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Recommended Citation

Carawan, Edwin M. "Paragraphê and the Merits." *Greek, Roman, and Byzantine Studies* 51, no. 2 (2011): 254-295.

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Paragraphē and the Merits

Edwin Carawan

On Archinus' suggestion you enacted a law that if anyone should bring a suit contrary to the oaths, the defendant could make a special plea; the magistrates would introduce this issue first and the man who brought the special plea would speak first. Whoever lost would pay a one-sixth penalty, so that those who dared to recall past wrongs (*mnēsikakein*) would not only be convicted as perjurers, but would also be penalized immediately, without awaiting punishment from the gods.¹

NOT LONG after democracy was restored, Archinus introduced a special remedy against lawsuits that violated the oaths and covenants of the Amnesty. This procedure for *paragraphē* was to be one of the defining reforms of the new regime; inspired by the reconciliation agreement and broadly adapted in later law, no other procedure is better represented in the extant speeches. The distinctive features are described here in the prologue to Isocrates' speech *Against Callimachus*: the archon will introduce this issue first and the defendant will speak first, challenging the suit against him; the loser will owe a penalty of one-sixth the amount at issue. So it is that Isocrates' client speaks first, as he is the defendant: he

¹ Isoc. 18.2–3: εἰπόντος Ἀρχίνου νόμον ἔθεσθε, ἂν τις δικάζεται παρὰ τοὺς ὄρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δὲ πρότερον τὸν παραγραψάμενον, ὁπότερος δ' ἂν ἡττηθῆ, τὴν ἐπωβελίαν ὀφείλειν, ἵν' οἱ τολμῶντες μνησικακεῖν μὴ μόνον ἐπιορκοῦντες ἐξελέγχοντο μηδὲ τὴν παρὰ τῶν θεῶν τιμωρίαν ὑπομένοινεν ἀλλὰ καὶ παραχρῆμα ζημιόιντο. Transl. Mirhady, in David C. Mirhady and Yun Lee Too, *Isocrates I* (Austin 2000) 98. Elsewhere translations are my own except where noted. In this study “the Amnesty” refers to the *diallagai* of 403.

challenges the plaintiff's claim (10,000 drachmas) for money that was confiscated under the oligarchy, on the grounds that it violates the Amnesty. If the *paragraphê* goes against him, Callimachus will owe one-sixth of that sum. In that respect, the roles are reversed: the defendant becomes plaintiff.²

This testimony is open to interpretation and the other evidence is often equivocal, but it was concluded long ago that the new procedure involves a two-stage trial.³ That the archons shall "introduce this issue first" seems to imply that there is first a hearing to determine whether the suit is admissible, and then, if the challenge is rejected, the court takes up the original complaint.⁴ Whoever loses on the procedural issue would owe the *epôbelia*, whatever the outcome on the main suit; for, supposedly, the *paragraphê* requires a separate decision.

The later cases refer to statutes barring lawsuits for procedural errors, as in Roman *exceptiones*,⁵ and it has been supposed that *paragraphê* was available in all such cases as, for instance, when a suit was brought in the wrong court (*exceptio fori*). Such is the plea opposed by Lysias 23 *Against Pancleon* (the

² Thus R. Dareste, *Les Plaidoyers civils de Démosthène* (Paris 1875) xx: "Le défendeur qui opposait la paragraphè devenait demandeur non pas seulement aux fins de son exception, mais pour tout le litige. Il parlait le premier sur la fin de non-recevoir d'abord, et ensuite sur le fond, car la question du fond n'était pas réservée, et il fallait toujours plaider à toutes fins. Les rôles des parties se trouvaient ainsi complètement renversés, à ce point que le rejet de la paragraphè entraînait contre celui qui l'avait opposée condamnation à l'épobélie." Cf. Dem. 34.4, *κατηγορεῖν τοῦ διώκοντος*.

³ This was already assumed by M. H. E. Meier and G. F. Schömann, *Der attische Process* (Halle 1824) 645–647; followed by J. Lipsius, *Das attische Recht und Rechtsverfahren* III (Leipzig 1915) 846. By their view the *epôbelia* is assessed (at least in the later cases) if either party fails to win one-fifth of the votes.

⁴ Largely from the late lexicographers, Lipsius, *Recht* III 857 n.39, concluded that both *paragraphê* and *diamartyria* led to "delayed judgments," *ἀναβόλιμοι δίκαι*. To the contrary, W. Hellebrand, "*Παραγραφή*," *RE* 18 (1949) 1169–1181, at 1176.

⁵ Or *praescriptiones*; but see U. E. Paoli, *Studi sul processo attico* (Padua 1933) 120, against the parallel.

only instance roughly contemporary with Isoc. 18): there the defendant's maneuver is called *antigraphé* and there is little similarity to the later pleas called *paragraphai*; yet scholars have often assumed that it is a variation on Archinus' model. The procedure was evolving, but the basis for it was, as Wilamowitz described it, just such "form- oder kompetenzfrage."⁶

On this reckoning the procedure that Archinus introduced soon after 403/2 was an *ad hoc* solution to a singular problem,⁷ and this technical solution opened the door to other procedural objections in the later *paragraphai*. Initially this recourse was based on the claim that the suit was in violation of a general amnesty (as it is usually interpreted), and thereafter it could be adapted to unrelated objections, precisely because it was originally and essentially a procedural remedy divorced from "the merits."

The idea that such questions should be decided separately from the main issue is a mainstay of legal thinking, of course, in both the Roman and common-law traditions. In Roman law procedural exceptions were regularly decided in the preliminary hearing before the magistrate, *in jure*. In the American system, for instance, an appellate court may reconsider questions of law but refuse to reconsider the lower court's verdict on factual issues; for the jury's sovereignty as "trier of fact" is enshrined in the Bill of Rights.⁸ So it seemed reasonable to sup-

⁶ *Aristoteles und Athen* (Berlin 1893) II 368–373. Wilamowitz sees the time constraint as indicating a second stage of the trial: "offenbar hatte er wenig wasser, weil diese vorfrage erst von der eigentlichen abgetrennt worden war" (369). We return to this problematic case at 259–261 below.

⁷ For the date of Archinus' reform see D. Whitehead, "Athenian Laws and Lawsuits in the Late Fifth Century B.C.," *MusHelv* 59 (2002) 71–96; followed (for the most part) by E. Carawan, "The Athenian Law of Agreement," *GRBS* 46 (2006) 339–374.

⁸ The rule derives from the Seventh Amendment: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined by any court in the United States than according to the rules of the common law."

pose that a comparable division of issues emerged at Athens.

But then Paoli presented an alternative construction:⁹ the real issue for the Athenian jury to decide, in civil suits where *paragraphe* applies, is whether to authorize the plaintiff to carry out his claim (demand payment or seize assets in lieu of payment), and the legalities cannot be severed from that reckoning. So there was no two-stage trial, with a separate hearing on the procedural question. Instead, the plaintiff's claim and the defendant's challenge are introduced in the same hearing (the latter first); and, if the *paragraphe* is rejected, the same jury proceeds directly to a second ballot on the original complaint.¹⁰ That unified procedure respects the principle of "inscindibilità": there is no divide between the substantive rights and the process to exercise them. After all, the extant *paragrapheis* show that the plaintiffs argued their case on the merits, and even the defendant, though insisting that plaintiff's claims be barred, devoted much of his argument to answering their claims.

To illustrate Paoli's model: in Isoc. 18 the issue is whether Callimachus will be authorized to demand payment or seize

⁹ Paoli, *Processo* 77–116; followed by Hellebrand, *RE* 18 (1949) 1178–1179, and A. Biscardi, "Giudizi paragrafici," in A. Azura and E. Eula (eds.), *Novissimo Digesto Italiano* VII (Turin 1961) 879–880. Also skeptical of a second hearing: Dareste, *Plaidoyers* xx (quoted n.2 above); J. Miles, "Some Observations on Demosthenes' Speech against Pantaenetus," *Hermathena* 85 (1955) 50–66. Cf. A. Steinwenter's review of Paoli, *ZRG* 54 (1934) 382–387, suggesting that the protocol varied and evolved over time (esp. 385).

¹⁰ In his conclusions Paoli outlines the sequence as follows (*Processo* 113–114): "Quando il convenuto avesse prescelto questo mezzo de difesa [i.e., *paragraphe*], ne derivavano delle notevoli conseguenze procedurali. Il principio che *reus in excipiendo actor fit* influiva anche sulla forma del giudizio in quanto: 1) il convenuto aveva per primo la parola, e lasciava perciò all'attore quel vantaggio, che tutte le legislazioni antiche e moderne attribuiscono al convenuto o all'accusato, di poter chiudere il dibattito; 2) se l'eccezione non riportava il quinto dei voti, il convenuto era colpito da un'ammenda, ἐπωβελία ... Il magistrato che aveva la direzione del dibattito ... doveva, terminata l'orazione del convenuto e dell'attore, sottoporre alla votazione del giudici anzitutto la questione paragrafica, quindi, a meno che l'eccezione non fosse stata accolta, τ'ἔγκλημα dell'attore."

assets, if Isocrates' client will not settle; and our unnamed defendant (NN) has a good deal to say against the merits of Callimachus' claim, insisting that he is lying about what happened. He expects Callimachus to respond by arguing his case on the facts at issue in the hearing at hand. So, if the *paragraphé* is rejected, there is really nothing left to argue over; the jury will cast a second ballot, now on the original complaint.

Wolff set out to disprove Paoli's theory and largely succeeded.¹¹ But Wolff himself was not so categorical as his followers have been. Some of his findings may tell conclusively against Paoli but not so unequivocally in favor of his own construction. On balance, it seems reasonable to reject Paoli's double verdict, but the old two-stage trial remains precarious.

Wolff's argument against Paoli turns on two disparate findings. (1) There is no evidence or clear indication of the second ballot; that much is indisputable. But (2) Wolff argues that the extant speeches are in fact well-focused on the procedural issue, the *paragraphé* itself; and that finding is not so conclusive. Most readers have been struck by how much the speeches labor the merits, but Wolff discounts that impression as "an optical illusion."¹² In that regard, we should at least give the speeches another reading. And in his finding against the double verdict, Wolff himself scrupulously acknowledged, neither is there any clear reference to a second hearing, if the *paragraphé* is rejected.

Following those implications, this essay offers a new model: (§1) In *paragrafhai* there is no second stage to the trial—neither

¹¹ H. J. Wolff, *Die attische Paragrafhe: Ein Beitrag zum Problem der Auflockerung archaischer Prozeßformen* (Weimar 1966). Cf. A. R. W. Harrison, *The Law of Athens* II (Oxford 1971) 108–119; D. M. MacDowell, *The Law in Classical Athens* (Ithaca 1978) 215, concluding "Paoli's view "has been decisively refuted by Wolff's detailed study"; S. C. Todd *The Shape of Athenian Law* (Oxford 1993) 138, "Paoli's hypothesis ... was demolished by Wolff." Wolff himself showed admirable caution in his conclusions (84–85), even acknowledging the value of "inscindibilità" in a diminished sense.

