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## How to Lease an Orphan's Estate in Classical Athens

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## HOW TO LEASE AN ORPHAN'S ESTATE IN CLASSICAL ATHENS\*

*A recently discovered new fragment of a court speech by one of the famous ten Attic orators, Hyperides, sheds new light on the Athenian law of guardianship in the fourth century BC. The article focuses on the legal measures to secure orphans' estates. First, the text of the entire fragment is given in English translation; the full Greek text is attached as an Appendix. The second section analyzes the actual guardianship case: it was a private action of a ward that had come of age, not a public one as recently suggested. He called his guardian to account. In section three new details about leasing an inherited business concern are established. It took place by auction; a law court gave the acceptance to the person who offered the highest valuation of the business concern. Also the guardian himself was allowed to bid. The lessee had to pay interest to sustain the ward and after the ward's coming of age had to return the capital assessed in court. In this case no account of the business had to be rendered. Section four deals with 'phasis', a denunciation that every citizen was entitled to file when a guardian was suspected of incorrectly administering the ward's business concern. A new conclusion is that the denunciator himself would submit a claim to lease the property and that the phasis would result in an auction.*

Key words: *Attic forensic oratory. Hyperides. – Ancient Athenian law of guardianship. – Responsibility of the guardian. – Private and public actions against the guardian.*

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In antiquity life expectancy was low. War and diseases on the one hand and childbed on the other took their toll. Thus orphans were frequent in everyday life. The Athenians met this problem with sophisticated rules on guardianship. One of the two recently discovered fragments of court speeches of Hyperides<sup>1</sup> deals with this subject. It sheds new light on some institutions of Athenian law. In this paper I will deal with the lease and the denunciation of a ward's property, *misthōsis* and *phasis oikou orphanikou*.<sup>2</sup> First, I will present the new text in English translation,<sup>3</sup> then the guardianship case and finally some new ideas on *misthōsis* and *phasis*.

## 1. THE TEXT IN TRANSLATION

[Hyperides, *Against Timandros for Guardianship, Supporting Speech for Akademos*]

[The guardians could have let the property in accordance with the laws, so that] for the children [the capital managed]<sup>4</sup> would not be less than the amount realized<sup>5</sup> in court. (2) But should they produce more for

<sup>1</sup> N. Tchernetska, "New Fragments of Hyperides from the Archimedes Palimpsest," *Zeitschrift für Papyrologie und Epigraphik (ZPE)* 154, 2005, 1–6 identified a few pages of the famous "Archimedes Palimpsest" as belonging among the court speeches of Hyperides. The full text of the 64 lines' fragment of *Against Timandros* was published by N. Tchernetska, E.W. Handley, C.F.L Austin, L. Horváth, "New Readings in the Fragment of Hyperides' *Against Timandros* from the Archimedes Palimpsest," *ZPE* 162, 2007, 1–4 with some improvements by L. Horváth, "Note to Hyperides in Timandrum," *Acta Antiqua Hungarica* 48, 2008, 121–23; in this paper I shall follow his text. – For the exiting story of the "Archimedes Codex", sold at Christies in 1998 and kept now in the Walters Art Museum, Baltimore MD, see R. Netz, W. Noel, *The Archimedes Codex*, London 2007 (German: *Der Kodex des Archimedes*, München 2007).

<sup>2</sup> For other topics see C. Jones, "Hyperides and the Sale of Slave-Families," *ZPE* 164, 2008, 19f.; D. Whitehead, "Hyperides' *Timandros*: Observations and Suggestions," *Bulletin of the Institute of Classical Studies*, London (*BICS*) 52, 2009, 135–48 and L. Rubinstein, "Legal Arguments in Hyperides *Against Timandros*," *BICS* 52, 2009, 149–59; see also W. Luppe, "Zwei Textvorschläge zu Hyperides' Rede *pros Timandron*," *ZPE* 167, 2008, 5. The volumes *Acta Antiqua Hungarica* 48, 2008, and *BICS* 52, 2009, 133–252 (*The New Hyperides*. Conference Proceedings, Jan. 2009) are dedicated to this new source.

<sup>3</sup> Text version Horváth (n. 1, above), see Appendix; principally I follow the translation of Tchernetska *et al.* (n. 1, above).

<sup>4</sup> "... so that (the profit) for the children is not less than the price it fetches in court" Tchernetska *et al.* (n. 1; above). Exempli gratia I suggest the restoration: [ἐξῆν δὲ τοῖς ἐπιτρόποις ~~πρὸς~~ τὸν οἶκον κατὰ τοὺς νόμους, ὥστε τὸ κεφάλαιον τὸ διαχειρισθὲν] τοῦ μὲν εὐρίσκοντος...; see Dem. 27.58; κεφάλαιον Dem. 27.11,66; διαχειρισθὲν *cf.* line 14 of the text.

<sup>5</sup> Similar *part. praes.* coincident to a past tense Aesch. 1.96: ...οὐδὲ τὸ λυσιτελοῦν, ἀλλὰ τοῦ ἤδη εὐρίσκοντος ἀπέδοτο. *Cf.* also Dem. 27.23. I thank Glen Bower-

μισθῶσι

the children, it might be a benefaction on their part.<sup>6</sup> (3) Yet the laws forbid the guardians to lease the property on their own authority.<sup>7</sup> (5) It is possible to argue in court that it is better not to lease the children's inherited estate, and those of you who are appointed by lot to the court are to hear the case and vote for what seems best for the child.<sup>8</sup> (9) Now read me the laws. LAWS. (10) Now, the defendant did none of these things, nor did he register the estate with the archon at all. (11) Now take up the testimony. (12) TESTIMONY. (13) Now you have heard from the laws that this man Timandros did not handle Akademos' property in any legal way whatever, and from the witnesses that he did not lease the estate and, when a third party brought a denunciation (*phasis*) so that the property would be leased out, he prevented it.

