unpleasant consequences, in case that the person for whom he has guaranteed fails to carry out a desicion given against him. So, the speaker says that, if he actually was the guarantor for Parmenon, he would not have allowed himself to be deserted in difficulties by Parmenon as his surety to Apatourios. We are not told what he would have done, but probably in first place he would have prevented him from going away before the arbitration procedure was over.

In section 29ff, he refers to the lack of any written agreements in accordance with which the arbitration took place and he had stood surety for Parmenon; and he concludes that, since Apatourios cannot prove that his name is written as surety in any agreement between him and Parmenon, Apatourios' claim is baseless and he has instituted a suit contrary to the law.

In this speech we hear about two instances of ἐγγύη in two different contexts. Firstly, a loan is to be made by a banker to a merchant in order to cover another previous loan. For this loan a third person stands surety for the borrower and future debtor to the banker-creditor. This third person assumes full responsibility for repayment of this loan in case that the debtor fails to do so. The obligations of the guarantor start when the debtor is unable to fulfil his obligations. If the debtor repays the loan, the guarantor's role will be restricted to the initial proceedings for the contracting of the loan; he is not required to proceed to any further action. But if the debtor fails to repay, then the guarantor takes, in fact, the position of the debtor, and it is him who is required to undertake repayment of the loan.

The second instance of ἐγγύη concerns arbitration proceedings. A private arbitration is to be set up; the disputants choose their arbitrator(s) and each party appoints a third person as surety to the other. Each guarantor undertakes the responsibility that the arbitrator's judgement will be binding for the person for whom he stands surety and, if this person is the losing party, that he will carry out the award; otherwise, each of them undertakes to pay any sum that may be awarded against the person for whom he is the guarantor. Again, in this instance of ἐγγύη the obligations of the guarantor start when the losing party of the case does not fulfil his obligations.

In both cases, in failure of the debtor to satisfy his opponent, a demand for the ἐγγύη is made to the guarantor. And if the guarantor refuses to pay, then what follows is the δίκη ἐγγύης, brought against him by the unsatisfied party.

* * *

THE VERB ΕΓΓΥΩ AND THE NOUN ΕΓΓΥΗ IN DEMOSTHENES XXXIII

The verb ἐγγυῶ in the middle voice with the accusative of a person and the dative of a person is used to denote that the subject of the verb stands security for the person in the accusative to the person in the dative. The syntax of the verb is as following:

ἐγγυῶμαί τινά τινι = "I am guarantor for someone to someone else",

e.g. εἰ γὰρ ἠγγυησάμην ἐγὼ τούτῳ τὸν Παρμένοντα (section 28).

Sometimes the dative is missing and the form of the phrase may be:

ἐγγυῶμαί τινα = "I guarantee someone", "I am guarantor for someone",

e.g. οὐκ ἠγγυησάμην ἐγὼ τὸν Παρμένοντα (section 22),

ὥστε εἰ ἦν ἠγγυημένος ἐγὼ τὸν Παρμένοντα (section 24).

A variation of this expression may be as follows: Instead of the verb ἐγγυῶμαι sometimes we have the noun ἐγγυητής with the verb εἰμί, plus genitive of a person. The noun ἐγγυητής denotes the person who (of course he is identical with the subject of the verb εἰμί) guarantees, and the person in the genitive is the person for whom the ἐγγυητής gives the surety. The form is:

ἐγγυητής εἰμί τινος = "I am guarantor for someone",

e.g. εἰ δὴ τῷ ἀληθείᾳ ἐγγυητὴς ἦν τοῦ Παρμένοντος (section 23).

The noun ἐγγυητής is also used with the verb καθίστημι accompanied by an accusative of a person and a dative of a person. The subject of the verb καθίστημι denotes the person who seeks the security; the accusative with the noun ἐγγυητής denote the guarantor and the person in the dative is the person to whom the surety is given. The form is

καθίστημί τινα ἐγγυητήν τινι = "I make somebody surety to somebody else",

e.g. καὶ τὰς τριάκοντα ὧν κατέστησεν ἐμὲ ἐγγυητὴν τῷ τραπεζίτῃ (section 8),

ἐγγυητὰς τούτων ἀλλήλοις κατέστησαν, οὗτος μὲν ἐκείνῳ τὸν Αριστοκλέα, ὁ δὲ Παρμένων τούτῳ Ἄρχιππον Μυρρινούσιον (section 15).

The noun ἐγγυητής is also used with the verb λαμβάνω and an accusative of a person. The subject of the verb is the person who accepts a guarantor to himself, and the accusative denotes the guarantor. The form is:

λαμβάνω τινα ἐγγυητήν = "I accept somebody as guarantor"

e.g. ἔπεισα αὐτὸν δανεῖσαι τὰ χρήματα λαβόντα ἐμὲ ἐγγυητήν (section 7).

The noun ἐγγύη in the genitive with the verb ἀπολύομαι is used to indicate discharge from the surety. The subject of the verb is the guarantor. The form is:

ἀπολύομαι τῆς ἐγγύης = "I get free from a guaranty"

e.g. ἐσκοπούμην δὲ ὅπως αὐτός τε ἀπολυθήσομαι τῆς ἐγγύης τῆς ἐπὶ τὴν τράπεζαν (section 10),

Καὶ ἠρώτα εἰ οὐχ ἱκανόν μοι εἴη αὐτῷ ἀπολυθῆναι τῆς ἐγγύης τῆς πρὸς τὴν τράπεζαν (section 11).

The noun ἐγγύη is used in a variation of phrases in which it serves either as the subject or as the object of a verb:

subject: τὸν νόμον, ὃς κελεύει τὰς ἐγγύας ἐπετείους εἶναι (section 27),

πῶς ἐνῆν. . . ἢ δίαιταν γενέσθαι ἢ ἐγγύην (section 30).

object: ὅπως αὐτός τε ἀπολυθήσομαι τῆς ἐγγύης (section 10),

διὰ τί. . . οὐκ . . . ἐπράττετο τὴν ἐγγύην; (section 23),

ἀλλ᾽ εὐθὺς τότε εἰσέπραττεν ἄν με τὴν ἐγγύην (section 24), etc.

It is also found with a preposition infront of it to denote either the reason (ὡς ἐγὼ διὰ τὴν ἐγγύην ἠφάνικα τὰς συνθήκας, section 37) or a situation (ἐν

ἐγγύῃ καταλειπόμενον, section 28). Sometimes the noun ἐγγύη in the genitive serves as a complementary element of a verb (ἐδεδίκαστο γὰρ ἄν μοι τῆς ἐγγύης, section27; οὐδ' ἂν ἐγὼ τῆς ἐγγύης ὑπόδικος ἦν, section 29).

The noun ἐγγύη means "suretyship", "guaranty". As it is used in this speech, the same noun, ἐγγύη, seems to take two slightly different meanings of which the second depends on the first.

The first meaning is "suretyship", restricted to "the act of suretyship", i.e. someone's undertaking to stand surety with all the consequences it might have. In this category we might classify the following phrases:

- ἐσκοπούμην δὲ ὅπως αὐτός τε ἀπολυθήσομαι τῆς ἐγγύης τῆς ἐπὶ τὴν τράπεζαν (section 10),
- ἐν ἐγγύῃ καταλειπόμενον (section 28),
- πῶς ἐνῆν . . . ἢ δίαιταν γενέσθαι ἢ ἐγγύην; (section 30),
- πολὺ γὰρ ὁ λόγος ἦν μοι ἰσχυρότερος ὁμολογοῦντι τὴν ἐγγύην ἐπὶ τὰς συνθήκας ἰέναι (section 29),
- τὶ βουλόμενος ἠρνούμην ἂν τὴν ἐγγύην; (section 29).

The second meaning which the noun ἐγγύη seems to take (in this speech) is "the sum guaranteed". The word is identical with an amount of money. Under this meaning we might classify the following phrases:

- διὰ τί πρῶτον μὲν οὐκ εὐθὺς τῆς γνώσεως γενομένης ἐπράττετο τὴν ἐγγύην; (section 23),
- ἀλλ' εὐθὺς τότε εἰσέπραττεν ἄν με τὴν ἐγγύην (section24),
- προσελθεῖν αὐτόν μοι ἔχοντα μάρτυρας καὶ ἀπαιτῆσαι τὴν ἐγγύην (section 25),
- καὶ τὴν ἐγγύην αὐτὸν εἰσπράξας τὴν πρὸς τὴν τράπεζαν (section 28).

In sections 23, 24, 25, the ἐγγύη mentioned is identical with the amount of twenty minai and in section 28 it is identical with forty minai.

However, sometimes it is hard to decide which meaning we should take as the primary; in some examples of the word ἐγγύη, both meanings fit the context very well:

- τὸν νόμον, ὃς κελεύει τὰς ἐγγύας ἐπετείους εἶναι (section 25),
- ἐδεδίκαστο γὰρ ἄν μοι τῆς ἐγγύης ἐν τῷ χρόνῳ . . . (section 25),
- οὐδ' ἂν ἐγὼ τῆς ἐγγύης ὑπόδικος ἦν (section 29),
- ὡς ἐγὼ διὰ τὴν ἐγγύην ἠφάνικα τὰς συνθήκας (section 37).

DEMOSTHENES 24, *AGAINST TIMOCRATES*

The public debtors were of different kinds, and a man might become debtor to the state in various ways. Public debtors might be classified as follows: (1) Lessees of public property and leasable revenues (οἱ τὰ μισθώσιμα μισθούμενοι); (2) Tax-farmers (οἱ ὠνούμενοι τὰ τέλη); (3) Persons who had been sentenced to a public fine; (4) Persons who had borrowed property from the state which was due to be returned (Dem. 47 *Euerg.* 22); (5) Persons who were holding public property, although they ought have turned it in to the state.

In the first two cases (Lessees of public property and tax-farmers) we have a contract between an individual (or more than one) and the state. The individual(s) contracted to make payments to the state at future dates which must have been clearly defined in the contract. For each case a fixed date would have been appointed and the lessees or tax-farmers were required to make payment to the state up to that date or at least on that date at the latest. Failing to do so, they became public debtors and liable to the consequences that a state debtor might have. When the lessees of public property and the tax-farmers made the agreement with the state, they were required to provide sureties (ἐγγυητοί). These ἐγγυητοί were men who promised to pay the sum due, in the event that the debt was not paid by the debtor himself.

The farmers of public property or duties became public debtors as soon as they exceeded the appointed term of payment. As public debtors they were subjected to ἀτιμία and they were regarded as disfranchised until they paid up. We learn from Andocides that in the last years of the Peloponnesian War

defaulting contractors and other men in debt to the State became ἄτιμοι.[89] The ἀτιμία was put into force immediately upon failure of payment at the appointed period. A state debtor (under a contract) was required to pay at the latest in the ninth prytany of the year; if he failed to pay, his debt was doubled and if it was due to the gods' treasury it was multiplied by ten[90]; and if the double amount was not immediately paid, his property was confiscated and sold to pay it. We also learn from Andocides that before 403 the boule had authority to imprison any tax-collector who defaulted on his payments to the state.[91]; this right of imprisoning the tax-collectors is also contained in the oath of the boule of five hundred ; in this way the possibility of their escape was prevented and they were deterred in advance for any irregularity in their payments. The sureties were also responsible for payment of the debt and they were subjected to the same penalties.

Let us turn now to the persons who had been sentenced to a public fine. If a man condemned to pay a fine to the state for some offence did not pay it, he was reckoned among the public debtors. In public suits any fine which was imposed went to the state.[92] A prosecutor in a public suit who either dropped the prosecution or failed to secure one-fifth of the votes was fined 1000 drachmai and was ἄτιμος until he had paid.[93] According to the law in Demosthenes (*Against Meidias*, 47) if any person was condemned for ὕβρις and sentenced to pay a money penalty, he should be imprisoned until he paid it: Ἐάν τις ὑβρίζῃ εἴς

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[89].And. 1 *Myst.* 73-74

[90] And. 1 *Myst.* 73 ; Dem. 24 *Timocr.* 82, 59 *Neair.* 7

[91] And. 1 *Myst.* 92-93

[92] The only exception was that half of the fine in a *phasis*, and three-quarters of the amount confiscated in an *apographe* went to the successful prosecutor.

[93] And. 1 *Myst.* 33,76; Dem. 21 *Meid.* 47,103 ; 24 *Timocr.* 7 and others.

τινα...γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν... ἐὰν δὲ ἀργυρίου τιμηθῇ τῆς ὕβρεως, δεδέσθω, ἐὰν ἐλεύθερον ὑβρίσῃ, μέχρι ἂν ἐκτείσῃ. In this case the fine was to be paid immediately after the sentence, otherwise the party so sentenced should be instantly imprisoned. In Demosthenes 24 *Against Timocrates* 105, a law concerning theft, maltreatment of parents and desertion is quoted:

ΝΟΜΟΙ ΚΑΚΩΣΕΩΣ ΓΟΝΕΩΝ, ΑΣΤΡΑΤΕΙΑΣ

---Ἐὰν δέ τις ἁπαχθῇ τῶν γονέων κακώσεως ἑαλωκὼς ἢ ἀστρατείας ἢ προειρημένον αὐτῷ τῶν νόμων εἴργεσθαι, εἰσιὼν ὅποι μὴ χρή, δησάντων αὐτὸν οἱ ἕνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορείτω δὲ ὁ βουλόμενος οἷς ἔξεστιν. ἐὰν δ᾽ἀλῷ, τιμάτω ἡ ἡλιαία ὅ,τι χρὴ παθεῖν αὐτὸν ἢ ἀποτεῖσαι. ἐὰν δ᾽ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ.

According to this law a person convicted and fined for one of these offences was imprisoned until he paid the fine.

Timocrates had proposed a law which provided that the offenders who had been prosecuted by an εἰσαγγελία, and condemned to pay a fine, should be imprisoned until such time as they paid: Τιμοκράτης εἶπεν ὁπόσοι Ἀθηναίων κατ᾽ εἰσαγγελίαν ἐκ τῆς βουλῆς ἢ νῦν εἰσιν ἐν τῷ δεσμωτηρίῳ ἢ τὸ λοιπὸν κατατεθῶσι, καὶ μὴ παραδοθῇ ἡ κατάγνωσις αὐτῶν τοῖς θεσμοθέταις ὑπὸ τοῦ γραμματέως τοῦ κατὰ πρυτανείαν κατὰ τὸν εἰσαγγελτικὸν νόμον, δεδόχθαι τοῖς νομοθέταις εἰσάγειν τοὺς ἕνδεκα εἰς τὸ δικαστήριον τριάκονθ᾽ ἡμερῶν ἀφ᾽ ἧς ἂν παραλάβωσιν, ἐὰν μὴ τι δημοσίᾳ κωλύῃ, ἐὰν δὲ μή, ὅταν πρῶτον οἷόν τ᾽ ᾖ. κατηγορεῖν δ᾽ Ἀθηναίων τὸν βουλόμενον οἷς ἐξεστιν. ἐὰν δ᾽ ἁλῷ, τιμάτω ἡ ἡλιαία περὶ αὐτοῦ ὅ,τι ἂν δοκῇ ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσαι. ἐὰν δ᾽ ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ ὅ,τι ἂν αὐτοῦ καταγνωσθῇ. (Dem. 24, 63)

In Ar. *Ath. Pol.* 63.3 there is the rule that a public debtor who sat as a juror, and was informed against by ἔνδειξις and convicted and fined by a court, was imprisoned until he paid both the original debt and the fine.

Therefore, the persons who were convicted to pay a fine to the state became public debtors, if they did not pay the fine immediately after their sentence. In the examples above, imprisonment was stipulated by the law. This kind of imprisonment was not part of the sentence itself, since the sentence was a money-penalty, but it was imposed as a means to exact payment of the money-penalty, when it was not paid by the condemned party immediately after the sentence.

We are to suppose that in cases in which the law did not prescribe imprisonment, it could be added by the increase of punishment (προστίμημα) if the law permitted it. However, imprisonment did not always take place. In the passage from Andocides[94] nothing is mentioned about it, whereas if imprisonment was a general rule it must have been mentioned.

Therefore, from the day that any person was sentenced to a fine which was not paid immediately, he became a public debtor. Ἀτιμία was the punishment immediately connected with the condition of a public debtor, while imprisonment was not always an immediate consequence of a public debt, except when the law expressly provided it. The debt was to be paid to the state by the ninth prytany and if it remained unpaid until that date, then a more severe penalty was imposed, the debt was doubled and the debtor's property was confiscated.

To sum up, we should try to define the main principles of the law concerning public debtors in the fourth century. They are divided in two main categories: (1) Those who became public debtors by undertaking to collect a tax or by other form of contract and failed to carry out their duties towards the state, and (2)

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[94]And.1 *Myst.*73-74.

those who became public debtors as a result of their conviction in a public suit. Ἀτιμία was imposed on all public debtors; they were required to pay by the ninth prytany, otherwise the debt was doubled and in failure of its payment confiscation of the property was to follow. As far as the lessees and tax-farmers are concerned, they had to provide guarantors when the contract was made, persons who guaranteed the payment to the state. But in the case where a man became a state debtor on his conviction in a court he might be required to pay the "debt" (money-penalty) immediately after his conviction and if he failed to do so, then he was imprisoned until he paid it. Sometimes imprisonment was a stipulation of a certain law for a certain offence or in other cases imprisonment could be imposed by the jury as an additional penalty. Therefore there was this category of state debtor who suffered all the same consequences with the other state-debtors but in addition they had to suffer something more-- imprisonment until the final payment of their money-penalty. And there is something more; a man who undertook, for instance, to collect a tax on behalf of the state, made a contract with the state, a date when the debt was to be due was fixed and he had time in advance to prepare the payment. But a man who was sentenced to pay a fine to the state and immediately was required to pay it, otherwise he would be imprisoned, was in a more serious situation.

In 353 Timocrates introduced a law which was milder than the existing law governing state debts:

Ἐπὶ τῆς Πανδιονίδος πρώτης, δωδεκάτῃ τῆς πρυτανείας, Τιμοκράτης εἶπεν, καὶ εἴ τινι τῶν ὀφειλόντων τῷ δημοσίῳ προστετίμηται κατὰ νόμον ἢ κατὰ ψήφισμα δεσμοῦ ἢ τὸ λοιπὸν προστιμηθῇ, εἶναι αὐτῷ ἢ ἄλλῳ ὑπὲρ ἐκείνου ἐγγυητὰς καταστῆσαι τοῦ ὀφλήματος, οὓς ἂν ὁ δῆμος χειροτονήσῃ, ἢ μὴν ἐκτείσειν τὸ ἀργύριον ὃ ὤφλεν. τοὺς δὲ προέδρους ἐπιχειροτονεῖν ἐπάναγκες, ὅταν τις καθιστάναι βούληται. τῷ δὲ

καταστήσαντι τοὺς ἐγγυητὰς, ἐὰν ἀποδιδῷ τῇ πόλει τὸ ἀργύριον ἐφ' ᾧ κατέστησε τοὺς ἐγγυητὰς, ἀφεῖσθαι τοῦ δεσμοῦ. ἐὰν δὲ μὴ καταβάλῃ τὸ ἀργύριον ἢ αὐτὸς ἢ οἱ ἐγγυηταὶ ἐπὶ τῆς ἐνάτης πρυτανείας, τὸν μὲν ἐξεγγυηθέντα δεδέσθαι, τῶν δὲ ἐγγυητῶν δημοσίαν εἶναι τὴν οὐσίαν. περὶ δὲ τῶν ὠνουμένων τὰ τέλη καὶ τῶν ἐγγυωμένων καὶ ἐκλεγόντων, καὶ τῶν τὰ μισθώσιμα μισθουμένων καὶ ἐγγυωμένων, τὰς πράξεις εἶναι τῇ πόλει κατὰ τοὺς νόμους τοὺς κειμένους. ἐὰν δ' ἐπὶ τῆς ἐνάτης ἢ δεκάτης πρυτανείας ὄφλῃ, τοῦ ὑστέρου ἐνιαυτοῦ ἐπὶ τῆς ἐνάτης πρυτανείας ἐκτίνειν. (Dem. 24 *Timocr.* 39-40)

Against this law a certain Diodoros brought a γραφὴ παρανόμων and, in the speech written for him by Demosthenes (Dem. 24 *Timocr.*), he claimed that Timocrates introduced that law because he wanted to save Androtion and his companion from the consequences of the embezzlement of which they were guilty at the time of their embassy to Mausolos of Caria. According to Diodoros (Dem. 24 *Timocr.* 11-16), Androtion, Melanopos, and Glauketes were sent as ambassadors to Mausolos, prince of Caria. The occasion of the embassy, according to the scholiast, was to complain of the intrigues by which Mausolos was endeavouring, in the interest of the Pesian King, to overthrow the democratic governments in the islands of Chios, Cos and Rhodes. The ship on which they sailed was commanded by Archebios and Lysitheides. On their way they fell in with a merchant vessel from Naucratis in Egypt, and took it to Athens as a prize for adjudication. The Athenian authorities decided that this was a lawful seizure of enemy's property as Egypt was in revolt from Persia, with which Athens was at the time on friendly terms. The proceeds should have come into the treasury, but after considerable time no payment had been made. However, on the motion of the orator Aristophon, a commission of enquiry (ζητηταί) was appointed to receive information against all persons retaining public property. Before this body

Euctemon and Diodoros laid information against the two trierarchs, who commanded the vessel conveying the ambassadors, and denounced them as not having accounted for prize-money the amount of nine and a half talents. When the matter came before the assembly, the three ambassadors admitted that they, and not the trierarchs, were in possession of the money, but Euctemon moved and carried a decree that the trierarchs should be responsible for recovering the money. So, as the trierarchs were legally responsible, it was decreed that payment should be exacted from them and that a διαδικασία should decide the question of liability as between them and the ambassadors. Androtion and his friends brought a γραφὴ παρανόμων against Euctemon, but failed to obtain a verdict and they had only the alternative of immediate payment or of being adjudged defaulters. Timocrates, the present defendant, interposed, according to Diodoros, on their behalf with this law against which the prosecution was directed.

Timocrates' law proposed that, if any one of the public debtors, by any law or decree, had been, or should be, condemned to imprisonment as an additional penalty, it should be lawful for himself or any one else on his behalf to give sureties for the debt. The sureties should be approved by vote of the Assembly and the debtor who has given sureties should be released from the penalty of imprisonment. The debt should be paid by the ninth prytany of the year, but if at that time neither the debtor nor his sureties had paid it, the debtor who gave sureties should be imprisoned and the property of the sureties should be confiscated. Timocrates excluded from this decree the following persons: tax-farmers, their sureties, and their collectors, the lessees of leasable revenues, and their sureties. For those the established laws were to be in force.

Thus this decree would not affect the state debtors who were in a contract with the state. But by τῶν ὀφειλόντων τῷ δημοσίῳ in the first clause of this decree were meant the other kinds of public debtors, namely:(1) persons who had been

sentenced to a public fine, and (2) persons who were still holding state property while it was due to be returned to the state.

We have seen that when a person was condemned by a jury to pay a fine for certain offences, it was stipulated in the law that he was to be held in prison until he paid it [νόμος ὕβρεως(Dem. 21,47), νόμος κακώσεως γονέων-ἀστρατείας (Dem. 24,103), and the law of Timocrates (Dem. 24,63)]. There were also other cases where a person might have been condemned to a fine and the jury might have imposed the additional penalty of imprisonment until the debt was paid, although imprisonment was not stipulated in the law for this particular offence of which the person was sentenced (προστίμημα).

It seems that Timocrates' decree would apply to persons who became state debtors immediately on their conviction in a court. And we can easily understand the reason why he excluded from his decree all the contractual debtors. Because they had already what the other categories of debtors were gaining -i.e. payment by the ninth prytany of the year. This decree laid down the same consequences, at the same time (ninth prytany), for all public debtors. It provided for all the different kinds of public debtors a common starting point from where they became liable to the same legal treatment.

The first clause of his decree goes as follows: καὶ . . . εἶναι αὐτῷ ἢ ἄλλῳ ὑπὲρ ἐκείνου ἐγγυητὰς καταστῆσαι . . .; not only one person, but at least two or more should stand as guarantors. They would probably share exactly the same responsibilities and the obligation would be *in solidum*. In the event of the debtor's default, they would be all sued and condemned in the whole amount for which they guaranteed and they would bear their share in this amount. Not only the debtor himself was entitled to nominate sureties for his debt, but also any other person on his behalf could do the same. In this case the most probable is that the person who nominated sureties on behalf of the debtor would be one of

the ἐγγυητοί. Most likely these ἐγγυητοί would come from the very close social circle of the debtor (friends - Antiph. 5.47 ἢ τοῖς φίλοις τοῖς ἐμοῖς ἐξεγγυῆσαι) or even from his own family (excluding probably those who belonged to the same *οἶκος*).

These persons had to be approved as guarantors by vote of the Assembly. The law itself says nothing about the criteria under which the Assembly would (or would not) accept them to be guarantors. However a comment on this point made by the speaker lies in section 85: τίς γὰρ οὐ ποριεῖται φαύλους ἀνθρώπους; οὓς ὅταν ὑμεῖς ἀποχειροτονήσητ' ἀπηλλάξεται; ***φαῦλοι ἄνθρωποι*** (men of straw?) were not acceptable as guarantors. But how are we supposed to understand the meaning of φαῦλοι ἄνθρωποι? Are they men of bad nature or men of a low social class? Both meanings are well attested in our texts but I think that here this adjective refers rather to men of low social class - as it was defined by the lack of a considerable property. Since the ἐγγυητοί would be subjected to confiscation of their property if the debtor failed to pay the debt, therefore their property itself was a decisive point for their approval by the Assembly.

ἢ μὴν ἐκτείσειν τὸ ἀργύριον: the ἐγγυητοί would guarantee that the debtor would pay the amount in which he was indebted, but if he did not pay, then the guarantors themselves would be the persons from whom payment would be exacted. By providing sureties the debtor could remain free until the ninth prytany; if he had not paid by then he would be imprisoned and the property of the sureties would be confiscated.

I have mentioned above that persons who were condemned in a public suit to a money - penalty became state debtors and they might have been imprisoned until they paid the debt. In my view, by Timocrates' decree these money-penalties (debts) were affected; immediate payment was replaced by a contractual obligation to pay by the ninth prytany.

Against this law a γραφὴ παρανόμων was brought by Euctemon and Diodoros, and the trial came on about the beginning of 352. The heading κατὰ Τιμοκράτους and the repeated demands for punishment show that the person of the defendant was attacked, and not merely his law, and therefore the time-limit of a year had not expired.[95] Unfortunately we do not know what the result of the trial was. If Timocrates was found guilty, then his law would be annulled and he would be punished by a fine.

In section 144 the speaker (of Dem.24 *Timocr.*) says that Timocrates intends to cite a statute already existing as a precedent of his own proposal; this statute contains the following words:

οὐδὲ δήσω Ἀθηναίων οὐδένα, ὃς ἂν ἐγγυητὰς τρεῖς καθιστῇ τὸ αὐτὸ τέλος τελοῦντας, πλὴν ἐάν τις ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ καταλύσει τοῦ δήμου συνιὼν ἁλῷ, ἢ τέλος πριάμενος ἢ ἐγγυησάμενος ἢ ἐκλέγων μὴ καταβάλῃ.

In section 147 the speaker notices that: αὐτὸ μὲν καθ' αὐτὸ οὐκ ἔστι νόμος, τὸ οὐδὲ δήσω Ἀθηναίων οὐδένα, ἐν δὲ τῷ ὅρκῳ τῷ βουλευτικῷ γέγραπται.

After the appointment and δοκιμασία of the bouleutai, the new members of the boule took an oath of loyalty to the state. According to Ar. *Ath. Pol.* 22. ii the bouleutic oath was first sworn in 501/0. The boule was created primarily as a probouleutic council and until 462 its judicial power was limited. In 462 with the reforms of Ephialtes the Areopagus lost a significant part of its powers which were divided among the boule, ecclesia and δικαστήρια. The boule was given

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[95]There was a time-limit for γραφὴ παρανόμων. If proceedings were not instituted within one year, the proposer of a new law could no longer be punished, but it was still possible for any person to proceed by γραφὴ παρανόμων against his law. D. M. MacDowell, *The Law in Classical Athens, p.50.*

judicial powers and this transfer of judicial procedures may have involved an addition to the oath sworn by the bouleutai. Restrictive clauses were embodied in this oath and the clause that we have in Dem. 24 *Timocr.* is one of them. By the fourth century the boule was functioning as a law-court in a number of ways. One of its judicial functions was that it heard εἰσαγγελίαι.[96]

Εἰσαγγελία[97] was one of the three procedures under which the boule and ekklesia might act in a judicial capacity; the other two were the ἀποχειροτονία and προβολή.[98] Εἰσαγγελία was available against those guilty of acts threatening the stability of the state. There was a separate law, the νόμος εἰσαγγελτικός[99] that named the following grounds for impeachment (Hyper. 3 *Euxen.* 7-8,29):

(a). Attempt to overthrow the constitution (section 7ff.)

(b). Treason (section 8)

(c). Taking of bribes by an orator (sections 8, 29, 39)

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[96]On this subject see: M.H. Hansen *Eisangelia* (Odense 1975), Harrison *The Law of Athens* vol. II 50-59, Mac Dowell *The law in Classical Athens* 183-186, P.J. Rhodes *The Athenian Boule* (Oxford 1972)162-171.

[97]The verb εἰσαγγέλλειν means "report", "give information about" and in a technical sense indicates the initiating of a legal procedure called εἰσαγγελία (impeachment).

[98]That the boule was the normal recipient of εἰσαγγελίαι, see Isoc. 15. 314, γραφὰς μὲν πρὸς τοὺς θεσμοθέτας, εἰσαγγελίας δ'εἰς τὴν βουλὴν, προβολὰς δ' ἐν τῷ δήμῳ.

[99]According to Ar. *Ath. Pol.* viii. 4, Solon enacted a law of εἰσαγγελία against men who attempted to overthrow the government: τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν (ἡ τῶν Ἀρεοπαγιτων βουλή), Σόλωνος θέντος νόμον εἰσαγγελίας περὶ αὐτῶν. It is probably this law that starts the history of the νόμος εἰσαγγελτικός.

(d). Making deceptive promises to the people - ἀπάτη τοῦ δήμου (Dem. 49 *Timoth.* 67).

Therefore this process (εἰσαγγελία) was used for certain types of cases. But this does not exhaust the list of offences which might be dealt with by εἰσαγγελία. The law of impeachment found in Hypereides did not forbid that offences other than those mentioned in the law should be tried by εἰσαγγελία, but merely made certain that these specified offences should be so tried. And the fact that Hyperides complains about the degeneration of εἰσαγγελία into a means of dealing with petty crimes (Hyp. 4 *Eux.* 1-3) suggests that there was no finite list of offences to which it could be applied. By the middle of the fourth century the process of εἰσαγγελία was widely employed for the most trivial offences.

The procedure followed in εἰσαγγελία submitted to the boule could be summarised as follows: After an information concerning an offence to which εἰσαγγελία was applicable had been given before the boule against someone, the boule could either reject the information out of hand, or fix a day in the near future for a hearing before it. Hearing by the boule constituted a full trial and to make sure that the accused man would appear for trial the boule took strong measures; if the charge was one of treason or conspiracy to overthrow the democracy or charge against any tax-farmer or his surety or collector who was in default, then the accused man had to be held in custody until the day when the trial took place. But if the charge was something else apart from the three categories above, then the accused man could by providing sureties that he would appear for trial avoid the imprisonment. On the day fixed for the hearing the boule considered the charge and if it acquitted the trial was over. But if the boule convicted, it could itself impose a penalty of up to five hundred drachmai However if the offence was regarded very serious and a heavier penalty was thought appropriate, then the case had to go further. In this case a second hearing

was required before the ἐκκλησία or a δικαστήριον. A decree (κατάγνωσις) was passed referring the matter for trial to one of these two bodies. The θεσμοθέται were the εἰσάγουσα ἀρχή when an εἰσαγγελία was referred to a δικαστήριον.

