Evidence and Proof in Ancient Greece

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Edited by

Chris Carey, Mike Edwards
and Brenda Griffith-Williams

Cambridge
Scholars
Publishing

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This book first published 2024

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-5275-7478-4
ISBN (13): 978-1-5275-7478-6

CONTENTS

List of Contributors 1

Introduction 3

Chapter 1 8
Prehistory and History of the *Diamartyria*
Alberto Maffi

Chapter 2 16
Oral and Written Evidence in the Speeches of Isaeus
Mike Edwards

Chapter 3 28
Dike Pseudomartyrion: A Remedy and Measure for Retrial?
Eleni Volonaki

Chapter 4 40
Use and Abuse of Evidence in the Herms and Mysteries Cases
Maria S. Youni

Chapter 5 55
Reshuffling the Evidence: A Reading of Demosthenes 54 *Against Conon*
Vassilis Lentakis

Chapter 6 64
The Curious Case *Against Timarchus*: Rhetoric and Prejudice
Kostas Kapparis

Chapter 7 79
Witness Statements in the Speeches of Aeschines: The Evidence
of the Manuscript Tradition
Dóra Solti and Athanasios Efstathiou

Chapter 8 88
"Knowing Witnesses" in Late Fifth-Century Prose
Jurgen Gatt

Chapter 9 104
Calling for Witnesses: Aspects of Role Playing and Metatheatre in Aristophanes' *Frogs*
Andreas Fountoulakis

Chapter 10 119
Thoughts on the Socratic Oath "*μά/νή τὸν κύνα*"
Flora P. Manakidou

Chapter 11 133
The Dicast as Witness in Athenian Trials
Chris Carey

Chapter 12 145
Witness Testimony in Assault Cases: Questions of Fact and Construction of Ethos
Ifigeneia Giannadaki

Chapter 13 159
Witnesses, Evidence and Rhetoric in Dem. 57 *Appeal Against Eubulides*
Kostas Apostolakis

Chapter 14 172
The Evidential Value of Religious Observance in Athenian Inheritance Disputes
Brenda Griffith-Williams

Chapter 15 184
The Ultimate Evidence: Hyperides in Defence of Phryne: Notes for the New Critical Edition of the Fragments
László Horváth

Chapter 16 198
Proof, Truth and Justice in the *Epilogoi* of Attic Forensic Speeches
Christos Kremmydas

Chapter 17 217
Witnesses and Narratives of Displacement in Attic Drama and Oratory
Adele C. Scafuro

Chapter 18 235
Oath and Torture in the "Doloneia"
David Mirhady

Chapter 19 248
Witness of Virtue: The Epigraphic Evidence of the Hellenistic Honorific Decrees
Antiopi Argyriou-Casmeridis

Chapter 20 260
Literature as Evidence: The Case of Herodotus
Christopher Pelling

Chapter 21 277
Nachor the False Witness: The Greek Metaphrase of Aristides' Lost *Apology* in the Novel of *Barlaam and Josaphat* and its Old French Version (Cod. Athon. Iviron 463)
Emese Egedi-Kovács

Bibliography 293

Indices 332

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INTRODUCTION

The notion of proof (in the form of physical evidence, witnesses, corroborative information or logical demonstration) is fundamental to all attempts to convince. Communication of any sort, including and perhaps especially persuasion, is at heart a collaborative process, involving the active engagement of the recipient in the construction of meaning. Successful communication (minimally) requires the hearer(s) to accept the truth or at least plausibility of what is said or implied and the authority of the speaker as a source of information and/or guidance and advice. Where not already a given, i.e. where the speaker's credibility is unknown or contested, or where the facts are uncertain or disputed, those conditions must be created by the speaker or writer, if the recipient is to be persuaded. Even in an age of polarized political positions and social media capable of creating intellectual space seemingly impenetrable to alternative points of view, there is always ultimately a need to persuade the uncommitted or to reinforce the committed. And the further the receiver is in time or space or experience from the events or information provided, the greater the need for proof. This applies to arenas both formal and informal, whether they are a polite tea-time conversation or a lively debate in a pub, formal institutional contexts such as legal hearings, academic texts in Science or the Humanities, or narrative genres such as historiography, though in general, the more formal the arena, the greater the need for proof, since reputation, social or financial status, liberty or even (in some cultures) life may rest on the reaction of the recipient(s). The modes of proof possible or required vary from culture to culture and (within a given culture) from context to context. So too does the notion of what constitutes satisfactory proof. This volume assembles a range of papers from experts in ancient Greek culture and literature to address the theme of proof from different angles. Much of the focus is on the orators, and in particular on the witness. This is perhaps unavoidable. The diversity of the means of proof available and the consequent diversity of deployment in formal public contexts, already fully theorized by the fourth century B.C., makes this a particularly challenging and rewarding area of study. And the nature of proof and the role of the witness have been subject to ongoing debate, with one influential school of thought maintaining that questions of fact, and consequently the role of witnesses and proof of fact, are peripheral to the decision-making process.

But demonstration through evidence and argument and the language of proof are not peculiar to the law courts. They extend both to other oratorical forms and contexts, and to other genres, prose and verse, and accordingly several papers in the collection address other literary genres.

It is common in introductions to collective volumes to emphasize the overall intellectual cohesion and intersecting complementarity of the chapters included. The cohesion of this volume resides solely in the choice of theme. There is, designedly, no governing perspective. The aim of the collection is not to tell a coherent story or to reach a synthesis, if synthesis (whether between different procedures, processes and practitioners or between competing modern approaches) were possible, but to explore some areas of interest, illustrate some of the lines of enquiry available, to shed light on the topic from different angles and to stimulate further research. The strength of the book resides in this diversity.

