

MOGENS HERMAN HANSEN

**TWO NOTES ON THE ATHENIAN
DIKAI EMPORIKAI**

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In his seminal study *Ancient Athenian Maritime Courts* (Princeton 1973) E.E. Cohen presented a profound discussion of the *dikai emporikai* leading to the provocative conclusion that *dikai emporikai* were actions accepted every month (and not heard within a month) in the autumn and winter (and not in the summer during the sailing season). Cohen's conclusions have been accepted by some scholars (e.g. by D.M. MacDowell)¹ and rejected by others (e.g. by Ph. Gauthier)². For my part³, I am impressed by many of Cohen's discussions but not convinced by his conclusions, and in this paper I shall adduce some new arguments in favour of the traditional view, viz. that a *dike emporike* was an action to be brought within the sailing season and heard within a month after the magistrate's acceptance of the complaint.

I

Dikai emporikai as dikai emmenoi

The *dikai emporikai* belong to the category of *dikai emmenoi* (Dem. 33.23, cf. Dem. 7.12), but what does it mean that a *dike* is *emmenos*? The traditional view is that a *dike emmenos* is a private action which has to be brought to trial within a month⁴. According to Cohen a preferable definition would be «suits for which complaints (λήξεις) were accepted at monthly intervals and ex-

1. Review in *CR* 26 (1976) 84-85; *The Law in Classical Athens* (London 1978) 231-32.

2. Review in *REG* 87 (1974) 424-25; *Un commentaire historique des Poroi de Xénophon* (Paris 1976) 225.

3. S. Isager and M.H. Hansen *Aspects of Athenian Society in the Fourth Century B.C.* (Odense 1975) 85-87.

4. References given by Cohen page 23.

peditiously decided by a shortened procedure» (page 27). Cohen's argument runs as follows: the adjective *emmenos* has two related meanings (a) «recurring at monthly intervals» and (b) «encompassing a monthly period» (page 24). Now, when interpreting the legal term *dike emmenos*, we have one source clearly indicating which of the two meanings is to be preferred, viz. Dem. 33.23: αἱ δὲ λήξεις τοῖς ἐμπόροις τῶν δικῶν ἔμμηνοί εἰσιν ἀπὸ τοῦ βοηδρομιῶνος μέχρι τοῦ μουνιχιῶνος, ἵνα παραχρῆμα τῶν δικαίων τυχόντες ἀνάγωνται. Cohen points out, rightly in my opinion, that, according to Demosthenes, what is *emmenos* is not the hearing but the *lexis*, viz. the acceptance by the magistrate of the complaint ⁵, and so *emmenos* must be taken in sense (a) «recurring at monthly intervals» it is simply impossible to connect *lexis* with *emmenos* in sense (b). Similarly, in Dem. 7.12, the *dikai emporikai* are described as αἱ κατὰ μῆνα, meaning trials recurring in a monthly pattern. To this acute interpretation Cohen adds an argument from analogy (page 33ff), *lexeis* in γραφαὶ ξενίας were conducted by the *nautodikai* on the last day of each month (Harp. s.v. ναυτοδίκαι), and a δίκη χρέως had to be brought on the very last day of every month (Ar. *Clouds* 1189-91, 1221, *Birds* 1047). On the other hand, Cohen adduces no evidence that an action had to be brought to trial within thirty days, and he dismisses expressly the evidence of τριακοσταῖαι δίκαι as irrelevant because «the few 30-day cases known to us only from the area outside Athens provide no suggestion as to the nature of Athenian monthly suits» (page 40).

