

Miszellen

On the Legal Effects of Sponsalia

This article challenges the traditional view that informal *sponsalia* (as described in D. 23,1) were legally unenforceable in classical Roman law. After a close examination of the contents and structure of D. 23,1 and related Digest texts, it offers a new interpretation of a crucial passage from Aulus Gellius (Noctes Atticae 4.4), which has traditionally been read as showing that Roman *sponsalia* were unenforceable. The article then concludes with a consideration of the literary evidence offered by Varro, Plautus and Ovid. – Keywords: Betrothal, legal validity, Latin practice

Über die rechtlichen Wirkungen von Sponsalia. Gegen die wohl herrschende Meinung argumentiert dieser Beitrag, dass informelle *sponsalia* (wie in D. 23,1 beschrieben) nach klassischem Recht klagbar waren. Nach Analyse der in D. 23,1 enthaltenen und sachlich verwandten Digesten-Stellen wird eine neue Deutung eines Textes von Aulus Gellius (Noctes Atticae 4.4) präsentiert, der bislang als Beweis dafür angesehen wurde, dass *sponsalia* in Rom nicht einklagbar waren. Auch Zeugnisse bei Varro, Plautus und Ovid scheinen die hier vertretene Auffassung zu stützen.

I. When two people become engaged to be married, what are the legal consequences? In current English law the position is clear: There are none, actions for “breach of promise” being abolished by the Law Reform (Miscellaneous Provisions) Act 1970¹). The position in classical Roman law, if we are to believe the textbooks, was the same, although Roman law had no equivalent of the emphatic English legislation. One thing that both Roman and English law definitely had in common, however, was that in earlier times the position had been different. No less a figure than Ulpian vouched for the practice among the *veteres* of making binding contractual promises by way of stipulation in respect of their future wives²). The prominence of the verb *spondeo* in such stipulations had given the engagement the name “*sponsalia*”, and also explained why the man to be married was called *sponsus* and his bride-to-be *sponsa*³). The consensus is, however, that by the classical period – and certainly by the time that Ulpian was writing – such stipulations, and stipulations between the parties to the intended marriage themselves were, as Thomas puts it, “not actionable”⁴).

¹) Law Reform (Miscellaneous Provisions) Act 1970 s 1(1).

²) D. 23,1,2.

³) D. 23,1,3. Varro, ling. 6,69–6,70.

⁴) J. A. C. Thomas, Textbook of Roman Law, Amsterdam 1976, 420. See also A. Berger, Encyclopedic Dictionary of Roman Law, Transactions of the American Philosophical Society, vol. 43 part 2, Philadelphia 1953, 713; W. Buckland/P. Stein, A Text-Book of Roman Law, Cambridge ³1963, 112, n. 5; P. Corbett, The Roman Law of Marriage, Oxford 1930, 14–15; B. W. Frier/T. A. J. McGinn, A Casebook on Roman Family Law, Oxford 2004, 65, 71; R. Astolfi, Il Fidanamento nel Diritto Romano, ³1994, 2. The main secondary literature specifically directed to *sponsalia* is H. Kupiszewski, Das Verlöbniß im altrömischen Recht, ZRG

If this accepted account of the decline in legal significance of *sponsalia* is true, it raises an interesting question about the relationship between legal change and social practice. For there is no sign of *sponsalia* losing their *social significance* in the classical period. On the contrary, as Treggiari has shown, the word “*sponsalia*” should often be understood as referring to the celebrations accompanying the engagement, specifically the banquet, rather than the engagement itself⁵). We find, for example, Cicero using *sponsalia* and *convivium* interchangeably in a letter to Quintus⁶); and Seneca, in his *De Beneficiis*, invoking – as an illustration of what our moral duties require of us – the example of a person getting up to go to *sponsalia* despite (already) suffering from indigestion⁷). The hint in Seneca that attendance at betrothal feasts could be as much a matter of social obligation as pleasure is made explicit by the younger Pliny, in a letter reflecting that frequent attendance at *sponsalia* was one of the tedious chores of urban life⁸). Indeed, there seems to have been a wider concern about excessive, ostentatious *sponsalia*: Suetonius reports that the emperor Claudius endeared himself to the Roman people by his self-effacement and modest lifestyle, which latter included the decision to celebrate his daughter’s engagement *silentio et tantum domestica religione* (“with great privacy, at home”)⁹). Seneca, this time in *De Tranquillitate Animi*, nicely captures the sense of a significant familial event bloating into a meaningless public display when he lists attendance at the *sponsalia* of people who often marry alongside going to hear the latest claim brought by a vexatious litigant; these, he explained, were exactly the kinds of activities that distracted people from doing something truly worthwhile¹⁰).