¹² E.g., *Paragrafhe* 17 n.1: "dieser Eindruck ... das Ergebnis einer optischen Täuschung war..."

Paoli's second ballot nor Wolff's second hearing. Each invoked the silence of our sources against the rival theory, but the evidence weighs against them both. And (§2) the litigants themselves are not so keen on the divide between fact and formality as later rhetoricians would be.¹³ From the first example to the last, the *paragraphai* represented in the speeches involve a peculiarly contractual principle. In the case against Callimachus, the question for the jurors to decide is whether earlier agreements (including the Amnesty of 403) have preempted the claim. Similar issues predominate in the later instances: after an arbitrated settlement or binding agreement, is the plaintiff's claim foreclosed or already fulfilled in accordance with the covenants?¹⁴ This is not to deny that other, purely technical objections were also acknowledged, as *paragraphai* came to be more widely applied. But, in the cases documented by the speeches, the issues that emerge from the claim and the challenge lend themselves to a single decision. If the *paragraphé* is rejected, the plaintiff's claim is affirmed and he will proceed to demand payment or seize assets in compensation. After all, Isocrates' client, in explaining what appears to be an unfamiliar procedure, never says that the jury must reach *a separate decision* first on the *paragraphé*, only that this is *introduced first* and the defendant will *speak first*.

But let us first try to gain some perspective on Panleon's case (Lys. 23), as it is often treated as the missing link in the two-trial model. The speech tells us little or nothing about the original complaint but, aside from that silence, there is no sign

¹³ The scholarly division of issues seems better suited to the later *rhetorica* than to the fourth-century realities; cf. E. Carawan, "What the Laws Have Prejudged: *Παράγραφη* and Early Issue-Theory," in C. Wooten (ed.), *The Orator in Action and Theory in Greece and Rome* (Leiden 2001) 17–51. The entry in Pollux 8.57, in particular, relies on later rhetorical hypotheses (on fictitious issues).

¹⁴ Paoli supposed, "very likely, in all cases where 'the obligation was extinct' it was possible to pose an exception by *paragraphé*" (*Processo* 95–96).

of a separate hearing on the merits.¹⁵ To be sure, the text we have addresses only the procedural issue,¹⁶ answering Pancleon's claim, that the suit cannot be tried in the polemarch's court because he has citizen rights; but that does not mean that this was all the plaintiff had to say in the hearing at hand. The tale of his damages, whatever wrong Pancleon has done him, may be so straightforward as to need no speechwriter's art; the text begins with the sort of formula that might often suffice, when a speaker turns from his narrative to a complicated issue.¹⁷ So our plaintiff probably consulted the speechwriter only in regard to the more complicated question raised by Pancleon's *antigraphé*.¹⁸ And on that issue he concludes his argument with a telling parallel (13–14): when Aristodicus brought suit against Pancleon, the defendant raised the same objection, that he could not be sued as an alien because he was (as he claimed) a Plataean. In that instance the objection was quashed by sworn testimony (*diamartyria*), without jury trial. In that parallel case Pancleon's plea is simply called his *antomosia* (his formal response to the charge), and that may be all it is in this

¹⁵ Cf. Edward Cohen's reply to S. C. Todd, "Status and Contract in Fourth-Century Athens," in G. Thür (ed.), *Symposion 1993* (Cologne 1994) 146–149.

¹⁶ The formula *μη̄ εισαγωγίμων εἶναι* does not always indicate a *paragraphe* (for trial): see 274–276 below; recall that Callimachus' claim had been quashed by a *diamartyria*, sworn testimony that the case was not admissible because of a prior settlement: *οὐκ εισαγωγίμος ἦν ἡ δίκη διαίτης γεγενημένης* (11). This was before Archinus introduced the new procedure; so, if there were no witness willing to swear, the defendant would have had to argue that point at trial on the main claim (just as Antiph. 5 argues abuse of procedure). On the sense of *eisagein/eisagōgimos*, see at nn.60, 71 below.

¹⁷ *πολλὰ μὲν λέγειν, ὧ̄ ἄνδρες δικασταί, περὶ τουτουὶ τοῦ πράγματος οὔτ' ἂν δυναίμην οὔτε μοι δοκεῖ δεῖν*. The deictic *τουτουὶ* suggests that he has at least summarized his grievances. For similar *paraleipsis* cf. Dem. 23.90 (*περὶ αὐτοῦ τουτουὶ πολλὰ μὲν λέγειν οὐκ οἶμαι δεῖν*), 40.38, 18.50; Isoc. 20.153.

¹⁸ K. J. Dover, *Lysias and the Corpus Lysiacum* (Berkeley 1968) 165, suggests that Lys. 23 is a client copy, showing the client's own alterations.

instance—*antigraphê* usually means no more than the text of the counterclaim.¹⁹ The case at hand has come before a jury because (apparently) Lysias' client has not found anyone willing to deny under oath that Pancleon is a citizen (to decide the case as Aristodicus did, by *diamartyria*). But there is nothing to suggest that Pancleon's plea is now any different. And, aside from the missing narrative, there is nothing to suggest that this case will be given a separate hearing on the merits, when Pancleon's *antigraphê* is rejected. Indeed the speaker concludes with the usual injunction to the jury, as though the verdict in this hearing will decide the case, not just the procedural issue (16): οἶδ' ὅτι τά τε δίκαια καὶ τᾶληθῆ ψηφιεῖσθε, ἃ καὶ ἐγὼ ὑμῶν δέομαι.

From these considerations I conclude that Pancleon's case does not tell us much about early *paragraphai*. Whatever it may say about evolving procedure, it does not refer to a separate hearing on the merits.

Whatever we make of the case against Pancleon, the other instances are very different disputes. In each example, from the case against Callimachus down to the latest of the mercantile suits, there is a tangle of questions that must be argued *ab initio*: Are the claims to contract or legal settlement fair or fraudulent? And where do we draw the line between the rights recognized in the agreement and further claims that were not clearly addressed?

1. A hearing on the merits

Wolff's scenario proceeds as follows:

Of course, introducing a *paragraphê* delays the debate on the merits of the case and leads immediately to a preliminary that is independent, though the main issue remains pending. In procedural terms, this means that, if the *paragraphê* is rejected, there is no need to initiate the case anew, but, rather, the magistrate now brings that issue before the court. The question whether

¹⁹ Cf. Dem. 45.45–46, reporting the *antigraphai* in the suit for false testimony against Stephanus. Pancleon's case would be the only instance where a *paragraphê* is called *antigraphê*.

this sequel was before the same jury that decided the preliminary or a newly allotted panel, would be of no consequence; it depends on whether there is enough time remaining, after the preliminary concludes, to bring the main issue to a conclusion before the same judges, on the same day.²⁰

This picture involves some awkward complications, both with regard to the practical arrangements and in the juristic rationale. Athenian justice seems to have followed the principle that trials begin and end on the same day—even in cases of life and death (Pl. *Ap.* 37C).²¹ But if the second hearing proceeds in the same court on the same day, there may be some confusion when the tables turn.²² These complications can be managed, of course, but it is surprising that there is no mention of them. Let us begin with what our sources do not say and then proceed to the recourse they recognize.

As Wolff emphasized, “nowhere, not even in the speeches

²⁰ *Paragraphe* 84–85 (the emphasis is his): “Zwar verhinderte die Einlegung einer Paragraphe einstweilen die Einführung des Meritums und führte zunächst zur Instruktion eines selbständigen Vorprozesses, doch hob sie die Anhängigkeit der Hauptsache nicht auf. Prozeßrechtlich ausgedrückt heißt das, daß es nach Zurückweisung der Paragraphe *keiner erneuten Einbringung* (*λαγχάνειν*) der *δίκη* bedurfte, sondern der Magistrat nun ihre Einführung beim Dikasterion bewirkte. Ob dies dann dasselbe Dikastenkollegium war, das über den Vorprozeß entschieden hatte, oder ein neu ausgelostes, wird ohne Belang gewesen sein und davon abgehängt haben, ob nach Beendigung des Vorprozesses noch genügend Zeit übrig war, um die Hauptsache am selben Tage vor den gleichen Richtern zu Ende zu führen.”

²¹ Ian Worthington has argued for the exception in cases such as the *apophasis* against Demosthenes in 323 (and he may be right): “The Length of an Athenian Public Trial: a Reply to Professor MacDowell,” *Hermes* 131 (2003) 364–371. But such exceptions hardly disprove the rule: even for capital cases, the trial should ordinarily conclude in a day. In private suits we have no sign of an exception.

²² From one vote to the next, the jurors will assign the opposite meaning to their ballots: in the *paragraphe*, the first urn or pierced ballot will be for the defendant, the second urn or solid ballot for the plaintiff; then at the main hearing, presumably, the plaintiff would speak first, so the pierced ballot is in his favor (on ballot arrangements see Todd, *Shape* 132–133).

opposing *paragraphai*, is there any mention at all of the need to renew the suit"; he takes that silence as a sign that, if the *paragraphē* were rejected, the court would proceed directly to a hearing on the merits.²³ Presumably the procedural sequence was well known, and so, supposedly, a decision against the defendant on the *paragraphē* would lead directly to a trial on the original complaint, without any further formalities and without comment. Yet, if there is to be a separate hearing on the merits—and the jurors will not quite be done with the case when they reject the *paragraphē*—we might expect plaintiffs to say something to that effect, somewhere in the corpus of speeches on *paragraphai*. The speakers (on both sides) never say anything of the sort. Wolff admitted as much, as the same silence tells against Paoli's model;²⁴ but his followers have not been satisfied with that disclaimer or the uncertainty about when the main hearing would come.

Thus MacDowell supposed that the hearing on the main issue would have to be decided "at a later date" and he found this indicated in the prologue to Dem. 36, *For Phormio*: τὴν μὲν οὖν παραγραφὴν ἐποιησάμεθα τῆς δίκης οὐχ ἵν' ἐκκρούοντες χρόνους ἐμποιῶμεν (2).²⁵ Here, supposedly, "the speaker denies that the postponement of the trial ... was his motive." But that denial might simply mean that they did not introduce the *paragraphē* in order to derail the arbitration, where the suit began and might have reached a conclusion.²⁶ After all, Phormio

²³ *Paragraphe* 85: "nirgends, auch nicht in den zur Abwehr von Paragraphai gehaltenen Reden, von der etwaigen Notwendigkeit einer neuerlichen Klagerhebung die Rede ist."

²⁴ *Paragraphe* 83: "Spricht somit keine Quelle für grundsätzlich ungebrochene Kontinuität der Verhandlung zu Paragraphe und Meritum, so gilt allerdings das gleiche auch für das Gegenteil."

²⁵ MacDowell, *Law* 215. Against "the usual view," cf. Miles, *Hermathena* 85 (1955) 64–65, finding it "absurd that the whole case should be re-tried after the parties had already argued fully on the merits and the facts ... Surely the hearing of the plea would be regarded as a trial of the action."