Let us turn now to the clause itself found in Demosthenes 24,144. We know that this clause was a part of the bouleutic oath, but not one of the original bouleutic oath sworn in 501/0. The most probable is that it was embodied in the oath at some date after the reforms of Ephialtes in 462 B.C.[100] The clause speaks about the right reserved by the boule to imprison and from the speaker's discussion on this point (sections 145-8) we learn that those who might be imprisoned by the boule were persons who had been accused of an offence and that this kind of imprisonment was not penal but precautionary.[101] We also know that an accusation could be brought before the boule only by the procedure called εἰσαγγελία.

Therefore this clause here, "οὐδὲ δήσω Ἀθηναίων οὐδένα...." refers to the following case: when a person was accused of an offence by εἰσαγγελία before the boule he could by providing sureties that he would appear for trial avoid precautionary imprisonment imposed by the boule. But if he did not provide sureties, then imprisonment until trial seems to have been the rule. However persons accused of very serious offences (such as, treason, conspiracy against the democratic constitution, and misappropriation of public money) did not have the right to nominate sureties in order to avoid imprisonment but they had to be held in prison until their trial. According to the speaker this rule was intended for the

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[100] See: Rhodes, *Boule* pp. 194ff.

[101] See : Bonner - Smith, *The Administration of Justice from Homer to Aristotle*, Vol. II, p.275

protection of people who had not stood their trial (for those who were untried-ἄκριτοι) and its purpose was that they should not plead at a disadvantage, or even without any preparation at all, because they had been sent to prison (section 145).

But why did this rule exclude certain persons from the right of nominating sureties? ... πλὴν ἐάν τις ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ καταλύσει τοῦ δήμου συνιὼν ἁλῷ, ἢ τέλος πριάμενος ἢ ἐγγυησάμενος ἢ ἐκλέγων μὴ καταβάλῃ. As Harrison points out[102], the word ἁλῷ here does not have the meaning "convicted", since the speaker says in the next sentence that these men are still ἄκριτοι, but it means "against whom a *prima facie* case has been made out". Therefore when there was a *prima facie* case the boule had the right to arrest and imprison the accused man until his trial (precautionary imprisonment), since the danger of his escape would be one of a high possibility. Again, as far as the tax-farmers, their sureties and the collectors are concerned, they had a definite date by which they had to make payment to the state. Their failure to satisfy the state was the *prima facie* evidence that they were guilty. In both cases the trial, which would follow after the εἰσαγγελία to the boule and would probably take place in a δικαστήριον or in the ἐκκλησία, would not have to consider whether the accused man was guilty or innocent, but to impose a fine on him. Therefore persons accused of treason, attempt to overthrow the democracy, and malversation were not entitled to provide sureties but they were imprisoned by the boule until their trial.

However, except in the case of these certain specific offences which I have just mentioned above, a person accused by εἰσαγγελία could stay out of custody if he provided as sureties three persons of the same property class as himself: οὐδὲ

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[102] A.R.W. Harrison, *The Law of Athens*, vol.II: *Procedure*, p. 56 n. 2

δήσω Ἀθηναίων οὐδένα, ὅς ἂν ἐγγυητὰς τρεῖς καθιστῇ τὸ αὐτὸ τέλος τελοῦντας. He had to provide three sureties, not just one, and the Scholiast took the passage to mean that the collective property of the three sureties was to be equal to that of the defendant: τῶν τριῶν ἐγγυητῶν ἐχόντων τὴν ἴσην οὐσίαν ἐκείνῳ ᾧπερ ἐγγυῶνται. But if that was the case, then just one person whose property was equal to the defendant's property could stand perfectly as ἐγγυητής, and there would be no need for specification of the number three. And since these three ἐγγυηταί would be from the defendant's own property class their collective property would be larger than his.

Nevertheless, I cannot think of any other reason why this restriction (τὸ αὐτὸ τέλος τελοῦντας) was put down in the oath, apart from the following: After an accusation against a person had been made, it was important for the boule to ensure that this person would appear for trial. It could either imprison him or accept sureties that he would appear for trial. In the first case, the defendant would surely appear for trial since he was imprisoned. He would be tried and if found guilty he would have to face the verdict. But if after providing sureties the accused man failed to appear for trial, then the sureties would suffer in his place the punishment due to him. And if the punishment was a financial penalty (financial penalties must in practice have been much the commonest) then the sureties would have to pay it. Therefore, the property of the ἐγγυηταί became a substitute for payment of the financial penalty imposed on the defendant [103]

The question, however, remains unanswered, i.e. why three guarantors but not one of the same property class were required? Since there is no evidence to support any certain answer to this question, we are bound to make an assumption. First of all, it would be much more difficult for an accused man to find and

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[103] Ant. *Tetr*.I.β.12 : μεγάλας ὑπὲρ πολλῶν ἐγγύας ἀποτίνοντα.

nominate three persons to be sureties for him than to nominate just one. But only accused men who provided three sureties (ἐγγυητάς τρεῖς) were not remanded in custody; any other person was imprisoned, and the result would be the restriction to a small number of cases in which ἐγγυηταί were involved. Was that the boule's intention? Whatever the answer is, it seems that the boule by requiring not less than three sureties placed those who intended to provide sureties in an awkward position. Furthermore the requirement of ἐγγυηταὶ τὸ αὐτὸ τέλος τελοῦντες refers to the property of the sureties and by this requirement the boule made a provision against an accused man who after providing sureties failed to appear for trial; in this case the sureties were responsible for the trial and the imposed punishment (money-penalty was the commonest), and it would be easier for the boule to exact payment from three persons than from one. Probably the three sureties distributed the liability between themselves and bore their share in the money- penalty.

Finally, we should notice that the φαύλοι ἄνθρωποι of the section 85 might be illuminated by the ἐγγυηταὶ τὸ αὐτὸ τέλος τελοῦντες, although both phrases are employed in two different contexts for two different cases of ἐγγυηταί. The common basis, however, is the obligation of the ἐγγυηταί to pay themselves an amount of money (either a debt due to the state or a money-penalty), when the defendant for whom they had guaranteed failed to fulfil his obligation.

Evidently from some unknown date, but probably after the reforms of Ephialtes 462/1 B.C., any person accused to the boule of an offence dealt with by the procedure of εἰσαγγελία, had the right to provide sureties in order to avoid precautionary imprisonment until his trial. The sureties had to be three persons from his own property class who guaranteed that the accused man would appear for trial. The responsibility undertaken by the ἐγγυηταί was on a large scale and

consisted in that they suffered in the defendant's place the punishment due to him, if he failed to appear for trial.

Lysias 13 *Against Agoratos*

After the victory of Lysander at Aegospotamoi (end of summer, 405 BC.), his fleet was blockading the Peiraieus and the Peloponnesian armies under the Spartan kings, Agis and Pausanias, lay encamped outside the city (Xen. *Hell.* 2.1.30-32; 2.2.1-2,5-9; Plut. *Alc.* 37). During December supplies of food began to give out. The people asked for peace if they could retain their walls and become allies of Sparta, but the Ephors demanded the demolition of part of the Long Walls. Kleophon then carried a decree to put to death anyone who proposed the acceptance of such terms. The people next appointed Theramenes to negotiate with Lysander. He stayed away for three months, during which time many died of starvation and Kleophon was executed for desertion, the charge being brought by members of an oligarchic club. When Theramenes returned, he and nine others were appointed with full powers to arrange the terms of surrender. They presented themselves before the Congress of the Spartan Alliance (Xen. *Hell.* 2.2.3-4;10-18). The envoys returned with terms which the Athenians accepted with relief : the Long Walls and fortifications of Peiraieus were to be destroyed ; the Athenians lost all their foreign possessions but remained independent, confined to Attica and Salamis ; their whole fleet, with the exception of 12 triremes, was forfeited ; all exiles were allowed to return ; Athens became the ally of Sparta, pledged to follow her leadership. When Theramenes brought back these terms, there was relief in Athens that an end to death and famine was in sight. However, the removal of Kleophon from the political scene had not still stifled resistance. Some military men, including former generals and taxiarchs, protested against the terms Theramenes accepted (Lysias 13.13,16: Xen. *Hell.* 2.2.22: ἀντειπόντων δὲ

τινῶν αὐτῷ). Among them was Dionysodoros, whose murder by the Thirty became the occasion of Lysias *Against Agoratos* (13).

We have mentioned in the previous section (page ....) that εἰσαγγελία was one of the three procedures under which the Boule and the ekklesia might act in a judicial capacity. Εἰσαγγελία was available against those guilty of acts threatening the stability of the state and in the νόμος εἰσαγγελτικός (Hypereides 3 *Euxen.* 7-8, 29) the grounds for impeachment are named: attempt to overthrow the constitution (section 7ff.) and treason (section 8) were among them.

In Lysias 13. 19-22 we learn that at a secret meeting of the boule a certain Theocritos gave news of a conspiracy and informed the boule that there was a certain number of persons who were plotting to defeat the Peace with Sparta: εἰσελθὼν δὲ εἰς ταύτην τὴν βουλὴν ἐν ἀπορρήτῳ Θεόκριτος μηνύει ὅτι συλλέγονταί τινες ἐναντιωσόμενοι τοῖς τότε καθισταμένοις πράγμασι. Theocritos declined, however, to give their names but he said that there were others who would give the names, and revealed only the name of Agoratos. The fact that Theocritos laid his information before the boule at a secret meeting does not mean that he was a member of the boule. Although meetings of the boule were open to the public (Dem. 8 *Chers.* 4: 19 *F.L.* 17), the boule was entitled, when it chose, to meet in secret, and there is a number of references to these secret meetings (G.E.M. de Ste Croix *CQ*^{2} 13(1963)115 n.1). Non-members also could be given permission to address the boule, either at a public or at a secret meeting (*see* Rhodes *Boule* 40-2).

Theocritos' nickname son of Ἐλαφόστικτος (Deermark) indicates a foreign or servile or freedman origin. Therefore Theocritos was a slave or a freedman who was given permission to address the boule at a secret meeting in order to inform it about a conspiracy. And we know that in cases of εἰσαγγελία an information could be laid before the boule by any person, slave or free

foreigner or citizen (Thuc. 6.27.2). Since Theocritos (the informer in this case) was a slave or a freedman, the prosecutor at the trial which would follow had to be someone other than the informer, and indeed the impeachment against Agoratos was brought by a commission of bouleutai who acted on behalf of the boule (*see* Hansen *Eisangelia* 32). Therefore the giving of information by Theocritos must be distinguished from the prosecution brought presumably by some members of the boule and then, in this case, εἰσαγγελία could mean the prosecution only.

Since an information of conspiracy was laid by Theocritos before the boule against Agoratos, two courses were then open to the boule: it could either reject the information out of hand or accept it. If the boule decided that there was a ground for this charge, the prytaneis fixed a day in the near future for a hearing of the case before the boule. In Agoratos' case the boule accepted the information given by Theocritos and it proceeded to the following action: It passed a decree which ordered the arrest of Agoratos, and some of its members went down to the Peiraeus to arrest him; they met him in the agora and tried to arrest him (section 23).

The boule was able to imprison in certain circumstances: it could order the arrest of men whom it found guilty on an εἰσαγγελία, whose case it intended to refer to a δικαστήριον for a heavy penalty (Dem. 24 *Tim.*63); it could also arrest a person charged of treason or conspiracy against the demos or under the νόμοι τελωνικοί. That kind of imprisonment was a precautionary one, to ensure that a man discharged a debt or stood trial.

However, the obligation to accept guarantors in most cases instead of arresting a man until his trial was written into the bouleutic oath: Dem.24 *Tim.*144: οὐδὲ δήσω Ἀθηναίων οὐδένα, ὃς ἂν ἐγγυητὰς τρεῖς καθιστῇ τὸ αὐτὸ τέλος τελοῦντας, πλὴν ἐάν τις ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ

καταλύσει τοῦ δήμου συνιὼν ἁλῷ, ἢ τέλος πριάμενος ἢ ἐγγυησάμενος ἢ ἐκλέγων μὴ καταβάλῃ.

As Harrison[104] points out the word ἁλῷ here does not have the meaning "convicted", since the speaker says in the next sentence that these men are still ἄκριτοι but it means "against whom a *prima facie* case has been made out". Therefore, when there was a *prima facie* case the boule had the right to arrest and imprison the accused man until his trial (precautionary imprisonment) since the danger of his escape would be one of a high possibility. But when there was not a *prima facie* case the boule might accept guarantors instead of arresting a man until his trial. Probably it was left to the boule to decide in any case for which it was responsible whether these precautions were necessary. This must have been the case of Agoratos.

Agoratos was accused of conspiracy by the procedure of εἰσαγγελία to the boule, and according to the bouleutic oath he should have been arrested by the bouleutai appointed for that purpose. But probably his case was not a *prima facie* one and subsequently the bouleutai had to accept the sureties in case that sureties were offered by Agoratos. And indeed when the bouleutai met Agoratos in the agora, in the Peiraeus, and tried to arrest him, Νικίας and others offered themselves as guarantors: καὶ περιτυχόντες (οἱ αἱρεθέντες τῶν βουλευτῶν) αὐτῷ ἐν ἀγορᾷ ἐζήτουν ἄγειν. παραγενόμενος δὲ Νικίας καὶ Νικομένης καὶ ἄλλοι τινές, ... ἄγειν μὲν τὸν Ἀγόρατον οὐκ ἔφασαν προήσεσθαι, ἀφηροῦντο δὲ καὶ ἠγγυῶντο καὶ ὡμολόγουν παρέξειν εἰς τὴν βουλήν. (section 23).

The narrative of Lysias and the verbs used to refer to the actions which took place at that specific point of time indicate that the bouleutai were extremely

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[104]A.R.W. Harrison, *The Law of Athens*, vol. II: *Procedure*, p.56 n.2

close to arresting Agoratos, otherwise the orator would have not used the verb ἀφῃροῦντο. The verb ἀφαιρεῖσθαι used with an accusative of a person (τινα) and the prepositional adjunct εἰς ἐλευθερίαν, i.e. ἀφαιρεῖσθαί τινα εἰς ἐλευθερίαν, has the meaning "to remove someone to freedom from slavery", and it refers to the case where a person was wrongly enslaved and got a friend formally to "remove him to freedom" (Lys.23. 9-12; Dem. 58.19, etc.). But Agoratos neither was a slave nor was going to be enslaved, simply he would be arrested until his trial because a charge of conspiracy was laid upon him. Therefore the verb ἀφαιρεῖσθαι here might have the meaning "to release him from arrest, asserting his right to be free". And his right to be free until his trial, after such an accusation against him, was prescribed in the bouleutic oath under the condition that he would provide three guarantors. Nikias and the others knew that, as the situation had been formed (εἰσαγγελία to the boule against Agoratos and attempt to arrest him), Agoratos had only two alternatives: either he should be arrested by the bouleutai or he could remain out of prison only if he produced three guarantors according to the bouleutic oath. And since they did not want Agoratos to be imprisoned, they offered themselves as guarantors and eventually Agoratos evaded precautionary imprisonment until his trial.

They guaranteed that they would produce Agoratos (the accused man) before the boule to face the charge. According to the bouleutic oath three persons were required to stand as guarantors. We are not told by Lysias explicitly about the number of the guarantors in Agoratos' case. However three names are mentioned in the speech which must have been the names of the guarantors: Νικίας καὶ Νικομένης and Ἀριστοφάνης ὁ Χολλῄδης. That Ἀριστοφάνης ὁ Χολλῄδης was one of the guarantors is made very clear by Lysias: Ἀριστοφάνει

. . . τῷ Χολλῇδῃ, ὃς ἐγγυητὴς τότε τούτου ἐγένετο (section 58) But as far as the other guarantors are concerned, namely Nikias and Nikomenes, they are not named as guarantors in the same way like Aristophanes, but they are the subjects of the verbs in section 23 οὐκ ἔφασαν (μὲν) . . . ἀφῃροῦντο δὲ καὶ ἠγγυῶντο καὶ ὡμολόγουν. . . . However, the subjects of all these verbs seem at first sight to be not only Νικίας καὶ Νικομένης, but also καὶ ἄλλοι τινές. So, the verb ἠγγυῶντο would have Νικίας καὶ Νικομένης καὶ ἄλλοι τινές as its subjects and one would say that the ἐγγυηταί would be more than four persons: Νικίας, Νικομένης, Ἀριστοφάνης and at least two other persons to justify the plural of καὶ ἄλλοι τινές; even if we include Ἀριστοφάνην in the plural of καὶ ἄλλοι τινές, still at least another person is required to make this plural valid. However, in my opinion, the ἐγγυηταί must have been three, i.e. Νικίας, Νικομένης and Ἀριστοφάνης ,and the phrase καὶ ἄλλοι τινές must refer to other people who just happened to be present in the agora, in the Peiraeus, and they were of the same opinion with the guarantors (*see* section 24). In the speech they are distinguished from the ἐγγυηταί in the following ways: First, the emphasis which the participle παραγενόμενος carries, at the beginning of the period, in the singular, with Νικίας, an individual, as its subject, and Νικομένης who comes next, all of it is in contrast with the plural καὶ ἄλλοι τινές where we have to understand the participle παραγενόμενοι, and intimates that Νικίας and Νικομένης are going to play a more significant role than all the others. Second, in section 24 we hear that ἐδόκει οὖν τοῖς ἐγγυηταῖς καὶ τοῖς ἄλλοις ἅπασιν ἐκποδὼν ποιήσασθαι τὸν Ἀγόρατον ὡς τάχιστα, where the two categories of persons, ἐγγυηταί and "all the others", are clearly distinct.

These guarantors did not merely guarantee that Agoratos would appear before the boule to face the charge against him, but also that they themselves would produce him before the boule, καὶ ἠγγυῶντο. . . παρέξειν εἰς τὴν βουλήν. Therefore the surety "produces" (παρέχει) the bailee, (*see* also Lys.23.9: ἐγγυησάμενοι παρέξειν). According to Lysias (sections 23-24) Nikias, Nikomenes and Aristophanes offered themselves to stand as sureties, whereas Agoratos does not seem to have taken an active part in the whole proceeding. However in the bouleutic oath (οὐδὲ δήσω Ἀθηναίων οὐδένα, ὃς ἂν ἐγγυητὰς τρεῖς καθιστῇ) the verb καθιστῇ is in the active voice which indicates that the accused man nominated the sureties. Thus the fact that the bouleutai, in Agoratos' case, accepted the sureties proves that it was perfectly legal when other people took the initiative in proposing themselves to stand as sureties. Therefore, the phrase ὃς ἂν ἐγγυητὰς τρεῖς καθιστῇ might have the meaning that either the accused man himself nominated the sureties or he merely accepted the sureties when they were offered.

The ἐγγύη took place in a public place (agora) where there were many people who could witness the incident. The bouleutai, however, took the guarantors' names first and then returned to Athens (γραψάμενοι δὲ οἱ βουλευταὶ τὰ ὀνόματα τῶν ἐγγυωμένων καὶ κωλυόντων[105], ἀπιόντες ᾤχοντο εἰς ἄστυ.) The bouleutai wrote down the names of the guarantors at the time when they undertook to stand sureties for Agoratos. If we try to explain it practically, we could probably say that a document was drawn up by the

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[105] The subject of the participle κωλυόντων should be identified with τῶν ἐγγυωμένων, i.e. Νικίας, Νικομένης and Ἀριστοφάνης.

bouleutai which defined the terms of the ἐγγύη and clearly stated the guarantors' names.[106]

We do not know whether the time of the appearance of the accused man before the boule was accurately defined in the document or it was just left indefinite until the prytaneis fixed a day in the near future for a hearing before the boule. We know that, when a person was accused by εἰσαγγελία of an act threatening the stability of the state, his case was tried with the minimum of delay (Harpokr. s.v. εἰσαγγελία· ἡ μὲν γὰρ ἐπὶ δημοσίοις ἀδικήμασι μεγίστοις καὶ ἀναβολὴν μὴ ἐπιδεχομένοις). Therefore we might assume that Agoratos would appear before the boule in the very near future and in this case we can say that the law which ordered that the guaranties should be for one year is not applicable here.[107]

Finally, this document would be used as the main proof that certain persons named in it were Agoratos' guarantors, who would be prosecuted in case that Agoratos ran away and evaded trial; and their prosecution would be based mainly on this document in combination with other witnesses.

The guarantors would be responsible for the appearance of Agoratos before the boule. After the information about the alleged conspiracy had been laid before the boule by Theocritos and the name of Agoratos had been mentioned, the boule ordered the arrest of Agoratos in order to be questioned and to face trial, if he was found quilty. The hearing before the boule would take place in the near future but from the moment when the accusation was made until the hearing

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[106]*See* also [Dem.] 33 *Apatour*.22, καί φησιν ἐγγραφῆναι εἰς τὰς συνθήκας ἐμὲ ἐγγυητήν.

[107][Dem.] *ibid.* 27, τὸν νόμον, ὃς κελεύει τὰς ἐγγύας ἐπετείους εἶναι.

before the boule the accused man had either to be imprisoned (precautionary imprisonment) or to produce three guarantors. The guarantors were in a way the substitute for imprisonment, whereas imprisonment and guarantors seem to be two different ways leading (theoretically) to the same end, i.e. hearing before the boule or trial. Agoratos would certainly appear before the boule if he was imprisoned, whereas he would *possibly* appear before the boule if he produced guarantors, unless he ran away. Therefore there was no possibility of avoiding the trial in the case that he was held in prison, but there was a possibility of evading trial in the case that he produced guarantors.

Let us try now to list all the possibilities of what could have happened after the ἐγγύη took place. Three persons (Nikias, Nikomenes and Aristophanes) stood sureties for Agoratos that he would appear before the boule as a result of an accusation against him by the procedure of εἰσαγγελία to the boule:

1) The accused man appeared before the boule to face the charge. Probably he would be accompanied by the ἐγγυητοί since they had guaranteed that they would produce him before the boule (ἠγγυῶντο παρέξειν εἰς τὴν βουλήν, 24). Their responsibility would finish at that point and they would be released from the ἐγγύη, (ἀπολύεσθαι τῆς ἐγγύης, [Dem.] 33 *Apatour*. 10,11). If the accused man was found guilty and condemned, the guarantors would not have any further implication.

2) The accused man did not appear before the boule. In that case the ἐγγυητοί would be bound to appear before the boule and to report that the person for whom they guaranteed escaped. The whole responsibility would lie upon them namely that they would be tried and suffer the penalty which would have been imposed on the accused man. So, the ἐγγυητοί, who in the first place

became the substitute for the imprisonment of the accused man, now become the substitute for the accused man himself.

3) Neither the accused man nor his ἐγγυητοί appeared before the boule. By doing so they would accept that the accused man was guilty and they would be all condemned by default.

In section 27 Lysias referring to the case that Agoratos would escape says that the guarantors Ἀθηναῖοι ἦσαν ὥστε οὐκ ἐδέδισαν βασανισθῆναι[108], which indicates that they would be interrogated by the boule, they would be tried and fined.

After the ἐγγύη took place and the guarantors' names were taken by the bouleutai, Agoratos and his guarantors took refuge by the altar at Mounychia. There they started thinking about what should be done. The guarantors suggested that Agoratos should quit Athens as soon as possible but Agoratos refused to escape. Of course this is a very peculiar case and we should not conclude from this that guarantors in general would support or even try to persuade the person for whom they guaranteed to escape and not to appear for trial. It would probably happen the other way round.

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[108]However Lysias' argument here might be correct and possible but not definite. It is true that citizens were protected from torture by τὸ ἐπὶ Σκαμανδρίου ψήφισμα (And. *Myster.* 43) but in the same speech of Andokides we hear that, section 43: Ἡ μὲν εἰσαγγελία αὐτῷ, ὦ ἄνδρες, τοιαύτη: ἀπογράφει δὲ τὰ τὰ ὀνόματα τῶν ἀνδρῶν... ἀναστὰς δὲ Πείσανδρος ἔφη χρῆναι λύειν τὸ ἐπὶ Σκαμανδρίου ψήφισμα καὶ ἀναβιβάζειν ἐπὶ τὸν τροχὸν τοὺς ἀπογραφέντας, ὅπως μὴ πρότερον νύξ ἔσται πρὶν πυθέσθαι τοὺς ἄνδρας ἅπαντας. ἀνέκραγεν ἡ βουλὴ ὡς εὖ λέγει. This passage points out that Skamandrios' decree could be repealed by the boule under special circumstances. Peisandros moved that the boule should repeal it and the boule was in favour of this proposal.

While Agoratos and his guarantors were at Mounychia the boule enacted another decree (sections 29, 30), presumably that Agoratos was to be arrested and interrogated at once. With this new decree the arrest of Agoratos was authorised, notwithstanding that ἐγγυηταί had been found for him (section 24). We saw at first that when οἱ αἱρεθέντες τῶν βουλευτῶν went down to the Peiraieus to arrest Agoratos because an information of conspiracy was laid against him, they accepted the sureties and did not arrest him. And although the charge against him was conspiracy (probably, against the Demos - sections 21, 48) for which the boule did not accept sureties for the accused person, according to the bouleutic oath, when there was a *prima facie* case, we concluded that Agoratos' case must not have been, at least at the beginning, a *prima facie* one, otherwise the boule would not have accepted the sureties. But now how can we understand and explain the second decree in accordance with οἱ ἐκ τῆς βουλῆς were authorised to arrest Agoratos although sureties had been nominated? This decree obviously invalidated the ἐγγύη and since, from the moment when the decree was voted, the ἐγγυηταί ceased to have any significance because of the new facts Agoratos had to be arrested until his trial or to be arrested and appear before the boule immediately. There was no ground left for avoiding the arrest by producing three guarantors who would guarantee his appearance before the boule in the near future. But what had changed? I think that the key to this question lies on the nature of the information and charge against Agoratos. We are told by Lysias (sections 25-28) that Agoratos' guarantors tried to persuade him to quit Attica with them. This happened in a very public place, at the altar at Mounychia, where many people were around and witnessed the fact, (ἐδόκει οὖν τοῖς ἐγγυηταῖς καὶ τοῖς ἄλλοις ἅπασιν ἐκποδὼν ποιήσασθαι τὸν Ἀγόρατον ὡς τάχιστα...) and I suppose that information about this fact reached without difficulty the boule in Athens. The guarantors' attempt to persuade Agoratos to leave

Athens and all the discussion about escaping was a proof in the hands of the boule that Agoratos "actually" was guilty and that his case was a *prima facie* case. But when there was a *prima facie* case, ἐάν τις ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ καταλύσει τοῦ δήμου συνιὼν ἁλῷ... (Dem. 24. *Timokr.* 144), the boule was bound to arrest the accused person and not to accept sureties. Only in this way, I think, we could explain the reason why although the boule at the beginning accepted the guarantors, after a while it invalidated the ἐγγύη and arrested Agoratos. Certainly according to Lysias there was a plot between the leaders of the oligarchic party and Agoratos but still they wanted a reasonable and valid reason for the prompt arrest of Agoratos.

Under the boule's second decree which authorised the arrest of Agoratos, he and his guarantors were brought before the boule: ἐπειδὴ τοῦτο τὸ ψήφισμα ἐψηφίσθη καὶ ἦλθον οἱ ἐκ τῆς βουλῆς Μουνιχίαζε. . . εἰς τὴν βουλὴν ἐκομίσθησαν. . .(sections 29,30). The plural verb ἐκομίσθησαν ("were brought") probably refers to Agoratos and his guarantors. Agoratos' guarantors were brought before the boule with him not because they were merely his guarantors from the first moment when the boule tried to arrest him, but because they were the persons who, by guaranteeing him, had frustrated the first attempt to arrest him and, in addition, because they tried to persuade Agoratos to escape from Attica providing him with means to do so. When οἱ ἐκ τῆς βουλῆς went to Mounychia to arrest Agoratos under the second decree, Agoratos' guarantors had not been denounced yet. They were denounced by Agoratos himself later in the boule where they had been brought with him by the bouleutai. In the boule's eyes Agoratos' guarantors were supposed to make sure that he would appear before the boule in the near future, whenever the prytaneis fixed a date for the hearing before it. They had appointed themselves as guarantors and by doing so they had become the substitute for the precautionary imprisonment which the boule

intended to impose upon Agoratos at the very beginning of the case. If the boule passed the decree for the immediate arrest of Agoratos simply because it found more strong evidence which made his case a *prima facie* one without his guarantors being involved in the whole affair, then this decree would merely repeal the ἐγγύη, the guarantors would have nothing to do any more and Agoratos alone would be arrested. The guarantors would be arrested only in the case that Agoratos escaped while they had stayed back. Then, even if they were not involved in the charge made against Agoratos, they would be brought before the boule because they failed to fulfil their duty, i.e. to produce the accused man before this political body to face the charge himself. The guarantors would be then responsible for the charge against Agoratos and they would have to suffer any penalty imposed. But the boule probably thought that his guarantors had a part in the case because of their behaviour after they had stood as guarantors, and that is, probably, why they were brought before the boule with Agoratos.

The plural ἐκομίσθησαν may, however, also refer to the fact that, besides Agoratos, two other persons denounced by Theocritos were brought before the boule at the same time, as we learn from a later part of the speech (section 54), where the phrase is, ὑπὸ τῆς βουλῆς μετεπέμφθησαν.

When Agoratos was taken to the boule, he denounced there his guarantors and others; and he was produced before an assembly in the theatre at Mounychia, where he repeated his denunciations. This assembly voted that the accused men should be arrested and tried in a δικαστήριον. No chance was given to them to nominate sureties, probably on the pretext that there were strong evidence that they were guilty, ἐκεῖνοι συλληφθέντες ἐδέθησαν (section 34).

In my opinion, what we have here is an εἰσαγγελία to the boule first and an εἰσαγγελία to the assembly afterwards. Agoratos denounced certain persons to the boule and to the assembly and I think that he can technically be described as ὁ εἰσαγγέλλων. That the procedure here is an εἰσαγγελία is proved by the word εἰσαγγεῖλαι (section 50) and by the fact that the trial was instituted by the boule and it was submitted to the court by a decree of the assembly.[109] The verb εἰσαγγέλλειν is used in its peculiar meaning of impeachment by Lysias 13 *Agorat.* 50, (*see also*, Lys.12 *Eratosth.* 48). Hager thinks that because εἰσαγγεῖλαι is used here in a public document it must have its ordinary technical meaning in the language of the Attic courts[110]. I cannot understand why Hansen believes that Agoratos cannot technically be described as ὁ εἰσαγγέλλων. Probably the problem lies on the fact that he takes Agoratos to be a metic. According to Hansen there are only two examples of an εἰσαγγελία to the assembly being opened in the boule, and he thinks that this is irregular and can be explained by extraordinary circumstances. Of these two examples one is the case of Agoratos, and Hansen explains the fact that the oligarchs in 404 opened their attack on the generals and trierarchs in the boule and not in the assembly because the attack was based on information supplied by the *metic* Agoratos whom they could not bring before the people without the permission of the boule[111] But Agoratos was not a metic, nor was he a slave or a freedman. He was an Athenian citizen, in the sense that he had gained the Athenian citizenship and was regarded

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[109]For a partly opposite view *see* , M.H.Hansen, *Eisaggelia* , p. 86 n.3 and 6.

[110]H. Hager "On the Eisangelia" *Journal of Philology* 4 (1872) 81: *see also* P.J. Rhodes, *Boule* 165 n. 15.

[111]M.H. Hansen *ibid.* 26.

by law and all the political bodies as an Athenian citizen, (*see* sections: 65, 70, 73, 76, 91).

In sections 59-60 Lysias speaks about Aristophanes of Cholleis who was one of Agoratos' three guarantors. Lysias says that some persons in the assembly in the theatre at Mounychia wanted him to be put to the torture as one who was not of pure Athenian stock. He also says that the persons who then had control of affairs came to Aristophanes and appealed to him to save himself by a denunciation, and not to run the risk of the extreme penalty by standing his trial on the count of alien birth.

