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GERHARD THÜR

*THE STATUTE ON HOMOLOGEIN IN
HYPERIDES' SPEECH AGAINST ATHENOGENES*

Abstract

The paper focuses on the structure of contract in Athenian law and the liability to comply with. After a short outline of the meaning and the practical relevance of 'consensual contracts' in classical Roman law and their further development in late Antiquity up to modern times the one-century-old controversy about contract in ancient Greek law is resumed: on the one hand the 'consensualists' hold that the verb *homologeïn* (literally "speak the same") means "promise to comply with debts." On the other hand the 'realists' argue that the binding force of a contract was not created by a simple promise, but rather through a real basis. The debtor was only liable when he had accepted some goods or assets from the creditor and was frustrating the purpose, for which the creditor had rendered them to him, the so-called 'Zweckverfügung' (disposition for a certain purpose, Hans Julius Wolff). One of the crucial sources is the *nomos on homologeïn* quoted in Hyperides' speech *Against Athenogenes* (§ 13). Compared with quotations of similar statutes (Dem. 42.12, 56.2) it will turn out that in technical sense *homologeïn* was only related to court procedure: "in whatever regard someone says the same as another, this is definitive (in the law court)" and did not create obligations.

L'articolo si concentra sulla struttura del contratto nel diritto ateniese e sulla natura della responsabilità che ne discende. Dopo aver esposto brevemente il significato e la rilevanza pratica dei 'contratti consensuali' nel diritto romano classico, e il loro ulteriore sviluppo dalla tarda antichità fino all'epoca moderna, viene riassunta la controversia, ormai secolare, riguardo al contratto nel diritto greco: da un lato i 'consensualisti' affermano che il verbo *homologeïn* (letteralmente 'dire la stessa cosa') significa "promettere di eseguire la prestazione dovuta"; dall'altro i 'realisti' sostengono che l'efficacia vincolante del contratto non derivava dalla semplice promessa, ma si fondava su una base reale. Il debitore era responsabile solo se aveva accettato determinati beni o vantaggi dal creditore, e non realizzava lo scopo che il creditore si era proposto mettendoli a disposizione del debitore, la c.d. 'Zweckverfügung' (disposizione diretta a uno scopo, Hans Julius Wolff). Una delle fonti decisive è la legge relativa all'*homologeïn* citata da Iperide nell'orazione *contro Atenogene* (§ 13). In base al confronto con citazioni delle medesime leggi (Dem. 42.12, 56.2) ci si può rendere conto che *homologeïn*, usato in senso tecnico, si riferiva soltanto all'ambito giudiziario: "in tutti i casi in cui qualcuno dice la stessa cosa di un altro, ciò non può essere contestato (nel corso del processo)", e non creava perciò obbligazioni.



Surprisingly to a modern lawyer, in Athenian trials we never hear a party discussing legal questions at the high level of classical Roman jurisprudence. Statutes quoted by Athenian litigants mostly are clear and seem to fit exactly the case—as presented in the speech. Usually the facts of the case are in dispute. Facts not law are the primary topic of oratory.¹ One of the few exceptions is Hyperides' third speech, *Against Athenogenes*. Along with distorting the facts—what we always should bear in mind—by reasoning by analogy the speaker refers to a sample of more or less relevant statutes. Though vested in rhetoric this comes close to professional legal argumentation. Since the opponent had the solid base of a written document and of a statute enforcing it—a *nomos* on *homologeîn*—the speaker had no other chance than revealing the 'real meaning' of this *nomos*,² to his mind misused by the opponent. Furthermore, in recent discussions about the nature of contractual obligation in ancient Greece this speech has become an essential argument.

Law of contracts, especially in Athens, is a topic discussed since modern jurists started to study Greek law in the beginning of the 20th century.³ The question was—and still is: what created the binding force of a contract? To modern legal mind it is the agreement between the parties. To us breach of contract is breach of a promise voluntarily given. Non-juristic scholars predominantly have translated the word *homologeîn* (literally "speak the same") simply as "promise." Recently a prominent scholar, Edward Cohen, uttered "one must understand the Athenian sources in the most simple way."⁴ I agree; but what is this simplest way: in our thinking or in that of the ancient Greeks—at least as we think they have thought?

