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## **DIG. 34,2,33: THE RETURN OF THE CROSS-DRESSING SENATOR\***

KAIUS TUORI

### **1. Introduction**

Historians have long argued that exceptions such as rare situations, persons and cases are good indicators of the commonplace, because they bring forth opinions on what is considered normal and acceptable.<sup>1</sup> The legal case that forms the focus of the present work, Digest 34,2,33, is such a curiosity that has elicited lively discussion from both legal and historical scholars.<sup>2</sup> In this quotation in the Digest of Justinian from the fourth book of Pomponius' commentary on Quintus Mucius Scaevola Pontifex, there is a reference that "a certain senator" habitually wears a woman's dinner dress.

In this article, I shall examine law, morality and gender during the Late Republic through the supposed transgressions of this unnamed senator, and in the process I shall be questioning the assumptions on the limits of tolerance for the members of the Roman upper classes. The case is also used to show how much is actually known and how many of the interpretations are assumed by historians.

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\* An earlier version of this article was presented at the Annual Meeting of the Association of Ancient Historians at the University of British Columbia, Vancouver, 15th May 2009. I am grateful for all comments received.

<sup>1</sup> See, for example, N. Zemon Davis, *The return of Martin Guerre*, Cambridge 1983; C. Ginzburg, *Il formaggio e i vermi: il cosmo di un mugnaio del '500*, Torino 1999.

<sup>2</sup> E. Brewster, "The Synthesis of the Romans", *TAPhA* 49 (1918) 133; L. Wilson, *The Clothing of the Ancient Romans*, Baltimore 1938, 172; R. Astolfi, *Studi sull'oggetto dei legati in diritto romano II*, Padova 1969, 251; R. Astolfi, "Abiti maschili e femminili", *Labeo* 17 (1971) 33–9; A. Watson, *The Law of Succession in the Later Roman Republic*, Oxford 1971, 88; A. Wacke, "Die 'Potentiores' in den Rechtsquellen", *ANRW* 2:13 (1980) 567–8; B. Albanese, "Volontà negoziale e forma in una testimonianza di Q. Mucio Scaevola", in M. Harder, G. Thielmann (eds.), *De iustitia et iure, Festschrift für U. von Lübtow*, Berlin 1980, 157–8.

Roman dress is a subject of growing interest among ancient historians. The new type of scholarship focuses not only on the dresses and adornments themselves, but also on their social significance.<sup>3</sup>

## 2. Sources

As is often the case in legal sources, the information we have has been filtered through several quotations. The original text is that of Quintus Mucius Scaevola Pontifex (c. 140–82 BC), a renowned Roman jurist. His original works have been lost, but second century jurist Sextus Pomponius produced a commentary on Quintus Mucius' influential legal opinions. Pomponius' text was then preserved by the compilers of the Digest of Justinian in the early sixth century. The legal issue at stake is that in the case of a legacy, the things that should be included in the bequest are to be determined according to the way the testator would understand them.

*Dig. 34,2,33 Pomponius 4 ad Q. Muc.: Inter vestem virilem et vestimenta virilia nihil interest: sed difficultatem facit mens legantis, si et ipse solitus fuerit uti quadam veste, quae etiam mulieribus conveniens est. Itaque ante omnia dicendum est eam legatam esse, de qua senserit testator, non quae re vera aut muliebris aut virilis sit. nam et Quintus Titius ait scire se quendam senatorem muliebribus cenatoriis uti solitum, qui si legaret muliebrem vestem, non videretur de ea sensisse, qua ipse quasi virili utebatur.*

"There is no difference between men's clothing and men's garments; but the intention of the testator makes for difficulty, if he himself had been in the habit of using certain clothing which is also suitable for women. And so, in the first place, it must be held that that clothing constitutes the legacy which the testator intended, not what is in fact female or male. For Quintus Titius [Mucius] also says that he knows that a certain senator was accustomed to use women's dinner dress, and if he were to leave women's clothing [it] would not be regarded as having expressed an intention in respect of what he himself used as if it were men's clothing."<sup>4</sup>

<sup>3</sup> J. L. Sebesta – L. Bonfante (eds.), *The World of Roman Costume*, Madison 1994; K. Olson, *Dress and the Roman Woman*, London and New York 2008.

