

SPONSIO QUAE IN VERBA FACTA EST? TWO LOST SPEECHES AND THE FORMULA OF THE ROMAN LEGAL WAGER

Our limited evidence for the formula of the Roman *sponsio* is enough to clear up lingering controversy about two otherwise obscure speeches preserved only in testimonia and fragments. The elder Cato wrote a speech whose title is variously cited by our sources: 'si se Caelius tribunus plebis appellasset';¹ 'in M. Caelium si se appellasset';² 'contra M. Caelium' (Fest. p. 266L); 'in Marcum Cae[ci]llium'.³ On the reasonable postulate that these are variations on a single original, the fullest expression is relatively easy to reconstruct: 'si se M. Caelius tribunus plebis appellasset'.⁴ Doubts about the sense of these words have led to more radical proposals which have little to recommend them, especially in view of the new analysis I intend to offer.⁵ The conclusion among those who have attempted to explain the obvious reading has been that the title of the speech is a condition contrary to fact referring to a hypothetical situation to which the speech responded: some have suggested that Cato wrote the speech against the possibility that Caelius might make an accusation against him;⁶ Antonio Cima suggested that Caelius had made a speech against Cato without naming him and that Cato had responded, 'if Caelius had meant to refer to me . . .'.⁷

But none of these analyses has taken account of the title of another little-known speech, of which we have nothing but general characterizations and the claim that Cicero wrote it, displaying the same formulaic pattern as the title of Cato's speech. The commentator of the *scholia Bobiensia*, making the transition from *Pro Flacco* to *Post Reditum in Senatu*, referred to a speech discovered, so the author supposed, after Cicero's death, which fitted between the aforementioned two in chronological sequence, but was unworthy of inclusion, since it treated only issues covered suffi-

¹ Gel. *N.A.* 1.18.9; the reading 'tribunum' was corrected in the lesser manuscripts to 'tribunus', which is confirmed by other evidence in the same context (*N.A.* 1.18.10: 'Idem Cato . . . eidem M. Caelio tribuno plebis vilitatem opprobrans . . .'). All dates are B.C.E.

² Fest. p. 466L; cf. p. 170L (in *Caelium si se appella* [. . .]).

³ Paul. *Fest.* p. 52L; Prisc. in *G.L.* 2.228.

⁴ H. Meyer (ed.), *Oratorum Romanorum Fragmenta*⁴ (Turin, 1849), 131; H. Jordan (ed.), *M. Catonis praeter librum de re rustica quae exstant* (Stuttgart, 1860), lxix–lxx; A. Cima, *L'eloquenza latina prima di Cicerone. saggio storico-critico* (Rome, 1903), 82–3; R. Till, 'Zu Plutarches Biographie des älteren Cato', *Hermes* 81 (1953), 442; H. Malcovati (ed.), *Oratorum Romanorum Fragmenta Liberae Rei Publicae*³ (Turin, 1953), 46–7; M. T. Sblendorio Cugusi (ed.), *M. Porci Catonis Orationum Reliquiae* (Turin, 1982), 85.

⁵ B. Janzer, *Historische Untersuchungen zu den Redenfragmenten des M. Porcius Cato: Beiträge zur Lebensgeschichte und Politik Catos* (Würzburg, 1937), 45–6 ('si quis Caelium tribunum plebis appellasset'); P. Fraccaro, 'Catoniana', *SSAC* 3 (1910), 257–73, in: *Opuscula* I (Pavia, 1956), 237–47 ('oratio in M. Caelium trib. pl., cum auxilio fore pollicitus est, si se quis appellasset'); so also H. H. Scullard, *Roman Politics 220–150 B.C.*² (Oxford, 1973), 62–3. Each argued that Cato prepared the speech against the possibility that someone would appeal to Caelius against one of his censorial acts. Other scholars have rightly rejected both conjectures as unlikely, though certainly they were ingenious.

⁶ Till (n. 4), 443; Sblendorio Cugusi (n. 4), 259; cf. Janzer (n. 5), 46.

⁷ Cima (n. 4), 84.

ciently in other speeches to be included in the commentary. The scholiast glossed the speech 'si eum P. Clodius legibus interrogasset'.⁸

Jane Crawford has summarized the debate about the speech up to the previous decade.⁹ One line has it that the speech was a rhetorical fabrication.¹⁰ The other has it that the speech, which was never delivered, was found by Tiro among the deceased Cicero's papers and subsequently published. It had been written against a trial in 58 that never took place, and so it could have served only as a source of ideas for the speeches he gave upon his recall from exile.¹¹ Crawford dismissed the latter interpretation; after all, Cicero never mentioned the speech, and there is no other record of Tiro's supposed discovery of it. She concluded:

[It] was, at best, an exercise done later by a student of rhetoric in the manner of the Senecan *Controversiae*, or, at worst, a forgery. Whoever published it, it was not Cicero, and very likely whoever wrote it was not Cicero either.¹²

Nothing more can be said for this conclusion than that it is possible. Given the absence of a passage in which the omission of mention of this speech would seem implausible if Cicero wrote it, the argument from silence lacks persuasiveness. On the other hand, scholars have apparently taken the clause 'si eum P. Clodius legibus interrogasset' to be the protasis of a condition contrary to fact ('if Publius Clodius had put him under oath . . .'), and thus, perhaps inevitably, have seen it as evidence of a hypothetical exercise against a prosecution which never happened, whether composed by Cicero himself or someone else.

