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Indice

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The Meaning of the Legal Term *Symbolaion*, the Law about *Dikai Emporikai* and the Role of the *Paragraphe* Procedure

Abstract

This essay examines the meaning of the legal term *symbolaion*, the interpretation of the law about maritime cases (*dikai emporikai*), and the use of the *paragraphe* procedure in maritime cases. The first part shows through a careful examination of the passages in which the term *symbolaion* is found that the word does not mean "contract" but in legal contexts designates all "actionable liabilities" arising either from a delict or from breach of contract or "disputes about such liabilities." The second part shows that the law about maritime cases applied broadly to disputes about actionable liabilities arising from delicts and from breaches of contract incurred by merchants and ship-owners in the port of Athens and on voyages from and to Athens. The third applies this new understanding of the law about mercantile suits and the use of the *paragraphe* to the demosthenic speeches *Against Zenothemis*, *Against Apaturius*, *Against Phormio*, and *Against Lacritus* and provides a better understanding of the legal issues in these cases. The final section also demonstrates that parts of these speeches that scholars have considered irrelevant to the main legal issues are in fact directly relevant to the task of proving the legal charges and sheds new light on the legal procedure of *paragraphe*.

Il presente articolo si occupa del significato del termine giuridico *symbolaion*, dell'interpretazione della legge relativa alle azioni commerciali (*dikai emporikai*), nonché dell'uso, in queste ultime, della procedura di *paragraphe*. Nella prima parte, attraverso un'attenta analisi dei passi in cui ricorre *symbolaion*, si intende dimostrare che il termine non significa "contratto" ma, in un contesto giuridico, designa tutte le "responsabilità azionabili" sorgenti o da delitto o da inadempimento contrattale, ovvero "controversie relative a tali responsabilità". Nella seconda parte si mostra che la legge sui casi commerciali era ampiamente applicata a controversie relative a responsabilità azionabili sorgenti da delitti e da inadempimenti contrattuali di commercianti e armatori nel porto di Atene e nei tragitti da e verso Atene. Nella terza parte questa nuova interpretazione della legge sulle azioni commerciali e del ricorso alla *paragraphe* è applicata ai discorsi demostenici *Contro Zenotemide, Contro Apaturio, Contro Formione* e *Contro Lacrito*, in modo da fornire una migliore comprensione dei problemi giuridici in questi processi. La parte conclusiva illustra peraltro che alcune parti di questi discorsi, considerate dalla dottrina irrilevanti rispetto al problema giuridico di fondo, sono in

effetti determinanti al fine di provare le pretese fatte valere in giudizio e gettano nuova luce sulla procedura della *paragraphe*.

In three orations attributed to Demosthenes (Dem. 32.1; 33.1; 34.3-5, 42) the speakers mention a law about mercantile cases for *symbolaia* relating to the port of Athens and voyages to and from Athens. Almost all scholars who have discussed the laws about mercantile cases have used the word "contract" to translate the term *symbolaion* in passages about the law. This essay is divided into three parts. The first part will analyze the meaning of the word *symbolaion* and show that it does not mean "contract" but has a broader range of meaning and in legal contexts means "actionable liabilities" arising either from a delict or from contracts (to be precise, "from a failure to fulfill the terms of a contract") that could give rise to a legal action or "disputes about such liabilities."[1] The second part will examine how this finding affects our understanding of the law about mercantile cases and one of the parts of the law about the legal procedure of *paragraphe* that relates to mercantile cases. It will show that the law applied not only to disputes in which there was a written contract but more broadly to disputes about actionable liabilities arising from delicts and from breaches of contract incurred by merchants and ship-owners in the port of Athens and on voyages from and to Athens. The third and final part will apply this new understanding of the law about mercantile suits and the use of the *paragraphe* in these cases to the legal arguments in the demosthenic speeches *Against Zenothemis*, *Against Apaturius*, *Against Phormio*, and *Against Lacritus*. A careful analysis of these speeches in light of the correct understanding of the law about *paragraphe* will provide a better understanding of the legal arguments used by the speakers and show that several sections that scholars have thought irrelevant to the main legal issues are in fact directly relevant to the legal charges.

I

Perhaps the best place to start is two passages in Plato's *Laws* (913a and 922a). The word *symbolaia* occurs at the beginning and the end of a section covering several different topics. At the start of Book 9 the Athenian introduces the next topic, which is *symbolaia pros allêlous*, which require regulation.[2] The Athenian

1 Carlo Pelloso reminds me that the correct German translation for *symbolaion* would be *Verantwortlichkeit*, which is distinct from *Schuld*. In this essay, I do not discuss the heterodox views of Wolff 1957 about contracts in Greek Law, which I do not find convincing. The views of Phillips 2009 are well criticized by Dimopoulou 2014. I plan to deal with this topic in a future essay.

2 On the meaning of the term *symbolaion* in Plato see Cataldi 1981. Bury 1926, 389 translates the term "our business transactions." Saunders 1970, 449 translates the phrase "our transactions with each other," which is too broad because it includes transactions that do not give rise

then establishes the general rule that no one should touch my goods or move them at all unless he has my consent and I must do the same. This brings him to the topic of a treasure hidden by one person and found by another and the procedures to be followed when a treasure is found (*Leg*. 913a-914a). The next section provides rules about property left behind (*Leg*. 914b-d). In neither of these sections is there any mention of contracts; these are offenses concerning property. After this follow rules about slaves and freedmen (*Leg*. 914e-915c) and about the disputes about the ownership of animals (*Leg*. 915c-d), but these rules do not mention contracts. One finally comes to rules about contracts in the section about buying and selling (*Leg*. 915d-916a), the sale of slaves (*Leg*. 916a-c), and selling of adulterated goods (*Leg*. 916d-918a), and retail trade (*Leg*. 918c-921d). At the end of this section the Athenian says that they have made regulations for most of the important *symbolaia* and must now turn to those involving orphans (*Leg*. 922a-b), which leads to a discussion of wills (*Leg*. 923a-924a). It is clear that the term *symbolaia* in this passage covers a much wider range of topics than contracts and must refer to obligations between people in general that give rise to legal actions and include both those arising from delicts and from contracts.[3]

In the *Nicomachean Ethics* (9.1.9.1164b13) Aristotle uses the expression *hekousia symbolaia*: "In some countries the laws do not allow actions for voluntary liabilities (i.e. arising from a voluntary agreement) on the grounds that obligations in which one has placed his trust should be settled just as one has entered into them" (ἐνιαχοῦ τ' εἰσὶ νόμοι τῶν ἑκουσίων συμβολαίων δίκας μὴ εἶναι, ὡς δέον, ᾧ ἐπίστευσε, διαλυθῆναι πρὸς τοῦτον καθάπερ ἐκοινώνησεν). The translation "voluntary contracts" makes no sense. First, a contract that is not entered into voluntarily is not a contract.[4] Second, one brings actions for obligations and one settles (διαλυθῆναι) "disputes arising from liabilities," that is, cases in which one person owes compensation to another person because he has committed a delict or not abided by a contract. One does not "resolve contracts." The expression must mean "actionable obligations arising from voluntary actions," that is liabilities arising from an agreement concluded voluntarily as opposed to liabilities arising from actions against one's will (i.e. delicts).[5] The expression *hekousia symbolaia* is similar to the expression *hekousia synallagmata* in the *Nicomachean Ethics*. In this passage Aristotle distinguishes between *hekousia synallagmata* and *akousia synallagmata*. In the first category Aristotle places liabilities arising from contracts (*ex contractu*); in the second liabilities arising

to litigation. Wyse 1904, 384-85 compares the use of the term in this passage with Isaeus 4.12 and translates "dealings between man and man." But this is also too broad, and in the Isaeus passage the term *symbolaion* is clearly linked with disputes in court (εἰσαγωγαῖς).

3 The evidence from Plato's *Laws* shows that the term does not apply just to liabilities arising from breach of contracts (*pace* Küssmaul 1985, 38).

4 For the requirement that agreements must be voluntary for them to be actionable when violated see Dem. 56.2. For this point see Cataldi 1982 and Pelloso 2007: 16 with note 33, 34 with note 69, 35 with note 69, 50-51.

5 For the same expression see Pl. *Resp*. 556a-b. Cf. de Ste. Croix 1961, 104.

from delicts (*ex delicto*). Just as the term *synallagmata* here obviously refers to liabilities in general, which can be divided into two more specific categories, the term *symbolaion* should refer to liabilities giving rise to legal action in general.

Lysias (12.98) uses the term *symbolaia* in his speech *Against Eratosthenes* in which he reminds the judges how "your children, as many who were here then, were treated abusively by them (i.e. the Thirty) or were in slavery because of small liabilities through lack of anyone to help them." The translation "contract" makes no sense in this context; one does not speak of "small contracts" but "small liabilities" or "liabilities for small amounts," that is, unpaid debts for small amounts of money.[6] And one is not punished for concluding contracts, but for incurring liabilities by not fulfilling the terms of a contract. In *On the Property of Eraton* Lysias (17.3) uses the term in a similar way. The speaker recalls how his grandfather made a loan of two talents to Eraton. Eraton died without repaying the loan and left three sons, Erasiphon, Eraton, and Erasistratus (Lys. 17.2). In 401/0 BCE Eraton brought an action against Erasistratus for the "the entire liability (i.e. amount owed)" (παντὸς τοῦ συμβολαίου) because Eraton and Erasiphon were abroad (Lys. 17.3).[7] First, one should note that he brought the suit not because there was a contract but because there was an outstanding liability arising from a failure to repay. Second, it makes no sense to speak of "the entire contract" – the adjective παντός indicates that the plaintiff asked Erasistratus for the entire amount owed to him as opposed to asking each brother for one third of it.

