

XIX.—Domitius Afer's Defense of Cloatilla

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This paper differentiates two cases, usually confounded as one, which involved Cloatilla; connects the first confidently with Scribonianus' revolt against Claudius; assigns a date to the second, which Afer defended; and, analyzing the meagre data afforded by Quintilian, offers an hypothesis to explain and interpret it in association with early imperial legislation which forbade women to go surety.

I

Quintilian four times cites the speech delivered by Domitius Afer in defense of Cloatilla. The passages may here be set down in full for convenience of reference.

(a) *Iam haec magis nova sententiarum genera. . . . Sunt et alio relata: ut Afer Domitius, cum Cloatillam defenderet, cui obiectum crimen, quod virum qui inter rebellantes fuerat sepelisset, remiserat Claudius, in epilogo filios eius adloquens, matrem tamen, inquit, pueri sepelितote.*

(b) *A quo schemate non procul abest illa quae dicitur communicatio, cum aut ipsos adversarios consulimus, ut Domitius Afer pro Cloatilla: Nescit trepida, quid liceat feminae, quid coniugem deceat; forte vos in illa solitudine obvius casus miserae mulieri obtulit; tu, frater, vos, paterni amici, quod consilium datis?*

(c) *Hinc est παρανομασία quae dicitur adnominatio. Ea non uno modo fieri solet: ex vicinia quadam praedicti nominis ducta casibus declinatis, ut Domitius Afer pro Cloatilla: mulier omnium rerum imperita, in omnibus rebus infelix.*

(d) *Solebat Afer Domitius traicere in clausulas verba tantum aspernandae compositionis gratia et maxime in prooemiis, ut pro Cloatilla: gratias agam continuo.*¹

These passages are all we have about Cloatilla, and it is obvious at once that the fourth supplies no information, but merely provides a three-word fragment of Domitius Afer's speech.

Her name shows that Cloatilla was the daughter of a Cloatius or a Cloatia, in either case granddaughter at least of a Cloatius.²

¹ Quint. 8.5.15 f.; 9.2.20; 9.3.66; 9.4.31.

² W. Schulze, *Zur Gesch. lat. Eigennamen* 238.

That gentile name seems to have been extremely uncommon. It is not found at all in the indices of the *Corpus Inscriptionum Latinarum*, although the forms Cluatius and Clovatus make infrequent appearance.³ A single Cloatius has a place in the *Prosopographia Imperii Romani* and in the literary histories. Cloatius Verus was one of the minor scholars of the Augustan age, who is cited by Gellius, Macrobius, and Festus. In view of the evident rarity of the name, it is perhaps allowable to assume that our Cloatilla, adult at the beginning of Claudius' reign, was granddaughter or great-granddaughter of Cloatius Verus.

Stein writes of Cloatilla: a filiis, fratre, paternis amicis accusata, quod virum qui inter rebellantes fuerat, sepelisset, defensa a Domitio Afro, liberata est ab imperatore Claudio.⁴ This repeats almost verbatim what Klebs had written.⁵ The same understanding is found in Kappelmacher's account of Domitius Afer;⁶ he accepts the connection of Cloatilla's husband with the conspiracy of Scribonianus, which Klebs advances tentatively and Stein omits.

These scholars have seen, then, a single case in which Cloatilla, accused by her brother and the rest, is tried for having buried her convicted husband, is defended by Afer, and is pardoned (or acquitted) by Claudius. But, astonishingly, all these scholars have with perfect unanimity overlooked the pluperfect tenses in Quintilian's passage (a). It is there perfectly clear that Afer's defense of Cloatilla post-dated her pardon by Claudius.⁷ We have to do with two separate cases. It will also appear that Cloatilla's sons were not among her accusers, a second — if less palpable — error. Let us make a fresh start, in the hope of learning more.

II

Suetonius (*Claud.* 13) says of Claudius: Nec tamen expers insidiarum usque quaque permansit, sed et a singulis et per factionem et denique civili bello infestatus est. . . . Bellum civile movit

³ *CIL* 6.4752; 9.405; 11.3254, ii.14 (for Cluatius or Cluatia); 2.545; 6.33308-9; 9.2385; 10.1065, 7393 (for Clovatus or Clovatia); cf. Schulze, *op. cit.* 483.

