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Response to Lene Rubinstein

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RESPONSE TO LENE RUBINSTEIN

Methodologically the "dangerous liaisions" – as Lene Rubinstein originally entitled her paper – are very successful and fruitful ones. Like her excellent book about courtroom supporters, her paper, too, has combined the statistical methods of simple counting introduced long ago by her teacher Mogens Hansen, with deep insights into the legal problems and strategies of litigation in Athenian courts. Missing, in my opinion, are three legal aspects: first the historical development of the witness as a legal institution in Athens, second a brief look at other Greek cities (both, admittedly, out of the scope of the paper), and third a closer distinction of the witnesses' duties in the preliminary procedure on one side and in the main trial on the other.

I remember long discussions I had with Mogens Hansen many years ago about the question whether there were oath-helpers (Eideshelfer) in Athenian procedure. At that time I thought the Athenian witness was, genetically, very close to 'Eideshelfer'. Hansen denied this. Rubinstein, in her paper, gave an answer in the sense of her teacher and I am convinced by her arguments. Very cautiously she left aside homicide cases (n. 7). With good reason she concentrated on Athens in the time of the orators and gave precise answers to precisely formulated questions, avoiding speculation – as many scholars would call it – about the development of the Greek law of evidence from archaic to classical times. In my short response I cannot supply that either.

Following S.C. Humphreys, the paper starts by grouping Athenian witnesses into concentric circles. Humphreys regarded the witness very generally as a supporter of one or the other litigant. Stephen Todd was the first to differentiate along procedural lines, according to public and private actions. Rubinstein goes into much more detail. She refines Humphreys' concentric circles, replacing them by ten groups of witnesses. She also supplements Todd's rough differentiation by regarding the type of testimony within each type of action.

I think one can follow her first conclusion, that – as far as witnesses are concerned – friends, relatives, and private connections were not automatically perceived as the most obvious supporters of Athenian litigants. To be sure, we must not fall into the other extreme: of course the Athenians show a strong tendency to produce such persons as witnesses in court, especially in private cases.

The second conclusion also will stand: to carry weight with the judges, litigants did not present the widest possible range of personal supporters as witnesses, but

those who were held to have the best knowledge of the facts to be testified to. Here I raise my first point of criticism. As correctly stated in the paper, witnesses gave no information but just confirmed the wording of testimony formulated by one of the litigants. Accordingly, no next of kin gave "information that might not be universally available," nor were ex officio witnesses "to reveal what they knew." No witness gave more information than the litigant already had and supplied the court with. However, it was of greatest advantage for a litigant to produce as a witness that person who was most competent to know the fact to be testified to. The strategy was not to give the court the best and widest possible information, but to present the most competent person on one's side. By the example of Aischines' use of the general Phokion and the taxiarchos Termenides as witnesses for his bravery at sea, the paper shows how an orator was able to combine competent witnesses with citizens of the highest reputation, and also structured his speech to fit these *atechnoi pisteis*.

With the above mentioned more or less terminological correction, I agree with both main conclusions of the paper. So far, only social, historical, and philological aspects are touched. Whether in classical Athens a witness was a personal supporter or an outsider is not a legal question. However, to reach her conclusions Rubinstein deals with legal problems as well. In my opinion these most interesting parts of her paper are worth presenting as main conclusions also.

The most important legal points are, first, the purpose of *dike pseudomartyrion* and second, the constraint upon a witness unwilling to testify in court and the possible ways of avoiding this constraint. It is common opinion now that the *dike pseudomartyrion* gave the losers of an action the possibility to claim damages from witnesses who could be held responsible for their loss. Bonner's[1] opinion that the condemned witness had to pay the sum to the state is not correct. But what about the cases where a winner sues a witness, as in Lysias 10.22, 25, 30, Isocrates 18.54 and Isaeus 3.4? Here the concern is not personal compensation but satisfaction for lost reputation, personal revenge, or building a case for further litigation. According to Lys. 10.22, Dionysios had testified that Theomnestos threw away his shield – testimony normally subject to a *dike kakegorias*. Here, the *dike pseudomartyrion* was only a matter of honor.[2]

It is generally known that many potential witnesses were afraid to take the risk of a *dike pseudomartyrion*. The paper deals with this issue in detail. The easiest way for the witness to avoid testifying is to swear an oath, the *exomosia*, normally formulated as "not to know." This formula is exactly the opposite of the usual formulaic beginning of a testimony "to know something" (εἰδέναι), and, in my opinion, through this oath the witness does not deny knowledge, but the facts he is

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[1] R.J. Bonner, *Evidence in Athenian Courts* (1905) 92; followed by E. Berneker, *RE* XXIII/2 (1959) 1364-1375, s.v. ψευδομαρτυρίων δίκη.

[2] See G. Thür, Der Streit über den Status des Werkstättenleiters Milyas, *Demosthenes* ed. U. Schindel (1987) 412, 429.

asked to confirm by the litigant.[3] In German terminology these witnesses are called "Zufallszeugen" (witnesses by chance) as opposed to "Geschäftszeugen" (witnesses called to assist a legal act). The latter – referred to in Hypereides 4.12 – testify with the formula "to have been present at" (παραγενέσθαι). Dem. 46.6 exactly relates to these two types of witnesses: οἱ δέ γε νόμοι οὐ ταῦτα λέγουσιν, ἀλλ' ἃ ἂν εἰδῇ τις καὶ οἷς ἂν παραγένηται πραττομένοις, ταῦτα μαρτυρεῖν κελεύουσιν ("The laws do not say this, but ordain that a man may testify to what he knows or to the matter at the doing of which he was present"). So, I think the correct formula of an *exomosia* of a παραγενέσθαι-testimony must have been "μὴ παραγενέσθαι".

