SPONSIONE PROVOCARE: ITS PLACE IN ROMAN LITIGATION

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Two of the Herculaneum Tablets, though fragmentary and obscure, furnish evidence that justifies a re-examination of the role played in Roman law and society by the institution which is the subject of this paper: [1]

Tab. Herc. LXXXIII:

L. V[e]nidius En[ny]chus testand[i ca]usa dixs[i]t
[L.] An[n]io Rufo se honoris ius emerere [ut]
si vellet ex numero decurionum aut au[gus]-
talium nominatis a se decem de petition[ibus]
nostris discep[t]atorem dicas ra[t]ione posc[
[. . .]e H[S] M[—]me sibi debere s[t]i[puletur] . . .

LXXXIV:

. . .] quem et superius nom[i]-
n[a]s[ti . . .] Fes[ti]nium Proculum
disc[e]ptatorem paratus sum ire,
si minus necessario c[oa]ctus a te spo(n)-
sionem tecum faciam. VAC.

From these texts it can be gathered that, at some time in the sixties of the first century A.D., one L. Venidius Ennychus of Herculaneum, having been blackballed in his candidatures for unspecified offices, testified before witnesses his willingness to draw up a list of ten men of standing from whom his adversary might choose one as *disceptator* concerning his candidatures; and there survives part of what appears to be the adversary's reply, in which he declares himself ready to appear before a certain Festinius Proculus as *disceptator*—otherwise, he says, ' necessario coactus a te spo(n)sionem tecum faciam '. The procedure implied in this last remark has a substantial set of precedents in the Republican period; one finds the cases discussed earnestly in older modern books,[2] referred to but rather cavalierly dismissed as ' extra-judicial ' in some more recent ones,[3] and by most present authorities quite ignored.[4] In what follows the examples will be reviewed in the light of two particular questions. The first is: to what extent and in what sense, if at all, is it proper to describe or dismiss *sponsione provocare* as ' extra-judicial '? The second, more important to the historian, is: what bearing does this group of texts have upon the attitude of the Romans to, and the mechanisms of their law in defence of, matters of personal standing and reputation?

I

We begin by examining, in chronological order, those examples of the procedure of *sponsione provocare* which are unambiguous in nature, specific in reference, and at least roughly datable.

1. In 241 B.C. C. Lutatius Catulus, *cos.* 242, and Q. Valerius Falto, who had been his praetor, quarrelled over which of them should have the credit for the naval victory off the Aegates Islands.[5] There was no dispute as to the facts: Catulus, though in command, had been injured, and the active commander had been Falto. The purpose of Falto was simply to bring his real services to full public notice, and so he ' sponsione Lutatium provocavit

[1] *Tabulae Herculanenses*, nos. LXXXIII and LXXXIV, published by V. Arangio-Ruiz and G. Pugliese Carratelli in *La Parola del Passato* X (1955) 460–6, with fundamental discussion that in part anticipates the present paper. Of much importance also is the article of Arangio-Ruiz, ' Lo *status* di L. Venidio Ennico ercolanese ', *Droits de l'antiquité et sociologie juridique, Mélanges Henri Lévy-Bruhl* (1959), 9–24 (esp. 10–12).

[2] e.g. E. I. Bekker, *Die Aktionen des römischen Privatrechts* I (1871), ch. 13, ' Die Streitsponsionen '; E. Jobbé-Duval, *Études sur l'histoire de la procédure civile chez les romains* I; *La procédure par le pari* (1896), esp. 44–6.

[3] A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (1901), 54: ' its employment was strictly extra-judicial '; H. J. Roby, *Roman Private Law* II (1902), 375: ' not strictly judicial '.

[4] Dr. A. W. Lintott has, however, considered the relationship of *sponsione provocare* to the procedure of the earliest statutes *de repetundis* in a paper of which he kindly allowed me to see the draft. I am thus indebted to him for some references, acknowledged below.

[5] Valerius Maximus II, 8, 2.

" ni suo ductu Punica classis esset oppressa " '. Atilius Calatinus was agreed by the disputants to act as *iudex*, and duly gave judgement.