There is much to be said for Cohen's interpretation of the passages he discusses, but if we accept his new definition of a *dike emmenos* we are immediately faced with a serious problem. The purpose of the *dikai emmenoi* was the speedy settlement of disputes and it is difficult to explain how a procedure becomes expeditious simply by prescribing that complaints are to be accepted once every month. We know that the *dikai emmenoi* were exempted from the otherwise obligatory arbitration ⁶, but this is not enough if the hearing of the case could be postponed indefinitely without any magistrate being held responsible for the delay. Cohen acknowledges the problem and, after his presentation of the new definition, he adds some cautious remarks: «it is highly likely that the decision normally was rendered within 30 days of the introduction of the complaint, probably within an even shorter period» (page 39). «And it is clear that if the procedure were to work well, the cases from one month would have to be finished prior to the acceptance of the *lexeis* for the next month» (page 40). Cohen, however, is

5. For a discussion of the *lexis* cf. J.H. Lipsius, *Das attische Recht und Rechtsverfahren* I-III (Leipzig 1905-15) 816-18; A.W.R. Harrison, *The Law of Athens* II (Oxford 1971) 88-89.

6. Lex. Seg. 310,17 (the *dikai xenikai* are probably identical with the *dikai emporikai*). cf. Cohen pages 35-36, 39-40.

emphatic that the speedy hearing was only a practical consequence and not a legal requirement, and he rejects the traditional view that a hearing within thirty days was an essential element in a *dike emmenos*.

In my opinion, Cohen is wrong in presenting the two meanings of *emmenos* as alternatives and in rejecting that a hearing within 30 days was a statutory requirement. His account is so clearcut because he has omitted some important sources to which I shall now draw attention:

Dem. 42.13: καίτοι, ὧ ἄνδρες δικασταί, τίς οὐκ οἶδεν ὑμῶν, ὅτι ὁμοίως ἢ τε ἐν τῷ νόμῳ γεγραμμένη κυρία ἐστὶν ἡμέρα καὶ ἢ ὑπὸ τῶν ἀντιδίκων συγχωρηθεῖσα; πολλάκις γὰρ ἐν τε τοῖς νόμοις γεγραμμένης τριακοστῆς ἡμέρας ἑτέραν ἡμῖν αὐτοῖς συγχωρήσαντες ἐθέμεθα, παρά τε ταῖς ἀρχαῖς ἀπάσαις καὶ δίκαις καὶ κρίσεις ἀναβάλλονται τοῖς ἀντιδίκους οἱ ἄρχοντες συγχωρησάντων ἐκείνων ἀλλήλοις.

Dem. 21.47: ἐάν τις ὑβρίζη εἰς τινα... γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν, οἱ δὲ θεσμοθέται εἰσαγόντων εἰς τὴν ἡλιαίαν τριάκοντα ἡμερῶν ἀφ' ἧς ἂν γραφῆ, ἐὰν μὴ τι δημόσιον κωλύη, εἰ δὲ μὴ, ὅταν ἦ πρῶτον οἶόν τε.

Dem. 24.63: ὅποσοι Ἀθηναίων κατ' εἰσαγγελίαν ἐκ τῆς βουλῆς ἢ νῦν εἰσιν ἐν τῷ δεσμοτηρίῳ ἢ τὸ λοιπὸν κατατεθῶσι, καὶ μὴ παραδοθῆ ἢ κατάγνωσις αὐτῶν τοῖς θεσμοθέταις ὑπὸ τοῦ γραμματέως τοῦ κατὰ πρυτανείαν κατὰ τὸν εἰσαγγελτικὸν νόμον, δεδόχθαι τοῖς νομοθέταις εἰσάγειν τοὺς ἑνδεκα εἰς τὸ δικαστήριον τριάκονθ' ἡμερῶν ἀφ' ἧς ἂν παραλάβωσιν, ἐὰν μὴ τι δημοσίᾳ κωλύη, ἐὰν δὲ μὴ, ὅταν πρῶτον οἶόν τ' ἦ.

IG II²46 fr. c: ἐνδίκον τρι|ἄκοντα ἡμερ...