In this paper first I will sketch the development of the 'consensus theory' from the origins in Roman law to our times and the opposing 'asset payment theory' established by Hans Julius Wolff in 1957. Then I will return to Hyperides *Against Athenogenes*, whereupon David Phillips in 2009 has based a revival of consensus, and finally I will oppose it by explaining *homologeîn* from its origin in Athenian law of procedure. Phillips completely misunderstands, I should think, the Athenian statutes on *homologeîn*.

We all know that Roman jurists developed a scheme of four types of contract: *obligationes re, verbis, litteris, consensu contractae*.⁵ The most important contracts in everyday life seem to have been the consensu-

1. Thür, in press.

2. Kästle 2012: 203.

3. Patsch 1909: 32f. was—to my knowledge—the first, who challenged the 'debtor's' liability from pure consent, "Willenseinigung;" for the 'cash sale principle' see Pringsheim 1950: 157–79.

4. In discussion during Symposion 2011 in Paris.

5. See Gaius, *institutiones* 3.89.



al ones: *emptio venditio, locatio conductio, societas, mandatum*.⁶ For these neither special formalities nor performing an asset, a real element, were necessary; they were based just on the partners' *fides*. However, in practice Roman consensual contracts played a rather inferior role. Normally the partners drew a deed and added a *stipulatio* clause. Originally *stipulatio* had been concluded by formal oral question and answer: *dari spondes?—spondeo* or similar.⁷ However, in the time of the classical Roman jurists the verbal contract changed to an appendix within a written contract deed. The usual legal action from such a document was the *condictio* based on the *stipulatio* and not the *actio* from the consensual contract. Rising actions from the consensual contract was only supplementary.⁸ The same is true for another important everyday contract, the loan: in business life a deed was drawn for reimbursing capital and interest, again secured by a *stipulatio* clause. The normal claim for repayment was the *condictio* based on this *stipulatio*, not the *condictio* based on the *mutuum*, the *obligatio re contracta*,⁹ comprising only the capital without interest.

In late Antiquity, with the system of classical Roman *actiones* the formal character of *stipulatio* was abolished too. Pure consensus was sufficient: in 533 Justinian decreed in his Institutes (3.15.1): „These solemn words, however, were indeed formerly used, but afterwards the Leonine Constitution was promulgated, which dispensed with the verbal formality, and required that only the meaning and intention should be understood on both sides, no matter in what words they were expressed.” The constitution of emperor Leo (CJ 8.37.10) from 472 was still clearer about consensus: *stipulationes quibuscumque verbis pro consensu contrahentium compositae sint*. Nevertheless we have to bear in mind that at these times a written formal document was essential for claiming. In the course of European legal history this formal requirement vanished and today every mutually declared consensus about performance creates a debtor's responsibility.

This short introduction was necessary for understanding the nature of ancient Greek law of contracts. In no way it is self-evident to translate the verb *homologeîn* in the most simple sense “promise to comply with debts.” On the contrary, there are some serious arguments against it. First one can argue *ex silentio*: in 1957 Wolff noticed that Greek law knew no general action for breaking a contract. Different from the Roman system of *obligationes ex contractu* the Greeks also were far away from developing special claims for performing single obligations coming from sale, lease, deposit, loan and so on.¹⁰ Thus, what brought about the binding force of a contract in ancient Greece? By accurately and systemati-

6. Enumerated in Gaius, *institutiones* 3.135.

7. Gaius *institutiones* 3.92.

8. For building contracts see Thür 1999: 488–91.

9. See Gaius, *institutiones* 3.90.

10. Wolff 1957: 34.



cally scrutinizing the sources Wolff established that not consensus but rather some real basis was essential. The debtor was liable if he had accepted some goods or assets from the creditor and had frustrated the purpose for which the creditor had rendered them to him. Mostly in a written deed the debtor agreed (*homologeïn*) to have received the object and concurred in the purpose; normally a penalty was fixed for non-performance. Anyway, the creditor could not claim performance but rather had a claim for tort, in Athens a *dike blabes* for the double sum of the actual loss or the penalty the debtor had agreed to. Unluckily, in highly abstract words only to be understood by a jurist trained in German civil law Wolff denominated this simple theory “Zweckverfügung”¹¹ (disposition for a certain purpose¹²). To simplify the matter for non-German speakers: the debtor was not responsible for complying with the performance he had promised, but rather for compensating the actual loss the creditor had suffered by vainly paying his advance.