<sup>4</sup> Translation by R. Seager in A. Watson (ed.), *The Digest of Justinian III*, Philadelphia 1985, 155.

The fact that the text speaks of Quintus Titius and not Quintus Mucius has conventionally been interpreted by the editors of the Digest to be a scribal error, because no such author called Titius is known and the main text is a commentary on Quintus Mucius.

The case is an example of the *verba* or *voluntas* dilemma, the classical problem of textual interpretation. Quintus Mucius, departing from previous authors who claimed that one should follow the wording of the text, opts for the will of the author as the determining factor in legal interpretation. Thus, in the case of the said senator, that dress would not be included in his legacy of women's clothing because he used them as men's clothing.

The case is said to be the only text in the Digest of Justinian that contains a purely hypothetical case with real characters.<sup>5</sup> Hypothetical casuistry in itself has been considered vital for the development of Roman law, because it liberated jurists from contemplating solely cases that had actually occurred to ponder cases that might occur.<sup>6</sup> This change from responsive to active reasoning made possible the development of law as a science.

### 3. Interpretations

Given that Roman attitudes towards cross-dressing, the wearing of the clothes of the opposite sex, could be rather harsh during the Republic, the passage is quite puzzling and has produced a number of theories. Most of these theories wish to prove that unisex clothing was widespread in Rome and that the senator was not necessarily a transvestite.<sup>7</sup> For example, Andreas Wacke highlighted the passage as an example of how modern interpretations confuse our understanding of the Roman world. According to him, the senator was no transvestite and his use of women's dress was no stranger than the "current success of the 'Jeans trousers' both among young women and men." Instead of us the interpreters being Victorian prudes, we should, according to Wacke, see the senator's dress habits as "luxurious snobbism".<sup>8</sup>

However, there are a number of issues with this admittedly simple and elegant solution. Most importantly, the unisex theory fails in respect to what is

<sup>5</sup> Watson (above n. 2) 88.

<sup>6</sup> B. Frier, *The Rise of the Roman Jurists*, Princeton 1985, 168.

<sup>7</sup> See, for example, Albanese (above n. 2) 157–8.

<sup>8</sup> Wacke 568: "... der gegenwärtig gleichen Beliebtheit der Jeans-Hose unter jungen Damen wie unter Männern."

known of the social significance of clothing. Gender-specific clothing formed aesthetic codes for men and women and, as Olson recently writes, though male and female clothing in Rome were similar in basic design, they were easily distinguishable.<sup>9</sup> Should one use a contemporary example, despite the fact that a suit and a pantsuit are similar in design, they are instantly recognizable.

The scandal caused by the cross-dressing Clodius infiltrating the secret rites of Bona Dea a few decades later could be seen as a sign that during the Republic, such antics like men wearing women's clothes were tolerated only by actors, foreigners and other disreputable characters. As Cicero says, a manly spirit demands a manly dress.<sup>10</sup> Not only women's clothes, but also clothes that resemble them, such as an ankle-length tunic would have been considered effeminate.<sup>11</sup> And indeed, another passage in the Digest (*Dig.* 34,3,23,2) states that women's clothes are those that a man cannot wear without *vituperatione*.<sup>12</sup>

The moralizing interpretation that linked using feminine dress with sexual deviance was common during the Republic. According to Gellius, Scipio Africanus criticized P. Sulpicius Galus for effeminacy because he wore a long-sleeved tunic. Scipio says that men who dress in long-sleeved tunics are also in the habit of being trimmed and groomed, lying in banquets alongside their lovers like women and most likely committing all kinds of immoral acts. The fact that Gellius describes Galus as a *homo delicatus* adds to impression that he was not commonly seen as an embodiment of *virtus*.<sup>13</sup>

<sup>9</sup> Olson (above n. 3) 10–1.

<sup>10</sup> Cicero contrasts previous demagogues such as the Gracchi who were manly, gallant and distinguished, but ultimately misled, to Publius Clodius who prances to the political stage essentially in drag. *Cic. har. resp.* 43–4: *P. Clodius a crocota, a mitra, a muliebribus soleis purpureisque fasceolis, a strophio, a psalterio, a flagitio, a stupro est factus repente popularis.*

<sup>11</sup> J. Heskell, "Cicero as Evidence for Attitudes to Dress in the Late Republic", in Sebesta – Bonfante (above n. 3) 134.

