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OBSERVATIONS ON LEG. GORT. II. 16—20

αἱ κα τὰν ἐ-
λευθέραν ἐπιπέρ^εται οἶπεν ἄκε-
ύοντος καδεστᾶ, δέκα στατῆ-
ρανς καταστασεῖ αἱ ἀποπῶνιο-
ι μαίτυς.

17 ἐπιπηρηταῖοι πενακεύοντος Comparetti¹; ἐπιπέρηται οἶπεν Fabricius, al.; ἐπιπέρ^εται οἶπεν Baunack, Comparetti², Guarducci, Buck. al. 17—18 ἀχεύοντος Blass; ἀκεύοντος al.

The passage is crucial and notoriously difficult. The careful analysis of its several problems by Gernet, renewed in 1955 after an interval of nearly forty years¹, is an excellent guide to an appreciation of its importance. It seeks to probe beyond the textual problems to the realities of social life. At the same time it incidentally reveals how two early readings have exercised a ghostly influence over subsequent discussion. These are (a) ἐπιπηρηταῖοι πενακεύοντος of Comparetti's first edition; and (b) ἀχεύοντος suggested by Blass². It is easy to condemn, but more charitable to excuse both as over-hasty conjectures, arrived at under the compulsion to give the earliest possible coherence to a recently discovered monumental text, by far the most comprehensive social document of its time. The first of these conjectures was rejected by its author in his second edition, in deference to Wilamowitz and Meister³; and the second has only ever been believed in by Blass himself.

Yet these abandoned readings cannot be forgotten. For we can still say of both of them, as Gernet did of the first: "Même dans les interprétations périmées, même dans celles que leurs auteurs (Dareste et Comparetti, par exemple) ont abandonnées, nous verrons qu'il y a quelque chose à retenir"⁴.

¹ L. Gernet, *Observations sur la loi de Gortyne*, *Rev. Ét. Gr.* (1916) pp. 383 ff; *Droit et Société dans la Grèce ancienne* (Paris, 1955) pp. 51 ff.

² Comparetti, *Mus. It.* I (1885) pp. 245, 253, 263; Blass, *Neue Jahrb. f. Philol.* (1885) p. 480, GDI 4991 ad loc.

³ Comparetti, *Mon. Ant.* 3 (1893) p. 164.

⁴ *Rev. Ét. Gr.* p. 383 n. 1.

Comparetti commented on his first readings thus⁵:

- (a) “ἐπιπηρηταῖοι, il verbo in questa forma è nuovo; conosciamo invece πηρητίζω con significato presso a poco simile, poichè par chiaro che qui si accenna a tentativo di seduzione.”
- (b) “Πενακεύοντος καδεστᾶ, la forma φενακεύω è nuova; non c'è ragione di crederla, nel significato, diversa da φενακίζω. Il senso apparirebbe più chiaro e semplice se si potesse leggere φενακεύων τῶς καδεστᾶ[νς], supponendo una omissione di due lettere, che però sarebbe unica in tutto il testo. Prendendo la lezione qual'è, non si può spiegarla altrimenti che intendendo φενακεύοντος καδεστᾶ (τὰν ἐλευθέραν).”

He interpreted⁶: “Se poi alcuno attenti (alla pudicizia di) una libera coll'aiuto di un cognato (di lei) che la illuda . . .”

Even when others, including Comparetti⁷, were convinced that the most likely forms in ll. 17—18 were ἐπιπερεται οἴπεν ἀκεύοντος, Blass, though accepting the division, preferred to read ἀχεύοντος rather than ἀκεύοντος. He maintained: “der Sinn verlangt indes ‘gegen den Willen’ (ἀφέκων, φεκών nirgends in diesen Inschr.)”, leaving us to guess what kind of *kadestas*, under what improbable circumstances, would have been willing to consent to the rape or seduction of a free woman.

It is agreed that Cretan οἴπεν = ὀχεύω⁸. The major problem is to determine the meaning and significance of ἀκεύοντος καδεστᾶ; and a lesser problem is to decide how to interpret ἐπιπερεται. Both of these textual problems have a bearing on problems of a different order. We have to account for the significance, if any, of the omission of κάρτει before οἴπεν. For in the two preceding sections the formula is: (a) αἶ κα . . . κάρτει οἴπει (ll. 2—10) for rape as variously categorized according to the different social classes involved and the different fines in consequence assessed; and (b) αἶ κάρτει δαμάσαιτο (ll. 11—16) in the special case of the forcible seduction of a household slave-girl. There is also need to explain why a fine of ten staters only is imposed here in ll. 16—20 for this offence against a free woman if a witness should testify, as compared with a fine of one hundred staters for rape of a free

⁵ Mus. It. I p. 263.

⁶ Ibid p. 253.

⁷ Mon. Ant. 3. pp. 105, 164.

⁸ GDI 4991 ad loc.

⁹ But only of human beings. So LSJ s. v., citing τὰν Χελιδονίδα Plu. Pyrrh. 28, cf. IG 12(3). 536 (Thera vii B. C.).

person, male or female, and double that amount if the guilty party is servile. It seems clear from the outset that the offence is envisaged as being against a free woman by a free man. Moreover, the testimony of a witness is required for the first time in this set of regulations.

