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## ISAEUS AND THE ATHENIAN INHERITANCE LAWS

As a student primarily of rhetoric, my first inclination is to come down firmly on one side of the debate on Athenian law between those who study it from a legal perspective and those who come at the subject from the rhetorical angle.<sup>1</sup> I am, however, currently working on Isaeus, who has the potential to help us bridge the divide – was he not, after all, the member of the canon of ten Attic orators who came closest to being an expert in the laws and who used them as the basis of his arguments? On the other hand, Isaeus had a reputation in the ancient world as well as the modern for cleverness (*deinotes*), a word which in this context implies deception. Some of the tensions apparent here are what I shall endeavour to explore in this paper.

I shall begin with the rhetorical angle. Isaeus had the distinct honour of receiving a critical essay by the ancient world's leader in this field, Dionysius of Halicarnassus. Dionysius originally wrote on only six of the ten in the canon (who may have been selected by Caecilius of Caleacte), later adding a piece on Dinarchus, but omitting Antiphon, Andocides and Lycurgus altogether. Of the six he says (*On the Ancient Orators* 4):

ἔσονται δὲ οἱ παραλαμβανόμενοι ῥήτορες τρεῖς μὲν ἐκ τῶν πρεσβυτέρων, Λυσίας Ἰσοκράτης Ἰσαῖος, τρεῖς δ' ἐκ τῶν ἐπακμασάντων τούτοις, Δημοσθένης Ὑπερείδης Αἰσχίνης, οὓς ἐγὼ τῶν ἄλλων ἡγοῦμαι κρατίστους.

The orators to be compared will be three from the earlier generation, Lysias, Isocrates and Isaeus, and three from those who flourished after these, Demosthenes, Hyperides and Aeschines. These I consider to be the best orators. (trans. Usher)

The essays on Hyperides and Aeschines do not survive, and it quickly becomes clear which of the other four was considered the best and which the least good – but at least Isaeus is included. Dionysius' criticisms of Isaeus' methods, however, do not come close to the barbs of his main modern commentator, William Wyse.<sup>2</sup>

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<sup>1</sup> There is a good article on this by Harvey Yunis in Gagarin and Cohen (2005).

<sup>2</sup> Wyse (1904).

Dionysius wrote (*Isaeus* 3) that Isaeus ‘blackens his opponent’s character, outgenerals the jury with his stratagems and tries by every means to help his client’s case’ (καὶ πρὸς μὲν τὸν ἀντίδικον διαπονηρεύεται, τοὺς δὲ δικαστὰς καταστρατηγεῖ, τοῖς δὲ πράγμασιν, ὑπὲρ ὧν ὁ λόγος, ἐκ παντὸς πειράται βοηθεῖν). Wyse easily outgenerals Dionysius, for example on p. 393, ‘the impudence of these paragraphs is a measure of Isaeus’ contempt for the intelligence of an Athenian tribunal’. But we have to remember that Isaeus was a professional speechwriter, and what competent logographer did not seek to do everything he could to earn his fee? The beginnings of a rehabilitation of Isaeus’ reputation are already discernible in A.R.W. Harrison’s *Law of Athens*, when he writes, ‘Throughout his commentary Wyse attempts to discredit Isaios’ statements as to what was the law. This scepticism has been much overdone; it is unlikely that Athenian juries were so gullible or so ignorant of the law as it implies’.<sup>3</sup> Stephen Todd is not convinced by Harrison’s point, and rightly notes that jurors might be convinced by a ‘cunning and slightly dishonest litigant’ regardless of what the law actually said.<sup>4</sup> More recently, Stephen Usher picked up the rehabilitatory baton in his *Greek Oratory*, though he can still remark ‘This is Isaeus at his most devious’.<sup>5</sup>

But if Isaeus is so devious, this raises the thorny question of the validity of his speeches as a source for Athenian law, a topic also excellently discussed by Todd in relation to the orators as a whole in his 1990 article. How reliable is Isaeus’ reporting and interpretation of the laws? This is an area to which Wyse devoted meticulous care, and many of his conclusions are still accepted by legal historians today – and rightly so. But what I will venture to suggest is that this is another area where Isaeus has been to some extent unfairly castigated. If Athenian statutes were primarily procedural rather than substantive, this means that there was often considerable scope for litigants to interpret laws as supporting their case, and since the jurors were not routinely bound by precedent or directed by a judge, they would decide in favour of the case that was presented to them the more persuasively – and thereby did not break the dicastic oath they swore to judge according to the laws. So it is doubtless sensible to start, with Todd, ‘from the premise that an orator will lie his head off at the slightest opportunity’,<sup>6</sup> and even to follow the method of Paul Millett as recorded by Todd,<sup>7</sup> that you should ‘disregard anything the orator says which might benefit his case; only believe the *obiter dicta* which he happens to mention in passing’. This is, of course, to judge the ancient logographer by the standards of the modern historian: it is one thing for a speaker to interpret the law misleadingly for his own purposes, but quite another to lie about what a law actually said – there was no procedure for checking this in court, though it seems from Dem.