⁴ *PIR*² c.1149; cf. *idem* in *RE* s.v. "Cloatilla."

⁵ *PIR*, c.900: mulier a filiis, fratre, paternis amicis accusata, quod virum qui inter rebellantes fuerat (*fortasse particeps motus Scriboniani*), sepelisset, a Domitio Afro defensa et ab imperatore Claudio absoluta est.

⁶ *RE* s.v. "Domitius (14)."

⁷ The pluperfects and the phrase *alio relata* are noted and the correct interpretation indicated in the edition of Quintilian by G. L. Spalding and J. J. Dussault (Paris, Lemaire, 1823).

Furius Camillus Scribonianus Delmatiae legatus. When, therefore, Quintilian writes that Cloatilla's husband "inter rebellantes fuerat," it is practically certain that he was among those convicted of complicity with Scribonianus in A.D. 42, and executed for treason.⁸

The corpse of an executed convict must be asked for burial; permission was generally granted, but might be refused.⁹ Cloatilla buried her husband's body, either without so asking permission, or in defiance of its refusal, and thus incurred indictment. What the specific charge was in such a case, we do not know; perhaps *maiestas* is most likely. What penalty might be invoked is also unknown.¹⁰ But in the present case Claudius pardoned Cloatilla, that is, either he refused to allow trial of the indictment, or, upon her conviction, he vetoed the sentence, exercising his imperial clemency. The wording of Quintilian, (a), rather suggests the latter, but one cannot be certain.

III

Subsequently Cloatilla was defendant on some other cause and her counsel was Domitius Afer. The chronological limits are A.D. 42 and 59; it is posterior to the treason of Scribonianus, and Domitius Afer died in 59.¹¹ And it is not to be set too late in those years, for Afer failed markedly toward the end,¹² while his defense of Cloatilla was evidently one of his famous cases. Rather it is to be placed fairly soon after 42, because the "allusion" in (a) would be rhetorically effective only if the first case of Cloatilla were of recent memory.

It would be very interesting if we could say what the cause was in which Afer defended Cloatilla. But in the nature of the evidence the best that is attainable is a plausible hypothesis. Perhaps that is worth the attempt.

⁸ Cf. Tac. *Ann.* 12.52.1 f.; Plin. *Ep.* 3.16.6-13; Dio 60.15.2-6; Dessau *ILS* 157, 6124; *CIL* 6.2015. Klebs (see above, note 3) and Groag in *PIR*² A.1140, suggested the complicity tentatively; Kappelmacher (see above, note 4) accepts it; it is permissible to be quite confident of the conclusion.

⁹ *Dig.* 48.24.1 (Ulpian): Corpora eorum qui capite damnantur cognatis ipsorum neganda non sunt. . . . hodie autem eorum, in quos animadvertitur, corpora non aliter sepeliuntur, quam si fuerit petitum, et permissum, et nonnumquam non permittitur, maxime maiestatis causa damnatorum. Cf. Tac. *Ann.* 6.23.2.

¹⁰ The nearest analogy to the prohibition of unauthorized burial is the ban on mourning for an executed convict. In one such case, that of Vitia in A.D. 32, the capital penalty was inflicted: Tac. *Ann.* 6.10; cf. my *Criminal Trials* 140, and F. Vittinghoff, *Der Staatsfeind in der röm. Kaiserz.* 43 ff.

¹¹ Tac. *Ann.* 14.19.

¹² Quint. 12.11.3; Tac. *Ann.* 4.52.8.

Assuredly the data in the second case are few and meagre. Either the trial arose out of a situation antecedent to her husband's death, or else Cloatilla had been married again, for Afer describes her, (b), as *coniunx* in the circumstances that initiated the case. She had sons living, but they were under-age, for Afer addresses them, (a), as *pueri*. This of itself should prove that they were not accusers of their mother;¹³ there is the corroboration that Quintilian does not name them, (b), among the *adversarii*. She had also a brother; he and friends of their father were the prosecutors or the plaintiffs in the case. Something had occurred, some situation had developed, some circumstances obtained, which made Cloatilla, according to her counsel, (b), "trepida," "misera," and "in solitudine." Afer dramatically describes his client in her difficulty: "nescit trepida quid liceat feminae, quid coniugem deceat," (b). Cloatilla was of sufficient prominence and distinction, or the case had enough interest and importance, to engage the services of Domitius Afer, who was in this period the outstanding leader of the Roman bar.¹⁴ And the case became a celebrated one, which Quintilian four times cites for illustrative purposes.

