

THE LEGAL ARGUMENTS IN AISCHINES' *AGAINST KTESIPHON* AND DEMOSTHENES' *ON THE CROWN*.¹

IN the famous prosecution and defense of Ktesiphon the modern reader tends to consider the technical legal arguments as something more or less artificial, providing only an excuse preliminary to the real heart of the matter, the discussion of Demosthenes' foreign policy.² Yet this is erroneous, for they are more than a mere introduction or literary framework. Every legal system has its substantive law and its procedure, to which a lawsuit must conform; and this is true even if the Athenian jury was less restricted in its limits of thinking than is ours.³ Furthermore the forensic orator must have been very well aware that at least some part of every jury possessed what we would call a legal cast of mind and the disposition to weigh even technical points of law very carefully. This smaller group must be appealed to in addition to the many dicasts who would vote in accord with general considerations. No orator could afford to flout it and roam too far afield; rather it would be the point of good legal strategy not only not to offend it, but to make as cogent as possible an argument to gain its votes. Thanks to the presence of both the legally minded juror and his non-legally minded fellow, the immediate task of winning his case both kept the attorney within the limits of the legal setting and allowed him to range somewhat afield.

One is therefore justified in looking at the legal points rather closely, and in adopting the attitude toward argument of counsel assumed by a modern trial or appellate judge.⁴ Although his counterpart did not exist in Athens, there must have been a substantial number of dicasts looking very closely at the niceties and legal distinctions. We may be in very much their position as we consider the legal points brought forth by the orators.

I

Such close attention is more rewarding in connection with the main two points brought forth by Aischines than with the third, which at best is puzzling. The first

¹ This paper grew out of a course in Aischines and Demosthenes given by the writer while Annual Professor at the American School of Classical Studies in Athens during the session of 1955-56.

² "Aeschines had accused Ctesiphon of illegality on three counts in proposing that a gold crown should be awarded to Demosthenes. This was a mere pretext, and the real issue was a review of the political life of the two opponents." J. F. Dobson, *Oxf. Class. Dict.*, s. v. *Demosthenes*, p. 268.

³ Cf. the succinct summation by R. J. Bonner, *Oxf. Class. Dict.*, s. v. *Dicasteries*, p. 276 (7).

⁴ The adoption of this point of view frees one from the necessity of considering the question of re-editing the texts of both orations after their delivery, and permits him to focus upon the texts as they have come down to us.

task of the prosecutor in a *γραφὴ παρανόμων* suit is to hold up for comparison the proposed *ψήφισμα* and the existent law which it is thought to violate.⁵ Aischines brings into juxtaposition Ktesiphon's proposal to crown Demosthenes because he continues to do what is good for the Athenian populace and an asserted provision of all the laws specifying that public documents shall not include falsity.⁶ The remaining part of the oration is designed to prove that the assertion of Demosthenes' patriotism is a false entry. The evocation of all the laws rather than a specific law is somewhat suspicious, and many are of the opinion that even if such a law did exist it probably referred to the falsification of documentary records rather than to the assertions in what would be called a preamble of a modern legislative enactment.⁷ Demosthenes makes no allusion to any such law in his argument, and we may well suspect that this bespeaks a lack of attention to the point by the jury, and an understanding that Aischines' assertion is a mere *tour de force* to launch the attack on Demosthenes' policies, which the latter has no disposition to avoid. One may observe that for Demosthenes to argue openly that there was no such law, or that it did not apply, would have weakened his case by creating the impression of taking refuge in technicalities rather than meeting the charge directly. But we are left without means of considering the legal point involved. If we have the suspicions outlined above, we must in all fairness put on the other side of the balance a wonder whether there had to be a specific and detailed law declaring the falsification of documents illegal, or whether appeal might be made to something fundamental and underlying, though unwritten.⁸ Furthermore, one must assume that such an assertion as that of Aischines must not have seemed too unreasonable, as it had cleared all the preliminaries to the trial.

II

Two other points, however, are argued at great length. With respect to the first, Aischines contends that at the time of Ktesiphon's proposal Demosthenes had not yet passed the audit required at the conclusion of his terms of office as *τειχοποιός* and magistrate in charge of the Theoric Fund, and that the award of a crown was illegal

⁵ Aischines, 199-200.

⁶ 50.