But such a formula for a title is nowhere attested. There are other preserved speeches which were never delivered, and they are titled as if they had been. There is no independent corroboration that we should have expected a gloss of any undelivered speech taking the form 'if such and such a speech had been called for'. A better explanation is available: each speech was composed as support for a *sponsio*. (They may also have been composed for occasions that never eventuated, but the point is that the forms of the titles have nothing to do with that.)

1. THE NATURE AND FORM OF THE GENERIC *SPONSIO*

Although our evidence is slight, John Crook has painted a convincing picture at least of the outlines of the quasi-judicial wager called the *sponsio*.¹³ A *sponsio* was, generically speaking, a promise; it referred, for example, to a betrothal. The practice developed, probably quite early, of sealing verbal contracts with a *sponsio*: the parties

⁸ *Schol. Bob.* p. 108 Stangl. I owe my discovery of it to P. Cugusi, 'Catone oratore e Cicerone oratore', *Maia* 38 (1986), 210.

⁹ J. Crawford (ed.), *M. Tullius Cicero. The Lost and Unpublished Orations* (Göttingen, 1984), 265.

¹⁰ F. Schoell (ed.), *M. Tullii Ciceronis scripta quae manserunt omnia* VIII (Leipzig, 1918), 493.

¹¹ G. Puccioni, 'Prolegomeni ad una nuova edizione dei frammenti delle orazioni perdute di Cicerone', *Ciceroniana* 1-2 (1960), 111; F. Luterbacher, 'Cicerone Reden', *Sokrates* 10 n.s. (1922), 89-91.

¹² Crawford (n. 9), 265; her comment that 'the Bobbio scholiast noted but rightly declined to comment on' the speech obscures the scholiast's point. He did not refuse to comment because he thought the speech was spurious, as Crawford implies by the word 'rightly', but because for his purposes it was redundant.

¹³ J. Crook, 'Sponsione provocare: its place in Roman litigation', *JRS* 66 (1976), 132-8, building on and modifying the relevant commentary of V. Arangio-Ruiz and G. Pugliese Carratelli (edd.), 'Tabulae Herculenses', *PP* 10 (1955), 460-66.

made a deal and one party or the other, or both, offered a surety, making a promise to forfeit in the event of default. At some point, in a cultural phenomenon I have witnessed operating informally among children on the school playground, the practice evolved of using the *sponsio* to settle factual disputes. As a child I both participated in and witnessed disputes over facts—perhaps over the question of which of two artists had performed a certain song being played on the radio—in which the parties wagered something of value over the answer. They appealed to some knowledgeable and impartial third party or other source to find the answer, and the loser paid the penalty. It was a way of shutting up a ‘know-it-all’ or at least holding his or her feet to the fire. The Roman *sponsio* was used in precisely this way. We have an example from the *Cena Trimalchionis*: Trimalchio (Pet. Sat. 70.10) invited a slave to come into the dinner ‘even if you are a notorious partisan of the Greens (*prasinianus*)’. Moments later the cook (Sat. 70.13) [‘began’] to challenge his master to a *sponsio* “*si prasinus proximis circensibus primam palmam*” (see below for the analysis of the formula).

As Roman law evolved, since disputes over facts were ubiquitous and often central, the *sponsio* came to be used in official proceedings to establish or deny the validity of certain actions. That these were outgrowths of the more generic formal *sponsio* is demonstrated by the fact that an amount was wagered but not actually paid; the penalty for losing the *sponsio* was in being set back in the larger procedure.¹⁴ As we shall see, the formula for this judicial type of *sponsio* was the inverse of the type we will be considering, here, but it will still be useful in answering some questions.¹⁵

The type of *sponsio* that concerns us, which I will call, for the sake of convenience, the ‘generic *sponsio*’, came to be used most visibly as a political and social weapon of attack or defence, as follows. A Roman challenged someone who had made some claim against him, or against whom he wanted to sustain a claim, to a reckoning of the facts. The two agreed on a judge and put up property in a kind of wager against the truth or falsehood of an assertion. The judge heard the arguments or questioned the parties and made a decision which was binding on both; the loser forfeited the tendered property. The party challenged was not, however, obligated to accept the challenge (as he was in the judicial type); by refusing to accept it, he essentially admitted his inability to win.¹⁶

The generic *sponsio* was thus a ready weapon against false accusations, innuendo, and other affronts, although results were mixed.¹⁷ Valerius Maximus (2.8.2) wrote a relatively detailed account of one incident: in 241 Q. Valerius Falto (*cos.* 239), a praetor who had won a naval victory while the consul in command, C. Lutatius Catulus, was sick, felt that he had been denied his full measure of credit and challenged his former commander to a *sponsio*. Atilius Calatinus was appointed *iudex*, and found in favour of Catulus; even though he had been sick, his had been the ultimate authority and responsibility for the outcome. In another recorded anecdote,

¹⁴ Gaius, *Inst.* 4.94: ‘non tamen haec summa sponsonis exigitur: non enim poenalis est, sed praeiudicialis, et propter hoc solum fit, ut per eam de re iudicetur’.

