

Section 12. LAW AND RHETORIC

A. CICERO, *PRO CAECINA*

(H. Grose Hodge ed., Loeb Classics, 1927), 86-205 [original footnote numbering retained]

INTRODUCTION

The facts in Caecina's^a case are briefly as follows:

§1. Marcus Fulcinius, on his marriage to Caesennia, invested her dowry in the purchase of an estate, and, shortly before his death, bought some more land adjoining it. By his will his wife inherited a life-interest in his property conjointly with the heir, their son. But the son died, and the terms of his will made it necessary for his heir, Publius Caesennius, to put the inheritance up for auction in detail. At this sale Caesennia decided to invest the money she inherited from her son in buying the land, formerly her husband's, which adjoined her own estate, and she commissioned Aebutius to act for her. Caesennia took possession of this land, let it, and shortly afterwards died, making Aulus Caecina her heir, and leaving a small sum to Aebutius. Aebutius challenged Caecina's qualification to be heir and claimed the land as his own. As a usual preliminary to settling the question, Caecina agreed to meet Aebutius on the land in dispute and submit to formal "ejection" from it; but on arrival he was prevented from entering and driven away by the threats of Aebutius and his armed followers. Accordingly he applied for and obtained an injunction ordering Aebutius to restore him. Aebutius denied liability: a wager^b was made raising the issue and "Recoverers"^b were appointed to try it.

§2. The arguments of Aebutius's counsel, as reconstructed from this speech, and Cicero's reply to them on behalf of Caecina, may be tabulated as follows:

ARGUMENT OF PISO			REPLY OF CICERO		
1		Caecina was not "ejected" but excluded: he had not entered on the same estate.	1.		This is a quibble: the two things are the same.
2.		No "force" was really used: no one was hurt.	2.		Force, in the legal sense, means any extra-legal means of redress.
3.	(i.)	The injunction specifies possession.	3.	(i.)	Yes, the ordinary injunction; but not this one which deals with "armed men."
	(ii)	Caecina was not in possession.		(ii.)	a. Caesennia had possession through her life interest: Caecina, as her heir, inherited her possession.
					b. Caecina had personally taken possession by entering on and receiving rent for the land.

^a The *i* appears, from the best authorities, to be short.

^b See Introduction, §7 D.

^b See Introduction, §7 D.

					c. Aebutius had recognized him as possessor of the estate both by serving him with a formal notice about it and by agreeing to a formal ejection of Caecina.
4.		Caecina was not the owner, and had no more right to possession than any adventurer.	4.		The whole story of the land shows it was Caecina's: Aebutius's witnesses prove nothing but the original sale and purchases.
5.		Caecina, as being a Volaterran, was disqualified from inheriting.	5.	(i)	Citizenship, like freedom, cannot be taken away.
				(ii)	Sulla's law hedges on the point.
				(iii)	Volaterrae was only reduced to the status of Ariminum, whose citizens retained their rights of inheritance.

§3. From the fact that the court, after two hearings of the case, was unable to come to a decision, it would appear that the case admitted of considerable doubt, and we need not take too seriously the reasons which Cicero suggests for the postponement of the verdict. The facts were mostly admitted by both sides: the real issue was a legal one. Nor is it easier for us than it was for the court to decide the rights and wrongs of the case, for we do not know the exact state of Roman law in the days of Cicero. On the whole it would appear that later jurisprudence, at all events, upheld the definitions of "ejection" and "force" by which he answered his opponent's first two arguments, as set forth in the preceding section. His view of Sulla's law (the terms of which we do not possess) and of the formal savings clause which it contained appears to be pressed too far; but his answer generally to Piso's fifth argument is sound and was probably convincing. With the fourth argument he hardly deals at all: it is the third argument—the question of possession—upon which modern critics are least in agreement and which may well have been responsible for the hesitation of the court.

§ 4. French critics tend to uphold Cicero's view of the matter: there were two distinct and different injunctions, distinctly and differently worded. The first, or "ordinary" injunction, dealing simply with forcible ejection, specified that the petitioner for restoration must have had flawless possession at the time of his ejection: in the second, which dealt with forcible ejection by armed men, no mention of possession is made. Possession is therefore an irrelevant question in Caecina's case.

To this the German critics, generally, reply that Cicero's argument was a false interpretation, if not a false statement, of the terms of the two injunctions; and that—as we know to have been the case in Ulpian's time—possession was required in both injunctions alike.

The probability is, not so much that Cicero was misquoting the actual terms of the second injunction, as distorting the sense of the first; the point which was not that the petitioner must have been in possession: that was assumed as obvious; but that his possession must have been flawless. Possession was assumed also by the second injunction, but as it need not be flawless, it was not expressly mentioned. Mr. Roby^a thinks, therefore, that "Cicero adroitly in the interest of his client seized on the apparent difference in the wording of the two injunctions," and laid a false emphasis on the clause in the "ordinary" injunction which specifies possession and on its absence from the second injunction; whereas the mere fact of possession is unimportant in the first and assumed in the second.

§5. Cicero's pleading appears, however, not to have failed in its effect upon those to whom it was originally addressed; for it is probable, though not certain, that he won his case. We know at all events that he remained on good terms with Caecina, who, in subsequent correspondence between them,^a styles himself his old client; and we know, too, that Cicero was proud of the speech which he made on this occasion.^b

^a H.J. Roby, *Roman Private Law*, vol. ii. Appendix.

^a Cic. *Ad Fam.* vi. 5-9.

^b Cic. *Orator*, xxix. § 102.

§6. Whether or no the speech was successful, he had good cause to be proud; for in it “Cicéron apporte une connaissance profonde du droit. Il discute en maître les termes du texte dont on veut se servir contre lui. Il prouve en suite, avec finesse, que la lettre et le sens de la loi sont en faveur de la cause dont il s’est chargé. Il saisit enfin l’occasion que lui fournit Pison de sortir d’une argumentation pleine d’intérêt, mais un peu trop technique, pour s’élever à de nobles considerations sur la liberté et le droit de cite. Son éloquence s’épanche alors librement sur des sujets qu’il affectionne. Discussions minutieuses, mouvements oratoires, plaisanterie fine, pathétique, Cicéron met tout en œuvre pour faire triompher son client et nous donne ainsi une haute idée de ce que devaient être, dans l’antiquité romaine, les débats judiciaires. Mais il y a, dans ce discours, plus que de la science, de l’habilité, de l’éloquence; un amour véritable pour la justice et pour le droit s’y révèle a toutes les pages et il résulte de la lecture de ce plaidoyer une émotion pénétrante qui fait que Cicéron gagne encore sa cause devant la postérité, comme il a dû la gagner devant les récupérateurs.”^c

Those who feel that such praise is more enthusiastic than discriminating will none the less appreciate the exceptional interest of the *Pro Caecina* to the student of Roman law and antiquities; and will at all events be unlikely to cavil at such measure of praise as Cicero, in referring to this speech, bestowed upon himself: “res involutas definiendo explicavimus, ius civile laudavimus, verba ambigua distinximus.”^a

§7. NOTE ON THE PROCEDURE IN THE *PRO CAECINA*

A. SPONSIO was the earliest and therefore the most sacred method of making any agreement between citizens, of whatever nature. One party put a question to the other (beginning *spondesne?* do you pledge yourself?) as to whether he undertook the obligation in question. The other replied *spondeo*, I do; and the agreement was completed.

At law, any case might be tried on a *sponsio*, which became a sort of wager. One party would “pledge himself” to pay a certain sum to his opponent if or unless (*sive nive*, § 65) his side of the case were found to be true. This sum might be the actual penalty to the loser of the case or a mere formality.

A *sponsio* was the proper procedure when, as in the present case, a man desired to deny his liability to an injunction. Aebutius would make a formal promise to pay a certain sum “*nisi restitisset...*” “if he had not restored...”

B. POSSESSIO, possession, is defined by Mr. Roby as “occupation either by yourself or by someone else for you, with the intention to hold as of right for yourself.” It is distinct from absolute ownership, *dominium*, on the one hand, and, on the other, from usufruct or life-interest, which gave only the right to occupy and to enjoy the “use and fruits” of whatever was subject to the usufruct.

C. THE INTERDICTUM or injunction was a “police order” designed to safeguard possession. Anybody who thought that his right as a possessor had been infringed might apply to the praetor to issue an injunction in his favour, ordering the person named as defendant to do something or to refrain from doing it or to restore what he had taken from the plaintiff’s possession.

In the present case, the procedure, after an ordinary ejection, would have been for the praetor to issue in Caecina’s favour against Aebutius the “ordinary” injunction *de vi*, dealing merely with ejection by force, in the following terms: *unde tu, Sexte Aebuti, aut familia, aut procurator tuus, Aulum Caecinam aut familiam aut procuratorem illius, hoc in anno vi deiecisti, cum ille possideret, quod nec vi nec clam nec precario a te possideret, eo restituas* (“that you, Sextus Aebutius, or your servants or your agent, do restore Aulus Caecina, his servants or his agent, to the place whence you have in this year ejected^d him by force, he being in possession, without having gained it from you by force or stealth or request”)

But because Aebutius actually employed armed men and real violence, Caecina obtained from the Praetor the *interdictum de vi armata*, dealing with ejection by force of arms, which ran as follows: *unde tu, Sexte Aebuti, aut familia aut procurator tuus Aulum Caecinam, aut familiam, aut procuratorem illius, vi hominibus coactis armatisve deiecisti, eo restituitus* (“that you, Sextus Aebutius, or your servants or your agent do restore Aulus Caecina, his servants or his agents, to the place whence you have ejected him by force through men collected together and armed”).

^c Armand Gasquy, *Cicéron jurisconsulte*, pp. 255, 256.

^a Cicero, *Orator*, xxix. §102.

^a An adequate translation of the word *deicere* has proved often difficult, and sometimes (as in §§38 and 50) impossible: no single word in English fits all the contexts. It has therefore seemed best to use the words “eject” and “drive out” as alternatives.

Wishing to deny his liability to comply with this injunction, Aebutius had the alternative either of submitting to arbitration or of entering into a wager (*sponsio*) with Caecina which would raise the issue. He chose the latter course, and “recoverers” (*recuperatores*) were appointed to try the case.

D. RECUPERATORES or “recoverers” were originally persons nominated by the *praetor peregrinus* to settle informally disputes arising between citizens and non-citizens: their presence in this case is probably due to the fact that Caecina’s claim to be a citizen was disputed. They were probably three in number.

ANALYSIS OF THE SPEECH

(Chapter i.) Aebutius originally put himself in the wrong, though perhaps not at a disadvantage, by using an admittedly ultra-legal degree of force in ejecting Caecina. (ii.) The failure of the court hitherto to condemn him must be due either to a false impression that the legal issues are highly complicated or to an improper reluctance (iii.) to disgrace him. But he has brought it on himself: there is no other way of dealing with him.

(iv.) This case arises out of the widowed Caesennia’s inheritance; (v.) the management of which Aebutius contrived to get into his own hands: (vi.) in particular, he acted as her agent in the purchase of an estate. When she died, she made Caecina her heir and left Aebutius a trifling legacy. (vii.) Not content with this, Aebutius denied Caecina’s claim to be her heir and said that the estate in question was his own. Caecina decided to raise the issue by submitting to formal “ejection by force” from the estate; but when he went there by agreement, (viii.) Aebutius threatened to kill him if he advanced and twice made a murderous attack on him when he tried to do so. He therefore fled and applied for an injunction. (ix.) Aebutius’s illegal violence is attested by his own witnesses, (x.) all except the last—the notorious perjurer, Staienus.

(xi.) Such being the facts, what form of redress is open to me? (xii.) Dare you say that there is none? An action for assault is useless to me: (xiii.) so is procedure by any injunction other than the present one. Your argument is a mere quibble: (xiv.) I was ejected—whether just before or just after entering makes no difference. To say that actual physical force was not used (xv.) is equally disingenuous. (xvi.) Force in the legal sense was used in plenty.

(xvii.) A merely literal interpretation makes nonsense of the injunction (xviii.) or of any other combination of words. It is the spirit that matters, (xix.) as is shown by precedent. Examine the injunction (xx.) phrase by phrase: the terms employed—“servants,” “agent,” (xxi.) “collecting together,” “armed men”—(xxii.) are all meant to be widely interpreted.

(xxiii.) You object to my quoting the Legal Authorities (xxiv.) but they are of the highest value: (xxv.) to disparage them is to disparage the Law, (xxvi.) the mainstay of our civilization, (xxvii.) against lawlessness like that of Aebutius. My particular authority is too honoured a name for you to asperse; (xxviii.) and the lawyer you yourself quote has admitted to me that I have on my side even the letter of the law (xxix.) on which you challenge me. Caecina was ejected—though not necessarily from the estate in question.

(xxx.) The fact is that each expression in the injunction is a general one—not least the expression “whence” which was designed to cover my case, (xxxi.) as you know well enough. The question of possession is irrelevant, (xxxii.) for it is not mentioned in this particular injunction.

(xxxiii.) As for Caecina’s alleged inability to inherit, as being a Volaterran and therefore disfranchised, citizenship is something that cannot be taken from anyone. (xxxiv.) Instances quoted to contradict this prove on examination to be false analogies. (xxxv.) Besides, no attempt was made to” disfranchise Volaterran completely. To deny Caecina’s citizenship would be dangerous as well as absurd.

(xxxvi.) Every point raised by my opponent has been answered: Caecina is both morally and legally in the right.

THE SPEECH OF M. TULLIUS CICERO IN DEFENCE OF AULIUS CAECINA

I.1¹ If effrontery were as potent before a tribunal of justice as recklessness is effective in the lonely country-side, Aulus Caecina would have as little chance in the conduct of his case to-day against the effrontery of Sextus Aebutius as once he had in the employment of force against his audacity. However he considered that while circumspection forbade him to contend with arms over an issue which ought to be decided at law, resolution also bade him overcome by a legal process one against whom he declined to

¹ Editors have provided the *Pro Caecina* with two sets of references numbers. The section number is given in Roman numerals, normally at the beginning of the paragraph where the section begins. A system of line numbers is distributed throughout the speech quite at random, and is given in boldface.

fight with armed violence. **2** Personally I consider Aebutius to have displayed both conspicuous audacity in collecting and arming his followers and also effrontery in his legal proceedings, not only in daring to take such proceedings (for though the obvious nature of the case made even this a wrong thing to do, such conduct is common enough on the part of a rogue), but in not hesitating openly to admit the very point we seek to prove; unless indeed his idea was this, that—whereas previously had he used the customary amount of force, he would have been at no advantage when it came to retaining possession—because he used a degree of force contrary to law and custom, Aulus Caecina and his friends fled in a panic: so, too, at the present time and in these proceedings, if his defence were to follow universal custom and usage, we should be at no disadvantage in conducting our case, whereas, should precedent be abandoned, the more outrageous his conduct, the greater would be his advantage in the end. **3** As if indeed dishonesty were as efficient in a court of justice as is impudence in an affair of violence; and as if we did not yield the more gladly to his audacity on that occasion in order the more easily to withstand his effrontery on this! And so, gentlemen, my plans for the conduct of my case in these proceedings are very far different from what they were originally;^a for then the success of our case rested upon my powers in defence, now it rests on the admissions of my adversary: then I was relying upon our witnesses, but now upon theirs. These witnesses of theirs at one time caused me anxiety: if they were dishonest, they might lie; if they succeeded in passing for honest, what they said might be believed. Now I am completely happy about them: if they are good men, they help my case by saying on their oath what I, not on my oath, merely suggest; and if they are not so satisfactory, they do my case no harm: for if the court believes them, it believes the very point we seek to prove; and if it does not credit them, then my opponent's witnesses are discredited.

II.4 When, however, I consider my opponent's conduct of the case, I cannot imagine anything more outrageous; though when I consider your hesitation to pronounce judgement^b I am afraid that their apparently outrageous conduct may have been a shrewd and clever move. For had they denied the employment of force through armed men, they would have been easily and incontrovertibly met by unimpeachable evidence: but should they admit the fact and then put forward the defence that what can never be done lawfully was on that occasion lawfully done by themselves, they hoped—and their hopes were realized—that they would give you ground for deliberation and make you feel a legitimate scruple about deciding the case at once. And they further reckoned that—scandalous though it is that it should be so—the point at issue in this trial would appear to be, not the depravity of Sextus Aebutius, but a point of law. **5** Now if in this trial I had to maintain the cause of Aulus Caecina and of no one else, I should profess myself sufficiently qualified to defend it as guaranteeing honesty and effort on my part: given these qualities in counsel, there is no cause for exceptional ability, especially in so plain and simple a matter. But since I have to speak about the Law, which affects us all, which was established by our forefathers and has been preserved even to this day, the overthrow of which would not merely impair our rights in some respect but would seem to be lending the support of a legal decision to the use of force, which is the absolute antithesis of law; I realize that the case demands the highest ability, not to prove what a mere glance can see, but to prevent everyone supposing, should you be induced to take up a false position on so important a question, that it is rather I who have betrayed my cause than you your consciences.

6 I am, however, persuaded, gentlemen,^a that your reason for having twice shown yourselves reluctant to decide the same case was not any ambiguity or doubt you may have felt about the law, but the fact that this trial, seeming to strike at the very root of the defendant's honour, induced you to postpone your condemnation and so give him time to get his case together. This practice, which is becoming customary and is followed by honest men like yourselves when acting as judges, seems perhaps less reprehensible, though actually more deplorable, just because all legal processes are designed either for the settlement of

^a See Introduction, § 7 D.

^b See Introduction, § 3.

^a See Introduction, § 7 D.

disputes or the punishment of wrongdoing. Of these functions the former is the less serious, as it inflicts less suffering and is often determined by private arbitration; whereas the latter is drastic in the extreme, dealing as it does with grave matters and calling, not for the informal assistance of a friend, but for the stern and trenchant action of a judge. 7 And now the weightier function, the chief purpose for which our courts exist, is abrogated by this evil practice. For the more heinous the offence, the greater and the speedier should be the retribution. But that is precisely the case which, because it imperils a man's honour, is the slowest to be decided. III. How can it, then, be right that the very cause responsible for bringing the courts of justice into being should also be responsible for delay in passing judgement? In a case of solemn contract, he who does not perform an obligation which he has taken upon himself by pronouncing a single word,^a is promptly condemned without any scruple on the part of the judge. But in the case of fraud arising over a wardship, a partnership, an informal contract, or the return of a security, the slowness of the punishment is proportionate to the gravity of the offence. 8 "Yes," you say, "for the sentence involves infamy." Of course, because it is passed upon infamous conduct. How unfairly it comes about, then, that whereas dishonour is the penalty for evil conduct, that very conduct should remain unpunished just because dishonour is its penalty!

And if any judge or assessor^a were to say to me "But you might have brought your action by a less stringent process: you might have secured your rights by an easier and more convenient form of trial; so either adopt; a different process or do not press me to pronounce judgement," he would none the less seem either more nervous than a resolute judge ought to be or more presumptuous than a wise one; for either he is lacking in the courage to try the case himself or he is seeking to prescribe the method which I am to employ in pursuing my rights. 9 For if the praetor,^b he who gives leave to bring an action, never prescribes to a claimant what form of action he wishes him to employ, how unfair it is that, when that leave has definitely been obtained, the judge should consider not the line that is being taken but that which may be or might have been taken! None the less we should gladly take advantage of your excessive kindness, if it were possible for us to recover our rights by any other process. But in the circumstances, is there anyone who either supposes that violence through armed men ought to go unpunished, or can inform us of any less stringent process for dealing with it? When the offence is one of those to which, as our opponents are so fond of asserting, a charge of assault is proper or even a capital charge, can you accuse us of vindictiveness when you see that all we ask is to recover possession through the praetor's injunction?

IV. But, whether it is the danger to which the defendant's honour is exposed or your uncertainty on a point of law which has made you hitherto reluctant to deliver judgement—as to the former, you have yourselves removed it by your frequent adjournments of the case; all grounds for the latter I will this very day remove forthwith, leaving you no further ground for hesitation about either the issue between us or the general right. 10 And if you should think that I am going further back in tracing the origins of the case than I am obliged to do by the principle of law involved, the point of law under dispute or the nature of the case, I crave your indulgence. For my client is as anxious not to seem to be pressing his rights to the uttermost as he is not to fail in obtaining the rights that are manifestly his.

There was one M. Fulcinius, gentlemen, a native of Tarquinii, who in his native place enjoyed an eminently honourable reputation and at Rome had a considerable business as a banker. He was married to Caesennia, a lady from the same township, of honourable family and approved character, as he made known in many ways during her life and after his death declared by his will. 11 To this Caesennia he sold an estate in the districts of Tarquinii during those times of financial stringency,^a and as he was using the cash which had comprised his wife's dowry, he took the precaution of charging the dowry on the farm in

^a The single word was *spondeo*. "I pledge myself."

^a See Introduction. § 7 D.

^b Part of the praetor's duty was to decide whether an action should be heard, and when.

^a *i.e.* in the time of Sulla.

order to give her, as a woman, better security for it. Some time afterwards Fulcinius gave up his banking business and bought some land in continuation of and next to this estate of his wife's. Fulcinius died—I will pass over many points in the story because they are unconnected with this case—and in his will made his son by Caesennia his heir, subject to a life interest on her part in all his property, to be exercised conjointly with her son. **12** She would have appreciated this great honour done her by her husband could it have been hers for long; for she would have been sharing her interest in his property with the son whom she hoped would be the heir to her own, and who was her greatest interest in life. But of this interest fate deprived her prematurely; for in a short time the young Marcus Fulcinius died, making Publius Caesennius his heir, subject to the payment of a large sum of money to his wife and the greater part of his property to his mother. In these circumstances the two women were notified to take their shares.

V. **13** It was decided to sell by auction^a the property thus bequeathed: whereupon Aebutius there, who had long been battenning upon Caesennia's lonely and widowed situation, and had insinuated himself into her confidence through his system of undertaking on her behalf, with some advantage to himself, any business or dispute that might arise, was also engaged at this particular time over this matter of selling and dividing the estate, obtruding himself and pushing himself forward and inducing Caesennia to believe that a woman's inexperience was incapable of conducting a good business transaction without the presence of Aebutius. **14** The character which you know from your daily experience, gentlemen, to belong to a flatterer of women, a widows' champion, a litigious attorney, a frequenter of the Basilica,^b a clumsy fool among men but a shrewd and clever lawyer among women—such is the character which you should ascribe to Aebutius, for such did he prove himself to Caesennia. Perhaps you may ask: "Was he a relation of hers?" Far from it. "An old friend of her father's or her husband's?" No one less so. "Who was he, then?" Why, the very man whose portrait I have just given you, the lady's self-constituted friend, connected with her by no tie of relationship but by obtrusive kindnesses and feigned good offices and by services which, occasionally undertaken in duty to her, were more often beneficial to himself. **15** When, as I had begun to say, it was settled to hold the auction at Rome, Caesennia's friends and relations began to persuade her (and the same idea was occurring to her independently) that as she had the chance to buy the estate which had belonged to M. Fulcinius and which adjoined her own original farm, there was no reason to let such an opportunity slip, especially as money was owing to her from the division of the property, which could not be better invested. This therefore she decided to do: she gave a commission to buy the farm to—whom indeed? Whom do you think? Does it not occur to everyone of you that this was essentially the business of the man who was ready to undertake all the lady's business, without whom no adequate foresight or shrewdness was possible? You are right. The business was entrusted to Aebutius.

VI. **16** Aebutius attends at the sale.^a He does the bidding. Many purchasers are deterred, some by consideration for Caesennia, some too, by the value of the property. The estate is knocked down to Aebutius. Aebutius promises the money to the banker^b—a fact which our worthy friend is now using as evidence that he bought the estate for himself. As if indeed we denied that it was knocked down to him! Or as if anyone doubted at the time that it was being purchased for Caesennia; since most people knew it, everyone had heard it, and anyone who had not heard it might have guessed it, inasmuch as money was owing to Caesennia under this will, as far the best investment for this money would be in land, as the particular land which was much best suited to the lady's needs was for sale, as the bidder was one whom no one was ever surprised to find acting for Caesennia and as no one could suppose he was making the purchase for himself. **17** For the purchase thus concluded the money was found by Caesennia, though our friend calculates that no record of the transaction can be produced because he himself has made away

^a At such an auction the heir sold so much of the estate as was necessary to enable him to discharge the legacies subject to which he had inherited the whole estate (*universitas*).

^b A colonnade (βασιλική) in the Forum, apparently a common resort of disreputable characters.

^a Literally, the board to which an announcement of the auction was affixed.

^b The banker kept a written record of the transactions and, at the conclusion of the sale, received and disbursed all payments due.

with the account books, while retaining in his own possession the banker's book in which the price was entered on the debit side of his account and then carried over to the credit side. As if any other procedure would have been correct! After the conclusion of the whole affair in the manner I have maintained, Caesennia took possession of the estate and let it. Shortly afterwards she married Aulus Caecina. To bring my story quickly to an end, she died, after making a will in which she bequeathed twenty-three twenty-fourths of her estate to Caecina and one thirty-sixth part to M. Fulcinius, a freedman of her first husband's, throwing in a seventy-second part for Aebutius.^a This seventy-second part she intended as an acknowledgement of his devotion to her affairs and of any trouble they might have caused him. Our friend, however, looks upon this fraction as giving him a handle for raising disputes about everything.

VII.18 He started by having the effrontery to say that Caecina could not be Caesennia's heir, since he had not full rights like other citizens by reason of the disability and the civil degradation to which the Volaterrans were subject. And so I suppose, like a timid and inexperienced man, lacking both in courage and resource, my client did not think it worth while, for the sake of the inheritance, to have any doubts cast on his rights as a citizen, and gave way, to Aebutius, letting him keep whatever of Caesennia's estate he wanted! No indeed! He acted like a brave and wise man, and crushed this foolish and dishonest claim. 19 Now as he was in possession of the property, and Aebutius was making out his seventy-second share to be greater than it was, he asked, in his capacity as an heir, for an arbiter to divide the inheritance. In the course of the next few days, realizing that nothing could be squeezed out of Caecina by the threat of a lawsuit, Aebutius formally notified him in the Forum at Rome that the estate of which I have already spoken and which I showed that the defendant purchased on the instructions of Caesennia, was his own, bought by him for himself. What? Is Aebutius the owner of the estate of which Caesennia was indisputably in possession for four years, that is, from the day it was sold until she died? His answer is: "Yes; for she had been left a life interest in it under her husband's will."

20 While Aebutius with such evil intent was planning this singular kind of lawsuit, Caecina decided on the advice of his friends to fix a day on which he should repair to the actual place and be formally ejected from the estate. A conference was held and a day chosen to suit both parties. Caecina came with his friends on the appointed day to the castle of Axia, from which the disputed estate was not far distant. There he was informed by several people that a large band of freedmen and slaves had been collected and armed by Aebutius. While some were astounded at this and others refused to believe it, behold! Aebutius himself came to the castle, gave Caecina notice that he had armed men with him and swore that if he got as far as the property he should never go away again. Caecina and his friends decided to make the attempt notwithstanding, as far should appear possible without endangering their lives. Leaving the castle they set out for the estate. 21 I think it was rash of them to do so, but the reason for it was, I imagine, that no one supposed that Aebutius would be as rash in his actions as in his threats. VIII. The defendant, then, stationed armed men at every possible way of approach not only to the estate under dispute but even to the adjoining one, about which there was no contention. And so, in the first instance, when Caecina wanted to enter the original estate, because that was the nearest way to the other, he was confronted by a crowd of armed men.

22 Repulsed from this spot, Caecina none the less started to make his way as best he could to the estate on which it had been agreed that he should submit to force: the boundary of this estate is marked by a straight row of olive-trees. When he reached these trees, the defendant was waiting for him with all his forces, and calling to him one of his slaves named Antiochus, he ordered him in a loud voice to kill anyone who came within the row of olive-trees. Caecina, whom I consider a cautious man, seems to have displayed in this instance more spirit than sense. For although he saw the crowd of armed men and heard the remark of Aebutius which I have quoted, he none the less came nearer and was actually passing within the boundary of the land delimited by the olive-trees, when Antiochus rushed at him sword in hand: the rest threw missiles at him and charged; and he fled before them. His friends and supporters,

^a A testator's property was looked upon as a unit (*as*) divisible into twelfths (*unciae*) which were again subdivisible.

panic-stricken, fled simultaneously as you heard my opponent's own witnesses say. **23** Such being the facts of the case, the praetor, P. Dolabella, issued the usual injunction "concerning force through armed men,"^a ordering Aebutius, without any saving clause, merely to "restore to the place whence he had ejected." Aebutius replied that "he had restored."^b A wager at law^c was concluded: on that wager you have to pass judgement.

IX. What Caecina would have most desired, gentlemen, was to have no quarrel with anyone: in the next place, to have no quarrel with such a knave; and in the last, to have his quarrel with such a fool! For actually Aebutius's folly does us as much good as his knavery does us harm. A knave he was, in that he collected men together, armed them and "used force by means of men collected together and armed." Therein he did Caecina harm, and therein, too, he does him good; for he procured evidence of the very deeds which his knavery perpetrated and that evidence he brings forward at this trial. **24** And so I am resolved, gentlemen, before I come to present my case and summon my own witnesses, to make use of his admissions and his witnesses. What is his admission, gentlemen—made with a readiness which suggests that he is not merely making but actually volunteering it? "I summoned my men: I collected them together, armed them and withstood your approach with the fear of death and by threatening your life." "By the sword," says he, "by the sword," yes, and he says it in a court of law, "I drove you back and routed you."

