

Apollodoros v. Phormion : the Computation of Damages

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Apollodoros sued Phormion for twenty talents (Dem., 36, 3), but neither litigant explains what this sum represents. Instead of Apollodoros' presentation of the case against Phormion himself, where he must have made a clear statement of the damages he suffered, we have his prosecution of one of Phormion's witnesses for perjury (Demosthenes 45 and 46), where the original *timema* is no longer relevant. On the other side it was not Phormion's business (in Demosthenes 36) to clarify why his opponent was seeking a certain sum.

Current explanations of the demand for twenty talents start from the contract (Dem., 36, 4-6) by which Phormion leased the banking business of Apollodoros' father, Pasion. The parties intended to have Phormion assume responsibility for loans which had already been made from the bank's deposits, but as a non-citizen he would be unable to foreclose on real estate which had been offered as security. Therefore, Pasion took those loans over in his own name and agreed to owe the bank personally. Scholars have seized upon the amount of the loans, eleven talents, as the key to the damages sought by Apollodoros. Since he claims that the contract is spurious, the usual interpretation is that he is asking for the return of the eleven talents which Phormion misappropriated, plus interest or other sums adding up to the twenty talents⁽¹⁾. Recently Pearson has

(1) J.E. SANDYS, *Select Private Orations of Demosthenes*, II (1896)

suggested, "The contention of Apollodoros is that Pasion, far from owing the bank eleven talents, had put eleven talents of his personal fortune into the bank" (2).

As between the two explanations, the second has more to commend it. The main issue in the proceedings is whether Phormion, as he says, leased only the deposits in the bank and the right to employ them, τὴν ἐργασίαν αὐτὴν τῆς τραπεζῆς καὶ τὰς παρακαταθήκας (3), or whether he also leased the equity capital (ἀφορμή) which Pasion had accumulated, as Apollodoros charges (4). Although neither man says so explicitly, Apollodoros must be seeking the repayment of this equity capital since the alleged existence of this *aphorme* is the only topic which Phormion addresses in defending his conduct (5). The usual view is deficient in having Apollodoros merely ask for restitution of the eleven talents which Phormion put down as Pasion's debt to the bank, without demanding the return of the *aphorme* as well.

Pearson's version at least has the virtue of making Apollodoros seek repayment of the *aphorme*, in the amount of eleven talents, but is still not really satisfactory. After all, Apollodoros argues that the lease which Phormion offers in evidence is a

xxiv, n. 4; LOUIS GERNET, *Démosthène. Plaidoyers civils*, I (1954) 201; RAYMOND BOGAERT, *Banques et banquiers dans les cités grecques* (1968) 347; J.K. DAVIES, *Athenian Propertied Families* (1971) 432; Eberhard ERXLIEBEN, *Klio* 55 (1973) 124.

(2) LIONEL PEARSON, *Demosthenes: Six Private Speeches* (1972) 215. The superiority of this version is shown by Dem., 36, 12, where Phormion contrasts the eleven talents as a charge against Pasion's estate with his alleged contribution to the bank as an asset of the estate. However, Phormion does not specify the size of this contribution.

(3) Dem., 36, 6; cfr also 36, 13, where he says that the subsequent lessees took the deposits on the same terms.

(4) Dem., 36, 11-12; 45, 5 and 47; and 46, 27.

(5) See especially 36, 1-27. The last half of the speech is largely an argument from *ethos*, contrasting the personalities of the two opponents, where Demosthenes deflects Apollodoros' appeal to racial prejudice by showing that everything spiteful which he says about Phormion applies equally to himself.

forgery⁽⁶⁾. How can he then argue from it that the eleven talents were owed *to* Pasion, not *by* him? Moreover, Pearson has Apollodoros base his entire case on a simpleminded deception: "He apparently proposes to argue that the bank is being robbed by Phormio, because he has not produced money that is 'owed' to it — as though they will not realize that this is a credit, not a debit"⁽⁷⁾. It is true that Apollodoros lost his suit against Phormion, but he did manage to recover twenty talents from the bank's customers by persuasion or through litigation⁽⁸⁾. He did not accomplish this by such foolishness as Pearson ascribes to him. As we can see from his successful prosecution of Timotheos (Demosthenes 49), he founded his claims firmly on the bank's records, and — as I shall outline — he could use those records in suing Phormion.