II. People might have wasted their time listening to claims brought by obsessive litigants, or attending the engagement parties of serial spouses, but it seems that they could never be distracted by legal claims arising from broken engagements. Any investigation of the legal effects of *sponsalia* has to begin with Digest book 23 chapter 1, which contains eighteen texts. After a crisp definition of betrothal as *mentio et repromissio nuptiarum futurarum* (D. 23,1,1 “the announcement and mutual promise of marriage in the future”), the compilers turned their attention to etymology. Ulpian, in his *Liber singularis de sponsalibus*, had said that:

D. 23,1,2 *Sponsalia autem dicta sunt a spondendo: nam moris fuit veteribus stipulari et spondere sibi uxores futuras.*

“Betrothal” was so called from the “solemn plighting of troth”, since it was customary for our ancestors to stipulate and solemnly promise their wives-to-be to each other.

RA 77 (1960) 125; Idem, *Studien zum Verlöbnis im klassischen römischen Recht I*, ZRG RA 84 (1967) 70; R. Astolfi, *Per la storia del fidanzamento arcaico*, SDHI 58 (1992) 272; R. Astolfi, *Il fidanzamento nel diritto romano*, ³1994; and C. Fayer, *La Familia Romana, Aspetti giuridici ed antiquari*, 2.: *Sponsalia, Matrimonio, Dote*, 2005 ch. 1.

⁵) S. Treggiari, *Roman Marriage*, Oxford 1991, 147.

⁶) Cicero l. c. 2.5.

⁷) Sen., *benef.* 4,39.

⁸) Pliny l. c. 1.9.

⁹) Suet., *Claud.* 12.

¹⁰) Sen., *dial.* (*De Tranquillitate Animi*) 9,12.

The origin of betrothals in stipulations using *spondere* also explained why the engaged couple were known as *sponsus* and *sponsa* (D. 23,1,3). However, as the fourth text in the chapter, from Ulpian's *ad Sabinum*, made clear, stipulations were no longer necessary:

D. 23,1,4 Sufficit nudus consensus ad constituenda sponsalia. Denique constat et absentis absentem desponderi posse, et hoc cotidie fieri.

Agreement alone is sufficient for betrothal. It is agreed that betrothal can take place in the absence of the parties, and this is quite common.

This emphasis on informality, and the centrality of consent, was echoed in a text from Paul (D. 23,1,7), and was reinforced by extracts from a range of jurists dealing with problems of consent. For instance, both parties had to be old enough to understand the nature of the transaction (D. 23,1,14), and while a daughter in power had to consent to betrothal, her consent was presumed and could only be withheld on specific grounds (D. 23,1,11–12). A son in power, by contrast, seems to have had an unrestricted freedom to refuse (D. 23,1,13). The jurists also addressed issues such as the powers of tutors (D. 23,1,6; D. 23,1,15), the effect of insanity and long delay on betrothals (D. 23,1,8; D. 23,1,17), and whether prohibitions on senatorial marriages applied by analogy to betrothals (D. 23,1,16). The chapter ends with Ulpian reasserting the lack of formal requirements for creating *sponsalia*:

D. 23,1,18 In sponsalibus constituendis parvi refert, per se (et coram an per internum vel per epistulam) an per alium hoc factum est.

When betrothals are being contracted, it does not matter much whether this is done by the parties themselves (in person, by sending a messenger, or by letter) or by someone else.

The detail and elaborate analysis in these texts seems at first sight difficult to reconcile with the idea that these agreements were not binding. The explanation offered by writers such as Berger, Buckland and Corbett is that although the promises were unenforceable, the status of *sponsus* or *sponsa* had certain legal consequences¹¹). Corbett listed the following seven points¹²):

(a) two simultaneous engagements, or marriage to one person whilst engaged to another, entails *infamia*;

(b) betrothal created a kind of affinity: a son may not marry his father's *sponsa*, nor a father his son's;

(c) a *sponsus* was entitled to prosecute his *sponsa* for infidelity;

(d) gifts and legacies from *sponsus* to *sponsa* and *vice versa* were exempt from limitations;

(e) betrothal exempts a *sponsus* from the penalties of celibacy imposed by the *lex Julia*;

(f) a *sponsus* could not be compelled to give evidence against his fiancée's father;

(g) the murder of a *sponsus* or a *sponsa* came within the definition of parricide.

On this interpretation, D. 23,1 had a legal function, but it was merely to provide a definition of a concept used elsewhere. Nothing in D. 23,1 itself, it should be stressed, indicates that this is the case. Equally striking is the fact that nowhere in D. 23,1 is

¹¹) Berger (Fn. 4) 713; Buckland/Stein (Fn. 4) 112 – “it was important to have rules as to what were valid *sponsalia*”; Corbett (Fn. 4) 16–17.

¹²) Corbett (Fn. 4) 16–17.

there any statement that betrothals do not give rise to legal rights in the parties. It would have been easy to say so, but the logic of the texts actually points the other way. The description of the stipulatory practices of the *veteres* in 23,1,2, which undoubtedly were enforceable, is never contradicted or contrasted with a more contemporary position of unenforceability. Of course, the chapter shows that the law governing *sponsalia* has changed since the time of the *veteres* in that the requirements for a valid stipulation need no longer be satisfied. It does not matter that the parties were not physically present, nor that they did not use the formal promissory language *spondesne?/spondeo*. But the gist of the juristic extracts is that one achieves the same results as the *veteres* without having to go through all the stipulatory formalities: The way of making *sponsalia* has changed, but their effects have not. What is being described, in other words, is something akin to the informal contracts of sale, hire partnership and mandate¹³).