(17) But that he did so in order to make away with the money, by Zeus,<sup>9</sup> this I will demonstrate. (18) Indeed it was in order to get the money that he did the same man's sister a wrong worthy of capital punishment. (20) When there were left these two brothers and two sisters, the girls being orphans without mother or father, and all of them small children (the eldest brother Antiphilos, who died, was perhaps ten years old), this man Timandos brought up the youngest sister in his own home, dragging away and taking her to Lemnos when she was perhaps seven. (27) And this no guardian nor a man of good will would do, not even those who hold war captives in their possession: even they sell them as far as possible as a family. (31) Furthermore, those slave-retailers and –traffickers<sup>10</sup> who do anything outrageous for profit, (33) when they trade in children who are siblings or a mother with small children or put up a father with children for sale, they sell them with financial loss, for less, this being the right. (35) For affection between people comes about by close contact and by growing up together rather than by kinship. (38) As evidence of this: neither would all fathers be fond of their children if they were not brought up with them from infancy, if straightaway someone had kidnapped them as little children, nor would children be fond of their parents if they were not brought up by them.

(42) Timandros, then, is responsible for precisely this, that the sisters could not recognize each other on sight in a street or a temple, not having seen each other for more than thirteen years, while it was their brother, Akademos, who recognized his own sister, but when he went to Lemnos, he did not even know her when he saw her. (49) Yet the legislator took the view that orphaned children should not each be brought up separately, nor in any random way, but where it would be best for them to

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sock and Carl Huffman for discussing this passage with me in Princeton at the Institute for Advanced Study.

<sup>6</sup> Cf. Dem. 27.64; "let this be a credit to them" Tchernetska *et al.* (n. 1, above).

<sup>7</sup> "...on their own profit" Tchernetska *et al.* (n. 1, above).

<sup>8</sup> "...individual child" Tchernetska *et al.* (n. 1, above).

<sup>9</sup> Text Horváth (n. 1, above).

<sup>10</sup> Jones (n. 2, above), similarly Thür (both articles quoted in n. \*, above).

be brought up. (53) Now read me the law. LAW. (54) Now then, Timandros: if this one girl was well looked after in your charge, why were not these here well looked after in your charge and in the same place? (56) But if they were well looked after, why was she not, and in the same place as her brothers and her elder sister? (58) It was, I suppose, the sheer desire for money that caused you to commit all this illegality.

(60) That was why he took charge of young Akademos here while he was penniless, while now holding<sup>11</sup> resources from his estate worth more than five talents, as I shall demonstrate to you. (62) First of all, right in the first year when the father of the children died, he took the young girl and five...”

A—not exclusively—philological problem, in my view not yet solved, is the title of the speech. Tchernetska (2005) succeeded in identifying the fragment as a Hyperides speech from the word παιδάριον in that very lemma in the Suda; the title of the speech is given there as πρὸς Τίμανδρον. Stephen Todd supplied with a quotation by Harpocration (*s.v. Hephaistia: ὑπὲρ Ἀκαδήμου*). All editors have suggested a title [πρὸς Τίμανδρον], following the Suda. Since the case is a private suit against a guardian, a *dike epitropēs*—as I will demonstrate—the title must read [κατὰ Τιμάνδρου], not πρὸς.<sup>12</sup> According to Dem. 27 the title probably continued with ἐπιτροπῆς. Since the speaker is a *sunēgoros* for the young Akademos who had just come of age, the full title, according to Harpocration, may have continued further with ὑπὲρ Ἀκαδήμου συνηγορία. Combining the two lemmata of the lexica I have suggested the full title: [*Against Timandros for Guardianship, Supporting Speech for Akademos*]

## 2. THE GUARDIANSHIP CASE

My second point is the guardianship case. Unambiguously, the person charged is Timandros. He has been, or still is, guardian (*epitropos*) of initially four orphans, two boys and two girls. Who is the prosecutor or plaintiff? The speaker whose name we don't know may—as *boulomenos* (person willing and qualified to plead)—be prosecuting the actual guardian in a public lawsuit (*actio popularis*) for wrongs against the wards or their property. In *Ath. Pol.* 56.6 Aristotle mentions some *eisangeliai* and *graphai*, which would exactly meet our case.<sup>13</sup> Every Athenian in posses-

<sup>11</sup> The term οὐσίαν ἔχειν is the key indicator that the action was a δίκη ἐπιτροπῆς (see n. 15, below).

<sup>12</sup> Denying the private character of the case, Whitehead recently (n. 2, above) 137 also retains πρὸς; but see the next section 2.

<sup>13</sup> *AP* 56.6–7: “*Graphai* and *dikai* are instituted before him (the *arkhōn*)...for ill-usage of orphans (which lie against their guardians); for ill-usage of an heiress (which lie

sion of his full civic rights was entitled to file such an action on behalf of the wards. An argument in this direction could be that Timandros is threatened with death penalty (l. 19/20). But the whole section about the lonesome girl<sup>14</sup> on the faraway island (ll. 17–59, the larger part of the whole fragment) is mere rhetoric to demonstrate Timandros' avaricious character. The speaker recounts some reliable facts, but there is no trustworthy legal information about the action.