The proponents of both views have been following a false scent. As far as one can judge, it is Phormion, not Apollodoros, who introduces the figure of eleven talents into the proceedings. When Apollodoros does deal with it, he attempts to rebut Phormion's version by ridiculing this sum and by denying the authenticity of the document in which it appears. It is unreasonable, therefore, to suppose that Apollodoros is basing his claim for damages on the eleven talents.

As we have seen, Phormion argues that he leased only the deposits of the bank without the equity. To prove this contention he introduces his contract with Pasion into evidence. If the jury accepts the genuineness of the document, Phormion has his case won. But to attain that end he must give a satisfactory explanation of the clause which obligates Pasion to pay the bank eleven talents. It is for this reason that Phormion brings this sum into his story.

When Apollodoros came to prosecute Stephanos for perjury, rather than presenting a coherent version of what Phormion had done to him and why he was entitled to receive twenty

(6) Dem., 45, 5, 29-33, and 47.

(7) *Op. cit.*, 215.

(8) Dem., 36, 36 and 41.

talents in compensation, he chose two other tactics instead, to pick out items from the testimony of the various witnesses and from the rest of Phormion's speech which could be made to seem implausible on first hearing, and to raise racial and social prejudice against Phormion, the freedman. It is the first which concerns us. Apollodoros quibbles, for instance, that Phormion's witnesses have testified about Pasion's "will" when they should have used the words, "purported will" (Dem. 45, 19-26). Again, the opposing side alleges that Pasion was in debt to the bank for eleven talents. Even if he was, who could have been responsible for this sad turn in his fortunes? It must have been Phormion, who was running the bank for some years prior to the execution of the lease. But this does not square with his story that Pasion wanted him to continue in charge (Dem., 45, 31-33). Thus does Apollodoros hope to reduce Phormion's account of the lease and its eleven talents to the absurd. This figure is not the foundation of Apollodoros' claim for damages, but the main weakness in his opponent's case.

To reconstruct Apollodoros' theory of Phormion's fraud and the resulting damages, we must free ourselves from the preoccupation with the eleven talents. Instead of looking at Apollodoros' attempts to rebut the defense which Phormion offered, we must ask how he could have presented his own case against the banker. What could he prove against Phormion? More importantly, what points could he not establish?

The problem is straightforward, and Apollodoros did not need accounting tricks. Using the memoranda which his father left him, the γράμματα which he mentions in the speech against Timotheos⁽⁹⁾, Apollodoros could easily demonstrate how much

(9) Dem., 49, 5, 8, 30, 43, and 59. Phormion also says (Dem., 36, 20-21 and 36) that Apollodoros used such documents to prosecute the borrowers. At 49, 5 Apollodoros tells the jury how he happens to know precisely what dealings his father had with Timotheos: "For the bankers are accustomed to write memoranda (ὑπομνήματα) of monies they give, and for what purpose, and of what someone deposits, in order that what is taken and what is deposited may be known to them for their accounts".

equity capital Pasion had accumulated in his bank. What he could not show from these documents was that Phormion had rented the *aphorme* in addition to the deposits.

The *idia áφορμή* (Dem., 36, 11-14) is that portion of a bank's capital which belongs to the banker rather than the depositors. Even if Pasion originally had no capital of his own in the bank and simply lent the deposits, the interest which he collected and lent out again would constitute the bank's *aphorme*, a sum which would grow through the years. Apollodoros could use the bank's records to show its assets (loans and cash on hand) and its liabilities (deposits) prior to the execution of the lease. The difference would be Pasion's equity.