The volume has two sections, divided on broad thematic lines:

Section A

The broad theme of this section is the role played by witnesses and proof in different contexts, primarily but not exclusively the Athenian courts. The section opens with a chapter by Alberto Maffi, "Prehistory and history of the *diamartyria*", which discusses the development and continuing role of the process of *diamartyria* against the background of modern reconstructions and argues that it was and remained a means of proof comparable with the role of the witness in the procedure of *dikadden kata maityra* at Gortyn. The developmental focus continues in Mike Edwards' chapter, "Oral and written evidence in the speeches of Isaeus", which revisits the question of the move from oral to written testimony in legal hearings. Procedure is also the subject of Eleni Volonaki's chapter, "*Dike pseudomartyrion*: a remedy and measure for retrial?", which deals with the action for false testimony. With Maria Youni, "Use and abuse of evidence in the Herms and Mysteries Cases", we turn to case studies; her chapter discusses the procedure of *menysis* in gathering evidence in the Mysteries case and the visible strain placed on the legal system by the crisis. This focus continues in the chapters by Vassilis Lentakis, "Reshuffling the evidence: a reading of Demosthenes 54 *Against Conon*", which explores the manipulation of the evidence both by the accuser and the defendant in Demosthenes' speech *Against Conon*; and Kostas Kapparis, "The curious case *Against Timarchus*: rhetoric and prejudice", which demonstrates Aeschines' skill in conjuring a successful prosecution in the absence of solid supporting evidence.

The speeches which survive carry titles indicating the nature of the documents presented as evidence in court. Some include what claim to be the documents themselves, though many are clearly later interpolations. The chapter by Dóra Solti and Athanasios Efstathiou, "Witness statements in the speeches of Aeschines: the evidence of the manuscript tradition", seeks to identify the source and date of the witness statements inserted into the corpus of Aeschines. Jurgen Gatt's chapter, ""Knowing witnesses" in late fifth-century prose", expands the focus to examine judicial practice within a larger cultural and generic perspective. He discusses the judicial role of witnesses against the background of recent sociopolitical approaches to the phenomenon, focusing specifically on the speeches of Antiphon in comparison with other (non-forensic) fifth century textual sources.

This larger generic perspective continues in Andreas Fountoulakis' chapter. The Athenian courts make their presence felt in other Attic genres, notably comedy. In "Calling for witnesses: aspects of role playing and metatheatre in Aristophanes' *Frogs*", Fountoulakis examines Aristophanes' parodic use of the process of calling passers-by to witness as a means of exploring the nature and limitations of theatrical fiction. Witnesses are of course not the only source of proof, in or out of court. Oaths played a prominent role in the Athenian system, as they did from our earliest Greek texts and continued to do. The section finishes with a celebrated non-judicial oath, that of Socrates, which forms the subject of Flora Manakidou's chapter, "Thoughts on the Socratic oath: μά/νή τὸν κύνα".

Section B

The broad theme of this section is identity, explored from different directions: evidence of identity, the identity of witnesses and the reasons for the choice/use of different kinds of witness or evidence, actual and metaphorical. The first chapter, by Chris Carey, "The *dikast* as witness in Athenian trials", deals with a minor item in the logographer's toolbox, the metaphorical presentation of the judges as witnesses to elements in the litigant's case. This is followed by two papers which discuss the strategic handling of the witness testimony at the logographer's disposal, each focused on a different kind of case: Ifigeneia Giannadaki in "Witness testimony in assault cases: questions of fact and construction of ethos" addresses the deployment of testimony in two cases of assault, Demosthenes 54 and 21, while Kostas Apostolakis in "Witnesses, evidence and rhetoric in Dem. 57 *Appeal against Eubulides*" examines the use of testimony to support and to sideline elements in the speaker's case. With Brenda Griffith-Williams' "The evidential value of religious observance in Athenian

inheritance disputes" the focus shifts from witness testimony to other kinds of proof. Arguments made in support of inheritance claims based on religious activity shared with the *de cuius* are often seen simply as emotional appeals; while not dismissing this dimension, she argues that evidence for such activity serves as a useful indicator of status, identity and relationships. László Horváth's chapter, "The ultimate evidence: Hyperides *In Defence of Phryne*: notes for the new critical edition of the fragments", addresses one of the most notorious lost speeches of fourth-century Athens; after establishing the nature of the prosecution brought against Phryne, he examines the historical basis for some of the statements and arguments attributed to Hyperides in later sources. The focus widens in Christos Kremmydas' chapter, "Proof, truth and justice in the *epilogoi* of Attic forensic speeches", from individual speeches to a broad discussion of the role played by references to "artless proofs" and references to truth and justice in the closing section of speeches written for the courts. The focus broadens still further in Adele Scafuro's "Witnesses and narratives of displacement in Attic drama and oratory". As noted above, courtroom practices found in the orators also influence other generic contexts. Scafuro's chapter compares the deployment of multiple testimonies identifying individuals in recognition scenes in tragedy and New Comedy with techniques used by the orators. This focus on other genres continues in David Mirhady's "Oath and torture in the "Doloneia"", which explores the dynamics of the encounter between Odysseus and Diomedes with Dolon in the *Iliad*. Mirhady finds in the incident elements of the role played by status and identity in the use of oaths and torture which we later find in forensic contexts.

The focus on non-forensic sources continues in the last three chapters in the collection. The chapter by Antiopi Argyriou-Casmeridis, "Witness of virtue: the epigraphic evidence of Hellenistic honorific decrees", addresses the practice and terminology of testifying used by envoys sent to foreign communities to inform those communities that one or more of their citizens had been publicly praised in the envoys' community and elevated into public *paradeigmata* of *arete*. Judges in court are not the only audience who expect evidence. The historian too must convince his hearers/readers, and Chris Pelling's chapter, "Literature as evidence: the case of Herodotus", looks at the way in which Herodotus uses literary sources. He finds that Herodotus uses poetic sources only when more reliable conduits for the truth were unavailable, and speculates that poetry was possibly too close, with the risk that use of poetry as a source might reduce *historie* to a pedestrian equivalent. Finally, Emese Egedi-Kovács in "Nachor the false witness: the Greek metaphrase of Aristides' lost *Apology* in the novel of

Barlaam and Josaphat and its Old French version (Cod. Athon. Iviron 463)" again looks at the use of literary sources, in this case the use of Aristides' *Apology* in the fictional saint's biography; she also includes previously unpublished Greek and Old French versions of the apology preserved in the Iviron codex.

