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THE WITNESS'S *EXOMOSIA* IN THE ATHENIAN COURTS

My purpose in this note is to examine the evidence for the witness's oath of disclaimer in the Athenian lawcourts. This is an issue on which modern discussions tend to be brief for want of ancient evidence.[1] However, although our ignorance on matters of detail relating to the *exomosia* remains, and is likely to remain, profound, I believe that we can, by a careful reading of the limited evidence which is available, draw a number of more or less confident conclusions about the form and content of the oath and the degree of restriction it imposed on witness and litigant. The lexicographers have the following to say on pressures applied to recalcitrant witnesses:

Polydeukes 8.37: *τὸν δ' οὐ βουλόμενον μαρτυρεῖν ἐκλήτευον ἀνάγκην τοῦ μαρτυρεῖν προστιθέντες· ἔδει δὲ αὐτὸν ἢ μαρτυρεῖν ἢ ἐξομόσασθαι ὡς οὐκ εἰδείη ἢ μὴ παρείη ἢ χιλίας ἀποτίνειν. κλητεύεσθαι μὲν οὖν ἐστὶ τὸ καλεῖσθαι εἰς μαρτυρίαν, ἐκκλητεύεσθαι δὲ τὸ δίκην ὀφείλειν ἐπὶ τῶι τὰς χιλίας καταβαλεῖν.*
('Against anyone who was unwilling to give evidence they used *kleteusis* and applied pressure to depose. He was required either to give evidence or to swear off to the effect that he did not know or was not present or to pay a thousand drachmas. *Kleteuesthai* therefore is to be called upon to give evidence, *ekkleteuesthai* is to forfeit the case on payment of the thousand drachmas.')

8.55 *ἐξώμνυντο δὲ καὶ οἱ κληθέντες μάρτυρες εἰ φάσκοιεν μὴ ἐπίστασθαι ἐφ' ἃ ἐκαλοῦντο.*
('Those who were called as witnesses, if they claimed that they did not know the things they were called to support, also[2] swore off.')

Souda s.v. *ἐξομόσασθαι: οἱ μαρτυρήσειν τισὶν ἐν δικαστηρίωι ὑπισχνούμενοι, εἰ μὲν μετὰ ταῦτα μὴ βούλοιντο καταμαρτυρεῖν ὤμνυον μηδὲν ἐπίστασθαι,*
('To swear off: people who promised they would give evidence for others in court, if subsequently they were unwilling to give evidence, swore that they knew nothing')

Taken together, the evidence of the lexicographers suggests that the witness in court had three options: he could depose, he could 'swear off/away', or he could submit to the process of *kleteusis* with its attendant penalty.[3] Although statements by the lexicographers must be used with caution,[4] the picture which emerges is corroborated by a substantial body of supporting evidence from surviving oratory from the fourth century. Demosthenes 19.176 writes: *εἶτα τῶν ἄλλων πρέσβεων ἕκαστον καλῶ, καὶ δυοῖν θάτερον, ἢ μαρτυρεῖν ἢ ἐξόμνυσθαι ἀναγκάσω* ('I shall call each of the other envoys and compel them to choose either to give evidence or to swear off'). Similarly Dem. 45.60 (cf. 45.58) *ἢ μαρτυρεῖτε ἢ ἐξομόσασθε* ('give evidence or swear off'), [Dem.] 49.20 *οὔτ' ἐμαρτύρησεν οὔτ' ἐξωμόσατο* ('he neither gave evidence nor swore off'), [Dem.] 58.7, 59.28 *μαρτυρεῖν ἢ ἐξόμνυσθαι* ('to give evidence or swear off'),

[1] For recent discussions of the issue, see A. R. W. Harrison, *The law of Athens* vol. ii (Oxford, 1971), p. 144; D. M. MacDowell, *The law in classical Athens* (London, 1978), p. 243; S. C. Todd, 'The purpose of evidence in Athenian courts', in *Nomos: studies in Athenian law, politics and society* (Cambridge, 1990), p. 24.

[2] This item follows a reference to the process of *exomosia* used by individuals selected to serve as ambassador who wished to decline on the grounds that they were unable to serve. Harpokration s.v. *ἐξωμοσία* deals only with the use of the *exomosia* by ambassadors and ignores the witness's oath of disclaimer, as does his discussion of *kleteusis* (s.v. *κλητεῦσαι*).

[3] For *kleteusis* see most recently Todd (cit. n. 1 above) 24f., with my demurrer, *Apollodoros: Against Neaira [Demosthenes]59* (Warminster, 1992), p. 25 n. 38.