2. The elder Cato in his censorship, 184, expelled Flamininus' brother from the senate.[6] When there was a fuss about his action he held a *contio*, specified the grounds of the expulsion, and challenged the victim, if he wished to deny the charges, to defend himself with a *sponsio*—otherwise the public would have no sympathy for his disgrace. The same story is told twice by Plutarch (*Cato maior*, 17; *Flamininus*, 19), who gives us the Greek for the challenge, προὐκαλεῖτο αὐτὸν εἰς ὁρισμόν, and makes clear that the challenge was declined and the victim indeed regarded as guilty.

3. In his speech *de sumptu suo* Cato referred to another speech of his ' de ea re quod sponsionem feceram cum M. Cornelio '.[7] So he in his turn had been *sponsione provocatus*—and perhaps not once only. Dr. Lintott plausibly suggests that it is to a case of the same procedure that Valerius Maximus refers when he tells the story how Cato was ' in quaestionem publicam deductus ' by his enemies and silenced them by demanding Ti. Gracchus, his great political opponent, as *iudex*.[8]

4. The censors elected for 179 were personal enemies. Fulvius Nobilior complained that his fellow-censor had pursued a vendetta against him and had made a *sponsio*, that is, evidently, forced Fulvius to wager that he had not done some shameful action; [9] we are not told what sort of action, but clearly the motive had been to attack his reputation.

5. The next example is connected with a very well-known incident, the deposition of his fellow-tribune by Ti. Gracchus in 133. Plutarch tells us that one T. Annius προὐκαλεῖτο τὸν Τιβέριον εἰς ὁρισμόν, challenged him with the wager, ' that he had indeed done dishonour to a fellow-tribune whom the laws held sacred and inviolable '.[10] It appears that Gracchus declined the challenge, which was perhaps never meant to be accepted; one notes how the procedure could be used to keep an issue involving political reputations on the boil by entangling it in litigation or continued publicity.

6. Cicero, echoed by Valerius Maximus,[11] praises the conduct of Flavius Fimbria—he says he was a consular, so if we take this strictly the incident should be after 104 B.C.—who, having been made *iudex* on a *sponsio* by a Roman *eques* ' ni vir bonus esset ', very honourably refused to give a judgement, lest by saying ' yes ' he should be pronouncing the man a paragon of all virtue or by saying ' no ' imply that he was a rogue. An important inference is to be derived from this example. Fimbria was *iudex*: why had he simply not declined to serve, since he did not like the issue? One must infer that he was unable to decline, and that leads to the inference that he had been appointed by the praetor after proceedings *in iure*. Trial of an issue ' ni ' someone ' vir bonus esset ' may sound very odd, but the story belongs to the lifetime of Cicero, who says his father used to tell it, so it would be perverse not to accept it; and if accepted it serves as corroboration for something that sounds even odder: a passage from Gellius' piece *de officio iudicis* in which he quotes verbatim, from the elder Cato's speech *pro L. Turio*, a reference to the possibility of a *sponsio* ' uter ex his vir melior esset '.[12]

7. Next for consideration come two provincial cases arising out of the behaviour of Verres. In the Third Verrine [13] Cicero records the story of a certain Q. Apronius who was a partner of Verres in his despoliation of the Sicilian farmers. To bring him, and with him Verres, to book, one L. Rubrius, at Syracuse in full *conventus* and in the presence of the governor, challenged Apronius to a *sponsio* ' ni Apronius dictitaret Verrem sibi in decumis esse socium '. Nothing happened, for Verres managed to get the challenge withdrawn; but later a bolder man, P. Scandilius, challenged Apronius to the same *sponsio* and refused to be put off. It was duly made, and Scandilius called for *recuperatores* or a *iudex*; whereupon Verres announced that he would appoint *recuperatores* from his *cohors amicorum*. Scandilius declined to plead before such persons and demanded *reiectio Romae*. This was refused, and Scandilius said that in that case he would drop the suit; but it was, of course, too late to retire with impunity, and Verres treated him as having lost and forced him to pay the sum

[6] Livy XXXIX, 43, 5.
[7] Fronto, *ad Anton.* I, 2, 11 (van den Hout, 92–3). It is this and the following reference that I owe to Dr. Lintott.
[8] Val. Max. III, 7, 7.
[9] Livy XL, 46, 14.
[10] Plutarch, *Ti. Gr.* 14, 5.
[11] Cicero, *de off.* III, 77; Val. Max. VII, 2, 4.
[12] Aulus Gellius, *NA* XIV 2, 21 ff. and 26.
[13] Cic., *II Verr.* III, 132 ff.

named in the wager to Apronius. It is to be observed how, once a *sponsio* came into the courts, the full legal procedure for trying it applied, whatever the circumstances of its origin.