The editors wish to thank the Department of Greek and Latin at UCL and the UCL Leventis Fund for their support. Also, Katie McHugh for her help with the indexing, and the staff at CSP for seeing the volume through to publication.

CHAPTER 1

PREHISTORY AND HISTORY OF THE *DIAMARTYRIA*

ALBERTO MAFFI

In an article of 1927, later republished (Gernet 1955), Louis Gernet re-examined the nature and function of an institution which, in the fourth century, was used above all as a means available to the legitimate descendant to oppose the *epidikasia* of an inheritance by a collateral of the deceased. It is in this function that we encounter the *diamartyria* in orations 2, 3, 4, 5 and 6 of Isaeus and in Dem. 44, *Against Leochares*.[1] I do not intend here to re-examine all the complicated questions related to the functioning of *diamartyria* (in particular as regards its relationship with the *paragraphe*) in the fourth-century Attic documentation. Instead, I am interested in discussing the validity of Gernet's opinion on the original configuration of *diamartyria*, which forms the core of his article.

First of all, it is necessary to recall briefly what *diamartyria* is and how it worked in the Attic procedure of the fourth century with particular regard to inheritance disputes. Through the *diamartyria* a witness (or possibly several witnesses) declares that the inheritance cannot be claimed through *lexis klerou* (*me epidikon einai ton kleron*) because there is a legitimate descendant who has the right to possess the inheritance without the need for authorization by the public authority. By virtue of this testimony, the request of the collateral was cancelled (*diegraphe*). However, the latter has the right to accuse the witness of false witnessing by means of *episkepsis* and to bring a *dike pseudomartyrion* accordingly. If he wins the case, scholars are divided on the question whether he should submit a new request for *epidikasia*, or whether he had to resume the procedure interrupted by

[1] The *diamartyria* also recurs outside the topic of succession, in particular in Isocrates 18 and in Lysias 23. I will not deal with these sources here.

diamartyria. If he loses the case, he will not be able to submit a new request for *epidikasia*.

As observed above, Gernet proposes a historical explanation of the singular peculiarities of the *diamartyria* regime, in particular of the fact that testimony in such cases produces the automatic annulment of the inheritance claim made by the collateral. Gernet starts from an observation. In the Athenian procedural law of the fourth century (and probably as early as the fifth century) any witness can be accused of false testimony, giving rise, in the event of the applicant's victory, to compensation for damages.[2] Gernet therefore asks: why give *diamartyria* a binding efficacy for the outcome of the procedure (contrary to what happens for any other kind of testimony) and at the same time allow its effects to be annulled by means of the *dike pseudomartyrion*? Furthermore, while as a rule the *episkepsis* against the false witness is formulated before the people's court votes, there is no verdict in this case. Therefore, observes Gernet, "on a l'impression ... qu'un droit récent, et par des moyens plus ou moins récents, a fortement réagi pour contenir l'effet énergique d'une procédure traditionnelle".[3] On the basis of this observation, Gernet formulates his hypothesis on the origin of *diamartyria*: originally it was not a question of judicial witnesses, but of the witnesses who assisted the legitimate descendant heir at the moment in which he entered into possession of the hereditary assets or defended them against any attempts to take them away. That is, it is necessary to refer the process to a remote era, in which someone who claimed the inheritance as a collateral relative did not yet have recourse to formal adjudication by a court through *lexis klerou*, but entered personally into the possession of the hereditary assets. The direct descendant heir reacted to the collateral's taking possession through *exagoge* (that is by the formal process of escorting the rival from the property)[4] by being assisted by an adequate number of witnesses. Or, if it was the collateral heir that had taken possession of the hereditary assets (which could still happen in the fourth century, as shown by Dem. 44.32),[5] the legitimate descendant heir could remove them from his possession; if the collateral tried to prevent him, he could react with force or, at least starting with Solon, with the *dike exoules*.[6] When the system of claiming inheritance through *lexis klerou* was introduced (not before Solon, according to Gernet 1955, 88), the witnesses,

[2] In inheritance disputes, the conviction of a witness would even have given rise to the repetition of the trial: see Gernet 1955, 87 n. 3; Behrend 1975.
[3] Gernet 1955, 89.
[4] For *exagoge*, see in general Harrison 1968, 219.
[5] See Gernet's commentary on the Belles Lettres edition of the oration, 140 n. 1.
[6] For the *dike exoules*, see in general Harrison 1968, 217-221.

who originally assisted the direct descendant heir in the exercise of self-help, became judicial witnesses whose role was to render the collateral's claim ineffective. Consequently, the only way to counter the testimony in favour of the direct descendant heir was recognized in the *dike pseudomartyrion*.[7] Gernet then concludes his reconstruction of the origins of *diamartyria* by proposing the following definition: "la *diamartyria* est un interdit privé, extra-judiciaire, et qui consiste dans une *protestation* collective où les 'témoins' assistent l'intéressé et consacrent une situation juridique".[8] Gernet therefore starts from the assumption that there was an era in which "les droits ne sont pas directement sujets à une appréciation judiciaire".[9] At that time the witnesses would have served to make the affirmed right "objective" by making the resistance of the one who was damaged by the affirmation of that right socially unacceptable. Gernet was probably aware that the transition from witnesses of an act of self-help to judicial witnesses was not easy to explain, and therefore goes in search of other clues that allow us better to represent what he defines as "les prolongements de la *diamartyria*".[10] First of all, he observes that "instrumental" witnesses, whose presence is required for the validity of a specific private act, can then be called, if a dispute arises, to testify in court. Then he adds: "nous savons du reste qu'à une époque ancienne, ils peuvent se présenter sous l'aspect de cojureurs".[11] Also in this case the testimony has a purely formal efficacy, determining the outcome of the case which is decided by the number of "cojureurs". Finally, Gernet observes that, despite the fact that apparently the *diamartyria* now performs the function of a means of proof (therefore on a par with other types of judicial testimony), in reality it does not serve to prove the qualification of a legitimate descendant of those who make use of *diamartyria* itself, but its function is still that of "interdire un trouble",[12] deriving from the *lexis klerou* of the collateral. Gernet's thesis met with considerable success. I will limit myself here to mentioning two of the most authoritative scholars who praised it, H. J. Wolff and A. R. W. Harrison. In particular, Wolff (1966) proposes an interpretation of *diamartyria* in succession matters which is in some way a variant of Gernet's thesis. Wolff argues, with Harrison's (1971, 128) approval, that the *diamartyria* produces its singular paralysing effect on the