¹⁵ On the various forms of judicial *sponsio*, see Fritz Schulz, *Classical Roman Law* (Oxford, 1951), 61, 368–9, 446–7, 449–53. I am concerned mainly with the formula, and not so much with legal niceties, but I hope that my endeavours may spark some new interest in this issue among those better versed in Roman law than I am.

¹⁶ Crook (n. 13), 135–6.

¹⁷ Crook (n. 13), 136–8 pointed out that prosecution for *iniuria*, the other remedy for serious slander, was relatively difficult and complicated, and thus often impractical, whereas *sponsio* was a relatively safe alternative if a man believed in his reputation and the merits of his case.

Cicero declined a *sponsio* offered by his enemy L. Calpurnius Piso Caesoninus (*cos.* 58), and thus admitted defeat, while claiming that his defeat was inconsequential because the point in dispute was trivial.¹⁸ Finally, when Cato, during his censorship of 184–3, expelled L. Quinctius Flamininus (*cos.* 192) from the senate for an alleged moral transgression, he invited Flamininus to challenge his allegations in a *sponsio*, which Flamininus declined to do, inviting the conclusion that he was, in fact, guilty (or that whatever he would be compelled to admit would be bad enough in itself).¹⁹

The basic form of the challenge to a generic *sponsio* can be recovered from the several examples.²⁰ Falto challenged Catulus (Val. Max. 2.8.2) ‘*ni suo ductu Punica classis esset oppressa*’. In a defence speech, Cato envisioned a possible *sponsio* ‘*ni vir melior esset Gellius quam Turius*’.²¹ Verres (Cic. *Verr.* 2.3.132–40) was challenged twice ‘*ni Apronius dictitaret Verrem sibi in decumis esse socium*’. Verres himself (Cic. *Verr.* 2.5.140–2) fraudulently challenged a C. Servilius to a *sponsio* ‘*ni furtis quaestum faceret*’. In his speech for A. Caecina, Cicero argued that his client had been dispossessed of his land by force when he saw armed men from a distance and declined to engage them; after all, it was true of old, said Cicero (*Caec.* 45), that those who spied armed men from afar and fled could safely make *sponsiones* ‘*ni adversum edictum praetoris vis facta esset*’.²² Piso challenged Cicero (*Pis.* 55) ‘*ni Esquilina introisset*’. Flavius Fimbria (*cos.* 104) served as *iudex* in a *sponsio* proposed by M. Lutatius Pinthia, an *eques* of good repute, ‘*ni vir bonus esset*’.²³

So the challenge of the generic *sponsio* was framed as the condition under which the challenger would be forced to pay. A *sponsio* ‘*ni vir bonus esset*’ meant the challenger would pay ‘if he was not a good man’. A *sponsio* ‘*ni Apronius dictitaret . . .*’ meant the

¹⁸ Cic. *Pis.* 55; the point of dispute was over the question by which gate Piso had entered the city upon his return from his province of Macedonia; Cicero, in order to emphasize that Piso had had no triumph, had claimed erroneously that he had entered by the gate closest to his home (loc. cit.): ‘*cum ego eum Caelimontana introisse dixissem, sponsione me ni Esquilina introisset homo promptus lacessivi; quasi vero id aut ego scire debuerim aut vestrum quisquam audierit aut ad rem pertineat qua tu porta introieris, modo ne triumphali, quae porta Macedonicis semper consulibus ante te patuit; tu inventus es qui consulari imperio praeditus ex Macedonia non triumphares*’. I cannot agree with Crook’s (n. 13), 134, characterization of Cicero’s defence: ‘he sails off brilliantly on the tack of ridicule to cover his discomfiture’. He had been caught drawing a false inference (not a ‘lie’ as Crook [*ibid.*] characterized it) about which gate Piso had used, but his point—that it was not a *triumphal* gate—obviously still held; cf. R. G. M. Nisbet, *M. Tulli Ciceronis In L. Calpurnium Pisonem Oratio* (Oxford, 1961), 117.

¹⁹ Plu. *Cat. Ma.* 17; *Flam.* 19; Livy 39.43.5. For further literary examples, see Crook (n. 13), 133–4 and below.