In Dem. 42 the speaker states that a time limit stipulated in a contract may have the same validity as a time limit fixed by law and he adduces two examples of this general rule: (a) Although thirty days is a period frequently prescribed in the laws, the parties may agree on some other term. (b) The magistrates may postpone *dikai* and *kriseis* if both parties agree. So we learn from (b) that the laws frequently fixed a time limit for the hearing of a case (δίκαι καὶ κρίσεις), and in (a) we are told that thirty days was a common time limit stated in the laws. Admittedly, we are not allowed to combine (a) and (b) and to conclude that the time limit fixed by law for the hearing of a *dike* was thirty days, but this information can be obtained from the other sources quoted above. The law quoted in Dem. 24.63 prescribes that if a person is imprisoned in consequence of an *eisangelia* to the council, the Eleven are obliged to arrange a hearing of the case within thirty days, and according to the law quoted in Dem. 21.47 exactly the same rule applies in the *graphe hybreos*. Now, the *graphe hybreos* was closely related to the *dike aikeias*, and in many cases a prosecutor had an option between the two types

of action ⁷. We know that the *dike aikeias* was one of the *dikai emmenoi*⁸ and that the *graphe hybreos* had to be finished within a month, and it is a plausible inference that a *dike aikeias*, like a *graphe hybreos*, had to be finished within a month. Finally, on a stele inscribed with a treaty (*symbola*) between Athens and Troizen, we hear once more about a time limit of thirty days in connection with the administration of justice⁹. Now, since *symbola* deal mainly with the same kind of disputes as the *dikai emporikai* this inscription provides us with one more indication that a statutory limitation of thirty days may have applied in the *dikai emporikai*.

So the laws in Dem. 24.63 and 21.47 provide us with indisputable evidence that in some public actions, an interval of max thirty days between the complaint and the trial was a statutory requirement. The passage from the speech *Against Phainippos* (Dem. 42) suggests that the same rule applied in some *dikai*, and the similarity between the *graphe hybreos* and the *dike aikeias*, which was a *dike emmenos*, indicates that the *dikai emmenoi* were actions, probably accepted every month by the competent magistrate as maintained by Cohen, but also subject to the rule that all complaint received in one month had to be heard before the acceptance of new complaints in the following month. On this interpretation, we have no difficulty in explaining how a *dike emmenos* was a speedy procedure.

II

Dikai emporikai heard in the summer

According to Dem. 33.23 (quoted above in part one), *dikai emporikai* could be brought only in the period from Boedromion to Mounichion (approximately from October to April). Paoli emended the text¹⁰, reversing the order of the months so that *dikai emporikai* could be brought only in the period from Mounichion to Boedromion i.e. during the sailing season. Paoli's emendation was accepted by Gernet and Harrison¹¹, but Cohen argues in favour of the transmitted text¹² and maintains that the time indication makes perfect sense as it stands:

7: Dem. 54.1 (*Against Konon*), cf. Isok. 20.5.

8. Arist. *Ath. Pol.* 52.2.

9. In *Symbōla* (Nancy 1972) Ph. Gauthier suggests the following interpretation: «A deux reprises sont fixés des délais, 5 jours (*i* 6) et 30 jours (*c* 57), qui pourraient être l'un le délai de citation, l'autre celui du jugement (cf. Gitzig, *Staatsverträge*, p. 12)» (page 167).

10. U.E. Paoli, «Zur Gerichtszeit der δίκαι ἐμπορικαὶ im attischen Recht» *ZSav* 49 (1929) 473-77.

11. L. Gernet, *Démosthène Plaidoyers civils I* (Paris 1954) 141. Harrison (*op. cit. supra* n. 5) 86.

12. «Emporic Cases Heard in the Winter» (42-59).

the *dikai emporikai* were introduced in order to facilitate commerce and carriage of goods by sea. In the summer, the *emporoi* were busy and did not wish to waste time on litigation. On the other hand, since *emporoi* regularly stayed in Athens during the winter, the period from Boedromion to Mounichion was the most suitable time for settling all commercial disputes arisen in the course of the sailing season. So the introduction of *dikai emporikai* to be heard during the winter was a welcome reform and much more convenient than a reform by which litigation was confined to the sailing season.