Again, what say his witnesses? Publius Vetilius, his neighbour, says that he came on the summons of Aebutius with some armed slaves. What further? That there was a large number of armed men. What else? That Aebutius threatened Caecina. **25** What am I to say about this witness, gentlemen, except that I hope you will not believe him the less because he is little worthy of credence, but will believe him for the very reason that his story, told in my opponent's interest, is most unfavourable to my opponent's case? The second witness, Aulus Terentius, charges not only Aebutius but himself with a heinous crime. Against Aebutius he says that there were armed men there; but against himself he proclaims that it was he who gave the order to Aebutius's slave Antiochus to attack Caecina with his sword if he came on. What further am I to say about this man? I never meant to say what I have said against him, although Caecina asked me to do so, for fear of seeming to be bringing a capital charge against him; but now I am wondering how I can either speak or fail to speak about him, inasmuch as he proclaims this information about himself on his oath. **26** Next comes Lucius Caelius, who, in addition to stating that Aebutius was attended by a very large body of armed men, adds that Caecina came to the spot with a very small body of supporters. X. Am I to disparage this witness? No, I demand that you believe him equally with my own witnesses. There followed P. Memmius who recorded the considerable kindness which he had done to Caecina's friends in affording them, as he said, a way of escape through his brother's land when they were all in a state of panic. I will ask this witness to accept my thanks for having shown himself merciful in his conduct and scrupulous in his evidence. **27** Aulus Atilius and his son Lucius Atilius stated both that armed men were there and that they brought thither their own slaves; and they said further that when Aebutius was threatening Caecina with hurt, Caecina then and there demanded that his ejection should take place formally. The same statement was made by P. Rutilius and all the more gladly for the hope of at last securing credence for his evidence in a court of law! Two more witnesses gave evidence, though not about the use of force but only about the original facts and the purchase of the estate. Then came Publius Caesennius, the vendor of the estate, a man of greater physical than moral weight; and Sextus Clodius, the banker, surnamed Phormio, no less black and no less brazen than the Phormio in Terence:^a they gave no evidence about the use of force—or anything else relevant to your court.

^a See Introduction, § 7 C.

^b A formal way of denying liability.

^c See Introduction, § 7 A.

^a The *Phormio* of Terence takes its name from its leading character, a parasite.

28 The tenth witness to give evidence, anxiously awaited and reserved for the last, a member of the Roman Senate, the glory of his order, the pride and ornament of the law courts, the model of old-time uprightness, was Fidiculanus Falcula; and although he came into court in so violent and bitter a spirit as not only to attack Caecina with his perjuries but even to appear enraged against myself, I so far calmed and soothed his feelings that, as you remember, he dared not say a second time how many yards his farm is distant from the city. For when he said “Nearly 50,000,” the people laughed and cried out, “The very sum!”^a For everyone remembered how much he had received at the trial of Oppianicus. **29** As for him, what am I to say against him save what he cannot deny—that he attended the session of a public tribunal although not one of the jurors at that session;^b and that, in the course of it, although he had not heard the case, and an adjournment was possible, he voted “guilty”; that, since he decided to pronounce judgement on the case without having heard it, he preferred voting “guilty” to voting “not guilty”; and that, since the accused could not have been convicted had there been one vote less given against him, his purpose there was not to investigate the case but to ensure a conviction? ^b **30** Can anything worse be said against anyone than that he took a bribe to condemn a man whom he had never seen or heard? Or, again, can any allegation be made with more certainty than one which the object of it cannot attempt to dispute even by shaking his head? Yet this is the witness who (as if to convince you that he was not paying attention while my opponent was pleading his case and his witnesses were giving evidence but that his thoughts meanwhile were with the accused^c at some other trial) alone, and despite the statement of all the previous witnesses that there were armed men with Aebutius in large numbers, said that there were none. At first I thought that the old villain clearly realized where his interest lay in the case and was only making the mistake of discrediting all the previous witnesses: but suddenly he himself again and said that two armed slaves were there. I ask you, Aebutius, what are you to do with a man like that? Must you not occasionally allow him to escape the reproach of superlative wickedness by pleading his superlative stupidity?

XI.31 Was it, gentlemen, that you did not believe these witnesses on the occasion when you could not agree on a verdict?—and yet they were indisputably speaking the truth—or was it that you could not make up your minds to decide whether or no the collection of a numerous body, the presence of arms and missiles, of an instant fear of death and a manifest danger of murder, in any way amounted to the use of force? What circumstances may be understood to amount to force, if not these? Or was it indeed that you were so greatly impressed by my opponent’s defence—“I did not eject you; I withstood you; for I did not allow you to enter on the estate, but placed armed men in your way in order to convince you that if you did set foot on it, you must perish forthwith”? What is this you say? A man who has been by force of arms frightened away, put to flight and driven off—has he not, in your opinion, been ejected? **32** We will consider the appropriate expression later on; for the moment, let me take for granted the facts of the case which my opponents do not deny, and examine the law and procedure relevant to those facts.

The following fact is taken for granted and not denied by my opponents, that Caecina, arriving on the appointed day and at the appointed hour in order formally to submit to forcible ejection, was driven off and debarred from entry by force, by means of men collected together and armed. As this is agreed, I, unskilled as I am in the law and unversed in the business of litigation, consider that there is a legal process which enables me to maintain my rights and to deal with the injury you have done me by means of an injunction. **33** Suppose that I am mistaken in this and that it is quite impossible for me to attain my ends by this injunction—I am anxious to be your pupil in this matter: I ask you, is there any legal process available in my case or is there none? The collecting of men together because of a disputed ownership is

^a Falcula was supposed to have received 40,000 sesterces to vote Oppianicus “not guilty” and the people were reminded of this by his saying “nearly 50,000”: his words could be taken as referring either to yards or to sesterces. See the *Pro Cluentio*, §§ 103, 104, and 113, where a different view of his character is given.

^b See the *Pro Cluentio*, § 74. There were 32 jurors, and the voting must have been 17 to 15 for conviction: had it been equal, the accused would have been given the benefit of the doubt.

^c Presumably Oppianicus, about whom he had a guilty conscience; see the *Pro Cluentio*.

not right: the arming of a mob in order to maintain a right is inexpedient: nothing is so inimical to private rights as force, nor anything so hostile to public justice as that men should be collected together and armed.

XII. This being so, and the case appearing preeminently one for cognizance by the magistrates, I ask, again: “Is there any legal process in my case or is there none? “None,” will you say? I am anxious to hear. **34** Is one who has, in a time of peace and quiet, raised a band, levied a force, collected a crowd of men, armed them, drawn them up, and who, by force of arms, by numbers, by fear and by danger of death, has driven away, put to flight, and turned back unarmed men who had come by agreement for the purpose of going through a legal process—is such an one to say: “I did indeed act in all respects as you describe, and such actions are both riotous, reckless, and dangerous. **35** But what of that? I acted with impunity; for law and equity alike^a give you no remedy against me”? Does he indeed say that, gentlemen? Will you listen to such a statement and suffer it to be made in your presence more than once? Inasmuch as our forefathers displayed such care and foresight as to prescribe and secure every right that everyone possesses, not only in important like this, but even in the slightest matters, would they have failed to do so in this single and most important instance, with the result that I have a remedy against the man who compels me to leave my house, but no remedy against the man who prevents me from entering it? I am not yet arguing about my client’s case, I am not yet speaking of our right to possession; what I am objecting to now is your defence, Gaius Piso.^a For your speech and your conclusion amount to this: that, if Caecina had been ejected from the farm when actually on it, in that case he would have had the right to restitution by means of this injunction; but, as it is, he was in no sense “ejected” from a place in which he was not; and that we have gained nothing by this injunction: I ask you, then, what would you proceed to do if, on your return home to-day, you were prevented by men collected together and armed from entering not merely the door-way and the actual interior of your house but even the forecourt by which it is approached? My friend Lucius Calpurnius advises you to give the same answer as he once gave: “an action for assault.” But what has that to do with possession or with restitution of the man who ought to be restored or, indeed, with either the civil code or the praetor’s notice and cognizance?^b Suppose you bring your action for assault: nay, I will grant you more than that, suppose you not only bring your action but win it, you will not be any nearer, will you, to possession? For an action for assault does not seek to establish a right to possession: it merely consoles a man for interference with his liberty by trying and punishing his assailant.

XIII.**36**² Will the praetor, Piso, have nothing to say meanwhile about so important a matter? Will he have no power to restore you to your house? Will the praetor, who spends his whole day either in securing that force shall not be used or in counter-acting it if it has been, who issues his injunction in the matter of ditches and drains and trifling disputes over rights of water and of way—will he, I say, be suddenly struck dumb and be found without resource to meet so iniquitous a state of things? Will he be without the means to relieve Gaius Piso, according to usage and precedent, when debarred from entering his own house and home, debarred, I say, by means of men collected together and armed? What terms will he employ, or what will you, in the face of so notable an injury, demand that he use? “Whencesoever you have been by force debarred”? No such injunction has ever been issued: it is an innovation not merely unusual but unheard of. **37** “Whence you have been ejected”? How will that help you when your opponents will give you the same answer as you are now giving me, that they used arms to prevent you entering the house and no one can possibly be ejected from a place he never entered? “I am ejected,” you

^a The *ius civile* was based on statute law, available only as between citizens and administered by the *praetor urbanus*. The *ius praetorium* was based on custom and equity and was embodied for the benefit of non-citizens in the “perpetual edict” administered by successive provincial governors. Its greater readiness and adaptability caused it to be increasingly preferred even by citizens.

^a Counsel for Aebutius.

^b See note, p. 128.

² The argument that follows is interesting in that it assumes that there are remedies for all wrongs. CD.

say, “if a member of my household is ejected.” By all means. Now this is good pleading; for you are forsaking the wording and appealing to the spirit of the law. For if we choose to abide by the actual words, how is it you who are ejected when your servant is ejected? But you are right—I am bound to consider you ejected even though you were not touched, am I not? Come now, suppose that not even one member of your household has been removed, but that all of them have been kept safely in the house, and that you alone have been debarred and frightened away from your house by force of arms, will you be entitled to employ either the same procedure which we are now employing, or a different one or none at all? To say that no procedure is available in so signal and scandalous a case is consistent neither with your common sense nor with your position: if there be some other which I may have failed to notice, pray inform me what it is: I am anxious to learn. **38** But if it be this same procedure which we have employed, your own judgement gives us the verdict. For I have no fear of your saying that in identical cases the same injunction should restore you but not Caecina. **39** Who indeed can fail to see that all men’s goods, fortunes and tenures are reduced to insecurity if this injunction be in any respect lessened in scope or weakened in power; if the violence of armed men appear, on the authority of men like yourselves, to be sanctioned by a court of law, a court in which, as will be said, the question of arms was not disputed, discussion being confined to a question of words? Shall your verdict be given to the man who defends himself by saying, “I drove you back by armed men, I did not drive you out,”^a giving the impression that so infamous a deed owed its immunity not to the equity of the defence but to a single letter^b in the law? Shall your decision be that there is no legal process to meet this case, no right prescribed for raising the issue at law, when a man has been debarred by means of armed men, by the collecting together of a multitude, from effecting not merely an entry but even an approach?

XIV. How now? What force has the contention that there is any sort or kind of difference between my being expelled and ejected after I have entered and taken possession by setting foot inside, and my being attacked by the same force and with the same arms before I do so, and thus prevented from entering, nay, even from beholding or approaching my objective? What difference is there between the two cases such as to enforce the restitution of a man who has been expelled after making entry but not to enforce that of a man who has been expelled as he was making entry? **40** In Heaven’s name consider what decision you are minded to impose upon us, what a position upon yourselves, nay, what a law upon the Commonwealth! One process only has been framed to meet a case of this kind, that is, procedure by the injunction which we are now employing. If this process be non-effective or in-applicable to this case, then what negligence or what stupidity could be more gross than that of our forefathers, who either failed to frame any process to deal with so grave a matter or framed one such as to give wholly insufficient expression to the nature of the case or the principle of law involved? Dangerous as it is that this injunction should be annulled; universal as is the peril if any set of facts be held to preclude the undoing by law of what has been done by arms; even so the greatest shame of all is this—that wise men should be found guilty of such folly as theirs must have been if you decide that no process at law to meet this case occurred to the minds of our forefathers.

41 “We may, indeed, regret it,” says Piso, “but, none the less this injunction is not applicable to Aebutius.” How so? “Because force was not used upon Caecina.” Can it be said in this case that where there were weapons, a multitude of men collected together, drawn up and stationed at definite positions under arms, where there was menace, peril and fear of death, there was no force? “No one,” he replies, “was either killed or wounded.” What? When we are dealing with a dispute over possession, a private action at law, will you say that no force was used unless murder and killing took place? I remind you that great armies have often been routed and put to flight merely by the terror inspired by the enemy’s onset without a man being killed or wounded.

^a See Introduction, § 7 C, note.

^b The difference between the letters ‘r’ and ‘d.’

XV. **42** In truth, gentlemen, force which touches our persons or our lives is not the only form of force: much more serious is the force which removes a man from a definite position or situation by exposing him to the danger of death and striking terror into his mind. Thus there are many cases of wounded men whose minds refuse to give way, though their bodies are weakened, and who do not abandon the position they are resolved to defend; others, on the contrary, are driven back although unscathed; which proves that a greater degree of force is brought to bear upon the man whose mind is terror-stricken than on the man whose body is wounded. **43** But if we say of armies which have been put to flight by the fear or sometimes by the vaguest suspicion of danger, that they have been driven back by force; if we have both seen and heard tell of great armies driven back, not by the weight of the enemy's shields nor the shock of impact, not by blows struck in close combat nor missiles hurled from a distance, but often enough just by the shouting of the foe, his battle-array and the sight of his standards, shall not that which is called "force" in war be called the same in peace? Shall that which is termed vigour in the conduct of a soldier be adjudged as mildness under citizen law? Shall not that which dislodges hosts arrayed in arms be held to have dislodged a concourse of citizens in the garb of peace? Shall we consider a maimed body better evidence of force than a terror-stricken mind? **44** Shall we go looking for wounds when the rout is an accepted fact? For it was one of your own witnesses who stated that he pointed out a way of escape to my client's terror-stricken supporters. Shall it be held that no force was used on those who sought not merely to flee but to find a way by which to flee in safety? Why were they fleeing? Because they were afraid. Afraid of what? Obviously, of force. Can you then deny the cause when you admit the effect? You confess that they fled in terror; the reason for their flight you state to be what we all know it was—arms, a multitude, the furious onset of armed men. When this is an admitted fact, can it be denied that force was used?

XVI. **45** And yet this at any rate is a time-honoured principle, supported by the constant practice of our forefathers, that when there was a meeting for the exercise of force, the party which caught sight of armed men, however far away, might secure evidence of the fact and depart immediately, as being perfectly entitled to make a wager at law in the form beginning: "If no force has been used in contravention of the praetor's edict."^a Is this so? Is it enough to be aware that armed men are present, in order to prove the use of force, but not enough to fall into their hands? Shall the sight of armed men constitute a proof of force and shall their furious onset constitute no proof? Shall it be easier for a man to prove that he was subjected to force if he walked away than if he ran away? **46** I go so far as to say that had Caecina immediately departed as soon as Aebutius told him at the castle that he had collected and armed his men and that if Caecina reached the property he would never leave it, you would have had no grounds for doubting that Caecina was subjected to force: still less doubt would you feel, had he withdrawn the moment he saw armed men in the distance. For anything constitutes force which, by the threat of danger, either compels us to leave or prevents us from reaching any place. Should you decide otherwise, beware lest your decision amount to this—that no force has been employed upon a man who goes away alive: beware lest you be directing all men engaged over a disputed right of possession to the conclusion that they must decide their quarrel by an armed conflict: beware lest the punishment meted out by generals to the cowardly in war find its counterpart in the courts, and the weaker case be theirs who have fled rather than theirs who have fought to the last. **47** When we are speaking of rights and disputes at law and in that connexion use the word "force," a very slight degree of force should be understood. I saw armed men, however few: this is an instance of great force. I was frightened away by a missile thrown by a single man: I was ejected and expelled. If you so decide, you will remove all future motive for resorting to battle over possession; nay more, there will be no motive even for accepting battle. But if you understand by force nothing which is unaccompanied by slaughter, wounds and the shedding of blood, you will be deciding that men ought to think more of possession than of life itself.

XVII. **48** Come now, Aebutius, you shall yourself pronounce judgement on the question of force. Answer me, if you please. Was Caecina in fact unwilling to enter on the estate or was he unable? In

^a See Introduction, § 7A.

saying that you withstood my client and drove him back you admit that he had the will to enter on it. Can you, then, say that it was not force which hindered him, when he was debarred from entering by a gathering of men although he desired to enter and had come there with that intention? For if he was absolutely unable to do what he was extremely anxious to do, then some force must inevitably have prevented him; otherwise, pray tell me why, when he desired to enter, he did not do so.

49 Nay, but you cannot deny that force was used: the question is how, since he failed to enter, he was “driven out.” For if a man is to be driven out he must needs be removed and displaced. But how can he be, if he has never once been in the place out of which he claims to have been driven? Well, suppose he had actually been there and had fled in terror at the sight of armed men, would you say that he had been driven out? I think you would. Will you, then, who show such care and skill in settling disputes by the letter and not the spirit of the law, and who interpret laws in the light rather of their wording than of the general good—will you, I say, bring yourself to state that a man has been driven out without having been touched? Or will you say that he has been “thrust out”—for that was the word the praetors were formerly in the habit of using in this injunction? Well, can anyone “thrust out” without being touched? Surely if we mean to go by the words, we must understand that, for a man to be thrust out, hands must be laid on him. I repeat, it is impossible, if we wish to give the word its fair value, to hold that anyone has been thrust out, unless it be clear that he had been dislodged and driven headlong by personal application of force. 50 And how can anyone be literally “ejected” unless he has been removed from higher to lower ground? He may be expelled, put to flight or evicted; but “ejected” he cannot be if he is not touched, or even if the ground is flat and level. What then? Do we imagine that this injunction was framed for the benefit of those who claimed to have been thrown headlong down from a height (for they it is who can rightly be styled “ejected”) or shall we rather, since the intention, design and meaning of the injunction is clear to us, reckon it a piece of consummate impudence and of unparalleled stupidity to be concerned over a verbal error while abandoning, nay betraying, the facts of the case and the interests of the public?

XVIII. 51 Can it indeed be doubted that neither our own language, which is said to be deficient,^b nor even any other, contains so large a store of words as to distinguish every concept by a definite and peculiar term; or indeed, that words are superfluous when the concept is clear for the expression of which words were originally invented? What statute, what senatorial decree, what magisterial edict, what treaty or agreement or (to speak once more of our private concerns) what testament, what rules of law or undertakings or formal pacts and agreements could not be invalidated and abolished, if we chose to sacrifice the meaning to the words without taking into account the design, the purport, and intention of the writer? 52 Why, the familiar speech of every day will not have a consistent meaning if we set verbal traps for one another. Even our authority at home will cease to exist if we allow our slave-boys to obey our orders to the letter only, without paying any attention to the meaning implied in our words. And now I suppose I must produce examples of all these points; as though indeed everyone of you cannot think of some example, whether in one connexion or another, to support my plea that right does not depend on words, but that words are subservient to the purpose and the intentions of men. 53 This opinion was supported by the great orator, Lucius Crassus, in an elegant and ample speech before the centumviral court^a shortly before I was called to the bar;^b and although the learned Quintus Mucius^c was against him he proved to everyone, and with ease, that Manius Curius, who was to succeed to an estate “in the event of the death of a posthumous son,”^d was entitled to succeed although the son was not dead—never, in

^a The point, which it seems impossible to bring out in English lies in the derivation of the word “*deiectus*” from *de* (down) and *iectus* (thrown). See Introduction, § 7 C, note.

^b Compare Lucretius, i. 832 “*patrii sermonis egestas*.” Cicero always denies the “poverty of our native tongue.”

^a A special court of 105 persons chosen annually for the hearing of civil suits, especially those dealing with inheritance.

^b Cicero was called in 93 B.C.

^c Quintus Mucius Scaevola, the Pontifex Maximus (see § 67), of whom Cicero had been a devoted pupil.

^d A posthumous son, in the Roman sense, was one born after the father’s will had been made, and not necessarily after his death. [Cf. below, *De oratore*, p. 606. CD]

fact, having been born! Well, did the wording of the will provide adequately for this situation? Far from it. Then what was the deciding consideration? Intention; for if our intention could be made clear without our speaking, we should not use words at all; but because it cannot, words have been invented, not to conceal but to reveal intention.

XIX. **54** By statute, property in land is to be determined by two years possession; but we adopt the same principle in the case of houses, which are not specified in the statute. By statute, if a road is impassable, a man may drive his beast by any way he likes:^a the actual words can be held to mean that if a road in Bruttium is impassable, a man may, if he likes, drive his beast through the estate of Marcus Scaurus at Tusculum. A form of action lies against a vendor, if present in court, beginning with the words “whereas I see you in court...”: this form could not be used by old Appius Claudius^b if people kept strictly to the words without considering the meaning which it is the object of words to express. If an estate had been left by will to “Cornelius the Minor,”^c and Cornelius were now twenty years old, he would lose his inheritance according to your interpretation.

55 A great number of instances occur to me, and still more to you, I feel sure, but in order not to extend my survey unduly and not to wander too far from the point, let me deal with the actual injunction with which we are concerned; for it will be clear to you in the case of this particular injunction, that, if we make right dependent upon words, we shall be losing all benefit from it as long as we like to exercise our ingenuity and cunning. “Whence you or your household or your agent...” If your steward alone had driven me out it would not have been your household, surely, that had done so, but a member of your household. Would you then be entitled to reply, “I have restored”?^d Certainly, for what is easier than to prove to anyone, provided he knows Latin, that the word “household” does not apply to one single slave? And suppose you actually had no other slave beside the one that drove me out, doubtless you would exclaim: “I admit that it was my household that drove you out—if I have one!” It cannot be doubted that if our judgement is to follow the letter and not the spirit of the law, we understand a household to consist of several slaves and that a single slave is not a household; the actual word not only requires but compels this interpretation; **56** and yet such a line of defence is rejected with contumely by the principles of law, the force of the injunction, the purpose of the praetor, the design and intention of wise legislators. XX. What then? Are those I mention not speaking good Latin? On the contrary, their Latin is good enough to make clear what was their intention when they resolved that, whether it be you who drive me out or one of your associates or slaves or friends, they would describe the slaves collectively as your household without specifying their number, while describing any free person concerned as your agent: not that anyone who undertakes business for us is our agent or is so described; **57** but the sense in the particular case being perfectly clear, they declined to make a minute investigation of every word. For it makes no difference to the equity of the case whether one slave was concerned or more than one: it makes no difference to the legal principle—at all events in this instance—whether I was driven out by your agent (giving the word “agent” its legal sense of a man practically in the position of owner of all the property belonging to someone not in Italy or absent on State service, that is, one who possesses the rights of another as his representative) or whether it was your tenant or neighbour or client or freedman or anyone else who, at your request or in your name, effected the forcible ejection in question. **58** Wherefore, if the principle of equity has the same force in the case of a person forcibly ejected, it is surely irrelevant, once that is established, to consider the force of words and names. You will make the same “restitution” if your freedman has ejected me, though not commissioned with any business of yours, as if your agent has: not that anyone who undertakes business for us is our agent, but that the question is in this case irrelevant. You will make the same “restitution” if it be a single slave who has done it as if it had been your entire household: not that your one slave is the same as your household, but because we are concerned, not with

^a That is, through the particular estate over which he has a right of way.

^b Appius Claudius Caecus, the famous censor in 312 B.C., who was blind.

^c A boy attained his majority at fourteen.

^d See note ^b on § 23.

the wording, but with the content of each clause. And even if (to depart still further from the wording though no whit from the spirit of the law) it was no slave of your own, but all those concerned belonged to other people or were hired, even they will none the less be classed together and described as your household.

XXI. **59** Let us proceed with our examination of this same injunction. “Through men collected together.” Suppose you did not collect anybody but they came of their own accord. Without doubt collecting means assembling and inviting, and people are said to be collected when they have been assembled by someone into one place. Suppose that, so far from being invited to assemble, they did not assemble at all, and that the only people concerned were those who had habitually frequented the place before the occurrence for the purpose not of using force but of tillage and pasturage: you will then raise the plea that there had been no collecting together of men, and on the verbal issue you will secure the verdict though I myself be your judge; but in point of actual fact you will not even be able to stand your ground whoever your judge may be. Our legislators intended restitution in cases of force employed by a number of persons and not only when those persons had been collected together; but because it is usual to collect people when numbers are needed, the injunction was framed to deal with “men collected together.” So that, even though there seems to be a verbal difference yet it will be one and the same thing, and the effect will be the same in all cases where the principle of equity is seen to be one and the same.

60 “Or armed.” What shall we say of that? Whom, if we wish to speak good Latin, can we properly style armed men? Those, I suppose, who are provided and equipped with shields and spears. Well, suppose you have used clods, or sticks, or stones to drive a man headlong from his farm and are ordered to restore “him whom you have driven out by means of armed men”: will you say, “I have restored”?^a If it is words that count, and phrases rather than principles that carry weight in a case, then you have my leave to say it. You will doubtless establish your point that those who threw stones picked up by themselves from the ground were not armed men, that clods and turf are not arms, nor were those “armed” who broke off a branch in passing: that arms are, by their definition, some for defence, some for offence; and you will establish your point that men who had no such weapons were unarmed. **61** If “arms” form the subject of a suit,^b then by all means bring those points forward; but where the subject of the suit is law and equity, beware of taking refuge in so poor and empty a subterfuge. For you will not find a single judge or assessor who will accept the term “an armed man” only in the sense suitable to a military arms-inspection: on the contrary, those who are found in possession of the means to cause death or physical hurt will on those grounds be held to have been armed to the teeth.

XXII. **62** In order that you may better understand how unimportant are mere words, suppose that you or anyone else had attacked me singly with sword and shield and I had been thereby driven out, would you dare to say that the injunction specifies armed men but here there was only one armed man? I do not believe you would have the effrontery. And yet, take heed that your effrontery in the present case be not far greater. For in the imaginary case you might have appealed for pity to all the world because, in dealing with your suit, the court was forgetting its Latin and holding unarmed men to be armed men, and because, while the injunction specified more than one man, and the deed was done by one only, the court was holding one man to be more than one.^a **63** But in the present case the issue before the court is not

^a See note ^b on § 23.

^b *Armorum iudicium* was the title of a play by Pacuvius, Cicero’s allusion to which would have been understood by his audience. [It is just possible that the argument ridiculed by Cicero here was employed by the adherents of the Henry Beaufort, hishop Winchester, who, having been forbidden to appear “armed” in parliament in 1426, arrived carrying large clubs. Cicero’s *Pro Caecina* was discovered by the Italian humanist, Poggio Bracciolini, who announced his discovery at the council of Constance in 1417. Beaufort attended the council and invited Poggio to visit him in England, which the latter did from 1418 to 1423. See D. Daube, “Cicero and the Parliament of Bats,” *JRS* 30 (1940) 53–5, in *id.*, *Collected Studies in Roman Law* (Frankfurt, 1991), 1:103–5. CD]

^a The injunction *de vi armata* (see Introduction. § 7 C) specifies *hominibus armatis* (armed men). Cicero imagines his assailant pleading that, in order to make these words applicable to him, either some other (presumably unarmed) men were included as “armed” or his single self was referred to as plural.

one of words but of the actual facts which caused these words to be employed in the injunction. It was intended that “restitution” should be made for the use of force in every case without exception affecting human life; and this usually comes about through the collecting and arming of men: if force were used with a different intention but with the same dangerous result, the same law was intended to apply. For the wrong done is no greater whether it was your household or your steward, whether your own slaves or slaves that you had borrowed or hired, whether your agent or your neighbour or your freedman, whether it was by men collected together or by casual helpers or even by your regular staff, whether by armed men or by unarmed, provided that they were as capable as armed men of inflicting hurt; whether by one armed man or by more than one. For it is those means which are usually employed to produce force that are correspondingly specified in the injunction: if other means are used to produce it, even though not included in the terms of the injunction, they come none the less within the meaning and purport of the law.

XXIII. **64** I come now to that argument of yours, “I did not drive him out of the farm for I never let him reach it.” I believe you realize yourself, Piso, how much more quibbling and inequitable such an argument is than it would be to argue “they were not armed men: they only had sticks and stones.” I swear that if I, poor speaker that I am, were offered the choice of maintaining either that a man is not driven out when opposed by force of arms in the act of entering, or that those were not armed men who had neither shields nor swords—as for establishing it I should find either proposition weak and unsubstantial enough, but as for making a speech, I think I could find something to support the second proposition, that is, that those were not armed men who had nothing by way of sword or shield; but I should indeed be at a loss if I had to maintain that a man who has been put to rout and to flight is not driven out.

Then there is that statement of yours—the most **65** astounding thing, I thought, in the whole of your defence—that we ought not to defer to legal authorities.^a This is not the first occasion on which I have heard it said nor have I heard it only in this case; but why you should say it I am completely at a loss to know. Most people betake themselves to an argument of that kind when they feel that they have in their case some fair and just contention to maintain: if they are met with an appeal to the wording and the letter or, as the saying goes,^b to “the utmost rigour of the law,” they usually counter unfairness of that kind with the honourable and weighty plea of fairness and justice. Then it is that they pour scorn on the formulas with their “ifs” and “if nots,” cry shame on verbal catches and the snares involved in a letter, and loudly protest that a case must be decided by what is fair and just and not by legal trickery and cunning. “A false accuser,” they say, “adheres to the letter of the law, a good juror to the meaning and intention of him who framed it.” **66** But in this case of yours, when you are the one whose defence is based upon the strict letter of the law; when it is you who take the line: “Whence were you driven out? From a place which you were prevented from reaching? You were driven away, not driven out”—though it was you who said, “I admit that I collected men together; I admit I armed them; I admit I threatened you with death; I admit I am liable under this actual praetorian injunction as far as its intention and fair interpretation are concerned; but I can take shelter behind a single word which I find in the injunction: I have not driven you out of a place which I have prevented you from entering”—when that, I say, is your defence, your ground of complaint against the authorities^a is the opinion they record that we should be guided by the spirit and not by the letter of the law. XXIV. **67** And in this connexion you remarked that Scaevola lost his case in the centumviral court; but I have already reminded the court^b that when he took the same line

^a It was customary for eminent lawyers, *iuris consulti*, to sit in the Forum and give their advice (*ius respondere*) to those who consulted them. In imperial times qualified persons were granted the *ius respondendi*, and their rulings were recognized as authoritative.