[4] For the reliability of the lexicographers see the general comments of D. Whitehead, *The demes of Attica* (Princeton, 1986), pp. 53–5.

Isai. 9.18 *κάλει Ἱεροκλέα, ἵνα ἐναντίον τούτων μαρτυρήσηι ἢ ἐξομόσηται* ('call Hierokles, so that before these people he may give evidence or swear off'), and more elaborately Lykourgos 20 *ἀξιοῦτε οὖν τοὺς μάρτυρας ἀναβαίνειν καὶ μὴ ὀκνεῖν,... ἀλλ' ἀποδίδοναι τῆι πατρίδι τἀληθῆ καὶ δίκαια, καὶ μὴ λείπειν τὴν τάξιν ταύτην, μηδὲ μιμεῖσθαι Λεωκράτην, ἢ λαβόντας τὰ ἱερὰ κατὰ τὸν νόμον ἐξομόσασθαι* ('demand that the witnesses mount the stand and do not hesitate... but give to their country what truth and justice demand, and that they do not quit this post and do not imitate Leokrates here, or that they take hold of the sacrificial victims and swear off'), and Aischines 1.46–7 *ἐὰν δὲ προαίρηται ἐκκλητευθῆναι μᾶλλον ἢ τἀληθῆ μαρτυρεῖν, ὑμεῖς τὸ ὅλον πρᾶγμα συνήσετε. εἰ γὰρ ὁ μὲν πράξας αἰσχυνεῖται καὶ προαιρήσεται χιλίας μᾶλλον δραχμὰς ἀποτίσαι τῶι δημοσίωι, ὥστε μὴ δεῖξαι τὸ πρόσωπον τὸ ἑαυτοῦ ὑμῖν, ὁ δὲ πεπονθὼς δημηγορήσει, σοφὸς ὁ νομοθέτης ὁ τοὺς οὕτω βδελυροὺς ἐξείργων ἀπὸ τοῦ βήματος. ἐὰν δ' ἄρα ὑπακούσηι μέν, τράπηται δὲ ἐπὶ τὸ ἀναιδέστατον, ἐπὶ τὸ ἐξόμνυσθαι τὰς ἀληθείας, ὡς Τιμάρχωι μὲν χάριτας ἀποδιδούς, ἑτέροις δ' ἐπίδειξιν ποιούμενος ὡς εὖ ἐπίσταται τὰ τοιαῦτα συγκρύπτειν, πρῶτον μὲν εἰς ἑαυτὸν ἐξαμαρτήσεται, ἔπειτα οὐδὲν αὐτῶι ἔσται πλέον* ('If he prefers to be subjected to *kleteusis* rather than attest the truth, you will know the whole story. If the active partner is to feel ashamed and prefer to pay a fine of one thousand drachmas to the exchequer to avoid showing his face before you, while the passive partner is to address the assembly, it was wise of the lawgiver to exclude such villains from the platform. If, however, he obeys but chooses the more brazen course, to swear off the truth, thereby showing his gratitude to Timarchos and giving notice to others that he knows how to keep such activity secret, first of all he will be doing himself a disservice, secondly he will get no profit.'). That the same procedure obtained for proceedings at public arbitration is shown by Dem. 29.20 *τοῦ δὲ διαιτήτου κελεύοντος μαρτυρεῖν ἢ ἐξομνύειν ἐμαρτύρησεν πάνυ μόγις* ('when the arbitrator instructed him either to give evidence or swear off he gave evidence with extreme reluctance'). It is perhaps to arbitration, not to lawcourt, procedures, that *Ath. Pol.* 55.5 refers: *...τὸν λίθον ἐφ' οὗ τὰ τόμι' ἐστίν, ἐφ' οὗ καὶ οἱ διαιτηταὶ ὀμόσαντες ἀποφαίνονται τὰς διαίτας καὶ οἱ μάρτυρες ἐξόμνυνται τὰς μαρτυρίας* ('the stone containing the sacrificial portions, on which the arbitrators swear before declaring their verdict and the witnesses swear off the depositions'). [Dem.] 49.20, 59.29 and Lykourgos 20 indicate that this choice was governed by a procedural law (*κατὰ τὸν νόμον*), and most of the texts agree (with the use of the verb *ἀναγκάζειν*, 'compel', 'apply pressure'; cf. Dem. 19.176, [Dem.] 58.7, 59.28) that the witness was compelled to choose between the options of deposing and taking the *exomosia* if he wished to avoid the process of *kleteusis* and resultant penalty. Lykourgos adds that the oath was sworn over sacrificial victims.

