USE OR ABUSE OF *DIAMARTURIA* IN AN ATHENIAN INHERITANCE CASE?

A. The *diamarturia*

1. 'The historical development of *diamartyria* is obscure, but it is less obscure than it used to be, thanks to a classic study by the most distinguished of all French students of Athenian law, the late Louis Gernet. Gernet argues that, even though no surviving text mentions *diamartyria* before the closing years of the fifth century, it was really a much older procedure; it had archaic features which cannot have originated as late as the age of the Attic orators and the democratic juries. Some details of his inferences may be open to doubt, but he is surely right to regard *diamartyria* as primitive. Formal assertion seems out of tune with the dialectical age of Sokrates.' MacDowell, p. 213.

2. 'Le verbe *διαμαρτυρεῖν* est employé couramment avec un complément pour exprimer l'idée que la saisine appartient à un tel individu (Isée VI, 10, 17, 58, etc.) ou pour affirmer un fait sur lequel se fond ce droit (*id.* VI, 52; [Dem.] XLIV, 54), ou pour nier un fait dont l'adversaire se prévaut (Isée VI, 62). Mais nous trouvons la formule *διαμαρτυρεῖν μὴ ἐπίδικον εἶναι τὸν κλῆρον*, à plusieurs reprises, comme formule technique (Isée V, 16, VI, 4, 59; VII, 3); et, encore qu'on y puisse ajouter des considérants dans l'acte écrit du IVè siècle, cette expression négative n'a de raison d'être que si elle suffit à elle-même dans le principe, ce qui est conforme à la structure archaïque de la *διαμαρτυρία*. Il convient de souligner que, dans l'action consécutive à celle-ci, le jugement décide formellement, et sans plus, si la succession est susceptible ou non d'attribution judiciaire.' Gernet, p. 101, n. 2.

3. 'It is clear that when the court by its verdict affirmed the pleading of the witness, that he "gave true testimony," it legally established a title that effectually barred, not only other present claims, but also those that might be set up in the future.' Calhoun, p. 177.

4. 'It is easy to see why *paragraphē* increased its scope at the expense of *diamarturia*: from the viewpoint of the community, *paragraphē* was better suited to a democratic system of justice, because it ensured a court hearing rather than simply permitting one by the back door (*diamarturia* was presented before the magistrate, and there was no trial unless the plaintiff sued the witness by *dikē pseudomarturiōn*); from the litigant's perspective, *paragraphē* was preferable to *diamarturia* because if you won it your opponent would be penalized.' Todd, p. 137.

5. 'Instead of a straight denial, the defendant at the *anakrisis* might bring forward the technical objection that the prosecution could not legally be brought. There is, however, an important difference between an Athenian and a modern legal objection. … In English common law, a litigant who brought a demurrer was claiming that his legal position was so strong that he was prepared to ignore any plea based on fact and instead to rest his case on (French *demeurer*) the issue of law. In Athens, however, issues of fact and issues of law were in practice inseparable, because the *dikastai* were competent over both, and were in a sense an immediate source of law; as a result, no litigant could dare to confine his plea to the issue of law and to ignore the facts.' Todd, p. 135.

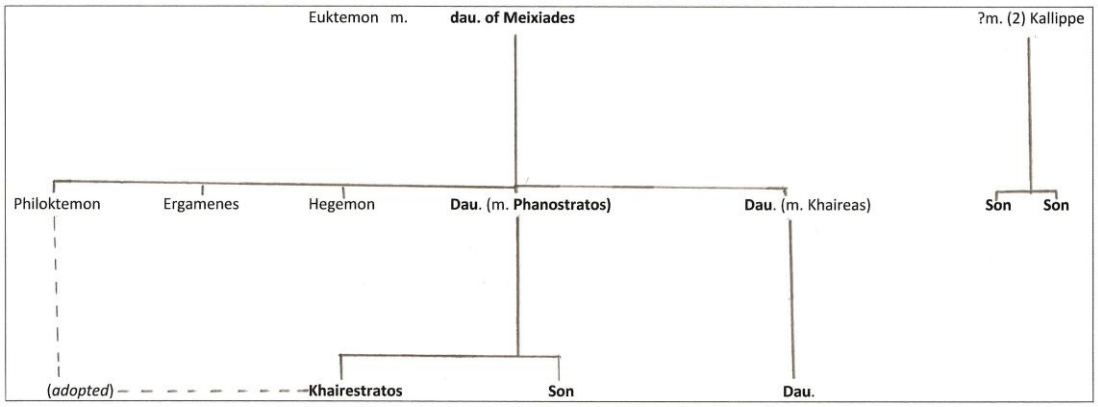
6. 'The ideal use of *diamarturia* is clear: its effect is to bar the original hearing, because the witness is deemed to be telling the truth until the opposite is proved; if the plaintiff wishes to proceed further, he must sue the witness in a *dikē pseudomarturiōn*.' Todd, p. 136.