So much we have with which to work. There is little that looks very promising.¹⁵ But Afer's words: "nescit trepida quid liceat feminae, quid coniugem deceat," strongly suggest that Cloatilla had felt morally compelled by devotion to her husband to do something, regarding which it could be asked whether a woman might so act legally.

There were things of course which a woman might not legally do under Roman law. The *Lex Cincia* forbade her to make excessive gift. The *Lex Voconia* prohibited her from inheriting estates larger than a fixed limit. If she were convicted of adultery, certain disabilities were imposed by the *Leges Iulia et Papia*. The same laws provided that she could receive benefits under wills only if she were married and had children. This last restriction obviously would not apply to Cloatilla. There is no hint of circumstances which would make any of the others applicable to her. More important, none

¹³ See above, p. 265.

¹⁴ Quint. 12.11.3: Tac. *Dial.* 13.3; *Ann.* 4.52.7.

¹⁵ The mention of *paterni amici*, (b), reminds one of Pliny's letters recording his gifts of dowries to the daughters of his friends. But there seems to be no situation in which the donors of a woman's dowry may sue *her* to recover it; action to recover dowry lies against the husband.

of the actions prohibited by these laws would clearly operate to the benefit of Cloatilla's husband, as her action evidently did.

Certain other prohibitions had been imposed by edict in pursuance of the principle: *ne contra pudicitiam sexui congruentem alienis causis se immisceant, ne virilibus officiis fungantur mulieres*.¹⁶ The praetor had deprived women of the right of *postulatio*; they could not be *iudices* or *procuratores*; they could not conduct a banking business; there were limitations on their power to act as witnesses. And they could not go surety.¹⁷ In the last-named we find the only prohibition which seems to be apt to the few data about Cloatilla's case and to offer a possible and plausible explanation of it. This was the subject of three instruments known to us, an edict of Augustus, an edict of Claudius, and the *Senatusconsultum Velleianum* which appears to belong to the early years of Nero.¹⁸

An important passage in the *Digest*, excerpted from Ulpian, contains record of the edicts, and the very informative wording of the S.C.:

Et primo quidem temporibus divi Augusti, mox deinde Claudii edictis eorum erat interdictum, ne feminae pro viris suis intercederent. Postea factum est senatus consultum, quo plenissime feminis omnibus subventum est, cuius senatus consulti verba haec sunt: "Quod Marcus Silanus et Velleus Tutor consules verba fecerunt de obligationibus feminarum, quae pro aliis reae fierent, quid de ea re fieri oportet, de ea re ita censuere: quod ad fideiussiones et mutui dationes pro aliis, quibus intercesserint feminae, pertinet, tametsi ante videtur ita ius dictum esse, ne eo nomine ab his petitio <sit>, neve in eas actio detur <cum intercesserint pro viris suis>, cum eas virilibus officiis fungi et eius generis obligationibus obstringi non sit aequum, arbitrari senatum recte atque ordine facturos ad quos de ea re in iure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur."¹⁹

It is obvious that the edicts of Augustus and Claudius did not prevent women from offering surety, nor others from accepting such surety; that, however, the courts customarily refused to give a

¹⁶ *Dig.* 3.1.1.5.

¹⁷ Cf. Paul Gide, *Étude sur la condition privée de la femme* (Paris, 1885) 146–153, and references there.

¹⁸ E. Cuq, *Manuel des Institutions Juridiques des Romains* (Paris, 1928) 658 and note 5.