⁷ Goodwin, larger ed. of *On The Crown*, Cambridge, 1901, p. 326; smaller ed., New York, 1904, pp. 268-269; Richardson, ed. of Aischines, *Against Ctesiphon*, Boston, 1889, on sect. 50; Gwatkin and Shuckburgh, ed. of Aischines, *Against Ctesiphon*, London, 1890, on sect. 50. Pusey, *Νόμοι τῶν Ἀθηναίων*, Harvard Diss., 1937 (unpublished), inclines, but only mildly, towards belief in the existence of such a law (Law No. 101).

⁸ The heliastic oath taken by the jurors contained a proviso for judging according to general concepts of justice when there was no law. Cf. Bonner and Smith, *Administration of Justice from Homer to Aristotle*, Chicago, 1938, I, pp. 152-156.

if the audit had not been sustained.⁹ The phraseology of the law is concise: *τοὺς ὑπεύθυνους μὴ στεφανοῦν*,¹⁰ and in consequence the argument turns upon the meaning of a single word *ὑπεύθυνος*. If Demosthenes is *ὑπεύθυνος*, the crowning is illegal, and Ktesiphon is guilty; if Demosthenes is not *ὑπεύθυνος*, the crowning is legal, and Ktesiphon has proposed nothing contrary to law.

The strict legalist will have no difficulty in feeling that Aischines is using the term in the sense that is meant in the law. One who is *ὑπεύθυνος* is under the necessity of rendering a financial accounting in the future at the conclusion of his term of office. One still in office is subject to the *εὐθυνα* and it is illegal to crown him until it is sustained, although admittedly this requirement was circumvented in instances by appending a clause postponing the crowning until after the audit—a practice deprecated by Aischines,¹¹ and testified to by inscriptions,¹² but not in point in the present case, since Ktesiphon had failed to add such a condition in his proposed *ψήφισμα*.¹³ Aischines gives a very lucid and appealing exposition of the purpose of the law—to allow those deciding a *εὐθυνα* that freedom of decision which might be restricted if the official under review had already been honored by the people before his accounts were passed upon.¹⁴

Of what nature would these accounts be? I suggest that a consideration of their possible form will throw light upon the puzzling argument of Demosthenes.

Any accounting, we may be sure, would consist of two elements, a statement of receipts and a statement of expenditures. If the receipts exceed the expenditures plus balance on hand to be turned over to a successor in office, the official examined fails to sustain the audit. If receipts and expenditures exactly balance, quite obviously the audit is passed. Aischines is able to quote a law showing that this form of accounting must be filed even when the receipts are zero and the expenditures are zero.¹⁵

But what form will the accounting take if the magistrate has in actuality spent

⁹ Aisch., 9-31.

¹⁰ Aisch., 11. Pusey thinks the proviso a rather new one, dating from approximately 343/2 (Law No. 41).

¹¹ 11-12.

¹² *I.G.*, II², 223, lines A13, B13, C13 (343/2); 330, line 42 (336/5); 338, line 18 (333/2); 354, line 24 (328/7); 410, line 22 (*ca.* 330); 415, line 27 (330/29). Cf. M. N. Tod, *B.S.A.*, IX, 1902-3, pp. 166-167.

¹³ It is fair to remark that one possible way of legal analysis is to read "when he shall have passed the audit" into Ktesiphon's proposal by judicial construction and so bring it into line with proposals whose legality is beyond question. A juror might ask himself whether the omission of this clause should be fraught with such important legal consequences. To suggest this question is perhaps the purpose of Demosthenes' designation of the whole charge as a mere failure to add the clause (section 58). Aischines, of course, stresses the omission (sections 31 and 203).

¹⁴ 9-12.

¹⁵ 22.

more than he has received, i. e., if he has made a contribution of his own toward the performance of his official duties? I suggest that either he need not show this additional sum in his statement of expenditures, or if he does so that the auditing λογισταί will not check this amount once they have convinced themselves that the expenditures total at least the amount of the official receipts. Somewhat the same situation would obtain in case the official shows his personal contributions under both expenditures and receipts, the λογισταί checking only the official receipts, disregarding the personal contributions under receipts, then checking expenditures only until they equaled official receipts.¹⁶ The amount for which the official is strictly accountable, therefore, is only the amount he has received officially. That is, ὑπεύθυνος applies only this far; above that amount one is not ὑπεύθυνος.