7. 'Defeat in *paragraphē* or *diamarturia* was surely so prejudicial to your chances in the original case that you would have dropped your claim or accepted any terms that your opponent was prepared to offer.' Todd, pp. 138-139.

8. *Ὡς δὲ καὶ τῶν ἀγώνων ἀδικώτατοι καὶ πλείστης ὀργῆς ἄξιοι τοῖς ἀγωνιζομένοις αἱ διαμαρτυρίαι εἰσί, μάλιστ' ἄν τις ἐκεῖθεν καταμάθοι. πρώτον μὲν γὰρ οὐκ ἀναγκαίως ἔχουσιν, ὥσπερ οἱ ἄλλοι, ἀλλ' ἐκ προαιρέσεως καὶ βουλήσεως τῆς τοῦ διαμαρτυροῦντος γίγνονται. εἰ μὲν γὰρ ὑπὲρ τῶν διαμφισβητουμένων μὴ ἔστιν ἄλλον τρόπον δίκην λαβεῖν ἢ διαμαρτυρήσαντα, ἴσως ἀναγκαῖον τὸ διαμαρτυρεῖν.· ει δὲ καὶ ἄνευ διαμαρτυρίας πρὸς ἅπασι τοῖς συνεδρίοις ἔστι λόγου μὴ ἀποστερηθῆναι, πῶς οὐ προπετείας καὶ τῆς μεγίστης ἀπονοίας σημεῖον τὸ διαμαρτυρεῖν ἔστιν; οὐδὲ γὰρ ὁ νομοθέτης ἀναγκαῖον αὐτὸ ἐποιήσε τοῖς ἀντιδίκοις, ἀλλ' ἂν βούλωνται διαμαρτυρεῖν, ἔδωκεν, ὥσπερ διάπειραν ποιούμενος τῶν τρόπων ἑνὸς ἑκάστου ἡμῶν, πῶς ποτ' ἔχοιμεν πρὸς τὸ προπετῶς τι πράττειν. ἔτι τοίνυν ἐπὶ τὸ τῶν διαμαρτυρούντων μέρος οὔτε δικαστήρια ἦν ἂν οὔτε ἀγῶνες ἐγίγνοντο· κωλύει γὰρ πάντα ταῦτα τὸ τῶν διαμαρτυρίων γένος καὶ ἀποκλείει εἰσαγωγῆς ἕκαστα τῆς εἰς τὸ δικαστήριον, κατά γε τὴν τοῦ διαμαρτυροῦντος βούλησιν. διόπερ οἶμαι δεῖν κοινοὺς ἐχθροὺς τοὺς τοιούτους ἀνθρώπους ὑπολαμβάνειν πᾶσιν εἶναι, καὶ μηδέποτε τυγχάνειν αὐτοὺς συγγνώμης ἀγονιζομένους παρ' ὑμῖν· προελόμενος γὰρ ἕκαστος αὐτῶν τὸν ἐκ τοῦ διαμαρτυρῆσαι κίνδυνον, οὐκ ἀναγκασθεὶς εἰσέρχεται.* And it can be seen very clearly from the following that *diamarturiai* are the most unjust of all legal procedures, and that those who resort to them are the most contemptible of litigants. First of all they are not compulsory, like other procedures, but subject to the choice and wish of the person testifying. If there is no other way of obtaining justice over matters in dispute than by a *diamarturia*, then it is perhaps necessary to make one. But if it is possible even without a *diamarturia* to get a hearing before all tribunals, how can it not be a sign of recklessness and extreme desperation to use one? For the legislator did not make it compulsory for litigants to testify in a *diamarturia*, but allowed them to do so if they wished, as if he were testing the character of each of us, to see how we react to a reckless procedure. Furthermore, if it were up to those who make *diamarturiai*, there would be neither courts nor trials, for it is in the nature of *diamarturiai* to block all such things and to shut all cases out of the courtroom – at least according to the wish of the person using a *diamarturia*. For that reason I think such people should be considered public enemies, and they should never enjoy any sympathy when they are contesting their cases before you. For each of them comes into court having chosen to take the risk of the *diamarturia*, not from compulsion. [Dem.] 44.57-58.