One can imagine that only a few, mainly German, scholars of Greek law have followed Wolff’s theory.¹³ Recently Barta¹⁴ opposed it strongly, Kästle¹⁵ let the question open. In Anglo-American scholarship, principally consenting to Wolff, in 2006 Edwin Carawan reconsidered the sources of *homologeïn*. In knowledge of but discussing neither Carawan’s nor Wolff’s contributions in any way, in 2009 David Phillips returned to consensus as formerly held by Edward Cohen,¹⁶ for example. Phillip’s main argument is the law of *homologeïn* quoted in the third speech of Hyperides strangely enough not considered by Wolff—later I will tell why he had no need to do so. Phillip’s article is a good example for the instance that even apparently perfect philological research cannot replace legal reasoning.

Surprisingly, Hyperides is not transmitted in medieval manuscripts, at least as far as preserved. Some of his speeches are known from Egyptian papyri. Recently, large fragments of two of his speeches, well known from Byzantine lexica, have been detected in the famous Archimedes palimpsest.¹⁷ Again, they display him as ingenious *logographos* with high capacity in distorting or misusing statutes as Horváth and Rubinstein have shown.¹⁸

11. Wolff 1957: 52, 63.

12. In his ‘authentic’ translation Wolff 1966: 325.

13. For example Behrend, Rupprecht, Herrmann, Thür, Jakab; in this paper it is not necessary discussing the subtle versions by which the authors modified the theory.

14. Barta 2010: 25–28, 489.

15. Kästle 2012: 195.

16. Cohen 2006 opposed by Jakab in her response.

17. Horváth 2008 and 2010.

18. Horváth 2007, Rubinstein 2009.

Now, what was the case in Hyperides' third speech? Also this text is preserved fragmentarily but well enough to follow the argument. The date is between 330 and 324 BC. The speaker, a young Athenian citizen Epicrates (§ 24?), a playboy presenting himself as simple peasant, filed a claim for damages (a *dike blabes* as I will show) against a resident alien (*metoikos*) Athenogenes, a perfume dealer. He numbers his *blabe* five talents, 30,000 drachmai, but not at all it is sure whether he is claiming the double of this huge amount. In Athens rich Athenogenes owned three perfume shops, one was run by his slave Midas together with two sons of Midas. Epicrates fell in love with one of the boys and wanted to buy him to set him free. Athenogenes managed to sell not only the dearly beloved boy but also the whole slave family together with the shop to Epicrates for 40 minas. Athenogenes drew up a deed of sale, *synthekai*, which is read out to the judges (§ 12) but, as usual, in the speech not preserved as document. We may assume that it started with the standard form: ἀπέδοτο Ἀθηνογένης τὸν δοῦλον... καὶ ὁμολογεῖ ἀπεσχηκέναι τὴν τιμὴν ἐπρίατο Ἐπικρατῆς... (Athenogenes sold the slave Midas together with his two sons serving in his business and the perfume shop run by Midas for 40 minas and acknowledges to have received the price, Epicrates bought¹⁹). As usual the seller, Athenogenes, might have named a *prater* or *bebaioter* as surety for the case that a third person would contest the buyer's ownership. Furthermore the parties agreed that the buyer, Epicrates, assumed responsibility for the debts that Midas accumulated in running the shop. Thus, the *synthekai* most probably encompassed the clause "Epicrates acknowledges, *homologeî*, to have taken over what Midas owes for the business to Pancalus, Procles, Polycles and Dicaiocrates (these creditors were namely mentioned, §§ 6, 10, 11) and"—most important for the trial—"whatever Midas owes to anyone else." (καὶ εἰ τῷ ἄλλῳ ὀφείλει τι Μίδα, § 10). For these debts, on his part, Epicrates, named a guarantor, Nikon (§ 8), who must have been present at the transaction.²⁰ Normally only the buyer was keeping the original of the sale contract to prove his ownership of the purchased goods when they were contested. Since in this case the buyer, Epicrates, had assumed responsibility too, the original document was deposited with a third person, Lysicles (§ 9), so that also the seller, Athenogenes, would be able to submit evidence when sued by the creditors. The parties of the deal possessed only copies of the document. So far, the business seems to have been transacted in a legally correct way and we need not trust in all the strange details of the transaction Epicrates tells without any proof.