On this approach, it becomes easier to understand why *sponsalia* attracted the lively juristic discussion evidenced in D. 23,1. Florentinus, Gaius, Julian, Modestinus, Paul, Pomponius and Ulpian were all writers of the classical era or later. If *sponsalia* were not binding, these authors' interest in the subject could only be explained either in terms of an enthusiasm for the seven arcane points listed by Corbett, or by a taste for legal history. It would be especially surprising to find Ulpian's name in this list; he apparently wrote a monograph on *sponsalia*, but it is difficult to imagine him having either the time or the inclination for pottering about in the bye-ways of Roman law¹⁴). A legally binding contract, on the other hand, with its own peculiar rules, would be perfectly suited to detailed analysis in a short book.

III. The texts of D. 23,1 provide the vast majority, but not all, of the Digest's discussion of *sponsalia*. We now turn to consider two further texts, which might, at first sight, appear to suggest that *sponsalia* did not give rise to legally binding agreements. First, Gaius (11 ad ed. prov.) states that

D. 24,2,2 In sponsalibus quoque discutiendis placuit renuntiationem intervenire oportere: in qua re haec verba probate sunt: 'condicione tua non utor'.

It is agreed that in order to end betrothals a renunciation must be made. Here the established words are: 'I do not accept your conditions'¹⁵).

The text does not discuss the legal consequences that follow such a renunciation, but the context of Gaius' discussion might be suggestive. D. 24,2,2 is part of a longer passage discussing divorces, and it might be tempting to infer that, just as a divorce could not lead to a claim for breach of contract, neither could the repudiation of *sponsalia*. However, such an inference requires a great deal to be read into D. 24,2,2: Gaius' stated purpose in referring to the form of words typically used to end *sponsalia* was to draw a parallel with the form of words typically used to end a marriage. The importance of certainty and clarity for both parties in such situations is obvious¹⁶), and it seems unwise to go further, and to deduce that Gaius meant to say that all the legal

¹³) Kupiszewski, Verlöbnis I (Fn. 4) 75 (although Kupiszewski is not seeking to argue that *sponsalia* had similar legal effects to those contracts).

¹⁴) Ulpian's *Liber Singularis de Sponsalibus* is excerpted at 23,1,2 and 23,1,12; for Ulpian's methods and priorities, see A. Honoré, *Ulpian: Pioneer of Human Rights*, Oxford 2002.

¹⁵) Translation A. Watson (ed.), *The Digest of Justinian*, 1985.

¹⁶) Cf. D. 24,2,3 (Paul. 35 ad ed.).

consequences of such repudiations were identical in both marriages and betrothals. The consideration of this text also provides a good opportunity to address a broader argument that the law on *sponsalia* developed by tracking developments in the law of marriage: As free marriage became more widespread, so, it is said, it became “illogical” for *sponsalia* to continue to create binding legal obligations¹⁷). This equalisation between marriage and betrothal might be appealingly elegant, but it is not, as Corbett pointed out, logically inevitable: It is perfectly coherent to give legal effect to a promise to enter a relationship in future, even if that relationship once entered can be terminated at will¹⁸). In such circumstances the claimant might find it difficult to establish what loss had been suffered, but that difficulty does not make a claim “illogical”, it simply makes it problematic to quantify.

The second text to consider is Paul. 15 resp., in which Paul is reported as denying a claim to enforce a *poena* attached to a betrothal agreement, which was stated to become payable if either of the intended spouses blocked the marriage. Paul advises that

D. 45,1,134 pr. ex stipulatione ... cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturum, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta
the stipulation ... was contrary to sound morals, so that an action on it would be met by the defence of fraud. It is regarded as degrading for the bond of marriage, present or future, to be secured by a penalty¹⁹).

Berger rather tendentiously summarises this text as saying that “even a penalty clause attached to the pertinent agreement was void since it was considered dishonest that marriage be enforced by the tie of a penalty”²⁰). The characterisation of the *poena* as a penalty seems correct. As Berger points out elsewhere in his Dictionary, a *stipulatio poenae* can sometimes refer to losses suffered by one party that have to be made good by another party²¹); but here, in Paul’s example, the payment claimed is a “penalty” in the purest sense – it is a sum specified as payable without reference to any losses actually suffered by the claimant²²). The text shows, therefore, that the traditional form of *sponsalia*, in which the bride’s father promised either the bride or money, was no longer enforceable in Paul’s time²³). However, it seems unwarranted to read the text as saying that all *sponsalia* were unenforceable; and here Berger’s use of the word “even” is unfortunate. It risks misrepresenting Paul’s argument, and at the very least it assumes what we are seeking to investigate. For the text says nothing about the underlying legal effects of a betrothal where there is no stipulation for a penal sum and the disappointed party has suffered loss by its repudiation; the text’s emphasis is on the penalty itself as the factor determining enforceability.