9. *ἐγὼ δ' εἰ μὲν ἑώρων ὑμᾶς μᾶλλον ἀποδεχομένους τὰς διαμαρτυρίας ἢ τὰς εὐθυδικίας, κἂν μάρτυρας προὐβαλόμην μὴ ἐπίδικον εἶναι τὸν κλῆρον ὡς ποιησαμένου με υἱὸν Ἀπολλοδώρου κατὰ τοὺς νόμους. ἐπειδὴ δ' οὐ διαφεύγει τὰ δίκαια μὴ οὐ κατὰ τοῦτον γιγνώσκεσθαι τὸν τρόπον [καὶ] παρ' ὑμῖν, αὐτὸς ἥκω διαλεξόμενος περὶ τῶν πεπραγμένων, ἵνα μηδεμίαν ὑμῖν αἰτίαν περὶ τοῦ μὴ βούλεσθαι δοῦναι δίκην τοιαύτην ἐπιφέρωσιν.* If I saw that you preferred a *diamarturia* to a *euthudikia*, I should have produced witnesses to testify that the estate was not subject to adjudication because Apollodoros had adopted me in accordance with the law. But since the rights of the matter cannot be made known to you in that way, I have come forward myself to explain the facts to you, so that [my opponents] cannot accuse me of being unwilling to come to trial. Isa. 7.3

B. Isaios 6: On the estate of Philoktemon



The family of Euktemon of Kephisia

Notes

1. People shown in **bold** were living at the time of Isaios 6.
2. The speaker's opponent, **Androkles**, was a collateral kinsman of Euktemon, but their relationship is not specified.
3. The 'sons' of Euktemon and Kallippe are said by the speaker of isaios 6 to be the sons of Alke and Dion.

10. *Φιλοκτήμων γὰρ ὁ Κηφισιὺς φίλος ἦν Χαιρεστράτῳ τουτῳι δοὺς δὲ τὰ ἑαυτοῦ καὶ υἱὸν αὐτὸν ποιησάμενος ἐτελεύτησε. λαχόμτος δὲ τοῦ Χαιρεστράτου κατὰ τὸν νόμον τοῦ κλήρου,* ***ἐξὸν αμφισβητῆσαι*** *Ἀθεναίων τῷ βουλομένῳ καὶ εὐθυδικίᾳ εἰσελθόντι εἰς ὑμᾶς, εἰ φαίνοιτο δικαιότερα λέγων, ἔχειν τὸν κλῆρον, διεμαρτύρησεν Ἀνδροκλῆς οὑτοσὶ μὴ ἐπίδικον εἶναι τὸν κλῆρον,* ***ἀποστερῶν*** *τοῦτον τῆς ἀμφισβητήσεως καὶ ὑμᾶς τοῦ κυρίους γενέσθαι ὄντινα δεῖ κληρονόμον καταστήσασθαι τῶν Φιλοκτήμονος· καὶ ἐν μιᾷ ψήφῳ καὶ ἑνὶ ἀγῶνι οἴεται ἀδελφοὺς καταστήσειν ἐκείνῳ τοὺς οὐδὲν προσήκοντας, καὶ τὸν κλῆρον ἀνεπίδικον ἕξειν αὐτός, καὶ τῆς ἀδελφῆς τῆς ἐκείνου κύριος γενήσεσθαι, καὶ τὴν διαθήκην ἄκυρον ποιήσειν.* For Philoktemon of Kephisia was a friend of Khairestratos here, and when he died he had given him his property and adopted him as his son. But when Khairestratos claimed the estate, in accordance with the law, although it was permissible for any Athenian who wished to come before you in a *euthudikia* and contest the estate, and, if he appeared to have the better case, to obtain it, Androkles here testified in a *diamarturia* that the estate was not subject to adjudication, trying to deprive my friend of the opportunity to contest it and you of determining who should be established as Philoktemon's heir. And with a single vote and in a single contest he thinks he can establish people who had no relationship to Philoktemon as his brothers, and get the estate himself without an adjudication, and become *kurios* of Philoktemon's sister, and annul the will. Isa. 6.3-5.

