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Law and Rhetoric in Commercial Shipwreck Cases: Isolating the Facts

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ΙΟΥΛΙΑΝ ΒΕΛΙΣΣΑΡΟΠΟΥΛΟΥ ΕΠΑΙΝΕΣΑΙ

Studies in Ancient Greek and Roman Law

ΕΛΛΗΝΙΚΗ ΕΠΙΓΡΑΦΙΚΗ ΕΤΑΙΡΕΙΑ

ΑΘΗΝΑΙ 2020



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Studies in Ancient Greek and Roman Law

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ΕΛΛΗΝΙΚΗ ΕΠΙΓΡΑΦΙΚΗ ΕΤΑΙΡΕΙΑ

ΑΘΗΝΑΙ 2020

Ἡ ἔκδοση πραγματοποιήθηκε
μὲ τὴν γενναία χορηγία
τοῦ ἰδρύματος ARETÉ FOUNDATION

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GERHARD THÜR

Law and Rhetoric in Commercial Shipwreck Cases:
«Isolating the Facts»

I met the scholar honored with this volume, my colleague and friend Julie Vélisaropoulos, first at the «Symposion 1977» in Chantilly. At that time she was working on her epoch-making book *Les nauclères grecs*, which was published in 1980. In that publication, she dealt at length with sea loan and shipwreck. Forty years after, it might be appropriate to supplement the topic with some thoughts about the rhetorical side of the issue. In Athenian court speeches, and particularly in those concerning shipwreck, the speakers use a special technique of persuasion that I have named «isolating the facts.» My modest contribution to this volume aims at demonstrating how that technique worked in forensic practice.¹

Neither in ancient nor in modern scholarship does a special category of «shipwreck speeches» exist. Nevertheless, I think there are some common features in four commercial speeches held in sea loan cases: Demosthenes or. 32, *Against Zenothemis*; or. 34, *Against Phormion*; or. 35, *Against Lacritus*, and or. 56, *Against Dionysodorus*. The authenticity of orations 32, 34 and 56 does not matter for my purpose. All four speeches were delivered in the course of about 30 years between 353 and 322 BC and deal with *daneion nautikon*, «sea loan» or to use the now obsolete English law term, «bottomry»: a creditor gives a loan to a ship owner or a tradesman for a certain sea voyage under the provision that no repayment is due if the ship is lost at sea. Interest on the loan was calculated for the period of the journey, generally two or three months, ranging up to 30%, recalculated as annual percentages up to 200%. The high interest rates and the clause «if the ship arrives safely at the port of destination» reflect the inherent risks of the sea trade. If the ship was lost to shipwreck or piracy the lender could recover neither principal nor interest. Thus, the borrower and the lender shared the risk. All in all, over a long period, this type of contract effectuates a kind of insurance.

1. The technique of «isolating the facts» is exemplified by G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens*, Wien 1977, 256. To my knowledge no comments to this topic exist. Since this contribution will not result in new juristic findings I will keep with the oral version as given in Athens on 9 June 2016 in the meeting in honor of Julie (after a preliminary paper given in Shanghai on 28 September 2014 at the conference «Law and Commerce in Ancient world»). I thank the organizers of these meetings, A. Helmis, A. Dimopoulou and D. Karambelas, and Prof. He Qin Hua, respectively, for the invitations. The sea loan document preserved in Dem. 35.10-13 is printed below, in the Appendix.

In the Appendix the only sea loan document is copied, a *sungraphē*, luckily preserved in Dem. 35.10-13. It contains: the lenders, the borrowers, the amount of the loan and the interest (22.5 or 30% depending on the risk), the exact route and time of the voyage, the goods to be traded in – all pledged to the lenders –, payment date, enforcement clause, three witnesses. This standard form was used up to Hellenistic and Roman times. In medieval times the ban of usury complicated the matter, and since the year 1338 canonistic scholars discussed remuneration for taking over risk at sea. This was the birth of modern insurance.

In Athens, when ship and cargo – usually both encumbered for different loans – did arrive safely, the lenders' claim for repayment was the *dikē blabēs* (claim for damages) performed in the shape of a *dikē empirikē* (commercial claim), open also to foreign tradesmen.