[7] A parallel development also occurred with regard to the *dike exoules*: see Gernet 1955, 93, 97.
[8] Gernet 1955, 98.
[9] Gernet 1955, 91.
[10] Gernet 1955, 98.
[11] Gernet 1955, 99.
[12] Gernet 1955, 101.

lexis klerou of a collateral because the request for the allocation of the inheritance (*epidikasia*) is an extrajudicial procedure, in which the magistrate is called not to perform a judging function, but to make an administrative decision.

In itself, Gernet's reconstruction appears, as always happens to those who read the pages of this scholar, fascinating and, at first glance, convincing. However, Talamanca (2017, 28 n. 62) has already highlighted its weakness: the difficulty of explaining the transition from "interdit privé" to "means aimed at asserting the inadmissibility of the dike". Starting from this last observation, one wonders whether the original efficacy of *diamartyria* really penetrated the judicial sphere from the outside, or whether it should be placed within it from the very beginning. Gernet had considered the "cojureurs", figures who play an early role in the process, as an "extension" of the original *diamartyria*. But the "cojureurs" are certainly a very ancient institution, whose nature does not change from the moment they become judicial witnesses, unlike what happens, according to Gernet himself, with the witnesses of *diamartyria*. It should also be noted that the "cojureurs" by definition swear together with the party whose reasons they confirm. Now, the one who presents the *diamartyria* to counteract the *epidikasia* of a collateral of the deceased does not appear to be sworn in (just as apparently the witness in an Athenian trial does not swear). And above all, according to the dominant doctrine, the one who makes use of *diamartyria* is not party to a *diadikasia* deriving from a *lexis klerou* opposed to that brought by the collateral. For this reason, it is argued that it is an out-of-court act, even if it has the effect of extinguishing the inheritance claim brought by the collateral. But the most cogent objection to Gernet's thesis seems to me to be formulated in this way. It can be accepted for the sake of argument (even in the absence of sources) that the *lexis klerou*, i.e. the possibility of claiming the inheritance by a collateral, was introduced by a legislative innovation (for convenience attributable to Solon); and that, precisely by virtue of this innovation, the witnesses of the primitive *diamartyria* have acquired a new function within the framework of the new procedure. But it is not explained why in this transformation their testimony retains a decisive efficacy for the affirmation of the right of the descendant, unlike what happens for the testimony of ordinary judicial witnesses, which never determine the outcome of the dispute. It is not explained, that is, why, despite the fact that the archon is invested with the decision on the allocation of the inheritance, the confrontation between the parties is removed from the decision of the court by virtue of a testimony. Nor does it seem to me that the thesis according to which it is an "administrative" and not a judicial procedure, as Wolff argued, provides a more convincing explanation. In

fact, even in the case of *diamartyria,* the intervention is still a testimony, as confirmed by the use of the *dike pseudomartyrion* to contest it. It does not therefore seem to me that we can postulate a different effectiveness of a judicial testimony if the procedure aimed at obtaining the allocation of the inheritance is defined as "administrative".

In 1938 F. Lämmli had insisted on the character of *diamartyria* as a formal means of proof, therefore binding for the magistrate (pp. 154-155). Lämmli's opinion was fundamentally ignored (perhaps because, against the dominant doctrine that considers it an out-of-court act, he considered *diamartyria* a testimony).[13] Now, if we keep in mind the provision of the so-called Code of Gortyn (IC IV 72, col. XI 26-31), which contemplates, in the cases established by law, the mode of judgment *dikadden kata maityra* ("to decide according to a witness"), it is possible to advance the hypothesis that even in Athens the direct descendant of the deceased could successfully oppose the inheritance claim of a collateral of the deceased by presenting a witness who certified the qualification of the descendant. This is obviously an analogical reasoning that cannot be substantiated with historically convergent or even superimposable data. Meanwhile, in Gortyn's law there is no trace of a procedure similar to Attic *epidikasia*. And as far as Athens is concerned, we are not able to say whether, before Solon, there was a rule (written or oral) which, similarly to the norm of the Code just mentioned, provided for the presentation of a binding testimony on the judge. Of the situation preceding the supposed creation of the *lexis klerou* the principle remains firm, presumably recognized at the Panhellenic level (as it will later be in Rome with regard to the *sui*), that direct descendants can take possession of the hereditary assets (a principle which, moreover, Gernet himself admits).[14] But, as we have seen, this principle does not explain the binding effectiveness of testimony in favour of the legitimate descendant. We must therefore go back to an era prior to the establishment of the people's court, when the formal judicial power lay with the magistrate.[15] And consequently we must suppose that the decision on the *lexis klerou* by a collateral opposed to the right asserted by a direct descendant was left to the archon. A law (we do not know whether written or oral) allowed the legitimate descendant, who wanted to have his right to inheritance recognized, to present a binding testimony aimed at excluding the claim of the collateral. We must therefore assume the existence also in Athens of a