However the bargain turned out to be a disadvantageous one. If we believe the speaker—we need not, because it was his concern exaggerating the amount—creditors came up demanding repayment of loans of the overall amount of five talents (300 minas) they had invested in the busi-

19. See Pringsheim 1950: 103 and Rupprecht 1994: 115 for the most usual form in the papyri. In Greek inscriptions—only from outside of Athens—no sale contracts, but rather excerpts from public registers are preserved. For the registers the buyer (and present owner) is more important, therefore they start with his name: (buyer) ἐπρίατο παρά (vendor)....; see Thür 2008: 176.

20. Pace Phillips 2009: 99, but correctly seen already by Mitteis 1891: 505 n. 1.

ness, which Epicrates had bought for 40 minas. In this situation Epicrates filed the present lawsuit against Athenogenes. In accordance with the still prevailing opinion Phillips correctly holds a *dike blabes*, a private lawsuit for damage.²¹ However, it is quite clear that Epicrates did not yet pay the 5 talents to the creditors; at the moment he is not yet ruined (*apolomai*, § 13). Thus Phillips incorrectly numbers the damage 5 talents.²² As the text indicates Epicrates did not even pay a small part of this sum. Meyer-Laurin holds that the damage were the 40 minas Epicrates had paid for the over indebted shop.²³ That's the only sum Epicrates really had paid (§§ 9 and 18). Nevertheless, even being convicted of the penalty of the double price Athenogenes in no way would be obliged to take back the slaves and the shop, and the sale document wouldn't be automatically canceled. In Athenian law I see no claim for annulling a contract because of being defrauded like the Roman *actio de dolo* with the consequence of *restitutio in integrum*; at least *dike blabes* is not the right way of automatically getting "release from the contract" as Phillips holds,²⁴ also Meyer-Laurin says: "die Nichtigkeit des Vertrags nachzuweisen;"²⁵ similarly Barta not even referring to *dike blabes*.²⁶ Only when Epicrates actually will recover his asset, the price of 40 minas (with the same sum as penalty), ownership of the slaves and the shop will backslide to Athenogenes and herewith the real basis of Epicrates' *homologia* assuming responsibility for the debts will vanish. This is the simple consequence of the principle 'owner is who spent the money for the goods' established by Fritz Pringsheim.²⁷ So far to the legal situation of the case.

Now I can switch to the statute, the *nomos* on *homologeîn* referred to in § 13 of the speech, and the Athenian law of contract. Over 14 pages, although discussing neither the legal situation nor the diverging opinions on the binding force of Greek contracts, in meticulous philological manner Phillips has reconstructed an assumedly "general law of contract,"²⁸ quoted in § 13: ὅσα ἂν ἕτερος ἐτέρῳ ὁμολγήσῃ κύρια εἶναι. He is resuming: "Therefore, according to the Roman and modern typology, this is a law of consensual contracts."²⁹ On his opinion "the law itself must be Solonian or later" (p. 106). However, such a general law never existed; it would presuppose a general claim for performing contracts substan-

21. Phillips 2009: 91.

22. Phillips 2009: 91 n. 8.

23. Meyer-Laurin 1965: 17.

24. Phillips 2009: 91 n. 8.

25. Meyer-Laurin 1965: 17.

26. Barta 2010: 39.

27. Pringsheim 1950: 205.

28. Phillips 2009: 93–106.

29. Phillips 2009: 106; referring to the seldom use of *arrhabon* is not at all a sufficient discussion of Wolff's theory of "Zweckverfügung" (n. 49): in the same way quoting Wolff's version of a *homologeîn* statute is no contribution to the consensus discussion (94 n. 15).

tiated neither by Phillips nor by earlier scholarship. Even Roman legislation was far off a similar statute; the proverb *pacta sunt servanda* is concerning collateral agreements (*pacta*), not *contractus* in strictly technical sense. In Antiquity the most self-evident issues needed no rules by statutes, especially contracts governed by different principles than ours, as we have seen. So we must look for a better understanding of the words *homologeîn* and *kyria* than “promise” and “binding,” respectively.