²⁶ On the effect of entering a *paragraphē* in arbitration see S. Isager and M.

had reached a settlement with his litigious step-son on two previous occasions, and it was probably assumed that he would settle yet again. If the speaker had meant to disavow a delay within the proceedings at hand, he would probably have said so more plainly: “Our aim was not to postpone your verdict.”²⁷ Instead he speaks of prolonging the dispute more generally and with obvious irony; for endless litigation—on the part of Apollodorus—is a major theme of the speech.

If Wolff’s scenario holds true, we might especially expect *the plaintiffs* to say something about the second stage of the proceedings, where their claims would be given a proper hearing: “Put these technicalities aside and give us a fair trial—today!” The closest approximation is Dem. 35.43, where the plaintiff calls on the judges to “demand that [defendant Lacritus] show either that they did not receive the money, or that they repaid it, or that maritime contracts need not be valid, or that they should use the money in any other way than under the terms of the contract.” Now the defendant has already made the first speech, so it is fair to ask, when or how will he have the chance to respond? Wolff saw this injunction to the jury as a veiled demand for them to reject the *paragraphé* and proceed to the main issue.²⁸ But it seems out of character for this plaintiff, who is so emphatic about every detail of the proceedings, to speak so obliquely of his one chance of success. It seems more his style to demand that the jury voice their outrage directly (in *thorubos*),

H. Hansen, *Aspects of Athenian Society in the Fourth Century B.C.* (Odense 1975) 124–125.

²⁷ As Paoli remarked, *Processo* 107: “se avesse voluto accennare al differimento del giudizio principale avrebbe detto οὐχ ἵνα τὴν κρίσιν ἀναβαλλώμεθα.”

²⁸ *Paragraphe* 78: “nichts anderes als das in rhetorische Form gekleidete Verlangen, dem Beklagten durch Zurückweisung seiner Paragraphe die direkte Verteidigung und damit das voraussichtlich hoffnungslose Suchen nach tragfähigen Gegenbeweisen aufzuzwingen.” Of course, the “veiled demand” may be simply a commonplace from contract cases where the plaintiff speaks first.

and let Lacritus try to answer; the aim is to catch him off guard.²⁹

Of course, in the corpus of eight speeches that seem fairly complete we have only two for the plaintiffs: Dem. 34 and 35.³⁰ But these seem largely representative and consistent with the defendants' speeches in this respect: the litigants (on both sides) would try to exhaust the arguments they would use in any hearing on the merits. In fact we might have supposed that the plaintiffs' speeches were actually written for hearings on the main issue, were it not for brief passages disposing of the plea to bar litigation. Thus in the speech *Against Phormio* (Dem. 34) the plaintiffs waste few words on the *paragraphê* (3–5) and then rely almost entirely on the testimony to what happened (only reverting to the *paragraphê* in conclusion, 43–45). The issue is whether the defendant (another Phormio) must pay off the penalty under a contract he made to deliver a cargo to Athens; the defendant contends that the contract is no longer valid because the ship was lost at sea (and the contract recognizes that exigency); so he has invoked the law allowing *paragraphê* in cases

²⁹ The dismissive εὖ οἶδ' ὅτι οὐδὲν ἂν τούτων οἶός τ' εἴη οὗτος οὔτε διδάξαι οὔτε πείσαι ("I'm confident that he could neither explain or persuade (you) of anything") suggests that AA expects to catch Lacritus with no answer (much as Plato's Socrates catches Meletus, *Ap.* 34A–B). So this was probably a demand for spontaneous response. It is also possible that the litigants had a brief rebuttal after the first round of speeches (as the anonymous referee suggested); that would match the sequence for ordinary *dikai* (*Ath. Pol.* 67.2).

³⁰ Neither does Hyperides(?) *Against Demeas* (*P. Oxy.* XXVII 2464) give any sign of a subsequent hearing on the merits, but it is too fragmentary to carry any weight. The only passage indicating a *paragraphê* is col. iii.11–24: AA protests the contradiction, if the law establishes guardians for orphans, to safeguard their interests, but the jury should decide that suit against the wrongdoing guardians be barred (μη̄ εἰσαγωγίμων εἶναι ψηφί[σ]θη). Here Wolff observes (*Paragraphhe* 19), "Apparently all that the plaintiff aims to achieve is quashing the *paragraphê*; for him the main issue is a *cura posterior*." But we hardly have enough of the connected argument to draw that conclusion. In this essay I also avoid questions of authenticity, indicating by the attribution "Dem." only that a speech belongs to the Demosthenic corpus.

where there is no contractual obligation (*symbolaion*). In response, the plaintiff introduces a barrage of testimony on every stage of the voyage (6–16), to show how Phormio has systematically cheated him of payment and security; and then a second speaker turns back to the sequence of litigation to discredit Phormio’s scenario and his chief witness, Lampis (who initially denied taking payment and then in arbitration admitted it). This line of argument takes up most of the rest of the speech, up to what appears to be a commonplace in such cases: If the case is rejected here, what recourse is there—“to what court shall we take our case, ... if not to you (in the jurisdiction) where we made the contract?” (43). And, after one last attack on Lampis, the speaker concludes, “I have said all that I can. But I shall call another to speak in our behalf, if you require it.”

Evidently the plaintiffs mean to say all that they have to say in the hearing at hand. If the jurors want to hear more, they will say so (in *thorubos*), and he will call the other speaker. If there were the chance of a second hearing, we would expect the litigant at least to allude to it: “If you have any reservations, reject the *paragraphé* and let us proceed to the main event; then we can answer any lingering doubts, and our opponent will have to answer our argument on the merits.” But he does not anticipate that option.

In the parallel passage, Dem. 35.47–49, the plaintiff develops the commonplace in more detail: “Where must we turn for justice?” If not here, where maritime suits are decided, perhaps to the Eleven? But they deal with *kakourgoi* and capital crimes. Perhaps to the archon *eponymos*? But he deals with disputes over heiresses and orphans (etc.). Perhaps to the archon *basileus*? But he deals with *asebeia* (etc.). Perhaps to the polemarch or the generals? But these, again, have no jurisdiction over maritime contracts.

The commonplace may have been inspired by the plea that the court has no authority.³¹ But it has developed into a broad

³¹ Not precisely that the case is in the wrong jurisdiction but that there is no court competent to hear it—no magistrate can “bring in” the claim (or

response to *paragraphai* generally: If the remedy in this court is disallowed, where can we turn for justice? That development makes it all the more striking that, even after closing all the other options, the plaintiff never says, “Let us proceed to a proper debate on the merits.”

All the *paragraphê* speakers—plaintiffs and defendants alike—conclude in much the same way, as though *the debate at hand is the only hearing on the merits*.³² Of course the argument from silence cannot be conclusive, but it must weigh at least as heavily against Wolff’s model as against Paoli’s: if the absence of any mention tells against a second ballot, surely it tells against a second stage of the trial with another round of arguments. And there are passages where the silence is especially persuasive, where the speaker turns to what recourse he has, if he loses the *paragraphê* hearing.

The regular recourse is a suit against the witnesses.³³ Such is the case of Apollodorus against Stephanus (Dem. 45). As we noted, Apollodorus had reopened some old claims against his guardian Phormio, going back to the disposition of his inheritance, and this Phormio (not the plaintiff in Dem. 34) defeated the suit by insisting that the matter was closed by prior settlement. Indeed, Demosthenes’ *For Phormio* presented a compelling argument on those grounds. So Apollodorus recalls:³⁴

the claimant); cf. Wolff, *Paragraphe* 97–101. The law in Dem. 37.33 allows *paragraphai* against suits for which there are no magistrates (*περὶ ὧν οὐκ εἰσὶν εἰσαγωγεῖς*), but that objection was not the basis for the *paragraphê* (it was deleted from the affidavit); see n.45 below.

³² E.g. Dem. 37.58–60, first focusing on the question of fact, to this effect: How could *I* have done you any wrong when I wasn’t even in town? Then defending the grounds for *paragraphê*: Even in homicide cases settlements are binding; the most dire prospect is that the jurors may do away with the ancient rule for final settlement. If there were a sequel, the defendant would anticipate it: Do not be misled to think that you can reject the *paragraphê* and do justice in the hearing that follows.

³³ Cf. Dem. 34.28, 31, and esp. 46–48, implying that a suit for false witness is his only recourse.

³⁴ Dem. 45.6: *προλαβὼν δέ μου ὥστε πρότερος λέγειν διὰ τὸ παρα-*

As he spoke before me and took advantage, because it was a *paragraphé* hearing and *was not going to trial on the main issue*, he read these documents (releasing Phormio from further obligation) ... and so affected the judges that they refused to hear any utterance from us; so I was penalized with the *ephōbelia*, denied a fair hearing and humiliated like no one else I know.

The picture of Apollodorus baffled by *thorubos* may not be quite true to life, but the implication is plausible enough: he speaks as though a suit that is contested by *paragraphé* goes to trial on that basis and is not expected to proceed to a hearing on the main issue. Of course the articular infinitive, τὸ παραγραφῆν εἶναι καὶ μὴ εὐθυδικία εἰσιέναι, may be a simplification, but the whole tenor of the passage reinforces the sense of it.³⁵ For Apollodorus goes on to say (7) that he can only sympathize with the judges who ruled against him, because the lying witnesses were so unscrupulous. If that jury had had the option of dismissing the *paragraphé* and giving him a hearing on the merits, surely Apollodorus would have alluded to that option, to make the most of the due process that was denied him.

There is one other passage where defenders of the two-trial model might be tempted to find an allusion to some subsequent

γραφῆν εἶναι καὶ μὴ εὐθυδικία εἰσιέναι, καὶ ταῦτ' ἀναγνοὺς καὶ τ' ἄλλ' ὡς αὐτῷ συμφέρειν ἡγείτο ψευδάμενος, οὕτω διέθηκε τοὺς δικαστάς, ὥστε φωνὴν μὴδ' ἡντινοῦν ἐθέλειν ἀκούειν ἡμῶν· προσοφλὼν δὲ τὴν ἐπωβελίαν καὶ οὐδὲ λόγου τυχεῖν ἀξιωθεῖς, ἀλλ' ὑβρισθεῖς ὡς οὐκ οἶδ' εἴ τις πώποτ' ἄλλος ἀνθρώπων. Isoc. 18.39 suggests that the plaintiff could avoid the *ephōbelia* by abandoning his case, but evidently Apollodorus at least tried to argue his claim, the jury voted, and he was saddled with the fine.