In our four speeches the following parties appear: in Dem. 32 Zenothemis is claiming repayment of a loan given to Hegestratus, secured on the grain bought by Protus with the money lent to him by Demon; in Dem. 34 Chrysippus sues a certain Phormion (not the banker) for the repayment of a sea loan; in Dem. 35 Androcles sues Lacritus, and in Dem. 56 an unknown speaker (possibly named Darius) is suing Dionysodorus for the same reason. The first three speeches were held in *paragraphē* trials, counter indictments, after the defendants had objected that the suits filed by the plaintiffs (called *euthydikia*) were inadmissible. In these trials, exceptionally, the defendant spoke first.

In this paper I will not focus on the legal problems, but rather the parties' rhetorical strategies. Since shipwrecks usually happened far away from Athens the speakers were quite free in recounting the facts. And therefore the speechwriters (*logographoi*) used the technique of «isolating the facts» in the highest degree. In order to cast the right light on their clients' positions, the logographers rarely resorted to simplistic lies; instead, they typically created distortions that the audience was nearly unable to unravel. They «isolated» facts that belonged together and, by creating psychological links, combined individual aspects of an issue that were true *per se*. The «art» of lying – or rather, manipulating – was in the attribution of typical psychological motives to the opponent, a broad field because a person's actual motives always remain in the dark. In so doing, out of a set of true facts the orators shaped an overall impression that was falsified, but met the needs of their clients' cases. In court the litigants used this technique of portrayal to their advantage, by informing the audience in a thorough, but biased manner. Through careful preparation of their speeches, plaintiffs were able to keep their opponents from taking the jurors by surprise with new facts. Every relevant fact must be mentioned somewhere in the plaintiff's speech, but not necessarily in the correct order. «Plaintiffs» means the parties who spoke first, who had the first word at the

law court. And indeed, in one speech, Dem. 32, the defendant resorted to a counter indictment, the *paragraphē*, explicitly to reach the goal of getting the first word. In Dem. 34 and 35 we have the plaintiffs' defenses against a *paragraphē*, speaking second. In Dem. 56 the plaintiff is speaking first, in his proper place. In the following I hope to sketch the different rhetoric strategies of speaking first and second in the huge Athenian law courts. These courts consisted at least of 201 lay citizens chosen by lot. These jury members had to decide cases immediately after listening to the opponents' speeches, which lasted about half an hour, by voting «yes» or «no» in a secret ballot. Nobody was allowed to interrupt a speaker, to pose questions or cross-examine the witnesses. Witness depositions, documents and quotations of statutes were prepared by the litigants beforehand and read aloud by the court clerk. To understand the litigants' rhetorical strategies one must keep in mind these exterior circumstances.

1) To start with the Zenothemis speech, I will not focus on the most controversial juristic issues of ownership and security, but rather on reconstructing the facts. The scene is thus: Demon, a relative of the rhetorician Demosthenes, lent money to a non-Athenian merchant Protus to buy grain in Syracuse, Sicily, and import it to Athens. Doubtless they contracted a sea loan and in advance the grain was pawned to Demon. Protus traveled in a ship owned and skipped by Hegestratus, a man from Massalia (modern Marseille in southern France). On their way back from Syracuse to Athens Hegestratus was «lost at sea» (Dem. 32.2 and 4). Prior to that, another Massaliot, Zenothemis, had lent him money secured on Protus' cargo too, as I will explain. After some troubles at sea, the ship finally arrived at Athens and, through a *dikē exoulēs*, Zenothemis claimed the grain encumbered also to Demon. Here I shall skip the details of the pending procedure Zenothemis *vs.* Demon, the *euthydikia*. Against this action Demon, the defendant, brought a counter-indictment claiming that the prosecution was inadmissible. If he won this trial against the Massaliot he also would be rid of the main issue.