> 10a. Philoctemon of Cephisia, the son of Euctemon, had so great a regard for Chaerestratus, that he adopted him by will and appointed him successor to his estate: when, therefore, Chaerestratus claimed his succession in due form (at which time any Athenian had a right to

set up an adverse claim in a direct course of law, …) this Androcles, instead of bringing a fair and regular action, entered a protestation that the estate was not liable to controversy, intending to prevent my friend from supporting his claim … Jones, p. 56.

10b. Philoktémon de Képhisia était ami de Chairestratos ici présent; il lui légua ses biens et l'adopta en mourant. Quand Chairestratos, conformément à la loi, demanda l'envoi en possession, bien qu'il fût loisible à tout Athénien qui le voulait d'élever une revendication … c'est à la procédure d'opposition par attestation qu'eut recours Androklès, déclarant qu'il n'y avait pas lieu à un jugement d'attribution de l'héritage et interdisant ainsi toute revendication à mon ami … Roussel, p. 109.

10c. Philoctemon of Cephisia was a friend of Chaerestratus here and died leaving him his property and adopting him as his son. Chaerestratus claimed the estate in accordance with the law. But any Athenian who wished could make a claim, enter a direct action (*euthydikia*) before you … . Androcles here thus made a declaration that the estate was not adjudicable, so depriving my friend of his claim … Edwards, p. 101.

11. *ἐπειδὴ δὲ προσδιαμεμαρτύρηκεν [ὡς] ὑὸν εἶναι γνήσιον Εὐκτήμονος τοῦτον* And then he additionally testified in the *diamarturia* that this young man was a legitimate son of Euktemon. Isa. 6.10.

12. *καὶ εἰς τοῦτο ἀναιδείας ἥκουσιν, ὥστ' εὐθυδικίᾳ μὲν οὐκ ἐτόλμησαν εἰσελθεῖν, ἀλλὰ διεμαρτύρουν ὡς ὑπὲρ γνησίων …* And they are so shameless that they did not dare to appear in a *euthudikia*, but have testified in the *diamarturia* as if it were a case of legitimate sons. Isa. 6.43.

13. *τουτὶ γὰρ αὐτοῖς ἡ διαμαρτυρία δύναται, ἵν' ὁ κίνδυνος τοῖσδε μὲν ᾖ περὶ πάντων, οὗτοι δὲ κἂν νῦν διαμάρτωσι τοῦ ἀγῶνος, δόξῃ δὲ ὁ κλῆρος ἐπίδικος εἶναι, ἀντιγραψάμενοι δὶς περὶ τῶν αὐτῶν ἀγωνίζωνται.* For this is the effect of [Androkles's] *diamarturia*, that all the risk falls on [Khairestratos], and that even if he loses the case and the estate is held to be subject to adjudication, he may claim again and contest the same estate twice. Isa. 6.52.

14. *καὶ τούτῳ μὲν οὐδεὶς διαμαρτυρεῖ μὴ ἐπίδικον εἶναι τὸν κλῆρον, ἀλλ' εὐθυδικίᾳ εἰσιέναι ⟨ἐξῆν⟩, οὗτος δ' ἅπαντας ἀποστερεῖ τῆς ἀμφισβητήσεως.* No-one is testifying in a *diamarturia* against [Androkles] that the estate is not subject to adjudication, and it was open to him to bring a *euthudikia*, but he is trying to deprive everyone else of the opportunity to claim. Isa. 6.59.

