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CONSENSUAL CONTRACTS AT ATHENS

A. The Greek Law of Sale

"The Greek Law of Sale" is not of ancient origin. In 1950, in a massive volume that has come to dominate its subject "more than perhaps any other" study in the entire field of Greek legal history (Todd 1993: 255), the German legal scholar Fritz Pringsheim first enunciated the "Greek Law of Sale." Scholars have accorded virtually universal acceptance to Pringsheim's fundamental rule – which "Greek law never abandoned" (Pringsheim 1950: "Thesis") – that a sale attains juridical significance (that is, gives rise to a legal action for claims relating to the transaction) only through simultaneous payment of the purchase price and delivery of the good being purchased.[1] This rule renders sale, for legal purposes, an instantaneous transaction: immediately prior to the exchange, neither party has any juridical obligation or right relative to the other. Since a legal relationship, and hence a basis for court enforcement of an obligation between the parties, could thus arise only upon actual performance of services (or delivery of goods) against actual payment of the full purchase price, Greeks could not enter directly into legally-enforceable "executory" (i.e. future) obligations, such as deferred delivery of merchandise or delayed transfer of ownership of commodities being purchased. The "Greek Law of Sale" was thus juridically simple: unconsummated agreements were legally irrelevant and hence unenforceable.

B. Consensual Agreements at Athens

Athenian sources enunciate, with repetitive consistency, a single fundamental principle entirely incompatible with the modern academic "Greek Law of Sale": a mere consensual agreement *(homologia*[2]) is "legally binding" *(kyria*[3]) from the

[1] See Pringsheim 1950: 86-90, 179-219. In accord: Gernet 1954-60: I.261; Jones 1956: 227-32; Wolff [1957] 1968, 1961; MacDowell 1978: 138-40; Harris 1988: 360; Millett 1990: 174; von Reden 2001: 74; Maffi 2005: 261.

[2] For *homologia* as "contract" at Athens, see Vélissaropoulos-Karakostas 1993: 163-65; 2002: 131-36. Refuting Wolff's attempt (1957 [1968]: 53-61) to define *homologia* as "acknowledgement," Kussmaul offers numerous examples where *homologein* conveys future promissory obligations (1969: 30-37). For Hellenistic and Roman usage of *homologia,* see Soden 1973.

moment of mutual consent, even when the *homologia* is clearly anterior to provision of the service, delivery of the good or payment in full of the anticipated purchase price. Athenian law thus holds "legally binding ... whatever arrangements one party might agree upon with another" (Demosthenes 47.77).[4] Hypereidês records that "the law states: whatever arrangements one party might agree upon with another are legally binding."[5] Demosthenes 42 similarly refers to "the law" that "mutual agreements *(homologiai)* are legally binding."[6] Deinarkhos insists that the "law of the polis" imposes legal liability on anyone who violates any agreement *(homologêsas)* made with another citizen.[7] Isokratês cites the Athenian rule that agreements between individuals ("private agreements": *homologiai idiai*) be "publicly" enforceable, and insists on the importance of complying with these consensual arrangements *(hômologêmena)*.[8] In fact, as Pringsheim concedes,[9] some texts even emphasize this mutuality of commitment as essential to the creation of a legally-enforceable obligation. Thus Demosthenes 56.2 confirms the binding effect of "whatever arrangements a party might willingly agree upon with another,"[10] and Demosthenes 48 cites "the law" governing agreements "which a willing party has agreed upon and covenanted with another willing party."[11] Epigraphic evidence also demonstrates the legal significance of executory agreements:[12] the sale of real estate without payment of the full purchase price – impossible under the Pringsheim thesis

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3 For the translation of *kyria* as "legally binding," see below pp. 82ff.

4 τὸν (νόμον) ὃς κελεύει κύρια εἶναι ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ. Scholars have assumed, in the absence of evidence to the contrary, that a naked promise by one party was not itself actionable: Wolff 1966a: 322; Vélissaropoulos-Karakostas 1993: 165-66.

5 *Athên.* § 13: ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι. The speaker does add a condition, otherwise unattested, to this general statement – "but only if they are fair" (τά γε δίκαια). As has been often noted (cf. Whitehead 2000: 267-69; MacDowell 1978: 140; Dorjahn 1935: 279), Epikratês is unable to cite any explicit Athenian legal precept supporting his assertion.