D. 45,1,134 pr. is not the only text to distinguish carefully between *poenae* and other financial inducements in the context of a future marriage. In Pap. 17 quaest., Papinian discusses the validity of a condition in a will:

¹⁷) Thomas (Fn. 4) 420. See also Kupiszewski, Verlöbnis (Fn. 4) 159.

¹⁸) Corbett (Fn. 4) 11.

¹⁹) Translation Watson, Digest (Fn. 15).

²⁰) Berger (Fn. 4) 713.

²¹) Berger (Fn. 4) 718 “Stipulatio poenae”.

²²) Cf. R. Knütel, *Stipulatio poenae*, Studien zur römischen Vertragsstrafe, 1976, 42–43.

²³) Varro ling. 6,70; Kupiszewski, Verlöbnis (Fn. 4) 148.

D. 35,1,71,1 Titio centum relicta sunt ita, ut Maeviam uxorem quae vidua est ducat: condicio non remittetur et ideo nec cautio remittenda est. huic sententiae non refragatur, quod, si quis pecuniam promittat, si Maeviam uxorem non ducat, praetor actionem denegat: aliud est enim eligendi matrimonii poenae metu libertatem auferri, aliud ad testamentum certa lege invitari.

One hundred were bequeathed to Titius to take to wife the widow Maevia; the condition will not be waived, nor accordingly will the undertaking. There is no conflict between this opinion and the fact that should someone promise money if there were no marriage to Maevia, the praetor would refuse an action. Depriving of free choice by fear of a penalty on one's own option is one thing; to be invited into marriage by a will's provision is another²⁴).

Here the illegitimate pressure of the *poena* is emphatically contrasted with the legitimate inducements offered by the provisions of the will²⁵).

D. 45,1,134 pr. has also been relied on, in a more subtle way, by Corbett, as showing that *sponsalia* were not enforceable. His account of the transition from the legally enforceable stipulations of the early days to the classical position under which no action lay began by stressing that the transition could not have been a straightforward one. There was no trace of a *lex* prohibiting an *actio ex sponsu*, he pointed out, “Yet the serious step of depriving the formal stipulation, when used as a promise of marriage, of direct legal sanction would surely require legislative or at least magisterial enactment”²⁶). It followed, in Corbett's view, that the stipulations must have been actionable for longer than had traditionally been thought. “Then”, continues Corbett, “another element entered. Freedom to break off an engagement or marriage came to be regarded as a matter of public interest in which private convention, even in strict form, could not prevail”²⁷). As textual support he relied on D. 45,1,134 pr., but this text, as explained above, was expressly dealing with *poenae*, and, in any case, surely Corbett's initial (and, in my view, compelling) point about the need for legislation to deprive previously valid stipulations of their legal effect still applies where the reason for changing the law is a new view of the public interest.

IV. Although the jurists themselves do not provide direct evidence of a change from enforceability to unenforceability in betrothal agreements, it has been argued that a secondhand account of one of their works does. That is Aulus Gellius' summary of part of Servius Sulpicius' book *De Dotibus*. The text is so central to the theme of this article that it needs to be set out in full:

Aulus Gellius, *Noctes Atticae* 4,4 Quid Servius Sulpicius in libro, qui est de dotibus, scripserit de iure atque more veterum sponsaliorum. 1 Sponsalia in ea parte Italiae, quae Latium appellatur, hoc more atque iure solita fieri scripsit Servius Sulpicius in libro, quem scripsit de dotibus: 2 “Qui uxorem” inquit “ducturus erat, ab eo, unde ducenda erat, stipulabatur eam in matrimonium datum . . . iri; qui ducturus erat, itidem spondebat. Is contractus stipulationum sponsonumque dicebatur “sponsalia”. Tunc, quae promissa erat, “sponsa” appellabatur, qui sponderat ducturum, “sponsus”. Sed si post eas stipulationes uxor non dabatur aut non ducatur, qui stipulabatur, ex sponsu agebat. Iudices cognoscebant. Iudex quamobrem data acceptave non esset uxor quaerebat. Si nihil iustae causae videbatur, litem pecunia aestimabat,

²⁴) Translation by Watson, *Digest* (Fn 15).

²⁵) Knütel (Fn. 22) 52; Fayer, *La Familia Romana II* (Fn. 4) 58 emphasises these texts' focus on penal stipulations.

²⁶) Corbett (Fn. 4) 14.

²⁷) Corbett (Fn. 4) 14.

quantique interfueraut eam uxorem accipi aut dari, eum, qui sponderat, ei qui stipulatus erat, condemnabat.” 3 Hoc ius sponsaliorum observatum dicit Servius ad id tempus, quo civitas universo Latio lege Iulia data est. 4 Haec eadem Neratius scripsit in libro quem de nuptiis composuit.

