

THE DATE OF [DEMOSTHENES] 49: A RE-EXAMINATION

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WITH OCCASIONAL EXCEPTIONS, scholars who have concerned themselves with the date of the pseudo-Demosthenic speech *Against Timotheos* ([Dem.] 49) have accepted the view of Arnold Schäfer that it was delivered during the summer of 362.¹ Recently, however, E. M. Harris has sought to show that the speech was delivered considerably earlier, at some point at the beginning of the 360s.² Potentially significant as this radical redating is for our understanding of the career of Timotheos, the real novelty of Harris's article lies in his argument that, contrary to the general assumption of scholars, a minor could act as a witness in an Athenian court. If his arguments are valid, then they must necessarily have a considerable impact on our understanding of the nature and operation of the Athenians' system of justice. In this article, I hope to demonstrate that, although Schäfer's original dating is not wholly secure, the balance of probabilities tells against Harris's hypothesis, and that 362 remains the most likely date for the delivery of the speech.

The speech was written for (and possibly by) Apollodoros the son of Pasion of Acharnae, who was seeking to recover from Timotheos a series of loans which his father, who had been a prominent banker, had made to Timotheos in the late 370s.³ The argument for dating it to 362 runs as follows. Apollodoros' younger brother Pasikles, who gave evidence at the trial (42), came of age at some time between 364 and 362.⁴ On the

¹A. Schäfer, *Demosthenes und seine Zeit* (Berlin 1856–1858) Beilagen 140–143. The only exceptions are K. Klee, "Timotheos (3)" *RE* 6A.2 (1937) 1324–29, at 1327, who assigned the speech to 368/7; and A. Floros, "Δημοσθένους πρὸς Τιμόθεον ὑπὲρ χρέως γνησιότης καὶ χρόνος συγγραφῆς," *Platon* 12 (1960) 230–238, who argued that the speech was delivered in 358. He sought to tie it in with Chares' prosecution of Timotheos in that year, but failed to rebut (or even address) Schäfer's argument for a *terminus ante quem* of 362.

²E. M. Harris, "The Date of Apollodoros' Speech Against Timotheos and Its Implications for Athenian History and Legal Procedure," *AJP* 109 (1988) 44–52 (referred to hereafter by author's name alone). Since Apollodoros delivered the speech, the prosecution must in any case have been brought after the death of his father Pasion in 370/69 ([Dem.] 46.13). Harris rules out any year from 366/5 onward, on the ground that Timotheos' campaigning in the Aegean started then and continued (on his reconstruction) for the rest of the decade. He also discounts 368/7, when Apollodoros was trierarch, leaving late 370/69, 369/8, and 367/6 as possible years.

³For full discussions of the speech see Schäfer (above, n. 1) 137–143 and F. Blass, *Die attische Beredsamkeit* 3.1 (Leipzig 1893) 522–526.

⁴Apollodoros' father Pasion leased the bank to his freedman Phormion for the duration of Pasikles' minority (Dem. 36.10). The lease began at some time between

assumption that witnesses had to be of age in order to give evidence in court, the trial can therefore have been held no earlier than 364.⁵ Moreover, we know that Timotheos was abroad on campaign from 365 onwards, and can hardly have returned before 362.⁶ The speech must therefore have been delivered no earlier than 362. Now, Apollodoros was absent on trierarchic service from autumn 362 until early 360.⁷ No sooner had he returned than his mother died ([Dem.] 50.60), whereupon he and his step-father, Phormion, fell out with each other over his inheritance (Dem. 36.14). Since Phormion gave evidence for Apollodoros in his prosecution of Timotheos (18), the speech was almost certainly delivered before their quarrel, and therefore before the start of Apollodoros' trierarchic service in 362. Taking these two arguments together, Schäfer concluded that the speech must have been delivered in summer 362, and that Timotheos must have returned from his command earlier in the same year.

It is clear that any attempt to redate the speech to earlier in the decade needs to demonstrate that Athenian boys were allowed to give evidence in court before they came of age. We know that neither women nor minors could conduct any legal action in their own right, but had to be represented by their *κύριος*. Nevertheless, there must have been circumstances in which they were in the possession of knowledge that would have a material bearing on a case, and there is a difference between conducting a case and giving evidence in court. We therefore cannot automatically exclude the possibility that minors were allowed to testify. No ancient author has anything to say on the question, nor is there any clear instance of their having done so.⁸ There is, however, one passage ([Dem.] 47.69–70) which Harris (46, note 8) takes to imply that women and children could testify under oath. The context of this passage is as follows. Three enemies, Theophemos, Euergos, and Mnesiboulos, had broken into the speaker's house in his absence,

372/1, which is the last occasion on which Pasion is described as running the bank ([Dem.] 49.17), and 370/69 when he died ([Dem.] 46.13). Since the lease lasted for eight years (Dem. 36.37), it must have ended, and Pasikles must have come of age, at some time between 364 and 362.

