Athenian Concept of the Surety:

One of the characteristics of Greek contracts that drew my attention over the last decade was their public settings. The Greek contract is not concluded by the contracting parties behind closed doors. It is public and involves, besides the contracting parties themselves (and these naturally are not always just two) many other members of their community. The act of contracting is attended by witnesses, usually six, and some contracts also involve guarantors: this is the case with the sale contract, where former owners of the asset, from whom the current vendor bought it, are required to warrant the title to the purchased asset if it happens to be challenged. In the case of loan and lease contracts, this is the surety (ἐγγυητής in Athens, ἔγγυος in the papyri and elsewhere) are to guarantee that the debtor or the lessee will perform his contractual obligations, in the case of the former the return of the debt.

Within an earlier paper, published in the proceedings of the last symposion, I studied the position of the surety in Ptolemaic Egypt. The paper started out from the loan contract [HA1]. Ptolemaic contracts recording cash loans incorporate as a rule a clause, establishing the identity of the surety of the debtor (ll. 42-46). The same contracts also contains the *praxis* clause-i.e. the clause recording and defining the form of execution that the creditor can apply, should the debtor fail to return the debt on time (ll. 39-43). The clause allows the creditor to apply the *praxis* not only against the debtor, but also against the surety. But what does the *praxis* mean in this context? Does it means that if the debt was not paid on time, the creditor could exact it from either the debtor or the surety at wish?

An analysis of the related contemporary papyri (petitions, letters and others) induced me to a negative answer. According to my current working hypothesis, once the debt was not duly returned, not even after repeated requests by the creditor from the debtor, the debtor was summoned to court. On that occasion the surety was to warrant in writing the attendance of the debtor as scheduled. The document of warrant also recorded a fine, which the surety was to pay if the debtor did not show up on time. The fine equaled, and even surpassed the amount

of the debt claimed by the creditor, but formally it was a different entity. As a result, if the debtor did not show up the creditor did not have to prove at all in court the existance of the debt. Instead, he could rely on the act of warrant, charging the money by simply showing that the surety did not produce the debtor as pledged. It was this innate weakness of the institution of the surety that led to its *de facto* abrogation in loan contracts among private persons in the late Ptolemaic period, roughly aroung 130 BCE. So, far, in a nutshell, the contents of the *Symposion* paper.

In the course of my studies on Ptolemaic law, I was of course aware of the classical Greek background of the recorded legal institutions. Legal institutions that appear on the papyri go back to the classical world, and can be better understood if one studies that background. I have never conducted such research in the past, at least not in connection with my own personal research, but have become increasingly intrigued by this question, so that when Werner invited me to speak at this meeting, I decided to jump into the for me cold Athenian watter. I goes without saying that the work presented here is a work in progress, which is not meant to be exhaustive in the sources studied, nor, needless to say, does it claim affirmitivness or conclusiveness.

The material to be studied below is Athenain, in particular the orators, but the *Fragestellung* is still to some extent Ptolemaic. In my symposion paper, I opened the discussion with two pieces of evidence: one was the celebrated, and well studied, episode in the Homeric epos, relating the act of adultery committed by Ares and Aphrotide, their apprehension and binding by Aphorodite's husband Hephaistos, and the counsel of the gods, in which Poseidon offers surety for the relase of Ares, so that the latter could pay the due indemnity [HA3]. The second piece of evidence, BGU XIV 2367 [HA2], contains some regulations of a Ptolemaic law, dating to the early third century (around 275 BCE) that enjoins the sealing of a legal document, in all probability the double document, by the contracting parties, and the safekeeping of the document by one of the witnesses, the *syngraphophylax*.

