



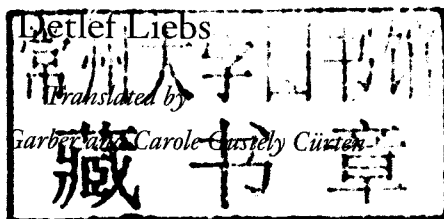
SUMMONED TO THE ROMAN COURTS

FAMOUS TRIALS FROM ANTIQUITY

DETLEF LIEBS

Summoned to the Roman Courts

Famous Trials from Antiquity



Rebecca L. R.

Garber and Carole Gustely Cuzick

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PREFACE

This book grew out of my experience teaching. In particular, it evolved from a course that focused on the history and comparison of law, within the curriculum at the Law School at Albert-Ludwigs-Universität in Freiburg im Breisgau. To deepen our understanding of Roman law, I gave a lecture entitled "Seminal Trials in the Roman Empire," in which I acknowledged the contributions of Roman judicial practices to the evolution of Roman law. The trials discussed in this book were thus selected on the basis of their importance to legal history, that is, their ability to illuminate specific legal precedents that were essential to the development of law in Roman antiquity and quite possibly beyond. I am grateful to Stefan von der Lahr of the Beck Verlag, whose encouragement and unfailing support ensured that these lectures were first published. This book would not have been possible without the help of my youngest son, David, who patiently showed me the ways of word processors and remained ever ready to spring to my assistance. To David, therefore, I express my deepest thanks here as well.

I dedicate this book to the University of Freiburg, my alma mater, on the occasion of its 550th anniversary. I was a professor of law at Freiburg for forty years (with sabbaticals in Paris, Princeton, and Oxford), and I am deeply grateful for the academic opportunities there from which I have benefited. My career as a teacher and scholar would not have been as rewarding without the well-trained staff and excellent facilities at the University of Freiburg, particularly in the Departments of Law, History and Classics, and Theology. Not least, I would like to thank my students, whose commitment and curiosity were a constant inspiration.

Rebecca L.R. Garber took on the demanding task of translating this book into American English at a considerable distance from the author (her task was made even more difficult by his weakness for complex sentences). Nevertheless, she succeeded in completing a very fine, even intuitive translation of this book. I have revised her excellent translation, fine-tuning the legal concepts and vocabulary, together with Carole Cürten and Albert Furtwangler, who made innumerable suggestions to improve the flow of the text. During this revision, I seized the opportunity to make minor corrections in the content as well, to incorporate new knowledge and to eliminate information of interest only to German readers. In conclusion, I wish to express my deep gratitude to the University of California Press, especially classics editor Eric Schmidt, for allowing me to reach the English-speaking public with these fascinating tales, and last but not at all least to Marian Rogers, for her diligent and very helpful editing.

Freiburg im Breisgau

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Introduction

The acts of Roman politicians have often been described: how their deeds blazed a path of legislation that is still followed today. The decisions of Roman jurists have also been extensively studied: how they interpreted laws and attempted to fill in legal lacunae. The development of Roman law by civil authorities has also been well researched: how they helped establish lines of precedence in case law.

Far less attention has been paid to the most direct contributors to case law, the Roman judges themselves. The men who ultimately made the decisions in legal cases were, during antiquity and well into the Middle Ages, simply honorable men from the upper classes. They were, as a rule, not trained as jurists; legal experts were relatively rare in the Roman world. The contributions of advocates who prepared cases for judges and those of the parties have also been relatively ignored. Such men influenced legal decisions through their public speeches in crucial cases in favor of one party or the other, which were often well received. Advocates were not trained as jurists as a rule either.

In addition, from the early days of the imperial period, the emperor's opinion carried weight. As he was of course never selected for his legal expertise, we can generally assume that he had none. Judges, advocates, interested parties, and authorities were advised by jurists as a matter of course, although they were often guided in their legal decisions by public opinion, their own experiences, and their personal attitudes about justice.

