

# Legal Comedy: A Study of Terence's the *Phormio*

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*Legal historians frequently rely on literary evidence to fill gaps left by a paucity of legal documents. Literature often supplies a “popular” view of law and legal institutions. This Article provides a legal commentary of the ancient Roman comedy, Phormio, written by Terence (circa. 186-159 B.C.). A troupe of actors first performed the Phormio in 161 B.C. Because Terence based his play on a Greek original, The Claimant, by Apollodorus of Carystus (a writer of New Comedy in the first half of the third century B.C.), the Article uses the text of Terence's comedy in an effort to identify and examine both Athenian and Roman law. Legal issues and legal references animate the entire play.*

*In considering the Phormio, we gain legal insight by addressing two specific issues. First, because Terence based his play on an earlier Greek original, certain elements of the plot (some of which include legal matters) are dictated by the Greek original. However, Terence was free to treat other elements (also including legal matters) more freely when they were not essential to the plot itself. Thus, some legal elements that are essential to the plot reflect Athenian law from the time of the Greek original (i.e., 300-250 B.C.), while other, nonessential elements may reflect the Roman law with which Terence was familiar (i.e., Roman law one hundred years later, 200-150 B.C.). For example, because marriage law is so vital to the plot, the laws relating to marriage in the Phormio must surely be Athenian. But much of the casual dialogue—for example, the banter about the sons and slaves, and the slave trade—may reflect Roman law regarding the sale of slaves. And even if Terence did not consciously depict Roman law, his audience most certainly would have related to the play using its knowledge of contemporary Roman law (not Athenian law).*

*Part II provides a brief summary of the plot. Parts III-VI consider in turn specific areas of law: slave law, marriage and family law, contracts and commercial law, and procedure.*

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## I. INTRODUCTION

A troupe of actors first performed Terence's the *Phormio* in 161 B.C. at the Roman Games.<sup>1</sup> The Roman playwright Terence (*circa* 186-159 B.C.)<sup>2</sup> based his comedy on a Greek original, *The Claimant*, by Apollodorus of Carystus (a writer of New Comedy in the first half of the third-century B.C.).<sup>3</sup> The *Phormio* is a fast-paced farce that pokes fun at wealthy fathers and the law. "The play both mocks and parodies the legal profession . . ."<sup>4</sup> In the *Phormio*, a sharp-witted itinerant, a household slave, and two young lovesick sons conspire to ensure that: (1) the youths marry and keep their sweethearts, and (2) their self-righteous fathers get taken down a peg or two, while suffering both embarrassment and a loss of money.

Legal historians frequently rely on literary evidence to fill gaps left by a paucity of documents (e.g., wills, leases, codes, and land records).<sup>5</sup> Literature often supplies a popular view of law and legal institutions. Legal issues and legal references animate the entire play. In fact, "Terence's comedy begins with a lawsuit closed and concludes with a lawsuit opened."<sup>6</sup>

In the *Phormio*, we gain significant legal insight by considering two specific issues. First, Terence based his play on an earlier Greek original; therefore, certain elements of the plot (some of which include legal matters) are dictated by the Greek original. Second, Terence was free, on the other hand, to treat other elements (including legal matters) more liberally when they were not essential to the plot.<sup>7</sup> Thus, some legal

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1. See GEORGE E. DUCKWORTH, *THE NATURE OF ROMAN COMEDY* 76 (1952) ("Terence's *Phormio* and *Hecyra* (third presentation) were later performed at the *Iudi Romani*"). Duckworth considers this play "[s]tructurally perhaps the best of Roman comedies . . ." *Id.* at 156.

2. For a brief summary of Terence's life, see, for example, *id.* at 57; RICHARD C. BEACHAM, *THE ROMAN THEATRE AND ITS AUDIENCE* 46-55 (Harvard University Press 1992) (1991).

3. Betty Radice, *Introduction to TERENCE, THE COMEDIES* 11, 17 (Betty Radice trans., Penguin Books, Ltd. 1979) (1965).

4. Erich Segal & Carroll Moulton, *Contortor Legum: The Hero of the Phormio*, 121 *RHEINISCHES MUSEUM FÜR PHILOLOGIE* 276, 287 (1978).

5. See, e.g., S.C. Humphreys, *The Discourse of Law in Archaic and Classical Greece*, 6 *LAW & HIST. REV.* 465, 476 (1988) (using Aeschylus' *Eumenides* (585-673) as a basis for suggesting that Athenian court procedure around 450 B.C. permitted litigants to cross-examine witnesses); H.W.P. Stevens, *Roman Law in the Roman Drama*, 34 *CAN. L. TIMES* 344, 344 (1914) (quoting Sir Henry Maine for the proposition that "actual examples in the plays of the Latin comic dramatists afford sometimes the most vivid illustrations of the rules of Roman law"); *id.* at 345 ("But the comic dramatists, Plautus and Terrace [sic], give many proofs of their legal knowledge.").

6. Segal & Moulton, *supra* note 4, at 285.

7. See *id.* at 277 (noting that scholars often use Roman comedy "merely as an archaeological site . . . digging under literature to unearth legal knowledge of the classical

elements that are essential to the plot reflect Athenian law from the time of the Greek original (i.e., 300-250 B.C.), while other nonessential elements may reflect the Roman law with which Terence was familiar (i.e., Roman law one hundred years later: 200-150 B.C.).<sup>8</sup> For example, because marriage law is so vital to the plot, the laws relating to marriage in the *Phormio* must surely be Athenian. However, much of the casual dialogue (e.g., the banter about sons, slaves, and the slave trade) may reflect Roman law regarding the sale of slaves. And even if Terence did not consciously depict Roman law, his audience most certainly would

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world”); BEACHAM, *supra* note 2, at 37 (“References to Roman customs and institutions suddenly poke through the plot of a story ostensibly set in Greece, or characters recite the verbal formulae of Roman religious ritual.”).

8. The degree to which Terence followed the Greek original versus the degree to which he took the liberty of imposing his own alterations has been the subject of scholarly debate. See, e.g., DUCKWORTH, *supra* note 1, at v (“The plays of Terence contain few Roman allusions . . .”); *id.* at vi (“[Scholars’] conclusions about the originality of Plautus and Terence are often most unconvincing, for they maintain that the Roman elements can be detected largely by means of real or imagined flaws and inconsistencies, and they likewise do no service to Greek comedy by their attempted separation of Greek and Roman elements and their fanciful theories about the nature of the non-existent Greek originals.”); *id.* at 25 (“[T]he criteria for separating the Greek elements from the Roman were often extremely subjective.”); *id.* at 30 (“Hence the question arises: What is Greek and what is Roman in Plautus and Terence?”); *id.* at 139 (“To determine with any degree of accuracy what is basically Greek and what is . . . Terentian in the plays is one of the most difficult and most controversial problems in the study of Roman comedy.”); *id.* at 176 (“Terence . . . brought in variations and innovations that were both subtle and amusing.”); *id.* at 177 (“In most instances we have no way of knowing what additions, omissions, or substitutions were made in the structure of the original Greek plays by the Roman playwrights. Countless conjectures have been made and undoubtedly will continue to be made, but we should always be conscious, in dealing with the writings of scholars and critics, that much is guesswork, sometimes based upon unsound premises, and we should attempt to distinguish between what is probable and what is merely possible.”); *id.* at 202 (“[S]cholars have attempted to separate the Roman elements from the Greek and have sought in repetitions and inconsistencies arguments to support various theories of composition.”); *id.* at 203-08 (discussing the question of *contaminatio*); *id.* at 270 (“In his effort to lift his characters to a higher and more serious level Terence may well have distorted or lost the psychological truthfulness of his models.”); *id.* at 384-95 (Chapter 14: The Originality of Roman Comedy: A Recapitulation); *id.* at 393 (“The originality of Terence is less striking [than Plautus] but no less obvious; his innovations were in the direction of greater naturalness and artistry, a more subtle portrayal of character, a more elegant and refined type of comedy. His technical improvements include the substitution of dialogue for monologue, omission of the omniscient prologue, a greater use of surprise, and increased skill in the use of the double plot.”); W. Geoffrey Arnott, *Phormio Parasitus: A Study in Dramatic Methods of Characterization*, 17 GREECE & ROME (2d Ser.) 32, 33, 37, 44, 47, 52, 57 (1970); MATTHEW LEIGH, COMEDY AND THE RISE OF ROME 23 (2004) (“Cicero describes comedy as a mirror of Roman life . . .”); BEACHAM, *supra* note 2, at 53; R.H. Martin, *Introduction to TERENCE: PHORMIO* 1, 15 (R.H. Martin ed., Methuen Educational 1968) (n.d.) (“The instances where Terence has deviated from the Greek original seem to be few in number, and the alterations are almost all small ones. The evidence thus suggests that in his adaptation of Apollodorus’ comedy Terence did not make major alterations to the plot.” (footnote omitted)); Segal & Moulton, *supra* note 4, at 278 (citing Buchner for the proposition that “the *Phormio* alters the Apollodoran original only very slightly”).

have related to the play using its knowledge of contemporary Roman law (not Athenian law).

This Article provides a legal commentary on the *Phormio*. In short, the Article uses the text of the play to identify and examine Athenian and Roman law. Part II provides a brief summary of the plot. Parts III through VI consider in turn, specific areas of law: slave law, marriage and family law, contracts and commercial law, and procedure.

## II. PLOT SUMMARY

Demipho and Chremes are the wealthy fathers in the story. They are brothers. Demipho has a son named Antipho, and Chremes has a son named Phaedria. In Athens, Chremes is married to Nausistrata, but unbeknownst to anyone in Athens (except his brother Demipho), Chremes has married a second wife (whose name we never learn) on the island of Lemnos, by whom he has fathered a daughter, Phanium. Chremes was able to conceal the secret of his second family on Lemnos because he routinely traveled from Athens to Lemnos on business for extended periods.

The play begins with the following events having transpired in the past few days. Chremes has journeyed to Lemnos. Interestingly, this is a case where two ships literally pass in the night. Phanium (Chremes' Lemnian daughter), her mother (Chremes' Lemnian wife), and Phanium's nurse, Sophrona, have sailed to Athens in search of Chremes. Misfortune compounding, Phanium's mother falls ill and dies. By chance, Antipho (Demipho's son) encounters Phanium in mourning and falls head-over-heels in love with her. He wants to marry her, but because his father, Demipho, is out of town, Antipho knows that he cannot get his father's permission to marry.