Since the guardianship was over (aorist διεχειρίσε, l. 14) the lawsuit was most probably a private one. After 13 years of guardianship (l. 46) Akademos had come of age and is advancing a claim for his property, worth more than five talents (l. 61), that Timandros still is holding “in his hands,” ἔχει in l. 62. This ἔχειν is the crucial word for a *dike epitropēs*.<sup>15</sup> Therefore Akademos is calling his former guardian Timandros to account for badly managing his affairs over 13 years. Usually, a young plaintiff would be supported by a *sunēgoros*<sup>16</sup> unless he possessed the exceptional ability of young Demosthenes, who was able to undertake his own court speech in his *dikē epitropēs* well prepared by his teacher Isaeus.

against the guardians or the relations that they live with); for injury to an orphans' estate (these also lie against the guardians);... (7) He also supervises orphans and heiresses... He grants leases of estates belonging to orphans...”

<sup>14</sup> Rubinstein (n. 2, above) convincingly doubts the existence of an Athenian statute prohibiting the separation of orphaned siblings. In fact the *nomos* quoted in l. 53 may have provided that “orphans should be reared where their needs were most likely to be adequately met” (p. 157); the use Hyperides makes of this law “is at least as sophisticated—and potentially misleading—as that which we have long been able to enjoy in his speeches *For Euxenippos* and *Against Athenogenes*” (p. 159).

<sup>15</sup> D. Becker, “Die attische *dike epitropēs*,” *SZ* 85, 1968, 30–93 (68–78); see the text of the writ cited by Demosthenes in 29.31: ἔστιν οὖν τοῦ μὲν ἐγκλήματος ἀρχὴ “τάδ’ ἐγκαλεῖ Δημοσθένης Ἀφόβῳ ἔχει μου χρήματ’ Ἀφοβὸς ἀπ’ ἐπιτροπῆς ἐχόμενα...” (cf. also Dem. 27.12,34,37, Lys. 32.2,20,28). Whitehead (n. 2, above) completely misunderstands the meaning of οὐσίαν (τινος) ἔχειν (holding, having in one’s hand, other people’s property or money). In cases of financial damages (*blabē*) and guardianship the “commonplace word” ἔχειν has nothing to do with sophisticated “*Eigentum* and *Besitz*” (Whitehead, p. 140). It rather points to unjustly holding other people’s (*i.e.* the wards’) property creating the liability of compensation (for the guardians)—easily to be grasped by any Athenian layman judge. The reference to “Continental scholarship”, which Whitehead (*ibidem*) underestimates, should not be A. Kränzlein, *Eigentum und Besitz* (Berlin 1963) but H.J. Wolff, “Die Grundlagen des griechischen Vertragsrechts,” *SZ* 74, 1957, 26–72 (39, 42, 49). In the Hyperides fragment ll. 17–59 clearly is a digression to demonstrate Timandros’ “desire of money” framed by ll. 17–19 and 58/59. Neither the (scarcely reliable) title πρὸς in the *Suda* (p. 136f.) nor the “*thanatos* phraseology” (p. 142–45) in l. 19/20 corroborate an *eisangelia* of an ex-orphan desiring for revenge. The *timēma* is not death penalty (p. 148) but financial compensation through a *dikē epitropēs*. The double amount of at least five talents (l. 61) is high enough to justify any rhetorical effort, the topos “deserving of death” included.

<sup>16</sup> See L. Rubinstein, *Litigation and Cooperation*, Stuttgart 2000, 67.



The facts of the case are quickly told: an Athenian couple died and left behind four orphans, two boys and two girls. Surprisingly a guardian living in Lemnos was appointed, Timandros. He was an Athenian citizen and most probably *klēroukhos* in the city Hephaistia, one of the two *klēroukhiai* of that island close to the Bosphorus.<sup>17</sup> Timandros took the younger of the two girls with him, allegedly by “dragging her away” (l. 25). I think that, for the other three children who stayed in Athens, a co-guardian was appointed, as usual by their father’s will, just as there were three guardians of Demosthenes and his sister. My further conjecture is that the father in his will gave the younger daughter to the co-tutor Timandros in marriage. Parallels are again Demosthenes’ father (27.5) and maybe Isae. 6.13. This would easily explain why Timandros succeeded in keeping the young woman with him for 13 years without any successful objection up to the present lawsuit.

Now, another accusation against Timandros—and the principal one in the case—is that he conducted the guardianship completely contrary to the laws (ll. 10–17). In detail: 1) he did not register the guardianship with the *arkhōn* (for this request see Isae. 6.36<sup>18</sup>); 2) he didn’t have the property let (again Isae. 6.36, which tells us this was to be done by the *arkhōn*), and 3) he prevented a denunciation (*phasis*) to let the property from being filed with the *arkhōn*.

From Dem. 27.58 we see guardians were best off when the estates were let.<sup>19</sup> In these cases, at the end of their duties, they were not called to account. They only had to pay annual interest to sustain the wards and, at the end of their duty, deliver the capital they had taken over at the beginning of the guardianship. I shall come back to the leasing in the following section. For the moment only the arguments of the parties are of interest. Apparently the former guardian, Timandros, holds that the property was let; Akademos, the former ward, contra.