Among the parties mentioned in that law we find the creditors (οἱ δανείζοντες), the debtors (οἱ δανειζόμενοι), the witnesses and the sureties. Mentioning the sureties did not strike me when I wrote the *symposion* paper as anything peculiar. I was quite familiar with the attestation of sureties in contemporary Greek papyri, with the Homeric scene, and also with accounts of the institution of surety in Athens as made by specialists in Athenian law. I therefore asserted in the *symposion* paper that the legislator of *BGU* XIV 2367 did not introduce the surety as a new institution. The institution of the **contractual surety**, that is sureties appointed on the act of contracting and recorded in the contract of loan, mentioned in the law and widely attested in contemporary Greek loan contracts, was deeply rooted I assimed and went back to the classical period. But as I started studying the Athenain sources I became less confident: this is the question I wish to discuss with you: to what extent does the Athenian source material bear evidence of the appointment of sureties in the context of loan contracts among private persons. I think that the study of this question may highlight a certain transformation in the concept of Greek surety in the fourth century BCE, a point that I will address at the end of this paper.

The earliest, and by far the best documented type of surety is what I term procedural-surety. In article 4 of your handouts I list key features of this type of surety. I ask you to follow the list as I discuss the sources. Let us start with the earliest source, and maybe also the simplest to analyse: Hom. *Od.* 8.343-359 [HA3]. According to a episode narrated by the aoidos Demodokos, the aduterous Ares and Aphrodite are apprehended and bound by Aphrotide's husband Hephaistos. Hephaistos summons the gods, who remain present in the following scene: the act is, in other words, public (1). The gods also pass verdict on the, stating Ares' obligation to pay fine for adultery, the μοιχάγρια, the context is hence judicial, or in this case, semi-judicial (2). Since the verdict has already been passed, the matter at stake is the enforcement of the payment by the culpit, or in other words, the execution of the debt. We are facing, according to the terminology to be followed below, a case of execution-surety.

Poseidon, in what in the following lines will be designated ἐγγυύη, asks Hephaistos to release Ares, promising that Ares will pay indemnity. This is another feature of the Homeric surety: A promises to B that C will perform an act (3): in this case the τείνειν (l. 348). The text also prescribes preconditions for release: binding the surety himself as a substitute for the debtor (roughly a primitive version of 5), and option to avert judgement, through the payment of the indemnity by the surety (6).

Some of the above features are probably archaic: this is in particular the case with the actual immeditate detention of the surety until the debt is paid. But others are well attested in Athenian literary sources (I refer in particular to the orators). Within the Athenean sources, it is the law discussed in against Timocrates that offers one of the most lucid examples and closest parallels to the Homeric model. According to a motion brought forward by Timocrates in *against Timocrates* [HA5], those found by the assembly to be public debtors (hence public and judicial (1,2)), should go to jail until the debt is paid. The detention can be averted by offering sureties that will make sure that they will pay the debt (A promises to B that C will perform an act (3)). The appointment of surety substitutes (5) the debtor's incarceration. The surety can also pay the debt himself, hence averting (6) the execution against the debtor.

All these are features that are attested in Homer. Other are new, other because the homeric passage did not both mentioning them, or because they are later developments. This is the case with the formula denoting the appointment of the surety (4) [καταστῆσαι δεῖνα ἐγγυητὴν ἢ μὴν ἐκείσειν, which is replaced by ἐγγυᾶσθαι ἢ μὴν δεῖνα (debtor) ἐκείσειν if the act is described from the surety's point of view], the interval (7) given to the debtor to settle his debt, and the sanction in case of non-payment (8): incarceration of the public debtor and confiscation of the surety's assets. To these we may add as a novelty, again in comparison to the Homeric passage, the very regulation of the affair by law (9), the very purpose of Timocrates' motion.

Another type of surety, better attested than the execution surety is the attendance-surety: when the procedure is set in motion, both litigants have to present sureties that they will attend the hearing. The act is performed before the magistrate who will introduce the case to court (e.g. the polemarchos), that is it is public and judicial (1,2) [see for example item 6b]. The accusing party summons the defendant to appoint sureties, whom the defendant then appoint before the said official [see for example item 6c]. The sureties promise to the magistrate that the defentant will attend: A promises to B that C will perform an act (3). The formula (4) used is that attested in the case of the execution surety: ἐγγυᾶμαι ἢ μὴν μενεῖν vel sim. At least as far as the defendant is concerned, the appointment of sureties substitutes incarceration (6) [note 6a, 6b, 6d]. In some cases, at least, the consequence of non-attendance is the incarcarceration of the sureties (8), and the procedure is regulated by law (9) [note items 6a, 6d]. The only element that is not attested, is naturally the creditors ability to avert the debtor attending court by attending it himself (6). Litigation by proxy is not possible.