What Servius Sulpicius wrote in his work *On Dowries* about the law and practice of betrothals of the *veteres*. 1 In the book to which he gave the title *On Dowries* Servius Sulpicius wrote that in the part of Italy known as Latium betrothals were regularly contracted according to the following law and practice. 2 «One who wished to take a wife,» says he, «demanded of him from whom she was to be received a formal promise that she would be given in marriage. The man who was to take the woman to wife made a corresponding promise. That contract, based upon pledges given and received, was called sponsalia, or ‘betrothal.’ Thereafter, she who had been promised was called sponsa, and he who had asked her in marriage, sponsus. But if, after such an interchange of pledges, the bride to be was not given in marriage, or was not received, then he who had asked for her hand, or he who had promised her, brought suit on the ground of breach of contract. The court took cognizance of the case. The judge inquired why the woman was not given in marriage, or why she was not accepted. If no good and sufficient reason appeared, the judge then assigned a money value to the advantage to be derived from receiving or giving the woman in marriage, and condemned the one who had made the promise, or the one who had asked for it, to pay a fine of that amount.” 3 Servius Sulpicius says that this law of betrothal was observed up to the time when citizenship was given to all Latium by the Julian law. 4 The same account as the above was given also by Neratius in the book which he wrote *On Marriage*²⁸).

The centrality of this text is, hopefully, obvious; but its significance is less than clear. Indeed, what it says about the Roman legal position in Gellius’ own day is entirely inferential. Most commentators assume that Gellius was drawing his readers’ attention to a contrast between Latium and Rome, but Volterra points out that the text itself provides no compelling reason to make that assumption²⁹). The two previous texts, on the scope of the obligation under the edict of the curule aediles, and on actions following divorces seem to be concerned with the historical origins of current legal phenomena³⁰); the text on betrothals could be read in exactly the same way, particularly as Gellius used Servius Sulpicius as his source for both the betrothals text and the divorces text.

However, the gist of the passage seems to be that things were different in Latium until the lex Julia conferred Roman citizenship (and, with it, Roman law) on the inhabitants³¹). But the precise point of contrast is elusive. It might be, it is true, between the legal consequences of betrothals in Latium and Rome³²) (although, if

²⁸) Translation in J.C. Rolfe, *The Attic Nights of Aulus Gellius*, London 1927, I, 325–327 (lightly amended). In particular, Rolfe translates *veterum* in the first sentence as “in early times”; I propose a more specific reference to the *veteres*. The issues are helpfully set out in Fayer, *Familia Romana* II (Fn. 4) 32–36.

²⁹) E. Volterra, *Osservazioni intorno agli antichi sponsali romani*, in: E. Volterra, *Scritti Giuridici* vol.II, Napoli 1991, 491, 499–500 (first published in *Scritti C.A. Jemolo*, V, Milano 1963, 639–657).

³⁰) Gell. 4,2 (edict), Gell. 4,3 (divorce).

³¹) For an implicit acknowledgement that Latins had their own distinctive practices in relation to *sponsalia* see lex Valeria Aurelia, where the prohibition on *sponsalia* as part of the public mourning of Germanicus applies only to Roman citizens; M.H. Crawford (ed.), *Roman Statutes*, London, 1996, vol. 1, 516–517 (translated at 528).

³²) Fayer, *Familia Romana* II (Fn. 4) 36 describes this as “l’opinione generale oggi corrente” in the (Italian) literature.

that were the case, would the account need to be so detailed?). But it might alternatively be a contrast in who makes the promises (with Servius envisaging promises by the intended husband and the bride's father in Latium, whilst Roman practice extended to promises made by the bride as well). Or it might well be making the point that the Latins continued to insist on strict compliance with the stipulatory formalities associated with the *veteres* despite those requirements having been relaxed by the Romans. This interpretation would give a precise significance to Gellius' introductory allusion to *veterum sponsaliorum*, which is traditionally translated as "betrothals in early times"³³), but could mean "the *sponsalia* of the *veteres*". The true significance of the passage as a whole would then be that it shows that the move towards informality in Rome indicated in D. 23,1 had occurred by the time that Servius was writing. It may also be that Servius wished to draw his readers' attention to *two* differences between Latium and Rome: one of legal rules (*iure*), the other of custom or habit (*more*). The obvious custom would be the litigation process, the steps of which are painstakingly described in the passage. Now, if *sponsalia* were not legally binding in Rome, it was hardly very illuminating to contrast the legal processes applicable in Latium with those used in Rome. If, on the other hand, *sponsalia* were legally enforceable in both Latium and Rome, an account of Latin litigation practices might be revealing. As we shall see, a claim for breach of *sponsalia* would have raised discouragingly difficult questions about loss and quantification of damage; Servius may well have included his account of Latin claims to show that these problems were not insuperable.

V. We now turn to consider writings not aimed at, or produced by lawyers (at least, in their professional capacities). The use of such "literary" evidence has been commonplace in legal studies of topics such as betrothals³⁴), but it obviously requires careful handling, particularly where it is included in a work of fiction. We might perhaps feel that the ground is safest where non-fictional material is produced by an author with undoubted legal expertise, conditions which are obviously satisfied in the work of Varro, whose *De Lingua Latina* discusses (in 6,69–6,72) words deriving from *spondere*, meaning "to promise solemnly". These include *sponsa* (intended bride), and, in 6,70, a cluster of words surrounding engagements:

Varro ling. 6,70 Si spondebatur pecunia aut filia nuptiarum causa, appellabatur et pecunia et quae desponsa erat sponsa; quae pecunia inter se contra sponsu rogata erat, dicta sponsio; cui desponsa quae erat, sponsus; quo die sponsum erat, sponsalis.