I conjecture that both parties are right up to a certain degree: the speaker can be trusted on the point that no registration or lease took place

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<sup>17</sup> See the Harpocration gloss mentioned in section 1, above.

<sup>18</sup> Isae. 6.36f.: “They registered these two boys with the *arkhōn* as being adopted...putting themselves down as their guardians, and they asked the *arkhōn* to lease out the estates as belonging to orphans...and that they themselves might become lessees and obtain the income. (37) And the first time the courts sat, the *arkhōn* put the lease up for auction and they offered to take it on. But certain persons present reported the plot to the relatives, who came and revealed the affair to the jurors, and so they voted by show of hands not to lease out the estates.”

<sup>19</sup> Dem. 27.58f.: “He might have avoided all this trouble by letting the estate, pursuant to the laws which I am going to cite. Take and read the laws. LAWS...(59)...Ask the defendant why this has not be done. If he says it was *better* not to let the estate, let him show, not that it has been doubled or trebled, but that the principal (*ta arkhaia*) has been returned to me.” Cf. Lys. 32.23.

in Athens, and a *phasis* did fail. But Timandros could have countered that he had registered and let the estate in his hometown Hephaestia at Lemnos. We know from inscriptions (one from Samos, for example) that the Athenian *klēroukhiar* had their own boards of magistrates and law courts like Athens herself.<sup>20</sup> If Timandros had correctly fulfilled his duties in Hephaestia, the *arkhōn* in Athens evidently had had no reason to accept any denunciation (*phasis*) to the effect that something was wrong with the guardianship.

One may wonder why Timandros could not easily have won his case simply by presenting witnesses for what he had done lawfully at Lemnos. However, one must take into account what emotions Hyperides was able to arouse in our short fragment. Furthermore, Hyperides may have argued that far away, at Lemnos, Timandros got all his benefits in a completely illegal way.

Whatever the content of the complete speech might have been, in my opinion, the new 64 lines present a precious additional document pertaining to procedural strategies in Athenian courts in a guardianship case hitherto unknown. In the following parts 3 and 4 I shall give the outlines of some new results relating to the Athenian laws of guardianship.

### 3. THE LEASING: *MISTHOSIS OIKOU ORPHANIKOU*

The crucial point of the case was the question: did Timandros lease the property or not? For the legal historian it doesn't matter if Timandros in fact did so or not. What is important are the new details on leasing the property that the speech reveals. These concern 3.1 the person, 3.2 the object and the procedure, and 3.3 the consequences of the leasing.

#### 3.1. The Person

Scholarship before Wolff, especially Wyse, held that the guardian would conclude a private contract of lease with a third party. Therefore it was logically and legally impossible for the guardian to make the contract with himself; thus the guardian seemed to be excluded from taking over the property as a leaseholder.<sup>21</sup> Taking seriously the story told in Isae. 6.36 Wolff thought that it was not the guardian but rather the *arkhōn* who concluded the contract.<sup>22</sup> Therefore, in his opinion, the guardian, too, was

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<sup>20</sup> For Lemnos see G. Reger, "The Aegean," in: M.H. Hansen / Th.H. Nielsen (eds.), *An Inventory of Archaic and Classical Poleis*, Oxford 2004, 732–93 (756–58); cf. *IG VI* 1.262 (Samos, ca. 350 BCE).

<sup>21</sup> W. Wyse, *The Speeches of Isaeus*, Cambridge 1904, 526f.

<sup>22</sup> H.J. Wolff, "Verpachtung von Mündelvermögen in Attika," in: *FS Lewald*, Basel 1953, 201–08; for the text of Isae. 6.36 see n. 18, above.



a possible leaseholder. With the last point I can agree, but not with the first: ll. 5–9 now expressly tell us that the law court, not the magistrate, had the last word.

By translating ἀδτοῖς in l. 3 with to lease “for their own profit” (*dativus commodi*) Tchernetska concluded recently: guardians are not allowed to make a profit; this means guardians are not allowed to lease at all.<sup>23</sup> In my view every leaseholder derives the profit—and also takes the risk—of the business, so why not a guardian too? Rather, I understand the dative as *comitativus instrumentalis* “on their own authority”, which means: without the *arkhōn* and the *dikastērion* mentioned immediately after.<sup>24</sup> In my opinion, the plaintiff does not say that guardians are excluded from leasing; rather, they have to follow the general rules of appointment which were allegedly not followed by Timandros. To sum up: the active party who let the property was the law court, not the *arkhōn*; the leaseholder could have been any person, the guardian included.

### 3.2. Object and Procedure of Leasing

Wolff established that with the term *oikos* only a business or an enterprise could be objects of leasing, for example the two factories belonging to Demosthenes’ father; *oikos* in this connection never meant the whole estate or a single plot of land.<sup>25</sup> In his first speech against Aphobus the young Demosthenes is claiming only the 54 slaves, raw materials, loans, and a modest dwelling house where, I think, the slaves were living, altogether worth more than 13 talents (in our case Akademos’ *ousia*, resources—not *klēros* or *klēronomia*, estate—, was worth more than five talents, ll. 13, 61/62.). To keep a business running for at most 18 years was both a great opportunity for profit and at the same time represented a risk of loss. Much depended on the skill and the trustworthiness of the guardian. By letting the enterprise, under securities on real property given by the lessee,<sup>26</sup> all risk was taken away from the ward and the status quo at the time of the father’s death was preserved.