Most literary sources recording ἐγγυητής as a legal term relate to one of the above two scenarios: attendance-surety is recorded in 10 sources, execution-surety in four. Taking into account this accumulation of evidence, along side the homeric surety on the one end, and the Ptolemaic source material on the other, we can firmly establish the procedureal surety as a firm component of the Greek legal koine. Some of the subsets of the procedural surety, such as the public and judicial context (1,2), the pledge to have another perform an act (3), the established formula denoting this act (4) and maybe also the substitution incarceratio through surety (5), seem especially common, and can be regarded as indispensible compontents of the act. At the same time, there are cases of surety where none of these elements seems present.

A good example is provided by the Trapeziticus of Isocrates, paragraph 37 [HA7a]. The speaker, a Thracian, short of money in Athens, takes a loan from a certain Stratokles, which should be returned by the speaker's father in the Chersonesos. But Stratokles is concerned that he will not be able to retrieve the money either from the father or the son, upon which Pasion, the current antagonist, promises to return the money if neither the father nor the

son do. For this reason the speaker terms him, in the following sentence ἐγγυητήν μου. As already stated, of the elements listed on the list, only one, the ability of the surety to settle the debtor's debt (roughly no. 6) is evident in this case, but this is hardly a key feature of the procedural surety, certainly not that of the attendance surety. So we should either assume that the procedural surety is just one derivation and development of a basic concept: one person's liability to stand for another's debts, or that the concept of surety as presented in the Isocrates' speech is 'imprecise', deriving from the superficial similarity between Pasion's function, and ability of the 'real' surety to avert the execution against the debtor by settling his debts. For a while, I thought that the latter, more dogmatic explantion is supported by another key evidence, the Demosthenic against Lakritos, but as I will show below, I am no longer convinced that this is the case.

In the case narrated in against Lakritos, Artemon and Apollonios, both citizens of Phaselis in Asia Minor, received from the speaker a maritime loan, which they apparently never returned. On this occasion, we are told, Lakritos assumed the position of surety. Later, after Artemon's death, Lakritos also became the latter's heir. By virtue of both positions, a heir and a surety, the speaker sues Lakritos, who now introduces on his part a *paragraphe*, denying that he ever became contractually obligated towards the speaker. In this case, no doubt, providing evidence that would prove Lakritos' position as surety would have strongly supported the speaker's case, and the speaker does stress this position repeatedly throughout the speech, applying a terminology which is quite close to that found in the evidence on attendance and execution surety (including in the Homeric passage) discussed above.[1]

[1] ἡγούμενος ποιήσειν αὐτοὺς πάντα ὅσαπερ **ὑπισχνεῖτο** καὶ **ἀνεδέχετο** Λάκριτος οὑτοσί and later καὶ Λακρίτου τουτουὶ **ἀναδεχομένου** μοι **πάντ᾽ ἔσεσθαι** τὰ δίκαια παρὰ τῶν ἀδελφῶν τῶν αὐτοῦ, [8], and κατὰ τὴν συγγραφὴν ταύτην, ὦ ἄνδρες δικασταί, ἐδάνεισα τὰ χρήματα Ἀρτέμωνι τῷ τούτου ἀδελφῷ, κελεύοντος τούτου καὶ ἀναδεχομένου ἅπαντα ἔσεσθαί μοι τὰ δίκαια κατὰ τὴν συγγραφήν, καθ᾽ ἣν ἐδάνεισα τούτου αὐτοῦ γράφοντος καὶ συσσημηναμένου, ἐπειδὴ ἐγράφη [15].