Apollodoros had a second way of making his point. As Phormion tells it in § 5, Pasion had made loans of thirty-nine talents from his own funds⁽¹⁰⁾. Of this amount, those loans which had been made *through the bank* would be part of its equity so that Apollodoros could argue that in leasing the *aphorme* Phormion became responsible for those loans. When Apollodoros sued him twenty years later, many of the loans had still not been collected and were obviously uncollectable⁽¹¹⁾. It would follow, then, that Phormion must make these loans good by reimbursing Apollodoros out of his own fortune. The records of the bank enabled Apollodoros to demonstrate the amounts which Timotheos owed. Against Phormion he could likewise show the debts of all the other borrowers who had not repaid their loans.

But here the documentary material which had helped Apollodoros win so many other disputes in court finally failed him. The memoranda of deposits and loans which Pasion kept

(10) This passage is discussed extensively in the second half of this paper.

(11) The loans originally amounted to fifty talents (36, 5), of which Apollodoros had collected twenty talents (36, 36 and 41); I suggest *infra* that Pasion had collected some of them himself. Two talents in loans may have formed part of the dowry of Pasion's widow (Dem., 45, 28). Phormion (36, 41) seems to suggest that the debts could still be collected, which of course would relieve him of the onus.

would not answer the questions which are at the heart of the case. Did Phormion lease the entire capital of the bank (including the *aphorme*) or just the deposits? Only the lease would show this. Further, if he did lease only the deposits, did he take responsibility for the loans which Pasion had made out of the deposits, or did Pasion retain that liability by substituting himself as debtor to the bank in the amount of eleven talents? Only the lease would settle this question as well. The document which Phormion produces tells against Apollodoros on both points, and he can only answer that it is a forgery.

We can summarize Apollodoros' plea to the jury as something like the following:

For many years my father successfully operated a bank. Near the end of his life he turned over daily control to Phormion (Dem., 45, 33) and later leased the bank to him. The bank had x talents in loans including y talents from the equity capital (*aphorme*) which Pasion had built up over the years. Phormion agreed to pay one hundred minai a year for the use of the deposits and the capital (45, 32) and to return both intact at the end of the lease. After my father died, Phormion debauched his widow and persuaded her to destroy the lease agreement⁽¹²⁾. He then forged a substitute.

At the expiration of the lease Phormion returned the deposits but denied his obligation for the *aphorme*. Still, I convinced some of the bank's debtors to repay what they owed and brought suits against others to compel repayment (Dem., 36, 36 and 41). But many of the debtors have become insolvent or have fled from Athens so that z talents in loans could not be recovered⁽¹³⁾.

I can present documents to verify the loans outstanding⁽¹⁴⁾ but have none to prove that Phormion

(12) Apollodoros refers to sexual misconduct at 45, 3, 27, 39, 79, and 84. From 36, 18 we learn of his charge that his mother destroyed the documents which would prove his case.

(13) Clearly many borrowers defaulted during the banking crisis which Phormion mentions in §§ 49-51. For examples of men who left Athens rather than go through legal proceedings cfr Dem., 32, 24-30 and 33, 20-21.

accepted responsibility for them since he has replaced the genuine lease with a forgery. But it stands to reason that my version is correct since the wealthiest man in Athens could not possibly owe his slave eleven talents, and rent which Phormion paid shows that he was employing the *aphorme* in addition to the deposits (45, 32-33).

One ought to conclude, then, that Apollodoros was not merely seeking reimbursement of the eleven talents mentioned in the lease nor trying to transform that sum from a debt to an asset. He was demanding repayment of all the loans which Pasion had made through his bank which were outstanding at the time of the trial.