Demon, speaking first, wove an enthralling story of how Hegestratus lost his life at sea – and, to my knowledge, until this time, all scholars seem to have believed the narrative. Allegedly, in Syracuse Hegestratus and Zenothemis had planned a fraud: each of them borrowed money pretending that they were owners of the grain in the ship and pledged it as security to their creditors. Demon's own words are (Dem. 32.5-6): «When they'd got the money, they sent it home to Massalia and put nothing on board the ship. The written agreements required repayment of the money upon the ship's safe arrival, as is usual. So, in order to defraud the creditors, they decided to sink the ship. When they were two or three days' voyage from land, Hegestratus went down to the hold at night and began cutting a hole in the bottom of the vessel. Zenothemis stayed on deck with the other passengers, as if he knew

nothing about it. As there was a noise, the people on board realized something was wrong in the hold, and they rushed down to help. (6) Hegestratus was caught and expected to be punished; so he ran away and, being chased, threw himself into the sea, but because it was dark, he missed the dinghy and was drowned. So the bad man died a bad death, as he deserved, himself suffering the fate that he planned to inflict on the others.» (Translation MacDowell, 2004)

In my opinion this story is a lie, carefully based on true details. Only by the way, at the end of the speech in § 27, the audience learns an essential new detail that might shed light on the real facts: the ship went through a dangerous storm. Probably, the ship was heavily damaged in the storm, so that the passengers, all accompanying tradesmen, discussed abandoning it (§ 7). Nonetheless, it barely reached Cephallenia (§ 8) to be repaired. On this dangerous trip the captain Hegestratus might have lost his life, and before, Zenothemis might have given him a loan (§§ 12, 16) – not mentioned: for the repair of the ship. At Cephallenia the cargo must have been discharged, and since the sailing season, supposedly, was nearly over – all this is not mentioned in the speech, either – the Massaliots wanted to reach their homes (§ 8). Informed about the average Demon sent an agent to Cephallenia to negotiate the costs of repair (again not mentioned) and to have the local authorities direct the ship to Athens (§ 9) where it eventually arrived safely (§ 14). Cephallenia was under Athenian authority. When Zenothemis, as I reason, gave the loan for repairing the ship damaged at sea, the cargo – whomever it belonged to – was bonded to him. My conclusion is: in Athens Demon refused to contribute to the costs that his own agent Aristophon – not named until § 11! – had presumably agreed to. Having listened to the moving speech providing the first information about the facts no juryman would suspect the real background of the case. On the other hand, Zenothemis, speaking second, would scarcely have been able to penetrate the net of lies and half-truths.

2)The situation just mentioned, speaking second, occurs in our next speech, Dem. 34 *Against Phormion*. Chrysippus made a loan to Phormion, probably one of the three witnesses in the *sungraphē* preserved in Dem. 35.13 (see below, Appendix), for a voyage to the Black Sea and back to Athens to import grain. Phormion traveled on board a vessel owned and skippered by Lampis. They all were non-Athenians. When they reached the foreign port of destination a war had broken out and business was poor. Lampis immediately decided to sail back to Athens, but Phormion, Chrysippus' debtor, continued his journey on another ship. Unfortunately, on its way back, Lampis' ship sank but he survived. When Phormion later returned to Athens, Chrysippus charged him to repay the loan. Against this charge Phormion, the defendant, brought a counter-indictment, a *paragraphē*, claiming that the prosecution was inadmissible. His argument was that he had in fact already

repaid the loan by giving the equivalent in gold coins to Lampis at the Black Sea for conveyance to Chrysippus at Athens. Since the money and the ship had both drowned, Phormion argued, the contract with Chrysippus was void and therefore Chrysippus' prosecution was based on a *sungraphē* that was no longer valid and was therefore inadmissible. The whole case depended on the simple question of whether Lampis received the money or not; and currently Lampis was out of Athens.

We do not know what story the defendant, Phormion, produced speaking first in the *paragraphē* trial; only the plaintiff's, Chrysippus', reply is preserved. Besides the claim that Phormion did not comply with the terms of the *sungraphē* (§§ 6-7), unsurprisingly, Chrysippus' strategy was to heavily discredit Phormion's character. We learn a great deal about the procedure of private arbitration in Athens, where Phormion allegedly behaved in a most unscrupulous way (§§ 18, 21, 44-5). Likewise Lampis, the skipper, is depicted as a dishonest accomplice and habitual cheat. It is reported that he first confirmed having received the money but later recanted the fact (§§ 11, 18, 46-8). Furthermore, previously Phormion had requested public subsidy for transporting grain to Athens and then took it to another place (§§ 36-7). Chrysippus, the speaker, by contrast, stressed that he was a strong supporter of Athens who had made generous donations of grain to the citizens in times of famine (§§ 38-9). These are all purely circumstantial arguments and not directly relevant to the case.