6 Dem. 42.12: τὸν (νόμον) κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας.

7 3.4: καὶ ὁ μὲν κοινὸς τῆς πόλεως νόμος, ἐάν τις εἰς ἕνα τινὰ τῶν πολιτῶν ὁμολογήσας τι παραβῇ, τοῦτον ἔνοχον εἶναι κελεύει τῷ ἀδικεῖν. The text (Nouhaud 1990) incorporates Lloyd-Jones' emendation (εἰς ἕνα τινά) for manuscripts A and N's ἐναντίον.

8 τὰς μὲν ἰδίας ὁμολογίας δημοσίᾳ κυρίας ἀναγκάζετ' εἶναι (18.24); ἀναγκαῖον εἶναι τοῖς ὡμολογημένοις ἐμμένειν (18.25). On this enforcement of private agreements through public procedures, see Carawan (forthcoming).

9 "... ἑκών merely emphasizes that contracts depend on consent, whereas delicts do not" (1950: 36).

10 τοῖς νόμοις τοῖς ὑμετέροις (sc. Ἀθηναίοις) οἳ κελεύουσι, ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι. For the effect of fraud or improper influence on requisite volition, see Wolff [1957] 1968: 484, n. 3; Maschke 1926: 162; Simônetos 1939: 193ff.; Jones 1956: 222. Cf. Plato, *Kritôn* 52e, *Nomoi* 220d.

11 §§ 11, 54: τὸν νόμον ... καθ' ὃν τὰς συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτούς ... ἃ μὲν ὡμολόγησεν καὶ συνέθετο ἑκὼν πρὸς ἑκόντα.

12 Cf. Finley [1951] 1985: Nos. 3, 112, 113, 114, 115.

– is confirmed by a *horos* ("mortgage") inscription published some decades after the appearance of *The Greek Law of Sale*.[13] In contrast to the paucity of evidence supporting many generally-accepted modern "reconstructions" of Athenian law,[14] consensual contracts at Athens are thus attested by a multitude of examples occurring not in a single context, but over a broad range of situations – taxation, personal services, testamentary transmission of wealth, the obtaining of judgments, the transfer and mortgaging of real estate, business transactions, maritime finance. Even popular discourse recognized the primacy of consensual agreements among willing parties: in a discussion of the demands of erotic love, the acclaimed playwright Agathôn alludes to the city laws sanctifying "that which a willing person should agree upon with another willing person."[15] Aristotle in the *Rhetoric* similarly confirms that "the laws" deem "legally binding" *(kyria)* whatever the parties agree upon (provided that these private arrangements are consistent with prevailing law).[16]

C. Modern Efforts to Refute the Ancient Evidence

Because of the profusion and variety of evidence supporting the existence of consensual contracts at Athens, virtually all scholars before Pringsheim had recognized the legal efficacy of such agreements.[17] But the existence of legally-significant consensual agreements contradicts Pringsheim's principal thesis that only actual payment of the purchase price or physical delivery of goods entitled a buyer or a seller to pursue judicial remedies. Accordingly, Pringsheim insisted that "the possibility of an informal and binding Greek contract of sale has to be eliminated from the very outset" (1950: 14): "Greek law did not know consensual contracts" (1950: 47). Yet in some 70 pages of dense argumentation on this theme, Pringsheim does not attempt to "eliminate" consensual contracts by offering persuasive counter-

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[13] SEG 34 (1984): 167= Millett 1982: No. 12A: ὅρος χωρίου̣ καὶ οἰκίας καὶ κήπων πεπραμ̣ένων ἐπὶ λύσει Φιλίωι Ἁλαιεῖ̣ τιμῆς ἐνοφει̣λομένης τοῦ ἡ̣μίσεος χωρίου̣ ξξξ. See Millett's discussion of this document in Finley [1951] 1985: xvii.

[14] Scholars often consider the text of a law or the existence of a legal principle to be incontrovertibly well-established if it is confirmed by two or three testimonia. The accuracy of a portion of the Law against Hybris, for example, is "assured" because it is quoted in two independent texts (Fisher 1992: 36, n. 1).

[15] Plato, *Symp*. 196c 2-3: ἃ δ' ἂν ἑκόντι ὁμολογήσῃ, φασὶν "οἱ πόλεως βασιλῆς νόμοι" δίκαια εἶναι.

[16] *Rhet*. 1375b9-10, 1376b8-9: ὁ μὲν κελεύει κύρια εἶναι ἁττ' ἂν συνθῶνται, ὁ δ' ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον ... αἱ μὲν συνθῆκαι οὐ ποιοῦσι τὸν νόμον κύριον, οἱ δὲ νόμοι τὰς κατὰ νόμους συνθήκας. Cf. Dem. 24.117, 46.24.