²⁰ On the strict question of form Crook (n. 13) was mostly mute. If anyone takes his remark (p. 133) mentioning ‘a reference to the possibility of a *sponsio* “uter ex his vir melior esset”’ as an indication that he thought the formula might have been so fluid, I would simply point out that Crook took those words from Gellius (*N.A.* 14.2.21), who later gave the hypothetical *sponsio* a formulation (purportedly in Cato’s words) which matches the bulk of the others (*N.A.* 14.2.26): ‘*ni vir melior esset Gellius quam Turius*’. Obviously this condition involved the question ‘uter ex his vir melior esset’, and Gellius’ casual phrasing indicates nothing more than that.

²¹ Gel. *N.A.* 14.2.26 = Cato, *Orat.* 206, defending a L. Turius against a Cn. Gellius. Of course, Cato asserted that ‘no one would be so insane as to judge Gellius a better man than Turius!’

²² We might have expected Cicero to use the judicial formula in his judicial speech, but it appears that he did not: as we are about to see, the other evidence suggests the generic formula gave the condition under which the challenger would lose, and the judicial formula the condition under which the opponent would lose. Here, the hypothetical persons would lose if violence had not been done to them, so the formula fits with the other examples of the generic, not the judicial, type.

²³ Cic. *Off.* 3.77. Fimbria refused to rule because he didn’t want to defame the man, but also didn’t want to reduce ‘goodness’ to a momentary judgment.

challenger would pay if Apronius had not said what followed. Piso's challenge 'ni Esquilina introisset' would have failed if he had not entered through the Esquiline gate.

The judicial *sponsiones* used precisely the inverse of this formula. The formula was constructed as a question for the opponent (Gaius, *Inst.* 4.93): 'si homo de quo agitur ex iure Quiritium meus est, sestertios XXV nummos dare spondes'? So a friend of Cicero's (*Fam.* 7.21.1), in an inheritance case, considered a *sponsio* 'si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dedit', but prevailing opinion among the jurists consulted was that the praetor could not legitimately have given possession of the woman's goods to Cicero's friend. Obviously, it was only in the case that possession had been given to Cicero's friend that his opponent would have been obliged to pay.²⁴ Similarly, in *Pro Quinctio* (30) Cicero, arguing that Quinctius' property had not been held for thirty days, gave the formula of the *sponsio* Quinctius was obliged to make: 'si bona sua ex edicto P. Burrieni praetoris dies XXX possessa non essent'. Again, this was the condition under which Quinctius' opponent, who claimed to have possessed the goods in question for thirty days, would have paid. So the two subcategories of *sponsio* seem to have used similar, but inverted, formulae. But it is time to deal with evidence that might be raised in objection to this analysis.

I know of three examples of generic *sponsiones* which take forms different from those already considered.²⁵ Two are paraphrases which pose no real difficulty. Valerius Maximus (7.2.4) glossed Lutatius Pinthia's *sponsio* 'quod vir bonus esset'. Plutarch (*TG* 14.5) wrote that Tiberius Gracchus was challenged by a colleague in the tribunate whom he had deposed ἡ μὴν ἱερὸν ὄντα καὶ ἄστυλον ἐκ τῶν νόμων ἡτιμωκέναι τὸν συνάρχοντα. These are paraphrases; they certainly get at the gist of the meaning of the better-attested formula: when Lutatius Pinthia made his challenge 'ni vir bonus esset', he clearly wanted the ruling to be that he was, in fact, a good man. Gracchus' challenger wanted to prove by his challenge (that is, by Gracchus' inability to prove the opposite) that Gracchus had deposed him illegally. Such paraphrases impose no obstacle to the conclusion that the formulation of the generic *sponsio* commonly started with the subordinating conjunction *ni*.

The *sponsio* from Petronius may not be so easy to dismiss, but it will not stand decisively against the rest of the evidence either. Trimalchio had indicated (Pet. *Sat.* 70.10) some disdain for the Greens in his offhand remark to a slave he was inviting to share in the dinner, 'etsi prasinianus es famosus' ('even if you are a notorious partisan of the Greens'). Moments later, Petronius wrote (*Sat.* 70.13), in the *persona* of the main character, Encolpius:

Certe ego notavi super me positum cocum qui de porco anserem fecerat, muria condimentisque fetentem. Nec contentus fuit recumbere, sed continuo Ephesum tragoedum coepit imitari et subinde dominum suum sponsione provocare 'si prasinus proximis circensibus primam palmam'.

Certainly I took note of the fact that the cook who had made a goose out of pork had been seated above me, stinking of brine and seasonings. And he wasn't satisfied just to recline, but he

²⁴ Alan Watson, *The Law of Succession in the Later Roman Republic* (Oxford, 1971), 3–5; he chided Wilhelm Rein, *Das Privatrecht und Civilprozeß der Römer von der ältesten Zeit bis auf Justinianus*² (Leipzig, 1858), 847, n. 4, for 'misquoting' the *sponsio* by printing *ni* instead of *si* in his citation; the possibility occurs to me (I have not been able to consult the work directly) that Rein noticed all the generic *sponsiones* and thought, probably erroneously, that there was a common formula for all *sponsiones*, such that this one needed correction.

