BOOK V

LIBER V

Prooemium

Fuerunt et clari quidem auctores, quibus solum videretur oratoris officium docere ; namque et adfectus duplici ratione excludendos putabant, primum quia vitium esset omnis animi perturbatio, deinde quia iudicem a veritate depelli misericordia gratia similibusque non oporteret, et voluptatem audientium petere, cum vincendi tantum gratia diceretur, non modo agenti supervacuum, sed vix etiam viro dignum
2 arbitrabantur ; plures vero, qui nec ab illis sine dubio partibus rationem orandi summoverent, hoc tamen proprium atque praecipuum crederent opus, sua confirmare et quae ex adverso proponerentur refutare.
3 Utrumcunque est (neque enim hoc loco meam interpono sententiam), hic erit liber illorum opinione maxime necessarius, quia toto haec sola tractantur ; quibus sane et ea, quae de iudicialibus causis iam
4 dicta sunt, serviunt. Nam neque prooemii neque narrationis est alius usus, quam ut iudicem huic praeparent ; et status nosse atque ea, de quibus

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[1] *cp.* Ar. *Rhet.* I. i. 4 Also Quint. IV. v. 6.
[2] See III. vi.

BOOK V

Preface

There have been certain writers of no small authority[1] who have held that the sole duty of the orator was to instruct: in their view appeals to the emotions were to be excluded for two reasons, first on the ground that all disturbance of the mind was a fault, and secondly that it was wrong to distract the judge from the truth by exciting his pity, bringing influence to bear, and the like. Further, to seek to charm the audience, when the aim of the orator was merely to win success, was in their opinion not only superfluous for a pleader, but hardly worthy of a self-respecting man. The majority however, while 2
admitting that such arts undoubtedly formed part of oratory, held that its special and peculiar task is to make good the case which it maintains and refute that of its opponent. Whichever of these views is 3
correct (for at this point I do not propose to express my own opinion), they will regard this book as serving a very necessary purpose, since it will deal entirely with the points on which they lay such stress, although all that I have already said on the subject of judicial causes is subservient to the same end. For the purpose of the *exordium* and the *statement of facts* is merely to prepare the judge for these 4
points, while it would be a work of supererogation to know the *bases*[2] of cases or to consider the other

supra scripsimus, intueri supervacuum foret, nisi ad
5 hanc perveniremus. Denique ex quinque quas iudicialis materiae fecimus partibus, quaecunque alia potest aliquando necessaria causae non esse; lis nulla est, cui probatione opus non sit. Eius praecepta sic optime divisuri videmur, ut prius, quae in commune ad omnes quaestiones pertinent, ostendamus; deinde, quae in quoque causae genere propria sint, exsequamur.

I. Ac prima quidem illa partitio ab Aristotele tradita consensum fere omnium meruit, alias esse probationes, quas extra dicendi rationem acciperet orator, alias, quas ex causa traheret ipse et quodam modo gigneret. Ideoque illas ἀτέχνους, id est inartificiales, has ἐντέχνους, id est artificiales, vocaverunt.
2 Ex illo priore genere sunt praeiudicia, rumores, tormenta, tabulae, iusiurandum, testes, in quibus pars maxima contentionum forensium consistit. Sed ut ipsa per se carent arte, ita summis eloquentiae viribus et adlevanda sunt plerumque et refellenda. Quare mihi videntur magnopere damnandi, qui totum hoc
3 genus a praeceptis removerunt. Nec tamen in animo est omnia, quae aut pro his aut contra dici solent, complecti. Non enim communes locos tradere destinamus, quod esset operis infiniti, sed viam quandam

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[1] III. xi. [2] III. ix. 1; IV. iii. 15.
[3] *Rhet.* I. ii. 2.

points dealt with above,[1] unless we intend to proceed to the consideration of the *proof*. Finally, of the five parts[2] into which we divided judicial cases, any single one other than the *proof* may on occasion be dispensed with. But there can be no suit in which the *proof* is not absolutely necessary. With regard to the rules to be observed in this connexion, we shall, I think, be wisest to follow our previous method of classification and show first what is common to all cases and then proceed to point out those which are peculiar to the several kinds of cases.

I. To begin with it may be noted that the division laid down by Aristotle[3] has met with almost universal approval. It is to the effect that there are some proofs adopted by the orator which lie outside the art of speaking, and others which he himself deduces or, if I may use the term, begets out of his case. The former therefore have been styled ἄτεχνοι or *inartificial* proofs, the latter ἔντεχνοι or *artificial*. To the first class belong decisions of previous courts, rumours, evidence extracted by torture, documents, oaths, and witnesses, for it is with these that the majority of forensic arguments are concerned. But though in themselves they involve no art, all the powers of eloquence are as a rule required to disparage or refute them. Consequently in my opinion those who would eliminate the whole of this class of proof from their rules of oratory, deserve the strongest condemnation. It is not, however, my intention to embrace all that can be said for or against these views. I do not for instance propose to lay down rules for commonplaces, a task requiring infinite detail, but merely to sketch out the general lines and method

atque rationem. Quibus demonstratis, non modo in exsequendo suas quisque vires debet adhibere, sed etiam inveniendo similia, ut quaeque condicio litium poscet. Neque enim de omnibus causis dicere quisquam potest saltem praeteritis, ut taceam de futuris.

II. Iam praeiudiciorum vis omnis tribus in generibus versatur: rebus, quae aliquando ex paribus causis sunt iudicatae, quae exempla rectius dicuntur, ut de rescissis patrum testamentis vel contra filios confirmatis; iudiciis ad ipsam causam pertinentibus, unde etiam nomen ductum est, qualia in Oppianicum facta dicuntur et a senatu adversus Milonem; aut cum de eadem causa pronuntiatum est, ut in reis deportatis et assertione secunda et partibus cen-
2 tumviralium, quae in duas hastas divisae sunt. Confirmantur praecipue duobus: auctoritate eorum, qui pronuntiaverunt, et similitudine rerum, de quibus quaeritur; refelluntur autem raro per contumeliam

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[1] *pro Cluent.* xvii. *sqq.* [2] *pro Mil.* v.

[3] Banished persons who have been accused afresh after their restoration.

[4] When a slave claimed his liberty by *assertio* through a representative known as *assertor*, his case was not disposed of once and for all by a first failure, but the claim might be presented anew.

to be followed by the orator. The method once indicated, it is for the individual orator not merely to employ his powers on its application, but on the invention of similar methods as the circumstances of the case may demand. For it is impossible to deal with every kind of case, even if we confine ourselves to those which have actually occurred in the past without considering those which may occur in the future.

II. As regards decisions in previous courts, these fall under three heads. First, we have matters on which judgment has been given at some time or other in cases of a similar nature: these are, however, more correctly termed precedents, as for instance where a father's will has been annulled or confirmed in opposition to his sons. Secondly, there are judgments concerned with the case itself; it is from these that the name *praeiudicium* is derived: as examples I may cite those passed against Oppianicus[1] or by the senate against Milo.[2] Thirdly, there are judgments passed on the actual case, as for example in cases where the accused has been deported,[3] or where renewed application is made for the recognition of an individual as a free man,[4] or in portions of cases tried in the centumviral court which come before two different panels of judges.[5] Such previous decisions are as a rule 2
confirmed in two ways: by the authority of those who gave the decision and by the likeness between the two cases. As for their reversal, this can rarely be

[5] The meaning is not clear. The Latin suggests that portions of a case might be tried by two panels sitting separately, while the case as a whole was tried by the two panels sitting conjointly. The *hasta* (spear) was the symbol of the centumviral court. *cp.* XI. i. 78.

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