

# The Athenian Law of Agreement

*Edwin Carawan*

καὶ τὰς μὲν ἰδίᾳς ὁμολογίας δημοσίᾳ κυρίας ἀναγκάζετ'  
εἶναι, τὰς δὲ τῆς πόλεως συνθήκας ἰδίᾳ τὸν βουλόμενον  
λύειν ἐάσετε (Isoc. 18.24)

SOON AFTER THE RECONCILIATION of 403 Isocrates posed this paradox to the jury: if you side with the plaintiff Callimachus, “(though) you make private agreements binding with public authority, you will allow anyone who wishes to abrogate the city’s covenants for private interest.” He appears to be citing a “law of agreement” newly enacted by the restored democracy,<sup>1</sup> a statute making *homologiai idiai* enforceable in court. This rule was restated in subsequent legislation and in the course of the fourth century we find it invoked in a wide range of cases. But the rationale behind the law is often obscure: What is it that the Athenians regarded as particularly binding about “agreements”? The aim of this essay is to define that sense of obligation, common to the city’s covenants and private contracts, that the law of agreement enforced.

But there is a broader dispute that complicates our inquiry. On one side we read that the Greeks knew nothing of consensual contract:<sup>2</sup> as in other cultures east of Rome, an exchange

<sup>1</sup> Thus L. Gernet, “Le droit de la vente et la notion du contract en Grèce (d’après M. Pringsheim),” *RD* 29 (1951) 560–584, at 579–580 (= *Droit et société dans la Grèce ancienne* [Paris 1955] 220–221); M. Alliot, “L’ὁμολογία dans la vente en Grèce,” *RD* 32 (1952) 462–463. But cf. H. J. Wolff, “Die Grundlage des griechischen Vertragsrechts,” *ZRG* 74 (1957) 26–72, at 61 n.81, finding the connection “quite uncertain.”

<sup>2</sup> R. Gneist, *Die formellen Verträge des neueren römischen Obligationenrechts in Vergleich mit den Geschäftsformen des griechischen Rechts* (Berlin 1845), discounted the consensual foundation, emphasizing the formal element of written instrument. F. Pringsheim, *The Greek Law of Sale* (Weimar 1950), esp. 17–85, emphasized formality of witnesses, asserting that sale required full exchange

of promises created no enforceable obligation. For an agreement to be binding there must be some basis in a “real” asset that one party took from the other; the exchange is marked by a particular formality which might seem binding in itself, but the lawsuit is a claim for loss or damage to that property, not for breach of promise. Let us call this school of thought (despite their differences), “the realists.” On the other side stand those we might call “the consensualists,”<sup>3</sup> for whom the very meaning of the word “agreement,” *homologia*, suggests something like the concurrence of wills, the *consensus in idem* that is the essence of Roman consensual contract. There are certainly arguments in the speeches that point to this principle. After all, even in modern business, most contracts only become enforceable with some expenditure (in payment or “reliance”), but we readily regard the meeting of minds as the essence of the obligation.<sup>4</sup>

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(credit sale was unenforceable). Emphasizing the real exchange: J. Partsch, *Griechisches Bürgschaftsrecht* (Leipzig 1909), esp. 76–86, treating surety as the foundation of Greek contract; H. J. Wolff, “Consensual Contracts in the Papyri?” *JJP* 1 (1946) 55–79, against consensual contracts in the Ptolemaic period, emphasizing the real transaction as in archaic antecedents (esp. 76–77); Wolff, *ZRG* 74 (1957) 26–72, dealt more directly with the classical texts. For sound objections against Pringsheim and Wolff, but skeptical of any “doctrine of contract,” cf. S. C. Todd, *The Shape of Athenian Law* (Oxford 1993) 255–257 and 264–268.

<sup>3</sup> Gernet, *Droit* 218–222, suggested that formalistic features in the fourth-century law might be a regression from earlier consensual obligations. Also defending the consensual base: L. Beauchet, *Histoire du droit privé de la république athénienne* III (Paris 1897) 14–31; A. Biscardi, *Diritto greco antico* (Rome 1982) 133–161; P. Millett, “Sale, Credit and Exchange in Athenian Law and Society,” in P. Cartledge et al. (eds.), *Nomos: Essays in Athenian Law, Politics, and Society* (Cambridge 1990) 167–194, emphasizing “positive reciprocity” as a force of trust in transactions; J. Velissaropoulos-Karakostas, “Altgriechische *pistis* und Vertrauenshaftung,” *Symposion 1993* (1994) 187–189, and “Merchants, Prostitutes and the ‘New Poor’: Forms of Contract and Social Status,” in P. Cartledge et al. (eds.), *Money, Labour and Land* (Cambridge 2002) 131–135; and esp. E. Cohen, “A Legal Fiction: ‘The Athenian Law of Sale,’” *Symposion 2003* (forthcoming).

<sup>4</sup> As Pringsheim conceded (in response to Gernet), “L’origine des contrats consensuels,” in *Gesammelte Abhandlungen* II (Heidelberg 1961) 175–193, esp. 186; a sort of consensual contract emerges with the transition to written documents. For the state of the debate see now E. Cohen’s appraisal in M.

So, too, in Athenian lawsuits, where this law of agreement is specifically invoked what seems to be *at issue* is precisely the consensual element: even in cases where the law insists that claims be based on a real transaction, the plaintiff is demanding something more than his actual losses, something to which he is entitled only because of the agreement.

As this profile suggests, the two sides may be arguing at cross-purposes. By “consensual contract” the realists seem to mean one thing and the consensualists something else. To be clear about what we mean in this study, let us consider the instructive example of a modern casebook.<sup>5</sup>

A few days before Christmas in 1952, at a roadside restaurant in rural Virginia, one neighbor offered to another \$50,000 as the sale price for a farm. Both men had been drinking but were not noticeably impaired by it. The owner of the farm agreed to the sale and even wrote out a simple contract on the back of a restaurant bill. The buyer happily proceeded to raise the money and research the title. But the seller then dismissed the deal as a joke. The court found to the contrary: although nothing of any value had been exchanged, and what the buyer had spent in expectation of the sale (his “reliance interest”) was negligible, nonetheless, the fact that the two parties undertook the formality of a written contract, evidently intending to be bound by their agreement, was sufficient to make the deal binding. It does not matter that the seller was mocking his buyer (convinced he could never raise the money): any reasonable person would have concluded from his outward actions that he intended to make the sale—“the undisclosed understanding ... is immaterial.”

Two features of this case make it especially useful for defining the issue before us: It is a straightforward example of a consensual contract, uncluttered by part-payment or prior obligation. And it demonstrates how forceful a thing is formality.

The first feature illustrates a basic distinction: in a *strictly* consensual contract the exchange of promises is binding in itself.<sup>6</sup>

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Gagarin and D. Cohen (eds.), *The Cambridge Companion to Ancient Greek Law* (Cambridge 2005) 290–302.

<sup>5</sup> Adapted from B. Frier and J. White, *The Modern Law of Contracts* (St. Paul 2005) 1–14.

<sup>6</sup> That is, the essence of the obligation is that promises are inherently

Among the known cases the Athenian law of agreement has nothing to do with deals of that sort, where a new obligation is entirely constructed on the exchange of promises. That is why the realists roundly reject any notion of consensual contract at Athens. But even at Athens, in dealings where the exchange of some asset seals the deal, the “agreement” creates obligations beyond the *quid pro quo*, and these seem to be what the law of agreement specifically enforces; this is what the consensualist emphasizes. After all, if the plaintiff merely asks for compensation, to be paid for the money or goods he lost, the lawsuit aims at enforcing proprietary rights, not the “agreement” itself. The law of agreement particularly applies to what we might distinguish simply as “the further obligations,” beyond merely repaying the debt: without the law of agreement the plaintiff would still have a claim for what he paid or loaned; with the law-bound agreement he has a right to something more.

By contrast the second feature—the force of formality—is important because it agrees so well with the Athenian cases: here, too, the law looks to the outward representation, however much the litigants plead for a deeper understanding. The realists may discount the force of binding consensus because it is cloaked in form and fiction; but the consensualist may argue that it is precisely that demonstrative expression of one’s will that marks it as a binding commitment.

But what sort of commitment is it that *this law* particularly enforces? When we speak of contract, we often rely on Roman terms and modern thinking: consensus is essentially an exchange of promises, creating new obligations for the transfer of assets in future (as in Roman *stipulatio*).<sup>7</sup> But in order to under-

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binding; see C. Fried, *Contract as Promise. A Theory of Contractual Obligation* (Cambridge [Mass.] 1981); cf. D. Kimel, *From Promise to Contract. Toward a Liberal Theory of Contract* (Oxford 2003). One could argue that strictly consensual contracts were a viable (even essential) part of Athenian commerce, but that question lies beyond our scope (below, n.7).

<sup>7</sup> On the Roman development cf. R. Zimmerman *The Law of Obligations* (Cape Town 1990) 546–577. At Athens unsecured contracts often relied on reciprocity within the group (as Millett has emphasized: in Cartledge, *Nomos* 167–194), e.g., the leases of demes and orgeones in *IG II<sup>2</sup>* 2492–2501; cf. E.

stand how the Athenians construed their obligations under this law of agreement, we need to focus on the cases where that law is specifically invoked and parse those arguments on their own terms. We cannot simply assume that all commercial dealings are governed by this rule; it appears to be only those concluded with a particular formality. And of the known cases, where that formality is invoked, more than half have nothing to do with commercial transactions. How then, in this odd set of cases, does the law of agreement apply—what does it have to do with the matter for the court to decide? Or, in sum, what exactly is enforceable by this rule, *homologiai kyriai*?