This is where the play's protagonist, Phormio, enters the mix.<sup>9</sup> According to Phormio, because Phanium's father is nowhere to be found

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9. Although Phormio does not fit the mold perfectly, he generally represents a particular type of stock character in Roman comedy, the "parasite." See DUCKWORTH, *supra* note 1, at 265 ("The parasite is the 'funny' man *par excellence* of Roman comedy. Living by his wits and always on the lookout for a free meal, he is at times a professional jokester eager to amuse his prospective host, at times a 'handy man' anxious to win favor by running errands and willing to accept both insult and abuse, at times a flatterer who points up the stupidity of others by his cynical asides."). But Duckworth also recognizes that Phormio, in many respects, breaks the mold: "Phormio . . . has a major role; he controls the course of events from beginning to end with a masterful hand but, except for a jest about 'doubtful food'—so delicious that you're in doubt what to eat first—and his final request for a meal, he has none of the parasite's usual characteristics, neither the preoccupation with hunger and food nor the desire to win favor by jesting or flattery." *Id.* at 267 (citations omitted); see also Martin, *supra* note 8, at 21 ("[T]here is

and her mother has died, “the law” requires that Phanium marry her closest male relative.<sup>10</sup> The details of the Athenian law of the *epiklēros* to which Phormio refers are more complex than his off-the-cuff explanation, but Phormio’s explanation will do for now. Segal and Moulton go so far as to claim that Phormio is actually a lawyer.<sup>11</sup> Although plausible, there is no direct evidence to support their claim, and that conclusion is probably an overstatement.

Nevertheless, Phormio constructs a plan to manipulate “the law” and assist Antipho in marrying Phanium. He convinces Antipho to come with him to court. There Phormio testifies (falsely, so he thinks) that Antipho is Phanium’s nearest male relative, and, hence, she is required by the law of the *epiklēros* to marry Antipho. Phormio has instructed Antipho to remain silent and to acquiesce to Phormio’s charges. Presumably by his silence, Antipho admits Phormio’s claims. Consequently, the magistrate “in court” orders Antipho to marry Phanium, and that is just what they do.<sup>12</sup>

Phaedria, Antipho’s cousin (Chremes’ son) has also developed a love interest. Phaedria is in love with Pamphila, a slave girl owned by Dorio, a slave dealer. Unfortunately for Phaedria, he has been unable to acquire the money necessary to buy the girl.

The play opens as Demipho arrives back in Athens. Geta, Demipho’s slave, who was supposed to have supervised Antipho in Demipho’s absence, is justifiably frightened out of his wits. He fears that Demipho will be angry with him and punish him for allowing Antipho to marry on his watch.

The play itself comprises roughly fifteen mini-episodes.<sup>13</sup> Below is a brief summary of those scenes and the actors who move the action and plot forward:

nothing of the buffoon about him . . . .”); Segal & Moulton, *supra* note 4, at 280 (“[H]e is much more than the stereotypical food-mad, flattering *parasitus* . . . .”).

10. TERENCE, PHORMIO, *in* THE COMEDIES, *supra* note 3, at 219, 232; Martin, *supra* note 8, at 8. Professor Martin suggests: “These lines may be a Roman addition, in which Terence summarizes the provisions of the Attic law for the benefit of his Roman audience.” R.H. Martin, *Commentary to TERENCE: PHORMIO*, *supra* note 8, at 81, 97.

11. Segal & Moulton, *supra* note 4, at 276 (“[T]he hero is a lawyer.”); *id.* at 278 (“He is an expert advocate in a play which abounds in legalistic maneuvers, legal language both straightforward and metaphorical, and which culminates in a transformation of the entire stage into a courtroom.”).

12. See Martin, *supra* note 8, at 7-8 (“Antipho has let a friendly parasite, Phormio, bring an action of *epidikasia* against him. Phormio alleges that Antipho is Phanium’s nearest relation and thus obliged by Athenian law to marry her. Needless to say, Antipho makes no attempt to refute Phormio’s allegation and is compelled to marry Phanium.” (footnote omitted)).

13. Traditionally, scholars have divided the play into five Acts with twenty-five scenes: Act I (scenes 1-4); Act II (scenes 1-4); Act III (scenes 1-3); Act IV (scenes 1-5); and, Act V

- I. The slaves Davos<sup>14</sup> and Geta discuss the background and events that have transpired during Demipho's absence from Athens.
- II. Antipho and Phaedria discuss their counterfactual situations. Antipho complains that he is in trouble because he has married Phanium under questionable circumstances. Phaedria complains that he cannot wed the girl whom he loves.
- III. Geta joins and greets Antipho and Phaedria with the news that Demipho has returned from his trip abroad and is at the harbor. Together they formulate a strategy for dealing with Demipho. They decide that they will excuse their conduct by blaming the legal system and will explain that the court ordered Antipho to marry Phanium.
- IV. Antipho, overcome by stress, departs. At this juncture, Demipho joins Phaedria, and the slave Geta steps out of the picture for a moment. Demipho learns of the marriage and anticipates their arguments about how the court forced the marriage. Phaedria and Demipho discuss Antipho's marriage, while Geta rejoins the conversation. Demipho berates them and threatens to annul the marriage. He demands that they fetch Phormio.
- V. Geta explains Demipho's intentions to Phormio and Phormio hatches a plot to fix everything.
- VI. Demipho, with his legal advisers in tow, confronts Phormio and Geta. At first, Geta and Phormio pretend—for Demipho's benefit—to argue. Demipho argues with Phormio about the legal aspects of Antipho's marriage to Phanium. Demipho demands to know more about the facts of the case. He presses Phormio to learn how Phormio claimed Phanium and Antipho were related, thereby triggering the relationship that would have necessitated the

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(scenes 1-9). See Martin, *supra* note 10, at 87 ("The Scene divisions are ancient and an integral feature of our earliest manuscripts of Plautus and Terence (fourth-fifth centuries A.D.). Their function was not to mark a break in the action of the play, but to indicate the exit or entrance of one or more characters."). My division into fifteen episodes is merely for convenience. See also DUCKWORTH, *supra* note 1, at 101 ("[W]e may conclude that neither Plautus nor Terence applied any rule of act-division to their comedies, and that the plays were usually produced on the stage with complete continuity of action. . . . The ideal situation would perhaps be to have new editions of the comedies with no divisions whatsoever but a tradition of almost two thousand years cannot lightly be cast aside. It is, however, very misleading for the student to read plays divided into acts and scenes unless he realizes clearly that such divisions have no meaning for the presentation of Roman comedy in the second century B.C.").

14. Davos is what Duckworth calls a "protatic character": "a character who is introduced to make exposition possible by means of dialogue and who then disappears from the scene, never to reappear." DUCKWORTH, *supra* note 1, at 108; see also Segal & Moulton, *supra* note 4, at 279 (describing the scene as "a dialogue between two slaves in which it is revealed that a pair of old men, brothers, have gone abroad, leaving their respective sons in the care of the slave Geta").

marriage. Phormio momentarily hesitates and then either by a stroke of dumb luck or because either Phanium or her nurse, Sophrona, supplied the name to use in court, says that the name is "Stilpo." Demipho denies ever having known anyone by the name Stilpo. Demipho then offers Phormio 500 drachmas as a dowry to take Phanium as his own wife. Phormio alleges that Demipho really does not understand the law.<sup>15</sup>

Phormio and Demipho continue their procedural posturing and arguments. Phormio explains that the court dealt with Antipho, and, therefore, Demipho has no legal standing with regard to the marriage. Demipho threatens to expel Phanium from his household, and Phormio replies that if he does expel her, he will sue Demipho on her behalf.

- VII. Phormio and Geta depart. Demipho and his lawyers briefly discuss the legal merits of the situation. The lawyers offer no concrete advice whatsoever.
- VIII. Geta rejoins Demipho just as his lawyers leave. Demipho decides to seek advice from his brother, Chremes. Meanwhile, Geta departs in search of Antipho.
- IX. Geta finds Antipho and they begin assessing matters. Geta reassures and lies to the naive Antipho, telling him that his father does not suspect anything out of order.<sup>16</sup> Phaedria joins them and argues with Dorio, the slave dealer, about the contract of sale for the slave Pamphila. Dorio has agreed to sell her to a captain, apparently in breach of his earlier agreement to sell her to Phaedria. After intense wrangling, Dorio and Phaedria agree to a new deal, whereby Phaedria will furnish the money to Dorio for the slave before the captain can give Dorio the money. Geta agrees to procure the money for Phaedria.
- X. Chremes and Demipho meet. Chremes tells Demipho that he failed to find his daughter on Lemnos. The audience now becomes aware that Demipho knew of Chremes' clandestine marriage on Lemnos and that Chremes believed that his secret was safe with his own brother. Chremes learns Antipho has married but does not know he married Phanium. Chremes explains to Demipho that Antipho's

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15. Interestingly, at least one commentator has noted that Demipho seems to have had a good "knowledge of the law and a readiness to use it for his purposes." Arnott, *supra* note 8, at 38.

16. Regarding the general conduct of slaves in Roman comedy, Duckworth remarks: "[T]hey do not hesitate to lie, cheat, and steal when it seems necessary—usually for the benefit of their young master rather than for their own personal advantage . . ." DUCKWORTH, *supra* note 1, at 249.

marriage puts him in a bind, because he had hoped to arrange a marriage between Antipho and his daughter, presumably, in order to comply with the laws relating to an *epiklēros*. Now that Antipho has married (someone else, or so Chremes thinks), Chremes fears that he may be forced to reveal his secret in order to dissolve Antipho's marriage as a condition precedent to having Antipho marry his daughter.<sup>17</sup>

- XI. Geta joins Chremes and Demipho while Antipho hides in the doorway to eavesdrop on their conversation. Geta tells them that Phormio has consented to help them by agreeing not to marry the girl whom he has already promised to marry (apparently a fabricated tale). Instead, for a fee, Phormio agrees to marry Phanium (presumably once Demipho has her marriage to Antipho annulled). According to Geta, Phormio has agreed to do so for 3000 drachmas plus other perks. Of course, that is the exact amount that Phaedria needs to buy Pamphila. Although outraged at Phormio's demand, Chremes, who seems to believe that he has a vested interest in having Antipho marry his daughter, agrees to help Demipho pay off Phormio. Meanwhile, Antipho, who has been listening, is beside himself at the thought of their stratagem. After Chremes and Demipho enter Chremes' house, Antipho confronts Geta with indignation. Geta reassures him and explains that it is all a ruse to secure the money for Phaedria to buy Pamphila. The plan is that Phormio will first delay his wedding to Phanium and then ultimately excuse himself completely. By that time, Phaedria will have Pamphila and he, Antipho, will get to keep Phanium. Chremes then asks Demipho to fetch his wife, Nausistrata, so that she can smooth things over with Antipho's new bride and explain to her some invented rationale as to why Phanium has to leave and marry Phormio. Chremes departs, hoping to find his Lemnian wife and daughter.
- XII. Sophrona, Phanium's elderly nurse, who has been living in Demipho's house (as a personal slave, she apparently comes along with Phanium as something of a package deal), exits Demipho's