[13] "Jede *Diamartyria* ist in erster Linie ein Zeugnis … Erste Voraussetzung jeder *Diamartyria* ist also das *martyrein*: es darf sich nicht um eine blosse Erklärung *me eisagogimon einai* handeln" (Lämmli 1938, 156).
[14] Gernet 1955, 90-91.
[15] See *AP* 3.5 with the commentary by Rhodes 1981, 106.

mode of judgment equivalent to the *dikadden kata maityra* in Gortyn. That apparently the testimony does not aim to affirm the status of legitimate heir of the descendant is justified by the fact that he was not required to obtain the allocation of the inheritance from the archon, also because he was normally already in possession of the inherited assets. However, it is clear that victory in the *dike pseudomartyrion* did not give the collateral, who challenged the testimony, recognition of his right to inherit, but would indirectly demonstrate that the one who presented the *diamartyria* could not be considered a legitimate descendant of the deceased (in this sense the procedure exercised the function of controlling civil status that Paoli attributed to *diamartyria*).[16] It therefore appears more plausible, even if not demonstrable, that the binding effect of the classical *diamartyria* is to be linked to a form of judgment bound by testimony, precisely as we see in the Gortyn Code. In the Code there is still no trace of the possibility of challenging a testimony as false (although the Code is certainly dated long after the alleged introduction of the *dike pseudomartyrion* by Charondas).[17] However, as Gernet himself notes,[18] even in Athens there are no traces of the *dike pseudomartyrion* before the end of the fifth century. Evidently, a compromise was sought between the ancient binding effectiveness of the testimony and the need to submit it to a veracity check in the new regime of free evaluation of evidence by the people's court. For what reason the Athenians wanted to maintain, at least in the first instance, the ancient binding effect is not easy to conjecture. Perhaps because the legitimate descendant did not need to prove his qualification except to counter the claim of a collateral.[19] On the other hand, it is not even entirely correct that the *diamartyria* has only negative content (*me epidikon* ...), as argued by Gernet.[20] In fact, the testimony is given in the interest of the legitimate descendant, so it indirectly proves his qualification. In the event of defeat in the *dike pseudomartyrion* of the one who gave the testimony, the *epidikasia* of the collateral, rendered ineffective by the *diamartyria*, will not only be again proposed, but it will be proved that the party in whose interest the testimony was given is not a descendant of the deceased.

The thesis that I support implies that from the very beginning the *diamartyria* was an institution of a judicial nature, that is, substantially a means of proof (as is precisely the witness in the *dikadden kata maityra*). This implies that even in fourth-century inheritance cases it retains the

[16] Paoli 1933, 143ff.
[17] For Charondas and *dike pseudomartyrion*, see Aristotle *Pol*. 1274b.
[18] Gernet 1955, 88.
[19] In this sense also Gernet 1955, 100.
[20] Gernet 1955, 101.

nature of a means of proof. Thus, the procedure in question, contrary to what Wolff, followed by Harrison, argued, was a judicial procedure.[21] This is confirmed by the possibility of challenging the *diamartyria* through the *dike pseudomartyrion*. Despite the difficulty of reconstructing the phases of the procedure, I believe that the archon himself will have had to pronounce formally in accordance with the testimony, denying the admissibility of the *lexis* by the collateral: we are therefore faced with a case, completely exceptional, in which the archon keeps the jurisdictional power he was vested with before the creation of the people's court. But in order to present a witness, the legitimate descendant must also have appeared in court and taken an active part in the *anakrisis*, at least in order to affirm his right.[22] Consequently, the *episkepsis* on the part of the collateral against the witness who provides the *diamartyria* will precede the statement of the archon which determines the *diagraphe* of his *lexis klerou*. It is no coincidence that no deadline has been established by the sources for presenting the *episkepsis*.[23]

On the other hand, there is at least one case in which the *diamartyria* is given in favour of a party who, while claiming to be a descendant of the deceased, has also presented the *lexis klerou* in opposition to that of the collateral, and is therefore a party in a proceeding defined by the speaker himself as *diadikasia* (Dem. 44.50).[24] This is Dem. 44, a *dike pseudomartyrion* by which Leochares' *diamartyria* is challenged. Therefore, in this case it is necessary to postulate a ruling by the archon which presumably produces the loss of the claims of both parties. In §7 the speaker invites the judges to vote to award the *kleros*. Now, the *dike pseudomartyrion* cannot reallocate the inheritance. So the speaker probably alludes to the fact that, in the event of victory, Leostratus, that is, the party who presented the testimony given by his son Leochares, will be able to keep possession of the inheritance. If, on the other hand, it is the opponent, the son of Aristodemus, collateral of the deceased Archiades, who is the winner, he will be able to resubmit his request for the assignment of the inheritance.[25] Now, it is true that the case discussed in Dem. 44 presents characteristics that are in many respects

[21] See Behrend's critique (1975, 139 n. 34) of Wolff.

[22] See the description of the various initiatives of the parties in Isaeus 6.

[23] The proposal of U. E. Paoli (1933, 165-166 n. 2) is not documented.

[24] A similar situation almost certainly occurs also in Isae. 3 (see the commentary by Paoli 1935, 6ff.; less convinced is Wyse 1904, 288) and, in my opinion, also with reference to the *echinos* (*SEG* XXXVI 296) containing a *diamartyria* (*contra* Wallace 2001, according to whom it is not a *dike pseudomartyrion*).

[25] I leave aside here the question, which I mentioned above, whether it is the previous process, interrupted by the *diamartyria*, which continues, or whether a new *lexis klerou* had to be presented. See Paoli 1933, 166; Wolff 1966, 131 n. 55.

unusual. However, it seems to me undeniable that Leostratus, while proclaiming himself legitimate heir and despite being in possession of the hereditary assets (Dem. 44.27-32), on the one hand presents the *lexis klerou* (Dem. 44.40) and, on the other hand, resorts to the binding efficacy of the *diamartyria*. The *diamartyria* therefore appears here as a testimony presented by a party to the dispute, not an out-of-court remedy. Furthermore, in the significant passage of Dem. 44.57-59, *diamartyria* is alluded to as a judicial remedy. The *agones* in which the *diamartyria* is used are considered the most unjust and most worthy of reproach (§57). Recourse to *diamartyria* is allowed only if there is no other way of obtaining justice with regard to the issues involved in the dispute (§57). But the legislator did not impose it on the opposing parties (*antidikoi*) (§58). Finally, it is true that (as confirmed by §59) the *diamartyria* bars access to the court; but can we conceive that a trial (an *agon*, as we read here) ends with an act by one of the parties? It is therefore confirmed that, in cases of *diamartyria,* exceptionally, it is a decision of the magistrate to close the dispute (at least temporarily).