It is imperative for Demosthenes to convey to the dicasts the feeling that in some sense he is not subject to audit. Obviously he cannot deny that in 336 when the crown was proposed he was under the necessity of rendering an account at the end of his term. Aischines anticipates that he will argue non-liability to the εὔθηνα on the grounds that neither of his offices was an ἀρχή and builds up an elaborate argument about it.¹⁷ But this is rendered completely out of point by one rhetorical sentence in which Demosthenes accepts the applicability of the term to himself, exclaiming that he is ὑπεύθυνος for all the acts of his political life, and throughout all his life.¹⁸ This is, indeed, to accept the term, but the phraseology stretches the meaning to such a broad sense of "responsible for" as to give it an extra-legal meaning recognizable as purely rhetorical and not to be considered seriously in strictly legal argument.

Demosthenes' next sentence brings us to the statement that he is not ὑπεύθυνος,¹⁹ but this time upon inspection we discover that the meaning is that he is not subject to audit for the personal contributions he has made, and in a rhetorical flourish he develops the point that it is for the additional contributions that he is being crowned, as have been four others whose cases are brought to the attention of the jurors.²⁰

I suspect that there were some jurors who were not diverted from their straight legal thinking by these diversionary tactics. To them the alternatives must have appeared clear-cut: in Aischines' argument, Demosthenes is subject to audit in that

¹⁶ Emphasis seems to have been upon the checking of expenditures rather than receipts. Aisch. 27 describes those under audit as those from whom the city would receive an accounting of expenditures. Nothing is said of receipts. A fourth-century inscription (*I.G.*, II², 1183; commented upon by B. Haussoullier, *La vie municipale en Attique*, Paris, 1884, pp. 80-83) gives the oath taken by the λογιστής of the deme Myrrhinous in which he swears to make an accounting of what seems to him to have been expended. Again nothing is said of receipts. Presumably the accounting procedure for the city would be similar to that in the demes.

¹⁷ 13-16.

¹⁸ 111.

¹⁹ 112.

²⁰ 113-118.

he is under the necessity of filing his accounts; in Demosthenes' argument, he is not *ὑπεύθυνος* in the sense that in any account filed he need not account for personal contributions. It seems rather obvious to us that the better reasoning is that of Aischines, and that Demosthenes was *ὑπεύθυνος* in the legal sense in 336 when the crown was proposed, with the consequence that Ktesiphon's proposal was illegal and that he should be condemned. The weakness of Demosthenes' argument has been noted often, and it was pointed out very early that it is placed in the center of the oration to hide its weakness.²¹ But considerations such as those presented above suggest that Demosthenes has skilfully conveyed to at least some of the dicasts the impression that he was not subject to audit, and failing to recognize the shift in meaning which had occurred in the term they proceeded to the decision that no illegality had occurred.

In spite of its obvious strength, the argument of Aischines contains certain weaknesses. Apparently he was able to produce no law specifically covering the situation in which a magistrate expended more than his official receipts. Demosthenes exploits this weakness by a specific challenge to produce such a law.²²

Furthermore one must remember that the trial took place not in 336 but in 330.²³ By this time Demosthenes had passed his audit, as he states quite distinctly.²⁴ That is, in 330 he was not *ὑπεύθυνος* in either the sense of having to file some accounting or the sense of having to account for excess funds. What was his situation in 336, when Ktesiphon made his proposal? His weakness in *On the Crown* is that in 336 he was *ὑπεύθυνος* in the sense of having to file some account. His concentration upon non-accountability for his private donations is explained by the fact that it is only in this sense that he can maintain that he was not *ὑπεύθυνος* in that year. Aischines in two places at least tries to concentrate upon that year;²⁵ but he does not allude to the situation at time of trial, for to do so would weaken his case with the jury. With a system such as ours, by appropriate motion to a presiding judge or by instructions to the jury suggested to and given by the judge he might have succeeded in focusing attention upon 336. But he could not employ these methods in the Athenian courtroom. The individual dicast could not be prevented from thinking in terms of 330, when Demosthenes was clearly not subject to audit, instead of in terms of 336; and for that year, indeed, he might accept Demosthenes' sophistical meaning of *ἀννπεύθυνος*.

In addition, Aischines' very admirable explanation of the reason behind the law prohibiting the crowning of one subject to audit²⁶ might very well have worked

²¹ Libanius, Hypothesis 6; Second Hypothesis 5; Quintilian, VII, 1, 2; other references in Schaefer, *Demosthenes und seine Zeit*, III², p. 288, note 1 and Blass, *Attische Beredsamkeit*, III, 1, p. 423, note 1.