In the fourth century Athens there was a γραφή against an alien who passed himself off as a citizen (γραφή ξενίας). At any time a person alleged to be pretending that he was a citizen, by exercising any of the rights which only citizens possessed, could be prosecuted by γραφή ξενίας (for being an alien)[112]. Aristophanes of Cholleis was threatened that he would be prosecuted by a γραφή ξενίας probably because he was exercising some of the rights possessed by citizens only, whereas he was alleged to be a foreigner. Because of the context in which this threat was expressed and because of the fact that Aristophanes was one of Agoratos' guarantors, I think that one of the rights which he allegedly exercised without being entitled to it would be his undertaking to stand surety for Agoratos. They would prosecute Aristophanes by γραφή ξενίας for being an alien who exercised rights possessed by citizens, and they would use the most recent example of a right exercised by him as if he was a citizen, i.e. to guarantee that a man accused by εἰσαγγελία to the boule would appear for trial. To stand as a surety in this context was restricted only to Athenian citizens:

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[112]Isai. 3. 37: Dem. 24. 131, 39.18 etc.

ἐγγυητὰς τρεῖς καθιστῇ τὸ αὐτὸ τέλος τελοῦντας (Dem. 24.144), where τὸ αὐτὸ τέλος τελοῦντας refers to the property classes defined by Solon.

Ἔνδειξις

Ἔνδειξις was naming an offender and his offence in writing to a magistrate. In most cases the appropriate magistrates were the Eleven, but in certain cases it was either the basileus or the thesmothetai.[113] The procedure of ἔνδειξις could be employed against persons who although they had lost their civil rights (ἄτιμοι) behaved as if they had full civil rights (ἐπίτιμοι), and exiles who returned to Attica without reprieve. In practice ἔνδειξις was applied to those who visited places from which they were banned or who exercised rights of which they had been deprived by ἀτιμία, and the most frequent case may have been that of the man who was technically ὀφείλων τῷ δημοσίῳ.

Ἔνδειξις was slightly different from ἀπαγωγή. The traditional view among scholars has been that ἔνδειξις and ἀπαγωγή were two different procedures. Lipsius thinks that the most important difference between the two procedures was that in ἀπαγωγή the accused was arrested by the accuser while in ἔνδειξις he was seized by the magistrates empowered to do so.[114] Lipsius was followed by Harrison and MacDowell who take ἔνδειξις and ἀπαγωγή to be two different procedures with the main difference that in ἀπαγωγή the accuser himself arrested the accused and took him to the appropriate official, while in ἔνδειξις the accuser merely reported the offence to the official, and the official made the arrest.[115]

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[113]Ar. *Ath. Pol.* 52.1, Dem. 24 *Timokr.* 22, And. 1 *Mysi.* 111.

[114]J. H. Lipsius, *Das Attische Recht und Rechtsverfahren* (Leipzig 1915) pp. 319, 331.

[115]A. R. W. Harrison, *The Law of Athens*, vol. 2: *Procedure* (Oxford 1971) pp. 222, 229.
D. M. MacDowell, *Athenian Homicide Law* (Manchester 1963) p. 135.

However, Hansen discussing the relationship between ἀπαγωγή, ἔνδειξις and ἐφήγησις concludes that they were not three different types of process but three variants of one and the same type of public action, "**apagoge**, in which the trial was preceded by the prosecutor arresting the supposed offender; **ephegesis**, in which the prosecutor denounced the supposed offender to the magistrates and entrusted the arrest to them; and **endeixis** in which the trial was preceded by a denunciation, and the prosecutor had to choose whether he wanted to arrest the suspect or not. If the prosecutor did decide to arrest him, an endeixis was followed by an apagoge."[116]

Harrison in his chapter under the title *ἀπαγωγή, ἔνδειξις, ἐφήγησις* writes: "The defendant was incarcerated unless he could furnish three sureties from his own census class", and quotes two passages, Dem. 24 *Timokr.*146 and 144.[117] MacDowell in his commentary on Andokides, O*n the Mysteries,* writes that " *normally* [my italics] a person accused by ἔνδειξις or ἀπαγωγή was imprisoned until his trial" and refers to Dem. 24 *Timokr.*146 with the explanation "quoting from a law: τὸν δ'ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἕνδεκα ἐν τῷ ξύλῳ". He goes further and adds, "But, except in the case of certain specific offences, he had to be released if he provided as sureties three persons of the same property-class as himself (Dem. 24.144, quoting what he calls a law, but what looks more like part of *the oath of the Eleven* [my italics]: οὐδὲ δήσω Ἀθηναίων οὐδένα, ὃς ἂν ἐγγυητὰς τρεῖς καθιστῇ τὸ αὐτὸ τέλος τελοῦντας, πλὴν ἐάν τις ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ καταλύσει τοῦ δήμου συνιὼν ἁλῷ, ἢ τέλος πριάμενος ἢ ἐγγυησάμενος ἢ ἐκλέγων μὴ καταβάλῃ)".[118]

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[116]M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense Univ. Press 1976) p. 26.

[117]Harrison, ibid. p.221.

[118]D.M. MacDowell, *Andokides, On The Mysteries,* (Oxford 1962) p.63.

To sum up, these scholars think that in a case of ἔνδειξις the accused man was usually given the choice of furnishing sureties (ἐγγυηταί) or suffering imprisonment until the case came into court. The two pieces of evidence on which they base this conclusion are: 1) Dem.24 *Timokr.* 146: οὔθ' ὅσων ἔνδειξίς ἐστιν ἡ ἀπαγωγὴ προσεγέγραπτ' ἂν ἐν τοῖς νόμοις "τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἕνδεκα ἐν τῷ ξύλῳ", from where they conclude that the normal procedure in ἔνδειξις was imprisonment of the accused until his trial, and 2) Dem. 24 *Timokr.* 144: " οὐδὲ δήσω Ἀθηναίων οὐδένα, ὃς ἂν ἐγγυητὰς τρεῖς καθιστῇ τὸ αὐτὸ τέλος τελοῦντας. . .", from where they conclude that the accused could avoid imprisonment if he provided three guarantors.

However, there is a number of objections to these conclusions as far as the method used for drawing them is concerned.

Even if we accept that in a case of ἔνδειξις the normal procedure was that the accused man was imprisoned until the day of his trial, quoting as evidence what Demosthenes quotes -"τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἕνδεκα ἐν τῷ ξύλῳ" (Dem. 24.146), I do not think that we can go further and claim that the accused man could avoid imprisonment by providing three guarantors, quoting as evidence what Demosthenes quotes -"οὐδὲ δήσω Ἀθηναίων οὐδένα. . . μὴ καταβάλῃ" (Dem. 24.144). Such a combination of these two pieces of evidence is not correct and it is not possible for the following reason: What Demosthenes refers to, in section 144 ("οὐδὲ δήσω. . . μὴ καταβάλῃ"), is a part of the bouleutic oath (section 147, ἔπειτα δ', ὦ ἄνδρες δικασταί, τοῦτο τὸ γράμμα αὐτὸ μὲν καθ' αὐτὸ οὐκ ἔστι νόμος, τὸ "οὐδὲ δήσω Ἀθηναίων οὐδένα", ἐν δὲ τῷ ὅρκῳ τῷ βουλευτικῷ γέγραπται)[119], and applied to cases of εἰσαγγελία

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[119]cf. MacDowell, And. *Myst.*, p. 63: "Dem. 24. 144, quoting what he calls a law, but what looks more like *part of the oath of the Eleven* [my italics]".

brought to the boule (see pages 111-116, where I discuss the case of εἰσαγγελία to the boule and the obligation of the boule to accept sureties for an accused man instead of imprisoning him until his trial).

Therefore the conclusion that one accused by ἔνδειξις or ἀπαγωγή could provide sureties and avoid custody until his trial seems to be invalid if it is to be based on this piece of evidence found in Dem. 24.144.

Let us see now whether the normal procedure after an ἔνδειξις (and not after an ἀπαγωγή) was actually always imprisonment of the accused until his trial or providing sureties instead. Most scholars base their conclusion on the evidence found in Dem. 24.146 "τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἕνδεκα ἐν τῷ ξύλῳ" and they claim that normally a person accused by ἔνδειξις was imprisoned until his trial.

It is true that the above sentence as it stands here between quotation marks, translated word by word, and with the previous comment of Demosthenes that it was a part of a law, gives the impression that there was a law ordering that an accused by ἔνδειξις or ἀπαγωγή had to be kept in custody until the day of his trial, and that it must have been the normal procedure. However we should be very cautious when we use this piece of evidence to prove that imprisonment *as a rule* was imposed on a person accused by ἔνδειξις and that it was applied to all cases of ἔνδειξις. Here our task is to look carefully into the context in which the phrase "τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἕνδεκα ἐν τῷ ξύλῳ" is said.

In 353 Timokrates introduced a law which proposed that, if anyone of the public debtors, by any law or decree, had been, or should be, condemned to imprisonment as an additional penalty, it should be lawful for himself or anyone else on his behalf to give sureties for the debt, and the debtor who has given sureties should be released from the penalty of the imprisonment. Against this law

a certain Diodoros brought a γραφὴ παρανόμων and Dem. 24 *Timokrates* was the speech of the prosecutor in this case. Timokrates' proposal concerned cases of persons who had already been punished with a fine for an offence and imprisonment would be imposed as an additional penalty until they would pay that fine. However Timokrates claimed that in his proposal he followed an existing statute according to which certain persons had the right to nominate sureties in order to avoid imprisonment. The speaker's task, however, is to prove that Timokrates tries to confuse two different cases, i.e. imprisonment as a means of leading to a trial and imprisonment as a penalty imposed on a person who had already been tried and convicted.

In sections 144-148 the main issue is imprisonment which is divided by the speaker into two kinds: precautionary imprisonment and punitive imprisonment. The speaker says that Timokrates was prepared to cite a statute (actually a part of the bouleutic oath) which he would claim to have followed in his own proposal and he quotes it in section 144; in section 145 he tries to indicate to whom it really applied. According to the speaker what is written in the bouleutic oath was not intended for the protection of people who had stood their trial and argued their case, but for those who were still untried (ἄκριτοι) and he accuses Timokrates that he is going to speak to the jurors of regulations made for untried culprits, as though they had been framed to include everybody (οὗτοσὶ δὲ, ἃ ἐπὶ τοῖς ἀκρίτοις κεῖται, ὡς περὶ ἁπάντων εἰρημένα μέλλει πρὸς ὑμᾶς λέγειν). And in the following section he tries to prove that this part of the bouleutic oath does not affect the right of the judges to impose imprisonment as a penalty for an offence, and to make clear that it does not apply to everybody. He says:

> οὔτε γὰρ ἄν, ὦ ἄνδρες δικασταί, τιμᾶν ἐξῆν ὑμῖν ὅ,τι χρὴ παθεῖν ἢ ἀποτεῖσαι (ἐν γὰρ τῷ παθεῖν καὶ ὁ δεσμὸς ἔνι· οὐκ ἄν οὖν ἐξῆν δεσμοῦ τιμῆσαι), οὔθ' ὅσων ἔνδειξίς ἐστιν ἢ

ἀπαγωγὴ προσεγέγραπτ' ἂν ἐν τοῖς νόμοις 'τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἔνδεκα ἐν τῷ ξύλῳ', εἴπερ μὴ ἐξῆν ἄλλους ἢ τοὺς ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ καταλύσει τοῦ δήμου συνιόντας ἢ τοὺς τὰ τέλη ὠνουμένους καὶ μὴ καταβάλλοντας δῆσαι. νῦν δὲ ταῦθ' ὑμῖν τεκμήριʼ ἔστω ὅτι ἔξεστι δῆσαι· παντελῶς γὰρ ἤδη ἄκυρ' ἂν ἦν τὰ τιμήματα.

In the whole passage (sections 144-148) the distinction that is made is between precautionary imprisonment before trial - which according to the bouleutic oath it could be avoided under certain circumstances and if the accused provided three persons as guarantors - and punitive imprisonment after trial - which could either exist as a simple penalty or as an additional penalty in the case where a fine was imposed as the primary penalty and imprisonment was simply the means of pressing the convicted man to pay the fine and it would last as long as he did not pay it.

Following this argumentation the speaker concludes that if what is written in the bouleutic oath was to apply to all cases of imprisonment, then the judgments (τιμήματα) - among which imprisonment was a possibility - would be invalid and inoperative.

In this context, in my opinion, the phrase - οὔθ' ὅσων ἔνδειξίς ἐστιν ἢ ἀπαγωγὴ προσεγέγραπτ' ἂν ἐν τοῖς νόμοις 'τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἔνδεκα ἐν τῷ ξύλῳ' - might refer to punitive imprisonment which, if Timokrates' proposal became a statute, would automatically be inoperative, since a person who was condemned to a fine and was imprisoned until he paid it could avoid imprisonment by providing three sureties according to Timokrates' proposal. Furthermore another point which makes this interpretation stronger might be the following: Timokrates' proposal was attacked by Diodoros by a γραφὴ παρανόμων and his task was to prove that the new proposal was against

(an) existing law(s). Timokrates' proposal concerned punitive imprisonment as an additional penalty, while there was already at least one law in which punitive imprisonment as an additional penalty was prescribed in it. Therefore Timokrates' proposal was against this law, and if it became a valid statute it would affect that certain law in making the penal sentences imposed according to it entirely inoperative.

Actually the speaker has quoted this law in section 105:

> ΝΟΜΟΙ ΚΑΚΩΣΕΩΣ ΓΟΝΕΩΝ, ΑΣΤΡΑΤΕΙΑΣ
>
> Ἐὰν δέ τις ἀπαχθῇ, τῶν γονέων κακώσεως ἑαλωκὼς ἢ ἀστρατείας ἢ προειρημένον αὐτῷ τῶν νόμων εἴργεσθαι, εἰσιὼν ὅποι μὴ χρή, δησάντων αὐτὸν οἱ ἔνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορείτω δὲ ὁ βουλόμενος οἷς ἔξεστιν. ἐὰν δ' ἁλῷ, τιμάτω ἡ ἡλιαία ὅ,τι χρὴ παθεῖν αὐτὸν ἢ ἀποτεῖσαι. ἐὰν δ' ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ.

However, in this law both precautionary and punitive imprisonment are mentioned; the phrase δησάντων αὐτὸν οἱ ἔνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν refers to precautionary imprisonment[120], while the phrase ἐὰν δ' ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ refers to punitive imprisonment imposed as an additional penalty.

In my opinion, there is a connection between sections 102-103, 105 and 146-147, and I tend to believe that in section 146 the phrase "τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἔνδεκα ἐν τῷ ξύλῳ" refers to punitive imprisonment and not to precautionary imprisonment, and therefore we cannot use this reference

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[120]This law concerns ἀπαγωγή and not ἔνδειξις (ἐὰν δέ τις ἀπαχθῇ).

to argue that normally in ἔνδειξις and ἀπαγωγή the accused man had to be kept in custody until his trial.

Let us look carefully at the above sections and notice some key words which probably will make it clear: section 102: (Timokrates' proposal) τὰς γὰρ ὑπαρχούσας ἐκ τῶν νῦν κυρίων νόμων τιμωρίας καταλύει. The key word here is τιμωρίας.

section 103: (1) ἄν τις ἀλῷ κλοπῆς καὶ μὴ τιμηθῇ θανάτου, προστιμᾶν αὐτῷ δεσμόν, (2) κἄν τις ἁλοὺς [τῆς] κακώσεως τῶν γονέων εἰς τὴν ἀγορὰν ἐμβάλλῃ, δεδέσθαι, (3) κἄν ἀστρατείας τις ὄφλῃ καὶ τι τῶν αὐτῶν τοῖς ἐπιτίμοις ποιῇ, καὶ τοῦτον δεδέσθαι, (4) Τιμοκράτης ἅπασι τούτοις ἄδειαν ποιεῖ, τῇ καταστάσει τῶν ἐγγυητῶν τὸν δεσμὸν ἀφαιρῶν.

The key words are: (1) προστιμᾶν...δεσμόν

(2) ...δεδέσθαι...

(3) ...δεδέσθαι..

(4) ...τὸν δεσμὸν...

(1) In this case it is clear that we have to do with imprisonment as an additional penalty.

(2) and (3) are not very straight forward cases in the sense that one could say that they refer to cases where the procedure of ἀπαγωγή was employed against the alleged offender and therefore δεδέσθαι refers to the arrest of the accused by the accuser. However, I think that both δεδέσθαι here refer to punitive imprisonment imposed on the convicted person who had been tried and found guilty of an offence for which the procedure of ἀπαγωγή was employed; The whole section 103 comes immediately after the phrase τὰς γὰρ ὑπαρχούσας ἐκ τῶν νῦν κυρίων νόμων τιμωρίας καταλύει and the speaker explains which kind of penalty the proposal of Timokrates would invalidate and associates τὰς τιμωρίας with προστιμᾶν...δεσμόν, ..δεδέσθαι... δεδέσθαι...τὸν δεσμόν.

Furthermore the two infinitives (section 103 δεδέσθαι) lead us directly to the last clause of the νόμοι κακώσεως γονέων, ἀστρατείας in section 105 - ἐὰν δ' ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ (where δεδέσθω refers to punitive imprisonment) and not to the phrase δησάντων αὐτὸν οἱ ἕνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, because the two infinitives (δεδέσθαι) are cited under the "heading" τὰς τιμωρίας.

Finally, in section 146 the key phrases are: τιμᾶν ἐξῆν ὑμῖν ὅ,τι χρὴ παθεῖν ἢ ἀποτεῖσαι (ἐν γὰρ τῷ παθεῖν καὶ ὁ δεσμὸς ἔνι·), and, νῦν δὲ ταῦθ' ὑμῖν τεκμήρι' ἔστω ὅτι ἔξεστι δῆσαι· παντελῶς γὰρ ἤδη ἄκυρ' ἂν ἦν τὰ τιμήματα, which make clear that the speaker, when he even mentioned imprisonment in the context of ἔνδειξις and ἀπαγωγή, meant punitive and not precautionary imprisonment. His whole argument started in section 102 by saying that (Timokrates' proposal) τὰς γὰρ ὑπαρχούσας ἐκ τῶν νῦν κυρίων νόμων τιμωρίας καταλύει, and the speaker finishes it in section 147 by concluding that παντελῶς γὰρ ἤδη ἄκυρ' ἂν ἦν τὰ τιμήματα.

Therefore, I think that the phrase "τὸν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἕνδεκα ἐν τῷ ξύλῳ" is more likely to refer to the case where an accused by the procedure of ἔνδειξις or ἀπαγωγή would be found guilty, fined and kept in prison until he paid the fine. Consequently, if this interpretation is correct, I do not think that we can use Dem. 24.146 as a piece of evidence to prove that *normally* a person accused by ἔνδειξις was imprisoned until his trial.

Andokides' speech *On the Mysteries* is a speech delivered in a case falling under the procedure of ἔνδειξις and it is the speech for the defence. Ἔνδειξις was a normal procedure for the prosecution of persons accused of exercising rights to which they were not entitled and of which they had been deprived by

ἀτιμία, (e.g. it was applied to those who visited places from which they were banned).

Kephisios prosecuted Andokides by an ἔνδειξις. The ἔνδειξις was brought during the Eleusinian Mysteries in Boedromion 400/399 and it was laid with the basileus (section 111). Kephisios' main charge was that Andokides had infringed the decree of Isotimides by attending the Mysteries in 400 after committing impiety in 415; the decree of Isotimides had bidden all who were guilty of impiety and had admitted it to keep away from the temples and the Agora at Athens (And. 1 *Myst.* 71: Κηφίσιος γὰρ οὑτοσὶ ἐνέδειξε μέν με κατὰ τὸν νόμον τὸν κείμενον, τὴν δὲ κατηγορίαν ποιεῖται κατὰ ψήφισμα πρότερον γενόμενον ὃ εἶπεν Ἰσοτιμίδης. . . ὁ μὲν γὰρ εἶπεν εἴργεσθαι τῶν ἱερῶν τοὺς ἀσεβήσαντας καὶ ὁμολογήσαντας. Kallias paid Kephisios one thousand drachmas to proceed against Andokides by ἔνδειξις on the charge of infringing the decree of Isotimides by attending the festival of the Eleusinian Mysteries. Practically, Kephisios pointed out to the basileus that Andokides was attending the festival; at the end of the festival the basileus reported this to the council, and the council referred the case to a law-court (section 111).

In the speech of his defence, Andokides says: καὶ πρῶτον μὲν ἐνθυμηθῆναι ὅτι νῦν ἐγὼ ἥκω οὐδεμιᾶς μοι ἀνάγκης οὔσης παραμεῖναι, οὔτ' ἐγγυητὰς καταστήσας οὔθ' ὑπὸ δεσμῶν ἀναγκασθείς...

What Andokides says here implies that after the ἔνδειξις against him and during the period until his trial either he could have been kept in custody or he could have been at liberty by providing sureties (ἐγγυητάς). But Andokides was neither remanded in custody nor released on bail for the period between the indictment and the trial. However, on the one hand the fact that Andokides mentions here these two possibilities (remand in custody until trial or release on bail) indicates that this procedure was applied to persons who were prosecuted by

ἔνδειξις, on the other hand the fact that Andokides was free until his trial indicates that in a case of ἔνδειξις the accused man could be free until his trial without providing sureties.

According to Hansen it is not very clear whether the accused had to be arrested and held in custody for the period preceding the trial. Of the five surviving speeches concerned with ἔνδειξις, three (Dem. 25 *Aristogeit.* A, 26 *Aristogeit.* B, 58 *Theokr.*) were directed against men who had brought prosecutions in spite of being state debtors. The other two (Andok. 1 *Myst.*, Lys. 6 *Andok.*) deal with the case of Andokides.

There are two instances in which an ἔνδειξις led to the arrest of the accused: Dem.53 *Nikostr.*14, Lys.6 *Andok.*30; these passages indicate that imprisonment before a court hearing was used in ἔνδειξις. However, there are another three examples of ἔνδειξις where the accused was at liberty for the period preceding the trial: Andok.1*Myst.*2, Dem.58*Theokr.*, Dem.25*Aristogeit.A* 49, Dein.2 *Aristogeit.*13; none of the speakers of the above speeches protest that the law has been broken by the accused being at liberty after the ἔνδειξις. And there is not any indication in the sources that the accused could avoid arrest only by finding bail.

Therefore, since we have examples of ἔνδειξις where either the accused man was arrested, or he was at liberty until his trial, and since Andokides mentions the possibility of avoiding arrest by providing sureties (Andok. 1 *Myst.* 2), we may conclude that when a person was prosecuted by ἔνδειξις and until the day of his trial arrived there were three possibilities:

(1). he could either be at liberty, or

(2). be kept in custody, or

(3). he could avoid arrest by providing sureties.

However the criteria according to which each one of these three different procedures was chosen and employed to deal with cases of ἔνδειξις are not known.

I think that Hansen[121] is correct in concluding that in ἔνδειξις there was no general statutory requirement of detention in custody or bail and his assumption may well be true, namely that either it was laid down by law that certain types of offence resulted in the arrest of the accused, whereas other offenders prosecuted by ἔνδειξις were allowed to be at liberty; or that there was a general provision that a prosecutor had the right - but not the duty - to arrest the denounced person.

If there was a law which required that in ἔνδειξις the accused had to be kept in custody or alternatively he had to provide sureties until his trial, then it would be impossible to explain why Andokides was neither imprisoned nor required to provide sureties in accordance with that law. Andokides in the first sections of his speech says that he could have been arrested or at least he could have been asked to furnish sureties until his trial (section 2), and intimates that neither of these happened because the prosecutors wanted him to remain at liberty and hoped that he would flee to avoid trial (section 4)[122]. Andokides does not give a hint that the law was broken by his prosecutor. Therefore the case of Andokides indicates that in a case of ἔνδειξις it depended on the prosecutor whether the accused would be at liberty, or arrested or he would avoid custody until his trial by nominating sureties.

Antiphon's speech *On The Murder of Herodes* presents a case of ἔνδειξις and ἀπαγωγή where bail was refused by the prosecutors. Antiphon 5 was written to be delivered by a Mytilenian (Euxitheos) who was charged with the murder of an

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[121]M.H. Hansen, *Apagoge* p. 13.

[122]In that case Kallias would have achieved all he wanted, i.e. to claim and win the heiress, who was the real reason for the ἔνδειξις.

Athenian citizen, Herodes, on a journey from Mytilene to Ainos. In a considerable part of this speech (Ant. 5.8-19) Euxitheos deals with the argument that the accusers have employed the wrong legal procedure in prosecuting him. When he reached the Piraeus, after he had been summoned to appear before the court in Athens, he was denounced by Herodes' relatives and arrested. However, when he was summoned he expected the action brought against him to be a δίκη φόνου and not an ἔνδειξις and ἀπαγωγή against him as a κακοῦργος. The procedure used in this case is ἔνδειξις and ἀπαγωγή κακουργίας which, according to the speaker, is not a correct procedure when the alleged offence is homicide.

I am not concerned here about the validity of the objection raised by the defendant to the action of his accusers in prosecuting him as a κακοῦργος before a Heliastic court, instead of as a φονεύς before the Areopagos. Macdowell seems to take the view that this procedure was not proper in a case of homicide (MacDowell, *Homicide*,140). On the other hand, Hansen after discussing the examples of ἔνδειξις and ἄπαγωγή κακούργων being employed against murderers concludes that "it is conceiveable that the Eleven at the end of the fifth century began to interpret νόμος τῶν κακούργων as including homicides and that accordingly Aischines, in the middle of the fourth century, could include homicides without hesitation among the types of criminal who could be arrested by any citizen.", (M.H. Hansen, *Apagoge*, 107; Aischin.1,91).

Euxitheos in his speech for the defence protests against the procedure chosen by the prosecutors (Ant.5.9-10) and in section 17 says:

Ἔτι δὲ μάλ' ἐδέθην, ὦ ἄνδρες, παρανομώτατα ἁπάντων ἀνθρώπων. ἐθέλοντος γάρ μου ἐγγυητὰς τρεῖς καθιστάναι κατὰ τὸν νόμον, οὗτως οὗτοι διεπράξαντο τοῦτο ὥστε μὴ ἐγγενέσθαι μοι ποιῆσαι. τῶν δὲ ἄλλων ξένων ὅστις πώποτε ἠθέλησε καταστῆσαι ἐγγυητάς, οὐδεὶς πώποτ' ἐδέθη. καίτοι οἱ ἐπιμεληταὶ τῶν κακούργων τῷ αὐτῷ χρῶνται νόμῳ τούτῳ. ὥστε

καὶ οὗτος κοινὸς τοῖς ἄλλοις πᾶσιν ὧν ἐμοὶ μόνῳ ἐπέλιπε μὴ ἀπολῦσαι τοῦ δεσμοῦ. (Ant.5.17)

The procedure in this case is ἔνδειξις κακουργίας employed against an alleged homicide (Euxitheos), (Section 9: κακοῦργος ἐνδεδειγμένος φόνου δίκην φεύγω), followed by an ἀπαγωγὴ κακουργίας, (section 9: ταύτην τὴν ἀπαγωγήν, section 17:ἐδέθην); this ἀπαγωγὴ κακουργίας is based on the prosecutors' assumption that the accused man would run away before the trial if he remained at liberty, (section 13: Λέγεις δὲ ὡς οὐκ ἂν παρέμεινα εἰ ἐλελύμην, ἀλλ' ᾠχόμην ἂν ἀπιών.). Probably if the accuser could show good reason for supposing that the accused would default if allowed his liberty, bail would be refused by the Eleven.

After the ἔνδειξις the prosecutors proceeded to arrest the accused man (ἀπαγωγή) who demanded to exercise his potential right of nominating sureties instead of being arrested, (ἐθέλοντος γάρ μου ἐγγυητὰς τρεῖς καθιστάναι κατὰ τὸν νόμον). However, this right was not absolute but depended on the discretion of the prosecutors who eventually did not allow him to be at liberty by accepting bail for him from the moment of the indictment until his trial, (οὕτως οὗτοι διεπράξαντο ὥστε τοῦτο μὴ ἐγγενέσθαι μοι ποιῆσαι; the wording here implies that the authority to decide whether the accused should be imprisoned or not rested with the prosecutors).

Euxitheos protests against his arrest which, according to him, is illegal. When he says ἐθέλοντος γὰρ μου ἐγγυητὰς τρεῖς καθιστάναι κατὰ τὸν νόμον, it is not very clear which law (if any) he refers to. If in the νόμος τῶν κακούργων there was a provision concerning bail, Euxitheos would have most probably referred to it. Probably the phrase κατὰ τὸν νόμον, as well as his statement that all the other aliens who demanded bail were unexeptionaly accepted to it, should

be seen as a generalization made from the practice of bail which might have been attested in other cases of ἔνδειξις.

From Andokides' statement in his speech *On The Mysteries* (And.1.2) and from Ant.5.17 we may conclude that a person arrested by ἔνδειξις followed by ἀπαγωγή had the right to be freed on bail only if the prosecutor accepted it; the prosecutor himself could choose whether he wanted to arrest the accused, or to let him be at liberty before the trial, or to let him be admitted to bail.

Therefore we may conclude that an accused person was sometimes arrested as a consequence of an ἔνδειξις and probably the authority to decide whether the accused should be imprisoned or not rested with the prosecutor. In an ἔνδειξις the arrest until trial seems to have been optional and the accused, if arrested, could avoid imprisonment by providing sureties for himself.

Φάσις

Φάσις[123] was a public legal action used particularly for some offences concerning trade. Φάσις was also used to initiate an action by pointing out to the arkhon that an orphan's estate had not been leased, and an action of impiety where the basileus was the authority to whom this φάσις would be made; it was also available against mining offences. Φάσις was a form of denunciation which, as it has been argued by MacDowell, was aimed primarily at a piece of property and indirectly at the offender who committed an offence with this piece of property. It could be brought by anyone who wished to prosecute (ὁ βουλόμενος) and the prosecutor in a φάσις, if he won the case, received half of the payment made by a convicted defendant - the fine or the value of confiscated property (Dem. 58.13).

Aristophanes mentions three cases of φάσις: in the *Akharnians* against the Megarian who tries to sell his daughters as pigs:

> τὰ χοιρίδια τοίνυν ἐγὼ φανῶ ταδὶ
> πολέμια καὶ σέ
>
> (Ar.*Akharn.* 819-20)

and against the Boeotian who has a variety of goods to sell:

> ἐγὼ τοίνυν ὁδὶ

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[123]Φάσις is discussed by J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905-15) 309-16; A. R. W. Harrison, *The Law of Athens*, vol. 2 (Oxford 1971) 218-21; R. G. Osborne, "Law in Action in Classical Athens", *JHS* 105 : 47-8. However the most complete account of φάσις is given by D. M. MacDowell, "The Athenian Procedure of *Phasis*", *Symposion* 1990 : *Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Cologne, Weimar, and Vienna), 187-98.

φαίνω πολέμια ταῦτα. . .

καὶ σέ γε φανῶ πρὸς τοῖσδε.

(Ar. *Akharn.* 911-14).

In these cases the offence is importing goods from an enemy state. The authority to whom these φάσεις would be made is not specified here.

The third case of φάσις mentioned by Aristophanes is in the *Knights*, where the Paphlagonian threatens to φαίνειν the sausage-seller to the prytaneis for goods on which a payment ought to have been made and the offence here seems to be similar to a failure to pay customs duty:

καὶ φανῶ σε τοῖς πρυτάνεσιν
ἀδεκατεύτους τῶν θεῶν ἱε-
ρὰς ἔχοντα κοιλίας.

(Ar. *Knights* 300-302)

Early in the fourth century a ship on which a man had lent money was denounced by φάσις as belonging to a Delian: ὁλκάδα γάρ, ἐφ' ᾗ πολλὰ χρήματ' ἦν ἐγὼ δεδωκώς, ἔφηνέ τις ὡς οὖσαν ἀνδρὸς Δηλίου (Isokr. 17 *Trapez.* 42); this case is discussed in details later.

Another case of φάσις is also found in Isokrates' speech *Against Kallimakhos* but we should be cautious about using this passage as evidence of the correct legal procedure since the incident described here occurred in 403, during the regime of the Ten: Patrocles claimed that money in possession of Kallimachos belonged to the state; an argument developed, and when one of the Ten appeared Patrokles made a φάσις to him; when this man brought the disputants before his colleagues they referred the case to the boule, which gave its verdict against Kallimachos. (Isokr. 18 *Kallim.* 5-6). The offence here seems to be similar to import of goods from an enemy state since the money carried by

Kallimakhos, according to Patrokles, had been left behind by a man of the democratic party which was the enemy of the regime in Athens at this time.