In *On the Mysteries* Andocides (1.88) discusses the laws passed after the restoration of the democracy in 403 BCE. Among these laws is one by which the Athenians made binding all lawsuits and arbitrations that took place under the democracy so that there would be no cancellation of debts or overturning of verdicts, but that there would be recovery of private obligations owed (τῶν ἰδίων συμβολαίων αἱ πράξεις εἶεν). The word *praxis* is the term used to denote the procedure of recovering money owed from an unpaid debt or other liability arising either from the failure to abide by a contract or from a delict, not of enforcing a contract.[8]

Isocrates uses the term *symbolaia* in several passages. In *On the Antidosis* Isocrates (15.38) alludes to those "who live off your disputes about legal liabilities" (τοὺς μὲν τοίνυν τῶν ὑμετέρων συμβολαίων ζῶντας). This is clearly a reference to sycophants who bring false charges in both private and public suits to gain money from their victims. The translation "contracts" does not fit the context because the passage alludes to trials in court (ἐν τοῖς δικαστηρίοις).[9]

6 Lamb (1930) 275 translates the phrase "petty debts", which is repeated by Todd 2000, 136.
7 Lamb 1930, 393, followed by Todd 2000, 188, translates the phrase "the whole debt."
8 For the use of the term *praxis* with this meaning see for example Dem. 56.45.
9 On other passages in Isocrates (4.11; 12.240; 15.3, 40, 42, 79, 228, 309) where the terms *symbolaion* is linked to disputes in court see Kussmaul 1985, 40. Cf. *IG* XII, 5, 1065, line 8: διαλῦσαι τὰ συμβόλαια; *Priene* 8, lines 2-12, in which the term is linked to disputes in the court that must be settled (διαλύειν); *Teos* 59, lines 24-26 (τὰ δὲ ἐγκλήματα

In another speech Isocrates (12.243) mentions those who deprive people of their *symbolaia* (τοὺς μὲν γὰρ ἀποστεροῦντας τὰ συμβόλαια), that is, what is owed to them (cf. Dem. 32.7).[10] One does not "deprive people of their contracts" but rather "violates (*parabainein)* a contract."[11] One deprives another person of the amount owed because of delicts or breaches of contracts.[12]

In Demosthenes' speech *Against Spudias*, the speaker married the daughter of Polyeuctus, who has promised him 40 *mnai* as a dowry (Dem. 41.3). Because he was unable to pay the full amount of the dowry immediately, Polyeuctus paid 30 *mnai* immediately and acknowledged a debt of 10 *mnai* (Dem. 41.5). Not long before Polyeuctus' death, the speaker took his father-in-law's house as security, which was done in accordance with Polyeuctus' wishes (Dem. 41.5). Polyeuctus had given his other daughter to Leocrates, whom he also adopted (Dem. 41.3). Polyeuctus later fell out with Leocrates and took away his daughter, in other words, brought about a divorce between his adopted son and his daughter (Dem. 41.4). The speaker then observes that as long as Leocrates was the heir of Polyeuctus (Dem. 41.5: ὁ τε Λεωκράτης ἦν κληρονόμος τῶν Πολυεύκτου), Leocrates was obligated to pay him the amount of the dowry still owed to him (πρὸς ἐκεῖνον ἦν μοι τὸ συμβόλαιον). The word *symbolaion* here must refer to an obligation or liability incurred by a failure to pay; it cannot mean "contract" because there was no agreement between the speaker and Leocrates, as the narrative makes clear.[13]

The term *symbolaion* also appears to mean "disputes about liabilities," which arise from contracts and delicts, in several inscriptions. In a treaty between Athens and Selymbria dated to 408 BCE there is a provision about *symbolaia*, those of private citizens with other private citizens, those of private citizens with the community, and those of the community with private citizens (*IG* i^3 118, lines 22-25). The decree orders that these be "resolved" (line 25: δια]λύειμ π[ρ]ὸς ἀλλήλους). Those that are still contested (lines 25-26: ὅ τι δ' ἂν ἀμφισβη[τῶσι) should be

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καὶ τὰ συμβόλαια [τὰ ὑπάρχοντα ἑκα]ι[τέ]ροις αὐτοὺς πρὸς αὑτοὺς διαλυθῆναι ἢ διακριθῆναι κ[ατὰ τοὺς ἑκατέρων] | [ν]όμους καὶ τὸ παρ' ἡμῶν διάγραμμα); and *Erythrai* 114, line 7 (διεξάγεσθαι τὰ συμβόλαια).

10 Cohen 1973, 131 claims that *symbolaion* at Dem. 32.7 (τὰ συμβόλαια ἀποστερήσαιεν) means "contract", but Kussmaul 1985, 38-39 rightly rejects Cohen's claim and observes: "Ἀποστερεῖν 'vorenthalten' ist ein gebräuchlicher Ausdruck, wenn eine Schuld nicht bezahlt wird. Hier will der Redner sagen, es sei das Ziel der beiden Schurken gewesen, ihre Schuld nicht zu bezahlen." Kussmaul 1985, 39 also notes that one never finds the expression "ἀποστερεῖν τὰς συνθήκας".

11 Isoc. 15.79 draws a general contrast between public suits and private suits (ἀλλ' ἡ μὲν τούτων χρῆσις τοῦτ' ὠφελεῖν μόνον πέφυκε, τὰ κατὰ τὴν πόλιν καὶ τὰ συμβόλαια τὰ γιγνόμενα πρὸς ἡμᾶς αὐτούς). If the term *symbolaia* refers only to contracts, the contrast does not work as well.

12 Kussmaul 1985, 85 notes that Greek authors use phrases like "ταῖς ὁμολογίαις ἐμμένειν, ταῖς συνθήκαις ἐμμένειν, τὰς ὁμολογίας διαφυλάττειν" and like "τὰς ὁμολογίας παραβαίνειν, τὰς συνθήκας παραβαίνειν, τὰς συνθήκας ὑπερβαίνειν" but never link the term *symbolaion* with these verbs.

13 At Dem. 41.5 the term *symbolaion* is mistranslated as "agreement" by Scafuro 2011, 93.

decided by the legal procedures provided by treaty (line 21: δίκα]ς εἶναι ἀπὸ χσυμβολῶν). As de Ste. Croix observed, *symbolaia* "therefore are not mere contracts, but already matters in dispute, and must surely include what we would call actions in tort."[14] A treaty between Olbia and Miletus stipulates that if a citizen of Miletus has a *symbolaion* at Olbia (ἐὰν δέ τι συμβόλαιον ἦ⟨ι⟩ τῶι Μιλησίωι ἐν Ὀλβίαι), he is to have a trial within five days in the public court (*Syll*.[3] 286, lines 14-17). The translation "contract" makes no sense in this context; one has the right to a trial only when there is a dispute arising from a liability.[15] In a decree from Samos (*Samos* 63 [McCabe] = *IG* xii, 6, 1, 95, line 9) one finds a request that the Mindians send a court that can resolve τὰ μετέωρα συμβόλαια, the expression should mean "pending disputes (about legal liabilities)" (Cf. *Syll*.[3] 344). The translation "pending contracts" would make no sense. This analysis of the evidence shows beyond a doubt that the term *symbolaion* means a liability that is actionable in court and arises from a delict or a failure to perform the terms of a contract. Alternatively it can mean a legal dispute arising from a liability incurred by a delict or by a breach of contract, which must be settled by a legal decision.

II

It is now possible to examine the evidence for the law about commercial suits, which contains the term *symbolaion*, and for the law about the use of the *paragraphe* in maritime cases.[16] It is important to begin with the two speeches in which the speakers actually have the law read out by the clerk. The paraphrases of the law's contents in these speeches are likely to be accurate because if they were not, the judges would have been able to compare their statements with the text of the law and see that they were misrepresenting the contents of the statute.[17]

14 de Ste. Croix 1961, 102. Note also the link between the terms ἀμφισβητήσιμα συμβολαίων at Dem. 35.27 with Kussmaul 1985, 37, refuting Cohen 1973, 131. Cf. Isoc. 15.40 (ἀμφισβητουμένων . . . τὰ συμβόλαια). The term also occurs in this sense in *IG* i[3] 10. Cf. Meiggs and Lewis 1969, 67: "Though interpretations of it (i.e. the inscription) based on translating συμβόλαιον still survive, roughly giving the meaning that breach of contracts made at Athens must be tried at Athens, Hopper and de Ste Croix rightly argue for a broader meaning, 'cause of action'."

15 de Ste. Croix 1961, 102. For the meaning of the term *symbolaion* in later period see Kussmaul 1985, 41-42.

16 Many earlier analyses of the law are based on a mistranslation of the term *symbolaion*. See for example Cohen 1973, 100-114; Isager and Hansen 1975, 86-87 ("The word here translated as 'agreement' (*symbolaion*) really means loan or lease contract"). Harrison 1971 appears not to discuss the issue explicitly.

17 For this principle when evaluating the evidence for Athenian law see Canevaro and Harris 2012, 99-100 and Canevaro 2013, 27-32, esp. 32 ("summaries [i.e. of documents] should be considered basically reliable, especially when they are very close to the reading of the document by the clerk"). Cohen 1973, 100 arbitrarily claims that "The clearest and most definitive statement on the nature of the emporic suit is offered by the speaker in Dem. 32.1" but offers neither evidence nor argument to support this arbitrary assertion.

One should also take into account the nature of the case in each speech and the aims of the speaker. It is possible that a speaker may attempt to slant his interpretation of the law in a certain way according to the nature of his case.[18]

In *Against Apaturius* the speaker begins by paraphrasing the law about maritime cases: this law allows for merchants and ship-owners to bring actions before the *thesmothetai* if they are wronged in any way (τι ἀδικῶνται) in the port of Athens (ἐν τῷ ἐμπορίῳ) or sailing from Athens to another port (ἐνθένδε ποι πλέοντες) or to Athens from another port (ἐτέρωθεν δεῦρο) (Dem. 33.1).[19] The important thing to note is that the speaker does not limit this kind of suit to cases involving contracts. The scope of the action is much broader involving any wrongs (τι ἀδικῶνται), namely those arising from breach of contract or delict. The speaker continues by mentioning that those convicted in maritime suits are to remain in prison until they pay the penalty the court has decided. The aim of this penalty is not just to ensure that contracts are respected but much broader, namely to ensure that no one wrongs any merchants (μηδεὶς ἀδικῇ μηδένα τῶν ἐμπόρων). The speaker goes on to say that the law provides recourse to a *paragraphe* (counter-suit) for cases in which there is no *symbolaion* (Dem. 33.2: περὶ τῶν μὴ γενομένων συμβολαίων). If one were to translate this term by the word "contract" this would limit the scope of the law and make it narrower than the speaker indicates in the previous section.[20] It would also make no sense in the context because the speaker makes it very clear in the remainder of the speech that there was a contract between himself and Apaturius (Dem. 33.8). On the other hand, if we translate the term with the word "actionable liability," the speaker's presentation of the law is consistent and free from contradiction. Furthermore, the cases can obviously only be brought when there is a liability arising from a delict or a breach of contract, not just when there is a contract. One cannot bring a case about a contract until the other party has failed to perform his agreed duties under the contract.