CHAPTER 2

ORAL AND WRITTEN EVIDENCE IN THE SPEECHES OF ISAEUS

MIKE EDWARDS

There is general agreement among scholars of Athenian law that at some time in the early fourth century a change took place in the practice of calling witnesses at trials. Before the change, witnesses gave their evidence orally, with the opportunity to be questioned and cross-examined, but from this point on witness statements were read out by the court clerk, and the witnesses themselves simply confirmed that this was their evidence.[1] When this change occurred has been the matter of some debate, most scholars accepting a date of "around 380", or more precisely 378/7.[2] The purpose of this chapter is to revisit this old chestnut, with specific reference to the evidence for it in the corpus of the speeches of Isaeus. In doing so, we find that the evidence for a change at this time is, to say the least, rather flimsy.

We start, however, not with Isaeus, but with his most famous pupil.[3] In his *Against Stephanus I* Demosthenes makes the following statement:

> First of all, whenever he tries to say this, that he's not accountable for the whole deposition, reflect that the very reason why the law bids the witness to give testimony in written form is to prevent him from subtracting or adding to the items that have been put in writing. Accordingly, it was *then* that he should have ordered them to erase the particular items that soon he'll say he has not witnessed—and not order them erased *now*, when those items are part of the deposition, should he have the impudence to repudiate them. (Demosthenes 45.44; trans. Scafuro, her emphasis)

[1] As MacDowell 1978, 242-243.
[2] As proposed by Calhoun 1919. MacDowell (ibid.) considers that this "cannot be proved". For "around 380", see, e.g., Todd 1993, 336; Phillips 2013, 38.
[3] For the tradition that Isaeus was Demosthenes' teacher, see Edwards 2007, 2.

The "*then*" refers to the arbitration process (*diaita*) which preceded the series of trials of which this case was a part, when the evidence for both parties was presented to the public arbitrators and sealed in two jars (*echinoi*), one for the prosecution and one for the defence.[4] The case itself was heard in c. 350/49, in all probability soon after the *paragraphe* case brought by Phormion against Apollodorus at which Demosthenes had written a speech in support of Phormion (Dem. 36).[5] That he has now changed sides and is writing for Apollodorus has worried some scholars, but most accept that Dem. 45 is a genuine work of the orator, rather than of Apollodorus.[6] Either way, there is no reason to doubt that the speech was composed at this time. This passage of Demosthenes, then, is the evidence for a change in the law from the giving of oral to written evidence in court, and 350/49 is the immediate *terminus ante quem* for the passing of the new law. Bonner and Smith push this *terminus* further back to Demosthenes' early litigation against his guardians, which dates to 364.[7] In *Against Aphobus I*, for example, he says:

> καί μοι ἀναγίγνωσκε λαβὼν ταύτην τὴν μαρτυρίαν.
>
> Please take and read this testimony. (Dem. 27.8; trans. MacDowell)

This is the regular deposition formula in these earliest Demosthenic speeches,[8] however in the third one, *Against Aphobus III*, which is a defence of Phanus against a charge of false witness (a *dike pseudomartyrion*), the first witness formula we find in the speech runs as follows:

> καί μοι κάλει τούτων τοὺς μάρτυρας.
>
> Please call the witnesses of this. (Dem. 29.12; trans. MacDowell)

This formula, which recalls those of the earlier orators when evidence was certainly given orally, recurs three times in §§18, 26 and 53, and the four instances of it in fact outnumber the three instances of the deposition

[4] See MacDowell 1978, 209.
[5] See MacDowell 2009, 115.
[6] Such as Trevett 1992, 50-76, though interestingly (since he tends towards giving the benefit of the doubt in these matters) not MacDowell 2009, 120, who would attribute the speech to Apollodorus himself.
[7] Bonner and Smith 1930, 353-362.
[8] Cf. 17, 22, 26, 28, 33, 39, 41, 42, 46; Dem. 28, *Against Aphobus II*, 10, 11-13; 29, *Against Aphobus III*, 21, 39, 54; 30, *Against Onetor I* 9, 17-18, 24, 30, 32, 34; 31, *Against Onetor II*, 4.

formula at §§21, 39 and 54. *If*, then, the four references to witnesses in Dem. 29 do in fact indicate that oral evidence was still employed in 364, that year becomes problematic for the dating of the change in the law.

As was indicated earlier, however, most scholars think that the change in the law actually took place a decade and a half earlier than 364. In a seminal article in 1919, Calhoun argued that the change from oral to written testimony accompanied a change from oral to written pleading, and he dated both changes to the archonship of Nausinicus (378/7), a year of constitutional reforms in the build-up to war against Sparta. Calhoun noted that "we find in the forensic speeches of Antiphon, Andocides, Lysias, and Isocrates a studied variety of expression for the commencement of actions, but nothing that may be construed as an allusion to the writing or handing in of pleadings by litigants";[9] and the same applies to witness testimony. Now, the latest datable forensic speech of the four orators named by Calhoun is by Lysias—not 10, *Against Theomnestus* in 384/3, as Bonner and Smith have it,[10] but 26, *Against Euandrus*, delivered on the final day of the archon year 383/2, as Todd, who also notes that the fragment of the *For Pherenicus* speech (fr. 135 Carey) "must belong during the period of Spartan occupation of the Theban Kadmeia in 382-379".[11] All this fits with Calhoun's 378/7, but what seems a serious problem for his dating is a passage from Isaeus 5, *On the estate of Dicaeogenes*, which is datable to 389/8:[12]