<sup>3</sup> Harrison (1968) 122 n. 1.

<sup>4</sup> Todd (1990) 172-3.

<sup>5</sup> Usher (1999) 128 n. 6; for the remark see p. 162.

<sup>6</sup> Todd (1990) 173.

<sup>7</sup> Todd (1990) 174.

26.24 that the citing of a non-existent law carried the death penalty. Does Isaeus regularly lie his head off, or perhaps more often interpret? Take as an example the discussion of adoption at 10.9-10:

οἶμαι τοίνυν πάντας ὑμᾶς εἰδέναι, ὧ ἄνδρες, ὅτι κατὰ διαθήκας αἱ εἰσαγωγαὶ τῶν εἰσποιήτων γίνονται, διδόντων τὰ ἑαυτῶν καὶ ὑεῖς ποιουμένων, ἄλλως δὲ οὐκ ἔξεστιν. εἴτε οὖν Ἀρίσταρχον φήσῃ τις αὐτὸν διαθέσθαι, οὐκ ἀληθῆ λέξει· γνησίου γὰρ ὄντος αὐτῷ Δημοχάρους ὑέος οὐτ' ἂν ἐβούλετο ταῦτα πράξει, οὔτε ἐξῆν δοῦναι τὰ ἑαυτοῦ ἐτέρῳ· εἴτε Ἀριστάρχου τελευτήσαντος Δημοχάρην αὐτὸν ποιήσασθαι, καὶ ταῦτα ψεύσονται. παιδὸς γὰρ οὐκ ἔξεστι διαθήκην γενέσθαι· ὁ γὰρ νόμος διαρρηθῆναι κωλύει παιδί μὴ ἐξεῖναι συμβάλλειν μηδὲ γυναικὶ πέρα μεδίμνου κριθῶν. μεμαρτύρηται δὲ Ἀρίσταρχον μὲν πρότερον Δημοχάρους τοῦ ὑέος τελευτήσαι, ἐκείνον δὲ ὕστερον τοῦ πατρός· ὥστε κατὰ γε διαθήκην ἐκείνων, οὐδ' εἰ διέθεντο προσῆκεν αὐτῷ τούτων τῶν χρημάτων κληρονομήσαι. ἀνάγνωθι δὴ καὶ τοὺς νόμους, καθ' οὓς οὐδετέρῳ αὐτῶν ἐξῆν διαθήκας ποιήσασθαι.

#### NOMOI

I think you all know, gentlemen, that introductions of adopted children take place through a will, with men devising their property and adopting a son, and any other procedure is not allowed. So if anybody says Aristarchus I made a will himself, he will not be speaking the truth: while he had a legitimate son, Demochares, he would not have wanted to do so and was not allowed to bequeath his property to another. And if they say that on the death of Aristarchus I Demochares adopted Aristarchus II, they will be lying about this too. A minor is not allowed to make a will, for the law expressly forbids a child or woman to make a contract for the disposal of more than a medimnus of barley. Now it has been testified that Aristarchus I died before his son Demochares and that the latter died after his father; so even if they had made wills, Aristarchus II was not entitled to inherit this property by will. Read, then, the laws according to which neither of them was allowed to make a will.

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Everyone, e.g. Lene Rubinstein,<sup>8</sup> says minors cannot adopt, but note that the speaker has just lied, if you like, or misinformed the jurors about adoptions by will ('and any other procedure is not allowed'): it is not the case that the only legal method of adoption was for a man to make a will, adopt a son and introduce him to his phratry

<sup>8</sup> Rubinstein (1993) 16.