⁵ Depending on when the lease expired, the actual *terminus post quem* may have been as late as 362.

⁶ Timotheos' successes are described at Isoc. 15.112–113 and Din. 1.14; he captured over twenty cities, including Methone, Pydna, and Potidea. He also succeeded in lifting the siege of Cyzicus (Diod. 15.81.6). Harris (47) considers that these successes make it unlikely that he was recalled to Athens, and finds it "difficult to believe that Timotheos could have achieved all that he did in the area in only two years."

⁷ See [Dem.] 50 *passim*. His trierarchic service started on 24 Metageitnion 362/1 (4) and lasted for seventeen months (10).

⁸ We should not attach any weight to the fact that Plato (*Laws* 937a–b) recommends that in the ideal state children and slaves should only be allowed to give evidence in cases of murder. There is no reason to think that his prescription reflects Athenian practice.

and had so ill-treated a freedwoman who lived there that she subsequently died. There were no witnesses to their action except for the speaker's wife and children. He consulted the *Exegetai* as to what course of action he should take, and was advised by them not to denounce the men by name as murderers ἐπειδὴ αὐτοὺς μὲν οὐ παρεγένον, ἡ δὲ γυνὴ καὶ τὰ παῖδιά, ἄλλοι δέ σοι μάρτυρες οὐκ εἰσὶν (69). It seems clear to me that this passage is far from proving that women and children could testify in court. D. M. MacDowell put his finger on the crucial point:

The word μάρτυς, like the English "witness," can be used in two different ways. It may mean a person who sees something happen. Or it may mean a person who appears in court to give evidence about something. Often of course the two senses overlap, because the same person sees an event and afterwards gives evidence about it in court. But often they are quite distinct.⁹

So in this passage it is impossible to determine whether the problem facing the speaker was that his wife and children were entitled to testify, but that their uncorroborated testimony would be unlikely to carry much weight, or that they, who happened to be the only witnesses to what had happened, were barred from giving evidence in court. Precisely the same argument prevents us from drawing any conclusions from Antiphon's statement that τὰ πραχθέντα φανερώς ἅπαντα πραχθῆναι καὶ ἐναντίον μαρτύρων πολλῶν, καὶ ἀνδρῶν καὶ παιδῶν, καὶ ἐλευθέρων καὶ δούλων (6.19).

The speaker of [Dem.] 47 continues by saying that the *Exegetai* advised him not to institute legal proceedings before the Basileus Archon against the woman's attackers, since he was neither related to her nor her master; if he did prosecute them, they anticipated the following undesirable consequences: ὥστ' εἰ διομεῖ ἐπὶ Παλλαδίῳ αὐτὸς καὶ ἡ γυνὴ καὶ τὰ παῖδιά καὶ καταράσασθε αὐτοῖς καὶ τῇ οἰκίᾳ, χείρων τε δόξεις πολλοῖς εἶναι, κἂν μὲν ἀποφύγῃ σ', ἐπιωρκῆναι, ἐὰν δὲ ἔλῃς, φθονήσῃ (70). This passage makes it clear that there were circumstances in which women and children were allowed to swear an oath. Not indeed that this is a matter of doubt, since at [Dem.] 40.10-11 we hear of Plangon swearing an oath before the arbitrator at the Delphinion, whilst at Isaeus 12.9 the mother of Euphiletos is recorded as having expressed her willingness to swear before the arbitrator, again at the Delphinion, that Euphiletos was her son. Finally, the speaker of Dem. 55.27 tells of having tendered an oath to the mother of his opponents, although the circumstances of this challenge are not recorded. Yet the fact that women were allowed to swear oaths before an arbitrator at a religious shrine does not prove that either they or minors were allowed to give evidence, which was normally unsworn, in the course of a trial. I am in full agreement with R. Just who, in his recent discussion of women and the

⁹D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) 105.

law in Athenian society, has drawn a sharp distinction between sworn and unsworn (secular) evidence, and who has concluded that it would "be most misleading to say that women had the right to have their views presented in court or that in this context their legal incapacity was any the less."¹⁰

Nor can I accept the argument of R. J. Bonner, that this passage provides evidence that women and children could in fact appear as normal witnesses.¹¹ He argued that the case would only have had any chance of succeeding if it had been supported by the testimony of witnesses; since the only potential witnesses were the speaker's wife and children, and since the *Exegetai* apparently believed that the case had some chance of succeeding (ἐὰν δὲ ἔλῃς), he concluded that they must have been allowed to give evidence in court. This argument is tendentious in the extreme, since there is no reason why the case could not have been conducted on the basis of circumstantial arguments alone.