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17. This aspect of the plot makes little sense. Why should Chremes want Antipho to marry Phanium? Perhaps no dowry would be required because they are both from the same family. But because Phanium's father, Chremes, is still alive, she cannot qualify as an *epiklēros*. Consequently, the law of the *epiklēros* does not demand that they marry. Besides, they are cousins. Perhaps Chremes' desire to have them wed would have been humorous to an Athenian audience (and, presumably, a Roman audience who "got" his joke) precisely because it is so illogical. See RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 236-37 (2002).



house and begins to bemoan her fate aloud.<sup>18</sup> Chremes recognizes her and Sophrona explains what has happened: the death of his Lemnian wife and Phanium's marriage to Antipho. Chremes now realizes that, by sheer coincidence, his daughter has married Antipho—the precise outcome for which he had hoped. Sophrona addresses Chremes by the name “Stilpo,” the fictitious name that he had used on Lemnos. At this point, the audience becomes painfully aware of the irony that Phormio had earlier alleged to Demipho that Antipho and Phanium were related by blood by a man named “Stilpo.”<sup>19</sup> As one scholar explains, “[t]he recognition of Phanium as Chremes' daughter by another wife not only solves Antipho's problem but puts Chremes in a position where he can no longer object to Phaedria's love affair.”<sup>20</sup>

- XIII. Geta and Demipho return from having paid Phormio the 3000 drachmas. Demipho instructs Nausistrata to persuade Phanium to go along with their plan for her to leave Antipho and marry Phormio. At that very moment, Chremes emerges from Demipho's house and, without seeing Nausistrata, asks Demipho if he has paid off Phormio yet. He hastily tries to explain why they should call off their deal with Phormio, but then realizes that he's been thrust into a very awkward situation, because Nausistrata has overheard enough of the conversation to jeopardize his secret (i.e., his second marriage and daughter on Lemnos).

Once Nausistrata has gone into her own (Chremes') house, Chremes feels at liberty to explain to Demipho fully what has happened. They enter Demipho's house where Chremes explains the details.

- XIV. Antipho, Phormio, and Geta meet, and Geta reveals that he had overheard the discussion between Chremes and Sophrona earlier. He also heard some of the conversation between Demipho and Chremes. Thus, Geta explains to Phormio and Antipho what the audience has already learned: Antipho has, by chance, married his

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18. Regarding the general utility of nurses and maids in Roman comedy, Duckworth says that “[i]n most cases [they] run errands or aid in the discovery of identity but the part they play in the action is usually very slight and they are seldom used either for characterization or humor.” DUCKWORTH, *supra* note 1, at 255.

19. “Terence does not tell us how Phormio had learnt this name prior to the [*epidikasia*], and readers aware of the dangers of the documentary fallacy will not waste their time on guessing either how Terence envisaged this transfer of information or how Apollodorus described it in his prologue.” Arnott, *supra* note 8, at 39. Duckworth notes that “[t]he recognition scene causes an amusing reversal in their plans, for Chremes discovers that his daughter is already Antipho's wife.” DUCKWORTH, *supra* note 1, at 157.

20. DUCKWORTH, *supra* note 1, at 187.

cousin Phanium, and that marriage is precisely what the law of the *epiklēros* requires (or would require if Phanium had actually been an *epiklēros*) and the very outcome that both Chremes and Demipho desire.<sup>21</sup>

Armed with this knowledge, Phormio concocts a new scheme. Aware that Demipho and Chremes will be eager to call off their previous deal (i.e., for Phormio to break off his fictitious prior engagement and marry Phanium), Phormio decides to turn the tables on them. He waits for them, and when they try to revoke the deal and to ask for their 3000 drachmas back, Phormio protests, saying that he will be unable to go back now and marry the other girl to whom he had previously been engaged. Phormio argues that, if they plan to breach their agreement with him in order to have him marry Phanium, it is only right that he be entitled to the dowry. Chremes and Demipho threaten to take him to court and begin physically to drag him there.

- XV. As they continue to bicker and struggle, Phormio calls for Nausistrata, who comes out of Chremes' house and asks what is going on. Phormio verbally tortures Chremes as he slowly reveals Chremes' secret Lemnian marriage and family. Nausistrata berates Chremes and agrees to invite Phormio to dinner. The play ends as she asks that Phaedria be summoned so that Nausistrata can ask his advice about how best to deal with her bigamous husband.<sup>22</sup>

### III. SLAVE LAW

The male slaves in the *Phormio* have a great deal of freedom.<sup>23</sup> In the opening scene, when the two slaves Davos and Geta discuss the background action of the plot, we learn that slaves have money, may be both debtors and creditors, may marry,<sup>24</sup> may give gifts, and may work for

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21. *Id.* at 28-29. The Roman comedy frequently relies on the humor created when the audience has information that the characters lack: "The plays are rich in comic irony, for the audience knows far more than the characters." *Id.*; *id.* at 158 ("It is somewhat startling to discover that Phormio's supposedly false claim about the relationship of Antipho and Phanium proves to be the truth.").

22. Segal and Moulton remark that this closing scene "has been acknowledged to be a Terentian addition to the original ending" and note that "the *entire stage* is here transformed into a court of law." Segal & Moulton, *supra* note 4, at 284.

23. See DUCKWORTH, *supra* note 1, at 288 ("Yet it is hardly possible that in real life ancient slaves had as much freedom as the slaves of Roman comedy, nor could they have been as outspoken and as impudent.").

24. Martin explains that "Doricum is probably the *contubernalis* of Geta (strictly speaking 'concubine', as slaves could not contract a legal marriage, but normally translatable as 'wife')." Martin, *supra* note 10, at 100.

money.<sup>25</sup> In the same conversation, Geta states that he was left as a guardian for the cousins (Antipho and Phaedria) while their fathers went abroad. Although there may have been unstated restrictions, the legal rights to own, borrow, and lend money are significant, along with the right to marry, and the legal responsibility associated with guardianship.

In Classical Athenian law, slaves had no rights at all; Athenian law did not acknowledge any family relationships among slaves, they could not own property, and they were not permitted to sue in Athenian courts.<sup>26</sup> Because they were not citizens, slaves were not allowed to enter either the *gymnasia* (exercise grounds) or the *palaistrai* (wrestling grounds).<sup>27</sup> Harrison notes, “[W]e should recognize that there was a pervasive ambiguity about the legal status of a slave which made him both a chattel and something more than a mere chattel.”<sup>28</sup> Somewhat paradoxically, however, many Athenian slaves managed to work outside of their masters’ households. In those instances, Athenian law required that such slaves hand over to their masters a percentage of their outside earnings (*apophora*).<sup>29</sup>

Similar to Athenian law, Roman law generally treated slaves as property, but Roman slaves had attributes both of property and also of human beings.<sup>30</sup> Roman slaves could not sue nor could they be sued, and Geta uses this limitation as an excuse when explaining to Demipho why he was unable to prevent Antipho’s marriage to Phanium: “What did you want me to do for you in all this? The law doesn’t permit a slave to plead in court and he isn’t allowed to give evidence.”<sup>31</sup> Still, many Roman slaves held positions of responsibility (e.g., sheep herder or ship’s captain) and thus needed to be able to execute legally valid contracts. In those cases, slaves functioned like agents on their masters’ behalf.<sup>32</sup> Roman masters also routinely gave their slaves a stipend of money or property (*peculium*). Although masters technically owned the *peculium*,

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25. TERENCE, *supra* note 10, at 229; TERENCE, PHORMIO, *in* TERENCE: PHORMIO, *supra* note 8, at 37-39.

26. See VERSTEEG, *supra* note 17, at 229.

27. *Id.*

28. I A.R.W. HARRISON, THE LAW OF ATHENS 163 (1968).

29. VERSTEEG, *supra* note 17, at 229.

30. For a detailed discussion regarding the legal aspects of Roman slavery and prisoners of war as reflected in Plautus’ *Captivi*, see LEIGH, *supra* note 8, at 58-97.

31. TERENCE, *supra* note 10, at 240; see also Stevens, *supra* note 5, at 378 (“But slaves, although they could be poets and teachers of literature, might not practise in court, as we see from the *Phormio* (II. I. 62), ‘Servum hominem causam orare leges non sinunt.’”).

32. VERSTEEG, *supra* note 17, at 307.

they (and the community at large) treated the *peculium* as though their slaves had free reign over it.<sup>33</sup>

Nevertheless, it is important to note that in the *Phormio* masters maintain the authority to punish their slaves. Geta confides to Phaedria that he fears that his master, Demipho, will hurt him, put him in chains, and force him to do agricultural labor as punishment for having allowed Antipho to marry in Demipho's absence.<sup>34</sup> Indeed, both Athenian law<sup>35</sup> and Roman law<sup>36</sup> permitted masters to beat their slaves.

The play suggests that there may have been a legal limit to a slave's authority to conduct business as an agent on behalf of third parties. When Geta is pitching Phormio's plan to marry Phanium for the sum of 3000 drachmas, Demipho challenges Geta: "And who gave you authority to talk like this?"<sup>37</sup> Whether Demipho's question is prompted by Geta's status as a slave or merely his authority to speak on another's behalf in general, we cannot tell.

The female slaves in the play, however, have far tighter restrictions. Although the audience never sees her, Dorio's slave girl, Pamphila, apparently enjoys few, if any, rights of independence. Dorio, Geta, Antipho, Phaedria, and Phormio refer to her simply as an object of a sales transaction. As far as we can discern, her feelings are absolutely no part of the calculus.<sup>38</sup> Nevertheless, Phormio's comment that "Phaedria took [Pamphila] for his own now she's been freed,"<sup>39</sup> after Phormio bought her from Dorio, suggests that slave status was not permanently fixed or immutable. Indeed, Athenian law permitted owners to free slaves through rather informal declarations.<sup>40</sup> However, an Athenian citizen could not marry a slave, and Harrison explains that "[w]here one of the parties was Athenian and the other a foreigner or metic, the rule

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33. *Id.* at 308.

34. TERENCE, *supra* note 10, at 238; TERENCE, *supra* note 25, at 47; *see* DUCKWORTH, *supra* note 1, at 290 ("The freedom and insolence of the comic slaves, their immunity from serious punishment, their happy-go-lucky existence . . . combine to paint a picture of slave life that bears little relation to reality. No respectable householder in Greece or Rome would have countenanced such activity and the spectators were well aware of the fact. Slaves guilty of lying, cheating, or stealing would have been whipped, or imprisoned, or condemned to hard labor.").

35. VERSTEEG, *supra* note 17, at 229.

36. *Id.* at 306.

37. TERENCE, *supra* note 10, at 258.

38. *Id.* at 252-53; TERENCE, *supra* note 25, at 55-58; *see also infra* Part V.

