

# The Testimony of Witnesses in the Gortyn Laws

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**N**EARLY A CENTURY ago J. W. Headlam, in an influential study of legal procedure at Gortyn, examined (among other matters) the rôle of witnesses and concluded that witnesses at Gortyn could only testify to procedural or contractual acts and not to disputed points of fact.<sup>1</sup> In this paper I shall examine two specific cases which show that Headlam was wrong: in one a witness is certainly allowed to testify to the facts of a case, and in another it is probable that a witness to the fact of the crime is required. I shall conclude that witnesses testified to the facts in these two cases, and that they were probably allowed to testify to the facts in any case.

In his article Headlam first surveys a number of provisions in the Gortyn laws in which the nature of the witness's testimony is clear from the text; he concludes that "in all these cases *μαίτυρες* refers to witnesses of formalities. The form or act that they have to prove is sometimes proceedings in court, sometimes contracts or agreements. In all cases the witnesses are official, they must have been summoned beforehand for the purpose of witnessing the act; it does not include the evidence of accidental spectators" (57). This conclusion is valid for the cases on which it is based, but Headlam goes further. Examining several other provisions where the nature of a witness's testimony is ambiguous, he interprets these along the lines he has already laid down and concludes that his description of the function of witnesses at Gortyn is true in all cases.

Headlam's general conclusion has not been challenged,<sup>2</sup> but there exists at least one case which clearly proves it false, though the text of this law, *I.Cret.* IV 41.5.4–11, was probably not known to Headlam.<sup>3</sup> It reads as follows:

<sup>1</sup> "The Procedure of the Gortynian Inscription," *JHS* 13 (1892–93) 48–69, esp. 51–63 (hereafter 'Headlam').

<sup>2</sup> It is accepted by, e.g., F. Pringsheim, who calls it "hors de doute" ("Le témoignage dans la Grèce et Rome archaïque," in *Gesammelte Abhandlungen* II [Heidelberg 1961] 330–38, esp. 331 [*RI DA* 6 (1951) 161–75], and R. F. Willetts, *The Law Code of Gortyn* (*Kadmos* Suppl. 1 [1967]) 33.

<sup>3</sup> The first two columns of *I.Cret.* IV 41 were published in 1885, but columns 3–7 were not published until 1887 (*MusItal* 2: 593–668), and the combined text of all

αἰ δέ κα κελομένο οἱ κα παρῆι φεργάδδηται ἢ πέρηι, ἄπα-  
τον ἤμην. αἰ δέ πονίοι μὴ κελομένο, τὸν δικασσάτᾱν ὀμνύν-  
τα κρίνεν, αἰ μὲ ἀποπονίοι μαίτυρς.

If someone works in a field [*sc.* belonging to another] or carries off property [*sc.* belonging to another] at the command of the person to whom he belongs [*sc.* by contract of indenture], he is immune from damages. But if [that person] testifies that it was not at his command, the judge is to decide on oath, if no witness testifies.<sup>4</sup>

The legal condition of indentured service, encountered fairly often in the Gortyn laws, is one in which one person may be pledged to the service of another in order to work off a debt. His position is not the same as a slave's, since he is liable for actions he undertakes on his own, but the law quite reasonably exempts him from liability when he acts on the orders of his (temporary) master.

The question concerning us is what sort of testimony by a witness is envisaged in the clause of this law, and it seems quite impossible that this could be anything other than testimony to the fact that the master either did or did not give the wrongdoer an order to act as he did.<sup>5</sup> And this is clearly testimony to a fact, and, moreover, to a fact learned by chance, since it is scarcely possible that a master summoned a witness to observe either that he was giving his servant an order to do something wrong or that he was not giving any such order. This one example, which to my knowledge has been neglected by all scholars who accept Headlam's conclusion about witnesses, is thus sufficient to disprove the view that the laws mention witnesses only in connection with procedural or contractual acts.

Since we have one case of a witness being allowed to testify to a factual matter, we may now reexamine Headlam's conclusions about the more ambiguous references to witnesses without presupposing that in these cases the testimony of witnesses will be confined to procedural or contractual acts. For the present I shall examine only one of these ambiguous cases.<sup>6</sup>

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seven columns not until 1893 (by Comparetti in *MonAnt* 3: 243–86). To my knowledge no one has discussed *I.Cret.* IV 41.5.4–11 as evidence for the nature of the testimony of witnesses at Gortyn.