³⁵ Cf. Dem. 34.4: ἀλλ' ὑπὲρ μὲν τῶν μὴ γενομένων ὅλως συμβολαίων Ἀθήνησι μὴδ' εἰς τὸ Ἀθηναίων ἐμπόριον παραγράφεσθαι δεδώκασιν, ἐὰν δέ τις γενέσθαι μὲν ὁμολογῆ, ἀμφισβητῆ δὲ ὡς πάντα πεποίηκεν τὰ συγκείμενα, ἀπολογεῖσθαι κελεύουσιν εὐθυδικίαν εἰσιόντα, οὐ κατηγορεῖν τοῦ διώκοντος, “The laws have granted *paragraphé* in cases where there are no contractual obligations at Athens or for an Athenian market; if one admits that there is (a contract) but argues that he has done all that was agreed, (the laws) order him to proceed to *euthudikia* and make his defense there, not to accuse the plaintiff.” Again, the options, *paragraphé* and *euthudikian eisienai*, are opposite paths to the verdict, with no sign that one would lead to the other.

hearing: this is the remark by Isocrates' client, at the end of a passage anticipating what Callimachus will say, "soon it will be possible to reply," *τάχ' ἀντειπεῖν ἐξέσται*.³⁶ But scholars have usually treated this as a reference to further arguments in the same speech, and for good reason. This turn of the argument begins (35–36) with the protest that Callimachus will make (supposedly) at the injustice of being threatened with a fine under the democracy (the *epôbelia*) for money that was taken from him under the oligarchy. Against that complaint, our speaker says, "I think it will be easy to reply" (*ῥάδιον ἀντειπεῖν*). He then proceeds to offer various considerations against that complaint: all the democrats who came home from Peiraieus have suffered some loss, and yet none has resorted to litigation of this sort (38). Moreover, Callimachus has the option "even now, before making trial of your judgment, to drop the suit," thus to be rid of the risk (39). So, if he speaks of the wrongs done to him under the oligarchy, the jury must demand that he show that the defendant—the man on trial—is the one who has taken the money (40). The men the jury must condemn are those who committed the wrongs, not the innocent (41). And so Isocrates concludes this section: *πρὸς μὲν οὖν τούτους τοὺς λόγους καὶ ταῦτ' ἴσως ἀρκέσει καὶ τάχ' ἀντειπεῖν ἐξέσται*. Mirhady translates: "In response to those arguments, then, this is perhaps sufficient, and it will be possible now to raise my own objections." For this sentence introduces a further defense of the Amnesty (42–50), calling upon the jury to remember the conflict it delivered them from, when they cast their votes (45); after which Isocrates turns to discrediting the litigious tactics of Callimachus (51–57).

2. Framing the issue

Now let us weigh what the speeches do have to say about what is at issue in *paragraphai*, beginning with the first instance (a) and then proceeding to the later adaptations (b). Other

³⁶ Isoc. 18.41, as suggested by the anonymous referee. Cf. Mirhady's translation, in *Isocrates* 105–106.

readers were struck, as Paoli was, by how the speeches grapple with the merits of the case, the facts in dispute and the evidence on those claims. Wolff's study was a *tour de force* in dispelling that impression. But let us reconsider the key arguments, each in its own context.

(a) Thus against Callimachus (as we saw above), the defendant calls for the jury to demand that the plaintiff address the matter at issue, to show that the defendant—the man on trial—is the one who has taken the money, “that I am the one who caused the damages he aims to recover.”³⁷ As Paoli argued, that demand strongly suggests that the facts at issue will be decided in the proceedings at hand. But, as Wolff insists, that point in the argument has to be read in its historical context. It comes in anticipation of claims that Callimachus will make linking NN to the oligarchs: “If he recalls what happened under the oligarchy, don't let him make accusations against them, for crimes that no one will defend, but insist that he show that *I* have taken the money.”

In Wolff's view, this instruction to the jury is “nothing more than a rhetorical device, to remind the judges emphatically, that it is not the injustice at large in the era of the despotic regime but solely the role of the defendant individually that is at issue” (83). He sees it as an appeal to a general amnesty and, in that light, should not be construed as an argument on the merits. After all (in his view), the other *paragraphai* are based on technical rules, separate from issues of substance. And the basis for *paragraphé* in this instance is the oath *mê mnêsikakein* that Isocrates invokes in the prologue: the new procedure is a way of enforcing a pledge against prosecuting the wrongs of civil conflict. The amnesty thus amounts to an *ad hoc* limitation, and challenging the lawsuit on this basis is typical of *paragraphé*, as a

³⁷ Isoc. 18.40: ἂν δ' ἄρα μεμνήται τῶν ἐπὶ τῆς ὀλιγαρχίας γεγενημένων, ἀξιοῦτε αὐτὸν μὴ κείνων κατηγορεῖν, ὑπὲρ ὧν οὐδεὶς ἀπολογήσεται, ἀλλ' ὡς ἐγὼ τὰ χρήματα εἴληφα διδάσκειν, περὶ οὐπὲρ ὑμᾶς δεῖ ψηφίζεσθαι, μηδ' ὡς αὐτὸς δεινὰ πέπονθεν ἀποφαίνειν, ἀλλ' ὡς ἐγὼ πεποίηκα ἐξελέγχειν, παρ' οὐπὲρ ἀξιοῖ τὰ πολυλότα κομίζεσθαι.

matter quite apart from the substantive claim.

But *mê mnêsikakein* did not always mean “amnesty” in the usual sense.³⁸ In the earliest documents the oath “not to recall wrong” seems to function as a closing upon the covenants of a treaty or private settlement. In casual usage, of course, it may suggest the moral burden of “forgiveness.” But where the pledge is invoked *as a rule that can be enforced*, it regularly conveys a bar against any further dispute on the matters resolved in the agreement.³⁹ So, in the era after 404, it does not imply a bar

³⁸ Paoli, *Processo* 122–123: it is not until the second century B.C. that *amnēstia* gains currency as “an act of clemency by the sovereign power.” The Athenian Amnesty in particular, “differs juristically from the amnesty of our positive law: *in form*, because it is not an act of indulgence by sovereign power but a renunciation of the remedies allowed by law, by contractual agreement on the part of the members of the two hostile factions; *in substance*, because it also cancels private suits [whereas modern amnesty deals with criminal complaints]; *in its processual function*, because it does not take effect *ipso iure* but must be invoked by the accused or defendant as an exception, that the plaintiff’s claim is inadmissible; *in its extent*, as it does not extend ... to cases previously decided.”

³⁹ So argued E. Carawan, “The Athenian Amnesty and the Scrutiny of the Laws,” *JHS* 122 (2002) 1–23; on the contractual implications, *GRBS* 46 (2006) 368–374; cf. R. Waterfield, *Why Socrates Died* (New York 2009) 132–134, treating *mê mnêsikakein* as a rule of “no reprise.” For the conventional view (forgiveness by the victor): C. J. Joyce “The Athenian Amnesty and Scrutiny of 403,” *CQ* 58 (2008) 507–518; cf. my reply, *CQ* forthcoming. For the main comparanda see Astrid Dössel, *Die Beilegung innerstaatlicher Konflikte in den griechischen Poleis* (Frankfurt 2003). We may now add the well-preserved text of a settlement at Dikaia on the Thermaic gulf with Perdikkas III as witness and guarantor (364/3): E. Voutiras and K. Simanides, “Δικαιοπολιτῶν Συναλλαγαι. Μία νέα επιγραφή από τη Δίκαία,” in *Ancient Macedonia VII* (Thessaloniki 2007) 253–274. Here we have detailed arrangements for lawsuits, within a time-limit, concluding with an oath that includes the formulae (67–82) not to recall wrong “in word or deed” (καὶ οὐ μνησικακήσω οὐδενὶ οὔτε λόγῳ οὔτε ἔργῳ), to honor the pledges they have exchanged (πιστώματα = συνθήκαι), and to abide by the city’s verdicts (ἐν ταῖς δίκαις αἰς ἐδίκασεν ἡ πόλις ἐμμενέω). For a deeper perspective on *syngnômê* and comparable terms, see now David Konstan, *Before Forgiveness* (Cambridge 2010).

against all retributive actions absolutely. The settlement (*diallagai*) included remedies for bloodshed and lost property. And it did not bar recriminations for past liabilities to the polis—those protections had to be enacted into law. A general immunity is not at all what Isocrates implies where he explains the rationale for his client's *paragraphé*.

The lawsuit by Callimachus (C) violates “the oaths and covenants” in two ways: (1) C is prosecuting an accomplice, whose role amounted to (at most) “informing or denouncing,” whereas the covenants expressly barred prosecution for such complicity. Moreover (2) whatever claim C could make upon our defendant, he had settled in arbitration, and such decisions are rendered final by a rule that was evidently embraced in the covenants and promptly restated in statute. Of course, NN argues that C is lying about the facts, as well, and those matters of fact bear directly upon the legal issues: C probably argued that NN was the instigator, chiefly responsible for the confiscation, and therefore was not protected by the covenant on informants. And C would claim that NN is lying about the settlement: NN says that C would deny that there had been any settlement at all. However it was framed, that justification is disposed of in the first part of the argument (13–18) where NN argues that the claim is indeed subject to the settlement (however deficient his proof).⁴⁰

The first guarantee is presented as the threshold for the *paragraphé*: NN calls for a reading of the text (19) and then summarizes it (20), “the covenants expressly absolve (*διαρρήδην ἀφεισῶν*) those who informed or denounced or did *anything of this sort*” (*ἐνδείξαντας ἢ φήναντας ἢ τῶν ἄλλων τι τῶν τοιούτων πράξαντας*). This paraphrase suggests that the clause was broadly framed to encompass both those who initiated formal proceedings (*endeixis* and *phasis*) and those were merely accom-

⁴⁰ The received text gives no indication of any testimony to confirm the fact of the settlement or the terms of it. Most editors assume a lacuna in §10, to allow for testimony by the arbitrator Nicomachus.

plices or accessories (as NN claims to be). Those who shared in the proceeds of confiscation could not be prosecuted for that complicity.

How that rule applies is illustrated in §23: we are told that Thrasybulus and Anytus, though they know the men who listed their property for confiscation (*apograpantes*) “nonetheless do not dare to bring suit against them or recall wrongs,” ὄμως οὐ πολυῶσιν αὐτοῖς δίκας λαγχάνειν, οὐδὲ μνησικακεῖν. By the usual interpretation, this refers to a general amnesty barring legal recourse for any wrongs committed in civil conflict. But it is clear that property rights remain valid and returnees are entitled to reclaim what is theirs. Citizens could take possession of their land and houses and recover at least some of their movable goods (whatever had not been sold). Thus Thrasybulus and Anytus recovered their real property and secured whatever assets they could find, at the expense of those who had taken possession. But even the champions of democracy had not prosecuted the *apograpantes*, those who had listed property for confiscation and received part of the proceeds.⁴¹ These accomplices are protected, as Isocrates’ client claims to be, by the covenant shielding “those who informed or denounced or did anything of this sort.”