²⁵ As noted above (n. 20), I do not take Gellius' phrase *uter ex his vir melior esset* as even a paraphrase of the formulaic gloss *ni vir melior esset Gellius quam Turius*.

immediately started imitating the tragedian Ephesus and challenging his master from time to time to a *sponsio* 'if a Green [takes/took] first prize in the [next/last] races'.

The fact that no verb is expressed makes it difficult to determine whether the bet is over a future outcome or a past established fact. The other examples of *sponsiones* formulated in roughly this way—both the generic and the judicial ones—are wagers over facts, not future events. I think it is better to take it as referring to the past: 'if a Green took first prize in the last races'.²⁶

In any event, the *sponsio* offered by the cook was clearly intended to challenge Trimalchio's dismissal of the fans of the Greens. So from the context it is easy to see that the cook was betting that a Green had won (or was going to). But the generic *sponsio*, if the other examples carry the day, would then call for the formulation, 'ni prasinus proximis circensibus primam palmam', such that the challenger would lose if a Green had not won (or would not win). By itself, the state of preservation of the text of the *Cena Trimalchionis* makes such an emendation reasonable; the fact that there were two formulae competing side-by-side, one that would have begun with *ni* and another with *si*, makes such a 'correction' or simple error eminently plausible.

If, on the other hand, the text is accurate, it may be that in informal contexts the stricter formula was more mutable. The context of this single incident would make it clear what the cook wanted to prove by his challenge, so the strict form was less crucial. Or perhaps the cook inverted the formula inadvertently, so that the joke was on him. In any event, this anecdote should not be taken by itself as a serious challenge to the otherwise overwhelming consensus of evidence for the formula.

But the anecdote does bring up the possibility, which would probably have occurred to us anyway, that we might occasionally have found *si* instead of *ni* in a generic *sponsio*. We saw one example of the judicial formula with a negative, using the phrase *si . . . non*, not *ni*. If the analogy were perfect, the opposite of *ni* in the generic type would be *ni . . . non*; however, in view of the equivalence of *ne . . . non* and *ut* in clauses of fearing, *si* is likely enough to have been an alternative. The best explanation of the two speech-titles under consideration is that they were formulated with *si* as the opposite of *ni*.

2. CATO AGAINST CAELIUS AND CICERO AGAINST CLODIUS

It is apparently the result of a bias in our sample that in every confirmed case of a *sponsio* in which we have the formula, it was introduced by *ni*. So Falto, believing that it was under his leadership that the victory over the Carthaginian fleet had been won, said that if it had not been so, he would pay. But the converse is also possible. If Falto had inverted his reasoning, he could have challenged Catulus to prove that he himself had been in command when the victory had been won. Falto would then have inverted the formula: '*si Catuli* (instead of *ni suo*) ductu Punica classis est oppressa'. Obviously, though, Falto wanted to emphasize that he himself was in command, not that Catulus was not.

We should, at long last, consider the possibility that speeches whose titles began with *si* were *sponsio* speeches. Our evidence is necessarily indirect, but it is enough to show that this is the best way to interpret both titles. The content and character of

²⁶ Pace J. P. Sullivan (trans.), *Petronius. 'The Satyricon' and Seneca. 'The Apocolocyntosis'* (New York, 1986), 84; Crook (n. 13), 135. A better attested word for a simple 'bet' is *pignus* (in phrases like *pignore certare*, *pignus dare*, etc.). At any rate, if Crook was right to say that this was a simple bet, it cannot be quoted against my analysis.

Cato's speech *Si se M. Caelius tribunus plebis appellasset*, which has to date presented so many problems of interpretation, suits this hypothesis nicely.

The preserved fragments of the speech consist mostly in character assassination—the sort of thing that, in general, must have been common in (though certainly not exclusive to) *sponsiones*, in which one main point was to destroy the opponent's credibility and claims. Cato (*Orat.* 111) characterized Caelius as being afflicted with a 'sickness of talking' (*morbis . . . loquendi*), such that listeners heard him, but paid him no mind, just as they would hear a drug-monger (*pharmacopolam*), but would not entrust themselves to him when they were sick. Caelius, Cato (*Orat.* 112) declared, could be induced to speak or keep silent by a crust of bread. He said (*Orat.* 114–15, although of course the relative position of the statements cannot be recovered):

He comes down from his horse, then starts posing and being ridiculous. . . . Beyond that he sings when the spirit moves him, sometimes performs Greek poetry, tells jokes, does impressions and poses.

All of this portrays Caelius as a flimsy character, and in general would tend to detract from his credibility.²⁷ But there is at least one indication that tends more specifically to detract from his opponent's ability to sustain a claim against the premise of Cato's challenge.