Against Cohen it must be objected first, that there is not sufficient evidence for the view that foreign *emporoi* stayed in Athens during the winter¹³. Second, that it is obscure why a *dike emporike* had to be a speedy procedure if it could be heard only in the winter when the *emporoi*, wintering in Athens, had plenty of time. Third, that Cohen has great difficulties in explaining the clause ἵνα παραχρῆμα τῶν δικαίων τυχόντες ἀνάγωνται, offered by the speaker of Dem. 33 as an explanation of why the *dikai emporikai* could be brought only in some months and not all the year. Fourth, that Cohen does not discuss Xenophon *Poroi* 3.3, and fifth, that two of the *dikai emporikai*, known to us from speeches in the Demosthenic corpus, do not square with Cohen's reconstruction. In this section I shall carry on the discussion of the crucial passages Dem. 33.23 and Xen. *Poroi* 3.3¹⁴ and add some new evidence supporting the emendation proposed by Paoli, viz. a reconstruction of the chronology of the events related in Dem. 34, *Against Phormion*, and in Dem. 56, *Against Dionysodoros*.

Our most important source is the passage in Dem. 33 in which the speaker states that *dikai emporikai* could be brought only between Boedromion and Mounichion ἵνα παραχρῆμα τῶν δικαίων τυχόντες ἀνάγωνται. It is in fact the discrepancy between the indication of time and the motivation for it that constitutes the strongest argument in favour of Paoli's emendation. How can it be possible for an *emporos* to sail without delay if the *dikai emporikai* were brought and heard during the winter when sailing was suspended or at least reduced to a minimum? Cohen takes great pain to argue that, in the motivation offered by the speaker, there is no emphasis on the *temporal* relationship between the litigation and the departure from Athens at the beginning of the next sailing season. The meaning is only that when all disputes have been settled during the winter there is no obstacle preventing an *emporos* from sailing out at the very beginning of the sailing season. Now, in his discussion of the passage Cohen focuses on the participle τυχόντες without offering any interpretation of the crucial word παραχρῆ-

13. Pointed out by J. Velissaropoulos in her review of Cohen in *Jura* 24 (1973) 353-54.

14. Cf. Gauthier *op. cit. supra* n.2

μα. This adverb may go either (a) with the participle *τυχόντες* or (b) with the finite verb *ἀνάγονται*. If we accept (a) the meaning must be that *emporoi* can have their disputes settled at once, *i.e.* immediately after they have arisen (in the course of the sailing season!). If we prefer (b) the passage must be taken to mean that the *emporoi* can sail out immediately after their disputes have been settled, and again the implication is that disputes are settled during the sailing season. No matter how *παραχρῆμα* is interpreted it is irreconcilable with the indication of time for *dikai emporikai* transmitted in the MSS. If we follow Cohen in retaining the order of the months we must delete or emend *παραχρῆμα* in the next line.

Similarly, in *Poroi*, which was published a few years before the introduction of the *dikai emporikai*¹⁵, Xenophon recommends a reform by which commercial disputes can be settled by the harbour officials immediately during the sailing season by some speedy procedure so that the *emporoi* are not prevented from leaving Athens: εἰ δὲ καὶ τῆ τοῦ ἐμπορίου ἀρχῆ ἄθλα προτιθείη τις, ὅστις δικαιοτάτα καὶ τάχιστα διαιροίη τὰ ἀμφίλογα, ὡς μὴ ἀποκωλύεσθαι ἀποπλεῖν τὸν βουλόμενον (Xen. *Por.* 3.3).

The principal objection against Cohen's reconstruction is based on the chronology of events in Dem. 34 and in Dem. 56.