It is best to begin near the end of the fourth century, as the later texts address these questions more directly in regard to commercial contracts. So in section 1 we focus on Hypereides' *Against Athenogenes* (of the 320s), where the speaker insists upon the meeting of minds as an issue for the jury to consider, though he cannot find that criterion in the law of agreement itself. In section 2 we turn to the loan contracts governed by *dikai emporikai*. From well-attested wording of the law for this special jurisdiction, it is clear that "agreement" alone did not make a contract that the court would enforce: there must be a *symbolaion*, an obligation to complete the transaction once money or goods change hands. But it is also quite clear that the law of agreement specifically applies to the further obligations, especially the duty to pay an additional penalty for any deviation, however understandable. In section 3 we turn to the two cases that treat procedural arrangements as guaranteed by the law of agreement, without any real transaction behind them. But in this singular application (it turns out), the obligation to honor a new deadline (and deliver then as promised) is unenforceable. Finally, in section 4, we return to the testimony of Isocrates 18 in the context of other cases of the same type: "settlement contracts" (*diallagai*) that dispose of some prior liability. I argue that the law to which Isocrates refers was a broad

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Carawan, "Oath and Contract," in A. Sommerstein and J. Fletcher (eds.), *Horkos* (Bristol 2006) [forthcoming]. These do not appear to be governed by the law on *homologiai idiai* (perhaps by the Solonian law on *synthekai*, F76a Ruschenbusch).

measure affecting private obligations (*symbolaia idia*), delictual liability as well as contract. The original rationale was not that “agreements” are binding because promises are binding but that decisions about the past must be closed with a certain finality. And that principle, crucial to the Reconciliation, helps to explain the peculiar reach of this rule that has provoked so much scholarly dispute.

1. *A contract for sale:*

ὅσα ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι (Hyp. *In Ath.* 13)

Hypereides’ speech *Against Athenogenes* is the only text that specifically applies the rule *homologia kyria* to a contract for sale. It is cited in such a way as to suggest that it is part of a statute that directly applies to sales such as this, but it may simply be part of a more general law on transactions. That ambiguity may be key to the dispute. The plaintiff Epicrates treats the transaction as a cash sale, yet it was concluded with a detailed contract setting forth further obligations. There seems to be little question but that the plaintiff is legally bound by the letter of that agreement. Yet he poses the issue for the jury to decide as essentially a question of consensus: should the buyer be bound by liabilities that he never recognized?

The essential background is as follows. Epicrates was infatuated with a slave boy belonging to Athenogenes; the two men had quarreled and then reconciled, with the understanding that Athenogenes would free the boy along with his father and brother, for forty minae (5). Following that settlement—indeed, as though honoring his pledge of “friendship”—Athenogenes offered, for the same sum, to sell the slaves outright together with the perfume business that the father, Midas, operated. When Epicrates proved receptive, Athenogenes produced a written contract that he had already drawn up, read it out, and evidently explained certain clauses. Epicrates would be assuming responsibility for the debts of the perfume business (6): Athenogenes assured him that the stock-in-trade would cover any such debts; yet a certain Nikon is named as surety for Epicrates. The parties met at the perfumery and there the sale was concluded (9): the money was paid, Epicrates took possession, and the contract was given to a trustee named Lysicrates. Soon after the deal was done, Epicrates was hounded by credi-

tors: he discovered that the debts totaled five talents. It was only then that Epicrates read the contract for himself (or with help from his friends) and realized the meaning of the crucial clause (10): that he would be liable for whatever Midas owed (καὶ εἴ τῳ ἄλλῳ ὀφείλει τι Μίδας). He then confronted Athenogenes, apparently demanding that he cover some of the debts; but the seller simply answered that he had no idea what debts Epicrates was referring to and, in any event, it was no concern to him as he had a document disposing of their transaction (12): ὡς οὔτε τὰ χρέα γινώσκοι ἃ λέγομεν, οὔτε προσέχοι ἡμ[ῖν] τὸν νοῦν, γραμματεῖόν τ' εἶη αὐτῷ κεί[μ]ενον πρὸς ἐμὲ περὶ τού[τ]ων.

Athenogenes appears to have a strong defense, that the plain wording of the written document trumps any deeper understanding (13): “straightaway [he] will tell you that the law says ‘whatever terms one man agrees to with another are binding’.” What is striking to us is that the plaintiff Epicrates never argues to the contrary—that, surely, “to agree” (*homologeîn*) naturally requires that both parties clearly understand and willingly consent to what the deal entails. Instead he must argue that the law honors only dealings that are *dikaia*, rightful or equitable. By that objection he seems to mean that the transaction should convey equivalent value, not that true intentions are somehow paramount. But let us carefully consider Epicrates’ rationale, first weighing the points of law and then the argument on consensus.

It was once supposed that this suit relies upon a rule analogous to the Roman *exceptio doli*: if a contract is made under false pretenses, the defendant may enter this plea to cancel the obligation. In our case the whole thrust of Epicrates’ complaint is that Athenogenes plotted to deceive him by means of the contract. Indeed Epicrates repeatedly describes the seller’s scheme as a plot against him (*epiboulê*) and an “ambush.”<sup>8</sup> But,

<sup>8</sup> ἐνταῦθα ἡ ἐπιβουλή καὶ τὸ πλάσμα τ[ὸ] μέγα (8); ἐν]εδρεύσας ἡμᾶς ταῖς συνθήκαις, and from the reading of the contract the jurors will realize the *epiboulê* (12); ἐνεδρεύσαντές με, with fragmentary reference to “plotting,” *bouleuseôs* (18); the law is not made by (or for) those who plot against others, *epibouleuontes* (21). It was once supposed that the charge is *bouleusis*, in the

as Meyer-Laurin showed,<sup>9</sup> the nature of the case is quite otherwise: Epicrates cannot point to any specific law against fraud that applies to this case. And he seems to have *no intention of canceling the contract*. Rather, by drawing parallels from laws of dubious relevance, Epicrates builds his case on a more basic idea, that Athenogenes has done him damage by means of the contract just as if he had used any other instrument.

The most nearly relevant of his counter-examples is a statute on sale of slaves (15). The text is unfortunately marred by a lacuna, but the sense seems reasonably secure: “when the parties *agree* on the terms of their transaction” the seller is to disclose any illness or infirmity; if not, the buyer has the right to return the slave.<sup>10</sup> The restoration [ὁμολογοῦν]τες, “when they agree,” is not certain but most probable from the grammar and the context.<sup>11</sup> Leading up to this passage, Epicrates has accepted responsibility for what he knowingly decided: the debts “I learned of in the contract, I do not dispute but admit that I owe” (ὄσους [ἐπυθόμην, οὐδὲν ἀντιλέ]γω σοι, ἀλλ’ ὁμολογ[ῶ ὀφείλειν). The law on slave-sale is cited as a further instance of this principle.

If the wording of this law included the crucial term, *homologein*, it might seem surprising that Epicrates makes so little of it. His situation and that addressed in the law would seem perfectly parallel: he has unwittingly taken on losses, just as if he had bought a slave with a hidden disability.<sup>12</sup> The chief

sense of concerted fraud, but see D. Whitehead’s sensible comment on 18: *Hyperides* (Oxford 2000) 315–317.

<sup>9</sup> H. Meyer-Laurin, *Gesetz und Billigkeit im attischen Prozess* (Weimar 1965) 16–19.

<sup>10</sup> ἕτερο]ς νόμο[ς ἐστὶ περὶ ὧν ὁμολογοῦν]τες ἀλλήλοις συμβάλλουσιν, ὅταν τις πωλῆ ἄνδράποδον, προλέγειν, ἐάν τι ἔχη ἀρρώστημα· εἰ δ[ὲ μ]ή, ἀναγωγὴ τούτου ἐστίν.

<sup>11</sup> The dative ἀλλήλοις (“[agreeing] with one another”) makes this restoration preferable to the alternative (πωλοῦν]τες). The participle supplements the main verb συμβάλλουσιν: on the legal sense, see esp. P. Kussmaul, “Zur Bedeutung von συμβόλαιον bei den attischen Rednern,” in C. Schäublin (ed.), *Catalepton: Festschrift für Bernhard Wyss* (Basel 1985) 31–44.

<sup>12</sup> Presumably the buyer recovers at least part of what he paid. *Suda* s.v. *enagōgē oiketou* seems to suggest that the buyer has the advantage: the law



reason that he does not pursue the analogy is simply that it does not lend much support to his case. He is bound by a written document setting forth further obligations and guarantees. If there is to be *anagôgê*, it should be spelled out in the covenants: either the guarantee is not there or it is useless. The terms of the contract are final and trump any claim to the contrary, even rights that are otherwise secured by statute. That rule, that contract is more binding than law (below, n.30), was often expressly asserted in the document and was probably included in this one. The fragmentary passage 28–31 dealing with Athenogenes' violations of other laws seems to answer this trump clause: Athenogenes "insists upon his individual rights ... while transgressing the common covenants of the city," κοινὰς τῆς πόλεως συνθήκας παραβὰς ταῖς ἰδίαις πρὸς ἐμὲ ἰσχυρίζεται (30–31).

So the argument on consensus appears to be just that: argumentation. Epicrates can find no statute that expressly penalized or canceled contracts framed by deception. The statute closest to a rule against fraud is the law against telling lies in the marketplace which may have nothing to do with this case.<sup>13</sup> Athenogenes has the law on his side: it makes an agreement binding regardless of misunderstanding; the formal act of affirming the agreement is what counts.<sup>14</sup> In this sense we can speak of *homologia* as a sort of consensus. Indeed, the Romans

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urges him to resolve the matter with the seller (ἐφίησιν ὁ νόμος τῷ ὀνησαμένῳ διακρίνεσθαι πρὸς τὸν πεπρακότα); cf. Whitehead, *Hyperides* 315–317.

<sup>13</sup> Meyer-Laurin, *Gesetz* 18, argued that this law is an instruction to the officials charged with supervising the agora and largely irrelevant as the deal was not done in the market.