[17] See Beauchet [1897] 1969: 4.12ff.; Lipsius [1905-15] 1966: 684ff.; Vinogradoff 1922: 230; Ferrari 1910: 1198, 1911: 538; Mitteis and Wilcken [1912] 1963: 73, n. 1; Simônetos 1943: 293. *Contra:* Gneist 1845: 413-82. Maschke (1926: 165) recognized a limited number of specific consensual contracts. After the acceptance of Pringsheim's thesis by Wolff ([1957] 1968: 26ff., 1961: 129ff.), only Biscardi continued to assert the legal significance of such agreements (1991: 232ff.).

evidence. Instead he offers an *explanation* that he believes "sufficient to refute our texts" (1950: 40): not all consensual agreements were enforceable in the courts, but only those made in the presence of witnesses. Wolff, in an influential 1957 article, similarly argues in effect that not all consensual agreements were enforceable in the courts, but only – those accompanied by oaths![18] Yet, like Pringsheim, Wolff too had an ulterior motivation for denying legal significance to consensual agreements: their very existence contradicted Wolff's cardinal thesis that contractual legal obligation arose only as the result of a "real act," a "disposition for a determined purpose" *(Zweckverfügung)* that thereby imposed some obligation on the recipient.[19] Wolff's thesis is entirely incompatible with the existence (or even the possibility) of legally-significant consensual contracts. Accordingly, as Wolff's formulation has become generally accepted,[20] it has further reinforced (and itself taken confirmation from) Pringsheim's denial of the legal significance of consensual contracts.[21] Under the Pringsheim/Wolff theory, Athenian assertions that mutual covenants are *kyria* ("legally binding") can mean no more than that reciprocal promises are determinative of the parties' legal rights if, and only if, a "hand-to-hand" physical exchange has previously created a legal relationship between the parties. In the absence of such a "real" element, the parties' mutual covenants have no legal significance and cannot be enforced through the legal system.[22] In effect, the frequent statement in the ancient sources that a consensual agreement *(homologia)* is "legally binding" *(kyria)* has been transformed into an expression conveying precisely the opposite meaning, viz. that a consensual agreement *(homologia)* is "of no legal effect" *(kyria)*, in the absence of a "real element" – an interpretation that defies philological or semantic sense, and mutilates the plain meaning of the Greek.[23] To be sure, in classical Greek the word *kyria* does carry a multitude of significations and implications: the Liddell-Scott-Jones Greek Lexicon offers more than a dozen basic meanings – and a multitude of nuanced differentiations within the basic divisions. But in all contexts *kyria* conveys – in the Lexicon's words – such meanings as "having power," "having authority," being "decisive" or "valid," being "authorized" or "ratified," or, as a substantive, being "lord," "master," or "owner." God, for prime example, is *kyrios* – "all-powerful," "omnipotent." When described

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18 See below Section C3.

19 1957 [1968]: 63. Cf. Wolff 1961.

20 For its prevailing sway, see Trôianos and Vélissaropoulos-Karakostas 1997: 89-92; Vélissaropoulos-Karakostas 2002: 130-31; Jakab (this volume).

21 Wolff explicitly acknowledges the interdependence between his thesis and that of Pringsheim ("dem wir die Aufhellung der Wege verdanken" [1957] 1968: 487).

22 Vélissaropoulos-Karakostas 2002: 131: "Here, in brief, is the concept of Greek contract formulated by H.J. Wolff ... Everyone ... had to resort to the same contractual paradigm, the contract 'from hand to hand,' if they wanted to benefit from the protection of the civic courts."

23 Cf. Gernet [1955] 1964: 219: "valable et efficace (κύρια)."

as *kyrios*, a law *(nomos)* or decree *(psêphisma)* is "in force" or has "legal effect."[24] A court that is *kyrios* is one having legal authority.[25] In the context of covenants, "legally binding" is thus clearly the closest modern equivalent for *kyria*.[26] Carawan (forthcoming) correctly describes a "*kyria* clause" as a "contractual agreement (that) cancels prior claims and considerations. Parties to (such) an agreement have this capability to demand that one or both do thus-and-such in future, beyond any *quid pro quo* in hand," even when there is no other formalistic element (such as an oath) to create a legal obligation. Legal historians have differed in interpreting fourth-century "*kyria* clauses" as either absolutely determinative of the matter in question or as highly persuasive.[27] But, to my knowledge, no one has ever directly suggested that *kyria* should be understood in any context as "ineffective" or "non-binding." Let us therefore consider the justifications offered by Pringsheim and Wolff for their singular interpretation.