The picture is (with the significant exception of the obscure process of *kleteusis*) reasonably clear in its broad outlines, and is of a piece with what we learn elsewhere was the procedure for attestation by witnesses for most of the fourth century. Although in the fifth century witnesses deposed in person, during the fourth century the litigant drafted a deposition.[5] The role of the witness was now to attest the truth of the deposition, i.e. formally and publicly to accept responsibility for the testimony by making himself liable to an action for false testimony. The evidence of the orators makes clear that the witness was not free to query details in the testimony for which he accepted responsibility.

However, the litigant was not at liberty to impose any deposition at will on the witness. The evidence of the lexicographers and of surviving oratory indicates that the

[5] See R. J. Bonner, *Evidence in Athenian courts* (Chicago, 1905), 46f.

exomosia allowed the witness some freedom. How much is uncertain. From the lexicographers we gather that anyone declining to testify could assert under oath one of two things, that he was not present (Pol. 8.27 *μὴ παρείη*) or that he was ignorant (8.27 *οὐκ εἰδείη*, 8.55 *μὴ ἐπίστασθαι*, Souda *μηδὲν ἐπίστασθαι*).[6] The option of assertion of ignorance is indirectly attested by Isaios (9.19): *ἀκριβῶς μὲν ἤδειν· τοῦ γὰρ αὐτοῦ ἀνδρός ἐστιν, ἃ μὲν οἶδεν ἐξόμνυσθαι, τῶν δὲ μὴ γενομένων ἐθέλειν ἐπιθεῖναι ἢ μὴν εἰδέναι γενόμενα* ('I just knew it. It's part of the same character to swear off facts that he knows, but in the case of fictitious events to add an oath that he knows they occurred'). It is important to note the conjunction used by Polydeukes at 8.27: the witness asserts that he was not present *or* is ignorant; not *and*. That is, within the oath itself there is a choice. This is suggested also by Dem. 45.60, where a number of people who were present at an arbitration hearing are called upon in court to confirm the speaker's allegation of irregularity committed by Stephanos. The deposition offered to them (if genuine) reads:

μαρτυροῦσι φίλοι εἶναι καὶ ἐπιτήδειοι Φορμίωνι, καὶ παρεῖναι πρὸς τῶι διαιτητῆι Τεισίαι ὅτε ἦν ἀπόφασις τῆς διαίτης Ἀπολλοδώρωι πρὸς Φορμίωνα, καὶ εἰδέναι τὴν ματρυρίαν ὑφηιρημένον Στέφανον, ἣν αἰτιᾶται αὐτὸν Ἀπολλόδωρος ὑφελέσθαι.
('They attest that they are friends and associates of Phormion and supported him at the meeting with the arbitrator Teisias when the announcement of the decision in the action of Apollodoros against Phormion book place, and that they know that Stephanos has removed secretly the deposition which Apollodoros accuses him of removing.')

Whether or not the text is reliable on this point, it is clear that the individuals called to depose were present at the arbitration hearing. We must of course always reckon with the possibility that in any given case an individual who confirms a testimony or alternatively opts for the *exomosia* is lying. Nonetheless, anyone dishonestly taking the *exomosia* will presumably wherever possible seek what in American politics has been termed 'plausible deniability', and the individuals in question could not plausibly deny that they were present. Their oath will probably therefore have been limited to the denial of knowledge. This is also suggested by the speaker's reaction. He does not call attention to (what would be) an obvious falsehood, but merely accuses them of lying on oath.

Common sense suggests that the limited choice offered to the witness could be unduly restrictive, particularly if the deposition contained deliberate omissions. This was perhaps not a problem for the majority of witnesses, who were usually friends or acquaintances of the parties involved. But the neutral witness might well find a procedure which prevented him from qualifying statements drafted for him by the litigant frustrating.[7] This is suggested by [Dem.] 58.7ff., where the *epimeletai tou emporiou* elect to give evidence rather than take the oath of disclaimer; but evidently they acquiesce with some reluctance. As I have argued elsewhere, it is likely that the deposition is true but incomplete.[8] They cannot without lying claim ignorance, since the facts are as stated and they know this to be the case. They are therefore compelled either to lie on oath or to attest to an inadequate 'truth'. They choose the latter.

[6] The Souda (quoted above p. 1) does not note the choice, but mentions only the claim of ignorance. I find no evidence to support the suggestion of MacDowell, *The law in classical Athens* 243, that a witness could assert that the facts were not as stated. Todd (cit. n. 1 above) 24 n. 8 is likewise sceptical.

[7] I assume that the role of the witness in court was primarily to confirm questions of fact, against Todd (cit. n. 1 pp. 30f.), who sees this role as secondary to that of providing support for a litigant; I address this question in greater detail in 'Legal space in classical Athens', *Greece and Rome* 41 (1994), 12f.