Normally more than one person was interested in leasing a wealthy ward’s enterprise, and a kind of auction took place in court. What was the highest bid? One opinion is that the person who offered the highest rate of interest obtained acceptance. But no source tells us about interest rates at all. Probably the rate was fixed by law or by custom. Neither can I fol-

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<sup>23</sup> Tchernetska (n. 1, above) 3.

<sup>24</sup> A philological parallel is Plato *Apology* 26a: τὴν γραφὴν ὑβρεῖ...γράφασθαι (out of *hubris*), in Attic also expressed by *διά* with *acc.* (E. Schwyzler, A. Debrunner, *Griechische Grammatik* II, München 1950, 150).

<sup>25</sup> Wolff (n. 22, above) 205, n. 23.

<sup>26</sup> See H.J. Wolff, “Das attische Apotimema,” in: *FS Rabel* II, Tübingen 1954, 243–333.

low the other opinion that the person, who offered the best security, obtained acceptance.<sup>27</sup>

Now, in the first line of the new fragment I see a possible solution: Tchernetska and her co-editors (2007) restore a noun τὸ λῆμμα corresponding with the adjective ἔλαττον: “...so that <the profit> for the children is not less than the price it fetches in court.” Usually the profit for the ward is called ἡ πρόσοδος or οἱ τόκοι, neither of which agrees with ἔλαττον. In a *dikē epitropēs* it was not the interest payment, but rather the amount of capital that was under dispute; on the basis of that amount, any shortfall in interest payments would in turn be easy to calculate. It was the capital that Akademos was claiming (l. 62). So I suggest the missing noun corresponding to ἔλαττον might have been κεφάλαιον or ὄρχαϊον. This would mean that in leasing out the enterprise the amount of the capital, the value of the enterprise, was achieved (εὐρίσκοντος) or realized in court.<sup>28</sup> Thus the auction was carried out to obtain the highest assessment of the capital, not the highest rate of interest on an unknown amount of capital. The person who offered the highest assessment of the substance received the enterprise to lease.

This result is confirmed also by terminology. The orators always speak of leasing the enterprise, *misthoun*, but the consideration is never called rent, *misthos* or *phoros*, the terms used in land leasing; they use the designation ‘interest’, *tokoi*, just as in loan transactions.<sup>29</sup> For calculating the interest one must assess the capital exactly. In land leasing the rent, *misthos*, does not automatically correspond to the plot’s value; its value is never mentioned in such contracts. In the leasing of an orphan’s *oikos*, therefore, the monetary value was essential, rather than the individual items that made up the enterprise.

### 3.3. The Consequences of Leasing and Non-Leasing

The consequences of the first option, to *lease* the business, are evident: with the value of the enterprise fixed by public auction on the one hand, the ward had a guarantee that he would receive his money—but not the actual items—when coming of age. Demosthenes (27.58)<sup>30</sup> speaks only of paying money, not of returning the items. On the other hand, the leaseholder had a chance to make much more profit than the probably modest interest that he had to pay to sustain the ward. But the leaseholder also took on the full risk of any loss, with his property encumbered to the ward. After leasing, the guardian would not have had any problems of

<sup>27</sup> Both opinions are discussed by A.R.W. Harrison, *The Law of Athens I. The Family and Property*, Oxford 1968, 106.

<sup>28</sup> See my suggestion of restoring the beginning of the fragment in n. 4, above.

<sup>29</sup> See Dem. 27–29, Lys. 23.

<sup>30</sup> Text see n. 19, above.

being called to account by the ward (again Dem. 27.58); he just had to pay the amount that he himself had assessed in court to be the worth of the enterprise. Sometimes also the entire interest was paid afterwards, in a single instalment.

The other option was *not* to lease the property. Then the guardians administered the enterprise by themselves, being fully responsible to the wards. That happened in Demosthenes' case despite his father having ordered in his will that the factories be leased. In this matter the guardians had full discretion. Then all profit and loss devolved on the wards, but disputes concerning the guardians' accounts frequently followed. In Athens the general view was that letting an enterprise was the safer option for the wards. And there were some ways to control how the guardians complied with their duties and, when they did not perform them well, to force them to let the *oikos*.

#### 4. THE PHASIS

This brings me to my last point, the *phasis* (denunciation).<sup>31</sup> On the basis of my results up to now, the fragment allows new insights here too. Formerly the *phasis* of a ward's enterprise was thought to be a public action brought by a *boulomenos*, but not mentioned by Aristotle in his catalogue in *Ath. Pol.* 56.6.<sup>32</sup> Wolff corrected this opinion, holding that *phasis* was nothing other than a report to the *arkhōn* that there was an orphan's *oikos* to be let (incidentally mentioned in the following section *Ath. Pol.* 56.7).<sup>33</sup> On this basis MacDowell reconstructed the law on *phasis* mentioned in Dem. 27.58 from Dem. 27.59.<sup>34</sup> Now, the whole procedure becomes much clearer: 1) It was not the magistrate but the law court that let the *oikos*. 2) In l. 5/6 Hyperides uses the word ἀμφισβητεῖν. This indicates opposing positions. The word, for example, occurs in cases about ownership, inheritance or public services, *leitourgiai*. In my opinion, we therefore also have opposing claims in a *phasis* about a ward's enterprise: the claim of the guardian, who intends to carry on administering the business by himself, and that of the denunciator, who makes a counter-claim. The counter-claim can only be that the enterprise should be leased to the

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<sup>31</sup> Generally on *phasis* see A.R.W. Harrison, *The Law of Athens II. Procedure*, Oxford 1971, 218–21; D.M. MacDowell, "The Athenian Procedure of *Phasis*," in: M. Gagarin (ed.), *Symposion 1990*, Köln 1991, 187–98; R.W. Wallace, "*Phainein* in Athenian Laws," in: G. Thür, F.J. Fernández Nieto (eds.), *Symposion 1999*, Köln 2003, 167–81.