The reading ἐπιπῆρεται of some early editors, following Fabricius, though syntactically plausible, with τὸν ἐλευθέρων as direct object and οἶπεν as epexegetic infinitive, has no clear meaning¹⁰. It was abandoned in the edition of J. and T. Baunack¹¹, in favour of the alternative ἐπιπῆρεται (with the same syntax), which was accepted by Comparetti in his second edition, rightly, as is now generally agreed. Although not found elsewhere, ἐπιπῆρεται = ἐπιπειρεται <ἐπιπειρᾶσθαι is a reasonable dialectal formation. It can be supported by the Hsch. gloss: ἐπιπείρει (sic)· μοιχεύεται, ἢ μοιχεύει; and also by the usage of πειράομαι with acc. pers. in Pi. P. 2. 34: Διὸς ἄκοιτιν ἐπειρᾶτο¹². LSJ s. v. give the meaning of πειράομαι in the Pindar passage as "make an attempt on", but of ἐπιπειράομαι as "do violence to a woman" — a meaning which cannot be derived from the formation, from the Hsch. gloss, or from the *immediate* context of the passage, unless κάρται be understood with οἶπεν. This is how Gernet interpreted and he argued further: "Le mot ἐπιπειρᾶσθαι (composé qui est d'ailleurs un *hapax*, mais où le préfixe doit avoir sa valeur propre) évoque suffisamment l'idée de violence"¹³. But the idea of violence can only be understood if the passage is taken within the *general* context of the preceding regulations. This is to pre-judge the issue. Ἐπιπειράομαι could only mean, by itself, "make an attempt against".

Whether there is an original connexion between ἀκέω and ἀκούω so close¹⁴ as to allow ἀκεύοντος to be taken as = ἀκούοντος¹⁵ in this passage is improbable, not least because it has led to strained

¹⁰ E. g. "Wenn er die Freiin verführt zur Begattung": Bücheler-Zitelmann, Das Recht von Gortyn in Rh. Mus: Ergänzungsheft 40 (1885) p. 19; "If one assault a free woman... with intent to rape": Merriam, Law Code of the Kretan Gortyna in AJA I (1885) p. 333. Cf. J. W. Headlam in JHS 13 p. 59: "It is not quite clear whether the passage refers to seduction or to secret marriage"; also Comparetti's criticism in Mon. Ant. 3 p. 164 and LSJ s. v. ἐπιπῆρεω.

¹¹ Die Inschrift von Gortyn (Leipzig 1885) pp. 97, 125.

¹² Frequently in this sense with acc. pers. and the active in Attic.

¹³ Droit et Société p. 54.

¹⁴ Ibid. p. 53, Boisacq s. v.

¹⁵ So in Inscr. Jur. Gr. I (1891—5) p. 359; also Bücheler-Zitelmann, loc. cit: Baunack.

translation¹⁶ or unsatisfactory justification¹⁷ of ἀκεύοντος καδεστᾶ. The much more satisfactory alternative, which seems to have prevailed, is to understand ἀκεύω as = "take care of", "act as guardian", with the support of the Hsch. gloss: ἀκεύει· τηρεῖ. Κύπριοι.¹⁸ For, as J. W. Headlam pointed out, it thus becomes clear that the peculiarity of the case is that the woman is in the keeping of a καδεστᾶς i. e. (as Headlam saw it) of a father, brother, or mother; that the punishment is a fine to be paid to the καδεστᾶς, who, in order to recover damages, has to prove his right to sue¹⁹. Headlam considered that, in the Code, the word μαίτυρες refers to formal witnesses of processual or contractual acts, there being no case where it refers certainly to evidence brought to settle disputed points of fact. In this case too, the witness is not a witness to prove the injury. No witness has been assigned in the preceding cases; and we must suppose that the woman has been formally assigned to the relation before witnesses²⁰.

Gernet argued on similar lines to the logical conclusion that the free woman in question must be an heiress in the charge of relatives, i. e. a woman without father, brother or husband. He was drawn to this conclusion by comparing the role which καδεσταί play in matters affecting marriage, including the marriage of the heiress, elsewhere in the Code. For Gernet this was natural because καδεσταί were "les membres d'un groupe familial assez large"²¹. Once he had seen this solution, he was able to draw attention to a complementary case in the following regulations about adultery²². Here it is ruled that if someone be taken in adultery with a free woman in a father's, brother's or the husband's house, he shall pay a hundred staters, but if another's, fifty. Here too, as Gernet said, "another's" house must be the house of a relative in charge of an heiress. The reason why the fines are less in both of these cases is because, at the stage of legislation represented by the Code, compensation was paid to family groupings. A καδεστᾶς, representing such a grouping, naturally received less than a father, brother or husband. The

¹⁶ Inscr. Jur. Gr. loc. cit.: "et qu'un parent le surprenne".

¹⁷ See Gernet's criticism of Bücheler-Zitelmann, *Droit et Société* p. 52.