The speaker then explains that he has brought his *paragraphe* against Apaturius because there has been a release and a discharge for all *symbolaia* between the two men (Dem. 33.3: ὅσα μὲν ἐμοὶ καὶ τούτῳ ἐγένετο συμβόλαια, πάντων ἀπαλλαγῆς καὶ ἀφέσεως γενομένης). Once more, the term *symbolaia* must refer to obligations because releases and discharges do not apply to contracts but to liabilities arising from contracts. He adds that he has no other obligation toward Apaturius (ἄλλου δὲ συμβολαίου οὐκ ὄντος ἐμοὶ πρὸς τοῦτον). The language of the phrase confirms this: he does not say that the two men have no contract, but that he has no obligation toward Apaturius. As we read later in the speech, there was at one point in the past a contract between the two men, but that is not relevant

18 For the use of law and legal interpretation in the Attic Orators see Harris 2013a, 175-245.
19 For the meaning of the verb *keleuei* in this passage see Harris 2006, 131 with note 16.
20 Murray 1936, 203 and MacDowell 2004, 98 both mistranslate the term *symbolaion* in this passage as "contract".

to his *paragraphe*.[21] What counts is that at the present moment he has no kind of obligation toward him. It is also significant that nowhere in his discussion of the law about maritime suits does the speaker mention the need for written contracts.

The law is also discussed in two passages in the speech *Against Phormion* (Dem. 34.3-5, 42). Toward the end of the speech, the partner of Chrysippus paraphrases the law and has the clerk read out the text of the law. The paraphrase of the law found in this passage is very close to the one given in *Against Apaturius*: the law permits mercantile suits (τὰς δίκας . . . τὰς ἐμπορικάς) about liabilities incurred at Athens (συμβολαίων τῶν ᾽Αθήνησι) or for voyages to Athens (εἰς τὸ ᾽Αθηναίων ἐμπορίον). The speaker then draws out the implications of the law by stating that it applies not only to obligations incurred at Athens but also for those arising for the purpose of a voyage to Athens. This paraphrase of the law contains precisely the same elements found in the discussion of the law in *Against Lacritus*: the law concerns liabilities in general (συμβόλαια) and applies to liabilities incurred at Athens or for voyages to Athens. The speaker does not mention voyages from Athens because they are not relevant to his case.

Chrysippus, who is the defendant in the *paragraphe* suit, also alludes to the law in the beginning of the speech. This passage is very important because it reveals that the law about maritime suits could be interpreted in two ways. According to the speaker Chrysippus, the defendants do not deny there was a *symbolaion* in the port of Athens (τὸ παράπαν συμβόλαιον ἐξαρνοῦνται μὴ γενέσθαι ἐν τῷ ἐμπορίῳ τῷ ὑμετέρῳ) but claim that there is no longer a *symbolaion* (οὐκέτι εἶναί φασι πρὸς ἑαυτοὺς οὐδὲν συμβόλαιον) because they did nothing contrary to the terms of the contract (πεποιηκέναι γὰρ οὐδὲν ἔξω τῶν ἐν τῇ συγγραφῇ γεγραμμένων) (Dem. 34.3). In other words, there is no legal liability that could give rise to a legal action because the defendant has fulfilled all the duties he agreed to perform in the contract. This implies that the *paragraphe* could only be brought if the defendant had not fulfilled his duties and was in arrears.[22] One cannot translate the term *symbolaion* with the word "contract" here because the speaker makes a clear distinction between the liability arising from the contract (*symbolaion*) and the written contract itself (*syngraphe*). There is also a distinction between the past, when a liability did exist, and the present, when the liability no longer exists (or so Phormio claims). On the other hand, one could not say that the contract existed in the past and now no longer exists.

21 In his analysis of the speech MacDowell 2004, 95-98 does not grasp this point, which completely undermines his analysis.

22 Wolff 1966, 64, followed by Harrison 1971, 110, note 2, claims that this phrase is a deliberate misrepresentation of the law: "Das ist nun gewiß im höchsten Maße widerspruchsvoll und unklar, vielleicht sogar, wie wir alsbald sehen werden, eine absichtlich mißverständliche Wiedergabe des Sinnes der Paragraphe." But if one correctly understands the meaning of the term *symbolaion* in the law about maritime cases, there is no reason to follow Wolff's extreme view that the litigant is misrepresenting the law.

Chrysippus then discusses Phormio's use of the *paragraphe* action. He claims that Phormio has not brought his action in accordance with the laws. He admits that the laws state that one can bring a *paragraphe* (οἱ μέντοι νόμοι . . . παραγράφεσθαι δεδώκασιν) when there is no liability arising at Athens or for a voyage to the port of Athens (Dem. 34.4: ὑπὲρ τῶν μὴ γενομένων ὅλως συμβολαίων Ἀθήνησι μηδ' εἰς τὸ 'Αθηναίων ἐμπόριον). On the other hand, Chrysippus claims that if a defendant agrees there has been an agreement (ὁμολογῇ) but alleges that he has performed all that has been agreed (πάντα πεποίηκε τὰ συγκείμενα), the laws require that he present his defence (i.e. on the charges in the plaint) and submit to a straight judgment on the facts (εὐθυδικία) and not bring a charge against the plaintiff.[23] Chrysippus claims that his opponent is not following the law, but it is more likely that each litigant is following a different interpretation of the law. Phormio argues that Chrysippus can bring a maritime suit only when the defendant has incurred a liability toward the plaintiff either as the result of not abiding by a contract or by committing a delict. Because he has fulfilled his terms of the contract, no liability exists, and Chrysippus cannot bring a *paragraphe* against him. Chrysippus adopts a different interpretation of the law. He points out that Phormio does not deny that in the past he accepted a loan, which created an obligation. Whether that obligation still exists is a matter of dispute. On his interpretation, he has the right to bring a maritime suit, and the court should not hear a *paragraphe*, but make a decision on the facts of the case (εὐθυδικίαν).[24] In other words, he denies that there is a legal issue about his choice of procedure. But the magistrate who received the plaint from Chrysippus clearly sided with his interpretation of the law about the procedure because he allowed the case to go forward and be tried in court.[25] In other words, the official who accepted the plaint interpreted the law in the same way as it was interpreted in *Against Apaturius*. As we noted above, the interpretation of the law given by Chrysippus is one designed to support his case, but it was not the most straightforward reading of the law nor the one commonly accepted.[26]

We can now turn to the discussion of the law in *Against Zenothemis* (Dem. 32.1). The speaker Demon has brought a *paragraphe* against Zenothemis and justifies his use of the procedure by appealing to the terms of the law about maritime

23 Note that in this passage when Chrysippus mentions the existence of a contract he uses the verb ὁμολογῇ and not the noun *symbolaion*.

24 MacDowell 2009, 283 misrepresents the argument of Chrysippus ("because he has fulfilled his obligations to Khrysippos and therefore no written agreement now exists"). In fact, the actual written document did still exist at the time of the trial and is read out to the court at Dem. 34.7.

25 For the power of Athenian judicial officials to reject a charge that did not fall within their jurisdiction or that was not based on a specific written law see Antiphon 6.37-38. For officials insisting that the *engklema* contain key words from the statute see Lys. 13.85-87. The implication is that the officials would not have accepted the case if the plaint did not contain the right words. On the *engklema* in general and its role in litigation see Harris 2013b.

26 For the tendency of the Athenian courts to apply the laws in the most straightforward way and according to the commonly accepted interpretation see Harris 2013a, 213-73.

suits. He reminds the court that the laws allow suits for merchants and ship-owners regarding *symbolaion* concerning voyages to Athens and from Athens (τῶν Ἀθήναζε καὶ τῶν ᾽Αθήνηθεν συμβολαίων) and about which there are written contracts (καὶ περὶ ὧν ἂν ὦσι συγγραφαί). This phrase has given rise to much debate, but most scholars who have discussed this passage have assumed that the word *symbolaia* must be translated by the word "contracts" and have therefore argued that the law restricted maritime cases to obligations arising from written contracts.[27] As we have seen, the word's meaning is much broader than this and covers liabilities arising both from breaches of contracts and from delicts. But if this is so, why does Demon add the phrase "about which there are written contracts"? Many scholars believe that this adds a restriction, but this does not make much sense. First, the paraphrases of the law about maritime suits in Dem. 33 and Dem. 34 do not mention any requirement about written contracts. Second, if this phrase added a restriction to the first phrase, the first phrase in the law is otiose – why not simply write there are maritime suits for liabilities arising from written contracts, one category instead of two, the second of which is contained in the first?[28]

A correct understanding of Demon's discussion of the law hinges on the meaning of the connective *kai*. Scholars have assumed that the connective links two requirements both of which must be met for the plaintiff to get his case accepted. It is more likely however that the connective only specifies a category already included in the larger first category and does not add a separate qualification. It should therefore be translated "including." We find a good example of this at Aeschylus' *Persians* 749-750 in which the Ghost of Darius says that Xerxes thought that he could lord it over all the gods and Poseidon. Here the connective *kai* links two words, and the second word ("Poseidon") is included in the first group ("all the gods").[29] As Denniston points out, καί means "and in particular" in several passages.[30] In the same way the phrase at Dem. 32.1 does not add a restriction and limit the first category ("actionable liabilities arising from voyages to and from Athens") but specifies one kind of liability in this general category ("liabilities arising from written contracts"). The speaker singles out this category because he wants to emphasize that his opponent can present no written evidence proving that he had incurred an obligation toward Zenothemis.[31] As we will see later, Demon devotes the rest of his speech not to proving that he had not concluded a

27 See especially Cohen 1973, 100-157, followed uncritically by Isager and Hansen 1975, 84-87, MacDowell 2004, 13 and MacDowell 2009, 275 ("the law allowed the mercantile procedure to be used only if the dispute concerned a written agreement").

28 One cannot use Dem. 35.27 to support the view that one could bring a maritime suit only if there was a written contract. This passage concerns contracts in general and does not have anything to do with the specific terms of the law about maritime suits.