<sup>12</sup> *Dig.* 34,3,23,2 Ulpianus libro 44 ad Sabinum: *Vestimenta omnia aut virilia sunt aut puerilia aut muliebria aut communia aut familiarica. Virilia sunt, quae ipsius patris familiae causa parata sunt, veluti togae tunicae palliola vestimenta stragula amfitapa et saga reliquaque similia. Puerilia sunt, quae ad nullum alium usum pertinent nisi puerilem, veluti togae praetextae aliculae chlamydes pallia quae filiis nostris comparamus. Muliebria sunt, quae matris familiae causa sunt comparata, quibus vir non facile uti potest sine vituperatione, veluti stolae pallia tunicae capita zonae mitrae, quae magis capitis tegendi quam ornandi causa sunt comparata, plagulae penulae. Communia sunt, quibus promiscui utitur mulier cum viro, veluti si eiusmodi penula palliumve est et reliqua huiusmodi, quibus sine reprehensione vel vir vel uxor utatur. Familiarica sunt, quae ad familiam vestiendam parata sunt, sicuti saga tunicae penulae lintea vestimenta stragula et consimilia.*

<sup>13</sup> Gell. 6,12,4–5: *Hac antiquitate indutus P. Africanus, Pauli filius, vir omnibus bonis arti-*

Cicero was, of course, in the habit of using the Greek-dress card against Verres, whose misdeeds in *tunica pulla* and *pallio purpureo* he outlines in great detail.<sup>14</sup> It is exceedingly clear that Cicero holds that dressing in a way that may be interpreted as effeminate was simply unacceptable for a Roman man and even less for a nobleman.

In recent years, there has been something of a conceptual revolution regarding dressing and its gendered interpretations. The term "cross-dressing" is used for the act of wearing clothing commonly associated with another sex within a particular society, whereas the term transvestite refers to a person who cross-dresses. However, the word has additional, often sexual connotations. Neither of the terms has any relation to a transgender identity nor being transsexual.<sup>15</sup>

Cross-dressing as a theme was an established part of ancient Greek, and to a lesser degree, Roman culture with manifestations in historical writing, myth and religion. For example, Plutarch mentions how Alcibiades, on the night before his death, dreamt that he was dressed in women's clothes.<sup>16</sup>

#### 4. Solutions

What then should be made of the text? At the outset, it should be noted that the tone of the text is dry and declaratory, devoid of moralization. Nor does the text credit the senator with transgressive or carnivalistic motives, or any motive at all for that matter.

We know little of the clothes that the Romans wore at dinner and there are very few realistic representations of them in iconography. The *cenatoria* mentioned in the text are not known except in some texts and there is uncertainty regarding what kind of dress it was. The altar of P. Vitellius Successus is one of the few examples of a realistic dining scene with people with their clothes on, because most the images of dining are idealized scenes with nude or semi-nude

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*bus atque omni virtute praeditus, P. Sulpicio Galo, homini delicato, inter pleraque alia, quae obiectabat, id quoque probro dedit, quod tunicis uteretur manus totas operientibus. 5 Verba sunt haec Scipionis: "Nam qui cotidie unguentatus adversum speculum ornetur, cuius supercilia radantur, qui barba vulsa feminibusque subvulsis ambulet, qui in conviviis adolescentulus cum amatore cum chirodyta tunica interior accubuerit, qui non modo vinosus, sed virosus quoque sit, eumne quisquam dubitet, quin idem fecerit, quod cinaedi facere solent?"*

<sup>14</sup> Cic. 2 *Verr.* 4,54–5; 5,31; 5,40; See Heskell (above n. 11) 134–5, 139, for more examples.

<sup>15</sup> For discussion, see V. and B. Bullough, *Cross-Dressing, Sex and Gender*, Philadelphia 1993.