<sup>14</sup> It is the savvy "speechwriter" Athenogenes who will (supposedly) insist upon what was "promised" or "undertaken." Thus, when he initially proposed the deal (6), Athenogenes acknowledged the small sums owed to Pancalus and Procles and added, "if any of the regular suppliers has any other stores at the perfumery, of whatever sort, this", he said, "you will undertake" (σὺ ἀναδέξῃ). Then (7), Epicrates explains the consequences of buying the business: "If I bought ... outright, *agreeing* with [Athenogenes] *to undertake* the debts (ὁμολογήσας αὐτῷ τὰ χρέα ἀναδέξασθαι)—assuming they were negligible because I had *no advance knowledge* (δ[ιὰ] τὸ μὴ π[ρο]ειδέναι)—he intended to put his creditors onto me ... entrapping me in an *agreement*" (ἐν ὁμολογίᾳ λαβών).

began with a similar assumption: the promises are binding because they adhere to a particular form of words.<sup>15</sup> To be sure, Epicrates argues that he was deceived, that there was no meeting of minds, but it is clear from the way he argues *against the statute* that this meeting of minds was not what the law meant by *homologeîn*. Athenogenes will insist that the agreement is final; Epicrates can only contend that binding agreements must be “just” or equitable and he agreed to the deal on that basis. That principle is not contained in the law of agreement but is for the jurors to weigh by their “most just opinion.”<sup>16</sup>

In this argument, knowledge weighs more than intentions. Epicrates insists (as we saw) that he accepts the debts that he had “learned of” (14); his complaint is over the debts of which he was given “no advance knowledge” (8). This emphasis, that a man is responsible for what he knowingly takes on, leads to an effective dilemma (19–20): If Athenogenes claims he did not *know* of the debts, that is not a defence (*apologêma*) but a confession (*homologêma*) that Epicrates is under no obligation to pay them—for how could *he* be expected to know;<sup>17</sup> but if Athenogenes knew of the debts and concealed that crucial feature of the transaction, the deal is wrongful (*adikon*) and must be remedied. Of course, Athenogenes must have known: he insisted on a surety because he was expecting Epicrates to find himself in some difficulty (20). And in the midst of their negotiations Athenogenes queried Epicrates’ friends about what *he* was up to: Why buy the whole business, when he could just buy the boy? In this gambit, Epicrates claims, Athenogenes was already providing cover for his scheme, pretending he had fully informed the unwary buyer.

<sup>15</sup> On the origins of *stipulatio* see H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge 1967) 293–295; further, below 361 nn.35–36.

<sup>16</sup> Meyer-Laurin, *Gesetz* 16–19, in disproving the old theory of a legal mechanism against fraud, leads us in this direction: the arguments on “equity” in the law are just that, artful arguments, *entechnoi pisteis*, using the law-texts to construct a circumstantial model.

<sup>17</sup> Perhaps Athenogenes would argue that Epicrates, from his intimacy with the slave family, knew the nature of the business better than the owner did.

This “argument from consensus” is the crux of Epicrates’ case: he appeals to the court for fairness claiming that he did not know or understand what he was agreeing to—that he was entrapped by an agreement. Such is the thrust of the whole scenario portraying Epicrates as love-struck, easily duped by the conniving Athenogenes. So he introduces the Solonian law on wills (17), the one statute that directly addresses state of mind (but not contract): a man is at liberty to bequeath his property as he sees fit, “unless he is impaired by age or illness or madness or a woman’s inducements, bound or under dire constraint.” Epicrates contends that his own case is parallel: he was ensnared by the wiles of a woman (the procuress Antigone), indeed, under a sort of erotic derangement.

Of course, we can easily imagine as plausible an argument on the other side. Athenogenes’ naming a surety should have put Epicrates on notice that he was taking on risky obligations that could cost him his property. Just as a modern lawyer might argue, the outward act marks the decision: “the undisclosed understanding ... is immaterial.”

But Epicrates contends, to the contrary, that contracts should require a sort of consensus, an honest understanding of the consequences. And, I think, we have to suppose that such suits were admissible and it was a proper issue for the court to decide, whether a man should be bound only by what he *knowingly* “agrees” to. But let us be very clear about how the issue is framed: the crux of Epicrates’ case is that he thought he was getting fair value and that understanding should count for something, *even though* this principle is *not* contained in the law that “agreements be binding.” “Agreement” in the law may be no more than consenting out loud, not requiring an honest understanding of the commitment.

That at least is the model that emerges from this admittedly singular case. *Homologia* involves a formal consensus: the plaintiff argues over the meeting of minds but never suggests that the key term in law, *homologeîn*, should properly convey a true consensus. The focus of the dispute is there at the margin, between what the law recognizes in a man’s formal agreement and what basic fairness would require in the jury’s best judgment.

That formalism is reinforced by prevailing usage. Typically

when a man “agrees,” *homologeí*, he acknowledges some fact at hand, something he knows from the outward act. It may have consequences for the future and he acknowledges these in the same breath, but there is no suggestion that promises are binding in themselves. In the well-worn usage of legal proceedings, when a man “agrees” he affirms as one integral decision what he has taken and what he must repay in the balance.<sup>18</sup>

Thus in a series of inscriptions from the same period, regarding trierarchs’ obligations for state property (*IG II<sup>2</sup>* 1623, 1628, 1629, 1631: 334/3 to 323/2), we find the basic formula, τάυτην τὴν ναῦν ὠμολόγησεν παρειληφέναι ... καὶ ἀποδώσειν (with variations). The trierarch affirms that he *has* taken possession of the vessel and *will* repay: his promise is tied to his acceptance. He may acknowledge that he has received a particular vessel (identified by its name and shipwright) and promise to return that particular vessel in shipshape (1629.480, 496, 506). Or he acknowledges that he has received an old vessel and will repay with one “new” (1623.6–8, 26–32, 129–132). There may be considerable duties beyond simply restoring what was received: the trierarch may specify that he received a vessel without rigging (1629.302–305) or “half the trireme” (573–575) but nonetheless acknowledges the duty to restore it; if he has fallen into arrears, he affirms that he will repay two-fold (1623.109–112). Of course these texts record a different kind of obligation from the freely-contracted dealings of the marketplace (the trierarch is obligated to the polis); but the pattern of usage is nonetheless indicative: in *homologia* as a binding legal decision, there is no taking without the promise to pay, and no enforceable promise without the receipt.

Epicrates and the trierarchs of the 320s are bound by their agreements in just this way: their *homologia* is a formal agreement and binding *only if* it belongs to a real transaction, sealed by some transfer of assets at hand. But that real exchange is not so simple as it might seem: there are standard arrangements

<sup>18</sup> As a rule of evidence, *homologeín* means “confess” or acknowledge; that such statements are binding means essentially that having once made such a statement, one cannot go back on it: G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens: Die Proklesis zur Basanos* (*SBWien* 317 [1977]) 152–158.

that often extend the reach of the transaction far beyond the quid pro quo, as the next set of cases will illustrate.

2. *Maritime loans*, ca. 340–323:

ὅσα ἂν τις ἐκὼν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι ([Dem.] 56.2)

In the special jurisdiction for *dikai emporikai* we find the law of agreement invoked as specifically enforcing penalties that were agreed upon in the contract. The debt is essentially doubled if the borrower violates any terms of the agreement. This further obligation under the law of agreement forms the main issue in three cases: Dem. 56, 34, and 35.

In these penalty clauses the obligation seems to us entirely devised from a meeting of minds. But the Athenians seem to regard it as a natural extension of the real transaction: the loan is secured by a pledge of ship and cargo, security that the lender may seize at any point if the borrower violates their agreement. Of course the borrower initially makes this pledge before he has actually acquired the cargo; thus much of the collateral is fictitious. So long as the security is actually available, the lender or his agent may seize it if the agreement is violated. But if the borrower cheats his creditor of this asset, then the lender's claim may amount to (roughly) double indemnity, for the court to enforce. Indeed, in all three cases, defrauding the lender of his security (not defaulting on the loan) is the main complaint.

So in the case against Dionysodorus, [Dem.] 56 (ca. 323/2), the plaintiff, Darius, demands a judgment twice the value of his loan, and he persistently links that penalty with the clause requiring security of a certain value. He protests that the borrowers, who never brought ship or cargo back to Athens, have cheated him not only of the loan but also of the security (4); therefore they owe the penalty. The defendants have offered to pay back the principal and to add the interest that accumulated to the end of the voyage, but Darius rejects that compromise: "What does the contract say? ... If you do not ... provide the security in plain view and unencumbered, or do anything else contrary to the contract, it orders you to pay twice the value"

(38).<sup>19</sup> He then has the contract read out and proceeds to emphasize the chief violation: “Is there any place where you have provided the ship on which (security) you received the money from us?” (39).

Such penalties are expressly recognized in statute (10), and Darius protests that the defendants, by off-loading their cargo of grain in Rhodes and selling it there, “have shown contempt for the agreement and for the penalties which they wrote into the contract to bind themselves, if they should commit any violation—contempt also for your laws which demand that captains and onboard agents sail to whatever port they have agreed upon; and, if not, that they be liable to the highest penalties” (10).<sup>20</sup>

Thus, however rooted in the real transaction, the issue before the court is the further obligation, beyond the *quid pro quo*: Don’t let them off with paying simply what they owe (*opheilomena*). “Fine them with the penalties (they agreed to) in the contract. It would be awful for *them* to have prescribed a two-fold penalty ... but *you* prove more generous” than their judgment against themselves (44).