29 One should compare the expression καὶ δὴ καί ("and in particular"). See Denniston 1954, 255-57.

30 Denniston 1954, 291. Denniston gives as examples Hom. *Il*. 5.398; Hdt. 2.32.4; 3.136.1; 8.17; 9.21.3; 9.25.2. Hdt. 8.17 provides a good parallel – "of the Greeks the Athenians distinguished themselves and (in particular) Cleinias."

31 Compare Dem. 32.2: οὐδὲν ἦν συμβόλαιον οὐδὲ συγγραφή.

written contract with Zenothemis, but that he has no obligation toward him. There is therefore no contradiction between the paraphrases of the law in *Against Zenothemis* on the one hand and those in *Against Phormio* and *Against Apaturius* on the other.[32] In each speech the litigant states that the law allows maritime suits for liabilities incurred at Athens or during voyages either to or from Athens.

One should add that this reading of the law about maritime cases and about the use of the *paragraphe* in maritime cases is what we would expect to find in an Athenian law. Many Athenian laws (but far from all) contain two parts, a protasis containing the name of the substantive offense that the law aims to punish or provide redress, and an apodosis, which names the procedure to be followed. For instance, the law about the scrutiny of speakers lists several offenses (speaking in the Assembly after beating one's father or mother, after failing to provide them support, after failing to perform one's military duties, acting as a prostitute, or after squandering one's patrimony), then provides a procedure to be used in such cases (*dokimasia rhetoron*) (Aeschin. 1.28-32).[33] In the law about maritime cases, therefore, we should expect the statute to contain a term referring to the grounds for a legal action. If one translates the term *symbolaion* as "contract", the law does not contain a term referring to an actionable offense, but if one translates the term "liability arising from a delict or a breach of contract", this problem does not arise.

III

A correct understanding of the law about *dikai emporikai* makes it possible to understand the legal arguments in the speeches delivered in cases brought by the procedure of *paragraphe* against suits initiated by this procedure: *Against Zenothemis* (Dem. 32), *Against Apaturius* (Dem. 33), *Against Phormio* (Dem. 34), and *Against Lacritus* (Dem. 35). As a careful analysis of the speeches will show, litigants who bring a *paragraphe* do not attempt to show that no contract existed but that there was no liability arising either from delict or from a breach of contract. Conversely the defendants in the *paragraphe* actions attempt to prove not that a contract or legally binding relationship existed or had existed (this was easy to prove), but that liability arising from delict or a breach of contract existed.

This will help to resolve the debate between U. E. Paoli and H. J. Wolff about the nature of the *paragraphe* procedure. Paoli argued that when one litigant brought a suit against a defendant, and the defendant responded by bringing a procedure for *paragraphe* on the grounds that the plaintiff's case was not

32 *Pace* Isager and Hansen 1975, 86: "The three versions are so different from one another that it is impossible to reconstruct the exact wording of the law." As we have seen, the three versions agree on the main features, but each litigant places a slightly different emphasis on the terms of the law according to the nature of the case he is pleading.

33 On the shape of Athenian laws see Harris 2013a, 138-174.

admissible, the two different issues ("Had the defendant committed a wrongful action?" and "Was the case admissible?") were not decided at two different trials, but at one and the same trial. His main grounds for this view are that the speeches delivered in *paragraphe* cases often discuss topics relevant to the issue, "Had the defendant committed a wrongful act?" as well as topics relevant to the topic, "Was the case admissible?"[34] Wolff contested this view and claimed that the *paragraphe* addressed only the procedural issue concerning the admissibility of a case. This means that if the defendant brought a case by the *paragraphe* procedure and the court decided that the case was admissible, the charges brought by the accuser would be decided at another trial.[35]

As we will see in what follows, Paoli and Wolff are each partly right and partly wrong, though in different ways. Wolff is certainly right that if a defendant brought a *paragraphe* to bar a plaintiff's suit and lost his challenge to the admissibility of his opponent's suit, there would be another separate trial, several days later. Probably the best evidence for this is the distinction between the terms *euthydikia* and *paragraphe*. In a *euthydikia* ("a straight judgment") there was no separate trial about the admissibility of the case; there was one trial that addressed the question, had the defendant wronged the plaintiff and owed him damages as a result? But if Paoli were correct in believing that at the trial for the *paragraphe* the litigants discussed both the procedural issue ("was the plaintiff's action admissible?") and the substantive issue ("had the defendant wronged the plaintiff?"), there would have been no difference between the two terms. On the other hand, if the vote at the *paragraphe* concerned only the procedural issue (as Wolff held), the substantive issue would have been decided at a separate trial following the one for the *paragraphe*.

The issue in a *paragraphe* trial for a maritime case was complicated however by the fact that the law was interpreted to make the substantive issue relevant to the procedural issue. The law stated that one could bring a maritime case if 1) the litigants were merchants or ship-owners (Dem. 32.1; 33.1), 2) the dispute involved trade either from Athens or to Athens (Dem. 32.1; 33.1), and 3) there was a *symbolaion* (Dem. 32.1) or any wrong committed in these circumstances (Dem. 33.1). This meant that one could bring a *paragraphe* against a maritime case if one of the three conditions were not met. The first two criteria involved the occupation of the litigant (ship-owner or merchant) and the circumstances of the offense (on a voyage to or from Athens). But the third involved a substantive issue: did the defendant commit an offense? This in turn raises two questions. First, why did the procedure in effect give a merchant who was charged with an offense potentially two chances to defend himself against the substantive charge? Second, if the liability of the defendant was discussed at the *paragraphe*, and the court decided that liability existed, what more was there to dis-

34 Paoli 1933, 75-174.
35 Wolff 1966, *passim*.

cuss at the trial after the *paragraphe* was decided? We must however postpone the answers to those questions, until after examining the legal issues in the four speeches delivered at trials brought by the *paragraphe* procedure.

1. Demosthenes *Against Zenothemis*

The defendant Demon begins his speech by citing the law under which he has brought his *paragraphe*: "the laws provide that there be private actions for ship captains and merchants for obligations arising during voyage to and from Athens, including those for which there may be written agreements" (Dem. 32.1).

As we noticed before, this is an unusual paraphrase of the law, which should not mislead us. The law covered all cases in which there was a *symbolaion*, a liability arising either from a breach of contract or delict that could give rise to an action in court. Demon however adds the phrase "including those for which there may be written agreements" because he wishes to give the impression that the scope of the law was limited to contractual obligations. The reason for this attempt to narrow the scope of the law because this would disqualify Zenothemis's case in which there was only delictual liability arising from the illegal seizure of his property (τὸ ναῦλον σφετερίσασθαι).[36] Demon next claims that there has been no obligation or contract between the two men and produces the plaint submitted by Zenothemis to prove his point: "he says that he made a loan to the ship captain Hegestratus, and after he was lost at sea, we appropriated his cargo" (Dem. 32.2).

But we should not place too much weight on Demon's opening argument because he ignores it in the rest of the speech, which aims to show that Zenothemis had no claim to the grain and as a result there was no liability (either contractual or delictual) on his part. Now if the law providing for maritime suits required the existence of a written contract as Cohen, MacDowell and others believe and one could bring a *paragraphe* action if there was no written contract, all that Demon would have to do is to prove that there was no written contract or that the written contract provided by Zenothemis was not genuine. And if the law about the use of the *paragraphe* in maritime suits were directed

36 Wolff 1966, 44 rightly calls this argument "Spitzfindigkeit" and in note 54 presents evidence demonstrating that *symbolaion* meant "obligation" in the broader sense. Wolff also noted that Zenothemis justified his use of the *dike emporike* on the grounds that Demon's exclusion of him from property that he claimed belonged to him created the liability necessary for bringing a maritime suit ("das formale Mittel zur Schaffung einer [deliktischen] Haftungsbeziehung"). Wolff is right that Zenothemis' claim is delictual, but it was not created by Demon's *exagoge*. If the property belonged to Zenothemis, the delictual obligation arose when Demon seized it. Wolff 1966, 45 then noted that Demon had to follow a narrow interpretation of the statute ("so eng genommen haben") because his case was weak on evidentiary grounds ("so dürfte sie [i.e. die Zulässigkeitsbedingungen der δίκη ἐμπορική] im Interesse seiner gewundenen Argumentation zu eng genommen haben"). MacDowell 2004, 84-86 misses this point. Carawan 2011, 284 appears to have misunderstood his point, and his objection to Wolff's argument is based on his mistaken view of the law about maritime suits.

just at the procedural issue, all discussion about the merits of Zenothemis' *dike exoules*, the suit that caused Demon to bring his *paragraphe*, would be irrelevant. On the other hand, if the defendant who brought a *paragraphe* against a maritime case had to prove that there was no outstanding liability (*symbolaion*) either from a delict or from a breach of contract, then the merits of Zenothemis' *dike exoules* become relevant – after all, if there were no outstanding liability, there would be no grounds for the *dike exoules*.

Demon divides his argument into four parts: 1) the voyage from Syracuse to Athens (4-13); 2) the dispute about the possession of the grain after the ship's arrival in Athens (14-19); 3) the summary of the grounds for the *paragraphe* (20-23); and 4) the reasons why Protus left Athens and did not provide testimony (24-30). We will deal with each part separately.

Demon starts his narrative by recalling the information in Zenothemis' plaint and filling in details, which he claims his opponent has suppressed. According to Demon, Zenothemis and Hegestratus borrowed money at Syracuse, then each told other creditors who sailed with them that the other had grain he had bought on the ship (Dem. 32.4). Demon then alleges that both men sent the money they borrowed to Marseille and put no cargo on the ship. To avoid paying their creditors, they plotted to sink the ship on its voyage to Athens. While Zenothemis distracted the other passengers, Hegestratus started boring a hole in the hull. Hegestratus was caught by other passengers but tried to escape by jumping overboard. He missed the lifeboat tied to the ship and drowned (Dem. 32.5-6). Demon presents no evidence to prove his account of events. The witnesses he presents at the end of this section testify to different matters. In his plaint Zenothemis claimed that he made a loan and that Hegestratus was lost at sea. The language of his plaint implies that his property was transported on the ship. Demon agrees that Hegestratus borrowed money but not from Zenothemis and denies that both men had any merchandise on the ship.