In the Fifth Verrine [14] we find the initiative the other way round: Verres summoned C. Servilius, who had made damaging remarks about him, to appear before his tribunal, and bullied the man into entering into a wager with his lictor ' ni furtis quaestum faceret ', though no one was accusing Servilius of any such delict. ' And what is more ', said Verres, ' you shall have a civil jury from my *cohors* '. Servilius naturally lamented that this was a way of forcing him to undergo a trial in which his civic reputation was at peril without requiring an accuser. There is no legal end to the tale, for Servilius was, according to Cicero, fatally beaten up by Verres' henchmen.

8. It seems that Cicero, denigrating the untriumphant return of his enemy Piso from what he alleged to have been a disastrous provincial governorship, had asserted that Piso re-entered Rome through the *porta Caelimontana*. Piso, it is not clear why, regarded this assertion as deeply slanderous, and, as Cicero admits in the *in Pisonem*, had at once challenged him to a *sponsio* ' ni Esquilina introisset '.[15] Evidently Cicero declined the wager, and equally evidently he was in the wrong, for in his speech he sails off brilliantly on the tack of ridicule to cover his discomfiture: who the deuce cares which gate Piso came in by, so long as it was not the *porta triumphalis*? Nevertheless Piso, by his challenge to a *sponsio*, had successfully nailed the lie.

9. Last in the chronological sequence must be put the anecdote of Antony and Cleopatra told by Pliny and by Macrobius.[16] Cleopatra told Antony she could make a million sesterces disappear at a single dinner party; they took a bet on it and Munatius Plancus was *iudex*. Cleopatra took from her ear one of the costliest pearls of Egypt and dropped it into a cup of vinegar, where it dissolved, and the prudent Plancus only just stopped the queen from dissolving the pearl from her other ear by declaring that she had won the bet.

The catalogue of examples does not quite rest there; certain other cases, valuable for the light they shed on the purposes for which *sponsione provocare* was used, must be brought in.[17] First there is an undated anecdote in Valerius Maximus: [18] a distinguished retired centurion, C. Cornelius, was imprisoned by the *iiiviri capitales* on a charge of *stuprum* with a free-born male *adulescens*. He could not deny the charge, but he appealed to the tribunes, saying he was ready to enter a *sponsio* to prove that the person involved was a male prostitute. The tribunes refused to interpose their veto to enable him to make his *sponsio*, and he apparently committed suicide in prison.

About the remaining two items there is a problem. Two passages from the third book of Livy refer to challenges, not to a *sponsio* but to acceptance of a *iudex*; [19] most scholars have been content to see, in this ' iudicem ferre alicui ', exactly the same institution as ' sponsione provocare aliquem ', and if that is right we have evidence that, at least in the belief of Livy and his source,[20] *sponsione provocare/iudicem ferre* was an ancient procedure going back to the age of the Twelve Tables. In the first of the two passages M. Volscius, the principal witness whose testimony had led to the exile of Kaeso Quinctius in 461 B.C., was later confronted with numerous persons ready to embark on a civil action that would reveal that his evidence had been perjured. Clearly illustrated by this earliest—if genuine—example is the principle that a man did not have to accept the challenge, but if he declined it damaging conclusions might be drawn. The second passage is the dénouement of the tale of Appius Claudius the *decemvir*: brought at last to bay, he is granted a kind of last chance by the tribune Verginius, for, *die* already *dicta* (much as in the case of Cornelius the centurion), he is challenged to take a *iudex* ' ni vindicias ab libertate in servitutem dederit ', otherwise he will be put in custody for criminal trial. Appius utters his *provocatio*, but it is met only by reiterated challenges to accept a *iudex*, and in the end he is duly incarcerated. If this passage too is a case of the same procedure as *sponsione provocare* under another name

[14] id., *II Verr.* v, 140 ff.

[15] id., *in Pis.* 55. Nisbet, ad loc., thinks Piso's challenge was a joke; but Piso had a house near the *porta Caelimontana*, and Cicero's implication may have been that he slipped home on the sly.

[16] Pliny, *NH* IX, 119 ff.; Macrobius, *Sat.* III, 17, 15 ff.