We shall follow the course of sixteen trials that ended in trail-blazing decisions, examining to what extent these participants in the public discourse on law were also able to effect change that contributed to the development of Roman law, which in turn forms the basis for European and world law. Although Roman law was later referred to as world law, its beginnings were fairly ordinary. Initially, it contained many wayward standards cobbled together from older conventions, including the sophistry of experts (by which means critics, who were not among the *illuminati*, could be effectively muzzled), as well as bold innovations and no-frills solutions, which attempted to create an equilibrium between old and new. Over the course of several centuries, civil law developed relatively undisturbed by other systems, from a specifically Roman system into a new mutation that gradually became *the* classical law. This law sought to treat all citizens, not all people, with reasonable fairness and thus was adopted throughout Europe and from there in the rest of the western world, Africa, and even the Far East. On its path through the centuries, this legal system, or at least a large portion of it, was almost universally applicable, with the general exception of penal law. But that is no reason to ignore the less-felicitous verdicts in this branch of law, which have so troubled posterity.

CHAPTER ONE

Killing a Sister for Mourning a Fallen Enemy

The Horatius Trial

Allegedly circa 670 B.C.E. (fifth century?)

THE STORY

According to Livy, Rome and another Latin city, Alba Longa, came into conflict in what would amount to a battle for hegemony over the Latin-speaking part of Italy. So as not to exhaust either army, which would have left the cities vulnerable to attack by power-hungry third parties, they agreed that a duel should determine which city would dominate Latium. Now it happened that each army had triplets, the Horatius brothers from Rome and the Curiatius brothers from Alba Longa. These six young men were instructed to fight until one side was obviously victorious. Initially, things went badly for the Roman triplets: two of them fell early in the duel, although the third was uninjured. All the Alba Longa triplets sustained injuries of greater and lesser severity. At this point, the surviving Roman, Horatius, fooled the trio from Alba Longa by pretending cowardice and fleeing, and immediately the three Curiatius warriors set off in pur-

suit. Because of their various wounds, the warriors from Alba Longa ran at different speeds, so that when the surviving Roman turned suddenly to face them, he could fight each individually, slaying them one after the other. Rome was victorious, and Alba Longa had to submit to Roman hegemony.

The triumphant Publius Horatius strode home at the head of the returning Roman army, carrying the weapons and equipment he had captured from the Curiatius brothers. He was met by his sister, Horatia, who had been engaged to marry one of the triplets from Alba Longa. When she saw the war cloak that she had made for her fiancé hanging from her brother's shoulders, she tore her hair and tearfully called the fallen enemy by name. Her impassioned brother was deeply offended by his sister's lament: he had, after all, only just survived by the skin of his teeth, and his victory was the reason for the Romans' great jubilation. He drew his sword and approached his sister saying: "Get lost! Join your betrothed, with your misplaced love, since you have forgotten your brothers, both the dead and the living, and forgotten your country! So shall perish every Roman woman who mourns a foe!" And with that, he drove his sword through her.

The senate and the people of Rome were appalled by his action. His killing of his sister, however, was counterbalanced by his accomplishments on behalf of the city immediately before the killing. He was brought before the king to be tried. Yet the king wanted nothing to do with pronouncing the sentence, which had to be harsh, and which the crowd that had gathered would not understand. Therefore, he summoned the people's assembly and declared: "By the power of the law, I appoint two men (*duumviri*), who shall sit in judgment over Publius Horatius in this case of treason." The law at that time read: "Two men shall pass judgment in cases of treason. If he (the accused) is convicted, and

appeals the conviction in the people's assembly (right of *provocatio*), then he may contest for his rights in the appeal proceedings. If the *duumviri* win the case, then the head of the accused shall be veiled and he shall be hanged, before which he shall be flagellated, either inside or outside the city walls."