and deme, because a man might leave a will in which the adoptive son was named but the procedure was not carried out until after his death (he might be going off to war, say); and moreover, there existed the possibility of posthumous adoption, whereby the deceased's family might carry out an adoption to secure the future of his estate after an unforeseeable event such as his premature death. Again, it is also not strictly the case that a man with a legitimate son, here Aristarchus and Demochares, was not allowed to devise his estate to anyone else, because there was a law (quoted at [Dem.] 46.24) which allowed a man to nominate an heir in the event of the death of his son during his minority. Now it may well be that men usually adopted *inter vivos* and themselves introduced their adopted sons to their phratry and deme, to forestall the kinds of dispute evidenced in Isaeus' speeches; and probably men did not usually leave a will when they had a son. Further, I imagine that many of the jurors listening to this speech will have agreed with the speaker's general line of argument, even if they knew it was not watertight. But why, if we can show that these two assertions are false, and if we follow the Todd-Millett method, should we simply accept the speaker's third contention, that minors were not allowed to make a will? This is no *obiter dictum*. Notice that the speaker does not actually say that there was a law prohibiting minors from making a will – he can only quote the provision of a law restricting a minor's financial capacity, and it is an *a fortiori* argument that a minor then could not devise his property; and in the Greek it is unclear whether the qualification 'more than a medimnos of barley' applies to minors as well as women, or only to women. These last points were made by Wyse, while not doubting for once the truth of what Isaeus' client says, and I am not going to act as devil's advocate and argue that a minor could make a will. But I will ask what the laws were that the speaker has read out at the end of §10? Did the clerk read out the whole text, or an edited version that suited his arguments? Is Isaeus deliberately lying? Or is he interpreting the laws tendentiously for the sake of his client, as we really ought to expect him to do? And why should we assume that the opponents in all these cases quoted the laws any more truthfully than Isaeus' clients? Laws, of course, are classified by Aristotle among the ἄτεχνοι πίστεις or inartificial proofs, along with witnesses, contracts, torture and oaths (*Rhetoric* 1.15.1-12), and he suggests strategies on how to proceed if the laws do not favour your case (*Rhetoric* 1.15.4):

φανερὸν γὰρ ὅτι, ἐὰν μὲν ἐναντίος ἢ ὁ γεγραμμένος τῷ πράγματι,  
τῷ κοινῷ νόμῳ χρηστέον καὶ τοῖς ἐπιεικέσιν ὡς δικαιοτέροις.

For it is evident that, if the written law is counter to our case, we must have recourse to the general law and equity, as more in accordance with justice.  
(trans. Freese)

I shall return to this presently. But mark that for Aristotle laws are proofs, not an objective criterion against which both parties must operate as today. The competent logographer, then, supports his client using whatever methods he deems necessary, and his skill should be assessed accordingly. I do not believe that Athenian laws were as clear-cut as Wyse would have us believe, and in modern terms Isaeus was skilled at exploiting loopholes in them. This is unfortunately of no comfort to the legal historian seeking to discover what the laws actually said – but it is meat and drink for students of rhetoric.

Where does this leave us with Isaeus as a source for legal history? Does he deserve the reputation of being the orator who is closest to being a legal expert, and how does he use the laws in his speeches? These questions immediately take us into the realm of invention, one of the five parts of rhetoric (the others being arrangement, style, memory and delivery); and it might also be argued that the answer to the question about Isaeus' legal expertise depends to a large extent on an accident of historical survival. As is well known, all fifteen of the extant speeches of Antiphon concern homicide, and similarly the eleven speeches of Isaeus that survive in the manuscripts all concern inheritance in one form or another. Richard Jebb long ago suggested that this may be due to the way the speeches were arranged in the collection, with the largest or most famous group put first, and he pointed out that the final speeches of these two orators both appear to break off before the end, so the speeches on other types of case have been lost.<sup>9</sup> We know that Antiphon wrote on various other topics, including allied tribute and peacocks, and we also know from the large fragment in Dionysius that is regularly printed as Isaeus speech 12 that Isaeus wrote on citizenship rights. Now the latter may be significant. I have argued elsewhere that there is in fact little evidence in Isaeus' case for any great variety of speeches; rather, inheritance disputes clearly formed the bulk of the Isaeus corpus, at least as it was known later in antiquity.<sup>10</sup> Fifteen of the forty-five identified titles and/or fragments listed in the Teubner edition of Thalheim were almost certainly connected with inheritance, and several more may well have been. The only other major category for which we have evidence is that of the cognate area of citizenship rights – seven speeches concerned citizenship, with at least four treating the rights of freedmen. Further, Chris Carey has recently suggested that a papyrus fragment usually attributed to Lysias is more likely to be by Isaeus, and this too concerns either inheritance or citizenship.<sup>11</sup> Flimsy though this evidence is, it may point to the conclusion that Isaeus did indeed concentrate on a particular area of the law.

Whatever the truth of this, Isaeus certainly makes extensive use of the laws in his speeches, quoting them as evidence and using them to form the basis of probability arguments. Or does he? In fact, in four of the eleven speeches no law is

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<sup>9</sup> Jebb (1893) ii.314.

<sup>10</sup> Edwards (2006) 72-5.