39. TERENCE, *supra* note 10, at 269; TERENCE, *supra* note 25, at 70. The editor's footnote in the Loeb edition states: "The Latin *emissart manu* refers to the formal process of manumission by which slaves were granted their freedom." TERENCE, PHORMIO, *in* 2 TERENCE 109 n.60 (John Barsby ed. & trans., Harvard Univ. Press 2001) (n.d.).

40. VERSTEEG, *supra* note 17, at 229.

differed at different periods.”<sup>41</sup> In order for a marriage to be valid under Roman law, both husband and wife had to be Roman citizens, or one had to be a citizen of a state that had a right of intermarriage with Rome.<sup>42</sup>

The play's other female slave, Sophrona, also enjoys few rights. She expresses fear that she will have no means of support for either herself or Phanium if Demipho should annul Phanium's marriage.<sup>43</sup> Yet she does appear to have some authority, for she says that it was she who “married the girl to the young gentlemen [Antipho] who is master of this house.”<sup>44</sup> Presumably, however, since Chremes has materialized and since, in the end, all are happy with Antipho's marriage to Phanium, both households (Chremes' and Demipho's) will gladly support the elderly nurse.

#### IV. MARRIAGE AND FAMILY LAW

Part of the humor in the *Phormio* emanates from the disrespect shown to the wealthy Athenian fathers. In Roman law, a father, the *paterfamilias*, had complete and absolute legal authority and control over his extended family.<sup>45</sup> Technically speaking, a Roman *paterfamilias* held the power of life and death over his children, and his wife was essentially treated as a daughter in the eyes of the law.<sup>46</sup> Thus, the power that sons, slaves, and wives exert over the Athenian fathers in the play would have heightened the comedic effect for a Roman audience.<sup>47</sup>

The plot of the *Phormio* explores various laws concerning marriage that act as the play's central concern. Consider the following constellation of marriage issues. When the play begins, Antipho has already married Phanium on what the play's characters believe is a mere legal pretext. Phaedria is consumed with marrying his sweetheart, Pamphila. Chremes has two wives (although one has died). According

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41. *Id.* at 235 (quoting 1 HARRISON, *supra* note 28, at 24).

42. *Id.* at 323.

43. TERENCE, *supra* note 10, at 262-64; TERENCE, *supra* note 25, at 65-67.

44. TERENCE, *supra* note 10, at 264; TERENCE, *supra* note 25, at 66.

45. See BEACHAM, *supra* note 2, at 38 (“Under the law, the *paterfamilias* held the literal power of life and death over his children. ‘He could sell them into slavery, his consent to their marriage was needed, and he could bring about their divorce if he wished. The children could own no property . . . anything they acquired belonged to the father.’”).

46. “[I]t was not until the time of Constantine, in A.D. 319, that it was enacted that he who had slain his son should incur the penalty of parricide. The *paterfamilias* could sell his child.” Stevens, *supra* note 5, at 349.

47. See BEACHAM, *supra* note 2, at 38 (“In such situations the behaviour of the father is presented as degrading and ludicrous, and his eventual humiliation at the hands of his son—unthinkable in real life—must have been a particularly potent source of pleasure, providing brief comic relief from one of the most deeply seated of all psychological repressions . . .”).

to Geta, Sophrona told Antipho that if he wanted to marry Phanium, the marriage would have to be “all proper and legal” because “the girl is an Attic citizen, honest daughter of honest parents.”<sup>48</sup> Even though she is an Athenian citizen, as a general rule, the boy was required to get his father’s permission to marry. Geta says that Demipho would not have granted his permission because she apparently had “no dowry and no family.”<sup>49</sup>

However—and this is where the peculiarities of Athenian marriage law take over—Phormio intervenes. He explains that Phanium must marry her nearest male relative because she is an “orphan” (this is a leap of fact since all the characters believed that her mother had died but her father (Chremes/Stilpo) was merely missing). Phormio hatches his plot to allege—falsely, he believes—that Antipho is Phanium’s nearest male relative, and, therefore, the law of the *epiklēros* requires that he marry her.<sup>50</sup> Presumably, when this kind of marriage, *epidikasia*, is involved, the father’s permission is not required. As we know, Phormio’s plan works, and Antipho marries Phanium by *epidikasia*.<sup>51</sup>

Phormio’s version of the law does not exactly comport with our traditional teachings regarding Athenian marriage law. Ancient Athenian marriage law recognized two very different kinds of marriage: *enguē* and *epidikasia*. Marriage by *enguē*, which required no formal government sanction, was the more common type. *Enguē* involved “a transaction between the bride’s father and the bridegroom of which the bride [was] the object.”<sup>52</sup> In many respects, this type of marriage resembles a contract between the prospective father-in-law and the groom. *Epidikasia*, which did require government sanction, was a marriage of a female who had become an *epiklēros*.

In a typical marriage by *enguē*, the man first had to reach a formal agreement called *engyesis* (i.e., an oral contract) with his intended bride’s *kyrios*, typically her father. Indeed, it was this formal agreement process between the would-be husband and the girl’s father that was called *enguē*. Primarily, the *enguē* consisted simply of the father’s formal declaration to the suitor that he (the father) was giving his daughter to the suitor. The girl’s wishes were irrelevant to the *enguē*. Later the actual transfer,

48. TERENCE, *supra* note 10, at 231; TERENCE, *supra* note 25, at 41.

49. TERENCE, *supra* note 10, at 232; TERENCE, *supra* note 25, at 41.

50. See DUCKWORTH, *supra* note 1, at 229 (“The story concocted by Phormio that Antipho was Phanium’s kinsman and therefore should marry her proved later to be true but the audience had no knowledge of this at the time.” (citation omitted)).

51. The next several pages in the text are for the most part taken from VERSTEEG, *supra* note 17, at 236-37.

52. 1 HARRISON, *supra* note 28, at 2.

*ekdosis*, took place. The *ekdosis* occurred when the girl physically relocated to her husband's *oikos* (house).<sup>53</sup> It was also possible, although not legally required, for the couple to have a formal ceremony called *gamos*.<sup>54</sup> And the *ekdosis* and the *gamos* often may have been performed simultaneously.

In addition to the ordinary marriage by *enguē*, and most relevant to the *Phormio*, an Athenian marriage was also legally valid when accomplished through *epidikasia*. The necessity for this kind of marriage arose in cases where a father died leaving no male heirs—no sons, no grandsons, and no great-grandsons. If, however, such a man did have a daughter, granddaughter, or even a great-granddaughter, it was theoretically and practically possible for her to give birth to a male child who would thereby become the deceased's grandson, great-grandson, or great, great-grandson. The ancient Greek legal term for a woman in such a position was *epiklēros*, a term that some legal historians have translated "heiress." In order to facilitate the deceased's inheritance lineage, the closest male relative of the deceased was entitled to marry the *epiklēros*.<sup>55</sup> He could, if he wished, decline the opportunity to marry the *epiklēros*. At the other extreme, however, he could even legally force her to divorce her current husband. The orator Isios claims, indeed, that the nearest male relative commonly invoked this privilege, and required the *epiklēros* to divorce her husband and remarry him. The archon was responsible for ensuring that the *epiklēros* married an appropriate husband. Frequently, more than one relative laid claim to marry her, and a legal proceeding (*diadikasia*) was necessary to select a husband. According to tradition, one of Solon's laws required that the husband of the *epiklēros* have intercourse with her a minimum of three times a

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53. See Stevens, *supra* note 5, at 354 ("In the *Phormio* (IV. 4, 12) Antipho says, 'Dotem si accipiet uxor ducenda est domum' . . .").

54. See *id.* at 353 ("Yet a religious ceremony was not unusual."). Stevens specifically cites the *Phormio* (IV. 4, 18-21) and Geta's words:

Audi nunc contra jam. Si argentum acceperit,  
Ducenda est uxor, ut ais: concedo tibi:  
Spatium quidem tandem apparandis nuptiis,  
Vocandi *sacrificandi* dabitur paululum[.]

*Id.* Stevens again cites the *Phormio* (IV. 3, 49.52) as evidence for the religious ceremony of marriage. *Id.* at 356.

55. "This law was designed to keep the property of any orphaned heiress within her father's family by compelling her to marry her male next-of-kin." Arnott, *supra* note 8, at 34; see also Segal & Moulton, *supra* note 4, at 280 ("By Athenian law an orphaned girl . . . had to be married to her next of kin. Terence explains the law carefully . . . since it was literally foreign to his Roman audience." (footnote omitted)).

month for the purpose of producing legitimate offspring. And anyone could prosecute a person who mistreated an *epiklēros*.

As previously noted, however, Phanium technically cannot be an *epiklēros* because her father, Chremes, has not died.<sup>56</sup> The characters never acknowledge this problem. Yet, what is perhaps even more surprising is that the commentators have also failed to acknowledge this issue. It is possible that Phormio's "lawyerly" sleight of hand is just one of Apollodorus' jokes. In any event, the law of the *epiklēros* is so hyper-technical that part of the humor may actually originate from the fast-talking manner in which Phormio is able to pull off this scheme. Basically, no legal foundation exists for Antipho to marry Phanium, although all of the play's characters seem to believe that there is.

Demipho adds yet another legal twist. According to Demipho, in addition to the law requiring that Antipho marry Phanium, there was another option. Demipho tells Geta, "You could have supplied the dowry the law demands and looked for another husband for her . . ."<sup>57</sup> However, as was noted, in fact we know that the nearest male relative could refuse to marry the *epiklēros* if he so desired.<sup>58</sup>

Demipho also raises another interesting question about marriage law. He asserts that he intends to undo the marriage: "I refuse to allow this marriage for another day."<sup>59</sup> At this point in the play, the characters think that the marriage was a hoax, predicated on a false accusation (i.e., that Antipho was Phanium's nearest male relative). Of course, later they all learn that he was, in fact, her nearest male relative, and therefore, arguably, entitled to marry her. But, at the time that Demipho threatens to void the marriage, all assume that that is not the case. Hence it seems quite logical to conclude that a father would have the legal authority to annul such a marriage whose foundation was based on falsehoods.

Perhaps a more difficult question is whether, assuming for the sake of argument that Antipho's marriage to Phanium was legal under Athenian law, the groom's father had the legal authority to annul, or otherwise dissolve, the marriage of an *epiklēros*. Of course in Roman law, as *paterfamilias*, Demipho probably would have had the legal

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56. See *supra* note 17 and accompanying text.

57. TERENCE, *supra* note 10, at 240; TERENCE, *supra* note 25, at 48; see also DUCKWORTH, *supra* note 1, at 274 ("Demipho suggests that Antipho, instead of marrying Phanium, should have given her a dowry and married her to someone else, borrowing the money at interest if necessary." (citations omitted)); Segal & Moulton, *supra* note 4, at 281 ("[T]hey could have supplied the girl with a dowry and married her off.").