15.*εἰ γὰρ, ὥς ὅυτοι λέγουσι, τῷ μὲν Φιλοκτήμονι μὴ ἐξῆν διαθέσθαι, τοῦ δ' Εὐκτήμονός ἐστιν ὁ κλῆρος, πότερον δικαιότερον τῶν Εὐκτήμονος κληρονομεῖν τὰς ἐκείνου θυγατέρας, ὁμολογουμένως οὔσας γνησίας, καὶ ἡμᾶς τοὺς ἐκ τούτων γεγονότας, ἢ τοὺς οὐδὲν προσήκοντας ... ;* For if, as my opponents say, Philoktemon was not entitled to make a will and the estate was Euktemon's, who would more justly inherit Euktemon's estate – his daughters, who are agreed to be legitimate, and we their sons, or those who are completely unrelated to him … ? Isa. 6.56.

16. 'Quand s'ouvrit la succession d'Euktémon, Androklès commença, nous dit-on, par revendiquer à titre de parent le plus proche la main d'une fille d'Euktémon … . Puis, suivant une tactique toute différente, il fit opposition à la requête de Chairestratos par la *διαμαρτυρία* … : il attestait à la fois qu'il existait des fils légitimes d'Euktémon, et que Philoktémon n'avait pas fait de testament. *On*

comprend mal comment ces deux faits distincts étaient confondus dans une même procédure dont l'effet ordinaire se fonde uniquement sur l'existence d'héritiers de plein droit.' Roussel, p. 105 (emphasis added).

17. 'Androcles had made two statements, (1) that legitimate sons of Euctemon were alive, and (2) that Philoctemon had not made a will. The juxtaposition of two distinct and independent issues is confusing. The substance of a *διαμαρτυρία* was a protest founded on the existence of sons. To sustain such an objection Androcles had to prove the legitimacy of the alleged sons, but was not obliged to show that Philoctemon had not made a will. Even if a genuine will existed, its effects were problematical. In any case, if other sons of Euctemon were alive, the will could not make Philoctemon's adoped son Euctemon's sole heir. The advantage of the combination was that a verdict against Chaerestratus would annihilate his pretension that as heir of Philoctemon he possessed rights not shared by his brother and his cousin.' Wyse, pp. 486-487.

18. 'Androcles had chosen the proper and legal course on the assumption that his wards were legitimate sons of Euctemon. If he had not availed himself of his right, Isaeus would have taunted him with a guilty conscience … . Claimants pulled up by a *διαμαρτυρία,* and compelled to disprove in court a definite allegation before they can proceed with their own case, vent their annoyance in cavils at the procedure of their opponents. The strictures of Chaerestratos' advocate appear moderate and sensible by the side of the tirade of the son of Aristodemus in [Dem.] 44.59.' Wyse, p. 492

References and further reading

Calhoun, G. M., '*Diamarturia, paragraphē*, and the law of Archinus', *Classical Philology* 13 (1918), pp. 169-185.

Edwards, M., trans., *Isaeus*, Austin, Tex., 2007.

Gernet, L., 'La diamartyrie procédure archaïque du droit athénien' in L. Gernet, *Droit et société dans la Grèce ancienne*, Paris, 1955, pp. 83-102. (Originally published 1927.)

Harrison, A. R. W., *The law of Athens, volume I: The family and property*, Oxford, 1968.

Harrison, A. R. W., *The law of Athens, volume II: Procedure*, Oxford, 1971.

Jones, W., trans., *The speeches of Isaeus in causes concerning the law of succession to property at Athens*, London, 1779.

Labarbe, J., 'L'âge correspondant au sacrifice du *κούρειον* et les données historiques du sixième discours d'Isée', Bulletin de la Classe des Lettres et des Sciences Morales et Politiques de l'Académie Royale de Belgique, 1953, pp. 358-394.

Roussel, P., ed. and trans., *Isée: Discours*, Paris, 1926.

Schweigert, E., 'The Athenian cleruchy on Samos', *The American Journal of Philology*, 61 (1940), pp. 194-198.

Thompson, W., 'Isaeus 6: the historical circumstances', *The Classical Review*, 20 (1970), pp. 1-4.

Todd, S. C., *The shape of Athenian law*, Oxford, 1993.

Wyse, W., ed., *The speeches of Isaeus*, Cambridge, 1904.

Brenda Griffith-Williams
Department of Greek and Latin
University College London

b.griffith-williams@ucl.ac.uk