The procedure of φάσις was also employed against the seller who did not accept silver coins, which were offered in payment for goods in the market, approved by the public tester (δοκιμαστής). The law of 375/4 about silver coinage stated that the goods offered for sale by a seller who refused to accept approved silver coins were "to be pointed out" to the officials in charge of the particular market, and not to the prytaneis (*Hesperia* 43[1974] 158, lines 18-29).

Therefore offences concerning trade for which the φάσις procedure could be used were the following:

- importing goods from an enemy state, which was forbidden in war time (Ar. *Akharn.* 819-20, 911-14),

-importing smuggled goods, without payment of customs duty (Ar. *Akharn.* 517-22, 541-3: *Knights* 300-2),

-lending money for a ship which was not going to transport grain to Athens (Dem. 35.51),

- selling goods for which the seller refused to accept approved silver coins (the law of 375/4 about silver coinage).

In accordance with our evidence concerning φάσις and as far as the authorities to whom φάσεις would be made are concerned, MacDowell concludes that in the fifth century and early in the fourth φάσις cases were brought before the boule (Ar. *Knights* 300-2, Isokr. 17.42, 18.6), while later in the fourth century such cases were going to a variety of different magistrates, such as the supervisors of the market; minor cases were decided by them, while more serious ones were referred to a court.

In the *Trapezitikos* of Isokrates we find a case of φάσις which occurred in the 390s:

ὁλκάδα γάρ, ἐφ' ᾗ πολλὰ χρήματ' ἦν ἐγὼ δεδωκώς, ἔφηνέ τις ὡς οὖσαν ἀνδρὸς Δηλίου. ἀμφισβητοῦντος δ' ἐμοῦ καὶ καθέλκειν ἀξιοῦντος οὕτω τὴν βουλὴν διέθεσαν οἱ βουλόμενοι συκοφαντεῖν ὥστε τὸ μὲν πρῶτον παρὰ μικρὸν ἦλθον ἄκριτος ἀποθανεῖν, τελευτῶντες δ' ἐπείσθησαν ἐγγυητὰς παρ' ἐμοῦ δέξασθαι. (Isokr. *Trapez.* 42).

Someone pointed out (ἔφηνέ τις) that a merchant vessel which was in the Peiraeus belonged to a Delian man. The accusation in the first place seems to be that the ship belonged to the enemy and therefore it ought not to be there - Delos was under Spartan domination after 403 and at war with Athens at the time of the φάσις which must be dated within the Korinthian war 395-386. The ship was denounced by φάσις as belonging to a Delian and presumably the Delian himself was denounced and he would be on trial. We are not told anything about the ship's owner, probably because the speaker finds it irrelevant to his case.

However the speaker of Isokr.17, a man from Bosporos who was doing business in Athens, was involved in this case and he was accused before the boule of an offence which is not explicitly defined in this passage, but we learn that he had extended a maritime loan on the cargo of the merchant-man. What we have so far is the following: a maritime loan was contracted between the Bosporan and the ship's owner who was allegedly a Delian; probably the ship's owner had taken the money and he was preparing for the trade voyage; the ship was denounced by φάσις on the pretext that it belonged to the enemy and the ship's owner would have to face trial initiated by the φάσις. Nevertheless the Bosporan was brought before the boule where he was accused of an offence which must have had something to do with the φάσις of the ship. Eventually he was released on bail for the period preceding the trial.

Here there is a problem in defining the accurate accusation against the Bosporan and the type of the legal procedure used by the accusers to bring him before the boule. Some scholars think that here we have two actions against the Bosporan, first a φάσις, and second another action initiated after his protest, and that under this second action he was brought before the boule. Lipsius believes that the second action was an εἰσαγγελία, while Hansen thinks that it was an ἔνδειξις/ἀπαγωγή.[124] The problem is caused by the fact that the Bosporan was brought before the boule where he was obliged to find sureties if he wanted to avoid arrest and custody. However a φάσις could be brought before the boule (Ar. *Knights* 300) at least in the fifth and early in the fourth century. As far as the possibility of arrest and remand in custody until the trial is concerned the traditional view is that φάσις neither entailed arrest and custody nor otherwise the defendant compelled to find sureties.[125] But there is no evidence in support of these statements. When we look at the evidence concerning φάσις we realize that nothing is mentioned about arrest and custody of the accused. For the one of the two real cases of φάσις that are known, (Isokr.18.6), we are not told anything about arrest and custody, but in the other real case of φάσις (Isokr.17.42-3) a person undoubtedly connected with the φάσις of the ship produced sureties in order to avoid remand in custody until his trial. Now since there is not any other instance of φάσις where arrest and custody or the demand of sureties were attested, the scholars thought that this must not have been the practice in cases of φάσις and they tried to find a way out of the problem by assuming that in this case (Isokr. 17.42-3) two actions against the Bosporan took place. Starting from the end, namely the appointment of sureties as a substitute for the accused man's

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[124]Lipsius, idib. p.314 n.20; M.H.Hansen, *Apagoge*, p.132

[125]Hansen, ibid. p.132; Harrison,ibid. p.220.

remand in custody, they tried to find a type of process which entailed arrest and custody and consequently sureties, to match our case here and they conclude that the second type of the legal procedure used against the Bosporan must have been either εἰσαγγελία or ἔνδειξις / ἀπαγωγή.

Hansen thinks that the Bosporan was prosecuted by an ἔνδειξις or an ἀπαγωγή to the boule as a result of his protest against the φάσις of the ship, of the ship's owner and of himself. And if I have understood Hansen's argument properly, then it seems to me that the offence for which the Bosporan was denounced by ἔνδειξις or ἀπαγωγή to the boule was that he protested at the φάσις of the ship (ἀμφισβητοῦντος δ' ἐμοῦ καὶ καθέλκειν ἀξιοῦντος). But although I do not have any evidence to support my argument, I think that the reaction of the Bosporan is very comprehensible and it is something that we should expect from anyone who was accused of any offence, namely to protest against the accusation and to claim that he was innocent, without running the risk of a double prosecution.

Therefore I am not convinced by Hansen's arguments and I think that the procedure before the boule was the φάσις brought against the Bosporan. The accusation presumably was that he lent money for trade purposes to a shipowner who was from Delos, an enemy of Athens at that time.

We know that a law existed which authorized φάσις for the offence of lending money for a ship which was not going to transport grain to Athens:

ΝΟΜΟΣ

Ἀργύριον δὲ μὴ ἐξεῖναι ἐκδοῦναι Ἀθηναίων καὶ τῶν μετοίκων τῶν Ἀθήνησι μετοικούντων μηδενί, μηδὲ ὧν οὗτοι κύριοί εἰσιν, εἰς ναῦν ἥτις ἂν μὴ μέλλῃ ἄξειν σῖτον Ἀθήναζε, καὶ τἆλλα τὰ γεγραμμένα περὶ ἑκάστου αὐτῶν. ἐὰν δέ τις ἐκδῷ παρὰ ταῦτα, εἶναι τὴν φάσιν καὶ τὴν ἀπογραφὴν τοῦ ἀργυρίου πρὸς τοὺς ἐπιμελητάς, καθάπερ τῆς νεὼς καὶ τοῦ σίτου εἴρηται, κατὰ ταὐτά. καὶ δίκη αὐτῷ μὴ ἔστω περὶ τοῦ ἀργυρίου, ὃ ἂν ἐκδῷ ἄλλοσέ ποι ἢ Ἀθήναζε, μηδὲ ἀρχὴ εἰσαγέτω περὶ τούτου μηδεμία.

(Dem. 35 *Lakrit.*51)

Now, having in mind that φάσις was also available against those who had commercial dealings with enemies of Athens (Ar. *Akharn.* 819 ff. and 908 ff.), we may assume that there might have been a law, analogous with the law found in Dem. 35.51, which prohibited loans to merchants who were enemies of Athens and φάσις would be the proper type of action against those who extended such loans to enemies. The accusation against the Bosporan might have been made in accordance with that law and the procedure of φάσις would be employed as almost in all the cases concerning offences of having commercial dealings with enemies of Athens and of lending money for a ship which was not going to transfer grain to Athens. We know that the Bosporan's case was brought before the boule which handled many or all cases of φάσις at that time (Ar. *Knights* 300-302), and there the accused faced the possibility of arrest and custody until his trial, unless he furnished sureties who would guarentee his appearance in court.

If my interpretation is correct, then we might conclude that in Isokr. 17.42-3 we have a case of φάσις before the boule which entailed the possibility of arrest and remand in custody of the accused until his trial or the requirement of furnishing sureties.

The Bosporan was released on bail until his trial. A trial was to follow where it would be decided whether the accused was guilty or not. If it was proved that the ship's owner was a Delian, then the Bosporan would be declared guilty and would be sentenced, (We do not know whether, apart from the money that he had given as a loan and which would be confiscated, he had to pay a fine in addition or to suffer another penalty). When he was brought before the boule the prosecutors proposed execution without trial (οὕτω τὴν βουλὴν διέθεσαν οἱ βουλόμενοι συκοφαντεῖν, ὥστε τὸ μὲν πρῶτον παρὰ μικρὸν ἦλθον ἄκριτος ἀποθανεῖν). If we are to believe the speaker on this point, it seems that there was talk in the boule of putting the accused to death ἄκριτος.[126] However the case was ultimately referred to a δικαστήριον.

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[126]If what is said here is not an exaggeration by the speaker, then this instance should re-open the vexed question of the punitive powers of the boule. This case might suggest that those powers were important where the defendants were non-citizens. There is the case of the assassination of the Athenian πρόξενος in Iulis [*IG* ii² 111 (Tod 142), dated in 364/3] where the boule condemns the murderer to death (37-8), and we might conclude that if ,at this time, the boule might still in certain circumstances pass the death sentence on foreigners from allied cities, probably it could do the same in the case of metics in the same circumstances, i.e. in public actions with the public interest at stake, and as soon as a *prima facie* case had been established.

See also, Rhodes, *Boule*, pp. 179-207 for a full account of the punitive powers of the boule.

After the φάσις was brought before the boule, as it seems from what is said here and what actually happened, two courses were open to it: it could either put the accused to death ἄκριτος, without referring the case to a δικαστήριον, or refer the case to a δικαστήριον. If the boule chose the second alternative, then the accused had to be kept in custody until his trial, or he could avoid remand in custody by providing sureties (ἐγγυητάς). Actually the Bosporan provided ἐγγυητάς and stayed out of custody, (τελευτῶντες δ' ἐπείσθησαν ἐγγυητὰς παρ' ἐμοῦ δέξασθαι). These ἐγγυηταί guaranteed that the accused would appear for trial.

The number of the ἐγγυηταί provided is not mentioned here explicitly, but we may infer that they must have been definitely more than one. The plural ἐγγυητάς (τελευτῶντες ἐπείσθησαν ἐγγυητὰς παρ' ἐμοῦ δέξασθαι) indicates that the ἐγγυηταί were at least two; moreover we are told that two persons named in this passage stood as guarantors, Ἀρχέστρατος (Πασίων δ' Ἀρχέστρατόν μοι τὸν ἀπὸ τῆς τραπέζης ἑπτὰ ταλάντων ἐγγυητὴν παρέσχεν) and Πασίων (καίτοι εἰ μικρῶν ἀπεστερεῖτο καὶ μηδὲν ἦδει μ' ἐνθάδε κεκτημένον, οὐκ ἂν δήπου τοσούτων χρημάτων ἐγγυητής μου κατέστη. ἀλλὰ δῆλον ὅτι τὰς μὲν τριακοσίας δραχμὰς ἐνεκάλεσεν ἐμοὶ χαριζόμενος, τῶν δ' ἑπτὰ ταλάντων ἐγγυητής μοι ἐγένεθ' ἡγούμενος πίστιν ἔχειν ἱκανὴν τὸ χρυσίον τὸ παρ' αὐτῷ κείμενον) where the subject of the verbs in the phrases ἐγγυητής μου κατέστη and ἐγγυητής μοι ἐγένετο is identical with ἐγγυητὴς and it is Πασίων; since Πασίων is the subject of the verb in the sentence ὅτι τὰς μὲν τριακοσίας δραχμὰς ἐνεκάλεσεν ἐμοὶ χαριζόμενος (and actually in the sections 38-39 we are told that the Bosporan had admitted that he owed Pasion three hundred drachmas, although this debt was a fictitious one made up by them for another purpose) he is also the subject of the verb in the phrase ἐγγυητής μοι ἐγένετο. Thus we have here:

τὰς μὲν τριακοσίας δραχμὰς ἐνεκάλεσεν [Πασίων]

τῶν δ' ἑπτὰ ταλάντων ἐγγυητής μοι ἐγένετο [Πασίων]

Therefore we may conclude that the ἐγγυηταί in this case were at least two. However, Archestratos and Pasion are the only sureties mentioned by the Bosporan in this speech but not necessarily the only sureties put up by him when the ἐγγύη actually took place. The plural of ἐγγυητὰς in Isok. 17. 42 might include more than two persons.

I think that the accused was obliged to find more than one surety otherwise the boule would not release him. The requirement of more than one surety must have been a condition in cases of ἐγγύη of this type. If it was enough for the boule to accept just one person as surety, then either Pasion could have furnished Archestratos as the only surety for the Bosporan or he himself could have stood as the only surety for him. The fact that Pasion actually contacted and persuaded Archestratos to stand as surety for the Bosporan and then he himself went surety for him indicates that the number of the sureties (more than one) must have been important and decisive.

The Bosporan had his own circle of contacts to whom he could appeal for help and from whom the ἐγγυηταί would come. One of his father's guest-friends (ξένος), Philip, was summoned and appeared but he refused to undertake the responsibility of standing surety for him, because he was scared of the danger. When the φάσις against the Bosporan was brought before the boule and it decided eventually to refer the case to a δικαστήριον the accused man was either to be kept in custody until his trial or to provide sureties who would guarantee that he would actually appear before the court. Probably at this stage Philip was called by the accused to appear in the boule and to accept to be one of his sureties. Possibly although Philip knew the reason why he was called he appeared before the boule, which indicates that he had not decided yet whether he would

stand surety or not. Since he knew that he was called in order to play the role of one of the ἐγγυητοί, if he did not want right from the beginning to undertake such a responsibility, he could have not appeared at all in the boule. But Philip appeared, heard the case, was informed of the prospective ἐγγύη and then left without committing himself to such an act: καὶ Φίλιππος μὲν ὢν μοι ξένος πατρικός, κληθεὶς καὶ ὑπακούσας, δείσας τὸ μέγεθος τοῦ κινδύνου ἀπιὼν ᾤχετο.

But how can Philip's behaviour be explained? Probably he refused to be one of the ἐγγυητοί because of the amount of money (ἑπτὰ τάλαντα) for which he would become the Bosporan's surety (δείσας τὸ μέγεθος τοῦ κινδύνου). This amount of money was probably fixed by the boule when the accused man was given the chance to stay free until his trial only by providing persons who would become his sureties for this certain amount of money. The boule not only accepted to release the accused on bail but it itself determined the amount of money that would compose the bail. The Bosporan however managed to find other persons as his sureties. Archestratos and Pasion undertook to become his sureties for seven talents [Ἀρχέστρατόν μοι...ἑπτὰ ταλάντων ἐγγυητὴν παρέσχεν - (Πασίων) τῶν δ' ἑπτὰ ταλάντων ἐγγυητής μοι ἐγένετο]. Therefore the amount of seven talents, for which the Bosporan had to find at least two persons to become his sureties, was set by the boule.

The practical function of the seven talents must have been the following: The Bosporan who was accused by φάσις to the boule for possibly extending a maritime loan to an enemy (the Delian ship-owner) was to face trial on a future day after the φάσις had been brought before the boule. In the meantime he was not remanded in custody because some persons (ἐγγυητοί) guaranteed for seven talents that he would actually appear for trial. If the accused did not eventually appear for trial then the ἐγγυητοί would be responsible and they would have to

pay the sum of seven talents. The failure of a party to appear for the trial was sufficient evidence for a verdict by default. In a public prosecution if the defendant fled the country his flight was regarded as a confession of guilt and he was forthwith condemned *in absentia* (*see* Lycourg. I. 117). The ἐγγυηταί would pay the money for which they became the accused man's sureties not because he was proven guilty by his escape but because he failed to appear for the trial. In other words if the accused appeared for trial and was found guilty and condemned, I do not think that the ἐγγυηταί would pay the money since the surety was for appearance in court and not for carrying out the court's award.

In our case here, the accusation against the Bosporan was probably that he contracted an illegal maritime loan. The amount of money lent by him to the ship's owner is not mentioned explicitly in this passage but the speaker says that it was a large sum of money (ὁλκάδα γάρ, ἐφ' ᾗ πολλὰ χρήματ' ἦν ἐγὼ δεδωκώς...). The legal procedure used against him was φάσις to the boule and the case was referred to a court. At least two men became his sureties for seven talents, an act which replaced his remand in custody. If the Bosporan appeared for trial and was found guilty then he would be condemned - the money for the loan would be confiscated and shared between the plaintiff(s) and the state. If the Bosporan did not appear for trial but fled Athens then such an act would be regarded as a confession of his guilt and he would be condemned *in absentia*. But in this case what was going to be the sentence? In theory the money of the maritime loan should be confiscated but in practice the ἐγγυηταί would pay the money for which they became his sureties, i.e. in our case seven talents.

Is there any connection between the two amounts of money, i.e. the loan and the seven talents? I think that this is very likely since I cannot find what other criteria were used by the boule to fix the seven talents as the amount of money for which some persons would become the Bosporan's sureties. If this interpretation

is correct, then the maritime loan made by the Bosporan would be seven talents, an amount of money which was very substantial. And although the maritime loans usually ranged from 1,000 to 4,500 drachmas, we actually have two references to maritime loans where the sums of money borrowed were several talents: **a.** the philosopher Zeno of Citium, according to Diogenes Laertius, had more than a thousand talents which he lent out in maritime loans (φασὶ δ' αὐτὸν ὑπὲρ χίλια τάλαντα ἔχοντα ἐλθεῖν εἰς τὴν Ἑλλάδα καὶ ταῦτα δανείζειν ναυτικῶς, Diog Laert. 7 *Zeno* 13). Probably this sum of money was made up of a plurality of loans, and **b.** we learn from Lysias that when Diodotos, who was a very rich man, died his estate was worth at least fifteen talents, of which seven talents and forty minas were lent out in maritime loans (ναυτικὰ δὲ ἀπέδειξεν ἐκδεδομένα ἑπτὰ τάλαντα καὶ τετταράκοντα μνᾶς..., Lys. 32 *Diogeit.* 6).

I now summarise my conclusions: I think that

_ The Bosporan was accused by the legal action of φάσις before the boule of extending an illegal maritime loan to a ship-owner (ναύκληρος).

_ For his appearance in court sureties were demanded to the sum related to the matter in dispute (illegal maritime loan).

_ He avoided remand in custody by providing sureties for the amount of seven talents which must have been the same sum of money with the maritime loan.

_ These persons guaranteed that the accused would appear before the court, otherwise they would be liable to pay the sum of seven talents.

If my whole intrerpretation of the case above is correct then we might also conclude that this case here is the only known to us example of a case of φάσις where arrest and custody of the accused as well as release on bail was a possibility. Therefore this type of legal action (φάσις) might have entailed arrest

and custody or consequently release on bail (ἐγγύη) until trial, if not in all at least in some cases. Because of lack of evidence it is hard to determine the criteria used by either the boule or the other magistrates to whom φάσις cases were brought to order arrest and custody [and in this case release on bail (ἐγγύη) was an option] or to accept the case and just refer it to a court.

Δίκη ἀφαιρέσεως and ἐγγύη before the polemarchos
&
Isocr. 17 *Trapez.* 14

There are five references to ἀφαίρεσις in the orators and a sixth in a fragment from a lost speech by Isaeos with the title Ὑπὲρ Εὐμάθους εἰς ἐλευθερίαν ἀφαίρεσις.

These are the following:

1. [Dem.] 59 *Neaera* 40

[Dem.] 59 *Neaera* is a speech of accusation in a γραφὴ ξενίας brought by Apollodoros and his brother-in-law Theomnestos against a woman, Neaera. The charge was that she, being herself an alien, was living as wife with Stephanos, who was an Athenian citizen. As Neaera's life is narrated in detail we learn that she had been a slave and a common prostitute and that before she went to live with Stephanos she had an eventful life. Among other things we hear that when she was a slave of Timanoridas and Eucrates in Corinth, she was offered her freedom by her two masters for the sum of twenty minae which she had to pay them. Neaera managed to collect some money from some men as a contribution towards the price of her freedom. This money was not enough and eventually a certain Athenian called Phrynion advanced the balance needed to make up the twenty minae, and he paid it to Eucrates and Timanoridas to secure her freedom. After paying down the money Phrynion went back to Athens taking Neaera with him. But after some time Neaera, not being happy with Phrynion, ran off to Megara where she remained for two years until Stephanos met her there and brought her back to Athens with him.

When Phrynion learned that she was in Athens he reacted in the following way:

> πυθόμενος δὲ ὁ Φρυνίων ἐπιδημοῦσαν αὐτὴν καὶ οὖσαν παρὰ τούτῳ, παραλαβὼν νεανίσκους μεθ' ἑαυτοῦ καὶ ἐλθὼν ἐπὶ τὴν οἰκίαν τοῦ Στεφάνου ἦγεν αὐτήν.
>
> ἀφαιρουμένου δὲ τοῦ Στεφάνου κατὰ τὸν νόμον εἰς ἐλευθερίαν, κατηγγύησεν αὐτὴν πρὸς τῷ πολεμάρχῳ.

To prove that what is said here is true the speaker brings as a witness to the facts the man who was polemarchos at the time:

> ΜΑΡΤΥΡΙΑ
>
> Αἰήτης Κειριάδης μαρτυρεῖ πολεμαρχοῦντος αὐτοῦ κατεγγυηθῆναι Νέαιραν τὴν νυνὶ ἀγωνιζομένην ὑπὸ Φρυνίωνος τοῦ Δημοχάρους ἀδελφοῦ, καὶ ἐγγυητὰς γενέσθαι Νεαίρας Στέφανον Ἐροιάδην, Γλαυκέτην Κηφισιέα, Ἀριστοκράτην Φαληρέα.
>
> [Dem.] 59.40

Phrynion attempted to carry Neaera off from the house of Stephanos and take her with him, presumably on the pretext that she was a slave of his who had run away (ἦγεν αὐτὴν [εἰς δουλείαν])[127].

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[127]The legal basis for Phrynion's attempt to arrest Neaera is not very clear. We know that Phrynion had paid a sum of money to Neaera's former masters for her emancipation and took her to Athens, but we do not know whether Phrynion had actually acted as her patron during her previous stay in Athens.

We also know that after some time with Phrynion Neaera ran away from him and went to Megara but she came back to Athens after two years with Stephanos as her patron (προῖσταται Στέφανον τουτονὶ αὐτῆς, section 37). If Phrynion was Neaera's patron during her previous stay in Athens, then the proper

Stephanos, however, took her away from Phrynion declaring that she was a free woman and not a slave; he acted in accordance with the law (ἀφαιρουμένου δὲ τοῦ Στεφάνου κατὰ τὸν νόμον εἰς ἐλευθερίαν).

What happened next is the following:

> Λαχόντος τοίνυν αὐτῷ τοῦ Φρυνίωνος δίκην, ὅτι αὐτοῦ ἀφείλετο Νέαιραν ταυτηνὶ εἰς ἐλευθερίαν, καὶ ὅτι, ἃ ἐξῆλθεν ἔχουσα παρ' αὐτοῦ αὕτη, ὑπεδέξατο, συνῆγον αὐτοὺς οἱ ἐπιτήδειοι καὶ ἔπεισαν δίαιταν ἐπιτρέψαι αὐτοῖς.
>
> [Dem] 59. 45

Phrynion brought a suit against Stephanos for taking Neaera from him and asserted her freedom. The charge was that Stephanos wrongfully made a stand for Neaera's liberty and it was originally laid with the Polemarchos, who would pass the case to the relevant court. Neaera was compelled to provide sureties to the Polemarchos that she would actually appear in court. The case however was submitted to arbitration and it was decided that Neaera was to be free

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course for him would have been to bring a δίκη ἀποστασίου against her because she appeared with a new patron (Stephanos), and his action would have been based on the law forbidding a change of patron. However Phrynion's action (his seizure of Neaera) indicates that he was probably claiming her as a runaway slave, although his actual intention may not have been to enslave her, but to keep her as his mistress again.

Presumably he claimed that he paid money to Neaera's former masters for buying her to be his slave and not for her manumission. *See* C. Carey *Greek Orators: Apollodoros Against Neaira* [Demosthenes] 59, p. 107.

(συνελθόντες δ' οὗτοι ἐν τῷ ἱερῷ, . . .γνώμην ἀπεφήναντο . . .τὴν μὲν ἄνθρωπον ἐλευθέραν εἶναι καὶ αὐτὴν αὑτῆς κυρίαν, section 46), where the decision ἐλευθέραν εἶναι καὶ αὐτὴν αὑτῆς κυρίαν is opposed to the other possible decision which could have been taken by the arbitrators, i.e. δούλην εἶναι καὶ Φρυνίωνα αὐτῆς κύριον, and indicates that Phrynion was claiming Neaera to be his own slave.

Therefore when a person was seized as a slave by someone who claimed that he was the owner of the alleged slave, a third person could oppose the seizure by declaring the liberty of the alleged slave. The alleged owner of the alleged slave could then bring an action against the third party who prevented the seizure. This action was called δίκη ἀφαιρέσεως or ἐξαιρέσεως; since Harpokration discusses the suit under ἐξαιρέσεως δίκη and refers to a lost speech by Isaeos (Ἰσαῖος ἐν τῇ ὑπὲρ Εὐμάθους εἰς ἐλευθερίαν ἀφαιρέσει) it seems that there is no difference in meaning whether the term δίκη ἀφαιρέσεως or δίκη ἐξαιρέσεως is used[128].

2. Aeschin. 1 *Timarch.* 62-63

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[128]Harp. s.v. ἐξαιρέσεως δίκη: ὁπότε τις ἄγοι τινὰ ὡς δοῦλον, ἔπειτά τις αὐτὸν ὡς ἐλεύθερον ἐξαιροῖτο, ἐξῆν τῷ ἀντιποιουμένῳ τοῦ ἀνθρώπου ὡς δούλου λαγχάνειν ἐξαιρέσεως δίκην τῷ εἰς τὴν ἐλευθερίαν αὐτὸν ἐξαιρουμένῳ: Ἰσαῖος ἐν τῇ ὑπὲρ Εὐμάθους εἰς ἐλευθερίαν ἀφαιρέσει.

ὅτε δ' ἐδικάζετο, ἄλλην σκέψασθε μεγάλην ῥώμην Ἡγησάνδρου· ἄνθρωπον οὐδὲν αὐτὸν ἠδικηκότα, ἀλλὰ τὸ ἐναντίον ἠδικημένον, οὐδὲ προσήκοντα αὐτῷ, ἀλλὰ δημόσιον οἰκέτην τῆς πόλεως, ἦγεν εἰς δουλείαν φάσκων ἑαυτοῦ εἶναι. ἐν παντὶ δὲ κακοῦ γενόμενος ὁ Πιττάλακος προσπίπτει ἀνδρὶ καὶ μάλα χρηστῷ. ἔστι τις Γλαύκων Χολαργεύς· οὗτος αὐτὸν ἀφαιρεῖται εἰς ἐλευθερίαν. τὸ δὲ μετὰ τοῦτο δικῶν λήξεις ἐποιήσαντο.

Hegesandros attempted to enslave to himself Pittalacos, who was a public slave, alleging that he was his owner. But Glaucon took Pittalacos away into liberty[129] and law-suits were begun next (δίκη ἀφαιρέσεως). It is very clear in this passage that Hegesandros claimed that Pitallacos was a slave of his (ἦγεν εἰς δουλείαν φάσκων ἑαυτοῦ εἶναι).

3. [Dem.] 58 *Theokr.* 19:

τέταρτος τοίνυν νόμος ἐστίν ... καθ' ὃν
ὀφείλει πεντακοσίας δραχμὰς Θεοκρίνης
οὑτοσί, οὐκ ἐκτετεικότος αὐτῷ τοῦ πατρὸς
ἃς προσῶφλεν ἀφελόμενος τὴν
Κηφισοδώρου θεράπαιναν εἰς ἐλευθερίαν...

Presumably in this instance the father of Theocrines maintained that the maid-servant of Cephisodoros was a free woman. Cephisodoros then brought a

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[129]Public slaves were privileged and their legal status was close to that of the metics (*see* Harrison *Law* I 177). Thus, when Glaucon rescued Pittalacos and secured his freedom, we should understand the freedom of a state-slave in place of the slavery that Hegesandros had attempted to impose on him.

δίκη ἀφαιρέσεως against him and the case went to the court where Cephisodoros claimed ownership over the maid-servant and eventually won the case. The father of Theocrines had evidently not been able to make good his claim that the servant in question was a free woman, and had been ordered to pay damages to his adversary and a like sum as a fine to the state (προσῶφλεν)[130].

4. Lysias 23 *Pankleon* 9-11

In this speech the speaker (plaintiff) tries to prove that Pankleon was not a Plataean, and therefore could not claim the rights of an Athenian citizen. He tells how he made inquiries among the Plataean community in Athens who denied knowledge of him and that the only information he could get concerning Pankleon was from one man, who said that a slave of this name, who seemed to be like the defendant, had run away from him. Some days later the accuser saw Pancleon being arrested as the slave of Nikomedes: Ἡμέραις τοίνυν μετὰ ταῦτα οὐ πολλαῖς ὕστερον ἰδὼν ἀγόμενον τουτονὶ Παγκλέωνα ὑπὸ Νικομήδους, ὃς ἐμαρτύρησεν αὐτοῦ δεσπότης εἶναι, section 9. Nikomedes asserted that he was Pankleon's owner and arrested him. However some of Pankleon's associates said that he had a brother who would vindicate him as a freeman: εἶπόν τινες τῶν τούτῳ παρόντων ὅτι εἴη αὐτῷ ἀδελφὸς ὃς ἐξαιρήσοιτο αὐτὸν εἰς ἐλευθερίαν, section 9.

But Pankleon was unable to find anyone, even a relative, who would assert, in proper legal form, his allegedly free status and, according to the plaintiff, the sole issue concerning the defendant's status is the identity of his owner, since a woman asserted her ownership of Pankleon and prevented Nikomedes from taking

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[130]Dem. 58. 21: τόν τε νόμον, ὃς κελεύει τὸ ἥμισυ τοῦ τιμήματος ὀφείλειν τῷ δημοσίῳ, ὃς ἂν δόξῃ μὴ δικαίως εἰς τὴν ἐλευθερίαν ἀφελέσθαι.

possession of him, γυνὴ δὲ φάσκουσα αὐτῆς αὐτὸν εἶναι δοῦλον, ἀμφισβητοῦσα τῷ Νικομήδει, καὶ οὐκ ἔφη ἐάσειν αὐτὸν ἄγειν, section 10.

Pankleon was not vindicated as a freeman by legal process but he resisted forcibly when he was hauled into slavery by Nikomedes, although Nikomedes and the woman, who also claimed that Pankleon was her slave, were both willing to let him go if somebody should either vindicate him as a freeman or arrest him on the claim of owning him as a slave: εἰς τοῦτο δὲ βιαιότητος ἦλθον οἵ τε παρόντες τούτῳ καὶ αὐτὸς οὗτος, ὥστε ἐθέλοντος μὲν τοῦ Νικομήδους ἐθελούσης δὲ τῆς γυναικὸς ἀφιέναι, εἴ τις ἢ εἰς ἐλευθερίαν τοῦτον <ἀφαιροῖτο> ἢ ἄγοι φάσκων ἑαυτοῦ δοῦλον εἶναι, τούτων οὐδὲν ποιήσαντες ἀφελόμενοι ᾤχοντο, section 11.