²² 112.

²³ The evidence is cited by Schaefer, *Demosthenes und seine Zeit*, III², p. 224, note 1; Goodwin, *Crown*, larger edition, p. 329, note 2; small edition, p. 270, note 2.

²⁴ 117.

²⁵ 24, 27.

²⁶ 9-12.

against him in 330. The purpose of the law was to allow a free hand in passing upon accounts. In 336 it would be well to postpone a crowning until the audit was over. But in 330 the purpose of the law had been fulfilled. Demosthenes had sustained the audit. Even if Ktesiphon had made an illegal proposal in 336, by 330 no accounting process would be embarrassed by any crowning of Demosthenes as a magistrate subject to audit in the future. Why not look to the accomplishment of the law's purpose rather than to exact compliance with its terms? At least so some of the jurors could have reasoned. And to obtain this result Demosthenes had sensed that the intimation of a single sentence²⁷ was more effective than sustained argument, which would have pointed the contrast between the situation in 336 and that in 330, focusing attention upon the earlier year when the legally-minded portion of the jury would be likely to decide that he could not be crowned legally.

Aischines had made a strong counter-argument in anticipation of that of Demosthenes.²⁸ Even priests, trierarchs, the Areopagus, and the Council of the Five Hundred are subject to audit—officials presumed to have a minimum of public money to handle. All the more, officials with financial responsibilities would be required to undergo an audit, and there seems force to the general assertion made in two places that no official in Athens is exempt.²⁹ The mention of trierarchs causes some wonder. Aischines says that they handle no public funds, yet are nevertheless subject to audit.³⁰ Modern authorities are of the opinion that they were subject to audit precisely because they did handle public funds.³¹ It seems unlikely that Aischines would indulge in too glaring an inaccuracy, and it may be suggested that for a period there had been in actuality very little public money advanced to the trierarchs, whatever the legal provisions may have been. The experience of Demosthenes with his attempts to change the trierarchy system indicates that the main thought of the time on the subject concentrated upon the personal contributions required of trierarchs.³²

One wonders why Aischines did not make more of the comparison of Demosthenes' offices with the trierarchy. He may well have felt, however, that the establish-

²⁷ 117.

²⁸ Aisch., 17-23.

²⁹ 17, 22.

³⁰ 19.

³¹ H. Strasberger, *R.E.*, s.v. *Trierarchie*, col. 115; G. Busolt-H. Swoboda, *Griechische Staatskunde*, p. 1209, note 5; J. H. Lipsius, *Attisches Recht*, II, i, p. 288.

³² Many authorities are convinced by Aisch., 222 and Demosthenes, *Crown*, 312 that Aischines had himself introduced some minor changes in Demosthenes' system before 330 (Boeck, *Die Staatshaushaltung der Athener*, I³, p. 668, note *b*; Busolt-Swoboda, *Griechische Staatskunde*, p. 1204; H. Strasberger, *R.E.*, s.v. *Trierarchie*, col. 112; M. Brillant, *Dict. des Antiq.*, s.v. *Trierarchie*, pp. 449-450). The supervision over the trierarchs exercised by the *στρατηγὸς ἐπὶ τὰς συμμορίας* mentioned by Aristotle, *Ath. Pol.*, 61, 1 seems to have been instituted between 334 and 325 (Brillant, *op. cit.*). In view of the changes indicated, therefore, it would be the part of wisdom to exercise caution in attributing error or dishonesty to Aischines.

ment of the general principle that every holder of an office was subject to audit provided a stronger argument than the argument from analogy. In the abstract this is probably correct, though in this particular situation it does not seem correct tactics to the modern reader. Concentration upon the trierarchy, however, would offer Demosthenes the opportunity to exploit his trierarchic reform, as he does, even without invitation.³³