[17] The *grandis sponsio* of *ad Her.* IV, 23, 33 may not be of the type here discussed.

[18] Val. Max. VI, 1, 10.

[19] Livy III, 24, 5–6 and 56, 4.

[20] Ogilvie is massively sceptical about the historicity of the second case, though not of the first: see his *Commentary*, 437 (note on 24, 3) and 503–4.

we may be emboldened to add one final passage to the dossier: the challenge of Fulvius Flaccus to Scipio Nasica in Cicero, *de oratore* II, 285. It is true that this last example sounds more like a metaphorical challenge and response than a real one; one feels that it is not only ' not on the occasion of a formal trial ',[21] but not even intended to lead to one. Its function is the skirmish and the publicity, as may very well be said of the challenge of Annius to Ti. Gracchus.[22]

It would be a happy chance if the Herculaneum Tablets threw light on the relationship between *iudicem ferre* and *sponsione provocare*. At first sight they reveal that the two processes are not the same, but alternatives, for Venidius' opponent writes that he is willing to go before Festinius Proculus as *disceptator*, but ' si minus ', (' if not '), he will have to make a *sponsio*; and one might conceive the former of these alternatives offered to him as an ' extra-judicial ' arbitration, gentlemanly and conciliatory, and the latter as a downright summons to law, uncompromising and disrespectful.[23] This would square ill, however, with some of the other evidence: Verginius would be offering Appius Claudius the ' gentlemanly ' alternative,[24] and Valerius Falto would be offering Catulus the less gentlemanly alternative—notwithstanding that they were able to agree on a *iudex* (and that that *iudex* called his case a *disceptatio*). There is a further difficulty when one examines the implications of ' si minus '. With all respect to Arangio-Ruiz, it can hardly imply ' I am willing to accept one of your proffered *disceptatores*, but if not (i.e. if I fail to do so, if I don't turn up) [25] I shall be obliged to make a *sponsio* '. What the man is saying must surely be ' I propose Festinius Proculus, whom you have *not* proffered, as *disceptator*, and if you won't accept that then I shall have to make a *sponsio* '. As to Venidius' original offer, in *Tab.* LXXXIII, if in the very dubious sixth line there lurks a trace of a *sponsio mille sestertium*, then there is no room before it for any ' si minus ', any indication that it is an alternative to the proffered ten *disceptatores*. The natural ' scenario ' for these two documents would go something like this: Venidius politely challenged his detractor to a *sponsio* and proposed a list of acceptable arbiters; his opponent offered to go, extra-judicially, to an arbiter of *his* choice, but agreed that if that offer was rejected he would accept the challenge. Something, on any hypothesis, seems amiss with ' quem et *superius* nominasti ' in a (presumably separate) note penned by Venidius' opponent; Arangio-Ruiz was uncomfortable about it, but his suggestion that it might mean ' whom you nominated first (in your list) ' [26] does not convince. What is called for by the sense is ' quem et superius nominavi ', but whether a re-reading would bear this out I do not know. The upshot of this discussion is that the evidence of the Herculaneum Tablets is inconclusive as to whether *sponsione provocare* and *iudicem ferre alicui* were two names for the same procedure; in any case only the two early passages of Livy are at risk for our purpose.

II

The evidence having been set out, the questions may now be put; and first, is *sponsione provocare* ' extra-judicial ', in the sense, for example, that *arbitrium ex compromisso* is extra-judicial,[27] or in some other sense? (In itself, of course, the phrase just means to ' make a bet with ' somebody, as Trimalchio's cook does at *Satyricon* 70, 13, ' si prasinus proximis circensibus primam palmam '.) It is not clear what Greenidge and Roby meant by so describing it. Jobbé-Duval used the analogy of a ' jury d'honneur ',[28] which seems to have been an alternative to a duel, and therefore very ' extra-judicial ' indeed; but he, and of course Greenidge and Roby too, were perfectly clear about what cannot be denied, namely that a *sponsio* in due form was actionable in the courts. The Verrine cases and that in which Fimbria was *iudex* are conclusive as to what happened once the *sponsio* was taken into court. In the sense, then, in which *arbitrium ex compromisso* is ' extra-judicial ', *sponsione provocare*

[21] Wilkins in his edition, ad loc.