<sup>11</sup> Carey (2005).

cited at all, though there are clearly reasons for this.<sup>12</sup> Speech 4 is a *synegoria*, and speech 5, an action to compel the discharge of a suretyship, was based on an affidavit, which is read out twice. But rather more interestingly in speeches 1 and 9 the speaker is both times arguing against the validity of a will on moral rather than legal grounds, because the law was not on his side. This reminds us of Aristotle's advice in the *Rhetoric*, that a speaker should emphasise law if the statutes strengthen his case, but equity if they weaken it. On the face of it Isaeus does exactly what Aristotle was later to suggest, but let us investigate this a little further.

In the eleven inheritance speeches, Isaeus uses the word νόμος and its parts some 149 times. I would break down this usage into three basic categories, though I am fully aware that this is a very simplistic approach, where the first two categories have overlaps and which lumps all the examples that are not in the other two into a third, catch-all category – rather like Aristotle's division of speeches into forensic, the overlapping deliberative and the catch-all epideictic. My categories are (1) passages where the laws are actually read out to the jurors; (2) passages where speakers state what the laws say, without having them read out; (3) other general references to the laws, which we might designate as the purely rhetorical use of them. Taking these in reverse order, more than half the occurrences of *nomos* in Isaeus fall under category (3), as we might expect. There are numerous passages in the speeches where speakers make general, often vague references to the laws, though sometimes clearly with the laws relevant to their case in mind, even when they are against them, such as 1.4: 'and the laws have given us the right of succession as next of kin' (δεδωκότων δ' ἡμῖν καὶ τῶν νόμων κατὰ τὴν ἀγγιστεῖαν). On other occasions speakers highlight how their opponent is abusing or misusing the laws, such as 11.36: 'my adversary has in this matter acted entirely unjustly ... but has cleverly devised the whole plot from motives of self-interest, uttering calumnies, misinterpreting the laws and seeking to get the better both of you and of me contrary to justice ...' (ὅτι μὲν οὖν οὔτε περὶ τούτων οὐδὲν δίκαιον πεποίηκεν οὔτε περὶ τῶν ἄλλων ἀληθὲς οὐδὲν εἶρηκεν, ἅπαντα δὲ δεινῶς πλεονεξία μεμηχάνηται διαβάλλον καὶ τοὺς νόμους παράγων καὶ ὑμῶν καὶ ἐμοῦ παρὰ τὸν δίκαιον περιγενέσθαι ζητῶν ...). A common expression is κατὰ τοὺς νόμους ('according to the laws'), which appears some 35 times (i.e. almost a quarter of the times the word appears); and in several of the speeches the laws are connected with justice in the final appeal to the jurors, such as 4.31: 'remember the laws and the oaths which you swore and also the evidence which we have placed before you, and give your verdict in conformity with justice' (ἀλλὰ καὶ τῶν νόμων ἀναμνησθέντες καὶ τῶν ὄρκων οὐς ὠμόσατε, πρὸς δὲ τούτοις καὶ τῶν μαρτυριῶν ἃς ἡμεῖς παρεσχήμεθα, τὰ δίκαια ψηφίσασθε). One remarkable fact, however, is that *nomos* does not appear at all in

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<sup>12</sup> See Edwards (2006) 75.

speech 5, even though the speaker is faced by an uphill task and we might expect him to appeal vaguely at least to the laws and justice.

In the majority of cases where Isaeus uses the laws as the basis of arguments, his client simply states what the law said without having it read out. This must raise our suspicions because there were no presiding judges in Athenian courts to instruct the jurors on matters of law. So before we can believe what a speaker says the law says, we really need corroborative evidence, but this is not always available – what do we do then? For example, the speaker of speech 9, who is contesting the validity of a will which would deprive him of the estate of Astyphilus, says (9.13):

ἀλλὰ μὴν οὐδ' αἰσχυνθῆναι οὐδενὶ προσήκει ἐπὶ τοιαύταις  
διαθήκαις ὡς πλείστους μάρτυρας παρίστασθαι, νόμου γε ὄντος  
ἐξεῖναι ὅτῳ βούλοιο δοῦναι τὰ ἑαυτοῦ.

Moreover, no one ought to be ashamed of summoning the largest possible number of witnesses to the execution of such a will, when there is a law which permits a man to bequeath his property to whomsoever he wishes.