III

The second point in dispute is whether a crown awarded by Boule and ecclesia may be proclaimed legally in the theatre of Dionysos at the time of the Great Dionysia. The argument of Aischines is that this is forbidden by a law providing that a crown awarded by the ecclesia must be proclaimed in the ecclesia, i. e., on the Pnyx, one awarded by the Boule must be proclaimed in the Bouleuterion, and proclamation must occur nowhere else.³⁴ He uses this law in two ways. Emphasizing the last clause, "and nowhere else," he insists that it is impossible to make Ktesiphon's proposal of proclamation in the theatre accord with it.³⁵ He also claims that his law shows inapplicable a certain law which he anticipates Demosthenes will use. This, termed the Dionysiac law, in general prohibits the proclamation of a crown in the theatre of Dionysos, but contains a clause allowing it in case the Boule or assembly so vote. Aischines' argument is that there cannot be two conflicting laws on the same subject, and that the Dionysiac law applies to only a limited number of situations, leaving the law he has cited originally to prevail in the case of Ktesiphon's proposal.³⁶

Demosthenes' counter-argument is brief and impassioned: many crowns have actually been proclaimed in the theatre, the practice brings honor to the state, and Aischines failed to cite an all-inclusive excepting clause when he had the clerk read the law to the dicasts.³⁷

Modern legal thinking will probably disregard Demosthenes' second argument at once as more appropriate for legislative consideration in making a new law than judicial use in interpreting or applying one already in existence.³⁸ It should be remarked, however, that this distinction probably did not present itself with such clarity to the Athenian dicast, and he may have viewed the argument in the framework of the argument from probability, indicating that the lawmakers would probably have enacted such a law.

³³ 102-109.

³⁴ 32; repetition of portions in 34, 36, and 43.

³⁵ 34; 48.

³⁶ 35-48.

³⁷ 120-121.

³⁸ The form of the argument, a balanced sentence, is couched to exploit the question, "What difference does the place of proclamation make?" The turn of the answer is, "None to the person honored, but much to the state itself."

We cannot be sure which law Demosthenes accuses Aischines of quoting only partially. The omission is an excepting clause: "But if the people or the Boule vote, let him proclaim (them)." ³⁹ This may be added to the law of Aischines, which, as indicated above, contained three clauses: if the Boule crowns, the proclamation is to be in the Bouleuterion; if the people crown, the proclamation is to be in the ecclesia; and the proclamation is to occur nowhere else. ⁴⁰ The excepting clause would add, "But if the people or the Boule vote, let him proclaim (them)." Demosthenes' argument has greater point if the addition be understood as made to this law. ⁴¹ On the other hand, it does seem somewhat circuitous for a law to provide for proclamation only in the Bouleuterion or the ecclesia, stating emphatically, "and nowhere else," and then immediately to provide for proclamation elsewhere if the people or Boule so vote. ⁴²

If the excepting clause be added to the Dionysiac law, Demosthenes' outcry of indignation at the suppression of part of the law seems to lose some of its point and become mere bluster when we observe that in two places Aischines indicates his anticipation that just such an addition to this Dionysiac law will be brought into the argument. ⁴³ The Dionysiac law, outlined only by Aischines, seems to have had four clauses: proclamations of manumissions in the theatre are prohibited; proclamations of crowns awarded by phyle or deme are prohibited; proclamations of those awarded by anyone else are prohibited; otherwise the herald is to be ἄριστος. ⁴⁴ Then if the addition be made it will continue, "Except, if the people or the Boule vote, let him crown (them)." It will be noted that the language of the addition makes a "join" with the provisos of the law as quoted, and this seems very persuasive that Demosthenes' addition is intended to the Dionysiac law. ⁴⁵ But certainty is impossible, and it would perhaps be best to consider the alternative possibilities when one restates the argument of Demosthenes.

Stated in terms of the two laws, Aischines' argument runs as follows: the law of Aischines prevails, and this distinctly prohibits the proclamation of a crown in the theatre. The Dionysiac law, including the excepting clause which Demosthenes stresses, applies only to crowns awarded to Athenians by foreign states, which may be proclaimed only if the people or Boule so vote. Aischines has three arguments against applying this law: firstly, since there is a regularly established process for

³⁹ 121; repeated from the document, now lost, read at the end of 120; repeated in general terms in Aisch., 36.

⁴⁰ Aisch., 32.

⁴¹ So understood by Blass, *Attische Beredsamkeit*, III², 2, p. 213.

⁴² It is fair to remark that Blass does not consider "and nowhere else" a quotation from the law.

⁴³ 36, 48. Some have tried to resolve the difficulty by considering Aisch., 35-48 a late revision inserted after the delivery of the *On the Crown*. So Goodwin, large edition, p. 315, small edition, p. 264.

⁴⁴ 44.