But the second count in the plea, that the matter is closed by an arbitrated settlement, is perhaps more vital to the argument because it serves to remind the jury (from common experience) of just what it means to settle past grievances by contractual agreement. This settlement was concluded as a *diáita epí rhêtois*. In this sort of settlement the so-called arbitrator witnesses the agreement and takes custody of the document; his duty is then

⁴¹ As S. C. Todd recognized, *Athenian Internal Politics 403–395 BC with Particular Reference to the Speeches of Lysias* (diss. Cambridge 1985) 108. H. Kühn, “Die Amnestie von 403 v. Chr. im Reflex der 18. Isokrates-Rede,” *WS N.F.* 1 (1967) 31–73, at 64 n.47, accepted the rule regarding informants and denouncers but discounted it in this case. T. Loening, *The Reconciliation Agreement of 403/2 B.C. in Athens* (Stuttgart 1987) 56, discounted the rule; it was implicit in the amnesty.

to decide any dispute over compliance, if one party contends that the other has violated the provisions for payment or other performance.⁴² This arrangement is a way of guaranteeing the finality of the settlement. It is that principle that is crucial to this case and to the reconciliation. In accepting that settlement, Callimachus has renounced his right to any further claim in that matter. To amplify that principle Isocrates extols the “covenants” (*synthékai*) and the contract for peace that was built upon them (§§24–34). For that principle of finality is the essence of the pledge *mê mnêsikakein* that sealed the covenants of the agreement that we call the Amnesty.

(b) The later speeches mention quite a number of grounds on which to bar litigation: these include a statutory time-limit (*prothesmia*) and the rule against claims without jurisdiction.⁴³ The speakers sometimes refer to these rules as though they were summarized in a general statute. Be that as it may, the grounds cited in later proceedings seem to lack any common denominator other than procedural defect, and that feature has encouraged scholars to suppose that the *paragraphé* is divorced from the main dispute, to be decided quite separately.

But it is doubtful whether all of those rules that declare suits inadmissible (*μη̄ εισαγώγιμον τὴν δίκην* or *δίκας μη̄ εἶναι*) might lead to a jury trial. While defendants in *paragraphai* often reinforce their arguments with limitations on time or jurisdiction, these technicalities are never introduced as the principal grounds for the plea to bar the plaintiff’s claim. In the speeches, the defendants base their case on laws affirming specifically the *right to invoke* the *paragraphé* (not simply that the suit is inadmissible); and those grounds for trial usually involve contractual

⁴² We have one other instance in this era: Isoc. 17.19. Cf. A. Steinwenter, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte* (Munich 1925) 135–140.

⁴³ The various grounds to bar a lawsuit are reconstructed by Paoli, *Processo* 85–95 (esp. omnibus measures indicated at Dem. 36.25 and 38.5); by Wolff, *Paragraphe* 90–105; Isager, *Aspects* 126–129.

agreement.⁴⁴ In many instances, purely procedural barriers (such as time-limit or jurisdiction) might be addressed by the archon or the arbitrator and would not in themselves constitute an issue for the jury.⁴⁵ Indeed, where those issues are brought up in court, they are often introduced with a disclaimer: the scrupulous defendant would not rely on such objections; the procedural violation is merely a mark against the plaintiff's integrity. Thus Dem. 33.27 mentions the one-year limit for sureties, only to dismiss it, *οὐκ ἰσχυρίζομαι τῷ νόμῳ*. The defendants in Dem. 36.26 and 38.17–18 mention the five-year limit for suits against guardians only as a yardstick by which to measure the injustice, as (in each case) the suit comes twenty years after settlement with full release.⁴⁶

To judge from the cases represented in our speeches, the *paragraphai* that went to trial were based on the laws that bar litigation after “release and quittance” and those that deal with contracts for mining or maritime trade.⁴⁷ To be clear: it may have been possible, in principle, to bring a *paragraphē* on the

⁴⁴ Cf. Carawan, *GRBS* 46 (2006) 351–358, with n.47 below.

⁴⁵ Thus in Lys. 17.5, we are told, the defendants got the suit against them barred as being in the wrong jurisdiction (*διεγράψαντο*), evidently dismissed by the magistrates (without trial). In Dem. 37.33–34, where the defendant invokes the rule barring suits “for which there are no *eisagogeis*,” he explains that he originally included that in his plea, in preliminaries before the thesmothetai, but they erased it from the official formulation for trial. Similarly Steinwenter (*ZRG* 54 [1934] 382–387) emphasized the shifting scope of the archon's discretion.

⁴⁶ Esp. 38.18, *τοῦ νόμου λέγοντος ἄντικρυς, ἐὰν μὴ πέντ' ἐτῶν δικάσωνται, μηκέτ' εἶναι δίκην. οὐκοῦν ἐλάχομεν, φαίεν ἄν. καὶ διελύσσασθέ γε, ὥστ' οὐκ εἰσὶν αὐθις ὑμῶν δίκαι* (“But we did bring suit, they may say. Yes, but you settled that suit, so you have no recourse”).

⁴⁷ *Aphesis* and *apallagē*: Dem. 37.1 = 38.1. Maritime contracts: 32.1–2, 23–24; 33.1–2, *ἵνα μηδεὶς ἀδικῆ μηδένα τῶν ἐμπόρων εἰκῆ. τοῖς δὲ περὶ τῶν μὴ γενομένων συμβολαίων εἰς κρίσιν καθισταμένοις ἐπὶ τὴν παραγραφὴν καταφεύγειν ἔδωκεν ὁ νόμος*; 34.4, *οἱ μὲν οὖν νόμοι ... ὑπὲρ μὲν τῶν μὴ γενομένων ὅλως συμβολαίων Ἀθηνησι μηδ' εἰς τὸ Ἀθηναίων ἐμπόριον παραγράφεσθαι δεδώκασι*.

basis on any law that says simply, “such suits are not admissible.” But among the speeches for trial there is no wide range of issues; the cases all revolve around the finality of binding decisions. This principle encompasses the contractual settlement of private quarrels and the covenants of business contracts that foreclose any further dispute. It is beyond our scope to proceed through all the arguments in detail; here it should be sufficient to show how consistently the litigants embrace this principle in the other speeches, long after the plea *Against Callimachus*.

Thus in the *paragraphé* against Apollodorus, *For Phormio* (as we saw above, 263–264), the challenge to the lawsuit is based upon earlier settlements that should have barred any further claim on those matters. In the speech *Against Pantaenetus* the defendant begins on the same note (Dem. 37.1), invoking the laws that grant *paragraphé* against cases where a plaintiff has given release and quittance and yet brings suit in the same matter. And the speech *Against Nausimachus* (Dem. 38) begins with nearly the same words: δεδωκότων ... τῶν νόμων παραγράψασθαι περὶ ὧν ἄν τις ἀφείς καὶ ἀπαλλάξας πάλιν δικάζεται.

The contract cases (Dem. 32–35) develop a variation on that theme. The defendants invoke the law authorizing suits in the maritime court in matters “for which there are written contracts (*syngraphai*) and obligations (*symbolaia*)” based on that agreement; the law grants *paragraphai* against claims that are barred by provisions of the contract.⁴⁸

Wolff begins his analysis of the speeches with the case against Apaturius (Dem. 33), because “[i]t shows with particular clarity that the speaker is solely concerned with the question of admissibility”; but it is also “an instructive example of how the

⁴⁸ It was once supposed that this court heard cases based upon either written contract or (other) legal obligation: thus L. Gernet, *Droit et société dans la Grèce ancienne* (Paris 1955) 186–187; and that seems to be Wolff’s assumption, notably in regard to Dem. 32. Most commentators are now reasonably convinced that this law for *dikai emporikai* effectively required a written contract, and the *symbolaia* at issue depend upon that agreement: e.g. Todd, in *Symposium 1993* 136–137.

speaker, by convoluted tactics, sometimes slighting the juristic implications, was able to conceal his objective” (25–26). That is, the defendant is unconcerned with the main issue—he is not arguing against the claim as he would do in *euthydikia*—but in order to see this, we must extricate the real issue from the diversions. We shall follow Wolff’s exegesis below, but let us first get a sense of what the defendant (NN) says the case is about.

This dispute has a history going back two years. The defendant tells it in detail, as though those events have some bearing on the decision at hand. In brief: a shipowner from Byzantium, Apaturius, relied upon his countryman Parmeno and our Athenian defendant to lend him a sum of money, putting up his ship as collateral; Apaturius then tried to abscond with the ship, but Parmeno intervened, seized the slave crew, and stopped the ship. NN, in disgust, sold his share to a company of bankers. Then all parties reconciled: the original articles of agreement, the *synthékai*, were destroyed; and the parties formalized their settlement with release and quittance (*aphesis* and *apallagê*)—“so that I would have no further business with [Apaturius] nor he with me” (12). He calls witnesses and emphasizes this conclusion: “Since then I have had no contractual bond with him, whatever” (13, *μετὰ ταῦτα τοίνυν ἐμοὶ μὲν οὔτε μείζον οὔτ’ ἔλαττον πρὸς αὐτὸν συμβολαῖον γέγονεν*).

Of course that was not the end of it. Parmeno brought suit against Apaturius, for assault, because of the beating he got when the slaves were taken. Then Apaturius apparently evaded a challenge to decide the dispute by oath and instead brought a counter complaint against Parmeno (14). Thereupon they agreed to submit their dispute to arbitration and drew up covenants governing the procedure (*γράψαντες συνθήκας*).

That document is the crux of the case at hand. As NN tells it, the covenants specified that the arbitrators were to deliver a verdict that would be binding upon the two parties, if the three arbitrators were unanimous or two concurred; NN was one of the three arbitrators. But Apaturius contends that one arbitrator, Aristocles was to decide the case; the other two were merely mediators (and NN was one of them). Now, in Apa-

turius' version, NN was named as surety for Parmeno, and that is the basis for his claim against him.

As NN tells it, the lead arbitrator was an impartial compatriot of the litigants, Phocritus; but when Apaturius realized that Phocritus was leaning against him, he insisted that the document of their agreement be entrusted to Aristocles—who was also his surety. He then claimed that Aristocles was sole arbitrator, with full power to decide the case. But when Aristocles was called upon to prove this claim from the covenants, he said the document had been lost (18). After this impasse, the parties tried again to draft an agreement for arbitration, but each insisted upon the arrangement most favorable to his cause. So, by NN's description, the effort to reach a settlement failed: the original covenants were now disputed and there was no document by which to decide the dispute. Nonetheless, Aristocles asserted his authority and was on the point of pronouncing a verdict in favor of his man, Apaturius; but Parmeno confronted him and rejected a unilateral decision as a violation of their agreement. Soon thereafter, however, Parmeno left town to deal with a personal disaster (for his family had been devastated by an earthquake). Yet, though both of the other arbitrators disavowed the process, Aristocles proceeded to make an award of twenty minas to Apaturius. And, with Parmeno unavailable to contest it, there the matter remained for two years, until Apaturius decided to sue NN as surety for the delinquent Parmeno.

Now it may be helpful to summarize the sequence in even shorter compass. There was first a contract to pay off liens on the ship; this led to a dispute which was resolved in arbitration, with release and quittance. There were then cross claims for assault, which led to a second agreement for arbitration; but that agreement was nullified when the document was lost and the parties could not agree on the arrangements. And yet NN is now sued as surety for a judgment that was rendered under that second, defective agreement.