1. Legal Evolution.

In a formulation akin to Maine's conceptualization of inexorable legal movement "from status to contract,"[28] Pringsheim saw Greek law as embodying an early stage of juridical immaturity in which only physical payment of the purchase price or physical delivery of the good could effectuate a legal relationship. For him, "the early history of legal transactions is always dominated by formalism; independence of form is a later gradual growth" (1950: 15). Hence, his evolutionary imperative: "Greek law like other laws developed from mere formalism to more convenient forms; but it never recognized informal agreements, it did not know consensual contracts" (1950: 47). (Wolff offers a similar evolutionary conceptualization in a discussion of contract law "in the light of comparative legal history" [1961]).

Although an evolutionary conception of law and society never again attained the dominance reached in the nineteenth century,[29] evolutionary theories of legal development, and especially of the evolution of contract, were still somewhat acceptable at the time that Pringsheim was writing, now more than a half-century

[24] See Dem. 24.117 (τοὺς ἄλλους νόμους ἀκύρους οἴεται δεῖν εἶναι, αὐτὸν δὲ καὶ τὸν αὐτοῦ νόμον κύριον); Dem. 50.1 (περὶ τῶν νόμων, πότερα κύριοί εἰσιν ἢ οὔ). Cf. Dem. 23.32 (τὸν νόμον κύριον).

[25] See Dem. 13.16; 26.9; 57.56. *Akyros* (lacking legal authority): Dem. 24.2, 79, 102, 148, 154.

[26] Gernet [1955] 1964: 218: "ὅσ' ἄν τις ἕτερος ἑτέρῳ ὁμολογήσῃ εἶναι, on peut traduire 'toutes conventions font loi entre les parties'." Cf. Gernet [1955] 1964: 219.

[27] Determinative: Partsch 1909: 149, 1913: 447. Persuasive: Segrè 1925: 127ff.; Hässler 1960: 17ff., 42, 60, 71, 92; Rupprecht 1967: 61, 1971: 19, 72. In the Hellenistic period, such provisions appear to have become formulaic, lacking persuasive force (Schwarz 1920: 1104ff.; Wolff 1978: II.161). Cf. Vélissaropoulos-Karakostas 2001.

[28] 1861: 169. On the inapplicability of Maine's evolutionary theory to Athenian life and law, see Todd 1994 and E. Cohen 1994.

[29] See Burrow 1966: 17-41; Stein 1980: 86-98; Kuper 1988: 17-41; Cocks 1988: 52-78.

ago.[30] In the twenty-first century, however, few scholars envision legal history as a process of progression from a lower, simpler, or worse state to a higher, more complex or better arrangement. For the overwhelming majority of contemporary scholars, conclusions based upon an historical assumption of legal evolution are dismissed as "naïve" (Todd 1993: 253), and even among those who do recognize the possibility of patterns in legal history, a growing consensus seems to hold that "the path of development of legal institutions does not always follow a straight line. Often it is actually circular."[31] In contrast, there seems to be increasing acceptance, from anthropological and historical perspectives, of the "Liberal Theory of Contract," which suggests that from time immemorial, promises have been enforced by legal bodies because of a fundamental human moral belief that individuals should be bound by obligations that they impose on themselves by an exercise of free will, and that the consensual contract accordingly lies at the beginning, not toward the end of legal history.[32] Athenian recognition of oral consensual agreements, far from defying the pattern of legal "development," may instead be seen as conforming to a universal imperative.

2. Witnessing

Despite Pringsheim's insistence, on evolutionary grounds, that consensual contracts could not have existed in classical Athens, he still had to acknowledge the ancient evidence supporting their existence and legal efficacy (1950: 34-43). He therefore proposed a general rule giving legal force not to all *homologiai* but "only to witnessed *homologiai*" (1950: 22-25, 43). There is, however, no sign of a general requirement in Athenian law attributing legal significance only to mutual promises made before witnesses. Pringsheim was able to find only a single equivocal passage, Demosthenes 42.12, that appends to the usual formulation of the law ("mutual agreements *[homologiai]* are legally binding") the phrase "which they undertake in the presence of witnesses."[33] But even this citation is ambiguous. Because the Athenian orators often interpose among verbatim legal citations their own extraneous comments,[34] two interpretations are possible: (1) the speaker here is dealing with the facts peculiar to this specific case, describing agreements which were in fact witnessed, but not purporting to establish a legal rule at variance with the multitude of formulations (quoted above) which do not allude to witnessing, or (2) the orator is actually quoting verbatim a legal text that adds a requirement not otherwise known. Various considerations, including other passages in Demosthenes

[30] For the alleged evolution of contracts under the Common Law, see especially Simpson 1975 and Baker 1981.