There are at least two other cases where such issues arise. These are represented by speeches where the plaintiff argues against a *paragraphê*: [Dem.] 34 *Against Phormio* and 35 *Against Lacritus*. In these cases the defendant finds a basis for challenging the lawsuit in the general statute for *dikai emporikai*. The law provides for expedited proceedings in disputes regarding contracts at Athens, for trade to or from Athens, in cases where there is a transaction or real obligation (*symbolaion*) and a

<sup>19</sup> ἢ δὲ συγγραφὴ τί λέγει; ... ἐὰν μὴ ἀποδῶς τὸ δάνειον καὶ τοὺς τόκους ἢ μὴ παράσχης τὰ ὑποκείμενα ἐμφανῆ καὶ ἀνέπαφα, ἢ ἄλλο τι παρὰ τὴν συγγραφὴν ποιήσης, ἀποτίνειν κελεύει σε διπλάσια τὰ χρήματα. The same point, in much the same language, at 45.

<sup>20</sup> This provision is distinct though reinforced by the law prohibiting any resident in Athens from contracting to transport grain to any other port than Athens (e.g. Dem. 35.37, 50–51). In the law providing for penalty clauses we see that the rule applies not only to the end destination but to “whatever port they have agreed upon.” And the penalties are established by contractual commitment: these are penalties “they wrote into the contract to bind themselves,” not penalties prescribed by law.

written contract (*syngraphê*); if not, the defendant has recourse to the *paragraphê*.<sup>21</sup>

In the one case ([Dem.] 34) Phormio contends that there is no real obligation because he has fully complied with the contract and therefore the transaction is at an end.<sup>22</sup> The law may indeed suggest that completion of the contract should serve as a bar to litigation, but only if the contract is properly terminated, by payment and cancellation of the written instrument. Our plaintiff suggests as much in a comment that is incidental to another point of evidence and thus all the more revealing: it is absurd that Phormio called no one to witness the payment he claims to have made to the ship's captain, Lampis; that formality is essential in payment to an agent; only if he had made the payment directly to the lender could he have dispensed with witnesses. For in that case they would have canceled the written contract, and "you would be quit of the obligation," τὴν γὰρ συγγραφὴν ἀνελόμενος ἀπήλλαξο ἂν τοῦ συμβολαίου (31).<sup>23</sup> In any event, the plaintiff argues that the defendant has not completed but violated the contract, and the penalty must therefore apply. This contingency is among the terms of the contract: if Phormio failed to comply he would be liable to (essentially) double the sum of principal and interest.<sup>24</sup> That

<sup>21</sup> Cf. [Dem.] 32.1–2, 33.2–3, 34.4–5. Kussmaul, in Schäublin, *Catalepton* 33–35, here takes the unlikely view that the relative clause might actually recognize contracts other than those secured by transactions at Athens; but his main point seems secure: *symbolaia* and *syngraphai* in this context are not synonymous; both are essential elements of the *paragraphê*. That the written contract is required, not an alternative, is indicated by the argument at [Dem.] 34.31 (discussed below).

<sup>22</sup> οὗτοι οὐ τὸ παράπαν συμβόλαιον ἐξαρνοῦνται μὴ γενέσθαι ἐν τῷ ἐμπορίῳ τῷ ὑμετέρῳ, ἀλλ' οὐκέτι εἶναί φασι πρὸς αὐτοὺς οὐδὲν συμβόλαιον. ... οἱ μὲν οὖν νόμοι ... οὐχ οὕτως λέγουσιν, ἀλλ' ὑπὲρ μὲν τῶν μὴ γενομένων ὄλως συμβολαίων Ἀθήνησι μὴδ' εἰς τὸ Ἀθηναίων ἐμπόριον παραγράφεσθαι δεδώκασιν, ἐὰν δέ τις γενέσθαι μὲν ὁμολογῇ, ἀμφισβητῇ δὲ ὡς πάντα πεποίηκεν τὰ συγκείμενα, ἀπολογεῖσθαι κελεύουσιν εὐθυδικίαν εἰσιόντα, οὐ κατηγορεῖν τοῦ διώκοντος (3–4). Phormio claimed to have paid principal and interest to the ship captain as the contract allowed him to do if he could not complete the return voyage (32); and, evidently, he took refuge in the usual clause that canceled the debt if the vessel were lost or disabled (33).

<sup>23</sup> Cf. Kussmaul, in Schäublin, *Catalepton* 37–39.

<sup>24</sup> From 25–26, R. Bogaert, "Notes critiques, juridiques et économiques

double indemnity is what the plaintiff Chrysippus is now demanding, on much the same rationale as we saw in the case against Dionysodorus.

Here again we find the penalty clause linked to the security (6): “I loaned to this man Phormio,” Chrysippus acknowledges, “twenty minae for the round-trip (ἀμφοτερόπλου) to Pontus, on security of either cargo” (ἐπὶ ἑτέρῳ ὑποθήκη). The last phrase is elliptical (the assumptions would be familiar to the special court): its full meaning should be that Chrysippus had the right to seize and sell the cargo on either leg of the voyage.<sup>25</sup> Thus he charges that “[our] contract ordered a cargo worth 4000 drachmas to be loaded”—that is, a cargo double the value of his loan. This does not mean that Phormio was somehow supposed to take the twenty minae and buy in Athens a cargo worth twice as much. The sum is calculated from the ultimate security on the return voyage: Phormio should have profitably sold his cargo at Pontus and there purchased a cargo for sale at Athens; thus the security doubles in value.<sup>26</sup> But it was all a scam: “for he put no assets at all in the ship, though the contract required it as an absolute necessity.” Chrysippus repeatedly emphasizes that linkage, between the cargo as security and completion of the contract (22): “From what asset could he expect to pay the money; for he set sail from here without loading marketable goods in the ship and (thus) with no security.” Again, at 33 the penalty is specifically tied to this particular breach of the contract—not that Phormio would not pay, but that his security was a fraud: “It orders you to load marketable goods in the ship; and if not, to pay 5000

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sur le discours contre Phormion,” in *Studi in onore di Edoardo Volterra* III (Milan 1971) 123–134, at 132–133, suggested that there was a separate penalty of one and a half times principal and interest (= 39 minae) prescribed for the first leg of the journey. But the whole calculation is argumentative and may be referring to a standard option.

<sup>25</sup> Thus in 8 Chrysippus protests that he had sent a letter to his agent in Bosphorus, alerting him to protect his security, presumably to seize the cargo or denounce it if there were any fraud.

<sup>26</sup> Phormio proceeded to make other loans on the same security, loans that would ultimately have made him liable for more than a 100 minae. Bogaert, in *Studi* 123–134, argued that the sum should be 95 minae, not 115 as the text has it or 150 as editors have supposed.



drachmas. But you took no notice of this clause, violating the contract from the outset by not loading goods of any value.”

For the linkage between penalty and security, Dem. 35, *Against Lacritus*, is especially instructive as it gives the most detailed report of the contract, along with an inserted document (one that is quite competent, perhaps largely authentic).<sup>27</sup> This is, again, a plaintiff’s speech arguing against a *paragraphê*; the basis for the *paragraphê* is that there is no *symbolaion* binding upon the defendant. In this case, however, the argument is that defendant Lacritus is not bound by the contractual obligation of his brother recently deceased, as he has renounced the inheritance. On this legal issue, our plaintiff, Androcles, has very little to say;<sup>28</sup> he insists upon the requirements of the contract that were not met. And chief among these is the security arrangement.

For a loan of 3000 drachmas at a steep rate (rising if the voyage is prolonged), the brothers of Lacritus had agreed to load 3000 jars of wine in the Chalcidice, to sell that cargo in Bosphorus (or farther along the coast) and then return with a cargo of marketable goods to Athens. These cargoes are again pledged as security, and the contract made clear that the cargo was to be solely pledged to Androcles and his partner, free and without encumbrance (11–12):

They pledge these (assets) as security, owing no money on them to anyone else, nor will they borrow (in future) ... they will provide the security unencumbered (*anepapha*) under the lenders’ control until such time as they pay the money accrued according to the contract. If they do not pay in the prescribed period, the lenders themselves have the right to offer the cargo as security or sell at the going rate. And if there is any shortfall of what is owed

<sup>27</sup> E. Drerup, “Ueber die bei den Attischen Rednern eingelegten Urkunden,” *Jahrbücher für klassische Philologie* Suppl. 24 (1898) 315–322.

<sup>28</sup> Beauchet, *Histoire*, suggested that Lacritus was held liable as surety because his role is persistently described as ἀναδέχεσθαι (8, 15–16). Partsch, *Bürgschaftsrecht* 101–104, concluded that this term is intentionally misleading: if Lacritus were named as surety, Androcles would have used the legal term, ἐγγυᾶσθαι. But there was no mechanism to bar the jury from holding Lacritus liable (even if he was not surety); therefore Androcles insists that Lacritus has benefited from the transaction that he “sponsored.”

to the lenders according to the contract, the lenders have the right to execute their claim (ἔστω ἡ πρόξις) against [the debtors] and all their property, on land and at sea, wherever it may be, just as in (seeking) judgment for debt or default, (suing) individually or together.

In the speaker's summary this obligation to provide real security is put forward as the chief grounds for the suit. And he indicates, incidentally, how that obligation translates into a penalty of twice the principal (18):

First it is written that they borrowed thirty minae from us on security of 3000 jars of wine, with the assumption that they would hold security to the value of another thirty minae (on the return voyage), so that the realized value of the wine would amount to one talent ... So it is written in the contract ... but these men, rather than 3000 jars, did not load even 500 ... They had no aim or intention to load 3000 jars in the vessel in keeping with the agreement.