The title of the speech indicates that Cato's claim was that Caelius had not 'called' him (*appellasset*). But 'if Caelius had called him', he would admit defeat. Now, *appellasset* has been the main problem of interpretation in this title because in context with a *tribunus plebis* the verb *appellare* usually means 'to appeal to'. That meaning will not fit this context: Caelius is clearly the subject, Cato was never a *tribunus plebis*, and an appeal from a *tribunus plebis* to anyone else is unlikely.²⁸ *Appellare* could also mean 'to accuse', and this has been the usual interpretation. But the word need not have had so formal a connotation. It could be used, after all, of any generic call for help or consultation.²⁹

Here we have an interpretation that makes sense and poses no problems: Cato's purpose in this speech was simply to deny that he had been called upon for some kind of consultation by the tribune M. Caelius, and to challenge the man to prove otherwise. On the surface, this premise for a *sponsio* might seem trivial, but it is certainly no more trivial than Piso's challenge to Cicero to prove that he had not come home by the Esquiline gate. Given that Cato has been accused without obvious basis (other than innuendo) of having been involved in some tribunician action or other, it is hardly implausible that someone at the time might have implicated him in something with which he had no connection.³⁰ A *sponsio* would have been an appropriate means to put the lie to the innuendo.

²⁷ Cf. Sblendorio Cugusi (n. 4), 259.

²⁸ Cf. Janzer (n. 5), 46; Till (n. 4), 442–3; Scullard (n. 5), 262.

²⁹ Cf. *B. Afr.* 86.2: 'ipse Vergilius appellavit invitavitque ad editionem'; *Sal. Cat.* 17.1: 'igitur circiter Kalendas Iunias L. Caesare et C. Figulo consulibus [Catilina] primo singulos appellare; hortari alios, alios temptare; opes suas, inparatam rem publicam, magna praemia coniurationis docere'.

³⁰ Scullard (n. 5), 137 thought it virtually certain that Cato was behind the tribunician prosecution of his former commander, M. Acilius Glabrio, in 189 when both were running for the censorship and Cato's testimony (among others') helped to force Glabrio to withdraw from the race. There is no indication that Cato was behind it, but Scullard's suspicion (it would seem) even put A. E. Astin, *Cato the Censor* (Oxford, 1978), 64, on his heels. There is at least ancient support, albeit in one of the most confused and controversial episodes confronting us, for an involvement by Cato in the instigation of the 'trials of the Scipios'. But Livy's wording (38.54.2)

As promised, there is internal support for this interpretation. One fragment of the speech (Cato, *Orat.* 116) asks a rhetorical question which was clearly designed to deny credibility to a claim that Cato would have had any substantive meeting with Caelius: 'quid ego cum illo dissertem amplius, quem ego denique credo in pompa vectitatum iri ludis pro ceteris, atque cum spectatoribus sermocinaturum?' Cato implied he would not have a serious conversation (*dissertem amplius*) with a man whom he saw as nothing more than a buffoon.³¹ The hypothesis that this speech was part of a *sponsio* in which Cato challenged Caelius to prove that he had asked Cato's advice (or something along those lines) clears up all the problems of interpretation associated with the title and nature of the speech.

What we know about Cicero's similarly titled speech is, likewise, entirely compatible with its being part of a *sponsio*. The social situation in which Cicero found himself was precisely the sort in which a *sponsio* was likely to be used. Cicero had suffered a serious blow to his reputation, and had not been given the opportunity to defend himself in court. A *sponsio* would give him the opportunity to use his oratorical talents to defeat Clodius.

Furthermore, what the scholiast says about the content of the speech is precisely what a speech supporting such a *sponsio* would almost certainly contain: 'nam plurimarum et de consulatu suo et de exilio et contra eundem Clodium locuturus est'.³² Cicero would have described the Catilinarian conspiracy and his actions in saving the state from that scourge, and would have asserted the necessity that had compelled him and his supporters in the senate to the controversial solution (*de consulatu suo*). He would have lamented his exile as a sorry reward for his sacrifices for the state (*de exilio*). He would have assailed the person of Clodius himself to ruin his credibility and restore his own honour by contrast (*contra eundem Clodium*).³³ Much of this, one might assert, is irrelevant to the question of fact; however, it is entirely pertinent to the question of relevance. Cicero would prove not only that there had been no trial, which was well known, but that there should indeed have been one, and that he should have been acquitted. Both speeches and titles are easily explained as having been written for *sponsiones*. There is now room for a fresh assessment of the facts of both speeches.

3. CONCLUSION: TITLES, DATING, COMPOSITION AND DELIVERY

The titles of speeches are reported to us in such a way that they fall often in secondary sequence and almost always in indirect discourse. So Festus (p. 282L) cited a speech 'quam habuit [Cato] ne quis consul bis fieret', which should indicate that the speech was argued at the time 'ne quis consul bis fiat'. Similarly, the title 'si se . . . appellasset' might stand in the secondary sequence for an original condition contrary to fact (as has regularly been assumed); on the other hand, it might represent in secondary sequence the simple past condition: 'si se . . . appellavit'.