[8] In 'Artless proofs in Aristotle and the orators', *BICS* n.s. 39 (1994), 98f.

But how restrictive was the oath where the deposition sinned by commission rather than omission, that is, where it deviated either in whole or in part from what the witness on the basis of personal knowledge could reasonably attest as the truth? Here we are hampered by the fact that the words of the oath are not cited anywhere in the orators. We can however draw some tentative conclusions from the *exomosiai* which survive. Firstly, we can deduce that although it asserted only ignorance the oath in practice allowed a witness to withhold support from a deposition which he knew (or claimed he knew) to contain misstatements. Hegesandros in Aischin.1 takes the oath to reject an allegation concerning his relationship with Timarchos. Clearly he knows the nature of his relationship with Timarchos, and nobody on the jury panel will have supposed otherwise. The cases in Isai. 9 and Dem. 45 point in the same direction. As supporters of the opposition, they presumably do not accept the truth of the depositions they are asked to attest. Whatever the original scope and precise wording of the oath of disclaimer, in practice during the classical period it could be used not only to indicate that a witness did not know whether a given statement was true or false but also that he did not know it to be true. Secondly, it is likely that the version of Polydeukes, according to which the witness asserts that he is ignorant of the specific facts he is called upon to confirm (*οὐκ εἰδείη, μὴ ἐπίστασθαι*) is closer to the truth than that of the Souda,[9] which suggests that the witness swears that he is completely ignorant on the issue in question (*μηδὲν εἰδέναι*). In many, perhaps most, cases the distinction I have drawn would be meaningless. Where the deposition made a single allegation which was (or was claimed to be) untrue there would be no practical difference between asserting complete ignorance of the matter in question (*μηδὲν εἰδέναι περὶ ὧν λέγει ὁ δεῖνα/περὶ τοῦ πράγματος*, 'that he knows nothing concerning the statements made by X/ of the matter'), i.e. that the witness knew of no such incident or set of circumstances, and that one did not know the specific detail (*μὴ εἰδέναι τὸν δεῖνα τὸ δεῖνα ποιήσαντα*, 'that he does not know that X did Y'). The instances in Aischin. 1 and Isai. 9 appear to fall into this category. In each an allegation concerns an isolated event or set of circumstances (an alleged assault, Aischines' version of the nature of Hegesandros' relationship with Timarchos) which could be denied with either format. The instance of *exomosia* in Dem. 45 is less flexible. In this case a number of statements are made, some of which are self-evidently true, and self-evidently within the knowledge of those who are called to affirm them. Only one detail, the trick with the deposition, could be denied using an oath of complete ignorance. The mixture of deniable and undeniable assertions in this deposition, and the fact that the oath was still taken, suggests that the oath will have covered specific aspects of the deposition. We may therefore guess that the oath ran something like: X *⟨ἐξ⟩όμνυται* (or *⟨ἐξ⟩όμνυμαι*) *ἢ μὴν μὴ εἰδέναι τὸν δεῖνα τὸ δεῖνα ποιήσαντα* ('X swears/I swear that he does/I do not know that Y did Z'). If this is the case, and it is by no means certain, then we can see one reason why a litigant might draft a deposition even for a witness who was likely to take the *exomosia*, since he could ensure that the allegation was at least repeated by the witness, who was constrained by the format of the oath to deny only the knowledge, not the fact. This fell far short

[9] The formulation of R. J. Bonner and G. Smith, *The administration of justice from Homer to Aristotle* vol. ii (Chicago, 1938), 163f. ('A witness had to give the evidence for which he was summoned or else swear an *exomosia*, an oath of denial to the effect that he knew nothing about the case and could give no evidence') appears to go beyond the Souda, since it suggests that only complete ignorance of the dispute could exempt a witness from giving evidence. If this is what is meant it is certainly erroneous, since we know (n. 11 below) that anyone taking the oath could still appear as witness for the opposing side. Whatever the precise formulation, the *exomosia* dealt with specific issues relating to the case, not the case as a whole.

of the support he would desire from a witness. But if the direct evidence in support of his case was limited, or if his opponent was able to provide a greater body of witness testimony, he might welcome even this.[10] However, since taking the oath of disclaimer did not debar a potential witness from appearing for the opposing side,[11] it would be possible for the opponent to counteract this effect by drafting a deposition which allowed the witness to deny the allegation explicitly, where this was important for the jurors' decision.