^b The saying was “Summum ius, summa iniuria.”

^a See note on § 65.

^b See § 53.

as you (though he had some reason for doing so and you have none) he failed to commend his arguments to anybody because it appeared that he was using the letter to assail the spirit of the law.

I am indeed surprised that you should have taken this line in the present instance—at the wrong moment and against the interests of your case; and it is equally surprising to me to find the same argument, that neither should the authorities^a be followed nor should the law invariably be allowed to decide the case, commonly maintained in trials and not infrequently by able men. **68** For if those who maintain this view assert that the authorities are wrong on some point, that is no reason for saying that no attention should be paid to the authorities, but that no attention should be paid to foolish individuals. But if they admit that the opinions given by the authorities are right and still say that judgements should be at variance with them, they are stating that wrong judgements should be given. For it cannot possibly be right that the judgement of the court and the opinion of the authority should differ on a point of law or that anyone should be accounted a legal authority if what he decides to be law ought not to be followed in the law courts. **69** “But the courts have sometimes gone against the authorities.” Have they, in the first place, done so rightly or wrongly? If rightly, that was law which the court laid down: if otherwise, there is no doubt which deserve abuse, the jurors or the authorities. In the next place, if a court has decided some doubtful point of law, it is no more going against the authorities if giving a ruling of which Mucius^a did not approve, than it is relying on them in deciding conformably with the view of Manilius.^b Why, Crassus himself did not take the line he did in pleading before the centumviral court, in order to disparage the authorities, but to convince the court that the point which Scaevola^c was maintaining was not law; and in addition to the arguments he adduced to support his contention he went so far as to quote the authority of many learned men, including that of his father-in-law, Quintus Mucius.^c

XXV. For he who thinks that the law is to be despised is sundering the bonds which maintain not only judicial procedure but the well-being and life of the community; while he who finds fault with the interpreters of the law by calling them bad lawyers is aspersing the individuals and not the law. But in thinking that, though good lawyers, they deserve no attention, it is not the individuals that he is injuring: he is undermining law and justice. Wherefore you must needs adopt this conclusion, that no institution in our state deserves to be so carefully preserved as the law. Abolish law and there can be no means whereby the individual can ascertain what belongs to him and what to other people: there can be no universal and invariable standard. **71** And so it often happens in the ordinary disputes that come before a court, when it is a question of whether something is or is not a fact or whether an allegation is true or false, that a false witness suborned, forged documents are put in and sometimes, under the guise of fair and honest dealing, an honest juror is deceived or a dishonest juror afforded the chance of giving the impression that his wrong verdict, which was really intentional, was the result of his having been guided by the witness or the documents. In a question of law, gentlemen, there is nothing like that—no forged document, no dishonest witness; and even undue influence, which is all-powerful in public life, is here, and only here, inoperative; for it has no chance of getting to work, no opportunity to tamper with a juror, no means even of raising a finger. **72** For a man of more presumption than decency may say to a juror, “Give judgement that this took place or never took place: credit this witness, admit these documents”; but he cannot say, “Decide that a will is not invalidated by the subsequent birth of a son to the testator: give judgement that a promise is binding when made by a woman without the sanction of her trustee.”^a No man’s power, or influence either, can affect the decision in such a matter; and further—to show how exalted and inviolable the law is—not even money can corrupt a juror in such a connexion. **73** That very witness of yours^b who dared to

^a See note on § 65.

^a This is Quintus Mucius Scaevola, the Pontifex Maximus, an eminent jurist (see note c on § 53).

^b Manilius was a famous jurist whom Cicero often mentions.

^c This is Quintus Mucius Scaevola, the augur, also famous jurist.

^a A trustee was required by Roman law for women (and minors, etc.), whose father was dead; his sanction was required for any obligation which his ward wished to contract.

^b Fiducianus Falcus, see §§ 28 and 29 and footnotes.

pronounce a man guilty when he could not possibly have known even the charge against him, even he would never dare to give judgement that, if a woman settles her dowry on her husband without proper sanction,^a the settlement is binding.

XXVI. How splendid a thing is the law, gentlemen, and how worthy, therefore, of your protection! How may we describe it? The law is that which influence cannot bend, nor power break, nor wealth corrupt; if law be overthrown, nay, if it be neglected or insufficiently guarded, there will be nothing which anyone can be sure either of possessing himself or of inheriting from his father or of leaving to his children. **74** What does it profit you to possess a house or an estate left to you by your father or legitimately acquired in some other way, if you are not certain of being able to keep that which the law of ownership^a now makes yours, if the law be inadequately safeguarded and if our public code be unable to maintain our rights in the face of some private interest? What advantage is there, I say, in having an estate if all the rights fittingly prescribed by our forefathers in connexion with boundaries, possession, water, and roads can be upset or changed on any consideration? Believe me, the property which anyone of us enjoys is to a greater degree the legacy of our law and constitution than of those who actually bequeathed it to him. For anyone can secure by his will that an estate comes into my possession; but no one can secure that I keep what has become mine without the assistance of the law. A man can inherit an estate from his father, but a good title to the estate, that is, freedom from anxiety and litigation, he inherits not from his father but from the law. Rights of water, drawn or carried, rights of way for man or beast, he derives from his father, but he derives from the law his established title to all these rights. **75** Wherefore you ought to hold fast what you have received from your forefathers—the public heritage of Law—with no less care than the heritage of your private property; and that, not only because it is the law by which private property is hedged about, but because the individual only is affected if he abandons his inheritance, while the law cannot be abandoned without seriously affecting the community.

XXVII. So in the present case, gentlemen, if we fail to establish that a man who is proved to have been repelled and routed by force through armed men, has been “driven out by force through armed men,” Caecina will not lose his property, though he would bear the loss bravely if it so fell out: he will fail, for the moment, to recover possession of it, and that is all. **76** It will be the cause of the Roman people, the rights of the commonwealth, the property, the fortunes, and the claims to possession of us all which will again be brought into doubt and uncertainty. **77** Yours will be the responsibility for a decision and an ordinance in these terms: “With whomsoever you subsequently have a dispute over possession, you will be bound to ‘restore’ him only if you have driven him out after he has entered on the estate: but if, while he is in the act of entering, you meet him with an armed multitude and, while he is thus approaching, drive him away, put him to flight and turn him back, you shall not ‘restore’ him.” If it be the voice of law which declares that force consists not only in killing but in intention to kill, and the voice of lawlessness which declares that there is no force where no blood is seen to flow; if it be law which claims that a man is driven out if he is debarred from entering, and lawlessness, that no one can be driven out except from a place on which he has set foot; if it be law which deems that the first consideration should be the substance, the meaning, and the spirit of the law, and lawlessness that it should be twisted round to suit the terms and the letter; then do you, gentlemen, decide to which of these two voices belongs more of honour and of expediency.

Now it happens most conveniently at this point that there is absent from the court one who was here but recently and who has been a regular attendant throughout this case—I refer to that distinguished man, Gaius Aquilius. If he were present, I should be nervous about referring to his soundness of character and of judgement; both because he would be embarrassed at hearing his own praises and because a similar feeling of embarrassment would deter me from praising him to his face. His is the authority to which I am told by the other side that undue deference must not be paid. **78** Of such a man I am not afraid of saying more than you yourselves feel or would like to have recorded; and so I will say this, that undue weight

^a *Mancipium*, an ancient form of conveyance, for the transfer of *res mancipi*, that is, everything which in those early times was regarded as valuable (land, stock, slaves, etc.).

can never be attached to the authority of one whose judgement Rome has seen to be exercised in protecting, not in deceiving, her citizens; whose conception of law has never been divorced from equity; whose ability, industry and integrity have been, through all these years, ready and accessible for the service of the Roman people; who, as a man, is so just and good that he seems to be a jurist by nature rather than by training; whose wisdom and good sense suggest that the study of law has begotten in him not only some mere knowledge but goodness also; whose ability is so great and his integrity so apparent that whatever you draw from such a source you feel to be clear and pure. Wherefore you are entitled to our profound gratitude when you say that he is the authority on whom we base our defence. **79** I am indeed astounded to hear you say that you deem it a point against me when you describe him as the authority on my side, a partizan of mine.

However, what says the authority you claim as yours? “In whatever terms a proposal or a pronouncement has been framed ...” **XXVIII.** I have met personally one lawyer at least of that persuasion, the very man, I believe, whom you quote as the authority responsible for the arguments of your defence. He started to argue with me your contention that no one could be proved to have been driven out except from a place in which he had been, and made me the admission that the substance and the meaning of the injunction were on my side, though he held that there was no getting away from its actual terms. **80** I quoted many instances, including ancient precedent, to show that the justice and the principle of right and equity were very constantly at variance with the actual wording of a law, and that decisions had always been based on the interpretation which was the best supported and the most equitable. Whereupon he consoled me by pointing out that in this particular case I had no reason for anxiety, for the actual terms of the wager-at-law were in my favour if I would consider them carefully.

“How so?” I said. “Because,” said he, “Caecina was undoubtedly ‘driven out by force through armed men’ from some place or other: if not from the place to which he wanted to go, then assuredly from the place from which he fled.” “What of that?” “The praetor,” he replied, “issued an injunction ordering that he be restored ‘to the place from which he had been driven out,’ any place, that is, from which he had been driven out. **81** Now since Aebutius admits that Caecina was driven out from some place or other, he must inevitably have made a bad wager in answering that he had restored him.” Well, Piso, does it please you to join issue with me over words? Does it please you to make the course of justice and equity, the right to possession—not only my client’s but absolutely everyone’s—turn upon a word? I showed you what my opinion was, what was the practice of our forefathers, what course was consistent with the dignity of those who must decide our case: how that truth, justice and the general good combine to demand that we consider not the exact terms in which any particular law was framed but its purpose and its intention. You challenge me to a discussion of the terms: I will not accept without first lodging my objection. I say that your position is wrong: I say that it is untenable: I say that no law can possibly be adequate either in its terms or its provisions or its exceptions if through some word being either omitted or used in an ambiguous context, and despite the substance and intention of the law being obvious, it is to be interpreted according to the words which it employs and not according to the meaning it conveys.

XXIX.82 Now, since I have lodged my objection plainly enough, I take up your challenge. I ask you, was I driven out? Not indeed from the estate of Fulcinius, for the praetor did not order that I be restored “if I had been driven out from the estate,” but “to that place from which I had been driven out.” I was driven out—driven from my neighbour’s adjoining estate, through which I was making my way to the estate in question; driven from the road; driven out, assuredly, from some place or other, whether private or public. To that place the injunction has ordered that I be restored. You have asserted that you have restored me: I assert that I have not been restored in accordance with the praetor’s order. What are our arguments? Your case is doomed to fall, either by your own sword, as the saying is, or by mine. **83** If you take refuge in the meaning of the injunction and say that we must inquire which farm was meant when Aebutius was ordered to restore me; if you think it wrong that the arm of justice should be caught in a noose of words, then you are sheltering in my camp and behind my ramparts. That line of defence is mine—mine, I say! It is I who cry aloud, I who call Heaven and Earth to witness that since our forefathers made no provision under cover of which the use of armed force could be defended at law, the court is not

concerned with the footprints of the man who was driven out but with the action of the man who drove him out: that a man is driven out who has been put to flight, and that a man is subjected to force who has been put in danger of death. **84** But if on the other hand you abandon this position and shrink from holding it: if you challenge me to exchange what I may call the open field of equity for the crooked ways of verbal subtlety and all the obscurities of the letter, you will find yourself caught in just those snares which you are trying to set in my path. “I did not drive you out, I drove you back”—you think this is very smart: it is this that gives point to your defence; and upon this very point your case is doomed to fall! For my answer is: “If I was not driven out from the place I which I was prevented from reaching I was none the less driven out from the place which I did reach and from which I fled. **85** If the praetor has given orders that I be restored, without specifying to what place, then I have not been restored in compliance with his order.”

If, gentlemen, all this part of my argument seems to you less straightforward than my pleading usually is, I hope you will take into consideration first that it was not I but someone else who devised it; and further that, so far from having originated I do not even approve of it—I use it, not to support my plea but to answer theirs—and that I have the right to say that neither in the particular instance I quoted ought we to be asking what were the actual terms in which the praetor framed his injunction but what was the place intended when he framed it, nor in any case of “force used by armed men” should we ask where it was used but whether it was used; but that you, Piso, on the other hand, have no sort of right to plead that the actual terms should be considered where it suits you but not where it does not suit you.

XXX.**86** But at the same time, is there any possible answer to the statement I have just made, that not only the substance and the meaning of this injunction but even the terms in which it is framed are such as to leave no alteration desirable? Listen carefully, I beg you, gentlemen; for men of your capacity will recognize, not my foresight, but that of our forefathers;³ for what I am about to say is nothing that I have discovered but something that they did not fail to see. They realized that an injunction dealing with the use of force might be called for by two sets of circumstances—one being a claim by somebody that he had been forcibly driven out from the place in which he had been, the other, from the place to which he was going: one or the other of these cases may arise, gentlemen, but there is no third possibility. Now examine this point further. **87** If anyone drives my household from my estate, he drives me out of it; if anyone meets me with armed men outside my estate and prevents my entering it, he does not drive me out of it but away from it. To cover both these sets of circumstances, our forefathers devised one word calculated adequately to express both, in order that whether I be driven out of my estate or away from it, one and the same injunction might restore me to it, the one beginning “whence you...” The word “whence” covers the two cases, both the place out of which and the place away from which I was driven. Whence was Cinna driven?^a Out of the city. Whence Telesinus? Away from the City. Whence were the Gauls driven? Away from the Capitol. Whence the followers of Gracchus? Out of the Capitol. **88** So you see that the single word “whence” covers two things, the place out of which and the place away from which. Now, in ordering restitution “to that place,” the injunction does so in the sense that, if the Gauls had demanded of our ancestors to be restored to the place from which they had been driven out and had somehow had the force to gain their point, they would, in my opinion, have had to be restored not to the underground passage by which they had attacked the Capitol but to the Capitol itself. For this is plain: “whence you have driven out” means either “out of any place” or “away from any place.” “Thither thou

³ The Latin here is *maiores*, which can mean “forefathers” but probably does not in this context, because the interdict *de vi armata* had been adopted only a two years previously. CD.

^a The allusions are to: *Cinna*, a supporter of Marius, driven out of Rome during his consulship in 87 B.C. by his colleague, a supporter of Sulla.

Telesinus, leader of the Samnites, who were defeated by Sulla outside the Colline gate of Rome in 82 B.C.

The Gauls, repulsed, according to Cicero, in 390 B.C., but Livy’s account differs.

Tiberius Gracchus and his followers, who had taken refuge in the Capitol whence they were dragged by the forces of the Senate and murdered 133 B.C.

shalt restore”: this too is clear—you must restore to the actual place: if you have driven a man out of this place, restore him to this place; or if you have driven him away from this place, restore him to the actual place, not out of which, but away from which he was driven. For instance, if a man on a voyage had come near his own country but had been suddenly driven back from it by a storm and were to wish that since he had been driven away from his country he might be restored to it, he would, I think, be wishing that fortune might restore him to the place away from which he had been driven—not indeed to the sea, but to the actual city for which he was making. In the same way (for we are compelled to use analogies in order to catch the exact significance of words) a man who demands to be restored to the place away from which, that is, “whence” he has been driven, is demanding to be restored to the actual place itself.

XXXI.89 Not only do the words of the injunction lead us to this conclusion; the facts as well compel us to adopt this view and this interpretation. In truth, Piso (and here I return to the point I raised at the beginning of my speech), if anyone drives you out of your house by force through armed men, what will you do? I suppose you will proceed against him by this same injunction which we have employed. Well, and what will you do if someone prevents you by means of armed men from entering your home as you are returning to it from the Forum? You will employ the same injunction. 90 When, therefore, the praetor issues an injunction ordering that you be restored to the place from which you have been driven out, you will put the same interpretation on it as I am putting and as ought manifestly to be put; namely that, since the word “whence” covers both sets of circumstances, and the injunction orders that you be restored “to that place,” you have just as much right to be restored to your house if you have been ejected from the forecourt as if you had been ejected from the inside of the house.

And now, gentlemen, as if to remove all doubt that, whether you regard the substance or the letter of the injunction, you ought to give us the verdict, there rises out of the wreck and ruin of my opponent’s case the argument that a man can be “driven out” if in possession at the time but cannot possibly be so if not in possession; and accordingly, that if I am driven out of your house, I have no claim to restitution, but that if you are driven out yourself, you have. Count the flaws in that argument, Piso! And observe first of all that you have been forced to abandon your principle that, as you maintained, no one can be driven out except from the place in which he was at the time. You now admit that he can, but say that a man cannot be driven out if he is not in possession. 91 Why, then, in the ordinary form of the injunction^a beginning “Whence he has driven me out by force,” are the words added, “I being in possession at the time,” if no one can be driven out unless in possession? And why are they not added in the case of the present injunction “concerning armed men,” if the question of possession is relevant? You say “No one is driven out if he is not in possession”: I prove that if anyone is driven out, but not by means of men armed and collected together, then the man who admits having driven him out wins the wager-at-law^b if he can prove that the other was not in possession. You say: “No one is driven out if he is not in possession.” I prove that under the terms of the injunction “concerning armed men,” a man who can prove that the person driven out was not in possession, is none the less certain to lose his wager if he admits that the other was driven out.

XXXII.92 There are two ways in which people are driven out, either without the employment of men collected together and armed or by the employment of force in some such way. To meet the two different cases, two separate injunctions have been framed. In the case of the ordinary employment of force, it is not enough for a claimant to show that he has been driven out unless he can prove that he was in possession at the time he was driven out. And even that is not sufficient unless he can show that his possession arose neither from force, fraud, or favour. And so it is quite usual to hear a man, who has replied to the injunction “I have restored,” openly admitting that he did drive out by force but adding at the same time, “He was not in possession.” And further, after admitting even the fact of possession, he still wins this wager-at-law if he makes it clear that his opponent had obtained possession from him either

^a See Introduction, § 7 C.

^b See Introduction, § 7 A.

by force, fraud, or favour. **93** Do you see how many lines of defence our forefathers placed at the disposal of a man who uses force but without recourse to arms or a multitude? But as for my opponent who, forgetful of law, duty and decency, betook himself to the sword, to arms, and to murder, you see that they left him to plead his cause naked and defenceless, in order to show that one who had armed himself to contend for possession must come disarmed to settle a wager-at-law. Is there, then, any difference between these injunctions, Piso? Does it make any difference whether or not our injunction contains the additional clause “Aulus Caecina being in possession”? Do the principles of law, the point of difference between the injunctions, the intention of our forefathers, make any impression on you? Had the clause been added, your point would have been a relevant one. **94** It was not added: shall the point be relevant still?

In this particular, I am not defending Caecina: for Caecina, gentlemen, has possession; but although it is outside my case I will briefly deal with the question in order to make you no less anxious to protect the person of my client than you are to protect the rights of the public. You, Aebutius, do not deny that Caesennia had possession by virtue of her life interest.^a Now since the tenant who had the farm on lease from Caesennia maintained his tenure by virtue of that same lease, is there any doubt that, if Caesennia had possession during the tenure of the lessee, her heir after her death had the same title to possession?^a Further, when Caecina came to this estate as he was going the round of his property, he received a statement of account from this tenant; and there is evidence to prove it. **95** Why, subsequently, did you, Aebutius, serve Caecina with notice to quit this particular farm rather than any other you may have, if Caecina had no possession? Why, moreover, did Caecina himself consent to being formally ejected, as he had informed you in the answer which he gave on the advice of his friends and of Aquillius himself?

XXXIII. But, you may say, there is Sulla’s law.^b Without a single reflection on the days of Sulla or the calamity that then overwhelmed the country, my answer to you is this: that there was a clause, added to this same law by this same Sulla to the effect that “if this statute contain any proposal contrary to law, that proposal be null and void.” What is there which it is unlawful to propose or which the people cannot command or prohibit? Without digressing too far, this very additional clause shows that there is such a thing: for if there were not, this clause would not be appended to all statutes. **96** But I ask you: if the people command me to be your slave or you mine, do you think that command would be binding and valid? You realize and you admit that it would be null and void. And in doing so you first of all concede that not everything which the people command ought to be valid; and in the second place you advance no reason why, if liberty cannot possibly be taken away, citizenship can. For we have inherited the same tradition with regard to both, and if once it is possible to take away citizenship it is impossible to preserve liberty. **97** For how can a man enjoy his rights to the freedom of a Roman citizen if he is not among the number of Roman citizens? I established this point as quite a young man when I was opposed by Gaius Cotta, the most learned man in Rome. I was defending the freedom of a woman of Arretium; and Cotta worked upon the scruples of the court,^a telling them that they could not give us their verdict^b because the people of Arretium had lost their citizenship; while I argued with great vigour that it was not possible for them to lose it. The court did not come to a decision at the first hearing, but after a thorough examination and discussion of the case, they subsequently gave us their verdict; and they gave it us though Cotta opposed it and Sulla was still alive. **98** But why indeed should I quote you further instances of people in the same position taking legal proceedings, vindicating their rights and availing themselves of the whole body of citizen law^a without anyone, magistrate or juror, lawyer or layman, casting doubts on their rights to do so? Not one of you feels any doubt.

^a. See Introduction. § 7 B.

^b 82 B.C. See Historical Summary..

^a A special court for trying cases connected with citizenship.

^b The *sacramentum* originally meant a sum of money paid into court by each of the parties to a suit and at its conclusion forfeited by the loser. (See note on *sponsio*, p. 91.) Here the word means the suit itself.

^a See note on § 34.

There is certainly one question which, as I am well aware, is constantly asked (and here, Piso, I propose to supply the arguments which do not occur to you): “How is it that, if citizenship cannot be lost, our citizens have often joined Latin Colonies?”^b They have done so either of their own free will or to avoid a penalty imposed by law: had they been willing to undergo the penalty, they could have remained within the citizen body. XXXIV. Again, when anyone is surrendered by the Chief Priest of the Fetial College,^c or sold as a slave by his own father or by the state, what justification is there for the loss of his citizenship? A Roman citizen is surrendered to save the honour of the state: if those to whom he is surrendered accept him, he becomes theirs; if they refuse to accept him, as the Numantines did Mancinus,^d he retains his original status and his rights as a citizen. A father, by selling a son of whom he has assumed control,^e frees him from his control. 99 So too the state, by selling a man who has evaded military service, does not take away his freedom but decrees that one who has refused to face danger for his freedom’s sake is not a free man. By selling a man who has evaded the census, the state decrees that, whereas those who have been slaves in the normal way gain their freedom by being included in the census, one who has refused to be included in it although free, has of his own accord repudiated his freedom.^a

Now if these are the special grounds on which citizenship and liberty can be lost, do those who quote them fail to understand that our forefathers, by intending that loss of liberty should be possible in these circumstances, intended that it should be impossible in any others? 100 For as they have produced these instances from our law, I wish they would also produce instances in which people have been deprived of their citizenship or their liberty by any statute or proposal. For the position with regard to exile is transparently clear. Exile is not a punishment: it is a harbour of refuge from punishment. Because people want to escape from some punishment or catastrophe, they “quit their native soil,”^b that is to say, they change the place of their abode. And so, in no statute of ours will you find, as you will in the laws of other states, that exile figures as the punishment for any crime at all; but people seeking to avoid imprisonment, death, or dishonour, when imposed upon them by our laws, take refuge in exile as in a sanctuary. Should they consent to remain within the citizen body and submit to the rigour of the law, they would lose their citizenship only with their lives. But they do not consent; and therefore their citizenship is not taken from them, but is by them abandoned and discarded. For as no one under our law can be a citizen of two states, citizenship of Rome is actually lost at the moment when the runaway becomes an exile, that is, a member of another state.

XXXV.101 Now, gentlemen, though I fail to mention very many points in connexion with this right of citizenship, I do not fail to see that I have been led on to speak about it at greater length than consideration for your verdict demanded. But I have done so, not because I thought that in this case you would look for this particular defence, but in order to bring it home to everybody that citizenship has never been and can never be taken away from any man. I wished all men to know this—both those whom Sulla intended to injure and all other citizens as well, whether the old or the new.^a For if it has been possible to take away his citizenship from any newly created citizen, no argument can be advanced to

^b On joining a “Latin colony,” a Roman citizen suffered a partial loss of status (*capitis diminutio minor*), i.e. he lost his citizenship but recovered, as a Latin, some of his citizen rights: these varied from time to time.

^c The high priest of this college concluded with the enemy (*patrare*, to conclude) under religious forms matters relating to peace and war.

^d Mancinus was surrendered to the Numantines in 131 B.C. in order to free Rome from the obligation of ratifying the treaty which he had concluded with them.

^e The reference is to the formal “taking up” of a newly born infant by the father who thus acknowledged and assumed control (*potestas*) of him. The selling of a son three times by his father, which, according to the Twelve Tables, freed him from this control, developed later into a legal fiction.

^a One of the forms of legal manumission was the entry of the slave’s name on the censor’s lists as a citizen.

^b Cicero thought (probably wrongly) that the word *exilium* (exile) contained the same root as *solum* (soil).

^a That is, those Italians included in the citizen body after the Social War 91–88 B.C.

show why it should not be taken away from all patricians, all the citizens of oldest creation. **102** How irrelevant are such considerations to the present case may be understood first from the fact that this question is not the one which you are called upon to decide; and second, from Sulla's own law dealing with the citizen rights of these communities, which was so framed as not to deprive them of their rights of contract and of inheritance. The law enacts that they are to have the same rights as the people of Ariminum, which, as everybody knows, was one of the Twelve Colonies^b and had the right to inherit under the wills of Roman citizens. But even had it been possible to take away Aulus Caecina's citizenship by statute, it would be more natural for us to be concerned, as good citizens, in finding some way to free from injustice and retain among our number the most estimable and respectable of men, eminent as he is for wisdom, for goodness and for the respect which he commands at home, than that now, when it has proved impossible for him to be deprived of a single one of his citizen rights, anyone should be found, unless your match, Sextus, in folly and effrontery, to assert that my client's citizenship has I been taken from him.

103 Inasmuch, gentlemen, as he has not abandoned his rights nor yielded aught to the effrontery and insolence of his opponent, henceforward he commits his case, which is yours as well, and the rights of the people, to your sense of honour and of duty. XXXVI. Such is his character, such has he ever wished to be found by you and by men like you, that his one object in this case and his single aim has been to avoid losing by remissness the right that is his; and that he is equally afraid of appearing either to treat Aebutius with contempt or to be so treated by him. **104** Wherefore, if something is due to a man's merits apart from those of his case, you have in him a man of unusual moderation, of distinguished character and approved loyalty, bearing the most honourable name in an Etruria, and distinguished, alike in good fortune or ill, by abundant evidence both of a manly and a humane character. Should there be, on the opposite side, something in the man that causes offence, you have there one who, to say nothing more, admits that he collected his forces together. But if you set personalities aside and consider the case by itself, then, since you are to pass judgement upon the question of force, since he who is accused of it admits that he employed force by means of armed men, since he endeavours to defend himself by the letter and not the spirit of the law, and since you see that the protection even of the letter has been torn from him, that the most learned authorities are on our side, that, though this case does not raise the question of Caecina's possession, possession none the less is shown to have been his, and that, though the question of Caecina's ownership is still less a relevant issue, I have established the actual fact of his ownership; since all this, I say, is so, make up your minds what verdict you are called upon to pass by considerations of public policy upon the employment of armed men, by his own admission upon the use of force, by our conclusion upon the claims of equity, and by the spirit of the injunction upon the legal issue.

^b These were probably twelve communities which, having received the citizenship after the Social War, were deprived by Sulla of the *ius connubii*, the right of contracting a marriage valid under Roman law, while retaining the right of contract (*ius commercii*) which Cicero divides into its chief constituent elements—*nexa*, the right to acquire property, and *hereditates*, the right to inherit under a citizen's will.

B. CICERO, *PRO QUINCTIO*

J. H. Freese, trans., Loeb Classics, 1930, pp. 2–109
[trans. only, original footnote numbering retained]

INTRODUCTION

ACCORDING to Aulus Gellius (*Noctes Atticae*, xv.27.3), Cicero delivered the following oration in 81 B.C. during the consulship of M. Tullius Decula and Cn. Cornelius Dolabella,^a when he was only twenty-six years of age. It is his first extant speech, although he mentions that he had delivered others. Part of it is lost, but is clearly summarized at the end, and fragments to be found in a rhetorical treatise by a fifth-century rhetorician, Julius Severianus.^b

The facts of the case, as stated in iii.11 to ix.34 are the following, the point at issue being whether the order of the praetor, characterized by Cicero as unfair, had been properly carried out.

Gaius Quinctius, the brother of Cicero's client Publius Quinctius, owned a cattle farm and land in Gallia Narbonensis and had taken Sextus Naevius into partnership. He was suspicious of Naevius's management of certain transactions, but no actual rupture took place, and the partnership continued until Gaius died suddenly in Gaul, Naevius being present at the time. Publius was left his brother's heir by will. Some debts had been incurred by Gaius, which Publius had to pay. Naevius, who had married a cousin of Publius, then offered to advance him the money, and persuaded him not to sell certain private property in Gaul to liquidate the debts, as he had intended to do. Later, when reminded of his promise, Naevius declared that he would not let Publius have a penny until the accounts and state of the affairs of the partnership had been gone into, and he could feel sure that no business dispute would crop up later. Publius thereupon sold his property, paid a pressing debt, and called upon Naevius to come to some arrangement about the matter. This, however, was found to be impossible.