However, the speech is quite cleverly composed to give the impression that it is Phormion, not the speaker Chrysippus, who is more likely to be lying that the money had been given to Lampis. Because Athenian court speeches were prepared in advance the party speaking second could never reply directly to the arguments that the jury just had heard. Therefore the safest strategy for the second speaker was the *argumentum ad personam*. In my opinion the first speaker had the better chance of bringing the court round to his point of view. And this was the reason some defendants chose to rely on the counter-indictment, the *paragraphē*, despite the risk of paying a penalty of one-sixth of the amount in dispute if they lost the trial.

3) Also in Dem. 35, *Against Lacritus*, a plaintiff is answering a *paragraphē*, but the speaker's strategy is quite different. From the *sungraphē* (see below, Appendix) one recognizes the deal and the principal actors: Androcles, an Athenian citizen, and the non-citizen Nausicrates lent 3,000 drachmas to Artemon and Apollodoros, two brothers and tradesmen from Phaselis, for a voyage to the Black Sea to deal in wine and import grain to Athens – by now a well known scenario. On their return the brothers did not put in at Piraeus but anchored outside the boundary markers of the port (§§ 28, 53) – with good reason, as I will show – and finally headed for

Chios. Subsequently Artemon died and thereafter Androcles, one of the creditors, sued Apollodorus and Lacritus, the third brother of the two Phaselites, for the repayment of the sea loan. Against this, Lacritus, as defendant, brought a *paragraphē*, objecting that he should not be prosecuted by that action. The jury had listened to Lacritus' (not preserved) speech first. His main argument may have been that he was not liable to fulfil the terms of a *sungraphē* transacted by his brothers and Androcles. Concerning the main issue Lacritus relied on the fact that the ship was wrecked and the cargo lost. Against this, in his (extant) speech Androcles, in spite of being the plaintiff speaking second, made Lacritus responsible as the late Artemon's heir (§ 44) and (in no way relevant for the case) as initiator of the deal and drafter of the contract (§§ 7, 15). Circumstantially Androcles remarked that Lacritus, resident alien (metic) in Athens, was well known as rhetorician and pupil of Isocrates, and therefore accused him personally of sophistry. Furthermore, he attacked the Phaselites in general as scoundrels. In contrast, Lacritus depicted himself as a plain, blunt man.

The crucial point was the shipwreck. After having the clerk read aloud the *sungraphē* (§§ 10-13), in all details Androcles pointed out that his partners did not in any way comply with its provisions (§§ 17-28) culminating in the reproach of not having put in at Piraeus but rather at the «Thieves Cove» outside the harbor (§ 28 and stressed at the end in § 53). In his report he carefully conceals that the vessel originally used by his partners had sunk. This is not mentioned until § 31, and only at the end of the speech do the listeners learn that the two merchants came back on another ship bound to Chios (§ 52). Probably, loaded with grain bound for another destination than Athens, for legal reasons the ship was not allowed to enter the Piraeus. By the way, if the merchants' vessel had safely reached Athens loaded with return cargo, probably grain, no creditor would have worried that they had deviated from the provisions of the *sungraphē* in their maritime trade. To sum up: by isolating some facts and concealing others, Androcles effectively painted a compelling picture of his partner's wickedness, not to forget some serious personal insults. I think this speech is like that *Against Zenothemis* (or. 32) one of Demostenes' masterpieces.

4)After the three *paragraphē* speeches, finally, we throw a brief glance at Dem. 56, *Against Dionysodorus*, the only shipwreck speech held in a *euthydikia* trial. Pamphilus and his partner Darius (the speaker, his name is preserved only by Libanius) lent 3,000 drachmas to Dionysodorus and Parmeniscus to import grain from Egypt to Athens via Rhodes. All were foreigners in Athens. The borrowers owned the ship, gave it in mortgage and beside the interest stipulated double the principal as penalty if the ship were not produced in Athens. On the voyage back from Egypt the ship sprang a leak and was forced to put in at Rhodes. There the