[22] The rhetorical questions of Scipio Africanus to Ti. Asellus in Gellius, *NA* VI, 11, 9 are purely hypothetical.

[23] So Arangio-Ruiz and Carratelli, op. cit. (n. 1), 462 and Arangio-Ruiz, op. cit (n. 1), 11.

[24] Simply one more demonstration, perhaps, of the falsity of Livy's tale?

[25] So Arangio-Ruiz: ' ove ciò non facesse ', ' ove non fosse comparso '.

[26] Arangio-Ruiz and Carratelli, op. cit. (n. 1), 462.

[27] The law did, however, impose certain regulations on the *arbitrium ex compromisso*, such as that an *arbiter* who accepted the task must perform it; and in the *arbitrium* referred to in Cicero, *pro Roscio comoedo* 10–12, C. Piso, the *arbiter*, had a *formula*.

[28] op. cit. (n. 1), 45.

is not. Moreover, as a way of initiating legal proceedings these wagers fit into a whole complex of procedures much used by Roman law,[29] and in that context the older books duly placed them. Thus, Bekker had a chapter on *Streitsponsionen*, wagers initiatory of proceedings, classifying them elaborately: there were wagers initiating a main action, like the *rei vindicatio* or *hereditatis petitio per sponsionem* and those that brought on the proceedings of the *pro Quinctio* and *pro Caecina*; there were wagers of the interdictal procedure, and *sponsiones praeiudiciales* to settle points preliminary to a main action, or even independent of any other action. But there is a fundamental distinction to observe in describing the *sponsio* as being ' for the purpose of bringing on an action '. If you call your opponent *in ius* and then the convenient way of crystallizing the conflict and setting out for the *iudex* what he must try is for you and your opponent to make a wager on the (or on some) issue, the praetor can and will require the defendant to accept the proffered wager, on pain of being *indefensus*. In our cases, on the contrary, the wager itself is offered outside the court altogether, and so your opponent can simply refuse to play—and if he does refuse there is no *sponsio* for anyone to try. The actual *sponsio* is extra-judicial; and that alone is the sense in which the procedure of *sponsione provocare* can be so described. We have seen that in practice his fellows might look with suspicion upon the man who declined the challenge, but that was up to him; as Arangio-Ruiz pointed out, when Venidius' opponent wrote ' necessario coactus a te sponsionem tecum faciam ' he was alluding to a ' moral and social ', not a legal compulsion.[30]

That the procedure of *sponsione provocare* has a relationship to Roman attitudes towards honour, dignity and reputation is plain from the examples of its use. We have seen it used in defence of reputation by nailing a lie or libel, proving mitigation in connexion with a criminal offence, justifying a *nota censoria*—and indeed giving publicity to one's honour in the most general way (' ni vir bonus esset '); and we have seen it used as a weapon of attack—' arme dangereuse entre les mains d'un ennemi, d'un rival de gloire, d'un envieux ' [31]—to accuse an adversary in politics or otherwise of unconstitutional conduct or some other matter tending to his disesteem, to bring a rogue to book, to keep a political issue hot, to establish one's right to honours or office.

Now it is commonly asserted that the Romans were very pernickety in matters of honour. Kaser speaks of the ' immer stärker verfeinerte Ehrbewusstsein ' of the Roman upper class; [32] and he does so in the context of the law of *iniuria*, for it was that branch of the law which, at the end at least of a long development, provided a remedy for what seems a practically limitless range of offences against dignity, standing and outraged feelings. But there are puzzles about this ' Ehrbewusstsein '. If they were so pernickety (and we learn in the legal sources that it was *iniuria* to prevent a man fishing on a public river-bank, to imply that he could not meet his debts, to make improper suggestions to his wife or daughter, to beat his slave—let alone to box his ears), how is it that in political and forensic oratory [33] and in political pamphlets they were so unlimitedly defamatory of one another? And this puzzle is reinforced by one about *iniuria*. I do not here refer to the controversial difficulties about the way the law of *iniuria* grew up [34] (though they darken the issue by making it impossible to be sure just when ordinary defamation first became actionable under the rules of *iniuria*), but to the surprising fact that in the whole of Roman history there is only one attested actual case of a suit for defamation under the law of *iniuria*—or rather, one passage with two cases: the *ad Herennium* tells us that Lucilius prosecuted an actor for *iniuria* for defaming him *nominatim in scaena*, and lost, but Accius brought a similar action and was successful.[35] That is really all one can point to. Hortensius, who was a dandy, prosecuted

[29] See, for instance, Gaius, *Inst.* IV, 13; 93–4; 165 ff.