<sup>16</sup> Plut. *Alc.* 39.

figures.<sup>17</sup> The altar relief depicts a man and a woman reclining on a couch. Brewster suggests that the man's dress would have been an example of the *synthesis*.<sup>18</sup>

Earlier scholars on Roman dinner garments suggested that the *cenatoria* and *synthesis* might be almost identical banquet costumes,<sup>19</sup> but the evidence for that is inconclusive. *Cenatoria* appear in sources very rarely, but they are referred to exclusively as dinner costumes. For example, Martial (14,135) writes that not law courts or going to bail are for them, but rather the work of *cenatoria* is to lie on couches. Petronius also calls dinner garments *cenatoria*.<sup>20</sup> They are also known as costumes worn by the college of Arval Brethren, who did have a suitable dining room at their sacred grove. The claim of the similarity of *cenatoria* and *synthesis* rests mostly in that according to their Acta, in AD 91 the Brethren reclined and dined having donned the *synthesis*, while in the year AD 218 the college wore white *cenatoria* for a similar banquet and in AD 241 again dined in their white *cenatoria*.<sup>21</sup>

Brewster claims that the *synthesis* and *cenatoria* were identical garments worn as dinner clothing as substitutes for the toga and both *synthesis* and *cenatoria* were used by men and women (the identification hypothesis).<sup>22</sup> Wilson suggests that the *synthesis* was a women's dress that was beginning to be adopted by men at the time of Q. Mucius (the transformation hypothesis). That it still carried the stigma of effeminacy, especially to conservatives, would be indicated in the text of Quintus Mucius. Later, by the time of Martial, its use would have been commonplace.<sup>23</sup>

Based on this evidence, it is perhaps prudent to hold the identical nature of *synthesis* and *cenatoria* as not conclusively proven.<sup>24</sup> There are too many as-

<sup>17</sup> For example, wall paintings in the Casa dei Casti Amanti in Pompei.

<sup>18</sup> M. Roller, "Horizontal Women: Posture and Sex in the Roman Convivium", *AJPh* 124 (2003) 407, fig. c; W. Altmann, *Die römischen Grabaltäre der Kaiserzeit*, Berlin 1905, 192, fig. 154; *CIL* VI 29088a.; Brewster (above n. 2) 142. See also M. Roller, *Dining Posture in Ancient Rome*, Princeton 2006.

<sup>19</sup> Brewster (above n. 2); Wilson (above n. 2).

<sup>20</sup> Petron. 21: *lassitudine abiecta cenatoria repetimus et in proximam cellam ducti sumus*.

<sup>21</sup> *CIL* VI 2068 *cum sintes[ibus] epulati sunt*; *CIL* VI 2104 *cenatoria alba*; *CIL* VI 2114. Brewster (above n. 2) 133: "It is unlikely that the Romans, considering the lack of variety in their wardrobe as a whole, had two special costumes for dinners." *Dig.* 34,2,38,1 has a reference to *synthesis*, where the translators have ordinarily interpreted it as a matching tunic and mantle.

<sup>22</sup> Brewster (above n. 2) 134.

<sup>23</sup> Wilson (above n. 2) 172

<sup>24</sup> Brewster (above n. 2) 134 already noted that "we have no knowledge of the latter that would throw light upon the nature of the former".



sumptions and leaps of faith both in the identification hypothesis and the transformation hypothesis and thus I remain unconvinced of this explanation.

Watson has noted that it is not difficult to detect a hint of malice in the text of Pomponius.<sup>25</sup> On the contrary, I would suggest that the text is actually quite neutral and the only interpretation that would be possible with a reading faithful to the text is that the senator was a cross-dresser. Explicitly, the text simply declares that the senator habitually dresses in women's clothes for dinner.

The interpretations presented in the literature by earlier authors can be categorized into three classes. These explanations label the senator as: 1) a queen, or sexually deviant, 2) a kook, or eccentric, or 3) cool, or in the vanguard of fashion.