<sup>4</sup> See M. Guarducci, *I.Cret.* IV pp.90–98. The text may also be found in R. Dareste, *Rec.inscr.jurid.gr.* I 393–97 (with French translation), and in J. Kohler and E. Ziebarth, *Das Stadtrecht von Gortyn* (Göttingen 1912) 28–31 (with German translation). There is no disagreement about the text or its translation.

<sup>5</sup> See R. Dareste, *JSav* 1894, 108: "S'il y a contestation sur le fait de l'ordre allégué, la preuve est faite par la déclaration d'un témoin."

<sup>6</sup> At a later time I hope to examine all the evidence for witnesses, together with the evidence for judgment and oaths, in a thorough study of legal procedure at Gortyn.

The second column of the Great Inscription of laws at Gortyn (*I.Cret.* IV 72) begins with laws concerning sexual offenses. These are organized into four sections:<sup>7</sup> lines 2–10, rape; 11–16, forcible intercourse with a slave;<sup>8</sup> 16–20, attempted seduction; and 20–45, adultery. The third of these (lines 16–20) reads as follows:

αἴ κα τὰν ἐλευθέραν ἐπιπερέται οἴπειν ἀκέοντος καδεστᾶ,  
δέκα στατέρανς καταστασεῖ αἰ ἀποπονίοι μαίτυς.

If someone attempts to have intercourse with a free woman under the guardianship of a *kadestas*, he shall pay ten staters, if a witness testifies.

The section has given rise to considerable controversy, especially among the early editors and commentators, but the more recent work of Gernet and Willetts has resulted in agreement on many questions of text and interpretation.<sup>9</sup> In particular, they agree that the woman must be an *epikleros* under the temporary guardianship of a relative, the *kadestas*. They disagree, however, on the nature of the crime, Gernet maintaining that it is another case of rape and Willetts that it is attempted seduction.<sup>10</sup>

Several considerations support the more common view of Willetts and others. First, the idea of violence is not present in this provision unless it is introduced from the context of the preceding laws. As I have argued elsewhere,<sup>11</sup> however, the asyndeton at the beginning of the provision (line 16) indicates that it was conceived and enacted separately from the preceding sections; and in any case, to assume that the content of the preceding provisions can be applied to the interpretation of this case is to beg the question. If the crime here

<sup>7</sup> See M. Gagarin, "The Organization of the Gortyn Law Code," *GRBS* 23 (1982) 129–46, esp. 131f.

<sup>8</sup> The expression used to designate the crime in this section (*κάρτει δαμάσαιτο*) may suggest a sense of domination in the master's rape of a slave that is not present in the other cases of rape, where the expression is *κάρτει οἴπει*. See S. G. Cole, "Greek Sanctions against Sexual Assault," *CP* 79 (1984) 109.

<sup>9</sup> L. Gernet, "Observations sur la loi de Gortyne," in *Droit et Société dans la Grèce ancienne* (Paris 1955) 51–59 (revising *REG* 29 [1916] 383–408); R. F. Willetts, "Observations on Leg. Gort. II.16–20," *Kadmos* 3 (1964–65) 170–76.

<sup>10</sup> Willetts' view is shared by Guarducci in her translation ("corrumpere conetur") and commentary *ad loc.* and by Cole (*supra* n.8: 109f). M. R. Cataudella, "L'interpretazione delle parole *ἀκέοντος κηδεστᾶ* e il ruolo del tutore nel codice di Gortina, col. II, 17–20," *RendIstLomb* 107 (1973) 799–809, agrees with Gernet that the crime is actual, not attempted, intercourse, but argues that it is committed under the supervision of (*i.e.* with the connivance of) the woman's guardian, and that the witness would testify to the guardian's rôle in the crime. This theory is implausible at best, and it is hard to see how there might be witnesses to the rôle of the guardian in such a case.