After the failure to come to an agreement, the parties gave mutual security for their appearance in court. After several delays, Naevius appeared at the time appointed. He then stated that he himself had held an auction in Gaul and had sold sufficient property to satisfy all his claims on the partnership; that there was no longer any reason for him to summon Publius to appear again, but that, if Publius wanted to bring an action against him, he offered no objection. Publius, who was anxious to see how things were going on in Gaul, also renounced the idea of a *vadimonium* (see on § 22), and the parties separated without any agreement to appear in court having been made.

After remaining about thirty days in Rome, Publius set out for Gaul on January 29, 83 B.C. (see § 24). On the way there, accompanied by a friend Lucius Albius, he was seen at Vada Volaterrana by a friend of Naevius, a certain Publicius, who was bringing him some slaves from Gaul to sell. Naevius, having been informed of Publius's whereabouts, sent round to friends and former colleagues, inviting them to meet him at the *tabula Sextia* (a banker's counter) at second hour of the following day. A large number of them responded to the invitation. Naevius called upon them to bear witness that he had appeared the appointed day but that Publius had not, although, according to Cicero, neither of them was bound to appear. An affidavit was drawn up in full and signed and sealed by the persons of rank present. Naevius then obtained the authority of the praetor Burrienus to take possession of Publius's estate in accordance with his edict, and publicly advertised his goods for sale. Sextus Alfenus, Publius's agent or attorney (*procurator*), and also a friend and kinsman of Naevius pulled down the notices of sale, rescued a slave on whom Naevius had laid hands, notified that he was Publius's agent, and expressed his opinion that in fairness Naevius ought to wait until Publius returned. If he refused, Alfenus said that he was ready to undertake the defence of Publius in court, if Naevius wished to bring an action.

In Gaul, in the meantime, on February 23, a few days after his arrival, Publius was ejected from the pastures and farm-lands by slaves belonging to the partners in common. He thereupon appealed to Flaccus, the governor of the province, who happened to be there at the time. Flaccus strongly expressed his disapproval of Naevius's action, probably because the owner of the property had been ejected again, his will, but nothing is known of any orders issued by him or of their results.

^a Not the same as the praetor in § 30. The consul was a partisan of Sulla, and during his administration of the province of Macedonia was accused of extortion by the young Julius Caesar, but was acquitted.

^b See note b on XXVII. § 85.

In Rome, Alfenus continued his resistance to Naevius. The latter demanded that Alfenus should give security for the payment of the judgement if the decision went against him. Alfenus, on the other hand, maintained that it was unfair that an agent should have to give security which his principal, if present, would not be obliged to give. As the result of an appeal to the tribunes, it was settled that Alfenus should promise that Publius would present himself on September 13. He returns and appears to his bail. For eighteen months Naevius makes no claim upon Publius, but keeps him in suspense with various proposals. At last he demands from the praetor Dolabella that Publius should give him security for payment of the judgement in accordance with the formula "since he is claiming from one whose goods have been possessed for thirty days in accordance with the praetor's edict."^a This seems to show that Naevius was going to bring some action against Publius, perhaps for a sum of money or on some matter connected with the partnership. Publius offered no objection, if the goods had really been possessed in accordance with the edict. Nevertheless the praetor decided that Publius and Naevius should inter into a *sponsio* (a kind of legal wager or stipulation) that the latter should pay a nominal sum "if it appeared that the goods had *not* been possessed for thirty days in accordance with the edict of Publius Burrienus the praetor." Publius's friends objected to this, maintaining that a judicial verdict ought be given on the matter; that either both or neither should give security; that there was no need to imperil the good name of one of the parties. Publius himself was unwilling to give security, lest by doing so he might seem to confirm the judgement that his goods had been possessed in accordance with the edict; further, that if he undertook to enter into a wager of that kind, he would be obliged, in a matter which affected his civil status and political privileges to speak before his opponent and thereby take the part of plaintiff. But Dolabella persisted, and Publius chose what seemed to him the lesser of two evils and accepted the *sponsio*, since he might have something to hope for from a fair judicial trial and verdict.

The case is one which was known as *praeiudicialis*, that is, one in which certain things had to be determined before the chief matter could be tried. Its object was to ascertain certain facts, and the judge's decision formed the basis of subsequent litigation. Here the points to be examined are those arising out of the *sponsio* and deal with the question of possession. Cicero asserts that Naevius has not possessed Publius's goods in accordance with the edict, and undertakes to prove this by the *sponsio*. What he desires to prove is succinctly stated in ch. X., where he divides his defence into three parts: "We deny that you have taken possession of the goods of Publius Quinctius in accordance with the praetor's edict." That is the question in regard to which the *sponsio* was made. Cicero says that he will prove: (1) that Naevius had no grounds for applying to the praetor to authorize him to take possession of the goods; (2) that he could not have possessed them in accordance with the edict; (3) that he did not possess them at all.

(1) Naevius had no grounds for applying to the praetor, since Publius owed him nothing either as a partner or as a private individual; and if he asserts that Gaius did owe him a considerable sum which his heir would have to pay, why did he wait for two years before he mentioned the debt, although he lived with Publius and had plenty of opportunities for making a claim? His previous acts also support this. If he had had a good claim, he could have brought an action or tried some simpler way than one dangerous and dishonourable to himself, and most injurious to the reputation and civil status of Publius. Even if money was owing to him, he could not at once have applied to the praetor to grant him a writ of possession; for, even assuming that Publius had forfeited his recognizances, it was unfair to proceed at once to extremes against him. But in reality there was no *vadimonium* at all. Naevius, in answer to Publius, said it had been concluded on February 5, but, as can be proved, on that day he was not in Rome at all.

(2) Naevius could not have possessed the goods in accordance with the praetor's edict, because none of the conditions justifying such a course, as stated in the edict, were applicable to Publius.

(3) Naevius anticipated the writ, which was applied for on February 20, whereas Publius had been ejected from his property on February 23, when the writ could not possibly have arrived, unless a messenger from Naevius could have covered the distance (700 miles from Rome to the Gallic estate) in two days! Further, the only possession recognized by the edict was a universal one, whereas Naevius had made no attempt to gain possession of Publius's house and slaves Rome and his private landed property in Gaul.

Then too the edict expressly declared that an owner must not be forcibly ejected from his property and that Publius and Naevius should be allowed to have possession in common.

^a "Quod ab eo petat, quous ex edicto praetoris bona dies XXX possessa sunt," § 30. When the praetor gave a creditor permission to seize a debtor's property (*missio in possessionem*), the order was executed at the petitioner's risk ("praetor non fieri, sed ex edicto suo fieri iubebat," § 60). When an order was made that the debtor's goods should be sold, they were to be kept in possession and notices posted for thirty successive days, until the expiration of which nothing could be done. The creditor took possession as a precautionary measure, in order to save the property (see also note on § 85).

The peroration compares the insolence and good fortune of Naevius with the miserable condition the unhappy Publius, and ends with an appeal to justice and the sympathy of the judge and his assessors.

Gaius Aquilius Gallus was the judge, his assessors being P. Quinctilius Varus, M. Claudius Marcellus and L. Lucilius Balbus. Naevius had for his advocate the celebrated Hortensius (Quintus H. Hortalus) assisted by L. Marcius Philippus. The result of the trial is unknown.

A full discussion of Cicero's arguments and the speech generally will be found in H. J. Roby, *Roman Private Law*, ii. pp. 458-485, some points from which have been mentioned in the notes. See also A. H. Greenidge, *The Legal Procedure of Cicero's Time*, Appendix I. (1901), and the Introduction in Long's edition.

BIBLIOGRAPHY

Text: A. C. Clark (Oxford, 1909); C. F. Miller, Part II. vol. i., Bibliotheca Teubneriana (Leipzig, 1880); H. de la Ville de Mirmont (text with French translation, Paris, 1921).

Text (all the Orations with Commentary): R. Klotz (1832, etc.), G. Long (1851-1858).

Pro Quinctio: F. L. Keller, *Semestrium ad M. Tullii Ciceronis libri sex*, i. (Zürich, 1842); J. Frei, *Der Rechtsstreit zwischen P. Q. and S. N.* (Zürich, 1862); R. Klotz, *Adnotationes ad M. T. C. orationem Quinctianam* (Leipzig, 1862); W. Oetling, *Ciceros Quinctiana* (Oldenburg, 1882); E. Costa, *Le orazioni di diritto privato di Cicerone* (Bologna, 1899).

General: M. A. von Bethmann-Hollweg, *Der römische Zivilprozess*, ii. (Bonn, 1865); H. J. Roby, *Roman Private Law*, ii. (Cambridge, 1902), and review in *Athenaeum*, June 7, 1902; A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford, 1901).

IN DEFENCE OF PUBLIUS QUINCTIUS

I.1 Two things which have most power in the state—I mean great influence and eloquence—are both working against us to-day; the one, Gaius Aquilius,^a fills me with apprehension, the other with dread. That the eloquence of Quintus Hortensius^b may embarrass me in my pleading is a thought that causes me some disquietude; that the influence of Sextus Naevius may injure the cause of Publius Quinctius—of that I am gravely afraid. 2 Yet I should not consider the possession of these advantages in so high a degree by my opponents to be so greatly deplored, if we possessed at least a moderate share of either; but the position is such that I, who have little natural ability and insufficient experience, am pitted against a most accomplished advocate, while my client Quinctius, whose resources are small, who has no opportunities and only a few friends, has to contend with a most influential adversary. 3 An additional disadvantage for us is that Marcus Junius, who has several times pleaded this cause before you, Aquilius, who has had great experience at the bar, and has given great and frequent attention to this cause in particular, is prevented by a new commission from being present to-day.^a So then I was applied to—I who, even if I possessed all other qualifications in the highest degree, have scarcely had time enough to make myself acquainted with a matter of such importance and one involving so many disputed points. 4 Thus what has generally been a help to me in other opuses also fails me in this. For I have always supplemented my lack of ability by taking careful pains, and how great my industry is, unless one has time and leisure, cannot be perceived.^b

^a Gaius Aquilius Gallus was a well-known jurist and a pupil of Q. Mucius Scaevola. He is highly praised by Cicero (*Pro Caecina*, XXVII. 77), with whom he was praetor in 66. He is often cited in the Digest, published certain formulae, and was also one of the judges in the trial of Caecina.

^b Hortensius (Quintus H. Hortalus, 114-50 B.C.), the famous advocate and rival of Cicero. In the civil war he joined Sulla and strongly supported the aristocratical party, members of which he frequently defended, e.g. Verres when accused by Cicero. When the latter went over to the senatorial party, they often acted together. Hortensius was a master of the florid or Asiatic style, and wrote a treatise on commonplaces, besides *Annales* and poems.

^a It is not certain who this Junius was, nor is anything known of this legation or commission.

^b Or, "it is difficult to see what results (how much industry) can be expected." Cicero means that in this case he has little chance of showing his industry.

The more numerous these disadvantages are, Aquilius, the greater should be the indulgence with which you and your assessors^c listen to our words, so that truth, weakened by so many unfavourable conditions, may at last be revived by the impartiality of men so eminent. **5** But if you, in your capacity as judge, show that you can afford no protection to loneliness and distress against violence and interest; if, before such a tribunal, the cause is weighed in the balance of influence and not in that of truth, then assuredly neither sanctity nor purity any longer exists in the state, nor can the authority and integrity of the judge afford any consolation to a humble citizen. No doubt either truth will prevail before you and your assessors, or, driven by violence and interest from this tribunal, will be unable to find a place wherein to rest.

II. If I use such language, Aquilius, it is not that I have any doubt of your firmness and integrity, or as if Quinctius ought not to have the highest confidence in these distinguished citizens whom you have summoned to be your assessors. **6** What then is it that troubles us? In the first place, his great peril inspires my client with the greatest alarm, since he is staking all his fortunes on the issue of a single judgement; and when he reflects upon that, the idea of your power comes into his mind as often as that of your sense of justice; for, as a rule, all those whose life is in the hands of another think more often of what the man in whose absolute power they are is able to do than of what he ought to do. **7** In the next place, Quinctius has for his opponent nominally Naevius, but in reality the most accomplished men of our time, the bravest and most prosperous of our citizens, who with united efforts and vast resources are defending Naevius, if to subserve the cupidity of one of the parties in order that he may be able the more easily to overwhelm anyone he chooses by an iniquitous trial—if that can be called defending. **8** For can anything more iniquitous or more scandalous be spoken of or mentioned, Gaius Aquilius, than the fact that I, who am defending the civil rights,^a the good name and fortunes of the other party, should have to plead my cause first,^b above all, when Hortensius, who in this trial fills the part of an accuser,^c upon whom nature has lavishly bestowed a wealth of language and the greatest eloquence, is going to speak against me? Thus it comes to pass that I, whose duty it is to repel the darts of the enemy and to heal the wounds inflicted by them, am compelled to perform this task, even before my adversaries have launched a single dart, while they have the time granted them for making an attack when we shall have been deprived of the power of avoiding their assault, and when, if they launch some false charge, as they are ready to do, we shall have no opportunity of applying an antidote. **9** This is due to the unfairness and injustice of the praetor; in the first place because, contrary to all precedent, he has preferred that the trial should deal with my client's dishonour^a before the fact at issue; in the second place, because he has so arranged the course of procedure that the accused should be forced to plead his cause before he has heard a single word from the accuser. This is the result of the power and influence of those men who support the passionate desires of Naevius as zealously as if their own interests or honour were at stake, and test their resources in matters in which, the greater the power they possess owing to their merit and rank, the less ought they to show how great it is.

10 Weighed down and overwhelmed by so many and such great difficulties, Quinctius has taken refuge in your integrity, uprightness, and compassion. Since until now the power of his opponents has prevented him from enjoying the same legal rights as theirs, from obtaining the same facilities for pleading, from finding an impartial magistrate; since, by the greatest injustice of all, everything is unfavourable and hostile to him, he begs and prays you, Aquilius, and you his assessors, to allow equity, driven about and persecuted by many acts of injustice, to find rest and support at last in this tribunal. III.

^c These assessors or assistants (*qui tibi in consilio sunt*) were chosen by the judge himself and formed his *consilium*.

^a Caput often does not mean literally "life" here and elsewhere in this speech, but a man's civil and political rights, which would be lost by *infamia*, if judgement were given against him and his goods sold (the important point).

^b *i.e.* before we have heard the exact charge; see § 33.

^c Hortensius was defending Naevius, so Cicero has on right to call him an *accusator*. *In* is inserted by Baiter.

^a His alleged (according to Cicero) non-appearance to his bail, involving *infamia*.

And to enable you to do this more easily, I will endeavour to make you acquainted with the origin, progress, and conduct of the matter.

11 Publius Quinctius, my client, had a brother named Gaius, undoubtedly a careful and industrious manager of an estate in every respect except one. He showed rather less caution than usual in entering into partnership with Naevius, a worthy man I dare say, but one who had not been brought up in such a manner as to give him the opportunity of becoming acquainted with the rights of a partnership and the duties of a trustworthy manager; not that he did not possess a certain talent, for he was never regarded as a buffoon who lacked humour or as an unmannerly auctioneer.^a How then does the matter stand? Since nature had endowed him with nothing better than a good voice, and his father had left him nothing but his freedom, he made his voice a considerable source of gain, and used his freedom to utter his witticisms with greater impunity. **12** The only reason why you could have wanted to take him into partnership must have been to afford him the opportunity, in handling your money, of thoroughly learning what was the value of it. However, Quinctius, being acquainted with and familiar with the man, was induced to admit him, as I have said, into a partnership in his business in Gaul, where he had a considerable grazing farm, well cultivated and very productive. Naevius is removed from the Licinian auction-halls^b and the company of auctioneers, and transported across the Alps to Gaul. A great change of place but not of character! For the man who from early youth had made a practice of getting money for himself without any capital, after he had put a certain bit of capital into the partnership, could not rest contented with a moderate profit. **13** Nor is it to be wondered at if he, who had let out his voice on hire, thought that what he had acquired by it would bring him great profit. Accordingly, by Hercules! he withdrew from the common stock whatever he could (no small sum) and put it into his own pocket; and in this he displayed as much activity as if those who carried on a partnership with the greatest honesty were, should any question about the partnership come before an arbitrator, regularly condemned.^a But I do not think it necessary to mention in regard to these matters certain facts which my client desires me to recall; although the cause asks for them, still, because it only asks and does not absolutely demand, I will pass them over.

IV.14 After the partnership had lasted for several years, Naevius had more than once been suspected by Gaius Quinctius, since he was unable to render a satisfactory account of certain transactions which he had carried on as he thought fit and not in accordance with the rules of business. **15** In the meantime Gaius Quinctius dies in Gaul, while Naevius was there; his death was sudden.^b By his will he left his brother Publius, my client, his heir, desiring that he who felt the bitterest sorrow at his death might also receive the highest proof of his esteem.^c Soon after his brother's death Quinctius set out for Gaul, where he lived on the most friendly terms with this fellow Naevius. They were together nearly a year, during

^a *Praeco*, literally a crier in a court of justice, at public games, at auctions (where he called out the conditions of sale), and the like. The word *scurra* originally meant a fine gentleman of distinguished manners, opposed to a rustic; an idler, acquainted with all the gossip. In Cicero's time it means a professional wit or buffoon. Then, when it became customary for the great men of Rome to have one of these people at table to amuse their guests, the name was used for a parasite, who let himself out for a dinner and entertained them with gross flattery, small talk, and various tricks. Socrates was called *scurra Atticus* by Zeno, and dissipated men about town *scurrae* in *Pro Sestio* XVII. § 39.

^b Besides being the name of part of a house, atrium was also a court surrounded by a colonnade and the halls where auctions were held. The *atria Licinia* were named after L. Licinius Crassus, the orator.

^a So Naevius, to avoid such a thing happening, was careful to cheat his partner. Prof. H. Morgan (*Harvard Studies in Classical Philology*, xii., 1901) rejects this generally accepted interpretation: "Long's explanation renders *arbitrium* useless and some older editors omitted it. But *condemnare* with double accusative is common in legal language. The punishment (*arbitrium*) is kept with the passive, and the meaning is: As if men who acted as honest partners were usually condemned to *arbitrium pro socio*, that is, had to go before an arbitrator on a question of defrauding a partner. *Pro socio* is the legal phraseology for: in a partnership question." He compares *Pro Roscio Comoedo*, x. 25 "Quae cum ita sint, cur non arbitrium pro socio adegeris Q. Roscium quaero."

^b This seems intended to create the suspicion that Naevius had something to do with his death.

^c It was considered a mark of respect to be mentioned in a friend or relative's will and a great slight if one's name were omitted. The emperor Augustus was very touchy on this point.

which time they had several discussions^a both about the partnership and everything connected with the management of the farm and the property in Gaul. In the meantime, Naevius never put in a word to the effect that either the partnership owed him anything or that Quinctius was personally indebted to him. **16** Since a certain number of debts had been left unpaid which had to be settled at Rome, my client had a notice put up in Gaul that he would sell some private property of his at Narbo.^b Then it was that this excellent man Naevius endeavoured, at great length, to dissuade him from making the sale. He told him that the date he had fixed was not a favourable one for selling; that he himself had plenty of money at Rome, which my client, if he had any sense, ought to look upon as belonging to both, considering his intimacy with his late brother and his relationship to himself, Naevius having married a cousin of Quinctius by whom he had children. Because Naevius spoke of what an honest man ought to do, Quinctius believed that one who imitated the language of honest men would also imitate their actions. He abandoned the idea of making the sale and set out for Rome. Naevius did the same. **17** Since Gaius was indebted to Publius Scapula,^c his brother Publius, according to your decision, Aquilius, settled how much he had to pay to Scapula's children. The question had to be settled by you, because, owing to the rate of exchange,^a it was not enough to examine the account-books for the amount of the debt, but also you had to make inquiries near the temple of Castor^b how much he had to pay. You settled the question, and, in consideration of your intimate friendship with the Scapulae, decided how much ought to be paid to them reckoning in denarii.^c

V.18 All this took place at the suggestion and on the urgent advice of Naevius. Nor was it surprising that Quinctius took the advice of a man of whose assistance he felt assured; for Naevius had promised him not only in Gaul, but every day in Rome, that he would pay down the money as soon as Quinctius had given him a hint. Moreover, Quinctius knew that he was able to pay and felt that he ought to; he had no idea that he was telling him a lie, because there was no reason why he should do so. Accordingly, as if he had the money at home, he entered into a formal engagement to pay the Scapulae,^d informed Naevius, and asked him to see about getting the money, as he had promised. **19** Then that excellent man—I am afraid he may think he is being laughed at because I call him “excellent” for the second time—thought that Quinctius was reduced to the greatest straits, so that he could tie him down at the critical moment on his own terms. He refused to advance Quinctius a penny until a settlement had been arranged in regard to all the affairs and accounts of the partnership, and he felt assured that no cause of dispute would arise between them. “Let us see about that later,” said Quinctius; “for the present, if you will be so kind, I should be glad if you would see about getting the money, as you promised.” Naevius declared that he would only do so on his own terms, saying that his promise had no more to do with him than any other

^a *Communicare* is a legal term meaning to share with others; and this may be intended here, with reference to a division of what remained of the old stock to form a new partnership, since the one between Gaius and Naevius was ended by the death of the former.

^b Narbo Martius (mod. Narbonne), capital of Gallia Narbonensis and the first Roman colony in Gaul. It was connected by a canal with the sea, was a flourishing town, and a centre for the transport of tin from Spain and Britain.

^c Supposed to have been a money-lender.

^a Various explanations have been given of this much discussed phrase (*propter aerariam rationem*): (1) that the difference between Gallic and Roman money is meant, the debt having been incurred in Gaul and being payable in Rome, where the rate of exchange was different; (2) that it alludes to the state of the currency. M. Drusus (in 91) authorized the mint to issue one plated *denarius* in every seven, the result being that no one knew whether his money was good or bad; later (in 84) the praetors and tribunes decided to replace the plated *denarii* by silver. (3) To this Niebuhr objected that *argentaria* (not *aeraria*) would be the proper word, and explains the passage as referring to the *lex Valeria* brought forward by the consul L. Valerius Flaccus (86). By this law all debts were cancelled and creditors only received a quarter of their debt (like our composition of 5s. in the £). Mommsen agrees and explains the process as the substitution in calculation of the reduced *as* ($1/16$ of a *denarius*) for the libral *as* represented by the silver *sestertius*. According to Niebuhr, the law only applied to debts owing at the time, whence the difficulty of settling the amount of the debt to the Scapulae (see Roby, *Roman Private Law*, ii. p. 456).

^b The bankers' counting-houses were near the temple of Castor in the Forum.

^c Or, how much should be deducted from the debt for each *denarius* paid.

^d *Constituere* is a technical term, meaning to make a definite arrangement to pay a definite sum on a definite day.

promise that he had made when selling goods by auction, by the owner's orders. **20** Quinctius, thoroughly upset by such a disappointment, obtains a few days' grace from the Scapulae and sends to Gaul to have the goods sold as he had previously advertised; the auction takes place during his absence at an unfavourable time, and he pays off the Scapulae on less favourable terms than he had previously arranged. He then of his own accord appeals to Naevius, asking him, since he suspected there might be a dispute about something or other, to see about getting the whole affair settled as soon as possible and with the least trouble. **21** Naevius appoints his friend Marcus Trebellius to represent him; we appoint a man connected by common ties with both parties, a man who had been brought up in Naevius's house and was an intimate friend of his, a relative of ours, Sextus Alfenus. No arrangement was possible, because my client wished to suffer only a moderate loss, while Naevius was not content with a moderate booty. **22** And so from that time the matter had to be settled in the courts.^a After several appointments had been made and adjourned, involving considerable loss of time without any result, Naevius appeared in court.

VI. I beg you, Aquilius, and you his assessors, to give me your earnest attention, that you may be able to understand a remarkable kind of fraud and an entirely new method of trickery. **23** Naevius next declared that he had sold by auction in Gaul whatever he thought fit; that he had taken care that the partnership should not be indebted to him; that he no longer claimed that Quinctius should produce bail nor was he ready to promise bail to him; but if Quinctius wished to bring any action against him, he had no objection to make. Since Quinctius desired to pay another visit to his property in Gaul, for the present he did not bind Naevius over to appear; and they separated without any appointment for appearance in court having been made. Next, Quinctius remains in Rome about thirty days; he adjourned any suits^a that he had with others, so that he might be able to set out for Gaul free from anxiety. **24** He set out and left Rome on January 27,^b during the consulship of Scipio and Norbanus. I beg you to bear this date in mind. Lucius Albius, the son of Sextus, of the tribe of Quirinus, a worthy and especially honourable man, set out with him. After they had reached the fords of Volaterrae,^c as they are called, they saw an intimate friend of Naevius, one Lucius Publicius, who was bringing him some slaves from Gaul for sale, and on his arrival at Rome told Naevius where he had seen Quinctius. **25** Had not Naevius received this information from Publicius, the matter would not have been so soon a subject of dispute in court.^d Then Naevius sent his slaves round to all his friends, got together his acquaintances from the Licinian halls and the entrance to the market by his own efforts, and invited them to meet him at the counting-house of Sextius^e at the second hour of the following day. They attended in great numbers. Naevius called them to witness that "Publius Quinctius had not answered to his bail, and that he had answered"; an affidavit was signed in full^a and bore the seal of the distinguished witnesses, after which the meeting broke up. Naevius then applied to the praetor^b Burrienus for permission to take possession of the defaulter's estate in accordance with the edict. He ordered the goods of the man to be put up for sale, whose intimate friend he had been, whose partner he still was, and whose kinship by marriage was indissoluble as long as Naevius's children still lived. **26** This makes it easy to understand that there is no duty so sacred and solemn that it cannot in most instances be impaired and violated by avarice. For if friendship is

^a *Esse in vadimonium coepit*: literally, "the matter came to giving bail." When proceedings *in iure* (before a praetor or other magistrate who possessed jurisdiction) were not finished on the same day, the parties agreed upon a time when they should appear again, and this agreement was called *vadimonium* (that is, a guarantee that they would appear in court on the appointed day). A sum of money of varying amount (but never exceeding 100,000 sesterces) had to be paid by one who failed to appear, called *poena desertionis*.

^a Literally, put off appearances in court.

^b In 83 B.C. (see § 57).

^c A seaport in the territory of Volaterrae in Etruria (mod. Torre di Vado).

^d The words in the text from *narratum* to *Naevius* are omitted by many, who begin § 25 with "Quod ubi ex Publicio audivit, pueros . . ."

^e Some banker, otherwise unknown.

^a Or, reading *maximae* with some MSS., "a very bulky affidavit."

^b On February 20: see § 79.

maintained by truth, partnership by good faith, and kinship by a sense of duty, the man who has attempted to rob his friend, his partner, his kinsman of his reputation and fortunes must admit that he is untrustworthy, perfidious, and undutiful. 27 Alfenus, Quinctius's agent,^c the friend and relative of Naevius, tore down the bills of sale, carried off one young slave whom Naevius had seized, formally declared himself Quinctius's agent, and insisted that it was only right that Naevius should have regard for the reputation and fortunes of Quinctius and await his return to Rome; if he refused to do this and was determined to force him by such methods to accept his terms, he asked no favour, and if Naevius chose to bring an action, he was ready to defend Quinctius in court. 28 While such was the course of events at Rome, in the meantime Quinctius, contrary to law, custom, and the edicts of praetors, was forcibly driven from the common pastures and land by slaves belonging to the partners.

VII. If what Naevius did in Gaul by written instructions appears to you to have been correct and regular, then you must think that all that he did in Rome was moderate and reasonable. Quinctius, expelled and driven out of his estate, having been subjected to such flagrant injustice, had recourse to Gaius Flaccus the governor, who was at that time in the province, and whom, as his rank demands, I mention with the respect due to his office.^a How severely he thought such a course of action ought to be punished, you will be able to learn from his decrees. 29 In the meantime at Rome Alfenus was fighting daily with this veteran gladiator; the people, no doubt, he had on his side, because his opponent continued to aim at the head.^b Naevius makes a formal application that the agent should give security for payment of the award if Quinctius lost his case. Alfenus says it was not fair that an agent should give security, which the defendant would not have to give if he were present in person.^c Thereupon Alfenus appeals to the tribunes;^d and, after definite assistance had been asked from them, they separated on this occasion, on Alfenus promising that Quinctius should appear in court on September 13.

VIII.30 Quinctius returns to Rome, and appears to his bail. This Naevius, a most violent fellow, who had taken possession of the property, had driven Quinctius out and robbed him of it, for eighteen months made no claim, kept quiet, amused Quinctius as long as he could with proposals for coming to terms, and finally applied to the praetor Gnaeus Dolabella^a that Quinctius should give him security for payment of the judgement according to the formula: IN THAT HE IS CLAIMING FROM ONE WHOSE GOODS HAVE BEEN POSSESSED FOR THIRTY DAYS ACCORDING TO THE PRAETOR'S EDICT. Quinctius did not object to an order being made that he should give security, if his goods had really been "possessed" in accordance with the edict. The praetor gave a decision—how far equitable, I say nothing about that; I only say this, that it was an innovation, and I should have preferred to remain silent upon this point, since anyone could understand

^c *Procurator* was an agent appointed to act generally for an absent principal or in a particular suit. He had to give security that his principal would abide by the terms of the decision.

^a Quinctius probably asked for an order that he might be put in possession of his property again, since he had been ejected by force. Such an order was called *Interdictum de Vi*. Flaccus expressed his strong disapproval of Naevius's action and issued some orders, but it is not known what they were or what was the result. C. Valerius Flaccus (consul 93) gained victories over the Gauls and the Celtiberi in Spain. He was a partisan of Sulla.