Dem. 34 is a speech for the defence delivered by Chrysippos and his brother in a *paragraphe* raised by Phormion against a *dike emporike* brought by Chrysippos. The basic facts are as follows¹⁶: Chrysippos and his brother extend a maritime loan to Phormion — Phormion sails from Athens to the Bosphoros aboard Lampis' ship — Lampis' ship is wrecked near the Bosphoros outside the harbour Lampis and Phormion return to Athens — Phormion refuses to repay the loan and Chrysippos brings a *dike emporike* — Chrysippos and Phormion agree on private arbitration — the arbitrator refers the case to the people's court — Phormion counters with an *paragraphe* — When the *paragraphe* is heard, Dem. 34 is delivered by Chrysippos and his brother. Now, there can be no doubt that Phormion's journey from Athens to the Bosphoros and back again took place during the sailing season. Furthermore, it is explicitly stated by Chrysippos that the bringing both of the *dike emporike* and of the *paragraphe* occurred in the previous year¹⁷.

If, following Cohen, we accept that maritime suits had to be brought be-

15. In his article «sur les actions commerciales en droit athenien» *REG* 51 (1938) 12 L. Gernet fixed the introduction of the *dikai emporikai* within the years 355 (Xen. *Por.* 3.3) and 342 (Dem. 7.12). Cohen (186) and MacDowell (*op. cit. supra* n.1 231) accept the same two sources as the *termini post* and *ante quem* for the reform of the *dikai emporikai*. Let me repeat what I have already stated earlier (*op. cit. supra* n.3 84) that the *terminus ante quem* must be 347 since Demosthenes refers to a *dike emporike* in his speech *Against Meidias* 176.

16. Cf. Isager/Hansen (*op. cit. supra* n.3) 156-69.

17. λαβὲ δὲ μοι καὶ τὸ ἐγκλημα ὃ ἔλαχον αὐτῶ πέρυσιν (16). αὐτοὶ γὰρ οὗτοι παραγραφὴν

tween October and April, we must assume that Phormion returned to Athens late in the sailing season, that both the *dike emporike* and the *paragraphe* were brought during the autumn, but that the hearing of the *paragraphe* was postponed for almost a year and did not take place until after October in the following year. In the speech, however, there is not the slightest indication of any prolonged interruption of the procedure¹⁸. On the contrary, a passage in the speech suggests that Phormion's arrival in Athens is a fairly recent event antedating the hearing of the *paragraphe* by perhaps one month, but not one year¹⁹.

Conversely, assuming with Paoli and Gernet that *dikai emporikai* had to be brought during the sailing season, we have no difficulty in reconstructing the chronology. Phormion sets out early in the sailing season, he returns early in the summer before the turn of the year, and both the *dike emporike* and the *paragraphe* are brought before the turn of the year in July²⁰. The *paragraphe* is heard later in the summer and there is no interruption of the procedure.

Dem. 56 deals with a loan extended by Dareios and Pamphilos to Dionysodoros and Parmeniskos²¹. The loan is a *nautikon daneion* for a voyage Athens — Egypt — Athens. The speaker states that the loan was taken in the year preceding the trial in the month of Metageitnion²² and had to be repaid before the end of the sailing season²³. Parmeniskos sails the ship to Egypt while Dionysodoros stays in Athens. On its way back from Egypt, however, the ship calls at Rhodes, according to Dionysodoros because it is wrecked. The grain on board is unloaded

διδόντες πέρυσιν (17).

18. The events related in 36-37 are prior to the *nautikon daneion* contracted between Phormion and Chrysippos. In 36 I follow Rennie and Gernet in accepting Blass' reading διέθετο [ό] κοινωνήσας (Rennie: προσκοινωνήσας) whereas, pace Voemel and Rennie, I follow Blass and Gernet in retaining the MSS ἡμετέρων.

19. καὶ νῦν μὲν εἰς τὸ ἐμπόριον ἦκων, οὐδὲ τὸ συμβόλαιον ἐγένετο, οὐκ ὀκνεῖς ἀποστερεῖν τὸν δανείσαντα; (27).

20. A voyage from Athens to the Bosphoros and back to the Piraeus could probably be completed in about one month (cf. Isager/Hansen [*op. cit. supra* n.3]60). Phormion had to stay some time in Pantikapaion (8-10), but, setting out in Elaphebolion, he may have been back in Athens as early as in the beginning of Thargelion.