Presumably, if Pankleon could find someone who would assert his free status, then Nikomedes would probably bring a δίκη ἀφαιρέσεως against the *adsertor*, and in this suit he would claim that Pankleon was his slave, (cf. ὑπὸ Νικομήδους, ὃς ἐμαρτύρησεν αὐτοῦ δεσπότης εἶναι, section 9; γυνὴ δὲ φάσκουσα αὐτῆς αὐτὸν εἶναι δοῦλον, section 10; εἴ τις ... ἢ ἄγοι φάσκων ἑαυτοῦ δοῦλον εἶναι, section 11, where it is clear that the person who ἄγοι εἰς δουλείαν claimed that the alleged slave was his own slave).

5. Isocr. 12 *Panathenaikos* 97

> καὶ παραπλήσιον ἐποίησαν τοῖς παρὰ μὲν τῶν ἄλλων τοὺς οἰκέτας εἰς ἐλευθερίαν ἀφαιρουμένοις, σφίσι δ' αὐτοῖς δουλεύειν ἀναγκάζουσιν.

Here we have a reference to ἀφαίρεσις in general as a practice in Athenian law; the parties involved are as follows:

a. τοῖς εἰς ἐλευθερίαν ἀφαιρουμένοις: people who asserted the freedom of wrongfully enslaved persons.

b. τοὺς οἰκέτας: slaves or according to the *adsertor*, wrongfully enslaved persons.

c. παρὰ τῶν ἄλλων: alleged owners of the alleged slaves.

In a potential δίκη ἀφαιρέσεως brought by the persons of category c against the persons of category a, the latter would claim that the persons of category b being wrongfully enslaved should be free, while the former would assert their right of ownership over the alleged slaves. We should notice here that the persons who would bring a δίκη ἀφαιρέσεως were identical with the alleged owners of the slaves.

6. Isaeus Fr. 16 (Thalheim) *Eumathes*

> Ἔβλαψέ με Ξενόκλης ἀφελόμενος Εὐμάθην εἰς ἐλευθερίαν, ἄγοντος ἐμοῦ εἰς δουλείαν κατὰ τὸ ἐμὸν μέρος.

This is probably an extract from the speech of the plaintiff in the δίκη ἀφαιρέσεως brought against Xenocles. Eumathes was seized as a slave by the speaker of this lost speech by Isaeos (ὑπὲρ Εὐμάθους εἰς ἐλευθερίαν ἀφαίρεσις, *see* Harp. s.v. ἐξαιρέσεως δίκη) claiming to be the owner, but Xenocles opposed the seizure and "took him away to freedom" (ἀφελόμενος Εὐμάθην εἰς ἐλευθερίαν). The party claiming ownership brought an action (δίκη ἀφαιρέσεως) against Xenocles who prevented seizure.

Therefore, to sum up, when a person was wrongly seized as a slave by someone claiming to be the owner, he might be hauled into freedom (ἀφαιρεῖσθαι or ἐξαιρεῖσθαι εἰς ἐλευθερίαν) by a third party who claimed that the enslaved person was a free man/woman. But if the alleged owner denied the validity of that

"removal to freedom" and still claimed to own the person in question as a slave he could bring a δίκη ἐξαιρέσεως-ἀφαιρέσεως against the *adsertor* who prevented seizure, for having wrongfully asserted the alleged slave's liberty. The charge was originally laid with the Polemarchos before whom the alleged slave had to provide sureties to guarantee his/her appearance for the trial. The case was passed by the Polemarchos to the relevant court where it was decided whether the alleged slave was really the slave of the man who claimed him. If the action (δίκη ἀφαιρέσεως) was successful the defendant had to hand over the slave or the slave's value in money and to pay a fine to the state equal to the value of the slave ([Dem.]58.19, 21)[131].

We have discussed the six references to ἀφαίρεσις in the orators (including Isocr. *Panath.* 97 which is not a reference to an actual case of ἀφαίρεσις but a general statement about this procedure) and we have seen that four of them ([Dem.] 59 *Neaera* 40, 45; Aischin. 1 *Timarch.* 62-63; [Dem] 58 *Theokr.* 19; Is. Fr. 16 (Thalheim) *Eumathes*) refer to actual cases of ἀφαίρεσις where the alleged owner of the alleged slave brought a δίκη ἀφαιρέσεως before the Polemarchos against the person who asserted the liberty of the alleged slave. We know that the polemarchos supervised cases involving metics (Ar. *Ath. Pol.* 58. 2-3), and his involvement in cases of δίκη ἀφαιρέσεως is due to the fact that the alleged slave was usually claiming the status of a freedman or freedwoman, and consequently metic status.

When the case was brought before the polemarchos, the alleged slave was usually compelled by the plaintiff to produce sureties who would guarantee that the slave in question would appear for trial. In our evidence of the δίκη

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[131]*See* Harrison *Law* I 178-9, 221; MacDowell *Law* 80.

ἀφαιρέσεως there is clear reference to such persons (ἐγγυητοί) in [Dem.] 59 *Neaera* 40 and Lysias 23 *Pankleon* 12.

In Pankleon's case, however, a δίκη ἀφαιρέσεως was not brought since an ἀφαίρεσις εἰς ἐλευθερίαν never took place, and this is used by the speaker of Lysias 23 as an evidence that Pankleon knew that he had a very weak case and therefore by his own actions acknowledged his unfree status: εὖ εἰδὼς ἑαυτὸν ὄντα δοῦλον ἔδεισεν ἐγγυητὰς καταστήσας περὶ τοῦ σώματος ἀγωνίσασθαι, section 12. This implies that if Pankleon had been removed to freedom by a relative or a friend of his, then his alleged owner would have brought a δίκη ἀφαιρέσεως and he would have demanded sureties. The fact that the speaker here mentions the possibility of sureties in the hypothetical context of the procedure ἀφαίρεσις εἰς ἐλευθερίαν, with the possible consequence of a δίκη ἀφαιρέσεως, indicates that furnishing sureties was the normal consequence after a δίκη ἀφαιρέσεως.

Actually the only preserved real case which is certainly a δίκη ἀφαιρέσεως ([Dem.] 59 *Neaera* 40, 45) points to the same conclusion, ἀφαιρουμένου δὲ τοῦ Στεφάνου κατὰ τὸν νόμον εἰς ἐλευθερίαν, κατηγγύησεν αὐτὴν πρὸς τῷ πολεμάρχῳ, section 40. Stephanos asserted Neaera's freedom, Phrynion brought a δίκη ἀφαιρέσεως against him (section 45) and demanded sureties.

But who was the defendant in a δίκη ἀφαιρέσεως and who furnished the sureties before the polemarchos? [Dem.] 59.45 (Λαχόντος τοίνυν αὐτῷ τοῦ Φρυνίωνος δίκην, ὅτι αὐτοῦ ἀφείλετο Νεαίραν ταυτηνὶ εἰς ἐλευθερίαν, "so then Phrynion brought a suit against him (Stephanos) for asserting the freedom of this woman Neaera") suggests that the real defendant in a δίκη ἀφαιρέσεως was the *adsertor*. The main issue in the case was the status of the alleged slave; if the slave in question was proved actually to be a slave and belonged to the plaintiff of the δίκη ἀφαιρέσεως, then the *adsertor* would be guilty of a wrong in

taking him/her into freedom, and liable to a fine as the lost party of the suit ([Dem.] 58 *Theokr.* 21 κελεύει τὸ ἥμισυ τοῦ τιμήματος ὀφείλειν τῷ δημοσίῳ ὃς ἂν δόξῃ μὴ δικαίως εἰς τὴν ἐλευθερίαν ἀφελέσθαι).

Therefore, since the alleged slave's status inevitably was in question in a δίκη ἀφαιρέσεως, I think that we should understand in this context the language of Lys. 23 *Pankleon* 12 (εὖ εἰδὼς ἑαυτὸν ὄντα δοῦλον ἔδεισεν ἐγγυητὰς καταστήσας περὶ τοῦ σώματος ἀγωνίσασθαι)[132] and we should not take the phrase περὶ τοῦ σώματος ἀγωνίσασθαι as an indication of the alleged slave's role as the defendant in a δίκη ἀφαιρέσεως.

As far as the second question is concerned (who furnished the sureties?), both cases ([Dem.] 59.40 and Lys. 23.12) suggest that the alleged slave did so. The verb κατεγγυᾶν means "to compel to give security" and Phrynion κατηγγύησεν αὐτὴν (Νέαιραν) πρὸς τῷ πολεμάρχῳ- "he compelled her to give security before the polemarchos". The phrase καθιστάναι ἐγγυητάς means "to appoint sureties" and Pankleon ἔδεισεν ἐγγυητὰς καταστήσας- "he was afraid to appoint sureties".

The plural ἐγγυητάς in Lys. 23.12, although it does not specify the exact number, indicates that more than one persons were required to stand as guarantors. In [Dem.] 59.40 the deposition of the polemarchos before whom the sureties were furnished is given, where the names of the guarantors are stated. The guarantors were three, they were Athenian citizens and members of propertied families.[133] One of them was Stephanos himself, the man who "removed Neaera to freedom " and who was now facing a δίκη ἀφαιρέσεως brought against him by Phrynion, the man who alleged that he was Neaira's owner.

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[132]cf. Harrison *Law* I 179.

[133]See J.K. Davies, *Athenian Propertied Families, 600-300 B.C.* (Oxford 1971) 60, 89.

We may then conclude that the normal practice in cases of δίκη ἀφαιρέσεως must have been that the slave in question was required to furnish as sureties three Athenian citizens and that there was nothing wrong if one of the sureties was the *adsertor* himself. Stephanos's example suggests that an *adsertor* by his act was not disqualified to play the role of one of the sureties.

These three Athenian citizens would guarantee before the polemarchos (hence the deposition of the polemarchos himself, [Dem.] 59.40) that the alleged slave would actually appear for trial. Presumably, if the alleged slave could not furnish the sureties required by the plaintiff (the alleged owner of the slave), he / she would be kept in custody, either by his / her alleged master or by the Eleven after an order of the polemarchos, until a decision about the status of the alleged slave was taken, either by a trial or by arbitration proceedings, (cf. Isocr. 17 *Trapez.* 12 εἶλκέ με πρὸς τὸν πολέμαρχον, ἐγγυητὰς αἰτῶν, καὶ οὐ πρότερον ἀφῆκεν, ἕως αὐτῷ κατέστησ' ἓξ ταλάντων ἐγγυητάς).

Let us consider now what might have happened, first in the case that the alleged slave appeared in court, and second in the case that he / she did not turn up for trial.

* If the alleged slave appeared for trial, he / she could either be proved a free person, and in that case the alleged owner would lose his case and the alleged slave would go free, or he / she could be proved a slave of the plaintiff, and in that case, since the action of the δίκη ἀφαιρέσεως was successful, the defendant had not only to hand over the slave, but also to pay a fine to the state equal to the value of the slave (see [Dem.] 58.19, 21).

* If the alleged slave did not appear for trial and ran away, then what would probably happen is the following : His / her escape would be taken as a proof that he/she was actually a slave of the plaintiff, and the defendant who had previously taken him/her into freedom would be guilty. In this case the slave

himself was probably replaced by the slave's value in money which the defendant had to pay to the slave's owner; he would still have to pay an equal amount as a fine to the state.

But what would be the responsibility of the guarantors? They guaranteed that the slave would appear for trial, but eventually the slave did not. It was they who prevented the slave's arrest until the trial, otherwise his/her owner would have taken him/her into custody which carried more guarantee that he /she would certainly appear for trial. Here we should bear in mind that it appears to have been perfectly legal for the *adsertor* to be one of the guarantors (there was no objection against Stephanos by Phrynichos or by the polemarchos, [Dem.] 59.40), and probably this was the most common practice in cases of δίκη ἀφαιρέσεως, since the person who asserted the freedom of an alleged slave would certainly be willing to stand as surety for him/her if he was allowed to do so. In the case where the slave did not furnish sureties and was kept in custody until the trial, if the defendant was convicted, he would have to pay a fine to the state. The slave was there and would go with his/her master. But if, in the case where the slave furnished sureties and being free until trial had ample opportunity to run away, he/she actually did so, then the convicted defendant would have to pay twice an amount of money equal to the slave's value, first to the slave's owner who had lost a piece of property and second to the state as the law ordered. The slave was replaced by his /her value in money.

The same person had undertaken two different roles, one of the *adsertor* and another of the guarantor, and he was required to pay accordingly a sum of money to the state, as *adsertor*, and another to the owner of the slave, as guarantor (supposing the slave had ran away). Probably to secure his position the owner of the slave demanded three guarantors who would cope more easily with the second payment (to the owner) than only one person would do, and especially when this

person was the *adsertor* who had also to pay another amount of money (to the state). Therefore, I think that the responsibility of the guarantors would be restricted only to the second payment, i.e. the payment made to the owner of the slave as a compensation for a lost piece of his property.

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An incident described in Isokr. *Trapez.*14 has been taken by some scholars as a reference to the procedure of ἀφαίρεσις εἰς ἐλευθερίαν with the ensuing δίκη ἀφαιρέσεως.[134] Before we consider this case, it would be appropriate to mention briefly the facts which led to this incident. A Bosporan man who had moved to Athens opened an account in Pasion's bank, and when he prepared to go back to Bosporos and asked Pasion to return him his money, Pasion at first claimed that he had not the means of refunding it just then, but when the Bosporan sent his friends Philomelos and Menexenos to inquire the matter, Pasion repudiated the debt altogether. The Bosporan then decided to take legal proceedings against Pasion. The only person who had knowledge of their financial transactions, according to the Bosporan, was Kittos, a slave of Pasion. Believing that this slave could furnish the clearest proof of his claim the Bosporan went to Pasion and demanded that Kittos should be given to torture. Kittos however had disappeared; according to the Bosporan, Pasion hid him, while Pasion accused the Bosporan and Menexenos that they had taken Kittos away after having deceived him when he was in the bank and took six talents from him. However, after some time Kittos was found in Athens by Menexenos who then arrested him and

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[134] Harrison *Law* I, 221, MacDowell *Law*, 80 n. 149.

demanded that he should be given by Pasion to torture in order to give testimony about the Bosporan's deposit and the charge brought by his master:

> Μενέξενος δ' εὑρίσκει τὸν παῖδ' ἐνθάδε, καὶ ἐπιλαβόμενος ἠξίου αὐτὸν βασανίζεσθαι καὶ περὶ τῆς παρακαταθήκης καὶ περὶ ὧν οὗτος ἡμᾶς ἠτιάσατο. Πασίων δ' . . . ἀφῃρεῖτ' αὐτὸν ὡς ἐλεύθερον ὄντα . . . κατεγγυῶντος γὰρ Μενεξένου πρὸς τὸν πολέμαρχον τὸν παῖδα, Πασίων αὐτὸν ἑπτὰ ταλάντων διηγγυήσατο.
>
> Isocr. 17 *Trapez.*13- 14

It is true that the language of this passage suggests that here we have the procedure of ἀφαίρεσις εἰς ἐλευθερίαν followed by a δίκη ἀφαιρέσεως. However, there is a problem which dissuades me from accepting this passage as reference to ἀφαίρεσις εἰς ἐλευθερίαν.

Menexenos seized Kittos and demanded that he should give testimony under torture; he took as granted that Kittos was Pasion's slave and challenged his master to submit him to torture in order to give testimony about the deposit and the charge brought against Menexenos by Kittos's master. His action is described as: ἐπιλαβόμενος (τὸν παῖδα) ἠξίου αὐτὸν βασανίζεσθαι. The arrest of Kittos was not an attempt of enslavement by Menexenos in the sense that he claimed the slave as his own. Menexenos arrested Kittos because of the circumstances: previously, Menexenos and the Bosporan had been charged by Pasion that they had kidnapped Kittos. That is why Menexenos, when he met Kittos in Athens, arrested and led him before Pasion who was then challenged to submit the slave to torture. Pasion's reaction is described as: ἀφῃρεῖτ' αὐτὸν ὡς ἐλεύθερον ὄντα. He released Kittos on the ground that he was not a slave but a freeman, and thus

he could not be tortured. Finally a legal action was taken by Menexenos before the polemarchos.

Let us suppose that this action was the δίκη ἀφαιρέσεως against Pasion who "removed Kittos to freedom" brought by Menexenos who denied the validity of that removal and insisted that Kittos was a slave.

We have seen that in cases of ἀφαίρεσις εἰς ἐλευθερίαν there were the following parties:

1. The alleged slave. --- (in our case, Kittos),
2. the person who arrested the alleged slave and claimed that he was the owner. --- (in our case, Menexenos ?),
3. the person who reacted to this action and removed the enslaved person to freedom. --- (in our case, Pasion).

And the next step was made by the man who arrested the alleged slave. He could bring a δίκη ἀφαιρέσεως against the man who removed the enslaved person to freedom. This suit would decide whether the enslaved person was wrongfully removed to freedom and consequently rightly enslaved. The wrongfully enslaved person had to prove his/her non-slave status. The plaintiff had to prove that the alleged slave was actually a slave and that he was his/her owner, while the defendant would claim that the alleged slave was a free man/woman.

But in the alleged δίκη ἀφαιρέσεως brought by Menexenos against Pasion, the plaintiff would argue that Kittos was a slave and not a free man as the defendant claimed, and when the question "who owns Kittos?" would arise, Menexenos would reply that Pasion owned him. But Pasion himself was the man who "removed Kittos to freedom". In other words Menexenos would claim that Kittos was Pasion's slave, while at the same time Pasion claimed that Kittos was a freeman. But what was the issue of this suit? If the alleged master of an alleged

slave declared that he was a freeman, how could another person prove that this man was not free but a slave of the man who declared that the alleged slave was a freeman?

The question in this suit would be whether Kittos was Pasion's slave or a freeman. Menexenos would maintain the former, while Pasion the latter.

Paradoxically the person who enslaved the alleged slave (Menexenos) would claim that he (Kittos) was a slave of the person who removed him to freedom (Pasion).

I conclude that Isocr.17 *Trapez.*14 is not a reference to a δίκη ἀφαιρέσεως, and therefore the demand of sureties by Menexenos should not be seen in this context.

I suggest that Menexenos brought probably a δίκη βλάβης against Kittos whose status had changed from a former slave of Pasion to a freeman after Pasion's declaration that Kittos was not his slave but a freeman.

Consequently this δίκη βλάβης was brought before the polemarchos who was dealing with cases concerning metics (an emancipated slave held metic status). The purpose of this δίκη βλάβης was to compel Kittos to give testimony about the Bosporan's deposit in Pasion's bank and the charge brought by Pasion against the Bosporan and Menexenos. We are told that Kittos was the only person who knew about Pasion's transactions with the Bosporan and therefore the person who could give such a testimony (Isocr. 17.11). Menexenos taking Kittos to be Pasion's slave and seeking for his testimony, arrested him and challenged his master to submit him to torture, (a slave's testimony would be accepted in court only if it was given under torture). When Pasion denied that Kittos was a slave and therefore he could not be tortured, Menexenos acted in a different way:

presumably he called Kittos to give evidence as a free man[135] but he refused to do so, and then Menexenos brought a δίκη βλάβης against him.

The δίκη βλάβης (a private action for damages) is one of the most frequently attested kinds of case in Athenian law, because the concept of βλάβη was very broad covering any action which caused someone to lose property, and particularly money.

When an important witness was unwilling to give evidence or, although he promised to do so, failed to attend at the required hearing, it appears that there were three ways in which a litigant could bring pressure to bear on the unwilling witness:

1. κλήτευσις
2. δίκη λιπομαρτυρίου
3. δίκη βλάβης

Dem. 49 *Timoth.* 18-20 is the only evidence for the δίκη βλάβης in this connection; νυνὶ δὲ τῷ Ἀντιφάνει εἴληχα βλάβης ἰδίαν δίκην, ὅτι μοι οὔτ' ἐμαρτύρησεν οὔτ' ἐξωμόσατο κατὰ τὸν νόμον. When Apollodoros brought an action for debt against Timotheos, he needed Antiphanes's testimony since he was present when the money was lent. Antiphanes, however, failed to testify, with the result that Apollodoros lost the case before the arbitrator. Apollodoros then brought a δίκη βλάβης against Antiphanes because it was Antiphanes who had caused him to lose the money.

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[135]cf. Dem. 49 *Timoth.* 55: ἠρόμην αὐτὸν πρὸς τῷ διαιτητῇ εἰ ἔτι δοῦλος εἴη ὁ Αἰσχρίων, καὶ ἠξίουν αὐτὸν ἐν τῷ δέρματι τὸν ἔλεγχον διδόναι. ἀποκριναμένου δέ μοι τούτου ὅτι ἐλεύθερος εἴη, τῆς μὲν ἐξαιτήσεως ἐπέσχον, μαρτυρίαν δ' αὐτὸν ἠξίουν ἐμβαλέσθαι τοῦ Αἰσχρίωνος ὡς ἐλευθέρου ὄντος.

Furthermore, Plato *Laws* 937 a (ὁ δ' εἰς μαρτυρίαν κληθείς, μὴ ἁπαντῶν δὲ τῷ καλεσαμένῳ, τῆς βλάβης ὑπόδικος ἔστω κατὰ νόμον) may be based on an Athenian law.[136]

In our case, Pasion brought a charge against Menexenos and the Bosporan that they deceived Kittos and received six talents from him, (section 12). Kittos whose deposition would be vital was unwilling to give testimony about the matter. Kittos's testimony was also important for the deposit which the Bosporan had in Pasion's bank. Therefore, Kittos's failure to testify could result in their conviction, which meant that Menexenos would be liable for the six talents and that the Bosporan, who would lose his deposit, would also be liable for the six talents[137].

In section 15 we are told that after Menexenos's action (probably δίκη βλάβης) Pasion changed his attitude and appeared willing to surrender Kittos (according to the Bosporan) for torture. They chose βασανιστάς (according to the Bosporan "torturers" while according to Pasion "questioners") and when the Bosporan demanded that they should torture Kittos, Pasion made a stand against torture and asserted that they had not been chosen as torturers but as interrogators (λόγῳ πυνθάνεσθαι παρὰ τοῦ παιδός, section 15; λόγῳ μὲν ἐκέλευσε βασανίζειν ἔργῳ δ' οὐκ εἴα, section 17).

This change of Pasion's attitude may be due to the fact that Menexenos put pressure on Kittos and consequently on Pasion by bringing the δίκη βλάβης.

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[136]See Harrion *Law* II 139-143.

[137]cf. Isocr. 17. 21 Μενέξενος δ' ὀργιζόμενος ὑπὲρ τῆς αἰτίας ἧς κἀκεῖνον Πασίων ἠπάσατο, λαχὼν δίκην ἐξήτει τὸν Κίττον, ἀξιῶν τὴν αὐτὴν Πασίωνι ψευδομένῳ γίγνεσθαι ζημίαν ἥσπερ ἂν αὐτὸς ἐτύγχανεν, εἴ τι τούτων ἐφαίνετο ποιήσας.

However I have to admit that my suggestion above is based more on pure assumption than evidence and it was made because of my refusal to accept, for reasons mentioned above, that the action brought by Menexenos before the polemarchos was a δίκη ἀφαιρέσεως against Pasion.

Pasion guaranteed that Kittos would appear for trial and gave security for him in the sum of seven talents. If we take the case here to be a δίκη ἀφαιρέσεως then the seven talents would be the alleged slave's value in money. Presumably this amount would be fixed by the alleged owner of the alleged slave and it would be paid over to him by the *adsertor* if the alleged slave failed to appear for trial.

If the case here was a kind of private suit (probably δίκη βλάβης) by which the plaintiff aimed to compel an unwilling witness to give evidence about another case in which he was involved either as a plaintiff or defendant, then presumably the seven talents would be an amount equal to the amount of the matter in dispute.

Here the charge was that Menexenos and the Bosporan had wrongfully extracted money from Pasion's bank through Kittos. The amount of this money was six talents. Kittos's testimony was vital. He was also called to give testimony about the Bosporan's deposit in Pasion's bank. We do not know exactly how much money the Bosporan had put in Pasion's bank, but we might infer from section 44 that it was at least seven talents. The consequences of Kittos's failure to give testimony, either under torture as if he was a slave or under normal circumstances as a witness, would be that Menexenos with the Bosporan would probably be convicted for the sum of six talents and that moreover the Bosporan would lose his deposit.

Menexenos, who after Pasion's declaration that Kittos was a freeman could not extract Kittos's testimony under torture, did not have another alternative than to call upon him to give testimony as a witness. In Kittos's refusal Menexenos probably brought the δίκη βλάβης against him on the ground that he would suffer a material loss (six talents, if he was convicted) as a result of Kittos's inaction as a desirable witness. Was this δίκη βλάβης directed against Kittos because he was not giving testimony about both issues, the deposit and the six talents, or because he refused to testify only about the six talents for which Menexenos was charged?

When Menexenos arrested Kittos, he demanded that he should give evidence under torture for both, the deposit and the six talents (section 13). However, after a short time he appears to have dissociated himself from the Bosporan who was trying to reach an agreement with Pasion (section 21).

Whatever the case was, the amount of money for which Pasion stood surety for Kittos (seven talents) corresponds neither to the deposit nor to the six talents, and I have here to admit ignorance in the question "why did Pasion guarantee Kittos for seven talents and not for six or for at least thirteen talents?". The only certain thing is that if Kittos did not appear for trial, then Pasion would be liable for the payment of the seven talents.

Isocr. 17 *Trapez.* 12

Pasion the banker, accusing Sopaeos's son, who was a metic, and Menexenos, who was an Athenian citizen, that they deceived Kittos, one of Pasion's slaves employed in his bank, and extracted six talents from him, brought a legal action against them. In section 12 of Isocr. *Trapez.* some details are given about the initiation of the action brought against Sopaeos's son.[138]

Pasion arrested the defendant and took him by force before the polemarchos, while in cases where the defendant was an Athenian citizen the prosecutor in a δίκη or γραφή (apart from ἀπαγωγή, ἔνδειξις, εἰσαγγελία and ἐφήγησις) had to summon him to appear before the relevant magistrate on a stated day (πρόσκλησις or κλῆσις).[139]

The involvement of the polemarchos is due to the fact that Sopaeos's son was probably a metic. He has paid εἰσφορά (section 41), and thus, presumably, μετοίκιον also. It appears that the polemarchos handled all lawsuits in which metics and privileged foreigners were involved (except on homicide charges) in the fifth century, whereas in the fourth he handled the private suits only while the public suits were handled by the same magistrates as would handle them if both parties were citizens.[140] The rule appears to have been that a private case in which a metic or a privileged foreigner was either plaintiff or defendant was handled by the polemarchos; Lys. *Pankleon* is a reply to a defendant's claim that he should be

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[138]However we may infer from section 21 that a separate legal action was brought against Menexenos before the appropriate magistrate.

[139] See Harrison *Law* II 85f, MacDowell *Law* 238.

[140] See MacDowell *Law* 221-24

treated not as a metic but as a citizen and so ought not to be indicted before the polemarchos.[141]

Before the polemarchos Pasion demanded sureties (ἐγγυητοί) from Sopaeos's son. These ἐγγυητοί would guarantee the defendant's appearance in court. The language of Isocr. 17.12 (εἶλκέ με πρὸς τὸν πολέμαρχον, ἐγγυητὰς αἰτῶν, καὶ οὐ πρότερον ἀφῆκεν, ἕως αὐτῷ κατέστησ' ἓξ ταλάντων ἐγγυητάς.) suggests, first, that since the case was submitted to the polemarchos the appointment of the sureties by the defendant was not a natural consequence, but it depended on the plaintiff to demand them, and, second, that since the plaintiff had demanded sureties, if the defendant failed to produce such sureties, he was imprisoned until the trial. The demand of sureties in these cases might be due to the fact that, unlike an Athenian citizen, a metic or an alien could more easily escape from Athens and avoid trial.

The plural ἐγγυητάς suggests that the sureties were more than one persons, probably three (cf. [Dem.] 59.40). They guaranteed Sopaeos's son for six talents; six talents was the amount of money that they had allegedly extracted from Pasion's bank. Therefore they undertook to stand sureties for an amount of money related to the value of the matter in dispute. If the defendant failed to appear for trial, then the sureties would be liable to pay the sum for which they guaranteed.

To sum up, in private cases where the defendant was a metic or a privileged alien the prosecutor could take him by force before the polemarchos and could then demand sureties for his appearance in court up to a sum related to the matter in dispute, otherwise the defendant was imprisoned until trial.

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[141] See also *IG* I^2 153, Arist. *Ath. Pol.* 58.2-3.

Ἐγγυηταί in connection with the public debtors

In [Dem.] 53 *Nikostr.* 26-27 we hear about a case of ἐγγύη which took place in the court. Before we consider in details the nature and the circumstances under which the ἐγγύη took place, it would be appropriate to give a brief account of the events which led to this point.

[Dem.] 53 was delivered in support of a lawsuit arising out of an information (ἀπογραφή) laid against a certain Arethousios for refusing to pay

a fine of one talent which had been imposed upon him by the jury before whom Apollodoros had secured his conviction for bearing false testimony. A certain Nikostratos made common cause with the opponents of Apollodoros, who was engaged at the time in a variety of lawsuits. Nikostratos induced a third party (one Lykidas) to bring against Apollodoros a suit demanding that certain articles, probably documents, should be produced in court (δίκη εἰς ἐμφανῶν κατάστασιν, section 14). Arethousios, a brother of Nikostratos, was among those who were entered as witnesses to the delivery of the summons requiring Apollodoros to produce the documents. Apollodoros claimed that the summons was never served and therefore he did not appear in court where judgement went against him by default. Subsequently, Apollodoros prosecuted Arethousios for fraudulent deposition to a citation (ψευδοκλητείας γραφή), and when the case was brought before the jury Apollodoros obtained a verdict against Arethousios, and a fine of one talent, for the payment of which his brothers guaranteed and became jointly responsible. Arethousios, who after this fine became a public debtor, failed to pay off the debt to the state and Apollodoros took the legal steps required for the confiscation of his property. In the written charge submitted by

Apollodoros, which probably consisted of a list (ἀπογραφή) of the land, houses or other property which he proposed should be confiscated, two slaves were stated to be the property of Arethousios and therefore liable to confiscation. However Nikostratos, a brother of Arethousios, put in a claim to the slaves, and in this speech ([Dem.] 53) Apollodoros has to show that the claim is false and the slaves are really the property of Arethousios.

In [Dem.] 53 there are two references to the ψευδοκλητείας γραφή brought by Apollodoros against Arethousios. Sections 17-18 and 26 -27 are a very brief account of the result of this suit concentrating on the way in which the penalty was fixed. Arethousios was convicted, and when it came to fixing the penalty the jurors had to choose between the sentence of death proposed by the plaintiff and a fine of one talent proposed by the defendant. Eventually Arethousios was condemned to the fine of one talent and it was at this point that the ἐγγύη took place: οὗτοι γάρ, ὅτε οἱ δικασταὶ ἐβούλοντο θανάτου τιμῆσαι τῷ Ἀρεθουσίῳ, ἐδέοντο τῶν δικαστῶν χρημάτων τιμῆσαι καὶ ἐμοῦ συγχωρῆσαι, καὶ ὡμολόγησαν αὐτοὶ συνεκτείσειν. τοσούτου δὴ δέουσιν ἐκτίνειν καθ' ἃ ἠγγυήσαντο, . . . (section 26-27).

Evidently they guaranteed that Arethousios would pay the fine and also agreed that they themselves would contribute to the payment. Therefore we could name this kind of ἐγγύη here as " ἐγγύη for the payment of a fine due to the public chest ".

The ἐγγύη must have taken place either simultaneously or immediately after the fixing of the fine. It might have been either a requirement of the plaintiff or even of the jurors, or it might have been offered by the defendant himself.

However, it does not seem that it replaced imprisonment of the convicted defendant until the payment of his fine. We know the case where a law for a certain offence stipulated that if the penalty was a fine the defendant had either to

pay it immediately or to be kept in custody until he paid it. There was not mention of guarantors in order to avoid the imprisonment, (Dem. 24 *Timokr.* 105, Aisch. 1 *Timarch.* 16). We also know cases where a fine was imposed but there was not any requirement of either imprisonment until payment or guarantors instead of it, (e.g. [Dem.] 59 *Neair.* 7-8). And if the law of Timokrates (Dem. 24 *Timokr.* 39-40) was ever enforced, we can guess that there might have been some cases where a defendant, who was condemned to a fine payable to the state and the additional penalty (προστίμημα) of imprisonment was imposed upon him until the payment of the fine, had the opportunity to avoid imprisonment by appointing three guarantors who would guarantee the payment of the fine within a limited period of time, the ninth prytany of the year in which the crime was committed.