^b "The head" is really the civic status of Quinctius; see § 8.

^c This reply of Alfenus is difficult to explain and could hardly have been made in later times. It would seem that in Cicero's time the necessity for security in the representation by a procurator admitted of exceptions, and at this time was not absolute. Perhaps Alfenus may have contended that there was no need for security, since Naevius claimed to be already in possession of all Quinctius's estate (Roby). Or he may have been afraid of doing harm to Quinctius by giving a security which might be taken to mean not such as was required from a procurator but demanded from a defendant, in the *actio iudicati* (in the proceedings on the judgement).

^d The appeal was against the writ of possession. The praetor seems to have let it be known that, as Alfenus had refused to give the security required, he would make an order in favour of Naevius keeping possession of Quinctius's property and authorize him to proceed to a sale.

^a Praetor 81. In the following year he had Cilicia as his province, which he and his *legatus* Verres plundered. Accused of extortion and betrayed by Verres, he was condemned and went into exile. Not to be confused with the consul in the same year, when Cicero delivered this speech.

it, regarded from either point of view—and ordered Quinctius to enter into an engagement^b with Naevius on the question WHETHER HIS GOODS HAD NOT BEEN POSSESSED FOR THIRTY DAYS according to the edict of Publius Burrienus the praetor.^c Quinctius's supporters demurred; they pointed out that the trial ought to deal with the real question,^d so that either both parties or neither of them should give security; that there was no need for the reputation of either being put on trial.^e

31 Further, Quinctius himself emphatically declared that his reason for being unwilling to give security was to avoid the appearance of himself thereby giving a verdict that his goods had been possessed in accordance with the edict; moreover, if he made an “engagement” of the kind asked for, he would be obliged to plead first in a matter affecting his civil rights, as has happened to-day. Following the practice of members of the nobility, who, when once they have begun to carry out some plan, whether right or wrong, show such superiority in its execution that is beyond the reach of one in our humble position, Dolabella most manfully persevered in acting wrongfully; he ordered that either security must be given or an engagement entered into, and in the meantime caused our advocates who protested to be forcibly removed from court.

IX.32 Quinctius withdrew quite distracted; and no wonder, since a wretched and unfair alternative was offered him—either to condemn himself to lose his civil rights if he gave security, or to plead first in an action in which they were at stake, if he entered into an “engagement.” Since in the one case there was nothing to prevent his being obliged to pass sentence on himself, which is the severest form of judgement, while in the other he had the hope after all of coming before a judge of such a character that the less influence he brought to bear, the greater the assistance he might obtain from him, Quinctius preferred to enter into the “engagement.” He did so; he proposed^a you as judge, Aquilius; and then sued Naevius on the “engagement.” This is the essential point of the trial; this is the gist of the whole cause.

33 You see, Aquilius, that the trial is not concerned with a pecuniary matter, but with the fame and fortunes of Quinctius. Although our ancestors established the rule that a man pleading on a matter affecting his civil rights should speak after the accuser, you see that we have to plead our cause first, without having heard the charge.^a And moreover, you see those who have been in the habit of speaking for the defence^b playing the part of accusers to-day, and directing those abilities, which were formerly

^b *Sponsio*. A legal wager, both parties to which agreed that the one who lost the cause should pay a certain nominal sum to the winner. The form of words was as follows: “Si bona mea ex edicto P. Burrieni praetoris dies xxx possessa non sunt, HS. . . . dare spondes?” the answer given (by Naevius) being “Spondeo.”

^c Quinctius denied that the goods had been possessed according to the edict, whereupon the praetor ordered him to prove his denial by becoming plaintiff in a fictitious action involving a *sponsio*. Dolabella evidently considered that the order of Burrienus, even though it might appear harsh, was *prima facie* valid, and he did not like to put it aside, unless it were proved to have been wrong or not duly carried out.

^d The partnership dispute.

^e If the result went against him, he would be ruined and disgraced. Dolabella considered it would be easier for him to prove a negative and speak first as a plaintiff; if the result was favourable, it would show that Quinctius's goods had not been possessed for thirty days, and the partnership dispute could be taken up; if unfavourable, he would be obliged to take the consequences of not having met Naevius's claim by appearing in court.

^a The plaintiff proposed the name of someone as *iudex*, who would be nominated if accepted by defendant, and the plaintiff then *sumpsit iudicem*.

^a Cicero says Dolabella forced Quinctius not only to speak first as accuser, but he also had to defend himself, not about a mere money matter, but one which endangered his civil rights as having forfeited his recognizances.

^b To instruct you (Aquilius) how to conduct the proceedings.

employed in saving and assisting, towards the work of destruction. The only thing that remained for them to do—and that they accomplished yesterday—was to summon you before the praetor,^c so that you might fix in advance the time allowed for us to speak; this they would without difficulty have obtained from the praetor, had you not taught him your rights, your duties, and your functions. **34** Neither, up to the present, have we found anyone except yourself, from whom we could maintain our rights against our opponents, nor have they ever been content to maintain what anyone would consider right: so unimportant, so weak do they consider power of any kind unless it is backed up by injustice.

X. But since Hortensius presses you to consult your assessors; since he calls upon me not to waste time in talking, and complains that, when my predecessor was defending Quinctius, his speech could never have been finished, I will not allow the suspicion to continue, that we do not want the matter to be decided. I shall not be so conceited as to claim that I can set forth the cause more adequately than has already been done by others before me; yet I shall be briefer, because it has already been described and put into shape by the advocate who spoke on that occasion, and also because brevity, which is most agreeable to myself, is required of me, who am incapable of thinking out or of delivering a long speech. **35** I will do what I have often observed you doing, Hortensius; I will divide my entire pleading under three distinct heads. You always do this, because you always can; I will do it in this case, because I think that in it I can; what your natural talent gives you the power of always doing, the nature of the cause permits me to do to-day. I will lay down for myself well-defined boundaries and limits which I must not overstep, however much I may desire to do so. Thus I shall have before me the subject of which I have to treat, and Hortensius will have a statement to which he has to reply, and you, Aquilius, will be able to understand in advance what are the matters which you are to hear discussed.

36 We deny, Sextus Naevius, that you have taken possession of the goods of Publius Quinctius in accordance with the praetor's edict. That is the question in regard to which the "engagement" was made. I will first prove that you had no grounds for applying to the praetor to authorize you to take possession of the goods; next, that you could not have taken possession of them in accordance with the edict; lastly, that you did not possess them at all. I beg you, Aquilius, and you his assessors, carefully to commit to memory the promise I have made; for, if you bear these points in mind, you will find it easier to understand the whole matter, and, as to myself, you will, by your influence, easily call me back, if I endeavour to pass beyond these barriers by which I have voluntarily confined myself. I deny that Naevius had any grounds for his application; I deny that he could have taken possession of the goods in accordance with the edict; I deny that he did take possession of them at all. When I have proved these three assertions, I will conclude.

XI.**37** There were no grounds for your application. How can this be proved? Because Quinctius never owed anything to Naevius, neither on account of the partnership nor as a private debt. Who is a witness to this? The very man who is our bitterest opponent. On this point I will call you, you, I say, Naevius, as a witness. Quinctius lived with you in Gaul for a year and more after the death of his brother. Prove that you ever asked him to pay that enormous sum, prove that you ever mentioned or said that it was owing, and I will admit that he owed it. **38** My client's brother dies, and, according to your statement, owed you a large sum of money on certain specific heads.^a My client, his heir, comes to you in Gaul, to your joint estate—in fact, to the very place where not only the property was, but where all the accounts and letters were kept. Who would have been so careless in his private affairs, so heedless, so unlike you, Sextus, after the property had passed out of the hands of the man with whom he had made the contract into those of his heir, as not to notify this heir as soon as he saw him, claim the money, present the account, and if any dispute arose, settle the matter privately or by the rigour of the law? Is it really so? What every good man does, every man who wishes his kinsfolk and friends to be and to be accounted worthy of affection and of honour, was this not what Sextus Naevius would do—this man who is so inflamed and carried

^c *In ius*, to be carefully distinguished from *in iudicium*, proceedings before a *iudex*—*ius* being the preliminary proceedings before the praetor.

^a This rendering seems better than "on good security."

away by greed that he would be unwilling^b to give up any of his advantages for fear of leaving his relative, my client, a share of anything that makes life honourable? **39** Would he not ask for the money, if any were owing, he who, because that was not paid which was never owed, is endeavouring to deprive his kinsman, not only of his money, but even of his life-blood?^a At that time I suppose you did not want to be troublesome to the man whom to-day you do not allow to breathe freely; at that time you were too modest to call upon the man to pay whom to-day you criminally desire to murder. I suppose so: you were unwilling or afraid to call upon one who was your relative, who had a great respect for you, a man of worth, modest, and older than yourself. More than once (as is often the case) after you had plucked up courage and determined to mention the money, when you approached him, having carefully prepared and considered what you intended to say, on a sudden you, the nervous man of virgin modesty, drew back; at once words failed you; when you wanted to call upon him for the money, you did not dare to do so, for fear he might feel hurt to hear you. No doubt that was the explanation.

XII.40 Let us believe then that Sextus Naevius spared the ears of the man at whose head his attacks are now aimed. If he had owed you anything, Sextus, you would have demanded it, and at once; if not at once, a little later; if not a little later, some time or other; certainly within six months; without doubt before the end of the year. But no! for eighteen months, during which you daily had an opportunity of reminding him of the debt, you never said a word; now, when nearly two years have passed, you call upon him for the money. Is there any dissipated and extravagant spendthrift—not one whose entire fortune has been squandered but who still has plenty of money—who would have been so careless as Naevius? The mere mention of the man's name seems enough. **41** My client's brother owed you money, you never asked for it; on his death, the estate passed to his heir, although you saw him every day, you waited two years before you finally asked him to pay. Can there be any doubt which is the more probable: that Sextus Naevius would have asked for anything that was owing to him at once, or that he would not even have claimed it for two years? You had no opportunity of claiming it? But he lived with you more than a year. Proceedings could not have been taken in Gaul? But justice was administered in the province and the courts were held in Rome. The only alternative is that extreme negligence or unparalleled generosity prevented you from demanding the money. If you plead negligence, we shall be astonished, if you plead generosity, we shall laugh; and I do not know what other excuse you can find. The fact that Naevius claimed nothing for so long a time is sufficient proof that nothing was owing to him.

XIII.42 But what if I show that the very thing which Naevius is now doing proves that nothing is owing to him? For what is he doing now? What is the matter in dispute? What is this trial on which we have already been engaged two years? What is this affair that is going on now, with which he is utterly wearing out so many eminent men? He demands his money. What! not till now? However, let him demand it; let us hear what he has to say. **43** He wants the accounts and disputed points concerning the partnership to be settled. It is rather late, but better late than never; let us grant this. "This is not the object of the present action, Gaius Aquilius," says he; "this is not what troubles me now. Quinctius has had the use of my money for so many years. Let him have it for all I care; I do not ask for it." What, then are you contending for? Is it, as you have said on so many occasions, that my client may lose his rights as a citizen, that he may not be able to keep his position which up till now he has so honourably maintained, that he may no longer be reckoned among the living, that he may have to fight for his life and all that makes it honourable, to plead his cause first before the judge, without hearing the voice of the accuser until he himself has finished his speech? What then? What purpose does this serve? That you may come into your own more speedily? But if this was what you wanted, that could have been done long ago. **44** That you may contest the matter by a more honourable form of procedure?^a But you cannot, without

^b Or, reading *velit*, "Naevius was so avaricious that he was ready to sacrifice something so as not to leave Quinctius anything," but it is difficult to see the sense of this.

^a Rhetorical exaggeration (cf. the use of *caput* in this speech and note on § 8).

^a That is, a trial involving more important issues than a mere money matter.

committing an abominable crime, murder your kinsman Quinctius. That the trial may be facilitated? But neither does Aquilius take pleasure in pronouncing sentence when a man's civil rights are at stake, nor has Hortensius learned the art of demanding a man's head. But what is our answer, Aquilius? Naevius demands his money; we deny that any is owing to him. Let a trial take place at once; we make no objection. Is there any thing else he wants?^b If he is afraid that, after the decision has been given in his favour, the money will not be forthcoming, let him accept security for the payment and give security for what I claim in the same form as that in which he accepts security from me.^c This can be settled now, Aquilius; you can leave the tribunal at once, relieved of a matter which I was on the point of saying has been as troublesome to you as to Quinctius.

45 What are we to do, Hortensius? What are we to say of our offer? Can we not for once lay aside our arms and discuss a question of money without imperilling anyone's fortunes? Can we not assert our claim in such a way as to leave the civil rights of a kinsman unimpaired? Can we not assume the role of plaintiff and abandon that of accuser? "No," says Naevius, "I will accept security from you, but I will not give you security." XIV.46 Who is it, I ask, who imposes upon us such equitable terms? Who has decided that what is fair for Quinctius is unfair for Naevius? "The estate of Quinctius," says he, "has been taken possession of in accordance with the praetor's edict." So then you demand that I should admit this, so that we may by our own verdict confirm the existence of this possession which we maintain in our judgement does not exist? Cannot some way be found, Aquilius, whereby each of the parties may come into his own without bringing disgrace, infamy, and ruin upon the other? Undoubtedly, if anything were owing to Naevius he would claim it; he would not prefer that all kinds of trial should take place rather than that single one,^a which is the origin of all the rest. **47** The man who for so many years never even applied to Quinctius for payment when he could have brought an action any day he chose; who, from the moment he began to act fraudulently,^b wasted all the time in a number of adjournments, who afterwards released his recognizances, and treacherously drove my client by force from their common lands; who, when he had the opportunity of bringing an action on the main point without anyone objecting, preferred to enter into an "engagement" which might ruin his opponent's reputation;^a who, when he is brought back to trying the question which is the origin of all the rest, rejects the most equitable terms, thereby virtually admitting that it is not my client's money but his life-blood that he is seeking—does not this man openly declare: "If anything had been owing to me, I should have claimed it and, more than that, I should have recovered it long ago; I should have had no need to enter upon so troublesome a business nor to engage in such odious legal proceedings, nor to employ so many friends to assist me, if it had been merely a question about making a claim. But I have to screw money out of a man against his will and under compulsion; I have to wrest and squeeze out of him what he does not owe; he must be driven from all his possessions; I must summon to my aid all men of influence, eloquence, and rank; violence must be employed against truth, threats flung about, perils thrown in his way, terrors brought before him, so that at last, overcome and thoroughly alarmed by these methods of attack, he may surrender of his own accord"? And in fact, by Hercules! when I see those who are fighting against us, when I think of that company of their friends,^b all these perils seem to me to be at hand, impending and inevitable; but when I carry back my eyes and thoughts to you, Aquilius, I believe that, the greater their efforts and zeal, the more trifling and feeble will the results appear.

48 Well then, Quinctius owed you nothing, as you yourself declare. But what if he had owed you any thing? Would that have been at once a reason for making an application to the praetor to attach Quinctius's goods? I think that such a proceeding is neither in accordance with the law nor to anyone's

^b *Ut quid* (the reading of nearly all the MSS.) must be rendered: "in order that what may happen besides?"

^c It would appear that Naevius owed Quinctius something in connexion with the partnership.

^a The money question in the partnership.

^b Madvig omits *male*, if so, the meaning is simply "to take legal proceedings."

^a In reality, the *sponsio* was about the fact of possession.

^b The *advocati* of Naevius, sitting together on the benches.

interest. What excuse, then, does Naevis give? He says that Quinctius had not kept his appointment to appear.

XV. Before proving that this is not the case, I should like, Aquilius, to examine both the fact itself and the behaviour of Sextus Naevis in the light of the principles of duty and the custom of all men. According to your assertion, he had not kept his appointment—this man between whom and yourself there existed ties of kinship, partnership, in short, all friendly relations and long-standing intimacy. **49** Was it seemly that you should go straight to the praetor? Was it fair that you should immediately make application to be allowed to enter into possession of Quinctius's property by virtue of his edict? Did you resort with such eager haste to these extreme and most unfriendly legal measures, in order that there might be nothing more grievous or more cruel which you kept back for future employment? For what greater disgrace can happen to a human being, what greater or more bitter misfortune can befall a man? Can such dishonour fall to one's lot, can such disaster be met with? If a man has been deprived of his money by ill luck or forcibly deprived of it by another's injustice, as long as his reputation is unsullied, his upright character proves a ready consolation for his poverty. On the other hand, there are cases where men, either tainted with ignominy or convicted of an offence that involves disgrace,^a do remain in possession of their own property, and are not obliged to wait for help from others, which is the worst of miseries, and so find what is after all a help and comfort that alleviates their sufferings. But the man whose property has been sold, who has seen not only his rich possessions but even the necessaries of food and clothing ignominiously put up for sale under the hand of an auctioneer—that man is not only banished from the company of the living, but is relegated to a position lower than the dead, if that be possible. In fact, an honourable death often confers lustre even upon a disgraceful life, but a life so disgraceful as this^a leaves no room even for an honourable death. **50** Therefore, by Hercules! if a man's goods are possessed by virtue of an edict, his character and reputation are taken possession of together with the goods; if a man's name is posted up on placards in the most frequented places, he is not even allowed the privilege of perishing in silence and obscurity; if a man has trustees appointed and put in as owners of his property,^b to fix the rules and conditions of his ruin; if a man hears the voice of an auctioneer crying out his name and putting a price on the goods, then, in bitterest^c pain, alive and with his own eyes, he sees the final act of his own funeral, if that can be called a funeral, which is attended not by friends met together to do honour to his obsequies, but by brokers, like executioners, ready to tear and mangle the remnants of his life.

XVI.**51** Accordingly our ancestors willed that such a sentence should be a rare occurrence, and the praetors have ordained that it should only be pronounced after mature consideration. Worthy men, even when they are openly defrauded, and when there is no opportunity of trying the case in the usual manner, only lower themselves to extreme measures with timidity and caution, driven by the force of necessity and with great reluctance, after the defendant has several times failed to appear, and after they have often been flouted and disappointed. For they carefully consider the nature and gravity of confiscating a man's possessions. No honourable man, even if he is within his rights, wants to put a citizen to death; he would prefer that it should be remembered that he spared when he could have destroyed than that he destroyed when he could have spared. Honourable men treat the greatest strangers, indeed, even their greatest enemies in this manner, for the sake of public opinion and the common feelings of humanity; so that, having never themselves done anything unpleasant to others knowingly, nothing disagreeable can justly

^a *Iudicium turpe* is a trial in which the penalty for the unsuccessful litigant was *infamia*, the loss of certain political rights. Such were actions relating to breach of trust, guardianship, partnership. One whose property was possessed and sold became *infamis* (*Pro Roscio Comoedo*, vi. 16). He lost his vote, could not fill public offices or appear in a court of law, and was expelled from his tribe.

^a The life of an *infamis*.

^b *Magister* was one of the creditors appointed to superintend the sale of the property; *domini* were the creditors who sold the property as if they were the owners of it.

^c There is special force in *acerbum funus*, *acerbus* being used of a premature death, before one is ripe for it, "dying cruelly before his time."

befall them by way of reprisals. He did not appear to his recognizances. **52** Who? Your kinsman. However blamable the matter may have appeared in itself, its heinousness should have been thought less of in consideration of your close relationship.

He did not appear to his recognizances. Who? Your partner. You ought to have pardoned even a graver fault in a man with whom either your own wish had associated you or chance had united you. He did not appear to his recognizances. Who? The man who was always in your company. So then, because he has once been guilty of not being in your company, you have hurled against him all the weapons which are reserved for use against those who have committed many guilty and fraudulent acts. **53** If it were a question of some two-penny bit of your own, Naeivius, if you were afraid of being taken in in some trifling matter, would you not have hurried to consult Gaius Aquilius or some other adviser? But when the rights of friendship, partnership, and kinship were in question; when it was fitting that your obligations and character should be considered, at such a time you not only abstained from consulting Gaius Aquilius or Lucius Lucilius, but you did not even consult yourself; you did not even say to yourself “Two hours have passed; Quinctius has not appeared to his bail; what am I to do? “If, by Hercules! you had only said these five words to yourself, your cupidity and avarice would have abated; you would have left room for reason and prudence; you would have composed yourself; you would not have sunk to the disgrace of having to confess before men of such eminence as these that, at the very same hour at which he did not appear to his recognizances, you formed the design of utterly ruining the fortunes of one who was your kinsman.

XVII. **54** I will now consult these gentlemen on your behalf, in regard to a matter that is now past and with which I am not concerned, since you forgot to consult them at the proper time on what was your personal affair. I ask you the following questions, Gaius Aquilius, Lucius Lucilius Balbus, Publius Quinctilius, and Marcus Claudius Marcellus.^a A partner and relative of mine has not answered to his recognizances; I have long been intimate with him, but have recently been engaged in a dispute with him about money matters. Am I to make application to the praetor to authorize me to take possession of his goods? or, since he has a house, a wife, and children at Rome, should I rather leave a notice at his house?

I should like to know your opinion on this matter. If I have rightly gauged your kindly feelings and good sense, I have certainly little doubt of the answer you would make if you were consulted: in the first place wait; then, if the man seems to be keeping out of the way and making a fool of you for any length of time, have an interview with your friends, ask who his agent is, and give notice at his house. It is difficult to say how many things there are which you would advise should be done before being compelled to resort to this extreme measure. **55** What says Naeivius to this? No doubt he laughs at our folly in desiring to find in his life any regard for duty or looking for the principles of men of honour. “What have I to do with such severe morality and caution?” says he; “let men of honour attend to the fulfilment of such obligations; but, as for me, let them ask, not what I possess, but how I have acquired it, the circumstances of my birth, and the manner in which I was brought up. **56** I remember that there is an old saying: it is much easier for a buffoon to become rich than a good head of a household.” This is what in reality he openly declares by his deeds, though he does not venture to say it in so many words. For if indeed he desires to live according to the principles of honourable men, he must learn and unlearn much—two things equally difficult for him at his time of life.

XVIII. “I did not hesitate,” says he, “to put up his goods for sale, since he had forfeited his recognizances.” Shameless rascal! since, however, that is what you claim as your right, and demand that it should be allowed, let us allow it. But what if he never forfeited his recognizances at all, if your plea is entirely a tissue of lies, invented by you with the greatest roguery and malice; what if no engagement for his appearing was ever made between you and Quinctius? by what name ought we to call you then? A rascal? But even if he had forfeited his recognizances, in making your application to the praetor and in advertising his goods for sale you still showed yourself to be an utter rascal. Full of malice? You do not

^a The three last-named are Aquilius's assessors.

deny it. Fraudulent? That is a name which you have already claimed for yourself and glory in it. Audacious, avaricious, perfidious? These terms are commonplace and out-of-date; but the act is unprecedented and unheard of. **57** What term then am I to use? By Hercules! I am afraid of using expressions so harsh that they would outrage nature, or not so strong as the cause demands. You assert that Quinctius forfeited his recognizances. As soon as he returned to Rome, he asked you to tell him on what day he had given bail to appear. You immediately answered: on the 5th of February. On leaving you, Quinctius tried to remember the day on which he set out from Rome for Gaul. On consulting his diary, he found that the day on which he set out was the 29th of January.^a If he was at Rome on the 5th of February, we admit there is no reason why he should not have entered into an engagement with you to appear. **58** But how can this be verified? Lucius Albius, an extremely honourable man, set out with him; he will give evidence. Some friends accompanied both Albius and Quinctius; they also will give evidence. The letters of Quinctius, those numerous witnesses, all of whom had the strongest reasons for being able to know the truth and none for lying, shall be confronted with your assistant stipulator.^b

59 And is it in a cause of this nature that Quinctius shall be in difficulty? Shall he any longer live miserably in the midst of such fear and peril? Shall he be more terrified by the influence of his opponent than reassured by the integrity of the judge? O yes, for he has always led a rude and boorish life; he has always been naturally melancholy and reserved; he never frequented the sundial,^a nor the Campus Martins, nor banquets; he has always made it his aim to keep his friends by treating them with respect, and his property by economy; he loved the old-fashioned principle of duty, all the brightness of which amid our modern manners has become dim and antiquated. Yet, if, in a cause in which the rights on both sides were equal, he were to be seen coming off defeated, even then there would be cause for complaint; but now, in a cause in which his rights are superior, he does not even demand to be considered on an equality; he is willing that he come off defeated, but only so far as not to be handed over with all his goods, fame, and fortunes to the greed and cruelty of Sextus Naevius.

XIX. **60** I have fulfilled my first promise, Aquilius; I have proved that there was no reason at all why Naevius should apply to the praetor, since no money was owing to him and, even if there had been, nothing had been done to justify a resort to such an extreme method of procedure.

Now let me call your attention to the fact that the goods of Quinctius could not possibly have been possessed in accordance with the praetor's edict. Examine the edict. ONE WHO HAS KEPT OUT OF THE WAY WITH FRAUDULENT INTENT. This does not apply to Quinctius, unless those are keeping out of the way, who went away on business leaving an agent behind. HE WHO HAS NO HEIR.^b This does not apply to Quinctius either. HE WHO HAS LEFT HIS COUNTRY TO GO INTO EXILE. This cannot be said of Quinctius. HE WHO HAS NOT BEEN LEGALLY DEFENDED IN HIS ABSENCE. **61** Nor even that.^a When or how, Naevius, do you think that Quinctius ought to have been defended in his absence? At the time when you made application to the praetor to take possession of the property? There was certainly no one there then, for no one could foresee that you would make such a request, nor was it anyone's business to object to what

^a Cf. § 24.

^b *Stipulator* is one who demands a formal promise, opposed to *promissor*, one who gives the promise. Sometimes one *stipulator* employed another (*adstipulator*) as accessory or assistant, who said to the promiser "idem spondes?" corresponding to the stipulator's "dari spondes?" The *adstipulator* in the present instance was probably a witness to the *vadimonium*.

^a In the Forum, a favourite resort and meeting-place for gossip. Bitterly ironical. What can a man expect who is out-of-date in his rude, honest ways?

^b If no one appeared, or was likely to appear as heir to represent his father, the goods could be seized as a precautionary measure in the interest of the heir himself and the creditors.

^a The words in the text, from *Dici id non potest* to *quidem*, are inserted by Hotman, who professed to have found them in a very old ms. Roby thinks that the inserted clause could not have justified a writ of possession which led to sale, and holds that mere undefended absence could only have led to *possessio* in the sense of "custody" or "safe-keeping." Hence possibly the non-concurrence of the other creditors, a point raised by Cicero to make the case for the *missio* seem weaker.

the praetor ordered, not to be done, but to be done in accordance with his edict.^b What then was the first opportunity the agent had of defending the absent man? When you advertised the sale of the property. Then Sextus Alfenus came forward; he did not allow this; he tore down the placards. His first duty as an agent was most carefully discharged by him.

Let us see what followed next. You seized a slave belonging to Quinctius in the street and attempted to carry him off. Alfenus refused to allow it; he took him away from you by force and had him taken back to Quinctius's house. In this also the duty of a zealous agent is shown to have been admirably performed. You assert that Quinctius is in your debt, his agent denies it; you wish to bind him over to appear in court, he promises to appear; you summon him before the magistrate,^c he follows you; you demand a trial, he does not refuse it. If this is not defending an absent man, I do not know what is. **62** But who was the agent? I suppose some beggar had been chosen, a litigious rascal, capable of putting up with the daily insults of a wealthy buffoon. Anything but that; he was a wealthy Roman knight, one who managed his own affairs well, and lastly, he was the man whom Naevius left as his agent in Rome, whenever he went into Gaul. **XX.** **63** And do you dare, Sextus Naevius, to deny that Quinctius was defended during his absence, seeing that he was defended by the same man who used to defend you? seeing that he who offered to stand trial on behalf of Quinctius was the man to whom, when going on a journey, you were in the habit of entrusting and committing the care of your fortune and reputation, do you attempt to say that there was no one to defend Quinctius in court? "I demanded," says Naevius, "that he should give security for payment of the judgement." You were wrong in your demand; so at least you appeared to be;^a Alfenus refused. "Yes, but the praetor was going to order that he must give it." That is why an appeal was made to the tribunes. "Here," says Naevius, "I have got you; to appeal to the tribunes is neither submitting to a trial nor defending in court." When I consider how clever Hortensius is, I do not think that he will make this objection; but when I hear that he has already done so and consider the cause in itself, I do not see what else he can say. **64** For he admits that Alfenus tore down the placards; that he promised to appear in court; that he did not refuse to stand trial in identically the same terms as those proposed by Naevius, with the reservation, however, that in accordance with custom and the established law, the order should be made by the magistrate appointed for the purpose of assisting the citizens.^b It is necessary, then, either that these things have not taken place or that such a man as Gaius Aquilius should on his oath lay down as law in this state that one whose agent has not consented to stand trial on any issue, whatever the terms in which the claim may have been drawn up, one whose agent has ventured to appeal from the praetor to the tribunes, is not defended; that his goods may be legally possessed; that it may be thought fit that the unhappy man, during his absence, ignorant of what is happening to him, may be stripped with the greatest disgrace and ignominy of all that makes life honourable. **65** But if such an interpretation of the law cannot be admitted by anyone, certainly everyone must admit that Quinctius during his absence was legally defended. This being so, his goods were not possessed in accordance with the edict. But you say the tribunes did not even listen to the appeal. If this is the case, I grant that the agent ought to have obeyed the decree of the praetor. What? if Marcus Brutus^a openly declared that he would intervene unless Alfenus himself and Naevius came to some agreement, does it not appear that the appeal to the tribunes and their intervention was intended, not for the purpose of causing delay, but of affording protection?