Apollodoros never specifies the size of the *aphorme*, but Phormion himself probably does. Since he, as Pasion's bank manager and as the guardian of Apollodoros' brother, had access to the very same material as Apollodoros, the two antagonists must have agreed on many of the facts in the case. Phormion explains why Pasion owed eleven talents "to the bank (τὴν τράπεζαν). For he did not owe this through ἀπορία, but through φιλεργίαν." Ἡ μὲν γὰρ ἔγγειος ἦν οὐσία Πασίωνι μάλιστα ταλάντων εἴκοσιν, ἀργύριον δὲ πρὸς ταύτην δεδανεισμένον ἴδιον πλεόν ἢ πενήκοντα τάλαντα (Dem., 36, 4-5, where some editors bracket ἴδιον). The usual interpretation of this sentence is that Pasion had fifty talents in loans *in addition to* his landed estate, but Erxleben asserts that πρὸς ταύτη means that Pasion had fifty talents in loans *at the bank* (15). It is not Demosthenes' habit, however, to refer to the

(14) It may even be that Phormion uses these documents against Apollodoros at 36, 40-41, as evidence of his fabulous wealth. In saying (36, 18) that Apollodoros told the arbitrator that he lacked τὰ γράμματα, Phormion is merely setting up a straw man. Of course Apollodoros had *some* documents left by his father, but he will argue that he lacks the key document, since his mother destroyed the lease.

(15) *Op. cit.*, 119. For the view that the phrase means "in addition to" cfr F.A. PALEY, *apud* SANDYS, *op. cit.*, 8, and the translations of J.H. VOEMEL (1845) and A.T. MURRAY (1936). V.N. ANDREYEV, *VDI*, 1979, 1, 134-139, understands Phormion to say that Pasion had twenty talents lent on the security of land, but the contrast in the μὲν/δέ clauses is

bank by the pronoun. For instance, in the next two sentences he says, "In these fifty talents, then, eleven talents from the deposits of the bank (τῆς τραπεζῆς) were employed. Therefore, [Phormion], renting the actual working of the bank (τῆς τραπεζῆς) and taking the deposits..." Only once in the speech does he use the pronoun⁽¹⁶⁾, in section 11: "They divided the bank (τὴν τράπεζαν) and the shieldworks, and having received a choice Apollodoros chose the shieldworks instead of the bank (τῆς τραπεζῆς). Yet if he had some private equity capital in the bank (τῆ τραπεζῆ), why would he have chosen this item rather than that (τοῦτο μᾶλλον ἢ 'κείνην)? For neither was the income greater, but less, τὸ μὲν γὰρ τάλαντον, ἢ δ' ἑκατὸν μνᾶς ἔφερον, nor was the possession more agreeable if the bank (τῆ τραπεζῆ) had private money in addition [to the deposits]". In both sections 5 and 11, even when the context is clear, Demosthenes says, "the bank". *A fortiori*, he should have said, ἀργύριον πρὸς τῆ τραπεζῆ in § 5, for we do not have the τοῦτο/'κείνην antithesis there to clarify πρὸς ταύτη, and the listener must ignore οὐσία in the μὲν-clause and the two feminine nouns in the proceeding sentence in order to connect ταύτη with τὴν τράπεζαν.

Against the usual translation Erxleben argues, "Dies aber müsste πρὸς δὲ ταύτη ἀργύριον heißen. Die zwischen ἀργύριον und δεδανεισμένον eingeschobene Stellung von πρὸς ταύτη zeigt, dass es sich nur auf die kurz vorher genannte τράπεζα (§ 4 ἐπὶ τὴν τράπεζαν) beziehen kann"⁽¹⁷⁾. In fact, however, πρὸς ταύτη does not go with the participle but separates it from its noun, just as in the μὲν-clause ἦν interrupts ἡ ἕγγειος οὐσία. Through hyperbaton Demosthenes avoids hiatus and perhaps adds emphasis as well.

between real property and money, not between money lent on land and money lent on some other security. He further suggests that Pasion borrowed, rather than lent, the fifty talents, but who would say that Pasion's debt of eleven talents to the bank did not arise from want and then explain that he had borrowed fifty talents?