There was one important respect in which the *exomosia* did not constrain the witness. Although speakers in court regularly emphasize the necessity to depose or take the oath, and although it is clear that failure to opt for either course could expose a man to a penalty through the procedure of *kleteusis*, there is nowhere any suggestion that any penalty attached to taking the oath of disclaimer falsely.[12] This silence is significant, given the frequency with which the oath is mentioned, the more so since failure to take the oath is occasionally envisaged, and since on those occasions on which the witness disclaims a deposition on oath the litigant makes clear that the oath is false. Two cases are particularly revealing. At Aischin. 1.46–7 (quoted above) the worst fate envisaged for Misgolas if he opts to take the oath is that he will derive no benefit from his falsehood. At Dem. 45.59 the speaker says of the recalcitrant witnesses: *ἐὰν δ' ἄρα τοῦτο ποιήσωσιν* [sc. *ἐξομνύωσιν*] *ὑπ' ἀναιδείας, πρόκλησιν ὑμῖν ἀναγνώσεται ἐξ ἧς τούτους τ' ἐπιορκοῦντας ἐπ' αὐτοφώρωι λήψεσθε καὶ τοῦτον ὁμοίως ὑφηιρημένον τὴν μαρτυρίαν εἴεσθε* ('If they have the effrontery to do this [i.e. take the oath], he will read out a challenge to you which will enable you to catch these men red-handed wearing falsely and you will know likewise that my opponent filched the deposition'). That is, they will be exposed as oathbreakers, but there is no suggestion that they will be liable to any legal penalty. Juridically the oath was of negative force only; it did not under the Athenian system amount to false testimony and expose a witness to the *dike pseudomartyrion*. *Ath. Pol.* 68.4 tells us that it was open to each litigant, before the votes were cast, to object formally to the testimonies of witnesses (*martyriai*) with the intention of bringing an action. But evidently an *exomosia* was not classified as a *martyria*. It would appear that it was left to the gods to punish those who took the *exomosia* dishonestly.

It is interesting finally to note the rarity of *exomosia* in our texts. Even if we allow for the distortions introduced by the process of survival, which has left us not just with a collection of published speeches only, speeches by professionals (politicians and/or logographers who will have played the tactical games available within the system with greater skill than the untutored litigant unable to afford professional assistance), and even then only a portion (since we must allow for the loss of a large

[10] He might also hope that the jurors would over the course of the trial forget the precise details of individual testimony and remember only the fact that a given witness had appeared in response to a deposition drafted for him.

[11] The individuals offered the oath in [Dem.] 45 supported Phormion at arbitration, and therefore in all probability also acted as his witnesses in the hearing in the *dikasterion*. Hegesandros in Aischin. 1 almost certainly appeared for Aischines' opponent, as 1.69 indicates: *οὐκ ἠγνόουν ὅτι ὑπερόψεται τὸν ὅρκον, ὦ Ἀθηναῖοι, ἀλλὰ καὶ προεῖπον ὑμῖν. κἀκεῖνο δέ μοι πρόδηλόν ἐστιν, ὅτι, ἐπειδὴ νῦν οὐκ ἐθέλει μαρτυρεῖν, αὐτίκα πάρεισιν ἐν τῆι ἀπολογίαι.* ('I was now unaware, men of Athens, that he would despise the oath; in fact I told you so. And this too is clear to me, that since now he refuses to testify he will immediately come forward as part of the defence.') The individual who takes the oath in Isai. 9 is a vital witness for the opposition (9.5–6, 22, 25, 31). This suggests a further reason why a litigant might wish to put a deposition to a potential witness who he knew would take the oath, particularly when speaking first: this would provide an opportunity for him to undermine the credibility of a witness for the opposition.

[12] Cf. Bonner-Smith (cit. n. 9 above) 137.

number of speeches by minor logographers which did not reach the library at Alexandria as well as the host of lost speeches by major writers for which we have evidence), it is difficult to believe that if *exomosia* was a frequent occurrence it would not be better represented within the surviving corpus of forensic oratory. That we do not have more instances of the *exomosia* may be evidence for the seriousness with which oaths continued to be viewed; but it may merely reflect the well-established preference of Athenian litigants for friendly witnesses, for whom no oath would normally be necessary.

This survey confirms the accepted picture of the witness as tightly constrained by the procedural rules. The odds are loaded in favour of the litigant. Provided that the latter can keep to the facts, even with significant omissions, the witness has difficulty in resisting the deposition, unless of course he is prepared to lie brazenly on oath. However, the litigant is not free to invent. If he drafts a deposition which contains factual misstatements, the witness is able to withhold his support. The form of the oath limits him to a denial of knowledge; in practice however, the oath is used to refuse to validate a statement which the witness regards (or believes he can plausibly represent) as untrue.[13]

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