If we follow the traditional view of the law about maritime cases, none of this is relevant for Demon's case.[37] All that he has to prove is that there was

37 Wolff 1966, 40 comments on this section: "Was aber, abgesehen vom Amüsement seiner Zuhörer, bezweckte der Beklagte mit dieser detaillierten Beschreibung der angelblichen Hintergründe des Prozesses? Daß sie, für sich genommen, allenfalls die Substanz des Rechtsstreits betraf, aber mit der Frage seiner Einführbarkeit auch nicht das geringste zu tun hatte, ist nicht zu leugnen." But if one sees that the issue of Zenothemis' right to the cargo is relevant to the question about the liability of Demon to Zenothemis, which is in turn relevant to the question of the admissibility of Zenothemis' suit, the entire section is relevant to the procedural legal issue because to get the case into court, there had to exist an actionable liability on the part of the defendant. Wolff 1966, 43 then claims that Demon's account of Zenothemis' shenanigans in 4-9 is simply meant to undermine his credibility ("seine Darlegung der Schurkereien des Zenothemis vielmehr als ein Mittel zur Stützung seiner *paragraphe* betrachtet haben"). Cf. Harrison 1971, 115, who follows Wolff: "The seemingly irrelevant details he gives are simply designed to undermine the credibility and respectability of Zenothemis." But Demon clearly uses the scheme to undermine Zenothemis' claim to the grain, which is the basis for his *dike exoules* (Dem. 32.10).

no written contract creating a liability between him and Zenothemis.[38] Every statement in this part of the narrative, however, is aimed at proving that Zenothemis had no right to any merchandise on the ship because nothing in the cargo belonged to him. The money he borrowed was sent to Marseille and was not used to purchase goods. Demon then tries to use the death of Hegestratus as evidence to prove the existence of a plot to defraud creditors. This alleged plot in turn casts doubt on the claims made by Zenothemis to the ship's cargo. And if Zenothemis had no right to the ship's cargo, he could not claim that Demon was wrongfully keeping it from him. In other words, the narrative is designed to prove that Demon has no liability (*symbolaion*) to Zenothemis. If we follow the broader interpretation of the law and the use of the *paragraphe*, all the information presented in this part of the narrative becomes relevant to the case.

The same is true for the next part of the first section of the narrative. After Hegestratus drowned, Zenothemis tried to get the prow-man and the crew to abandon ship and let the ship sink. Again Demon stresses his opponent's desire to evade liability for his obligations (Dem. 32.7: τὰ συμβόλαια ἀποστερήσαιεν). After the ship reached Cephallonia, Zenothemis and the people from Marseille tried to have the ship sail to their city on the grounds that they had lent the money (Dem. 32.8). This plot also failed when officials at Cephallonia instructed them to have the ship return to Athens (Dem. 32.9). At this point Demon exclaims that Zenothemis is so shameless that he has made a claim to his grain and brought a suit against him. But if the *paragraphe* could be brought only about matters of procedure as Wolff claims, what was shameless was Zenothemis' use of the *dike emporike* when it was not a suitable procedure, which is not the way Demon argues.

In the final part of the first section of the narrative Demon tells how he sent Aristophon to Cephallonia, apparently to represent his interests before the officials there and to argue that the ship continue its voyage to Athens (Dem. 32.11). Demon is rather vague about Aristophon's role and complains that he colluded with Zenothemis. In summing up this section, Demon says that Zenothemis laid claim to his merchandise only because he could not pay his own loans and could not evade these obligations by destroying the ship (Dem. 32.12). This too is relevant to the question of Demon's liability and the ownership of the grain. If Zenothemis had no case, Demon had to come up with a motive for him bringing a baseless suit. He therefore presents the story about the plot to sink the ship. Demon is in effect arguing that Zenothemis' suit is not admissible because he has no liability toward his opponent. What is striking is that after denying that there is any liability, Demon then explicitly states: "Such then is the issue about which you will

38 See, for instance, MacDowell 2004, 85: "Demon now brings a counter-indictment, asserting that prosecution under the mercantile laws cannot be allowed because there has never been any written contract between him and Zenothemis." MacDowell 2009, 272-275 repeats the same mistakes.

cast your votes" (Dem. 32.13: τὸ μὲν οὖν πρᾶγμα ὑπὲρ οὗ ψῆφον οἴσετε).[39] In the section immediately preceding this, Demon does not mention the existence or non-existence of a written contract nor does he limit himself to procedural matters. He stresses the lack of merit inherent in Zenothemis' claim to his grain.[40]

Up to this point, Demon denies Zenothemis' right to the grain. In the next section he proceeds to establish his own rights to it. After the ship's arrival, the ship was held by those who made loans on the security of the ship, and Protus, the person who purchased the grain, held it in his possession (Dem. 32.14). Zenothemis then came with Aristophon and demanded the grain held by Protus on the grounds that he made a loan to Hegestratus (Dem. 32.14). According to Demon, Protus then posed a rhetorical question: Why would Zenothemis lend money to Hegestratus with whom he was collaborating to defraud other people and was telling him that they would lose their money? (Dem. 32.15). In other words, Zenothemis' claim that he made a loan to Hegestratus is implausible because Zenothemis knew that he was not a good business risk. Despite the implausibility of his story, Zenothemis claimed it was true (Dem. 32.15: ἔφη). Another bystander then said that Zenothemis had been cheated by Hegestratus who had suffered punishment for his misdeed (Dem. 32.15). This comment also serves to undermine Zenothemis' claim to the cargo held by Demon.[41] Yet another bystander picked more holes in Zenothemis' argument. He pointed out that Zenothemis and Hegestratus deposited a written agreement with another person on board (Dem. 32.16). If Zenothemis had trust in Hegestratus, why did he seek assurances from him before the crime? But if he distrusted him, why didn't he get some legal assurance on land (that is, before the ship set sail) as the others did?

It is possible that Demon may have invented this conversation; the witness statements at the end of the section pertain to other events. But the aim of the alleged interchange is to show that Zenothemis' alleged loan to Hegestratus is implausible and that if it was made, Hegestratus defrauded Zenothemis because he purchased no grain with the money he borrowed. Both claims serve to undermine Zenothemis' claim to the grain held by Protus and thereby to deny Demon's liability in the *dike exoules*.

After this exchange, Protus tried to take possession of the grain, and so did Phertatus, his associate. Zenothemis refused to yield possession to anyone except De-

39 The word πρᾶγμα is almost a technical term for "legal issue." Compare Aeschin. 1.113 with Harris 2013a, 134, note 87.

40 Carawan 2011, 282-284 claims that "Z has a claim based on a maritime contract and he therefore asserts his right to bring suit in the maritime court" and that "D insists that maritime suits are properly reserved for obligations based on a contract between the two parties, not upon some incidental agreement with a third party" but Zenothemis is never reported to make such an argument and Demon never actually states what Carawan alleges. Zenothemis' claim to the grain is based on his statement that he bought it.

41 Another bystander tried to pick holes in Zenothemis' arguments, but his points are brief to the point of obscurity (Dem. 32.15). Yet it is clear that this bystander also doubted Zenothemis' rights to the cargo.

mon (Dem. 32.17).[42] To resolve the question about the ownership of the grain, both Protus and Demon challenged Zenothemis to travel to Syracuse and consult the records of the officials to see who paid the export tax on the grain (Dem. 32.18). When Zenothemis declined to accept the challenge, Protus urged Demon to take possession of the grain, which he did. Demon then presents the testimony of witnesses to prove that Zenothemis would not yield possession of the grain to anyone except Demon and that Zenothemis declined the challenge to travel to Syracuse (Dem. 32.19).[43] Once more, none of this has anything to do with the existence of a written contract linking Demo and Zenothemis. Every statement is aimed at proving that Zenothemis had no right to the grain, which rightfully belonged to Demon, in other words, that Demon had no obligation (*symbolaion*) to Zenothemis.

In the next section Demon summarizes his case for the *paragraphe*. He gives his reasons for taking possession of the grain: there was an outstanding obligation to him at Athens (ἡμῖν τοῖς ἐνθένδε μὲν πεποιημένοις τὸ συμβόλαιον) and the grain belonged to the person who bought it at Syracuse (τὸν σῖτον παρὰ τοῦ δικαίως ἐκεῖ πριαμένου) (Dem. 32.20). This is slightly elliptical, but the previous narrative makes the meaning clear: Demon seized the grain because Protus bought the grain and owed him money (cf. Dem. 32.14: τὸν δὲ σῖτον ὁ ἠγορακὼς εἶχεν· ἦν δ' οὗτος ὁ ἡμῖν τὰ χρήματ' ὀφείλων). The plot to sink the ship also makes it highly unlikely that Zenothemis owned the grain. For Demon this is the greatest proof that the grain does not belong to his opponent (Dem. 32.21). Yet in the following section Demon explicitly states twice (using a rather feeble pun) that the judges are now about to vote about the admissibility of Zenothemis' case (Dem. 32.22: ὡς εἰσαγώγιμον ψηφιεῖσθε τούτῳ τὴν δίκην περὶ τούτων τῶν χρημάτων and Dem. 32.23: ταῦτ' εἰσαγώγιμα τούτῳ ψηφίσαισθε;), not about his *dike exoules*. After having the law and his plaint for the *paragraphe,* which led to the trial, read out by the clerk, he states once more the issue about which the judges are voting: not a decision about Zenothemis' *dike exoules* but about the admissibility of his case (Dem. 32.24: ὅτι μὲν τοίνυν ἐκ τῶν νόμων παρεγραψάμην μὴ εἰσαγώγιμον εἶναι τὴν δίκην, ἱκανῶς οἴομαι δεδεῖχθαι). On the one hand, Demon has shown that Zenothemis has no right to the grain Demon now has in his possession, which means that he has no obligation to Zenothemis. On the other hand, Demon clearly states that his entire

42 The witnesses also testify about the contract between Hegestratus and Zenothemis (Dem. 32.19), but this has nothing to do with the dispute between Demon and Zenothemis. MacDowell 2004, 90, note 14 wonders why Zenothemis agreed to let Demon take the grain and not the others. He speculates implausibly that Zenothemis may have thought that Hegestratus borrowed money from Demon, but nothing in the narrative suggests this. But Zenothemis' motive is irrelevant. The important point is that Zenothemis' willingness to have Demon take possession makes a *prima facie* case that the grain belonged to the latter.