Without the document, the plaintiff relies on what witnesses will recall. And, as Wolff observed, the defendant apparently

has no witnesses present to confirm his side of the case, that he was *not* surety for Parmeno, that in fact Archippus had stepped into that role. Instead the “witnesses” that NN promised (22) turn out to be purely figurative. Thus he cites the time that passed as “witness”; for there is a statute of limitations barring any action against a surety more than a year after the judgment. Of course, our defendant will not insist upon that limitation, but it gives him an argument from probability: Apaturius was in Athens within that period and would not have missed the opportunity, if he had a legitimate claim. The only live testimony in this regard is introduced to prove that Apaturius was indeed present in Athens the year before (26).

In Wolff’s view, all the lengthy narrative and elaborate argument over events long past are merely a cloak for the frailty of our defendant’s case. The main claim is that NN is liable as surety, and Apaturius will have witnesses to that effect.⁴⁹ By this reckoning, the proof that the first round of the quarrel was resolved with full release is irrelevant; and the ground for the *paragraphê*, the claim that NN cannot be sued in the maritime court because there is no contract, is a very precarious footing. Every turn of the argument reveals some new diversion concealing the lack of evidence: Why did NN not call Archippus himself to testify that the latter was named surety?⁵⁰ As for the missing document, Wolff suggests that “many jurors may have suspected that the text was stolen ... at Parmeno's urging!” In §29, NN seems to recognize the distinction between procedural and factual issues only to confuse them: if he had been named surety he would never have denied it, “for the arbitrator’s verdict was not according to contract, so I would not be liable as

⁴⁹ Cf. Isager, *Aspects* 152, against Wolff’s theory of the *symbolaion* in this case.

⁵⁰ Wolff raises the point, *Paragraphe* 32: “Why does he not produce the supposed surety Archippus?”; if he were deceased, defendant would surely have invoked that excuse. But then, in an added n.25a, Wolff concedes that Archippus would probably have fled rather than face litigation.

surety.” Thus, in Wolff’s view, he practically concedes that his argument on the facts is beside the point.

Of course we should not make too much of the litigants’ narrative.⁵¹ But we should also be wary of our own assumptions where they run counter to the text. If we assume that the *paragraphé* hearing is all about the procedural barrier, then, of course, all of the argument on the main issue is simply a strategy of evasion.⁵² To be sure, NN has an awkward gap in the evidence: the contract is missing and he has no witness to prove that he was *not* named surety. But I doubt that failing to prove the negative would be decisive. After all, is it really surprising that Archippus is not anxious to step into the defendant’s role and make himself liable? In this instance, just as in the other speeches, the defendant *paragrafsamenos* seems compelled to argue on the merits as well as the procedural issues—to prove both that the plaintiff’s suit is contrary to the laws *and* that his claim is fraudulent. That the defendant devotes so much of his argument to the question of fact—where he is weakest—only proves that it is unavoidable.

Far from foreshadowing a separate hearing on the merits, this speech again, like the previous examples, closes with a glance at further recourse, beyond the proceedings at hand.

⁵¹ Wolff, *Paragraphe* 24, against “Spekulationen über den objectiven Wahrheitsgehalt ihrer Darlegungen ...; solche sind ja ohnehin fast ausnahmslos müßige Spielerei und juristisch zumeist ohne jeden Belang.”

⁵² *Paragraphe* 32–33: “In this predicament, if there was any remaining hope for this defendant, it was this, that the court would simply vote against admitting the case to trial on the merits, on this account, that the plaintiffs could not present the document to disprove the *τεκμήρια* by which defendant sought to render improbable the assumption of surety on his part (§§23–29). Perhaps he could still count on the judges to maintain a strict standard of proof in the *paragraphé* [requiring the document to prove the contract] where it was foremost at issue whether a contract actually existed. In *euthydikia*, ... the only question in dispute would be whether that obligation came due; [in that case] there was the danger that the court would take a more flexible attitude toward undocumented proofs which defendant could not contradict with other evidence.”

NN speaks as though the normal expectation would be for him to sue the witnesses who support Apaturius: if he loses the case at hand, he can bring a *ψευδομαρτυρίων δίκη* to recover his loss. But in that case, he protests, what basis will either side have to argue from, since the document itself is missing? “If he says it is lost, where shall I find proof that I am victim of false testimony?” Conversely, if *the defendant* had been custodian of the document, Apaturius would surely claim that *he* had gotten rid of it: “So why doesn’t Apaturius sue Aristocles, the one who took custody of the covenants and failed to produce them ... instead of suing me and producing him as a witness?” (37–38). The defendant’s only recourse, if he loses the hearing at hand, would be to do just that, to sue Aristocles. If there were to be further arguments in a hearing on the merits, we might expect him to acknowledge it. Instead he ends with the same words he would use in any ordinary trial: *εἴρηταί μοι τὰ δίκαια, ὅσα ἐδυνάμην. ὑμεῖς οὖν κατὰ τοὺς νόμους γιγνώσκετε τὰ δίκαια.*

In the suit of Demon against Zenothemis, Dem. 32, once again the argument turns upon missing evidence: the agent who was directly responsible for the transaction and for the loss would be the crucial witness, but he is nowhere to be found. Again, the statutory basis for the *paragraphé* is the law for the maritime courts, and this defendant invokes the same text of law cited against Apaturius. In this case, however, the special plea is grounded in the contention that “there is no contract” between the plaintiff and defendant.⁵³ In Wolff’s view, that objection amounts to a procedural ploy: if an action for damage or ejectment were brought in ordinary court, Demon would have no grounds to bar the suit simply because “there is no contract,” and that plea in bar is dubious here.

The background to the case is, briefly, as follows. Protus had borrowed from Demon (D), in order to purchase grain at Syracuse and ship it back to Athens for sale. As D tells it, once the

⁵³ This is also the basis for the *paragraphé* in Dem. 35; on the contract in this case see Carawan, *GRBS* 46 (2006) 355–357.

grain was loaded in Syracuse, Zenothemis (Z) conspired with the shipowner Hegestratus to raise further loans by pretending that the cargo on board was theirs (whereas Z had no legitimate claim to it). Now, the borrowers owe nothing if the ship goes down with its cargo. So, after two days at sea, Hegestratus tried to scuttle his ship; he was discovered, tried to escape, but was drowned. The ship managed to make port in Cephallenia, and there Z came forward with a claim upon the cargo, urging that the ship should proceed to Marseille, his own and Hegestratus' home port. But the officials in Cephallenia ordered the ship to proceed to Athens.

In Athens Protus was barred from taking possession of the grain by Z, who thus asserted his claim to it. Protus would then have recourse to "ejectment"—to take possession of the cargo. But Protus was reluctant to use force, and Z refused to give up the goods voluntarily. It was only when D arrived on the scene that Z agreed to go peacefully, on condition that D would be responsible for the ejectment. Z then brought legal action against Protus and against D, the latter by suit for ejectment, *dike exoulês*.⁵⁴ The case against Protus was quickly resolved in favor of Z: as Protus did not appear before the arbitrator, the case went by default. Meanwhile Z proceeded against D for the ejectment, arguing that he had been wrongfully deprived of goods that he had a legitimate claim to.

Now in framing the issue Demon explains the *paragraphê* as follows (1–2):

The laws [for the maritime court] provide for lawsuits involving shipowners and merchants *in obligations for shipment to and from Athens, and where there are written agreements*;⁵⁵ but if anyone prosecute contrary to these provisions, the suit is not actionable (*μὴ εἰσαγωγίμων εἶναι τὴν δίκην*). Between me and this fellow

⁵⁴ On the *dike exoulês* see Isager, *Aspects* 144–147.

⁵⁵ This and similar cases point to a restrictive reading: only obligations based on written agreements are actionable in this court (see n.48 above); cf. Isager, *Aspects* 151–152; D. M. MacDowell, *Demosthenes the Orator* (Oxford 2009) 275 with n.60, on this case.

Zenothemis there is neither obligation nor written agreement, as he himself admits in his complaint; for he says that he loaned money to Hegestratus, the shipowner, and when the latter was lost at sea, we deprived him (Z) of his cargo. Such is the complaint. From the very same argument you will learn that the claim is not actionable and you will see that this fellow has invented the whole sorry scheme.⁵⁶

The procedural issue amounts to this: Z has a claim based upon a maritime contract and he therefore asserts his right to bring suit in the maritime court; D insists that the maritime suits are properly reserved for obligations based on a contract *between the two parties*, not upon some incidental agreement with a third party. And that is not merely a technicality; for he argues at length that Z's claim to the goods in question is entirely fraudulent—he borrowed money on goods that were not his. Wolff discounts that whole argument: once again, the *paragraphé* is a desperate last resort. Were the case to go to trial on the main issue, whether D had wrongly ejected Z, the plaintiff would surely prevail.⁵⁷ But where is the contract linking D to Z?

Wolff's answer is intriguing—the ejection itself creates a viable obligation.⁵⁸

⁵⁶ Dem. 32.1–2: οἱ νόμοι κελεύουσιν, ὧ ἄνδρες δικασταί, τὰς δίκας εἶναι τοῖς ναυκλήροις καὶ τοῖς ἐμπόροις τῶν Ἀθήναζε καὶ τῶν Ἀθήνηθεν συμβολαίων καὶ περὶ ὧν ἂν ὡσι συγγραφαί. ἂν δέ τις παρὰ ταῦτα δικάζεται, μὴ εἰσαγωγίμων εἶναι τὴν δίκην. τουτωὶ τοίνυν Ζηνοθέμιδι πρὸς μὲν ἐμὲ ὅτι οὐδὲν ἦν συμβόλαιον οὐδὲ συγγραφή, καὶ τὸς ὁμολογεῖ ἐν τῷ ἐγκλήματι· δανείσαι δὲ φησιν Ἡγεστράτῳ ναυκλήρῳ, τούτου δ' ἀπολομένου ἐν τῷ πελάγει, ἡμᾶς τὸ ναῦλον σφετερίσασθαι· τουτὶ τὸ ἐγκλημα' ἐστίν. ἐκ δὴ τοῦ αὐτοῦ λόγου τὴν τε δίκην οὐκ εἰσαγωγίμων οὖσαν μαθήσεσθε, καὶ τὴν ὄλην ἐπιβουλὴν καὶ πονηρίαν τουτουὶ τοῦ ἀνθρώπου ὄψεσθε.

⁵⁷ Cf. *Paragraphe* 42 with n.53, emphasizing the disparity in evidence.