Now we know from [Dem.] 46.14, where the law on testaments is quoted, that this statement of the law by Isaeus is true – except that the law adds the rider ‘if he have no male children lawfully born, unless his mind be impaired by one of these things, lunacy or old age or drugs or disease, or unless he be under the influence of a woman, or under constraint or deprived of his liberty’ (ἂν μὴ παῖδες ὧσι γνήσιοι ἄρρενες, ἂν μὴ μανιῶν ἢ γήρως ἢ φαρμάκων ἢ νόσου ἔνεκα, ἢ γυναικὶ πειθόμενος, ὑπὸ τούτων του παρανοῶν, ἢ ὑπ' ἀνάγκης ἢ ὑπὸ δεσμοῦ καταληφθεὶς) (trans. Murray). These conditions are not at issue here, so the omission is not a problem; and I am accepting that the law quoted in Demosthenes’ text is genuine. But at 3.68 the speaker says: ‘the law states explicitly that, in the absence of legitimate male issue, a man can dispose of his property as he pleases, but that, if he has daughters, the legatees must take them as well’ (ὁ γὰρ νόμος διαρρηθῆναι λέγει ἐξεῖναι διαθέσθαι ὅπως ἂν ἐθέλη τις τὰ αὐτοῦ, ἐὰν μὴ παῖδας γνησίους καταλίπη ἄρρενας· ἂν δὲ θηλείας καταλίπη, σὺν ταύταις); and Isaeus says this again at 10.13: ‘her own father, in default of male heirs, could not have disposed of his estate without disposing of her with it; for the law ordains that he may dispose of his property to whomsoever he wishes, if he disposes of his daughters with it’ (καὶ τῷ μὲν πατρὶ αὐτῆς, εἰ παῖδες ἄρρενες μὴ ἐγένοντο, οὐκ ἂν ἐξῆν ἄνευ ταύτης διαθέσθαι· κελεύει γὰρ ὁ νόμος σὺν ταύταις κύριον εἶναι δοῦναι, ἐὰν τῷ βούληται, τὰ ἑαυτοῦ). Harrison, like others before him, accepts Isaeus’ remarks and, citing these two passages as evidence, states ‘if there were daughters but no sons he could adopt a son on

condition that he married her to one of the daughters'.<sup>13</sup> If there were no other evidence for this claim, both times of course made by Isaeus' clients from self-interest, we would be justifiably suspicious, especially since Lene Rubinstein has shown that disposal of the daughter did not always happen.<sup>14</sup> But Isaeus himself had already had the law read out at 3.42: 'no one has the right to devise or dispose of any of his property without also disposing of any legitimate daughters whom he may have left at his decease. You will understand this when you hear the text of the laws read out. Read these laws to the judges' (οὔτε γὰρ διαθέσθαι οὔτε δοῦναι οὐδενὶ οὐδὲν ἔξεστι τῶν ἑαυτοῦ ἄνευ τῶν θυγατέρων, ἐάν τις καταλιπὼν γνησίας τελευτᾷ. γνῶσεσθε δὲ αὐτῶν ἀκούσαντες τῶν νόμων ἀναγίνωσκομένων. ἀναγίγνωσκε τούσδε αὐτοῖς). Unless he is guilty of citing a non-existent law, Isaeus is a good authority, if the only one, for a law dictating the testator's duty with regard to his legitimate daughters. I merely note that a similar provision for daughters of fathers who died intestate is attested in [Dem.] 43.51. Wyse grudgingly writes, in his note on 3.68, 'for the form of the clause referring to daughters unfortunately Isaeus is our only authority'. On the other hand, given that Rubinstein is right (as I am sure she is), this seems with Wyse to be a case where Solon's law was no longer adhered to in the fourth century, even after presumably being reinscribed during the revision of the laws at the end of the fifth century – is this an instance of customary practice (*nomos* in that sense) overriding the law (*nomos* in the other sense)? One other example: note that at 3.52-3, where the speaker has been arguing that his opponent's niece Phile was illegitimate, as evidenced by the small dowry bestowed on her, he concludes this section of arguments by referring to and then having read out the laws which were 'precise on all these points' (οἱ δὲ νόμοι περὶ ἀπάντων διορίζουσι τούτων). Is this a tiny shred of evidence for a law regulating dowries?

My third category is the most frustrating one, because when Isaeus does have the law read out, the manuscripts do not preserve the text, except on one occasion at 11.11 where, as with many of the quotations in our manuscripts of Demosthenes, the alleged text is probably a reconstruction on the basis of what follows. Furthermore, on some occasions such as the one mentioned just now (3.42) it is not even clear which law was read out: was it part of a testamentary law not quoted in full at Dem. 46.14, or was it part of a separate law concerning heiresses (referred to also at Dem. 37.45)? Isaeus actually has the law read out on fifteen occasions in the eleven speeches, but ten of these citations come in three speeches only, three in speech 3, three in speech 7 (these are in fact three clauses from the same law) and four in speech 11. A variety of laws, or of different clauses within them, is used, including laws on adoption (2.16, 6.8), heiresses (3.42, 53), the rules of succession (7.21-2, 11.1, 4, 11, ?22) and testaments (10.10), marriage (3.38), neglect of parents (8.34),

<sup>13</sup> Harrison (1968) 85.