¹⁹ *Dig.* 16.1.2. pr., 1. The words in brackets are Mommsen's.

judgment against a woman who had thus gone surety. The question naturally arises: why should any creditor accept a woman as surety, if the courts would refuse him action against her to recover the debt? It appears that such a creditor must already have decided to make the loan anyway, and considered that the woman's surety was a little added protection which at least could do no harm. But explain it how one will, it is inescapable that women did give surety and creditors did accept. Even the S.C. carried no sanction to enforce its observance, but provided only that a woman who was sued for debt under surety might plead an *exceptio*.²⁰

The case of Cloatilla is of course much later than the edict of Augustus. It is earlier than the S.C., if the latter is now correctly dated early in the reign of Nero.²¹ We cannot assign a year to Claudius' edict, but unless it was proclaimed very early in his reign, our case very probably precedes it also. If so, then only the edict of Augustus was in effect in Cloatilla's day.²²

A hypothesis may now be attempted. Cloatilla's husband, absent from Rome, was in A.D. 41 or 42 sued on some debt. We know that Claudius, endeavoring to clear the overcrowded court docket, enforced the rule of law that a suit might be tried in the absence of one of the parties.²³ The judgment went against the defendant. Cloatilla, panic-stricken, wretched and alone,²⁴ did not know what to do, what as a woman she could do, what as a wife she ought to do. From her brother and some friends of her father, she obtained a loan secured by her dowry, substituting her obligation by novation, for her husband's indebtedness under the judgment.

Then followed her husband's treason in 42, his indictment and conviction, his execution or suicide, the burial of his body by Cloatilla and her consequent indictment — the first case of Cloatilla.

The hazard of her dowry, now that she was a widow, looked very different to Cloatilla from what it had seemed when her hus-

²⁰ *Dig.* 16.1.2.6.

²¹ The date A.D. 46 used formerly to be given, but cf. note 18 *supra*.

²² It used to be considered that the force of an Emperor's edict ceased with his death, Mommsen, *Röm. Staatsr.*³ 2.1124. The question remains controversial for the early principate, but opinion now inclines to the contrary view, cf. H. F. Jolowicz, *Hist. Introd. to the Study of Roman Law* 373 and references there.

²³ *Suet. Claud.* 15.2; *Dio* 60.28.6; cf. *Sen. Apoc.* 12.3; *Ben.* 1.15.5 f.; V. Scramuzza, *The Emperor Claudius* 46.

²⁴ Some MSS read *sollicitudine* for *solitudine*. Is that not *lectio facilior* with the preceding *trepida*? The present hypothesis offers an explanation of *solitudine*.

band lived. Sued on her obligation, she prevailed upon Domitius Afer to defend her case. We can discern in Quintilian's brief quotations a little something of the arguments. Counsel for the plaintiffs of course demanded satisfaction of the claim against Cloatilla and seem to have suggested that her sons should not be wronged by having the claim revert against her husband's estate through her failure to make settlement. The property of some at least of the convicted accomplices of Scribonianus had been spared confiscation in the interest of their sons.²⁵ Afer on the other hand promised the jurors his thanks if they should acquit the defendant. He argued that the edict forbade her to engage her dowry, that it was in the social interest that her dowry be maintained in its integrity. He made of course the usual sentimental plea for his unfortunate client — "mulier omnium rerum imperita, in omnibus rebus infelix," "trepida," "misera," "in solitudine," "she didn't know," "what would you have advised her to do?" Finally the plaintiffs' appeal to the interests of her sons Afer answered by alluding to Cloatilla's noble *pietas* toward her husband, and confidently enjoined the youths not to bear her grudge but, when the time should come, to grant her burial in filial piety.

How the case eventuated we do not know, can only guess. But the passage in the *Digest* suggests the guess that the plaintiffs' suit was denied, that this was one of the cases described in the words of the *S.C.*: ante videtur ita ius dictum esse ne eo nomine ab his petitio <sit> neve in eas actio detur. Was this case the reason for the issuance of Claudius' edict reaffirming the desirability of maintaining dowries intact? And, on the other hand, was this case later in the minds of the jurists when they ruled that a woman could not plead the *exceptio S.C. Velleiani* who had acted to protect her ill or *absent* husband?²⁶

²⁵ Dio 60.16.2.

²⁶ Cui, *op. cit.* (see above, note 18) 659.