<sup>32</sup> Quoted n. 13, above.

<sup>33</sup> Wolff (n. 22, above) 207 with reference to earlier literature.

<sup>34</sup> D.M. MacDowell, "The Authenticity of Demosthenes 29," in: G. Thür (ed.), *Symposion 1985*, Köln 1989, 253–62 (262): Ἐὰν δὲ δόξη βέλτιον εἶναι μισθωθῆναι τὸν οἶκον, φαινέτω πρὸς τὸν ἄρχοντα ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν, ὁ δὲ ἄρχων μισθοῦτά ἐν δικαστηρίῳ. (If it seems better that the estate should be leased every Athenian, who is allowed and willing to do so, may denounce to the *arkhōn*; the *arkhōn* has to lease in court.) Text of Dem. 27.58f. see n. 19, above.

denunciator. Thus the *phasis* had the character of a *diadikasia* between two or more parties, clearly expressed by the verb ἀμφισβητεῖν.

Every Athenian in possession of his full civic rights was allowed to file a *phasis* with the *arkhōn*. The magistrate had to handle the case as if the guardian himself had applied for letting the enterprise. He had to bring the case before the court. The auction took place there. After hearing the speeches (ἀκούσαντας, l. 7/8) the *dikastērion* had to decide which of several applicants, the denunciator and the guardian (if he chose to submit a claim) included, would obtain the enterprise for lease.

But at an initial stage the guardian had an opportunity to prevent the leasing at all. In Dem. 38.23 the judges voted against the denunciator and the guardian kept administering the enterprise.<sup>35</sup> Maybe this first vote took place quickly by show of hands as in Isae. 6.37.<sup>36</sup> Thus, only if the guardian did not protest against the *phasis*, or if the judges voted against him, could the auction begin in the shape of a *diadikasia*.

In our new Hyperides fragment both steps are addressed by different provisions: “that it would be *better* for the child” (ἄμεινον l. 6; βέλτιον in Dem. 27.59), meaning the first vote (maybe by show of hands), and “the judges have to vote for what seems *best* for the child” (l. 8/9), referring to the second vote in a *didikasia* procedure. On this basis I have tried to reconstruct the law on *phasis oikou orphanikou* as follows:

“If someone argues that it would be better to lease the property of the ward every Athenian, who is allowed and willing to do so, may denounce (it) to the *arkhōn*; the *arkhōn* has to introduce (the case) to the court. The judges have to hear (the case) and to vote for what seems best for the child”.<sup>37</sup>

<sup>35</sup> Dem. 38.23: “ ‘They did not let our estate’—perhaps our opponents will say. No; because your uncle Xenopeithes did not wish it let, but, after the *phasis* had been instituted by Nikidas, persuaded the jury to allow him to manage it,...

<sup>36</sup> Quoted n. 18, above.

<sup>37</sup> I would suggest replacing MacDowell’s reconstruction of the law (n. 34, above) by the following one: Ἐὰν δέ τις ἀμφισβητῆ βέλτιον εἶναι τὸν οἶκον μισθῶσαι τοῦ ὀρφάνου, φαινέτω πρὸς τὸν ἄρχοντα ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν, ὁ δὲ ἄρχων εἰσαγέτω εἰς τὸ δικαστήριον· τοὺς δὲ δικαστὰς ἀκούσαντας ψηφίσασθαι ἃ ἂν δοκῆ βέλτιστα εἶναι τῷ παιδί.

Text established by L. Horváth, "Note to Hyperides in Timandrum," *Acta Antiqua Hungarica* 48, 2008, 121-23.

[ΥΠΕΡΙΔΟΥ ΚΑΤΑ ΤΙΜΑΝΔΡΟΥ ΕΠΙΤΟΠΗΣ ΥΠΕΡ  
ΑΚΑΔΗΜΟΥ ΣΥΝΗΓΟΡΙΑ]

APPENDIX

138r του μὲν εὐβλοκοντος ἐν τῷ δικαστηρίῳ μὴ ἔλαττον ἢ τοὺς πααίτην· ἐὰν δὲ πάλαιω περιουσίῳ τοὺς πααίτησιν, τοὺτων ἐπὶ φιλοτιμίᾳ(α), αὐτοῖς δὲ τοὺς ἐπιτρόπους ἀπαγορευθῶσιν οἱ νόμοι μὴ ἔξεσθαι τὸν οἶκον μισθώσασθαι· ἔξεσθαι δὲ ἐν τῷ δικαστηρίῳ ἀμφοῖν ἐπιτήσομαι μὴ ἀμεινον εἶναι τὸν οἶκον μισθῶσαι τῷ(ν) παιδῶν, ὑμῶν δὲ τοὺς λαχόντας διακάζειν ἄκουσαστας ψηφισασθαι ἢ ἀνδοκῆν βέλαιστα εἶναι τῷ παίδι, καὶ μοι λέγε τοὺτος τοὺς νόμους. -- ΝΟΜΟΙ -- τοὺτων τοῖνων οὐτ(ος) οὐδὲν ἐπιτήσομαι οὐδ' ὄλας ἀεργασθῆν τὸν οἶκον πρὸς τὸν ἀρχον(τα), καὶ μοι λαβὴ τὴν μαρτυρίαν. -- ΜΑΡΤΥΡΙΑ --