⁴⁵ Cf. Goodwin, large edition, pp. 314-315, small edition, pp. 263-264.

the elimination of overlapping laws⁴⁶ it cannot be that the Dionysiac law overlaps the law upon which Aischines relies, but must apply to some other situation.⁴⁷ This argument, though on the surface persuasive, is in strictness a *non sequitur*, for if there were not some instances of overlapping laws there would be no necessity for providing for their removal from the statute books. Aischines' second argument is that the Dionysiac law was intended to relieve a situation which had arisen in the Dionysiac theatre where there had been public proclamations of manumissions, of crowns awarded by demes and phylai, of crowns awarded to Athenians by foreign states—all to the disturbance of spectators and participants. The first and second situations had been handled by express prohibitions of the law, and a prohibition of proclamations of crowns awarded by anyone else means only by anyone else within the number of the original group affected by the legislation, not by anyone else within the total number of those with crowns at their disposal. That is, when the excepting clause be added it means that the senate or demos may grant permission to proclaim a crown only in the case of those honored by foreign states.⁴⁸ It is certainly permissible to argue the meaning of legislation from the intent of the legislators, and often legislative intent can be determined from a consideration of the evil which is to be remedied by an enactment. One must, therefore, respect highly the method of argument which Aischines employs. His third argument is an argument from probability, running as follows: it is improbable that the people would simultaneously both give and take away a crown, and a crown proclaimed in the theatre of Dionysos must be dedicated to Athena. Therefore a crown awarded by the people must be proclaimed elsewhere.⁴⁹ On this argument inscriptions allow a little comment. In his argument about liability to audit Demosthenes mentions four Athenians as crowned by the people for their personal expenditures in the conduct of their offices,⁵⁰ and one of the inventory inscriptions of the treasurers of Athena shows the crowns which they obtained to be a part of the treasure of the goddess.⁵¹ This is interesting. It shows that Aischines was factually correct in that crowns were dedicated to Athena if proclaimed in the theatre of Dionysos.⁵² But there is no doubt that the awards were

⁴⁶ 38-39. This annual procedure, in which the initiative lies with the *θεσμοθέται*, has been taken usually to be distinct from, or subordinate to, the much discussed process of lawmaking by *νομοθέται*, for which cf. C. Hignett, *Hist. of the Athenian Constitution*, Oxford, 1953, pp. 299-305; U. Kahrstedt, *Klio*, XXXI, 1938, pp. 1-25; K. M. T. Atkinson, *Bul. John Rylands Libr.*, XXIII, 1939, pp. 1-46; A. R. W. Harrison, *J.H.S.*, LXXV, 1955, pp. 26-35; J. H. Oliver, *Hesperia*, IV, 1935, pp. 5-32; S. Dow, *Hesperia*, X, 1941, pp. 31-37; W. S. Ferguson, *Classical Studies Presented to Edward Capps*, Princeton, 1936, pp. 144-158.

⁴⁷ 35-40.

⁴⁸ 41-47.

⁴⁹ 46-47.

⁵⁰ 114-118.

⁵¹ *I.G.*, II², 1496 frag. h (338/7).

⁵² Demosthenes mentions only the award, but the general context shows that he means both award and proclamation in the theatre of Dionysos.

made by the Athenian people. Seemingly, therefore, Aischines' total argument collapses if he is contending that crowns were in actuality proclaimed only if awarded by foreign states. It has validity only if he means that these actual proclamations of crowns awarded Athenians by the Athenian people were illegal acts.

One argument, therefore, is weak by virtue of a *non sequitur*, and the last asks the jury in effect to declare a current practice illegal. Only one is left with strength—the one which stems from consideration of the purpose of the Dionysiac law.

In considering Demosthenes' argument we must allow for two possibilities, as indicated above. If the excepting clause he stresses was an added proviso of Aischines' law, he contends that this excepting clause, not quoted by Aischines, admits the proclamation of a crown in the theatre if so voted by the Boule or people. The Dionysiac law does not enter into his argument, and is not mentioned by him. Aischines, that is, has falsely anticipated its use by Demosthenes, and his lengthy argument is not in point.

If, on the other hand, the excepting clause is one of the provisos of the Dionysiac law, this is the real reliance of Demosthenes. The excepting clause under the Dionysiac law allows proclamation in the theatre. The law mentioned by Aischines is a dead letter law, and Demosthenes ignores it completely.