[30] Arangio-Ruiz and Carratelli, op. cit. (n. 1), 465; though he added that there may have been municipal rules of which we are ignorant, applying sanctions to one who blocked the candidature of a man who could prove his eligibility.

[31] Jobbé-Duval, op. cit. (n. 2), 44.

[32] M. Kaser, *Das römische Privatrecht* I (1955), 520.

[33] cf. Cic., *de orat.* II, 217 ff.

[34] M. Kaser, op. cit., 520–1; A. Watson, *The Law of Obligations in the Later Roman Republic* (1965), 248 ff.; P. Birks, ' The early history of *iniuria* ', in *Tijdschrift voor Rechtsgeschiedenis* XXXVII (1969), 163 ff.; R. E. Smith in *CQ* XLV (1951), 169 ff.; H. D. Jocelyn in *Antichthon* III (1969), 32 ff.; R. A. Bauman, *The Crimen Maiestatis in the Roman Republic and Augustan Principate* (1970), 246 ff., and *Impietas in Principem* (1974), 25 ff.

[35] *ad Her.* II, 13, 19 (cf. I, 14, 24). Prof. Daube holds that even these cases were based on *convicium*, public abuse, a different ground from ' straight ' defamation: *Atti del congresso ... Verona 1948* III, 413 ff., at p. 435. (See also n. 43 below.)

for *iniuria* a man who bumped into him round a corner and disarranged the folds of his toga,[36] but that was—presumably—battery, not defamation. Lucilius himself seems to have ' got away with murder ', and the young poets of Caesar's day, like Catullus, flung their insults about with reckless abandon; the poets of the Principate, however, knew they were not free to satirize living persons, but whether the source of their fears was the civil law of *iniuria* or the public *quaestio* or imperial *cognitio*, or all of these, it seems impossible to say.[37] The elder Seneca sets out, as one of his *controversiae*, an imaginary case of prosecution for defamation, with specimen arguments by well-known rhetors, including Porcius Latro, who referred to eminent Republican nobles (Metellus Macedonicus, Cato, Pompey, Brutus) who when defamed took no notice.[38] The *Digest* Title, 47. 10, in which are stated all the fussy-looking rules of what constitutes *iniuria*, has a very theoretical look (it is much concerned with definitions, and Labeo is prominent in it); [39] however, it is only fair to say that there are some imperial constitutions, which show that prosecutions for defamation must have occurred in practice.[40]

Nevertheless, taking the evidence as a whole one might well gain the impression that the Roman upper class were on the whole not over-fussy about attacks on their dignity. Cicero certainly thought it would be a bit ' shabby ' to press Dolabella's guarantors for payment before dunning Dolabella himself (it would imply Dolabella's insolvency),[41] but he shows no sign of having expected that Dolabella would retort with an *actio iniuriarum*. Stage attacks evidently were actionable, under whatever technical rubric (though one remembers ' nostra miseria tu es magnus ' and anecdotes about the freedom of the mimes),[42] and published literary libels came to be so; [43] but in general the lofty tone of Seneca's *de constantia sapientis*, with his tales—like those of Porcius Latro—about people who calmly took no notice, better reflects the true Roman attitude. Calmly, that is, in the sense of not whining pusillanimously and running for shelter to the law of *iniuria* when defamed: but the *inimicitia* would be there,[44] and would be pursued in a more positive and aggressive way,[45] with political weapons or criminal prosecutions or counter-slanders—or sometimes with *sponsione provocare*.[46]

Sponsione provocare was a weapon in some ways more handy than *iniuria*: it could be used in attack as well as defence, and in situations where an action for *iniuria* would be inappropriate. Thus, Piso would have been foolish to prosecute Cicero for *iniuria* (supposing it to have been available to him for ' ordinary ' slander at that date), since to succeed under *iniuria* required proof of intent, and Cicero could have blandly claimed a simple slip of the tongue about which was Piso's gate of entry; whereas by challenging him to a *sponsio* Piso forced a retractation. It is also instructive to compare the elder Seneca's imaginary prosecution for *iniuria* with the real-life case of *sponsio* in the Herculaneum Tablets, because their subject-matter is in certain respects similar. In Seneca's story we are asked to imagine that a rich man has been constantly followed about by the son of a deceased acquaintance who believes that the rich man murdered his father, in such a way (*sordidatus*, *immisso capillo* and so on) as to plant this suspicion in the public mind and so do harm to the rich man's reputation. The rich man has invited his tormentor either to desist or to prosecute (Seneca does not say by challenge to a *sponsio*), but the young man has continued to pursue him, and