Therefore we might classify the public cases (γραφαί) where the penalty was a fine as it follows:

Certain laws stipulated that the fine had to be paid immediately, otherwise the defendant had to be imprisoned until payment, (Aisch. 1 *Timarch.*16).

The fine had to be paid immediately, otherwise the defendant had to be imprisoned until payment unless he nominated three guarantors who would guarantee the payment of the fine at a future date (by the ninth prytany at the latest), (Dem. 24 *Timokr.* 39-40).

Although the fine had to be paid immediately, neither imprisonment was imposed nor guarantors were required. The convicted defendant became a public debtor liable to the same penalties like the other public debtors, if he did not pay it by the ninth prytany, (see [Dem.] 59 *Neair.*7-8).

We do not know the law for ψευδοκλητεία, and therefore we are not in a position to say whether the law stipulated imprisonment until the payment of the fine, if the penalty imposed was a fine; however this seems to be very unlikely since then Arethousios would have not been allowed to nominate sureties for the

payment of the fine. Nor we are in a safe position to say that in this particular case the additional penalty of imprisonment was imposed until the payment of the fine and the only way of avoiding that imprisonment was for the defendant to nominate sureties, because we would rather expect a hint about imprisonment to be made at the point where Apollodoros tells us about the ἐγγύη. Therefore, since the ἐγγύη here, as it seems, did not replace imprisonment of the convicted defendant until the payment of his fine, and since the penalty of a fine itself did not necessarily require persons who would guarantee its payment by the convicted party, then we have to ask, what purpose did the ἐγγύη serve here ([Dem.] 53, 27)?

Before we try to answer this question, I think that it is helpful to see how the decision concerning the penalty for Arethousios was reached by the jurors and even more helpful to put in a successive order, as far as it is possible, all the points mentioned in sections17-18 and 26-27 which refer to the fixing of the penalty and the resulting ἐγγύη.

The suit (γραφὴ ψευδοκλητείας) was an ἀγὼν τιμητός which means that the law had not fixed in advance the amount or nature of the penalty or damages; since judgement had gone against the defendant, the next step for the jurors was to fix the ποινή, damages or penalty. Each litigant proposed a penalty, in our case the death penalty was proposed by the successful prosecutor (Apollodoros), while the fine of one talent was proposed by the unsuccessful defendant (Arethousios). The jurors had to opt for one or the other. The successive order of what actually happened in the court after Arethousios's conviction and before the fixing of the penalty seems, according to sections 17-18 and 26-27, to be as follows:

1. The jurors wished at the beginning to impose the sentence of death upon Arethousios, βουλομένων τῶν δικαστῶν θανάτου τιμῆσαι αὐτῷ (section 18), οἱ δικασταὶ ἐβούλοντο θανάτου τιμῆσαι τῷ Ἀρεθουσίῳ (section 26).

2. Arethousios's supporters begged the jurors to chose the fine and begged Apollodoros to give his assent to this. They also agreed to be jointly responsible for the payment, ἐδέοντο τῶν δικαστῶν χρημάτων τιμῆσαι καὶ ἐμοῦ συγχωρῆσαι, καὶ ὡμολόγησαν αὐτοὶ συνεκτείσειν, (section 26).

3. Finally Apollodoros conceded to the defendant the lowering of the penalty and asked the jurors not to impose the death sentence upon Arethousios; he agreed to the fine of a talent , ἐδεήθην ἐγὼ τῶν δικαστῶν μηδὲν δι' ἐμοῦ τοιοῦτον πρᾶξαι, ἀλλὰ συνεχώρησα ὅσουπερ αὐτοὶ ἐτιμῶντο, ταλάντου, (section 18).

Therefore Apollodoros's narrative of the events which took place during the γραφὴ ψευδοκλητείας might take the following order: οὗτοι γὰρ, ὅτε οἱ δικασταὶ ἐβούλοντο θανάτου τιμῆσαι τῷ Ἀρεθουσίῳ, ἐδέοντο τῶν δικαστῶν χρημάτων τιμῆσαι καὶ ἐμοῦ συγχωρῆσαι, καὶ ὡμολόγησαν αὐτοὶ συνεκτείσειν, (section 26). καὶ . . . . . ἐδεήθην ἐγὼ τῶν δικαστῶν μηδὲν δι' ἐμοῦ τοιοῦτον πρᾶξαι, ἀλλὰ συνεχώρησα ὅσουπερ αὐτοὶ ἐτιμῶντο, ταλάντου . . . . . (section 18).

The fact that the supporters of Arethousios agreed to be jointly responsible for the payment of the fine should be seen as a part of the ἐγγύη, and the ἐγγύη as a whole should be seen as the crucial factor which eventually made Apollodoros, who had originally proposed the death penalty, to agree with the defendant to reduce it to one talent. However, a reason why he took back his initial proposition is given by him in section 18 (ἀλλ' ἵνα ἐγὼ Πασίωνος ὢν καὶ κατὰ ψήφισμα πολίτης μηδένα Ἀθηναίων ἀπεκτονὼς εἴην.) which, in my opinion, does not sound very convincing because when he made his proposition he was also κατὰ

ψήφισμα πολίτης and he could have not proposed the death penalty at all. But even if we accept that Apollodoros initially proposed the death penalty under an emotional charge and then when the jurors were going to impose it upon Arethousios he felt embarrassed that he, a naturalised Athenian citizen, would cause the death of a native Athenian citizen, it is not enough to explain Apollodoros's departure from his initial proposition, unless the ἐγγύη had not taken place. It seems that right up to the moment when the vote was about to be taken negotiations between the plaintiff and the defendant were taking place about the nature of the penalty. The ἐγγύη appears to be a condition put by the plaintiff in order to accept the fine as the penalty proposed by the defendant.

The verb ὠμολόγησαν might shed some light on the question whether the ἐγγύη was the plaintiff's requirement or not. Ὁμολογεῖν combined with a future infinitive takes the meaning "to agree to do something". Sometimes the dative of a person (τινι) is used to indicate the person with whom the subject of the verb ὁμολογεῖν agrees. But even when there is not such a dative, the verb ὁμολογεῖν + a future infinitive still has the meaning "to agree (with someone) to do something", e.g. καὶ τὸν εἰπεῖν ὅτι ἐπὶ δεῖπνον εἰς Ἀγάθωνος, χθὲς γὰρ αὐτὸν διέφυγον τοῖς ἐπινικίοις, φοβηθεὶς τὸν ὄχλον· ὡμολόγησα δ' εἰς τήμερον παρέσεσθαι. (Plato, *Symp.*174A). Socrates, who evaded Agathon and his celebrations yesterday because he feared the crowd, agreed to be present at Agathon's dinner the day after. This implies an invitation to dinner made to Socrates by Agathon. Consequently Agathon was the person with whom Socrates agreed to go to his dinner, although his name in the dative is not put into the sentence, but it can be easily understood from the context.

In our case here ([Dem.] 53,28 καὶ ὠμολόγησαν αὐτοὶ συνεκτείσειν), Arethousios's brothers, and possibly Lykidas, are the subjects of ὠμολόγησαν who agreed with Apollodoros that they would be jointly responsible for the

payment if the penalty was going to be a fine. However we do not have here the dative of Apollodoros's name which would indicate clearly the person with whom they agreed, but it is understood from the context. "To agree with a person" presupposes that this person at first has either made a statement or a proposal or a request or even has put a condition before any agreement is reached. When the brothers of Arethousios asked Apollodoros to change his proposal regarding the penalty and to give his assent to a fine in money, Apollodoros probably put the condition that he would accept to change his initial proposal of the death penalty to a fine in money, if they guaranteed the payment of the fine and also became jointly responsible for this payment; when they agreed to this condition, Apollodoros took back his initial proposal and proposed a fine in money.

The actual ἐγγύη must have taken place after this agreement had been reached and after the fine had been imposed upon Arethousios. Unfortunately we are told nothing else about the ἐγγύη itself apart from the purpose that it served, i.e. personal surety for the payment of the fine imposed upon the convicted defendant in a public suit (γραφὴ ψευδοκλητείας). The ἐγγύη took place in a public place, in the court after Arethousios's conviction and therefore many people witnessed the act. However we cannot tell whether the witnesses called at the end of section 18 were persons who had been especially appointed as witnesses to the ἐγγύη or they simply happened to be in the court at the time when the ἐγγύη took place and when the need arose they were called by Apollodoros to testify to it.

Certain persons were nominated by Arethousios or they offered themselves to stand as his guarantors. They must have been at least two (possibly three)- ἠγγυήσαντο, but we are not told anything about their exact number; neither we are told their names, since the orator refers to them as οὗτοι: (οὗτοι) τοσούτου δὴ δέουσιν ἐκτίνειν καθ' ἃ ἠγγυήσαντο, ὥστε καὶ τῶν ὑμετέρων

ἀμφισβητοῦσι (section 27). Our task then is to attempt to identify the persons who are hidden behind the pronoun οὗτοι.

The subject of the verb ἠγγυήσαντο (section 27) must be the same as the subject of the verb ἀμφισβητοῦσι which refers to the participle ἀμφισβητοῦντες τῶν ὑμετέρων (section 26). The pronoun οὗτοι at the beginning of the second period of section 26 refers to the same persons as the subject of the participle ἀμφισβητοῦντες and the verbs ἠγγυήσαντο and ἀμφισβητοῦσι (section 27). This second part of section 26 refers to sections 17 and 18 where the subjects of the verb ἐτιμῶντο must be Arethousios, Nikostratos, and even possibly Lykidas. It appears that the same persons, apart, of course, from Arethousios, are identical with the pronoun αὐτοί, (καὶ ὡμολόγησαν αὐτοὶ συνεκτείσειν, section 26). Consequently Nikostratos is one of the subjects of the verb ἠγγυήσαντο, and perhaps Lykidas might be another one. Furthermore, the pronoun τούτων in the clause ὥστε καὶ εἰ τούτων ἦν τὰ ἀνδράποδα, προσῆκεν αὐτὰ δημόσια εἶναι, which comes as the result of the previous sentence (καίτοι οἵ γε νόμοι κελεύουσι τὴν οὐσίαν εἶναι δημοσίαν, ὃς ἂν ἐγγυησάμενός τι τῶν τῆς πόλεως μὴ ἀποδιδῷ τὴν ἐγγύην) refers to the guarantors. Nikostratos is definitely one of them since we know that he had put a claim on the slaves included in the list (ἀπογραφή).[142] However Apollodoros goes further and uses the plural τούτων instead of τούτου which would clearly refer to Nikostratos who, as it appears, was the only ἀμφισβητῶν of the slaves. But who else could (at least in this hypothesis made by Apollodoros) be included in this plural τούτων which refers to the ἐγγυηταί? After the ἀπογραφή had been brought by

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[142]See title: Πρὸς Νικόστρατον περὶ ἀνδραπόδων ἀπογραφῆς Ἀρεθουσίου; section 1: πένθ' ἡμμναίων ἄξια ἀνδράποδα, ὡς αὐτὸς ὁ ἀμφισβητῶν τετίμηται αὐτά . . . ; section 4: Νικόστρατος γὰρ οὑτοσί . . .

Apollodoros, the possession of the slaves was at issue. According to Apollodoros they belonged to Arethousios, but Nikostratos had actually put a claim on them. The possession of the slaves under these new circumstances (ἀπογραφή) would depend on the result of the action brought by a person (or more than one) who had put a claim on them (ὁ ἀμφισβητῶν). In this context we should understand what Apollodoros says, i.e. ὥστε καὶ εἰ τούτων ἦν τὰ ἀνδράποδα . . ., section 27; this possessive genitive here (τούτων) does not indicate joint ownership over the slaves, but it rather takes the meaning that "either one or another from them all owned the slaves", and most importantly it is identical with the persons who might put a claim on these slaves (οἱ ἀμφισβητοῦντες). And although Nikostratos was the only one who claimed that the slaves belonged to him, Apollodoros uses the plural τούτων and concludes that even if the slaves belonged to them they should be confiscated because they would be property of the guarantors. Therefore τούτων refers definitely to the guarantors, but at the same time it refers to the persons who might put a claim on the slaves. Nikostratos is one of them, and I think that Deinon is the other one. In my view, the genitive τούτων is identical with τῶν ἀδελφῶν; section 28 holds the answer to this. We are told in section 28 that before Arethousios became a debtor to the state he was admitted to be the richest of the brothers, but now he pretends to be a poor man, and his mother lays claim to one part of his property, and his brothers to another (καὶ τῶν μὲν ἡ μήτηρ ἀμφισβητεῖ, τῶν δὲ οἱ ἀδελφοί.). Therefore the guarantors seem to be the following: Nikostratos, Deinon, and possibly Lykidas, who was involved in the suit brought against Apollodoros (δίκην εἰς ἐμφανῶν κατάστασιν, section 14). When Apollodoros prosecuted Arethousios for false citation and he won a conviction, it is very likely that Lykidas was one of those who proposed a fine (ὅσουπερ αὐτοὶ ἐτιμῶντο, ταλάντου, section 18) instead of the death penalty proposed by Apollodoros, and he might have been one of the guarantors who

promised that Arethousios would pay the fine and they themselves would contribute to the payment.

To sum up, although we are not explicitly told the names of the guarantors, we can identify with certainty one of those, i.e. Nikostratos; moreover, it is very likely that Deinon was another one and probably Lykidas. Nikostratos and Deinon were the brothers of Arethousios, which shows first that it was perfectly legal for Arethousios to nominate his brothers as his guarantors, and second that the close relatives of a defendant were on the top of the list of persons whom he would call on to be his sureties, if need arose.

We have noticed above that the ἐγγύη here seems to be the plaintiff's requirement in order to take back his initial proposal concerning the penalty which the jurors would impose upon Arethousios. Although it was an ἐγγύη to secure payment of the fine which Arethousios incurred, it operated as the decisive factor whether the penalty was going to be the death penalty or a fine in money. Two stages of the ἐγγύη should be discerned here: one was the negotiation of the prospective ἐγγύη with the influence that it had on the plaintiff in changing his initial penalty proposal, and the other was the actual ἐγγύη which took place and became lawfully valid from the moment when the jurors imposed the fine upon the defendant. Therefore we might classify the successive stages of the procedure which led to the ἐγγύη as it follows:

1. The defendant's proposal for the penalty of a fine.
2. The plaintiff's condition of the ἐγγύη.
3. The first stage of the ἐγγύη --- an "informal" ἐγγύη.
4. The plaintiff's acceptance of the fine.
5. The imposition of the fine upon Arethousios.
6. The actual ἐγγύη.

After Arethousios's condemnation to the fine of one talent in the γραφὴ ψευδοκλητείας brought by Apollodoros, three persons guaranteed that Arethousios would pay the fine and they agreed that they would be jointly responsible for the payment. From the moment when Arethousios was condemned to the fine he became a public debtor (the fine was payable to the public chest since he was convicted in a public case), and he had to pay it by the ninth prytany of the year.[143] If he did not pay it by that date then the debt was doubled and his property was liable to confiscation by the procedure known as ἀπογραφή. This was the normal procedure applied to all public debtors. However, the possible existence of guarantors in cases concerning a public debt on the one hand and the available procedure of ἀπογραφή against the public debtors on the other hand creates some problems as far as the way of extracting the sum of money required for the debt and the responsibility of the guarantors are concerned. The case of Arethousios ([Dem.] 53, 26-27) gives rise to an examination of all the possible cases where there was a state debtor with (or without) guarantors, and the result was the ἀπογραφή of his property:

1. If a state debtor had property the value of which was sufficient for the debt, and he did not have any guarantors, then the ἀπογραφή was brought against his property which was confiscated, sold by auction and with the amount which it raised the debt was paid off.

2. If a state debtor had property the value of which was sufficient for the debt, and at the same time had nominated some persons as his guarantors, then the

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[143] This seems to be the date for payment in most cases (Andok. 1 *Myst.* 73, [Dem.] 59 *Neair.* 8). In some other cases however the law stipulated that payment should be made on an earlier date (Aisch. 1 *Timarch.* 16).

ἀπογραφή probably was brought against his property (as in the case 1), but there is a problem here concerning the function and the responsibilities of the ἐγγυηταί.

3. In the case where a state debtor neither had any property nor had he any guarantors, an ἀπογραφή would be impossible; the debt was left unpaid indefinitely and he remained a state debtor.

4. If a state debtor had too little property to be worth confiscating, or he did not have any property at all, but he had nominated some persons as his guarantors, then the ἀπογραφή would be brought against the guarantors' property.

5. If a state debtor's property was not too little, but at the same time its value was not sufficient to cover the whole debt and he did not have any guarantors, then the ἀπογραφή would be brought against his property, although it was insufficient for the debt. Since the amount which it would raise would not be enough to pay off the whole debt, it would be merely reduced by that amount and he would still remain a state debtor until he paid off the whole debt.

6. In the case where the value of a state debtor's property was not sufficient for the whole debt and he had nominated some persons to be his guarantors, then the ἀπογραφή would be probably brought against the properties of both parties (debtor and guarantor). This seems to be implied by what is said in [Dem.] 53,27:

τοσούτου δὴ δέουσιν ἐκτίνειν καθ' ἃ ἠγγυήσαντο, ὥστε καὶ τῶν ὑμετέρων ἀμφισβητοῦσι. καίτοι οἵ γε νόμοι κελεύουσι τὴν οὐσίαν εἶναι δημοσίαν, ὃς ἂν ἐγγυησάμενός τι τῶν τῆς πόλεως μὴ ἀποδιδῷ τὴν ἐγγύην· ὥστε καὶ εἰ τούτων ἦν τὰ ἀνδράποδα, προσῆκεν αὐτὰ δημόσια εἶναι, εἴπερ τι τῶν νόμων ὄφελος.

Although we can probably figure out the amount of Arethousios's debt which must have been two talents (one talent was the original fine which would be doubled after the ninth prytany), we do not know exactly the value of Arethousios's property which was included in the list of the ἀπογραφή. In other

words, what concerns us here is whether the value of Arethousios's property included in the ἀπογραφή was sufficient to cover his debt, namely two talents, or it was less than this amount. Unfortunately we can not answer this question. However, in the ἀπογραφή handed in by Apollodoros two slaves were stated to be the property of Arethousios and therefore liable to confiscation as a partial payment of his debt to the public treasury. But Nikostratos put in a claim to the slaves and Apollodoros had to show that they were really the property of Arethousios.

In sections 19-21 he brings evidence to prove that the slaves belong to Arethousios, but in section 27 his argumentation follows a completely different way. He says that even though the two slaves were Nikostratos's property they should be confiscated, since he had guaranteed the payment of the fine and had failed to carry out his duty. The reader of the speech can easily get confused following Apollodoros's two different approaches to the issue, who tries to prove on the one hand that the two slaves belong to Arethousios and consequently they should be confiscated, and on the other hand that they should be public property if they belong to Nikostratos, one of the guarantors. The impression given is that the value of the two slaves (which actually was too little, 2.5 minai) was important in the sense that Arethousios's other property including the two slaves was sufficient to produce an amount equal to the debt, but it would not be sufficient without them. The controversial issue became the two slaves who had to be proven state property in one way or the other.

The guarantors guaranteed that Arethousios would pay the fine and therefore they themselves became responsible for its payment if he failed to do so. The phrase τοσούτου δὴ δέουσιν ἐκτίνειν καθ' ἃ ἠγγυήσαντο implies that they were expected or even required to pay off the debt in the failure of the debtor himself to do so. Arethousios had to pay off the debt by the ninth prytany,

otherwise it was to be doubled; the procedure of ἀπογραφή could be employed against him after the ninth prytany, but since there were guarantors, when were they supposed to accept responsibility for the payment of the debt?

The phrase ὥστε καὶ τῶν ὑμετέρων ἀμφισβητοῦσι following the previous sentence implies that the ἀπογραφή against Arethousios was brought after the date when the guarantors were expected to make good their guarantee.[144] This date must have been the ninth prytany (the latest), a date by which the public debtor was expected to pay and if he failed to do so, then the guarantors themselves became public debtors who had to pay off the doubled debt. Consequently the ἀπογραφή against the original debtor could have been avoided if the guarantors paid off his debt.

We might conclude that in the case where a person condemned to a fine as a result of a public suit had nominated three persons as his guarantors for the payment of the fine but he did not pay it until the ninth prytany, the procedure of ἀπογραφή was brought against him after the guarantors had been required to accept their responsibility in paying off the debt themselves. Therefore the ἐγγυηταί were required to fulfil the ἐγγύη before the ἀπογραφή was brought against the actual debtor.

In Arethousios's case it seems that, although the guarantors were expected to pay off his debt after he had failed to do so, no legal action was taken against them by which they would be enforced to fulfil their responsibilities. Ἀπογραφή against the actual debtor (Arethousios) was the first legal action taken in order to

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[144] cf. section 28, ἐπειδὴ δὲ οἱ νόμοι κελεύουσιν τἀκείνου ὑμέτερα εἶναι, τηνικαῦτα πένης ὢν φαίνεται ὁ Ἀρεθούσιος, καὶ τῶν μὲν ἡ μήτηρ ἀμφισβητεῖ, τῶν δὲ οἱ ἀδελφοί. χρῆν δ' αὐτούς, εἴπερ ἐβούλοντο δικαίως προσφέρεσθαι πρὸς ὑμᾶς, ἀποδείξαντας ἅπασαν τὴν οὐσίαν τὴν ἐκείνου, τὰ τούτων αὐτῶν εἴ τις ἀπέγραφεν, ἀμφισβητεῖν.

settle his debt with the state. The guarantors seem not to be involved at this stage although the ἀπογραφή against Arethousios took place after the date by which he was expected to pay and when the guarantors who had undertaken the responsibility of the debt's payment in the first place had now to accept this responsibility by paying off the debt. However a hint of a legal action against them is made in section 27. Apollodoros's argument runs as it follows: the two slaves who had been claimed by Nikostratos as his own property should be confiscated even if they were Nikostratos's property since he had guaranteed the payment of the fine and had failed to make good his guarantee. A hint of a legal action against the guarantors is clear here and this legal action would be an ἀπογραφή of their property (or part of it). The confiscation of the two slaves was unavoidable but it would be the same result of two separate legal actions, an ἀπογραφή against Arethousios (the actual debtor), if the slaves were proven to be his property, or an ἀπογραφή against Nikostratos (one of the guarantors), if the slaves were proven to be his property. In one way or the other the slaves had to be confiscated, but the legal base of their confiscation would be different, in the first case they would be confiscated as the property of the actual debtor, while in the second as the property of the guarantor. We do not actually know whether in such a case the prosecutor of the ἀπογραφή had necessarily to bring two separate ἀπογραφαί, one against the debtor and another against the guarantor, or for practical reasons he could bring just one ἀπογραφή against both debtor and guarantor with a specification of each party's property in the list, although in theory they should be regarded as two separate legal actions since two different persons were prosecuted; both practices seem to be possible.

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καίτοι οἵ γε νόμοι κελεύουσι τὴν οὐσίαν εἶναι δημοσίαν, ὃς ἂν ἐγγυησάμενός τι τῶν τῆς πόλεως μὴ ἀποδιδῷ τὴν ἐγγύην, [Dem.] 53, 27.

The law enacted that the property of persons who guaranteed the payment of a sum to the state, and failed to do so should be confiscated. This paraphrase of the law is very general and problematic. We hear that any man's estate should be confiscated, who, after guaranteeing any sum due to the state, did not make good his guarantee; but we are not told anything about the circumstances under which such a confiscation should take place, or whether this happened always or it could be avoided. What we are told here was definitely a possibility and refers to the case where neither the debtor nor the guarantor had paid off the debt by the time laid down for the payment. However, as this paraphrase of the law stands here, it is not difficult to be misunderstood in the sense that in the failure of a debtor to pay off his debt, his guarantors would necessarily suffer confiscation of their properties, if they did not pay off the debt, irrespectively of what happened to the debtor himself. Before we consider this problem it would be appropriate to quote three relevant passages from the orators, for a parallel reading, which refer to the confiscation of property which belonged either to a debtor or to the guarantors of a debtor:

a. [Dem.] 59 *Neair.* 5-7:

γραψάμενος γὰρ παρανόμων τὸ ψήφισμα Στέφανος οὑτοσὶ καὶ εἰσελθὼν εἰς τὸ δικαστήριον, . . . , εἶλε τὸ ψήφισμα. . . . ἀλλ' ἐπειδὴ περὶ τοῦ τιμήματος ἐλάμβανον τὴν ψῆφον οἱ δικασταί, δεομένων ἡμῶν συγχωρῆσαι οὐκ ἤθελεν, ἀλλὰ πεντεκαίδεκα ταλάντων ἐτιμᾶτο, ... ἡ μὲν γὰρ οὐσία οὐδὲ τριῶν ταλάντων πάνυ τι ἦν, ὥστε δυνηθῆναι ἐκτεῖσαι

τοσοῦτον ὄφλημα· μὴ ἐκτεισθέντος δὲ τοῦ ὀφλήματος ἐπὶ τῆς ἐνάτης πρυτανείας, διπλοῦν ἔμελλεν ἔσεσθαι τὸ ὄφλημα καὶ ἐγγραφήσεσθαι Ἀπολλόδωρος τριάκοντα τάλαντα ὀφείλων τῷ δημοσίῳ· ἐγγεγραμμένου δὲ τῷ δημοσίῳ, ἀπογραφήσεσθαι ἔμελλεν ἡ ὑπάρχουσα οὐσία Ἀπολλοδώρῳ δημοσία εἶναι, προθείσης δ' αὐτῆς εἰς τὴν ἐσχάτην ἀπορίαν καταστήσεσθαι καὶ αὐτὸς καὶ παῖδες οἱ ἐκείνου καὶ γυνὴ καὶ ἡμεῖς ἅπαντες.

Apollodoros has been convicted in a γραφὴ παρανόμων and the prosecutor's estimation of the penalty has been 15 talents. The speaker says that if the jury accept this estimate and if the defendant has not paid up at the ninth prytany, the fine would be doubled and his name would be posted up as that of a public debtor; his property would be confiscated and sold. Apollodoros had not nominated any guarantors who would guarantee the payment of the fine, 15 talents which was going to be doubled if it was not paid off by the ninth prytany. After this date his estate would be liable to ἀπογραφή but still it was not enough (3 talents) to cover the debt. If Apollodoros had nominated guarantors, then, according to the law, their property also would be liable to confiscation, not because that was the rule which happened always, but because, as we are told, Apollodoros's property was not sufficient to cover the debt. Apollodoros's property would be proposed for confiscation anyway regardless of the existence or not of the guarantors. Let us suppose that Apollodoros had nominated three persons as his guarantors, and let us suppose also that his property's value was more than 30 talents, say 31 talents. In his failure to pay the fine of the 15 talents up to the ninth prytany, his property would be confiscated and sold, and its value would be used for the payment of the debt which would be now 30 talents. But since, as we have supposed, his property's value was 31 talents, the remaining 1 talent should be returned to him. At least this practice is implied by a passage of

Demosthenes (40 *Boiot.* ii.22) which shows that after an enforced sale any excess of the proceeds over the debt was repayable to the debtor or his family.[145] Therefore, if Apollodoros had nominated guarantors and his property's value was more than his debt, and since any surplus of his confiscated property was to be returned to him, I do not think that the property of the guarantors would be confiscated.

b. **Andok. 1 *Myst.* 73**:

οἱ δὲ ἄτιμοι τίνες ἦσαν, καὶ τίνα τρόπον ἕκαστοι; ἐγὼ ὑμᾶς διδάξω· οἱ μὲν ἀργύριον ὀφείλοντες τῷ δημοσίῳ, ὁπόσοι εὐθύνας ὤφλον ἄρξαντες ἀρχάς, ἢ ἐξούλας ἢ γραφὰς ἢ ἐπιβολὰς ὤφλον, ἢ ὠνὰς πριάμενοι ἐκ τοῦ δημοσίου μὴ κατέβαλον τὰ χρήματα, ἢ ἐγγύας ἠγγυήσαντο πρὸς τὸ δημόσιον, τούτοις ἡ μὲν ἔκτεισις ἦν ἐπὶ τῆς ἐνάτης πρυτανείας, εἰ δὲ μή, διπλάσιον ὀφείλειν καὶ τὰ κτήματα αὐτῶν πεπρᾶσθαι.

Andokides giving a catalogue of classes of ἄτιμοι starts with those who owe money to the treasury: those who were convicted at their εὐθύνα as magistrates, in a δίκη ἐξούλης, in a γραφή and had to pay a fine to the state; those who were condemned to a fine (ἐπιβολή), payable to the state, imposed by magistrates or juries (see Ar. *Wasps* 769, MacDowell, *Andokides*109); Those who had purchased the right to collect taxes and were in arrear with the purchase money, and those who had stood guarantors for the payment of a sum to the state (ἢ

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[145] ἐὰν γὰρ λέγῃ ὡς ἡ μὲν ἐμὴ μήτηρ οὐκ ἐπηνέγκατο προῖκα, ἡ δὲ τούτων ἐπηνέγκατο, ἐνθυμεῖσθε ὅτι περιφανῶς ψεύδεται. πρῶτον μὲν γὰρ ὁ Πάμφιλος ὁ πατὴρ τῆς τούτου μητρὸς πέντε τάλαντα τῷ δημοσίῳ ὀφείλων ἐτελεύτησεν, καὶ τοσούτου ἐδέησεν περιγενέσθαι τι τοῖς ἐκείνου παισὶν τῆς οὐσίας ἀπογραφείσης καὶ δημευθείσης, ὥστε οὐδὲ τὸ ὄφλημα πᾶν ὑπὲρ αὐτοῦ ἐκτέτεισται, ἀλλ' ἔτι καὶ νῦν ὁ Πάμφιλος ὀφείλων τῷ δημοσίῳ ἐγγέγραπται.

ἐγγύας ἠγγυήσαντο πρὸς τὸ δημόσιον). The orator says that these men had to pay in the ninth prytany; if they failed to pay, then the sum owed was doubled and the debtors' and (or) the guarantors' goods were sold.

Here we have two categories of public debtors: those convicted in a judicial process and those owing under a contract. The phrase ἢ ἐγγύας ἠγγυήσαντο πρὸς τὸ δημόσιον refers to persons who might have stood sureties for the public debtors of both categories; namely, persons who had been convicted to a fine payable to the state in their εὐθύνα, in a δίκη ἐξούλης or in a γραφή might have nominated guarantors for the payment of this fine. Other persons also who had bought the right to collect a given tax had to furnish sureties for the payment of the tax to the state; these sureties became liable if the ἀρχώνης himself defaulted. The genitive αὐτῶν in the phrase καὶ τὰ χρήματα αὐτῶν πεπρᾶσθαι refers as much to the debtors as to the guarantors. Although it does mean in theory that all the guarantors were liable to the confiscation of their property, it should not however be deduced from here that this must have always happened in practice without any conditions. The property of a guarantor would be confiscated only when the person for whom he guaranteed that this person would pay either an imposed on him fine which was payable to the state or a tax which he undertook to collect on the behalf of the state, did not pay it until the appointed term of payment, and at the same time when he did not have any property to be confiscated by ἀπογραφή or when the confiscation of his property failed to produce the requisite sum for the debt. In this case the guarantor's property was the next target. We might conclude that "καὶ τὰ κτήματα αὐτῶν πεπρᾶσθαι" refers as much to the confiscation of the debtors' property as to the confiscation of the guarantors' property. But these confiscations could not take place simultaneously in the same cases unless the value of the debtor's property was insufficient for the payment of the debt.

c. Dem. 24 *Timokr.* 40:

τῷ δὲ καταστήσαντι τοὺς ἐγγυητάς, ἐὰν ἀποδιδῷ τῇ πόλει τὸ ἀργύριον ἐφ' ᾧ κατέστησε τοὺς ἐγγυητάς, ἀφεῖσθαι τοῦ δεσμοῦ. ἐὰν δὲ μὴ καταβάλῃ τὸ ἀργύριον ἢ αὐτὸς ἢ οἱ ἐγγυηταὶ ἐπὶ τῆς ἐνάτης πρυτανείας, τὸν μὲν ἐξεγγυηθέντα δεδέσθαι, τῶν δὲ ἐγγυητῶν δημοσίαν εἶναι τὴν οὐσίαν.