In all considerations of the question of the place of proclamation, however, one comes back to Demosthenes' exclamation that current practice admitted proclamation in the theatre of Dionysos without question. His language is that of exaggeration,⁵³ but he asserts that he himself has been crowned and the proclamation so made many times before.⁵⁴ In a previous context he has mentioned four Athenians awarded crowns under situations similar to his own.⁵⁵ Andokides about eighty years before had spoken of men as granted crowns and of the proclamation of the recipients, though without specifying the exact place.⁵⁶ Inscriptions exist to show proclamations voted for the Great Dionysia before and after the date of the present lawsuit.⁵⁷ Interestingly

⁵³ 120.

⁵⁴ 120. Section 83 refers to at least one crown (proposed by Aristonikos, and referred to also in section 223), and perhaps to two crowns proposed previously to the time of the *On the Crown*. Sections 222 and 223 refer to the crown proposed by Demomeles and Hypereides in 338 B.C.

⁵⁵ 114-118.

⁵⁶ *De Reditu Suo*, 18.

⁵⁷ *I.G.*, II², 174, line 7 (412); 2b, line 10 (cf. Addendum) (403/2); 20, lines 6-7 (cf. Addendum) (393/2); 385b, line 9 (319/8); 448, line 25 (323/2); 555, line 6 (307/6-304/3); 646, line 30 (295/4); 654, line 41 (285/4); 657, line 62 (*ca.* 283); 693, line 11 (*init. s. III*); 653, line 37 (285/4); 692, line 11 (*post* 303/2); 708, line 5 (*init. s. III*); 925, line 2 (cf. Addendum (*init. s. II*); 861 (*fin. s. III*)). This list is gleaned from the index volume, *I.G.*, II-III², p. 4. For dates in the third century, see *Hesperia*, XXIII, 1954, pp. 314-316, and above, p. 97. The lists in Goodwin, larger ed. of *On the Crown* on section 120 (taken from Blass) and A. W. Pickard-Cambridge, *Dramatic Festivals of Athens*, Oxford, 1953, p. 82, note 9 are helpful, but do not focus upon the

enough, most are for foreign persons or peoples as recipients, but in 293/2 and again *ca.* 283 an Athenian is proclaimed.⁵⁸ Mention has been made of the crowns of Nausikles, Diotimos, Charidemos, and Neoptolemos appearing in the Parthenon inventory of 338/7,⁵⁹ and one item in the inventory of 317/6 is a crown proclaimed in the theatre of Dionysos as awarded to an Athenian.⁶⁰ There seems little doubt that the dicasts trying the case against Ktesiphon were familiar with the circumstance that such crowns were awarded and proclaimed. Demosthenes' answer, in effect, was an appeal to the practices of Athens, though he had used that word not in connection with the present point but in connection with the question of the audit.⁶¹

What, then, is to be said concerning Aischines' law, which he claims prohibits such proclamations? Unless we assume that he is deliberately quoting a non-existent statute—and this seems unlikely—we must conclude that at least the law was a dead letter. But speculation may be allowed as to how it had become so.

We know that the laws were preserved in the Metroon on the west side of the Athenian Agora.⁶² A very considerable number of them must have been preserved on papyrus or other perishable material.⁶³ They must have been of rather free access to the Athenian public, for in the very year of the trial of Ktesiphon the orator Lykourgos in appealing to a jury makes the point that one would be punished with death if he walked into the Metroon and did away with a law, and the general tone of the sentence indicates that this would have appeared to the jury as perfectly possible.⁶⁴ The general word for rendering a law of no avail means originally to wipe out, and while this perhaps cannot be pressed, it is recorded that in 410 B.C. Alkibiades walked into the Bouleuterion, where judicial records of some kind were kept, moistened his finger, and did away with the record of a pending lawsuit for the benefit of a friend.⁶⁵ It has been thought that there must have been some kind of system of reference, as indeed seems most likely.⁶⁶

period under review here. Pusey is of the opinion that these proclamations were only on special occasions, and not as frequent as might be thought (Law No. 31).

⁵⁸ W. B. Dinsmoor, *Archons of Athens*, pp. 7-8, 40-43 (293/2); *I.G.*, II², 657, line 61 (*ca.* 283).

⁵⁹ Above, notes 50 and 51.

⁶⁰ *I.G.*, II², 1479, lines 8-9.

⁶¹ 114.