Two men were thus appointed in accordance with the law. They concluded that there was no point under which they could acquit Horatius: his deed was inexcusable. They proclaimed the sentence, "Publius Horatius, the court adjudicates against you in the case of treason," telling the executioner to bind his hands. The executioner approached and was about to bind him when Horatius made an appeal on the advice of the king. Thus the trial proceeded publicly before the people's court. The citizens, who were now responsible for passing judgment, were impressed most of all by this statement from Horatius's father: In his opinion, his daughter had been justifiably killed; had that not been the case, he would have initiated legal proceedings against his own son as befits the *paterfamilias*. He then begged the citizens not to take his last remaining child from him, a father who until recently had had four children. At this point, the father hugged his son, pointed at the captured weapons still known as the "Horatian Spears," and declared: "Citizens, can you stand by and watch while this man, who only recently returned as the triumphant victor bearing the spoils of war, is bound to the stake, flagellated, and ultimately hanged? Even the people of Alba Longa could not endure such an appalling spectacle. Go, executioner; bind the hands of the man who just now, with sword and shield, prevented the Roman people from losing their freedom! Go, veil the face of the liberator of this city! Hang him from the gallows tree! Whip him! But if you flagellate him inside the city walls, then you must do so next to these spears and the other captured

weapons; if outside the walls, then you must beat him while standing among the graves of the Curiatii! For where could you take him where the brilliance of his deeds would not denounce such a gruesome punishment?"

The people could not withstand the father's tears, and they were likewise impressed by his son's demeanor, as neither had he shown fear in the face of danger, nor had he begged for mercy. He was thus acquitted, more due to admiration for his courage than according to law and justice. In order that the public homicide be atoned for in some fashion, the father was ordered to make the necessary offerings: he brought many expiatory sacrifices and vowed that they would continue eternally, a promise the entire Horatius clan assumed. He laid a beam across the street, veiled the head of the young man, putting him in a manner of speaking under the yoke. This beam is known as the "Sister's Beam," and it still exists, being restored at state expense when necessary. An ashlar block monument was erected to Horatia at the site where she finally collapsed.¹

HISTORICAL BACKGROUND

That is how Livy (59 B.C.E.–17 C.E.) recorded this incident. As with everything written by this historian, when he refers to events so long ago, the factuality of this narrative remains highly dubious. According to him, all of this occurred early in the reign of King Tullus Hostilius, the third king after the fabled founding of the city in 753 B.C.E. Tullus Hostilius was said to have reigned from 672 to 640 B.C.E.; however, there were no urban centers in Latium over which a king might rule at that time, only rural settlements, even if the latter were indeed organized along military lines. Also, and this is the primary cause for doubt, Rome did not

conquer Alba Longa until the fifth century B.C.E., when it was no longer a significant rival for power. The duel, which plays out in a manner worthy of a Hollywood epic, could have been a Roman myth used to justify Rome's own supremacy within Latium.² On the other hand, transmission of the tale, in which the hero murders his sister and is then sensationally acquitted (we are interested only in this part of the story),³ appears, by the second century B.C.E., remarkably uniform in numerous sources.⁴ Therefore, it is entirely possible that the deed and trial did take place, but in connection with a different military endeavor, namely one from the fifth and not from the seventh century B.C.E.

THE TRIAL

According to Livy, the king was responsible for rendering judgment in cases like this. But he could also hand the case over, provided he had the agreement of the people's assembly, although this does not appear to be strictly necessary from Livy's report. Yet the law just cited strictly dictates that it was not the king who would sit in judgment, but rather a judicial collegium consisting of two men (*duumviri*) who would adjudicate. If convicted, the accused could then appeal to the people's assembly. The two men in question, however, were not appointed by the assembly, but by the king. These peculiarities, in addition to the king's further behavior, which is highly inconsistent with royal prerogative, make sense if one assumes that there was, in fact, no longer a king serving as head of state at the actual time of this trial. According to the records, kingship ended by 510 B.C.E. While it is probable that Livy, or his original source, did not create the trial out of thin air, he may have set it in an earlier period, which would tend to involve some kind of fabrication.