This passage is not very helpful. There is a reference to the confiscation of the guarantors' property, but we are not told what happened to the debtor's property, if he had any. The only information we get is that he would be imprisoned if he failed to pay off the debt until the ninth prytany. We might suppose by analogy that his property also would be liable to confiscation.

Inscription no.10 in Hesperia V(1936) 397ff., lines 115 ff., provides us with an example of the confiscation of a piece of property which belonged to a guarantor. Euthykles, son of Euthymenides, of Myrrinous, registered for confiscation an apartment house in Peiraeus which belonged to Meixidimos of Myrrhinus. Meixidimos had gone surety for various public contracts and neither the contractor nor he had paid up. The purchaser was Telemachos of Acharnai who bought the house for exactly the sum of the doubled debt, which implies that confiscation of the property of the actual debtors never took place, probably because they did not have any property to be confiscated; this is the only way in which we can explain the reason why the whole debt was eventually paid off by the proceeds of the sale of the guarantor's property, since we know that the property of a state debtor, even when he had nominated sureties, was also liable to confiscation (And. 1,73). We should also notice here that the same person

could stand as a guarantor at the same time for more than one persons who had made any contract with the state.

Finally, the case of Arethousios shows that when payment of a debt to the state was not made in time, neither by the debtor nor by the guarantors, it was possible for the procedure of ἀπογραφή to be employed against both the debtor and the guarantors, but it also shows that the order in which this procedure was brought was first against the debtor and afterwards against the guarantors. Apollodoros first brought an ἀπογραφή against Arethousios without having taken any legal action against his guarantors. However he implied that an ἀπογραφή against Nikostratos was still possible (section 27).

Conclusion

The law enacted that the property of persons who guaranteed the payment of a sum to the state, and failed to do so, should be confiscated. However, it seems that a guarantor's property was confiscated only when the debtor who failed to pay off his debt did not have any property which could be confiscated in order to provide the sum required for the payment of the debt, or even when he had some property which however was not enough to meet the debt.

Professional ἐγγυητής ?

Sealey in his article, "The *Tetralogies* ascribed to Antiphon", *TAPhA* 114 (1984) 71-85, concludes that the *Tetralogies* diverge from Athenian law and practice, and that they are not sufficient testimony to Athenian law and practice, unless there is additional evidence from less suspect sources (p.85).

The first speech for the defence of the *First Tetralogy* contains a reference to ἐγγύη (μεγάλας δὲ ὑπὲρ πολλῶν ἐγγύας ἀποτίνοντα), but since Sealey has doubted the legal accuracy of the *Tetralogies*, I think that it is appropriate first to examine his objections and decide whether the *Tetralogies* reflect Athenian law and practice; and if we decide that the law discussed in the *Tetralogies* is Attic, then we will proceed to discuss this reference to the ἐγγύη.

I am not concerned here with the question about the authorship of the *Tetralogies*. There is disagreement among scholars whether the author of the *Tetralogies* was Antiphon of Rhamnous - another Athenian - or a foreigner (maybe Ionian). Dover examined the Ionicisms of diction and he inferred that they are deliberate imitation by an Athenian who wrote the *Tetralogies* in imitation of an Ionic genre of forensic oratory. He concludes that "given the existence of εἰσφοραί in the Pentecontaetia, all the evidence is consistent with the hypothesis that the *Tetralogies* were written by Antiphon, in imitation ultimately of Ionic models, at a stage of his career earlier than his writing for real litigants; but if the existence of εἰσφοραί in the Pentecontaetia is denied, then Antiphon cannot be

held to be author of the *Tetralogies*.", [K.J.Dover, "The Chronology of Antiphon's Speeches", *CQ* 44 (1950) 44-60, p.59]. Maidment following Dittenberger [W.Dittenberger, "Antiphons Tetralogien und das attische Criminalrecht I", *Hermes* 31 (1896) 271-77; II, *Hermes* 32 (1897) 1-21; III, ibid. 21-41; "Zu Antiphons Tetralogien" *Hermes* 40 (1905) 450-70] argued that the author was a foreigner who spent some time in Athens [K.J.Maidment, *Minor Attic Orators I* (Loeb Classical Library, Cambridge, Mass. 1941) 46-47]. Arguing against Maidment, A.W.H. Adkins, *Merit and Responsibility* (Oxford 1960, reprinted Chicago1975)113-14, n.27, insisted that the author was an Athenian but held that he was not Antiphon and assigned him to the last quarter of the fifth century. Gagarin takes the view that the *Tetralogies* are the work of Antiphon [M.Gagarin, "The Prohibition of Just and Unjust Homicide in Antiphon's *Tetralogies*", *GRBS* 19 (1978) 291-306, esp.306].

Since the authorship of the *Tetralogies* is not going to affect any of my arguments about their legal accuracy and consequently my discussion about the ἐγγύη, I do not take here a view whether the *Tetralogies* are authentic or not, and whenever I need to refer to the person who wrote them I will use the term "author".

Sealey puts the question whether the *Tetralogies* actually reflect Athenian law and court-practice. His starting point is Dittenberger's work on the *Tetralogies* who claimed to find divergences both in diction and in law from Athenian practice. Many of the alleged discrepancies between the *Tetralogies* and Athenian law were explained by Lipsius [Berichte Leipzig 56 (1904)191-204], but in his reply to criticisms from Lipsius, although he withdrew some of his claims, Dittenberger continued to assert two of them.

<u>The first legal point</u>

Dittenberger's main argument which he continued to claim even after Lipsius's criticisms was that in two of the *Tetralogies* we hear about a law that forbids both "unjust" and "just" homicide (3.2.9; 3.3.7; 4.2.3; 4.4.8). On the other hand we know of an Athenian law that recognised that homicide under special circumstances specified in the law was justified and did not carry any penalty. Consequently, Dittenberger denied that the law stated or assumed in the *Tetralogies* was Attic.

There is a prohibition in the *Second* and *Third Tetralogy* that states μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν. It has been argued that this prohibition is inconsistent with Athenian homicide law because, as we know from Drakon's law and hear from Dem. 23.60, the Athenian homicide law recognised that certain cases of homicide were lawful and went unpunished. The prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν literally translated means "the law forbids killing whether justly or unjustly". This word by word translation was the reason which led some scholars to conclude that the law mentioned in the *Tetralogies* does not correspond to the Athenian homicide law which was enforced since the time of Drakon and continued to be in force until the end of the classical period.

Gagarin, however, argues [*GRBS* 19 (1978) p.293] that the full arguments of the *Second* and *Third Tetralogies* and in particular the context within which the prohibition against *just* and *unjust* homicide is introduced have not been taken into consideration. A closer look at the context of this prohibition reveals that the adverbs δικαίως and ἀδίκως here do not actually take their normal meaning "justly" and "unjustly" respectively, and therefore the alleged prohibition against *justly* and *unjustly* homicide found in the *Tetralogies* remains groundless.

Let us try now to examine the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν in the context of the *Second Tetralogy* first.

The *Second Tetralogy* is concerned with the accidental death of a young boy struck by a javelin. A youth was practising with the javelin in the gymnasium; the young boy ran in front of the target just as the youth was making a cast, and was killed; the young boy's father prosecutes the youth who threw the javelin for unintentional homicide, (ἑκόντα μὲν οὖν οὐκ ἐπικαλῶ ἀποκτεῖναι, ἄκοντα δέ - 2.1.1). In the first speech for the defence, the youth's father argues that the victim himself was responsible for his own death and that the youth who threw the javelin is not at all guilty of homicide, not even of unintentional homicide. After this argument he continues: ἀπολύει δὲ καὶ ὁ νόμος ἡμᾶς, ᾧ πιστεύων, εἴργοντι μήτε ἀδίκως μήτε δικαίως ἀποκτείνειν, ὡς φονέα με διώκει. ὑπὸ μὲν γὰρ τῆς αὐτοῦ τοῦ τεθνεῶτος ἁμαρτίας ὅδε ἀπολύεται μηδὲ ἀκουσίως ἀποκτεῖναι αὐτόν· ὑπὸ δὲ τοῦ διώκοντος οὐδ' ἐπικαλούμενος ὡς ἑκὼν ἀπέκτεινεν, ἀμφοῖν ἀπολύεται τοῖν ἐγκλημάτοιν, <μήτ' ἄκων> μήτε ἑκὼν ἀποκτεῖναι. "Furthermore the law acquits us upon which the plaintiff relies in charging me with the boy's death, [the law] forbidding killing *ἀδίκως* or *δικαίως*. For on the one hand, by the error of the dead boy himself this youth is acquitted of having unintentionally killed him; and on the other hand not even being accused by the plaintiff of killing intentionally, he is acquitted of both charges, of killing unintentionally and intentionally." (2.2.9). It becomes clear here that ἀδίκως and δικαίως are associated with ἀκουσίως and ἑκὼν (ἑκουσίως) respectively, and they must be equivalent here to ἄκων/ἑκών. Therefore the terms ἀδίκως and δικαίως in this passage must be taken to designate unintentional and intentional homicide.

In his second speech for the accusation, the plaintiff also mentions the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν where the terms δικαίως/ἀδίκως must be understood as equivalent to ἄκων /ἑκών: *ἑκὼν* μὲν οὐκ ἀπέκτεινε, μᾶλλον δὲ ἑκὼν ἢ οὔτε ἔβαλεν οὔτε ἀπέκτεινεν. *Ἀκουσίως*

δὲ οὐχ ἧσσον ἢ ἑκουσίως ἀποκτείναντές μου τὸν παῖδα, τὸ παράπαν δὲ ἀρνούμενοι μὴ ἀποκτεῖναι αὐτόν, οὐδ' ὑπὸ τοῦ νόμου καταλαμβάνεσθαί φασιν, ὃς ἀπαγορεύει μήτε *δικαίως* μήτε *ἀδίκως* ἀποκτείνειν. It is clear that the plaintiff here takes the terms δικαίως and ἀδίκως to designate intentional and unintentional homicide.

The *Third Tetralogy* deals with a case of homicide in self-defence. The facts are the following: An old man quarrels with a young one as they sit drinking. They come to blows and the old man is seriously injured in consequence. He receives medical attention, but ultimately dies. The relatives of the dead old man prosecute the young man for intentional homicide.

That the charge here is intentional homicide becomes clear in the first speech for the prosecution: εἰ μὲν γὰρ ἄκων ἀπέκτεινε τὸν ἄνδρα, ἄξιος ἂν ἦν συγγνώμης τυχεῖν τινός (3.1.6), "If he had killed his victim unintentionally, he would have deserved some measure of mercy", which implies that the accusation is one of intentional homicide for which the penalty is death (*see*: 3.1.5, where the death penalty is suggested by the plaintiff).

The defendant in his turn, in the first speech for the defence, refutes the accusation of intentional homicide first and then he declares his innocence by saying that he did not kill the old man at all. Before he starts his arguments in order to prove his innocence, he makes a significant point: the victim himself is to blame for his own death since he started the fight first. His arguments run as it follows: οἶμαι μὲν οὖν ἔγωγε οὔτε δίκαια τούτους οὔθ' ὅσια δρᾶν ἐγκαλοῦντας ἐμοί. τὸν γὰρ ἄρξαντα τῆς πληγῆς, εἰ μὲν σιδήρῳ ἢ λίθῳ ἢ ξύλῳ ἠμυνάμην αὐτόν, ἠδίκουν μὲν <ἂν > οὐδ' οὕτως - οὐ γὰρ ταὐτὰ ἀλλὰ μείζονα καὶ πλείονα δίκαιοι οἱ ἄρχοντες ἀντιπάσχειν εἰσί -· ταῖς δὲ χερσὶ τυπτόμενος ὑπ' αὐτοῦ, ταῖς χερσὶν ἅπερ ἔπασχον ἀντιδρῶν, πότερα ἠδίκουν;

The defendant here, in the first place, tries to repulse the accusation of intentional homicide. He refers to the victim by putting for emphasis at the beginning of his sentence a participle (τὸν γὰρ ἄρξαντα τῆς πληγῆς) which reminds that the victim himself started the fight. He then continues with the hypothesis that even if he had used any kind of weapon in attacking the victim, he ἠδίκουν μὲν <ἄν> οὐδ' οὕτως, because an aggressor deserves to be answered with, not the same, but more and worse than he gave; but he did not use any kind of weapon apart from his hands and closes his argument by putting the question "πότερα ἠδίκουν;". I have left the verb ἠδίκουν untranslated; the normal meaning of the verb ἀδικεῖν is "to do wrong", but I think that such a translation here does not reveal the actual meaning of this context. Aristotle gives us a clue as far as the meaning of the verb ἀδικεῖν in a certain context is concerned.

Arist. *Rhetor.* 1368b: περὶ δὲ κατηγορίας καὶ ἀπολογίας, ἐκ πόσων καὶ ποίων ποιεῖσθαι δεῖ τοὺς συλλογισμούς, ἐχόμενον ἂν εἴη λέγειν. δεῖ δὴ λαβεῖν τρία, ἓν μὲν τίνων καὶ πόσων ἕνεκα ἀδικοῦσι, δεύτερον δὲ πῶς αὐτοὶ διακείμενοι, τρίτον δὲ τοὺς ποίους καὶ πῶς ἔχοντας. διορισάμενοι οὖν τὸ ἀδικεῖν λέγωμεν ἑξῆς. ἔστω δὴ τὸ ἀδικεῖν τὸ βλάπτειν ἑκόντα παρὰ τὸν νόμον.

Therefore Aristotle defines τὸ ἀδικεῖν as "intentionally causing injury contrary to the law". If we try now to translate the verb ἠδίκουν in our text adopting the meaning which Aristotle gives to it, then the defendant's argument will be as follows: "and even if I had used steel or stone or wood to beat him off, I would not intentionally cause injury contrary to the law; an aggressor deserves to be answered with, not the same, but more and worse than he gave. Actually, when he struck me with his fists, I used my own to retaliate for the blows which I received. In which of the two cases above was I intentionally causing injury contrary to the law?"

Here we have to remember that the defendant is accused of intentional homicide. He does not only try to justify his act but also to prove that the accusation of intentional homicide laid above him is groundless. He has been accused of a murder and not only of an attack, therefore he does not need only to justify his attack but also to reject the accusation. By only justifying his attack he is not cleared from the accusation of intentional homicide. He dismisses the charge altogether but admits that he attacked the victim. His main concern is to prove that he did not kill the man either intentionally or unintentionally. But since the charge is intentional homicide he feels that he has to reject it with arguments, and even after he has done so to go further and reject a possible alternation of the charge by the plaintiff, namely that he killed at least unintentionally. And having proved that he did kill neither intentionally nor unintentionally, this leads him to his main argument that he is not the killer at all, but someone else is to blame for the victim's death; and in this case he accuses partly the victim himself (who started the fight and consequently received the blows by the defendant) and at the end he names the man who is responsible for his death, the doctor (who did not treat him sufficiently).

You can justify an intentional murder, but you cannot justify an unintentional murder.

εἰ μὲν γὰρ ὑπὸ τῶν πληγῶν ὁ ἀνὴρ παραχρῆμα ἀπέθανεν, ὑπ' ἐμοῦ μὲν δικαίως δ' ἂν ἐτεθνήκει - οὐ γὰρ ταὐτὰ ἀλλὰ μείζονα καὶ πλείονα οἱ ἄρξαντες δίκαιοι ἀντιπάσχειν εἰσί.

He would try to justify his murder, only if it was intentional. It would be a murder if the victim died immediately when he was attacked. He would have died immediately if the defendant had used a weapon in attacking him. The phrase ὑπ' ἐμοῦ μὲν δικαίως δ' ἂν ἐτεθνήκει, with the explanation that the starter of a fight deserves more and worse than he gave, refers to the previous argument that even

if he had used a weapon it would still be justified, but in this case it would have been an intentional attempt to kill him. There is a link, which is hard to discern, between the following arguments:

1) τὸν ἀρξαντα τῆς πληγῆς, εἰ μὲν σιδήρῳ ἢ λίθῳ ἢ ξύλῳ ἠμυνάμην αὐτὸν, ἠδίκουν μὲν <ἂν> οὐδ' οὕτως - οὐ γὰρ ταὐτὰ ἀλλὰ μείζονα καὶ πλείονα δίκαιοι οἱ ἄρχοντες εἰσί-·

and

2) εἰ μὲν γὰρ ὑπὸ τῶν πληγῶν ὁ ἀνὴρ παραχρῆμα ἀπέθανεν, ὑπ' ἐμοῦ μὲν δικαίως δ' ἂν ἐτεθνήκει- οὐ γὰρ ταὐτὰ ἀλλὰ μείζονα καὶ πλείονα οἱ ἄρξαντες δίκαιοι ἀντιπάσχειν εἰσί-·

Actually the second argument is an expansion of the first. Both arguments refer to a hypothetical outcome of the fight between the old man and the defendant. The old man would have died immediately if the defendant had used a weapon; his death then would be justified but the defendant in that case would have attacked intentionally. The adverb δικαίως in the sentence ὑπ' ἐμοῦ μὲν δικαίως δ' ἂν ἐτεθνήκει in the second argument justifies the hypothetical immediate death of the victim and at the same time conveys that the homicide would be intentional. As I have said above, one who has committed intentional homicide can justify it for himself as an active subject, but one who has committed unintentional homicide cannot justify it in the same way; he might justify the result (death of the victim) in another way. When someone starts to justify a killing of which he has been accused -(of unintentional homicide)- then he refutes the accusation itself, namely that he has committed unintentional homicide. There is the difference between intentional and unintentional homicide which allows an attempt for justification for the first, but does not allow the same for the second. In intentional homicide the active subject of the act has decided to kill and, if he wishes, he can try to justify his act. In unintentional homicide although there is an

active subject of the act he has not decided to kill and therefore he cannot attempt to justify his act as the active subject of it. He might still, though, attempt to justify only the killing not as a result of his act but as a result of something else, such as negligence from the victim's part, or an error he made.

Therefore, when the defendant in our case here says that εἰ μὲν γὰρ ὑπὸ τῶν πληγῶν ὁ ἀνὴρ παραχρῆμα ἀπέθανεν, ὑπ' ἐμοῦ μὲν δικαίως δ' ἂν ἐτεθνήκει he refers to the case where he would have killed him intentionally and then he would try to justify his murder. The argument goes as it follows: " If the victim died immediately from his wounds caused by me, then it would have been me (ὑπ' ἐμοῦ) who killed him δικαίως. But what actually happened was that he died after several days because of the incompetence of the doctor who treated him". We have a hypothesis of what could have happened and a statement of what actually happened. According to the hypothesis the victim would die ὑπὸ τῶν πληγῶν immediately; the wounds were caused by the defendant, therefore the victim would be killed by him (ὑπ' ἐμοῦ). According to the statement of what actually happened the victim died διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν after several days. In the hypothesis above the prepositional adjunct of the cause- ὑπὸ τῶν πληγῶν- in the protasis becomes the agent in the apodosis- ὑπ' ἐμοῦ- (the wounds were caused by him). Now, the statement which consists of two parts, like the hypothesis above, the participle ἐπιτρεφθεὶς and the verb ἀπέθανε combined with the prepositional adjunct of the cause, διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν, corresponds to the previous hypothesis in terms of reasoning:

1) Condition--- εἰ μὲν γὰρ ὑπὸ τῶν πληγῶν ὁ ἀνὴρ παραχρῆμα ἀπέθανεν , - [it entails that] - ὑπ' ἐμοῦ μὲν δικαίως δ' ἂν ἐτεθνήκει --- Result.

2) Fact--- μοχθηρῷ ἰατρῷ ἐπιτρεφθεῖς, - [it entails that] - διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν . . . ἀπέθανε --- Result.

In the hypothesis above we have seen that the ὑπὸ τῶν πληγῶν in the protasis becomes ὑπ' ἐμοῦ in the apodosis. Now in the statement the διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν implies that the victim died ὑπὸ τοῦ ἰατροῦ, which we can probably use to replace the prepositional adjunct of the reason- διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν- and even add to it the adverb ἀδίκως in order to make it equivalent to the structure of the apodosis of the conditional clause of the hypothesis above. Therefore the defendant's statement might be expanded as follows: διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν . . . ἀπέθανε, - [equivalent to] - *ὑπό τοῦ ἰατροῦ μὲν ἀδίκως δὲ ἀπέθανε.*

If this interpretation is correct and the defendant has actually this kind of reasoning in his mind (something which cannot be proved, of course), and since he is accusing the doctor of homicide which obviously must be unintentional homicide, then, while in his hypothesis he puts δικαίως to (let us say at the moment) justify his act only, the adverb ἀδίκως (which, according to our hypothesis, might correspond to δικαίως above) does not seem to have the same use, for the reasons explained earlier concerning the justification of an unintentional homicide. In other words, the defendant would never mean that the doctor killed the victim ἀδίκως (= unjustly). Ἀδίκως seems rather to take the meaning of ἀκουσίως (= unintentionally) which sounds quite logical if the defendant accuses the doctor of unintentional homicide.

Therefore if the adverb ἀδίκως, which allegedly corresponds to δικαίως, means ἀκουσίως in this context, then δικαίως can also take the meaning of ἑκουσίως, without however losing the meaning "justly". The argument then takes the following form: "If the victim died from his wounds immediately [which means that I used a kind of weapon to attack him and cause to him such a wounds from which he died immediately, (see how he starts the argument in section 2: εἰ

μὲν σιδήρῳ ἢ λίθῳ ἢ ξύλῳ ἠμυνάμην αὐτόν. . .)], then it would be me who killed him δικαίως = intentionally and justly".

Having in mind the discussion above, let us try to see the whole argumentation of the defendant. I think that there is only one main argument here consisting of four parts which I will briefly mention later. This main argument is that the defendant, who is accused of intentional homicide, is not guilty either of intentional or unintentional homicide. The defendant tries to discuss every aspect of this accusation without leaving any side of it aside. The accusation is intentional homicide - homicide based on an attack. He splits the accusation into two parts: 1) intentional, 2) homicide. According to the plaintiff the homicide was caused by the attack. The defendant rejects the accusation of homicide but accepts that he attacked the victim. Since the accusation of intentional homicide is based on the attack which is accepted by the defendant, he has first to prove that the attack was unintentional and justified at the same time. He does so by saying first that he did not use any weapon in attacking the victim and second that he was in self-defence, and that is why he attacked. He has proved then, in section 2, that the attack was unintentional and justified, but having admitted that he attacked the victim, even unintentionally, he feels that the plaintiff then might accuse him of unintentional homicide, since he associates the victim's death with the attack. Then, according to the defendant, the plaintiff might say that the law forbids μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν. This is put in quotation marks to indicate the possible answer of the plaintiff to the defendant's question "πότερα ἠδίκουν;". We have said above that Aristotle in his *Rhetoric* defines the verb ἀδικεῖν as "ἔστω δὴ τὸ ἀδικεῖν τὸ βλάπτειν ἑκόντα παρὰ τὸν νόμον", and if we accept that ἠδίκουν here can take this meaning, and in combination with what has just been said above, then the alleged answer of the plaintiff does still make sense in such a context: "If you, as you say, attacked him not intentionally, as I

say and based on it my charge of intentional homicide against you, but unintentionally, then, since the attacked man died, you are still guilty of unintentional homicide, since the law forbids either intentional or unintentional homicide". Then the defendant moves to the other part of his argument saying that he did not kill the man at all, neither intentionally nor unintentionally, and he proves it by saying that the man did not die immediately when he was attacked but after many days when he was under medical attention, and he uses this fact as a proof that he did not attack him intentionally.

In the second speech for the defence of the *Third Tetralogy* the speaker says:

Πρὸς δὲ τὸ *μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν* ἀποκέκριται· οὐ γὰρ ὑπὸ τῶν πληγῶν ἀλλ' ὑπὸ τοῦ ἰατροῦ ὁ ἀνὴρ ἀπέθανεν, ὡς οἱ μάρτυρες μαρτυροῦσιν. Ἔστι δὲ καὶ ἡ τύχη τοῦ ἄρξαντος καὶ οὐ τοῦ ἀμυνομένου. ὁ μὲν γὰρ *ἀκουσίως* πάντα δράσας καὶ παθὼν ἀλλοτρίᾳ τύχῃ κέχρηται· ὁ δὲ *ἑκουσίως* πάντα δράσας, ἐκ τῶν αὐτοῦ ἔργων τὴν τύχην προσαγαγόμενος, τῇ αὐτοῦ ἀτυχίᾳ ἥμαρτεν.

Here the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν is not further discussed because it has already been discussed in the first speech for the defence. The only comment made is that for the victim's death the doctor is responsible, which is the conclusion of the defendant's argument when he discussed the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν. We should notice here that there is the same kind of syllogism as in the *Tetralogy* 3.2.3, which is not repeated because an answer has been given (ἀποκέκριται), and only the conclusion of this syllogism is given here again (the victim died because of the doctor). However, the speaker goes further to notice that the defendant has done πάντα ἀκουσίως.

I conclude that the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν in this context should be understood as referring rather to intentional and unintentional

homicide than to just and unjust killing. This meaning has also been attested in the *Second Tetralogy* where it is more clear. Therefore, I do not think that what is actually said here is inconsistent with the Athenian law of homicide which actually regarded intentional and unintentional killing as a crime.

The second legal point

The second legal point on which Dittenberger based his argument about the divergence of the law in the *Tetralogies* from Attic law concerns the penalty imposed on someone found guilty of unintentional homicide. Athenian law imposed exile on a person convicted of unintentional homicide; the exile had no temporal limit but continued until the relatives of the victim, or select members of his phratry if no relatives survived, extended pardon (ἄϊδεσις) to the killer.[146] However, in the *Second Tetralogy*, according to Sealey following Dittenberger, the two parties, when they speak about the prospective penalty, do not explicitly mention exile. The defence refers to the penalty using the following wording: ἐπί τε γὰρ τῇ τούτου διαφθορᾷ ἀβίωτον τὸ λειπόμενον τοῦ βίου διάξω (*Tetr.*2.2.10), cf. *Tetr.*2.4.9: ὁ δὲ καθαρὸς τῆς αἰτίας ὅδε ἐὰν διαφθαρῇ. . . . He does not name the penalty but he says that the consequence of it will be "destruction"(διαφθορά).

The prosecutor, on the other hand, becomes more explicit and urges the judges "not to look on without regarding" [μὴ περιορᾶν (i.e.not to allow)] the whole city to be defiled by him, by keeping him away from things or places specified in the law:

ὑμᾶς δὲ ἀξιῶ. . . εἴργοντας ὧν ὁ νόμος εἴργει τὸν ἀποκτείναντα μὴ περιορᾶν ἅπασαν τὴν πόλιν ὑπὸ τούτου μιαινομένην (*Tetr.*2.1.2), cf.

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[146] See: *IG* I2 115 (I3 104), lines 10-19; Dem. 23.72; MacDowell, *Homicide* 117-121.

Tetr. 2.3.11: καταλαβόντες μὲν γὰρ αὐτὸν καὶ εἴρξαντες ὧν ὁ νόμος εἴργει καθαροὶ τῶν ἐγκλημάτων ἔσεσθε.

Now, it is well known that, from the moment when a person was accused of homicide until his trial, he was "excluded from the things specified in the laws", (*see* Ant.6.36: ὁ γὰρ νόμος οὕτως ἔχει, ἐπειδάν τις ἀπογραφῇ φόνου δίκην, εἴργεσθαι τῶν νομίμων), cf. IG i2 115, lin. 20-21; Dem. 47.69; Ar. *Ath.Pol.* 57.2. From the prosecutor's words (*Tetr.* 2.1.2) Sealey concludes that "the author [of the *Tetralogies*] has mistaken the restriction put on a person accused of homicide for the disability inflicted on one judged to have killed involuntarily" (p. 77).

If I have understood Sealey's argument properly, he draws this conclusion by comparing the prosecutor's phrases, εἴργοντας ὧν ὁ νόμος εἴργει τὸν ἀποκτείναντα (*Tetr.* 2.1.2) and εἰργόμενοι τῶν προσηκόντων (*Tetr.* 2.3.11), with the phrase εἴργεσθαι τῶν νομίμων (Ant. 6.35-36; Ar. *Ath. Pol.* 57.2) which is used to refer to the proclamation made first by the relatives of the killed person in the agora and then by the basileus after the relatives had submitted their charge to him; this proclamation was addressed to the killer who was commanded "to keep away from the things specified in the laws". Sealey does not explain why he interprets the prosecutor's words as if they allude ("with variation") to the proclamation against an alleged killer. Probably the verb εἴργειν/εἴργεσθαι used in both cases (i.e. the prosecutor's words referring to the prospective penalty, here, and the proclamation against an alleged killer, in general) made Sealey take the view that the author of the *Tetralogies* confused the penalty imposed on a person convicted for unintentional homicide with the restriction put on a person accused of homicide.

However, on this point I have two objections to make:

First, as far as the context is concerned (*Tetr.*2.1.2) nothing dissuades us from understanding in the prosecutor's words exile as the prospective penalty proposed by him; a person found guilty of unintentional homicide in order not to defile the whole city was bound to go into exile.

Second, we learn from And.1.94 that τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον, "a person who has planned is to be liable to the same treatment as one who has committed with his own hand"; the penalty imposed for *bouleusis* of homicide was the same as that for committing homicide with one's own hand. In Ant. 6 *Choreutes* 4, the khoregos accused of *bouleusis* of unintentional homicide says that if he is condemned he will be required "to keep away from Athens, holy places, games, and sacrifices" (Ant.6.4: εἴργεσθαι πόλεως, ἱερῶν, ἀγώνων, θυσιῶν), just like a person found to have committed unintentional homicide with his own hand. The khoregos referring to the prospective penalty uses the verb εἴργεσθαι which is used again by him in sections 35-36 to refer to the restriction put on him when he was charged with the homicide. Therefore the verb εἴργεσθαι has been also attested, in a real case, in connection with the penalty of exile.

On these grounds, I cannot see here (*Tetr.* 2.1.2 and *Tetr.* 2.3.11) any inconsistency with, or any inadequate knowledge of, the Athenian homicide law.

We have discussed the two legal points made by Sealey (following Dittenberger) and concluded that, as far as the first legal point is concerned, the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν is a very general statement about the Athenian homicide law, which does not add anything substantial to it, and that we should understand the pair δικαίως/ἀδίκως as corresponding to ἑκουσίως/ἀκουσίως in order to designate intentional/unintentional homicide. As far as the second legal point is concerned, there is nothing in the *Second Tetralogy* which can be taken as a proof that the author of the *Tetralogies* does

not make good use of the Athenian homicide law, in the sense that when he writes about the prospective penalty for an unintentional homicide he confuses exile, which was the penalty in such a case, with another legal practice in Athenian homicide law, i.e. the proclamation of the basileus against the alleged killer.

Dittenberger's and Sealey's arguments are not conclusive and, therefore, I do not see in the *Tetralogies* any inconsistency with the Athenian homicide law which should dissuade us from relying on the *Tetralogies* and using them as a testimony to Athenian law and practice.

Here we should probably quote some other points found in the *Tetralogies* in order to strengthen our view that the author of the *Tetralogies* was not ignorant of Athenian law, either on the subject of homicide, or on the Athenian legal system as a whole, and that the *Tetralogies* actually reflect Athenian law and Athenian court-practice:

1) *Tetr.* 1.1.6: κλοπὴ ἱερῶν χρημάτων (embezzlement of sacred monies of which the person concerned was in charge) was made the subject of a γραφή and it was punishable by fine; from Dem.24 *Timokr.* 111,112, we learn that the penalty for κλοπὴ ἱερῶν χρημάτων was the repayment of ten times the sum embezzled.