43 MacDowell 2004, note 16 mistakenly believes that the aim of the voyage was "to attend a trial at Syracuse" but as the narrative makes clear, it was to consult the records of the export tax.

argument has shown that Zenothemis' case is inadmissible.[44] The sequence of statements makes it clear that the case is not admissible because there exists no liability on the part of Demon toward Zenothemis because Zenothemis does not have a legitimate claim to the grain. This section clearly supports the view that to prove that a *dike emporike* was not admissible, one had to prove that no liability existed that could give rise to a legal action.[45] In other words, a discussion of the substantive issue was directly relevant to the procedural issue.

This section of the speech poses insuperable problems both for Paoli's view of the *paragraphe* and for that of Wolff. According to Wolff's view, the dispute about who owns the grain is irrelevant to the *paragraphe*, which concerned only procedural issues, not substantive issues, but Demon devotes the entire speech to the substantive issue. According to Paoli's view, the court hearing a *paragraphe* case determined not just the question of admissibility, but also ruled about the substantive issue, but when summarizing his case to the court, Demon clearly states that the judges are about to rule only on the question of admissibility. This section is also an obstacle to the view that maritime suits could only be brought for cases in which there was a written contract: Demon never uses this as one of the reasons for bringing his *paragraphe*. On the other hand, if the defendant who brought a *paragraphe* against a maritime case had to prove that no obligation (*symbolaion*) existed, that is, the plaintiff had no substantive grounds for bringing his case, then the statements made by Demon make perfect sense.

2. Demosthenes *Against Apaturius*

The case *Against Apaturius* is similar to that in *Against Zenothemis* in one important way: both speeches were delivered by defendants in maritime cases who have brought a *paragraphe* against the plaintiff. In this case, however, the plaintiff has brought his suit against the defendant because he claims that he was a surety for Parmeno, who Apaturius claims owes him money as the result of a decision by a private arbitrator. On the other hand, the speaker in this case also denies that the suit against him is not admissible because there is no obligation (*symbolaion*). As in the *Against Zenothemis*, the speaker in the *Against Apaturius* starts by reminding the court about the law for maritime cases, but adds the possibility of imprisonment for the defendant until he pays the penalty the court imposes (Dem. 33.1). He then notes that when there is no obligation

44 The final part of the speech (Dem. 32.25-32) anticipates his opponent's objections and concerns the actions of Protus, Zenothemis's suit against him and his relationship with Demosthenes. Demon's aim here is to explain why Protus did not come forward to testify for him as the judges might have expected and to argue that Zenothemis' victory against him in court is irrelevant to his own case.

45 Wolff 1966, 45-46 rightly notes that Demon stresses the fact that Zenothemis' case is not actionable at Dem. 32.22-24, but does not note that in sections 21-22 Demon cites substantive reasons for his argument by emphasizing the fact that the grain did not belong to Zenothemis as the grounds for his argument that the case is not actionable.

(*symbolaion*), the laws permit merchants and ship-captains to lodge a *paragraphe* so that there will be trials only in cases in which there has been some wrong done to these groups. This procedure has enabled men to prove that the plaintiffs' charges against them were wrong (Dem. 33.2).

All these statements provide more evidence for the conclusions reached in our analysis of *Against Zenothemis*: in a *paragraphe* action the defendant had to prove that the plaintiff's charges were unjust because he had committed no wrongdoing and that as a result there was no liability that could give rise to a legal action. The speaker then applies these rules to his own case: he will show that Apaturius is accusing him falsely (Dem. 33.3: ἐγκαλοῦντος δέ μοι ᾽Απατουρίου τὰ ψευδῆ) and thus has brought his suit illegally (παρὰ τοὺς νόμους δικαζομένου). In this way, he ties his *paragraphe* to the refutation of the charges in the plaint (*engklema*) Apaturius brought in his original suit, that is, the substantive issues of the original suit (cf. Dem. 33.35).[46] He next outlines the way in which he will do this: he will show that in one case he has been given a release and discharge from all obligations (Dem. 33.3: ὅσα μὲν ἐμοὶ καὶ τούτῳ ἐγένετο συμβόλαια πάντων ἀπαλλαγῆς καὶ ἀφέσεως γενομένης) and in another that no obligation exists (ἄλλου δὲ συμβολαίου οὐκ ὄντος).[47] MacDowell claims that "the ground for the counter-indictment is that the speaker has been prosecuted by the procedure for mercantile cases although no written agreement exists between him and the prosecutor," but this view rests on a mistranslation of the word *symbolaion* in the opening section.[48] When we examine the details of the case, we will also see that these are not the grounds for the *paragraphe*: as the speaker indicates in the prologue, he has brought his case because he has no obligation arising from delict or contract. In the case of the loan made to Apaturius, the speaker actually admits that a written contract existed (Dem. 33.8). In the case of the surety, the speaker denies the existence of a contract only to prove that there is no obligation. And he admits toward the end of his speech that even if there had been no written contract, Apaturius could still have brought his case if he brought witnesses forward to prove that a contract existed (Dem. 33.37).[49] Instead of saying that this would be irrelevant to his *paragraphe,* he attacks their testimony, which implies that if it were true, it would have been relevant to the case.

The speech deals with two related events, both of which involve the speaker, Parmeno, and Apaturius. In the first, the speaker served a surety for a loan of thirty minas made by the banker Heracleides to Apaturius (Dem. 33.7) and made another loan to Apaturius for ten minas with some money contributed by Par-

46 On the nature of the plaint (*engklema*) see Harris 2013b.

47 MacDowell 2004, 99 mistranslates the sentence: "I have been given a discharge from all the contracts made between him and myself, and he and I have made no other contract for business either at sea or on land."

48 MacDowell 2004, 97. Cf. MacDowell 2009, 278, which repeats the same point.

49 This evidence completely undermines the analysis of MacDowell 2004, 95-98.

meno on the security of his ship and some slaves (Dem. 33.8).[50] Later Apaturius tried to abscond with his ship and slaves, but Parmeno stopped him (Dem. 33.9). The speaker sold the ship for forty minas, the total amount of the loan, and repaid the money to the bank and to Parmeno. They therefore tore up the terms of the agreement and granted releases to each other from all claims (Dem. 33.12). These events are not directly relevant to the main issue of the *paragraphe*, which concerns a surety allegedly made to Apaturius by the speaker, but it is relevant to the speaker's initial claim that there exists no obligation (*symbolaion*) on his part to Apaturius. The speaker tells the story of these loans for several reasons: first, it explains the origin of the dispute that led to the private arbitration; second, it impugns the character of Apaturius, who is revealed to be dishonest; and third, it allows the speaker to show that he is a man of his word who upholds his obligations to pay under a contract. This character evidence serves to support his version of subsequent events. It also enables the speaker to come across as someone dedicated to full disclosure: not only in the case of the surety but also in other cases does he not have any obligations to Apaturius.

The next section of the speech brings us to the charge made against the speaker in his original suit. When Parmeno tried to prevent Apaturius from absconding with the slaves, the two men came to blows (Dem. 33.13). After the two men failed to come to terms after an oath challenge, each brought a private action against the other, but friends persuaded them to agree to private arbitration. According to the terms of this agreement, there would be three arbitrators: Phocritus, Aristocles and the speaker (Dem. 33.14). Apaturius then provided Aristocles as his surety, and Parmeno provided Archippus. The agreement was then deposited with Aristocles (Dem. 33.15). When Apaturius saw that the arbitration might go against him, he claimed that Aristocles, the arbitrator he nominated, was the only one authorized to make a decision (Dem. 33.16-17). Parmeno was furious and insisted that Aristocles produce the document containing the terms of the arbitration, but Aristocles claims that his slave fell asleep and lost it (Dem. 33.18). In front of witnesses, Parmeno forbade Aristocles to make a decision (Dem. 33.19). Parmeno had to leave after an earthquake in the Chersonnese killed his wife and children. After he left, Aristocles proceeded with the arbitration and gave judgment against him on the grounds that he did not attend the hearing (Dem. 33.20-21).

After this narrative, the speaker then reveals Apaturius' charge against him: he had promised as guarantor to pay whatever amount was awarded against Parmeno (Dem. 33.22). His first argument (Dem. 33.22-26) is not all that strong: the speaker says that if he really owed Apaturius money, the latter should have demanded it immediately and not two years later (Dem. 33.24: τρίτῳ ἔτει). To support his argument, he cites the law about personal security, which states that these contracts are valid for only one year (Dem. 32.27). This means that if such a

50 On this transaction see Harris 2006, 82.

contract existed, Apaturius should have attempted to enforce it several years ago. What is important to note is that this argument does not address the existence or non-existence of a written contract, but the existence of a liability arising from a contract of personal security. The speaker's argument is that it is improbable that he owed money to Apaturius because Apaturius did not ask for it immediately. The other arguments also focus on the existence or non-existence of a liability arising from a contract of personal security. The speaker argues that it is improbable that he would have agreed to be Parmeno's surety after taking his side against Apaturius (Dem. 33.28). It is equally unlikely that if he were Parmeno's surety, he would have tried to deny it, because he had a stronger argument available to him, namely, that the arbitrator's judgment against Parmeno was invalid (Dem. 33.29). It was also unlikely that he would have agreed to become Parmeno's surety before Parmeno and Apaturius drew up a new agreement for the arbitration, which indicates that the earlier agreement was invalid (Dem. 33.30). Next he adds further arguments to show that the judgment in the arbitration was invalid (Dem. 33.31-34). At the end of his speech, the speaker says that he has brought the *paragraphe* because the charges against him are false and therefore his opponent had no right to bring a case (Dem. 33.35: τὰ ψευδῆ ἐγκέκληκε καὶ παρὰ τοὺς νόμους τὴν λῆξιν πεποίηται). In other words, the substantive issue in the plaint brought by Apaturius is directly relevant to the procedural issue in the *paragraphe* brought by the speaker. The written document is not relevant to the admissibility of the case, but would have provided proof of the charges made in the original plaint (Dem. 33.35-38). Even if there was no document, the speaker says that Apaturius could have provided witnesses (Dem. 33.37). This proves that the speaker's argument concerns the evidence (either from witnesses or in a written document) for his liability arising from the contract, not the existence of a written contract.[51]

3. Demosthenes' *Against Phormio*

We have already discussed the opening section of *Against Phormio* in Part II and the different interpretations of the law about the *paragraphe*. From this section, it is clear that Chrysippus, the plaintiff in the original suit, does not think that it is sufficient for him to prove that he made a contract with Phormio (something that Phormio admits) to prove that the case is admissible. As he says, he must prove that liability exists because Phormio did not abide by the terms of the agreement, creating an obligation. In the rest of the speech Chrysippus repeatedly makes reference to the contract, but only to show that

51 Wolff 1966, 33, followed by Harrison 1971, 113, claims that the speaker made use of the *paragraphe* because his case was weak as a result of lack of evidence. For a similar view see MacDowell 2004, 97-98. But if the case had been tried by *euthydikia*, the plaintiff, who had the burden of proof, also did not have a strong case because the documents about the arbitration were missing (Dem. 33.18-19, 30) and because there was no document proving that the speaker was the surety for Parmeno, who had left Athens (Dem. 33.20).