15 ὅτι μὲν τοῖνων οὐ κατὰ τοὺς νόμους τὴν οὐσίαν τὴν Ἀκαδημίου τουτουῖ διεχέρισθε Τιμανδρ(ος) οὐτοσὶ ἀκηκόαστε τῶν νόμων, καὶ τῶν μαρτύρων ὅτι οὐτε ἐμισθῶσε τὸν οἶκον, ἐτέρου <τ> ἐν(α) μισθῶσθῆν, ἐκώλυσε. ὅτι δὲ ἰάυ(τα), ἴνα διαδόφωρησῆσθαι τὰ χρῆματα(τα), οὐτωσὶ ἐπιτήσομαι, νῆ Δία, τοῦτο δεῖξω. καὶ γὰρ δια τὰ χρῆματα(τα) καὶ εἰς τὴν ἀδελάφην τουτουῖ θάλατου ἀξί(α) ἠδὲ κηκεν καταλαβειθῆσθαι γὰρ τουτων δούτῳν ἀδελάφῳν καὶ ἀδελάφῳν δούτῳν ὄφθαλμῳ καὶ μητροδὺς καὶ παιδῶσιν πάλαιων δούτων -- ἰωσ γὰρ ὁ πρὸς βύτα(ος) ἀδελάφ(ος) Ἀντιφιδῶς ὁ τελευτήσομαι ἴν δέκα ἐτῶν -- τὴν νωτέραν ἀντιφιδῶν ἀδελάφῳν ἀποσπασσῶσ οὐ τοῖ Τιμανδρὸς ἐτέρε παρ' αὐτῶν ἀποκομιθ(ος) εἰς Ἀπηνον ἰωσ οὐσαν ἐπὶ ἐτῶν. κἀίρι τουτουῖ ὅτι οὐδ' οἱ κατὰ πρὸς αἰωνοσ γινώσκουσιν ἄλλῶσ καὶ κατ' οἰκίαν πωλοῦσιν (ἄν) ἄλλῳσ, ἀλλὰ καὶ κατ' οἰκίαν πωλοῦσιν οἱ τῶν ἀνδρῶσ κατὰ τῆσ(οἰ) καὶ εἰσ ποροὶ κέρδους ἐνεκα πάντων ἀνδρῶσ ἐπὶ ἐπὶ[5].