^b His order was not definite or absolute, but only referred to something that would have to be done in accordance with his edict. If there were any dispute, the matter would be investigated and compensation made if the order was unjustifiable and had damaged the person on whom it had been executed.

^c See note on § 33.

^a Reading *ita iubebare*, the words are Naevius's: "you were ordered to do so."

^b Alfenus expressed his willingness to give security in accordance with the law, if required to do so by the tribunes.

^a Probably the father of the Brutus who was one of Caesar's murderers. In the Civil War he supported Marius and was put to death by order of Pompeius when in command of the forces in Cisalpine Gaul. The appeal to the tribunes appears to have been against the writ of possession or the giving of security by Alfenus.

XXI. **66** What happened next? In order that everyone might be able to understand that Quinctius was legally defended and to prevent the slightest suspicion arising, unfavourable either to the way in which he had discharged his duty as agent or to Quinctius's reputation, Alfenus summoned several honourable citizens; he called them to witness, in the hearing of Naevius, that, considering the friendship which united him to both parties, he first appeals to him not to attempt to take severe measures against Quinctius in his absence; but if, on the other hand, he persists in carrying on his prosecution in a most unfriendly and hostile manner, that he is ready to maintain, by all honourable and legal means, that the money he demands is not owing, and to stand trial in any form of action given notice of by the plaintiff. **67** Several honourable gentlemen signed the minutes of the facts and conditions. There cannot be any doubt about their genuineness. Affairs being thus in their original position, Quinctius's goods being neither proscribed nor possessed, the result was that Alfenus promised Naevius that Quinctius should appear in court. He appears to his recognizances. The affair remains in dispute for two years, owing to the slanders spread abroad by that fellow^a until a method could be found whereby it could be diverted from the ordinary course of procedure and the whole cause could be included within the limits of this remarkable form of trial.

68 What part of an agent's duty can be mentioned, Gaius Aquilius, which appears to have been neglected by Alfenus? What reason is there for denying that Quinctius was defended in his absence? Or am I to suppose what Hortensius will put forward, because he has recently thrown out a hint of it and Naevius is always loudly proclaiming it, is that Naevius was not contending on equal terms with Alfenus at that particular time, when that particular party^b was in power? If I am willing to admit this, I think they will concede to me that, far from not having any agent, Quinctius had one who was very popular. But for gaining my cause, it is sufficient that there was an agent, against whom Naevius could have brought an action; what kind of a man he was, provided he defended his absent client by legal means and through a lawful magistrate, I do not think has anything to do with the question.

69 "Yes, but," says he, "Alfenus belonged to the dominant party." Why not? a man who had been brought up in your house, whom you had taught from his boyhood not to have respect for any kind of nobility, not even for a noble^a gladiator. If Alfenus wished the same thing as you earnestly desired, in what respect was the struggle between you unequal? "He was an intimate friend of Brutus," says he, "and therefore Brutus intervened." On the other hand, you were an intimate friend of Burrienus, who gave an unfair decision, in short, of all those to whom at that time violence and crime gave the greatest power, and who dared to do all that they had the power to do. Or did you wish all those to be victorious who are now working so hard that you may obtain the victory? Dare to say so: not openly, but merely to those whom you have summoned to your assistance. **70** However, I do not wish to recall the memory of an event, which in my opinion ought to be entirely forgotten and blotted out. XXII. I have only one remark to make: if his zeal for a political party made Alfenus powerful, then Naevius was most powerful; if Alfenus, on the strength of his personal influence, demanded anything that was somewhat unfair, Naevius obtained privileges that were far more unfair. For, in my opinion, there was no difference between you in party zeal, but in natural ability, cunning, and trickery, you were easily first. Leaving other things out of the question, it is enough to say that Alfenus perished with those and for the sake of those whom he loved, whereas you, after those who were your friends were unable to obtain the victory, managed to make friends of those who were victorious.^a

71 But if you think that at that time you had not the same legal rights as Alfenus, because in spite of all he was able to call in someone as his legal adviser against you, because a magistrate was found before

^a That is, Naevius.

^b That is, that of Marius.

^a *Nobilis* is used in the double sense of belonging to the nobility, and well-known, distinguished. Cicero makes out both Alfenus and Naevius to be opposed to the nobility, Sulla's party. In § 73 the affair between them is called a mere skirmish, at the time when the Marian party was in power, whereas now Naevius has the support of so many influential men.

^a Naevius once supported Marius, but now changed over to Sulla, when he saw that he would gain the victory.

whom his cause could be maintained, what course of action should Quinctius decide upon in his present circumstances? He has not yet found an impartial magistrate; the usual form of action has not been granted him; no condition, no engagement, in short, no demand has ever been made—I say nothing of a fair demand, but one that up to the present has never been heard or spoken of. I wish to plead on a question of money. “That is not permitted.” But that is the point at issue. “That has nothing to do with me; you must plead on a charge involving your political rights.” Make the charge then, since this course is necessary. “No, not unless you speak first, according to the new rule.” If I must, I must. “The number of hours allowed for your pleading will be fixed in advance as we think fit; the judge himself will be kept within limits.” **72** What then? “You will find some advocate, a man with the old-fashioned sense of duty, a man to treat our brilliant counsel and influence with indifference;^b Lucius Philippus^c will fight for me, a man of the greatest eminence in the state for his eloquence, dignity, and position; Hortensius will speak for me, a man distinguished for his ability, nobility, and reputation; further, I shall have the support of men of the highest birth and the greatest power, men whose numbers and presence would make not only Quinctius tremble, who is fighting for his political rights, but even anyone who is beyond the risk of any such danger.” **73** This is an unequal contest, not that in which you skirmished against Alfenus; you have not even left Quinctius a place where he could make a stand against you.

Wherefore you must either prove that Alfenus denied that he was my client’s agent, that he did not tear down the placards, that he refused to stand trial; or, since these facts are established, you must admit that you did not take possession of Quinctius’s goods in accordance with the edict.

XXIII. For if you did take possession in accordance with the edict, I ask why the goods were not sold, why the rest of the sureties^a and creditors did not meet. Was there no one to whom Quinctius owed money? Yes, there were several creditors, because his brother Gaius had left a considerable amount of debts. What, then, was the reason of this? They were all total strangers to him, and money was owing to them; yet not one among them was found capable of such remarkable scoundrelism as to venture to attack the reputation of Quinctius in his absence. **74** There was only one, his kinsman, his partner, his intimate friend, Sextus Naevius, who, although he was even himself in debt to Quinctius,^b as if some extraordinary reward had been offered for his crime, made the most passionate efforts to deprive his kinsman, crushed and overthrown by him, not only of property honestly acquired, but even of the light of day that is common to all. Where were the rest of the creditors? Indeed, where are they now? Who is there who can say that Quinctius kept out of the way with fraudulent intent, or can deny that he was defended during his absence? No one can be found to make such statements. **75** On the contrary, all those who have or have had dealings with him are here to support and defend him, and are doing their utmost to prevent my client’s good faith, well known in many places, from being disparaged by the perfidious slanders of Naevius. In the case of an “engagement” like this, he ought to produce witnesses from among them to depose as follows: “He has forfeited his recognizances with me; he has cheated me; he asked for time to pay a debt which he had denied; I could not get him to court; he kept out of the way; he left no agent.” Nothing of the kind is said. Witnesses are being procured to say it. Well, I suppose we shall look into that after they have said it. Yet let them remember this one thing—that claiming to be men of weight, their

^b This is ironical, the idea being that no advocate on behalf of Quinctius will be able successfully to oppose the brilliant advocates and supporters upon whom Naevius can count.

^c L. Marcius Philippus, tribune 104 B.C., consul 91. In the Civil Wars he took the side of Sulla. He was a distinguished orator, considered inferior only to Crassus and Antonius. In Horace, *Ep.* i. 7. 46, he is spoken of as “Strenuus et fortis causisque Philippus agendis Clarus.” Cicero else where (*De orat.* III. 1. 4) describes him as “vehemens et disertus et imprimis fortis ad resistendum.”

^a Apparently the sureties for Quinctius’s late brother Gaius.

^b See § 44.

evidence can only carry weight on condition that they keep to the truth; but if they neglect it, they so lose all weight that every one sees that authority is an aid to proving the truth, not to backing up a lie.^a

XXIV. 76 I put these two questions: first, on what grounds was it that Naevius did not finish the business which he had undertaken; that is, why did he not sell the goods of which he was in possession in accordance with the edict; secondly, why, among so many creditors, did no one else fall in with Naevius's plan? I ask these questions that you may be forced to admit that there was no one among them so rash, and that you yourself have been unable to persist in and complete the disgraceful business you had undertaken. What if you yourself, Sextus Naevius, have proved that the goods of Publius Quinctius were not taken possession of according to the edict? I think that your evidence, which would have little weight in a matter which had nothing to do with you, ought to have the greatest weight in a matter which concerns you personally, because it goes against you. You bought the goods of Sextus Alfenus, which the dictator Lucius Sulla caused to be put up for sale; you gave out that Quinctius was your partner in their purchase.^a I say no more. Did you form a voluntary partnership with the man who had cheated you in an hereditary partnership? Did you by your own judgement show your esteem for a man who, in your opinion, had been deprived of his reputation and his fortunes?

77 By heavens! Aquilius, I was feeling distrustful of my ability to stand my ground with sufficient courage and resolution in a cause like this. I was reflecting that, since Hortensius was to plead against me and Philippus was to listen with the greatest attention, I should be nervous and make frequent mistakes. I kept saying to Quintus Roscius,^b here present, whose sister is my client's wife, when he most earnestly begged me to undertake the defence of his kinsman, that it was very difficult for me, not only to plead so important a cause to the end, but even to attempt to utter a single word. When he pressed me still more urgently, I said to him, with the familiarity of a friend, that anyone who even attempted a stage gesture in his presence must be most brazen-faced, but that those who presumed to pit themselves against him, even if they already enjoyed a certain reputation for grace and correctness, would lose it at once, and that I was afraid that something of the kind might happen to me, when I had to speak against such an artist.^a

XXV. 78 Then Roscius said much to encourage me; and by Hercules! even if he had not said a word, anyone would have been greatly moved merely by the silent expression of his interest and zeal for his kinsman. For as he is such an artist that he alone seems worthy to be seen on the stage, so is he such a man that he alone seems worthy of never appearing upon it. 79 "But," he added, "suppose that you have such a cause that you need only prove that there is no one who can walk seven hundred miles in two or at most three days, would you still be afraid that you could not maintain the truth of so simple a statement against Hortensius?" "Certainly not," I answered; "but what has this to do with the matter?" "The whole cause undoubtedly turns upon it," he replied. "How so?" I asked. He then told me of the facts and at the same time of an action of Naevius, of such a kind that its disclosure alone ought to be enough. I beg you, Aquilius, and you his assessors, to listen carefully to what I have to say. I have no doubt you will see that, from the outset, on the one side avarice and audacity have been the attackers, while on the other, truth and modesty have resisted to the utmost of their power. You make an application that you may be allowed to take possession of Quinctius's goods according to the edict. On what day? It is yourself, Naevius, whom I want to hear; I want an unprecedented act of villainy to be proved by the words of the very man who committed it. Give the date, Naevius. "On February 20." Correct. How far is it from here to your pastures in Gaul? I ask you, Naevius. "Seven hundred miles." Quite right. Quinctius is turned out of his pasture: on what day? can you also tell us this? Why are you silent? Tell us the date, I say. He is

^a Naevius makes the claim that he will be able to bring forward *graves homines* as witnesses, to which Cicero replies that their *auctoritas* will depend on the manner in which they give their evidence, obviously suggesting that they will probably give false evidence.

^a How could Quinctius have been in a position to become a purchaser in partnership with a creditor by whom his goods had been seized? *Societatem coire* is the regular phrase for forming a partnership.

^b Quintus Roscius, the famous comedian, defended by Cicero in a speech included in this volume.

^a That is, as Hortensius is.

ashamed to do so; I understand; but his shame is too late and useless. Quinctius was turned out of his pasture on February 23; two days later, or, if we suppose that someone started running from the court immediately, in less than three days, a journey of seven hundred miles was accomplished. **80** Incredible! reckless covetousness! A winged messenger! The agents and hangers-on of Sextus Naevius reached the territory of the Segusiavi^a across the Alps from Rome in two days! Lucky man to possess such messengers or rather flying horses!

XXVI. On this occasion, if all the Crassi^b and Antonii^c could appear in court, even if you, Lucius Philippus, who shared their eminence, desired to join Hortensius in pleading this cause, yet I must gain the day. For eloquence does not, as you imagine, decide everything; there are truths so evident that nothing can invalidate them. **81** Now, before applying for authority to take possession of the goods, did you send an agent to see that the owner was expelled from his own estate by force and by his own slaves?^d Take your choice; the one is incredible, the other is atrocious; both are unprecedented. Do you maintain that seven hundred miles were covered in two days? Tell me. You answer no? Then you sent your agent beforehand. I like this better; for if you said the former, you would show yourself a bare-faced liar; in admitting the latter, you allow that you have been guilty of a crime which you cannot cover up even by a lie. **82** Will a course of action, so covetous, so audacious, and so rash, meet with the approval of Aquilius and men such as his assessors? What is the meaning of this madness, this precipitate and untimely haste? Does it not indicate violence, crime, brigandage, in short, anything but justice, duty, and honour? You sent an agent without an order from the praetor. What was your intention? You knew that he would give the order. What! could you not have waited till he had given it, and then sent your agent? You were going to make your application. When? Thirty days or so after.^a Yes, provided nothing happened to prevent you, if you did not change your mind, if you were in good health, in short, if you were alive. Of course the praetor would have given the order. I suppose so, if he had pleased, if he had been in good health, if he had been in court, if there had been no one to refuse to give security and be willing to stand trial in accordance with his decree. **83** For, by the immortal gods! if Alfenus, my' client's agent, had then given you security and been willing to stand trial, in short, had been willing to do everything you demanded, what would you have done? Would you have recalled the agent whom you had sent to Gaul? But Quinctius would by then have been expelled from his estate, driven headlong out of hearth and home, and, which is the height of indignity, outraged by the hands of his own slaves, at your bidding and according to your instructions. No doubt you would have set matters right later. And do you dare to attack any man's character, you who are forced to admit that you were so blinded by passion and avarice that, although you did not know what was going to happen afterwards—and many things might have happened—you founded your hopes of gain from a present crime on the uncertain issues of the future? And, in saying this, I am speaking just as if, at the moment when the praetor had authorized you to

^a Not *Segusiani*. They were a Gallic people, who in Caesar's time settled in the angle between the Saline and the Rhone and westwards beyond the upper course of the Loire. The MSS. have *Sebaginnos*, which led to the conjecture that they were an otherwise unknown Gallic tribe in Savoy. Hirschfeld says that Cicero would not have mentioned any Gallic tribe, but only in general terms the further limits of the province of Gallia Narbonensis. He conjectures ad Cebennas (Cévennes), the mountain in Southern Gaul that separated the Helvii and Arverni. There are several various readings here, the commonest being *Segusianos*; *Sebaginnos* Julian; *Sebaginos* Müller; *Segusianos* Baiter.

^b Licinius Crassus (140-91 B.C.), consul 95. He died a few days after he had violently attacked L. Marcus Philippus (§ 72), one of Aquilius's assessors.

^c Marcus Antonius (143-87 B.C.), praetor 104, consul 99. In the Civil War he took the side of Sulla, and was put to death by Marius on entering Rome. He is one of the interlocutors in Cicero's *De oratore*. He and Crassus were the greatest orators of their time.

^d Roby thinks that, although this was a great risk for Naevius to run, his action was legitimate in so far as he got the praetor's order before the eviction in Gaul took place.

^a According to Mommsen, these words are a gloss. It may refer to the time between Naevius's sending a messenger and the day of his application to the praetor. Others refer *postulaturus eras* to the final application for the sale, thirty days being the time that the possession must last before this could be made.

take possession according to his edict and supposing you had sent to take possession, you either should or could have ejected Quinctius from possession.^a

XXVII. **84** All these facts, Gaius Aquilius, are of such a kind that anyone can clearly see that in this cause rascality and influence are contending against helplessness and integrity. How did the praetor order you to take possession? According to his edict, I suppose. In what terms was the “wage “ or “engagement” drawn up? IF THE GOODS OF PUBLIUS QUINCTIUS HAVE NOT BEEN TAKEN POSSESSION OF ACCORDING TO THE PRAETOR’S EDICT. To return to the edict. In what manner does it order possession to be taken? If Naevius took possession in quite a different way from what the praetor ordered, can it be disputed that he did not take possession according to the edict, and that I have won the wager? Certainly not, I imagine. Let us examine the edict. THOSE WHO HAVE ENTERED INTO POSSESSION ACCORDING TO MY EDICT. He is speaking of you, Naevius, according to your idea, for you say that you entered into possession according to the edict, which defines what you are to do, and gives you instructions and directions. IT PLEASES US THAT THEY SHOULD BE IN POSSESSION IN THE MANNER FOLLOWING. In what manner? WHAT THEY CAN SAFELY GUARD UPON THE SPOT LET THEM GUARD THERE; WHAT THEY CANNOT, IT SHALL BE LAWFUL TO CARRY OFF AND DRIVE AWAY. What next? TO EJECT THE OWNER AGAINST HIS WILL DOES NOT PLEASE US. Even the man who keeps out of the way with fraudulent intent, even the man whom nobody has defended in his trial, even the man who acts with bad faith towards all his creditors, cannot be ejected from his property against his will. **85** When you set out to take possession, Sextus Naevius, the praetor himself openly told you: You may take possession in such a manner that Quinctius may have possession with you at the same time; you may take possession in such a manner that no violence be offered to Quinctius.^a What! how have you observed this order? I say nothing about his being a man who did not keep out of the way, who had a house, a wife, children, and an agent at Rome, who had not forfeited his recognizances—I say nothing about all this; I only say that the owner was ejected from his estate, that hands were laid on the owner by his own slaves in the presence of his household gods. I say this^b

* * *

XXVIII. [I have shown] that Naevius did not even apply to Quinctius, although he lived with him and could have gone to law with him any day; next, that he preferred entering into all the most troublesome legal proceedings, with great prejudice to himself and the greatest danger to Publius Quinctius, to abiding by a pecuniary action, the source and origin of all these proceedings, as he admits, which could have been finished in one day. On that occasion I proposed that, if he intended to sue for the money, Quinctius should give security for the payment of the judgement, provided that Naevius himself, in case Quinctius claimed any money, should give the same security to him.

86 I have shown how many steps should have been taken before application was made for possession of the goods of a relative, especially as he had at Rome a house, a wife, children, and an agent, a friend of both parties. I have proved that when Naevius says the recognizances were forfeited, no recognizances had been given at all; that on the day on which he says my client had made him a promise to appear, he was not even at Rome; and I undertook to make this clear by the evidence of witnesses who were both bound to know the facts and had no reason for lying. Further, I have proved that the property could not have been possessed according to the edict, because Quinctius had neither kept out of the way with fraudulent intent nor was it asserted that he had left his country to go into exile. **87** There remains the

^a Both of which alternatives are denied by Cicero.

^a There is a difference between taking possession with the intention of keeping it for one’s own, or as belonging to someone else. In a *missio in possessionem* the one who is missus has only the detention of the thing, to guard it and prevent its alienation, the original possessor not thereby losing his actual possession. Thus *possideto* appears to be used in the sense of detention, *possideat* in that of legal possession. Even if Quinctius were expelled from his land, he did not lose legal possession, since the one who expelled him did not intend to keep it as his own, and had not the *animus domini* (see Long’s note).

^b Something is missing here, where Cicero endeavours to prove, as he promised to do in § 36, that Naevius had not taken possession of the goods of Quinctius at all. See Appendix on p. 109 where the passage from Severianus is translated.

allegation that no one defended him in court. In answer to this I maintained that he was fully defended, not by any stranger nor by any false accuser or knavish lawyer, but by a Roman knight, his friend and relative, whom Naevius himself had formerly been in the habit of leaving at Rome as his agent. Nor, even if he did appeal to the tribunes, was he on that account less ready to submit to trial, nor was Naevius deprived of his rights by the influence of my client's agent; on the contrary, it was Naevius who was then somewhat superior by reason of his influence, and now he scarcely allows us the chance of breathing. XXIX. **88** I asked what was the reason why the goods had not been sold, since they had been seized according to the edict. Next, I inquired how it happened that none of my client's numerous creditors followed Naevius's course, but, instead of speaking against Quinctius to-day, are all of them doing their utmost to defend him, especially since, in an action such as this, the evidence of creditors is considered to be most material to the case. Afterwards, I used the evidence of my opponent, who just lately declared that he had taken into partnership a man who, as he maintains to-day, he then showed was not even among the number of the living. Then I brought forward that instance of incredible rapidity or rather audacity. I proved that either seven hundred miles must have been traversed in two days or that Naevius had sent an agent to take possession several days before he applied to the praetor to authorize him to attach the goods. **89** I afterwards read the text of the edict, which clearly forbade an owner to be ejected from his estate; this is enough to show that Naevius had not taken possession according to the edict, since he admitted that Quinctius had been forcibly ejected. On the other hand, I proved that the property had not been taken possession of at all, because goods are regarded as possessed, not when part only, but when everything that can be held and possessed^a has been seized. I said that my client had a house in Rome, of which Naevius did not even attempt to take possession; a number of slaves, none of whom did he seize or even put his hand upon; he tried, indeed, to lay hold of one, but, having been prevented, he did not renew the attempt. **90** In Gaul itself Quinctius has some farms of his own, which, as you know, Naevius never entered; lastly, you know that Quinctius's private slaves have not all been driven out of the same pastures of which Naevius took possession after he had ejected his partner from them by force. From this and all Naevius's other words, deeds, and intentions, anyone can understand that he had, and has, no other object than to enable himself to secure the whole estate (which belongs in common to both), as his own personal property by violence, injustice, and unfair legal procedure.

XXX. **91** Now that I have finished my pleading, the nature of the case and the greatness of the danger seem to make it necessary for my client to implore and beseech you, Aquilius, and you, his assessors, in the name of his old age and forlorn condition, simply to follow the dictates of your natural goodness of heart, so that, since he has the truth with him, his distress may have greater power to incline you to pity than the resources of Naevius to incline you to cruelty. **92** From the very day when we came before you as judge we began to pay less attention to the threats which we formerly dreaded. If it had been merely the cause of one party contending with the cause of another party, we felt certain that we could easily prove the justice of ours to anyone; but since the issue was between one mode of life and another, for that reason we thought that we needed you all the more as judge. For the question to be decided is whether the rustic and simple frugality of my client's life can defend itself against luxury and licentiousness, or whether, disgraced and stripped of all that made it honourable, it is to be handed over naked to greed and impudence. **93** My client does not compare his influence to yours, he does not vie with you in wealth and resources; he leaves to you all the talents which have made you great; he admits that he can neither speak elegantly nor accommodate his language to the will of another; that he cannot abandon a friend in affliction and fly into the arms of another who is the favourite of fortune;^a that he does not live in the midst of profusion and extravagance; that he does not prepare splendid and magnificent banquets; that he does not own a house that is closed to modesty and good living but open, nay, freely accessible to passion and debauchery. But on the other hand he declares that he has always cherished duty, good faith, industry,

^a *Teneri ac possideri*: in legal language, *possidere* is properly used of corporeal things (things that can be touched, as a slave, farm, gold), *teneri* of incorporeal (things that cannot be touched, as a right, inheritance, usufruct).

^a See § 70.

and a life that has been altogether rough and ill-provided. He is aware that the opposite mode of living is more highly thought of and has very great influence in these degenerate days. **94** What follows? This influence, however, he is aware, does not go so far as to place the civil existence and fortunes of most honourable citizens under the domination of those who have abandoned the principles of upright men and have preferred to follow the lucrative trade and luxury of Gallonius^b and have even shown in their lives an audacity and perfidy from which he was free. If, against the wish of Naevius, he is permitted to live; if there is room for an honourable man in the State in spite of Naevius; if it is not a crime that Quinctius should breathe, although the nod and supreme power of Naevius forbid it; if, thanks to my defence, he can preserve the distinctions, which he has obtained for himself by his modesty, in the face of impudence, there is still hope that this miserable and unhappy man may at last be able to find rest and security. But if Naevius is able to do all that pleases him and it will please him to do what is not permissible what is to be done? What god is to be appealed to? Who among men is to be implored to give protection? In short, what lamentation, what grief, can be found adequate to express so great a disaster?

XXXI. 95 It is pitiable to be ejected from all one's possessions, still more pitiable to be ejected unjustly; it is galling to be deceived by anyone, still more galling to be deceived by a kinsman; it is a calamity to be driven out of one's property, a still greater calamity to be driven out in disgrace; it is disastrous to be slain by a brave and honourable man, still more disastrous to be slain by one whose voice has been prostituted in the trade of a public crier; it is mortifying to be conquered by one's equal or superior, still more mortifying to be conquered by one's inferior or by one who is beneath us; it is grievous to be handed over with one's property to another, still more grievous to be handed over to an enemy; it is awful to have to plead for one's life, still more awful to have to plead before having heard the charge. **96** Quinctius has turned his eyes everywhere, he has tried all the chances of safety; not only has he been unable to find a praetor from whom he could get justice, not even one from whom he could obtain the kind of trial he wanted; he has not even been able to get any assistance from the friends of Naevius, at whose feet he often and for a long time prostrated himself, begging them by the immortal gods either to contend with him according to law or at any rate to inflict injustice upon him unaccompanied by disgrace. **97** Finally, he faced the haughty looks of his enemy Sextus Naevius himself; he seized his hand with tears—that hand experienced in proscribing the estates of his kinsmen; he implored him by the ashes of his dead brother, in the name of the relationship which united them and of his own wife and children, whose nearest relative is Publius Quinctius, to show at length some compassion, to have some consideration, if not for their relationship, at least for his age; if not for the man himself, at least for humanity; and to come to some arrangement with him on any terms, provided only they were enduring and his reputation were left unimpaired. **98** Repulsed by Naevius himself, having received no assistance from his enemy's friends, harassed and browbeaten by all the magistrates, he has no one to appeal to but yourself, Aquilius; to you he commits himself, to you he entrusts all his fortunes and everything he possesses; in your hands he places his reputation and all the hopes of the life that still remains to him. Worried by numerous affronts, tormented by many wrongs, he takes refuge with you, not disgraced but in misery; driven out from a rich estate, assailed by every kind of indignity, seeing this man lording it over his paternal heritage, unable to provide a dowry for his marriageable daughter, he has, in spite of this, done nothing to belie his past life.

99 He therefore implores you, Aquilius, to allow him to carry away with him from this court the reputation and respect which he brought before your tribunal at an age when his life was nearly over and had almost run its course; he begs that he, whose fidelity to duty has never been called in question, may not, in his sixtieth year, be branded with the mark of the greatest shame and ignominy; that Sextus Naevius may not disgrace all his distinctions by wearing them as trophies; that the good name, which has accompanied him up to his old age, may not be prevented through your decision from attending him even to the grave.

^b A public crier, who lived in the time of Lucilius, by whom he was satirized (145-103 B.C.). His great wealth and gluttony became proverbial (Horace, Sat. ii. 2. 46).

 APPENDIX TO XXVII. § 85.

In this manner Cicero, in his speech in defence of Quinctius; refutes the definition given by his opponent in accordance with the common opinion: If anyone in any way takes possession of a landed estate, but allows the owner to keep his other properties, in my opinion, says he, he appears to possess a property, not the whole estate of another. He then offers his own definition: What is possession? says he. It is evidently to be in possession of those things which at the time can be possessed. He proves that Naevius has not taken possession of the whole estate but only a property: at the time when Quinctius had a house at Rome, and slaves and private properties in Gaul of which you never ventured to take possession. He concludes with the words: But if you possessed the goods of Publius Quinctius, you ought to have taken possession of them all in accordance with the law.^a

^a The above extract from Julius Severianus, a fifth-century rhetorician and author of *Praecepta artis rhetoricae* (in C. Halm, *Rhetores Latini minores*, 1863, part i. p. 363) is inserted in *Pro Quinctio*, § 85, after the words *hoc dico*.

C. CICERO, *DE ORATORE* 1.36–62

W. Guthrie, trans., Oxford, 1840, pp. 53–90 [footnotes renumbered]

The *De oratore* is written in the form of dialogue. The main characters in the first book are Lucius Licinius Crassus and Marcus Antonius, the two most celebrated orators of the generation before Cicero, both of whom were proscribed by Marius in 85. Quintus Mucius Scaevola, the augur—not the Quintus Mucius who was in many ways the founder of the juristic profession, but his cousin—also plays a role, representing the juristic viewpoint. Cotta and Sulpicius, who appear at the end, are young men who aspire to be orators. A large part of the first book is devoted to a debate between Crassus and Antonius about the necessity for an orator to know the law. Crassus thinks that it's essential. Antonius has his doubts. We pick up the dialogue with Crassus making the argument for the affirmative. The Guthrie translation ain't great, but it will do for our purposes.

CHAP. XXXVI.