Phormio did not respect its terms. According to Wolff, all Chrysippus had to show was that the obligation in the contract existed, but this is not the way the litigant argues.[52] Chrysippus starts his case by recalling that Phormio agreed to purchase 4,000 drachmas worth of merchandise to provide adequate security for his loan of 2,000 drachmas, and a total amount of merchandise worth 11,500 drachmas to provide adequate security for all the loans, but he purchased only 5,500 drachmas worth of goods (Dem. 34.6-7). He proves both statements with the evidence of the contract and the statement of witnesses and the records of the export tax paid at Athens (Dem. 34.7). Phormio then sailed to the Bosporus but could not sell the goods he transported (Dem. 34.8). The ship's captain told Phormio to put a cargo on board according to the terms of the agreement, but he did not, instructing Lampis, his slave or business associate, to sail on the ship while he stayed in Bosporus (Dem. 34.9). This ship then sank with considerable loss of life, but Lampis survived (Dem. 34.10). Lampis then reported to Chrysippus that Phormio did not put goods on board or make payment to him (Dem. 34.11). When Chrysippus met Phormio in Athens, the latter at first promised to repay the loan, then changed his mind (Dem. 34.12). At this point Chrysippus presented Phormio with a summons as a way of initiating a law-suit (Dem. 34.13-15). He was accompanied by Lampis; despite his presence, Chrysippus, when presented with the summons, did not say that he had paid him the money in the Bosporus (Dem. 34.15). His account of this incident is supported by the evidence of the plaint Chrysippus lodged in the previous year (Dem. 34.16).

Chrysippus next recounts the private arbitration, to which he and Phormio agreed, and how Lampis changed his testimony. He claims that the arbitrator Theodotus believed that Lampis had perjured himself, but refused to give judgment out of partiality to Phormio (Dem. 34.18-21). Chrysippus next argues that Phormio could not have paid Lampis (Dem. 34.22-28). Once more, this argument is only relevant if Chrysippus had to prove that Phormio owed him money that he did not pay.

If Phormio had only to prove that a written agreement did not exist to show that the case against him was not admissible, it is difficult to make sense of the arguments that Chrysippus says Phormio has made (Dem. 34.33-36). According to Chrysippus, Phormio said that the contract required him to pay only if the ship returned safely to port (Dem. 34.33).[53] To refute this point, Chrysippus also refers to the terms of the contract, which required Phormio to put a cargo on board or pay 5,000 drachmas and argues that his failure to do so nullified

52 As a result, Wolff 1966, 71, followed by Harrison 1971, 111 with note 1, is forced to argue that either Chrysippus did not understand the juristic meaning of the *paragraphe* or that he deliberately confuses the legal issues. A correct reading of the law about the *paragraphe* in maritime cases shows that there is no reason to consider Chrysippus either a fool or a scoundrel.

53 This was a standard feature of maritime contracts. See Dem. 56.31-35. It is not clear when Phormio made this argument. He could not have made both arguments that Chrysippus attributes to him in this passage at the *paragraphe*, because they are contradictory.

this clause in the contract. Later Phormio changed his story and claimed that he paid money to Lampis (Dem. 34.34-35). Chrysippus attacks him for inconsistency, but the important point is that Phormio tried to argue that Chrysippus' suit was not admissible either because the terms of the contract did not require him to pay in the event of a shipwreck or because he had already paid the debt. Both these arguments address not the existence of the contract, which Phormio takes for granted, but the existence of his liability to Chrysippus for not abiding by the contract.[54] Later on in the speech, Chrysippus again attacks Lampis' testimony (Dem. 34.46-48), which was relevant only to the issue of Phormio's liability, not to the existence of the contract.

4. Demosthenes *Against Lacritus*

The speech *Against Lacritus* is similar to the speech *Against Phormio* because it was delivered by the plaintiff, Androcles, son of Xeinis of Sphettus, in response to the *paragraphe* brought by the defendant Lacritus, a merchant from Phaselis. This speech is different from the other *paragraphe* speeches because the speaker does not start with a discussion of the laws about maritime cases but immediately launches into his reply to Lacritus' case against the admissibility of his suit. Androcles has no problem proving the existence of a written contract between himself and Lacritus' brother Artemon: he produces the actual document (Dem. 35.10-13) and the testimony of several witnesses who were present when the agreement was made (Dem. 35.14). If the existence or non-existence of a legally binding relationship was the main issue to be debated in a *paragraphe*, Androcles could rest his case at this point in the speech.[55] But the main part of the speech is devoted to establishing two main points: first, Artemon did not pay him the money he owed and violated other terms of the contract; and second, Lacritus is responsible for his brother's debt as the heir of his estate. He states this explicitly toward

54 The argument at Dem. 34.38-41 aims to prove that Chrysippus' case is not a malicious action. He describes his benefactions to the Athenian people and says that after having spent so much money to acquire a good reputation, he would not destroy it by bringing a case without merit. Once again, the argument relates to the claims made in his original plaint, not just to the procedural issue.

55 MacDowell 2009, 264-265 claims that "The ground for the *paragraphe* must therefore have been that there was no written agreement between Androkles and Lakritos; a mercantile case had to be based on a written agreement." MacDowell rightly notes that Androcles has the written agreement read out, but fails to note that the reason why Androcles has it read out is to prove that Lacritus violated the terms of the agreement (see especially Dem. 35.43). One finds the same mistaken view in Isager and Hansen 1975, 175. On MacDowell's view of the use of *paragraphe* in maritime cases, most of the arguments in the speech are irrelevant. Wolff 1966, 76 encounters a similar difficulty and notes that only a few words of the speech are directed at the procedural issue, the rest addressing the substantive issue ("Den Rest der Rede bilden auch hier zum größten Teil Ausführungen zum materiellen Hintergrund des Rechtsstreits"). But if the substantive issue was relevant to the procedural issue, the rest of the speech is not irrelevant to the main issue of the *paragraphe*.

the beginning of the speech: "I made a loan to Artemon, judges, the brother of this man Lacritus, following the mercantile laws for a journey to Pontus and back to Athens. He died before he repaid me the money. I have brought this suit against this man Lacritus here according to the laws concerning the obligation now owing to me because he is that man's brother and possesses all Artemon's property, everything he left behind here and everything he owned at Phaselis, and because he has inherited everything that man owned, and furthermore because he would not be able to show me any law that gives him the right to possess and manage his brother's property as he thought best but not to repay other people's money and to say now that he is not his heir and is renouncing his rights to that man's property" (Dem. 35.3-5). I have translated the final sentence as one sentence because it is important to have Androcles' case presented together in its entirety. In both sentences the emphasis is on Artemon's failure to repay and Androcles' obligation to repay. It is also clear from Androcles's summary of Lacritus' objection that the latter did not contest the admissibility of the case on the grounds that there was no contract or written agreement but because he was not the heir of Artemon and therefore had no liability (*symbolaion*) toward him.

After presenting the contract and the testimony of witnesses to the court, Androcles proceeds to show that Artemon violated the terms of the agreement by shipping fewer than 500 *keramia* of wine instead of the 3,000 required in the contract (Dem. 35.18-21). The contract also stipulated that Androcles not pledge the cargo for other loans, but he violated this clause by contracting an additional loan on the same security (Dem. 35.21-22). The contract also required Artemon and his partner to sell the cargo from Athens in the Black Sea and to purchase a return cargo, which they were to transport to Athens, where they would repay the loan; Artemon also violated these terms of the contract (Dem. 35.24-27). Artemon returned to Athens but did not unload a cargo or repay the loan (Dem. 35.28-29). When Androcles confronted Lacritus, the latter claimed that all the goods had been lost in a shipwreck (Dem. 35.30-31). But Androcles claims that this cargo was bought with money borrowed from Antipater, a man from Kition on Cyprus (Dem. 35.32). This is supported by the testimony of witnesses (Dem. 35.33-34). He then charges that Lacritus violated the terms of the agreement by not shipping a return cargo with the money he received and by using his money in a way contrary to the terms of the contract (Dem. 35.36-37). When summing his main arguments (Dem. 35.38-39), Androcles repeats his points: Lacritus did not abide by the terms of the contract.[56]

56 In the rest of the speech Androcles attempts to blacken the character of Lacritus by accusing him of using sophistic arguments (Dem. 35.39-44), depriving him of the chance to obtain legal redress (Dem. 35.45-50), and illegally transporting grain to a port other than Athens (Dem. 35.51-54). Note however that at Dem. 35.43 Androcles states that the issue is "either that they did not borrow money from us, or that, having borrowed it, they have paid it back." Wolff 1966, 78 claims that "Im Paragrapheverfahren hatte Vorbringen dieser Art keinen Platz", but as we have seen, such an argument was directly relevant to the main is-

To sum up: like the previous speech, Androcles devotes most of his speech to proving that the defendant in the original case does in fact owe him money, that is, an obligation (*symbolaion*) does in fact exist. This in turn means that there are no grounds to reject the admissibility of the original suit.