(16) He uses ἡ τράπεζα nine times; in addition to the passages quoted in the text, it appears at the beginning and in the middle of § 4.

(17) *Op. cit.*, 119.

It is quite true that in the Attic orators and most other prose authors πρὸς with the dative comes first in a phrase when it means "in addition to". This is entirely natural since most authors simply string two sentences together: x and, in addition to that, y. Seldom is there need to contrast one thing or one word with another. But some authors do place a more important word or phrase ahead of the πρὸς-unit and this sometimes results in hyperbaton, such as we find in Dem., 36, 5. Herodotus has Maiandrios propose perquisites for himself: on the one hand (μέν) six talents, ἱερωσύνην δὲ πρὸς τούτοις αἰσέεσθαι ἔμοι τε αὐτῷ καὶ τοῖσι ἀπ' ἐμεῦ αἰεὶ γινομένοις τοῦ Διὸς τοῦ Ἐλευθερίου (3, 142, 4). Again, in Herodotus the people of Apollonia offer to expiate their crime against Euemos, who names two things which he would take as compensation: the best properties in the land καὶ οἴκησιν πρὸς τούτοις τὴν ἤδεε καλλίστην ἐοῦσαν τῶν ἐν [τῇ] πόλει (9, 94, 2). Plato ordains the confiscation of any foreign money in his Cretan city and adds that anyone who does not denounce a holder of such money to the authorities shall be subject to cursing and revilement and ζημίᾳ πρὸς τούτοις μὴ ἐλάττωνι τοῦ ξενικοῦ κοιμισθέντος νομίματος (*Laws*, 742B-C). We also have Aeschines, 2, 13, εἰπόντος δὲ ταῦτα τοῦ Κτησιφῶντος καὶ πολλὴν τινα ἐξαγγείλαντος πρὸς τούτοις φιλανθρωπίαν, and Arrian, 3, 18, 5, where Alexander takes up various forces, including τὴν ἴλην τὴν βασιλικὴν καὶ τετραρχίαν πρὸς ταύτῃ μίαν ἱπικὴν.

Demosthenes himself has a complex passage (24, 114-115) in which he contrasts Solon with Timokrates. Under Solon, if someone was convicted of theft, it was ordained that he pay double the assessed damages, προστιμῆσαι δ' ἐξεῖναι τῷ δικαστηρίῳ πρὸς τῷ ἀργυρίῳ δεσμὸν τῷ κλέπτῃ. For he did not consider it sufficient for wrongdoers to make *simple* restitution: the criminal must pay double the amount, δεθέντα δὲ πρὸς τούτῳ τῷ τιμῆματι ἐν αἰσχύνῃ ζῆν. Timokrates, however, has arranged for malefactors to pay simple damages without additional penalty, μηδ' ὅτιοῦν δ' ἐπιτίμιον ἔσται πρὸς τούτοις. Both here and in 36, 5 Demosthenes postpones the πρὸς-unit until he has mentioned his main point (προστιμῆσαι, δεθέντα, μηδ' ὅτιοῦν, ἀργύριον) so

that the prepositional phrase disrupts the natural flow of προσημῆσαι δεσμόν, δεθέντα ζῆν, and ἀργύριον δεδανεισμένον. Phormion's contention, then, is that Pasion had real estate worth twenty talents *plus* more than fifty talents in loans, including more than thirty-nine talents of his own money⁽¹⁸⁾.

Apollodoros has every reason to argue that *all* the loans were made through the bank so that the thirty-nine or so talents constituted its *aphorme*⁽¹⁹⁾. Since he himself had collected twenty talents in loans made by Pasion (Dem., 36, 36), it seems likely that his damage claim of twenty talents was based on the loans still outstanding, which amounted to 19 + talents.