If money or a daughter *spondebatur* 'was promised' in connection with a marriage, both the money and the girl who had been *desponsa* 'pledged' were called *sponsa* 'promised, pledged'; the money which had been asked under the *sponsus* 'engagement' for their mutual protection against the breaking of the agreement, was called a *sponsio* 'guarantee deposit'; the man to whom the money or the girl was *desponsa* 'pledged' was called *sponsus* 'betrothed'; the day on which the engagement was made, was called *sponsalis* 'betrothal day'³⁵).

³³) Translation by Rolfe (Fn. 28).

³⁴) See, for instance, A. Watson, *The Law of Persons in the Later Roman Republic*, Oxford 1967, ch. 2.

³⁵) Translation in R. G. Kent, *Varro on the Latin Language* (= Loeb Classical Li-

Varro makes it clear in the following section that anyone who has deliberately used *spondeo* is bound, even if their inner desire was not to assume an obligation:

Varro ling. 6,71 Qui sponderat filiam, despondisse dicebant, quod de sponte eius, id est de voluntate, exierat: non enim si volebat, dabat, quod sponsu erat alligatus: nam ut in comoediis vides dici: Sponden tuam gnatam filio uxorem meo? Quod tum et praetorium ius ad legem et censorium iudicium ad aequum existimabatur.

He who *sponderat* ‘had promised’ his daughter, they said, *despondisse* ‘had promised her away’, because she had gone out of the power of his *sponte* ‘inclination’, that is, from the control of his *voluntas* ‘desire’: For even if he wished not to give her, still he gave her, because he was bound by his *sponsus* ‘formal promise’: For you see it said, as in comedies: Do you now promise your daughter to my son as wife? This was at that time considered a principle established by the praetors to supplement the statutes, and a decision of the censors for the sake of fairness³⁶).

On the other hand, Varro also points out in 6,72 that the use of *spondeo* in jest would not create a contract. It is perhaps difficult to believe that this could have been the case in situations where the other party had no reason to believe that the language was not seriously meant; but the general point that binding obligations arise from the use of *spondeo*, and the illustration of that point with the promises made at *sponsalia* could not have been clearer. Of course, both the context and the use of the pluperfect tense show that Varro’s main concern was etymological. But there is no sense at all in these passages that the derivation of words like *sponsa* and *sponsalia* can only be explained by older legal rules, that no longer hold true.

Whilst H.F. Jolowicz acknowledged that Varro’s discussion indicated that *sponsalia* created legally binding obligations, he did not pursue the point, and later commentators have been resistant to accepting it³⁷). Watson, for instance, regards Varro’s suggestion that an action *ex sponsu* can be brought on a betrothal as “a flight of fancy” inconsistent with the “evidence” given in Aulus Gellius³⁸). Treggiari tends to agree³⁹). As we have seen, the “evidence” of Gellius is highly ambiguous; and to dismiss as a “flight of fancy” an extended exposition in a work by an author who has been described as “Rome’s greatest scholar”, who had been praetor and had written a treatise (now lost) on civil law is capricious⁴⁰). Surely the fact is, as Jolowicz recognised, that the passages in Varro point very unambiguously to the legal validity of betrothal agreements.

VI. When we move beyond non-fiction to fictional literary sources, the main author to attract commentators’ attention has been Plautus, whose plays contain several scenes where betrothals are agreed. Most of those agreements take the form of the classic stipulation – *spondesne? spondeo* – but much has been made of one instance, in the *Trinummus*, where the characters clearly regard an engagement as having been concluded, the father of the bride having said *spondeo*, but where there has been no *spondesne?* question. For Watson this moment demonstrates that no agreements for

brary 333), London 1938, I, 237–239.

³⁶) Translation *ibid.* 239.

³⁷) H.F. Jolowicz, *Historical Introduction to the Study of Roman Law*, Cambridge 1932, 238 Fn. 3.

³⁸) Watson, *Persons* (Fn. 34) 13.

³⁹) Treggiari (Fn. 5) 144 Fn. 88.

⁴⁰) See the outline of Varro’s career and work by R.A. Kaster in S. Hornblower/A. Spawforth/E. Eidinow (ed.), *The Oxford Classical Dictionary*, Oxford 2012, 1441–1442.

betrotals were actionable at the time Plautus was writing in the second century BC. His reasoning, essentially, is that no distinction is drawn in the plays between agreements in the *spondesne? - spondeo* form and the less formal instance where the bride's father says *spondeo* without the prior question. Since this latter instance "cannot be actionable because it lacks the prior question", the other instances must not be actionable either⁴¹). Treggiari is not prepared to go quite so far. For her the Plautus texts suggest a legal landscape in which formally correct, legally enforceable agreements co-exist alongside informal, unenforceable agreements⁴²); in such a world it must be up to the parties to be careful how they express themselves.