¹⁸ Dareste in *BCH* 9, p. 305, Lewy, *Altes Stadtrecht von Gortyn* (Berlin 1885), Merriam, op. cit., Comparetti, *Mon. Ant.* 3, Kohler-Ziebarth, *Das Stadtrecht von Gortyn* (Göttingen 1912), al.

¹⁹ Op. cit. p. 59.

²⁰ Ibid.

²¹ *Droit et Société* p. 53.

²² Ibid. p. 54, on col. II ll. 20 ff.

injured woman of ll. 16—20 did not receive the fine because she did not represent the family grouping, which had, however, been offended in her person²³.

For Gernet the distinction between the two cases is that between rape and adultery²⁴. He could find no reason to explain why such a refinement as an *attempt* at seduction should be specified only in this case²⁵.

However, there is a good reason, which becomes apparent once we appreciate the real meaning of *καδεστάς*. As I have argued elsewhere²⁶, the term has to be explained in relation to Cretan conditions of family relationship, much more primitive than those of the modern family or indeed those of contemporary Athens. The basis of this archaic system depended upon a continuous intermarriage of cross-cousins, which produced close ties of mutual obligation far outside the immediate family circle. The regulations about the Gortynian heiress show that the members of the tribe could still exercise their rights of marriage to an heiress when, in certain circumstances, she did not marry the next-of-kin²⁷. Hence the inference that tribal endogamy was still the normal rule. Within the tribe, one exogamous clan grouping, the *ἐπιβάλλοντες*, intermarried with their *καδεσταί*, who formed another such grouping. *Ἐπιβάλλοντες* and *καδεσταί* are thus complementary terms, denoting the close ties established by kinship on the one hand and by marriage on the other.

Strabo, citing Ephoros, tells us that all Cretan young men were obliged to marry at the same time²⁸. There is other evidence to indicate that this old custom of a public, collective ceremony, comprising those who belonged to the same age-grade, and based upon the existence of well-defined, intermarrying groups, lasted into Hellenistic times²⁹.

But contrary tendencies were operating by the time of the Gortyn Code, which makes an exception in the case of the minor who can marry the heiress, to protect the interests of the household,

²³ Ibid. p. 56. (In my *Aristocratic Society in Ancient Crete* (p. 52), I took the view that "fines normally were paid to the injured party", but I now consider this unlikely).

²⁴ Ibid. p. 54.

²⁵ Ibid. p. 53.

²⁶ Cretan *καδεστάς*, in *Proceedings of the First International Cretological Congress*, *Kret. Chronika* (1961—2) 1. pp. 241—7.

²⁷ *Leg. Gort. VII—VIII*.

²⁸ *Str.* 10. 482.

²⁹ *Inscr. Cret.* 3. III. 4.

in defiance of ancient custom. The need to ensure succession in the male line explains both the early marriageable age of the Gortynian heiress (i. e. at twelve or older) and the right of the minor to marry the heiress as an exception to the old rule. The rise of the individual family had begun to be promoted by state legislation on the basis of marriage of kin within the household³⁰.

The Gortynian heiress was a daughter who had no father and no brother of the same father³¹. She inherited her father's property but was obliged to marry the next-of-kin, i. e. either a paternal uncle or paternal cousin. If she was too young to marry and if there was no groom-elect, the heiress was then entitled to possess property and income and was to be brought up by her mother until she was old enough to marry; and if she had no mother, then by her mother's brothers³². Now the mother and the mother's brothers were *καδεσται* of the heiress. This is made clear by two later passages of the Code. It is laid down that if the groom-elect, now an adult, should not wish to marry the heiress who is of age and willing to be married to him, the *καδεσται* of the heiress are to bring the matter to court and the judge is to order the marriage to take place within two months³³. If there were no kinsmen of the heiress, she would hold all the property and marry anyone she wished from the tribe (i. e. presumably, the normal rules of marriage applied). But if no one wished to marry her from the tribe, the *καδεσται* of the heiress had to proclaim throughout the tribe: "Does no one wish to marry her?", before other steps could be taken³⁴.

The marriage of the heiress, whether legally eligible kinsmen were or were not available, was therefore subject to specific regulations which had to be properly observed by the *καδεσται* entrusted with her guardianship. It is this special position of the heiress in charge of *καδεσται* which explains the special need to safeguard her chastity. In the circumstances, the offender in such a case would normally be a married man, since unmarried men would have been still in the *ἀγέλα*; and he has attempted to violate the social ties binding upon a clansman and the clan with which his own has a compact of intermarriage, perhaps in defiance of the new restrictive marriage customs relating to the heiress. That such attempts were

³⁰ Leg. Gort. VII 15—27, 35—40.

³¹ Ibid. VIII 40—2.

³² Ibid. 47—53.

³³ Ibid. VII 40—47.

³⁴ Ibid. VIII 13—17.

sometimes successful is proved by the following regulation about the penalty for adultery in another's house — if we accept Gernet's explanation, as I think we must.

Therefore ll. 16—20 deal with a case of seduction in special circumstances and the passage is inserted as a logical bridge between the regulations about rape and those about adultery. The omission of *κάρται* is quite deliberate.