58. VERSTEEG, *supra* note 17, at 237.

59. TERENCE, *supra* note 10, at 240; TERENCE, *supra* note 25, at 48 ("*Egon illam cum illo ut patiar nuptam unum diem?*").



capacity to annul his son's marriage.<sup>60</sup> As the plot progresses, the characters accept that the marriage may be annulled, provided that someone else marry her and that someone (it need not necessarily be the girl's family) give the new husband a sufficient dowry. According to Demipho, even if the marriage of the *epiklēros* is properly concluded with her nearest male relative, the groom's father has the legal authority to annul that marriage and marry her off to another, provided the father gives a dowry to the new groom. Demipho says to Phormio: "I'll assume she *is* my relative and give her the dowry the law prescribes. Here's five hundred drachmas, now get her out of my house."<sup>61</sup> Phormio is not so sure about this. He contests Demipho's authority to dispense with Antipho's marriage, saying "what's done can't be undone."<sup>62</sup> Phormio also questions Demipho's standing in the matter: "Demipho; we're not interested in *you*. The court dealt with your son, not you."<sup>63</sup> When Demipho threatens simply to throw the girl out of the house, Phormio quickly makes his own threat: "She's a free citizen, and if you so much as lay a finger on her improperly I'll bring an action which will finish you."<sup>64</sup>

Interestingly, Demipho himself is actually uncertain about his legal rights. He must ask his cadre of three lawyers.<sup>65</sup> One lawyer, Hegio, at first refuses to render an opinion and passes the buck to his colleague, Cratinus. Cratinus thinks about it but ultimately tells Demipho that his "son's actions during [his] absence should rightly and properly be rendered null and void."<sup>66</sup> Hegio then disagrees with Cratinus: "I cannot agree that a legally pronounced judgement can be quashed . . ."<sup>67</sup> So, with one lawyer telling him one thing and another, the opposite,

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60. See *supra* text accompanying note 45.

61. TERENCE, *supra* note 10, at 246; TERENCE, *supra* note 25, at 52.

62. TERENCE, *supra* note 10, at 246; TERENCE, *supra* note 25, at 52 ("Ohe, 'actum' aiunt 'ne agas.'"). According to Professor Martin, this is a "proverb derived from the sphere of the law courts. 'Don't take to law what's already been settled.'" Martin, *supra* note 10, at 125.

63. TERENCE, *supra* note 10, at 246-47; TERENCE, *supra* note 25, at 52 ("Postremo tecum nil rei nobis, Demipho, est: tuos est damnatus gnatus, non tu; nam tua praeterierat iam ducendi aetas."); see *infra* Part VI.

64. TERENCE, *supra* note 10, at 247; TERENCE, *supra* note 25, at 53 ("Si tu illam attigeris secus quam dignumst liberam, dicam tibi impingam grandem."). For more on the legal procedure involved in Phormio's threat of litigation, see *infra* Part VI.

65. See Anton-Herman Chroust, *The Legal Profession in Ancient Athens*, 29 NOTRE DAME LAW. 339, 339 (1954) ("Traditionally, the lawyer has three main functions: he may be the expert *adviser* (counselor) as to how his client should defend or bring legal proceedings . . .").

66. TERENCE, *supra* note 10, at 248; TERENCE, *supra* note 25, at 53 ("Mihi sic hoc uidetur: quod te absente hic filius egit, restitui in integrum aequomst et bonum, et id impetrabis. Dixi.").

67. TERENCE, *supra* note 10, at 248; TERENCE, *supra* note 25, at 54 ("Mihi non uidetur quod sit factum legibus rescindi posse; et turpe inceptust.").

Demipho turns to his third lawyer, Crito, presumably hoping that he will be able to break the deadlock. However, Crito demurs completely with a time-honored attorney's reply: "I must have further time to consider my opinion. It is a difficult case."<sup>68</sup> Thus, we may never know whether, under Athenian law, a father could legally undo the marriage of an *epiklēros*, whether based on true or false allegations.

Of course, all of these machinations should probably be moot, because, as no one seems to have acknowledged, Phanium is not really an *epiklēros*! Since her father, Chremes, is alive, she cannot be an *epiklēros*—a fact that apparently escapes everyone. Therefore, one must wonder why Chremes wants her to marry Antipho in the first place. This is all the more problematic, given that Chremes has a son, Phaedria, who is alive and apparently well on his way to starting his own family with Pamphila.

The play raises another difficult legal question about marriage. The object of Phaedria's passion is Pamphila. Geta refers to her as "a lute-player" and says that "[s]he was working for that dirty pimp [Dorio]."<sup>69</sup> In their contract negotiations regarding Phaedria's desire to purchase her, Dorio, Antipho, Geta, and Phaedria treat her as Dorio's property which he has a right to sell:

Phaedria: What do you think? This beastly brute [referring to Dorio] has sold my Pamphila.

Antipho: Sold her?

Geta: Did you say he'd *sold* her?

Phaedria: Sold her.

Dorio: Can't a man sell a girl he bought and paid for? What's wrong in that?<sup>70</sup>

Pamphila is apparently a slave owned by Dorio. Whether she has been operating as a "working girl" the audience does not know. What is known, however, is that Athenian law did not permit marriage (neither *enguē* nor *epidikasia*) when one party was free and the other a slave.<sup>71</sup> The play presumes that, once Phaedria purchases Pamphila, they may

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68. TERENCE, *supra* note 10, at 248; TERENCE, *supra* note 25, at 54 ("Ego amplius deliberandum censeo: res magnast."). Professor Martin suggests that "*amplius* may be a reference to the Roman legal usage of *ampliatio*, technically a 'renewal of the case' after the jury had returned a verdict of *non liquet*." Martin, *supra* note 10, at 127; see also DUCKWORTH, *supra* note 1, at 261 ("Terence's subtle humor is here most effective."); Segal & Moulton, *supra* note 4, at 282 (remarking that Demipho's lawyers "each offer contradictory legal conclusions, clouded in courtroom jargon and cliché" and that "the *advocati* are farcical figures").

69. TERENCE, *supra* note 10, at 230; TERENCE, *supra* note 25, at 56.

70. TERENCE, *supra* note 10, at 252; TERENCE, *supra* note 25, at 56.

71. VERSTEEG, *supra* note 17, at 235.

wed. Technically, an Athenian slave owner could manumit a slave without having to go through any type of formal procedure.<sup>72</sup> A freed slave, as a rule, could only attain metic status.<sup>73</sup> However, there were some periods when an Athenian citizen could legally marry a metic.<sup>74</sup> Hence, Phaedria's marriage to Pamphila appears legal, provided that we assume: (1) that Phaedria freed her after purchasing her (an act which would have bestowed her with metic status) and (2) that *The Claimant* was written when citizen-to-metic marriages were considered valid.

There is one final point about marriage law worth considering. Because this issue arises in the midst of dialogue between Phormio and Demipho, it is possible that it reflects Roman law, not Athenian, because it is not really essential to the plot. At the moment when Demipho is trying to back out of his agreement to give Phormio 3000 drachmas as a dowry for Phanium, Demipho is asking Phormio to return the money. Phormio protests, arguing that if the person who is giving the bride away changes his mind and breaches, the groom who is left high and dry is entitled to keep the dowry. Phormio suggests that Demipho must forfeit the dowry, essentially as a liquidated sum, especially since he has passed up an opportunity to marry another girl in reliance on Demipho's promise:

If you intend to give me the bride you promised, Demipho, I will marry her; but if you really wish her to stay with you, the dowry stays with me. It is not right that I should be cheated on your account, gentlemen, especially as it was to safeguard your position that I broke with another girl who was going to bring me the same sum.<sup>75</sup>

Of course, Phormio's logic may be driven more by principles of contract law than by marriage law.<sup>76</sup>

Incidentally, some ambiguity exists regarding the legal relationship that Chremes had with Phanium's deceased mother. According to Geta, Sophrona had called Phanium "an Attic citizen, honest daughter of honest parents."<sup>77</sup> This is an important statement given what we otherwise know about Athenian citizenship. Pericles passed laws requiring that both mother and father had to be citizens in order for a child to be considered an Athenian citizen.<sup>78</sup> Since Phanium's mother

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72. *Id.* at 229.

73. *Id.*

74. *Id.* at 235; 1 HARRISON, *supra* note 28, at 24.

75. TERENCE, *supra* note 10, at 274; TERENCE, *supra* note 25, at 74.

76. For more on contracts, see *infra* Part V.

77. TERENCE, *supra* note 10, at 231.

78. VERSTEEG, *supra* note 17, at 225; see also N.G.L. HAMMOND, A HISTORY OF GREECE TO 322 B.C., at 301 (1959) (specifying 451/450 B.C. as the dates for Pericles' citizenship law).

lived on Lemnos, in order for Sophrona's statement to be true, Lemnos must have been legally considered part of Athens, and Lemnians, Attic citizens.<sup>79</sup>

Furthermore, Chremes' relationship with Phanium's mother is at one point called a "marriage," but later Geta refers to the relationship as an "affair."<sup>80</sup> Geta merely overheard a conversation between Chremes and Sophrona, but admits that he may not have heard every detail clearly: "I was outside the door. Do you suppose I could follow every word that they were saying inside?"<sup>81</sup> Then Phormio uses the term "married."<sup>82</sup> Demipho claims it was a drunken seduction.<sup>83</sup> The precise nature of their relationship could affect Phanium's legitimacy.<sup>84</sup> Of course, Sophrona *thought* that Chremes'/Stilpo's relationship to Phanium's mother was a marriage. However, even if the marriage was bigamous, Phanium's Attic citizenship would still have been valid.<sup>85</sup>

## V. CONTRACTS AND COMMERCIAL LAW<sup>86</sup>

Although there are a number of commercial and contract issues that arise throughout the course of the play, the two most salient involve the sale of Pamphila and the bargain struck between Phormio and Demipho.

The sale of Pamphila is complex. Dorio appears prepared to change the deal and his promise at any given moment. Phaedria and Antipho must persist in order to force him to establish the final terms of an agreement. Phormio's deal with Demipho, on the other hand, looks much more basic. Yet when Demipho threatens to breach, Phormio wants to enforce his contractual rights.

79. See HAMMOND, *supra* note 78, at 570 (noting that after the battle of Chaeronea in 338 B.C., Philip the Great permitted Athens to retain control of Lemnos).

80. TERENCE, *supra* note 10, at 271; TERENCE, *supra* note 25, at 72 ("Cum eius consuevit olim matre in Lemno clanculum").