INDEED, replies Crassus, I am prodigiously surprised that you, Scaevola, should insist on hearing what I am neither so much master of as they who teach it, nor is it of such a nature as, did I understand it ever so well, to suit your experience, or claim your attention. Say you so, answers the other, but granting that young gentlemen ought not to hear the common and vulgar rules, are we to neglect those precepts which you have pronounced ought to be known by an orator upon the nature and morals of mankind, upon the method of awakening and subduing their passions, upon history, antiquity, government; and, in short, our own system of the civil law? For I knew that your experience had mastered all this extent, all this variety of knowledge, but never did I see so magnificent furniture in the equipage of an orator. Then, answers Crassus, not to speak of other instances, which are numberless, of great importance, and to proceed to your favourite study of the civil law, can you reckon them orators, whom Scaevola, with a mixture of mirth and indignation, waited many hours for, when he was in haste to go to the Campus Martius; when Hypseus with a very audible voice, and in a power of words, insisted upon it with the pretor M. Crassus, that his client might lose his cause. While Cneius Octavius, a consular, in a speech of equal length, refused to suffer his antagonist to lose his cause, or that his own client should take the advantage, by the blunders of the other party, of being acquitted of the charge of betraying his ward, and all its troublesome consequences. For my part, answers the other, I remember to have heard Mucius talk of these dunces, but I am so far from allowing them the character of orators, that I am for depriving them of the privilege of pleading at the bar. And yet, replied Crassus, these advocates wanted neither for eloquence nor for method and readiness in speaking; what they wanted was a knowledge in the civil law. For the one insisted upon more, while he was pleading upon a law in the twelve tables, than the law admitted of; and if this was granted him, he of course lost his cause. The other thought it unjust that he should be more

hardly dealt [with than by] the charge brought against him implied, and could not perceive that if he had been dealt by in that manner his antagonist must be cast.

CHAP. XXXVII.

NAY, not many days ago, while we were sitting as assistants to our friend Q. Pompeius, the city pretor, did not one of your eloquent lawyers insist upon the defendant being indulged in an old and common exception in favour of a debtor who was engaged to pay a sum at a certain day? He did not understand that this rule was made in favour of the creditor; insomuch, that if the defendant, had proved before the judge that the money was demanded before it became due, when the plaintiff came to demand it a second time, he might have been precluded by this exception, BECAUSE THE THING HAD ALREADY BEEN BROUGHT INTO JUDGMENT.¹ Can any thing more scandalous than this be expressed or acted, than that a man who assumes the character of an advocate for the interests and causes of his friends, a reliever of the oppressed, a physician to the sick, and a raiser of the dejected, that such a man should trip in the most minute, the most trivial affairs, so as to become an object of pity to some, and of ridicule to others? I own that our kinsman, the rich Crassus, who in many respects was a man of taste and elegance, was highly commendable in. this, that he used to tell his brother Scaevola,² that the latter never could have made any figure in the civil law had he not allied himself to eloquence, (his son, who was joint consul with me, united both these characters), and that he himself had studied the civil law before he undertook to plead or manage any causes for his friends. But what was the character of the excellent M. Cato? Was it not that of being one of the best speakers of his age and country, and at the same time a most skilful civilian? I have all along touched upon this point with the greater delicacy, because there is now in this company a person of the greatest eloquence, and one whom I admire as the first of his profession as an orator, and yet he has always expressed a contempt for the study of the civil law. But as you insist upon being let into my opinion and sentiments I will hide nothing from you, but explain as much as I can my thoughts upon every subject.

CHAP. XXXVIII.

THE amazing, the unparalleled, the divine power of genius in Antonius, though void of the study of the civil law, seems to qualify him for managing and pleading causes by the assistance of other intellectual accomplishments; he is therefore an exception to our general rule; but as for the others, I own. I make no difficulty of condemning them in my own mind, first, of idleness, then of impudence. For to flutter over the forum; to be always dangling after the law, and the benches of the judges; to manage the most important trials upon private property, in which the question often does not turn upon points of fact, but of law and equity; to swagger in pleading before the Centumviri, where you have all the system of laws relating to interests, wards, families, relations; the alterations and eruptions of rivers, vassalage, and bondage; walls and windows; egress and regress; wills executed or unfulfilled; together with an infinite number of other things; if a man who undertakes all this is ignorant of what belongs to himself, and what to another, and how a man becomes bond, and how free, or what constitutes an inmate and what a citizen, such a fellow must be certainly furnished with a most consummate stock of impudence. What a ridiculous figure would a man make, to own that he did not know how to manage a small bark, and yet pretend to sail one of our first rate ships. If in a company I should find that you are over-reached by a quibble of your antagonist; if I shall see you put your seal to a deed for your client, the matter of which must do him

¹ *Because the thing, &c.*—The words I have put in capitals appear to have been part of the law.

² *His brother Scaevola*—To understand the wit of this saying of Crassus it may be proper to observe, that the family of the Scaevola, as he himself hints before in this dialogue, was famous for their knowledge of the civil law, as was that of Crassus for eloquence; Scaevola marrying the sister of Crassus gave the latter a handle for this saying. The Crassus here mentioned was not Marcus the famous triumvir, who was killed by the Parthians, and famous for his wealth, but another, who, according to certain authors in Gellius, had five several pre-eminences, viz. 1st, in riches; 2ndly, in quality; 3rdly, in eloquence; 4thly, in jurisprudence; and 5thly, in the sacerdotal college: *Is Crassus a Sempronio Asellione, et plerisque ahiæ historiae Romanae scriptoribus traditur quinque habuisse rerum bonarum maxima et pceipua, quod esset ditissimus, quod nobilissimus, quod eloquentissimus, quod jurisconsultissimus, quod pontifex maximus.* Gell. Noct. Att. 1. i. c. 13.

a prejudice, do you imagine that I would trust a cause of greater importance to your management? Take my word for it, the man who in harbour oversets a boat with but a pair of oars, shall sooner be made captain of a large ship in the Euxine sea. But if those causes that turn upon the civil law are none of your little ones, but often of the utmost importance, what a front must a roan have to pretend to be counsel in those causes; without the smallest knowledge of the law. For instance, could any cause be more important than that of the soldier, whose death his father had an account of by wrong information from the army; thereupon believing it to be true, he altered his will, and thought fit to make another person his heir; he then died himself, and the cause was brought before the Centumviri: the soldier, returning home, commenced an action for his father's estate; upon this the question that depended upon the civil law was, whether the son was disinherited by the will—whether the son, whom the father in his will neither expressly nominates to inherit or disinherit, is not cut off from succeeding to his father's estate?

CHAP. XXXIX.

FURTHER, what was the case decided by the Centumviri, in the cause between the patrician families of the Claudii and the Marcelli? When the Marcelli claimed an estate in right of descent from the son of a freedman, and the Claudii pretended that the same estate ought to revert to them by a family right derived from a patrician of their name; in such a cause, were not the pleaders to explain the whole system of the rights of succession and family? What do you say of another dispute I have heard of before the same court of the Centumviri? A man during his banishment had come to Rome, and claimed the protection of the Roman laws relating to banished persons; he had then applied himself to somebody to be, as it were, his patron, and then died intestate; in such a cause, are not the obscure and unknown laws relating to application³ to be laid open in the trial, and explained by the advocate in his pleading? What do you think of a late instance, when I pleaded toe cause of C. Sergius Aurata against our friend Antonius here in a private trial? Did not the whole import of my defence turn upon the civil law? For when Marius Gratidianus had sold the house to Aurata, without expressing in the deed of freehold that any part of that house was to be subjected to servitude; I pleaded, that whatever loss might arise by omitting this reservation, it ought to fall upon the seller, if he knew of any such servitude annexed to the purchase, and omitted to express it. In these kind of actions my friend M. Bucculeius, who is no fool in my conceit, and a very wise man in his own, with no aversion to the law besides, in some respect committed a blunder lately upon a like occasion. For when he sold a house to L. Fufius, reserving in servitude the doors and windows in the state they were then in, somebody began to build a house in a different quarter of the city, in a place that could be but just discerned from the other house; but he had no sooner begun to build than he went to law with Bucculeius, and insisted on it, that his lights could not, in the terms of their agreement, remain in the same state, if one straw's breadth of the horizon was intercepted, be the distance ever so great. But what shall I say of that great cause betwixt Manius Curius and Marcus Coponius, that was lately pleaded before the Centumviri, and a vast multitude in court, all curious to know the event? When Q. Scaevola, my equal and colleague, the man in the world who is best acquainted with the practice of the civil law, of the quickest discernment and, genius; his style remarkably smooth and polite; and, as I used to say, of all great lawyers, the most of an orator, and of all great orators the most of a lawyer; when

³ *Laws relating to application*—The clientships among the Romans constituted a part of the estate of a great man. There is a remarkable passage upon this head in Aulus Gellius, which gives us a clear view of the subordination of civil relations among the old Romans; the first relation next to that of son and father, says he, is that betwixt a guardian and his ward; the second, 'that betwixt a patron and his client; the third, that betwixt a landlord and his guest; lastly, those of kindred and alliance. But the words of Gellius contain somewhat so express and diffusive that I cannot omit giving them to the learned reader, who I believe will agree that there are few more curious passages in all antiquity.

Conveniebat autem facile, constabatque, ex moribus populi Romani, primum juxta parentes locum tenere pupillos debere fidei tutelaeque nostrae creditos; secundum eos proximum locum clientes habere, qui sese itidem in fdem patrociniumque nostrum dederunt tum in tertio loco esse hospites; postea esse cognatos affinesque. Hujus moris observationisque multa sunt testimonia documentaque in antiquitatibus perscripta. Ex quibus unum hoc interim, de clientibus cognatisque, quod prae manibus est ponemus. M. Cato in oratione, quam dixit apud censores in Lentulum. ita scripsit: "Quod majores sanctius habuere defendi pupillos, quam clientem non fallere? Adversus cognatos pro cliente testatur; testimonium adversum clientem nemo dicit: patrem primum, deinde patronum proximum nomen habere." Gellius Noct. Att. 1. v. c. 13.

such a man as he defended the validity of wills from their letter, maintaining, that unless the posthumous child expressed in the will of the deceased was born, and then dead before he was of age, that the person named in the will as succeeding to the posthumous child, who should thus be born and die, could not be the heir. I pleaded for the intention of the will; and that the meaning of the deceased testator must have been, that if he had no son come to age, then Manius Curius was the heir. Did not we in this cause persist in quoting authorities, precedents, disputing upon the nature of wills, I mean the essential part of the civil law?

CHAP. XL.

I SHALL at present pass over other numberless instances of very important causes; nay, it may often happen that our capital causes⁴ may turn upon the civil law. Thus Publius, the son of M. Rutilius, the tribune of the people, ordered Caius Mancinus, a man of the first quality, worth, and of consular dignity, to be turned out of the senate; because, to avoid the execution of a hated convention he had made with the Numantines, he had been delivered up to them by the presiding herald; and upon their refusing to receive him, he had made no scruple of returning home, and taking his seat in the senate. The opposition of the tribune was founded on a received tradition, that a person sold either by his father or the people, or delivered up by the presiding herald, has no right to reclaim his privileges. Can we in all the system of civil polity find a more important cause or dispute than that upon the rank, the privilege, the liberty, and the reputation of a consular person? Especially as it was not pretended that he was under any disability arising from his own demerit, but from the constitution of the civil law. Of a like, but a less important nature is the case of a native of a confederate state, who had been a slave here, and then obtained his freedom, and returned to his own country; it was in that case a doubt with our ancestors, whether such a person could reclaim his rights in his own state, and whether he had not forfeited the privileges of this city. But as I am now speaking of liberty, than which no more important cause can be tried, may it not become a question in the civil law, whether a man who is rated by the consent of his master, becomes not thereby, upon making up the rolls,⁵ free? Was there not a case that actually happened in the last age, when the father of a family came from Spain to Rome, leaving his wife big with child; he without any intimation to his wife, marries another at Rome, where he dies intestate, leaving behind him a son by each wife; was it any easy point that came in this case to be disputed? Here arises a question upon the rights of two citizens, I mean the latter son and his mother, who must have been deemed a concubine, had it been found upon the trial that a certain form of words, and not a new marriage, were necessary to constitute the validity of a divorce from the former wife. Must not a fellow therefore be a most eminent scoundrel, who shall strut about, with a face of gaiety and assurance, throwing his eyes first to one side, and then to another, swaggering over all the forum with a vast train, offering and tendering protection to his clients, assistance to his friends, and the guidance of his illuminated understanding and advice almost to all Rome, yet shall be ignorant of these and such like laws .of his own country?

⁴ *Capital causes*]-The English reader is often imposed upon by this expression in Roman authors. Therefore it may .be necessary to take notice, that in very few instances the life of a Roman citizen could be attacked. The word *caput* here does not mean the natural life, neither did the expression *capitalis causa* import a capital cause in our sense of the words. *Capitalis*, says Modestinus, *Latine loquentibus omnis causa existimationis videtur*. That is, whatever cause could in its event affect the honour and reputation of a person, such cause was *capital*.

⁵ *Upon making up the rolls*]-This passage is proposed by some annotators as a very curious field for criticism. The original is *ubi lustrum conditum*. Camerarius informs us, that he saw a very old copy, where the old passage runs thus. *Cum quaeritur is qui domini voluntate census sit, si non conditum lustrum sit, sit ne liber? Et continuone an tribus lustris conditis liber sit*. I shall leave the discussion of the authority of the two readings to those who are inclined to pursue the matter further; it is sufficient to take notice here, 1st. That if a person was upon the rolls of the Census, it would appear that at the time of making up those rolls, every person whose name was contained in them could, and upon any future occasion might, have appealed to them for proofs that he was then a Roman citizen: for this see Cicero's oration for Archias the poet. 2ndly. It would appear from his oration for Caecina, that though a man was a slave, his being enrolled in the Census rendered him free. These two considerations seem to determine the reading of this passage as I, have translated it. *Condere lustrum* was no other than finishing the rolls, at which time, we see by Livy, certain plays were celebrated.

CHAP. XLI.

HAVING discussed the impudence, I must now have a touch at the laziness and indolence, of mankind. For, granting the knowledge of the civil law to be an extensive, thorny study, yet its vast utility ought to spur mankind to undertake the fatigue of studying it. Yet, in the mean time, immortal gods! (I should not say this in the hearing of Scaevola, had not he himself used to own it) there is not an art the world more easily attained to. I own, that the general opinion for certain reasons is otherwise; first, because your ancient practitioners, who are the head of this profession, that they may retain and increase their influence, do not care to have, their art made common. In the next place, after it had been published, and the process of it explained by Cn. Flavius, nobody could reduce his artful digest into a methodical order. For nothing can be reduced into an art, unless the person who attempts it, besides knowing the principles which he wants to reduce, has skill enough to strike an art out of principles that have never been reduced to one. I was willing that the brevity with which I have explained myself upon this head should lead me into a little obscurity, but I will endeavour if I can to explain my meaning.

CHAP. XLII

ALMOST all the principles that are now reduced into arts were formerly dispersed and dissipated. Thus in music; tunes, sounds, and measures: in geometry; lines, figures, spaces, magnitudes: in astronomy; the revolution of the heavens, the rise and setting, and motions of stars: in grammar⁶; the reading of poets, an acquaintance with history, the import of words; a certain manner of articulation: and in our profession of eloquence; invention, embellishment, arrangement, memory, action; all these formerly were unknown, or they seemed too widely dissipated to be reduced into a system. Therefore, a certain art taken out of some other system, and which philosophers challenge for their own, was employed to cement, and by a certain method to combine, the matter that thus lay in a disjunction and confusion. Let us, therefore, lay it down, that the sum of the civil law is the preservation of just and impartial equity in deciding upon the interests and properties of fellow-citizens. Its heads are then to be marked, and to be reduced into a certain number as small as possible. Every head comprehends two or more parts, with certain properties in common, but differing in their species; and each part is ranged under those heads from which they are derived. And definitions must be laid down, expressing the force appropriated to every term, whether it relates to the beads or the parts. A definition again is a short and limited explanation of the properties of the thing which we want to define. I should give examples of these particulars, were I not sensible before whom I speak: I shall now comprehend what I proposed in as short a compass as I can. For were I at leisure to do what I have long meditated; should any one while I am busied set about it, and when I am dead accomplish it; first, to digest the whole civil law into its different heads, which are but very few; and then to branch out these heads, as it were, into so many members; and next define the power that is appropriated to each; then shall you have a complete system of the civil law, less difficult and obscure than important and diffusive. And yet, in the mean time, while what is now dissipated is, a connecting, let us be enriching the noble study of the civil law with what we can pick up and gather in ranging through all quarters.

CHAP. XLIII.

HAVE you never taken notice that C. Aculeo, the Roman knight, who now lives, and ever has lived with me, a man whose genius is formed to excel in every art, but who has very little studied any other than this, is now so much master of the civil law, that when you leave this company you shall find none of those, who are at the head of the profession, beyond him? For every thing in it is plain to your eyes, to be found in daily practice, the conversation of mankind, and the forum, rather than in a multitude of volumes, and extent of reading. For the same principles were, by a great many, published in words; then, by the alteration of a few terms, they were transcribed again and again by the same authors. There happens another encouragement and assistance, that is taken very little notice of in the study of the civil

⁶ *Grammar*—It appears that the ancients, by the study of *o* grammar, meant the study of what we call the *Belles Lettres*.

law, which is the great pleasure and satisfaction⁷ one has in knowing it. For if a man is in love with other studies, he has a strong picture of antiquity through the whole of the civil law, in the books of the priests, and the laws of the twelve tables; since he thereby learns the old signification of words, and certain kinds of actions instruct him in the practice and history of our ancestors. If a man is intent upon the study of civil polity, a study which Scaevola says belongs not to an orator, but to a different branch of knowledge, he sees all of it comprehended in the twelve tables, where the whole system of civil duties and dependencies is described. Or, if a man is enchanted with the resistless power of specious philosophy, I will boldly venture to say, that the source of all his disputations is contained in the civil law. For it is by this that the greatest dignity is to be acquired; when we see sincere, just and honest endeavours crowned with honours, rewards, and distinctions; while the vices and frauds of mankind are punished with loss, disgrace, fetters, whips, banishment, death. And we are taught, not by disputations, endless and full of quibbling, but by the authority and sanction of the laws, to subdue our passions, to check all our affections, to guard our own property, and to refrain our thoughts, our eyes, our hands, from that of another.

CHAP. XLIV.

LET them all take it ill if they please, but I will, speak what I think. By heaven! in my eyes, the single volume of the laws of the twelve tables, with regard to the source and principles of equity, is preferable to the libraries of all the philosophers that ever lived, both as to the weight of authority and extent of utility. But, if the love of our country is, as it ought to be, our ruling passion; a passion that is so strong and so natural, as to induce the wisest of mankind⁸ to prefer his Ithaca, (which, like a little nest, is perched upon a cluster of crags,) to immortality itself with what a passion ought we then to be fired for a country that has the pre-eminence over all other countries, of being the seat of valour, empire, and dignity! It is the sense, the manners, the government of this country that we ought first to be acquainted with, both because she is our common parent, and because we ought to presume that the plan of government upon which her constitution was founded, discovers equal wisdom with that conduct by which her power has been reared. You will be able, likewise, to discover the joy and satisfaction arising from the knowledge of the law, since you may easily perceive how much our ancestors, in sagacity, excelled the rest of the world, if you please to compare their system of laws with those of Lycurgus, Draco, and Solon. For it is incredible how uncouth, and almost ridiculous, all other systems, besides our own, are. I used to have a great deal of discourse upon this subject every day, while I prefer the sagacity of our countrymen to that of all other nations; especially the Greeks. For these reasons, Scaevola, I affirmed, that the knowledge of the civil law is necessary to those who want to be accomplished orators.

CHAP. XLV.

GIVE me leave now to observe, that nobody can be ignorant how much honour, interest, and dignity it communicates to those who are at the top of the profession. Therefore, as in Greece, the meanest of mankind hire themselves out for a pitiful fee, as assistants to an orator in a trial, and are by them called *πραγματικοὶ*, journeymen; on the contrary, in Rome, every man of the greatest quality and figure, like Aelius Sextus, whom, for his knowledge of the civil law, a great poet called A MAN,

⁷ *The great pleasure and satisfaction*—I believe Crassus may have the suffrage of all succeeding ages for what he has advanced here. There certainly never was so excellent a digest of laws formed, as was that of the twelve tables, for securing property; and had the public liberty obtained as strong a barrier, the constitution of the Roman government, in some sense, might have been said to be immortal. In the mean time, though we justly wonder at the neglect which, as appears from the words of Cicero, prevailed at Rome, with regard to this study, we perhaps in England are as defective as to the civil law. This is a most miserable omission in the education of young gentlemen who have a prospect of being one day members of the British legislature, where the most important points as to peace and war turn upon the principles of the civil law, and where even many private causes and matters of right that come before them, can never be either understood or decided but by a knowledge of the civil law; in short, what Cicero here puts into the mouth of Crassus is but too applicable to our own time and country.

⁸ *The wisest of mankind*—Our author here means Ulysses, whose ruling passion, according to Homer, was the love of his country, which, according to some critics, was not near so contemptible as Cicero makes it appear in this passage.

With the best heart, and with the wisest head,

with a great many others, who, though they raised themselves to dignity by their genius, yet, by their practice in the law have found that their authority was of more weight than their abilities. Can a more honourable shelter be found, under which we can pass an old age with dignity and lustre, than the study of the law? For my own part, I own that this is a relief which I have provided even from my youth, not only with a view to my practice at the bar, but even to grace and embellish my old age; that when, as the time now draws near, my strength shall fail me, I may shut out from my house that solitude which is generally the concomitant of years. For what can be more honourable than that an old man, who has discharged the honours, and the, duties he owed to his country, should boldly say with the Pythian Apollo in Ennius; that he is such a one as, if, I will not say all people and princes, but his countrymen, do not ask his advice, they must be

Uncertain as to their own affairs; but by my assistance I dismiss those who came to me in doubt, undoubting, and masters of the measures they ought to pursue; that they may not rashly plunge into perplexed matters?

Now it is past question, that the house of a lawyer is the oracle of the whole city. For the truth of this I appeal to the gate and the avenue of Quintus Mucius, which, in his valetudinary state, and advanced old age, is now the daily resort of multitudes of citizens, and frequented by men .of the greatest quality.

CHAP. XLVI.

WHAT I am now going to say does not require any long harangue; that an orator ought to be acquainted with the public acts that relate to matters of state and government, and likewise with the records of history, and transactions of antiquity; for as while he pleads in private causes and trials he must often have recourse to the civil law, and therefore, as I said before, that knowledge is necessary to an orator; so in public causes that come before our courts, assemblies, senates; all this history and that of antiquity, the weight of the public laws, together with the system and, science of government, ought to be as intimately known to those orators who are conversant in the commonwealth, as if they were the grounds of their study. For what we are now in search of is not an ordinary pleader, nor a bowler, nor a pettifogger, but such a man as may be the high priest of this art, a man who, notwithstanding the lavish endowments nature has bestowed upon mankind, shall appear to be a god; one whose qualifications, as a man, shall not seem to have been formed upon earth, but the peculiar gift of heaven: one, who dignified by the name of an orator, and not the ensigns of a herald, can walk unhurt through the array of his enemies: one, whose tongue can expose to the hatred of his countrymen, and to punishment, fraud, and guilt; and under the protection of his genius can free innocence from the penalties of the law: who can rouse a spiritless, desponding people to glory, reclaim them from infatuation, point their rage against the wicked; or sooth their resentment, if exasperated at the worthy. In short, one who by his eloquence can either awaken or compose all the emotions of the human soul, from whatever motive or cause they may proceed. It would be an egregious mistake in any man to imagine that this power has been explained by those who have written upon eloquence, or can be by me in this narrow compass; such a man must not only be unacquainted with my insufficiency, but even with the greatness of the subject. It is true, since you insisted on it, I have pointed out in the method I thought most proper, the fountains from whence you may draw, and the roads that lead to, this study; not that I pretend to conduct you in person, for that would be an infinite and a useless labour; I for my part have shewn you the way, and, as is usually done, pointed with my finger to the fountains.

CHAP. XLVII.

SURELY, replies Mucius, to me it appears that you have done enough, and more than enough, to further them, if they are really studious; for, as the famous Socrates used to say, he had gained his end, if, by his instruction, any person was effectually spurred to endeavour at the knowledge and discernment of virtue; because, whoever is once in earnest in preferring no character to that of being a worthy man, will find very easy work in all the remaining part of the study; in like manner I am persuaded, that if you have

a mind to enter into those principles that Crassus has explained in his discourse, that from this open avenue and door, you will easily, reach the attainments you aim at. It is true, answers Sulpicius, that what we have heard, lays us under great obligations, and gives us great pleasure. But we are at a loss, Crassus, for a few things more. And in the first place, as to those points which you very slightly touched upon, with regard to the art itself; since you owned, that you were so far from disregarding them, that you had studied them. If you will explain those a little more fully, you will satisfy every wish of our longing passion: for now we have heard what things we ought to study; a point, indeed, of great consequence; but we further wish to be acquainted with the roads and method leading to these objects. What, replies Crassus, if we should apply to Antonius, who, a little while ago, complained that a pamphlet had dropt from his pen upon this subject, to explain what he still keeps in reserve, and what is yet unpublished, and declare to us the mysteries of eloquence; because, what I have said, has been to engage you more easily to stay with me, and in compliance rather with your pleasure, than my own custom and nature? As you please, answers Sulpicius; for, from what Antonius shall deliver, we shall learn your sentiments. Then, says Crassus, we desire Antonius of you, since that burden, by the requests of these young gentlemen, is thrown upon persons of our years, that you explain your sense of what you perceive is the matter in question.

CHAP. XLVIII.

WHY really, says Antonius, I perceive very plainly that I am caught; not only by my opinion being asked, as to points in which I have neither knowledge nor experience, but because they will not suffer me now to get off from the thing in the world I have always most avoided at the bar; which was, speaking after you, Crassus. But I will enter the more boldly upon the task you impose upon me, from this consideration, that I hope the same thing will happen to me in this discourse, as usually happens to me at the bar, that no embellishments of language re expected; for I am not now to speak of an art I never learned, but of my own practice; and the very observations I have entered into my common-place book are of such a nature; they were not imparted to me by any study, but employed in the practice of business and causes if they are not approved by men of your great learning, you must blame your own unreasonableness in demanding to know from me what I did not know myself. At the same time, you ought to do justice to my complaisance, since, not from my own choice, but to oblige you, I so readily obey your commands. Says Crassus, do you, my friend, only proceed; I will venture to answer for it, that you will deliver nothing but with so much good sense, as will give us no reason to repent of our having forced you to talk upon this subject. For my part, replies the other, I will proceed, and do what in my judgment ought to be previously done in all disputes; which is, that the subject of dispute should be cleared up, lest the debate should be obliged to wander, and go out of the way, if the disputants have not the same notions of their subject. For, supposing it were asked, what is the art of a general, I should think it right, in the first place, to fix what is meant by a general; who, as he is, appointed, as it were, the manager of a war, we may then add what relates to an army, to a camp, to marching troops, to engagements, to sieges, to convoys, to forming and shunning ambuscades, and other matters that properly belong to the management of a war. And whoever had a turn for, and a perfect knowledge of these, I would pronounce such a man to be a general. I would bring the examples of the Africani and Maximi; and instance Hannibal, Epaminondas, and such other heroes. But were I asked who is the man, that in affairs of government has employed his experience, knowledge, and study; I would define such a man thus; the man who knows, and employs the advantages by which the welfare of a state is acquired and improved; I would insist upon it, that such a man ought to be reckoned the guardian of a government, and the source of public counsel; and here I would recommend the examples of Publius Lentulus, who once was the leading man in Rome the elder T. Gracchus, Q. Metellus, P. Africanus, C. Laelius, with an infinite number of others, both in Rome and other states. But if it were asked me, who can properly be termed a lawyer, I would answer; the man who knows how to give his advice upon, and to apply, in. the most cautious manner, those laws, and that constitution, that private men are directed by in a state; I would name S. Aelius, M. Manlius, and P. Mucius, as men of this stamp.

CHAP. XLIX.

BUT, (that I may now come to the studies of less important arts,) if the definition of a musician, of a grammarian, or a poet were asked, I would in like manner explain myself as to what each of them professes; and the precise qualifications, than which nothing more can be required. In short, the philosopher himself, who alone challenges to his own power and sagacity almost the monopoly of all good qualities, may yet be defined as a person who endeavours at the knowledge of the powers, the nature, and the principles of all subjects, divine and human, with the possession and practice of the whole system of living well in the world. But as to the orator, since he is the immediate object of our inquiry, indeed I do not conceive him to be such a person as Crassus would have him; for he seems to me to engross to the single duty and profession of an orator, the whole compass of knowledge and arts. At the same time, I think he is a person who, in causes at the bar, and such as are common, knows to adapt to his pleading the words that have the happiest effect upon the ear, and those expressions that are most suited to render his cause probable. Such a man I define to be an orator; and I would, at the same time, have him master of accent, action, and a certain species of wit: but our friend Crassus seems not to confine an orator to the bounds of that art, but to those of his own genius, which is next to infinite. For his discourse put into the hands of an orator the helm of government; and I own, Scaevola, I was a good deal surprised that you granted him this concession; for I have very often seen the senate brought in by a very short home-spun speech of yours to agree with you upon the most important affairs of state. But if M. Scaurus, who I hear is at his country seat not far from this, a man deeply seen in the affairs of government, were to hear you, Crassus, challenge to yourself all the weight of his dignity and political knowledge, take my word he would soon be with us in person, and by his look and air frighten us out of all this prating. For though he is no contemptible speaker, yet in matters of consequence he trusts more to his good sense than his eloquence. Give me leave to say further, that supposing a man possessed of both accomplishments, supposing him a leading man in public debates, and an excellent senator, he may not for all that be a good orator; or supposing another possessed of eloquence, and at the same time of political knowledge, no part of his knowledge is the consequence of his skill in speaking. These qualities are widely different, disjoined and separated from each other, nor did M. Cato, P. Africanus, Q. Metellus, and C. Laelius, who were all of them eloquent men, by the same means attain to their excellence in speaking, and their dignity in government.

CHAP. L.