In order to form an opinion about the character of the accused, the people's assembly listened intently to his father, assessing the defendant's behavior during the trial. In so doing the assembly endeavored to determine more completely than before all facts that might be significant for a comprehensive evaluation. The father, however, did not limit himself to the presentation of actual events; instead, he appended his own legal opinion, which the court took very seriously. The people's assembly was obviously not limited in its legal judgment, as the assembly diverged widely in this matter from the pertinent law, the *ius causae*, as Livy expressed it.

Nevertheless, as in the trial of Socrates, the only options available to the assembly were to condemn, which meant a death sentence, or to acquit the accused. In this case, the people's assembly chose acquittal. It is true that the father was obliged to atone for his son's deed in another manner; however, the records do not state that the assembly imposed this upon him. It is more probable that the order came from the priests, who stood next to the magistrate governing the assembly in order to ensure that religious procedures were followed, so as not to offend the gods.

SUBSTANTIVE LAW

According to modern understanding, Publius Horatius committed homicide; moreover, he killed a close relative, his sister. The killing of any close relative, not just the father or grandfather, was called *parricidium*. According to Roman law, this was an especially heinous crime, deserving an exceptionally severe punishment. The perpetrator was "sacked," that is, sewn into a leather sack with unclean animals—monkeys and snakes are

most commonly cited—and thrown into a river or the sea. In this case, however, Horatius was accused of *perduellio*,⁵ which included treason. It was Horatia who could have been accused of treason, had her mourning been specifically meant as a desire for her fiancé's survival. Had her wish been fulfilled, her third brother would have had to perish; he was, after all, involved in a battle to the death. Rome would have fallen under the rule of Alba Longa.

The question remains whether her brother committed treason. He first accused his sister of betraying her dead brothers, himself, and her country, and then usurped judicial powers, disregarding the rule of law. He high-handedly issued a death sentence and immediately carried it out. In addition, his behavior could be considered a presumption of paternal rights over his sister and their autocratic execution. As the authority of the *paterfamilias* may well have held the same legal status as the constitution at that time, this could be considered treasonous.

The father presented three points to exonerate his son, whom he understandably did not want to lose in addition to his other children. First he argued that the son had justifiably killed his daughter; otherwise he, the father, would have taken action against him as *paterfamilias*. Modern scholars tend to consider this argument to be rather weak, as it assumes that the speaker would always behave in a law-abiding manner and never allow himself to be influenced by personal feelings. The lack of logic of this claim is, in fact, demonstrated by the father's next argument: he had just lost three of his four children in quick succession; therefore the people should not also take his last child from him. This extremely personal point implies that he would never have initiated a lawsuit against his son in which this son would have

to forfeit his life to the father. In the end, the father's actions also undercut his first argument: if the son had indeed acted justifiably, then he would have been spared the acts of atonement that his father imposed on him. Of course, another possible explanation for this atonement is that even justifiable killing, for example in self-defense, had to be expiated at that time.

The final, third point upon which the father dwelled at great length, and which must have made quite an impression on all of the assembled Romans, was the deed that the accused had performed for the city. He had very recently placed himself in mortal danger, thus saving all Romans from subjugation by a neighboring city. Legally, this argument is not without its own dangers, because even serious crimes could theoretically be counterbalanced by service to the city: whoever provided Rome with extremely meritorious service would, if we carry this thought further, be permitted to commit *one* serious felony. And yet it was this argument that tipped the balance for Horatius's contemporaries, who had just been in fear of subjugation, even if Livy does phrase it in a more positive light: everyone admired the courage of the accused. Livy's positive formulation hides the fact that, in a strict sense, all who heard this argument, including the magistrates, were biased. They were impressed by the accused's calm in the face of this additional mortal peril, tantamount to the bravery he had demonstrated in the face of great danger on the battlefield. He did not beg for mercy. His behavior at the trial confirmed that his "flight" during the duel must have been a ruse.

EFFECT

Whether this trial actually took place or not, it remained firmly imbedded in the collective memory of Rome's citizens. Its pre-