81. TERENCE, *supra* note 10, at 272; TERENCE, *supra* note 25, at 72 ("Sed censen me potuisse omnia intellegere extra ostium intus quae inter sese ipsi egerint?").

82. TERENCE, *supra* note 10, at 278; TERENCE, *supra* note 25, at 76 ("Uxorem duxit").

83. TERENCE, *supra* note 10, at 278-79; TERENCE, *supra* note 25, at 77 ("Uinolentus fere abhinc annos quindecim mulierculam eam compressit unde haec natast; neque postilla umquam attigit"). "The diminutive [*mulierculam*] helps to stress the insignificance of the affair." Martin, *supra* note 10, at 172.

84. Children were considered bastards unless the parents were married by *enguē* or *epidikasia*. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 91 (1978).

85. *Id.* at 68 ("To establish his right to be a citizen, a man had to show only that his parents were citizens, not that they were married.").

86. "Plautus corroborates the view that in the early republic none but customary rules governed in the sphere of contract. We infer from his plays that the mere agreement of the wills of the assenting parties is the most frequent *causa* of obligations; their guarantee being good faith." Stevens, *supra* note 5, at 360.

Although it takes the audience a moment to realize fully the details of the original contract terms between Dorio and Phaedria,<sup>87</sup> we eventually ascertain that Dorio had promised to sell Pamphila to Phaedria. From the text, we may surmise that the original contract price for Pamphila was 1500 drachmas. When Phaedria tells Geta how much money they need to buy her, he says that they need 3000 drachmas. Yet, during their negotiations, Antipho had promised that Phaedria would double the asking price if Dorio would be willing to wait an additional three days, until such a time that Phaedria's friends would have repaid him the money that they owed him.<sup>88</sup> However, that is not the deal to which Dorio ultimately agrees; thus, it is possible that the original price had been 3000, not 1500 drachmas.

In addition, the original contract fixed a specific date by which Phaedria had to pay Dorio, and that date for payment has not yet arrived.

Antipho: Surely, if I remember rightly, there was a day fixed for you to pay him?

Phaedria: Yes, there was.

Dorio: Am I denying it?

Antipho: Is it past the date?

Dorio: No, but the new one's come first.<sup>89</sup>

No matter what the terms of their original contract for Pamphila were, it becomes painfully clear that Dorio is prepared to breach. Dorio has no qualms about breaking his contract with Phaedria in order to make the sale to the captain.<sup>90</sup> The play's characters never discuss whether Phaedria would have had a valid cause of action against Dorio for breach of contract or whether he would have been able to have that sale reversed and recover specific performance. Clearly, Phaedria hopes to avoid that scenario altogether. He hopes to buy Pamphila outright.

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87. "[T]he spectators of Roman comedy, being practical, business-minded persons, would follow with interest the financial transactions of the comedies, the various scenes of bargaining and sharp practices . . ." DUCKWORTH, *supra* note 1, at 278.

88. TERENCE, *supra* note 10, at 252; TERENCE, *supra* note 25, at 57 ("*Idem hic tibi, quod boni promeritus fueris, conduplicauerit.*").

89. TERENCE, *supra* note 10, at 253; TERENCE, *supra* note 25, at 57.

90. In discussing the typical character traits of slave dealers in Roman comedy, Duckworth specifically mentions Dorio as an example of the scoundrels who "break their promises when they see an opportunity for greater profit." DUCKWORTH, *supra* note 1, at 263; *id.* at 276 (remarking that slave dealers like "Dorio (*Phormio*) did not hesitate to break their word when they saw a chance for greater profit elsewhere"); *see also* Martin, *supra* note 8, at 7 (discussing the typical slave dealer in Roman Comedy, Martin says, "His chief trait is greed for money; he feels no compunction in breaking his word, if a more lucrative offer is made for one of his charges"); *see* Segal & Moulton, *supra* note 4, at 282 (noting that Dorio "has his own legal code: first paying first served" (citation omitted)).

Interestingly, if Dorio had accepted Antipho's offer of double payment in return for waiting an additional three days, Dorio could have breached his contract with the captain, paid the captain the price of the slave (or given him a slave of equivalent value), and still would have made the same profit that he had bargained for from the start. Modern scholars refer to this as an "efficient breach," since Dorio could breach and yet all parties would still wind up in as good or better an economic position as they would have been in had Dorio not breached.<sup>91</sup>

In order to try to prevent Dorio from selling Pamphila to the captain, Phaedria resigns himself to the fact that, as a practical matter, Dorio may be willing to breach, and thus, he is willing to renegotiate. Dorio says that the captain plans to bring him his money the next morning. So, he proposes that if Phaedria can pay him before the captain, he'll sell her to him (Phaedria).

Dorio seems to treat all of his contracts as if they are unilateral contracts. Essentially, he intends to sell her to the buyer who first hands over the money to him.<sup>92</sup> In fact, this may have been the way that Dorio considered his original contract with Phaedria. Under unilateral contract theory, Dorio offered to sell Pamphila to Phaedria, but the only valid means of acceptance would have been Phaedria's payment.<sup>93</sup>

Dorio and Phaedria finally agree to that deal. Dorio will sell Pamphila to Phaedria, provided that he brings his money to Dorio before the captain the next morning. As it turns out, it is later that day that Phormio succeeds in bringing 3000 drachmas to Dorio (presumably Phormio acts as Phaedria's agent for the sale).<sup>94</sup>

It is interesting how the other major contract that moves the play's plot forward is actually linked with the first. Phormio obtains the 3000 drachmas to buy Pamphila by entering into a contract with Demipho and Chremes. Chremes and Demipho discuss ways that they might be able to void Antipho's marriage.<sup>95</sup> Meanwhile, Geta has run to Phormio and asked him to think of possible ways that Phaedria might come up with 3000 drachmas to buy Pamphila. Thus, in the text, it is Geta who initially explains Phormio's offer to Demipho and Chremes. Although

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91. See E. ALLAN FARNSWORTH, *CONTRACTS* § 12.3 (2d ed. 1990).

92. TERENCE, *supra* note 10, at 253; TERENCE, *supra* note 25, at 58 ("[S]i tu prior tu attuleris, Phaedria, mea lege utar, ut potior sit qui prior ad dandumst.").

93. See FARNSWORTH, *supra* note 91, § 3.4.

94. TERENCE, *supra* note 10, at 269; TERENCE, *supra* note 25, at 70. As a rule, Terence appears to have painted his slave dealers with greater restraint than Plautus. Interestingly, Dorio is not cheated. He is "paid in full." See DUCKWORTH, *supra* note 1, at 263; Martin, *supra* note 8, at 19 ("Dorio is paid his money in full.").

95. TERENCE, *supra* note 10, at 256; TERENCE, *supra* note 25, at 60.

the precise amount that he is asking for seems to change during the course of the negotiations, in essence, Phormio agrees to marry Phanium and to “drop his present suit” (i.e., the claim that he had threatened to bring against Demipho if he were to throw Phanium out of his house) for money. As previously mentioned, the amount is not clear. According to Geta, Phormio at first proposed 6000 drachmas.<sup>96</sup> Demipho was quite angry with that high a price. Then again, according to Geta, Phormio offered to marry Phanium “if Demipho is willing to give [him] as much as [he was] getting from the girl who’s now engaged to [him]. . . .”<sup>97</sup> Phormio apparently had arranged his dowry to cover his debts. Geta then explains to Demipho and Chremes that Phormio has two houses mortgaged for 1000 drachmas each and that he also wants an additional 1000 drachmas to pay for a maid, wedding expenses, and furniture. Not coincidentally, 3000 drachmas precisely matches the sum needed to purchase Pamphila.<sup>98</sup> And although Demipho complains bitterly throughout the negotiation, Chremes offers to help him pay (since Chremes thinks he has a vested interest in the arrangement).<sup>99</sup> Chremes therefore agrees with Demipho, stating, “He shall have it at once, break it off with them and marry her.”<sup>100</sup>

Chremes’ assertion (about concluding the deal) reveals something very curious about the fundamental difference between this contract and

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96. TERENCE, *supra* note 10, at 259; TERENCE, *supra* note 25, at 62 (“*Si quis daret talentum magnum*”). The Loeb edition explains, “The phrase *talentum magnum* (‘large talent’) refers to the Attic silver talent (of sixty minas), which had a wide currency in Hellenistic times. Unlike local currencies its weight was guaranteed.” TERENCE, *supra* note 39, at 84-85 n.46 (editor’s note); see Martin, *supra* note 10, at 143 (“The purchasing price for a young female slave was normally from about twenty to sixty minae. The amount that a freeborn girl would bring as her dowry seems to have varied enormously: on the one hand orphan girls had to be given a minimum of five minae by their nearest of kin, on the other hand ten talents are spoken of as *dos summa*, while two talents are spoken of as an ordinary amount.” (citations omitted)). Arnott explains that this solution comports with Athenian law: “Demipho’s offer is based on an Athenian law quoted in the speech against Makartatos in the Demosthenic corpus . . .” Arnott, *supra* note 8, at 41.

97. TERENCE, *supra* note 10, at 259; TERENCE, *supra* note 25, at 62 (“[*S*]i uolt Demipho dare quantum ab hac accipio quae sponsast mihi . . .”).

98. See Segal & Moulton, *supra* note 4, at 283 (“[N]ot coincidentally—exactly the amount young Phaedria needs to redeem his music girl.”).

99. Arnott describes the traits which distinguish the two brothers from each other: “Chremes’ willingness to pay any sum, however extortionate, for the preservation of his secret—a fact that makes him the ideal blackmail victim; the combination of his weakness and tortured fears that make him press for haste in the earlier putative dealings with Phormio . . .” Arnott, *supra* note 8, at 45-46 (citations omitted). As explained earlier, Chremes’ wish that Antipho marry Phanium actually makes little sense, legally speaking, because Phanium, in reality, is not an *epiklēros*. See *supra* text accompanying note 17.