One of the arguments made throughout the speech, is that Artemon and Lakritos contravened against each and every provision of the loan contract. For this reason, the speaker brings the text of the contract *in extensu*, giving us a very rare glimplse into the contractual practice of classical Athens [item 7b]. To support his case, the speaker would undoubtedly also quote the clause, within the contract, in which Lakritos is appointed surety, as well as that which subjects him to the *praxis*, had these clauses ever been there (compare the scheme of the Egyptian documents). But he does not [note the absence of the name of the surety in the praxis clause, item 7b the underlined section]. Instead the speaker only mentions that the contract was "written and signed" by Lakritos, but he does not back up this assertion either.

When I first wrote this paper, I regarded the evidence provided by against Lakritos—together with the relative paucity of sources on contractual sureties in the orators, and the anomality of the position of Pasion in Isocrates' Trapeziticus—as a key proof that the appointment of contractual sureties was not common or even existent in classical Athens. This was still my bottomline two days ago. But I now have considerable doubts. It is methodically flaw to contend the absence (or the presence) of contractual surety on account of a single evidence piece of evidece [problem usually facing students of Athenian law rather than papyrologists]. All that the text shows is that ***in this particular case*** Lakritos was not appointed contractual surety, or at least that for some reason his appointment was not recorded in the document of loan. If anything, the speaker's assertion that Lakritos was a contractual surety shows that the institution of contractual surety in private loan contracts *per se* was known to judges and thus reflects an established practice in fourth century Athens. If anything, the evidence of against Lakritos thus point at the presence and not the absence of the institution of contractual surety in Athenian legal practice.

A further support for the existence of contractual surety is provided by another group of documents: private persons contracting with the state, be it in the position of borrowers, leassees or via contracts of labor, are requested in Classical Athens to provide sureties. Thus for example, the contract of labour ID 104(4).fr a.face A of 360-350 BCE, item 8 in your

handouts, incorporates detailed regulations (from line 17 onwards) of the the appointment of the sureties, the form of execution to be applied against them, and finally also an account of their identity. As the same clauses, that is the *praxis* clause, and the clause establishing the identity of the sureties, are also attested in early Ptolemaic private loan contracts, I see no reason why they were not incorporated in private loan contracts in classical Athens as well. Should this be the case, I believe that the Ptolemaic law of the early third century BCE, mentioning the sureties among the routine contractual parties in loan contracts in Ptolemaic Egypt does reflect a long-standing contractual and documentary tradition, as was my working hypothesis in my *symposion* paper.

One should naturally inquire about the legal and procedural implications of the position of the contractual surety and its relation to the procedural surety discussed at the beginning of this paper. A key source for the study of the position of the contractual surety are the contacts in which he is appointed, and their respective clauses. In inscriptions, we find wide some variation: in some cases it is made plain that in case of non-payment, the creditor can freely choose between turning agains the debtor and the surety. This is especially the case when the documents records a sale by the sureties of their property πρὸς τὴν ἐγγύην.

At the same time, such extensive right of execution is not recorded in any private loan contracts from Egypt (where surety is treated in the surety and praxis clauses alone), and my working hypothesis in the symposion paper was that in that context, mentioning the surety in the contract was meant to promote him as a attendance and execution surety, should the debtor fail, upon expiry, in settling the debt. In the case of Athens, all that we can say is that in our only significant literary source on the contractual surety, against Lakritos, it is the absence of the main debtor that induces, and maybe even allows the creditor to take action to retrieve the debt from the surety. But I am no longer sure that the surety needed to become a procedural surety for this action to become possible.

All the same, I think that one tengible conclusion may come out of the foregoing survey. Alongside the old, more rigid procedural surety, requiring the appointment of the surety following the rules layed out in item 4 in your handouts, emerge in the fifth and the fourth century a more flexible type of surety, based on a written documentation, which allowed the creditor to turn against the creditor for the exaction of the debt, if the debtor is absent. The parties are given leeway to shape the surety in that contract as they wish, and may turn the surety to a defacto second debtor, attendance-surety, or whatever they deem fit. Needless to say, the said act of appointment does not have to be public, judicial, or apply an established formula. The date of creation of the new surety, and whether it derived from the older one, will be examined in another, future lecture.