Here we have more clearly expressed what seems to be implied in the earlier case ([Dem.] 34), that the double indemnity derives from the value of the cargo, twice converted. That such were the decisive terms of the contract is confirmed in the argument: Androcles insists that shirking the security arrangement was the beginning of the fraud; they pledged security of such value, free and clear, and then ignored this crucial obligation.<sup>29</sup>

It is in regard to this particular fault that he invokes the law of agreement (37–38): Lacritus has argued that he and his brothers made other arrangements in Pontus, loaning out the money to others, and he was bound by law in that transaction; Androcles protests, “The contract does not say this but demands that they ship a return cargo to Athens, not loan our money to whomever they choose but provide (the cargo) un-

<sup>29</sup> “Concerning the quantity of wine that they were required to ship, they made this arrangement and then immediately, from the first clause, began to violate and not perform the written obligations. It stands next in the contract that they are pledging these assets free and clear and owing nothing to anyone and that they will make no additional loan on this security. So it is expressly written” (21). Cf. 24: pending payment, they were to provide the goods unencumbered, under the lenders’ control.

encumbered (*anepapha*) until we receive the money we loaned.” Thereupon he has the contract read again and he demands, “Does the contract order them to loan our money ... or to bring back a return cargo to Athens, in plain view (*phanera*) and unencumbered (*anepapha*)? For the contract does not admit anything to be more decisive (*kyriôteron*) than the written terms, *neither to adduce any law or decree or anything else in opposition to the contract*” (38–39).<sup>30</sup> Lacritus must show “either that he did not receive the money or ... that he repaid it, or that *maritime contracts must not be valid* or that one must put the money to other uses than that for which they received it under the contract” (43).

These passages are especially instructive for the way in which further obligations are treated as part of a real transaction: a cargo is pledged in exchange for the money received. And that pledge may appear to us as a pure promise: at the moment of “agreement” the borrower does not have in hand the cargo that will serve as security. It is merely by his promise that the borrower is responsible for as much again as he actually received. But that promise is cloaked in the fiction of a real exchange: the deal proceeds as though the cargo is already loaded and bound to double in value. This may approximate the sort of arrangement that inspired the Roman commentator to describe Greek contract as a sort of legal deceit: *in syngraphis etiam contra fidem veritatis pactio venit*.<sup>31</sup> That description was explained by Mitteis from Hellenistic contracts with accrued interest: upon renewing the loan, the lender affirms that he has now loaned a sum much greater than the actual principal. The fourth-century loans illustrate a similar device.<sup>32</sup>

<sup>30</sup> On this rule see Cohen, in Gagarin/Cohen, *Cambridge Companion* 299.

<sup>31</sup> Ps.-Asconius on Cic. *Verr.* 2.1.91. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig 1891) 459–475, argued that ps.-Asconius refers to a contract *litteris* (474) but that the two parties deposit the agreement with a *Gewahrsman* as in classical *syngraphai*.

<sup>32</sup> This sort of accumulating obligation suggests another explanation for the much discussed *horos* SEG XXXIV 167: here apparently the owner (or buyer) has mortgaged the whole of the property for half the value; as often supposed, he has received title with half yet to pay. As E. Harris pointed out (“When is a Sale Not a Sale?” *CQ* 38 [1988] 351–381, and “*Apotimema*,” *CQ*

These clauses of the maritime loans pose perhaps the closest approximation to consensual contracts (in the strong sense), and yet, even here, the Athenians themselves do not seem to have regarded the enforceable obligation as a matter of binding promises. Instead, by conventional reasoning, they treated the deal as binding because one thing of equivalent value is owed for another.

But there are cases where the law-bound agreement is not secured by any transfer of money or goods. These are best considered in two sets: first (section 3) in passages where the law of agreement is invoked only to validate the postponement of an obligation; and then (section 4) in settlements of prior disputes.

3. *Agreement to postpone an obligation:*

κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἅς ἂν ἐναντίον ποιήσωνται μαρτύρων (Dem. 42.12)

κύρια εἶναι ὅτι ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ (Dem 47.77)

It is surprising to find, a generation after written testimony became standard, two passages which nonetheless invoke the law of agreement for commitments that are nowhere written down. Instead, in one instance we find expressly asserted what Pringsheim thought implicit in the other cases: that the agreement must be witnessed. So one might be tempted to assume that we have here a relic of what was once standard: a verbal commitment that is binding so long as it is witnessed. Neither case involves a real transaction (loan, lease, sale, or service); both have to do with purely procedural requirements, and the bond appears to be strictly consensual—there is no *quid pro quo*.

But the agreements in question appear to be unenforceable. Each passage has to do simply with the postponement of a prior obligation: in one case (Dem. 42) it is the listing of property for *antidosis*; in the other ([Dem.] 47), it is the payment of

43 [1993] 73–95), the terminology of Greek securities does not always convey clear distinctions: this transaction is called a sale with option to repurchase, *prasis epi lysei*, but may be essentially the same as an ordinary loan upon security, *hypothéké*. It may be that the mortgagee has borrowed thirty minae but the loan is secured with a property of twice that value to cover the *tokos* or other accumulating obligations.

court-awarded damages. And in each case the adversary has (allegedly) failed to do as he promised, yet there seems to be no penalty or prescribed remedy for that violation. The effect of the law is not to enforce promises but to bar enforcement of old obligations that have been waived.

In Dem. 42 the plaintiff asks the jury to assign Phaenippus to his place on the board of three hundred responsible for burdensome public expenses. The agreement in question is given considerable emphasis throughout the speech (1–2, 12–13, 31) though it is only tangential to the question of Phaenippus' net worth: he had agreed to deliver the inventory of his property a few days after the date prescribed by law, but then failed to meet that deadline. It is, of course, characteristic of Athenian court arguments that the litigant treats the case broadly, as embracing secondary issues that contribute in some way to the gravity of the charge. In this as in other misdeeds, Phaenippus was attempting to conceal his wealth.

Thus, supposedly, Phaenippus has fabricated some liens—and put up mortgage markers—on his most valuable holding (a large farm), markers that were not in evidence when the plaintiff inspected that property (5). Phaenippus has also broken the seals upon storage areas and made off with grain and timber. But first he coaxed an agreement from our plaintiff, to postpone the date when he must deliver a complete listing of his property; he then failed to deliver the list for some weeks, until just a few days before the trial. It was that delaying tactic that allowed him to conceal his assets.

The breach of promise is not in itself grounds for a lawsuit; it is simply added in the scale of justice to offset whatever advantage Phaenippus gained by his scheme. Strictly speaking, the question before the jury is not whether to punish Phaenippus for failing to meet his deadline; and it is quite clear that the plaintiff had no specific remedy for that violation.<sup>33</sup>

In the earlier instance, [Dem.] 47, we find much the same

<sup>33</sup> See esp. 13, where he is most vehement: “If anyone should think that mutual agreements must be non-binding, you would hate him like the worst sort of shyster.” If there were a prescribed remedy or increment to the penalty (say, doubling the damages), our plaintiff would have mentioned it.

tactic: the injustice is greatly aggravated by a violated agreement which has nothing to do with the main issue.

The essential question before the court is whether to condemn two men, Evergus and Mnesibulus, for false testimony in an earlier case of assault. The assault had come about when the unnamed plaintiff, as trierarch, went to the home of Theophemus to seize property in payment for the ship's equipment that Theophemus had failed to return (as in *IG II<sup>2</sup>* 1623.109–112). At trial Theophemus charged that our trierarch struck the first blow; he called Evergus and Mnesibulus as witnesses to testify that he had challenged the trierarch to have the matter decided by slave-torture, but he refused—which testimony was a lie (as witnesses now attest, 40). In the midst of things, before the suit for false testimony could come to trial, the trierarch had asked Theophemus to put off payment, and he agreed (49–50, 73). Nonetheless, in violation of the agreement, the defendants had gone to the trierarch's home and seized property, on the very day when he paid the money to Theophemus (apparently unaware of the intrusion; cf. 51–52, 65–66, 77).

The broken agreement is not a small matter. When Theophemus' agents invaded the trierarch's home they injured a family servant who later died of the injury (68–73). Yet the trierarch was left with no legal recourse. Again, the law of agreement appears to be a rule without a remedy.

The first instance also suggests that binding agreements must be witnessed, but that does not necessarily reflect the language of a statute. It may simply represent common knowledge about what legal "agreement" means: if it is to have any force, there must be some way of proving it. In both instances the speakers may be referring to a law that was not meant to apply to procedural arrangements such as these. *Homologeîn* of course describes all manner of statements that accept some legal responsibility—acknowledging a public duty, confessing a crime, or concluding a treaty, as well as making a business contract. There is no juristic authority at Athens competent to determine that the phrasing of a law on one sort of obligation does not properly apply to another. Accordingly, in these two instances where the agreement has nothing to do with a real transaction

and seems to have no legal consequence, to invoke it may be merely an artful tactic of the speechwriter.<sup>34</sup>

But if so, it is an entirely appropriate borrowing, as the underlying obligation is well within the broad reach of *symbolaion*. In the law on *dikai emporikai* (section 2) we saw that the rule for binding agreement was attached to a statute requiring that a suit be based on some *symbolaion*, in the sense of transaction or real obligation. That rule for *dikai emporikai* was a restatement of the more general one to which Isocrates referred. And, as the following section will suggest, that general statute probably embraced *symbolaia* in the widest sense, including the obligations that arise from old liabilities, unpaid debts, and delicts (as in Dem. 42 and 47)—what the Greeks sometimes called *symbolaia akousia*.<sup>35</sup> After all, *symbolaia idia* include unintended liabilities for wrongful acts as much as the debts men willingly incur.

#### 4. *Settlement contracts (diallagai): [Dem.] 48, Isaeus 5, Isoc. 18*

That broad sense of *symbolaion*, found in both delicts and contracts, links the next set of cases: these are passages in which the law of agreement is said to apply to the settlement of disputes, in and out of court. These agreements pose a special difficulty for the realists: here we have binding promises that are not secured by any exchange of money or goods, not even fictitious cargo. In order to explain what makes the promise binding, Wolff invoked the force of oath as a constraint beyond the law.<sup>36</sup> That part of his theory would seem to solve one

<sup>34</sup> Perhaps indicative in this regard is Dem. 42.13: “Who does not know that the date prescribed in the law and the one agreed upon by the adversaries are equally binding? For often where the thirtieth day is prescribed in the laws, we come to an agreement and set another date, and the magistrates, in all jurisdictions, postpone lawsuits and court decisions for the adversaries as they have reached mutual agreement.” He does not say that the magistrates were expressly instructed (by statute) to arrange such postponements or to hear complaints when those agreements were violated.