Finally, there are two passages, to which Harris does not refer, which seem to indicate that women could not (or at least generally did not) testify. At Dem. 57.67 the speaker lists the people who gave evidence in support of his father: four (male) cousins, the son of a cousin, the husbands of the female cousins, as well as a number of others. The fact that his female cousins did not give evidence themselves suggests that at the very least there was strong social pressure against women testifying in court. Similarly at Isaeus 12.5 the speaker refers to the husbands of his sisters giving evidence of consanguinity, rather than the sisters themselves. These passages are not decisive, but they suggest that women (and by analogy children) did not testify in court even when they were in possession of pertinent knowledge.

Harris (46) also appeals to the fact that the testimony of slaves and foreigners was accepted in Athenian courts: the fact that the giving of evidence was not restricted to adult male citizens leads him to think that the same possibility existed for women and children as for slaves and foreigners. To this it can be objected that the evidence of slaves was only admitted when it had been extracted under torture. Evidently the Athenians believed that this was the only way in which they could be trusted to testify reliably. Yet there could be no comparable pressure put on citizen women, who were generally perceived by their menfolk as empty-headed and unreliable, or on children who had not yet reached the age of discretion. As A. R. W. Harrison put it, the Athenians probably had "an irrational feeling that this class of persons (slaves, women, minors, or those deprived of citizenship) could not be trusted to speak the truth."¹² That being so, what guarantee

¹⁰R. Just, *Women in Athenian Law and Life* (London 1989) 39.

¹¹R. J. Bonner, "Did Women Testify in Homicide Cases at Athens?," *CP* 1 (1906) 127-132, at 129.

¹²A. R. W. Harrison, *The Law of Athens* (Oxford 1968-1971) 2.137. For evidence that Athenian men believed that women were generally less reliable and less intelligent than

could there be that they would speak the truth if allowed to give evidence? Not that citizen witnesses could not lie in court, but they at least could then be indicted for bearing false witness. But this was a sanction that could hardly be applied to women or children, who were not viewed as legally responsible or competent.¹³

Harris (45–46) also argues that since women and children were often introduced into court in order to win the jurors' sympathy by theatrical expressions of grief, there was no objection to their appearing in a courtroom. This is true enough, but is quite beside the point, since there is a world of difference between letting children into court and admitting their testimony as evidence. Indeed, it is clear that women and children were not expected (or allowed) to say anything, merely to put on such a display of distress as would move the jurors to pity the defendant and treat him with leniency.¹⁴ Harris ends by asking "If their [women's] evidence was deemed acceptable, what reasons would the Athenians have had to reject the testimony of a minor, both of whose parents were Athenian citizens?" (46). This is an argument which seeks to import into Athenian society a wholly anachronistic sense of what is reasonable or equitable. It hardly needs saying that it was only adult male citizens who had the capacity fully to engage in civic life, and that in almost all legal transactions both women and children had to be represented by their *kúrios*. Against this background, I see nothing at all implausible in the idea that women and children were barred from giving evidence in court. On the contrary, I would be most surprised if evidence came to light that they were allowed to do so.

Having argued that children could testify in court, Harris then advances a series of general arguments against dating the speech to 362. First, he finds it unlikely that Timotheos either voluntarily returned or was recalled to Athens in or before 362, since his campaigning in the north Aegean had been a notable success (see above, note 6). He finds support for this view in the fact that Timotheos was reappointed general in 360/59: "It is much

themselves see K. J. Dover, *Greek Popular Morality in the Time of Plato and Aristotle* (Oxford 1974) 99–100. As for the young, Dover writes that "The Athenians viewed progress from infancy to late middle age as a continuous development of rationality" (102). Aeschines 1.18 seems to imply that boys were not considered responsible moral agents until they came of age.

¹³Thus Harrison (above, n. 12) 1.73: "Until a son came of age his father represented him in every kind of legal transaction, whether procedurally before a court or in matters of contract, since a minor was incapacitated from entering into any contract." On the inability of women and children to enter into contracts beyond the value of a *medimnos* of barley see Isaeus 10.10.