To start with the Hyperides speech: Epicrates is claiming damage. With no word he attacks the whole *synthekai*, but rather the—doubtlessly—fraudulent clause *καὶ εἰ τῷ ἄλλῳ ὀφείλει τι Μίδα* (§ 10). This was the reason why Epicrates owed debts of five talents when he had bought a business only 40 minas worthwhile. In his defense Athenogenes will reply: “you acknowledged the clause and the law of *homologeîn* keeps hold of you.” Anticipating this defense Epicrates argues *τά γε δίκαια*, only acknowledgements according to the law are *κύρια* (§ 13). Phillips correctly stresses that the word *dikaia* was not part of the *nomos* referred to, and his rhetorical interpretation of the following §§14–22 is splendid. One may add Kästle’s observation that in forensic practice *nomoi* were used as “Hyperprämissen” (hyper-premise).³⁰ To convince the court Epicrates refers to five statutes; though farfetched and irrelevant for his case four of them were useful for analogy. § 14: “No one is allowed to tell lies in the Agora,” was probably part of a market regulation and concerned everyday retail business and not selling a whole enterprise. The fact that the price was not paid in the dwelling house but rather in the perfume shop at the agora (§ 9) does not improve the argument. § 15: “When someone sells a slave, he fully must disclose any physical defects the slave may have,” concerns the slave market and has nothing to do with debts when an entire enterprise is sold with its slave manager and staff; fortunately the slaves Epicrates had bought were healthy. Even more farfetched is the statute on betrothal where at any rate Hyperides found the words “according to the law” (*ἐπι δικάσις*) in § 16. In § 17 the testament law gives opportunity stressing the role of the *hetaira* Antigona at the beginning recounted without proof—maybe the whole story about her trickery is composed to fit exactly this argument. Up to now the tenor is: many statutes forbid deceiving the business partner, therefore also the *nomos* of *homologeîn* implicitly has this *caveat*. Text and context of the next statute, § 21: “for a slave’s *zemiai* and (whatever) the master is responsible for whom he is working,” remain uncertain. Reclusively attributed to Solon it forms the climate of Epicrates’ argumentation, nevertheless, this time in an abusive way.

To sum up, if someone has bought a business acknowledging taking over any debts, he was in a bad position. Against the general rule concerning prudent tradesmen *caveat emptor* Hyperides resorted in convincingly narrating mostly unproven facts, farfetched analogies, distorting statutes and, maybe most effectively in the second half of the speech, discrediting the political and personal behavior of his opponent.

30. Kästle 2012: 187.

Assuming responsibility for the debts was only a collateral clause of the deed and the performance of the sale as such was beyond controversy. Nevertheless one has to ask: what else could the words *homologeîn* and *kyria* mean in this situation than the consensual character of the contract? In 1977 I have stressed the exclusive procedural function of *homologeîn*.³¹ This will help explaining the Athenogenes case too.