> And we'll produce witnesses to you first that Dicaeogenes renounced two-thirds of the estate in our favour, and then that Leochares went surety for him. Please read the deposition. DEPOSITION. You have heard the witnesses ... (Isaeus 5.2-3; trans. Edwards)

This is a clear reference to a written deposition (ἀνάγνωθι τὴν μαρτυρίαν), which is preceded by the statement that the speaker is going to call witnesses (μάρτυρας ὑμῖν παρεξόμεθα) and followed by a remark that the jurors have heard them (τῶν μὲν μαρτύρων ἀκηκόατε), i.e. that they have confirmed the wording of the document. A variation on one of the standard witness formulas is used here (cf. Lys. 13.66); the verb is more regularly found in the first person singular, παρέξομαι, as happens on seven subsequent occasions in the speech, where there is no hint of a written statement. But it is to be noted that there is a reference here to "witnesses" (*martyras*), used

[9] Calhoun 1919, 189.
[10] Bonner and Smith 1930, 358.
[11] Todd 2007, 625 n. 1.
[12] See Edwards 2007, 80. The trial took place about 22 years after the death of Dicaeogenes, probably in a sea-battle off Cnidus in 411.

in conjunction with a written deposition.

Various arguments have been put forward to explain away the difficulty, which Calhoun himself recognized, that written depositions are evidenced here in a speech that is a decade earlier than his proposed date for the change in the law. Long before Calhoun's article appeared, Thalheim, in a review of Bonner's *Evidence in Athenian Courts*, which was published in 1905, two years after Thalheim's Teubner text of Isaeus, took on board Bonner's arguments for a change in the law around 380 and proposed to delete the words καί μοι ἀνάγνωθι τὴν μαρτυρίαν as an interpolation, stemming from the use of the expression καί μοι ἀνάγνωθι τὴν ἀντωμοσίαν either side of this section in 2 and 4.[13] It may be regarded as bad editorial practice to adjust the text to make it fit a theory, although the suggestion was found attractive by Bonner and Smith,[14] and also by Hommel in a review of Calhoun.[15] But Calhoun himself argued that "the isolated instance of the reading of a deposition in 389 does not justify us in dating the change as early as 390, for there is not the slightest reason why evidence should not occasionally have been presented in writing prior to the enactment of a legal requirement that it be so presented".[16] This, on the face of it reasonable argument, was countered by Bonner and Smith, who find it "difficult to see why Isaeus' client needed a written deposition for the first witness when he was able to elicit the testimony of the remaining seven groups of witnesses in the presence of the jury".[17] Now, the problem with this, on the face of it equally reasonable, argument[18] is that speeches 6, 7, 8 and 9 of Isaeus all have the same mixture of calls to witnesses and calls to read depositions.[19] Either, then, Isaeus did use a mixture of oral and written evidence, for whatever reason; or we have to recognize the ambiguity of the formula which appears to summon witnesses to give oral testimony and assume that when the

[13] Thalheim 1905, 1575.
[14] Bonner and Smith 1930, 359.
[15] Hommel 1923.
[16] Calhoun 1919, 191.
[17] Bonner and Smith 1930, 361.
[18] Reasonable because the witness had to be in court anyway to confirm his written statement. Witnesses who were unable to be present could submit an absentee deposition (*ekmartyria*), made in front of witnesses who would then confirm the *ekmartyria* at the trial. See Phillips 2013, 38. Part of the evidence for the *ekmartyria* comes from Isae. 3.18-21, a speech which may be contemporary with speech 5 (see below). But it would, again, be bad practice to explain the presence of a written testimony here by amending the text of 5.2 to read ἐκμαρτυρίαν (followed by ΕΚΜΑΡΤΥΡΙΑ).
[19] Respectively, 3 and 5 times (speech 6); 5 and 1 (speech 7); 4 and 4 (speech 8); and 8 and 5 (speech 9).

speaker calls witnesses, he is in fact referring to written testimony.

At this point we need briefly to consider the dates of Isaeus' speeches.[20] In the following table, I give the commonly accepted dating for each speech, followed by the dating of Wevers, who used the rhythm of clausulae to set the order of the speeches (significant differences are highlighted):

1. *Cleonymus*:	early	**c. 355**
2. *Menecles*:	c. 355	c. 355
3. *Pyrrhus*:	late	**c. 389**
4. *Nicostratus*:	unknown	c. 350 or later
5. *Dicaeogenes*:	389/8	389
6. *Philoctemon*:	365/4 or 364/3	364[21]
7. *Apollodorus*:	c. 354	c. 355
8. *Ciron*:	after 383, before 364/3	c. 365[22]
9. *Astyphilus*:	366 or 350s	c. 370[23]
10. *Aristarchus*:	378-1	**c. 355**
11. *Hagnias*:	early 350s	c. 360[24]

It is evident from this table that while the witness/deposition formula debate has focused on the problems caused by Isaeus 5, speeches 6-9 indicate that there are also problems with this theory the other way round: why does Isaeus apparently continue to use oral evidence in speeches that are in the 360s (6, possibly 8 and 9) and even the 350s (7 and possibly 9), if there was a law in force from 378/7 requiring written testimony? Or again, in order to save that dating, must we take all the witness formulas to indicate (as certainly when the noun *martyrian* and the imperative *anagnothi* are used) written testimony?

The other speeches in the Isaean corpus are also relevant to the discussion, though most of their dates are equally uncertain. Most scholars

[20] For discussions, see, e.g., Forster 1927; Edwards 2007; on speeches 7, 8 and 9, Griffith-Williams 2013, on 1, 2, 4 and 6 Griffith-Williams 2022.

[21] On Greek inclusive reckoning, 52 years after the Sicilian Expedition (6.14), either archon year 365/4 or 364/3.