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| 138v | <p>[ἄ]ν ἀδελφὰ παιδάρια(α) πωλῶσιν ἢ μητέρα καὶ παιδία<br/> ἢ π(ατέ)ρα [καὶ π]αιδάρια(α) ἐστῶσι, ζημι[ι]οῦμενοι ἐλάττονος<br/> ἀ[πο]δίδονται [αὐτ]ῶν τι τοῦτο τῶν δικαίω(ν) ὄν. αἰ γ(άρ)</p>   | 35 |
|      | <p>εὔνοια τρεῖς ἀνθρώποις εἰσι διὰ τὴν συνήθει-<br/> α[ν] καὶ τὸ συντρόφους αὐτοὺς εἶναι μᾶλλον ἢ δι-<br/> ὰ τὰς συγγενείας. τεκμήριον δὲ τούτου· οὔτε γὰρ<br/> ἂν π(ατέ)ρ(ε)ς [το]ὺς αὐτῶν παῖδας ἀσπάζαιτο, εἰ μὴ [ἐπ'] αὐ-<br/> τοῖς ἐκ παιδαρίων τραφεί&lt;η&gt;σαν, εἰ εὐθύς τις αὐ-<br/> τῶν μικρὰ ὄ[ν](τα) ἀποσπάσαι, οὔτε [ο]ἱ παῖδες τοῦς<br/> γονέας εἰ μὴ ὑπ' ἐκείνων τραφείησαν. Τί-<br/> μανδρος τοίνυν τούτου αὐτοῦ γε αἴτιος γέγον(εν),<br/> ὥστε τὰς μὲν ἀδελφὰς ἀλλήλας μὴ ἀναγνῶναι<br/> μῆτε ἐν ὄδῳ μῆτε ἐν ἱερῷ ἰδούσας – πλεόν-<br/> ων γ(άρ) ἐτῶν ἢ τριῶν καὶ δέκα οὐχ ἐωράκασιν<br/> ἑαυτάς – τὸν δὲ ἀδελφὸν τουτονὶ Ἀκάδημον<br/> ἀναγνωρίσαι τὴν ἑαυτοῦ ἀδελφὴν, ἐλθόν(τα)<br/> δὲ εἰς Λῆμνον μὴ γγῶναι ἰδόν(τα). καίτοι ὁ νομο-<br/> θέτης τοὺς παῖδας τοὺς ὀρφανούς οὐ χωρὶς ἑ-<br/> καστον τρέφεσθαι ᾤθη[ν] δεῖν, οὐδ' ὅπως ἂν τύ-<br/> χωσιν, ἀλλ' ὅπου ἂν ἀριστα [μέ]λλωσ[ι] τρέφεσθαι.<br/> καὶ μοι λέγε τὸν νόμον. -- ΝΟΜΟΣ --</p> | 40 |
|      | <p>εἰ τοίνυν παρά σοι εὔ ἐτρέφετο, ὦ Τίμανδρε, ἡ μία,<br/> διὰ τί οὐ καὶ οὔτοι εὔ ἐτρέφοντο παρά σοι καὶ ἐν<br/> τῷ αὐτῷ; εἰ δ' οὔτοι εὔ, διὰ τί οὐχὶ καὶ ἐκείνη<br/> εὔ καὶ ἐν τῷ αὐτῷ τοῖς ἀδελφοῖς καὶ τῇ ἀδελ-<br/> φῇ τῇ πρεσβυτέραι; ἀλλ' οἶμαι ἢ τῶν χρημά-<br/> των ἐπιθυμί(α) ταῦτα πάντα παρανομεῖν ἐποίει.<br/> τοιγαροῦν ἐκ πένητ(ος) ἐπιτροπέυσας Ἀκάδημο(ν)<br/> τουτονί, ἐκ τῶν τούτου πλεόν ἢ πέντε ταλάν-<br/> των οὐσίαν ἔχει, ὡς ἐγὼ ὑμῖν ἐπιδείξω· πρῶτ(ον)<br/> μὲν γὰρ εὐθύς τῷ πρῶτῳ ἐνιαυτῷ ᾤ(ς) &lt;ὄ&gt; π(ατή)ρ αὐτῶ(ν)<br/> ἐτελεύτησεν τὴν τε παιδίσκην ἔλαβεν καὶ πέντε</p>  | 45 |
| 135r | <p>θέτης τοὺς παῖδας τοὺς ὀρφανούς οὐ χωρὶς ἑ-<br/> καστον τρέφεσθαι ᾤθη[ν] δεῖν, οὐδ' ὅπως ἂν τύ-<br/> χωσιν, ἀλλ' ὅπου ἂν ἀριστα [μέ]λλωσ[ι] τρέφεσθαι.<br/> καὶ μοι λέγε τὸν νόμον. -- ΝΟΜΟΣ --</p>   | 50 |
|      | <p>εἰ τοίνυν παρά σοι εὔ ἐτρέφετο, ὦ Τίμανδρε, ἡ μία,<br/> διὰ τί οὐ καὶ οὔτοι εὔ ἐτρέφοντο παρά σοι καὶ ἐν<br/> τῷ αὐτῷ; εἰ δ' οὔτοι εὔ, διὰ τί οὐχὶ καὶ ἐκείνη<br/> εὔ καὶ ἐν τῷ αὐτῷ τοῖς ἀδελφοῖς καὶ τῇ ἀδελ-<br/> φῇ τῇ πρεσβυτέραι; ἀλλ' οἶμαι ἢ τῶν χρημά-<br/> των ἐπιθυμί(α) ταῦτα πάντα παρανομεῖν ἐποίει.<br/> τοιγαροῦν ἐκ πένητ(ος) ἐπιτροπέυσας Ἀκάδημο(ν)<br/> τουτονί, ἐκ τῶν τούτου πλεόν ἢ πέντε ταλάν-<br/> των οὐσίαν ἔχει, ὡς ἐγὼ ὑμῖν ἐπιδείξω· πρῶτ(ον)<br/> μὲν γὰρ εὐθύς τῷ πρῶτῳ ἐνιαυτῷ ᾤ(ς) &lt;ὄ&gt; π(ατή)ρ αὐτῶ(ν)<br/> ἐτελεύτησεν τὴν τε παιδίσκην ἔλαβεν καὶ πέντε</p>  | 55 |
|      | <p>εἰ τοίνυν παρά σοι εὔ ἐτρέφετο, ὦ Τίμανδρε, ἡ μία,<br/> διὰ τί οὐ καὶ οὔτοι εὔ ἐτρέφοντο παρά σοι καὶ ἐν<br/> τῷ αὐτῷ; εἰ δ' οὔτοι εὔ, διὰ τί οὐχὶ καὶ ἐκείνη<br/> εὔ καὶ ἐν τῷ αὐτῷ τοῖς ἀδελφοῖς καὶ τῇ ἀδελ-<br/> φῇ τῇ πρεσβυτέραι; ἀλλ' οἶμαι ἢ τῶν χρημά-<br/> των ἐπιθυμί(α) ταῦτα πάντα παρανομεῖν ἐποίει.<br/> τοιγαροῦν ἐκ πένητ(ος) ἐπιτροπέυσας Ἀκάδημο(ν)<br/> τουτονί, ἐκ τῶν τούτου πλεόν ἢ πέντε ταλάν-<br/> των οὐσίαν ἔχει, ὡς ἐγὼ ὑμῖν ἐπιδείξω· πρῶτ(ον)<br/> μὲν γὰρ εὐθύς τῷ πρῶτῳ ἐνιαυτῷ ᾤ(ς) &lt;ὄ&gt; π(ατή)ρ αὐτῶ(ν)<br/> ἐτελεύτησεν τὴν τε παιδίσκην ἔλαβεν καὶ πέντε</p>  | 60 |