What both Watson and Treggiari have in common is a readiness to deduce pretty sophisticated legal points from texts that never set out to give an account of legal principles. But, of course, Plautus, as Kupiszewski reminds us, "schrieb ... kein Lehrbuch des Zivilrechts"⁴³), nor was he ahead of his time in being an exponent of social realism. He was a comic dramatist, and comic dramatists distort and exaggerate features of real life for the amusement of their audiences. Using Plautus to provide evidence of Roman law is peculiarly perilous, as he was adapting existing Greek plays, most of which are now lost, and the extent of his original contribution remains contentious. As Fraenkel persuasively suggests, in his definitive study of Plautus, legal elements essential to the plot structure of the plays can be confidently attributed to the Greek originals, even if those elements are given Roman legal names⁴⁴). Fraenkel seems not to have had *sponsalia* specifically in mind, but they fit into his category perfectly: The betrothals are significant plot incidents, which must immediately put their Roman authenticity in doubt.

Even if we are determined to deduce something about Roman law from the texts of these plays, the conclusions must surely be more modest than those asserted by either Watson or Treggiari. Plautus is unlikely to have set the action in a fictional legal framework that made no sense to its audience, and – to this extent – Treggiari is surely right to emphasise that all the characters regard the use of *spondeo* as a significant moment in the dialogue⁴⁵). But it is rather more difficult to believe (with Treggiari) that anything can be read into the failure to use *spondesne?* Are we to imagine a collective intake of breath as the dramatic irony dawns on the audience that a character has used *spondeo* without its corresponding *spondesne?*, and that any hoped-for legal consequences are, therefore, in vain? It seems more likely that the audience would have seen each transaction, as the characters seem to do, in the same way. It is also difficult to accept Watson's contention that the one instance of *spondeo* without a *spondesne?* must mean that even where there was a question, no legal rights were conferred. It may (or may not) have been the position in Plautus' time that a binding

⁴¹) Watson, *Persons* (Fn. 34) 15.

⁴²) Treggiari (Fn. 5) 143–144.

⁴³) Kupiszewski, *Verlöbnis* (Fn. 4) 141.

⁴⁴) E. Fraenkel, *Plautine Elements in Plautus* (*Plautinisches im Plautus*), trans. T. Drevikovsky/F. Muecke, Oxford 2007, 390. This material forms part of Fraenkel's addenda to the 1960 Italian translation of his German original. See also, to similar effect, J. Gaudemet, *La conclusion des fiançailles à Rome à l'époque pré-classique*, *RIDA* 1 (1948) 79, 83–84.

⁴⁵) Treggiari (Fn. 5) 142. See also Corbett (Fn. 4) 13. Gaudemet (Fn. 44) 85 makes a similar point about Plautus' drama referring to contemporary usage.

stipulation required a corresponding question and answer; the only firm evidence we have of the question and answer requirement is in Gaius' *Institutes* written several centuries later⁴⁶). Not surprisingly, Plautus' characters say nothing about legal enforceability – this was, after all, supposed to be an entertainment – and it seems ill-advised to draw sweeping inferences about precise legal issues that were marginal to the dramatic action, were not discussed by the characters, and that require us to attribute a degree of legal expertise to both dramatist and intended audience that we have no firm reason to believe either possessed⁴⁷). Indeed, solemnly to scrutinise the plays of Plautus for clues about legal principles while at the same time dismissing Varro's work as a "flight of fancy" seems oddly unsympathetic to both writers' very different priorities. It is difficult to avoid the feeling that each author would have been better served if the critical attitudes applied by Watson to their works had been swapped round.

While the legal effects of betrothals were at best incidental in Plautus, they were central in Epistle XX of Ovid's *Heroides*. The poem is a dramatic monologue addressed by Acontius, a young man, to Cydippe, the girl he hopes to marry. Their relationship has not been going well. According to the traditional version of the story, Acontius had seen Cydippe sitting in the temple of the goddess Artemis at Deles, and had fallen in love with her. He wrote on an apple the words "I swear by the sacred shrine of the goddess that I will marry you", and threw the apple at Cydippe's feet. Cydippe picked it up, and read the words aloud without thinking; to Acontius' disappointment she did not regard this as settling her future. Ovid's poem imagines Acontius' attempts to persuade her round. What is most interesting for us is that Acontius takes what seems (at least to a modern reader) a rather disagreeably legalistic approach. He invites Cydippe to reconsider the words she used, reminding her that *invenies illic, id te spondere* ["You'll find that you used 'spondeo' there"], and, although graciously admitting that there is perhaps a hint of trickery on his side, he insists that he was inspired by love. Love, it turns out, dismayingly, is a lawyer –

Ov., *Her.* 20,29–30 *Dictatis ab eo feci sponsalia verbis,
Consultoque fui iuris Amore vafer*

I made the betrothal in words dictated by him,
And I deliberately became expert in law through Love⁴⁸).