<sup>11</sup> *Supra* n.7.

were rape, as in the preceding sections, one would certainly expect to find the same or similar language in this section; but the explicit indication of force present in the earlier sections (*κάρτει*) is missing and a new and different verb (*ἐπιπερέται*, ‘make an attempt against’)<sup>12</sup> is used instead. Second, Gernet’s explanation (55f) of the fine of only ten staters in this case in contrast to one hundred for the rape of a free woman in the first section (2.2–4)—that the *kadestas* (who would receive the fine) is a more distant relative than the husband, father, or brother—is weak; we are not certain that the *kadestas* himself did receive the fine,<sup>13</sup> and even if he did, there seems no good reason for the fine to depend on the closeness of his relationship to the woman. More plausible is the explanation that the fine is smaller for an attempt than for the actual crime. Finally, Gernet argues (53) that in general laws concerning attempted crimes are not found elsewhere in Greece and that the concept of a lighter penalty for an attempted crime is rather refined for this period in Crete. This may be so, but the *epikleros* at Gortyn would at times be in the unusual position of choosing a husband herself,<sup>14</sup> and thus concern could easily arise that a suitor might attempt to seduce (but not rape) her before she had made her selection.

It seems fairly certain, then, that this section provides a fine for cases of attempted seduction of an heiress under the guardianship of a *kadestas*, “if a witness testifies.” This requirement for a witness occurs only here in the provisions concerning sexual offenses. Headlam asserts that the difference in this case is that the *kadestas* “has to prove his right to sue,” and that the witness must thus be required to testify to the formal assignment of guardianship to this particular relative. “We must suppose that the charge of the woman has been formally assigned to the relation before witnesses.”<sup>15</sup>

The text of the law is ambiguous enough that we cannot conclusively disprove this explanation, but since it is clearly motivated by Headlam’s conviction that all witnesses at Gortyn necessarily testify to procedural or contractual acts, and since we have seen that this is

<sup>12</sup> This is apparently the only occurrence of *ἐπιπερώω* (though Hesychius glosses *ἐπιπεύρει* with *μοιχέυεται ἢ μοιχέυει*). Gernet (*supra* n.9) 54 argues that “le préfix doit avoir sa valeur propre,” and ought thus to imply the use of violence. But even if the Greek meant ‘make a violent attempt to have intercourse with’ or ‘attack with intent to rape’, this would still be a case of attempted, not actual, rape.

<sup>13</sup> Willetts (*supra* n.9) 174 n.23, retracting an earlier view, considers it unlikely that fines were normally paid to the injured party.

<sup>14</sup> See in this inscription the regulations at 7.50–52, 8.4–7, etc.

<sup>15</sup> Headlam 59. Willetts in his commentary *ad loc.* repeats Headlam’s view nearly verbatim.

not universally true, we have no reason not to accept an explanation that is *prima facie* much more plausible, namely that the witness is expected to testify to the fact of attempted seduction. There is no parallel at Gortyn for the need to prove one's right to sue, and the fact that the *kadestas* was truly the guardian would be evident enough from the woman's residence in the man's house. The crime of attempted seduction, on the other hand, might be quite difficult to prove—certainly more difficult than rape, and the testimony of a witness might quite reasonably be required for conviction. In a situation where the *epikleros* was selecting a husband for herself, moreover, this provision may have had the effect of promoting the use of a chaperone during meetings with prospective husbands. We can only speculate whether this was the intent of the law, but in any case it seems much more likely that the requirement for a witness is connected with the designation of the crime as attempted intercourse than with any need for the guardian to prove his right to sue.

In view of these two examples, it seems likely that witnesses at Gortyn could and did testify to the facts in other legal cases. That such testimony is usually not explicitly mentioned may indicate only that witnesses to the fact were not required in most cases; it does not mean they were not allowed. Many legal codes explicitly require a witness to such formal procedures as writing a will but say nothing explicit about witnesses in connection with many kinds of crime. That a given law does not explicitly mention the testimony of a witness does not mean that a witness cannot testify in cases brought under that law.

The parallels cited by Headlam (59–62) from early Germanic and Anglo-Saxon law, showing that in these systems witnesses were not allowed to testify to the substantive facts of the case unless they had been summoned to witness them at the time, are simply not relevant evidence for conditions at Gortyn. Indeed, this brief study points to a more general conclusion, which I hope to explore at some length elsewhere, that legal procedure at Gortyn was considerably more rational and less mechanistic than comparisons with early Germanic laws have led Headlam and others to believe. This conclusion, however, would require a study of other aspects of legal procedure and is beyond the scope of this paper.