We have to start with a statute, which—at first glance—seems to be far off our problem. For the preparing sessions of a lawsuit, the *anakrisis* before the magistrate or the public *diaita*, there was stated (Dem. 46.10): “Both litigants must answer each other’s questions but need not to come forward as witnesses.”³² The compulsion to answer only makes sense if the party asking the question could hold his opponent to the assertions he conceded. A law cited in Dem. 42.12 serves exactly this purpose: “...(the law) prescribes that *homologiai* (saying the same) to each other, which are delivered before witnesses, are definitive.”³³ The mention of witnesses in the law on *homologeîn* has a plausible explanation in this context: at these pre-trial hearings the litigants always appeared with their friends and relatives, who subsequently at the law court were brought forward to witness the formal questions and challenges and the opponents’ replies. The law should accordingly be understood to mean that the litigants were not supposed to dissociate themselves from their answers to formal questions, which is not to say that they were bound to each and every word that was uttered in a hearing before the jurisdictional magistrate or public arbitrator. *Kyria* doesn’t mean: “binding to a promise” but rather “definitive in the law court.” Only in this way was it possible for both sides to induce their opponent to take specific positions before the ‘battle of words’ at the law court. They thereby laid the groundwork for the arguments and objectives that they would include in their pleas. The object of the law on *homologeîn* was, therefore, the anticipated acknowledgement of individual assertions relevant for the trial.

It was not just during the *anakrisis* or public arbitration that preparatory steps toward clarifying litigants’ positions for trial were taken. Moreover, there was the need to bind persons irrevocably to their declarations, even before a charge was filed. This binding was governed by another law (Dem. 56.2): “...(the laws) that command that whatever someone voluntarily acknowledges to another is definitive.”³⁴ The chance that the word *ἐκὼν* can be connected with consensus or lack of free will in general is unlikely. According to the situations just exam-

31. Thür 1977: 152–8; recently Carawan 2006: 350 n.18 and Kästle 2012: 194 n. 158 have accepted my opinion.

32. Dem. 46.10: ΝΟΜΟΣ. Τοῖν ἀντιδίκων ἐπάναγκες εἶναι ἀποκρίνασθαι ἀλλήλοις τὸ ἐρωτώμενον, μαρτυρεῖν δὲ μή.

33. Dem. 42.12: (νόμον) τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἅς ἂν ἐναντίον ποιήσωνται μαρτύρων.

34. Dem. 56.2: (νόμοι) οἱ κελεύουσιν, ὅσα ἂν τις ἐκὼν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι



ined, the expression ἐκὼν constitutes the criterion for distinguishing between the two types of *homologiai*, acknowledgements: the one given in a pre-trial procedure and the one given extra-judicially. The first is given under the obligation at least to answer one's opponent (ἐπάναγκες εἶναι ἀποκρίνασθαι, Dem. 46.10); the second type is given when a person speaks with his opponent voluntarily and without compulsion to answer (hence ἐκὼν). Both kinds of *homologiai* are issued in the same form, by simply agreeing to a declaration formulated unilaterally by the other party, and both have the same effect: the person who acknowledges the content of the declaration may not dispute it afterward in the law court. Both procedural statutes no way were Solonian, but rather introduced after the statutes on public *diaita* and—probably—written witness deposition were enacted, anyhow after 403/2.

Returning to our Hyperides speech we see that in the *synthekai*, in the sale contract, *homologeîn* did in no way create the binding to any performance by consensus: the (conjectured) words "Athenogenes sold the slave Midas...for 40 minas and acknowledges to have received the price, Epicrates bought..." created no obligation, but rather documented the transaction already preformed, as recently also Carawan clearly has demonstrated.³⁵ Neither could Athenogenes claim the slaves and the shop nor Epicrates the money. And even when Epicrates "acknowledges to have taken over what Midas owed for the business to...(Pancalus etc, namely mentioned) and whatever Midas owed to anyone else," no new obligation was created. When sued by a creditor the law would prohibit Epicrates to contest what he had acknowledged in the deed.³⁶ Speaking with Wolff the real basis of the deal was on the one hand that Epicrates paid down the price for the purpose Athenogenes handing over the shop and the slaves to him, and on the other hand that Athenogenes delivered these objects for the purpose Epicrates taking over the responsibility for Midas' debts. So one cannot blame Wolff (1957) for not discussing the very special case of the third Hyperides speech in his general overview of the binding force of contracts in ancient Greek law. Anyway, the speech makes no proof that in Athens a promise voluntarily given created an obligation to perform.

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35. Carawan 2006: 349–50.

36. Since the deed is referring to certain former creditors and to "any creditor else" the text probably contained a clause "these *synthekai* are *kyriai* for any person submitting them;" for this kind of the *kyria* clause see Wolff 1978: 155.



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