<sup>35</sup> Kussmaul, in Schäublin, *Catalepton* 32–38. The Aristotelian division between *symbolaia akousia* and *hekousia* probably served as the basis for Gaius’ division of obligations into delict and contract: A. M. Honoré, *Gaius* (Oxford 1962) 97–100; followed by Zimmerman, *Law of Obligations* 11.

<sup>36</sup> Wolff, *ZRG* 74 (1957) 26–72, assuming that *stipulatio/sponsio* derived from promissory oath; cf. Zimmerman, *Law of Obligations* 71, with Carawan, in Sommerstein/Fletcher, *Horkos*. Mitteis persuasively derived *sponsio* from

puzzle by introducing another: it explains what is practical and well-attested by invoking a psychological and often silent mechanism. But neither is the consensual model entirely adequate. What makes the obligation binding is not the promise in itself but the old liabilities, claims to property or compensation, that are hereby settled. If either party violates the settlement, the other has a remedy for damage to an asset that is already his, not for breach of a promise. The settlement oath serves to secure that disposition of property, as a boundary that one must respect.<sup>37</sup>

So in the suit that Wolff took as the paradigm for oath-bound promises, [Dem.] 48, the plaintiff Callistratus and his brother-in-law Olympiodorus had made an agreement settling their quarrel. At the death of their kinsman Comon, Callistratus and Olympiodorus initially quarreled over their respective rights to the estate but then quit their grievances (ἀπηλλάγημεν) and drew up a written contract, concluding with an oath to bar any further dispute.<sup>38</sup> In essence their deal is an absolute division of the property. In the businesslike terms of the contract itself, this is spelled out: “not to take any advantage, one over the other, in regard to any asset that Comon left behind, but to search out all assets jointly and always to act in concert, taking counsel together for what is needed.”<sup>39</sup> They deposited that instrument with an arbiter, Androclides. And from that moment, arguably,

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surety: “Über die Herkunft der Stipulation. Eine Hypothese,” in F. Bernhöft et al., *Aus römischem und bürgerlichem Recht* (Weimar 1907) 109–142; cf. Jolowicz, *Historical Introduction* 293–294.

<sup>37</sup> As P. Kussmaul found (*Syntheskai. Beiträge zur Geschichte des attischen Obligationsrechtes* [Basel 1969] 34), the law(s) of agreement seem especially addressed to such *pacta*.

<sup>38</sup> “I gave judgment for him and he for me, that each of us receive half of what Comon left (τὰ ἡμίσεα ἐκάτερον ἡμῶν λαβεῖν ὧν κατέλιπε Κόμων), and that there be no unpleasantness thereafter” (8). Later he refers to this agreement in principle as “equal shares” (*isomoirein*) and not taking advantage (*pleonektein*); see below, nn.39–43.

<sup>39</sup> καὶ μετὰ ταῦτα συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτοὺς περὶ ἀπάντων, καὶ ὄρκους ἰσχυροὺς ὠμόσαμεν ἀλλήλοισι ἢ μὴν τὰ τε ὑπάρχοντα φανερὰ ὄντα καλῶς καὶ δικαίως διαιρήσεσθαι καὶ μηδ’ ὅτιοῦν πλεονεκτήσῃ τὸν ἕτερον τοῦ ἐτέρου ὧν κατέλιπεν Κόμων καὶ ἄλλα πάντα κοινῇ ζητήσῃν, καὶ πράξῃν μετ’ ἀλλήλων βουλευόμενοι ὅτι ἂν ἀεὶ δεῖ (9).



each has an equal share.<sup>40</sup>

Olympiodorus honored the agreement for a time, to the point of sharing a small sum that a slave revealed under threat of torture; but then, without consulting his partner, he tortured the slave and recovered another seventy minae which he refused to share. Before this could be resolved, other claimants came forward and the estate was awarded to them. Olympiodorus later reopened the suit and succeeded in winning back the whole of the estate. Callistratus appeared as a rival claimant in the later proceedings but he now claims that he should recover his share under the original agreement.<sup>41</sup>

The case is based upon a law for binding agreements: though the statute itself is not preserved, at 11 Callistratus calls for the text to be read. At 46 he protests that if Olympiodorus held the agreement invalid, he should have gone to the trustee and demanded that he cancel the document.<sup>42</sup> And then in his epilogue he invokes the familiar wording of the law: “How could [Olympiodorus] be sane, if he thinks he has to *do* none of the things on which he agreed and made covenant willingly?” (54).

But Callistratus is in an awkward position: he must argue that his role as a *rival* is proof that he was *cooperating* with Olympiodorus; for he made no effective claim and thus adhered to their agreement to act in common.<sup>43</sup> Setting out upon that line

<sup>40</sup> Cf. 12–17, regarding the initial disposition of the property including the first sum of money discovered from the slave (κατὰ τὰς συνθήκας τὰς κειμένας παρὰ τῷ Ἀνδροκλείδῃ τὸ μὲν ἡμισυ ἐγὼ ἔλαβον); 18, the first quarrel over the seventy minae, “that each of us have his fair share according to the oaths and covenants that we made to each other for equal division”; 32, Olympiodorus prevailed and kept all the property though he made covenant to share equally, by the contract lodged with Androclides; further to the same effect, 38, 46, 48.

<sup>41</sup> For such partnership (*koinōnia*), sharing an estate and defeating other claimants, cf. Isae. 11.20–21; Dem. 41 (*Spudias*) 5, release from all claims, allowing no further enmity on condition that future inheritance would be divided in a certain way.

<sup>42</sup> ἀξιῶν ἀναρῆσθαι τὰς συνθήκας παρὰ τοῦ Ἀνδροκλείδου ὡς παραβαίνοντος ἐμοῦ καὶ τὰναντία πράττοντος ἑαυτῷ καὶ οὐκέτι κυρίων οὐσῶν τῶν συνθηκῶν (46).

<sup>43</sup> E.g., πάντα κοινῇ ζητήσιν, καὶ πράξιν μετ’ ἀλλήλων βουλευόμενοι (9); κοινῇ βουλευόμενοι; 18, ὁμομοκῶς κοινῇ ζητήσιν καὶ πράξιν (10); regarding the first round of litigation, ἐσκοποῦμεν πάλιν καὶ ἐβουλευόμεθα κοινῇ ...

of argument, he appeals to the jurors, to be “reconcilers and benefactors” (2), and he returns to this theme in the epilogue. But this is not a process in which jurors would actually negotiate various options. Like most of the contract disputes, this is a suit for damages (*dikê blabês*) and the jury will give judgment either for the plaintiff or for the defendant; they do not deliberate over conciliatory solutions. What then does the plaintiff mean by calling upon them to be reconcilers?

The plaintiff’s case is that the defendant must honor the original agreement, “according to the covenants which [they] entrusted to Androclides” (12). A verdict in the plaintiff’s favor would validate the old agreement, enforcing the division of property and authorizing the arbiter to dispose of any dispute. In this sense the jury is called upon to “reconcile” the two parties, as their verdict would settle the dispute by validating their old reconciliation. If they judge for Callistratus, Olympiodorus must submit the claim for seventy minae (and any other assets Callistratus might claim) to the arbiter Androclides, for him to dispose of as provided in the covenants.<sup>44</sup> Thus Callistratus has arranged for Androclides to be present, to testify that an agreement was made and entrusted to him. By the terms of the agreement the actual covenants cannot be divulged without the consent of both parties. So, as he brings his argument to a close, Callistratus challenges Olympiodorus to do just that: let him call for the document and have it read out to the court.<sup>45</sup> It is this maneuver that leads to the epilogue, beseeching the jurors “to persuade Olympiodorus” to do the right thing (58). What he seems to mean is that the jury should demand, with their *thorubos*, that Olympiodorus not proceed without reading the contract.

Of course if he accepts this “reconciling” Olympiodorus as

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ὄντινα τρόπον τούτων τι πάλιν κομιοῦμεθα (29); συνεθέμην πρὸς σὲ κοινῇ πράξειν ἅπαντα, ὅτι ἂν δοκῇ ἐμοὶ καὶ σοὶ βουλευομένοις βέλτιστον εἶναι (42).

<sup>44</sup> Wolff, *ZRG* 74 (1957) 69 n.199, discounted the “Scheinvertrag,” as R. Maschke characterized it, *Die Willenslehre im griechischen Recht* (Berlin 1926) 168.

<sup>45</sup> When the case came before the public arbiter, Callistratus tried a similar maneuver, challenging Olympiodorus to go with him to Androclides and make copies of the covenants to deposit in the *echinos* (48).

much as concedes the case. His position must be that the original agreement is invalidated by the second round of litigation in which he won the whole estate: in that suit Callistratus posed as a rival claimant<sup>46</sup> and his opposition voided their agreement. He would be on firmer ground if he had (as Callistratus suggests) demanded of Androclides that the contract be destroyed “as no longer valid.”<sup>47</sup> If he now recognizes its validity, he has no case. For it treats the division of property as a *fait accompli* and calls upon the parties to submit any dispute to the arbiter, who will dispose of the assets as prescribed in the covenants.<sup>48</sup>

Here again the law of agreement especially applies to enforcement clauses, the terms of the contract that prescribe what to do in the event of some default or dispute. And, to our way of thinking, these enforcement clauses amount to an exchange of promises—what the parties will do in certain eventualities, not in payment of a *quid pro quo*. But the Athenians did not frame the issue in quite that way. Callistratus insists upon his proprietary right to a share in the estate (it is already his); the terms of agreement that are particularly at issue are those that foreclose any further dispute. What the jury must decide is

<sup>46</sup> Thus 32–38, Callistratus emphasizes how he offered no real opposition to Olympiodorus, as the agreement remained in effect in the hands of Androclides. But Olympiodorus contends that Olympiodorus broke the agreement by acting against him: when any of our relatives asks him “why he will not pay, though he has sworn to share equally and the covenants are still in effect, he says that I violated the agreements ... and ends up claiming that I spoke and acted in opposition to him—that is his pretext” (38).