At this point it becomes much more difficult to reconstruct Apollodoros' reasoning. One would expect him to inflate his claim by perhaps demanding interest on the sum which Phormion allegedly withheld from him or doubling the amount as the standard fine for βλάβη⁽²⁰⁾. On the other hand, half

(18) My explanation of the case does not depend on accepting or rejecting ἴδιον in 36, 5. Editors have generally condemned the word on *logical* grounds. Since the fifty talents included eleven talents from the deposits, PEARSON, *op. cit.*, 211, says, "It is therefore inaccurate to describe the fifty talents as Pasion's 'private property'". But the word makes excellent sense *rhetorically*. Even though the lease agreement technically absolved him from any responsibility for the loans already granted, it is in his interest to make it seem that they were a personal liability of Pasion's even earlier. If one objects to ἴδιον on grounds of language or style, he should consider correcting it to ἰδίᾳ. The words are confused with one another at Dem., 52, 26, where one manuscript has τὰ ἴδια in place of τὶ ἰδίᾳ.

(19) BOGAERT in fact says, *op. cit.*, 365, that all the loans were made through the bank, but there is no proof of it. Clearly some of them were; cfr Dem., 45, 33 and 49, *passim* (especially 1-5).

(20) See Hans Julius WOLFF, *Die attische Paragraphe* (1966) 54, n. 71. ERXLEBEN, *op. cit.*, 124, reaches a figure of twenty talents by adding to the eleven talents a claim for the return of the money which Pasion's widow inherited. Surely this inheritance cannot amount to nine talents, as ERXLEBEN's theory requires, for Apollodoros (45, 74) says that by forging the will Phormion obtained a dowry of five talents, apart from the inheritance, which amounted to "much money". Any orator will specify the larger, not the smaller, sum. For his part, Phormion addresses only two issues, the central point of law, whether he has fulfilled his

of the claim should belong to Apollodoros' brother, who not only did not join in the prosecution but actually supported Phormion⁽²¹⁾. Perhaps, then, Apollodoros was claiming one-half of the double damages.

Finally, as we have seen, the figure of eleven talents is part of Phormion's case so that Apollodoros would have no need to include it in his calculation of damages. It is also likely that Pasion himself collected this money and transferred it to Phormion. The original plan, remember, was for Phormion to assume responsibility for the loans which Pasion had made from the deposits, but as an accommodation Pasion took this obligation upon himself. Under the circumstances it appears inevitable that the new lessee would want to use the eleven talents in his own banking operations and that the man who was retiring from the business would try to clear up his liability as quickly as possible. If Pasion did collect these loans, naturally his heir could not seek repayment from Phormion. Since, moreover, it would be a great embarrassment to admit that Pasion paid the eleven talents to Phormion,

obligations under the lease (including his alleged responsibility for the *aphorme*), and the prejudicial charge that he has debauched Pasion's wife. He never mentions her inheritance or her dowry. If he were defending himself against a claim for either, he could cite Pasion's will to show his right to it. But when he does quote the will, he uses it to prove his main points: he did not debauch the woman since Pasion himself arranged for the marriage in the will, and he did not violate the terms of the lease, for the guardians, following the spirit if not the letter of Pasion's testament, divided his estate between Apollodoros and his brother and gave each half the rent from the bank and the shieldworks. So "how is it possible for him to make a complaint about the lease"? (See 36, 7-9 and 31-32). The will apparently became a central issue in law only when Apollodoros prosecuted Stephanos for his testimony in support of it. In that trial he uses the argument that inconsistencies between the lease and the will show that the will is forged (45, 29-36). He probably employed this line of reasoning in the trial of Phormion himself to discredit the lease.

(21) For Pasikles' stand cfr 36, 22 and 45, 37; for his half-share, 36, 36 and 45, 84.

Apollodoros had another reason not to make this amount a part of his computation of damages⁽²²⁾.

(22) Phormion could use such a repayment as proof that the lease was genuine, but he has chosen to ignore altogether Apollodoros' charge of forgery.