grain was offloaded to repair the ship. So far the scenario is similar to the Zenothemis case in Cephallenia, Dem. 32, as we have seen earlier. The essential difference is, that the Athenians had no influence on the Rhodian port authority directing ship and grain to Athens. Therefore Parmeniscus could sell the grain at Rhodes and after repairing the ship make business heading for other cities. In Athens Dionysodorus offered to repay the principal to the creditor Darius, but was willing to pay interest only for the time until the ship had reached Rhodes. Darius refused this bargain and a year later he demanded Dionysodorus pay the principal, full interest and the penalty. Since, in contrast to Demon in the Zenothemis case, Darius had no collateral at hand – the ship was far away at sea – he brought a *dikē blabēs* (claim for damage, instead of *exoulēs*, for seizing the ship). His speech is preserved. In correct order, as plaintiff, he spoke first. In this position he was able to arrange and isolate the facts at his own discretion. So he started with the accusation that his debtor, with the sole aim of speculating for a better price, sold the grain at Rhodes, contrary to the contract and to Athenian law (§ 3). Not until § 21 were the jury informed that «allegedly» the ship had sprung a leak. These short remarks may suggestively demonstrate the method of persuasion adopted in this speech as well.

To conclude: Isolating and concealing facts was a strategy commonly used in Athenian court speeches, primarily by plaintiffs, who usually spoke first. The four shipwreck cases clearly exemplify this rhetorical strategy. In his speech *Against Lacritus* (or. 35) Demosthenes also made masterful use of this method for a litigant who spoke second.

APPENDIX: Dem. 35.10-13

ΣΥΓΓΡΑΦΗ

(10) Ἐδάνεισαν Ἄνδροκλῆς Σφήττιος καὶ Ναυσικράτης Καρύστιος Ἀρτέμωνι καὶ Ἀπολλοδώρῳ Φασηλίταις ἀργυρίου δραχμὰς τρισχιλίας Ἀθήνηθεν εἰς Μένδην ἢ Σκιώνην, καὶ ἐντεῦθεν εἰς Βόσπορον, ἐὰν δὲ βούλωνται, τῆς ἐπ' ἀριστερὰ μέχρι Βορυσθένους, καὶ πάλιν Ἀθήναζε, ἐπὶ διακοσίαις εἴκοσι πέντε τὰς χιλίας, ἐὰν δὲ μετ' Ἀρκοῦρον ἐκπλεύσωσιν ἐκ τοῦ Πόντου ἐφ' Ἱερὸν, ἐπὶ τριακοσίαις τὰς χιλίας, ἐπὶ οἴνου κεραμίσις Μενδαίοις τρισχιλίσις, ὅς πλεύσεται ἐκ Μένδης ἢ Σκιώνης ἐν τῇ εἰκοσῶρῳ ἢ Ἰβλήσιος ναυκληρεῖ. (11) ὑποτιθέασι δὲ ταῦτα, οὐκ ὀφείλοντες ἐπὶ τούτοις ἄλλῳ οὐδενὶ οὐδὲν ἀργύριον, οὐδ' ἐπιδανείσονται. καὶ ἀπάξουσι τὰ χρήματα τὰ ἐκ τοῦ Πόντου ἀντιφορτισθέντα Ἀθήναζε πάλιν ἐν τῷ αὐτῷ πλοίῳ ἅπαντα. σωθέντων δὲ τῶν χρημάτων Ἀθήναζε, ἀποδώσουσιν οἱ δανεισάμενοι τοῖς δανείασσι τὸ γιγνόμενον ἀργύριον κατὰ τὴν συγγραφήν ἡμερῶν εἴκοσιν, ἀφ' ἧς ἂν ἔλθωσιν Ἀθήναζε, ἐντελεῖς πλὴν ἐκβολῆς, ἣν ἂν οἱ σύμπλοι ψηφισάμενοι κοινῇ ἐκβάλλονται, καὶ ἂν τι πολεμίοις ἀποτείσωσιν· τῶν δ'