Several parallels from the judicial *sponsiones* support the latter alternative. The

marks Cato's involvement as part of what he regarded as inference, not established fact: '[Catone] auctore existimantur Petillii et vivo Africano rem ingressi et mortuo rogationem promulgasse'. Probably there was not secure knowledge about it even at the time, and rumour and speculation already abounded.

³¹ Paul. *Fest.* p. 52L glossed *citeris* (for which this citation was the example) as 'effigies quaedam arguta et loquax ridiculi gratia, quae in pompa vehi solita sit'.

³² *Schol. Bob.* p. 108 Stangl.

³³ These themes recur, as the scholiast noted, in several of Cicero's speeches following his recall: e.g. *Cic. Dom.* 56-61, 72-8.

formula Cicero gave verbatim in a letter to Trebatius (*Fam.* 7.21.1) was constructed as a simple condition: 'si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dedit'. Similarly the jurist Gaius (*Inst.* 4.93) gave *exempli gratia* the formula: 'si homo quo de agitur ex iure Quiritium meus est, sestertios XXV nummos dare spondes'? In *Pro Quinctio*, Cicero gave us an example once (30) in secondary sequence: *si bona sua . . . dies XXX possessa non essent*, and once (84) in primary: *si bona sua . . . dies XXX possessa non sunt*. The whole formula for Valerius Falto's *sponsio*, for example, then, must have run: 'ni meo ductu Punica classis est oppressa, tot nummos dare spondeo'. It is thus fair to conclude that both kinds of *sponsio*, as cognate to one another, were in the first instance expressed in the form of a simple condition.

I propose that the titles of these two speeches, which contain only the protasis of the formula, ought to be presented in that way. We should try to be faithful (where tradition has not bound our hands) to ancient evidence for titles, but it is probably fair to standardize them to some degree (conceding to our somewhat anachronistic taste for orderly titlature) when a citation fails to conform in some subtle way to the general pattern. So when we find Cicero's and Cato's speeches titled with different pronouns (Cato's reflexive, Cicero's demonstrative), we will note that other attested titles or glosses of speeches exhibited a clear preference for the reflexive: Cato's *Dierum dictarum de consulatu suo*, *De suis virtutibus contra L. Thermum post censuram*, *De sumptu suo*, and *Pro se contra C. Cassium*, and Cicero's *De consulatu suo in senatu* and *De domo sua ad pontifices*. By this reasoning, the titles of these lost speeches should be reported as follows: *Si se M. Caelius tribunus plebis appellavit* and *Si se P. Clodius legibus interrogavit*.

It is unlikely that Cicero ever had the opportunity to deliver the latter speech. The absence of mention of such a speech actually delivered against P. Clodius is unlikely enough to justify the opposite conclusion. Not only are we made aware by our sources of many actual or alleged public disputes between Cicero and Clodius, but in many cases they were remembered despite the fact that Cicero did not publish the speeches concerned.³⁴ If Cicero had delivered this speech, even if the text waited to be discovered after his death, it is likely we would have some record of it. Furthermore, Clodius would have been a fool to take the challenge.³⁵ The speech was probably never delivered.

Cicero probably wrote it during his exile, when he had ample time on his hands, and little else to think about than his plight, the reasons for it, and possible ways out. Even if he thought it unlikely that Clodius would pick up the gauntlet, he might have composed the speech to avoid the risk of being caught off guard, or even as a therapeutic exercise. At any rate, there is no decisive reason, now, to doubt that Cicero wrote the speech and that it was titled as any *sponsio* speech would have been.

It is on balance more likely, although certainty eludes us, that Cato actually did deliver the speech *Si se M. Caelius tribunus plebis appellavit*. Granted, there is no explicit suggestion among the citations of its fragments that the speech was delivered. There is also no other evidence to corroborate the assumption we would have to make in order to conclude that Cato did not deliver the speech—that Cato published speeches (or they were otherwise preserved) which he had not actually delivered.³⁶ I am

³⁴ Cf. Crawford (n. 10) 106–10, 121–3, 136–7, 163–7.

³⁵ If he had taken the challenge, he might have won the argument over the relevance of the *sponsio*, but he would at the same time have lost the factual contest and been forced to pay the penalty, which might have been substantial.

³⁶ John Lewis Heller expressed the same reservation in the margin of his copy of Janzer (n. 5),

inclined to think the safer course is to assume, in default of evidence one way or the other for the early period, that a speech Cato never delivered was unlikely to be preserved.

In any event, it is no longer possible to date the speech to Cato's censorship with any confidence. This tentative dating has rested on Till's association³⁷ of the 'potential prosecution' of Cato by Caelius the tribune with Plutarch's narrative (*Cat. Ma.* 19.2) of attempts by some of Cato's enemies to instigate tribunes to prosecute and fine him during his censorship.³⁸ If I have succeeded in destroying the idea that the title referred to a potential prosecution, there is no longer any reason to consider the censorial dating even tentatively tenable.