<sup>14</sup> Rubinstein (1993) 95-6.

and at 6.48 a law concerning women's attendance at the Thesmophoria, again our only source for such a law with no details of what it contained. But it is interesting to revisit Aristotle's advice on using the law when it is in your favour and trusting to equity when it is not, with regard to these three speeches where the laws are most employed. Whatever the possible deceptions and weaknesses in the legal arguments of speech 3, *On the Estate of Pyrrhus*, it is nevertheless the case that this was a second prosecution for perjury conducted by the speaker: he had already been successful in his suit against Xenocles, who was claiming the estate on behalf of his wife, and was now attacking Xenocles' witness Nicodemus, the brother of the wife's mother. So the speaker certainly believed he had the law on his side, and Isaeus uses the law as Aristotle suggests. In speech 7 the speaker Thrasyllus claims the estate of Apollodorus as his adopted son, but the trouble he has is that the formalities of the adoption had not been completed, and a rival claim was made by the deceased's first cousin, who was female. There is no doubt (it seems) who Apollodorus intended to succeed him and Thrasyllus' claim was in equity a strong one. But legally, without the adoption being complete, he was a remoter relative than his rival. Nevertheless, on the basis of the rules of the order of succession, the *ankhisteia*, he argues that her sister's son Thrasybulus had a stronger claim being male and shut out his aunt, but had given up the estate in Thrasyllus' favour. This is a complex issue which I have simplified, but it is almost certain that Isaeus here misrepresents the law, since Thrasybulus was the son of a daughter who had the same rights as her sister and the principle that 'males have precedence' (*κατατείν τοὺς ἄρρενας*) did not apply in that case. So on this occasion Isaeus seems to get the best of both worlds: he uses arguments from equity *and* has the law read out in such a way that it could be misinterpreted. What, then, of our third speech, speech 11 *On the Estate of Hagnias*, the one where Isaeus makes the most extensive use of the laws and which begins, from a rhetorical point of view, most remarkably and uniquely in the orators with the citation of a law, followed by a discussion of the laws which includes a rare cross-examination of the speaker's opponent (at 11.5)?

Almost all scholars have accepted the identification of Hagnias with the ambassador who was captured by the Spartan Pharax on an embassy to Persia in 397/6, handed over to the Spartans and executed (*Hell. Oxy.* 7.1). Sally Humphreys, however, pointed out some time ago that Harpocration equates his Hagnias with a man mentioned by Isaeus in his lost *Against Euclides*, and does not refer to speech 11. Further, in §8 Isaeus talks of the 'business which turned out advantageously for the city', whereas the 397/6 embassy probably did not.<sup>15</sup> Humphreys posited that Hagnias died on a later embassy, perhaps the one to Amyntas, king of Macedon, in 375 or 373. I am not one of those who fear the cut of Occam's razor, and I agree with Humphreys. The later date solves the very real problem that if Hagnias died in 396, his niece will have controlled the estate for about thirty-five years (down to the

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<sup>15</sup> Humphreys (1983).

awarding of the estate to Phylomache in 361/0, cf. [Dem.] 43.31) without, it seems, being married or having any children. If instead he died about twenty years later, the niece could now have inherited the estate and died when still unmarried. The problem arises because Hagnias had (unusually, it seems) adopted by will a female relative, his niece, but on condition that were she to die childless his estate should pass to his half-brother Glaucon (Glaucon would be posthumously adopted as Hagnias' son). This is indeed what transpired (§9), but the authenticity of the will was then challenged by Eubulides (§9; [Dem.] 43.43-45), who was Hagnias' second cousin on his father's side and first cousin on his mother's side. When he died, the case was successfully pursued on behalf of his daughter Phylomache by her husband Sositheus. Phylomache was Hagnias' first cousin once removed on his father's side and so took precedence over Glaucon, who was Hagnias' half-brother but on his mother's side. Since, however, the result of the trial was to overturn Hagnias' will, his other second cousins Stratius, Stratocles and Theopompus now entered a claim. The first two died, and Theopompus claimed the estate against (or so he says, §16) Phylomache and Hagnias' mother, who was also her own son's second cousin but being female after Theopompus in the line of succession (§17). But according to [Dem.] 43.7-8 there were five claimants, Phylomache, Theopompus, Glaucon, Glaucus and Eupolemus (who was possibly, with Humphreys, the son of Callistratus, Hagnias' father Polemon's cousin).<sup>16</sup> Sositheus claims that a deal was struck by the others against Phylomache, a written agreement being deposited with Medeios of Hagnus. It was also alleged that Theopompus had agreed with Stratocles to give the latter's son, whose guardian he was, half of the estate if his claim was successful (§§24-6). Theopompus of course denied this, and he won the whole estate by proving that Phylomache's grandmother was not a legitimate sister of Polemon: she was therefore only related to Hagnias as his second cousin once removed through her great-grandfather Eubulides, and Theopompus was the closest relative (Hagnias' mother probably had no legal claim as mother). The saga was far from over, however, since Theopompus was prosecuted some time in the early 350s for maltreatment of an orphan (§§6, 15) by another of the son's guardians, on the basis that he had defrauded him of half of Hagnias' estate.