21. Cf. Isager/Hansen (*op. cit. supra* n.3) 200-213.

22. Διονυσόδωρος γὰρ οὕτως, ὧ ἄνδρες Ἀθηναῖοι, καὶ ὁ κοινωνὸς αὐτοῦ Παρμενίσκος προσελθόντες ἡμῖν πέρυσιν τοῦ μεταγεινιῶνος μηνὸς ἔλεγον ὅτι... (5). Cf. δεύτερον ἔτος τουτί (4, 16, 34, 45).

23. καὶ δεῖον ἡμᾶς ἐν τῇ πέρυσιν ὥρα κεκομίσθαι τὰ χρήματα... (3).

and sold, and the ship does not return to Athens. The lenders now approach Dionysodoros and claim repayment of the loan plus interests as stipulated in the contract. Dionysodoros offers repayment of the loan plus the interest for the part of the voyage actually completed, *viz.* Athens — Egypt — Rhodes. The lenders refuse to accept this compromise and bring a δίκη θλάβης|ἐμπορικῆ²⁴ against Dionysodoros. Dem. 56 is the speech for the prosecution delivered by Dareios.

Now, when was the action heard? If we assume that *dikai emporikai* had to be brought in the period Boedromion — Mounichion we are bound to accept the following reconstruction: The loan was taken in Metageitnion and the contract stipulated repayment before the end of the sailing season. So the lenders must have approached Dionysodoros with their claim in the course of the autumn probably in Boedromion or in Pyanopsion. Nevertheless, no legal action was taken by the lenders until one year later in the period Boedromion — Mounichion in the following year, which is indeed strange. Why did the lenders allow one year to pass when they had the possibility of having Dionysodoros put on trial immediately? A much more reasonable reconstruction can be obtained by assuming that *dikai emporikai* were heard during the sailing season between Mounichion and Boedromion: the loan is taken in Metageitnion and when the lenders learn about the alleged shipwreck it is already too late to bring a *dike emporike*. So legal proceedings are to be adjourned until the sailing season from Mounichion to Boedromion, and the *dike emporike* is heard by the *dikasterion* in the following year, presumably shortly after the turn of the year. On this interpretation we are faced with a delay of no more than three months (from Mounichion to Skirophorion) which causes no problems. Furthermore, Dareios relates that, during the controversy over the repayment of the loan, Dionysodoros offered to pay back the loan plus a part of the interest. The lenders were advised by some friends to accept the money offered but afterwards to sue Dionysodoros for the remaining part of the interest. Dionysodoros, however, refuses to pay the money offered when he learns that the lenders will not cancel the contract and resign their claim for the remaining interest (12-15). This is a strange course of action on the part of the lenders if they had been in a position to bring a *dike emporike* immediately in the course of the autumn, whereas the compromise mentioned makes perfect sense if we assume that the lenders, by accepting the offer, had a possibility of regaining most of their money immediately but the remaining part of the interest only half a year later when, in Mounichion, *dikai emporikai* could be brought again.

24. The title of the speech is Κατὰ Διονυσοδώρου θλάβης which seems plausible and it is apparent from the reference to *epobelia* and imprisonment (4) that Dareios has brought a *dike emporike*.

Summing up. If, in Dem. 33.23, we retain the indication of time as transmitted in the MSS and assume that *dikai emporikai* could be brought only between Boedromion and Mounichion, we have great difficulties in explaining the phrase ἵνα παραχρῆμα τῶν δικαίων τυχόντες ἀνάγωνται. Furthermore, we are forced to accept very strange time tables for the course of events in the cases dealt with in Dem. 34 and Dem. 56. So I still prefer, as I did in 1972 and 1975²⁵, to follow Paoli and Gernet and to reverse the months which is indeed a plausible and easy emendation.

25. S. Isager and M.H. Hansen, *Attiske Retstaler fra Demosthenes' Tid* (Kobenhavn 1972) 73, 104-05, 225. Isager/Hansen (*op. cit. supra* n.3) 60, 85, 208-09.