100. TERENCE, *supra* note 10, at 260; TERENCE, *supra* note 25, at 63 (“*Iam accipiat: illis repudium renuntiet; hanc ducat*”).

the contract between Phaedria and Dorio. Recall that the contract for the sale of Pamphila was essentially treated as a unilateral contract.<sup>101</sup> Dorio apparently considered *payment* as the only valid means of acceptance, not merely a *promise* to pay. To the contrary, in this contract, Demipho and Chremes first pay Phormio and then await his performance (i.e., marrying Phanium). Geta articulates the contract principle simply: “If he takes the money he must marry her . . . .”<sup>102</sup> However, Demipho and Chremes plan to ensure Phormio’s performance by formalizing their contract. Demipho says, “Don’t worry, I tell you. I’ll see he doesn’t cheat us. I’ll take care not to hand over the cash except in the presence of witnesses, and when I do so I shall state exactly what it’s for.”<sup>103</sup> The ceremonial manner of transferring money to Phormio sounds very much like the ritualistic formula for contract formation in early Roman law.<sup>104</sup>

Of course it is only after Demipho has given Phormio the 3000 drachmas that Chremes discovers that Antipho has, in fact, married his daughter. Chremes appears crestfallen when he learns that Demipho has already paid Phormio.<sup>105</sup> The two brothers then think they can simply rescind their agreement with Phormio. “Now,” says Demipho, “we must find Phormio as quickly as possible, and recover our three thousand before he squanders the lot.”<sup>106</sup> That is precisely what they try to do.<sup>107</sup> They both lie, telling Phormio that other people will think less of Demipho if he dissolves the marriage and also that “Antipho is unwilling to part with her.”<sup>108</sup> Phormio protests and tells them that he’s already spent the money to pay his debts (yet this is not actually true, because instead he has used the money to buy Pamphila for Phaedria).<sup>109</sup> He alleges that he’s ready, willing, and able to fulfill his end of the deal (by marrying Phanium) and adds insult to injury, stating that he’s entitled to

101. See FARNSWORTH, *supra* note 91, § 3.4.

102. TERENCE, *supra* note 10, at 261; TERENCE, *supra* note 25, at 63-64 (“*Audi nunc contra: iam si argentum acciperit, ducendast uxor, ut ais, concedo tibi: spatium guidem tandem apparandi nuptias, uocandi, sacrificandi dabitur paullulum.*”).

103. TERENCE, *supra* note 10, at 261-62; TERENCE, *supra* note 25, at 64 (“*Quietus esto, inquam: ego curabo nequid uerborum duit. Hoc temere numquam amittam ego a me quin mihi testis adhibeam. Quoi dem et quam ob rem dem commemorabo.*”).

104. See VERSTEEG, *supra* note 17, at 349.

105. TERENCE, *supra* note 10, at 267; TERENCE, *supra* note 25, at 68 (“*nollem datum*”).

106. TERENCE, *supra* note 10, at 272 (footnote omitted); TERENCE, *supra* note 25, at 73 (“*Quantum potest nunc conueniundust Phormio, prius quam dilapidat nostras triginta minas ut auferamus.*”).

107. TERENCE, *supra* note 10, at 273; TERENCE, *supra* note 25, at 73-74.

108. TERENCE, *supra* note 10, at 273; TERENCE, *supra* note 25, at 74 (“*Tum autem Antiphonem uideo ab sese amittere inuitum eam . . . .*”).

109. TERENCE, *supra* note 10, at 274; TERENCE, *supra* note 25, at 74 (“*Quodne ego discripsi porro illis quibus debui?*”).



keep the 3000 drachma dowry.<sup>110</sup> Essentially, he argues that by breaking off his engagement with another girl, he relied on their promise to his detriment. Modern lawyers might say that Phormio is entitled to keep the 3000 drachmas as either liquidated damages, reliance damages, or consequential damages.<sup>111</sup> Nevertheless, Demipho and Chremes seem to think that they are justified, and they threaten to take Phormio to court to get their money back.<sup>112</sup> However, before they are able to have this matter adjudicated, the plot gets sidetracked as Phormio unexpectedly reveals Chremes' secret Lemnian marriage.

There are several other minor contract and commercial law lessons that we learn in the *Phormio*. A brief summary of them is included here.

- (1) As was mentioned, slaves can work and make money, and slaves can loan and borrow money.<sup>113</sup>
- (2) There is a casual reference to international trade when Geta mentions a "customs office."<sup>114</sup>
- (3) We hear of loans being made on interest.<sup>115</sup> Yet, Geta is quick to point out that Antipho could probably not get credit while his father was alive.<sup>116</sup>
- (4) Phormio says that part of the reason that he is willing "to drop his present suit" in return for his agreement to marry Phanium is to accept money.<sup>117</sup> Modern lawyers would treat this agreement as a promise to forebear a lawsuit as a means of settling a doubtful claim.<sup>118</sup>
- (5) Lastly, we learn in the play that absentee landlords could rent property<sup>119</sup> and that there was some semblance of a banking system.<sup>120</sup>

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110. See *supra* Part IV.

111. FARNSWORTH, *supra* note 91, § 12.18 (liquidated damages); *id.* § 12.16 (reliance damages); *id.* § 12.9 (consequential damages).

112. See *infra* Part VI for a discussion of the procedural aspects.

113. See *supra* Part III.

114. TERENCE, *supra* note 10, at 233; TERENCE, *supra* note 25, at 42 ("portitores").

115. TERENCE, *supra* note 10, at 240; TERENCE, *supra* note 25, at 48 ("Postremo si nullo alio pacto, fenore").

116. TERENCE, *supra* note 10, at 240; TERENCE, *supra* note 25, at 48. On this issue, Professor Martin notes that, in one of Plautus' plays, the *Pseudolus*, there is a reference to a specific Roman law "which forbade loans to young men under twenty-five." Nevertheless, he takes the position that, in this instance in the *Phormio*, "it is probable that the reference here is not to Roman legal restrictions but to the reluctance of Greek moneylenders to advance loans to sons whose fathers were likely to repudiate the debt." Martin, *supra* note 10, at 113.

117. TERENCE, *supra* note 10, at 258; TERENCE, *supra* note 25, at 62 ("his desistat litibus").

118. See FARNSWORTH, *supra* note 91, § 4.23.

119. TERENCE, *supra* note 10, at 266; TERENCE, *supra* note 25, at 68.

## VI. PROCEDURE AND THE LEGAL SYSTEM

As was noted, Segal and Moulton go so far as to say that Phormio is actually a lawyer.<sup>121</sup> One theme that surfaces several times in the play is the notion that individuals can manipulate the legal system for their own private advantage. The characters perceive the legal process more as a means of achieving personal gain than as a means of obtaining justice.<sup>122</sup> For example, the procedure that serves as the linchpin of the entire plot is the marriage of Antipho and Phanium.

We ultimately discover that they *were* actually blood relatives. If Phanium had in fact been an *epiklēros*, their marriage would have been proper. Nevertheless, a proper marriage was not what the parties originally intended. Phormio dreams up the scheme to have Antipho marry Phanium, using the fabricated charge that she is an *epiklēros* (which is untrue) and that Antipho is her nearest relative (which is actually true). According to Geta, Phormio advised them as follows:

The law says that female orphans must be married to their next-of-kin, and the same law puts the next-of-kin under obligation to marry them. I'll say you are her relative and I'll take out a summons against you. I'll pretend to be a friend of the girl's father. We'll go to court; who her father was and her mother, and how she's related to you I can easily make up in the way that suits me best. You won't contest anything, so I'm sure to win. Of course your father will come back and I'll be in trouble, but no matter. We shall have got the girl.<sup>123</sup>

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120. TERENCE, *supra* note 10, at 274; TERENCE, *supra* note 25, at 74 (“*Sed transi sodes ad forum atque illud mihi argentum rursus iube rescribi . . .*”); see Martin, *supra* note 10, at 166 (“The forum was the normal place of business of the banker . . . Demipho had paid Phormio in cash but is willing to accept repayment by means of a credit entry at his banker’s.”); see also TERENCE, *supra* note 39, at 121 n.67 (editor’s note) (“Banking was relatively new at Rome in the days of Plautus and Terence, though there were sophisticated financial systems at Athens in the time of New Comedy.”).

121. See *supra* note 11 and accompanying text; see also Segal & Moulton, *supra* note 4, at 280 (“[H]e is essentially a canny barrister. Significantly, Phormio’s very first words in the play (as reported by Geta) are *lex est . . .*”).

122. See Chroust, *supra* note 65, at 387 (“[T]he shrewd and successful lawyer wishing to win a favorable verdict was actually compelled to resort to appeals to political prejudices, violent passions, flagrant misrepresentations of the law, galling invectives, and sophistries of the worst sort.”).

123. TERENCE, *supra* note 10, at 232; TERENCE, *supra* note 25, at 41. Stevens points out that the sentence, “I’ll say you are her relative and I’ll take out a summons against you,”—“*Ego te cognatum dicam, et tibi scribam Dicam.*”—serves as evidence of “the written procedure of the later period” used for summoning a defendant before a praetor. Stevens, *supra* note 5, at 374.

The speed with which they were able to accomplish this ruse is striking.<sup>124</sup> Geta summarized the proceeding: “Antipho agreed, and everything else followed: summons, case, defeat, marriage.”<sup>125</sup> And since it is convenient, Geta, Antipho, and Phaedria plan to explain the marriage to Demipho by blaming the legal system, as if their hands were tied.

Geta: Say you were forced into it against your will.

Phaedria: By the law, by order of court.<sup>126</sup>

And again:

Geta: Do you remember the tale you both originally decided to tell your uncle to excuse your conduct: that Phormio had right and justice on his side and was bound to win?<sup>127</sup>

One of the truly humorous aspects of this dialogue is that the characters in the play are prepared to blame the legal system to such an extent that Demipho actually anticipates his son's excuse.

Demipho: Perhaps he'll say, 'I didn't want to do it: the law compelled me.'<sup>128</sup>

As Phaedria tries to smooth over the marriage, he tells his father that the legal procedure was actually “a trap” laid for “inexperienced youth” (i.e., Antipho) by “some ill-natured person” (i.e., Phormio).<sup>129</sup> Moreover, he continues finding fault with the legal system, arguing that Demipho should actually “blame the courts, which often take from the rich in spite and give to the poor out of pity.”<sup>130</sup> Thus, Antipho, Phaedria, and Geta, with Phormio's help, use the legal system out of convenience

124. It is all the more striking when one considers the breadth and complexity of the ancient Athenian court system. See, e.g., Chroust, *supra* note 65, at 342 (“There were more than one hundred types of public and private law suits, the handling of which was somewhat arbitrarily distributed among the heliastic courts, certain administrative magistrates, and a number of judicial magistrates.”).

125. TERENCE, *supra* note 10, at 232; TERENCE, *supra* note 25, at 42 (“*Persuasumst homini: factumst: uentumst: uincimur: duxit.*”).

126. TERENCE, *supra* note 10, at 236; TERENCE, *supra* note 25, at 45.

127. TERENCE, *supra* note 10, at 237; TERENCE, *supra* note 25, at 46.

128. TERENCE, *supra* note 10, at 238; TERENCE, *supra* note 25, at 46; see Chroust, *supra* note 65, at 376 (“Anticipation of the arguments that might possibly be used by an opponent was often taught in the schools of rhetoric. It was considered a neat little trick in that it gave the person who alleged such foreknowledge the psychological advantage of bringing such matters to the attention of the jury first, thus taking in advance some wind out of the sails of his opponent.”).