Isaeus bases Theopompus' defence on the law of succession of collateral relatives, which we know from Is. 7.20, supplemented by [Dem.] 43.51:

πατρώων μὲν οὖν καὶ ἀδελφοῦ χρημάτων τὸ ἴσον αὐτοῖς ὁ νόμος μετασχεῖν δίδωσιν· ἀνεψιοῦ δέ, καὶ εἴ τις ἔξω ταύτης τῆς συγγενείας ἐστίν, οὐκ ἴσον, ἀλλὰ προτέροις τοῖς ἄρρεσι τῶν θηλειῶν τὴν ἀγχιστείαν πεποίηκε. λέγει γάρ “κρατεῖν δὲ τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἄρρένων, οἳ ἂν ἐκ τῶν αὐτῶν ὦσι, καὶ γένει ἀπωτέρω τυγχάνωσιν ὄντες”.

<sup>16</sup> Humphreys (1983) 223 n. 13.

Thus the law gives the sister and the sister's son an equal share of their father's and their brother's estate; but when a first cousin, or any other kinsman in a remoter degree, dies, it no longer grants such equality, but gives the male relatives the right of succession as next-of-kin in preference to the female. For it declares that "the males and the issue of the males, who are descended from the same stock, shall be preferred, even though their relationship to the deceased is more remote".

ὅστις ἂν μὴ διαθέμενος ἀποθάνῃ, ἐὰν μὲν παῖδας καταλίπη  
 θηλείας, σὺν ταύτησιν, ἐὰν δὲ μὴ, τοῦσδε κυρίους εἶναι τῶν  
 χρημάτων. ἐὰν μὲν ἀδελφοὶ ὧσιν ὁμοπάτορες· καὶ ἐὰν παῖδες ἐξ  
 ἀδελφῶν γνήσιοι, τὴν τοῦ πατρὸς μοῖραν λαγγάνειν· ἐὰν δὲ μὴ  
 ἀδελφοὶ ὧσιν ἢ ἀδελφῶν παῖδες, ... ἐξ αὐτῶν κατὰ ταῦτα  
 λαγγάνειν· κρατεῖν δὲ τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἀρρένων, ἐὰν  
 ἐκ τῶν αὐτῶν ὧσι, καὶ ἐὰν γένει ἀπωτέρω. ἐὰν δὲ μὴ ὧσι πρὸς  
 πατρὸς μέχρι ἀνεψιῶν παίδων, τοὺς πρὸς μητρὸς κατὰ ταῦτα  
 κυρίους εἶναι. ἐὰν δὲ μηδετέρωθεν ἢ ἐντὸς τούτων, τὸν πρὸς  
 πατρὸς ἐγγυτάτω κύριον εἶναι. νόθῳ δὲ μηδὲ νόθῃ μὴ εἶναι  
 ἀγχιστεῖαν μὴθ' ἱερῶν μὴθ' ὀσίων, ἀπ' Εὐκλείδου ἄρχοντος.

Whenever a man dies without making a will, if he leaves female children his estate shall go with them, but if not, the persons herein mentioned shall be entitled to his property: if there be brothers by the same father, and if there be lawfully born sons of brothers, they shall take the share of the father. But if there are no brothers or sons of brothers, their descendants shall inherit it in like manner; but males and the sons of males shall take precedence, if they are of the same ancestors, even though they be more remote of kin. If there are no relatives on the father's side within the degree of children of cousins, those on the mother's side shall inherit in like manner. But if there shall be no relatives on either side within the degree mentioned, the nearest of kin on the father's side shall inherit. But no illegitimate child of either sex shall have the right of succession either to religious rites or civic privileges, from the time of the archonship of Eucleides. (trans. Murray)

Much ink has been spilled on the question as to whether the inheritance expert pulled the wool over the jurors' eyes, and I here follow my arguments in my translation of the speeches.<sup>17</sup> The law defined close relatives (*ankhisteis*) as being relatives 'as far as children of cousins (μέχρι ἀνεψιῶν)'. I suggested earlier that Athenian laws were not tightly worded, and the difficulty here lies in the meaning of

<sup>17</sup> Edwards (2007).