[22] Not earlier than 383, because the speaker, who will have been at least 20, was born after the archonship of Eucleides in 403 (§43); and it is unlikely to be later than 364/3, the year Demosthenes prosecuted his guardians Aphobus and Onetor employing passages that appear to be borrowed from Isaeus. Griffith-Williams (2013, 89-90) is sceptical about the latter argument, but agrees that the speaker's apparent youth makes a much later date unlikely.

[23] Astyphilus died in Mytilene (§1), after the Theban War in which he served (§14); possible occasions are the operations of Timotheus in 366/5 or later garrison duty, even into the 350s. See Griffith-Williams 2013, 151.

[24] See Edwards 2007, 178.

would put speech 1, *On the estate of Cleonymus*, amongst Isaeus' early efforts, but there are no internal indications of the date and Wevers' method puts it considerably later in c. 355.[25] It contains three references to witnesses (§§16 twice, 32), but none to depositions. The uncertainty of the dating, however, makes it problematic as firm evidence for the change. Likewise, speech 10, *Against Xenaenetus*, has only one testimony, introduced by the formula "please call the witnesses" (§7). Since the speaker tells us (§20) that he served with his father in the Corinthian War (394-386) and refers to a war that was still in progress (§22), most scholars date the speech to the time of the Theban War (378-371),[26] and so it could just about be squeezed in before the law was passed. But Wevers takes the reference to a current war as referring to the Social War (357-355) and dates the speech to c. 355, again making it one of the later speeches and problematic as evidence for a change in 379/8.[27]

As for the remaining speeches in the Isaean corpus connected with inheritance,[28] speech 2, *On the estate of Menecles*, for once is unproblematic. It has five written testimonies (§§5, 16, 34 twice, 37) and is certainly one of the later speeches, usually dated from internal evidence to c. 355.[29] On the other hand, speech 3, *On the estate of Pyrrhus*, strictly speaking is undatable from internal indications, though two of the witnesses are known from events in the late 340s, and so it is usually seen as one of the later speeches.[30] Wevers' method, however, suggests c. 389.[31] If that is right, it is interesting that the 12 sets of evidence in this speech are all written,[32] and so speech 5 may not be the only one with written depositions prior to 379/8. Speeches 2 and 3, in fact, are the only inheritance speeches where the evidence is exclusively (and definitely) written. While, then, speech 2 certainly fits with Calhoun's theory, speech 3 may not. Also problematic is speech 11, *On the estate of Hagnias*, which dates to the early 350s and has one written deposition (§46), as one would expect, but also one apparently oral statement (§43). If so, it might be thought ironic that a

[25] E.g. Bonner and Smith 1930, 358; *contra* Wevers 1969, 21.
[26] As Griffith-Williams 2013, 196.
[27] Wevers 1969, 23-25.
[28] Speech 12, *On behalf of Euphiletus*, concerns citizenship. Strictly speaking, it is a fragment, preserved in Dionysius (*Isaeus* 17), but it happens to contain one witness deposition (§11). The date of the speech appears to be 344/3 (as Forster 1929, 430-431; Edwards 2007, 195), and so it is evidence for a change by that time.
[29] For the details, see Forster 1927, 39, who is followed by Wevers 1969, 16. Edwards (2007, 31-32) has 354/3.
[30] As by Forster 1927, 75.
[31] Wevers 1969, 21. For discussion, see Hatzilambrou 2018, 10.
[32] Cf. §§7, 12, 14, 15, 37, 43, 53 twice, 56, 76 twice, 80.

speech which relies heavily on citing the law (in §§1, 4, 11 and 22) seems itself to contravene it. Or does it?

That leaves speech 4, *On the estate of Nicostratus*, a supporting speech which has no testimonies. However, I note that there are a number of references to testimonies produced by the main speaker: "producing witnesses" (μάρτυρας, §2), "we have produced witnesses to you of all these facts" (μάρτυρας, §18), "you have heard testimony about this too" (καὶ ταῦτα μεμαρτύρηται, §20), "are these relatives testifying for a man who claims ..." (λαχόντι μαρτυροῦσιν, §24), "they produced witnesses" (μάρτυρας, §26), and finally "the testimony that we produced" (τῶν μαρτυριῶν, §31). There appear, then, to be several references to what may have been oral or written testimony, followed at the end by a reference to what seem to be written testimonies—though τῶν μαρτυριῶν here in the speech's *epilogos* could be a general, recapping reference to the "testimony" the speaker has already mentioned. This speech is regularly dated to c. 374 because of an emendation which is in my view erroneous;[33] without that, there is no internal evidence and Wevers would put it in c. 350. Either way, if the references to witnesses are taken at face value, this speech is also after the date proposed for the change in the law to written depositions.

The above discussion suggests that Isaeus' speeches are far from being the firm evidence for a change in the law that they have been assumed to be. Isaeus seems to reflect a different practice from the earlier orators, but we need to consider how far his apparent references to oral testimony should be taken at face value. If they are not actually references to oral testimony, we might then ask whether we should take the exact same witness formulas used by the earlier orators (in the fourth century, at least) as secure evidence that *they* were not, in fact, using written testimony.[34] And how do we interpret similar formulas in later speeches? Bonner and Smith discuss the obvious question as to whether we can test the statements made by the orators: "On occasion they use language that shows beyond doubt that their witnesses were giving oral testimony … In these instances the witnesses evidently told their stories quite informally in their own way".[35] This judgment seems rather naive to me (the judges may have heard the witnesses orally confirm their written statements), and on most occasions, as Isae. 5.2 demonstrates, speakers saying they are now going to produce witnesses and then telling the judges what they have heard would fit both forms of

[33] See Edwards 2002. This date had previously been called into question by Wevers 1969, 21-23. See also Griffith-Williams 2022, 121-122.
[34] Though, as Bonner and Smith point out (1930, 353), a clerk is not asked to read a deposition in Andocides, Isocrates or Lysias.
[35] Bonner and Smith 1930, 353-354.