[36] Macrob., *Sat.* III, 13, 5; that, says Cicero in *pro Cael.* 19 and 20, is what those eminent people should have done who alleged that they and their wives had been assaulted and accosted by Caelius.

[37] See J. A. Crook, *Law and Life of Rome* (1967), 251–5.

[38] Seneca, *controv.* X, 1 (30); Latro is at § 8.

[39] See e.g. 47. 10. 1. 1 and 47. 10. 13. 4.

[40] e.g. *Cod. Just.* 9. 35. 5 and 9. 35. 3; *Dig.* 47. 10. 40.

[41] Cic., *ad Att.* XVI, 15, 2.

[42] ibid. II, 19, 3; Gellius, *NA* VII, 8, 5–6. See also Friedländer, *Sittengeschichte Roms* II[10], 117, and Jocelyn, op. cit. (n. 34.). The freedoms did not always go unpunished.

[43] Labeo's insistence (quoted at *Dig.* 47. 10. 1. 1) that *iniuria* can be committed *verbis* as well as *re* appears to have precursors in Cic., *de re pub.* IV, 12 and yet earlier in *ad Her.* IV, 25, 35. *Pace* Daube I think these passages are talking about ordinary verbal defamation and not about *convicium* in some narrower sense: see the definition in Cicero, *pro Cael.* 6. But c→tude is not to be had.

[44] Cic., *Phil.* I, 27: ' ego si quid in vitam eius aut in mores cum contumelia dixero, quominus mihi inimicissimus sit non recusabo '.

[45] Cic., *pro Cael.* 21: ' laesi dolent, irati efferuntur, pugnant lacessiti '. Not, however, with the duel: the Romans were, *domi*, a very civilian people. Gentlemen carried no weapons.

[46] Leonhard devoted his *Rektoratsrede* (1902) to *Der Schutz der Ehre im alten Rom*, but he had nothing to say about *sponsione provocare*, only about *iniuria*.

now in candidature for honours he has suffered a *repulsa*,[47] and therefore sues under the rules of *iniuria*. In the case of Venidius Ennychus someone has produced some allegation of his ineligibility to be candidate for *honores*—Arangio-Ruiz suggests that he may have been suspected of being a Junian Latin[48]—and Venidius offers *disceptatores* and/or a *sponsio*. The difference is that in Venidius' case nothing suggests that his opponent was not in good faith, so there was no clear *animus iniuriandi*, no intent to defame, and therefore a suit for *iniuria* would not have lain, or would have risked failing; whereas in Seneca's imaginary example it would hardly be possible to behave more patently *iniuriandi animo* than the defendant was said to have done. Once again, therefore, *sponsione provocare* has the wider range of attack. And a final point about it is that it was capable of doing its work without ever coming into court at all, if the opponent declined the challenge, whereas if a man brought an action for *iniuria* he had to go through with it, or otherwise suffer heavy financial penalties with possible additional liability for vexatious or calumnious litigation.

It will have been noticed that there is a concentration of the most reliable examples of *sponsione provocare* in the middle Republic and the earlier half of the late Republic; and until Venidius Ennychus turned up there was no known example from the Principate. If the history of *iniuria* for ordinary defamation were more settled it might be plausible to argue that *iniuria* pushed *sponsione provocare* out of the major part of its sphere of action; but we now know from the Herculaneum Tablets that at least in one Italian municipality the procedure was not dead in the first century A.D. Perhaps, as is suggested by the remarkable continuing predominance in Herculaneum of *fiducia* as the form of real security, they were old-fashioned down there.[49]

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[47] On a flaw in Daube's treatment of this passage see *CR* NS XXV (1975), 67–8.

[48] The thesis of Arangio-Ruiz' article in *Mélanges* (n. 1 above).

[49] cf. E. Lepore in *Parola del Passato* X (1955), 437.