2) *Tetr.* 1.2.7: ἀπιστουμένων δὲ καὶ τῶν ἄλλων δούλων ἐν ταῖς μαρτυρίαις - οὐ γὰρ ἄν ἐβασανίζομεν αὐτούς - : Slaves can only give evidence under torture.

3) *Tetr.* 1.4.7: οἱ μὲν (οἱ ἐλεύθεροι = "citizens", in contrast with οἱ δοῦλοι) γὰρ ἀτιμοῦνταί τε καὶ χρήμασι ζημιοῦνται, ἐὰν μὴ τἀληθῆ δοκῶσι μαρτυρῆσαι: a citizen convicted of ψευδομαρτυρία was fined, and disfranchised if he was convicted three times.

4) *Tetr.* 3.3.5: ὁ μὲν ἰατρὸς οὐ φονεὺς αὐτοῦ ἐστίν - ὁ γὰρ νόμος ἀπολύει αὐτόν, διὰ δὲ τὰς τούτου πληγὰς ἐπιτρεψάντων ἡμῶν αὐτῷ, πῶς

ἂν ἄλλός τις ἢ ὁ βιασάμενος ἡμᾶς χρῆσθαι αὐτῷ φονεὺς εἴη ἄν; The law absolved a physician from blame, if a patient died while under his care.

Therefore, all these passing references to laws other than those of homicide certainly seem to indicate that the author of the *Tetralogies* was acquainted with the Athenian legal system as a whole.

* * *

The Tetralogies ascribed to Antiphon are three groups of four short speeches each. Each group deals with a case of homicide, and each consists of two speeches for the prosecution and two corresponding speeches for the defence. They consist entirely of "artistic proofs" which are arguments from probability in a wide sense, as it is opposed to "artless proofs" which include laws, witnesses, testimonies, contracts and oaths, and they were not composed for real litigants since they were not intended for any actual law-suits.

However, since they seem to reflect Athenian law and court-practice, I think that they were probably written in the way their author would have used before an Athenian court at the time of their composition, and he tried to make them seem consistent with Athenian law and practice as if they were going to be used in an Athenian court for real litigants.

In this sense, I think that the *Tetralogies* might have something to give to us about the practice of ἐγγύη which is mentioned in one of their speeches (Ant. 2 *Tetr.*1.2.12).

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In the first speech for the defence of the *First Tetralogy*, the speaker who tries to create a positive impression of himself says:

ἐμὲ δὲ ἐκ τῶν προειργασμένων γνώσεσθε οὔτε ἐπιβουλεύοντα οὔτε τῶν οὐ προσηκόντων ὀρεγόμενον, ἀλλὰ τὰ ἐναντία τούτων πολλὰς μὲν καὶ μεγάλας εἰσφορὰς εἰσφέροντα, πολλὰ δὲ τριηραρχοῦντα, λαμπρῶς δὲ χορηγοῦντα, πολλοῖς δὲ ἐρανίζοντα, μεγάλας δὲ ὑπὲρ πολλῶν ἐγγύας ἀποτίνοντα, τὴν δὲ οὐσίαν οὐ δικαζόμενον ἀλλ᾽ ἐργαζόμενον κεκτημένον, φιλοθύτην δὲ καὶ νόμιμον ὄντα. (*Tetr.* 1.2.12).

We hear that he made several substantial payments to the Treasury, that he served as Trierarch more than once, that he furnished a brilliant chorus, that he advanced money to friends and finally that he paid large sums under guarantees given for others.

It is this last mentioned activity of the speaker that concerns us here and rises a number of questions. The phrase μεγάλας δὲ ὑπὲρ πολλῶν ἐγγύας ἀποτίνοντα is the only reference to ἐγγύη in the whole *First Tetralogy* which tells us that the speaker had been a guarantor (ἐγγυητής) for many persons in several different occasions.

There is not any hint of the (different?) circumstances under which the ἐγγύαι took place or of the purpose of it, and, therefore, we are bound to speculate about all the possible kinds of ἐγγύη which could have been applied here.

* He might have guaranteed the appearance of an accused man in court for trial. This could have been applied here only in cases in which the prospective penalty would be a fine, and only when the accused man who did not turn up for

trial was convicted by default to a fine for which, in this case, the guarantor became responsible.

* He might have guaranteed the payment of a fine.

* He might have guaranteed the full payment of a loan contracted under his influence; the guarantor would become liable for the full payment of the loan if the borrower did not repay it by the fixed date.

* He might have guaranteed the payment of a sum of money owed to the state by lessees of public property and tax-farmers.

The participle ἀποτίνοντα indicates how far the speaker played his role as a guarantor. The responsibility of the guarantor might have never become actual if the person for whom he guaranteed (let us name him, A) fulfilled his obligation; but if A failed to do so, then the guarantor would assume all the responsibility of doing whatever A should have already done. In a number of cases the speaker (*Tetr.* 1.2) had to go as far as to pay the amount of money for which he had guaranteed. This means that A either failed to pay a fine for which the speaker had guaranteed, or did not appear for trial while the speaker had guaranteed his appearance, or did not repay a loan for which the speaker had stood surety, or did not fulfil his obligations towards the state as a lessee of public property or a tax-farmer. We are also told that he had to pay large amounts of money under guarantees (μεγάλας ἐγγύας) given for many people at different times (ὑπὲρ πολλῶν). This indicates that more than once he had stood surety for more than one person under, probably, different circumstances for each person (e.g. a fine or a loan).

Let us try now to draw an imaginary picture in outline of this guarantor here:

Let us imagine that a man (B) had been convicted in a γραφὴ κλοπῆς ἱερῶν χρημάτων and had either to pay a fine of two talents (one talent being the sacred money embezzled) immediately, or to be imprisoned until he paid it, unless

someone guaranteed the payment of the fine at a future date. B could not pay the fine immediately but he nominated the speaker as his guarantor; he guaranteed that B would pay the fine in the future (normally by the ninth prytany of the year). However, B failed to pay it by then and consequently the guarantor became liable for its payment. Eventually the guarantor paid it.

After a year another man (C), who had been disfranchised because he owed money to the state (for example, a tax-farmer who failed to pay the price fixed for his tax-collecting privilege on the date when it fell due), was prosecuted by the procedure of *ἔνδειξις* because he was seen to be in one of the places which were forbidden to him. His prosecutor after delivering the charge to the magistrates (Thesmothetai) required that the accused man, C, should provide sureties, otherwise he should be kept under custody until his trial; the speaker became one of his sureties. However, C failed to appear for trial, and consequently his sureties took his place; they were tried on the original accusation made against C, and convicted to pay a fine. The speaker who was one of C's sureties paid his part to the fine.

After some time another man (D) was seeking to contract a loan, and the speaker stood surety for its repayment. However D was unable to repay the loan on the day when it fell due and, therefore, the speaker became liable for the payment of the loan which eventually was paid by him.

Before we put a question, it is appropriate first to recall some general observations concerning the nature and the function of ἐγγύη. Ἐγγύη was the means for the attainment of an act at a future date. The guarantor undertook the responsibility that the person for whom he guaranteed would do something in the future (either that he would pay a fine, or that he would appear for trial, or that he would repay a loan). If the person for whom the guarantor had guaranteed failed to fulfil his obligations, then the guarantor himself became liable and had to

perform whatever the other person failed to do. The risk at which the guarantor put himself voluntarily could be extremely big sometimes.

In our case here (Ant.2 *Tetr.* 1.2.12) we hear that the speaker not only had stood surety many times before, but also had paid the amount of money for which he guaranteed. More than once he had to confront an unpleasant situation where he had to pay money (a fine, or a loan) without originally having done anything wrong himself.

The question which arises here is the following:

Since he had obtained a very bad experience as a guarantor when he first had to pay the ἐγγύη, why did he put himself at such a risk again by guaranteeing later other sums for other persons? He could have stood surety for a person who eventually failed to fulfil his obligation; then he would pay the ἐγγύη, but having such a bad experience he could have refused to play again the role of the guarantor for someone else in the future. But the author of the *Tetralogies* puts the speaker to have stood surety, who paid the ἐγγύη, more than once. But what was it which would make an unlucky guarantor to repeat the same "mistake" more than once?

Before we attempt to answer this question, it would be helpful to gather all the possible information about the person of the guarantor, as we get it from the *First Tetralogy*.

We hear that he was a wealthy man who had undertaken many liturgies which he completed successfully. We also hear that he had held a public office, probably being a ταμίας τῶν ἱερῶν χρημάτων, treasurer of the sacred monies.[147] He had a riotous life by being involved in a number of lawsuits. The

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[147] Every temple of any importance had a treasure which was composed of offerings, and the surplus of the amount of the sacred property, together with other receipts which belonged to the particular deity; and

circle of his friends was wide enough and he was probably a member of an ἔρανος association.

The fact that he was a very wealthy man, although it did help and support his behaviour as a guarantor (namely his willingness to stand surety more than once, especially after the first time that he did so and had to pay the ἐγγύη) does not explain this behaviour.

The wide circle of friends that he had, although it created a higher possibility that some of them might have needed his help at some point, did not necessarily compel him to undertake the role of their guarantor when need arose.

His membership of an ἔρανος association might have demanded his financial help towards other members in the form of a contribution with others, but such a membership alone would not compel him to stand surety for one of the members of this association.

And finally, although for being a wealthy man the price that he had to pay was to undertake lit urgies which were compulsory and distributed among the richest members of the Athenian society, nothing could compel him because of his wealth to be a guarantor for other people unless he himself decided to do so.

It is hard to believe that a man, no matter how rich he was, was motivated only by his generosity and philanthropy in showing such a willingness to pay ἐγγύαι for others because they failed to fulfil their responsibilities. It is also hard to believe that such a guarantor would be particularly happy for behaving in this way since he would have to pay significant amounts of money, unless he was to be

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these treasures were under the managment of the treasurers of the sacred monies (ταμίαι τῶν ἱερῶν χρημάτων)

benefited in one way or another. Therefore there must have been something else which would lead a wealthy man to this kind of behaviour.

I suggest that his concern about his social-political status might be the key in explaining this behaviour. In sections 5 and 6 of the first speech for the prosecution of the *First Tetralogy* we hear that ἐκ παλαιοῦ γὰρ ἐχθρὸς ὢν αὐτοῦ πολλὰς μὲν καὶ μεγάλας γραφὰς διώξας οὐδεμίαν εἶλεν, ἔτι δὲ μείζους καὶ πλείους διωχθεὶς οὐδεπώποτ' ἀποφυγὼν ἱκανὸν μέρος τῶν ὄντων ἀποβέβληκε, τὰ δ' ἄγχιστα ἱερῶν κλοπῆς δυοῖν ταλάντοιν γεγραμμένος ὑπ' αὐτοῦ. A man who was involved in many law-suits either as a defendant or as a plaintiff would definitely need the support of others in dealing with all those law-suits. This support would practically mean the appearance of persons in court who would act either as his witnesses (especially when they would provide the court with a false testimony) or as prosecutors of his enemies. And nobody would be more willing to support such a man than one who had been benefited by him in the past. This might explain the way in which a *professional* guarantor could have thought: "I help you financially now (by being your guarantor, willing to pay the ἐγγύη) because I have the financial strength to do so, but when need arises (a law-suit) you will help me in another way (by being one of my witnesses)".

The creation of a core of permanent supporters might be exploited on other occasions as well. We know that any Athenian man of citizen status might be appointed by lot or by election to hold some public office. But before entering upon the office he had to undergo dokimasia by a jury in a court under the presidency of the Thesmothetai. During the dokimasia he was examined whether he was legally qualified for the office for which he had been selected. An accusation against him could be made by anyone who wished, on the ground that the candidate was not legally qualified for the office, and as we see from several

surviving speeches composed for dokimasia proceedings (Lys. 16, 25, 26, 31), the question whether the candidate was a good and patriotic citizen was very often put forward. Furthermore, once a man had entered upon a public office, legal proceedings were available for use against him if he misused his authority or neglected his duties. One was a vote in the Ekklesia (*epikheirotonia*) on the question whether the holders of public offices seemed to be performing their duties well. And if the vote went against anyone, he was deposed from his office; this was called *apokheirotonia*. The speaker of *Tetr.* 1.2 is said to have held a public office (probably being a treasurer of the sacred monies).

Another way in which we could explain the behaviour of a *professional* guarantor might be the following: Although in Athens there were not political parties in the modern sense, the existence of political groups is doubtless.[148] Such a *professional* guarantor could perfectly well be, if not the leader of a political group, at least one of the minor politicians (ἐλάττονες ῥήτορες). We know that each political group had its leader who was surrounded by his close followers and supporters whose task was to promote their political ideas and influence other citizens in order to enlarge their political group.[149] One of the means of attaining this goal might have been the creation of a sense of obligation in citizens who were benefited by their generosity which could be also expressed by an ἐγγύη when it was needed. Even many of the great politicians of the middle fifth century performed lit urgies, which were an important means to influence in public life, were dedicators and great benefactors, but private philanthropy also

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[148] See, W.R.Connor, *The New Politicians of Fifth-Century Athens* (Princeton, 1971) p.64; S.Perlman, "The Politicians in the Athenian Democracy of the 4th century B.C.", *Athenaeum* 41 (1963), pp. 327-55.

[149] See, Hyper. *con. Dem.*, col. 12; Aesch. 2. 64, 68, 71; Dem. 18.143; Isokr. 16.7; Plut. *Per.* 11.2.

was used by them for the same purpose of their political growth as can be seen by the following account of Cimon's generosity:

Theopompus, FGrH 115 F89 :

Κίμων ὁ Ἀθηναῖος ἐν τοῖς ἀγροῖς καὶ τοῖς κήποις οὐδένα τοῦ καρποῦ καθίστα φύλακα, ὅπως οἱ βουλόμενοι τῶν πολιτῶν εἰσιόντες ὁπωρίζωνται καὶ λαμβάνωσιν εἴ τινος δέοιντο τῶν ἐν τοῖς χωρίοις. ἔπειτα τὴν οἰκίαν παρεῖχε κοινὴν ἅπασι· καὶ δεῖπνον αἰεὶ εὐτελὲς παρασκευάζεσθαι πολλοῖς ἀνθρώποις, καὶ τοὺς ἀπόρους [προσιόντας] τῶν Ἀθηναίων εἰσιόντας δειπνεῖν. ἐθεράπευεν δὲ καὶ τοὺς καθ' ἑκάστην ἡμέραν αὐτοῦ τι δεομένους, καὶ λέγουσιν ὡς περιήγετο μὲν ἀεὶ νεανίσκους δύ' ἢ τρεῖς ἔχοντας κέρματα τούτοις τε διδόναι προσέταττεν, ὁπότε τις προσέλθοι αὐτοῦ δεόμενος. καὶ φασι μὲν αὐτὸν καὶ εἰς ταφὴν εἰσφέρειν. ποιεῖν δὲ καὶ τοῦτο πολλάκις, ὁπότε τῶν πολιτῶν τινα ἴδοι κακῶς ἠμφιεσμένον, κελεύειν αὐτῷ μεταμφιέννυσθαι τῶν νεανίσκων τινα τῶν συνακολουθούντων αὐτῷ· ἐκ δὴ τούτων ἁπάντων ηὐδοκίμει καὶ πρῶτος ἦν τῶν πολιτῶν.

The result of a politician's generosity to the citizens, as well as to the city, was the gratitude of his beneficiaries which could be easily converted into political support. And that that was the case can be seen by the last sentence of the account of Cimon's generosity (quoted above) which is a hint that the purpose of this generosity was political growth.

Now, ἐγγύη could perfectly well be included, among other things, in a politician's generosity, having the purpose of creating a sense of obligation in those who were benefited by his undertaking to stand surety for them. The political support which he was to gain by his beneficiaries could be expressed by them in different ways on several occasions, such as by voting for his proposals of decrees in the assembly, which was one of the characteristic tasks of the

politicians who sometimes took precaution to have a *probouleuma* ready in case favourable circumstances arose for a vote in the assembly, (Dem. 23.13-14).

The citizens for whom a politician would guarantee could be naturally found among members of the *hetaireiai* which were dining or drinking clubs of men who met in private houses for, apart from dinner and drinking, entertainment and talk. Many politicians appeared to be members of a *hetaireia* (G.M.Calhoun, "Athenian Clubs in Politics and Litigation", *Bulletin of the University of Texas* (no. 262, Austin 1913)) where they talked politics, and from where they gained political strength and influence (see Plut. *Aristides* 2). Some of the members supported other members who were in trouble in the courts, and they helped each other out financially.[150] A politician who played the role of an advocate or an accuser in a law-court and by doing so recruited supporters ([Dem.] 59.43) could also play the role of a guarantor, even though he had experienced it badly in the past and knew that he was going to pay again an expensive price for either retaining already existing supporters or recruiting new ones. For the repeated ἐγγύαι the motivation was his political career and the reward was a steady income of political support from his beneficiaries.

I conclude that the behaviour of an ἐγγυητής who μεγάλας δὲ ὑπὲρ πολλῶν ἐγγύας ἀποτίνοντα cannot be explained as a result of his philanthropy and generosity only; his concern about his social-political status must have been a significant factor which would motivate him to undertake μεγάλας ὑπὲρ πολλῶν ἐγγύας which he would eventually pay.

We should also notice here that the author of the *Tetralogies* puts the defendant to place the ἐγγύαι side by side with the lit urgies undertaken by him. However, the liturgies could not be avoided since they were compulsory and

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[150] S. Perlman, *Athenaeum* 41 (1963) 343 n.82.

distributed among the wealthy members of the Athenian society, whereas the ἐγγύη was totally voluntary and depended on the willingness of the person who would decide to undertake it or not. And although we can understand the reason why an Athenian would demonstrate his performance of litourgies in a law court, it is not however very clear what was the purpose of the use of his function as an ἐγγυητὴς.[151] In this context here, however, the mention of the ἐγγύαι has the purpose of supporting his main argument; the defendant argues that his wealth is the fruit of hard personal work and that he not only never claimed anything which did not belong to him, but also he had frequently paid large sums under guarantees given for others.

But what concerns us here is that the defendant who has been an ἐγγυητὴς on several occasions in the past is put by the author of the *Tetralogies* to use as a positive for himself argument his function as a responsible ἐγγυητής who eventually paid the ἐγγύαι. Now if we are to suppose that all these ἐγγύαι paid by the guarantor were either for a fine payable to the state, or for a loan, or for the appearance of an accused person in court, then the possible use of the payment of the ἐγγύαι by a guarantor in a law-court in order to give an extra positive impression concerning his personal record seems to be awkward in the following

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[151] As a client of Lysias says: Τετριηράρχηκά τε γὰρ πεντάκις, καὶ τετράκις νεναυμάχηκα, καὶ εἰσφορὰς ἐν τῷ πολέμῳ πολλὰς εἰσενήνοχα, καὶ τἆλλα λελῃτούργηκα οὐδενὸς χεῖρον τῶν πολιτῶν. καίτοι διὰ τοῦτο πλείω τῶν ὑπὸ τῆς πόλεως προσταττομένων ἐδαπανώμην, ἵνα καὶ βελτίων ὑφ' ὑμῶν νομιζοίμην, καὶ εἴ πού μοί τις συμφορὰ γένοιτο, ἄμεινον ἀγωνιζοίμην. (Lys. 25. 12-13). The reason why he was spending more than he was expected to spend was that he wanted to create a good reputation for himself, so that if he was ever involved in a trial he would stand a better chance in court. Many other examples of the same τόπος can be found in the orators, e.g. Lys. 3.47, 6.46, 7.30-31; Isokr. 7. 53, 18. 58; Is. 4. 27-31, 5. 35-38; Dem. 20.151, 21.153, 38.25, etc.

sense: Let us suppose that a person was accused of an offence for which he had to be tried in a law-court at a future date and had to nominate sureties for his appearance in the court; eventually he turned up for the trial, where he was convicted of a fine which he paid. And let us suppose that the same person after some time had also to nominate sureties for contracting a loan; he took the loan which eventually was repaid by him in time. In both cases the guarantors would not have any further implications in paying the ἐγγύη since the person for whom they guaranteed fulfilled his obligations. And let us imagine now that the above person was involved in a trial as a defendant having to defend himself in the same way as the author of the *Tetralogies* puts his defendant to do so. In this case, I do not think that we would expect such a defendant who would be at pains to create a positive impression for himself to claim that "among many lit urgies that I have undertaken and successfully completed so far, μεγάλα δὲ ὑπὲρ ἐμοῦ τιμήματα (or) δάνεια ἀποτίνοντα". However, a guarantor could possibly do so, probably because he would not feel that he had committed an offence for which he was punished. Furthermore he would probably use his action as an ἐγγυητής as a sample of his philanthropy and generosity.

Now, as far as the Attic legal system itself is concerned, it appears that what was at stake, of course, was justice which in any case had to be done. The concept of justice seems to be associated with the idea that since an offence had been committed by someone a penalty should definitely follow; the offender would normally suffer this penalty. That was, in the first place, actually required by the law which, however, recognised in some cases the possible appointment of ἐγγυηταί whose role was first to secure that a certain person would actually do, at a future date, what he was required to do, and second, in case of his failure, to become responsible themselves for what he should have done but he did not. In this case, if the ἐγγυητής undertook his responsibilities and completed his

function as ἐγγυητής by doing, paying, or suffering in the other person's place what he should have done, paid, or suffered, then justice was regarded as having been done, although the real offender was not punished himself. To give an example, let us take the case where someone was accused of an offence and the accuser demanded either sureties for the accused person's appearance in the court for the trial, or that he should be imprisoned until his trial; ἐγγυητοί were nominated but the accused person, who remained free as the result of his guarantors, did not appear for the trial. He would be tried by default and, if he was found guilty, then the ἐγγυητοί would have to suffer in his place exactly the same penalty which he would have suffered, and the story probably would close there. Justice has been done, although someone else and not the real offender suffered the penalty. The ἐγγυητοί should not be taken as if they were punished for the act of the ἐγγύη which led to the failure of the real offender's punishment, but they should be seen as the substitute for the real offender. The charge on which they would be tried would be the same charge brought against the real offender and they would suffer the same penalty which would have been imposed upon him.

To the best of my knowledge, there was not an extra penalty imposed upon the guarantors who were tried and convicted instead of the person for whom they had guaranteed. The fact that, in the case of the public debtors, their guarantors were liable to the payment of double the amount of the original debt after the ninth prytany should not be seen as an extra penalty directed to the guarantors, since, in any case, the original debtor had to pay it himself in the first place.

Neither can we say that a guarantor was debarred from undertaking an ἐγγύη again in the future, if he had already done so three times in the past and had been convicted in the place of the original offender, even though he had eventually paid the ἐγγύη, in analogy with what happened to a person convicted in a δίκη

ψευδομαρτυρίων who after his third conviction was automatically disfranchised,[152] since otherwise the defendant of the *First Tetralogy* would not have been able to stand surety several times, (μεγάλας δὲ ὑπὲρ πολλῶν ἐγγύας ἀποτίνοντα).

[152] Ant. 2.4.7, And. 1.74, Hyp. *Philippides* 12.

CONCLUSION

The verb ἐγγυᾶν has the basic meaning "to pledge" or "to promise" with an etymological connection to a ritual gesture involving the hand or hands - either pledging by putting something into the hand of someone, or promising with the seal of a handshake. It also means "to guarantee" and the noun ἐγγυητής denotes the guarantor.

The noun ἐγγύη means "suretyship", "guaranty" and denotes the act of suretyship, i.e. someone's undertaking to stand surety. Sometimes it is used to refer to "the sum guaranteed" and in this case the word is identical with an amount of money.

As a legal term, ἐγγύη refers to an oral contract made between two parties. The situations in which the term ἐγγύη was used were **marriage** and **suretyship**.

Ἐγγύη in the context of marriage

Marriage was essential for the preservation of the οἶκοι, because it ensured the continuation of the family through legitimate children, and the preservation of its property through proper inheritance procedures.

The essential element of marriage during the classical period was the ἐγγύη (the "promising" or "pledging of the bride"). The "living together" (συνοικεῖν) of a man and a woman was recognized as a valid marriage only when it was based on the ἐγγύη; so, ἐγγύη was a prerequisite, without which a marriage was not valid (except in the case of an ἐπίκληρος).

The ἐγγύη was an oral, legally valid, private contract of marriage concluded with the bridegroom by the woman's κύριος (father, brother or nearest male relative).

The κύριος's act at the ἐγγύη was to pledge or engage (ἐγγυᾶν) the woman to the bridegroom as wife, to promise her in marriage; the ἐγγύη resulted in the woman's becoming a γυνὴ ἐγγυητή - a pledged or promised woman.

The ἐγγύη was a necessary step towards a full marriage, but it required to be followed by ἔκδοσις in order actually to become a valid and legal marriage.

Witnesses were not necessary for giving validation to the act of the ἐγγύη; however, the absence of them was often used in court to argue that a woman had not been given in marriage by ἐγγύη. So, it was customary for both parties to bring their own witnesses to the transaction. They were needed not to validate the act of the ἐγγύη but to prove, if the need arose, that the ἐγγύη had taken place.

The dowry was not obligatory at Athens and it was a matter of custom rather than a legal requirement; it was the social and moral responsibility of a κύριος of a woman to give dowry with her to the prospective husband, and the natural moment for the bestowal of the dowry was when the ἐγγύη took place.

The most important effect of marriage, the legitimacy of children, depended on the existence and propriety of the ἐγγύη. The connection between the ἐγγύη and the legitimacy of children is clear. According to the law γνήσιος is that child who was born from a γυνὴ ἐγγυητή, (cf. Dem. 44.49). The ἐγγύη was the legal means of establishing that a woman would be the mother of a man's legitimate heirs.

Phratry membership was dependent on an man's being born from a marriage contracted by ἐγγύη. The content of the oath, sworn by the father on presenting his son to his phratry, seems to be that the son was born to him by a woman who was a citizen (ἀστῆ) and married to him under a contract of ἐγγύη. Νόθοι were

not only excluded from their father's phratry, but also from the possibility of adoption by another citizen and enrolment in his phratry. They were also excluded from all rights of inheritance. I tend to believe also that illegitimate birth was a bar to citizenship, in the period of the orators.

Ἐγγύη as surety

1. Ἐγγύη for appearance in court.

For each offence there was a certain type of legal procedure which should be followed in order the offender to be brought to trial. A prosecutor needed to know what kind of legal procedure he could bring for the offence with which he was concerned, and to which magistrate he should apply. Some legal procedures could involve ἐγγύη as the substitute of precautionary imprisonment which could be imposed on the alleged offender from the time of the initiation of the case until the trial itself. Legal procedures which could involve ἐγγύη were the following:

a. **Εἰσαγγελία**

From some unknown date, but probably after the reforms of Ephialtes 462/1 B.C., any person accused of an offence dealt with by the procedure of εἰσαγγελία before the boule had the right to provide sureties that he would appear for trial and so he could avoid precautionary imprisonment imposed by the boule. But if he did not provide sureties, then imprisonment until trial seems to have been the rule. However, persons accused of very serious offences (such as, treason, conspiracy against the democratic constitution, and misappropriation of public money) did not have the right to nominate sureties in order to avoid imprisonment but they had to be held in prison until their trial. The sureties had to be three persons from his own property class who guaranteed that the accused

man would appear for trial. They would suffer in the defendant's place the punishment due to him, if he failed to appear for trial and found guilty.

b. **Ἔνδειξις**

When a person was prosecuted by ἔνδειξις and until the day of his trial arrived there were three possibilities:

1) he could either be at liberty, or

2) be kept in custody, or

3) he could avoid arrest by providing sureties.

In an ἔνδειξις the arrest until trial seems to have been optional and the accused, if arrested, could avoid imprisonment by providing sureties for himself, only if the prosecutor accepted it.

c. **Φάσις**

A φάσις could be brought before the boule at least in the fifth and early in the fourth century. As far as the posibility of arrest and remand in custody until the trial is concerned the traditional view is that φάσις neither entailed arrest and custody nor otherwise the defendant was compelled to find sureties. But there is not evidence in support of these statements.

I think that in a case of φάσις arrest and custody of the accused as well as release on bail could be a possibility. It is hard, however, to determine the criteria used by either the boule or the other magistrates to whom φάσις cases were brought to order arrest and custody (and in this case release on bail was an option) or to accept the case and simply refer it to a court.

d. **Δίκη ἀφαιρέσεως**

When a person was wrongly seized as a slave by someone claiming to be the owner, he might be hauled into freedom (ἀφαιρεῖσθαι or ἐξαιρεῖσθαι εἰς ἐλευθερίαν) by a third party who claimed that the enslaved person was a freeman/woman. But if the alleged owner denied the validity of that "removal to

freedom" and still claimed to own the person in question as a slave he could bring a δίκη ἀφαιρέσεως-ἐξαιρέσεως against the *adsertor* who prevented seizure, for having wrongfully asserted the alleged slave's liberty. The charge was originally laid with the Polemarchos before whom the alleged slave had to provide sureties to guarantee his/her appearance for trial, ([Dem.] 59.40).

e. In cases also where a prosecutor had a reasonable suspicion that the accused would run away and evade trial, he could demand sureties for the accused man's appearance in court (the case of Kittos in Isokr. 17.14). Especially, in cases where the defendant was a metic or a privileged alien the prosecutor could take him by force before the Polemarchos and could then demand sureties for his appearance in court up to a sum related to the matter in dispute, otherwise the defendant was imprisoned until trial, (Isokr. 17.12).

2. Lessees of public property - Tax farmers.

Ἐγγυηταί were also required when the lessees of public property and persons who bought the right to collect a tax on behalf of the state made the agreement with the state. These ἐγγυηταί became public debtors themselves and responsible for the payment of the sum due, in the event that the debt was not paid off by the original debtor himself.

Persons also who had guaranteed the payment of a fine payable to the state became liable to the same penalties as the public debtors themselves. The law ([Dem.] 53.27) enacted that the property of persons who guaranteed the payment of a sum to the state, and failed to do so, should be confiscated. However, I have concluded that a guarantor's property was confiscated only when the debtor who failed to pay off his debt did not have any property which could be confiscated in order to provide the sum required for the payment of the debt, or even when he had some property which however was not enough to meet the debt.

3. Athenian Bankers.

Athenian bankers, who were almost without exception metics and did not have the right to own or put any claim on real property, made loans to Athenian citizens on the security of a piece of real property. These loan transactions involved (apart from the metic banker-lender and the borrower) other Athenian citizens who were called ἐγγυηταὶ τῆς τραπέζης and who would take legal action against the debtor who defaulted on repayment of the loan. They would foreclose on the security, would sell it and would return the amount of the loan to the metic banker.

However, when the loan transaction was between a metic banker and a metic person or a foreigner, then ἐγγυηταὶ seem also to be necessary. But these ἐγγυηταὶ should not be confused with the ἐγγυηταὶ τῆς τραπέζης. The latter would not be responsible themselves for the repayment of the loan, if the debtor failed to repay it (a piece of real property had been put down as security for the loan), while the former, in the failure of the debtor to repay the loan, were required to repay it themselves, (case of Apatourios, Dem. 33).

4. Arbitration proceedings.

Ἐγγυηταὶ seem also to be necessary in arbitration proceedings. The rules for an arbitration were written in a contract which arranged who was going to be the arbitrator(s), what the matter was, and who was surety for each party.

Each guarantor undertook the responsibility that the arbitrator's judgement would be binding for the person for whom he stood surety, and, if that person was the losing party, that he would carry out the award; otherwise, each of them undertook to pay any sum that might be awarded against the person for whom he was the guarantor.

5. Δίκη ἐγγύης.

The δίκη ἐγγύης was the legal means by which a guarantor was compelled to fulfil the ἐγγύη. It was brought against the guarantor by the winning party of a case who had not received what had been agreed when the ἐγγύη took place. The δίκη ἐγγύης was employed after an unsuccessful demand for the ἐγγύη had been made to the guarantor.

Ἐγγύη was the means for the attainment of an act at a future day. The guarantor undertook the responsibility that the person for whom he guaranteed would do something in the future (either that he would repay a loan, or that he would pay a fine or a debt to the state, or that he would conform to a decision taken in arbitration proceedings, or that he would appear for trial). If the person for whom the guarantor had guaranteed failed to fulfil his obligations, then the guarantor himself became liable and had to perform whatever the other person failed to do.

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