5. *Keeping to the Point in Maritime Cases*

When a litigant brought a private case to court in Athens, he swore that he would "keep to the point" ([Arist.] *Ath. Pol.* 67.1).[57] This meant that he would concentrate on proving the charges that he made in the plaint (*engklema*), which showed how the defendant had violated the substantive portion of the law under which his action was initiated.[58] The judges who heard cases also swore that they would vote only about the charges contained in the indictment (Dem. 45.50).[59] In his analysis of the speeches Dem. 32-35, Wolff believes that the speakers often stray far from the legal issue and insert material that is not directly relevant. He believes that this is characteristic of much argumentation in Athenian forensic oratory, in which the main aim was to convince the judges of the general dishonesty of their opponents and thereby to prepare them psychologically for a favourable vote in the case.[60] But his analysis of the speeches is based on a misconception of the charges in a *paragraphe*. If one understands the meaning of the law about the use of the *paragraphe* in maritime cases, one discovers that many of the points dismissed by Wolff are not only relevant to the legal charges made in the plaint, but absolutely necessary to prove the litigant's case. All the evidence that the litigants present and the arguments that they make to show that an actionable liability did or did not exist bear directly on the main legal issue of the *paragraphe*.[61] Wolff therefore seriously underestimates the efforts made by litigants to "keep to the point."

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sue of the speech. As a result, Wolff 1966, 79 charges Androcles with misleading the judges ("eine Irreführung der Richter").

57 Rhodes 2004 argues that litigants in Athenian courts generally attempted to keep to the point, but he never states how the courts could determine what the point was. He devotes only a few sentences to Dem. 32-35. He finds very little that is irrelevant but provides no detailed analysis of the legal charges and the arguments in these speeches.

58 For the role of the plaint in determining relevance in Athenian courts see Harris 2013a, 114-131 and Harris 2013b.

59 For allusions to this part of the Judicial Oath see Harris 2013a, 114, note 32.

60 See, for instance, Wolff 1966, 81: "Vielleicht bezweckte (. . .) die ganze lange Sachdarstellung, deren Einfügung ja durchaus zum üblichen Schema dieser Reden gehörte, nicht mehr, als die Richter von der allgemeinen Unredlichkeit der Gegenseite zu überzeugen und sie so psychologisch zu einem dem Kläger günstigen Votum auch in der spezifischen Frage der Paragraphe bereit zu machen."

61 Lanni 2006, 149-174 claims that there was a stricter standard of relevance in maritime cases than in other cases heard before the regular courts, but her arguments are not convincing. She fails to take into account the fact that the judges in maritime cases and in other private cases swore the same oath to decide only about the charge in the indictment. See Harris 2009/10, 330. Lanni also repeatedly mistranslates the term *symbolaion*.

IV

The analysis of the four speeches delivered in cases brought by the procedure of the *paragraphe* against maritime suits has shown that the litigants in each case address the question: did the defendant in the original maritime suit have a liability toward the plaintiff either because he had either committed a delict (*Against Zenothemis*) or because he had not abided by the terms of a contract (*Against Apaturius, Against Phormio, Against Lacritus*)? On the one hand, Wolff is correct in stating that the litigants in these cases all address the procedural issue: is the case admissible? On the other hand, Wolff is wrong to dismiss all the arguments about the liability of the defendant in the original maritime suit as irrelevant. Because there had to exist an actionable liability on the part of the defendant in a maritime suit, the defendant could bring a *paragraphe* if he claimed that no such liability existed on his part. Paoli was correct to emphasize that the litigants in these cases address the substantive issue of the original maritime suit, but he did not see how this issue was relevant to the procedural issue in the *paragraphe* case.[62]

This solution to the problem posed by the use of the *paragraphe* in maritime suits raises two questions noted above. First, why did the procedure in effect give a merchant who was charged with an offense potentially two chances to defend himself against the substantive charge? Second, if the liability of the defendant was discussed at the *paragraphe*, and the court decided that liability existed, what more was there to discuss at the trial after the *paragraphe* was decided?

To understand why the Athenians passed such a law granting the right to defendants, we must recall some of the features of the laws about maritime cases. In the *Poroi* (3.3) Xenophon recommends that the Athenians create prizes for market officials who resolve commercial disputes quickly and fairly. The maritime suits appear to have been created to pursue this goal. Such suits were classified as monthly suits, which meant that they had to be decided within a month after the plaint was accepted by the magistrate.[63] For the convenience of merchants and ship-owners, these suits could only be brought between the months of Boedromion and Munichion (Dem. 33.23), that is, during the period when merchants and ship-owners would not be doing their business at sea.[64] To ensure that defendants

62 The attempt of Carawan 2011 to defend Paoli's view is therefore not convincing.

63 The view of Cohen (1973) 23-36 that monthly suits were those that could be brought every month and not those brought to court within thirty days after the magistrate accepted the charge is not convincing. See Vélissaropoulos (1980) 241-45 and Hansen (1983) 167-70. Hansen's strongest evidence is Dem. 42.13. Hansen cites the document at Dem. 21.47, but this document is a forgery, and the statements in it unreliable as evidence. See Harris in Canevaro (2013) 224-31.

64 One should however not underestimate the amount of sailing done during the winter. See in general Beresford (2013). Some prefer to emend the text so that *dikai emporikai* could be brought only during the sailing season. See Hansen (1983) 170-75 with the literature cited there.

who were sentenced to pay damages made their payments, the law provided that they could be placed in prison until they paid (Dem. 32.29; 33.1; 56.4).

The disadvantage of these new, more stringent procedures was that they might encourage frivolous cases aimed at harassing ship-owners and merchants. There were several measures designed to discourage frivolous charges in Athenian law,[65] and the Athenians gave special protection to merchants against false charges (Dem. 58.53-54). According to the litigant who was charged by Apaturius, the intent of the law about the *paragraphe* in maritime cases was to protect merchants and ship-owners against malicious lawsuits (Dem. 33.2: ἵνα μηδεὶς συκοφαντῆται [. . .] συκοφαντοῦντας). The aim therefore of the procedure was not confined to procedural matters: its general aim was to prevent merchants and ship-owners from falling victim to baseless charges, that is, charges that had no basis in fact or in law. In this way, only those who were truly guilty would be brought to court (Dem. 33.2: αὐτοῖς τοῖς τῇ ἀληθείᾳ ἀδικουμένοις τῶν ἐμπόρων καὶ τῶν ναυκλήρων αἱ δίκαι ὦσιν).[66] One should note that this is similar to the analysis of the aim of the *paragraphe* procedure given in Demosthenes' speech *For Phormio* (36.2): "if the defendant shows that he has done nothing unjust, he will gain a release (i.e. from all charges) that is binding." In this case the defendant had to use the procedure to protect himself against the malicious prosecution (*sycophantia*) of Apollodorus (Dem. 36.3. Cf. Dem. 37.1). The *paragraphe* therefore gave the defendant who thought that he had been unjustly charged in a maritime case the chance to go on the offensive and to have the court rule that the baseless charges were inadmissible. It also gave the merchant or ship-owner potentially two chances to rebut the charges of the plaintiff. This was a way of providing a level playing field and not placing too many advantages in the hands of the plaintiff. If the successful plaintiff could have the defendant placed in prison until he paid, the Athenian legal system clearly wanted to make sure that it would not be too easy to impose this harsh punishment. The laws of Athens were designed to protect the rights of all ship-owners and merchants, not only those who were plaintiffs who were seeking recompense for wrongs done (Dem. 56.48-50), but also those who were defendants who needed to have their rights to procedural fairness enforced.

But if the plaintiff were able to defeat the suit brought by the defendant in a *paragraphe*, what was there left to discuss at the trial on the charges brought in the original case brought by the *dike emporike*? Here one must bear in mind the two aspects of a private action. First, the plaintiff had to prove that the defendant had committed a wrong. He might have also to prove that the wrong had been committed willingly as opposed to involuntarily if he wished to collect double damages (Dem. 21.43). Second, the plaintiff had to prove what amount

65 See Harris (2006) 405-22 and Harris (2013a) 72-76.

66 This passage is decisive against the view of Wolff (1966) about the general aim of the *paragraphe*.

of damages the defendant should pay. In the case Demosthenes brought against Aphobus, the court made two decisions. First, it voted about the liability of Aphobus, then it voted about the amount of damages to be awarded (Dem. 30.31-32. Cf. Dem. 31.10). It is important to note that in none of the speeches delivered in a *paragraphe* case against a maritime suit does the plaintiff in the original suit discuss the amount of damages the defendant should pay. This is in clear contrast with the maritime suit *Against Dionysodorus*, in which the plaintiff discusses not only the liability of the defendant but the amount to be paid in damages (Dem. 56.38, 45). If the original plaintiff in a maritime case proved at the trial about the *paragraphe* brought by the defendant that there was a liability on the part of the latter, the plaintiff still needed to show what damages the court should award. This would have been an issue that was not discussed at the trial on the *paragraphe*, which needed to be decided at another trial.

To conclude. If a plaintiff brought a maritime case, and the defendant did not dispute the admissibility of the case, both the substantive issue (did the defendant owe the plaintiff money because of a delict or the violation of a contract?) and the amount of the damages would be discussed and decided at one trial. If a plaintiff brought a maritime case, and the defendant denied the admissibility of the suit by bringing a *paragraphe*, there would first be a trial about the *paragraphe*. One of the issues that might be discussed would be whether an actionable liability (*symbolaion*) existed on the part of the defendant. This is in fact the issue that was debated in the four speeches in the Demosthenic corpus delivered in a cases involving a *paragraphe* brought against a maritime suit (see Part III), though it is possible that a *paragraphe* could have been brought on other grounds such as the jurisdiction of the court. If the defendant who brought the *paragraphe* won his case, the plaintiff's case was ruled inadmissible, and that was the end of the dispute. If the court rejected the *paragraphe*, another trial would have taken place about the plaintiff's original suit. This appears to have been what happened in the case of the *paragraphai* brought by Meidias against Demosthenes' suit for slander (Dem. 21.84).[67] At this trial, the plaintiff would have cited the verdict at the previous trial to prove that liability existed and possibly reviewed the main points in his case, then concentrated on proving the exact amount of the damages owed by the defendant. The court would then have decided about these issues.[68]

67 Some scholars have thought that the *paragraphai* mentioned in this passage were motions to postpone the arbitration, but MacDowell 1990, 306-308 rightly rejects these views and shows that there is no reason to believe that the word should not have its normal legal meaning. This passage is decisive against Paoli's view of the *paragraphe*. One should also note that at Dem. 36.2 the speaker claims that Phormio did not bring his *paragraphe* to waste time. This statement only makes sense if the procedure of *paragraphe* gave rise to a trial that potentially delayed another, final trial on the issue. If one follows Paoli that the use of the *paragraphe* gave rise to only one trial at which both procedural and substantive issues were decided, this statement makes no sense.

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