<sup>47</sup> ἀναιρεῖσθαι τὰς συνθήκας παρὰ τοῦ Ἀνδροκλείδου ὡς παραβαίνοντος ἐμοῦ καὶ τὰναντία πράττοντος ἑαυτῷ καὶ οὐκέτι κυρίων οὐσῶν τῶν συνθηκῶν καὶ τῷ Ἀνδροκλείδῃ τῷ ἔχοντι τὰς συνθήκας διαμαρτύρασθαι, ὅτι αὐτῷ οὐδὲν ἔστιν ἔτι πρᾶγμα πρὸς τὰς συνθήκας ταύτας (46).

<sup>48</sup> This kind of settlement appears characteristic of *diatai epì rhêtois*, as in Isoc. 17 and 18. This matter will require detailed treatment elsewhere but it is at least clear in these two instances that the role of the arbiter is to decide whether the parties have complied with their agreement or a stipulated penalty should apply. A similar role is also indicated in the later dispute between Callistratus and Olympiodorus, when the matter of the seventy minae arose: Callistratus first (20) demanded that Olympiodorus surrender half and then (34) issued a challenge for Olympiodorus to submit the matter to Androclides.

whether that closing remains valid or not.

The finality of the agreement, represented in the enforcement clause, is again at issue in Isaeus 5, against Leochares *On the Estate of Dicaeogenes* (ca. 390). The essential details are these (18–24): At the death of the elder Dicaeogenes (II), apparently in 412/1, his estate was divided between his sisters and his adoptive heir Dicaeogenes III. Twelve years later the estate was again subject to litigation: Dicaeogenes III had laid claim to the whole estate, taking advantage of the disruption following civil conflict (7–8).<sup>49</sup> Ten years thereafter the sons of the sisters renewed their claim only to be met with a *diamartyria* by Leochares; he swore that the estate was not open to litigation as Dicaeogenes was the adoptive heir to the whole. Leochares was brought to trial for false-witness and the jury voted to convict him; but then the parties conferred and, before the votes were counted to decide the penalty, they agreed that the verdict be set aside on condition that Dicaeogenes “vacated ... and agreed to deliver without dispute” two-thirds of the estate: ἀφίστατο ... καὶ ὁμολόγει ἀναμφισβήτητα παραδώσειν (20). To enforce that division of property, Leochares was named as surety, and now, in the case for which Isaeus wrote the speech, Leochares is charged with renegeing on that obligation.

The plaintiff, Menexenus, faces considerable difficulty. He argues that the clause ἀναμφισβήτητα παραδώσειν was understood to mean that Dicaeogenes would surrender two-thirds of the *original* estate, *free and clear*; this would require Dicaeogenes to recover any property he had sold or mortgaged. But if that was the honest understanding, there was better language to express it.<sup>50</sup> Instead, “without further dispute” suggests the

<sup>49</sup> Cf. W. Wyse, *The Speeches of Isaeus* (Cambridge 1904) 402–415. The implication is that no one disputed the original division while ordinary court proceedings were available (οὐσῶν δικῶν) but when civil conflict disrupted the courts Dicaeogenes put in his claim and it was only later decided at trial (εἰς δὲ τὸ δικαστήριον εἰσελθόντες) after litigation resumed, 401/0. As D. Whitehead points out, “Athenian Laws and Lawsuits in the Late Fifth Century B.C.,” *MusHelv* 58 (2002) 3–28, the evidence does not support the common assumption that suits were suspended under the Thirty.

<sup>50</sup> As we saw in the mercantile cases (above, nn.28–29). The future clause ἀναμφισβήτητα παραδώσειν is not necessarily the wording of the oral “agree-

standard closing: the disposition of property is final and Dicaeogenes cannot renew his past claims. From the moment of the agreement he vacates the property that properly belongs to his cousins and cannot thereafter make any claim upon it. Menexenus, of course, argues that Dicaeogenes must also assure access to the property; if not, Leochares is liable.

But what he has difficulty articulating seems to be a natural presumption. The agreement is an acknowledgement of the reality at hand, not a promise waiting on future performance: there is no delivery date before which the properties belong to Dicaeogenes and after which to the cousins. When the cousins are denied access to those properties they resort to suing Leochares, the surety who guaranteed their rights (not to dunning Dicaeogenes). Indeed, the clause naming Leochares as surety is the essence of the binding agreement: if there is any default or dispute, Leochares is answerable.

On that understanding—and without further ado—Menexenus and his partners had proceeded to seize a property that Dicaeogenes had sold to Micion, believing that Dicaeogenes would not “confirm title” (*bebaiôsein*) to Micion for the property he had vacated in court (of course, Dicaeogenes would have to settle with Micion). Dicaeogenes instead supported Micion’s claim, and so Menexenus and partners ended up owing Micion forty minae for their intrusion (23), protesting that Dicaeogenes has done “the opposite of what was agreed.”<sup>51</sup> That loss weighs in the balance: the plaintiff has at least an argument from fairness, that an honest understanding should outweigh the letter of the document. But, just as we saw in the case against Athenogenes (section 1), that “argument from consensus” runs counter to the law; there is nothing to suggest that *homologia* embraces the deeper understanding.

What seems to be particularly “binding” (*kyria*) about the

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ment”; it probably belongs to the *synthekai*, the written terms. In any event, as we saw in regard to the “agreements” of trierarchs (section 1), such commitments are not stand-alone promises but integral to the acknowledgement of some debt or assets at hand.

<sup>51</sup> Here we see how little the Greek obligation corresponds to common-law “consideration”: Dicaeogenes cannot be held strictly liable for what his cousins lost in “reliance” on his promise; cf. Wolff, *ZRG* 74 (1957) 69–70.

law-bound agreement is the decision to make an end. Thus, in the *paragraphê* speeches ([Dem.] 37.58–60, 38.21–22), a binding settlement is sometimes described as a “boundary marker” (*horos*); in an inheritance dispute (40.39), the binding decision is a *telos* or *peras*. That principle of finality is crucial to the paradox with which we began in Isocrates 18.

The context is complicated but revealing. The *paragraphê* is based on three connected contentions: (1) Callimachus has brought suit in violation of the “oaths and covenants”; (2) of course he is lying about certain facts; (3) he has brought a second suit in a matter settled in arbitration. The first and last contentions depend on the same principle of finality that we have discovered in the other cases. Both the Reconciliation Agreement, as a contract between the two parties at Athens, and the arbitration agreement between Isocrates’ client and Callimachus involve a decisive closing: the parties cannot revert to the claims that are hereby resolved.<sup>52</sup> In the Reconciliation this closing was sealed with the oath *mê mnêsikakein*. In the private agreement it took the form of a *diáita epi rhêtois*. The latter is not an arbitration in the usual sense, in which a third party decides a dispute on the merits. Instead, much as we saw in the case against Olympiodorus, the designated arbiter will simply invoke the fixed terms of the agreement to decide whether obligations are fulfilled or the stipulated penalties apply.

In both areas—the city’s Reconciliation and the private *diáita*—the parties are bound by certain commitments for the future. But this is not because promises are binding *per se*, for some future transfer of assets; it is because a certain finality must be given to formalized decisions about the past. It is in this regard that Isocrates introduces the law of agreement.

After concluding the narrative, he begins his argument (18.11–19) with the violated settlement: “Initially [Callimachus] abided by our agreement (*ἐνέμεινε τοῖς ὁμολογημένοις*), but now ... he brings suit for 10,000 drachmas. When I put forward a witness [to the agreement, to affirm] that the suit was

<sup>52</sup> See E. Carawan, “The Athenian Amnesty and the Scrutiny of the Laws,” *JHS* 122 (2002) 1–23, esp. 5–12.

inadmissible because a *diaita* had been concluded (ὥς οὐκ εἰσαγωγίμος ἦν ἡ δίκη διαίτης γεγενημένης), he did not prosecute the witness” (as he should have done if he disputed that claim). But later, apparently after the new archon took office, Callimachus brought the same suit. And now at trial (12) he intends “not only to lie about the charges, but even to deny the *diaita*”: he insists he would never have settled for 200 drachmas; and he would never have entrusted the *diaita* to Nicomachus whom he knew to be a crony of the defendant. But (the defendant argues) the jury must consider that it was not an arbitration of some matter in dispute but one they entrusted, by agreement, to an arbiter “on stated terms” (οὐκ ἀμφισβητοῦντες ἀλλ’ ἐπὶ ῥητοίς); so, arguably, he had no reason not to choose Nicomachus.

This last turn of the argument is dubious (Nicomachus is still in a position to favor his friend), but what it assumes about the nature of such *diatai* is significant for our inquiry: this *diaita* appears to be essentially a way of closing the agreement against further dispute, by appointing an arbiter to judge compliance. In the usual way of litigants and speechwriters, Isocrates has probably misrepresented the case for his adversary. Callimachus must have had some basis on which to challenge the finality of the settlement: he may have argued that the *diaita* was not *epi rhêtois*; or that the defendant defaulted on his debt and Nicomachus failed to impose the prescribed penalty; or perhaps that the “stated terms” were rather different.<sup>53</sup> But the essence of Isocrates’ first argument is that Callimachus should be bound by the agreement and is therefore barred from bringing suit on the same issue. And the second contention, that Callimachus will “lie about the charges,” probably has as much to do with the settlement agreement as with the original offense: Callimachus is lying about the *diaita*.

The validity of this enforcement clause is crucial to the case.