The first explanation, that the senator might have been sexually motivated in his dress habits, relies on the moralizing aspect that confused cross-dressing with being queer. This explanation is usually linked with passages about traditional Roman mores (*mos maiorum*) and effeminate Greek influences, such as Cicero charging Clodius with effeminacy because Clodius manages to look good in women's clothes.<sup>26</sup> Since Clodius supposedly dressed in women's clothes in order to sneak into a house during the rites of Bona Dea in order to commit adultery, it is usually accepted that Cicero did not pursue the claim that Clodius' cross-dressing had sexual implications.<sup>27</sup> However, Cicero does link cross-dressing with sexuality in his attacks against M. Antonius in the Philippics. According to Cicero, Antonius wore the *toga muliebris* and prostituted himself before forming a stable partnership with Curio and thence taking on the married woman's *stola*.<sup>28</sup> Cicero similarly derides the associates of Catiline as effeminate party boys who immerse themselves in debauchery such as dancing at banquets. They dress in long tunics normally worn by women, not a toga as would be fitting a Roman man, and wield daggers and poison.<sup>29</sup>

A further issue is the significance that we are talking about a dinner dress. Dinner was not simply a meal; for the upper classes, it was a way of presenting

<sup>25</sup> Watson (above n. 2) 88

<sup>26</sup> Fr. Schoell, *M. Tulli Ciceronis Scripta quae manserunt omnia*, VIII, Lipsiae 1918, xv, fr. 22,24; I. Puccioni, *M. Tulli Ciceronis Orationum deperitarum fragmenta*, Milano 1972, xv, fr. 21, 23; Heskell (above n. 11) 144.

<sup>27</sup> Heskell (above n. 11) 140; On the event, see Plut. *Caesar* 10,8–10.

<sup>28</sup> Cic. *Phil.* 2,44–5: *Sumpsisti virilem, quam statim muliebre togam reddidisti. Primo vulgare scortum, certa flagitii merces, nec ea parva; sed cito Curio intervenit, qui te a meretricio quaestu abduxit et, tamquam stolam dedisset, in matrimonio stabili et certo collocavit.* See also C. Edwards, *The Politics of Immorality in Ancient Rome*, Cambridge 2002, 64–5.

<sup>29</sup> Cic. *Cat.* 2,22–3; Heskell (above n. 11) 140.

social and sexual relations. A pleasant *convivium* consisted of wine, food, conversation, and allusions to sex and dress were an immensely important part of keeping up appearances on such occasions.<sup>30</sup>

The main difficulty of using this moralizing Cicero-based story to explain Pomponius' text is that it is not supported by the text itself. Despite what Watson says, the text has no hints in that direction.

The second explanation, that of the senator being an eccentric nobleman, claims that he was just slightly strange and nonconformist in his choice of dinner dress. Because nobody saw this behavior as threatening, there was no witch-hunt and he suffered no negative consequences. Despite the fact that the nobility is often heard denouncing the use of fine dress and adornment, they possessed both the material wealth and social freedom others did not have to display them.<sup>31</sup>

This brings us to the possible identity of the "certain senator". He could not have been a well known or influential politician, otherwise we might have heard about it in other sources, since late Republican character assassins loved this kind of material. A possibility is a senator in Quintus Mucius' inner circle, making this an inside joke. Considering the fact that Scipio objected the delicate Galus' use of the long-sleeved tunic and considered it as a sign of other depraved acts, we can safely assume that a woman's dress would have raised some eyebrows.

We must also consider the real possibility is that this example is mere juristic fiction. There is an ongoing debate on how much the Digest actually reflects social reality.<sup>32</sup> Though it is difficult to believe that Roman jurists possessed a sense of humor, we should not rule it out.

The third explanation is that this use of female *cenatoria* was a fashion statement by bold trendsetters that later became mainstream. Again, this is an attractive proposition that would have a natural background in the moralizing criticism by conservatives. Unfortunately, we know too little about the dresses to say that such a transformation occurred due to the confusion about women's clothing and *synthesis*. Especially since the transformation hypothesis was created to explain the existence of Pomponius' text and relies exclusively on the same text as its only evidence, its credibility is low.

I am now at the stage where it is customary to present an explanation of one's own. I shall do that with the help of Turner's theory of liminality. The theo-

<sup>30</sup> Roller (above n. 17) 377–422; B. Gold – J. F. Donahue (eds.), *Roman Dining*, Baltimore 2005.

<sup>31</sup> Olson (above n. 3) 103–4.