Once he swore an *exomosia* – as we will see, during the preliminary procedures, the *anakrisis* or the public *diaita* – the witness was free from any responsibility. Committing perjury had no legal but, according the general remarks of David Cohen in this volume,[4] severe social sanctions.

A witness summoned by a litigant and who had not sworn the *exomosia* was obliged to testify in court. This involved two steps of constraint: first to bring a witness before the magistrate or the public *diatetes*, and second to bring him into court. In private actions there were two indirect measures of constraint, a *dike lipomartyriou* and a *dike blabes* (Dem. 49.19-20).[5]

In Athenian sources on this subject we have only a few allusions in the speeches; from outside Athens statutes are preserved. In the treaty between Stymphalos in Arcadia and Demetrias-Sikyon from 302-300 B.C., lines 10-13 provide that a summoned witness had to pay the whole sum of the lawsuit to the injured party if he did not appear in court, unless he had sworn the *apomosia* – corresponding to the Athenian *exomosia* – before the magistrate: ὀμοσάμενος ἐπὶ τᾶι ἀρχᾶι τᾶι τὰς δίκας γραφούσας τὸν νόμιμον ὅρκον μὴ ἴσμεν τὰν μαρτυρίαν ("having sworn before the magistrate who has registered the action the legitimate oath not to know the testimony").[6] Doubtful is an oath provision in the Thasian law on the wine trade (c. 480 B.C.) line 8/9: πιερὶ τõ οἴνο νηϊδίης ... ὅρκος ("oath not to know about the wine"); the law forbids swearing this oath.[7]

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[3] See G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens* (1977) 131, 317.

[4] See his section III about the religious background of Athenian society.

[5] Briefly mentioned in Rubinstein n. 20. *Dike lipomartyriou* (Dem. 49.19) seems to be against a witness who failed to appear before the *diaitetes* (but see below, n. 10). A *blabe* (Dem. 49.20; cf. also 29.15) can occur only after the party who had summoned the witness has lost his case in the *dikasterion*, see A.R.W. Harrison, *The Law of Athens* II (1971) 143f.

[6] See G. Thür and H. Taeuber, *Prozeßrechtliche Inschriften der griechischen Poleis: Arkadien* (1994) 239f.

[7] H.W. Pleket, *Epigraphica* I (1964) no. 1. D.C. Gofas, *BCH* 95, 1971, 245-57 has good arguments for a purgatory oath to be sworn by the defendant. Nevertheless, prohibiting an oath "not to know" seems to be more appropriate to witnesses whose special duty is to keep knowledge of something (probably referred to in the previous lines now broken away). I thank Prof. Velissaropoulos for the reference.

The paper points to Dem. 45.60 as an example that in Athens *exomosia* was also sworn before the court. The story starts at section 57: Apollodoros reproaches Stephanos with having stolen a document during the last session of the public *diaita* against Phormio, when he, Apollodoros, was absent to execute an *exomosia* (as usual in the pretrial stage). In the *dike pseudomartyrion* against Stephanos, Apollodoros summoned some friends of Phormio to testify to the theft committed by Stephanos. As expected, these people did not testify against Stephanos, but swore the *exomosia*. As I will show in more detail elsewhere,[8] most probably they also had sworn it in the pretrial stage, and in this short passage Apollodoros was only creating artificial suspense. From the same speech (45.48) we learn that administering an *exomosia* took a considerable amount of time. Moreover, *Ath. Pol.* (55.5; cf. 7.1) mentions that, as a particularly celebrated oath, the *exomosia* was sworn on the stone before the Stoa of the archon basileus.[9] Thus, an altar in the court room (Rubinstein, n. 15) is of no help. From a rhetorical aspect, it is completely out of the question that because of this totally insignificant charge that Stephanos stole the document, Apollodoros would have departed together with the witnesses to the stone by the Stoa of the basileus, and left the jurors behind with nothing to do. Even an oath ceremony before the court, assuming it would have been allowed, would have caused a longer interruption and thereby destroyed the logical progress of the rhetorically well constructed story (45.57-62). My conclusion is that witnesses having sworn the *exomosia* must appear at the court in the same way as those willing to confirm the *martyria*. Presumably, Apollodoros wanted to show the judges personally what kind of "friends and associates" (45.60) Phormion had. The whole scene is one of sophisticated manoeuvres by Apollodoros; his uncertainty (45.58) is fabricated. Especially here a clear distinction between preliminary stage and main trial is necessary.

At the end I want to stress the most important legal result of the paper: the indirect constraint on a witness by a compensation claim did not work in public actions, and therefore the institution of *kleteusis* was most probably introduced only for those cases.[10] This is a small but important new insight in the otherwise well known Athenian law of procedure.

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[8] The role of the witness in Athenian law, *The Cambridge Companion to Ancient Greek Law* eds. D. Cohen and M. Gagarin (in press), where also Isai. 9.18-19 and Lyk. 1.20 (both mentioned in the paper, n. 15) will be discussed.

[9] See P.J. Rhodes, *A Commentary on the Aristotelian* Athenaion Politeia (1981; [2]1993) 136, 620.

[10] The only private case, Dem. 32.30, remains obscure; "to serve a summons on someone who is abroad" (Rubinstein, n. 22) one can hardly say about Protos as a "witness" (30.29). In Dem. 18.150 κλητεύειν is the activity of κλητῆρες, the witnesses (cf. ὁ εἰδώς) of a summons, cf. Harrison, *l.c.* 85. H.J. Wolff, *Die attische Paragraphe* (1966) 47 (with further references, n. 61) seems to be correct that in this private case (Dem. 32.30) κλητεύειν is a step necessary to *dike lipomartyriou*.