¹⁴For women and children being introduced in court by the defendant see Ar. *Wasps* 568–571, 976–978; Plato *Ap.* 34c–35b; Dem. 21.99; 43.81–84; 53.29. Although they no doubt made a vociferous display of their grief, there is no evidence that they were allowed to speak in court. What is stressed is the piteous spectacle which they provided.

more likely that Timotheus' campaign against Amphipolis lasted uninterruptedly from 364/3 down to 360/59, during which time he could not have been prosecuted by Apollodoros" (48).¹⁵ But is it true that his campaign was such a triumph? Against the successes noted above should be set the fact that two of his fellow generals of 363/2, Ergophilos and Kallisthenes, were impeached for their conduct of the war.¹⁶ There is no evidence that Timotheos was also put on trial, but it seems clear that operations in the north were not regarded as a complete success, and R. Sealey has plausibly suggested that Timotheos' two colleagues served him as scapegoats.¹⁷ We cannot be sure, but it was presumably their collective inability to capture Amphipolis that angered the Athenian people.¹⁸ If Sealey is right in suggesting that Timotheos successfully transferred the blame to his colleagues, it becomes easier to see how he might have been recalled in 362 and then restored to favour in 360. Notice must also be taken of *IG II*² 110, which represents Timotheos as recommending Menelaos the Pelagonian to the Athenians in early 362, and which Harris takes to prove that he still enjoyed popular favour then. However, it is unclear to me whether any inference can be drawn from this document as to the whereabouts of Timotheos at the time,¹⁹ nor of course does it prove that he was still in favour a few months later. Nor indeed need the fact that he stood in popular esteem have made it any the more difficult for Apollodoros to have prosecuted him over an unrelated private dispute.

Second, Harris asks (49) why Apollodoros should have prosecuted Timotheos when the bank belonged by 362 to his brother Pasikles.²⁰ He rejects as a lie Apollodoros' claim at 43 that the debts of Timotheos were part of his share of the estate (γίνεται ἐμὸν τὸ μέρος), on the ground that Pasion made his loans through the bank, and that Pasikles had inherited the bank. Yet the fact that Pasikles inherited the bank does not mean that he also inherited all of the debts owing to his father Pasion, who frequently seems to have lent his own money through the bank (as emerges from Dem. 36.5). All that Pasikles inherited was the bank itself, together with the use of

¹⁵For Timotheos as general in 360/59 see R. Develin, *Athenian Officials 684–321 B.C.* (Cambridge 1989) 270.

¹⁶For testimonia and discussion see M. H. Hansen, *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Impeachment of Generals and Politicians* (Odense 1975) 85 and 86 (pp. 93–94).

¹⁷R. Sealey, "Callistratos of Aphidna and His Contemporaries," *Historia* 5 (1956) 178–203, at 199.

¹⁸Sealey ([above, n. 17] 199) argues that these two men were in charge of operations against Amphipolis.

¹⁹Harris (48) assumes that he was still on campaign, but Develin ([above, n. 15] 263) takes his support of Menelaos as an indication that he had returned to Athens by then.

²⁰Pasikles received the bank as his share of the patrimony when he came of age (Dem. 36.11).

the deposits. Any loans made by Pasion which were still outstanding at his death were inherited jointly by his two sons, and there is no reason to doubt that they were divided between the two of them, as Apollodoros claims.

Third, Harris objects that if the speech dates to 362, there would be an unaccountably long interval between Pasion's death in 370/69 and Apollodoros' attempt to recover the money (51). However, both Apollodoros and Timotheos spent much of the decade absent from Athens, and we cannot be sure that Apollodoros was ever in a position to prosecute Timotheos during the early 360s.²¹ Moreover, we cannot assume that the brothers would have wanted to recover the money from Timotheos the moment that their father died: litigation may have been their final recourse, although it must be admitted that Apollodoros makes no mention in the speech of any earlier attempts on his part to get the money back.

Finally, we know that δίκαι were suspended in the early 360s on account of the war.²² We have no evidence as to how long this suspension lasted, but it may well explain why Timotheos was not prosecuted earlier in the decade.²³ I can therefore see no reason to believe that the trial did not take place according to the traditional dating, in 362.²⁴

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²¹We do not know when Timotheos' service with the king of Persia ended, but it was presumably soon after Pasion's death (thus Harris 50). Apollodoros was absent on trierarchic service, probably in 368/7 ([Dem.] 53.5). Either man may have been abroad on other occasions during the period.

²²For the suspension of δίκαι see Dem. 45.4: οὐ γὰρ ἦσαν ἐν τῷ τότε καιρῷ δίκαι, ἀλλ' ἀνεβάλλεσθ' ὑμεῖς διὰ τὸν πόλεμον.

²³It is not entirely clear whether this suspension was in order to enable litigants and jurors to serve in the army and navy, or whether the extra expense of paying for the war effort meant that there was insufficient money to pay jurors. In either case, we do not know when sittings were resumed.

²⁴I should like to thank Professor D. M. Lewis for commenting on an earlier draft of this paper. I should also like to thank the journal's two referees for their helpful comments.