Still, one significant fragment does suggest the censorship as a *terminus post quem* for the speech. Cato said (*Orat.* 117): 'si em percussi, saepe incolumis abii; praeterea pro re publica, pro scapulis atque aerario multum rei publicae profuit'.³⁹ There are hazards in reading too much into a fragment out of context, but a few points are clear: (i) the first sentence indicates numerous conflicts between the two, in which Cato often emerged unscathed; (ii) the second sentence indicates that these conflicts were over issues important to the Republic; (iii) in particular at least one conflict, and Cato's victory, contributed to the general well-being of the *populus Romanus* (*pro re publica*); (iv) at least one of Cato's other victories over Caelius tended to protect the 'shoulderblades' (*pro scapulis*), which, we are told by our source for the fragment (*Fest.* p. 266L), meant protection against scourging; and (v) at least one of those victories helped the treasury.

We can draw three conclusions from these points. First, Cato's victories over Caelius were in the area of legislation and magisterial action. Second, one of them must have been over support for a *lex Porcia de provocatione*, which was passed in this period to shore up prohibitions against magistrates punishing citizens by death or scourging without appeal to the people.⁴⁰ The law has sometimes been attributed to Cato as the most visible Porcius of the time; but before his consulship he was perhaps not the most visible, or at least not by much, of the Porcii, much less the most likely to propose legislation (that would probably be L. Porcius Laeca, *tribunus plebis* in 199). But the words *pro scapulis* here are best taken as indicating on Cato's part strong support for the law;⁴¹ Caelius, therefore, probably opposed it.

And finally, if we can date Cato's help to the treasury to the censorship, it must have been late in his censorship or some time thereafter that he composed the speech. While there might always be some other incident of which no record survives, it was quite

46, who proposed that the speech had been composed against a hypothetical circumstance; cf. Scullard (n. 5), 263.

³⁷ Till (n. 4), 443.

³⁸ Malcovati (n. 4), 46–7; Astin (n. 30), 86; D. Kienast, *Cato der Zensor: seine Persönlichkeit und seine Zeit* (Heidelberg, 1954), 79.

³⁹ The MS reads *em*, which is confirmed by Paul. *Fest.* p. 67L as the archaic form for classical *eum*. Numerous scholars have emended *profuit* to *profui*, unnecessarily; as it stands, the sentence means that Cato's action in supporting the law to which he alludes was of benefit to the state.

⁴⁰ Livy 10.9.4; Cic. *Rep.* 2.54, *Rab. Per.* 8, *Verr.* 2.5.163; Sal. *Cat.* 51.21–2, 40; A. W. Lintott, 'Provocatio from the Struggle of the Orders to the Principate', *ANRW* 1.2 (1972), 249–53; Astin (n. 30), 21–3.

⁴¹ Astin (n. 30), 22; Kienast (n. 37), 90–1. A. H. MacDonald, 'Rome and the Italian Confederation (200–186 B.C.)', *JRS* 34 (1944), 19, who emends *profuit* to *profui*, unnecessarily (it was Cato's on-again, off-again battle with Caelius that benefited the state on so many fronts), attributes the *lex Porcia* to Cato; so Scullard (n. 5), 112, n. 4, and others cited there and by Astin (*loc. cit.*).

probably during his censorship when he was raising taxes on luxury items and letting out contracts most favourable to the treasury and less favourable to publicans that Caelius opposed him (and might even have been instigated by T. Quinctius Flamininus).⁴² It is still possible that the *sponsio* took place around the same time, but the fact remains that Caelius is unlikely to have claimed consultation with Cato at time when they were openly in dispute with one another. The *sponsio* probably happened some time later.

It is perhaps ironic that the lost speech of Cato has hitherto garnered somewhat more attention from scholars than that of Cicero. So little is to be gained, it may sometimes seem, in focusing on scraps when you have whole speeches. And, to say the least, the world will not have been turned on its head by this analysis. But the formula for the generic *sponsio*, ancestral or cognate to the fully attested formula of the judicial *sponsio*, needed fuller analysis. The result has been to shed light on two speech-titles and illuminate what had been a dark corner of the *corpora* of speeches, whole and fragmentary, which have come down to us from these two important men. Paolo Cugusi was trying to show similarities between Cato and Cicero as orators when he mentioned the similar titles of these two speeches, but he missed the real point of comparison.⁴³ Fortunately for those (like me) who see Cato and Cicero more as stages in the same evolutionary process than as opposites on the spectrum of rhetorical art and taste, Cugusi's point holds, if anything, more strongly now that a more consistent and plausible analysis of both speeches has demonstrated what they probably did have in common, after all. As much as things had changed in the intervening decades, the generic *sponsio* was a tool for both men to use in political attack and defence.

University of Colorado at Boulder

J. BRADFORD CHURCHILL

j.churchill@colorado.edu

⁴² Livy 39.44.7–8; Plu. *Cat. Ma.* 19.1–2, *Flam.* 19.6–7; cf. Astin (n. 30), 85–6.

⁴³ Cugusi (n. 8), 210: 'Entrambi, ancora, pronunciarono un'orazione di "autodifesa anticipata" ...'.