[31] Vélissaropoulos-Karakostas 1993: 269.

[32] See Kimel 2003: 7-32; Scanlon 2001; Fried 1981.

[33] ἀλλ' ἀνθ' ἑνὸς δύο νόμους ἥκει πρὸς ὑμᾶς παραβεβηκώς ... ἕτερον δὲ τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων.

[34] Cf. Dover 1978 [1989]: 23-31; Harris 1992: 77.

42, favor the first explanation. In the paragraph immediately following 42.12, for example, the speaker, inveighing against his opponent's violation of agreements, makes no mention of witnesses in noting the "hatred" that Athenians would feel toward anyone suggesting that a consensual contract (*homologia pros allêlois*) was not legally enforceable.[35] Later he rebukes his adversary for behaving as though the law bade a party to "do none of the obligations which he had agreed to,"[36] again without adding "in front of witnesses," or some such qualifier.

In any event, a rule restricting the enforceability of consensual agreements to those that were witnessed would still not have established that "Greek law did not know consensual contracts" (1950: 47). To the contrary, such an evidentiary rule would merely confirm the juridical significance of consensual contracts that did comply with the evidentiary standard[37] – just as the Anglo-American Statute of Frauds, by denying legal enforceability to oral agreements for the sale of real-estate, confirms the actionability of executory real-estate contracts that do comply.[38] (Similarly the "new obligations" ["les nouveaux devoirs"] imposed in recent years on parties to contracts in France implicitly confirm the enforceability of those terms actually agreed upon).[39]

Moreover, a procedural requirement mandating the witnessing of consensual agreements would have been of no practical significance at Athens where the involvement of witnesses was an inherent aspect of virtually all commercial activity. Because the simple written receipt was unknown in classical Greece,[40] and because documents were generally destroyed concurrently with a party's compliance with the obligations imposed by written arrangements,[41] witnesses uniformly were gathered to note such mundane phenomena as delivery of goods[42] and the repayment of loans.[43]

3. Oaths

"What may be called the contractual obligation under Greek law always needed some real basis ... some material sacrifice. Lacking such a sacrifice, there was no room for any liability." (Wolff 1966 a: 131)

Like Pringsheim, Wolff created an elaborate legal theory that insisted on the need for a "real" element – for Wolff a disposition or other "material sacrifice" – in

[35] § 13: ὧν εἴ τις ἄκυρον ἡγήσαιτο δεῖν εἶναι τὴν πρὸς ἀλλήλους ὁμολογίαν, μισήσαιτ᾽ ἂν αὐτὸν ὡς ὑπερβάλλοντα συκοφαντίᾳ.

[36] § 14: ὥσπερ τοῦ νόμου προστάττοντος μηδὲν ποιεῖν ὧν ἂν ὁμολογήσῃ τις ...

[37] As Biscardi observed: 1991: 237-38.

[38] See Posner 2000: 161-66; Attiya 1986: 151-58; Kennedy 1973.

[39] Jourdain 1997: 73ff.

[40] Hasebroek 1923: 393ff.; Pringsheim 1955: 287-97.

[41] See Dem. 33.12, 34.31, 56.14-15. Cf. E. Cohen 1992: 125; Jones 1956: 220.

[42] Cf. Dem. 27.21; Hyper. *Athên.*

[43] See, for example, Dem. 27.58 (3,000 *dr.* payment before numerous observers in the Agora), 33.12 (many witnesses to repayment of 3,000 *dr.* loan). Cf. Dem. 34.30; 48.46.

order to create a juridically enforceable contractual obligation. Wolff insists that the Greeks did not conceive of a contract as an "agreement";[44] rather it was "in its origins a promise made on oath."[45] But since Greek law did not recognize mere mutual promises as a basis for liability – "the contractual obligation under Greek law always needed some real basis" – a consensual agreement, even fortified by oath, could not itself create a binding obligation.[46] As a result, according to Wolff, the courts were constrained to extend the action of "damage" (*blabê*) "to cover any kind of deterioration of the plaintiff's material interests caused by any wrongful act or conduct of the defendant," thus providing the Athenians with their only "system of contractual liabilities."[47]