<sup>53</sup> As Isocrates’ client goes to such lengths to defend his version of the *diaita*, it is perhaps possible that the agreement itself gave some opening for the second suit: our defendant construes it as a charge of “informing and denouncing,” but in a claim for damages it may have been more a question of how much he profited from the confiscation (perhaps Callimachus settled on the assumption that defendant got little or nothing, but later found that he had gotten the informant’s share).

The defendant has called witnesses to confirm his narrative of the earlier events, and he probably called witnesses, perhaps Nicomachus himself, to confirm that there was a *diaita epi rhêtois*. That this defendant does not appear to call for the clerk to read out the actual terms of agreement—and gives them small scope in his argument—does not diminish their importance. As we saw in the case against Olympiodorus ([Dem.] 48), it may be that the agreement itself barred disclosure without consent of both parties. Or it may be (quite likely) that our defendant has much to lose from close scrutiny: the letter of the agreement may give Callimachus too much leverage. That would make the paradox all the more effective: if the jury decides for Callimachus, they may indeed respect the rule making private agreements binding, but they will undermine the city's Covenants.

Whatever case Callimachus can make on the private settlement, Isocrates has a trump to play against it. Callimachus (he contends) is violating the Covenants in two ways: (1) he is now charging our defendant as the informant, who instigated the confiscation, where the Reconciliation Agreement specifically shields from prosecution “informants and denouncers”; (2) he is also formally in violation of the rule that “*dikai* and *diaitai* under democracy shall be *kyriai*”—legal decisions and arbitrated settlements shall be final. Even if Callimachus has a reasonable argument to overturn the settlement or hold Isocrates' client in default, to take his side is to undermine the more vital principle of the Covenants.

From the way Isocrates links the private settlement to the larger issue of the Covenants, he expects the jury to see the two agreements as creating the same kind of obligation: the finality of such agreements is precisely what this case is about. So he frames the law of agreement in an *a fortiori* argument to amplify that essential principle. He has the “oaths and covenants” read to the jury and illustrates with two high-profile examples.<sup>54</sup> The

<sup>54</sup> The *endeixis* against Philon was rejected; Thrasybulus and Anytus have not prosecuted the *apograpantes* who listed their property for confiscation. Both cases comply with specific rules: *apagôgê* and *endeixis* to the Council for official wrongs under the oligarchy were disallowed (Andoc. 1.91); returnees could reclaim their real property (cf. Lys. *Hippotherses* [fr.1 Gernet] 35–46)



comparanda serve to trivialize Callimachus' complaint: it would be absurd to discount momentous wrongs in order to abide by the Covenants, only to ignore them over petty litigiousness (24). Then he turns the tactic around, arguing from the case at hand to the more weighty concern: if you enforce the private agreement (in Callimachus' favor), you will break the bonds of the polis.

Both agreements serve the principle of finality in disposing of prior claims, not a particular *purpose*. That distinction is made clear in the next turn of the argument (25): the Athenians thought it imperative to abide by their Agreement when it was uncertain whether it would be to their advantage (εἰ καὶ μὴ σφέρερον ἀναγκαῖον εἶναι τοῖς ὁμολογημένοις ἐμμένειν); now that it has proven to be their salvation, it would be absurd to violate it. The Agreement has preserved the polis—and it must be defended on that score as well—but its binding force did not derive from that objective.

The rule *homologiai kyriai* is introduced into political discourse in this context.<sup>55</sup> It certainly encompassed ordinary dealings for lease or loan or the like, but the original context suggests that the rule especially applies to settlement contracts, the small-scale version of the city's Covenants. To be sure, both types of agreement, for new business and old, were encompassed in a single rule. And in the "paean to Covenant" (27–28) Isocrates emphasizes the broad reach of such agreements: trusting in *synthekai* Greeks and non-Greeks alike carry on commerce abroad; and among themselves the Greeks "conduct transactions"<sup>56</sup>

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but were barred from prosecuting those who denounced the property for confiscation (Isoc. 18.20, 23).

<sup>55</sup> See E. Carawan, "Oral 'Agreement', Written Contract, and the Bonds of Law at Athens," in C. Cooper (ed.), *The Politics of Orality* (Leiden 2006) 321–341. On the dating of Isoc. 18 see Whitehead, *MusHelv* 58 (2002) 3–28, followed by Carawan, "Amnesty and Accountings for the Thirty," *CQ* 56 (2006) 57–76, at 72–76.

<sup>56</sup> τὰ συμβόλαια ... ποιούμεθα. Nicely translated by Mirhady (D. Mirhady and Y. L. Too, *Isocrates I* [Austin 2000] 103) "conduct our transactions." In "Contracts in Athens," in D. Cairns and R. Knox (eds.), *Law, Rhetoric and Comedy in Classical Athens* (Swansea 2004) 51–63, Mirhady demands a formal consistency in translating *symbolaion* as "contract" but emphasizes the real and transactional character of the term. To this extent his reading is

and resolve both personal enmities and wars that involve the whole community.

At this juncture (ca. 402), presumably, any business contracts made under democracy, for shipping goods or leasing property, were subject to the rule *homologiai kyriai*. But in its immediate context the rule seems especially important in resolving past liabilities—settling personal enmities such as the very case at hand between Callimachus and Isocrates' client. That implication, that the same rule covers both business contracts and settling old liabilities, is also indicated in the closest contemporary testimony, Andocides 1.87–88.

In his defense *On the Mysteries* Andocides tallies up the procedural rules that took effect under the new democracy. In the list he cites the law that private suits and arbitrations concluded under democracy must be valid: τὰς μὲν δίκας ... καὶ διαίτας κυρίας εἶναι, ὅποσαι ἐν δημοκρατουμένη τῇ πόλει ἐγένοντο.<sup>57</sup> And then he explains the aim of the law: “so that debts should not be canceled and lawsuits not be reopened but that *transactions be carried out*” (ὅπως μήτε χρέων ἀποκοπαὶ εἶεν μήτε δίκαι ἀνάδικοι γίγνιντο, ἀλλὰ τῶν ἰδίων συμβολαίων αἱ πράξεις εἶεν). Of course *symbolaia* encompass non-commercial obligations, liabilities recognized through lawsuits and arbitrated settlements.<sup>58</sup> In other words, the intent of the law was that all such legally binding decisions, whether incurred under the old democracy or the new, shall remain binding (whereas rulings under the Thirty are invalid). That reading at least agrees with what Isocrates says about the law of agreement, as recently recognized in 402/1; for, as we saw, he introduces that principle as parallel to the binding authority of the Reconciliation Agreement as a settlement contract (*diallagai*).

Considering the overlap in their testimony, I suggest that

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consistent with Kussmaul, in Schäublin, *Catalepton* 31–44, though the latter prefers “Obligation.”

<sup>57</sup> By contrast, official decisions under the oligarchic regime are held invalid (Dem. 24.56); and public prosecutions—*graphai*, *phaseis*, *endeixeis*, and *apagogai*—apply only “from Euclides.” Cf. Carawan, *JHS* 122 (2002), esp. 12–19.

<sup>58</sup> Cf. Kussmaul, in Schäublin, *Catalepton* 40, treating *idia symbolaia* in Isocrates (but not this instance in Andocides).

Andocides and Isocrates are referring to clauses of the reform legislation that are closely connected, if not, indeed, one statute. For Andocides to explicate his text in terms of *symbolaia idia* probably indicates that those words were in the law itself. As corollary to the clause validating “private suits and arbitrations,” there would be a general rule recognizing contractual obligations of both types, to this effect: καὶ συμβόλαια ἴδια, ὅσα ἂν τις ὁμολογήσῃ, κύρια εἶναι. The original intent was probably two-fold: (1) it would recognize the finality of settlement agreements (like the one between Callimachus and Isocrates’ client); but (2) it would also enforce commercial obligations, so long as there had been some formal acceptance of the lease, loan, or other transaction. Phrased in this way the rule would encourage the settlement of unresolved issues from “involuntary transactions”: if a neighbor had appropriated an exile’s property or caused some injury to his household—just as if he had left a debt unpaid—rather than go to court, they were urged to settle and then be bound by the specific terms of their agreement.

The law of agreement enacted ca. 402 was not a law to enforce promises *per se* (as in Roman *stipulatio*). Among the known cases, to be sure, we find an argument from consensus, that a buyer should be bound by what he *knowingly* undertakes (section 1). But the argument itself suggests that such consensus was not the ordinary sense of *homologia* in the law: indeed, the plaintiff has to argue from what is just or equitable, *against* a strict reading of the law. In commercial loans (section 2) the law of agreement especially applies to what we might treat as promises, further obligations beyond the *quid pro quo*. But the Athenians themselves did not treat these further obligations as binding on the grounds that promises are *inherently binding*. Rather, they construe the arrangements for security, surety, or penalty as practical extensions of the real transaction: the debtor pledges the cargo as collateral and, if he withholds that security, he owes twice as much because that is what the cargo would have fetched. Where the law of agreement is invoked without any real transaction (section 3), it simply waives a prior obligation; the promise is unenforceable. The model for these rules, the law of the early restoration, seems to have recognized what was probably a principle of long standing which the

threat of conflict now made all the more compelling: after receiving another party's money or property—with his consent or without it—a formal agreement binds the receiver to repay by whatever terms he specifically accepts (section 4). Because the law was framed on that historic principle, it was not easily adapted to the consensual commitments that make commerce more productive. Indeed, it is probably more than an accident of the evidence that the commercial cases in which *homologiai kyriai* are invoked all date to the latter half of the fourth century, after the rule was restated in the statute for *dikai emporikai*, fifty years after Isocrates' paradox. Before ca. 350 the rule was certainly viable in commercial suits but apparently not so readily invoked. Through much of the fourth century, the law's *viva voce* "agreement" is not heard as an exchange of promises—creating new obligations for the future—but as a mutual decision about assets at hand and claims from the past.

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Modern and Classical Languages  
Missouri State Univ.  
Springfield, MO 65897  
ECarawan@missouristate.edu