<sup>32</sup> J. J. Aubert – B. Sirks (eds.), *Speculum Iuris: Roman Law as a Reflection of Social and Economic Life in Antiquity*, Ann Arbor 2002.

ry, as is well known, operates on the idea about transitional states when a transfer in social settings is taking place. Though the rite of passage is Turner's most often cited example, according to Turner, similar transformations of social roles take place through a state of liminality.<sup>33</sup>

The question that I think is the most essential is: where does one see the transition? The theories that have been presented in previous literature operate around the idea that the dressing in women's clothes is the liminal stage and thus would be dangerous to social norms. Therefore, it has been vital to discuss its social consequences, either negating or defending the notion of sexual subversion and deviance.

My theory is that Quintus Mucius was simply talking about legal categories. The mistake that previous authors have made is to link Cicero's moralistic propaganda to the whole affair. Hence, the three modes of explanation that try to counter the Ciceronian propaganda, not the text itself.

The text simply answers the legal dilemma of the cross-dressing senator, without any moral, sexual or social considerations. It might or might not be a hypothetical case; there is no way of knowing. What is clear is that the case was taken into the legal reasoning process without any moralizing or sexualizing epithets. Jurisprudence as a science prided itself on its separation (*Isolierung*) that allowed it to concentrate on the essentials of the case and to remove external considerations.<sup>34</sup>

Quintus Mucius has been seen by some as the "father of Roman legal science and of the Western legal tradition."<sup>35</sup> What has been shown here is that regardless of whether that is the case, he should be treated as a legal author, not a moralist.<sup>36</sup>

<sup>33</sup> W. Turner, *The Ritual Process: Structure and Anti-Structure*, New York 1970.

<sup>34</sup> On the isolation of Roman law, see F. Schulz, *Prinzipien des römischen Rechts*, Berlin 1934, 13–26; G. Pugliese, "L'autonomia del diritto rispetto agli altri fenomeni e valori sociali nella giurisprudenza romana", in *La storia del diritto nel quadro delle scienze storiche: Atti del primo Congresso internazionale della Società Italiana di Storia del Diritto*, Firenze 1966, 161–91; B. Frier, "Law, Roman, sociology of", in *OCD*<sup>3</sup>, 2003, 824: "... the most historically significant contributions of Roman law probably depended less on the specific content of its rules than on its emergence as a more or less autonomous discipline that was insulated by its professionalism from directly contending social pressures."

<sup>35</sup> Frier (above n. 6) 171.

<sup>36</sup> K. Tuori, "The Myth of Quintus Mucius Scaevola: Founding Father of Legal Science?", *LHR* 72 (2004) 243.

## 5. Conclusions

Transgressions of any sort are exciting and titillate the imagination with scenes of scandal and mayhem. Historical interpretation is by no means free of this temptation, as has been shown by the example of the senator in women's clothes. Pomponius' quotation of Quintus Mucius Scaevola's text from the late Republic uses this example to enlighten the reader on the classical question of inheritance law: whether one should follow the text of the will or the intention of its author, when these diverge. In addition and quite often overshadowing the legal issue, the figure of the cross-dressing senator has led scholars to ponder at length the extent this unnamed senator crossed moral, social and sexual boundaries. An intricate body of scholarship has been created to explain how he was or was not a sexual deviant, an eccentric character, or a fashion icon. All of these explanations rest for their rationale on the bulk of writing by Cicero who denounced his opponents as effeminate because they wore feminine dress. This need to rescue the unnamed senator from Cicero's rhetorical attacks has given us the now reigning school of thought that tries to explain that women's costume was actually the same as men's costumes and thus there is no scandal.

What this study has shown is that it is easy to get lost in the details and miss the vital point. Quintus Mucius was talking of legal categories, the results that would follow if someone, such as a senator, used things in a way that was not customary. Would one follow the intention of the senator, or the common accepted usage? Neither Quintus Mucius nor Sextus Pomponius have seen any need to delve into the social, moral or sexual consequences that this would have, because it would have made no difference to the legal issue at stake.

To put this in a theoretical framework, the previous authors to have written on the matter have wrongly contextualized their liminalities. Cicero's attempt at creating a moral panic for political purposes has nothing to do with Quintus Mucius' legal dilemma.

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