⁵⁸ *Paragraphe* 44–45 with n.56: “prozessual ging es ja gar nicht um die (gerechtfertigte oder ungerechtfertigte) Besitzergreifung des Protos, und nach ihm des Demon, an dem Getreide, sondern um die von letzterem vollzogene ἐξαγωγή. Diese aber war gerade das formale Mittel zur *Schaffung* einer (deliktischen) *Haftungsbeziehung*—und diese allgemeine Bedeutung, nicht bloß

In processual terms it is not a matter of taking possession of the grain (rightly or wrongly) on the part of Protus or Demo, but rather of the latter's executed ejection. But this was just the formal means of creating a (delictual) obligation—and this general meaning, not simply “contract,” belongs to *symbolaion*!—on which grounds the very party who has been wrongfully barred from taking possession (and this is precisely the claim of Zenothemis) can proceed with a *dike exoulês*.

Wrongs create liabilities, indeed, and the Athenians certainly described such obligations as *symbolaia*. Moreover, Z agreed to be ejected by D, with the understanding that he could later bring suit to recover what he lost. But to suppose that this form of liability meets the requirement for “contract” in that jurisdiction seems to me as doubtful as any of the strategies that Wolff imputes to the desperate defendants. Wolff supposed that the maritime court would normally have jurisdiction in cases of ejection involving imported goods.⁵⁹ But that does not quite square with the evidence (as most scholars now read it): the law for *paragraphê* in this jurisdiction makes it reasonably clear that the defendant can bar any claim that is not based on a written contract, *syngraphai* (nn.48 and 55 above). The practical effect of that rule would be that other kinds of claims (such as wrongful ejection), without a contract to establish the claimant's right to the goods, do not belong in this court. So in this case, as in other mercantile *paragraphai*, the rule defining jurisdiction is not merely a procedural distinction: by barring claims without a contract, it recognizes the defendant's right to goods he has secured by contract.

die von ‘Vertrag’, hat *συμβόλαιον*!—auf Grund deren derjenige, dessen Zugriff zu Unrecht abgewehrt worden war, und eben das nahm Zenothemis für sich in Anspruch, mit der *δίκη ἐξουλήs* vorgehen konnte.” For this “delictual” liability (non-consensual *symbolaion*) see esp. Arist. *Eth.Nic.* 9.1.9, 1164b.

⁵⁹ As Wolff explains, *Paragraphe* 45: “Insofern als nun diese der Sache nach allerdings eine stilisierte Form der Austragung des Streits um das Gut selbst war, und es sich im vorliegenden Falle um Einfuhrgut handelte, mochte man wohl die Zuständigkeit des Hafengerichts für gegeben halten.”

If we follow Wolff's interpretation the sole issue in the *paragraphê* is the purely jurisdictional distinction:⁶⁰ D has no interest in arguing about the facts because the preponderance of the evidence is on the plaintiff's side. D would be happy to see the case dismissed on procedural grounds, since the maritime court was the only venue where Z had any case.⁶¹

But the natural implication of this speech—as in the other Demosthenic speeches—is that the bearing of the contract is not regarded as a formality divorced from the facts. There is often the question of fraud. And there is always the question of whether the claim has been foreclosed. The formal issue is a question of whether there is any viable claim based on the contract. But in this case and others like it, that question is bound up with substantive questions about the plaintiff's right to what he claims: What was done to create the obligation or to undo it?

The argument ends abruptly in §30 with a reference to unfinished business.⁶² D accuses Z once again of conspiring with Protus to deprive him of his property; the proof is that he, Demon, will avail himself of *klêteusis*, whereas Z has no intention of resorting to that remedy. As Wolff acknowledged, *κλητεύσω* probably indicates a formal commitment by D to proceed against Protus for “failing to appear” (*lipomartyria*). So

⁶⁰ From this perspective, treating the *paragraphê* as *exceptio fori*, Wolff dismisses the argument in §22 as “sophistic wordplay.” Here the speaker treats the term *eisagôgimos/eisagein* literally, as though it refers to bringing the disputed goods (or the culprit) into the court's jurisdiction, and I am not so sure the Athenians would see it as facetious or sophistic. That literal sense of *eisagôgimos/eisagein* is also key to the commonplace in Dem. 34.43 and 35.47–49 (see 265–267 above, 288 below).

⁶¹ *Paragraphe* 43 with n.54. Wolff assumes that Z might sue in another court but the risk is minimal.

⁶² That is, D has already summoned Protus to give testimony at the present hearing and, of course, he fails to appear. The concluding sections, 31–32, anticipate some accusations against Demosthenes, of no relevance to the main argument.

here again, as in the case against Apaturius, the only recourse is to prosecute the witness; no one anticipates a separate hearing on the merits.

3. Ending the dispute

Not long after Wolff's study appeared, MacDowell set to work on the second volume of *The Law of Athens* (1971), which Harrison had left unfinished. There Wolff's model is articulated at length (106–124), and MacDowell would later follow that model in his own handbook (1978). And with such authority on his side, it is no surprise that Wolff has “demolished” Paoli's hypothesis and the matter is not to open to dispute.⁶³ The plaintiffs present their whole case only because they will be denied a proper hearing if the *paragraphe* prevails. And, however much the defendants delve into the facts, they are pinning all their arguments on the procedural issue because they have no case on the merits. Thus we are to conclude that the two issues were clearly distinct and properly assigned to separate hearings.⁶⁴ But the fact that defendants would have been at a grave disadvantage in a hearing on the merits, or that plaintiffs had to present their case as though they might not get another chance, does not prove that there ever was a second hearing. That conclusion is based on the assumption (“nothing to prevent our believing”) that the Athenians divided the issues and assigned them to separate hearings, much as later law would do.

Those who rely on that premise find reassurance in some

⁶³ Harrison, *Law of Athens* II 111, “there is nothing ... to weaken the view that the issue raised by the *παράγραφη* was treated quite separately from the main issue”; 112 “nothing to prevent our believing that the issue ... was whether suit lay against Lakritos”; 116, “nothing to suggest that the principal aim ... was to persuade the jury on the merits ...”

⁶⁴ *Law of Athens* II 119: “We can say with some confidence that argument and voting on a *παράγραφη* were quite distinct from argument and voting on the issue of substance and that when the *παράγραφη* was rejected a new hearing, quite possibly though not necessarily before a different jury, was opened.”

rather dubious evidence. There is of course the testimony of Pollux and the later lexica. But that tradition draws on rhetorical hypotheses rather than speeches-for-trial or any credible record of the law: the standard examples are cases rejected as not suited for *eisangelia* but for *graphê paranomôn*, or not for public prosecution but private suit, or not (for murder) before the Areopagus but (for manslaughter) before the Palladium court.⁶⁵ These instances have nothing to do with the *paragraphê* procedure at Athens in the fourth century B.C.; they illustrate issue theory.

But there is an *exceptio fori* in the plea of Pancleon addressed by Lysias 23, and the testimony in Pollux has encouraged scholars to suppose that Pancleon's plea is indeed a *paragraphê*. So Wilamowitz assumed though, by his reading, the plaintiff speaks first. It is fair to say, the order of speakers is not quite clear.⁶⁶ But there is no doubt about the disparity: this argument bears no similarity to the other *paragraphê* speeches. As we have seen, the other *paragraphai* never rely on such technicalities; when such objections are raised, they always come with a disclaimer (nn.45–46 above). The most striking difference is simply that *Against Pancleon* makes no argument at all on the merits—indeed, we have no clear indication what the plaintiff's claim happens to be.⁶⁷ Scholars have seized on that disparity as proof that the hearing at hand would only decide the question of jurisdiction, but it seems to me at least as likely that in this

⁶⁵ Poll. 8.57: οἶον οὐκ εἰσαγγελίας ἀλλὰ παρανόμων, οὐ δημοσία ἀλλ' ἰδίᾳ, ἢ ὡς οὐ παρὰ τούτοις κρίνεσθαι δεόν, οἶον οὐκ ἐν Ἀρείῳ πάγῳ ἀλλ' ἐπὶ Παλλαδίῳ. See n.13 above.

⁶⁶ Thus Isager, *Aspects* 124 n.5, concluding (with Wolff, *Paragraphe* 108–111) “that a ‘normal’ *paragraphe* is at issue.”

⁶⁷ As we noted at the outset (259–261 above). It is tempting to suppose that the case involves enslavement for debt or damages by a freedman with (supposedly) metic status (on which see Todd, *Shape* 181, 196). In the competing claims it is clear that Pancleon risks losing his liberty and so it is likely that NN's suit may have the same effect (thus, §5, he takes pains not to be accused of ὑβρίζειν).

singular case the main claim required no speechwriter's assistance. In the other speeches there is always an account of the dispute ἐξ ἀρχῆς. So it seems reasonable to suppose that Pan-
 cleon's plea is simply called *antigraphé* because it is not a *para-*
graphé.⁶⁸

Among all the other speeches the only passage that seems to point specifically to a second stage of the proceedings comes in the testimony with which we began, Isocrates' prologue explaining the procedure: the archons "introduce this issue first and the man who brought the special plea would speak first."⁶⁹ By itself, the first clause, *τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν*, might suggest that the issues are treated separately: the archons introduce the first question first, and then bring on the sequel. But the phrasing is not unequivocal, and this clause should not be taken apart from what follows. Apparently the law does not say "bring in the *paragraphé* first and thereafter the *diké*." Isocrates describes the issue elliptically: the archon is to "bring in" something "about this (dispute)."⁷⁰ What is it that he brings in?

The Athenian jury probably understood the phrase *περὶ τούτου ... εἰσάγειν* not as an abstraction but in practical terms: the archon will introduce the issue that the defendant has raised by having his formal plea, his *antómosia*, read out to the court. To put it another way, he introduces the issue by "bringing in" the defendant who raised it.⁷¹ That is not to say that the

⁶⁸ Pollux, in fact, in the next entry after *paragraphé*, notes the overlap and the differences (8.58, *ἀντιγραφὴ δέ, ὅταν τις κρινόμενος ἀντικατηγορῆ*).

⁶⁹ As for the passage where the plaintiff calls defendant to answer, see n.29 above.

⁷⁰ Cf. the law cited in Dem. 24.54 (*ne bis in idem*) *μὴ εἰσάγειν περὶ τούτων εἰς τὸ δικαστήριον μηδ' ἐπιψηφίζειν τῶν ἀρχόντων μηδένα*; 35.51: *μηδὲ ἀρχὴν εἰσαγέτω περὶ τούτου μηδεμίαν* (money lost in transporting grain elsewhere).

⁷¹ E.g. Isoc. *Antidosis* 287 (no one has "brought in" those who encourage the drunken youth); Lys. 13. 28 ("bring in" defendants to the council under the Thirty); cf. the law in Dem. 21.47, where defendants are omitted but naturally implied (*οἱ δὲ θεσμοθέται εἰσαγόντων εἰς τὴν ἡλιαίαν*).

Athenians could not conceptualize the “issue” as an abstract question or could not speak of “introducing a dispute,” ἀγῶνα εἰσάγειν. But, without such language, the ordinary implication seems to be that the archon literally “brings in” the litigants and that introduction is represented in the statements that he has read for them.