As one of Ovid's editors has commented, this letter has "a legalistic ring to it"⁴⁹). Whether, as the same editor claims, the letter "turns the very notion of law on its head"

⁴⁶) Gai. 3,92. The Digest does not require precise verbal correspondence of question and answer: D. 45,1,1,6 (Ulpian 48 ad Sab.) expressly approves the validity of stipulations where the question is in one language and the answer in another.

⁴⁷) Cf. Kupiszewski, *Verlöbniß* (Fn. 4) 154, where conclusions about the legal effects of *sponsalia* are deduced from silence in the plays.

⁴⁸) Ov., *Heroides* 20, lines 29–30 and English translation P.M. A more poetic translation is given in H. Isbell, *Ovid, Heroides*, London 2004, 204: "He wrote the bond of our betrothal;/ Love became a lawyer and taught me new tricks". Cf. the translation in Anonymus, *A New Translation of Ovid's Epistles into English Prose*, London, 31767, 263: "I inscrib'd a Marriage-Contract in Words dictated by him; it was by following his Suggestions, that I became so expert in the Law." 'Marriage-Contract' is perhaps suggestive of the (anonymous) translator's view of *sponsalia*.

⁴⁹) Isbell, *Ovid* (Fn. 48) 202.

is more doubtful⁵⁰); at least, it rather depends on what “the very notion of law” is, and the kind of law that Acontius finds himself having to rely on is clearly of a technical, unmeritorious kind. What is very obvious, however, is that Acontius is trying to stand on his legal rights, more or less acknowledging that he has no claim to the high moral ground. As with the Plautus texts discussed earlier, it is, of course, important to handle fictional sources with care; but what makes Ovid’s poem so valuable in our context is that it specifically argues that Cydippe’s words created a legal obligation that she was bound to fulfil. The case is actually a very striking one when seen against the background of D. 23,1, because the texts of that chapter have traditionally been understood to mean that even the use of formal stipulatory language between parties who were physically present could not create binding *sponsalia*. Yet Ovid’s description of Cydippe’s predicament flatly contradicts this, and the position that it illustrates suggests (and supports) a more natural reading of those texts in 23,1 where jurists emphasise that the criteria for a valid stipulation need no longer be met by parties to *sponsalia*: The point they were making is surely that legal obligations are created despite the informal agreement⁵¹).

VII. If the interpretations set out above are accepted, the legal status of *sponsalia* is both far more straightforward than, and radically different to, what has previously been understood. Book 23,1 of the Digest ceases to be a kind of oddly hollowed-out explanation of a concept that is only relevant for certain limited aspects of *infamia*, gifts between spouses, etc. Instead it can be given its more natural meaning as an exposition of the principles governing the legal liabilities arising from betrothal agreements. The jurists who contributed to it can be seen as writing on a topic of contemporary legal relevance, and as developing principles that Ulpian could trace back to the *veteres*, rather than engaging in inconsequential chattering among themselves. Nor, on his interpretation, is there any mystery about Varro’s account of the legally binding nature of *sponsalia*.

There does, however, remain one puzzle. Servius in his work on dowries, as quoted by Aulus Gellius, discussed both the law and practices of Latins in relation to *sponsalia*. If the legal point was all about different formal requirements in Latium and Rome, what was the difference in practice? Servius’ lengthy account of the litigation process in Latium suggests that things were different in Rome; but what Servius describes is an entirely orthodox *condictio* for breach of a stipulation. Servius’ point must surely have been that it was unusual to see orthodox claims for damages being brought in Roman courts. It is easy to see how this decline in litigation might have come about. The most obvious damages claim following breach of *sponsalia* would have been for loss of a promised dowry – indeed, it may well be no coincidence that the passage was taken from Servius’ monograph on dowries, where he may have been commenting on how dowries had previously been claimed. The use, in classical law, of *dotis dictio* to promise a dowry would have removed such claims from the scope of an action to enforce *sponsalia*⁵²), and there was also a significant change in the husband’s underlying rights. In early law the dowry was his to keep; but later the right

⁵⁰) Ibid.

⁵¹) D. 23,1,4; D. 23,1,7.

⁵²) Gai. 3,95a; Thomas (Fn. 4) 263–264, particularly 264 Fn.47.

to retain it became more and more tightly regulated, until, by the end of the Republic, the husband was effectively a temporary steward⁵³). It would, in other words, have become increasingly difficult to demonstrate what financial loss the fiancé had suffered as a result of losing the dowry. Other losses would also have been difficult to quantify, particularly following the rise of free marriages, which would have made it impossible for a claimant to insist that he or she would inevitably have been entitled to certain benefits during the course of the relationship. Servius may well have been making the point that what made the inhabitants of Latium unusual was their persistence in demanding that judges estimate losses the nature of which made them almost impossible to quantify accurately. It was not a point about the legal status of *sponsalia*, but about how different communities enforced their rights; a point not about law, but about the social practices that surrounded it.

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⁵³) P. Du Plessis, *Borkowski's Textbook on Roman Law*, Oxford 2015, 131–134; Thomas (Fn. 4) 428–431; J. Stagl, *Favor dotis, Die Privilegierung der Mitgift im System des Römischen Rechts*, 2009, 237–248.

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