‘cousin’. The Greek word ἀνεψιός covers what in English we would call first cousins and second cousins, and therefore it is not clear whether ‘children of cousins’ means ‘children of first cousins’ (i.e. ‘first cousins once removed’) or ‘second cousins’ (i.e. children of a parent’s first cousin). Theopompus was Hagnias’ second cousin, and on the interpretation that ‘children of cousins’ means ‘first cousins once removed’, he was outside the required degree of kinship. But Theopompus won both his cases, the one against Phylomache and that against his fellow-guardian, and his son may later have won a further case on the same basis (the case of [Dem.] 43). Two juries, therefore, certainly agreed with Theopompus’ interpretation of the law, and I contend, despite what I said earlier about Isaeus’ misinterpretation of the law in speech 7, that we have reason to accept that his version of it here was allowable, rather than that he managed to hoodwink the jurors on both occasions. But did Theopompus hoodwink them in the matter of his ward? He was the son of a second cousin of Hagnias, which must indicate that he was outside the requisite degree of kinship. Theopompus therefore argues correctly that he was not entitled himself to claim a share of Hagnias’ estate. But his father did have a claim, though he died before he established it, and so the opponent may have argued that his son ought to inherit his father’s share with the rest of his estate (just as Theopompus himself passed on his estate to his son Macartatus). But the jurors in our trial at least disagreed, and I do not think that this was because they were incapable of following the family tree. Perhaps part of the answer lies in the difference between those who were permitted by the law to enter directly into an inheritance by *embateusis* and those who had to establish their claim in court by *epidikasia*.<sup>18</sup> Since the jurors were here deciding a case of maltreatment, they may have been convinced that Theopompus had not maltreated his ward, who had not as yet established his claim to the estate.

But perhaps they were fooled after all. Nevertheless, the prosecutions of Theopompus’ witnesses for false testimony which followed (cf. §45) did not lead to his loss of the estate, which he enjoyed until his death. At this point Phylomache tried again. She had become the heiress to the estate of her father Eubulides and she had one of her sons, also named Eubulides, posthumously adopted as her father’s son ([Dem.] 53.14). If her grandmother had been legitimate (which Theopompus had successfully contested), her son would now have been in law a first cousin once removed of Hagnias, and Sositheus claimed Hagnias’ estate on that basis against Theopompus’ son Macartatus (by [Dem.] 43). The thrust of his argument is again that the law only covered the sons of first cousins (i.e. first cousins once removed) and Theopompus as a second cousin was outside the prescribed limit. But since Macartatus’ own son, who was an ephebe in 324/3 and therefore born about the time of this trial in c. 344/3, was called Hagnias, the likelihood is that Macartatus retained the estate of Hagnias (though we should not perhaps push this argument too far).

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<sup>18</sup> See Todd (1993) 220-1.

Scholars have mostly been very reluctant to accept that Theopompus is doing anything other than pulling the wool over the jurors' eyes, believing that his interpretation of the word *anepsios* is wrong. I wonder if, at worst, the legal expert who was his logographer in fact merely took advantage of loose wording in the law and found a loophole. Either way, his client's success in my opinion will ultimately have depended more on Isaeus' skilful rhetoric than on the letter of the law, and also more on what the jurors thought of as being the common practice (*nomos*) of their time than what the lawgiver necessarily intended. Others may disagree, and all this is an indication of how thorny indeed is the question of the validity of Isaeus' speeches as a source for the legal history of classical Athens. But this student of rhetoric is fully convinced that the law is there to be discovered.

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## APPENDIX

| Occurrences of νόμος in Isaeus by<br>speech: | Citation of laws in Isaeus by speech: |
|--|---------------------------------------|
| 1: 6   | 1: 0                                  |
| 2: 18  | 2: 1                                  |
| 3: 22  | 3: 3                                  |
| 4: 8   | 4: 0                                  |
| 5: 0   | 5: 0                                  |
| 6: 15  | 6: 2                                  |
| 7: 14  | 7: 3                                  |
| 8: 9   | 8: 1                                  |
| 9: 6   | 9: 0                                  |
| 10: 17                                       | 10: 1                                 |
| 11: 34                                       | 11: 4                                 |