So, in practical terms, the likely meaning of Isocrates’ description is simply that the archon has the *paragraphé* read before the plaintiff. That presentation to the court comes *first* (of all), *πρῶτον*. And then the defendant speaks *first* or, strictly, *prior* to the plaintiff (λέγειν δὲ πρότερον τὸν παραγραφόμενον). This second rule uses the more precise way of setting one event before another, because the reverse order is the surprise that requires an explanation. If there were separate proceedings for the main issue, and a second decision for the jury to make after the *paragraphé*, that would also be novel and perhaps confusing, and we might expect some guidance on that new protocol: *πρῶτον μὲν περὶ τούτου εἰσάγειν ... ἔπειτα δὲ τὴν δίκην*. Instead Isocrates seems to suppose that the jury would normally expect a plea of this sort, that the plaintiff is abusing the procedure, to be simply part of the defendant’s argument (as in Antiphon 5). Now it is presented at the outset and that reversal alters the dispute. But there is nothing to suggest that the jury are to *decide* the defendant’s objection first *and only then proceed* to plaintiff’s case, though that would be the crucial departure from the norm. If that were the order of business, surely the jurors should be advised that they have only to decide on the procedural issue at present and may reserve judgment on the merits until later. So, in my view, “introduce this issue first” simply refers to the fact that the defendant is introduced first, with the reading of his *paragraphé*, and he will begin the debate.

After all, it takes two sides to frame an issue, and it looks as though the plaintiff’s side is simply his original claim against the defendant. If the jury were to decide the procedural question apart from the main issue, we might expect the plaintiff to enter a formal reply, perhaps even a separate *antōmosia* on that question: if the *paragrafsamenos* claims that the suit is barred by a

settlement with full release (for instance), the plaintiff would respond specifically to that challenge—presumably that the settlement was invalid. The defendants sometimes begin by referring to the wording of the *paragraphé*, which the jury has just heard, but there is no reference to any formal response to the *paragraphé*, even in the plaintiffs' speeches (Dem. 34–35). We can reconstruct their positions from the arguments, but there seems to be no official formulation on that separate question.⁷² Thus, in the first instance (Isoc. 18), the defendant proceeds as though he does not know what Callimachus will say specifically in response to his plea.⁷³ The only answer to the *paragraphé* is the plaintiff.

If we set aside the usual assumption and simply form our judgment from the speeches themselves, there is nothing to suggest that the jury must separate the two questions and decide one before the other. On the contrary, the events that created the obligation and the course that the plaintiff has taken to recover what is owed to him are not easily divisible. Therefore, to the Athenians it seemed reasonable and sufficient for one verdict to answer both questions, because the *paragraphé*

⁷² See esp. Dem. 34.3–5, where the plaintiff does give a fairly succinct reply; 35.4–5, where the plaintiff largely discounts the *paragraphé* and pleads, “If I convict him of wronging us, the lenders—and (doing wrong to) you no less—aid us with justice,” *βοηθείτε ἡμῖν τὰ δίκαια*. G. M. Calhoun, “Athenian Magistrates and Special Pleas,” *CP* 14 (1919) 338–350, supposed that there must have been some formal reply to the *paragraphé* in the preliminaries, but he acknowledged that there is no indication of it in the speeches; in fact, Dem. 37.22–30 suggests that “the original complaint and the *παραγραφή* seem to constitute the pleadings” (345 n.5).

⁷³ Isoc. 18.7 and 13, show that C has not answered the *paragraphé* in the statement that has just been read to the court: NN says, “perhaps” C will claim that NN was the instigator of the confiscation (in response to the plea that NN is shielded by the covenant on informants); and “I learn that” C intends to deny the arbitration. The complaint was read in its original form, specifying the damages (§33). Similarly in Dem. 38.1–2 it seems clear that the plaintiff's statement is his original claim for damages in the specific amount, *ἐπὶ τῇ δίκῃ τίμημ' ἀκηκόατε*.

is a complete defense and the plaintiff will have made the best of his case, in a dispute that cannot be parsed without prejudice.

For in these trials the issue is essentially whether the plaintiff's claim is backed by binding agreement or foreclosed by it. The defendant gains the advantage of speaking first and framing the debate to his advantage, as he argues that any claim is canceled. If he prevails he wins the *epôbelia* and the plaintiff will pay for his litigiousness. But the plaintiff has the last word and, to make the most of it, he introduces all his evidence and follows all the implications. The jurors will vote once, for one litigant or the other—they do not decide on a formality. If the *paragraphê* is rejected, the plaintiff prevails and he earns the *epôbelia* in addition to his damages. That appears to be the working rationale when Archinus introduced the procedure, and we find the same principle at work in the last of the surviving speeches.

When the procedure was brand new, Isocrates argued that Callimachus' claim was strictly barred by the covenants of reconciliation. Among those articles of agreement was the rule that suits and settlements be binding. That principle was restated in subsequent legislation: "Whatever terms the parties agree to shall be final." Thus he argues, *a fortiori*, when private agreements are enforced by public authority (*τὰς μὲν ἰδίας ὁμολογίας δημοσίᾳ κυρίας ἀναγκάζει εἶναι*), it is all the more outrageous for Callimachus to violate the city's covenants to serve his own private interest (18.24–26). The Athenians swore to those covenants as part of a binding transaction, with stipulations to foreclose any further dispute: returnees may reclaim much of their property, and whatever settlements they devise shall be final. Now, as Isocrates puts it, they are asked to violate their pledge in the interest of predatory litigators such as Callimachus. So the jury must recognize that they are casting a verdict on the very viability of covenants (*synthékai*) as the mainstay of commerce and civil society (28):

... most of our way of life, for Greeks and non-Greeks alike, happens through covenants. Putting our trust in them we visit

one another and transport whatever goods we happen to need; with [covenants] we complete our transactions among ourselves; and we settle our differences, both private quarrels and wars that involve the whole community. This one common practice all mankind have always applied. So it is fitting for all to come to their aid, and especially fitting for you.

In this passage the principle defended by the new procedure is the package of rules that the parties had agreed to. The sanctity of covenant is represented on two levels: it is not only the Amnesty at large that demands compliance, but also private agreements that are concluded with binding formality. For the Reconciliation Agreement evidently embraced the rule that legal judgments and arbitrated settlements (concluded under the democracy) shall be final, and that rule was then enacted into law.⁷⁴ The law for the new *paragraphé* procedure seems to have come on the heels of that enactment, perhaps even as corollary to it.

The later laws granting *paragraphai* in various venues extended the reach of that remedy, but the later speeches all embrace the same principle in one way or another. In the contract cases, the dispute is about binding agreement at the most basic level. The two defendants, in Dem. 32 and 33, argue that they are not subject to any obligation of this sort. The essence of that rule is that proper contracts dispose of any further dispute (33.35–36):

The crux of the matter is this: Apaturius will not even try to claim that he has a contract with me. When he lies and says that I was listed as surety in the contract with Parmeno, demand (to see) the contract. And then confront him on this ground, that all men, when they make contracts with one another, seal the document and put it in the custody of those they trust, for this reason —so that if they have any dispute, they have recourse to the text and on that basis they can put the matter in dispute to the proof.

⁷⁴ With Isoc. 18.24 (*ιδίας ὁμολογίας δημοσίᾳ κυρίας*) compare Andoc. 1.87–88, among reforms inspired by the Amnesty; Dem. 24.54, canceling decisions under the Thirty; cf. Carawan, *GRBS* 46 (2006) 368–372.

The two plaintiffs, in Dem. 34 and 35, argue on the other side, that contracts must be enforced against defendants who have done all they can to evade their obligations. Both parties argue the merits because questions of fact and fraud are inseparable from the question of whether the claim has any basis in binding agreement. The plaintiff against Lacritus frames the issue as follows (35.26–27):

What is agreed by both parties, in covenants for which a maritime contract is secured, everyone considers final (*τέλος ἔχειν*); one has to apply what is written. That they have done nothing according to the contract but from the very beginning committed fraud and plotted to do wrong, is proven by the witnesses and by their own claims.

But the clearest instances come from the last three speeches in the set, Dem. 36–38: in each case prior settlements, solemnized with release and quittance, bar any further dispute; that basis is set forth in the prologues (as we saw, 274 ff. above). And the principle of finality is thoroughly developed in defendants' arguments. Thus in the epilogues to the last two speeches (37.58–59 = 38.21–22) we find it framed as a commonplace: even in matters of bloodshed—the most unquenchable grievances—once the parties have reconciled and given release to the killer, there must be a boundary barring any further recrimination. It is the same principle embodied in the closing to the Amnesty (cf. Dem. 40.46).

Again the first case is perhaps the best illustration (Isoc. 18). In their original settlement NN conceded his share in the loss, as he had been present when Patrocles took the money; Callimachus settled for that concession and gave a release from further claims. That should have ended the matter. But it is clear from NN's presentation that C has changed his construction of the events: presumably he claims that NN was the main actor and now fully liable; on this issue, C contends, "there was no *diata*." That at least is a plausible interpretation of what NN says: C was able to convince the archon to reopen the case by arguing that this is a new complaint of a more serious wrong, one that was (arguably) exempt from the agree-

ment and from the covenants of reconciliation.

Evidently, by claiming that NN is not a mere accomplice, C hopes to evade the covenant shielding “informants and denouncers.” There were no definitions in the law, but, to make a good case, C probably needed to show that NN was the prime mover, acting from his own motives, to his own advantage. It looks as though the evidence on that is doubtful or C’s construction is precarious, based on NN’s ties to the discredited regime. That is why our defendant insists upon it:⁷⁵

If he mentions what happened under the oligarchy, demand that he not accuse those whom no one will defend. Demand instead that he show that *I*—the person you must vote on—took the money. Demand not that he show that he has suffered terribly, but that he substantiate that *I* caused it, (as I am) the one from whom he is demanding to recover his losses.

Whereas Paoli treated this passage as proof that the main claim will be decided in the hearing at hand, Wolff discounted it as a rhetorical appeal to a general amnesty. But the issue is more clearly defined: the defendant insists upon this point precisely because there was a covenant specifically barring any claim of mere complicity in the crime; and the alternative, the charge that NN (or anyone) “caused it,” may be very difficult to prove. C will argue that NN was the main actor, who set the events in motion, to his own advantage. But that picture involves a complicated reckoning that NN asks the jury to reduce to its simplest terms. And it is all the more burdensome for the plaintiff, if the jurors weigh the prior agreement that Callimachus made with this same defendant: How can Callimachus claim such a sum for a loss he has already settled in arbitration, pledging “no further dispute”?

Awkward as it is, the jury’s decision does not involve sophisticated distinctions of fact and form. It is the sort of problem that neighbors and business partners wrestled with all the time, settling their own disputes and defining their obligations. There

⁷⁵ Isoc. 18.40, again following Mirhady’s translation.

was no elite judiciary to parse these complexities, and the archons had no competence to dispose of them summarily. These were cases for a jury representing the community to decide, not on a formality but for one litigant or the other.

March, 2011

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