Wolff's thesis – which fills the theoretical lacuna created by the denial of the existence of consensual contracts at Athens – has long commanded general acceptance.[48] Nonetheless, in recent years, it has drawn criticism as "speculative" (Todd 1993: 267) and as "solving one puzzle by introducing another," viz. "what it is that creates a duty" to rectify "material sacrifices" (Carawan [forthcoming] 7). On this point, Wolff argued that the religious element inherent in oaths imposed a duty on the recipient of a "disposition for a determined purpose" (*Zweckverfügung*) and that a "real" act (*praxis*) violative of that duty triggered legal liability ([1957] 1968: 530ff.). To show that his views were not mere theory lacking an ancient evidentiary basis, Wolff offered Demosthenes 48 as "eine Illustration" of his thesis. In Demosthenes 48, a case involving a purported agreement to share a contested estate and to coordinate strategy and action against other claimants, the speaker makes explicit reference to "the law" pursuant to which the parties entered into their agreement ("wrote up their contract" *[synthêkai]*).[49] The speaker has the text of the law (making such consensual agreements binding) read to the jurors (§ 11), and insists that his opponent must be "insane" to disregard this law requiring that a party "do whatever he has willingly agreed upon and covenanted with another."[50] Wolff correctly points out that the parties added oaths, promising to abide by these agreements,[51] but for this provision they called upon the gods as witnesses. (They

44 Wolff [1957] 1968: 522-23; 1966: 129-30.

45 Todd 1993: 267.

46 Wolff [1957] 1968: 529.

47 Wolff 1966a: 130-31. Cf. Wolff 1943 and Wolff 1966 b.

48 Todd 1993: 267; Kussmaul 1969: 9; Hamza 1989: 14-16.

49 § 10: τὸν νόμον ... καθ' ὃν τὰς συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτούς. Cf. § 9: συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτοὺς περὶ ἁπάντων ... καὶ μηδ' ὁτιοῦν πλεονεκτήσειν τὸν ἕτερον ὧν κατέλιπεν Κόμων, καὶ τἆλλα πάντα κοινῇ ζητήσειν, καὶ πράξειν μετ' ἀλλήλων βουλευόμενοι ὅ τι ἂν ἀεὶ δέῃ.

50 § 54: πῶς γὰρ οὐ μαίνεται ὅστις οἴεται δεῖν, ἃ μὲν ὡμολόγησεν καὶ συνέθετο ἑκὼν πρὸς ἑκόντα καὶ ὤμοσεν τούτων μὲν μηδ' ὁτιοῦν ποιεῖν;

51 § 9: ὅρκους ἰσχυροὺς ὠμόσαμεν ἀλλήλοις, ἦ μὴν τά τε ὑπάρχοντα φανερὰ ὄντα καλῶς καὶ δικαίως διαιρήσεσθαι. § 10: ἐγράψαμεν τὰς συνθήκας καὶ ὅρκους ὠμόσαμεν,

also made use of human witnesses, entrusted the agreement to a third party and recorded their undertakings in writing. [52]) But the text provides no linkage at all between these additional elements (oaths, witnesses, writing) and the legal efficacy of the parties' arrangements. "The law pursuant to which the parties entered into their agreement"[53] is the same provision we have encountered in so many other Athenian citations, the statute holding that a consensual agreement *(homologia*) is "legally binding" *(kyria*). Demosthenes 48 thus provides yet another example of the legal significance of reciprocal promises at Athens. Once again, Athenian law providing that "a *homologia* is *kyria*" offers a far simpler and far more credible explanation of the Athenian approach to "contracts" than that provided by the recherché modern concept of *Zweckverfügung*.

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ὅπως ἂν ... μηδετέρῳ ἐξουσία ἡμῶν γένηται μηδ' ὁτιοῦν ἰδίᾳ πρᾶξαι ... Cf. § 54 (preceding note).

[52] § 11: μάρτυρας ἐποιησάμεθα περὶ τούτων πρῶτον μὲν τοὺς θεοὺς οὓς ὠμόσαμεν ἀλλήλοις, καὶ τοὺς οἰκείους τοὺς ἡμετέρους αὐτῶν, ἔπειτ' Ἀνδροκλείδην Ἀχαρνέα, παρ' ᾧ κατεθέμεθα τὰς συνθήκας.

[53] τόν τε νόμον καθ' ὃν τὰς συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτούς (§ 11).

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