129. TERENCE, *supra* note 10, at 239; TERENCE, *supra* note 25, at 47 (“*Sed siquis forte malitia fretus sua insidias nostrae fecit adulescentiae.*”).

130. TERENCE, *supra* note 10, at 239; TERENCE, *supra* note 25, at 47-48 (“*Culpa east . . . iudicum, qui saepe propter inuidiam adimunt diuiti aut propter misericordiam addunt pauperi?*”).

to secure what they want, then turn around and, again, out of convenience, blame that very system as an excuse.

Next, we see Demipho planning to use the legal system to negate the consequences of the first court case. That is why he brings his three lawyers to listen to his argument with Phormio. Yet, Phormio quickly counters Demipho by pointing out the futility of having the same case heard a second time. He sarcastically chides Demipho: "You go to the magistrates and ask for a new trial. You're top dog and the only person here likely to get the same case heard twice."<sup>131</sup> Regarding this issue, W. Geoffrey Arnott remarks:

Apollodorus' Athenian audience and Terence's Roman one were well aware that it was normally illegal in both Athenian and Roman law to make a second investigation on the same charge against the same person. The Greek playwright, however, was faced with a difficulty at this point in constructing the fabric of his plot. In Athenian law a special exception to the rule debarring retrial was allowed in such cases of [*epidikasia*] where a rival claimant to the girl's hand could be produced. There was thus a ready solution for a real-life Demipho who had been caught in such a web of intrigue. But a play is not real life, and the complicating exception was conveniently suppressed by Apollodorus and neglected by Demipho. It is in fact unlikely that Terence made any sweeping changes here to adapt the situation to the more rigorous Roman law, since the whole concept of [*epidikasia*] is Greek and the Greek procedure is carefully outlined by Terence for the benefit of his Roman audience . . . .<sup>132</sup>

In the same scene, when Demipho threatens simply to toss Phanium out of his house, Phormio, once again, uses the threat of a lawsuit for his personal gain. He tells Demipho that if he tosses Phanium out, he'll "bring an action which will finish [him]."<sup>133</sup> This element of procedure is certainly Athenian. In Athenian law, a third party was entitled to bring a

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131. TERENCE, *supra* note 10, at 246; TERENCE, *supra* note 25, at 52 ("At tu qui sapiens es magistratus adi, iudicium de eadem causa iterum ut reddant tibi, quandoquidem solus regnas et soli licet hic de eadem causa bis iudicium adipiscier."). The Loeb edition explains, "Athenian law specifically forbade the retrial of a case once it had been decided. Roman law did allow for retrial but only in special circumstances." TERENCE, *supra* note 39, at 56 n.36; see also Stevens, *supra* note 5, at 378 ("In the *Phormio* (II. 3. 56-9) we have a reference to the legal axiom as to *Res iudicata* . . ."); Martin, *supra* note 10, at 124 ("[Demosthenes] states explicitly the principle of Athenian law that it is illegal to make a second legal investigation upon the same charge against the same person. Roman law did allow *in integrum restitutio*, though it did not normally offer much prospect of securing a reversal of *res iudicata*."); see also Segal & Moulton, *supra* note 4, at 282 ("Phormio asserts that the old man is no exception to the law, and a case once tried cannot be reopened . . .").

132. Arnott, *supra* note 8, at 40 (footnote omitted).

133. TERENCE, *supra* note 10, at 247; TERENCE, *supra* note 25, at 53 ("dicam tibi impingam grandem"); see also Segal & Moulton, *supra* note 4, at 282.

lawsuit against someone on behalf of another.<sup>134</sup> Tradition credits this procedure to Solon (594 B.C.).<sup>135</sup> This procedure came to be called *graphē* and became an important component of Athenian law thereafter.<sup>136</sup> In particular, “Solon’s laws provided this protection in cases of . . . ill-treatment of orphans . . . .”<sup>137</sup> A number of scholars have noted that this “volunteer prosecutor” aspect of Athenian legal procedure “enhanced the opportunities for individuals to manipulate legal institutions to serve their private purposes.”<sup>138</sup>

As the play reaches its climax, the characters once again resort to the threat of litigation. Demipho, Chremes, and Phormio are arguing about whether Phormio is entitled to keep the 3000 drachmas paid to him for marrying Phanium.<sup>139</sup> When Phormio claims that he is entitled to keep the sum because he has breached his promise to marry another in reliance on their promise of marriage to Phanium<sup>140</sup> and because he has already used the cash to pay his debts, Demipho summarily begins to initiate a suit.

Demipho: You hand over my money!

Phormio: No, you hand over my wife!

Demipho [*seizing him*]: Then come to court—<sup>141</sup>

Furthermore, the characters seem to think that the legal system is so accessible that they can set up court anywhere and anytime that they please. As Chremes, Demipho, and Phormio continue to struggle and argue, Demipho again resolves to sue Phormio, since, as Chremes sighs, “I can’t think of *what* to do with him.”<sup>142</sup> Evidently, litigation is the answer to everyone’s troubles: “I know,” Demipho says, “let’s take him to court,” and Phormio replies, “Certainly; set up court in there [*moving to*

134. See Chroust, *supra* note 65, at 340 (“Before the time of Draco (c. 620 B.C.) as far as we still can make out, in ancient Athens only the injured party was permitted to institute legal proceedings.”); *id.* at 341 (“At a later date, presumably as a result of Solon’s legal reforms (c. 594/3), any citizen could personally prosecute any person whomsoever in an Athenian court for any crime against the community.”); *id.* at 350 (“Whenever a litigant or defendant refrained from speaking at all in court and had someone else speak in his behalf, this substitute usually was called a *synegros* or (and perhaps more correctly) a *hyperapologoumenos*.”).

135. See *id.* at 364 (“Around the year 594 B.C. Solon decreed that every Athenian citizen without exception had the right to champion the cause of the commonweal in any Athenian court.”); VERSTEEG, *supra* note 17, at 204.

136. VERSTEEG, *supra* note 17, at 204.

137. Humphreys, *supra* note 5, at 469.

138. DAVID COHEN, LAW, VIOLENCE, AND COMMUNITY IN CLASSICAL ATHENS 21 (1995).

139. TERENCE, *supra* note 10, at 273-74; TERENCE, *supra* note 25, at 73-74.

140. See *supra* text accompanying note 75.

141. TERENCE, *supra* note 10, at 274; TERENCE, *supra* note 25, at 74.

142. TERENCE, *supra* note 10, at 276; TERENCE, *supra* note 25, at 75 (“*In id redactus sum loci ut quid agam cum illo nesciam prorsum.*”).

Chremes' *house*]."<sup>143</sup> All of the principal characters consider the legal system simply as a convenient tool that they have at their disposal to manipulate others and obtain the result that each desires.

In addition to the general use of legal procedure as a manipulative tool, the *Phormio* adds numerous minor procedural details and barbs relating to the legal system. Quite obviously, there is a distrust of lawyers and the system in general. Geta jests about hiring a lawyer to help him weasel out of the trouble that he will surely be in with Demipho for allowing Antipho to marry in his (Demipho's) absence.<sup>144</sup> According to Geta, lawyers are likely to plead a case on a person's behalf, but then abandon that individual once the case is resolved. This comment raises another point. In the *Phormio*, slaves are not permitted to testify in court and they cannot give evidence.<sup>145</sup> Indeed, Professor Martin has recognized: "Neither in Greece nor in Rome was it legally permissible for a slave either to act as *aduocatus* [sic] . . . or to give evidence; in both countries information might, under certain circumstances, be extracted from a slave under torture."<sup>146</sup> Moreover, the court expects each party to speak on his own behalf without the assistance of an advocate. This is an Athenian rule.<sup>147</sup> In Athenian courts, lawyers helped prepare speeches but each party pled his own case without assistance from a courtroom attorney.<sup>148</sup> Roman law, to the contrary, permitted parties to use advocates.<sup>149</sup>

Interestingly, this same aspect of Roman procedural law appears in the dialogue at another point. According to Phormio, after Phaedria has married Pamphila, and because Phaedria fears his father's (Chremes') reactions to the union, Phaedria intends to lie low and asks his brother, Antipho, to "plead his case" for him.<sup>150</sup> Although this request for an advocate is not technically attempting to secure an advocate in court, a Roman audience would nevertheless have readily accepted the notion of one person pleading a case on behalf of another.

One final interesting facet of procedure reflected in the play is that, in the courtroom, silence is deemed an admission. For example, when

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143. TERENCE, *supra* note 10, at 276; TERENCE, *supra* note 25, at 75 ("*Ego scio: in ius eamus*"); see also Arnott, *supra* note 8, at 50 (noting that Demipho's resort to a legal solution at this juncture is predictable).

144. TERENCE, *supra* note 10, at 232; TERENCE, *supra* note 25, at 42.

145. TERENCE, *supra* note 10, at 240; TERENCE, *supra* note 25, at 48 ("*Seruom hominem causam orare leges non sinunt neque testimoni dictios*").

146. Martin, *supra* note 10, at 113.

147. MACDOWELL, *supra* note 84, at 250.

148. *Id.*

149. VERSTEEG, *supra* note 17, at 276.

150. TERENCE, *supra* note 10, at 269; TERENCE, *supra* note 25, at 70 ("*causam ut pro*").

Antipho remains silent and fails to contest Phormio's allegations, the magistrate rules in Phormio's favor.<sup>151</sup> Phormio pronounces, "I made a clear statement in the proper place, in court. If it wasn't correct, why didn't your son refute it?"<sup>152</sup>

## VII. CONCLUSION

The *Phormio* is a very humorous and entertaining play. The plot moves quickly and the clever protagonist stays one mental step ahead of his adversaries at all times. Law and legal tactics drive the action. The unfaithful, greedy old man gets his due. Youth and love prevail.

We cannot identify with certainty precisely which legal elements are Athenian and which are Roman, but we can make educated guesses based both on our knowledge of those legal systems and on a careful analysis of the play's plot and dialogue. It is clear that knowledge and analysis of those legal systems helps us to appreciate the play's humor. An understanding of Greek and Roman slave law, marriage and family law, procedural rules, and contractual obligations enhance the play's comedic effect. In turn, dialogue from the play helps us understand more about Greek and Roman law.

The characters time and again challenge the law's boundaries and manipulate the law for their own private purposes. To the casual observer, it may appear that Phormio's creative use of the law of the *epiklēros* has carried the day. But, as it turns out, Phanium was not an *epiklēros*. So, in truth, it is love that has prevailed, not the witty legal maneuvering.

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151. TERENCE, *supra* note 10, at 240; TERENCE, *supra* note 25, at 48.

152. TERENCE, *supra* note 10, at 246; TERENCE, *supra* note 25, at 52 ("Dilucide expediui quibus me oportuit iudicibus: tum id si falsum fuerat, filius quor non refellit?").