FOR there is no prohibition, either from the nature of things, or from any law or custom, to hinder one man from being master of no more than one art. If Pericles therefore was a most eloquent man, and at the same time the leading man in all the public deliberations of the state for many years; yet we are not from thence to conclude that his abilities in both are owing to the same cause. Nor if P. Crassus was a good speaker and lawyer at the same time, that the knowledge of the civil law is therefore inherent to eloquence. For if every man who is eminent in some one art or profession, shall likewise associate with that another art, the consequence will be, that the art thus associated shall seem but, as it were, a branch of that art in which he is eminent. Otherwise, we may pretend, that to play at tennis, and the twelve pebbles, is a property of the civil law, because P. Mucius is very dexterous at both. And by the same rule, the gentlemen whom the Greeks term φυσικοὶ, naturalists, ought to be accounted poets, because Empedocles the naturalist wrote a very fine poem. Even the philosophers themselves, who pretend to engross every thing as their own and peculiar to their profession, dare not maintain that geometry and music are the qualities of philosophers, because it is allowed that Plato was in the highest degree master of those arts. However, if you will insist upon subjecting all arts to eloquence, you had much better say, that as eloquence ought not to be hungry and naked, but bespangled and diversified by, as it were, a pleasing medley of different subjects, he is a good orator who has taken in many objects with his ears, many with his eyes, and run over a vast number in thinking, reflecting, and reading. That he does not possess them as indispensable, but as auxiliaries to his own profession: for I own that an orator ought to be an artful kind of a fellow, no novice, no blunderer, no foreigner, no stranger in the management of affairs.

CHAP. LI.

NOR indeed, Crassus, am I at all affected with these, pathetic touches of yours, with which the philosophers make so much ado; *I mention this*, because you said that no man could either inflame, or, when inflamed, allay the passions of an audience, effects by which the chief power and importance of an orator is discerned, but a man who has a clear insight into the nature of things, the manners and views of mankind; in which case, philosophy becomes the necessary study of an orator; a study in which we have known men even of the most consummate genius, and the greatest leisure, waste their whole lives; men, whose variety and extent of knowledge and learning I am so far from despising, that I admire them; but, as for us, whose business lies with this, people, and in the forum, it is sufficient for us to know and talk of just so much of the manners of mankind as may show us to be no novices in the ways of the world. For did ever any great or grave orator, when he wanted to render the judge angry with his antagonist, boggle at this, because he did not know whether anger was a heat of the mind, or the desire of punishing resentment? Was there ever a man, who, when he wanted to raise a whirl and agitation in the other affections of the soul, either in judges or people, expressed himself in the same terms which philosophers use? some of whom say that the mind ought not to be susceptible of any emotions, and that they who in pleading touch the passions of the judges are guilty of detestable practices. Others of them, who want to appear not so rigid, and to accommodate themselves to real life, maintain, that the emotions of the mind ought not to be very violent, or rather, that they ought to be very gentle. But an orator, by his expression, magnifies and aggravates every thing, that in the common practice of life, is, of itself, evil, troublesome, and to be avoided. At the same time, he amplifies and embellishes, by his eloquence, those objects which to the generality of mankind are inviting and lovely: nor does he want to be thought so very wise among fools, as that his hearers should take him either for a coxcomb or a Greekling; for while they approve of the genius, and admire the good sense of the orator, They will take it very ill that they are treated like a pack of fools. But he roves through the passions of mankind; he so tunes their affections and senses as not to want the definitions of philosophers, or to make any disquisition whether, the chief good is seated in the soul or the body; whether it is to be defined by virtue or pleasure, or, whether these two can unite or coalesce: he is much further from entering into an inquiry as to the opinion which some hold, that we can have a certain knowledge or thorough comprehension of nothing: all these are points, I confess, of great and extensive learning, and admitting of many copious and various reasonings. But, Crassus, we are in search of a different, a very different, subject; we want a clear-headed man, artful by nature and practice; one who has good sense enough to trace what are the wishes, the sentiments, the opinions, and the hopes of his countrymen and, the persons to whose understandings he addresses his discourse.

CHAP. LII.

HE ought, as it were, to possess the springs of every kind, age, rank, and to enter into the minds and affections of those with whom he either deals, or is to deal. But as to the writings of philosophers, let him reserve those to the leisure and repose of a Tusculan retirement such as this; lest if he should at any time be obliged to speak upon justice and honour, he should borrow from Plato; who, in endeavouring to explain these points in his writings, created a new kind of a state, to be found only in his books; so widely did his sentiments of justice differ from the customs of life, and the manners of states. But if these maxims are to be approved of by states and people, who, Crassus, would have pardoned you, a man of the greatest eminence, and of the greatest interest in the state, for expressing yourself in this manner in a very great assembly of your countrymen? Deliver us from our CALAMITIES;⁹ deliver its out of the JAWS of those whose cruelty cannot be satiated with our blood; suffer us not to be SLAVES to any but you all, to

⁹ *Deliver us from our calamities*—These are the words of Crassus in an oration which he pronounced before the people upon a difference that happened betwixt the senators and the knights. This fragment is sufficient to show the distress to which the senate was reduced upon that occasion.

whom we both can gray and do owe submission. I do not touch upon those calamities¹⁰ into which, as they maintain, a brave man cannot fall. I do not take notice of those jaws, from which you wanted to be delivered, lest your blood, by an iniquitous proceeding, should be sucked out; a circumstance which, according to them, cannot happen to a wise man; but you ventured to go so far as to say that not only you, but all the senate, whose cause you were then pleading, were subjected. Can virtue, my friend, be subjected according to those authors whose dictates you comprehend in the office of an orator? virtue, the only thing that is eternally free; virtue that, while bodies are captive by the chance of war, or pinioned in fetters, ought still to assert her own authority and unquestioned liberty in every circumstance. But what did you say further? that the senate not only could, but ought to be the slaves of the people. What philosopher is so effeminate, so spiritless, so absolutely dependent upon bodily pleasure and pain for happiness or misery, as to admit of this doctrine? That the senate should be the slaves of the people, they to whom the people have entrusted, as it were, the reins and checks of government over themselves?

CHAP. LIII.

THEREFORE I say, I thought that while you spoke this, you spoke divinely, but P. Rutilius Rufus,¹¹ a learned man, and one who has applied to philosophy, maintained that what you said was not only unseasonable, but scandalous and profligate. The same person used to blame Servius Galba,¹² whom he said he remembered very well, because, upon an action brought against him by L. Scribonius, he had worked, the people to compassion, when M. Cato, the severe and implacable enemy of Galba, declaimed against him with great bitterness and vehemence before the people, in a speech which he himself has published among his antiquities. The circumstance, however, for which Rutilius blamed Galba, was because he had reared almost upon his shoulders the young son of Caius Sulpicius Gallus, who was his relation; and thereby drew tears from the people, upon their remembering how dear his father had been to them; and recommended himself and his two infant sons to the guardianship of the Roman people; and had made a kind of a soldier's will; by which, without observing any of the usual formalities, he had left the people of Rome the guardian of their orphan state. Rutilius said, that by those touching circumstances, though Galba was both hated and detested by the people at that time, he was acquitted; and I find the same thing said in the writings of Cato, who observes that, had it not been for the children and his tears, he had certainly been condemned. Rutilius expressed great indignation at all, this, and said, that banishment, nay death itself, was preferable to such meannesses. Nay, he not only said it, but proved by his practice, that he thought as he spoke; for (though you know it) he was a mirror of innocence, and though no man in Rome had cleaner hands, or a purer heart, he not only refused to be a suppliant to his judges, but to make use of any ornament or liberty in his defence, other than the simple language of truth. He allotted some part of his defence to Cotta, a most eloquent youth, the son of his sister. Q. Mucius likewise had some share in that defence, and spoke in his own way, without pomp, but with purity and perspicuity. But if you, Crassus, who a little while ago maintained that an orator, in order to accomplish himself in eloquence, must have recourse to the disputations of philosophers, had then pleaded; and had you been at liberty to have spoken for Rutilius, riot as a philosopher, but in your own way, as an orator; though those ruffians had been, as they really were, the plagues of the state, and deserved severe punishment; yet the power of your eloquence had rooted all the hardened guilt from the very bottom of their souls; now we have lost the man who, in making his defence, spoke as if he had been tried in Plato's Utopian commonwealth. Not a groan was heard; not a rapture of approbation broke from any of the advocates; not a pang was felt; not a complaint put up; nobody implored the state; nobody interceded for

¹⁰ *I do not touch upon those calamities*—The reader in this, and many other passages, will perceive, that Cicero alludes to the opinion of the stoics, who admitted of no mediocrity or trimming in principles, and made no allowances for passions and circumstances.

¹¹ *P. Rutilius Rufus*—Cicero has here introduced the character of a true stoic in the person of this Rutilius.

¹² *Servius Galba*—This Galba was a very artful, cunning, fellow; when he was governor in Spain he was guilty of great oppression and cruelty, and therefore impeached upon his return.

the accused. In short, nobody so much as stamped on the ground with his foot; for fear, I suppose, lest it might give offence to the stoics.

CHAP. LIV.

THIS consular Roman imitated the famous Socrates who, as he possessed the greatest wisdom and purity of any man alive, when he was tried for his life, spoke in such a manner, that he appeared not as a suppliant or a prisoner, but the lord and the master of his judges. Insomuch, that when Lysias, that most eloquent orator, had brought him an oration ready penned, which, if he pleased, he might have got by heart, and repeated in his defence; he cheerfully read it, and owned that it was prettily written; but, said he, if you brought me Sicyonian shoes that were very neat, and just fitted me, I should refuse to wear them, because they do not become a man; so I think that this oration is eloquent and rhetorical, but not strong and manly. The consequence of this was, that he too was condemned; not only in the first votes, by which the judges only determine whether they shall condemn or acquit, but in the sentence which, by their laws, they are afterwards obliged to pass. For at Athens, when the accused was condemned, if it was not for a capital fault, the punishment admitted, as it were, of a valuation. When, in consequence of the first sentence, the accused was left to the power of the judges, he was asked what he could chiefly plead as a plea for the mitigation of his punishment? Socrates being asked this question, answered, that he deserved to be distinguished with the highest honours and rewards; and that victuals should be publicly and daily served up to him in the Prytaneum;¹³ which in Greece is looked upon as the highest mark of honour. This answer so much exasperated the judges, that they condemned to death that most innocent person, who, if he had been acquitted, (which I own is nothing to us, however I wish, on account of his great genius, that he had), how can we bear with these philosophers, who now (though Socrates was condemned for no other crime but his want of eloquence) pretend, that all the rules of speaking are to be sought from them? I will not dispute with them about the superiority or truth of the two professions, I say only, that eloquence is different from philosophy, and may, without it, be perfect.

CHAP. LV.

FOR now I perceive, Crassus, why you so violently extolled the civil law; while you were speaking of it, I did perceive it.¹⁴ In the first place, you put yourself under the tuition of Scaevola, whom we have all of us the greatest reason to love, for his exceeding sweetness of temper. His art, which you found undowered, unattended, and undressed, you enriched by the wealth and ornament of words. In the next place, as you had bestowed a great deal of pains and labour upon this art, while Scaevola was the prompter of your studies, and your domestic tutor, you were afraid, if you did not exaggerate its praise by your eloquence, that you had lost your labour. But I do not even find fault with that art; let it have all the importance you have ascribed to it. For without doubt it is great, diffusive, generally interesting, highly honoured, and our most eminent citizens are now at the head of that profession. But take care, my friend, while you want to dress the study of the civil law, lest you strip and bare it of those ornaments that are appropriated to it. Now, if you had expressed yourself so as that the professions of law and eloquence were reciprocal, then you should have laid the foundations of two eminent arts, equal in themselves, and sharing the same dignity. But, by the argument you just now formed, you confessed that a man may be, as many have been, a lawyer, without that eloquence which is, the subject of our present inquiry; but you deny, that without the knowledge of the, civil law it is possible to form an orator. Thus, you make a lawyer in himself nothing, but a sly cunning limb of the law, a crier of actions, a bawler of forms, and a word-catcher. But, because an orator in his pleading often makes use of law, therefore you have joined the study of the law to that of eloquence, as if the former were the waiting-maid of the latter.

¹³ *Prytaneum*]—This was a place in Athens where their public affairs were transacted.

¹⁴ *I did perceive*—There is a difference in reading here; some copies have it *tum quum dicebas non videbam*.

CHAP. LVI.

BUT, as you have expressed your surprise at the impudence of those advocates, who with very little knowledge make very great professions, or in causes presume to treat of the most important points in the civil law, though they are both ignorant of them, and never have learned them; both these seeming absurdities may be very easily and readily defended. For we are not a bit surprised that a man who is ignorant of the very forms of a contract, should be capable of defending a woman who has been contracted; though the art of navigating a great and a small vessel is the same; yet it does not follow that a man who is ignorant of the form of drawing up an agreement, should for that reason be incapable of pleading a cause upon the distribution of the estate of a family. As to your bringing as instances some of the principal law causes tried before the court of the Centumviri, what cause among them all could not have been very eloquently spoken to by a man of eloquence, though unskilled in the law? In all those causes indeed there was a very great disagreement of opinion among the greatest men of the law; especially in that of Manius Curius, which was lately pleaded by you; in the case of C. Hostilius Mancinus, and of the boy who was born of a second wife, without any intimation of the father's intention to marry being sent to the former wife. I should, therefore, be glad to know what assistance the knowledge of the law can be of to an orator in those causes wherein the lawyer, who has the superiority, succeeds not by means of his own, but of a foreign profession; I mean he is supported, not by his skill in law, but by eloquence. Indeed, I have very often heard this, that when Publius Crassus stood for the edileship, and was favoured by Serv. Galba, who was his elder, and of consular dignity, because he had contracted the daughter of Crassus to his own son Caius, that a certain country-fellow applied to Crassus for his advice: after he had taken Crassus aside, and laid the matter before him, he was dismissed with a very just answer, but less favourable than the situation of his affairs required: that when Galba saw him look melancholy, he called him by name, and asked him what the nature of the case was upon which he had consulted Crassus? After the man had told him with a visible concern what it was; I see, answered Galba, that Crassus hath given you his opinion while his mind was perplexed and busied. He then took Crassus by the hand; hark ye, says he, how did you take it in your head to give such an opinion? Then that great man began to insist upon it, that his opinion was right and unquestionable. But Galba, with variety and plenty of allusions, brought a great many parallel cases, and talked a good deal in defence of equity against law; that Crassus being no match for Galba, though he was a well-spoken man, but not at all comparable to the other, he ran to his books, and brought the writings of his brother Publius Mucius, and the commentaries of Sextus Aelius, as vouchers for what he advanced; yet at the same time he owned that Galba, had formed a very plausible, and almost a very just, argument.

CHAP. LVII

YET causes that are of such a nature, that no doubt in point of law can arise in them, never use to be tried in courts. For who sues for an estate upon the right of a will, which a father had made before his son was born? Nobody, because such an event sets the will aside; so that cases of this kind admit of no dispute in law. An orator, therefore, may without any blame be ignorant of this part of the law in actions, a part that without doubt is by far the greatest. But in law cases that are canvassed by men of the greatest skill in their profession, it is no difficult matter for an orator to find some authority to support the part that he defends; from which, after he has received the missile weapons, he himself shall direct them by the force and nerves of eloquence. But (I speak this under correction of my very good friend Scaevola) when you defended the cause of your father-in-law from writings and rules of law; did you not rather seize the province of defending equity, wills, and the destination of the deceased? But give me leave to say, as I was often present and heard you, you won over the greatest part of the votes by your wit, your humour, and your delicate touches of raillery. When you played upon the mighty discovery made by Scaevola, and admired his penetration when he found out *that a man before he dies must be born*; when you made many collections from the decrees of the senate, from common life and common talk, not only with great subtilty, but with great humour and wit, but all tending to prove that if we are to follow the letter more than the spirit of a deed, nothing can be effected. Therefore the trial had in it a great deal of mirth and pleasantry, nor can I understand that the knowledge of the civil law was of any service to you;

but the noble energy of eloquence, worked up with so graceful a spirit, was of great. Mucius himself, the defender of paternal authority, that champion, as it were, for a paternal inheritance, when he pleaded against you in that cause, what did he display that seemed to be taken from the study of the civil law? What statute did he quote? What obscurity did he clear up to the unlearned in any part of his speech? Why, the whole of his discourse turned upon this single point, that the letter of a deed ought to have greatest weight. But what is this more than every school-boy practises with his master; when in their exercises they are taught in causes of this kind, sometimes to defend the letter, and sometimes the equity of a deed? And is it likely that in the cause of the soldier,¹⁵ had you either appeared for the heir or the soldier, that you would have placed the stress of your pleading upon the precedent of Hostilius, and not in the power and the address of eloquence that is so peculiar to yourself? Had you defended the testament you would have pleaded in such a manner as that the whole system of the law of wills should have seemed to be attacked in the trial; or had you defended the cause of the soldier, you would in your own way have raised his father from the grave; you would have placed him before our eyes; he would have embraced his son, and with tears in his eyes would have recommended him to the protection of the Centumviri. By heavens t he would have forced the very walls and flints to have wept and cried, so that the whole *uti lingua nuncupasset*¹⁶ should not have seemed to be written in the twelve tables, which you prefer before all the libraries in the world, but part of an old ballad.

CHAP. LVIII.

NOW, to your charge of indolence against young men who neglect to study this very easy art. As for its easiness, let them look to that who, upon the very arrogance of knowing it, strut about as if they had compassed the most difficult task in the world. In the next place, do you look to it; for you say that it is a very easy *art*,¹⁷ at the same time you owned that it was not absolutely an *art*, but that some time or other, if somebody should learn another art for reducing this into an *art*, then it would be an *art*. In the next place, as to its being full of delight, these gentlemen will freely make over to you all their part of the pleasure, and be contented to be without it; nor is there one amongst them, who having any thing to study would not choose to commit to memory the Teucer of Pacuvius,¹⁸ than the statutes of Manilius upon bargains and sales. As to your opinion, that the love of our country ought to be the motive of our studying the learning of our ancestors, do not you see that the old statutes either are become obsolete, or repealed by new laws? But you think that the civil law renders men good, because it enacts rewards for virtue, and punishment for vice. I always was of opinion that if virtue can be communicated¹⁹ by reason, it is to be communicated through precept and persuasion, and not by threats, force, and terrors. For even without the knowledge of any positive law we may be sensible of the beauty of this maxim, to guard

¹⁵ *Cause of the soldier, &c.*—Pontius, who had sent his son to the war against the Cimbri, persuaded by a false information that lie was there slain, appointed by his will Torquatus for his heir, and died: but his son, his lawful heir, on his return from the army, got the will to beset aside by a decree of the senate.

¹⁶ *Uti lingua nuncupasset*—This was a part of law jargon that is impossible to be translated so as give the reader any information of what is meant. [It is, of course, from the Twelve Tables V.1: “as his tongue has spoken, [so let the law be].” CD]

¹⁷ *Easy art*—I have purposely preserved the repetition of the word *art*, because Antonius seems to intend that it should throw the reasoning of Crassus into a ridiculous light.

¹⁸ *Teucer of Pacuvius*—This Pacuvius, the son of the famous poet Ennius, being himself an excellent tragedian, was born at Brundisium, and died in extreme old age; for, Quintilian says, he lived about ninety years. We have his epitaph in A. Gellius, b. i. ch. 24. thus written by himself, which may serve to shew his great modesty:—

Adolescens, tamen etsi properas, hoc te saxum rogat.

Uti ad se aspicias: deinde quod scriptu'st legas.

Hic sunt poetae Marcei Pacuviei sita

Ossa. Hoc volebam nescius ne esses. Vale.

¹⁹ *Virtue can be communicated*—The Pagan philosophers, as well as the Christian divines, had their disputes upon the subject of virtue; namely, if one could be virtuous by the assistance of nature alone, without the assistance of reason, or if they both contributed. Socrates was of the last opinion, but others declared for the first, saying, that virtue depended upon the constitution of our temper. The Peripatetics followed the mean between both extremes, for they taught that there is a seed of virtue implanted in our souls that flourishes by supernatural aid.

against evil. But with regard to myself, whom you make an exception to, as if I were the only man who can acquit my self in causes without the least knowledge of the law, my answer, Crassus, is, that I never either studied the civil law, nor was I ever sensible of any loss for not knowing it, in those causes which I was capable of managing in our courts. For it is one thing to be an artist in a certain way and craft, and another to be neither a dunce nor a novice in common life, and the general practice of the world. Who amongst us may not make a circuit around our estates, or to look into our affairs in the country, either for profit or delight? Yet there is no man who is so void of sight and, sense as to be absolutely ignorant of all that relates to seed-time and harvest, of pruning of trees and vines, at what time of the year, and after what manner they are done. Therefore if any gentleman was to survey his estate, or to give any orders to his steward or his manager in the country upon agriculture; must he make himself master of the works of Mago the Carthaginian?²⁰ Or ought we to be contented with the common knowledge we have acquired on this subject? Why, therefore, in like manner, may we not be sufficiently skilled in the civil law, especially as we are worn out in causes in the business and practice in the forum, so far, at least, as not to seem foreigners and strangers in our own country? But if some more obscure cause were laid before us, do you imagine it would be very difficult for us to consult with our friend Scaevola, though the very people who laid their causes before us bring every thing to us ready consulted and prepared? But if the dispute shall happen upon a matter of fact, upon marches which lie at a distance, upon deeds and prescriptions, we then must study some crooked, and often some difficult points. If we are to canvass the laws or the opinions of men skilled in law, are we to be afraid, though we have not studied the civil law from our youth, that we shall not be able to make ourselves master of these?

CHAP. LIX.

BUT you will ask, is the knowledge of the civil law of no benefit to an orator? I cannot affirm this of any study, especially with regard to the person whose eloquence ought to adorn the different subjects he treats of; but those qualities that are indispensable to an orator are so many, so great, so difficult, that I am unwilling his application should be diverted into too many studies. How can any one deny that an, orator in his attitude and. deportment while he speaks, may not be improved by the action and grace of Roscius? yet it never came into any man's head to persuade any of those young gentlemen who study rhetoric to practise the airs of a player, while they are learning how to behave. To an orator what is so necessary as a good voice? Yet nobody who wishes to speak well, shall ever have my advice to be a slave to his voice, like the Greeks and the tragedians, who for many years together declaim in their seats, and every day before they pronounce a word, in their beds gradually raise their voice, and when they, have done pleading sit down and shift, and, as it were, make it go through a scale, from the sharpest to the fullest accent. Were we to follow such a practice, our clients would lose their causes as often as we attempted it, before we could get half through the scale.²¹ But if it is improper for us to be at much pains about our gesture, which is of great service to an. orator, and our voice, which of itself is the greatest recommendation and support of eloquence; and if, in improving both, we are to consult our conveniency, we are to consult the leisure which we have from our daily practice; of how much less importance is it for us to demean ourselves to making ourselves masters of the study of the civil law? which, in general, can be both understood without learning, and is so far different from these matters, in that, the voice and action cannot, upon any emergency, be brought or borrowed from elsewhere; whereas all the utility of the civil law in any cause, let us have ever so short notice, may be known either from books or its professors. Therefore, those most eloquent men have their under-strappers, who are skilled in law affairs, though they themselves know nothing of the matter, and those fellows, as you told us a little while ago, are called solicitors. But, in this respect, our countrymen take a much better method in guarding the laws and the

²⁰ *Mago the Carthaginian*—The author of eight and twenty books upon country affairs; which were judged to be of so great use, that Dionysius of Utica, by order of the senate, translated them into Latin. There remains to this day some fragment of the said work in the Vatican library at Rome.

²¹ *Before we could get half through the scale*—All this passage for two or three lines before can scarcely be translated; the original is *peanem aut munionem*, which probably answers to our *sol fa la*.

rights of their country by the authority of the most eminent men. But the Greeks, if they thought it necessary that an orator himself should be skilled in the civil law, and not leave every thing to a solicitor, would never have neglected this precaution.

CHAP. LX.

AS to what you say about old age being fenced against solitude, by the knowledge of the civil law, that may very well be, for they commonly make a great deal of money by it; but the subject of our inquiry is not upon what is useful to us, but what is, necessary to an orator. And, because we derive from one artist in his way a great many properties resembling those of an orator; the same Roscius²² used to observe, that the older he grew he would render the notes of the music, and the recitative, more slack and slow; but if he who was bound down to a certain quantity of numbers and feet studied how to indulge his old age, how much more easily may we not only relax, but even alter the whole chime? For you, Crassus, must be sensible of the multiplicity and variety of the kinds of eloquence, and I do not know but you yourself prove this, since you have long spoken a great deal more slowly and gently than you used, and yet the smoothness of this grave manner is as much approved of as all the commanding power of energy you formerly exerted; and there have been many speakers, who in the manner said to be used by Scipio and Laelius, always delivered themselves in a smooth manner, and never, like Servius Galba, rending their throats and their sides. But, supposing you are neither willing nor able to practise this at such a time of life, would you be afraid that your house, the house of such a man, such a citizen, if unfrequented by the lovers of wrangling, would be deserted by others? Indeed. I am so far from that opinion, that I not only think that the comfort of old age is not to be placed in the multitude of those who come to consult upon law affairs; but I would long for your dreaded solitude, to be as it were a harbour of repose; for I look upon leisure from company to be the most charming comfort of old age. As to the other points, even though they are auxiliaries, I mean the knowledge of history and the municipal law, the progress of antiquity,²³ and variety of precedents; if I at any time have occasion for these, I will borrow them from my friend Longinus, who is both a very worthy man, and extremely well versed in such matters; neither shall I be against the advice which you just now gave, their reading and hearing every thing, their applying to every commendable study, and every branch of polite learning. But, upon my word, Crassus, if they should take it in their heads to follow your dictates, I do not see what time they can have for going through them; you likewise seem to me to lay too severe a task upon gentlemen of that age, though I own it is almost necessary for their attaining to what they purpose. For both sudden practisings upon causes that are proposed, and correct, digested declamations, together with the exercise of the pen, which, as you have well observed, both finishes and directs the orator, are tasks of great difficulty; and the comparison which you mentioned ought to make betwixt his own and foreign compositions, with the extempore practice of praising or taking to pieces; of defending or refuting, upon reading the writings of another author, is no easy matter, either for the memory or the judgment to compass.

CHAP. LXI.

BUT there was another thing that was quite frightful; and, upon my word, I am afraid that it will tend more to discourage than to promote this study; for you insisted upon each of us being, as it were, a Roscius in his profession; you said that what was excellent did not meet with such applause, as what was faulty gave lasting distaste; yet I do not think that our performance is examined so critically and nicely as is that of a player. To prove this, I have often seen an audience profoundly attentive to gentlemen of our profession, even though they were hoarse; because the subject itself, and the cause, fixes them; but, if Aesopus has got but a little hoarseness, he is hissed. For when people look for nothing more than to please their ears, they are shocked at every circumstance that in the least takes off from that pleasure. But

²² The same Roscius]—It would appear from this, and many other passages of antiquity, that the Roman players, while they were acting, spoke to certain airs of music which accompanied their voice.

²³ *The progress of antiquity*]—Cicero probably means by the expression of *iter antiquitatis*, which is in the original, the progress which the laws of the twelve tables made from one country to another, before they were digested and became the laws of Rome.

in eloquence there are many properties that are interesting enough to please them; and if all of these are not of the greatest, as most of them are of great consequence, it necessarily happens that those which are so should appear wonderful. That I may, therefore, return to our first proposition; let an orator be a person, as Crassus has described him, who knows the most proper method of persuading; but let him be confined to the usual practice of this city and forum; and quitting all other studies, be they ever so inviting and noble, let him, as I may say, night and day; be pressing to this mark; let him imitate Demosthenes, the famous Athenian, who is allowed to be a most excellent orator, whose indefatigable study and application were such, as is said, that in the first place, by habit and perseverance, he corrected the defect of nature. For having such an impediment in his speech, that he could not pronounce the R, which is the first letter of the art he was studying, he, grew so perfect by his practising before-hand, that he was thought to pronounce it as well as any man of his time. In the next place, as he was naturally short-winded, yet by keeping in his breath, he came to so great perfection in speaking, that in one continued period, as may be seen in his works, he twice raised and lowered his voice. We are further told, that putting pebbles into his mouth, he used at one breathing to pronounce a number of verses with a loud voice, and that too not standing, but walking, and mounting a steep ascent. I am, Crassus, entirely of the same opinion with you, that young gentlemen ought to be quickened to study and application by such motives as these. As for the other accomplishments, which you have collected out of different professions and arts, though you are master of them all yourself, yet I think they are quite distinct from what is properly the business and duty of an orator.

CHAP. LXII.

WHEN Antonius had done speaking, it is very certain that Cotta and Sulpicius seemed to be puzzled, to find out on whose side the truth lay. Then, said Crassus, you have formed a mechanical orator, my friend, though I do not know but that you think otherwise, and are now practising upon us that wonderful and unrivalled talent you have in confuting; a practice that is one part, indeed, of an orator's profession, but has, for some time, been taken up by philosophers, especially those who use to talk on both sides of any question that, is proposed with great readiness and flow: but it never entered into my head to think that all I had to do, especially in this company, was to lay before you the qualifications of a fellow who dwells in the lower forms of a court, and, never rises above what the immediate emergencies of his causes require. No, I had my eye upon a higher object, when I gave it as my judgment; that an orator, especially a Roman orator, ought to be void of no accomplishment. But as you have confined the profession of an orator within certain narrow bounds, it will be the more easy for you to explain to us what you require as to his duties and learning, But I think we may refer that to another day, for this day we have said enough; at present, let Scaevola, because he proposed to go to Tusculanum, rest a little till the heat is abated, while we, since the time of the day requires it, take care of our own health. When this was agreed to by the whole company, indeed, says Scaevola, I wish that I had not made an appointment to see Laelius at Tusculum today; I should have heard Antonius with great pleasure; and, as he was rising, why, really, said he, with a smile, it did not give near so much pain, that Antonius pulled our profession of civil law in pieces, as it gave me pleasure that he confessed that he knew nothing of it.

END OF THE FIRST DAY'S CONFERENCE.