⁶² H. A. Thompson, *Hesperia*, VI, 1937, pp. 215-217; references in *R.E.*, XV, 1932, col. 1489 f. There is no doubt about this in 336 or 330 B.C., though considerable controversy has arisen as to whether there were state archives previous to 403. Cf. U. Kahrstedt, *Klio*, XXXI, 1938, pp. 29-32; Jacoby, *Atthis*, Oxford, 1949, p. 384, note 27; C. Hignett, *Hist. of the Athenian Constitution*, pp. 14-17; and the references given in note 46, above.

⁶³ H. A. Thompson, *Hesperia*, VI, 1937, p. 215; Wachsmuth, *Stadt Athen*, Leipzig, 1890, p. 337.

⁶⁴ Lykourgos, *Against Leokrates*, 66.

⁶⁵ Athenaeus 9, 407C, on the authority of Chamaeleon of Pontos.

⁶⁶ Wilhelm, *Beitraege zur griechischen Inschriftenkunde*, p. 270.

Now one way for a law to become a dead letter is through its being lost in the general body of statutes. It may be indexed in some out-of-the-way place, where it may lie unnoticed for long periods. In the Metroon it may be opined that this might happen in case the generic heading was not the one which was generally consulted, and, indeed, a label might even be wiped away or obscured. Aischines' reference to the Dionysiac law suggests the possibility that it was catalogued, perhaps by a tag, under the word Dionysos or something very similar. We can imagine that this would be the item consulted when any question arose concerning the conduct of the Great Dionysia or any other performance in the theatre of Dionysos. If we can suppose that the other law was obscurely catalogued and the label perhaps erased or rendered illegible, we can see how the actual practice of proclaiming crowns in the theatre came to be governed by the Dionysiac law, while all the while there existed in obscurity another contradictory law which had not been brought to the attention of the *θεσμοθέται* for reconciliation with the former. And if any person more than another would be inclined to unearth it, he would be a person of the nature indicated by Demosthenes' criticism of Aischines—one with a clerk's type of mind, familiar with the written documents,⁶⁷ and bringing them forward in the face of common experience, asking the jurors in effect to declare that what was usual was in fact illegal.⁶⁸

It is worth considering whether Aischines could have based his argument upon the Dionysiac law. If one focuses attention upon the clause which rendered the herald *ἄτιμος* in case he proclaimed some crowns contrary to the preceding provisions, he sees simply the method of enforcement of the law. It is not hard to imagine that cases would arise in which the herald would be confronted with some order from his superiors to proclaim a crown in a situation where the law forbade it. To confront the herald with the alternative of obeying his superiors and thus incurring *ἀτιμία*, or obeying the law but refusing orders from above, involves a considerable amount of hardship;⁶⁹ and the excepting clause which Demosthenes cites may have arisen to relieve the herald from the consequences of illegal obedience to orders from above. If the Boule or the people voted for proclamation in the theatre, that is, the herald could not be held *ἄτιμος*. But that does not mean that the proclamation was in accord with the law. Merely one means of enforcement had been removed—perhaps in fact the sole effective means—but the act, no matter how frequently repeated, did not

⁶⁷ Demosthenes, *Crown*, 127, 209, 261; *De Falsa Legatione*, 70, 95, 200, 249, 314. Cf. Schaefer, *Demosthenes und seine Zeit*, I², p. 254 n.

⁶⁸ Gwatkin and Schuckburgh ed. of Aischines, *Against Ctesiphon*, London, 1890, p. 251, following Blass, *Attische Beredsamkeit*, III², ii, pp. 213-214.

⁶⁹ Cf. the famous situation of Socrates at the time of the accusation of the generals following Arginousai in 406 B.C. As *ἐπιστάτης τῶν πρυτάνεων* he was able to resist pressure and refuse to put the vote for the illegal *en masse* conviction. Plato, *Apology*, 32b; Xen., *Mem.*, IV, 4, 2. The situation of the more lowly herald would be more desperate.

become in accord with the law, and no legal consequences would flow therefrom. In the great majority of cases the mere physical proclamation was all that was desired, and the point becomes academic. But in the *γραφὴ παρανόμων* there was available one means of attacking the illegality of the practice either in general by repeated suits or in individual cases. It is quite possible to analyze Aischines' action in this way and maintain that he was as correct on this point as he was in respect to the *εὔθυνα*. But we may suspect that it would have been too much to ask many members of the jury to follow such reasoning, valid though it might have been.

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