ἄλλων ἀπάντων ἐντελής. καὶ παρέξουσιν τοῖς δανείσασιν τὴν ὑποθήκην ἀνέπαφον κρατεῖν, ἕως ἂν ἀποδώσιν τὸ γιγνόμενον ἀργύριον κατὰ τὴν συγγραφὴν. (12) ἔάν δὲ μὴ ἀποδώσιν ἐν τῷ συγκειμένῳ χρόνῳ, τὰ ὑποκείμενα τοῖς δανείσασιν ἐξέστω ὑποθεῖναι καὶ ἀποδόσθαι τῆς ὑπαρχούσης τιμῆς: καὶ ἔάν τι ἐλλείπη τοῦ ἀργυρίου, ὃ δεῖ γενέσθαι τοῖς δανείσασιν κατὰ τὴν συγγραφὴν, παρὰ Ἀρτέμωνος καὶ Ἀπολλοδώρου ἔστω ἡ πρᾶξις τοῖς δανείσασιν καὶ ἐκ τῶν τούτων ἀπάντων, καὶ ἐγγείων καὶ ναυτικῶν, πανταχοῦ ὅπου ἂν ᾧσι, καθάπερ δίκην ὠφληκῶτων καὶ ὑπερημέρων ὄντων, καὶ ἐνὶ ἑκατέρω τῶν δανεισάντων καὶ ἀμφοτέροις. (13) ἔάν δὲ μὴ εἰσβάλωσι, μείναντες ἐπὶ κυνὶ ἡμέρας δέκα ἐν Ἐλλησπόντῳ, ἐξελόμενοι ὅπου ἂν μὴ σῦλαι ᾧσιν Ἀθηναίοις, καὶ ἐντεῦθεν καταπλεύσαντες Ἀθήναζε τοὺς τόκους ἀποδόντων τοὺς πέρυσι γραφέντας εἰς τὴν συγγραφὴν. ἔάν δὲ τι ἡ ναῦς πάθῃ ἀνήκεστον ἐν ἧ ἂν πλῆη τὰ χρήματα, σωτηρία δ' ἔσται τῶν ὑποκειμένων, τὰ περιγεγόμενα κοινὰ ἔστω τοῖς δανείσασιν. κυριώτερον δὲ περὶ τούτων ἄλλο μηδὲν εἶναι τῆς συγγραφῆς.

Μάρτυρες: Φορμίων Πειραιεύς, Κηφισόδοτος Βοιωτίας, Ἡλιόδωρος Πιθεύς.

WRITTEN AGREEMENT

(10) Androcles of Sphettus and Nausicrates of Carystus lent to Artemon and Apollodorus of Phaselis three thousand drachmae of silver for a voyage from Athens to Mende or Scione, and from there to Bosporus, and if they wish, on the left-hand side as far as the Borysthenes, and back to Athens, at two hundred and twenty-five a thousand – and if they sail after Arcturus out of the Pontus towards Hierum, at three hundred a thousand – on security of three thousand Mendaeian jars of wine, which will be shipped from Mende or Scione in the twenty-oared ship skippered by Hyblesius. (11) They pledge these, not owing any money to anyone else on this security, nor will they obtain any further loan on it. They will convey back to Athens in the same boat all the goods from the Pontus purchased with proceeds from the outward cargo.

If the goods reach Athens safely, the borrowers will pay the accruing money to the lenders in accordance with the agreement within twenty days of their arrival at Athens in full – apart from any jettison which the fellow-voyagers vote to make jointly and any enemy exaction from them, but otherwise in full. They will place the security intact under the control of the lenders until they pay the accruing money in accordance with the agreement.

(12) If they do not pay within the agreed time, the lenders shall be permitted to pledge the pledged goods and to sell them at the prevailing price; and if the proceeds fall short of the amount which ought to accrue to the lenders according to the agreement, the lenders, both singly and together, shall be permitted to exact

it from Artemon and Apollodorus and from all their property, both on land and at sea, wherever it may be, in the same way as if judgment had been given against them and they had defaulted in payment.

(13) If they do not enter Pontus, after waiting in the Hellespont for ten days after the Dogs-tar, they shall unload in any place where Athenians are not liable to seizure of goods, and after sailing back from there to Athens, they shall pay the amount of interest written in the agreement in the previous year. If any ship in which the goods are being conveyed suffers irreparable loss but the pledged goods are saved, the lenders shall share what is preserved. On these matters nothing else is to prevail over the written agreement.

Witnesses: Phormio of Piraeus, Cephisodotus of Boeotia, and Heliodorus of Pithus.

Translation: D. M. MacDowell, *Demosthenes, Speeches 27–38*,
(*The Oratory of Classical Greece* 8) Austin 2004.